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

Case No. 2012-CP-42-5017

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.

INITIAL BRIEF OF RESPONDENTS

DAVID W. OVERSTREET
MICHAEL B. McCALL
Carlock, Copeland & Stair, LLC
40 Calhoun St., Suite 400
Charleston, SC 29401
(843) 727-0307

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases (South Carolina)

Cases (Other Jurisdictions)

Statutes and Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court correctly found that the substantive law of North Carolina, including North Carolina's four-year statute of repose, governed Appellant's legal malpractice action arising out of Respondents' representation of Appellant in an underlying North Carolina workers' compensation claim.

2. Whether the trial court correctly found that the parties' relationship was governed by the substantive law of North Carolina pursuant to the Contract of Representation.

STATEMENT OF THE CASE

Plaintiff Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy ("Client") filed this legal malpractice action against Kenneth E. Lee and Law Offices of Lee & Smith, P.A. (collectively, "Lawyer") arising out of an allegedly inadequate settlement of Client's North Carolina workers' compensation claim in 2003. The Summons and Complaint were filed in Spartanburg County on December 6, 2012. Lawyer timely answered and then moved for summary judgment on March 1, 2013 on grounds that Client's claims were barred by North Carolina's four-year professional malpractice statute of repose, which runs from the date of the last act of the defendant giving rise to the cause of action.

Lawyer's motion was supported by the Affidavit of Ken Lee with attached exhibits A through E (R. __), Client's discovery responses (R. __), a Memorandum in Support of Summary Judgment (R. __), and a Reply Memorandum (R. __). Client submitted a Memorandum in Opposition and the Affidavit of Mark A. Malloy. (R. __).

The Motion for Summary Judgment was heard by the Honorable Frank R. Addy, Jr. on August 28, 2013. (R. __. Tr. Aug. 28, 2013). Judge Addy issued a Form 4 Order on September 5, 2013 (R. __), and signed the formal order granting summary judgment on September 17, 2013. (R. __). Client timely moved to reconsider on October 3, 2013. (R. __). Both parties submitted additional memoranda in support of their respective positions. (R. __). Judge Addy heard the Motion to Reconsider on November 13, 2013. (R. __. Tr. Nov. 13, 2013). On November 26, 2013, Judge Addy issued a Form 4 Order denying Client's Motion to Reconsider, which declined to modify the previous order. (R. __). Client served a Notice of Appeal on December 12, 2013. (R. __).

INTRODUCTION

This appeal presents a choice of law dispute in the context of a legal malpractice action arising out of Lawyer's representation of Client in an underlying action that accrued in North Carolina and was commenced, litigated and settled in North Carolina. Client settled the underlying action at mediation in 2003. Over nine years later, Client filed suit against Lawyer in South Carolina alleging injuries directly and proximately caused by accepting Lawyer's advice to settle. Client asserts that as a result of the settlement, he lost the opportunity to further pursue his action in North Carolina for a larger settlement or proceed with a hearing on the merits before the North Carolina Industrial Commission. The choice of law dispute hinges on a relatively straightforward question: whether Client's claims against Lawyer are governed by the substantive law of North Carolina, where everything material to Client's underlying and present claims occurred, or by the substantive law of South Carolina by virtue of Client's residence in South Carolina.

The relevant North Carolina law for purposes of this appeal is a four-year statute of repose for professional malpractice claims that runs from "the last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c). It is undisputed that Client failed to commence this action within four years of the last act giving rise to the causes of action alleged in the Complaint, that North Carolina's statute of repose is substantive law, and that its application is dispositive. The trial court found that under South Carolina's traditional *lex loci delicti* choice of law rule, Client's claims were governed by the substantive law of North Carolina, and accordingly, Client's action was time-barred under North Carolina's four-year statute of repose.

STANDARD

An appellate court's review of a grant of summary judgment is subject to the same standard that governs the trial court under Rule 56(c), SCRCP. Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505, 509 (2006). A trial court may properly grant a motion for summary judgment 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 (1988).

Summary of Undisputed Material Facts

- Client has at all relevant times resided in South Carolina. (R. __, Malloy Affidavit).
- In 2002, Client sustained an on-the-job injury while working in North Carolina for a North Carolina employer. (R. __,).
- Client retained Lawyer in April of 2003 to pursue a North Carolina workers' compensation claim arising out of his on-the-job injury. (R. __, Lee Affidavit ¶¶ 2, 3)
- Lawyer was at all relevant times licensed to practice law in the State of North Carolina and remains licensed to practice law in North Carolina. (R. __, Lee Affidavit ¶ 4).
- Client executed a Contract of Representation on April 16, 2003, which provides, *inter alia*, "[t]his agreement shall be governed by the law of the State of North Carolina . . . ." (R. __, Lee Affidavit ¶ 2; Exhibit A).
- Lawyer filed Client's workers' compensation claim in North Carolina, and the claim was governed by North Carolina law. (R. __, Lee Affidavit, Exhibit C).
- Client settled his workers' compensation claim for $100,000 at mediation in North Carolina on November 25, 2003. (R. __, Lee Affidavit ¶ 5).
- Lawyer's advice to settle the workers' compensation claim was given and relied upon at mediation in North Carolina. (R. __, Lee Affidavit ¶¶ 6, 7; Exhibit B).

- Client executed a mediated settlement agreement at mediation, and the settlement was approved by the North Carolina Industrial Commission on February 3, 2004. (R. __, Lee Affidavit ¶ 8).

- The settlement funds were disbursed to Client on February 25, 2004 at Client's home address in South Carolina.. (R. __, Lee Affidavit ¶ 12; Exhibit D).

- Lawyer's representation of Client concluded upon disbursement of the settlement funds. (R. __, Lee Affidavit ¶ 11; Exhibit A).

- Client filed this lawsuit against Lawyer on December 6, 2012. (R. __, Complaint).

- Client's lawsuit seeks to recover damages for alleged injuries sustained as a direct and proximate cause of accepting Lawyer's advice to settle the workers' compensation claim. (R. __, Complaint).

- All of the alleged acts or omissions giving rise to the causes of action alleged in the Complaint occurred more than four years prior to the date the Complaint was filed. (R. __, Lee Affidavit ¶ 14; R. __, Plaintiff's Amended Response to Defendant's Request to Admit No. 10).

Unappealed Conclusions of Law

- The alleged tort occurred in North Carolina. (R. __, Order p. 5).

- The mediated settlement agreement that Client executed at mediation in North Carolina was binding and enforceable. (R. __, Order pp. 3, 5).

- North Carolina's four-year statute of repose is substantive law. (R. __, Order p. 3).

- All of Client's claims alleged in the Complaint are "malpractice" claims within the scope of North Carolina's four-year statute of repose. (R. __, Order pp. 3-4)

- North Carolina's four-year statute of repose is not subject to the discovery rule or tolling for any alleged disability, including incompetency. (R. __, Order p. 4).

- North Carolina's four-year statute of repose does not violate the public policy of South Carolina. (R. __, Order p. 7).

- The application of the substantive law of North Carolina is dispositive. (R. __, Order p. 4).

ARGUMENT

I. South Carolina's *lex loci delicti* choice of law rule requires the application of North Carolina law.

"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." Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81, 83 (Ct. App. 2007); Bannister v. Hertz Corp., 316 S.C. 513, 450 S.E.2d 629, 630 (Ct. App. 1994) ("Under South Carolina conflict of law principles, the substantive law governing a tort action is determined by the state in which the injury occurred.").

Client's claims against Lawyer arise out of an allegedly inadequate settlement of his North Carolina workers' compensation claim. Client's underlying claim arose out of injuries he sustained in North Carolina while working for a North Carolina employer. Client's underlying claim was filed in North Carolina by an attorney licensed to practice in North Carolina. Client's underlying claim was governed by North Carolina law. Client mediated and settled the underlying claim in North Carolina. Client executed a binding settlement agreement at mediation in North Carolina in reliance on Lawyer's settlement recommendation. The settlement was approved by the North Carolina Industrial Commission. The injury Client alleges in this lawsuit is the loss of his right to further pursue his workers' compensation claim in North Carolina for a larger settlement or proceed with a hearing on the merits in North Carolina. Client asserts that this lost opportunity was directly and proximately caused by relying on Lawyer's advice to settle the claim at mediation. The trial court correctly applied South Carolina's *lex loci delicti* choice of law rule to these undisputed facts and properly found that Client's claims were governed by the substantive law of North Carolina.

A. The *lex loci delicti* of this action is North Carolina.

Client does not challenge the trial court's finding that the tort occurred in North Carolina. Rather, the central theme of Client's appeal is that *lex loci delicti* does not mean *lex loci delicti*, but instead means the law of the state where the plaintiff resided at the time of the injury. A review of this traditional choice of law rule demonstrates that Client's residence in South Carolina simply has no bearing on the application of *lex loci delicti*.

Lex loci delicti literally translates as "[t]he law of the place where the tort or other wrong was committed." Black's Law Dictionary (9th ed. 2009). South Carolina has followed this traditional choice of law rule for over 100 years. Magill v. Seaboard Air Line Ry., 84 S.C. 416, 66 S.E. 561, 562 (1909) ("As the wrongs of which plaintiff complained occurred in Georgia, defendant's liability is to be solved by the laws of Georgia."). South Carolina continued to follow *lex loci delicti* after was adopted by the Restatement (First) of Conflict of Laws § 377, *et seq.* (1934). *See* id. § 378 ("The law of the place of wrong determines whether a person has sustained a legal injury."); Rauton v. Pullman Co., 183 S.C. 495, 191 S.E. 416, 419 (1937) (recognizing *lex loci delicti* as "the law of the place where the tort was committed" and citing Section 382, *et seq.* in finding that "whatever would be a defense to this action if it had been brought in the Republic of Mexico is a defense here, although it would not be if the cause of action had arisen in South Carolina."); Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303, 305 (1964) *overruled on other grounds by* Boone v. Boone, 345 S.C. 8, 546 S.E.2d 191 (2001) ("The general rule is that where an action is brought in one jurisdiction for a tort committed in another, all matters relating to the right of action are governed by the *lex loci delicti*.").

South Carolina courts have more recently referred to *lex loci delicti* as "the law of the state in which the injury occurred[,]" Nash, 650 S.E.2d at 83, but the underlying concept remains

unchanged. *Compare* Nash, 650 S.E.2d at 83, *with* Magill, 66 S.E. at 562 (applying the law of the state where the wrongs occurred), Rauton, 191 S.E. at 419 (referring to *lex loci delicti* as both "the law of the state or jurisdiction where the wrong is committed" and "the law of the place where the tort was committed"), *and* Complete Auto Transit, Inc. v. Bass, 229 S.C. 607, 610, 93 S.E.2d 912, 913 (1956) ("The cause of action asserted here . . . is for an alleged tort committed in this State. All matters relating to such right of action are, therefore, governed by the law of South Carolina.").

Our neighboring states that follow this traditional rule have likewise referred to *lex loci delicti* interchangeably as the law of the state where the tort occurred, the law of the place of the wrong, the law of the state where the cause of action arose, and the law of the state where the injury occurred. *E.g.*, Dowis v. Mud Slingers, Inc., 279 Ga. 808, 621 S.E.2d 413, 414 (2005) ("the substantive law of the state where the tort was committed."); White v. King, 244 Md. 348, 223 A.2d 763, 765 (1966) ("the law of the state in which the alleged tort took place."); McMillan v. McMillan, 219 Va. 1127, 253 S.E.2d 662, 663 (1979) ("the law of the place of the wrong."); Blais v. Allied Exterminating Co., 198 W. Va. 674, 482 S.E.2d 659, 662 (1996) ("the substantive law of the state where the cause of action arose"); Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849, 853-54 (1988) ("the state where the injury occurred"); Fitts v. Minnesota Min. & Mfg. Co., 581 So. 2d 819, 820 (Ala. 1991) ("the law of the state where the injury occurred.").

Regardless of the semantics, the concept of injury encompassed in *lex loci delicti* is the legal injury that makes negligent conduct actionable. Restatement (First) of Conflict of Laws § 378 (1934) ("The law of the place of wrong determines whether a person has sustained a legal injury."); Oshiek, 136 S.E.2d at 305 ("[T]he *lex loci delicti* . . . determines whether a person has sustained a legal injury."). While Client argues that the trial court misapplied the rule of *lex loci*

delicti, accepting Client's position would require this Court to disregard *lex loci delicti* in favor of an entirely new choice of law rule tailored to meet Client's needs in this case. Whether referred to as the location of the tort, injury, or wrong, *lex loci delicti* does not mean the law of the state where the plaintiff resided.

To support this new, unprecedented choice of law rule based solely on a plaintiff's residence, Client advances the novel theory that *lex loci delicti* does not encompass the location of the injury or tort or wrongful conduct, but the location where the financial consequences of the injury or tort or wrongful conduct were felt. To the extent Client was injured, it was not by the receipt of settlement proceeds, but by the fact that he entered into the settlement. The settlement precluded his right to further pursue the underlying workers' compensation claim. Client's alleged injuries stem from this lost opportunity, which occurred when he followed Lawyer's advice to settle the claim at mediation and executed a binding mediated settlement agreement. *See* Lemly v. Colvard Oil Co., 157 N.C. App. 99, 577 S.E.2d 712, 716 (Ct. 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).

Stated another way, Client's argument is that the *lex loci delicti* of this case is not where everything having anything to do with his lost opportunity occurred, but where he would have hypothetically benefitted but for the lost opportunity. Notably, the lost opportunity itself was the opportunity to further pursue his claim *in North Carolina* for a larger settlement or have the matter decided *by the North Carolina Industrial Commission*. The location where Client resided

when the hypothetical financial benefits of this lost opportunity would have materialized has no bearing on the *lex loci delicti* of this action.[1]

Lex loci delicti does not embrace this theoretical concept advanced by Client that tort actions are governed by the law of the state where someone resided at the time he purportedly should have received a hypothetical financial benefit. Instead, the application of *lex loci delicti* is firmly rooted in the actual location where the tort or wrongful conduct or injury occurred. The trial court properly applied *lex loci delicti* in finding that Client's claims were governed by the substantive law of North Carolina law, and the decision should be affirmed accordingly.

B. Client misread this Court's holding in Nash.

Client's characterization of Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81 (Ct. App. 2007) as involving "exactly opposite set of facts" does not hold up to any scrutiny and should be disregarded. Client takes the second footnote in Nash – that certain components of the footbridge were allegedly manufactured in South Carolina – to make a gigantic leap of logic: that the Nash court would have held that South Carolina law governs here because the tort was in North Carolina and the financial consequences manifested in South Carolina where Client resided.

[1] Client places added emphasis on language in the Form 4 Order denying Client's motion to reconsider in which the trial court recognized that "the financial harm to Plaintiff manifested itself in South Carolina because Plaintiff is and has always been a citizen of this state." This language, taken from an order in which the trial court twice noted that it "declines to modify the previous order[,]" must be read in the context of the paragraph from which it was plucked, which very clearly rejected the proposition that Client's residence is "the state in which the injury occurred." Lawyer does not dispute that Client has at all times resided in South Carolina. Given that this settlement was more than nine years ago, it can be assumed in the light most favorable to Client that he would have resided in South Carolina if and when the hypothetical financial benefits of his alleged lost opportunity materialized. Client's suggestion that this language constitutes a new and material factual finding that Lawyer could have or should have appealed is without merit. *See* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."); Winters v. Fiddie, 394 S.C. 629, 716 S.E.2d 316, 328-29 (Ct. App. 2011).

The dispute in Nash and this Court's holding in Nash had absolutely nothing to do with the significance, if any, of where a plaintiff resided or where the financial consequences of an injury or tort or wrongful conduct were felt. Rather, Nash addressed whether North Carolina's statute of repose was substantive or procedural, and if substantive, whether it offended South Carolina's public policy. Id. at 82-83. Nash stands for the proposition that North Carolina's statute of repose is substantive and that its application does not violate public policy. After finding that the alleged tort occurred in North Carolina, the trial court properly found that Client's claims were barred by North Carolina's statute of repose. (R.__, Order pp. 3, 5).

Client not only mischaracterizes the holding in Nash, but also fails to recognize that the plaintiffs' claims in Nash did not become actionable until they sustained injuries when the footbridge collapsed in North Carolina. *See* id. at 82. Notwithstanding the allegation that certain components of the footbridge were manufactured in South Carolina, the tort in Nash occurred in North Carolina when the bridge collapsed resulting in personal injuries. *E.g.*, Thornton v. Cessna Aircraft Co., 703 F. Supp. 1228, 1230 (D.S.C. 1988) *aff'd and remanded*, 886 F.2d 85 (4th Cir. 1989) (tort claims arising out of a plane crash in Tennessee were governed by Tennessee law, notwithstanding that decedent was a South Carolina resident and purchased the plane in South Carolina).

C. Client's reliance on Lister is misplaced.

After misconstruing Nash as involving the "exactly opposite set of facts" as this case, Client next argues that this Court's holding in Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997) is "directly on point." (Brief of App. p. 13). The specific holding in Lister that Client relies on is that in determining choice of law for a claim of fraudulent misrepresentation, "the law of the place of the wrong (*lex loci delicti*) controls. The

place of the wrong is not where the misrepresentations were made but where the plaintiff, as a result of the misrepresentation, suffered a loss." Id. at 455 (*citing* Hester v. New Amsterdam Cas. Co., 287 F. Supp. 957, 972 (D.S.C. 1968), *aff'd in part, appeal dismissed in part and remanded*, 412 F.2d 505 (4th Cir. 1969)).

