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March 13, 2015

Daniel E. Shearouse, Clerk of Court
Supreme Court of South Carolina
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

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
Appellate Case No. 2014-001979
HLF File No. 3.243

Dear Mr. Shearouse:

Enclosed for filing please find the unbound original and sixteen (16) bound copies of the Brief of Defendants Brantley C. Rowlen, and Erin Lawson Coia which we are serving on all other counsel of record as evidenced by the Certificate of Service which is also enclosed. Please return a clocked-in copy of each in the envelope provided.

Kind regards,

Yours truly,

Robert H. Hood, Jr.

RHHjr/spc
Enclosure(s)
cc: Mark B. Tinsley, Esquire
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STATE OF SOUTH CAROLINA
In the Supreme Court

Certified Question from United States District Court

Honorable J. Michelle Childs, District Judge

App. 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.

BRIEF OF DEFENDANTS BRANTLEY C. ROWLEN AND ERIN LAWSON COIA

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STATEMENT OF THE CERTIFIED QUESTION

The question certified by the District Court is:

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

The Attorney Defendants would respectfully restate the question as:

> Can a defendant assign legal malpractice claims against his defense attorney to the plaintiff as part of a settlement of the underlying tort action?

STATEMENT OF THE CASE[1]

This question comes to this Court on certification from the District Court because it is a determinative issue in a legal malpractice action pending in federal court. In turn, the legal malpractice action arises from an underlying tort action that was filed in Allendale County. George Skipper v. Specialty Logging, LLC and Harold Moors, Case No. 2012-CP-03-172. The underlying personal injury claim arose from a collision between a vehicle driven by George Skipper and a logging truck owned by Specialty Logging, LLC, and driven by Harold Moors in September 2010. Specialty Logging is owned and operated by Michael Perry Bowers. The Specialty Logging truck was insured under a commercial auto insurance policy issued by ACE Property and Casualty Insurance Company. ACE had retained the law firm of Lewis Brisbois Bisgaaard &

[1] The facts are recited herein as alleged in the complaint and recounted in the District Court's order of certification without any concession or admission as to the accuracy or truthfulness. *See* SCACR Rule 244 (limiting consideration of matters outside of the certification order). To the extent that these allegations form the pertinent factual basis, no separate Statement of the Facts is provided. SCACR Rule 208(b).

Smith, LLP to represent Specialty Logging and Moors in the underlying action, and attorneys Brantley C. Rowlen and Erin Lawson Coia were assigned to the case.[2]

As alleged in the legal malpractice action, various settlement negotiations transpired but ACE refused to settle for various demands that exceeded the available policy limits. Prior to filing suit, Skipper's attorney wrote to ACE, demanded the Policy's coverage limits of $ 1,000,000 to settle. ACE hired Brisbois as defense counsel and had Skipper's claims evaluated by a physician, and then offered $50,000 based on the physician's opinion that Skipper's alleged back injuries pre-existed the accident and were not aggravated by the accident. After filing the action in Allendale County, Skipper's attorney made a settlement demand for $2,500,000 as an offer of judgment. As a counter, ACE offered to settle Skipper's claim for $981,211.11, the amount of coverage that remained after paying his property damage claim.

Seizing upon a strategy to recover more than the ACE policy limits, Skipper's attorneys concocted claims against Special Logging defendants' Insurer and defense counsel with allegations that they had acted negligently and in bad faith in handling the claim and defending the underlying action ***on behalf of the Specialty Logging parties***, and then they cobbled those claims together with the underlying accident claims in a high-low offer which include a "high" of $7,000,000 and a "low" of the coverage available under the Policy. Pursuant to the high-low offer, they would only litigate the issue of the Insurer's and defense counsel's handling of the accident claim would be litigated. "If the trier of fact found in favor of the Defendants. the Skippers would accept

[2]The Plaintiffs refer to "these out of state lawyers." However, while both Defendant Attorneys are based in the Atlanta office of the Brisbois Firm, the Bar Registry shows that Attorney Coia is licensed in this State.

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." ACE rejected the high-low offer, but again offered to settle the claims for the remaining policy limits.

