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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity and Special Circuit Court Judge

Appellate Case No. 2017-000242

Robert E. Feldman and Lois J. Feldman.....Appellants,

vs.

Gary P. Coggin Respondent.

RECORD ON APPEAL

Thomas A. Pendarvis, J.D.
Christopher W. Lempesis, Jr., J.D., L.L.M.
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Counsel for Appellants

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Jeffrey M. Bogdan, J.D.
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Counsel for Respondent

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v. Sarah Dickenson, 2012-CP-070-3800 (hereinafter the “UIM Action”) was filed on or around October 29, 2012. Compl. ¶16.

After Attorney Coggin served the summons and complaint in the UIM Action on Liberty Mutual, as is required by S.C. Code Ann. §38-77-160, Liberty Mutual retained attorney Julian Allen “to represent Dickenson” in the UIM Action.¹ Compl. ¶¶17, 28. Liberty Mutual filed an Answer to the UIM Action on January 7, 2013. The Answer included only four (4) affirmative defenses, the last of which read as follows:

FOR A FIFTH DEFENSE
(Improper Service)

10. FURTHER ANSWERING, this party alleges that Plaintiff has failed to effectuate proper service under Rule 12(b)(4) and Rule 12(b)(5).

Liberty Mutual’s Answer did not allege that the at-fault driver, Dickenson, was not served, nor did it raise the statute of limitations as an affirmative defense. Liberty Mutual did not file any motions prior to the Answer, nor did it amend its Answer within 30 days of serving it as allowed by Rule 15(a), SCRCP.

For almost two years, Liberty Mutual defended the UIM Action by participating in written discovery, filing motions, taking both of the Plaintiffs’ depositions, and participating in mediation on or around May 7, 2014. Liberty Mutual offered, and Attorney Coggin recommended Plaintiffs accept, \$25,000 at mediation, but the Plaintiffs refused. Attorney Coggin’s recommendation to accept this amount was based partially on the fact that he recently discovered evidence that Plaintiff Robert Feldman had been playing golf regularly after the October 9, 2010 accident, something which both Plaintiffs had represented to Attorney Coggin that Robert Feldman could not do because of the injuries he sustained in the accident. To

¹ Despite the fact that Plaintiffs claim that Attorney Allen represented Dickenson in the UIM Action, South Carolina law is clear that Attorney Allen actually represented Liberty Mutual and did not represent Dickenson. Crawford v. Henderson, 356 S.C. 389, 398, 589 S.E.2d 204, 209 (Ct. App. 2003) (“[T]he attorney for the UIM carrier represents the carrier and not the named defendant.”).

Attorney Coggin, this newly discovered evidence completely undermined Plaintiffs' claim for damages in the UIM Action.

After Plaintiffs' refusal to accept Liberty Mutual's \$25,000 settlement offer at mediation, Attorney Coggin began focusing on getting the UIM Action ready for trial. In order to present the Plaintiffs' case at trial, Attorney Coggin would have to incur some rather large expenses, including those associated with taking video-taped *de bene esse* depositions of Plaintiff Robert Feldman's treating physicians. However, Plaintiffs refused to provide Attorney Coggin the funds to cover these expenses, despite having agreed to do so in the Contingency Fee Agreement that Mr. Feldman signed. After over nine months of attempting to get Plaintiffs to commit to paying these expenses, on September 16, 2014 Attorney Coggin filed a Motion to Withdraw as Counsel and to Stay the Proceedings. The following day Attorney Coggin was contacted by Attorney Robert Metro with notice that his firm, Bauer & Metro, P.C, was taking over representation of the Plaintiffs in the UIM Action. On September 23, 2014, Attorney Coggin provided Bauer & Metro his entire file in the UIM Action. The Consent Order to substitute counsel was filed on November 20, 2014.

Between January 7, 2013 when Liberty Mutual filed his Answer, and September 16, 2014, when Attorney Coggin filed his Motion to Withdraw, Liberty Mutual did not raise or argue that anyone was not served or was improperly served with process or that the statute of limitations had expired. Notably, the three-year statute of limitations for the UIM Action expired on October 9, 2013. Liberty Mutual continued actively defending the UIM Action after the expiration of the statute of limitation, including participation at mediation.

On October 14, 2014, after Bauer & Metro took over representation of the Plaintiffs, but before the Consent Order to substitute counsel was filed, Liberty Mutual filed a Motion to Dismiss, claiming for the first time that *Dickenson* was not served with the Summons and

Complaint in the UIM Action within the statute of limitations, which expired on October 9, 2013. Notably, the Motion to Dismiss was filed almost two years after the UIM Action was filed.

While this Motion to Dismiss was pending, Plaintiffs, then represented by Bauer & Metro, decided to accept Liberty Mutual's \$25,000 settlement offer that was made at mediation while they were under Attorney Coggin's representation. Importantly, Plaintiffs did not allow the Motion to Dismiss to be adjudicated, as they claim they now were "certain" that it would have been granted (Compl. ¶38). A Stipulation of Dismissal with Prejudice of the UIM Action was filed on March 4, 2015.

PROCEDURAL HISTORY

This legal malpractice action was filed just over two months later, on May 19, 2015. In the Verified Complaint, Plaintiffs allege that Attorney Coggin breached the standard of care only by failing to serve Dickenson with the Summons and Complaint in the UIM Action (Compl. ¶39), which forced them to accept Liberty Mutual's \$25,000 settlement offer instead of the \$500,000 maximum UIM benefits that Plaintiffs claim they "more likely than not" would have recovered from Liberty Mutual in the UIM Action (Compl. ¶¶38, 40). The Verified Complaint includes no other theory of liability. Similarly, the expert affidavit that Plaintiffs were required to file with their Verified Complaint specifies only one alleged negligent act or omission: Attorney Coggin's alleged failure to serve Dickenson with the Summons and Complaint in the UIM Action. Notably, Plaintiffs' expert affidavit is issued by Sam Bauer, one of the attorneys with Bauer & Metro who replaced Attorney Coggin as the Plaintiffs' counsel of record in the UIM Action and voluntarily consummated the \$25,000 settlement of the UIM Action.

After participating in discovery, Attorney Coggin filed a Motion for Summary Judgment on May 16, 2016. Attorney Coggin argued that even if Plaintiffs could establish that Attorney

Coggin failed to serve Dickenson, that theory of liability could not support this legal malpractice action because the defendant in that case failed to timely assert lack of service upon the at-fault driver and could therefore not defend the action on that basis.² Plaintiffs filed a Memorandum in Opposition, but instead of addressing Attorney Coggin's argument they stated that Attorney Coggin could be found liable to the Plaintiffs under a new theory of liability: that Attorney Coggin failed to adequately prepare the UIM Action for settlement or trial. Attorney Coggin's Motion for Summary Judgment was argued before Judge Dukes on June 29, 2016. Again, Plaintiffs failed to present any response to Attorney Coggin's argument that his alleged failure to serve Dickenson could not support this legal malpractice action, and instead again argued that Attorney Coggin could be held liable on the separate, distinct, and unpled theory that Attorney Coggin failed to adequately prepare the UIM Action. Judge Dukes took the matter under advisement, and allowed Plaintiffs to submit a supplemental memorandum. In their Supplemental Memorandum in Opposition, Plaintiffs continued to argue only that Attorney Coggin could be found liable for failing to prepare the UIM Action, and still failed to address the argument that the only pled theory of liability was meritless. After Attorney Coggin filed a Reply, Plaintiffs filed a Sur-Reply, still arguing only that Attorney Coggin could be found liable under this new failure-to-prepare theory of liability. The last brief was submitted to Judge Dukes on July 28, and the Motion is currently under his advisement.

After the June 29 hearing in front of Judge Dukes, but before the supplemental briefing was closed, Plaintiffs requested that Attorney Coggin consent to the filing of an Amended Verified Complaint, which proposed to add the new failure to prepare theory of liability.

² Attorney Coggin incorporates herein the arguments presented in his Memorandum in Support of Motion for Summary Judgment, at the hearing on the Motion for Summary Judgment, and in his Reply to Plaintiff's Supplemental Memorandum in Opposition to Motion for Summary Judgment. In short, Attorney Coggin argued at summary judgment that his alleged failure to serve Dickenson in the UIM Action had absolutely no effect on the UIM Action and did not proximately cause Plaintiffs any damages because Liberty waived its right to challenge service on Dickenson by not specifically raising that issue in its answer and by actively litigating the UIM Action as if service was appropriate, only to later move to dismiss after the statute of limitations had expired. See Unisun Inc. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000).

Attorney Coggin responded by inquiring as to whether Plaintiffs intended to use the same affidavit of Sam Bauer to support the proposed Amended Verified Complaint, or if they had a different expert affidavit. Plaintiffs responded that they intend to use Mr. Bauer's original affidavit. Attorney Coggin replied by pointing out that Mr. Bauer's affidavit alleges only that Attorney Coggin breached the standard of care by failing to serve Dickenson, and does not alleged that Attorney Coggin breached the standard of care by failing to adequately prepare the UIM Action. Attorney Coggin reminded Plaintiffs that they still had not advanced any argument that would allow Judge Dukes to let the failure-to-serve theory survive summary judgment. Attorney Coggin declined to consent to the proposed Amended Verified Complaint until Plaintiffs present a qualifying expert affidavit stating that Attorney Coggin breached the standard of care by failing to adequately prepare the UIM Action. See email chain attached hereto as Exhibit A. Plaintiffs have not submitted an additional or revised expert affidavit, and instead filed the present Motion for Leave to Amend.

ARGUMENT

"[I]n an action for damages alleging professional negligence against [an attorney] . . . the plaintiff must file as part of the complaint 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."

The expert affidavit that Plaintiffs intend to file as part of their proposed Amended Verified Complaint alleges only one negligent act or omission: Attorney Coggin's alleged failure to serve the at-fault driver, Dickenson, with the summons and complaint. This alleged negligent act or omission cannot, as a matter of law, support a legal malpractice action because the defendant insurer did not timely assert it as a defense. Plaintiffs appear to agree with this position, as they have not submitted any argument against it despite filing three briefs and

appearing at a hearing on Defendant Coggins' Motion for Summary Judgment.

What is conspicuously missing from Mr. Bauer's affidavit is an opinion that Attorney Coggin breached the standard of care by failing to adequately prepare the UIM Action. Since Mr. Bauer actually represented the Plaintiffs in the UIM Action after Attorney Coggin withdrew, he has unique personal knowledge of Attorney Coggin's preparation of that case. He was also in the best position to ensure that the case was properly prepared to maximize settlement or trial potential. Nevertheless, despite the fact that Plaintiffs have been aware since July 11 of Attorney Coggin's desire to see an expert affidavit identifying his alleged failure to prepare as a basis for liability, Plaintiffs have not produced a revised affidavit from Mr. Bauer opining that Attorney Coggin failed to prepare the UIM Action or that any such failure was a breach of the standard of care.

Further, on August 1, 2016, Plaintiffs identified another expert witness, attorney Ronnie Richter. However, Plaintiffs have failed to produce any affidavit from Mr. Richter opining that Attorney Coggin's alleged failure to prepare the UIM Action constitutes a negligent act or omission.

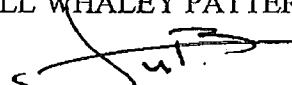
Having declined to present any argument that Attorney Coggin's alleged failure to serve Dickenson can support a legal malpractice claim, Plaintiffs now have changed their case to argue that Attorney Coggin was negligent for failing to prepare the UIM Action for settlement or trial. However, Plaintiffs are trying to shoehorn this theory into an already flawed pleading without a valid expert affidavit. Since the only negligent act or omission contained in Plaintiffs' expert affidavit cannot support Plaintiffs' case, as a matter of law, the Court should deny Plaintiffs' Motion for Leave to Amend. If Judge Dukes grants Attorney Coggin's Motion for Summary Judgment, Plaintiffs' expert affidavit will not allege any viable acts of negligence against

Attorney Coggin.³ If Judge Dukes denies the Motion for Summary Judgment, Attorney Coggin will consent to Plaintiffs filing the proposed Amended Verified Complaint, as the expert affidavit will then state one viable negligent act or omission. Either way, this Court's denial of Plaintiffs' Motion for Leave to Amend will not materially prejudice the Plaintiffs in any way.

CONCLUSION

Attorney Coggin readily concedes that § 15-36-100(B) only requires an expert affidavit to specify one negligent act or omission. However, the stated negligent act or omission must be one that can support liability. The only alleged negligent act contained in the expert affidavit Plaintiffs have presented does not meet this standard. Plaintiffs do not have an expert affidavit to support the new theory of liability that they intend to include in their Amended Verified Complaint. As such, Plaintiffs' Motion for Leave to File the Amended Verified Complaint should be denied, as it is not supported by a qualifying expert affidavit.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

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Jeffrey M. Bogdan, Esquire
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Attorneys for Defendant

September 6, 2016
Charleston, South Carolina

³ In addition to the failure-to-prepare theory being unsupported by expert affidavit, it is contradicted by the evidence exchanged in discovery. The failure-to-prepare theory is based on Attorney Coggin's failure to retain expert witnesses on Mr. Feldman's behalf in the UIM Action. However, Mr. Feldman refused to agree to pay for the expenses of even the most essential expert witness – his treating physician – to testify at deposition or trial. See collection of letters from Attorney Coggin requesting that Mr. Feldman agree to pay expert expenses, attached hereto as Exhibit B. It is disingenuous for Mr. Feldman to now claim that Attorney Coggin was negligent for failing to retain expert witnesses on his behalf when Mr. Feldman would not agree to pay for the most essential expert witness services in the UIM Action. Accordingly, the failure-to-prepare theory is meritless.

Jeff Bogdan

From: Thomas A. Pendarvis <tpendarvis@pendarvislaw.com>
Sent: Monday, July 11, 2016 4:33 PM
To: Jeff Bogdan
Cc: M. Dawes Cooke; Lindsey Perkins; Sara Wood; Chris Lempesis
Subject: RE: Feldman v. Coggin;

Jeff,

First, thanks for your response message earlier today. Next, as you consider any response to the requests posed by Chris, please understand that to keep things moving we intend to file the Motion to Amend by Friday, if a resolution is not reached by then.

Thanks.

Regards,

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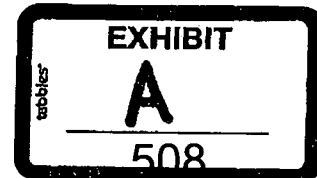
Practice concentrated in lawyer professional responsibility matters (plaintiff lawyer-malpractice claims, law-firm dissolutions, lawyer moves between firms, and consultation on lawyer professional ethics matters).

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From: Chris Lempesis
Sent: Monday, July 11, 2016 3:42 PM
To: Jeff Bogdan <jbogdan@barnwell-whaley.com>
Cc: M. Dawes Cooke <mdc@barnwell-whaley.com>; Lindsey Perkins <lperkins@barnwell-whaley.com>; Sara Wood <SWood@pendarvislaw.com>; Thomas A. Pendarvis <tpendarvis@pendarvislaw.com>
Subject: RE: Feldman v. Coggin;

Jeff,

Thank you for your email. I believe that the Plaintiffs have articulated a sufficient response to the Motion for Summary Judgment, both in an initial memo, at the hearing, and subsequent to the hearing by way of supplemental memo. At this point, I think that it may be up to Judge Dukes to opine as to whether summary judgment on the particular point referenced in the motion is appropriate so I will leave that to Judge Dukes to decide.



As to the sufficiency of the Affidavit, I believe that the issue that you have raised is addressed in Section 15-36-100(B), which requires 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. Mr. Bauer's Affidavit meets this requirement, given the context in which it was filed.

As far as I am aware, a Defendant's position as to the merit of the claims is not a predicate for amending a complaint generally speaking, unless there is a related argument as to bad faith and/or prejudice in the timing of the amendment. In this scenario, there is no discernable requirement contained in the relevant statute for the affidavit you have requested in order to amend the complaint, nor is there, generally, a requirement aside from not prejudicing the defendant or otherwise not acting in bad faith. If your client believes that there is prejudice or a showing of bad faith attendant to the proposed amendment of the complaint, please let me know that so that we can attempt to address that issue. Otherwise, I cannot see an actual basis, aside from a difference of opinion as to the merit of your client's defense as recited in the Motion for Summary Judgment, that would preclude your consenting to amending the complaint, and if a difference of opinion is the only reason, that in and of itself does not meet the standard as far as I am aware so as to provide a legitimate basis for your client to withhold consent to the filing of the proposed Amended Complaint.

I would appreciate it if you could provide additional information that supports your position as to the requirement for the additional affidavit as I would prefer to discuss this issue over email as opposed to unnecessarily subjecting your client to the additional cost of an additional motion hearing – regardless of which analysis is correct regarding the need for an additional affidavit.

Thanks,

Chris

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From: Jeff Bogdan [mailto:jbogdan@barnwell-whaley.com]
Sent: Monday, July 11, 2016 12:00 PM
To: Thomas A. Pendarvis <tpendarvis@pendarvislaw.com>; Melanie Weitzel <melanie@pendarvislaw.com>
Cc: M. Dawes Cooke <mdc@barnwell-whaley.com>; Chris Lempesis <chris@pendarvislaw.com>; Lindsey Perkins <lperkins@barnwell-whaley.com>
Subject: RE: Feldman v. Coggin;

Thomas,

I have received your Motion for Leave to File an Amended Complaint and the proposed Amended Complaint. I see that your proposed Amended Complaint adds new theories of legal malpractice: that my client breached the standard of care by (1) failing to retain expert witnesses on Mr. Feldman's behalf to develop his claim for future medical needs and expenses, and thus failing to prepare the case for settlement and trial and (2) failing to develop Mr. Feldman's claim for lost wages, and thus failing to prepare the case for settlement and trial. Your proposed Amended Complaint retains

your previous theory that my client breached the standard of care by failing to serve Ms. Dickenson with the Summons and Complaint in the UIM case.

You have also expressed your intention to use the affidavit of Sam Bauer, dated May 7, 2015, which was attached to your initial Complaint, to satisfy the expert affidavit filing requirement for your proposed Amended Complaint. Mr. Bauer's affidavit swears to only one alleged breach of the standard of care by my client: the alleged failure to serve Ms. Dickenson. Mr. Bauer's affidavit does not raise the issues of the alleged failure to retain expert witnesses, alleged failure to develop a lost wages claim, or alleged general failure to prepare Mr. Feldman's case for settlement or trial.

As you know, the issue of whether Mr. Coggin's alleged failure to serve Ms. Dickenson with the summons and complaint in the underlying UIM case is currently under Judge Dukes's advisement by way of my Motion for Summary Judgment. We argued that any alleged failure to serve Ms. Dickenson cannot support a claim of legal malpractice under these circumstances. To date, you have not advanced any opposing arguments to this position, and instead took the position in your briefs and at the hearing that these separate theories of legal malpractice (failure to retain experts and failure to develop lost wages) should allow your case to remain.

Since it is our position that that the theory of malpractice espoused in Mr. Bauer's affidavit is not viable, we cannot consider consenting to your filing of this proposed Amended Complaint until we see a qualifying affidavit alleging that my client breached the standard of care by either failing to retain expert witnesses, failing to develop a lost wages claim, or generally failing to prepare Mr. Feldman's case for settlement or trial.

If you have such an affidavit, please share it with me and I will reconsider my position.

Thanks,
Jeff

Jeffrey M. Bogdan
BWPH
843-577-7700

From: Thomas A. Pendarvis [<mailto:tpendarvis@pendarvislaw.com>]
Sent: Friday, July 08, 2016 1:50 PM
To: Jeff Bogdan; Melanie Weltzel
Cc: M. Dawes Cooke; Chris Lempesis; Lindsey Perkins
Subject: RE: Feldman v. Coggin;

Yes, we intend to use the same expert affidavit to support the Amended Verified Complaint.

Regards,

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From: Jeff Bogdan [<mailto:jbogdan@barnwell-whaley.com>]

Sent: Thursday, July 07, 2016 7:34 PM

To: Melanie Weitzel <melanie@pendarvislaw.com>

Cc: M. Dawes Cooke <mdc@barnwell-whaley.com>; Thomas A. Pendarvis <tpendarvis@pendarvislaw.com>; Chris Lempeis <chris@pendarvislaw.com>; Lindsey Perkins <lperkins@barnwell-whaley.com>

Subject: Re: Feldman v. Coggin;

Thomas and Chris,

Do you intend to use the same expert affidavit to support this Amended Complaint as the one that you filed to support the original complaint? If not, can you send a copy of the affidavit that you will file with the Amended Complaint?

Thanks,
Jeff

On Jul 7, 2016, at 11:53 AM, Melanie Weitzel <melanie@pendarvislaw.com> wrote:

The attached is being sent to you at the request of Thomas A. Pendarvis, J.D., PENDARVIS LAW OFFICES, PC.

Kindest Regards,

Melanie Weitzel
Pendarvis Law Offices, P.C.
710 Boundary St., Unit A-1
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<2016-07-07 TAP LT Counsel Consent to filing Amended Complaint.pdf>

Coggin Law Office

P.O. Box 7092
Hilton Head, SC 29938
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Fax: 843-689-7779
Email: gcitylaw@aol.com

December 17, 2013

Mr. Robert Feldman
55 Crescent Plantation
Bluffton, S.C. 29910

Dear Mr. Feldman:

I am enclosing a copy of an e-mail sent to Julian Allen regarding the transfer of Feldman v. Dickinson to the trial roster. If he agrees, this means, more than likely a February trial date.

As said, we have some matters we must agree on. First, the crux of our case depends upon the testimony, as an expert and treating physician, of Dr. Reuben. This means that he will be deposed by Allen and that he will come into court on your behalf. I have not talked with him, but I am of the opinion that his deposition fee is \$1500-\$2000 which be paid by the insurance attorney and \$3000-\$5000 to appear in court at your expense. The doctors usually want this up front.

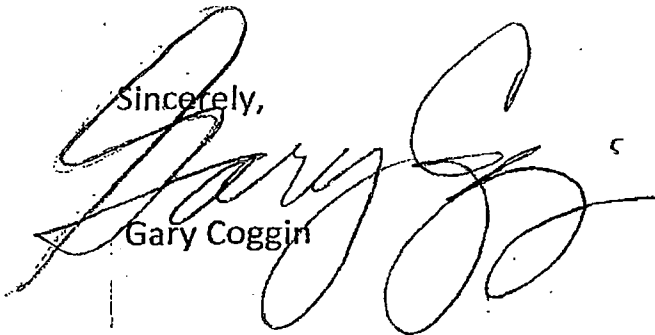
I would think this to be a two day trial. My expenses for trial are usually \$750-\$1200. In addition to this, I have an outstanding bill for Karma Young at \$2000.

So as to go forward I will need your commitment to pay Dr. Reuben's expert fee up front; attorney's expense up front of \$750 and the Karma Young fee in the amount of \$2000.



Please call me and I will be happy to discuss this matter with you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gary Coggin". The signature is written in dark ink and is positioned to the right of the typed name "Gary Coggin".

Gary Coggin

Gary Coggin/cab
enclosure

Coggin Law Office

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Fax: 843-689-7779
Email: gcogginlaw@aol.com

May 9, 2014

Robert Feldman
55 Crescent Plantation
Bluffton, SC 29938

Dear Mr. Feldman:

It appears that the above referenced matter will be going to trial.

As I know you aware, in personal jury trials, particularly the one at hand, expert medical testimony along with several expository exhibits, are absolutely necessary to a favorable outcome. As such, for both our edifications, I have listed below the estimated expenses:

Expert Deposition	\$1500 minimum first hour, \$500 each ¼ hour thereafter for a videotape deposition. (We need the expert testimony of Doctors Reubner and Shissias).
Witness Deposition	I would like to depose the tortfeasor, the other party to accident, the police officer. Each deposition is about \$150 + travel and appearance fee plus mileage. (See below)
Videographer	\$1000 - \$1200 for videotaping, additional \$250 for the written depositions.
Exhibits	I usually use 2 ½' by 4' exhibits. Depending on color, or black or white, they will cost \$100 to \$300 an exhibit.

Witness testimony I believe the latest fees are \$25
appearance and \$.50 a mile travel.

Litigation expenses The various costs of this case,
including depositions, records fees,
mediation, etc. are around \$1000.

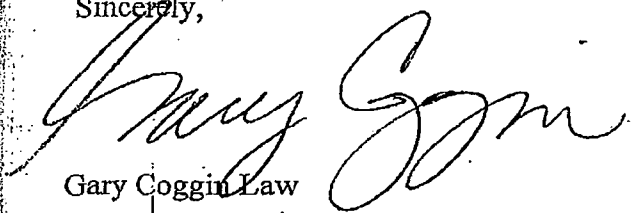
In round figures, the doctor testimony, including the videographer, would be at minimum \$5000. (Remember, we must have the agreement of the other side agree to allow us to use video depositions of witnesses that are within 100 miles of the court-house. The cost of a doctor to appear in person will easily be over \$3000). Also, if I take the deposition of the tortfeasor, the investigating officer and the witness, costs would be approximately \$600. (If I have to travel for the deposition of the tortfeasor, we have those expenses, also). Exhibits, even when costs are kept down, are about \$1200 to \$1500. Then finally, the appearance cost of each plaintiff's witness is, easily \$75.

In addition to the above, we also have the costs for the defense of Karma Young. This involved two court appearances and over 30 hours of work. (I promised you that I would keep my price down in the Young case. Therefore, the fee here is \$2000).

By my estimate, the costs already incurred, along with a very real estimate of the trial expenses show a potential output in excess of \$10,000. With this said, I request that you provide this amount for a trial escrow account that I will set up for the accrued expenses and the expenses preparatory for trial.

Bob, I will be happy to discuss this matter with you. Unfortunately, in this case, I cannot afford to carry these trial expenses.

Sincerely,


Gary Coggin Law

GPC/cab

Coggin Law Office

P.O. Box 7092
Hilton Head, SC 29938
Phone: 843-689-7777
Fax: 843-689-7779
Email: gcclaw@aol.com

September 15, 2014

Robert Feldman
55 Crescent Plantation
Bluffton, SC 29910

Re: Robert Feldman & Lois Feldman v. Sarah Dickenson
Case No.: 2012-CP-07-542

Dear Mr. Feldman:

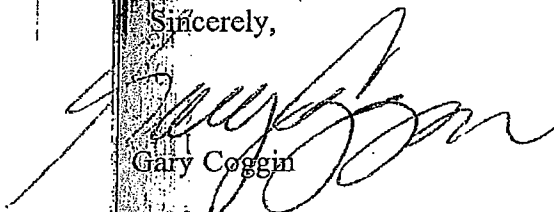
I have spent a great deal of time over this past weekend considering our disagreements over the past year re the above referenced case. Unfortunately, it has become apparent to me that I will not be able to meet your expectations in this matter.

I would like you to understand that, given the circumstances surrounding your injuries, not to mention your refusal to fund the depositions and other expenses necessary to moving this case to trial, I have accomplished all that I can on your behalf. You have already received \$90,000 (\$85,000 BI and \$5,000 MedPay) and have been offered an additional \$25,000 from your underinsurer (UIM). I believe this UIM offer to be fair and equitable and, as part of the total, more than will be awarded in a jury trial.

With this said, please be on notice that I am drafting a motion to the Court to be relieved as counsel. I will post to you a stamped and filed copy of the same as soon as is feasible. In the interim, I advise you to settle matter at hand for the \$25,000 that has been offered.

On the other hand, if you wish to continue, I ask that you immediately seek other counsel. Perhaps another attorney will see something in this case that I have missed. However, please remember to advise any future attorney that this is a UIM claim and that he must protect both my contingency on the \$25,000 UIM offer and also my unreimbursed expenses.

Sincerely,


Gary Coggin

GPC/cab

Sara Sutton

From: Sara Sutton
Sent: Monday, August 07, 2017 10:22 AM
To: Sara Sutton
Subject: Motion to Amend - Robert Feldman v. Gary Coggin (C/A No. 2015-CP-07-01251) (

AmicusFileIds: 884
AmicusFileName: Feldman v. Coggin - APPEAL
AmicusId: 224608
AmicusStatus: Saved

-----Original Message-----

From: Christopher W. Lempesis, Jr., J.D., LL.M.
Sent: Tuesday, September 13, 2016 4:02 PM
To: Law clerk for Judge Mullen
Cc: Thomas A. Pendarvis, J.D.; Sara E. Wood; Jeffrey "Jeff" M. Bogdan, J.D.; Janice Klein; Lindsey Perkins; Eileen Ganley; cmullen@sccourts.org
Subject: Motion to Amend - Robert Feldman v. Gary Coggin (C/A No. 2015-CP-07-01251) (

Ms. Paige Ornduff
Judicial Law Clerk
The Honorable Carmen T. Mullen
102 Ribaut Road
P.O. Drawer 1128
Beaufort, SC 29901

VIA EMAIL ONLY

Dear Ms. Ornduff:

As you may recall, Plaintiff's Motion to Amend the Complaint filed in the above referenced matter was heard before Judge Mullen on Thursday, September 8, 2016. While recognizing that leave to amend is freely given, Judge Mullen did not actually orally grant the Motion to Amend and indicated that a decision would be forthcoming depending on the outcome of the Defendant's Motion for Summary Judgment pending before Judge Dukes. On the following day, Judge Dukes entered a one sentence order granting the Defendant's Motion for Summary Judgment. We are in the process of drafting and will be filing shortly a Rule 52/59 Motion as to the Order entered by Judge Dukes granting summary judgment.

It is my recollection that Judge Mullen mentioned at the hearing that she prefers to receive requests for orders when orders are needed as opposed to counsel waiting for an order to issue. We have not received an Order from Judge Mullen as to the Motion to Amend and given the Order from Judge Dukes regarding the Motion for Summary Judgment, it would seem that we now need a response as to the Motion to Amend as the ruling on the Motion to Amend will have an impact on the Rule 52/59 Motion as well as any subsequent appeal.

Can you please ask about such an Order from Judge Mullen as to the Motion to Amend? Please note that I have copied Mr. Bogdan, opposing counsel, on this email. I have also copied Judge Mullen in hopes of saving you the effort of forwarding this information.

Thank you for your time.

With kind regards,

Chris Lempesis

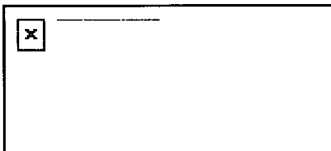
Christopher W. Lempesis, Jr.
Pendarvis Law Offices, P.C.
710 Boundary St., Unit A-1
Beaufort, SC 29902-4188
843.524.9500
Chris@PendarvisLaw.com
www.PendarvisLaw.com

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From: Lindsey Perkins [mailto:lperkins@barnwell-whaley.com]
Sent: Wednesday, September 07, 2016 3:08 PM
To: cmullenlc@sccourts.org
Cc: Thomas A. Pendarvis <tpendarvis@pendarvislaw.com>; Chris Lempesis <chris@pendarvislaw.com>; Sara Wood <SWood@pendarvislaw.com>; Jeff Bogdan <jbogdan@barnwell-whaley.com>; Janice Klein <jklein@barnwell-whaley.com>
Subject: Robert Feldman v. Gary Coggin (C/A No. 2015-CP-07-01251) (BWPH 5059.001)

Good afternoon. Attached please find a courtesy copy of Defendant's Memorandum In Opposition to Plaintiff's Motion for Leave to File Amended Verified Complaint with regard to the above case, which was sent to the Clerk of Court for filing yesterday. A hearing on this matter is scheduled for tomorrow, September 8th, at 12:00 p.m. in front of Judge Mullen. I have copies Plaintiffs' counsel on this email. Please let me know if you require anything further. Thank you.

LINDSEY PERKINS
BARNWELL WHALEY PATTERSON & HELMS, LLC
288 Meeting Street, Suite 200 | Charleston SC 29401 | 843.577.7700 | 843.329.5318 (D)
lperkins@barnwell-whaley.com | [Firm Website](#)



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are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies, electronic, paper or otherwise, which you may have of this communication.

Sara Sutton

From: Sara Sutton
Sent: Monday, August 07, 2017 1:35 PM
To: Sara Sutton
Subject: RE: Motion to Amend - Robert Feldman v. Gary Coggin (C/A No. 2015-CP-07-01251) (

AmicusFileIds: 884
AmicusFileName: Feldman v. Coggin - APPEAL
AmicusId: 224628
AmicusStatus: Saved

-----Original Message-----

From: Christopher W. Lempesis, Jr., J.D., LL.M.
Sent: Wednesday, September 14, 2016 9:27 AM
To: Jeffrey "Jeff" M. Bogdan, J.D.
Cc: Law clerk for Judge Mullen; Thomas A. Pendarvis, J.D.; Sara E. Wood; Janice Klein; Lindsey Perkins; Eileen Ganley; cmullen@sccourts.org
Subject: RE: Motion to Amend - Robert Feldman v. Gary Coggin (C/A No. 2015-CP-07-01251) (

Jeff,

I think that your response below contains an argument and a legal conclusion so I feel required to respond. My email did not argue for a specific outcome as to the Motion for Leave to Amend – only entry of an Order. The result of Judge Mullen's order on the motion to amend would have a substantive impact on the pending Rule 52/59 Motion as well as the case as a whole and for that reason, from the perspective of the moving parties, the Motion for Leave to Amend is not "moot."

Further, I believe that Rule 58, SCRPC provides (and that 58(a)(2) requires) an Order, regardless of what the order might say. If the ruling on the Motion for Leave to Amend was to continue the Motion for Leave to Amend, for instance, pending the outcome of the Motion for Summary Judgment, we need a written order as to that point for purposes of appeal. The same is true if the Court decides that the Motion for Leave to Amend is moot as we would prefer to include such an order in the likely appeal of the grant of the Motion for Summary Judgment. Regardless of what the Court decides on the Motion for Leave to Amend (which we would prefer that the Court grant), I believe that in Rule 58 entitles the Plaintiffs to a written order and that these Plaintiffs, given the history of this case and the underlying case, are certainly entitled to an Order from the Court regarding the Motion for Leave to Amend.

Thanks,

Chris

Christopher W. Lempesis, Jr.
Pendarvis Law Offices, P.C.
710 Boundary St., Unit A-1
Beaufort, SC 29902-4188
843.524.9500
Chris@PendarvisLaw.com
www.PendarvisLaw.com

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From: Jeff Bogdan [mailto:jbogdan@barnwell-whaley.com]

Sent: Wednesday, September 14, 2016 8:38 AM

To: Chris Lempesis <chris@pendarvislaw.com>

Cc: cmullenlc@sccourts.org; Thomas A. Pendarvis <tpendarvis@pendarvislaw.com>; Sara Wood <SWood@pendarvislaw.com>; Janice Klein <jklein@barnwell-whaley.com>; Lindsey Perkins <lperkins@barnwell-whaley.com>; Eileen Ganley <Eileen@pendarvislaw.com>; cmullen@sccourts.org

Subject: Re: Motion to Amend - Robert Feldman v. Gary Coggin (C/A No. 2015-CP-07-01251) (

Judge Mullen and Ms. Ornduff,

At the risk of arguing this issue via email, I feel the need to offer this very brief reply.

Defendant's Motion for Summary Judgment was as to the entire case. Judge Dukes granted that motion in full. Accordingly, this case is over. Plaintiff's Motion for Leave to Amend is moot. I do not believe an order is necessary.

Thank you,

Jeff Bogdan

On Sep 13, 2016, at 4:02 PM, Chris Lempesis <chris@pendarvislaw.com> wrote:

Ms. Paige Ornduff
Judicial Law Clerk
The Honorable Carmen T. Mullen
102 Ribaut Road
P.O. Drawer 1128
Beaufort, SC 29901

VIA EMAIL ONLY

Dear Ms. Ornduff:

As you may recall, Plaintiff's Motion to Amend the Complaint filed in the above referenced matter was heard before Judge Mullen on Thursday, September 8, 2016. While recognizing that leave to amend is freely given, Judge Mullen did not actually orally grant the Motion to Amend and indicated that a decision would be forthcoming depending on the outcome of the Defendant's Motion for Summary Judgment pending before Judge Dukes. On the following day, Judge Dukes entered a one sentence order granting the Defendant's Motion for Summary Judgment. We are in the process of drafting and will be filing shortly a Rule 52/59 Motion as to the Order entered by Judge Dukes granting summary judgment.

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Can you please ask about such an Order from Judge Mullen as to the Motion to Amend? Please note that I have copied Mr. Bogdan, opposing counsel, on this email. I have also copied Judge Mullen in hopes of saving you the effort of forwarding this information.

Thank you for your time.

With kind regards,

Chris Lempesis

Christopher W. Lempesis, Jr.
Pendarvis Law Offices, P.C.
710 Boundary St., Unit A-1
Beaufort, SC 29902-4188
843.524.9500
Chris@PendarvisLaw.com
www.PendarvisLaw.com

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From: Lindsey Perkins [<mailto:lperkins@barnwell-whaley.com>]
Sent: Wednesday, September 07, 2016 3:08 PM
To: cmullenlc@sccourts.org
Cc: Thomas A. Pendarvis <tpendarvis@pendarvislaw.com>; Chris Lempesis <chris@pendarvislaw.com>; Sara Wood <SWood@pendarvislaw.com>; Jeff Bogdan <jbogdan@barnwell-whaley.com>; Janice Klein <jklein@barnwell-whaley.com>
Subject: Robert Feldman v. Gary Coggin (C/A No. 2015-CP-07-01251) (BWPH 5059.001)

Good afternoon. Attached please find a courtesy copy of Defendant's Memorandum In Opposition to Plaintiff's Motion for Leave to File Amended Verified Complaint with regard to the above case, which was sent to the Clerk of Court for filing yesterday. A hearing on this matter is scheduled for tomorrow, September 8th, at 12:00 p.m. in front of Judge Mullen. I have copies Plaintiffs' counsel on this email. Please let me know if you require anything further. Thank you.

LINDSEY PERKINS
BARNWELL WHALEY PATTERSON & HELMS, LLC
288 Meeting Street, Suite 200 | Charleston SC 29401 | 843.577.7700 | 843.329.5318 (D)
lperkins@barnwell-whaley.com | [Firm Website](#)

<image001.jpg>

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the individual or entity named above. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies, electronic, paper or otherwise, which you may have of this communication.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2015-CP-07-1251

Robert E. Feldman and Lois J. Feldman,

Plaintiffs,

vs:

Gary P. Coggin,

Defendant.

**PLAINTIFFS' MOTION TO ALTER
OR AMEND JUDGMENT**

2016 SEP 19 PM 4:24
JERRI ANN RUSSELL
CLERK OF COURT
BEAUFORT COUNTY, S.C.

TO: M. Dawes Cooke, Jr., J.D., and Jeffrey M. Bogdan, J.D., counsel for Defendant
Gary P. Coggin:

NOTICE

PLEASE TAKE NOTICE THAT Plaintiffs, Robert E. Feldman and Lois J. Feldman, through their undersigned counsel, will move ten days after service of this motion or as soon thereafter as counsel can be heard before the Honorable Marvin H. Dukes, III, as the Beaufort County Judicial Center, Beaufort, South Carolina, for an Order pursuant to Rules 52(b) and 59(e), SCRCP, altering and/or amending the Order entered on September 9, 2016, granting the Defendant's Motion for Summary Judgment (hereinafter "the Order").

MOTION

This Motion filed on behalf of Plaintiffs, Robert E. Feldman and Lois J. Feldman, seeking an Order altering or amending the Order pursuant to Rule 52(b) and 59(e), SCRCP, is based on errors and omissions in the factual findings and conclusions of law upon which the Court must have relied in granting the Motion for Summary Judgment. See (Order) (Exhibit 1).

