

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III
Case No.15-CP-46-1827
Appellate Case No: 2016-001558

Willie Bell, individually and on behalf of the Estate of
Emma M. Davis as its duly appointed Personal Representative, ... Appellant.
v.

McGowan, Hood, and Felder, LLC and Chad McGowan, ... Respondents.

RECORD ON APPEAL
Volume 1, Pages 1-450

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP4601827

Willie Bell	Emma M Davis	McGowan Hood & Felder LLC	Chad McGowan

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ 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. ☐ See Page 2 for additional information.
- ☐ **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; ☐ Other: _____
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ **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.

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: DEFENDANT'S MOTION FOR DIRECTED VERDICT ON THE LEGAL MALPRACTICE CLAIM IS DENIED, HOWEVER IT WAS FOUND THAT PLAINTIFF FAILED TO PROVE MR. STRONG WAS NOT A COMMON LAW HUSBAND. DEFENDANT'S DIRECTED VERDICT MOTION ON UNFAIR TRADE PRACTICES ACT IS GRANTED. THE COURT FINDS THAT PLAINTIFF IS NOT ENTITLED TO DISGORGEMENT, IT IS SO ORDERED. BASED ON THESE RULINGS, COUNSEL OF PARTIES AGREED THIS EFFECTIVELY ENDED THE NEED FOR THE JURY TRIAL TO CONTINUE.

INFORMATION FOR THE JUDGMENT 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)

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

2049

Judge Code

7/20/2016

Date

For Clerk of Court Office Use Only

This judgment was entered on July 21, 2016, and a copy mailed first class or placed in the appropriate attorney's box on July 21, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

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A. Camden Lewis PO Box 11208 Columbia, SC 29211

Steven George Janik 9200 S. Hills Blvd. Ste. 300 Cleveland,
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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter: Bethanie K. Creppon

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Willie Bell, individually and on behalf
of the Estate of Emma M. Davis as its duly
appointed Personal Representative,

Plaintiff,

vs.

McGowan, Hood, and Felder, LLC and
Chad McGowan,

Defendants.

IN THE COURT OF COMMON PLEAS

COMPLAINT
(Jury trial demanded)

Comes now, Willie Bell ("Plaintiff"), individually and on behalf of the Estate of Emma M. Davis as its duly appointed Personal Representative, by and through his undersigned Counsel of Record, A. Camden Lewis of Lewis, Babcock, and Griffin, LLP, to allege the following against Defendants McGowan, Hood, and Felder, LLC and Chad McGowan ("Defendants McGowan"):

Parties

1. Plaintiff Willie Bell is a citizen and resident of Chester County, South Carolina, and the legally adopted son of Ms. Emma M. Davis. Exhibit A, Chester County Adoption Decree.
2. Defendant McGowan, Hood, and Felder, LLC is an entity which maintains a principal place of business in Richland County, South Carolina.
3. Defendant Chad McGowan is a citizen and resident of South Carolina.
4. As fully described herein below, the most substantial part of the acts and/or omissions giving rise to the causes of action occurred in South Carolina.

5. The jurisdiction of this Court over this matter is proper pursuant to S.C. Code Ann. §15-7-30(C)(1) and (2).

GENERAL ALLEGATIONS

6. On February 11, 2010, Emma M. Davis died without leaving a Will. Exhibit B, Affidavit of Willie Bell at Exhibit 1, Certificate of Death. (Defendants McGowan had this document in their possession.)

7. On February 16, 2010, Plaintiff Willie Bell was listed in the obituary as the son of the deceased "Miss Emma 'Monk' Davis". Exhibit B, Affidavit of Willie Bell at Exhibit 2, Obituary of Emma Davis dated February 16, 2010. (Defendants McGowan had this document in their possession.)

8. On her Death Certificate, issued by the State of South Carolina on February 17, 2010, Plaintiff Willie Bell is listed as the Informant; and under relationship to the Decedent, Mr. Bell was listed as Son. (Defendants McGowan had this document in their possession.)

9. In addition to being listed as the son of Emma Davis on the death certificate and in the published obituary, Ms. Davis is also listed as Plaintiff's mother on his Birth Certification. Exhibit B, Affidavit of Willie Bell at Exhibit 3, Birth Certification for Willie Bell.

10. Ms. Tanisha Gilmore, a distant niece of Ms. Davis, and Mr. Andrew Strong, who claimed to be Ms. Davis' common law husband, sought the advice and counsel of Defendants McGowan, after they had received an anonymous call about a potential case, as to a malpractice action on behalf of Ms. Davis' Estate.

11. As part of the scheme to illegally obtain the funds of any potential award from the planned lawsuit for the Estate and Andrew Strong, who was a mere former live-in companion of the Deceased, a false Application for Appointment in the Probate Court for Chester County that

did not include Plaintiff Willie Bell's name as an heir despite his being the true, sole intestate heir. Exhibit C, Application for Appointment dated February 19, 2010 at ¶ 4b.

12. The Application for Appointment listed only Rosa Hall and Atlean D. Jordan as the heirs of the Estate. Id.

13. In furtherance of the scheme, waivers and nominations to serve were obtained from the two heirs listed, one of whom was Ms. Gilmore's grandmother, and the same were attached with the Application.¹ Exhibit D, Waivers signed by Rosa Hall and Atlean D. Jordan.

14. As a result of the illegal scheme, Ms. Gilmore was appointed personal representative without public notice or any notice to Plaintiff Willie Bell and/or the Estate. Exhibit E, Certificate of Appointment for the Estate of Emma Davis dated February 19, 2010.

15. Upon information and belief, the appointment of Ms. Gilmore was accomplished under the counsel of Defendants McGowan and was procured for the specific purpose of pursuing a medical malpractice lawsuit against Ms. Davis' treating physician and hospital with all funds going to the scheme participants.

16. Defendants McGowan knew, or should have known, that the application for appointment filed by Ms. Gilmore with the Probate Court was false as to the nonexistence of additional heirs; Defendants McGowan knew, or should have known, that Willie Bell was the sole intestate heir and the only true client of McGowan's.

17. On the Application, Ms. Gilmore answered the question about the total value of the personal estate by stating "TO BE DETERMINED." Exhibit C at ¶ 11.

18. Andrew Strong, a man listed in the published obituary as Ms. Davis' "companion" but who was claiming an interest in the Estate as a supposed common law spouse,

¹ Upon information and belief, both received funds from this settlement. Exhibit A, Affidavit of Willie Bell at ¶¶ 19 and 20.

joined the scheme by allowing Defendants McGowan to represent him in his purported independent loss of consortium cause of action, which was done in conflict with the interests of Defendant McGowan's Estate client.

19. Defendants McGowan negligently and improperly took on the representation of Mr. Strong while knowing that his interests were adverse to those of his other clients.

20. The Complaint in the medical malpractice and loss of consortium actions was filed on September 15, 2010 and amended in 2012.

21. At no time prior to the filing of the underlying action nor at any time subsequent to the filing of that action did Andrew Strong or the Defendants McGowan on his behalf file a petition with the Probate or Family Court to be determined the common-law husband of Emma Davis as is required by the South Carolina Code Section 62-2-802.

22. As a result, and under the counsel of Defendants McGowan, Mr. Strong did not comply with South Carolina Code Section 62-2-802, did not obtain any finding as to his status as the alleged common-law husband of Emma Davis, and did not qualify as a surviving spouse under the laws of South Carolina at the time Defendants McGowan illegally represented to the Probate Court that he did.

23. In fact, Mr. Strong had not even been listed as an heir on the Application for Appointment filed by Tanisha Gilmore either. Exhibit C, Application for Appointment dated February 19, 2010 at ¶ 4b.

24. Defendants McGowan knew or should have known that their client, Mr. Strong, was not a proper heir to the Estate of Ms. Davis but took no measures to inform the Probate Court or Defendants' other client, the Estate, of the same but rather continued to litigate the

lawsuit on Mr. Strong's behalf and against the interests of their other client for the purposes of collecting a fee.

25. Prior to resolving the underlying litigation, Defendants McGowan negligently and illegally allowed the Probate Court to discharge Ms. Gilmore as Personal Representative and to close the Estate of Emma Davis on February 21, 2011 without taking the proper, required steps to make a determination as to the legitimate heirs of the Estate or to provide proper notice and/or publication to others with a potential interest in the Estate, thereby allowing the scheme to defraud the Probate Court to continue without the knowledge of Plaintiff Willie Bell and/or the Estate. Exhibit F, Certificate of Discharge dated February 21, 2011.

26. Defendants McGowan negligently and illegally allowed the Estate to be closed without making certain that the correct heirs had been determined and that the interests of all of the statutory beneficiaries were going to be protected going forward with the pending lawsuit yet continued to further the scheme by litigating the lawsuit in the name of the closed Estate and on behalf of Mr. Strong, a man known not to be a proper heir.

27. In 2013, two years after the closing of the Estate and after McGowan's representation of the Estate had lapsed, the underlying medical malpractice case settled for a total amount of Two-Million-Two-Hundred-Thousand Dollars (\$2,200,000.00);

28. As a reward for their malicious and illegal yet successful scheming, Defendants McGowan distributed to the improper heir Mr. Strong, against the interests of the Estate, the sum of Eight-Hundred-Thirty-Three-Thousand-Three-Hundred-Twenty-Seven Dollars and Ninety-Seven Cents (\$833,327.97); Defendants McGowan distributed to Tasha Gilmore Two-Hundred-Thousand Dollars (\$200,000.00), even though she had only been awarded a Twenty-Five-Thousand Dollar (\$25,000.00) fee by the Probate Court; and the remainder of the settlement

funds were retained by Defendants McGowan, Nine-Hundred-Twenty-Thousand Dollars (\$920,000.00) in fees and One-Hundred-Six-Thousand-One-Hundred-Seventy-Two Dollars and Three Cents (\$106,172.03) in reimbursed costs.

29. Defendants McGowan knew or should have known that they had illegally distributed more than a Million Dollars designated to go to the Estate of Emma M. Davis to an improper heir, Mr. Strong, against the interests of their other client, the Estate, and never attempted to contact or otherwise notify Plaintiff Willie Bell of the distribution and/or the conflict of interest that spawned the settlement.

30. Despite these facts, and against the interests of the true statutory beneficiaries, Defendants McGowan maliciously and illegally filed a Joint Petition for Approval of Settlement stating falsely both that their client, Andrew Strong, was the common law husband of the Deceased and that "Tanisha Gilmore is the duly appointed Personal Representative of the Estate of Emma Davis" (an Estate that had been closed two years prior). Exhibit G, Petition for Approval of Settlement filed August 1, 2013.

31. Additionally, Defendants McGowan falsely and illegally represented to the Probate Court that Andrew Strong was "the sole heir and beneficiary of the Estate of Emma Davis," without ever mentioning the existence of the son and true heir, Willie Bell. Exhibit G, Petition for Approval of Settlement filed August 1, 2013 at ¶ 5.

32. Defendants McGowan also failed to comply with Section 15-51-42(B) by neglecting to sign a certificate attesting to the fact that they were of the opinion that the settlement was fair and reasonable and in the best interests of the statutory beneficiaries and the Estate; Mr. McGowan could not sign such a document.

33. However, the Court entered an Order approving a settlement and awarding all net settlement proceeds to Mr. Strong² as a result of the scheming that included Defendants McGowan's illegal, unethical, and negligent actions. Exhibit H, Order Approving Settlement filed August 1, 2013.

34. Plaintiff Willie Bell was never informed about the underlying action and first learned of the litigation when Tanisha Gilmore furthered the scheme by calling him and telling him not to believe what he saw in the paper. Exhibit A, Affidavit of Willie Bell at ¶¶ 11 and 12.

35. Despite not being listed in the Order Approving Settlement filed by Defendants McGowan on August 1, 2013 or in the original appointment of personal representative petition, Ms. Gilmore assured Plaintiff that he was going to receive his proper share, a mere \$100,000.00. Exhibit A, Affidavit of Willie Bell at ¶¶ 13 and 14. Exhibit H, Order Approving Settlement filed August 1, 2013.

36. Recently, Defendant McGowan's client, Mr. Strong, delivered a check to Plaintiff for One Hundred Thousand Dollars (\$100,000.00) made payable to Mr. Strong and Plaintiff jointly.

37. Plaintiff Bell has also learned that despite being awarded only Twenty-Five-Thousand Dollars (\$25,000.00) as a personal representative fee in the Settlement Approval Order, Ms. Gilmore received a check for Two-Hundred-Thousand Dollars (\$200,000.00).

38. Throughout the entire underlying malpractice litigation, Defendants McGowan made no attempt to contact or otherwise notify Plaintiff Willie Bell about the Estate being opened up, the settlement proceeds, and/or about the conflict of interest that Defendants created by taking on the representation of both the Estate and a man claiming to be a common law husband of Ms. Davis, and should not be permitted to keep their fee from the case.

² Mr. Bell has filed a Rule 60 Motion in that action to correct this Order.

FIRST CAUSE OF ACTION
(LEGAL MALPRACTICE)

39. Plaintiff refers to and incorporates herein the General Allegations stated in Paragraphs 1 through 38 alleged herein above and makes them a part hereof as though set forth at length.

40. Defendants McGowan established an attorney-client relationship with the Estate of Emma Davis in agreeing to represent it with respect to medical malpractice claims against Ms. Davis' treating physician and hospital.

41. Defendants, and each of them, had a duty to use such skill, prudence, and diligence as members of the legal profession commonly possess and exercise, in providing legal services to Plaintiff Willie Bell and the Estate of Emma M. Davis ("the Estate" hereinafter).

42. During the course of Defendants' representation of the Estate, the Defendants' conduct fell below the applicable standard of care in the following respects:

- a. Defendants knew or should have known that Tanisha Gilmore had made false representations to the Probate Court in procuring her appointment as Personal Representative of the Estate;
- b. Defendants knew or should have known that their client, Tanisha Gilmore, was not a proper Personal Representative of the Estate;
- c. Defendants knew or should have known that their client, Tanisha Gilmore, would not protect the best interests of the statutory beneficiaries of the Estate;
- d. Defendants failed to notify Plaintiff Willie Bell and/or the Estate of Mr. Bell's interests in the Estate and/or about the conflict of interest that existed between Defendants' two clients;
- e. Defendants failed to notify Plaintiff Willie Bell that Tanisha Gilmore failed to identify him as an heir to the Estate in her application to the Court;
- f. Defendants filed a joint Petition for Approval of Settlement falsely representing to the Probate Court that their client, Andrew Strong, was the

common law husband of the Deceased, despite the fact that they knew or should have known that Mr. Strong had not taken the proper steps to become such;

- g. Defendants McGowan falsely represented to the Probate Court that Andrew Strong was the sole heir and beneficiary of the Estate of Emma Davis, which had been closed two years prior, despite the fact that they knew or should have known that he was not;
- h. Defendants failed to notify Plaintiffs Bell and the Estate that Mr. Strong's purported interests in the Estate were adverse to Bell's and those of the Estate in general;
- i. Defendants filed a joint Petition for Approval of Settlement falsely representing to the Probate Court that Tanisha Gilmore was the duly appointed Personal Representative of the Estate of Emma Davis at the time of the settlement of the underlying medical malpractice litigation, despite the fact that they knew or should have known that Ms. Gilmore had been relieved of those duties and the Estate closed in 2011;
- j. Defendants represented to the defendant in the underlying medical malpractice case that Mr. Strong was a proper recipient of the settlement funds;
- k. Defendants represented to the defendant in the underlying medical malpractice case that Ms. Gilmore was a proper payee of the settlement funds;
- l. Defendants dispersed all of the settlement funds to improper recipients;
- m. Defendants took on the representation of clients whose interests were diametrically opposed; and
- n. Defendants placed their interests in the proceeds of the procured settlement above the interests of their client, the Estate of Emma M. Davis.

43. Defendants McGowan's actions and silence as to the above-listed material facts constitutes a breach of the created duty to his clients.

44. As a direct result of Defendants McGowan's above-listed instances of breach of duty, Plaintiff Willie Bell and the Estate have suffered actual and consequential damages in an amount to be determined by a jury.

45. Furthermore, the actions of Defendants McGowan have been willful, wanton, reckless, and performed with a conscious indifference to the rights of the Plaintiff Willie Bell and the Estate, thereby entitling them to punitive damages.

SECOND CAUSE OF ACTION
(FRAUDULENT MISREPRESENTATION)

46. Plaintiff refers to and incorporates herein Paragraphs 1 through 45 alleged herein above and makes them a part hereof as though set forth at length.

47. Defendants McGowan established an attorney-client relationship with the Estate in agreeing to represent it with respect to medical malpractice claims against Ms. Davis' treating physician and hospital.

48. Defendants McGowan owed a duty to the Estate to disclose material facts that affected the rights and interests of the Plaintiff Willie Bell and the Estate.

49. Defendants McGowan maliciously breached its duty to disclose the following material facts to the Plaintiff Willie Bell and the Estate:

- a. Tanisha Gilmore had made false representations to the Probate Court in procuring her appointment as Personal Representative of the Estate;
- b. their client, Tanisha Gilmore, was not a proper Personal Representative of the Estate;
- c. their client, Tanisha Gilmore, would not protect the best interests of the statutory beneficiaries of the Estate;
- d. Plaintiff Willie Bell was the sole legitimate heir of the Estate;
- e. Tanisha Gilmore failed to identify Plaintiff Willie Bell as an heir to the Estate in her application to the Court;
- f. Defendants illegally filed a joint Petition for Approval of Settlement falsely representing to the Probate Court that their client, Andrew Strong, was the common law husband of the Deceased, despite the fact that they

knew or should have known that Mr. Strong had not taken the proper steps to become such;

- g. Defendants McGowan falsely and illegally represented to the Probate Court that Andrew Strong was the sole heir and beneficiary of the Estate of Emma Davis, despite the fact that they knew or should have known that he was not;
- h. Mr. Strong's purported interests in the Estate were adverse to his and those of the Estate in general;
- i. Defendants illegally filed a joint Petition for Approval of Settlement falsely representing to the Probate Court that Tanisha Gilmore was the duly appointed Personal Representative of the Estate of Emma Davis at the time of the settlement of the underlying medical malpractice litigation, despite the fact that they knew or should have known that Ms. Gilmore had been relieved of those duties and the Estate closed in 2011;
- j. Defendants improperly represented to the defendant in the underlying medical malpractice case that Mr. Strong was a proper recipient of the settlement funds;
- k. Defendants falsely represented to the defendant in the underlying medical malpractice case that Ms. Gilmore was a proper payee of the settlement funds;
- l. Defendants dispersed all of the settlement funds to improper recipients;
- m. Defendants took on the representation of clients whose interests were diametrically opposed; and
- n. Defendants placed their interests in the proceeds of the procured settlement above the interests of their client, the Estate of Emma M. Davis.

50. Defendants McGowan's silence as to the above-listed material facts constitutes a malicious "false representation" for the purpose of furthering their own pecuniary interests.

51. Defendants McGowan knew that its nondisclosure of material facts would create a false impression with respect to the true interests in the Estate.

52. Plaintiff Willie Bell and the Estate justifiably relied upon the silence/false misrepresentations to their detriment.

53. Defendants McGowan knew that Plaintiff Willie Bell and the Estate were not aware of the material facts Defendants were suppressing.

54. As a direct result of Defendants McGowan's above-listed instances of fraud, Plaintiff Willie Bell and the Estate have suffered actual and consequential damages in an amount to be determined by a jury.

55. Furthermore, the actions of Defendants McGowan have been willful, wanton, reckless, and performed with a conscious indifference to the rights of the Plaintiff Willie Bell and the Estate, thereby entitling them to punitive damages.

THIRD CAUSE OF ACTION
(NEGLIGENT MISREPRESENTATION)

56. Plaintiff refers to and incorporates Paragraphs 1 through 55 alleged herein above and makes them a part hereof as though set forth at length.

57. Defendants McGowan established an attorney-client relationship with the Estate in agreeing to represent it with respect to medical malpractice claims against Ms. Davis' treating physician and hospital.

58. Defendants McGowan owed a duty of care to Plaintiff to see that the material, truthful information was properly communicated to Plaintiff Willie Bell and the Estate.

59. Defendants McGowan negligently breached its duty to disclose the following material facts to the Estate:

- a. Tanisha Gilmore had made false representations to the Probate Court in procuring her appointment as Personal Representative of the Estate;

- b. their client, Tanisha Gilmore, was not a proper Personal Representative of the Estate;
- c. their client, Tanisha Gilmore, would not protect the best interests of the statutory beneficiaries of the Estate;
- d. Plaintiff Willie Bell was the sole legitimate heir of the Estate;
- e. Tanisha Gilmore failed to identify Plaintiff Willie Bell as an heir to the Estate in her application to the Court;
- f. Defendants illegally filed a joint Petition for Approval of Settlement falsely representing to the Probate Court that their client, Andrew Strong, was the common law husband of the Deceased, despite the fact that they knew or should have known that Mr. Strong had not taken the proper steps to become such;
- g. Defendants McGowan falsely and illegally represented to the Probate Court that Andrew Strong was the sole heir and beneficiary of the Estate of Emma Davis, despite the fact that they knew or should have known that he was not;
- h. Mr. Strong's purported interests in the Estate were adverse to his and those of the Estate in general;
- i. Defendants illegally filed a joint Petition for Approval of Settlement falsely representing to the Probate Court that Tanisha Gilmore was the duly appointed Personal Representative of the Estate of Emma Davis at the time of the settlement of the underlying medical malpractice litigation, despite the fact that they knew or should have known that Ms. Gilmore had been relieved of those duties and the Estate closed in 2011;
- j. Defendants improperly represented to the defendant in the underlying medical malpractice case that Mr. Strong was a proper recipient of the settlement funds;
- k. Defendants falsely represented to the defendant in the underlying medical malpractice case that Ms. Gilmore was a proper payee of the settlement funds;
- l. Defendants dispersed all of the settlement funds to improper recipients;
- m. Defendants took on the representation of clients whose interests were diametrically opposed; and

- n. Defendants placed their interests in the proceeds of the procured settlement above the interests of their client, the Estate of Emma M. Davis.

60. Defendants McGowan's negligent silence as to the above-listed material facts constitutes a "false representation."

61. Defendants McGowan should have known that its nondisclosure of material facts would create a false impression with respect to the true interests in the Estate.

62. Defendants McGowan had a pecuniary interest in remaining silent about the aforementioned material facts.

63. Plaintiff Willie Bell and the Estate justifiably relied upon the silence/false misrepresentations to their detriment.

64. Defendants McGowan should have known that Plaintiff Willie Bell and the Estate were not aware of the material facts Defendants were suppressing.

65. As a direct result of Defendants McGowan's above-listed instances of malpractice, Plaintiff Willie Bell and the Estate have suffered actual and consequential damages in an amount to be determined by a jury.

66. Furthermore, the actions of Defendants McGowan have been willful, wanton, reckless, and performed with a conscious indifference to the rights of the Plaintiff Willie Bell and the Estate, thereby entitling them to punitive damages.

Respectfully submitted,

LEWIS, BABCOCK & GRIFFIN L.L.P.



A. Camden Lewis

James M. Griffin

1513 Hampton Street

Post Office Box 11208

Columbia, SC 29211

(803) 771-8000

Attorneys for Plaintiffs

Columbia, South Carolina
September 16, 2014

) IN THE COURT OF COMMON PLEAS
)
)

) Case No. 204 CP-40 - 5570

in

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Securities and Exchange Commission as a special counsel. As a law school professor I specialized in business courses and legal ethics. I am familiar with lawyer disciplinary proceedings, having participated in the litigation of discipline cases as a defense lawyer, consultant to disciplinary counsel, and as an expert witness on various occasions. I have served as a member of the South Carolina Bar's Ethics Advisory Committee and have written various ethics opinions published by the Bar. Prior to my retirement from USC Law School in 2008, I taught legal ethics for 35 years at USC Law School. I have also taught legal ethics at numerous CLE programs, and at several JCLE programs. I have served as a litigation consultant, or as a testifying expert in numerous legal malpractice cases. I have lectured on the standards applicable to legal malpractice many times, and have written about the topic. I have participated in disputes as to the behavior of lawyers in handling litigation and fiduciary matters many times, and have testified as an expert in such cases many times. I have served as an expert witness many times on questions involving lawyers' obligation to investigate relevant facts and to convey accurate, complete information, and the duty to avoid or handle properly conflicts of interest. My curriculum vitae is attached as Exhibit 1, which further establishes my qualifications.

3. This affidavit is presented under S.C. Code § 15-36-100 which requires, in a complaint against a lawyer, for the plaintiff to file "an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit."

4. In evaluating the behavior of McGowan for purposes of this affidavit, I have reviewed relevant documents including the proposed complaint and the exhibits thereto. I have also consulted with Plaintiffs' legal counsel about the underlying facts. I have reviewed the

professional conduct in issue in light of the standard of care applicable to South Carolina lawyers, namely the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession in this State. See *Holy Loch Distribs.*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000). For purposes of this affidavit, I deem the actions and inactions of Mr. McGowan imputable to his law firm based on agency principles because it appears Mr. McGowan was acting for and on behalf of his law firm, in the scope of his employment and authority, at the time of the actions and inactions in question. For purposes of this affidavit, I accept as true the facts stated in the "General Allegations" section of the complaint and stated in the attachments thereto.

5. Based on the facts presented, it is my opinion as an expert in the legal malpractice field that McGowan engaged in one or more negligent acts and omissions in dealing with and on behalf of Plaintiffs, including the following:

a. Failure to investigate, understand, and make appropriate disclosure of all material facts concerning Plaintiff Willie Bell's status as Emma M. Davis's son and heir and as someone who would be reliant on and affected by McGowan's professional efforts.

b. Failure to properly protect the interests of Plaintiff Bell and the Estate of Emma M. Davis.

c. Failure to exercise due care and undivided loyalty in handling material legal and financial matters affecting the Plaintiffs, including the failure to investigate facts and the failure to use of competent professional efforts to assure that transactions involving Plaintiffs were proper and were properly authorized.

d. Failure to insure that the Estate of Emma M. Davis had a Personal Representative

who was not conflicted but rather was willing and interested in competently, diligently and loyally discharging the obligations owed.

e. Mismanaging litigation involving or affecting Plaintiffs, including by misleading a Circuit Court judge as to material facts affecting the case.

f. Failure properly to recognize and handle conflicts of interest between Plaintiffs and other purported claimant to Estate proceeds.

g. Failing to identify and protect the interest of Willie Bell as a legitimate heir of the Estate, while also failing to protect the Estate from the actions of a disloyal and incompetent Personal Representative. Instead of preventing or countering the improper actions of Tanisha Gilmore as Personal Representative, McGowan aided and abetted those actions, including Gilmore's breaches of fiduciary duty.

h. Allowing Mr. McGowan's interest in making a large fee to override the obligation to discharge the duties of care and loyalty that were owed under the circumstances.

6. I hold these opinions because there is evidence that McGowan negligently, recklessly or knowingly participated and effectuated a scheme involving conflicts of interest, deception, over-reaching, and foreseeable strife, leaving Plaintiffs exploited and abused. Additionally, as indicated above, I believe Mr. McGowan's law firm is accountable for his wrongful acts and inactions based on the Mr. McGowan's status as an agent.

7. In my opinion, it was McGowan's job to conduct a searching investigation of the true facts, to avoid conflicts of interest, to make fair and honest disclosures, to originate and promote timely, accurate communications to affected parties, and to see to it that Plaintiffs were

treated fairly, and protected from unfairness and financial harm. Because of McGowan's breaches of duty, it appears Plaintiffs were abused and damaged.

8. In my opinion, the McGowan's mishandling of the legal affairs affecting Plaintiffs fell below the standard of care, skill, diligence and loyalty expected of lawyers in South Carolina. It appears to me that this deficient conduct proximately caused injury to Plaintiffs and constitutes legal malpractice. I hold these opinions to a reasonable degree of professional certainty as an expert in the field of legal malpractice.

9. I reserve the right to amend or supplement my opinions as additional information becomes available.

10. Further affiant sayeth not.


JOHN P. FREEMAN

SWORN TO BEFORE ME this 21st day of March, 2014


NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission expires: 7/7/2018

EXHIBIT 1

RESUME **John P. Freeman** **Professor of Law Emeritus**

Address and phone numbers:

~~REDACTED~~ Avenue
Columbia, South Carolina 29205
803-254-4667 (phone)
753-9870 (fax)

Education history:

LL.M., 1976, University of Pennsylvania Law School; J.D., 1970, University of Notre Dame Law School; B.B.A., 1967, University of Notre Dame (Accounting)

Employment history:

1970-72, Attorney, Jones, Day Law Firm, Cleveland, Ohio

1972-73, Fellow, University of Pennsylvania Law School Center for the Study of Financial Institutions

1973-75, Assistant Professor of Law, University of South Carolina

1974 and 1975 (Summers), Special Counsel, Division of Investment Management, SEC, Washington, D.C.

1975-78, Associate Professor of Law, University of South Carolina; Visiting Associate Professor of Law at Loyola Law School (Chicago) Spring 1977

1978-2008, Professor of Law, University of South Carolina; Visiting Professor of Law at University of Texas Law School, summer 1978

Present:

Distinguished Professor Emeritus and John T. Campbell Chair in Business and Professional Ethics Emeritus

Honors and Awards:

Undergraduate: Member Beta Alpha Psi (Honorary Accounting Fraternity)
Law School: Executive Editor, Notre Dame Lawyer;
Distinguished Military Graduate

Professional:

At University of South Carolina Law School: Senior Class Annual Outstanding Faculty Award of 1975, 1976, 1977, 1984

Winston Churchill Award, South Carolina Jury Trial Foundation 1995; Distinguished Service Award, South Carolina Trial Lawyers Association 2000; Appointed Member, South Carolina Judicial Merit Selection Commission (presently serving)
John Belton O'Neill Inn of Court McDonald/Rhodes Award 2010

Admitted to Practice:

Ohio; South Carolina

**Teaching History
Courses Taught:**

Professional Responsibility, Legal Accounting, Business Associations, Corporations, Agency-Partnership, Securities Regulation, Corporate Finance, Business Planning, Legal Research and Writing, Business Crime, Legal Malpractice
Component of Advanced Legal Profession Seminar

Scholarly and Professional Publications

Author, 1999-2008, Regular Legal Ethics Column for South Carolina Lawyer.

Article, Protecting Judicial Independence, 6 Charleston L. Rev. 511 (2012).

Article, Appearance of Impropriety, Recusal, and the *Segars-Andrews* Case, 62 S.C.L. Rev. 485 (2011).

Article (with Stewart Brown and Steve Pomerantz), Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test, 61 Okla. L. Rev. 83 (2008).

Article, The Mutual Fund Distribution Fee Mess, 32 J. Corporation Law 739 (2007).

Viewpoint, Say No to Vending Machine Justice, S.C. Lawyer, July 2007, at 8.

Article, It's the Conflict of Interest, Stupid, Money Mgm't Exec., May 17, 2004, at 14.

Chapter on Legal Opinion Liability in Legal Opinion Letters A Comprehensive Guide to Opinion Letter Practice (M. John Sterba, Jr., ed. 2003) (plus annual updates).

Chapter in South Carolina Damages Treatise on Damages in Securities Cases (2004).

Article, The Ethics of Using Judges to Conceal Wrongdoing, 55 S.C.L. Rev. 829 (2004).

Article (with Stewart Brown), Mutual Fund Advisory Fees: The Cost of Conflicts of Interest, 26 J. Corporation Law 610 (2001).

Article, Liens, Fees and Taxes, South Carolina Trial Lawyer, Summer 2000, at 26.

Article, A Business Lawyer Looks at the Internet, 49 S.C.L. Rev. 903 (1998).

Article, Payments to Medical Care Providers: What Are the Lawyer's Obligations? South Carolina Lawyer, September-October 1994, at 39.

Article, Current Developments in Lawyer Liability: Coping with the Fraudulent Client, Delaware Lawyer, Winter 1993, at 27.

Article, Treble Damage Statutes Can Increase Trust Recoveries, 4 Probate Practice Reporter, June 1992, at 1.

Article (with Nathan Crystal), Scienter in Professional Liability Cases, 42 S.C.L. Rev. 783 (1991).

Article, How Computerized Databases Are Redefining Due Diligence, Carolina Lawyer (July-August 1991).

Article, When Are Lawyers' Gifts to Judges Improper? Carolina Lawyer (November-December 1990).

Article, Current Developments in Legal Opinion Liability, 1989 Col. J. Bus. L. 235.

Article, Understanding the Joint Client Exception to the Attorney-Client Privilege, Carolina Lawyer (July-August 1989).

Article, A RICO Primer, 1985 Small Business Counselor No. 4.

Article, The Use of Mutual Fund Assets to Pay Marketing Costs, 9 Loy. Chi. L.J. 553 (1978).

Article, Marketing Mutual Funds and Individual Life Insurance, 28 S.C.L. Rev. 1 124 (1976), reprinted in Nat'l Ins. L. Rev. Serv. (1977).

Article, Opinion Letters and Professionalism, 1973 Duke L.J. 371 439, reprinted in Securities Law Review 1974 (E. Folk, III, ed.).

Co-author, Multi student Survey, The Mutual Fund Industry: A Legal Survey, 44 Notre Dame Lawyer 732 983 (1969).

Case Comment, Escott v. BarChris Constr. Corp., 44 Notre Dame Lawyer, 122 40 (1968).

Other Scholarly Activities

Speeches (with accompanying outlines) presented at numerous CLE courses sponsored by various entities including the South Carolina Bar, University of South Carolina Law School and the South Carolina Supreme Court.

CLE Presentations 2004-14: 2004-14: Charleston Bar Ass'n, 20 Ethics Tips for a Happier Professional Life, Feb. 7, 2014; Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar March 22, 2013; SC Bar, Ethical Issues in Working with Vets and Their Families, Feb. 12, 2012; Expert Witness Participant, SC Bar-ABOTA, Masters in Trial Program, Feb. 1, 2013; SC Bar, Ethical Issues in Handling VA Appeals, Jan. 12, 2013; SC Bar, Ethical Issues in a Non-Adversarial System, Dec. 11, 2012; Richland County Bar Ass'n Ethics CLE, Nov. 9, 2012; University of South Carolina Law School, Alumni Reunion Ethics CLE, Nov. 3, 2012; General Assembly Legal Staff, Ethics for Government Lawyers, Oct. 3, 2012; Setzler Scott Law Firm (In-house CLE), West Columbia, SC, Ethics CLE, Feb. 14, 2012; Charleston Law School, Panel, Symposium on Lawyer and Judicial Fitness, Feb. 10, 2012; Charleston County Bar Ass'n, Ethics CLE, Feb. 3, 2012; SC Bar, Panel on Lawyer Confidentiality, Jan. 19, 2012; Nov. 15, 2011, SC Workers Comp. Comm., Legal Ethics; Richardson Patrick-Sponsored CLE, Charleston, SC, April 29, 2011; National Ass'n State Securities Administrators, Ethics in Securities Litigation, Charleston, Jan. 24, 2011; Richland County Legal Ethics Update, Nov. 5, 2010; S.C. Law Review Symposium, Judicial Recusal, Oct. 21, 2010; League of Women Voters, Lecture on Judicial Selection, Oct. 8, 2010, Charleston, S.C.; KershawHealth Board of Directors, Advice on Your Duties as Board Members, July 15, 2010, Camden, SC; American Ass'n of Matrimonial Lawyers, Ethics in Marital Cases, March 19, 2010 (Aruba), John Belton O'Neill Inn of Court, Ethics Lessons Taught by Lawyers, Nov. 17, 2009; South Carolina Defense Trial Lawyer's Ass'n, Judicial Selection in South Carolina, Nov. 7, 2009; Richland County Bar Ass'n, Legal Ethics, Nov. 6, 2009; South Carolina Legislature Employees, Legal Ethics Update, Oct. 21, 2009; Budget & Control Board, Ethics Lecture to SC State Employees, Oct. 2, 2009; South Carolina Bar, Family Law Ethics Update, Sept. 18, 2009; Motley Rice Law Firm, Legal Ethics Update, Sept. 11, 2009; South Carolina Judicial Selection Commission, Judicial Ethics, July 31, 2009; John

Belton O'Neill Inn of Court, Ethics of Advertising Firms, Jan. 20, 2009; S.C. Bar, Ethics Presentation "Business Lawyer Horror Stories, Nov. 21, 2008; Participant, Mutual Fund Industry Regulation Roundtable, Chicago-Kent Law School, Nov. 7, 2008; SC Legislature, Ethical Duties of Legislative Employees, Oct. 2, 2008; SC Bar, Dealing with Ethical Duties When Dealing with Pro Se Parties, Oct. 10, 2008; Richardson Patrick Local Counsel CLE, Litigation Ethics, May 2, 2008 (Charleston, SC); Inst. of Public Utilities, 39th Ann. Reg. Policy Conf., Panel on Equity and Responsibility in the Public Utilities Sector (Charleston, SC), Dec. 3, 2007; S.C. Attorney General's Office; Litigation Ethics, Nov. 9, 2007; Richland County Bar, Ethics Update, Nov. 2, 2007; SC Bar, Litigation Ethics, Oct. 26, 2007; S.C. Children's Law Center, Ethical Problems in the Child Abuse Area, Oct. 19, 2007; National Ass'n of Medicaid Fraud Control Units, Ethics and the Government Lawyer (Savannah, Ga.), Oct. 1, 2007; SCACPA, Litigation Conf., Litigation Ethics (Kiawah Island, SC), Sept. 21, 2007; S.C. Circuit Court Judges, May 17, 2007, Practice Tips in Civil Litigation; Energy & Mineral Law Foundation, May 15, 2007, Panel Member, Legal Ethics, 2 hr.; S.C. Government Investigators, Ethical Duties of Investigators, Feb. 23, 2007; S.C. Bar, Employment Law Section, Ethics Update, Jan. 26, 2007; S.C. Association of Counties, Ethics Update, Dec. 8, 2006; Lexington County Bar Ass'n, Ethics Update, Dec. 6, 2006; Richland County Bar, Ethics Update, Nov. 3, 2006; S.C. State Government Lawyers, Ethics Update, Nov. 3, 2006; S.C. Judicial Merit Selection Commission, Overview of Judicial Ethics, Sept. 14, 2006 (¼ hr.); Federal Bar Ass'n, SC Bar, Ethics and Professionalism, Sept. 8, 2006; Commercial Law League of America, Avoiding Grievances and Malpractice Worries in Your Practice, July 6, 2006, Asheville, N.C. (2 hours); National Structured Settlement Trade Ass'n, Ethics in Litigation, Westin Rio Mar, Puerto Rico, May 9, 2006; S.C. Chamber of Commerce, Legal Ethics for the Employment Lawyer, Hilton Head, S.C., May 6, 2006; American Ass'n Matrimonial Lawyers, Ethic Lecture, Los Cabos, Mexico, March 11, 2006; SC Bar, Legal Ethics for Health Care Providers, Jan. 28, 2006; S.C. Association of Counties, Ethics Update, Dec. 9, 2005; SCTLA, Making Money Out of Discovery Abuse, Dec. 2, 2005, Atlanta; Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar, Nov. 4, 2005, Asheville; S.C. Bar, Ethics in Masters Court, Oct. 14, 2005; N.C. Bar-S.C. Bar Construction Law Ethics Program, Asheville, Oct. 1, 2005; S. C. Bar, Unauthorized Practice Problems in Probate Court, Sept. 16, 2005; Greenville County Solicitor's Office, Prosecutorial Ethics, May 9, 2005; Mass Tort Seminar, NYC, Discovery Abuse Issues, March 18, 2005; S.C. Ass'n of Counties, Legal Ethics, Dec. 10, 2004; Federal Bar Ass'n, S.C., Ethics CLE, Dec. 10, 2004 ½ hr.; S.C. Bar Construction Law Section, Ethics CLE on the new Oath; Dec. 3, 2004; NASAA, Salt Lake City, Legal Ethics for Securities Enforcement Lawyers, Dec. 4, 2004; DSS Ethics Training, Dec. 3, 2004; (2-hr. lecture); PIABA, Ethics for Securities Lawyers, and Comments on the Mutual Fund Mess, Oct. 20, 2004 (2 hrs.); Commercial Law League of America, Southern Region Members' Ass'n, Ethical Issues in Commercial Law, Oct. 1, 2004; S.C. Bar, Annual Probate Bench/Bar, Ethics in Probate Court, Sept. 17, 2004; Charleston Bar Ass'n, Lawyer's Oath Seminar, August 27, 2004; S.C. Government Lawyers, Legal Ethics for Government Attorneys, August 20, 2004; S.C. Judiciary, Judicial Ethics Lecture, August 19, 2004; S.C. Bar, Accounting for Non-tax Lawyers, May 2, 2004; Palmetto Land Title Ass'n, Ethics for Closing Attorneys, April, 24, 2004; Richardson, Patrick Law Firm, CLE on Legal Issues Concerning the Mutual Fund Mess, March 26, 2004; S.C. Bar, An Update on Ethical Considerations for the Guardian, March 5, 2004; S.C. Prof. Society on

the Abuse of Children, Ethics and Child Abuse, Feb. 26, 2004; National Ass'n of State Boards of Accountancy, Professionalism, Accountability and the Accounting Profession, Feb. 9, 2004; Fidelity Nat'l Title, Ethical Duties of Closing Attorneys, Feb. 5, 2004; S.C. Bar, Annual Convention, Ethical Issues in Handling the Appeal, Jan. 22, 2004 (co-presenter).

Member, ABA Section of Business Law Task Force on Legal Opinions
Participant in Conference on Legal Opinions at Silverado, California, May 31-June 3 (1989).

University and Community Service
Author, Report on Tax Sheltered Annuities to USC Faculty and Staff (1976).
Faculty Senate (1996-98)

University Committees
Promotion and Tenure
Faculty Welfare

Annuities and Insurance
Budget Committee

Law School Committees
Faculty Selection
Academic Standing
Minority Student Affairs
Executive Committee
Dean Evaluation Committee
Dean Search Committee

Chairman, Supreme Court Commission on Continuing Lawyer Competence (1980-83)

President, Leaphart Elementary School PTO (1983)
Chairman, Irmo Middle School School Improvement Council (1985)
Member, Irmo Middle School School Improvement Council (1985-89),
President, Irmo High School Parent, Teacher, Student Association (1988-89, 1992-93) Member
Executive Board (1988-93)
Member, Irmo High School-School Improvement Council (1988-93)
Founder and Past-president, University of Notre Dame Club of South Carolina
Lexington District Five and South Carolina State School Volunteer of the Year 1993

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

WILLIE BELL, INDIVIDUALLY AND ON
BEHALF OF THE ESTATE OF EMMA M. DAVIS
AS ITS DULY APPOINTED PERSONAL
REPRESENTATIVE,

Plaintiffs,

vs.

MCGOWAN, HOOD & FELDER, LLC AND
CHAD MCGOWAN

Defendants.

IN THE CIRCUIT COURT FOR THE
FIFTH JUDICIAL CIRCUIT

2014-CP-40-05570

ANSWER OF DEFENDANTS'
MCGOWAN, HOOD & FELDER,
LLC AND CHAD MCGOWAN

Defendants McGowan, Hood & Felder, LLC (hereinafter "MHF"), and Chad McGowan (hereinafter collectively referred to as "Defendants") answer the Complaint of Plaintiff Willie Bell (hereinafter "Bell"), in his individual capacity as follows¹:

PARTIES, CAPACITY, AND JURISDICTION

1. In answering the allegations of paragraph 1, Defendants admit only the allegation Plaintiff, Willie Bell is a citizen and resident of Chester County, South Carolina. The remaining allegations in paragraph 1 are denied.

2. Paragraph 2 is denied. Defendants' principal place of business is York County, South Carolina. In further answering paragraph 2, Defendants admit that Defendant, McGowan, Hood & Felder, LLC maintains an office in Richland County.

3. Paragraph 3 is admitted. In further answering paragraph 3, Defendant, Chad McGowan admits he is a citizen and resident of York County.

4. In answering paragraph 4, Defendants admit only the substantial part of the alleged acts and/or alleged omissions occurred in York County and Chester County. Defendants deny any alleged acts and/or alleged omissions occurred in Richland County.

¹ The Court has stayed this action as to Bell's claims on behalf of the Estate of Emma M. Davis as its duly appointed Personal Representative (hereinafter "the Estate"). Defendants reserve and do not waive their right to answer the Complaint on these claims if and when the stay is lifted.

5. Defendants deny paragraph 5. In further answering paragraph 5, Defendant, Chad McGowan resides in York County.

6. In answering paragraph 6, Defendants admit only Emma M. Davis died without a last will and testament on February 11, 2010. The remaining allegations of paragraph 6 are denied.

7. In answering paragraph 7, Defendants admit only Emma M. Davis's obituary was published on February 16, 2010. The remaining allegations of paragraph 7 are denied.

8. In answering paragraph 8, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 8 are denied.

9. In answering paragraph 9, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 9 are denied.

10. Defendants deny paragraphs 10-11.

11. In answering paragraph 12, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 12 are denied.

12. In answering paragraph 13, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 13 are denied.

13. In answering paragraph 14, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 14 are denied.

14. Defendants deny paragraphs 15-16.

15. In answering paragraph 17, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 17 are denied.

16. Defendants deny paragraphs 18-20.

17. Defendants admit paragraph 21 only to the extent it alleges no filing was made to declare Andrew Strong was Emma Davis's common law husband. The remaining allegations of paragraph 21 are hereby denied.

18. Defendants deny paragraph 22.

19. In answering paragraph 23, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 23 are denied.

20. Defendants deny paragraphs 24-26.

21. In answering paragraph 27, Defendants admit only that *Tanisha Gilmore, as the Personal Representative of the Estate of Emma Davis, and Andrew Strong v. Amibsub of SC, Inc. d/b/a Piedmont Medical Center, et. al.*, 2010-CP-46-3899 (hereinafter "the 2010 action") was settled for \$2,200,000.00. The remaining allegations of paragraph 27 are denied.

22. In answering paragraph 28, Defendants admit only they received a fee of \$920,000.00 plus \$106,172.03 in reimbursed costs from the settlement of the 2010 action. The remaining allegations of paragraph 28 are denied.

23. Defendants deny paragraphs 29-38.

24. In answer to paragraph 39, Defendants incorporate and repeat their prior answers.

25. Defendants deny paragraphs 40-45.

26. In answer to paragraph 46, Defendants incorporate and repeat their prior answers.

27. Defendants deny paragraphs 47-55.

28. In answer to paragraph 56, Defendants incorporate and repeat their prior answers.

29. Defendants deny paragraphs 57-66.

ADDITIONAL AFFIRMATIVE DEFENSES

30. Any allegation or averment not specifically admitted herein is hereby denied. Further, Defendants hereby asserts the following affirmative defenses to Plaintiff's claims:

FOR A FIRST AFFIRMATIVE DEFENSE **(No Attorney-Client Relationship with Plaintiff, Willie Bell)**

31. Plaintiff has failed to state facts sufficient to constitute a cause of action for attorney malpractice. In particular, Plaintiff has failed to allege an attorney-client relationship existed between Plaintiff, Willie Bell in his individual capacity and Defendants.

FOR A SECOND AFFIRMATIVE DEFENSE
(Laches)

32. Plaintiff's claims herein are barred by the equitable doctrine of laches. *Inter alia*, Plaintiff failed to file any notices or claims on behalf of the Estate of Emma Davis within a reasonable period of time after the death of Emma Davis on February 11, 2010.

33. Plaintiff's claims are also barred by laches because Plaintiff knew or should have known of the existence of the 2010 action and failed to intervene or otherwise asserts his alleged rights during the pendency of that action.

FOR A THIRD AFFIRMATIVE DEFENSE
(Waiver)

34. Plaintiff's causes of action are barred because Plaintiff accepted Defendants representation of Tanisha Gilmore as the personal representative of the Estate of Emma Davis and accepted funds from the settlement of *Willie Bell v. Tanisha Gilmore, and Andrew Strong*, 2013-CP-46-3482 (hereinafter "the 2013 action."), which constituted a knowing waiver of any and all claims against Defendants.

35. Plaintiff's claims are also waived because Plaintiff knew or should have known of the existence of the 2010 action and failed to intervene or otherwise assert his alleged rights during the pendency of that action.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Immunity)

36. Plaintiff's claims are barred by S.C. Code Ann. § 62-1-109, and Defendants claim S.C. Code Ann. § 62-1-109 as absolute defense to all causes of action asserted by Plaintiff.

FOR A FIFTH AFFIRMATIVE DEFENSE
(No Proximate Cause)

37. There is no casual connection between the work performed by Defendants and any harm suffered by Plaintiff.

FOR A SIXTH AFFIRMATIVE DEFENSE
(Accord and Satisfaction)

38. An accord and satisfaction was reached when Plaintiff accepted settlement funds from Tanisha Gilmore and Andrew Strong in the 2013 action which bars Plaintiff's causes of action.

FOR A SEVENTH AFFIRMATIVE DEFENSE
(Sole Superseding and Intervening Negligence of Others)

39. The alleged damages set forth in the Amended Complaint arose as a result of acts or omissions of others over whom Defendants had no control or which occurred after or independent of Defendants in performance of their duties. If Defendants were negligent in the manner alleged by the Plaintiff--which is denied--the acts or omissions of others superseded and were a proximate cause of any damage suffered by Plaintiff.

FOR AN EIGHTH AFFIRMATIVE DEFENSE
(No Damages)

40. The Estate of Emma Davis has suffered no damages as the result of any legal services provided by Defendants.

FOR A NINTH AFFIRMATIVE DEFENSE
(No Privity of Contract)

41. Plaintiff does not have a contract with and does not have any privity with Defendants.

FOR AN TENTH AFFIRMATIVE DEFENSE
(Statute of Limitations)

42. Plaintiff failed to commence this action within the time required by the applicable Statute of Limitations, and the failure to timely commence the action constitutes a complete bar and complete defense to all claims.

FOR A ELEVENTH DEFENSE
(Scope of Representation)

43. The duties and obligations alleged by Plaintiff were not within the scope of legal services that were provided by Defendants, and such duties and obligations lie beyond the scope of services provided and such constitutes a complete defense to all claims of negligence.

FOR A TWELFTH AFFIRMATIVE DEFENSE
(Set Off)

44. Any recovery by Plaintiff must be set off or reduced, abated, or apportioned to the extent that any other party's actions caused or contributed to damages, if any, or as otherwise provided pursuant to S.C. Code Ann. § 15-38-50, *et. Seq.*

FOR A THIRTEENTH AFFIRMATIVE DEFENSE
(No Duty)

45. Defendants owed no duty to Plaintiff, Willie Bell as an alleged third-party beneficiary of the Estate of Emma Davis.

46. Plaintiff is not an intended third party beneficiary of attorney-client relationship because Emma Davis died intestate.

FOR A FOURTEENTH AFFIRMATIVE DEFENSE
(Judicial Estoppel)

47. Plaintiff is bound by judicial estoppel to the allegations contained in the 2013 action.

FOR A FIFTEENTH AFFIRMATIVE DEFENSE
(Unclean hands)

48. Defendants plea the equitable doctrine on unclean hands.

FOR A SIXTEENTH AFFIRMATIVE DEFENSE
(In Pari Delicto)

49. Defendants plea the doctrine of *in pari delicto* to bar Plaintiff's complaint.

FOR A SEVENTEENTH AFFIRMATIVE DEFENSE
(Judgmental Immunity)

50. Defendants plead the judgmental immunity rule as an absolute defense to Plaintiff's complaint.

FOR A EIGHTEENTH AFFIRMATIVE DEFENSE
(Failure to State a Claim)

51. Plaintiff's complaint fails to assert facts sufficient to constitute a cause of action.

FOR A NINETEENTH AFFIRMATIVE DEFENSE
(Improper Venue)

52. Venue is not proper in Richland County.

FOR A TWENTIETH AFFIRMATIVE DEFENSE
(Ratification)

53. Plaintiff's complaint is barred by the doctrine of ratification. *Inter alia*, Plaintiff ratified the actions of Defendants when he abandoned an attempt to intervene in the underlying action.

FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE
(Res Judicata)

54. Andrew Strong's status as the common law husband of Emma Davis is now the law of the case and cannot be collaterally challenged pursuant to *res judicata*.

FOR A TWENTY-SECOND AFFIRMATIVE DEFENSE
(Estoppel)

55. Plaintiff's complaint is barred by the doctrine of estoppel. *Inter alia*, Plaintiff was on notice of the pendency of the underlying action and remained silent during that time.

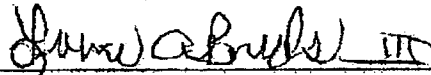
FOR A TWENTY-THIRD AFFIRMATIVE DEFENSE
(Reservation of Additional Defenses)

56. Defendants reserve the right to add additional defenses in a manner that is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully set forth their answer to Plaintiff's Complaint, Defendants McGowan, Hood & Felder, LLC and Chad McGowan pray:

- a. That the Plaintiff's Complaint be dismissed and that Defendants be awarded costs against the Plaintiff; or in the alternative
- b. For a trial by jury of all issues joined herein so triable; and
- c. For such other and further relief as this Honorable Court deems just and equitable.

Respectfully submitted this 5th day of February, 2015.



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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

WILLIE BELL, INDIVIDUALLY AND ON
BEHALF OF THE ESTATE OF EMMA M. DAVIS
AS ITS DULY APPOINTED PERSONAL
REPRESENTATIVE,

Plaintiffs,

vs.

MCGOWAN, HOOD & FELDER, LLC AND
CHAD MCGOWAN,

Defendants.

IN THE CIRCUIT COURT FOR THE
FIFTH JUDICIAL CIRCUIT

2014-CP-40-05570

AMENDED ANSWER OF
DEFENDANTS MCGOWAN, HOOD
& FELDER, LLC AND CHAD
MCGOWAN

[JURY DEMAND]

Defendants McGowan, Hood & Felder, LLC (hereinafter "MHF"), and Chad McGowan (hereinafter collectively referred to as "Defendants") answer the Complaint of Plaintiff Willie Bell (hereinafter "Bell"), in his individual capacity as follows¹:

PARTIES, CAPACITY, AND JURISDICTION

1. In answering the allegations of paragraph 1, Defendants admit only the allegation Plaintiff, Willie Bell is a citizen and resident of Chester County, South Carolina. The remaining allegations in paragraph 1 are denied.

2. Paragraph 2 is denied. Defendants' principal place of business is York County, South Carolina. In further answering paragraph 2, Defendants admit that Defendant, McGowan, Hood & Felder, LLC maintains an office in Richland County.

3. Paragraph 3 is admitted. In further answering paragraph 3, Defendant, Chad McGowan admits he is a citizen and resident of York County.

4. In answering paragraph 4, Defendants admit only the substantial part of the alleged acts and/or alleged omissions occurred in York County and Chester County. Defendants deny any alleged acts and/or alleged omissions occurred in Richland County.

¹ The Court has stayed this action as to Bell's claims on behalf of the Estate of Emma M. Davis as its duly appointed Personal Representative (hereinafter "the Estate"). Defendants reserve and do not waive their right to answer the Complaint on these claims if and when the stay is lifted.

5. Defendants deny paragraph 5. In further answering paragraph 5, Defendant, Chad McGowan resides in York County.

6. In answering paragraph 6, Defendants admit only Emma M. Davis died without a last will and testament on February 11, 2010. The remaining allegations of paragraph 6 are denied.

7. In answering paragraph 7, Defendants admit only Emma M. Davis's obituary was published on February 16, 2010. The remaining allegations of paragraph 7 are denied.

8. In answering paragraph 8, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 8 are denied.

9. In answering paragraph 9, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 9 are denied.

10. Defendants deny paragraphs 10-11.

11. In answering paragraph 12, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 12 are denied.

12. In answering paragraph 13, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 13 are denied.

13. In answering paragraph 14, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 14 are denied.

14. Defendants deny paragraphs 15-16.

15. In answering paragraph 17, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 17 are denied.

16. Defendants deny paragraphs 18-20.

17. Defendants admit paragraph 21 only to the extent it alleges no filing was made to declare Andrew Strong was Emma Davis's common law husband. The remaining allegations of paragraph 21 are hereby denied.

18. Defendants deny paragraph 22.

19. In answering paragraph 23, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 23 are denied.

20. Defendants deny paragraphs 24-26.

21. In answering paragraph 27, Defendants admit only that *Tanisha Gilmore, as the Personal Representative of the Estate of Emma Davis, and Andrew Strong v. Amibsub of SC, Inc. d/b/a Piedmont Medical Center, et. al.*, 2010-CP-46-3899 (hereinafter "the 2010 action") was settled for \$2,200,000.00. The remaining allegations of paragraph 27 are denied.

22. In answering paragraph 28, Defendants admit only they received a fee of \$920,000.00 plus \$106,172.03 in reimbursed costs from the settlement of the 2010 action. The remaining allegations of paragraph 28 are denied.

23. Defendants deny paragraphs 29-38.

24. In answer to paragraph 39, Defendants incorporate and repeat their prior answers.

25. Defendants deny paragraphs 40-45.

26. In answer to paragraph 46, Defendants incorporate and repeat their prior answers.

27. Defendants deny paragraphs 47-55.

28. In answer to paragraph 56, Defendants incorporate and repeat their prior answers.

29. Defendants deny paragraphs 57-66.

30. Any allegation or averment not specifically admitted herein is hereby denied.

Defendants hereby asserts the following affirmative defenses to Plaintiff's Complaint:

FOR A FIRST AFFIRMATIVE DEFENSE

(Jurisdiction)

31. The Court lacks jurisdiction, in whole or in part, over the person of Plaintiff or the subject matter of Plaintiffs' Complaint to the extent that Plaintiff seeks to act "on behalf of the Estate of Emma M. Davis as its duly appointed Personal Representative", so as to render all proceedings in this matter a nullity. In this regard, Defendants respectfully incorporate by reference herein their Petition to Restrain and Remove Successor Personal Representative (Ex. 1)

filed with the Probate Court of Chester County ("Probate Court"), and the proceedings related thereto before the Probate Court.

FOR A SECOND AFFIRMATIVE DEFENSE

(Standing)

32. Plaintiff lacks standing to proceed "on behalf of the Estate of Emma M. Davis as its duly appointed Personal Representative", as to render all proceedings in this matter a nullity. In this regard, Defendants respectfully incorporate by reference herein their Petition to Restrain and Remove Successor Personal Representative (Ex. 1) filed with the Probate Court, and the proceedings related thereto before the Probate Court.

FOR A THIRD AFFIRMATIVE DEFENSE

(Immunity)

33. Defendants are immune from liability to Plaintiff pursuant to S.C. Code Ann. § 62-3-714, judicial immunity, common law, or otherwise.

FOR A FOURTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

34. Plaintiff failed to file his Complaint within the time required by the applicable Statute of Limitations, or such other applicable period of time as established by law and/or equity, and the failure to timely commence the action constitutes a complete bar and complete defense to the Complaint.

FOR A FIFTH AFFIRMATIVE DEFENSE

(Venue)

35. Plaintiff's Complaint is not properly venued in Richland County.

FOR A SIXTH AFFIRMATIVE DEFENSE

(Joinder)

36. Plaintiff's Complaint is barred by the failure to join all parties necessary for and/or indispensable to a just adjudication of this case.

FOR A SEVENTH AFFIRMATIVE DEFENSE

(Failure to State a Cause of Action)

37. Plaintiff has failed to state facts sufficient to constitute a cause of action upon which relief can be granted. In this regard, Defendants respectfully incorporate herein their averments, denials, and affirmative defenses to Plaintiff's Complaint, as well as their Motion to Dismiss (Ex. 2) previously filed with the Court, and their Petition to Restrain and Remove Successor Personal Representative previously filed with the Probate Court.

FOR AN EIGHTH AFFIRMATIVE DEFENSE

(Scope of Engagement)

38. Pursuant to S.C. Code Ann. § 62-3-715(19)(20), Rule of Professional Conduct 1.7, and Defendants' Retainer Agreement with Tanisha Gilmore, Personal Representative of the Estate of Emma M. Davis, which is incorporated herein by reference (Ex. 3), Defendants' scope of engagement was limited to litigation of the underlying case captioned *Tanisha Gilmore, as the Personal Representative of the Estate of Emma Davis, et al. v. Amisub of SC, Inc. d/b/a Piedmont Medical Center, et al.*, Case No. 10-CP-46-03899, and did not extend to representation of Tanisha Gilmore in the administration of the Estate of Emma M. Davis, or to representation of Plaintiff in any way whatsoever.

FOR A NINTH AFFIRMATIVE DEFENSE

(Strict Privity)

39. Pursuant to S.C. Code Ann. § 62-1-109, Tanisha Gilmore, as Personal Representative of the Estate of Emma M. Davis, was Defendants' sole and exclusive client with respect to the underlying case captioned *Tanisha Gilmore, as the Personal Representative of the Estate of Emma Davis, et al. v. Amisub of SC, Inc. d/b/a Piedmont Medical Center, et al.*, Case No. 10-CP-46-03899, and Defendants neither represented, nor had any duty to, Plaintiff with respect to said underlying case.

FOR A TENTH AFFIRMATIVE DEFENSE

(Standard of Care)

40. Defendants' exercise of professional judgment was made with reasonable care and skill, and complied with the standard of care applicable to Defendants in the community in which they practice.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE

(Intervening Superseding Cause)

41. Plaintiff's Complaint is barred by the intervening and/or superseding acts, errors, or omissions of others over whom Defendants had no control, no legal right to control, and for whom Defendants are not legally responsible.

FOR A TWELFTH AFFIRMATIVE DEFENSE

(Comparative Fault)

42. Plaintiff's Complaint is barred, in whole or in part, by the comparative fault of Plaintiff, those acting by or for Plaintiff, or those for whom Plaintiff is legally responsible.

FOR A THIRTEENTH AFFIRMATIVE DEFENSE

(Assumption of Risk)

43. Plaintiff's Complaint is barred by the Plaintiff's assumption of risk, whether direct, indirect, express, implied, primary, secondary, consensually, or otherwise.

FOR A FOURTEENTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

44. Plaintiff's Complaint is barred, in whole or in part, by Plaintiff's failure to mitigate his damages.

FOR A FIFTEENTH AFFIRMATIVE DEFENSE

(Setoff)

45. Any recovery by Plaintiff must be set off or reduced, abated, or apportioned to the extent that any other party's actions caused or contributed to damages, if any, or as otherwise provided pursuant to S.C. Code Ann. § 15-38-50, *et. seq.*

FOR A SIXTEENTH AFFIRMATIVE DEFENSE

(Waiver)

46. Plaintiff's Complaint is barred by the doctrine of waiver.

FOR A SEVENTEENTH AFFIRMATIVE DEFENSE

(Judicial Estoppel)

47. Plaintiff's Complaint is barred by the doctrine of judicial estoppel.

FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE

(Estoppel)

48. Plaintiff's Complaint is barred by the doctrine of estoppel.

FOR A NINETEENTH AFFIRMATIVE DEFENSE

(Estoppel By Silence)

49. Plaintiff's Complaint is barred by the doctrine of estoppel by silence.

FOR A TWENTIETH AFFIRMATIVE DEFENSE

(Unclean Hands)

50. Plaintiff's Complaint is barred by the doctrine of unclean hands.

FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE

(Laches)

51. Plaintiff's Complaint is barred by the doctrine of laches.

FOR A TWENTY-SECOND AFFIRMATIVE DEFENSE

(Ratification)

52. Plaintiff's Complaint is barred by the doctrine of ratification.

FOR A TWENTY-THIRD AFFIRMATIVE DEFENSE

(Accord and Satisfaction)

53. Plaintiff's Complaint is barred by the doctrine of accord and satisfaction.

FOR A TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Release)

54. Plaintiff's Complaint is barred, in whole or in part, by Plaintiff's release of the claims and/or causes of action set forth therein.

FOR A TWENTY-FIFTH AFFIRMATIVE DEFENSE
(Public Policy)

55. Plaintiff's Complaint is barred by the public policy of the State of South Carolina.

FOR A TWENTY-SIXTH AFFIRMATIVE DEFENSE
(Nullity)

56. As a matter of fact, law, and/or equity, Plaintiff is not entitled to proceed in the captioned matter as the Personal Representative of the Estate of Emma M. Davis, and therefore these proceedings are a nullity.

FOR A TWENTY-SEVENTH AFFIRMATIVE DEFENSE
(Reservation of Additional Defenses)

57. Defendants reserve the right to add additional defenses as allowed by the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully set forth their answer to Plaintiff's Complaint, Defendants McGowan, Hood & Felder, LLC and Chad McGowan pray:

- a. That the Plaintiff's Complaint be dismissed with prejudice and that Defendants be awarded costs and fees from the Plaintiff; or in the alternative
- b. For a trial by jury of all issues joined herein so triable; and
- c. For such other and further relief as this Honorable Court deems just and equitable.

Respectfully submitted this 6th day of March, 2015.



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IN THE COURT OF COMMON PLEAS

) SIXTEENTH JUDICIAL CIRCUIT

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4. As fully described herein below, the most substantial part of the acts and/or omissions giving rise to the causes of action occurred in South Carolina.

5. The jurisdiction of this Court over this matter is proper pursuant to S.C. Code Ann. '15-7-30(C)(1) and (2).

GENERAL ALLEGATIONS

6. On February 11, 2010, Emma M. Davis died without leaving a Will. Exhibit B, Affidavit of Willie Bell at Exhibit 1, Certificate of Death. (Defendants McGowan had this document in their possession.)

7. On February 16, 2010, Plaintiff Willie Bell was listed in the obituary as the son of the deceased "Miss Emma 'Monk' Davis". Exhibit B, Affidavit of Willie Bell at Exhibit 2, Obituary of Emma Davis dated February 16, 2010. (Defendants McGowan had this document in their possession.)

8. On her Death Certificate, issued by the State of South Carolina on February 17, 2010, Plaintiff Willie Bell is listed as the Informant; and under relationship to the Decedent, Mr. Bell was listed as Son. (Defendants McGowan had this document in their possession.)

9. In addition to being listed as the son of Emma Davis on the death certificate and in the published obituary, Ms. Davis is also listed as Plaintiff's mother on his Birth Certification. Exhibit B, Affidavit of Willie Bell at Exhibit 3, Birth Certification for Willie Bell.

10. Ms. Tanisha Gilmore, a distant niece of Ms. Davis, and Mr. Andrew Strong, who claimed to be Ms. Davis' common law husband, sought the advice and counsel of Defendants McGowan, after they had received an anonymous call about a potential case, as to a malpractice action on behalf of Ms. Davis' Estate.

11. As part of the scheme to illegally obtain the funds of any potential award from the planned lawsuit for the Estate and Andrew Strong, who was a mere former live-in companion of the Deceased, a false Application for Appointment in the Probate Court for Chester County that did not include Plaintiff Willie Bell's name as an heir despite his being the true, sole intestate heir. Exhibit C, Application for Appointment dated February 19, 2010 at ¶ 4b.

12. The Application for Appointment listed only Rosa Hall and Atlean D. Jordan as the heirs of the Estate. Id.

13. In furtherance of the scheme, waivers and nominations to serve were obtained from the two heirs listed, one of whom was Ms. Gilmore's grandmother, and the same were attached with the Application.¹ Exhibit D, Waivers signed by Rosa Hall and Atlean D. Jordan.

14. As a result of the illegal scheme, Ms. Gilmore was appointed personal representative without public notice or any notice to Plaintiff Willie Bell and/or the Estate. Exhibit E, Certificate of Appointment for the Estate of Emma Davis dated February 19, 2010.

15. Upon information and belief, the appointment of Ms. Gilmore was accomplished under the counsel of Defendants McGowan and was procured for the specific purpose of pursuing a medical malpractice lawsuit against Ms. Davis' treating physician and hospital with all funds going to the scheme participants.

16. Defendants McGowan knew, or should have known, that the application for appointment filed by Ms. Gilmore with the Probate Court was false as to the nonexistence of additional heirs; Defendants McGowan knew, or should have known, that Willie Bell was the sole intestate heir and the only true client of McGowan's.

¹ Upon information and belief, both received funds from this settlement. Exhibit A, Affidavit of Willie Bell at ¶¶ 19 and 20.

17. On the Application, Ms. Gilmore answered the question about the total value of the personal estate by stating "TO BE DETERMINED." Exhibit C at ¶ 11.

18. Andrew Strong, a man listed in the published obituary as Ms. Davis' "companion" but who was claiming an interest in the Estate as a supposed common law spouse, joined the scheme by allowing Defendants McGowan to represent him in his purported independent loss of consortium cause of action, which was done in conflict with the interests of Defendant McGowan's Estate client.

19. Defendants McGowan negligently and improperly took on the representation of Mr. Strong while knowing that his interests were adverse to those of his other clients.

20. The Complaint in the medical malpractice and loss of consortium actions was filed on September 15, 2010 and amended in 2012.

21. At no time prior to the filing of the underlying action nor at any time subsequent to the filing of that action did Andrew Strong or the Defendants McGowan on his behalf file a petition with the Probate or Family Court to be determined the common-law husband of Emma Davis as is required by the South Carolina Code Section 62-2-802.

22. As a result, and under the counsel of Defendants McGowan, Mr. Strong did not comply with South Carolina Code Section 62-2-802, did not obtain any finding as to his status as the alleged common-law husband of Emma Davis, and did not qualify as a surviving spouse under the laws of South Carolina at the time Defendants McGowan illegally represented to the Probate Court that he did.

23. In fact, Mr. Strong had not even been listed as an heir on the Application for Appointment filed by Tanisha Gilmore either. Exhibit C, Application for Appointment dated February 19, 2010 at ¶ 4b.

24. Defendants McGowan knew or should have known that their client, Mr. Strong, was not a proper heir to the Estate of Ms. Davis but took no measures to inform the Probate Court or Defendants' other client, the Estate, of the same but rather continued to litigate the lawsuit on Mr. Strong's behalf and against the interests of their other client for the purposes of collecting a fee.

25. Prior to resolving the underlying litigation, Defendants McGowan negligently and illegally allowed the Probate Court to discharge Ms. Gilmore as Personal Representative and to close the Estate of Emma Davis on February 21, 2011 without taking the proper, required steps to make a determination as to the legitimate heirs of the Estate or to provide proper notice and/or publication to others with a potential interest in the Estate, thereby allowing the scheme to defraud the Probate Court to continue without the knowledge of Plaintiff Willie Bell and/or the Estate. Exhibit F, Certificate of Discharge dated February 21, 2011.

26. Defendants McGowan negligently and illegally allowed the Estate to be closed without making certain that the correct heirs had been determined and that the interests of all of the statutory beneficiaries were going to be protected going forward with the pending lawsuit yet continued to further the scheme by litigating the lawsuit in the name of the closed Estate and on behalf of Mr. Strong, a man known not to be a proper heir.

27. Defendants engaged in an unfair and/or deceptive act during the course of their representation of Mr. Strong and the Estate of Emma Davis by securing private loans from Mr. McGowan's father-in-law to Andrew Strong in a total principal amount of \$15,500, which carried an interest rate of 100%.

These loans were made by McGowan's father-in-law, Mr. Michael Maloney, on assurances by Defendants that the case would get resolved in Mr. Strong's favor.

28. Defendants helped secure these loans knowing that Mr. Strong had never been properly adjudicated by the Probate Court as a common-law husband as required by the Probate Code. Defendants knew or should have known that Mr. Strong was not the true sole heir to the Estate when they made the same representation to the Court to get the settlement approved.

29. These acts created a conflict of interest between Defendants and their clients, as Defendants placed themselves in a position to have to protect the interests of Mr. Strong, the Estate, and Mr. Maloney.

30. In 2013, two years after the closing of the Estate and after McGowan's representation of the Estate had lapsed, the underlying medical malpractice case settled for a total amount of Two-Million-Two-Hundred-Thousand Dollars (\$2,200,000.00);

31. As a reward for their malicious and illegal yet successful scheming, Defendants McGowan distributed to the improper heir Mr. Strong, against the interests of the Estate, the sum of Eight-Hundred-Thirty-Three-Thousand-Three-Hundred-Twenty-Seven Dollars and Ninety-Seven Cents (\$833,327.97); Defendants McGowan distributed to Tasha Gilmore Two-Hundred-Thousand Dollars (\$200,000.00), even though she had only been awarded a Twenty-Five-Thousand Dollar (\$25,000.00) fee by the Probate Court; and the remainder of the settlement funds were retained by Defendants McGowan, Nine-Hundred-Twenty-Thousand Dollars (\$920,000.00) in fees and One-Hundred-Six-Thousand-One-Hundred-Seventy-Two Dollars and Three Cents (\$106,172.03) in reimbursed costs.

32. Defendants McGowan knew or should have known that they had illegally distributed more than a Million Dollars designated to go to the Estate of Emma M. Davis to an improper heir, Mr. Strong, against the interests of their other client, the Estate, and never attempted

to contact or otherwise notify Plaintiff Willie Bell of the distribution and/or the conflict of interest that spawned the settlement.

33. Despite these facts, and against the interests of the true statutory beneficiaries, Defendants McGowan maliciously and illegally filed a Joint Petition for Approval of Settlement stating falsely both that their client, Andrew Strong, was the common law husband of the Deceased and that "Tanisha Gilmore is the duly appointed Personal Representative of the Estate of Emma Davis" (an Estate that had been closed two years prior). Exhibit G, Petition for Approval of Settlement filed August 1, 2013.

34. Additionally, Defendants McGowan falsely and illegally represented to the Probate Court that Andrew Strong was "the sole heir and beneficiary of the Estate of Emma Davis," without ever mentioning the existence of the son and true heir, Willie Bell. Exhibit G, Petition for Approval of Settlement filed August 1, 2013 at ¶ 5.

35. Defendants McGowan also failed to comply with Section 15-51-42(B) by neglecting to sign a certificate attesting to the fact that they were of the opinion that the settlement was fair and reasonable and in the best interests of the statutory beneficiaries and the Estate; Mr. McGowan could not sign such a document.

36. However, the Court entered an Order approving a settlement and awarding all net settlement proceeds to Mr. Strong² as a result of the scheming that included Defendants McGowan's illegal, unethical, and negligent actions. Exhibit H, Order Approving Settlement filed August 1, 2013.

² Mr. Bell has filed a Rule 60 Motion in that action to correct this Order.

