

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUN - 7 2013

APPEAL FROM HAMPTON COUNTY
In The Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

S.C. Supreme Court

Case No. 2009-CP-25-285

Gary Smart, ...Respondent,

v.

James Allen Grady, Louis Daniel Moffett,
Lynwood Brantley d/b/a Brantley Hauling,
Randolph Murdaugh, III, ... Defendants,

Of whom James Allen Grady is Petitioner,

And Randolph Murdaugh, III, is Defendant/Respondent.

APPENDIX TOPETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS
or in the alternative,
PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS

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The South Carolina Court of Appeals

Gary Smart, Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood
Brantley d/b/a Brantley Hauling, Randolph Murdaugh,
III, Defendants,

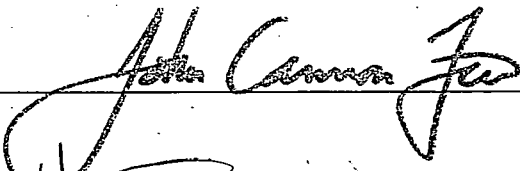
Of whom James Allen Grady is the Appellant.

Appellate Case No. 2011-197289

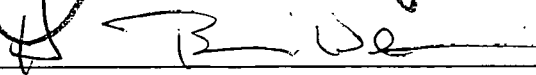
ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

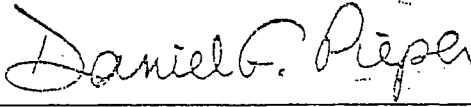
Because this Court recalled the remittitur in this case, Respondent's motion for costs is denied as premature. See Rule 222(d), SCACR ("A party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule.").



C.J.



J.



J.

FILED

1/31/13 

Columbia, South Carolina

cc:

Jason Franklin Ward
Mark Brandon Tinsley
Patrick M. Higgins
Robert L. Widener
John S. Nichols
John H. Tiller
Erin DuBose Dean
Myllinda D. Nettles

The South Carolina Court of Appeals

Gary Smart, Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood
Brantley d/b/a Brantley Hauling, Randolph Murdaugh,
III, Defendants,

Of whom James Allen Grady is the Appellant.

Appellate Case No. 2011-197289

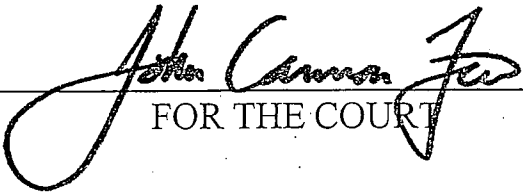
ORDER

Appellant filed a notice of appeal from (1) the trial court's oral ruling of August 8, 2011, striking Defendants Louis Daniel Moffett and Lynwood Brantley d/b/a Brantley Hauling from the underlying action; and (2) the trial court's order of August 3, 2011, denying Defendants' motions to compel execution of stipulations of dismissal and to transfer venue.

Respondent has filed a motion to dismiss arguing the orders are not immediately appealable. Appellant filed a return, withdrawing his appeal from the oral ruling of August 8, 2011, but arguing the order denying the motion to compel execution of the stipulation of dismissal and the motion to transfer venue is properly before this Court. Respondent filed a reply.

After careful consideration, Respondent's motion is granted and this appeal is dismissed. Because the denial of the Defendants' motion to compel execution of the stipulations of dismissal is akin the denial of a motion to enforce a settlement, the ruling is not immediately appealable pursuant to section 14-3-330 of the South Carolina Code. *Peterkin v. Brigman*, 319 S.C. 367, 461 S.E.2d 809 (1995). Furthermore, an order refusing to transfer venue is not immediately appealable. See *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000) (holding

the trial court's order denying a motion to change venue was not immediately appealable and noting that the order was not one affecting a substantial right because any error could be corrected on appeal following the trial).

 C.J.
FOR THE COURT

Columbia, South Carolina

cc:

Jason Franklin Ward
Mark Brandon Tinsley
Patrick M. Higgins
Robert L. Widener

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9-21-12 8084

The South Carolina Court of Appeals

Patrice Smart, Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood
Brantley d/b/a Brantley Hauling, Randolph Murdaugh,
III, Defendants,

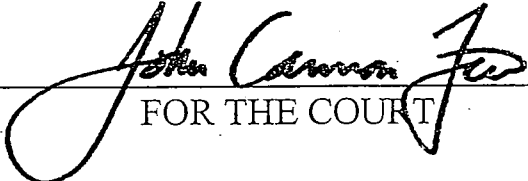
Of Whom James Allen Grady is the Appellant.

Appellate Case No. 2011-197290

ORDER

Appellant has filed a notice of appeal from the trial court's order dismissing Respondent's loss of consortium action against him with prejudice. Respondent has filed a motion to dismiss this appeal, arguing Appellant is not an "aggrieved party" to the order. Appellant filed a return, and Respondent filed a reply.

After careful consideration, Appellant's motion to dismiss is granted. *See* Rule 201, SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.") Although Appellant alleges he is aggrieved because the trial court's dismissal of the consortium action hinders Appellant's right to set off for any judgment Gary Smart may receive against him, the dismissal of the consortium action does not preclude Appellant from making arguments in favor of set off after trial if any judgment is awarded in Gary Smart's personal injury action.

 C.J.
FOR THE COURT

Columbia, South Carolina

FILED

9/28/12 

cc:

Jason Franklin Ward

Mark Brandon Tinsley

Patrick M. Higgins

STATE OF SOUTH CAROLINA

FILED

JUDGMENT IN A CIVIL CASE

COUNTY OF HAMPTON

2011 AUG -3 PM 4:12

CASE NO: 2009CP2500285

IN THE COURT OF COMMON PLEAS

MYLINDA D. HETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

Gary Smart vs. James Allen Grady

CHECK ONE:

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

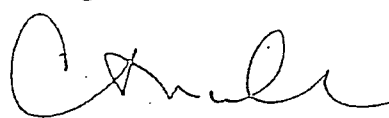
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Motion to Compel Execution of Dismissal is Denied
Motion to Transfer Venue is Denied

Dated at Hampton, South Carolina, this 3rd day of August 2011

Court Reporter: Debbie Everett


PRESIDING JUDGE - Hon. Carmen T. Mullen

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge
Carmen Tevis Mullen, Circuit Court Judge

Case No. 2009-CP-25-284

Case No. 2009-CP-25-285

Patrice Smart, ... Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood Brantley
d/b/a Brantley Hauling and Randolph Murdaugh, III, ... Defendants,
of whom

James Allen Grady is Appellant.

Gary Smart, ... Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood Brantley
d/b/a Brantley Hauling and Randolph Murdaugh, III, ... Defendants,
of whom

James Allen Grady is Appellant.

MOTION TO DISMISS APPEAL

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Attorneys for Respondent

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SEP 30 2009

McNair Law Firm, P.A.

Pursuant to Rule 240, SCACR, Respondents Patrice and Gary Smart move this Court to dismiss the appeal in this matter. The basis for the motion are that the purported Appellant James Allen Grady is not an aggrieved party pursuant to South Carolina law, and further that the orders Mr. Smart purports to appeal are not appealable interlocutory orders.

BACKGROUND

This is an automobile wreck case. Patrice Smart filed a complaint against James Allen Grady and Louis Daniel Moffett in Jasper County in April 2008, alleging she suffered a loss of consortium because of injuries to her husband, Gary Smart, caused by the negligence of Grady and Moffett. She also filed a stipulation in May 2008 asserting her damages did not exceed \$75,000. On May 18, 2009, Judge Carmen T. Mullen signed a consent order of dismissal without prejudice, which was submitted by counsel for all parties. The Smarts were represented by lawyer R. Alexander Murdaugh. However, Alex Murdaugh withdrew once it became apparent he would be a witness in the case.

On June 24, 2009, Mr. Smart filed an action in Hampton County against Grady, Moffett, Lynwood Brantley d/b/a Brantley Hauling and Randolph Murdaugh, III. Mrs. Smart filed a separate action against these same defendants seeking recovery for loss of consortium. The complaints essentially alleged that Grady was operating a vehicle in Jasper County on the evening of December 22, 2007 and was towing a trailer with an ATV aboard but not properly secured. The ATV became detached and fell into the roadway where it was struck by a tractor-trailer truck being operated by Moffett in the same direction behind Grady. Murdaugh was traveling in the opposite direction and stopped to render assistance. Murdaugh parked his car on the shoulder with his high beam

lights illuminated, facing northward and angled toward oncoming traffic. Smart was traveling southward along the highway and ran into Moffett's truck, and there were no warning devices and the lights on the Murdaugh vehicle blinded Smart. Mr. Smart was seriously injured in the collision. The Smarts were represented by lawyer Mark B. Tinsley, their current counsel.

Defendant Brantley Hauling removed the cases to federal court, contending Murdaugh, the only South Carolina resident, was a sham defendant because the Smarts never intended on getting a judgment against Murdaugh. Grady joined in that removal as required by federal law. United States District Court Judge Sol Blatt heard the matter and ruled that the Smarts had to sue Murdaugh to avoid the "empty chair" defense. Judge Blatt held there was a colorable claim against Murdaugh and issued a bench ruling that the case would be remanded to Hampton County. Judge Blatt also noted that "once the Murdaugh firm got out of the case, the plaintiffs got new lawyers, it was a new case." The District Court then entered a written order granting the motion to remand the matter to state court in October 2009.

On March 31, 2010, Mr. Smart filed and served an offer of judgment for \$2,750,000 and Mrs. Smart filed an offer of judgment for \$500,000.

Pursuant to mandatory mediation rules, the cases were mediated. Defendant Grady's counsel and his insurer, USAA, who were present at the mediation, elected not to participate in the settlement, and they did not settle. However, the other defendants (Moffett and Brantley d/b/a Brantley Trucking) did settle.

On August 31, 2010, Grady's counsel wrote to Mr. Tinsley advising him that Grady's insurer, USAA, had reviewed the case and decided to offer the policy limits of

\$300,000 to resolve the matter.

On October 6, 2010, Mr. Smart executed a stipulation of dismissal as to Moffett, Brantley and Murdaugh due to a partial settlement of the claims. The stipulation was signed by Tinsley and by attorney John H. Tiller for Murdaugh. The stipulation retained the right to proceed against Grady. Mr. Tiller and Mr. Tinsley also executed a stipulation of dismissal of Mrs. Smart's consortium claim as to those same defendants. The stipulations were not signed, however, by any other party or counsel for any other party. On October 18, 2010, the defendant Grady filed and served an offer of judgment for \$300,000 upon the plaintiff, Mr. Smart.

Defendant Grady then sought to strike the stipulation of dismissal. Grady argued the stipulation was not properly executed under Rule 41, SCRPC. He also sought reallocation of the settlement proceeds in that motion.

On April 2, 2011, the Smarts and Murdaugh executed a Covenant not to Execute in consideration for the payment of \$95,000 to Mrs. Smart and \$5,000 to Mr. Smart.. Murdaugh's counsel signed an affidavit that the Covenant replaced prior documents and "any prior agreement is rescinded."

On April 4, 2011, Judge Mullen held a hearing in Hampton County. Grady's counsel noted that all parties agreed the stipulation of dismissal was ineffective because the stipulation did not comply with Rule 41. Counsel for Grady added, "And they agree to that, which essentially moots our motion to change venue back to Jasper County."

On June 22, 2011, defendant Grady sent a stipulation of dismissal of Murdaugh with prejudice to all counsel in the case. Attorney Erin Dean signed the stipulation for Murdaugh and returned it to Grady's counsel. However, no one else signed the document.

On July 7, 2011, Grady filed a Motion to Drop Defendant Murdaugh from the case and to compel execution of the stipulation of dismissal as to Defendant Murdaugh. Grady contended that Mrs. Smart had settled her loss of consortium claims with respect to Moffett, Brantley and Murdaugh for \$1,040,000.00 and Mr. Smart settled his claims against those same defendants for \$10,000.00. Grady then pointed out that because the Stipulations of Dismissal were not fully executed by all parties upon filing, then the Stipulation was ineffective. Grady asserted the refusal to dismiss Murdaugh and the other defendants was solely to defeat diversity jurisdiction and to prevent a change of venue.¹

On July 8, 2011, Grady filed a motion to transfer venue from Hampton County to Jasper County. Grady contended that the matter had to be tried in the county where the wreck occurred (Jasper) or where the Smarts resided at the time (Jasper) under Section 15-7-30 of the South Carolina Code. Grady asserted the Smarts refused to execute a valid stipulation of dismissal as to Murdaugh pursuant to Rule 41, SCRPC, and further that Murdaugh is a nominal defendant whose presence in the case is solely to preserve venue in Hampton County.

On August 3, 2011, Judge Mullen held a second hearing to address a motion to enforce a settlement agreement and to compel execution of the stipulations of dismissal. Plaintiff Smart contended Murdaugh was still a defendant in the case so that venue remained proper in Hampton County. Mrs. Smart's case was settled in full so her case was dismissed. Grady countered that Murdaugh was a "nominal defendant" who was not in jeopardy in the case.

¹ The case was not removable because it had been pending for over a year at that time; therefore, diversity jurisdiction no longer existed. 28 U.S.C. § 1446(b).

Mr. Smart also asserted Grady waived any complaint to venue by not raising it in his answer and by withdrawing his prior motion to transfer venue.

On August 3, 2011, Judge Mullen entered a Form 4 Order denying the Motion to Compel Execution of Dismissal and the Motion to Transfer Venue. (Exhibit A). Judge Mullen also entered a separate Form 4 Order dismissing Mrs. Smart's case with prejudice, and ruled a pending Motion to Consolidate the two cases was "moot." (Exhibit B).

On August 10, 2011, Grady filed and served two notices of appeal, one for each case. (Exhibit C). It is those appeals that are currently pending before this Court.

On December 5, 2011, Grady filed a "Motion to Certify Appeals from the Court of Appeals, Consolidate Appeals and Correct Caption, Determine Appealability and Exercise 'Pendent' Jurisdiction, or in the Alternative, Petition for a Writ of Certiorari to the Court of Common Pleas" with the Supreme Court of South Carolina. That same date Grady filed a "Motion to Hold Appeals in Abeyance Pending Decision by Supreme Court" with this Court. On January 4, 2012, Respondents filed a Return to Grady's omnibus motion with the Supreme Court.

On April 5, 2012, the Supreme Court issued its order denying every one of Grady's motions. A copy of that Order is attached to this Motion.² (Exhibit D).

² This ruling renders moot Grady's pending motion to hold this appeal in abeyance. Furthermore, the Supreme Court neglected to send this order to this Court, so counsel is providing a copy.

MOTION TO DISMISS

This Court should dismiss these appeals. First, Grady lacks standing as an “aggrieved party” to appeal the trial court’s grant of Mrs. Smart’s Motion to Dismiss her consortium claim. Second, the remaining rulings are not appealable rulings pursuant to Section 14-3-330 of the South Carolina Code. These appeals are not proper.

I. Defendant Grady Does Not Have Standing as an “Aggrieved Party” to Appeal the Trial Court’s Grant of the Motion to Dismiss the Consortium Claim

Defendant Grady is not an “aggrieved party” to the order granting the motion to dismiss the consortium claim against him with prejudice and his appeal of that ruling is improper.

Rule 201, SCACR, provides “[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal.” See also *Ex parte South Carolina Dept. of Motor Vehicles*, 390 S.C. 457, 702 S.E.2d 568 (2010) (only an aggrieved party may appeal). An “aggrieved party” is one who is injured in a legal sense or has suffered an injury to person or property. *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986). See also *North American Rescue Products, Inc. v. Richardson*, 396 S.C. 124, 720 S.E.2d 53 (Ct. App. 2011) (a party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest). *Accord Powell ex rel. Kelley v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008) (there is no material distinction in general standing principles juxtaposed to the ability of an “aggrieved party” to appeal pursuant to Rule 201, SCACR; word “aggrieved” refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a

burden or obligation).

The Order Grady purportedly complains about actually dismisses with prejudice an action against the putative appellant, Grady. His position is not damaged because Mrs. Smart has voluntarily dismissed her case against him with prejudice. He is not being denied some personal or property right, or having some burden or obligation imposed upon him. In fact, he is being relieved of the burden and expense of defending the consortium claim. He simply is not “aggrieved” in the sense of that word as used in Rule 201, SCACR.

Accordingly, this Court should dismiss this appeal pursuant to Rule 201, SCACR.

II. The Remaining Rulings on Appeal are Not Appealable

The remaining rulings that are subject of this appeal are (1) Judge Buckner’s oral ruling of August 8, 2011, dismissing co-defendants Louis Daniel Moffett and Lynwood Brantley d/b/a Brantley Hauling from the suit; (2) Judge Mullen’s order of August 3, 2011, denying Grady’s motion to compel the execution of stipulations of dismissal; and (3) Judge Mullen’s order of August 3, 2011, denying Grady’s motion to transfer venue. None of these interlocutory rulings are appealable under Section 14-3-330.

The motion before Judge Mullen was an attempt to enforce the purported terms of a settlement agreement between the Smarts and Murdaugh. In fact, Grady’s counsel repeatedly based his arguments below on his contention that he only wanted to force the Smarts to do what he claimed they had originally agreed to do, that is, dismiss Murdaugh from the case. Grady’s counsel included the Covenant and settlement documents and contended the failure to actually dismiss Murdaugh was a violation of that agreement. In

essence, then, the motion was to enforce a settlement, which Judge Mullen denied.

Assuming Grady even has standing to raise these points, the Supreme Court has held that the refusal to enforce the terms of an alleged settlement agreement is not immediately appealable under Section 14-3-330. *Peterkin v. Brigman*, 319 S.C. 367, 461 S.E.2d 809 (1995), cited with approval in *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006). The ruling is not immediately appealable.

The same is true of the venue ruling. Grady's insurer made the decision below to give up the venue motion in an attempt to keep Mr. Murdaugh in the case so as preserve its right to seek allocation of fault to Mr. Murdaugh for a portion of any verdict the Smarts may have obtained under Section 15-38-15 of the South Carolina Code (the amended joint and several liability statute). Now the insurer wants Mr. Murdaugh out of the case to resurrect its attempt to transfer venue and to pursue the case with an empty chair at the table. The insurer through Defendant/Appellant Grady at least wants the Court to declare Mr. Murdaugh to be a nominal party for venue purposes.

The trial court has ruled on the venue motion, and Supreme Court precedent prevents immediate review of that interlocutory decision. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000) (order refusing transfer of venue is not immediately appealable under Section 14-3-330). This Court is constitutionally bound by Supreme Court precedent. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); *State v. Orozco*, 392 S.C. 212, 224 n. 4, 708 S.E.2d 227, 233 n. 4 (Ct. App. 2011) (the decisions of the supreme court bind this court as precedents; where the law has been recently addressed by the supreme court and is unmistakably clear, the court of appeals has no authority to change it); *Duval*

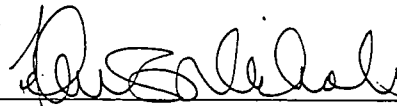
v. Heritage Life Ins. Co., 339 S.C. 616, 620 n. 7, 529 S.E.2d 566, 569 n. 7 (Ct. App.2000)

(court of appeals is bound by the decisions of the supreme court). The Court should adhere to those precedents, dismiss this improper appeal, and permit the matter to proceed to trial.

CONCLUSION

For the reasons stated this Court should dismiss these appeals and remand these matters to the circuit court for further proceedings.

Respectfully submitted,



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Attorneys for Respondents

April 26, 2012

EXHIBIT A

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

FILED

2011 AUG -3 PM 4:12

MYLINDA D. HETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP2500285

~~Gary Smart vs. James Allen Grady~~

CHECK ONE:

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Motion to Compel Execution of Dismissal is Denied
Motion to Transfer Venue is Denied

Dated at Hampton, South Carolina, this 3rd day of August 2011

Court Reporter: Debbie Everett


PRESIDING JUDGE - Hon. Carmen T. Mullen

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE DEFENDANT(S)

Mylinda Nettles - Clerk of Court

EXHIBIT B

STATE OF SOUTH CAROLINA

FILED

JUDGMENT IN A CIVIL CASE

COUNTY OF HAMPTON

2011 AUG -3 PM 4:12

CASE NO: 2009CP2500284

IN THE COURT OF COMMON PLEAS

MYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

~~Patrice Smart vs.~~ James Allen Grady

CHECK ONE:

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

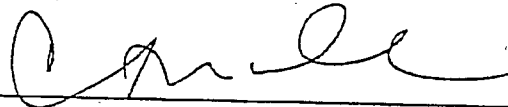
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Case Dismissed with Prejudice per Mark Tinsley. Motion to Consolidate is Moot.

Dated at Hampton, South Carolina, this 3rd day of August 2011

Court Reporter: Debbie Everett



PRESIDING JUDGE - Hon. Carmen T. Mullen

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Mark Brandon Tinsley Gooding & Gooding, PA
P.O. Box 1000 Allendale, SC 29810

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P.O. Box 40 Beaufort, SC 29902
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P.O. Box 2055 Beaufort, SC 29901-2055
Duke Raleigh Highfield Young Clement Rivers,
LLP P.O. Box 993 Charleston, SC 29402-0993
John H. Tiller Haynsworth Sinkler Boyd, PA 134
Meeting St., 3rd Floor Charleston, SC 29401

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

My linda Nettles - Clerk of Court

EXHIBIT C

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. Perry M. Buckner and Hon. Carmen Tevis Mullen

Civil Action No.: 2009-CP-25-285

GARY SMART, ... Respondent,

-vs-

JAMES ALLEN GRADY, LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY
d/b/a BRANTLEY HAULING, RANDOLPH MURDAUGH, III,

of whom JAMES ALLEN GRADY is Appellant

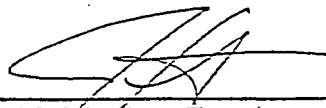
NOTICE OF APPEAL

James Allen Grady, appeals the Order of the Hon. Perry M. Buckner granting Plaintiff's Motion to Strike LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY d/b/a BRANTLEY HAULING, dated August 8, 2011 (ruled upon orally prior to trial; transcript will be forthcoming) and the Order of the Hon. Carmen Tevis Mullen denying Defendants Motions to Compel the Execution of Stipulations of Dismissal as to Randolph Murdaugh, III and to Transfer Venue, dated August 3, 2011. Defendant James Allen Grady also appeals the Order of the Hon. Carmen Tevis Mullen, dismissing with prejudice Case 2009-CP-25-284, dated August 3, 2011, by way of a separately filed Notice of Appeal in accordance with the Clerk of the Appellate Court's instruction of August 8, 2011.

Additionally, Defendant Grady has attached the Notice of Appeal previously filed in Hampton County on August 8, 2011 (inadvertently dated August 6, 2011) so as to, in part, clarify the urgency and importance of the appeals in this matter and in Case No. 2009-CP-25-284.

Respectfully Submitted,

HOWELL, GIBSON & HUGHES, P.A.

By: 

Patrick M. Higgins, Esquire
Jason Franklin Ward, Esquire
Howell, Gibson & Hughes, P.A.
Post Office Box 40
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(843) 522-2400
Attorneys for Appellant James Allen
Grady

Beaufort, South Carolina

August 9, 2011

Other Counsel of Record:

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Attorney for UIM carrier State Farm

FILED

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

IN THE COURT OF COMMON PLEAS

2011 AUG -3 PM 4:12

MYLINDA D. HETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP2500285

~~Gary Smart~~ vs. James Allen Grady

CHECK ONE:

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

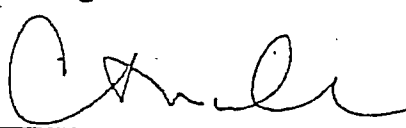
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Motion to Compel Execution of Dismissal is Denied
Motion to Transfer Venue is Denied

Dated at Hampton, South Carolina, this 3rd day of August 2011

Court Reporter: Debbie Everett


PRESIDING JUDGE - Hon. Carmen T. Mullen

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. Perry M. Buckner and Hon. Carmen Tevis Mullen

Civil Action No.: 2009-CP-25-284

and

Civil Action No.: 2009-CP-25-285

FILED

AUG - 8 2011 @11:40am

CLERK OF COURT
HAMPTON COUNTY

PATRICE SMART, ... Respondent,

-vs-

JAMES ALLEN GRADY, LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY
d/b/a BRANTLEY HAULING, RANDOLPH MURDAUGH, III,

of whom JAMES ALLEN GRADY is Appellant

GARY SMART, ... Respondent,

-vs-

JAMES ALLEN GRADY, LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY
d/b/a BRANTLEY HAULING, RANDOLPH MURDAUGH, III,

of whom JAMES ALLEN GRADY is Appellant

NOTICE OF APPEAL

James Allen Grady, appeals the Order of the Hon. Perry M. Buckner granting Plaintiff's Motion to Strike LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY d/b/a BRANTLEY HAULING, dated August 8, 2011 and the Orders of the Hon. Carmen Tevis Mullen, dismissing with prejudice Case 2009-CP-25-284, dated August 3, 2011, and the Order denying Defendants Motions to

Compel the Execution of Stipulations of Dismissal as to Randolph Murdaugh, III
and to Transfer Venue, dated August 3, 2011.

Respectfully Submitted,

HOWELL, GIBSON & HUGHES, P.A.

By: 

Jason Franklin Ward, Esquire
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Attorneys for James Allen Grady,
Appellant.

Beaufort, South Carolina

August 6, 2011

Other Counsel of Record:

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Attorney for Respondents Patrice and Gary Smart

John Tiller
Attorney for Randolph Murdaugh, III

Erin Dean
Attorney for Randolph Murdaugh, III

Duke Highfield
Ben Treywick
Attorneys for Louis Daniel Moffett, Lynwood Brantley d/b/a Brantley Hauling

Mitch Griffith
Attorney for UIM carrier State Farm

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. Perry M. Buckner and Hon. Carmen Tevis Mullen

Civil Action No.: 2009-CP-25-285

GARY SMART, ... Respondent,

-vs-

JAMES ALLEN GRADY, LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY
d/b/a BRANTLEY HAULING, RANDOLPH MURDAUGH, III,

of whom JAMES ALLEN GRADY is Appellant

PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing
Notice of Appeal upon all counsel of record by affixing same with proper postage
and placing same with the United States Postal Service on the 9th day of August,
2011 addressed to the following:

Mark B. Tinsley, Esquire
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Respectfully Submitted,

HOWELL, GIBSON & HUGHES, P.A.

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Attorneys for Appellant James Allen
Grady

Beaufort, South Carolina

August 9, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. Perry M. Buckner and Hon. Carmen Tevis Mullen

Civil Action No.: 2009-CP-25-284

PATRICE SMART,..... Respondent,

-VS-

JAMES ALLEN GRADY, LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY
d/b/a BRANTLEY HAULING, RANDOLPH MURDAUGH, III,

of whom JAMES ALLEN GRADY is Appellant

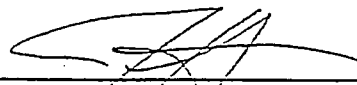
NOTICE OF APPEAL

James Allen Grady, appeals the Order of the Hon. Perry M. Buckner granting Plaintiff's Motion to Strike LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY d/b/a BRANTLEY HAULING, dated August 8, 2011 (ruled upon orally prior to trial; transcript will be forthcoming) and the Order of the Hon. Carmen Tevis Mullen denying Defendants Motions to Compel the Execution of Stipulations of Dismissal as to Randolph Murdaugh, III and to Transfer Venue, dated August 3, 2011. Defendant James Allen Grady also appeals the Order of the Hon. Carmen Tevis Mullen, dismissing with prejudice Case 2009-CP-25-284, dated August 3, 2011, by way of a separately filed Notice of Appeal in accordance with the Clerk of the Appellate Court's instruction of August 8, 2011.

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Respectfully Submitted,

HOWELL, GIBSON & HUGHES, P.A.

By: 
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(843) 522-2400
Attorneys for Appellant James Allen
Grady

Beaufort, South Carolina

August 9, 2011

Other Counsel of Record:

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**Attorneys for Louis Daniel Moffett, Lynwood Brantley d/b/a Brantley
Hauling**

E. Mitchell Griffith, Esquire
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Post Office Box 570
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Attorney for UIM carrier State Farm

FILED

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF HAMPTON

2011 AUG -3 PM 4:12

CASE NO: 2009CP2500284

IN THE COURT OF COMMON PLEAS

MYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

~~Patrice Smart~~ vs. James Allen Grady

CHECK ONE:

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

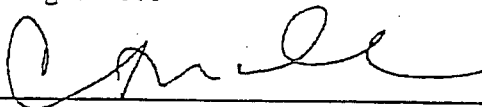
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR
ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court;

Case Dismissed with Prejudice per Mark Tinsley. Motion to Consolidate is Moot.

Dated at Hampton, South Carolina, this 3rd day of August 2011

Court Reporter: Debbie Everett


PRESIDING JUDGE - Hon. Carmen T. Mullen

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when
appearing pro se) as follows:

Mark Brandon Tinsley Gooding & Gooding, PA
P.O. Box 1000 Allendale, SC 29810

Patrick M. Higgins Howell Gibson & Hughes Pa
P.O. Box 40 Beaufort, SC 29902
Erin DuBose Dean Tupper Grimsley & Dean, PA

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. Perry M. Buckner and Hon. Carmen Tevis Mullen

Civil Action No.: 2009-CP-25-284

and

Civil Action No.: 2009-CP-25-285

FILED

AUG - 8 2011 01:40am

CLERK OF COURT
HAMPTON COUNTY

PATRICE SMART, ... Respondent,

-VS-

JAMES ALLEN GRADY, LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY
d/b/a BRANTLEY HAULING, RANDOLPH MURDAUGH, III,

of whom JAMES ALLEN GRADY is Appellant

GARY SMART, ... Respondent,

-VS-

JAMES ALLEN GRADY, LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY
d/b/a BRANTLEY HAULING, RANDOLPH MURDAUGH, III,

of whom JAMES ALLEN GRADY is Appellant

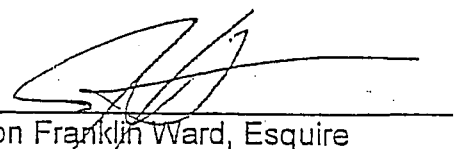
NOTICE OF APPEAL

James Allen Grady, appeals the Order of the Hon. Perry M. Buckner granting Plaintiff's Motion to Strike LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY d/b/a BRANTLEY HAULING, dated August 8, 2011 and the Orders of the Hon. Carmen Tevis Mullen, dismissing with prejudice Case 2009-CP-25-284, dated August 3, 2011, and the Order denying Defendants Motions to

Compel the Execution of Stipulations of Dismissal as to Randolph Murdaugh, III
; and to Transfer Venue, dated August 3, 2011.

Respectfully Submitted,

HOWELL, GIBSON & HUGHES, P.A.

By: 

Jason Franklin Ward, Esquire
Patrick M. Higgins, Esquire
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
Attorneys for James Allen Grady,
Appellant.

Beaufort, South Carolina

August 6, 2011

Other Counsel of Record:

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Attorney for Respondents Patrice and Gary Smart

John Tiller
Attorney for Randolph Murdaugh, III

Erin Dean
Attorney for Randolph Murdaugh, III

Duke Highfield
Ben Treywick
Attorneys for Louis Daniel Moffett, Lynwood Brantley d/b/a Brantley Hauling

Mitch Griffith
Attorney for UIM carrier State Farm

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. Perry M. Buckner and Hon. Carmen Tevis Mullen

Civil Action No.: 2009-CP-25-284

PATRICE SMART,..... Respondent,

-VS-

JAMES ALLEN GRADY, LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY
d/b/a BRANTLEY HAULING, RANDOLPH MURDAUGH, III,

of whom JAMES ALLEN GRADY is Appellant

PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing
Notice of Appeal upon all counsel of record by affixing same with proper postage
and placing same with the United States Postal Service on the 9th day of August,
2011 addressed to the following:

Mark B. Tinsley, Esquire
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Attorney for Respondents Patrice and Gary Smart

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Haynsworth, Sinkler & Boyd, P.A.
Post Office Box 340
Charleston, SC 29402
Attorney for Randolph Murdaugh, III

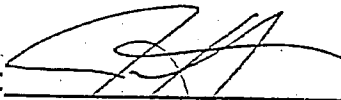
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Attorney for Randolph Murdaugh, III

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Benjamin Traywick, Esquire
Young Clement Rivers, LLP
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**Attorneys for Louis Daniel Moffett, Lynwood Brantley d/b/a Brantley
Hauling**

E. Mitchell Griffith, Esquire
Griffith, Sadler & Sharp, P.
Post Office Box 570
Beaufort, SC 29901-0570
Attorney for UIM carrier State Farm

Respectfully Submitted,

HOWELL, GIBSON & HUGHES, P.A.

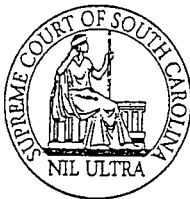
By: 

Jason Franklin Ward, Esquire
Patrick M. Higgins, Esquire
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Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
**Attorneys for Appellant James Allen
Grady**

Beaufort, South Carolina

August 9, 2011

EXHIBIT D



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 5, 2012

Patrick M. Higgins, Esquire
Jason Franklin Ward, Esquire
Howell Gibson & Hughes, P.A.
P O Box 40
Beaufort, SC 29901-0040

Robert L. Widener, Esquire
McNair Law Firm, PA
P O Box 11390
Columbia, SC 29211

Re: Smart, Gary v. Grady, James, et al.

Dear Counsel:

The following Order has been endorsed on your requests in the above entitled matter:

“Motion to Certify Appeals from the Court of Appeals, Consolidate Appeals and Correct Caption, Determine Appealability and Exercise Pendent Jurisdiction, or in the Alternative, Petition for a Writ of Certiorari to the Court of Common Pleas is denied.

s/ Costa M. Pleicones J.
For the Court

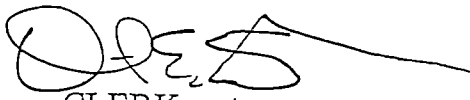
April 05, 2012.”

Smart, Gary v. Grady, James, et al.

Page 2

April 5, 2012

Very truly yours,



CLERK

DES/bfs

cc: Erin D. Dean, Esquire
H. Woodrow Gooding, Esquire
Mark B. Tinsley, Esquire
John H. Tiller, Esquire
John S. Nichols, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge
Perry M. Buckner, Circuit Court Judge

RECEIVED
JUN 11 2012
SC Court of Appeals

Case No. 2009-CP-25-284 and Case No. 2009-CP-25-285

Gary Smart, ... Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood
Brantley, d/b/a Brantley Hauling and Randolph Murdaugh, III, ... Defendants,

of whom James Allen Grady is Appellant.

AND

Patrice Smart, ... Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood
Brantley, d/b/a Brantley Hauling and Randolph Murdaugh, III, ... Defendants,

of whom James Allen Grady is Appellant.

RETURN TO MOTION TO DISMISS APPEAL

These appeals arise from an auto accident in Jasper County. The appellant (Defendant Grady) moved in the Supreme Court to certify the appeals, but the Supreme Court denied the motion. The respondents now move in this Court to dismiss the appeal. This motion should be denied for the reasons set forth herein. **Note:** Defendant Grady has filed a separate Appendix to Return to Motion to Dismiss Appeal, which is cited herein as "Appx. ____."

BACKGROUND

I. THE NEW VENUE STATUTE

These appeals arise against the backdrop of the significant 2005 amendments to the general venue statute. Prior to the amendments, S.C. Code Ann. § 15-7-30 (Rev. 2005) required civil actions to be tried in the following venues:

1. If there was one resident defendant, the action had to be tried in the county where that defendant resided at the time of the commencement of the action;
2. If there was more than one resident defendant, the action had to be tried in the county where one of the resident defendants resided at the time of the commencement of the action;
3. If no defendant was a resident, the action could be tried in any county selected by the plaintiff.

The 2005 amendments substantially changed venue – absent a special venue statute (none here), civil actions must now be tried in the following venues [changes indicated in brackets]:

1. If there is one resident defendant, the action must be tried in the county where that defendant resided at the time the cause of action arose [rather than commenced] or the county in which the most substantial part of the act or omission giving rise to the cause of action occurred [new], § 15-7-30(C)(1) and (C)(2) (Supp. 2010);
2. If there is one non-resident defendant, the action must be tried in the county where the most substantial part of the act or omission giving rise to the cause of action occurred [new], or the county where the plaintiff resided at the time the cause of action arose [new], § 15-7-30(D)(1) and (D)(2) (Supp. 2010) (abrogating plaintiff's right to bring action against non-resident in any county);
3. If there is more than one defendant, the action may be tried in any county where the action may be properly maintained against one of the defendants [new], § 15-7-30(B) (Supp. 2010).

As shown below, the present case involves a novel yet recurring issue that arises at the intersection between the 2005 venue amendments and the true interests of the parties to the litigation. At issue is whether a defendant remains relevant to venue if he settles with the plaintiff but remains in the case with no personal stake in the outcome of the litigation.

II. THE ACCIDENT

The accident occurred in Jasper County. The appellant (Defendant Grady) was hauling an ATV on a trailer. The ATV fell off the trailer. Defendant Moffett (Truck Driver) was driving an 18-wheeler and ran into the ATV. Defendant Randolph Murdaugh III came upon the accident scene and pulled his car to the side of the road to provide assistance, leaving his bright lights on and facing oncoming traffic. Plaintiff Gary Smart came around a corner into the path of Defendant Murdaugh's bright lights, was distracted by the headlights, and wrecked into the back of the 18-wheeler. (Appx. 11, ¶ 5; 16, ¶ 5; see also n.1, *infra*).

III. PROCEDURAL HISTORY

Alexander Murdaugh is the son of Defendant Murdaugh and was with him at the accident scene. Both Murdaughs are attorneys, and Alexander Murdaugh undertook the representation of the Plaintiffs. He filed a loss of consortium action for Patrice Smart in Jasper County against Defendant Grady, the Truck Driver and his employer, Defendant Brantley Hauling (the Trucking Defendants). His father, Defendant Murdaugh, was listed as a defendant on the summons but not in the caption of the complaint, and no relief was requested against him. (Appx. 3-6).

Jasper County was the only proper venue because: the accident occurred in Jasper County; Patrice Smart was a resident of Jasper County; and no defendant was a resident of South Carolina. Thus, the action had to be "brought *and tried* in [Jasper County]." § 15-7-30(D)(1), (D)(2) (Supp. 2010) (emphasis added). Since there was complete diversity amongst the parties, the case was removable to federal court. To avoid this, Patrice Smart filed a stipulation that her damages did not exceed \$75,000.00 (the jurisdictional minimum for diversity jurisdiction) and that she would not attempt to collect any judgment in excess of \$75,000.00. (Appx. 7).

Thereafter, Alexander Murdaugh withdrew as counsel, and Patrice Smart dismissed her Jasper County action without prejudice on May 26, 2009. (Appx. 8).

One month later, on June 24, 2009, Plaintiffs' current counsel (Mark Tinsley) filed separate actions on behalf of Gary Smart for personal injury and Patrice Smart for loss of consortium in Hampton County. Both complaints added Randolph Murdaugh as a defendant and alleged the cause of their injuries was that Gary Smart "collided with [the 18-wheeler] due to absence of any warning devices and the bright lights of Defendant Murdaugh, thereby causing Gary Smart to be seriously injured." (Appx. 11, ¶ 5; 16, ¶5). Gary Smart testified at deposition that Defendant Murdaugh's headlights distracted him as he approached the accident scene, and he therefore did not see the 18-wheeler until it was too late to avoid the accident.¹

Adding Randolph Murdaugh as a defendant changed the cases in two ways. First, he was a South Carolina resident, so the cases could not be removed to federal court based on diversity jurisdiction. Second, he was a resident of Hampton County, so the new actions could be filed in Hampton County as permitted *but not* required by § 15-7-30(C)(1) (Supp. 2010) (action against a "resident individual defendant must be *brought and tried* in" his county of residence or where act or omission occurred) (emphasis added). Plaintiffs were free to bring the actions in their home county (Jasper), because that is where the accident occurred, but they chose Hampton County.

The Trucking Defendants (driver and employer) removed the cases to federal court, claiming fraudulent joinder of Defendant Murdaugh to defeat diversity jurisdiction. The federal district court remanded the case to state court, because there was no evidence of a covenant not

¹ Gary Smart testified: (1) he approached a curve in the road, travelling approximately 50 miles per hour; (2) the accident occurred approximately 300 yards on the other side of the curve; (3) as he came out of the curve, the headlights of Defendant Murdaugh's car came into his vision; (4) believing them to be the high beam headlights of an oncoming car, he flashed his high beams once or twice; and (5) by the time he turned his attention back to the roadway in front of him, the stopped 18-wheeler was immediately in front of him and he slammed into the back of it, not having time to swerve away and barely having time to hit his brakes immediately before impact. (Appx. 148-173).

to execute or some other document demonstrating the Plaintiffs did not intend to recover and enforce a judgment against Defendant Murdaugh. (Appx. 20-31).

After remand to state court, the parties engaged in discovery for the next 10 months. During that time, on April 1, 2010, Gary Smart filed an offer of judgment for \$2.75 million dollars and Patrice Smart filed an offer of judgment for \$500,000.00. Both offers were for all defendants collectively. (Appx. 33-35).

The parties mediated the case on August 4, 2010. By this time, Gary Smart's medical bills exceeded \$76,000.00. (Appx. 185-187). The Plaintiffs settled with the Trucking Defendants (driver and employer) for \$1.0 million dollars, assigning only \$5,000.00 to Gary Smart's personal injury claim and assigning the remaining \$995,000.00 to Patrice Smart's consortium claim. The Plaintiffs settled with Defendant Murdaugh for \$100,000.00, again assigning only \$5,000.00 to Gary Smart's personal injury claim and assigning the remaining \$95,000.00 to Patrice Smart's consortium claim. Thus, of the \$1.1 million dollars in settlement proceeds, Plaintiff Gary Smart received only \$10,000.00 for his personal injuries but his wife received \$1.09 million dollars for her consortium claim – the wife's settlement was 109 times greater than the husband's settlement.

In exchange for these payments, both Plaintiffs agreed to fully release the Trucking Defendants and Defendant Murdaugh, and to dismiss with prejudice both lawsuits pending against the Trucking Defendants and Defendant Murdaugh. The settlement documents reserved Gary Smart's personal injury claim against Defendant Grady but nothing else. Thus, Defendant Grady was the only remaining defendant in the personal injury action by Gary Smart. As a result, Jasper County was the only proper venue for the trial of the case.²

² There were three basic settlement documents. First, there was an August 4, 2010, "Settlement Agreement" that recited the apportioned payments, required the Defendants to provide a Release and Stipulation of

As required by the settlement documents, on October 6, 2010, the attorney for the Trucking Defendants filed Stipulations of Dismissal in both lawsuits, which dismissed with prejudice all claims by both Plaintiffs against the Trucking Defendants and Defendant Murdaugh. (Appx. 36-41). Rule 41(a)(1)(B), SCRCP, governs these stipulations and provides a plaintiff may dismiss its action against a defendant without a court order, and with or without prejudice, “by filing a stipulation of dismissal signed by *all parties who have appeared* in the action.” (Emphasis added). The stipulations filed with the court were defective, because they were not signed by all parties. The stipulations had been executed by the Plaintiffs’ attorney and by one of the attorneys for Defendant Murdaugh (Attorney Tiller), but not by the attorney for the Trucking Defendants, the attorney for Defendant Grady, or the other attorney for Defendant

Dismissal with the settlement checks, and stated the settlement was “a resolution of all claims of Patrice Smart against the parties [and] a partial settlement [that did] not affect the claims of Gary Smart against [Defendant] Grady.” This agreement was signed by both Plaintiffs, their attorney, the attorney for the Trucking Defendants, and the attorney for Defendant Murdaugh. (Appx. 137-139).

