Turner | **Padget**

David C. Marshall
E-mail: DMarshall@TurnerPadget.com
Writer's Direct Dial: (803) 227-4293

March 6, 2015

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S.C. Supreme Court

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
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
File No.: 165.300

Dear Mr. Shearouse:

Enclosed please find the following documents:

1. Original and 15 copies of the Brief of Amicus Curiae South Carolina Defense Trial Attorneys' Association;

2. Original and one copy of the Certificate of Counsel; and

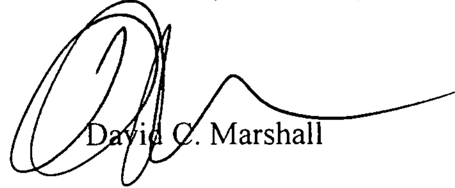
3. Original and one copy of the Proof of Service.

Please file the original documents with your office and return clocked copies to me via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.



David C. Marshall

DCM/tlj
Enclosures
cc: Blake A. Hewitt, Esquire
Mark B. Tinsley, Esquire
Randolph Murdaugh IV, Esquire
Ronald K Wray, II, Esquire
Robert H. Hood, Esquire
Robert H. Hood, Jr., Esquire
Justin Tyler Bamberg, Esquire
Alan Jones, Esquire
(w/enc.)

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

J. Michelle Childs, United States District Judge

Appellate Case No. 2014-001979

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

v.

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

BRIEF OF AMICUS CURIAE SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

David C. Marshall (Bar No. 73760)
Turner Padget Graham & Laney P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

Alan Jones (Bar No. 100141)
McGangus, Goudelock & Courie
2411 North Oak Street, Suite 401
Myrtle Beach, SC 29577-3173
Phone: (843) 848-6000
Fax: (803) 449-2306

ATTORNEYS FOR AMICUS CURIAE
SOUTH CAROLINA DEFENSE TRIAL
ATTORNEYS' ASSOCIATION

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STATEMENT OF ISSUE ON APPEAL

I. CAN A LEGAL MALPRACTICE CLAIM BE ASSIGNED BETWEEN ADVERSARIES IN LITIGATION IN WHICH THE ALLEGED LEGAL MALPRACTICE AROSE?

STATEMENT OF INTEREST

The South Carolina Defense Trial Attorneys' Association ("SCDTAA") was formally organized on November 14, 1968, with a mission to promote justice, professionalism, and integrity in the civil justice system by bringing together attorneys dedicated to the defense of civil actions. Members of SCDTAA consist of defense attorneys practicing law in South Carolina representing individuals, entities, and insurance carriers in all aspects of litigation, including but not limited to insurance defense, professional negligence, and legal malpractice. Because every client has the potential to assert a legal malpractice claim against his or her attorney, SCDTAA and its members have a substantial interest in the issue presented by the certified question of this appeal. Specifically, the issue to be addressed by the Court will determine whether attorneys' clients may assign claims for legal malpractice to their adversaries in litigation. Such decision will affect all attorneys practicing law in South Carolina, including SCDTAA members. SCDTAA is concerned that the Court's decision may result in detrimental and unintended consequences to the legal profession and provide inconsistent and inequitable legal precedent. A decision that would allow legal malpractice claims to be assigned between adversaries in litigation in which the alleged legal malpractice arose is not in the best interest of the legal profession or SCDTAA and its members.

STATEMENT OF THE CASE

The Court accepted this certified question from the United States District Court for the District of South Carolina. SCDTAA understands the underlying facts of the case involve an assignment of a legal malpractice claim between adversaries in litigation in which the alleged malpractice arose. SCDTAA anticipates the parties will set forth detailed statements of the facts underlying the present lawsuit. Rather than summarizing the facts as they are known to SCDTAA, SCDTAA instead adopts the Statement of the Case that has or will be submitted by Defendants.

ARGUMENT

For the reasons set forth below, the Court should answer the certified question, "no." Public policy should preclude the assignment of legal malpractice claims between adversaries because such claims are personal to the client. The policy applies regardless of whether the claims sound in contract or in tort. At the core of these policy considerations are significant practical implications affecting all practicing members of the bar. Combined, these reasons justify the prohibition of assignments of legal malpractice claims between adversaries in litigation. A result that allows assignments on a case-by-case basis does not sufficiently resolve the serious policy concerns and practical ramifications weighing against such assignments.

Under modern common law, it is anachronistic to resolve the issue of assignability of a cause of action by deciding whether such a claim would survive the client's death. Instead, assignment should be permitted or prohibited based on the effect it will likely have on modern society, and the legal system in particular. *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021, 1025 (Ind. 2007) (citation omitted); *Picadilly,*

Inc. v. Raikis, 582 N.E.2d 338, 341 (Ind. 1991), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007). Thus, survivability should not be the sole test. Regarding the assignability of legal malpractice claims specifically, the better approach is to resolve the question on public policy grounds. *Wagener v. McDonald*, 509 N.W.2d 188, 190 (Minn. Ct. App. 1993).

I. Public policy dictates that legal malpractice claims should not be assignable between adversaries in litigation in which the alleged malpractice occurred.

Legal malpractice claims should not be assignable between adversaries litigation for a number of reasons. Policy concerns are the most significant factor weighing against such assignments. These include the potential for a conflict of interest between attorney and client, the compromise of confidentiality, and the negative effect assignments would have on the integrity of the legal profession and administration of justice. *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 744 S.E.2d 130, 134 (N.C. Ct. App. 2013). Additionally, permitting such assignments would encourage the commercialization of such claims. Lastly, because the assignment is made between adversaries in litigation, it requires one party to reverse roles when shifting from the initial claim against the adversary to the subsequent claim against the adversary's attorney, and encourages collusion among the parties to the detriment of the lawyer.

A. Legal malpractice assignments should be prohibited to protect and preserve the sanctity of the attorney-client relationship.

All attorneys practicing law in South Carolina swear an oath to maintain the dignity of the legal system. *See* Rule 402(k)(3), SCACR. To their clients, attorneys pledge faithfulness, competence, and diligence. *Id.* Attorneys further pledge to preserve inviolate the confidences of their clients. *Id.* This is a solemn oath; the requirements are

inflexible. Attorneys are obligated to perform every act necessary to protect, conserve, and advance the interests of their clients. The attorney-client relationship must remain a confidential, fiduciary relationship of the highest character. Our legal system depends on it.

The fiduciary relationship between an attorney and client is a personal and confidential one, requiring the attorney to exercise the utmost degree of fidelity, honesty, and good faith. *Wilson v. Coronet Ins. Co.*, 689 N.E.2d 1157, 1159 (Ill. App. Ct. 1997) (quotation omitted). As a result of the relationship, the attorney owes the client not only the duty to use skill, prudence, and diligence in the rendition of services, but also the duty to act loyally towards the client and to maintain client confidences. *Can Do Pension & Profit Sharing Plan & Successor Plans v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865, 869 (Tenn. 1996).

This Court enforces these rules in order to protect the public, and violations may result in disciplinary actions and/or civil liability for legal malpractice. Allowing free assignment of legal malpractice claims would be a disservice to the public by compromising both the attorney's duty of loyalty and the duty of confidentiality, resulting in a weakened attorney-client relationship. *Id.* Such result would denigrate both the legal profession and the justice system. *Del. CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473, 479 (W. Va. 2003).

Prohibiting such assignments will safeguard the attorney-client relationship, which is an indispensable component of our adversarial system of justice. *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331, 334 (Va. 1998). As noted by the Supreme Court of Indiana:

> Unlike any other commercial transaction, the client-lawyer relationship is structured to function within an adversarial legal system. In order to operate within this system, the relationship must do more than bind together a client and a lawyer. It must also work to repel attacks from legal adversaries. Those who are not privy to the relationship are often purposefully excluded because they are pursuing interests adverse to the client's interests.

Picadilly, 582 N.E.2d at 343-44.

Indeed, South Carolina law generally imposes a privity requirement as a condition to maintaining a legal malpractice claim. *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014) (creating limited exception for third-party beneficiaries of existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent). The privity requirement has traditionally been established by the existence of an attorney-client relationship. *Id.* (citing *Rydde v. Morris*, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009)). This privity requirement would be meaningless if legal malpractice claims were assignable at will.

1. The duty of loyalty.

If allowed, the attorney's duty of loyalty to the client will be compromised by anticipation of the assignment of possible legal malpractice claims. The possibility of assignments, even on a case-by-case basis, places the attorney in the awkward and untenable position of both zealously protecting all of a client's rights and of being concerned that a possible future claim of malpractice could be used to settle a client's case or a client's debt to a stranger. *Roberts v. Holland & Hart*, 857 P.2d 492, 496 (Colo. Ct. App. 1993). If such assignments are permitted, they are sure to become an important "bargaining chip" in the negotiation of settlements – particularly for clients without a deep pocket. *Picadilly* at 343.

Allowing assignments of legal malpractice claims between adversaries would enable one party to drive a wedge between the other party and his lawyer by creating a conflict of interest. *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex. App. 1994). Lawyers involved in settlement negotiations that include a favorable offer to release claims against their clients in exchange for the assignment of the clients' rights to bring a malpractice claim against their attorneys would quickly realize that the interests of their clients were incompatible with their own self-interest. *Picadilly* at 343. This is especially true when the client is financially strapped or judgment proof. This scenario places attorneys in the position of potentially violating their oath and/or the rules of professional conduct in order to protect their own interests. The only way to avoid these conflicts is to prohibit such assignments.

If such assignments are permitted, it will become increasingly more risky for attorneys to represent underinsured, judgment proof defendants. These defendants may well find it harder to find legal representation. As noted by one court:

> [T]he ever present threat of assignment and the possibility that ultimately the attorney may be confronted with the necessity of defending himself against the assignee of an irresponsible client who, because of dissatisfaction with legal services rendered and out of resentment and/or for monetary gain, has discounted a purported claim for malpractice by assigning the same, would most surely result in a selective process for carefully choosing clients thereby rendering a disservice to the public and the profession.

Goodley v. Wank & Wank, 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976).

Injured plaintiffs have every incentive to look beyond underinsured, judgment proof defendants and look for additional sources of funding or insurance coverage. As a result, plaintiffs are sure to seek agreements with defendants to focus on the defense lawyer for monetary recovery if malpractice assignments are allowed. *Zuniga* at 317.

Indeed, it appears that is what happened in the underlying case that serves as the basis of the instant litigation.

