STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, PLAINTIFF, vs. Kenneth E. Lee and Law Offices of Lee & Smith, P.A., DEFENDANTS.	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-42-5017 **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court on Defendants' Motion for Summary Judgment. A hearing was held on August 28, 2013. For the foregoing reasons, the Court finds that summary judgment is proper and grants Defendants' motion.

STANDARD

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24, 25 (S.C. 1988).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 545 (S.C. 1991). "Once moving party carries its initial

EXHIBIT 1

burden, opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings." Id. (internal citations and quotations omitted).

FACTS

Plaintiff Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy ("Plaintiff" or "Malloy") filed this is a legal malpractice action arising out of an allegedly inadequate settlement of Malloy's North Carolina workers' compensation claim following an accident that occurred in 2002 while Malloy was working in North Carolina for a North Carolina employer. Plaintiff retained Defendant Kenneth E. Lee to represent him to pursue the North Carolina workers' compensation claim in April of 2003.

The attorney-client relationship was entered into pursuant to a Contract of Representation, which contains a provision stating that the contract is governed by the substantive law of North Carolina. The contract was entered into in South Carolina, which is where Plaintiff has resided at all relevant times. Defendant Lee also resides in South Carolina, but he was at all relevant times licensed to practice law in North Carolina and remains licensed to practice law in North Carolina.

Defendant Lee filed Plaintiff's underlying workers' compensation claim in North Carolina pursuant to North Carolina law, and the underlying claim was governed by North Carolina law. Plaintiff settled his underlying workers' compensation claim for $100,000 at mediation on November 25, 2003. The mediation was in North Carolina, and Malloy and Lee were physically present at mediation when Malloy relied on Lee's advice and recommendation

to settle the claim. Malloy executed a binding mediated settlement agreement at mediation that same day, and subsequently executed a clincher agreement consistent with those terms. The settlement was approved in North Carolina by order of the North Carolina Industrial Commission dated February 3, 2004, and the settlement funds were subsequently disbursed to Plaintiff by mail to his home address in South Carolina.

Plaintiff filed this lawsuit on December 6, 2012, which asserts legal malpractice claims arising out of the allegedly inadequate settlement of the underlying workers' compensation claim. Plaintiff's Complaint seeks to recover damages for injuries sustained "[a]s a direct and proximate result of accepting the Defendant [Lee's] advice to settle his workers' compensation claim . . . ." The alleged acts or omissions giving rise to the causes of action alleged in the Complaint all occurred more than four years prior to the date the Complaint was filed.

CONCLUSIONS OF LAW

I. North Carolina's Statute of Repose

At issue in the present motion is the application of North Carolina substantive law, which includes in relevant part, a four-year statute of repose for legal malpractice claims. N.C. Gen. Stat. § 1-15(c) (2003). *See* Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242, 243 (S.C. 1993) ("[a] statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation."); Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81, 83 (S.C. App. 2007) (applying North Carolina's statute of repose pursuant to *lex loci delicti*).

North Carolina's four-year statute of repose applies to claims "arising out of the performance of or failure to perform professional services[,]" and runs from "the last act of the defendant giving rise to the cause of action . . . ." N.C. Gen. Stat. § 1-15(c) (2003). All of Plaintiff's claims in this case arise out of the performance of or failure to perform professional

services and are therefore "malpractice" claims within the scope of North Carolina's four-year statute of repose. Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792, 793 (N.C. App. 1994) (plaintiff's claims against attorney for negligence, breach of contract and breach of fiduciary duty arising out of the performance of or failure to perform professional services are "malpractice" claims governed by N.C. Gen. Stat. § 1-15(c)).

Unlike a statute of limitations, North Carolina's statute of repose is not subject to the discovery rule, and cannot be tolled for an alleged disability, including incompetency. Livingston v. Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., 163 N.C.App. 397, 594 S.E.2d 44, 51 (N.C. App. 2004) (tolling provisions are not applicable to the statute of repose, such that plaintiff's legal malpractice claim was time-barred under statute of repose notwithstanding her alleged incompetency); Hargett v. Holland, 337 N.C. 651, 447 S.E.2d 784, 788 (N.C. 1994) ("[r]egardless of when plaintiff's claim might have accrued, or when plaintiffs might have discovered their injury, because of the four-year statute of repose, their claim is not maintainable unless it was brought within four years of the last act of defendant giving rise to the claim.").

Accordingly, because it is undisputed that all of the alleged acts or omissions giving rise to Plaintiff's causes of action alleged in the Complaint occurred more than four years prior to the date the Complaint was filed, the dispositive question for purposes of this motion is whether Plaintiff's action is governed by North Carolina law.

II. Choice of Law

As the forum state, South Carolina's choice of law rules govern this choice of law dispute. "Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred. . . Procedural matters are to be determined in accordance with the law of South

Carolina, the *lex fori*." Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81, 83 (S.C. App. 2007); *see* id. (citing Black's Law Dictionary (7th ed. 1999) in defining *lex fori* as "the law of the forum."); *see also* Black's Law Dictionary (9th ed. 2009) (defining *lex loci delicti* as "[t]he law of the place where the tort or other wrong was committed.").

In Nash, 650 S.E.2d 81 at 83, the Court of Appeals held that plaintiffs' claims arising out of the collapse of a footbridge in North Carolina were governed by North Carolina substantive law notwithstanding that the footbridge was allegedly manufactured in South Carolina. The substantive law of North Carolina included a six-year statute of repose, which operated to bar to plaintiffs' claims. Id. The Nash court further held that applying North Carolina's statute of repose did not offend the public policy exception to *lex loci delicti*, despite that plaintiffs' action would have been timely under South Carolina's equivalent statute of repose. Id. at 83-84.

As in Nash, the alleged tort in this case occurred in North Carolina. Plaintiff's claims are premised on the allegedly inadequate settlement of his North Carolina workers' compensation claim, which was filed, mediated, settled, and approved in North Carolina. Plaintiff alleges his injuries were directly and proximately caused by "accepting the Defendant [Lee's] advice to settle his workers' compensation claim[,]" and that advice was given at mediation in North Carolina and Plaintiff relied on that advice when he agreed to the settlement and executed the mediated settlement agreement in North Carolina that same day. *See* Lemly v. Colvard Oil Co., 577 S.E.2d 712, 716 (N.C. App. 2003) (finding a mediated settlement agreement executed by the parties at mediation and intended to be followed by a formal clincher agreement was binding and enforceable where plaintiff subsequently refused to sign clincher). The Court is unable to logically distinguish Nash and its precedent from the present facts.

Likewise, the Court is further unable to disentangle the nexus linking Plaintiff's present cause of action to the underlying workers' compensation action in North Carolina. Plaintiff sought out and retained an attorney licensed to practice in North Carolina for the purpose of pursuing a workers' compensation claim in North Carolina. His underlying claim was for injuries he sustained in North Carolina while working for a North Carolina employer, which was filed in North Carolina and governed by North Carolina law. Although the parties entered into their relationship in South Carolina, that relationship was governed by the substantive law of North Carolina pursuant to the terms of the Contract of Representation. *E.g.*, Team IA, Inc. v. Lucas, 395 S.C. 237, 717 S.E.2d 103, 108 (S.C. App. 2011) ("[c]hoice of law clauses are generally honored in South Carolina."); Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007) ("Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law.").

Having found that the *lex loci delicti* of this action is North Carolina, the Court turns to the public policy exception at issue in Nash, 650 S.E.2d at 84, which provides that "[f]oreign law may not be given effect in this State if 'it is against good morals or natural justice.'" (*quoting* Boone v. Boone, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (S.C. 2001)). "Examples of cases against good morals and natural justice are 'prohibited marriages, wagers, lotteries, racing, contracts for gaming or the sale of liquors, and others.'" Id. (*quoting* Dawkins v. State, 306 S.C. 391, 412 S.E.2d 407, 408 (S.C. 1991)).

Plaintiff argues the exception should apply here because of the preclusive effect of North Carolina's statute and the lack of a comparable statute in South Carolina. However, '[t]he fact that the law of two states may differ does not necessarily imply that the law of one state violates

the public policy of the other." Id. (*quoting* Boone v. Boone, 345 S.C. 8, 546 S.E.2d 191, 193 (S.C. 2001)). Moreover, as our courts have recognized,

> [t]he 'good morals or natural justice' of our State are not violated when foreign law is applied to preclude a tort action for money damages, whether against an individual or the State, even if recovery may be had upon application of South Carolina law.

Dawkins, 412 S.E.2d at 408 (*citing* Rauton v. Pullman Co., 183 S.C. 495, 191 S.E. 416, 422 (S.C. 1937)); *see also* Butler v. Ford Motor Co., 724 F. Supp. 2d 575, 582 (D.S.C. 2010) ("South Carolina courts have 'repeatedly adhered to the *lex loci delicti* rule to apply foreign law that defeated claims which would have survived under South Carolina law.'") (*quoting* Thornton v. Cessna Aircraft Co., 703 F.Supp. 1228, 1232 (D.S.C.1988), *aff'd* 886 F.2d 85 (4th Cir. 1989)).

The Court finds, consistent with Nash, and the precedent relied on by the Nash court, that North Carolina's statute of repose does not violate the public policy of South Carolina, and the statute should therefore be applied to Plaintiff's claims under the principle of *lex loci delicti*.

Accordingly, the Court finds that this action is governed by the substantive law of North Carolina, that North Carolina's four-year statute of repose operates to bar Plaintiff's claims, and that Defendants are entitled to judgment as a matter of law.

IT IS SO ORDERED.

Frank R. Addy, Jr., Circuit Court Judge

September 17, 2013
Greenwood, South Carolina

State of South Carolina
The Circuit Court of the Eighth Judicial Circuit

Frank R. Addy, Jr.
Judge

Greenwood County Courthouse
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Greenwood, SC 29646
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MEMORANDUM

To: The Honorable M. Hope Blackley

From: Freda Sartin, Administrative Assistant

Subject: Enclosed Order

Date: September 17, 2013

Ms. Blackley,

Please forward clocked copies of the enclosed Order signed by Judge Addy to the attorneys' of record.

Thank you and have a great day!

Freda Sartin
Administrative Assistant
Honorable Frank R Addy Jr
Resident Judge, Eighth Judicial Circuit
Greenwood County Courthouse
528 Monument St , Room 210
Greenwood, SC 29646
Phone: (864)943-8020
Fax: (864)942-8581
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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-42-5017

GRETCHEN A. ROGERS, AS GAL FOR MARK A. MALLOY

PLAINTIFF(S)

KENNETH E. LEE AND LAW OFFICES OF LEE AND SMITH, P.A.

DEFENDANT(S)

Submitted by: Attorney for ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

Disposition Type (Check One)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other: Summary Judgment Granted.

☐ **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 (formal order to follow) ☒ Statement of Judgment by the Court:

This matter comes before the court on November 13, 2013 on Plaintiff's motion for reconsideration of the court's prior order dismissing this case. With the consent of all concerned, the hearing was held in Greenwood during a CPNJ term. Having considered the argument of counsel, the court declines to modify the previous order.

Plaintiff cites the cases of Lister v. Nationsbank, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997) and Bannister v. Hertz Corp., 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994) for the proposition that, because Plaintiff's injuries manifested themselves in South Carolina, this court should apply South Carolina law as opposed to the law of North Carolina. The court finds that *Lister* and *Bannister* are distinguishable.

The court in *Lister* did state, "Since the [plaintiffs] suffered their financial loss as a result of this misrepresentation in South Carolina, we conclude South Carolina law applies under the choice of law test for torts." 329 S.C. at 455, 494 S.E.2d at 144. However, the court in Lister was addressing choice of law questions for the tort of fraudulent misrepresentation. The present case concerns professional malpractice, and for the reasons stated in the original opinion, the law of North Carolina controls.

In *Bannister*, the court restated the established principle that "the substantive law governing a tort action is determined by the state in which the injury occurred." Plaintiff encourages the court should read this maxim as meaning "the state in which the *results of the injury manifest themselves*." Clearly, the financial harm to Plaintiff manifested itself in South Carolina because Plaintiff is and has always been a citizen of this state. However, the court cannot ignore that the entire transaction which led to Plaintiff's damages occurred in North Carolina. *Lex loci delicti* controls, and the law of North Carolina applies to this action.

For the foregoing reasons, the court declines to alter or amend its prior orders.

Order Information

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

Complete if judgment requires payment of a sum of money or affects title to real or personal property

EXHIBIT 2

FILED
CLERK OF COURT
SPARTANBURG
2013 DEC -4 P 8:
HOPE BLACKLEY

RECEIVED DEC 11 2013

JUDGMENT AGAINST PLAINTIFF:		JUDGMENT AGAINST DEFENDANT:	
Judgment Amount	$_____	Judgment Amount	$_____
Taxable Costs	$_____	Taxable Costs	$_____
Attorney's Fees	$_____	Attorney's Fees	$_____
Interest	$_____	Interest	$_____
Other:	$_____	Other:	$_____
Total Amount to be Enrolled:	$_____	**Total Amount to be Enrolled:**	$_____

If applicable, describe the property, including tax map information and address, referenced in the order:

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

Circuit Court Judge

2159
Judge Code

11/26/13
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20___ and a copy mailed first class this _____day of _____, 20____to attorneys of record or to parties (when appearing pro se) as follows:

Thomas A. Pendarvis

ATTORNEY(S) FOR THE PLAINTIFF(S)

David W. Overstreet

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

FILED
CLERK OF COURT
SPARTANBURG
2013 DEC -4 AM 8:37
M. HOPE BLACKLEY