In January 2014, the defendants Specialty Logging and Moors (together with Bowers) entered into a settlement with the Skippers -- without consultation with or participation by ACE or their defense attorneys. Pursuant to the Settlement Agreement, the Specialty Logging parties executed a confession of judgment in which they admitted liability for the injuries and losses sustained by the Skippers and agreed that the value of those injuries and losses was $4,500,000. Specialty Logging parties further agreed to institute a civil action against ACE and their own defense counsel, and to assign to the Skippers an interest in any claims against ACE, Rowlen, and Coia. Pursuant to the Assignment, the Skipper Plaintiffs could receive anywhere from 85 to 95 percent of the proceeds from a settlement of the c!aims -- even if the settlement was for less than the amount of the Confession of Judgment.

The Skippers and the Specialty Logging parties further agreed that if the Settlement Agreement was found invalid, then the underlying lawsuit(s) 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. 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." The Confession of Judgment was not filed, but it is being held in "trust" by the Skippers so long as the Specialty Logging parties cooperate in the present lawsuit as required by the Settlement Agreement.

The Skippers, Specialty Logging, Michael Bowers, and Harold Moors, all as Plaintiffs, immediately commenced a civil action in the Court of Common Pleas of Allendale County, South Carolina, asserting bad faith claims against ACE and legal malpractice claims against Attorneys Coia and Rowlen. ACE removed the action to federal court asserting diversity jurisdiction, and both ACE and the Attorney Defendants have moved to dismiss the claims asserted by the Skipper. In addition, the Plaintiffs have moved to remand the action back to state court in Allendale County.

The federal court diversity jurisdiction issue centers of the facts that on the plaintiffs' side, the Skippers Plaintiffs are citizens of Georgia and each of the Specialty Logging Plaintiffs are citizens of South Carolina, while on the defendants' side, the Attorney Defendants are both citizens of Georgia and ACE is a citizen of Pennsylvania. The Defendants maintain that the Skippers -- whose involvement as plaintiffs destroys complete diversity -- are not real parties in interest to this action because the assignment of the legal malpractice claims against the Attorney Defendants is void as against public policy, which in turn, presents the novel question of law as certified by the District Court.

ARGUMENT

A defendant cannot assign a legal malpractice claim against his defense attorney to the plaintiff as part of a settlement of the underlying tort action.

The question certified by the District Court is: "Can a legal malpractice claim be assigned between adversaries in litigation in which the alleged legal malpractice arose?" Or, to restate the question more specifically -- Can a defendant assign legal malpractice claims against his defense attorney to the plaintiff as part of a settlement of the underlying tort action? As recognized by the District Court and acknowledged by all

parties, the question presented is a novel one upon which the South Carolina Appellate Courts have not yet ruled. These Attorney Defendants submit that a legal malpractice claim should not be assignable to an adversary in litigation in which the alleged legal malpractice arose, and more specifically, a defendant should not be allowed to assign a legal malpractice claim against his defense attorney to the plaintiff as part of a settlement of the underlying tort action.

A. Assignability of Choses in Action - Generally

These Defendants do not dispute the basic, general principles asserted by the Plaintiffs that (i) a chose in action is personal property under S.C. Code Ann. §15-1-40, or (ii) a legal malpractice action "survives" under S.C. Code Ann. § 15-5-90, or (iii) tort claims that "survive" can be assigned. *See* 5 S.C. Jur. *Assignments* 21 ("A right of action for personal injuries is assignable where it would, on the death of the assignor, survive to his legal representatives." (footnote omitted); *see also id.* §§ 19, 20. However, not all "survivable" choses in action are assignable. Notably, the Court has held that a cause of action arising out of a strictly personal tort, such as slander, is not assignable until it is reduced to judgment. *Id.* § 21 (citing Perry v. Atl. Coast Life Ins. Co., 166 S.C. 270, 164 S.E. 753, 754 (1932) ("a cause of action for slander is, until reduced to judgment, a tort of a strictly personal character, and therefore not assignable"). However, there is no reported South Carolina appellate court opinion ruling on any question of whether a legal malpractice action is assignable – whether it be to a litigation adversary or to any other uninterested person or entity. [3] Thus, this question comes before the Court as one of novel impression.