This is a fundamental policy concern. The attorney's duty of loyalty is compromised by the undesirable risk of tempering the attorney's zeal for his client with the concern that a present adversary may become the holder of the client's alleged malpractice claim if the client suffers an unsatisfactory result or is judgment proof. As a prospective judgment creditor of the defendant, the former adversary may view the attorney as a source of collection. These concerns can directly or subjectively detract from an attorney's loyalty, dedication, and zeal in pursuing the client's claim. *White v. Auto Club Inter-Ins. Exchange*, 984 S.W.2d 156, 160-61 (Mo. Ct. App. 1998). The risk that allowing assignments of claims would impair an attorney's loyalty would be present not only in those cases in which a client assigned a malpractice claim, but in all other cases as well.

2. The duty of confidentiality.

Not only would these assignments undermine an attorney's duty of loyalty, they are also incompatible with an attorney's duty to maintain client confidentiality. *Wagener,* 509 N.W.2d at 192. Once an assignment is made, the original client loses control of the malpractice claim and is in no position to control the release of confidential information that was otherwise privileged. Rather, the assignee, with little or no concern for the client's sensitivities, controls the claim and dictates how it is prosecuted and what information is released in order to achieve maximum monetary recovery. The client may be harmed as a result of not anticipating this consequence of the assignment. The net effect would erode the attorney-client relationship by discouraging the sharing of

confidential information. As noted by one court:

> 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. A legal malpractice action is not a commodity to be sold to a bidder who has never even had a relationship with the lawyer. The decision to bring a legal malpractice action is one particularly vested in the client. 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. Permitting this sort of alchemy would lead to baseless and excessive legal malpractice claims and would undermine the personal confidence that must exist between lawyers and clients.

Alcman Servs. Corp. v. Bullock, 925 F. Supp. 252, 258 (D.N.J. 1996). For these same reasons, this Court should prohibit the assignment of legal malpractice claims between adversaries in order to preserve and protect the sanctity of the attorney-client relationship.

B. Assignments should be prohibited to prevent the commercialization of legal malpractice claims.

Although many of the policy considerations are intertwined, the commercialization of legal malpractice claims is an additional, independent reason to prohibit such assignments, over and above the negative effects the possibility of assignments will have on the attorney-client relationship. Perhaps the seminal case to address the issue best summarized the concerns in allowing the possibility of such assignments:

> 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.

Goodley, 133 Cal. Rptr. at 87.

In short, permitting the assignment of legal malpractice claims will encourage the commercialization of such claims and lead to baseless and excessive legal malpractice claims, which in turn would burden the legal profession, the court system, and the public. *Del. CWC Liquidation Corp.*, 584 S.E.2d at 478 (collecting cases). Legal malpractice claims should not be relegated to commercial "bargaining chips" in settlement negotiations, and assignments of such claims should be prohibited.

C. Assignments should be prohibited because the parties are adversaries in litigation in which the alleged malpractice arose, requiring a distasteful reversal of roles and increasing the likelihood of collusion.

A number of other jurisdictions have addressed the issue of assignability of legal malpractice claims. Although a majority of courts prohibit all such assignments and a minority of courts allow such assignments on a case-by-case basis, these courts generally agree that assignments should not be permitted between adversaries in litigation. *See, e.g., Kim v. O'Sullivan,* 137 P.3d 61 (Wash. Ct. App. 2006) ("A client may not assign a claim of attorney malpractice to his adversary in the litigation out of which the alleged malpractice arose."); *Zuniga*, 878 S.W.2d at 318 ("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 gives them a financial

interest in switching."); *Picadilly*, 582 N.E.2d at 344 (citing the "disreputable public role reversal that would result during the trial" if assignments between adversaries were permitted); *Coffey v. Jefferson County Bd. of Educ.*, 756 S.W.2d 155, 157 (Ky. Ct. App. 1988) (holding an assignment to an adversary void as against public policy and the entire transaction involving a confession of judgment "so collusive that same should be held to be against public policy").

This is true even in states that have adopted the minority, case by case, approach. *See, e.g., Kommavonga v. Haskell*, 67 P.3d 1068, 1078 (Wash. 2003) ("In sum, 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."); *Edens Techs., LLC v. Kile Goekjian Reed and McManus, PLLC*, 675 F. Supp. 2d 75 (D.D.C. 2009) (invalidating an agreement to assign legal malpractice claim between adversaries in litigation based on public policy considerations).

There are several policy reasons for prohibiting assignments between adversaries in litigation in which the alleged legal malpractice arose. To begin, the "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." *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 174 (Conn. 2005). Additionally, assignments between adversaries in litigation provide an "opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation." *Kommavonga* at 1078. "[S]uch a

stipulated judgment cannot properly serve as an indication of the actual damages, if any there were, as a result of the legal malpractice." *Id.* (citing *Coffey*, 756 S.W.2d at 156-57).

Further, "[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." *Id.* For this reason, courts have expressly denounced the scenario where a party confesses judgment in favor of his adversary and then assigns to his adversary the right to sue the party's lawyer for legal malpractice. *See, e.g., Wagener*, 509 N.W.2d at 191 (describing the assignment and confession scenario as a "contrived and elaborate scheme"); *Coffey*, 756 S.W.2d at 157 (referring to a settlement involving an assignment of a legal malpractice claim to an adversary and a confession of judgment as a "contrived and elaborate scheme" that is "so collusive that same should be held to be against public policy).

The precise issue before the Court is whether legal malpractice claims can be assigned *between adversaries in litigation in which the alleged malpractice claim arose.* Regardless of other courts' split concerning the more broad issue of assignability of legal malpractice claims in general, the Court should most assuredly answer the certified question "no" in this case, prohibiting assignments between adversaries in litigation in which the alleged malpractice arose.

II. Serious practical implications and ramifications weigh in favor of prohibiting assignments of legal malpractice claims between adversaries in litigation.

The policy concerns set forth above are legitimate and not merely apocryphal. Defense attorneys practicing in South Carolina routinely handle cases where a time-limit

settlement demand is made for the defendant's insurance policy limits pursuant to *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E.2d 346 (1953). The attorney, working within the confines of the tripartite relationship, owes duties to both the client and the insurer. It is a complicated relationship. If the defense lawyer is faced with the possibility of his or her client assigning a legal malpractice claim to the plaintiff, it creates an untenable conflict of interest between the lawyer and client. Acceptance of a settlement offer which includes an agreement to assign a claim of legal malpractice may be in the client's best interests to limit liability and protect assets. However, acceptance of the settlement offer would have significant negative consequences for the defense lawyer. Nevertheless, the attorney has sworn an oath to faithfully and diligently represent the client, which may include a recommendation that the client accept the offer. What is the lawyer to do?

If such assignments are permitted, even on a case-by-case basis, it would likely lead to the defensive practice of law. Defense attorneys would have an incentive to inflate case evaluations provided to insurers so the carriers would be more likely to accept time-limit demands, based on their own personal fear that declining such offers may result in a legal malpractice claims against the lawyer, prosecuted by the very parties (and their attorneys) who made the settlement demands. As a result, carriers may increase the cost of insurance premiums or decline to write coverage in South Carolina because of the unfair cost of doing business. Just as the defensive practice of medicine likely does not promote patient safety or the efficiency of the healthcare system, the defensive practice of law has similar adverse consequences to the legal profession, the court system, and the public. Attorneys should not be placed in the position of having to

choose between adhering to their sworn oath to their clients and protecting their own personal interests.

Perhaps an example would be illustrative. Imagine a defendant with limited automobile insurance coverage that causes an accident injuring multiple people. Imagine liability is clear and the defendant's insurance carrier retains a lawyer to represent the defendant. Imagine three plaintiffs file suit against the defendant, all of whom have medical expenses in excess of the total insurance policy limit. Imagine all three plaintiffs make a time-limit demand for the defendant's full policy limit. Imagine the defendant is unable to settle all three claims within the policy limit. Imagine the defendant has little or no assets, and is essentially judgment proof. Imagine that on the eve of trial, the defendant is offered a covenant not to execute in exchange for a confession of judgment and agreement assigning a bad faith claim against the defendant's insurer.

This type of scenario happens all the time, and the defendant has every incentive to accept the proposed settlement, regardless of the merit of the bad faith claim. Now imagine the proposed settlement also included an additional agreement assigning a legal malpractice claim against the defendant's attorney. The defendant would still have every incentive to accept the proposed settlement. Doing so affords the client the best possible protection at the expense of the defense lawyer, whom the client did not select, does not pay for, and owes no loyalty under the tripartite relationship. What attorney would choose to accept these types of cases, or cases involving judgment proof defendants with minimum insurance limits and significant personal injuries on the other side, only to have the specter of a legal malpractice assignment be a potential source of recovery for the plaintiff? Indeed, it may be harder for these types of clients to find legal representation

because attorneys will be selective and cautious of becoming targets of their clients' adversaries.

The consequences of legal malpractice assignments are not, however, limited to just defense attorneys. Imagine a case where the defendant offers to settle for a relatively small amount, and the plaintiff accepts the offer. Imagine that after the settlement is finalized, the defendant approaches the plaintiff and tells him or her that there were additional bad facts that went undiscovered or unnoticed by the plaintiff's lawyer which would have drastically increased the value of the case, and seeks an assignment of a legal malpractice claim against the plaintiff's lawyer with an agreement to split the proceeds of such claim with the plaintiff. Doing so would allow the plaintiff to increase his or her recovery and the defendant to offset the defense costs and settlement amounts already paid. Such a scenario is not that farfetched if legal malpractice claims are permitted to be assigned among adversaries in litigation. Yet this type of scenario involves the distasteful role reversal of the defendant, who benefited from the alleged malpractice and then criticizes the opposing lawyer for not conducting sufficient discovery, taking the right depositions, or asking the right questions that would have led to the discovery of the bad facts and increased the value of the case.

These are just some possible scenarios demonstrating the adverse consequences of permitting legal malpractice assignments, affecting all attorneys practicing law in South Carolina. The possibility of assigning legal malpractice claims on case by case basis creates the legitimate risk of a dramatic increase in settlement proposals with such assignments. The claims would indeed become "bargaining chips" in settlement negotiations, regardless of validity. Such assignments should not be allowed because

savvy lawyers would ensure there is no evidence of collusion between the parties in obtaining the assignment. Although the agreements would be subject to review on a case-by-case basis, courts would have no objective evidence to rule the agreements invalid. The system would be ripe for abuse. Accordingly, the Court should universally prohibit assignments between adversaries in litigation.

Under the current state of the law in South Carolina, some parties are actively seeking, attempting to obtain, and obtaining assignments of legal malpractice claims between adversaries in litigation. In addition to the original case underlying the instant lawsuit giving rise to this certified question, SCDTAA is aware of other instances where legal malpractice claims have been assigned or attempted to be assigned.

In *Pavilion Development Corp. v. Nexsen Pruet, LLC*, Civil Action No. 2011-CP-10-05774, a law firm's client assigned a legal malpractice claim against the law firm to its adversary in the litigation in which the alleged malpractice occurred. The defendant received summary judgment on the alleged legal malpractice claim upon the trial court's finding that the assignment was void as against public policy. The case is currently on appeal. *See* Order Granting Summary Judgment, attached hereto as Exhibit A.

