THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

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Lower Court Case No. 2012-CP-42-5017
Appellate Case No. 2013-002699

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Gretchen A. Rogers, as Guardian *ad litem*
for Mark A. Malloy. . . . . Appellant,

v.

Kenneth E. Lee and
LAW OFFICES OF LEE & SMITH, P.A. . . . . Respondents.

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# INITIAL BRIEF OF APPELLANT

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Thomas A. Pendarvis (SC Bar # 64918)
Catherine B. Kerney (SC Bar # 81429)
PENDARVIS LAW OFFICES, P.C.
500 Carteret St Suite A
Beaufort, SC 29902-5066
843.524.9500 Tel.

Brent P. Stewart (SC Bar # 66083)
THE STEWART LAW OFFICES, LLC
P.O. Box 570
Rock Hill, SC 29731
803.328.5600 Tel.

Counsel for Appellant

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## Statement of Issues

I. Whether under a South Carolina choice-of-law analysis, the trial court's factual finding that "the financial harm to [Appellant] manifested itself in South Carolina" and its legal conclusion that "the substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred," precluded its ultimate finding that North Carolina law controlled Appellant's claims.

II. Whether it was error for the trial court to conclude the law where some of Respondents' negligence occurred controlled Appellants' claims instead of the law where all of Appellant's financial injuries occurred.

III. Whether the trial court erred in granting Respondents' motion for summary judgment on choice of law grounds by concluding that North Carolina's substantive law controls Appellant's claims when Respondents' acts and omissions caused Appellant to sustain financial injuries *only* in South Carolina where he resides, where the inadequate workers' compensation benefits were paid, and where all of Appellant's "lost" financial benefits should have been paid.

IV. Whether South Carolina law governs Appellant's tort claims against Respondents, including South Carolina's discovery rule and other statute of limitations jurisprudence and not the North Carolina statute of repose as determined by the trial court.

V. Whether South Carolina follows traditional choice of law principles whereby the substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred.

VI. Whether South Carolina substantive law governs Appellant's professional

negligence claim and breach of fiduciary duty claim because Appellant resided in South Carolina at the time when he sustained financial injuries proximately resulting from Respondents' errors.

## Statement of the Case

On December 3, 2012, Appellant, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy (Malloy) filed a Summons and Complaint in Spartanburg County against Respondents, Kenneth A. Lee and LAW OFFICES OF LEE AND SMITH, P.A. (collectively "Lee"), asserting claims for professional negligence, breach of fiduciary duty, and breach of contract arising from Lee's representation of Malloy on workers compensation claims. (Complaint, ROA ___). Lee accepted service on December 18, 2012 and filed an Answer on January 17, 2013.

After the exchange of written discovery and documents, on March 1, 2013, Lee filed a Motion for Summary Judgment on generally undisputed facts and seeking judgment as a matter of law contending that because North Carolina's statute of repose governed all of Malloy's claims, the lawsuit had not been timely commenced. (Motion for Summary Judgment, ROA ___). On June 4, 2013, Malloy filed the Affidavit of Mark A. Malloy. (Malloy Affidavit, ROA ___). On June 5, 2013, Malloy filed a Memorandum in Opposition of the Motion for Summary Judgment with exhibits. (Malloy Memorandum in Opposition, ROA ___). On June 6, 2013, Lee filed a Memorandum in Support of the Motion for Summary Judgment and a Reply Memorandum in Support of the Motion for Summary Judgment on August 28, 2013.

A hearing on Lee's motion for summary judgment was held on August 28, 2013. On September 5, 2013, the lower court judge issued a Form 4 Order granting Lee's Motion for

Summary Judgment. (Form 4 granting Motion for Summary Judgment, ROA ___). On September 17, 2013, the trial court issued a formal Order ("Summary Judgment Order") concluding, among other things, that "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 (S.C. App. 2007)." (Summary Judgment Order at 4-5 ROA ___) (emphasis added).