Second, there was a September 3, 2010, “Full, Final and Complete Release” that stated in the title: “This Release Ends All Claims” and stated above the signature block: “This Is A Full Final And Complete Release.” (Appx. 139). Both Plaintiffs and their attorney signed the Release (*id.* at 142-143), which acknowledged Plaintiffs’ receipt of the apportioned settlement payments under the “Settlement Agreement” and recited the following:

- a. The Plaintiffs “do hereby release, forever discharge, and *promise never to sue*” the Trucking Defendants and Defendant Murdaugh. (*Id.* at 139) (emphasis added). The Plaintiffs released these Defendants “from *any and all* injuries . . . actions, causes of action, demands, damages, suits at law or in equity . . . of whatsoever kind or nature . . .” (*Id.*) (emphasis added).
- b. The Plaintiffs accepted the Release “in *full* compromise and *release* of *all* injuries or damages allegedly suffered by them . . .” (*Id.*) (emphasis added).
- c. “[The Release was] in *full and final* settlement of *any and all* claims that the [Plaintiffs] now has or may have in the future arising out of the alleged accident *against the Settling Defendants*. However, it is understood that the settlement of the claims of Gary Smart is only a partial settlement and does not affect his claims against Defendant Grady.” (*Id.* at 140) (emphasis added).
- d. “The parties agree to a *dismissal, with prejudice*, of [the Trucking Defendants and Defendant Murdaugh] from the actions presently pending . . .” (*Id.*) (emphasis added).

Third, there was a “Stipulation of Dismissal (Partial Settlement)” signed by the attorney for Plaintiff Gary Smart and an attorney for Defendant Murdaugh. (Appx. at 36-38). This Stipulation of Dismissal provided the case had “been compromised and settled as to” the Trucking Defendants and Defendant Murdaugh, and it further provided the case was “ended with prejudice as to” the Trucking Defendants and Defendant Murdaugh. (*Id.* at 36). As with the “Settlement Agreement” and the “Full, Final And Complete Release,” the Stipulation of Dismissal reserved Gary Smart’s claims against Defendant Grady. (*Id.*).

Murdaugh (Attorney Dean). (*Id.*).³ Had the stipulations filed on October 6, 2010 been properly executed, Defendant Grady would have been the only remaining defendant, and Jasper County would have been the only proper venue for the trial of the case.

The Plaintiffs and Defendant Grady did not settle at the August 3, 2010 mediation, but Defendant Grady offered his \$300,000.00 policy limits four weeks later on August 31, 2010. (Appx. 181-182). Plaintiffs refused the limits tender, and Defendant Grady made an offer of judgment to the Plaintiffs of \$300,000.00 on October 18, 2010. (Appx. 42-43) Defendant Grady did not learn of the filed Stipulations of Dismissal until February 2011 – he had not been copied on any correspondence related to the drafting, signing, or filing of the stipulations – whereupon he sought discovery of the Release and received it on March 2, 2011.

Defendant Grady moved on March 24, 2011 to *inter alia* change venue to Jasper County based on the dismissal of Defendant Murdaugh. At the hearing before Judge Mullen on April 4, 2011, the Plaintiffs' attorney agreed the Stipulations were ineffective, because they did not comply with Rule 41, SCRCP. Thus, the motion to change venue was not heard – it had become moot, because it hinged on the dismissal of Defendant Murdaugh. (Appx. 95-96). Unbeknownst to Defendant Grady, Defendant Murdaugh had earlier agreed on March 31, 2011, to waive his right to an outright dismissal with prejudice and remain in the litigation under a covenant not to execute that rendered him a nominal defendant with no personal interest in the outcome of the litigation. Plaintiffs had executed the Covenant on Saturday, April 2, 2011, two days before the April 4th hearing, but they never mentioned it during the hearing.

To cure the Rule 41, SCRCP defect, Defendant Grady sent Stipulations dismissing Defendant Murdaugh to all counsel on June 22, 2011. (Appx. 174-175). One of Defendant

³ Defendant Murdaugh had two attorneys, because he had two insurance policies with different carriers that provided potential liability coverage – his personal policy and his employer's policy.

Murdaugh's attorneys (Erin Dean) immediately signed and returned the Stipulations, but Defendant Grady never received fully executed Stipulations. (Appx. 176-178). On June 23, 2011, despite the express terms of the settlement documents, the Plaintiffs' attorney advised that he did not intend to dismiss Defendant Murdaugh, stating that Plaintiffs had entered a covenant not to execute with Defendant Murdaugh. (Appx. 179-180).

On July 7, 2011, Defendant Grady moved to compel execution of the stipulation dismissing Defendant Murdaugh from both actions, and to consolidate the personal injury and consortium actions for trial. (Appx. 44-48). On July 8, 2011, Defendant Grady moved to transfer venue to Jasper County. (Appx. 49-54). On that same day, Plaintiffs sent Defendant Grady a copy of the Covenant Not To Execute, dated April 2, 2011.

Under the Covenant, the Plaintiffs promised not to execute on any judgment against Defendant Murdaugh and the stated purpose of the Covenant was to protect the Plaintiffs' right to seek UIM coverage. At this time however, and unbeknownst to Defendant Grady, Plaintiffs' attorney was in possession of a June 28, 2011, check from the UIM carrier for the UIM limits of \$50,000.00. (Appx. 183-184). The Plaintiffs have refused this tender of limits, and Defendant Murdaugh remains a party in the litigation. The effect of not dismissing him is to avoid a change of venue from Hampton County to Jasper County.⁴ In any event, and assuming there were no tender of UIM benefits or assuming the Plaintiffs have a valid reason for not accepting the tender, Defendant Murdaugh is nevertheless an immaterial defendant with no personal interest in the outcome of the litigation and should be disregarded for purposes of venue.

⁴ Gary Smart was driving someone else's car at the time of the accident, so there were two potential UIM policies -- the policy on the car and Gary Smart's own policy. State Farm issued the policy that covered Gary Smart personally -- his wife was the named insured -- and this policy provided \$50,000.00 in UIM coverage. State Farm sent the above-noted check for these limits to Plaintiffs' attorney. There was no UIM coverage on the car driven by Gary Smart, so the State Farm policy is the only potential UIM coverage.

Judge Mullen heard Defendant Grady's motions to compel execution of the stipulation and to change venue on August 3, 2011. Defendant Murdaugh did not appear at the hearing and or oppose the motions. In defense of both motions, the Plaintiffs asserted that Defendant Murdaugh had waived the prior release of him and agreed to replace it with a covenant not to execute, so that the Plaintiffs could pursue potential UIM coverage. (Appx. 119-121). The Plaintiffs' submitted the covenant not to execute and an affidavit from one of Defendant Murdaugh's attorneys (Attorney Tiller) in support of this defense. In his affidavit, Attorney Tiller states the Plaintiffs asked for the waiver of dismissal, and he drafted the requested Covenant and sent it to Plaintiffs on March 31, 2011, who executed the Covenant on Saturday, April 2, 2011. (Appx. 147). The Covenant does not recite any consideration for Defendant Murdaugh's voluntary rescission of the prior settlement – the only consideration mentioned was the already-paid \$100,000.00 that led to the original settlement and release. (Appx. 144-146)

Judge Mullen denied both motions. (Appx. 1) On that same day, she dismissed the consortium action in its entirety (including the claim against Defendant Grady) upon the request of the Plaintiffs' attorney and therefore found the motion to consolidate was moot. (Appx. 2) The Plaintiffs' request was based on the release and dismissal provisions of the settlement documents. As a result, the only pending case was Gary Smart's personal injury claim against Defendant Grady, with Defendant Murdaugh and the Trucking Defendants remaining as nominal defendants with no personal interest in the outcome of the litigation. Defendant Grady has appealed these orders.

On August 8, 2011, Judge Buckner granted Plaintiffs' motion to dismiss the Trucking Defendants – this motion was based on the release and dismissal provisions of the settlement documents. As a result, the only pending case was Gary Smart's personal injury claim against

Defendant Grady, with Defendant Murdaugh remaining in the lawsuit as a nominal defendant with no personal interest in the outcome. Defendant Grady immediately appealed this bench ruling. The appeal included an appeal from Judge Mullen's August 3rd orders. Defendant Grady hereby withdraws his appeal from Judge Buckner's oral ruling, so this appeal concerns only the three orders issued by Judge Mullen.

Defendant Grady moved in the Supreme Court to certify his appeals and for related relief. The Supreme Court denied this motion. Respondents argue the Supreme Court denied all of the relief requested in the motion, but their prescience is unfounded. (Mot. at "Background"). The Supreme Court manifestly denied only the motion to certify and, therefore, did not reach the other issues. To reach the other issues, the Supreme Court would first have to grant the motion to certify, thereby obtaining jurisdiction to rule on the other issues. Since the Supreme Court did not certify these appeals, it did not and could not have reached the other issues.

ARGUMENTS

The fundamental issue presented by the respondent's motion to dismiss is whether this Court has appellate jurisdiction over the appealed orders. The jurisdiction of all courts, including the appellate courts, flows from the Constitution in one of two ways: (1) a direct grant of jurisdiction in the Constitution; and (2) a directive in the Constitution that the General Assembly define a court's jurisdiction by statute. See, *e.g.*, S.C. Const. art. V, §§ 5, 9, 20. At issue here is the meaning and application of the S.C. Code Ann. §14-3-330 (1976), which is the general appellate jurisdiction statute. As with all statutes, the controlling inquiry is the intent of the General Assembly.

I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO CHANGE VENUE.

It is well-settled that a defendant joined for the purpose of establishing venue is a nominal or immaterial defendant who must be disregarded when deciding the proper venue of an action. See, e.g., *Williams v. Chrysler Motors Corp.*, 193 S.E.2d 524, 525 (S.C. 1972); *McMillan v. B.L. Montague Co.*, 121 S.E.2d 13, 15 (S.C. 1961); *Seegars v. WIS-TV*, 114 S.E.2d 502, 505 (S.C. 1960). Research reveals no case on the specific question presented here – whether a defendant becomes nominal and immaterial for purposes of venue when he settles with the plaintiff but remains in the case under a covenant not to execute or otherwise. The Supreme Court, however, has found that covenants not to execute “must be carefully scrutinized in order to determine their efficiency and *impact upon the integrity of the judicial process.*” *Poston v. Barnes*, 363 S.E.2d 888, 890 (S.C. 1987) (emphasis added).

Here, venue is “proper” in Hampton County solely because Defendant Murdaugh remains in the case. He is a nominal and immaterial defendant in the truest sense of the words, because he has no personal interest in the outcome of the litigation. Absent his presence in the case, Jasper County would be the only proper venue.

The federal courts have long held that defendants settling under covenants not to execute and similar arrangements are nominal defendants and are to be disregarded in determining the existence of diversity jurisdiction. For example, in *Bumgardner v. Combustion Engineering, Inc.*, 432 F. Supp. 1289 (D.S.C. 1977), Judge Chapman applied this well-established rule to the following facts:

1. The South Carolina plaintiff sued numerous defendants in state court.
2. There was only one South Carolina defendant, and its presence in the lawsuit prevented removal for diversity jurisdiction.

3. The plaintiff settled with the South Carolina defendant under a covenant not to execute.
4. As a result of the covenant, the South Carolina defendant no longer had an interest in the outcome of the litigation and, therefore, was a nominal defendant.
5. Accordingly, the case was properly removed to federal court under diversity jurisdiction despite the continued presence of the South Carolina defendant.

Defendant Grady respectfully submits this Court should adopt the same rule for venue when a defendant remains in the case after settling under a covenant not to execute or other instrument whereby the defendant no longer has a personal stake in the outcome of the litigation.

The Supreme Court adopted similar reasoning under the former venue statute in *McMillan* and *Seegars*, both *supra*. In *McMillan*, the Supreme Court ruled that once a defendant is deemed immaterial, “for venue purposes this defendant must be *disregarded* and the *sole inquiry* is whether the [remaining defendant] is subject to suit in that county [resident county of the immaterial defendant].” 114 S.E.2d at 505 (emphasis added). In *McMillan*, the Supreme Court ruled that a defendant could be irrelevant for venue purposes even if there existed a facially valid claim against him:

The fact that a complaint may state a cause of action against a sham or immaterial defendant is not ipso facto conclusive, and [the] defendant may be mala fide requiring [the] granting of [a] motion to change venue even though allegations and proof apparently available may be sufficient to submit [the] case to [a] jury.

121 S.E.2d at 15. Although *Seegars* and *McMillan* involved defendants who had been joined for the purpose of establishing venue, the underlying rationale for the Supreme Court’s rulings applies equally here. Neither defendant had a real interest in the outcome of the litigation, because there was no meaningful exposure to personal liability. The same is even more true here, because the Defendant Murdaugh absolutely has no personal liability exposure and, therefore, he has no real interest in the outcome of the litigation. In fact, Defendant Murdaugh is

a mere volunteer – he voluntarily waived his contractual right to dismissal with prejudice for no consideration. Accordingly, the trial court erred in denying the motion to change venue.

II. ~~THE ORDER DENYING THE MOTION TO CHANGE VENUE IS IMMEDIATELY APPEALABLE UNDER § 14-3-330(2) AND THE RATIONALE IN *HAGOOD V. SOMMERVILLE*, 607 S.E.2D 707 (S.C. 2005).~~

Appealability is controlled by the statute – § 14-3-330(2) (1976) is controlling here and provides that the appellate courts have appellate jurisdiction over:

An order *affecting a substantial right* made in an action *when such order* (a) in effect determines the action and *prevents a judgment from which an appeal might be taken* or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

§ 14-3-330(2) (emphasis added). The right to trial in the proper venue is a statutory right granted by the General Assembly and, therefore, it manifestly is a “substantial right.” See, *e.g.*, *Whaley v. CSX Transp., Inc.*, 609 S.E.2d 286, 292 (S.C. 2005) (venue right granted by former venue statute is a “substantial right”). Thus, the only question is whether the appealed denial of the motion to change venue to the statutorily required venue satisfies subparts (a), (b), or (c) of § 14-3-330(2).

In *Hagood v. Sommerville*, 607 S.E.2d 707 (S.C. 2005), the Supreme Court held that an order disqualifying an attorney in a civil case is immediately appealable under § 14-3-330(2)(a), because the right to choose one’s counsel is a “substantial right” and because “an appeal after final judgment and a new trial, if granted, *would not adequately protect* a party’s interest because it would be *difficult or impossible* for the affected party or the appellate court to ascertain by any objective standard *whether prejudice resulted* from the disqualification.” *Id.* at 710 (emphasis added). The same is true for an appeal after final judgment in a “venue” case. It will be impossible to prove prejudice, *i.e.*, that a different jury in a different county would have reached

a different result. Thus, an order denying the substantial right to the statutorily mandated venue is immediately appealable under the rationale in *Hagood, supra*.

III. THE RULE AGAINST IMMEDIATE APPEALS OF ORDERS DENYING THE SUBSTANTIAL RIGHT TO PROPER VENUE IS IN ERROR AND CONFLICTS WITH THE INTENT OF THE GENERAL ASSEMBLY AS EXPRESSED IN § 14-3-330.

In *Breland v. Love Chevrolet Olds, Inc.*, 529 S.E.2d 11 (S.C. 2000), the Supreme Court ruled that proper venue is a substantial right but orders denying that substantial right are not immediately appealable. In so ruling, the Supreme Court focused on § 14-3-330(2)(c) and the appellant's argument that the appealed order struck its defense of improper venue. The Supreme Court did not consider appealability under 14-3-330(2)(a) and the inability to prove prejudice (reversible error) on appeal. Thus, Defendant Grady submits the general rule against "venue" appeals is not applicable, because no case has considered the issue in this light. See *Hagood, supra*. In any event, as argued below, Defendant Grady submits the "venue" cases have been wrongly analyzed and, therefore, immediate appeals have been wrongly denied in some cases. For example, as also discussed later, *Breland* was rightly decided (no immediate appeal) but wrongly analyzed (relief available by new trial).

A. The judicial policy against "piecemeal litigation" is irrelevant to the General Assembly's decision to allow immediate appeals from certain pre-trial orders.

In denying immediate appeals under § 14-3-330, the courts often rely on the judicially created policy against "piecemeal litigation." *E.g., Breland*, 529 S.E.2d at 13. The entire purpose of § 14-3-330(1), (2), and (4), however, is to allow appeals before final judgment, *i.e.*, to allow piecemeal litigation. The General Assembly's plainly stated intent to allow such immediate appeals cannot be constrained by a judicial policy against piecemeal litigation. Rather, as a matter of constitutional law, that policy must yield to the General Assembly's policy in allowing immediate appeals from certain pre-trial orders.

Public policy is the province of the legislature. *Brown v. Duke*, 270 S.E. 2d 130, 132 (S.C. 1980). “Once the Legislature has made [a public policy] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy.” *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 382 S.E.2d 11, 14 (S.C. App. 1989) (emphasis added). Thus, under the separation of powers doctrine, the courts must yield to, follow, and promote the General Assembly’s policy choices. *Id.* And as this Court has aptly observed, “the responsibility for justice or wisdom of legislation rests exclusively with the legislature, whether or not [the courts] agree with the laws it enacts.” *Adkins v. Comcar Indus., Inc.*, 447 S.E.2d 228, 230 (S.C. App. 1994).

Section 14-3-330(1), (2), and (4) reflect a policy choice by the General Assembly to allow immediate appeals from certain pre-trial orders. The judicial policy against “piecemeal litigation” cannot, as a matter of constitutional law, provide any basis for limiting the General Assembly’s contrary policy choice. Thus, if an order is immediately appealable under the plain language of § 14-3-330, the appellate courts must entertain the appeal.

- B. The availability of relief after final judgment through reversing and remanding for a new trial is not a basis for denying the statutory right granted by the General Assembly to appeal immediately from certain pre-trial orders.

In denying immediate appeals under § 14-3-330, the courts have often relied upon the general observation that relief is available after final judgment by reversing and granting a new trial. *E.g., Breland*, 529 S.E.2d at 14 (finding that the “substantial right” to proper venue was not “affected” by the order, because any error could be remedied after final judgment by granting a new trial). The same rationale, however, applies with equal force to any order that is immediately appealable under § 14-3-330(2), because virtually any error in any order can always be “remedied” by a new trial.

For example, the “mode of trial” cases hold that an order denying a mode of trial to which a party is entitled as a matter of right is immediately appealable. *E.g., Creed v. Stokes*, 331 S.E.2d 351 (1985) (order denying right to jury trial); *Pelfrey v. Bank of Greer*, 244 S.E.2d 315 (1978) (order denying right to non-jury trial).⁵ Both of these errors, however, can be remedied by a new trial, *i.e.*, a new jury trial or a new non-jury trial. The same is true of the other orders the courts have found to be immediately appealable under § 14-3-330. An order disqualifying an attorney in a civil case is immediately appealable, but that error could be remedied after final judgment by reversing and remanding for a new trial with the disqualified attorney. See *Hagood, supra*. An order that improperly substitutes one entity for another as a party defendant is immediately appealable, but that error could be remedied after final judgment by reversing and remanding for a new trial with the party that was wrongly removed from the case. See *Neeltec Enterprises, Inc. v. Long*, Op. No. 27125 (S.C.Sup.C. filed May 16, 2012) (Shearouse Adv.Sh. No. 17 at 30), *rev’g* 705 S.E.2d 57 (S.C. App. 2011).

Finally, nothing in § 14-3-330(2) supports the notion that the right to an immediate appeal granted by the General Assembly is unavailable if a new trial can remedy the error. Indeed, this judicially created limitation would render § 14-3-330(2) virtually meaningless, because exceedingly few (if any) errors in a pre-trial order cannot be remedied after final judgment by reversing and remanding for a new trial.

⁵ In *Breland, supra*, the Supreme Court cited *Creed, supra*, as an example of an order that was immediately appealable because the “substantial right could not be vindicated on appeal after the case.” 529 S.E.2d at 13. Defendant Grady respectfully submits this analysis is wrong – the denial of the right to a jury trial in *Creed* could have been “vindicated” by reversing and remanding for a new trial before a jury in the very same manner that the courts have held the denial of a venue right can be remedied by a new trial.

- C. Appealability under § 14-3-330(2) is a “bootstrap” analysis that hinges on whether the trial court erred, i.e., if the trial court erred, the order is immediately appealable, but if the trial court did not err, then the order is not immediately appealable.

In the published opinions on § 14-3-330(2), the courts have engaged in a “bootstrap” analysis to determine appealability, albeit silently. For example, in the “mode of trial cases,” the Supreme Court has held an order is not immediately appealable if there was not right to a jury trial or there was not a right to a non-jury trial. Two cases illustrate this point.

In *Hannah v. United Refrigeration Servs., Inc.*, 409 S.E.2d 360 (S.C. 1991), the plaintiff had a right to a jury trial but failed to timely demand it. Thereafter, the plaintiff moved for a jury trial under Rule 39(b), SCRPC, which grants the trial court discretion to order a jury trial despite the failure to timely demand one. The trial court granted the motion and the defendants appealed immediately, contending they had a right to a non-jury trial. The Supreme Court dismissed the appeal without prejudice, holding that a party’s failure to timely demand a jury trial did not mean the opposing party had a right to a non-jury trial. In other words, since there was no right to a non-jury trial, there was no right to an immediate appeal.

In *Rowe Furniture Corp. v. Carolina Wholesale Furniture Co.*, 357 S.E.2d 725 (S.C. 1987), the defendants failed to timely demand a jury trial. They moved for a jury trial under Rule 39(b), SCRPC, and the trial court denied the motion. The defendants appealed immediately. The Supreme Court dismissed the appeal as premature, finding that there was no right to a jury trial since the right had not been timely demanded. In other words, since there was no right to a jury trial, there was no right to an immediate appeal.

Applying this “bootstrap” analysis to *Breland, supra*, demonstrates why that case was rightly decided (no immediate appeal) but wrongly analyzed (new trial available). In *Breland*, the Supreme Court noted the following: “From the record on appeal, it is clear that [the

evidence] will sustain the trial court's decision." 529 S.E.2d at 14. In other words, the record demonstrated that the trial court did not err in denying the motion to change venue in *Breland*. Since there was no error, there was no right to an immediate appeal.

- D. Orders denying the substantial right to proper venue are immediately appealable under § 14-3-330(2)(c), and the Supreme Court's contrary rulings violate the General Assembly's expressly stated policy choice in § 14-3-330(2)(c).

In *Breland*, the Supreme Court rejected the appellant's argument that the order was immediately appealable because it struck the defense of improper venue. This was error. Proper venue is a substantial right and, as noted in *Breland*, the denial of that right strikes the defense and prevents it from being considered further before trial. Thus, such an order comes within the express language of § 14-3-330(2)(c) as affecting a substantial right and "striking an answer or any part thereof or any pleading in any action." The General Assembly's policy choice prevails and, therefore, orders denying a change to the proper venue are immediately appealable – and *Breland* was wrongly decided (as well as other venue cases).⁶

Here, due to the manner in which the venue issue arose, venue was not pled as a defense, because venue was proper at the time of the answer. Appellant moved to change venue after the venue issue arose, thereby raising the defense of improper venue. The appealed order strikes that defense by denying the requested change of venue and, therefore, the appealed order comes within the General Assembly's expressly stated public policy in § 14-3-330(2)(c). Accordingly, the order is immediately appealable.⁷

⁶ Defendant Grady recognizes that this Court is bound by the Supreme Court's precedent, but the Supreme Court's venue cases do not expressly consider the issue of whether the appellate courts are required to entertain venue appeals based on the General Assembly's intent in § 14-3-330.

⁷ In the first full paragraph of the second page of their Argument II, the Respondents "argue" about the insurer's motives and its current intent to "pursue the case with an empty chair at the table" and to obtain a ruling that Defendant Murdaugh is a "nominal party for venue purposes." Respondents cite nothing to support their speculation about the insurer's motives, and counsel's statement in the Motion is not evidence of anything. In any event, any presumed motives do not and cannot affect the right to appeal under § 14-3-330. Also, granting the motion to change venue would not create an "empty chair" – Defendant Murdaugh would still be in the chair but in the proper

IV. THE ORDER DENYING DEFENDANT GRADY'S MOTION TO COMPEL EXECUTION OF THE STIPULATIONS OF DISMISSAL IS IMMEDIATELY APPEALABLE UNDER S.C. CODE ANN. § 14-3-330(4) (SUPP. 2011) AS AN ORDER DENYING AN INJUNCTION.

A. The trial court erred in refusing to compel execution of the stipulations.

Defendant Murdaugh voluntarily waived his contractual right to dismissal with prejudice and voluntarily agreed to "re-enter" the case as a nominal defendant with no personal interest in the outcome of the litigation. He did so as an accommodation to the Plaintiffs' desire to pursue UIM coverage and for no additional consideration. Thus, he is a mere volunteer in this action. No defendant should be permitted to re-enter a case as a mere volunteer with no interest in the outcome of the litigation – allowing such threatens the "integrity of the judicial process." *Poston*, 363 S.E.2d at 890. At the very least, his voluntary re-entry as a defendant, at the behest of and as an accommodation to the Plaintiffs, should be disregarded for purposes of venue.

B. The trial court's order is immediately appealable.

Defendant Grady moved to compel execution of the stipulation of dismissal required by the settlement documents. Judge Mullen denied this motion but, at the same time she granted the Plaintiffs' request to dismiss the consortium action in its entirety. (Orders). This dismissal included the consortium claim against Defendant Grady, even though there had been no settlement between Defendant Grady and Partice Smart (consortium plaintiff). A few days later, despite Judge Mullen's denial of Defendant Grady's motion, Judge Buckner granted the Plaintiff's request to dismiss the Trucking Defendants from the personal injury action against Defendant Grady based on the settlement documents, *i.e.*, the same basis earlier argued by Defendant Grady but rejected by Judge Mullen. Thus, with the exception of the consortium claim against Defendant Grady (discussed below), the only remaining issue is whether Judge

county. Finally, as demonstrated earlier, Defendant Murdaugh is in fact a "nominal" party for purposes of venue – indeed, his is a sham defendant who remains in the case for the sole purpose of defeating Defendant Grady's substantial right to proper venue.

Mullen erred in denying the motion to compel the execution and filing of a stipulation of dismissal for Defendant Murdaugh.

In seeking to compel the execution and filing of the stipulations of dismissal, Defendant Grady sought a mandatory injunction order that enjoined the parties to comply with the requirements of Rule 41, SCRCP, and the settlement documents. Judge Mullen denied the requested injunction and, therefore, her order is immediately appealable as the denial of an injunction under S.C. Code Ann. § 14-3-330 (4) (Supp. 2010).

Respondents contend Grady's motion was "in essence" a motion to enforce a settlement agreement, and such orders are not immediately appealable. (Mot. at Arg. II). Respondents rely on a case that denied appealability under subsections (1) and (2) of § 14-3-330 but did not consider subsection (4). (*Id.*). Here, Grady sought to enjoin the plaintiff and other defendants to execute the stipulations of dismissal. The denial of the motion was the denial of an injunction and, therefore, is immediately appealable under § 14-3-330(4).

V. THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS THE CONSORTIUM CLAIM AGAINST DEFENDANT GRADY, AND THIS ORDER IS IMMEDIATELY APPEALABLE UNDER S.C. CODE ANN. § 14-3-330(1) (1976) AS A FINAL ORDER.

Judge Mullen dismissed the consortium action in its entirety and with prejudice. Thus, it is a final order and immediately appealable under S.C. Code Ann. § 14-3-330(1) (1976). Respondents contend Defendant Grady is not "aggrieved" by this order and therefore does not have standing to appeal it. (Mot. at Arg. I). Ordinarily, a defendant would not be aggrieved by an order dismissing claims against him with prejudice. This is not an ordinary case.

The Plaintiffs' apportionment of the settlement proceeds, whether designed to do so or not, hinders Defendant Grady's rights to a set off for any judgment that Gary Smart may receive against him. Patrice Smart received \$1.09 million dollars, which is 99% of the settlement

proceeds and 109 times more than her husband received for his personal injuries. Defendant Grady submits that this grossly disproportionate division of the settlement proceeds is manifestly inequitable and improperly interferes with his right to a set-off. It thus implicates “the integrity of the judicial process.” *Poston*, 363 S.E.2d at 890.

The Plaintiffs’ attorney conceded on the record that the dismissal of the consortium action would not preclude Defendant Grady from raising this issue at a later time. (Appx. 121, 132-135). It is unclear, however, whether permitting the dismissal of the consortium claim would affect Defendant Grady’s right to challenge the apportionment of settlement proceeds, and it is unclear whether the Plaintiffs’ concession would cure any such defect – research reveals no answer to these questions. Thus, Defendant Grady has appealed. Moreover, and assuming Defendant Grady’s ability to raise the “apportionment” issue is not affected by the dismissal of the consortium claim, and assuming further that the Plaintiffs’ concessions protect his ability to do so, Defendant Grady is nevertheless aggrieved by the dismissal.

Any “apportionment” issue will turn on the reasonable value of the consortium claim. The Plaintiffs avoided this valuation by dismissing the consortium claim against Defendant Grady despite no consideration from him. The only rational reason for this dismissal is to avoid this valuation and protect the grossly disproportionate division of the settlement proceeds.

The most efficient way to value the consortium claim is a consolidated trial with the personal injury claim. Requiring Patrice Smart to submit her consortium claim to the personal injury jury will not place any undue burden on her. She will attend the personal injury trial and testify in it. Submitting her consortium claim will merely require her to also testify about her consortium damages. Any burden on her is de minimis when compared to the burden placed on Defendant Grady and the judicial system in requiring a second trial at a later time to establish the

reasonable value of the consortium claim. Moreover, she sued on this claim twice, and she should not be permitted to abandon the claim and thereby hinder Defendant Grady's right to a set off for any personal injury award to her husband.

Accordingly, the order dismissing the consortium claim against Defendant Grady should be reversed, and the trial of that claim should be consolidated with the personal injury trial.

CONCLUSION

Section 14-3-330 reflects a policy choice by the General Assembly to allow the appeal of certain pre-trial orders, and this public policy choice is binding on the courts. As demonstrated above, the venue order is appealable under subsections (2)(a) and (2)(c). Therefore, the venue order is immediately appealable, and the Supreme Court's contrary ruling in *Breland* and other cases is in error. Moreover, the Supreme Court's ruling in *Hagood* (inability to show prejudice) applies equally here, and the Supreme Court has not considered the *Hagood* rule in the context of venue orders.. For these reasons, and for the other reasons set forth above, Appellant respectfully submits the Motion to Dismiss Appeal should be denied.

Respectfully Submitted,



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Patrick M. Higgins
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Howell, Gibson & Hughes, P.A.
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Beaufort, South Carolina 29901
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Attorneys for Appellant

June 11, 2012
Columbia, SC



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge
Perry M. Buckner, Circuit Court Judge

Case No. 2009-CP-25-284 and Case No. 2009-CP-25-285

Gary Smart, ... Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood
Brantley, d/b/a Brantley Hauling and Randolph Murdaugh, III, ... Defendants,

of whom James Allen Grady is Appellant.

AND

Patrice Smart, ... Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood
Brantley, d/b/a Brantley Hauling and Randolph Murdaugh, III, ... Defendants,

of whom James Allen Grady is Appellant.

APPENDIX IN SUPPORT OF APPELLANT'S
RETURN TO MOTION TO DISMISS

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STATE OF SOUTH CAROLINA

FILED

JUDGMENT IN A CIVIL CASE

COUNTY OF HAMPTON

2011 AUG -3 PM 4: 12

CASE NO: 2009CP2500285

IN THE COURT OF COMMON PLEAS

KYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

~~Gary Smart v. James Allen Grady~~

CHECK ONE:

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Motion to Compel Execution of Dismissal is Denied
Motion to Transfer Venue is Denied

Dated at Hampton, South Carolina, this 3rd day of August 2011

Court Reporter: Debbie Everett



PRESIDING JUDGE - Hon. Carmen T. Mullen

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

STATE OF SOUTH CAROLINA

FILED

JUDGMENT IN A CIVIL CASE

COUNTY OF HAMPTON

2011 AUG -3 PM 4:12

CASE NO: 2009CP2500284

IN THE COURT OF COMMON PLEAS

MYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

~~Patrice Smart vs.~~ James Allen Grady

CHECK ONE:

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court;

Case Dismissed with Prejudice per Mark Tinsley. Motion to Consolidate is Moot.

Dated at Hampton, South Carolina, this 3rd day of August 2011

Court Reporter: Debbie Everett



PRESIDING JUDGE - Hon. Carmen T. Mullen

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Mark Brandon Tinsley Gooding & Gooding, PA
P.O. Box 1000 Allendale, SC 29810

Patrick M. Higgins Howell Gibson & Hughes Pa
P.O. Box 40 Beaufort, SC 29902
Erin DuBose Dean Tupper Grimsley & Dean, PA

STATE OF SOUTH CAROLINA)

COUNTY OF JASPER)

Patrice Smart,

Plaintiff,

v.

James Allen Grady, Louis Daniel
Moffett and Randolph Murdaugh, III,

Defendant(s).

IN THE COURT OF COMMON PLEAS

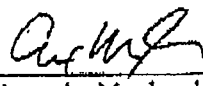
C/A NO.: 08-CP- 219

SUMMONS
(Jury Trial)

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscribed at their office, 101 Mulberry Street East, Hampton, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in this Complaint.

PETERS, MURDAUGH, PARKER, ELTZROTH,
& DETRICK, P.A.

BY: 

R. Alexander Murdaugh
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR PLAINTIFF

Hampton, South Carolina
April 9, 2008.

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

Patrice Smart,

Plaintiff,

v.

James Allen Grady and Louis Daniel
Moffett

Defendant(s).

IN THE COURT OF COMMON PLEAS

C/A NO.: 08-CP- 219

COMPLAINT
(Jury Trial)

15851

The plaintiff, complaining of defendant alleges:

1. That the defendant James Allen Grady and Louis Daniel Moffett are residents of a state other than the state of South Carolina;
2. That the plaintiff was at all times mentioned herein married to Gary Smart.
3. That on or about December 22, 2007, the defendant James Allen Grady was traveling on U.S. Highway 321 in Jasper County, South Carolina while pulling a four wheeler; that the four wheeler became detached from defendant James Grady's vehicle and entered U.S. Highway 321 where it was struck by the defendant Louis Daniel Moffett; that Gary Smart was traveling on Highway U.S. 321 and collided with the defendant Louis Moffett's vehicle causing him to be seriously injured.
4. That as a direct and proximate result of Gary Smart's injuries the plaintiff has been damaged in that she has suffered the loss of consortium.
5. That the damages to the plaintiff were the direct and proximate result of the defendant's negligence in the following particulars:

AS TO DEFENDANT JAMES ALLEN GRADY

- 1) In failing to properly secure his four wheeler to his vehicle;
- 2) In allowing the four wheeler to enter the roadway causing a hazard to drivers;
- 3) In failing to remove the four wheeler from the roadway;
- 4) In failing to warn of the hazard created by the four wheeler in the roadway;
- 5) In failing to act as a reasonably prudent person would under the same or similar circumstances.

AS TO DEFENDANT LOUIS DANIEL MOFFETT

- 1) In colliding with the aforementioned four wheeler;
- 2) In failing to remove his vehicle from the roadway;
- 3) In failing to place proper cautionary reflectors, flares or like warning devices in the roadway to warn oncoming motorist;
- 4) In failing to act as a reasonably prudent person would under the same or similar circumstances.

5. That as a direct and proximate result of the aforementioned negligence and recklessness of the defendants Gary Smart was seriously injured causing the plaintiff to be damaged in that she suffers the loss of consortium.

WHEREFORE, the plaintiff prays for judgment against all the defendants both actual and punitive damages in an amount determined fair and reasonable by a jury all in an amount not to exceed \$75,000.00 (Seventy-Five Thousand Dollars).

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: 

R. Alexander Murdaugh
Post Office Box 457
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR PLAINTIFF

Hampton, South Carolina

April 14, 2008.

STATE OF SOUTH CAROLINA)

COUNTY OF JASPER)

Patrice Smart,)

Plaintiff,)

v.)

James Allen Grady and Louis Daniel
Moffett)

Defendant(s).)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
C/A NO.: 08-CP-27-0219

**STIPULATION OF
DAMAGES**

The plaintiff in this action, by and through her undersigned attorney, hereby stipulates that the amount in controversy in this case does not exceed \$75,000.00. Should the amount in controversy change such that it exceeds \$75,000.00 the plaintiff will notify the defendants prior to the expiration of the one year removal period.

The plaintiff further agrees that he will not attempt to collect on any judgment rendered in excess of \$75,000.000 in the event a verdict is rendered exceeding this amount.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: _____


R. Alexander Murdaugh
Post Office Box 457
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR PLAINTIFF

Hampton, South Carolina

May 21, 2008.

STATE OF SOUTH CAROLINA)

COUNTY OF JASPER)

PATRICE SMART,)

Plaintiffs,)

vs.)

JAMES ALLEN GRADY AND LOUIS
DANIEL MOFFETT,)

Defendant.)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 08-CP-27-219

Consent Order of Dismissal

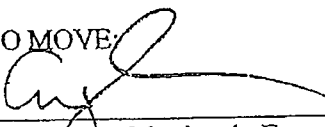
Upon consent of the parties plaintiff is hereby granted a non suit pursuant to rule 41(a)(1) of the SCRCF. This dismissal is made without prejudice.

AND IT IS SO ORDERED.

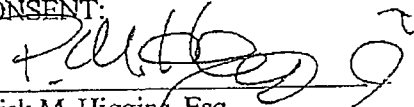

Honorable Carmen T. Mullen
Judge of the Fourteenth Judicial Circuit

~~March~~ ^{May} 18, 2009.

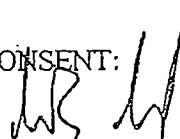
I SO MOVE:


R. Alexander Murdaugh, Esq.
Peters, Murdaugh, Parker,
Eltzroth & Detrick, P.A.
101 Mulberry Street East
PO Box 457
Hampton, SC 29924

I CONSENT:


Patrick M. Higgins, Esq.
Howell, Gibson & Hughes, P.A.
P.O. Box 40
Beaufort, SC 29901

I CONSENT:



Duke R. Highfield, Esq.
Young, Clement & Rivers, LLC
P.O. Box 993
Charleston, SC 29401

STATE OF SOUTH CAROLINA)
COUNTY OF HAMPTON)

IN THE COURT OF COMMON PLEAS
C/A NO.: 09-CP-25- 285

Gary Smart,

Plaintiff,

v.

James Allen Grady, Louis Daniel
Moffett, Lynwood Brantley d/b/a
Brantley Hauling, and Randolph
Murdaugh, III

Defendant(s).

COMPLAINT
(Personal Injuries)
(Jury Trial Demanded)

MYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

2009 JUN 24 PM 2:10

FILED

The Plaintiff would respectfully show:

1. Defendants Grady and Moffett are, and were at the time of the incident described herein, residents of a state other than the state of South Carolina and have subjected themselves to the jurisdiction of this court through their commission of a tortious act in whole within the State of South Carolina pursuant to S.C. Code Ann. § 36-2-803 (A)(3).

2. Defendant Murdaugh, is, and was at the time of the incident described herein, a resident of Hampton County, South Carolina.

3. Upon Information and Belief, Defendant Brantley d/b/a Brantley Hauling (hereinafter Defendant Brantley) is a licenced motor carrier existing under the laws of a state other than the State of South Carolina, and has subjected itself to the jurisdiction of this court by operating a motor vehicle on the public highways of the

State of South Carolina in a negligent, careless, reckless, and grossly negligent manner.

4. At all times relevant herein, Defendant Moffett was an agent, servant and/or employee of Defendant Brantley and was acting within the course and scope of said agency, service, and/or employment thereby making Defendant Brantley liable for the acts or omissions of Defendant Moffett under the theory of *respondeat superior*.

5. On or about December 22, 2007, Defendant Grady was operating his vehicle in a southerly direction on U.S. Highway 321 in Jasper County, South Carolina, towing a trailer with an ATV; because the ATV was not properly secured on the trailer, the ATV became detached from Defendant Grady's vehicle and entered U.S. Highway 321 where it was struck by Defendant Moffett who was operating a tractor trailer rig in the same direction and lane of travel behind Defendant Grady; Defendant Murdaugh was operating his vehicle on Highway 321 in the opposite direction, stopped to render assistance, and parked his vehicle on the shoulder with his bright lights illuminated in a northerly direction, angled towards the oncoming traffic; Plaintiff was operating his vehicle in a southerly direction on Highway U.S. 321 behind Defendants Grady and Moffett, and collided with Defendant Brantley's tractor trailer rig due to the absence of any warning devices, and the bright lights of Defendant Murdaugh, thereby causing Plaintiff to be seriously injured.

6. As a result of this collision, Plaintiff suffered injuries to his hands, neck, back, pelvis, and other parts of his body; these injuries have caused and will in the future cause him to endure great physical pain, suffering, mental anguish, emotional distress, and impairment of health and bodily efficiency; have caused Plaintiff to spend money for medical services; have caused the Plaintiff to lose money in the form of wages; have caused scarring and disfigurement and have caused a permanent disability.

7. The damages to Plaintiff were the direct and proximate result of Defendants' negligence in the following particulars:

AS TO DEFENDANT GRADY

- a) In failing to maintain proper lookout;
- b) In failing to maintain proper control;
- c) In failing to take evasive action to avoid the collision;
- d) In failing to properly secure his ATV to his vehicle and operating his vehicle with an unsecured load;
- e) In allowing the ATV to enter the roadway causing a hazard to drivers;
- f) In failing to remove the ATV from the roadway;
- g) In failing to warn of the hazard created by the ATV in the roadway;
- h) In failing to act as a reasonably prudent person would have acted under the same or similar circumstances.

AS TO DEFENDANT MOFFETT and DEFENDANT BRANTLEY

- a) In failing to maintain proper lookout;

- b) In failing to maintain proper control;
- c) In failing to take evasive action to avoid the collision;
- d) In colliding with the aforementioned ATV;
- e) In failing to remove his vehicle from the roadway;
- f) In failing to place proper cautionary reflectors, flares or like warning devices in the roadway to warn oncoming motorist;
- g) In following too closely;
- h) In failing to properly apply his brakes;
- i) In traveling too fast for existing conditions;
- j) In failing to properly hire, train and supervise its drivers (as to Defendant Brantley only);
- k) In failing to act as a reasonably prudent person would have acted under the same or similar circumstances.

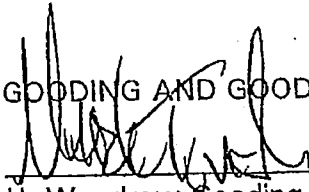
AS TO DEFENDANT RANDOLPH MURDAUGH, III

- a) In failing to dim his headlights;
- b) In undertaking a duty to render assistance and then failing to exercise due care;
- c) In parking his vehicle on the shoulder of the roadway with his headlights shining towards southbound traffic when Defendant Murdaugh knew or should have known of the danger presented to oncoming traffic and of the danger presented by obstructing the view of oncoming traffic by shining his lights in that direction when he knew there were no warning devices of any type in place to warn approaching traffic;
- d) In failing to exercise the degree of care that a reasonable person would have exercised under the same or similar circumstances; and
- e) In such other and further particulars as the evidence in trial may show; all of which combined and concurred as a direct and proximate cause of

the injuries and damages suffered by the Plaintiff herein, said acts being in violation of the statutes and laws of the State of South Carolina.

WHEREFORE, Plaintiff prays for judgment against Defendants in a sum sufficient to adequately compensate for actual damages, for such punitive damages as a jury may reasonably award, for the costs of this action, and for such other and further relief as this Court may deem just and proper.

GOODING AND GOODING, P.A.

By: 

H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676

Dated: June 22, 2009

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

IN THE COURT OF COMMON PLEAS

C/A NO.: 09-CP-25- 284

Patrice Smart,

Plaintiff,

v.

James Allen Grady, Louis Daniel
Moffett, Lynwood Brantley d/b/a
Brantley Hauling, and Randolph
Murdaugh, III

Defendant(s).

COMPLAIN
(Loss of Consortium)
(Jury Trial Demanded)

BY _____
MYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

2009 JUN 24 PM 2:11

FILED

The Plaintiff would respectfully show:

1. Defendants Grady and Moffett are, and were at the time of the incident described herein, residents of a state other than the state of South Carolina and have subjected themselves to the jurisdiction of this court through their commission of a tortious act in whole within the State of South Carolina pursuant to S.C. Code Ann. § 36-2-803 (A)(3).
2. Defendant Murdaugh, is, and was at the time of the incident described herein, a resident of Hampton County, South Carolina.
3. Upon Information and Belief, Defendant Brantley d/b/a Brantley Hauling (hereinafter Defendant Brantley) is a licenced motor carrier existing under the laws of a state other than the State of South Carolina, and has subjected itself to the jurisdiction of this court by operating a motor vehicle on the public highways of the

State of South Carolina in a negligent, careless, reckless, and grossly negligent manner.