Likewise, in *Bales v. Martinez*, 2010-CP-10-8631, the plaintiff moved for judicial assignment of any potential bad faith claim and claim for legal malpractice held by the defendant, who was allegedly served with the lawsuit, forwarded it to his insurance carrier, and held in default when no responsive pleading was filed. The plaintiff sought the assignment upon the belief that the insurance company and defense lawyer failed to defend the case and protect the defendant's interests, subjecting him to personal exposure. When the plaintiff was unable to obtain the assignment directly from the

defendant, the plaintiff moved for judicial assignment of said claims. It does not appear the trial court ever ruled on the motion, and the case ultimately settled. *See* Motion for Assignment of Claims to Fulfill Judgment, filed November 30, 2012, attached hereto as Exhibit B.

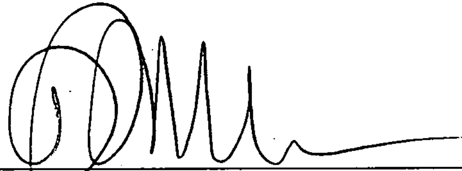
These are just a few examples known to SCDTAA where parties sought or obtained assignments of legal malpractice claims between adversaries in litigation. There are others. The policy and practical considerations raised by allowing assignments of legal malpractice claims between adversaries in litigation are legitimate and present in South Carolina. They affect all members of the practicing bar, including SCDTAA and its members. The Court should preserve and protect the legal profession and judicial system by prohibiting assignments of legal malpractice claims between adversaries in litigation in which the alleged malpractice occurred.

CONCLUSION

Permitting assignments of legal malpractice claims between adversaries in litigation would cause immeasurable damage to attorney-client relationships, to the tort system, to the court system, and to the public's sense of justice. It would give too much substance to the cynical belief, held by some, that lawyers will take any position, depending on where the money lies, and that litigation is a mere game and not a search for truth. *Botma v. Huser*, 39 P.3d 538, 542 (Ariz. Ct. App. 2002) (quotations omitted). It would relegate the legal malpractice action to the marketplace, which would encourage unjustified suits, increase legal malpractice litigation and insurance premiums, and force attorneys to defend themselves against strangers. *Moorehouse v. Ambassador, Inc.*, 383 N.W.2d 219, 221 (Mich. Ct. App. 1985). Accordingly, the Court should prohibit the

assignability of legal malpractice claims between adversaries in litigation in which the alleged malpractice arose.

Respectfully submitted,



March 6, 2015 By: ______________________________

David C. Marshall (Bar No. 73760)
Turner Padget Graham & Laney P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

Alan Jones (Bar No. 100141)
McGangus, Goudelock & Courie
2411 North Oak Street, Suite 401
Myrtle Beach, SC 29577-3173
Phone: (843) 848-6000
Fax: (803) 449-2306

ATTORNEYS FOR AMICUS CURIAE
SOUTH CAROLINA DEFENSE TRIAL
ATTORNEYS' ASSOCIATION

EXHIBIT A

2013 WL 5925732 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Ninth Judicial Circuit
Charleston County

PAVILION DEVELOPMENT CORP. & Larry Mcnair, Plaintiffs,
v.
NEXSEN PRUET, LLC, Defendant,
v.
DC & SONS, LLC, Counterclaim Defendant.

No. 2011CP1005774.
October 9, 2013.

Order

J.C. Nicholson, Jr., Judge.

*1 This matter is before the Court on Defendant Nexsen Pruet LLC's motion for summary judgment. Nexsen Pruet seeks an order granting summary judgment in its favor as to all causes of action in the complaint and counterclaim on the ground that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy.

The motion was heard on March 13, 2013. Elizabeth Van Doren Gray and Tina Cundari of Sowell Gray Stepp & Laffitte, LLC, appeared on behalf of Nexsen Pruet. Andrew K. Epting, Jr., and George Kefalos appeared on behalf of Pavilion Development Corporation and Larry McNair (Plaintiffs) and on behalf of Counterclaim Defendant DC & Sons, LLC (DC & Sons). After considering the arguments presented by counsel and the written memoranda filed, the Court grants Nexsen Pruet's motion for summary judgment. The Court finds that this case, although brought in the name of Plaintiffs, is proceeding pursuant to an assignment of a legal malpractice claim from Plaintiffs to DC & Sons. The Court concludes the assignment in this case is void as against public policy because it is an assignment between adversaries in litigation. Judgment is entered in favor of Nexsen Pruet.

BACKGROUND

This is a legal malpractice case. Pavilion Development Corporation and Larry McNair have sued Nexsen Pruet, LLC for legal malpractice that allegedly arose in litigation between Plaintiffs and DC & Sons. The litigation between Plaintiffs and DC & Sons began in 2007, when Plaintiffs sued DC & Sons for specific performance of a contract to purchase a piece of property at Shem Creek. [Compl. ¶ 13.] At the same time that they filed the complaint, Plaintiffs filed a notice of lis pendens. *Id.* Plaintiffs subsequently amended the complaint, dropping the cause of action for specific performance and pursuing claims for breach of contract and an equitable lien only. [Compl. ¶ 22.] Plaintiffs maintained the lis pendens, however, which DC & Sons alleged constituted an abuse of process. [Compl. ¶¶ 15, 23, 25.]

Plaintiffs were represented by Nexsen Pruet from the beginning of the case until April 2009, when Nexsen Pruet was permitted to withdraw as counsel by order of the court. [Wallace Aff., Jan. 14, 2013, ¶¶ 3, 6, 7.] The court permitted Nexsen Pruet to withdraw as counsel because Nexsen Pruet's lawyers had become witnesses to the facts of the case due to the allegations of abuse of process. [Id. ¶¶ 6, 7.] Attorney Dan David was substituted as counsel for Plaintiffs. [Wallace Aff., Oct. 19, 2011, ¶¶ 7, 8.] DC & Sons was represented throughout the case by Andrew K. Epting, Jr., and George Kefalos, who represent DC & Sons in this action as well. [Wallace Aff., Jan. 14, 2013, ¶ 4.]

On January 18, 2011, nearly twenty-one months after Nexsen Pruet withdrew as counsel, Plaintiffs and DC & Sons settled

the case. [Exs. A and B, Nexsen Pruet's Mem. in Supp. of Summ. J.] The settlement was reached during a court recess on what was to be the first day of J trial. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Jan. 18, 2011, Hr'g Tr. p. 14.] The recess was taken after DC & Sons argued its motion for summary judgment. *Id.* at pp. 13, 14. The trial judge stated that he intended to enter judgment in favor of DC & Sons. *Id.* The parties asked for time to see if they could reach an agreement. *Id.*

The Settlement

*2 The terms of the settlement reached between Plaintiffs and DC & Sons are as follows. First, Pavilion Development Corporation (Pavilion) confessed judgment in favor of DC & Sons for $4,580,015.93. [Ex. A, Nexsen Pruet's Mot. for Summ. J.] In exchange, Plaintiffs received a release of personal liability of Larry McNair and Lowell Frazier, the principals of Pavilion, and a waiver of trial against Pavilion on punitive damages. *Id.* Second, the parties entered into an agreement in which Plaintiffs assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty, as well as the right to elect to own the claims themselves. *Id.* Plaintiffs also gave DC & Sons the right to control the litigation, including trial, appeal, settlement, and the waiver of the attorney-client and work-product privilege with Nexsen Pruet. *Id.*

The pertinent terms of the agreement are as follows:

· "Pavilion and McNair assign to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties."

· "At DC & Sons election Pavilion and McNair assign all claims to include [breach] of contract, breach of fid[uciary] duty, professional negligence, etc."

· "Further, Pavilion and McNair place full control of the said litigation in the hands of DC & Sons, to include the handling of the litigation, trial, appeal, settlement, and the waiver of the attorney-client and work-product privilege with the Nexsen Pruet firm."

· "Further, Pavilion and McNair agree to cooperate in the prosecution of this action and to pursue the litigation as if they retained the right to all proceeds."

· "The cost of the litigation will be borne by DC & Sons alone."

· "Pavilion and McNair acknowledge [that the] suit will be brought in their names."

· "Pavilion and McNair direct that the earnest money [$50,000] plus interest shall be turned over to DC & Sons and their counsel."

· "DC & Sons agree that in the event of a settlement or judgment that the first $250,000 will be split equally between DC & Sons and Pavilion and McNair so as to defray their defense cost and compensation for loss of business and emotional distress. All further funds shall be for the benefit of DC & Sons."

Id.

After reaching an agreement, the parties went back on the record. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Hr'g Tr., Jan. 18, 2011, p. 14.] Counsel for DC & Sons announced to the court that the case had been settled. *Id.* Counsel for DC & Sons summarized the terms of the settlement by stating that "the effective deal is Mr. McNair is relieved from liability," and that Pavilion confessed judgment in the amount of $4,580,015.93, which according to counsel for DC & Sons, represented the actual damages to DC & Sons. *Id.* When the court asked how the amount was determined, counsel for DC & Sons provided an explanation "from memory," without submitting any evidence or testimony. *Id.* at pp. 15-16. Although counsel for DC & Sons told the court that claims and proceeds had been assigned to DC & Sons, he did not say which claims or which proceeds, and did not tell the court that the assignment was an assignment to DC & Sons of all proceeds from a legal malpractice case to be brought against Nexsen Pruet, and that it gave DC & Sons full control over the litigation, including the

right to elect to own the very claims themselves. *Id.* at p. 14.

When the trial judge asked counsel for DC & Sons how the assignment should be reflected in the Form 4 order, counsel for DC & Sons stated that the assignment was handwritten and did not need to be reflected in the Form 4 Order. *Id.* at p. 17. The court then suggested that the Form 4 Order state merely that the case has been settled and the amount of damages was put on the record. *Id.* at pp. 17-18. Counsel for DC & Sons agreed. *Id.* at p. 18.

The Present Case

*3 As contemplated in the agreement between Plaintiffs and DC & Sons, Nexsen Pruet has now been sued for legal malpractice and breach of fiduciary duty. [Compl.] The case was filed on August 16, 2011, and has been brought in the names of Pavilion Development Corporation and Larry McNair. *Id.* The assignment was not attached to or otherwise referenced in the complaint. *Id.* Plaintiffs are now represented by Andrew K. Epting, Jr., and George J. Kefalos, the very same lawyers who represented DC & Sons in the litigation between Plaintiffs and DC & Sons, and who represent DC & Sons in this action. *Id.*

Nexsen Pruet answered the complaint and asserted a counterclaim for declaratory judgment against Plaintiffs and a new party, DC & Sons, which was added to the case by Nexsen Pruet as a counterclaim defendant. [Ans. & Countercl.] Among other things, the counterclaim seeks an order declaring the assignment void as against public policy. Plaintiffs and DC & Sons moved to dismiss the counterclaim. [Mots, to Dismiss, Nov. 2, 2011, and Nov. 21, 2011.] Following a hearing, the court denied the motions to dismiss, allowing the counterclaim against Plaintiffs and DC & Sons to proceed. [Order, Apr. 26, 2012.]

On January 14, 2013, Nexsen Pruet filed a motion for summary judgment arguing, among other things, that judgment should be entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim on the basis that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy.

STANDARD

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Singleton, 311* S.C. at 197-98, 659 S.E.2d at 203. "The nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* at 198, 659 S.E.2d at 203.

An assignment is a contract, and the question of whether it is void as against public policy is a question of law. ("The interpretation of a contract is an action at law."). *See also Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 167 (Conn. 2005) ("The question of whether an assignment is barred as a matter of public policy is an issue of law."); *Comet Energy Servs., LLC v. Powder River Oil & Gas Ventures, LLC*, 185 P.3d 1259, 1261 (Wyo. 2008) ("Assignments are contracts and are construed according to the rules of contract interpretation.").

LAW / ANALYSIS

Nexsen Pruet contends that summary judgment should be granted in its favor as to all causes of action in the complaint and counterclaim because this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy. Nexsen Pruet further contends that the circumstances under which this case arose are tainted with collusion, and the taint cannot be cured by simply striking the assignment and allowing the case to proceed as filed. The Court agrees.

I. Assignment of Legal Malpractice Claims

A. Law

*4 South Carolina appellate courts have not addressed the question of whether a legal malpractice claim is assignable. Courts in other jurisdictions have.

1. The majority view

The majority view is that legal malpractice claims are not assignable because they are void as against public policy. The following states have adopted the majority view: **Arizona,** *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002); **California,** *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83 (Cal. Ct. App. 1976); **Colorado,** *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. Ct. App. 1993); **Florida,** *Law Office of David J. Stern v. Sec. Nat'l Servicing Corp.*, 969 So.2d 962 (Fla. 2007); **Illinois,** *Wilson v. Cornet Ins. Co.*, 689 N.E.2d 1157 (Ill. 1997), *but see Learning Curve Intern., Inc. v. Seyfarth Shaw LLP*, 911 N.E.2d 1073 (Ill. App. 2009) (allowing an assignment as part of a transfer of assets in a merger); **Indiana,** *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991) and *State Farm Fire Mut. Auto Ins. Co. v. Estep*, 873 N.E.2d 1021 (Ind. 2007); **Kansas,** *Bank IV Wichita, Nat'l Ass'n v. Am, Mullins, Unruh, Kuhn & Wilson*, 827 P.2d 758 (Kan. 1992); **Kentucky,** *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) and *Coffey v. Jefferson County Bd. of Educ*, 756 S.W.2d 155 (Ky. Ct. App. 1988); **Michigan,** *Joos v. Drillock*, 338 N.W.2d 736 (Mich. Ct. App. 1983); **Minnesota,** *Wagener v. McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993); **Missouri,** *Freeman v. Basso*, 128 S.W.3d 138 (Mo. Ct. App. 2004); **Nebraska,** *Earth Science Laboratories, Inc. v. Adkins and Wondra, P.C.*, 523 N.W.2d 254 (Neb. 1994); **Nevada,** *Chaffee v. Smith*, 645 P.2d 966 (Nev. 1982); **New Jersey,** *Alcman Servs. Corp. v. Samuel H. Bullock, P.C.*, 925 F. Supp. 252 (D.N.J. 1996) *aff'd, 12A* F.3d 185 (3d Cir.1997); **Tennessee,** *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865 (Tenn. 1996); **Virginia,** *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331 (Va. 1998); **West Virginia,** *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473 (W. Va. 2003). *See also* 6 Am. Jur. 2d *Assignments* § 57 (2012) ("Most jurisdictions have held that legal malpractice claims are nonassignable."). **North Carolina** recently adopted the majority view. *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, __ S.E.2d ___, 2013 WL 1876777 (N.C. Ct. App. May 7, 2013).

Several public policy reasons have been recognized for prohibiting such assignments. "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*, 584 S.E.2d 473 (W. Va. 2003). Assignments of legal malpractice claims are incompatible with the duty of loyalty and duty of confidentiality owed by attorneys to their clients, and "the unique and personal nature of the relationship between an attorney and a client and the need to preserve the sanctity of that relationship" counsel against permitting such assignments. *Gurski v. Rosenblum & Filan*, LLC, 885 A.2d 163 (Conn. 2005). Assignments of legal malpractice claims "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." *Goodley v. Wank& Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976).

*5 Additional reasons cited for prohibiting the assignment of legal malpractice claims are that they "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." *Id.* Allowing legal malpractice claims to be assigned "would encourage the commercialization of such claims and in turn spawn increased and unwarranted malpractice actions." *Gurski*, 885 A.2d at

170. Finally, allowing such assignments "would make attorneys hesitant to represent insolvent, underinsured or judgment proof defendants for fear that the malpractice claims would be used as tender." *Id.*

2. The minority view

A minority of jurisdictions have declined to adopt a *per se* bar against the assignment of legal malpractice claims but have instead taken a case-by-case approach in evaluating whether a particular assignment is void. These include **Connecticut**, *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163 (Conn. 2005); **District of Columbia**, *Richter v. Analex Corp.*, 940 F. Supp. 353 (D.D.C. 1996); **Georgia**, *Villanueva v. First Am. Title Ins. Co.*, 740 S.E.2d 108, 111 (Ga. 2013)1 **Maine**, *Thurston v. Cont'l Cas. Co.*, 567 A.2d 922 (Me. 1989); **Massachusetts**, *New Hampshire Ins. Co., Inc. v. McCann*, 707 N.E.2d 332 (Mass. 1999); **New York**, *Vitale v. City of New York*, 183 A.D.2d 502, (N.Y. App. Div. 1992); **Oregon**, *Gregory v. Lovlien*, 26 P.3d 180 (Or. Ct. App. 2001); **Pennsylvania**, *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 539 A.2d 357 (Pa. 1988); **Rhode Island**, *Cerberus Partners, L.P.* v. *Gadsby & Hannah*, 728 A.2d 1057 (R.I. 1999); Texas, *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. 1994); and **Washington**, *Kommavongsa v. Haskell*, 67 P.3d 1068, 1078 (Wash. 2003). *See also St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 293 P.3d 661 (Idaho 2013) (holding that "while legal malpractice claims are generally not assignable, where the legal malpractice claim is transferred to an assignee in a commercial transaction, along with other business assets and liability, such a claim is assignable.").

3. Assignments between adversaries in litigation.

Although there is division among courts as to whether to adopt an absolute bar against the assignment of legal malpractice claims or to take a case-by-case approach, courts uniformly hold that assignments between adversaries in litigation in which the alleged legal malpractice arose are void as against public policy. *See, e.g., Kim v. O'Sullivan*, 137 P.3d 61 (Ct. App. Wash. 2006) ("A client may not assign a claim of attorney malpractice to his adversary in the litigation out of which the alleged malpractice arose."); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. Ct. App. 1994) ("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 given them a financial interest in switching."); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991) (citing the "disreputable public role reversal that would result during the trial" if assignments between adversaries were permitted), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007); *Coffey v. Jefferson Cnty. Bd. of Educ*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (holding an assignment to an adversary void as against public policy and the entire transaction involving a confession of judgment "so collusive that same should be held to be against public policy"). This is true even in states that have adopted the minority, case-by-case approach. *See Kommavongsa v. Haskell*, 67 P.3d 1068, 1078 (Wash. 2003) ("In sum, 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.").

*6 There are several reasons for prohibiting assignments between adversaries in litigation in which the alleged legal malpractice arose. To begin, the "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." *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 174 (Conn. 2005). Additionally, assignments between adversaries provide an "opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation." *Kommavongsa*, 67 P.3d at 1078. "[S]uch a stipulated judgment cannot properly serve as an indication of the actual damages, if any there were, as a result of the legal malpractice." *Id.* (citing *Coffey*, 756 S.W.2d at 156-57).

As one court has explained:

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. A legal malpractice action is not a commodity to be sold to a bidder who has never even had a relationship with the lawyer. The decision to bring a legal malpractice action "is one peculiarly vested in the client." ... 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.

If assignments were permitted, we suspect that they would become an important bargaining chip in the negotiation of settlements.

Alcman Servs. Corp. v. *Bullock, P.C.*, 925 F. Supp. 252, 258 (D.N.J. 1996) (internal citations omitted).

Further, "[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*, 67 P.3d at 1078. Additionally, "to permit such assignments would make lawyers hesitant to accept the defense of defendants who are judgment-proof or nearly so, and who are uninsured or underinsured." *Id.* Moreover, because legal malpractice cases present a "trial within a trial," an assignment to an adversary "arising from the same litigation that gave rise to the malpractice claim would lead to abrupt and shameless shift of positions that would give prominence (and substance) to the perception 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, thereby demeaning the legal profession." *Id.*

Finally, courts have expressly denounced the scenario where a party confesses judgment in favor of his adversary and then assigns to his adversary the right to sue the party's lawyer for legal malpractice. *See Wagener v. McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993) (describing the assignment and confession scenario as a "contrived and elaborate scheme" that has been denounced by other courts); *Coffey v. Jefferson Cnty. Bd. of Educ*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (referring to a settlement involving an assignment of a legal malpractice claim to an adversary and a confession of judgment as a "contrived and elaborate scheme" that is "so collusive that same should be held to be against public policy").

B. Analysis

The present case involves a confession of judgment and an assignment of a legal malpractice claim between adversaries in litigation in which the alleged legal malpractice arose. To settle the litigation with DC & Sons, Pavilion confessed judgment in the amount $4,580,015.93 in exchange for a release of personal liability as to Pavilion's principals, Larry McNair and Lowell Frazier. Pavilion did so without challenging the amount or requiring DC & Sons to present evidence to support it. Plaintiffs then assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty, and assigned the right to elect to own the claims themselves. Plaintiffs gave DC & Sons complete control over the malpractice case, including the trial, appeal, and settlement, and the power to waive the attorney-client privilege and work-product protection. Plaintiffs agreed to cooperate in the prosecution of the malpractice case and to pursue the litigation as if they retained the right to the proceeds. Plaintiffs acknowledged that the suit would be brought in their names but that the cost of the litigation would be borne by DC & Sons alone.

*7 This scenario has been expressly denounced by other courts, and the Court denounces it here. Plaintiffs and DC & Sons have converted the legal malpractice action into a commodity to be exploited and transferred to an economic bidder (DC & Sons) that Nexsen Pruet has never represented or owed any legal duties to. By placing full control of the litigation against Nexsen Pruet in the hands of DC & Sons and their counsel, including the right to waive the attorney-client privilege between Plaintiffs and Nexsen Pruet, 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. Accordingly, the Court concludes that the assignment is void as against public policy.

In their opposition to Nexsen Pruet's motion for summary judgment, Plaintiffs do not defend the validity of the assignment or argue that it is not void as against public policy. Instead, Plaintiffs argue that they have not assigned the claims to DC & Sons, but rather have assigned only a portion of the proceeds, and argue that they remain the real parties in interest. This is contrary to the plain language of the assignment.

According to the plain language of the assignment, the proceeds have been assigned to DC & Sons. The assignment states: "Pavilion and McNair assign to DC & Sons *all proceeds* from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties." [Ex. A, Nexsen Pruet's Mot for Summ. J.] The assignment also

states: "[Pavilion and McNair] agree to cooperate in the prosecution of this action and to pursue the litigation *as if they retained the right to all proceeds.*" *Id.* There is nothing unclear or ambiguous about the language in the assignment. Additionally, the assignment states: "At DC & Sons election, Pavilion and McNair assign all claims to include [breach] of contract, breach of fid[uciary] duty, professional negligence, etc." *Id.* This "right to elect" reinforces the fact that DC & Sons is in control and has the right at any time and without any notice to own the very claims themselves. DC & Sons simply has to say when.

The fact that DC & Sons agreed to give half of the first $250,000 received in its pursuit of this action to Plaintiffs does not change the fact that DC & Sons owns the right to the proceeds. DC & Sons has simply agreed to allocate the proceeds in a way that gives Plaintiffs some nominal interest in the case, in an attempt to avoid the conclusion that an assignment of a legal malpractice claim has occurred. At most, Plaintiffs stand to receive $125,000 - $50,000 of which represents the money they have already directed to be paid to DC & Sons in settlement of the prior case - when there is allegedly $4,580,015.93 at stake. Plaintiffs' interest represents 2.7% of the total damages alleged. When the $50,000 in earnest money is taken into account, Plaintiffs' interest diminishes to 1.637%. This is far less than the interest held by assignors in other cases, and yet the courts in those cases have held that an illegal assignment had occurred. *See Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) (holding that an illegal assignment had occurred even though the assignor retained a 20% interest in the proceeds); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000) (holding that an assignment had occurred even though the assignor retained a 10% interest in any net recovery). Accordingly, the Court concludes that DC & Sons is the party that has the real, actual, material, and substantial interest in this case.

Moreover, the control that DC & Sons has over this case overcomes Plaintiffs' argument that only a portion of the proceeds has been assigned. Similar arguments have been made in other courts and rejected. For example, in one case the plaintiffs, conceding that Arizona law would not permit the assignment of the claim itself and in an effort to circumvent the prohibition, argued that only the proceeds of the action had been assigned, and not the cause of action itself. *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002). In rejecting this argument, the court stated:

*8 Whatever the form, whatever the label, whatever the theory, the result is the same. The policies create an interest in any recovery against a third party for bodily injury. Such an arrangement, if made or contracted for prior to settlement or judgment, is the legal equivalent of an assignment and therefore unenforceable.

Id. at 542.

Similarly, in another case, the plaintiff argued that only the proceeds had been assigned and that an assignment of the malpractice claim itself had not occurred. *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010). But after examining the substance of the agreement, the court disagreed. In holding that the legal malpractice claim had been assigned, the court stated:

This level of control over a lawsuit is consistent with an assignment of the entire cause of action, not merely the proceeds of the litigation. The terms of this settlement agreement essentially placed the control of the malpractice suit in [the assignee's] hands and rendered [the assignor's] interest merely nominal. Though [the parties to the agreement] assert otherwise, what has occurred is an assignment not merely of the proceeds of the claim against [the lawyer], but of the entire claim itself.

Id. at 91 (internal citations omitted).

Applying this same principle of looking to the substance of the agreement, courts in other jurisdictions have reached similar conclusions. *See Kim v. O'Sullivan*, 137 P.3d 61 (Wash. App. 2006) (holding that an assignment of a legal malpractice claim had occurred because the assignee and his attorney were in complete control of the malpractice suit and only they would benefit from a settlement or judgment); *Gurski v. Rosenblum &Filan, LLC*, 885 A.2d 163 (Conn. 2005) (stating "we agree with those courts that have identified the 'meaningless distinction' between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments"); *Weiss v. Leatherberry*, 863 So.2d 368 (Fla. Dist. Ct. App. 2003) (recognizing that the rule prohibiting the assignment of legal malpractice claims "has been applied even in the absence of a formal assignment of the claim"); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000) (holding that an assignment had occurred despite the fact that the assignor retained a ten percent interest in any net recovery because the assignor gave his former adversary "absolute control over the litigation, including the unfettered right to settle the malpractice suit on such terms as

[the adversary] determines").

Finally, Plaintiffs have all but admitted that an illegal assignment has occurred. On March 21, 2013, eight days after the hearing before this Court on Nexsen Pruet's motion for summary judgment, Plaintiffs and DC & Sons arranged a hearing before The Honorable Roger Young for the purpose of presenting an amended settlement agreement. [Tr. dated Mar. 21, 2013.] In the proposed amended settlement agreement, titled "Amended Agreement re: Assignment," Plaintiffs state: "the parties to the settlement wish to remove from the settlement the right of control by DC & Sons and to remove the right of assignment of proceeds or claims ...." [Ex. D, Pls.' Sur-Reply to Def. Nexsen Pruet's Mem. in Supp. of Summ. J.] By stating that the parties wish to remove the right of assignment of proceeds or claims, Plaintiffs appear to have conceded that the claims and proceeds have been assigned. Further, counsel's conduct of attempting to have another judge approve an amended settlement agreement after the hearing on the motion for summary judgment is a concession that the settlement agreement in its current form is illegal.

*9 Plaintiffs also contend that summary judgment is not appropriate because they have not had a full and fair opportunity to complete discovery. But there are no facts to be discovered that will impact the analysis of whether the assignment is void as against public policy. The assignment is a contract, and the question of whether it is void as against public policy is a question of law. *Alexander's Land Co., LLC v. M & M & K Corp.*, 390 S.C. 582, 592, 703 S.E.2d 207, 212 (2010) ("The interpretation of a contract is an action at law."). *See also Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 167 (Conn. 2005) ("The question of whether an assignment is barred as a matter of public policy is an issue of law."); *Comet Energy Servs., LLC v. Powder River Oil & Gas Ventures, LLC*, 185 P.3d 1259, 1261 (Wyo. 2008) ("Assignments are contracts and are construed according to the rules of contract interpretation.").

No facts or testimony can change the Court's conclusion that the agreement between Plaintiffs and DC & Sons is an assignment of a legal malpractice claim that is void as against public policy. The assignment says what it says. There is no genuine issue of material fact regarding the terms of the assignment or the circumstances under which it was entered. Plaintiffs have not presented any evidence to dispute the existence of the assignment or the circumstances under which it was entered.

Accordingly, the Court finds that Plaintiffs have assigned the legal malpractice claim against Nexsen Pruet to their adversary in the litigation in which the alleged legal malpractice arose. The Court concludes as a matter of law that the assignment is void as against public policy. The Court reaches this conclusion without deciding whether South Carolina courts should adopt the majority or minority rule. That is for the appellate courts to decide. Instead, the Court is guided by decisions in other jurisdictions - some of which have adopted the majority view, and some of which have adopted the minority view - that hold that assignments between adversaries in litigation in which the alleged legal malpractice arose are void as against public policy. The Court is further persuaded by those courts that have expressly denounced scenarios like the one in the present case, involving a confession of judgment and an assignment.

The Court concludes that the assignment in this case is void as against public policy. Nexsen Pruet's motion for summary judgment is granted.

II. The Remedy

Plaintiffs argue that even if the assignment is void as against public policy, the proper remedy is to strike the assignment and to allow the case to proceed as pled and filed. Nexsen Pruet argues that the case is tainted with collusion and the taint cannot be cured by simply striking the assignment and allowing the case to proceed in its current form.

The Court finds that this case cannot simply proceed as filed because it was never filed by Plaintiffs in the first instance. Plaintiffs ceded all rights and control of the case to DC & Sons, including the right to determine whether to file the case in the first instance. The entire case has been controlled by DC & Sons and their counsel, who also represent Plaintiffs. Further, the facts and circumstances under which the assignment was entered created the opportunity for collusion, as did the conduct by counsel for Plaintiffs and DC & Sons following the hearing on the motion for summary judgment. Accordingly, the Court concludes that the appropriate remedy is to dismiss the case with prejudice.

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A. Law

1. Dismissal with prejudice / Judgment in favor of law firm

Most courts that have addressed the question of whether an assignment of a legal malpractice claim is void as against public policy do not discuss the remedy. The courts either dismiss the case outright or enter summary judgment in favor of the law firm. *See, e.g., Gurski v. Rosenblum & Filan, LLC,* 885 A.2d 163, 167 (Conn. 2005) (dismissing the case outright and entering judgment in favor of the law firm); *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith,* 922 S.W.2d 865 (Tenn. 1996) (affirming dismissal of case brought pursuant to the illegal assignment); *Zuniga v. Groce, Locke &Hebdon,* 878 S.W.2d 313 (Tex. App. 1994); *Picadilly, Inc.* v. *Raikos,* 582 N.E.2d 338 (Ind. 1991) (affirming summary judgment in favor of the attorney or the law firm without addressing whether the client has the right to re-file the case), *abrogated on other grounds by Liggett v. Young,* 877 N.E.2d 178 (Ind. 2007); *Coffey v. Jefferson County Bd. of Educ,* 756 S.W.2d 155 (Ky. Ct. App. 1988) (same).

2. Dismissal without prejudice

*10 At least three courts that have addressed the remedy question have concluded that the case should be dismissed without prejudice. This is because cases born out of an illegal assignment are "tainted in some respect," and to allow them to proceed as filed would be "to wink at the rule against assignment of legal malpractice claims." *Davis v. Scott,* 320 S.W.3d 87, 92 (Ky. 2010) (quoting *Botma v. Huser,* 39 P.3d 538, 543 (Ariz. 2002)). In *Davis,* the court held that the proper remedy was dismissal without prejudice and stated that although the client did not forfeit the malpractice claim, "the current suit, born of the improper assignment, cannot be permitted to continue." 320 S.W.2d at 92. Accordingly, if the client decided to reassert his claim against the attorney, the client could do so "only upon showing that the attempted assignment is no longer in place and that he is the real party in interest." *Id.* In *Botma,* the court ruled that the case could not continue in the client's name because the client retained no interest in the lawsuit. 39 P.3d at 543. Any benefit that the client received in simply continuing the case would be used to pay the $12 million judgment confessed in favor of the client's adversary. *Id.*

Similarly, another court held that a case brought pursuant to illegal assignment should be dismissed without prejudice and that if the client wanted to re-file a malpractice claim against the law firm, the new case could not be controlled in any way by the party to whom the claims were initially assigned and the client could not be represented by attorneys associated with that party. *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC,* 675 F. Supp. 2d 75, 86 (D.D.C. 2009). The court recognized that a dismissal without prejudice "does not eliminate the risk of collusion in future cases completely, but it does provide the client with more of an incentive to 'seriously litigate the amount of damages' in the underlying suit because now the client bears the risk of not recovering in the legal malpractice action." *Id.* "Furthermore, it eliminates the public and disreputable role reversals that have concerned many courts." *Id.*

B. Analysis

The Court finds that the circumstances under which the present case arose and has proceeded require the Court to dismiss the case with prejudice. The present case was filed by Plaintiffs in name only and without notice to the Court or to Nexsen Pruet that Plaintiffs assigned the proceeds and the claims to their adversary in the litigation in which the alleged legal malpractice arose. [Compl.] Although brought in Plaintiffs' name, the Court finds that the case has belonged to DC & Sons since its inception. As the owner of the claims and proceeds, and as the party with full control over the case, the Court finds that DC & Sons is responsible for every decision made in this case on behalf of Plaintiffs, including the choice of counsel, the filing and service of the complaint, the serving of discovery, and the filing of motions opposing all motions filed by Nexsen Pruet in the case, including the motion to disqualify counsel[1] and the present motion for summary judgment. The Court concludes that the case cannot proceed as pleaded because it was not brought by the client, Pavilion and McNair, in the first instance.

Moreover, the circumstances under which the assignment arose and the conduct of counsel for Plaintiffs and DC & Sons, indicate that the opportunity for collusion was present. The circumstances are as follows:

1. The settlement of the case between Plaintiffs and DC & Sons was reached during a court recess on what was to be the first day of trial after Plaintiffs learned that the trial court intended to grant DC & Sons's motion for summary judgment. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Hr'g Tr., Jan. 18, 2011.]

*11 2. During the court recess, Pavilion confessed judgment in favor of DC & Sons for $4.5 million without challenging the amount of damages or requiring DC & Sons to present evidence to support the amount confessed. [Exs. A and B, Nexsen Pruet's Mem. in Supp. of Summ. J.] In exchange, Plaintiffs obtained a full release of personal liability as to its principals, Larry McNair and Lowell Frazier. *Id.* At the same time, Plaintiffs assigned all proceeds in a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty to DC & Sons and gave DC & Sons full control over the litigation, including the right to elect to own the claims themselves. *Id.* The assignment was drafted by counsel for DC & Sons. [Tr. 6:14-23, Mar. 13, 2013.]

3. Counsel for DC & Sons did not put all terms of the assignment on the record. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Hr'g Tr., Jan. 18, 2011.] Counsel did not tell Judge Young that the settlement included the assignment of a legal malpractice claim to be brought against Nexsen Pruet or that the legal malpractice case was to be controlled and funded by DC & Sons but brought in the names of Pavilion and McNair. *Id.*

4. Plaintiffs filed the present case against Nexsen Pruet without revealing the existence of the assignment. [Compl.] The existence of the assignment came to the Court's attention through the filing of the counterclaim by Nexsen Pruet. [Answer & Countercl.]

5. Counsel for Plaintiffs represented DC & Sons in the litigation between Plaintiffs and DC & Sons and also represent DC & Sons in the present case. [Wallace Aff., Jan. 14, 2013, ¶ 4.] This means that the lawyers who represented the adverse party in the case in which the alleged legal malpractice arose have now switched sides and represent the plaintiffs who were once adverse to their client. At the same time, the lawyers continue to represent DC & Sons, in whose favor the judgment was confessed.

6. Eight days after the hearing on Nexsen Pruet's motion for summary judgment regarding whether the assignment is void as against public policy, Plaintiffs and DC & Sons obtained a hearing before Judge Young without notice to Nexsen Pruet (or its counsel) asking Judge Young to approve a proposed amended settlement agreement striking the assignment but keeping the confession of judgment in place. [Hr'g Tr., Mar. 21, 2013.]

7. After the hearing, Judge Young issued a Form 4 order and entered it in the present case, Case No. 2011-CP-10-05774. [Order, Mar. 21, 2013.] The order states: "The proposed Amended Settlement Agreement has been DISMISSED." *Id.* Thereafter, Nexsen Pruet filed the transcript from the hearing before Judge Young. [Not. of Filing Tr. of H'rg.]

8. According to the transcript, the attorneys present were Andrew K. Epting, Jr., George J. Kefalos, who represented DC & Sons in the litigation between Plaintiffs and DC & Sons and who represent both Plaintiffs and DC & Sons in the present case, and Dan David, who represented Plaintiffs in the prior litigation. [Hr'g Tr., Mar. 21, 2013.] The only attorneys who spoke on the record were Epting and Kefalos. *Id.* Dan David was silent. *Id*: Mr. Epting asked Judge Young to approve an amended agreement regarding the assignment of the legal malpractice claim to "put the control in the [malpractice suit] in McNair and Pavilion and to void the assignment." [Hr'g Tr. 4:6-8.] Mr. Kefalos stated:

I didn't want to have Judge Nicholson issue an order about the validity of this one way or another because then it would create some precedent in South Carolina about this thing, and my feeling was the best thing to do is just take it off the table and void the assignment so he doesn't have to decide and we'll give up - return the right to control back to Pavilion and we can move forward.

*12 [Hr'g Tr. 5:20 - 6:6.] Judge Young declined to approve the amended agreement, stating: "I'm a little concerned that you're asking the Court to do something to help you out in the position in another case and there is another party out there that has an interest in what we do here in that it affects their case." [Hr'g Tr. 6:8-12.] Further, Judge Young repeatedly stated that he was "uncomfortable" with what he was being asking to do and that his "inner alarms" were going off. [Hr'g Tr. 6:15-16, 21; 7:1, 13-14, 20-21; 8:14.]

9. In response to Requests for Admission served by Nexsen Pruet, Plaintiffs admit that Pavilion has not paid anything to satisfy the $4.5 million judgment. [Ex. C, Nexsen Pruet's Mem. in Supp. of Mot. for Summ. J.] Moreover, it does not appear that Pavilion is at risk of having to pay the judgment, given that its counsel has asked the Court to keep the confession of judgment in place. [Hr'g Tr. 34:3-7, Mar. 13, 2013.] In addition, counsel submitted a proposed amended agreement to Judge Young stating that Pavilion agrees that DC & Sons retains the judgment and all rights as judgment creditor. [Ex. D, Pls' Sur-Reply to Def. Nexsen Pruet's Mem. in Supp. of Summ. J.].

These circumstances lend further support to the Court's conclusion that the proper remedy is dismissal with prejudice. Plaintiffs have used the court system to litigate a claim they do not own, without revealing this important fact to the Court or to the defendant. By assigning the proceeds, control, and the right to own all claims to DC & Sons, Plaintiffs completely and voluntarily relinquished their right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty. Further, after the hearing on the motion for summary judgment, Plaintiffs and DC & Sons went to another judge to try to have the assignment voided while the motion was still pending.

Additionally, the confession of judgment for an unsupported, multi-million dollar amount, coupled with the assignment of the legal malpractice claims, strongly suggest that collusion has occurred. The fact that counsel for Plaintiffs and DC & Sons seek to have the confession of judgment remain in place further supports the conclusion that Plaintiffs do not have any intention of paying the judgment and DC & Sons does not have any intention of executing on it, and therefore the confession was never intended to have any purpose, other than to be used in a case against Nexsen Pruet as purported evidence of damages. At the very least, the Court finds that the opportunity for collusion was present.

Given these facts and circumstances, the Court concludes that this case is not a genuine legal malpractice case. It is an action to collect a judgment confessed. The Court concludes that the only proper remedy under the circumstances is dismissal with prejudice. By dismissing the case with prejudice, the Court is not ruling on the merits of the legal malpractice or breach of fiduciary duty claims, especially given that the claims have been brought by an entity that has never been a client of Nexsen Pruet.

Because this case was brought by Plaintiffs in name only and under circumstances that suggest collusion, or the opportunity for collusion, the Court declines to simply strike the assignment and allow the case to proceed as pled. The conduct of Plaintiffs and DC & Sons with respect to the courts and with respect to Nexsen Pruet cannot be undone with the stroke of a pen. The case is dismissed with prejudice.

CONCLUSION

Nexsen Pruet's Motion for Summary Judgment is granted on the basis that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy. Accordingly, judgment is entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim, and this case is dismissed with prejudice.

*13 IT IS SO ORDERED.

<<signature>>

The Honorable J.C. Nicholson, Jr.

Circuit Court Judge

Charleston, South Carolina

10 / 8, 2013

Footnotes

1 Nexsen Pruet filed a motion to disqualify Andrew Epting and George Kefalos as counsel for Plaintiffs on the basis that they are witnesses to the facts of the case in which the alleged legal malpractice arose because they represented Plaintiffs' adversary, DC & Sons, in the underlying litigation. Plaintiffs opposed the motion, and following a hearing, the court ruled that the motion be held in abeyance pending discovery and any necessary evidentiary hearing. [Order, Apr. 26, 2012.]

End of Document

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EXHIBIT B

IN THE STATE OF SOUTH CAROLINA) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 2010-CP-10-8631
CYNTHIA BALES as Personal Representative of the ESTATE OF FRANK BALES, Plaintiff(s), v. ABEL MARTINEZ-MARTINEZ, Defendant(s).	**NOTICE OF MOTION AND MOTION FOR ASSIGNMENT OF CLAIMS TO FULFILL JUDGMENT**

FILED
2012 NOV 30 PM 2:10
JULIE J. ARMSTRONG
CLERK OF COURT

TO: DEFENDANT AND HIS ATTORNEY(S) OF RECORD

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through undersigned counsel, will move before the presiding Judge of Charleston County Court of Common Pleas within ten (10) days of the date of this Motion, or as soon as counsel may be heard, for an Order granting a judicial assignment of Defendant Abel Martinez-Martinez's (herein "Defendant") interest in choses of action against Northbrook Indemnity Company and/or its attorney(s) arising out of the underlying action, and all rights to payment thereunder, to the Plaintiff (Judgment Creditor) to the extent necessary to pay the judgment in full, including accrued interest, and costs through the date of payment.