37. Plaintiff Willie Bell was never informed about the underlying action and first learned of the litigation when Tanisha Gilmore furthered the scheme by calling him and telling him not to believe what he saw in the paper. Exhibit A, Affidavit of Willie Bell at ¶¶ 11 and 12.

38. Despite not being listed in the Order Approving Settlement filed by Defendants McGowan on August 1, 2013 or in the original appointment of personal representative petition, Ms. Gilmore assured Plaintiff that he was going to receive his proper share, a mere \$100,000.00. Exhibit A, Affidavit of Willie Bell at ¶¶ 13 and 14. Exhibit H, Order Approving Settlement filed August 1, 2013.

39. Recently, Defendant McGowans' client, Mr. Strong, delivered a check to Plaintiff for One Hundred Thousand Dollars (\$100,000.00) made payable to Mr. Strong and Plaintiff jointly.

40. Plaintiff Bell has also learned that despite being awarded only Twenty-Five-Thousand Dollars (\$25,000.00) as a personal representative fee in the Settlement Approval Order, Ms. Gilmore received a check for Two-Hundred-Thousand Dollars (\$200,000.00).

41. Throughout the entire underlying malpractice litigation, Defendants McGowan made no attempt to contact or otherwise notify Plaintiff Willie Bell about the Estate being opened up, the settlement proceeds, and/or about the conflict of interest that Defendants created by taking on the representation of both the Estate and a man claiming to be a common law husband of Ms. Davis, and should not be permitted to keep their fee from the case.

FIRST CAUSE OF ACTION
(LEGAL MALPRACTICE)

42. Plaintiff refers to and incorporates herein the General Allegations stated in Paragraphs 1 through 41 alleged herein above and makes them a part hereof as though set forth at length.

43. Defendants McGowan established an attorney-client relationship with the Estate of Emma Davis in agreeing to represent it with respect to medical malpractice claims against Ms. Davis' treating physician and hospital.

44. Defendants, and each of them, had a duty to use such skill, prudence, and diligence as members of the legal profession commonly possess and exercise, in providing legal services to Plaintiff Willie Bell and the Estate of Emma M. Davis ("the Estate" hereinafter).

45. During the course of Defendants' representation of the Estate, the Defendants' conduct fell below the applicable standard of care in the following respects:

- a. Defendants knew or should have known that Tanisha Gilmore had made false representations to the Probate Court in procuring her appointment as Personal Representative of the Estate;
- b. Defendants knew or should have known that their client, Tanisha Gilmore, was not a proper Personal Representative of the Estate;
- c. Defendants knew or should have known that their client, Tanisha Gilmore, would not protect the best interests of the statutory beneficiaries of the Estate;
- d. Defendants failed to notify Plaintiff Willie Bell and/or the Estate of Mr. Bell's interests in the Estate and/or about the conflict of interest that existed between Defendants' two clients;
- e. Defendants failed to notify Plaintiff Willie Bell that Tanisha Gilmore failed to identify him as an heir to the Estate in her application to the Court;
- f. Defendants filed a joint Petition for Approval of Settlement falsely representing to the Probate Court that their client, Andrew Strong, was the common law husband of the Deceased, despite the fact that they knew or should have known that Mr. Strong had not taken the proper steps to become such;
- g. Defendants McGowan falsely represented to the Probate Court that Andrew Strong was the sole heir and beneficiary of the Estate of Emma Davis, which had been closed two years prior, despite the fact that they knew or should have known that he was not;

- h. Defendants failed to notify Plaintiffs Bell and the Estate that Mr. Strong's purported interests in the Estate were adverse to Bell's and those of the Estate in general;
- i. Defendants filed a joint Petition for Approval of Settlement falsely representing to the Probate Court that Tanisha Gilmore was the duly appointed Personal Representative of the Estate of Emma Davis at the time of the settlement of the underlying medical malpractice litigation, despite the fact that they knew or should have known that Ms. Gilmore had been relieved of those duties and the Estate closed in 2011;
- j. Defendants represented to the defendant in the underlying medical malpractice case that Mr. Strong was a proper recipient of the settlement funds;
- k. Defendants represented to the defendant in the underlying medical malpractice case that Ms. Gilmore was a proper payee of the settlement funds;
- l. Defendants dispersed all of the settlement funds to improper recipients;
- m. Defendants took on the representation of clients whose interests were diametrically opposed; and
- n. Defendants placed their interests in the proceeds of the procured settlement above the interests of their client, the Estate of Emma M. Davis.

46. Defendants McGowan's actions and silence as to the above-listed material facts constitutes a breach of the created duty to his clients.

47. As a direct result of Defendants McGowan's above-listed instances of breach of duty, Plaintiff Willie Bell and the Estate have suffered actual and consequential damages in an amount to be determined by a jury.

48. Furthermore, the actions of Defendants McGowan have been willful, wanton, reckless, and performed with a conscious indifference to the rights of the Plaintiff Willie Bell and the Estate, thereby entitling them to punitive damages.

SECOND CAUSE OF ACTION

(FRAUDULENT MISREPRESENTATION)

49. Plaintiff refers to and incorporates herein Paragraphs 1 through 48 alleged herein above and makes them a part hereof as though set forth at length.

50. Defendants McGowan established an attorney-client relationship with the Estate in agreeing to represent it with respect to medical malpractice claims against Ms. Davis' treating physician and hospital.

51. Defendants McGowan owed a duty to the Estate to disclose material facts that affected the rights and interests of the Plaintiff Willie Bell and the Estate.

52. Defendants McGowan maliciously breached its duty to disclose the following material facts to the Plaintiff Willie Bell and the Estate:

- a. Tanisha Gilmore had made false representations to the Probate Court in procuring her appointment as Personal Representative of the Estate;
- b. their client, Tanisha Gilmore, was not a proper Personal Representative of the Estate;
- c. their client, Tanisha Gilmore, would not protect the best interests of the statutory beneficiaries of the Estate;
- d. Plaintiff Willie Bell was the sole legitimate heir of the Estate;
- e. Tanisha Gilmore failed to identify Plaintiff Willie Bell as an heir to the Estate in her application to the Court;
- f. Defendants illegally filed a joint Petition for Approval of Settlement falsely representing to the Probate Court that their client, Andrew Strong, was the common law husband of the Deceased, despite the fact that they knew or should have known that Mr. Strong had not taken the proper steps to become such;
- g. Defendants McGowan falsely and illegally represented to the Probate Court that Andrew Strong was the sole heir and beneficiary of the Estate of Emma Davis, despite the fact that they knew or should have known that he was not;

- h. Mr. Strong's purported interests in the Estate were adverse to his and those of the Estate in general;
- i. Defendants illegally filed a joint Petition for Approval of Settlement falsely representing to the Probate Court that Tanisha Gilmore was the duly appointed Personal Representative of the Estate of Emma Davis at the time of the settlement of the underlying medical malpractice litigation, despite the fact that they knew or should have known that Ms. Gilmore had been relieved of those duties and the Estate closed in 2011;
- j. Defendants improperly represented to the defendant in the underlying medical malpractice case that Mr. Strong was a proper recipient of the settlement funds;
- k. Defendants falsely represented to the defendant in the underlying medical malpractice case that Ms. Gilmore was a proper payee of the settlement funds;
- l. Defendants dispersed all of the settlement funds to improper recipients;
- m. Defendants took on the representation of clients whose interests were diametrically opposed; and
- n. Defendants placed their interests in the proceeds of the procured settlement above the interests of their client, the Estate of Emma M. Davis.

53. Defendants McGowan's silence as to the above-listed material facts constitutes a malicious "false representation" for the purpose of furthering their own pecuniary interests.

54. Defendants McGowan knew that its nondisclosure of material facts would create a false impression with respect to the true interests in the Estate.

55. Plaintiff Willie Bell and the Estate justifiably relied upon the silence/false misrepresentations to their detriment.

56. Defendants McGowan knew that Plaintiff Willie Bell and the Estate were not aware of the material facts Defendants were suppressing.

57. As a direct result of Defendants McGowan's above-listed instances of fraud, Plaintiff Willie Bell and the Estate have suffered actual and consequential damages in an amount to be determined by a jury.

58. Furthermore, the actions of Defendants McGowan have been willful, wanton, reckless, and performed with a conscious indifference to the rights of the Plaintiff Willie Bell and the Estate, thereby entitling them to punitive damages.

THIRD CAUSE OF ACTION
(NEGLIGENT MISREPRESENTATION)

59. Plaintiff refers to and incorporates Paragraphs 1 through 58 alleged herein above and makes them a part hereof as though set forth at length.

60. Defendants McGowan established an attorney-client relationship with the Estate in agreeing to represent it with respect to medical malpractice claims against Ms. Davis' treating physician and hospital.

61. Defendants McGowan owed a duty of care to Plaintiff to see that the material, truthful information was properly communicated to Plaintiff Willie Bell and the Estate.

62. Defendants McGowan negligently breached its duty to disclose the following material facts to the Estate:

- a. Tanisha Gilmore had made false representations to the Probate Court in procuring her appointment as Personal Representative of the Estate;
- b. their client, Tanisha Gilmore, was not a proper Personal Representative of the Estate;
- c. their client, Tanisha Gilmore, would not protect the best interests of the statutory beneficiaries of the Estate;
- d. Plaintiff Willie Bell was the sole legitimate heir of the Estate;

- e. Tanisha Gilmore failed to identify Plaintiff Willie Bell as an heir to the Estate in her application to the Court;
- f. Defendants illegally filed a joint Petition for Approval of Settlement falsely representing to the Probate Court that their client, Andrew Strong, was the common law husband of the Deceased, despite the fact that they knew or should have known that Mr. Strong had not taken the proper steps to become such;
- g. Defendants McGowan falsely and illegally represented to the Probate Court that Andrew Strong was the sole heir and beneficiary of the Estate of Emma Davis, despite the fact that they knew or should have known that he was not;
- h. Mr. Strong's purported interests in the Estate were adverse to his and those of the Estate in general;
- i. Defendants illegally filed a joint Petition for Approval of Settlement falsely representing to the Probate Court that Tanisha Gilmore was the duly appointed Personal Representative of the Estate of Emma Davis at the time of the settlement of the underlying medical malpractice litigation, despite the fact that they knew or should have known that Ms. Gilmore had been relieved of those duties and the Estate closed in 2011;
- j. Defendants improperly represented to the defendant in the underlying medical malpractice case that Mr. Strong was a proper recipient of the settlement funds;
- k. Defendants falsely represented to the defendant in the underlying medical malpractice case that Ms. Gilmore was a proper payee of the settlement funds;
- l. Defendants dispersed all of the settlement funds to improper recipients;
- m. Defendants took on the representation of clients whose interests were diametrically opposed; and
- n. Defendants placed their interests in the proceeds of the procured settlement above the interests of their client, the Estate of Emma M. Davis.

63. Defendants McGowan's negligent silence as to the above-listed material facts constitutes a "false representation."

64. Defendants McGowan should have known that its nondisclosure of material facts would create a false impression with respect to the true interests in the Estate.

65. Defendants McGowan had a pecuniary interest in remaining silent about the aforementioned material facts.

66. Plaintiff Willie Bell and the Estate justifiably relied upon the silence/false misrepresentations to their detriment.

67. Defendants McGowan should have known that Plaintiff Willie Bell and the Estate were not aware of the material facts Defendants were suppressing.

68. As a direct result of Defendants McGowan's above-listed instances of malpractice, Plaintiff Willie Bell and the Estate have suffered actual and consequential damages in an amount to be determined by a jury.

69. Furthermore, the actions of Defendants McGowan have been willful, wanton, reckless, and performed with a conscious indifference to the rights of the Plaintiff Willie Bell and the Estate, thereby entitling them to punitive damages.

FOURTH CAUSE OF ACTION
(VIOLATION OF UNFAIR TRADE PRACTICES ACT)

70. Plaintiff refers to and incorporates Paragraphs 1 through 69 alleged herein above and makes them a part hereof as though set forth at length.

71. Defendants engaged in an unfair and/or deceptive act during the course of their representation of Mr. Strong and the Estate of Emma Davis by securing private loans from Mr. McGowan's father-in-law to Andrew Strong in a total principal amount of \$15,500, which carried an interest rate of 100%.

72. These loans were made by McGowan's father-in-law, Mr. Michael Maloney, on assurances by Defendants that the case would get resolved in Mr. Strong's favor.

73. Defendants helped secure these loans knowing that Mr. Strong had never been properly adjudicated by the Probate Court as a common-law husband as required by the Probate Code. Defendants knew or should have known that Mr. Strong was not the true sole heir to the Estate when they made the same representation to the Court to get the settlement approved.

74. These acts created a conflict of interest between Defendants and their clients, as Defendants placed themselves in a position to have to protect the interests of Mr. Strong, the Estate, and Mr. Maloney.

75. These unfair and/or deceptive practices affected the interests of not only Defendants named clients, those of Willie Bell, but also impact the interests of the general public as there is a likelihood of repetition, as demonstrated by Mr. McGowan's securing similar loans for other his firm's clients.

76. As a direct result of Defendants McGowan's above-listed instances of unfair and/or deceptive practices, Plaintiff Willie Bell and the Estate have suffered actual and consequential monetary damages in an amount to be determined by a jury.

77. Furthermore, the actions of Defendants McGowan have been willful, wanton, reckless, and performed with a conscious indifference to the rights of the Plaintiff Willie Bell and the Estate, thereby entitling them to treble damages under the Act.

FOURTH CAUSE OF ACTION
(BREACH OF CONTRACT WITH FRAUDULENT INTENT)

78. Plaintiff refers to and incorporates Paragraphs 1 through 77 alleged herein above and makes them a part hereof as though set forth at length.

79. Defendants entered into a contract with the Estate of Emma Davis to represent its interests in the underlying medical malpractice lawsuit.

80. Defendants breached the contract of representation by acting in conflict to the interests of the Estate and its beneficiary.

81. Defendants' breaches of the contract were accompanied by fraudulent acts.

82. During the course of their representation of Mr. Strong and the Estate of Emma Davis, Defendants arranged and help secure private loans from Mr. McGowan's father-in-law to Mr. Strong in a total principal amount of \$15,500, which carried an interest rate of 100%.

83. These loans were made by McGowan's father-in-law, Mr. Michael Maloney, on assurances by Defendants that the case would get resolved in Mr. Strong's favor.

84. Defendants helped secure these loans knowing that Mr. Strong had never been properly adjudicated by the Probate Court as a common-law husband as required by the Probate Code. Defendants knew or should have known that Mr. Strong was not the true sole heir to the Estate when they arranged the loans to Mr. Strong and when they fraudulently made the same representation to the Court to get the settlement approved. Once the loans were secured, McGowan had no other choice but to continue with the position that Mr. Strong was the common-law husband.

85. These acts created a conflict of interest between Defendants and their clients, as Defendants placed themselves in a position to have to have to protect the interests of Mr. Strong, the Estate, and Mr. Maloney.

86. These fraudulent practices were done with fraudulent intent and against the interests of the Estate in favor of Mr. Strong and Mr. McGowan's father-in-law.

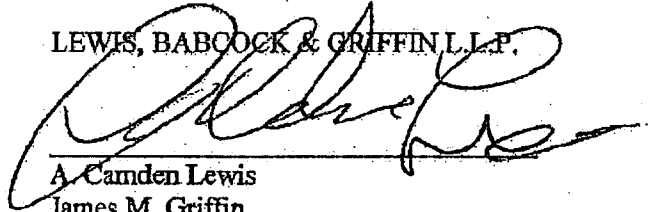
87. Defendants fraudulently withheld the 100% interest payment to be made to McGowan's father-in-law in the Petition for Settlement Approval submitted to the Court and left the same off of the final Settlement Statement to the clients.

88. As a direct result of Defendants McGowan's above-listed instances of fraudulent acts and practices, Plaintiff Willie Bell and the Estate have suffered actual and consequential monetary damages in an amount to be determined by a jury.

77. Furthermore, the actions of Defendants McGowan have been willful, wanton, reckless, and performed with a conscious indifference to the rights of the Plaintiff Willie Bell and the Estate, thereby entitling them to punitive damages.

Respectfully submitted,

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

WILLIE BELL, INDIVIDUALLY AND ON
BEHALF OF THE ESTATE OF EMMA M.
DAVIS AS ITS DULY APPOINTED PERSONAL
REPRESENTATIVE,

Plaintiff,

vs.

MCGOWAN, HOOD & FELDER, LLC
AND CHAD MCGOWAN

Defendants.

COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO: 2015-CP-46-1827

**DEFENDANTS MCGOWAN,
HOOD & FELDER, LLC
AND CHAD MCGOWAN'S
ANSWER TO PLAINTIFF'S
AMENDED COMPLAINT**

[JURY DEMAND]

Defendants McGowan, Hood & Felder, LLC and Chad McGowan, Esq. (collectively
"McGowan") answer Plaintiff's Amended Complaint as follows:

PARTIES, CAPACITY, AND JURISDICTION

1. In answering the allegations of paragraph 1, Defendants admit only the allegation Plaintiff Willie Bell is a citizen and resident of Chester County, South Carolina. The remaining allegations in paragraph 1 are denied.

2. Paragraph 2 is denied. Defendants' principal place of business is York County, South Carolina. In further answering paragraph 2, Defendants admit that Defendant, McGowan, Hood & Felder, LLC maintains an office in Richland County.

3. Paragraph 3 is admitted. In further answering paragraph 3, Defendant, Chad McGowan admits he is a citizen and resident of York County.

4. In answering paragraph 4, Defendants admit only the substantial part of the alleged acts and/or alleged omissions occurred in York County and Chester County. Defendants deny any alleged acts and/or alleged omissions occurred in Richland County.

5. Defendants deny paragraph 5. In further answering paragraph 5, Defendant, Chad McGowan resides in York County.

6. In answering paragraph 6, Defendants admit only Emma M. Davis died without a last will and testament on February 11, 2010. The remaining allegations of paragraph 6 are denied.

7. In answering paragraph 7, Defendants admit only Emma M. Davis's obituary was published on February 16, 2010. The remaining allegations of paragraph 7 are denied.

8. In answering paragraph 8, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 8 are denied.

9. In answering paragraph 9, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 9 are denied.

10. Defendants deny paragraphs 10-11.

11. In answering paragraph 12, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 12 are denied.

12. In answering paragraph 13, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 13 are denied.

13. In answering paragraph 14, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 14 are denied.

14. Defendants deny paragraphs 15-16.

15. In answering paragraph 17, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 17 are denied.

16. Defendants deny paragraphs 18-20.

17. Defendants admit paragraph 21 only to the extent it alleges no filing was made to declare Andrew Strong was Emma Davis's common law husband. The remaining allegations of paragraph 21 are hereby denied.

18. Defendants deny paragraph 22.

19. In answering paragraph 23, Defendants admit only the document referred therein is the best evidence of its contents. The remaining allegations of paragraph 23 are denied.

20. Defendants deny paragraphs 24-29.

21. In answering paragraph 30, Defendants admit only that *Tanisha Gilmore, as the Personal Representative of the Estate of Emma Davis, and Andrew Strong v. Amibsub of SC, Inc. d/b/a Piedmont Medical Center, et. al.*, 2010-CP-46-3899 (hereinafter "the 2010 action") was settled for \$2,200,000.00. The remaining allegations of paragraph 30 are denied.

22. In answering paragraph 31, Defendants admit only they received a fee of \$920,000.00 plus \$106,172.03 in reimbursed costs from the settlement of the 2010 action. The remaining allegations of paragraph 31 are denied.

23. Defendants deny paragraphs 32-41.

24. In answer to paragraph 42, Defendants incorporate and repeat their prior answers.

25. Defendants deny paragraphs 43-48.

26. In answer to paragraph 49, Defendants incorporate and repeat their prior answers.

27. Defendants deny paragraphs 50-58.

28. In answer to paragraph 59, Defendants incorporate and repeat their prior answers.

29. Defendants deny paragraphs 60-69.

30. In answer to paragraph 70, Defendants incorporate and repeat their prior answers.

31. Defendants deny paragraphs 71-77.

32. In answer to paragraph 78, Defendants incorporate and repeat their prior answers.

33. Defendants deny paragraphs 79-89 (Paragraph 89 is incorrectly marked as paragraph 77).

34. Any allegation or averment not specifically admitted herein is hereby denied.

Defendants hereby asserts the following affirmative defenses to Plaintiff's Amended Complaint:

FOR A FIRST AFFIRMATIVE DEFENSE
(Jurisdiction)

35. The Court lacks jurisdiction, in whole or in part, over the person of Plaintiff or the subject matter of Plaintiff's Amended Complaint to the extent that Plaintiff seeks to act "on behalf of the Estate of Emma M. Davis as its duly appointed Personal Representative", so as to render all proceedings in this matter a nullity. In this regard, Defendants respectfully incorporate by reference herein their Petition to Restrain and Remove Successor Personal Representative (Ex. 1) filed with the Probate Court of Chester County ("Probate Court"), and the proceedings related thereto before the Probate Court.

FOR A SECOND AFFIRMATIVE DEFENSE
(Standing)

36. Plaintiff lacks standing to proceed "on behalf of the Estate of Emma M. Davis as its duly appointed Personal Representative", as to render all proceedings in this matter a nullity. In this regard, Defendants respectfully incorporate by reference herein their Petition to Restrain and Remove Successor Personal Representative (Ex. 1) filed with the Probate Court, and the proceedings related thereto before the Probate Court.

FOR A THIRD AFFIRMATIVE DEFENSE
(Immunity)

37. Defendants are immune from liability to Plaintiff pursuant to S.C. Code Ann. § 62-3-714, judicial immunity, common law, or otherwise.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Statute of Limitations)

38. Plaintiff failed to file his Amended Complaint within the time required by the applicable Statute of Limitations, or such other applicable period of time as established by law and/or equity, and the failure to timely commence the action constitutes a complete bar and complete defense to the Amended Complaint.

FOR A FIFTH AFFIRMATIVE DEFENSE
(Joinder)

39. Plaintiff's Amended Complaint is barred by the failure to join all parties necessary for and/or indispensable for a just adjudication of this case.

FOR A SIXTH AFFIRMATIVE DEFENSE
(Failure to State a Cause of Action)

40. Plaintiff has failed to state facts sufficient to constitute a cause of action upon which relief can be granted. In this regard, Defendants respectfully incorporate herein their averments, denials, and affirmative defenses to Plaintiff's Complaint, as well as their Motion to Dismiss (Ex. 2) previously filed with the Court of Common Pleas for Richland County, South Carolina, and their Petition to Restrain and Remove Successor Personal Representative previously filed with the Probate Court.

FOR A SEVENTH AFFIRMATIVE DEFENSE
(Scope of Engagement)

41. Pursuant to S.C. Code Ann. § 62-3-715(19)(20), Rule of Professional Conduct 1.7, and Defendants' Retainer Agreement with Tanisha Gilmore, Personal Representative of the Estate

of Emma M. Davis, which is incorporated herein by reference (Ex. 3), Defendants' scope of engagement was limited to litigation of the underlying case captioned *Tanisha Gilmore, as the Personal Representative of the Estate of Emma Davis, et al. v. Amisub of SC, Inc. d/b/a Piedmont Medical Center, et al.*, Case No. 10-CP-46-03899, and did not extend to representation of Tanisha Gilmore in the administration of the Estate of Emma M. Davis, or to representation of Plaintiff in any way whatsoever.

FOR A EIGHTH AFFIRMATIVE DEFENSE
(Strict Privity)

42. Pursuant to S.C. Code Ann. § 62-1-109, Tanisha Gilmore, as Personal Representative of the Estate of Emma M. Davis, was Defendants' sole and exclusive client with respect to the underlying case captioned *Tanisha Gilmore, as the Personal Representative of the Estate of Emma Davis, et al. v. Amisub of SC, Inc. d/b/a Piedmont Medical Center, et al.*, Case No. 10-CP-46-03899, and Defendants neither represented, nor had any duty to, Plaintiff with respect to said underlying case.

FOR A NINTH AFFIRMATIVE DEFENSE
(S.C. Code Ann. § 15-36-100)

43. Plaintiff's Amended Complaint is barred as it fails to comply with S.C. Code § 15-36-100.

FOR A TENTH AFFIRMATIVE DEFENSE
(Standard of Care)

44. Defendants' exercise of professional judgment was made with reasonable care and skill, and complied with the standard of care applicable to Defendants in the community in which they practice.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE
(UTPA – Representative Capacity)

45. Plaintiff's cause of action for violation of the Unfair Trade Practices Act in his "representative capacity" is barred by S.C. Code Ann. § 39-5-140(a).

FOR A TWELFTH AFFIRMATIVE DEFENSE
(UTPA – Lack of Public Interest)

46. Pursuant to S.C. Code Ann. § 39-5-140, Plaintiff's Amended Complaint is barred as the acts of Defendants do not directly or indirectly affect the public interest.

FOR A THIRTEENTH AFFIRMATIVE DEFENSE
(Lack of Contract)

47. Plaintiff's Amended Complaint is barred as no contract existed between Defendants and the Plaintiff.

FOR A FOURTEENTH AFFIRMATIVE DEFENSE
(No Breach of Contract)

48. Plaintiff's Amended Complaint is barred because Defendants did not breach a contract.

FOR A FIFTEENTH AFFIRMATIVE DEFENSE
(Fraud)

49. Plaintiff fails to plead his cause of action for fraud with appropriate specificity and particularity.

FOR A SIXTEENTH AFFIRMATIVE DEFENSE
(Lack of Fraudulent Intent and Fraudulent Act)

50. Plaintiff's Amended Complaint is barred as there was not a breach of contract accomplished with a fraudulent intention that was accompanied by a fraudulent act.

FOR A SEVENTEENTH AFFIRMATIVE DEFENSE
(Intervening Superseding Cause)

51. Plaintiff's Amended Complaint is barred by the intervening and/or superseding acts, errors, or omissions of others over whom Defendants had no control, no legal right to control, and for whom Defendants are not legally responsible.

FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE
(Comparative Fault)

52. Plaintiff's Amended Complaint is barred, in whole or in part, by the comparative fault of Plaintiff, those acting by or for Plaintiff, or those for whom Plaintiff is legally responsible.

FOR A NINETEENTH AFFIRMATIVE DEFENSE
(Assumption of Risk)

53. Plaintiff's Amended Complaint is barred by the Plaintiff's assumption of risk, whether direct, indirect, express, implied, primary, secondary, consensually, or otherwise.

FOR AN TWENTIETH AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

54. Plaintiff's Amended Complaint is barred, in whole or in part, by Plaintiff's failure to mitigate his damages.

FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE
(Setoff)

55. Any recovery by Plaintiff must be set off or reduced, abated, or apportioned to the extent that any other party's actions caused or contributed to damages, if any, or as otherwise provided pursuant to S.C. Code Ann. § 15-38-50, *et. seq.*

FOR A TWENTY-SECOND AFFIRMATIVE DEFENSE
(Punitive Damages)

56. Plaintiff may not recover punitive damages because such damages are unconstitutional.

FOR A TWENTY-THIRD AFFIRMATIVE DEFENSE
(Waiver)

57. Plaintiff's Amended Complaint is barred by the doctrine of waiver.

FOR A TWENTY-FOURTH AFFIRMATIVE DEFENSE
(Judicial Estoppel)

58. Plaintiff's Amended Complaint is barred by the doctrine of judicial estoppel.

FOR A TWENTY-FIFTH AFFIRMATIVE DEFENSE
(Estoppel)

59. Plaintiff's Amended Complaint is barred by the doctrine of estoppel.

FOR A TWENTY-SIXTH AFFIRMATIVE DEFENSE
(Estoppel By Silence)

60. Plaintiff's Amended Complaint is barred by the doctrine of estoppel by silence.

FOR A TWENTY-SEVENTH AFFIRMATIVE DEFENSE
(Unclean Hands)

61. Plaintiff's Amended Complaint is barred by the doctrine of unclean hands.

FOR A TWENTY-EIGHTH AFFIRMATIVE DEFENSE
(Laches)

62. Plaintiff's Amended Complaint is barred by the doctrine of laches.

FOR A TWENTY-NINTH AFFIRMATIVE DEFENSE
(Ratification)

63. Plaintiff's Amended Complaint is barred by the doctrine of ratification.

FOR A THIRTIETH AFFIRMATIVE DEFENSE
(Accord and Satisfaction)

64. Plaintiff's Amended Complaint is barred by the doctrine of accord and satisfaction.

FOR A THIRTY-FIRST AFFIRMATIVE DEFENSE
(Release)

65. Plaintiff's Amended Complaint is barred, in whole or in part, by Plaintiff's release of the claims and/or causes of action set forth therein.

FOR A THIRTY-SECOND AFFIRMATIVE DEFENSE
(Public Policy)

66. Plaintiff's Amended Complaint is barred by the public policy of the State of South Carolina.

FOR A THIRTY-THIRD AFFIRMATIVE DEFENSE
(Nullity)

67. As a matter of fact, law, and/or equity, Plaintiff is not entitled to proceed in the captioned matter as the Personal Representative of the Estate of Emma M. Davis, and therefore these proceedings are a nullity.

FOR A THIRTY-FOURTH AFFIRMATIVE DEFENSE
(Reservation of Additional Defenses)

68. Defendants reserve the right to add additional defenses as allowed by the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully set forth their answer to Plaintiff's Amended Complaint, Defendants McGowan, Hood & Felder, LLC and Chad McGowan pray:

- a. That the Plaintiff's Amended Complaint be dismissed with prejudice and that Defendants be awarded costs and fees from the Plaintiff; or in the alternative
- b. For a trial by jury of all issues joined herein so triable; and
- c. For such other and further relief as this Honorable Court deems just and equitable.

Respectfully submitted this 2nd day of October, 2015.



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STATE OF SOUTH CAROLINA

COUNTY OF YORK

WILLIE BELL, INDIVIDUALLY AND ON
BEHALF OF THE ESTATE OF EMMA M. DAVIS
AS ITS DULY APPOINTED PERSONAL
REPRESENTATIVE,

Plaintiffs,

vs.

MCGOWAN, HOOD & FELDER, LLC AND
CHAD MCGOWAN

Defendants.

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT

CASE NO: 2015-CP-46-01827

DEFENDANTS MCGOWAN, HOOD
& FELDER, LLC AND CHAD
MCGOWAN, ESQ. MOTION FOR
SUMMARY JUDGMENT

FILED-RECEIVED
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CLERK OF COURT
YORK COUNTY, S.C.

Pursuant to Rule 56, SCRCF, Defendants McGowan Hood & Felder, LLC ("MHP") and Chad McGowan, Esq. (collectively "McGowan") respectfully move the Court for summary judgment on the Amended Complaint of Plaintiff Willie Bell ("Bell") as there are no genuine issues of material fact and McGowan is entitled to judgment as a matter of law. As grounds in support of this motion, to be more fully and specifically shown in a memorandum in support to be filed before the hearing on this motion, McGowan would show the Court that McGowan is not in privity with Bell either individually or as the Successor Personal Representative of the Estate and therefore has no duty or obligation to Bell whatsoever, which bars Bell's cause of action for legal malpractice; that Bell's causes of action for fraudulent misrepresentation, negligent misrepresentation, violations of SCUPTA, and breach of contract with fraudulent intent must be dismissed as duplicative of his cause of action for legal malpractice and as failing to state a claim; and that Bell's causes of action are otherwise barred based on his prior waiver, settlement and ratification of the matters of which he complains.

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Respectfully submitted,



JANIK LLP

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February 1, 2016

STATE OF SOUTH CAROLINA

COUNTY OF YORK

WILLIE BELL, INDIVIDUALLY AND ON BEHALF
OF THE ESTATE OF EMMA M. DAVIS AS ITS
DULY APPOINTED PERSONAL
REPRESENTATIVE,

Plaintiffs,

vs.

MCGOWAN, HOOD & FELDER, LLC AND CHAD
MCGOWAN, ESQ.

Defendants.

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT

CASE NO: 2015-CP-46-01827

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT OF DEFENDANTS
MCGOWAN, HOOD & FELDER, LLC
AND CHAD MCGOWAN, ESQ.

McGowan respectfully submits his Memorandum in Support of Motion for Summary Judgment pursuant to Rule 56, SCRPC.

I. PREAMBLE

This case never should have been filed. It is time to end it. There are no questions of fact. There are only questions of law, and they must be answered in favor of McGowan by way of summary judgment.

Bell – through counsel and expert – has vilified McGowan during the course of this litigation, wrongfully accusing him of scheming, lying, and lining his own pockets, along with a long list of violations of the Rules of Professional Conduct (“RPC”), all of which will be shown to be false as a matter of law by this Motion. Bell will no doubt continue to smear McGowan in his Opposition to this Motion in an ongoing effort to turn questions of law into questions of fact that will allow him to escape summary judgment under the “Scintilla Rule”. Bell’s efforts will fail, however, because he

cannot escape the principles of law that control this case; principles that command summary judgment for McGowan.

This case never should have been filed. It is time to end it by way of summary judgment for McGowan.

II. INTRODUCTION

McGowan secured a \$2.2M settlement on behalf of Tanisha Gilmore ("Gilmore"), as the duly appointed Personal Representative of the Estate of Emma Davis ("Estate"), and on behalf of Andrew Strong ("Strong"), as the common law husband of Emma Davis ("Davis"), in the case of *Tanisha Gilmore, as the Personal Representative of the Estate of Emma Davis, and Andrew Strong v. Amisub of SC, Inc. d/b/a Piedmont Medical Center et al*, Case No. 10-CP-46-3899, Court of Common Pleas for York County, Sixteenth Judicial Circuit, South Carolina ("Wrongful Death Litigation").

After the settlement was approved by the Circuit Court and the funds were distributed to Strong, who was believed to be the common law husband of Davis and the sole statutory beneficiary of the Estate, Bell emerged and made claim upon the settlement, announcing for the first time that he was Davis' adopted son and therefore entitled to the entire \$2.2M settlement. Bell sued Gilmore and Strong, settled with them, and then sued McGowan, seeking to recover individually and as the Successor Personal Representative of the Estate.

McGowan is not in privity with Bell either individually or as the Successor Personal Representative of the Estate, and therefore has no duty to Bell whatsoever. In fact, Bell concedes¹ that McGowan did not breach any standard of care in handling and settling the Wrongful Death Litigation – he just wants the money: "No one is bitching about the money, they're bitching about

¹ Depositions will be cited by reference to the last name of the witness; e.g. "McGowan" for the Deposition of Chad A. McGowan, Esq. (May 13, 2015). Deposition transcripts and exhibits are attached as Appendices.

where it went."²

Thus, the question in this case is whether McGowan, who was retained by Gilmore, the duly appointed Personal Representative of the Estate, had any duty or obligation to Bell, as a potential heir or statutory beneficiary of Davis, in connection with the settlement of the Wrongful Death Litigation. The answer to this question is found in the "Strict Privity Rule" of S.C. Code Ann.³ § 62-1-109 ("§ 109"), which provides:

§ 62-1-109. Duties and obligations of lawyer arising out of relationship between lawyer and person serving as a fiduciary.

Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

(Emphasis added.) Thus, McGowan's attorney-client relationship with Gilmore, as Personal Representative of the Estate, did not impose upon McGowan any duties or obligations to Bell "unless expressly provided otherwise in a written employment agreement".

² Ex. 1 McGowan at 123, quoting A. Camden Lewis, Esq. ("Lewis"), counsel for Bell; Ex. 2 John P. Freeman ("Freeman"), expert witness for Bell, at 76-77:

Q To quote Mr. Lewis, no one is bitching about the results, only who got the money?

A Well, that's what he told me not using exactly those words, but -

Q I think that's pretty close to a quote.

A Probably is.

Mr. Lewis Probably is.

Q Okay. You agree with that?

A Yes, that's the way I understand it.

Q Okay. So the issue in this case is who got the money?

A It is the handling of the money, yes sir.

McGowan reserves all rights to challenge the qualifications of Freeman to offer expert opinion in this case.

³ All references to statutory sections herein are references to South Carolina Code Annotated (1976).

Bell seeks to invoke this exception, arguing that McGowan's Retainer Agreement was not with Gilmore, as Personal Representative of the Estate, even though she signed the Retainer Agreement as "Client", *Lanisha Gilmore*, but rather was with the "Estate of Mrs. Davis" based upon the following handwritten notation at the beginning of the Retainer Agreement:

This is an agreement between McGowan, Hood & Felder, LLC (hereinafter "attorneys") and (hereinafter "client").

Relying upon this notation, Bell argues that McGowan's duties and obligations ran to the "Estate of Mrs. Davis" as "expressly provided . . . in a written employment agreement", and then seeks to extend such duties and obligations by "implication" to potential heirs and statutory beneficiaries of Davis, like Bell, who were required to be set forth in the Petition filed with the Circuit Court in order to settle the Wrongful Death Litigation.

Bell's argument fails for four reasons: (1) the "Estate of Mrs. Davis" is not a legal entity and therefore lacks the legal capacity needed to enter into the Retainer Agreement, to be a "client" represented by counsel, or to sue or be sued; (2) the exception to § 109 does not arise by implication, but only by express written provision, and there is no express written provision in the Retainer Agreement that imposes upon McGowan any duties or obligations to Bell; (3) Bell cannot "contract around" the Probate Code and the Wrongful Death Act to authorize the "Estate of Mrs. Davis", as opposed to Gilmore, as Personal Representative of the Estate, to pursue the survival and wrongful death actions arising out of the wrongful death of Davis; and, (4) every duty and obligation that Bell seeks to impose upon McGowan is a duty and obligation that McGowan owed exclusively to his "Client" under § 109 - whether Gilmore as Personal Representative of the Estate or the "Estate of Mrs. Davis" if it be deemed a legal entity - but did not owe to any potential heirs or statutory

beneficiaries of Davis, including Bell. Thus, the exception to § 109 does not apply and as a matter of law McGowan does not owe any duties or obligations to Bell.

In a further effort to avoid § 109, Bell launches collateral attacks, arguing that privity has been relaxed in other types of professional negligence and that § 109 has been altered by the decision of the Supreme Court of South Carolina in *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E. 2d 132 (2014), such that Bell is a third-party beneficiary of the Wrongful Death Litigation. Bell's arguments fail for three reasons: (1) unlike other settings, the Legislature has expressly imposed a "Strict Privity Rule" under § 109 that controls in this case; (2) *Fabian* did not so much as mention § 109, did not and could not judicially alter, overturn, or rewrite § 109, and is factually and legally distinguishable from this case; and, (3) the Wrongful Death Act cannot be construed to create third party beneficiary relationships in derogation of § 109.

Bell also showers this case with arguments about conflicts of interest and McGowan's violations of the RPC. Bell's arguments fail, again for three reasons: (1) § 109 bars Bell's allegations of conflict of interest just as it bars Bell's other allegations; (2) Bell is not and has never been McGowan's client and McGowan therefore owes no duties or obligations to Bell, including any duties regarding conflicts of interest; and, (3) as McGowan owes no duties or obligations to Bell there can be no conflict with any duties or obligations that McGowan owes to Gilmore, as Personal Representative of the Estate, and/or to Strong. In fact, even if McGowan had a potential conflict with Bell, it did not materialize until the time of distribution of the settlement funds, at which point McGowan referred Gilmore and Strong to Rikard & Protopapas thereby avoiding any conflict. Prior to distribution, Gilmore, as Personal Representative of the Estate, and Strong, as the common law husband of Davis, were aligned in seeking to maximize recovery for all concerned in the Wrongful

Death Litigation, with the settlement therein evidencing not only their success, but also the absence of any conflict of interest.

Moreover, Bell cannot pursue McGowan in connection with a settlement that Bell has ratified; cannot attack McGowan on a settlement that has been reduced to judgment and is now *res judicata* as to Bell in this case; cannot sue McGowan where Bell's exclusive remedy was against Gilmore and he has settled with Gilmore; cannot sue McGowan where Gilmore never sued him; and, cannot overcome McGowan's immunity to Bell's Causes of Action.

Bell bears the burden of proving McGowan's legal malpractice by "clear and convincing evidence"; that is, evidence which is so clear, definite, unequivocal, and satisfactory as to lead to but one conclusion, or as to leave no reasonable doubt as to the truth of the allegations being made.⁴ Bell cannot carry this burden and McGowan is therefore entitled to judgment as a matter of law.

III. FACTS

McGowan represented Gilmore, as the duly appointed Personal Representative of the Estate⁵, and Strong, as Davis' common law husband⁶, in the Wrongful Death Litigation⁷. Gilmore sought to recover for survival and wrongful death under §§ 15-5-90 and 15-51-10, and Strong sought to recover for loss of companionship under § 15-75-20, in connection with the wrongful death of Davis, who died while having a heart pacemaker implanted at Piedmont Medical Center⁸.

Summary judgment was entered against Gilmore on her survival cause of action.⁹ Shortly thereafter, the remaining causes of action for wrongful death and loss of companionship were settled.

⁴ *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 350-351, 108 S.E.2d 414, 424 (1959); *Gordon v. Busbee*, 2008 WL 8994336 (S.C. C.P. Aiken Cnty. May 23, 2008). Bell's remaining causes of action fail as being duplicative of his cause of action for Legal Malpractice. *Infra* at 42.
⁵ Ex. 3 February 19, 2010 Gilmore Application for Personal Representative; Ex. 4 February 19, 2010 Gilmore Certificate of Appointment; Ex. 5 March 15, 2010 Retainer Agreement.
⁶ Ex. 6 McGowan at 15:24-16:6.
⁷ Ex. 7 McGowan at 15:24-16:6, 86:16-87:1; Ex. 8 Gilmore at 33:5-8.
⁸ Ex. 9 September 15, 2010 Complaint; Ex. 10 June 25, 2012 Amended Complaint.
⁹ Ex. 11 May 17, 2012 Order on Motion for Summary Judgment.

before the Circuit Court for the sum of \$2.2M¹⁰, which was allocated equally between wrongful death and loss of companionship.¹¹ Out of the settlement, McGowan received \$1,026,172.03 for fees and expenses, with Strong receiving the balance of \$1,173,827.97, as he was believed to be the sole beneficiary and common law husband of Davis¹².

In turn, Strong gave \$420,000 of the settlement proceeds to members of Davis' extended family¹³, including \$100,000 to Bell¹⁴, who according to the family had been taken in and raised by Davis, but never adopted by her, after the murder of his mother, Elizabeth Young, Davis' cousin¹⁵.

Shortly after receiving the \$100,000, Bell announced, for the first time, that he was the adopted son of Davis, and was therefore entitled to the entire \$2.2M settlement¹⁶. Bell filed a Motion to Intervene in the Wrongful Death Litigation for purposes of filing a Motion to Vacate the Settlement¹⁷, filed a separate complaint against Gilmore and Strong in the case of *Willie Bell v. Tanisha Gilmore and Andrew Strong*, Case No. 2013-CP-46-3482, Court of Common Pleas for York

¹⁰ Ex. 12 Aug. 1, 2013 Petition for Approval of Settlement; Ex. 13 Aug. 1, 2013 Order Approving Settlement.

¹¹ *Id.* Bell takes issue with the Petition for Approval of Settlement because Strong was never adjudicated to be the common law husband of Davis in accordance with § 62-2-802. (Ex. 14 McGowan at 40:11-24.) However, stipulation of the parties is as effective to prove common law marriage as is adjudication under § 62-2-802. *See McDaniel v. McDaniel*, 243 S.C. 286, 288, 133 S.E.2d 809, 810-811 (1963); *accord Bennett v. Floyd*, 237 S.C. 64, 72, 115 S.E.2d 659, 663 (1960). In this regard, the underlying defendants drafted the Petition for Approval of Settlement, and the accompanying Order Approving Settlement. The Petition was duly executed by Gilmore, as Personal Representative of the Estate, and Strong, which together with the Order constitute the functional equivalent of the parties' stipulation to Strong as the common law husband of Davis, and to the equal allocation of settlement between wrongful death and loss of companionship. (Ex. 15 McGowan at 54:7-18, 58:2-18.) Additionally, Strong's claim for loss of companionship under § 15-75-20 is independent of any right he had under the Wrongful Death Act, § 15-51-10, did not require adjudication under § 62-2-802, and was subject to being proven on the merits at trial before the Circuit Court. *E.g., Burroughs v. Worsham*, 352 S.C. 382, 406-407, 574 S.E. 2d 215, 227 (S.C. App. 2002); *accord White v. U.S.*, 907 F. Supp. 2d 703, 708-709 (D.S.C. 2012).

¹² Ex. 16 McGowan at 23:14-19, 28:20-29, 34:4-35:15, 56:6-23, 81:14-82:9, 84:9-86:7; Ex. 17 Gilmore at 21:17-19, 23:4-10, 41:15-43:18.

¹³ Ex. 18 Aug. 7, 2013 Check No. 9859 made payable Andrew Strong and Willie Lee Bell in the sum of \$100,000.00; Ex. 19 Gilmore at 43:23-44:20, 46:21-49:14.

¹⁴ *Supra* note 13; Ex. 20 Bell at 16:13-22; Ex. 21 Gilmore at 46:21-47:3.

¹⁵ Ex. 22 Bell at 25:6-15; Ex. 23 Gilmore at 29:13-30:17.

¹⁶ Ex. 24 Aug. 22, 2013 transcript of voicemail from Bell to MHF; Ex. 25 McGowan at 127:22-128:1; Ex. 26 Bell at 36:22-37:24.

¹⁷ Ex. 27 Nov. 13, 2013 Motion to Intervene for Purposes of Filing a Rule 60 Motion to Vacate.

County, Sixteenth Judicial Circuit, South Carolina ("Gilmore Litigation"), alleging¹⁸ causes of action for conversion, constructive trust, injunction, and as to Gilmore only, breach of fiduciary duty¹⁹, and filed a Motion for Temporary Restraining Order, which was granted, enjoining alienation of any of the settlement funds by Gilmore and Strong.²⁰ Bell thereafter ratified the settlement through his counsel, John Alphin of the Strom Law Firm L.L.C.²¹ and settled with Gilmore and Strong for the sum of \$250,000, with Strong paying \$200,000, and Gilmore paying \$50,000, consisting of \$5,000 in cash and a note in favor of Bell in the amount \$45,000 at 8% annual interest, secured by a first mortgage on her home²².

Bell next appointed himself as Successor Personal Representative of the Estate²³, again through the Strom Law Firm L.L.C., retained A. Camden Lewis of Lewis Babcock L.L.P. as counsel, and filed suit against McGowan in the case of *Willie Bell, Individually and as Successor Personal Representative of the Estate of Emma Davis v. McGowan, Hood, and Felder, LLC and Chad McGowan Esq.*, Case No: 2014 CP-400-5570, Court of Common Pleas for Richland County, Fifth Judicial Circuit, South Carolina ("Malpractice Litigation")²⁴, seeking to recover for legal malpractice, fraudulent misrepresentation, negligent misrepresentation, violations of the South Carolina Unfair Trade Practice Act ("SCUTPA"), and breach of contract with fraudulent intent, all

¹⁸ Ex. 28 Nov. 13, 2013, Complaint-in-Intervention. Although Bell alleged he was adopted, he never produced his Decree of Adoption during the Gilmore Litigation. *E.g. In re Lain*, 147 So. 3d 1204, 1214 (La. App. Aug. 20, 2014) (absence of decree is fatal to claim adopted).

¹⁹ *Id.*

²⁰ Ex. 29 Nov. 13, 2013 Order granting Motion for Temporary Restraining Order.

²¹ Ex. 30 Nov. 18, 2013 letter from James Edward Bradley, Esq. to John Alphin, Esq.; Ex. 31 McGowan at 122:10-123:25.

²² Ex. 32 Jan. 3, 2015 Release.

²³ Ex. 33 Mar. 20, 2014 Bell Application for Successor Personal Representative; Ex. 34 Mar. 20, 2014 Bell Certificate of Appointment.

²⁴ Ex. 35 Sept. 11, 2014 Bell Complaint; Ex. 36 Sept. 15, 2015 Bell Amended Complaint. McGowan's Motion to Dismiss the Complaint was denied based upon SCRCP 7(b)(1) and never ruled upon on its merits. App. 6 Motion to Dismiss; App. 7 Opposition to Motion to Dismiss ("Opposition").

arising out of McGowan's alleged failure to protect Bell's interests in the underlying Wrongful Death Litigation²⁵.

IV. LEGAL MALPRACTICE

In order to recover from McGowan for legal malpractice, Bell must prove, both individually and as Successor Personal Representative of the Estate, that:

1. He was in privity with McGowan by way of an attorney-client relationship;
2. Such relationship imposed duties upon McGowan that ran in favor of Bell;
3. McGowan breached such duties;
4. Such breach proximately caused damage either to Bell individually, or to the Estate.

E.g., Fabian, 410 S.C. at 482, 765 S.E.2d at 136, citing *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams, LLP*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) and *Rydde v. Morris*, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009) ("Privity denotes a relationship" that is equated with standing, which has traditionally been established by the existence of an attorney-client relationship, and which is a requirement for a legal malpractice action).

Bell must also prove by appropriate expert testimony the standard of care incumbent upon McGowan, which is the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession. *E.g., Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010).

²⁵ McGowan challenged Bell's right to serve as Successor Personal Representative by way of Petition to Remove and Restrain in the case of *McGowan, Hood & Felder L.L.C. and Chad McGowan v. Bell*, Case No. 2010-ES-12-00059-2, Probate Court for Chester County, South Carolina. (Ex. 37.) The Probate Court, however, granted Bell's Motion to Dismiss the Petition, holding that McGowan did not have standing to challenge Bell in Probate Court, and that all issues should be presented to, and resolved by, the Circuit Court in the course of the Malpractice Litigation (Ex. 38), venue for which was thereafter transferred to the Court of Common Pleas for York County, Sixteenth Judicial Circuit. (Ex. 39.)

V. McGOWAN WAS NOT IN PRIVACY WITH AND HAD NO DUTIES OR OBLIGATIONS TO BELL AS AN INDIVIDUAL

McGowan had no relationship with Bell whatsoever, much less an attorney-client relationship, as is evidenced by Bell's own testimony²⁶:

Q: Have you ever met Chad McGowan?

A: No, sir.

Q: Have you ever met anyone from McGowan, Hood and Felder?

A: No, sir.

Q: Have you ever had any kind of communications with Chad McGowan?

A: No, sir.

Q: Or with anyone from McGowan, Hood and Felder?

A: No, sir.

Q: Have you ever had any correspondence with them?

A: No, sir.

Q: Have you ever asked them to represent you in any legal proceedings?

A: No, sir.

Q: Have you ever signed any type of retainer agreement with them?

A: No, sir.

* * *

Q: And you told me before that you had never retained Chad McGowan or McGowan, Hood and Felder?

A: I don't know him.

Q: They were the lawyers that were involved with Tanisha's suit against the hospital.

²⁶ Ex. 40 Bell at 7-8, 24-25.

A: I don't know him.

Q: Okay. You never hired them?

A: No, sir.

Q: Okay. Did you ever have any reason to believe that they were representing you in that case?

A: No. I didn't know nothing about the case.

Q: So you had no reason to believe they were representing you?

A: Like I say, I don't know - - I didn't know what they were doing until the paper came out.

Q: Do you believe that they were representing you in that case?

A: No.

As Bell had no communications with McGowan by which he sought and received legal advice, he was not in privity with McGowan by way of an attorney-client relationship, and therefore McGowan had no duties or obligations to Bell as a matter of law. See *Spence v. Wingate*, 395 S.C. 148, 160-161, 716 S.E.2d 920, 926-927 (2011), quoting *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) ("An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance."); *In re Broome*, 356 S.C. 302, 316, 589 S.E.2d 188, 195-196 (2003), citing *Marshall v. Marshall*, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (S.C. App. 1984) ("A person attains the status of 'client' when that person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice."). Accordingly, Bell cannot, in his individual capacity, recover from McGowan for legal malpractice.

**VI. MCGOWAN WAS NOT IN PRIVACY WITH AND HAD NO DUTIES OR
OBLIGATIONS TO BELL AS A POTENTIAL HEIR OR STATUTORY BENEFICIARY
OF THE ESTATE**

A. Gilmore – The Duly Appointed Personal Representative

Gilmore's status as the duly appointed Personal Representative of the Estate for purposes of the Wrongful Death Litigation is unassailable. On February 18, 2010, the Probate Court for Chester County, South Carolina, prepared Gilmore's Informal Application²⁷ for appointment as Personal Representative, and on February 19, 2010 issued its Certificate appointing Gilmore as Personal Representative of the Estate.²⁸ Gilmore's Certificate is valid on its face²⁹, and therefore her authority to act by and for the Estate cannot be challenged except by way of direct attack in the Probate Court.³⁰ *E.g., In re Mayo's Estate*, 60 S.C. 401, 38 S.E. 634, 635-626 (1901); *accord Kiley v. Lubowski*, 315 F.Supp. 1025, 1027-1028 (D.S.C. 1970); *Fouche*, 217 S.C. 147, 153-154, 60 S.E.2d 73, 75-76 (1950).

Not only has Bell failed to launch such a direct attack on Gilmore's appointment, but he has in fact relied upon her appointment as the foundation for his own informal appointment as Successor Personal Representative to the Estate.³¹ Thus, Bell cannot attack Gilmore's appointment, as to do so

²⁷ Ex. 3 Gilmore Application for Personal Representative; Ex. 41 Gilmore at 24:6-16; 25:3-27:12. Under § 62-3-301(a)(1)(i), Gilmore was required to provide information as to Davis' spouse, children, heirs and devisees so far as such information was known or ascertainable with reasonable diligence by Gilmore. Gilmore did so, responding to all inquiries made by the Probate Court in completing her Application for Informal Appointment as Personal Representative, including inquiries about Bell. *Id.*; Ex. 42 Gilmore at 45:15-46:7. Contrary to Bell's argument that Gilmore was appointed without notice, App. 7 Opposition to Motion to Dismiss ("Opposition") at 1, Gilmore proceeded by way of Informal Application pursuant to § 62-3-306, as did Bell in seeking appointment as Successor Personal Representative, such that formal notice of the proceedings, and formal notice to Bell in particular, was not required. Gilmore was duly appointed under § 62-3-307(B), and once appointed was fully vested with all powers and duties as Personal Representative of the Estate.

²⁸ Ex. 4 Gilmore Certificate of Appointment.

²⁹ McGowan relied upon, and was entitled to rely upon, Gilmore's facially valid certificate. (Ex. 43 McGowan at 48:20-49:13.)

³⁰ Ex. 44 McGowan at 31:21-32:8. McGowan had no duty to Bell to ensure that Gilmore was properly appointed as Personal Representative. *E.g., Bornhorst v. Lee*, 2011 WL 8106439 (S.C. C.P. Charleston Cnty. April 19, 2011) (counsel for conservator had no duty to beneficiary to ensure conservator properly appointed). Gilmore and McGowan were entitled to presume that what should have been done by the Probate Court in appointing Gilmore as Personal Representative of the Estate was, in fact, done and done properly. *E.g., Fouche v. Royal Indem. Co. of N.Y.*, 217 S.C. 147, 154-155, 60 S.E.2d 73, 75-76 (1950).

³¹ Ex. 33 Bell Application for Successor Personal Representative; Ex. 34, Bell Certificate of Appointment.

would invalidate his own appointment, and render everything he has done in this case a complete and total nullity. *E.g., Asbury v. S.C. Nat'l Bank*, 268 S.C. 40, 43, 231 S.E.2d 306, 307-308 (1977), quoting *Glenn v. E.I. DuPont DeMenours & Co., Inc.*, 254 S.C. 128, 133, 174 S.E.2d 155, 158 (1970).

B. Order of Closure and Termination of Personal Representative

Cognizant that he cannot challenge Gilmore's appointment directly lest he undo his own appointment, Bell seeks to challenge Gilmore indirectly, asserting that the Estate was closed and Gilmore's appointment terminated on February 21, 2011³², such that Gilmore could not act as Personal Representative of the Estate in settling the Wrongful Death Litigation on August 1, 2013³³. Bell's indirect attack on Gilmore also fails as the Probate Court's Order of Closure and Termination was never served upon Gilmore³⁴, and McGowan, who never appeared as counsel for Gilmore in the Probate Court³⁵, was equally unaware of the Order³⁶. In fact, no evidence has been adduced that even suggests Gilmore or McGowan were aware of the Order of Closure and Termination at any time prior to settlement of the Wrongful Death Litigation³⁷.

³² Ex. 45 Order closing Estate and terminating Gilmore as Personal Representative; Ex. 46 Freeman at 45:6-9; Opposition at 6.

³³ Bell argues that § 109 did not apply after the Estate was closed and Gilmore was terminated, but fails to recognize that the Probate Court retained jurisdiction over the Estate as to any such procedural irregularities as to be able to reopen the Estate *nunc pro tunc* should the need arise, and that all actions of the Personal Representative during the time the Estate was closed can be ratified, as Bell did here in ratifying settlement. See, e.g., *McNair v. Howle*, 123 S.C. 252, 116 S.E. 279, 284-285 (1923); accord *Moultis v. Degen*, 279 S.C.1, 6, 301 S.E.2d 554, 557-558 (1983); *Moses v. Halle-Howard, ex. rel Estate of Smith*, 2011 WL 11735040, *1-2 (S.C. App. Aug. 9, 2011); *McCullar v. Campbell*, 2005 WL 5798590 (S.C. C.P. Richland Cnty. June 30, 2005); *Southeastern Housing Foundation v. Smith*, 2006 WL 6318130 (S.C. C.P. Barnwell Cnty. Nov. 20, 2006); *Mintz v. U.S.*, 842 F.2d 1291, *2 (4th Cir. 1988).

³⁴ Ex. 47 Gilmore at 37:14-20.

³⁵ Ex. 48 McGowan at 60:1-25.

³⁶ Ex. 49 McGowan at 106:5-107:14, 109:22-110:6.

³⁷ *Id.*; Ex. 50 Freeman at 45:20-23; Ex. 51 Gilmore at 37:14-16, 38:14-16, 39:11-15.

Accordingly, Gilmore was entitled to proceed as Personal Representative of the Estate notwithstanding the Order of Closure and Termination³⁸ until such time as she completed her duties as Plaintiff in the Wrongful Death Litigation, or a new Personal Representative was substituted as Plaintiff in her place. *See, e.g., Kolb v. Cook*, 284 S.C. 598, 602 n.3, 327 S.E.2d 379, 382 (S.C. App. 1985) (discharge of personal representative in probate proceeding did not remove personal representative as defendant in and abate common pleas action where personal representative was not also dismissed as defendant in such action); *see also Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 641, 670 S.E.2d 680, 691 (2008) (actions of "de facto" officer acting under color of right sustainable).

Moreover, any actions of Gilmore as Personal Representative after the Estate closed could be and were ratified by Bell, as confirmed by Mr. Bradley's letter of November 18, 2013³⁹ to Mr. Alphin⁴⁰, as adopted by Bell in submitting his Informal Application⁴¹ for and securing appointment⁴² as Successor Personal Representative to the Estate⁴³. *See, e.g., McNair* 123 S.C. at 252, 116 S.E. at 284-285; *accord Mintz v. U.S.*, 842 F.2d 1291, *2 (4th Cir. 1988); *Moultis v. Degen*, 279 S.C. 1, 6, 301 S.E.2d 554, 557-558 (2014); *Moses*, 2011 WL at *1-2; *Southeastern Housing Foundation v. Smith*, 2006 WL 6318130 (C.P. Barnwell Cnty. Nov. 20, 2006); *McCullar v. Campbell*, 2005 WL

³⁸ In accordance with § 62-3-714, no order purporting to limit the power of a personal representative is effective except as to persons having actual knowledge of such order. Moreover, in accordance with § 62-3-610, once the Order of Closure and Termination is effective, it not only terminates Gilmore as Personal Representative, but also relieves McGowan of any duties or obligations he may have had to the Probate Court.

³⁹ § 62-3-701 ("A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.")

⁴⁰ Ex. 30, November 18, 2013 letter from James Edward Bradley, Esq. to John Alphin, Esq.

⁴¹ § 62-3-301(a) (6) (an application for appointment of a personal representative to succeed a personal representative . . . shall adopt the statements in the application . . . which led to the appointment of the person being succeeded).

⁴² In accordance with § 62-3-701, Bell's duties and powers as Personal Representative commenced upon his appointment, and relate back in time to give effect to acts by Bell which are beneficial to the Estate that took place prior to his appointment.

⁴³ Ex. 33 Bell Application for Successor Personal Representative; Ex. 34 Bell Certificate of Appointment.

5798590 (C.P. Richland Cnty. June 30, 2005). Thus, the Order of Closure and Termination are of no consequence in this case.

C. **"Strict Privity" of § 109**

As the duly appointed Personal Representative of the Estate, and by such appointment a deputy of the Probate Court, *e.g.*, *Thompson v. Hudgens*, 161 S.C. 450, 159 S.E. 807, 813 (1931), Gilmore was authorized under § 62-3-715(20) to retain McGowan for purposes of pursuing the Wrongful Death Litigation. *E.g.*, *Tyler v. Salley*, 2004 WL 6250803, *3 (S.C. App. March 22, 2004). Gilmore did so by way of her Retainer Agreement with McGowan of March 15, 2010⁴⁴, and the attorney-client relationship established thereby falls squarely within the "Strict Privity Rule" of § 109, as taught by the Supreme Court of South Carolina in *Douglass ex rel. Louthian v. Boyce*, 344 S.C. 5, 10, 542 S.E.2d 715, 717-718 (2001), such that McGowan had no duty⁴⁵ to Bell in connection with the settlement of the Wrongful Death Litigation.

In accordance with the "Strict Privity Rule" of § 109, the attorney-client relationship between a lawyer, such as McGowan, and a fiduciary, such as Gilmore as Personal Representative of the Estate, does not impose upon McGowan any duties or obligations to others who may have an interest in the Estate, such as Bell:

§ 62-1-109. Duties and obligations of lawyer arising out of relationship between lawyer and person serving as a fiduciary.

Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary.

⁴⁴ Ex. 5 Retainer Agreement.

⁴⁵ Duty is a question of law to be determined by the Court. *E.g.*, *Spence v. Wingate*, 395 S.C. 148, 160, 716 S.E.2d 920, 926 (2011); *Bennett v. Carter*, 2013 WL 8298015 (S.C. C.P. Charleston Cnty. July 3, 2013), *aff'd in part, rev'd in part*, 2015 WL 5968253 (S.C. App. October 14, 2015). Duty is defined as the obligation to conform to a particular standard of conduct toward another. *Moore v. Weinberg*, 373 S.C. 209, 221, 644 S.E. 2d 740, 746 (S.C. App. 2007).

This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

(Emphasis added.)

As is made clear by the Reporter's Comments⁴⁶, McGowan's duties ran solely to Gilmore under § 109, and did not run in any way, directly or vicariously, to Bell:

REPORTER'S COMMENTS

This section was enacted and intended to clarify to whom an attorney representing a fiduciary owes a duty: **unless a written employment agreement expressly provides otherwise, the attorney for a fiduciary owes a duty only to the fiduciary and not to any other person.** Thus, this section confirms that an attorney for the fiduciary does not owe any duty or obligation to a beneficiary of the estate for which the fiduciary serves; there is no direct or vicarious duty owed by the attorney to a beneficiary without an express written agreement to the contrary. Moreover, the attorney for the fiduciary owes no duty to the fiduciary estate or property. The attorney effectively represents the fiduciary and not the fiduciary estate. The rule of this section applies even if the fiduciary pays the attorney from the estate for which the fiduciary serves. The section is expressly declarative of the common law and applies to attorney-client relationships existing before and after the enactment of this section.

(Emphasis added.) *Douglass*, 344 S.C. at 10-11, 542 S.E.2d at 717-718; *Hartsock v. Goodyear Dunlop Tires North America LTD*, 2013 WL 6919715 (D.S.C. Nov. 22, 2013), *aff'd*, 2014 WL 51237, *3-4 (D.S.C. Jan. 1, 2014); *Singleton v. Cromartie, II*, 2005 WL 5712347 (S.C. C.P. Richland Cnty. Dec. 20, 2005); *Argoe v. Three Rivers Behavioral Center*, 2008 WL 8185836 (S.C. C.P. Lexington Cnty. July 3, 2008), *aff'd*, 388 S.C. 394, 687 S.E.2d 551 (2010); *Gordon v. Busbee*, 2003 WL 26131496 (S.C. C.P. Aiken Cnty. January 5, 2003).

⁴⁶ *Branch v. City of Myrtle Beach*, 340 S.C. 405, 409-410, 532 S.E. 2d 289, 292 (2000) (language of clause and meaning of words used should be construed in conjunction with the purpose of the whole statute and the policy of the law).

The "Strict Privity Rule" of § 109 is reinforced by § 62-1-110, which preserves attorney-client privilege between a fiduciary and counsel as to beneficiaries:

Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

(Emphasis added.)

In *Douglass*, which is factually and legally on point with this matter, the Supreme Court of South Carolina considered the precise issue raised by Bell in this case: whether an attorney, like McGowan, representing a Personal Representative, like Gilmore, in a wrongful death action has any duty to statutory beneficiaries, like Bell.

In *Douglass*, Christopher Boyce ("Christopher") was killed in an automobile accident. His parents, Daniel and Yvonne Boyce, were appointed Personal Representatives of his estate. They retained Brown & Givens to pursue a wrongful death action which was settled. The Boyces received the entire proceeds thereof as the sole beneficiaries of Christopher's Estate.

William David Douglass ("William") commenced an action against the Boyces alleging they had breached their fiduciary duty to him by failing to include him as a statutory beneficiary in the wrongful death action. William alleged that he was Christopher's son by way of Christopher's liaison with Melodye Shampine, who was married to Robert Douglass at the time. Mr. Douglass was listed on William's birth certificate as his father. William amended his complaint to add Brown & Givens as a party defendant seeking to recover in connection with their representation of the Boyces in the wrongful death action.

The Supreme Court of South Carolina held that Brown & Givens owed no duty to William as a matter of law; with a simple overlay applying the Supreme Court's holding to the present case:

As noted by both the trial judge and the Court of Appeals, an attorney is immune from liability to third persons arising from the attorney's professional activities on behalf and with the knowledge of the client, absent an independent duty to the third party . . . Accordingly, in this case, the question is whether an attorney [McGowan] representing the personal representative [Gilmore] in a wrongful death action has an independent duty to the statutory beneficiaries [Bell].

Under our Probate Code, S.C. Code Ann. §62-1-109 (Supp.1999), the legislature has provided the following:

Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

This statute expressly negates any duty to persons interested in . . . the proceeds of a wrongful death action [Bell] since such an action is brought by a fiduciary [Gilmore].

* * *

We hold under §62-1-109 the Court of Appeals properly affirmed the dismissal of the causes of action against [Brown & Givens] [McGowan] because they owed [William] [Bell] no duty in connection with their representation of the Boyces [Gilmore] as personal representatives of Christopher's estate [Davis' Estate].

344 S.C. at 10, 542 S.E.2d at 717 (Emphasis added; overlay added). In accordance with *Douglass*, which is controlling precedent, McGowan owed no duty to Bell, and Bell therefore cannot recover from McGowan for legal malpractice arising out of McGowan's handling of the Wrongful Death Litigation.

More recently in *Singleton*, the Court of Common Pleas of South Carolina, Fifth Judicial Circuit, followed *Douglass* in holding that § 109 was fatal to the legal malpractice claims of Plaintiff Barry Naylor, II, as a beneficiary or heir of the estates at issue; again, a simple overlay applies the Court's holding to the present case:

It is axiomatic in South Carolina that the Plaintiff in a legal malpractice suit must prove several elements: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the Plaintiffs' damages by the breach. *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct.App.1998); *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 472 S.E.2d 612 (1996); *Henkel v. Winn*, 346 S.C. 14, 550 S.E.2d 577 (Ct.App.2001), *cert. denied*. With respect to the claims of Plaintiff Barry Naylor, II [Bell], the S.C. Probate Code, specifically S.C. Code Ann. §62-1-109 (Supp. 2004), defines the duties and obligations of the lawyer, like Defendant Cromartie [McGowan], arising out of a relationship between lawyer and a person serving as a fiduciary, like Dr. Singleton [Gilmore] as Personal Representative of these Estates. In short, the attorney-client relationship involved is between the lawyer [McGowan] and person serving as the fiduciary [Plaintiff Dr. Singleton as Personal Representative] [Gilmore] and does not extend to "other persons interested in the estate, trust estate, or fiduciary property" like Plaintiff Barry Naylor, II [Bell], an heir or beneficiary of these Estates.

S.C. Code Ann. §62-1-109 states as follows:

Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

Thus, insofar as Barry Naylor, II [Bell] is a beneficiary or heir of the Estate [Davis' Estate], no attorney-client relationship would exist between Defendants Cromartie and Law Firm [McGowan] and Plaintiff Barry Naylor, II [Bell] at any juncture. Therefore, the first element, the

existence of an attorney-client relationship is absent and proves fatal to any purported legal malpractice claim in this regard.

(Emphasis added; overlay added.) Here, like in *Singleton*, the absence of an attorney-client relationship is fatal to Bell's legal malpractice claim.

Because South Carolina has expressly seen fit to codify the "Strict Privity Rule" of the common law by way of § 109, there can be no doubt that the attorney-client relationship between an attorney, such as McGowan, and a personal representative, such as Gilmore, does not impose upon McGowan any duties or obligations to others, such as Bell. See *State v Eli Lilly & Company*, 2009 WL 6058384 (S.C. C.P. Spartanburg Cnty. Sept. 22, 2009) (the legislature can enact statutes that are in accord with or at variance with common law concepts such as privity). The plain and ordinary meaning of the language of § 109 is clear, unambiguous, and conveys a definite meaning from which the intent of the Legislature is readily ascertained, and has, in fact, been ascertained by the Supreme Court of South Carolina in *Douglass*. Moreover, § 109 was enacted in 1994⁴⁷, *Douglass* was decided in 2001, and § 109 was amended in 2013⁴⁸ with no changes based upon *Douglass*, which evidences the Legislature's ratification of the Supreme Court's interpretation of § 109 as set forth in *Douglass*. E.g., *State v Sawyer*, 409 S.C. 475, 481, 763 S.E. 2d 183, 186 (2014).

Accordingly, the Court should not rewrite § 109, impose meaning upon it that is not found in its own words, inject matters into it that are contrary to the Legislature's intent, engraft upon it, or hold that it authorizes more than its plain language allows. E.g., *Amisub of S.C., Inc. v. S.C. Dept. of Health & Invtl. Control*, 407 S.C. 583, 597-598, 757 S.E.2d 408, 416 (2014); *Grazia v. S.C. State Plastering LLC*, 390 S.C. 562, 571, 703 S.E.2d 197, 201 (2010); *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 431-432, 137 S.E.2d 608, 611 (1964); *Ballard v. Ballard*, 314 S.C. 40, 42, 443

⁴⁷ 1994 South Carolina Laws Act 449 (H.B. 4619).

⁴⁸ 2013 South Carolina Laws Act 100 (S.B. 143).

S.E.2d 802, 803 (1994) (will not read distribution provisions out of § 15-51-40 of the Wrongful Death Act); *Santee v. S.C. Public Service Comm'n*, 298 S.C. 179, 184, 379 S.E. 2d 119, 122 (1989); *Gordon v. Busbee*, 367 S.C. 116, 119, 623 S.E. 2d 857, 858-859 (S.C. App. 2005). Applying § 109 as written, McGowan had no duty to Bell in connection with the settlement of the Wrongful Death Litigation; and more specifically, no duty to identify or protect Bell's interests in connection with the settlement.

D. "Unless Expressly Provided Otherwise In A Written Employment Agreement"

Bell acknowledges the "Strict Privity Rule" of § 109, but hastens to argue that the Retainer Agreement "expressly provides" that the "Estate of Mrs. Davis" was McGowan's client, as opposed to Gilmore as Personal Representative of the Estate, as to not only fall within the exception to § 109, but to also extend McGowan's duties and obligations to all heirs and statutory beneficiaries of the Estate, including Bell⁴⁹:

Q. What does that mean to you, the Estate of Mrs. Davis? How do you interpret that?

A. That means that his obligation is to do right by the Estate and the heirs of Mrs. Davis when it comes to processing this piece of litigation and protect their interest, and see that they get what they are entitled to.

* * *

Q: All right. So under that statute [62-1-109], you would agree that his client is Tanisha Gilmore, the personal representative?

A: That's what the statute says.

Q: Do you agree with that interpretation?

A: Yes, I believe that it is true. But I don't believe that that is the - - I don't believe that that is the be all and end all and completion of his obligations.

⁴⁹ Ex. 52 Freeman at 38:8-14; 35:12 to 38:6.

Q: Let's take one step at a time. So the starting point you would agree that under the statute Tanisha Gilmore, as personal representative, is Chad McGowan's client?

A: Yes. Well, yes and no. They say unless there is some other written agreement.

Q: Are you aware of any other written agreement?

A: Sure, sure.

Q: What other written agreement are we talking about?

A: The retainer agreement.

* * *

Q: You indicated that the Retainer Agreement would be another written agreement under 109?

* * *

Q: I'm glad to put the statute in front of you.

A: Yes, let me see it. Thanks.

* * *

A: Unless expressly provided otherwise in a written employment agreement the creation - - so this is the expressly provided in a written employment agreement that I'm talking about.

Q: Okay. So unless expressly provided otherwise, then Tanisha Gilmore as personal representative is Chad's client, yes?

A: That's where you start.

Q: So the answer is yes? You would agree with that for a starting point?

* * *

A: Yes, that's what I said. Your starting point is that she is the client subject to written agreements, other written agreement.

Q: Do you believe that there was another written employment agreement?

A: Sure.

Q: Which one?

A: The Retainer Agreement, Exhibit Seven.

Q: Why do you believe that is such another written employment agreement?

A: Because it lists the Estate and the beneficiaries of the Estate that I think are subsumed under that.

Q: When you say it lists the Estate, you're referring to the handwritten note in the second line?

A: Right. Agreement between McGowan and hereafter client. And who is that? And this says Estate of Mrs. Davis, that's how I read it anyhow. It's kind of cramped in there, squeezed in there.

Q: I read it the same way.

Contrary to Bell's argument, however, McGowan did not represent the "Estate of Mrs. Davis", the exception to § 109 does not apply, and McGowan owed no duties or obligations to Bell.