The Order should be altered or amended for several reasons, including 1) the Order contains no findings of fact or conclusions of law whatsoever; 2) the Order was issued before discovery has been completed; 3) the Order overlooks, misapprehends, fails to fully consider, or fails to rule on matters of material fact in the record that are disputed and arguments as to proximate cause; 4) the Order erroneously rules as to the proximate cause issue that it was appropriate for the Court to determine solely as a matter of law that Plaintiffs failed to prove they would have ultimate succeeded at trial – excluding any consideration of disputed facts showing the Defendant lawyer’s acts or omissions actually had a detrimental effect on settlement value of Plaintiffs’ underlying claims. Plaintiffs, therefore, move the Court to reconsider the Order, and also that the Court issue an Order specifically making findings of fact and conclusions of law on the facts in the record, and arguments and issues raised in the motions, memoranda, and in the oral arguments at the hearing held on June 29, 2016, all of which is discussed below. Further, the arguments and issues addressed below were raised, but not ruled upon in the Order, and therefore are presented again in this Motion to preserve them for appellate review.

STANDARD OF REVIEW

Rule 52(b), SCRCP, provides that not later than 10 days a party may motion the Court to make additional findings and amend the judgment rendered accordingly, even without previous objection concerning such findings or a motion to amend them. Pursuant to Rule 59(e), SCRCP, a party may file a motion when they believe the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. *Elam v. S. Carolina Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). “A party must file such a motion

when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id.*

PROCEDURAL BACKGROUND

Plaintiffs filed the present legal malpractice suit for damages resulting from Defendant Coggin's negligence in both failing to perfect service of process on an at-fault driver, and in Defendant Coggin's failures to meet the minimum standard of care in handling the Plaintiffs' underlying UIM personal injury case thereby breaching his professional duties to the Feldmans by other such particulars as the evidence in the case may demonstrate. See (Verified Complaint of Plaintiffs and the Expert Merit Affidavit by Samuel C. Bauer that is attached as an exhibit) (emphasis supplied) (**Exhibit 2**). Paragraph Fifteen of the Expert Affidavit filed in connection with the Complaint pursuant to S.C. Code Ann. § 15-36-100(B) (2006), specifically stated that:

Had Coggin met the standard of care by performing his professional duties to ensure the Dickenson was timely served with process to commence a lawsuit **and** protect the Feldmans' claims, it is more likely than not that the Feldmans would have recovered all or almost all of the \$500,000 UIM policy coverage.

(Expert Merit Affidavit by Samuel C. Bauer) (Emphasis supplied).

On June 17, 2016, the Court entered an Order requiring that discovery be completed on or before December 1, 2016,¹ and that the case be subject to call for trial after January 1, 2017.

On or around June 20, 2016, Defendant filed a Motion for Summary Judgment, arguing that even if Defendant Coggin did breach the standard of care by failing to serve

¹ The parties have been engaged in the process of discovery, however, to date, only the deposition of Defendant Coggin has been accomplished, with Plaintiffs now having named four additional expert witnesses prior to the entry of the September 9 order.

the at-fault driver, that breach did not proximately cause the Plaintiffs to suffer any damages because such a failure would not have affected the underlying UIM case in any way.

On June 27, 2016, Plaintiffs filed a Memorandum in Opposition to the Motion for Summary Judgment and a Rule 56(f) Affidavit, arguing that the motion was premature because discovery is not complete, Plaintiffs and their counsel could not present by affidavit facts which are essential to justify their opposition, and there are genuine issues of material fact which preclude an award of summary judgment to Defendant. See (Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment, and Rule 56(f), SCRCF Affidavit of Thomas A. Pendarvis) (**Exhibit 3** and **Exhibit 4**).

On June 8, 2016, Defendant Coggin was deposed and that deposition transcript was made part of the Court's record in connection as Exhibit 1 to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment that was filed on June 27, 2016.

On June 29, 2016, Defendant's Motion for Summary Judgment came before the Honorable Marvin H. Dukes, III, for hearing. After hearing arguments of counsel, the Court requested additional briefing.

On July 11, 2016, Plaintiffs filed their Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment (**Exhibit 5**) arguing along the lines argued at the hearing on June 29, 2016, that Defendant Coggin's negligence which compromised the value of the Plaintiffs' claims in the underlying UIM lawsuit is at the heart of Plaintiffs' claims in this lawsuit; that there are actual disputed issues bearing on whether Mr. Coggin's failure to prepare the Feldmans' case proximately resulted in a diminution of the

settlement value of the Feldmans' claims; and that Loss of settlement value caused by a lawyer's negligence can be recovered in a legal malpractice action. In briefs and at argument, Plaintiffs addressed the filing of a Motion to Amend the Complaint in order to include more specific allegations concerning the various actions and omissions of Defendant Coggin which had been revealed in Defendant Coggin's recent deposition.

On July 19, 2016, in an effort to placate concerns raised by the Defendant during arguments at the Motion for Summary Judgment hearing, Plaintiffs' filed the Motion to Amend the Complaint to include more specific language in the Complaint, with copies of such pleadings having been forwarded to Judge Dukes per conversations conducted at the hearing on June 29, 2016. See (Plaintiffs' Notice of Motion and Motion for Leave to File Amended Verified Complaint) (**Exhibit 6**).

On July 28, 2016, Defendant filed a Reply to Plaintiffs' Supplemental Memorandum, arguing that the Court should grant the Motion for Summary Judgment because, as a matter of law, the Plaintiffs' Verified Complaint and expert affidavit cannot support the present suit; and Plaintiffs' theory of liability that Defendant Coggin failed to properly prepare the UIM action for settlement, mediation, and trial is not properly before the Court and cannot prevent a grant of summary judgment.

On August 4, 2016, Plaintiffs filed a Sur-Reply to Defendant's Reply pointing out that there are disputed issues of material fact as to the impact of Defendant Coggin's failures on diminution of the settlement value of the underlying case, and that the Defendant's focus on the allegations of the Complaint are misplaced in light of the standards for a motion for summary judgment, and especially where it is undisputed that discovery is not complete in this lawsuit. See (Plaintiffs' Sur-Reply) (**Exhibit 7**).

On or around September 6, 2016, Defendant filed a Memorandum in Opposition to Plaintiff's Motion for Leave to File Amended Verified Complaint, conceding that § 15-36-100(B) only requires an expert affidavit to specify one negligent act or omission, but *[while this is not contained in the language of the statute]* the negligent act or omission must be one that can support liability; and that the only alleged negligent act contained in the expert affidavit Plaintiffs filed with the initial Complaint and referenced in the proposed Amended Complaint does not meet this standard because there is not an expert affidavit to support the new theory of liability that Plaintiffs have specifically referenced in the Amended Verified Complaint.

On September 8, 2016, Plaintiffs' Motion to Amend the Complaint came before the Honorable Carmen T. Mullen for argument. Without a written order, Judge Mullen orally declined to rule as to the Motion to Amend, acknowledging that amendment under Rule 15, SCRPC, should be freely granted, but reserving judgment pending an Order from Judge Dukes on the Defendant's Motion for Summary Judgment.

The very next day, on September 9, 2016, the Honorable Marvin H. Dukes, III, entered the one sentence Order simply granting the Defendant's Motion for Summary Judgment. See (Order) (Exhibit 1).

ARGUMENTS

I. The Court's Order granting Defendant's Motion for Summary Judgment was premature because discovery has not been completed.

The Plaintiffs filed a Rule 56(f) affidavit explaining that discovery in this matter has not yet been completed and on such basis, affidavits in response to the Motion for Summary Judgment cannot be procured and filed. While this issue was before the trial court, the Order granting summary judgment does not address this argument raised by

Plaintiffs. For this reason, Plaintiffs request that the Court rule as to whether or not the issues addressed in the Rule 56(f) Affidavit of Thomas A. Pendarvis raise sufficient basis so as to require the Court's denial of the Defendant's Motion for Summary Judgment. See A ruling on a motion for summary judgment was premature because the parties had not complete discovery. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537, 543 (1991) (" . . . summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.")

Simply stated, the entry of an Order granting Defendant's motion for summary judgment is premature because discovery has not been completed. Because the Order did not rule on this issue, Plaintiffs' motion to alter or amend judgment should be granted, and a new Order should be issued denying Defendant's motion for summary judgment.

II. In granting the Defendant's Motion for Summary Judgment, the Court improperly ruled, as a matter of law, that Defendant's negligence did not proximately cause diminution in settlement value of the underlying case.

A. The Order overlooked or misapprehended the law concerning proximate cause.

Whether a defendant's acts or omissions proximately caused harm to a plaintiff is almost always a question of fact for a jury. See *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006); *Oliver v. South Carolina Dept. of Highways & Pub. Transp.*, 309 S.C. 313, 318, 422 S.E.2d 128, 131 (1992) (causation issues generally present questions of fact for the jury). The Order granting Defendant's motion for summary judgment based on an alleged *lack* of causation was error. The Court's unstated ruling on this point should be altered and amended, such that Defendant's motion should be denied.

B. The Order overlooked or misapprehended the law and the evidence before the Court concerning loss of settlement value for the proximate cause and damage elements of the professional negligence claim.

Evidence was before the Court showing Defendant Coggin's handling of the Feldmans' UIM claim, in terms of 1) failing to file an affidavit of service providing the UIM carrier with the basis to file a dispositive motion, or 2) failing to prepare the case for trial causing the UIM carrier to offer virtually nothing to settle the case at the mandatory mediation held months before the dispositive motion, or 3) a combination of 1 and 2. Collectively, evidence giving rise to disputed questions of material fact was before the Court showing Defendant Coggin's handling of the Feldman's case substantially reduced the settlement value of their case.

The client's burden of establishing proximate cause in a legal malpractice action ... does not necessarily compel the client to demonstrate that he would have won the underlying case. Rather, it is **enough for the legal malpractice plaintiff to show that he has lost a valuable right; e.g., the settlement value of the underlying case.**

Doe v. Howe, 367 S.C. 432, 446, 626 S.E.2d 25, 32 (Ct. App. 2005) (emphasis added).

A legal malpractice plaintiff can satisfy the most probably requirement and defeat a motion for summary judgment by establishing that he most probably would have received a larger judgment. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009) (*internal citation omitted*).

In this case, Defendant Coggin argues that his negligence in failing to serve the at-fault driver, did not, in any way compromise the value of the Plaintiffs' claims in the

underlying suit; and that the issue of diminution in the value of settlement of the underlying suit was not properly before the Court. Yet, the Feldmans filed an Expert Affidavit that specifically states that '[h]ad Coggin met the standard of care by performing his professional duties to ... protect the Feldmans' claims, it is more likely than not that the Feldmans would have recovered all or almost all of the \$500,000 UIM policy coverage." Exhibit 2. The Feldmans also submitted the deposition of Defendant Coggin to the Court, with specific reference to various other failures in preparation of the underlying case for settlement, mediation and trial – all of which were offered to the Court explicitly and specifically to highlight factual issues as to whether or not the negligence of Defendant Coggin, in the specific instance of failing to perfect service and in the general sense of failing to adequately prepare the case. Further, the Feldmans raised these arguments and these factual disputes as to the impact of Defendant's specific and general negligence in briefs filed response to Defendant's Motion for Summary Judgment, and also in their Motion to Amend the Complaint, which was also before the Court before the Order was issued.

Evidence was before the Court showing that during the more than 2 ½ years while representing the Feldmans, Defendant Coggin did not obtain the testimony of any physician causally linking Mr. Feldman's injuries to the automobile accident, did not obtain any reports from a vocational rehabilitation specialist, did not obtain a life care plan, and did not get any medical evidence or testimony establishing Mr. Feldman's future medical needs prior to the mediation held in May 2014, which was many months before the UIM carrier filed the motion to dismiss in the underlying matter. Again, the Expert Affidavit filed on behalf of Plaintiff states that '[h]ad Coggin met the standard of care by performing

his professional duties to ... protect the Feldmans' claims, it is more likely than not that the Feldmans would have recovered all or almost all of the \$500,000 UIM policy coverage."

Despite clearly controlling South Carolina law that diminution of settlement value and proximate cause of damages based on the same are questions of fact and matters to be proven at trial; and that the evidence and all inferences which can be reasonably drawn must be viewed in the light most favorable to the Feldmans as the nonmoving parties in this case, the Court issued an Order granting the Defendant's Motion for Summary Judgment. The Order effectively rules that, as a matter of law, Defendant Coggin's negligence could not compromise the value of Plaintiffs' claims in the underlying case. Notably, Defendant Coggin cited *Doe v. Howe*, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005) in his briefs to the Court. Essentially, the Court has erroneously accepted Defendant Coggin's arguments that the question on the proximate cause as to the ultimate success at trial is solely a matter of law – excluding any consideration of the defendant lawyer's acts or omissions that had a detrimental effect on settlement value. This proposition, however, overlooks or misapprehends the South Carolina Supreme Court's holdings in *Madison, supra*. (whether a defendant's acts or omissions proximately caused harm to a plaintiff is almost always a question of fact for a jury) and the Court of Appeals' holdings in *Doe v. Howe, supra*. (proximate cause in a legal malpractice case is satisfied by evidence of a diminution in settlement value).

For these reasons, the Order should be altered or amended to deny Defendant's motion for summary judgment; disputed evidence of material fact is, before the Court as

to whether the acts and omissions of Defendant Coggin were the proximate cause of the damages sustained by Plaintiffs.

III. The Order contains no findings on whether there are disputed issues of material fact as to proximate cause.

The Court did not rule on Plaintiffs' arguments that there are disputed issues of material fact concerning proximate cause, including whether Mr. Coggin's failure to file the affidavit of service, or failure prepare the Feldmans' case, or a combination of both proximately resulted in a diminution of the settlement value of the Feldmans' claims. Similarly, the Court did not make any rulings on Plaintiffs' argument that loss of settlement value caused by a lawyer's negligence can be recovered in a legal malpractice action. In response to Defendant's Motion for Summary Judgment, Plaintiffs raised arguments concerning disputed questions of material fact as to the proximate cause of the diminution in settlement value of the underlying case. Plaintiffs also contended that such allegations were properly raised in the filed Complaint, the Expert Affidavit filed with the Complaint, the deposition of Defendant Coggin filed with the Court, and the Motion to Amend the Complaint; and that the Expert Affidavit complied with S. C. CODE ANN. § 15-36-100(B). The Order makes no findings of fact or conclusions of law regard to these disputed question of fact. Plaintiffs, therefore, respectfully request the Court modify and amend its Order to make findings of fact and conclusions of law as to these factual disputes and arguments. *See Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004).

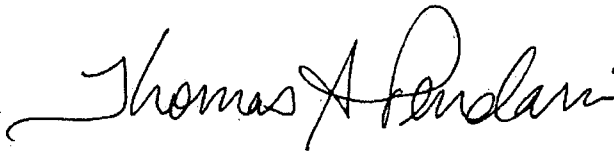
CONCLUSION

Based on the foregoing arguments, the affidavits, pleadings of record, testimony and evidence before the Court, an Order should be issued pursuant to Rules 52 and 59, SCRPC, reconsidering, altering, and/or amending the Order granting Defendant's Motion

for Summary Judgment so as to DENY Defendant's motion. In the alternative, and only so, an Order should be issued pursuant to Rules 52 and 59, SCRPC, reconsidering, altering, and/or amending the Order granting Defendant's Motion for Summary Judgment so as to make specific findings of fact and conclusion of law on the disputed questions of material fact and arguments before the Court. Plaintiffs respectfully request this Honorable Court reconsider then alter and amend its rulings.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with the first name "Thomas" and last name "Pendarvis" clearly legible.

Thomas A. Pendarvis (SC Bar # 064918)
Christopher W. Lempesis, Jr. (SC Bar # 077012)
710 Boundary Street, Unit A-1
Beaufort, SC 29902
843.524.9500
Thomas@PendarvisLaw.com

Counsel for Plaintiffs

September 16, 2016

Beaufort, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CASE NO: 2015-CP-07-1251

Robert E. Feldman, et al.,

Plaintiff(s).

vs.

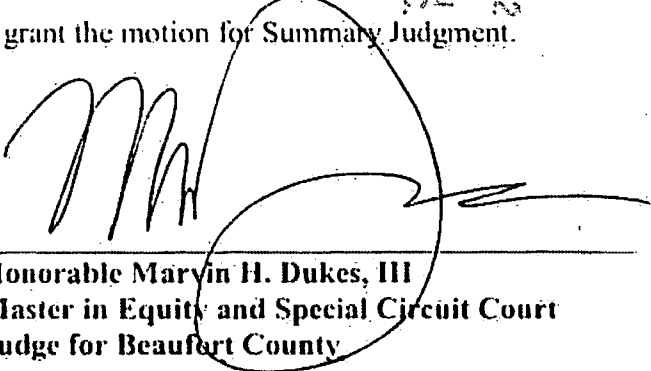
Gary P. Coggin,

Defendant(s).

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

This matter came before me on Defendant's Motion for Summary Judgment, filed May 16, 2016. After hearing from parties, I hereby grant the motion for Summary Judgment.

IT IS SO ORDERED:



Honorable Marvin H. Dukes, III
Master in Equity and Special Circuit Court
Judge for Beaufort County

September 9, 2016
Beaufort, South Carolina





STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2015-CP-07- 1251

Robert E. Feldman and Lois J. Feldman,

Plaintiffs,

vs.

Gary P. Coggin,

Defendant.

VERIFIED COMPLAINT
(Jury Trial Demanded)

(Legal Professional Negligence)
(Breach of Contract)

2015 MAY 19 PM 3:24
CLERK OF COURT
JUDICIAL CIRCUIT
FOURTEENTH
COUNTY OF
SOUTH CAROLINA

Plaintiffs, Robert E. Feldman and Lois J. Feldman, complaining of Defendant, Gary P. Coggin, would respectfully show unto the Court as follows:

SUMMARY OF THE CASE

1. This legal malpractice action centers upon the Defendant lawyer's professional negligence while representing his clients on claims arising from a motor vehicle collision in 2010. The Defendant lawyer's acts and omissions, including failing to perfect service of process on the defendant at-fault driver, allowed the statute of limitations to expire on his clients' claims. Allowing the statute of limitations to expire resulted in their inability to recover all of the \$500,000 in available underinsured insurance proceeds that, but for the Defendant lawyer's acts and omissions, would have been paid by their carrier to compensate them for personal injuries, medical expenses, lost wages, and loss of consortium claims arising from their injuries caused by the at-fault driver.

PARTIES

2. Defendant, Gary P. Coggin, is, upon information and belief, a citizen and resident of Beaufort County, South Carolina, and is an lawyer licensed to practice law in this State.

3. Plaintiff, Robert E. Feldman, is a resident of Beaufort County, South Carolina.

4. Plaintiff, Lois J. Feldman, is a resident of Beaufort County, South Carolina.

JURISDICTION

5. This Court has jurisdiction over these matters based upon Article V of the South Carolina Constitution, S.C. CODE ANN. §§ 36-2-802 and 36-2-803 (1976), and its plenary powers.

VENUE

6. Venue is proper in Beaufort County as it is, upon information and belief, the county of residence for Defendant, Gary P. Coggin.

FACTS

7. Defendant, Gary P. Coggin ("Coggin"), is a lawyer licensed to practice law in South Carolina.

8. Coggin accepted the representation of Plaintiffs, Robert E. Feldman and Lois J. Feldman ("Bob Feldman," "Lois Feldman," or collectively, "the Feldmans"), on their personal injury and loss of consortium claims against an at-fault driver, Sarah Dickenson ("Dickenson"), arising from a motor vehicle accident that occurred on October 9, 2010.

9. On October 9, 2010, Dickenson failed to properly control her motor vehicle while traveling on US 278 in Beaufort County, South Carolina, and was at fault in causing a collision with a vehicle driven by Bob Feldman, which caused Bob Feldman to suffer substantial personal injuries, incur medical expenses, and incur lost wages, all of which gave rise to valuable personal injury and loss of consortium claims in favor of the Feldmans.

10. Bob Feldman's present medical specials alone exceed \$150,000, he has substantial future medical needs, he has substantial lost wages, and he has sustained other financial losses.
11. As part of the representation, Coggin obtained copies of the medical specials, substantial future medicals, materials showing Bob Feldman's substantial loss wages, and other financial losses.
12. Dickenson had \$100,000 of available liability insurance coverage for the Feldmans' claims.
13. The Feldmans had \$500,000 in underinsurance (UIM) coverage with Liberty Mutual Insurance Company ("Liberty") available for injuries sustained and claims arising from the collision caused by Dickenson.
14. To get their consent to settle for only \$85,000 of Dickenson's \$100,000 liability coverage, Coggin recommended they settle for 85,000 and assured the Feldmans that he would recover the available \$500,000 in UIM coverage under the Feldmans' policy issued by Liberty. Based on Coggin's assurances, the Feldmans authorized the settlement with Dickenson and her liability carrier.
15. Coggin settled the Feldmans' claims for only \$85,000 of Dickenson's \$100,000 available liability coverage.
16. On or about October 29, 2012, Coggin filed suit on behalf of the Feldmans against Dickenson in the Beaufort County Court of Common Pleas in a matter styled, *Robert Feldman & Lois Feldman vs. Sarah Dickenson*, C.A. # 2012-CP-07-3800 ("the Underlying Lawsuit") alleging claims for negligence and loss of consortium, and including an *ad damnum* clause seeking a total of \$525,000 in damages.

17. On or about November 29, 2012, Coggin provided copies of the Underlying Lawsuit papers to Liberty.

18. To commence the Underlying Lawsuit under South Carolina common law and Rule 3(a), SCRCP, Coggin was required to file the lawsuit with the clerk of court and accomplish service of process on Dickenson within the statute limitations in any manner prescribed by law or, if Dickenson was not served within the statute limitations, actual service was required to be accomplished no later than 120 days of the date of filing, which was on or before February 26, 2013.

19. Once service of process has been accomplished, Rule 4(g), SCRCP, required the person serving process to make a proof of service in the form of an affidavit stating, among other things, the date, time and place of service. Rule 4(g), SCRCP, also required Coggin to file proof of service with the Clerk of Court.

20. Coggin did not commence the Underlying Lawsuit.

21. Coggin did not commence the Underlying Lawsuit within the applicable statute of limitations because Dickenson was not served within the statute limitations and actual service of process was not accomplished before February 26, 2013.

22. Coggin did not at any point obtain an affidavit or other sworn statement by any individual establishing proof of service of process on Dickenson through personal service pursuant to Rule 4(d), SCRCP.

23. Coggin did not at any point obtain service of process on Dickenson through a statute or an order of court pursuant to Rule 4(e), SCRCP.

24. Coggin did not at any point obtain service of process on Dickenson anywhere within the United States pursuant to Rule 4(h), SCRCP.

25. Coggin did not at any point obtain service of process on Dickenson by an acceptance of service pursuant to Rule 4(j), SCRCF.
26. Coggin did not at any point obtain service of process on Dickenson by publication pursuant to S.C. CODE ANN. §§15-9-15 and 15-9-710.
27. Coggin did not at any point file any documents or an affidavit by an individual establishing proof of service of process on Dickenson by delivering a copy of the summons and complaint personally or by any other means.
28. Liberty retained counsel to represent Dickenson in the Underlying Lawsuit.
29. On October 9, 2013, the statute of limitations expired on the Feldmans' claims against Dickenson.
30. On or about May 5, 2014, Coggin sent a letter to a third-party concerning the Feldmans' claims stating, among other things, about Mr. Feldman's claim that "this does not include loss of work, loss of enjoyment of life and pain and suffering. If we would consider this, the demand on UIM is \$300,000 to \$350,000." Coggin further represented that Ms. Feldman's loss of consortium claim was valued at \$100,000.
31. In or around September, 2014, upon information and belief, counsel for Dickenson advised Coggin of their plan to file a motion to dismiss based on Coggin's failure to serve Dickenson with process, and, upon information and belief, extending on behalf of Liberty a \$25,000 offer to settle to avoid having to litigate the dispute further and because the Feldmans were their insureds.
32. On or about September 15, 2014, Coggin sent a letter to the Feldmans "advis[ing] you to settle the matter at hand for the \$25,000 that has been offered," notwithstanding his

prior pleadings and representations valuing the combined claims between \$450,000 and \$525,000.

33. On October 8, 2014, almost 2 years after the Underlying Lawsuit had been filed and almost 1 year after the statute of limitations had expired, counsel for Dickenson filed a motion to dismiss pursuant to Rule 12(b)(4) and 12(b)(5), SCRCP, stating, "Although Plaintiffs filed a lawsuit within the applicable statute of limitations, Plaintiffs have failed to serve the Defendant within the applicable time period. To date, upon information and belief, the Defendant still has not been served with this lawsuit."

34. After the motion to dismiss had been filed and after the statute of limitations had expired on their claims against Dickeson but before the hearing on the motion to dismiss, the Feldmans terminated Coggin's representation of them and retained other counsel to take over the representation.

35. There was no proof of service or any other evidence that service of process on Dickenson had been accomplished in the files that Coggin delivered to the Feldmans' new counsel.

36. In several communications, including Coggin's response to a subpoena, Coggin indicated that the entire file had been delivered and that Coggin had no other documents related to his representation of the Feldmans. The file did not contain proof of service of process on Dickenson.

37. Liberty paid the Feldmans a mere \$25,000 of the available \$500,000 in UIM coverage to settle the Feldmans' claims against Dickenson and the UIM policy.

38. The Feldmans knew and understood that it was virtually certain that Dickenson's motion to dismiss on statute of limitations grounds would be granted. Liberty would not be

required to pay the \$500,000 policy limits under the UIM policy because Coggin, as the Feldmans' legal counsel, did not satisfy the requirements of S.C. CODE ANN. § 38-77-160 by timely and properly commencing a lawsuit and obtaining a judgment against Dickenson. Therefore, the Feldmans agreed to settle their claims for only \$25,000 of the available \$500,000 in UIM coverage to mitigate the damages caused by Coggin's failure to commence the Underlying Lawsuit within the time period allowed by the applicable statute of limitations, the South Carolina Rules of Civil Procedure, and South Carolina common law.

39. Coggin is liable to his clients, the Feldmans, as a direct and proximate result of not performing his professional duties to timely commence a lawsuit on their behalf before permitting a statutory time limitation to bar the Feldmans' claims against Dickenson.

40. Had Coggin met the standard of care by performing his professional duties to timely commence a lawsuit, it is more likely than not that the Feldmans would have recovered the entire amount of the \$500,000 UIM policy from Liberty.

FOR A FIRST CAUSE OF ACTION
(Legal Professional Negligence)

41. The foregoing factual and jurisdictional allegations are reiterated and realleged as though set forth verbatim.

42. At all times relevant hereto, a lawyer-client relationship existed between Coggin and the Feldmans.

43. Coggin owed duties to the Feldmans, including the duty to represent and protect the Feldmans' interests by timely commencing a lawsuit on their behalf before permitting a statutory time limitation to bar the Feldmans' claims against Dickenson.

44. Coggin failed to meet the minimum standard of care thereby breaching his professional duties to the Feldmans and otherwise acted in a negligent, grossly negligent, willful, wanton and reckless manner by failing to timely commence a lawsuit on their behalf before permitting a statutory time limitation to bar the Feldmans' claims against Dickenson.

45. Coggin failed to meet the minimum standard of care thereby breaching his professional duties to the Feldmans by other such particulars as the evidence in this case may demonstrate.

46. As a direct and proximate result Coggin's breach of his professional duties by the actions and omissions as specified herein, the Feldmans sustained actual, consequential, and incidental damages in an amount to be determined by the jury at the trial of this case.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

47. The foregoing factual and jurisdictional allegations are reiterated and realleged as though set forth verbatim.

48. Coggin entered into a contract with the Feldmans, the terms of which Coggin agreed and contracted to provide competent and prudent legal services.

49. The Feldmans fulfilled all necessary preconditions, if any, of the contract with Coggin.

50. By virtue of their contract, Coggin owed duties to the Feldmans, including the duty to protect, preserve and advance the rights and interests of the Feldmans by possessing and exercising that degree of care, skill, and learning which other reasonable and competent lawyers would be expected to possess and exercise under the same or similar circumstances.

51. Coggin failed to meet the minimum standard of care by failing to timely commence a lawsuit on their behalf before permitting a statutory time limitation to bar the Feldmans' claims against Dickenson thereby breaching his contractual duties to the Feldmans.

52. Coggin failed to meet the minimum standard of care thereby breaching his contractual duties to the Feldmans by other such particulars as the evidence in this case may demonstrate.

53. As a direct and proximate result of Coggin's breach of his contractual duties by the actions and omissions as specified herein, the Feldmans sustained actual, consequential, and incidental damages in an amount to be determined by the jury at the trial of this case.

TRIAL BY JURY.

54. The Feldmans demand a jury trial on all claims and issues so triable.

EXPERT AFFIDAVIT

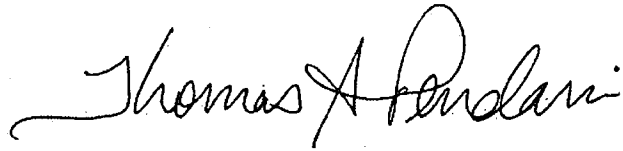
55. Pursuant to S.C. CODE ANN. § 15-36-100(B) (2006), attached hereto and incorporated herein by reference as **Exhibit 1**, is the affidavit of Samuel C. Bauer, J.D., an expert witness and lawyer with experience in handling personal injury matters, which specifies at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, Robert E. Feldman and Lois J. Feldman, pray for judgment against Defendant, Gary P. Coggin, for all actual damages, consequential damages, and incidental damages, and for prejudgment interest, all in an amount to be more specifically

proven at trial, and the costs of this action, and for such other and further relief as this Honorable Court may deem just and proper.

Respectfully submitted,

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with a large initial "T" and "P".

Thomas A. Pendarvis (SC Bar # 064918)
Catherine B. Kerney (SC Bar # 81429)
PENDARVIS LAW OFFICES, P.C.
500 Carteret St Ste A
Beaufort, SC 29902-5066
843.524.9500 Tel.
843.524.9501 Fax.
Thomas@PendarvisLaw.com
Carey@PendarvisLaw.com

Counsel for Plaintiffs

Beaufort, South Carolina

April 16, 2015

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2015-CP-07-

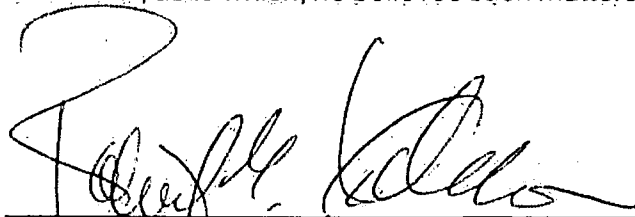
Robert E. Feldman and Lois J. Feldman,
Plaintiffs,

vs.

Gary P. Coggin,
Defendant.

**VERIFICATION OF THE
COMPLAINT**

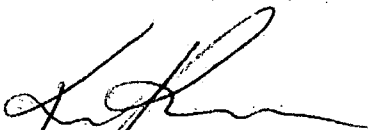
PERSONALLY appeared before me, Robert E. Feldman, who, first being duly sworn, says: that he is a Plaintiff in the foregoing action; that he has read the foregoing Complaint; that the statements contained therein are true to the best of his knowledge except as to those stated to be based upon information and belief, as to which, he believes such matters to be true.



Robert E. Feldman

SWORN to before me this

15 day of April, 2015



NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires Oct 8, 2024

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2015-CP-07-

Robert E. Feldman and Lois J. Feldman,

Plaintiffs,

vs.

Gary P. Coggin,

Defendant.

**EXPERT MERIT AFFIDAVIT BY
SAMUEL C. BAUER**

**Pursuant to
S.C. CODE ANN. § 15-36-100(B)**

STATE OF SOUTH CAROLINA)
) SS:
COUNTY OF BEAUFORT)

Personally appeared before me, Samuel C. Bauer, who, first being duly sworn, says:

1. It is my expert opinion, held to a reasonable degree of professional certainty based upon my review of the available evidence, that the defendant-lawyer committed at least one act of professional negligence proximately causing financial damages to the plaintiffs.
2. The following statements and opinions are based on my review of the available evidence.
3. Gary P. Coggin (Coggin) is a lawyer licensed to practice law in South Carolina.
4. Coggin had a client-lawyer relationship with Robert E. Feldman and Lois J. Feldman (the Feldmans) with regard to representing them on their personal injury and loss of consortium claims against an at-fault driver, Sarah Dickenson (Dickenson), arising from a motor vehicle accident she caused that occurred on October 9, 2010.
5. Dickenson had \$100,000 of available liability insurance coverage for the Feldmans' claims and the Feldmans had \$500,000 in underinsurance (UIM) coverage available for injuries sustained



and claims arising from the collision caused by Dickenson.

6. Coggin settled the Feldmans' claims for only \$85,000 of Dickenson's \$100,000 available liability coverage.

7. On or about October 29, 2012, Coggin filed suit on behalf of the Feldmans against Dickenson in the Beaufort County Court of Common Pleas in a matter styled, *Robert Feldman & Lois Feldman vs. Sarah Dickenson*, C.A. # 2012-CP-07-3800 (the Underlying Suit) alleging claims for negligence and loss of consortium, and including an *ad damnum* clause seeking a total of \$525,000 in damages.

8. Coggin did not at any point obtain an affidavit or other sworn statement by any individual establishing proof of service of process on Dickenson through personal service under any of the methods available under Rule 4, SCRCP, or by publication pursuant to S.C. CODE ANN. §§15-9-15 and 15-9-710.

9. Coggin did not at any point file any documents or an affidavit by an individual establishing proof of service of process on Dickenson.

10. On October 9, 2013, the statute of limitations expired on the Feldmans' claims against Dickenson.

11. Coggin did not present to the court any evidence establishing Dickeson had, in fact, been served with process of the Underlying Suit on or before October 9, 2013, when the statute of limitations expired.

12. Coggin owed duties to the Feldmans, including the duty to represent and protect the Feldmans' interests by timely commencing a lawsuit on their behalf before permitting a statutory time limitation to bar the Feldmans' claims against Dickenson.

13. Coggin was required serve Dickenson with process of the Underlying Lawsuit before the statute of limitations expired to timely commence the lawsuit under the South Carolina Rules of Civil Procedure and binding case law.

14. Coggin failed to meet the minimum standard of care thereby breaching his professional duties to the Feldmans by failing to timely commence a lawsuit on their behalf before the statutory time limitations expired precluding the Feldmans' recovery of a judgment against Dickenson as required in order to recover the \$500,000 in benefits available under their UIM policy.

15. Had Coggin met the standard of care by performing his professional duties to ensure the Dickenson was timely served with process to commence a lawsuit and protect the Feldmans' claims, it is more likely than not that the Feldmans would have recovered all or almost all of the \$500,000 UIM policy coverage.

16. In my opinion, that the Feldmans would have recovered and Liberty would have paid all or almost all of the \$500,000 in UIM coverage, based on the amount of Mr. Feldman's medical expenses incurred and the future medical expenses his physicians are advising he will, more likely than not, incur as a result of the accident, and his lost wages.

17. My resume, summarizing my professional qualifications, is attached as Exhibit 1.

18. I am a lawyer licensed to practice law in the State of South Carolina since _____.

19. I am a shareholder in BAUER & METRO, P.C., located at 38 New Orleans Rd, Hilton Head Island, South Carolina.

20. My areas of practice generally relate to litigation matters, including litigation of personal injury claims.

21. I have been retained by Thomas A. Pendarvis with PENDARVIS LAW OFFICES as an expert witness in this matter on behalf of Robert E. Feldman and Lois J. Feldman.

22. In rendering my opinion I have reviewed the available evidence of the kinds of factual sources and legal authorities customarily relied upon by lawyers serving as experts to develop opinions on the handling of personal injury claims. I have had access to the factual materials available, including the materials filed with the Beaufort County Clerk of Court's office and other materials in the Feldmans' possession.

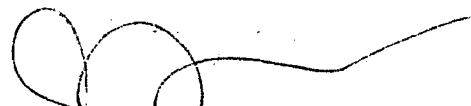
23. I reserve the right to supplement my opinions based on additional evidence obtained and testimony developed in this matter.

Further the Affiant sayeth not.



Samuel C. Bauer, Affiant

SWORN to before me this 7 day of ^{May}~~April~~, 2015



(L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires 12/30/23



STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Robert E. Feldman and Louis J. Feldman,

Plaintiffs,

vs.

Gary P. Coggin,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) C/A No.: 2015-CP-07-01251

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

2016 JUN 27 PM 12:41
JAN ARNOLD
BEAUFORT COUNTY S.C.
CLERK OF COURT

**TO: M. DAWES COOKE, JR. AND JEFFREY M. BOGDAN, COUNSEL FOR
DEFENDANT:**

Plaintiffs, Robert E. Feldman and Lois J. Feldman, respectfully submit this
Memorandum in Opposition to the Motion for Summary Judgment filed by Defendant.

SUMMARY OF THE ARGUMENTS

The Motion for Summary Judgment should be denied for each and all of the
following bases:

1. The motion fails to provide adequate notice of the basis for the relief requested in the motion in violation of Rule 7, SCRCP. Motion by ambush is not permitted.
2. The motion is premature as discovery is not complete.
3. Plaintiffs and their counsel cannot, for reasons stated, present by affidavit facts which are essential to justify their opposition.
4. There are genuine issues of material fact which preclude an award of summary judgment to Defendant.

FACTS

In October 2010, Mr. Feldman was seriously injured in an automobile collision

caused by another driver. Mr. Coggin accepted the representation of Mr. and Ms. Feldman in pursuit of their personal injury and loss of consortium claims arising from the collision. **Mr. Coggin made demands for \$1.5M** to the carrier for the at-fault driver.¹ Inexplicably, Mr. Coggin resolved the claims against the at-fault driver's carrier for only \$85,000 of the \$100,000 limit available under the at-fault driver's liability policy coverage.

In October 2012, Mr. Coggin filed a lawsuit styled, *Robert & Lois Feldman v. Sarah Dickenson*, 2012-CP-070-3800 (hereinafter the "UIM lawsuit"), to recover under Mr. Feldman's available \$500,000 in underinsured motorist coverage. Mr. Coggin hired a company in the State of New York to have someone personally serve the at-fault driver, Sarah Dickenson, who had been relocated to New York after the collision. Although he testified that he received an affidavit showing service on someone at an assisted living facility somewhere in the State of New York where he believed Sarah Dickenson was living, **Mr. Coggin admitted in his deposition in this lawsuit that he had the duty to file, but did not file, an affidavit of service showing that Ms. Dickenson had been served with process.** (Coggin deposition, Exhibit 1; 121:8-13, 127:17-23, 132:9-11, 142:14-18).

After the 120 days that were available under Rule 3(a), SCRCP, to serve the pleadings had expired and after the statute of limitations had expired, Mr. Coggin made demands for payment of the \$500,000 policy limit to counsel for the UIM carrier during the UIM lawsuit. The UIM carrier made a nuisance settlement offer of \$25,000, which was not accepted. The UIM lawsuit was coming up on the trial roster in the early

¹ The statements of fact in this background section are derived generally from Mr. Coggin's deposition testimony and from the exhibits to his deposition. The deposition of Mr. Coggin was taken on Wednesday, June 8, 2016, and the original sealed transcript is being filed contemporaneously with this memorandum and is attached hereto and incorporated herein by reference as **Exhibit 1**.

summer – fall of 2014. After it was clear that Mr. Coggin was going to have to try the UIM lawsuit, in August 2014, he filed a motion to be relieved as counsel.