INTRODUCTORY FACTS

Plaintiff's decedent and husband, Frank R. Bales, was killed as a result of an automobile and motorcycle collision that occurred on October 15, 2008, when Defendant disregarded a traffic signal and collided with Mr. Bales. Following his death, Plaintiff was duly appointed the Personal Representative of Mr. Bales' Estate and initiated this action. The lawsuit was properly served, and appropriate notice given to Defendant's insurance company. Defendant failed to file any responsive pleadings, or otherwise defend the action. Importantly, Defendant's insurance company also failed to file any responsive pleadings, allowing Defendant to default .

As a result, default was entered on October 4, 2011, and, after a hearing on damages, the Honorable Kristi L. Harrington entered judgment against the Defendant and in favor of the

Plaintiff in the amount of $1,900,000.00. (Exhibit A). Following the entry of judgment, Plaintiff has made repeated attempts to collect on the same and/or settle this matter with the Defendant.

Plaintiff is informed and believes that Defendant may have causes of action against his insurance company and/or its attorney(s) for their failure to defend him and properly protect his interests in this action. In lieu of seizing Defendant's personal assets, Plaintiff has offered to accept an assignment of these claims in exchange for entering into a covenant not to execute the judgment against Defendant personally. To date, although this settlement would appear to be in the best interest of both parties, Defendant's attorneys have been unable to communicate this offer to Defendant and therefore unable to gain permission to agree to the same. Therefore, Plaintiff seeks the Court's assistance in finalizing the assignment. It is not anticipated that Defendant's attorneys will contest this Motion as a judicial assignment is in Defendant's own best interest.

ARGUMENT

I. DEFENDANT'S CAUSES OF ACTION ARE ASSIGNABLE TO FULFILL PLAINTIFF'S JUDGMENT AGAINST DEFENDANT

An assignment is "a transfer of property or some other right from one person to another, which confers a complete and present right in the subject matter to the assignee." 6 Am.Jur.2d *Assignments* § 1 (2012). Generally, it is recognized that if a right of action arising out of tort would survive in statute to the injured party's personal representative it may be assigned; or in simpler terms "survival is the test of assignability of a right." Doremus v. Atlantic Coast Line R. Co., 242 S.C. 123, 138 130 S.E.2d 370, 376 (1963) *citing* 6 C.J.S. Assignments § 32, p. 1080. *See also* 6 Am.Jur.2d *Assignments* § 49 (2012) ("choses in action that survive as assets or continue as liabilities can be assigned").

South Carolina has long recognized that causes of action in tort "survive both to and against the personal or real representative [of the injured party or tortfeasor]...any law or rule to the contrary notwithstanding." S.C. Code Ann. § 15-5-90 previously § 10-209, South Carolina Code of Laws, 1952. *See also* Bultman v. Atlantic Coast Line R. Co., 103 S.C. 512, 88 S.E. 279 (1916), Doremus v. Atlantic Coast Line R. Co., 242 S.C. 123, 130 S.E.2d 370 (1963). Logically, courts in South Carolina have extended this, and adopted the general rule, to hold that this survivability statute authorizes the assignment of a cause of action in tort. *See generally* McWhirter v. Otis Elevator Company, 40 F.Supp. 11, 15 (S.C. 1941), Hair v. Savannah Steel

Drum Corp., 161 F.Supp. 654 (S.C. 1955), Bultman v. Atlantic Coast Line R. Co., 103 S.C. 512, 88 S.E. 279 (1916).

Defendant's choses in action including: bad faith, breach of contract, and legal malpractice are all claims that would survive in the event Defendant died, therefore they are assignable as choses in action under a general judicial assignment.

II. THE COURT MAY ORDER A DEFENDANT, JUDGMENT DEBTOR, TO ASSIGN A RIGHT TO PAYMENT TO THE PLAINTIFF, JUDGMENT CREDITOR

Moreover, South Carolina law allows the assignment of choses in action pursuant to S.C. Code Ann. § 15-39-410. Specifically section 15-39-410 provides:

> "Property Which May be Ordered to be Applied to Execution:
> The judge may order *any* property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person or due to the judgment debtor, to be applied toward the satisfaction of the judgment, *except* that the earnings of the debtor for his personal services cannot be so applied."

South Carolina has long recognized a chose in action as property. Ball v. Ball, 312 S.C. 31, 34, 430 S.E.2d 533, 534-35 (Ct.App. 1993) ("This right of action is a chose in action, an interest which, as we noted, South Carolina courts included in the definition of the term "property."). Moore v. Weinberg, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (Ct.App. 2007) ("The interest in the property assigned can be present, future, or contingent; it may represent contract rights to money, property, or performance, or rights to causes of action.") *citing* 5 S.C. Jr. *Assignments* § 2 (2006);

The assignability of this property, a chose in action, was recognized as early at 1804 in South Carolina. *See* Forrest v. Warrington, 2. Des. 254, 262, 2. S.C.Eq. 254, 262 (1804) ("It was contended by complainants counsel that a chose in action is not assignable at law...[t]his may have been the case formerly, but the case of Carteret & Paschal, 1st Peer Wm. 199, it is held where Baron is entitled to a chose in action, as he may release or forfeit it, so if he should assign it for valuable consideration, it would be good."); *See also* Slater Corp. v. South Carolina Tax Com'n, 280 S.C. 584, 587, 314 S.E.2d 31, 32 (Ct.App. 1984) ("The law of South Carolina has long recognized that a chose in action can be validly assigned in either law or equity.").

In the present case, the Defendant has choses in action against his insurer, Northbrook Indemnity Company and its attorney(s), including but not limited to: bad faith, breach of contract, and legal malpractice. These choses in action are property under South Carolina law (*See e.g.* Ball, Weinberg) held by Defendant, and should be assigned to fulfill Plaintiff's $1.9 million judgment against him. They are excepted from the plain language of § 15-39-410, or any subpart and do not qualify as earnings for his personal services.

PRAYER

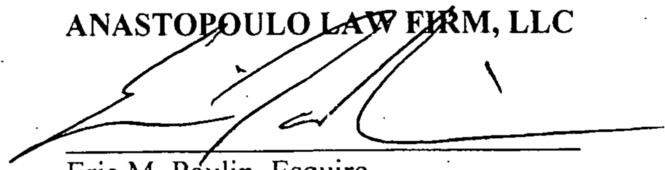
For the reasons set forth above, the Plaintiff respectfully requests the Court assign Defendant's choses in action against Northbrook Indemnity Company and/or its attorney(s) arising out of the underlying matter to Plaintiff.

RULE 11 CERTIFICATION

Plaintiff, by letter dated April 23, 2012, and in several follow up conversations with attorneys for the Defendant, has offered to accept a voluntary assignment of Defendant's claim in exchange for entering a covenant not to execute the underlying judgment against Defendant's personal assets. To date, Plaintiff is informed and believes that Defendant's attorneys have been unable to communicate with Defendant. Although the assignment is in Defendant's best interest, Defendant's counsel is hesitant to accepted or reject Plaintiff's offers without Defendant's input, and thus, additional consultation would serve no useful purpose.

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC



Eric M. Poulin, Esquire
SC Bar Number: 100209
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Rd.
North Charleston, SC 29418
(843) 614-8888

Charleston, South Carolina
November 28, 2012

EXHIBIT A

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 **CP**-10-8631

Cynthia D. Bales, as Personal Representative of the Estate of Frank R. Bales

PLAINTIFF(S)

Abel Martinez Martinez and the South Carolina Department of Transportation

DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2012 MAR -2 PM 2:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
Cynthia D. Bales, as Personal Representative of the Estate of Frank R. Bales	Abel Martinez-Martinez	$1,900,000.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge 2157 Judge Code 3/1/12 Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS FOR THE 9TH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	CASE NO.: 2010-CP-10-8631
CYNTHIA D. BALES, as Personal Representative of the Estate of FRANK R. BALES, Plaintiff,	
v.	FINAL JUDGMENT
ABEL MARTINEZ MARTINEZ and the SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, Defendants.	

FILED
2012 MAR -2 PM 2:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY

THIS MATTER is before the Court on Plaintiff's Motion for a determination of unliqudated damages following Defendant Martinez-Martinez's default. A hearing was conducted before the South Carolina Court of Common Pleas for the Ninth Judicial Circuit on January 11, 2012. Attorneys for both parties were present at the call of the case as was the Plaintiff and Plaintiff's witnesses. Also present was counsel for an alleged applicable uninsured motorist carrier(s). The Defendant did not make an appearance. Following Defendant's default, Plaintiff requested this hearing pursuant to Rule 55 of the South Carolina Rules of Civil Procedure for a determination of Plaintiff's unliquidated damages. After hearing testimony and receiving evidence on the record, and for the reasons more fully articulated below, I determine and enter judgment for the Plaintiff in the amount of $1,900,000.00 against Defendant Abel Martinez-Martinez.

FACTUAL/PROCEDURAL BACKGROUND

Plaintiff's husband, Frank R. Bales, was killed as a result of an auto/motorcycle collision that occurred on October 15, 2008. According to Plaintiff's Complaint, Defendant Martinez-Martinez disregarded a traffic signal, causing Defendant's vehicle to strike and fatally injure Mr. Bales. Following this accident, attorneys for the Plaintiff initiated this action which was served upon Defendant Abel Martinez-Martinez on May 16, 2011.

Defendant Martinez-Martinez failed to file any responsive pleadings with this Court or otherwise defend in this action. Plaintiff moved for an entry of default, which was signed October 4, 2011, and asked this Court to schedule a hearing to determine and enter judgment upon the proper amount of damages. Plaintiff sent notice of the hearing to Defendant's last known address and filed proof of the same with the Clerk.

1 of 3 3/1/12

LAW/ANALYSIS

In a wrongful death action, the decedent's beneficiaries are entitled to recover all damages, present and prospective, which are naturally the proximate consequence of the wrongful act, including: pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of the deceased's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972). Decedent's life expectancy for purposes of calculating future lost earnings and damages must be determined pursuant to S.C. Code Ann. § 19-1-150. In situations where the defendant's actions show willful, wanton, intentional or malicious intent, Plaintiff may also seek to recover punitive damages, provided the plaintiff is able to prove such damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135.

Plaintiffs' decedent suffered fatal injuries as a result of Defendant's negligence. Plaintiff presented testimony from Clyde L. Hiers, a certified public accountant, certified financial planner, and certified forensic financial analyst. Mr. Hiers was qualified as an expert in the field of economic loss calculation without objection.

Mr. Hiers testified that Frank Bales, the decedent, through his surviving beneficiaries, sustained a present value economic loss of $1,502,166.00. Mr. Hiers testified that this calculation was based upon the present adjusted value of Mr. Bales' lost pre-trial income; lost pre-trial fringe benefits; lost post-trial income; lost post-trial fringe benefits; lost anticipated household services (based upon statutory life expectancy); and estimated life value (based upon statutory life expectancy). Mr. Hiers also testified that Mr. Bales' historical medical costs and personal income abated were subtracted from the total economic loss.

Mr. Hiers further testified that his estimate was on the conservative side. He stated that income and benefits were calculated at a retirement age of 65 and were not adjusted to take into account possible future promotions or increases in pay. The Court finds Mr. Hiers' calculations to be reasonable. The Court accepts these findings and is satisfied that Mr. Hiers reached these conclusions to a reasonable degree of professional certainty, using methods and calculations generally recognized in his field.

Mr. Hiers' economic loss calculation did not include any amounts for mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, or deprivation of the use and comfort of the deceased's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries.

The Court also heard testimony from Cynthia Bales, decedent's wife and the representative Plaintiff in this action. Mrs. Bales testified that her husband's death had a severe and negative impact on her and their minor child. Mrs. Bales testified that she was having trouble living life without her husband whom she referred to as her "soul mate." She testified that both she and her minor child were required to undergo grief and other counseling to deal with the consequences of Decedent's death. Based on this testimony, it is clear to the Court that the Decedent's beneficiaries have suffered a great deal of mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of the deceased's society.

Finally, because the Defendant is in default, the Court must deem all allegations in Plaintiff's Complaint as admitted. Plaintiff has alleged that Defendant's acts were willful, wanton, and/or reckless. Plaintiff has alleged that Defendant Martinez was driving without a

3/1/12

valid license and that he dis-regarded a traffic signal at a high rate of speed. Accordingly, Plaintiff argues she is entitled to punitive damages.

The Court has heard testimony from Decedent's wife and her economic loss expert and has received on the record evidence and testimony of funeral bills, lost wages, and other damages. Based on this record, and consistent with the statutory and common law of South Carolina, THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

That the Defendant, Abel Martinez-Martinez, failed to submit a responsive pleading or otherwise defend this action within thirty days of service upon him of the Summons and Complaint, and is in Default.

That The Plaintiff, and decedent's statutory beneficiaries suffered and were otherwise damaged as a result of the actions of the Defendant.

That Defendant's acts and omissions show willful misconduct, malice, wantonness and an entire want of care, raising a presumption of the Defendants' conscious indifference to the consequences of such acts and omissions.

That because of the Defendant's acts and omissions and the proximate harm resulting to Plaintiff and decedent's beneficiaries, Plaintiff and decedent's beneficiaries are entitled to punitive damages in order to punish and penalize the Defendant and to deter the Defendant and others from similar behavior.

IT IS THEREFORE ORDERED that Default be entered against Defendant and that he be held fully liable for the Plaintiffs' damages.

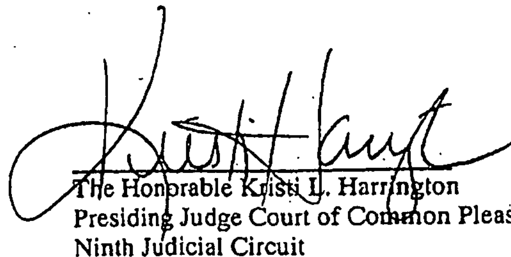
IT IS FURTHER ORDERED that Defendant pay Plaintiffs $1,700,000.00 in actual damages for their injuries.

IT IS FURTHER ORDERED that Defendant pay Plaintiffs $200,000.00 in punitive damages.

IT IS HEREBY ORDERED, ADJUGED, AND DECREED THAT DEFENDANT ABEL MARTINEZ-MARTINEZ IS AND BE FULLY LIABLE FOR PLAINTIFF'S DAMAGES AND SHALL PAY UNTO DECEDENT'S BENEFICIARIES THE SUM OF $1,900,000.00.

IT IS SO ORDERED.

This 15 day of March, 2012



The Honorable Kristi L. Harrington
Presiding Judge Court of Common Pleas
Ninth Judicial Circuit

CERTIFICATION OF MAILING

Plaintiff's Motion for Assignment of Claims

Cynthia Bales et al v. Martinez
Case No.: 2010-CP-10-8631

I, the undersigned, hereby certify that I have served a copy of the above document by hand delivery, or by placing said copy in a first class postage prepaid envelope in the United States mail at Charleston, South Carolina addressed to:

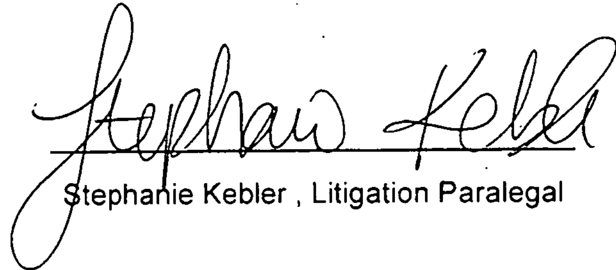
Michael Ethridge
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401

David Cobb
Turner Padget Graham & Laney, P.A.
P.O. Box 22129
Charleston, SC 29412

Joseph Weston
Weston Law Firm, P.A.
P.O. Box 1992
Mt. Pleasant, SC 29465

FILED
2012 NOV 30 PM 2: 11
JULIE J. ARMSTRONG
CLERK OF COURT
BY

this 28 day of November, 2012.



Stephanie Kebler , Litigation Paralegal

ANASTOPOULO LAW FIRM, LLC

ATTORNEYS AT LAW

Toll Free: (800) 313-2546
Facsimile: (843) 853-2291
Mailing Address: 2557 Ashley Phosphate Rd.
North Charleston, SC 29418

Florence Office: 150 W. Evans Street, Florence, SC

Akim A. Anastopoulo (SC) Eric M. Poulin (NC) (SC)
John I. Henderson, (SC) Catherine F. Juhas (NC) (SC)

Reply to the North Charleston Office

November 28, 2012

Charleston County Clerk of Court
Court of Common Pleas
100 Broad Street, #106
Charleston, SC 29401

RE: *Estate of Bales v. Martinez-Martinez*
Case No.: 2010-CP-10-8631

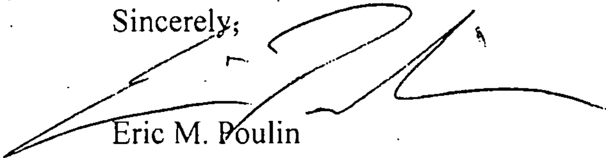
Dear Sir or Madam:

Enclosed please find the original and Three (3) copies of Plaintiff's Motion for Assignment of Assets in the above-named case along with our check of $25.00 for the filing fee. We would appreciate it if you would file the original and return the clocked in copies to us.

By copy of this letter, I am serving the same on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,



Eric M. Poulin

Cc: Michael Ethridge
Cc: David Cobb
Cc: Joseph Weston
Cc: Cindy Bales

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

CYNTHIA BALES as Personal Representative of the ESTATE OF FRANK BALES,

Plaintiff(s),

v.

ABEL MARTINEZ-MARTINEZ,

Defendant(s).

CASE NO.: 2010-CP-10-8631

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney: Eric M. Poulin Bar Number: 100209 Address: 2557 Ashley Phosphate Road North Charleston, SC 29418 Phone: 843-614-8888 Fax: 843-853-2291 E-Mail: eric@akimlawfirm.com	Defendant's Attorney: Michael Ethridge, Esq. Bar Number: Address: 40 Calhoun Street, Suite 400 Charleston, SC 29401 Phone: (843) 727-0307 E-Mail: methridge@carlockcopeland.com

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTINONS III and III)**
☐ **PROPOSED ORDER / CONSENT ORDER (complete SECTIONS II and III)**

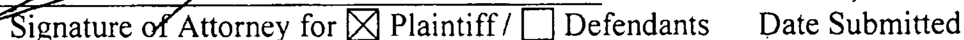
SECTION I: Hearing Information

Nature of Motion: Motion for Assignment Order
Estimated Time Needed: 30 Court Reporter Need: ☒ YES / ☐ NO

SECTION II: Motion / Order Type

☒ Written motion attached
☐ Form Motion / Order

I hereby move for relief or action by the court as set forth in the attached proposed order.



Signature of Attorney for ☒ Plaintiff / ☐ Defendants — November 28, 2011 Date Submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT:
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposal order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: ___________________
☒ Other: Assignment

JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	______________________________ JUDGE CODE: ________ DATE: ____________

CLERK'S SECTION

Date Filed:

Collected by: ______________________________

☐MOTION FEE COLLECTED: ____________

☐CONTESTED – AMOUNT DUE: ____________

RECEIVED

MAR - 6 2015

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

J. Michelle Childs, United States District Judge

Appellate Case No. 2014-001979

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the BRIEF OF AMICUS CURIAE SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated April 15, 2014.

(Signature page to follow.)

March 6, 2015

By:

David C. Marshall (Bar No. 73760)
Turner Padget Graham & Laney P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

Alan Jones (Bar No. 100141)
McGangus, Goudelock & Courie
2411 North Oak Street, Suite 401
Myrtle Beach, SC 29577-3173
Phone: (843) 848-6000
Fax: (803) 449-2306

ATTORNEYS FOR SOUTH CAROLINA
DEFENSE TRIAL ATTORNEYS' ASSOCIATION

RECEIVED
MAR - 6 2015
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

J. Michelle Childs, United States District Judge

Appellate Case No. 2014-001979

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

v.

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

PROOF OF SERVICE

I certify this 6th day of March 2015 that I have served copies of the BRIEF OF AMICUS CURIAE SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION and the CERTIFICATE OF COUNSEL upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

Blake A. Hewitt, Esquire
Bluestein Nichols Thompson & Delgado
P. O. Box 7965
Columbia, SC 29202

Mark B. Tinsley, Esquire
Gooding & Gooding
P. O. Box 1000
Allendale, SC 29810

Ronald K Wray, II, Esquire
Gallivan White and Boyd
55 Beattie Place, Suite 1200
Greenville, SC 29601

ATTORNEYS FOR DEFENDANT
ACE PROPERTY AND CASUALTY
INSURANCE COMPANY

Randolph Murdaugh IV, Esquire
Peters, Murdaugh, Parker, Eltzroth & Detrick
P. O. Box 457
Hampton, SC 29924

ATTORNEYS FOR PLAINTIFFS

Robert H. Hood, Esquire
Robert H. Hood, Jr., Esquire
Justin Tyler Bamberg, Esquire
Hood Law Firm
P. O. Box 1508
Charleston, SC 29402

ATTORNEYS FOR DEFENDANTS BRANTLEY C. ROWLEN AND ERIN LAWSON COIA

March 6, 2015

By: ______________________________

David C. Marshall (Bar No. 73760)
Turner Padget Graham & Laney P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
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Alan Jones (Bar No. 100141)
McGangus, Goudelock & Courie
2411 North Oak Street, Suite 401
Myrtle Beach, SC 29577-3173
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ATTORNEYS FOR AMICUS CURIAE SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION