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March 13, 2015

VIA HAND DELIVERY
Honorable Daniel E. Shearouse, Clerk
The Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

Re: George Skipper, et al. v. ACE Property and Casualty Insurance Company, et al. - Appellate Case No. 2014-001979

Dear Mr. Shearouse:

Enclosed please find for filing in the above-referenced matter the original and twenty-two copies of the Brief of Defendant ACE Property and Casualty Insurance Company. Please return eight (8) clocked copies of the aforementioned Brief to our office.

As evidenced below, we are serving a copy of this Brief upon counsel for the remaining parties.

If you have any questions or concerns, please do not hesitate to contact our office.

Sincerely yours,

A. Camden Lewis

ACL/kc
Enclosures: as stated

cc: Mark B. Tinsley, Esq.
Randolph Murdaugh, IV, Esq.
Robert H. Hood, Esq.
Robert Holmes Hood, Jr., Esq.
Deborah Harrison Sheffield, Esq.
Blake A. Hewitt, Esq.

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STATEMENT OF THE ISSUE

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

STATEMENT OF THE CASE

Because the certified question before this Court is entirely legal, the case's factual background is largely irrelevant. The plaintiffs, however, devote a substantial amount of their brief characterizing the underlying facts in an argumentative fashion that does not fairly represent what actually happened. See Pls.' Br. at 14–16. ACE clarifies the factual background in this section. And while the facts have little to do with the purely legal question before the Court, they are useful in exemplifying the dangers that have led other courts to adopt bright-line rules prohibiting the type of assignment at issue in this case.

A. The Underlying Tort Suit and the Skippers' Settlement Demands

Plaintiffs George and Veronica Skipper are husband and wife and Georgia residents. In September 2010, Mr. Skipper was driving his truck in Georgia when he was involved in an accident with a logging truck owned by plaintiff Specialty Logging and driven by plaintiff Harold Moors (together, "Specialty Logging"). ACE insured the logging truck under a commercial auto insurance policy with limits of $1 million. ACE promptly paid for the property damage to Mr. Skipper's truck.

Roughly 20 months later, Mr. Skipper's counsel notified ACE that Mr. Skipper had been hurt in the accident and made a $1 million settlement demand, with the offer expiring in 30 days. ACE hired defendants Brantley Rowlen and Erin Coia of the Lewis Brisbois law firm to represent Specialty Logging's interests. ACE also

hired a physician who concluded that Mr. Skipper likely suffered some superficial soft tissue injuries from the accident, but that his alleged back injuries pre-existed the accident and were not aggravated by the accident. Relying on the physician's assessment, ACE offered $50,000 to settle the matter. ACE made this offer without the benefit of any discovery or Mr. Skipper's pre-accident medical records.

In August 2012, Mr. Skipper filed suit against Specialty Logging. ACE tendered a defense, appointing the Lewis Brisbois firm to represent Specialty Logging. Mr. Skipper's next settlement demand was for $2.5 million, more than double the original demand, in the form of an offer of judgment that was not accepted. While discovery was still underway—but before discovery was completed, and well before trial—ACE offered to settle the matter for $981,211.21; the amount of coverage left on the policy after paying Mr. Skipper's property damage claim. Mr. Skipper rejected ACE's offer.

Mr. Skipper then made what he characterized as a "high–low" offer whereby Mr. Skipper proposed that the parties completely bypass trial on Mr. Skipper's personal injury claims—and any determination of causation and damages—and instead litigate ACE's handling of the claim. If ACE were found to have mishandled the claim, it would pay $7 million to Mr. Skipper—again, without any determination that Mr. Skipper had suffered $7 million in damages. If ACE were not found to have mishandled the claim, then it would pay the remaining policy limit of $981,211.21. ACE rejected this proposal, but once again offered $981,211.11 to settle the claim, the full balance of the policy limit.

Mrs. Skipper later filed a separate lawsuit against Specialty Logging asserting claims for alleged loss of consortium.

B. The Settlement Agreement, Assignment, and Confession of Judgment[1]

In January 2014, unbeknownst to ACE, the Skippers and Specialty Logging entered into a Settlement Agreement, Agreement to Stay Execution of Judgment, and Springing Covenant Not to Execute. Until that point, ACE and counsel had been preparing Specialty Logging's defense for the upcoming trial, which was on the January 2014 trial docket. Pursuant to the Settlement Agreement, Specialty Logging executed a Confession of Judgment in which it admitted liability for the injuries and losses allegedly sustained by the Skippers and stipulated that the value of those injuries and losses was $4.5 million. Section 5.2 of the Settlement Agreement further provided that Specialty Logging would assign to the Skippers an interest in any legal malpractice claims Specialty Logging may have had against Rowlen and Coia, the attorneys representing Specialty Logging. Specialty Logging similarly assigned an interest in any claims it may have had against ACE. Pursuant to section 5.3 of the Settlement Agreement, Specialty Logging retained an interest in the assigned claims and could receive anywhere from five to fifteen percent of the proceeds from a settlement of those claims.

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[1] Pursuant to Rule 244(b) of the South Carolina Appellate Court Rules, ACE moved to include in the record (1) the Confession of Judgment signed by Plaintiffs Michael Bowers, Harold Moors, and Specialty Logging and (2) the Settlement Agreement, Agreement to Stay Execution of Judgment, and Springing Covenant Not to Execute between the plaintiffs. ACE complied with Rule 244(b) by providing notice to the certifying court. The motion was pending as of the time this brief was filed.

Even though Specialty Logging stipulated that it was liable for $4.5 million, under sections 4.3 and 5.3 of the Settlement Agreement, Specialty Logging is absolutely shielded from having to pay any money so long as it cooperates with the Skippers in connection with the claims against Rowlen, Coia, and ACE. The Confession of Judgment was not filed and instead is being held in "trust" by the Skippers' counsel so long as Specialty Logging cooperates in the present lawsuit as required by the Settlement Agreement. According to section 4.3 of the Settlement Agreement, in the event there is a settlement or final judgment of the claims against Rowlen, Coia, and ACE, the Skippers will mark the Confession of Judgment as satisfied and agree never to enforce it. A settlement or final judgment are, of course, the only two realistic outcomes. Thus, as a practical matter, Specialty Logging is completely insulated from liability for the confessed judgment.

C. The Prior Proceedings

As contemplated by the Settlement Agreement, the Skippers and Specialty Logging filed a lawsuit against Rowlen, Coia, and ACE in the Court of Common Pleas of Allendale County. ACE removed the case to the United States District Court for the District of South Carolina based on diversity jurisdiction. ACE contended that there was complete diversity because, among other reasons, the Settlement Agreement and related assignment of claims against Rowlen and Coia were invalid, leaving the Skippers with no cause of action against Rowlen and Coia, the only non-diverse defendants vis-à-vis the Skippers. The plaintiffs moved to remand, which all defendants opposed. In addition, Rowlen and Coia moved to dismiss the Skippers'

legal malpractice claim, arguing that the assignment of that claim to the Skippers was invalid.

In considering the motion to remand and Rowlen and Coia's motion to dismiss, the district court found "determinative" the issue of whether South Carolina permits the assignment of a legal malpractice claim. The court concluded that there was no controlling precedent addressing the issue, and accordingly certified the following question: "Can a legal malpractice claim be assigned between adversaries in litigation in which the alleged legal malpractice arose?"

This Court agreed to answer the question.

ARGUMENT

I. Summary of the Argument

No court has ever permitted the assignment of a legal malpractice claim to an adversary in the underlying litigation in which the alleged malpractice arose where, as here, the defendant stipulated to liability and damages without a jury or judge making such a finding. The overwhelming majority of courts prohibit any assignment between adversaries in the underlying litigation. And for good reason: These assignments create opportunities for collusion, threaten the sanctity of the attorney–client relationship, limit access to legal services, and undermine the public's confidence in the legal system by showcasing "abrupt and shameless shift[s] of positions." *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 318 (Tex. App. 1994). As the Washington Supreme Court succinctly concluded in addressing the exact question before this Court, "we can see no advantage flowing to the legal system or the public that it serves from permitting assignments of malpractice claims

to adversaries in the same litigation that gave rise to the alleged malpractice." *Kommavongsa v. Haskell*, 67 P.3d 1068, 1080 (Wash. 2003).