[3] There is a trial court order in Pavilion Dev. Corp. v. Nexsen Pruet, LLC, 2013 WL

B. Assignability of Legal Malpractice Claims – Other Jurisdictions[4]

As recounted by the Plaintiffs, albeit with a decidedly numerical focus, the majority of other jurisdictions that have addressed the issue have adopted a broad, general rule that legal malpractice claims are not assignable. The states having adopted the majority view include: Arizona, California, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Tennessee, Virginia, West Virginia, and most recently, in Georgia, the Legislature passed a statutory provision that actions for legal malpractice are not assignable. Ga. Code 44-14-24; 2013 Georgia Laws Act 196 (H.B. 359).

5925732 (S.C. Com. Pl. Oct. 9, 2013), a comparable case which involves a confession of judgment and an assignment of a legal malpractice claim between adversaries in litigation in which the alleged legal malpractice arose. Judge Nicholson held that Pavilion's assignment of a legal malpractice claim against its former counsel, Nexsen Pruet, to their adversary in the litigation in which the alleged legal malpractice arose is void as against public policy. However, it appears that order is being challenged in an appeal pending in the Court of Appeals. Appellate Case No. 2013-002796. The Attorney Defendants were not aware of the pending appeal when it represented to the District Court that Judge Nicholson's order had not been appealed because the Charleston Count Docket (a copy of which was obtained and provided in the District Court) does not show that Pavilion ever filed a notice of appeal in the lower court as required by SCACR Rule 208(d)("The notice of appeal shall be filed with the clerk of the lower court and the clerk of the appellate court within ten (10) days after the notice of appeal is served.") The Attorney Defendants first became aware that there was an appeal pending in *Pavilion* after the Appellants filed their brief in this matter. Regardless of the pending appeal, Judge Nicholson's order is instructive and bears consideration regarding the prevailing precedent in other jurisdictions on the legal question posed by the District Court as discussed below.

[4] "Assignability of Claim for Legal Malpractice," 64 A.L.R.6th 473 (2011 & Cum. Supp. 2014). ("While a number of jurisdictions have held that legal malpractice claims are nonassignable, a minority of jurisdictions have held that a case-by-case determination is more appropriate when meritorious public-policy concerns are implicated, and within those jurisdictions, some authority prohibits assignment to the adversary in the litigation out of which the alleged malpractice arose.")

As listed by the Plaintiffs, a minority of jurisdictions have adopted a case-by-case approach to determining whether a legal malpractice claim in assignable: Connecticut, District of Columbia, Idaho, Maine, Massachusetts, New York, Oregon, Pennsylvania, Rhode Island, Texas, and Washington. However, even of the minority jurisdictions, Connecticut, DC, Texas, and Washington, prohibit assignment of a legal malpractice claim to the adversary in the litigation out of which the alleged malpractice arose.

Without belaboring the number count of majority v. minority jurisdictions or a citation- by-citation comparison of all the decisions from these other jurisdictions, the Attorney Defendants submit that the proper focus for analysis of the question posed to the Court is on the important public policy considerations that weigh in favor of a general rule prohibiting a defendant from assigning legal malpractice claims against his defense attorney to the plaintiff as part of a settlement of the underlying tort action.

C. Public Policy Limits on Freedom of Contract - Generally

While basic contract law generally allows for broad freedom to contract, it is manifest that such freedom may be subordinated to public policy and the Court can declare a contract (or specific contract terms) void as contrary to public policy. Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 615, 732 S.E.2d 626, 628 (2012); Berkebile v. Outen, 311 S.C. 50, 54, 426 S.E.2d 760, 762 n.2 (1993) ("The general well-established rule is that "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution."). In this case, the public policy concerns fall within this Court's exclusive power and duty to regulate the practice of law in South Carolina. *See* S.C. Const. art. V, § 4; Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d 612, 622 (2002).

D. *Public policy favors prohibiting a defendant from assigning legal malpractice claims against his defense attorney to the plaintiff as part of a settlement of the underlying tort action.*

As a general consensus, those courts that have held that an assignment of a legal malpractice action is void on public policy grounds have largely focused on concerns for the attorney-client relationship. "Most courts view the unique personal nature of the relationship between an attorney and his client to be the most compelling public policy reason for prohibiting the assignment of legal malpractice claims." Delaware CWC Liquidation Corp. v. Martin, 213 W. Va. 617, 621, 584 S.E.2d 473, 477 (2003); Gurski v. Rosenblum & Filan, LLC, 276 Conn. 257, 268-69, 885 A.2d 163, 168-69 (2005)(noting the majority view focuses on attorney-client relationship).[5]

In one of the first cases to address the issue, Goodley v. Wank& Wank, Inc., 133 Cal. Rptr. 83, 86-87 (Cal. Ct. App. 1976), the Court articulated concerns for the special

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[5]As listed in Gurski: See, e.g., *Schroeder v. Hudgins,* 142 Ariz. 395, 399, 690 P.2d 114 (Ct.App.1984) (assignment of legal malpractice claims barred, citing "uniquely personal" relationship between attorney and client); *Roberts v. Holland & Hart,* 857 P.2d 492, 495 (Colo.App.), cert. denied, 1993 Colo. Lexis 728 (1993) ("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"); *Christison v. Jones,* 83 Ill.App.3d 334, 338, 39 Ill.Dec. 560, 405 N.E.2d 8 (1980) (prohibiting assignment due to "the personal nature of the [attorney-client] relationship and the duty imposed upon the attorney, coupled with public policy considerations surrounding that relationship"); *Joos v. Drillock,* 127 Mich.App. 99, 105, 338 N.W.2d 736 (1983) (citing "personal nature of the attorney-client relationship" and other public policy concerns), appeal denied, 419 Mich. 935 (1984); *Earth Science Laboratories v. Adkins & Wondra, P.C.,* 246 Neb. 798, 801-802, 523 N.W.2d 254 (1994) (refusing to permit assignment because of "personal nature and confidentiality involved in the attorney-client relationship"); *Delaware CWC Liquidation Corp. v. Martin,* 213 W.Va. 617, 621-23, 584 S.E.2d 473 (2003) ("[t]o permit the assignment of a claim that is firmly rooted in the highly personal attorney-client relationship would denigrate both the legal profession and the justice system").

personal and confidential nature of the attorney-client relationship, stating:

> 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 considerations based thereon.
>
> ***
>
> 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.

The Court expressed a grim concern that allowing such assignments would "embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." *Id.* at 87.

Many of the "majority" courts have followed the California Court with citation to and extensive quotation from *Goodley*, but even where different courts has spoken in varying terms and rhetoric, the core public policy concern repeatedly referenced is the confidential and fiduciary relationship of attorney and client. "Our own conclusion that legal malpractice claims should not be assigned is based on our general agreement with *Goodley,* and our particular concern about two issues: the need to preserve the sanctity of the client-lawyer relationship, and the disreputable public role reversal that would result during the trial of assigned malpractice claims like this one." Picadilly, Inc. v. Raikos, 582 N.E.2d 338, 342 (Ind. 1991).[6] *See also* Kiley v. Jennings, Strouss & Salmon, 187 Ariz. 136, 140, 927 P.2d 796 (Ct.App.1996) (such assignments would negate attorney's fiduciary and ethical duty to client because assignee is not client); Wagener v. McDonald, 509 N.W.2d 188, 191 (Minn.App.1993) (allowing such assignments would be

[6] *Abrogated on other grounds by* Liggett v. Young, 877 N.E.2d 178 (Ind. 2007).

incompatible with the attorney's duty to act loyally towards the client and to maintain confidentiality).

Another public policy concern expressed as a ground for barring such assignments is the prospect of creating a commercial marketplace for legal malpractice claims. As discussed in *Goodley*:

> The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

133 Cal.Rptr. at 87; *see also* Picadilly, 582 N.E.2d at 341-42 (quoting Goodley with agreement).

Certain courts have debunked this prospect of commercialization of legal malpractice claims as unrealistic. Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313 (Tex. App. 1994) ("Most legal malpractice assignments seem to be driven by forces other than the ordinary commercial market."); *see also* New Hampshire Ins. Co. v. McCann, 429 Mass. 202, 210, 707 N.E.2d 332, 337 (1999) ("We suspect that fear of "open trading" is based in part on outmoded concepts and protectionism."). However, a number

of courts have recognized a more compelling concern -- the potential for collusion and improper use of assignment in the settlement with the adversary in the underlying action.

As mentioned above, a number of the minority courts that refuse to adopt a blanket rule prohibiting assignment of legal malpractice claims, still bar the assignment of a legal malpractice claim to an adversary in the underlying litigation that gave rise to the malpractice claim. One basis voiced for the distinction is a concern for the opportunity for collusion that would erode public confidence in the legal system. For example, in Gurski v. Rosenblum & Filan, LLC, 276 Conn. 257, 278-79, 885 A.2d 163, 174 (2005), the Court states:

> This counterintuitive claim and reversal of roles, requiring the assignee to bring a claim for legal malpractice when she was the very party who benefited from that malpractice in the underlying litigation, would engender a perversion that would erode public confidence in the legal system. Permitting an assignment of a legal malpractice claim to the adversary in the underlying litigation that gave rise to the legal malpractice claim also 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. (Citation omitted).

Likewise, the Washington appellate court also has concluded that concern for potential collusion is a compelling reason to bar assignment to an adversary:

> [P]ermitting the assignment of legal malpractice claims to an adversary in the same litigation that gave rise to the legal malpractice claim ought to be prohibited because of the opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation....
>
> ****
>
> [W]e think that prohibiting such assignments in general will provide less incentive for collusion, based on the self-interests of the defendant in the underlying litigation. A defendant who can assign his or her legal malpractice claim in exchange for a covenant not to enforce a judgment in the underlying litigation would have little incentive to seriously litigate the amount of damages allegedly arising from his or her negligence.

Kommavongsa v. Haskell, 149 Wash. 2d 288, 307, 67 P.3d 1068, 1078-79 (2003). *Of the majority jurisdictions see also* 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) (Table)("There is, in addition, a high risk that the plaintiff and defendant in the underlying litigation will collude to the detriment of the defendant's lawyer."); Coffey By & Through Collins v. Jefferson Cnty. Bd. of Educ., 756 S.W.2d 155, 157 (Ky. Ct. App. 1988) ("it appears to us that this transaction is so collusive that same should be held to be against public policy"); Wagener v. McDonald, 509 N.W.2d 188, 191 (Minn. Ct. App. 1993) ("we recognize the risk of collusion in assignment situations"). Similar concerns have been expressed that allowing such assignments creates a potential for tactics and schemes that would allow the plaintiff and the defendant to make a deal and focus on the defense lawyer which would pit the defense lawyer against his client. Zuniga, 878 S.W.2d at 317; *see also* Picadilly, 582 N.E.2d at 343 ("If assignments were permitted, we suspect that they would become an important bargaining chip in the negotiation of settlements.")

This is just the type of ploy the Skippers' counsel utilized in this case by exploiting the *Tyger River*[7] doctrine with their settlement demands and negotiating with the Specialty Logging defendants to admit liability, stipulate to damages far in excess of the policy limits, confess judgment, and assign purported bad faith claims against the Insurer and legal malpractice claims against the defense counsel assigned by the Insurer. The specter of an increasing trend of such tactics looms in light of the comparable scenario found in Pavilion Development v. Nexsen Pruet.

[7] Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346, 348 (1933)

To refute the collusion concerns, the Plaintiffs contend that there are "safeguards" to protect the attorneys from assignments of "a dubious nature." They argue that the courts will scrutinize settlement agreements and root out any collusion or fraud, and that any attorney that pursues a meritless legal malpractice claim will be subject to sanctions for frivolous civil proceedings and/or ethical violations under the Rules of Professional Conduct. They even make reference to the statutory provisions that impose criminal penalties for barratry, S.C. Code Ann. § 16-17-10. However, these so-called "safeguards" do not provide effective protection for the attorney-client relationship necessary to preserve the adversarial litigation process.

For each and all of the public policy reasons discussed above, this Court should bar assignment of legal malpractice claims between adversaries in litigation in which the alleged legal malpractice arose:

- to preserve the attorney-client relationship and protect the sanctity of the highly confidential and fiduciary relationship existing between attorney and client;
- to avoid the prospect of creating a commercial marketplace for legal malpractice claims; and
- to prevent the potential for collusion and improper use of assignment in the settlement with the adversary in the underlying action.

