BNTD
BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

March 23, 2015

RECEIVED
MAR 23 2015
S.C. Supreme Court

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

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

Dear Mr. Shearouse:

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

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

Sincerely,

Erin Bridges

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

/emb
Enclosures
cc: Mark B. Tinsley, Esquire

COLUMBIA 1614 Taylor Street
PO Box 7965 | Columbia, SC 29202
P·803 779.7599 F·803 771.8097

CONWAY 1208 3rd Avenue
Conway, SC 29526
P·843 665.9779

TOLL FREE 877 524.4675

BNTDLAW.COM

Randolph Murdaugh, IV, Esquire
Ronald K. Wray, II, Esquire
Robert H. Hood, Jr., Esquire
Justin T. Bamberg, Esquire

RECEIVED

MAR 23 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.

REPLY BRIEF

Mark B. Tinsley, # 15597
GOODING & GOODING
P.O. Box 1000
Allendale, SC 29810
(803) 584-7676

Randolph Murdaugh IV, # 64305
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

Blake A. Hewitt, # 73674
BLUESTEIN NICHOLS THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Other Authorities

ARGUMENT

In January of this year, this Court wrote that it will "exercise restraint when undertaking the amorphous inquiry of what constitutes public policy." This is because public policy often involves things that are vague and variable. *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, __, 768 S.E.2d 385, 387 (2015) also at (Shearouse Adv. Sh. No. 4, pp.15-16).

The words "restraint," "vague," and "variable" have particular relevance in this case.

The defendants do not identify their "public policy" with any real specificity. There is no lucid rationale for banning an assignment that is, in reality, fair and reasonable. Prohibiting that sort of assignment just forces the client to experience the full consequences of a lawyer's malpractice before the client can seek to be made whole.

This is not regulating the practice of law. The certified question does not involve enforcing the rules of professional conduct or supervising attorneys. See *Villanueva v. First Am. Title Ins. Co.*, 740 S.E.2d 108, 112 (Ga. 2013) (articulating this reasoning).

The central thrust of the defendants' briefs is that assignments to adversaries offer more bad than good, but if adopting the "minority" view led to shameless role-reversals, collusion, and eroded the public's confidence in the legal system, one would expect to hear loud lamentations from the jurisdictions following this view. The briefs cite none.

And while there *are* examples of courts invalidating assignments that *did* involve role-reversals, collusion, and parties seeking to turn a worthless claim against a penniless adversary into a valuable claim against a lawyer, does this not prove the plaintiffs' point that people have no practical incentive to engage in collusion? We rely on courts to catch fraud. These cases show that the court is doing it.

The defendants point out that legal malpractice involves a "case-within-a-case." Litigating the legal malpractice claim will necessarily involve the underlying suit's merits.

Respectfully, does this not show the weakness of the argument about parties colluding to a lawyer's detriment? The plaintiffs will have the initial burden of proving that Specialty Logging's decision to settle and to confess a judgment were reasonable. These issues *will* be subject to adversarial testing. The claim of "secret collusion" is a lie. The defendants can float this narrative only because there is no evidentiary record.

The way to promote the public's confidence in the legal system is to reject a rule that looks like it was designed to protect bad lawyers. Many of the policy reasons behind the "majority" view sound wonderful as poetry, but there are forceful arguments against each of them. Thankfully, many clients may not find themselves in a situation where an assignment is attractive, but these assignments are highly valuable in certain circumstances, and despite the defendants' suggestion to the contrary, banning them *does* lead to inequity and injustice.

At the end of the day, the defendants are seeking to invalidate an agreement that does nothing but protect the insured. If the defendants handled the case appropriately, they have nothing to fear. Moreover, the defendants are the "moving" parties trying to throw this assignment out: we ought to be viewing things in the plaintiffs' favor and asking whether public policy should ban a *fair* assignment of a claim that is *valid*. This is not the debate the defendants want to have. Instead, they continue to put their interests ahead of their client.

This Court should answer the certified question "yes." A party should be free to assign a legal malpractice claim to an adversary unless the circumstances of the transfer in question violate a clear rule of public policy.

A. The defendants are not being intellectually honest. Many jurisdictions have rejected their "risk of collusion" argument and have opted to police collusive settlements when they occur.