4. At all times relevant herein, Defendant Moffett was an agent, servant and/or employee of Defendant Brantley and was acting within the course and scope of said agency, service, and/or employment thereby making Defendant Brantley liable for the acts or omissions of Defendant Moffett under the theory of *respondeat superior*.

5. On or about December 22, 2007, Defendant Grady was operating his vehicle in a southerly direction on U.S. Highway 321 in Jasper County, South Carolina, towing a trailer with an ATV; because the ATV was not properly secured on the trailer, the ATV became detached from Defendant Grady's vehicle and entered U.S. Highway 321 where it was struck by Defendant Moffett who was operating a tractor trailer rig in the same direction and lane of travel behind Defendant Grady; Defendant Murdaugh was operating his vehicle on Highway 321 in the opposite direction, stopped to render assistance, and parked his vehicle on the shoulder with his bright lights illuminated in a northerly direction, angled towards the oncoming traffic; Gary Smart was operating his vehicle in a southerly direction on Highway U.S. 321 behind Defendants Grady and Moffett, and collided with Defendant Brantley's tractor trailer rig due to the absence of any warning devices and the bright lights of Defendant Murdaugh, thereby causing Gary Smart to be seriously injured.

6. That as a direct and proximate result of Gary Smart's injuries, Plaintiff has been damaged in that she has suffered the loss of consortium.

7. The damages to Plaintiff were the direct and proximate result of Defendants' negligence in the following particulars:

AS TO DEFENDANT GRADY

- a) In failing to maintain proper lookout;
- b) In failing to maintain proper control;
- c) In failing to take evasive action to avoid the collision;
- d) In failing to properly secure his ATV to his vehicle and operating his vehicle with an unsecured load;
- e) In allowing the ATV to enter the roadway causing a hazard to drivers;
- f) In failing to remove the ATV from the roadway;
- g) In failing to warn of the hazard created by the ATV in the roadway;
- h) In failing to act as a reasonably prudent person would have acted under the same or similar circumstances.

AS TO DEFENDANT MOFFETT and DEFENDANT BRANTLEY

- a) In failing to maintain proper lookout;
- b) In failing to maintain proper control;
- c) In failing to take evasive action to avoid the collision;
- d) In colliding with the aforementioned ATV;
- e) In failing to remove his vehicle from the roadway;

- f) In failing to place proper cautionary reflectors, flares or like warning devices in the roadway to warn oncoming motorist;
- g) In following too closely;
- h) In failing to properly apply his brakes;
- i) In traveling too fast for existing conditions;
- j) In failing to properly hire, train and supervise its drivers (as to Defendant Brantley only);
- k) In failing to act as a reasonably prudent person would have acted under the same or similar circumstances.

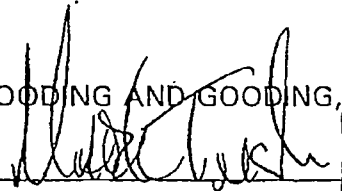
AS TO DEFENDANT RANDOLPH MURDAUGH, III

- a) In failing to dim his headlights;
- b) In undertaking a duty to render assistance and then failing to exercise due care;
- c) In parking his vehicle on the shoulder of the roadway with his headlights shining towards southbound traffic when Defendant Murdaugh knew or should have known of the danger presented to oncoming traffic and of the danger presented by obstructing the view of oncoming traffic by shining his lights in that direction when he knew that there were no warning devices of any type in place to warn approaching traffic;
- d) In failing to exercise the degree of care that a reasonable person would have exercised under the same or similar circumstances; and
- e) In such other and further particulars as the evidence in trial may show; all of which combined and concurred as a direct and proximate cause of the injuries and damages suffered by the Plaintiff herein, said acts being in violation of the statutes and laws of the State of South Carolina.

WHEREFORE, Plaintiff prays for judgment against Defendants in a sum sufficient to adequately compensate for actual damages, for such punitive damages

as a jury may reasonably award, for the costs of this action, and for such other and further relief as this Court may deem just and proper.

GOODING AND GOODING, P.A.

By: 

H. Woodrow Gooding
Mark B. Tinsley
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676

Dated: June 22, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

RECEIVED
USDC, CLERK, CHARLESTON, SC
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Patrice Smart,

Plaintiff,

v.

Civil Action No. 9:09-2086-SB

James Allen Grady, Louis Daniel
Moffett, Lynwood Brantley d/b/a
Brantley Hauling, and Randolph
Murdaugh, III,

Defendants.

ORDER

Gary Smart,

Plaintiff,

v.

Civil Action No. 9:09-2087-SB

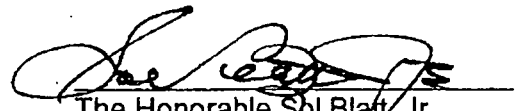
James Allen Grady, Louis Daniel
Moffett, Lynwood Brantley d/b/a
Brantley Hauling, and Randolph
Murdaugh, III,

Defendants.

This matter came before the Court on Monday, October 26, 2009, for a hearing on the Plaintiffs' motions to remand the above-captioned cases to the Court of Common Pleas for Hampton County, South Carolina. For the reasons stated by the Court at the hearing, the Court grants the motions to remand. Accordingly, it is

 **ORDERED** that Plaintiff Patrice Smart's motion to remand (Entry 12 in Civil Action No. 9:09-2086-SB) is granted; Plaintiff Gary Smart's motion to remand (Entry 11 in Civil Action No. 9:09-2087-SB) is granted; and these cases are hereby remanded to the Hampton County Court of Common Pleas.

AND IT IS SO ORDERED.


The Honorable Sol Blatt, Jr.
Senior United States District Judge

October 26, 2009
Charleston, South Carolina

#2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

PATRICE SMART

vs.

JAMES ALLEN GRADY, ET AL.

No. 9:09 - CV - 2086

Motion hearing in the above-captioned matter held on
Monday, October 26, 2009, commencing at 3:00 p.m., before
the Hon. Sol Blatt, Jr., in the United States Courthouse,
Courtroom III, 81 Meeting St., Charleston, South Carolina,
29401.

APPEARANCES:

H. WOODROW GOODING, ESQ. and MARK B. TINSLEY,
ESQ., P.O. Box 1000, Allendale, SC, appeared
for plaintiff.

BENJAMIN A. TRAYWICK, ESQ., P.O. Box 993,
Charleston, SC, appeared for Brantley.

JOHN H. TILLER, ESQ., P.O. Box 340,
Charleston, SC, appeared for Murdaugh.

JASON WARD, ESQ., P.O. Box 40, Beaufort, SC,
appeared for Grady.

REPORTED BY DEBRA L. POTOCKI, RMR, RDR, CRR
Official Court Reporter for the U.S. District Court
P.O. Box 835
Charleston, SC 29402
843/723-2208

1 THE COURT: Well, I've been over the briefs, and I
2 guess the burden is on the moving party to show there's been
3 some fraudulent or sham defendant. So I'll be glad to hear
4 from you. Isn't that what the moving parties allege, that
5 Mr. Murdaugh is a sham defendant?

6 MR. TINSLEY: Yes, Your Honor, I'm Mark Tinsley.
7 They've alleged; I believe they do have the burden.

8 THE COURT: And I'll be glad to hear from you about
9 that.

10 MR. TRAYWICK: Thank you, Your Honor. May it please
11 the Court, Your Honor, my name is Ben Traywick. Our position
12 in the case is that Mr. Murdaugh is an actually sham or
13 fraudulent defendant, the genuine article. We're not saying
14 in this case that there's no possibility that the plaintiff
15 can maintain a cause of action against Mr. Murdaugh. That's
16 kind of the more common typical rubric that these cases are
17 analyzed under. That's just the way that a lot of the
18 defendants in our situation choose to proceed.

19 THE COURT: Now, you don't contest that then?

20 MR. TRAYWICK: That is not the basis of the motion,
21 Your Honor.

22 THE COURT: All right.

23 MR. TRAYWICK: We're arguing the other option for
24 prevailing on the sham defendant argument, and that is that
25 the plaintiff has no real intention -- or no real intention of

1 getting a judgment against Mr. Murdaugh, and that the facts,
2 the circumstances -- circumstantial evidence, if you will,
3 don't support an honest belief on the plaintiffs' part that
4 Mr. Murdaugh is jointly responsible for their injuries.

5 Now, obviously there are two separate cases, and there's a
6 slightly different procedural posture, but I think the
7 plaintiffs have conceded in their brief, and I think for the
8 purposes of the discussion today, I think it's largely fitting
9 to just refer to them as the plaintiffs, because there are
10 tremendous similarities between the two claims.

11 The law is in my brief, Your Honor, and I don't want to
12 sit here and cite one case after another, but I want to talk
13 about what I view to be the critical analytical issue in the
14 case, and how that issue plays out under the facts and
15 circumstances of this case.

16 Obviously fraud, sham, these are words of subjective
17 intent. They refer to a state of mind. Obviously the
18 defendant cannot prove by direct evidence, the subjective
19 intent of a party. The only way really for me to do that by
20 direct evidence, would be for one of these attorneys to stand
21 up and acknowledge that his client has a fraudulent intent,
22 and that's obviously never going to happen.

23 But the fraudulent joinder and sham defendant doctrines
24 are out there. They exist. So how do we prove a sham
25 defendant. How are we supposed to prove that Mr. Murdaugh was

1 January of 2009, some five months later, four or five months
2 later.

3 And those are the very circumstances that lead -- that
4 show that the only inference to be drawn here is that
5 Mr. Murdaugh -- that there's no intent on the plaintiffs'
6 part -- and again, it has nothing to do with Mr. Tinsley's
7 intent -- do the plaintiffs have a genuine intent and a
8 genuine belief that Mr. Murdaugh was one of the causes of
9 their injuries? And if so, how do we explain the fact that
10 they proceeded in litigation for a year without suing
11 Mr. Murdaugh? There's no explanation for that. And if even
12 if that was a strategic decision carried out by the Murdaughs,
13 they acted as the plaintiffs' agents, and they're stuck with
14 those circumstances, despite the fact that they've now changed
15 attorneys.

16 THE COURT: Thank you.

17 MR. TRAYWICK: Thank you, Your Honor.

18 THE COURT: Anybody else want to add anything? Let's
19 take about a ten minute break. Let me think about it.

20 (A recess was held at this time.)

21 THE COURT: Well, I'm going to start off on the easy
22 part first. The majority of the circuits have held that you
23 can't remove unless the removing party or his attorney signs.
24 I don't doubt that you weren't told, and I'm not questioning
25 that, but I think that removing just by saying the other

1 lawyer gave me permission, I don't think that's a proper
2 removal. I think that the attorney or the client or somebody
3 has got to sign it. Now, I don't mean to infer in any way
4 that you weren't told to do it. Please realize that. But
5 that's really not the crux of the case. Any conduct or
6 problems with the conduct of the attorneys in the first case,
7 which was the loss of consortium, what they disclosed and what
8 they didn't disclose and why they didn't disclose it, I think
9 is not in this case, needs to be taken up in another forum.

10 Now, in this particular case, after the Murdaugh firm got
11 out of the case, the plaintiffs got new lawyers, it was a new
12 case. And if you look at the South Carolina cases, and
13 there's another one, I think, that has some bearing on it,
14 Matthews against Porter, which was about the time -- it was in
15 '64, because I remember thinking at the time it involved a
16 parking on the other side of the road. It carried proximately
17 caused about as far as you could carry it. But there are five
18 or six South Carolina cases that indicate under similar
19 circumstances that you can hold the defendant who parked with
20 his headlights allegedly blinding somebody, and if you look at
21 it from the plaintiffs' lawyers' -- plaintiffs' attorneys'
22 viewpoint, I think they'd be derelict in their duties if they
23 didn't sue Randolph Murdaugh, under the law of South Carolina.

24 Now, I think the only way that you can defeat the removal
25 is if you had something happen like happened over in the case

1 in Horry County where -- I guess it was young Jim Stevens --
2 don't know whether it was young Jim or old Jim -- got up and
3 said, now, we don't want you to return -- I think that was a
4 tobacco barn -- and said we don't want you to return a verdict
5 against this local fellow. But before court closed, before
6 the clerk's office in Columbia closed that day, the
7 defendant's attorney removed the case. And then they went
8 before, as I recall, I haven't looked at it in a long time,
9 but as I recall they went before Bob Chapman to get it
10 remanded, and he refused to remand it. Because there wasn't
11 any question in that case, they weren't -- he was a sham
12 defendant, because they said in open court, don't bring any
13 verdict against the local fellow who they had in the case to
14 keep it there. I don't know whether he was the owner of the
15 tobacco barn or -- had to do with a tobacco barn, I believe.

16 Now, if you had some agreement or if you had some evidence
17 that the plaintiffs didn't intend to make any recovery against
18 Mr. Murdaugh, or didn't intend to introduce any evidence of
19 his negligence, or if you had any evidence like the plaintiff
20 had gone to Mr. Murdaugh or the plaintiffs' attorneys had gone
21 to him and you had a copy of some agreement that he had with
22 them that we're not going to try to recover from you if we get
23 a verdict, or something like that, but I don't think, in view
24 of the law, as I said, I think the plaintiffs' attorneys would
25 be kind of derelict if they would have -- if you don't sue

1 Mr. Murdaugh. I mean, then you've got two defendants, other
2 defendants who are going to be putting all the negligence on
3 him, and then -- and taking it off of the named defendants.
4 So I think you'd be derelict in your duties if you didn't
5 bring him in.

6 Now, as I said, what took place in that loss of consortium
7 case was in another court, another case and another venue.
8 And the problems arose in that case which indicated fraud, and
9 that's got to be taken up in another venue, not in -- because
10 that's just not in the case that I've got. And I don't think
11 that, in itself, is enough to defeat the plaintiffs' right to
12 name the defendants that he feels appropriate defendants, his
13 new lawyers, and leave an empty chair where Mr. Murdaugh might
14 be, and let everybody be pointing at that extra chair, that's
15 where all the negligence is, you sure want somebody there.

16 And there's just nothing in the case that -- other than
17 the circumstances of the case which isn't even in this court,
18 never has been in this court, because they stipulated, as I
19 recall, in the first case, they stipulated that it wasn't
20 worth more than -- it wouldn't meet the jurisdictional amount.

21 I don't -- never have felt that trying to avoid federal --
22 come into the Federal Court, it was anything legally or
23 morally wrong with that. That's been done, been going on
24 since time immemorial, and it will continue to go on, I guess.
25 Plaintiffs' attorneys have thought of all kinds of ways to

1 defeat federal jurisdiction. Used to be you could appoint an
2 out-of-state administrator, but you couldn't do that anymore.
3 Then you could make an assignment of a one-one-hundredth
4 interest in your case. Can't do that anymore. But people
5 have thought of all sort of ways to avoid federal
6 jurisdiction; and I just never have felt there was anything
7 legally or immoral about that, if you had the law to back up
8 your position.

9 And I just don't think -- I'm sure that if they're put
10 under oath and got up on the stand, the attorneys for the
11 plaintiff and the plaintiff would say we want to try the case
12 in our own county, we don't want to try it in Federal Court,
13 but they've got a right to that. And obviously I just don't
14 think that the kind of fraud that you need to overcome them
15 doing what they've got a right to do, and what I think would
16 probably be derelict if they didn't do it, I don't think that
17 absent a showing like in the tobacco barn case, Jim Stevens,
18 and I'm sure it was in the heat of argument that he made that
19 statement, because it was an unusual statement to make. And
20 unless you had some copy of some document that showed the
21 plaintiff didn't intend to recover against -- or if he
22 recovered, not to collect anything from Mr. Murdaugh, absent
23 something like that, I just don't think you can overcome the
24 fact that it's true under the law of South Carolina that
25 there's not only a glimmer of hope, a good possibility that

1 they can recover against Mr. Murdaugh. So I think the case
2 ought to be remanded.

3 First on the signing situation, I don't know what the
4 Fourth Circuit would do. I think you really need to get the
5 attorney signature. But leaving that aside, because that's
6 not really with any import, if that was the only issue, I
7 would -- before I'd pass on that I'd certify it. Somewhere.
8 Because I don't know really what the answer to that is.

9 I think probably the majority opinion holds attorneys --
10 the attorney does have to sign. And the Ninth and Sixth would
11 hold to the contrary, I can't imagine the Fourth going along
12 with the Ninth on anything.

13 So I'm going to issue just a short order remanding the
14 case to the Court of Common Pleas of Hampton County or
15 Allendale.

16 MR. TINSLEY: Hampton.

17 THE COURT: Hampton?

18 MR. TINSLEY: Yes, sir.

19 THE COURT: Okay. I appreciate y'all's brief and I
20 appreciate your argument. And one other thing I want to say,
21 that maybe I said it. If you've got a right, I mean, there's
22 just nothing wrong -- I've already said this. Nothing wrong
23 with trying to avoid, I never have felt, federal jurisdiction,
24 if you can do it properly and legally and not fraudulently.
25 And I don't see any fraud that defeats the conduct in this

1 case like it was in Jim Stevens' case, or maybe I think Judge
2 Duffy had a case where there was some writing or something the
3 attorneys or somebody had signed a letter they didn't intend
4 to recover or make any effort to recover against a defendant,
5 that they were using the local defendant.

6 So I'll sign that order and I'll let y'all have a good
7 time, wherever you go. Thank you.

8

9 (Court adjourned at 4:03 p.m.)

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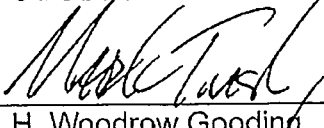
IN THE COURT OF COMMON PLEAS
C/A#: 09-CP-25-285

C/A#: 09-CP-25-285

OFFER OF JUDG

OFFER OF SUBS

GOODING AND GOODING, P.A.

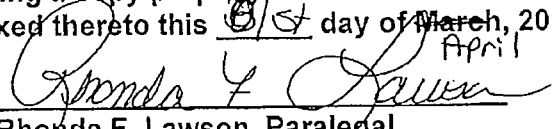
By: 

H. Woodrow Gooding
Mark B. Tinsley
Attorneys for Plaintiff
P. O. Box 1000
Allendale, SC 29810
(803) 584-7676

Dated: March 31, 2010

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have mailed a true and correct copy of the within Motion/Pleading/Document to all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 8/5 day of ~~March~~ April, 2010.

By: 

Rhonda F. Lawson, Paralegal

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

PATRICE SMART,

Plaintiff,

vs.

JAMES ALLEN GRADY, LOUIS
DANIEL MOFFETT, LYNWOOD
BRANTLEY d/b/a BRANTLEY
HAULING, and RANDOLPH
MURDAUGH, III,

Defendants.

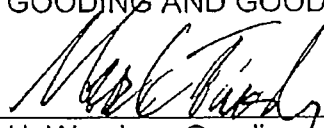
IN THE COURT OF COMMON PLEAS
C/A#: 09-CP-25-284

OFFER OF JUDGMENT

TO: PATRICK M. HIGGINS, ESQUIRE, ATTORNEY FOR DEFENDANT GRADY
DUKE R. HIGHFIELD, ESQUIRE, ATTORNEY FOR DEFENDANTS MOFFETT
AND BRANTLEY; and JOHN H. TILLER, ESQUIRE, ATTORNEY FOR
DEFENDANT MURDAUGH.

Plaintiff, pursuant to Rule 68 of the South Carolina Rules of Civil Procedure, hereby offers to take judgment in the Plaintiff's favor for a total of Five Hundred Thousand and No/100 (\$500,000.00) Dollars, is included herein costs now accrued. Should this offer not be accepted within twenty (20) days, it is deemed withdrawn and Plaintiff shall proceed with preparation for trial. Furthermore, if this offer is not accepted and Plaintiff obtains a verdict of determination at least as favorable as this offer, Plaintiff shall recover from Defendants any administrative, filing, or other court costs from the date of this offer until the entry of the judgment, and eight (8%) percent interest computed on the amount of the verdict award from the date of the offer to the entry of judgment.

GOODING AND GOODING, P.A.

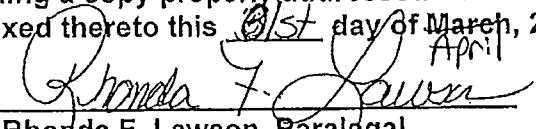
By: 

H. Woodrow Gooding
Mark B. Tinsley
Attorneys for Plaintiff
P. O. Box 1000
Allendale, SC 29810
(803) 584-7676

Dated: March 31, 2010

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have mailed a true and correct copy of the within Motion/Pleading/Document to all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 31st day of ~~March~~ April, 2010.

By: 

Rhonda F. Lawson, Paralegal

FILED

2010 OCT -6 AM 9:59

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

GARY SMART,

PLAINTIFF,

vs.

JAMES ALLEN GRADY, LOUIS DANIEL
MOFFETT, LYNWOOD BRANTLEY
D/B/A BRANTLEY HAULING, AND
RANDOLPH MURDAUGH, III,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
MYLINDA D. FOURTEENTH JUDICIAL CIRCUIT
CLERK OF COURT NO. 2009-CP-25-0285
HAMPTON COUNTY, S.C.

BY _____

STIPULATION OF DISMISSAL
(Partial Settlement)

The above-captioned matter having been compromised and settled as to Defendants Louis Daniel Moffett, Lynwood Brantley d/b/a Brantley Hauling, and Randolph Murdaugh, III only, now, by stipulation of Young Clement Rivers, LLP, attorneys for Defendants Louis Daniel Moffett and Lynwood Brantley d/b/a Brantley Hauling; Haynsworth Sinkler Boyd, P.A., attorneys for Defendant Randolph Murdaugh, III; and Gooding & Gooding P.A., attorneys for the Plaintiff, it is

Hereby stipulated by the above-named parties and the above-named counsel of record that the above case be ended with prejudice as to Defendants Louis Daniel Moffett, Lynwood Brantley d/b/a Brantley Hauling, and Randolph Murdaugh, III and the causes of action therein sued upon be forever barred.

This being only a partial settlement of the claim of Gary Smart and the parties to this settlement contemplating that Gary Smart's claims against James Allen Grady will continue unaffected by this partial settlement, the action shall not be ended with regard to the claims against James Allen Grady.

Page 1 of 3

AND IT IS SO STIPULATED.

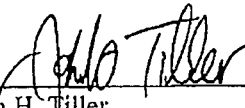
WE STIPULATE:

YOUNG CLEMENT RIVERS, LLP

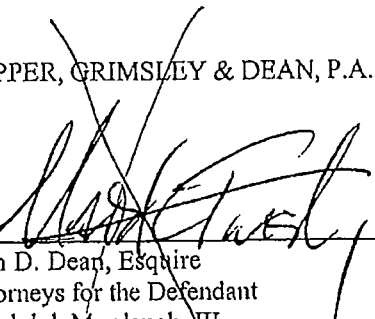
By _____
Duke R. Highfield
Attorneys for Defendants
Louis Daniel Moffett, Lynwood Brantley
d/b/a Brantley Hauling

WE STIPULATE:

HAYNSWORTH SINKLER BOYD, P.A.

By:  _____
John H. Tiller
Attorneys for the Defendant
Randolph Murdaugh, III

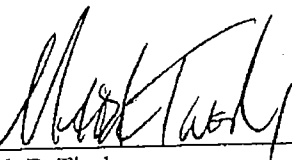
TUPPER, GRIMSLEY & DEAN, P.A.

By:  _____
Erin D. Dean, Esquire
Attorneys for the Defendant
Randolph Murdaugh, III

(Not a party)

WE STIPULATE:

GOODING & GOODING P.A.

By 
Mark B. Tinsley
Attorneys for Plaintiff

FILED

2010 OCT -6 AM 9:59

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

PATRICE SMART,

PLAINTIFF,

vs.

JAMES ALLEN GRADY, LOUIS DANIEL
MOFFETT, LYNWOOD BRANTLEY
D/B/A BRANTLEY HAULING, AND
RANDOLPH MURDAUGH, III,

DEFENDANTS.

) IN THE COURT OF COMMON PLEAS
) MYL FOURTEENTH JUDICIAL CIRCUIT
) CLERK OF COURT 2009-CP-25-0284
) HAMPTON COUNTY, S.C.

BY _____

STIPULATION OF DISMISSAL

The above-captioned matter having been compromised and settled as to Defendants Louis Daniel Moffett, Lynwood Brantley d/b/a Brantley Hauling, and Randolph Murdaugh, III only, now, by stipulation of Young Clement Rivers, LLP, attorneys for Defendants Louis Daniel Moffett and Lynwood Brantley d/b/a Brantley Hauling; Haynsworth Sinkler Boyd, P.A., attorneys for Defendant Randolph Murdaugh, III; and Gooding & Gooding P.A., attorneys for the Plaintiff, it is

Hereby stipulated by the above-named parties and the above-named counsel of record that the above case be ended with prejudice as to Defendants Louis Daniel Moffett, Lynwood Brantley d/b/a Brantley Hauling, and Randolph Murdaugh, III and the causes of action therein sued upon be forever barred.

AND IT IS SO STIPULATED.

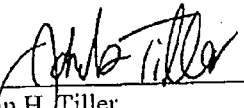
WE STIPULATE:

YOUNG CLEMENT RIVERS, LLP

By _____
Duke R. Highfield
Attorneys for Defendants
Louis Daniel Moffett, Lynwood Brantley
d/b/a Brantley Hauling

WE STIPULATE:

HAYNSWORTH SINKLER BOYD, P.A.

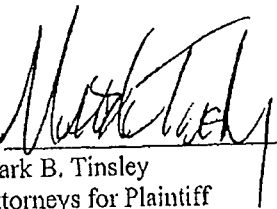
By:  _____
John H. Tiller
Attorneys for the Defendant
Randolph Murdaugh, III

TUPPER, GRIMSLEY & DEAN, P.A.

By: _____
Erin D. Dean, Esquire
Attorneys for the Defendant
Randolph Murdaugh, III

WE STIPULATE:

GOODING & GOODING P.A.

By 
Mark B. Tinsley
Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON

) IN THE COURT OF COMMON PLEAS
)
) CIVIL ACTION NO: 2009-CP-25-284
) CIVIL ACTION NO: 2009-CP-25-285

GARY SMART,

Plaintiff,

vs.

JAMES ALLEN GRADY; LOUIS
DANIEL MOFFETT; LYNWOOD
BRANTLEY d/b/a BRANTLEY
HAULING; and RANDOLPH
MURDAUGH, III,

Defendants.

PATRICE SMART,

Plaintiff,

vs.

JAMES ALLEN GRADY; LOUIS
DANIEL MOFFETT; LYNWOOD
BRANTLEY d/b/a BRANTLEY
HAULING; and RANDOLPH
MURDAUGH, III,

Defendants

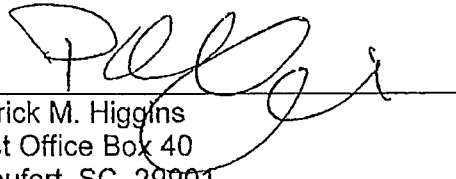
OFFER OF JUDGMENT

FILED
2010 OCT 18 PM 3:39
KYLEA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.
BY _____

Pursuant to Section 15-35-400(a), South Carolina Code of Laws 1976, as amended, and pursuant to Rule 68(a) of the South Carolina Rules of Civil Procedure, the Defendant, James Allen Grady hereby offer the Plaintiffs to take a judgment against them in the amount of Three Hundred Thousand and No/100 (\$300,000.00) DOLLARS inclusive of any and all interest, attorneys fees, and

costs. This Offer of Judgment must be accepted within twenty (20) days after service hereof. If the Plaintiff(s) fails to accept this Offer of Judgment within the aforesaid time period, this offer shall be considered rejected. This Offer of Judgment is made for the purposes specified in Section 15-35-400(a), South Carolina Code of Laws 1976, as amended, and Rule 68 of the South Carolina Rules of Civil Procedure, and is not to be construed either as an admission that the Defendant(s) is/are liable to the Plaintiff(s) in this action, or that the Plaintiff(s) has suffered any damages as a result of alleged negligence on the part of Defendant(s).

HOWELL, GIBSON & HUGHES, P.A.

By: 

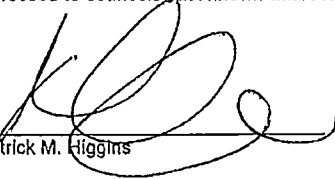
Patrick M. Higgins
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
Attorney for Defendant Grady

Beaufort, South Carolina

October 14, 2010

CERTIFICATE OF SERVICE

I certify that I served the foregoing Offer of Judgment upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on 15 day of October, 2010.

By: 

Patrick M. Higgins

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2009-CP-25-284

CIVIL ACTION NO: 2009-CP-25-285

GARY SMART,

Plaintiff,

vs.

JAMES ALLEN GRADY; LOUIS
DANIEL MOFFETT; LYNWOOD
BRANTLEY d/b/a BRANTLEY
HAULING; and RANDOLPH
MURDAUGH, III,

Defendants.

PATRICE SMART,

Plaintiff,

vs.

JAMES ALLEN GRADY; LOUIS
DANIEL MOFFETT; LYNWOOD
BRANTLEY d/b/a BRANTLEY
HAULING; and RANDOLPH
MURDAUGH, III,

Defendants.

DEFENDANT JAMES ALLEN GRADY'S
MOTION TO DROP DEFENDANT
RANDOLPH MURDAUGH, III
and
TO COMPEL EXECUTION OF
STIPULATION OF DISMISSAL OF
DEFENDANT RANDOLPH
MURDAUGH, III

FILED
2011 JUL -7 AM 10:54
MYRNA D. KETTLER
CLERK OF COURT, S.C.
HAMPTON COUNTY, S.C.

TO: MARK B. TINSLEY, ESQUIRE, ATTORNEY FOR THE PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE THAT Defendant James Allen Grady, by and through his undersigned counsel, Howell, Gibson and Hughes, P.A., will move on the tenth day after service hereof, or as soon thereafter as counsel may be heard, before the presiding Circuit Court Judge, or such other person as may be designated to hear such motions, for an Order of this Court compelling

Plaintiff to execute the Stipulation of Dismissal of the above referenced matter. The within motion, made pursuant to the provisions of Rules 21 and 41, South Carolina Rules of Civil Procedure, is grounded upon the following consideration(s), and may be further supplemented by way of memorandum of law, affidavits, and other supportive documentation to be provided prior to the hearing of this matter.

Defendant Grady believes that Plaintiff's refusal to officially dismiss Randolph Murdaugh, III is done solely in an effort to negatively affect the judicial machinery, thwart Defendant James Allen Grady's substantial rights, and confuse litigation unnecessarily. There is perhaps no better piece of evidence supporting Defendant James Allen Grady's contention that the impropriety of Plaintiff's refusal to execute these Stipulations of Dismissal than that of the *Full, Final and Complete Release (and Covenant Not To Sue)* executed by Plaintiffs on September 3, 2010. [*Full, Final and Complete Release (and Covenant Not To Sue)* attached hereto as EXHIBIT A]

In this *Full, Final and Complete Release (and Covenant Not To Sue)*, the Plaintiffs Gary Smart and Patrice Smart, individually and as husband and wife, released, forever discharged **and promised never to sue** Louis Daniel Moffett; Cowan Systems; Lynwood Brantley, individually and d/b/a Brantley Hauling; and **Randolph Murdaugh, III**. [Please see EXHIBIT A] [emphasis added] Moreover, Plaintiffs unequivocally **agreed to a dismissal** with prejudice of Louis Daniel Moffett; Lynwood Brantley, individually and d/b/a Brantley Hauling; and **Randolph Murdaugh, III** from the actions presently pending in the South Carolina Court of Common Pleas, Hampton County, entitled Patrice Smart v.

James Allen Brady; Louis Daniel Moffett; Lynwood Brantley d/b/a Brantley Hauling; and Randolph Murdaugh, III, Civil Action No. 2009-CP-25-0284; and Gary Smart v. James Allen Brady; Louis Daniel Moffett; Lynwood Brantley d/b/a Brantley Hauling; and Randolph Murdaugh, III, Civil Action No. 2009-CP-25-0285.

Plaintiff Patrice Smart has previously settled her loss of consortium claims with respect to Louis Daniel Moffett; Cowan Systems; Lynwood Brantley, individually and d/b/a Brantley Hauling; and Randolph Murdaugh, III for \$1,040,000.00, and Plaintiff Gary Smart has settled his negligence claim with respect to Louis Daniel Moffett; Cowan Systems; Lynwood Brantley, individually and d/b/a Brantley Hauling; and Randolph Murdaugh, III for \$10,000.00. [Please see Settlement Agreement dated August 4, 2010 attached hereto as EXHIBIT B].

As clearly evidenced by the previously executed Stipulation of Dismissal [attached hereto as EXHIBIT C], Plaintiff Gary Smart intended to dismiss Randolph Murdaugh, III as a Defendant from his case. However, as conceded by Plaintiffs' counsel at the hearing of this matter, due to the fact that this Stipulation of Dismissal was not fully executed by all parties upon filing, such a Stipulation of Dismissal was ineffective¹. Plaintiffs now refuse to dismiss Randolph Murdaugh, III solely to defeat 1) diversity jurisdiction and b) Defendant Grady's right to have his matter transferred to the only proper venue, Jasper County.

¹ Defendant Grady believes such a Stipulation is ineffective under Rule 41; however, given the procedural and unjust maneuvering by Plaintiffs in now refusing to dismiss Randolph Murdaugh, III, Defendant Grady seeks clarification from this Court. Please see Hearing Transcript, dated April 4, 2011.

Plaintiff Patrice Smart also executed a Stipulation of Dismissal [attached hereto as EXHIBIT D] and filed such Stipulation of Dismissal with the Hampton County Clerk of Court indicating her assent to dismissal of Randolph Murdaugh, III as a party.

Counsel for Defendant James Allen Grady has recently prepared Stipulations of Dismissal of Randolph Murdaugh, III pursuant to Rule 41 so as to properly dismiss Defendant Murdaugh as there likely has not been an effective Stipulation of Dismissal of Defendant Murdaugh filed to date. Currently, Louis Daniel Moffett; Cowan Systems; Lynwood Brantley, individually and d/b/a Brantley Hauling; and Randolph Murdaugh, III are all still technically defendants in this litigation. However, Plaintiff now refuses to execute an effective Stipulation of Dismissal despite Defendant Grady's best efforts to cure this defective Stipulation of Dismissal.

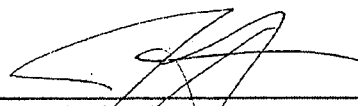
Not only does the *Full, Final and Complete Release (and Covenant Not To Sue)* clearly state that the Plaintiffs do not intend to sue Randolph Murdaugh, III, they specifically agreed to a dismissal of Randolph Murdaugh, III as a party defendant in this litigation. Their refusal to execute a Stipulation of Dismissal is unjust, and is a blatant attempt to improperly affect the judicial machinery of this State. At this point in time, Defendant Randolph Murdaugh, III must be considered to be a sham defendant, and should be dismissed.

WHEREFORE, Defendant James Allen Grady, having made this motion pursuant to the South Carolina Rules of Civil Procedure, would respectfully request that this Honorable Court issue its Order compelling the Plaintiff to

execute a Stipulation of Dismissal and/or dropping Randolph Murdaugh, III as a party Defendant.

Respectfully submitted.

HOWELL, GIBSON & HUGHES, P.A.

By: 
Patrick M. Higgins
Jason Franklin Ward
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
Attorneys for Defendant James Allen Grady

Beaufort, South Carolina

July 5, 2011

CERTIFICATE OF SERVICE

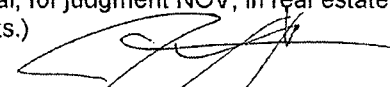
I certify that I served the foregoing Motion to Compel upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on the 5th day of July, 2011.

By: 
Jason Franklin Ward

RULE 11 CERTIFICATION

I certify pursuant to Rule 11 of the South Carolina Rules of Civil Procedure that

- ☒ I have consulted with opposing counsel and have been unable to resolve the matter.
- ☐ Consultation with opposing counsel would serve no useful purpose, or is not required.
- ☐ Consultation with opposing counsel could not be timely held
- ☐ I certify that there is no duty of consultation for the attached motion (to dismiss, for summary judgment, for new trial, for judgment NOV, in real estate foreclosures, or with pro se litigants.)

By: 
Jason Franklin Ward

) IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2009-CP-25-284
CIVIL ACTION NO: 2009-CP-25-285

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MYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.
BY _____

for an Order transferring venue of the above captioned action to Jasper County pursuant to S.C. Code Ann. §15-7-30, as this matter must be tried either where the accident occurred (Jasper County) or where the Plaintiff resided at the time the cause of action arose (Jasper County).

Currently, the Plaintiffs refuse to execute a valid stipulation of dismissal of Randolph Murdaugh, III in accordance with Rule 41. Though they initially executed and filed stipulations of dismissal (these were only signed by counsel for Randolph Murdaugh, III and Plaintiffs' counsel), Plaintiffs agreed that these filed stipulations were ineffective due to the fact that not all of the parties had executed the stipulations of dismissal in accordance with Rule 41. (See Transcript of Hearing, dated April 4, 2011, attached hereto as EXHIBIT A) Nevertheless, according to the express terms of the Release and Promise Not to Sue Randolph Murdaugh III, the Plaintiffs both agreed that they would never sue Randolph Murdaugh, III and that they would execute stipulations of dismissal. Despite Defendant Grady's efforts to obtain an effective stipulation of dismissal of Randolph Murdaugh, III from all parties, to date only a signature from Erin Dean has been received.¹ As explained in Defendant Grady's Motion to Drop Randolph Murdaugh, III and/or compel execution of the Stipulation of Dismissal (incorporated herein by reference), the Plaintiffs, despite having executed a valid and lawful Release and Promise Not to Sue Randolph Murdaugh, III, are now refusing to dismiss him as a party defendant in a blatant attempt to maintain

¹ Attorney Dean represented Defendant Murdaugh by and through his personal automobile insurance carrier. Attorney Tiller also represented Defendant Murdaugh (by and through his employer's automobile insurance carrier). Attorney Tiller initially executed the prior ineffective stipulations of dismissal, though to date counsel has not received a new signature on the recently sent stipulations of dismissal.

venue in Hampton County. Undoubtedly, Defendant Grady has a substantial right to have this matter heard in the proper venue; but more importantly, this Court has a right to candor and honesty. The Plaintiffs are improperly thwarting the effective and proper exercise of judicial authority to transfer venue by making such conflicting and improper representations; this is unjust, at best. As explained hereinbelow, venue is only proper in Jasper County, and this court must transfer venue so as to protect the substantial rights of the Defendants and effectuate the clear and unambiguous intent of the Legislature.

James Allen Grady is a non-resident individual defendant (and seemingly the only remaining defendant).² In an action against a non-resident individual defendant, S.C. Code Ann §15-7-30 (D) provides the following:

A civil action tried pursuant to this section against a nonresident individual defendant must be brought and tried in the county in which the:

- (1) most substantial part of the alleged act or omission giving rise to the cause of action occurred; or
- (2) plaintiff resides at the time the cause of action arose, or if the plaintiff is a domestic corporation, domestic limited partnership, domestic limited liability company, domestic limited liability partnership, foreign corporation, foreign limited partnership, foreign limited liability company, or foreign limited liability partnership, at its principal place of business at the time the cause of action arose.

² Pursuant to a Settlement Agreement reached during mediation between the Plaintiffs and Defendants Louis Daniel Moffett, Lynwood Brantley, individually and d/b/a Brantley Hauling and Randolph Murdaugh, III, the Plaintiff Gary Smart received \$10,000.00 for his negligence claim and Plaintiff Patrice Smart received \$1,090,000.00 dollars for her loss of consortium claim. (Settlement Agreement, attached hereto as EXHIBIT B) Defendant James Allen Grady has received copies of a Release of claims as against these Defendants and purported Stipulations of Dismissal of these Defendants as well. (Release and Stipulations of Dismissal, attached hereto as EXHIBIT C) Consequently, the only remaining Defendant for trial is James Allen Grady, a non-resident individual defendant.

This case was originally brought in Hampton County.³ As set forth in the Complaints of Plaintiff Gary Smart and Patrice Smart, the accident giving rise to the alleged cause of action in this case for negligence occurred in Jasper County. (Complaints of Gary Smart, Patrice Smart attached hereto as EXHIBIT D). The South Carolina Traffic Collision report indicates Gary Smart's home address as being 1599 Clyo Kilgore Road, Clyo, GA 31303. Contradictorily, the Plaintiff deposed under oath that he and Patrice Smart have lived at 4937 Cypress Branch Road, Pineland, SC 29934 in Jasper County since around the year 2000 (since the time the cause of action arose). (S.C. Traffic Collision Report, attached hereto as EXHIBIT E; Deposition of Gary Smart, attached hereto as EXHIBIT F) Defendant James Allen Grady is presently and was at the time of the commencement of this action, a resident of Orlando, Florida (Orange County).

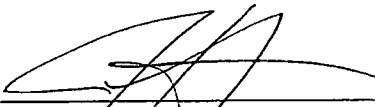
Regardless of whether the Plaintiff lived in Jasper County, South Carolina or Effingham County, Georgia at the time the cause of action arose, venue for purposes of trial is only proper in Jasper County pursuant to S.C. Code Ann §15-7-30(D), and according to the statute, the action, "must be...**tried**" in Jasper County. The accident occurred in Jasper County and the Plaintiff, according to

³ Technically, Patrice Smart's case was initially brought by Randolph Murdaugh, III son, Alex Murdaugh, in Jasper County. This case was dismissed by consent of all parties, and Mark Tinsley took over as counsel for the Plaintiffs in the cases filed in Hampton County. Venue was purportedly proper in Hampton County due to the residence of a resident individual defendant (Randolph Murdaugh III) being in Hampton County. See §15-7-30(C). According to documents received pursuant to discovery, it now appears as though Randolph Murdaugh, III may no longer be a party to this action. All other Defendants except for James Allen Grady may have now been dismissed from this action prior to trial. However, the stipulations of dismissal may not be legally effective, and this Defendant expressly does not waive any rights or remedies (in contribution and/or otherwise) associated with the defense of this action should a court determine the filed stipulations of dismissal are legally effective or ineffective.

his sworn testimony, lived there at the time the cause of action arose. Consequently, venue must be transferred to Jasper County in accordance with the law of South Carolina.

WHEREFORE, the above named Defendant requests that this Court inquire into the matters alleged herein and thereafter issue its Order transferring venue of this matter to the Jasper County Court of Common Pleas, pursuant to Section 15-7-30 of the South Carolina Code of Laws, 1976, as amended.

HOWELL, GIBSON & HUGHES, P.A.

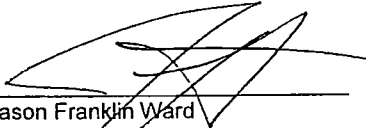
By: 
Patrick M. Higgins
Jason Franklin Ward
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
Attorneys for Defendant James Allen Grady

Beaufort, South Carolina

July 7, 2011

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Change Venue upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on the 7th day of July, 2011.

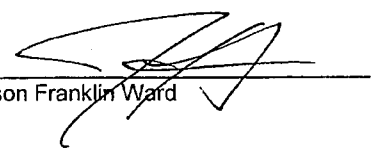
By: 
Jason Franklin Ward

RULE 11 CERTIFICATION

I certify pursuant to Rule 11 of the South Carolina Rules of Civil Procedure that

- ☒ I have consulted with opposing counsel and have been unable to resolve the matter.
- ☒ Consultation with opposing counsel would serve no useful purpose, or is not required.
- ☐ Consultation with opposing counsel could not be timely held

— I certify that there is no duty of consultation for the attached motion (to dismiss, for summary judgment, for new trial, for judgment NOV, in real estate foreclosures, or with pro se litigants.)

By: 

Jason Franklin Ward

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO: 2009-CP-25-284
CIVIL ACTION NO: 2009-CP-25-285

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Randolph Murdaugh and Drop Randolph Murdaugh as a party Defendant in this matter. The Plaintiffs refuse to execute the stipulations of dismissal for one simple reason: if Randolph Murdaugh, III is no longer a formal defendant or is disregarded by the Court as being "nominal"¹ for purposes of venue, then venue is only proper in Jasper County, as the Plaintiff resided there at the time of the accident and that is the county where the accident occurred. The truth, in this case, is that Defendant Randolph Murdaugh III has no interest, legal or otherwise, in remaining a party defendant, formally or nominally, and dropping him or disregarding him as being nominal will effectuate justice in this matter..

For all of the following reasons, Defendant Grady respectfully requests that this Honorable Court correct the inequity apparent in this matter and drop Randolph Murdaugh, III as a party defendant and compel the execution of stipulations of dismissal in this matter previously agreed to by the Plaintiffs. In the alternative, Defendant Grady would ask that this Court disregard Defendant Randolph Murdaugh, III as being nominal and transfer venue of the trial of this matter to Jasper County in accordance with S.C. Code Ann. §15-7-30.

¹ See Rankin Lumber Co. v. Graveley, 112 S.C. 128, 99 S.E. 349 (1919); The Supreme Court held that an immaterial or nominal defendant cannot be joined in litigation for the purpose of conferring jurisdiction and to have a trial in the improper venue. See also Bumgardner v. Combustion Engineering, Inc. 432 F. Supp. 1289 (D.S.C. 1977); a discontinuance of an action against a defendant by way of a covenant not to execute or other such settlement device makes a defendant nominal or immaterial and such defendant must be disregarded when evaluating jurisdiction.

STANDARD OF REVIEW

It is well settled that where there has been a discontinuance of an action against a Defendant, i.e. where there is no possible outcome that would affect the Defendant at trial or, expressed another way, that the Plaintiff will in no way be entitled to a right to relief from that defendant, he must be considered to be "nominal" and must be disregarded for purposes of determining a proper venue for the action. See Bumgardner v. Combustion Engineering, Inc. (432 F.Supp 1289) (D.S.C. 1977) (District Court found that covenant not to execute entered into with only resident defendant constituted "voluntary discontinuance of the action" against resident defendant and that such a defendant may be disregarded for purposes of determining jurisdiction); See also Rankin Lumber, 112 S.C. 128 (Supreme Court disregarded trustees of school district residence and transferred venue as the Plaintiffs sought no substantial relief against nominal defendant, finding that appellant Graveley was the only party that had a real and substantial interest in the action adverse to the Plaintiff.) When analyzing whether a party is "nominal", our Federal Court holds that it "**must disregard nominal or formal parties and rest jurisdiction** only upon the citizenship of **real parties to the controversy.**" Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 461, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980) Though the case at bar is in state court, our Supreme Court has applied this same concept of who may be considered to be a nominal defendant in the context of a motion to transfer venue. See Rankin Lumber v. Graveley, et al., 112 S.C. 128, 99 S.E. 349 (1919)

("An immaterial [or nominal] defendant cannot be joined merely for the purpose of conferring jurisdiction and to have a trial in a different county [than is proper]")

OVERVIEW

This case arose out an accident on U.S. 321 in Jasper County that occurred on December 22, 2007 whereby Defendant Grady's ATV fell off of the back of his trailer, causing Louis Daniel Moffett of Brantley Hauling to crash into the ATV. (EXHIBIT A; see also Hampton County Complaint (naming Randolph Murdaugh, III as Defendant), attached hereto as EXHIBIT B; See also, generally, Deposition of Gary Smart, attached hereto as EXHIBIT C; Deposition of Louis Daniel Moffett, attached hereto as EXHIBIT D; Deposition of James Allen Grady, attached hereto as EXHIBIT E; Deposition of Randolph Murdaugh, III, attached hereto as EXHIBIT F) Multiple cars were directed around the wrecked vehicles and the 18 wheeler truck had turned its flashing lights on. During this time frame, Alexander Murdaugh and Randolph Murdaugh, III stopped to assist the parties. Their headlights were facing oncoming traffic. (See generally, Deposition of Randolph Murdaugh, III, EXHIBIT F) Gary Smart then negligently sped around a curve and wrecked into the back of the 18 wheeler. (See, generally, Deposition of Gary Smart, attached hereto as EXHIBIT C; Deposition of Louis Daniel Moffett, attached hereto as EXHIBIT D; Deposition of James Allen Grady, attached hereto as EXHIBIT E; Deposition of Randolph Murdaugh, III, attached hereto as EXHIBIT F)

The Plaintiffs were initially represented by Alex Murdaugh based upon the causes of action arising out of this accident. (Jasper County Summons and Complaint, EXHIBIT G). On the face of the Jasper County Summons for Patrice Smart's Loss of Consortium case, Randolph Murdaugh (Alex Murdaugh's father)

was initially named as a defendant; however, on the face of the Complaint his name was not listed in the caption and no relief was requested against him. (*Id.*)

Nevertheless, due to the existence of diversity jurisdiction as to Defendants Moffett/Brantley Hauling and Defendant Grady, and specifically in order to avoid removal to Federal Court, the Plaintiff Patrice Smart, by way of her (then) counsel, executed and filed a stipulation of damages that the amount in controversy did not exceed \$75,000.00 and that if the amount in controversy changed "such that it exceeds \$75,000.00 the Plaintiff [would] notify the defendants prior to expiration of the one year removal period." (Stipulation of Damages, 5/21/08, attached hereto as EXHIBIT G) The Plaintiff further agreed per this Stipulation that, "[s]he will not attempt to collect on any judgment rendered in excess of 75,000.00 in the event a verdict is rendered exceeding this amount." (*Id.*) After discovery began, it was then discovered that Alex Murdaugh and/or Randolph Murdaugh were witnesses to the accident; they withdrew as counsel and filed a fully executed stipulation of dismissal without prejudice signed by all parties. (Stipulation of Dismissal, filed on or around May 26, 2009 , attached hereto as EXHIBIT H)

Then, on June 24, 2009, Patrice and Gary Smart, by and through their new counsel Mark Tinsley, each filed another Complaint in Hampton County. These Complaints named not only the same defendants as were named in the Jasper County case, but also added Randolph Murdaugh, III as a party defendant due to his negligence with respect to leaving his headlights on facing oncoming traffic. (Hampton County Complaint(s) of Gary and Patrice Smart,

dated June 24, 2009; EXHIBIT A). On August 7, 2009, Co-Defendants Louis Daniel Moffett and Brantley Hauling filed Notices of Removal to Federal Court in both of these cases, arguing that Randolph Murdaugh, III had been fraudulently joined as a defendant in an effort to thwart Federal diversity jurisdiction. (Moffett Notices of Removal, attached hereto as EXHIBIT I)

After receiving memoranda of law and hearing arguments, Judge Blatt remanded this matter back to Hampton County, finding that absent evidence of a covenant not to execute or some writing showing that the Plaintiff's did not intend to recover against Randolph Murdaugh, III² no fraudulent joinder had occurred. (Order and Transcript of Hearing, dated October 27, 2010, attached hereto as EXHIBIT J) After some discovery ensued over the next 10 months, Plaintiffs' counsel moved to compel mediation, and ultimately the parties agreed to mediate this matter in accordance with the ADR Rules on or around August 4, 2010. (Motions to Compel Mediation, dated June 22, 2010)

Prior to mediation, and even as of December 30, 2008, Plaintiff Gary Smart's medical damages alone were calculated as being at or around \$76,000.00 or more. (Letter from R. Alexander Murdaugh dated December 30, 2008, attached hereto as EXHIBIT K; Letter from Mark Tinsley, dated September 18, 2009, attached hereto as EXHIBIT L) Plaintiff Gary Smart filed an Offer of Judgment against all of the Defendants in the amount of \$2.75 million dollars. (Gary Smart Offer of Judgment, dated April 1, 2010, attached hereto as EXHIBIT

²It should be noted that Defendant is not arguing Fraudulent Joinder for purposes of this motion as understood by our federal courts. However, Defendant Grady is arguing that Defendant Murdaugh, by virtue of the Release and Covenant Not to Sue (as well as a purported Covenant

M) At no time has Plaintiff Patrice Smart sent a demand letter specifying the extent of her damages; however, she did file an Offer of Judgment in the amount of \$500,000.00 on or around April 1, 2010. (Patrice Smart Offer of Judgment, dated April 1, 2010, attached hereto as EXHIBIT N)

Mediation occurred on or around August 4, 2010, and a partial settlement agreement occurred. As set forth in the settlement agreement (produced by the Plaintiffs in discovery), the Plaintiffs agreed to settle their cases,

"with the Defendants Louis Daniel Moffett, Lynwood Brantley d/b/a Brantley Hauling paying the Plaintiff Gary Smart \$5000.00 and Plaintiff Patrice Smart \$995,000.00 and the Defendant Randolph Murdaugh, III paying the Plaintiff Gary Smart \$5000.00 and Plaintiff Patrice Smart \$95,000.00. The Plaintiffs agree to indemnify the Defendants for any claims brought against them by James Allen Grady, or any other entity or person, arising out of the allocation of the settlement proceeds or Medicaid or Medicare regarding a lien, set aside, or for any other claims. The Plaintiffs agree to be responsible for all liens associated with this matter. The Defendants shall provide the Release, Stipulation of Dismissal and the settlement check within thirty days of the signing of this agreement. There will be separate checks issued to Gary and Patrice Smart for the settlement proceeds by each Defendant. This settlement is a resolution of all claims of Patrice Smart against the parties. This [is a partial] settlement [and] does not affect the claims of Gary Smart against James Allen Grady."

While represented by counsel, Patrice Smart and Gary Smart settled with the Co-Defendants for a collective total of \$1.1 million dollars. (Settlement Agreement, attached hereto as EXHIBIT O; General Release and Covenant Not to Sue of Gary and Patrice Smart, dated September 3, 2010, attached hereto as EXHIBIT P) The very terms of this settlement agreement contemplate and

Not to Execute), is a nominal or immaterial defendant that must be disregarded for purposes of the Motion to Transfer Venue and this Motion to Drop.

specify that the Plaintiffs are to execute a Release and Stipulations of Dismissal; there is no mention of a covenant not to execute, and there was no consideration exchanged for a covenant not to execute. (*Id.*) Gary Smart, despite having documented medical damages in excess of \$75,000.00, settled his claims with Defendants Moffett/Brantley Hauling and Defendant Murdaugh for merely \$10,000.00. Patrice Smart settled her claims of loss of consortium with the Co-Defendants for \$1.09 million dollars. (*Id.*) The Plaintiffs chose not to settle with Defendant James Allen Grady. Defendant James Allen Grady filed an Offer of Judgment in the amount of \$300,000.00, which has to date been refused by the Plaintiff Gary Smart. (Grady Offer of Judgment, dated October 18, 2010, attached hereto as EXHIBIT Q)

Contemporaneous to the execution of the Settlement Agreement, the Plaintiffs executed stipulations of dismissal; these stipulations were signed only by Plaintiff's counsel and one of Defendant Randolph Murdaugh's attorneys. (Stipulations of Dismissal, executed on or around September 16, 2010; attached hereto as EXHIBIT R). No other parties executed these stipulations of dismissal, though counsel for Brantley Hauling sent this document to be filed with the Hampton County Clerk of Court. At no time did counsel for Defendant Grady receive copies of any of these documents, nor were they copied on any correspondence regarding the same. It was not until February of 2011 that Defendant Grady obtained copies of these Stipulations of Dismissal from the Hampton County Courthouse. Nevertheless, these stipulations clearly indicated, at a bare minimum, the Plaintiffs and Randolph Murdaugh's intent that the cases

be, "ended with prejudice as to Defendants Louis Daniel Moffett, Lynwood Brantley d/b/a Brantley Hauling, and Randolph Murdaugh, III and the causes of action therein sued upon be forever barred." (Id.)

Upon discovering that such documents existed, Defendant Grady then requested the production of the Release that was referenced by the Settlement Agreement. In a response to Defendant Grady's supplemental requests for production, the Plaintiffs (responding as to both Patrice and Gary Smart's cases) produced a copy of the Release on or around March 2, 2011. (Plaintiffs Response to Defendant Grady's Supplemental requests for Production, dated March 2, 2011; EXHIBIT S) The Release explicitly sets forth the contractual obligations of the respective parties that were signatories to the Settlement Agreement. (See generally, General Release, attached as EXHIBIT P)

Defendant Grady then moved to strike the ineffective stipulations of dismissal and to reform the settlement agreement on March 24, 2011. (Defendant Grady's Motion to Strike Stipulation of Dismissal and to Reform the Settlement Agreement, March 24, 2011; Motion and Memorandum of Law (w/o exhibits) attached hereto as EXHIBIT T) Defendant Grady also moved to transfer venue; however, this motion was withdrawn because Plaintiffs counsel stated that the stipulations of dismissal were ineffective prior to any argument on said motion (this legal issue affected whether Randolph Murdaugh, III was a party defendant, which would in turn affect whether venue remains proper in Hampton County). (Transcript of Hearing, dated April 4, 2011; attached hereto as EXHIBIT) This motion was heard by the Honorable Carmen T. Mullen on April 4,

2011, and she issued an Order denying Defendant's motion on May 24, 2011 (Order of Judge Mullen; filed on June 3, 2011; received on June 6, 2011); attached hereto as EXHIBIT U.)

Defendant Grady then moved to consolidate Patrice Smart and Gary Smart's cases for trial on June 17, 2011. (Motion to Consolidate, filed June 22, 2011) On June 22, 2011, Defendant Grady sent out stipulations of dismissal to all counsel, requesting that they execute the same, in an effort to cure the prior ineffective stipulations. (Letter to all counsel, dated June 22, 2011, attached hereto as EXHIBIT V) On that same day, one of Randolph Murdaugh's attorneys returned an executed stipulation of dismissal. (Stipulation of Dismissal signed by Erin Dean, attached hereto as EXHIBIT W) Despite having received oral assurances from all other parties, Defendant Grady has not received a fully executed stipulation of dismissal to date. (Email to Plaintiff's counsel, dated June 23, 2011, attached hereto as EXHIBIT X) By way of this same email, Plaintiff's counsel informed Defendants that he did not intend to dismiss Randolph Murdaugh and that it "did not matter" that everyone else agreed (at least orally) to dismiss Randolph Murdaugh as a party defendant³. (Id.)

On June 27, 2011, counsel for Defendant Grady received an email from Plaintiffs counsel requesting the date that the hearing on Defendants Motion to Strike and Reform the Settlement Agreement was heard. (Email from Lawson,

³ As is argued later, the execution of the stipulations of dismissal is a formality that is required under Rule 41; the stipulations of dismissal, if this court compels the execution, will make Randolph Murdaugh, III officially not a party to the litigation. Even if the Court refuses to compel the execution of effective stipulations, given the fact that a Release and Covenant not to Execute have been executed that discharged any further right to relief as against Randolph Murdaugh, he must be considered to be, at a minimum, a nominal or immaterial defendant for purposes of the

dated June 27, 2011; attached hereto as EXHIBIT Y) Counsel for Defendant Grady responded and provided the Plaintiffs with this information on July 1, 2011. (Id.) Also on or around July 1, Defendant Grady sent for filing a motion to compel the execution of the stipulations of dismissal and to drop Randolph Murdaugh. On July 7, Defendant Grady filed a motion to transfer venue as well.

Then on July 7, 2011, Plaintiff's provided to Defendant Grady a document entitled "COVENANT NOT TO EXECUTE THIS RESCINDS ANY PRIOR SETTLEMENT AGREEMENT BETWEEN GARY SMART, PATRICE SMART AND RANDOLPH MURDAUGH" (Email from Tinsley, dated July 7, 2011; attached hereto as EXHIBIT Z). This document was only signed by Counsel for the Plaintiffs, and the Plaintiffs themselves. (Id.) Of peculiar interest is that this document was also dated April 2, 2011; two days before the hearing on Defendant's Motion to Strike and Reform the Settlement Agreement (April 4, 2011). April 2, 2011 fell on a Saturday. This document was never produced until July 7, 2011, nearly three months after it was presumably executed. (Email from Tinsley, dated July 7, 2011; attached hereto as EXHIBIT AA) By way of this same email, Plaintiffs' counsel informed Defendant Grady that this document rescinded the prior settlement agreement and was done so, "when it was discovered that there was UIM". (Id)

Unbeknownst to Defendant Grady, on June 28, 2011, Mitch Griffith (on behalf of the UIM Carrier State Farm) tendered a check for \$50,000.00 made payable to both Gary Smart and Patrice Solomon, individually and as husband

motion to transfer venue and this Motion to Drop him as a party defendant as there can be no question under our law that the action is discontinued as against him.)

and wife. (Letter from UIM Carrier, dated June 28, 2011) Upon information and belief, counsel for the UIM carrier was never provided a copy of the Release or Settlement Agreement, but rather only a copy of the unilaterally executed Covenant Not to Execute. Defendant Grady is informed and also believes that Plaintiffs have to date refused to accept this tender in a clear effort to create the illusion of a further "pursuable" claim against Randolph Murdaugh, III in a transparent effort to manipulate the forum where this case will be tried.⁴

⁴ Plaintiffs apparently believe that by not accepting UIM monies, Randolph Murdaugh somehow remains a party defendant to be recovered against due to the subsequent execution of a covenant not to execute. This belief is misguided, at best. As explained later, there has been no effective rescission of the Release, as there has neither been a mutual mistake in the execution nor a finding of an effective unilateral rescission on grounds of fraud, etc. Without Randolph Murdaugh, III a party defendant, venue would only be proper in Jasper County, as that is where the Plaintiff resides and where the accident occurred. There is no other nexus with Hampton County. Moreover, the UIM has been fully tendered, and but for the Plaintiff's continued refusal to accept it, UIM monies would not be an issue, if it ever was.

LAW AND ANALYSIS

I. THE RELEASE AND COVENANT NOT TO SUE MUST BE ENFORCED IN THIS CASE, AND THE PLAINTIFF MUST BE COMPELLED TO EXECUTE A FORMAL STIPULATION OF DISMISSAL IN ACCORDANCE WITH ITS EXPRESS TERMS.

It is well settled in South Carolina that a release is a contract. See Ecclesiastes Production Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 649 S.E.2d 494 (Ct. App., 2007); See also Bowers v. S.C. Dep't of Transp., 360 S.C. 149, 600 S.E.2d 543 (Ct. App. 2005). Consequently, the court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); Jordan v. Security Group, Inc., 311 S.C. 227, 428 S.E.2d 705, 707 (1993). The term "release" has been defined as the "relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced." 76 C.J.S. Release §2 (1994). A release is an agreement providing that a duty owed to the maker of the release is discharged immediately. *Id.*; see also *Black's Law Dictionary* 1315-16 (6th ed. 1990) (a release is the act of giving up a right or claim to the person against whom it could have been enforced). As clearly shown below, there can be no doubt that the Plaintiffs relinquished, conceded, and gave up all rights to any relief against Randolph Murdaugh, III by way of this document entitled Release. Moreover, the subsequent Covenant Not To Execute that purportedly rescinds the settlement agreement with Randolph Murdaugh, III further evidences the unequivocal fact that there is no outcome at trial that would in any way jeopardize

Randolph Murdaugh, III as a defendant and clearly shows that the Plaintiff has no further right to relief as against Randolph Murdaugh, III.

The Plaintiffs, with the advice, approval, and explicit recommendation by their counsel, executed a document entitled, "FULL, FINAL AND COMPLETE RELEASE READ CAREFULLY THIS RELEASE ENDS ALL CLAIMS" on September 3, 2010. (EXHIBIT P) The Release explicitly states that, "I, Mark B. Tinsley, Esquire and Gooding and Gooding P.A., as attorneys for Gary Smart and Patrice Smart, individually and as husband and wife, recommend and approve the settlement above made." (Release, p. 4) In this document, both Patrice and Gary Smart **released, forever discharged, and promised never to sue** Randolph Murdaugh, III for any claims arising out of the accident that occurred in Jasper County on December 22, 2007. (Id.) Further evidencing the intent of the parties that this document is to be considered a Release is that the word "Release" appears over fifteen (15) times, including an unambiguous self-reference in all capital letters, in bold, and underlined, "CAUTION: READ BEFORE SIGNING: THIS IS A FULL, FINAL AND COMPLETE RELEASE" appearing over the signature lines for the Plaintiffs. (Release, p. 4) The Plaintiffs executed this Release, "in full compromise and release of all injuries or damages allegedly suffered by them", and accepted \$100,000.00 from Randolph Murdaugh, III (as referenced by the Settlement Agreement). They further agreed that the Release "sets forth the acceptance of the sum set forth above and is in full and final settlement of any and all claims that the undersigned now has or may have in the future arising out of the alleged accident **against the settling**

defendants. However, it is understood that the settlement of the claims of Gary Smat is only a partial settlement and does not affect his claim against Defendant Grady.⁵ Perhaps most importantly, the Plaintiffs specifically agreed that they would execute Stipulations of Dismissal with prejudice as to both actions presently pending in Hampton County in favor of Randolph Murdaugh, III. Though they executed stipulations of dismissal and filed them in Hampton County, these stipulations were defective pursuant to Rule 41; despite Defendant Grady's efforts to circulate effective and fully signed Stipulations, counsel for the Plaintiffs now refuses to execute said stipulations, in an effort to keep venue in Hampton County.

In further support of Defendant Grady's contention that a Release of Randolph Murdaugh was intended, as set forth in the Affidavit of John H. Tiller, dated July 26, 2011 (attached hereto as EXHIBIT BB), Mr. Tiller requested that his client be included on the Release of September, 3 2010. His client was in fact included in this Release, and a settlement agreement was executed by all of the settling parties.⁶ This in and of itself expressly indicates his and his clients intent to be released as a party defendant from the litigation, having exchanged \$100,000 in valuable consideration to be released from the litigation. Plaintiff prepared this subsequent covenant in an effort to unilaterally withdraw the Release. This is precisely the same type of situation that the Court in Bumgardner was faced with, and the District Court there found that counsel could

⁵ This was written by hand by Plaintiffs counsel and was initialed by both Patrice and Gary Smart.

⁶ Defendant Grady only received a copy of the settlement agreement after mediation; he was never provided with a copy of the Stipulations of Dismissal and Release until February and March

not unilaterally withdraw such a document. Though Mr. Tiller acknowledges that the Covenant was forwarded to him in March 2011 and that the Covenant purports to rescind the Release, his affidavit in no way states that either he or Randolph Murdaugh (a) consent to rescind the prior Release or (b) that there was a mutual mistake of material facts so as to support rescission by the Court.⁷ Moreover, there was no additional consideration exchanged for such a subsequent document. In sum, the Covenant, whether considered effective or not, cannot change the fact that the action originally filed against Randolph Murdaugh, III has been unequivocally discontinued by way of even the covenant

of 2011, respectively, by way of searching the Court's file and receiving the Release in discovery from the Plaintiffs.

⁷ In Alderman v. Bivin, 233 S.C. 545, 552, 106 S.E.2d 385, 389 (1958) our Supreme Court held:

A contract may be reformed or rescinded, as the justice of the case may require, upon the ground of mistake, under these circumstances: (1) Where the mistake is mutual and is in reference to the facts, or supposed facts, upon which the contract is based; (2) where the mistake is mutual and consists in the omission or insertion of some material element affecting the subject-matter or the terms and stipulations of the contract, inconsistent with those of the prior agreement which necessarily preceded it; (3) where the mistake is not mutual, [but] unilateral, and has been induced by the fraud, deceit, misrepresentation, concealment; or imposition in any form of the party opposed in interest to the reformation or rescission, without negligence on the part of the party claiming the right; (4) where the mistake is not mutual, but unilateral, and is accompanied by very strong and extraordinary circumstances, showing imbecility or something which would make it a great wrong to enforce the agreement, sustained by competent testimony of the clearest kind.

Avoidance of a release on the grounds of mistake must be based upon a finding of unknown facts that were in existence and were not in contemplation of the parties when the settlement was consummated. Smother's v. U.S. Fidelity and Guar. Co. 322 S.C. 207, 470 S.E.2d 858 (Ct. App., 1996) (Availability of UIM coverage is a question of law, mistake as to which cannot support rescission) It is the general rule that a court of equity will not, where a mistake of law is disclosed, grant relief from the consequences thereof in the absence of fraud or undue influence. 27 Am. Jur. 2d Equity §37. Nor will relief be granted where the complaining party took measures to secure knowledge as to the state of the law and, being misinformed, placed himself in the prejudicial situation of which he later complains. 27 Am. Jur. 2d Equity §41. Everyone is presumed to have knowledge of the law and must exercise reasonable care *211 to protect his interests. Cf. Maw v. McAlister, 252 S.C. 280, 166 S.E.2d 203 (1969) (court refused to rescind release based on insurance adjuster's misrepresentations when party, an experienced businessman, did not exercise due care and read release prior to signing, but instead relied on the adjuster who was a stranger representing an adverse interest).

and thus, at a minimum, he must be disregarded as being a nominal defendant for purposes of the proper venue for this case to be tried.

The Release was effective when it was executed. Nothing has changed. The unilateral attempt by the Plaintiffs to cancel the settlement agreement and Release ought to be viewed for precisely what it is; ineffective under our law. Defendant Grady would ask that the Court compel the execution of the stipulations of dismissal and formally dismiss Randolph Murdaugh, III as a party defendant. Concurrently, Defendant Grady would respectfully request, on the grounds as outlined in his Motion to Transfer Venue and on the basis of the presumably immutable nature of deposition testimony of the Plaintiff Gary Smart as to his residence at the time the cause of action arose, to transfer venue for the trial of this case to Jasper County in accordance with the statutory and common law of South Carolina.

II. RANDOLPH MURDAUGH IS A NOMINAL DEFENDANT AND MUST BE DISREGARDED FOR PURPOSES OF VENUE OR DROPPED IN THE INTERESTS OF JUSTICE.

As things stand currently, there is not a single scenario by which the Plaintiff could have any right to relief against Randolph Murdaugh, III at the trial of this matter. There is no verdict that could be rendered by which he could be held liable, in any fashion. Not only have the Plaintiffs released him and promised not to sue him, they have also discontinued the action against him by way of a covenant not to execute. They agreed to dismiss him in the Release, but have simply not formally done so. Upon information and belief, both attorneys representing Defendant Randolph Murdaugh, III closed their files upon

the execution of the Release, and neither has in any substantial way participated in litigation or discovery since said time. As shown herein below, Randolph Murdaugh, III is indubitably what our State and Federal courts consider to be "nominal" or "immaterial" (as opposed to bona fide), and as interpreted under both jurisdictions, Randolph Murdaugh, III must be disregarded for purposes of the Motion to Transfer Venue.

When a "Covenant Not To Execute" has been entered into, covenanting tortfeasor is no longer a party to the litigation. Poston by Poston v. Barnes, 294 S.C. 261, 363 S.E.2d 888 (1987); See also Bumgardner v. Combustion Engineering, Inc. 432 F. Supp. 1289 (D.S.C. 1977)(District Court found a discontinuance of an action against a defendant by way of a covenant not to execute or other such settlement device makes a defendant nominal or immaterial and such defendant must be disregarded when evaluating jurisdiction.); Beaufort County School District v. United Nat'l Ins. Co., et al., 519 F.Supp.2d 609 (D.S.C., 2007) (Court found a distinct ground of removal existed where a party is alleged to be nominal and must disregard "nominal" parties who have no substantial interest in the litigation where no further liability could be imposed.)

Defendant Grady can conceive of no reasonable basis for believing that our state law would impose liability upon a defendant who has been released from the litigation. The Plaintiffs have attempted to unilaterally "fix" the problem of their execution of a Release and Covenant Not to Sue with Randolph Murdaugh, III by signing a covenant not to execute that purportedly rescinds the

prior settlement agreement with Randolph Murdaugh, III. While this Court ought to carefully scrutinize⁸ the subsequent Covenant Not to Execute, the ultimate result under any review of the record is apparent: there has been a discontinuance of the action as against Randolph Murdaugh, III. Thus, under the standards established by both our Federal and State Courts when reviewing forum manipulation vis a vis a nominal defendant, this Court must disregard such a nominal defendant and transfer venue in accordance with S.C. Code Ann §15-7-30. As explained in Defendant Grady's Motion to Transfer Venue, under the clear and unambiguous facts of this case and the clear and unambiguous language of the venue statute, venue is only proper in Jasper County. Should this Court not dismiss and/or disregard Randolph Murdaugh, III as a party defendant, the Plaintiffs will have effectively thwarted these Defendants substantial rights of removal (by virtue of the previously filed stipulation of damages) and their rights to place venue in Jasper County pursuant to S.C. Code Ann. §15-7-30, and will have done so in an inequitable fashion.

III. The Plaintiffs are judicially estopped from now claiming that Randolph Murdaugh is a party defendant.

Our Supreme Court in *Cothran v. Brown*, 592 S.E.2d 629 (2004) set forth the requirements for the application of judicial estoppel:

- (a) Two Inconsistent positions taken by the same party or parties in privity with one another;

⁸ See Poston by Poston v. Barnes, 294 S.C. 261, 363 S.E.2d 888 (1987) Our Supreme Court reminded the bar in South Carolina that it would carefully scrutinize settlement agreements that were essentially facades and that facilitate inequity.

- (b) The positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;
- (c) The party taking the position must have been successful in maintaining that position and have received some benefit;
- (d) The inconsistency must be a part of an intentional effort to mislead the court and the two positions must be totally inconsistent.

These requirements are easily met in this case.

As set forth in *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997), a Court should apply the doctrine of judicial estoppel to prohibit parties from taking clearly inconsistent factual positions in the same litigation; doing so prevents parties, such as the Smarts, from manipulating the integrity of the judicial system. The doctrine's function is to protect the integrity of the judicial process or the integrity of the courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. (*Id.*); *Quinn v. The Sharon Corporation*, 343 S.C. 411, 416, 540 S.E.2d 474, 476 (Ct. App.2000) (Anderson, J., concurring) ("A court must be able to rely on the statements made by the parties because truth is the bedrock of justice. Therefore, a litigant cannot 'blow both hot and cold.' Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements, or contentions made under oath, is prohibited from adopting an inconsistent posture in subsequent proceedings.") (citations omitted).

The Plaintiffs in this case are blowing hot and cold as to whether Randolph Murdaugh, III is a party defendant in a transparent effort to manipulate the integrity of our venue statute. By the very terms of the settlement agreement and Release and filed ineffective Stipulations of Dismissal, the Plaintiffs promised

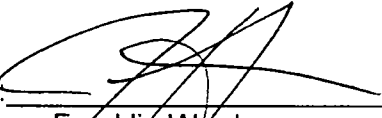
that, in exchange for only \$100,000.00, they "hereby release, forever discharge and promise never to sue...Randolph Murdaugh, III..." for any claims that might have arisen or arise out of the accident that occurred on December 22, 2007. (See EXHIBIT P, generally) Indeed, Plaintiffs' counsel and counsel for Randolph Murdaugh, III (Tiller) executed and filed Stipulations of Dismissal that, at a minimum, evidenced their intent that Randolph Murdaugh ought not remain a party in the litigation. It was only when Defendant Grady sent out stipulations of dismissal to correct the problem with the initial stipulations of dismissal that the Plaintiffs began taking the position that they will not execute such a document and that he must remain a party defendant. These actions are part and parcel to the inconsistent positions taken with respect to the damages in this case, and should be estopped accordingly.

CONCLUSION

For all of the foregoing reasons, Defendant Grady respectfully comes before this Court and would ask that the Court compel the parties to execute valid stipulations of dismissal and drop Randolph Murdaugh, III as a party defendant. In the alternative, Defendant Grady would ask that this Honorable recognize that he is nominal/immaterial, and disregard him for purposes of evaluating the Motion to Transfer Venue. Lastly, if the Court agrees to dismiss and/o disregard him, Defendant Grady would respectfully ask that the Court transfer venue to Jasper County in accordance with the statutory and common law of South Carolina.

RESPECTFULLY SUBMITTED,

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August 2, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. Perry M. Buckner and Hon. Carmen Tevis Mullen

RECEIVED
AUG 10 2011
SC Court of Appeals

Civil Action No.: 2009-CP-25-285

GARY SMART, ... Respondent,

-vs-

JAMES ALLEN GRADY, LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY
d/b/a BRANTLEY HAULING, RANDOLPH MURDAUGH, III,

of whom JAMES ALLEN GRADY is Appellant

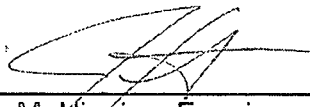
NOTICE OF APPEAL

James Allen Grady, appeals the Order of the Hon. Perry M. Buckner granting Plaintiff's Motion to Strike LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY d/b/a BRANTLEY HAULING, dated August 8, 2011 (ruled upon orally prior to trial; transcript will be forthcoming) and the Order of the Hon. Carmen Tevis Mullen denying Defendants Motions to Compel the Execution of Stipulations of Dismissal as to Randolph Murdaugh, III and to Transfer Venue, dated August 3, 2011. Defendant James Allen Grady also appeals the Order of the Hon. Carmen Tevis Mullen, dismissing with prejudice Case 2009-CP-25-284, dated August 3, 2011, by way of a separately filed Notice of Appeal in accordance with the Clerk of the Appellate Court's instruction of August 8, 2011.

Additionally, Defendant Grady has attached the Notice of Appeal previously filed in Hampton County on August 8, 2011 (inadvertently dated August 6, 2011) so as to, in part, clarify the urgency and importance of the appeals in this matter and in Case No. 2009-CP-25-284.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Court of Common Pleas

Hon. Perry M. Buckner and Hon. Carmen Tevis Mullen

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d/b/a BRANTLEY HAULING, RANDOLPH MURDAUGH, III,

of whom JAMES ALLEN GRADY is Appellant

PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing
Notice of Appeal upon all counsel of record by affixing same with proper postage
and placing same with the United States Postal Service on the 9th day of August,
2011 addressed to the following:

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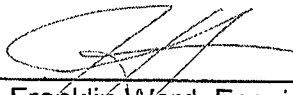
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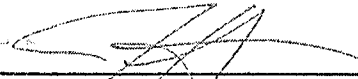
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. Perry M. Buckner and Hon. Carmen Tevis Mullen

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Civil Action No.: 2009-CP-25-284 **SC Court of Appeals**

PATRICE SMART, ... Respondent,

-vs-

JAMES ALLEN GRADY, LOUIS DANIEL MOFFETT, LYNWOOD BRANTLEY
d/b/a BRANTLEY HAULING, RANDOLPH MURDAUGH, III,

of whom JAMES ALLEN GRADY is Appellant

PROOF OF SERVICE

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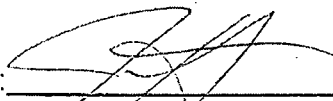
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August 9, 2011

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AUG 10 2011

SC Court of Appeals

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HAMPTON) CASE NO.: 2009-CP-25-0285

GARY SMART,)
PLAINTIFF,)
v.)
JAMES ALLEN GRADY, LOUIS DANIEL)
MOFFETT, LYNWOOD BRANTLEY,)
d/b/a BRANTLEY HAULING, AND)
RANDOLPH MURDAUGH, III,)
DEFENDANTS.)

APRIL 4TH, 2011
HAMPTON, SOUTH CAROLINA
BEFORE THE HONORABLE CARMEN T. MULLEN, JUDGE.

APPEARANCES:

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Rebecca H. Hill
Official Court Reporter

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1 **THE COURT:** All right, y'all. I can tell you that I
2 have only read probably the first five pages of the
3 Memorandum for the Motion to Strike. What I need for y'all
4 to do for me, Mr. Ward, I certainly understand about the
5 wreck. Tell me what each of the defendants allegedly did.
6 I somewhat understand about the wreck, but I guess I'm
7 having a hard time understanding -- you've got the ATV that
8 fell off of a trailer, and then you also have an 18-wheeler
9 involved, and I guess my question is, was that the trailer
10 or no? I'm assuming it wasn't, but I don't know.

11 **MR. WARD:** It was not, well -- yes and no, Judge.

12 **THE COURT:** Tell me how -- help me understand how this
13 happened. I understand we have one of the Murdaugh's
14 pointing their car with the headlights toward oncoming cars
15 is what I gather.

16 **MR. WARD:** That's correct, Judge.

17 **THE COURT:** That's what I understand.

18 **MR. WARD:** Again, I'm Jason Ward, along with Pat
19 Higgins. We represent the defendant, James Allen Grady in
20 the case. And Judge, to give you a bit of background, and
21 I'll go through the facts as well, just so that it's
22 abundantly clear. Respective to the accident, Mr. Grady was
23 driving down Robertsville Loop down in Jasper County and he
24 had a trailer and an ATV. The ATV fell off the back of the
25 trailer. It was about seven o'clock at night. And the 18-

1 wheeler comes along and runs over this ATV, okay? That's
2 the first accident. Everything stops. Mr. Grady comes back
3 to the scene of the accident. The truck driver, Louis
4 Daniel Moffett, puts on the flashing lights on the back of
5 the 18-wheeler. They are working to clean up everything.
6 During this interim, Randolph, and I think, Alec Murdaugh,
7 pull up on the side of the road in their car and again, it's
8 about seven o'clock at night and they have their headlights
9 on, and they're facing the opposite direction into oncoming
10 traffic.

11 THE COURT: They pull over to the outside of the road;
12 is that right?

13 MR. WARD: That's correct, Judge.

14 THE COURT: Okay.

15 MR. WARD: And they get out; they're kind of assisting
16 the situation and ---

17 THE COURT: Is this a two-lane highway?

18 MR. WARD: It's a two-lane highway, yes, ma'am.

19 THE COURT: Okay.

20 MR. WARD: And about five to seven minutes go by, and
21 then Mr. Smart, Gary Smart, comes barreling around the
22 corner and slams into the back of the 18-wheeler.

23 THE COURT: Okay.

24 MR. WARD: At any rate, runs into the back of the 18-
25 wheeler and I think he fractures his hip as a result of the

1 accident, and he has approximately 75 to \$100,000 of medical
2 bills.

3 THE COURT: Okay.

4 MR. WARD: Provide a little bit of overview,
5 procedurally. The case was initially filed by Alec
6 Murdaugh. He represented Patrice Smart and Gary Smart,
7 initially.

8 THE COURT: And was Ms. Smart in the car, too?

9 MR. WARD: She was not. She has a loss of consortium
10 claim.

11 THE COURT: Okay.

12 MR. WARD: Alec represents both of them. Patrice files
13 a stipulation of damages, limiting her damages, because of
14 diversity jurisdiction existed in the case.

15 THE COURT: This is just for Patrice for the loss of
16 consortium?

17 MR. WARD: That's correct.

18 THE COURT: Okay.

19 MR. WARD: And she said her claim would never exceed
20 \$75,000, and in the event that a judgment is rendered at
21 trial, they would only collect seventy-five.

22 THE COURT: Right.

23 MR. WARD: Well, Alec discovers at some point in time
24 that he's going to be a witness in the case and withdraws as
25 counsel, consent order of dismissal signed by Your Honor.

1 The case goes away and that was the Jasper County case.

2 Now, a month later, Mr. Tinsley comes in and represents
3 both Patrice Smart, for loss of consortium claim, as well as
4 Gary Smart for ---

5 THE COURT: Now, I understand Alec and Randolph, or
6 just Randolph, is it?

7 MR. WARD: Yes, and then they named Randolph Murdaugh -
8 --

9 THE COURT: He was the driver of the vehicle, I'm
10 assuming?

11 MR. WARD: Again, he pulled over to the side of the
12 road ---

13 THE COURT: But he's the driver of his vehicle that had
14 the headlights, so they named Randolph ---

15 MR. WARD: That's correct.

16 THE COURT: --- and thus we have Hampton jurisdiction.

17 MR. WARD: That's correct, Judge.

18 THE COURT: Gotcha. Okay.

19 MR. WARD: At that point in time, the co-defendant,
20 Brantley Hauling, removed the case to Federal Court arguing
21 fraudulent enjoinder. Judge Blatt remanded it back down.
22 Some discovery started. We took the depositions of the
23 plaintiff and the defendants in the case, and fast-forward a
24 little further. Some offers of judgment were made,
25 specifically, Patrice Smart made an offer of judgment for

1 \$500,000, trying to get the Court to apply that 8 percent
2 per annum should a verdict come back in her favor.

3 THE COURT: Okay. Was that based anything on policies
4 that y'all have, too, or no?

5 MR. WARD: No, Your Honor.

6 THE COURT: And I'm just -- okay.

7 THE COURT: Gary Smart files an offer in judgment for
8 \$2.75 million dollars, okay? Fast forward a little bit more
9 and we're in 2010, August of 2010, the case goes to
10 mediation.

11 THE COURT: Okay.

12 MR. WARD: At that point in time, that's when our
13 motions really become pertinent and relevant. And to start,
14 Judge, we made two motions: a motion to change venue and a
15 motion to strike the stipulations of dismissal and to reform
16 the settlement agreement.

17 Now, I've been informed by counsel for the plaintiffs
18 that he consents and says that the stipulations of dismissal
19 are ineffective. They were not signed by everybody. We
20 didn't sign off on it. Ms. Dean didn't sign off on it, nor
21 did ---

22 THE COURT: So, it wasn't in compliance with 41(a)?

23 MR. WARD: That's correct, Judge.

24 THE COURT: And they agree to that?

25 MR. WARD: And they agree to that, which essentially

1 moots our motion to change venue back to Jasper County.

2 THE COURT: Okay.

3 MR. WARD: So those motions do not need to be heard.

4 The motion that we are here today about is the motion to
5 reform that settlement agreement, and our argument is pretty
6 straight forward. We are asking the Court, in its equitable
7 powers, to utilize judicial estoppel and basically hold
8 their feet to the fire with respect to that stipulation of
9 damages that they filed in 2008.

10 THE COURT: Do you have a written settlement agreement?

11 MR. WARD: There is a written settlement agreement.

12 THE COURT: I apologize; that I haven't seen. I'm not
13 sure if it's an exhibit to one of the first ones, but let me
14 go ahead and look really quick.

15 MR. WARD: It is, Judge.

16 (BRIEF PAUSE WHILE THE COURT LOOKS FOR THE SETTLEMENT
17 AGREEMENT.)

18 MR. WARD: Just to make the record clear, we received
19 that settlement agreement after mediation, but also in the
20 course and scope of discovery.

21 THE COURT: I need a copy of it. I'm not seeing it
22 among this -- does anyone have an extra copy of it? If it's
23 in this packet, why don't you come up and find it, Jason.

24 MR. WARD: I apologize, Judge.

25 THE COURT: No, no, no. I'm sure it's attached

1 somewhere.

2 MR. WARD: It is. I'll get it real quick for you.

3 (BRIEF PAUSE IN THE COURTROOM WHILE THE COURT LOCATES
4 THE DOCUMENTS.)

5 Here you go, Judge. That's the settlement agreement,
6 the stipulations of dismissal, as well as the release.

7 THE COURT: Gotcha. All right. So you want to reform
8 the settlement agreement how?

9 MR. WARD: We want to reform the settlement agreement
10 basically to make Patrice Smart's previous position that she
11 clearly established was \$75,000 or less. What happened in
12 the settlement agreement, as you will see up there, is the
13 case settled with the co-defendants for \$1.1 million
14 dollars.

15 THE COURT: All right. Which co-defendant?

16 MR. WARD: Louis Daniel Moffett and Brantley Hauling.

17 THE COURT: Moffett was the driver and he was hauling
18 for Brantley Hauling?

19 MR. WARD: That's correct, Judge.

20 THE COURT: Okay. Okay.

21 MR. WARD: And then Randolph Murdaugh settled out of
22 his policy for \$100,000.

23 THE COURT: Okay. And that's in the settlement
24 agreement?

25 MR. WARD: That's correct, Judge.

1 THE COURT: And the only person that didn't settle at
2 that time was James Allen Grady?

3 MR. WARD: That's correct.

4 THE COURT: He was driving the truck with the ATV,
5 correct?

6 MR. WARD: That's correct.

7 THE COURT: All right. Gotcha.

8 MR. WARD: And as you'll see in the terms of that
9 settlement agreement, they allocated \$1.09 million dollars
10 to the loss of consortium claim, and \$10,000 to Gary Smart's
11 negligence claim.

12 THE COURT: The practical effect of that is -- is it
13 for tax purposes, or what is it for?

14 MR. WARD: The practical effect is obviously post-
15 verdict, with respect to any sort of equitable setoffs.

16 THE COURT: Okay. I understand that.

17 MR. WARD: That's implicit in what the settlement was.
18 But all we're here today about is simply to get the Court,
19 because these are the same parties, same issues, same
20 litigation. We just want the Court to hold the people to
21 what they said their stipulation was, and what the value of
22 their claim was.

23 THE COURT: As to Patrice?

24 MR. WARD: As to Patrice, that's correct.

25 THE COURT: The \$75,000 versus the 1.09 million?

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1 MR. WARD: That's correct. Just to have the Court take
2 a look at that settlement agreement. There's no prejudice
3 to them by reforming it, because that's what she said her
4 claim was worth, and that will actually help speed up the
5 process when it comes time for trial.

6 THE COURT: You represent Grady, correct?

7 MR. WARD: That's correct, Judge.

8 THE COURT: Okay. So you want only to limit her claim
9 to \$75,000, but additionally ---

10 MR. WARD: And to -- right, and to ---

11 THE COURT: And to realign the allotment, is what
12 you're saying?

13 MR. WARD: That's correct, Judge.

14 THE COURT: So you'd have a larger setoff?

15 MR. WARD: That's correct.. As a practical effect, yes,
16 Judge.

17 THE COURT: Okay. And was your client and your
18 adjuster, all of them, at the mediation as well? Did you
19 all -- was this a tele-mediation?

20 MR. WARD: Yes, Your Honor.

21 THE COURT: Okay.

22 MR. WARD: Just so it's clear, also, we have offered
23 \$300,000 via an offer of judgment to resolve the matter as
24 well.

25 THE COURT: Is that your policy?

1 MR. WARD: Yes, Your Honor.

2 THE COURT: Okay. So, just so I'm clear, how much
3 total did Patrice get from Moffett and Brantley Hauling,
4 1.09 in that settlement; and what did Mr. Smart get, Gary
5 Smart?

6 MR. WARD: Ten thousand dollars.

7 THE COURT: That's total from both Hauling and from
8 Moffett?

9 MR. WARD: Yes, five thousand ---

10 THE COURT: It's the same policy, right, but is it the
11 same policy or am I ---

12 MR. WARD: Yes, Your Honor.

13 THE COURT: Okay, sorry, okay.

14 MR. WARD: Five thousand dollars from Randolph
15 Murdaugh's policy and five thousand dollars from Brantley
16 Hauling's policy.

17 THE COURT: Thank you, okay.

18 MR. WARD: And as you'll see, also in the settlement
19 agreement, Judge, and this is kind of runs to both the
20 equitable powers of the Court and the unfairness and the bad
21 faith that we think is apparent in the settlement agreement.
22 You know, the plaintiffs have agreed to indemnify the
23 defendants before any trial happens, before any contribution
24 action happens, they've agreed to indemnify the defendants
25 that settled out at this mediation in the event that there's

1 an action against them later on; specifically, as it relates
2 to the allocation of the proceeds; which means they
3 contemplated at that point in time, problems with the
4 allocation. And obviously, again, some of this stuff is
5 post-verdict, and we understand that, but as of right now,
6 there is the practical effect of this is marring the
7 integrity of the judicial process, because when it comes
8 time for trial, Patrice Smart's case is going to go first.

9 THE COURT: Okay.

10 MR. WARD: Okay.

11 THE COURT: Why is that? Is it just because it's first
12 up on the docket?

13 MR. WARD: That's correct, Judge.

14 THE COURT: And has there not been a motion to
15 consolidate the cases?

16 MR. WARD: We did actually move to consolidate, but it
17 was consolidated only for purposes of discovery and
18 plaintiffs would not consent to consolidate for purposes of
19 trial.

20 THE COURT: Who was that in front of, me or Judge
21 Buckner?

22 MR. WARD: I'm not sure, Judge.

23 THE COURT: So you made a motion to consolidate and
24 whoever the judge was that heard it, said no?

25 MR. WARD: Yes, Your Honor.

1 THE COURT: And Patrice's case is going first, why,
2 again?

3 MR. TINSLEY: It's not, Your Honor.

4 THE COURT: I guess, the only reason why I ask that is
5 one is case number 284 and Patrice's is 285; so as far as I
6 would think a regular docket is concerned, his should go
7 first.

8 MR. WARD: Hers is 284 and his is 285.

9 THE COURT: Well, then, you guys have it wrong in your
10 settlement agreement.

11 MR. WARD: That's incorrect. It's 284 is Patrice's.

12 THE COURT: It's incorrect?

13 MR. WARD: Yes, Your Honor.

14 THE COURT: Okay.

15 MR. WARD: And that's the crux of our argument, Judge.

16 THE COURT: Okay.

17 MR. WARD: Thank you for hearing us.

18 THE COURT: Let me just ask you, Mr. Ward, could you
19 not make a motion to have Mr. Smart go first, because based
20 on whether or not there is any liability, that would, in
21 fact, determine whether or not a consortium case should go
22 forward?

23 MR. WARD: Well ---

24 THE COURT: I mean, I know what your basis would be and
25 I don't know under what rule it would be, but ---

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1 **MR. WARD:** I think the Court has the inherent power to
2 do something like that, but again, there is a statutory loss
3 of consortium action, in and of itself, which is separate
4 and independent from Gary Smart's claim, and it's just the
5 manner in which they chose to file those cases. And
6 obviously, when we get to trial, we're certainly not
7 concerned about getting -- even if there was a verdict of \$5
8 million dollars in Patrice Smart's case, there's a
9 stipulation.

10 **THE COURT:** Exactly.

11 **MR. WARD:** So, at the practical effect of having that
12 \$1.09 million dollar setoff, there is no -- it's
13 meaningless.

14 **THE COURT:** Okay.

15 **MR. WARD:** And so, that's why we're here today, Judge.

16 **THE COURT:** Okay.

17 **MR. WARD:** Thank you, Judge.

18 **THE COURT:** Mr. Tinsley?

19 **MR. TINSLEY:** Yes, Your Honor. Judge, first of all ---

20 **THE COURT:** Can I ask you one question, first?

21 **MR. TINSLEY:** Yes.

22 **THE COURT:** Why is there any problem with the plaintiff
23 indemnifying certain defendants for any excess verdict?

24 **MR. TINSLEY:** They're not indemnifying for any
25 excess -- I don't understand -- they were indemnifying if

1 they get sued for contribution. I mean, it's ---

2 THE COURT: Oh, I apologize, and you're right. I mean,
3 what is wrong with that?

4 MR. TINSLEY: Nothing. There's absolutely nothing
5 wrong.

6 THE COURT: I mean, we do that all the time in
7 construction cases. And I can't see that being a problem.

8 MR. TINSLEY: No, ma'am.

9 THE COURT: Okay.

10 MR. TINSLEY: And you hit the nail on the head. When
11 the mediator walks downstairs and says, "Okay, guys, this is
12 what is about to happen. Everybody is settling and you're
13 going to be left and they don't offer their coverage and
14 they don't participate in the settlement, I think this is
15 vastly different than if you look at Rutland v. S.C.D.O.T.;
16 if you look at Ward v. Epting; if you look at Welch v.
17 Epstein, where the settling defendants and the non-settling
18 defendants aren't there. They're not a party to mediation.
19 This is something that is going on. They're there, they can
20 participate, but they chose not to participate at that point
21 in time. But let me back up. The stipulation of dismissal
22 is such a farce. That case was dismissed. It was dismissed
23 without prejudice, and when the cases that I filed, were
24 filed here in Hampton County, they were removed; they went
25 to Federal Court. There's an Order from Judge Blatt, and

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1 what his Order says is for all the reasons I said on the
2 record. Now, I've requested the record and I'm going to get
3 the transcript of all the reasons, but one of the reasons he
4 said was that once the initial action got dismissed, then
5 that ended it, and anything related to those filings was
6 also ended. The stipulation is not -- they're not
7 judicially estopped.

8 It's like Judge Blatt said, used to be we used the loss
9 of consortium claim for discovery, and that's exactly what
10 happened in this case. They filed it; they saw that they
11 couldn't get the case resolved. They dismissed it and I got
12 involved and I filed the cases. The cases come back and we
13 mediated pursuant to the rule in good faith. They, on the
14 other hand, didn't even have their coverage that they turned
15 around after the mediation, write a letter and say, "We've
16 now had a chance to review the file and we're going to
17 tender our coverage." They didn't mediate the case in good
18 faith.

19 But the real issue, Your Honor, is if you will look at
20 -- and I've told them this, I don't care if they stand up at
21 the time the verdict comes back and they argue about a
22 reallocation. If you look at the cases: Rutland, which is
23 the most recent. It's a 2010 Court of Appeals decision 390,
24 S.C. 78; if you look at Ward v. Epting, which is 290, S.C.
25 547, that's a 1986 Court of Appeals; and then Welch v.

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1 Epstein, which was the Court of Appeals 342, S.C., 279.
2 This is all on the backside of the verdict. If I get a \$5
3 million dollar verdict for Gary Smart who is disabled and
4 got \$2 million dollars in actual hard number of damages that
5 we can put up, forget about the pain and suffering and
6 fighting with his wife. Who is going to ever say that a
7 million dollars for her consortium claim is too much?
8 Nobody will. And that's exactly what the Courts have
9 repeatedly held. In Rutland, the Court set aside and
10 reallocated the settlement because there was absolutely no
11 evidence of a survival plan. There was a survival wrongful
12 death and they said, "We don't recognize pre-impact fright."
13 Therefore, there was no survival claim, and based on that,
14 we're going to reallocate.

15 In Ward v. Epting, the exact same thing; except in Ward
16 v. Epting, this was a medical malpractice case and the
17 plaintiff came around in the recovery room, and the Court
18 held -- the record contains evidence from testimony of Dr.
19 Epting, and the recovery room nurse, that Mrs. Ward was
20 responding to directions given to her following the surgery.

21 If there is any evidence from which a jury could
22 reasonably find conscious pain and suffering, and factually
23 she was presented, and that was the standard of this test.
24 Is there a factual issue that there is a claim, because the
25 non-participating defendant doesn't get the benefit of

1 coming back Monday morning quarter-backing what everybody
2 else did when they had an opportunity to participate.

3 We find there was sufficient evidence to present a jury
4 question of conscious pain and suffering. A non-settling
5 defendant is entitled to a pro tanto reduction of a judgment
6 in the same cause of action. The Order complied with powers
7 in reducing the wrongful death verdict. We find no merit in
8 this exception, and their exception was they needed to
9 reallocate exactly what they're arguing here.

10 The other case is Welch; and again, in Welch,
11 absolutely zero this guy was comatose and he was comatose
12 for the last three days of his life, and they said the only
13 amount of damages he can claim under pain and suffering is
14 medical expenses, \$28,000, and I think the jury found
15 \$450,000, or something along those lines. They reallocated
16 the balance, but those are the cases and those are all --
17 all those decisions are made after the evidence has been
18 produced at trial.

19 Now, when we settled the case, it was the intent to
20 completely settle Patrice Smart's. I had told Pat that
21 we're going to do a stipulation of dismissal. I think hers
22 will settle. Now, they might not want hers dismissed. They
23 might want to argue -- I don't why, but that was the intent.
24 That was completely settled. And then we're going to try
25 Gary Smart's case. We will put in whatever evidence. They

1 will testify the way they will and if the Court hears all of
2 the evidence and all of the damages, and thinks there should
3 be reallocated, because it's unfair and somehow they can
4 create a factual question. In other words, if there is no
5 question that she couldn't recover, the amount that was
6 settled, then I guess it would be reallocated at that time;
7 but today, it's simply premature, Your Honor.

8 **THE COURT:** Let me ask you this, if for some reason,
9 Gary Smart, there was a defense verdict as to Grady, then
10 that might be an argument of truth, Patrice Smart might have
11 a loss of consortium claim.

12 **MR. TINSLEY:** If there's a defense verdict for Gary
13 Smart, they won't care. It will be over with.

14 **THE COURT:** It's done, right?

15 **MR. TINSLEY:** It's done.

16 **THE COURT:** Okay. So, how is it not a question of fact
17 whether or not she's allowed a consortium claim?

18 **MR. TINSLEY:** Well, I think that she absolutely has a
19 loss of consortium claim.

20 **THE COURT:** Right, and what I'm saying is, who are we
21 to put a value on it? I mean, it's a jury issue, is my
22 question. I guess, one other question, and I could be
23 completely off base, but a settlement agreement is also a
24 negotiation. It's a deal or contract between parties, and
25 unless it, I guess, and your argument would be is if it

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1 perpetuates a fraud on a Court ---

2 MR. TINSLEY: And if you look at these cases - and I
3 only have one copy, but I'm happy to make copies if you
4 would like.

5 THE COURT: Oh, no, I've actually read -- I know I've
6 read the first one.

7 MR. TINSLEY: But the fraud on the Court was that there
8 was no survival claim.

9 THE COURT: Right.

10 MR. TINSLEY: And so you couldn't put \$250,000 you got
11 from GM on a survival claim, even though GM paid you
12 \$250,000, because there was absolutely no evidence. And the
13 DOT was there and objected, and it was in Diane Goodstein's
14 Order that they were going to get to raise that later at
15 trial.

16 THE COURT: Okay. Who was the mediator?

17 MR. TINSLEY: John Austin.

18 THE COURT: And Mr. Higgins, were you there for it?

19 MR. HIGGINS: Yes.

20 THE COURT: And did you have someone from your
21 insurance company there in compliance with the rules ---

22 MR. HIGGINS: Absolutely, yes. We offered \$100,000.

23 THE COURT: So that person clearly understood possible
24 ramifications?

25 MR. HIGGINS: Absolutely.

1 THE COURT: I'm just looking at it, y'all ---

2 MR. HIGGINS: Yeah, we had everybody there, Your Honor.

3 THE COURT: Okay. I know between Duke Highfield, John
4 Tiller, I don't think there would be any question - I'm sure
5 you did, put your carrier on notice of ---

6 MR. HIGGINS: Oh, yeah, we had it covered, Your Honor,
7 yeah.

8 THE COURT: Okay. Okay. Anything else we need to
9 argue?

10 MR. WARD: I don't have anything further, Judge. It
11 speaks for itself, and again, we're moving in equity today
12 under judicial estoppel just to hold their feet to the fire
13 as to specifically what they stipulated to.

14 Again, the case law is really clear, the stipulation is
15 binding on that party as the same party, same accident, same
16 litigation. That's what we have here and they can't come
17 back later and try to change that. So, thank you, Judge.

18 THE COURT: Well, the stipulation is binding, but not
19 necessarily a settlement, is it? I mean, it's binding
20 before you go to trial.

21 MR. TINSLEY: Your Honor, the stipulation is not of the
22 same litigation. And the law of the case in this case is
23 that whatever was filed in the first case is over ---

24 THE COURT: Oh, yes, you're correct. The stipulation
25 was only in the first case ---

1 MR. TINSLEY: Yes, ma'am.

2 THE COURT: --- when Alec filed it, because I noticed
3 the stipulation was under Alec's signature, which he was the
4 first attorney and dismissed the case when he realized he
5 was going to be a witness. Okay. All right. Anything
6 else?

7 MR. WARD: No, Your Honor.

8 MR. TINSLEY: No, Your Honor.

9 THE COURT: Mark, you need to go ahead and draft me an
10 Order allowing him to re-raise it certainly if he -- for
11 trial, if there is a verdict. Okay?

12 MR. TINSLEY: Yes, ma'am.

13 THE COURT: All right. Anything else?

14 MR. WARD: No, Your Honor.

15 MR. TINSLEY: No, Your Honor. Thank you.

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STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON

COURT OF COMMON PLEAS
2009 CP 25 00285

GARY SMART,

Plaintiff

VS

JAMES ALLEN GRADY, et al.,

Defendant

TRANSCRIPT OF RECORD

AUGUST 3, 2011
HAMPTON COUNTY,
SOUTH CAROLINA

B E F O R E:

HONORABLE CARMEN T. MULLEN, Judge.

Deborah E. Everett
Official Court Reporter

 ORIGINAL

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Attorney for the Defendant

Patrick M. Higgins, Attorney at Law
Attorney for the Defendant

I N D E X

NO WITNESSES INTRODUCED

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EXHIBITS

NO EXHIBITS INTRODUCED

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1 (Whereupon Hearing began at approximately 10:30 A.M.)

2 THE COURT: Good morning, gentlemen.

3 MR. JASON WARD: Good morning. This is a
4 motion to enforce a settlement agreement, Your Honor.

5 THE COURT: Can you give me what the
6 background on this is? Whenever you are ready, Mr.
7 Ward.

8 MR. WARD: May it please the Court?

9 THE COURT: Yes, sir.

10 MR. WARD: Your Honor, Jason Ward, I'm here
11 representing James Allen Grady in this case. Would you
12 like just a factual background ---

13 THE COURT: Just real brief ---

14 MR. WARD: Okay. December 22nd, 2007, our
15 client was out hunting in Ridgeland Pineland South
16 Carolina, right off the Roberstville loop and he was
17 driving down 321. It was about six-thirty at night.
18 And he somehow, managed not to secure the ATV that was
19 on his trailer. The ATV falls off the back. An
20 eighteen wheeler comes by and slams into the ATV. Mr.
21 Grady turns around and comes back to the accident
22 scene.

23 During this interim, apparently five to seven
24 minutes go by, I think Alec and Randolph ---

25 THE COURT: Stop by ---

1 MR. WARD: Yeah, they happen to stop by trying
2 to help and umm -- so they are helping out at the
3 scene. They direct a couple of cars by and then all of
4 a sudden Mr. Smart comes around the corner, about
5 fifty-two, fifty-five miles an hour and barrels into
6 the back of this eighteen wheeler.

7 So he gets injured. He has dislocated --
8 dislocates his hip and it cracks -- it's a substantial
9 injury.

10 THE COURT: Okay.

11 MR. WARD: At any rate that's the facts of the
12 case and Judge, we really have three motions in front
13 of you today. Two of the three which can be handled in
14 the same argument. And that's our motion to compel the
15 execution of stipulations for dismissal pursuant to
16 Rule 41 and Rule 21. But also we've got a motion to
17 consolidate. These cases are -- Patrice Smart's case
18 is case is 284 on the trial court roster. Case 285,
19 Gary Smart's case, obviously he's got to establish the
20 tort in Gary Smart's case. It just doesn't make a
21 whole lot of sense to try her case first and then try
22 Gary Smart's case second ---

23 THE COURT: Her case is consortium?

24 MR. WARD: It's a consortium case. We've got
25 a motion to consolidate those cases together for a

1 couple of different reasons, which I'll get into in a
2 minute. We've got that and then we've got this motion
3 to compel the execution of stipulations dismissal and a
4 motion to transfer venue to Jasper County.

5 THE COURT: Okay.

6 MR. WARD: And I think it will probably be
7 best for purposes of argument and cleanness to handle
8 the bigger motion first and then motion to consolidate
9 is a quick argument is a quick argument.

10 THE COURT: Okay.

11 MR. WARD: The motion to compel the execution
12 of the stipulation of dismissal, I submitted it -- a
13 brief to the Court that I memoed to the Court and
14 overnighted last night -- I'm not sure if you got it or
15 not. I overnighted a copy of our -- I guess it was a
16 pretty substantial document which was why I couldn't
17 get it to you any other way but at any rate, this is
18 what happened, Your Honor.

19 Back in October of 2010, the Plaintiff's and two
20 of the other Defendants that were involved in this
21 case, Randolph Murdock and Brandon Allred, settled out
22 of court in mediation.

23 THE COURT: Okay.

24 MR. WARD: And in October 2010, unbeknownst to
25 us, there was a release executed. In that release it

1 said they were going to execute stipulations dismissal
2 to get rid, with prejudice of Randolph Murdock and
3 Brandon Allred.

4 Your Honor, I didn't find out about this until
5 February of 2011 that there were, in fact, stipulations
6 of dismissal had been filed in the clerks' office. I
7 found out after talking with Ben Traywick. At any
8 rate, I came up here and pulled the stipulations of
9 dismissal and sure enough they had come from Duke
10 Cottfield in Charleston -- they were only signed by Mr.
11 Tinsley and Mr. Tiller, who represented Randolph
12 Murdock. None of the other lawyers who were involved
13 in the case had signed those documents. Under Rule 41
14 -- and if they were ineffective I think that was when
15 we actually came to argue last time. Plaintiffs'
16 counsel conceded that they were ineffective. We didn't
17 even argue the motion.

18 THE COURT: Okay.

19 MR. WARD: With that having been said, Your
20 Honor, all we want done is exactly what they had agreed
21 to do in the release. And under Rule 41 it's very
22 clear, you've got to have everybody's signature on the
23 documents to make it an effective stipulation of
24 dismissal. That's all we want. That's it. That's our
25 argument. With respect to compelling the execution of

1 stipulations of dismissal.

2 THE COURT: Okay. They were not signed,
3 correct?

4 MR. WARD: They were not signed.

5 THE COURT: Okay. Let's take up this first.

6 MR. MARK TINSLEY: First of all, there was a
7 document that was drafted by Randolph Jordan that
8 rescinded the release that he has attached to his
9 motion. I have filed the affidavit of John Tiller. It
10 indicates that the release that was drafted by Ben
11 Traywick was rescinded as to Randolph Murdock and a
12 covenant became an agreement between these parties.
13 That is the only agreement between these parties is
14 this covenant.

15 THE COURT: Okay.

16 MR. TINSLEY: Now, we argued this motion --
17 this motion, as well as the motion to transfer venue
18 was filed on March the 14th, on the same grounds, the
19 exact same argument. At the time -- what's goin' on
20 here Judge, is initially they wanted to -- the jury to
21 apportion all among the defendant's that's in this --
22 named in the law suit, now here at the last minute,
23 they've changed their mind and they want to transfer
24 venue. The motion they one, was never filed an
25 answered. Two, this case has been pending for two and

1 a half years. Three, they made the motion and they
2 withdrew it.

3 THE COURT: Made motion to transfer venue?

4 MR. TINSLEY: Yes ma'am. It was filed March
5 14th, 2011. This motion was filed July the twenty --
6 I don't have clocked copy of it but this motion has
7 been filed the last couple of weeks.

8 MR. WARD: July 7th.

9 MR. TINSLEY: At any rate, it's the same
10 basis. Clearly, the issue is whether or not Randolph
11 is a defendant in this case. He is a defendant in
12 this case.

13 THE COURT: The only thing he agreed to was a
14 covenant, right?

15 MR. TINSLEY: He is still a defendant. And
16 what they argue is, at least in their agreement, is
17 that I can't unilaterally change the release to a
18 covenant. I didn't do it. The affidavit of John
19 Tiller makes it clear that John Tiller did it. That is
20 the agreement between the parties. It was discovered
21 Patrice Smart had under insured coverage with State
22 Farm. Fifty thousand dollars under insured coverage.

23 The coverage was not in her last name. So we went
24 and immediately checked with State Farm. They had it
25 under her maiden name. They said there was no UI

1 coverage. We didn't discover this until UI coverage
2 until after this was done and that's why it was
3 rescinded. John Tiller, Randolph Murdock's lawyer,
4 agreed to this ---

5 THE COURT: Okay.

6 MR. TINSLEY: End of this discussion. End of
7 this motion. Now, consolidation is the next part. We
8 had settled Patrice Smarts' case in full. At the last
9 hearing I stood up, and he's attached a transcript, it
10 settled in full. There is no loss of consortium claim.
11 It's over with. They don't want it dismissed because
12 they think that somehow affects the ability to argue on
13 the backside that the Judge can't reallocate under some
14 theory of equitable reallocation of the settlement.

15 I've agreed that if the Judge is going to do that,
16 whether it be Judge Buckner or some other Judge, at the
17 end of the trial we don't have to try Patrice Smarts'
18 claim. I've asked the Court to dismiss the claim.
19 They can't stop me from dismissing that claim. They
20 don't have any prejudice and this is dismiss it with
21 prejudice. It's over with. And I agreed and I'll
22 agree right now -- I don't agree that the law allows
23 for equitable reallocation of this case. But if it
24 does -- if the Court concludes that is does after the
25 trial of this case, I don't need that case pending ---

1 THE COURT: (talking over Mr. Tinsley)...Okay,
2 okay. Mr. Ward.

3 MR. WARD: Yes, Your Honor. I think that
4 number one the biggest thing is the release is still in
5 effect. The affidavit of John Tiller in no way says
6 there was a mutual mistake made. It in no way says he
7 consents to rescinding. That's incredibly important.

8 Moreover, we didn't see the copy of that covenant
9 not to execute til July 7th. That's exactly when we
10 filed this motion to change venue. There is no
11 question we filed the motion to change venue back in
12 April. We are trying to figure whether or not they
13 considered the plaintiff's -- whether or not they
14 considered Randolph Murdock to be a party defendant in
15 this case.

16 Clearly, I think -- I sent some stipulations of
17 dismissal to really see whether or not Randolph was, in
18 fact, going to be a party defendant in the case June
19 22nd. I received one signed copy back from Erin Deane,
20 who also represents Randolph Murdock in the case.
21 Received that back. That's all in my brief.

22 I'd like to say as far as putting us on notice and
23 withdrawing the motion, we have absolutely every right
24 to withdraw a motion without prejudice. Nobody said it
25 was with prejudice. Moreover, it's not been apparent

1 that Mr. Murdock is, what we are determining, a nominal
2 defendant, not a fraudulent and joined defendant, a
3 named nominal defendant. That's the second part of my
4 argument, Your Honor.

5 Whether there is a release or whether there is a
6 covenant doesn't make any difference at the end of the
7 day. The reason is simply this. There is no outcome
8 at trial that is going to place Mr. Murdock or his
9 insurance carriers in any shape, fashion, or form,
10 liable for any verdict that's rendered against him.

11 Under Bumgardner versus Combustion Engineering,
12 which I'm sure you are familiar with, Judge Chapter,
13 they contracted with Mr. Motley and Terry Richardson,
14 they've got a covenant not to execute with one of the
15 Asbestos's case and in-state defendant, covenant to not
16 execute, they discovered it later on. They said, he
17 said it very clearly, that's a nominal defendant and I
18 must disregard him for purposes of, not federal
19 jurisdiction, and I understand that, but the context of
20 the South Carolina state law, and I've provided a copy
21 of this case to Your Honor. It's a 1919 case. Rankin
22 Lumber versus Gravely.

23 In that case, the Supreme Court of South Carolina
24 affirmed this concept of what a nominal defendant is
25 for purposes of a motion to transfer venue. Same exact

1 analysis. If there is no outcome at trial, whether
2 there be any verdict at trial, there is no outcome that
3 is going to affect that liability of that defendant.
4 They are not a bonafide defendant. If they are not
5 considered by the Court to be nominal they must be
6 disregarded for purposes of venue.

7 And Judge again, we don't think this covenant not
8 to execute and this UIM argument is valid in the first
9 place because quite frankly, Doctor Wood or Oliver Wood
10 has said the claims are likely to exceed the three
11 hundred thousand dollars in liability and that makes us
12 under insured and there's no reason he can't pursue
13 UIM. Moreover, Mitch has already tendered fifty
14 thousand dollars. Mitch has the UIM carrier. He's
15 already tendered it and it's my understanding Mr.
16 Tinsley, today, rejected that tender and won't accept
17 the money.

18 Now he -- Mr. Griffith, and I put this all in my
19 memo as well, he sent letters over to Mr. Tinsley with
20 the stipulation that since the beginning the UIM
21 carrier is out and none of that has been executed.

22 And I guess again I need to make a point here.
23 The release is the controlling document. We didn't get
24 that document until March of this year. We were never
25 copied on any of the correspondence. We did not -- we

1 didn't find out about it until February. I guess it's
2 just -- there's been no waiver and and I'm not going to
3 get into the inequitable conduct or anything like that.
4 That's not necessary, Your Honor.

5 Quite frankly, there's a release, there's a
6 covenant. Either way you look at it there's been a
7 discontinuance of the action which is what Bumgardener
8 says. There's been a discontinuance of the action
9 against Randolph Murdock and he must be disregarded as
10 a party defendant.

11 This is where our motion to transfer Venue comes
12 in and if Randolph is no longer a party -- and they
13 know this -- if Randolph is no longer a party
14 defendant, Venue is only proper in Jasper County
15 because the plaintiff resides there. There's no
16 question the plaintiff lives there. That's what he
17 testified to in his deposition. That's where the UIM
18 carrier just tendered their check to. Pineland, South
19 Carolina.

20 The accident, umm, there's no dispute it happened
21 in Jasper County. 15 730 is very clear, the
22 legislature was unambiguous with respect to that
23 statute and it's very clear ---

24 THE COURT: What about the remaining
25 defendant?

1 MR. WARD: Excuse me?

2 THE COURT: What about the remaining
3 defendant?

4 MR. WARD: That's -- and that goes into what
5 we believe there is some defense and some machinations
6 -- suffice it to say I'm not going to get into that,
7 umm, all of the other defendant's were non-residents.
8 When Randolph Murdock came in that defeated removal ---

9 THE COURT: Oh, they are out of state. I've
10 got cha'.

11 MR. WARD: That's right. They're out of state
12 which is why in 15 730 you look at where the plaintiff
13 resides.

14 THE COURT: Okay.

15 MR. WARD: Thank you, Judge.

16 THE COURT: Okay.

17 MR. TINSLEY: Judge, if you look at the
18 Bumgardner case, the copy he gave you on page 305, the
19 Court said, -- talking about what Ron Motley did --
20 they had an agreement. The agreement was with this
21 defendant, you go in there, in this deposition and you
22 ask these questions that are favorable to my plaintiff
23 and I'm not going to come after you. That was the
24 agreement. They did that. It was disclosed and then
25 the case was removed. Federal Court.

1 And then Ron Motley stated that the agreement was
2 initiated and withdrawn. This was a unilateral act on
3 a part of the plaintiff.

4 John Tiller's affidavit in this case -- John
5 Tiller's covenant rescinded by agreement. They did
6 agree. There's nothing any different in this case that
7 tens of thousands of cases that are settled in this
8 state every year where there's a covenant not to
9 execute so that we can go after uninsured coverage and
10 if State Farm has committed bad faith and I think I've
11 got a claim -- it doesn't have any -- there's no
12 relevance. I cannot accept it. I cannot settle with
13 certain defendants. I can choose to do -- handle my
14 case how I choose to handle it. They can't come in and
15 second guess a Monday morning quarterback when they --
16 at the mediation -- saw the transcript of the first
17 trial -- they knew this is what was happening. They
18 new this was settled. They came in here and they asked
19 you to strike the stipulation of dismissal that got
20 Randolph out.

21 They made a decision back in March that they would
22 rather have an apportionment than transfer venue. Pat
23 Higgins and I had that discussion. It's either or at
24 that point in time and they chose they wanted an
25 apportionment of the liability because those parties

1 were remained named and under the new statute. Now
2 they've changed their mind. The waiver issue is under
3 Rule 12 -- Rule 12h -- there's no question, Venue is
4 not raised in their answer.

5 Venue would have become viable back in March, when
6 they discovered, if there was a dismissal. But there's
7 not been a dismissal. One, they withdrew their motion.
8 Two, they could've argued all this stuff -- they could
9 have removed the case in Federal Court. They could
10 have done a hundred things but they've come in here and
11 they waited to the last minute and Venue is proper.
12 Venue is always gonna be proper in this case. There
13 are a multitude of cases. Venue is proper in this case
14 and you should deny this and end all these
15 machinations. This is frankly, a waste of everybody's
16 time. There is no merit to what they are arguing.
17 Zero.

18 THE COURT: Ya'll are first up on the trial
19 roster Monday, right?

20 MR. TINSLEY: Yes, ma'am.

21 THE COURT: Jason, anything else you want to
22 put on the record?

23 MR. WARD: Just again, Your Honor, as far as
24 the waiver and the stipulations of dismissal, we in no
25 way-- our position was very clear. We simply want it

1 done right. If it's gonna be done, we want it done
2 right. The only way to make it right is have everybody
3 sign off on those documents. I've called around, I've
4 spoke with every single other lawyer and I spoke with
5 Mr. Tinsley about getting these stipulations and
6 corrected, which is what they had agreed to do in the
7 release.

8 I specifically asked those questions. I
9 specifically circulated those documents. The only one
10 I received back was Erin Deans' signature for Randolph.
11 And so, Your Honor, we are here at the last minute not
12 because of our conduct. We were not copied on any of
13 this correspondence circulating for the stipulation of
14 dismissal. We didn't know about the release until --
15 and I want to make sure I get it right -- I didn't find
16 out about the release until I spoke with Ben Traywick
17 in February ---

18 THE COURT: And that's when you came to the
19 courthouse, you said.

20 MR. WARD: And then we argued -- that's right.
21 That's when I came up to the courthouse and I don't
22 think they filed the release. They had filed the
23 stipulations -- but at any rate, I only want it -- and
24 our position is consistent the whole time. We want it
25 done right. If it's gonna be done and you are gonna do

1 it under Rule 41 then everybody needs to sign off on
2 it. If not, you must disregard it because he's
3 nominal, at best. And that's my argument.

4 THE COURT: And the definition of becoming
5 nominal is that nothing can be pursued now against him.
6 Do you -- he got something substantial in this case,
7 didn't he?

8 MR. TINSLEY: A hundred thousand dollars.

9 THE COURT: A hundred thousand dollars --

10 MR. TINSLEY: Between the two cases.

11 THE COURT: Between the two cases. So the
12 definition of nominal under the case law is whether or
13 not anything he is going to be liable or personally
14 responsible for anything as a result of this case.

15 MR. WARD: If there is any right to relief at
16 trial, the plaintiff's could recover from that
17 defendant in any way, shape, fashion, or form. But
18 there's nothing there. And the only reason he won't
19 accept the UIM is because he's trying to come up with
20 this illusion of liability in some shape, fashion, or
21 form. That fails on its face because, quite frankly,
22 we are still involved in the case. We would
23 technically be considered under insured. He could put
24 the UIM carrier on notice right now. It doesn't make a
25 difference.

1 THE COURT: Mr. Tinsley?

2 MR. TINSLEY: The statute provides to do
3 exactly what we've done, which is fifty-thousand
4 dollars and whether or not the cases -- when they look
5 at whether or not it's nominal or whether or not it's a
6 sham or should be disregarded, it's whether I can get
7 any relief.

8 And he said it, there's no possibility it's the
9 standard -- there's a possibility that Randolph
10 Murdock is under insured. Fifty thousand dollars I can
11 get to. There maybe more if State Farm has handled
12 that claim in bad faith. But they can't make me take
13 that.

14 There are issues that are unrelated to this case
15 why I will not take it. This is an issue, as well and
16 I can see that and I'm not going to take it. There's
17 no mechanism to make me take it.

18 MR. WARD: If I may be heard?

19 THE COURT: Absolutely, absolutely.

20 MR. WARD: I think I've got everything on the
21 record.

22 THE COURT: You're good?

23 MR. WARD: I think we are good.

24 THE COURT: Okay. Well, respectfully, I am
25 going to deny all three motions. Let's go forward on

1 MR. TINSLEY: I ---

2 THE COURT: I don't understand. Did I miss
3 something?

4 MR. TINSLEY: That's what I'm saying. I'm
5 saying that I want to dismiss with prejudice and I've
6 agreed to that.

7 THE COURT: Am I wrong? Did I miss something?

8 MR. TINSLEY: No, that's what I'm saying. I'm
9 saying that I will dismiss with prejudice and I've
10 agreed to that. There's a case, South Carolina
11 Department of Social Services versus Prickter.

12 First of all, there is no case in South Carolina
13 where the defendant has ever argued that the case
14 against him can't be dismissed by the plaintiff with
15 prejudice. There is no case. You will not find one.

16 There are cases where they talk about it being
17 without prejudice ---

18 THE COURT: Right.

19 MR. TINSLEY: But this Prickter case says
20 dismissal of the action from the plaintiff's request is
21 within the trial court's discretion. And the Rule says
22 the trial court can do it and make any orders that
23 maybe necessary. Your order, you need to notify me
24 that this is the only argument with prejudice. We
25 can't get this equitable reallocation if that case is

1 not -- I'm waiving that. I'm waiving dismissal of
2 Patrice Smart's consortium claim prevents somehow this
3 argument of reallocation. If reallocation should be
4 ordered in this case then I agree the dismissal has
5 nothing to do with it. There is no prejudice to them
6 at all and they can't make me severe this case.

7 If you look at Page versus New Lower Richmond
8 handed down by Judge Alexander. The consortium claim
9 is wholly independent from the injury claim. And in
10 that case, they tried their wreck case but they lost
11 it. They turned around and they tried the consortium
12 claim and they won it.

13 THE COURT: The question I have for you is if
14 I don't consolidate, will you ever try Patrice Smart's
15 case? What you are telling me is you can't is you want
16 to dismiss with prejudice, correct?

17 MR. TINSLEY: I want it dismissed with
18 prejudice, correct. I'm not gonna try it. This is a
19 no gain, Your Honor. There is no reason for this
20 argument. You'll never get another defendant come in
21 and say, I don't want the case in Hampton County
22 dismissed with prejudice. Not gonna happen.

23 (laughter)

24 MR. WARD: Your Honor, the reason for that is
25 that million dollar allocation that and the ten

1 thousand to Gary Smart's claim, he clearly has the more
2 substantial claim.

3 THE COURT: Isn't that the determination of
4 the trial judge? Decide whether or not ---

5 MR. WARD: As he just pointed out it's an
6 independent and not a derivative claim. The fear is if
7 we get post verdict he's gonna say, Judge, that case is
8 out. You can't reallocate after post verdict. You
9 can't reallocate because that's a separate case. And
10 that's the concern. It's ---

11 THE COURT: I don't understand how the
12 consolidation of the cases he is dismissing with
13 prejudice. I'm having a hard time getting passed that.

14 MR. WARD: As long as he's conceding and
15 willing to agree that we have the right to raise the
16 nature of the settlement -- equitable allocations of
17 the settlement -- that's the only thing that's adhering
18 these two cases and if they don't want to put up any
19 testimony about loss of consortium at trial I don't see
20 any problem either. But quite frankly, we'd like that
21 to be reflected in the order.

22 THE COURT: Well, I think you can raise
23 anything you want. It's for the trial judge. It's not
24 for me. I just don't know, Jason, how I force him to
25 try a case that he is dismissing with prejudice.

1 MR. TINSLEY: And Judge, when you sign an
2 order dismissing that case with prejudice you can put
3 in there that I have agreed, which I've told him nine
4 times now, that I'm willing to agree so he can make his
5 reallocation argument. But what I don't want to happen
6 is I don't want -- he keeps saying is that I'm gonna
7 show up Monday morning and say, Judge, the only thing
8 I'm here to try is the consortium claim. And I'm not
9 trying the consortium claim. That's what he keeps
10 saying. We can end these games. We are going to try
11 this matter next week and this matter will be resolved.

12 MR. WARD: I'll let the record speak for
13 itself with respect to any games that are being played
14 ---

15 THE COURT: Is that what you intend on doing?

16 MR. WARD: If Your Honor intends on dismissing
17 this case with prejudice ---

18 THE COURT: Then there's nothing you can do
19 about it.

20 MR. WARD: There's nothing I can do about it
21 accept appeal, Your Honor.

22 THE COURT: Okay. So I need to know if I need
23 to do a form order dismissing Patrice Smart's case with
24 prejudice?

25 MR. TINSLEY: Correct.

1 THE COURT: And then you are going to give me
2 a proposed order on the other two -- the motion to
3 compel the execution of dismissal?

4 MR. TINSLEY: I can but we could do a form---

5 THE COURT: Mr. Ward is going to want more
6 than that. I can hear him.

7 MR. TINSLEY: Your Honor, I'll take a form
8 order if I can get a transcript expedited.

9 THE COURT: I can ---

10 COURT REPORTER: I have something for Matthew
11 Walker that I have to get to him by Friday.

12 THE COURT: I can tell you this, I'm happy to
13 with a form four but I can't commit to her. Whatever
14 she can do for you is great. She's doing transcripts
15 for that case. Okay, thank you ya'll.

16 (Whereupon hearing ended at 11:15 A.M.)

17 ----- END OF TRANSCRIPT OF RECORD -----
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STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

GARY SMART

Plaintiff,

vs.

JAMES ALLEN GRADY; LOUIS DANIELL
MOFFETT; LYNWOOD BRANTLEY DBA
BRANTLEY HAULING; AND RANDOLPH
MURDAUGH III

Defendants.

PATRICE SMART

vs.

JAMES ALLEN GRADY; LOUIS DANIELL
MOFFETT; LYNWOOD BRANTLEY DBA
BRANTLEY HAULING; AND RANDOLPH
MURDAUGH III

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2009-CP-25-284

SETTLEMENT AGREEMENT

CASE NO.: 2009-CP-25-285

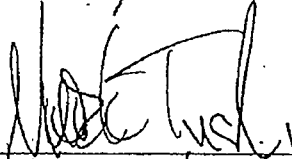
SETTLEMENT AGREEMENT

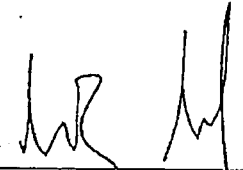
THE UNDERSIGNED PARTIES and their attorneys hereby agree to settle the above-referenced cases with the Defendants Louis Daniell Moffett and Lynwood Brantley DBA Brantley Hauling paying the Plaintiff Gary Smart \$5,000.00 and Plaintiff Patrice Smart \$995,000.00 and the Defendant Randolph Murdaugh III paying the Plaintiff Gary Smart \$5,000.00 and Plaintiff Patrice Smart \$95,000.00. The Plaintiffs agree to indemnify the Defendants for any claims brought against them by James Allen Grady, or any other entity or person, arising out of the allocation of the settlement proceeds or Medicaid or Medicare regarding a lien, set aside, or for any other claims. The Plaintiffs agree to be responsible for all liens associated with this matter.

The Defendants shall provide the Release, Stipulation of Dismissal and the settlement check within thirty days of the signing of this agreement. There will be separate checks issued to Gary and Patrice Smart for the settlement proceeds by each Defendant.

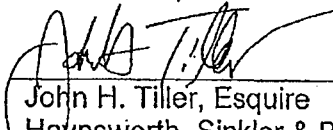
This settlement is a resolution of all claims of Patrice Smart against the parties. This ^{and} ~~is a~~ settlement does not affect the claims of Gary Smart against James Allen Grady.

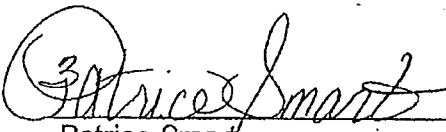
Dated August 4, 2010.


Mark Tinsley, Esquire
Gooding & Gooding, P.A.
P.O. Box 1000
Allendale, S.C. 29810
ATTORNEY FOR PLAINTIFFS


Duke R. Highfield, Esquire
Young Clement Rivers, L.L.P.
P.O. Box 993
Charleston, S.C. 29402
ATTORNEY FOR DEFENDANTS LOUIS
DANIEL MOFFETT & LYNN BRANTLEY
DBA BRANTLEY HAULING


Gary Smart


John H. Tiller, Esquire
Haynsworth, Sinkler & Boyd, P.A.
P.O. Box 340
Charleston, S.C. 29402
ATTORNEY FOR DEFENDANT
RANDOLPH MURDAUGH III


Patrice Smart

FULL, FINAL AND COMPLETE RELEASE
READ CAREFULLY.
THIS RELEASE ENDS ALL CLAIMS

38
J.S.
W.A.
For and in consideration of the total sum of One Million One Hundred Thousand and 00/100, *in accordance with the terms of the Settlement Agreement entered into at the mediation of this matter,* (\$1,100,000.00) Dollars, the receipt and sufficiency of which are hereby acknowledged, the undersigned,

Gary Smart and Patrice Smart, individually and as husband and wife, do hereby release, forever discharge and promise never to sue Louis Daniel Moffett, Cowan Systems, Lynwood Brantley, individually and d/b/a Brantley Hauling and Randolph Murdaugh, III, and their subsidiaries, agents, attorneys, employees, officers, owners, shareholders, directors, servants, insurance carriers, successors, administrators and assigns, *and any and all other people, entities or corporations who might be claimed to be liable at some point, but* all of whom expressly disclaim any liability whatsoever from any and all injuries (known or unknown, foreseen or unforeseen, suspected or unsuspected), actions, causes of action, demands, damages, suits at law or in equity (including claims for contribution and/or indemnity), of whatsoever kind or nature (including claims for loss of consortium, property damage and loss, rental charges, loss of use and depreciation) or because of any matter or thing done, omitted or suffered to be done by Louis Daniel Moffett, Cowan Systems, Lynwood Brantley, individually and d/b/a Brantley Hauling and Randolph Murdaugh, III, prior to and including the date hereof, on account of all injuries and damages resulting or to result, and all other possible or potential injuries and damages, from an accident that occurred on December 22, 2007, when Gary Smart collided with the vehicle being operated by Louis Daniel Moffett on U.S. Highway 321, in the County of Jasper, State of South Carolina.