Other lawyers took over the representation of Mr. and Ms. Feldman, and immediately asked Mr. Coggin for the affidavit of service, as they were unable to locate it or proof that it had been filed in the Feldmans' file materials delivered by Mr. Coggin. Literally the day after the new lawyers asked Mr. Coggin for the affidavit of service, counsel for the UIM carrier filed a motion to dismiss the UIM "lawsuit due to Plaintiffs' failure to effectuate proper service under Rule 12(b)(4) and 12(b)(5)."

Mr. Coggin filed an affidavit in the UIM lawsuit explaining his efforts to have Ms. Dickenson served and the efforts to obtain a copy of the affidavit of service. Unfortunately, Mr. Coggin's affidavit did not contain any admissible testimony by someone with personal knowledge of the efforts to serve Ms. Dickenson. On January 6, 2015, a hearing on the motion to dismiss was held before the Hon. J. Earnest Kinard, Jr. After directing Mr. Coggin to "get an affidavit from the process server," the transcript, in relevant part, on pages 11-12 contains the following colloquy between Judge Kinard and Mr. Coggin:

12 THE COURT: But he did plead non service. He doesn't
13 have to do that with specificity. He -- you are on notice
14 that he says you didn't comply with the rule. Which you
15 didn't, because you didn't file it.

25 But I don't think I can let it go forward
1 without a little more than your affidavit.
2 MR. COGGIN: Thank you.

Mr. Coggin testified in his deposition that he contacted the company in New York seeking another copy of the affidavit of service and was told they would not be able to provide a copy or identify the individual who attempted to effect service. The new

lawyers were able to convince the UIM carrier to restore the prior settlement offer, and the UIM lawsuit then settled for \$25,000. This lawsuit was filed shortly thereafter.

ARGUMENTS

1. The Motion fails to provide notice of the basis for relief requested.

Rule 7, SCRPC, states that "[a]n application to the court for an order shall be by motion ... shall state with particularity the grounds therefor ..." SCRPC 7(b)(1). In *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010), the S.C. Supreme Court explained:

Rule 7(b)(1), SCRPC requires that motions shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The particularity requirement is to be read flexibly in recognition of the peculiar circumstances of the case. By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly.

(Internal citations and quotations omitted.) To permit plaintiff to file a skeletal motion within the relevant time period and then allow the motion to be filled in later "would make mockery of the particularity requirements of Rule 7(b)(1)." *Garrison v. Burke*, No. 91 C 20150, 1997 WL 148048, at *1 (N.D. Ill. Feb. 26, 1997). As one court noted (interpreting the substantively similar federal Rule 7):

The court would ordinarily excuse the failure to comply with (Rule 7(b)(1) if it were inadvertent, but such is not the case here. There should be strict compliance with the rules, otherwise they will be whittled away and become meaningless and unenforceable.

Steingut v. National City Bank of New York, 36 F.Supp. 486, 487 (E.D.N.Y. 1941). A motion that fails to meet the particularity requirements will not be considered adequate or timely. See *Talano v. Northwestern Med. Faculty Foundation, Inc.*, 273 F.3d 757, 761 (7th Cir. 2001) (Rule 59(e) motion "devoid of specificity" does not satisfy Rule 7(b)(1),

and therefore does not toll the time period for filing an appeal); See, e.g., *Rosenberg v. Gattarello*, 359 N.E.2d 467 (Ohio Ct. App. 1976); *Schmidt v. Michigan*, 1:10 CV 307, 2010 WL 2720868 (W.D. Mich. July 7, 2010).

The Defendant's Motion does not recite the basis of the relief requested but instead makes vague reference to depositions, which have not been conducted, pleadings containing disputes of material fact, unidentified answers to interrogatories, and unidentified admissions, all alleged to be "on file" in a file that has not been identified. (See Affidavit of Thomas A. Pendarvis, attached hereto as "**Exhibit 2**".)

Plaintiffs cannot identify the basis of the Motion, the Motion does not state with particularity the grounds therefor, and should therefore be denied. *Id.* The Motion also lacks any supporting materials.

Rule 56(c), SCRCP, "requires summary judgment motions and, inferentially, supporting materials required to be on file when they are to be relied upon at a summary judgment motion hearing. To be on file, we hold they ordinarily must have been filed." *Lloyd's Inc. v. Good*, 306 S.C. 450, 453, 412 S.E.2d 441, 443 (Ct. App. 1991). The trial court should refuse to consider materials that were not timely served such that the opposing party had no time to prepare a response. *Black v. Lexington School District No. 2*, 327 S.C. 55, 60, 488 S.E.2d 327, 329 (1997). There were no supporting materials filed with the Defendant's Motion. The Court should not consider any materials that were not filed with the Motion and Defendants should not be permitted to file any additional supporting materials.

2. Plaintiffs cannot present by affidavit facts essential to justify their opposition.

"Should it appear from the affidavits of a party opposing the motion that he cannot

for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment ..." SCRCF 56(f). Plaintiffs cannot present by affidavit facts which are essential to justify their opposition to this Motion because the Motion itself does not provide enough information and/or notice as to the bases of the Motion; and because, despite pursuit of discovery by Plaintiffs, discovery that would provide information for affidavits in opposition has not yet occurred. See (Plaintiffs' Rule 56(f) affidavit, **Exhibit 2**). For these reasons, the Motion for Summary Judgment should be denied.

3. There genuine issues of material fact that preclude summary judgment.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791, (S.C. 2008), *rehearing denied*.

While the question of Defendant's liability may no longer be in dispute, based on Mr. Coggin's deposition testimony, the question of the proximate cause of the damages suffered by Plaintiffs is in dispute.

The client's burden of establishing proximate cause in a legal malpractice action requires that he prove that he would have obtained a better result in the underlying matter if the attorney had exercised reasonable care. The burden does not necessarily compel the client to demonstrate that he would have won the underlying case. Rather, it is enough for the legal malpractice plaintiff to show that he has lost a valuable right; e.g., the settlement value of the underlying case.

Doe v. Howe, 367 S.C. 432, 446, 626 S.E.2d 25, 32 (Ct. App. 2005). "Ordinarily, the question of proximate cause is one of fact for the jury ..." *McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998).

Mr. Coggin committed legal error in failing to file an affidavit showing service of process within the statute limitations which made it impossible to defend the motion to

dismiss and likely would have resulted in a dismissal with prejudice, had the case not been settled for the \$25,000 nuisance value. The Plaintiffs also intend to show that Defendant Coggin's failure to secure a life care plan expert, a vocational expert and an expert to reduce the damages to present value, separately and/or together resulted in Plaintiffs losing valuable rights, including significant diminution in the settlement value of the case, notwithstanding the failure to effect service of process issue. See (Plaintiffs' Rule 56(f) affidavit, Exhibit 2); (Plaintiffs' Verified Complaint and the expert affidavit attached as an exhibit). On the other hand, Mr. Coggin claims—in stark contrast to the Verified Complaint and the Affidavit of Merit—that the Plaintiffs' claims were reduced approximately 95% in value because Mr. Feldman attempted to play golf. See *e.g.*, (Coggin deposition, 94:17-95:16). While the parties agree that Mr. Coggin owed duties to the Plaintiffs, the parties disagree as to whether Mr. Coggin violated those duties, including the duties to develop the damage aspects of the case, whether such violations were the proximate cause of the damages claimed, and the value of damages that Plaintiffs' claim. See (Plaintiffs' Rule 56(f) affidavit, Exhibit 2). The outcome of these various factual disputes must be determined by a jury and for these reasons, the Motion for Summary Judgment should be denied.

4. Discovery is incomplete.

[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (citations omitted).

Weeks prior to his filing the present Motion, in his “Response to Request for a Scheduling Order” Mr. Coggin, argued that “[d]iscovery in this case will be extensive and will likely require over a year to complete” and that

This legal malpractice action is not ready to be placed on the trial roster. It was filed less than eleven months ago and discovery has not even been open for seven months. The early mediation, which officially failed less than one month ago, caused the parties to delay taking depositions such that none have been taken or even noticed. The remaining discovery necessary to get this case ready for trial will likely take over a year to complete.

Id. at pg. 5, 6. Two depositions were scheduled, with one currently moving forward and a second awaiting confirmation as to the schedule of the Defendant and counsel for the Defendant. See (Plaintiffs' Rule 56(f) affidavit, Exhibit 2). Plaintiffs are actively vetting expert witnesses to be named not later than August 1, 2016. *Id.* It is clear, through Defendant's own arguments, as well as the current development of discovery in this case, that discovery has not been completed, that Plaintiffs have not had a full and fair opportunity to complete discovery, that Plaintiffs are actively engaged in discovery, the results of which are necessary to respond to this motion for summary judgment, and on these bases that this Motion for Summary Judgment should be denied. See *Baughman*, *supra*, and (Plaintiffs' Rule 56(f) affidavit, Exhibit 2).

5. Standard of Review.

Pursuant to Rule 56(c), SCRCP, summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Under Rule 56(c), SCRCP, the party seeking summary judgment has the burden of demonstrating the absence of a genuine issue of material fact. *Baughman*, 306 S.C. at 102, 410 S.E.2d at 539. In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747

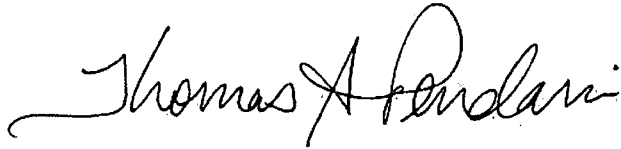
(1996); *Lattie v. SHS Enterprises, Inc.*, 300 S.C. 417, 389 S.E.2d 300 (Ct. App. 1990) (summary judgment standard of review is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986). "At the summary judgment stage of the proceedings, it is only necessary for the non-moving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied." *Hill v. York County Sheriff's Department*, 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993), cert. denied (1994).

CONCLUSION

Defendant's Motion for Summary Judgment should be denied because the Motion fails to provide adequate notice of the basis for the relief requested therein; Plaintiffs and their counsel cannot present facts by affidavit which are essential to justify their opposition; there are genuine issues of material fact which preclude an award of summary judgment to Defendant; and discovery has not been completed. For all the reasons stated herein, the Plaintiffs respectfully submit that the defendant's motion for summary judgment should be denied and attorney's fees and costs incurred in defending this motion should be awarded to the Plaintiffs.

Respectfully Submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with the first name "Thomas" and last name "Pendarvis" clearly legible.

Thomas A. Pendarvis (SC Bar # 064918)
Christopher W. Lempesis, Jr. (SC Bar # 077012)
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Counsel for Plaintiffs

Beaufort, South Carolina

June 27, 2016

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF BEAUFORT
3 ROBERT E. FELDMAN and
4 LOIS J. FELDMAN,
5 Plaintiffs,
6 vs. CASE NO. 2015-CP-07-1251
7 GARY P. COGGIN,
8 Defendant.

9 DEPOSITION OF: GARY P. COGGIN
10 DATE: June 8, 2016
11 TIME: 10:06 a.m.
12 LOCATION: Pendarvis Law Offices, P.C.
13 710 Boundary Street, Unit A-1
Beaufort, SC
14 TAKEN BY: Counsel for the Plaintiffs
15 REPORTED BY: TRISHA M. THOMAS
16
17

2016 JUN 27 PM 12:41
A. WILLIAM ROBERTS, JR.
BEAUFORT COUNTY, SC
CLERK OF COURT

18 A. WILLIAM ROBERTS, JR. & ASSOCIATES
19 Fast, Accurate & Friendly
20 Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (843) 839-3376
21
22 Columbia, SC Greenville, SC Charlotte, NC
(803) 731-5224 (864) 234-7030 (704) 573-3919
23
24
25

EXHIBIT

1

A W R

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 2

1 APPEARANCES OF COUNSEL:
2 ATTORNEYS FOR THE PLAINTIFFS
3 ROBERT E. FELDMAN and LOIS J. FELDMAN:
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15
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17 LLC
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19 288 Meeting Street, Suite 200
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21 (843) 577-7700
22 Jbogdan@barnwell-whaley.com
23
24
25 ALSO PRESENT: Robert E. Feldman

(INDEX AT REAR OF TRANSCRIPT)

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1 THE WITNESS: That will be fine.
2 BY MR. PENDARVIS:
3 Q. Number two, I'm going to be asking a
4 series of questions today, of course, and showing
5 you some documents. If in the course of that
6 exchange you have any questions about or
7 misunderstandings, maybe, about the type of -- what
8 I'm asking, please let me know. I'll be glad to
9 readdress or rephrase the question.
10 And you're not allowed to communicate
11 with counsel about the substance of your
12 testimony --
13 A. That's fine.
14 Q. -- during the course of the deposition
15 today.
16 And you understand all those, correct?
17 A. Yes, I do.
18 Q. And you're doing great on verbal
19 response. Better than me.
20 I am going to do my very best today not
21 to interrupt your answers, so if I do that, please
22 make sure to stop me or your counsel will 'cause
23 I've done it in the past. I want to do my very
24 best to get a good, clean transcript today.
25 A. Absolutely.

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1 GARY P. COGGIN
2 being first duly sworn, testified as follows:
3 EXAMINATION
4 BY MR. PENDARVIS:
5 Q. Good morning, Mr. Coggin. We exchanged
6 greetings right before the deposition started.
7 Could you state your full name for the
8 record, please?
9 A. Gary Coggin.
10 Q. Mr. Coggin, you are a lawyer licensed
11 to practice here in South Carolina, correct?
12 A. In good standing.
13 Q. And for the formality of the deposition
14 rules there are a few things we need to have an
15 agreement on.
16 A. Sure. Go ahead. Uh-huh.
17 Q. And you've taken depositions before,
18 correct?
19 A. Yes.
20 Q. That's yes.
21 If you need a break at any point in
22 time, please, you know, let us know. We're not
23 here for an endurance contest. I'll be glad to
24 take a break and accommodate.
25 MR. PENDARVIS: Same for counsel.

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1 Q. Okay. Before we get into the
2 substance, what did you do to prepare for your
3 deposition today?
4 A. I looked over the documents a little
5 bit. That's about all.
6 Q. And you did that today?
7 A. At McDonald's, briefly, yeah.
8 Q. Okay. Did you review the pleadings and
9 your --- the discovery requests and responses in
10 the case?
11 A. I looked at the pleadings for about
12 five minutes. I did not look at the discovery.
13 Q. And just on the procedural side of the
14 lawsuit so far, in this lawsuit have you been
15 assisting your counsel in preparing discovery
16 responses?
17 A. Very little.
18 Q. Okay. Okay. Have you reviewed --
19 A. Let me back up to -- in preparing
20 discovery?
21 Q. Responses, your responses.
22 A. Oh, yes. Absolutely.
23 Q. Okay.
24 A. Yeah. Sorry.
25 Q. When did you first meet Mr. Robert

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1 **"Bob" Feldman?**
2 A. I think it was in -- I'm not sure of
3 the exact date, but sometime in 2010, latter part
4 of the year, probably in the fall.
5 **Q. Was it related to the automobile**
6 **accident?**
7 A. Yes, it was.
8 **Q. And prior to -- and we're going to get**
9 **into your representation of Mr. Feldman and his**
10 **wife. Did you know them before that?**
11 A. No.
12 **Q. Either?**
13 A. Neither one.
14 **Q. Okay.**
15 A. Let me back up again. Lois worked at
16 the bank. I don't know if I knew her at that time
17 or not.
18 **Q. TD Bank?**
19 A. Yeah. Yes.
20 **Q. And do you have an account with TD**
21 **Bank, or did you have an account with TD Bank?**
22 A. No longer.
23 **Q. No longer?**
24 A. Yeah.
25 **Q. But during the course of --**

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1 A. In court?
2 **Q. Yes, sir. And let's go first to --**
3 **let's focus in on circuit court actions.**
4 A. I don't know. I really can't tell you.
5 If you have any documents I can look at, I'll be
6 happy to look at them and tell you, but I really
7 don't know. I've been here since '95, and that's
8 all I can tell you.
9 **Q. More than ten lawsuits to try -- that**
10 **went to trial?**
11 A. Again, I don't know.
12 **Q. What's your best estimate of cases that**
13 **you've tried? Estimate now. I'm not asking for an**
14 **accurate number.**
15 A. Anywhere from -- in common pleas?
16 **Q. Yes, sir.**
17 A. Anywhere from five to fifteen.
18 **Q. Okay.**
19 A. I don't know.
20 **Q. And I understand --**
21 A. Yeah. And I really --
22 **Q. -- it's just an estimated range.**
23 A. And I'm going to back up. I don't
24 really want to speculate on it 'cause I just don't
25 know.

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1 A. Yes.
2 **Q. -- of the initial part of your**
3 **representation, you did have a -- you or your law**
4 **firm had an account with TD Bank?**
5 A. Yes.
6 **Q. Which one? You?**
7 A. Law firm.
8 **Q. Okay. When did you become licensed to**
9 **practice law in South Carolina?**
10 A. 1994 or '95. I'm not sure which one.
11 **Q. Okay. And could you describe -- where**
12 **did you -- where in South Carolina did you begin**
13 **practicing law?**
14 A. Hilton Head Island. I've been there
15 the entire time.
16 **Q. Okay. And describe the nature of your**
17 **law practice here in South Carolina.**
18 A. Mostly accident injury, a little bit of
19 general practice. People come in off the street
20 and need help. I do a lot of that.
21 **Q. Divorce? Criminal?**
22 A. No. Most of the time it's poor people
23 that have lost their truck, getting thrown out of
24 an apartment, something like that.
25 **Q. Okay. How many cases have you tried?**

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1 **Q. Okay. And those common plea matters --**
2 **okay. First off, you've tried cases, and you've**
3 **tried cases in common pleas court.**
4 A. Yes, I have.
5 **Q. Correct?**
6 **Were the cases you tried limited to**
7 **auto -- personal injury claims arising from**
8 **automobile accidents?**
9 A. The cases I've tried, I believe were
10 limited to involving an automobile.
11 No. That's not correct. I've done
12 other cases where there was disputes over money,
13 et cetera.
14 **Q. Okay. Were the majority of the cases**
15 **you tried automobile accident cases?**
16 A. Yeah. I believe so.
17 **Q. Okay. Have you formed a corporation or**
18 **an entity to operate your law practice?**
19 A. I'm an LLC.
20 **Q. Coggin Law Office, LLC?**
21 A. I believe that's it.
22 **Q. Okay. I'm going to represent to you**
23 **that Mr. Feldman's accident with -- the collision**
24 **with Ms. Dickenson between -- Dickenson, as driver,**
25 **and Mr. Feldman occurred on October the 9th, 2010.**

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1 We're going to see some documents on that. I'm
2 just going to represent that to you now.
3 And I'm going to also represent -- when
4 we get a copy, but I thought we had a copy right
5 here, but we're going to get a copy of your fee
6 agreement with Mr. Feldman that's dated a few days
7 later, October 13, 2010. I'm going to show you
8 that in just a moment.
9 And tell me about your first meeting
10 with Mr. Feldman. Where did it occur?
11 A. It occurred at Bob's house.
12 Q. Okay. And how did it come about that
13 you went to Mr. Feldman's house?
14 A. I believe I received a call from
15 Mr. Feldman. He said he was infirm from the
16 accident and asked me to come to his house.
17 Q. So you went to his house --
18 A. Yes.
19 Q. -- to meet. And you had some
20 conversations with Mr. Feldman?
21 A. Oh, absolutely.
22 Q. And, of course, you know, that's
23 October 2010. I'm not going to ask for a verbatim.
24 Could you generally describe the substance of your
25 communications with Mr. Feldman at his house that

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1 things you discuss with clients as you are
2 developing the, you know, lawyer-client
3 relationship and leading to the contract?
4 A. You're going to have to be more
5 specific, Mr. Pendarvis. I don't know what you're
6 asking.
7 Q. All I'm asking is, in the circumstance
8 where you're meeting with a prospective client --
9 A. Uh-huh.
10 Q. -- and a contract's not been signed, is
11 there -- are there things you describe about what
12 you're going to do and how the representation is
13 going to be handled that are communicated to your
14 clients or prospective clients before the
15 contract's signed?
16 A. I don't hold out a lot of things. I
17 tell them that I will represent them competently,
18 and I don't know anything more beyond that, and I
19 specifically don't remember anything in that
20 conversation.
21 Q. Did you have any discussions with
22 Mr. Feldman at or about the time the contract was
23 signed about how -- who would be paying costs for
24 the litigation?
25 A. The -- my contract's pretty clear on

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1 day?
2 A. Talked about the accident.
3 Q. Okay. Did you have any conversations
4 -- okay. What did he tell you about the accident?
5 A. Essentially what happened is that he
6 was on 278 -- I believe he was in the slower lane
7 -- coming up to an intersection. A vehicle came
8 through the intersection against the light and hit
9 him.
10 Q. Did he describe medical treatments and
11 things that happened after the collision?
12 A. You know, I can't speculate. I'm sure
13 he did, and I'm sure we talked about that. I don't
14 recall.
15 Q. Did you have any conversations about
16 your serving as counsel for Mr. Feldman in that
17 meeting at his house that day?
18 A. Again, I'm sure we did, but I don't
19 recall.
20 Q. Were there any conversations about your
21 representing his wife, Lois Feldman, as part of the
22 representation?
23 A. I don't recall, and I don't -- in that
24 case I don't think that came up.
25 Q. Do you have a typical conversation or

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1 that, and it says that the -- the plaintiff or the
2 party will play -- pay all reasonable costs.
3 Q. That wasn't my question. My question
4 was: Did you have any conversations with
5 Mr. Feldman about who is paying costs in this
6 litigation?
7 A. I don't know.
8 Q. Okay.
9 (EXH. 1, Contingency Fee Agreement, was
10 marked for identification.)
11 BY MR. PENDARVIS:
12 Q. Going to pass to you a copy of a
13 document that's been marked as Exhibit 1 -- states
14 on the title of the document Contingency Fee
15 Agreement -- and ask is this a copy of the fee
16 agreement that you presented to Mr. Feldman?
17 A. It's signed by Mr. Feldman. I agree --
18 I believe it is.
19 Q. And is that your signature at the very
20 bottom?
21 A. Yes, it is.
22 Q. And is this or was this the standard
23 contingency fee agreement that you were using in --
24 A. At that time, yeah.
25 Q. -- 2010?

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1 A. Uh-huh.
2 Q. I see, in reference to Paragraph 6,
3 there's a portion of the form that has been marked
4 out.
5 A. Uh-huh.
6 Q. You see that?
7 A. Yes, I do.
8 Q. And it says -- it's the portion that
9 says: 40 percent if there is an appeal.
10 Did your agreement with Mr. Feldman
11 exclude modification of the 33 percent if there was
12 an appeal?
13 A. The -- this exactly says the 40 percent
14 if there's an appeal. I don't do appeals.
15 Q. Okay.
16 A. I think probably I made that clear to
17 Mr. Feldman.
18 Q. Why is that in your contract then? Why
19 do you even have --
20 A. It's a -- that's a good question. It's
21 a standard in the contract. I've never done an
22 appeal.
23 Q. Did Ms. Lois Feldman ever sign a fee
24 agreement with you?
25 A. No.

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1 settlement was in 2012 -- I believe in the fall --
2 so it was filed shortly after that.
3 Q. I thought you said that you typically
4 file -- that you file the case right after you take
5 it.
6 A. No. I said after we agreed to have it
7 filed. I'm not filing a case if I'm going to
8 settle the case.
9 Q. Okay.
10 A. I apologize if I gave that impression.
11 Q. And after you accepted the
12 representation of Mr. Feldman in October of 2010 --
13 we're going to look at some demand letters and that
14 by --
15 A. Sure.
16 Q. -- the summer of 2011 -- and is it
17 accurate that in between October -- generally
18 between October of 2010 and July of '11 you were
19 gathering medical documents and things that were --
20 you know, that related to the claim?
21 A. That and the scene of the accident,
22 taking photographs. I visited with Bob at his
23 home, I think probably three times during that
24 period of time. Getting the police reports,
25 et cetera, et cetera.

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1 Q. But she was named as a plaintiff in the
2 complaint you filed though?
3 A. Yes, she was.
4 Q. What were the terms of your
5 relationship -- of your relationship with her?
6 A. She was essentially subsumed into the
7 contingency fee agreement.
8 Q. Okay. When you take on a case -- and
9 we'll use the car -- automobile accident case as an
10 example -- do you have internal calendars that you
11 mark for statutes of limitations and things of that
12 nature?
13 A. No.
14 Q. What do you do to make sure that you've
15 timely filed the claim?
16 A. The -- the claim is filed as soon as I
17 get it and as soon as we've agreed on it. The
18 three-year statute of limitations is something I'm
19 well aware of all the time.
20 Q. Well, we do know that the -- the
21 lawsuit in this case -- you filed a lawsuit in this
22 case, correct?
23 A. That's correct.
24 Q. And when was it filed, approximately?
25 A. It was filed after the settlement. The

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1 Q. Okay. And if I'm -- stop for a second.
2 (EXH. 2, Letter from Gary Coggin to
3 Sonya Wise dated July 5, 2011, was marked for
4 identification.)
5 BY MR. PENDARVIS:
6 Q. If I'm understanding things
7 correctly -- we're going to look at some documents
8 in which you made --
9 A. Sure.
10 Q. -- demands -- those were all based on
11 the information you had gathered during the -- part
12 of your representation, correct?
13 A. I think most of my demands would in
14 part have been made on that, and I cannot tell you
15 what I gathered at that time because I don't know.
16 Q. Sure.
17 A. Okay? And I -- it could very well have
18 been that I started to look for information a year
19 later. I don't know. Unless you can show me
20 something that I sent off, I just can't help you on
21 that but --
22 Q. I'm going to -- okay. Fair enough.
23 And I'm not really -- I want to do my best to get
24 an accurate --
25 A. Yeah. No. I understand.

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1 Q. -- reflection of what happened, so
2 let's -- this will help a little bit, I believe.
3 I'm going to pass you one of the first. I will
4 represent to you there were several demands letters
5 that were made, and we're going to look at each of
6 them.
7 This is a letter dated -- I'm passing
8 you now a document marked as Exhibit 2. This
9 appears to be a letter you wrote to -- the at-fault
10 party was Sarah Dickenson.
11 A. That's correct.
12 Q. This appears to be a letter you wrote
13 on July 5, 2011, to the claims representative for
14 Ms. Dickenson's carrier, Allstate Insurance; is
15 that correct?
16 A. Sonya Wise. Yes.
17 Q. And based on the information that you
18 had gathered -- and I would suggest you take a look
19 at this last -- next to the last paragraph -- you
20 made an offer to settle for \$1,550,000, correct?
21 MR. BOGDAN: Object to the form.
22 BY MR. PENDARVIS:
23 Q. Let me restate that. I want to get a
24 good answer.
25 Can you read for me the last sentence

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1 primarily from Bob, and what I saw coming from the
2 doctors -- and again, I don't know when those came.
3 They might have come later. I don't know. Based
4 on what Bob told me, I felt that a million 500 was
5 at that time reasonable. Now, later on, I realized
6 that that wasn't. But at this time, yes.
7 Q. And when you said later on that wasn't,
8 you're talking about the -- Mr. Feldman's injuries
9 weren't as severe as you were led to believe?
10 A. Yes.
11 Q. And when did you come to that
12 realization?
13 A. It was a slow realization, and it came
14 to fruition in my thought pattern during 2013.
15 Q. What part of 2013?
16 A. I would say that it started in the
17 summer months of 2013. And again, I can't be that
18 sure. If you have documents that say earlier, let
19 me see it and I'll be happy to comment on it.
20 Q. We don't have -- I'll tell you we don't
21 have a single document anywhere where you
22 communicated in writing to Mr. Feldman that you
23 didn't -- you weren't believing his statements to
24 you about his injuries. I'm going to represent to
25 you there's no document, no e-mail, no letter, no

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1 in the next to the last paragraph on page 2?
2 A. Uh-huh. I think you will agree with me
3 an offer of settlement for damages of 1,500,000 is
4 reasonable.
5 Q. Did you consider that to be an offer on
6 behalf of Robert Feldman?
7 A. That was an offer I made to settle.
8 Q. And based on the information you had at
9 the time, this was a reasonable offer?
10 A. The -- yes and no. The fact of the
11 matter is is that in visiting with Bob over the
12 year -- and I saw him quite often from October 9 to
13 this date -- he represented to me that he was in
14 excruciating pain, and he represented to me that he
15 could do very, very little of what he had done
16 before. He could hardly go to the bathroom.
17 I think at that time he claimed that he
18 was still sleeping in the La-Z-Boy that he would
19 sleep in and he could not even get to his bed
20 because it wasn't comfortable.
21 So a lot of this was based on what Bob
22 wanted. Bob talked to me about -- initially I
23 think he said he wanted to settle for \$2,500,000.
24 I said that was way too high. He wanted big
25 numbers on this. And based on what I knew,

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1 note, anything.
2 The first time we saw -- I want to
3 represent to you the first time we saw that was in
4 this litigation.
5 Number two, did you have any
6 conversations with Mr. Feldman wherein he described
7 how he felt after he get an epidural injection?
8 A. No.
9 Q. Did you ever write to anyone describing
10 how Mr. Feldman felt after he got an epidural
11 injection?
12 A. He may have said he felt much better.
13 Okay? Beyond that, I -- I don't know.
14 There's -- you've made about three
15 questions here, so you're going to have to back up
16 and ask me one at a time, and I'll be happy to
17 answer it.
18 Q. Did you have any conversations with Bob
19 Feldman about how he felt after he got an epidural
20 injection?
21 A. I think Bob probably told me he felt
22 very good after he had an epidural. That's all I
23 can tell you.
24 Q. Okay.
25 A. I don't remember.

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1 **Q. Did you communicate those thoughts and**
2 **statements by Mr. Feldman to anyone in writing?**
3 A. I wrote letters to the doctors asking
4 for impairment ratings and things like that, yes,
5 and they're somewhere in your files. I probably
6 also wrote a letter -- and again, this has been --
7 we're going a period of six years now. I probably
8 wrote to the insurance companies.
9 **Q. And based on what you stated on page 2**
10 **of Exhibit 2 --**
11 A. Uh-huh.
12 **Q. -- you were aware Mr. Feldman really**
13 **enjoyed playing golf, correct?**
14 **The first full paragraph.**
15 A. He has suffered greatly?
16 **Q. No. In sum is the beginning of that**
17 **paragraph. Read on.**
18 A. Oh, okay. That's -- he can no longer
19 enjoy a round of golf, take walks --
20 **Q. Yeah.**
21 A. -- drive, and travel. Yeah. Uh-huh.
22 That's it.
23 **Q. So you knew he enjoyed golf.**
24 **Did Mr. Feldman ever tell you that**
25 **after he had an epidural injection he was able to**

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1 THE WITNESS: Mr. Pendarvis, I used to
2 be an enthusiastic golfer, and I developed back
3 spasms. I haven't paid for -- played for 15 years
4 because of that. That's my answer.
5 BY MR. PENDARVIS:
6 **Q. Well, maybe let me rephrase the**
7 **question 'cause you might not have understood it.**
8 **I'm asking about your skills as a trial lawyer.**
9 A. Yeah.
10 **Q. Here's my question: With your**
11 **experience as a trial lawyer, would you have been**
12 **able to explain to a jury that despite the injuries**
13 **Bob Feldman suffered -- let me finish my question.**
14 **Sorry.**
15 A. I'm not saying --
16 **Q. I thought you were getting ready to say**
17 **something.**
18 A. No, no, no, no, no.
19 **Q. -- despite the injuries Bob Feldman**
20 **experienced from the collision with Ms. -- caused**
21 **by Ms. Dickenson that he was able to play a round**
22 **of golf after epidural injections and that that**
23 **really had -- that was no compromise to his claim?**
24 MR. BOGDAN: Object to the form.
25 THE WITNESS: If I felt that I was

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1 **go play golf?**
2 A. I don't remember.
3 **Q. Possible?**
4 A. I don't remember.
5 **Q. No, no. That's not the question.**
6 A. I don't think we ever -- we -- no. I'm
7 telling you. I don't remember.
8 I do remember this, is that -- in
9 answer to your question that went unanswered -- I
10 talked to Bob many, many times about how he had
11 compromised his case by playing golf. We had many
12 conversations of that. To put it in writing I
13 think would have impugned Bob. I never put it in
14 writing.
15 **Q. You're a good trial lawyer, right?**
16 A. I don't know.
17 **Q. You try --**
18 A. Uh-huh.
19 **Q. -- to do your best?**
20 A. Uh-huh.
21 **Q. You don't think you'd be able to argue**
22 **in front of a jury that the days after Bob Feldman**
23 **got an epidural he was able to go play golf and**
24 **that that really was mitigation more than anything?**
25 MR. BOGDAN: Object to the form.

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1 lying -- and that would have been the case here --
2 I wouldn't have been able to sell that to the jury.
3 I wouldn't lie to a jury.
4 BY MR. PENDARVIS:
5 **Q. What would be the lie?**
6 **What would be the lie?**
7 A. The lie is this, is that he was playing
8 golf and he was claiming at the same time that he
9 was infirm from back injuries.
10 **Q. Did you ever have any conversations**
11 **with Mr. Feldman about the frequency of his golf**
12 **activities?**
13 A. I told Mr. Feldman any number of times
14 -- and I didn't know about the frequency of his
15 golf activities. I told Mr. Feldman any number of
16 times -- 'cause he would make oblique references to
17 golf. And I said, Bob, if you're playing golf,
18 we've got a problem with this case.
19 And he -- oh, no. I'm not playing
20 golf. I'm just riding around in the cart because I
21 have friends and it's a social thing. Every once
22 in a while I'll swing a club two or three times a
23 round.
24 That was our conversation. That's what
25 he told me.

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1 **Q. And this all comes in, you said -- is**
2 **this leading to the part in the summer of 2013 you**
3 **mentioned earlier when you became --**
4 A. This is before that. He would make
5 oblique references from time to time about, you
6 know, golf and so forth, and that's what I would
7 tell him.
8 MR. PENDARVIS: This will be three.
9 THE WITNESS: Mr. Pendarvis, could I --
10 BY MR. PENDARVIS:
11 **Q. Hold a second while the court --**
12 **she's --**
13 A. Well, no. I'm -- I'm still trying to
14 answer the question, but go ahead.
15 **Q. Okay. Well, she was --**
16 A. Oh, okay.
17 **Q. -- marking an exhibit. I'm sorry.**
18 A. Yeah. If we look at Exhibit 2, at the
19 bottom of the page it says: In addition, Bob has
20 experienced other losses following this accident.
21 And this is what Bob was telling me.
22 He could no longer assume the responsibility of
23 home maintenance. The tasks of landscaping,
24 gardening, power washing, window washing, garbage
25 disposal are now handled with others at a price.

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1 A. I believe so.
2 **Q. Did you ever -- how were you going to**
3 **establish -- excuse me. Let me rephrase that.**
4 **If claims against Ms. Dickenson were**
5 **not settled, what were your plans to establish**
6 **Mr. Feldman's lost wages at trial?**
7 A. In -- now, we've moving ahead now, but
8 in discovery, when Mr. Allen came in, they asked
9 many, many times for Bob's wages. Bob was a
10 mortgage broker for an outfit called Silverthorn.
11 Before that he was a mortgage broker. And I asked
12 many times what his wages were because I wanted to
13 specifically say something to Allstate. Bob would
14 never give me an answer.
15 **Q. Okay. So you're telling me you were**
16 **not going to be able to prove damages at trial?**
17 A. No. What we were going to look at and
18 what Bob finally agreed on was that -- I said:
19 Well, Bob, mortgage brokers, according to the
20 standards that I read -- and I researched this on
21 Google -- make, at the low end, 50,000 a year.
22 And he said: Yeah. That's about
23 right.
24 So that's what I was going to go with.
25 **Q. And that was the footnote, maybe, on**

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1 In addition, he is no longer able to work at his
2 once-thriving business as a mortgage broker. In
3 sum, these medical losses proximately caused by the
4 negligence of your insured continue to accrue, and
5 they're easily more than \$70,000 a year.
6 This is what Bob would tell me at all
7 times. Sometimes he would call me, and I felt that
8 he was on the verge of tears when he would talk
9 about things like this. I felt very sorry for him.
10 **Q. Thank you.**
11 (EXH. 3, Letter from Gary Coggin to
12 Sonya Wise dated October 10, 2011, was marked for
13 identification.)
14 BY MR. PENDARVIS:
15 **Q. Passing to you now another document**
16 **that's marked as Exhibit 3 to your deposition.**
17 **This appears to be another letter to Ms. Wise dated**
18 **-- this one's dated October 10 --**
19 A. Uh-huh.
20 **Q. -- 2011. Is this your signature on**
21 **page 2?**
22 A. Yes, it is.
23 **Q. And the contents of this letter are**
24 **true and accurate to the best of your knowledge**
25 **when you wrote it?**

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1 **page 2 of Exhibit 3?**
2 A. Hang on.
3 Yeah. Uh-huh.
4 **Q. And how were you going to get that into**
5 **evidence at trial?**
6 A. We would have to get an economist.
7 I've used economists in trial.
8 **Q. Were you going to -- did you have plans**
9 **to get a vocation rehabilitation specialist to give**
10 **an opinion on whether Mr. Feldman was able to**
11 **work --**
12 A. Mr. Feldman was --
13 **Q. -- as a broker?**
14 A. Excuse me. I'm sorry. Finish it.
15 **Q. I was finished. Just that he was going**
16 **to be able or unable to work as a broker.**
17 A. The -- Bob had held out that he could
18 not sit up for very long periods of time, and that
19 varied. Sometimes it was 15 minutes, a half an
20 hour, something like that. And I can't tell you.
21 That was told to me many times. The -- I felt that
22 he was in physical therapy. I think the physical
23 therapist would have been able to testify in trial
24 on this.
25 **Q. Okay. In the -- two, three -- fourth**

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1 full paragraph on page 1 of Exhibit 3, you're
2 making -- discussing future medical treatments.
3 A. Uh-huh.
4 Q. Do you see that?
5 A. I do. I'm reading it.
6 Q. Okay.
7 THE REPORTER: Sorry. I didn't --
8 THE WITNESS: I'm -- I'm reading it.
9 THE REPORTER: Okay.
10 THE WITNESS: That's what I meant. I
11 was reading it silently. I'm sorry.
12 BY MR. PENDARVIS:
13 Q. And do you see that?
14 A. Yes, I do.
15 Q. Okay. I'm just not sure I had a clear
16 answer.
17 Were you planning on getting a life
18 care planner to develop a future medical plan for
19 Mr. Feldman for use at trial?
20 A. There is a -- and I can answer it this
21 way. There is a very good economist that's used by
22 all the trial attorneys out of the University South
23 Carolina. I believe he was an economics professor.
24 I've used him before. I was going to use that
25 gentleman.

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1 Q. Did you talk to Dr. Wood about
2 Mr. Feldman's case?
3 A. No, I did not.
4 Q. But you were planning to talk with --
5 sorry. Off the record.
6 (Off-the-record conference.)
7 (EXH. 4, Letter from Gary Coggin to
8 Alton Prioleau dated October 17, 2011, was marked
9 for identification.)
10 BY MR. PENDARVIS:
11 Q. Mr. Feldman, just for correcting the
12 record, the copy of the Exhibit 3 that's been
13 presented to you has inadvertently got a third
14 page, and I'm going to ask if we can remove --
15 'cause it's clearly not -- wasn't enclosed with
16 this letter. It's a copy of September 2012
17 settlement agreement, and the letter itself is
18 October 10, '11, so --
19 A. Can I see the settlement agreement?
20 Q. It's on page 3 of Exhibit 3, and I'm --
21 I'm just suggesting that, if you don't mind, pull
22 that off, because it was inadvertently included
23 with Exhibit 3.
24 A. No, no. This is part of the exhibit.
25 Q. I know it is. What it was presented to

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1 Q. Oliver Wood?
2 A. That's him. Yeah.
3 Q. And how was Mr. Wood going to be able
4 to give any testimony about the value of the future
5 medicals without a life care plan?
6 A. I would have -- okay. Number one, I
7 don't know what you're talking about with a life
8 care plan.
9 Q. Okay.
10 A. You're going to have to explain that to
11 me.
12 Q. How was Mr. -- have you used Dr. Wood
13 at trial?
14 A. Uh-huh.
15 Q. And were you able to get Dr. Wood's
16 opinions on future medicals introduced in evidence
17 at trial?
18 A. The trial was years ago, and the -- the
19 trial -- and I just don't remember what it was. I
20 was very impressed by what he had done, and he, in
21 whatever case this was -- and I think this was a
22 wrongful death case -- was able to go forward on
23 what this gentleman would have made, and I was
24 basing the thoughts that I had for Mr. Feldman on
25 Mr. Wood.