The defendants' principal argument focuses on what they call an opportunity for collusion. This argument says pre-trial agreements that protect a litigant from personal liability are ripe for fraud because once personal liability is off the table, a defendant like Specialty Logging has no incentive to contest liability or the amount of damages.

Many jurisdictions, South Carolina included, have already rejected this same exact contention. This is not a "minority" view. Several of the relevant cases involve an insurance company's attack on a settlement that was executed by the insured. E.g., *Campione v. Wilson*, 661 N.E.2d 658 (Mass. 1996); *Glenn v. Fleming*, 799 P.2d 79 (Kan. 1990); *Arizona Prop. & Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451 (Ariz. 1987). Our Court of Appeals addressed this issue in *Fowler v. Hunter*, and *Fowler* follows the lead of these other States. See 380 S.C. 121, 125-28, 668 S.E.2d 803, 805-07 (Ct. App. 2008). Rather than prohibit pre-trial settlements, covenants, and assignments, South Carolina follows the majority by scrutinizing the circumstances of each case and policing collusion when it actually occurs.

The reason why courts allow parties to engage in this sort of action is that when an insurance company breaches its duty and exposes the insured to personal liability, it is only natural that the insured should seek to shield himself from harm. *Helme*, 735 P.2d at 459. A breach by the insurance company—failing to treat settlement proposals with appropriate consideration is one example—relieves the insured of *his* duty to cooperate with the insurer. *Id.* The forsaken client is not required to be a "financial masochist." *Id.* He can look after himself as long as he does not engage in collusion while doing so.

This is a widely held view, but it is not a universally held view. Texas does not allow this sort of settlement. See *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996). This is ideologically consistent with Texas' decision to prohibit the assignment of a legal malpractice claim to an adversary. *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. Ct. App. 1994). Texas is skeptical of this kind of agreement and adamantly so.

But the majority view is that there is nothing intrinsically nefarious about pre-trial settlements and covenants not to execute. These can be fair and reasonable. The Court of Appeals has noted that most jurisdictions allow such agreements. See *Fowler*, 380 S.C. at 125, 668 S.E.2d at 805. This Court affirmed that decision. See 388 S.C. 355, 361-63, 697 S.E.2d 531, 534-35 (2010). There *is* a risk of fraud when the defendant loses the incentive to contest damages, but the cases acknowledge that any risk of collusion can be diminished by requiring the plaintiffs to prove their claims in the subsequent litigation and by recognizing that a settlement cannot fix the liability of someone who was not a party to the settlement agreement. *Campione*, 661 N.E.26 at 663; see also *Glenn*, 799 P.2d at 79.

There is no reason why adding a legal malpractice claim to the mix would change this logic. If nobody believes that the insurance company is bound by the confessed judgment, it follows that the defendant in the legal malpractice claim would not be bound by the confessed judgment. The confessed judgment represents a negotiated value reached by the parties to that judgment. It is not conclusive of liability or of the case's worth. The cases openly acknowledge this. See, e.g., *Glenn*, 799 P.2d at 92 (adopting the burden of proof as explained in a New Jersey decision). When a pre-trial settlement involves a confessed judgment and a subsequent claim against someone like an insurance company, the plaintiff has the initial burden of proving reasonableness and the insurance company can choose to litigate the point. The same would be true if the defendant in the subsequent suit is a lawyer.

The fact that these sorts of pre-suit agreements are so widely allowed may explain why ACE Insurance Company is injecting itself into this certified question. There is a long-standing precedent that bad faith claims can be assigned. See *Jolly v. Gen. Accident Group*, 382 F. Supp. 265, 269 (D.S.C. 1974). An insurance company would seem to lack any standing to argue about how public policy relates to a malpractice claim against a lawyer.

But whatever ACE's motivation may be, it is inaccurate to suggest that most courts prohibit pre-trial agreements that protect a litigant from personal liability and that such agreements are inherently collusive. The cases say precisely the opposite. This Court should follow the same approach it articulated in *Fowler*. The way to police wrongdoing is to scrutinize the case in question and to give the plaintiffs the initial burden of proof.

B. Banning assignments to adversaries *can* led to injustice and unfair harm, and while assignments might not be useful on many occasions, they are highly practical in at least two (2) situations.