Lister and Hester both involved fraudulent misrepresentation claims, and the holdings in both cases are derived from the comments and illustrations to the Restatement (First) of Conflict of Laws specifically addressing the "place of wrong" for fraudulent misrepresentation claims. *See* Restatement (First) of Conflict of Laws § 377 (1934), Summary of Rules, Rule 4 ("When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made."); Hester, 287 F. Supp. at 972 n. 7 (*citing* Restatement of Conflict of Laws § 377 (1934)); Lister, 494 S.E.2d at 455 (*citing* Hester)). Client does not allege he sustained a loss by fraud, but by Lawyer's professional negligence in advising him to settle the workers' compensation claim.

Moreover, even if the holdings in Lister and Hester were not limited to claims for fraud, neither case can be read to support the ultimate conclusion that Client asks this Court to make: that a plaintiff's residence is the "place of wrong" notwithstanding that the loss was sustained elsewhere. In Lister, 494 S.E.2d at 455-56, the loss was sustained in South Carolina not because the plaintiff resided in South Carolina, but because the money that was wrongfully appropriated by fraud was located in South Carolina. In Hester, 287 F. Supp. at 972, the court found that the "place of wrong" was not Georgia, where the plaintiffs resided, but Florida, where the subject property was located and where the transaction occurred and culminated.

In this case, Client's alleged loss is not the loss money wrongfully appropriated by fraud from a South Carolina bank account, but the loss of Client's opportunity to further pursue his

North Carolina workers' compensation claim, which arose out of injuries in North Carolina, accrued in North Carolina, was litigated and settled in North Carolina, and as Client alleges, would have proceeded in North Carolina but for Lawyer's settlement recommendation. Client's residence in South Carolina simply has no bearing on the application of the *lex loci delicti* rule.

D. Client's reliance on cases from other jurisdictions applying an entirely difference choice of law test is misplaced.

Client's argument in Section I. C. begins with the heading "the law of the state where the client resided at the time of the injury governs the legal malpractice claims." (Brief of App. p. 14) (capitalization removed). To support this assertion and presumably lend credence to the misreadings of Nash and Lister, Client cites several cases from other jurisdictions that considered a plaintiff's residence among several factors in analyzing choice of law issues. What is not apparent from Client's string cite is that all but one of these cases are from jurisdictions that have adopted an entirely different choice of law test, the most significant relationship test set forth in Restatement (Second) of Conflict of Laws § 6 (1971).[2] *See* Bobbitt v. Milberg, LLP, 285 F.R.D. 424, 428-29 (D. Ariz. 2012) (applying most significant relationship test under Arizona choice of law rules in denying certification of nationwide legal malpractice class action); Ennenga v. Starns, 677 F.3d 766, 774 (7th Cir. 2012) (finding it unnecessary to address the most significant relationship test under Illinois choice of law rules); St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP, 233 F. Supp. 2d 171, 175-76 (D. Mass. 2002) (applying most significant relationship test under Massachusetts choice of law rules, finding that between

[2] It is unclear from Sections I. C. and D of the Brief of Appellant whether Client is asking this Court to depart from South Carolina's traditional *lex loci delicti* rule in favor of the most significant relationship test, or adopt an entirely new, unprecedented bright line choice of law rule based solely on a plaintiff's place of residence. To the extent Client is indeed asking this Court to depart from *lex loci delicti*, this argument not preserved for review.

Massachusetts, Minnesota, Virginia, Florida, insurer's subrogated legal malpractice claim was governed by Massachusetts law); Streber v. Hunter, 14 F. Supp. 2d 978, 983 (W.D. Tex. 1998) (same, Texas choice of law rules, finding Texas law applied to legal malpractice claims arising out of tax litigation that occurred in Texas, giving the most weight to the fact that the underlying litigation turned on the application of Texas law); David B. Lilly Co., Inc. v. Fisher, 18 F.3d 1112, 1117-1121 (3d. Cir. 1994) (same, Delaware choice of law rules, finding that between Delaware, New York, Missouri, and the District of Columbia, the law of Delaware applied to legal malpractice claims arising out of an improperly structured acquisition of a Delaware corporation).

The only case in Client's string cite that does not involve the application of the most significant relationship test, Dow v. Jones, 311 F. Supp. 2d 461 (D. Md. 2004), merely explains the court's basis for applying Maryland law in the diversity jurisdiction action. *See* id. at 466 n. 3 ("the alleged tort occurred in Maryland, so the court will apply Maryland legal malpractice law."). In Dow, the court noted, apparently without objection from either party, that the plaintiff's legal malpractice action against his D.C. criminal defense attorneys was governed by Maryland law, where the plaintiff was tried and convicted. Id.

The remaining cases in Client's string cite would be distinguishable even if South Carolina recognized the most significant relationship test. Unlike Client, the plaintiffs in these most significant relationship test cases did not sustain their underlying injuries in the course of employment in North Carolina; they did not seek out and hire an attorney licensed to practice in North Carolina for the purpose of pursuing a workers' compensation claim in North Carolina against a North Carolina employer; they did not enter into a representation agreement that expressly provides for the application of North Carolina law; they did not file a workers'

compensation claim in North Carolina; their underlying claim was not governed by North Carolina law; they did not settle the claim at mediation in North Carolina; they did not agree to the settlement in reliance on advice given by the attorney at mediation in North Carolina; they did not execute a binding settlement agreement at mediation in North Carolina; and the settlement was not approved in North Carolina by the North Carolina Industrial Commission.

Courts that have applied the most significant relationship test to similar facts have found that a legal malpractice plaintiff's residence does not control. For example, in Foulke v. Dugan, 187 F. Supp. 2d 253, 257-58 (E.D. Pa. 2002), the court held that legal malpractice claims brought by New Jersey residents arising out of their lost opportunity to litigate claims in Pennsylvania, which arose out of an underlying workplace altercation in Pennsylvania, were governed by Pennsylvania law. The court found that "the injury to the plaintiffs, being barred from pursuing their claim in Pennsylvania state court, occurred in Pennsylvania." Id. at 257.

Likewise, in O'Boyle v. Braverman, 337 F. App'x 162, 167 (3d Cir. 2009) (unpublished), the court held that the plaintiffs' legal malpractice claims arising out of the dismissal of their Tennessee lawsuit were governed by Tennessee law, notwithstanding that the plaintiffs resided in New Jersey or that the defendant attorney was a member of the New Jersey bar. The court succinctly addressed all of the most significant relationships test factors as follows:

> The alleged injury at issue is the dismissal of the Tennessee suit and the Tennessee court's imposition of sanctions. Both this injury and the conduct that caused the injury-[lawyer's] allegedly improper handling of the Tennessee litigation-occurred in Tennessee. [Clients'] involvement in the Tennessee lawsuit arose out of their status as general partners in New Midland, a Tennessee General Partnership with its principal place of business in Tennessee. As the [clients] hired [lawyer] "for the purpose of filing a lawsuit . . . in Tennessee," the parties' relationship is centered in Tennessee. The only factors weighing in favor of the application of New Jersey law are [clients'] New Jersey citizenship and the fact that [lawyer] is a member of the New Jersey bar. These factors are insufficient to overcome the fact that Tennessee has the most significant relationship to a claim

> of legal malpractice arising out of litigation that took place in its courts and involved an entity formed under its laws.

Id.

Notwithstanding these cases applying the most significant relationship test, South Carolina continues to adhere to the traditional *lex loci delicti* rule. To the extent this Court is inclined to depart from *lex loci delicti*, and deems the issue preserved despite Client's failure to make this argument to the trial court, there is no precedent – in South Carolina or elsewhere – to support Client's proposition that legal malpractice claims are subject to a bright line choice of law rule based solely on a plaintiff's residence. If this Court were to adopt the most significant relationship test, Client's residence in South Carolina does not outweigh the other factors of the test as set forth and applied in Foulke and O'Boyle. Accordingly, the trial court's decision should be affirmed based on its conclusion that North Carolina law governs.

II. North Carolina's statute of repose does not violate public policy.

In Section I. D. of the Brief of Appellant, Client advances two points: that South Carolina has an interest in providing tort remedies for its residents, and South Carolina has not adopted a statute of repose for legal malpractice claims comparable to North Carolina's statute of repose. (Brief of App. pp. 16-18).

A. The competing interests of the states are not relevant to *lex loci delicti.*

Client's declaration of South Carolina's interest in providing tort remedies to its residents is well-received, and if South Carolina followed the most significant relationship test, it would be a relevant factor to weigh against North Carolina's competing interest in providing finality for claims against attorneys licensed to practice in North Carolina arising out of litigation that occurred in North Carolina pursuant to North Carolina law. However, the competing interests of the states are not relevant to the application of *lex loci delicti*. Client cites the Restatement

(Second) of Conflict of Laws § 145 (1971), but does not expressly asks this Court to depart from the traditional rule of *lex loci delicti*. To the extent that Client is arguing that South Carolina should adopt the most significant relationship test, this argument was not raised in the trial court and is not preserved for review.[3]

B. North Carolina's statute of repose is not against good morals or natural justice.

Client's next argument in Section I. D. is that because South Carolina has not adopted a comparable statute of repose, the trial court should not have applied North Carolina's statute of repose. Although Client does not specifically address or even mention the public policy exception to *lex loci delicti*, the public policy exception is the only exception to this choice of law rule. To the extent Client implicitly argues for the public policy exception here, the fact that South Carolina has not adopted a comparable statute for legal malpractice claims has been soundly rejected as a reason for applying this exception.

The public policy exception recognized in South Carolina is that "foreign law may not be given effect in this State if it is against good morals or natural justice." Boone v. Boone, 345 S.C. 8, 546 S.E.2d 191, 193 (2001) (*citing* Dawkins v. State, 306 S.C. 391, 412 S.E.2d 407, 408 (1991)). Examples of foreign laws against good morals and natural justice include "prohibited marriages, wagers, lotteries, racing, contracts for gaming or the sale of liquors, and others." Dawkins, 412 S.E.2d at 408. A statute of repose for professional negligence claims simply does not fall within this class of laws deemed "against good morals and natural justice." This is best demonstrated by the fact that South Carolina has adopted statutes of repose for other claims,

[3] As discussed in Section I. D. above, applying the most significant relationship test to the facts of this case would not result in a different outcome.

including malpractice claims against other professionals. *E.g.*, S.C. Code Ann. § 15-3-640 (Supp. 2006); S.C. Code Ann. § 15-3-545 (Supp. 2013).

Client does not appear to take issue with statutes of repose as a general class of laws, just this statute of repose in particular. A more accurate way of stating Client's argument is that his claims should not be barred by North Carolina's statute of repose unless they would have been barred by a comparable statute in South Carolina. However, "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.'" Butler v. Ford Motor Co., 724 F. Supp. 2d 575, 582 (D.S.C. 2010) (*citing* Thornton v. Cessna Aircraft Co., 703 F. Supp. 1228, 1232 (D.S.C. 1988), *aff'd* 886 F.2d 85 (4th Cir. 1989)).

As our Supreme Court explained in Dawkins, 412 S.E.2d at 408:

> [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. '[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.'

(*citing* Rauton v. Pullman Co., 183 S.C. 495, 191 S.E. 416, 422 (1937)); *e.g.*, Thornton, 703 F. Supp. at 1232 (application of Tennessee statute of repose did not violate public policy despite the absence of a comparable statute of repose in South Carolina); Butler, 724 F. Supp. 2d at 582-83 (application of North Carolina statute of repose did not violate public policy despite the lack of a comparable statute in South Carolina); Nash, 650 S.E.2d at 84 (application of North Carolina's six-year statute of repose did not violate public policy, notwithstanding that action would have been timely under South Carolina's eight-year statute of repose).

The public policy exception to *lex loci delicti* – the only exception to *lex loci delicti* – does not apply to North Carolina's statute of repose. A statute of repose is not in the class of laws

deemed "against good morals and natural justice" and North Carolina's four-year malpractice statute of repose in particular does not offend "good morals or natural justice" simply because it operates to bar Client's claims in this case. The trial court properly applied North Carolina's statute of repose in finding Client's claims were time-barred.

III. The trial court correctly concluded that the parties' relationship was governed by North Carolina law pursuant to the Contract of Representation.

After admitting in discovery responses that "the attorney-client relationship between [Client] and Defendant Lee was entered into pursuant to the terms of the Contract of Representation[,]" (R. __,Plaintiff's Amended Response to Defendant's Request to Admit No. 1), Client now takes issue with the trial court's finding based on the choice of law provision in that very contract.

Client entered into the Contract of Representation with Lawyer at the onset of the representation. The contract was executed by Client on April 16, 2003 and specifically provides that "[t]his agreement shall be governed by the law of the State of North Carolina . . . ." (R. __, Lee Affidavit, Exhibit A). Based on the express language of the contract and Client's discovery admission, the trial court properly concluded that "the parties' . . . relationship was governed by the substantive law of North Carolina pursuant to the Contract of Representation." (R. __ Order p. 6).

Client does not dispute the validity or enforceability of the choice of law provision, and concedes that it operates to bar Client's second cause of action for breach of contract. (Brief of Appellant p. 11; R.__). Instead, Client contends that its scope does not extend to Client's claims against Kenneth E. Lee individually because the contract states that "[t]he client, Mark Malloy, retains The Law Offices of Lee and Smith, P.A. . . ." without naming the attorney individually. Id. (R.___ Contract of Representation).

Notwithstanding Client's binding discovery admission that his relationship with "Defendant Lee was entered into pursuant to the terms of the Contract of Representation[,]" the contract reflects that its scope extends to the firm's namesake partner, Kenneth E. Lee. The very next sentence of the contract after the portion quoted by Client begins with "[t]he client authorizes *the attorneys* to take all appropriate actions to resolve the claim. . . . (emphasis added), and thereafter refers to *the attorneys* throughout the contract. (R. __). The second page of the contract bears the signatures of Client and Kenneth E. Lee for the Law Offices of Lee and Smith, P.A. (R. __). Moreover, Client specifically alleges in the Complaint that Kenneth E. Lee and Law Offices of Lee and Smith, P.A. are one in the same:

> Kenneth E. Lee . . . is or was a member of Defendant, Law Offices of Lee & Smith, P.A. (collectively 'Lee').
>
> * * *
>
> At all relevant times hereto, Kenneth E. Lee is or was acting as an agent for Law Offices of Lee & Smith, P.A.
>
> * * *
>
> [A]t all relevant times hereto, Law Offices of Lee & Smith, P.A. herein acted by and through its employees and agents, including but not limited to Defendant, Kenneth E. Lee, who acted within the course and scope of his employment and/or agency with all implied, inherent, apparent and express authority to so bind his master and principal. . . .

(R. __ Complaint ¶¶ 7, 8, 10).

The designation of North Carolina law in the Contract of Representation was reasonable in light of the purpose and subject matter of the representation: retaining an attorney licensed to practice in North Carolina to pursue litigation in North Carolina. Accordingly, the trial court correctly concluded that the relationship between Lawyer and Client was governed by the substantive law of North Carolina pursuant to the choice of law provision in the contract.

IV. Client's remaining arguments are not relevant, not preserved, or both.

In Section I. E. of the Brief of Appellant, Client acknowledges that North Carolina law governs the proximate cause element of Client's claims. (Brief of Appellant pp. 18-19). Lawyer agrees that the proximate cause element of Client's claims are governed by North Carolina law, and submits that the trial court correctly determined that the substantive law of North Carolina governs Client's claims in their entirety.

In Section I. F. of the Brief of Appellant, Client argues that his claims are governed by the procedural laws of South Carolina, including South Carolina's three-year statute of limitations and discovery rule. (Brief of Appellant pp. 19-20). Lawyer agrees that as the forum state, the procedural laws of South Carolina apply. However, as this Court made expressly clear in Nash, 650 S.E.2d at 83, a statute of repose is substantive law. Client does not appear to challenge and has not preserved for review the trial court's findings that North Carolina's statute of repose is substantive law or that its application in this case is dispositive. The only issue before the trial court and on appeal is whether Client's claims are governed by the substantive law of North Carolina.

To the extent these findings are challenged and subject to review, Client's concession that North Carolina law operates to bar his third cause of action for breach of contract is in and of itself a concession that North Carolina's statute of repose is substantive law and that its application in this case is dispositive as to all claims. (R.__; Brief of Appellant). Moreover, as set forth in Lawyer's memoranda submitted to the trial court, (R.___) and the trial court's order (R.___), these findings are supported by the express language in N.C. Gen. Stat. § 1-15(c) (2003) and the holdings in Nash, 650 S.E.2d at 83, Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d

792, 793 (1994), and Livingston v. Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., 163 N.C. App. 397, 594 S.E.2d 44, 51 (2004).

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the trial court's order granting summary judgment should be affirmed.

Respectfully submitted,

DAVID W. OVERSTREET
MICHAEL B. McCALL
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307

Attorneys for Respondents

May 6, 2014