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1 you --
2 A. Yeah. Oh. I --
3 Q. -- and it's --
4 A. It's part of the -- it's part of the
5 case. Excuse me.
6 Q. Right. Part of the case but not --
7 A. That's fine.
8 Q. I'm just going to ask --
9 A. Yeah.
10 Q. -- if we can remove that from
11 Exhibit 3.
12 A. Absolutely.
13 Q. That was just inadvertently included.
14 A. Absolutely. Yeah.
15 Q. I'm not sure how that got there, but...
16 And just, again, moving down the
17 trail --
18 A. Uh-huh.
19 Q. -- I'm going to pass to you now another
20 letter to Allstate claims representative, and this
21 is marked as Exhibit 4. Apparently it's -- this
22 appears to be a letter dated October 17, 2011, to a
23 new claims representative, Mr. Alton Prioleau. Am
24 I saying that right?
25 A. That's pretty close. I don't remember.

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1 **Q. And this may be the identical letter.**
2 A. Yeah.
3 **Q. I'll let you take a look and see, but,**
4 **you know, I've got two letters, both signed and --**
5 **oh. Excuse me. This one was not signed, the copy**
6 **I've got. Do you know -- let me rephrase.**
7 **Take a look at Exhibit 4. Do you know**
8 **if this letter was sent to Mr. Prioleau?**
9 A. I do not know. By way of explanation,
10 Allstate will switch up, as you're probably aware,
11 their adjusters, and Ms. Wise had been with me.
12 Prioleau -- I may have decided I was going to send
13 him the same letter to her, but I don't know, and I
14 can't tell you beyond that. I have no idea.
15 **Q. I'm going to represent to you we're**
16 **going to be looking at some more letters to**
17 **Mr. Prioleau --**
18 A. Yeah. That's fine.
19 **Q. -- so apparently he --**
20 A. He was on --
21 **Q. You're right. He comes on board at**
22 **some point.**
23 A. Yeah.
24 **Q. Okay.**
25 (EXH. 5, Letter from Gary Coggin to

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1 **Q. -- as the way he was living, you have**
2 **no reason to doubt that the medical bills and the**
3 **surgeries were related to the accident, do you?**
4 A. The surgery that we're talking about
5 here was previous to the accident. It was 2008.
6 No, they -- they weren't related at all. This was
7 a preexisting condition that Bob had.
8 **Q. And you're describing in Paragraph 3**
9 **that the -- that matters between January of 2011**
10 **and March of 2011 are dealing with --**
11 A. Yeah.
12 **Q. -- treatments for the accident?**
13 A. If you read the second sentence:
14 Please note here there are two separate regimes --
15 **Q. Right.**
16 A. -- of physical therapy for the
17 claimant.
18 The only thing I can think of was that
19 somehow they were connected and I sent the two bill
20 -- that's all I can think of. I don't know.
21 **Q. Just clarifying for the adjuster what's**
22 **going on --**
23 A. Yeah.
24 **Q. -- with treatments?**
25 A. Yes.

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1 Alton Prioleau dated October 24, 2011, was marked
2 for identification.)
3 BY MR. PENDARVIS:
4 **Q. Mr. Coggin, I'm going to pass to you**
5 **now another letter. It appears to be another**
6 **letter you wrote. This one's date October 24,**
7 **2011. It's been marked as Exhibit No. 5.**
8 **Okay. Is this a letter that you sent**
9 **to Mr. Prioleau in -- on October 24, 2011?**
10 A. I would think so, but I don't -- I only
11 have one page. There's not a signature page.
12 **Q. I think it is.**
13 A. Oh, okay. Excuse me.
14 You're right. Yeah. I agree.
15 **Q. Is that your signature?**
16 A. Uh-huh.
17 **Q. Okay.**
18 A. Yes.
19 **Q. And what is the purpose of this letter?**
20 **Or what was the purpose of this letter?**
21 A. I think I was probably bringing him up
22 to speed on medicals.
23 **Q. And notwithstanding your statements**
24 **about Mr. Feldman's pain and suffering issues --**
25 A. Uh-huh. Uh-huh.

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1 **Q. Let's take a look, if the -- that**
2 **document that was attached to the letter, I've got**
3 **another copy for you. I'll tell you, before we get**
4 **just into that --**
5 A. Uh-huh.
6 **Q. -- let's let the court reporter mark**
7 **that. That's going to be Exhibit 6. And I've got**
8 **a few questions for you.**
9 A. Okay.
10 MR. BOGDAN: Hand that to her, Gary,
11 and let her mark it.
12 THE WITNESS: Oh. I'm so sorry.
13 MR. PENDARVIS: Well, I'll let you --
14 you can look at it all you need.
15 (EXH. 6, Release, Covenant Not to
16 Execute and Settlement Agreement, was marked for
17 identification.)
18 BY MR. PENDARVIS:
19 **Q. Take a moment and look that over. When**
20 **you're ready, we'll -- let me know, and we'll have**
21 **a few questions.**
22 MR. BOGDAN: Was that six, Thomas?
23 MR. PENDARVIS: Yeah. It's number six.
24 THE WITNESS: Okay.
25 BY MR. PENDARVIS:

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1 Q. It appears from the date of the
2 document, September 18 --
3 A. 2012.
4 Q. -- 2012 --
5 A. Yeah.
6 Q. -- that by that time you've reached an
7 agreement to resolve the claims with
8 Ms. Dickenson's at-fault carrier, Allstate --
9 A. Correct.
10 Q. -- for an amount of 85,000?
11 A. Correct.
12 Q. And she had \$100,000 in coverage,
13 correct?
14 A. Correct.
15 Q. Did you have any discussions with
16 Mr. Feldman about settlement with Allstate?
17 A. Yeah. We did. There was a hundred
18 thousand dollars there. Bob, at this time, was
19 putting considerable pressure on me to get this
20 settled. He told me he was broke. There was one
21 time, maybe twice, that he called and asked to
22 borrow money from me, which I couldn't do.
23 I told him that I was pushing as hard
24 as I could to get this matter settled and that we
25 would -- I would relay all reasonable settlements

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1 telling the jury in this case that in September
2 2012 \$85,000 was a sufficient settlement with the
3 at-fault driver?
4 A. The one thing you have to be aware of
5 is that --
6 Q. Well, answer yes or no and then you can
7 explain. Is that what you're telling me?
8 A. Ask me the question again.
9 Q. So you are going to be telling the jury
10 in this case that based on a claim that you made a
11 demand for Mr. Feldman in excess of \$1 million --
12 A. Uh-huh.
13 Q. -- that in September 2012 the \$85,000
14 settlement on a \$100,000 policy was sufficient and
15 reasonable?
16 MR. BOGDAN: Object to the form.
17 THE WITNESS: The \$90,000 settlement on
18 a hundred thousand dollar policy was reasonable,
19 yes.
20 BY MR. PENDARVIS:
21 Q. Notwithstanding your million dollar
22 demand?
23 A. Now, at the beginning of this,
24 Mr. Pendarvis, you made a pledge to me you weren't
25 going to try to trick me. Is this one of these

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1 to him. They had started out by offering, I think,
2 \$40,000, and they moved up. \$85,000, to me, for
3 three broken ribs, was just fine because you got to
4 the point where you could go after his UIM and make
5 that declaration with full confidence that it would
6 be treated the way it should, rather than if you
7 settled for \$40,000.
8 In addition to that, Bob had also
9 gotten five -- gotten \$5,000 from his own insurance
10 company. These companies, particularly Allstate
11 and State Farm, will always argue that the med pay
12 is part of the settlement, and I've had that happen
13 in cases that I've won where they come back to me
14 and they argue that they want the money for what
15 they paid when there was Allstate on both sides.
16 They want the 20,000 they paid in med pay. So I
17 look at this as more a \$90,000 settlement.
18 The settlement was made purely with
19 Bob's agreement, and Bob wanted to know if we were
20 going to go after his UIM. Considering at this
21 time, 2012, I was of the opinion that everything
22 Bob told me about his condition was truthful, I
23 said: Yes. We are.
24 Q. So you, based on a claim that you made
25 demands in excess of a million dollars, you're

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1 non-trick questions?
2 Q. First off, I didn't say that. I don't
3 intend to trick you. I don't intend to trick you,
4 but I just want to put in light for the jury that
5 the -- you made a -- let's make sure that we're
6 clear.
7 A. The policy was a hundred thousand
8 dollars. We got \$90,000. That was a good
9 settlement.
10 Q. Well --
11 A. That's the answer.
12 Q. We're going to stick with that.
13 A. Okay.
14 Q. Remember your statement.
15 A. Okay. That's fine.
16 Q. Remember your statement for trial.
17 A. Okay. I'll remember that.
18 Q. How were you going to establish that
19 Mr. Feldman was under -- that the at-fault party
20 was underinsured when you didn't get all the policy
21 limits as part of making your claim against
22 Mr. Feldman's underinsured carrier?
23 A. I can only go with what the policy is
24 that I've known for the years I have practiced law,
25 and that is that you can make a claim for

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1 underinsurance for any reason whatsoever, and even
2 if I had gotten \$20,000, I still could have claimed
3 the underinsurance. Whether they would have paid
4 it or not is something different, but the -- in
5 this case here they took the case very seriously
6 and -- as I expected they would.

7 **Q. Okay. Did you have any discussions**
8 **with Mr. Feldman about the risks of accepting**
9 **85,000; that it might create a defense for the**
10 **underinsured carrier that there was -- that the**
11 **at-fault party truly wasn't underinsured because**
12 **you didn't get all of the available proceeds?**
13 A. I do not know any case I've ever seen
14 that has addressed that question. My answer, that
15 is -- that was not a consideration, was not a
16 problem.

17 And remember, Bob desperately needed
18 money. And remember this also. Bob did not have
19 to take the settlement.

20 **Q. So the answer to the question is no,**
21 **you didn't have that conversation with Bob?**
22 A. What's that?

23 **Q. That you didn't discuss any risks of**
24 **settling for less than policy limits?**
25 A. No. I think that probably would have

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1 **Q. Is there anything in this document that**
2 **you believe is -- today -- is not accurate?**
3 A. No. It's accurate.

4 **Q. Okay. And looking at the last page of**
5 **Exhibit 7, pursuant to the statutes -- and I'm not**
6 **going to go into the specific statutes, but**
7 **pursuant to South Carolina law you served a copy of**
8 **this civil cover sheet, summons, and complaint on**
9 **the secretary of state?**
10 A. No. The department of insurance.

11 **Q. Department of insurance? Okay.**
12 **And they, in turn, deliver it to**
13 **Liberty Mutual?**
14 A. That's correct.

15 **Q. And Liberty Mutual was the underinsured**
16 **carrier for the Feldmans?**
17 A. That was Robert's carrier. That's
18 right.

19 **Q. Okay. And basically the ad damnum**
20 **clauses on -- on the last page of the complaint**
21 **would have effectively make this demand a policy**
22 **limits demand for the underinsured coverage,**
23 **correct?**
24 A. You used the phrase ad damnum. I don't
25 know what that means.

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1 come up, and I think I would have told him that we
2 can still bring the action for UIM. I have never
3 seen, Mr. Pendarvis, a case where we have made a
4 settlement for less that wouldn't get UIM. I've
5 gotten UIM a number of times.

6 (EXH. 7, Civil Action Cover Sheet,
7 Summons, Complaint, Copy of certified mail
8 envelope, was marked for identification.)
9 BY MR. PENDARVIS:

10 **Q. Mr. Feldman, I'm passing to you a copy**
11 **of a group of documents, a civil cover sheet --**
12 A. Uh-huh.

13 **Q. -- a summons, and a complaint, and I'm**
14 **going to ask that you -- in very back of it is a**
15 **certified mail receipt, a copy of a certified mail**
16 **receipt. Were these pleadings you signed and filed**
17 **on behalf of Robert Feldman and Lois Feldman in**
18 **October of 2012?**
19 A. Yeah. Yes.

20 **Q. Can we call this the Feldman versus**
21 **Dickenson lawsuit for today?**
22 A. Absolutely.

23 **Q. Okay. And, of course, you prepared the**
24 **complaint, correct?**
25 A. Yes, I did.

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1 **Q. The two wherefore clauses on the last**
2 **page of the complaint --**
3 A. Uh-huh.

4 **Q. -- make two separate demands, one for**
5 **the first cause of action in the amount of 300,000,**
6 **and the second for the second cause of action in**
7 **the amount of \$225,000. Do you see that?**
8 A. Yes.

9 **Q. And combined, that would have been a --**
10 **basically a policy limits demand for the**
11 **underinsured coverage, correct?**
12 A. That's correct.

13 **Q. Assume for a second, Mr. Coggin, that**
14 **Liberty Mutual tendered payment right then and**
15 **there. Out of the \$525,000, what would have been**
16 **your fee?**
17 A. Well, they probably would have tendered
18 payment for 500, which was the extent of the
19 policy.

20 **Q. Let's assume 500.**
21 A. My fee would have been 35 percent.

22 **Q. Okay. Were there any discussions with**
23 **Mr. Feldman about taking less than 35 percent if**
24 **the case was settled early in the representation?**
25 A. I do not recall anything like that.

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1 Q. In a claim where the lawsuit is being
2 brought against a defendant who is -- there's been
3 a covenant to -- not to execute and you're pursuing
4 underinsured coverage, in that context what do you
5 do to effect service of process of the -- of the
6 pleadings?
7 A. I didn't understand the first part of
8 the question.
9 Q. Well, in the context where you have
10 settled under a covenant with the at-fault party --
11 A. Not to execute.
12 Q. -- and you're proceeding with a
13 complaint to pursue underinsured coverage.
14 A. Uh-huh.
15 Q. In that context. And then we can even
16 apply it here to the Feldman versus Dickenson
17 matter. What do you do to effect service of
18 process?
19 A. You hire a process server. You give
20 them a copy of the process, you give them the last
21 known address, and ask them to serve it.
22 Q. And I've seen some information where
23 you did just that in this case, correct?
24 A. That's right.
25 Q. And that's a requirement to perfect the

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1 where she was at.
2 Q. And Mr. Witt told you that sometime
3 right after he was charged with serving?
4 A. He -- he gave me an affidavit of
5 nonservice.
6 Q. Okay. Did you follow up with that and
7 ask him what he found out about where she might be
8 located?
9 A. Oh, yeah. Absolutely.
10 Q. How did you come to learn that
11 Ms. Dickenson was in New York state?
12 A. You're probably as familiar with this
13 -- these materials on the Internet as I am.
14 There's various search engines like Spokeo, People
15 Find, and that type of thing. Armed with the
16 information that I had -- the age, the previous
17 addresses -- and if you plug that in, that's --
18 it'll come up.
19 Q. And what did you do next?
20 And what was your next step for
21 service?
22 A. My next step was to serve her in person
23 with a process server from Long Island.
24 Q. And the location was on Long --
25 somewhere on Long Island?

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1 pleadings in an underinsured lawsuit context?
2 A. It's a requirement. It's not
3 perfecting the pleadings, but it's a requirement to
4 serve them, yeah.
5 Q. It's a requirement to formally commence
6 the lawsuit.
7 A. Yeah.
8 Q. Correct?
9 A. That's correct.
10 Q. And so if I were -- I want to get to
11 the right...
12 Mr. Michael Witt was the process server
13 you hired here in Beaufort County --
14 A. That's correct.
15 Q. -- to effect service on Ms. Dickenson?
16 A. That's correct.
17 Q. And do I understand correctly that he
18 tried to serve her at the last known address?
19 A. Yeah. Doncaster Road was in Sun City.
20 Q. And I understand that he learned that
21 she -- Ms. Dickenson had been -- Ms. Dickenson's
22 family had taken her back to New York state?
23 A. He didn't know that. The neighbors
24 were not forthcoming. They just simply said she
25 hadn't been there for a while and they didn't know

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1 A. I think it may have been New Hyde Park.
2 I'm familiar with Long Island to a certain extent,
3 but there's a number of cities very close -- or a
4 number of little cities very close to -- what am I
5 thinking of -- maybe the Bronx or Brooklyn.
6 Q. Okay. I'm a pure, unadulterated
7 southern. I've been up there one time. I'm going
8 to rely on you to tell me that.
9 A. I will tell you a great story about
10 going up there to a deposition one time.
11 Q. We'll do that later.
12 A. We'll do that later, yeah.
13 Q. Okay. So Mr. Witt obviously wouldn't
14 be a good candidate --
15 A. No, no. Huh-uh.
16 Q. -- to handle that, so what was your
17 next step for effecting service on Ms. Dickenson in
18 New York state?
19 A. I went on the Internet and looked at
20 where she lived. And then I looked at various
21 process service companies in that area and made
22 some calls.
23 Like everywhere else, nobody answers
24 their phone. The first company where they answered
25 the phone was a company called Zeller --

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1 Zellner-Wood. Okay? I don't remember the first
2 name exactly. And I talked to a process server
3 there by the name of Fran, then we went from there.
4 **Q. And payment arrangements were made, and**
5 **you delivered the pleadings to --**
6 A. Fran --
7 **Q. -- Zeller-Wood; is that correct?**
8 A. Fran wanted up front money.
9 **Q. Okay.**
10 A. Like New York. She said a money order
11 would be fine. I -- and the one mistake I made in
12 my affidavit, I said it was \$200, and I think it
13 was actually a hundred dollars. And she wanted
14 payment of a hundred dollars.
15 I made two calls to her -- actually,
16 there was about three calls. I called initially
17 and then I called back a couple of more times. The
18 second time we made the arrangements, and after I
19 finished that call, I called her back and said I
20 want to firm up the address with you. Give me the
21 address again. And that's -- she gave it to me. I
22 took care of it all that afternoon.
23 **Q. And the address you're talking is the**
24 **Zeller-Wood process serving address?**
25 A. Right.

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1 anything to department of insurance.
2 **Q. No, no, no. I'm going to represent to**
3 **you that in November -- on November 29 you sent the**
4 **letter to the department of insurance --**
5 A. Uh-huh.
6 **Q. -- and I'm asking: Can you -- does**
7 **that clue you in on when you had the conversations**
8 **with the service --**
9 A. Huh-uh. I think it was pretty
10 concurrent. I think that the -- it went to the
11 department of insurance first.
12 **Q. I don't know if it's me or you, but**
13 **we've got to slow down on our Q and A 'cause we're**
14 **talking on top of each other a little bit. Okay?**
15 A. I apologize.
16 **Q. No, no, no. I'm apologizing equally.**
17 **I'm not sure which of us is doing it, but let's --**
18 A. Yeah. Ask me the question again.
19 **Q. Okay. So you're believing late**
20 **November or maybe early December is this**
21 **conversation, and I'm going to represent to you**
22 **that in late November is when the -- you sent a**
23 **letter to the department of insurance.**
24 A. And if I can answer that --
25 **Q. Sure.**

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1 **Q. You gave her what you got off the**
2 **Internet for Ms. Dickenson's service --**
3 A. Yeah.
4 **Q. -- process address? Okay.**
5 A. Uh-huh. Uh-huh. And that was -- I do
6 remember that. That was an address -- I think
7 MacGregor Avenue. And I can't remember. I think
8 it might have been New Hyde Park, though I'm not
9 sure.
10 **Q. Okay. And using Exhibit 7 --**
11 A. Right.
12 **Q. -- October 29 as our sort of baseline,**
13 **when were these conversations with Zeller-Wood**
14 **process service company?**
15 A. It was a -- what I remember, it was a
16 while because I had given this to Mr. Witt. He
17 probably had it for two or three weeks. He was
18 pretty thorough. And when he came back to me, I'm
19 thinking maybe sometime in November, even early
20 December. I don't know.
21 **Q. Okay. Can you relate the conversation**
22 **with the Zeller-Wood -- Fran in terms of when you**
23 **sent the department of insurance the copy of the**
24 **summons and complaint?**
25 A. I never talked to her about sending

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1 A. -- I believe I served the department of
2 insurance first.
3 **Q. Before the conversation with the**
4 **process server?**
5 A. Yeah. Uh-huh.
6 **Q. Okay. That's fine.**
7 (EXH. 8, Answer and Certificate of
8 Service, was marked for identification.)
9 BY MR. PENDARVIS:
10 **Q. And by follow-up question or response,**
11 **when I said process server, I'm really referring**
12 **now to Zeller-Wood and not Mr. Witt.**
13 A. That's fine.
14 **Q. Okay. I'm going to pass you a copy of**
15 **a document marked as Exhibit 8 to your deposition**
16 **that appears to be the answer filed on behalf of**
17 **Liberty Mutual or by Liberty Mutual's counsel.**
18 A. Yeah.
19 **Q. This is weird. We both know that Sarah**
20 **Dickenson's the defendant but that Liberty Mutual**
21 **is the party answering the complaint per the**
22 **statute, but anyway -- so this is the answer that**
23 **was filed on behalf of Liberty Mutual?**
24 A. Uh-huh.
25 **Q. Yes?**

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1 A. I'm sorry. Yes.
2 Q. When did you receive a copy of this
3 answer?
4 A. It's time-stamped January 7, and I
5 assume I received it by mail, so it would have been
6 within five days.
7 Q. Okay. So early January --
8 A. Yeah.
9 Q. -- you received this answer?
10 A. And I can answer the former question
11 now if you want me to trigger it.
12 Q. Yes.
13 A. November the 28th was the -- no.
14 November 28, I think, is when he received the --
15 the service from the secretary of state.
16 Q. Okay. Help me understand, Mr. Coggin.
17 We're going to look at your affidavit about
18 receiving proof of service of process. In light of
19 the time when you received the answer, when did you
20 receive information about service of process from
21 the Zeller-Woods people: Before? After? Can you
22 help me there?
23 A. This answer?
24 Q. Yes, sir. Exhibit 8.
25 A. I believe it would have been before.

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1 I received the affidavit of service. I
2 remember I waited quite some time, and I was going
3 to call her, and I would say it was three weeks
4 after the conversation, when I was ready to call
5 her that day, there was an affidavit of service in
6 the mail.
7 Q. So that's late December?
8 A. It could have been -- it could have
9 been January. I don't know.
10 Q. Was there a cover letter with the
11 affidavit of service?
12 A. Affidavit of service. That was it.
13 Q. Just the raw affidavit?
14 A. Uh-huh.
15 Q. Who served it?
16 A. It was a gentleman. I looked at the
17 name. It wasn't -- certainly wasn't Fran.
18 Q. Right.
19 A. It was a name of a process server, and
20 he had served it on an address where this woman
21 was, which was a -- I determined later it was an
22 assisted living, slash, dementia home. You know,
23 the woman is, I think, 85 at that time, something
24 like that, and that's all I could tell.
25 It was served. The person that

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1 Q. So you had information from Zeller-Wood
2 process server Fran --
3 A. Uh-huh.
4 Q. -- someone up there -- that
5 Ms. Dickenson had been served?
6 A. That's correct.
7 Q. Tell me what you understood about the
8 service of Ms. Dickenson in New York state at the
9 time you received that information.
10 A. I had sent the material to
11 Zellner-Wood. I didn't hear anything from them,
12 and I called them a week later. The -- Fran again
13 answered the phone. She said service had been
14 attempted at the address I had given her and there
15 was nonservice.
16 And I said -- I can remember saying,
17 jeez, thinking to myself this is going to be a
18 headache.
19 And she said: Don't worry. We got a
20 real good address, and we're serving that.
21 Didn't hear anything from her, and I
22 called probably seven or eight days later, and she
23 said service has been made. And she said: You'll
24 -- and I asked about the affidavit of service, and
25 she said: You'll be getting that.

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1 accepted service was, I remember, a man, a man's
2 name, and I was a little concerned about that, but
3 I looked at the law and the rules. You know,
4 service at the residence accepted by somebody who
5 holds them self out to accept -- be able to accept
6 service. It was fine.
7 Q. When you filed the complaint in -- in
8 Exhibit 7, did -- did you mark the time for service
9 of process of the complaint, the time period you
10 were allowed to serve it?
11 Let me back up.
12 A. Yeah. I'm not --
13 Q. Are you aware of a rule -- are you
14 aware of a rule of procedure that limits the time
15 to serve a summons and complaint?
16 A. There -- there's a couple of rules.
17 You're going to have to help me out here because I
18 think I know what you're talking about, and I'm
19 going to probably disagree with you. We have --
20 tell me what the rule is.
21 Q. Well, this is your deposition.
22 A. And I apologize.
23 Q. This is your deposition. I'm asking
24 you: What rule --
25 Let me ask you a different way. What

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1 rules are in play as far as the time to serve a
2 summons and complaint that were -- that were
3 governing matters in --
4 A. Oh, okay.
5 Q. -- when this complaint was filed in
6 2012?
7 A. Service can be made within 120 days
8 after the time has tolled by statute.
9 Q. And what tolls the time by statute?
10 A. Three years.
11 Q. And do I understand what you're saying
12 is once you file a complaint you have 120 days to
13 serve it?
14 A. No. Once you -- when Robert was
15 injured was September 10 or 9. You had three years
16 from that time.
17 Q. 2010?
18 A. Yeah. If you filed a complaint --
19 okay -- you would have -- you would be able to
20 serve that complaint, for example, filed the last
21 day of the statute. You still had 120 days to
22 serve it after the statute ran.
23 Q. And if you don't serve it after 120
24 days, what happens?
25 A. It's -- I assume you're in default.

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1 A. Uh-huh.
2 Q. Wouldn't it be 120 days after this
3 complaint was filed?
4 A. I don't know. When was it filed?
5 It's filed October 29. The -- the --
6 was served, as I said, in -- that's November. It
7 was served probably in January. That's -- that's
8 more than enough time after it's been filed.
9 Q. I'm really trying to get an idea.
10 A. Yeah.
11 Q. What's the 120th day after October 29,
12 2012?
13 A. No, no. It -- that's not the way the
14 -- the rule reads. Everybody makes that mistake.
15 It's 120 days after the three-year time period.
16 Q. Okay.
17 A. I've had that argument with people many
18 times. I can show you the rule.
19 Q. Okay.
20 A. That has nothing to do with this at
21 all. This was served in a timely basis.
22 Q. So what did the rules require as far as
23 filing proof of service?
24 A. The rule says -- I think it's within
25 ten days after the receipt of service.

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1 Q. Okay. Or out of time?
2 A. Yes.
3 Q. Okay.
4 A. Excuse me.
5 Q. Did you mark on your calendar or have
6 an internal calendaring system that identified the
7 120 days from the date of filing?
8 A. No, I did not.
9 Q. And how does that help Mr. Coggin -- I
10 mean Mr. Feldman? I mean, what if you missed the
11 deadline?
12 A. I didn't miss the deadline. That's
13 the --
14 Q. I'm asking you what if. What did you
15 do to make sure you had the deadline calendared?
16 A. I knew the dates very well. If you're
17 asking if I calendared and put it on a calendar, I
18 did not, by I knew the dates very well.
19 Q. What was the 120th day of after
20 October 29, 2012?
21 A. No. It's not -- it would have been 120
22 days after -- it would have been 120 days after
23 2016 -- or under -- after 2013 and ran.
24 Q. This complaint was filed October 29,
25 2012.

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1 Q. And you testified a few moments ago
2 that you received an affidavit from a process
3 server in New York --
4 A. Right. Uh-huh.
5 Q. -- stating that they -- Ms. Dickenson
6 had been served with process?
7 A. Yeah.
8 Q. When did you file that document?
9 A. I did not.
10 Q. Why not?
11 A. Put it in the papers of the case and
12 went on to other things.
13 Q. No. I'm asking why not.
14 A. I just told you.
15 Q. You knew there was a rule that required
16 filing?
17 That's yes?
18 A. Yes.
19 Q. And you did not file the affidavit,
20 correct?
21 A. That's correct.
22 Q. How did that help Mr. Feldman and
23 Ms. Feldman on their claim?
24 A. There is -- there is case law,
25 Mr. Pendarvis -- and I think you've probably read

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1 it -- that says that that's not determinative. If
2 in fact you serve it and you had -- you have
3 service of process -- it's been returned -- that's
4 enough to satisfy the law.
5 **Q. Okay.**
6 A. So Mr. Feldman's in good -- was in good
7 shape with that.
8 **Q. Okay. And so I've passed you**
9 **Exhibit 8, correct?**
10 A. Yeah.
11 **Q. So early January --**
12 A. Uh-huh.
13 **Q. -- within a week or so -- let's just**
14 **say -- I think you testified within five days or so**
15 **of January 7, 2013, you received this answer by**
16 **Liberty Mutual Insurance Company, correct?**
17 A. That's correct. Yeah. Uh-huh.
18 **Q. And did you look at the whole answer,**
19 **read the entire document?**
20 A. Oh, yeah. Absolutely. Uh-huh.
21 **Q. And you saw as a fifth defense they**
22 **were alleging that plaintiff had failed to**
23 **effectuate proper service, right?**
24 A. The heading says improper service. I'm
25 not sure the heading is part of the -- the

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1 **So October 10, 2013, was the last date**
2 **to commence a lawsuit against Ms. Dickenson?**
3 A. That's correct.
4 **Q. If a summons and complaint is not**
5 **served on a defendant, then the lawsuit's not**
6 **commenced, correct?**
7 A. That would -- according to the law,
8 yeah, that's correct.
9 **Q. Okay. As of January 4, 2013, when**
10 **Mr. Allen -- I'm going to assume that that's his**
11 **signature -- but on the date this answer was**
12 **filed --**
13 A. Uh-huh.
14 **Q. -- in January of 2013 the statute of**
15 **limitations hadn't expired yet, had it?**
16 A. No. No. No.
17 We're still on eight?
18 **Q. Right.**
19 A. Okay.
20 **Q. In other words, assuming -- and I'm**
21 **asking you to assume this lawsuit wasn't properly**
22 **commenced. A new lawsuit could have been filed any**
23 **time before October 10, 2013, and the statute would**
24 **have been protected, correct?**
25 A. Yes.

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1 paragraph, but go ahead.
2 **Q. Well, could you read Paragraph 10 for**
3 **us?**
4 A. Further answering, party alleges
5 plaintiff has failed to effectuate proper service
6 under 12(b)(4) and 12(b)(5).
7 **Q. And with that assertion by the**
8 **defendant, why didn't you file the affidavit of**
9 **service?**
10 A. I had simply forgot.
11 **Q. Okay. And as of January 4 -- you know,**
12 **what was the -- you said earlier -- I want to make**
13 **sure I'm clear on this --**
14 A. Yeah.
15 **Q. -- that the statute of limitations**
16 **governing Mr. and Ms. Fieldman's claims against**
17 **Ms. Dickenson would have been -- if the wreck**
18 **occurred on October 9, 2010 --**
19 A. Uh-huh. Yes.
20 **Q. -- then the statute of limitations**
21 **would have been expired on that claim October 9,**
22 **2013, correct?**
23 A. October 10, 2013.
24 **Q. Correct. Day after. You're right.**
25 **You're right.**

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1 **Q. With that assumption?**
2 A. Uh-huh.
3 MR. PENDARVIS: Let's take a break for
4 a minute.
5 (A recess transpired.)
6 BY MR. PENDARVIS:
7 **Q. As I briefly mentioned off the record,**
8 **Mr. Coggin, there -- there are plenty of materials**
9 **in your files that have been delivered to us that**
10 **dealt with the discovery answer, interrogatories,**
11 **requests for production both ways, motions to**
12 **compel, and all of those things, but at the end of**
13 **the day you -- documents were exchanged,**
14 **interrogatories were answered, and by May of 2014**
15 **mediation was scheduled.**
16 A. Okay.
17 **Q. Correct?**
18 A. Uh-huh.
19 **Q. Terry Finger was the mediator?**
20 A. Correct. Uh-huh.
21 **Q. I think we all know Terry.**
22 MR. PENDARVIS: You know Terry?
23 MR. BOGDAN: Not personally.
24 MR. PENDARVIS: Okay. Well, he's a
25 fella that does a lot of mediation around Beaufort

Page 66 1 County. Good guy. 2 BY MR. PENDARVIS: 3 Q. In the time between January 2013 and 4 May of 2014, did you have any other conversations 5 with Mr. Julian Allen, the lawyer hired by Liberty 6 Mutual, about service of process, affidavits of 7 service, anything of that nature? 8 A. None. 9 Q. Did you review your pleadings to -- for 10 -- ensure compliance with service of process or 11 anything of that sort during those year and a half 12 or so? 13 A. I was pretty much hands-on with this 14 case, but I can't say that I did or didn't. 15 Q. I guess we can really say 2013 and 16 early 2014 you were communicating with some of the 17 medical providers who had treated Mr. Feldman, 18 correct? 19 A. I had a lot of communications with them 20 by letter. It seemed to me, prior to the 21 settlement more so than afterwards, I know I had 22 sent some letters to Dr. Shissias and also 23 Dr. Reuben -- I think it's Reuben or Rubner -- 24 Reuben -- regarding what Bob was feeling and how 25 badly he was injured and so forth like that and	Page 67 1 asking for maximum medical improvement and so forth 2 like that. 3 Q. And was to supplement with 4 Ms. Dickenson's carrier, Allstate? 5 A. That was for -- in prep for the 6 settlement with the carrier. That's correct. 7 Q. Did you have any communications with 8 any of the medical providers during 2013 and early 9 2014 to get an update on medical condition? 10 A. I don't remember. If you have 11 something, I would like to look at it, and I'd 12 certainly tell you. 13 Q. I'm going to represent to you that 14 through October of 2013 the only communications we 15 have with any of Mr. Feldman's medical providers is 16 a letter from Mr. Allen to Dr. Platt and Coastal 17 Carolina with a subpoena for records and other 18 activities by the defense -- 19 A. Uh-huh. 20 Q. -- but not you. 21 A. Okay. 22 Q. You already had a large body of 23 Mr. Feldman's records, correct? 24 A. I would think so. And again, I don't 25 remember the date of any of those letters.
Page 68 1 Q. That's fine. 2 At some point before you were -- you 3 moved to be relieved as counsel you were trying to 4 schedule the deposition of Dr. Reuben, correct, 5 that got canceled for some reason? 6 A. That I don't remember. 7 Q. Okay. We'll look at that. 8 A. I don't remember that at all. 9 Q. By December of 2013 this case was 10 coming up on the roster, correct, for trial? 11 A. I don't recall. 12 Q. I don't have this as an exhibit, but 13 I'm going to show this to both of you. This is a 14 document, Mr. Coggin, from your file that's an 15 e-mail from you to Mr. Allen that states that the 16 case is up on the jury -- transferred to the jury 17 roster. 18 A. Okay. 19 Q. And I'll give you -- 20 A. I don't remember that. 21 Q. Does that look like -- I mean, this 22 came from your file. And then I'm going to give 23 you a Bates number too so you'll have the record. 24 A. That's my style of writing, yes. 25 Q. And for the -- and I'm not going to	Page 69 1 make this as an exhibit, but this is -- this 2 document bears Bates number -- come on -- 00119. 3 MR. BOGDAN: Does it have a date on it? 4 I didn't see it. 5 MR. PENDARVIS: It didn't have the 6 subject re line on the -- 7 THE WITNESS: Thomas, could I see that 8 again, please? 9 BY MR. PENDARVIS: 10 Q. Certainly. But it's talking about -- 11 and it doesn't, but I'll read it. I'll read it in 12 the record. It says: Julian. Re the case of 13 Feldman versus Dickenson. 14 I'm going to skip the civil action 15 number. 16 As a courtesy to you, please be 17 informed that I will request a transfer of the same 18 to the jury trial roster in January of the new 19 year. I hope you have a holiday season. 20 And so that would have been December 21 '13, transfer onto jury trial roster in 2014. 22 A. Is there a date on that or not? I 23 don't see it. 24 Q. No, no, sir, there's not, but we're 25 talking --

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1 A. See, that's --
2 **Q. I mean, it's talking about the new**
3 **year, and that's why I'm --**
4 A. I just don't -- that looks like
5 something I would do, but I would love to know what
6 the date was.
7 **Q. The reason I'm asking you about this is**
8 **the case was filed in 2012, October?**
9 A. Uh-huh. Yes.
10 **Q. So by early 2014 it's going to be**
11 **appearing on Beaufort County roster, correct,**
12 **whether you move to transfer to the jury trial**
13 **roster or not. Fair enough?**
14 A. We were probably in the midst of
15 receiving notifications about ADR, et cetera,
16 et cetera. That would have come a little later
17 though. And I don't know what the default time is
18 for that, the triggers for those being sent out,
19 but we're getting into the neighborhood.
20 **Q. We've not seen a notice of ADR, but I**
21 **will move into --**
22 A. Yeah.
23 **Q. -- that topic at this point.**
24 (EXH. 9, Letter from Gary Coggin to
25 Terry Finger dated May 5, 2014, was marked for

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1 A. Yes, it is.
2 **Q. And were the -- was the demand made on**
3 **the first two paragraphs on page 2 reasonable based**
4 **on what you knew at the time you made the demand in**
5 **May of 2014?**
6 A. No, it was not.
7 **Q. I think you've told me before you**
8 **learned some things, you believe in 2013, about**
9 **Mr. Feldman's health?**
10 A. That's correct. Yeah. Uh-huh.
11 **Q. And why did you make a statement in**
12 **mediation -- to a mediator that was not reasonable**
13 **based on what you knew?**
14 A. This was a mediation. I had asked for
15 \$300,000 for Mr. Feldman and \$225,000 for his wife.
16 We were in a mediation, and the mediation was going
17 to be for a settlement. In this case here we had
18 already settled for \$100,000. He had \$500,000 of
19 underinsurance, and I was going into this
20 mediation, as with every mediation, is starting
21 high; you end up low.
22 **Q. So your testimony is that you knew you**
23 **were making an unreasonable demand when you made it**
24 **in this letter dated May 5, 2014, to Mr. Finger?**
25 A. This is something that you -- when you

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1 identification.)
2 BY MR. PENDARVIS:
3 **Q. Mr. Coggin, I am passing to you a**
4 **letter dated May 5, 2014, marked as Exhibit 9 to**
5 **your deposition. It appears to be a letter from**
6 **you to Terry Finger --**
7 A. Uh-huh.
8 **Q. -- re mediation, Feldman v. Dickenson.**
9 **Is this your signature on page 2?**
10 A. Yes, it is.
11 **Q. And is this your statement of the claim**
12 **in the case as of May 5, 2014?**
13 A. You know, I thought that the -- the
14 mediation was May 5 or 4. I'm not sure about the
15 -- the date on this. And I don't know what the
16 mediation date was, but I will say it is my
17 signature.
18 **Q. So your testimony is the mediation was**
19 **sometime in May of 2014?**
20 A. Yeah. Uh-huh.
21 **Q. Okay.**
22 A. 2014. That's correct.
23 **Q. As of May 2014, are the statements you**
24 **made in this letter accurate, to the best of your**
25 **knowledge?**

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1 put in -- when you go into mediation, these are all
2 supposed to be privileged, and my demand in this --
3 considering the problems that I had under -- found
4 out about Bob, this was merely, on my end, puffing.
5 You can recall it unreasonable, whatever you want,
6 but it was puffing. I was starting high. We would
7 end up somewhere where I thought would be a good --
8 would be a good settlement for Bob.
9 **Q. Did you have any conversations with**
10 **Mr. Feldman or Mrs. Lois Feldman about the**
11 **substance of what you were demanding in the letter**
12 **marked as Exhibit 9?**
13 A. Apparently I didn't copy Bob on it, so
14 I would say probably not.
15 **Q. Okay. I have not seen what I'm going**
16 **to ask for. I'm just going to see if you know of**
17 **anything. Did the carrier or Mr. Allen on behalf**
18 **of Liberty Mutual submit a mediation statement to**
19 **Mr. Finger?**
20 A. I don't know. I don't recall any.
21 **Q. You participated in the mediation?**
22 A. Oh, absolutely.
23 **Q. And was it Mr. Finger's office?**
24 A. Yes.
25 **Q. Okay. Who was there?**

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1 A. Mr. Feldman was there, Mr. Finger was
2 there, Mr. Allen was there, I was there, and Lois
3 Feldman was there.
4 **Q. Did this mediation go down like most of**
5 **the ones I've been in where the parties meet,**
6 **little bit of conversation about the mediator's**
7 **role, then parties break into separate rooms for**
8 **negotiation?**
9 A. It started out that way.
10 **Q. And what was the demand made in the**
11 **mediation?**
12 A. I assume the demand was probably like
13 this: Here is my demand.
14 **Q. Similar to the wherefore clauses in the**
15 **complaint?**
16 **That's a yes?**
17 A. Yes.
18 **Q. Did Liberty Mutual make a counteroffer?**
19 A. They did make a counteroffer.
20 **Q. And what was that?**
21 A. 25,000.
22 **Q. Did you make any notes? Did you record**
23 **any notes during the -- during the mediation?**
24 A. I don't believe so, no.
25 **Q. Okay. And what was -- when you**

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1 at all.
2 **Q. Well, do you remember if there was a**
3 **message that said this is our final offer, 25,000,**
4 **take it or leave it?**
5 A. If there was something like that, I
6 always take those with a grain of salt. I then
7 reduce my offer, and we'll see what happens.
8 **Q. So --**
9 A. They weren't getting in the car.
10 **Q. Your understanding was they were**
11 **prepared to continue negotiating over --**
12 A. Oh, absolutely.
13 **Q. -- north of \$25,000?**
14 A. Absolutely.
15 **Q. And what was the -- was there a**
16 **counteroffer made?**
17 A. I didn't have time.
18 **Q. Okay. In terms of Mr. Feldman left**
19 **immediately?**
20 A. Yeah. Uh-huh.
21 **Q. Were there any follow-up conversations**
22 **with -- okay. So after Mr. Feldman left, what**
23 **happened next?**
24 A. I think I apologized to Terry Finger.
25 I said: Terry, I'm sorry about this.