ACE's brief says that banning assignments to adversaries will not cause any injustice and that the plaintiffs have not identified a single case where a rule against assignments has caused harm.

A note in the Texas Law Review illustrates two examples, one hypothetical and one actual, where the rule against assignments appears to cause unnecessary injury and to place the owner of the malpractice claim at a significant disadvantage. Furthermore, although assignments of legal malpractice claims might not be useful on many occasions, there are at least two (2) situations when these assignments are imminently fair and practical.

i. Banning assignments to adversaries can led to actual injustice and unfair disadvantage.

The law review's hypothetical example is based on the facts that gave rise to the Indiana Supreme Court's decision in *Picadilly, Inc. v. Raikos.*

The plaintiff in *Picadilly* was injured by a drunk driver. He sued the drunk driver, and he also sued Picadilly, the bar that served the drunk driver even though the drunk driver was clearly intoxicated. See 582 N.E.2d 338, 339 (Ind. 1991).

As to Picadilly, a jury awarded the plaintiff $75,000 in actual damages and $150,000 in punitive damages. Picadilly eventually claimed that its attorneys were negligent in allowing the jury to hear an incorrect charge on punitive damages. Picadilly filed for bankruptcy, and its malpractice claim was assigned to the original plaintiff. *Id.*

As the note in the Texas Law Review describes, allowing the assignment to Picadilly's former adversary could be quite valuable. See Kevin Pennell, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to A Contractual Problem*, 82 Tex. L. Rev. 481, 502-04 (2003). The original plaintiff has a $225,000 judgment, but it is not collectible because Picadilly is insolvent. Picadilly's legal malpractice claim may be valid—it is certainly possible to have been negligent but not grossly negligent—but Picadilly cannot sue for the $150,000 because it is bankrupt. The plaintiff might need money immediately and conclude that a $150,000 claim against Picadilly's lawyer is better than a $225,000 claim against an insolvent Picadilly. Banning an assignment needlessly forces the plaintiff to wait.

The "real life" example of ban on assignments putting the plaintiff at an actual disadvantage is taken from a Texas case, *Douglas v. Delp*. See Pennell, *supra*, at 506-07.

The plaintiffs in *Douglas* were a married couple who sued their former lawyers for malpractice. The husband filed for bankruptcy while the malpractice suit was pending and as a part of the reorganization plan, the husband's legal malpractice claim was sold to a company acting on behalf of his former lawyer's malpractice carrier. This was over the husband's objection. *Id.* (citing *Douglas*, 987 S.W.2d 879, 880-81 (Tex. 1999)).

Having acquired the status of "plaintiff," this intermediary for the malpractice carrier then moved to dismiss the case. This led to the dismissal of the wife's claim as well because the claim was acquired during the parties' marriage and was thus part of the husband's bankruptcy estate. Pennell, *supra* p.6, at 507 (citing *Douglas*, 987 S.W.2d. at 882-83).

To be fair, the law firm in *Douglas* may not have committed malpractice, but fairness also requires acknowledging that it seems inconsistent to prohibit the original plaintiffs from trading their legal malpractice claims for value but to allow other people, including people who had an adverse interest in those claims, to purchase the claims through other means. This seems like a double standard.

Banning assignments *does* raise a risk of harm. "[A] client who is in dire financial straits as a result of his attorney's negligence may not be in a position to litigate a legal malpractice claim." Pennell, *supra* p.6, at 506. Furthermore, "[i]f the client declares bankruptcy, the malpractice claim becomes part of the bankruptcy estate and the bankrupt client no longer controls what happens to it." *Id.* We permit people to bring bad faith cases even though the person has not gone through the full throes of financial ruin. This applies to legal malpractice claims with equal force. It is senseless to force someone to experience damages when that experience is avoidable. Assignments can save a client from collapse.

ii. There are at least two (2) situations where these assignments are fair and practical.

The first situation where the assignment of a legal malpractice claim to an adversary is valuable and practical is the situation where an actual conflict of interest arises between an insurance company and its insured.

The nature of the conflict is not relevant for the example. Let us simply assume that the conflict arises after the litigation begins and that it is the sort of actual conflict where a single lawyer may not represent the interests of both the client and the insurance company.

When there is an actual conflict of interest between the insurance company and the client, the insurance company is required to provide the client with independent counsel. This is based on the lawyer's duty of loyalty, which prohibits him from representing clients with competing interests. See *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co.*, 336 F. Supp. 2d 610, 615 (D.S.C. 2004).

Suppose the client's new and independent lawyer discovers that the client's previous lawyer committed malpractice and that this malpractice has exposed the client to personal liability. Suppose further that the plaintiff in the underlying suit, who wants only to be made whole for his or her injuries, is willing to forego putting his opponent out of business in exchange for the opponent's right to sue the opponent's former lawyer.

There is nothing unfair or collusive about the independent lawyer advising the client to pursue this sort of assignment. There is no functioning relationship with prior counsel. That relationship is over due to the conflict of interest. The plaintiff will still have to prove causation and he will still have to prove damages. Nobody is driving a "wedge" between an attorney and his client. These parties are trying to prevent unnecessary harm.

The second situation when an assignment is practical is when a lawyer discovers his own malpractice before the case goes to trial and shares that discovery with the client. Here, assignment is the only option that makes any sense.

We could force the client to stay with the negligent attorney and lose the trial, but this seems unnecessarily cruel. Alternatively, the client could fire the negligent lawyer, hire a new lawyer, and march on towards defeat, but here again, this seems to cause useless pain.

But a settlement and assignment is efficient and effective. The original lawyer is conceding malpractice, the plaintiff is satisfying his desire to be made whole, and the defendant occupies the same position he would have occupied if his original lawyer had performed capably. There is no collusion or shameful role-reversal. This is an honorable transaction that the law should allow.

This Court has recognized that forcing a party wait for actual damages can translate into requiring that party to undergo significant harm instead of taking action that can prevent that harm. *Menezes v. WL Ross & Co.*, 403 S.C. 522, 549, 744 S.E.2d 178, 193 (2013) (breach of fiduciary duty claim). The Court's statement is right. The Court should reject the argument that these assignments offer no benefits. Banning them *does* cost something.

C. There are forceful arguments against each "justification" of the "majority" view.

The plaintiffs' principal brief attempted to describe both sides of the argument fairly. Eloquent articulations of the "majority" view include the oft-cited cases of *Goodley v. Wank and Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976) and *Picadily, Inc. v. Raikos*, 582 N.E.2d at 341-45. For the "minority" view, the better cases include *New Hampshire*

Insurance Co. v. McCann, 707 N.E.2d 332, 334-38 (Mass. 1999) and *Gregory v. Lovlien*, 26 P.3d 180, 183-85 (Or. Ct. App. 2001). Any balanced review of this issue would involve all of these authorities.

The defendants' briefs leave one with the impression that the plaintiffs are advocating an idiotic rule that provides a safe haven for fraud. The defendants say that the attorney-client relationship is too sacred, the potential for collusion is too strong, and the likelihood of a shameless role-reversal is too certain for any sensible court to take this risk.

If this was so, one would expect the jurisdictions that allow assignments between adversaries to have changed course. One would also expect those States to have a chorus of lawyers clamoring that dishonest litigants are constantly seeking to perpetrate fraud.

The reason there is no such chorus is that there are forceful arguments explaining why the bad consequences that the defendants predict are not likely to come to pass.

i. A "commercial market" for legal malpractice claims is unlikely to develop and this concern is not even implicated if the assignment is to an adversary.

There is no evidence that the jurisdictions which allow assignments have experienced an increase in baseless malpractice claims. Massachusetts opined that the fear of commercialization was based on "outmoded concepts and protectionism" and suggested that the lack of any increase in frivolous cases weakened the argument that allowing assignments would lead to open trading between strangers. *McCann*, 707 N.E.2d at 337.

One commentator has opined that the reason this evidence is absent is because "legal malpractice claims are very suspect." Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims*, 37 S. Tex. L. Rev. 1203, 1215-16 (1996). He notes a fellow academic's conclusion that "many more" legal malpractice cases end in defeat rather than victory, and he also argues that a routine market for such claims is unlikely to develop because a rational assignee of a legal malpractice claim will expect a stiff fight from the defendant. *Id.*

The truth is that there *is* a market for legal malpractice claims, but it is a market where the only buyer is the lawyer who is being sued. Tom W. Bell, Comment, *Limits on the Privity and Assignment of Legal Malpractice Claims*, 59 U. Chi. L. Rev. 1533, 1549 (1992). This buyer gets to decide whether to "purchase" the claim by settling out of court, and the unfairness in that "monopsony" is that the case might be highly valuable in the hands of a well-financed assignee, but the original plaintiff may lack a bankroll and be tempted to take less. One-buyer markets do not produce optimum outcomes.

In short, there is no evidence that the "commercialization" argument is based on accurate assumptions and that this even constitutes something that approaches a cognizable "public policy." And if the argument is that it somehow offends public policy for the lawyer to be sued by a stranger, this concern has no application when the assignee is someone like the adversary. The adversary has a direct connection to the underlying lawsuit.

ii. Assignments do not undermine the attorney/client relationship. The desire to avoid a malpractice claim will only make the attorney's work better.

First, there is no statutory basis for treating assignments of legal malpractice claims different than any other professional negligence claims. Lawsuits against attorneys are governed by the same statute that governs claims against certified public accountants, medical doctors, and professional counselors. See S.C. Code Ann. § 15-36-100 (Supp. 2014). Some of these professions have special duties and involve confidentiality. Medical doctors are bound by a stringent oath in the same way that lawyers are bound by an oath. If assignments involving lawyers are going to be judged by a different standard, the reasoning for doing so should be unassailable. The statutory law treats lawyers the same.

The defendants' response to this is to say that the statutory law does not matter. The Court should summarily reject this suggestion. Yes, some of the courts that follow the "majority" view have called survival an "anachronistic" test for assignability, but the survival rule is based on this Court's interpretation of a statute and that interpretation is long-standing. If the legislature disagreed with this standard, it would have reacted. It has not.

Second, as the Supreme Court of Pennsylvania has stated, "[w]here the attorney has caused harm to his or her client, there is no relationship that remains to be protected." *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 539 A.2d 357, 359 (Pa. 1988). If the fear is that the attorney will be less loyal to the client because he is scared of being sued, respectfully, that concern is not rational. A lawyer who fears his client has "more incentive to zealously represent his client, not less." Pennell, *supra* p.6, at 498. We associate increased accountability with producing a better work-product, not something poorer.

Finally, although the attorney/client relationship is very much a "personal" relationship, legal malpractice cases do not often involve personal *injuries*. Instead, many legal malpractice claims will be about a discreet financial harm. *Gregory*, 26 P.3d at 182; *Hedlund*, 539 A.2d at 359. This is different from a personal tort like slander, where the damages center on intangible things like loss of reputation, hurt feelings, emotional distress, and "similar types of injuries which are not capable of definite money valuation." *Erickson v. Jones Street Publishers*, 368 S.C. 444, 465 n.6, 629 S.E.2d 653, 664 n.6 (2006).

The "loyalty/personal relationship" argument presumes too much. The diligent lawyer is already concerned about being sued. This is a desirable thing, not a bad thing.

iii. The distasteful "role-reversal" is precisely why rational litigants will avoid collusive assignments.

Surely most defendants are more interested in winning a lawsuit as opposed to concocting a scheme to lose the case, turn around, and sue their lawyer. When the highest court in Massachusetts considered this argument, it said there was "no logic" to the idea that *every* assignment to an adversary would create an inappropriate role-reversal that demeans the profession. *McCann*, 707 N.E.2d at 337. In fact, the court argued that the opposite was true. The court argued that "providing shelter for attorneys"—treating attorneys differently—"would actually diminish public confidence in the profession by creating the perception that the system provides attorneys with unjustified special protection." *Id.*

The shameful role-reversal argument goes like this, and if not exactly like this, then at least something like this: the plaintiff in the underlying case is going to have to admit during the course of the malpractice case that his original suit was not viable and that he should have lost. Whereas his original case against the defendant was "the law says that I should win," when he sues the defendant's former lawyer, he will be arguing "the law says *the defendant* should have won; I won only because his lawyer was bad." See Quinn, *supra* p.10, at 1232; see also *Zuniga*, 878 S.W.2d at 318.

Many assignments to adversaries will not involve a role-reversal. There was no role-reversal in *McCann* and there has been no showing that there will be a role-reversal in the present case. There is no difference between Specialty Logging contesting the Skippers' damages and the defendants contesting the Skippers' damages. Either way, *somebody* is contesting the Skippers' damages. Moreover, if all "role-reversals" were bad, public policy would ban all legal malpractice cases. *Kommavongsa v. Haskell*, 67 P.3d 1068, 1085 (Wash. 2003) (Ireland, J., dissenting). There is no legal justification to ban an assignment that is fair.

One commentator says shameful role-reversals will police themselves. "Rational parties will not want an assignment of a legal malpractice claim precisely because of how they will be portrayed[.]" Pennell, *supra* p.6, at 504. The lawyer who is being sued will be able to parade his ex-client's previous positions in front of the jury and the ex-client will have to explain why he has switched camps. Other deterrents include judicial estoppel, the threat of sanctions (civil and criminal), and barriers to entry such as the requirement that a legal malpractice plaintiff secure expert testimony that identifies at least one negligence act or omission. See § 15-36-100(B). The defendants say these deterrents do not matter, but the defendants never explain why that is so. We are supposed to take their claims that the system will collapse at face value, and we are also to presume that these safeguards, which were enacted for the precise reason of deterring baseless lawsuits, actually count for nothing.

iv. There is no evidence that assignments to adversaries will reduce the availability of legal services.

Several of the cases that support the defendants' position suggest that if assignments to adversaries were allowed, these assignments would become a "bargaining chip" in suits where the defendant does not have a deep pocket. This will supposedly make it harder for impoverished defendants to find counsel. See, e.g., *Zuniga*, 878 S.W.2d at 317.

First, this is something that could be policed on the case-by-case level. There has been no showing that Specialty Logging is not a deep-pocketed defendant that lacks the assets to satisfy the confessed judgment. The question whether an assignment represents an inappropriate means to amplify the worth of a case is a question that is tied to the record.

Second, the Supreme Court of Oregon's decision in a bad faith case provides perhaps the best rejoinder to this argument. The insurance company in the Oregon case argued that it had been "set up" by the plaintiffs for the purpose of obtaining a greater recovery than would otherwise be available. The court's reply was pointed. It wrote "[t]he attorneys who represented the plaintiffs did so with skill and fidelity to their clients' interests." *Groce v. Fid. Gen. Ins. Co.*, 448 P.2d 554, 558 (Or. 1968). It also wrote that the insurance company was equally well protected by counsel. *Id.* The court observed that "long before the cases were filed, the agents of the defendant knew that the damage claims were not the kind that would, if tried, be likely to result in verdicts within the insurance limits." *Id.* In spite of this knowledge, the defendant's actions reflect "an errogant disdain" for the rights of its insured. *Id.* The defendant had not been "set up." It wrote that to avoid excess liability, all an insurance company needs to do to is exercise good faith. *Id.*

The rule for lawyers is the same. All that a lawyer needs to do is act competently.

CONCLUSION

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

These assignments are valuable tools when the lawyer commits malpractice that exposes the client to increased liability. The wedge between the attorney and the client is not the assignment. The wedge is the malpractice. Here, the claim is that the legal malpractice occurred along with an insurance company's act of bad faith. If we accept the precedent that the bad faith claim can be assigned—and there has been no challenge to that precedent here—logic would seem to suggest that the legal malpractice claim is assignable as well.

Assignments are contracts, and South Carolina courts have an established history of judging contracts by examining the circumstances of the contract in question. Even when the contract is a type of contract that is historically disfavored, the circumstances of each case matter. It is difficult to see how a court could ban a private transaction if that transaction does not violate some policy that is specific and identifiable. The way to police collusion is to scrutinize each case and to give the plaintiff the initial burden of proving that any settlement was reasonable.

Respectfully submitted,

March 23, 2015

Blake A. Hewitt
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com

Attorney for Plaintiffs

RECEIVED

MAR 23 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

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

Ronald K. Wray, II
Gallivan, White & Boyd, PA
P.O. Box 10589
Greenville, SC 29603

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

Justin T. Bamberg, Esquire
Lanier & Burroughs, LLC
250 Gibson Street
Orangeburg, SC 29115

Erin Bridges

March 23, 2015
Columbia, South Carolina

Erin Bridges
Paralegal
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC