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January 12, 2015

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: George Skipper, Veronica Skipper, Michael Perry Bowers, Specialty Logging, LLC, and Harold Moors v. ACE Property and Casualty Insurance Company, Brantley C. Rowlen and Erin Lawson Coia
Case Tracking No. 2014-001979

Dear Mr. Shearouse:

Please find enclosed for filing the original and fifteen (15) copies of the *Plaintiff's Brief* in reference to the above matter. I have also enclosed a proof of service of this document on counsel for the Defendants. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Erin Bridges
Paralegal to Blake A. Hewitt
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: Mark B. Tinsley, Esquire

Randolph Murdaugh, IV, Esquire
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Justin T. Bamberg, Esquire

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

J. Michelle Childs, United States District Judge

Appellate Case No. 2014-001979

George Skipper, Veronica Skipper,
Michael Perry Bowers, Specialty Logging,
LLC, and Harold Moors ..... Plaintiffs,

v.

ACE Property and Casualty Insurance
Company, Brantley C. Rowlen and
Erin Lawson Coia ..... Defendants.

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QUESTION PRESENTED

Can a legal malpractice claim be assigned between adversaries in litigation in which the alleged legal malpractice arose?

STATEMENT OF THE CASE

This case has its roots in another case.

In 2012, George Skipper filed a lawsuit claiming that he suffered serious injuries as the result of an automobile wreck that involved his personal vehicle and a commercial logging truck. He sued Harold Moors, who was driving the truck, and he sued Specialty Logging, the company that owned the truck.

The present case arises out of the way the wreck case was handled by an insurance company and by the lawyers the insurance company hired to defend its insureds.

Specialty Logging was insured by ACE Property & Casualty Insurance Company. ACE Insurance hired a law firm to defend Mr. Skipper's case. Brantley Rowlen and Erin Coia are lawyers in this firm's Atlanta office.

ACE Insurance was allegedly negligent and committed several acts of bad faith while handling Mr. Skipper's claim. In the same vein, these out-of-state lawyers allegedly committed multiple acts of legal malpractice during their managing of the claim. The charged mistakes include accusations that the lawyers did not do a proper investigation, that the lawyers rejected reasonable settlement offers without discussing those offers with Mr. Moors and with Specialty Logging, and that the lawyers repeatedly took actions that impermissibly put ACE Insurance's interests ahead of the interests of Mr. Moors and Specialty Logging, who were the true clients. In short, the claim is that the lawyers failed

to remain independent from the insurance company and loyal to the insureds. These allegations are disputed, but these are the claims.

In January of 2014, the parties entered into a settlement agreement. This was roughly a year and a half after the suit began, and it was nearly three and a half years after the wreck.

This settlement *only* involved the parties—Mr. Skipper, Mr. Moors, and Michael Bowers, who owns Specialty Logging. It also involved Mr. Skipper's wife, who had a separate consortium claim. ACE Insurance and the out-of-state lawyers were not parties.

The settlement agreement is lengthy and detailed. It involved an admission that Mr. Moors and Specialty Logging were liable for Mr. Skipper's injuries, and it also involved a $4.5 million confession of judgment in the Skippers' favor.

The agreement further provided that along with Mr. Skipper and his wife, the original defendants—Mr. Moors and Specialty logging (plus Mr. Bowers)—would file a bad faith claim against ACE as well as a malpractice claim against the lawyers. The agreement only assigned the Skippers *a portion* of the recovery for those claims, and it additionally gave the Skippers a lien against the suit's proceeds.

The agreement also provided that the Skippers would not file the confessed judgment as long as the original defendants cooperated in the claims against ACE Insurance and the lawyers. This provision is part of the agreement's "springing covenant not to execute."

The bad faith and legal malpractice case was filed the day after the settlement agreement was executed. As the settlement agreement contemplates, the plaintiffs in the case are Mr. and Mrs. Skipper, Mr. Moors, Mr. Bowers, and Specialty Logging. The defendants are ACE Insurance, attorney Rowlen, and attorney Coia.

In February, ACE removed the case to federal court claiming diversity jurisdiction under 28 U.S.C. § 1332. This placed the settlement at issue because Mr. and Mrs. Skipper derived their standing as parties in interest from the agreement and judgment. The Skippers share the same state of citizenship as the Atlanta lawyers. This made removal improper under *Strawbridge v. Curtiss*, 7 U.S. 267 (1806), which requires complete diversity.

ACE Insurance acknowledged that complete diversity was lacking, but it claimed that removal was appropriate because Mr. and Mrs. Skipper were "sham" plaintiffs. The argument went that the settlement agreement was invalid and that the Skippers did not have any viable claims against ACE or the lawyers. ACE cast the settlement as a dubious deal which was part of a fraudulent plan. It argued that the assignment was collusive and that giving part of the claims to the Skippers was designed to defeat diversity jurisdiction.

Within months of removal, the parties filed multiple motions raising these same issues. ACE Insurance and the lawyers filed separate motions to dismiss the suit for failure to state a claim. In addition to seeking dismissal of the Skippers claims by charging that the assignment was void, they sought dismissal of the other parties' claims by arguing that those parties had lost their standing via the assignment. The plaintiffs filed a motion to remand. They claimed that the assignment was valid and that removal was obviously improper.

In an order dated September 19, 2014, the United States District Judge assigned to the case elected to certify a question to this Court about whether South Carolina law prohibits a party from assigning a legal malpractice claim to the person who was his or her adversary in the case where the alleged malpractice arose. The District Court noted that South Carolina does not have any precedent that directly addresses whether legal malpractice claims can be

assigned and that the only decision which appeared to discuss the issue was an order issued by a state circuit court judge. This Court subsequently accepted the question for review.

ARGUMENT

The description of this case's history endeavored to stay within the District Court's order requesting certification, which is attached to this brief as Appendix A. The only deviations are the sentence on page one that describes the nature of the bad faith and malpractice claims and the sentence on page two which explains that Mrs. Skipper was a party to the settlement agreement because of her separate suit with a consortium claim.

But there is much more to this case than the District Court's order describes. There is more to the settlement agreement, which the plaintiffs strongly believe is reasonable, and there are many more facts that the plaintiffs believe demonstrate bad faith by the insurance company and malpractice by the lawyers. Those facts include the inexplicable decision to reject multiple settlement offers that would have protected Mr. Moors, Mr. Bowers, and Specialty Logging from an excess judgment while working no prejudice—none—to the insurance company or the lawyers that it hired. Fairness requires acknowledging that these matters are hotly contested, but fairness also requires emphasizing that there is more to this case than the concise overview that the District Court's order provides.