E. The Impracticability of a Case-by-Case Analysis

The Plaintiffs argue that none of the public policy concerns justify a wholesale ban on assignments, and propose that the Court should adopt a case-by-case approach: "A party should be free to assign a legal malpractice claim to an adversary unless the

circumstances of the transfer in question violates a clear rule of public policy." [Plaintiffs' Brief, p. 13.] In support of this case-by-case approach, the Plaintiffs make comparisons to the areas of law that allow – but limit – noncompete agreements and restrictive covenants, and contend that the courts are capable of conducting case-by-case analyses of assignments to address any public policy concerns.

As Plaintiffs maintain, our Courts limit freedom of contract on public policy grounds in various circumstances, such as restrictive covenants or covenants not to compete as contracts in restraint of trade and exculpatory agreements limiting liability. *See i.e* Standard Register Co. v. Kerrigan, 238 S.C. 54, 71, 119 S.E.2d 533, 542 (1961)(while contracts in general restraint of trade are void as against public policy; "A covenant not to compete is enforceable if it is not detrimental to the public interest, is ancillary to the sale of a business or profession, is reasonably limited as to time and territory, and is supported by a valuable consideration."); Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987)(restrictive covenants historically disfavored based on public policy view that society's best interests are advanced by encouraging the free and unrestricted use of land; however, courts will enforce them unless they are indefinite or contravene public policy); *see also* Fisher v. Stevens, 355 S.C. 290, 297, 584 S.E.2d 149, 153 (Ct. App. 2003) (exculpatory agreements are held to contravene public policy where they are so broad that they would absolve the defendant from any injury to the plaintiff for any reason).

However, such a case-by-case approach to determining the validity of assignments of legal malpractice claims is impracticable. In one aspect, the validity and enforceability of such covenants is a matter between the parties to the agreements, but in

the case of the type of assignment at issue, the public policy concerns are not directly related to the assignment agreement or relationship of the assignor/defendant and the assignee/plaintiff. Rather, the concerns relate to the subject matter of the assignment – namely, the attorney-client relationship between the assignor defendant and his trial attorney.

The Attorney Defendants submit that fairness and judicial efficiency support the need for a bright line rule – as opposed to a case-by-case standard. If the Court were to adopt a case-by-case analysis, it would create layers upon layers of cases within cases. As a general matter, the typical legal malpractice action is a case-within-a-case in that it encompasses the merits of the underlying action because the client plaintiff must, as an element of proximate case, show that he "most probably would have been successful" in the action if the attorney defendant had not committed the alleged malpractice. Brown v. Theos, 345 S.C. 626, 629, 550 S.E.2d 304, 306 (2001). Having to litigate the validity/enforceability of an assignment of a legal malpractice claim would encompass yet another layer of litigation.

The court would first have to determine the validity of the assignment to decide who is the proper party to proceed with the legal malpractice claim, and then the legal malpractice lawsuit would, in turn, require a virtual mini-trial of the merits of the underlying action. And in cases such as this, where the insurer and bad faith claim(s) are intertwined, the complications would be exponential at great cost to the parties and the judicial system.

CONCLUSION

The Plaintiffs go beyond the District Court's certification order, asking this Court to "suppose" a litany of alleged wrongful actions by both ACE and the Defendant Attorneys during the course of the underlying litigation, and argue that Specialty Logging "insureds should be free to mitigate their damages and look after themselves." [Plaintiffs' Brief, p. 17.] However, such argument misapprehends that the question presented to this Court is not the Specialty Logging Plaintiffs' right to pursue their purported legal malpractice claims against these Defendant Attorneys, but the validity of the assignment of such claims to their adversary in the underlying action as part of the settlement. The Defendant Attorneys respectfully submit that for each and all of the public policy reasons discussed above, this Court should answer the question with a "NO" and bar assignment of legal malpractice claims between adversaries in litigation in which the alleged legal malpractice arose.

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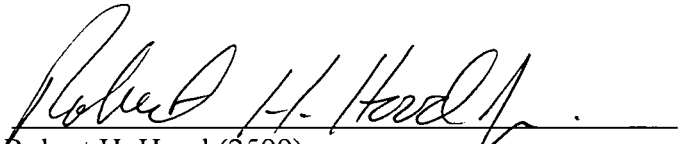

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STATE OF SOUTH CAROLINA
In the Supreme Court

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Honorable J. Michelle Childs, District Judge

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Plaintiffs,

v.