On October 3, 2013, Malloy filed and served a Motion to Alter or Amend and a Memorandum in Support of the Motion to Alter or Amend. (Motion to Alter or Amend, ROA___); (Memorandum in Support of Motion to Alter or Amend, ROA ___). On November 12, 2013, Lee filed a Memorandum in Opposition to the Motion to Alter or Amend. On November 13, 2013, a hearing on Malloy's Motion to Alter of Amend was held. The lower court issued its Order denying Malloy's Motion to Alter or Amend on November 26, 2013 ("Reconsideration Order"). (Reconsideration Order, ROA ___). The Reconsideration Order included a critical factual finding that "Clearly, **the financial harm to [Appellant] manifested itself in South Carolina** because [Appellant] is and has always been a citizen of this state." (Reconsideration Order at 1, ROA ___) (Emphasis added). Nevertheless, the trial court denied the motion to alter or amend its findings in the Summary Judgment Order.

This appeal was timely filed.

## Arguments

### I. South Carolina Law Governs Malloy's Tort Claims Because All of the Financial Injuries Malloy Suffered as a Result of Lee's Errors Were Manifested in South Carolina.

#### A. Facts Relevant to the Arguments.

Malloy lived and resided in Lancaster, South Carolina at all times relevant to the claims in this lawsuit. (Malloy Affidavit, ROA ___), (Summary Judgment Order at 2, ROA ___). Malloy sustained brain injuries on the job while working in North Carolina. *See id.* After Malloy was injured he hired Lee to represent him on his workers' compensation claims. *See id.* He went to Lee's office in South Carolina to meet with him and that is where and when Malloy retained Lee. *See id.* Malloy has lived his entire life in South Carolina, including at the time he hired Lee all the way through the time when the workers' compensation matter was settled on terms that Malloy (and his wife) discovered years later were woefully inadequate and below what should have been recovered. *See id.*

The trial court's finding that "the financial harm to [Malloy] manifested itself in South Carolina" is uncontested; Lee chose not to appeal that finding. (Reconsideration Order at 1, ROA ___). It is therefore uncontested that all financial benefits Malloy ever should have received as a result of Lee's legal services would have been received by Malloy *in South Carolina*. In fact, it was to Malloy's residence in South Carolina where Lee delivered the inadequate settlement proceeds. (Lee letter to Malloy, Feb. 25, 2004; ROA ___), (Summary Judgment Order at 3, ROA ___). Those settlement proceeds were far below the fair and reasonable settlement value of his claims according to R. James Lore, J.D., one of the top experts, if not the top expert, on workers compensation law in North Carolina. (Affidavit of

R. James Lore, ROA ___). In other words, it was in South Carolina alone where Malloy felt the financial consequences of Lee's negligent acts.

The Contract of Representation prepared by Lee and signed by Malloy in South Carolina contains a provision stating that the contract is governed by the substantive law of North Carolina. (Summary Judgment Order at 2, ROA ___).

Based on Lee's forceful recommendations, Malloy settled his underlying workers' compensation claim for $100,000 at a mediation in North Carolina. (Complaint, ¶ 27 at 6; ROA ___). Malloy executed a settlement agreement at mediation that same day and subsequently executed a clincher agreement. (Summary Judgment Order at 2-3, ROA ___). The settlement funds were subsequently disbursed by Lee to Malloy by mail to his home address in South Carolina. (Summary Judgment Order at 3, ROA ___).

### B. The Trial Court Erroneously Granted Summary Judgment Under North Carolina's Statue of Repose Because South Carolina's Statute of Limitations Governs Malloy's Claims under a South Carolina Choice of Law Analysis.

The location where Malloy's financial damages caused by Lee's errors were manifested is the key to properly applying South Carolina's choice of law jurisprudence founded on the concept of *lex loci delicti*. The Summary Judgment Order cited *Nash v. Tindall Corp.*, 375 S.C. 36, 39, 650 S.E.2 81, 83 (Ct. App. 2007) as controlling authority on South Carolina's choice of law principles. (Summary Judgment Order at 4-5, ROA ___). While Malloy agrees with the application of *Nash* and South Carolina's choice of law principles, neither the Summary Judgment Order nor the Reconsideration Order accurately applied South Carolina's choice of law principles as expressed in *Nash* to the factual findings made by the trial court that "the financial harm to [Malloy] manifested itself in South

Carolina." Of course, the only financial harm that is in dispute in this matter is the financial harm caused by Lee's professional errors.