E. McGowan did not represent the "Estate of Mrs. Davis"

The "Estate of Emma M. Davis" is not a legal entity and therefore does not have the legal capacity to enter into the Retainer Agreement; sue or be sued; or, be represented by McGowan in the Wrongful Death Litigation. *Gordon*, 2003 WL 26131496 ("a probate estate is not a legal entity which can sue or be sued or be represented by counsel"); accord *Austin Nursing Center, Inc. v. Lovato*, 48 Tex. Sup. Ct. J. 624, 171 S.W.3d 845, 848 (2005) (an estate is not a legal entity that can sue or be sued); *Hansen v. Stanton*, 177 Wash. 257, 260, 31 P.2d 903, 904 (1934) ("estate" does not mean a legal entity; it generally means the property of a decedent); *Coleman v. Mariner Heath Care, Inc.*, 2011 WL 11797017, *1 (S.C. C.P. Florence Cnty. March 25, 2011) (it is a basic tenant of contract law that the parties must have the capacity, i.e., the authority, to contract).

Under § 62-1-201(11), “[e]state’ includes the property of the decedent . . . as originally constituted and as it exists from time to time during administration.” Upon Davis’ death, her “estate” devolved to Gilmore, as the duly appointed Personal Representative under § 62-3-101⁵⁰, who took possession of the Estate pursuant to § 62-3-709 for purposes of administration⁵¹, which included the pursuit of civil actions for survival⁵², the recovery for which becomes an asset of the Estate to be distributed by Gilmore, as Personal Representative, in accordance with the Probate Code⁵³, and for wrongful death, the recovery for which is to be distributed by Gilmore, as Personal Representative, to Davis’ statutory beneficiaries in accordance with the Wrongful Death Act⁵⁴; both of which actions were required to be brought in Gilmore’s name as Personal Representative of the Estate⁵⁵. *E.g.*, *Bennett v. Spartanburg*, 97 S.C. 27, 81 S.E. 189, 189-190 (1914) (in a survival action the personal representative seeks damages for injury to the decedent, and the amount recovered becomes an asset of the estate, whereas in a wrongful death action the personal representative seeks damages for injury to the statutory beneficiaries of the decedent, and the amount recovered will be distributed directly to such beneficiaries); *accord Lester v. McFaddon*, 415 F.2d 1101, 1103-1104 (4th Cir. 1969) (wrongful death action can only be brought in name of personal representative; any amount recovered for wrongful death does not go to the estate, but is payable, upon receipt by the personal

⁵⁰ An appointment by the Probate Court is required to give the Personal Representative authority to act, and in the absence thereof, the Personal Representative has no legal capacity to institute a wrongful death action. *Glenn*, 254 S.C. at 130, 174 S.E.2d at 157.

⁵¹ *E.g.*, *In re Estate of Livingston*, 404 S.C. 137, 143-146, 744 S.E.2d 203, 206-208 (S.C. App. 2013); *see Asbury*, 268 S.C. at 42, 231 S.E.2d at 307-308.

⁵² § 15-5-90 (“Causes of action for . . . any and all injuries to the persons or to personal property shall survive . . . to . . . the personal representative”).

⁵³ § 62-3-715(8) authorizes the Personal Representative to “distribute the estate as provided in this Code.”

⁵⁴ § 15-51-10, *et seq.*; *See, e.g.*, *Boyd v. Richie*, 159 S.C. 55, 155 S.E. 844, 845 (1930) (personal representative acts in official capacity in maintaining wrongful death action and acts in same capacity in distributing any recovery on such action).

⁵⁵ § 15-51-10, *et seq.*; *Glenn*, 254 S.C. at 133, 174 S.E.2d at 157; § 15-51-20 (“every [wrongful death] action shall be brought for the benefit of the wife or husband and child or children . . . then for the benefit of the parent or parents . . . then for the benefit of the heirs . . . by or in the name of the [personal representative of the decedent]”).

representative, directly to the statutory beneficiaries; personal representative's duty is limited to receipt of funds and disbursement to statutory beneficiaries).

In order to pursue such actions, Gilmore, as Personal Representative of the Estate, was authorized to retain counsel pursuant to § 62-3-715(20)⁵⁶, with the costs of such counsel to be borne by the Estate in accordance with § 62-3-720. *Tyler v. Salley*, 2004 WL at *3; *In re Estate of Connor*, 2009 WL 9530096, *4 (S.C. App. Oct. 29, 2009). Gilmore's authority to enter into such a retainer on behalf of the Estate is exclusive and plenary, usurping the rights of any and all heirs or statutory beneficiaries, including Bell, who might otherwise have an interest in the retention of counsel and the pursuit of such actions. *Livingston*, 404 S.C. at 145, 744 S.E.2d at 208.

Thus, as a matter of law, Gilmore, as Personal Representative of the Estate, is the only person who was legally authorized⁵⁷, i.e., had the legal capacity, to enter into the Retainer Agreement with McGowan, which she did on March 15, 2010, signing the Agreement on the last page in the space designated for "Client"⁵⁸. While the first line of the Agreement bears a handwritten notation that the client is the "Estate of Mrs. Davis", Bell cannot invoke this notation to circumvent the requirements of the Wrongful Death Act and the Probate Code to substitute the fictitious "Estate of Mrs. Davis" for Gilmore, the duly appointed Personal Representative of the Estate, in order to avoid § 109. See, e.g., *Richland Horizontal Prop. Regime Homeowners Ass'n, Inc. v. Sky Green Holding, Inc.*, 392 S.C. 194, 197-198, 708 S.E.2d 225, 226 (S.C. App. 2011) (parties to a contract may not circumvent a statute by redefining its plain and unambiguous terms); see also *Ktzer v. Dorchester Cnty.*

⁵⁶ Compare with § 62-3-715(19) which authorizes Personal Representatives to retain counsel "to advise or assist the personal representatives in the performance of his administrative duties . . ." If McGowan had been retained under § 62-3-715(19), he would still enjoy immunity as to Bell's causes of action pursuant to § 62-3-714. Moreover, § 109 applies whether McGowan was representing Gilmore, as Personal Representative of the Estate, for litigation or administration.

⁵⁷ In accordance with § 62-3-103, the powers, duties, and liabilities of a personal representative can only be acquired upon appointment by order of the Probate Court.

⁵⁸ *Supra* at 3.

Vocational Edu. Bd. of Trustees, 287 S.C. 545, 551, 340 S.E.2d 144, 147-148 (1986) (it is against public policy for duly appointed officials to enter into a contract that is contrary to their official duties as imposed by statute). Indeed, McGowan did not file the Wrongful Death Litigation in the name of "The Estate of Mrs. Davis", but rather in the name of "Tanisha Gilmore, as Personal Representative of the Estate of Emma M. Davis", the proper party plaintiff under the Retainer Agreement, Wrongful Death Act, and Probate Code.

F. **"Expressly Provided"**

Nor can the notation "Estate of Mrs. Davis" be construed as having "expressly provided"⁵⁹ for the imposition upon McGowan of duties or obligations to others, like Bell, who may have an interest in the Estate, as it is not clear from the face of the Retainer Agreement that this notation was made by Gilmore and McGowan to evidence their mutual intent to impose such duties and obligations within the meaning of the exception to § 109. *See Hartsock*, 2013 WL at *4; *accord Nye*, 2013 WL at *5; *Ivanic v. Enos*, 978 N.E.2d 927 (Ohio App. 11th Dist. 2012) (Grendell, concurring); *Butler v. Kidder*, 87 N.Y. 98 (1881) ("[U]nless otherwise expressly provided by written agreement" applies only if it appears from the face of the document at issue, or other writing, that the parties had in mind the contingency mentioned in the statute, and inserted clear and unambiguous provisions in their agreement evidencing their intent to invoke the exception); *see also Ducane*, 320 B.R. at 320 (the fact that an attorney drafts an agreement between parties does not mean that he intended to represent all parties similarly aligned with his client); *In re Jones*, 329 S.C., 97, 104, 495 S.E.2d 450,

⁵⁹ Review of the definitions of the words of § 109, "unless", "express", "provided", and "otherwise" in Black's Law Dictionary (10th ed. 2014) discloses their meaning to be "unless clearly and unmistakably communicated to the contrary", which overlaid upon § 109 gives us:

[Unless clearly and unmistakably communicated to the contrary] in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate"

Where statute uses words that have a well-recognized meaning in law the words are presumed to have been used in their legal meaning. *E.g., Hughes v. Edwards*, 265 S.C. 529, 536, 220 S.E. 2d 231, 234 (1975); *accord Grier v. Amisub of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E. 2d 693, 696 (2012).

454 n.1 (1998) (the fact that an attorney's services have inured to the benefit of others does not give rise to a contractual relationship, absent a clear agreement among the parties). In fact, Bell concedes that any such duties or obligations are not expressly provided for by the notation "Estate of Mrs. Davis", but rather are subsumed in or implied by the notation⁶⁰. As such, the notation does not fall within the exception to § 109.

Moreover, the intent of Gilmore and McGowan in entering into the Retainer Agreement is readily ascertained when viewed in the context of events, as it flows from McGowan's initial meeting with the members of Davis' family; the selection of Gilmore by family members to serve as Personal Representative of the Estate; the appointment of Gilmore as Personal Representative by the Probate Court; Gilmore's execution of the Retainer Agreement as the "Client" pursuant to § 62-3-715(20) in order to pursue claims for survivorship and wrongful death, which could only be done by the Personal Representative of the Estate; and, the filing and settlement of the Wrongful Death Litigation, which again could only be done by Gilmore, as Personal Representative of the Estate. When "Estate of Ms. Davis" is read in this context⁶¹, the only common sense, good faith, reasonable, fair, and just conclusion is that it is simply a shorthand reference to "Tanisha Gilmore, as Personal Representative of the Estate of Emma M. Davis", and makes no express provision that in any way triggers the exception to § 109⁶². *C.A.N. Enterprises, Inc. v. S.C. Health & Human Services Finance Comm'n.*, 296 S.C. 373, 377-378, 373 S.E.2d 584, 586 (1988) ("Common sense and good faith are the leading touchstones of construction of the provisions of a contract; while one construction makes the

⁶⁰ Ex. 53 Freeman at 37:23-24, 46:25-47:3.

⁶¹ *Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (2007).

⁶² Such construction is also the only reasonable construction to be given to McGowan's letter of February 24, 2010 seeking medical records in connection with the Wrongful Death Litigation. Ex. 54 February 24, 2010 letter from Chad McGowan to Diane West, Risk Manager, Piedmont Medical Center; Ex. 55 McGowan at 74:19 - 75:15.

provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail.”).

G. Duties or Obligations

As set forth in the Retainer Agreement, all duties or obligations of McGowan ran to his “Client”⁶³. No such duties or obligations ran in any way to “heirs” or “beneficiaries”; these terms are not to be found anywhere in the Retainer Agreement. (Ex. 3.) *See Betz v. Blatt*, 116 A.D.3d 813, 815, 984 N.Y.S.2d 378, 381 (2014) (retainer agreement that did not make reference to “administration of the estate” did not create duty to estate and beneficiaries); *accord Johnson v. Jones*, 103 Idaho 702, 704, 652 P.2d 650, 652 (1982). In fact, Freeman specifically testified on behalf of Bell that McGowan’s duties and obligations remained the same irrespective of whether Gilmore, as Personal Representative, or the “Estate of Mrs. Davis” were deemed to be McGowan’s client⁶⁴:

Q If the retainer agreement had identified on the first page Tanisha Gilmore as the client, would Mr. McGowan still have obligations to determine the heirs and beneficiaries?

A I believe so under this – under the facts of this case, and here’s why. He’s undertaking to get this case settled or tried if it’s – it’s got to be taken – ultimately under the statute, it’s got to be taken to a court and the court needs to be advised of certain things. And whether she is – has her name on the front page or not, the statute doesn’t change and the obligations don’t change in my estimation.

Thus, under either scenario McGowan’s duties and obligations run to his “Client” and the Retainer Agreement cannot be deemed to have “expressly provided” for the imposition of duties or

⁶³ McGowan’s alleged failure to identify Bell as the adopted son of Davis is the common denominator to all duties or obligations that Bell seeks to impose on McGowan. (Ex. 56 Freeman at 80-81.)

⁶⁴ Ex. 57 Freeman at 40:23-41:10; *see also* Ex. 58 McGowan at 33:24-34:3.

obligations upon McGowan that ran to any potential heir or statutory beneficiary of the Estate, including Bell⁶⁵.

H. McGowan Has No Duty Or Obligation To Bell

As the Retainer Agreement was between McGowan, as counsel, and Gilmore, as Personal Representative of the Estate, for the pursuit of survival and wrongful death actions under §§ 15-5-90 and 15-51-10, as authorized by § 62-3-715(20), it creates an attorney-client relationship between attorney and fiduciary that falls squarely within the provisions of § 109, such that McGowan had no "duties or obligations to other persons interested in the estate . . . or other fiduciary property" in connection with the pursuit and/or settlement of such survival and wrongful death actions. *Douglass*, 344 S.C. at 10, 542 S.E.2d at 717; *Hartsock*, 2013 WL at *4; *Singleton*, 2005 WL 5712347; *Argo*, 2008 WL 8185836. Any duties or obligations undertaken by McGowan that were attendant or incidental to the pursuit and/or settlement of such survival and wrongful death actions, including the filing of the Petition for Approval of Settlement in the Circuit Court pursuant to § 15-51-42, either concerned assets of the Estate (survival) or concerned assets that were controlled by Gilmore as

⁶⁵ As McGowan had no independent duties to Bell, McGowan is immune from Bell's causes of action in the Malpractice Litigation. *E.g., Belk v. Harris*, Civil Action No. 08-CP-43-0347 (S.C. C.P. Sumter Cnty. Oct. 25, 2008), *citing Gaar v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (S.C. App. 1986) and *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995), *aff'd* 2011 WL 11735037 (S.C. App. Aug. 4, 2011); *Bornhorst v. Lee*, 2011 WL 8106439 (S.C. C.P. Charleston Cnty. April 19, 2011). Nor is McGowan stripped of immunity because he was paid for services rendered. *Argoe v. Three Rivers*, 388 S.C. 394, 400, 687 S.E. 2d 551, 554 (2010); *Belk*, Civil Action No. 08-CP-43-0347 ("If mere receipt of attorney fees were sufficient to cause a lawyer to lose his immunity, the lawyer would never have immunity unless the services were rendered without a fee being charged.").

Personal Representative of the Estate (wrongful death), as to be subject to § 109⁶⁶. See *Spence*, 395 S.C. at 158, 716 S.E. at 925; *Argoe*, 2008 WL 8185836. Thus, the “Strict Privity Rule” of § 109, and the holding of *Douglass* control. McGowan had no duty or obligation to Bell in connection with the settlement of the Wrongful Death Litigation.

VII. FABIAN DID NOT ALTER § 109 AND BELL IS NOT A THIRD-PARTY BENEFICIARY OF THE WRONGFUL DEATH LITIGATION

A. Fabian/Third-Party Beneficiary

Bell argues that *Fabian* “altered the duties in S.C. Code §62-1-109” and “recognize[d] causes of action both in tort and in contract by a third-party beneficiary”; that as a result thereof “the heirs of an intestate decedent’s estate are the third-party beneficiaries of any litigation brought by the estate”; and therefore McGowan had a duty to Bell as a third-party beneficiary of the Wrongful Death Litigation.⁶⁷

Freeman concurs, testifying⁶⁸:

Q How do you apply *Fabian* here?

⁶⁶ Bell takes issue with the Petition because McGowan did not sign a certificate attesting that the settlement was fair, reasonable, and in the best interest of the statutory beneficiaries and the Estate. The Petition, however, is simply the mechanism by which the Court acquires jurisdiction over the settlement. *Ex Parte McLeod*, 323 S.C. 461, 463, 476 S.E.2d 167, 168-169 (1996). McGowan appeared in open court in support of the Petition, which was duly executed by Gilmore and Strong, and no one – neither party, counsel, nor the Court – sought McGowan’s certification of the settlement at that time, such that it is now deemed waived; particularly since settlement was thereafter ratified by Bell. (Ex. 30, November 18, 2013 letter from James Edward Bradley, Esq. to John Alphin, Esq.). Moreover, had any one brought his inadvertent and unintentional failure to sign and submit the certificate to McGowan’s attention, he would have cured this deficiency in a timely manner in accordance with Rule 11, SCRCP. *Anderson Cnty. v. Preston*, 2013 WL 10154806, *4 (S.C. C.P. Anderson Cnty. Nov. 8, 2013). In the alternative, McGowan could, and is still willing, to ratify his approval of the settlement and submit an executed certificate to that effect, although it appears that this point is now moot. *Hyman v. Ford Motor Co.*, 142 F.Supp.2d 735, 748 (D. S.C. 2001). In short, Bell makes much about nothing in an effort to give some semblance of credibility to his wrongful allegations that McGowan perpetrated a fraud upon the Court with respect to the settlement; again, a settlement that Bell ratified such that it cannot give rise to extrinsic or intrinsic fraud. *V.E. Amick & Associates LLC v. Cooper*, 2013 WL 6637489 (S.C. C.P. Richland Cnty. Jan. 8, 2013).

⁶⁷ Opposition at 5. Bell also argues that privity has been “relaxed” for professional negligence, citing to *Tommy L. Griffin Plumbing & Heating Co. v. Jorda, Jones & Goulding, Inc.*, 320 S.C. 49, 54-55, 463 S.E. 2d 85, 88 (1995). *Griffin*, however, had nothing to do with § 109 or liability to third party beneficiaries.

⁶⁸ Ex. 59 Freeman at 73:17-74:19.

A In Fabian you had a document, i.e., the will that said this guy is entitled to a share of the estate and he didn't get it because of the lawyer's malpractice. You can say, well, Freeman, that doesn't apply here because there's no will, and my answer is but there's a statute and the statute says these people are entitled to share in the estate. And the question is he one of those people and the answer is, yes, he is, and if the lawyer had done his job, he would have got

A . . . What I say is because he was an adopted son and because he was under the statute, entitled to take under the statute, that he was a third party beneficiary of McGowan's services just like the beneficiary of the will was in Fabian.

Q So the statute effectively became the will, that's the link that creates the third-part beneficiary?

A It creates his right, yes. What created --

Q As a third party?

A What created the third-party's right in Fabian, a document, the will? What created Willie's right here, a document, the statute.

Bell and Freeman are both wrong.

B. Fabian Did Not Alter § 109

Setting aside for the moment, that no court - not even the Supreme Court - can judicially "alter" a statute, e.g., *Vaughn v. Bermhardt*, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001); *Lail v. Richland Wrecking Co., Inc.*, 280 S.C. 532, 534, 313 S.E.2d 342, 343 (1984); *Smith v. S.C. Law*

Enforcement Div., 2013 WL 8477943, *4 (S.C. C.P. Anderson Cnty. Nov. 6, 2013), *Fabian* did not analyze, discuss, cite to, address, or even mention § 109, much less “alter the duties in” § 109.

C. *In Pari Materia*

Nor is the Wrongful Death Act to be read in a vacuum as Freeman would read it in concluding that Bell “was a third party beneficiary of McGowan’s services just like the beneficiary of the will was in *Fabian*”. Instead, it is to be read *in pari materia* with § 109, with the “Strict Privity Rule” of § 109 controlling as being later in time and more specific to the issue at hand. *E.g.*, *Ranucci v. Crain*, 409 S.C. 493, 501-503, 763 S.E.2d 189, 193-195 (2014); *Denman v. City of Columbia*, 387 S.C. 131, 137-138, 691 S.E.2d 465, 468 (2010) (statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result; but if they conflict, the more recent and specific controls); *accord Amisub of S.C., Inc.*, 407 S.C. at 598, 757 S.E.2d at 416; *Original Blue Ribbon Taxi Corp. v. S.C. Dep’t of Motor Vehicles*, 380 S.C. 600, 608, 670 S.E.2d 674, 678 (2008); *Joiner ex rel v. Rivas*, 342 S.C. 103, 109-110, 536 S.E. 2d 372, 375 (2000). As such, the “Strict Privity Rule” of § 109 controls, and no duties or obligations running to Bell can be imposed upon McGowan.

D. *Undue Burden*

Moreover, if *Fabian* is somehow deemed to create a cause of action for Bell as a third-party beneficiary of the Wrongful Death Litigation, it will not simply alter § 109, but will so eviscerate it as to effectively repeal the “Strict Privity Rule” established thereunder⁶⁹. Repealing legislation is not, however, within the province of the Court, and should not be entertained in the present matter

⁶⁹ It will likewise eviscerate the immunity afforded to McGowan in contracting with Gilmore, as Personal Representative of the Estate, under § 62-2-714, which provides:

A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. [Emphasis added.]

under the guise of extending *Fabian* to give heirs and statutory beneficiaries third-party beneficiary status with respect to survivorship and wrongful death litigation. *Burns v. State Farm Mutual Auto. Ins. Co.*, 297 S.C. 520, 523, 377 S.E. 2d 569, 570 (1989) (courts have no power to legislate).

Indeed, if *Fabian* is applied in this matter as to create a cause of action for third-party beneficiaries of wrongful death litigation, it will be an unprecedented extension of South Carolina law that will wreak havoc with counsel's ethical duties to Personal Representatives, heirs, and statutory beneficiaries, as well as prospective heirs and statutory beneficiaries, of the estates that are at issue. See *Rydde*, 381 S.C. at 650, 675 S.E.2d at 435 ("The imposition of a duty on an attorney to a perspective beneficiary of a non-existent will would wreak havoc on the attorney's ethical duty of undivided loyalty to the client and force an impermissible wedge in the attorney-client relationship.").⁷⁰

It will also place an impossible - not just undue - burden upon counsel retained for such litigation to investigate their clients, their clients' known heirs and statutory beneficiaries, and their clients' potential heirs and statutory beneficiaries in an effort to determine what distributions are to be made, lest they become entangled in claims or litigation with heirs like Bell who stand silent for years and then emerge at the time of distribution of settlement funds, asserting rights that could have been resolved by the Probate Court years earlier.⁷¹ *ITC Commercial Funding, LLC v. Cerar*, 393 S.C. 487, 492-493, 713 S.E.2d 335, 338 (S.C. App. 2011) (rejecting beneficiary argument that

⁷⁰ *Accord Allen v. Stoker*, 138 Idaho 265, 267 61 P3d 622, 624 (App. 2002) (rejects successor personal representative's argument that attorney for personal representative owed all heirs a duty of care to protect estate assets because they are intended beneficiaries of personal representative's relationship with attorney. "The imposition of a duty owed by the attorney to the heirs would create a conflict of interest whenever a dispute arose between the personal representative and an heir." (Emphasis added.) If an estate is harmed by the malfeasance of the personal representative, the heirs can sue the personal representative for breach of fiduciary duty. If an estate is harmed by malpractice, the personal representative can sue the attorney.)

⁷¹ Litigation counsel retained under § 62-3-715(20) will, in effect, also have to serve as probate counsel retained under § 62-3-715(19) to assist the personal representative with the administration of the estate, which is exactly what is advocated for by Freeman (Ex. 63 Freeman 47:19-48:15).

counsel should have explained the risks of limited representation, discussed representation with the beneficiary personally and in the presence of a family member or a family attorney, and obtained a response from her to ensure she understood his inability to represent her); *Hall v. Superior Court*, 108 Cal. App.4th 706, 714, 133 Cal. Rptr.2d 806, 811-812 (2003) ("We are wary about extending an attorney's duty to persons who have not come to the attorney seeking legal advice and whom the attorney has never met."); *Leak-Gilbert v. Fahle*, 55 P.3d 1054, 1058 (Okla. 2002) (duty between attorney and third persons affected by attorney-client agreement should not be any greater than duty between attorney and client); *Jensen v. Crandell*, 1997 WL 34981765, *4 (Me. Super. Mar. 4, 1997) ("The harm that may be caused by requiring counsel to focus, not on his client's needs, but on the needs of those who may be affected by his client's actions would certainly "unduly burden" the profession.").

Here, Freeman would have McGowan track down all heirs and beneficiaries of Davis as far back as was required to comply with distribution under the Wrongful Death Act, including identification, conferences, meetings, obtaining waivers, and securing separate counsel before the Circuit Court could even consider settlement. (Ex. 60 Freeman at 93:26-6; Ex. 61 Freeman Dep. at 88:9-91:2.) As evidenced by Davis' "Family Tree" (Ex. 62), this would be a monumental task in which McGowan would virtually replace the Probate Court for purposes of administration of the Estate under the guise of complying with the Wrongful Death Act, which would not only eviscerate the protections of § 109 that the Legislature so carefully crafted, but also ignore the warnings and holdings of the Supreme Court of South Carolina in *Rydde* and *Fabian* about the dangers of speculation in probate and wrongful death cases.

If changes are to be made to § 109, they should be made by the Legislature, as opposed to being made by judicial legislation in response to the creative but self-serving arguments of Bell.

Until such time, the "Strict Privity Rule" of § 109 controls, and no duties or obligations are owed by McGowan to Bell as a matter of law.

VIII. SUCCESSOR PERSONAL REPRESENTATIVE

Bell's appointment as Successor Personal Representative to the Estate does not create privity between Bell and McGowan for purposes of the Malpractice Litigation. To the contrary, § 109 speaks to "the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary" as opposed to the creation of an attorney-client relationship between a lawyer and the office of the fiduciary. The attorney-client relationship, and the attendant duty of undivided loyalty, comes into existence only by mutual agreement. *E.g., Ducane*, 320 B.R. at 321. Although § 62-3-613 provides that a "successor personal representative has the powers and duties and respect of the continued administration which the former personal representative would have had if his appointment had not been terminated", it does not serve to extend the attorney-client privilege enjoyed by the personal representative to a successor personal representative. *E.g., Estate of Cabatit v. Canders*, 105 A.3d 439, 443-445 n. 6 (Me. 2014); *Betz v. Blatt*, 116 A.D.3d 813, 816, 984 N.Y.S.2d 378, 382 (N.Y. App. 2014) (an attorney represents the administrators individually and not the estate itself); *Nye*, 2013 WL at *5.

Thus, McGowan's privity with Gilmore, as Personal Representative of the Estate, does not extend to Bell as Successor Personal Representative of the Estate for purposes of Bell's suit against McGowan. To extend privity in such a fashion allows Bell to do indirectly what he cannot do directly: obtain the functional equivalent of an assignment of any legal malpractice claim that Gilmore may have against McGowan. Such an assignment, whether direct or indirect, is against the public policy of South Carolina. *E.g., Skipper v. ACE Prop. & Casualty Ins. Co.*, 413 S.C. 33, 36-37, 775 S.E.2d 37, 38-39 (2015) (risk of collusion and threat to integrity of attorney-client

relationship, and diametrically opposed role reversal precludes assignment of legal malpractice claim between adversaries in litigation in which the alleged malpractice arose); *Pavilion Dev. Corp. v. Nexsen Pruet, LLC*, 2015 WL 4755645, *1 (S.C. Aug. 12, 2015); accord *Johnson v. Hart*, 279 Va. 617, 625, 692 S.E.2d 239, 244 (2010). Accordingly, McGowan owes no duty to Bell as Successor Personal Representative, and Bell cannot recover from McGowan for legal malpractice.

Additionally, as Successor Personal Representative of the Estate, Bell holds the beneficial interest to the chose-in-actions that have been alleged in the Malpractice Litigation, whereas in his individual capacity he holds the legal interest to the very same chose-in-action. As such, the beneficial interest, which is the lesser interest of the two, merges with the legal interest, which alone remains. After merger, Bell may only proceed in his individual capacity against McGowan, but in this capacity lacks the necessary privity to maintain the Malpractice Litigation, and McGowan is therefore entitled to judgment as a matter of law. *E.g., Thompson v. Hudgens*, 161 S.C. 450, 159 S.E. 807, 810 (1931), quoting *Pond v. Pond's Estate*, 79 Vt. 352, 65 A. 97, 98-99 (1906).

Merger also fosters a self-gift by Bell, as Successor Personal Representative, to himself, in his individual capacity, by way of distribution through the Estate, even though Bell cannot sue McGowan in his individual capacity because of lack of privity. Such a self-gift violates the public policy of South Carolina. *E.g., Gordon v. Busbee*, 387 S.C. 119, 130, 732 S.E. 2d 822, 828-829 (S.C. App. 2011).

Moreover, it is manifestly unfair, unjust, and inequitable to allow Bell to sue McGowan when neither Gilmore nor Strong have elected to do so; not even to seek recoupment of the amounts they paid to Bell in settlement. *E.g., Neeley v. Thompson*, 365 S.C. 345, 354-355, 618 S.E.2d 884, 889 (2005). As such, Bell cannot recover from McGowan.

Bell's exclusive remedy was to sue Gilmore under § 62-3-712 for breach of fiduciary duty arising out of the Wrongful Death Litigation⁷². Bell did so. Gilmore, in turn, had the right to sue McGowan for legal malpractice over Bell's suit against her for breach of fiduciary duty. *Jensen*, 1997 WL at *4. Gilmore did not do so, and Bell cannot do so now in her place. *E.g., Cabatit*, 105 A.3d at 445-446.

Nor is Bell entitled to seek disgorgement of McGowan's fees. "It is repugnant to fundamental principles of equity . . . that [Bell] should reap where they have not sown, free from any legal duty to compensate those who made the reaping possible." *Petition of Crum*, 196 S.C. 528, 533, 14 S.E.2d 21, 24 (1941). Particularly since Bell has failed to pursue, and therefore waived any right to "claw back" distributions of the settlement proceeds pursuant to § 62-3-909, and has similarly failed to pursue, and therefore waived, review of McGowan's fees under § 62-3-721. McGowan's fees were well within the standard of the profession, totally justified considering the complexity of and result in the Wrongful Death Litigation, and are not subject to disgorgement. *Belk*, Civil Action No. 08-CP-43-0347 ("If mere receipt of attorney fees were sufficient to cause a lawyer to lose his immunity, the lawyer would never have immunity unless the services were rendered without a fee being charged.").

At the very least McGowan is entitled to recover his fees based upon *quantum meruit*; the reasonable value of the services rendered. *E.g., Peppertree Resorts, Ltd. v. Cabana Ltd. Partnership*, 315 S.C. 36, 43, 431 S.E. 2d 598, 602 (S.C. App. 1993); *accord Andrews v. Cent. Sur. Ins. Co.*, 295 F. Supp. 1223 (D. S.C. 1969) (40% contingency fee upheld).

Lastly, as summary judgment was entered on Gilmore's cause of action for survivorship, which was the only cause of action that belonged to the Estate⁷³, no harm has been done to the

⁷² Ex. 64 Freeman at 84:7-85:2; acknowledges Bell's cause of action against Gilmore.

⁷³ Ex. 65 McGowan at 77:5-19.

Estate⁷⁴ that can be recovered by Bell by way of legal malpractice against McGowan.⁷⁵ *Lemons v. McNair Law Firm, P.A.*, 2012 WL 10646748, *8 (S.C. C.P. Horry Cnty. Sept. 4, 2012), *aff'd*, 2014 WL 2582768 (S.C. App. 2014); *Brown v. Butcher*, 2011 WL 12565695, *9 (S.C. C.P. Kershaw Cnty. Nov. 8, 2011).

IX. CONFLICTS

McGowan never had an attorney-client relationship with Bell⁷⁶, and therefore never had a duty to Bell with respect to any potential conflicts between or among Bell, Gilmore, and/or Strong. *E.g.*, *Argoe*, 388 S.C. at 403-404, 687 S.E.2d at 556 (conflict of interest cannot exist absent existence of an attorney-client relationship); *accord Umphreyville v. Gittens*, 662 F.Supp.2d 501, 510-512 (W.D. Va. [S.C.] 2009).

Freeman asserts that McGowan violated RPC 1.7⁷⁷, which governs "Conflict of Interests", but this Rule applies only to "Current Clients", which by definition does not include third-party beneficiaries and therefore does not include Bell.⁷⁸ *Bruner v. Clement*, 2005 WL 5533022 (S.C. C.P. Greenville Cnty. Mar. 18, 2005) (RPC 1.7 applies to "Clients"). Freeman offers neither case law nor ethics opinion in support of his testimony that RPC 1.7 applies to conflicts with third-party beneficiaries. Nor does Freeman offer case law, ethics opinion, or explanation as to how there is a

⁷⁴ Ex. 66, Freeman at 99:3-22; offered no opinion on harm done to the Estate.

⁷⁵ *Supra* at 23.

⁷⁶ Freeman concedes Bell is not McGowan's client, but asserts he is a third-party beneficiary of McGowan's services. (Ex. 67 Freeman at 73:17-75:10.)

⁷⁷ Ex. 68 Freeman at 18, 28-29, 92.

⁷⁸ *Contra* Bell's arguments (Ex. 69 Freeman at 80:4-19), consent sufficient to waive conflicts is inferred from the conduct of Gilmore and Strong, as well as the successful outcome of the Wrongful Death Litigation. *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 492, 713 S.E.2d 335, 337-338 (2011); *In re Trexler*, 327 S.C. 315, 318, 491 S.E.2d 257, 259-260 (1997). Also *contra* Bell's arguments (Ex. 70 Freeman at 81), while preferred, McGowan did not need a retainer agreement with Strong. *In re Carter*, 400 S.C. 170, 177, 733 S.E.2d 897, 900 (2012) (RPC 1.5 "is designed to protect clients from [inadequate representation, not to determine the presence of an attorney-client relationship] . . . '[A] signed retainer agreement is not essential to create [an attorney-client] relationship' . . . a person can be deemed a client when he seeks" and receives legal advice.); *U.S. v. Cannon*, 2012 WL 5386045, *8 (D. S.C. Nov. 1, 2012); *Blake v. Cannon*, 312 S.C. 135, 138-139, 439 S.E.2d 302, 304 (S.C. App. 1993) (contact between counsel and client can be express or implied).

conflict with respect to the survivor claims, when summary judgment was entered against Gilmore, as Personal Representative of the Estate, on such claims, which were the only claims that would have yielded assets that would have been property of the Estate.⁷⁹

Moreover, Strong and Gilmore were united in their effort to maximize recovery⁸⁰ in the Wrongful Death Litigation such that there was no conflict in McGowan's joint representation of them that in any way adversely affected the Wrongful Death Litigation.⁸¹ *E.g., Bankers Trust of S.C. v. Bruce*, 283 S.C. 408, 421, 323 S.E.2d 523, 531 (1984); *Holmes v. McClendon*, 349 Ark. 162, 172-174, 76 S.W.3d 836, 842-844 (2002).

Conflicts did arise between Bell, on the one hand, and Gilmore and Strong, on the other, as to distribution of the settlement proceeds; but never as between Gilmore and Strong – McGowan's clients.⁸² As soon as conflicts arose, McGowan withdrew as counsel for Gilmore and Strong, and referred them to Rickard & Protopapas⁸³. Moreover, conflict arose after McGowan had completed his services, and all proceeds were then owned by the statutory beneficiaries of Davis, with the distribution of such proceeds being an administrative duty of Gilmore as Personal Representative of the Estate. *E.g., Moss v. Shelly*, 287 S.C. 310, 311, 338 S.E.2d 327, 328 (1985).⁸⁴

⁷⁹ Ex. 72 Freeman at 91:14-22; *supra* at 24.

⁸⁰ Ex. 73 McGowan at 53:10-55:23. Consent is implied where there is mutual interest in the success of the case. *E.g., Peppertree Resorts Ltd. v. Cabana Ltd. Partnership*, 315 S.C. 36, 41-42, 431 S.E. 2d 598, 601 (S.C. App. 1993).

⁸¹ RPC 1.7 is governed by an objective standard. If a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for consent. *Matter of Anonymous Member of S.C. Bar*, 315 S.C. 141, 143, 432 S.E.2d 467, 468 (1993).

⁸² Contrary to Freeman's contentions, (Ex. 74 Freeman at 55), McGowan did not have a duty under RPC 1.15 to distribute the settlement to Bell, but rather to distribute it in accordance with "applicable law", which is precisely what was done. *Byrd v. Wansau Underwriters Ins. Cos.*, 2011 WL 11748258, *1 (S.C. 2011); *accord Klancke v. Smith*, 829 P.2d 464, 466 (Col. App. 1991) (attorney for surviving spouse did not breach any duty to surviving children by paying proceeds of wrongful death judgment directly to their client, the surviving spouse, without taking any steps to ensure that the children receive a portion of the proceeds).

⁸³ Ex. 75 McGowan at 16:10-22; Ex. 76 Gilmore at 55:4-18.

⁸⁴ As McGowan had procured the settlement and completed his services prior to inception of the conflict, he was entitled to receive his agreed upon fee and Bell's claims for disgorgement must fail as a matter of law. *E.g., Holmes*, 349 Ark. at 173, 76 S.W.3d at 842-843.

Lastly, in *Argoe*, the Court of Common Pleas of South Carolina, Eleventh Judicial Circuit, held that § 109 barred claims for legal malpractice based upon alleged conflicts of interest on the part of counsel for the fiduciary; again, a simple overlay applies the Court's holding to the present case:

The Probate Code expressly contemplates situations such as this in which a fiduciary, in this case Buss Argoe, retains a lawyer to assist in the administration of his fiduciary responsibilities or in exercising a power that he holds. Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary.

S.C. Code Ann. §62-1-109 (1994 Supp.)

To hold otherwise would defeat the very purpose of a durable power of attorney, which is to give one person authority over another at a future time when their desires might be opposed to one another. The creation of an attorney-client relationship between Buss Argo [Gilmore] and Walsh [McGowan] did not place upon Walsh [McGowan] any duties to the Plaintiff [Bell], much less an attorney-client relationship by proxy. Thus, Walsh [McGowan] cannot be liable to her [Bell] for legal malpractice arising from the alleged conflict of interest by right of his representation of Buss Argoe [Gilmore], her [Bell's] fiduciary.

(Emphasis added; overlay added.)

Bell's allegations of conflicts on the part of McGowan are illusory and completely lacking in merit. McGowan is entitled to judgment on such allegations as a matter of law.

X. SCUPTA

Bell has sued McGowan for violations of SCUPTA alleging that he facilitated private loans to Strong from his father-in-law, Michael Maloney. Bell cannot, however, maintain such an action in his capacity as Successor Personal Representative of the Estate. *Faircloth v. Jackie Fine Arts, Inc.*, 682 F. Supp. 837, 846 (D. S.C. 1988), *aff'd in part, rev'd in part*, 938 F. 2d 513 (4th Cir. 1991);

accord Wogan v. Kunze, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (S.C. App. 2007). Moreover, each loan complained of by Bell was memorialized by an "Acknowledgment and Agreement" duly executed by Strong that explained the amount advanced and the amount to be repaid; that McGowan recommended against the loans; that McGowan would not receive any benefit in connection with the loans; that Strong was encouraged to seek the advice of separate counsel; advised that if Strong did not recover in the Wrongful Death Litigation he would not have to repay the loan; all as to facilitate Strong's informed consent to the potential conflict of interest presented by the loans. As such, McGowan has not violated any Rules of Professional Conduct, and correspondingly has not violated SCUPTA. *See In re Swanner*, 408 S.C. 191, 195, 758 S.E.2d 711, 713 (2014); *see also Parker v. Shecut*, 340 S.C. 460, 483, 531 S.E.2d 546, 559 (S.C. App. 2000), *rev'd on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002) (loans by personal representatives disclosed to heirs could not be fraudulent).

XI. FRAUD, NEGLIGENT MISREPRESENTATION, AND BREACH OF CONTRACT WITH FRAUDULENT INTENT

In addition to legal malpractice, Bell seeks to recover from McGowan for fraud, negligent misrepresentation, and breach of contract by fraudulent act. Even a cursory review of these allegations discloses that they do not just mirror, but are virtually identical to Bell's allegations of legal malpractice. As all of Bell's causes of action are based upon the same operative facts, resulting in the same injury, they are identical, and therefore Bell's causes of action for fraudulent misrepresentation, negligent misrepresentation, and breach of contract by fraudulent act must be dismissed as duplicative of his cause of action for legal malpractice. *E.g., Vieira v. Simpson*, 2015 WL 1299959, *3 (D. S.C. March 23, 2015) (claims for negligent misrepresentation, fraudulent misrepresentation, and breach of contract premised on same facts and seeking identical relief to a claim for legal malpractice are duplicative and must be dismissed); *accord Steinmetz v. Cooper*, 2011

WL, 4543894, *6 (D. S.C. Bankr. March 18, 2011) (breach of contract, constructive fraud, breach of fiduciary duty, and negligence are duplicative of legal malpractice); *RFT Mgmt. Co. LLC v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 336-337, 732 S.E. 2d 166, 173 (2012); *Holmes v. Haynsworth*, 2009 WL 6423945 (S.C. C.P. Charleston Cnty. July 14, 2009) (plaintiff's multiple causes of action for breach of contract, breach of contract accompanied by fraudulent act, breach of fiduciary duty, unfair trade practices, conversion, quantum merit, and fraud are mirror disguises for plaintiff's legal malpractice claims because the breach alleged in all is the same failure to provide legal services that is the crux of the legal malpractice claim); *Belk*, Civil Action No. 08-CP-43-0347; *DeLoache, III v. Robertson, III*, 2013 WL 9745583, *3 (S.C. C.P. Charleston Cnty. Nov. 5, 2013) (plaintiff's allegations of different causes of action are simply a ruse to avoid the statute that requires an expert affidavit for legal malpractice claims); *Betz v. Blatt*, 116 A.D. 3d 813, 815, 984 N.Y.S.2d 378, 381 (2014).⁸⁵

Moreover, as McGowan had no duty of disclosure to Bell to begin with, he cannot be liable to Bell for non-disclosure, whether sounding in fraud or negligent misrepresentation. *Vieira*, 2015 WL at *10; accord *Ardis v. Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (1993); see also *Bennett*, 2013 WL *6 (negligent misrepresentation does not lie absent express communications); *Cagle v. James Street Group*, 400 Fed. Appx. 348, *9-10 (10th Cir. Oct. 28, 2010).

Nor can McGowan be liable to Bell for breach of contract by fraudulent act as Bell was never a party to the contract at issue, i.e., the Retainer Agreement between McGowan and Gilmore, as Personal Representative of the Estate. *Belk*, Civil Action No. 08-CP-43-0347; accord *Vieira*, 2015 WL at *10.

⁸⁵ Bell's fraud and negligent misrepresentation claims also fail to satisfy Rule 9(b), SCRCP which requires fraud to be "stated with particularity." *Allegro, Inc. v. Scully*, 409 S.C. 392, 417-418 (S.C. App. 2014); *Doe 2 v. Associated Press*, 331 F.3d 417, 420 (4th Cir. (S.C.) 2003); *Thomas v. Speedway*, 2003 WL 25457021, *2 (S.C. C.P. Charleston Cnty. Nov. 24, 2003); *Ardis v. Cox*, 314 S.C. 512, 517-518 (S.C. App. 1993).

XII. RATIFICATION

As Bell ratified the underlying settlement and the proceeds to be paid thereunder⁸⁶, Bell cannot proceed against McGowan in legal malpractice or otherwise over the very same proceeds that were the subject of his ratification. *L.F.S. Corp. v. Kennedy*, 287 S.C. 162, 163-164, 337 S.E.2d 209, 210 (1985) (acceptance of financial benefits and advantages of order are clear, unequivocal acts of ratification of order); *accord Lemons*, 2012 WL at *7-8, citing *Brazell Bros. Contractors v. Hill*, 245 S.C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification . . . is the adoption by one of a bargain struck by another under circumstances that he would not have been bound but for his subsequent assent"); *accord Southeastern Housing Found. v. Smith*, 2006 WL 6318130 (S.C. C.P. Richland Cnty. Nov. 20, 2006) (can ratify pending legal actions *nunc pro tunc*).⁸⁷ Accordingly, McGowan is entitled to judgment as a matter of law.

XIII. RES JUDICATA

Bell sought to have the Order of August 1, 2013 approving settlement of the Wrongful Death Litigation vacated or modified, but chose to abandon his Motion to Intervene and Complaint in favor of settlement⁸⁸. As a result, the Order of August 1, 2013 is now final and binding upon Bell in the present case in all particulars. More specifically, Bell cannot collaterally attack the Court's finding that Strong was Davis' Common Law Husband and the Court's allocation of the settlement as between Wrongful Death and Loss of Companionship, by way of legal malpractice in the present proceedings. *E.g., Neely v. Thomasson*, 365 S.C. 345, 352-355, 618 S.E.2d 884, 888-889 (2005); *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 582, 757 S.E.2d 399, 407 n.9 (2014); *V.E. Amick & Assoc. LLC v. Cooper*, 2013 WL 6637489, *2 (S.C. C.P. Richland Cnty. Jan. 8, 2013), *aff'd*, 2015

⁸⁶ *Supra* at 7.

⁸⁷ *Contra* to Freeman at 75:11-21 (Ex. 77), "ratification" is not Bell's knowing relinquishment of rights against McGowan, or mitigation of damages.

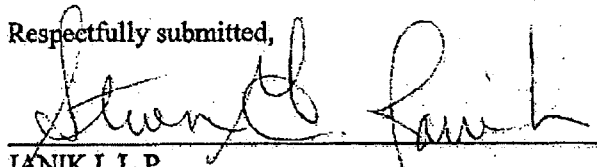
⁸⁸ *Supra* at 7.

WL 1546167 (S.C. App. April 8, 2015); *Fryer v. S.C. Law Enforcement Dtv.*, 2004 WL 5576852 (S.C. C.P. Richland Cnty. 2004) (judgment on merits final once time for appeal has run); *accord Judy v. Judy*, 393 S.C. 160, 172-173, 712 S.E. 2d 408, 414 (2011). Accordingly, McGowan is entitled to judgment as a matter of law.

XIV. CONCLUSION

Despite Bell's widespread allegations, McGowan had no duty to Bell and Bell therefore cannot recover for legal malpractice. As Bell's cause of action for legal malpractice fails, so too do his duplicate causes of action for fraudulent misrepresentation, negligent misrepresentation, violations of SCUPTA, and breach of contract with fraudulent intent. There are no questions of fact. There are only questions of law. Such questions of law must be resolved in favor of McGowan, and McGowan therefore respectfully submits that he is entitled to summary judgment pursuant to Rule 56, SCRPC.

Respectfully submitted,



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February 8, 2016

Defendant.

~~DAVID HAMILTON
C.C. & SONS
LYORN & SONS, SC~~

R 0121

more than Two Million Dollars (\$2,000,000) presents a litany of wrongful conduct. Defendants' actions cannot be justified. Defendants' assertions by way of defense are that Plaintiff Bell, either individually and/or as the appointed Successor Personal Representative of the Estate, has no right to sue them for having cheated him out of the settlement funds from the underlying medical malpractice that killed his mother. The acts of Defendants resulted in millions of dollars going to individuals who were not the rightful heirs to the Estate, who had directly competing interests to those of McGowan's client (the Estate of Emma Davis), and netted more than a million dollars into McGowan's pocket. As Professor John Freeman testified, "A to Z is to me messed up representation, glittering malpractice, wrongful conduct, unexplainable conduct, self-serving viewpoints." **Exhibit 1**, Dep. of Freeman, p.1-8, lns 16-18.

FACTUAL BACKGROUND

Emma M. Davis died intestate on February 11, 2010 from complications that occurred while undergoing a medical procedure at the Piedmont Medical Center to have a pace-maker implanted. At the time of her death, Davis was not married and had one adopted son, Willie Bell. **Exhibit 9** (Death Certificate) and **Exhibit 10** (Obituary). Shortly after her death, a relative received an anonymous call from a man who allegedly worked at the hospital, who stated that that "mistakes were made" by the doctors and that they should call Defendant McGowan to help investigate and pursue a potential medical malpractice claim. **Exhibit 6**, Dep. of Brenda Foster, p.1-8 -1-10. They did call McGowan and a meeting was arranged for a few days later to discuss the potential case. **Exhibit 3**, Dep. of McGowan, p. 1-8, lns. 14-17.

According to McGowan's notes from that meeting, two of Ms. Davis' sisters, three of Ms. Davis' nieces, and two sisters of Ms. Davis' boyfriend, Andrew Strong ("Strong") attended the initial consultation. (**Exhibit 12**). During the meeting, at least one of Ms. Davis' relatives

raised the issue of her having an adopted son, Willie Bell, and at least one of her sisters, Atlean Jordan, has testified that she was aware of Willie's adoption at the time of that meeting. Exhibit 5, Dep. of Jordan, p. 1-7. In fact, McGowan himself wrote down in both his Client Questionnaire and in his Memo to File the name "Willie Bell," referring to him as the "surviving son." (Exhibits 14 and 28). Willie Bell was listed as Davis' son in her Obituary, her Death Certificate, and in Davis' medical records (all of which McGowan had in order to bring the lawsuit for wrongful death) (Exhibits 9, 10, and 30). Despite all of these references to Bell's existence and status, McGowan made no attempt to contact Bell, even while knowing that he would be the one true heir to the Estate of Emma Davis if, in fact, Bell had been formally adopted.²

The other name that arose during the initial consultation was "Andrew Strong," who McGowan referred to in his Questionnaire as being the "potential common (law) husband." Interestingly though, Strong was not listed as Ms. Davis' common law spouse in her Obituary. Strong was simply labeled a "companion," nor was he mentioned on her Death Certificate, referenced in the medical records as Ms. Davis' "friend." Strong was never adjudicated a common law spouse by the Probate or Family Court as required by the South Carolina Code Section 62-2-802 and referred to himself as "a friend" in his Deposition testimony. See *id.* Exhibit 4, Dep. of Strong, pg. 4-24. In the face of these facts, however, McGowan took it upon himself to declare Mr. Strong to be Ms. Davis' common law husband and agreed to represent him simultaneously with his representation of the Estate, despite entering into a formal fee agreement with only the Estate and not Strong and with the two clients' having conflicting

² In fact, McGowan would not ever mention the name "Willie Bell" again throughout the litigation until after the case had been settled, notably leaving his name off of all discovery responses and court filings. Willie's interview and/or deposition from either side of the case never took place.

interests in any potential settlement or award in the medical malpractice case.³ McGowan had not even met the man.

Soon after the initial meeting, Tanisha Gilmore ("Gilmore"), another niece of Ms. Davis, contacted McGowan with regard to representation of the Estate of Emma Davis in claims for survival and wrongful death. McGowan entered into a formal retainer agreement for representation; the first sentence of which specifically states that his client was to be "the Estate of Emma Davis," which was signed by Ms. Gilmore. Exhibit 13, Retainer Agreement.⁴ Regardless, McGowan's litigation on behalf of Mr. Strong and the Estate had begun.

During the course of the litigation, McGowan allowed the Probate Court to discharge Gilmore as Personal Representative and to close the Estate of Emma Davis on February 21, 2011. Exhibit 15.

This is to certify that
the personal representative(s)
in the above estate
appear(s) to have completed the administration, and this
Court has closed this estate
by order dated FEB 21 2011

This was without taking the proper, required steps to make a determination as to the legitimate heirs of the Estate or to provide proper notice and/or publication to others with a potential

³ Despite the fact that Strong was not a proper heir to the Estate of Ms. Davis and that he had directly conflicting interests to those of the sole true heir of the Estate, McGowan took no measures to inform the Probate Court or his other client, the Estate, of the same. Rather, McGowan continued to litigate the lawsuit on Strong's behalf and against the interests of his other client, the Estate. McGowan would eventually file a complaint for wrongful death, survival, and loss of consortium asserting Strong was the surviving spouse of Ms. Davis, and only heir of the Estate, and petition the Court for settlement approval under the same guise.

⁴ Of particular note in the Petition to Appoint the P.R. is that there is no mention of either Mr. Strong or Willie Bell as other potential heirs to the Estate, which McGowan knew to be untrue at the time the appointment of Ms. Gilmore was approved. (Exhibit 11).

interest in the Estate. Failing to take these steps, McGowan allowed the scheme to defraud the Probate Court to continue without the knowledge of Bell and/or the Estate. McGowan also arranged for private loans totaling \$15,000 to be made to Mr. Strong by McGowan's own father-in-law, Mr. Maloney. Mr. Maloney was to receive 100% interest on the loans at the conclusion of the malpractice case. These loans were secured and guaranteed against the expected proceeds of the claims against the hospital by McGowan's assurances that he would obtain a favorable outcome of the case. At this stage of the litigation, McGowan was now representing the competing interests of Strong, the Estate, and Mr. Maloney. *See Exhibits 24, 45, and 46, Acknowledgement & Agreements.*

Ultimately, McGowan obtained a settlement for the wrongful death/loss of consortium case in the amount of Two Million Two Hundred Thousand Dollars (\$2,200,000.00). McGowan filed a Joint Petition for Approval of Settlement in the Court of Common Pleas in York County asserting that Gilmore "is the duly appointed personal representative" even though the Estate had been dismissed and Gilmore discharged. In the same Joint Petition, McGowan also asserted that Strong was the common law husband of Davis, even though Strong had not been adjudicated Ms. Davis' common law spouse. McGowan represented that Strong was the "sole heir and beneficiary of the Estate of Emma Davis," even though no determination of heirs had been made by the Probate Court. That determination had been made *solely* by McGowan. *Exhibit 16, Order of Approval.*

From the settlement funds of \$2.2 million dollars, McGowan distributed to Strong, the improper heir, the sum of Eight Hundred Thirty Three Thousand Three Hundred Twenty Seven Dollars and Ninety-Seven Cents (\$833,327.97); McGowan distributed to Gilmore

Two Hundred Thousand Dollars (\$200,000.00), even though she had only been awarded a Twenty Five Thousand Dollar (\$25,000.00) fee by the Probate Court and was not an heir of the Estate; and the remainder of the settlement funds were retained by Defendants, Nine Hundred Twenty Thousand Dollars (\$920,000.00) in fees and One Hundred Six Thousand One Hundred Seventy Two Dollars and Three Cents (\$106,172.03) in reimbursed costs. Rather than ever being contacted by McGowan, Bell, the son and sole true heir to the settlement proceeds, learned of the settlement of his mother's claims from an article in the newspaper. **Exhibit 2**, Dep. of Bell, p. 2-15 - 2-16.

McGowan had conflicts with both Strong and the Estate. After learning of the scheme between McGowan, Gilmore, and Strong, Plaintiff Bell sought to be appointed as subsequent successor personal representative of his mother's Estate. Upon proper appointment by the Probate Court, Bell filed suit, both in his individual capacity and as successor personal representative, against McGowan in the Circuit Court for Richland County, alleging causes of action for legal malpractice, fraudulent and negligent misrepresentation, breach of contract with fraudulent intent, and violations of the South Carolina Unfair Trade Practices Act. **Exhibits 56 and 61**, Compl. and Amended Compl.

STANDARD OF REVIEW

Summary judgment is not proper where further inquiry into the facts is desirable to clarify the application of law. *Standard Fire Insur. Co. v. Marine Contracting & Towing*, 492 S.E.2d 460 (SC 1990). Summary judgment has been characterized as a drastic and extreme remedy, one that should be cautiously invoked. *Holloman v. McAllister*, 289S.C. 183, 345 S.E.2d 728 (1986). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. *Baugus v. Wessinger*, 404 S.E.2d 169 (SC

1991). In fact, "[i]n order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit *a mere scintilla of evidence*." *Turner v. Millman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011) (emphasis added).

LEGAL MALPRACTICE

Defendants rely heavily throughout their Motion for Summary Judgment on what they assert to be a lack of necessary attorney-client relationship between Bell and McGowan to support their claims of owing no duty to Bell and of being immune from liability for their acts that led to Bell's being cheated out of his inheritance of millions of dollars. Determining who McGowan's clients were is a large issue of material fact in this matter. *See e.g. Matter of Morgan*, 288 S.C. 401, 343 S.E.2d 29 (1986); *Matter of Pyatt*, 280 S.C. 302, 312 S.E.2d 553 (1984); *Margulies v. Upchurch*, 696 P.2d 1195 (Utah 1985) (finding an "implied attorney-client relationship" or "fiduciary duty"). Defendants confuse Bell's status as an individual and Successor Representative when it is perceivably beneficial to their arguments.

McGowan is wrong on this issue for several reasons: (1) their client was "the Estate of Emma Davis," and Bell, as the sole true heir of that entity, was the Estate for all intent and purposes of filing the medical malpractice claims and was in privity with Defendants⁵; (2) even if it were true that the only client McGowan had with respect to the Estate was the Personal Representative, the Personal Representative of the Estate is the Plaintiff in this case against McGowan for his professional activities that gave rise to this litigation; and (3) Bell, as the sole

⁵ The legal term "entity" includes person, estate, trust, governmental unit. *West's Encyclopedia of American Law*, edition 2.

true heir of his deceased mother, was *the* third-party beneficiary to the attorney-client contract for representation of the Estate of Emma Davis and, therefore, in privity.⁶

(1) Defendants spend a lot of pages of their Memorandum discussing the duties and obligations of a lawyer arising out of a relationship between a lawyer and a person serving as a fiduciary under section 62-1-109 of the South Carolina Code, more or less arguing that the duties owed by them only run to the fiduciary of the Estate and no one else, including known proper heirs, which is more fully addressed below. The exception to that Rule is, of course, “**unless a written employment agreement expressly provides otherwise.**” Legal scholars have said that lawyers often find themselves being hire by the personal representative to act as attorney for the estate. In this relationship, the personal representative is still the client but owes a duty to all of the heirs or beneficiaries of this estate.

Bell was and is today “the Estate of Emma Davis,” as the sole true heir of his deceased mother. When McGowan was first contacted by the family of Ms. Davis, it was done so on her behalf, and on behalf of any heir, to investigate her death and to determine whether she had been wrongfully killed. When the Personal Representative was appointed to administer the activities of the Estate, it was done so on behalf of Ms. Davis and her heirs. When McGowan entered into a written representation agreement to pursue claims on behalf of the Estate, it was done so under clear terms with the Estate of Emma Davis and not her Personal Representative; the attorney-client agreement states:

This is an agreement between McGowan, Hood & Felder, LLC (hereinafter “attorneys”) and Estate of Mrs. Davis (hereinafter “client”). This agreement covers legal service for claims relating to injuries suffered by client. This agreement covers any claim that client may have against any potentially liable party for injuries, resulting damage and any liability insurance coverage.

⁶ This matter involves novel issues of law that should not be tossed out on a summary judgment motion.

The attorneys will work on behalf of client to settle this case. They will discuss significant case developments with the client. The attorneys will discuss offers of settlement with the client. Only the client has the right to accept or reject these offers...

Exhibit 13. (Emphasis added). That document was signed by Gilmore. When asked in his Deposition about who his retainer agreement says he represents, McGowan stated the following:

- 22 Q. I didn't ask you that. I asked you who
23 your client was.
24 A. The PR of the estate.
25 Q. But then your retainer agreement says
1 the estate. It doesn't say anything about PR.
2 Doesn't it?
3 A. It says what it says.

Dep. of McGowan, p. 72-73. (Exhibit 3) Beyond that, and during the course of litigation, McGowan affirmed who his client was by writing to medical providers stating that "I represent the Estate of Emma Davis," not its Personal Representative. Exhibit 31, Letter from McGowan to Piedmont Medical Center, dated February 24, 2010.

I hope this finds you well. Please be advised that I represent the estate of Mrs. Emma Davis who died during a procedure at PMC on February 11, 2010. I enclose a copy of the PR paperwork and the records authorization.

McGowan was asked about that, too, in his Deposition:

- 11 Q. So who does it say you represent?
12 A. The identified client here is the
13 estate of Ms. Davis for the purpose of a potential
14 injury claim.

Id. at 74.

Upon McGowan's admission, Bell was McGowan's client and any and all duties

McGowan owed to his client ran to Willie Bell:

7. A. My opinion is that there was legal malpractice on
8 the part of counsel in this case, Mr. McGowan.
9 That he owed duties in discharging his obligations
10 as counsel that ran a right to Willie Bell, though

11 Willie Bell didn't hire him, though Willie Bell
12 didn't have a retainer agreement with Willie Bell's
13 name on it, that Willie Bell did not chase him
14 around calling attention to himself, that he had
15 plenty of reason to know and appreciate that Willie
16 Bell was out there, needed his rights evaluated,
17 needed his rights cared for, and it never happened.
18 And I understand Mr. McGowan's position that he
19 wasn't my client, therefore, there can be no
20 malpractice, therefore, I didn't owe him any duties
21 and so forth, and I reject that.

Dep. of Freeman, p. 16. (Exhibit A) Prof. Freeman went on to discuss the significance of identifying the client:

8 A Well, I put emphasis on the fact that he put down
9 the Estate as the client for this reason. First of
10 all, I read with interest his Deposition where I
11 couldn't count the number of times he said that it
12 wasn't the Estate is the client, the Estate wasn't
13 the client, but he said it many times, and he
14 didn't -- he didn't want the Estate to be the
15 client. And I was asking myself why is he so
16 concerned about the Estate being the client. And
17 the way I looked at it was he's -- the problem with
18 the Estate being the client is the concept that you
19 have broad responsibilities to see that the Estate
20 and those with interests in the Estate, the heirs
21 of the Estate, get treated properly and get
22 everything that they are entitled to.

Id. at 95.

Unfortunately, McGowan never once contacted Bell, despite knowing who he was and how to reach him. He was told directly that Ms. Davis had a son; he had the Obituary listing Willie as the son (Exhibit 10); he had the Death Certificate (Exhibit 9) which did the same; and he had medical records (Exhibit 30) that specifically named Bell as her son. Despite that, McGowan chose to ignore his "client," opting instead to focus on representing a man who he had never met, but who he was told lived with Ms. Davis for a number of years and only

communicated with a questionable niece during the course of litigation; a niece who he would handsomely reward with a \$200,000 check once the settlement was completed. In furtherance of his neglect and his attempts to quickly resolve the case for his million-dollar fee, McGowan never identified in any court document or discovery response Bell's identity or existence. He successfully kept Willie Bell anonymous until the settlement was finalized, failing in his duties under Statute 15-51-42:

The petition must be verified by the personal representative and shall set forth, in terms satisfactory to the court in which the petition is filed, the basic facts surrounding the death of the decedent, the pertinent facts surrounding the liability of the alleged wrongdoer, the amount of insurance available to pay for damages, the terms of the proposed settlement, the statutory beneficiaries of the wrongful death or survival action, the heirs at law or appropriate devisees of the estate, the appropriate creditors, the amount of their claims, and, if the personal representative has retained legal counsel, the terms and provisions of the agreement with respect to attorney's fees and costs.

S.C. Code Ann. § 15-51-42.

Defendants take the position in their Motion that Bell's allegedly not being in privity with them and, as a result, having no duties owed to him is because "McGowan had no relationship with Bell whatsoever." Def.'s Memo at 10-11. Defendants cite to Bell's Deposition in which he says that he had never had any kind of communication with McGowan. This is a bizarre stab at avoiding liability. McGowan knew of Bell and of his potentially being the sole true heir to the Estate he was representing, yet he made no attempt to contact him or identify him to others (including the Court) who may have had an interest in talking to him (see Exhibits 9, 10 and 30). Bell did not know who McGowan was; he did not know the fact that McGowan was in theory representing his interests; he did not know anything else about the Estate's lawsuit until

he read about it in the newspaper after the settlement had been approved by the Court. Exhibit 2, Dep. of Bell, p. 2-15 - 2-16, Exhibit 48 (Newspaper Article).

Bell's never having an opportunity to speak to his lawyer does not alter in any way McGowan's duties owed to Bell as the sole true heir to his "client," the Estate of Ms. Davis, as well as his duties under S.C. Code Ann. § 15-51-42.

Similarly, McGowan tries to support the Motion by suggesting that Bell "failed to launch...a direct attack on" the Personal Representative's appointment to the Estate. Def.'s Memo at 12. Again, how was Willie supposed to launch an attack against anyone if he was never contacted by his own lawyer or the Personal Representative until after the settlement was finalized? Bell was never notified that his lawyer was representing his interests and/or that McGowan was also representing his deceased mother's boyfriend, who had directly opposing interests in the lawsuit. In fact, the appointment of Gilmore as Personal Representative of the Estate of Emma Davis was terminated by an order (Exhibit 15) of the Probate Court:

(a) Unless otherwise provided, an order closing an estate as provided in Section 62-3-1001 terminates an appointment of a personal representative and relieves the personal representative's attorney of record of any further duties to the court.

Section 62-3-610. Order closing estate terminates appointment.

Accordingly, should McGowan's only client have been the Personal Representative of the Estate, he no longer had a client but for the sole true heir, Bell. McGowan could not meet the requirements of S.C. Code Ann. § 15-51-42. McGowan and Ms. Gilmore had been relieved of their duties.⁷ In footnote 38 of their Memorandum, Defendants further state that the termination of Gilmore and McGowan would have relieved McGowan of any duties he may have had to the

⁷ Defendants suggest that Bell somehow ratified the actions of Gilmore by becoming the Successor P.R. to the Estate, which is absurd given the fact that he was being appointed to pursue a lawsuit for all of the misconduct that took place during her appointment and had just sued her as well.

Probate Court. Despite the termination, McGowan continued to represent himself as the Estate's attorney of record to collect his fee. He negotiated a settlement without any communication to/with its heir and his client, while simultaneously representing someone, Strong, with no valid claim to the same monies due to the Estate. He also represented the interests of getting his father-in-law repaid on the loans to Mr. Strong that he had facilitated plus the 100% interest on the same. McGowan misrepresented to the Court who his clients were and who was the proper heir to the millions of dollars the Court was approving, and then distributed to everyone but the sole true heir to the Estate.⁸

(2.) Defendants argue in their Motion that they had but one client and that to one client only did they owe a fiduciary duty, the Personal Representative of the Estate of Emma Davis. Bell is the duly appointed Personal Representative of the Estate of Emma Davis and has brought this action in respect to the continued administration of the Estate of his deceased mother, within the scope of the same powers and duties that the original Personal Representative would have had should she not have been terminated by the Probate Court.

After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process, or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. **Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.**

⁸ Surely, McGowan is not representing to this Court that he no longer had a duty to not make a material misrepresentation to the Probate Court that would ultimately take millions of dollars from the sole true heir of the Estate he was representing.

Section 62-3-613. Successor personal representative (Emphasis added).

Bell was duly appointed Successor Representative of the Estate by the Chester County Probate Court, which McGowan challenged. (Exhibit 62) In denying McGowan's Petition to Remove Bell, the Court stated, "McGowan has failed to present sufficient evidence to support the claim that bell should be removed as Personal Representative. McGowan does not dispute that Bell has priority of appointment under S.C. Code § 62-3-203 as the sole surviving heir. It is undisputed that Andrew Strong, who McGowan contends is a common law husband, failed to have his status as Ms. Davis' husband adjudicated within the time limits provided under S.C. Code § 62-2-802(b)(4) and therefore is not to be considered a surviving spouse under the Probate Code."

Bell, the Successor Personal Representative, has every right to do what Gilmore could have done on behalf of the Estate. Under their theory, no one can sue McGowan for his misconduct. As Defendants admit, they were in privity with the Personal Representative and only owed their duties to the representative of the Estate, who is Bell.

(3.) As stated above, Defendants are reliant upon the Strict Privity Rule, as articulated in section 62-1-109; their reliance is misplaced even beyond the written-agreement exception discussed above herein. Bell, as the sole true heir to his deceased mother's Estate, was clearly *the* third-party beneficiary to the contract between McGowan and the Estate, even if one were to assume that the contract was between McGowan and Gilmore alone.

A recent South Carolina Supreme Court opinion recognizes a recovery theory for plaintiffs based on their status as third-party beneficiaries to a contract. The plaintiffs in that case brought a breach of contract action by a third-party beneficiary against the plaintiffs' uncle's attorney. Under South Carolina law, "if a contract is made for the benefit of a third

person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Fabian v. Lindsay*, 765 S.E.2d 132,139 (S.C. 2014). The majority opinion also noted that, "[c]ourts in other jurisdictions have expressly extended this principle to frustrated third-party beneficiaries . . . some have done so as a breach of contract action while other have used the 'third-party beneficiary' principle as a basis to allow recovery in negligence." *Id.* Clearly, beyond earning their million-dollar fee, Defendants entered into the attorney-client relationship for the purpose of benefiting the heirs of Ms. Davis' Estate, despite making no effort whatsoever to find out who those heirs were or acknowledge the identity of the one they knew about. The Court went on to say:

Recognizing a cause of action is not a radical departure from the existing law of legal malpractice that requires a lawyer-client relationship, which is equated with privity and standing. Where a client hires an attorney to carry out his intent for estate planning and to provide for his beneficiaries, there is an attorney-client relationship that forms the basis for the attorney's duty to carry out the client's intent... Thus, imposing an avenue for recourse in the beneficiary, where the client is deceased, is effectively enforcing the client's intent, and the third party is in privity with the attorney.

Id. (citing Dennis J. Horan & George W. Spellmire, Jr., *Attorney Malpractice: Prevention and Defense* 2-1 to 2-5 (1989), *Gaar v. N. Myrtle Beach Rally Co.*, 287 S.C. 525, 529, 339 S.E.2d 887, 889 (Ct.App.1986) ("In his professional capacity the attorney is not liable, except to his client and those in privity with his client, for injury allegedly arising out of the performance of his professional activities," and *Thompson v. Hudgens*, 161 S.C. 450, 463, 159 S.E. 807, 812 (1931) ("Generally speaking, the heir is in privity with his ancestor..."))

Professor Freeman explained the application of the holding in *Fabian* to the instant case:

17 A What I say is, because he was an adopted son and
18 because he was under the statute, entitled to take
19 under the statute, that he was a third-party
20 beneficiary of McGowan's services just like the
21 beneficiary of the will was in *Fabian*.
22 Q So the statute effectively becomes the will, that's
23 the link that creates the third-party beneficiary?
24 A It creates his right, yes.



Exhibit 1, Dep. of Freeman, p. 1-74.

The idea that the sole heir to Emma Davis' Estate would not be considered a third-party beneficiary of McGowan's contract to represent the Estate is simply baseless. Regardless, as Prof. Freeman explained in his deposition, section 109 does not apply here:

8 Q So you do see a difference between referring to the
9 Estate as the client and Tanisha Gilmore as
10 personal representative?

11 A Yes. I think if it just said Tanisha or Tanisha as
12 PR, it would be more consistent with the defense or
13 argument that it's okay to have blinders on. I
14 don't believe it is -- would be even in that case,
15 but that gives you less to explain away if you are
16 being deposed.

17 Q It removes the exception from 109?

18 A Yep.

19 Q It takes that issue away?

20 A Yes.

Id. at 96. As Prof. Freeman explains, there is great significance to McGowan's having written in the Estate as the client rather than Tanisha Gilmore.

Defendants rely heavily upon *Douglass ex rel. Louthian v. Boyce*, 344 S.C. 5, 10, 542 S.E.2d 715, 717-718 (2001) in support of their assertion that McGowan had no duty to Bell in connection with the settlement of the Wrongful Death Litigation, claiming that the case is "factually and legally on point with this matter." However, it is neither. In *Douglass*, seventeen-year-old Christopher Boyce was killed in an automobile accident on April 27, 1991. His parents, defendants Daniel and Yvonne Boyce, were appointed personal representatives of his Estate and pursued a wrongful death action which they eventually settled. The Boyces were the sole beneficiaries of the wrongful death action. Petitioner, William David Douglass ("William"), commenced an action in 1995 against the Boyces alleging they breached their fiduciary duty to him by failing to include him as a statutory beneficiary in the wrongful death action. William

alleged he was Christopher's biological son and was, therefore, entitled to recover in the wrongful death action as the sole statutory beneficiary. He was born less than a year before Christopher's death to Melodye Shampine who was married at the time to Robert Douglass. Melodye and Robert divorced shortly after William's birth. *Id.*

This case has nothing to do with the case at hand. *Douglass* was a paternity question — under the law, child was presumed to be child of the parents. The lawyer was not expected to look past that legal presumption. The clear distinction between *Douglass* and the instant case is that the attorney in that case did not know about the existence of William during the course of the wrongful death litigation, and all of the evidence (even if available to him) pointed to his being the child of someone other than Christopher Boyce. Here, we have quite the opposite. McGowan had knowledge that Bell was the potential son and sole heir of Ms. Davis at the time he commenced his representation of the Estate: he had the Obituary (Exhibit 10); he had the Death Certificate (Exhibit 9); he had the medical records (Exhibit 30); and he had at least one statement from a family member saying that Willie was the adopted son. Dep. of A. Jordan, Exhibit 5. A reasonable lawyer would have checked into that. Exhibit 1, Dep. of Freeman, p. 1-20, lns 9-10. It is apparent in its decision that the *Douglass* court considered seriously and found its bases for its decision in the attorney's lack of knowledge that a child was potentially being left out of the settlement. McGowan had knowledge, be it direct or constructive, that Bell existed and was potentially the son and sole true heir to Ms. Davis' Estate, but McGowan ignored it and hid his knowledge of the same. Also distinguishable about *Douglass* is the fact that it does not appear that the child, William, ever became the successor personal representative in his action against the Estate's lawyer as Willie Bell did in this action and the lawyer represented the personal representative and not the Estate.

Defendants argue that if *Fabian* is somehow deemed to create a cause of action for Willie Bell as a third-party beneficiary of his deceased mother's Estate that it would somehow "eviscerate" the Strict Privity Rule, create havoc across the legal community, and cause undue burden by requiring lawyers to research every member of the family tree to determine who the proper heirs were. This is a red-herring argument for sure. In Willie Bell's case, McGowan had knowledge, direct or constructive, of an adopted son. He was put on notice but did nothing. As Freeman put it:

4 And he was on notice that Willie
5 Bell was there. He was -- you could have spent a
6 hundred bucks to have an investigator go down and
7 pull a file at the Family Court to find out whether
8 there was adoption papers. That was never done.
9 Essentially, he turned a blind eye to Willie,
10 Willie's rights, and I say that was wrong. The
11 duties were owed, the duties were breached and the
12 damaged were proximately caused.

Exhibit 1, Dep. of Freeman, p. 1-17.

CONFLICTS

An attorney who represents more than one client must be cognizant of the vicissitudes of dual representation. Dual representation is not *per se* unethical, but raises the spectre of a violation of Rules 1.7 and 2.2 of the South Carolina Rules of Professional Conduct (RPC), Rule 407, SCACR. Rule 1.7 addresses conflict of interest and provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests,

unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

McNair v. Rainsford, 330 S.C. 332, 344, 499 S.E.2d 488, 494 (Cl. App. 1998).

Defendants assert that McGowan never had an attorney-client relationship with Willie Bell and, therefore, never had a duty to Bell with respect to any potential conflicts of interests. Again, they alternate back and forth on Bell's status. For all of the reasons above, they are wrong about the lack of duty to Bell as the sole heir to McGowan's client and/or as the Successor Personal Representative. There were direct conflicts of interest between McGowan's clients, Andrew Strong and the Estate (Willie Bell) as well as a further conflict which arose during the litigation with McGowan's having to protect the interests of his father-in-law, Mr. Maloney.

Andrew Strong was never entitled to any money from the settlement of the medical malpractice lawsuit. He was never adjudicated to be the common law spouse by the Probate or Family Court as required by the South Carolina Code Section 62-2-802, and it is well documented that he would not have qualified as the common law husband. As such, representing Mr. Strong in the lawsuit was absolutely adverse to the interests of the Estate.

18 Q So Chad has to deal with conflicts with third-party

19 beneficiaries under the statute?

20 A Sure.

21 Q And what Rule would say that?

22 A One point seven (1.7).

23 Q Any others, any ethical opinions, any cases?

24 A No. I think Willie -- look, suppose Willie came in.

25 and said, okay, I want to take. I claim it all.

Page 93

1 Here's my adoption papers. That man there, Mr.

2 Strong, is not her common law husband. He was a

3 companion, they didn't hold themselves out. And I
4 take and he doesn't. Now you say there's no
5 conflict there. **There's a whopping conflict there,**
6 okay.

Exhibit 1, Dep. of Freeman, p. 1-92 – 1-93. Anything Mr. Strong would receive from the lawsuit would be taken away from the Estate and the rightful heir to the same. Even if he had been adjudicated as the common law spouse, the same would be true.

McGowan's arranging the loans from his father-in-law, Mr. Maloney, to Mr. Strong during the course of the litigation created an even more adverse relationship. At that point, having assured his father-in-law of the success of the claim and full-payment of the principal and the 100% interest on the loans, McGowan was now representing the interests of three parties who would take from the same pot of money. McGowan failed to make his clients aware of the competing interests he represented and/or obtain written consent allowing him to continue to represent those adverse interests in the litigation.

DISGORGEMENT

Damages in malpractice cases as a result of conflict of interest

McGowan refutes Bell's claim for disgorgement of fees, calling it "repugnant to fundamental principles of equity." However, it is the legal malpractice, conflicts of interest, fraudulent behavior, and knowing misrepresentations of McGowan that is truly repugnant. McGowan should not be rewarded. One aspect of damages usually found in malpractice cases involving a lawyer's conflict of interest requires forfeiture or disgorgement of fees. *See, e.g., Blecher & Collins, P.C. v. Northwest Airlines, Inc.*, 858 F. Supp. 1442 (C.D. Cal. 1994)(lack of written consent to waive actual conflict would require a forfeiture of unpaid legal fees and refund of fees from the time the conflict manifested); *Hendry v. Pelland*, 73 F.3d 397, 401 (D.C. Cir. 1996)(Court found that to the extent the plaintiffs sought disgorgement of legal

fees, they needed to prove only that the attorney breached his duty of loyalty, not that his breach proximately caused them injury); *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 429 (Tex. App. 2009)(If a client seeks the remedy of fee forfeiture and proves a breach of fiduciary duty by the attorney, the client may obtain that remedy without need to prove causation or damages if the court finds the attorney's conduct was a "clear and serious breach of duty" which can include failure to disclose conflicts of interest.)

Depending on the nature of the underlying case and the type of damages, some courts have recognized that "not all legal malpractice actions constitute a 'case within a case' requiring resolution of the underlying lawsuit." Order of the Honorable Rebecca R. Palimeyer, *Interclaim Holdings Ltd. v. Ness Motley, Loadholt, Richardson & Poole*, No. 00C7620 (N.D. Ill. January 8, 2003). In that case, the law firm picked the interests of one client over another. The court awarded damages to the client not picked, but used an alternative to the "case within a case" method. Other jurisdictions have suggestion varying remedies for conflict of interest cases. See, e.g., *In re Marriage of Kantar*, 581 N.E.2d 6 (Ill.App. 1991)(holding for fee forfeiture for a conflict of interest). As one scholar noted, the failure to avoid conflicts of interest can result in fee forfeiture or "lawsuits seeking damages for breach of lawyer's common law fiduciary duties." Moore, Nancy J., *Restating the Law of Layer Conflicts*, 10 Georgetown J. Leg. Ethics 541 (Summer 1997). See also, Restatement (Third) of Law Governing Lawyers, § 49, Comment d, Illustration 1.

SCUTPA

"An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." *Wogan v. Kunze*, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct.App.2005) (citing *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct.App.2000)). To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).

S.C. Code Ann. §§ 39-5-10 to -560....Section 39-5-140(a) creates a private right of action in favor of "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20...." Under section 39-5-140, a plaintiff can recover treble damages where "the use or employment of the unfair or deceptive ... act or practice was a willful or knowing violation of § 39-5-20." *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 477, 351 S.E.2d 347, 348-49 (Ct.App.1986).

Wright v. Craft, 372 S.C. 1, 23-24, 640 S.E.2d 486, 498 (Ct. App. 2006)

Defendants engaged in an unfair and/or deceptive act during the course of their representation of Mr. Strong and the Estate of Emma Davis by securing private loans from Mr. McGowan's father-in-law to Andrew Strong in a total principal amount of \$15,500, which carried an interest rate of 100%. These loans were made by McGowan's father-in-law, Mr. Michael Maloney, on assurances by Defendants that the case would get resolved in Mr. Strong's favor. Defendants helped secure these loans knowing that Mr. Strong had never been properly adjudicated by the Probate Court as a common-law husband as required by the Probate Code. Defendants knew or should have known that Mr. Strong was not the true sole heir to the Estate when they made the same representation to the Court to get the settlement approved. These acts created a conflict of interest between Defendants and their clients, as Defendants placed themselves in a position to have to protect the interests of Mr. Strong, the Estate, and Mr. Maloney. These unfair and/or deceptive practices affected the interests of not only Defendants named clients, those of Willie Bell, but also impact the interests of the general public as there is a likelihood of repetition, as demonstrated by Mr. McGowan's securing similar loans for other his firm's clients.

Defendants assert that they are immune to this cause of action, claiming that Bell may not maintain such an action in his capacity as Successor Personal Representative of the Estate and

citing to *Faircloth v. Jackie Fine Arts, Inc.* 682 F. Supp. 837 (D.S.C. 1988) to support that notion. The holding in *Faircloth* as to the SCUPTA claims in that case is merely that a SCUPTA claim will not survive a death. The difference is that here the injuries from the SCUPTA violation occurred after the death and to the Estate. As Successor Personal Representative of the Estate that suffered the loss, Willie Bell should be permitted to maintain his SCUPTA action. Further, any waivers signed by Mr. Strong (a desperate man who cannot read) are not applicable to the Estate's claims under SCUPTA. Not only did the Estate not waive anything, it was not even made aware that the loans were being made or how much interest was to be owed on them.

McGowan's repeated failures in recognizing conflicts of interest exhibits his potential to do the public harm in the future.

**FRAUD, NEGLIGENT MISREPRESENTATION, AND BREACH OF CONTRACT
WITH FRAUDULENT INTENT**

In their Motion, Defendants ask the Court to dismiss Plaintiff's causes of action for Fraud, Negligent Misrepresentation, and Breach of Contract with Fraudulent Intent, arguing that these causes of action are duplicative and should be subsumed under the claim for legal malpractice. As to the fraud and negligent misrepresentation, no attorney-client relationship needs to be established by Plaintiff for these causes of action to stand apart from the Legal Malpractice claim. If the Court were to determine that no such relationship was established between Bell, individually or as the Successor Personal Representative, and McGowan, and grant Defendants' Motion for Summary Judgment on the legal malpractice claim, these causes of action would survive separately. In the *Vieira* case, cited by Defendants, the Court only dismissed the causes of action after stripping them down to being based entirely on the attorney-client relationship. That is not the case here. This is an attempt by Defendants to extinguish all

of Bell's claims with one broad stroke of their defense of lack of privity, which does not apply to all the causes of action.

With respect to Bell's cause of action of Breach of Contract with Fraudulent Intent, Defendants could not be more inaccurate in stating to the Court that this claim is based upon the same operative facts, resulting in the same injury, and are virtually identical to the claim of legal malpractice. The facts giving rise to this cause of action focus squarely on the loans to Mr. Strong that were procured by McGowan from his father-in-law, which was not specifically addressed in any of the other causes of action but for the SCUPTA claim.

Additionally, all of these causes of actions have different elements, have different burdens of proof, and can result in different results. Regardless, Plaintiff can plead multiple causes of action, even alternative and inconsistent causes of action, and choose which one(s) he wants to pursue as the litigation proceeds to trial. He is not required to elect until trial. *See* Rule 8(a), S.C.R.C.P.

RATIFICATION

Defendants claim that Bell somehow ratified the underlying settlement and the proceeds to be paid thereunder by obtaining a settlement of his lawsuit against Gilmore and Strong in an attempt to get back what he could of what was rightfully his. Unfortunately, there was not much left by the time he was able to get the stolen money frozen. In accepting what he could get, Bell specifically reserved his rights to pursue a lawsuit against McGowan for having ignored his existence as the sole heir of his deceased mother's Estate and for having instead given his money to those with no valid claim to the inheritance. *See Exhibit 53, Addendum to Settlement* ("Release of claims was not intended to and does not release any claim that the Plaintiff may have against the Defendants' former attorneys, the law firm of McGowan, Hood & Felder

LLC...that any and all claims that Plaintiff may have against any other attorneys or firms are not being released, compromised, satisfied or prejudiced by the Settlement Agreement and Release.”)

1 A Because he did not -- he did not knowingly
2 relinquish his rights against McGowan and Hood.
3 What he did is he took -- he mitigated his damages
4 by getting everything that he could from Strong and
5 Tanisha and then turned his attention to McGowan
6 and Hood, which I think he had a right to do.

19 A Let me put it this way. So far as I'm aware,
20 neither Mr. Bell nor his lawyers dispute or contest
21 that the \$2.2 million paid by the defendants was
22 appropriate. As far as I know, there is no
23 challenge to that by Mr. Lewis or by Willie. It's
24 the allocation of the funds and the behavior of the
25 McGowan Firm that is the focus.

Exhibit 1, Dep. of Freeman, p. 1-76. In other words, Bell is not suing McGowan because the settlement was not large enough; he is suing because of how the money was allocated by McGowan. Professor Freeman addressed it appropriately.

RES JUDICATA

Defendants claim that Bell's claims are barred by Res Judicata for having obtained a settlement of his lawsuit against Gilmore and Strong in an attempt to get back what he could of what was rightfully his. Unfortunately, there was not much left by the time he was able to get the stolen money frozen. In accepting what he could get, Bell specifically reserved his rights to pursue a lawsuit against McGowan for having ignored his existence as the sole heir of his deceased mother's Estate and for having instead given his money to those with no valid claim to the inheritance. See **Exhibit 53**, Addendum to Settlement ("Release of claims was not intended to and does not release any claim that the Plaintiff may have against the Defendants' former attorneys, the law firm of McGowan, Hood & Felder LLC...that any and all claims that Plaintiff

may have against any other attorneys or firms are not being released, compromised, satisfied or prejudiced by the Settlement Agreement and Release."'). McGowan failed to meet the requirements under S.C. Code Ann. § 15-51-42. It was McGowan's hiding the identity of Bell, as the sole true heir of the Estate of Emma Davis, and his misrepresentations to the Court that Andrew Strong was instead the sole true heir that caused all of the money to go to the wrong hands. The party responsible for misleading the Probate Court into approving the settlement and issuing an Order is now asking this Court to bar Plaintiff's claims based on that ill-gotten Order. That is not the law.

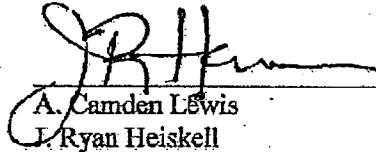
CONCLUSION

Bell was the sole true heir to the Estate of Emma Davis. McGowan owed a duty to his client, the Estate, and to Bell, either as the heir or as a third-party beneficiary. McGowan knew of Bell and chose to ignore his interests in his deceased mother's Estate to the benefit of others. McGowan is liable to Bell either individually or as the Successor Personal Representative of the Estate. All of Plaintiff's causes of action are appropriate and not duplicative. The case is littered with issues of material fact, and Defendants' Motion for Summary Judgment should be denied in its entirety.

(SIGNATURE ON FOLLOWING PAGE)

Respectfully submitted,

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Attorneys for Plaintiffs

Columbia, South Carolina
February 17, 2016.

) IN THE COUR OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2015-CP-46-01827

CASE NO.: 2015-CP-46-01827

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

WILLIE BELL, INDIVIDUALLY AND ON
BEHALF OF THE ESTATE OF EMMA M.
DAVIS AS ITS DULY APPOINTED
PERSONAL REPRESENTATIVE,

Plaintiff,

vs.

MCGOWAN, HOOD & FELDER, LLC
AND CHAD MCGOWAN

Defendants.

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT

C/A No.: 2014-CP-46-01827

**DEFENDANTS MCGOWAN,
HOOD & FELDER, LLC AND
CHAD MCGOWAN, ESQ.'S
RENEWED MOTION FOR
SUMMARY JUDGMENT**

Pursuant to Rule 56, SCRCP, Defendants McGowan Hood & Felder, LLC ("MHF") and Chad McGowan, Esq. (collectively "McGowan") respectfully renews their motion for summary judgment on the Amended Complaint of Plaintiff Willie Bell ("Bell") and seek reconsideration of the Court's denial of summary judgment. Alternatively, McGowan respectfully request the Court to make an order specifying the facts that appear without substantial controversy as to each question of law in issue pursuant to Rule 56(d). As grounds in support of this motion, and to be more fully and specifically shown in the memorandum in support to be filed before the hearing on this motion, McGowan would show the Court as follows:

1. The original motion for summary judgment was filed on February 1, 2016 and the supporting memorandum, with exhibits, was filed on February 10, 2016, both of which are incorporated by reference in the present motion.

2. The Court's Order denying summary judgment filed on March 18, 2016 states:

"Here, there exist questions of law in the present case that are complex and novel to this Court. The Court recognizes that novelty does not necessarily render summary judgment inappropriate. See Med. Univ. of S. Carolina v. Arnaud, 360 S.C. 615, 620, 602 S.E.2d

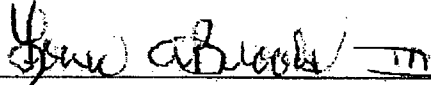
747, 750 (2004). However, this Court's review of the existing factual development¹ established that application of the law to these facts does not establish the Defendants are entitled to judgment as a matter of law.

¹Discovery is still taking place.

3. Discovery in this matter will be completed on June 23, 2016 with the deposition of McGowan's final expert witness.¹

4. If this motion is denied in whole or in part, factual findings in accordance with Rule 56(d) will clarify the issues for trial and expedite trial.

Respectfully submitted,



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Columbia, South Carolina

June 16, 2016

¹A Hearing is scheduled for June 23, 2016 on McGowan's Motion to Compel, but this discovery dispute is not material to the present motion.

COPY

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Case No.: 2015-CP-46-01827

Willie Bell, individually and on behalf
of the Estate of Emma M. Davis as its
duly appointed Personal Representative,

Plaintiff,

vs.

McGowan, Hood, and Felder, LLC and
Chad McGowan,

Defendants.

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF THE
MOTION TO STRIKE OR DISMISS
DEFENDANTS' RENEWED MOTION
FOR SUMMARY JUDGMENT AND IN
OPPOSITION TO THE RENEWED
MOTION FOR SUMMARY
JUDGMENT**

FILED-RECEIVED
2016 JUL 14 PM 1:20
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

Plaintiff Willie Bell, individually and on behalf of the Estate of Emma M. Davis as its duly appointed Personal Representative, ("Plaintiff") submits this Memorandum in Support of his Motion to Strike or Dismiss Defendants' Renewed Motion for Summary Judgment and in opposition to the Motion for Summary Judgment.

Rule 43(f), SCRCF, provides, "If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, *no subsequent motion upon the same set of facts shall be made to any other judge in that action.*" (emphasis added). On February 1, 2016, Defendants moved for summary judgment. By way of Order dated March 18, 2016, the Honorable John C. Hayes, III denied the motion for summary judgment. Defendants did not move to alter or amend that order under Rule 59(e).

On June 16, 2016, Defendants filed a Renewed Motion for Summary Judgment, or in the alternative, asks the court to make findings pursuant to rule 56(d).¹ The renewed motion does not specify *any* additional grounds or facts for summary judgment.

As noted above, Rule 43(l), SCRCP states "If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same set of facts shall be made to any other judge in that action." While a party may make a subsequent summary judgment motion after an initial denial of summary judgment, a renewed motion should only be made "once new evidence [comes] to light."; Dorrell v. S. Carolina Dep't of Transp., 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004) (emphasis added).

Rule 43 requires that a subsequent motion be based on a "different set of facts" that are established after the first summary judgment. Smith v. Breedlove, 377 S.C. 415, 421, 661 S.E.2d 67, 70-71 (2008). For example, in Smith, the second summary judgment motion took place two years after the first, and substantial and extensive discovery had been conducted during the two-year period that warranted consideration of the second motion for summary judgment.

Moreover Rule 7(b)(1), SCRCP requires that motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Defendants' renewed motion merely states that the defendant "renews their motion for summary judgment ... and seek reconsideration of the Court's denial of summary judgment." Def. Motion, p. 1.² Defendants' Motion then quotes a portion of the Court's order denying summary judgment, in which the Court stated "...this Court's review of existing factual development established that the law of

¹ Defendants' motion does not include which facts they claim the court should specify as those "without substantial controversy."

² Defendants did not timely file a motion for reconsideration of the denial of summary judgment as required by Rule 59(e), SCRCP.

these facts does not establish that Defendants are entitled to judgment as a matter of law.” Defendants’ Motion does not “state with particularity” the renewed grounds for summary judgment or any changes in the “existing factual development” that would warrant reconsideration of the denial of summary judgment.³ Nor does Defendants’ Renewed Motion set forth the “different set of facts” as required by Rule 43(l), SCRCP. Smith v. Breedlove, 377 S.C. 415, 421, 661 S.E.2d 67, 70-71 (2008). Thus, the Defendants’ Renewed Motion should be struck or dismissed without further consideration.⁴

As to the merits of Defendants’ motion, Plaintiff incorporates herein by reference, his previous Memorandum in Opposition to the Motion for Summary Judgment, including all attachments, filed on or around February 16, 2016. In addition, the recent deposition testimony of George Beighley and William Gunn support a denial of summary judgment, as discussed below.

Throughout this case, Defendants have claimed that they only represented and had a duty to the fiduciary Tanisha Gilmore, as personal representative of the Estate of Emma Davis. However, Defendants were simultaneously representing the Estate and Andrew Strong (for his consortium claim) and had an ethical duty to not allow their client to commit perjury and/or to take remedial measures when the lawyer’s witness offered false testimony. See, e.g. Rules 3.3(a)

³ It has only been three months since this Court denied summary judgment and the discovery conducted since that time has not altered the “set of facts” upon which Defendants seek summary judgment.

⁴ Furthermore, at the hearing on the initial summary judgment, Defendants asked the Court for an order “specifying the facts that appear without substantial controversy” under Rule 56(d), SCRCP, which the Court declined to do. Defendants have not identified any supposed facts that are “without substantial controversy.”

and 3.4(b), South Carolina Rules of Professional Conduct. Rule 3.3(a)(3) of the Rules of Professional Conduct states that a lawyer shall not knowingly:

offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Rule 3.3 applies "to ancillary proceeding[s] conducted pursuant to the tribunal's adjudicative authority, such as a deposition." Rule 3.3(c). Moreover, if a lawyer actually suborns perjury, it constitutes fraud. Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E. 2d 605 (2003).

In the underlying malpractice case against the doctor and hospital, Andrew Strong was asked if he had been adjudicated the common-law spouse of Ms. Davis:

Q. Did you make a claim in the probate court when Ms. Davis passed away as her common-law husband?

A. Yeah.

Q. Okay. Was that – was—did the family court—or the probate court rather, acknowledge that claim.

A. Yeah. Family.

Q. I mean, the – I should have said the probate. The – court that handles estates, did – did they acknowledge you as her common-law husband?

A. Yeah.

Strong Dep. August 29, 2011 40:11-21 (Ex. 1). Strong's testimony was false. No court ever adjudicated Mr. Strong as Ms. Davis's common law husband..

George Beighley who represented the doctor in the underlying malpractice case (in which Mr. Strong was a plaintiff represented by Defendants), testified that it was important to determine Mr. Strong's status. Beighley Dep. 6:9-16 (Ex. 2). Mr. Beighley specifically stated

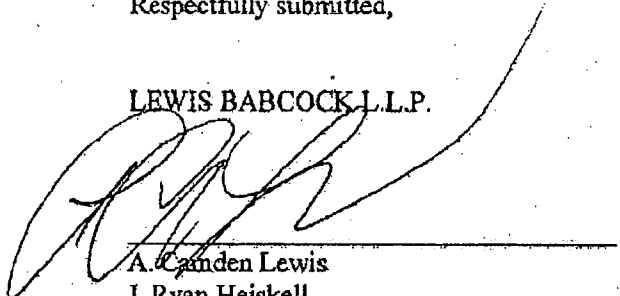
that he "relied on that testimony" – i.e., Mr. Strong's deposition testimony that he had been adjudicated a spouse by the court – and that during Strong's testimony, Defendant McGowan was sitting right there in the deposition. Beighley Dep. 7:7-11; 5:16-6:8 (Ex. 2). Similarly, Mr. Gunn, who represented the hospital in the malpractice action, acknowledged the importance of a plaintiff attorney having all of the parties with a claim –such as an adopted son--included in the lawsuit. Gunn Dep. 25:13-26:1 (Ex. 3).

CONCLUSION

For the reasons set forth above, as well as the grounds set forth in Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment filed on or around February 16, 2016, Defendants' Renewed Motion for Summary Judgment should be struck, dismissed, or denied.

Respectfully submitted,

LEWIS BABCOCK L.L.P.



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jrh@lewisbabcock.com

Attorneys for Plaintiffs

Columbia, South Carolina
June 11, 2016

State of South Carolina)

County of York)

Tanisha Gilmore, as
 Personal Representative of
 the Estate of Emma Davis,
 and Andrew Strong,

Plaintiffs,

vs.

Amisub of South Carolina,
 Inc., d/b/a Piedmont
 Medical Center; Carolina
 Cardiology, Vasant Patel,
 MD, Ellenora Issac, RN,
 Gary Miller, RN, Debra
 Swartzman, RN, Robert
 Baker, MD, and Anesthesia
 Associates of Rock Hill,
 PA,

Defendants.

10-CP-46-3899

Deposition

of

Andrew Strong

Deposition of Andrew Strong, taken before Angela M.
 Barrett, a notary public in and for the State of South
 Carolina, commencing at the hour of 9:49 a.m., Monday,
 August 29, 2011, at the office of McGowan, Hood &
 Felder, L.L.C., 1539 Health Care Drive, Rock Hill, South
 Carolina.

Reported by
 Angela M. Barrett



APPEARANCES

For the Plaintiffs:

Chad A. McGowan, Esq.
McGowan, Hood & Felder, L.L.C.
1539 Health Care Drive
Rock Hill, South Carolina 29732

For the Defendants Amisub
of South Carolina, Inc., d/b/a
Piedmont Medical Center, Ellenora
Issac, RN, Gary Miller, RN and
Debra Swartzman, RN:

William U. Gunn, Esq.
Holcombe Bomar, P.A.
Post Office Drawer 1897
(100 Dunbar Street, Suite 200)
Spartanburg, South Carolina 29304

For the Defendants Carolina
Cardiology and Vasant
Patel, MD:

George C. Beighley, Esq.
Richardson Plowden & Robinson, P.A.
Post Office Drawer 7788
(1900 Barnwell Street)
Columbia, South Carolina 29202

For the Defendants Robert Baker,
MD and Anesthesia Associates of
Rock Hill, PA:

James E. Bradley, Esq.
Moore, Taylor & Thomas, P.A.
Post Office Box 5709
(1700 Sunset Boulevard)
West Columbia, South Carolina 29171

Also Present:

Tanisha Gilmore

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Stipulations:	3
Examination by Mr. Gunn:	3
Examination by Mr. Beighley:	39
Examination by Mr. Bradley:	47

EXHIBITS

No exhibits were marked during this deposition.

1 A We bought it. It was in her name.

2 Q The -- the title of it was in her name?

3 A Yeah.

4 Q Did Ms. Davis leave a will?

5 A Unh-unh.

6 Q And is the -- is the mobile home in -- whose name
7 is the mobile home in now?

8 A Tanisha Gilmore.

9 Q That's her -- her niece?

10 A Yeah.

11 Q Did you make a claim in the probate court when Ms.
12 Davis passed away as her common-law husband?

13 A Yeah.

14 Q Okay. Was that -- was -- did the family court --
15 or the probate court rather, acknowledge that
16 claim?

17 A Yeah. Family.

18 Q I mean, the -- I should have said the probate. The
19 -- the court that handles estates, did -- did they
20 acknowledge you as her common-law husband?

21 A Yeah.

22 A Okay. So how -- how did the title to the mobile
23 home go to the niece instead of to you if there was
24 no will and you were her husband?

25 A I just put it in her name. I put all my stuff in

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF YORK
3
4 Willie Bell, individually and on behalf of the
5 Estate of Emma M. Davis as its duly appointed
6 Personal Representative,
7 Plaintiff,
8 vs. CASE NO.: 2015-CP-46-01827
9 McGowan, Hood, and Felder, LLC, and Chad McGowan,
10 Defendants.
11

12 D E P O S I T I O N

13 WITNESS: GEORGE C. BEIGHLEY
14 DATE: Friday, July 8, 2016
15 TIME: 11:05 a.m.
16 LOCATION: Law Offices of Lewis Babcock
17 1513 Hampton Street
18 Columbia, South Carolina
19 TAKEN BY: Attorney for the Plaintiff
20 REPORTED BY: Cheryl A. Wiszowaty
21 South Carolina Court Reporter
22

23 ABC REPORTING SERVICE
24 257 Summerland Avenue
25 Batesburg, South Carolina 29006
1-803-532-5255
1-803-730-3015 (cell)

ABC REPORTING SERVICE (803) 730-3015



1 this action for his loss of consortium."

2 Q. And how did you accept that he was
3 married to Emma Davis? Did you just accept it?
4 How did you -- was that important to you, to prove
5 that, or did you just accept that?

6 A. Well, what we found out in the
7 discovery process was that it was -- that they had
8 never actually been legally married. It was a
9 common-law assertion, and so we, as I remember it,
10 examined him about the nature of the relationship,
11 how long they lived together, did they hold
12 themselves out to third parties, that, and we
13 asked some of the family members as well. As I
14 recall, it was only an allegation of a common-law
15 marriage.

16 Q. And I understand that. Well, I have
17 the deposition of Andrew Strong and you
18 questioning, "Did you make a claim in the probate
19 court when Ms. Davis passed away as her common-law
20 husband?"

21 And he said, "Yes."

22 Do you remember that?

23 A. I do remember that.

24 Q. And he said, "Okay."

25 "What that was -- did the family

1 court -- or the probate court, rather, acknowledge
2 that claim?"

3 And he said, "Yes."

4 Do you remember that?

5 A. I remember him saying that.

6 Q. And Mr. McGowan was sitting there, is
7 that correct, at this time?

8 A. He was.

9 Q. Have you ever seen any piece of paper
10 where he has been adjudicated as the common-law
11 husband?

12 A. I have not.

13 Q. So this representation was very
14 important to you.

15 A. Well, we were trying to get that
16 narrowed down as to what his status was.

17 Q. And there is a statute that tells you
18 how to do that, and you have to go to court. Do
19 you know that?

20 A. The understanding that I've got, and
21 you'll have to excuse me because I'm not a family
22 law lawyer, but as I remember it, it would be --
23 it's a factual determination in each given case if
24 you're trying to establish common-law marriage.

25 Q. But there is a statute that tells you

1 you have to go to probate to do that. Do you know
2 that?

3 A. I'm not aware. I don't want to say
4 something I don't know for sure, but I know there
5 is ways to establish it, but I can't tell you
6 details.

7 Q. And so in this case, you took it upon
8 the representations of Mr. McGowan and his client
9 that he was a common-law husband.

10 A. That was -- we relied on that
11 testimony.

12 Q. All right. Now, another thing, and I
13 got your documents, and I sure appreciate the
14 documents. You know, it's a lot of stuff. I
15 don't see a release in here.

16 A. The -- what we did, I gave you all
17 the stuff that I figured that you wouldn't have,
18 and then the stuff that I figured that you had,
19 like depositions --

20 Q. I don't -- yeah.

21 A. -- all that stuff, I didn't copy
22 that, but I can go back and get you the --

23 Q. Release. I'd just like to see the
24 release.

25 A. All right. Yeah.

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF YORK

3 Willie Bell, individually and on behalf of the
4 Estate of Emma M. Davis as its duly appointed
5 Personal Representative,
6 Plaintiff,

7 vs. CASE NO.: 2015-CP-46-01827

8 McGowan, Hood, and Felder, LLC, and Chad McGowan,
9 Defendants.
10

11

12

DEPOSITION

13

14

WITNESS: WILLIAM U. GUNN

15

DATE: Friday, July 8, 2016

16

TIME: 11:58 a.m.

17

LOCATION: Law Offices of Lewis Babcock
1513 Hampton Street
Columbia, South Carolina

18

TAKEN BY: Attorney for the Plaintiff

19

REPORTED BY: Cheryl A. Wiszowaty
South Carolina Court Reporter

20

21

22

23

24

25

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257 Summerland Avenue
Batesburg, South Carolina 29006
1-803-532-5255
1-803-730-3015 (cell)

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1 inappropriate for Mr. McGowan to call him, would
2 it?

3 A. I have -- I don't know. I can't make
4 that judgment. I don't --

5 Q. Now, Mr. Gunn, you're sitting there
6 and you represent the estate --

7 A. Yeah.

8 Q. -- and you represent Mr. Strong, and
9 someone out there may be an adopted son and you
10 have no obligation to look into that?

11 A. I don't -- I just...

12 Q. Is that what you're telling me?

13 A. I really -- I really cannot -- if I
14 had a plaintiff's case, and I've had plaintiffs'
15 cases, when I have a plaintiff's case, I try to
16 follow up on who might have any interest on my
17 side of the case and nail all that down.

18 Q. Right. Everybody should.

19 A. I don't -- I don't...

20 Q. You're not everybody.

21 A. No.

22 Q. But that's what you'd do.

23 A. If I had -- if I had information that
24 somebody had a claim on the plaintiff's side, I
25 would want to make sure that I had the parties all

1 there.

2 MR. LEWIS: I agree with you 100
3 percent. Thank you.

4 Do you have anything?

5 MR. BROOKS: No questions.

6 (The deposition concluded at
7 approximately 12:25 p.m.)

8

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

WILLIE BELL, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF
EMMA M. DAVIS AS ITS DULY APPOINTED
REPRESENTATIVE,

Plaintiff,

vs.

McGOWAN, HOOD & FELDER, LLC
AND CHAD McGOWAN,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No: 2015-CP-46-1827

**DEFENDANTS MCGOWAN, HOOD
& FELDER, LLC AND CHAD
MCGOWAN, ESQ.'S NOTICE OF
INTENT TO UTILIZE PLAINTIFF'S
CRIMINAL RECORD**

Pursuant to Rule 609(b), SCRE, Defendants McGowan, Hood & Felder, LLC and Chad McGowan ("McGowan") hereby give notice of their intent to utilize Plaintiff Willie Bell's ("Bell's") criminal record in this matter. *See* Exhibit 1. Specifically, Bell has been convicted of multiple felonies, as well as three (3) convictions for shoplifting, two (2) convictions for forgery, four (4) convictions for passing fraudulent checks, and (1) conviction for receiving stolen property. Thus, as Bell has been convicted of serious crimes and numerous crimes of dishonesty and false statements, Bell's criminal record is admissible in this matter for purposes of attacking his credibility. Rule 609(a), SCRE. At least one of his convictions for dishonesty falls within the last ten (10) years, however, several others fall outside of that timeframe. Despite this, those convictions should be admissible in this matter.

In determining whether remote convictions should be admitted, South Carolina Court's employ a balancing test, including the following factors: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's

testimony; and (5) the centrality of the credibility issue. *See State v. Colf*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000) (the court has discretion in determining whether to admit evidence of remote convictions provided it engages in the balancing test and noting that considerations in that matter such as the fact that larceny reflects on credibility and the importance of credibility in the jury's decision should weigh in the admissibility determination). In the present matter, Bell's credibility is at the forefront of the jury's consideration and his testimony in this case will be central to the issues. Due to this, the probative value of his criminal record and his ten (10) convictions for crimes of dishonesty outweigh any prejudicial effect in this case and justifies introduction of his criminal record in its entirety.

Therefore, Bell's criminal record should be admissible in its entirety and McGowan provides the present notice of his intent to utilize Bell's criminal record as required by the Rules.

Respectfully Submitted,

JANIK L.L.P.

STEVEN G. JANIK (S.C. Bar #: 81464)

CRYSTAL L. MALUCHNIK (S.C. Bar #: 100961)

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MONICA K. BRACEY (S.C. Bar #102197)

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Email: Lovic.Brooks@Janiklaw.com

Email: Monica.Bracey@Janiklaw.com

York, South Carolina
July 14, 2016



SLED CATCH
Citizens Access to Criminal Histories

Results

Name **WILLIE BELL**
DOB **1969 01 13**
Gender **Male**
Maiden Name
SSN
Transaction **NL6QX3GQEL**
Date of Check **September 27, 2015 at 14:36**

ARREST RECORD
S.C. Law Enforcement Division
WWW

The record is based on a search using Last Name, First Initial, Gender, and Date of Birth Only. Compare all identifying data given for record subject with screening subject. Fingerprint comparison is recommended as the most reliable means to identify a record subject.

INTERNET RAP SHEET REQUEST
ORI-SCLE00000 SID-3C00721252 FBI-***** PUR-E
ATR-WEB, ACCOUNT

AUTHORIZED USE ONLY. ***** CONTACT CONTRIBUTING
AGENCY FOR SPECIFIC/MORE DATA ABOUT CHARGES AND/OR DISPOSITIONS.
BECAUSE ADDITIONS OR DELETIONS MAY BE MADE AT ANY TIME, A NEW COPY
SHOULD BE REQUESTED WHEN NEEDED FOR SUBSEQUENT USE.

PAGE-01 DATE-09/27/2015 TIME-14:32:47
REQ ORI-SCLE00000 S C LAW ENF DIV
SID-SC00721252 FBI-
NAME-BELL, WILLIE LEE SEX-M RACE-B
HEIGHT-600 WEIGHT-160 EYES-BRO HAIR-BLK SKIN- BORN-SC
FPC-1611PI171216PI1214PI HENRY-16 M 2 U OIO 12
N 11 W IOO

PHOTOGRAPH AVAILABLE AUTHORIZED USE ONLY
1-FINGERPRINT IMAGES ON THIS SUBJECT ARE STORED ON SCAPIS

DATE RECORD ENTERED--N/A DATE OF LAST UPDATE--04/17/2015

ADDITIONAL IDENTIFIERS	BIRTH	DATES	MARKS	SEC	SEC	MISC	NUM
NAME	01131969						

BELL, WILLIE

CONTRIBUTOR/SUBJECT	DOA/RCVD CHARGE/DISPOSITION/ETC
BELL, WILLIE LEE	11/06/1989

SC0120100 CHESTER PD
CASE-6005
WARR-C500820

WARR-C500820

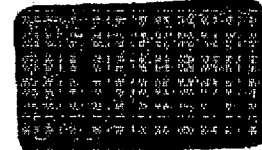
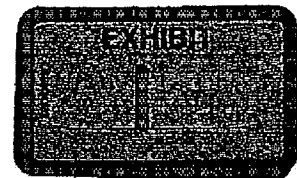
ARREST CHARGE -SHOPLIFTING
OFFENSE DATE-10/31/1989
COURT CHARGE 01-SHOPLIFTING
COURT DISP-CONVICTED:\$237
FINE

BELL, WILLIE LEE
SC0120000 CHESTER CNTY SO
WARR-C590867

12/30/1989

ARREST CHARGE -POSSESSION OF
STOLEN GOODS
OFFENSE DATE-12/30/1989
PHOTOGRAPH AVAILABLE
COURT CHARGE 01-POSSESSION

WARR-C590867
630553



9/27/2015 2:39 PM

OF STOLEN GOODS
COURT DISP-CONVICTED; BAIL
FORFEITED: \$68
COURT DATE-01/25/1990

BELL, WILLIE LEE
SC0120100 CHESTER PD
WARR-C500862

11/20/1989

ARREST CHARGE -BURGLARY I
OFFENSE DATE-12/20/1989

WARR-C500863

ARREST CHARGE -GRAND LARCENY
COURT CHARGE 01-BURGLARY
FIRST

WARR-C500862

COURT DISP-NON-CONVICTION;
NOLLE PROSSED
COURT DATE-02/16/1990
COURT CHARGE 02-GRAND LARCENY
COURT DISP-NON-CONVICTION;
NOLLE PROSSED
COURT DATE-02/16/1990

WARR-C500863

BELL, WILLIE LEE
SC0120100 CHESTER PD
WARR-C754405

09/20/1990

ARREST CHARGE -FORGERY
OFFENSE DATE-07/25/1990

WARR-C754340

ARREST CHARGE -FORGERY
ARREST INFO- PCC
COURT CHARGE 01-FORGERY
COURT DISP-CONVICTED; 2Y PROB;
4Y BALANCE SUSPENDED;
INTENSIVE SUPERVISION
COURT DATE-11/13/1990
COURT CHARGE 02-FORGERY
COURT DISP-CONVICTED; 2Y PROB;
CONCURRENT; 4Y BALANCE
SUSPENDED; INTENSIVE SUPERV
ISION
COURT DATE-11/13/1990

SC040015G CENTRAL PDP
WARR-C754405

SC040015G CENTRAL PDP
WARR-C754340

BELL, WILLIE
SC0120100 CHESTER PD
WARR-D064537

10/05/1991

ARREST CHARGE -FRAUDULENT
CHECK
OFFENSE DATE-07/03/1991

WARR-C064531

ARREST CHARGE -FRAUDULENT
CHECK
COURT CHARGE 01-FRAUDULENT
CHECK
COURT DISP-CONVICTED; \$200
FINE
COURT CHARGE 02-FRAUDULENT
CHECK
COURT DISP-CONVICTED; \$150
FINE

WARR-D064532

WARR-D064531

BELL, WILLIE LEE
SC0120000 CHESTER CNTY SO.
CASE-153
WARR-D262541

03/12/1992

ARREST CHARGE -SHOPLIFTING
OFFENSE DATE-03/12/1992
PHOTOGRAPH AVAILABLE
COURT CHARGE 01-SHOPLIFTING

WARR-D262541
630583

	COURT DISP-CONVICTED;PAID \$146 COURT DATE-09/20/1992
BELL, WILLIE LEE SC0120000 CHESTER CNTY SO CASE-9391221 WARR-D262959	09/01/1993 ARREST CHARGE -SHOPLIFTING OFFENSE DATE-09/01/1993 PHOTOGRAPH AVAILABLE ARREST CHARGE -PROBATION VIOLATION
SC040055C R & E CENTER COLA CASE-208377 CIT-16-13-10 MISDEMEANOR	11/19/1993 CUSTODY STATUS-RECEIVED START DATE-11/19/1993 COURT CHARGE 01-FORGERY COURT DISP-CONVICTED; 4 YEARS SUSPENDED TO 1 YEAR
BELL, WILLIE LEE SC0120000 CHESTER CNTY SO CASE-230 WARR-D309307	12/22/1995 ARREST CHARGE -DISTRIBUTION OF CRACK COCAINE OFFENSE DATE-12/22/1995 PHOTOGRAPH AVAILABLE
WARR-D309313	ARREST CHARGE -DISTRIBUTION OF CRACK COCAINE OFFENSE DATE-12/22/1995
WARR-D309306	ARREST CHARGE -CONSPIRACY TO DISTRIBUTE CRACK OFFENSE DATE-12/22/1995
CIT-44-53-420-UNCLASSIFIED DOC-006312 WARR-D309306	COURT CHARGE 01-ATTEMPT AND CONSPIRACY PROVISIONS DRUG LAW COURT DISP-NON-CONVICTION; DISM/NOL PROS/PROS ENDED COURT DATE-09/11/1996
CIT-44-53-375(B) (1)-FELONY DOC-96081208389 WARR-D309307	COURT CHARGE 02-DRUGS/MAN,DIS T,ETC OF COCAINE BASE 1ST COURT DISP-CONVICTED;5 YRS & 25000.00 COURT DATE-09/11/1996
CIT-44-53-375(B) (1)-FELONY DOC-96081200390 WARR-D309313	COURT CHARGE 03-DRUGS/MAN,DIS T,ETC OF COCAINE BASE 1ST COURT DISP-NON-CONVICTION; DISM/NOL PROS/PROS ENDED COURT DATE-09/11/1996
SC040055C R & E CENTER COLA CASE-237135 CIT-44-53-370(B) (1) FELONY	09/23/1996 CUSTODY STATUS-RECEIVED START DATE-09/23/1996 COURT CHARGE 01-DISTRIBUTION OF CRACK COURT DISP-CONVICTED;5Y
BELL, WILLIE LEE SC0120000 CHESTER CNTY SO ATN- WARR-H142408 830553	04/21/2002

South Carolina Law Enforcement Division

<https://catch.sled.sc.gov/SCBackground.aspx?token=T...>

CIT-34-11-60-MISDEMEANOR

CIT-34-11-60-MISDEMEANOR
DOC-R84
WARR-4142408

ARREST CHARGE - FRAUDULENT
CHECK UNDER \$500 - 1ST

COURT CHARGE 01-FRAUDULENT
CHECK UNDER \$500 - 1ST
COURT DISP-CONVICTED; \$125
FINE AND \$85
COURT DATE-06/23/2002
ATN-

BELL, WILLIE LEE
SC0120000 CHESTER CNTY SO
ATN-
WARR-5330600
CIT-16-25-20-MISDEMEANOR

09/14/2002

ARREST CHARGE - CRIMINAL DOMES
TIC VIOLENCE 1ST OFFENSE

WARR-H143000
CIT-34-11-60-MISDEMEANOR

ARREST CHARGE - FRAUDULENT
CHECK UNDER \$500 - 1ST

CIT-16-25-20 (A) - MISDEMEANOR
DOC-R84
WARR-5330600

COURT CHARGE 01-CRIMINAL
DOMESTIC VIOLENCE 1ST
OFFENSE
COURT DISP-NON-CONVICTION;
DISMISSED
COURT DATE-09/19/2002
ATN-

CIT-34-11-60-MISDEMEANOR
DOC-R84
WARR-H143000

COURT CHARGE 02-FRAUDULENT
CHECK UNDER \$500 - 1ST
COURT DISP-CONVICTED; FINE
SERVED
COURT DATE-09/26/2002

BELL, WILLIE LEE
SC0120000 CHESTER CNTY SO
ATN-
WARR-H448030
CIT-16-25-20-MISDEMEANOR

04/06/2003

ARREST CHARGE - CRIMINAL DOMES
TIC VIOLENCE 2ND OFFENSE
OFFENSE DATE-04/06/2003

CIT-16-25-20-MISDEMEANOR
DOC-R84
WARR-H448030

COURT CHARGE 01-CRIMINAL
DOMESTIC VIOLENCE 2ND
OFFENSE
COURT DISP-NON-CONVICTION;
NOT GUILTY
COURT DATE-04/24/2003
ATN-

BELL, WILLIE LEE
SC0460300 ROCK HILL PD
CASE-0612281930
ATN-460300501720
WARR-5187700
CIT-56-1-460-MISDEMEANOR

12/28/2006

ARREST CHARGE - DRIVING UNDER
SUSPENSION
OFFENSE DATE-12/28/2006
PHOTOGRAPH AVAILABLE
PALM PRINTS AVAILABLE

BELL, WILLIE LEE
SC0120100 CHESTER PD
630553

01/13/2007

CASE-CP7361
ATN-990000275014
WARR-2258000
CIT-56-1-440-MISDEMEANOR

ARREST CHARGE -DRIVING WITHOU
T A LICENSE
OFFENSE DATE-01/13/2007
PHOTOGRAPH AVAILABLE

WARR-2258100
CIT-56-1-460-MISDEMEANOR

ARREST CHARGE -DRIVING UNDER
SUSPENSION
OFFENSE DATE-01/13/2007

BELL, WILLIE LEE
SC0120100 CHESTER PD
CASE-CP8005
ATN-990000275030
WARR-2183900
CIT-56-1-440-MISDEMEANOR

01/28/2007

ARREST CHARGE -DRIVING WITHOU
T A LICENSE
OFFENSE DATE-01/27/2007
PHOTOGRAPH AVAILABLE

BELL, WILLIE LEE
SC0120000 CHESTER CNTY SO
CASE-28070345
ATN-990000326282
WARR-K044708
CIT-34-11-60-MISDEMEANOR

07/27/2007

ARREST CHARGE -FRAUDULENT
CHECK UNDER \$500 - 1ST
OFFENSE DATE-09/23/2006
PHOTOGRAPH AVAILABLE

WARR-K044710
CIT-34-11-60-MISDEMEANOR

ARREST CHARGE -FRAUDULENT
CHECK UNDER \$500 - 1ST
OFFENSE DATE-09/23/2006

WARR-K044709
CIT-34-11-60-MISDEMEANOR

ARREST CHARGE -FRAUDULENT
CHECK UNDER \$500 - 1ST
OFFENSE DATE-09/23/2006

CIT-34-11-60-MISDEMEANOR
DOC-R84
WARR-K044710

COURT CHARGE 01-FRAUDULENT
CHECK UNDER \$500 - 1ST
COURT DISP-CONVICTED; SENTENCE
UNKNOWN
COURT DATE-10/01/2007
ATN-990000326282

CIT-34-11-60-MISDEMEANOR
DOC-R84
WARR-K044709

COURT CHARGE 02-FRAUDULENT
CHECK UNDER \$500 - 1ST
COURT DISP-CONVICTED; SENTENCE
UNKNOWN
COURT DATE-10/01/2007

CIT-34-11-60-MISDEMEANOR
DOC-R84
WARR-K044708

COURT CHARGE 03-FRAUDULENT
CHECK UNDER \$500 - 1ST
COURT DISP-CONVICTED; SENTENCE
UNKNOWN
COURT DATE-10/01/2007

BELL, WILLIE LEE
SCSHP0400 SC HIGHWAY DEPT DIST 4
CASE-SCHP3611
630653

06/01/2012

South Carolina Law Enforcement Division

<https://catch.sled.sc.gov/SCBackground.aspx?token=T...>

ATN-128000002997
WARR-F537928
CIT-56-05-2930(A) (1) -MISDEMEANOR

ARREST CHARGE -DUI 16 OR
HIGHER 1ST OFFENSE
OFFENSE DATE-06/01/2012
PHOTOGRAPH AVAILABLE

BELL, WILLIE LEE 01/05/2013
6CSHPJ400 SC HIGHWAY DEPT DIST 4
CASE-SCHE3809
ATN-128000004238
WARR-G086598
CIT-56-05-2940(2) -MISDEMEANOR

ARREST CHARGE -DUI/DRIVING
UNDER THE INFLUENCE .08
2ND OFF
OFFENSE DATE-01/05/2013
PHOTOGRAPH AVAILABLE

CIT-56-05-2930(A) (2) -MISDEMEANOR
DOC-13691200159
WARR-G086598

COURT CHARGE 01-DUI < 10,
2ND OFFENSE
COURT DISR-NON-CONVICTION/
DISM/NOL PROS/PROS ENDED
COURT DATE-04/16/2013
ATN-128000004238

8 - WARRANT OCCURS WITH MORE THAN ONE SID NUMBER

BASED ON SEARCH OF SCLED CJIS CCH FILE USING SID/SC00721232
THIS CRIMINAL HISTORY RECORD IS FOR SOUTH CAROLINA ARRESTS AND
CONVICTIONS ONLY AND IS BASED ON THE INFORMATION PROVIDED. SINCE
CHANGES MAY OCCUR DAILY A NEW INQUIRY SHOULD BE MADE AND NO SUBSEQUENT
USE OF THIS RECORD IS ALLOWED.

INDIVIDUAL PROHIBITED FROM POSSESSING OR ACQUIRING FIREARM OR AMMUNITION
PURSUANT TO FEDERAL GUN CONTROL ACT OF 1968

INFORMATION SUBMITTED TO SLED CCR INDICATES THIS INDIVIDUAL HAS BEEN
CONVICTED OF A FELONY ACCORDING TO THE SOUTH CAROLINA CODE OF LAWS.
THEREFORE, THIS PERSON IS INELIGIBLE TO SHIP, TRANSPORT, OR RECEIVE ANY
FIREARM OR AMMUNITION AFFECTED BY INTERSTATE OR FOREIGN COMMERCE, AS
DEFINED BY THE GUN CONTROL ACT OF 1968 (18 USC 922(G)).

** S C CJIS END OF RECORD **

630553

STATE OF SOUTH CAROLINA

COUNTY OF YORK

WILLIE BELL, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF
EMMA M. DAVIS AS ITS DULY
APPOINTED REPRESENTATIVE,

Plaintiff,

vs.

McGOWAN, HOOD & FELDER, LLC
AND CHAD McGOWAN,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No: 2015-CP-46-1827

MOTION IN LIMINE OF DEFENDANTS
MCGOWAN, HOOD & FELDER, LLC
AND CHAD MCGOWAN, ESO.
REGARDING ISSUES OF LAW

Defendants McGowan, Hood & Felder, LLC and Chad McGowan (collectively "McGowan") respectfully move the Court for an order in limine and a preliminary jury instruction as to the following issues of law;

1. Willie Bell ("Bell") has admitted that he has never, in his individual capacity, had an attorney-client relationship with McGowan or spoken to McGowan. McGowan therefore respectfully moves the Court to limit the argument and evidence at trial to solely whether Bell can recover as the Successor Personal Representative of the Estate. (Ex. 1, Admission No. 2.) *See Spence v. Wingate*, 395 S.C. 148, 160-161, 716 S.E.2d 920, 926-927 (2011), *quoting Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003); *In re Broome*, 356 S.C. 302, 316, 589 S.E.2d 188, 195-196 (2003), *citing Marshall v. Marshall*, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (S.C. App. 1984) ("A person attains the status of 'client' when that person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice.").

2. Bell has conceded that the \$2.2M settlement of the underlying Wrongful Death Litigation¹ was reasonable. McGowan therefore respectfully moves the Court for an order precluding any argument, evidence, or reference to a conflict of interest on the part of McGowan prior to the \$2.2M settlement of the underlying Wrongful Death Litigation. (Ex. 2, Interrogatory No. 8.) *In re Trexler*, 327 S.C. 315, 318, 491 S.E.2d 257, 259-260 (1997).
3. By way of Answers to Interrogatories and Requests for Admission, Bell has limited his claim of malpractice solely to "the handling of the settlement funds". McGowan therefore respectfully moves the Court for an order precluding any argument, evidence, or reference to McGowan's alleged malpractice being based upon anything other than "the handling of the settlement funds". (Ex. 1, Admission No. 14; Ex. 2, Interrogatory No. 8; Ex. 3, Freeman at 76-77). *See Scott v. Greenville Housing Authority*, 353 S.C. 639, 579 S.E.2d 151 (App. 2003), *quoting Commerce Center of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 554-555, 556 S.E.2d 718, 723 (App. 2001) ("Admissions under Rule 36 are treated as admissions in pleadings,").
4. The Estate of Emma M. Davis ("Estate") is not a legal entity. McGowan therefore respectfully moves the Court to preclude any argument, evidence, or reference to the Estate having the legal capacity to enter into the Retainer Agreement with McGowan; sue or be sued; or, be represented by McGowan in the underlying

¹ The underlying Wrongful Death Litigation is captioned, *Tanisha Gilmore, as the Personal Representative of the Estate of Emma Davis, and Andrew Strong v. Amisub of SC, Inc. d/b/a Piedmont Medical Center et al*, Case No. 10-CP-46-3899, Court of Common Pleas for York County, Sixteenth Judicial Circuit, South Carolina.

Wrongful Death Litigation. *Gordon v. Busbee*, 2003 WL 26131496 (S.C. C.P. Aiken Cnty. Jan. 5, 2003) ("a probate estate is not a legal entity which can sue or be sued or be represented by counsel"); accord *Austin Nursing Center, Inc. v. Lovato*, 48 Tex. Sup. Ct. J. 624, 171 S.W.3d 845, 848 (2005) (an estate is not a legal entity that can sue or be sued); *Hansen v. Stanton*, 177 Wash. 257, 260, 31 P.2d 903, 904 (1934) ("estate" does not mean a legal entity; it generally means the property of a decedent); *Coleman v. Mariner Heath Care, Inc.*, 2011 WL 11797017, *1 (S.C. C.P. Florence Cnty. March 25, 2011) (it is a basic tenant of contract law that the parties must have the capacity, i.e., the authority, to contract).

5. The Retainer Agreement specifically disclaimed any responsibility for probate matters. McGowan therefore respectfully moves the Court for an order precluding any argument, evidence, or reference to a duty on the part of McGowan for probate matters. SCRPC 1.2; *Betz v. Blatt*, 984 N.Y.S.2d 378, 116 A.D.3d 813, 815-816 (2014).
6. McGowan relied upon, and was entitled to rely upon, the facially valid certificate of the Probate Court appointing Tanisha Gilmore ("Gilmore") as Personal Representative of the Estate. McGowan therefore respectfully moves the Court to preclude any argument, evidence, or reference in this Court attacking Gilmore's appointment as Personal Representative. E.g., *Bornhorst v. Lee*, 2011 WL 8106439 (S.C. C.P. Charleston Cnty. April 19, 2011) (counsel for conservator had no duty to beneficiary to ensure conservator properly appointed); *Fouche v. Royal Indem. Co. of N.Y.*, 217 S.C. 147, 154-155, 60 S.E.2d 73, 75-76 (1950); *Cole*, 397 S.C. at 251, 725 S.E.2d at 478 (2011).

7. McGowan's challenge in the Probate Court of Bell's appointment as the Successor Personal Representative is void as it was dismissed for lack of standing. McGowan therefore respectfully moves the Court to preclude any argument, evidence, or reference to the Probate Court's dismissal of McGowan's challenge.
7. McGowan had no duty to Bell to identify him as the adopted son of Emma Davis in connection with the underlying Wrongful Death Litigation, and therefore moves the Court to preclude any argument, evidence, or reference to any such duty. *See Rydde v. Morris*, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009); *Cole*, 397 S.C. at 251, 725 S.E.2d at 478 (2011).
8. McGowan had no duty to Bell to determine whether he was an heir, beneficiary, or statutory beneficiary of the Estate in connection with the underlying Wrongful Death Litigation, and therefore moves the Court to preclude any argument, evidence, or reference to any such duty. *See Rydde*, 381 S.C. at 650, 675 S.E.2d at 435 ("The imposition of a duty on an attorney to a perspective beneficiary of a non-existent will would wreak havoc on the attorney's ethical duty of undivided loyalty to the client and force an impermissible wedge in the attorney-client relationship."); *accord Allen v. Stoker*, 138 Idaho 265, 267 61 P.3d 622, 624 (App. 2002) ("The imposition of a duty owed by the attorney to the heirs would create a conflict of interest whenever a dispute arose between the personal representative and an heir." If an estate is harmed by the malfeasance of the personal representative, the heirs can sue the personal representative for breach of fiduciary duty. If an estate is harmed by malpractice, the personal representative can sue the attorney.); *Cole*, 397 S.C. at 251, 725 S.E.2d at 478 (2011).

9. McGowan had no duty to Bell to tell him he did not represent him in connection with the underlying Wrongful Death Litigation, and therefore moves the Court to preclude any argument, evidence, or reference to any such duty. *Argoe v. Three Rivers Behavioral Center*, 388 S.C. 394, 400, 687 S.C. 551, 554 (2010) (“an attorney owes no duty to a non-client”); *Cole*, 397 S.C. at 251, 725 S.E.2d at 478 (2011).
10. A signed retainer agreement is not essential to the attorney-client relationship, and McGowan therefore respectfully moves the Court for an order precluding any argument, evidence, or reference to his lack of a written retainer agreement with Strong. *In re Carter*, 400 S.C. 170, 177, 733 S.E.2d 897, 900 (2012) (RPC 1.5 “is designed to protect clients from inadequate representation, not to determine the presence of an attorney-client relationship . . . ‘[A] signed retainer agreement is not essential.’); *U.S. v. Cannon*, 2012 WL 5386045, *8 (D. S.C. Nov. 1, 2012); *Blake v. Cannon*, 312 S.C. 135, 138-139, 439 S.E.2d 302, 304 (App. 1993) (contact between counsel and client can be express or implied).
11. McGowan had no duty to Bell under applicable law to distribute the settlement funds in the underlying Wrongful Death Litigation to him, and McGowan therefore respectfully moves the Court to preclude any argument, evidence, or reference to any such duty. *Byrd v. Wausau Underwriters Ins. Cos.*, 2011 WL 11748258, *1 (S.C. 2011); accord *Klancke v. Smith*, 829 P.2d 464, 466 (Colo. App. 1991) (attorney for surviving spouse did not breach any duty to surviving children by paying proceeds of wrongful death judgment directly to their client, the surviving

spouse, without taking any steps to ensure that the children receive a portion of the proceeds).

12. McGowan completed his services prior to Bell making a claim on the settlement and prior to any conflict of interest. McGowan therefore respectfully moves the Court to preclude any argument, evidence, or reference to him not being entitled to receive his agreed upon fee. *E.g., Holmes v. McClendon*, 349 Ark. 162, 172-174, 76 S.W.3d 836, 842-844 (2002).
13. Disgorgement is an equitable remedy for which there is no right to a trial by jury. McGowan therefore respectfully moves the Court to preclude any argument, evidence, or reference to Bell's request that McGowan disgorge the fees he received for the underlying Wrongful Death Litigation. *Verenes v. Alvanos*, 387 S.C. 11, 16-17, 690 S.E.2d 771, 773-774 (2011) (as disgorgement is an equitable remedy there is no right to a jury trial).
14. Disgorgement cannot be awarded as Bell has admitted the amount of the settlement of the underlying Wrongful Death Litigation was reasonable. McGowan therefore respectfully moves the Court to preclude any argument, evidence, or reference to Bell's request that McGowan disgorge the fees he received for the underlying Wrongful Death Litigation. (Ex. 2, Interrogatory No. 8.) *Brown v. Butcher*, 2011 WL 12565695 (S.C. Com. P. Kershaw Cnty. Nov. 8, 2011).
15. § 62-1-109 ("§ 109") provides a sole exception to strict privity for an express provision by way of written employment agreement between the attorney and the personal representative. McGowan therefore respectfully moves the Court to preclude any argument, evidence, or reference to any other exception to § 109. *E.g.,*

Douglass ex rel. Louthian v. Boyce, 344 S.C. 5, 10-11, 542 S.E.2d 715, 717-718 (2001); *Singleton v. Cromartie, II*, 2005 WL 5712374 (S.C. C.P. Richland Cnty. Dec. 20, 2005); *Argoe v. Three Rivers Behavioral Center*, 2008 WL 8185836 (S.C. C.P. Lexington, July 3, 2008), *aff'd*, 388 S.C. 394, 687 S.C. 551 (2010).

16. Bell, as Successor Personal Representative of the Estate, lacks standing to pursue a cause of action under SCUPTA. McGowan therefore respectfully moves the Court to preclude any argument, evidence, or reference to Bell's SCUPTA cause of action *Fairecloth v. Jackie Fine Arts, Inc.*, 682 F. Supp. 837, 846 (D. S.C. 1988), *aff'd in part, rev'd in part*, 938 F. 2d 513 (4th Cir. 1991); *accord Wogan v. Kurze*, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (App. 2007).
17. The loans complained of by Bell were memorialized by an "Acknowledgement and Agreement" duly executed by Andrew Strong, by which he acknowledged the terms of the loans, McGowan's advice against obtaining a loan under these terms, and his right to seek the advice of independent counsel. McGowan therefore respectfully moves the Court to preclude any argument, evidence, or reference to Bell's SCUPTA cause of action. *See In re Swanner*, 408 S.C. 191, 195, 758 S.E.2d 711, 713 (2014); *see also Parker v. Shecut*, 340 S.C. 460, 483, 531 S.E.2d 546, 559 (S.C. App. 2000), *rev'd on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002) (loans by personal representatives disclosed to heirs could not be fraudulent).
18. There is no evidence of any communication between McGowan and Bell, or any reliance by Bell, upon which a cause of action for fraud, negligent misrepresentation, or breach of contract with fraudulent intent could be based. McGowan therefore respectfully moves the Court to preclude any argument,

evidence, or reference to these causes of action. *Allegro, Inc. v. Scully*, 409 S.C. 392, 418, 762 S.E.2d 54, 67-68 (2014); *Vieira v. Simpson*, 2015 WL 1299959, *10 (D.S.C. March 23, 2015); *Bennett v. Carter*, 2013 WL 8298015 (S.C. C.P. Charleston Cnty. July 3, 2013), *aff'd in part, rev'd in part*, 2015 WL 5968253 (S.C. App. October 14, 2015); *Cagle v. James Street Group*, 400 Fed. Appx. 348, *9-10 (10th Cir. Oct. 28, 2010); *Quail Hill, LLC v. Richland Cnty.*, 387 S.C. 223, 240-241, 692 S.E.2d 499, 508-509 (2010).

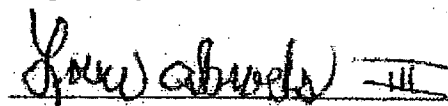
19. Bell's causes of action for fraud, negligent misrepresentation, and breach of contract with fraudulent intent are duplicative of his cause of action for legal malpractice. McGowan therefore respectfully moves the Court to preclude any argument, evidence, or reference to these causes of action. *E.g.*, *Vieira*, 2015 WL at *3 (claims for negligent misrepresentation, fraudulent misrepresentation, and breach of contract premised on same facts and seeking identical relief to a claim for legal malpractice are duplicative and must be dismissed); *accord Steinmetz v. Cooper*, 2011 WL 4543894, *6 (D. S.C. Bankr. March 18, 2011) (breach of contract, constructive fraud, breach of fiduciary duty, and negligence are duplicative of legal malpractice); *RFT Mgmt. Co. LLC v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 336-337, 732 S.E. 2d 166, 173 (2012); *Holmes v. Haynsworth*, 2009 WL 6423945 (S.C. C.P. Charleston Cnty. July 14, 2009) (plaintiff's multiple causes of action for breach of contract, breach of contract accompanied by fraudulent act, breach of fiduciary duty, unfair trade practices, conversion, quantum merit, and fraud are mirror disguises for plaintiff's legal malpractice claims because the breach

alleged in all is the same failure to provide legal services that is the crux of the legal malpractice claim).

Issues of law are within the exclusive province of the Court. *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 174-175. Accordingly, McGowan respectfully moves the Court for an order in limine precluding any argument, evidence, or reference to the foregoing issues of law. A proposed preliminary jury instruction is attached for the Court's consideration.

Should the Court deny this Motion, in whole or in part, McGowan respectfully seeks a continuing objection as to these issues so as not to impede the flow of trial.

Respectfully submitted,



JANIK L.L.P.

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Columbia, South Carolina
July 5, 2016

MOTION IN LIMINE
EXHIBIT #1

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Willie Bell, individually and on behalf
of the Estate of Emma M. Davis as its
duly appointed Personal Representative,

Plaintiff,

vs.

McGowan, Hood, and Felder, LLC and
Chad McGowan,

Defendants.

Civil Action No.: 2014-CP-46-01827

**PLAINTIFF'S RESPONSES TO
DEFENDANT MCGOWAN, HOOD
AND FELDER, LLC'S FIRST SET OF
REQUESTS FOR ADMISSION TO
PLAINTIFF WILLIE BELL AS
SUCCESSOR PERSONAL
REPRESENTATIVE OF THE
ESTATE OF EMMA M. DAVIS**

Plaintiff, Willie Bell, as Successor Personal Representative of the Estate of Emma M. Davis, respectfully submits his Responses to Defendant McGowan, Hood and Felder, LLC's First Set of Requests for Admission as follows:

ADMISSIONS

1. Admit that the Answers to Interrogatories, Requests for Production of Documents and Answers to Requests for Admission that you have given in this matter are binding upon you whether given in your individual capacity or in your capacity as Successor Personal Representative of the Estate of Emma Davis.

RESPONSE:

Admit.

2. Admit that you have never been a client of McGowan, Hood & Felder, LLC nor Chad McGowan in your individual capacity.

RESPONSE:

Admit.

3. Admit that you have never been a client of McGowan, Hood & Felder, LLC or Chad McGowan in your capacity as Successor Personal Representative of the Estate of Emma Davis.

RESPONSE:

Denied.

4. Admit that neither McGowan, Hood & Felder, LLC nor Chad McGowan breached any standard of care in connection with the Underlying Litigation up to the point of distribution of the settlement funds.

RESPONSE:

Denied.

5. Admit that neither McGowan, Hood & Felder, LLC nor Chad McGowan breached any standard of care in connection with the distribution of the settlement funds in the Underlying Litigation.

RESPONSE:

Plaintiff denies Request to Admit No. 5. Plaintiff believes that Defendants' failure to investigate the proper heirs and heirs in law, as well as Defendants' improper determination of Mr. Strong's marital status with Ms. Davis' was a breach of duty owed to Plaintiffs. See Deposition of John P. Freeman dated October 2, 2015.

6. Admit that neither McGowan, Hood & Felder, LLC nor Chad McGowan had any conflict of interest in representing Tanisha Gilmore as Personal Representative of the Estate of Emma Davis and Andrew Strong in the Underlying Litigation up to the point of distribution of the settlement funds.

RESPONSE:

Plaintiff denies Request to Admit No. 6. See Deposition of John P. Freeman dated October 2, 2015.

7. Admit that neither McGowan, Hood & Felder, LLC nor Chad McGowan had any conflict of interest in representing Tanisha Gilmore as Personal Representative of the Estate of Emma Davis and Andrew Strong in connection with the distribution of the settlement funds in the Underlying Litigation.

RESPONSE:

Denied.

8. Admit that if McGowan, Hood & Felder, LLC or Chad McGowan had any conflict of interest in representing Tanisha Gilmore as Personal Representative of the Estate of Emma Davis and Andrew Strong in the Underlying Litigation that such conflict of interest was cured by referral of Tanisha Gilmore Personal Representative of the Estate of Emma Davis and Andrew Strong to the law firm of Rikard & Protopapas LLC in connection with any issues regarding distribution of the settlement funds in the Underlying Litigation.

RESPONSE:

Denied.

9. Admit that if McGowan, Hood & Felder, LLC or Chad McGowan had any conflict of interest in representing Tanisha Gilmore as Personal Representative of the Estate of Emma Davis and Andrew Strong in the Underlying Litigation that such conflict of interest did not affect the Underlying Litigation up to the point of distribution of the settlement funds.

RESPONSE:

Denied.

10. Admit that if McGowan, Hood & Felder, LLC or Chad McGowan had any conflict of interest in representing Tanisha Gilmore as Personal Representative of the Estate of Emma Davis and Andrew Strong in the Underlying Litigation that such conflict of interest did not affect the Underlying Litigation in connection with the distribution of the settlement funds in the Underlying Litigation.

RESPONSE:

Denied.

11. Admit that neither Tanisha Gilmore as Personal Representative of the Estate of Emma Davis, McGowan, Hood & Felder, LLC, or Chad McGowan had notice that the Estate of Emma Davis had been closed on February 11, 2011, or that Tanisha Gilmore had been terminated as Personal Representative of the Estate of Emma Davis on February 21, 2011, until after the settlement proceeds had been distributed in the Underlying Litigation.

RESPONSE:

Plaintiff has insufficient information as what knowledge Ms. Gilmore, Mr. McGowan, or McGowan, Hood & Felder had, and therefore Plaintiff denies Request to Admit 11.

12. Admit that prior to distribution of settlement funds in the Underlying Litigation no one told Tanisha Gilmore as Personal Representative of the Estate of Emma Davis or Andrew Strong that Plaintiff Willie Bell had, in fact, actually been adopted by Emma Davis.

RESPONSE:

Denied.

13. Admit that prior to distribution of settlement funds in the Underlying Litigation no one told McGowan, Hood & Felder, LLC or Chad McGowan that Plaintiff Willie Bell had, in fact, actually been adopted by Emma Davis.

RESPONSE:

Denied. Defendants had in their possession many documents which contained information and made reference to Plaintiff being the son of Emma M. Davis.

14. Admit that the settlement of the Underlying Litigation was fair and reasonable and in the best interest of the statutory beneficiaries and of the Estate of Emma Davis.

RESPONSE:

Because of the improper handling of the settlement proceeds, it is denied.

15. Admit that the settlement funds received and distributed in the Underlying Litigation did not constitute assets of the Estate of Emma Davis.

RESPONSE:

Denied.

16. Admit that neither McGowan, Hood & Felder, LLC nor Chad McGowan caused damage to the Estate of Emma Davis as alleged in the captioned matter.

RESPONSE:

Denied.

17. Admit that adjudication under S.C. Code Ann. §62-2-802 is not the sole mechanism by which Andrew Strong can or could be proven to be the common law husband of Emma Davis.

RESPONSE:

Denied.

18. Admit that Andrew Strong did not have to be adjudicated the common law husband of Emma Davis under S.C. Code Ann. §62-2-802 in order to proceed for loss of consortium under S.C. Code Ann. §15-75-20.

RESPONSE:

Denied.

19. Admit that Plaintiff Willie Bell lived with Andrew Strong continuously from the date of Emma Davis' death until the date of the distribution of the settlement proceeds in the Underlying Litigation.

RESPONSE:

Denied.

20. Admit that Plaintiff Willie Bell lived with Andrew Strong from time to time from the date of Emma Davis' death until the date of the distribution of the settlement proceeds in the Underlying Litigation.

RESPONSE:

Denied.

(SIGNATURE ON FOLLOWING PAGE)

LEWIS BABCOCK P.L.P.



A. Camdean Lewis

J. Ryan Heiskell

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Fax: (803) 733-3541

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jrh@lewisbabcock.com

Columbia, South Carolina
June 30, 2016

MOTION IN LIMINE
EXHIBIT #2

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2015-CP-46-01827

Willie Bell, individually and on behalf
of the Estate of Emma M. Davis as its
duly appointed Personal Representative,

Plaintiff,

vs.

McGowan, Hood, and Felder, LLC and
Chad McGowan,

Defendants.

**PLAINTIFF'S REVISED RESPONSES
TO DEFENDANTS MCGOWAN,
HOOD AND FELDER, LLC'S FIRST
SET OF GENERAL
INTERROGATORIES
TO PLAINTIFF WILLIE BELL,
SUCCESSOR PERSONAL
REPRESENTATIVE FOR THE
ESTATE OF EMMA DAVIS**

Plaintiff, Willie Bell, Successor Personal Representative for the Estate of Emma Davis, respectfully submits his Answers to Defendant McGowan, Hood and Felder, LLC's First Set of General Interrogatories as follows:

OBJECTIONS

Rule 33(b)(9), SCRPC, provides limitations as to interrogatories and states that the "the total number of interrogatories to any one party shall not exceed fifty questions including subparts...." These Interrogatories amount to 96 interrogatories to Plaintiff Willie Bell (individually). Thus, Plaintiff objects to these Interrogatories.

However, in an effort to be fair, Plaintiff provides the following supplemental responses to these Interrogatories.

INTERROGATORIES

1. If your answer to any of McGowan, Hood & Felder, LLC's First Set of Requests for Admission is anything other than an unqualified admission, for each answer:

- a. State the facts upon which you base your Answer;
- b. Set forth the citations to any case law, statutes, regulations, rules, or other authority upon which you base your Answer;
- c. Set the name, home address, home phone number, business address, business telephone number, cell phone number, and personal and business email address for each Person having knowledge of the facts upon which you base your Answer;
- d. State the name, business address, business phone number, cell phone number, and email address of any expert whose opinions you relied upon in your Answer, state the subject matter upon which each such expert is expected to testify, and state the grounds for each opinion of such expert;
- e. Set forth or cite to any testimony given by any Person(s) upon which you base your Answer; and
- f. Identify each Document that you will offer at deposition, hearing, or trial evidencing the basis of your Answer.

ANSWER:

As to Admission No. 1: Defendants argue that they had but one client and that to one client only did they owe a fiduciary duty, the Personal Representative of the Estate of Emma Davis. Bell is the duly appointed Personal Representative of the Estate of Emma Davis and has brought this action in respect to the continued administration of the Estate of his deceased mother, within the scope of the same powers and duties that the original Personal Representative would have had should she not have been terminated by the Probate Court.

After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process, or claim which was

given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative.

Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.

Section 62-3-613. Successor personal representative (Emphasis added).

Bell was duly appointed Successor Representative of the Estate by the Chester County Probate Court, which McGowan challenged. (Exhibit 62) In denying McGowan's Petition to Remove Bell, the Court stated, "McGowan has failed to present sufficient evidence to support the claim that Bell should be removed as Personal Representative. McGowan does not dispute that Bell has priority of appointment under S.C. Code § 62-3-203 as the sole surviving heir. It is undisputed that Andrew Strong, who McGowan contends is a common law husband, failed to have his status as Ms. Davis' husband adjudicated within the time limits provided under S.C. Code § 62-2-802(b)(4) and therefore is not to be considered a surviving spouse under the Probate Code."

Bell, the Successor Personal Representative, has every right to do what Gilmore could have done on behalf of the Estate. Under their theory, no one can sue McGowan for his misconduct. As Defendants admit, they were in privity with the Personal Representative and only owed their duties to the representative of the Estate, who is Bell.

As to Admission No. 3: This requests asks for attorney-work product.