Moreover, there is simply no basis to depart from the established bright-line rule in other jurisdictions prohibiting all assignments between adversaries in the litigation in which the alleged malpractice arose. Such a rule causes no injustice to the allegedly injured clients because they are still free to bring the malpractice claims themselves. Indeed, the plaintiffs have not pointed to one case in the over 30 years that these prohibitions have been in effect where an attorney who committed malpractice was able to use the rule against assignments to escape liability or where the prohibition caused injustice to a client.

As the plaintiffs concede in their brief, of the courts that have considered the question, the overwhelming majority have prohibited all assignments of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose. The justifications for this *per se* rule are well documented and well reasoned:

- **Assignments of legal malpractice claims between litigation adversaries create opportunities and incentives for collusion.** *E.g.*, *Edens Techs., LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 79 (D.D.C. 2009) ("Because the 'losing' party in the consent judgment will never have to pay, nothing prevents the parties from stipulating to artificially inflated damages that could serve as the basis for unjustly high damages in the 'trial within a trial' phase of the subsequent malpractice action.").

- **Such assignments undermine the integrity of the attorney–client relationship.** *E.g.*, *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Ct. App. 1976) ("It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney–client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment.").

- **Such assignments disincentivize lawyers to represent under-insured or judgment-proof defendants.** *E.g.*, *Botma v. Huser*, 39 P.3d 538, 541 (Ariz. Ct. App. 2002) (noting that assignments of legal malpractice claims "would enable a plaintiff to drive a wedge between the defense attorney and his client by creating a conflict of interest with the result that, in time, it would become increasingly risky to represent the underinsured, judgment-proof defendant") (internal quotations omitted).

- **Such assignments lead to disreputable role reversals.** *E.g.*, *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 344–45 (Ind. 1991) ("The trial of [an] assigned malpractice claim would feature a public and disreputable role reversal" that would "magnify the least attractive aspects of the legal system," causing jurors hearing the evidence to "rightly leave the courtroom with less regard for the law and the legal profession than they had when they entered.").

These concerns are exacerbated when the assignments are to adversaries in the underlying litigation in which the alleged malpractice arose, and are even more troublesome where, as here, the assignor has confessed to judgment without a prior finding of liability or damages. In these situations, the public policy considerations noted above are always present and always weigh in favor of invalidating the assignment. The benefits of a bright-line rule prohibiting these assignments are numerous and the costs, if any, are slight. Indeed, the plaintiffs have not pointed to one case where the rule against assignments worked an injustice. The only parties that this rule works against are the plaintiffs and attorneys who would be unable to "transmute a claim against a penniless adversary into a claim against the adversary's wealthier lawyer." *See Alcman Servs. Corp. v. Samuel H. Bullock, P.C.*, 925 F. Supp. 252, 258 (D.N.J. 1996), *aff'd*, 124 F.3d 185 (3d Cir. 1997).

One South Carolina court has addressed this issue and squarely held that assignments of legal malpractice claims are contrary to South Carolina public policy.

See Pavilion Dev. Corp. v. Nexsen Pruet, LLC, No. 2011 CP 1005774, 2013 WL 5925732 (S.C. Com. Pl. Oct. 9, 2013), *appeal filed*, C-TRACK Appellate Case No. 2013-002796. The *Pavilion Development* court examined an assignment that was materially similar to the assignment between the Skippers and Specialty Logging. The court found it persuasive that "courts uniformly hold" that such assignments "are void as against public policy." *Id.* at *5. The court noted that assignments of legal malpractice claims create an undue opportunity for collusion and "br[ing] embarrassment to the attorney–client relationship and . . . imperil[] the sanctity of the highly confidential and fiduciary nature of the relationship." *Id.* at *7. As this brief will show, the overwhelming majority of courts in other states are in line with this ruling.

The plaintiffs base their argument primarily on South Carolina's survival statute. They reason that if a claim or property right survives death, it must be assignable. However, courts in other states with survival statutes similar to South Carolina's have rejected this exact argument as "anachronistic." *See, e.g.*, *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 341 (Ind. 1991) ("Today, it seems anachronistic to resolve the issue of the assignability of a legal malpractice claim by deciding whether such a claim would survive the client's death."); *Can Do, Inc. Pension and Profit Sharing Plan & Successor Plans v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865, 868 (Tenn. 1996) ("[I]n resolving the question of assignability of legal malpractice actions, public policy considerations, rather than the traditional survivability test, should guide the analysis.").

ACE asks this Court to join the overwhelming majority of courts to decide the issue and adopt a bright-line rule that a party *cannot* assign a legal malpractice claim to an adversary in the underlying litigation in which the alleged malpractice arose. Such a rule is narrowly tailored and would apply only in situations where the dangers of assignments are most acute.

II. Assignments of legal malpractice claims to adversaries in the litigation in which the alleged malpractice arose should not be permitted because they create opportunities for collusion, undermine the public's confidence in the legal system, threaten the sanctity of the attorney–client relationship, and limit access to legal services.

Courts in at least 18 states have held that legal malpractice claims are invalid under any circumstances.[2] Of those 18 states, at least 12 have expressly addressed

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[2] **Arizona**, *Botma v. Huser*, 39 P.3d 538, 542 (Ariz. Ct. App. 2002); **Colorado**, *Roberts v. Holland & Hart*, 857 P.2d 492, 495 (Colo. App. 1993), and *DC-10 Entm't, LLC v. Manor Ins. Agency, Inc.*, 308 P.3d 1223, 1227 (Colo. App. 2013 (recognizing prohibition); **Illinois**, *Grimes v. Saikley*, 904 N.E.2d 183, 194 (Ill. App. Ct. 2009) (collecting cases), and *Wilson v. Coronet Ins. Co.*, 689 N.E.2d 1157, 1158–59 (Ill. App. Ct. 1997) (prohibiting assignment to an adversary in the underlying litigation); **Indiana**, *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 341–44 (Ind. 1991); **Kansas**, *Bank IV Wichita, Nat. Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson*, 827 P.2d 758, 765 (Kan. 1992); **Kentucky**, *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010), and *Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155 (Ky. Ct. App. 1988); **Louisiana**, *Taylor v. Babin*, 13 So. 3d 633, 641 (La. Ct. App. 2009); **Michigan**, *Joos v. Drillock*, 338 N.W.2d 736, 739 (Mich. Ct. App. 1983); **Minnesota**, *Wagener v. McDonald*, 509 N.W.2d 188, 193 (Minn. Ct. App. 1993); **Missouri**, *Freeman v. Basso*, 128 S.W.3d 138, 142 (Mo. Ct. App. 2004), and *White v. Auto Club Inter-Ins. Exch.*, 984 S.W.2d 156, 160 (Mo. Ct. App. 1998); **Nebraska**, *Earth Sci. Labs., Inc. v. Adkins & Wondra, P.C.*, 523 N.W.2d 254, 257 (Neb. 1994); **Nevada**, *Chaffee v. Smith*, 645 P.2d 966, 966 (Nev. 1982); **New Jersey**, *Alcman Servs. Corp. v. Samuel H. Bullock, P.C.*, 925 F. Supp. 252, 258–59 (D.N.J.); **North Carolina**, *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 744 S.E.2d 130, 134 (N.C. Ct. App. 2013); **Oklahoma**, *Trinity Mortg. Cos. v. Dreyer*, No. 09-cv-551, 2011 WL 61680, at *3–4 (N.D. Okla. Jan. 7, 2011); **Tennessee**, *Can Do, Inc. Pension and Profit Sharing Plan & Successor Plans v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865, 869 (Tenn. 1996); **Virginia**, *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331, 333–34 (Va. 1998); **West Virginia**, *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473, 479 (W. Va. 2003).

and refused to permit assignments of legal malpractice claims between litigation adversaries.[3] All 18 states relied on public policy to invalidate the assignments. Contrary to what the plaintiffs' brief implies, these states are fairly uniform in their approach and reasons for prohibiting assignments of legal malpractice claims between litigation adversaries. *See* Pls.' Br. at 8.

Moreover, the plaintiffs understate the number of jurisdictions that rely on public policy to invalidate assignments. For example, the plaintiffs contend that New Jersey and Louisiana prohibit assignments of legal malpractice claims on the basis that legal malpractice claims are tort or personal injury claims that cannot be assigned under state law. *See* Pls.' Br. at 8–9. This argument implies, incorrectly, that those states did not consider the public policy rationales most courts have relied on to invalidate such assignments. In fact, the New Jersey and Louisiana decisions relied primarily on public policy to invalidate assignments between litigation adversaries.

Georgia amended its code in 2013 to explicitly prohibit assignments of legal malpractice claims. GA. CODE ANN. § 44-12-24 ("A right of action for personal torts, *for legal malpractice*, or for injuries arising from fraud to the assignor may not be assigned.") (emphasis added).

[3] The other six states do not appear to have addressed a case in which the legal malpractice claim was assigned to an adversary in the underlying litigation in which the alleged malpractice arose. The cases in which those states invalidated the assignments arose in situations where the malpractice claims were assigned as part of a larger business transaction, part of a bankruptcy liquidation, or as a private transaction. *See* **Colorado**, *Roberts*, 857 P.2d at 495 (private transaction); **Kansas**, *Bank IV Wichita*, 827 P.2d at 763 (foreclosure of business assets); **Nebraska**, *Earth Sci. Labs.*, 523 N.W.2d 255 (bankruptcy transfer); **North Carolina**, *Revolutionary Concepts, Inc.*, 744 S.E.2d at 132 (owner of company assigned his legal malpractice claim relating to patent application to the company he founded); **Tennessee**, *Can Do*, 922 S.W.2d at 866 (bankruptcy transfer); **Virginia**, *MNC Credit Corp.*, 497 S.E.2d at 332 n.1 (assignment was pursuant to an asset-purchase agreement between a parent corporation and subsidiary corporation).

See Alcman Servs. Corp. v. Samuel H. Bullock, P.C., 925 F. Supp. 252, 258 (D.N.J. 1996) ("[W]e believe that New Jersey courts, if faced with this issue directly, would prohibit the assignment of claims for legal malpractice under any circumstances *for compelling reasons of public policy*.") (emphasis added); *Taylor v. Babin*, 13 So. 3d 633, 641 (La. Ct. App. 2009) (holding that "as a matter of public policy, we conclude it is not prudent to permit enforcement of a legal malpractice claim that has been transferred by assignment"). The plaintiffs similarly understate the reliance on public policy by courts in Arizona, Colorado, Florida, and Oklahoma to support their prohibitions on assignments of legal malpractice claims.[4]

Roughly nine states carve out exceptions to the general rule prohibiting all assignments of legal malpractice claims. A common exception is when "a legal malpractice claim is transferred to an assignee in a commercial transaction, along with other business assets and liabilities." *See, e.g.*, *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 293 P.3d 661, 665 (Idaho 2013). But that exception, like the others, is narrow and irrelevant to the question before this Court: whether assignments of legal malpractice claims are assignable when they are between adversaries in the

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[4] **Arizona**, *Botma*, 39 P.3d at 542 (stating that "permitting such assignments would cause immeasurable damage to attorney–client relationships, to the tort system, to the court system, and to the public's sense of justice"); **Colorado**, *Roberts*, 857 P.2d at 495–96 (citing the way in which assignments of legal malpractice claims compromise the attorney–client relationship as one of many public policy bases for prohibiting such assignments); **Florida**, *Salerno v. Auto Owners Ins. Co.*, No. 04-cv-1056, 2006 WL 2085467, at *3 (M.D. Fla. July 25, 2006) ("[C]ourts prohibit the assignment of legal malpractice claims, mostly based on public policy concerns.") (internal quotations omitted); **Oklahoma**, *Trinity Mortg. Cos.*, 2011 WL 61680, at *4 ("Even absent the clear legislative prohibition which exists in this instance, the assignment at issue should not be permitted because it is clearly against public policy.").

litigation in which the alleged malpractice arose. Further, of the nine states carving out exceptions for some assignments, five have expressly held that assignments of legal malpractice claims between adversaries are void as against public policy.[5] The fact that those courts have permitted assignments of legal malpractice claims in some situations, but never when between adversaries in the underlying litigation, reflects the careful consideration behind the majority rule against such assignments.

A. Assignments of legal malpractice claims either suggest collusion or create unacceptable opportunities and incentives for collusion.

Courts have identified collusion as the most "compelling" argument against assignments of legal malpractice claims. *Edens Techs., LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 79 (D.D.C. 2009). Opportunities for collusion are inherent in assignments of legal malpractice claims between litigation adversaries, especially when the defendant has stipulated to liability and damages. The opportunity for collusion is inherent in these assignments because they create economic incentives for plaintiffs and defendants to collude. *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 174 (Conn. 2005) ("Permitting an assignment of a legal

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[5] *See* **California**, *White Mountains Reinsurance Co. of Am. v. Borton Petrini, LLP*, 164 Cal. Rptr. 3d 912, 913 (Ct. App. 2013) (recognizing the general prohibition against assignments of legal malpractice claims); **Connecticut**, *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 164 (Conn. 2005); **District of Columbia**, *Edens Techs., LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 79–86 (D.D.C. 2009); **Florida**, *Salerno*, 2006 WL 2085467, at *4–5 ("Public policy concerns are readily apparent when the assignment is made to a former adversary."); **Washington**, *Kenco Enters. NW, LLC v. Wiese*, 291 P.3d 261, 263 (Wash. Ct. App. 2013).

The other four states—Alaska, Idaho, Massachusetts, and Rhode Island—do not appear to have addressed an assignment of a legal malpractice claim between litigation adversaries.

malpractice claim to the adversary in the underlying litigation that gave rise to the legal malpractice claim . . . creates the opportunity and incentive for collusion in stipulating to damages in exchange for an agreement not to execute on the judgment in the underlying litigation."). To invalidate the assignment, proof of actual collusion is unnecessary. Rather, the opportunity and incentive for collusion is sufficient. *See Kommavongsa*, 67 P.3d at 1078 ("We merely observe that the opportunity and incentive for collusion were certainly present here. [The defendant–assignor in the underlying lawsuit] was underinsured; he is of limited means, and his loved ones were severely injured in the motor vehicle rollover. Thus, he had every incentive to stipulate to very high damages . . . .").

Courts have characterized assignments of legal malpractice claims between litigation adversaries as "a transparent device to replace a judgment-proof, uninsured defendant with a solvent defendant." *Zuniga*, 878 S.W.2d at 317; *see also Taylor*, 13 So. 3d at 640 (same); *Alcman*, 925 F. Supp. at 257 (same). Such an assignment "enabl[es] the defendant–client to extricate himself from liability[] and fund[] the original plaintiff's judgment." *Zuniga*, 878 S.W.2d at 317. To "[p]ermit[] this sort of alchemy would lead to baseless and excessive legal malpractice claims." *Alcman*, 925 F. Supp. at 258. Recognizing the collusive characteristics of these assignments, a federal district court applying New Jersey law stated in oft-cited language that "[a] party should not be permitted to transmute a claim against a penniless adversary into a claim against the adversary's wealthier lawyer based on the lawyer's supposed negligence towards the adversary." *Id.*; *see also Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155, 157 (Ky. Ct. App. 1988) (holding that an assignment to an

adversary was "so collusive" when the assignment involved a confession of judgment and covenant not to execute on the judgment); *Wagener v. McDonald*, 509 N.W.2d 188, 191 (Minn. Ct. App. 1993) (citing the risk of collusion as a basis for holding legal malpractice claims per se unassignable).

The opportunities for collusion are apparent when looking at the circumstances in which these assignments typically occur: A defendant signs a confession of judgment and assigns his or her legal malpractice claim to the plaintiff in the underlying tort action. In exchange for the assignment of the defendant's legal malpractice claim, the plaintiff promises not to execute on the judgment. In many cases, this makes economic sense for both parties. The defendant is shielded from liability because the plaintiff has promised not to execute on the judgment. The plaintiff obtains a confession of judgment without having to prove liability or damages and now has, presumably, a wealthier target to sue. The public policy concern with such arrangements, as the Washington Supreme Court recognized, is that "such a stipulated judgment cannot properly serve as an indication of the actual damages, if any there were, as a result of the alleged legal malpractice." *Kommavongsa*, 67 P.3d at 1079. This is because there has never been a judge or jury finding that the defendant was liable and caused damages to the plaintiff.

The caselaw is replete with situations in which plaintiffs have attempted to use assignments of legal malpractice claims as vehicles to convert claims against penniless or poorly-funded defendants into malpractice claims against the defendants' wealthier or better- insured lawyers. Courts have repeatedly invalidated these

assignments on the ground that they are collusive or present an unacceptable opportunity for collusion.

A recent decision from the District Court for the District of Columbia, *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75 (D.D.C. 2009), exemplifies these decisions. In *Edens*, Edens Technologies, a manufacturer of golf simulation technology, sought legal advice from the law firm Kile Goekjian Reed & McManus PLLC ("KGRM"). Edens requested an opinion on whether its device infringed a patent owned by Golf Tech. *Id.* at 76. KGRM advised Edens that the device did not infringe Golf Tech's patent. *See id.* Edens subsequently marketed the device, and Golf Tech later sued for patent infringement. *Id.* KGRM represented Edens in the infringement action, but was replaced after the court entered summary judgment in favor of Golf Tech on liability. *Id.* at 77. Before trial and before any finding of damages, Edens entered into a settlement agreement with Golf Tech in which Edens consented to judgment in the amount of $734,246. *Id.* In the settlement agreement, Golf Tech agreed to accept as "satisfaction in full" the proceeds of any legal malpractice action that Edens asserted against KGRM. *Id.* The settlement agreement further provided that, even though the action was brought in Edens' name, Golf Tech would control and pay the costs and fees of the malpractice action. *Id.* The agreement obligated Edens to cooperate in the suit. *Id.* Edens, as the nominal plaintiff, sued KGRM.

The district court dismissed the action against KGRM. *Id.* at 86. The court held that the assignment of Edens' legal malpractice claim against KGRM to Golf Tech was void as against public policy and cited the risk of collusion as the "most

compelling argument against this type of assignment." *Id.* at 79. The court further noted that "[b]ecause the 'losing' party in the consent judgment will never have to pay, nothing prevents the parties from stipulating to artificially inflated damages that could serve as the basis for unjustly high damages in the 'trial within a trial' phase of the subsequent malpractice action." *Id.* Consequently, there was an unacceptable possibility "that the stipulation was not based on a fair assessment of the merits, but was reached in order to increase the damages in this action." *Id.* at 80.

The widely cited *Zuniga* decision from Texas provides another example of the incentives to collude created by assignments between adversaries. In *Zuniga*, the Zunigas brought a personal injury suit against Bauer Manufacturing Company and other defendants. 878 S.W.2d at 314. Bauer's insurer became insolvent, and Bauer feared that a large judgment would bankrupt it. *Id.* Bauer therefore agreed to a $25 million settlement in which it assigned to the Zunigas any legal malpractice claim it might have against the lawyers who represented it in the Zunigas' personal injury suit. *Id.* Bauer transferred all of its assets except the legal malpractice claim to a new corporation. *Id.* The parties agreed that the transfer was not fraudulent, and the Zunigas waived their rights to the new entity's assets. *Id.* The Zunigas then sued Bauer's attorneys. The appellate court invalidated the assignment on the basis that it was "a transparent device to replace a judgment-proof, uninsured defendant with a solvent defendant," which would "enabl[e] the defendant–client to extricate himself from liability, and fund[] the original plaintiff's judgment." *Id.* at 317.

Similarly, the court in *Pavilion Development* concluded that a "confession of judgment for an unsupported, multi-million dollar amount, coupled with the

assignment of the legal malpractice claims"—a factual situation nearly identical to the assignment between the Skippers and Specialty Logging and the assignments in *Edens* and *Zuniga*—"strongly suggest[s] that collusion has occurred." *Pavilion Dev. Corp.*, 2013 WL 5925732, at *12. Because the assignment suggested, or at least provided the opportunity for collusion, the court ruled that it was void as against South Carolina public policy. *Id.* The court accordingly dismissed the assigned legal malpractice claim against the law firm with prejudice.[6]

The same opportunity for collusion that led to the invalidation of the assignments in *Edens*, *Zuniga*, *Pavilion Development*, *Gurski*, *Alcman*, *Coffey*, *Wagener*, *Coffey*, and *Kommavongsa* (in addition to other cases too numerous to mention here) is present in the assignment between Specialty Logging and the Skippers. The circumstances of the assignment between Specialty Logging and the Skippers illustrates how assignments between litigation adversaries create incentives for the defendant to stipulate to a very high, yet unsupported, damages figure,

[6] Yet another case in which a court cited the opportunity for collusion as a basis to invalidate an assignment to an adversary is *Coffey v. Jefferson County Board of Education*, 756 S.W.2d 155 (Ky. Ct. App. 1988). In *Coffey*, a seven-year-old child was killed when a concrete sewer pipe rolled onto him while he was playing near the playground of a closed school. *Id.* at 156. The child's mother sued the school board, its individual members, and others, including Joe Coffey, the director of grounds for the school board. *Id.* The school originally retained an attorney for the defendants, but later terminated the attorney after all the defendants other than Coffey were dismissed from the case. *Id.* On the day of trial, Mr. Coffey confessed to judgment for $1,000,000, the child's mother signed a covenant not to execute on the judgment against Coffey, and Coffey assigned his claim for legal malpractice against the attorney to the mother. *Id.* The child's mother then asserted Coffey's legal malpractice suit against the attorney. *Id.* The trial court entered summary judgment in favor of the attorney, and the mother appealed. *Id.* The Kentucky Court of Appeals affirmed, stating that the assignment was a "contrived and elaborate scheme" and "so collusive" that it "should be held to be against public policy." *Id.* at 157.

allowing the plaintiff to manufacture a more lucrative claim against the defendant's lawyer.

Specialty Logging had a primary commercial auto liability policy with a limit of $1 million per accident. It could have procured a primary policy with a higher limit, but it did not. It could have procured an umbrella or excess policy. But again, it did not. In violation of the cooperation clause in the policy it did procure, Specialty Logging attempted to fashion additional coverage after the fact by confessing to a judgment for an unsupported, multi-million dollar amount in exchange for a covenant not to execute on the judgment and assignment of its legal malpractice claims against Rowlen and Coia as well as the bad-faith claims against ACE. This is precisely the type of conduct the cases cited above have prohibited.

Specialty Logging had no incentive to dispute the $4.5 million judgment because the Skippers' covenant not to execute on the judgment insulated Specialty Logging from liability. Free from any economic constraint, Specialty Logging could (and did) stipulate to an artificially inflated damages amount. *See Edens*, 675 F. Supp. 2d at 79. The opportunity for collusion between the Skippers and Specialty Logging is further magnified by the fact that Specialty Logging stands to share in the proceeds of the malpractice suit. The structure of the Settlement Agreement and related assignment of claims raises a legitimate concern that Specialty Logging's confession of judgment "was not based on a fair assessment of the merits, but was reached in order to increase the damages in this action." *Id.* at 80. Indeed, but for Specialty Logging's stipulation to damages in excess of the policy limit, there would

be no claim against Rowlen, Coia, or ACE, because any valid judgment at or below the limit would be covered.

Because assignments of legal malpractice claims between litigation adversaries will always suggest collusion or create opportunities and incentives for collusion, ACE asks this Court to hold that they violate South Carolina public policy.

B. Assignments to adversaries in the litigation in which the alleged malpractice arose undermine the integrity of the attorney–client - relationship.

The threat these assignments pose to the integrity of the attorney–client relationship is another reason to prohibit them. South Carolina courts recognize the unique and important qualities of the attorney–client relationship. The relationship "is by nature a fiduciary one." *Hotz v. Minyard*, 304 S.C. 225, 230, 403 S.E.2d 634, 637 (1991). It "is founded on the trust and confidence reposed by one person in the integrity and fidelity of another." *Moore v. Moore*, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004). The Virginia Supreme Court has recognized that preserving the sanctity of this relationship "is an indispensable component of our adversarial system of justice." *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331, 334 (Va. 1998).

Assignments of legal malpractice claims threaten the attorney–client relationship by allowing the plaintiff "to drive a wedge between the defense attorney and his client by creating a conflict of interest." *Zuniga*, 878 S.W.2d at 317; *accord Botma v. Huser*, 39 P.3d 538, 541 (Ariz. Ct. App. 2002). A long line of cases recognizes this threat. These cases began with the decision in *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83 (Ct. App. 1976), in which the court stated that "the

unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney–client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment." *Id.* at 87. At least fifteen courts have followed *Goodley*'s lead, including six state supreme courts and one court in South Carolina:

State Supreme Courts

- **Indiana**: *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 342 (Ind. 1991) ("Our own conclusion that legal malpractice claims should not be assigned is based on . . . our particular concern about . . . the need to preserve the sanctity of the client–lawyer relationship[.]").

- **Kansas**: *Bank IV Wichita, Nat. Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson*, 827 P.2d 758, 764 (Kan. 1992) ("It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney–client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment.") (quoting *Goodley*, 133 Cal. Rptr. at 87).

- **Nebraska**: *Earth Sci. Labs., Inc. v. Adkins & Wondra, P.C.*, 523 N.W.2d 254, 257 (Neb. 1994) ("We are persuaded by the reasoning in . . . other jurisdictions which refuse to permit the assignment of legal malpractice claims because of public policy considerations concerning the personal nature and confidentiality of the attorney–client relationship.").

- **Tennessee**: *Can Do, Inc. Pension & Profit Sharing Plan & Successor Plans v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865, 868 (Tenn. 1996) ("The many public policy reasons underlying these courts' rejection of assignability of legal malpractice claims was perhaps best summarized by the California appellate court in *Goodley*, which was the first to flatly confront the issue. There, the court focused on the unique character of legal services, the personal nature of the attorney's duty to the client, and the confidentiality of the attorney–client relationship.").

- **Virginia**: *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331, 334 (Va. 1998) ("[T]he common law rule which prohibits the assignment of legal malpractice claims safeguards the attorney–client relationship which is an indispensable component of our adversarial system of justice.").

- **West Virginia**: *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473, 478 (W. Va. 2003) (prohibiting *all* assignments of legal malpractice claims after noting "this Court is ever mindful of its role in ensuring that the sanctity of this confidential relationship is preserved and protected").

Other Courts

- **Arizona**: *Schroeder v. Hudgins*, 690 P.2d 114, 118 (Ariz. Ct. App. 1984), *abrogation on other grounds recognized by Franko v. Mitchell*, 762 P.2d 1345, 1353 n.1 (Ariz. Ct. App. 1988) (citing *Goodley* for the proposition that "the relationship between attorney and client is of a uniquely personal nature, giving rise to a 'fiduciary relation of the very highest character'") (quoting *Goodley*, 133 Cal. Rptr. at 86).

- **Colorado**: *Roberts v. Holland & Hart*, 857 P.2d 492, 495 (Colo. App. 1993) ("In our view, the assignment of legal malpractice claims involve matters of personal trust and personal service and do not lend themselves to assignability because permitting the transfer of such claims would undermine the important relationship between an attorney and client.").

- **Florida**: *Salerno v. Auto Owners Ins. Co.*, No. 04-cv-1056, 2006 WL 2085467, at *4 (M.D. Fla. July 25, 2006) (stating that permitting assignments of legal malpractice claims would "embarrass the attorney–client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client") (quoting *Goodley*, 133 Cal. Rptr. at 87).

- **Illinois**: *Brocato v. Prairie State Farmers Ins. Ass'n*, 520 N.E.2d 1200, 1201 (Ill. App. Ct. 1988) ("Illinois courts have determined a cause of action for legal malpractice is not assignable because of the personal nature of the attorney–client relationship and the potential for abuse.").

- **Kentucky**: *Coffey v. Jefferson Cnty. Bd. of Educ.*, 756 S.W.2d 155, 157 (Ky. Ct. App. 1988) ("Our view that a chose in action for legal malpractice is not assignable is predicated on the uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney–client relationship arises, and public policy consideration based thereon.") (quoting *Goodley*, 133 Cal. Rptr. at 86).

- **Michigan**: *Joos v. Drillock*, 338 N.W.2d 736, 739 (Mich. Ct. App. 1983) ("In view of the personal nature of the attorney–client relationship . . . we conclude that a legal malpractice cause of action is not subject to assignment.").

- **Minnesota**: *Wagener v. McDonald*, 509 N.W.2d 188, 191 (Minn. Ct. App. 1993) ("Because of the inherent character of the attorney–client relationship, it

has been jealously guarded and restricted to only the parties involved.") (quoting *Goodley*, 133 Cal. Rptr. at 86).

- **South Carolina**: *Pavilion Dev. Corp. v. Nexsen Pruet, LLC*, No. 2011 CP 1005774, 2013 WL 5925732, at *7 (S.C. Com. Pl. October 9, 2013) ("Plaintiffs have brought embarrassment to the attorney–client relationship and have imperiled the sanctity of the highly confidential and fiduciary nature of the relationship. The assignment spawned this litigation, which appears to have been brought for the purpose of collecting a judgment confessed rather than remedying a wrong.").

- **Texas**: *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex. App. 1994) ("[T]o allow assignments would exact high costs: the plaintiff would be able to drive a wedge between the defense attorney and his client by creating a conflict of interest . . . .").

In South Carolina, an attorney owes a duty of loyalty to the client. S.C. RULES OF PROF'L CONDUCT 1.7 cmts. 1, 6. Assignments of legal malpractice claims to litigation adversaries undermine the attorney–client relationship by pitting a client's interests against the attorney's interests. Such assignments also implicate the duty of loyalty. One can easily think of examples when an attorney's duty of loyalty will conflict with his or her self-interests in avoiding a potential malpractice action. Consider a situation like the facts of the present case in which the Skippers sued Specialty Logging. The duty of loyalty would require counsel to advise Specialty Logging about the possibility of settling the case in exchange for an assignment of any potential legal malpractice claims against counsel. The conflict of interest in this scenario is obvious.

The Supreme Courts of Indiana and Tennessee recognized this conflict and cited it as a basis for prohibiting assignments of legal malpractice claims between adversaries. The Supreme Court of Indiana stated "[a]n adversary might well make a

favorable settlement offer to a judgment-proof or financially strapped client in exchange for the assignment of that client's right to bring a malpractice claim against his attorney. Lawyers involved in such negotiations would quickly realize that the interests of their clients were incompatible with their own self-interest." *Picadilly*, 582 N.E.2d at 343; *accord Can Do, Inc.*, 922 S.W.2d at 869.

Assignments between litigation adversaries could also result in clients unwittingly losing control over the disclosure of their confidential information, creating tension with an attorney's duty of confidentiality. The Rules of Professional Conduct allow an attorney to reveal confidential information to defend against a malpractice claim. S.C. RULES OF PROF'L CONDUCT 1.6(b)(6). Therefore, when a client assigns a legal malpractice claim to an adversary, he or she cannot stop the lawyer's disclosure of confidential information. If the client had asserted the claim directly against the lawyer, the client would have the option of dropping the lawsuit to stop the disclosure of such information. But when the client assigns the legal malpractice claim, the client no longer controls the litigation and cannot prevent the disclosure of confidential information. "The client could thereby be harmed and such disclosures would foster disrespect for the attorney–client relationship in general." *Can Do, Inc.*, 922 S.W.2d at 869.

C. Permitting assignments of legal malpractice claims would make lawyers hesitant to represent under-insured or judgment-proof defendants.

Courts have invalidated assignments of legal malpractice claims between adversaries in the underlying litigation on the basis that allowing these assignments will "restrict the availability of competent legal services." *Goodley*, 133 Cal. Rptr. at

87. The specter of an assignment makes it "increasingly risky to represent the underinsured, judgment-proof defendant." *Zuniga*, 878 S.W.2d at 317. As noted earlier, if assignments to litigation adversaries are permitted, the plaintiff–assignee is able "to transmute a claim against a penniless adversary into a claim against the adversary's wealthier lawyer." *Alcman*, 925 F. Supp. at 258. As in this case, such assignments are frequently accompanied by multi-million dollar "confessed" judgments. *See, e.g.*, *Zuniga*, 878 S.W.2d at 314 (stipulating to $25 million judgment).

From the defense lawyer's perspective, the risk of having to defend against a multi-million dollar legal malpractice claim, no matter how meritless, outweighs the benefit of any fee the lawyer could hope to receive from defending the client in the underlying litigation. Some defense lawyers would rationally stop representing under-insured or judgment-proof clients altogether. For lawyers that continue to represent such clients, obtaining malpractice insurance would become more difficult and more expensive. In response to the increased exposure to high-dollar malpractice claims and corresponding increases in malpractice insurance premiums, the lawyers that continue to represent under-insured or judgment-proof defendants will raise their rates. This would be especially true with respect to insurance-defense lawyers, who are frequent targets for assigned legal malpractice claims. In response to the higher rates that the insurance-defense bar will demand, insurance companies will spread the costs of the increased rates across their policyholders, increasing premiums for everyone.

D. Assignments of legal malpractice claims to adversaries in the underlying litigation lead to disreputable role reversals.

This Court should prohibit these assignments for another important public policy reason: Inherent in assignments of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose are "public and disreputable role reversal[s]." *Picadilly*, 582 N.E.2d at 344. The role reversal arises because, in order to establish proximate cause in the malpractice action, the plaintiff–assignee must show that the defendant–assignor had a meritorious defense and would have prevailed but for counsel's malpractice. This requires the plaintiff–assignee to take a position that is "diametrically opposed" to his or her position in the underlying litigation. *Zuniga*, 878 S.W.2d at 318.

The decision in *Zuniga* comprehensively explained how the role reversal arises and why it undermines the public's confidence in the legal system:

> In each assigned malpractice case, there would be a demeaning reversal of roles. The two litigants would have to take positions diametrically opposed to their positions during the underlying litigation because the legal malpractice case requires a "suit within a suit." To prove proximate cause, the client must show that his lawsuit or defense would have been successful "but for" the attorney's negligence. In the malpractice suit, the [plaintiff–assignees] would argue that [the defendant–assignor] suffered judgment not on the strength of the [plaintiff–assignees'] claim but because of attorney negligence.
>
> In the underlying tort case, the [plaintiff–assignees'] position was: we have a valid tort case involving a defective ladder [built by the defendant–assignor], and we will win the case on the merits even if [the defendant–assignor's] lawyer represents it capably. But to prove proximate cause in the legal malpractice case, the [plaintiff–assignees] would have to take the contrary

> position: we would have lost our tort case and [the defendant–assignor] would have prevailed if its lawyers had capably defended our suit. [The defendant–assignor] would have won the defective-ladder case if only its lawyers had used due care and competence.
>
> For the law to countenance this abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth. It is one thing for lawyers in our adversary system to represent clients with whom they personally disagree; it is something quite different for lawyers (and clients) to switch positions concerning the same incident simply because an assignment and the law of proximate cause have given them a financial interest in switching.

Id. (internal citations omitted).

Other courts have relied on *Zuniga*'s reasoning with respect to the role reversal to invalidate assignments of legal malpractice claims to adversaries. *See, e.g.*, *Gurski*, 885 A.2d at 174 ("Perhaps the best discussion of the problems associated with an assignment [of a legal malpractice claim to a litigation adversary] is in *Zuniga* . . . .").

The Supreme Court of Indiana similarly recognized that the role reversal erodes the public's confidence in lawyers and "magnif[ies] the least attractive aspects of the legal system":

> [T]he trial of this assigned malpractice claim would feature a public and disreputable role reversal. The mechanics of trying this case would magnify the least attractive aspects of the legal system. . . . Because of the unique nature of the trial within a trial [the plaintiff–assignee's] change in position would be obvious to all the jurors hearing the evidence . . . . They would rightly leave the courtroom with less regard for the law and the legal profession than they had when they entered.

Picadilly, 582 N.E.2d at 344–45.

The plaintiffs devote only two sentences of their brief to the judiciary's expressed concern with the role reversals that flow from assignments between litigation adversaries. *See* Pls.' Br. at 11–12. Moreover, their conclusory analysis mischaracterizes the argument. The plaintiffs attempt to minimize the public policy concerns by arguing that "*all* legal malpractice cases involve a role-reversal" on the theory that all malpractice cases pit the client and the lawyer "against one another as vigorous adversaries." *Id.* at 12 (emphasis in original). This argument misses the point. The role-reversal argument is not concerned with the lawyer and client going from allies to adversaries. That is true in all legal malpractice cases. Rather, the role-reversal argument is concerned with the plaintiff and his or her lawyer taking a position in the legal malpractice action that is diametrically opposed to their position in the underlying action. The plaintiffs' brief does not address this concern other than to dismiss it.

Because assignments of legal malpractice claims provide a mechanism and incentive for lawyers and parties to act in ways that erode the public's confidence in the justice system, this Court should conclude that such assignments are against South Carolina public policy.

E. A bright-line rule prohibiting all assignments of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose addresses the dangers of these assignments, yet is narrowly tailored to permit other assignments in which those dangers may not be as acute.

There is simply no reason to depart from the bright-line rule that is nearly uniform in other jurisdictions prohibiting all assignments between adversaries in the

underlying litigation in which the alleged malpractice arose. Blanket prohibitions on these types of assignments have been effective since their advent in the 1970s. There is no evidence that these prohibitions result in any injustice. The case-by-case approach the plaintiffs advocate is unnecessary and will only encourage the filing of meritless malpractice actions. This will unnecessarily burden the courts with deciding the validity of each individual assignment using some amorphous balancing test that is without clear criteria.

The benefits of a bright-line rule are numerous. The first is ease of administration. Nearly every time a legal malpractice claim is assigned between adversaries in the litigation in which the alleged malpractice arose, the four public policy bases noted above will be present and will militate in favor of invalidating the assignment. For example, the opportunity for collusion will be present in every case where the assigning party also stipulates to liability and damages before an adversarial determination of those issues. And all such assignments undermine the attorney–client relationship. There is no reason to force courts to engage in a case-by-case inquiry when these public policy considerations are present and always weigh in favor of invalidating the assignment. The better approach is to have a bright-line rule that discourages these assignments in the first place.

Moreover, a bright-line rule is the only way to account for the disincentives to represent under-insured or judgment-proof defendants that these assignments create. A court looking at a single assignment in a vacuum cannot say that the particular assignment by itself will lead to a reduction in legal services. But when having the benefit of looking at the effect of these assignments in the aggregate, one can see how

they discourage lawyers from representing the under-insured and judgment proof. A bright-line rule prohibiting these assignments is the only way to address this concern.

On the other hand, the costs of a bright-line rule are slight. The plaintiffs have not pointed to one case in which an injustice resulted from prohibitions on assignments of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose. Given that these prohibitions have been in effect since the 1970s, if they resulted in an actual injustice or allowed a negligent lawyer to escape liability, one would expect the plaintiffs to point that case out. But the best the plaintiffs can do is hypothesize to a situation in which the assignment of a legal malpractice claim to an adversary in the underlying litigation does not violate public policy. *See* Pls.' Br. at 14–16. Such conjecture is contradicted by 30 years of actual cases and is not a legitimate basis to depart from the well-established bright-line rule.

F. A bright-line rule prohibiting assignments in no way prevents defendants from protecting themselves against legal malpractice or bad faith, and in no way allows a negligent attorney to escape liability.

The plaintiffs argue—using a long "hypothetical" that exaggerates and misstates the facts of this case—that a bright-line rule prohibiting all assignments of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose would force a defendant like Specialty Logging to bear the "brunt" of the insurance company's bad faith and counsel's alleged malpractice. *See* Pls.' Br. at 14–17. Not true. If this Court adopts the majority rule and prohibits all assignments of legal malpractice claims between litigation adversaries, such a ruling would not prevent defendants like Specialty Logging from fully recovering for any

harm caused by their insurers or their attorneys. Defendants would remain free to pursue legal malpractice claims against their lawyers and pursue, or assign, bad faith claims against their insurers.

For example, according to section 4.4 of the Settlement Agreement, if the assignment between Specialty Logging and the Skippers is invalidated, then the Settlement Agreement will be invalided according to its own terms, and the Skippers will seek to reinstate their underlying cases against Specialty Logging. Should the Skippers obtain a judgment against Specialty Logging in excess of the policy limits, South Carolina law allows Specialty Logging to assign a potential bad faith claim against ACE to the Skippers to satisfy the excess judgment. *See Wilkins v. State Farm Mut. Ins. Co.*, No. 06-334, 2008 WL 2690240, at *7 n.12 (D.S.C. July 1, 2008). Indeed, such assignments are common in South Carolina when a plaintiff obtains a verdict in excess of the insurance policy and the defendant does not have the assets to pay the difference. Such assignments allow injured plaintiffs to obtain a full recovery (if they can prove bad faith) and protect insureds against excess liability to the same extent as the Settlement Agreement and assignment in this case.[7]

Moreover, Specialty Logging could still pursue a legal malpractice claim against Rowlen and Coia and require them to answer for their alleged malpractice (again, if they can prove that any malpractice occurred).

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[7] No bad faith occurred in this case. ACE tendered a defense and offered to settle the claim for the remaining policy limit well before trial. No South Carolina court has found such conduct to run afoul of *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.C. 286, 170 S.E. 346 (1933).

Consequently, the plaintiffs are incorrect that a rule prohibiting the assignment of legal malpractice claims between adversaries in the underlying litigation forces the defendant to bear the brunt of the insurer's wrongdoing and the attorney's malpractice. By adopting the majority rule, this Court would leave the plaintiff in the underlying litigation with effective mechanisms to obtain a full recovery while protecting the defendant from any harm caused by a lawyer's malpractice or an insurer's bad faith.

A further benefit of requiring the plaintiff to try his case to a verdict is that the jury or judge's finding of liability and damages, having been tested through an adversarial process, provide a reliable estimate of the plaintiff's injury and, in turn, the harm potentially caused by the insurer's alleged bad faith or the attorney's alleged malpractice. This contrasts with the unsupported damage amounts that follow from a defendant–assignor stipulating to liability and damages that he knows he will never be held to answer for. *See Kommavongsa*, 67 P.3d at 1079 (stating that "such a stipulated judgment cannot properly serve as an indication of the actual damages, if any there were, as a result of the alleged legal malpractice").

G. The three outlier cases cited by the plaintiffs are fundamentally distinguishable and do not undermine the majority view that assignments between litigation adversaries violate public policy, especially when they are made before liability and damages are determined through an adversarial process and are accompanied by a confessed judgment in the underlying litigation that the assignee has agreed not to enforce against the assignor.

In their appendix, the plaintiffs list three outlier cases from Maine, Massachusetts, and New York as decisions that have permitted assignments of legal malpractice claims to litigation adversaries. The plaintiffs do not discuss those cases

in their brief. Those cases are not on point because the assignments in those cases arose in materially distinguishable factual situations. They do not undermine the bright-line rule recognized by the far larger majority of courts that have considered the issue: Assignments of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arises are void as against public policy.

In *Thurston v. Continental Casualty Company*, 567 A.2d 922 (Me. 1989), the defendant in the underlying action did not assign its legal malpractice claim until after a summary judgment in excess of its insurance coverage had been entered. *Id.* at 923. In a single paragraph that did not discuss public policy considerations, the Supreme Judicial Court of Maine held that "there is no reason to prohibit the assignment of a legal malpractice claim *in a situation such as this.*" *Id.* (emphasis added).

Similarly, in *Greevy v. Becker, Isserlis, Sullivan & Kurtz*, 658 N.Y.S.2d 693 (N.Y.A.D. 1997), the defendant did not assign his legal malpractice claim until after the plaintiffs in the underlying negligence action were awarded $200,000. *Id.* at 694. The New York Appellate Division validated the assignment in a single paragraph that did not meaningfully discuss public policy considerations.

Thurston and *Greely* are fundamentally distinguishable on a critical point: in both cases the defendants assigned their legal malpractice claims to the plaintiff *after* they had been found liable and judgment was entered against them. There was no confession of judgment and no stipulation to an unsupported damages figure. Because liability and damages were determined in an adversarial manner rather than by stipulation, there was little, if any, opportunity for collusion. *See Edens Techs.*, 675 F. Supp. 2d at 85 (distinguishing *Thurston* in this respect: "[T]here was no risk in

Thurston that the parties colluded to specify unreasonable damages, because the damages were awarded *by the court* on summary judgment.") (emphasis in original).

The assignment between the Skippers and Specialty Logging is distinguishable. Like the defendants in *Edens* and *Zuniga* and unlike the defendants in *Thurston* and *Greevy*, Specialty Logging assigned its malpractice claim to the Skippers before there was any adversarial determination of liability or damages in the underlying action. Because the Settlement Agreement effectively insulates Specialty Logging from liability for the confessed judgment, Specialty Logging had, unlike the defendants in *Thurston* and *Greevy*, no incentive to litigate or seriously negotiate the amount of damages. Indeed, the fact that Specialty Logging stands to receive a portion of any recovery on the assigned claims gave it an incentive to *inflate* the amount of the confessed judgment. The assignment in this case bears all the hallmarks of collusion recognized by the case law, and at the very least created an opportunity for collusion.

On this point, the Supreme Judicial Court of Massachusetts' decision in *New Hampshire Insurance Co. v. McCann*, 707 N.E.2d 332 (Mass. 1999), is also distinguishable. In *McCann*, the Crantons were trustees of a trust that owned and operated an apartment building. *Id.* at 332. The Crantons, as trustees, were sued under Massachusetts' lead paint statute. *Id.* at 333. The parties agreed to settle the claim. *Id.* The Crantons' lawyer drafted a settlement agreement releasing the Crantons from liability in their capacities as trustees. *Id.* The agreement, however, did not release the Crantons from liability in their individual capacities. *Id.* Eleven years later, the same plaintiff sued the Crantons as individuals. *Id.* The Crantons and

their insurer settled the later claim by paying the plaintiff $220,000 and assigning the rights to malpractice claims against the attorney who prepared the settlement and release in the earlier action. *Id.* at 333–34.

The court permitted the assignment because, among other reasons, there was "no suggestion of improper collusion." *Id.* at 338. Indeed, because the Crantons and their insurer actually paid the $220,000 settlement, they had every incentive to keep the settlement low and commensurate with the value of the claims. Moreover, the public policy concern with disreputable role reversals was muted in *McCann* because the assignment was not between the adversaries in the litigation in which the alleged malpractice occurred. Rather, the assignment was made in connection with the settlement of the later action against the Crantons in their individual capacities, while the malpractice claim related to an oversight in the drafting of the settlement agreement that released the Crantons from liability in their capacities as trustees. Therefore, the legal malpractice claim did not go to the merits of the underlying action.

At best, *Thurston*, *Greevy*, and *McCann* reflect the view of a small minority of courts that have refused to adopt a bright-line rule that prohibits all assignments of legal malpractice claims between litigation adversaries. ACE respectfully submits that the majority view is the far better one: All such assignments should be prohibited.

If this Court is not persuaded by the majority view, then ACE respectfully submits that this Court should at the very least adopt a narrower bright-line rule that is certain to capture only those situations that squarely implicate the public policy

considerations discussed above: Assignments of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose are void as against public policy if they are made before liability and damages in the underlying litigation are determined in an adversarial manner and are accompanied by a confessed judgment in the underlying litigation that the assignee has agreed not to enforce against the assignor.

III. This Court should reject the plaintiffs' remaining arguments for the same reasons that other courts have rejected nearly identical arguments.

A. There is no support for the plaintiffs' argument that a legal malpractice claim is assignable simply because it is a property right.

The plaintiffs suggest that a legal malpractice claim should be freely assignable because one could view it as a property right in a "chose in action." This argument rests on the theory that "[a] person is ordinarily free to dispose of his or her property however he or she sees fit." Pls.' Br. at 5. The plaintiffs' theory falls apart, however, because whether a chose in action constitutes a property interest does not answer the question of the claim's assignability. The plaintiffs have not pointed to any statute or case supporting their theory. Indeed, South Carolina's jurisprudence teaches a contrary result. South Carolina prohibits the assignability of similar types of "choses in action," for example, actions for slander, irrespective of any property interest they represent. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 97 (2002); *see also Schneider v. Allstate Ins. Co.*, 487 F. Supp. 239, 244 (D.S.C. 1980).

B. The plaintiffs' reliance on South Carolina's survival statute is misplaced because it relies on an anachronistic argument that other courts have consistently rejected.

More than fifty years ago, this Court stated that "causes of action for tort which survive are assignable, while those which do not survive are not assignable." *Doremus v. Atl. Coast Line R.R. Co.*, 242 S.C. 123, 142, 130 S.E.2d 370, 379 (1963). It does not appear that this Court has revisited that proposition since then. Although the plaintiffs cite *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 97 (2002), as an example of this Court reaffirming the principle that assignability follows from survival, that case did not concern or discuss assignability. The plaintiffs do not cite any South Carolina holdings that legal malpractice claims survive. Nor do they cite any South Carolina holdings that legal malpractice claims are assignable simply because they survive. Yet that is the plaintiffs' argument.