"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." *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001); *Nash v. Tindall Corp.*, 375 S.C. 36, 39, 650 S.E.2d 81, 83 (Ct. App. 2007); *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449 (Ct. App.1997); *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App.1994). The claims in this case are for legal professional negligence and breach of fiduciary duty asserted on behalf of Malloy, a former client, against Lee, his lawyer, all of which could be summarily described as "legal malpractice" claims. The only damages recoverable for legal malpractice claims under South Carolina law are for financial injuries. *Cf., Caddel v. Gates*, 284 S.C. 481, 327 S.E.2d 351 (Ct. App. 1984) ("We adopt the almost universal rule that damages for mental anguish are not recoverable in these cases, regardless of whether they allege causes of action for tort, breach of contract, breach of warranty or agreements to insure; and we so hold."). Thus, the place where Malloy suffered financial injuries caused by Lee's professional errors determines the *lex loci delicti*.

The substantive law governing Malloy's legal malpractice tort claims is South Carolina law because it was in South Carolina where the trial court found that "the financial harm to [Malloy] manifested itself" and South Carolina must be therefore where Malloy's entire financial "injury occurred." *Nash v. Tindall Corp.*, 375 S.C. at 39, 650 S.E.2 at 83. No workers' compensation benefits, including the paltry net settlement proceeds, were ever planned or supposed to be paid, delivered to, or received by Malloy *in North Carolina*. Any

and all financial benefits Malloy ever would have received as a result of Lee's legal services would have been received by Malloy *in South Carolina*.

For choice of law purposes, there is a significant distinction between the state where many of Lee's negligent acts and omissions occurred, North Carolina, and the state where all of Malloy's financial injuries occurred or were manifested, which is South Carolina. The Summary Judgment Order devotes a substantial amount of attention and focus on Lee's negligent acts leading to the "inadequate settlement of [Malloy's] North Carolina workers' compensation claim, which was filed, mediated, settled, and approved in North Carolina." (Summary Judgment Order at 5-6, ROA ___). All of these events relate to Lee's negligence, but not to where Malloy suffered the consequences of those acts, which was in South Carolina as per the trial court's factual finding. (Reconsideration Order at 1, ROA ___) ("Clearly, the financial harm to [Malloy] manifested itself in South Carolina because [Malloy] is and has always been a citizen of this state.") The trial court, however, did not apply the holding in *Nash* to the undisputed findings of fact that Malloy's financial harm caused by Lee's errors occurred only in South Carolina.

South Carolina is where Malloy always has resided and where Lee delivered Malloy's settlement proceeds that were far below the fair and reasonable settlement value of his claims. (Summary Judgment Order at 2-3, ROA ___). In other words, it was in South Carolina alone where Malloy felt the financial consequences of Lee's negligent acts. (Reconsideration Order at 1, ROA ___).

The *Nash* opinion, relied upon in the Summary Judgment Order, concerned whether North Carolina law or South Carolina law governed personal injury claims arising from an allegedly defective footbridge, parts of which were manufactured here in South Carolina,

which caused physical injuries in North Carolina where the footbridge was erected and later collapsed. The alleged negligent acts, that is, defective manufacturing, took place in South Carolina. *Nash v. Tindall Corp.*, 375 S.C. 36, 38, 650 S.E.2 81, 82 (Ct. App. 2007). The injury, however, occurred in North Carolina were the plaintiffs were standing when they suffered personal injuries from the collapse of the footbridge. *Id.* The *Nash* court's application of South Carolina's choice of law jurisprudence, therefore, resulted in the application of North Carolina substantive law, including its statute of repose, because it was "the law of the ***state in which the injury occurred***." 375 S.C. at 39, 650 S.E.2 at 83 (emphasis added).

The instant case presents the exactly opposite set of facts. Lee's negligent acts, that is, legal malpractice, took place primarily in North Carolina, although some of the final acts of negligence took place in South Carolina where the final settlement papers were executed. Malloy's financial damages, on the other hand, occurred only in South Carolina where he resided and where he should have received a substantially higher settlement recovery had Lee met the standard of care. (See Affidavit of R. James Lore at 2; Defendant Lee erred in "[f]ailing to advise plaintiff against the proposed $100,000.00 settlement in his workers' compensation case of *Malloy v. Aneco Electrical* (IC 301187) because the settlement accepted is less than the reasonable settlement value in this case given the evidence contained in the records in the attorney's own legal file."). The Summary Judgment Order accurately finds that the settlement proceeds were sent to and received by Malloy at his residence here in South Carolina. (Summary Judgment Order at 3, ROA ___). The Reconsideration Order expressly finds as an undisputed fact that "the financial harm to [Malloy] manifested itself in South Carolina" recognizing that all financial benefits

Malloy ever would have received as a result of Lee's legal services would have been received by Malloy *in South Carolina*. In other words, Malloy did not suffer any financial harm *in North Carolina* from Lee's legal errors because no one, including Malloy's employer or its workers compensation insurance carrier, ever planned or intended to deliver any of the settlement proceeds to Malloy while he was *in North Carolina*.

After concluding as a matter of fact that "the financial harm to [Malloy] manifested itself in South Carolina", it was error for the trial court's to apply North Carolina law was mistaken. Those rulings should be reversed, and remanded to apply South Carolina's choice of law rules as per *Nash* and other controlling South Carolina authority, which should have resulted in the application of South Carolina substantive tort law because it is "the law of the ***state in which the injury occurred***." *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001) (emphasis added); *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449, 454 (Ct. App. 1997) ("[T]he substantive law governing a tort action is determined by the state in which the injury occurred.") (holding as to claim for fraudulent misrepresentation that "[t]he place of the wrong is not where the misrepresentations were made but where the plaintiff, as a result of the misrepresentation, suffered a loss"); *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994); *Algie v. Algie*, 261 S.C. 103, 198 S.E.2d 529 (1973); *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964).

The trial court's factual findings and legal conclusions in this case are not consistent with *Nash* were those plaintiffs were physically in North Carolina when their injuries occurred although the negligence was alleged to have incurred in South Carolina, the forum where that suit was brought. The fact that those plaintiffs injuries occurred in North

Carolina was the basis on which the South Carolina trial and appellate courts concluded that North Carolina substantive law, including its statute of repose, controlled the claims in that case.

The Summary Judgment Order bluntly states that "the alleged tort in this case occurred in North Carolina" without making any analysis or specific finding on the critical aspect of where Malloy's injuries occurred as a result of the tortious conduct by Lee. (Summary Judgment Order at 5, ROA___). The Summary Judgment Order's summary of all of Lee's negligent acts simply has no bearing on South Carolina's choice of law rule that requires a determination of where Malloy was located when his "financial injuries occurred." In other words, a determination of the location where Malloy's injuries were manifested was necessary to apply the South Carolina choice of law rule; a determination that is wholly absent in any of the findings of fact or conclusions of law in the trial court's Order. The Court of Appeals' opinion in *Nash* is the proof in the pudding because the negligent acts in that case, that is manufacturing an allegedly defective footbridge, happened here in South Carolina but the plaintiffs' personal injuries occurred in North Carolina when the footbridge collapsed; hence the application of North Carolina law.

Another important misapplication of law to facts that should be considered is the portion of Summary Judgment Order that states "the Court is further unable to disentangle the nexus linking Plaintiff's present cause of action to the underlying workers comp action in North Carolina." One way to "disentangle" Malloy's legal malpractice claims arising from "the underlying workers comp action North Carolina" is to consider the nature of the injuries sustained. Malloy's underlying workers compensation claims were based on physical injuries Malloy sustained "when he fell 10 feet to 12 feet off a ladder." (Complaint, ¶ 11 at

4, ROA___). Malloy's legal malpractice claims, on the other hand, are based purely on financial injuries Malloy sustained (in South Carolina) when Lee failed to meet the standard of care required of lawyers handling his underlying claims, which, if the matter had been handled properly should have resulted in Malloy receiving substantial financial benefits in South Carolina where the trial court found Malloy "is and has always been a citizen" . . .. (Reconsideration Order at 1, ROA ___).

The Summary Judgment Order contains another misstatement with regard to the conclusion that the "parties . . . relationship was governed by the substantive law of North Carolina pursuant to the terms of the Contract of Representation." (Summary Judgment Order at 6, ROA___). The Contract was between Malloy and Respondent, LAW OFFICES OF LEE & SMITH, P.A., only. ("[T]he client, *Mark Malloy*, **retains The Law Offices of Lee and Smith, P.A.** to represent him/her in connection with a claim for Workers' Compensation benefits for accidental injuries sustained to client's *head* arising out of client's employment with Aneco Electrical on or about the *9* Day of *September, 2002*.") (bold emphasis in original) (italic emphasis represents handwritten portions of the contract). Respondent Lee, individually, was not a party to that contract, but certainly could have been if he had chosen to include himself as a party.[1] Clearly, Lee (and presumably other members of the firm) chose to set up a Professional Association and use that entity to enter into contracts with clients in an attempt to insulate themselves individually from personal liability. Because Lee was the drafter of that contract and as a fiduciary to Malloy, the trial

[1] Malloy conceded to the trial court that the Contract of Representation between Malloy and THE LAW OFFICES OF LEE AND SMITH, P.A. contains a North Carolina choice of law provision, which under South Carolina law should operate to bar his third cause of action for breach of contract only, but not the other tort claims.

court should not have summarily included Lee, individually, as a party to that contract and provided individual cover under the choice of law provision when Lee could have done so at the outset of the client-lawyer relationship. That was not part of the contract Malloy signed.

Proper application of South Carolina's choice of law rules should have South Carolina substantive law governing Malloy's legal malpractice tort claims based on the record before the trial court and its undisputed factual finding that "the financial harm to [Malloy] manifested itself in South Carolina". But even under South Carolina legal malpractice jurisprudence, to establish proximate cause Malloy acknowledged to the trial court that he will need to prove the financial benefits that would have been available under North Carolina's workers compensation laws, but for the acts and omissions of Lee. In other words, while South Carolina law governs Malloy's professional negligence and breach of fiduciary duty claims, North Carolina worker's compensation laws will govern the proximate cause element of those claims as they relate to the recovery of actual damages.

The trial court's Reconsideration Order failed to distinguish the holdings in the *Lister* and *Bannister* cases as applied to the facts in this case. (Reconsideration Order at 1, ROA ___; see *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449, 454 (Ct. App. 1997) and *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994)).

The trial court acknowledged that the South Carolina Court of Appeals' holding "in *Lister* did state, '[s]ince 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.'" (Reconsideration Order at 1, ROA __) (*citing Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449, 454 (Ct. App. 1997)). After

making that acknowledgment, however, the Reconsideration Order concludes – without citation to any authority – that because the *Lister* court "was addressing choice of law questions for the tort of fraudulent misrepresentation" and not professional malpractice claims as asserted by Malloy, "the reasons stated in the [Summary Judgment Order], the law of North Carolina controls." (Reconsideration Order at 1, ROA ___). There is no case law, statutory authority, or even a public policy basis for this erroneous conclusion. The holdings in *Lister* are directly on point with the holdings that should have been applied to the summary judgment motion filed in Malloy's case. There simply is no legal malpractice exception to South Carolina's choice of law jurisprudence on the law governing tort claims.

The Reconsideration Order also acknowledged that the South Carolina Court of Appeals' holding in *Bannister* "restated the established principle that 'the substantive law governing a tort action is determined by the state in which the injury occurred.'" (Reconsideration Order at 1, ROA ___) (*citing Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994)). The Reconsideration Order goes on to find that "[c]learly, the financial harm to [Malloy] manifested itself in South Carolina because [Malloy] is and has always been a citizen of this state." (Reconsideration Order at 1, ROA ___). Amazingly, however, after concluding that the "financial harm to [Malloy] manifested itself in South Carolina" the Reconsideration Order turns its attention away from the location where Malloy suffered the financial harm, that is, South Carolina, instead focusing on the location where some, but not all, of Lee's negligence occurred, that is, North Carolina.[2] Yet again, the

[2] After citing the established principle in *Bannister* that "the substantive law governing a tort action is determined by the state in which the injury occurred," the trial court then notes that the "[Malloy] encourages the court should read this maxim as meaning,'the state in which the *results of the injury manifest themselves*.'"

Reconsideration Order's conclusions are contrary to the very authority it cited.

### C. The Law of the State Where the Client Resided at the Time of the Injury Governs the Legal Malpractice Claims.

One of the reasons for using the state where the client resided as the "place where the injury occurred" is the improvement to the predictability in determining choice of law problems. *See e.g., Workman v. Chinchinian*, 807 F. Supp. 634, 638 (E.D. Wash. 1992) (applying Washington's "significant relationship rule" for choice of law on tort claims); *David B. Lilly Co., Inc. v. Fisher*, 18 F.3d 1112 (3d Cir. 1994) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (Considerations for choice of law principles (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) *the protection of justified expectations*, (e) the basic policies underlying the particular field of law, (f) *certainty, predictability and uniformity of result*, and (g) ease in the determination and application of the law to be applied.") (emphasis added).

For legal malpractice cases many courts have held that the place where the injury occurred, that is, where the client sustained a financial injury or an economic loss, is the state where the client resided or was located at the time of the injury. *See Bobbitt v. Milberg, LLP*, 285 F.R.D. 424, 429 (D. Ariz. 2012), *certificate of appealability denied* (Nov.

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(Reconsideration Order, ROA ___) (emphasis in original). In fact, Malloy's injury or actual damages is the loss of benefits, which occurred in South Carolina, and what the trial court refers to as the "results of the injury" are Malloy's consequential damages, which are outside of the issues before the Court. Based on what Malloy argued, that sentence should read, "[Malloy] encourages the court should read this maxim as meaning,'the state in which the *damages resulting from Lee's tortious acts manifest themselves*.'"

8, 2012) (legal malpractice plaintiffs and putative class members' economic loss "injury" occurred in the States where the absent class members were located); *Ennenga v. Starns*, 677 F.3d 766 (7th Cir. 2012) (Illinois statute of limitations applied to Illinois clients' legal malpractice claims even though defendant lawyers resided and practiced law in Minnesota, and their firm was a Minnesota law firm); *Dow v. Jones*, 311 F. Supp.2d 461, 466 n. 3 (D. Maryland 2004) (Under Maryland conflict of law rules, plaintiff's legal malpractice tort claim was governed by law of place where injury occurred, which is place where last act required to complete tort occurred); *St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP*, 233 F. Supp.2d 171, 172–175, 179 (D. Mass. 2002) (client was sued in Florida arising from actions taken based on bad legal advice; the client settled for two million dollars on the second day of trial in Florida; as to the legal malpractice action, the Court found that the client was injured where its business was located which was in Massachusetts; "[The client's] injury occurred in Massachusetts where, as the result of the malpractice, it would have to dispense funds.")); *Streber v. Hunter*, 14 F. Supp. 2d 978 (W.D. Tex. 1998) (Under Texas choice of law principles, Texas statute of limitations for legal malpractice actions, under which discovery rule applies, and not Louisiana statute of limitations, under which discovery rule is not recognized, would be applied to legal malpractice action brought by Texas residents against Louisiana lawyer who had represented them in tax matter); *David B. Lilly Co., Inc. v. Fisher*, 18 F.3d 1112, 1119 (3d Cir. 1994) (Delaware law applied to Delaware corporation's legal malpractice claims against New York law firm based on its rendering of advice to corporation's Missouri lawyers on structuring acquisition of corporation so that it could retain its small business status; place where injury occurred was Delaware which also was center of web of relationships among

the parties, and Delaware had particular stake in protecting its legal consumers from negligent lawyers when resulting injury occurred in Delaware).

Based on the evidence before the trial court, Malloy's economic injuries occurred in South Carolina because that is where he resides now and at the time of the underlying representation by Lee. (Malloy Affidavit, ROA ___); (Lee letter to Malloy, Feb. 25, 2004, ROA ___); (Summary Judgment Order at 2-3, ROA ___). In addition, Lee resides in South Carolina and the LAW OFFICES OF LEE & SMITH, P.A. is a Professional Association formed under South Carolina law and with its principal place of business in South Carolina. Also, all meetings between Malloy and Lee took place at the LAW OFFICES OF LEE & SMITH, P.A. in their South Carolina offices. (Summary Judgment Order at 2-3, ROA ___). Furthermore, Lee's errors took place, presumably, in his offices located in South Carolina.

Since Malloy was a resident of South Carolina at the time of the financial injuries resulting from Lee's negligence, South Carolina law should govern Malloy's malpractice claims and summary judgment was improper.

### D. South Carolina Has an Interest in Providing Tort Remedies for Clients Injured by a Lawyer's Acts or Omissions.

South Carolina has an interest in compensating victims for injuries accruing here in South Carolina resulting from legal professional negligence and breach of fiduciary duty claims, and provides causes of action for such injuries. *See Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612 (1996); *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 140, 697 S.E.2d 644 (Ct. App. 2010); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); *Sims v. Hall*, 357 S.C. 288, 592 S.E.2d 315 (Ct. App. 2003); *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); *Henkel v.*

*Winn*, 346 S.C. 14, 550 S.E.2d 577 (Ct. App. 2001); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). Moreover, South Carolina has a particular stake in protecting its legal consumers from negligent lawyers when the resulting injury occurs in South Carolina. "[A] state has an obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. d (1971). The basic policy underlying an action for professional negligence, to compensate the victim, further supports South Carolina's interest as the state where the injury occurred and where its citizens, including Malloy, reside. *See id.* § 145 cmt. c.

Unlike North Carolina, when South Carolina adopted the "South Carolina Noneconomic Damages Awards Act of 2005," a choice was made not to create a statute of repose for professional negligence claims other than claims against medical professionals. *See* S.C. CODE ANN. § 15-3-545 (Supp. 2013) (six year statute of repose on suits to "recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . .."). There is no statute of repose for legal malpractice claims under South Carolina law.

A statute of repose serves to limit the time within which a claim must be brought or the claim is forever lost even if a reasonable person did not know or had no reason to know of his claims. It was a choice of law error by the trial court to impose a North Carolina statute of repose to avoid a South Carolina cause of action when all of Malloy's financial damages occurred in South Carolina, especially given that South Carolina has chosen not to enact a statute of repose for legal malpractice. South Carolina has an interest in providing a cause of action and a remedy for legal malpractice and has chosen only to limit

a plaintiff's claims by requiring a lawsuit to be filed within three years of discovering the malpractice. Since the North Carolina statute of repose does not and should not control Malloy's claims, summary judgment was unavailable.

### E. The Proximate Cause Element of South Carolina's Legal Professional Negligence Cause of Action Is the Only Instance Where North Carolina Law Is Applicable to Malloy's Claims.

Malloy acknowledged to the trial court that North Carolina law was applicable to his claims, but *only* in establishing that Lee's acts and omissions proximately caused financial injuries to him. This is because Lee's alleged errors occurred while handling Malloy's underlying North Carolina workers' compensation matter. When the negligence in a legal malpractice matter involves the lawyer's alleged negligence in handling a litigation matter, South Carolina employs the "case within the case" methodology. *See e.g., Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997) ("In a legal malpractice action, . . .. [P]laintiff must show she most probably would have been successful in the underlying suit if the lawyer had not committed the alleged malpractice"). In the happy event this matter is remanded for trial, Malloy will have the burden to establish that a lawyer exercising reasonable care would have obtained a better result on his workers compensation claims under the laws of North Carolina, where Malloy was injured while working. *See e.g., Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010) (lawyer may be liable for damages to a client for failure to act with a reasonable degree of skill and care). In other words, while South Carolina law governs Malloy's legal malpractice claims, South Carolina law also will require Malloy to convince a jury that a reasonable and prudent lawyer handling his workers' compensation matter would have obtained a better result under North Carolina workers' compensation law.

It is not unusual in legal malpractice cases for the trial court to consider choice of law issues controlling the underlying action because of the case-within-the-case methodology for proximate cause. *See e.g., Boyson, Inc. v. Archer & Greiner, P.C.*, 308 N.J. Super. 287, 705 A.2d 1252 (App. Div. 1998); *Burns v. Geres*, 140 Wis. 2d 197, 409 N.W.2d 428 (Ct. App. 1987). Generally, as to the proximate cause element, the law governing the underlying matter is applied. *See e.g., Burns v. Geres*, 409 N.W.2d at 430 (because the slip and fall occurred in Arizona, the case-within-a-case methodology required the Wisconsin trial court to apply Arizona law to the underlying claim).

Because North Carolina law is only applicable to the proximate cause element of Malloy's South Carolina legal malpractice claim, summary judgment imposing North Carolina's statue of repose should not have been available.

**F. Summary Judgment Should Not Have Been Available Because Malloy Filed this Lawsuit Prior to the Expiration of the Statute of Limitations and There Is No Statute of Repose on Legal Malpractice Claims in South Carolina.**

Malloy, along with the assistance of his wife, learned of Lee's errors when the Malloys met with another workers' compensation lawyer. (Malloy Affidavit, ROA ___). After having a guardian and conservator appointed to represent his interests, Malloy brought this lawsuit well within the three-year statute of limitations governing his claims. (Order Appointing Counsel/Guardian, ROA ___).

A three year statute of limitations period applies to legal malpractice lawsuits. *See* S.C. CODE ANN. § 15-3-530 (Supp. 2013). Beginning with *Mills v. Killian*, 273 S.C. 66, 254 S.E.2d 556 (1979), South Carolina adopted the discovery rule for the accrual of legal malpractice claims for the purposes of when the statute of limitations begins to run. *See*

*id.* "Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (citing *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996); S.C. CODE ANN. § 15-3-530 (Supp. 2013); and *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997)). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed." *Id.* "Under Section 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another." *Epstein*, 363 S.C. at 376, 610 S.E.2d at 818 (citing *True v. Monteith*, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997)).

The statute of limitations is a procedural issue and, in the question of the choice of law, the forum state prevails in procedural issues. "A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time." *Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) quoting *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006).

South Carolina procedural law applies to Malloy's claims therefore the South

Carolina statute of limitations required him to file within three years of discovering Lee's malpractice. Malloy discovered Lee's malpractice, with the help of his wife, upon meeting with another workers' compensation lawyer and file his lawsuit well within the three years required under the South Carolina statute of limitations. (Malloy Affidavit, ROA ___). Further, South Carolina procedural law applies to Malloy's legal malpractice claims and therefore, the North Carolina statute of repose should have had no bearing on this matter. Summary judgment was improper.

## Conclusion

Based on the foregoing arguments, the affidavits, testimony, and other evidence that was before the trial court, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, respectfully request this Court issue an Opinion reversing the trial court's Order Granting Defendants' Motion for Summary Judgment and Order denying the Motion to Alter or Amend Judgment because those Orders are based on an mistaken application of South Carolina's choice of law doctrine. Because of the trial court's undisputed findings that all of Malloy's financial injuries occurred in South Carolina, it was reversible error to rule that North Carolina law governed Malloy's tort claims. Under South Carolina's choice of law jurisprudence, it is South Carolina law that should control Malloy's tort claims. North Carolina's statute of repose is simply irrelevant and the Order Granting Defendants' Motion for Summary Judgment should be reversed and this matter remanded for trial.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

Thomas A. Pendarvis (SC Bar # 064918)
Catherine B. Kerney (SC Bar # 81429)
500 Carteret St Ste A
Beaufort, SC 29902-5066
843.524.9500 Tel.
Thomas@PendarvisLaw.com
Carey@PendarvisLaw.com

Brent P. Stewart (SC Bar # 66083)
THE STEWART LAW OFFICES, LLC
P.O. Box 570
Rock Hill, SC 29731
803.328.5600 Tel.
Brent@stewartlawoffices.net

Counsel for Appellant

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Beaufort, South Carolina