As to Admission No. 5: Plaintiff's counsel was hired by Bell to right a wrong that cheated him out of his rightful inheritance of more than Two Million Dollars (\$2,000,000) presents a litany of wrongful conduct. Defendants' actions cannot be justified. Defendants' assertions by way of defense are that Plaintiff Bell, either individually and/or as the appointed Successor Personal Representative of the Estate, has no right to sue them for having cheated him out of the settlement funds from the underlying medical malpractice that killed his mother. The acts of Defendants resulted in millions of dollars going to individuals who were not the rightful heirs to the Estate, who had directly competing interests to those of McGowan's client (the Estate of Emma Davis), and netted more than a million dollars into McGowan's pocket. As Professor John Freeman testified, "A to Z is to me messed up representation, glittering malpractice, wrongful conduct, unexplainable conduct, self-serving viewpoints." Dep. of Freeman, p.1-8, lns 16-18.

Admission No. 7: An attorney who represents more than one client must be cognizant of the vicissitudes of dual representation. Dual representation is not *per se* unethical, but raises the spectre of a violation of Rules 1.7 and 2.2 of the South Carolina Rules of Professional Conduct (RPC), Rule 407, SCACR. Rule 1.7 addresses conflict of interest and provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

McNair v. Rainsford, 330 S.C. 332, 344, 499 S.E.2d 488, 494 (Ct. App. 1998).

Defendants assert that McGowan never had an attorney-client relationship with Willie Bell and, therefore, never had a duty to Bell with respect to any potential conflicts of interests. Again, they alternate back and forth on Bell's status. For all of the reasons above, they are wrong about the lack of duty to Bell as the sole heir to McGowan's client and/or as the Successor Personal Representative. There were direct conflicts of interest between McGowan's clients, Andrew Strong and the Estate (Willie Bell) as well as a further conflict which arose during the litigation with McGowan's having to protect the interests of his father-in-law, Mr. Maloney.

Andrew Strong was never entitled to any money from the settlement of the medical malpractice lawsuit. He was never adjudicated to be the common law spouse by the Probate or Family Court as required by the South Carolina Code Section 62-2-802, and it is well documented that he would not have qualified as the common law husband. As such, representing Mr. Strong in the lawsuit was absolutely adverse to the interests of the Estate.

18 Q So Chad has to deal with conflicts with third-party
19 beneficiaries under the statute?
20 A Sure.

21 Q And what Rule would say that?

22 A One point seven (1.7).

23 Q Any others, any ethical opinions, any cases?

24 A No. I think Willie -- look, suppose Willie came in

25 and said, okay, I want to take. I claim it all.

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1 Here's my adoption papers. That man there, Mr.

2 Strong, is not her common law husband. He was a

3 companion, they didn't hold themselves out. And I

4 take and he doesn't. Now you say there's no

5 conflict there. There's a whopping conflict there,

6 okay.

Exhibit 1, Dep. of Freeman, p. 1-92 - 1-93. Anything Mr. Strong would receive from the lawsuit would be taken away from the Estate and the rightful heir to the same. Even if he had been adjudicated as the common law spouse, the same would be true.

McGowan's arranging the loans from his father-in-law, Mr. Maloney, to Mr. Strong during the course of the litigation created an even more adverse relationship. At that point, having assured his father-in-law of the success of the claim and full-payment of the principal and the 100% interest on the loans, McGowan was now representing the interests of three parties who would take from the same pot of money. McGowan failed to make his clients aware of the competing interests he represented and/or obtain written consent allowing him to continue to represent those adverse interests in the litigation.

As to Admission No. 8: Any such referral was too late.

As to Admission No. 9: Emma M. Davis died intestate on February 11, 2010 from complications that occurred while undergoing a medical procedure at the Piedmont Medical Center to have a pace-maker implanted. At the time of her death, Davis was not married and had one adopted son, Willie Bell. (Death Certificate) and (Obituary). Shortly after her death, a relative received an anonymous call from a man who allegedly worked at the hospital, who stated that that "mistakes were made" by the doctors and that they should call Defendant McGowan to help investigate and pursue a potential medical malpractice claim. Dep. of Brenda Foster, p.1-8 -1-10. They did call McGowan and a meeting was arranged for a few days later to discuss the potential case., Dep. of McGowan, p. 1-8, Ins. 14-17.

According to McGowan's notes from that meeting, two of Ms. Davis' sisters, three of Ms. Davis' nieces, and two sisters of Ms. Davis' boyfriend, Andrew Strong ("Strong") attended the initial consultation. During the meeting, at least one of Ms. Davis' relatives raised the issue of her having an adopted son, Willie Bell, and at least one of her sisters, Atlean Jordan, has testified that she was aware of Willie's adoption at the time of that meeting. Dep. of Jordan, p. 1-7. In fact, McGowan himself wrote down in both his Client Questionnaire and in his Memo to File the name "Willie Bell," referring to him as the "surviving son." Willie Bell was listed as Davis' son in her Obituary, her Death Certificate, and in Davis' medical records (all of which McGowan

had in order to bring the lawsuit for wrongful death). Despite all of these references to Bell's existence and status, McGowan made no attempt to contact Bell, even while knowing that he would be the one true heir to the Estate of Emma Davis if, in fact, Bell had been formally adopted.¹

The other name that arose during the initial consultation was "Andrew Strong," who McGowan referred to in his Questionnaire as being the "potential common (law) husband." Interestingly though, Strong was not listed as Ms. Davis' common law spouse in her Obituary. Strong was simply labeled a "companion," nor was he mentioned on her Death Certificate, referenced in the medical records as Ms. Davis' "friend." Strong was never adjudicated a common law spouse by the Probate or Family Court as required by the South Carolina Code Section 62-2-802 and referred to himself as "a friend" in his Deposition testimony. *See id.* Dep. of Strong, pg. 4-24. In the face of these facts, however, McGowan took it upon himself to declare Mr. Strong to be Ms. Davis' common law husband and agreed to represent him simultaneously with his representation of the Estate, despite entering into a formal fee agreement with only the Estate and not Strong and with the two clients' having conflicting interests in any potential settlement or award in the medical malpractice case.² McGowan had not even met the man.

Soon after the initial meeting, Tanisha Gilmore ("Gilmore"), another niece of Ms. Davis, contacted McGowan with regard to representation of the Estate of Emma Davis in claims for survival and wrongful death. McGowan entered into a formal retainer agreement for representation; the first sentence of which specifically states that his client was to be "the Estate of Emma Davis," which was signed by Ms. Gilmore. Retainer Agreement.³ Regardless, McGowan's litigation on behalf of Mr. Strong and the Estate had begun.

As to Admission No. 10: Emma M. Davis died intestate on February 11, 2010 from complications that occurred while undergoing a medical procedure at the Piedmont Medical Center to have a pace-maker implanted. At the time of her death, Davis was not married and had one adopted son, Willie Bell. (Death Certificate) and (Obituary). Shortly after her death, a relative received an anonymous call from a man who allegedly worked at the hospital, who stated that that "mistakes were made" by the doctors and that they should call Defendant McGowan to help investigate and pursue a potential medical malpractice claim. Dep. of Brenda Foster, p.1-8 -1-10. They did call McGowan and a

¹ In fact, McGowan would not ever mention the name "Willie Bell" again throughout the litigation until after the case had been settled, notably leaving his name off of all discovery responses and court filings. Willie's interview and/or deposition from either side of the case never took place.

² Despite the fact that Strong was not a proper heir to the Estate of Ms. Davis and that he had directly conflicting interests to those of the sole true heir of the Estate, McGowan took no measures to inform the Probate Court or his other client, the Estate, of the same. Rather, McGowan continued to litigate the lawsuit on Strong's behalf and against the interests of his other client, the Estate. McGowan would eventually file a complaint for wrongful death, survival, and loss of consortium asserting Strong was the surviving spouse of Ms. Davis, and only heir of the Estate, and petition the Court for settlement approval under the same guise.

³ Of particular note in the Petition to Appoint the P.R. is that there is no mention of either Mr. Strong or Willie Bell as other potential heirs to the Estate, which McGowan knew to be untrue at the time the appointment of Ms. Gilmore was approved.

meeting was arranged for a few days later to discuss the potential case. Dep. of McGowan, p. 1-8, Ins. 14-17.

According to McGowan's notes from that meeting, two of Ms. Davis' sisters, three of Ms. Davis' nieces, and two sisters of Ms. Davis' boyfriend, Andrew Strong ("Strong") attended the initial consultation. During the meeting, at least one of Ms. Davis' relatives raised the issue of her having an adopted son, Willie Bell, and at least one of her sisters, Alean Jordan, has testified that she was aware of Willie's adoption at the time of that meeting. Dep. of Jordan, p. 1-7. In fact, McGowan himself wrote down in both his Client Questionnaire and in his Memo to File the name "Willie Bell," referring to him as the "surviving son." Willie Bell was listed as Davis' son in her Obituary, her Death Certificate, and in Davis' medical records (all of which McGowan had in order to bring the lawsuit for wrongful death) Despite all of these references to Bell's existence and status, McGowan made no attempt to contact Bell, even while knowing that he would be the one true heir to the Estate of Emma Davis if, in fact, Bell had been formally adopted.⁴

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Soon after the initial meeting, Tanisha Gilmore ("Gilmore"), another niece of Ms. Davis, contacted McGowan with regard to representation of the Estate of Emma Davis in claims for survival and wrongful death. McGowan entered into a formal retainer agreement for representation; the first sentence of which specifically states that his client was to be "the Estate of Emma Davis," which was signed by Ms. Gilmore. Retainer

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⁵ Despite the fact that Strong was not a proper heir to the Estate of Ms. Davis and that he had directly conflicting interests to those of the sole true heir of the Estate, McGowan took no measures to inform the Probate Court or his other client, the Estate, of the same. Rather, McGowan continued to litigate the lawsuit on Strong's behalf and against the interests of his other client, the Estate. McGowan would eventually file a complaint for wrongful death, survival, and loss of consortium asserting Strong was the surviving spouse of Ms. Davis, and only heir of the Estate, and petition the Court for settlement approval under the same guise.

Agreement.⁶ Regardless, McGowan's litigation on behalf of Mr. Strong and the Estate had begun.

As to Admission No. 10: During the course of the litigation, McGowan allowed the Probate Court to discharge Gilmore as Personal Representative and to close the Estate of Emma Davis on February 21, 2011.

This is to certify that
the personal representative(s)
in the above estate
appear(s) to have completed the administration, and this
Court has closed this estate
by order dated FEB. 21, 2011

This was without taking the proper, required steps to make a determination as to the legitimate heirs of the Estate or to provide proper notice and/or publication to others with a potential interest in the Estate. Failing to take these steps, McGowan allowed the scheme to defraud the Probate Court to continue without the knowledge of Bell and/or the Estate. McGowan also arranged for private loans totaling \$15,000 to be made to Mr. Strong by McGowan's own father-in-law, Mr. Maloney. Mr. Maloney was to receive 100% interest on the loans at the conclusion of the malpractice case. These loans were secured and guaranteed against the expected proceeds of the claims against the hospital by McGowan's assurances that he would obtain a favorable outcome of the case. At this stage of the litigation, McGowan was now representing the competing interests of Strong, the Estate, and Mr. Maloney. *See Acknowledgement & Agreements.*

As to Admission No. 12: At least Atlean Jordan was aware that Bell had been formally adopted by Ms. Davis.

As to Admission No. 13: At least Atlean Jordan was aware that Bell had been formally adopted by Ms. Davis.

As to Admission No. 14: Ultimately, McGowan obtained a settlement for the wrongful death/loss of consortium case in the amount of Two Million Two Hundred Thousand Dollars (\$2,200,000.00). McGowan filed a Joint Petition for Approval of Settlement in the Court of Common Pleas in York County asserting that Gilmore "is the duly appointed personal representative" even though the Estate had been dismissed and Gilmore discharged. In the same Joint Petition, McGowan also asserted that Strong was the common law husband of Davis, even though Strong had not been adjudicated Ms. Davis' common law spouse. McGowan represented that Strong was the "sole heir and beneficiary of the Estate of Emma Davis," even though no determination of heirs had

⁶ Of particular note in the Petition to Appoint the P.R. is that there is no mention of either Mr. Strong or Willie Bell as other potential heirs to the Estate, which McGowan knew to be untrue at the time the appointment of Ms. Gilmore was approved. (Exhibit 11).

been made by the Probate Court. That determination had been made *solely* by McGowan. Order of Approval.

From the settlement funds of \$2.2 million dollars, McGowan distributed to Strong, the improper heir, the sum of Eight Hundred Thirty Three Thousand Three Hundred Twenty Seven Dollars and Ninety-Seven Cents (\$833,327.97); McGowan distributed to Gilmore Two Hundred Thousand Dollars (\$200,000.00), even though she had only been awarded a Twenty Five Thousand Dollar (\$25,000.00) fee by the Probate Court and was not an heir of the Estate; and the remainder of the settlement funds were retained by Defendants, Nine Hundred Twenty Thousand Dollars (\$920,000.00) in fees and One Hundred Six Thousand One Hundred Seventy Two Dollars and Three Cents (\$106,172.03) in reimbursed costs. Rather than ever being contacted by McGowan, Bell, the son and sole true heir to the settlement proceeds, learned of the settlement of his mother's claims from an article in the newspaper. Dep. of Bell, p. 2-15 - 2-16.

McGowan had conflicts with both Strong and the Estate. After learning of the scheme between McGowan, Gilmore, and Strong, Plaintiff Bell sought to be appointed as subsequent successor personal representative of his mother's Estate. Upon proper appointment by the Probate Court, Bell filed suit, both in his individual capacity and as successor personal representative, against McGowan in the Circuit Court for Richland County, alleging causes of action for legal malpractice, fraudulent and negligent misrepresentation, breach of contract with fraudulent intent, and violations of the South Carolina Unfair Trade Practices Act. Compl. and Amended Compl.

As to Admission No. 15: The checks and settlement documents shows such to be an asset of the Estate.

As to Admission No. 16: Ultimately, McGowan obtained a settlement for the wrongful death/loss of consortium case in the amount of Two Million Two Hundred Thousand Dollars (\$2,200,000.00). McGowan filed a Joint Petition for Approval of Settlement in the Court of Common Pleas in York County asserting that Gilmore "is the duly appointed personal representative" even though the Estate had been dismissed and Gilmore discharged. In the same Joint Petition, McGowan also asserted that Strong was the common law husband of Davis, even though Strong had not been adjudicated Ms. Davis' common law spouse. McGowan represented that Strong was the "sole heir and beneficiary of the Estate of Emma Davis," even though no determination of heirs had been made by the Probate Court. That determination had been made *solely* by McGowan. Order of Approval.

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As to Admission No. 17: It is the sole mechanism as no other method has been identified.

As to Admission No. 18: Code Section 62-2-802 had to be complied with. No other method has been cited.

As to Admission No. 19: Mr. Bell lived in the house in front of his mother, Ms. Davis, with his wife.

As to Admission No. 20: This should be amended to be admitted.

2. Please identify the "clients with directly conflicting interests" as set forth at page 1 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing, state the conflicts of interest between such clients, and cite to any Rule of Professional Conduct, case law, or other authority that you rely upon for your assertion that conflicts of interest existed.

ANSWER:

The clients with the directly conflicting interests would be Tanisha Gilmore, Andrew Strong, and the Estate of Emma Davis. As Prof. Freeman stated in his deposition at P. 28, lns 6-18, *inter alia*:

Once we figured out who the folks are and reckoned with Willie, for example, and now we have Mr. Strong with potential adverse relationship between them, in my estimation it would have been a smart thing to get independent counsel for one or the

other to represent their interests in connection with this matter. At a minimum, you needed conflict of interest waivers in writing involving Willie and the alleged common law husband.

Q. What Rule of Professional Conduct are you referring to when you speak to the conflict of interest waivers?

A. One point seven (1.7).

3. Please identify what "claims of the Estate were in conflict with the claims of Andrew Strong" as set forth at page 2 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing, and cite to any Rule of Professional Conduct, case law, or other authority that you rely upon for your assertion that the claims of the Estate of Emma Davis were in conflict with the claims of Andrew Strong.

ANSWER:

Plaintiff objects to this Interrogatory as it seeks information which is protected as attorney work product. Notwithstanding the foregoing objection, Plaintiff's answer is explained in the deposition testimony of John P. Freeman at P. 83 ln 11 - P. 84 ln 3, *inter alia*:

Q. You've mentioned the conflict between Andrew and Willie. Is there a conflict between Andrew and Tanisha?

A. I think that -- I think that there is a conflict between everybody who potentially may take and that that should be reckoned with and explained and dealt with properly. Here's why I say that. In personal injury litigation sometimes you run into the concept of a limited fund. There is a fixed fund. Getting the fund is step A, but now you are into pie slicing. And once that fund has been assembled, it's impossible to give Mr. Lewis -- and there's one pie -- a bigger piece of the pie that you are getting a slice of without taking away from the potential for you. And if it's you against him, I can't give him more without giving you less. That's the potential conflict that is right there to be seen.

4. Please state what monies were awarded to Andrew Strong in the Underlying Litigation that rightfully should have gone to Plaintiff Willie Bell as set forth at page 2 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing, and cite to any Rule of Professional Conduct, case law, or other authority that you rely upon for your assertion that the monies awarded to Andrew Strong should have gone to Plaintiff Willie Bell.

ANSWER:

McGowan after ignoring his obligation to find the true sole heir of the Estate and self-declaring Andrew Strong as the common-law husband of Emma Davis, McGowan illegally distributed the settlement funds to Tanisha Gilmore, Andrew Strong, McGowan's father-in-law, and other witnesses for McGowan. All of the monies awarded should have gone to Plaintiff Willie Bell, the son of Emma Davis.

5. Please state what portion of the proceeds from that settlement of the Underlying Litigation was Plaintiff Willie Bell entitled to receive as set forth at page 2 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing, and cite to any Rule of Professional Conduct, case law, or other authority that you rely upon for your assertion that Plaintiff Willie Bell was entitled to receive proceeds from the settlement.

ANSWER:

Plaintiff was entitled to all of the settlement funds which were improperly distributed to Tanisha Gilmore, Andrew Strong, McGowan's father-in-law, and other witnesses for McGowan. Plaintiff would have been entitled to \$1,289,327.97, which does not include the disgorgement of attorney fees sought in this action.

6. Please state what portion of the proceeds from the settlement of the Underlying Litigation was the Estate of Emma Davis entitled to receive as set forth at page 2 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack

of Standing, and cite to any Rule of Professional Conduct, case law, or other authority that you rely upon for your assertion that the Estate of Emma Davis was entitled to receive proceeds from the settlement.

ANSWER:

Plaintiff was entitled to all of the settlement funds which were improperly distributed to Tanisha Gilmore, Andrew Strong, McGowan's father-in-law, and other witnesses for McGowan. Plaintiff would have been entitled to \$1,289,327.97, which does not include the disgorgement of attorney fees sought in this action.

7. Please state how Chad McGowan constructed the lawsuit and settlement of the Underlying Litigation such that all of the proceeds from the settlement, other than the \$25,000 fee that was awarded to Tanisha Gilmore, would go to Chad McGowan and Andrew Strong as set forth at pages 2-3 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing, and cite to any Rule of Professional Conduct, case law, or other authority that you rely upon for your assertion that Chad McGowan constructed the lawsuit and settlement of the Underlying Litigation in such a manner that all of the proceeds from the settlement, other than the \$25,000 fee that was awarded to Tanisha Gilmore, would go to Chad McGowan and Andrew Strong.

ANSWER:

Mr. McGowan acting as a pseudo-Probate Judge declared on his own Andrew Strong as the common-law husband to ensure McGowan's father-in-law received repayment of his loans and McGowan's received its million-dollar fee. To further ensure this, McGowan ignored his obligations to the true sole heir, Plaintiff Willie Bell. McGowan gave all the money to the only two people his experts claim have a right to bring suit against him, thus buying off any potential litigation. McGowan failed in his obligation of reasonable diligence in his representation of the Estate, bypassed his obligation to explain Andrew Strong's inconclusive status as common-law husband and the conflicting interests, ignored his obligation to enter into a proper fee agreement with Andrew Strong, and made untruthful statements and representations throughout the course of the litigation, including in his Petition for Settlement Approval. (Violations of Rules 1.3, 1.4, 1.5(c), 1.7 and 4.1 of the Rules of Professional Conduct). He made no attempt to contact Willie Bell.

8. How was the settlement of the Underlying Litigation not in the best interest of the Estate of Emma Davis?

ANSWER:

The settlement amount was within the range of reasonableness, while the handling of the settlement funds was malpractice. All of the monies went to Andrew Strong and not to the true sole heir, Willie Bell.

9. Please state what "legal malpractice and misrepresentations complained of were all committed on the Estate by McGowan either through Ms. Gilmore or directly through the Court system" as set forth at page 6 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing, and cite to any Rule of Professional Conduct, case law, or other authority that you rely upon for your assertion that legal malpractice and misrepresentations were committed.

ANSWER:

Plaintiff objects to this Interrogatory as it seeks information which is protected as attorney work product. Notwithstanding the foregoing objection, Plaintiff's answer is best summed up by Professor Freeman in his deposition, *inter alia*, at P.55 ln 22 - P. 56 ln 10 and P.56 ln 21 - P. 57 ln 1:

A. Yes I think he had to reckon with Willie's interest and see that that was properly addressed. I think he had to reckon with the conflict between Willie and Mr. Strong and see that that was properly addressed. I think that he had to disburse properly under 1.15, and under the statute.

Q. Any other duties? You have given me the settlement, the conflict and the distribution.

A. Yes. He didn't conduct any investigation. I just, you know, incorporate by reference my prior testimony concerning what I consider to be his failure to properly handle the settlement of the matter.

A. Well, the overarching duty, the duty to protect Mr.

Bell's interest as a beneficiary of the Estate through the statute and see that he was treated fairly and got what he was fairly entitled to as a result of this personal injury action and wasn't taken advantage of by anybody.

10. What recovery was Tanisha Gilmore seeking for the Estate as set forth at page 7 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing?

ANSWER:

The claims specific to the Estate were for Wrongful Death and Survival.

11. How were the "claims of the Estate and Gilmore not aligned" as set forth at page 8 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing?

ANSWER:

The claims of the Estate should have been for Plaintiff Willie Bell. Instead, the claims were for Tanisha Gilmore, Andrew Strong, and Defendants. Ms. Gilmore and McGowan intentionally ignored the sole true heir to the Estate and illegally distributed more than one million dollars to wrongful recipients.

12. What personal claim was Andrew Strong pursuing outside of the Estate of Emma Davis' medical malpractice/wrongful death action as set forth at page 8 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing?

ANSWER:

Andrew Strong was seeking recovery to repay loans to McGowan's father-in-law as well as conspired with McGowan to be self-declared as the common-law husband of Emma Davis. Specifically, Andrew Strong wrongfully claimed Loss of Consortium as the alleged common law husband.

13. How was Andrew Strong reducing the amount of recovery available to the Estate of Emma Davis by pursuing his personal claim as set forth at page 8 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing?

ANSWER:

By not following the statutory requirement and conspiring with McGowan to self-declare himself as the common-law husband of Emma Davis, Andrew Strong was taking an improper piece of the pie, as described by Professor Freeman:

A. I think that -- I think that there is a conflict between everybody who potentially may take and that that should be reckoned with and explained and dealt with properly. Here's why I say that. In personal injury litigation sometimes you run into the concept of a limited fund. There is a fixed fund. Getting the fund is step A, but now you are into pie slicing. And once that fund has been assembled, it's impossible to give Mr. Lewis -- and there's one pie -- a bigger piece of the pie that you are getting a slice of without taking away from the potential for you. And if it's you against him, I can't give him more without giving you less. That's the potential conflict that is right there to be seen.

14. Why did "referral to separate counsel not cure McGowan's alleged original conflict in representing both the Estate and Strong" as set forth at page 8 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing?

ANSWER:

Referral to separate counsel after the original conflicting bad act had occurred in no way alleviates or cures the original conflicting bad act. The damage caused by the conflict had already occurred prior to referral to outside counsel.

15. What "evidence was available to McGowan when he filed Strong's case that gave no support to Strong's assertion that he was the common law husband of Emma Davis and only supported the fact that Bell, as Davis' son, was [sic] the true heir" as set

forth at page 8 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing?

ANSWER:

McGowan had in his possession during the course of the investigation of the Underlying Litigation Ms. Davis' death certificate, obituary, as well as medical records obtained by McGowan. Those records identified Willie Bell as the son and Emma Davis as single. He also had available to him Willie Bell and Andrew Strong. There is no evidence that he made any attempt to speak to either of them to determine their status with respect to their interests in the Estate of Emma Davis.

16. How was "Andrew Strong's interest opposed to the Estate" as set forth at pages 8-9 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing?

ANSWER:

The Estate had the obligation to bring a claim on behalf of the legal beneficiaries. Mr. Strong was not a legal beneficiary of the Estate. Any and all monies that went to Strong should have gone to the sole true beneficiary of the Estate, Willie Bell.

17. What "evidence was contrary to McGowan's representations to the Circuit Court that Strong was the common law husband of Emma Davis" as set forth at page 9 of your Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Standing?

ANSWER:

McGowan had in his possession during the course of the investigation of the Underlying Litigation Ms. Davis' death certificate, obituary, as well as medical records obtained by McGowan. Those records identified Willie Bell as the son and Emma Davis as single. He also had available to him Willie Bell and Andrew Strong. There is no evidence that he made any attempt to speak to either of them to determine their status with respect to their interests in the Estate of Emma Davis. McGowan never followed the statute to have Strong adjudicated as common law husband.

18. Please state the facts upon which you base your allegations that "McGowan, Hood & Felder and Chad McGowan participated in a scheme regarding the Underlying Litigation" as alleged in the Amended Complaint.

ANSWER:

McGowan made representations to the Court that the sole heir and beneficiary of the Estate was Andrew Strong, even though Mr. Strong had never been properly adjudicated as the common-law husband of Ms. Davis. Additionally, McGowan had documentation in his possession at the time these representations were made to the Court which refuted and contradicted Mr. Strong's relationship with Ms. Davis. Mr. McGowan ignored his obligation to ensure that the sole true heir of the Estate of Emma Davis received the settlement monies in an effort to ensure that his father-in-law received repayment of loans made to Andrew Strong and that McGowan would secure his million-dollar fee. McGowan never once contacted Willie Bell despite noting twice that he was the surviving son and possibly formally adopted.

19. How was the scheme that is alleged in your Amended Complaint supposed to have worked?

ANSWER:

The alleged scheme did work out as designed. Strong was disguised as the common law husband, and Willie Bell was never contacted or ever even identified as a potential witness. Strong, Maloney, McGowan and many of McGowan's witnesses in this matter split up the money.

20. Did any of the Judges or employees of the Probate Court of York County participates in this scheme?

ANSWER:

Plaintiff is not aware of any such participation.

21. If so, please state the name, home address, home phone number, business address, business phone number, cell phone number, personal email address, and business email address each such Judge or employee who participated in such scheme.

ANSWER:

Not applicable.

22. Please state the facts upon which you base your allegations that Chad McGowan knew, or should have known, that the Application for Appointment filed by Tanisha Gilmore with the Probate Court was false, and that Chad McGowan knew, or should have known that Plaintiff Willie Bell was the sole intestate heir and only true client of Chad McGowan as alleged in paragraph 16 of the Amended Complaint.

ANSWER:

McGowan had in his possession during the course of the investigation of the Underlying Litigation Ms. Davis' death certificate, obituary, as well as medical records obtained by McGowan. McGowan, acting as a pseudo-Probate Judge, declared on his own, without any additional investigation, Andrew Strong as the common-law husband of Emma Davis and ignored the existence of Willie Bell; a man he knew was possibly the adopted son of Emma Davis. McGowan twice noted that McGowan was possibly the surviving son of Emma Davis.

23. What interest in the Estate of Emma Davis did Andrew Strong claim as the supposed common law spouse of Emma Davis as alleged in paragraph 18 of the Amended Complaint.

ANSWER:

Andrew Strong wrongfully claimed, with McGowan's assistance, Loss of Consortium as the alleged common law husband of the Deceased.

24. How did Chad McGowan's representation of Andrew Strong conflict with the interests of the Estate of Emma Davis as alleged in paragraph 18 of the Amended Complaint.

ANSWER:

The Estate had the obligation to bring a claim on behalf of the legal beneficiaries. Mr. Strong was not a legal beneficiary of the Estate. As Prof. Freeman stated:

A. I think that -- I think that there is a conflict between everybody who potentially may take and that that should be reckoned with and explained and dealt with properly. Here's why I say that. In personal injury litigation sometimes you run into the concept of a limited fund. There is a fixed fund. Getting the fund is step A, but now you are into pie slicing. And once that fund has been assembled, it's impossible to give Mr. Lewis -- and there's one pie -- a bigger piece of the pie that you are getting a slice of without taking away from the potential for you. And if it's you against him, I can't give him more without giving you less. That's the potential conflict that is right there to be seen.

25. Who were Chad McGowan's "other clients" whose interests were adverse to Andrew Strong as alleged in paragraph 19 of the Amended Complaint.

ANSWER:

The clients with the directly conflicting interests would be Tanisha Gilmore, Andrew Strong, the Estate of Emma Davis, and Michael Maloney.

26. Who prepared, or assisted in the preparation, of the Application for Appointment filed by Tanisha Gilmore as alleged in the Amended Complaint.

ANSWER:

Plaintiffs are without sufficient knowledge or information to provide an answer to this Interrogatory. Plaintiffs do not know who prepared or assisted with the Application for Appointment.

27. Please state the facts upon which you base your allegations that "prior to resolving the underlying litigation, Defendants McGowan negligently and illegally allowed the Probate Court to discharge Ms. Gilmore as Personal Representative and to

close the Estate of Emma Davis on February 21, 2011, without taking the proper, required steps to make a determination as to the legitimate heirs of the Estate or to provide proper notice and/or publication to others with a potential interest in the Estate, thereby allowing the scheme to defraud the Probate Court to continue without the knowledge of Plaintiff Willie Bell and/or the Estate" as alleged in paragraph 25 of the Amended Complaint.

ANSWER:

It is clear from the Probate's Certificate of Discharge that the Estate was allowed to be closed on February 21, 2011. It is also clear from all of the documentation from the Underlying Litigation that McGowan continued to litigate the case on behalf of the Estate for another two years following the closure of the Estate. Further, it is clear that McGowan failed to check the records to be certain the Estate remained open and viable.

28. Please state the facts upon which you base your allegations that "Defendants McGowan negligently and illegally allowed the Estate to be closed without making certain that the correct heirs had been determined and that the interests of all the statutory beneficiaries were going to be protected going forward with the pending lawsuit yet continued to further the scheme by litigating the lawsuit in the name of the closed Estate and on behalf of Mr. Strong, a man not to be a proper heir" as alleged in paragraph 26 of the Amended Complaint.

ANSWER:

It is clear from the Probate's Certificate of Discharge that the Estate was allowed to be closed on February 21, 2011. It is also clear from all of the documentation from the Underlying Litigation that McGowan continued to litigate the case on behalf of the Estate for another two years following the closure of the Estate. McGowan had the obituary, death certificate, and medical records showing Bell as the son and Strong as nothing but a companion. McGowan never had Strong adjudicated as the common law husband and had no clear and convincing evidence to prove the same.

Further, it is clear that McGowan failed to check the records to be certain the Estate remained open and viable.

29. How did McGowan Hood & Felder, LLC and Chad McGowan place themselves in a position to have to protect the interest of Andrew Strong, the Estate of Emma Davis, and Michael Maloney as alleged in paragraph 29 of the Amended Complaint.

ANSWER:

McGowan assured Maloney that his loan to Strong would be a good deal, as the case was sure to settle. He did so to secure a loan to Strong from Maloney for \$15,500 with 100% interest. This was done against the interests of Strong and the Estate.

30. How was the distribution of the settlement proceeds in the Underlying Litigation against the interests of the Estate of Emma Davis as alleged in paragraph 31 of the Amended Complaint?

ANSWER:

Defendants violated Rule 1.15. Professor Freeman describes this in his deposition at P.66 lns 2-12 and P.5 ln 18 - P.8 ln 20:

Q. Well, the probate court had an independent duty to ensure the proper distribution, right?

A. Yes, but I don't see the probate court's job is to conduct an investigation to find all the heirs. The probate court's job is to see that there's based on the facts that are presented to it and it's Mr. -- to me I view Mr. McGowan as responsible for seeing that the facts concerning the proper allocation of settlement funds are assembled, analyzed and properly dealt with. It didn't happen.

A That I mentioned that I had never encountered a deponent before who explained that in preparation for his deposition he had said prayers, which

Willie testified to. And Mr. Lewis indicated that he had never had that happen either. There was a discussion about the -- my belief that there was a failure on the part of the McGowan Firm and Chad McGowan in discharging their obligations. Because in my mind their obligations included settling the case and in order to settle the case you have to reckon with people who may be entitled to inherit based on the statutory rights and also heirs-at-law and provide all that to the court in a verified petition. And so I have a fundamental problem with any view that Mr. McGowan was entitled to wear blinders or to have a narrow focus and believe that all he had to do was deal with the hospital and let everything else take care of itself. I don't believe that that's true. We talked about the evidence showing, of course, that Willie was adopted and the ease with which that could be determined. Which Mr. Lewis verified saying that they had sent just a request to determine whether or not there were papers on file and there certainly were, and that's in the record. The fact that the McGowan Firm was on inquiry notice from basically day one when the question came up about maybe son, and then the obituary, which nobody as far as I can tell has admitted preparing, which lists him as a son, the records in the McGowan firm file indicating that he's a son, the hospital records, the death certificate. And then the question of the -- Mr. -- with the husband, the

alleged husband's rights, and how even though factually disputable whether he was a common law husband, we have that determination gladly made by the McGowan Firm. And yet you've got a statute that was not complied with that is problematical because it wasn't complied with. So how does he take by intestate succession when he's not a common law husband, hasn't been approved as such. The issue came up about the payments to Mr. Strong and to the point where Mr. Lewis seemed to be chided at the deposition for not understanding the way law is being practiced today where evidently there is some right or entitlement to funnel money to your personal injury clients for living costs, which I always understood was prohibited, but seems to be,

according to Mr. McGowan, permissible as long as you do it through your father and tell the client it's a bad idea, but you can still get them the money so that the client can have living costs and your father can make money off of that, which is an issue.

You know, in my expressive view which I hold, that there is an overall breakdown of professional standards in McGowan's handling of this. That it was off to an auspicious start when you have an anonymous phone call come into the McGowan Firm from somebody tipping the McGowan Firm off about alleged malpractice at the hospital at the same time or contemporaneously you have an anonymous phone call going to the family relaying issues concerning the handling of this by the hospital and suggesting that the McGowan Firm might be involved. In my experience, I don't -- and I've been a lawyer for 45 years. I don't tend to get, in fact I can say I have never gotten anonymous phone calls tipping me off about the possibly couple million dollar case that could be brought. And I thought that was a little strange as I thought the paying of money to Mr. Strong was a little strange and the handling of that.

A to Z is to me messed up representation, glittering malpractice, wrongful conduct, unexplainable conduct, self-serving viewpoints. And I'm ready to answer any other questions you have.

31. What illegal, unethical and negligent act of McGowan, Hood & Felder, LLC and Chad McGowan were included in the scheme alleged in paragraph 31 of the Amended Complaint?

ANSWER:

See answer to immediately preceding Interrogatory.

32. Please state the facts upon which you base your allegations that Chad McGowan had a duty to disclose the material facts alleged in paragraph 52 of the Amended Complaint.

ANSWER:

McGowan owed a duty of reasonable diligence in representing his clients under Rule 1.3 of the Rules of Professional Conduct. He failed to be reasonably diligent. His failure to explain Strong's inconclusive status as the common law husband and the conflicting interests posed to the Estate was a violation of Rule 1.4. McGowan had no fee agreement for his representation of Strong in violation of Rule 1.5(c). He represented clients with conflicting interests in violation of Rule 1.7 and made untruthful representations in violation of Rule 4.1.

33. Please state the facts upon which you base your allegations that Chad McGowan negligently breached his duty to disclose material facts to the Estate of Emma Davis as alleged in paragraph 62 of the Amended Complaint.

ANSWER:

McGowan owed a duty of reasonable diligence in representing his clients under Rule 1.3 of the Rules of Professional Conduct. He failed to be reasonably diligent. His failure to explain Strong's inconclusive status as the common law husband and the conflicting interests posed to the Estate was a violation of Rule 1.4. McGowan had no fee agreement for his representation of Strong in violation of Rule 1.5(c). He represented clients with conflicting interests in violation of Rule 1.7 and made untruthful representations in violation of Rule 4.1.

35. Please state the facts upon which you base your allegations that McGowan Hood & Felder, LLC and Chad McGowan engaged in fraudulent acts as alleged in paragraph 81 of the Amended Complaint.

ANSWER:

McGowan had knowledge that Willie Bell was possibly the son and sole true heir of the Estate he represented. McGowan had knowledge that Strong had not been adjudicated the common law husband of Emma Davis and that no clear and convincing evidence existed to prove the same. Regardless, McGowan ignored Bell's existence and appointed Strong the common law husband status on his own.

He then prosecuted the entire Underlying Litigation for the sole purpose of collecting money for Strong, Maloney, McGowan, and many of the witnesses in this matter.

36. Please state the facts upon which you base your allegations that these acts created a conflict of interest between McGowan, Hood & Felder, LLC, Chad McGowan, and their clients, as McGowan, Hood & Felder, LLC and Chad McGowan placed themselves in a position to have to protect the interests of Andrew Strong, the Estate of Emma Davis, and Michael Maloney as alleged in paragraph 81 of the Amended Complaint.

ANSWER:

McGowan assured Maloney that his loan to Strong would be a good deal, as the case was sure to settle. He did so to secure a loan to Strong from Maloney for \$15,500 with 100% interest. This was done against the interests of Strong and the Estate. McGowan needed to make certain that he did not lose representation of both Strong and the Estate to be certain the loan and interest were paid off and of course that he got one million dollars.

37. Please state the facts upon which you base your allegations that these fraudulent practices were done with fraudulent intent and against the interests of the Estate of Emma Davis and in favor of Andrew Strong and Michael Maloney as alleged in paragraph 86 of the Amended Complaint.

ANSWER:

McGowan had knowledge that Willie Bell was possibly the son and sole true heir of the Estate he represented. McGowan had knowledge that Strong had not been adjudicated the common law husband of Emma Davis and that no clear and convincing evidence existed to prove the same. Regardless, McGowan ignored Bell's existence and anointed Strong the common law husband status on his own. He then prosecuted the entire Underlying Litigation for the sole purpose of collecting money for Strong, Maloney, McGowan, and many of the witnesses in this matter.

38. Please state the amounts of the damages suffered as alleged in paragraphs 58, 69, and 88 of the Amended Complaint.

ANSWER:

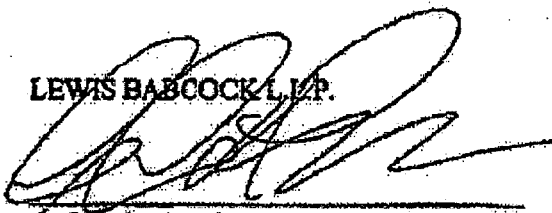
\$2,021,827.97.

39. Please state the facts upon which you base your allegations that the actions of McGowan, Hood & Felder, LLC and Chad McGowan have been willful, wanton, reckless, and performed with a conscious indifference to the rights of the Plaintiff Willie Bell and the Estate as alleged in paragraphs 58, 69, and 77 of the Amended Complaint.

ANSWER:

McGowan had knowledge that Willie Bell was possibly the son and sole true heir of the Estate he represented. McGowan had knowledge that Strong had not been adjudicated the common law husband of Emma Davis and that no clear and convincing evidence existed to prove the same. Regardless, McGowan ignored Bell's existence and anointed Strong the common law husband status on his own. He then prosecuted the entire Underlying Litigation for the sole purpose of collecting money for Strong, Maloney, McGowan, and many of the witnesses in this matter. McGowan's efforts were to ensure he was able to collect his fee in the Underlying Litigation.

LEWIS BABCOCK LLP.



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Columbia, South Carolina
July __, 2016.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
Case No.: 2015-CP-46-01827

Willie Bell, individually and on behalf
of the Estate of Emma M. Davis as its
duly appointed Personal Representative,

Plaintiff,

vs.

McGowan, Hood, and Felder, LLC and
Chad McGowan,

Defendants.

CERTIFICATE OF SERVICE

I, Kathy A. Collins, employee at the law firm of Lewis Babcock L.L.P., do hereby
certify that I served a copy of the foregoing Plaintiff's Answer to Defendant
McGowan, Hood, and Felder, LLC's First Set of General Interrogatories to Plaintiff
Willie Bell, Successor Personal Representative for Estate of Emma Davis by hand
delivery to the following counsel for Defendants:

Lovic A. Brooks, III
Steven G. Janik
JANIK, L.L.P.
1122 Lady Street, Suite 1025
Columbia, SC 29201


Kathy A. Collins

Columbia, South Carolina
July 1, 2016.

MOTION IN LIMINE
EXHIBIT #3

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
)
 COUNTY OF YORK) C/A NO.: 15-CP-46-1827

Willie Bell, Individually and on)
 Behalf of the Estate of Emma M. Davis)
 as its Duly Appointed Personal)
 Representative,)

DEPOSITION OF

Plaintiff,)

JOHN P. FREEMAN

vs.)

October 2, 2015

McGowan, Hood, Felder, LLC and)
 Chad McGowan,)

Defendants.)

COPY

Deposition on oral examination of JOHN P. FREEMAN,
 reported by Diane Grubowski, Court Reporter and Notary Public
 in and for the State of South Carolina; Said deposition taken
 pursuant to Notice and in accordance with the South Carolina
 Rules of Civil Procedure, at the Law Offices of Lewis,
 Babcock and Griffin, 1513 Hampton Street, Columbia, South
 Carolina, on Wednesday, the 2nd day of October, 2015,
 scheduled for 10:00 a.m. and commencing at the hour of 10:01
 a.m.

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EXHIBIT
 3

Page 6

1 in my mind their obligations included settling the
2 case and in order to settle the case you have to
3 reckon with people who may be entitled to inherit
4 based on the statutory rights and also heirs-at-law
5 and provide all that to the court in a verified
6 petition. And so I have a fundamental problem with
7 any view that Mr. McGowan was entitled to wear
8 blinders or to have a narrow focus and believe that
9 all he had to do was deal with the hospital and let
10 everything else take care of itself. I don't
11 believe that that's true. We talked about the
12 evidence showing, of course, that Willie was
13 adopted and the ease with which that could be
14 determined. Which Mr. Lewis verified saying that
15 they had sent just a request to determine whether
16 or not there were papers on file and there
17 certainly were, and that's in the record. The fact
18 that the McGowan Firm was on inquiry notice from
19 basically day one when the question came up about
20 maybe son, and then the obituary, which nobody as
21 far as I can tell has admitted preparing, which
22 lists him as a son, the records in the McGowan firm
23 file indicating that he's a son, the hospital
24 records, the death certificate. And then the
25 question of the -- Mr. -- with the husband, the

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1 properly addressed. I think that he had to
2 disburse properly under 1.15, and under the
3 statute.

4 Q Any other duties? You have given me the
5 settlement, the conflict and the distribution.

6 A Yes. He didn't conduct any investigation. I just,
7 you know, incorporate by reference my prior
8 testimony concerning what I consider to be his
9 failure to properly handle the settlement of the
10 matter.

11 Q No, I understand that. I'm just trying to make
12 sure and perhaps I'm -- and what I'm trying to do
13 is not blend the two. You said there were certain
14 duties that ran to Bell even though he didn't hire
15 McGowan and he didn't have a retainer agreement.
16 And you've identified identification of the heirs,
17 the conflict of interest issue and the
18 distribution, that there were duties to resolve
19 those issues. Any other issues, any other duties
20 that fall within that component of your --

21 A Well, the overarching duty, the duty to protect Mr.
22 Bell's interest as a beneficiary of the Estate
23 through the statute and see that he was treated
24 fairly and got what he was fairly entitled to as a
25 result of this personal injury action and wasn't

1 taken advantage of by anybody.

2 Q What statute are you referring to, the wrongful
3 death statute?

4 A Yes.

5 Q You used the term "notice inquiry", is that a
6 particular term of art?

7 A Sure. Well, we see that a lot within the law.

8 Q What did you mean by that?

9 A When you have facts that put you on notice that
10 there is an issue there. Once you're on notice of
11 it, you're expected to investigate. For instance,
12 if you had notice that -- what our court would say
13 is that if you have notice that somebody has
14 committed legal malpractice as to you, you have
15 notice -- you maybe don't know all the facts, but
16 you have notice that there is a problem there, that
17 could be held to be sufficient notice to start the
18 statute of limitations running, called inquiry
19 notice, i.e. a reasonable person would have taken
20 what was known and then pursued it. And I say he
21 was on inquiry notice about Willie when he knew
22 that Willie maybe was a son, maybe was adopted. He
23 knows that -- he knows that there is an issue out
24 there. So now, Mr. Lawyer, that's a legal issue.
25 What's the answer, yes or no? Well, I don't know,

1 A Because he did not -- he did not knowingly
2 relinquish his rights against McGowan and Hood.
3 What he did is he took -- he mitigated his damages
4 by getting everything that he could from Strong and
5 Tanisha and then turned his attention to McGowan
6 and Hood, which I think he had a right to do.

7 MR. JANIK: Let's go off the record a
8 second.

9 (MOMENTARILY OFF THE RECORD)

10 Q There is a letter, I don't have it here and I
11 apologize, from one of the defense lawyers in the
12 underlying case to John Alphin, who was
13 representing Mr. Bell at that time, saying do you
14 want us to keep making the payments in the
15 settlement. And those payments were made. Does
16 the fact those payments were made indicate the
17 settlement was ratified and, therefore, a source of
18 the funds that were used to pay Willie?

19 A Let me put it this way. So far as I'm aware,
20 neither Mr. Bell nor his lawyers dispute or contest
21 that the \$2.2 million paid by the defendants was
22 appropriate. As far as I know, there is no
23 challenge to that by Mr. Lewis or by Willie. It's
24 the allocation of the funds and the behavior of the
25 McGowan Firm that is the focus. So you know if a

1 defendant -- one of the defendants came in and if
2 he was challenging them, you know -- let me just
3 say he is not challenging the settlement with the
4 defendants.

5 Q To quote Mr. Lewis, no one is bitching about the
6 results, only who got the money.

7 A Well, that's what he told me not using exactly
8 those words, but.

9 Q I think that's pretty close to a quote.

10 A Probably is.

11 MR. LEWIS: Probably is.

12 Q Okay. You agree with that?

13 A Yes, that's the way I understand it.

14 Q Okay. So the issue in this case is who got the
15 money?

16 A It is the handling of the money, yes, sir.

17 MR. JANIK: Let's go off the record.

18 (MOMENTARILY OFF THE RECORD)

19 Q The issue notes that we've marked as Exhibit Fifty-
20 Four, you prepared these yourself?

21 A Yes, sir.

22 Q Has anyone assisted you at all on this file in any
23 of the work you have done or the opinions you've
24 reached?

25 A Only by getting me stuff, not by -- not otherwise.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

WILLIE BELL, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF
EMMA M. DAVIS AS ITS DULY
APPOINTED REPRESENTATIVE,

Plaintiff,

vs.

McGOWAN, HOOD & FELDER, LLC
AND CHAD McGOWAN,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No: 2015-CP-46-1827

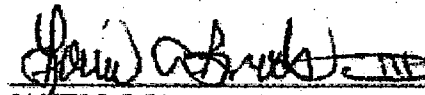
**DEFENDANTS MCGOWAN, HOOD &
FELDER, LLC AND CHAD MCGOWAN,
ESO.'S MOTION IN LIMINE TO
EXCLUDE THE TESTIMONY OF JOHN
FREEMAN**

Defendants McGowan, Hood & Felder, LLC and Chad McGowan (collectively "McGowan") respectfully move the Court, pursuant to Rule 702 of the South Carolina Rules of Evidence, to exclude the expert testimony of John Freeman, named by Plaintiff as an expert witness. This Court should exclude Freeman's testimony on the ground that it will not assist the trier of fact as required under Rule 702, SCRE, because he does not have the requisite experience and knowledge to opine as to the standard of care applicable in the context of medical malpractice and probate matters.

Defendants' counsel certifies pursuant to Rule 11, SCRCF, that consultation with Plaintiff's counsel would serve no useful purpose.

The detailed grounds for this motion are set forth in the concurrently filed Memorandum in Support.

Respectfully submitted,



JANIK L.L.P.

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Columbia, South Carolina
July 15, 2016

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Willie Bell, Individually and on Behalf of
the Estate of Emma M. Davis as its Duly
Appointed Personal Representative,

Plaintiff,

vs.

McGowan, Hood, & Felder, LLC, and
Chad McGowan,

Defendants.

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT

C/A No. 2015-CP-46-01827

**MEMORANDUM IN SUPPORT OF
MOTION *IN LIMINE* OF MCGOWAN,
HOOD, & FELDER, LLC, AND CHAD
MCGOWAN TO EXCLUDE THE
TESTIMONY OF JOHN FREEMAN**

I. INTRODUCTION

The testimony of John Freeman should be excluded because Freeman has not confined his testimony to his limited area of expertise – legal ethics – such that his testimony will not assist the trier of fact. Plaintiff has designated Freeman as an expert expected to testify at trial. In Plaintiff's Answers to McGowan's First Set of General Interrogatories to Plaintiff, Individually, Plaintiff answered interrogatory number 2 as follows:

[Interrogatory No.] 2. Please identify each person you expect to call as an expert witness at trial, state the subject matter on which each expert is expected to testify, state the substance of the facts and opinions to which each expert is expected to testify, and set forth a summary of the grounds for each opinion.

ANSWER: Plaintiff refers Defendants to the Affidavit of John Freeman.

In Freeman's affidavit¹, Freeman lists himself as an expert in the broad field of legal malpractice. (Exhibit A, ¶15). Many of Freeman's conclusions assert mismanagement of litigation and assignment of duty in the context of the medical malpractice and probate actions. These

¹ A copy of the Affidavit of John P. Freeman referenced in this memorandum is submitted as Exhibit A.

conclusions require a close review and interpretation of the probate code, wrongful death statutes, and survivorship statutes, which Freeman does not have the expertise to do. Freeman's affidavit provides experience and knowledge in field of ethics, but does not extend to medical malpractice or probate. Indeed, Freeman has no purported expertise in the field of probate, wrongful death, or survivorship in his affidavit. *See Exhibit A.*

In deposition, Freeman could not provide education, experience, or training in these areas of law other than assertions lacking detail that he has testified in legal malpractice cases involving probate and assisted in some cases involving probate and medical malpractice. (Deposition of John Freeman 21:19-25:23)². Freeman explained that his only experience as counsel in probate matters was litigation requiring approval by probate, not any actual probate matters. (Deposition of John Freeman 21:12-17). As for medical malpractice, he could only distinctly recall assisting on one matter. (Deposition of John Freeman 25:1-6). When asked to explain the details on this medical malpractice matter, he stated "[t]he lawyer was under attack by the other side concerning a tape recording that had been made by the clients", which is clearly not an issue of medical malpractice. (Deposition of John Freeman 25:8-10). Thus, the matters involved herein regarding medical malpractice and probate extend beyond Freeman's scope of expertise.

II. ARGUMENT

The trial court serves as a gatekeeper to determine whether an expert is qualified to testify, whether expert opinions are reliable, and whether the testimony is ultimately admissible. *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010); *Jamison v. Morris*, 385 S.C.

² A copy of those pages from Freeman's deposition referenced in this memorandum is submitted as Exhibit B.

215, 228, 684 S.E.2d 168, 175 (2009). The admissibility of expert testimony is governed by Rule 702 of the South Carolina Rules of Evidence, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. "The party offering the expert has the burden of showing his witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony." *State v. Robinson*, 396 S.C. 577, 586, 722 S.E.2d 820, 825 (Cl. App. 2012), *aff'd as modified*, 410 S.C. 519, 765 S.E.2d 564 (2014)(quoting *State v. Schumpert*, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993)). Thus, Plaintiff's had the burden to prove that Freeman's testimony is admissible. Expert testimony is not admissible unless it is deemed necessary, qualified, and reliable. *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). The requirement of reliability is the central feature of the Court's inquiry. *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

Freeman identifies himself as an expert in all of legal malpractice, which extends the scope of his testimony beyond his actual qualifications under Rule 702, SCRE. Indeed, this area of expertise is so broad that it is devoid of any meaning. Trial courts should be cautious in conferring an expert label upon a witness because juries may accord excessive or undue weight to "expert" testimony. *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169, Prod. Liab. Rep. (CCH) P 18485 (2010). McGowan does not challenge the fact that Freeman has ample knowledge and experience to be an expert in legal ethics, but this does not extend to expertise in all of legal malpractice.

Plaintiff is relying on Freeman to meet the requirement in a legal malpractice claim to "establish both the standard of care and the deviation by the defendant from such standard." *Gilliland v. Elmwood Props.*, 301 S.C. 295, 301, 391 S.E.2d 577, 580 (1990). The mere fact that an expert is licensed to practice law does not qualify that individual to be an expert in a legal malpractice claim. See *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 637, 760 S.E.2d 399, 408 (2014), reh'g denied (Aug. 5, 2014).

III. CONCLUSION

For the foregoing reasons, McGowan respectfully move this Court to exclude the testimony of John Freeman.

Respectfully submitted,



JANIK L.L.P.
LOVIC A. BROOKS, III (S.C. Bar #: 913)
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Email: Steven.Janik@Janiklaw.com
Email: Crystal.Maluchnik@Janiklaw.com

Columbia, South Carolina
July 15, 2016

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Willie Bell, individually and on behalf of
the Estate of Emma M. Davis as its duly
appointed Personal Representative,

Plaintiff,

v.

McGowan, Hood, and Felder, LLC and
Chad McGowan,

Defendants

IN THE COURT OF COMMON PLEAS

Case No. CP-40 - 5570

AFFIDAVIT OF JOHN P. FREEMAN

Personally appeared before me John Freeman who first being duly sworn, deposes and states as follows:

1. The information contained herein is true and correct to the best of my knowledge, information, and belief. This affidavit relates to above-captioned lawsuit asserting claims for legal malpractice, among others. It will be filed by Plaintiffs against attorney Chad McGowan and his firm ("McGowan").

2. I am competent to render this affidavit. Following my graduation from the University of Notre Dame Law School in 1970, I worked at the Jones Day law firm (then known as Jones, Day, Cockley and Reavis). I left Jones Day in 1972 to take a Fellowship at the University of Pennsylvania Law School's Center for Study of Financial Institutions. I subsequently received my LL.M. from Penn Law School. In 1973 I joined the faculty of the University of South Carolina Law School. Besides teaching at USC, I have taught at the University of Texas Law School and Loyola Law School in Chicago. I have also worked for the



Securities and Exchange Commission as a special counsel. As a law school professor I specialized in business courses and legal ethics. I am familiar with lawyer disciplinary proceedings, having participated in the litigation of discipline cases as a defense lawyer, consultant to disciplinary counsel, and as an expert witness on various occasions. I have served as a member of the South Carolina Bar's Ethics Advisory Committee and have written various ethics opinions published by the Bar. Prior to my retirement from USC Law School in 2008, I taught legal ethics for 35 years at USC Law School. I have also taught legal ethics at numerous CLE programs, and at several JCLE programs. I have served as a litigation consultant, or as a testifying expert in numerous legal malpractice cases. I have lectured on the standards applicable to legal malpractice many times, and have written about the topic. I have participated in disputes as to the behavior of lawyers in handling litigation and fiduciary matters many times, and have testified as an expert in such cases many times. I have served as an expert witness many times on questions involving lawyers' obligation to investigate relevant facts and to convey accurate, complete information, and the duty to avoid or handle properly conflicts of interest. My curriculum vitae is attached as Exhibit 1, which further establishes my qualifications.

3. This affidavit is presented under S.C. Code § 15-36-100 which requires, in a complaint against a lawyer, for the plaintiff to file "an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit."

4. In evaluating the behavior of McGowan for purposes of this affidavit, I have reviewed relevant documents including the proposed complaint and the exhibits thereto. I have also consulted with Plaintiffs' legal counsel about the underlying facts. I have reviewed the

professional conduct in issue in light of the standard of care applicable to South Carolina lawyers, namely the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession in this State. See *Holy Loch Disnibs.*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000). For purposes of this affidavit, I deem the actions and inactions of Mr. McGowan imputable to his law firm based on agency principles because it appears Mr. McGowan was acting for and on behalf of his law firm, in the scope of his employment and authority, at the time of the actions and inactions in question. For purposes of this affidavit, I accept as true the facts stated in the "General Allegations" section of the complaint and stated in the attachments thereto.

5. Based on the facts presented, it is my opinion as an expert in the legal malpractice field that McGowan engaged in one or more negligent acts and omissions in dealing with and on behalf of Plaintiffs, including the following:

a. Failure to investigate, understand, and make appropriate disclosure of all material facts concerning Plaintiff Willie Bell's status as Emma M. Davis's son and heir and as someone who would be reliant on and affected by McGowan's professional efforts.

b. Failure to properly protect the interests of Plaintiff Bell and the Estate of Emma M. Davis.

c. Failure to exercise due care and undivided loyalty in handling material legal and financial matters affecting the Plaintiffs, including the failure to investigate facts and the failure to use of competent professional efforts to assure that transactions involving Plaintiffs were proper and were properly authorized.

d. Failure to insure that the Estate of Emma M. Davis had a Personal Representative

who was not conflicted but rather was willing and interested in competently, diligently and loyally discharging the obligations owed.

e. Mismanaging litigation involving or affecting Plaintiffs, including by misleading a Circuit Court judge as to material facts affecting the case.

f. Failure properly to recognize and handle conflicts of interest between Plaintiffs and other purported claimant to Estate proceeds.

g. Failing to identify and protect the interest of Willie Bell as a legitimate heir of the Estate, while also failing to protect the Estate from the actions of a disloyal and incompetent Personal Representative. Instead of preventing or countering the improper actions of Tanisha Gilmore as Personal Representative, McGowan aided and abetted those actions, including Gilmore's breaches of fiduciary duty.

h. Allowing Mr. McGowan's interest in making a large fee to override the obligation to discharge the duties of care and loyalty that were owed under the circumstances.

6. I hold these opinions because there is evidence that McGowan negligently, recklessly or knowingly participated and effectuated a scheme involving conflicts of interest, deception, over-reaching, and foreseeable strife, leaving Plaintiffs exploited and abused. Additionally, as indicated above, I believe Mr. McGowan's law firm is accountable for his wrongful acts and inactions based on the Mr. McGowan's status as an agent.

7. In my opinion, it was McGowan's job to conduct a searching investigation of the true facts, to avoid conflicts of interest, to make fair and honest disclosures, to originate and promote timely, accurate communications to affected parties, and to see to it that Plaintiffs were

treated fairly, and protected from unfairness and financial harm. Because of McGowan's breaches of duty, it appears Plaintiffs were abused and damaged.

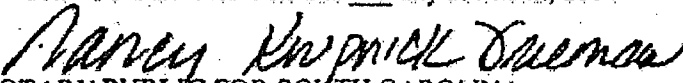
8. In my opinion, the McGowan's mishandling of the legal affairs affecting Plaintiffs fell below the standard of care, skill, diligence and loyalty expected of lawyers in South Carolina. It appears to me that this deficient conduct proximately caused injury to Plaintiffs and constitutes legal malpractice. I hold these opinions to a reasonable degree of professional certainty as an expert in the field of legal malpractice.

9. I reserve the right to amend or supplement my opinions as additional information becomes available.

10. Further affiant sayeth not.


JOHN P. FREEMAN

SWORN TO BEFORE ME this 21st day of March, 2014


NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission expires: 7/7/2018

EXHIBIT 1

RESUME
John P. Freeman
Professor of Law Emeritus

Address and phone numbers:

~~REDACTED ADDRESS~~
Columbia, South Carolina 29205
803-254-4667 (phone)
753-9870 (fax)

Education history:

LL.M., 1976, University of Pennsylvania Law School; J.D., 1970, University of Notre Dame Law School; B.B.A., 1967, University of Notre Dame (Accounting).

Employment history:

1970-72, Attorney, Jones, Day Law Firm, Cleveland, Ohio

1972-73, Fellow, University of Pennsylvania Law School Center for the Study of Financial Institutions

1973-75, Assistant Professor of Law, University of South Carolina

1974 and 1975 (Summers), Special Counsel, Division of Investment Management, SEC, Washington, D.C.

1975-78, Associate Professor of Law, University of South Carolina; Visiting Associate Professor of Law at Loyola Law School (Chicago) Spring 1977

1978-2008, Professor of Law, University of South Carolina; Visiting Professor of Law at University of Texas Law School, summer 1978

Present:

Distinguished Professor Emeritus and John T. Campbell Chair in Business and Professional Ethics Emeritus

Honors and Awards:

Undergraduate: Member Beta Alpha Psi (Honorary Accounting Fraternity)
Law School: Executive Editor, Notre Dame Lawyer;
Distinguished Military Graduate

Professional:

At University of South Carolina Law School: Senior Class Annual Outstanding Faculty Award of 1975, 1976, 1977, 1984

Winston Churchill Award, South Carolina Jury Trial Foundation 1995; Distinguished Service Award, South Carolina Trial Lawyers Association 2000; Appointed Member, South Carolina Judicial Merit Selection Commission (presently serving)
John Belton O'Neill Inn of Court McDonald/Rhodes Award 2010

Admitted to Practice:

Ohio; South Carolina

**Teaching History
Courses Taught:**

Professional Responsibility, Legal Accounting, Business Associations, Corporations, Agency-Partnership, Securities Regulation, Corporate Finance, Business Planning, Legal Research and Writing, Business Crime, Legal Malpractice
Component of Advanced Legal Profession Seminar

Scholarly and Professional Publications

Author, 1999-2008, Regular Legal Ethics Column for South Carolina Lawyer.

Article, Protecting Judicial Independence, 6 Charleston L. Rev. 511 (2012).

Article, Appearance of Impropriety, Recusal, and the *Segars-Andrews* Case, 62 S.C.L. Rev. 485 (2011).

Article (with Stewart Brown and Steve Pomerantz), Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test, 61 Okla. L. Rev. 83 (2008).

Article, The Mutual Fund Distribution Fee Mess, 32 J. Corporation Law 739 (2007).

Viewpoint, Say No to Vending Machine Justice, S.C. Lawyer, July 2007, at 8.

Article, It's the Conflict of Interest, Stupid, Money Mgm't Exec., May 17, 2004, at 14.

Chapter on Legal Opinion Liability in Legal Opinion Letters A Comprehensive Guide to Opinion Letter Practice (M. John Sterba, Jr., ed. 2003) (plus annual updates).

Chapter in South Carolina Damages Treatise on Damages in Securities Cases (2004).

Article, The Ethics of Using Judges to Conceal Wrongdoing, 55 S.C.L. Rev. 829 (2004).

Article (with Stewart Brown), Mutual Fund Advisory Fees: The Cost of Conflicts of Interest, 26 J. Corporation Law 610 (2001).

Article, Liens, Fees and Taxes, South Carolina Trial Lawyer, Summer 2000, at 26.

Article, A Business Lawyer Looks at the Internet, 49 S.C.L. Rev. 903 (1998).

Article, Payments to Medical Care Providers: What Are the Lawyer's Obligations? South Carolina Lawyer, September-October 1994, at 39.

Article, Current Developments in Lawyer Liability: Coping with the Fraudulent Client, Delaware Lawyer, Winter 1993, at 27.

Article, Treble Damage Statutes Can Increase Trust Recoveries, 4 Probate Practice Reporter, June 1992, at 1.

Article (with Nathan Crystal), Scienter in Professional Liability Cases, 42 S.C.L. Rev. 783 (1991).

Article, How Computerized Databases Are Redefining Due Diligence, Carolina Lawyer (July-August 1991).

Article, When Are Lawyers' Gifts to Judges Improper? Carolina Lawyer (November-December 1990).

Article, Current Developments in Legal Opinion Liability, 1989 Col. J. Bus. L. 235.

Article, Understanding the Joint Client Exception to the Attorney-Client Privilege, Carolina Lawyer (July-August 1989).

Article, A RICO Primer, 1985 Small Business Counselor No. 4.

Article, The Use of Mutual Fund Assets to Pay Marketing Costs, 9 Loy. Chi. L.J. 553 (1978).

Article, Marketing Mutual Funds and Individual Life Insurance, 28 S.C.L. Rev. 1 124 (1976), reprinted in Nat'l Ins. L. Rev. Serv. (1977).

Article, Opinion Letters and Professionalism, 1973 Duke L.J. 371 439, reprinted in Securities Law Review 1974 (E. Folk, III, ed.).

Co-author, Multi student Survey, The Mutual Fund Industry: A Legal Survey, 44 Notre Dame Lawyer 732 983 (1969).

Case Comment, Escott v. BarChris Constr. Corp., 44 Notre Dame Lawyer, 122 40 (1968).

Other Scholarly Activities

Speeches (with accompanying outlines) presented at numerous CLE courses sponsored by various entities including the South Carolina Bar, University of South Carolina Law School and the South Carolina Supreme Court.

CLE Presentations 2004-14: 2004-14: Charleston Bar Ass'n, 20 Ethics Tips for a Happier Professional Life, Feb. 7, 2014; Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar March 22, 2013; SC Bar, Ethical Issues in Working with Vets and Their Families, Feb. 12, 2012; Expert Witness Participant, SC Bar-ABOTA, Masters in Trial Program, Feb. 1, 2013; SC Bar, Ethical Issues in Handling VA Appeals, Jan. 12, 2013; SC Bar, Ethical Issues in a Non-Adversarial System, Dec. 11, 2012; Richland County Bar Ass'n Ethics CLE, Nov. 9, 2012; University of South Carolina Law School, Alumni Reunion Ethics CLE, Nov. 3, 2012; General Assembly Legal Staff, Ethics for Government Lawyers, Oct. 3, 2012; Setzler Scott Law Firm (In-house CLE), West Columbia, SC, Ethics CLE, Feb. 14, 2012; Charleston Law School, Panel, Symposium on Lawyer and Judicial Fitness, Feb. 10, 2012; Charleston County Bar Ass'n, Ethics CLE, Feb. 3, 2012; SC Bar, Panel on Lawyer Confidentiality, Jan. 19, 2012; Nov. 15, 2011, SC Workers Comp. Comm., Legal Ethics; Richardson Patrick-Sponsored CLE, Charleston, SC, April 29, 2011; National Ass'n State Securities Administrators, Ethics in Securities Litigation, Charleston, Jan. 24, 2011; Richland County Legal Ethics Update, Nov. 5, 2010; S.C. Law Review Symposium, Judicial Recusal, Oct. 21, 2010; League of Women Voters, Lecture on Judicial Selection, Oct. 8, 2010, Charleston, S.C.; KershawHealth Board of Directors, Advice on Your Duties as Board Members, July 15, 2010, Camden, SC; American Ass'n of Matrimonial Lawyers, Ethics in Marital Cases, March 19, 2010 (Aruba), John Belton O'Neill Inn of Court, Ethics Lessons Taught by Lawyers, Nov. 17, 2009; South Carolina Defense Trial Lawyer's Ass'n, Judicial Selection in South Carolina, Nov. 7, 2009; Richland County Bar Ass'n, Legal Ethics, Nov. 6, 2009; South Carolina Legislature Employees, Legal Ethics Update, Oct. 21, 2009; Budget & Control Board, Ethics Lecture to SC State Employees, Oct. 2, 2009; South Carolina Bar, Family Law Ethics Update, Sept. 18, 2009; Motley Rice Law Firm, Legal Ethics Update, Sept. 11, 2009; South Carolina Judicial Selection Commission, Judicial Ethics, July 31, 2009; John

Belton O'Neill Inn of Court, Ethics of Advertising Firms, Jan. 20, 2009; S.C. Bar, Ethics Presentation "Business Lawyer Horror Stories, Nov. 21, 2008; Participant, Mutual Fund Industry Regulation Roundtable, Chicago-Kent Law School, Nov. 7, 2008; SC Legislature, Ethical Duties of Legislative Employees, Oct. 2, 2008; SC Bar, Dealing with Ethical Duties When Dealing with Pro Se Parties, Oct. 10, 2008; Richardson Patrick Local Counsel CLE, Litigation Ethics, May 2, 2008 (Charleston, SC); Inst. of Public Utilities, 39th Ann. Reg. Policy Conf., Panel on Equity and Responsibility in the Public Utilities Sector (Charleston, SC), Dec. 3, 2007; S.C. Attorney General's Office; Litigation Ethics, Nov. 9, 2007; Richland County Bar, Ethics Update, Nov. 2, 2007; SC Bar, Litigation Ethics, Oct. 26, 2007; S.C. Children's Law Center, Ethical Problems in the Child Abuse Area, Oct. 19, 2007; National Ass'n of Medicaid Fraud Control Units, Ethics and the Government Lawyer (Savannah, Ga.), Oct. 1, 2007; SCACPA Litigation Conf., Litigation Ethics (Kiawah Island, SC), Sept. 21, 2007; S.C. Circuit Court Judges, May 17, 2007, Practice Tips in Civil Litigation; Energy & Mineral Law Foundation, May 15, 2007, Panel Member, Legal Ethics, 2 hr.; S.C. Government Investigators, Ethical Duties of Investigators, Feb. 23, 2007; S.C. Bar, Employment Law Section, Ethics Update, Jan. 26, 2007; S.C. Association of Counties, Ethics Update, Dec. 8, 2006; Lexington County Bar Ass'n, Ethics Update, Dec. 6, 2006; Richland County Bar, Ethics Update, Nov. 3, 2006; S.C. State Government Lawyers, Ethics Update, Nov. 3, 2006; S.C. Judicial Merit Selection Commission, Overview of Judicial Ethics, Sept. 14, 2006 (½ hr.); Federal Bar Ass'n, SC Bar, Ethics and Professionalism, Sept. 8, 2006; Commercial Law League of America, Avoiding Grievances and Malpractice Worries in Your Practice, July 6, 2006, Asheville, N.C. (2 hours); National Structured Settlement Trade Ass'n, Ethics in Litigation, Westin Rio Mar, Puerto Rico, May 9, 2006; S.C. Chamber of Commerce, Legal Ethics for the Employment Lawyer, Hilton Head, S.C., May 6, 2006; American Ass'n Matrimonial Lawyers, Ethic Lecture, Los Cabos, Mexico, March 11, 2006; SC Bar, Legal Ethics for Health Care Providers, Jan. 28, 2006; S.C. Association of Counties, Ethics Update, Dec. 9, 2005; SCTLA, Making Money Out of Discovery Abuse, Dec. 2, 2005, Atlanta; Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar, Nov. 4, 2005, Asheville; S.C. Bar, Ethics in Masters Court, Oct. 14, 2005; N.C. Bar-S.C. Bar Construction Law Ethics Program, Asheville, Oct. 1, 2005; S. C. Bar, Unauthorized Practice Problems in Probate Court, Sept. 16, 2005; Greenville County Solicitor's Office, Prosecutorial Ethics, May 9, 2005; Mass Tort Seminar, NYC, Discovery Abuse Issues, March 18, 2005; S.C. Ass'n of Counties, Legal Ethics, Dec. 10, 2004; Federal Bar Ass'n, S.C., Ethics CLE, Dec. 10, 2004 ½ hr.; S.C. Bar Construction Law Section, Ethics CLE on the new Oath; Dec. 3, 2004; NASAA, Salt Lake City, Legal Ethics for Securities Enforcement Lawyers, Dec. 4, 2004; DSS Ethics Training, Dec. 3, 2004; (2-hr. lecture); PIABA, Ethics for Securities Lawyers, and Comments on the Mutual Fund Mess, Oct. 20, 2004 (2 hrs.); Commercial Law League of America, Southern Region Members' Ass'n, Ethical Issues in Commercial Law, Oct. 1, 2004; S.C. Bar, Annual Probate Bench/Bar, Ethics in Probate Court, Sept. 17, 2004; Charleston Bar Ass'n, Lawyer's Oath Seminar, August 27, 2004; S.C. Government Lawyers, Legal Ethics for Government Attorneys, August 20, 2004; S.C. Judiciary, Judicial Ethics Lecture, August 19, 2004; S.C. Bar, Accounting for Non-tax Lawyers, May 2, 2004; Palmetto Land Title Ass'n, Ethics for Closing Attorneys, April, 24, 2004; Richardson, Patrick Law Firm, CLE on Legal Issues Concerning the Mutual Fund Mess, March 26, 2004; S.C. Bar, An Update on Ethical Considerations for the Guardian, March 5, 2004; S.C. Prof. Society on

the Abuse of Children, Ethics and Child Abuse, Feb. 26, 2004; National Ass'n of State Boards of Accountancy, Professionalism, Accountability and the Accounting Profession, Feb. 9, 2004; Fidelity Nat'l Title, Ethical Duties of Closing Attorneys, Feb. 5, 2004; S.C. Bar, Annual Convention, Ethical Issues in Handling the Appeal, Jan. 22, 2004 (co-presenter).

Member, ABA Section of Business Law Task Force on Legal Opinions
Participant in Conference on Legal Opinions at Silverado, California, May 31-June 3 (1989).

University and Community Service

Author, Report on Tax Sheltered Annuities to USC Faculty and Staff (1976),
Faculty Senate (1996-98)

University Committees

Promotion and Tenure
Faculty Welfare

Annuities and Insurance

Budget Committee

Law School Committees

Faculty Selection
Academic Standing
Minority Student Affairs
Executive Committee
Dean Evaluation Committee
Dean Search Committee

Chairman, Supreme Court Commission on Continuing Lawyer Competence (1980-83)

President, Leaphart Elementary School PTO (1983)

Chairman, Irmo Middle School School Improvement Council (1985)

Member, Irmo Middle School School Improvement Council (1985-89),

President, Irmo High School Parent, Teacher, Student Association (1988-89, 1992-93) Member
Executive Board (1988-93)

Member, Irmo High School-School Improvement Council (1988-93)

Founder and Past-president, University of Notre Dame Club of South Carolina

Lexington District Five and South Carolina State School Volunteer of the Year 1993

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
)
 COUNTY OF YORK) C/A NO.: 15-CP-46-1827

Willie Bell, Individually and on)
 Behalf of the Estate of Emma M. Davis)
 as its Duly Appointed Personal)
 Representative,)

DEPOSITION OF

Plaintiff,

JOHN P. FREEMAN

vs.

October 2, 2015

McGowan, Hood, Felder, LLC and)
 Chad McGowan,)
)
)
)

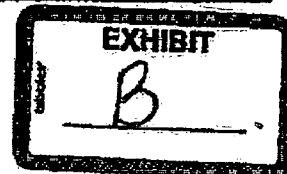
Defendants.

COPY

Deposition on oral examination of JOHN P. FREEMAN,
 reported by Diane Grubowski, Court Reporter and Notary Public
 in and for the State of South Carolina; Said deposition taken
 pursuant to Notice and in accordance with the South Carolina
 Rules of Civil Procedure, at the Law Offices of Lewis,
 Babcock and Griffin, 1513 Hampton Street, Columbia, South
 Carolina, on Wednesday, the 2nd day of October, 2015,
 scheduled for 10:00 a.m. and commencing at the hour of 10:01
 a.m.

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1 on. And it just has a smell about it.

2 Q You taught for 35 years, I believe?

3 A Yes, sir.

4 Q At USC?

5 A Yes, sir.

6 Q Did you also maintain a private practice on the

7 side?

8 A Periodically.

9 Q What did you do in your private practice?

10 A Sometimes I served as an expert witness. Sometimes

11 I represented clients, actually had cases.

12 Q Okay. Well, I'm assuming that you've always done

13 expert witness work, so if we --

14 A I've done -- I've done expert witness work since

15 the late 1970s.

16 Q Okay.

17 A But that isn't exactly the entirety of my legal

18 experience.

19 Q Right. So looking away from your expert witness

20 work at the moment. How much work on the private

21 side have you done with probate?

22 A I've been involved in some probate cases. I've

23 never been the lead lawyer, but I've been involved

24 in probate issues.

25 Q You know, how have you been involved and what

1 issues?

2 A Typically, when lawyers do bad things toward
3 people.

4 Q Was that as an expert? You were opining on those?

5 A Yes. For example, there's a case involving Jackie
6 Cram and a lawyer -- that was the client's name,
7 and a lawyer, Bowen was his name from Hilton Head,
8 and that was a probate court matter because Bowen
9 was allegedly stealing an incapacitated client's
10 money. And that was both a civil case and a
11 disciplinary case in which I testified.

12 Q If we can set aside the cases for a moment that you
13 served as an expert on, just the ones that you were
14 actually counsel, the attorney for the party, have
15 you ever handled any probate cases?

16 A Only insofar as they were maybe a personal injury
17 case that had to go for approval.

18 Q Okay.

19 A Or a death case.

20 Q But you handled personal injury and death cases?

21 A I was in them, but when it came to getting court
22 approval, it was typically my co-counsel that would
23 do it. I don't remember ever presenting a petition
24 of the sort that we have in this case. But I was
25 in cases, yes, where you needed to go to court and

1 get approval.

2 Q How many jury trials have you had in your career

3 where you were lead counsel?

4 A You know it's kind of hard because who's lead

5 counsel? Sometimes --

6 Q When the judge says, Counsel, you ready to proceed,

7 you were the one that stood up and said, yes, Your

8 Honor.

9 A Okay. Five or ten.

10 Q What kind of cases were those?

11 A The first one was a case involving investment fraud

12 in Federal Court in Charleston and it was in front

13 of Falcon Hawkins and I tried the case myself.

14 Q How about the second?

15 A I don't remember them in chronological order. I

16 remember another one before --

17 Q Give me the next, the next one you remember.

18 A The next one, I remember another case in the same

19 courtroom with Falcon Hawkins.

20 Q What was it about?

21 A It was a Hugo claim over business interruption. I

22 was the lawyer.

23 Q What next?

24 A Geez, they are out there, but I ain't --

25 Q Let's try it a different way. Have you ever --

Page 24

- 1 A There was another investment one here in Richland
2 County. Go ahead.
- 3 Q Have you ever been lead counsel, tried a jury case,
4 on a wrongful death case?
- 5 A I don't think so. They have always settled.
- 6 Q Medical malpractice?
- 7 A No. I've been involved in medical malpractice
8 cases, but never tried a medical malpractice case.
- 9 Q A probate case?
- 10 A No, not as a lead counsel.
- 11 Q Do you have any idea over the years how many
12 wrongful death cases you have been counsel for,
13 lead or otherwise?
- 14 A I'm thinking. Okay. One case they broke a guy's
15 neck and he died before we got the money and I
16 think it may have flipped over to wrongful death,
17 too. Another case counsel -- but it was settled
18 and that was a burn case.
- 19 Q Okay. Any others you were involved with?
- 20 A There was a -- a woman was an accident victim. I
21 had that case, but it settled.
- 22 Q Any others?
- 23 A I'm sure there are, but none come to mind right
24 now.
- 25 Q How about medical malpractice cases you were

1 involved with even if it wasn't lead counsel?

2 A I got involved in -- I've been involved in medical
3 malpractice cases. The only one that I recall
4 distinctly was helping the medical malpractice
5 plaintiff's lawyer with an issue and I made
6 arguments in court on that.

7 Q What was the issue?

8 A The lawyer was under attack by the other side
9 concerning a tape recording that had been made by
10 the clients.

11 Q Any other medical malpractice cases you remember?

12 A I just don't remember any distinctly, but I'm sure
13 there are some.

14 Q Any probate cases you were involved with even if
15 you weren't lead counsel?

16 MR. LEWIS: Asked and answered.

17 A Yes. No distinct recollection of -- well, I mean
18 like the Jackie Cram case was a probate court case.
19 There's a --

20 Q Right. I asked about lead counsel. I'm asking for
21 any other.

22 A Yeah. No, I've never been lead counsel that I
23 recall in a probate case.

24 Q Do you have records of the cases you've
25 participated in?

STATE OF SOUTH CAROLINA

COUNTY OF YORK

WILLIE BELL, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF
EMMA M. DAVIS AS ITS DULY
APPOINTED REPRESENTATIVE,

Plaintiff,

vs.

McGOWAN, HOOD & FELDER, LLC
AND CHAD McGOWAN,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No: 2015-CP-46-1827

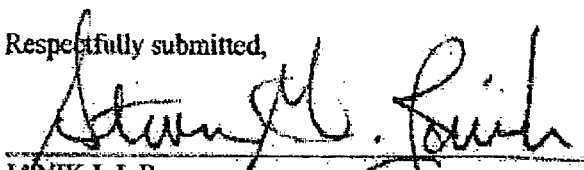
**DEFENDANTS MCGOWAN, HOOD &
FELDER, LLC AND CHAD MCGOWAN,
ESQ.'S MOTION IN LIMINE
PROHIBITING PLAINTIFF'S USE OF
THE PHRASES "CONSPIRACY" AND
"SCHEME"**

Defendants McGowan, Hood & Felder, LLC and Chad McGowan (collectively "McGowan") respectfully move this Honorable Court for an Order precluding Plaintiff, his witnesses, and his attorneys (collectively "Plaintiff") from making any reference to a "conspiracy" or "scheme" between Defendants and any other person or entity. Because Plaintiff has asserted no cause of action for conspiracy and has developed no evidence to support the existence of a conspiracy, permitting Plaintiff to use terms like this are highly prejudicial to McGowan in this matter.

The detailed grounds for this Motion are set forth in the concurrently filed Memorandum in Support.

< SIGNATURE LINE TO FOLLOW >

Respectfully submitted,


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York, South Carolina

July 15, 2016

STATE OF SOUTH CAROLINA

COUNTY OF YORK

WILLIE BELL, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF
EMMA M. DAVIS AS ITS DULY
APPOINTED REPRESENTATIVE,

Plaintiff,

vs.

McGOWAN, HOOD & FELDER, LLC
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Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No: 2015-CP-46-1827

MEMORANDUM IN SUPPORT OF
DEFENDANTS MCGOWAN, HOOD &
FELDER, LLC AND CHAD MCGOWAN,
ESQ.'S MOTION IN LIMINE
PROHIBITING PLAINTIFF'S USE OF
THE PHRASES "CONSPIRACY" AND
"SCHEME"

I. INTRODUCTION

Throughout the course of this case, Plaintiff has repeatedly referenced that McGowan "conspired" with others, or was otherwise involved in a "scheme," to wrong Plaintiff. However, because Plaintiff's Complaint contains no cause of action for conspiracy, the use of such phrases is improper as it will be confusing and misleading to the jury. Further, because the only purpose of using such phrases is to inflame the jury, it would be unduly prejudicial to McGowan if Plaintiff is permitted to use such language at trial. Therefore, McGowan respectfully moves this Honorable Court to preclude such argument in this matter.

II. ARGUMENT

Given that Plaintiff elected not to pursue a cause of action for conspiracy, there is no purpose for Plaintiff to use terms such as "conspiracy" or "scheme" in the present matter.¹ In

¹ McGowan submits that the present Motion is not limited solely to the phrases of "conspiracy" or "scheme." Rather, this Motion is intended to include all similar terms and phrases, including, but not limited to plot, fix, game, treachery, trick, collusion, complicity, racket, scam, shell game, flimflam, fast shuffle, cahoots, hush-up, scam, pull a fast one,

reality, the only reason Plaintiff would seek to use these terms is not for any relevance it may possess to the claims he has asserted, but for its tendency to cause unfair prejudice, to confuse the issues, and to mislead the jury. Specifically, phrases like "conspiracy" or "scheme" are inherently prejudicial because they are designed to create a visceral reaction to, and bias against, McGowan, and interfere with appropriate and reasoned jury deliberations in this case. As Plaintiff has chosen not to pursue such a claim of conspiracy (nor can Plaintiff meet the elements of a claim for conspiracy), Plaintiff must not be allowed to reference this highly prejudicial cause of action. See *South Carolina State Highway Dept. v. Nasim*, 255 S.C. 406, 179 S.E.2d 211 (1971) (inflammatory statements such as the witness was a "great highway robber" warranted a new trial because they were calculated to appeal to the passions or prejudices of a jury and should have been affirmatively condemned by the trial court); *Major v. Alverson*, 183 S.C. 123, 190 S.E. 449, 450 (1937) (counsel had the right to point out reasons why a witness was unworthy of belief, but could not actually call the witness a liar or a "bare faced liar" because it tended to greatly prejudice the defendant's case in the eyes of the jury); *Dial v. Niggel Assoc., Inc.*, 333 S.C. 253, 257, 509 S.E.2d 269, 271 (1998) (acknowledging there are situations where inflammatory language could result in new trial, but finding it was not warranted in that case because the statement "deceit and lies" was made exclusively in response to opposing counsel who was insisting that party engaged in deceptive litigation tactics).

Because there is no legitimate basis for Plaintiff to utilize these prejudicial terms, McGowan requests the Court to instruct Plaintiff not to mention, refer to, interrogate concerning, or attempt to convey or suggest to the jury in any manner, directly or indirectly, evidence concerning any alleged conspiracy at any stage of trial or voir dire, and to further instruct all parties

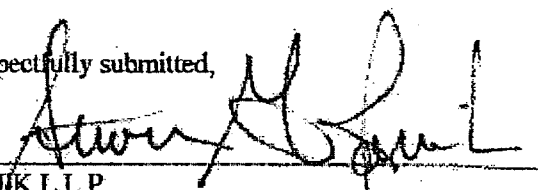
con, fleece, dupe, and shaft. However, for convenience sake the remainder of the motion will only reference "conspiracy" or "scheme".

and their counsel and witnesses to not make any reference to the fact that this motion has been filed and acted on, and to caution that these instructions are to be followed strictly.

III. CONCLUSION

For the foregoing reasons, McGowan respectfully moves this Honorable Court to exclude any reference to "conspiracy," "scheme," or any other prejudicial term in this matter.

Respectfully submitted,



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York, South Carolina

July 15, 2016

STATE OF SOUTH CAROLINA
COUNTY OF YORK

WILLIE BELL, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF
EMMA M. DAVIS AS ITS DULY
APPOINTED REPRESENTATIVE,

Plaintiff,

vs.

McGOWAN, HOOD & FELDER, LLC
AND CHAD McGOWAN,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No: 2015-CP-46-1827

DEFENDANTS MCGOWAN, HOOD & FELDER, LLC AND CHAD MCGOWAN, ESQ.'S BRIEF REGARDING PLAINTIFF'S INABILITY TO RELY ON PROBATE ORDER

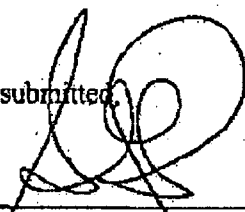
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DAVID HAMILTON
YORK COUNTY, SC

Defendants respectfully submit that the Order issued by The Honorable Lois H. Roddey on May 4, 2015 ("Probate Order") in the Probate Court for Chester County, South Carolina ("Probate Court") has no effect on the present matter because the Probate Court lacked subject matter jurisdiction. In this regard, the Supreme Court of South Carolina has held that "[j]urisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the particular judgment requested." *In re Estate of Hover*, 407 S.C. 194, 207, 754 S.E.2d 875, 882 (2014), citing *Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013). In the Probate Order, it was determined that Defendants had no standing before the Probate Court. *See* Probate Order, pgs. 2-3; Exhibit 1. Standing is a component of subject matter jurisdiction and without it the court has no ability to hear a case or controversy. *See Lennor v. South Carolina Coastal Council*, 330 S.C. 414, 498 SE 2d 906 (Ct.App. 1998)(the issue of standing is a component of subject matter jurisdiction that goes to a court's ability to hear a case or controversy); *Limehouse*, 404 S.C. at 104, 744 S.E.2d at 572 (absent jurisdiction a court cannot proceed at all other than to announce the lack of jurisdiction and dismiss the case).

Thus, Plaintiff cannot utilize the Probate Order to prove or disprove any issue or claim in the present matter because the Probate Court's attempt to rule on anything other than standing is void and without any legal effect. *See Thomas & Howard Company, Inc. v. T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)(if a court acts without subject matter jurisdiction, its judgments are void and from its inception the judgment is a complete nullity and without legal effect); *Ross v. Richland*, 270 S.C. 100, 240 S.E.2d 649 (1978)(a judgment is void if a court acts without jurisdiction).

Accordingly, Defendants submit that the Probate Order has no effect in this matter and can be used for no purpose in the present case.

Respectfully submitted,



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York, South Carolina
July ____, 2016

STATE OF SOUTH CAROLINA

COUNTY OF YORK

WILLIE BELL, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF
EMMA M. DAVIS AS ITS DULY
APPOINTED REPRESENTATIVE,

Plaintiff,

vs.

McGOWAN, HOOD & FELDER, LLC
AND CHAD McGOWAN,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No: 2015-CP-46-1827

CERTIFICATE OF SERVICE

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DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

I, Samuel J. Janik, an employee of Janik, L.L.P., do hereby certify that I have
served counsel in this action with a copy of the pleading(s)/document(s) listed below via hand
delivery.

DOCUMENTS SERVED

*Defendants McGowan, Hood & Felder, LLC and Chad McGowan's
Brief Regarding Plaintiff's Inability to Rely on Probate Order*

PARTY SERVED

A. Camden Lewis, Esquire
J. Ryan Heiskell, Esquire
Lewis Babcock, LLP
1513 Hampton Street
Columbia, SC 29201

York, South Carolina
July 18, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF CHESTER)

IN THE PROBATE COURT
Case No.: 2010-ES-12-00059-2

IN THE MATTER OF EMMA DAVIS
McGOWAN, HOOD & FELDER, LLC
AND CHAD MCGOWAN, ESQ.,

Petitioners,

vs.

WILLIE BELL, Successor Personal
Representative of the Estate of Emma
Davis.

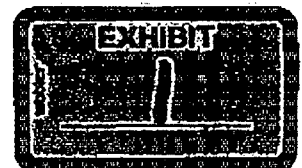
Respondent.

ORDER

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PROBATE COURT
CHESTER COUNTY S.C.

This matter came before the Court upon Petition to Restrain and Remove Successor Personal Representative Willie Bell ("Bell") brought by McGowan, Hood & Felder, LLC and Chad McGowan (collectively referred to as "McGowan") who are defendants in a lawsuit brought by Bell on behalf of the Estate of Emma Davis. Respondent Bell has also filed a Motion to Dismiss the Petition on the grounds that Petitioners lack standing to challenge Bell's appointment.

After carefully considering the entire record in this matter as well as arguments of counsel presented at a hearing held in this matter on April 21, 2015, the Court hereby denies McGowan's petition. McGowan has failed to present sufficient evidence to support the claim that Bell should be removed as Personal Representative. McGowan does not dispute that Bell has priority of appointment under S.C. Code § 62-3-203 as the sole surviving heir. It is undisputed that Andrew Strong, who McGowan contends is a common law husband, failed to have his status



as Ms. Davis' husband adjudicated within the time limits provided under S.C. Code § 62-2-802(b)(4) and therefore is not to be considered a surviving spouse under the Probate Code. Furthermore, there is no claim that Bell has committed fraud or mismanaged the assets of the Estate.¹ Rather, McGowan asserts that there is not a legal or factual basis to assert the claims alleged in the lawsuit brought by Bell on behalf of the Estate. The Court concludes that this is not sufficient justification to remove Bell and that these issues will be resolved by the civil courts of this State in the context of the lawsuit.

In addition, McGowan as a defendant in the lawsuit does not have standing to challenge Bell's appointment. South Carolina Probate Code only provides for a "person interested in the estate" to petition the court for the removal of a PR.

SC Code § 62-3-611 provides:

(a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in Section 62-3-607, after service of the summons and petition upon the personal representative and receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration, or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed. (emphasis added)

¹ McGowan also claims that Bell is not a suitable or capable to serve as the Personal Representative because of certain arrests or convictions he had in the past. Unlike many other states, South Carolina's probate court system does not have any provision barring a person with convictions to serve as PR. Even states that have statutes that prohibit a person "who is under a legal disability as a result of a conviction of crime" have found a person who has a past conviction but has completed his sentence is not automatically disqualified from serving. See, *In re Estate of Foxworth*, 732 S.W.2d 931 (Mo.App. 1987) (felony conviction for sale of heroin did not disqualify personal representative because at the time of his appointment he was no longer imprisoned and was free to carry out his duties). See also, *Padgett v. Estate of Gilbert*, 676 So.2d 440 (Fla. Dist. Ct. App. 1996) (Statutes precluding those convicted of felony from serving as personal representatives of decedent's estate may not constitutionally provide for absolute disqualification of convicted felon who has had his or her civil rights restored). Here, Bell's felony conviction was over 20 years ago. Bell also has a misdemeanor conviction from 2007 for writing a fraudulent check under §25. The Court finds that Bell's prior convictions do not disqualify him.

In the probate code, an "Interested person" is expressly defined:

"Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person,² which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

SC Code § 62-1-201 (23).

McGowan is not an heir, devisee, child, spouse, creditor, beneficiary, person having a property right or claim in the estate, a ward or a protected person. McGowan is not a person who has priority to be appointed PR. McGowan is not a fiduciary representing interested persons — while he may have represented Tanisha (and she herself may not be an "interested person" under the statute), he no longer does, and the petition was not filed on her behalf. While there are no South Carolina cases on point, there are opinions from other states clearly holding that a defendant in a lawsuit brought by the Estate cannot challenge the appointment of the PR. See, *Murg v. Barnsdall Nursing Home*, 123 P.3d 21 (2005); *Halliburton Energy Services, Inc. v. Gunter*, 167 P.3d 645 (2007); *In re Estate of Bendtsen*, 230 S.W.3d 832 (2007) ((citing *Logan v. Thomason*, 146 Tex. 37, 202 S.W.2d 212, 215 (Tex.1947); *Cassell v. Portelance*, 172 Wash.App. 156, 163 (2012).

² "Protected person" is as defined in Section 62-5-101: A "protected person" is a minor or incapacitated person for whom a conservator has been appointed or other protective order has been made the appointment of the PR.

Based upon the foregoing, McGowan's Petition is hereby denied and dismissed with prejudice.

IT IS SO ORDERED THIS 4 DAY OF May, 2015.


The Honorable Lois H. Roddey

Chester, S.C.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

WILLIE BELL, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF
EMMA M. DAVIS AS ITS DULY
APPOINTED REPRESENTATIVE,

Plaintiff,

vs.

McGOWAN, HOOD & FELDER, LLC
AND CHAD McGOWAN,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No: 2015-CP-46-1827

DEFENDANTS MCGOWAN, HOOD & FELDER, LLC AND CHAD MCGOWAN, ESQ.'S BRIEF REGARDING THE PROHIBITION OF EXPERT TESTIMONY ON ISSUES OF LAW

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DAVID HAMILTON
YORK COUNTY, SC
C.C.P. & GS

Pursuant to Rules 702 and 704, SCRE, this Court should prohibit expert witnesses from testifying on issues of law. This Court must draw the line between "expert evidence as to facts, the inferences to be drawn from those facts, and the opinions of the expert, on the one hand, and testimony as to the meaning and applicability of the appropriate law, on the other hand." *Adelman v. Baker. Watts & Co.*, 807 F.2d 359, 366 (4th Cir. 1986) (distinguishing between testimony as to customary practice of a trade and applicable legal standards).¹

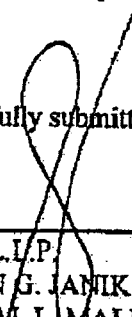
In this regard, expert testimony on issues of law is inadmissible. *Wactor v. Jackson Nat. Life Ins. Co.*, 604 Fed.Appx. 220, 225-226 (4th Cir. 2015) (expert may not make legal conclusion that certain case law governed the present matter); *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 206-207 (2008) (testimony did not make improper legal conclusion or instructions but instead opined regarding specific acts); *Dawkins v. Fields*, 354 S.C. 58, 66 (2003) (expert affidavit providing primarily legal arguments and conclusions usurped court's role in determining appropriate application of law and was properly excluded); *Green v. State*, 351 S.C. 184, 198 (2002) (expert excluded where opinion was a legal argument as to how court should rule); *O'Quinn*

¹ Rules 702 and 704, SCRE, are identical to Fed. R. Evid. 702 and Fed. R. Evid. 704(a), respectively.

v. Beach Assoc., 272 S.C. 95, 106-107 (1978) (conclusions of law are within exclusive province of court); *but see State v. Morris*, 376 S.C. 189, 205 (2008) (expert permitted to opine on whether certain hypothetical scenarios would constitute violations of complex securities laws). Thus, this Court alone has the authority to make decisions and issue instructions on applicable issues of law.

Accordingly, Defendants respectfully request that expert witnesses be prohibited from testifying on issues of law.

Respectfully submitted,



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STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Willie Bell, Individually and on Behalf of
the Estate of Emma M. Davis as its Duly
Appointed Personal Representative,)

Plaintiff,)

vs.)

McGowan, Hood, & Felder, LLC, and
Chad McGowan,)

Defendants.)

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT

C/A No. 2015-CP-46-01827

**MOTION FOR DIRECTED VERDICT OF
MCGOWAN, HOOD, & FELDER, LLC
AND CHAD MCGOWAN**

Defendants McGowan, Hood & Felder, LLC and Chad McGowan (collectively "McGowan") respectfully move the Court, pursuant to Rule 50(a), SCRCP, for directed verdict on the grounds that taking the evidence and inferences in a light most favorable to the Plaintiff, he has failed to prove the necessary elements to succeed on any of his causes of action. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999).

"When the evidence yields only one reasonable inference, a directed verdict in favor of the moving party is proper." *Id.* Rule 50(a) does not allow for speculative, theoretical, and hypothetical views to be submitted to the jury. *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 420, 697 S.E.2d 558, 565 (2010). "In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence." *Sims v. Giles*, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (App. 2001). An issue must only be submitted to the jury when "there is material evidence tending to establish the issue in the mind of a reasonable juror." *Hartfield*, 388 S.C. at 420, 697 S.E.2d at 565.

Plaintiff has failed to put forth evidence from which a reasonable juror could conclude that McGowan is liable for any of the alleged causes of action. First, in order to recover for legal

malpractice, Plaintiff must prove that: 1) he was in privity with McGowan by way of an attorney-client relationship; 2) such relationship imposed duties upon McGowan that ran in favor of Bell; 3) McGowan breached such duties; and, 4) such breach proximately caused him damage. *See, e.g., Fabian v. Lindsay*, 410 S.C. 475, 482, 765 S.E. 2d 132, 136 (2014), *citing RFT Mgmt. Co., L.L.C. v. Tinsley & Adams, LLP*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) and *Rydde v. Morris*, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009).

Plaintiff failed to put forth any evidence that he individually was in privity with McGowan a necessary element to recover for legal malpractice. In fact, the evidence shows that Plaintiff has admitted he had no contact with McGowan, that he did not believe McGowan to be his attorney, and that he had no individual attorney-client relationship with McGowan.

Further, Plaintiff offered no appropriate expert testimony of the standard of care incumbent upon McGowan, which is the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession, as Professor Freeman simply espoused his beliefs based on presumptions and assumptions unsupported by law or fact. Nor did Professor Freeman have the experience to testify to the core legal issues in this case, especially as he admitted he has never practiced in the areas of medical malpractice and probate. *E.g., Harris Teetor, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010).

As Successor Personal Representative, Plaintiff has, just like his individual claim, failed to prove privity with McGowan, duties owed by McGowan to Plaintiff, a breach of those duties, or that such breach proximately caused him damage. Moreover, other than saying the money should have all been his, there was no testimony whatsoever by any of the witnesses to establish Plaintiff's damages. Significantly, there was no expert testimony as to proximate cause and damages. *Holmes v. Haynsworth*, 2009 WL 6423945 (S.C. Com. Pl. Charleston Cnty. July 14, 2009).

("Plaintiff failed to submit any admissible expert testimony to establish (a) the applicable standard of care; (b) that Defendants breached the standard of care; or (c) that she suffered damages that proximately resulted from such breach. Plaintiff, therefore, failed to establish *any* of the essential elements of her claim and, on that basis, Defendants are entitled to judgment as a matter of law.").

Nor was there any proof by Plaintiff to establish underlying case within his case, which is required to establish proximate cause in a legal malpractice case. *See, e.g., Doe v. Howe*, 367 S.C. 432, 448 n.27, 626 S.E.2d 25, 33 (App. 2009). In fact, the only evidence offered by Plaintiff regarding Mr. Strong's status and whether he should have been recognized as Mrs. Davis' common law husband were reference to unverified statements by third-parties. Plaintiff turns a blind eye to the insurance applications, signed under penalty of perjury by Mrs. Davis designating Mr. Strong as her beneficiary and describing him as her common law husband; the testimony of 9 members of the family; and, the evidence developed in the underlying medical malpractice litigation. Plaintiff also offered no expert testimony as to this issue or to establish damages proximately caused by a breach of the standard of care.

Plaintiff's second cause of action for fraudulent misrepresentation requires proof of a (1) a representation; (2) the falsity of the representation; (3) the materiality of the representation; (4) knowledge of its falsity, or reckless disregard for its truth or falsity; (5) intent that the representation be acted upon; (6) Plaintiff's ignorance of the falsity; (7) Plaintiff's reliance on its truth; (8) Plaintiff's right to rely thereon; and, (9) Plaintiff's consequent and proximate injury. *First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 71, 451 S.E.2d 907, 912 (App. 1994). There was absolutely no evidence presented by Plaintiff of *any* representation by McGowan that was false or material, that he acted knowingly or with reckless disregard, that McGowan intended the representation be acted upon by Plaintiff, that Plaintiff did rely on it, or of any damage to Plaintiff

proximately caused by these actions. *Allegro, Inc. v. Scully*, 409 S.C. 392, 418, 762 S.E.2d 54, 67-68 (2014); *Vieira v. Simpson*, 2015 WL 1299959, *10 (D. S.C. March 23, 2015); *Bennett v. Carter*, 2013 WL 8298015 (S.C. C.P. Charleston Cnty. July 3, 2013), *aff'd in part, rev'd in part*, 2015 WL 5968253 (S.C. App. October 14, 2015); *Cagle v. James Street Group*, 400 Fed. Appx. 348, *9-10 (10th Cir. Oct. 28, 2010); *Quail Hill, LLC v. Richland Cnty.*, 387 S.C. 223, 240-241, 692 S.E.2d 499, 508-509 (2010). To the contrary, Plaintiff admitted he never spoke to McGowan, did not know McGowan, and was not represented by McGowan. Plaintiff has not put forth any evidence to support his cause of action for fraudulent misrepresentation.

Plaintiff's third cause of action for negligent misrepresentation fails for these very same reasons. Plaintiff was required to establish that: (1) McGowan made a false representation to him; (2) McGowan had a pecuniary interest in making the statement; (3) McGowan owed a duty of care to see that he communicated truthful information to the plaintiff; (4) McGowan breached that duty by failing to exercise due care; (5) McGowan justifiably relied on the representation; and (6) he suffered a pecuniary loss as the proximate result of his reliance on the representation. *Allegro*, 409 S.C. at 418, 762 S.E.2d at 68. Plaintiff has admitted that he never spoke to McGowan. Plaintiff therefore cannot prove a negligent misrepresentation by McGowan.

Plaintiff's fourth cause of action seeks to recover for a violation of the Unfair Trade Practices Act ("SCUPTA"). *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 69, 777 S.E.2d 176, 195 (2015). "[W]hether an act or practice is unfair or deceptive, within the meaning of the act, depends upon the facts and circumstances surrounding what someone's done and the impact of that act or transaction on the market place." *Id.* Moreover, Plaintiff has elicited no testimony and has presented no evidence to support his allegation that McGowan engaged in an unlawful or deceptive trade practice. It is well settled that SCUPTA was not

intended to apply to mere acts of negligence. Nor does it give rise to a cause of action by a Personal Representative. *Fairecloth v. Jackie Fine Arts, Inc.*, 682 F. Supp. 837, 846 (D. S.C. 1988), *aff'd in part, rev'd in part*, 938 F. 2d 513 (4th Cir. 1991); *accord Wogan v. Kunze*, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (App. 2007); *see In re Swanner*, 408 S.C. 191, 195, 758 S.E.2d 711, 713 (2014)

Plaintiff's Fourth Cause of Action asserts a claim for breach of contract with fraudulent intent, for which he was required to prove a (1) breach of contract, (2) fraudulent intent relating to breaching of contract and not merely to its making, and (3) fraudulent act accompanying breach; with regard to third element, standard of proof of clear and convincing evidence is applicable. *Osborn v. University Medical Associates of Medical University of South Carolina*, 278 F. Supp.2d 720 (D.S.C. 2003). Plaintiff has failed to provide testimony or evidence that establishes the existence of a contract he had with McGowan, such that there can be no breach of contract. Even if there were a breach, certainly there has been no evidence of a fraudulent intent or fraudulent act.

Although Plaintiff admits that the settlement McGowan recovered in the underlying medical malpractice case was reasonable and that he takes no issue with it, he nonetheless asserts that McGowan should be required to disgorge his fee. McGowan certainly is entitled to be paid for the services performed, especially as no one takes issue with the work he did in prosecuting the medical malpractice case.

Plaintiff's case is closed. He has not introduced sufficient testimony and evidence to support any of his causes of action. The only reasonable inference is that McGowan is not liable to Plaintiff on any of his causes of action. Accordingly, for the reasons set forth, as well as those set forth in McGowan's Motion for Summary Judgment, Renewed Motion for Summary, and Motion in Limine on Issues of Law, McGowan respectfully moves the Court for a directed verdict on each and every one of Plaintiff's causes of action.

Respectfully submitted,

/s/ Crystal L. Maluchnik

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Rock Hill, South Carolina
July 19, 2016

State of South Carolina) In the Court of Common Pleas
) Sixteenth Judicial Circuit
 County of York) 2015-CP-46-01827

Willie Bell,)
)
 Plaintiff,)
)
 Vs.) Excerpt of
) Transcript of Record
 McGowan, Hood & Felder LLC,)
 et al,)
)
 Defendants.)
)
)

July 18 and 19, 2016
 York, South Carolina

B e f o r e:

The Honorable John Hayes, Judge

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1 THE COURT: Good morning. I'm John Hayes from Rock
2 Hill. I'm a resident judge here in York County, Sixteenth
3 Judicial Circuit, which is York and Union Counties. We're
4 holding this week of court of common pleas. That's a
5 technical term, but basically it's civil court.

6 First case we have lined up is one involving what's
7 known as a "legal malpractice case." I'll tell you more
8 about that later.

9 First, the clerk is going to ask for certain
10 information. I'm going to ask you to give us that
11 information. Please do so with a good, strong voice. You
12 don't need to shout, but we want to hear what you have to
13 say. This is sort of our opportunity to meet you, see who
14 you are, hear what you do for a living, and what your
15 spouse does.

16 After that, I will have certain things to go over with
17 you concerning your qualifications to serve as a juror.
18 There -- I'll tell you more about that in just as little
19 bit. There's certain qualifications, exemptions, and
20 disqualifications for serving as a juror, but we'll go over
21 that after the clerk calls the roll.

22 Whereupon the jury panel is sworn
23 at 10:46 a.m. and the court clerk calls the roll.

24 THE COURT: All right. Members of the jury panel,
25 thank you for giving us that information. At this point

1 I'm going to go over certain qualifications, exemptions,
2 and disqualifications for serving as a juror with us this
3 week. Once a panel is qualified, we will probably take a
4 break and then go over the -- and draw a jury for the first
5 trial for this week. I'll tell you more about that later.

6 I'm not going to ask you to stand up in front of
7 everyone in tell me if any of these matters apply to you.
8 What I will do is when I get through with this list, if any
9 of you need to discuss any of these issues with me, please
10 come forward. I'll step down to where the court reporter
11 is seated. The attorneys have the right to come and hear
12 what we have to say, but you will not have to stand up in
13 front of everyone and tell me why you need to talk to me.
14 So we'll have a private -- semi-private conversation if you
15 need to discuss any of these matters with me.

16 First, in order to serve as a juror in this particular
17 court, you have to fall under one of the following
18 categories. You don't need to fall into all three. You
19 must either be a qualified elector, that is a registered
20 voter; or hold a valid South Carolina drivers license; or
21 hold a South Carolina Department of Public Safety
22 identification card. If you do not fall into one of those
23 categories, then please come forward in just a moment.

24 If any of you are not a United States citizen or if
25 you reside in a county other than York County, South

1 Carolina, please come forward in just a moment.

2 If any of you work in one of our courthouses or if any
3 of you hold any elected office here in York County, please
4 come forward in just a moment.

5 If any of you hold a constable's license, either with
6 or without pay, please come forward in just a moment.

7 If any of you have been convicted or pled guilty in a
8 state or federal court for a crime which carried a
9 potential punishment of more than one year imprisonment and
10 if your civil rights have not been restored by pardon or
11 amnesty, please come forward in just a moment.

12 I call to your attention that this has to do with
13 crimes, offenses that carried a potential sentence that
14 exceeded one year. It's not tied to any sentence one may
15 have actually been -- had imposed on them.

16 Any of you have any mental or physical health issues
17 that would prevent you from serving with us as a juror this
18 week, please come forward in just a moment.

19 If any of you have less than sixth grade education or
20 its equivalent; or if you're unable to read, write, speak,
21 or understand the English language, please come forward in
22 just a moment.

23 If any of you are 65 or older, you have an exemption.
24 That means you can serve if you wish or you can be excused
25 automatically if you wish; that is, you have an exemption

1 if you're 65 or older. So if you're 65 or older and wish
2 to serve, keep your seat; if you're 65 or older and wish to
3 be excused, please come forward in just a moment.

4 Any of you are the care -- primary caregiver for a
5 child under the age of seven and you do not work outside
6 the home, that is, if you are -- your primary job basically
7 or your primary occupation is taking care of children --
8 your child, not other people's children -- but your
9 children and they are under the age of seven; and if any of
10 you are also -- if any of you are the primary caregiver for
11 anyone of any age, that is, if you take care of someone who
12 because of mental or physical disability is unable to take
13 care of themselves and that's what you do -- again, not for
14 pay -- but as an accommodation to a family member or
15 friend, please come forward in just a moment.

16 If any of you have served on a circuit court jury such
17 as this, either civil or criminal, within the last three
18 calendar years or if you have served on a statewide or
19 countywide grand jury within the last five calendar years,
20 please come forward in just a moment.

21 If any of you are a teacher or a student and serving
22 with us this week this term will interfere with that,
23 please come forward in just a moment. We can transfer you
24 to another time.

25 Finally, if any of you know of any reason why you

1 cannot serve or should not serve as a juror, please come
2 forward and we'll discuss that.

3 So I'm going to step down. Mr. Hamilton will stand
4 there at the gate and announce you. And we'll come up and
5 I'll step down by the court reporter. The attorneys can
6 come gather around if they wish.

7 (Brief pause as jurors come forward.)

8 THE COURT: I'll -- I'll go ahead -- I was going to do
9 this later when I qualified the jury for this case. The
10 first case that we have may extend into the following week;
11 that is, it may take more than five days of this week. It
12 may take a day or two or more of the next week.

13 So if that's going -- if there's any -- if that was to
14 be any hardship on you serving this week and a day or two
15 or more of next week, please come on up. We'll talk about
16 that now, too. Thank you.

17 THE COURT: Come on up.

18 COURT CLERK: This is Juror No. 124, Thomas Stang,
19 124.

20 THE COURT: Good morning.

21 JUROR: I'm a convicted felon. Presenting and
22 pointing a firearm.

23 THE COURT: He -- he'll be excused.

24 COURT CLERK: This is Juror No. 57, Bobby B. Harper,
25 Juror No. 57.

1 THE COURT: Good morning.

2 JUROR: I travel for a living. So I'm good this week
3 to be here, but next week, the flight's already scheduled.
4 I'm going to New York on Sunday and I'll be gone for five
5 days next week. I -- I don't mind serving, but I

6 THE COURT: This case may go into next week. So I --
7 what I'll do is I'll excuse you. We'll reschedule you.

8 JUROR: That's fine.

9 THE COURT: Okay. He'll be rescheduled.

10 COURT CLERK: This is Juror No. 36, Christie R. Dease,
11 Juror No. 36.

12 THE COURT: Good morning.

13 JUROR: I was sentenced to three years back in late
14 '93/'94.

15 THE COURT: All right. She'll be excused.

16 COURT CLERK: This is Juror No. 82. He's name is Tim
17 -- Timothy S. Ledford, Juror No. 82.

18 THE COURT: Good morning.

19 JUROR: If I could be rescheduled. I've got vacation
20 scheduled with my family Monday, starting Monday through
21 next week.

22 THE COURT: Okay. We'll reschedule you.

23 JUROR: Okay.

24 THE COURT: He'll be continued.

25 CLERK OF COURT: This is Juror No. 142, Frances D.

1 Wildman, Juror No. 142.

2 THE COURT: Good morning, Ms. Wildman.

3 JUROR: Good morning. I keep the handicapped and all.

4 THE COURT: You do? Okay. I'm going to excuse you.

5 JUROR: Thank you.

6 THE COURT: Okay. She'll be excused.

7 CLERK OF COURT: This is Juror No. 37, Matthew M.

8 Deegan, Juror No. 37.

9 THE COURT: Good morning.

10 JUROR: Good morning. My father's been in and out of
11 the hospital. He just went in the hospital again.

12 THE COURT: We'll -- why don't we check with you when
13 you return ---

14 JUROR: That would be ---

15 THE COURT: I hope your dad does okay.

16 JUROR: Thank you, sir.

17 THE COURT: Just step on over there.

18 JUROR: Yes, sir.

19 CLERK OF COURT: Juror No. 130 is Penny P. Tallent,
20 Juror No. 130.

21 THE COURT: Hey.

22 JUROR: I take care of two disabled kids and my father
23 and my brother.

24 THE COURT: Okay. That's what you do ---

25 JUROR: Yes, sir. I work on the weekend and then I

1 take care of them ---

2 THE COURT: I'll excuse you.

3 She'll be excused.

4 CLERK OF COURT: William E. Haughey is Juror No. 60,
5 Juror No. 60.

6 JUROR: How are you, Your Honor?

7 THE COURT: I'm fine. How are you?

8 JUROR: Good, sir. My wife just had surgery, and we
9 had set aside this week that I could be available. Next
10 week she begins her physical therapy and she cannot drive.

11 THE COURT: Okay. We'll transfer you to -- and you're
12 involved with the NFL ---

13 JUROR: Yes, sir. Trying to, yes, sir.

14 (Brief pause.)

15 THE COURT: He'll be excused -- I mean, transferred,
16 transferred.

17 CLERK OF COURT: Juror No. 25 is Herbert L. Comer. He
18 goes by "Lee," Lee Comer, No. 25.

19 THE COURT: Another Gamecock member of the Comer
20 family.

21 JUROR: Yes, sir. I actually have -- I didn't know if
22 I should say this. I actually have a pending criminal case
23 right now.

24 THE COURT: If you're pending, you're okay.

25 JUROR: Okay.

1 (Brief pause.)

2 CLERK OF COURT: Juror No. 62 is Robert Hensley, Jr.,
3 Juror No. 62. Roger, excuse me, Roger Hensley, Juror No.
4 62.

5 THE COURT: Good morning.

6 JUROR: Yes, sir. I've got a disabled wife and I have
7 to be -- I'm self-employed and I'm doing a house in
8 Lexington, new construction. And my bills rely on me.

9 THE COURT: You say your wife's disabled and you take
10 care of her?

11 JUROR: Yeah.

12 THE COURT: I'll excuse you.

13 He'll be excused.

14 CLERK OF COURT: Juror No. 116 is Amanda B. Saari,
15 116.

16 THE COURT: Good morning.

17 JUROR: Good morning. Just want to be honest that I
18 have served I the last three years, but it was a different
19 district. I was in Mecklenburg County.

20 THE COURT: Okay.

21 JUROR: I just wanted to ---

22 THE COURT: Okay.

23 JUROR: Thank you.

24 CLERK OF COURT: Juror No. 54 is Benny R. Hall, Juror
25 No. 54.

1 JUROR: How you doing?

2 THE COURT: Hey.

3 JUROR: I -- on my job, we have band camp. We have
4 football practice and all that.

5 THE COURT: One of my guys that does some handywork
6 for me ---

7 JUROR: I work year round.

8 THE COURT: --- he's involved with that football, so I
9 know ---

10 JUROR: Yeah.

11 THE COURT: --- you're busy all year.

12 JUROR: Okay.

13 THE COURT: I know you're year round, but it won't be
14 quite as bad later on. So we'll transfer him.

15 JUROR: Okay. Thank you.

16 THE COURT: You just step over there.

17 All right. That'll do it for right now, and what
18 we'll do --

19 (Brief pause.)

20 THE COURT: It's about 11:15. We're going to take a
21 break 'til 11:30. Now that we've gotten this out of the
22 way, the staff -- the Clerk's office has to make sure that
23 the computer has the right people in it. And that'll take
24 a few minutes, and also we probably need to do a little
25 regrouping anyway. So we'll take a 15 minute break, be

1 back at 11:30. Don't disappear on us. So we'll see you
2 back at 11:30. Thank you.

3 (Off the record at 11:16 a.m.)

4 (Back on the record at 11:30 a.m.)

5 THE COURT: We're going to start our first trial for
6 the week. And this is the case of Willie Bell -- I'm going
7 to ask Mr. Bell to stand.

8 (Mr. Bell complies.)

9 THE COURT: Mr. Bell -- this is Willie Bell, and he's
10 represented by Mr. Heisley [sic] and Mr. Lewis.

11 (Both attorneys stand.)

12 THE COURT: You may be seated.

13 The case is against McGowan, Hood, and Felder, LLC,
14 which is a law firm; and Chad McGowan's -- Mr. McGowan, if
15 you'd please stand.

16 (Mr. McGowan complies.)

17 THE COURT: He is represented by Mr. Stephen Janik and
18 Mr. Lovic Brooks.

19 (Both attorneys stand.)

20 THE COURT: You may be seated. Thank you.

21 This case involves a legal -- what's known as a legal
22 malpractice case claim. I'm not going to go into all the
23 facts of that at this time because that's not my job.
24 You'll learn more as you go along, but I wanted you to know
25 in advance it involves a case where Mr. Bell has sued the

1 McGowan firm and Mr. McGowan, alleging that he committed
2 mal -- malpractice in regard to a lawsuit.

3 I'm going to ask you some questions similar to what I
4 asked this morning. They're a little more detailed. What
5 I'm going to do now is ask if you need to discuss any of
6 these with me, just please stand where you are and we'll
7 have a dialogue back and forth. If that's not sufficient
8 to answer whatever wrinkle there might be, I'll have you
9 come -- come up. But I think we can probably accomplish
10 this by you just staying where you are.

11 First, are any of you on the jury panel related blood
12 or marriage -- by blood or marriage to Mr. Willie Bell? If
13 so, please stand.

14 (No audible response.)

15 THE COURT: Noone stands.

16 This involves the estate of Emma M. Davis, the late
17 Emma M. Davis. Any of you related by blood or marriage, or
18 did you know through church or any other way Miss Emma M.
19 Davis? If so, please stand.

20 (No audible response.)

21 THE COURT: Noone stands.

22 Are any of you on the jury panel related by blood or
23 marriage to Mr. Chad McGowan or any member of his law firm?
24 They are Mr. McGowan, Randall Hood, Johnny Felder, William
25 Andrew Jones, William McKennon, Robert Phillips, Joseph

1 Wright, James Stephen Welch, Laura Pettis Harrell, Whitney
2 Harrison, Susan Campbell, Debra Casey, Chance Fair -- Farr,
3 Ashley Creech, Jordan Callaway, Anna Mad -- Magan, or
4 Patrick Killman. Related by blood or marriage to any of
5 those individuals? If so, please stand.

6 (No audible response.)

7 THE COURT: Noone stands.

8 I'm going to go over a couple of lists of witnesses.
9 I don't know that all of these witnesses will testify, but
10 I've got them in two separate places, so I may mention the
11 same witness at different times.

12 What I would like you to do is if you know or have a
13 relationship, of course, if you're related, have a
14 relationship, or know any of these witnesses, please stand.

15 Now, I don't believe all of these witnesses will
16 testify. Don't know for sure, but I don't believe they
17 will. But even if they don't testify, their names may be
18 mentioned at some point during the trial. So if you know
19 these -- any of these, please stand.

20 I've already introduced Mr. Bell. Rose Foster,
21 Darlene Bell, Claudine Boyd, Atin -- Atlene Jordan, Brenda
22 Foster, Barbara Foster, Debbie Strong, Jeanette Strong,
23 John Alfin, Pete Strom, Michael Maloney, Moses Caldwell,
24 Shirley Caldwell, Rosa Hall, Tanisha Gilmore, Andrew
25 Strong, William Gunn, George Beighley, John Freeman,

1 Fayrell Furr, Tiffany Provence, or Gregory Adams.

2 (No audible response.)

3 THE COURT: Noone stands.

4 If any of you or any member of your family been
5 represented by Mr. Lewis or his law firm out of Columbia;
6 or by Mr. McGowan and his law firm out of Rock Hill --
7 although he has offices in other parts of the state -- or
8 have any of you been represented by the Strom Law Firm --
9 Pete Strom and John Alphin of the Strom Law Firm in
10 Columbia? If so, please stand.

11 (No audible response.)

12 THE COURT: Noone stands.

13 Have any of you heard about this case or have any of
14 you formed or expressed any opinion about the matters or
15 issues involved in this case? If so, please stand.

16 (No audible response.)

17 THE COURT: Noone stands.

18 Are any of you aware of any bias or prejudice you
19 would have toward Mr. Bell or Mr. McGowan? Any bias for or
20 bias against or prejudice for or prejudice against either
21 of those parties? If so, please stand.

22 (No audible response.)

23 THE COURT: Noone stands.

24 Have any of you on the jury panel ever been a
25 practicing attorney or worked in an attorney's office? If

1 so, please stand.

2 (One juror stands.)

3 THE COURT: All right. Yes -- yes, ma'am. Your name
4 and number again. And I ---

5 JUROR: Juror 72, Stacey Jurbabla.

6 THE COURT: All right. And what did you do?

7 JUROR: I was pre-law, and I worked for an attorney --
8 med/malpractice.

9 THE COURT: What -- what firm?

10 JUROR: They were firms out of New York and Florida.

11 THE COURT: Okay.

12 JUROR: --- and Charlotte.

13 THE COURT: All right. Would that affect your ability
14 to be fair and impartial in the trial of this case?

15 JUROR: No, sir.

16 THE COURT: Okay. Thank you.

17 Have any of you or a member of your immediate family
18 been involved in a law suit? Now, I'm not talking about
19 family court matters, but involved in a lawsuit of -- of
20 any type involving automobile accident, a contract dispute,
21 home repair dispute, anything like that? If so, please
22 stand.

23 (One juror stands.)

24 THE COURT: All right. Your name and number?

25 JUROR: Margaret Huss, Juror 67. My sister was

1 involved in an automobile accident. Did not actually go to
2 trial.

3 THE COURT: All right. Would that affect your ability
4 to be fair and impartial in this trial?

5 JUROR: I don't think so.

6 THE COURT: Okay. You can be seated.

7 (Another juror stands.)

8 THE COURT: Yes, sir. Your name and number.

9 JUROR: Randy Campbell, Juror 14. I had an automobile
10 accident lawsuit and a worker compensation lawsuit.

11 THE COURT: All right. Would that affect your ability
12 to be fair and impartial in this trial?

13 JUROR: No.

14 THE COURT: Okay. Thank you. You may be seated.

15 (Brief pause.)

16 THE COURT: Is there anyone on the jury panel who
17 would not be able to set aside personal opinions, thoughts,
18 or impressions as to what the law should be and apply the
19 law as I tell you it is; that is, I will instruct the
20 jurors to apply the law as I charge it, whether they think
21 I charge the law in error or think the law should be
22 different. Do you have any opinions or thoughts, or
23 impressions that would prevent you from doing -- following
24 that instructions -- instruction? If so, please stand.

25 (No audible response.)

1 THE COURT: Noone stands.

2 Can each of you put aside any opinions you have of
3 judges, lawyers, the judicial process, or trials as to how
4 they're supposed to work; and try this case based on the
5 law and the evidence presented during the trial? If you
6 cannot do that, please stand.

7 (No audible response.)

8 THE COURT: Noone stands.

9 I'm going to go over a wit -- another witness list.
10 Each party's handed me a witness list, so I've -- they --
11 they may be duplicates.

12 Again, if any of you are related by blood or marriage,
13 or if you know any of these individuals, please stand. And
14 I may be repeating some. I apologize for that.

15 (As read) Andrew Strong; Tanisha Gilmore, also known
16 as Tanisha Gilmore Mentor; Linda Gilmore; Rosa Hall; Alton
17 -- Alteen Jordan; Dorothy Davis; Maggie Davis; Mary
18 Featherstone; Rose Foster; Robert McClurk -- Robin
19 McClurken; Brenda Foster; Debbie Strong; Jeanette Strong;
20 Annette Strong; Darlene Wright; Michael Maloney; Heather
21 Henderson; Persan Patel, medical doctor; Peter Potapappas;
22 Robert Rikard; Charles Usery; Pete Strom; John Alphin;
23 Claudine Bell; Darlene Bell; Tyree Lee; Gregory Delaney;
24 Lois Roddy; Terry Zion; Moses Caldwell; William Gunn;
25 George Beighley; James Bradley Moore; Michael Young; Annie

1 Hutchins -- Hutchins-Grey; Ashley Creech; John Freeman.

2 (No audible response.)

3 THE COURT: Noone stands.

4 To your knowledge -- I might -- think I might have
5 asked this, but I'm going to ask it again if I have: Have
6 you or a member of your family, to your knowledge, of
7 course, been represented by either Mr. Lewis's firm, Mr.
8 McGowan's firm, or Mr. Strom's firm? If so, please stand.

9 (No audible response.)

10 THE COURT: Noone stands.

11 One last little group of possible witnesses: Shirley
12 Caldwell; Hilliard Buchanan; Wayne Jordan; Dr. Gregory
13 Adams; Tiffany Provence; and Fayrell Furr. Anyone know
14 those individuals? Is so, please stand. Or related, of
15 course.

16 (No audible response.)

17 THE COURT: Noone stands.

18 The one lady that stood earlier, I'm not going to ask
19 her to stand again. But any of the others of you, not you
20 personally, but you or -- well, a member of your family,
21 any relative, close friend, or associate who has been
22 involved as a lawyer, judge, employee of a lawyer, employee
23 of a judge, or a member of law enforcement? If so, please
24 stand.

25 (Several jurors stand.)

1 THE COURT: All right. I'm going to ask each of you
2 give me your name and number and some information, like
3 Uncle Joe's a policeman, or whatever causes you to stand.

4 Yes, ma'am.

5 JUROR: Number 116, Amanda Saari. My father is a
6 retired FBI agent. He's ---

7 THE COURT: Just remain standing.

8 Yes, sir.

9 JUROR: Juror No. 83, Phillip Lemmons. My brother
10 used to work for the prison.

11 THE COURT: All right.

12 JUROR: Juror No. 73, Gwen Kennedy. My uncle was an -

13 -

14 THE COURT: Okay. Yes, ma'am.

15 JUROR: Juror No. 30, Elizabeth Crenshaw. My husband
16 used to be a sheriff's deputy in Georgetown County, and --

17 THE COURT: All right. Yes, sir.

18 JUROR: Number 13, James Campbell. My brother was a
19 police officer in North Carolina, and a Federal Marshall in
20 Texas.

21 THE COURT: All right. Now, you stood again. I
22 forget your name.

23 JUROR: Stacy Jurbala. My husband is a sergeant for
24 CNPD.

25 THE COURT: Okay.

1 JUROR: Pete Simianakis, 120. I used to work for the
2 Department of Corrections.

3 THE COURT: Your name and number again?

4 JUROR: Pete Simianakis, 120.

5 THE COURT: Okay. Now, there are seven of you
6 standing. If any one of you could not be fair and
7 impartial based on that association, please raise your
8 right hand.

9 (No response.)

10 THE COURT: None do. Thank you. You may be seated.
11 Have any of you felt as though you have been wronged
12 by a professional or professional group -- a doctor or
13 lawyer, accountant or other professional -- if so, please
14 stand.

15 (No audible response.)

16 THE COURT: Noone stands.

17 Have any of you been the personal representative or we
18 used to call it the "executor" or -- of an estate; that is,
19 have any of you have handled an estate for a deceased
20 family member or friend. If so, please stand.

21 (Several jurors stand.)

22 THE COURT: All right. What I'll do is ask your name
23 and number, and tell me, "I was the personal representative
24 of my mother's or whatever."

25 JUROR: My name is Bonnie Maier, Juror No, 88. I was

1 personal representative for my husband and my father.

2 THE COURT: All right.

3 JUROR: My name is Ashley Fischbach, Juror 46, and I
4 was the executor of the estate of my father.

5 THE COURT: All right. Of course, this case involves
6 an estate. Would the fact that you have this background,
7 if that would prevent you from being fair and impartial in
8 this trial, please raise your right hand.

9 (No audible response.)

10 THE COURT: Neither do. All right. Thank you.
11 Anything further from the plaintiff?

12 MR. LEWIS: No, sir.

13 THE COURT: All right. Defense, other than what's
14 already been handed up?

15 MR. JANIK: No, Your Honor. Thank you.

16 THE COURT: Okay. Finally, if any of you know of any
17 reason whatsoever why you could not or should not serve as
18 a fair and impartial juror in the trial of this particular
19 case, if so, please stand.

20 (No audible response.)

21 THE COURT: Noone's -- yes, ma'am. Your name and
22 number again. And I know you just stood, but --

23 JUROR: That's okay. Elizabeth McNeeley, Juror No.
24 30. I am a person who's licensed in the State of South
25 Carolina and has held malpractice insurance myself before.

1 I'm not sure if that would ---

2 THE COURT: Would that -- would that affect your
3 ability to be fair in this trial?

4 JUROR: I -- I ---

5 THE COURT: If you have any questions about it, I --
6 I'll excuse ---

7 JUROR: I have questions about it.

8 THE COURT: I'll excuse you then. I'll excuse you
9 then. Well -- no. Don't ---

10 (The juror starts to leave.)

11 THE COURT: Whoa, whoa. Don't go.

12 JUROR: You said I was excused.

13 THE COURT: You are to a degree. You can go ahead and
14 have a seat.

15 JUROR: I -- I guess I would also like to say ---

16 THE COURT: Well, don't -- don't -- I'm not going to
17 be rude. I'm not going ask you to say any more. Thank
18 you. But just stay with us. When I said "excused," it's -
19 - you're fine. You're fine.

20 Now, the way we draw jurors in this court is as
21 follows: They'll be 12 jurors and 2 alternates. So the
22 clerk will make out a list of 20 individuals. From that
23 list, each side can remove four individuals, excuse four
24 individuals.

25 Now, when we strike, that is, when we remove those

1 individuals, we use preprinted numbers, 1 through 20. So
2 you will not know if you've been stricken.

3 You might hear -- you might be Juror No. 7 and you'll
4 hear them strike, maybe, Juror No. 7. Could be you, but
5 it's probably not because we're not using your juror
6 numbers.

7 The only way you will know that you are on this list
8 is if you remain on it when we seat the jury panel.

9 In addition to taking eight away from that 20 leaving
10 us 12, we will draw six more, in two sets of threes, for
11 two alternates. And out of those two sets, each side has
12 the opportunity to strike one, leaving us, out of each set
13 of three, one alternate.

14 So it will take us a little while to do that. We have
15 to get the list for the attorneys, and I'll allow the
16 attorneys to leave the courtroom for about 15/20 minutes to
17 go over the list with each other and then with -- with
18 their -- with their client.

19 And Counsel, there's a jury assembly room that's not -
20 - that's vacant right now and the library. So there's two
21 private places where you can go, and Mr. Lloyd will make
22 sure you know where they are.

23 So we're not going to take a break, but we're going to
24 be at ease just for a little while. So just keep your
25 seats and we'll take care of this part of the process.

1 (Off the record at 11:47 p.m.)

2 (Back on the record at 12:15 p.m.)

3 THE COURT: All right. Using the numbers on -- the
4 numbers on the far left, plaintiff strikes first.

5 MR. LEWIS: Plaintiff -- the plaintiff strikes No. 18

6 MR. JANI: Defendant's strike No. 4.

7 THE COURT: You can remain seated.

8 MR. LEWIS: Plaintiff strikes No. 16.

9 MR. JANI: Defendants strike No. 3.

10 MR. LEWIS: Plaintiff strikes No. 2.

11 MR. JANI: Defendants strike No. 9.

12 MR. LEWIS: Plaintiff strikes 19.

13 MR. JANI: Defendants strike No. 11.

14 THE COURT: All right. Now, for the alternates.

15 MR. LEWIS: Plaintiff strikes, from the alternate, No.
16 23.

17 MR. JANI: Defendants strike No. 21.

18 THE COURT: All right. The second.

19 MR. LEWIS: Plaintiff, from the second alternate,
20 strikes No. 25.

21 MR. JANI: Defendants strike No. 24.

22 THE COURT: All right. The clerk will now check on
23 the -- confirm the strikes.

24 COURT CLERK: I'll verify the strikes of each side. I
25 have the following strikes for the plaintiff: Number 18,

1 16, 2, and 19; and as your alternates, No. 23 and No. 25.
2 Is this correct?

3 MR. LEWIS: That's correct, Madam Clerk.

4 COURT CLERK: For the defendants, I have the following
5 strikes: No. 4, 3, 9, and 11; and your alternates No. 21
6 and 24. Is this correct?

7 MR. JANIK: That is correct.

8 COURT CLERK: Ladies and gentlemen, if I call your
9 name, if you will please gather your personal belongings
10 and come down and have a seat to my left in the jury box at
11 the direction of the bailiff.

12 Juror No. 108, Mary E. Phillips.

13 (A black female comes forward.)

14 COURT CLERK: Juror No. 83, Phillip S. Lemmons.

15 (A white male comes forward.)

16 COURT CLERK: Juror No. 88, Bonnie P. Maier.

17 (A white female comes forward.)

18 COURT CLERK: Juror No. 135, Olivia J. Valentine.

19 (A white female comes forward.)

20 COURT CLERK: Juror No. 45, Lamar M. Finch.

21 (A black male comes forward.)

22 COURT CLERK: Juror No. 116, Amanda B. Saari.

23 (A white female comes forward.)

24 COURT CLERK: Juror No. 139 Deronald N. White.

25 (A black male comes forward.)

1 COURT CLERK: Juror No. 27, Zachery P. Conrad.

2 (A white male comes forward.)

3 COURT CLERK: Juror 71, Diane M. Johnson.

4 (A white female comes forward.)

5 COURT CLERK: Juror No. 112, Sarah L. Robinson.

6 (A white female comes forward.)

7 COURT CLERK: Juror No. 126, Shawn T. Sterling.

8 (A black male comes forward.)

9 COURT CLERK: Juror No. 121, Shellie A. Sloop.

10 (A white female comes forward.)

11 COURT CLERK: Serving as the first alternate, Juror

12 No. 53, Janet K. Hachen.

13 (A white female comes forward.)

14 THE COURT: Ms. Sloop, I'm going to ask you to be the
15 forelady. If you'll take this first seat on the front row.

16 (Ms. Sloop complies.)

17 COURT CLERK: And serving as the second alternate,
18 Juror No. 55, Christian M. Hall.

19 (A white male comes forward.)

20 THE COURT: Anything from the plaintiff involving the
21 striking of the panel?

22 MR. LEWIS: I'm sorry, Your Honor.

23 THE COURT: Anything involving the striking of the
24 panel?

25 MR. LEWIS: No, sir.

1 THE COURT: Anything from defense?

2 MR. JANIK: No, Your Honor.

3 THE COURT: All right. Those of you were not chosen,
4 I'm going to allow you to leave. I'm going to ask you to
5 do so quietly, as were going to start working with this
6 jury. This is the only case we've got scheduled for the
7 week. So this completes your duty for this term. So thank
8 you, and again, try to be relatively quiet as you leave.
9 Thank you.

10 (Remaining jurors exit the courtroom at 12:21 p.m.)

11 THE COURT: Those of you who were chosen, if you'll
12 please stand and raise your right hand. The clerk will
13 administer the oath.

14 Whereupon the jury panel is sworn
15 at 12:21 p.m.)

16 THE COURT: Members of the jury panel, I'm going to
17 chat with you just a little bit and then we're going to
18 break for lunch. When you come back after lunch, the
19 attorneys have the right, but no obligation, to come before
20 you and make what are called "opening statements."

21 These opening statements are not arguments. In a
22 later point of the trial, the attorneys have the
23 opportunity to come before you and based on their view of
24 the facts and their knowledge of the law I will charge you,
25 argue why your verdict should be a certain verdict.

1 That's not what they're doing now. They're giving you
2 an outline or a blueprint of the trial.

3 Now, I have three primary jobs as the trial judge in
4 this case. One I sometimes refer to as the "wagon master."
5 I'm sort of the mechanical person. I make sure we take
6 breaks. Try to make sure that you can see and hear. Make
7 sure the people are positioned where they ought to be.

8 My second job is that I rule on questions of
9 admissibility of evidence. If one side believe certain
10 evidence should be allowed into the record for your
11 consideration, and the other, based on some legal rule or
12 rule of evidence, believes that evidence is not admissible,
13 I have to make a ruling on that. And once I have, it is
14 binding. The ruling is binding of the witness and the
15 attorneys and on the jury.

16 My third job is that I'm the sole judge of the law in
17 this case. You must take, accept, and apply the law as I
18 charge it. This is true even if you think I've charged the
19 law in error or even if you think the law should be
20 different. Your oath requires you to take, accept, and
21 apply the law as I charge it.

22 You're not to infer from anything I say or do at all
23 during the trial of this case as being an opinion on the
24 facts. Our law does not allow a trial judge to formulate
25 or expressed to a jury any opinion on the facts. It is

1 solely your job as the trial jury in this case to examine
2 the evidence; to give to the evidence the effect, the
3 value, the weight, and belief you believe it should have.

4 During this, you may believe one witness as opposed to
5 several, several witnesses opposed to one. You may believe
6 all, part, or none of the witness's testimony. Use your
7 common sense, your sense of logic, your sense of reason.
8 Use your experiences in life to analyze the evidence.

9 As judges of the facts, you necessarily must judge the
10 credibility; that is, the believability of the witnesses
11 who testify. In assessing believability, use the things
12 I've just talked about. Use the things that you find in
13 your day-to-day life as being indicators of the truth in
14 listening to individuals; and you can use certain
15 evaluators: a witness's demeanor, how they act on the
16 stand. Are they hesitant, straightforward. Is their
17 testimony consistent or inconsistent with -- in their
18 testimony or from earlier testimony.

19 You can consider any bias will prejudice a witness may
20 have, and you can consider the opportunity a witness had to
21 know those things to which the witness testified.

22 In this case, we're going to have expert witnesses
23 testify; that is, individuals who, based on their
24 experience, training, and knowledge can render opinions.
25 Generally an individual can only testify as to something

1 they observed with one of their five senses. Generally
2 it's something they've seen or heard, but it could be
3 taste, touch, or smell.

4 However, where an individual has certain training,
5 experience, and education in an area, they can take
6 opinions and -- they can take facts and render an opinion.
7 The example I use is that of a medical doctor. If you take
8 your child to the pediatrician, and your child has a fever
9 or a child is throwing up, your child is lethargic, you can
10 come in here testify to all those things. But you could
11 not testify as to what was wrong with the child because you
12 don't have the education, knowledge, and experience.

13 But if you take the child to the doctor, the doctor
14 can examine the child and the doctor can reach an opinion.
15 We think of it as a diagnosis, but it's an opinion as to
16 what's wrong with the child based on the same facts that we
17 saw.

18 So we'll have some testimony from individuals who will
19 testify as to their opinion, based on facts.

20 Now, you're not to make up your own mind or discuss
21 the case among yourselves until we reach the point in the
22 trial where I instruct you to jointly deliberate and return
23 a unanimous verdict. Prior to that time, you're not
24 equipped with all the tools you need to make a Fehr and
25 reasoned decision. So don't try to make up your own mind

1 or discuss the case to any extent until I instruct you to
2 do so.

3 Don't let anyone discuss the case with you outside the
4 courtroom. If anyone tries to discuss this case with you,
5 tell them you cannot as you're serving as a juror; and
6 report back to me if anyone tries to discuss this case with
7 you as I would have to take action against someone sit --
8 trying to talk to a seated juror.

9 Pay close attention, but you do not need to take
10 notes.

11 Now, do not use any outside source for any research.
12 Don't go online to try to find out anything. Don't go to
13 Google, don't go to any source to obtain information about
14 this case. That would be improper and a violation of your
15 oath because you must base your verdict solely on the law
16 and the evidence as it's developed in the trial.

17 Do not even go on social media and -- or Facebook or
18 something like that, and say, "Hey, guess what? I'm
19 serving on a jury this week." Don't do that. It sounds
20 innocent enough, but someone may reply with information
21 that would not be helpful for you serving as a juror in
22 this case.

23 I do not believe this case will receive any news
24 coverage, but if it does, do not let yourself be exposed to
25 it. Don't read, watch, or listen to anything that could

1 remotely deal with this trial.

2 If you can't hear, cup your ear, give me a voice
3 raising gesture, and I'll try to correct that. If you
4 can't see, give me a nudging gesture and I'll try to
5 correct that. Keep in mind that the -- that you should pay
6 close attention. You do not need to take notes. We take
7 breaks about every hour and a half. I find that a good
8 comfort level for most people. But at any time, if any of
9 you need a break, simply raise your right hand and we'll
10 take a break. We want to move the case along, but we're
11 not in such a hurry that we won't take a break if one is
12 needed.

13 And I extend that to counsel and their clients.
14 Again, we want to move the case along, but we -- but not to
15 the extent that we won't take a break if we need one.

16 Now, when you leave now, you are officially on the
17 jury, you're sworn in, so everything I've said is by -- is
18 -- takes effect. And if you would, the bailiff will show
19 you have to get in and out and show you the jury room where
20 you'll be residing with this while you're not here in the
21 courtroom while -- during this trial.

22 So I'm going to allow you to leave at this time for
23 lunch. The bailiff will tell you how to get in and out
24 while you're serving as a juror, and we'll see you back at
25 two o'clock.

1 I have a short matter that should only take about five
2 minutes at two. But please be here at two because as soon
3 as I get through with that short matter, I want to be ready
4 to go forward with the attorneys making for you their
5 opening statements.

6 So have a pleasant lunch and we'll see you back at two
7 o'clock.

8 (Jury exits the courtroom at 12:29 p.m.)

9 THE COURT: Anything before we break for lunch?

10 MR. LEWIS: No, sir.

11 THE COURT: Defense?

12 MR. JANIK: Nothing, Your Honor, from me.

13 THE COURT: For -- for the record, we have had a
14 chamber com -- chamber conference regarding certain motions
15 in limine. I think that the -- they can be taken care of
16 as we progress through the trial.

17 Two of them deal with experts. One deals with some
18 language that I've got kind of get my head around because
19 I'm not sure I understand that one at this point.
20 Hopefully I will before we're too late.

21 And then one deals with a long list of issues that the
22 -- I guess for lack of a better way -- the defense thinks I
23 should maybe take judicial notice and at least tell the
24 jury certain what I consider facts. But I do -- at this
25 time I will go over that list again and to -- to do that as

1 I believe that would be an improper comment on the facts.
2 So that's where we stand as far as the motions in limine..
3 And subject to further review.

4 So we'll see you back at two o'clock.

5 (Off the record at 12:30 p.m.)

6 (Back on the record at 2:09 p.m.)

7 THE COURT: All right. Plaintiff ready?

8 MR. LEWIS: Yes, sir.

9 THE COURT: Defense ready?

10 MR. JANIK: Yes, Your Honor.

11 THE COURT: Just for planning purposes, time you think
12 you'll take to make opening statement?

13 (No audible response.)

14 THE COURT: I'm not locking you in to any time. Just

15 ...

16 MR. LEWIS: I don't think I'll take more than two and
17 half hours.

18 THE COURT: Okay.

19 (Courtroom laughter.)

20 (Brief pause.)

21 MR. LEWIS: I don't think it will be more than a half
22 hour.

23 THE COURT: All right. How 'bout you? Have any idea?

24 MR. JANIK: Not anymore than him, Your Honor.

25 THE COURT: Okay. Bring in the jury.

1 (Jury enters the courtroom at 2:11 p.m.)

2 THE COURT: Good afternoon. I didn't tell you, but
3 the bailiffs, of course, sort things out for me. But the
4 two alternates will always sit in those seats, and the
5 foreman in that seat; and then there's no other assigned
6 seating.

7 Now, I turn it over to the attorneys for their opening
8 statements. Mr. Lewis.

9 MR. LEWIS: Now you're going to get to see something
10 here.

11 (Sound as Mr. Lewis's chair moves and rises up.)

12 (Courtroom laughter.)

13 MR. LEWIS: Anyway, my name's Cam Lewis, and I'm an
14 attorney. I guess you probably figured that out. And I've
15 been an attorney near 50 years. I think you can figure
16 that out, too. And when you're -- come in -- a jury comes
17 into a room, most of the things I want to start to try to
18 help you is to solve your curiosity because you normally
19 say, "Who is he? What is he? Who is that? What is that?"

20 You look around and you think, "What is that -- who is
21 that person?" So I'm going to tell you who we are and what
22 we're here for.

23 But the most thing I want to tell you is in the United
24 States, a jury, like y'all, we're the last real country
25 with a jury. We're the last country that puts the

1 decisions in the hands of regular fellows out there that
2 live and work and know what it is to be an American
3 citizen. Other times it's judges. Now, there's nothing
4 wrong with the judge.

5 (Courtroom laughter.)

6 MR. LEWIS: But juries are what makes a difference in
7 these United States. And you say, "Well, why is a jury so
8 important? What do I bring here today that makes me a good
9 juror?"

10 Well, one, you bring the most important thing: Common
11 sense. If something doesn't make common sense, it isn't
12 any good. You bring your logic. If something's not
13 logical, it isn't any good. And you bring your reasoning.
14 If you look at the two and you reason and you say, "That
15 just doesn't make any sense. That's not logical." If it
16 doesn't fit, you can't convict.

17 What I'm saying is if it doesn't fit, it's -- it --
18 that means there's something wrong. So you're going to use
19 that thing.

20 And you're going to hear words you don't know about.
21 You're going to say, "What in the world is that about and
22 what are they talking about?" But use your common sense.
23 Use that logic, and you'll come up with just what we want
24 you to, truth; because that's all we can ask for as a
25 lawyer is for you to give us the truth.

1 And the truth is going -- what they call a "verdict."
2 And you're going to render a verdict.

3 And jury system -- our system -- when someone gets
4 hurt, they lose -- lose an arm, you can't get them back an
5 arm. You give them compensation. So those are called
6 "damages."

7 So in this case, we ask for damages, compensation for
8 what happened to Willie Bell. Willie Bell's here in the
9 blue shirt. Young fellow who's my client.

10 We -- when you look at me, you say, "Okay." You're
11 gonna wonder, "Where did I come from?" That's only
12 natural, where did these people come from. How did I only
13 have one leg? That's -- I'm going to tell you.

14 I'm a -- I was -- grew up, and I was a -- went to West
15 Point, went to Viet Nam, fought over there. Came back over
16 here, had an Agent Orange problem which allowed me to get
17 an infection. And four years ago the infection took over
18 my leg and I lost my leg. Am I mad about it? No. Am I
19 glad I went to Viet Nam? Yeah. But that's who I am.

20 I've been a lawyer for near 50 years. Been a football
21 coach. I've been all kinds of things. Been a lawyer for
22 50 years, near 50 years and a veteran.

23 But that -- that -- that's me. When you look at Ryan
24 Heiskell, this young fellow. He's a young lawyer. Got
25 out of law school not too long ago. He's from my hometown

1 in West Virginia. I know you -- probably don't even know
2 anybody from West Virginia. Now you know two of us.

3 And sitting behind is Sherry Johnson, my paralegal.
4 She's the brains of me. She does everything, keeps me in
5 the way I'm supposed to be and so forth. It's really
6 wonderful.

7 And another person that you have to know about is the
8 judge right there (indicates.) The judge -- he is the
9 master of the law. That means he tells you what the law
10 is, like he -- if the law says that a white shirt is bad,
11 then that's the law, and you have to live with "the white
12 shirt is bad." Okay.

13 But you are the masters of the facts, and the facts
14 make all cases. The facts are what count. And the facts
15 and the law are logical. They go together, they fit. Just
16 like glove, or you know, that goes right on, that fits you.

17 Now, who are the other people here that we're here
18 for? We're here on a legal malpractice. That's a fancy
19 word for saying a lawyer messed up and he hurt his client
20 and he owes his client money. That's what legal
21 malpractice is.

22 The difference between, say, a legal malpractice and -
23 - or a truck accident or something like that, you know,
24 truck accident, someone can hurt you. They don't mean to.
25 They made a mistake. You know, medical malpractice. Guy

1 cuts the wrong vein. He didn't mean to, but he made a
2 mistake. Those people have to pay for those mistakes.

3 The difference in a legal malpractice is the lawyer
4 knows what he's doing and he means to do what he did and he
5 means to hurt the person that he hurt. That's what bad --
6 I'm a lawyer. I've been doing this a long time. I'm proud
7 to be a lawyer, but I don't like lawyers that take their
8 position and use it to hurt their ---

9 MR. JANIK: Objection, Your Honor.

10 MR. LEWIS: --- client.

11 THE COURT: You didn't need to go into your personal -
12 --

13 MR. LEWIS: Oh, I'm sorry.

14 THE COURT: --- likes and dislikes.

15 MR. LEWIS: I'm going to back off.

16 I don't know anybody that thinks a lawyer should hurt
17 his client. It's purposeful.

18 Now, who are -- who is the lawyer? The lawyer's Chad
19 McGowan, right over here (indicates.) He's a medical
20 malpractice lawyer. He takes medical malpractice cases and
21 he prosecutes those and he gets money for his client. In
22 this case, it isn't the money he got, it's who he gave the
23 money to. That's why we're here.

24 He got 2.3 million dollars and he didn't give the
25 client any money or the money to Willie Bell right here.

1 Now, why, you say, he did that? Well, let's talk
2 about that. We're going to show you that Willie Bell was a
3 young man whose mother got murdered. He was taken in by
4 Emma Davis, one of the friends of the mother, and as a
5 young man, was adopted. And Emma Davis raised him all
6 through the years, and he grew up to be a young man. And
7 he had a tough life growing up. He isn't a perfect
8 citizen. He's had some problems. He's had some run ins.
9 But, you know, he came up hard. And those run ins, you
10 know, like I tell people, it -- if you -- if you had a hard
11 life, that doesn't mean someone can treat you bad. Or if
12 you're -- if you're not in a car and someone runs over you,
13 if you -- if you had a hard life, that doesn't mean what
14 they did to you was okay.

15 In this case, Willie had a hard life. He's made it.
16 He's grown up, he has children, he has an ex-wife. Now he
17 has Darlene back there (indicates), his new wife; and
18 they're very happy. He's come around. He works in the
19 landscaping business. He's come around.

20 They're going to try to tell you he was a bad person.
21 He had a bad record. Well, you know, he may -- he did have
22 a bad record. That -- that doesn't mean you get to cheat a
23 person with a bad record. That's not what you do.

24 Emma Davis was a wonderful lady, and she had -- went
25 to the hospital and the hospital messed up. And you're

1 going to find out it was a mess up and they paid 2.3
2 million dollars. Now, how did that come about? When Emma
3 Davis died -- this is the important part of this case --
4 when Emma Davis died, she had -- Willie Bell was her
5 adopted son. She had -- Tanisha Gilmore was her niece and
6 a Andrew Strong who lived with her. Andrew Strong and
7 Tanisha Gilmore went to Chad McGowan and took the medical
8 malpractice to Chad McGowan and said, "Please bring this.
9 We've got to get the money for poor Emma Davis."

10 And Chad McGowan looked at it and he wrote down on a
11 piece of paper ...

12 (Mr. Lewis and Mr. Heiskell confer.)

13 MR. LEWIS: He wrote down on a piece of paper (using
14 demonstrative aid) -- this will be in evidence. Here it
15 is. I'm going to be like Ed McMahan.

16 It says here (as read): "Willie Bell, maybe son."

17 There's a lot of documents that say "Willie Bell,
18 maybe son." The birth certificate says "Willie Bell, son."
19 The death certificate says "Willie Bell, son." The
20 obituary says "Willie Bell, son." And you know why that's
21 important? Because it's the son that gets the money for a
22 mal -- legal -- medical malpractice on his mother. The son
23 gets it. Not the boyfriend, not the niece. The son gets
24 it. Willie Bell, son.

25 And do you know what Mr. McGowan did? He joined

1 forces with Ms. Gilmore and Andrew Strong and himself --

2 MR. JANIK: Objection, Your Honor.

3 MR. LEWIS: --- and he's ---

4 THE COURT: Whoa, whoa. Just change the wording a
5 little bit.

6 MR. LEWIS: You see what happens? They never, never,
7 never contacted Willie Bell. He's in the town. They have
8 his name down there. They all know him. They hid it from
9 him. That's why we're here: because Mr. Chad McGowan,
10 Tanisha Gilmore, and all of them wanted the money.

11 You know how much Chad McGowan got out of this?
12 Almost a million dollars. You know how much the boyfriend,
13 his pal, his client -- did you know Chad McGowan also
14 represented the boyfriend. He represents the estate which
15 has Willie Bell as part of it, he represents the boyfriend,
16 Andrew Strong. You know how much he gave the boyfriend?
17 Eight hundred thousand dollars.

18 You know how much he give Ms. Gilmore? Two hundred
19 thousand dollars.

20 All that money, every penny of that money belongs,
21 under the law, to Willie Bell. That's why we're here
22 because Mr. McGowan took care of everybody, himself
23 included.

24 Mr. McGowan even borrowed -- had his client, Mr.
25 Strong, borrow money from Mr. McGowan's father-in-law. He

1 drew up the papers, and the money -- the father-in-law
2 leant Mr. Strong money. And you know what the interest
3 rate was? 100 percent.

4 Mr. McGowan taking care of his father-in-law, taking
5 care of Mr. Strong, taking care of Tanisha Gilmore; and
6 most of all, taking care of himself to the tune of a
7 million dollars. And all he had to do was pick up the
8 phone and call Willie Bell and say, "Are you adopted?"
9 Never did that.

10 He asked Tanisha Gilmore and Mr. Andrew Strong if
11 Willie was adopted, and he says they said don't know that
12 he was adopted.

13 Well, do you know anybody that's adopted? I do. They
14 don't run around with a forehead sticker saying "I'm
15 adopted." What you do is you try to -- they're part of the
16 family. And that's nothing you advertise, you make them
17 part of the family.

18 So Mr. McGowan got with the two people that got the
19 money and they declared that Andrew Strong was a common-law
20 husband. That allowed Andrew Strong, according to Mr.
21 McGowan, to take the money, the 800-and-some thousand
22 dollars. But unfortunately for them, they got caught.
23 Andrew Strong took the money, they spent it.

24 After Mr. Willie Bell couldn't find the money, he got
25 some -- little bit of it back. But then he looked around

1 and he found out that Mr. McGowan, with these other people,
2 had cut him out, had hid it, had shielded him illegally.

3 Now, when you have common law -- you've heard of that
4 before, common-law wife, common-law husband. You know, you
5 don't get to walk off the street when someone's -- a friend
6 of yours dies or someone you're a boyfriend with and say,
7 "I get part of the inheritance because I'm common-law
8 husband." You don't just -- get to declare that. There's
9 a law that says how you do it. There's a law that requires
10 you to get the courts to look at that and say whether your
11 legally a common-law husband.

12 You think Mr. McGowan did that? No. Mr. McGowan's a
13 lawyer. Should he have done it? Yes. Did he do it? No.
14 He anointed himself, he picked Mr. Strong as the common-law
15 husband. Why? So he could get a million dollars, so Mr.
16 Strong could get a million dollars; and so missed Tanisha
17 Gilmore could get \$250,000.

18 Greedy. Money. And who's out in the cold? Willie
19 Bell.

20 Now, you say, you know, it would have fortunate to
21 have gotten that money. He should have got it. His mother
22 suffered for it. His mother, who adopted him, who loved
23 him.

24 There are adoption papers. All Mr. McGowan had to do
25 was get over here to Chester, look in the records, and he'd

1 have found that Willie Bell was actually legally adopted.

2 Did he do that? No. Why? He put his blinders on so
3 he could keep his money, keep his blinders on so Willie
4 Bell wouldn't be found because he didn't know Willie Bell.
5 He didn't know.-- he didn't have a hold over Willie Bell
6 like he did Andrew Strong with the money his father-in-law
7 leant him. He didn't have a hold on Willie Bell, so he
8 couldn't afford to find Willie Bell or he might not have
9 got his million dollars.

10 So what you're going to see in this case is -- is
11 evidence. And evidence -- I'm going to tell you about
12 evidence. I'm -- you hear me yap here. I'm a yapper and
13 I'll get excited, too. I get excited. And I get all "go
14 get 'em."

15 But I'm not -- I'm just a lawyer. Where the facts
16 come from are the stands up here and the exhibits. And
17 that's what you look at. I'm going to tell you what I
18 think of them, but you believe what they witnesses and the
19 exhibits say. And if they -- you don't agree that they're
20 the same as I say, then you take your memory. I'm not
21 trying to trick you. I get excited. I get mad. I'm been
22 doing this for 50 -- near 50 years, and there's nothing
23 worse to me than the lawyer that takes advantage.

24 We all have to use lawyers. That's a specialty. We
25 all have to trust lawyers to be honest. We have to tell

1 lawyers -- we have to say they can't join in or they can't
2 help someone cheat us.

3 MR. JANIK: Objection, Your Honor. I think we're
4 quite far afield.

5 THE COURT: All right. You're getting little bit into
6 argument now. Let's just stick with the opening -- kind of
7 outline of the -- where we're going.

8 MR. LEWIS: Yes, sir.

9 So what we're going to do now is just show you a few
10 exhibits that we're going to show you and tell you what
11 they show. Noone's objected to the exhibits, so let me
12 show you this.

13 (Using demonstrative aid.)

14 Mr. McGowan says he didn't know who Willie Bell was.
15 He didn't know he was adopted. This is a death
16 certificate. Mr. McGowan brought a wrongful death case.
17 You have to have a death certificate. And what does this
18 death certificate say (as read): "Willie Bell;
19 relationship, son."

20 Now, you're going to see a disbursement statement
21 (using demonstrative aid.) This is what Mr. McGowan says
22 how the money should go. Incoming from Piedmont, incoming
23 from -- this is the money he got: 2.3 million dollars.
24 See that? (As read) "Attorney fees" -- ah ha, attorney
25 fees -- "\$900,020. Costs: Loan pay backs to Mr. Malone:

1 \$15,500." Tanisha Gilmore, he gives her 25 there. And to
2 Mr. Strong, 1.233332 million dollars. That's what he said
3 he did.

4 But what he really did was -- and he give this money
5 out. This is his money. They sent Willie Bell \$100,000,
6 and you're gonna hear from Willie. He says, "I heard -- I
7 read in the paper that my -- there was a settlement for my
8 mother's death and I called Tanisha Gilmore; and she said
9 that -- "Don't believe it." And said -- gonna send me
10 \$100,000. Said that got me all curious and I went to see a
11 lawyer. Sent him \$100,000 payoff.

12 And Aleta [sic] Jordan, \$5,000; Rosa Hall, \$5,000. A
13 bunch of 5,000 people. They're the people that said that
14 they didn't know if Willie Bell was adopted or not.

15 Then you see Tanisha Gilmore, the P.R.: \$200,000.
16 You remember the one I just showed you, said she got
17 \$25,000? Well, this one, when she really got it, it was
18 200,000.

19 And then we have Mr. Strong, who got the remainder.

20 This isn't right.

21 Now -- now, we're going to talk a little bit -- might
22 confusion a little, but I'm going to try help you with it.
23 You say, "Well, how does Mr. McGowan say that he doesn't
24 have to call Willie Bell?" I don't know how he says it,
25 but I'm going to tell you what he says he says. I mean,

1 Willie Bell's on his papers, he knows who Willie Bell is.
2 He knows he's right in the town. He -- all those people
3 know Willie Bell. All he has to do is pick up the phone,
4 call Willie Bell, and say, "Are you adopted?" He didn't do
5 that.

6 And he says that he didn't do that because of who his
7 client is. Now, when you're an attorney, whoever your
8 client is, you -- absolute loyalty to that client. That's
9 a fact. Noone's going to argue with that.

10 In this case, unfortunately, Mr. McGowan had multiple
11 clients. When you have multiple clients, it's hard to be
12 loyal to multiple clients, especially when one client wants
13 it one way and another client wants it another way. That's
14 called a "conflict." And in our law, that's malpractice.
15 You can't have a conflict. You can't represent one person
16 who has an interest different from another person you're
17 representing. You can't do it.

18 So in this case, it's very important to say who did
19 Mr. McGowan represent? And there's three people in this
20 case -- or three entities that Mr. McGowan could represent:
21 One, Andrew Strong. And he says he represents him. And
22 he's the one that he anointed his common-law husband.
23 Picked him out, said, I like you to be common-law husband.
24 That person is his client now.

25 He doesn't have an agreement with that client, and the

1 rules are you -- you have to have a written agreement, but
2 he doesn't have one. He just says that he's the client.
3 And of course, he paid him 800-and-some thousand dollars.
4 I -- I -- if a lawyer wanted to pay me that, I'd be a
5 client, too.

6 Anyway, the next thing we have is Tanisha Gilmore.
7 She is the personal representative, that is, the Court
8 appointed her personal representative of the estate because
9 Willie Bell wasn't around; and she was the other client Mr.
10 McGowan says he has. And he says because he represented
11 the personal representative, he didn't have any obligation
12 to call Willie Bell.

13 That makes no sense. Use your common sense. But
14 that's what the story is.

15 And the third person in all this, the third, is the
16 estate of Emma Davis. And that's who we say he represented
17 because that gives you the most obligation. Because you're
18 supposed to handle the estate properly, and one of your
19 charge is -- that make sure that -- the people are supposed
20 to get -- the beneficiaries of that estate get their money.

21 Mr. McGowan runs from that. He said, "I didn't
22 represent the estate."

23 Well, lookie here. (Using demonstrative aid.) This
24 is the only written agreement that Mr. McGowan has about
25 who he represents. And right up there in his writing, it

1 says (as read): "The Estate of Emma Davis."

2 He says that doesn't mean what it says. I represented
3 Ms. Gilmore. That's what it says, the estate of Emma
4 Davis. That's what his agreement says. He runs from it
5 because if he represent the estate of Emma Davis, he has an
6 absolute obligation to contact Willie Bell.

7 MR. JANIK: Your Honor, I'm going to object. I think
8 that counsel's trying to charge the jury instead of making
9 opening statement.

10 THE COURT: Yeah. Just don't -- I -- I'll charge you
11 -- at the end of the case, I'll charge you the law that you
12 are to apply to the facts.

13 You can go ahead.

14 MR. LEWIS: Then he says he doesn't -- he doesn't
15 represent the estate of Emma Davis. (Holds up a document)
16 This is his letter to Piedmont Medical Center (as read):
17 "I hope finds you well. Please be advised that I represent
18 the estate of Miss Emma Davis."

19 And he says, "That's not true. I didn't represent the
20 estate of Emma Davis. I just put that."

21 Well, we've gone through a lot of things and you've
22 had to listen to me yap around here. But the most
23 important thing I want to bring to this -- your attention
24 is if a lawyer doesn't handle the case for his client with
25 absolute loyalty, we're in trouble.

1 In this case, follow the money. The money went to Mr.
2 McGowan, Ms. Gilmore, and Mr. Strong. Follow the money,
3 and it's pretty clear they cut out Willie. Willie's
4 sitting there, he's the son. His mother's dead and he
5 didn't get his inheritance like he should have pure and
6 simple.

7 So I want you to think that we here -- you're the only
8 people in the world that can straighten up lawyers. We're
9 a hard group to straighten up, and it's the jury that takes
10 that and it becomes your duty -- and a great job it is --
11 and you're the only people to use your logic and common
12 sense to tell Mr. McGowan, "You should have called Willie
13 Bell. Willie Bell should've got his money from his
14 mother's death. It shouldn't have -- go to you and your
15 pals."

16 And that's what were going to ask you to do at the end
17 of this case. Thank you.

18 (Brief pause.)

19 MR. JANIK: May it please the Court.

20 THE COURT: Yes, sir.

21 MR. JANIK: Members of the jury, it is my distinct
22 privilege to represent Chad McGowan and McGowen, Hood, and
23 Felder. Ethical, honest, and good. And that's why he
24 brought the result home he did.

25 Something lawyers shouldn't do is leave things out.

1 Now, let's just talk about a few of the things the evidence
2 will show Mr. Lewis leaves out.

3 Chad McGowen anoints Andrew Strong a boyfriend and
4 common-law husband. You will have in evidence Emma Davis,
5 Ms. Davis, signed an application for life insurance ---

6 MR. LEWIS: Your Honor, we object.

7 MR. JANIK: --- that ---

8 MR. LEWIS: We object to -- like to come to the bench.

9 THE COURT: All right.

10 (Bench conference.)

11 THE COURT: Let me let the jury go to the jury room
12 while we take up a matter of law.

13 (The jury exits the courtroom at 2:44 p.m.)

14 THE COURT: All right. What's the -- what was the
15 statement. I -- I -- for the record, I was looking down at
16 something and -- what -- what did you ...

17 MR. LEWIS: He was asking her, Your Honor -- ask --
18 telling the jury that I didn't tell them that there was
19 insurance papers that Emma Davis filled out that said that
20 Mr. Strong was the common-law husband. There's also other
21 papers where he says -- she says he wasn't.

22 And my position is quite clear, that that's order and
23 that's -- came out of this very suit and is the law of this
24 case in this suit. And it ends the question of whether
25 Andrew Strong is the common-law spouse by the judge's own

1 words that I've highlighted in yellow.

2 And that should not be the subject of any kind of
3 inquiry as it's already been determined as the law of the
4 case.

5 MR. JANIK: May I respond, Your Honor?

6 THE COURT: Yes, sir.

7 MR. JANIK: First of all, it's not the law of the
8 case. And if I can, I'll hand the Court this memorandum
9 which -- and if the Court will look at that order of the
10 probate court, clearly the Court hold Mr. McGowan does not
11 have standing to raise the issues; and the issues will be
12 resolved in your court in this trial.

13 (Hands a document to the Court.)

14 MR. JANIK: And the -- this memorandum, once probate
15 court held there was no standing, then there was no
16 jurisdiction. The only order it could make was there's no
17 standing and the case is dismissed. The rest is dicta. It
18 is dicta that was written by plaintiff's counsel when they
19 submitted that order. The probate court did not draft it.
20 That's the first point.

21 The second point is that we have legal malpractice at
22 issue. And what is at issue is whether Mr. McGowan acted
23 reasonably based upon the information provided from all
24 sources as to Andrew Strong's relationship with Miss Davis,
25 and in particular his status as the common-law husband

1 because he's allowed to bring a separate consortium action
2 for the common-law husband under the Consortium Act,
3 separate and apart from the Wrongful Death Act.

4 The evidence that we are offering goes to show that
5 Ms. Davis herself signed an insurance application, was part
6 of her probated estate inventory, paid for her funeral, and
7 -- and her death services in which she designated the
8 beneficiary Andrew Strong, common-law husband, and signed
9 it.

10 The same people that were at that funeral know that
11 relationship, told Chad McGowan Andrew Strong's the common-
12 law husband. That goes to state of mind whether, under the
13 Harris Teeter case, he acted reasonably.

14 The probate court had -- had no jurisdiction after it
15 ruled there was no standing. This evidence is directly
16 admissible as to Mr. McGowan's professional judgment and
17 reasonableness in what he -- (clears throat) excuse me --
18 in whether he met the standard of care in representing his
19 clients.

20 MR. LEWIS: Your Honor, this is a new approach to
21 orders of the Court saying that since you loose, it doesn't
22 count. And they lost in this case, and the Court clearly
23 held that he -- it's just as clear as it can be, is not to
24 be considered a surviving spouse under the probate code.
25 And when you read section 62-802, it says that you have to

1 be -- to be declared a common-law spouse, it has to be
2 certain criteria. You have to go to court and get it. Can
3 you imagine the chaos if you can just -- the lawyer can
4 come out and just say, "Hey. This guy's a common-law
5 spouse because I think so. I know there's evidence on both
6 sides, but he's -- I think he's a common-law spouse and I
7 win."

8 The -- the judge heard it all, they brought the case,
9 and we say the law of the case -- they didn't ask for a
10 rehearing, they didn't do anything, they just sat here on -
11 - now they're coming and say, "It doesn't mean what it says
12 and because we lost, there's no jurisdiction and the order
13 doesn't count."

14 MR. JANIK: Your Honor, this is not the law of the
15 case. It was a separate case in the probate court matter,
16 subject to the probate -- probate court jurisdiction. And
17 that court held it did not have jurisdiction when it held
18 and did not have standing.

19 What Mr. Lewis is -- has attempted to do with the jury
20 and with this Court is to avoid the Consortium Act Statute,
21 15-75-20, I believe it is, that is -- an independent act,
22 being subject to the Court in a motion for summary judgment
23 -- we gave you the cases on it -- that allows Mr. Strong,
24 as the common-law husband, to recover for loss of
25 consortium.

1 Did Mr. McGowan have to prove that Mr. Strong was the
2 common-law husband in the underlying case? Obviously he
3 proved it sufficiently that they settled the case and paid
4 the 2.3 million dollars. That is case within a case
5 concept in legal malpractice, and you can't put walls up
6 around the case that we have to try within the case.

7 This evidence directly goes to what Ms. Davis herself
8 thought about Andrew Strong, and refutes what Mr. Lewis had
9 been arguing; and it's admissible as the case within a case
10 on a legal malpractice.

11 MR. LEWIS: That makes no sense, Your Honor.

12 THE COURT: Wait, wait, wait.

13 MR. LEWIS: Case within a case? I don't understand
14 what he saying. The question is: Under the -- this is --
15 it's a question of law: Under the common-law husband
16 statute, it says how you have to go about it and in -- when
17 -- it says you can have a common law, and says "common-law
18 spouse." That's what the statute says.

19 THE COURT: All right.

20 MR. LEWIS: So does the common-law spouse -- can you
21 declarant without going to court under the statute or can
22 you not? And that's a pure question of law for the Court
23 and it -- it's -- it needs to be answered. And I want to
24 preserve my objection whatever which way it goes because
25 you can't have an order saying he's not a common-law

1 husband for the probate code and then say you can go ahead
2 and call him a common-law husband for the -- for purposes
3 of declaring him common law.

4 THE COURT: Well, I -- I -- I -- this post-dates the
5 alleged conduct of Mr. McGowan.

6 MR. LEWIS: Yes, sir.

7 THE COURT: So I find that is not the law of the case.
8 Well, I'm not going to say it is or is not the law of the
9 case. I'm not going to make a finding on that because the
10 issue is what was the situation at the time the suit was
11 brought and the time the settlement was made.

12 The fact that later -- that thereafter an order was
13 issued saying that Mr. McGowan -- allegedly, as you're
14 arguing -- was wrong, that doesn't -- I -- I think that
15 they can still argue the information he had at the time he
16 did the acts of which you complain.

17 MR. LEWIS: You -- I -- I -- just make sure I
18 understand you, we're saying that he's a lawyer and he
19 supposed -- he supposed to know the law. And the law says
20 that you have to get it adjudicated to be a common-law
21 husband. But because he didn't know about that law, it's
22 okay.

23 THE COURT: No. That's not what I'm saying, Mr.
24 Lewis. What I'm saying is you can certainly present that
25 to the jury, but what I'm saying is this is -- this

1 particular letter is not the law of the case as to whether
2 or not Mr. McGowan acted appropriately at the time.

3 I think you can certainly present this to the jury and
4 argue, not the letter, but the statute. And I -- I reserve
5 ruling on that because I'm rolling off the hip at this
6 point. But I -- I am -- allow counsel to go forward with
7 the argument that they were making.

8 MR. LEWIS: May I -- my objection continue through
9 this?

10 THE COURT: Yes. Yes. All right. Bring in the jury.

11 MR. JANI: Your Honor, for the record, I -- I would
12 assume that our objections on motions in limine would
13 continue as well?

14 THE COURT: Yes.

15 MR. JANI: Thank you, Your Honor.

16 THE COURT: Yeah. All right. Bring in the jury.

17 (The jury enters the courtroom at 2:54 p.m.)

18 THE COURT: You may proceed. Go ahead.

19 MR. JANI: Thank you, Your Honor.

20 THE COURT: And I overruled Mr. Lewis's objection. Go
21 ahead.

22 MR. JANI: Ms. Emma Davis herself signed a life
23 insurance application where the beneficiary was Andrew
24 Strong, and she wrote down "my common-law husband" on the
25 application. We know what she thought.

1 We know how she treated her "Cue Ball" -- what she
2 called him -- no offense. But he was pretty -- pretty bald
3 and that was his nickname. And we'll show you the photos
4 of him as well.

5 Leaves out -- leaves out -- saying McGowan did all
6 these things, leaves out that the probate court appointed,
7 certified Tanisha Gilmore as personal representative of the
8 estate. You will had that order and that certification;
9 and leaves out the law that says once that issues, she is
10 Chad McGowan's client for this purpose. Because it's the
11 personal representative that brings the underlying case,
12 the case of wrongful death and survivorship for the --
13 coming from the death of Ms. Davis.

14 And there was a separate action where Chad represented
15 Andrew Strong under separate statutes, and I see some of
16 your eyes crossing. But in -- when you file a complaint,
17 you can allege ultimate causes of action. Okay. So if you
18 don't recover for wrongful death or for survivorship, you
19 can recover under the Consortium Act. They're all
20 different statutes that'll let you recover. Okay. Leaves
21 that out.

22 Leaves out the fact where he says, "Chad McGowan gave
23 all this money away." That didn't happen. Everybody that
24 was a party to the underlying law suit that Chad did bring
25 for Tanisha Gilmore and Andrew Strong against FMC and the

1 doctors, they came to this court; and they filed a petition
2 and Judge Hayes ruled on it that said we want to settle
3 this case and this settlement is reasonable. And Judge
4 Hayes approved it and that's why money was paid because the
5 Court approved the settlement. Leaves that out.

6 Go get the adoption papers. Call Willie Bell, he's
7 right down the road, pick up the adoption papers they have
8 sealed. Nobody can do that. They didn't give us the
9 adoption papers until six months after this lawsuit was
10 filed. If it's so easy, why didn't they just send them
11 over? You have to go file a motion with the Court and you
12 have to get a court order. Nobody can get them without
13 that order.

14 Chad's father-in-law controlled this case for \$15,000.
15 Andrew needed money. They were turning off the utilities
16 to his house. He couldn't -- Chad couldn't loan it to him.
17 He was going to go to companies out there that do this.
18 Chad gave him a name, says if you want to do it --
19 recommends against it. His father-in-law does this
20 occasionally. Signed an agreement. You'll have the
21 agreement. Left that out, too.

22 And the agreement shows that Chad has warned him,
23 "Don't do this. It's not good." Told him not to do it.
24 Andrew wanted it anyway. He needed the money, so he took
25 it out. Fifteen hundred -- because he wanted to buy

1 Christmas presents, cover his utilities. The total was
2 \$15,000. And that's control over a 2.3 million dollar
3 settlement? Use logic and common sense.

4 And not at all -- more importantly -- more
5 importantly, that agreement -- everything was done where it
6 was approved by independent experts because he wanted to be
7 sure he was right. So he went to the expert and said, "Is
8 this all right?" And they said, "yes." Just like the
9 Court approved the settlement, independent experts.

10 I get excited, too.

11 The death certificate, Willie Bell, son. Guess who
12 gave the corner the information to put in that? Willie
13 Bell.

14 The disbursement: We've already talked about the
15 Court approved. Who did Andrew -- Andrew, who received
16 that money -- give the money to? Emma Davis's sisters,
17 nieces, people who were close to her that Andrew thought
18 should share in some.

19 You're going to hear from Andrew. He's a unique guy.
20 He wanted folks that were close to Emma to also share in
21 it.

22 Conflict: What did we leave out? There was no
23 conflict. Andrew Strong and Tanisha Gilmore stood against
24 the hospitals to recover for the death of Emma Davis.
25 Absolutely and I -- and if you're united, there is no

1 conflict and there's nothing wrong with his representation
2 of both. When did a conflict arise? When Willie Bell
3 said, "I want the money."

4 What did he do? He immediately referred his clients,
5 Tanisha and Andrew, to a different law firm and said, "I
6 can't handle this any further. I have a conflict now."

7 Had Willie Bell showed up earlier he would have done
8 the same thing. He took the appropriate action, but leave
9 that out.

10 Section 109 -- you're -- we're gonna blow it up.
11 You're gonna hear about 109. 62-1-109, I can almost -- I
12 can -- actually, I can. I can recite it. But it
13 specifically says by statute that unless "expressly
14 provided in the lawyer's employment agreement, there is no
15 duty from the lawyer to the heirs or beneficiaries of the
16 estate." The sole duty is to the personal representative,
17 and they're trying to change that law and they can't.

18 So what do they try and do? They try and say, "Well,
19 we're into an exception, look at this notation: Estate of
20 Mrs. Davis. And so he has to report to everybody that
21 possibly could have been taken through the estate of Mrs.
22 Davis. We'll bring in the family tree chart. It's a long
23 list.

24 But they say that's the contract. What did they leave
25 out? Who signed the contract: Tanisha Gilmore, the duly

1 appointed personal representative of the estate.

2 Who's hiding things from who -- from you?

3 Those will -- we'll give you the whole documents.

4 We'll give you everything that you should have been
5 evidence, not pieces and parts. But those pieces and parts
6 -- because they get to go first. I'm not going to get to
7 put our case on for a while -- they're like a maze, you
8 enter the maze and that evidence is going to lead you down
9 the corridors. And it's going to take you different
10 directions and I don't know -- where is the road sign? How
11 do I get there?

12 You remember what we all were taught in second grade,
13 the Five W's -- Six: Who, what, where, how, when, why.
14 Every witness that takes the stand, every piece of paper
15 that's put in front of you, those are the questions: Who
16 is the client? What did Mr. McGowan do? When did he know
17 this? When was he told? Why? Those are the questions
18 that we give to you. Those are the questions that careers
19 turn around. Those are the questions that we want you to
20 answer, not a yapper, you to answer them.

21 What did he leave out? He shows you the front page of
22 a letter saying he says he represents the estate of Emma
23 Davis. He didn't point out to the next sentence on that
24 letter. Says, "I'm enclosing the personal representative's
25 papers and release."

1 What went with that letter? Signed release by the
2 duly appointed personal representative Tanisha Gilmore, his
3 client, who he would have a conflict if he went around her
4 back to other people, other beneficiaries, when the statute
5 said you can't do that, here's your client.

6 Now, you're going to hear from Dr. Greg Adams who is
7 an ethics professor at the University of South Carolina,
8 that's going to say Chad did not do anything wrong. You're
9 going to hear from Ferrell Furr, one of the best leading
10 malpractice lawyers in the State of South Carolina, who's
11 going to say Chad did nothing wrong. And you're going to
12 hear from Tiffany Provence, a former probate judge who is
13 now in private practice, who is going to tell you Chad did
14 nothing wrong. He met the standards of care, did what he
15 was supposed to do.

16 When Emma Davis died, Chad McGowen did something about
17 it. Willie Bell did not. When her family came to Chad and
18 asked him to help, Willie Bell stayed home. They asked him
19 to come along, but he stayed home. Chad helped.

20 When the family met to select a personal
21 representative and said, "Willie, come on. Let's do this,"
22 he wasn't there. They wanted him to be there. He wasn't
23 there.

24 When the family went to probate court to get Tanisha
25 appointed, and she explained Andrew's the common-law

1 husband, she explained Willie. She explained this all the
2 probate court judge, and the probate court judge appointed
3 her the duly appointed personal representative of the
4 estate. Willie stayed behind.

5 For three years, when Tanisha and Andrew stood up to
6 the hospitals, Chad stood with them -- the doctors, the
7 hospitals that caused Emma's death -- he stood with them.
8 Willie stood on the sidelines. But when the money arrived,
9 so did Willie.

10 Andrew gave him \$100,000. Willie sued and sued
11 Tanisha. Sued -- even though they'd been raised in that
12 home, raised in Ms. Emma's home, lived with Tanisha, lived
13 with Andrew, he sued.

14 Says Andrew isn't her common-law husband, even though
15 Miss Emma said it herself. Ms. Emma could have designated
16 Willie as that beneficiary. She did not do that, she
17 designated Andrew.

18 Willie was upset about that, and you'll hear from the
19 witnesses he wanted that money, too, from the insurance.
20 What did Andrew do with it? He used it to pay for Ms.
21 Emma's funeral. That's what that insurance went to.

22 He sues this family, tears them apart. Andrew and
23 Tanisha could not abide by that. They settled. They said,
24 "Let's get this behind us." They paid him another \$250,000
25 out of the money that Chad help them recover.

1 Tanisha asked to pay it in installments to pay off a
2 mortgage on her home and a note that secured it because
3 that's how much they wanted the family to be made whole.

4 And now sues Chad. Sues the man who did what he said
5 he would do, help Ms. Emma's family vindicate her death,
6 when Willie Bell was nowhere to be found for those two
7 years.

8 Sometimes life is about saying what you mean and mean
9 what you say. And -- and that's what this case is about,
10 that's what Willie is about -- that's what Chad is about.
11 Willie's about the money. He wants something for nothing
12 and he can't have it.

13 He admits he never hired Chad McGowen: He never even
14 spoke to him, he never wrote to him, he never communicated
15 with them, he didn't believe he was representing him. He
16 never -- never had a thought that Chad McGowen was doing
17 anything for him, but now he says he should get the money
18 that Chad worked for three years to get for Tanisha and
19 Andrew.

20 Was it a lot of money? Sure. Think about it now:
21 Three years you don't get a paycheck. Still gotta pay your
22 house bills, gotta pay for your kids' shoes, gotta pay for
23 everything that's going on; and so now, three years down
24 the road, you finally get a check. That's -- that's --
25 that's a tough way to go. That's a risk you're taking

1 because it was a contingency fee that if he lost, he
2 wouldn't get paid. He took that risk.

3 And his fee -- standard, normal, what all good
4 plaintiff's lawyers take. We'll get to that. Mr. Lewis
5 takes the same percentage or more.

6 But Willie says he's the adopted son, so he gets all
7 the money. Now, we know that now. Certainly that doesn't
8 mean Chad knew it back then or had any real reason to think
9 it was so. And that's what's so important in this case.

10 Everyone in the family told him the opposite. All of
11 the aunts, all of Emma Davis's sisters; and Andrew Strong,
12 who Willie has known for over 30 years, who he lived with,
13 said, "No. He was never adopted." Nobody knew. They
14 never told anyone.

15 Finally, they say four people knew: Rose Foster, his
16 favorite aunt; Atleen Jordan; Rosa Hall -- they finally say
17 there were only four people that were told that he was
18 adopted. They didn't hand out decrees or anything else.
19 Noone says they told Chad McGowen he was adopted. They'll
20 be here to tell you themselves noone told Chad he was
21 adopted.

22 That's what you have to look at: What did he know and
23 did he act reasonably at the time, not, you know, looking
24 back. As the old -- as the old adage goes, hindsight is
25 always 20/20.

1 Willie's adopted. Not gonna deny that, but the facts
2 then are not the facts we know now; and more importantly,
3 Willie was never his client. He can't sue a lawyer when
4 you're not his client. Judge Hayes is gonna tell you that
5 at the end of the case.

6 Please remember everything Mr. Lewis has said because
7 he's got to prove it, and he's not going to be able to do
8 that. Remember the maze, remember the five W's, and you
9 decide where you go with this case.

10 Because one thing I do agree with is that you, the
11 jury, is the greatest safeguard of freedom that we have in
12 this country. And you know what, you have the same right
13 that Mr. McGowan had, and that is his right to be wrong.
14 That's why we put decisions in people's hands, that's why
15 he's held to a standard of a professional.

16 Willie was adopted. He still had the right to be
17 wrong even if that were the case because at that time,
18 there was no evidence that told him to disregard his
19 clients and do what Mr. Lewis is saying he should have
20 done. He did his job. He did it right. At the end of
21 this case he deserves your verdict and we'll ask you for
22 it.

23 Now, it's gonna be a long time before I get to do this
24 again. So please remember what I said. If I didn't say it
25 well, if I stumbled, if I could do better, please let it be

1 -- let it be heard that way because this lawyer is
2 representing that lawyer (indicates) and it matters to me
3 and thank you.

4 THE COURT: All right. Members of the jury panel,
5 we'll take our afternoon break. You were out for a few
6 minutes; we were not. So we'll take our 15 minute break.

7 (Jury exits at 3:13 p.m.)

8 THE COURT: We'll take about a 15-minute break.

9 (Off the record at 3:13 p.m.)

10 (On the record at 3:41 p.m.)

11 THE COURT: Well, gentlemen, apparently the jury's
12 listened more to you than they do to me because I
13 understand they have been discussing a little about -- the
14 bailiffs overheard them discussing the opening arguments -
15 - open -- opening statements.

16 I'm gonna bring them in and admonish them not to do
17 that again, and at this point and -- tell them -- make sure
18 they understand and this was in one of the motions to limit
19 -- to tell them this anyway -- I usually don't -- that this
20 is not evidence. They have not received the first shred of
21 evidence, and that they should not be trying to analyze
22 anything. And -- and admonish them again to not discuss
23 the case.

24 I don't know how more I can tell them that, but I'll -
25 - any comments from the plaintiff.

1 MR. LEWIS: I don't think this is the first time
2 that's every happened.

3 THE COURT: Oh, it's not. Anything from defense?

4 MR. JANIK: No, sir.

5 THE COURT: My best one's when I called the foreman in
6 and asked him, "I understand you've been discussing the
7 case." "Oh, no, no, no, no. We were just talking about
8 the facts."

9 (Courtroom laughter.)

10 THE COURT: Bring in the jury.

11 MR. LEWIS: Are you bringing the jury in?

12 THE COURT: Yes.

13 MR. LEWIS: I have something ---

14 THE COURT: Okay. Whoa. Mr. Lord, one minute.

15 THE BAILIFF: Okay.

16 MR. LEWIS: If we're going to put up a witness -- our
17 first witness, I told them, would be Mr. Bell. We got in
18 the mail today that they were gonna go into his criminal
19 record. And there are some crimes that are less than 10
20 years old and more than 10 years old. And we -- we don't -
21 - we can't object to the less than 10 years old; but the
22 more than 10 years old we object to them.

23 THE COURT: Well, the rule is pretty specific as to
24 the time and the nature of the charges. I mean, let me
25 look at the rule, but I think unless it's -- are there any

1 that involve what I would call "moral turpitude?" I don't
2 think that's the word that they use -- dishonesty.

3 MR. JANIK: Your Honor, the ---

4 THE COURT: I mean ---

5 MR. JANIK: --- there are not -- there -- we would
6 respectfully submit they're not subject to the 10-year rule
7 because they will go to the -- the evaluation of the -- of
8 the case if, in fact, they're -- they're -- as counsel's
9 arguing, they should have gone to Willie Bell and he should
10 have been the personal representative, then his whole
11 history would have been available in that wrongful death
12 case and it would have had an impact on the value of the
13 case.

14 So we're not -- we're not going after it from the
15 standpoint of trying to discredit Mr. Bell with his prior
16 convictions, but to show that they would have had an impact
17 on the value of the case if what plaintiff said should have
18 happened did happen.

19 THE COURT: You follow what he said?

20 MR. LEWIS: Not very well, but I'll try. He says he
21 wants to put it in because it would have had a value on the
22 case. Well, he's got experts and they can put that in. He
23 wants to put it in to try to impeach Mr. Bell, and if it's
24 for impeachment purposes -- which it obviously is -- he's
25 supposed to send it to me in advance, which he did not, and

1 shouldn't go before 10 years.

2 If he wants to ask his experts about it when they get
3 up there, that's fine with me. But right now, were talking
4 about Willie Bell on the stand and trying to make him look
5 bad.

6 MR. JANIK: Your Honor, we gave appropriate notice of
7 the filing of the documents. I think we complied with any
8 standards requiring giving notice -- or rules. And I have
9 no idea if I'm going to use it for impeachment because I
10 don't know what Mr. Bell's going to say.

11 THE COURT: Well, obviously, as -- as far as
12 impeachment, under Rule 609, you have to comply with --
13 with that as to impeachable offenses.

14 What offenses do you contend are outside that time
15 limit that you think what affect the damages issue?

16 MR. JANIK: I think if -- if he were, as -- as counsel
17 says, that he should have been the personal representative,
18 that would have had a major impact on the value of the
19 wrongful death case itself. And -- so I think his total
20 history becomes relevant ---

21 THE COURT: Yeah. I know. But what is it, your total
22 history, what's the history -- what's -- what's earlier
23 than the 10 years that you want to get in?

24 MR. JANIK: Judge, I'd actually have to pull it out
25 and look at it.

1 THE COURT: Okay. You can.

2 MR. JANIK: And it's gonna take a little bit of time
3 to pull ---

4 (Brief pause.)

5 MR. JANIK: Your Honor, we have -- we have a set of
6 exhibits for you and the witness. Would you like them ---

7 THE COURT: Please.

8 MR. JANIK: --- now?

9 THE COURT: The sooner the better.

10 (Brief pause.)

11 (Hands documents to the Court.)

12 (Marked Court's Exhibit No. 1, Defense proposed voir
13 dire, 14 pages.)

14 (Marked Court's Exhibit No. 2, Plaintiff's proposed
15 voir dire, 5 pages.)

16 (Brief pause.)

17 MR. LEWIS: What -- the personal representative -- the
18 character of the personal representative only goes to
19 whether the -- they could be the personal representative.
20 It doesn't impact the case at all.

21 THE COURT: Well, that's -- I agree with that. I'm
22 looking at it more from the standpoint of who -- who would
23 be the beneficiary of the -- under the estate and -- and --
24 and -- I mean, that's his position, Mr. Bell's position is
25 that he -- I guess, if you cut out Mr. Strong, he would be

1 the sole beneficiary, correct?

2 MR. LEWIS: He -- he what? I'm sorry.

3 THE COURT: If -- if Mr. Strong -- if the common-law --
4 -- forget about Mr. Strong and say -- if -- if- if there was
5 no husband --

6 MR. LEWIS: Yes. He'd be sole beneficiary.

7 THE COURT: All right. Well, their position is that
8 the -- the damages that would be able to be recovered if
9 you went to trial for someone with a criminal record -- and
10 he has a substantial one -- a jury would be less likely to
11 award 2.3 million dollars because of his -- his record.

12 MR. LEWIS: Well, I've been in a lot of cases, and
13 I've never heard that you try the beneficiary in a case as
14 to what they would get their -- what money they would get.
15 It's -- it's where death of the deceased and the -- whoever
16 the beneficiary's a statutory beneficiary. So you're gonna
17 -- we're gonna try, in all the wrongful death and survivor
18 actions, the character of the beneficiaries? I don't --
19 that would -- that's gonna be a terrible outcome.

20 MR. JANI: But here, Your Honor, the beneficiary's is
21 also going to be personal represent, and that certainly is
22 -- is a fundamental issue, as everything would be going to
23 him. That's their argument. Our position is he would
24 never achieve the settlement that Chad approved -- that
25 Chad procured.

1 MR. LEWIS: In any ---

2 THE COURT: Well, Mr. -- Mr. Lewis what is saying is
3 that that -- his record would not be admissible as far as
4 the medical malpractice case itself because -- because the
5 -- the wrongful death statute spells out who the
6 beneficiary is, but how would it affect his damages, the
7 fact that he was a bad character?

8 MR. JANIK: Your Honor, I was gonna say in -- in the
9 med-mal case --

10 THE COURT: Right. Right.

11 MR. JANIK: -- if it goes to trial --

12 THE COURT: Right.

13 MR. JANIK: -- maybe the same evidence goes in, but
14 the defendants in the med-mal are gonna get that same rap
15 sheet and it's gonna impact how much they're willing to do
16 and how much they're willing to settle for versus the
17 common-law husband, Andrew Strong.

18 So it's -- it is important. He's trying to claim the
19 whole 1.2 million, and he can't do that when you have
20 differing ---

21 THE COURT: Mr. Lewis is saying -- what -- what law do
22 you have that the character of the beneficiary affects the
23 value of the estate's rights?

24 MR. JANIK: That's expert testimony, Your Honor. I
25 think that's expert testimony ---

1 THE COURT: Well, I'm going to allow you to go into
2 the record for impeachment solely through Mr. Bell. As far
3 as his record and what affect it would have on the
4 diminution of the ability to settle, that'll -- you can do
5 that -- and Mr. Lewis has already conceded -- through the
6 expert witnesses, but not for impeachment purposes.

7 MR. JANIK: Thank you, Your Honor.

8 THE COURT: Thank you.

9 MR. LEWIS: Sir, I don't -- I don't know what they're
10 going to say. So I'm not conceding whatever they going to
11 say is okay til I hear what they have to say.

12 THE COURT: Nobody's asking you to. But I think that
13 what we've come down to is that only those within the last
14 10 years, which carried in excess of a year, that would go
15 back -- he had some fraudulent checks. And of course,
16 those have to do with truthfulness. Or let's see, how does
17 the Rule call it? Dishonesty or false statement.

18 So certainly you can ask about the 2007 fraudulent
19 checks.

20 MR. LEWIS: Those were under \$25.

21 THE COURT: It doesn't matter. It's a question of
22 whether or not it shows somebody being truth -- involving
23 dishonesty.

24 DUI second, I don't think it carries over a year. I
25 think it carries a year. You look that up. We'll look

1 real quick.

2 (Brief pause.)

3 The one I'm looking at was nolle prossed anyway. Non-
4 conviction.

5 (The Court confers with his law clerk.)

6 THE COURT: It does not appear that the DUI or the
7 driving without a license would qualify, but certainly the
8 fraudulent checks would.

9 All right. Bring in the jury.

10 (Jury enters the courtroom at 3:55 p.m.)

11 THE COURT: Members of the jury panel, both -- both of
12 the lawyers said they were excitable. I'm not really
13 excitable, but I do sometimes get anxious. And I get a
14 little anxious when I hear from individuals that the jury
15 may already be discussing the case after I've told them not
16 to. So it's very important that you not discuss the case
17 at any time until we reach the end of the trial.

18 If -- if you do and we find out about it, then we'll
19 have to take certain actions which we don't want to do. So
20 don't discuss the case. It's not fair until you hear all
21 the evidence and hear the law. So wait until we reach that
22 point.

23 Now, I -- following up on that, you hadn't received
24 any evidence yet. So you really go nothing to discuss.
25 The fact that two good lawyers got up and made good

1 arguments, you can't even discuss that.

2 But you haven't received any evidence. You haven't
3 heard any of the law from me, other than a little bit I
4 gave you this morning when I told you about use of evidence
5 and things like that. So don't discuss the case.

6 Call your first witness. Mr. Lewis, you ready?

7 MR. LEWIS: Yes, sir.

8 THE COURT: Call your first witness.

9 MR. LEWIS: We call Willie Bell.

10 THE COURT: Now, Mr. Bell, please take -- come on up
11 and be sworn and take the stand.

12 WILLIE BELL, having been first
13 duly sworn, testifies as follows:

14 DIRECT EXAMINATION BY MR. LEWIS:

15 Q Give us your name, please.

16 A Willie Lee Bell.

17 Q And you're the plaintiff in this case?

18 A Yes, sir.

19 Q Let's talk a little bit about you, Mr. Bell. How old
20 are you?

21 A I'm 47.

22 Q And are you married?

23 A Yes, sir.

24 Q And who are you married to?

25 A Darlene Wright Bell.

1 Q Is she back there?

2 A Yes, sir. That's her with the blue on, dark blue.

3 Q And you've been married before.

4 A Yes, sir.

5 Q And you raised two young children.

6 A Yes, sir.

7 MR. JANIK: We move for sequestration.

8 THE COURT: Okay. Yeah.

9 MR. LEWIS: Sir?

10 THE COURT: Other than experts, the sequestration
11 order's in effect.

12 MR. LEWIS: Who do they -- who do they want to -- I
13 don't have any witnesses.

14 THE COURT: Well, I don't know. I -- I'm just making
15 a blanket statement.

16 MR. LEWIS: Okay. Sorry.

17 MR. JANIK: Your Honor, Miss Bell may be a witness in
18 the case, Mrs. Bell.

19 THE COURT: Well, I mean, have -- Mr. Lewis has to
20 make that decision at this point because I've ordered fact
21 witnesses be sequestered.

22 (Brief pause as people exit the courtroom.)

23 THE COURT: All right. Now, you can go forward.

24 DIRECT EXAMINATION BY MR. LEWIS:

25 Q Was that your wife they just asked to leave?

1 A Yes, sir.

2 Q And you have -- we asked, you said you were married
3 before.

4 A Yes, sir.

5 Q And you raised two sons.

6 A Yes, sir.

7 Q And you're still in contact with the -- with the wife
8 and the two sons or the two children to try to help them.

9 A Yes, sir.

10 Q All right. Let's go back in time. Now, do you
11 remember your youth, when you were young?

12 A A little bit.

13 Q Did you -- what happened to your birth mother?

14 A She got shot by her boyfriend.

15 Q And did you then -- were left to the world alone?

16 A No, sir.

17 Q What happened?

18 A I think I stayed with my grandmother. And my
19 grandmother got to the age that she couldn't take care of
20 me, and my mother, Emma Davis, took me in.

21 Q You say "your mother, Emma Davis." Who is Emma Davis?

22 A She is my -- she is my mother -- she is my adoptive
23 mother. She adopted me, but Emma Davis was my -- and my
24 birth mother were first cousins.

25 Q And she adopted you.

1 A Yes, sir.

2 Q How old were you then?

3 A Around 15 or 16.

4 (Hands document to the witness.)

5 Q Is that your decree of adoption?

6 (Marked Plaintiff's Exhibit No. 1, Decree of Adoption,
7 4 pages.)

8 A Yes, sir.

9 MR. LEWIS: We'd introduce this as Exhibit No. 1, Your
10 Honor.

11 THE COURT: Any objection?

12 MR. JANIK: No.

13 THE COURT: Without objection.

14 (Plaintiff's Exhibit No. 1, in evidence.)

15 Q Now, after you were adopted, did you run around
16 telling everybody you were adopted?

17 A No, sir.

18 Q That's just something you didn't talk about.

19 A No, sir.

20 Q So you grew up, with Ms. Emma -- Emma Davis as your
21 mom.

22 A Yes, sir.

23 Q And what -- how far did you go in school?

24 A To about the 11th.

25 Q And then you went out to try to -- or did you get

1 married or what happened?

2 A I went out and I got a job doing brick mason work.

3 You know, I never did go back and finish school.

4 THE COURT: All right. Try to keep your voice up so
5 we can all hear you, Mr. Bell.

6 A I stopped in the 11th grade and I got a job doing
7 brick mason work. And I didn't go back to finish after I
8 got that job.

9 Q Now, there came a time you got married; is that right?

10 A Sir?

11 Q You got married.

12 A Yes, sir.

13 Q And you moved out from being -- living with Ms. Davis;
14 is that right?

15 A Yes, sir.

16 Q Did you keep in contact with her?

17 A Yes, sir. All the time.

18 Q How far away did you live from her?

19 A From Chester to Rock Hill.

20 Q Huh?

21 A From Chester to Rock Hill, like 'bout 30 miles, I
22 guess.

23 Q Did you see her a lot?

24 A Yes, sir.

25 Q Now, did there come a time when Ms. Davis got sick?

1 A Yes, sir.

2 Q Where were you living then?

3 A Probably with -- me and my wife -- ex-wife, were
4 staying together. But she would -- I would call her and I
5 would go with the doctor with her sometime, not all the
6 time.

7 Q And when would that have been? Do you remember what
8 year or anything?

9 A No, sir.

10 Q Now, during the last -- I think you had -- had some
11 problems with the law in the last 10 years; is that right?

12 A Yes, sir.

13 Q And one of them you had a check you forged for \$25.

14 A Yes, sir.

15 Q You proud of that?

16 A No, sir.

17 Q What have you done about your life since back then
18 when it was a little rocky?

19 A Well, back then I was just kind of hard headed, you
20 know. My mama used to talk to me a lot and you know, when
21 -- but she still kept encouraging me, you know, stop
22 hanging with the crowd that I was hanging with. And I was
23 just doing wrong things, but I grewed [sic] up out of that.

24 Q What do you do now?

25 A I do -- I work for a landscaping company, plus I got

1 my own landscaping.

2 Q And when you heard your mother was sick, did you go
3 see her?

4 A Yes, sir.

5 Q Where did you see her?

6 A At her house; sometime in the hospital.

7 Q When did you find out she had died?

8 A She had -- she was short of breath. She used to catch
9 a lot of fluid in her heart, and she went -- I didn't go
10 with her that day when she went to the -- to some -- to a
11 specialist. They told her that she got to have surgery on
12 her heart or something like that.

13 But the day that she went, I went with her and --

14 Q The day that she went where?

15 A To the Piedmont Medical to have a stint put in her
16 heart.

17 Q And what happened?

18 A We was all out there in the waiting room waiting on
19 her.

20 Q Who was -- we were all, who is that?

21 A Me, Atleen, Andrew, Jeanette. That was it.

22 Q And then what -- what happened?

23 A We went to eat breakfast, and well, we went back there
24 and talked to her, to get her undressed, all of us. And
25 she was smiling. We told her that we -- she could probably

1 be out the hospital by 12 o'clock that morning. And she
2 was smiling and laughing and so we -- after we left and
3 went to eat breakfast at Shoney's we came back, and the
4 surgery still wasn't over with. And we just sat there, you
5 know, talking, having fun.

6 And then all of a sudden, the nurse -- I don't know if
7 she was a nurse or what, but she came to us and told us
8 that something had happened, and that's kind of -- shaken
9 and scared me, you know. And she said, "Don't panic.
10 We'll be right back -- or I'll be right back to let y'all
11 know," you know.

12 And so she waited for about few minutes, came back,
13 said she couldn't get no pulse.

14 Q She what?

15 A She couldn't get --

16 Q A pulse?

17 A A pulse from my mama, and we started crying. And she
18 says, "Still, don't panic. We still trying to do CPR."
19 And so last time she came she said that she was dead. And
20 that wasn't -- we just went -- you know, we just went --
21 when you miss somebody like that, your mama or something,
22 your just -- your mind just go. And I was just crying and
23 ...

24 Then my preacher came and she came. They called --
25 they -- I don't know who called her. I didn't call her

1 because my mind was gone. And she came and hugged me and
2 try to keep me calm, and I calmed down a little bit.

3 They asked me did I want to go back there and see her.
4 I told her, "Yeah." And I went back there and saw my mama
5 and she was just laying there dead. And me -- but me and
6 Andrew went back there together, and she was gone. And
7 like I said, my mind was -- I -- I couldn't -- you know,
8 wasn't thinking.

9 They asked did I want to do an autopsy. They asked me
10 did I want to do a autopsy, and I told them no because I
11 didn't -- really, I wasn't thinking what would -- what had
12 happened, but I know that she was happy and -- and smiling,
13 you know, when we left that room. And that's what
14 happened.

15 Q You told them that they -- not to do an autopsy.

16 A Yes. I wasn't -- I wasn't thinking like, you know ---

17 Q And what's the next thing you remember after your mama
18 passed?

19 A They asked me who do I want to release her body. They
20 asked me who did I want to release -- have her body. And I
21 told them Moe Caldwell. And I ---

22 Q Who's that?

23 A He is a funeral director down there in Chester, South
24 Carolina.

25 Q Okay. And that's where you released the body?

1 A Yes, sir.

2 Q Did you talk to him?

3 A Yes, sir.

4 Q All right. And when you talked to him, what was that
5 about?

6 A I can't remember everything I told him, but like I
7 say, I was still shaken up, you know, about my mama. But I
8 did -- I remember signing the paper to release her body to
9 Moe Caldwell.

10 Q Now, have you seen your birth certificate?

11 A Yes, sir.

12 Q Let me show that to you.

13 (Hands a document to the witness.)

14 (Marked Plaintiff's Exhibit No. 2, birth certificate
15 document, 1 page.)

16 Q And is that your birth certificate?

17 A Yes, sir.

18 MR. LEWIS: We'd introduce it as Exhibit No. 2.

19 A Yes, sir.

20 THE COURT: In without objection.

21 (Plaintiff's Exhibit No. 2 in evidence.)

22 Q And who in that birth certificate does it say -- I'm
23 sorry.

24 (Brief pause.)

25 Q Who does it say your mother's name on there?

1 A (As read) Emma Davis.

2 Q Now, when your mother died, did you ever see her death
3 certificate?

4 A Yes, sir.

5 (Mr. Lewis hands a document to the witness.)

6 (Marked Plaintiff's Exhibit No. 3, death certificate.)

7 Q Is that the death certificate?

8 A Yes, sir.

9 MR. LEWIS: Do you have any objection to the death
10 certificate?

11 MR. JANIK: I don't have it, but no objections.

12 THE COURT: Okay. In without objection.

13 (Plaintiff's Exhibit No. 3 in evidence.)

14 Q Do you see your name on there?

15 A Excuse me?

16 Q Do you see your name on there?

17 A Yes, I do. Yes, sir.

18 Q What's it say?

19 A (As read) Willie Bell.

20 Q And what does it say you -- who you are?

21 A Son, Emma Davis.

22 Q And there's an address there. What is that?

23 A 203 Ligon Street, Chester, South Carolina.

24 Q What is that?

25 A The address that we stayed at.

- 1 Q Who is "we"?
- 2 A Me, my mama, and Andrew
- 3 Q Do you see that exhibit, up at the top?
- 4 A (No audible response.)
- 5 Q Does it say that your -- your mama was never married?
- 6 Do you see that?
- 7 A (No audible response.)
- 8 Q It said "marital status"? Do you see that?
- 9 A I can't -- I can barely see of it.
- 10 Q I gotta put my magnifying glasses on.
- 11 A I can't -- I can't see it either. Oh, yes, sir. I
- 12 see it now.
- 13 Q It says "marital status at time of death."
- 14 A Yes, sir.
- 15 Q And there's a little "x" that says "never married."
- 16 Do you see that?
- 17 A I can't see it.
- 18 Q It's in blank No. 9.
- 19 A Yes, sir. I see it.
- 20 Q It says "marital status at time of death" ---
- 21 A Yes, sir.
- 22 Q --- "never married."
- 23 A Yes, sir.
- 24 Q Who gave -- do you know who gave this information to -
- 25 - at her time of death?

1 A I might have.

2 Q Would Mr. Strong done it?

3 A No, sir.

4 Q You would have done it?

5 A Yes, sir.

6 Q Okay. Now, after your mommy died, there was an
7 obituary in the paper; do you remember that?

8 A Yes, sir.

9 Q Do you know who wrote that obituary?

10 A No, sir. Well, when she first died and they came --
11 they came to -- the dude -- the obituary -- Shirley
12 Caldwell, Moe's wife, came to me first and ask me did I
13 want to do the obituary, I told her yes. And I did it.
14 But when we got to the funeral -- to the -- to the church,
15 somebody had changed it.

16 Q Do you know who changed it?

17 A No, sir.

18 Q I'm looking at exhibit -- what we'd introduce as
19 Exhibit No. 4, the obituary.

20 (Marked Plaintiff's Exhibit No. 4, obituary.)

21 THE COURT: In without objection.

22 (Plaintiff's Exhibit No. 4 in evidence.)

23 Q Now, looking at Exhibit No. 4, is that the obituary
24 you're talking about that was the one that had been changed
25 to?

- 1 A Excuse me now?
- 2 Q Huh?
- 3 A Sir, I ---
- 4 Q You said that you wrote one and it was changed.
- 5 A Yes, sir.
- 6 Q Is this the one you wrote or the one -- the other one?
- 7 A This -- this the one someone else wrote.
- 8 Q And it says in there, down at the last paragraph (as
- 9 read): "Survivors include a son, Willie Bell, and his wife
- 10 Claudine of Chester; her companion, Andrew Strong; two
- 11 brothers ..." and so forth. Who -- who put in there the
- 12 "companion of Andrew Strong"?
- 13 A I don't know. I didn't do it.
- 14 Q Now, you -- you had the -- your mama passed and you've
- 15 had the -- you had a funeral; is that right?
- 16 A Yes, sir.
- 17 Q And you had the obituary.
- 18 A Yes, sir.
- 19 Q What happened next?
- 20 A Someone called to the house one night. It's like -- I
- 21 think -- I don't know whether it was on a Monday or
- 22 Tuesday. I think it was on a Monday. I forgot what day
- 23 exactly it was, but someone called to the house and said
- 24 that something had -- said he was in the surgery room when
- 25 my mama died and said Piedmont Medical had did something

1 wrong, some wrong things that made her die. They gave her
2 too much anesthesia.

3 Q Did you get that call or did somebody else?

4 A Somebody else.

5 Q When did you hear about that call?

6 A It was -- when we was in the house, they was saying
7 they said that, and that's how I heard it.

8 Q Well, who -- who got the call?

9 A I can't remember who -- who took the phone call.

10 Q Okay. So what happened after that?

11 A I -- didn't nothing happen. They -- I guess they went
12 and saw -- talked to an attorney.

13 Q Okay.

14 A And ---

15 Q Did anybody ask you to go with them to talk to an
16 attorney?

17 A No, sir.

18 Q Do you know what a personal representative is or did
19 you at that time?

20 A No, sir.

21 Q Did anybody ask you to go to the probate court and be
22 a personal representative?

23 A No, sir.

24 Q Just noone talked to you about it.

25 A No, sir.

1 Q And where were you living at that time?

2 A At the house.

3 Q With -- who was in the house?

4 A Me -- me and Andrew Strong.

5 Q And he never mentioned it to you.

6 A No, sir.

7 Q Now, who is Tanisha Gilmore?

8 A She is like a -- my third cousin. My momma niece.

9 Q Did she ever mention anything to you about being a
10 personal representative or a lawsuit or anything?

11 A No, sir.

12 Q Did anybody talk about you -- the lawsuit?

13 A No, sir.

14 (Marked Plaintiff's Exhibit No. 5, newspaper article,
15 four pages.)

16 Q I'm going to ask you to look at a document.

17 (Hands document to the witness.)

18 You see that document?

19 A Yes, sir.

20 MR. LEWIS: This is exhibit number 5, and we'd offer
21 it into evidence, Your Honor

22 THE COURT: Any objections?

23 MR. JANIK: No objection.

24 THE COURT: In without objection.

25 Q When did your -- your mama die? Do you remember?

1 A I think it was like February the 10th, February the
2 10th, 2010.

3 Q 2010.

4 A Yes.

5 Q So this article, Exhibit No. 5, says it's in April 7,
6 2013. Is this the next thing that you remember happening
7 with reference your mother?

8 A Yes, sir.

9 Q What is it? Explain this to us and how this came
10 about. What -- how did you learn about your mother and the
11 money that she had ---

12 A Well ---

13 Q --- they had rewarded for her death.

14 A Well, like I say, I didn't know that -- what -- what
15 the family members were doing behind my back. But they
16 never did tell me to go -- come go with them or nothing.
17 And I didn't know nothing.

18 But when this paper came out, The Evening Herald
19 Paper, Tanisha called me, Tanisha Gilmore called me like
20 about six o'clock that morning. I was up, getting ready to
21 go to work, and she called me and said, "Willie, I'm going
22 to tell you something. Don't believe that in the paper."
23 I said, "Believe what?" She said, "It's -- it's in the
24 paper that -- that we got 2. -- 2.3 million," she said,
25 "but don't believe that right there because the lawyer got

1 half of it." I said, "What you talking 'bout?" And she --
2 and she was just saying that don't believe that.

3 I said, "Well, how much I'm getting?" And she said,
4 "I think you supposed to get \$100,000." I said, "Well,
5 okay."

6 And I said, "Who else supposed to be getting
7 something?" And she said, "My -- Linda Gilmore, her mama."
8 She give her mama \$100,000. I said, "Okay."

9 And I said, "Well, how much you getting?" She said,
10 "I can't tell you that."

11 And then my -- my wife took the phone from me. I
12 said, "You hear what she saying?"

13 And she -- I don't know what she told my wife, but --
14 and after she hung up -- we hung up from her, we said, "Why
15 my name been on there? You know, they been seeing a lawyer
16 and ain't told me nothing 'til -- 'til this right here
17 came." And I started crying again because I really didn't
18 know what was going on 'bout my mama, how she died and
19 stuff, you know. And that's how I knew about it.

20 Q And then after that, what did you do?

21 A I talked to Andrew and I said, "Andrew, why Tanisha
22 gettin' all this money?" And he said, "Wasn't for her, he
23 wouldn't have got nothing." And I said, "Well, I didn't
24 get but \$100,000, and she got 2.2/2.3 million," and I said,
25 "I'm the son." And he said, "Wasn't for her, we wouldn't

1 have got nothing." I said, "Well, okay then."

2 And so bout another week or two I was working, cutting
3 grass, and my -- some of my aunt -- my family member had
4 told me, said, "Willie, something ain't right." She said,
5 "Your name isn't on that paper nowhere, and you need to
6 talk to you -- do something about that. You need to go
7 talk to somebody."

8 So I looked in the phone book, and called -- I just
9 picked up a number out the phone book, attorney in Rock
10 Hill. His name was "Stewart," I think. And I asked him a
11 question. And I told him, "How can someone get 2.3 million
12 and they not the child and I'm the son?" And he said ---

13 MR. JANIK: Objection.

14 THE COURT: I sustain the objection.

15 A And he said ---

16 THE COURT: No. You can't testify to what he said.
17 That's ---

18 A Okay.

19 THE COURT: He would have to come testify to that.

20 Q Based upon what he told you, what did you do?

21 A I called -- he gave me a number and I called -- I
22 don't know who she was. I think her name was Ann.

23 Q Is that -- was in Mr. McGowen's office?

24 A Yes, sir.

25 Q And what did she say?

1 A And I told her everything. I told her that I was the
2 son of Emma Davis, she said, "Well, I'm sorry about your
3 loss, and I wish I could do something to help you. But the
4 case been settled and you just can't do nothing about
5 this." And I said, "Well, okay."

6 And so that's when I took my -- my some of my family
7 members said, "Willie, yes, you can do something about it."
8 So that's when we got John -- John Austin [sic] and Pete
9 Storm [sic].

10 Q Pete Strom and John Alphin?

11 A Yes, sir.

12 Q You went to see them.

13 A Yes, sir.

14 Q And what did you -- what did -- what happened out of
15 that?

16 A We told him everything. The -- the what did happen,
17 and he said, no, something ain't right. He said, no, it --
18 you --

19 Q Did they send you to get a document? Did they send
20 you to get your birth certificate?

21 A Yes, sir.

22 Q Did you bring it to them?

23 A Me and him went to Columbia, down there to the
24 building, I got my birth certificate.

25 Q Who's "you and him"?

1 A John -- John ---

2 Q John and you went down to get your birth certificate,
3 the one that we put in evidence.

4 A Yes, sir.

5 Q And then what happened after that?

6 A And they investigated the case and -- and -- and the
7 just investigated and they -- we had -- we got so they --
8 we -- we were going to go to trial. But they wanted --
9 they came to want to settle it, said that, "Willie, you can
10 have that money." I said, "Well, that ain't the point,
11 it's not about the money. It's just the point how y'all
12 did me. Y'all didn't put my name down and didn't tell me
13 nothing."

14 And all of them got mad at me, saying I -- I was doing
15 wrong to them. Like, putting -- getting a lawyer and
16 stuff. And I think I'm doing the right thing because ---

17 Q Andrew's mad about you getting a lawyer.

18 A Yes, sir.

19 Q And they gave you the money they had left.

20 A Yes, sir.

21 Q And then you went to another lawyer --

22 A Yes.

23 Q -- and that's why we're here today.

24 A Yes, sir. I came to you.

25 Q Me.

1 A Yes, sir.

2 MR. LEWIS: Just a minute, Your Honor. Can I have a
3 second?

4 THE COURT: Yes, sir.

5 Q Willie, they say this is all about the money. You --
6 you're the son, right?

7 A Yes, sir.

8 Q The money's supposed to come to you.

9 A Yes, sir.

10 Q And that's all you want, isn't it?

11 A Yes, sir.

12 MR. LEWIS: Excuse me just a minute, Your Honor

13 THE COURT: Yes, sir.

14 MR. LEWIS: I'm not as quick as I used to be.

15 (Brief pause.)

16 Q Who is Andrew Strong?

17 A (Coughs) Excuse me. That was my mama boyfriend.

18 Q Were they ever married?

19 A No, sir.

20 Q Did your mama -- you -- you -- they don't have -- they
21 never had a marriage or anything that you know of.

22 A No. No, sir.

23 Q Now, after you came to me, did we find out that the
24 estate had been closed? Do you remember that?

25 MR. JANI: Objection.

1 THE COURT: Well, I overrule the objection.

2 A I think so. I can't remember.

3 Q Well, you remember going to court to become the
4 successor PR?

5 A Yes, sir.

6 Q Do you remember the document that did that?

7 A Yes, sir.

8 (Marked Plaintiff's Exhibit No. 6, Application
9 Document, 4 pages.)

10 MR. LEWIS: We would offer that as Exhibit No. 6.

11 MR. JANIK: No objection.

12 THE COURT: In without objection.

13 (Plaintiff's Exhibit No. 6 in evidence.)

14 Q Do you see No. 1, it says (as read) "Subsequent
15 administration of the above estate is needed because the
16 following additional property in the above estate has been
17 discovered. A description of the property and its value
18 the day of decedent's death is potential litigation with an
19 unknown value." Do you see that?

20 A Yes, sir.

21 Q That's the suit we have here today; is that right?

22 A Yes, sir.

23 Q And it says (as read): "I did not serve as personal
24 representative under the previous administration. My
25 priority for this appointment is..." and it says why.

1 A Yes, sir.

2 Q (As read) "Other heir on decedent; describe sole
3 surviving heir: son. Do you see that?"

4 A Yes, sir.

5 Q And then you -- you were appointed the surviving trust
6 -- I mean, the surviving PR; is that right?

7 A Yes, sir.

8 Q And that's where you're here today.

9 A Yes, sir.

10 Q You're here both as Willie and as the surviving -- as
11 the new PR for the -- the predecessor PR for the estate; is
12 that right?

13 A Yes, sir.

14 (Mr. Lewis confers with co-counsel.)

15 MR. LEWIS: Thank you, Willie. Will you answer any
16 questions that they have of you?

17 THE WITNESS: Sir?

18 MR. LEWIS: They're going to ask you some questions.
19 Just answer their questions

20 (Brief pause.)

21 CROSS-EXAMINATION BY MR. JANIK:

22 Q Mr. Bell, you said that you were here as Willie and as
23 the PR. Is that what you just testified to?

24 A Yes, sir.

25 Q What do you mean?

1 A I'm here to -- to represent the PR. The wrong PR took
2 and got the money.

3
4 Q Are you saying you're here individually as well, that
5 you were Mr. McGowan's client individually?

6 A Sir?

7 Q Are you saying that you were Mr. McGowan's client?

8 A No. I'm Mr. Cam's client.

9 Q Oh, I'm sorry. I didn't hear you.

10 A I'm Mr. Cam client.

11 Q Okay. So Mr. McGowan -- you and Mr. McGowan never
12 spoke.

13 A No, sir.

14 Q You never corresponded.

15 A No, sir.

16 Q No communications at all.

17 A No, sir.

18 Q You never asked him to represent you.

19 A No, sir.

20 Q He never agreed to represent you.

21 A No, sir.

22 Q You didn't think he was representing you.

23 A Sir?

24 Q You didn't ever think he was representing you.

25 A No. I didn't know who -- I mean, you know, I didn't -

1 - didn't know what was going on.

2 Q When you were asked to go to meetings, you declined.

3 A I didn't -- didn't nobody ask me.

4 Q Did anyone ever talk with you about meetings?

5 A No, sir.

6 Q The -- we've -- you know, we've deposed a lot of your
7 family members.

8 A Yes, sir.

9 Q And -- and I've heard a phrase they've all kind of
10 used, that everybody in Chester knows everything that's
11 going on in Chester.

12 A That's right.

13 Q You'd agree with that.

14 A Yes, sir.

15 Q Okay. And you got a big family.

16 A That's right.

17 Q Okay. And we'll bring in the family tree. We've
18 looked at it before, right?

19 A Yes, sir.

20 Q Okay. And so you have aunts and cousins and nieces,
21 right?

22 A Yes, sir.

23 Q And are they always called, you know, like Michael
24 Young, he's called a brother, but he might be a cousin. Or
25 Tanisha's called "daughter," and she might be a grandniece.

1 Those things happen?

2 A No, sir.

3 Q Never heard anybody called brother or sister ---

4 A I hadn't heard nobody call Tanisha no daughter.

5 Q Have you ever heard from amongst your family people
6 use any of those titles?

7 A I heard my mama call Michael Young "brother."

8 Q Okay. And was he her brother?

9 A Not biological brother, but they came up as like
10 brother and sister it was so close.

11 Q Right.

12 A Yes.

13 Q Raised like a brother --

14 A Yes, sir.

15 Q -- in the house brother.

16 A Yes, sir.

17 Q Okay. And you were raised like a son.

18 A I was the son.

19 Q When she first took you in, were you adopted?

20 A No, sir.

21 Q How old were you when she first took you in?

22 A I think like 6 or 7. I was like in the third grade.

23 Q Right. And she didn't adopt you until you were 15.

24 A Somewhere around in there, yes, sir.

25 Q But she treated you like a son that whole time, didn't

1 she?

2 A Treated me like a son, yes, sir.

3 Q Called you son?

4 A Yes, sir.

5 Q Treated the same before you were adopted as after you
6 were adopted.

7 A Same.

8 Q Called you "son" same way.

9 A Yes, sir.

10 Q Okay. And you called her "mom."

11 A Yes, sir, sometime.

12 Q Why's that?

13 A 'Cause she have a nickname, Monk. And the family used
14 to call her "Monk."

15 Q Andrew had a nickname, too.

16 A Emma -- yeah. Her nickname was "Monk."

17 Q What was Andrew's?

18 A Cue Ball.

19 Q Cue Ball. Okay.

20 After you were adopted, what -- did you have a party
21 with the family or any kind of announcements, anything to
22 celebrate?

23 A My mama used to get -- have party for me for like --
24 something -- my birthday -- I can't remember which one she
25 had it for -- and she'd invite the family over.

1 Q Did you have a specific party where she said,
2 "Everybody, hey, I adopted Willie" and ...

3 A I don't know what she said.

4 Q Okay. Did you ever hear her tell anybody you were
5 adopted?

6 A My mama?

7 Q Yeah.

8 A I don't know.

9 Q And you only told a few people you were adopted,
10 right?

11 A I might have.

12 Q Your Aunt Rose?

13 A Well, she was there when I got adopted.

14 Q So she knew.

15 A Yes, sir.

16 Q Who else?

17 A I -- in my mind and heart, I -- I think everybody --
18 all of them know that I was adopted.

19 Q And they knew that just 'cause your mama referred to
20 you as "son."

21 A Yes.

22 Q No other reason than that.

23 A Well, I don't know that she told them or not, but --

24 Q All right. But she called you "son" before you were
25 adopted and called you "son" after you were adopted.

1 A Yes.

2 Q How would they know which reference to you as your son
3 meant you were adopted and which one meant you weren't?

4 A Well, like I say, my Aunt Rose know and my Aunt Rose
5 told me that she had told Rosa Hall.

6 MR. JANIK: Objection. Non-responsive.

7 THE COURT: Just --

8 MR. LEWIS: He opened the door, Your Honor.

9 THE COURT: Well, dis -- disregard what another person
10 other than him said to some other person. Thank you.

11 MR. JANIK: Withdrawn. We'll start over.

12 Q Your Aunt Rose was at the adoption.

13 A Yes, sir.

14 Q Okay. Who else was at the adoption?

15 A I think the lawyer.

16 Q Anybody else?

17 A I can't remember.

18 Q Was Ms. Emma at your adoption?

19 A My mama, yes.

20 Q Okay. Now, after you -- after your adoption, 15, as
21 you're -- as you're growing up in your -- Ms. Emma's home
22 there, did you tell any of your family you were adopted?

23 A I think I did, but I can't -- I can't remember who I
24 told.

25 Q Do you know of anyone that told Mr. McGowan you were

1 adopted?

2 A I don't know.

3 Q Do you know if anyone gave him any -- gave him your
4 adoption decree or your birth certificate?

5 A I don't -- I don't know.

6 Q Now, you indicated that when you heard about the --
7 the settlement, that somebody told you you gotta do
8 something about this? Who told you that?

9 A Tanisha -- oh. Excuse me now?

10 Q You said that when -- after you heard about the
11 settlement --

12 A Yeah.

13 Q -- you were talking to some family members who said,
14 "This isn't right. You gotta do something about it."

15 A Yes, sir.

16 Q Who was that?

17 A Her name was Ernestine.

18 Q And what -- who is Ernestine?

19 A My first cousin.

20 Q On the Young side of the family or the Davis side?

21 A On the Young.

22 Q Anybody else tell you you gotta do something?

23 A Yes, some of her sisters. And my aunt. My aunt and
24 her daughters.

25 Q Okay. Back when your mom died, anybody tell you you

1 had to do something?

2 A Well, when she first died?

3 Q Uh-huh.

4 A I -- I -- didn't nobody really know what happen.

5 Q When you heard about the money, you went to a public
6 pay phone, picked up the phone and called a lawyer.

7 A No. I had my cell phone.

8 Q Okay. Called him on your cell phone. Looked up his
9 number?

10 A Yes.

11 Q Did you get -- when your mama died, did you get help
12 see if there's something wrong there?

13 A Excuse me now? Say that again now.

14 Q Sure. When your mama died, did you ever call a lawyer
15 to say, "We got this phone call and something's wrong and I
16 want you to look into this"?

17 A No, I didn't do that.

18 Q Any reason you didn't do that?

19 A I wasn't thinking. My head wasn't -- I wasn't
20 thinking clear.

21 Q Did your head ever clear and -- and you went forward,
22 you ever think about calling a lawyer?

23 A After I -- after my family had talked to me and -- and
24 after I -- I saw the -- the paper, The Herald. And that's
25 when I did something about it.

1 Q From -- right. After you heard about the money.

2 A Yes, sir.

3 Q From the time your mama died until you heard about the
4 money, did you do anything at all?

5 A I didn't know I could do something about it.

6 Q You didn't know you could call a lawyer for that?

7 A No, because I didn't know the hospital had killed her.

8 Q But you knew the phone call had come in saying that
9 the hospital had killed her, right?

10 A Yes.

11 Q And you didn't do anything.

12 A No, sir. I didn't do nothing.

13 Q Now, your mama had some -- some insurance, right?

14 A I don't know. I don't know.

15 Q Never saw the insurance that was used to pay for the
16 funeral services?

17 A I saw -- when I saw the insurance paper, Moe had
18 showed it to the -- to the family.

19 Q Right. You saw the paper at that time.

20 A Yes.

21 Q And that was insurance used to pay for the funeral.

22 A Yes.

23 Q And that insurance was -- was made payable to Andrew.
24 He signed it over, right?

25 A Yes. And he also told me, he said, "Willie, it ---"

1 MR. JANIK: Objection, Your Honor.

2 THE COURT: Yeah. Don't -- don't go into what
3 somebody else said or think.

4 Q Did you ever talk to any attorneys to get that
5 insurance?

6 A No, sir.

7 Q Now, your mama died on February 10 of 2011, right?

8 A 10.

9 Q February 11 of 2010.

10 A 10, yes, sir.

11 Q I'm sorry. And Mr. Bell, let -- let me make it clear,
12 I am sorry about your mama.

13 A Thank you.

14 Q And I'm -- I know this is -- this is not an easy
15 process; and -- and I don't want you to think in any way,
16 shape, or form that -- that we are not sensitive to that,
17 that this is how we solve problems.

18 A Yes, sir.

19 Q You understand?

20 A Yes, sir.

21 Q Okay. So from February 11, 2010 until August 7, 2013,
22 when you saw that article, even though in Chester everyone
23 knows everything, you never heard a word about this lawsuit
24 or on the streets or anything?

25 A Yes, I heard a guy -- a friend of the family told me

1 that Andrew was seeing a lawyer.

2 Q And when was that?

3 A I don't -- I can't remember when.

4 Q Was it closer to when your mama died or close to when

5 ---

6 A While -- it was after about a year -- about a year
7 after.

8 Q Okay. And did you ever go to Andrew and say, "Why are
9 you seeing a lawyer?"

10 A No.

11 Q Did you ever call a lawyer and say, "Hey, something's
12 going on here. Andrew's got a lawyer"?

13 A No, sir.

14 Q Did you ever -- did you ever -- did you ever think
15 Andrew cheated you out of your money?

16 A Sir?

17 Q Do you really thing Andrew's cheating you out of your
18 money?

19 A Yes.

20 Q Okay. You believe that happened. You could live with
21 him all these years and you think that he's taken advantage
22 of you.

23 A Yes. Because one reason why, when he borrowed it --
24 the letter's saying that he borrowed money while the
25 lawsuit was going on. He didn't never tell me nothing

1 about that. So that's why I figured he was cheating.

2 Q Because he -- he borrowed money to pay his bills?

3 A Yes.

4 Q Well, why would he tell you about it?

5 A I don't know.

6 Q Okay. Any other reasons you feel that way?

7 A Yes. Because I was -- I'm the only one who was in the
8 house working, and I was paying all the bills.

9 Q Okay.

10 A And he wasn't paying because he wasn't getting no
11 income.

12 Q Was he able to work?

13 A No.

14 Q And that was the whole time while you were living
15 there, right?

16 A Ever -- ever since my mama died, I paid all the bills
17 in the house until about -- up to about couple years, and
18 then Andrew started getting Social Security -- I mean,
19 retirement.

20 Q And -- but Andrew did give you \$100,000.

21 A After they got the money, yes, sir.

22 Q Okay. The hospital asked you -- did -- someone asked
23 you about an autopsy?

24 A Yes.

25 Q Who was that?

1 A I can't remember.

2 Q Was that at the hospital?

3 A Yes.

4 Q Did you talk to anybody about whether you should have
5 an autopsy done?

6 A I don't think so.

7 Q Talk to Claudine? Ask her about it?

8 A I don't -- I don't know. I can't remember.

9 Q Claudine's your first wife.

10 A Yes.

11 Q She's got a medical background. She works in the
12 health industry?

13 A She got a what now?

14 Q Does she have a medical background? Does she work in
15 the health care industry?

16 A I don't know.

17 Q Remember talking to her about an autopsy?

18 A I don't -- I can't recall. I might -- I don't -- I
19 don't know. After everything got -- you know, I don't
20 know.

21 Q Did anyone ever recommend to you, "Get the autopsy"?

22 A I can't remember.

23 Q From the time your mom had died until you read that
24 article, did you ever think that somebody at the hospital
25 had caused her death, some of the doctors had caused her

1 death?

2 A Well, when they -- when someone called to the house
3 that night and -- they said it was a guy. But then never
4 did tell me nothing, you know, they just said that that
5 night and they didn't told [sic] me nothing else, so ---

6 Q What exactly did they -- I'm sorry. Were you done?

7 A When -- when that -- whoever called to the house that
8 night ---

9 Q You want some water, Mr. Bell?

10 A No, I'm fine.

11 Q You sure?

12 A Yes, sir.

13 Q All right.

14 A But whoever called to the house that night and -- I
15 don't know who it was, but they never did tell me. I just
16 heard that they saying that -- they were saying that --
17 that -- that something went wrong in the -- in this --
18 surgery room.

19 Q Who did you hear talking about it?

20 A I don't -- I think it was Laverne -- Laverne Young,
21 Michael Young's wife. I think she the one.

22 Q Who was she talking to?

23 A I don't remember.

24 Q Did you ever ask her, say, "What -- what happened?"

25 A No, I didn't ask her.

1 Q Why not?

2 A I wasn't thinking about that. Like I said, my mama
3 dead and ---

4 Q Did you ever go -- come back a few days later,
5 whatever, and say, "Did you ever check that out what was
6 going on?"

7 A I -- I -- I should have, but like I said, my -- it
8 took a while for me to get over about my mama.

9 Q Well, once you got over it, did you ever go back and
10 check it out?

11 A No, sir.

12 MR. JANIK: Can I have a minute, Your Honor?

13 THE COURT: Yes, sir.

14 (Brief pause.)

15 Q Mr. Bell, from the time that your mama died, on
16 February 11 of '10, to the time that you read that
17 newspaper article, were you living with Andrew that whole
18 time?

19 A Yes.

20 Q Did Tanisha ever come and pick Andrew up and take him
21 places?

22 A Yes.

23 Q They ever tell you where they were going?

24 A No, sir.

25 Q Were they -- when they got back?

- 1 A They didn't tell me nothing.
- 2 Q Okay. You're angry at Andrew and Tanisha.
- 3 A No, sir.
- 4 Q No.
- 5 A No, sir.
- 6 Q You hold them accountable in your mind?
- 7 A No. I hold them accountable what they -- what they
- 8 done to me.
- 9 Q Correct.
- 10 A Yes.
- 11 Q Anybody else beside them?
- 12 A Yes, sir.
- 13 Q Who else?
- 14 A The -- the whole list of -- the people that -- that
- 15 name on the list --
- 16 Q Uh-huh.
- 17 A Them.
- 18 Q You didn't sue them though, did you?
- 19 A No, sir.
- 20 MR. JANIK: Nothing further, Your Honor.
- 21 THE COURT: All right. Re-direct.
- 22 MR. LEWIS: No, sir.
- 23 THE COURT: All right. You can step down.
- 24 (The witness complies.)
- 25 THE COURT: Everybody else for this afternoon?

1 MR. LEWIS: Sir?

2 THE COURT: Everybody else for this afternoon?

3 MR. LEWIS: We can -- we can read a deposition.

4 THE COURT: Okay. All right. The next presentation --
5 - it's a little early. We try to ---

6 MR. JANIK: We -- we don't have a designation. I
7 don't know what the deposition is or what they're going to
8 read.

9 THE COURT: All right. Let me let the jury go to the
10 jury room just for a minute. We'll kind of see where we
11 are.

12 (Jury exits the courtroom at 4:48 p.m.)

13 THE COURT: All right. You want to go over -- tell
14 counsel where we are as far as your deposition, which one
15 it is, and --

16 MR. LEWIS: George Beighley, and it's just a few
17 lines. But if he wants me to read -- it's not very long.
18 I'll read the whole thing. But -- but I didn't know he
19 wanted me to designate. There's no -- we don't have rules
20 like in Federal court.

21 MR. JANIK: We do have rules.

22 THE COURT: Yeah. We -- yeah.

23 MR. LEWIS: Well, I'll just read the whole thing. I
24 don't have any problem with that. It's not very long.

25 MR. BROOKS: Your Honor, if he's going to read a

1 deposition, we're entitled to notice to know what he's
2 going to designate. And the whole thing, we're entitled to
3 know that so we can then pose whatever objections we have.

4 THE COURT: All right.

5 MR. BROOKS: I don't think the whole deposition's
6 going to be ---

7 MR. JANIK: He's available, Your Honor.

8 MR. LEWIS: Well, it's just as though he testified.
9 They can object just like they do normally.

10 MR. BROOKS: He's available.

11 MR. LEWIS: He's not available. He's 50 miles out of
12 the -- 50 mile radius on -- in our rules.

13 THE COURT: I don't think it's 50. I ---

14 (All counsel talk at once.)

15 THE COURT: I thought it was 100.

16 MR. BROOKS: It's state-wide for trial.

17 THE COURT: All right. Well, we'll stop for the day
18 and see what y'all can work out overnight and whether or
19 not that's admissible; and I'll take another look at the
20 rule. Bring in the jury.

21 THE COURT REPORTER: And gentlemen, please don't talk
22 at the same time. Thank you.

23 MR. JANIK: Sorry.

24 THE COURT REPORTER: And definitely don't talk over
25 the Court.

1 THE COURT: This is a note -- they're not discussing
2 the case, but it says, "Are the documents supposed to be
3 passed around to the jury?"

4 I don't have a good answer for that. I usually
5 prefer, unless -- unless they're projected, that exhibits
6 be held 'til a later time because what happens is you hand
7 them to the jury and they read them and try to digest them,
8 and they should be listening to the witness.

9 So unless there's some strong feeling otherwise, I'm
10 going to ask that documents not be passed around. Any
11 objection?

12 MR. LEWIS: If that's what you rule, I don't -- I've
13 seen them done all kinds of ways.

14 THE COURT: Well, I -- I ---

15 MR. LEWIS: Different courts do it different ways.
16 And I -- I hand it to them and done it. Lots of times we
17 put them up on the -- on the thing you're talking about.

18 MR. JANI: We're planning to project -- project ours,
19 Your Honor.

20 THE COURT: Yeah. Let's --

21 MR. LEWIS: Well, if they're going to project them,
22 then I should be able to hand them out. Because I mean ---

23 THE COURT: Well, here -- here's the problem -- and
24 I'll be glad -- but if you hand them out, then in the past
25 what I've done is, say, you -- you hand them an exhibit,

1 and I'll say, "All right. We'll stand at ease until
2 everybody looks at it." And they pass it around and we
3 spend five or six minutes while the jury passes them
4 around, and they get anxious because they know -- when they
5 get the exhibit, they say, "Well, you know, I -- I'm not
6 going to take a look at it because I'm holding up
7 everybody." And it just doesn't work very well.

8 MR. LEWIS: They can project our exhibits. So we'll
9 just project them all. That's fine with me.

10 THE COURT: All right. Well, we'll ---

11 MR. LEWIS: They were very kind to say that.

12 THE COURT: Okay. All right. Well, I'm going to call
13 them in. We're going to dismiss them for the day and start
14 back at 9:30 in the morning. And I'll tell them that we're
15 going to use projection. All right.

16 Bring in the jury.

17 (Brief pause.)

18 (Marked Court's Exhibit No. 3, juror note.)

19 THE COURT: Bring them in. I'm told by the bailiff
20 that the concern was that the foreperson was hogging them
21 and wasn't sending them around.

22 (Courtroom laughter.)

23 (Jury enters the courtroom at 4:54 p.m.)

24 THE COURT: Members of the jury panel, we don't have
25 another witness to fit in. We're going at a pretty good

1 rate. We -- this is all we planned to do today. We start
2 back at 9:30 in the morning.

3 Like we did at lunch today, I have a short matter at
4 9:30, but it should only take a few minutes. So hopefully
5 we can start shortly after 9:30.

6 As far as the documents, we're going to start
7 projecting all of them on the screen so we won't be
8 distracted by having them handed to -- handed to the jury
9 to be -- to be passed around. They'll be projected on the
10 screen.

11 Keep in mind those admonitions about not discussing
12 the case, not doing any independent research, not going to
13 the Cloud or Google or anywhere to find anything about the
14 case or about anything that could remotely deal with the
15 trial. And reminding you not try to make up your mind or
16 let anyone discuss the case with you outside the courtroom.

17 And we'll see you at 9:30 in the morning. Have a
18 pleasant evening.

19 (Jury exits the courtroom at 4:55 p.m.)

20 THE COURT: Anything we can do from -- anything from
21 the plaintiff?

22 MR. LEWIS: Sir?

23 THE COURT: Anything before we stop for the day?

24 MR. LEWIS: No, sir.

25 THE COURT: Defense?

1 MR. JANIK: Just if we can access to the courtroom,
2 Judge, to set up the projector.

3 THE COURT: All right. Well, we'll be here -- what
4 time do the bailiffs -- Ms. Strait, can they get in? 8:30?

5 CLERK OF COURT: Yes, sir.

6 THE COURT: All right. 8:30 on.

7 MR. JANIK: Thank you.

8 THE COURT: Or you want to try to do it tonight?

9 MR. JANIK: We -- we'd like to do it tonight if we
10 can, Judge.

11 THE COURT: Okay.

12 (The Court confers with the clerk.)

13 THE COURT: Okay. We'll give you time right now, and
14 have at it.

15 MR. JANIK: Yes, sir.

16 THE COURT: All right. We'll see you all at 9:30.

17 (Off the record at 4:56 p.m.)

18 Day 2

19 (On the record at 9:58 a.m.)

20 THE COURT: All right. Plaintiff ready?

21 MR. LEWIS: Yes, sir.

22 (Brief pause.)

23 THE COURT: Defense ready?

24 MR. JANIK: (No audible response.)

25 THE COURT: All right. Bring in the jury.

1 (Jury enters the courtroom at 10:00 a.m.)

2 THE COURT: Good morning. I -- I told you I had
3 something earlier that I didn't think would take long. And
4 actually, it didn't. Unfortunately, my court reporter,
5 lawyers involved in the other matter, and my law clerk --
6 although she didn't get caught in it -- were all coming
7 from Columbia, and there was a bad, bad wreck. And so
8 everyone was running about 15 or 20 minutes late. So
9 that's why we're a little off schedule.

10 The -- the -- the scene in front of you has changed a
11 little bit because now we have Crystal Maluchnik.

12 MS. MALUCHNIK: Close enough.

13 THE COURT: She's an attorney, and she is associated
14 with Mr. Janik and Mr. Brooks. And she is seated where she
15 is, not because she's gotten in trouble and been put in the
16 corner by the judge, but she's going to be operating some
17 audio/visual equipment is my understanding.

18 All right. Mr. Lewis, you may proceed.

19 MR. LEWIS: Yes, sir. We call Chad McGowan.

20 THE COURT: All right. Mr. McGowan, please come up.

21 THE CLERK: Mr. McGowan, go ahead and stop here to be
22 sworn.

23 THE WITNESS: Yes, ma'am.

24 THE CLERK: Place your left hand on the Bible and
25 raise your right.

1 (The witness complies.)

2 CHAD MCGOWAN, having first been
3 duly sworn, testifies as follows:

4 MR. LEWIS: May I proceed?

5 THE COURT: Yes, sir.

6 DIRECT EXAMINATION BY MR. LEWIS:

7 Q Mr. McGowan, you're the defendant in this case, you
8 and your law firm, correct?

9 A Yes.

10 Q And you are a lawyer.

11 A I am.

12 Q How long have you been a lawyer?

13 A Since 1995.

14 Q And yesterday your -- do you know who Willie Bell is?

15 A I do now.

16 Q You didn't know before?

17 A He was reported to me as having been raised by Emma
18 Davis, in my first meeting with the family, in February of
19 2010.

20 Q And that's all you knew about him?

21 A No.

22 Q What else you know about him back from 19 -- uh, 2010?

23 A My first meeting with the family was on February 17,
24 and it was with, I believe, seven or eight different family
25 members. That's the first time I met anybody from the Emma

1 Davis family whatsoever. And Mr. Bell was told to me that
2 he was raised like a son, but he was never adopted as a
3 son.

4 Q Now, if someone asks -- how would someone know someone
5 is never adopted unless they went to the courthouse and
6 checked the records, Mr. McGowan?

7 A I had --

8 Q I'm asking you how would you do it unless you go to
9 the courthouse and check the records?

10 A How would you know someone was not adopted?

11 Q Not adopted. I mean, they might not know whether he
12 was adopted. How -- but how would you know he's not
13 adopted unless you talked to Mr. Bell or went to the
14 courthouse?

15 A I had in front of me seven family members at that
16 initial meeting. Later there were more, all of whom said
17 actively that he was not adopted. And these were not, so
18 far as I could tell, strangers to Ms. Davis. These were
19 her sisters, these were people that had lived with her for
20 decades. And in my judgement, a family of that kind, that
21 were that close, if they tell me he's not adopted, then I
22 have every right to believe that, unless some evidence
23 comes up later that would explain why they said he was
24 raised like a son but not adopted.

25 Q I'm asking you the question again: How would they know

1 that he wasn't adopted -- was not adopted, unless they went
2 to the courthouse records? Just saying here that they
3 thought he wasn't or he was told he wasn't, how do you know
4 unless you go to the courthouse and check? Is there any
5 other way?

6 A If you know that someone was brought into the home
7 when they were young and raised as Ms. Davis's son and you
8 know that he was not the child of Ms. Davis and you're not
9 ever informed that adoption had took place; and no
10 interaction among the family was different, no one treated
11 him differently, called him differently, or did anything
12 differently with Mr. Bell, then it seemed reasonable to me
13 that this family, who had known Mr. Bell since he was five,
14 would say and would know he was not adopted.

15 Q They might not know if he was or wasn't, but the way
16 to check is to go to the courthouse or to ask Mr. Bell.
17 Isn't that the most -- best way to determine if he was
18 adopted?

19 A Two things there: No and no.

20 As you know, we are not allowed to get adoption
21 records. The only people that can do that, under
22 extraordinary circumstances, is the adoptee.
23 And that's my understanding of what the law is.

24 And in fact, so far as I know, Mr. Bell didn't have
25 his adoption papers until six months after you threatened

1 to sue me. And there's no way to go to the court and check
2 to see if someone's actually adopted.

3 Now, I relied upon this -- these -- these seven family
4 members. It turned out to be nine family members.

5 Q I understand that.

6 Now, one thing you can do, if you can't go -- you
7 could have asked Mr. Bell to go get the adoption records,
8 couldn't you?

9 A Mr. Bell was not my client, so ---

10 Q Couldn't you ask him ---

11 A --- no.

12 Q --- to go get them?

13 A No, I couldn't because he was not my client.

14 Q Well, could you call him -- well, Miss -- all those
15 family members weren't your clients either.

16 A Well, they -- they were perspective clients until
17 February 24, when, at that point, I had two clients,
18 Tanisha Gilmore, the PR of the estate, and Andrew Strong.
19 From that point on, I had two clients, Ms. Gilmore as PR
20 and Andrew Strong.

21 Q But you talked to them beforehand, before that, and
22 you asked them if Willie Bell was adopted or not.

23 A That's true. And they were -- at that point, were
24 perspective clients. I had no clients until February 24th
25 of 2010.

1 Q All right. So with the perspect -- maybe Willie Bell
2 would have been a perspective client. You could have asked
3 him if he was adopted. Could you not have called him and
4 asked him that? Just say "yes" or "no," I could have or I
5 did -- I couldn't have. Could you have?

6 A Between the 18th and the 24th, no.

7 Q Why?

8 A Because he had not reached out to a lawyer. There is
9 -- my understanding of the rules is that it's -- it's very
10 improper for me to reach out to someone who may be a client
11 in a case. They have to come to the lawyer, because
12 otherwise, I'd be getting criticized up here for barratry
13 and for churning up lawsuits and what not.

14 If Mr. Bell had an issue, the way it works is the
15 client calls the lawyer. And I had never heard from Mr.
16 Bell, so I couldn't call him and start inquiring of him
17 because he was not my client. He didn't approach me. He
18 expressed no interest in having me investigate anything on
19 his behalf.

20 Q You call people all the time on behalf of your clients
21 that you don't represent, don't you? Witnesses, all kinds
22 of people.

23 A Witnesses in a case. Once I have a client in a case,
24 I do call witnesses.

25 Q And you call -- you call people when you have a client

1 in a case. But once you had Ms. Gilmore as your client or
2 Mr. Strong as your client, then you could have called Mr.
3 Bell, but you didn't, did you? You could have called him
4 then. You had clients you had to investigate for. You
5 didn't call -- you just didn't call, did you?

6 A Well, during the course of the work up of the case ---

7 Q I just asked you if you called.

8 A Did I call Mr. Bell? No, but I asked to get in
9 contact with him through Tanisha Gilmore.

10 Q And -- but you knew who he was. Did you ask for his
11 telephone number?

12 A No. Because my -- my -- what I do is when I have a
13 client like Ms. Gilmore, who is in charge of this case and
14 has an extended family, I go through that person so that
15 they can then say, "Alright, Mr. Bell is expecting your
16 call. He'll be here for a deposition." That's what we did
17 with all of the family members in this case, and that's
18 what I usually do because that's why I have a PR. I have a
19 point of contact, I have attorney/client relationship, and
20 I have attorney/client privilege. And if that person --
21 that's who I go through to ask, "We need to get Willie
22 Bell involved." And I was told he didn't want anything to
23 do with this case.

24 Q He -- you -- but you must have said, "Well, does
25 Willie Bell want anything to do with this case?"

1 A No, what happened was in about -- I think it was
2 January of 2013 -- this case had been pending now for two
3 and a half years -- it came out that Mr. Bell was more of a
4 witness than I think anybody had anticipated, and it came
5 out in the context of Mr. Bell -- at least there was some
6 evidence that Mr. Bell was at the hospital when some
7 representations by the doctors were made. And that was the
8 depositions of Atlene Jordan, Linda Gilmore, and there was,
9 I believe, Rosa Hall.

10 And after those depositions, the defense counsel says,
11 "We need to depose Willie Bell." And I said, "I -- I agree
12 with you. Let's try to get him set up."

13 I then called Tanisha, and I said, "Tanisha, we need
14 to get Willie Bell's deposition." She called me back the
15 next day and said, "There is -- there is no way he's going
16 to give his deposition. He doesn't want anything to do
17 with this case."

18 Q Well, Tanisha Bell, how much money did she get out of
19 this case?

20 A Her PR fee was \$25,000, and then ---

21 Q How much did she get after that from Mr. -- you and
22 Mr. Brown?

23 MR. JANIK: Objection, Your Honor.

24 MR. LEWIS: I mean Mr. Strong.

25 MR. JANIK: Objection.

1 A Tanisha ---

2 MR. JANIK: Counsel has said that the money came from
3 Mr. McGowan and Mr. Strong.

4 THE COURT: All right. Just rephrase your question.

5 MR. LEWIS: Sir?

6 THE COURT: Rephrase your question.

7 Q How much had Ms. Tanisha Gilmore get on a check that
8 was issued by your firm to -- to Tanisha and -- excuse me --
9 -- to Mr. Strong and Tanisha?

10 A She was given two checks: One for \$25,000 and the
11 other was a check for \$200,000 made payable to Andrew
12 Strong and Tanisha Gilmore at Mr. ---

13 Q Who wrote that check?

14 A --- at Mr. Strong's ---

15 THE COURT: Let -- let -- excuse me.

16 A --- direction.

17 THE COURT: Let him finish ---

18 Q I'm sorry.

19 THE COURT: --- his answer.

20 Q Who wrote it?

21 A That check was made at Mr. Strong's explicit
22 direction, and it was written from my trust account and
23 signed by me.

24 Q By you.

25 A Yes.

1 Q Now, let's go back with Mr. Bell. You said you found
2 out he was a -- could be a witness, and the defense lawyers
3 wanted to call him as a witness.

4 A I didn't say that. They said they wanted to take his
5 deposition and find out ---

6 Q Excuse me.

7 A --- what he had to say.

8 Q Take his deposition.

9 A Sir, I hate to be disrespectful, but --

10 Q And that was important for you not to let that happen.

11 A Absolutely not. In fact, that's why I called Tanisha
12 and I said, "Let's get Willie Bell. We got to get him
13 deposed."

14 Q And then you called the -- the defense lawyers. You
15 said he's not going to show up.

16 A What I was told by Tanisha is that Willie Bell said
17 that he'd been in prison so many times he didn't want to
18 come within 20 miles of the courthouse, and he was not
19 going to get involved in this case. That's what I was
20 told.

21 I then was going to relay that to the defense lawyers
22 and say, "I don't have control over Mr. Bell," and what
23 that then occurs is that I -- that means I can't facilitate
24 his deposition. That's not saying he can't be deposed.
25 That says that, unfortunately, defense lawyers are going to

1 have to issue a subpoena and get him to court. That's
2 where it was. So to say ---

3 Q Did -- did ---

4 A --- that I was trying to avoid it --

5 THE COURT: Whoa, whoa, whoa. Let me -- let me
6 interject. Mr. Lewis, you're going to have to let him --

7 MR. LEWIS: I'm sorry.

8 THE COURT: --- answer. He -- pick up -- pick up on
9 his speech pattern and let him finish.

10 COURT REPORTER: I can only take one at a time.

11 MR. LEWIS: I know that.

12 MR. MCGOWAN: So to say that I was trying to avoid Mr.
13 Bell's deposition is absolutely wrong. I was trying to get
14 it and was told he wanted nothing to do with it.

15 Q All right. Now, did you have his address?

16 A I knew that he was living with Andrew Strong, 23 and a
17 half Ligon Street in Chester.

18 Q All right. And you had his address, so did you give
19 the -- answer your -- update your interrogatories to put
20 his name on your interrogatories; that is, the names of the
21 possible witnesses and give the defense people the address
22 of Mr. Bell so they could subpoena him? Did you do that?

23 A No, because they already knew who he was and --

24 Q Excuse me. I -- you don't know what they knew.

25 A Well, no. I -- I do because they were in the same

1 depositions I were in and they heard the same evidence that
2 I heard. And they heard that Willie Bell may actually have
3 some testimony to give about the underlying med mal case.
4 So to say that they didn't know is -- is just wrong,
5 frankly. And in terms of getting his address, we were at
6 that point when the case was fixing to be settled.

7 Q But you didn't update your interrogatory and give them
8 the address so they could subpoena Willie Bell; isn't that
9 true?

10 A They hadn't yet asked me for that, and I hadn't yet
11 done that. But to say he was being hidden, you know, is, I
12 think -- I think that's wrong.

13 Q What?

14 A You're trying to -- I mean, I think ---

15 Q I think you have an obligation to update your
16 interrogatories. I'm just asking you did you.

17 A Well, I -- I -- I disagree with an obligation to
18 update written interrogatories in the face of a sworn
19 deposition that everybody was there and everybody knew
20 exactly what was happening. So I disagree with what you're
21 saying fundamentally from a legal standpoint.

22 And so no, I didn't because everybody knew it and we
23 were working towards that when the case settled.

24 Q What you wanted to do was to keep Willie Bell hid
25 because if Willie Bell came out, your client, Mr. Strong,

1 would not get any money, right?

2 A No, sir.

3 Q If Willie Bell's son, an adopted son, he's the heir;
4 is that not right?

5 A He's an heir.

6 Q And Mr. Strong is a competing heir.

7 A Potentially.

8 Q Well, alright. And so there's a potential conflict of
9 interest there.

10 A No, there -- there's not because my job, what I was
11 hired to do as a med mal lawyer, was to obtain the largest
12 recovery as a whole. And this has come up in other
13 situations, that when people that may get the money decide
14 to have disagreements, then they're referred out to
15 separate lawyers.

16 And the minute this disagreement came to my attention,
17 I referred my people out to a separate lawyer because
18 that's something that I could not and need not be a part
19 of.

20 Q But if it came up earlier, before you settled the case
21 and gave out the money and took your fee, you wouldn't have
22 gotten your fee until that dispute was settled; isn't that
23 true?

24 A No, sir, that's not true at all. That's absolutely
25 not the case. That's not the way this works.

1 Q Well, you keep saying who you represent. Who did you
2 represent?

3 A Tanisha Gilmore, as PR of the estate, and Andrew
4 Strong.

5 Q And Andrew Strong. All right.

6 (To Ms. Maluchnik) Would you pull up Exhibit No. --

7 THE COURT: Is this already ---

8 MR. LEWIS: Number 7, I think, the retainer agreement.

9 COURT REPORTER: I haven't marked it.

10 MR. LEWIS: You haven't marked it?

11 COURT REPORTER: I've only marked through 6 so far.

12 No, sir.

13 MR. LEWIS: Okay.

14 THE COURT REPORTER: I don't have that exhibit.

15 THE COURT: Does it need to be -- it's not in
16 evidence, as I understand it.

17 MR. LEWIS: I'll move that into evidence. Any
18 objection.

19 MR. JANIK: No.

20 THE COURT: In without objection.

21 (Marked Plaintiff's Exhibit No. 7, retainer agreement,
22 3 pages.)

23 Q We've talked about this a lot, haven't we, Mr.
24 McGowan?

25 A That's fair to say.

1 Q Huh?

2 A That is fair to say.

3 Q And we all agree that the retainer agreement says at
4 the very top up there (as read): "An agreement between
5 McGowan, Hood & Felder, hereinafter attorneys, and the
6 estate of Emma Davis."

7 A I -- I don't mean to put too fine a point on it, but I
8 think it says "Mrs. Davis."

9 Q Huh?

10 A I think it says "Mrs. Davis."

11 Q It doesn't say "the estate of?"

12 A No. It says "estate of Mrs. Davis, I think is what
13 that handwriting indicates.

14 Q Huh?

15 A I -- I believe this handwriting says "estate of Mrs.
16 Davis."

17 Q Yes. The estate of Mrs. Davis is your client. That's
18 what it says; does it not?

19 A Yeah.

20 Q Isn't that who your client was, right?

21 A Well, no. My client -- well, yes and no. My client
22 is the PR of the estate, and you're trying to draw a
23 distinction on a label that -- that has no legal
24 significance from what I was hired to do.

25 Now, offhandedly and short-handedly, we've been use --

1 we use "estate of Mrs. Davis." There is no legal entity
2 known as "the estate of Mrs. Davis," there's only the PR
3 that can act for anything.

4 In fact, as a shorthand in the legal world, this is
5 used all the time when then the truth -- when the client is
6 the person who signs it, Tanisha Gilmore as the PR. And in
7 fact, this is the way it's been for more than 20 years. I
8 think when I worked for you in 1992, this is the way you
9 did it, too.

10 Q I don't know. I'm too old to remember 1992.

11 Let me ask you something. Your -- did you represent
12 the estate of Ms. Davis?

13 A For a med-mal practice case through the PR, yes, I
14 did.

15 Q Did you represent -- was one of your clients the
16 estate of Ms. Davis?

17 A My client was Tanisha Gilmore, the PR who signed it,
18 and Andrew Strong.

19 Q All right. You -- you had Mr. -- Mr. Strong. You say
20 you had Tanisha Gilmore, and did you also represent the
21 estate?

22 A No. Because Tanisha Gilmore is the PR of the estate.
23 So my -- my client was the PR of the estate. So maybe
24 through the PR I represent the estate, which is we use this
25 shorthand.

1 Q And you said -- is the estate a legal entity?

2 A My understanding that an -- that an -- the estate is
3 a -- is a legal fiction that can only pursue anything
4 through a personal representative that's been appointed by
5 the probate court.

6 Q Have you ever read the case of *Dickey vs. Clarke*
7 *Nursing Home*?

8 A Dickey versus what?

9 Q Have you ever read that case called Dickey versus --

10 THE COURT: All right. Let -- let -- let's let the
11 jury go out, see where we are. We'll take a short break
12 while we take up a matter of law.

13 (Jury exits the courtroom at 10:17 a.m.)

14 THE COURT: All right. Mr. Lewis, this is a -- and
15 I'll -- I'll hear what Mr. -- what Mr. Janik -- what --

16 MR. JANIK: Several things, Your Honor. First of
17 all, counsel's about to establish -- giving a pop quiz on a
18 case with just a few excerpts from the case. A witness is
19 here to testify about facts. The Court will determine the
20 law.

21 THE COURT: Well, that was my first thought is that
22 he's a fact witness, not an expert witness.

23 MR. LEWIS: But if -- if part of this, Your Honor --
24 it's important that you -- and I agree with you. You tell
25 us, as a matter of law, whether it's a ruling of the Court,

1 that an estate is a legal entity or not, that that makes a
2 big difference of all their experts and so forth, that it's
3 a question of law. Now, we recognize that. We've been
4 trying to bring it up. We bring it up square in the
5 Court's attention that we say that the estate is a legal
6 entity, and we have the law on it and be glad to argue it.

7 THE COURT: Well ---

8 MR. LEWIS: But that has to be ruled because it's the
9 basis of a lot of questions that we have to go forward.
10 That's a question of law. We agree with you 100 percent.

11 THE COURT: I'll have to look at that case, but I
12 don't think you -- I need to make a ruling on whether an
13 estate's a legal entity for this witness to be -- fact
14 witness to be examined.

15 MR. LEWIS: That's right. But his -- his -- he is
16 saying he can't represent something because it's not a
17 legal entity. So that is a legal question. And if it is a
18 legal entity, he has different responsibilities.

19 So I need the Court to rule to me whether you're going
20 to rule that it's a legal entity or not. Whatever it is --
21 your ruling is, I need it to be able to go forward, and I
22 want to rule -- would like to know is a legal -- is an
23 estate a legal entity or not. That's all we're asking the
24 Court's guidance on.

25 MR. JANI: Your Honor, several things. The -- Mr.

1 McGowan has testified that his client was the personal
2 representative of the estate of Ms. Davis. That goes to
3 62-1-109 itself and the exception to 109, which is
4 otherwise provided in the contract.

5 Our position certainly has been that an estate is not
6 a legal entity. We can argue the cases with Mr. Lewis on
7 that standpoint, but there are domino of questions that
8 follow all questions of law from this initial question.

9 THE COURT: Well, my -- my question is: Is it timely
10 for the Court to rule at this time on that issue?

11 MR. LEWIS: Yes, sir. I had -- I have -- it's a
12 question of law, they've objected to me talking to him
13 about it; and I need to know what the ruling of the Court
14 is because the experts rely on it being a -- not an entity.
15 He relies on it being not an entity. I need to know
16 whether -- what the -- what the law is because that
17 controls all these witnesses, and it's very, very
18 important.

19 And I'm just asking the Court for guidance and to give
20 me the Court's ruling on the law of whether a estate is a
21 legal entity.

22 THE COURT: All right.

23 MR. LEWIS: And we'll be glad to show you what we have
24 to do that, but we need to know that.

25 MR. JANIK: Your Honor, to place it in the proper

1 context, the plaintiff has to show that Mr. McGowan did not
2 meet the standard of care and he is entitled to his
3 professional judgement on these issues. Those are the fact
4 issues that go with the legal issues, and that -- that is a
5 separate inquiry from the standpoint of what this witness
6 is on the stand for.

7 The legal question will have to be answered by a
8 Court. We certainly have cued that up and briefed it. But
9 I don't think that --

10 THE COURT: (Coughs) Excuse me.

11 MR. JANI: --- I just got a copy for Mr. McGowan on
12 the -- on the law in this state. I think that's meant for
13 the Court.

14 THE COURT: Well, I -- I take a little bit of issue
15 about it being a pop quiz. Mr. McGowan does this for a
16 living, represents a lot of estates. I've approved a lot
17 of settlements. I'm aware of what he does. I don't see
18 this as sort of a pop quiz issue. I think it's a
19 fundamental issue.

20 Let me take a look at that case. We'll take a break.
21 Give the cite to my law clerk.

22 MR. LEWIS: Yes. Let me give you the ---

23 THE COURT: Make sure that the -- (coughs)...

24 MR. JANI: I'm -- I'm familiar with the case. We
25 have cited *Gordon vs. Busbee* as well.

1 Your Honor, this -- this being the fundamental thrust
2 of this -- of this argument goes to the scope of 109, who
3 is the client under 109 and that's where it started ---

4 THE COURT: (Coughs) You talking about 109 --

5 MR. JANIK: 62-1-109 provides that (as read): "Unless
6 otherwise expressly provided in a written employment
7 agreement between counsel and the personal representative
8 expressly provided there, that the creation of the
9 attorney/client relationship with a personal representative
10 does not impose any duties or obligations to those who have
11 an interest in -- in the estate as heirs, beneficiaries, or
12 statutory beneficiaries."

13 THE COURT: Well, I'm aware of that. But the question
14 then becomes whether or not this insertion of this language
15 about the client being the estate of Mrs. Davis, whether or
16 not that's -- and that may be a fact question for the jury
17 to determine whether or not that falls under the 109
18 category of -- or exception of being a specified obligation
19 with Mr. McGowan.

20 MR. JANIK: I -- I think that there's issues as to
21 whether it falls within the exception and -- and whether it
22 is a legal entity that could be contract within the
23 exception from that standpoint; and whether or not that
24 notation is an expressed provision within the concept --
25 context of 109. So I think there's a multitude of issues.

1 THE COURT: Well, I think we're saying the same thing.
2 I -- I didn't follow you there because I -- I think the --
3 the question's whether or not -- I don't think it's a
4 question of law. Maybe -- maybe I'll be convinced
5 otherwise as we go forward.

6 It's a question of fact as to whether or not that
7 language -- charge the jury whether or not that language
8 takes the -- the obligation of Mr. McGowan beyond Ms. Davis
9 into a representation of someone outside for purposes --

10 MR. JANIK: Respectfully, Your Honor, I -- I -- it's a
11 question ---

12 MR. LEWIS: That's correct, Your Honor.

13 MR. JANIK: --- of law.

14 MR. LEWIS: Well, I -- well, that's exactly why we are
15 here, Your Honor, what you just said.

16 THE COURT: All right. Well, let me see the cases.
17 We'll take a break.

18 MR. LEWIS: All right.

19 THE COURT: And the jury wants the image -- we -- we --
20 - we're still working on the A/V stuff with the jury.
21 They'd like the image -- the jury would like -- the jury
22 would like the image on the screen to be a little larger so
23 they can ...

24 THE COURT: Mr. McGowan, you can step down.

25 THE WITNESS: THANK YOU.

1 (Off the record at 10:28 a.m.)

2 (On the record at 10:55 a.m.)

3 THE COURT: Thank you. You may take your seats.

4 Anybody have anything else?

5 (No audible response.)

6 Mr. McGowan, you can come on up and have a seat.

7 (The witness complies.)

8 THE COURT: As I said yesterday, this case is plowing
9 some new ground, and I thought one area was not so new and
10 that is the issue we're talking about now, that an estate
11 is or is not a legal entity.

12 The case *Brown vs. Coe* that -- that the plaintiff
13 handed up, I don't find that to be really on point.

14 Judge Barber issued a circuit court order in 2003
15 where he cites an Arkansas case from 1977 and a Washington
16 case from 1944 with the proposition of, quote, "Probate
17 estate is not a legal entity that can sue or be sued or
18 represented by counsel." Of course, that is not binding,
19 not precedent.

20 But the most interesting case is the *Dickey* case,
21 which also is not precedential, but persuasive. And I know
22 how courts often -- how Courts of Appeals -- and hopefully
23 none of you quote me on this, although I'm getting toward
24 the end of my involvement in the judiciary -- that they
25 sometimes salt their opinions with things that may or may

1 not be -- that may -- that may not be necessary, but end up
2 giving us some kind of headaches. And I say that because
3 *Dickey* is persuasive, but not precedential.

4 This *per curiam* opinion -- Huff, Beatty and Williams -
5 - and it's -- unequivocally states, quote, "Because the
6 estate is a separate legal entity, only a lawyer can
7 represent the interest of the estate and its beneficiaries
8 in court." Then, quote, "Although *Dickey* could have
9 potentially recovered as an individual under the wrongful
10 death statute if he is -- if he is, comma, as PR, comma,
11 brought the action and a licensed lawyer represented the
12 estate in court, he failed to do so."

13 So twice in this opinion, the Court treats an estate
14 as a legal entity. And so I so find that the estate is a
15 legal entity -- and again, this case has -- there's no
16 straight lines in this case, but -- yes, sir.

17 MR. JANIK: Without pushing my luck, Your Honor, may I
18 speak to that point?

19 THE COURT: Yes.

20 MR. JANIK: Because the -- the Court is -- is quite
21 accurate that these are non-precedential decisions, what --
22 what controls here is our probate code. And that's what
23 *Gordon vs. Busbee* went through very carefully as to 62-1-
24 201, estate is the property of the decedent.

25 If the laws -- property of the laws to the personal

1 representative under 62-3-101 for administration and
2 distribution, 62-3-709 and 715, but it is not an entity per
3 se that he contract or sue or be sued. And the *Eclesiastes*
4 case also goes to contractual capacity issue.

5 Significantly, *Dickey and Brown vs. Coe* reference the
6 estate as a legal entity without any explanation
7 whatsoever. It's pure dicta.

8 THE COURT: I understand. That's why I used the word
9 that they salt their opinions with some stuff that gives us
10 headaches later.

11 MR. JANIK: Whereas *Gordon vs. Busbee* does go through
12 the entire analysis based on the code, which we would
13 respectfully submit would control, such that -- and we
14 would add to that the view of the Ethics Advisory Committee
15 of the Bar, Opinion 93-341, which answered the question:
16 What does the referenced attorney for the estate -- which
17 is our issue -- mean? And the Ethics Committee said it
18 means the attorney for the personal representative of the
19 estate, looking at the same probate code.

20 I'd respectfully request the Court to reconsider.

21 THE COURT: All right. Well, no. I -- I'm -- I'm --
22 like some other rulings in this case, they're on a fine
23 line and my comfort level isn't as high as I'd like to be.
24 But I -- I think we got this, whether it's dicta or -- as I
25 -- as I told Chief Justice Gregory one time in trying to

1 talk him out of ruling against us -- against me, that he
2 had put something in an opinion that really shouldn't even
3 have even been there at all. And he said, "You mean it's
4 dicta?" I said, "No, sir. It shouldn't even be in there
5 at all." He didn't buy that argument.

6 But I -- I find that it -- that -- that under the
7 cases that -- what we have is that it -- the probate -- the
8 estate can be and is -- can be a legal entity -- and for
9 purposes of this case.

10 MR. JANIK: Thank you, Your Honor.

11 THE COURT: All right. Let's bring in the jury.

12 MR. JANIK: Your Honor, may we have your legal
13 guidance as to how that fits into the use of the word
14 "estate" in 109.

15 THE COURT: Well, we -- the thing about 109 -- and --
16 and I don't have it right in front of me now -- is though -
17 - I keep going back to the fact question of whether or not
18 putting the -- putting the estate of Ms. Davis thought is
19 sufficiently specifics to say ---

20 MR. JANIK: Thank you, Your Honor.

21 THE COURT: --- that, you know, we -- you know, I'm
22 representing the personal representative and the estate. I
23 think that's going to be a fact question.

24 MR. JANIK: Thank you, Your Honor.

25 (Brief pause.)

1 MR. JANIK: Your Honor, we're -- we've just kind of
2 had a major sea change in the case. Would it be possible
3 to allow us to regroup here for a moment?

4 THE COURT: Yeah.

5 (Brief pause.)

6 MR. JANIK: And -- and I'm in an unusual situation
7 where I'm normally not allowed to talk to my client. But I
8 have a ruling of the Court that we've never had a chance to
9 discuss. Am I allowed to talk to him?

10 MR. LEWIS: I don't know whether I agree with that.

11 THE WITNESS: Since -- since I'm the one getting sued
12 --

13 THE COURT: You don't agree -- you agree -- your
14 position is that he can talk to his client?

15 MR. LEWIS: Can't talk to his client while he's on the
16 stand.

17 THE COURT: Can't.

18 MR. LEWIS: Can not.

19 THE COURT: Can not. All right. You waive that?

20 MR. LEWIS: No, I don't waive it.

21 THE COURT: Okay.

22 THE WITNESS: Since -- since -- since I'm the one
23 being sued, may I make a request of somebody to request the
24 Court to tell this jury when they come in that it was not
25 well established in the law that the estate is a legal

1 entity because --

2 MR. LEWIS: I think that's ---

3 COURT REPORTER: Don't talk -- please don't talk at
4 the same time.

5 (The witness and Mr. Lewis talk simulataneously.)

6 THE WITNESS: That the ---

7 MR. LEWIS: Your Honor, we ---

8 THE WITNESS: --- this is the first time I have heard
9 any Court anywhere say that the estate is a separate legal
10 entity. And what I would hate to have happen is that the
11 jury be told that the estate is a legal entity and get the
12 implication that it has been that way forever, and that I
13 somehow neglected to take advantage of that or somehow
14 misrepresented something. Because I'm very concerned that
15 if there's an instruction from the Court that says an
16 estate is a legal entity, that this is -- and I mean this
17 with all respect -- the first time I've heard anybody say
18 that.

19 THE COURT: Well, I -- I'm not going to instruct the
20 jury one way or the other. I'm just going to allow the
21 questions to continue. And I certainly think that you,
22 again, going into the facts, that the door -- the door's
23 open; that you can certainly tell the jury that today, five
24 minutes ago, is the first time you've ever heard that.

25 THE WITNESS: Yes, sir.

1 THE COURT: I mean, that's -- that's a true fact.

2 All right. Bring in the jury.

3 (Jury enters the courtroom at 11:05 a.m.)

4 MR. JANIK: We're ready, Your Honor.

5 MR. LEWIS: I'm sorry, Your Honor.

6 THE COURT: Okay.

7 (Brief pause.)

8 THE COURT: All right. You may proceed.

9 DIRECT EXAMINATION BY MR. LEWIS:

10 Q We were talking about the retainer agreement that's up
11 on the screen. It's very hard to read. You said it was --
12 the -- says that the writing on there said it was Mrs.

13 Davis. Is that what you said?

14 A That's my interpretation of it.

15 Q All right. I'd like you to --

16 (Mr. Lewis confers with A/V tech.)

17 Q Does that help you any? It says the estate of Mrs.
18 Davis? Does that help you?

19 A I -- I --- I told you that's what I thought it said.

20 Q Well, I thought you said Mrs. Davis.

21 A Yeah. Right. That's exactly right.

22 Q Is it the estate of Mrs. Davis or Mrs. Davis?

23 A We don't have a disagreement of what it says. It says

24 --

25 Q What does it say?

1 A It says "estate of Mrs. Davis."

2 Q All right. So in your retainer agreement, you -- you
3 represent the estate of Mrs. Davis?

4 A For the purposes set out in the retainer agreement,
5 that's -- that's true.

6 Q And when you -- you also say you represent the PR.

7 A Yes. The person that is legally allowed to do
8 anything on behalf of an estate is only the personal
9 representative. So yes, I represent the PR of the estate.

10 MR. LEWIS: Your Honor, would you just please instruct
11 him to answer yes or no, and then he can explain it to me.
12 I just asked if he also represents the PR and he said yes
13 or no, he wants to explain it, I'd appreciate him to answer
14 the questions.

15 THE COURT: Okay. Answer the question and then
16 explain it if you wish. But you certainly have the right
17 to explain it -- the answer.

18 Go ahead. Next question.

19 Q So you also represent the PR; isn't that right?

20 A From my perspective, yes, but they're the same.
21 They're not different because the person I represent is the
22 PR who represents the estate; and therefore, I represent
23 the estate through the PR. Those are not different people.

24 Q They're not different people.

25 A No, they're not. Especially for the purpose for which

1 I was specifically hired to execute.

2 Q Now, you do a lot of actions where you have to get
3 approval of the Court in survival actions or death cases,
4 don't you?

5 A Yes.

6 Q Huh?

7 A Yes.

8 Q And one of the things you have to do is certify who
9 the beneficiaries are, don't you?

10 A What I have -- no. What I have to do is prove to the
11 satisfaction of the Court who the heirs and the
12 beneficiaries are. That's what the wrongful death statute
13 and the survival statute say.

14 So my job is not to certify who they are. My job is
15 to prove to the satisfaction of the -- provide to the
16 satisfaction of the Court who the heirs and the -- and the
17 beneficiaries are.

18 Q All right. In this case, what did you put before the
19 Court to show that this -- these were the heirs, other than
20 your petition?

21 A Well, what we put forward in front of the Court -- now
22 the way settlements work is there were three defense
23 attorneys there from three different defense firms, there
24 were my clients, and there was me in front of Judge Hayes,
25 in a little room back there. And it was a joint petition,

1 signed by my clients, presented by us, to try to resolve
2 this case.

3 An in that petition, it said, based upon what we knew
4 at the time, that the sole heir and beneficiary was Andrew
5 Strong And it stated that he had made claims -- asserted
6 claims as the common-law husband.

7 His Honor was there. His Honor had all of these
8 parties in front of him. The defense lawyers were there, I
9 was there, Tanisha, and Andrew Strong were there; and any
10 questions that the Court had were answered. And it was
11 proved to the satisfaction of the Court because the Court
12 approved it. And as a result, we then went forward with
13 the settlement.

14 Q So was Willie Bell there?

15 A No.

16 Q Could have invited him to come, couldn't you?

17 A Based upon everything I knew to that time, he was not
18 an heir or statutory beneficiary.

19 Q All right. Let's talk about that a little bit. Now -
20 - so you -- you -- we know now that you say you represent
21 the estate of Emma Davis and the PR of Emma Davis; is that
22 correct?

23 A To me, they're the same thing, so the -- the "and" is
24 -- is not accurate because to me, I was hired to pursue the
25 med mal case for the PR of the estate, and that's what I

1 set out to do.

2 Q I'm just asking you who your clients are.

3 A Yeah. I -- exactly. My ---

4 Q Is the estate your client?

5 A My client is the PR on behalf of the estate.

6 Q Does this say that your client is the estate?

7 A It's the same thing.

8 Q This document?

9 A It's the same thing ---

10 Q I just asked you ---

11 A --- from what I've said.

12 Q --- does this say this -- your client is the estate.

13 That's all I asked you.

14 A That's what it says.

15 Q Thank you.

16 (Marked Plaintiff's Exhibit No. 8, letter dated
17 2/24/10, 1 page.)

18 MR. LEWIS: I offer that into evidence as Exhibit No.
19 8. It is the letter of McGowan to the Piedmont Medical
20 Center.

21 THE COURT: Any objection?

22 MR. JANI: We would ask that the complete letter be
23 offered, Your Honor. It had two enclosures, and they're
24 not part of this exhibit.

25 THE COURT: You have the enclosures?

1 MR. LEWIS: No, I don't have the enclosures. I -- I
2 showed him my exhibits, and he agreed beforehand we could
3 introduce them. If he wants to put the little exhibits to
4 them, I'm happy. But I was just -- this is what I showed
5 him as my exhibits.

6 MR. JANIK: That's -- that's correct, Your Honor.
7 That's fine. I'll add them separately.

8 THE COURT: Okay. In without objection.

9 (Plaintiff's Exhibit No. 8, in evidence.)

10 Q All right. Do you see this letter, the one that is
11 dated February 24, 2010?

12 A Yes.

13 Q And that's just after you entered that retainer
14 agreement, isn't it?

15 A It would have been the same day. There was some sense
16 of urgency about getting this letter out.

17 Q Why was there a sense of urgency to get that letter
18 out?

19 A In my experience, when there's potential medical
20 negligence, it's better to put the potential defendant on
21 notice that they need to preserve all their records and
22 films before things get lost. And if things happen to get
23 lost after they receive a letter like this, it allows for
24 certain things to occur in court. So I was trying to
25 secure the evidence as soon as I could.

1 Q And what -- who does it say you represent in that
2 letter?

3 A Well, the first paragraph says, "I hope this finds you
4 well. Please be advised that I represent the estate of
5 Mrs. Davis, who died during a procedure at PMC on February
6 11, 2010. I enclose a copy of the PR paperwork and the
7 records authorization."

8 Q Now, I'm going to show you an email and ask you if you
9 could identify it as an email that you sent.

10 (Marked Plaintiff's Exhibit No. 9, email dated
11 11/4/13, 2 pages.)

12 MR. LEWIS: We offer it as Exhibit No. 9, Your Honor.

13 THE COURT: Any objection?

14 MR. JANI: No, objection, Your Honor.

15 THE COURT: In without objection.

16 (Plaintiff's Exhibit No. 9, in evidence.)

17 Q Do you see Exhibit No. 9, Mr. McGowan?

18 A Yes, I do.

19 Q And this was late in the game that you wrote this; is
20 that right?

21 A Well, from my perspective, the game -- I mean, I don't
22 know what you mean by "late in the game."

23 Q Well, what's the date of it?

24 A It says November of 2013, which was ---

25 Q It was -- it was three years after the -- almost, the

1 death; is that right?

2 A Yeah. It was -- it was about three and a half years
3 after Ms. Davis died, and it was after the settlement.

4 Q After the settlement.

5 A Yes, sir.

6 Q Yes, sir. And you wrote in there Ms. Gilmore may be
7 getting counsel for this matter. They were complaining
8 because Mr. Bell -- Mr. Bell -- it was when Mr. Bell was
9 complaining that he'd been left out; isn't that true?

10 A I -- I'm sorry. I don't understand what you mean.

11 Q Well, Mr. Bell went to Mr. Pete Strom and complained
12 that he'd been left out of the procedures and not made --
13 was not in and participated in his inheritance; isn't that
14 true?

15 A That's right. He -- he -- he first made himself known
16 as an heir after the settlement, and then he went to see
17 Mr. Strom, from what I understand.

18 Q You heard him testify.

19 So when -- and this is -- when that happened, Mr.
20 Strom got in touch with you; isn't that right?

21 A Pete Strom did get in touch with me, yes.

22 Q And it says right here (as read): "Mrs. Gilmore was
23 getting counsel for this matter." Mrs. Gilmore is the PR.

24 A Yes.

25 Q So you decided she needed somebody else.

1 A I -- well, yes. But mostly I decided it would be
2 inappropriate for me to be involved in it.

3 THE COURT: All right. We need the lights off right
4 now?

5 MR. LEWIS: I'm sorry?

6 THE COURT: The lights. Can we turn the lights back
7 on?

8 MR. LEWIS: Does it bother me that they're off?

9 THE COURT: No. But it bothers me.

10 (Courtroom laughter.)

11 THE COURT: More importantly.

12 MR. LEWIS: You're more -- much more important, Your
13 Honor.

14 THE COURT: All right. Go ahead.

15 Q And I was asking you whether -- at that point, you
16 decided you couldn't represent Ms. Gilmore anymore.

17 A As I put in here, I said, "I believe it'd be
18 inappropriate for me to do so."

19 Q And the reason that you don't -- you didn't want to
20 represent Ms. Gilmore anymore is because you represented
21 the estate as a whole. Isn't that what it says?

22 A Personally. But what it -- what it says is (as read):
23 "Pete, Ms. Gilmore will be getting counsel for this matter.
24 I believe that since I represented the estate as a whole
25 and not any individual heir, it would be wrong for me to

1 try to represent one heir or heirs against another. Also,
2 I think I'm probably a material witness to the underlying
3 case, which would make it inappropriate for me to purport
4 to represent anyone in particular. I've advised Ms.
5 Gilmore to find independent counsel and she expressed to me
6 that she would do so.

7 "I am, of course, available to discuss the underlying
8 case with you and how everything came about from my end
9 whenever you wish. I do not believe there are any
10 privilege issues of any significance.

11 "Last, and mostly as an aside, I understand that the
12 Chester Probate Court arranges for and publishes the notice
13 to creditors in general. And in this case, I am sure we
14 will have an opportunity to discuss this further. Thanks,
15 Chad McGowan."

16 Q All right. Let's go back to that first sentence that
17 says that you represented the estate as a whole and not
18 individual -- any individual heir. Is that what it says?

19 A Yes.

20 Q But you did represent an individual heir, didn't you?

21 A I represented Mr. Strong for his loss of consortium
22 claim.

23 Q And he was an individual heir, too; wasn't he?

24 A As far as I know, he was both an individual heir and
25 he was entitled to a loss of consortium claim.

1 Q So when you say you did not -- that -- that you did
2 not represent any individual heir, that is not correct, is
3 it?

4 A No. It -- it is correct because the -- the PR
5 represented the estate, and I understood the only
6 beneficiary to be Mr. Strong. And he also happened to have
7 a loss of consortium claim, so he's -- he's both.

8 Q Well, it just says here that "the estate as a whole
9 and not individual -- any individual heir." But you did
10 represent an individual heir?

11 A For his loss of consortium claim, absolutely. And I -
12 --

13 Q And you represented him in respect to him getting the
14 money for \$900-and-something-thousand he got.

15 A I -- I -- I represented the PR for the estate, which
16 was for his benefit; and I also represented Mr. Strong for
17 his individual claim. That's -- that's what happened.

18 Q You represented the estate for his benefit. The
19 estate's for the benefit of all heirs, isn't it?

20 A Yes. And as -- what I knew at the time is that he was
21 the only heir.

22 Q So -- but you know the estate was for the benefit of
23 all the heirs, right?

24 A Yes. But in this case -- but in this case ---
25 (Mr. Lewis interrupts the witnesses answer.)

1 THE COURT: Well, let -- let him answer.

2 MR. LEWIS: Oh, I'm sorry. I thought he was finished.

3 THE COURT: Go ahead.

4 A But in this case, the only heir was Andrew Strong so
5 far as I knew, based upon all the evidence.

6 Q So far as you knew because you didn't look or talk to
7 Willie Bell.

8 A No.

9 (Marked Plaintiff's Exhibit No. 10, amended complaint
10 document, 16 pages.)

11 Q And looking at No. 10, do you see that?

12 A Is that what --

13 Q It's a complaint, amended complaint.

14 A Yes, sir. Yeah, I see it.

15 Q And it's your amended complaint in the underlying mal
16 -- medical malpractice case; is it not?

17 A It is.

18 Q And what's the date of this -- filing of this?

19 A June 25, 2012.

20 Q So that's two years after you got the case.

21 A Sure.

22 Q A year and a half.

23 A Sure. Yes.

24 Q And you write in there -- did you know that Mr. Strong
25 was the common-law husband at that time?

1 A Yes.

2 Q Well, you write in here (as read): "Andrew Strong,
3 being married to Emma Davis...". That's not true, is it?

4 A No, it's totally true.

5 Q He wasn't married to her. You -- you say he was a
6 common-law husband.

7 A That's married.

8 Q That's what?

9 A That's married.

10 Q That's marriage?

11 A Yeah, it -- it is.

12 Q Why didn't you write common-law husband in there?

13 A Because he was married.

14 Q Did he ever marry Ms. Davis?

15 A Yes.

16 Q When?

17 A It was a common-law marriage.

18 Q Ah. So he was a common-law marriage. Why didn't you
19 write common-law marriage?

20 A Because the law makes no distinction. You're married
21 or you're not, and the two main ways that happens is
22 ceremonial or common law. And that you get to the point of
23 marriage is -- doesn't matter how you get there. It
24 matters that you're there.

25 Q And there's a statute that says how you adjudicate

1 that so people just don't walk off of the street and come
2 claim that you're common-law married. You have to go to
3 court to get that done, don't you?

4 A Sometimes you do.

5 Q Did you go?

6 A Not in probate court, but as part of the wrongful
7 death action and part of the loss of consortium action,
8 that's where that, if it became an issue, was going to be
9 adjudicated.

10 Q So -- but you had two -- you -- you decided you would
11 have two settlements, one for wrongful death and one for
12 the loss of consortium; is that not right?

13 A (No audible response.)

14 Q It was split in half.

15 A Well --

16 Q Is that right or not? Just say yes or no, and you can
17 explain anything you want.

18 A Well, two settlements. At the -- at the end, it
19 turned out there were two settlements. But at the
20 beginning, we didn't know what was going to happen.

21 Q Right. At the end there were two settlements, loss of
22 consortium and loss -- and --

23 A Wrongful death.

24 Q -- wrongful death.

25 A Yes.

1 Q If -- but you just take the wrongful death portion of
2 that, you had to have it adjudicated, according to your
3 testimony.

4 A I -- I don't think so. I don't think you have to. I
5 think if there's a dispute, you need to. But I think that
6 if both sides of that potential argument -- the PR and the
7 common-law husband -- if they both agree, then there's --
8 there's no reason that I see to involve a court to say
9 these two people agree.

10 That doesn't make the -- that doesn't make any sense
11 to me as a practicing attorney that if both people agree on
12 something, then there's no need to go to a court in a
13 probate area to have the Court say, "Well, y'all agree
14 because that is not in dispute."

15 Q Well, let's talk about that a minute. It isn't in
16 dispute because you didn't call Willie Bell. If you had
17 brought a petition to declare Mr. Strong as the common-law
18 husband, you would have had to have served all the people
19 of interest, wouldn't you?

20 A No. What I -- who I -- that -- that disagreement, if
21 there was one, would have been between the personal
22 representative of the estate and Mr. Strong.

23 Q And it wouldn't have been between Mr. Bell who is the
24 adopted son and he -- you're saying he doesn't have an
25 interest in that dispute when he's the sole heir if Mr.

1 Strong doesn't become a common-law husband? There's no
2 dispute there?

3 A The PR is then, if there's a disagreement, charged
4 with -- if there's some disagreement, some reason to say it
5 didn't happen, then -- hiring counsel to produce witnesses,
6 and I assume Mr. Bell would have been part of that. But
7 that was not a dispute that ever came up ---

8 Q It didn't come up because ---

9 A --- when I was handling this case.

10 Q --- no one contacted Mr. Bell.

11 A I -- I disagree with that. I think that Mr. Bell
12 himself said that he knew what was going on and choose to
13 do nothing. So to say he wasn't contacted, honestly, I
14 don't think is correct.

15 And it was not my scope of representation as a med mal
16 lawyer to determine if Willie Bell is an heir or he's not.
17 That's clearly outside the scope of what I was trying ---

18 Q In your ---

19 A --- to do.

20 Q --- petition to the Court, you represent ---

21 THE COURT: Mr. Lewis --

22 Q --- the sole surviving heir is Mr. Strong.

23 THE COURT: Mr. ---

24 Q That is your petition.

25 THE COURT: Mr. Lewis, you keep stepping on his

1 answers. So ...

2 MR. LEWIS: I'm sorry.

3 THE COURT: Go a little slower.

4 A Mr. Lewis, as you know, the way these cases are
5 settled, it's -- it's a joint presentation of all the
6 defendants and the plaintiff. And did -- did I allow to be
7 represented to the Court what I believed to be true at the
8 time? Absolutely. And that was that Willie Bell was not -
9 - was not an heir, that Andrew Strong was the sole heir and
10 statutory beneficiary. I believed that to be true at the
11 time, as did every defense lawyer at that table.

12 Q Now -- so you let the defense lawyers think that Mr.
13 Strong had been adjudicated as a common-law husband, didn't
14 you? You let that -- and didn't correct that because
15 that's not true; isn't that right?

16 A That was multiple questions. Could you try one at a
17 time?

18 Q Mr. Strong was not adjudicated as a common-law
19 husband; is that correct?

20 A My understanding, there was no formal proceeding to
21 have that done; however, I do also understand that Mr.
22 Strong went to the probate court where his relationship was
23 described to Judge Roddey, and that she determine -- she
24 said the common-law husband can't be the PR.

25 Q What? The common-law husband what?

1 A Couldn't be the PR.

2 Q Could not be the PR.

3 A And that is what was reported through Tanisha and that
4 happened on, I think --

5 Q Did you ever see an order on that or is that just
6 hearsay from Ms. Tanisha, your person you gave \$250,000 to?

7 A That is what was relayed to me, and I had no reason to
8 disagree with that. And throughout the case, there was no
9 reason to disagree with it.

10 Q You attended the deposition of Andrew Strong on August
11 29, 2011, didn't you?

12 A If -- if I'm on the -- if I'm on the attendee list,
13 then yes.

14 (Marked Plaintiff's Exhibit No. 11, deposition
15 transcript of Andrew Strong, 50 pages.)

16 MR. LEWIS: I move in exhibit -- into evidence Exhibit
17 10, Your Honor.

18 THE COURT: Any objection?

19 MR. JANI: No, Your Honor.

20 THE COURT: In without objection.

21 (Plaintiff's Exhibit No. 10 in evidence.)

22 Q Do you see that deposition? You attended that?

23 A Yes.

24 Q And the date of it is August of -- 29, 2011?

25 A Yes.

1 Q When's the last time you looked at this?

2 A Last week probably.

3 Q And would you turn to page 40?

4 A Yes.

5 Q And you are sitting there listening to these lawyers
6 question Mr. Strong aren't you?

7 A Yeah.

8 Q And they ask did you -- and they ask Mr. Strong (as
9 read): "Did you make a claim in the probate court when Ms.
10 Davis passed away as her common-law husband?" And he says
11 yes or yeah.

12 A Correct.

13 Q Where is that claim?

14 A What he was talking about was when he went with his
15 family to the probate court. Here's what he said --

16 Q No, sir. I want to know ---

17 A Let ---

18 MR. JANIK: Objection, Your Honor.

19 Q --- where the claim is. Just answer the question
20 where the claim is. Is there a claim ---

21 MR. JANIK: Objection.

22 THE COURT: All right.

23 Q --- a written claim or any claim?

24 A Yeah.

25 Q Where is it?

1 A It was when Tanisha took the family members to the
2 probate court and met with Judge Roddey. And if you read
3 the rest of this, it makes it clear what happened.

4 Q Well, I'm going to read the rest of it. Just ---

5 A Well, let's do that then.

6 Q Would you answer my question?

7 A I'm sorry, I did. The claim was made with Tanisha and
8 the family when they went and sat in front of Judge Roddey
9 on February 18, 2010.

10 Q Okay. Was that -- (as read): "Did the family court or
11 the probate court, rather, acknowledge that claim?" "Yeah,
12 family."

13 A So he said yeah, it was probate court. Then he said
14 family.

15 Q Well, what does he -- what -- did -- it says the
16 family acknowledged it. It doesn't say the family -- that
17 the clothe -- probate court did. It says, "Yeah, family."

18 A The question was, was that -- did the family court or
19 the probate court, rather, acknowledge that claim. He said
20 "Yeah, family."

21 Q Did the family court acknowledge the claim? Did any
22 family court acknowledge his claim?

23 A No. But I took that to be yeah, the probate court
24 acknowledged it, and the family reference was with his
25 family on the 18th.

1 Q So -- but you didn't explain that to Mr. Beighley and
2 them 'cause for them saying -- this would read that the
3 family court -- that the family court acknowledged that
4 claim. And you didn't ever correct that the family court
5 had not done that, did you?

6 A Well, no, but ---

7 (Mr. Lewis interrupts the witness.)

8 Q Did you correct that that the family court had not
9 done that?

10 A No, but Mr. Strong did in the very next question. The
11 question -- next question was (as read): "I mean, the -- I
12 should have said the probate." "Did -- the court that
13 handles estates, did they acknowledge you as her common-law
14 husband?" And he said yeah.

15 So I figured that Mr. Strong, in the very next
16 question, cleared that up; and therefore, I had no -- no
17 need to clear that up because Mr. Strong, in the very next
18 question, says the -- the probate court acknowledged him as
19 a common-law husband.

20 Q Is there any written order of the probate court or the
21 family court or any order of a court that you have seen
22 that adjudicates Mr. Strong as a common-law husband? Have
23 you see any order?

24 A No.

25 Q Are you familiar with section 62-2-802, "Effect of

1 divorce, annulment, decree of separation or other main,
2 terminating marriage of private -- property rights [sic]?

3 A I don't mind pleading my ignorance on that. I'd
4 probably have to see the statute because I don't know that
5 I know the probate code by chapter and verse.

6 Q Let me see if -- I'll read this and see if you
7 remember it (as read): "An individual claiming to be a
8 common-law spouse" -- and that's what Mr. Brown is
9 complaining, right -- I mean, Mr. Strong. He's claiming to
10 be a common-law spouse, is he not?

11 A Yeah.

12 Q (As read): "An individual claiming to be a common-law
13 spouse who has not been established to be a common-law
14 spouse by adjudication commenced before the death of the
15 decedent ..." -- there was no adjudication before the death
16 of Ms. Davis, was there?

17 A Not to my knowledge.

18 Q (As read): "... or within the later of 18 months
19 after the death of the decedent or 6 months after the
20 initial appointment of a personal representative ..." --
21 there was no adjudication of -- within that period of him
22 being a common-law husband, was there?

23 A No, there wasn't.

24 Q So the statute, 62-2-0 -- 2-803, which tells you how
25 to be a common-law spouse was not complied with.

1 A That probate statute, in my judgement, was not the way
2 to go in this case. I could prove it through the wrongful
3 death action in circuit court. There was an option there.
4 And frankly, again, since everybody agreed that he was the
5 spouse, there was no need to it -- to get a Court's
6 imprimatur on that.

7 And if it ever did become an issue, if the defendants
8 decided they would bring it -- an issue, that's a waivable
9 time limit by the PR. And I had every reason to believe
10 that Tanisha would say, "I don't care about the time limit.
11 Let's get to the true facts here."

12 Q It's waivable? It doesn't say it's waivable.

13 A Well, you say it's waivable.

14 Q I don't say it's waivable. I'm not on the stand. I'm
15 asking you. The statute doesn't say it's waivable.

16 A It's -- it's waivable.

17 Q Okay. And the one thing you don't have to worry about
18 is if you can keep Willie Bell hid somewhere and out of the
19 thing, you don't even have to worry about it; isn't that
20 right?

21 A No, sir.

22 Q Well, if Willie Bell comes in the picture, then
23 there's a problem, isn't there?

24 A Not from my perspective. There's no problem
25 whatsoever.