Indeed, the plaintiffs have not cited one case holding that legal malpractice claims are assignable on the basis of a state's survival statute, from this state or any other. No such case exists. That is because modern courts have rejected as "anachronistic" arguments that legal malpractice claims are assignable based on the state's survival statute. *See Picadilly*, 582 N.E.2d at 341; *Wagener*, 509 N.W.2d at 190. Indeed, every court to consider the argument that legal malpractice claims should be assignable based on the state's survival statute has rejected it. *See, e.g.*, *Picadilly*, 582 N.E.2d at 34; *Can Do, Inc.*, 922 S.W.2d at 867–68; *Wagener*, 509 N.W.2d at 190; *Joos*, 338 N.W.2d at 738. Those cases are instructive because the survival statutes at issue in those cases are materially similar to South Carolina's

survival statute. *Compare* S.C. CODE § 15-5-90, *with* MINN. STAT. § 573.01 *and* MICH. COMP. LAWS § 600.2921.

The Indiana Supreme Court explained why public policy, rather than a formulaic application of a state's survival statute or common law analogue, should govern the analysis:

> Today, it seems anachronistic to resolve the issue of the assignability of a legal malpractice claim by deciding whether such a claim would survive the client's death. . . . As is sometimes the case with the common law, the rule has outlived the reason for its creation.
>
> . . .
>
> Assignment should be permitted or prohibited based on the effect it will likely have on modern society, and the legal system in particular.

Picadilly, 582 N.E.2d at 341.

Other courts have relied on this passage from *Picadilly* in concluding that public policy should determine the assignability of legal malpractice claims rather than survival statutes. For example, the Tennessee Supreme Court ruled that "in resolving the question of assignability of legal malpractice actions, public policy considerations, rather than the traditional survivability test, should guide the analysis." *Can Do, Inc.*, 922 S.W.2d at 868; *see also Wagener*, 509 N.W.2d at 190 (quoting *Picadilly*, 582 N.E.2d at 341).

So, too, the leading case in Michigan relied on public policy to hold that assignments of legal malpractice claims are prohibited despite a survival statute providing that causes of action surviving death are assignable. *Joos*, 338 N.W.2d at 738. In *Joos*, the court first noted that Michigan's survival statute provided that "[a]ll actions and claims survive death" and that "actions which are deemed to survive

death are assignable under the common law." *Id.* (brackets in the original; internal quotations omitted). Nevertheless, the court stated that "survivability is not the only test" and ultimately concluded that legal malpractice claims were unassignable based on public policy bases. *Id.*

In light of the numerous and well-reasoned decisions holding that a broad survival statute does not determine assignability, in addition to the absence of any authority to the contrary, the Court should reject the plaintiffs' argument that legal malpractice claims between litigation adversaries are assignable based on South Carolina's survival statute. No South Carolina court has validated an assignment of claims that offends public policy simply because that claim would survive under the survival statute. This case should not break that ground.

C. Whether states permit assignments of other professional malpractice or negligence claims is irrelevant to deciding the assignability of legal malpractice claims.

The plaintiffs incorrectly analogize professional malpractice or negligence claims, which are generally assignable, to legal malpractice claims. *See* Pls.' Br. at 7. This analogy is inappropriate because assignments of legal malpractice claims implicate important public policy considerations that professional malpractice claims do not. This distinction has led many states to permit assignments of professional malpractice claims, yet prohibit assignments of legal malpractice claims.

The distinction between legal malpractice claims and professional malpractice claims is based on the attorney–client relationship. A client's relationship with an attorney implicates a set of considerations that a client's relationship with, for example, an insurance broker does not. While the attorney–client relationship is a

fiduciary relationship based on confidentiality and trust, the client's relationship with his insurance broker is "an activity properly characterized as a commercial and business transaction." *10 Entm't, LLC v. Manor Ins. Agency, Inc.*, 308 P.3d 1223, 1229 (Colo. App. 2013) .

These distinctions have led courts in Arizona, California, Colorado, Connecticut, and Kentucky to permit assignments of professional malpractice claims.[8] *Cf. Fowler v. Hunter*, 388 S.C. 355, 362, 697 S.E.2d 531, 535 (2010) (allowing the prosecution of assigned claims against an insurance broker where "there was no evidence of collusion between the parties. For instance, the parties did not stipulate as to the Fowlers' damages in the settlement agreement to reduce the appearance of collusion and the settling parties believed the motorcycle suit would be tried to a conclusion."). These states, however, have never wavered from their bright-line rules prohibiting assignments of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose. The Arizona Supreme Court decision in *Webb v. Gittlen*, 174 P.3d 275 (Ariz. 2008), explained why claims of professional malpractice (in the context of a negligence claim against an insurance broker) are assignable while legal malpractice claims are not. The court noted:

- "Attorneys are fiduciaries with duties of loyalty, care, and obedience, whose relationship with the client must be one of utmost trust. By contrast, insurance agents generally are not fiduciaries, but instead owe

[8] *See* **Arizona**, *Webb v. Gittlen*, 174 P.3d 275, 279–80 (Ariz. 2008); **California**, *Troost v. Estate of DeBoer*, 202 Cal. Rptr. 47, 52 (Ct. App. 1984); **Colorado**, *10 Entm't, LLC*, 308 P.3d at 1229; **Connecticut**, *Esposito v. CPM Ins. Servs., Inc.*, 922 A.2d 343, 352 (Conn. Supp. Ct. 2006); **Kentucky**, *Associated Ins. Serv., Inc. v. Garcia*, 307 S.W.3d 58, 62–63 (Ky. 2010).

only a duty of reasonable care, skill, and diligence in dealing with clients."

- "[A]lthough clients share personal information with both their insurance agents and attorneys, they typically share much less with their agents. While clients often inform their agents about their medical history, financial information, prior claim history, and personal habits, they provide their attorneys more extensive or sensitive information about their private and public conduct . . . ."

- "[A]ttorney–client confidentiality protects broader interests than does insurance agent–client confidentiality. It protects the public interest in accessible legal advice by allowing people to consult their attorneys without fear of retribution."

- "Once attorneys receive information, they are also bound by stricter confidentiality duties than are insurance agents."

Id. at 279 (internal citations and quotations omitted).

Because of the public policy considerations unique to assignments of legal malpractice claims, the fact that South Carolina may permit assignments of professional malpractice claims is irrelevant to deciding whether legal malpractice claims are assignable.

D. South Carolina's existing statutes and rules cannot adequately address the dangers that assignments of legal malpractice claims pose.

The plaintiffs argue that South Carolina provides "safeguards" that are sufficient to alleviate the well-documented concerns associated with assignments of legal malpractice claims between litigation adversaries. *See* Pls.' Br. at 17–18.

These arguments are unpersuasive, because the safeguards that the plaintiffs cite cannot by themselves adequately address the public policy concerns noted throughout this brief. For example, neither a court's scrutiny of a settlement

agreement, sanctions, nor pleading rules address the "public and disreputable role reversal," *Picadilly*, 582 N.E.2d at 344, that occurs when the plaintiff–assignee takes a position that is "diametrically opposed" to his or her position in the underlying litigation, *Zuniga*, 878 S.W.2d at 318. Likewise, the safeguards the plaintiffs point to do not protect against the threats to the attorney–client relationship. Nor will they counter the disincentive for lawyers to represent under-insured or judgment-proof defendants.

Moreover, it is telling that the states prohibiting assignments of legal malpractice claims between adversaries in the underlying litigation have the same safeguards that the plaintiffs here contend are sufficient. Yet, those states still have bright-line rules prohibiting these assignments. South Carolina is, of course, not the only state in which courts scrutinize settlement agreements or where attorneys are prohibited from filing frivolous lawsuits. Nor is South Carolina unique in requiring a plaintiff to file an expert affidavit with a complaint alleging professional negligence. *See, e.g.*, MINN. STAT. § 544.42 (requiring expert affidavits in cases alleging professional negligence).

The "safeguards" the plaintiffs cite cannot adequately address the dangers posed by assignments of legal malpractice claims between adversaries in the underlying litigation. A bright-line rule prohibiting these assignments is necessary.

CONCLUSION

ACE respectfully submits that the Court should conclude that assignments of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose are prohibited and answer the certified question "No."

Respectfully submitted,

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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

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LLC, and Harold Moors ..... Plaintiffs,

v.

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Company, Brantley C. Rowlen, and
Erin Lawson Coia ..... Defendants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211, SCACR, and with the August 13, 2007 Order of the South Carolina Supreme Court which requires redactions of certain personal identifying information.

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