It is further agreed that this is a compromise of a doubtful and disputed claim³ and that the payment of the consideration for this Release is not to be considered as an admission of liability on the part of Louis Daniel Moffett, Cowan Systems, Lynwood Brantley, individually and d/b/a Brantley Hauling and Randolph Murdaugh, III, by whom all liability is expressly denied.

This Receipt and Release is accepted by the undersigned in full compromise and release of all injuries or damages allegedly suffered by them resulting from the above-mentioned alleged accident, it

being the intent of the undersigned and the purpose that this Receipt and Release is to cover all past, present and future losses which might occur to the undersigned. The undersigned fully understand that the existence of a certain claim may not be recognized at this time.

It is further agreed that this Release sets forth the acceptance of the sum set forth above and is in full and final settlement of any and all claims that the undersigned now has or may have in the future arising out of the alleged accident.

ASB
3/8
The undersigned further agree and acknowledge that should there be any liens for health care services or other services provided (including, but not limited to, workers' compensation liens and Medicaid and/or Medicare liens), whether by statute or contract, the undersigned will reimburse the health care providers or other service providers from the proceeds of this settlement for the full amounts of said liens (or any agreed-to compromised amount) and should the health care providers or other service providers assert a statutory or a contractual lien against the persons, entities or corporations being released by this Receipt and Release, or their agents, servants, employees or insurance carriers, that the undersigned will indemnify and hold the persons or corporations being released by this Receipt and Release, their agents, servants, employees and insurance carriers, harmless from any and all claims, demands, actions, causes of action of whatsoever kind or nature, to include the reimbursement of reasonable attorneys' fees in defending such action brought by said lienholders.

However it is understood that the settlement of the claims of Gary Smart is only a partial settlement and does not affect his claim against Defendant Grady.

The parties have considered Medicare's interests in this settlement and have determined that an allocation for future Medicare covered expenses is not required pursuant to the policy and procedure established by the CMS Memoranda to protect Medicare's interests as required by the Medicare Secondary Payer Statute. The undersigned agree to hold harmless and indemnify Louis Daniel Moffett, Cowan Systems, Lynwood Brantley, individually and d/b/a Brantley Hauling and Randolph Murdaugh, III, and their respective insurance carriers, from any cause of action, including but not limited to an

action to recover or recoup Medicare benefits or loss of Medicare benefits, or for any recovery sought by Medicare, including past, present, and future conditional payments.

The provisions of this Receipt and Release are contractual and not merely a recital and may be used as a defense in any action or proceeding instituted or undertaken by the undersigned.

Moreover, the undersigned state affirmatively that they have read carefully this Receipt and Release, that they have consulted their attorney concerning the provisions, conditions and effect thereof, that they know and understand the contents thereof and that there is no agreement other than that expressed herein. Further, the undersigned agree that this instrument may be pled as a defense in any action or other proceeding which may be brought or instigated ^{against these settling Defendants} out of the claims, demands, actions and causes of action recited above.

The undersigned and their attorney expressly agree to keep strictly confidential and to disclose to no one, other than close family members and law partners and associates, the terms and provisions of this settlement agreement. This agreement is made a part and parcel of the Receipt and Release of all claims and is expressly consented to by the undersigned and their attorney.

The parties agree to a dismissal, with prejudice, of Louis Daniel Moffett, Lynwood Brantley, individually and d/b/a Brantley Hauling, and Randolph Murdaugh, III from the actions presently pending in the South Carolina Court of Common Pleas, Hampton County entitled Patrice Smart v. James Allen Grady, Louis Daniel Moffett, Lynwood Brantley d/b/a Brantley Hauling, and Randolph Murdaugh, III, Case No. 2009-CP-25-0284 and Gary Smart v. James Allen Grady, Louis Daniel Moffett, Lynwood Brantley d/b/a Brantley Hauling, and Randolph Murdaugh, 2009-CP-25-0285.

In the event that any other person, firm or corporation makes a claim against any of the persons, firms or corporations being released by this Receipt and Release, or their agents, servants, employees, attorneys or insurance carriers, for injuries or damages suffered by the undersigned, then the undersigned agree to indemnify and hold harmless those persons, firms or corporations being released from any and all

claims, demands, actions, causes of action of whatever kind or nature, to include the reimbursement of reasonable attorneys' fees in defending against such claims.

The undersigned further agree that this Receipt and Release is to be governed by and interpreted in accordance with the laws of the State of South Carolina.

The undersigned have carefully read this Release and understand the contents and the effects thereof.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 3rd day of September, 2010.

WITNESSETH:

CAUTION: READ BEFORE SIGNING:
THIS IS A FULL, FINAL AND
COMPLETE RELEASE

Rhonda F. Lawson
Witness

By: Gary Smart
Gary Smart

Cheryl M. Vick
Witness

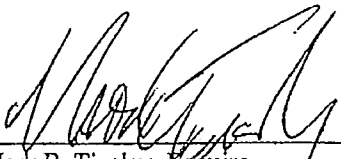
Rhonda F. Lawson
Witness

By: Patrice Smart
Patrice Smart

Cheryl M. Vick
Witness

I, Mark B. Tinsley, Esquire and Gooding & Gooding P.A., as attorneys for Gary Smart and Patrice Smart, individually and as husband and wife, recommend and approve the settlement above made and state that I have explained the contents as well as the effect of the above Receipt and Release to them and they have stated to me that they understand the contents and effect of this Receipt and Release and they have signed the same as their own voluntary acts.

Mark B. Tinsley
Attorney
Client
Privileged
§ 8-3-1



Mark B. Tinsley, Esquire
Gooding & Gooding P.A.

COVENANT NOT TO EXECUTE
THIS RESCINDS ANY PRIOR SETTLEMENT AGREEMENT
BETWEEN GARY SMART, PATRICE SMART AND RANDOLPH MURDAUGH, III

This Covenant is made by Patrice Smart and Gary Smart, (hereinafter referred to as "Payees"), in favor of Randolph Murdaugh, III, Montgomery Mutual Insurance Company and Auto Owners Insurance Company, (hereinafter referred to as "Payers"), their heirs, executors, legal representatives, successors, and assigns.

WHEREAS, on December 22, 2007, a vehicle owned and operated by Gary Smart collided with a vehicle operated by Louis Daniel Moffett on U.S. Highway 321 in Jasper County, South Carolina and a vehicle operated by Murdaugh was alleged to have contributed to the collision (hereinafter referred to as the "Accident"); and

WHEREAS, Payees subsequently made a claim against Payers for bodily injuries, medical expenses, pain and suffering, and damages allegedly suffered by Patrice Smart and Gary Smart, as a result of the Accident (hereinafter referred to as the "Claim"); and

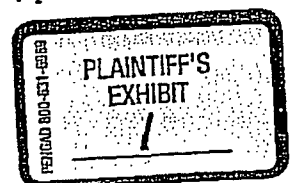
WHEREAS, at the time of the Accident, Montgomery Mutual Insurance Company had in effect a policy of automobile liability insurance providing automobile liability insurance coverage to Payer Murdaugh's employer, Peters Murdaugh Parker Eltzroth & Detrick, PA and Auto Owners had in effect a policy of automobile liability insurance insuring Murdaugh individually for the Accident; and

WHEREAS, Payers acknowledge that Payees assert a substantial claim against Payers and under the Policies for damages arising out of the Accident and that Payees allege that the value of the Claim will exceed the amount of liability insurance coverage available to the Payers arising out of the Accident under the Policies; and

WHEREAS, Payers wish to limit their liability or exposure for damages that might exceed the liability coverage available under the Policies; and

NOW, THEREFORE, for and in consideration of the payment of the sum of One Hundred Thousand and no/100 (\$100,000) (\$95,000.00 to Patrice Smart and \$5,000 to Gary Smart) by Payers, and for other good and valuable consideration, Payees agree, promise, and covenant as follows:

1. Payees and attorney, Mark B. Tinsley, acknowledge receipt of such payment.
2. Payees hereby promise and covenant for themselves, Patrice Smart and Gary Smart, their heirs, executors, administrators, legal representatives, and assigns, not to execute against Payers, their heirs, executors, administrators, legal representatives, successors, or assigns, on any judgment that may be obtained by Payees on behalf of Patrice Smart and Gary Smart, in excess of any and all recoverable insurance coverage, for bodily injuries, medical expenses, pain and



suffering and any other damages allegedly sustained by Patrice Smart and Gary Smart, as a result of the Accident.

3. Payees hereby covenant and promise that if they should obtain a judgment against Payers on behalf of Patrice Smart and Gary Smart, they will not execute on said judgment against Payers or under the Policies, and that, upon a final determination of whether any other insurance benefits will be paid for the Claim, they will cause the judgment to be marked and entered as satisfied.

4. Should Payees refuse to mark and enter any judgment obtained against Payers as satisfied as provided hereinabove, Payees do hereby authorize the Clerk of Court to mark and enter the judgment as satisfied upon receiving a copy of this Covenant from Payers.

5. Payees agree that the payment made by Payers is in compromise of a doubtful and disputed claim and that the payment made is not to be construed as an admission of liability on the part of Payers or of any other person hereby benefiting from this Covenant.

6. Payees declare and represent that Payers have made no promise, inducement, or agreement not expressed herein, that this Covenant contains the entire agreement between the Payees and Payers, that the terms of this Covenant are contractual and not merely recital, and that Payers have made no representations as to the possibility of the recovery of any monies by Payees from any other insurance coverage for the Claim.

7. Payees hereby represent that they understand that Payers may continue to cooperate and assist in the defense of the Claim, regardless of whether any other insurance carrier should elect to participate in or assume the defense of same.

8. Payees hereby further agree that should there be any liens, whether by statute, contract, or otherwise, for workers compensation benefits, health care services, or funeral services provided to Payees, they will cause the provider(s) to be reimbursed from the proceeds of this settlement to the extent required by law and should the provider(s) assert a statutory or contractual lien against Payers, their heirs, executors, administrators, legal representatives, successors, or assigns, Payees will indemnify and hold harmless Payers, their heirs, executors, administrators, legal representatives, successors, and assigns from any and all such claims, demands, actions, or causes of action of whatsoever kind or nature, and will reimburse Payers for reasonable attorneys' fees incurred in defending any such action brought by a purported lienholder.

9. Payees acknowledge that they rely wholly upon their own judgment, belief, and knowledge, as well as the advice and counsel of the attorney, Mark B. Tinsley, as to the nature, extent, and duration of the bodily injuries, medical expenses, pain and suffering, and other damages of Patrice Smart and Gary Smart,

and the possibility of recovery for the Claim, and that, in making this Covenant, they have relied upon no representations or statements made by Payers, or by their agents or representatives regarding these injuries or damages or any other matter.

10. Payees further agree and understand that this instrument is not intended as a release, discharge, or accord and satisfaction with any person whomsoever, but only as a covenant not to execute against Payers, their heirs, executors, administrators, legal representatives, successors, and assigns, and is executed simply for Payers to purchase freedom from the threat of execution upon any judgment that may be obtained against them after payment of One Hundred Thousand and no/100 Dollars (\$100,000.00). This Covenant Not to Execute is not intended to impair in any fashion Payees' rights, if any, to recover underinsured motorist insurance benefits from any other insurance carrier for the Claim, except under the Policies discussed herein.

11. It is specifically understood and represented that this Covenant includes the final release of any and all claims against Montgomery Mutual Insurance Company and Auto Owners Insurance Company for the Accident and the handling and adjustment of the Claim of Patrice Smart and Gary Smart, arising from the Accident.

IN WITNESS WHEREOF, we have here unto set our hands and seals in the presence of the below named witnesses on the date set forth below.

IN THE PRESENCE OF:

CAUTION. READ BEFORE SIGNING.

Phyllis F. Lawson Patrice Smart
Patrice Smart
Phyllis F. Lawson Gary Smart
Gary Smart

Dated: April 2, 2011

I, the undersigned attorney for the Payee, hereby certify that the contents, meanings and effects of this Covenant Not To Execute have been carefully and fully explained to him by me ^{on} and I have recommended that he execute it for the consideration expressed therein. ^{are}

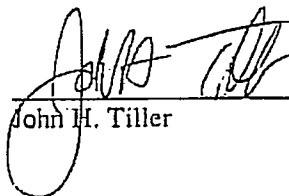
Mark B. Tinsley
Mark B. Tinsley, Esquire

Section
Harvey
Client

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HAMPTON	)	C/A#: 09-CP-25-285
GARY SMART,	)	
Plaintiff,	)	
vs.	)	AFFIDAVIT OF
	)	JOHN H. TILLER
JAMES ALLEN GRADY, LOUIS DANIEL	)	
MOFFETT, LYNWOOD BRANTLEY d/b/a	)	
BRANTLEY HAULING, and RANDOLF	)	
MRUDAUGH, III	)	
Defendants.	)	

PERSONNAL APPEARED BEFORE ME, John H. Tiller, who being duly sworn, deposes and says:

1. He represented the Defendant, Randolph Murdaugh, III in this matter.
2. Following a mediation, he requested that counsel for the other settling Defendants include his client on the release.
3. The release in issue was drafted by counsel for the other settling Defendants.
4. Counsel for the Plaintiff subsequently asked that the release as to Randolph Murdaugh be rescinded in exchange for a Covenant Not To Execute so that the Plaintiff could pursue an underinsured motorist claim.
5. He forwarded the Covenant Not To Execute, attached hereto as Exhibit "1" on March 31, 2011.
6. The Covenant Not To Execute provides that any prior agreement is rescinded.


John H. Tiller

Sworn to before me this 26
day of July, 2011.


Notary Public State of South Carolina
My commission expires: 11-5-11
Charleston: 774288 v.1

1 beams, they're equally likely possibilities in your mind?

2 A Yes.

3 Q Okay. Prior to -- was there anybody -- when
4 you -- when you were in the accident, was there anybody
5 directly behind you?

6 A At the time--

7 Q Let's just say --

8 A Unless that -- at the time I left his shop, nobody
9 was on that road behind me. None. No traffic at all behind
10 me.

11 Q Did you have to -- when you were pulling onto 321,
12 did you have to stop and wait for traffic to clear?

13 A Yes, I stopped, but it wasn't -- you know, just
14 courteous stopping to the stop sign I was supposed to.

15 Q But there weren't cars coming--

16 A No.

17 Q -- that you had to wait for?

18 A No cars I had to wait for, no.

19 Q Okay. And when you took a left onto 321, there
20 was no car behind you between that point--

21 A That I can remember, no, there wasn't any car
22 behind me.

23 Q Okay. Between when you pulled onto 321 and the
24 moment that you ran into the back of Mr. Moffett's trailer,
25 did anybody pass you heading northbound?

1 A That I can remember, no.

2 Q Okay. All right. You heard Mr. Murdaugh's
3 testimony that he was parked on the right-hand shoulder?

4 A Yes.

5 Q Okay. Did you see his car over there?

6 MR. TINSLEY: Object to the form.

7 THE WITNESS: After -- I remember seeing some
8 lights after I came around that curve and got into the
9 straight area, because the straight area also has like a
10 little -- it's a little low spot to it. But after I came
11 around that curve and got here in the point where it
12 straightens up at, then there was the lights. And I
13 remember courtesy flashing. Like a lot of people would just
14 blink their brights to high or whatever, or the brights to
15 low, being -- to make the other person dim the light. And I
16 recall I did that one time.

17 BY MR. TRAYWICK:

18 Q You did that?

19 A Yes.

20 Q Okay. So you saw high beams. Did you know -- did
21 you think -- did you actually see the car?

22 MR. TILLER: Object.

23 MR. TINSLEY: Object to the form.

24 BY MR. TRAYWICK:

25 Q Or did you just kind of see lights?

1 A No. And I -- and like I say, it was only lights,
2 I couldn't tell whether they was on high nor low for the
3 simple fact that, you know, when you got newer vehicles,
4 even the trucks, it's hard to tell if those lights are
5 on bright or dim. I have done that a couple of times,
6 flashed the lights at people.

7 Q Okay.

8 A And their lights will be on dull, it just -- or I
9 mean on dim, but it's just the fact that those new vehicles
10 carry such a bright--

11 Q Okay.

12 A You know, bright light.

13 Q So you weren't clear -- you're not clear right now
14 whether those were high beams or low beams--

15 A I -- I--

16 Q -- that you saw--

17 MR. TINSLEY: Object to the form.

18 THE WITNESS: I could not tell you.

19 BY MR. TRAYWICK:

20 Q Okay. I mean, is that--

21 A Only thing I remember, there was this bright
22 lights, I hit my blinkers.

23 Q Okay. Let me -- let me -- let me just walk
24 through it. You came out of that curve.

25 A Yes.

1 Q Do I understand your testimony that -- well, let
2 me just ask you. Before you a came out of the curve and the
3 road straightened up, did you see those lights before that
4 moment?

5 A No.

6 Q Okay.

7 A No.

8 Q Did you see Mr. Murdaugh's vehicle on the side of
9 the road?

10 A No.

11 Q Okay. As you got to the last car length of that
12 curve, were you aware of any other vehicles on that highway?

13 MR. TINSLEY: Object to the form.

14 THE WITNESS: No.

15 BY MR. TRAYWICK:

16 Q Okay. But as you came out of the curve and
17 straightened--

18 A Yes.

19 Q .-- you saw headlights?

20 A Yes.

21 Q Was it your belief that those headlights were on a
22 vehicle -- were on a vehicle heading north or did you know
23 that they were on a vehicle that was on the side of the
24 road?

25 A At the point that I can remember, it just seemed

1 like, you know, a normal vehicle that was headed toward me.

2 Q Okay. They were -- they were bright and so you
3 flicked your lights--

4 A Uh-huh.

5 Q -- in case the person had their high beams on?

6 A Yes.

7 Q You don't know whether the person had his high
8 beams on.

9 MR. TINSLEY: Object to the form.

10 THE WITNESS: No.

11 BY MR. TRAYWICK:

12 Q But you flashed your lights?

13 A Yes.

14 Q Did you flash them once or twice?

15 A I usually always do a courtesy flash twice--

16 Q Okay.

17 A -- and that's it. If they still don't dim them
18 then, you know, I still just drive on anyway.

19 Q Okay. Did you look to see whether the person with
20 those headlights was going to -- I mean, were you looking to
21 see what their response was when you flashed your lights?

22 MR. TINSLEY: Object to the form.

23 THE WITNESS: Yes.

24 BY MR. TRAYWICK:

25 Q And what was their response?

1 A I didn't get any.

2 Q Okay. All right. Did you see -- did you see
3 pedestrians on the side of the road?

4 A No.

5 Q Did you see pedestrians in the roadway?

6 A No.

7 Q Okay. How long after you flashed your lights --
8 or how long after you -- how long after you flashed your
9 lights did you hit Mr. Moffett's truck?

10 A After doing the second flash and getting kind
11 of -- you know, because just a quick moment, you only got
12 like a -- like a three to four second window that you can
13 glance out the side of your eye to look at these bright
14 beams. And it just seems like this, when I flashed twice,
15 then I looked back like this. [Indicating.]

16 Q Okay.

17 A It was just that quick.

18 Q Okay. So immediately after you looked back--

19 A Yeah, because I--

20 Q -- from the headlights--

21 A Yes.

22 MR. TINSLEY: Let him -- let him finish now.

23 THE WITNESS: Okay.

24 MR. TRAYWICK: Thank you.

25 BY MR. TRAYWICK:

1 Q Immediately after you looked back from the
2 headlights, you hit Mr. Moffett's truck?

3 MR. TINSLEY: Object to the form.

4 THE WITNESS: Yes.

5 BY MR. TRAYWICK:

6 Q Okay. Did you see the truck that you were about
7 to hit before you hit it?

8 MR. TINSLEY: Object to the form.

9 THE WITNESS: Not until I was up on it.

10 BY MR. TRAYWICK:

11 Q Okay. But I mean when you -- so I mean -- right
12 up on it?

13 A Yes.

14 Q Did you swerve?

15 A Wasn't no time.

16 Q I mean, did you break?

17 A Yes.

18 Q Okay. And you break just instantaneously before
19 you hit that truck?

20 A Yes, I pressed the breaks to the floor.

21 Q Okay. But just right before you hit the truck?

22 A Yeah. I mean -- yes.

23 Q Okay. Do you know how much your speed had
24 decreased?

25 A No.

1 Q When you hit the -- by the time you hit the truck?

2 A I couldn't tell you. I couldn't tell you. At
3 that time I was panicked. It was just over.

4 Q Did the truck have its taillights on?

5 MR. TINSLEY: Object to the form.

6 THE WITNESS: I can't seem to remember if it was
7 on or not.

8 BY MR. TRAYWICK:

9 Q All right. You don't know one way or the other?

10 A I don't recall them being -- you know, usually I'm
11 pretty good about stuff like this, but I don't recall; it
12 happened so fast.

13 Q Okay. So you think that the head -- did the
14 headlights that you flashed your lights to, did they
15 distract you?

16 MR. TINSLEY: Object to the form.

17 BY MR. TRAYWICK:

18 Q From the road?

19 A Normally I don't let headlights bother me too
20 much, but, yeah, I would say it played a -- it played a
21 factor into it.

22 Q Because you were looking off to your left?

23 A Well--

24 MR. TINSLEY: Object to the form.

25 THE WITNESS: -- I was looking like this, kind of

1 slightly. [Indicating.]

2 BY MR. TRAYWICK:

3 Q Okay. But I mean you were -- your--

4 A Yeah. But it was not where I had to turn my head.

5 Q Okay.

6 A To look to see these lights.

7 Q But you were looking at the lights to see whether
8 there was going to be a response?

9 A Yeah.

10 MR. TINSLEY: Object to the form.

11 THE WITNESS: Yes.

12 BY MR. TRAYWICK:

13 Q And that was instantaneously before you hit the
14 truck?

15 A Yes.

16 Q All right. Have you lost memory of what happened
17 after you hit the truck?

18 A No.

19 Q Okay. So you have a clear memory?

20 A Pretty clear memory.

21 Q Okay. Did you lose consciousness in the wreck?

22 A That I remember, maybe like five seconds of it.

23 Q Okay.

24 A Just a instant knock out and then back -- back to.

25 Q Did your air bag deploy?

1 A Yeah.

2 Q Didn't even have the text service enabled?

3 A No.

4 Q Okay. Radio playing?

5 A No.

6 Q All right. Was there anything else that you were
7 doing at the time of the accident that would have distracted
8 your attention from the roadway?

9 A Nope. It was a quiet ride, just listening to the
10 car itself.

11 Q There was no obstruction in the roadway that would
12 have prevented you from seeing what was in front of you?

13 MR. TINSLEY: Object to the form.

14 THE WITNESS: That I remember seeing anything, no.

15 BY MR. TRAYWICK:

16 Q How long a stretch do you think it is -- excuse
17 me -- that that curve runs?

18 MR. TINSLEY: Object to the form.

19 THE WITNESS: It's not a long stretch at all.

20 It's like a -- you know, you got -- I'm going to give you a
21 rough guesstimate. I can't really say on that exactly for
22 sure, but if you was to straighten that curve out, that
23 curve might be a -- almost 75 yards, I guess--

24 BY MR. TRAYWICK:

25 Q Okay.

1 A -- length or whatever maybe.

2 Q So it's a -- it's a very short curve?

3 A Yeah. Yeah, it's not long at all.

4 Q And it's not real -- it's not real dramatic, it's

5 a--

6 A No.

7 Q It's an easy curve?

8 A Yes, easy curve.

9 Q If I were -- I guess there are woods on both sides
10 of the road?

11 A Yeah, woods and bamboo, yeah.

12 MR. TINSLEY: Object to the form.

13 BY MR. TRAYWICK:

14 Q Woods and bamboo. Do you know how -- let's just
15 think about where the accident scene is. Do you know how
16 far off the center line the trees or bamboo begin over on
17 the right-hand side--

18 MR. TINSLEY: Object to the form.

19 BY MR. TRAYWICK:

20 Q -- as you're heading south?

21 A Let's see. The right -- if it had -- had a ditch
22 there for the right-of-away, it be about the same length of
23 -- of a distance that would be a ditch from the edge of the
24 high. Because those bamboo sits off just like that, which
25 would be pulling space, if you would say, you could park on

1 the side of the road.

2 Q Okay. If I were standing -- let's say I was
3 heading -- well, let me ask you this. When you pulled onto
4 321, were you already in the middle of that curve or were
5 you north of that curve?

6 MR. TINSLEY: Object to the form.

7 THE WITNESS: I was north of that curve.

8 BY MR. TRAYWICK:

9 Q Okay. But not by much?

10 A Not by much.

11 Q All right. If I were standing on 321--

12 A Uh-huh.

13 Q -- and I'm heading south the way you were--

14 A Uh-huh.

15 Q -- and just as the curve begins, okay?

16 A Uh-huh.

17 Q And it curves around to the right; correct?

18 A Uh-huh. Uh-huh.

19 Q Yes?

20 A Yes. Sorry about that.

21 Q I'm sorry. I don't mean to badger you about that.

22 A Yes. Yes. That's okay. Yes.

23 Q If I were standing at the leading edge of that
24 curve, okay, I'm heading southbound and I'm getting ready
25 to enter that curve--

1 A Yes.

2 Q -- if I'm -- if I'm sitting right there I'm in the
3 southbound travel lane, can I see the accident scene?

4 A Standing, yes, you would be.

5 Q Okay. The trees on the right-hand side don't
6 obscure my view of the accident scene?

7 MR. TINSLEY: Object to the form.

8 THE WITNESS: I'm trying to think of that. They
9 do hinder your vision just a little. Just a tad. But if
10 you're standing, it's visible.

11 Q Okay.

12 A A vehicle, there just ain't no way. You wouldn't
13 -- you wouldn't just see it.

14 BY MR. TRAYWICK:

15 Q But I mean, there's -- if you -- if you're in a
16 car on the leading edge of that curve heading southbound--

17 A Right.

18 Q -- you're just getting ready--

19 A Right.

20 Q -- to come to the curve--

21 A Right.

22 Q -- are there trees between your eyes and the
23 accident scene?

24 MR. TINSLEY: Object to the form.

25 THE WITNESS: Yes. With that -- with that

1 particular -- let me rephrase. With that particular vehicle
2 that I was driving, that small of a car, you're lower to the
3 ground. And with me having a long, tall stature, the seat
4 got to be a little more relaxed back.

5 BY MR. TRAYWICK:

6 Q Okay.

7 A So with that being said--

8 Q All right.

9 A -- you cannot see it.

10 Q Well, let's say that you're in that Cavalier and
11 you're long and tall and you've got the seat kicked back and
12 your eyes are back here where you've got the seat kicked
13 back, are there trees between your eyes and that accident
14 scene?

15 MR. TINSLEY: Object to the form.

16 THE WITNESS: On that curve, it is -- it is trees
17 and bamboos. And bamboos does this. [Indicating.] They
18 lean out.

19 BY MR. TRAYWICK:

20 Q But would those -- are say situated such that they
21 obscure your view of the accident scene?

22 MR. TINSLEY: Object to the form.

23 THE WITNESS: Yes, on the curved part, yes.

24 BY MR. TRAYWICK:

25 Q Okay.

1 A You wouldn't be able to see anything until you
2 actually got out of that curve.

3 Q Okay. And that doesn't have anything to do with
4 whether you're kicked back in your seat--

5 A No, it was -- it would--

6 Q -- that's just because of the curve?

7 A Yeah. Right. It's just a curve. It's nothing
8 you can do about it.

9 Q All right. But certainly by the time you got half
10 way through that curve--

11 A Uh-huh.

12 Q -- you can -- there's nothing -- there are no
13 trees between you and the accident scene?

14 A No. no, no. After you come out of it, straighten
15 up, there's nothing there.

16 Q Or even when you're at the -- the -- you know, I
17 don't know what the geometric term is, but when you're at
18 the--

19 MR. TILLER: Apex.

20 BY MR. TRAYWICK:

21 Q -- apex of that curve --

22 MR. TINSLEY: Object to the form.

23 THE WITNESS: Uh-huh.

24 BY MR. TRAYWICK:

25 Q You know, in the middle of it--

1 A Yes.

2 Q And they were still kind of engaged?

3 A Yes.

4 Q So you were right near the truck?

5 A Yes.

6 Q You don't know how far -- do you know how far
7 north of the back of the -- of Mr. Moffett's truck that
8 Suburban was parked?

9 MR. TILLER: Object to the form.

10 THE WITNESS: No, I do not. My head, if you will,
11 was headed -- was laying into the -- lying to the north
12 position, feet was at south. So I -- I didn't bother to
13 even look up at that.

14 BY MR. TRAYWICK:

15 Q When you came out of the -- I think your testimony
16 was that you didn't see those headlights until you came out
17 of -- until you were just coming out of the curve; right?

18 A Yes.

19 MR. TINSLEY: Object to the form.

20 BY MR. TRAYWICK:

21 Q Do you know how far in front of you those
22 headlights were when you first saw them?

23 A No. No, sir. Couldn't tell you that.

24 Q Was it more or less than a hundred yards?

25 MR. TINSLEY: Object to the form.

1 THE WITNESS: I can't say. I really don't know
2 how far it is. I'm poor at judging stuff at night.

3 BY MR. TRAYWICK:

4 Q Okay. Well, your testimony was that from where
5 the road straightens out--

6 A Uh-huh.

7 Q -- to the accident scene was about 300 yards.

8 A I'm assuming that.

9 Q All right.

10 A It could be less.

11 Q Okay. That's your best estimate though?

12 A Yes.

13 Q Okay. Were the headlights that you saw somewhere
14 between you and the accident scene?

15 MR. TINSLEY: Object to the form.

16 BY MR. TRAYWICK:

17 Q Or were they farther back?

18 A I can't really say it was further back, but of my
19 memory recollection that serves me best is it was in the
20 vicinity of where the back end of that truck was and my car,
21 it was somewhere in that wide variety of area right in that
22 space somewhere. I don't recall exactly where.

23 Q But you think -- so you think that the -- the
24 headlights were in the vicinity laterally kind of across 321
25 where the back of Mr. Moffett's truck was?

1 A I can't say. Because the only thing I remember is
2 just meeting the lights. So to me, coming, it looks like a
3 normal car coming -- on-coming traffic--

4 Q Right.

5 A It's just normal. So I can't say.

6 Q Okay. You didn't -- well, let me just ask you. I
7 thought your testimony just now was that in your mind the
8 headlights were kind of near where Mr. Moffett's truck was.

9 MR. TINSLEY: Object to the form.

10 MR. TILLER: Object to the form.

11 BY MR. TRAYWICK:

12 Q Wasn't that your testimony?

13 A Yeah, I said it was in that vicinity somewhere.

14 Q Okay.

15 A To say exactly if that truck was sitting exactly
16 where the accident occurred, can't exactly say.

17 Q Okay.

18 A If it was right directly, you know, at the back of
19 the truck, the front of the truck, I can't say.

20 Q Okay. But you never -- okay. But your best
21 recollection is it was -- the headlights were in the
22 vicinity of the back of Mr. Moffett's truck?

23 A Yeah, somewhere in that broad vast of the
24 accident, it was there somewhere.

25 Q Okay. You never saw -- did the -- when you first

1 saw those headlights--

2 A Uh-huh.

3 Q -- as you're coming down that road, they were
4 never obscured by Mr. Moffett's truck; were they?

5 MR. TINSLEY: Object to the form.

6 BY MR. TRAYWICK:

7 Q In other words, you didn't see those lights come
8 out from behind Mr. Moffett's truck as you were coming
9 south?

10 A I don't recall that.

11 Q Okay.

12 A I don't recall that.

13 Q All right. Okay.

14 A Best of my knowledge, I don't recall that.

15 Q Okay. Because you weren't aware of that truck
16 until right -- Mr. Moffett's truck, until right before you
17 hit it?

18 MR. TINSLEY: Object to the form.

19 THE WITNESS: Yes.

20 BY MR. TRAYWICK:

21 Q All right. I mean, when you -- that instant where
22 you hit your breaks, that was the first time you were aware
23 of Mr. Moffett's truck right there?

24 A Yes.

25 Q Did the headlights that you saw -- I think you

1 already testified that they distracted you. I guess sort of
2 along the same lines but a little bit different, did they
3 actually prevent you from seeing the roadway in front of
4 you?

5 MR. TINSLEY: Object to the form.

6 MR. TILLER: Object to the form.

7 THE WITNESS: Maybe slightly.

8 BY MR. TRAYWICK:

9 Q Okay.

10 A I would say slightly. Not a hundred percent.
11 Visually I can see the road, you know, because one thing is
12 if you're looking directly in the lights, you're never going
13 to see the road anyway.

14 Q Right. And is -- and what I'm saying is, was
15 there a point where you were looking directly into those
16 lights that you could not see that roadway in front of you?

17 MR. TINSLEY: Object to the form.

18 MR. TILLER: Object to the form.

19 THE WITNESS: To recall that, no, but the lights
20 were -- being so bright, that I couldn't actually see the
21 whole totally roadway.

22 BY MR. TRAYWICK:

23 Q Okay. I'm not sure I understand that.

24 A In other words, like the sun being in your eyes.
25 If that's sun's coming through that blind directly in your

1 eye, you only going to see just a little bit of people in
2 there, you're not going to see like Mark sitting in front of
3 you.

4 Q Okay. So did the lights -- the lights didn't --
5 is it your testimony that the lights did not completely
6 blind you to the road in front of you?

7 MR. TINSLEY: Object to the form.

8 MR. TILLER: Object to the form.

9 THE WITNESS: No. Only for -- only part of the
10 road that was visual to me at the point in time that I can
11 kind of remember was one of my headlights is showing in
12 front of me directly.

13 BY MR. TRAYWICK:

14 Q Okay. So you can--

15 A So which is just a couple of feet in front of the
16 road. Those other lights. Now, I don't know how far my
17 lights actually expanded out. But from what I can see on
18 the highway itself, my lights.

19 Q Okay. So just the -- so you could see -- when you
20 came upon the -- when you confronted those -- or when you
21 became aware of those headlights, you could see a little
22 ways in front of you but not distantly?

23 A Yeah, not a -- not a long distance.

24 Q Okay.

25 A Those -- sorry. Those lights are actually

1 brighter than the little lights I got.

2 Q And so you couldn't -- you could see a little bit
3 in front of you but not distantly in front of you?

4 A Yeah. No, not at all.

5 Q Do you know how far at the time that you -- at the
6 time you saw those headlights and they got in your eyes, I
7 guess do you know how far in front of you could see?

8 MR. TINSLEY: Object to the form.

9 MR. TILLER: Object to the form.

10 THE WITNESS: No, I did not know. Other than,
11 like I said, for me to give a rough estimate, I'd be lying
12 about it, and I cannot -- I don't want to tell -- I can't
13 tell a lie about that part. I don't -- I don't know.

14 BY MR. TRAYWICK:

15 Q Okay. But whatever the distance was, you could
16 see a little ways in front of you--

17 A Just little ways, right.

18 Q And beyond that you couldn't see--

19 A Right.

20 Q -- because of these headlights?

21 A Right. Right.

22 Q Okay. Was the back of Mr. Moffett's truck ever in
23 that area where you could see right in front of you?

24 MR. TINSLEY: Object to the form.

25 THE WITNESS: No -- at the point in time, no.

1 BY MR. TRAYWICK:

2 Q Okay.

3 A At the point in time being questioned, no.

4 Q Were those headlights that you allege were
5 Mr. Murdaugh's headlights, were they still affecting your
6 vision at the time that you ran into Mr. Moffett's truck?

7 MR. TINSLEY: Object to the form.

8 MR. TILLER: Object to the form.

9 THE WITNESS: I would say possibly. I -- I -- I
10 -- I can't -- that's unclear to me on that. It really is.
11 It's unclear so I'm not sure.

12 Q Okay.

13 A Maybe, maybe not.

14 THE VIDEOGRAPHER: Counsel, could we go off the
15 record to change tapes, please?

16 MR. TRAYWICK: Sure.

17 THE VIDEOGRAPHER: Off the record at approximately
18 3:45.

19 (Off the record at 3:45 p.m.)

20 (On the record at 3:45 p.m.)

21 THE VIDEOGRAPHER: Back on the record at 3:45.

22 MR. TRAYWICK: Will you read back the last
23 exchange?

24 I know what it is. I know what it is.

25 BY MR. TRAYWICK:

1 Q I was asking you whether at the time you hit
2 Mr. Moffett's truck, whether the headlights, Mr. Murdaugh's
3 headlights, were still affecting your vision; do you recall
4 that question?

5 MR. TINSLEY: Object to the form.

6 MR. TILLER: Object to the form.

7 THE WITNESS: I don't recall if the lights --
8 maybe they did have -- they did pay a certain part into
9 that.

10 BY MR. TRAYWICK:

11 Q Okay.

12 A Maybe they did.

13 Q It -- it -- your testimony is that it may be that
14 Mr. Moffett -- or that Mr. Murdaugh's headlights were
15 affecting your vision when you hit Mr. Moffett's truck, but
16 they may not have been?

17 MR. TINSLEY: Object to the form.

18 MR. TILLER: Object to the form.

19 BY MR. TRAYWICK:

20 Q You just don't remember.

21 A I just don't remember that being a clear, clear
22 thing. Like I'm saying, when I looked over to the lights
23 that I was coming to, all of a sudden when I -- my eyes got
24 distracted here and come back, it was just -- {Snapping.]

25

1 Q Okay. Okay. What -- what part of Mr. Moffett's
2 truck did you see? What was the first thing you saw?

3 A I seen the container.

4 Q You saw the container?

5 A And that was right before initial -- I mean, just
6 knock out impact.

7 Q Okay. Is that all you remember seeing was the
8 container?

9 A Yes, because, I mean, when I came up on it, it was
10 just -- just frightened. It's a big piece of metal; that's
11 all I seen.

12 Q Okay. That's all you had time to see?

13 A Right; that was it.

14 MR. TRAYWICK: Okay. I don't have any other
15 questions. Thank you, Mr. Smart.

16 THE WITNESS: You're welcome.

17 EXAMINATION BY COUNSEL FOR DEFENDANT GRADY

18 BY MR. HIGGINS:

19 Q Mr. Smart, my name is Pat Higgins--

20 A Uh-huh.

21 Q -- I just have a few questions for you.

22 A Okay.

23 Q Clear up a few things for me.

24 A Okay.

25 Q You saw Dr. Nivens a couple weeks ago?

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June 22, 2011

VIA EMAIL ONLY

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Post Office Box 1000
Allendale, SC 29810

Re: Patrice Smart vs. James Allen Grady; Louis Daniel Moffett; Lynwood
Brantley d/b/a Brantley Hauling; and Randolph Murdaugh, III
Civil Action No: 2009-CP-25-284

And Gary Smart vs. James Allen Grady; Louis Daniel Moffett; Lynwood
Brantley d/b/a Brantley Hauling; and Randolph Murdaugh, III
Civil Action No: 2009-CP-25-285
Our File No: 10372 PMH

Counselors:

Please find enclosed herein the below-listed documents in connection with the above captioned matters:

1. Stipulation of Dismissal (with prejudice) of Defendant Randolph Murdaugh, III, ONLY [Gary Smart matter]; and
2. Stipulation of Dismissal (with prejudice) of Defendant Randolph Murdaugh, III, ONLY [Patrice Smart matter].

Please sign where indicated and return to me at your earliest possible convenience. I will provide all counsel with a fully executed and filed copy of each.

If you should have any questions regarding this matter, please feel free to contact me.

With kindest regards, I am

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A

Jason Franklin Ward

JFW/lt
Enclosures

TUPPER, GRIMSLEY & DEAN, P.A.

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STACEY PATTERSON CANADAY
KATHERINE GRAHAM FERGUSON

* ALSO ADMITTED IN NEW YORK

June 22, 2011

Jason Franklin Ward, Esquire
Howell, Gibson, & Hughes, P.A.
P. O. Box 40
Beaufort, SC 29902

RE: Gary Smart v. Randolph Murdaugh, et al
Civil Action Number: 09-CP-25-285
Our File Number: 90174

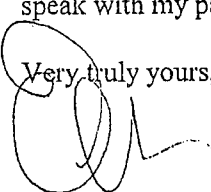
Patrice Smart v. Randolph Murdaugh, et al
Civil Action Number: 09-CP-25-284
Our File Number: 90174

Dear Jason:

Enclosed please find my original signatures for *Stipulation of Dismissal (with prejudice) of Defendant Randolph Murdaugh, III, Only*, which I hereby serve upon you with respect to the above entitled matters.

Should you have any questions, please feel free to contact me. If I am unavailable, please ask to speak with my paralegal, Xiomara Ingram.

Very truly yours,


Erin D. Dean
EDD/arm
Enclosures

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HAMPTON	)	CIVIL ACTION NO: 2009-CP-25-285
GARY SMART,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	<u>STIPULATION OF DISMISSAL</u>
	)	<u>(with prejudice)</u>
JAMES ALLEN GRADY; LOUIS	)	
DANIEL MOFFETT; LYNWOOD	)	<u>of Defendant Randolph Murdaugh, III,</u>
BRANTLEY d/b/a BRANTLEY	)	<u>ONLY</u>
HAULING; and RANDOLPH	)	
MURDAUGH, III,	)	
	)	
Defendants.	)	
_____	)	

The above entitled action was instituted by the Plaintiffs against the Defendants for injuries and damages sustained by the Plaintiffs.

The referenced matter having now been settled between Plaintiffs and Defendant Randolph Murdaugh, III [only], the undersigned attorneys do hereby stipulate that this matter be dismissed as to Defendant Randolph Murdaugh, III, with prejudice, and forever ended, with each party bearing its own costs of this action. This Stipulation does not affect Plaintiff's cause(s) of action against any remaining Defendants, or the remaining Defendants' rights under S.C. Code Ann. §15-38-10 et seq. and other applicable legal and equitable principles under South Carolina common law.

[signature page follows]

STIPULATION OF DISMISSAL (with prejudice)
of Defendant Randolph Murdaugh, III, ONLY
Civil Action No. 2009-CP-25-285

WE SO STIPULATE:

GOODING AND GOODING, P.A.

HOWELL, GIBSON & HUGHES, P.A.

Mark B. Tinsley
Attorney for Plaintiff

Jason Franklin Ward
Attorney for Defendant James Allen
Grady

June ____, 2011

June ____, 2011

YOUNG CLEMENT RIVERS, LLP

HAYNSWORTH, SINKLER & BOYD, P.A.

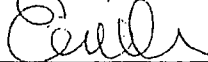
Duke R. Highfield
Benjamin Traywick
Attorneys for Defendant Louis Daniel
Moffett and Lynwood Brantley d/b/a
Brantley Hauling

John H. Tiller
Attorney for Defendant
Randolph Murdaugh, III

June ____, 2011

June ____, 2011

TUPPER, GRIMSLEY & DEAN, P.A.



Erin D. Dean
Attorney for Defendant Randolph Murdaugh, III

June 20, 2011

Townsend, Lauralee Phillips

From: Jason F. Ward
Sent: 6/23/2011 10:25 AM
To: Mark Tinsley; Lauralee Townsend
CC: erindean@tgdpa.com; dhighfield@ycrlaw.com; jtiller@hsblawfirm.com; Rhonda Lawson; Patrick M. Higgins
BCC:

Attachments:

Priority: Normal
Request: None
Security: Normal
Deliver After 0 days(s)
Subject: RE: Patrice & Gary Smart vs. James Allen Grady, et al

Mark:

I am perplexed. Are you saying that you assent to dismissing him in one case, but not the other? You previously signed the stipulations of dismissal for Defendant Murdaugh, and filed them, for both cases. Why are you refusing to dismiss him now? Are you saying that you believe Patrice Smart's case is settled even with respect to Grady?

From: Mark Tinsley [mailto:mark@goodingandgooding.com]
Sent: Thursday, June 23, 2011 8:25 AM
To: Lauralee Townsend
Cc: erindean@tgdpa.com; dhighfield@ycrlaw.com; jtiller@hsblawfirm.com; Jason F. Ward; Rhonda Lawson
Subject: Re: Patrice & Gary Smart vs. James Allen Grady, et al

Jason:

I have a covenant not to execute on Randolph and he will not be dismissed. I am willing to dismiss the case of Patrice Smart, as I have previously indicated, as that matter is completely settled.

Mark B. Tinsley, Esquire
Gooding and Gooding, P.A.
P.O. Box 1000
Allendale, South Carolina 29810
(803) 584-7676
mark@goodingandgooding.com <mailto:mark@goodingandgooding.com>

On 6/22/2011 4:16 PM, Lauralee Townsend wrote:

Counselors,

Please see attached correspondence and Stipulations with regard to the above referenced matters.

Lauralee Townsend

Assistant to David S. Black and Jason F. Ward

Howell, Gibson & Hughes, P.A.

Post Office Box 40, Beaufort, SC 29901-0040 (mailing)

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August 31, 2010

Mark B. Tinsley, Esquire
Gooding and Gooding, P.A.
Post Office Box 1000
Allendale, SC 29810

Re: Gary Smart vs. James Allen Grady; Louis Daniel Moffett; Lynwood
Brantley d/b/a Brantley Hauling; and Randolph Murdaugh, III
File No: 10372 PMH
Civil Action: 2009-CP-25-285

Re: Patrice Smart vs. James Allen Grady; Louis Daniel Moffett; Lynwood
Brantley d/b/a Brantley Hauling; and Randolph Murdaugh, III
Civil Action No: 9:09-cv-02086-SB
Our File No: 10372 1 PMH

Dear Mark:

Please be advised that after the recent mediation this case was reviewed by a USAA Authority Conference Panel and the \$300,000.00 policy limits have now been authorized to resolve this matter. Before USAA orders the settlement draft, they wanted to know if your client might be interested in structuring some of USAA's portion of the settlement. In that regard, please find enclosed National Settlement Consultants periodic payment plan which they have prepared for your client which sets out three payment scenarios; one structuring \$100,000.00 of the proceeds and the other structuring \$200,000.00 of the proceeds. Please discuss with your client and let me know if he may be interested in such structures so that we can get the selected plan funded and issue the remaining settlement proceeds in a draft.

Thank you very much for your cooperation. I look forward to hearing from you after you have had an opportunity to speak with your client.

With kindest regards, I remain

Sincerely,

HOWELL, GIBSON AND HUGHES, P.A

Patrick M. Higgins

PMH/bg

Enclosures

cc: Ms. Melanie Hatfield

GRIFFITH, SADLER & SHARP, P.A.

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*Also Admitted in N.C.

June 28, 2011

Mark B. Tinsley
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RE: Gary Smart v. James Allen Grady, Louis Daniel Moffett, Lynwood
Brantley d/b/a Brantley Hauling, and Randolph Murdaugh, III
Civil Action No. 2009-CP-25-085
GS&S File No. 6691

Dear Mark:

Please find enclosed in settlement of the above-captioned matter
the following:

1. Check number 127710841J, in the amount of \$50,000.00, payable
to Gary Smart and Patrice Solomon, Individually and as Husband
and Wife and Mark Tinsley, Their Attorney;
2. Stipulation of Dismissal as to Underinsured Motorist Carrier
Only; and
3. Medicare Verification Insurance Form.

Please hold the settlement funds in trust until you have signed the
dismissal, completed the Medicare Verification Insurance Form, and
returned all documents to me. I will file the dismissal with the
Clerk and will provide a clocked copy to you for your file.

GRIFFITH, SADLER & SHARP, P.A.

Mark B. Tinsley

June 28, 2011

Page 2

If you have any questions, please do not hesitate to contact me.

With kindest regards, I remain

Very truly yours,



E. Mitchell Griffith

EMG/lln

Enclosures

cc: Allyson Gardner

Claim #40-8655-184

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December 30, 2008

Amar Herpal
USAA
P.O. Box 33490
San Antonio, TX 78265

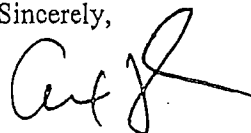
Re: Our Client: Gary Smart
Policy Number: 4669872-13-7995-25
Your Insured: James Allen Grady
Date of Accident: December 22, 2007

Dear Mr. Herpal:

I enclose for you a copy of Gary Smart's medical records and bills. As you can see Mr. Smart's medical bills are in excess of \$76,000.00. I have been informed through discovery in Mrs. Smart's case that the policy limits for your insured are \$100,000.00. As you can see from the attached records, Mr. Smart's damages are far in excess of this coverage. Despite this fact Mr. Smart is willing to accept the policy limits in return for a covenant. As you know this will allow you to protect your insured. This offer to accept the policy limits will expire ten (10) days from the date of this letter if I have not received written confirmation from you confirming your willingness to pay Mr. Smart the policy limits. If you have any questions please do not hesitate to contact me. By copy of this letter I am advising Mr. Higgins of same.

With kind regards, I am

Sincerely,



R. Alexander Murdaugh

RAM/khj
enclosures
cc: Patrick M. Higgins, Esquire

MEDICAL EXPENSES

NAME: Gary Smart

DATE OF ACCIDENT: 12/22/07

ADDRESS: 4937 Cypress Branch Road
Pineland, SC 29934

Date of Birth: 04/19/75
Social Security Number: 256-37-2295

DOCTORS	Bills	Recs	Amount	
SPECIALS				
Apria HealthCare, Inc. (Walker) 12/26/07 Account #: 0702AJB839	✓		\$125.00	
Live Oaks Physical Therapy Inc. 3/24/08 – 6/24/08	✓	✓	\$1,760.00	
RESCUE SQUAD				
Jasper County EMS Account #: 21966	✓	✓	\$828.50	
HOSPITALS				
MUSC 12/23/07 – 6/18/08 Acct. #'s: 491332946, 235370854 & 239624463	✓	✓	\$69,446.30	*additional expense for June 2008 not included on disc
Hampton Regional Medical Center 12/22/07 Account #: V00000417909	✓	✓	\$2,439.60	
MEDICINE				
Kerr Drug – 12/26/07	✓		\$74.08	
Hanna's Pharmacy – 12/28/07	✓		\$19.21	
CVS – 12/28/07, 2/14/08 & 2/6/08	✓		\$68.36	
Family Dollar	✓		\$6.99	
APRIA Healthcare Inc.	✓		\$175.00	
MISCELLANEOUS				
Rivers Construction		✓	\$1,146.34	

LOST WAGES				

TOTAL: \$76,089.38 *

12/30/2008

*Additional medicals not included on Medical Summary on disc. (Summary on Disc last updated 10/3/2008)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas
Perry M. Buckner, Circuit Court Judge
Carmen Tevis Mullen, Circuit Court Judge

Case No. 2009-CP-25-284
Case No. 2009-CP-25-285

Patrice Smart, ... Respondent,
v.
James Allen Grady, Louis Daniel Moffett, Lynwood Brantley
d/b/a Brantley Hauling and Randolph Murdaugh, III, ... Defendants,
of whom
James Allen Grady is Appellant.

Gary Smart, ... Respondent,
v.
James Allen Grady, Louis Daniel Moffett, Lynwood Brantley
d/b/a Brantley Hauling and Randolph Murdaugh, III, ... Defendants,
of whom
James Allen Grady is Appellant.

REPLY TO RETURN TO
MOTION TO DISMISS APPEAL

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Attorneys for Respondent

Pursuant to Rule 240(f), SCACR, Respondents Patrice and Gary Smart file this Reply to the Return to their Motion to dismiss the appeal in this matter. The orders Appellant Grady purports to appeal are not appealable interlocutory orders under South Carolina statutory and case law.

Two points must be addressed at the outset. First, Appellant Grady states that Respondents contend the Supreme Court denied “all of the relief requested in the motion, but their prescience is unfounded.” (Return, p. 10). Appellant contends that the Supreme Court only ruled upon the motion for certification and because it denied that motion, it could not have ruled upon the other issues. (*Id.*) Appellant contends the Supreme Court “did not reach the other issues.”

Respondents simply point this Court to what happened. Appellant Grady filed *one* motion, and in that *one* motion, Appellant asked for multiple relief as follows: (a) certify the appeal pursuant to Rule 204, SCACR; (b) “consolidate appeals and correct captions”; (c) determine appealability; (d) exercise “pendent jurisdiction” and (e) alternatively issue a discretionary writ of certiorari to the Court of Common Pleas. (Exhibit A). The Supreme Court’s order *in its entirety* is as follows:

Motion to Certify Appeals from the Court of Appeals, Consolidate Appeals and Correct Caption, Determine Appealability and Exercise Pendent Jurisdiction, or in the Alternative, Petition for Writ of Certiorari to the Court of Common Pleas is denied.

(Exhibit B). The Supreme Court’s order does *not* say “Motion to Certify Appeals denied. The Court does not reach the other relief sought in the Motion.” Appellants brought all of these requests in *one* motion before the Supreme Court, and the Supreme Court disposed

of everything Appellants asked the Court to address in one order. In fact, in his own Return, Appellant describes the Motion as follows: “Defendant Grady moved in the Supreme Court to certify his appeals *and for related relief*.” Respondents deny they are engaging in “prescience” or attempting to interpret the Court’s order; Respondents were merely reporting the Motions made and the express ruling obtained.

Second, Appellant has now alerted the Court and counsel that he withdraws his appeal from Judge Buckner’s oral ruling, “so this appeal concerns only the three orders issued by Judge Mullen.” (Return, p. 10). There are actually two Form 4 orders that dispose of three motions: (1) order of August 3, 2011, denying Defendants’ Motion to Compel Execution of Stipulations of Dismissal as to Randolph Murdaugh, III; (2) that same order of August 3, 2011, denying the motion to transfer venue; and (3) a separate order of August 3, 2011 dismissing with prejudice case no. 2009-CP-25-284 (Patrice Smart’s case raising her claim for loss of consortium) (appealed separately). Judge Buckner’s oral ruling dismissed co-defendants Louis Daniel Moffett and Lynwood Brantley d/b/a Brantley Hauling from the suit, and that order is no longer a part of this appeal.

I. THE ORDER DENYING CHANGE OF VENUE

Appellant argues that because of changes in the venue statute in 2005, an order refusing a change in venue is now an immediately appealable interlocutory order. Appellant then proceeds to argue the merits of the venue motion at length, describing the procedural history and contending the trial court should have declared Randolph

Murdaugh to be the equivalent of a “sham” defendant joined solely to provide venue in a certain county. The arguments attack the decision on the venue motion itself rather than addressing why the orders on appeal are somehow exempt from well-settled precedent denying immediate appealability. (Return, pp. 11-13). That is, the arguments here are directed toward the merits of Appellant’s claim that the trial court’s venue decision is wrong. The arguments can be made at the end of the case, and an immediate appeal of an order denying venue, even under the 2005 amendments to the venue statute, is inappropriate under Section 14-3-330 of the South Carolina Code.

Appellant’s implication that the appealability of venue orders changed with the amendment of the statute in 2005 should also not be persuasive. Even under the amended statute, Appellant can raise this issue at the end of the case. In fact, our appellate courts continue to hold that venue orders are not subject to immediate appeal and to cite to *Breland v. Love Chevrolet*, 339 S.C. 89, 529 S.E.2d 11 (2000) for that proposition. *Cf. Burkey v. Noce*, Op. No. 4971 (S.C. Ct. App. filed May 9, 2012) (Shearouse Adv. Sh. No. 16 at 197) (case addressed the appealability of a ruling on *forum non conveniens* and cited to *Breland* in dismissing appeal); *Thornton v. South Carolina Electric & Gas Co.*, 391 S.C. 297, 305 n.7, 705 S.E.2d 475, 479 n.7 (Ct. App. 2011) (dismissing an appeal from a ruling on class certification and citing to *Breland*); *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008) (reversing this Court’s holding that ruling on motion to remove matter to probate court was immediately appealable; Supreme Court cited *Breland* under facts that pre-dated amendment of statute but did not note the amendment to the statute changed appealability of venue rulings).

The Court should not be persuaded to address the merits of Appellant's argument regarding the venue ruling. That argument must be made another day. Instead, the Court should address the primary issue before the Court at this time – whether the orders being appealed are immediately appealable under Section 14-3-330(2).

II. THE ORDER DENYING THE MOTION TO CHANGE VENUE IS NOT IMMEDIATELY APPEALABLE UNDER SECTION 14-3-330(2) AND THE RATIONALE IN *HAGOOD V. SOMMERVILLE*, 362 S.C. 191, 607 S.E.2d 707 (2005)

Appellant acknowledges that appealability of the venue ruling is controlled by Section 14-3-330(2), which provides:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

* * *

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action[.]

S.C. Code Ann. § 14-3-330 (1977 & Supp. 2011). (Return, p. 13). Appellant contends that the right to trial in the proper venue is a “substantial right” so that the only question is “whether the appealed denial of the motion to change venue...satisfies subparts (a), (b), or (c) of § 14-3-330(2).” (Return, p. 13). In making the argument that the order is immediately appealable Appellant relies upon the Supreme Court's analysis in *Hagood v. Somerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). (Return, pp. 13-14). *Hagood*, however, is meaningfully distinct from this case.

In *Hagood*, the order on appeal essentially disqualified the appellant's lawyer. This Court dismissed the appeal in an unpublished opinion. The Supreme Court granted a writ of certiorari to consider this issue: "Is an order which grants a motion to disqualify a party's attorney immediately appealable?" The appellant contended the order affected a substantial right, "namely, the right to proceed with a lawyer of his choosing." *Hagood*, 362 S.C. at 195, 607 S.E.2d at 709. The appellant pointed out the right would be lost if not immediately appealed, contending "If a new trial were ordered after an appeal in the distant future, the preferred attorney may not be available or a litigant may not be able to afford the attorney for a second trial. Further, a litigant would find it difficult or impossible to show prejudice resulting from the disqualification order in a later appeal." *Id.*

The Supreme Court noted there was no "clear majority on the appealability of an order granting a motion to disqualify a party's attorney in a civil case." *Id.* The Court stated:

The reasons most often cited by state courts which have concluded such an order may be immediately appealed include (1) the importance of the party's right to counsel of his choice in an adversarial system; (2) the importance of the attorney-client relationship, which demands a confidential, trusting relationship that often develops over time; (3) the unfairness in requiring a party to pay another attorney to become familiar with a case and repeat preparatory actions already completed by the preferred attorney; and (4) an appeal after final judgment would not adequately protect a party's interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney.

Id. at 196, 607 S.E.2d at 710 (citations omitted). The Court found these authorities persuasive and held an order disqualifying a party's attorney in a civil case affects a

substantial right and may be immediately appealed under Section 14-3-330(2)(a) (affects a substantial right and “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action”). The Court stated:

The right to be represented by an attorney of ones choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case. Moreover, the right to be represented by ones preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right.

Id. at 197-198, 607 S.E.2d at 710 (underline added). Thus, the Court viewed the order as “rare” in that it could, in effect, determine the action and prevent a judgment from which an appeal might be taken, or could discontinue the action. Such is not the case, however, with the order before this Court – there is nothing about the denial of the venue transfer motion that determines the action and prevents a judgment from which Appellant may appeal, or discontinues the action. Unlike the availability of counsel at a later time in the case, the alternate venue (Jasper County) is highly unlikely to go anywhere or be less available after a trial in Allendale County.

In discussing the uniqueness of the order in *Hagood*, the Supreme Court stated:

Deprivation of the right to one’s preferred attorney would affect the attorney-client relationship, which is extremely important in our adversarial system. Furthermore, an appeal after final judgment and a new trial, if granted, would not adequately protect a party’s interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification.

Id.

The Court then held that, like the “mode of trial” orders, a party must immediately appeal an order disqualifying the party’s preferred trial counsel or any later objection will be waived. The Court did not explain the reasoning behind this second holding in *Hagood*. In *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008), however, the Supreme Court cited to Justice Pleicones’s dissent in *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 461, 661 S.E.2d 81, 91 (2008) that “the ‘mode of trial’ exception to the general rule that only final orders are appealable is confined to orders which abridge a party’s constitutional right to trial by jury.” The order before this Court – denial of a motion to transfer venue – does not abridge Appellant’s right to trial by jury. It also does not finally determine the issue in such a way as to prevent later appellate review. The rationale of *Hagood* does not apply in this instance.

Recently, the Supreme Court declared one other type of order fell within the “must be immediately appealed or is waived” category. In *Neeltec Enterprises, Inc. v. Long*, Op. No. 27125 (S.C. Sup. Ct. filed May 16, 2012) (Shearouse Adv. Sh. No. 17 at 30), the Court held that an order substituting a party-defendant for the defendant the plaintiff chose to sue was immediately appealable because it affected a substantial right within the meaning of Section 14-3-330(2)(a), citing *Chester v. South Carolina Dep’t of Pub. Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010) (on appeal from order requiring plaintiff to join parties as defendants, Court recognized common law right of tort plaintiff to choose her defendant). The Supreme Court then cited the 1933 case of *Watts v. Copeland*, 170 S.C. 449, 170 S.E. 780 (1933) for the rule that a party who does not immediately appeal an order of substitution waives the issue. The Court then noted that it

has held that an order that falls within the purview of Section 14-3-330 (2)(a) must be immediately appealed if it is to be considered at all, and that there is no review available after final judgment, citing *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (mode of trial case). The Court was citing to *Creed* as an example of when it has, on rare occasion, held such an order must be immediately appealed. Like an order disqualifying counsel or denying a mode of trial to which a party is entitled as a matter of right, an order that dismisses a party-defendant whom the plaintiff chose to sue and requires substitution of another party whom the plaintiff did not choose to sue affected a substantial right (the plaintiff's right to choose the defendant) and an appeal after final judgment would not adequately protect the party's right. The ruling in this case (denial of a motion to transfer venue) does not fall into the same category – appeal after final judgment will adequately protect Appellant's claimed right to venue in Jasper County.

The Court should conclude that the Supreme Court's analysis in *Hagood v. Sommerville* does not require (or even permit) immediate appeal of an order denying a transfer of venue. This appeal should be dismissed without prejudice.

III. THE RULE AGAINST IMMEDIATE APPEALS OF ORDERS DENYING THE SUBSTANTIAL RIGHT TO PROPER VENUE IS NOT IN ERROR AND DOES NOT CONFLICT WITH THE INTENT OF THE GENERAL ASSEMBLY AS EXPRESSED IN SECTION 14-3-330

The upshot of Appellant Grady's argument here is that (1) the order denying venue transfer is appealable under Section 14-3-330(2)(a), which has never been addressed by the appellate courts of this State, and (2) the cases that have addressed the

issue are “wrongly analyzed” and, therefore, wrongly decided. These arguments should not be persuasive.

A. THE JUDICIAL POLICY AGAINST “PIECEMEAL LITIGATION” IS ENTIRELY RELEVANT TO THE GENERAL ASSEMBLY’S EXPRESSION OF APPEALABILITY UNDER SECTION 14-3-330

Appellant criticizes the appellate courts for relying upon “the judicially created policy against ‘piecemeal litigation’ in denying immediate appeals under Section 14-3-330. Appellant contends the whole point of Section 14-3-330(1), (2) and (4) is to allow appeals before final judgment, *i.e.*, to allow piecemeal [litigation].” (Return, p. 14). Appellant argues public policy is the province of the legislature, not the courts, and the Supreme Court’s jurisprudence violates the separate of powers doctrine.

The short answer is that while Appellant Grady laments the Supreme Court’s jurisprudence and contends it is wrong, this Court can do nothing about that. See S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”).

Even if this Court could somehow reach the merits of the argument here, the Court should find it is not persuasive. Section 14-3-330 provides:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from

such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action; * * * and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

This statute governs appealability and permits immediate review of final judgments as well as intermediate orders that fall within some exception under the statute. *North Carolina Federal Sav. and Loan Ass'n v. Twin States Dev. Corp.*, 289 S.C. 480, 347 S.E.2d 97 (1986).

The Supreme Court's expression of policy against "piecemeal appeals" does not offend this statute, nor is it contrary to public policy expressed by the General Assembly. In fact, the notion that the General Assembly desired to limit the types of things that could be immediately appealed "to prevent the inconvenience, delay and expense of frequent and vexatious appeals, resulting from a piecemeal consideration of the questions arising" is itself well-settled in the Supreme Court's jurisprudence. *Garvin v. Garvin*, 1 S.C. (1 Rich.) 55, 59 (1868).

Section 14-3-330 allows immediate appeal of certain interlocutory rulings but under very specific limits. The final responsibility for construing the statute and declaring what those limits are belongs to the Supreme Court. *See, e.g., Mims Amusement Co. v. South Carolina Law Enforcement Div.*, 366 S.C. 141, 621 S.E.2d 344

(2005) (the Court has the final responsibility for construing the constitution and laws of this state, and must do so without concern for political or popular opinion); *Steinke v. South Carolina Dept. of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999) (construction of a statute is a judicial function and responsibility; judicial interpretation of a statute is determinative of its meaning and effect). The Supreme Court has construed Section 14-3-330 and its predecessor against the backdrop of avoiding piecemeal appeals, which was within the Court's power.

Furthermore, the Court presumes the General Assembly is aware of the Supreme Court's interpretation of its statutes. *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003). As the Supreme Court noted in *Wigfall*, "[b]uttressing a plain reading of the statute is the Legislature's inactivity on the issue over the last forty years since" the prior case construing the statute in that case. 354 S.C. at 111, 580 S.E.2d at 105. Likewise, buttressing the view that the Court properly considered the policy against piecemeal appeals in deciding whether an order is immediately appealable is the legislature's inactivity since the first time the Supreme Court expressed the policy. The Court has long expressed the policy of the "debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy..." *Knowles v. Standard Sav. and Loan Ass'n*, 274 S.C. 58, 261 S.E.2d 49 (1979) (citing United States Supreme Court precedent in following the policy when dismissing unappealable interlocutory ruling under Section 14-3-330 some 33 years ago). In fact, the Supreme Court has held this view for a very long time. *See, e.g., Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 42, 21 S.E.2d 209, 213 (1942) ("The rule in

restriction of piecemeal appellate procedure, dating back to the common law, is based upon sound reason and practical utility. If it were otherwise, endless delays would be encountered—delays which are unnecessary in cases similar to the one now before us, which can be decided upon an appeal from such final judgment as may later be entered by the trial Court.”); *State v. Burbage*, 51 S.C. 284, 287, 28 S.E. 937, 938 (1898) (“It is a bad practice, and generally condemned, to hear appeals by piecemeal, especially in criminal cases; for it is destructive of the prompt administration of justice, which is so essential to the peace of society. Besides, it leads to an unnecessary consumption of the time of this court, which could be much better employed than in considering or determining questions which may never become of any practical importance in a given case.”). In the 114 years since *State v. Burbage*, the 70 years since *Good v. Hartford Accident*, or even the 33 years since *Knowles*, the General Assembly has said nothing about the Supreme Court’s application of the “avoidance of piecemeal appeal” policy when dismissing appeals of various interlocutory rulings.

Finally, our Supreme Court has instructed that in *modern* times “[t]he provisions of Section 14-3-330, including subsection (2), have been *narrowly* construed and immediate appeal of various orders issued before and during trial generally have not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial.” *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005) (emphasis added). *See also Thornton v. South Carolina Electric & Gas Co.*, 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011) (applying rule of narrow construction to Section 14-3-330 under *Hagood*); *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464

(2006) (noting “[t]he phrase ‘involving the merits’ is *narrowly* construed in *modern* precedent”) (emphasis supplied).

In sum, the Supreme Court’s application of the policy of “avoidance of piecemeal appeal” to declare certain interlocutory rulings are not immediately appealable under Section 14-3-330 is not inconsistent with the policy choices the General Assembly made when it adopted the statute. The Court should reject Appellant’s argument and dismiss the appeal without prejudice.

B. THE AVAILABILITY OF RELIEF AFTER FINAL JUDGMENT IS AN EXPRESSED BASIS FOR DENYING AN INTERLOCUTORY APPEAL OF CERTAIN PRE-TRIAL ORDERS

Appellants contend that the “general observation that relief is available after final judgment” contained in opinions dismissing appeals is insufficient under the statute since the same rationale could be applied to “mode of trial” cases, the disqualification of attorney case (*Hagood v. Sommerville*), and the substitution of party case, *Neeltec Enterprises, Inc. v. Long*, Op. No. 27125 (S.C. Sup. Ct. filed May 16, 2012) (Shearouse Adv. Sh. No. 17 at 30). (Return, pp. 15-16). This argument should not be persuasive.

As noted above, Section 14-3-330 provides:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

* * *

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an

answer or any part thereof or any pleading in any action[.]

(Emphasis added). Thus, the statute itself contemplates that the interlocutory order first “affect[] a substantial right.” Assuming a substantial right is affected¹, the order must next “in effect determine[] the action.” The implication is that something about the order is outcome determinative in the trial court. Even so, an appellant must meet the third part of the test, that is, the order must also “prevent[] a judgment from which an appeal might be taken...” This means that the interlocutory order would so infect the trial proceeding that an appeal after final judgment could not provide sufficient relief. *See, e.g., State v. Wilson*, 387 S.C. 597, 693 S.E.2d 923 (2010) (Supreme Court explained *Hagood* and the underlying reason for the ruling, that is, “right to be represented by an attorney of one’s choosing could, in effect, determine the action, and it is closely related to the right to a particular mode of trial, which is an established substantial right”).

There is nothing about the denial of the transfer of venue at issue in this case that cannot be taken up after final judgment in the case. That is, the order does not “determine the action,” nor does it “prevent a judgment from which an appeal might be taken.” The Supreme Court has construed this statute to preclude appeal under Section 14-3-330 where relief is available after final judgment, and this construction is wholly consistent with the language and intent of Section 14-3-330(2)(a).

Once again, this Court is bound by Supreme Court precedent. *See* S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as

¹ *See Breland*, 339 S.C. at 94, 529 S.E.2d at 13 (“The trial court’s order [denying a change of venue] did not ‘affect’ the Defendant’s right to venue in the county of its residence because any error in the order can be corrected on appeal following the trial.”)

precedents.”). Even if the Court could rule differently, nothing Appellant has argued should persuade the Court that the order denying a transfer of venue in this case is immediately appealable under Section 14-3-330(2)(a). The Court should dismiss this appeal without prejudice.

**C. THE COURT SHOULD REJECT APPELLANT’S “BOOTSTRAP” CRITIQUE
OF SUPREME COURT JURISPRUDENCE**

The Appellant’s argument here goes like this: In deciding appealability under Section 14-3-330(2), the Supreme Court has engaged in a silent “bootstrap” analysis that improperly hinges on whether the trial court erred in the ruling below. (Return, pp. 17-18). Appellant illustrates this point by a cursory examination of three cases: *Hannah v. United Refrigeration Servs., Inc.*, 305 S.C. 394, 409 S.E.2d 360 (1991), *Rowe Furniture Corp. v. Carolina Wholesale Furniture Co.*, 292 S.C. 575, 357 S.E.2d 725 (Ct. App. 1987) and *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000). These cases do not undermine Respondents’ Motion to Dismiss and should not persuade this Court to deny the motion.

In *Rowe*, this Court had before it an appeal from a circuit court order denying a motion for a jury trial made by the defendants. The defendants had not demanded a jury in the pleadings trial but later requested one pursuant to Rule 39(b), SCRCp, which permits the circuit court the discretion to order a jury trial even though a party failed to demand one. The defendants contended the circuit court abused its discretion in denying their request for a jury trial under Rule 39. This Court dismissed the appeal since the

order did not deny the defendants a mode of trial to which they were entitled as a matter of right, citing *C&S Real Estate Services v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) (an order denying a party a jury trial is not immediately appealable unless it deprives him of a mode of trial to which he is entitled as a matter of right). See *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997) (Supreme Court explained this Court's opinion in *Rowe* as involving Rule 39 under which the right to jury trial was discretionary, and stating where the right is asserted under Rule 38, SCRCP, as a matter of right, the failure to immediately appeal operated as a waiver of that right). *Rowe* is thus consistent with the Supreme Court's "mode of trial" cases.

In *Hannah*, the trial court granted a Rule 39 request for a jury trial, and the non-moving party appealed. In dismissing the appeal in *Hannah*, the Supreme Court stated, "A party's failure to make a timely demand for a jury trial does not mean the opposing party acquires a right to have, as a matter of law, a non-jury trial." *Hannah*, 305 S.C. at 394, 409 S.E.2d at 364. Again, there was no "mode of trial to which a party had a right" involved and *Hannah* is entirely consistent with other Supreme Court precedent.

The third case, *Breland*, was not wrongly analyzed as Appellant suggests. (Return, p. 17-18). In *Breland*, the Supreme Court did not focus on whether or not the trial court erred. Instead, the Court focused on the language of Section 14-3-330 and the policy against piecemeal appeals. The Court stated:

Since any trial court error concerning venue will be correctable upon appeal, the only damage a losing party will sustain is the expense of litigating in an improper county. Even though proper venue is a substantial right, we have previously found the avoidance of a trial is not a sufficient reason to justify immediate appellate review. See *Shields v.*

Martin Marietta Corp., 303 S.C. 469, 402 S.E.2d 482 (1991). In this case, since any venue error will be correctable upon appeal after trial, we find the right of proper venue has not been affected such that the order would be immediately appealable.

Breland, at 94-95, 529 S.E.2d at 14. This analysis is wholly consistent with the express language of Section 14-3-330(2)(a) and related case law.

The Court should not be persuaded by this “bootstrap” critique of Supreme Court jurisprudence, and should dismiss the appeal in this case without prejudice.

D. THE SUPREME COURT’S JURISPRUDENCE UNDER SECTION 14-3-330 DOES NOT VIOLATE THE GENERAL ASSEMBLY’S EXPRESSLY STATED POLICY CHOICE IN SECTION 14-3-330(2)(C)

Appellant contends the Supreme Court’s decision in *Breland* is wrong because the Supreme Court failed to consider that the order in that case “struck the defense of improper venue.” (Return, p. 18). Appellant asserts the order in this case “strikes that defense by denying the requested change of venue and, therefore, the appealed order comes within the General Assembly’s expressly stated public policy in § 14-3-330(2)(c).” (Return, p. 18). This argument should not be persuasive.

There is *nothing* in *Breland* to suggest the trial court actually or effectively struck anything from the answers filed in that case. Instead, while the issue of improper venue was raised in the answers of both defendants, the trial court in that case was ruling upon a separate motion to transfer venue the defendants filed. The Supreme Court described the issue as “Is a trial court’s order denying a motion to change venue immediately appealable?” *Breland*, at 92, 529 S.E.2d at 12. Although the defendants in *Breland*

contended “the refusal to transfer venue *effectively* struck out a portion of their answer,” *Breland*, at 92, 529 S.E.2d at 13 (emphasis added), the Supreme Court disagreed.

The Supreme Court stated that “the questions in the current case are whether the order denying the venue transfer: (1) affected; (2) a substantial right; and (3) struck part of the answer.” *Id.* In dismissing the appeal, the Supreme Court rejected defendants’ contention that the denial of the motion to transfer venue “effectively struck out a portion of their answer.” This is further evidenced by the Court’s statement that “Requiring a defendant to wait until after trial to appeal the issue of proper venue is the most appropriate course to take where any error in that decision will not prejudice the defendant anymore than other interlocutory orders which, if in error, would require a new trial.” That is, the issue of venue was not “struck” from the case; rather, defendants had to wait until the end of the case to appeal the denial of their motion to transfer.

Like the order in *Breland*, the order in this case does not actually or effectively strike the issue of improper venue from the pleadings. First, as Appellant concedes, improper venue was not raised in the answers; this is because Mr. Murdaugh was a defendant at the time and had not been relegated to the alleged status of “sham” defendant. All Judge Mullen did was deny a motion to transfer venue – nothing more, nothing less. The issue was not struck, and Appellant may raise the issue at the end of the case. Section 14-3-330(2)(c) does not apply.

The Court should reject Appellant’s argument that Section 14-3-330(2)(c) supports immediate appealability, and should dismiss the appeal without prejudice.

IV. THE ORDER DENYING APPELLANT GRADY'S MOTION TO COMPEL EXECUTION OF THE STIPULATION OF DISMISSAL IS NOT IMMEDIATELY APPEALABLE UNDER SECTION 14-3-330(4)

Appellant contends the order denying Grady's motion to compel execution of the stipulation of dismissal is appealable as "an order denying an injunction" under Section 14-3-330(4). (Return, pp. 19-20). This argument should not be persuasive.

A. THE TRIAL COURT'S REFUSAL TO COMPEL EXECUTION

Appellant contends defendant Murdaugh's "voluntary re-entry" into the case should be disregarded for venue purposes. This is an argument addressed to the merits of the propriety of the denial of the motion to transfer venue. The argument must await the end of the case for this Court's review. The Court should decline to address it when ruling upon the real issue at hand – appealability of the denial of the venue motion.

B. THE TRIAL COURT'S ORDER IS NOT IMMEDIATELY APPEALABLE

Appellant contends his motion "to compel execution of dismissal required by the settlement documents" is in fact a request for "a mandatory injunction order that enjoined the parties to comply with the requirements of Rule 41, SCRCP, and the settlement documents." (Return, pp. 19-20). Appellant contends the ruling is therefore appealable under Section 14-3-330(4), while the cases Respondent cites are limited to appealability under Section 14-3-330(1) and (2). (Return, p. 20). This argument should not be persuasive.

The actual motion before the circuit court was a motion to force Respondents to execute a stipulation of dismissal of Defendant Murdaugh as part of a settlement agreement. Defendant Grady conceded that the stipulation of dismissal pursuant to Rule

41, SCRCPP, that he sought to enforce was “ineffective,” but he sought clarification and an order compelling execution of the document. (Appendix, p. 46, fn. 1). This was part of a settlement, however, and the upshot of the motion was an attempt to enforce its terms, not to obtain injunctive relief.

This Court should not be persuaded by Appellant’s argument that the motion below sought injunctive relief so that the denial of the motion is appealable under Section 14-3-330(4). Any time a party seeks to compel compliance with an alleged settlement agreement the relief sought may be couched in terms of seeking injunctive relief. What is actually happening, however, is that the party is seeking specific performance of some term of the settlement, the denial of which the Supreme Court has held is not immediately appealable. *See Peterkin v. Brigman*, 319 S.C. 367, 461 S.E.2d 809 (1995) (denying immediate appellate review of order declining to approve wrongful death settlement, finding there was no “meeting of the minds”).

The Court should reject Appellant’s assertion that the order denying Appellant’s motion to compel execution of the stipulation of dismissal is immediately appealable under Section 14-3-330(4). The Court should dismiss the appeal without prejudice.

V. GRADY LACKS STANDING TO CHALLENGE THE TRIAL COURT’S ORDER GRANTING MRS. SMART’S MOTION TO DISMISS HER LOSS OF CONSORTIUM CASE

Appellants argue that because the apportionment issue regarding the settlement of Mrs. Smart’s separate loss of consortium case, Grady is aggrieved by the order and therefore may appeal. (Return, pp. 20-22). This argument should not be persuasive.

There is nothing about Judge Mullen's order that precludes Grady from raising the issue following a trial on the merits. Grady acknowledges that Respondents' attorney conceded as much at the hearing. (Return, p. 21).

Grady suggests "the most efficient way to value the consortium claim is a consolidated trial with the personal injury claim." (Return, p. 21). Grady is therefore advocating that a party who has resolved her case be forced to resurrect it and engage in a time-consuming and potentially costly trial – the very thing her settlement avoided. The Court should reject this suggestion and find that Grady is not an "aggrieved" party for purposes of appealing the order of dismissal.

As noted in the Motion to Dismiss, Appellant Grady is not aggrieved with respect to an order that dismisses with prejudice a claim that was brought against him. And as he acknowledges in his Return, the dismissal does not preclude Grady from later making the arguments in favor of setoff. At that point Appellant Grady will be permitted seek an evaluation by the court of the money Respondents received through settlement, and may argue in favor of reapportionment of the settlement amounts as against any verdict Respondent Gary Smart may obtain.

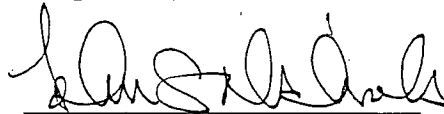
The Court should hold that Appellant is not an aggrieved party for purposes of Rule 201, SCACR, and should dismiss this appeal with prejudice.

CONCLUSION

Even if Appellant were correct that existing Supreme Court precedent is wrongly decided (and he is not), this Court must follow those decisions. See S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). If this Court does not follow Supreme Court precedent and dismiss these appeals now, the parties will engage in much work before this Court only to have the Supreme Court vacate any decision on the merits that this Court renders. Time and effort will have gone for naught, and the merits of the issues will have to be re-briefed and re-argued when the case is truly final.

For the reasons stated this Court should dismiss these appeals and remand these matters to the circuit court for further proceedings.

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June 19, 2012

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge
Perry M. Buckner, Circuit Court Judge

Case No. 2009-CP-25-285

Gary Smart, ... Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood
Brantley, d/b/a Brantley Hauling and Randolph Murdaugh, III, ... Defendants,

of whom James Allen Grady is Appellant.

PETITION FOR REHEARING AND REINSTATEMENT OF APPEAL

This Court dismissed the above-captioned appeal upon finding the appealed orders were not immediately appealable. Pursuant to Rules 221 and 240, SCACR, the Appellant hereby respectfully petitions this Court for rehearing of its decision to dismiss the appeal and for reinstatement of the appeal. The grounds for this petition are set forth below.

I. ~~THE TRIAL COURT ERRED IN DENYING THE MOTION TO CHANGE VENUE.~~

It is well-settled that a defendant joined for the purpose of establishing venue is a nominal or immaterial defendant who must be disregarded when deciding the proper venue of an action. See, e.g., *Williams v. Chrysler Motors Corp.*, 193 S.E.2d 524, 525 (S.C. 1972); *McMillan v. B.L. Montague Co.*, 121 S.E.2d 13, 15 (S.C. 1961); *Seegars v. WIS-TV*, 114 S.E.2d 502, 505 (S.C. 1960). Here, Defendant Murdaugh ostensibly was not joined for the purpose of

establishing venue, but he remains in the case without any personal interest in the outcome of the litigation under a covenant not to execute, which the Supreme Court has found “must be carefully scrutinized in order to determine their efficiency and *impact upon the integrity of the judicial process.*” *Poston v. Barnes*, 363 S.E.2d 888, 890 (S.C. 1987) (emphasis added). Moreover, Defendant Murdaugh is a mere volunteer in this case, because he voluntarily waived his contractual right to be dismissed from the lawsuit without any consideration for doing so.

Having no personal interest in the outcome of the litigation, Defendant Murdaugh is immaterial and, therefore, “for venue purposes this defendant must be *disregarded* and the *sole inquiry* is whether the [remaining defendant] is subject to suit in that county [resident county of the immaterial defendant].” *Seegars*, 114 S.E.2d at 505 (emphasis added). This is true even if there are sufficient allegations and proof to pursue a claim against him. *McMillan*, 121 S.E.2d at 15. See also *Bumgardner v. Combustion Engineering, Inc.*, 432 F. Supp. 1289 (D.S.C. 1977) (defendants settling under covenants not to execute and similar arrangements are nominal defendants and are to be disregarded in determining the existence of diversity jurisdiction). When Defendant Murdaugh is disregarded, venue is only proper in Jasper County and, therefore, the trial court erred in denying the motion for change of venue.

II. THE ORDER DENYING THE MOTION TO CHANGE VENUE IS IMMEDIATELY APPEALABLE UNDER § 14-3-330(2)(A) AND THE RATIONALE IN *HAGOOD V. SOMMERVILLE*, 607 S.E.2D 707 (S.C. 2005).

In *Hagood v. Sommerville*, 607 S.E.2d 707 (S.C. 2005), the Supreme Court held that an order disqualifying an attorney in a civil case is immediately appealable under § 14-3-330(2)(a), because the right to choose one’s counsel is a “substantial right” and because “an appeal after final judgment and a new trial, if granted, *would not adequately protect* a party’s interest because it would be *difficult or impossible* for the affected party or the appellate court to ascertain by any

objective standard *whether prejudice resulted* from the disqualification.” *Id.* at 710 (emphasis added). The same is true for an appeal after final judgment in a “venue” case. It will be impossible to prove prejudice, *i.e.*, that a different jury in a different county would have reached a different result. Thus, an order denying the substantial right to the statutorily mandated venue is immediately appealable under § 14-3-330(2)(a) and the rationale in *Hagood, supra*.¹

This Court dismissed the present appeal under the Supreme Court’s ruling in *Breland v. Love Chevrolet Olds, Inc.*, 529 S.E.2d 11 (S.C. 2000). That case, however, was decided under § 14-3-330(2)(c), not § 14-3-330(2)(a), so it does not control here. The rationale and analysis in *Hagood, supra* under § 14-3-330(2)(a) applies equally here and, therefore, the order denying change of venue is immediately appealable.

III. THE ORDER DENYING THE MOTION TO CHANGE VENUE IS IMMEDIATELY APPEALABLE UNDER § 14-3-330(2)(C).

The appealed order struck the defense of improper venue and therefore is immediately appealable under the express terms of § 14-3-330(2)(c). The Supreme Court’s contrary ruling in *Breland* and other cases impermissibly “construe” this code section to avoid the express intent of the General Assembly.

A. The judicial policy against “piecemeal litigation” is irrelevant to the General Assembly’s decision to allow immediate appeals from certain pre-trial orders.

In denying immediate appeals under § 14-3-330, the courts often rely on the judicially created policy against “piecemeal litigation.” *E.g., Breland*, 529 S.E.2d at 13. The entire purpose of § 14-3-330(1), (2), and (4), however, is to allow appeals before final judgment, *i.e.*, to allow piecemeal litigation. The General Assembly’s plainly stated intent to allow such immediate appeals cannot be constrained by a judicial policy against piecemeal litigation.

¹ The right to trial in the proper venue is a statutory right granted by the General Assembly and is a “substantial right” under § 14-3-330(2). See, *e.g., Whaley v. CSX Transp., Inc.*, 609 S.E.2d 286, 292 (S.C. 2005) (venue right granted by former venue statute is a “substantial right”).

Rather, as a matter of constitutional law, that policy must yield to the General Assembly's policy in allowing immediate appeals from certain pre-trial orders. See *Brown v. Duke*, 270 S.E. 2d 130, 132 (S.C. 1980) (public policy is the province of the legislature); *Adkins v. Comcar Indus., Inc.*, 447 S.E.2d 228, 230 (S.C. App. 1994) (same); *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 382 S.E.2d 11, 14 (S.C. App. 1989) (same). Thus, under the separation of powers doctrine, the courts must yield to, follow, and promote the General Assembly's policy choices as set forth in § 14-3-330.

Section 14-3-330(1), (2), and (4) reflect a policy choice by the General Assembly to allow immediate appeals from certain pre-trial orders. The judicial policy against "piecemeal litigation" cannot, as a matter of constitutional law, provide any basis for limiting the General Assembly's contrary policy choice. Thus, if an order is immediately appealable under the plain language of § 14-3-330, the appellate courts must entertain the appeal.

- B. The availability of relief after final judgment through reversing and remanding for a new trial is not a basis for denying the statutory right granted by the General Assembly to appeal immediately from certain pre-trial orders.

In denying immediate appeals under § 14-3-330, the courts have often relied upon the general observation that relief is available after final judgment by reversing and granting a new trial. *E.g.*, *Breland*, 529 S.E.2d at 14 (finding that the "substantial right" to proper venue was not "affected" by the order, because any error could be remedied after final judgment by granting a new trial). The same rationale, however, applies with equal force to any order that is immediately appealable under § 14-3-330(2), because virtually any error in any order can always be "remedied" by a new trial. For example, the Supreme Court has found that all of the following pre-trial orders are immediately appealable, but the error in each of these orders could have been remedied by ordering a new trial after final judgment: *Neeltec Enterprises, Inc. v.*

Long, 725 S.E.2d 926 (S.C. 2012) (order improperly substituting one entity for another as a party defendant), *rev'g* 705 S.E.2d 57 (S.C. App. 2011); *Hagood v. Sommerville*, 607 S.E.2d 707 (S.C. 2005) (order disqualifying an attorney in a civil case); *Creed v. Stokes*, 331 S.E.2d 351 (1985) (order denying right to jury trial); *Pelfrey v. Bank of Greer*, 244 S.E.2d 315 (1978) (order denying right to non-jury trial).²

In any event, nothing in § 14-3-330 supports the notion that the right to an immediate appeal granted by the General Assembly is unavailable if a new trial can remedy the error. Indeed, this judicially created limitation would render § 14-3-330 virtually meaningless, because exceedingly few (if any) errors in a pre-trial order cannot be remedied after final judgment by reversing and remanding for a new trial. There is no logical or jurisprudential basis, nor any statutory basis, to disallow an immediate appeal of an order denying the substantial right to proper venue granted by the General Assembly. Accordingly, the order denying a change of venue is immediately appealable under § 14-3-330(2)(c).

C. *Breland* was rightly decided but wrongly analyzed and, therefore, it does not preclude an appeal of the venue order at issue here.

In the published opinions on § 14-3-330(2), the courts have engaged in a “bootstrap” analysis to determine appealability, albeit silently. For example, in the “mode of trial cases,” the Supreme Court has held an order is not immediately appealable if there was not right to a jury trial or there was not a right to a non-jury trial. *Hannah v. United Refrigeration Servs., Inc.*, 409 S.E.2d 360 (S.C. 1991) (since there was no right to a non-jury trial, there was no right to an immediate appeal); *Rowe Furniture Corp. v. Carolina Wholesale Furniture Co.*, 357

² As noted earlier, the rationale in *Hagood* was that it would be difficult if not impossible to show prejudice in an appeal after final judgment, and that same rationale applies here, *i.e.*, that a different jury in a different county would have reached a different result. This same rationale provides a unifying and logical basis for the other “immediate appeal” cases, to-wit: (1) if an order denies a right to a jury trial, it cannot be shown that a different result would have obtained in a non-jury trial; (2) if an order denies a right to a non-jury trial, it cannot be shown that a different result would have obtained in a jury trial; and (3) if an order improperly substitutes a defendant party, it cannot be shown that a different result would have obtained with the original defendant.

S.E.2d 725 (S.C. 1987) (since there was no right to a jury trial, there was no right to an immediate appeal). Applying this “bootstrap” analysis to *Breland*, *supra*, demonstrates why that case was rightly decided (no immediate appeal) but wrongly analyzed (new trial available).

In *Breland*, the Supreme Court noted the following: “From the record on appeal, it is clear that [the evidence] will sustain the trial court’s decision.” 529 S.E.2d at 14. In other words, the record demonstrated that the trial court did not err in denying the motion to change venue in *Breland*. Since there was no error, there was no right to an immediate appeal. Here, the trial court plainly erred in denying a change of venue and, therefore, the order is immediately appealable.

In *Breland*, the Supreme Court rejected the appellant’s argument that the order was immediately appealable because it struck the defense of improper venue. This was error. Proper venue is a substantial right and, as noted in *Breland*, the denial of that right strikes the defense and prevents it from being considered further before trial. Thus, such an order comes within the express language of § 14-3-330(2)(c) as affecting a substantial right and striking a defense. The General Assembly’s policy choice prevails and, therefore, orders denying the substantial right to the proper venue are immediately appealable.

IV. THE ORDER DENYING DEFENDANT GRADY’S MOTION TO COMPEL EXECUTION OF THE STIPULATIONS OF DISMISSAL IS IMMEDIATELY APPEALABLE UNDER S.C. CODE ANN. § 14-3-330(4) (SUPP. 2011) AS AN ORDER DENYING AN INJUNCTION.

A. The trial court erred in refusing to compel execution of the stipulations.

Defendant Murdaugh voluntarily waived his contractual right to dismissal with prejudice and voluntarily agreed to “re-enter” the case as a nominal defendant with no personal interest in the outcome of the litigation as an accommodation to the Plaintiff. Thus, he is a mere volunteer in this action. No defendant should be permitted to re-enter a case as a mere volunteer

with no interest in the outcome of the litigation – allowing such threatens the “integrity of the judicial process.” *Poston*, 363 S.E.2d at 890. At the very least, his voluntary re-entry as a defendant, at the behest of and as an accommodation to the Plaintiffs, should be disregarded for purposes of venue.

B. The trial court’s order is immediately appealable.

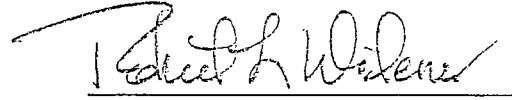
Defendant Grady moved to compel execution of the stipulation of dismissal required by the settlement documents. In doing so, Defendant Grady sought a mandatory injunction order that enjoined the parties to comply with the requirements of Rule 41, SCRC, and the settlement documents. Judge Mullen denied the requested injunction and, therefore, her order is immediately appealable as the denial of an injunction under S.C. Code Ann. § 14-3-330 (4) (Supp. 2010).

Relying on *Peterkin v. Brigman*, 461 S.E.2d 809 (S.C. 1995), this Court dismissed the appeal upon finding the Appellant’s motion was “akin” to a motion to enforce a settlement agreement, and such orders are not immediately appealable. That case, however, denied appealability under subsections (1) and (2) of § 14-3-330 but did not consider subsection (4). (*Id.*). Here, the Appellant sought to enjoin the plaintiff and other defendants to execute the stipulations of dismissal. The denial of the motion was the denial of an injunction and, therefore, is immediately appealable under § 14-3-330(4).

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Appellant’s Return to the Defendant’s Motion to Dismiss, which are incorporated herein by reference, it is respectfully submitted that this Court should grant rehearing, find that the appealed orders are immediately appealable under § 14-3-330, and reinstate the appeal.

Respectfully Submitted,



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October 23, 2012
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge
Carmen Tevis Mullen, Circuit Court Judge

Case No. 2009-CP-25-285

Gary Smart, ... Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood Brantley
d/b/a Brantley Hauling and Randolph Murdaugh, III, ... Defendants,
of whom

James Allen Grady is Appellant.

RESPONDENT'S RETURN TO PETITION FOR REHEARING
AND REINSTATEMENT OF APPEAL

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Attorneys for Respondent

Pursuant to Rules 221(c) and 240(e), SCACR, Respondent Gary Smart files the following Return to the Petition for Rehearing and Reinstatement of Appeal filed by the Appellant, James Allen Grady. The Court should deny this Petition.

BACKGROUND

Grady appealed (1) an order dismissing Mrs. Smart's consortium claim against Grady with prejudice; (2) an oral ruling striking Defendants Louis Daniel Moffett and Lynwood Brantley d/b/a Brantley Hauling from the underlying action; and (3) an order denying Grady's motions to compel execution of stipulations of dismissal and to transfer venue. Respondent moved to dismiss on the ground that Grady was not an aggrieved party with regard to the dismissal of the consortium claim against him, and further that the other orders were not immediately appealable interlocutory orders. Grady filed a Return withdrawing the appeal from the oral ruling of dismissal as to the Brantley defendants but arguing the remaining orders were appealable under S.C. Code Ann. § 14-3-330 (1976 & Cum. Supp.). Respondent filed a Reply to the Return.

On September 21, 2012, the Court entered an order dismissing the appeal without prejudice on the ground that the orders being appealed were not immediately appealable under Section 14-3-330. On October 8, 2012, the petition for rehearing was due from the order but Grady wrote the Court requesting an extension of deadline until October 23, 2012. Respondent had no objection to the request and wrote the Court on October 10, 2012 of the Respondent's consent to the request.

However, the Court did not rule on Grady's request; rather, on October 9, 2012,

the Clerk issued an order remitting the case to the trial court.

On October 12, 2012, Grady wrote the Court advising it that the request for rehearing was due October 15, 2012 (not October 23) and requesting another extension until October 30, 2012. There was no mention of the fact that the remittitur had been sent on October 9, 2012. On October 16, 2012, Respondent once again wrote that there was no objection to the request. Because the remittitur had been sent on October, 9, 2012, however, Respondent filed a Motion for Costs and Fees on October 24, 2012, out of an abundance of caution.

On October 23, 2012, Grady filed and served his Petition for Rehearing and Reinstatement of Appeal. This response follows.¹

DISCUSSION

I. THE COURT WILL NEED TO RECALL THE REMITTITUR TO ACT UPON GRADY'S PETITION

As an initial point, the matter as been remitted to the lower court. (Exh. A, attached). Thus, in order to address Grady's request for rehearing, the Court will need to recall the remittitur since jurisdiction follows the document. *See Wise v. South Carolina Dept. of Corrections*, 372 S.C. 173, 642 S.E.2d 551 (2007) (sending of the remittitur ended appellate jurisdiction over the matter).

Although Grady did not request that the Court recall the remittitur, Grady did seek

¹ Grady also broadly asserts that he incorporates by reference the arguments he made in his Return to Respondent's Motion to Dismiss. (Petition, p. 7). Insofar as the Court considers those arguments, Respondent incorporates the arguments he made in response in his Reply to the Return.

“reinstatement of the appeal.” As the time line above sets forth, Grady made requests for extensions to file his Petition for Rehearing within the time frame for filing his Petition. Although the Court did not act upon those requests, it is counsel’s experience that absent extraordinary circumstances these request are routinely granted.

The remittitur in this case was most likely sent as the result of inadvertence by the Court since Grady requested extensions by letter and not by formal motion. See *Wise, supra* (when the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter; the only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the Court). Accordingly, the Court will need to recall the remittitur in this matter before addressing Grady’s Petition for Rehearing.

II. THE COURT SHOULD NOT ADDRESS THE MERITS OF THE VENUE ISSUE AT THIS STAGE

Grady first contends that the trial court erred in denying the motion to change venue because “Defendant Murdaugh ostensibly was not joined for the purpose of establishing venue, but he remains in the case without any personal interest in the outcome of the litigation under a covenant not to execute....” (Petition, pp. 1-2). Grady asserts Murdaugh is thus a “nominal or immaterial defendant who must be disregarded when deciding the proper venue of an action.” (Petition, pp. 1, 2).

Even if Grady is correct about everything he says in this two-paragraph argument (the trial court properly rejected these arguments and Respondent asserts the argument is

legally incorrect), because the interlocutory appeal is inappropriate under Section 14-3-330 and Supreme Court precedent, this issue is not properly before the Court. Should the Court recall the remittitur, grant the petition for rehearing, reinstate the appeal, and then deny the motion to dismiss on reconsideration (which the Court should not do), then the parties can proceed to argue about the merits of the issue. However, at this point this argument is premature.

III. THE ORDER DENYING THE MOTION TO CHANGE VENUE IS NOT IMMEDIATELY APPEALABLE UNDER SECTION 14-3-330(2) AND THE RATIONALE IN *HAGOOD V. SOMMERVILLE*, 362 S.C. 191, 607 S.E.2d 707 (2005).

Grady makes the same argument here that he made in his Return to the Motion to Dismiss, that is, that venue is a “substantial right” so that the order denying the transfer is immediately appealable under Section 14-3-330(2)(a) and *Hagood v. Sommerville*.

(Petition, pp. 2-3). Respondent repeats here his response to that Return.

Appealability of the venue ruling is controlled by Section 14-3-330(2), which provides:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

* * *

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action[.]

S.C. Code Ann. § 14-3-330 (1977 & Supp. 2011). Grady contends that the right to trial in

the proper venue is a “substantial right” and is therefore appealable. Grady relies upon the Supreme Court’s analysis in *Hagood v. Somerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). (Petition, pp. 2-3). *Hagood*, however, is meaningfully distinct from this case.

In *Hagood*, the order on appeal essentially disqualified the appellant’s lawyer. This Court dismissed the appeal in an unpublished opinion. The Supreme Court granted a writ of certiorari to consider this issue: “Is an order which grants a motion to disqualify a party’s attorney immediately appealable?” The appellant contended the order affected a substantial right, “namely, the right to proceed with a lawyer of his choosing.” *Hagood*, 362 S.C. at 195, 607 S.E.2d at 709. The appellant pointed out the right would be lost if not immediately appealed, contending “If a new trial were ordered after an appeal in the distant future, the preferred attorney may not be available or a litigant may not be able to afford the attorney for a second trial. Further, a litigant would find it difficult or impossible to show prejudice resulting from the disqualification order in a later appeal.” *Id.*

The Supreme Court noted there was no “clear majority on the appealability of an order granting a motion to disqualify a party’s attorney in a civil case.” *Id.* The Court stated:

The reasons most often cited by state courts which have concluded such an order may be immediately appealed include (1) the importance of the party’s right to counsel of his choice in an adversarial system; (2) the importance of the attorney-client relationship, which demands a confidential, trusting relationship that often develops over time; (3) the unfairness in requiring a party to pay another attorney to become familiar with a case and repeat preparatory actions already completed by the preferred attorney; and (4) an appeal after final judgment would not adequately protect a party’s interests because it would be difficult or

impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney.

Id. at 196, 607 S.E.2d at 710 (citations omitted). The Court found these authorities persuasive and held an order disqualifying a party's attorney in a civil case affects a substantial right and may be immediately appealed under Section 14-3-330(2)(a) (affects a substantial right and "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action") (underline added). The Court stated:

The right to be represented by an attorney of ones choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case. Moreover, the right to be represented by ones preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right.

Id. at 197-198, 607 S.E.2d at 710 (underline added). Thus, the Court viewed the order as "rare" in that it could, in effect, determine the action and prevent a judgment from which an appeal might be taken, or could discontinue the action.

Such is not the case, however, with the order before this Court – there is nothing about the denial of the venue transfer motion that determines the action and prevents a judgment from which Grady may appeal, or discontinues the action.² Unlike the

² In fact, although Grady surmises that "it will be impossible to prove prejudice, i.e., that a different jury in a different county would have reached a different result" (Petition, p. 3), Grady does not contend that the order "prevents a judgment from which [Grady] may appeal, or discontinues the action." This failure to demonstrate that the order prevents a judgment from which Grady may appeal or somehow discontinues the action is fatal to any argument that the order is appealable under Section 14-3-330(2)(a). That is, even if the order involves a "substantial right," the inquiry is not ended – instead, Grady must demonstrate that the order *also*

availability of counsel at a later time in the case, the alternate venue (Jasper County) is highly unlikely to go anywhere or be less available after a trial in Allendale County.

In discussing the uniqueness of the order in *Hagood*, the Supreme Court stated:

Deprivation of the right to one's preferred attorney would affect the attorney-client relationship, which is extremely important in our adversarial system. Furthermore, an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification.

Id.

The Court then held that, like the "mode of trial" orders, a party must immediately appeal an order disqualifying the party's preferred trial counsel or any later objection will be waived. The Court did not explain the reasoning behind this second holding in *Hagood*. In *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008), however, the Supreme Court cited to Justice Pleicones's dissent in *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 461, 661 S.E.2d 81, 91 (2008) that "the 'mode of trial' exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury." The order before this Court – denial of a motion to transfer venue – does not abridge Grady's right to trial by jury. It also does not finally determine the issue in such a way as to prevent later appellate review. The rationale of *Hagood* does not apply in this instance.

Recently, the Supreme Court declared one other type of order fell within the "must be immediately appealed or is waived" category. In *Neeltec Enterprises, Inc. v.*

prevents an appeal or discontinues the action before it is appealable under 14-3-330(2)(a).

Long, 397 S.C. 563, 725 S.E.2d 926 (2012), the Court held that an order substituting a party-defendant for the defendant the plaintiff chose to sue was immediately appealable because it affected a substantial right within the meaning of Section 14-3-330(2)(a), citing *Chester v. South Carolina Dep't of Pub. Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010) (on appeal from order requiring plaintiff to join parties as defendants, Court recognized common law right of tort plaintiff to choose her defendant). The Supreme Court then cited the 1933 case of *Watts v. Copeland*, 170 S.C. 449, 170 S.E. 780 (1933) for the rule that a party who does not immediately appeal an order of substitution waives the issue. The Court then noted that it has held that an order that falls within the purview of Section 14-3-330 (2)(a) must be immediately appealed if it is to be considered at all, and that there is no review available after final judgment, citing *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (mode of trial case). The Court was citing to *Creed* as an example of when it has, on rare occasion, held such an order must be immediately appealed. Like an order disqualifying counsel or denying a mode of trial to which a party is entitled as a matter of right, an order that dismisses a party-defendant whom the plaintiff chose to sue and requires substitution of another party whom the plaintiff did not choose to sue affected a substantial right (the plaintiff's right to choose the defendant) and an appeal after final judgment would not adequately protect the party's right. The ruling in this case (denial of a motion to transfer venue) does not fall into the same category – appeal after final judgment will adequately protect Grady's claimed right to venue in Jasper County.

The Court should conclude that the Supreme Court's analysis in *Hagood v. Sommerville* does not require (or even permit) immediate appeal of an order denying a

transfer of venue. The Court should deny Grady's Petition for Rehearing and Reinstatement of this appeal.

IV. THE ORDER DENYING THE MOTION TO CHANGE VENUE IS NOT APPEALABLE UNDER SECTION 14-3-330(2)(C)

As he argued in his Return to the Motion to Dismiss, Grady contends the appealed order "struck the defense of improper venue" and is therefore immediately appealable under Section 14-3-330(2)(c). (Petition, p. 3). He asserts that Supreme Court precedent to the contrary is wrongly decided and against the legislature's expression of public policy contained in Section 14-3-330. (Petition, pp. 3-4). These arguments should not be persuasive.

A. THE JUDICIAL POLICY AGAINST "PIECEMEAL LITIGATION" IS ENTIRELY RELEVANT TO THE GENERAL ASSEMBLY'S EXPRESSION OF APPEALABILITY UNDER SECTION 14-3-330

Grady criticizes the appellate courts for relying upon "the judicially created policy against 'piecemeal litigation'" in denying immediate appeals under Section 14-3-330. Grady contends the whole point of Section 14-3-330(1), (2) and (4) is to allow appeals before final judgment, *i.e.*, to allow piecemeal litigation." (Petition, pp. 3-4). Grady argues public policy is the province of the legislature, not the courts, and the Supreme Court's jurisprudence violates the separate of powers doctrine.

The short answer to this argument is that while Appellant Grady laments the Supreme Court's jurisprudence and contends it is wrong, this Court can do nothing about that. See S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the

Court of Appeals as precedents.”).

Even if this Court could somehow reach the merits of the argument here, the Court should find it is not persuasive. Section 14-3-330 provides:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action; * * * and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

This statute governs appealability and permits immediate review of final judgments as well as intermediate orders that fall within some exception under the statute. *North Carolina Federal Sav. and Loan Ass'n v. Twin States Dev. Corp.*, 289 S.C. 480, 347 S.E.2d 97 (1986).

The Supreme Court's expression of policy against "piecemeal appeals" does not offend this statute, nor is it contrary to public policy expressed by the General Assembly. In fact, the notion that the General Assembly desired to limit the types of things that

could be immediately appealed “to prevent the inconvenience, delay and expense of frequent and vexatious appeals, resulting from a piecemeal consideration of the questions arising” is itself well-settled in the Supreme Court’s jurisprudence. *Garvin v. Garvin*, 1 S.C. (1 Rich.) 55, 59 (1868).

Section 14-3-330 allows immediate appeal of certain interlocutory rulings but under very specific limits. The final responsibility for construing the statute and declaring what those limits are belongs to the Supreme Court. *See, e.g., Mims Amusement Co. v. South Carolina Law Enforcement Div.*, 366 S.C. 141, 621 S.E.2d 344 (2005) (the Court has the final responsibility for construing the constitution and laws of this state, and must do so without concern for political or popular opinion); *Steinke v. South Carolina Dept. of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999) (construction of a statute is a judicial function and responsibility; judicial interpretation of a statute is determinative of its meaning and effect). The Supreme Court has construed Section 14-3-330 and its predecessor against the backdrop of avoiding piecemeal appeals, which was within the Court’s power.

Furthermore, the Court presumes the General Assembly is aware of the Supreme Court’s interpretation of its statutes. *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003). As the Supreme Court noted in *Wigfall*, “[b]uttreassing a plain reading of the statute is the Legislature’s inactivity on the issue over the last forty years since” the prior case construing the statute in that case. 354 S.C. at 111, 580 S.E.2d at 105. Likewise, buttressing the view that the Court properly considered the policy against piecemeal appeals in deciding whether an order is immediately appealable is the

legislature's inactivity since the first time the Supreme Court expressed the policy. The Court has long expressed the policy of the "debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy..." *Knowles v. Standard Sav. and Loan Ass'n*, 274 S.C. 58, 261 S.E.2d 49 (1979) (citing United States Supreme Court precedent in following the policy when dismissing unappealable interlocutory ruling under Section 14-3-330 some 33 years ago).

In fact, the Supreme Court has held this view for a very long time. *See, e.g., Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 42, 21 S.E.2d 209, 213 (1942) ("The rule in restriction of piecemeal appellate procedure, dating back to the common law, is based upon sound reason and practical utility. If it were otherwise, endless delays would be encountered-delays which are unnecessary in cases similar to the one now before us, which can be decided upon an appeal from such final judgment as may later be entered by the trial Court."); *State v. Burbage*, 51 S.C. 284, 287, 28 S.E. 937, 938 (1898) ("It is a bad practice, and generally condemned, to hear appeals by piecemeal, especially in criminal cases; for it is destructive of the prompt administration of justice, which is so essential to the peace of society. Besides, it leads to an unnecessary consumption of the time of this court, which could be much better employed than in considering or determining questions which may never become of any practical importance in a given case."). In the 114 years since *State v. Burbage*, the 70 years since *Good v. Hartford Accident*, or even the 33 years since *Knowles*, the General Assembly has said nothing about the Supreme Court's application of the "avoidance of piecemeal appeals" policy

when dismissing appeals of various interlocutory rulings.

Finally, our Supreme Court has instructed that in *modern* times “[t]he provisions of Section 14-3-330, including subsection (2), have been *narrowly* construed and immediate appeal of various orders issued before and during trial generally have not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial.” *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005) (emphasis added). *See also Thornton v. South Carolina Electric & Gas Co.*, 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011) (applying rule of narrow construction to Section 14-3-330 under *Hagood*); *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006) (noting “[t]he phrase ‘involving the merits’ is *narrowly* construed in *modern* precedent”) (emphasis supplied).

In sum, the Supreme Court’s application of the policy of “avoidance of piecemeal appeals” to declare certain interlocutory rulings are not immediately appealable under Section 14-3-330 is not inconsistent with the policy choices the General Assembly made when it adopted the statute. The Court should reject Grady’s argument and deny the Petition for Rehearing and Reinstatement of the Appeal.

B. THE AVAILABILITY OF RELIEF AFTER FINAL JUDGMENT IS AN EXPRESSED BASIS FOR DENYING AN INTERLOCUTORY APPEAL OF CERTAIN PRE-TRIAL ORDERS

Grady contends that the “general observation that relief is available after final judgment” contained in opinions dismissing appeals is insufficient under the statute since the same rationale could be applied to “mode of trial” cases, the disqualification of

attorney case (*Hagood v. Sommerville*), and the substitution of party case, *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012). (Petition, pp. 4-5). This argument should not be persuasive.

As noted above, Section 14-3-330 provides:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

* * *

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action[.]

(Emphasis added). Thus, the statute itself contemplates that the interlocutory order first “affect[] a substantial right.” Assuming a substantial right is affected³, the order must next “in effect determine[] the action.” The implication is that something about the order is outcome determinative in the trial court. Even so, an appellant must meet the third part of the test, that is, the order must also “prevent[] a judgment from which an appeal might be taken...” This means that the interlocutory order would so infect the trial proceeding that an appeal after final judgment could not provide sufficient relief. *See, e.g., State v. Wilson*, 387 S.C. 597, 693 S.E.2d 923 (2010) (Supreme Court explained *Hagood* and the underlying reason for the ruling, that is, “right to be represented by an attorney of one’s choosing could, in effect, determine the action, and it is closely related to the right to a

³ See *Breland*, 339 S.C. at 94, 529 S.E.2d at 13 (“The trial court’s order [denying a change of venue] did not ‘affect’ the Defendant’s right to venue in the county of its residence because any error in the order can be corrected on appeal following the trial.”)

particular mode of trial, which is an established substantial right”).

There is nothing about the denial of the transfer of venue at issue in this case that cannot be taken up after final judgment in the case. That is, the order does not “determine the action,” nor does it “prevent a judgment from which an appeal might be taken.” The Supreme Court has construed this statute to preclude appeal under Section 14-3-330 where relief is available after final judgment, and this construction is wholly consistent with the language and intent of Section 14-3-330(2)(a).

Once again, this Court is bound by Supreme Court precedent. See S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”). Even if the Court could rule differently, nothing Grady has argued should persuade the Court that the order denying a transfer of venue in this case is immediately appealable under Section 14-3-330(2)(a).

Unlike the Return to the Motion to Dismiss, Grady now points specifically to Section 14-3-330(2)(c) as authority for his claim that the order denying a change of venue is immediately appealable. (Petition, p. 5). This subpart of 14-3-330(2) permits immediate appeal of “an order affecting a substantial right made in an action when such order * * * (c) strikes out an answer or any part thereof or any pleading in any action[.]” As noted below, however, this order does not strike out anything. Instead, it denies a motion to transfer venue. Just because Grady describes the order as an order striking out a part of the pleading does not make it so. Grady still has the defense of improper venue in this case and may raise his arguments at the end of the case, as the Supreme Court stated in *Breland*. This Court should reject Grady’s mischaracterization of the nature of

the order.

Accordingly, the Court should deny the Petition for Rehearing and Reinstatement of the Appeal.

C. THE COURT SHOULD REJECT GRADY'S "BOOTSTRAP" CRITIQUE OF SUPREME COURT JURISPRUDENCE

Grady's argument here goes like this: In deciding appealability under Section 14-3-330(2), the Supreme Court has engaged in a silent "bootstrap" analysis that improperly hinges on whether the trial court erred in the ruling below. (Petition, pp. 5-6). Grady illustrates this point by a cursory examination of three cases: *Hannah v. United Refrigeration Servs., Inc.*, 305 S.C. 394, 409 S.E.2d 360 (1991), *Rowe Furniture Corp. v. Carolina Wholesale Furniture Co.*, 292 S.C. 575, 357 S.E.2d 725 (Ct. App. 1987) and *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000). These cases do not undermine Respondent's Motion to Dismiss and should not persuade this Court to grant the Petition for Rehearing and Reinstatement.

In *Rowe*, this Court had before it an appeal from a circuit court order denying a motion for a jury trial made by the defendants. The defendants had not demanded a jury in the pleadings trial but later requested one pursuant to Rule 39(b), SCRCP, which permits the circuit court the discretion to order a jury trial even though a party failed to demand one. The defendants contended the circuit court abused its discretion in denying their request for a jury trial under Rule 39. This Court dismissed the appeal since the order did not deny the defendants a mode of trial to which they were entitled as a matter

of right, citing *C&S Real Estate Services v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) (an order denying a party a jury trial is not immediately appealable unless it deprives him of a mode of trial to which he is entitled as a matter of right). See *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997) (Supreme Court explained this Court's opinion in *Rowe* as involving Rule 39 under which the right to jury trial was discretionary, and stating where the right is asserted under Rule 38, SCRCp; as a matter of right, the failure to immediately appeal operated as a waiver of that right). *Rowe* is thus consistent with the Supreme Court's "mode of trial" cases.

In *Hannah*, the trial court granted a Rule 39 request for a jury trial, and the non-moving party appealed. In dismissing the appeal in *Hannah*, the Supreme Court stated, "A party's failure to make a timely demand for a jury trial does not mean the opposing party acquires a right to have, as a matter of law, a non-jury trial." *Hannah*, 305 S.C. at 394, 409 S.E.2d at 364. Again, there was no "mode of trial to which a party had a right" involved and *Hannah* is entirely consistent with other Supreme Court precedent.

The third case, *Breland*, was not wrongly analyzed as Grady suggests. (Petition, pp. 5-6). In *Breland*; the Supreme Court did not focus on whether or not the trial court erred. Instead, the Court focused on the language of Section 14-3-330 and the policy against piecemeal appeals. The Court stated:

Since any trial court error concerning venue will be correctable upon appeal, the only damage a losing party will sustain is the expense of litigating in an improper county. Even though proper venue is a substantial right, we have previously found the avoidance of a trial is not a sufficient reason to justify immediate appellate review. See *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 402 S.E.2d 482 (1991). In this case, since any venue error will be correctable upon appeal after trial, we find

the right of proper venue has not been affected such that the order would be immediately appealable.

Breland, at 94-95, 529 S.E.2d at 14. This analysis is wholly consistent with the express language of Section 14-3-330(2)(a) and related case law.

The Court should not be persuaded by this “bootstrap” critique of Supreme Court jurisprudence, and should deny the Petition for Rehearing and Reinstatement of the Appeal.

D. THE SUPREME COURT’S JURISPRUDENCE UNDER SECTION 14-3-330 DOES NOT VIOLATE THE GENERAL ASSEMBLY’S EXPRESSLY STATED POLICY CHOICE IN SECTION 14-3-330(2)(C)

Grady contends the Supreme Court’s decision in *Breland* is wrong because the Supreme Court failed to consider that the order in that case “struck the defense of improper venue.” (Petition, p. 6). Grady asserts the order in this case “strikes that defense and prevents it from being considered further before trial.” (Petition, p. 6). Grady claims the order comes within the express language of Section 14-3-330(2)(c) “as affecting a substantial right and striking a defense” and within “the General Assembly’s policy choice....” (Petition, p. 6). This argument should not be persuasive.

There is *nothing* in *Breland* to suggest the trial court actually or effectively struck anything from the answers filed in that case. Instead, while the issue of improper venue was raised in the answers of both defendants, the trial court in that case was ruling upon a separate motion to transfer venue the defendants filed. The Supreme Court described the issue as “Is a trial court’s order denying a motion to change venue immediately

appealable?” *Breland*, at 92, 529 S.E.2d at 12. Although the defendants in *Breland* contended “the refusal to transfer venue *effectively* struck out a portion of their answer,” *Breland*, at 92, 529 S.E.2d at 13 (emphasis added), the Supreme Court disagreed.

The Supreme Court stated that “the questions in the current case are whether the order denying the venue transfer: (1) affected; (2) a substantial right; and (3) struck part of the answer.” *Id.* In dismissing the appeal, the Supreme Court rejected defendants’ contention that the denial of the motion to transfer venue “effectively struck out a portion of their answer.” This is further evidenced by the Court’s statement that “Requiring a defendant to wait until after trial to appeal the issue of proper venue is the most appropriate course to take where any error in that decision will not prejudice the defendant anymore than other interlocutory orders which, if in error, would require a new trial.” That is, the issue of venue was not “struck” from the case; rather, defendants had to wait until the end of the case to appeal the denial of their motion to transfer.

Like the order in *Breland*, the order in this case does not actually or effectively strike the issue of improper venue from the pleadings. First, as Grady concedes, improper venue was not raised in the answers; this is because Mr. Murdaugh was a defendant at the time and had not been relegated to the alleged status of “sham” defendant. All Judge Mullen did was deny a motion to transfer venue – nothing more, nothing less. The issue was not struck, and Grady may raise the issue at the end of the case. Section 14-3-330(2)(c) does not apply.

Furthermore, as pointed out above, this Court is bound by Supreme Court precedent. See S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind

the Court of Appeals as precedents.”). Thus, even if *Breland* was “wrongly decided,” as Grady contends, this Court must follow that ruling.

The Court should reject Grady’s argument that Section 14-3-330(2)(c) supports immediate appealability, and should deny the Petition for Rehearing and Reinstatement of the appeal.

V. THE ORDER DENYING APPELLANT GRADY’S MOTION TO COMPEL EXECUTION OF THE STIPULATION OF DISMISSAL IS NOT IMMEDIATELY APPEALABLE UNDER SECTION 14-3-330(4)

Grady contends the order denying Grady’s motion to compel execution of the stipulation of dismissal is appealable as “an order denying an injunction” under Section 14-3-330(4). (Petition, pp. 6-7). This argument should not be persuasive.

A. THE TRIAL COURT’S REFUSAL TO COMPEL EXECUTION

Grady contends defendant Murdaugh’s “voluntary re-entry” into the case should be disregarded for venue purposes. (Petition, pp. 6-7). This is an argument addressed to the merits of the propriety of the denial of the motion to transfer venue. The argument must await the end of the case for this Court’s review. The Court should decline to address it when ruling upon the real issue at hand – appealability of the denial of the venue motion.

B. THE TRIAL COURT’S ORDER IS NOT IMMEDIATELY APPEALABLE

Grady contends his motion “to compel execution of dismissal required by the settlement documents” is in fact a request for “a mandatory injunction order that enjoined the parties to comply with the requirements of Rule 41, SCRCP, and the

settlement documents.” (Petition, p. 7). Grady contends the ruling is therefore appealable under Section 14-3-330(4), while the case upon which the Court relied was limited to appealability under Section 14-3-330(1) and (2). (Petition, p. 7). See *Peterkin v. Brigman*, 319 S.C. 367, 461 S.E.2d 809 (1995). This argument should not be persuasive.

The actual motion before the circuit court was a motion to force Respondent to execute a stipulation of dismissal of Defendant Murdaugh as part of a settlement agreement. Defendant Grady conceded that the stipulation of dismissal pursuant to Rule 41, SCRPC, that he sought to enforce was “ineffective,” but he sought clarification and an order compelling execution of the document. (Appendix to Return, p. 46, fn. 1). This was part of a settlement, however, and the upshot of the motion was an attempt to enforce its terms, not to obtain injunctive relief.

This Court should not be persuaded by Grady’s argument that the motion below sought injunctive relief so that the denial of the motion is appealable under Section 14-3-330(4). Any time a party seeks to compel compliance with an alleged settlement agreement the relief sought may be couched in terms of seeking injunctive relief. What is actually happening, however, is that the party is seeking specific performance of some term of the settlement, the denial of which the Supreme Court has held is not immediately appealable. See *Peterkin v. Brigman* (denying immediate appellate review of order declining to approve wrongful death settlement, finding there was no “meeting of the minds”).

The Court should reject Grady’s assertion that the order denying Grady’s motion to compel execution of the stipulation of dismissal is immediately appealable under

Section 14-3-330(4). The Court should deny the Petition for Rehearing and Reinstatement of the appeal.

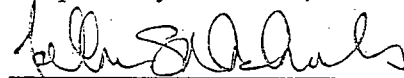
CONCLUSION

The Court remitted the matter to the circuit court and will need to recall that document before the Court can address Grady's Petition.

As to the Petition itself, even if Grady were correct that existing Supreme Court precedent is wrongly decided (and he is not), this Court must follow those decisions. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). If this Court does not follow Supreme Court precedent and permits this rehearing and reinstatement of the appeal, the parties will engage in much work before this Court only to have the Supreme Court vacate any decision on the merits that this Court renders. Time and effort will have gone for naught, and the merits of the issues will have to be re-briefed and re-argued when the case is truly final.

The Court should deny Grady's Petition for Rehearing and Reinstatement of the appeal and remand the matter to the circuit court for further proceedings.

Respectfully submitted,



John S. Nichols, SC Bar #4210
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC

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October 29, 2012

Attorneys for Respondent

Exhibit A



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 09, 2012

The Honorable Mylinda D. Nettles
PO Box 7
Hampton SC 29924-0007

REMITTITUR

Re: Smart, Gary v. Grady, James
Lower Court Case No. 2009CP2500285
Appellate Case No. 2011-197289

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Jason Franklin Ward
Mark Brandon Tinsley
Patrick M. Higgins
Robert L. Widener

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge
Perry M. Buckner, Circuit Court Judge

RECEIVED

NOV 05 2012

SC Court of Appeals

Case No. 2009-CP-25-285

Gary Smart, ... Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood
Brantley, d/b/a Brantley Hauling and Randolph Murdaugh, III, ... Defendants,

of whom James Allen Grady is Appellant.

REPLY TO RETURN TO
PETITION FOR REHEARING AND REINSTATEMENT OF APPEAL

INTRODUCTION

The Respondent mistakenly asserts that this Court has not recalled and does not have the remittitur. This Court, however, has recalled and does have the remittitur as shown below:

September 21, 2012: This Court dismissed this appeal – Petition for Rehearing due on October 8, 2012.

October 8, 2012: Appellant hand-filed a request extending the due date for the Rehearing Petition until October 23, 2012. (Exh. A).

October 9, 2012: The remittitur was issued to the trial court in error. (Exh. B).

October 11, 2012: The remittitur was recalled as issued in error (Exh. C), and the Rehearing deadline was extended to October 23, 2012. (Exh. D).

October 23, 2012: Appellant hand-filed his Rehearing Petition.

It appears that the letter issuing the remittitur and orders recalling the remittitur and granting the extension were not sent to Attorney Nichols, but they were sent to Attorney Tinsley, both of whom represent the Respondent on appeal. (Exhs. B-D). It also appears that Attorney Tinsley forwarded the remittitur letter to Attorney Nichols but not the orders recalling the remittitur and granting the extension— Attorney Nichols filed the Respondent’s Return to Petition for Rehearing and was aware of the remittitur letter but apparently unaware of the orders recalling the remittitur and granting the extension. In short, the Petition for Rehearing is properly before this Court.

Throughout his Return, the Respondent argues that this Court is bound by the Supreme Court’s precedent on several issues raised in the Petition for Rehearing. To the extent there is Supreme Court precedent directly on point, the Appellant agrees this Court is bound by that precedent but, as argued in the Petition and this Reply, that precedent is not always directly on point. To the extent that the Appellant is arguing against precedent that is directly on point, doing so is required by the SCACR and general rules of appellate practice and procedure to preserve those issues for possible review by the Supreme Court. See, *e.g.*, Rule 242(d)(2), SCACR (only questions raised in the Court of Appeals and in the petition for rehearing may be raised in a petition for certiorari).

REPLY ARGUMENTS

- I. The Respondent reads the Supreme Court’s opinion in *Hagood v. Sommerville*, 607 S.E.2d 707 (S.C. 2005) too narrowly and misses the salient point in *Neeltec Enters., Inc. v. Long*, 725 S.E.2d 926 (S.C. 2012), *rev’g* 705 S.E.2d 57 (S.C. App. 2011).

The Respondent correctly notes that the Supreme Court held in *Hagood* that the appealed order was appealable immediately under § 14-3-330(2)(a) because it affected a substantial right – the first requirement – and it also met the second requirement that the order “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the

action.” The order met this second requirement because “an appeal after final judgment and a new trial, if granted, *would not adequately protect* a party’s interest because it would be *difficult or impossible* for the affected party or the appellate court to ascertain by any objective standard *whether prejudice resulted* from the disqualification.” *Id.* at 710 (emphasis added). Here, it is uncontested that proper venue is a “substantial right.” Also here, it is indisputable that, in an appeal after judgment, “it would be *difficult or impossible* for the affected party or the appellate court to ascertain by any objective standard *whether prejudice resulted* from the [wrongful denial of venue],” *id.* at 710 (all emphasis added), because it will be “difficult or impossible” to show that a different jury in a different county would have reached a different result. Importantly, *Hagood* represents a new test under § 14-3-330(2)(a) that the Supreme Court has never considered in a venue case. Thus, the rulings in the prior venue cases are not on point with the issue presented here and, therefore, those cases are not binding precedent here.

To bolster his argument, the Respondent relies on *Neeltec*, 725 S.E.2d 926, but he misses the salient point. He contends the order in *Neeltec* was immediately appealable, because “an appeal after final judgment would not adequately protect the party’s right,” *i.e.*, the plaintiff’s right to chose the defendant to be sued. That right, however, could be protected in precisely the same manner that the Respondent argues the Appellant’s right to proper venue can be protected in the present case, *i.e.*, a new trial against the defendant of the plaintiff’s choice. There simply is no meaningful distinction between the present case and *Neeltec* vis-à-vis the remedy available in an appeal after judgment.

Finally, the rule against an immediate appeal in venue cases creates an undesirable anomaly in the law. If a plaintiff brings the action in the wrong county, the informed defendant will move to change venue and then hope its own motion is denied, because the defendant will

then have a “free shot” in the first trial, *i.e.*, the defendant can try the case and, if the result is adverse, the defendant has an automatic reversal for a new trial in an appeal after judgment. This is a particularly inefficient use of scarce judicial resources. For this reason, an order denying a change of venue to a venue to which the moving party is entitled under the venue statute should not only be immediately appealable, an immediate appeal should be required as it is in the “mode of trial” case and others.

II. The Respondent misreads the Appellant’s “bootstrap” argument.

The Respondent misreads the Appellant’s argument – the Appellant has never argued that the “bootstrap” analysis used by the Supreme Court is “improper.” (See Return at 16). To the contrary, it is the proper analysis under § 14-3-330(2), because the focus of that subsection is the denial of a “substantial right,” *i.e.*, if the order does not deny a substantial right, it is not appealable under any part of § 14-3-330(2).

III. Remaining Issues.

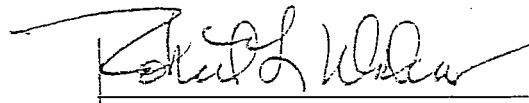
As to the remaining issues, the Appellant relies upon the arguments presented in his Petition for rehearing – with which the Respondent simply disagrees – but one point bears repeating here. The new analysis of § 14-3-330(2)(a) announced in *Hagood, supra* – “difficult or impossible” to show prejudice in appeal after judgment – offers a unifying jurisprudential basis for the somewhat *ad hoc* rulings on when interlocutory orders must be appealed immediately. All of the immediate appeal cases, including the “mode of trial” cases, can be explained based on the difficulty or impossibility of proving prejudice in appeal after final judgment. And all of these cases should require an immediate appeal, because allowing post-judgment appeals would create the earlier-noted undesirable anomaly of giving the affected party a “free shot” in the first trial. Orders denying a party the venue to which it is entitled under the

venue statute – a substantial right – also meets both of these criteria and, therefore, should also be immediately appealable.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Appellant's Petition for Rehearing and Return to Motion to Dismiss, which are incorporated herein by reference, it is respectfully submitted that this Court should issue an amended order that denies the Respondent's motion to dismiss this appeal.

Respectfully Submitted,



Robert L. Widener
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Patrick M. Higgins
Jason Franklin Ward
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(803) 522-2400
Attorneys for Appellant

November 5, 2012
Columbia, SC

COPY

MCNAIR
ATTORNEYS

October 8, 2012

Robert L. Widener

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Via Courier

Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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OCT 08 2012

SC Court of Appeals

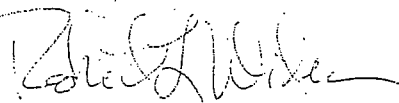
Re: Smart, Gary v. Grady, James
Appellate Case No. 2011-197289

Dear Madam Clerk:

Appellant's Petition for Rehearing of the Court's September 21, 2012 Order dismissing the appeal is currently due October 8, 2012. Due to conflicts in the schedule of counsel, Appellant respectfully requests a fifteen (15) day extension to serve and file his Petition for Rehearing. This extension would make the Petition due on October 23, 2012. By copy of this letter, we are advising counsel for the Respondent of this request. Our check in the amount of \$25.00 is enclosed.

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener
SC Bar No. 6089

RLW/as
Enclosure

cc: John S. Nichols, Esq.
Mark B. Tinsley, Esq.
Patrick M. Higgins, Esq.
Erin D. Dean, Esq.
John H. Tiller, Esq.

McNair Law Firm, P. A.
1221 Main Street
Suite 1800
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Columbia, SC 29211

mcnair.net

COLUMBIA T093664v1

EXH. A



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The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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October 09, 2012

The Honorable Mylinda D. Nettles
PO Box 7
Hampton SC 29924-0007

REMITTITUR

Re: Smart, Gary v. Grady, James
Lower Court Case No. 2009CP2500285
Appellate Case No. 2011-197289

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Jason Franklin Ward
Mark Brandon Tinsley
Patrick M. Higgins
Robert L. Widener

The South Carolina Court of Appeals

Gary Smart, Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood
Brantley d/b/a Brantley Hauling, Randolph Murdaugh,
III, Defendants,

Of whom James Allen Grady is the Appellant.

Appellate Case No. 2011-197289

The Honorable Perry M. Buckner
Hampton County
Trial Court Case No. 2009CP2500285

ORDER

The above referenced appeal was remitted on October 9, 2012, in error. Accordingly, the original Remittitur is recalled from the Hampton County Clerk of Court. The Hampton County Clerk of Court must return the original Remittitur within fifteen (15) days of the date of this order.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc: Jason Franklin Ward
Mark Brandon Tinsley
Patrick M. Higgins
Robert L. Widener
Myllinda D. Nettles

FILED

10/11/12 AS

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The South Carolina Court of Appeals

Gary Smart, Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood
Brantley d/b/a Brantley Hauling, Randolph Murdaugh,
III, Defendants,

Of whom James Allen Grady is the Appellant.

Appellate Case No. 2011-197289

The Honorable Perry M. Buckner
Hampton County
Trial Court Case No. 2009CP2500285

ORDER

The time for serving and filing the petition to reinstate is hereby extended until
October 23, 2012.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Jason Franklin Ward
Mark Brandon Tinsley
Patrick M. Higgins
Robert L. Widener
My linda D. Nettles

FILED

10/11/12 AS

EXH. D

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