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

Defendants.

Certificate of Service

The undersigned certifies that on this 13th day of March, 2015, a copy of the **BRIEF OF DEFENDANTS BRANTLEY C. ROWLEN AND ERIN LAWSON COIA**, was served by depositing said copy in the U.S. Mail, with sufficient first class postage, on the following counsel at the addresses listed below:

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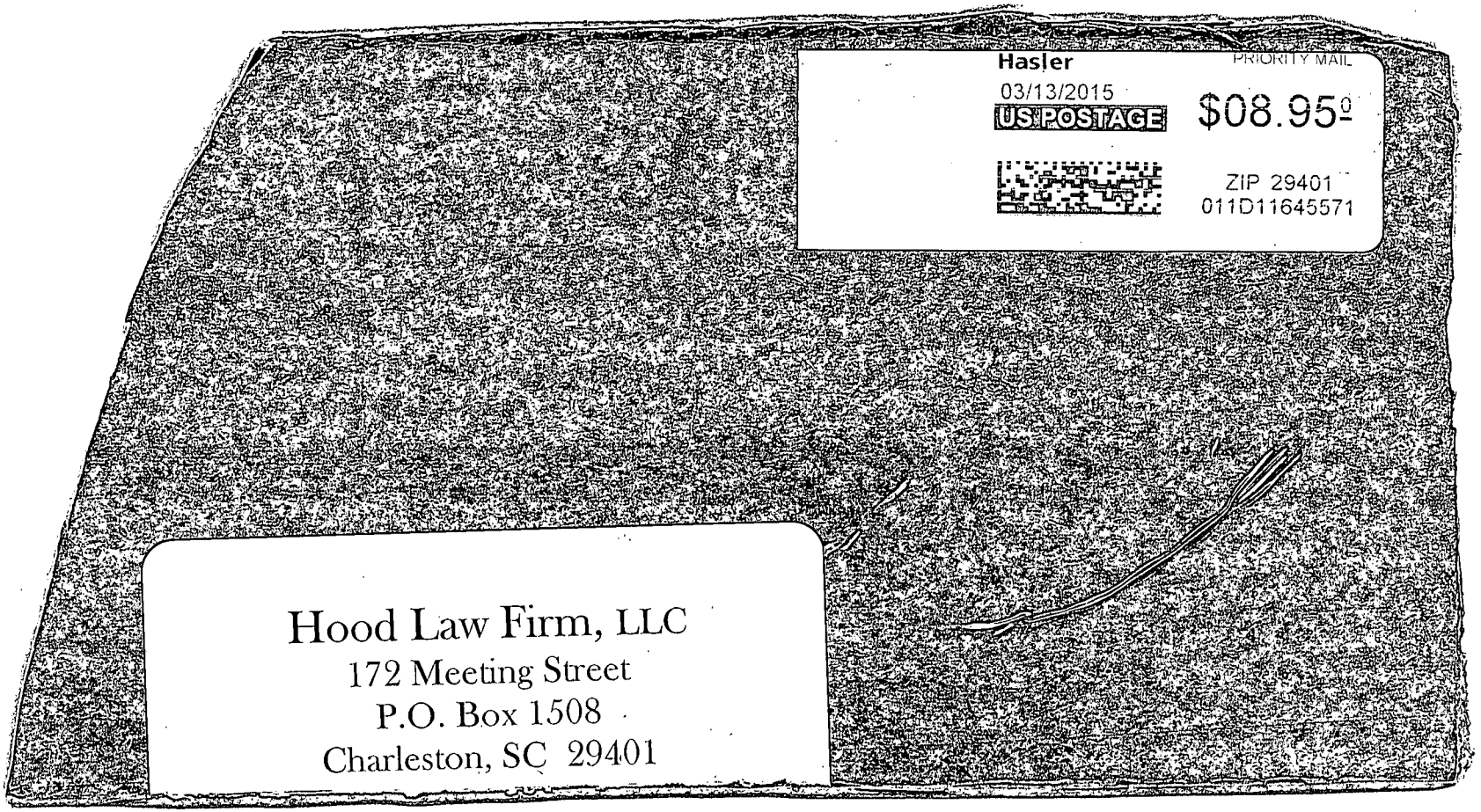
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