This Court should answer the certified question "yes." The right to sue a lawyer for malpractice is a property right that an owner should be free to transfer unless the circumstances of the specific transfer in question violate a clear rule of public policy. This is something of a "minority" view, but it is the better view. The view that is touted as the "majority" is not consistent, and the public policies those cases identify do not always apply.

The reality is that assignments are contracts, and South Carolina courts generally judge a contract's validity by examining the circumstances of the contract in question. As with any other contract, it is possible that an assignment of a legal malpractice claim might be designed to perpetrate some unfairness or fraud, but we already expect the court to look for fraud and to police it when it occurs. Other assignments—even some to former adversaries—do not violate any public policy at all. It is difficult to see how a court could bar those transactions. There would be no cogent rationale for doing so. The best approach is to answer the certified question "yes." The circumstances of each case should control.

a. The right to sue a lawyer for malpractice is a property right that an owner should generally be free to transfer.

South Carolina law provides that the right to sue a lawyer for malpractice is a property right and that an owner is generally free to transfer property as he or she wishes.

i. A potential malpractice claim against a lawyer is a property interest that is protected by law.

The right to a potential lawsuit is included in the statutory definition of someone's property. See S.C. Code Ann. § 15-1-40 (2005). This is not unique to South Carolina; other states define "personal property" to include tangible things like money and chattels as well as intangible "things in action" or "choses in action." The phrases "chose in action" and "thing in action" describe the right to sue to recover a debt, an item, or to recover money damages. BLACK'S LAW DICTIONARY 219 (5th ed. 1979). Thus, if someone has a potential malpractice claim against a lawyer, that claim is a property interest that is protected by law.

A person is ordinarily free to dispose of his or her property however he or she sees fit. As the next section explains, this generally applies to the right to a potential lawsuit.

ii. South Carolina law ties the assignability of a lawsuit to the survival statute. Most claims are assignable because most claims survive the owner's death.

Someone's ownership of a potential lawsuit is not materially different from the ownership of a chattel. There is a statutory basis for this rule: through the "survival statute," South Carolina law provides that all causes of action for injuries to real property, personal property, or injuries to the person will survive to the personal representative of the injured person's estate. See S.C. Code Ann. § 15-5-90 (2005). In *Doremus v. Atlantic Coast Line Railroad Co.*, this Court held that although it had not decided the precise question before, it had previously acknowledged that any tort claims which survive someone's death are assignable during that person's lifetime. See 242 S.C. 123, 142, 130 S.E.2d 370, 379 (1963). The Court has continued to recognize this principle on multiple occasions. See, e.g., *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 97 (2002). The test for assignability is whether the claim would survive the original owner's death.

iii. South Carolina law suggests that legal malpractice claims survive, which would mean the default view is that such claims are assignable.

Nothing suggests that a legal malpractice claim would not survive the owner's death. This Court has observed that the language of South Carolina's survival statute is "broad" and that it "appears to include almost every conceivable cause of action." *Id.* at 564, 564 S.E.2d at 97. The Court has also observed that the only tort claims that have been held to *not* survive are workers' compensation claims (which are governed by specific survival statutes) and claims for libel, slander, fraud, and malicious prosecution. *Id.* at 563-64, 564 S.E.2d at 97. But there is no South Carolina statute or case suggesting that a legal malpractice claim

would not fall within the survival statute's language. The general rule is that any cause of action that could have been brought by the deceased will survive.

The broad language from the *Ferguson* decision is not an outlier. The year after *Ferguson*, the Court wrote that the survival statute "has a wide ambit that includes all causes of action not covered by specific exceptions." *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 377, 585 S.E.2d 292, 300 (2003) (claims for violation of the attorney preference statute survive).

It may also be helpful to consider an analogy. A legal malpractice claim is similar in some respects to a malpractice claim against a physician. Both arise out of a contract for personal services, and both are claims for professional negligence. See S.C. Code Ann. § 15-36-100 (Supp. 2014) (requirements for professional negligence cases). Medical malpractice claims appear to survive the patient's death. See, e.g., *Wooten v. Amspacher*, 279 S.C. 325, 307 S.E.2d 232 (1983) (a medical malpractice action brought under the survival statute). If one species of professional negligence survives, it would seem that all should survive.

Finally, this Court's decision in *Fabian v. Lindsay* may be instructive. In addressing whether a disinherited beneficiary could pursue a legal malpractice claim involving estate planning, the Court observed that the estate is not likely to file suit because it has not been damaged. This implies that a malpractice claim that *did* damage the estate would survive. Op. No. 27460 (S.C. Sup. Ct. filed Oct. 29, 2014) (Shearouse Adv. Sh. No. 43 at 35).

Thus, as a matter of South Carolina's statutory law, the default rule would seem to be that legal malpractice claims are freely assignable. Legal malpractice claims appear to survive the owner's death, and because South Carolina has a long history of tying assignability to survivability, it naturally follows that legal malpractice claims are assignable.

b. Allowing a legal malpractice claim to be assigned is a bit of a "minority" view, but the division is not overwhelming, and there is a healthy divide on whether the reasons that are commonly offered for prohibiting such assignments have any merit.

The plaintiffs located twenty-one (21) other jurisdictions that purport to prohibit all assignments of legal malpractice claims. Eleven (11) jurisdictions disagree and follow a case-by-case approach. As to the question of assignments between adversaries, the plaintiffs located eight (8) cases that have considered this precise question. Five (5) of these cases refused to honor the assignment while the remaining three (3) allowed it.

As the Court will expect, there are areas of material variance between the reasoning of some of these jurisdictions. This is even true for States in the same camp. But there are some general themes that emerge. This section attempts to fairly describe both sides.

i. Twenty-one jurisdictions ban all assignments of legal malpractice claims, but they do not follow a uniform approach and some of them should not count.

The twenty-one jurisdictions with authorities that appear to prohibit all assignments of legal malpractice claims are Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Oklahoma, Tennessee, Virginia, and West Virginia. Appendix B contains a list of citations to the relevant authorities in these jurisdictions.

These cases do not follow a uniform approach. Several of them rely heavily on a California case, *Goodley v. Wank and Wank, Inc.*, and the public policy arguments articulated in that decision, but there are still meaningful differences between some of these States.

For example, New Jersey law does not allow any tort claims to be assigned. See *Alcman Servs. Corp. v. Samuel H. Bullock, P.C.*, 925 F. Supp. 252, 258 (D.N.J. 1996).

Arizona and Louisiana view legal malpractice as a claim for a personal injury, and these jurisdictions do not allow personal injury claims to be assigned. See (Arizona and Louisiana cases cited in Appendix B, column I).

Colorado, Florida, and Kansas take the position that legal services are "personal" services which are not subject to assignment. See *id.*

Oklahoma limits assignments by statute. See Olka. Stat. tit. 12 § 2017. The same is true in Georgia. See Ga. Code Ann. § 44-12-24.

These differences matter. All of these States have a material divergence from South Carolina's statutory law or common law. This suggests that these States would be bound to strike down the assignment of a legal malpractice claim regardless of any policy rationale that is specific to that claim. One could therefore say that the number of States employing a "pure" policy analysis for disallowing assignments is not twenty-one, but thirteen.

ii. Eleven jurisdictions evaluate the assignment of a legal malpractice claim on an individual basis. As to assignments between adversaries, the split is 5 to 3.

Eleven jurisdictions judge the assignment of legal malpractice claims on a case-by-case basis. Those jurisdictions are Connecticut, the District of Columbia, Idaho, Maine, Massachusetts, New York, Oregon, Pennsylvania, Rhode Island, Texas, and Washington. See Appendix B, column II.

There used to be twelve jurisdictions that followed this approach. The Georgia Supreme Court held that legal malpractice claims are not *per se* unassignable in *Villanueva v. First Am. Title Insurance Co.*, 740 S.E.2d 108 (2013), but Georgia subsequently passed a statute that prohibited these assignments. See Ga. Code Ann. § 44-12-24.

Five (5) jurisdictions have considered assignments between adversaries and held that such an assignment is invalid *because* it is to an adversary. See Appendix B, column III(a).

Three (3) jurisdictions have gone the other way and have upheld such assignments. See Appendix B, column III(b).

There are at least six (6) other jurisdictions with cases involving assignments between adversaries, but these cases were omitted from consideration because these jurisdictions did not employ analysis that focused on this precise issue. See Appendix B, column III(c).

iii. The basic policy rationale of the "majority" is that allowing assignments will debase the profession. The gist of the "minority" is that this concern is dramatically overstated and is not always in play.

There are several policy arguments that are generally offered against allowing all legal malpractice claims to be assigned. Some of the authorities on this topic have grouped these policy arguments into categories. This brief employs the labels from a student note in a law review article. See Kevin Pennell, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to A Contractual Problem*, 82 Tex. L. Rev. 481, 493-94 (2003).

The first public policy argument against these assignments is a "commercialization" argument. This argument goes that allowing legal malpractice claims to be assigned would convert these claims to marketable commodities. The concern is that this would increase the number of malpractice claims, force attorneys to defend themselves against strangers, and ultimately debase the profession.

The second is a "sanctity" argument. This argument goes that allowing assignment would weaken the attorney's duties of loyalty and confidentiality and make an attorney less

likely to zealously represent the client. This argument also involves a concern that an opposing litigant would retaliate to zealous advocacy by offering to buy the opponent's right to sue his lawyer, which would drive a wedge between the lawyer and his or her client.

The third policy argument is a "role-reversal" argument. This argument goes that if a client is allowed to assign a legal malpractice claim to his or her former adversary, there will be a distasteful change of position. When the underlying case was being litigated on the merits, the adversary was arguing that he was entitled to win because his case was stronger. The fear is that in the malpractice case, the adversary will switch gears and argue that he should *not* have won and that he prevailed only because the opposing lawyer was bad.

The fourth argument is a "reluctant lawyer" argument. According to this argument, attorneys will be hesitant to represent clients, particularly ones with limited means, due to fear that the client will sell the lawyer out to the client's adversary.

Eloquent articulations of the majority view appear in *Goodley*, see 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976), and in the Indiana Supreme Court's decision in *Picadily, Inc. v. Raikos*. See 582 N.E.2d 338, 341-45 (Ind. 1991).

The cases that reject the "majority" rule reason that most legal malpractice claims are different from a personal injury claim, which usually involves intangible damages like pain and suffering. Most legal malpractice cases involve a concrete injury that is pecuniary—the typical claim is that the lawyer committed malpractice and that this malpractice caused the client to lose money. These cases that follow the "minority" view also focus on the fact that the policy concerns identified in *Goodley* and its progeny are either based on inaccurate assumptions or are not present in every case. Using the "role-reversal" argument as an

example, one of the responses to this argument is that *all* legal malpractice cases involve a role-reversal. Where the client and the lawyer used to be on the same team, every malpractice case pits them against one another as vigorous adversaries.

Persuasive defenses of the minority view can be found in *New Hampshire Insurance Co. v. McCann*, 707 N.E.2d 332, 334-38 (Mass. 1999) and *Gregory v. Lovlien*, 26 P.3d 180, 183-85 (Or. Ct. App. 2001). Additional criticisms of the public policies articulated in the "majority" view also appear in Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61, 68-69 (2011) and Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims*, 37 S. Tex. L. Rev. 1203 (1996).

c. A case-by-case analysis is faithful to this Court's established jurisprudence, it recognizes that these claims are the client's property and that assignments can be both useful and fair, and it follows the same approach that applies to other contracts.

There does not appear to be any binding South Carolina authority that addresses the precise question presented. The District Court *did* note that a South Carolina circuit court has addressed this issue and invalidated the assignment, see Appendix A, p.7, but that circuit court order has been appealed to the Court of Appeals. See *Pavilion Dev. Corp. v. Nexsen Pruet* (C-TRACK Appellate Case No. 2013-002796).

This Court is familiar with the standard it applies when considering certified questions: if the certified question raises a novel issue of law, the Court is free to decide the question based on its view of which answer would best reflect the law and public policies of this State as well as the Court's sense of law, justice, and right. E.g., *Howell v. U.S. Fid. & Guar. Ins. Co.*, 370 S.C. 505, 508, 636 S.E.2d 626, 627 (2006).

This Court should answer the certified question "yes." A party should be free to assign a legal malpractice claim to an adversary unless the circumstances of the transfer in question violate a clear rule of public policy. First, this case-by-case approach is faithful to this Court's established jurisprudence regarding assignments. Second, it recognizes that these claims are the client's property and that assignments can be both useful and fair. Finally, this follows the same limiting principle that applies to other contracts generally.

i. This Court's jurisprudence emphasizes a link between the statutory law, assignments, and public policies.

A review of this State's jurisprudence illustrates a strong correlation between the statutory law and the question of what claims are assignable. This has not always been true—the common law rule was that *no* claims were assignable, but this Court has drawn a direct connection between the issue of assignability and the language of South Carolina's survival statute. The rule is that any cause of action which survives is assignable during the owner's life. See *Doremus*, 242 S.C. at 142, 130 S.E.2d at 379.

This has been the test for over 50 years. If this association was *not* consistent with the public policy of South Carolina—if the legislature believed that it was out-dated to tie assignability to survival—the legislature could easily have changed the statute.

This Court's previous decisions also describe a close relationship between statutory law and public policy. The Court has written that it will use statutes to determine public policy "whenever possible" and that the judiciary is generally reluctant to expand public policy beyond that which has been crafted by the legislature. See *Gladden v. Boykin*, 402 S.C. 140, 143-44, 739 S.E.2d 882, 883-84 (2013). There is a difference between giving voice to existing policy and declaring policy in the absence of legislative direction.

The plaintiffs have not discovered any statutory basis for a public policy that would prohibit someone from assigning a legal malpractice claim to his or her adversary. The statutory law regards a malpractice claim as being part of someone's personal property, and the law generally allows people to dispose of their property and enter into contracts as they see fit. See, e.g., *Ashley II of Charleston v. PCS Nitrogen, Inc.*, 409 S.C. 487, 492, 763 S.E.2d 19, 21-22 (2014) (noting "longstanding regard for parties' freedom to contract."). Answering the certified question "no" would seem to require an existing policy against these assignments that is clear and unequivocal. The statutory law does not provide one.

ii. It is easy to envision assignments that are useful and fair, and there are existing authorities that police fraud and that serve as strong disincentives for collusion.

The problem with the policy arguments from *Goodley* is that they do not withstand the test of repeated application. Any honest evaluation will be forced to concede the point. Some assignments have no likelihood of debasing the legal profession, will not involve a duplicitous role-reversal, and will be the product of fair negotiation, not collusion. One can accordingly assume (although it is debatable) that the *Goodley* policies have merit. Even if they justified invalidating an individual assignment, they cannot justify a wholesale ban.

It may be helpful to consider a hypothetical example. Suppose that something like the allegations of the present case are true.

Suppose that Mr. Skipper's lawyer notified ACE Insurance about the wreck almost immediately after the wreck occurred in 2010. Suppose also that Ms. Skipper's lawyer said he would be investigating the claim promptly and that he suggested ACE Insurance do the same because the lawyer anticipated making a time-sensitive settlement offer.

Suppose further that Mr. Skipper's first offer to resolve the case was for ACE to tender the limits of the coverage. Suppose that neither ACE nor the lawyers that it hired ever communicated this offer to Mr. Moors or Mr. Bowers—instead they unilaterally rejected the offer after doing little (if any) investigation. Suppose also that Mr. Skipper's first offer was a time-sensitive offer which he agreed to extend for two months to allow ACE and its lawyers to investigate the claim even though they had been notified of the claim two years previously. Suppose that despite this two-month extension, the investigation was minimal and there was no communication of the offer or the decision to reject it to the clients.

Suppose that this failure to communicate is very important. Suppose Mr. Bowers says that if he had known about the offer, he would have personally paid the $17,000 difference between the Mr. Skipper's demand and the available coverage.

Suppose that liability is clear. Suppose there is truly no dispute about whether Mr. Moors was at-fault in the wreck and that Specialty Logging is vicariously liable for his negligence.

Suppose time passes, trial is imminent, and that ACE and its lawyers refuse to negotiate above the policy limits or consider the effect of an excess judgment on the clients. Mr. Skipper's lawyer believes that the case is highly valuable and files an offer of judgment for $2.5 million which is at the low end of the range identified by his economics expert. Suppose Mr. Skipper has diligently prepared and has assembled a team of experts including a functional capacity expert, an economics expert, a trucking safety expert, and Mr. Skipper's treating physicians. Meanwhile ACE Insurance and its lawyers have done little if anything to protect the insureds from exposure. They will only offer the remaining limits of the policy

(which means they know the claim is valuable), and they allow the $2.5 million offer of judgment to expire without ever communicating the offer to Mr. Moors or Mr. Bowers.

Finally, suppose that in addition to believing that the case is highly valuable, Mr. Skipper's lawyer believes that ACE has engaged in bad faith and that its lawyers have committed malpractice. He therefore makes several "high/low" settlement offers that would settle the case within the coverage limits while the parties litigate whether any bad faith and legal malpractice occurred. The District Court's order describes the "high" component of the offer as being $7 million, but suppose that this was just the first offer. Suppose that Mr. Skipper's lawyer subsequently offered for either a jury or a mediator to determine the amount of the "high" judgment, but ACE and its lawyers rejected these offers too and they refused to negotiate any further.

There is no public policy reason why Mr. Moors and Mr. Bowers should be forced to bear the initial brunt of another party's wrongdoing. South Carolina law requires an insurance company to sacrifice its interests in favor of its insured. See *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 292-93, 170 S.E. 346, 348 (1933). The "low" part of the "high/low" was identical to the settlement offer that ACE and its lawyers proposed. The "high" simply invited ACE and its lawyers to litigate whether their conduct had been appropriate. This offer protected the insureds from exposure and it would not have prejudiced anyone. Banning assignment makes the client suffer for someone else's mistake.

There is also no functioning attorney-client relationship to protect in this situation. The clients desperately want the case resolved, but the attorneys are insisting on trial, are refusing to negotiate above the coverage, and are not telling the clients about settlement

offers. *Goodley* (and its progeny) speaks of fear that the attorney-client relationship will be commercialized, but this relationship has already been commercialized: the only reason that these particular lawyers were involved is because a commercial transaction—Specialty Logging's decision to buy insurance—required Specialty Logging to surrender rights like the right to choose the lawyers who would defend its interests in litigation. If ACE breaches its duty to put its insureds first, and if ACE's lawyers forget whose interests they were hired to serve, the insureds should be free to mitigate their damages and look after themselves.

Furthermore, there are several existing safeguards in place that will protect a lawyer from any assignment of a dubious nature.

First, this Court has noted that although South Carolina has a policy that favors settlements, South Carolina courts will scrutinize settlement agreements that protect a party from personal liability to ensure that those agreements do not involve complicity or wrongdoing. *Fowler v. Hunter*, 388 S.C. 355, 362, 697 S.E.2d 531, 535 (2010). If there *is* collusion or fraud involved in an assignment, the court will root it out.

The second deterrent is the threat of sanctions. A lawyer who brings *any* lawsuit (including a legal malpractice suit) without a reasonable basis will risk professional discipline for violating the Rules of Professional Conduct. E.g., Rule 3.1, RPC, Rule 407, SCACR (titled "Meritorious Claims and Contentions"). The lawyer will also be subject to sanctions under the frivolous civil proceedings sanctions act. See S.C. Code Ann. § 15-36-10 (Supp. 2014). The client is subject to sanctions under this act as well.

There are special pleading rules to deter baseless malpractice claims. South Carolina law requires a plaintiff to attach an expert's affidavit to the complaint. See § 15-36-100 (B).

There is also the risk of criminal sanctions. South Carolina recognizes the crime of barratry. This consists of inciting someone to bring a lawsuit for the purpose of harassing the opposing party. S.C. Code Ann. § 16-17-10 (2003).

The net effect of these potential penalties is that there is very little incentive for a party to attempt to use an assignment to accomplish something untoward or collusive. The Court followed this same sort of analysis when it abolished the defense of champerty (funding a stranger's lawsuit) in *Osprey, Inc. v. Cabana Limited Partnership*. See 340 S.C. 367, 381-83, 532 S.E.2d 269, 277-78 (2000). There is no reason to prohibit all assignments between adversaries. Some of those assignments will be perfectly defensible, and there are already tools in place to police any misconduct.

iii. A case-by-case approach follows the same limiting principle that applies to other contracts generally.

South Carolina courts are already familiar with policing private agreements on a case-by-case basis.

One area where this approach applies is non-compete agreements. At common law, any agreement that restricted someone's right to exercise his "trade or calling" was held to be void as against public policy. *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 59, 119 S.E.2d 533, 536 (1961). This ban has eroded because businesses have a legitimate interest in preventing unfair competition. Put differently, the common law rule has changed out of recognition that not all restrictions on trade are bad.

The rule that governs non-compete agreements is a rule of reasonableness: the agreement must be reasonable from the employer's perspective, the employee's perspective,

and the general public's perspective. *Id.* at 66-69, 119 S.E.2d at 539-541. Courts judge the "public's perspective" by asking how the public interest is impacted by "depriving [the public] of the employee's industry and service." *Id.* at 69, 119 S.E.2d at 541.

Another area where the court makes an individualized determination of how an agreement impacts the public interest is the area of restrictive covenants.

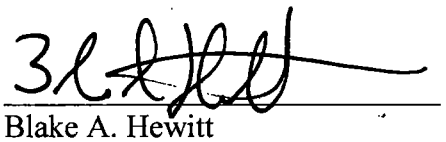
Restrictive covenants are disfavored. The source of this disfavor is "the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land." *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987). But even though these agreements are disfavored, South Carolina courts have made it plain that such covenants will generally be enforced. The exceptions to this rule of validity provide that these covenants will not be enforced if they are unreasonable, indefinite, or contravene public policy. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 350, 628 S.E.2d 902, 907 (Ct. App. 2006).

The court system knows how to examine the circumstances of an individual case and how to police a violation of public policy if the case contains one. As the examples of non-compete agreements and restrictive covenants illustrate, this is even true with private agreements that are disfavored and viewed with a skeptical eye. The point here is that even if there is a reason to be cautious with assignments to a former adversary—and there are good arguments that there is *no* reason fear such assignments—the court is capable of doing a case-by-case analysis and this approach is consistent with existing jurisprudence.

CONCLUSION

This Court should answer the certified question "yes." The right to sue a lawyer for malpractice is a property right that an owner should be free to transfer unless the circumstances of the specific transfer in question violate a clear rule of public policy.

Respectfully submitted,



January 12, 2015

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

George Skipper, Veronica Skipper, Michael Perry Bowers, Specialty Logging, LLC, and Harold Moors, Plaintiffs, v. ACE Property and Casualty Insurance Company, Brantley C. Rowlen, and Erin Lawson Coia, Defendants.	Civil Action No. 1:14-cv-00444-JMC **ORDER**

Plaintiffs George Skipper, Veronica Skipper, Michael Perry Bowers ("Bowers"), Specialty Logging, LLC ("SLL"), and Harold Moors ("Moors") (collectively "Plaintiffs") filed this action seeking damages from Defendants ACE Property and Casualty Insurance Company ("ACE"), Brantley C. Rowlen ("Rowlen"), and Erin Lawson Coia ("Coia") (collectively "Defendants") for their alleged mishandling of a lawsuit arising out of an automobile/log truck collision that resulted in a civil action captioned George Skipper v. Specialty Logging, LLC, Civil Action Number 2012-CP-03-172 (hereinafter the "Underlying Lawsuit"). (ECF No. 1-1.) Specifically, Plaintiffs assert state law claims against ACE for bad faith/breach of the covenant of good faith and fair dealing, negligence, breach of contract, restitution/unjust enrichment/quantum meruit; claims against Rowlen and Coia for legal professional negligence, breach of fiduciary duty, breach of the implied warranty of workmanlike service, interference with contractual relationship; and claims against Defendants collectively for barratry and equitable indemnity. (Id. at 18–34.)

This matter is before the court pursuant to a motion by Rowlen and Coia to dismiss the

claims asserted against them by George Skipper and Veronica Skipper (together the "Skipper Plaintiffs") for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) (the "Rule 12(b)(6) motion"). (ECF No. 5.) In addition, ACE moves the court to dismiss the action against it also pursuant to Fed. R. Civ. P. 12(b)(6). (ECF No. 12.) Plaintiffs filed memorandums in opposition to both pending Rule 12(b)(6) motions. (ECF Nos. 15, 20.) Plaintiffs further move the court to remand the matter to state court on the ground that removal was improper because diversity jurisdiction does not exist. (ECF No. 19.)

In addressing the merits of these pending motions, the court must consider a determinative issue of whether a legal malpractice claim is assignable. This issue has not been addressed by controlling precedent of the South Carolina appellate courts. As a result, the court must certify this issue to the South Carolina Supreme Court.

I. RELEVANT BACKGROUND AND FACTUAL FINDINGS[1]

Skipper Plaintiffs are husband and wife and citizens of the State of Georgia. (ECF No. 1-1 at 8 ¶1, n.1.) On September 22, 2010, George Skipper was involved in a vehicle accident (the "Accident") with a logging truck owned by SLL[2] and driven by Moors. (Id. at 10 ¶ 13, 11 ¶ 16.) ACE[3] insured SLL's logging truck under a commercial auto insurance policy with limits of $1,000,000.00 per occurrence (the "Policy"). (Id. at 11 ¶¶ 16–17.) Plaintiffs allege that the Accident caused serious and permanent bodily injuries to George Skipper. (Id. at ¶ 15.)

On May 15, 2012, George Skipper's attorney wrote to ACE, outlined the extent of

[1] In light of the procedural posture of this case, the facts set forth herein are essentially the allegations in the complaint.

[2] SLL is a limited liability company organized and existing under the laws of the State of South Carolina. (ECF No. 1-1 at 8 ¶ 2.) SLL is owned and operated by Bowers, a citizen of South Carolina. (Id. at ¶ 3.) Moors is also a citizen of South Carolina. (Id. at 9 ¶ 4.)

[3] ACE is an insurance company organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania. (ECF No. 1 at 4 ¶ 11.)

George Skipper's injuries, and demanded the Policy's coverage limits of $1,000,000.00 to settle George Skipper's claims within thirty (30) days. (Id. at 12 ¶ 21.) ACE retained the law firm of Lewis Brisbois Bisgaard & Smith LLP[4] to represent SLL's and Harold Moors' interests and defend them against George Skipper's claims. (Id. at ¶ 22.) ACE also hired a physician to evaluate George Skipper's claims. (Id. at 13 ¶ 24.) The physician concluded that George Skipper's alleged back injuries pre-existed the Accident and were not aggravated by the Accident. (Id.) On that basis, ACE offered $50,000.00 to settle the matter. (Id.)

On August 17, 2012, George Skipper commenced the Underlying Lawsuit in the Allendale County (South Carolina) Court of Common Pleas against SLL and Moors alleging that they were negligent, careless, reckless, grossly negligent, willful and wanton in causing the wreck that injured George Skipper. (Id. at 13 ¶ 25.) By letter dated February 14, 2013, George Skipper's attorney made a settlement demand for $2,500,000.00 in the form of an offer of judgment, which offer would expire twenty (20) days later. (Id. at 14 ¶ 28.) Defendants did not accept George Skipper's offer of judgment. (Id. at ¶ 29.) ACE then offered to settle George Skipper's claim for $981,211.11, the amount of coverage that remained after paying his property damage claim. (Id.)

On May 28, 2013, George Skipper's attorney offered to settle the matter on a "high-low" basis with the "high" being $7,000,000.00 and the "low" being the coverage available under the Policy.[5] (Id. at 15 ¶ 31.) ACE rejected the "high-low" settlement proposal on June 11, 2013, but again offered to settle the claims for the remaining policy limits. (Id. at ¶ 32.)

[4] Rowlen and Coia are attorneys in the Atlanta Office of Lewis Brisbois and are citizens of the State of Georgia. (ECF No. 1 at 2 ¶ 3, 4 ¶ 12.)

[5] Pursuant to the "high-low" offer, "only the issue of Defendants' conduct in handling the claim would be litigated." (ECF No. 1-1 at 15 ¶ 31.) "If the trier of fact found in favor of the Defendants, the Skippers would accept and ACE would pay its remaining coverage of $981,211.21; if the trier of fact found against the Defendants, ACE would pay Skipper $7,000,000." (Id.)

On January 14, 2014, Skipper Plaintiffs and SLL, Bowers, and Moors (together the "SLL Plaintiffs") entered into a Settlement Agreement, Agreement to Stay Execution of Judgment, and Springing Covenant not to Execute (the "Settlement Agreement"). (Id. at 17 ¶ 36 (referencing ECF No. 1-1 at 40–47).) Pursuant to the Settlement Agreement, SLL Plaintiffs agreed to, and did, execute a confession of judgment (the "Confession of Judgment") in which they admitted liability for the injuries and losses sustained by Skipper Plaintiffs and agreed that the value of those injuries and losses was $4,500,000.00.[6] (ECF No. 1-1 at 43 § 3.1.) SLL Plaintiffs further agreed in the Settlement Agreement to assign to Skipper Plaintiffs an interest in any claims against ACE, Rowlen, and Coia (the "Assignment"). (Id. at 44 § 5.1, 45 § 5.2 (Skipper Plaintiffs and SLL Plaintiffs "will institute a civil action against Ace and its assigned counsel . . ." and SLL Plaintiffs agree to "assign a portion of the recovery from those claims to [Skipper] Plaintiffs, and hereby give [Skipper] Plaintiffs a lien against the proceeds from the claims . . . .").) Pursuant to the Assignment, Skipper Plaintiffs could receive anywhere from 85 to 95 percent of the proceeds from a settlement of the claims—even if the settlement was for less than the amount of the Confession of Judgment. (Id. at 45 §§ 5.3–5.3.5.) Skipper Plaintiffs and SLL Plaintiffs agreed that if the Settlement Agreement was found invalid, then Skipper Plaintiffs' underlying lawsuits would be "reinstated so as to return the parties the status quo prior to the execution of the Settlement Agreement and the entry of the Confession of Judgment." (Id. at 43 § 3.2.) They also agreed that "if any part of this Agreement is declared to be in any way illegal, void or unenforceable, then the entire Agreement is void." (Id.; see also id. at 44 § 4.4.)

[6] The Confession of Judgment was not filed. Skipper Plaintiffs agreed to delay filing the Confession of Judgment and stay its execution "until all claims that may be brought by or on behalf of [Skipper Plaintiffs] and [SLL Plaintiffs] . . . are resolved by settlement or verdict or otherwise resolved or abandoned." (ECF No. 1-1 at 44 § 4.2.) Accordingly, the Confession of Judgment is being held in "trust" by Skipper Plaintiffs' attorney so long as SLL Plaintiffs cooperate in the present lawsuit as required by the Settlement Agreement. (See id. at 43 § 3.1, 46 § 5.5.)

On January 15, 2014, Plaintiffs commenced the instant action in the Allendale County (South Carolina) Court of Common Pleas alleging the aforementioned causes of action against Defendants. (ECF No. 1-1.) On February 20, 2014, ACE removed the case to the United States District Court for the District of South Carolina pursuant to 28 U.S.C. § 1332. (ECF No. 1.) In the notice of removal, ACE asserted that removal was proper because the court possessed diversity jurisdiction over the matter since (1) Skipper Plaintiffs have no valid claims to assert because the Settlement Agreement and Assignment are invalid; (2) Skipper Plaintiffs' claims against ACE, Rowlen, and Coia were fraudulently joined; and (3) the assignment of claims against ACE, Rowlen, and Coia was collusive and designed to defeat diversity jurisdiction. (ECF No. 1 at 3 ¶ 8.) ACE further asserted that the amount in dispute exceeds the requisite sum of $75,000.00. (Id. at ¶ 7.)

On February 21, 2014, Rowlen and Coia filed their Rule 12(b)(6) motion and ACE filed its Rule 12(b)(6) motion on February 27, 2014. (ECF Nos. 5, 12.) On March 17, 2014, Plaintiffs filed their motion to remand. (ECF No. 19.)

II. LEGAL STANDARD

Federal courts in diversity cases apply the law of the forum state. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). In situations in which "there is no case law from the forum state which is directly on point, the district court attempts to do as the state court would do if confronted with the same fact pattern." Roe v. Doe, 28 F.3d 404, 407 (4th Cir. 1994) (internal citations omitted). The Fourth Circuit has noted that "[o]nly if the available state law is clearly insufficient should the court certify the issue to the state court." Id. (citing Smith v. FCX, Inc., 744 F.2d 1378, 1379 (4th Cir. 1984)).

South Carolina Appellate Court Rule 244 provides that the South Carolina Supreme

Court "in its discretion may answer questions of law certified to it by any federal court of the United States . . . when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court." Rule 244(a), SCACR. The certification order must set forth: (1) "the questions of law to be answered"; (2) "all findings of fact relevant to the questions certified"; and (3) "a statement showing fully the nature of the controversy in which the questions arose." Rule 244(b), SCACR.

III. NATURE OF THE CONTROVERSY

A. The Parties' Arguments

Skipper Plaintiffs, Rowlen, and Coia are all citizens of the State of Georgia. As a result, Plaintiffs argue that the court should remand the matter to the Allendale County (South Carolina) Court of Common Pleas because there is a lack of complete diversity of citizenship among the parties.[7] (ECF No. 19-1 at 12.) Defendants oppose remand asserting that the motion should be denied because Skipper Plaintiffs are not real parties in interest and have been collusively or fraudulently joined to this action by virtue of a void assignment of alleged legal malpractice and related tort claims by SLL Plaintiffs against their former counsel, Rowlen and Coia; and there is complete diversity between the real parties in interest. (ECF No. 27 at 1.)

In support of their position, Plaintiffs assert that Skipper Plaintiffs are real parties in

[7] ACE removed this case based on diversity jurisdiction. For this removal to have been proper, the court must agree with ACE on one of the following assertions: (1) Skipper Plaintiffs do not have any claims against either ACE or Rowlen and Coia; (2) Skipper Plaintiffs do not have any claims against Rowlen and Coia and Skipper Plaintiffs claims against ACE should be severed from the claims of SLL Plaintiffs against Rowlen and Coia; or (3) even if Skipper Plaintiffs and SLL Plaintiffs have valid claims against both ACE and Rowlen and Coia, the claims against ACE should be severed from the claims against Rowlen and Coia. If the court does not agree with any of these assertions, the matter must be remanded to state court.

interest because legal malpractice claims are assignable under South Carolina law. (Id. at 39–53 (citing, e.g., Fowler v. Hunter, 697 S.E.2d 531 (S.C. 2010) (affirming Fowler v. Hunter, 668 S.E.2d 803 (S.C. Ct. App. 2008))).) In Fowler, the South Carolina Supreme Court affirmed a holding by the South Carolina Court of Appeals that a professional negligence claim against an insurance agency could be assigned pursuant to a settlement agreement so long as the risk of collusion was minimized. Fowler, 697 S.E.2d at 535. However, if the court was not persuaded by Fowler and the other case law cited by Plaintiffs, they requested that the court certify this issue to the South Carolina Supreme Court before issuing a decision. (Id. at 57.)

Defendants contend that the claims against Rowlen and Coia are for legal malpractice and arise from their attorney/client relationship with SLL Plaintiffs and the assignment of such claims is void as against public policy. (See ECF No. 5-1.) In support of this argument, Rowlen and Coia specifically point out that although South Carolina appellate courts have not addressed whether a legal malpractice claim is assignable, the court should be persuaded that assignment of legal malpractice claims is void as against public policy pursuant to the opinion issued by Judge J.C. Nicholson, Jr. in Pavilion Dev. Corp. v. Nexsen Pruet, LLC, No. 2011-CP-10-05774, 2013 WL 5925732 (S.C. Ct. C.P. Oct. 9, 2013).[8] (ECF No. 5-1 at 7–10.) In Pavilion, Judge Nicholson found that a party's assignment of a legal malpractice claim to an adversary in the litigation in which the alleged malpractice arose is void as against public policy. Pavilion, 2013 WL 5925732 at *9. In reaching this conclusion, Judge Nicholson noted that the majority view of jurisdictions "is that legal malpractice claims are not assignable because they are void as against public policy." Id. at *4 (identifying the following states as having adopted the majority view: Arizona, California, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, Tennessee, Virginia, West Virginia, and North

[8] Pavilion was attached as an exhibit to ACE's notice of removal. (See ECF No. 1-2 at 11–22.)

Carolina). Based on the foregoing, Rowlen and Coia assert that because the Assignment is void, Skipper Plaintiffs have no basis for any other cause of action against them and, therefore, the complaint against them should be dismissed.

B. The Court's Review

After reviewing the authority cited by the parties, the court is persuaded that certification is appropriate in this case. There is only one case that addresses the issue of whether a legal malpractice claim can be assigned and that opinion originated from the South Carolina Circuit Court without review by an appellate level court. Based on the lack of controlling precedent, the court finds that the available state law on the assignability of a legal malpractice claim is clearly insufficient. Therefore, because the assignability of a legal malpractice claim is a determinative issue, the court proceeds with certifying a question to the South Carolina Supreme Court.

III. CERTIFIED QUESTION

The court certifies the following question:

Can a legal malpractice claim be assigned between adversaries in litigation in which the alleged legal malpractice arose?

IV. CONCLUSION

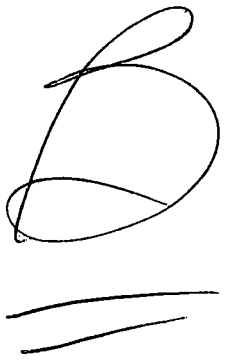
Based on the foregoing, the court **CERTIFIES** the foregoing question to the South Carolina Supreme Court. The clerk shall forward a copy of this Order to the South Carolina Supreme Court under this court's official seal. In the interest of judicial economy and its docket considerations, the court **DENIES** without prejudice the motions to dismiss of ACE Property and Casualty Insurance Company, Brantley C. Rowlen, and Erin Lawson Coia with leave to re-file after adjudication of the certified question. (ECF Nos. 5, 12.)

IT IS SO ORDERED.

J. Michelle Childs

United States District Judge

September 19, 2014
Columbia, South Carolina



Column I (Assignments Not Allowed)	**Column II** (Case-by-Case Analysis)	**Column III** ("Adversary" Cases)
Arizona - *Botma*, 39 P.3d 538 (Ariz. Ct. App. 2002) **California** - *Goodley*, 133 Cal. Rptr. 83 (Ct. App. 1976) **Colorado** - *Roberts*, 857 P.2d 492 (Colo. Ct. App. 1993) **Florida** - *Stern*, 969 So. 2d 962 (Fla. 2007) **Georgia** - Ga. Code Ann. § 44-12-24 **Illinois** - *Wilson*, 689 N.E.2d 1157 (Ill. App. Ct. 1997) **Indiana** - *Picadilly*, 582 N.E.2d 338 (Ind. 1991) **Kansas** - *Bank IV Wichita*, 827 P.2d 758 (Kan. 1992) **Kentucky** - *Davis*, 320 S.W.3d 87 (Ky. 2010) **Louisiana** - *Taylor*, 13 So. 3d 633 (La. Ct. App. 2009) **Michigan** - *Joos*, 338 N.W.2d 736 (Ct. App. 1983) **Minnesota** - *Wagener*, 509 N.W.2d 188 (Ct. App. 1993) **Missouri** - *Freeman*, 128 S.W.3d 138 (Ct. App. 2004) **Nebraska** - *Earth Sci. Labs*, 523 N.W.2d 254 (Neb. 1994) **Nevada** - *Chaffee*, 645 P.2d 966 (Nev. 1982) **New Jersey** - *Alcman*, 925 F. Supp. 252 (D.N.J. 1996) **N.C.** - *Rev. Concepts*, 744 S.E.2d 130 (Ct. App. 2013) **Oklahoma** - Olka. Stat. tit. 12 § 2017 **Tennessee** - *Can Do, Inc.*, 922 S.W.2d 865 (Tenn. 1996) **Virginia** - *Sickels*, 497 S.E.2d 331 (Va. 1998) **West Virginia** - *Martin*, 584 S.E.2d 473 (W. Va. 2003)	**Connecticut** - *Gurski*, 885 A.2d 163 (Conn. 2005) **District of Columbia** - *Richter*, 940 F. Supp. 353 (D.D.C. 1996) **Idaho** - *Luciani*, 293 P.3d 661 (Idaho 2013) **Maine** - *Thurston*, 567 A.2d 922 (Me. 1989) **Massachusetts** - *McCann*, 707 N.E.2d 332 (Mass. 1999) **New York** - *Vitale*, 583 N.Y.S.2d 445 (N.Y. App. Div. 1992) **Oregon** - *Gregory*, 26 P.3d 180 (Or. Ct. App. 2001) **Pennsylvania** - *Hedlund Mf'g Co.*, 539 A.2d 357 (Pa. 1988) **Rhode Island** - *Cereberus Partners*, 728 A.2d 1057 (R.I. 1999) **Texas** - *Zuniga*, 878 S.W.2d 313 (Tex. Ct. App. 1994) **Washington** - *Haskell*, 67 P.3d 1068 (Wash. 2003)	**a. <u>Not Allowed</u>** **Connecticut** - *Gurski*, 885 A.2d 163 (Conn. 2005) **District of Columbia** - *Edens Techs.*, 675 F. Supp. 2d 75 (D.D.C. 2009) **Indiana** - *Picadilly*, 582 N.E.2d 338 (Ind. 1991) **Texas** - *Zuniga*, 878 S.W.2d 313 (Tex. Ct. App. 1994) **Washington** - *Haskell*, 67 P.3d 1068 (Wash. 2003) **b. <u>Are Allowed</u>** **Maine** - *Thurston*, 567 A.2d 922 (Me. 1989) **Massachusetts** - *McCann*, 707 N.E.2d 332 (Mass. 1999) **New York** - *Greevy*, 658 N.Y.S.2d 693 (N.Y. App. Div. 1997) **c. <u>Not Analyzed as Adversary Cases</u>** **Arizona** - *Botma*, 39 P.3d 538 (Ariz. Ct. App. 2002) **Illinois** - *Wilson*, 689 N.E.2d 1157 (Ill. App. Ct. 1997) **Kentucky** - *Davis*, 320 S.W.3d 87 (Ky. 2010) **Michigan** - *Joos*, 338 N.W.2d 736 (Ct. App. 1983) **New Jersey** - *Alcman*, 925 F. Supp. 252 (D.N.J. 1996) **West Virginia** - *Martin*, 584 S.E.2d 473 (W. Va. 2003)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

J. Michelle Childs, United States District Judge

Appellate Case No. 2014-001979

George Skipper, Veronica Skipper,
Michael Perry Bowers, Specialty Logging,
LLC, and Harold Moors ..... Plaintiffs,

v.

ACE Property and Casualty Insurance
Company, Brantley C. Rowlen and
Erin Lawson Coia ..... Defendants.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Defendants with a copy of the *Plaintiff's Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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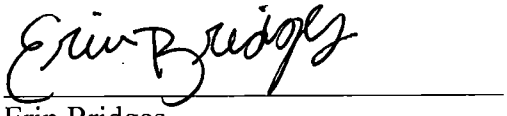

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January 12, 2015
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