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1 **received the \$25,000 counteroffer, what -- did it**
2 **come with a message on why it was so low?**
3 A. Actually, I thought it was a pretty
4 good offer. Very rarely you get an offer of
5 \$25,000 in a mediation. They usually start off
6 about five or six.
7 **Q. Okay. What did you -- describe the**
8 **conversation with Mr. Feldman when the \$25,000**
9 **offer was made.**
10 A. Unfortunately, Bob kind of lost his
11 composure and started to carry on about how this
12 was nothing and so forth like that, and he
13 essentially left the mediation shortly after that.
14 **Q. So your testimony is that a \$25,000 --**
15 **all right. Let me back up.**
16 A. Yeah.
17 **Q. Was \$25,000 the opening offer from**
18 **Liberty Mutual?**
19 A. Yes, it was.
20 **Q. And your testimony is that was a pretty**
21 **high offer for mediation?**
22 A. I thought so, yeah.
23 **Q. Was there any message conveyed with the**
24 **offer?**
25 A. I don't believe there was any message

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1 And he said: Oh, it happens all the
2 time. Don't worry.
3 And that was about it.
4 **Q. Were there any continuing settlement**
5 **negotiations after the mediation?**
6 A. Bob was very hard to get ahold of at
7 that time. I would call and -- and I never was
8 able to get ahold of him. He told me later that --
9 I wrote him some letters. He told me later he had
10 been in Chicago or something like that.
11 **Q. Okay. Was that the -- I want to make**
12 **sure I'm clear. The \$25,000 was the only offer at**
13 **mediation?**
14 A. We didn't have any time even to give a
15 counteroffer.
16 **Q. Okay.**
17 A. That's the only offer that was made.
18 **Q. Were there ever any points in time**
19 **after the mediation where -- where on behalf of Mr.**
20 **and Ms. Feldman a counteroffer was made?**
21 A. I don't believe so. I don't remember.
22 **Q. During the mediation, was there any**
23 **mention of the service of process issue?**
24 A. I don't think that was an issue.
25 **Q. No. Maybe, but was there any mention**

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1 of that?

2 A. No. Answer is no.

3 Q. Was there any mention of statute of

4 limitations?

5 A. No.

6 Q. Did Mr. Finger make any comments to you

7 about the merits of the claim, claim value, or

8 anything of that nature during the mediation?

9 A. Terry -- and I've known him for 25

10 years or close to -- is a very taciturn person, and

11 he didn't say anything one way or the other.

12 I do remember this, and I'm -- this has

13 triggered. Bob had said a number of things, and I

14 remember Terry saying to him: Well, maybe they'll

15 believe this about your -- your back and so forth

16 when you go to trial.

17 Or something to that effect. And Bob

18 left.

19 Q. Do I understand from that comment you

20 just made that --

21 A. Yeah.

22 Q. -- that during the breakout session Bob

23 Feldman was telling you, Terry, and his wife, those

24 in the room, that his injuries were severe and this

25 -- you know, he needed this --

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1 A. Oh, yeah. Uh-huh.

2 Q. Again, I'm not going to make this an

3 exhibit --

4 A. Yes.

5 Q. -- but -- I'm not going to make this an

6 exhibit. I've got -- you've produced copies of

7 letters in May to Dr. Reuben stating you're

8 providing a HIPAA form and asking for medical

9 records. Is that consistent with your plans on

10 trying this case?

11 A. I -- I don't remember that, so I can't

12 comment on it.

13 Q. I'm going to -- again, this is --

14 A. I'd like to see the whole letter if

15 it's --

16 Q. I'm going to show it to you.

17 A. Yeah.

18 Q. It's a one-page letter, and it's Bates

19 numbered 00114, and this is -- I'm going to let

20 your counsel look at it too.

21 A. Okay. I -- it looks to me like I was

22 asking for a -- to been brought up to speed on the

23 treatments he had had since October of 2012.

24 That's certainly my letter.

25 Q. Okay. And my question was: And this

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1 A. I -- I don't know if it was that as

2 much as he was just simply very, very irritated at

3 the -- what he considered to be a small offer.

4 Q. And what did you say to Mr. Feldman?

5 A. Wasn't much I could say.

6 Q. Did you tell him in your experience

7 there could be -- there was going to be some

8 continuing negotiations?

9 A. I don't know. I'm not going to say

10 anything that I did say or didn't say because I

11 just don't remember. I could have said something.

12 I might not have said anything. I don't know.

13 Q. Can you talk generally in terms of how

14 you handle mediations? In that scenario do you

15 generally try to tell a client that settlement

16 negotiations are -- this is early and they're going

17 to continue, they're not leaving, that kind of

18 thing?

19 A. Thomas, I've never had a situation in

20 the mediations where this has happened.

21 Q. Okay.

22 A. People will stay, and they'll stay to

23 the bitter end, is my -- my experience.

24 Q. After the mediation was over, did you

25 believe you were going to have to try the case?

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1 is consistent with your understanding that you were

2 going to have to try this case, getting his medical

3 records and things of that nature?

4 A. I thought that trying the case was on

5 the horizon. Bob was bound and determined, from

6 the conversations with him, he wanted to have this

7 case tried.

8 Q. As of May of 2014 -- well, before we

9 get to that, when you spend money on a client

10 matter, you keep a record -- do you keep a record

11 that identifies monies spent on client matters so

12 that it can be recovered if there's a settlement?

13 A. The way I keep it is everything is --

14 that we write for payment for depositions, payments

15 for filing, payments for attorney -- or not for

16 attorneys but for process servers and so forth like

17 that is ordinarily, with the exception of

18 Zellner-Wood, is ordinarily in check, and I will

19 keep contact with those checks.

20 I do not like what a lot of attorneys

21 do, and that is to nickel and dime people to death:

22 Letter, 42 cents. I don't do that. What I do is I

23 keep the checks. I put them in the file, and at

24 the end of the case I go through all my materials.

25 I add up the checks. It's a very fair way, I

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1 think, of treating my clients.
2 **Q. Okay. And so you're able to account**
3 **for monies spent on a client matter --**
4 **significant monies?**
5 A. Significant money, yeah.
6 **Q. No charges for faxes and --**
7 A. No.
8 **Q. -- letters and postage. Okay.**
9 A. No, no.
10 **Q. So as of May 2014 -- and I understand**
11 **you don't have any records right here, but is -- am**
12 **I correct in understanding that you paid for a**
13 **filing fee --**
14 A. Uh-huh.
15 **Q. -- from the Feldmans?**
16 A. Uh-huh.
17 **Q. A money order to Zeller-Wood process**
18 **serving people?**
19 A. I never charged for that.
20 **Q. No. But you paid for it, right?**
21 A. Yes, I did. Yeah.
22 **Q. And were there any other expenses**
23 **incurred, medical record expenses or things of that**
24 **nature?**
25 A. That's hard for me to answer. I can

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1 **expenses and recover them out of the settlements**
2 **for clients?**
3 A. Sometimes. Other times, when they get
4 larger and it gets involved, I will ask the client.
5 I'll say: You're going to have to pick this up.
6 You're going to have to do this and that and so
7 forth. And the clients are usually pretty -- you
8 know, they're pretty -- pretty much --
9 Thomas, may -- I want to explain
10 something. Bob already owed me money for work that
11 I had done and that he had promised to pay me which
12 he never paid, so --
13 **Q. And this was the DUI for --**
14 A. Yeah, yeah. Uh-huh.
15 **Q. -- another person?**
16 A. Yeah. And when he promised before when
17 I took it on, he said: I'll pay you.
18 When I finished up and I won the
19 case -- girl blue a .284, and we had it thrown out.
20 And Bob said: You know I don't have the money.
21 That was the answer. So I was very --
22 very close with money with Bob.
23 **Q. When did that -- first off --**
24 A. Yeah.
25 **Q. -- I understood your testimony earlier**

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1 tell you this, is that I checked as to what Bob
2 made on the underlying settlement for the predicate
3 accident, and I believe I charged him \$900 for
4 expenses for two years.
5 **Q. Okay.**
6 A. And that's -- beyond that, I can't tell
7 you.
8 **Q. Okay. Well, at any point -- so we're**
9 **clear --**
10 A. Uh-huh.
11 **Q. -- the \$900, thereabout, that your firm**
12 **had spent prior to the settlement with Allstate --**
13 A. Yeah.
14 **Q. -- was reimbursed out of the Allstate**
15 **settlement proceeds, correct?**
16 A. That's correct. Yeah.
17 **Q. And so you're kind of starting with a**
18 **clean slate when the new lawsuit gets filed, right?**
19 A. That's correct.
20 **Q. And so the monies you spent from the**
21 **beginning of the lawsuit, Feldman v. Dickenson,**
22 **until May of 2014, had you asked Bob Feldman to**
23 **reimburse you for those monies?**
24 A. I don't know if I had or not.
25 **Q. In most cases don't you handle those**

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1 **that the first time you met Mr. Feldman was right**
2 **after the collision with Dickenson --**
3 A. Yeah.
4 **Q. -- was at his house?**
5 A. Yeah.
6 **Q. When did you take on this other matter,**
7 **the DUI matter?**
8 A. That was -- I believe it was the summer
9 of 2013.
10 **Q. And you'd already settled the -- with**
11 **Allstate at that point?**
12 A. Yeah. Uh-huh, uh-huh.
13 **Q. Okay. What was the agreement? I mean,**
14 **you didn't represent Mr. Feldman, right, in the**
15 **DUI?**
16 A. Mr. Feldman asked me to take this on as
17 -- he asked me if I did DUIs and so forth, and I
18 had been rather successful in trying these cases
19 and so forth and winning them, and he asked me if I
20 did it, and I said: Yeah.
21 He said he had young woman named Karma
22 who was staying at his house, and she had been in a
23 D -- she had --
24 **Q. Been charged?**
25 A. -- had a DUI at the entrance to where

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1 he lived, and he asked me to represent her.
2 **Q. And you agreed?**
3 A. Yeah. Uh-huh.
4 **Q. Okay. And if I'm hearing your**
5 **testimony correctly, then the compensation with**
6 **that representation, Mr. Feldman had agreed to**
7 **under -- you know, be reasonable for that?**
8 A. He had indicated to me: I will pay you
9 whatever -- whatever you charge.
10 **Q. Was there a fee agreement or anything**
11 **on that?**
12 A. That was -- Bob is a trustworthy
13 person. If he said he was going to pay me, he was
14 going to pay me. I do a lot of things on a
15 handshake.
16 **Q. And I didn't say -- accurately.**
17 A. Yeah.
18 **Q. Was there a written agreement on that?**
19 A. No.
20 **Q. Help me on understanding this. What**
21 **does payment on the Young case have anything to do**
22 **with your representation of Dickenson in this**
23 **case -- I mean of the Feldmans.**
24 A. No. That's a good question. There was
25 a lot of money going out, and in getting ready for

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1 **pay you for your work on the Young case?**
2 A. What he told me was, oh, I'll pay you,
3 but I never got it. We talked about it two or
4 three times. In fact, I lowered the price.
5 What I recall is saying to him this was
6 a \$5,000 case, which is what I charge for DUIs, and
7 I said I'll charge -- I think the first time I told
8 him I'll charge 3,000. He didn't have the money.
9 And then I later said I'll charge you \$2,000, and
10 he didn't have the money.
11 **Q. Let's consider the summer of 2014:**
12 **May, June, July, August.**
13 A. Fine.
14 **Q. Did you have any conversations with**
15 **Mr. Feldman, or Ms. Feldman for that matter, about**
16 **the value of their claim against Ms. Dickenson?**
17 A. I don't recall.
18 **Q. There was a \$25,000 offer of**
19 **settlement.**
20 A. Right.
21 **Q. Did you have any discussions -- you**
22 **told us about the mediation.**
23 A. Right.
24 **Q. Did you have any discussions with**
25 **either of the Feldmans after the mediation prior to**

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1 trial there was going to be a great money going
2 out, and this was a case that I felt that we
3 probably would not win because I think Julian Allen
4 knew pretty much what was going on with Bob, though
5 he and I never discussed any of this, but I wanted
6 to make sure I had my money. It's as easy as that.
7 And Bob had indicated to me with his
8 actions regarding the case of Miss Karma that he
9 was not willing to pay, which greatly surprised me.
10 **Q. Was it willing or able?**
11 A. Bob had received a settlement eight
12 months earlier or ten months earlier of nearly
13 \$50,000, and I had worked very hard to get him that
14 money, and I assumed, the way he talked about how
15 he would pay me, that he was -- he had the money.
16 I guarantee you this. If he had said
17 I'm not going to pay you or I'm going to short you
18 if you win or lose, I wouldn't have done it.
19 **Q. Wouldn't have done what?**
20 A. The case.
21 **Q. The Dickenson case?**
22 A. No, no, no, no, no. The Karma Young
23 case.
24 **Q. And did Mr. Coggin ever tell --**
25 **Mr. Feldman ever tell you that he was not going to**

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1 **your moving to be relieved as counsel about the**
2 **value -- the merits of their claim and the value of**
3 **their claim?**
4 A. I told Bob any number of times that he
5 had greatly compromised his case by his insistence
6 on playing golf. I told him that probably a half
7 dozen times.
8 **Q. You made some requests to Mr. Feldman**
9 **to assist in paying cost during the summer of 2014?**
10 A. I don't think I ever made to assist in
11 paying cost. I asked him to pay the cost, yes.
12 **Q. Okay. What did Mr. Feldman tell you?**
13 **Or what was his response?**
14 A. I wrote him a number of letters which
15 weren't answered. When I say a number of letters,
16 two or three, which weren't answered, and I got a
17 call from him, oh, I don't know when, at the end of
18 the summer, and we had discussed it at that time,
19 and I don't remember what he told me. I think he
20 told me I'll pay you out of the settlement.
21 **Q. Did you have any -- thank you for that.**
22 **Did you have any conversation about the \$25,000**
23 **offer and why that was good, bad, or otherwise?**
24 A. I don't believe we ever discussed it.
25 That -- as far as I was concerned, that was over.

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1 That was -- that ship had sailed.
2 MR. PENDARVIS: This is going to be
3 ten.
4 (EXH. 10, Letter from Gary Coggin to
5 Robert Feldman dated September 15, 2014, was marked
6 for identification.)
7 (Off-the-record conference.)
8 BY MR. PENDARVIS:
9 Q. Mr. Coggin, I've passed to you a letter
10 dated September 15, 2012.
11 A. Uh-huh.
12 Q. It appears to be a letter from you to
13 Mr. Feldman --
14 A. Yeah.
15 Q. -- outlining the merits of the claim --
16 A. Yeah.
17 Q. -- and the cost and the prospect for
18 trial. First question: Is this your letter to
19 Mr. Coggin?
20 A. Yes, it is.
21 Q. To Mr. Feldman. Excuse me.
22 A. Yeah.
23 Q. The first sentence talks about
24 disagreements over the past year.
25 A. Uh-huh.

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1 That's exactly what I was talking about.
2 Q. What was the amount of the medicals
3 that Mr. Feldman had incurred as a result of the
4 collision with Dickenson?
5 A. I have no idea. Have no idea.
6 Q. It's in your communications in the
7 original demands?
8 A. If you have something that says it --
9 Q. Well, they're in front of you --
10 A. -- let me look at it and see.
11 Q. -- but let's take -- let's take a look.
12 MR. BOGDAN: You guys are talking over
13 each other.
14 MR. PENDARVIS: I'm sorry.
15 MR. BOGDAN: Let's help Trisha out
16 here.
17 THE WITNESS: I apologize.
18 BY MR. PENDARVIS:
19 Q. You testified about the letter to
20 Mr. Finger, that it was accurate as far as you knew
21 based on the -- what information you had in May of
22 2014. Do you recall that testimony?
23 A. I don't -- I don't know what you're
24 talking about.
25 Q. This is Exhibit 9.

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1 Q. Can you elaborate on what that --
2 A. Yeah. It -- it involved Bob playing
3 golf.
4 Q. And what did you understand Bob's --
5 your next sentence talks about, you know, your
6 concern about not being able to meet his
7 expectations.
8 A. Right.
9 Q. What did you understand were
10 Mr. Feldman's expectations as of September 2014?
11 A. He wanted to exhaust the amount of
12 underinsurance.
13 Q. Okay.
14 A. And apparently I did talk about the
15 \$25,000. I see that in here. I stand corrected.
16 Q. Saves the question.
17 A. Yeah.
18 Q. Thank you.
19 And do I understand from the first
20 sentence in the second full paragraph: The
21 circumstances surrounding your injuries.
22 And does that mean the golf issue, that
23 he was not as injured as you thought he initially
24 was?
25 A. That's -- that's absolutely right.

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1 A. Okay.
2 Q. I'm trying to get an understanding of
3 the amount of medicals that you understood
4 Mr. Feldman had incurred that were in context for
5 your conversations in September of 2014.
6 A. I think I can answer that. Typically
7 -- for example, I'm going to trial at the end of
8 this month, and the attorney on the other side and
9 I have talked about medicals. I don't typically
10 get those together until the eve of trial for the
11 reason that I don't want to miss anything, so I
12 don't know if there was any medicals that we could
13 talk about. If there was, I'd love to see it.
14 because I just don't remember.
15 Q. Well, you're stating to Mr. Finger on
16 the top of the second page that the amount of the
17 -- the amount of -- the above amount is 150 to
18 180,000.
19 A. Only an estimate. I have no idea what
20 I was basing that on.
21 Q. Okay. But you wouldn't have written
22 something that was not true, would you?
23 A. I would have estimated something, and
24 that could be \$50,000 high. I don't know.
25 Q. Okay. So let's just knock \$50,000 off

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1 both numbers, so between 100 and \$130,000 in
2 medicals.
3 A. I think that the retail numbers would
4 probably been somewhere around there, yeah.
5 Q. Okay. So 100 to \$130,000 in medicals,
6 no dispute on liability whatsoever, and your
7 testimony today is that your recommendation to
8 accept \$25,000 was a fair value for Mr. Feldman's
9 claim?
10 A. Yes, it was.
11 Q. You're saying he wouldn't even get his
12 medicals back?
13 A. Yes. He would not.
14 Q. Okay.
15 A. Based on the information I have. And
16 again, Bob compromised his case.
17 Q. Are you going to tell this jury that
18 Bob Feldman's playing golf after the collision
19 would mean that the at-fault party wasn't
20 responsible for at least paying back the medical
21 expenses he incurred? Yes or no and then you can
22 explain.
23 A. This was a preexisting condition.
24 Q. No, sir. The question is -- yes or
25 no -- are you going to tell this jury that Bob

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1 Q. No, sir. I'm talking about actual
2 medical expenses that Mr. Feldman incurred that you
3 stated in the letter that we've adjusted down by
4 \$50,000 were between a hundred and \$130,000 in
5 medicals, and my -- I want to make sure I'm clear
6 on this. You're going to go in front of the jury
7 and tell the jury that Mr. Feldman would not have
8 been able to recover out-of-pocket medical expenses
9 because of his conduct after the fact?
10 A. Yeah.
11 MR. BOGDAN: Object to the form.
12 THE WITNESS: That's exactly right.
13 Yes. Emphatically.
14 And again, Mr. Pendarvis, I don't know
15 -- and again, I've stated that to you. I don't
16 know what his medicals were. That was just an
17 estimate.
18 BY MR. PENDARVIS:
19 Q. Did Julian Allen ever say anything
20 about to you Mr. Golf -- Mr. Feldman's golf
21 situation?
22 A. Julian Allen, what I recall -- and we
23 didn't -- I think a lot of that would be
24 privileged. Julian Allen did ask Mr. Feldman at
25 his deposition if he had ever played golf since the

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1 Feldman would not be able to recover the at -- the
2 medical expenses he incurred by Ms. Dickenson's
3 collision? Yes or no.
4 A. He would not, based on his behaviors.
5 Q. After the fact. Let me rephrase the
6 question. I want to make sure I got this.
7 A. Uh-huh.
8 Q. Your testimony is that Mr. Feldman's
9 conduct after the accident is going to defeat his
10 claim to recover medicals that were incurred as a
11 result of Ms. Dickenson's clear liability?
12 A. His conduct --
13 MR. BOGDAN: Object to the form.
14 THE WITNESS: His conduct after the
15 fact, after the accident, were such that it showed
16 that he didn't have any problems.
17 BY MR. PENDARVIS:
18 Q. We're not talking about pain and
19 suffering.
20 A. I'm talking --
21 Q. I'm not talking about pain and
22 suffering. I want to talk about medical expenses
23 that were incurred as a result of the collision.
24 A. So you're talking about medical
25 expenses that are obviously puffed up for a trial?

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1 accident. Mr. Feldman replied in the affirmative,
2 and Julian Allen apparently, if I remember
3 correctly, asked some follow-up questions, and
4 Bob's reasoning was the same thing he'd always told
5 me, was that he just liked to ride around in the
6 cart to be with his friends.
7 Q. Thank you for your summary of the
8 deposition testimony.
9 A. I don't know if that's a summary of
10 not. That's a summary of my recollection.
11 Q. That's fair.
12 A. You're welcome.
13 Q. And here's my question.
14 A. Yeah.
15 Q. Outside of the deposition --
16 A. Uh-huh.
17 Q. -- did you have any conversations with
18 Julian Allen about Mr. Feldman's golf?
19 A. Not that I can recall. If you have
20 something I could look at, I'd be happy to look at
21 it and comment on it.
22 Q. My question was about conversations,
23 not really letters, e-mails, or anything like that.
24 Did you have any conversations with --
25 A. Not that I recall.

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1 **Q. Did Mr. Allen ever communicate other --**
2 **in a conversation statements to the effect that**
3 **Mr. Feldman's golf activities were a reason they**
4 **weren't offering any money?**
5 A. I don't recall him ever saying anything
6 like that. But I want to put this caveat.
7 Mr. Allen is a very skilled attorney, and
8 Mr. Allen, I believe, probably knew all about this.
9 **Q. Have you had any conversations with**
10 **Mr. Allen about the merits of this claim --**
11 A. No.
12 **Q. -- this legal malpractice case?**
13 A. No.
14 **Q. Do you know if your counsel has reached**
15 **out to Mr. Allen?**
16 A. I -- I don't know.
17 MR. BOGDAN: I think that's work
18 product.
19 THE WITNESS: I'm not sure.
20 MR. PENDARVIS: The rules only allow
21 you -- are you instructing the witness not to
22 answer, or are you just objecting? 'Cause I think
23 the rules only deal with communication,
24 attorney-client privilege, not work product. I'm
25 just trying to get an understanding of where we

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1 **caused by the accident, do you believe he had a**
2 **claim for lost wages for that limited time period?**
3 A. I would believe he did, yes.
4 **Q. Okay.**
5 A. Uh-huh.
6 **Q. Would the fact that Mr. Feldman may**
7 **have played golf months, years after that, defeat**
8 **his claim for lost wages?**
9 A. That I don't know, but the fact of the
10 matter is I don't know if he worked.
11 **Q. Okay.**
12 A. He would never answer that question to
13 me.
14 **Q. For the time period after Mr. -- or**
15 **after the accident and while Mr. Feldman was not**
16 **actively getting medical treatments, did you reach**
17 **out to any of the physicians or vocation**
18 **rehabilitations experts to find out if there were**
19 **-- if Mr. Feldman's ability to work was limited or**
20 **compromised by the injuries caused by the accident?**
21 A. Regarding work, I don't believe I ever
22 asked that question. There were letters that I
23 wrote to his physicians, but it wasn't -- didn't
24 involve work.
25 **Q. Typically requesting copies of medical**

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1 are.
2 MR. BOGDAN: What's the question again?
3 BY MR. PENDARVIS:
4 **Q. The question is: Do you know if your**
5 **lawyer has reached out to Mr. Julian Allen about**
6 **the -- his testimony in this case?**
7 A. The answer is I don't know.
8 **Q. Okay. I have not seen any written**
9 **communications from Mr. Allen about the settlement.**
10 **Are there -- I mean, were you aware of any that**
11 **somehow didn't get in the file or anything of that**
12 **nature?**
13 A. I'm not aware of anything. And again,
14 if there is something, I'd like to look at it.
15 **Q. Okay. I --**
16 A. Okay.
17 **Q. I'm telling you I haven't seen it**
18 **either. I just wanted to see if there was**
19 **something.**
20 I'm going to break this -- this is a
21 question about lost wages.
22 A. Okay.
23 **Q. And I'm going to break this down to**
24 **several segments of time. During the time**
25 **Mr. Feldman was getting treatments for injuries**

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1 **records?**
2 A. Medical records. I believe I sent a
3 letter to Shissias and to Dr. Reuben regarding his
4 health and so forth.
5 **Q. And a percentage of impairment?**
6 A. Yeah. Uh-huh.
7 **Q. Okay.**
8 A. That's right.
9 **Q. So if a person was determined to be 11**
10 **percent impaired, that would tend to support a**
11 **claim for lost wages, wouldn't it?**
12 A. If he worked.
13 **Q. Right. And you've made those arguments**
14 **for other clients where percentages of impairment**
15 **impaired their ability to work, correct?**
16 A. If they have a job. If they don't have
17 a job, they don't pay workers' comp or anything
18 else like that. You know that.
19 **Q. So turning back to Exhibit 10, if I'm**
20 **understanding --**
21 A. Yeah.
22 **Q. -- your testimony -- I want to try to**
23 **summarize here.**
24 A. Uh-huh.
25 **Q. Looking at the -- one, two, three --**

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1 third full paragraph, you -- last sentence: In the
2 interim, I advise you to settle the matter at hand
3 for the 25,000 that's been offered.
4 A. That's correct.
5 Q. Did you have any conversations with
6 Mr. Feldman about why you were making this
7 recommendation?
8 A. Bob and I talked on the telephone. As
9 I said, I sent a couple of these letters to him
10 regarding costs and so forth like that. My
11 recollection is he called me sometime later in the
12 summer. At that time I told him that he had
13 severely compromised his case with his activities
14 and I felt that the -- the case was really not a
15 very good case.
16 Q. You'd been practicing law about 20 --
17 almost 25 years --
18 A. Yeah.
19 Q. -- as of this?
20 A. That's about right. Yeah.
21 Q. And it's your testimony that Mr. -- if
22 you'd gone to trial that you didn't -- your expert
23 opinion was that the case was not worth more than
24 \$25,000?
25 A. Based on what I knew about Bob, yes.

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1 A. I don't recall that.
2 Q. This is --
3 A. So show me -- pass me the certificate
4 of service.
5 Q. I'm showing to you a copy of the
6 certificate of service. And do you recall filing a
7 motion to withdraw?
8 A. I don't recall.
9 Q. Okay.
10 A. That doesn't mean I didn't do it, but I
11 don't recall. And if you have something that will
12 help me, please give it to me.
13 Q. This image I'm going to show you is
14 Bates No. 00048, and it's a -- it appears to be a
15 clocked copy of a motion to -- for withdrawal of
16 appearance and stay of proceedings, and the movant
17 was you.
18 I can make that a little larger if
19 that'll help.
20 A. Yeah. Go ahead. I can't hardly see
21 it.
22 Q. I'm sorry.
23 A. Is that the end of it, or can I move it
24 down?
25 Q. Yes, sir. We can --

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1 Q. After this September 15 letter we
2 marked as Exhibit 10, did you have any
3 conversations with Mr. Feldman about having the
4 need to maybe find substitute counsel instead of
5 filing a motion to withdraw as counsel?
6 A. I don't recall. But I have a feeling
7 that I did. And if you have a letter, I'd like --
8 I'd like to look at it before I answer any further
9 than that.
10 Q. You believe you've had conversations
11 with Mr. Feldman about --
12 A. I think I may have written him a
13 letter.
14 Q. Okay. Check something real quick.
15 A. Sure.
16 Q. I don't think I've seen the -- I don't
17 think I've seen the letter.
18 I'm going to represent you the first
19 time that the substitution of counsel came into
20 play was after you had filed your motion to
21 withdraw.
22 Well, I'll tell you what. I'll just
23 use this for now. I'm not going to mark this as an
24 exhibit. We've got a copy of it, but you filed a
25 motion to be -- to withdraw as counsel, correct?

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1 A. Oh.
2 Q. Oh, wait a minute. Let me see if I can
3 get it to scroll down better.
4 A. Okay. Okay. Is that it? Is there a
5 signature page?
6 Q. I think there is, and I'll show you
7 that.
8 A. Okay. That's correct.
9 What was the date? I'm -- I apologize.
10 Q. It was clocked or filed with the court
11 on September 16, 2014.
12 A. Okay.
13 Q. And did you have any -- and where I'm
14 going with this is did you have any conversations
15 with Mr. Feldman before this motion was filed on
16 the preference to substitute counsel rather than
17 you moving to be relieved as counsel?
18 A. I just don't remember. I think it
19 would be my habit to talk to him because ordinarily
20 I talk to people. I just don't remember.
21 Q. Did you help the Feldmans find other
22 counsel?
23 A. No. I don't believe I did that, no.
24 Q. Why not?
25 A. He didn't ask me. If he had asked me,

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1 I would have given him some recommendations.
2 MR. BOGDAN: Do you have a signature
3 page of that, Tom?
4 MR. PENDARVIS: Sure.
5 MR. BOGDAN: Thanks.
6 MR. PENDARVIS: It goes over to Bates
7 page 00049, and I think the -- out of order, but
8 0030 was the certificate of service, the same date
9 as the signed.
10 BY MR. PENDARVIS:
11 Q. Okay. The law firm of Bauer & Metro
12 took over the representation --
13 A. That's correct.
14 Q. -- of the Feldmans?
15 A. Uh-huh.
16 Q. Okay. I'm going to go back a little
17 bit in just a second, back in time.
18 MR. BOGDAN: Did you mark this?
19 MR. PENDARVIS: No.
20 (EXH. 11, Letter from Gary Coggin to
21 Julian Allen dated May 21, 2014, was marked for
22 identification.)
23 BY MR. PENDARVIS:
24 Q. Mr. Coggin, I'm going -- I'm going to
25 rewind a little bit.

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1 three, four -- fifth paragraph beginning with the
2 word following.
3 A. Uh-huh.
4 Q. You're showing total billings at
5 47,450?
6 A. Yeah. Uh-huh.
7 Q. And you're also looking at foreseeable
8 future for injections that Mr. Feldman's going to
9 need?
10 A. Right.
11 Q. So you had done some calculations on
12 the amount of medicals?
13 A. I just told you I didn't remember.
14 Q. I know. And I'm just saying -- well,
15 you also said sometimes you don't do them until
16 right before trial, but my point is you had done
17 some for Mr. Feldman's case during the time you
18 were representing him, correct?
19 A. I would say so. I would agree.
20 Q. Okay.
21 A. This also shows that the billings were
22 relatively small compared to what they were before,
23 47,450.
24 Q. Okay. Did you develop any values for
25 the future medicals that Mr. Feldman was going to

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1 A. That's fine.
2 Q. We've been up to the point of -- in
3 September. I'm going to go back a little bit, into
4 May. I'm passing you -- appears to be a letter
5 from you to Julian Allen from May 21, 2014. Going
6 to ask if -- if that's a letter you sent to
7 Mr. Allen?
8 A. Yes, it is.
9 Q. Okay. What's the purpose of this
10 letter?
11 A. I would assume I was still working on
12 the case and trying to get a settlement.
13 Q. It appears, if you're looking at the
14 third paragraph, that there -- you provided all of
15 Mr. Feldman's medical records that you had in your
16 possession --
17 A. Uh-huh.
18 Q. -- and you divided them basically into
19 preaccident medical bills and postaccident medical
20 bills.
21 A. That's --
22 Q. Is that a fair summary?
23 A. That's correct.
24 Q. And looking at the -- you're showing
25 existing medicals, and this is the -- one, two,

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1 need?
2 A. You're going to have to explain that to
3 me. I don't know what you mean.
4 Q. Your letter says that, according --
5 Mr. Feldman has had 16 injections, one every two
6 and a half months --
7 A. Yeah.
8 Q. -- and the injections will continue at
9 this rate for the foreseeable future.
10 A. I -- no. I did -- I'm going to back up
11 on this. There was a letter to Dr. Shissias or
12 Reuben in which I talked about some kind of future
13 medicals or something like that, and that's all I
14 can tell you. I do remember there was something
15 there.
16 Q. Okay.
17 A. If you have it, I'd like to look at
18 that.
19 Q. And you made statements in the -- to
20 the Allstate carrier about future medicals for
21 Mr. Feldman?
22 A. If there's -- in the letters, I would
23 say yes. I don't know if I did or not. I'm sure I
24 did.
25 Q. You're welcome to look. I'm going to

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1 represent to you that you did.
2 A. Yeah, yeah.
3 Q. If you want to see them, you can.
4 A. Yeah. I'd like to see them, yeah.
5 Q. They're right in front of you. They're
6 in one of the earlier exhibits, those first two or
7 three letters that we looked at.
8 A. You're going to have to help me here.
9 What are we looking for?
10 Q. I'm looking. I'm --
11 A. I had a -- I had a senior moment there.
12 Q. Well, in one of your first letters,
13 Exhibit 2, July 5, 2011 --
14 A. Uh-huh.
15 Q. -- the second full paragraph and,
16 really, the third full paragraph talk about future
17 medicals.
18 A. Okay.
19 Q. And question I've got is, that that was
20 an expense that was going to be available at trial
21 for the case.
22 A. Uh-huh.
23 Q. Correct?
24 A. Uh-huh.
25 Q. Thank you. I just feel -- I wanted to

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1 Q. No, no, no.
2 A. I'd have to see it. I remember some
3 kind of letter like that. I'm not going to agree
4 to the specifics until I look at it.
5 Q. Okay.
6 A. I don't remember what I said.
7 Q. That's fine. The letter -- I mean,
8 it's just not worth really getting into.
9 Let's just do this.
10 (EXH. 12, Letter from Carrie M. Murphy
11 to Gary Patrick Coggin dated October 7, 2014, was
12 marked for identification.)
13 BY MR. PENDARVIS:
14 Q. Mr. Coggin, I'm going to pass you a
15 document marked Exhibit 12 --
16 A. Sure.
17 Q. -- to your deposition. This appears to
18 be a document from the Bauer & Metro law firm faxed
19 and e-mailed to you on October 7, 2014. I'm going
20 to let you read that, and I have a few questions
21 for you.
22 A. Uh-huh. I read it.
23 Q. Tell me about this telephone
24 conversation on October 6 referenced in the first
25 sentence between you and Mr. Bauer.

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1 get that testimony.
2 A. Yes, yes.
3 Q. Fast-forward now back again to the
4 point in time when -- after Bauer & Metro had taken
5 over the representation. Could you describe just
6 generally what happened in that exchange?
7 A. There was a -- they asked for the --
8 all the records. I put them in a box. They sent a
9 girl over to get them, and I had to carry them.
10 They were so heavy I had to carry them down to the
11 car for her.
12 Q. And the records you're referring to
13 would have been the entire file for the Feldmans?
14 A. I believe so, yes.
15 Q. And you were -- and we've seen
16 communications or -- communication's been produced
17 where you were basically telling the lawyers at
18 Bauer & Metro that -- to protect your expenses that
19 you'd paid and your interest in the \$25,000
20 settlement offer?
21 A. Uh-huh.
22 Q. Correct?
23 A. Yeah.
24 Q. You've got to say yes.
25 A. It's got to be --

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1 A. I don't remember.
2 Q. Okay. This letter states that --
3 apparently it's about the affidavit of service
4 conversation.
5 A. I would -- again, I don't remember.
6 Q. When you received this letter -- second
7 sentence says: We have searched the file you've
8 provided --
9 A. Uh-huh.
10 Q. -- and cannot locate the affidavit of
11 service for the named defendant.
12 A. Right.
13 Q. I would appreciate it if you would
14 search your records and provide me a copy of the
15 affidavit or name the -- or the name of the process
16 server who served the pleadings on the defendant.
17 A. Okay.
18 Q. And you got this letter, correct?
19 A. Yes.
20 Q. What did you do in response?
21 A. I don't know if I did anything. I
22 didn't consider this to be something that I had to
23 answer. They said they couldn't find the affidavit
24 of service. My position was that I had included
25 the affidavit of service in all my papers. I

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1 didn't hold anything back, and I think that's all
2 that I can tell you about that.
3 **Q. Is that what you said to Mr. Bauer when**
4 **he called you on October 6?**
5 A. I don't know. I told you already I
6 didn't know what we talked about. We could have
7 talked about anything. I've known Sam for a long
8 time.
9 **Q. What do you believe your duties are to**
10 **a client when you terminate the representation of a**
11 **client?**
12 MR. BOGDAN: Object to the form.
13 MR. PENDARVIS: What's the basis of the
14 objection?
15 MR. BOGDAN: It calls for a legal
16 conclusion.
17 MR. PENDARVIS: Okay. I'm going to ask
18 him. He's a lawyer.
19 BY MR. PENDARVIS:
20 **Q. You're a lawyer, right?**
21 A. That doesn't deserve an answer, does
22 it?
23 **Q. I mean, you're a lawyer, and you know**
24 **that there are rule --**
25 A. Thomas, you're trying to be

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1 **Q. I thought -- my understanding was your**
2 **testimony was I probably didn't do anything when I**
3 **got this letter that's been marked as Exhibit --**
4 A. In response to Bauer & Metro. That's
5 all I meant.
6 **Q. Okay.**
7 A. I looked very hard for that.
8 **Q. Did you respond -- do you know if you**
9 **communicated back to Bauer -- Sam Bauer or anyone**
10 **at Bauer & Metro about your efforts to look?**
11 A. I don't know. I don't know if that's
12 any of their business. I don't know, and that's my
13 answer.
14 (Off-the-record conference.)
15 BY MR. PENDARVIS:
16 **Q. I'm going to represent to you that**
17 **ultimately there was an order submitted**
18 **substituting counsel, that your motion to be**
19 **relieved never was -- did you ever appear on the**
20 **motion to be relieved as counsel?**
21 A. I don't believe it ever came up.
22 **Q. Yeah. It was a substitution of counsel**
23 **that was --**
24 A. Yeah.
25 **Q. -- handled, so the order relieving you**

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1 provocative. I'm not going to answer that.
2 **Q. No, I'm not.**
3 A. Yes, you are.
4 **Q. You're a lawyer, and you know there are**
5 **rules governing your duties to a client when you're**
6 **terminating representation.**
7 A. I do not know what the ethical -- as I
8 sit here, no, I don't know enough about the ethical
9 conundrums regarding transferring of documents. I
10 did everything correctly and up front. That's all
11 I can tell you.
12 **Q. You would agree, as the lawyer who'd**
13 **handled a matter for a client, including**
14 **Mr. Feldman and Ms. Feldman, that you've got an**
15 **obligation to make sure the transition of the file**
16 **to new counsel goes as smoothly as possible so as**
17 **not to interfere with the client's claims, correct?**
18 A. Absolutely.
19 **Q. And if that meant looking, going an**
20 **extra step to look for an affidavit of service,**
21 **that's not asking too much, is it?**
22 A. I probably looked through every file
23 that I had in my office, so, yes, we looked very
24 hard for that. I thought you were asking what I
25 did with Bauer & Metro.

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1 **as counsel for Mr. and Ms. Feldman was done by**
2 **substitution and a consent. Okay.**
3 (EXH. 13, Letter from Julian K. Allen
4 to Honorable Jerri Ann Roseneau dated October 8,
5 2014; Liberty Mutual Insurance Company's Notice and
6 Motion to Dismiss; and Certificate of Service, was
7 marked for identification.)
8 BY MR. PENDARVIS:
9 **Q. This is 13.**
10 A. Thank you.
11 **Q. Mr. Coggin, this -- a document -- a**
12 **cover letter and a -- and a motion that's been**
13 **passed to you marked Exhibit 13 --**
14 A. Uh-huh.
15 **Q. This appears to be a letter from Julian**
16 **Allen to the clerk of court filing defendant's --**
17 **Liberty Mutual Insurance Company's notice and**
18 **motion to dismiss.**
19 A. Okay.
20 **Q. And you were copied on that, correct?**
21 A. Yes.
22 **Q. You were of record at that point. You**
23 **were --**
24 A. Oh, no, no. Yes.
25 **Q. You were still counsel of record,**

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1 right?
2 A. Right.
3 Q. So Bauer & Metro and their law firm
4 were -- before this motion got filed, they were --
5 they were looking for the affidavit, right?
6 A. They indicated they had gone through
7 the file, yes.
8 Q. Okay. Did you have any conversations
9 with anyone about this motion when you received it?
10 A. I don't believe did.
11 Q. Did Mr. Metro or Mr. Bauer call you to
12 discuss this motion when they received it?
13 A. I don't remember. If you have
14 something, it might trigger my memory. I'm not
15 trying -- I'm not being deliberately obtuse.
16 MR. PENDARVIS: Let's take a pause
17 while we're looking for this document.
18 (A recess transpired.)
19 (EXH. 14, Letter from Samuel C. Bauer
20 to Gary Patrick Coggin dated October 10, 2014, was
21 marked for identification.)
22 BY MR. PENDARVIS:
23 Q. Mr. Coggin, I'm passing to you a
24 document marked as Exhibit 14 that appears to be
25 another letter to you from the Bauer & Metro firm,

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1 A. I called them immediately. In fact, we
2 must have had 20 conversations. And I called them
3 immediately, and as I said, I'd had a number of
4 conversations with her when this was being served,
5 and the answer that I got was -- the first time I
6 called them -- was that one-time service, none of
7 the -- none of the documents are kept. We only
8 keep the documents -- they only keep records for
9 people that work with us multiple times. Other
10 times, everything else is destroyed or thrown away,
11 and that was the answer.
12 Now, I talked to them several times
13 after that. I called them up and confronted them
14 with the telephone calls I had made there, and they
15 said, well -- at that point the answer was that
16 they had had three different computer systems in
17 since the period of time. They're obviously
18 worried about a malpractice suit themselves.
19 And the last time I -- I called many,
20 many times, and another time I called, that they
21 said they looked and they couldn't find anything,
22 so that was the gist of the excuses every time.
23 And then this gal, Fran, stopped taking
24 my calls, so there was only so much you could do.
25 Q. Why were you doing all the -- why did

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1 and this one's from Sam Bauer to you --
2 A. Uh-huh.
3 Q. -- dated October 10, 2014. Did you
4 receive this letter?
5 A. I don't remember, but I think I did.
6 My address is on there. Everything is correct.
7 Q. It appears there was a -- I mean, this
8 references a conversation with you and Mr. Bauer.
9 You were going to look for the affidavit?
10 A. Uh-huh.
11 Q. That's yes?
12 A. Yes. Excuse me.
13 Q. What did you do in response to this
14 letter?
15 A. There was an ongoing search for the
16 affidavit of service. All right? As for the --
17 the check, that -- my recollection of that was
18 clear. I paid cash for that. Oh, no. Not the
19 process -- yeah. The process server. We're
20 talking about Zellner-Wood.
21 You can provide an affidavit it was
22 personally served, and I did provide an affidavit.
23 Q. Well, let me ask you this. Why didn't
24 you just call back the process server in New York
25 and just get another affidavit?

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1 you take all these actions to try to recover the
2 affidavit of service?
3 A. Why?
4 Q. Yes. Why?
5 A. Because I had done it. They had served
6 -- I had served.
7 Q. Well --
8 A. I had an obligation.
9 Q. What was the purpose of the affidavit
10 of service? I mean, why did you need to get it?
11 A. Well, the affidavit of service had to
12 be filed. I had to protect my client. I'm not
13 sure if that's what you're asking.
14 Q. Okay. I think we're going to look at
15 an affidavit that you prepared. I'm following up
16 on some conversation --
17 A. We're talking about different things?
18 Q. Yeah.
19 A. Yeah.
20 Q. The last statement this -- in this
21 request from Mr. Bauer was could you provide an
22 affidavit, and you did provide one at some point,
23 correct?
24 A. Yeah.
25 Q. Okay. Now, in between the affidavit

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1 you prepared did Mr. Bauer or his firm serve you
2 with a subpoena for production of the file or the
3 affidavit?
4 A. I think they did serve me. I don't
5 know if it was for the production of the file or
6 not. Maybe it was. I think I recall that.
7 (EXH. 15, Letter from Gary Coggin to
8 Jerri Roseneau dated December 6, 2014; Objection to
9 Plaintiffs' Subpoena; and Certificate of Service,
10 was marked for identification.)
11 BY MR. PENDARVIS:
12 Q. Mr. Coggin, I'm going to skip a step or
13 two --
14 A. Yeah.
15 Q. -- and I'm going to pass you as -- a
16 document marked as Exhibit 15. It appears to be a
17 letter from you to the clerk of court filing an
18 objection to a subpoena, and I'm going to ask if
19 that's a letter -- is that your signature and an
20 objection that you filed?
21 A. Yeah. Uh-huh.
22 Q. And so, based on the statement in your
23 objection, the subpoena that was served sought,
24 quote, copies of any and all records evidencing
25 service of process of plaintiff's summons and

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1 A. Yes. I think the -- this was given to
2 Julian Allen, and I probably sent a copy of it to
3 Bauer & Metro, and I don't know. Unless you have a
4 -- something else. Maybe you have some letters or
5 something like that.
6 Q. I'm not sure I've seen a clocked copy
7 or a cover letter. I'm just try -- that's what I'm
8 trying to find out.
9 A. I think I gave it to Mr. Allen, and I
10 probably gave a copy to Sam Bauer.
11 Q. Do you know if this was submitted to
12 Judge Kinard when he heard the hearing -- motion?
13 A. It's in the documents. And again, I --
14 I don't know. You're -- I'd have to look at it and
15 see. I -- I don't recall one way or the other.
16 MR. PENDARVIS: Okay. Off the record
17 for just a moment.
18 (Off-the-record conference.)
19 (EXH. 17, Answer to Defendant's
20 12(b)(4) and 12(b)(5) Motion to Dismiss, was marked
21 for identification.)
22 (EXH. 18, Answer to Defendant's
23 12(b)(4) and 12(b)(5) Motion to Dismiss, was marked
24 for identification.)
25 BY MR. PENDARVIS:

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1 complaint in the above-captioned matter upon
2 Defendant Sarah Dickenson, correct?
3 A. That's correct.
4 Q. And your objection was that you
5 provided the file?
6 A. A complete file had been provided.
7 Right.
8 (EXH. 16, Affidavit of Gary Coggin, was
9 marked for identification.)
10 BY MR. PENDARVIS:
11 Q. I'm going to pass you a document marked
12 as Exhibit 16. It appears to be an affidavit that
13 you signed a few days later dated December 8 and,
14 first off, ask if this is an affidavit you signed?
15 A. Yeah. Yes, it is.
16 Q. And did anyone assist you with the
17 content of this affidavit?
18 A. No. I did it myself. I'll take part
19 of the blame for it.
20 Q. Did you have any conversations with
21 Mr. Bauer or Mr. Metro or anyone at that law firm
22 while you were developing this affidavit?
23 A. I don't believe so, no.
24 Q. Okay. To your knowledge was this ever
25 submitted to a court?

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1 Q. Mr. Coggin, I'm going to pass to you
2 two documents. Both of them are styled Answer of
3 Defendant's 12(b)(4) and 12(b)(5) Motion to
4 Dismiss. One, Exhibit 17, has not been signed, and
5 one, Exhibit 18, has been signed. Take a look at
6 those for a moment and then I've got a couple of
7 questions for you.
8 A. Okay.
9 Q. Did you prepare these documents?
10 A. I'm sure I did.
11 Q. Why did you prepare them?
12 A. I don't know if it was in response to
13 Julian Allen's motion to dismiss. Depends on the
14 dates. And then there was a second hearing, and
15 you provided us those documents under -- you
16 provided us those documents under the
17 interrogatories or production yesterday, so there
18 were two separate hearings.
19 Q. Right.
20 A. One in front of Maitley Murphy, a young
21 -- or young judge, and then one in front of an old
22 judge, Judge Kinard, so I -- I think they were
23 probably prepared for one of those. That's all I
24 can think of.
25 Q. By this time you'd been relieved as

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1 **counsel for Mr. Feldman?**
2 A. I don't know what the -- the dates
3 were, so I can't tell you.
4 **Q. Do you believe when you prepared these**
5 **responses to the plaintiff's motion -- excuse me --**
6 **the defendant's motion that you were counsel of**
7 **record -- counsel for Mr. or Ms. Feldman?**
8 A. There's two ways I could answer that
9 question. The first one is that I don't know what
10 the date is that we have the consents and so forth
11 like that. If you can provide that for me, I can
12 answer it a lot better.
13 The second one is that the -- the clerk
14 of court or in -- become mixed up from time to time
15 and they'll list an attorney as the counsel of
16 record, and you better show up even if you're not,
17 so I can't tell you when it was or whatever until I
18 know what the dates were.
19 **Q. After letting you look at this I'm**
20 **going to represent to you --**
21 A. Yeah.
22 **Q. -- that October 17 Mr. Bauer sent you a**
23 **consent order -- let's get it. You can read it --**
24 **for substitution of counsel.**
25 A. Uh-huh. Do you have the consent order?

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1 January 6, 2015, was marked for identification.)
2 BY MR. PENDARVIS:
3 **Q. Mr. Coggin, we were able to obtain a**
4 **copy of the transcript of a hearing before Judge**
5 **Kinard in January of 2015. I'm going to pass a**
6 **copy of it to you marked as Exhibit 19. And,**
7 **candidly, we just got it recently. Did you have a**
8 **chance to look over this transcript before our**
9 **deposition today?**
10 A. Briefly, briefly.
11 **Q. There is a summary in the first page**
12 **about the circumstances about you and at an earlier**
13 **hearing.**
14 A. Right. Uh-huh.
15 **Q. Accurate, as far as you know?**
16 A. Do you want me to comment on it?
17 **Q. Sure.**
18 A. This is one of the things that I was
19 talking about where you're listed as the attorney
20 of counsel. I was the attorney of counsel listed.
21 **Q. Okay.**
22 A. That's why I showed up. Sam Bauer came
23 in, and Sam and I have known each other for years.
24 He sat down at the table with me. I asked him what
25 he was doing, and he said: I'm the attorney here.

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1 That's what I'm looking for.
2 **Q. I believe it's the next page. Here's**
3 **the cover page for the judge. Hold on. I got to**
4 **do it -- switch to the next page.**
5 A. The same thing is I still can't answer
6 it.
7 **Q. And here's --**
8 A. I'm sure you have it.
9 **Q. And here's the --**
10 A. Okay.
11 **Q. -- consent. Did you sign a consent**
12 **order?**
13 A. I don't know. I want to see it.
14 **Q. Do you believe you stayed on as counsel**
15 **for the Feldmans?**
16 A. What I -- I think that -- and you were
17 talking about the obligations that you have. I
18 think that to a certain extent, as the author of
19 the predicate incident over which this is involved,
20 I had a certain obligation to Bob Feldman to
21 protect him as much as I could, which is what I was
22 doing, so I don't know what the dates are or
23 anything else like that.
24 **Q. Fair enough.**
25 (EXH. 19, Transcript of Record dated

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1 And I said: Where are you on the list?
2 I said: I got to go by the list here.
3 We had a brief disagreement, which --
4 and I can't remember how it worked, to be honest
5 with you, what happened after that. And I think we
6 both -- I think we both answered, to be honest with
7 you.
8 **Q. I mean, we're kind of coming at it from**
9 **both sides of the same thing. You filed a motion**
10 **to be relieved.**
11 A. Uh-huh.
12 **Q. There's a substitution of counsel --**
13 A. Right.
14 **Q. -- that was in play, and apparently no**
15 **order had been signed at this point.**
16 A. I don't know. That -- I don't know if
17 the order was signed or not. All I know is that I
18 was on the roster, and if you're on the roster, you
19 better -- you know, sometimes it takes a while to
20 get these orders signed and so forth, and I didn't
21 know what the situation was, so I went to answer
22 it.
23 **Q. And if we take a look at page 4 of the**
24 **transcript, which is Norton, bunch of zeros, 4,**
25 **very bottom right-hand corner. Page 4 of the**

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1 transcript --
2 A. Yeah, yeah. Go ahead.
3 Q. -- and if you scroll down to line
4 number 17 --
5 A. Uh-huh.
6 Q. -- take a look at that, 17 through 20.
7 A. Yeah. That's exactly what I was
8 talking about.
9 Q. And then down below that, 21, 22, that
10 Mr. Coggin had been relieved as of November of
11 2014?
12 A. Uh-huh.
13 Q. Correct?
14 A. Yeah.
15 Q. And this is a hearing that's taking
16 place in January of '15.
17 A. No. This is a -- I think this is a
18 December hearing.
19 Q. It says on the front -- first page
20 January 6, 2015 --
21 A. Hang on.
22 Q. -- before Judge Kinard.
23 A. Hang on. But we're talking about Judge
24 Murphy here.
25 Q. Right, right. But I'm just saying that

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1 the arguments to page 9 --
2 A. Okay.
3 Q. -- of the transcript, in particular,
4 line 18, you told Judge Kinard that you were not
5 going to -- you don't -- didn't blame Bauer & Metro
6 about the affidavit not getting filed, correct?
7 A. You know, there's -- in this case,
8 Mr. Pendarvis, there's plenty of blame to go
9 around. Most of it rests on my doorstep, and I
10 fully admit that I failed to file this paper when I
11 got it; however, I will maintain today and tomorrow
12 and whenever that all the papers of the case went
13 over to Bauer & Metro. I don't know what happened.
14 There were three documents that did not
15 come back. One was the -- my -- one was my
16 contract with Mr. Feldman. They called me and
17 asked -- told me that they didn't have the
18 contract, and I know that was in there. We sent
19 that off. We sent a copy off.
20 The second was the -- the affidavit of
21 nonservice by Michael Witt, and I knew that was in
22 there because when I was putting them in I -- I
23 looked at this document and I said: Who hand
24 scribbled this? And it was Mike Witt's document.
25 That never came back to me.

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1 this is --
2 A. November of '14.
3 Q. -- reciting a history. In a hearing
4 before -- let me make sure I get this correct.
5 A. Yeah.
6 Q. In a hearing before Judge Kinard in
7 January of 2015, Mr. Allen, on pages 3 and 4 of the
8 transcript, is giving Judge Kinard some history
9 behind the motion, correct?
10 A. Right. Uh-huh.
11 Q. Okay. And that's the discussion you
12 had mentioned earlier about Judge Murphy?
13 A. Right. Uh-huh.
14 Q. Okay.
15 A. I thought we were talking about Murphy
16 here.
17 Q. My apologizes if I wasn't clear.
18 A. Yeah. Okay. This is the Kinard.
19 Yeah.
20 Q. And in this circumstance, beginning, I
21 believe, on page 5 of the transcript, is the first
22 point in time where you're giving arguments to the
23 Court, correct?
24 A. Yeah. Uh-huh.
25 Q. Okay. And if we fast-forward through

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1 The third document was this, but I will
2 not --
3 Q. And by this, just so the record's
4 clear, you're talking about the affidavit of
5 service in New York?
6 A. The affidavit of service, yeah. And --
7 but I am not going to say -- even though I've said
8 I put them with the papers of the case and that's
9 what I remember, that is -- I will not accuse Bauer
10 & Metro of doing anything untoward because I don't
11 think they're capable of that, and that's what I'm
12 saying.
13 Q. And if we fast-forward over to page
14 11 --
15 A. Sure.
16 Q. -- Judge Kinard, bless his soul --
17 A. A good man.
18 Q. A very good man. That's one thing we
19 will definitely not disagree on.
20 He's instructing you --
21 A. Uh-huh.
22 Q. -- page 11, line 3, to get an affidavit
23 from the process server.
24 A. Uh-huh.
25 Q. Correct?

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1 A. Uh-huh.
2 **Q. That's yes. I'm sorry to --**
3 A. Yeah. I'm sorry. That's correct.
4 Yeah.
5 **Q. And from your prior testimony and your**
6 **multiple conversations with the Zeller-Wood process**
7 **server people in New York, that simply couldn't be**
8 **done, correct?**
9 A. Actually, I -- I talked to them, and I
10 talked to the president of Zeller-Wood, and he
11 said: Send me up your proposed affidavit.
12 I sent it to him, and in that period of
13 time --
14 **Q. I'm listening. In that period of**
15 **time...**
16 A. Okay. In that period of time a couple
17 things happened: One, the case was settled.
18 Number two, Kinard died.
19 The other part of it was that Kinard
20 also told Mr. Allen to get an affidavit from
21 Ms. Dickenson. I never pushed the affidavit after
22 that because they had settled the case, and as far
23 as I was concerned that ended the case.
24 And the second thing is immediately
25 after that Judge Kinard died, and had that been

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1 The fact of the matter is is what they
2 were going to agree to was that I had made multiple
3 calls to them. That's all they would agree to. So
4 it's not exactly the smoke --
5 **Q. So there wasn't --**
6 A. It's not the smoking gun. And I will
7 look for it.
8 **Q. So they weren't going to be able -- I'm**
9 **sorry.**
10 A. Yeah. I'll look for it. I'll try to
11 get it for you.
12 **Q. Well --**
13 A. If I have it, I'll look for it.
14 **Q. Then I'm correct -- then the statement**
15 **that an affidavit of service from the process**
16 **server was not available?**
17 A. I did not finish. I don't know -- you
18 know, it depends on what your definition of the
19 affidavit of service is.
20 **Q. Did you believe that someone with**
21 **personal knowledge of service on Ms. Dickenson,**
22 **however that occurred --**
23 A. Uh-huh.
24 **Q. -- was available to give an affidavit**
25 **about those events?**

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1 scheduled, I would have driven to New York and
2 stood at their doorstep until they signed this
3 affidavit.
4 **Q. And it's your testimony you prepared a**
5 **proposed affidavit?**
6 A. Yes, I did.
7 **Q. Have you produced that?**
8 A. No. Because it went off to them. I
9 don't even remember what it was. I produced the
10 affidavit. I sent it up to them.
11 **Q. You didn't keep a copy of it?**
12 A. I did not.
13 **Q. Do you have a word processing document**
14 **that generates that?**
15 A. I can tell you what -- exactly what it
16 said, if you want me to tell you.
17 **Q. Well, I need to see the -- no, no, no.**
18 **My question was: Do you have a word processing**
19 **file from which that affidavit was printed?**
20 A. I can look. I don't know how it was
21 done or whatever. I have a computer at home. I
22 have a computer at the office. The computers at
23 home have been thrown out. I don't know. I have a
24 computer that all the -- all the memory has been
25 wiped out somehow.

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1 A. That question -- I asked that question
2 of Zeller-Wood one time, and the answer was we have
3 thousands of process servers. We can't possibly
4 dig up who it is. I can only go with what they
5 told me. That was their way of saying no.
6 **Q. Okay. And essentially the document --**
7 **draft affidavit you sent to New York was arguably**
8 **the flip side of your affidavit that said I made**
9 **multiple calls and their affidavit saying we**
10 **received multiple calls, correct?**
11 A. Prior to the service of the affidavit.
12 **Q. Okay.**
13 A. Yeah. Uh-huh. That's exactly right.
14 **Q. So effectively, your decision not to**
15 **file the affidavit left the Feldmans in a position**
16 **of not being able to respond to the motion to**
17 **dismiss, correct?**
18 A. No. That did not even -- that did not
19 even come up. Judge Kinard said he was going to
20 schedule another hearing. He wanted us, in the
21 interim, to each come up with affidavits. Mr. --
22 Mr. Allen never had an affidavit. I had never had
23 an affidavit. You guys settled. That was --
24 Mr. Feldman settled that relatively quickly. I
25 would say within a month. Okay?

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1 That had been drafted. It had been
2 sent off. I didn't hear anything. In the meantime
3 it was settled.
4 **Q. Did you tell Mr. Metro, Mr. Bauer, or**
5 **anyone representing Mr. Feldman that the process**
6 **server people in New York, Zeller-Wood, had told**
7 **you that basically there was not going to be an**
8 **affidavit available from someone who had personal**
9 **knowledge of service?**
10 A. No, I did not.
11 **Q. Did you have any communications with**
12 **Bauer or Metro after the hearing on January 6,**
13 **2015?**
14 A. What's -- what's January 6, 2015?
15 **Q. This hearing. It's the transcript that**
16 **you're looking at.**
17 A. Okay. Hang on.
18 **Q. And I'm just trying to find out: Did**
19 **you have any conversations with them?**
20 A. I think I may have talked with Sam
21 regarding what happened, and he said that the case
22 settled.
23 **Q. Didn't Judge Kinard say at the end of**
24 **the hearing that -- I'm going to quote this from**
25 **page 11, lines 25, carrying over to page 12, to**

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1 to have to go over my memorandum of law, and he was
2 going to decide. He also said to Mr. -- to
3 Mr. Allen he wanted an affidavit from him.
4 BY MR. PENDARVIS:
5 **Q. From Ms. Dickenson?**
6 A. Yeah. And you -- look with this. The
7 last person to talk to him was Julian Allen, not
8 me. Julian Allen said: Thanks, judge.
9 The Court says: Good luck with it
10 because it's complicated. I don't think I can let
11 it go forward without a little more of your --
12 without a little more than your affidavit.
13 And that was the end. So he was
14 talking to Julian Allen rather than me, I believe.
15 **Q. But the response to that question was**
16 **who? Could you read into the record who answered**
17 **that statement?**
18 A. I said: Thank you, Judge.
19 **Q. Right. Judge was talking to you.**
20 **Okay.**
21 A. You're reaching, Mr. Pendarvis.
22 MR. BOGDAN: Object to the form.
23 THE WITNESS: You're reaching.
24 BY MR. PENDARVIS:
25 **Q. Here's --**

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1 **you: But I don't think I can let it go forward**
2 **without a little more than your affidavit?**
3 A. Where are we at?
4 MR. BOGDAN: Object to the form.
5 BY MR. PENDARVIS:
6 **Q. Page 11, line 25. I said 24. I'm**
7 **sorry. Line 25, over to line 1 on page 12.**
8 **Isn't that what Judge Kinard told you,**
9 **that you were basically going to need an affidavit**
10 **of service?**
11 MR. BOGDAN: Object to the form.
12 THE WITNESS: Judge Kinard said a
13 couple of things, and I don't agree with that.
14 Judge Kinard also said: This is a complicated
15 case, and I have not read the case law.
16 He said a number of things.
17 BY MR. PENDARVIS:
18 **Q. But in conclusion he told you: But I**
19 **don't think I can let it go forward without a**
20 **little more than your affidavit.**
21 **Correct?**
22 MR. BOGDAN: Object to the form.
23 THE WITNESS: What he was meaning there
24 was that -- and I was there -- is that he was going
25 to have to read the case law on this. He was going

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1 A. No. That's not the correct -- that's
2 -- no. He was speaking to Mr. Allen. I said thank
3 you, Judge, for that ruling.
4 **Q. Did you communicate with Mr. Bauer or**
5 **Mr. Metro -- well, one more thing.**
6 A. Yeah.
7 **Q. The only affidavit before the Court was**
8 **your affidavit, correct? At the hearing before**
9 **Judge Kinard on January 6.**
10 A. That was an affidavit that I had
11 written that I had promised a while -- way before
12 that had nothing to do with Judge Kinard.
13 **Q. No, no, no. I'm sorry if I wasn't**
14 **clear.**
15 **The only affidavit before Judge Kinard**
16 **was your affidavit that's been marked as**
17 **Exhibit 16, correct?**
18 A. I don't even know if that went in front
19 of Judge Kinard. I have no idea about that
20 affidavit. I don't know much about it. You
21 probably have the history of that, as who saw it
22 and whatever. You would probably know better than
23 me.
24 **Q. If you look on page 5 of the**
25 **transcript, there's -- beginning on line 8, through**

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1 line 10, Mr. Allen is describing your affidavit.
2 A. Okay.
3 Q. And you're welcome to look through this
4 transcript, but I'm going to represent to you that
5 the only affidavit mentioned in this entire hearing
6 of January 6, 2015, was your affidavit marked as
7 Exhibit 16.
8 A. Okay.
9 Q. Are you aware of any other affidavits
10 that were before the Court?
11 A. All that is done here is Allen has
12 referenced it, and he referenced it very badly. He
13 obviously didn't have the affidavit in front of
14 him. Process server up in New Jersey or New York
15 to serve the defendant. I think I got the
16 affidavit, but I don't have it. I don't know who
17 actually served or where they were served under
18 these rules.
19 That's not what my affidavit said.
20 Mr. Allen did not have the affidavit in front of
21 him. I don't know where that affidavit was.
22 Q. The statement you made before the
23 Court, really pages 8 and 9 of the transcript,
24 basically were the substance of the affidavit,
25 correct?

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1 happened.
2 A. Uh-huh.
3 Q. And I saw this a second ago. Bear with
4 me.
5 A. Yeah. Sure. Take your time.
6 Q. And in fact, on page 10, lines 18 and
7 19, you told Judge Kinard, quote: In addition to
8 all that, Your Honor, I have submitted an affidavit
9 as to what happened.
10 A. Yeah. Uh-huh.
11 Q. Okay.
12 A. We have not received an affidavit from
13 Ms. Dickenson. That's what Kinard was referring
14 to.
15 Q. Right. But the only affidavit before
16 was a little more than your affidavit on page 12.
17 It's the only affidavit that's being discussed, was
18 your affidavit.
19 A. But he says -- but I say in there: We
20 have not received an affidavit from Ms. Dickenson.
21 That was what was -- were required by
22 Mr. Allen, and the judge says: Good luck. I don't
23 think we can go forward with it without a little
24 more than your affidavit.
25 He was talking to Julian Allen, not me.

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1 A. Tell me what sections you're referring
2 to.
3 Q. Pages 8, 9.
4 A. Yeah. I know that, but tell me
5 basically.
6 Q. You're explaining on page 9, line 9
7 through, certainly, line 19 on page 9, you're
8 describing the efforts you made to -- matters that
9 related to the affidavit of service, correct?
10 A. Yeah. I don't think that had anything
11 to -- oh, the affidavit of service. I thought you
12 were --
13 Q. Yes, sir.
14 A. -- talking about my affidavit --
15 Q. Yes.
16 A. -- that I had --
17 From nine?
18 Q. The middle of page 9.
19 A. No, no. It went till -- till what
20 number though?
21 Q. Nine to 19. And then again on page
22 10 --
23 A. Yeah. That's -- I would agree with
24 that, yeah.
25 Q. -- you're describing what's -- what

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1 They had the affidavit that I submitted.
2 Q. After January 6, 2015, did you
3 communicate with Mr. Bauer or Mr. Metro or anyone
4 else in the law firm about the Feldmans' matter?
5 A. I don't know if I did or not. I don't
6 think so.
7 Q. Did you --
8 A. Wait. Back up. I think that Sam told
9 me it had been settled. I think I got the
10 information from him.
11 Q. Did you have any conversations with
12 Mr. Bauer or Mr. Metro or anyone at the Bauer &
13 Metro law firm about filing a motion to intervene
14 to stop the settlement?
15 A. I had thought about that, and I thought
16 better of it.
17 Q. So the answer is yes, you did have a
18 conversation with one of them?
19 A. I don't know. What I -- I don't know
20 if I told them about that or not. I think what
21 happened was I had called -- when I heard about it,
22 I called Allen and I called Bauer saying I'm going
23 to file a motion to intervene, then I called them
24 back about two hours later and said I decided not
25 to do it.

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1 **Q. What would have been the basis of your**
2 **motion to intervene?**
3 A. I have no idea. I can't remember it.
4 **Q. What made you consider filing a motion**
5 **to intervene?**
6 A. I -- I thought a couple things. I
7 thought that maybe I should have been consulted.
8 Okay? I wondered what the agreement was, without
9 running it past me. Because I was the author of
10 the predicate incident, I thought there was a
11 courtesy that should have been given to me. And
12 that's about all I can tell you.
13 I do know I called them both back in a
14 relatively short time, said I've -- after a lot of
15 thought I decided I'm not going to do that.
16 **Q. Have you had any further communications**
17 **with Mr. Bauer, Mr. Metro, or anyone at that law**
18 **firm about the Feldmans, the Feldmans' claims?**
19 A. I have communications with them, but I
20 don't think I've ever talked to them again about
21 that. If you have some information, let me look at
22 it, and I'll be happy to comment on it.
23 **Q. I'm trying to find out the information.**
24 **Did you --**
25 A. What I'm saying is I don't recall.

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1 A. -- the context of it and so forth like
2 that. I don't even know who --
3 MR. BOGDAN: Our answer in this case?
4 MR. PENDARVIS: Yes.
5 THE WITNESS: Oh. I can't answer it.
6 I don't know.
7 BY MR. PENDARVIS:
8 **Q. Well, this is an answer that was filed**
9 **on your behalf in this case, correct?**
10 A. Uh-huh.
11 **Q. Yes?**
12 A. Yes.
13 **Q. And do you have any knowledge of what**
14 **factual allegations support this affirmative**
15 **defense for alleged failure to mitigate?**
16 A. I don't know what's behind that
17 defense. The defense -- those defenses were
18 drafted by my lawyers. That's why I'm paying them.
19 And that particular thing, I have no idea.
20 **Q. There is -- and I'll let you look at**
21 **it.**
22 A. Sure.
23 **Q. There is an affirmative defense for**
24 **statute of limitations. I want to let you read it.**
25 **It's Paragraph 66.**

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1 **Q. Okay.**
2 A. What I'm saying is, if you have any
3 information, let me see it.
4 **Q. Have you had any communications with**
5 **Liberty Mutual directly about the --**
6 A. No.
7 **Q. -- Feldman matter?**
8 A. No. I don't believe so.
9 **Q. Getting really close.**
10 A. That's all right. Take your time.
11 (Off-the-record conference.)
12 BY MR. PENDARVIS:
13 **Q. I want to understand some of the**
14 **defenses asserted in your answer.**
15 A. Sure.
16 **Q. And I'm happy to show it to you.**
17 **There's an affirmative defense for failure to**
18 **mitigate.**
19 A. I'd like to look at it. I don't know
20 what we're talking about here. Do you have a copy?
21 **Q. Have you ever seen a failure to**
22 **mitigate defense as a lawyer?**
23 A. No. I -- I want to look at it and see
24 what --
25 **Q. Sure.**

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1 A. Again, I'm paying Dawes and Jeff here
2 to answer these. I think these questions would be
3 better placed in front of them.
4 **Q. I haven't asked the question. I just**
5 **wanted to let you know that's been asserted, and my**
6 **question is: What facts are you aware of that**
7 **would support a statute of limitations defense?**
8 A. I don't know -- I don't think it'd be
9 fair to you or to myself to answer that question
10 without having some knowledge about it:
11 **Q. Is that going to be the answer for each**
12 **of these affirmative defenses that I were to ask**
13 **you about?**
14 A. I would say so, yes.
15 **Q. Okay. That saves us --**
16 A. As I said, I've paid my attorneys to do
17 this.
18 **Q. Save us some time. Save us some time.**
19 A. Yeah.
20 **Q. Let me take a break, talk to my folks,**
21 **and then we'll wrap it up.**
22 A. That'll be fine. Thank you.
23 (A recess transpired.)
24 MR. PENDARVIS: Mr. Coggin -- back on
25 the record.

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1 THE WITNESS: Yeah.
2 MR. PENDARVIS: That's all the
3 questions I've got at this time.
4 EXAMINATION
5 BY MR. BOGDAN:
6 Q. Gary, for the record, Jeff Bogdan, your
7 attorney in this case. I've got a couple things to
8 follow up with you on just to --
9 A. Sure.
10 Q. -- clear up a couple issues.
11 Will you look at Exhibit 1, please?
12 A. I was keeping these in good order.
13 Q. You did a good job.
14 A. There we go.
15 Q. This is a copy of your contingency fee
16 agreement --
17 A. Right.
18 Q. -- with Mr. Feldman, correct?
19 A. Uh-huh.
20 Q. All right. Is that a yes?
21 A. Yes. Excuse me.
22 Q. It's all right.
23 Thomas talked with you about the
24 strike-out over the 40 percent of the fee if
25 there's an appeal.

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1 have pursued Mr. Feldman's case and let's say it
2 would have gone to trial and it turned out one way
3 or the other and there was an appeal, would you
4 have associated another attorney to handle that --
5 A. Absolutely, yeah.
6 Q. Let me finish the question.
7 A. I'm sorry.
8 Q. Would you have associated another
9 attorney to handle that appeal?
10 A. Yes.
11 Q. Okay. And in that event, if this 40
12 percent provision was still in there, then that
13 would be the applicable provision for the -- for
14 the contingency based on the appeal, correct?
15 A. Yeah. But we struck it.
16 Q. Right.
17 A. Yeah.
18 Q. And you would have had to share that
19 fee with the attorney who you associated?
20 A. Absolutely.
21 Q. All right. I want to look at Julian
22 Allen's answer, and it is Exhibit 8.
23 A. Yeah.
24 Q. Do you see that one?
25 Just getting it out of the way.

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1 A. Yeah.
2 Q. Right? And you said that you don't do
3 appeals.
4 A. That's correct.
5 Q. And then he asked you, well, why is
6 this in the agreement. You just said it was a
7 standard agreement; is that right?
8 A. Yeah. Yes.
9 Q. Do you not do appeals -- have you had
10 an opportunity to do an appeal?
11 A. I've had many opportunities. I just
12 don't -- it's a whole section of the law that I
13 think you can get yourself in deep trouble.
14 Q. Sure. Sure.
15 A. The other thing too -- and I want to
16 add to that, is I've been -- I thought about that
17 -- is that Robert actually asked me to strike that,
18 the 40 percent.
19 Q. Okay.
20 A. And, you know, I have to give Robert
21 credit. I've been getting after him pretty good,
22 but he -- he did ask me to strike that.
23 Q. Are those his initials next to it?
24 A. I think so.
25 Q. Okay. And if for some reason you would

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1 A. Number eight. Let's do it this way.
2 Okay. We've got it.
3 Q. All right. Who is this answer filed on
4 behalf of? Liberty Mutual Insurance Company,
5 correct?
6 A. I think it's Liberty Mutual, yes.
7 Q. All right. Okay. And when a --
8 A. In fact, it says in the first sentence:
9 Liberty Mutual Insurance --
10 Q. Right.
11 A. -- as the underinsured.
12 Q. Is it your understanding that when a
13 party that files an answer to a complaint asserts
14 affirmative defenses that those are the affirmative
15 defenses of that party?
16 MR. PENDARVIS: Form objection.
17 THE WITNESS: That's correct.
18 BY MR. BOGDAN:
19 Q. Okay. And if you look at the fifth --
20 the fifth defense for improper service -- you see
21 that one?
22 A. Yes, I do.
23 Q. Okay. And this is Liberty Mutual's
24 defense, correct?
25 A. Right.

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1 Q. Okay. And it says improper service,
2 correct?
3 A. (Witness moves head up and down.)
4 Q. Okay. And who does it say was not
5 properly served with the complaint?
6 A. It says no one.
7 Q. It doesn't say that Ms. Dickenson was
8 improperly served with the complaint?
9 A. No.
10 MR. PENDARVIS: Form objection.
11 THE WITNESS: The assumption here is
12 that Liberty Mutual wasn't served.
13 BY MR. BOGDAN:
14 Q. This is a general and unspecific
15 affirmative defense, is it not?
16 A. That's correct.
17 MR. PENDARVIS: Form objection.
18 BY MR. BOGDAN:
19 Q. Okay. And if this affirmative defense
20 was specific and said that Sarah Dickenson was not
21 properly served with the -- with service, what
22 would you have done?
23 MR. PENDARVIS: Form objection.
24 THE WITNESS: I would have immediately
25 checked with Zellner-Wood to see what was going on,

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1 I'll give you the hint.
2 MR. BOGDAN: Okay.
3 BY MR. BOGDAN:
4 Q. What would you have done with regards
5 to the affidavit of service that you had already
6 received had this affirmative defense actually said
7 that Sarah Dickenson was not properly served?
8 A. I would have searched high and low for
9 that affidavit.
10 Q. And what would you have done with it if
11 you found it?
12 A. I would have filed it.
13 Q. That's it for Exhibit 8. Let's move on
14 to Exhibit 9.
15 A. Eleven, ten. Nine. Okay.
16 Q. This is the letter from you to Terry
17 Finger, correct?
18 A. That's correct.
19 Q. And there was some discussion between
20 you and Mr. Pendarvis about the demand, the opening
21 demand at mediation that you made in this of 300 to
22 \$350,000, correct?
23 A. That's correct.
24 Q. And I believe he asked you if you had
25 discussed this opening demand with Mr. Feldman, and

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1 and if I had gotten the answer they had been giving
2 me, I would have re-served.
3 BY MR. BOGDAN:
4 Q. And would that have also triggered you
5 to look for and file the affidavit of service --
6 MR. PENDARVIS: Form objection.
7 BY MR. BOGDAN:
8 Q. -- that you had already received?
9 A. Yes.
10 MR. BOGDAN: Let me finish the question
11 again, Thomas.
12 MR. PENDARVIS: I'm sorry. He's
13 answering so quick I can --
14 MR. BOGDAN: I understand. Let me
15 start over --
16 THE WITNESS: Yeah.
17 MR. BOGDAN: -- just so we get this
18 clean, and I'll --
19 BY MR. BOGDAN:
20 Q. Gary, if you'll wait, 'cause we know
21 Thomas is going to object.
22 A. I -- I -- yeah. That's fine.
23 Q. We'll let him get it in.
24 A. Yeah, yeah.
25 MR. PENDARVIS: Leading questions.

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1 you said that Mr. Feldman was not cc'd on the
2 letter, right?
3 A. That's correct.
4 Q. Okay. Just because he's not cc'd on
5 the letter, does that mean that you wouldn't have
6 discussed this opening demand with him?
7 MR. PENDARVIS: Form objection.
8 THE WITNESS: May 5. We were still
9 discussing these matters. I probably did.
10 BY MR. BOGDAN:
11 Q. Okay. You just don't have any
12 recollection?
13 A. I don't have any recollection, but my
14 habit would have been to discuss it with him.
15 Q. Okay. All right. Still on Exhibit 9.
16 There was also a lot of discussion between you and
17 Mr. Pendarvis about this 150 to \$180,000 range that
18 was -- is set out on top of page 2?
19 A. Uh-huh.
20 Q. Is that a yes?
21 A. Excuse me. Yes.
22 Q. Okay. You remember that line of
23 testimony?
24 A. Yes.
25 Q. And I believe where we ended up was

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1 that you testified that this was an estimate of Bob
2 Feldman's past medical expenses; is that correct?
3 MR. PENDARVIS: Form objection.
4 THE WITNESS: Hang on.
5 Yes.
6 BY MR. BOGDAN:
7 Q. Okay. Well, what I want you to do is
8 look back on the first page, and if you see the --
9 it's numbered A. It says impairment. Do you see
10 that?
11 A. Yes.
12 Q. And then number B is medicals. Do you
13 see that?
14 A. Yes.
15 Q. So in the impairment section the last
16 sentence says: By any formula, this impairment
17 should be valued at somewhere around \$100,000.
18 Is that right?
19 A. That's what it says.
20 Q. Okay. And then under the medicals, the
21 conclusion of that section is: If this is extended
22 ten years, there is an expense of \$60,000.
23 Correct?
24 A. That's correct.
25 Q. Okay. So what's \$100,000 plus \$60,000?

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1 counsel concerning Exhibit 8 and in particular the
2 fifth defense asserted by -- by the defendants in
3 the -- defendant in the answer that was filed.
4 A. Uh-huh.
5 Q. Is it your testimony that when you
6 received this answer that you analyzed this fifth
7 defense carefully enough to see that it didn't name
8 Ms. Dickenson specifically?
9 A. At what period of time are we talking?
10 Q. January 4 -- sometime in January of
11 2013.
12 A. I -- I analyzed very closely. I'm not
13 sure when.
14 Q. Well, you were asked questions that
15 suggested that had this improper service fifth
16 defense had Ms. Dickenson's name in here --
17 A. Uh-huh.
18 Q. -- that you would have done things
19 differently, and my question to you is: Did you --
20 is it your testimony that you analyzed this fifth
21 defense that carefully and decided they didn't name
22 Ms. Dickenson, therefore I'm not going to have to
23 worry about this affidavit?
24 MR. BOGDAN: Object to the form.
25 THE WITNESS: I don't think that's what

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1 A. 160.
2 Q. Okay. So then the next sentence is:
3 The above amount is \$150,000 to \$180,000.
4 Correct?
5 A. That's correct.
6 Q. Those are not actual past-incurred
7 medical expenses, are they?
8 MR. PENDARVIS: Form objection.
9 THE WITNESS: No, they're not.
10 MR. BOGDAN: All right. That's all I
11 have.
12 EXAMINATION
13 BY MR. PENDARVIS:
14 Q. Mr. Feldman, one follow-up on your --
15 MR. BOGDAN: Tom, Coggin.
16 MR. PENDARVIS: Oh. I'm sorry. That
17 was it?
18 MR. BOGDAN: No, no. You called him
19 Mr. Feldman.
20 MR. PENDARVIS: I'm sorry. Mr. Coggin.
21 THE WITNESS: I'm always flattered.
22 I'm always flattered.
23 MR. PENDARVIS: Thank you. Thank you.
24 BY MR. PENDARVIS:
25 Q. You were asked some questions by your

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1 I testified to, but no.
2 BY MR. PENDARVIS:
3 Q. You didn't analyze it that carefully in
4 January of 2013?
5 A. No. I didn't -- you -- the last
6 sentence. Repeat the last sentence.
7 Q. In --
8 A. That I don't have to serve
9 Ms. Dickenson?
10 Q. My question -- let me reframe the
11 question.
12 A. Yeah.
13 Q. See if I can get this clear. I want to
14 make certain about your testimony about what
15 actually occurred when you received this answer in
16 terms of your analysis of this fifth defense.
17 A. Uh-huh.
18 Q. Am I correct in understanding your
19 testimony that you didn't analyze it as carefully
20 as was suggested earlier in that because it does
21 not state Ms. Dickenson's name you chose not to
22 file the affidavit or look for the affidavit?
23 MR. BOGDAN: Object to the form.
24 THE WITNESS: I don't think that's what
25 it said -- what he said, but -- and it has nothing

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1 to do with looking for the affidavit or not. This
2 was in 2013. I didn't start looking for the
3 affidavit until two thousand and -- when I heard
4 from Bauer & Metro.
5 BY MR. PENDARVIS:
6 **Q. Okay.**
7 A. I did look at this very closely when I
8 -- when I received it. I always do. And I thought
9 that -- at that time, to myself, I felt that
10 Mr. Allen had quite -- a very slim answer. He
11 didn't include a statute of limitations defense,
12 and I knew enough that the improper service defense
13 of his was not enough to fit the law and -- but as
14 for I decided not to look for Ms. Dickenson at the
15 time, no.
16 **Q. If it had had reference somewhere in**
17 **this defense the name Dickenson, would you have**
18 **done anything different?**
19 A. I probably would have looked a little
20 closer at my papers.
21 **Q. Why?**
22 A. Because I knew that he was doing
23 something specific here when he hadn't done it in
24 the entire case, and he was talking about Liberty
25 Mutual. He says he answers for Liberty Mutual. If

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1 out.
2 BY MR. PENDARVIS:
3 **Q. Take a look at Exhibit 8 --**
4 A. Okay. Go ahead.
5 **Q. -- and the wherefore clause.**
6 A. I apologize. What are we looking at
7 now?
8 **Q. Exhibit 8, the wherefore clause on page**
9 **2 of Exhibit 8.**
10 A. Oh, okay.
11 **Q. Could you read that, please?**
12 A. Wherefore, having answered, Defendant
13 asks this Court to dismiss the complaint and grant
14 such relief as the Court deems just and proper.
15 **Q. On page 1, in the caption, who is the**
16 **named defendant?**
17 A. It's Sarah Dickenson.
18 **Q. Okay.**
19 A. However, it says: Liberty Mutual, as
20 the alleged underinsured, answers this complaint as
21 follows.
22 **Q. But the wherefore clause on page 2 does**
23 **not say wherefore, having answered, Liberty Mutual**
24 **asks this Court to dismiss the complaint, does it?**
25 A. Mr. Pendarvis, we can parse this all

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1 he had said something about Ms. Dickenson, yeah,
2 that would have raised my antenna.
3 **Q. Well, have you looked at 38-7 --**
4 **Section 38-77-160?**
5 A. I'm sure I have, but I cannot tell you
6 what 38-77-160 says. I've pretty much at one time
7 or another had most of the civil procedure book
8 memorized, but that goes quickly, as you probably
9 know.
10 **Q. Well, honestly, candidly, S.C. Code**
11 **Annotated Section 38-77-160 is not in the Rules of**
12 **Civil Procedure. It's in the Code of Laws, but --**
13 A. Okay. Well, tell me what it is.
14 And congratulations.
15 **Q. It's a statute governing the**
16 **underinsured motorist carrier's rights to defend on**
17 **behalf of their insured. And the wherefore clause**
18 **states what?**
19 A. I'm -- I don't know. I'm going to have
20 to look at the --
21 **Q. I know. But take a look at Exhibit 8.**
22 A. I'm going to have to look at the law.
23 MR. BOGDAN: Hold on a second.
24 THE WITNESS: Yeah.
25 MR. BOGDAN: Let him get the question

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1 day long, and we're going to -- and we can also go
2 into the books, and you know as well as I do we'll
3 probably have five or six different answers for it.
4 I -- I think it's unfair of you to try to catch me
5 on something where I don't know the law on this.
6 **Q. Well, I'm not really doing that except**
7 **in response to --**
8 A. Yeah, you are.
9 **Q. And that's fine. But it's my job to**
10 **handle the case for Mr. Feldman, and what I'm**
11 **trying to understand is what your testimony was,**
12 **that if this answer had been styled differently in**
13 **terms of the language in the fifth defense your**
14 **testimony is you would have done things**
15 **differently, and I'm trying to understand what it**
16 **is that would have triggered something different**
17 **than what you did.**
18 A. Here's what I -- my answer was. If it
19 said further answering, alleges the Plaintiff had
20 failed to effect proper service under Rule 12(b)(4)
21 and 12(b)(5) on Ms. Dickenson, you're doggone right
22 I would have looked very closely at that.
23 **Q. Okay.**
24 A. All right.
25 MR. PENDARVIS: Thank you. I have no

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1 further questions.
2 (The witness, after having been advised
3 of his right to read and sign this transcript, does
4 not waive that right.)
5 (The deposition was concluded at
6 1:44 p.m.)
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1 SIGNATURE OF DEPONENT (CONTINUED)
2 DEPOSITION DATE: June 8, 2016
3 REPORTER: TRISHA M. THOMAS
4 AWR JOB #: 160608tmt
5 CASE CAPTION: ROBERT E. FELDMAN and LOIS J.
6 FELDMAN vs. GARY P. COGGIN
7 PAGE LINE CHANGE REASON
8
9
10
11
12 GARY P. COGGIN Date
13 I, Trisha M. Thomas, Notary Public for the
14 State of South Carolina at Large, do hereby certify
15 that the deponent was advised of his or her right
16 to read and sign said deposition both verbally and
17 in writing. If the deponent fails to execute and
18 return foregoing Signature of Deponent pages within
19 the thirty (30) days allowed pursuant to the Rules
20 of Civil Procedure, the original transcript may be
21 filed with the court.
22
23
24 Trisha M. Thomas
25 My Commission expires
February 2018



TThomasco

Page 167

1 SIGNATURE OF DEPONENT
2 DEPONENT: GARY P. COGGIN
3 DEPOSITION DATE: June 8, 2016
4 REPORTER: TRISHA M. THOMAS
5 AWR JOB #: 160608tmt
6 CASE CAPTION: ROBERT E. FELDMAN and LOIS J.
7 FELDMAN vs. GARY P. COGGIN
8
9 (Please return both Signature of Deponent pages)
10
11 I, the undersigned, GARY P. COGGIN, do
12 hereby certify that I have read the foregoing
13 deposition and find it to be a true and accurate
14 transcription of my testimony, with the following
15 corrections, if any:
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PAGE	LINE	CHANGE	REASON
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1 CERTIFICATE OF REPORTER
2
3 I, Trisha M. Thomas, Court Reporter and
4 Notary Public for the State of South Carolina at
5 Large, do hereby certify that the foregoing
6 transcript is a true, accurate, and complete
7 record.
8 I further certify that I am neither
9 related to nor counsel for any party to the cause
10 pending or interested in the events thereof.
11 Witness my hand, I have hereunto
12 affixed my official seal this 21st day of June,
13 2016, at Hardeeville, Jasper County, South
14 Carolina.
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TThomasco

Trisha M. Thomas,
Court Reporter
My Commission expires
February 2018

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2		Page/Line		2	EXH. 3, Letter from Gary	27	11
3	WITNESS/EXAMINATION			3	Coggin to Sonya Wise dated		
4	GARY P. COGGIN	3	1	4	October 10, 2011		
5	EXAMINATION	3	3	5	EXH. 4, Letter from Gary	32	7
6	BY MR. PENDARVIS			6	Coggin to Alton Prioleau dated		
7	EXAMINATION	150	4	7	October 17, 2011		
8	BY MR. BOGDAN			8	EXH. 5, Letter from Gary	34	25
9	EXAMINATION	159	12	9	Coggin to Alton Prioleau dated		
10	BY MR. PENDARVIS			10	October 24, 2011		
11	SIGNATURE OF DEPONENT	167	1	11	EXH. 6, Release, Covenant Not	37	15
12	CERTIFICATE OF REPORTER	169	1	12	to Execute and Settlement		
13				13	Agreement		
14				14	EXH. 7, Civil Action Cover	43	6
15	REQUESTED INFORMATION INDEX			15	Sheet, Summons, Complaint,		
16				16	Copy of certified mail		
17	(No Information Requested)			17	envelope		
18				18	EXH. 8, Answer and Certificate	53	7
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22	EXH. 1, Contingency Fee	13	9	22	May 5, 2014		
23	Agreement			23	EXH. 10, Letter from Gary	90	4
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5	Murphy to Gary Patrick Coggin			5	EXH. 19, Transcript of Record	127	25
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9	Roseneau dated October 8,			9			
10	2014; Liberty Mutual Insurance			10			
11	Company's Notice and Motion to			11			
12	Dismiss; and Certificate of			12			
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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) C/A No.: 2015-CP-07-01251

ROBERT E. FELDMAN and LOIS J.
FELDMAN,

Plaintiffs,

vs.

GARY P. COGGIN,

Defendant.

**RULE 56(f), SCRCP
AFFIDAVIT OF
THOMAS A. PENDARVIS**

THOMAS A. PENDARVIS
BEAUFORT COUNTY, S.C.
CLERK OF COURT

2016 JUN 27 PM 12:41

Personally appeared before me, Thomas A. Pendarvis, who first being duly sworn, says:

1. I am a lawyer licensed and in good standing in the State of South Carolina and in the State of Georgia.
2. The testimony in this Affidavit relates to matters of fact, as to which I am competent to testify as I am over the age of eighteen years and not affected by anything which would affect my ability to testify.
3. I am counsel for the Plaintiffs in the foregoing action, which asserts legal malpractice claims based on the Defendant's handling of the Plaintiffs' claims arising from a motor vehicle collision.
4. I have reviewed the Defendant's Motion for Summary Judgment filed on May 16, 2016 ("Motion").
5. The Motion provides that it is based on the following grounds: "the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue as to any material fact ..." and recites that the " ... Motion is further

based on South Carolina Jurisprudence, the South Carolina Rules of Civil Procedure, the pleadings and discovery in this action, and any Memorandum and affidavits that will be subsequently filed."

6. The Motion makes reference to depositions which have not yet occurred. Currently, the deposition of a key witness, Julian Allen, J.D. (defense counsel in the underlying "under insured motorist" lawsuit at issue) is scheduled for September 13, 2016, and no depositions have been taken of the witnesses to the underlying motor vehicle collision or Plaintiff, Robert Feldman's treating physicians.
7. The Plaintiffs have actively pursued and continue to actively pursue discovery in this matter, including having only recently conducted the deposition of Defendant Coggin.
8. Also, Plaintiffs have consulted with several potential expert witnesses. At this point, Plaintiffs have commenced the process of information exchange with some of these potential expert witnesses and anticipate shortly having justification to identify said expert witnesses as expert witnesses for trial.
9. Eight weeks prior to filing the present Motion, in his "Response to Request for a Scheduling Order" filed on March 16, 2016, the Defendant argued that "[d]iscovery in this case will be extensive and will likely require over a year to complete" and that ... "[t]he remaining discovery necessary to get this case ready for trial will likely take over a year to complete."
10. The parties entered into a Scheduling Order by consent, establishing that the Plaintiffs shall identify each expert witness by no later than August 1, 2016; and that discovery shall be complete no later than December 1, 2016. That Order was forwarded to the Court for approval and signature on May 18, 2016.
11. On behalf of the Plaintiffs, my firm has consulted and will shortly identify four experts:

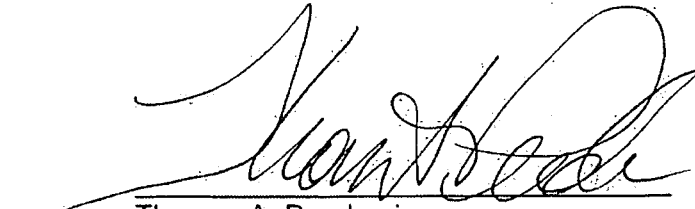
an expert competent to provide a life care plan and corresponding opinion regarding the future medical needs of Mr. Feldman, an expert competent to provide a report and corresponding opinion regarding Mr. Feldman's vocational rehabilitation possibilities, an expert competent to provide an additional opinion as to the various acts and omissions of the Defendant which constitute legal malpractice and the cause of the damages suffered by Plaintiffs, and an expert competent to reduce the damages claimed by Plaintiffs to present value.

12. Discovery in this matter is not complete, as Julian Allen, J.D., and these four referenced experts, have not been deposed, and Plaintiffs have only recently, not even two days ago, received the deposition transcript of the Defendant. Additionally, the additional needed depositions are likely to necessitate additional requests for production of documents.
13. At a minimum, we request the opportunity to take depositions of Julian Allen, J.D., possibly some of Plaintiff Robert Feldman's treating physicians, which will allow the four referenced experts to develop their opinions.
14. There are genuine issues of material fact that have not been resolved, including the fact that the Verified Complaint recites that Defendant Coggin did not obtain an affidavit or other sworn statement by any individual establishing proof of service of process on the at-fault driver in the underlying case at issue pursuant to Rule 4(d), SCRPC, (Compl. at ¶ 22.) and Defendant Coggin denies this allegation. (Ans. at ¶ 22).
15. The question of proximate cause of the damages suffered by Plaintiffs is in dispute, as Plaintiffs contend that Defendant Coggin's failures to properly serve the at-fault driver, and to properly prepare the case for settlement, mediation and trial, resulted in

Plaintiffs losing valuable rights, whereas Defendant Coggin claims, that the Plaintiffs' claims were drastically reduced in value because Mr. Feldman attempted to play golf; or in the alternative that Defendant Coggin would have been successful in defending the UIM carrier's Motion to Dismiss.

16. While the parties agree that Defendant Coggin owed duties to the Plaintiffs, the parties disagree as to whether Defendant Coggin violated those duties, whether such violations were the proximate cause of the damages claimed, and the value of damages that Plaintiffs claim.
17. Depending on the outcome of pending discovery, the Plaintiffs may seek to amend their Verified Complaint to include additional specific allegations of legal malpractice, based on Defendant Coggin's failures to secure a life care plan expert, a vocational expert and an expert to reduce the damages to present value, which separately and/or together resulted in Plaintiffs losing valuable rights, including diminution in the settlement value of the case.
18. Plaintiffs respectfully submit that for the foregoing reasons, which are essential to justify Plaintiffs opposition, Plaintiffs respectfully submit that this Court continue the hearing on Defendant's motion for summary judgment until such time as discovery is been completed.

FURTHER AFFIANT SAYETH NOT.


Thomas A. Pendarvis

Beaufort, South Carolina

June 24, 2016

SWORN to before me this

24 day of June, 2016



Melanie Weitzel
NOTARY PUBLIC
State of South Carolina
My Commission Expires
July 2, 2024


(L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission expires 7/2/24



STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

ROBERT E. FELDMAN and LOIS J.
FELDMAN,

Plaintiffs,

vs.

GARY P. COGGIN,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) C/A No.: 2015-CP-07-01251

**RULE 56(f), SCRCF
AFFIDAVIT OF
THOMAS A. PENDARVIS**

2016 JUN 28 PM 1:30
CLERK OF COURT
BEAUFORT COUNTY, S.C.

Personally appeared before me, Thomas A. Pendarvis, who first being duly sworn, says:

1. I am a lawyer licensed and in good standing in the State of South Carolina and in the State of Georgia.
2. The testimony in this Affidavit relates to matters of fact, as to which I am competent to testify as I am over the age of eighteen years and not affected by anything which would affect my ability to testify.
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an expert competent to provide a life care plan and corresponding opinion regarding the future medical needs of Mr. Feldman, an expert competent to provide a report and corresponding opinion regarding Mr. Feldman's vocational rehabilitation possibilities, an expert competent to provide an additional opinion as to the various acts and omissions of the Defendant which constitute legal malpractice and the cause of the damages suffered by Plaintiffs, and an expert competent to reduce the damages claimed by Plaintiffs to present value.

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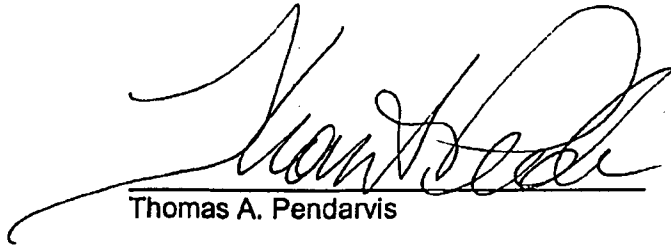
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16. While the parties agree that Defendant Coggin owed duties to the Plaintiffs, the parties disagree as to whether Defendant Coggin violated those duties, whether such violations were the proximate cause of the damages claimed, and the value of damages that Plaintiffs claim.

17. Depending on the outcome of pending discovery, the Plaintiffs may seek to amend their Verified Complaint to include additional specific allegations of legal malpractice, based on Defendant Coggin's failures to secure a life care plan expert, a vocational expert and an expert to reduce the damages to present value, which separately and/or together resulted in Plaintiffs losing valuable rights, including diminution in the settlement value of the case.

18. Plaintiffs respectfully submit that for the foregoing reasons, which are essential to justify Plaintiffs opposition, Plaintiffs respectfully submit that this Court continue the hearing on Defendant's motion for summary judgment until such time as discovery is been completed.

FURTHER AFFIANT SAYETH NOT.


Thomas A. Pendarvis

Beaufort, South Carolina

June 24, 2016

SWORN to before me this

24 day of June, 2016



Melanie Weitzel
NOTARY PUBLIC
State of South Carolina
My Commission Expires
July 2, 2024


(L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission expires 7/2/24

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2015-CP-07-1251

Robert E. Feldman and Lois J. Feldman,

Plaintiffs,

vs.

Gary P. Coggin,

Defendant.

**PLAINTIFFS' SUPPLEMENTAL
MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

To: M. DAWES COOK, JR., J.D. AND JEFFREY M. BOGDAN, J.D., COUNSEL FOR
DEFENDANT:

Plaintiffs, Robert E. Feldman and Lois J. Feldman, respectfully submit this
Supplemental Memorandum in Opposition to Defendant's Motion For Summary Judgment.

**Defendant Coggin's negligence which compromised the
value of the Plaintiffs' claims in the underlying UIM lawsuit
is at the heart of Plaintiffs' claims in this lawsuit.**

I. The allegations in the Verified Complaint.

Pursuant to S.C. CODE ANN. § 15-36-100(B), the Verified Complaint includes at least one act of professional negligence which centers on Defendant Coggin's failure to timely serve the at-fault driver. In addition, the Verified Complaint also contains language which clearly places Defendant Coggin on notice of the existence of additional claims or refinement of existing claims.¹ The Verified Complaint contains the following factual averments:

¹ Plaintiffs have asked counsel for Mr. Coggin to accept service on an Amended Verified Complaint that contains specific allegations concerning Mr. Coggin's errors in failing to prepare the underlying case for settlement or trial, which Plaintiffs contend proximately resulted in a diminution in the settlement value and trial value of their claims.

45. Coggin failed to meet the minimum standard of care thereby breaching his professional duties to the Feldmans by other such particulars as the evidence in this case may demonstrate.

46. As a direct and proximate result Coggin's breach of his professional duties by the actions and omissions as specified herein, the Feldmans sustained actual, consequential, and incidental damages in an amount to be determined by the jury at the trial of this case.

52. Coggin failed to meet the minimum standard of care thereby breaching his contractual duties to the Feldmans by other such particulars as the evidence in this case may demonstrate.

53. As a direct and proximate result of Coggin's breach of his contractual duties by the actions and omissions as specified herein, the Feldmans sustained actual, consequential, and incidental damages in an amount to be determined by the jury at the trial of this case.

Mr. Coggin has responded to such allegations with a Motion for Summary Judgment on the grounds that even if Mr. Coggin was negligent failing to serve the at-fault driver in the UIM case, that breach did not proximately cause the Plaintiffs to suffer any damages because there was no final ruling and Plaintiffs could have been successful in defending the UIM carrier's motion to dismiss in the underlying UIM case. Even if Defendant is correct regarding the motion to dismiss (which is disputed), Mr. Coggin's failure to prepare the Feldmans' case greatly reduced the settlement value of the UIM case.

II. Disputed actual issues bearing on whether Mr. Coggin's failure to prepare the Feldmans' case proximately resulted in a diminution of the settlement value of the Feldmans' claims.

Mr. Coggin accepted the representation of the Feldmans in October 2010, less than one week after the motor vehicle collision that gave rise to the Feldmans' claims. In September 2012, after making several \$1.5 million demands, Mr. Coggin recommended the Feldmans accept a \$85,000, the available \$100,000 liability policy. On October 29, 2012, Mr. Coggin filed the Summons and Complaint in the underlying UIM case. On

January 4, 2013, Liberty Mutual filed its Answer which included the defense of "Improper Service" claiming that "Plaintiff's failed to effectuate proper service under Rule 12(b)(4) and 12(b)(5)." On January 4, 2013, Liberty Mutual also served Mr. Coggin with interrogatories and requests for production. On March 19, 2013, after several months of past no response, Liberty Mutual filed a motion to compel. On June 24, 2013, the court issued a Consent Order Granting Defendant Liberty Mutual's Motion to Compel, which required the Feldmans to provide complete responses within 20 days "will be subject to sanctions." On July 9, 2013, Mr. Coggin signed Plaintiffs' Answers to Defendant's First Set of Interrogatories. On May 6, 2014, the parties in the underlying UIM lawsuit participated in a mediation. The mediation was unsuccessful and on September 16, 2014, Mr. Coggin filed a "Motion for Withdrawal of Appearance and to Stay Proceeding."

At no point during Mr. Coggin's nearly 4 year representation of the Feldmans, did he 1) provide the UIM carrier with sworn testimony by any of the treating physicians causally linking Mr. Feldman's injuries, medical expenses, and future medical needs to the motor vehicle collision; 2) take deposition testimony of any fact witness, treating physicians, or any other expert witness; 3) retain a vocational rehabilitation expert to establish Mr. Feldman's present and future lost wages; 4) retain a nurse with life care planning certification to prepare a life care plan report showing present and future medical needs and expenses; or 5) retain an economist prepare a report showing the present value of Mr. Feldman's future medical expenses. Plaintiffs expect testimony from Julian Allen, who was representing Liberty Mutual in the underlying UIM lawsuit, showing that had Mr. Coggin prepared and developed the causation and damages aspects of the Feldman's

underlying claims, it would have been more likely than not that Liberty Mutual would have offered substantially more than \$25,000 to resolve the Feldmans' claims.

III. Loss of settlement value caused by a lawyer's negligence can be recovered in a legal malpractice action.

Mr. Coggin's motion should be denied on the grounds that the Feldmans should be allowed to complete discovery and present this Court with facts showing that Mr. Coggin's acts and omissions proximately caused a diminution in the settlement value of their claims.

The client's burden of establishing proximate cause in a legal malpractice action ... does not necessarily compel the client to demonstrate that he would have won the underlying case. **Rather, it is enough for the legal malpractice plaintiff to show that he has lost a valuable right; e.g., the settlement value of the underlying case.**

Doe v. Howe, 367 S.C. 432, 446, 626 S.E.2d 25, 32 (Ct. App. 2005) (emphasis added).

"[I]n cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 673 S.E.2d 801, 803 (S.C. 2009). Claims by a legal malpractice plaintiff survive summary judgment with a showing of a scintilla of evidence that establishes that he would have received a larger settlement **or** that he would have most probably prevailed on the underlying claim at trial. In *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002), the Court of Appeals held in a legal malpractice case that a former client **"could satisfy the 'most probably' requirement and defeat [the defendant lawyer's] summary judgment motion by establishing he 'most probably' would have received a larger settlement."**

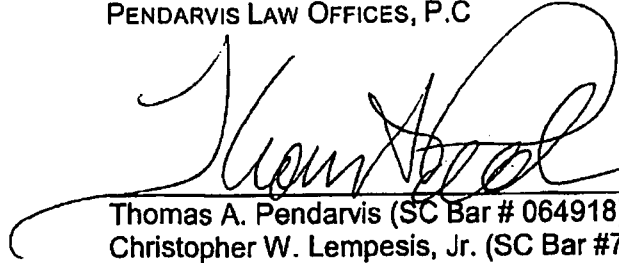
Mr. Coggin's deposition establishes that the value of the Plaintiffs claims in the UIM case were as high as the highest demand made by Mr. Coggin on behalf of Plaintiffs. The highest demand that Mr. Coggin made was \$1,550,000.00 (Coggin dep. 18:17-19:7, June 8, 2016). Additionally, Mr. Coggin's deposition establishes that Mr. Feldman's actual medical expenses occasioned by the collision subject of UIM case were at least \$100,000 to \$130,000 (Coggin dep. 94-96); and that Mr. Feldman's condition rendered him unable to work for at least two more years, resulting in lost income of over \$200,000.00. (Coggin dep. Ex. 3 at pg. 2.). The case settled for \$25,000.00. The question is whether the negligence of Mr. Coggin was the proximate cause for the diminution in the settlement value of the case. "Ordinarily, the question of proximate cause is one of fact for the jury ..." *McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998). In the context of this particular case and Motion for Summary Judgment, Mr. Coggin requests that the Court rule as a matter of law that the motion to dismiss was winnable and that because the motion to dismiss was winnable, as a question of fact, Mr. Coggin's negligence could not have been a proximate cause for the case settling for an extremely low figure. This conclusion would require the court to rule as a matter of law that the Motion to Dismiss was without merit, but then also that if the Motion to Dismiss had been won, that the case was not devalued because of Mr. Coggin's negligence.

Plaintiffs have already provided Mr. Coggin's deposition in response to the Motion for Summary Judgment, which demonstrates a scintilla of evidence as to the value of the UIM case and the \$25,000.00 that the case settled for. The question of proximate cause of the diminution in value of the case is a factual question that should be considered by the jury; and Defendants have not and cannot provide a factual basis for the court to conclude

that Mr. Coggin's negligence was not a proximate cause of the extremely low settlement amount relative to the other competing values of the case which are outlined in Mr. Coggin's deposition. Additionally, the Verified Complaint (verified under oath) provides factual averments, with the significance of an Affidavit, that other particulars that the evidence reveals will support that as a direct and proximate result Coggin's breach of his professional duties and breaches of contract by his actions and omissions the Plaintiffs sustained actual, consequential, and incidental damages in an amount to be determined by the jury at the trial of this case. Counsel for Plaintiffs has provided a Rule 56(f), SCRCR affidavit which outlines the fact that discovery in this matter, under the Consent Scheduling Order agreed to by Mr. Coggin, is not yet complete, and that as a result, as of the filing of this Motion for Summary Judgment, Plaintiffs are not able, yet, to provide the factual particulars by affidavit which will further outline the negligence of Mr. Coggin which resulted in the devaluation of the UIM Case at settlement and which directly and proximately caused the damages complained of in the Verified Complaint. Based on all of the foregoing, Plaintiffs respectfully request that Defendant's Motion for Summary Judgment be denied.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C

A handwritten signature in black ink, appearing to read "Thomas A. Pendarvis", written over a horizontal line.

Thomas A. Pendarvis (SC Bar # 064918)
Christopher W. Lempesis, Jr. (SC Bar #77012)
710 Boundary Street, Unit A-1
Beaufort, SC 29902-4188
843.524.9500
Thomas@PendarvisLaw.com
Chris@PendarvisLaw.com

Counsel for Plaintiffs

Beaufort, South Carolina
July 8, 2016



STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2015-CP-07-1251

Robert E. Feldman and Lois J. Feldman,
Plaintiffs,

vs.

Gary P. Coggin,
Defendant.

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
LEAVE TO FILE AMENDED
VERIFIED COMPLAINT**

2015 JUL 19 PM 3:44
CLERK OF COURT
JUDICIAL CIRCUIT
FOURTEENTH JUDICIAL CIRCUIT
SOUTH CAROLINA

To: M. DAWES COOK, JR., J.D. AND JEFFREY M. BOGDAN, J.D., COUNSEL FOR
DEFENDANT:

NOTICE

YOU WILL PLEASE TAKE NOTICE that Plaintiffs, Robert E. Feldman and Lois J. Feldman, by and through the undersigned attorneys, will move ten days after service of this motion or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 15, SCRPC, to amend their Verified Complaint.

MOTION

The grounds for this motion are stated as follows:

Rule 15(a) of the South Carolina Rules of Civil Procedure provides that more than 30 days after a responsive pleading is served, "a party may amend his pleading only by leave of court or by written consent of the adverse party" Although requested to consent to the amendment of Plaintiffs' pleadings, Defendant Gary Coggin, the motions, responses, and actions of Defendant Coggin demonstrate he has not consented to the filing and service of the Amended Complaint.

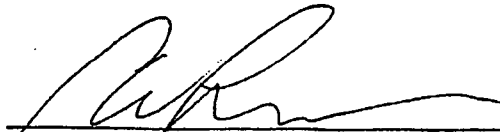
Rule 15(a), SCRCP, provides that "leave [to amend] shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP, permits a plaintiff to add, modify, or change existing claims against an existing defendant. *Valentine v. Davis*, 319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995). The additional and/or modified allegations directed toward Defendant, as set forth in Exhibit 1, are well within the purview of acceptable amended pleadings under Rule 15(a), SCRCP. Rule 15(a) has been interpreted "to strongly favor amendments where the moving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced, and the trial of the issues will not be unduly prejudiced." *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 369 S.E.2d 156, 157 (Ct. App. 1988) (citations omitted). There are no allegations that Plaintiffs' motion to amend is in bad faith, for the purpose of delay, will prejudice Defendant Coggin, or will prejudice the trial of this case. *Shelton v. Southern Railroad Co.*, 86 S.C. 98, 67 S.E. 899 (1910) (party opposing motion to amend has burden of establishing prejudice). Plaintiffs' motion should be granted. See *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 369 S.E.2d 156 (Ct. App. 1988) ("... leave to amend shall be freely given when justice so requires and does not prejudice any other party.").

This case is subject to a Consent Scheduling Order filed with the Court on June 17, 2016, which requires Plaintiffs to identify expert witnesses for trial not later than August 1, 2016; and that discovery be completed not later than December 1, 2016. Plaintiffs are well within the time frame established in said Consent Scheduling Order to conduct discovery and to amend pleadings as a result of facts gleaned from discovery. In fact, in a pleading

signed on March 16, 2016, Defendant took the position that discovery in this matter would take more than a year from that date to complete so there is obviously, from Defendant's perspective, still much discovery to be conducted and as a result plenty of time to allow Defendant to conduct discovery to address the amendments contained in the proposed Amended Complaint. See Defendant's "Response to Request for a Scheduling Order" ("The remaining discovery necessary to get this case ready for trial will likely take over a year to complete." *Id.* at pg. 5, 6). Defendant Coggin is already aware of the allegations regarding his negligence resulting in diminution of settlement value as he was questioned and testified as to his role in diminution of settlement value in his deposition conducted on June 8, 2016, and which is on file with the Court.

WHEREFORE, on the bases of all of the foregoing, Plaintiffs Robert E. Feldman and Lois J. Feldman pray that this Court allow them to file the proposed *Amended Verified Complaint* attached to this motion to amend as Exhibit 1.

Respectfully submitted,



Thomas A. Pendarvis (SC Bar # 064918)
Christopher W. Lempesis, Jr. (SC Bar #77012)
710 Boundary Street, Unit A-1
Beaufort, SC 29902-4188
843.524.9500
Thomas@PendarvisLaw.com
Chris@PendarvisLaw.com

Counsel for Plaintiffs

Beaufort, South Carolina

July 7, 2016

EXHIBIT**1**

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2015-CP-07-01251

Robert E. Feldman and Lois J. Feldman,

Plaintiffs,

vs.

Gary P. Coggin,

Defendant.

**AMENDED
VERIFIED COMPLAINT**
(Jury Trial Demanded)

(Legal Professional Negligence)
(Breach of Contract)

Plaintiffs, Robert E. Feldman and Lois J. Feldman, complaining of Defendant, Gary P. Coggin, would respectfully show unto the Court as follows:

SUMMARY OF THE CASE

1. This legal malpractice action centers upon the Defendant lawyer's professional negligence while representing his clients on claims arising from a motor vehicle collision in 2010. The Defendant lawyer's acts and omissions, including failing to perfect service of process on the defendant at-fault driver, allowed the statute of limitations to expire on his clients' claims. In addition, the Defendant lawyer's acts and omissions in not properly preparing the underlying case greatly reduced and compromised the value of the case. Allowing the statute of limitations to expire, and otherwise failing to properly prepare the case resulted in Feldman's inability to recover a significant portion of the \$500,000 in available underinsured insurance proceeds that, but for the Defendant lawyer's acts and omissions, would have been paid by their carrier to compensate them for personal injuries, medical expenses, lost wages, and loss of consortium claims arising from their injuries caused by the at-fault driver.

PARTIES

2. Defendant, Gary P. Coggin, is, upon information and belief, a citizen and resident of Beaufort County, South Carolina, and is an lawyer licensed to practice law in this State.
3. Plaintiff, Robert E. Feldman, is a resident of Beaufort County, South Carolina.
4. Plaintiff, Lois J. Feldman, is a resident of Beaufort County, South Carolina.

JURISDICTION

5. This Court has jurisdiction over these matters based upon Article V of the South Carolina Constitution, S.C. CODE ANN. §§ 36-2-802 and 36-2-803 (1976), and its plenary powers.

VENUE

6. Venue is proper in Beaufort County as it is, upon information and belief, the county of residence for Defendant, Gary P. Coggin.

FACTS

7. Defendant, Gary P. Coggin ("Coggin"), is a lawyer licensed to practice law in South Carolina.
8. Coggin accepted the representation of Plaintiffs, Robert E. Feldman and Lois J. Feldman ("Bob Feldman," "Lois Feldman," or collectively, "the Feldmans"), on their personal injury and loss of consortium claims against an at-fault driver, Sarah Dickenson ("Dickenson"), arising from a motor vehicle accident that occurred on October 9, 2010.
9. On October 9, 2010, Dickenson failed to properly control her motor vehicle while traveling on US 278 in Beaufort County, South Carolina, and was at fault in causing a collision with a vehicle driven by Bob Feldman, which caused Bob Feldman to suffer

substantial personal injuries, incur medical expenses, and incur lost wages, all of which gave rise to valuable personal injury and loss of consortium claims in favor of the Feldmans.

10. Bob Feldman's present medical specials alone exceed \$150,000, he has substantial future medical needs, he has substantial lost wages, and he has sustained other financial losses.

11. As part of the representation, Coggin obtained copies of the medical specials, substantial future medicals, and some materials showing Bob Feldman's substantial loss wages, and other financial losses.

12. Dickenson had \$100,000 of available liability insurance coverage for the Feldmans' claims.

13. The Feldmans had \$500,000 in under insurance (UIM) coverage with Liberty Mutual Insurance Company ("Liberty") available for injuries sustained and claims arising from the collision caused by Dickenson.

14. To get their consent to settle for only \$85,000 of Dickenson's \$100,000 liability coverage, Coggin recommended they settle for 85,000 and assured the Feldmans that he would recover the available \$500,000 in UIM coverage under the Feldmans' policy issued by Liberty. Based on Coggin's assurances, the Feldmans authorized the settlement with Dickenson and her liability carrier.

15. Coggin did not prepare or provide documents to the insurance adjuster nor defense counsel in the UIM case that actually demonstrated the lost wages of Mr. Feldman, despite Coggin having such documentation by way of, among other items, tax returns of Mr. Feldman.

16. Coggin did not timely attempt to procure nor timely recommend that the Feldmans procure services of key expert witnesses be utilized to establish Mr. Feldman's lost wages, medical expenses, nor the anticipated future costs of Mr. Feldman's medical treatment during his representation of the Feldmans.
17. Coggin settled the Feldmans' claims for only \$85,000 of Dickenson's \$100,000 available liability coverage.
18. On or about October 29, 2012, Coggin filed suit on behalf of the Feldmans against Dickenson in the Beaufort County Court of Common Pleas in a matter styled, *Robert Feldman & Lois Feldman vs. Sarah Dickenson*, C.A. # 2012-CP-07-3800 ("the Underlying Lawsuit") alleging claims for negligence and loss of consortium, and including an *ad damnum* clause seeking a total of \$525,000 in damages.
19. On or about November 29, 2012, Coggin provided copies of the Underlying Lawsuit papers to Liberty.
20. To commence the Underlying Lawsuit under South Carolina common law and Rule 3(a), SCRPC, Coggin was required to file the lawsuit with the clerk of court and accomplish service of process on Dickenson within the statute limitations in any manner prescribed by law or, if Dickenson was not served within the statute limitations, actual service was required to be accomplished no later than 120 days of the date of filing, which was on or before February 26, 2013.
21. Once service of process has been accomplished, Rule 4(g), SCRPC, required the person serving process to make a proof of service in the form of an affidavit stating, among other things, the date, time and place of service. Rule 4(g), SCRPC, also required Coggin to file proof of service with the Clerk of Court.

22. Coggin did not commence the Underlying Lawsuit.
23. Coggin did not commence the Underlying Lawsuit within the applicable statute of limitations because Dickenson was not served within the statute limitations and actual service of process was not accomplished before February 26, 2013.
24. Coggin did not at any point obtain an affidavit or other sworn statement by any individual establishing proof of service of process on Dickenson through personal service pursuant to Rule 4(d), SCRCP.
25. Coggin did not at any point obtain service of process on Dickenson through a statute or an order of court pursuant to Rule 4(e), SCRCP.
26. Coggin did not at any point obtain service of process on Dickenson anywhere within the United States pursuant to Rule 4(h), SCRCP.
27. Coggin did not at any point obtain service of process on Dickenson by an acceptance of service pursuant to Rule 4(j), SCRCP.
28. Coggin did not at any point obtain service of process on Dickenson by publication pursuant to S.C. CODE ANN. §§15-9-15 and 15-9-710.
29. Coggin did not at any point file any documents or an affidavit by an individual establishing proof of service of process on Dickenson by delivering a copy of the summons and complaint personally or by any other means.
30. Liberty retained counsel to represent Dickenson in the Underlying Lawsuit.
31. On October 9, 2013, the statute of limitations expired on the Feldmans' claims against Dickenson.
32. On or about May 5, 2014, Coggin sent a letter to a third-party concerning the Feldmans' claims stating, among other things, about Mr. Feldman's claim that "this does

not include loss of work, loss of enjoyment of life and pain and suffering. If we would consider this, the demand on UIM is \$300,000 to \$350,000." Coggin further represented that Ms. Feldman's loss of consortium claim was valued at \$100,000.

33. Coggin represented the Feldmans during a mediation of the UIM case on Tuesday, May 6, 2014.

34. In or around September, 2014, upon information and belief, counsel for Dickenson advised Coggin of their plan to file a motion to dismiss based on Coggin's failure to serve Dickenson with process, and, upon information and belief, extending on behalf of Liberty a \$25,000 offer to settle to avoid having to litigate the dispute further and because the Feldmans were their insureds.

35. On or about September 15, 2014, Coggin sent a letter to the Feldmans "adv[is]ing you to settle the matter at hand for the \$25,000 that has been offered," notwithstanding his prior pleadings and representations valuing the combined claims between \$450,000 and \$525,000.

36. On October 8, 2014, almost 2 years after the Underlying Lawsuit had been filed and almost 1 year after the statute of limitations had expired, counsel for Dickenson filed a motion to dismiss pursuant to Rule 12(b)(4) and 12(b)(5), SCRCP, stating, "Although Plaintiffs filed a lawsuit within the applicable statute of limitations, Plaintiffs have failed to serve the Defendant within the applicable time period. To date, upon information and belief, the Defendant still has not been served with this lawsuit."

37. After the motion to dismiss had been filed and after the statute of limitations had expired on their claims against Dickeson but before the hearing on the motion to dismiss,

the Feldmans were terminated Coggin's representation of them and retained other counsel to take over the representation.

38. Coggin attempted to get an Affidavit of Service from the process server to indicate that the at-fault driver had actually been served the Complaint in the UIM case, however, Coggin was not able to get such an Affidavit because no such process server could be identified.

39. There was no proof of service or any other evidence that service of process on Dickenson had been accomplished in the files that Coggin delivered to the Feldmans' new counsel.

40. In several communications, including Coggin's response to a subpoena, Coggin indicated that the entire file had been delivered and that Coggin had no other documents related to his representation of the Feldmans. The file did not contain proof of service of process on Dickenson.

41. Throughout the approximately four years that Coggin represented the Feldmans, Coggin never provided information to the UIM adjuster nor counsel for the UIM carrier to substantiate Mr. Feldman's lost wages.

42. Throughout the approximately four years that Coggin represented the Feldmans, Coggin did not prepare the Feldman's file for trial.

43. Throughout the approximately four years that Coggin represented the Feldmans, Coggin did not procure expert witnesses necessary to properly prepare the Feldmans' claims for settlement or trial. Coggin did not supply needed information to UIM counsel regarding lost wages, medical expenses, nor future medical expenses.

44. Liberty paid the Feldmans a mere \$25,000 of the available \$500,000 in UIM coverage to settle the Feldmans' claims against Dickenson and the UIM policy.

45. Based on communications from Defendant Coggin urging the Feldmans to accept \$25,000.00, and the outcome of the January 6, 2015 hearing on the Motion to Dismiss, the Feldmans knew and understood that it was virtually certain that Dickenson's motion to dismiss on statute of limitations grounds would be granted. Liberty would not be required to pay the \$500,000 policy limits under the UIM policy because Coggin, as the Feldmans' legal counsel, did not satisfy the requirements of S.C. CODE ANN. § 38-77-160 by timely and properly commencing a lawsuit and obtaining a judgment against Dickenson. Based on all of the foregoing, the Feldmans agreed to settle their claims for only \$25,000 of the available \$500,000 in UIM coverage to mitigate the damages caused by Coggin's failure to commence the Underlying Lawsuit within the time period allowed by the applicable statute of limitations, the South Carolina Rules of Civil Procedure, and South Carolina common law.

46. Coggin is liable to his clients, the Feldmans, as a direct and proximate result of not performing his professional duties to:

- a. timely commence a lawsuit on their behalf before permitting a statutory time limitation to bar the Feldmans' claims against Dickenson;
- b. timely and properly prepare the lawsuit for settlement negotiations, mediation, and trial;
- c. timely and properly advise the Feldmans to secure the appropriate expert evaluations and participation to establish lost wages, and current and future medical care expenses; and

d. timely and properly supply all relevant documentation to support Mr.

Feldman's claims for lost wages, and current and future medical expenses.

47. Had Coggin met the standard of care by performing his professional duties to timely commence a lawsuit, timely and properly prepare the lawsuit for settlement negotiations, mediation, and trial; timely and properly advise the Feldmans to secure the appropriate expert evaluations and participation to establish lost wages, and current and future medical care expenses; and timely and properly supply all relevant documentation to support Mr. Feldman's claims for lost wages, and current and future medical expenses; it is more likely than not that the Feldmans would have recovered the entire amount of the \$500,000 UIM policy from Liberty.

FOR A FIRST CAUSE OF ACTION
(Legal Professional Negligence)

48. The foregoing factual and jurisdictional allegations are reiterated and realleged as though set forth verbatim.

49. At all times relevant hereto, a lawyer-client relationship existed between Coggin and the Feldmans.

50. Coggin owed duties to the Feldmans, including the duty the duty to protect, preserve and advance the rights and interests of the Feldmans by possessing and exercising that degree of care, skill, and learning which other reasonable and competent lawyers would be expected to possess and exercise under the same or similar circumstances; and in the following particulars, duties:

- a. to represent and protect the Feldmans' interests by timely commencing a lawsuit on their behalf before permitting a statutory time limitation to bar the Feldmans' claims against Dickenson;
- b. to timely and properly prepare the lawsuit for settlement negotiations, mediation, and trial;
- c. to timely and properly advise the Feldmans to secure the appropriate expert evaluations and participation to establish lost wages, and current and future medical care expenses; and
- d. to timely and properly supply all relevant documentation to support Mr. Feldman's claims for lost wages, and current and future medical expenses.

51. Coggin failed to meet the minimum standard of care thereby breaching his professional duties to the Feldmans and otherwise acted in a negligent, grossly negligent, willful, wanton and reckless manner by:

- a. failing to timely commence a lawsuit on their behalf before permitting a statutory time limitation to bar the Feldmans' claims against Dickenson; and by failing to adequately prepare the case for settlement discussions, mediation, and trial.
- b. failing to timely and properly prepare the lawsuit for settlement negotiations, mediation, and trial;
- c. failing to timely and properly advise the Feldmans to secure the appropriate expert evaluations and participation to establish lost wages, and current and future medical care expenses;

- d. failing to timely and properly supply all relevant documentation to support Mr. Feldman's claims for lost wages, and current and future medical expenses; and
- e. failing to protect, preserve and advance the rights and interests of the Feldmans by possessing and exercising that degree of care, skill, and learning which other reasonable and competent lawyers would be expected to possess and exercise under the same or similar circumstances

52. Coggin failed to meet the minimum standard of care thereby breaching his professional duties to the Feldmans by other such particulars as the evidence in this case may demonstrate.

53. As a direct and proximate result Coggin's breach of his professional duties by the actions and omissions as specified herein, the Feldmans sustained actual, consequential, and incidental damages in an amount to be determined by the jury at the trial of this case.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

54. The foregoing factual and jurisdictional allegations are reiterated and realleged as though set forth verbatim.

55. Coggin entered into a contract with the Feldmans, the terms of which Coggin agreed and contracted to provide competent and prudent legal services.

56. The Feldmans fulfilled all necessary preconditions, if any, of the contract with Coggin.

57. By virtue of their contract, Coggin owed duties to the Feldmans, including the duty to protect, preserve and advance the rights and interests of the Feldmans by possessing

and exercising that degree of care, skill, and learning which other reasonable and competent lawyers would be expected to possess and exercise under the same or similar circumstances.

58. Coggin failed to meet the minimum standard of care by failing to timely commence a lawsuit on their behalf before permitting a statutory time limitation to bar the Feldmans' claims against Dickenson thereby breaching his contractual duties to the Feldmans.

59. Coggin failed to meet the minimum standard of care by:

- a. failing to timely and properly prepare the lawsuit for settlement negotiations, mediation, and trial;
- b. failing to timely and properly advise the Feldmans to secure the appropriate expert evaluations and participation to establish lost wages, and current and future medical care expenses; and
- c. failing to timely and properly supply all relevant documentation to support Mr. Feldman's claims for lost wages, and current and future medical expenses.
- d. failing to protect, preserve and advance the rights and interests of the Feldmans by possessing and exercising that degree of care, skill, and learning which other reasonable and competent lawyers would be expected to possess and exercise under the same or similar circumstances

60. Coggin failed to meet the minimum standard of care thereby breaching his contractual duties to the Feldmans by other such particulars as the evidence in this case may demonstrate.

61. As a direct and proximate result of Coggin's breach of his contractual duties by the actions and omissions as specified herein, the Feldmans sustained actual, consequential, and incidental damages in an amount to be determined by the jury at the trial of this case.

TRIAL BY JURY.

62. The Feldmans demand a jury trial on all claims and issues so triable.

EXPERT AFFIDAVIT

63. Pursuant to S.C. CODE ANN. § 15-36-100(B) (2006), attached hereto and incorporated herein by reference as **Exhibit 1**, is the affidavit of Samuel C. Bauer, J.D., an expert witness and lawyer with experience in handling personal injury matters, which specifies 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.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, Robert E. Feldman and Lois J. Feldman, pray for judgment against Defendant, Gary P. Coggin, for all actual damages, consequential damages, and incidental damages, and for prejudgment interest, all in an amount to be more specifically proven at trial, and the costs of this action, and for such other and further relief as this Honorable Court may deem just and proper.

Respectfully submitted,

Thomas A. Pendarvis (SC Bar # 064918)
Christopher W. Lempesis, Jr. (SC Bar #77012)
PENDARVIS LAW OFFICES, P.C.
710 Boundary St., Unit A1
Beaufort, SC 29902-4188
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Thomas@PendarvisLaw.com
Chris@PendarvisLaw.com

Counsel for Plaintiffs

Beaufort, South Carolina

July 7, 2016

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2015-CP-07-

Robert E. Feldman and Lols J. Feldman,
Plaintiffs,

vs.

Gary P. Cogglin,

Defendant.

**VERIFICATION OF THE
AMENDED COMPLAINT**

PERSONALLY appeared before me, Robert E. Feldman, who, first being duly sworn, says: that he is a Plaintiff in the foregoing action; that he has read the foregoing Complaint; that the statements contained therein are true to the best of his knowledge except as to those stated to be based upon information and belief, as to which, he believes such matters to be true.

Robert E. Feldman

SWORN to before me this

_____ day of July, 2016

NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires _____



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
 COUNTY OF BEAUFORT) C/A No.: 2015-CP-07-01251

Robert E. Feldman and Louis J.)
 Feldman,)

Plaintiffs,)

vs.)

Gary P. Coggin,)

Defendant.)

PLAINTIFFS' SUR-REPLY TO

**DEFENDANT'S REPLY TO
 PLAINTIFFS' SUPPLEMENTAL
 MEMORANDUM IN OPPOSITION
 TO DEFENDANT'S MOTION FOR
 SUMMARY JUDGMENT**

2016 AUG - 1 PM 3:30
 CLERK OF COURT
 BEAUFORT COUNTY, S.C.

**TO: M. DAWES COOKE, JR. AND JEFFREY M. BOGDAN, COUNSEL FOR
 DEFENDANT:**

Plaintiffs, Robert E. Feldman and Lois J. Feldman, respectfully submit this Sur-Reply.

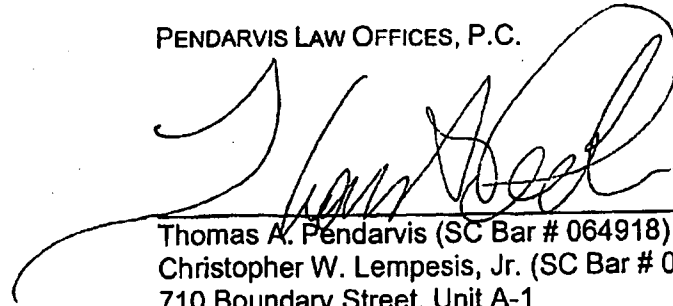
Defendant's Motion should be denied because disputed questions of material fact remain as to whether Mr. Coggin's actions and inactions devalued the Feldmans' UIM claims. The viability of the UIM carrier's motion to dismiss in the underlying case is not dispositive as to the impact of Coggin's failures on diminution in the value of the Feldmans' UIM claims. Defendant's Reply (and other motion papers) simply do not extinguish the *disputed questions of fact* on the diminution in settlement value, raised in record before the trial court by Mr. Coggin's deposition and the Verified allegations in the Complaint. Defendant Coggin's focus on the *allegations* in the Verified Complaint is misplaced in light of the standards for a motion for summary judgment.

For these reasons and for all of the other many reasons already discussed, including the fact that discovery is not complete, the Motion for Summary Judgment

should be denied. See *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) and *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001).

Respectfully Submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, appearing to read 'Thomas A. Pendarvis', is written over a horizontal line.

Thomas A. Pendarvis (SC Bar # 064918)
Christopher W. Lempesis, Jr. (SC Bar # 077012)
710 Boundary Street, Unit A-1
Beaufort, SC 29902
843.524.9500 Tel.
Thomas@PendarvisLaw.com

Counsel for Plaintiffs

Beaufort, South Carolina

July 28, 2016

Thomas A. Pendarvis

From: Mullen, Carmen T. Law Clerk (Paige Ornduff) <CMullenLC@sccourts.org>
Sent: Thursday, September 22, 2016 11:26 AM
To: Chris Lempesis; Jeff Bogdan
Cc: Thomas A. Pendarvis; Sara Wood; Janice Klein; Lindsey Perkins; Eileen Ganley; Mullen, Carmen T.
Subject: RE: Motion to Amend - Robert Feldman v. Gary Coggin (C/A No. 2015-CP-07-01251) (

AmicusFileIds: 884
AmicusFileName: Feldman v. Coggin
AmicusId: 192525
AmicusStatus: Saved
AmicusTimeEntry: Yes

All,

As a result of Judge Dukes' Order granting Defendant's Motion for Summary Judgment and pending the outcome of an appeal of that Order, Judge Mullen will not rule on Plaintiff's Motion to Amend unless and until this matters comes back before the court.

Thank you,
Paige

From: Chris Lempesis [mailto:chris@pendarvislaw.com]
Sent: Wednesday, September 14, 2016 9:28 AM
To: Jeff Bogdan
Cc: Mullen, Carmen T. Law Clerk (Paige Ornduff); Thomas A. Pendarvis; Sara Wood; Janice Klein; Lindsey Perkins; Eileen Ganley; cmullen@sccourts.org
Subject: RE: Motion to Amend - Robert Feldman v. Gary Coggin (C/A No. 2015-CP-07-01251) (

Jeff,

I think that your response below contains an argument and a legal conclusion so I feel required to respond. My email did not argue for a specific outcome as to the Motion for Leave to Amend – only entry of an Order. The result of Judge Mullen's order on the motion to amend would have a substantive impact on the pending Rule 52/59 Motion as well as the case as a whole and for that reason, from the perspective of the moving parties, the Motion for Leave to Amend is not "moot."

Further, I believe that Rule 58, SCRCP provides (and that 58(a)(2) requires) an Order, regardless of what the order might say. If the ruling on the Motion for Leave to Amend was to continue the Motion for Leave to Amend, for instance, pending the outcome of the Motion for Summary Judgment, we need a written order as to that point for purposes of appeal. The same is true if the Court decides that the Motion for Leave to Amend is moot as we would prefer to include such an order in the likely appeal of the grant of the Motion for Summary Judgment. Regardless of what the Court decides on the Motion for Leave to Amend (which we would prefer that the Court grant), I believe that in Rule 58 entitles the Plaintiffs to a written order and that these Plaintiffs, given the history of this case and the underlying case, are certainly entitled to an Order from the Court regarding the Motion for Leave to Amend.

Thanks,

Chris

Christopher W. Lempesis, Jr.

Pendarvis Law Offices, P.C.

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Beaufort, SC 29902-4188

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The Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521, applies to e-mail, prohibits unauthorized interception, unauthorized use, and unauthorized disclosure of an e-mail, of the contents of an e-mail, and of any attachments to the e-mail. 18 U.S.C. §§ 2510-2521, the Electronic Communications Privacy Act, provides for civil remedies, including an award of damages, in cases of unauthorized interception, unauthorized use, or unauthorized disclosure of an e-mail, of the contents of an e-mail, or of any attachments to the e-mail.

From: Jeff Bogdan [<mailto:jbogdan@barnwell-whaley.com>]

Sent: Wednesday, September 14, 2016 8:38 AM

To: Chris Lempesis <chris@pendarvislaw.com>

Cc: cmullenlc@sccourts.org; Thomas A. Pendarvis <tpendarvis@pendarvislaw.com>; Sara Wood <SWood@pendarvislaw.com>; Janice Klein <jklein@barnwell-whaley.com>; Lindsey Perkins <lperkins@barnwell-whaley.com>; Eileen Ganley <Eileen@pendarvislaw.com>; cmullen@sccourts.org

Subject: Re: Motion to Amend - Robert Feldman v. Gary Coggin (C/A No. 2015-CP-07-01251) (

Judge Mullen and Ms. Ornduff,

At the risk of arguing this issue via email, I feel the need to offer this very brief reply.

Defendant's Motion for Summary Judgment was as to the entire case. Judge Dukes granted that motion in full. Accordingly, this case is over. Plaintiff's Motion for Leave to Amend is moot. I do not believe an order is necessary.

Thank you,

Jeff Bogdan

On Sep 13, 2016, at 4:02 PM, Chris Lempesis <chris@pendarvislaw.com> wrote:

Ms. Paige Ornduff
Judicial Law Clerk
The Honorable Carmen T. Mullen
102 Ribaut Road
P.O. Drawer 1128
Beaufort, SC 29901

VIA EMAIL ONLY

Dear Ms. Ornduff:

As you may recall, Plaintiff's Motion to Amend the Complaint filed in the above referenced matter was heard before Judge Mullen on Thursday, September 8, 2016. While recognizing that leave to amend is freely given, Judge Mullen did not actually orally grant the Motion to Amend and indicated that a decision would be forthcoming depending on the outcome of the Defendant's Motion for Summary Judgment pending before Judge Dukes. On the following day, Judge Dukes entered a one sentence order granting the Defendant's Motion for Summary Judgment. We are in the process of drafting and will be filing shortly a Rule 52/59 Motion as to the Order entered by Judge Dukes granting summary judgment.

It is my recollection that Judge Mullen mentioned at the hearing that she prefers to receive requests for orders when orders are needed as opposed to counsel waiting for an order to issue. We have not received an Order from Judge Mullen as to the Motion to Amend and given the Order from Judge Dukes regarding the Motion for Summary Judgment, it would seem that we now need a response as to the Motion to Amend as the ruling on the Motion to Amend will have an impact on the Rule 52/59 Motion as well as any subsequent appeal.

Can you please ask about such an Order from Judge Mullen as to the Motion to Amend? Please note that I have copied Mr. Bogdan, opposing counsel, on this email. I have also copied Judge Mullen in hopes of saving you the effort of forwarding this information.

Thank you for your time.

With kind regards,

Chris Lempesis

Christopher W. Lempesis, Jr.
Pendarvis Law Offices, P.C.
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From: Lindsey Perkins [<mailto:lperkins@barnwell-whaley.com>]
Sent: Wednesday, September 07, 2016 3:08 PM
To: cmullenlc@sccourts.org
Cc: Thomas A. Pendarvis <tpendarvis@pendarvislaw.com>; Chris Lempesis <chris@pendarvislaw.com>; Sara Wood <SWood@pendarvislaw.com>; Jeff Bogdan <jbogdan@barnwell-whaley.com>; Janice Klein <jklein@barnwell-whaley.com>
Subject: Robert Feldman v. Gary Coggin (C/A No. 2015-CP-07-01251) (BWPH 5059.001)

Good afternoon. Attached please find a courtesy copy of Defendant's Memorandum In Opposition to Plaintiff's Motion for Leave to File Amended Verified Complaint with regard to the above case, which was sent to the Clerk of Court for filing yesterday. A hearing on this matter is scheduled for tomorrow, September 8th, at 12:00 p.m. in front of Judge Mullen. I have copied Plaintiffs' counsel on this email. Please let me know if you require anything further. Thank you.

LINDSEY PERKINS
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<image001.jpg>

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STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT

ROBERT E. FELDMAN and LOIS J.  
FELDMAN,

Plaintiffs,

vs.

GARY P. COGGIN,

Defendant.

) IN THE COURT OF COMMON PLEAS  
) SECOND JUDICIAL CIRCUIT  
) C/A No.: 2015-CP-07-01251

**DEFENDANT'S MEMORANDUM IN  
OPPOSITION TO PLAINTIFF'S MOTION  
TO ALTER OR AMEND JUDGMENT**

**TO: THOMAS A. PENDARVIS AND CHRISTOPHER W. LEMPESIS, ATTORNEYS  
FOR PLAINTIFF**

For the reasons that follow, the Defendant, Gary P. Coggin (hereinafter "Attorney Coggin") respectfully requests that the Court deny the Plaintiff's Motion to Alter or Amend Judgment.

Plaintiffs argue, under Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure, that the Court should alter or amend its Order Granting Defendant's Motion for Summary Judgment, which is dated and time-stamped September 9, 2016 (hereinafter the "Order"). Plaintiffs argue that the Order should be altered or amended for three reasons: (1) the Order is premature because discovery is not complete; (2) the Court improperly found that Attorney Coggin's alleged negligence did not proximately cause Plaintiffs any damages; and (3) the Order contains no findings.

This action for Legal Professional Negligence and Breach of Contract is based on one theory of liability – that Attorney Coggin failed to serve Sarah Dickenson, the tortfeasor, with the Summons and Complaint in an underinsured motorist lawsuit. The Verified Complaint alleges no facts to support any other theory of liability, and the expert affidavit attached to the Complaint asserts no other theory of liability.

Attorney Coggin moved for Summary Judgment, arguing that even if Plaintiffs could establish that Attorney Coggin failed to serve Dickenson, that theory of liability could not support this legal malpractice action because the defendant in the UIM action failed to timely assert lack of service of the at-fault driver and could therefore not defend the action on that basis.<sup>1</sup>

Despite filing three separate briefs and arguing at a hearing, Plaintiffs never addressed Attorney Coggin's argument, and instead argued that Attorney Coggin could be held liable under a separate theory of liability – that he failed to properly prepare the UIM action for settlement or trial. While Plaintiffs claim that this failure to prepare theory is contained in its pending Verified Complaint, they sought leave to file an Amended Verified Complaint to include this new theory. Before the Motion for Leave to File the Amended Verified Complaint was ruled on, the Court succinctly granted Attorney Coggin's Motion for Summary Judgment in full, rendering the Motion for Leave moot.

Plaintiffs now present the same argument they did at the summary judgment phase – that this case should proceed under the new theory that Attorney Coggin failed to prepare the UIM action for settlement or trial. Plaintiffs again fail to address Attorney Coggin's argument at summary judgment that his alleged failure to serve Dickenson cannot support this case.

I. No Additional Discovery is Necessary

The sole issue in this case is whether Attorney Coggin's alleged failure to serve Dickenson with the Summons and Complaint in the UIM action amounts to compensable negligence or breach of contract. South Carolina case law is clear that Attorney Coggin's

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<sup>1</sup> Attorney Coggin incorporates herein the arguments presented in his Memorandum in Support of Motion for Summary Judgment, at the hearing on the Motion for Summary Judgment, and in his Reply to Plaintiff's Supplemental Memorandum in Opposition to Motion for Summary Judgment. In short, Attorney Coggin argued at summary judgment that his alleged failure to serve Dickenson in the UIM Action had absolutely no effect on the UIM Action and did not proximately cause Plaintiffs any damages because the UIM insurer waived its right to challenge service on Dickenson by not specifically raising that issue in its answer and by actively litigating the UIM Action as if service was appropriate, only to later move to dismiss after the statute of limitations had expired. See Unisun Inc. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000).

alleged failure to serve Dickenson in the UIM case was waived because the defense was not properly pled, and thus had no effect on the UIM action or the Plaintiffs' ability to recover therein. See Unisun Inc. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559.

Despite now having a fifth opportunity, Plaintiffs have yet to present any argument that Attorney Coggin's alleged failure to serve could have proximately caused the Plaintiffs any damages. Similarly, while Plaintiffs claim that discovery must be completed before Attorney Coggin's Motion for Summary Judgment is ripe for a decision, Plaintiffs have failed to specify what specific discovery they need to do to determine the sole issue pending in this case. In fact, no additional discovery is necessary for the Court to decide as a matter of law, as it did, that Attorney Coggin is entitled to Summary Judgment on Plaintiff's pending Verified Complaint. Unisun is dispositive of this issue, and Plaintiffs have not argued against it.

## II. The Court Properly Ruled on the Proximate Cause Issue

Plaintiffs next argue that the Court misapprehended the law on proximate cause and improperly ruled on this issue. Plaintiffs argue that this case actually includes two separate theories of liability: (1) failure to serve and (2) failure to prepare. Again, it is unequivocal from reviewing the pending Verified Complaint and expert affidavit that Plaintiffs only advanced one theory of liability -- the alleged failure to serve. Nowhere in the pending Verified Complaint or expert affidavit is the failure to prepare theory even mentioned. Plaintiff's argument that Attorney Coggin's alleged failure to prepare the case could have proximately caused the Plaintiffs damages should not be considered, as it is not a part of this case.

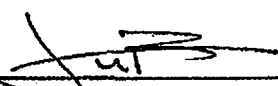
Attorney Coggin fully briefed this issue in its summary judgment filings and argued it at the hearing. In short, even if Attorney Coggin did fail to serve Dickenson, the failure to serve defense was waived in the UIM action and, thus, the alleged failure to serve could not, as a matter of law, have proximately caused the Plaintiffs any harm or diminished the settlement

value of the UIM action. See Unisun v. Hawkins, 342 S.C. 537, 537 S.E.2d 559.

III. The Order is Sufficient in its Current Form

Plaintiffs' final argument is that the Order is insufficient in that it fails to specifically rule on Plaintiffs' arguments. While it is brief, the Order sufficiently addresses and rules on all arguments presented at summary judgment. The Court is not required to include findings of fact or conclusions of law in deciding a motion for summary judgment. Rule 52(a), SCRCP ("Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 and 56 . . ."). Attorney Coggin believes that the Order adequately disposes of his Motion for Summary Judgment and requests that the Court deny Plaintiffs' Motion to Alter or Amend.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

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*Attorneys for Defendant*

September 29, 2016  
Charleston, South Carolina

**Leanne James**

---

**From:** Chris Lempesis  
**Sent:** Friday, January 06, 2017 1:08 PM  
**To:** McLeod, Heather  
**Cc:** Jeff Bogdan; Thomas A. Pendarvis; Sara Sutton; Leanne James; mdukes@bcgov.net  
**Subject:** Feldman v Coggin, 2015-CP-07-1251  
**Attachments:** 2017-01-06 Order granting Motion to Alter or Amend Judgment.docx

Dear Heather:

Thomas Pendarvis requested that I forward the attached proposed Order to Judge Dukes in connection with the above referenced matter. While I have enrolled our firm in the e-filing system for this case, my read of the instructions suggests that this proposed order should be emailed directly to Judge Dukes as opposed to filing the same in the e-filing system.

I hope everyone has a nice weekend.

With kind regards,

Chris Lempesis

Christopher W. Lempesis, Jr.  
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STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2015-CP-07-1251

Robert E. Feldman and Lois J. Feldman,

Plaintiffs,

vs.

Gary P. Coggin,

Defendant.

**ORDER<sup>1</sup> GRANTING  
PLAINTIFFS' MOTION TO ALTER  
OR AMEND JUDGMENT**

On December 12, 2016, this matter came before the Court for argument on Plaintiffs' Motion to Alter or Amend the Court's Order entered on September 9, 2016 granting summary judgment ("Summary Judgment Order") to the Defendant, Gary Coggin ("Mr. Coggin"). Present at the hearing on behalf of Plaintiffs were Thomas A. Pendarvis, Esquire, and Christopher W. Lempesis, Jr., Esquire. Also present at the hearing were Defendant Coggin and Jeffery Bogdan, Esquire, appearing on behalf of Defendant Coggin.

For the reasons stated below, Plaintiffs Motion to Alter or Amend Judgment is hereby GRANTED, and correspondingly, the Defendant's Motion for Summary Judgment is hereby DENIED.

In the hearing on the present motion, several issues not addressed in the Court's Summary Judgment Order were recapitulated, including: several existing factual disputes

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<sup>1</sup> Plaintiffs presented the present Order pursuant to the standing request of the Honorable Marvin H. Dukes, III, that the Court be notified if more than 30 days has passed from the date of a hearing and an order has not been issued from the Court. Rather than present the material enclosed herein as a Supplemental Memorandum, in the interests of efficiency, Plaintiffs present this information as an Order for the Court's signature, while maintaining that this Order also serves the same function of record preservation as if it were cast as a Supplemental Memorandum in support of Plaintiffs' Motion to Alter or Amend Judgment.

highlighted by counsel for both Plaintiffs and Defendant; the Court was reminded that there is evidence that discovery, as addressed in a filed Rule 56(f) Affidavit, is not yet complete; and questions surround the proximate cause of the damages that Plaintiffs claim were further illustrated.

The Court finds that factual disputes exist as to: the inherent settlement value of the case based on the actual medical expenses of Mr. Feldman; whether Mr. Coggin actually served the at-fault driver or could have ever procured an affidavit in order to successfully challenge a Motion to Dismiss for failure to serve the at-fault driver; whether the trial court required an affidavit of service that Mr. Coggin admitted could not be obtained to challenge a Motion to dismiss for failure to serve the at-fault driver, and the impact of such a requirement on the settlement value of the case. Evidence is before the Court, by way of a Rule 56(f) affidavit, that discovery is not yet complete.

As to proximate cause, the Court finds Defendant's arguments concerning *Unisun*<sup>2</sup> persuasive, in that Mr. Coggin's alleged failure to serve the at-fault driver was not the sole proximate cause of the damages that Plaintiffs claim. Yet, to assert that a defendant is liable, it is not necessary for a Plaintiff to prove that a defendant's particular action was the sole proximate cause of the injury, instead, it is sufficient if such action can be shown as a concurring or a contributing proximate cause. See *Player v. Thompson*, 259 S.C. 600, 606, 193 S.E.2d 531, 533–34 (1972). Also, the Court recognizes that the operative statute cited by both Plaintiffs and the Defendant, South Carolina Code §15-36-100(B), only requires an expert affidavit to specify one negligent act or omission for the *initiation* of a legal malpractice suit. Additionally, as to matters of proximate cause, a legal

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<sup>2</sup> *Unisun Inc. v. Hawkins*, 342 S.C. 537, 573 S.E.2d 559 (Ct. App. 2000).

malpractice plaintiff is not specifically relegated having to show that he would have won the underlying case; but instead in order to establish proximate cause a legal malpractice plaintiff may show that by virtue of the actions of a defendant lawyer, that plaintiff has lost a valuable right, e.g., the settlement value of the underlying case. See *Doe v. Howe*, 367 S.C. 432, 446, 626 S.E.2d 25, 32 (Ct. App. 2005). A legal malpractice plaintiff can defeat a motion for summary judgment by establishing that he most probably would have received a larger judgment. See *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002). In his motion for summary judgment, Mr. Coggin essentially argues that Plaintiffs could have won the underlying Motion to Dismiss pursuant to *Unisun*, and for this reason, Plaintiffs cannot establish that Mr. Coggin's alleged failure to serve proximately caused Plaintiffs not to recover all of the \$500,000 policy in the underlying UIM case.

Mr. Coggin's *Unisun* argument, although well phrased, does not address the issue of proximate cause of the lost ability to settle the case for any value greater than the \$25,000 they were able to obtain and up to the \$500,000 UIM limits. Mr. Coggin's response to the lost value discussion presented by *Hall* and *Doe* requires that the Plaintiffs are relegated to the allegations raised in the initial Complaint and verified by the initial expert affidavit filed therewith, and based on only those pleadings, Plaintiffs are barred, at the summary judgment stage, from making allegations and/or an assertion of lost settlement value, whether occasioned by the alleged failure to serve, or a subsequently offered theory of liability based on a failure to adequately prepare the underlying case. Assuming that Defendant's analysis is correct in that the Complaint and Expert Affidavit do not sufficiently allege lost diminution in settlement value, such an

argument ignores that at the summary judgment phase, the Court is required to view available evidence and reasonable inferences therefrom in the light most favorable to these Plaintiffs. See *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747 (1996); *Lattie v. SHS Enterprises, Inc.*, 300 S.C. 417, 389 S.E.2d 300 (Ct. App. 1990); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986). Reading the record before the Court in the light most favorable to these Plaintiffs, there exists at least a scintilla of evidence (including statements in the expert affidavit attached to the Verified Complaint and proposed Amended Complaint) that the Plaintiffs did not recover at least some portion of the \$500,000 UIM policy in the underlying case greater than \$25,000, at least in part because of the negligence of Defendant Coggin.

Whether the specific act of negligence in failing to serve the at-fault driver was the proximate cause in the diminution of settlement value that Plaintiffs contend was alleged in the initial Complaint and Expert Affidavit, or whether additional and/or other negligence of Defendant Coggin also proximately caused diminution of settlement value that Plaintiffs allege in the initial Complaint and Expert Affidavit and/or proposed Amended Complaint, are all questions to be developed in further discovery and then such factual questions generally must be decided by a jury. Also, Plaintiffs did attempt to amend the Complaint through proper motion and a hearing, and this Court and the Defendant were aware of such an attempt, and the lost settlement value theory of liability. The factual basis for amendment of the complaint, including alternative theories of liability for diminution in settlement value and failure to adequately prepare the underlying case for settlement, mediation and trial, were all allegations including in that Motion to Amend; and thus before

this Court and the Defendant. Not only are these allegations are present in the proposed Amended Complaint; and also raised in the deposition of Defendant Coggin, and in other documents filed also filed with the Court in connection to Plaintiffs' opposition to the Motion for Summary Judgment, these inferences arise even if the Court only considers the allegations raised in the initial complaint, i.e., that Defendant Coggin's failure to serve the at-fault driver resulted in the Plaintiffs not recovering \$500,000 in the underlying UIM case.

The factual questions recapitulated at the hearing on the present Motion, coupled with evidence that discovery is not complete, and inferences that must be drawn in favor of these Plaintiffs, requires the Court to grant Plaintiffs' present Motion, hereby altering and amended the previous grant of summary judgment to deny the same.

IT IS SO ORDERED:

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Honorable Marvin H. Dukes, III  
Master In Equity and Special Circuit Court  
Judge for Beaufort County

January \_\_, 2017  
Beaufort, South Carolina

|                                        |   |                                       |
|----------------------------------------|---|---------------------------------------|
| STATE OF SOUTH CAROLINA                | ) | IN THE COURT OF COMMON PLEAS          |
|                                        | ) | SECOND JUDICIAL CIRCUIT               |
| COUNTY OF BEAUFORT                     | ) | C/A No.: 2015-CP-07-01251             |
| ROBERT E. FELDMAN and LOIS J. FELDMAN, | ) |                                       |
|                                        | ) |                                       |
| Plaintiffs,                            | ) |                                       |
|                                        | ) | <b>DEFENDANT'S SUPPLEMENTAL</b>       |
| vs.                                    | ) | <b>MEMORANDUM IN OPPOSITION TO</b>    |
|                                        | ) | <b>PLAINTIFF'S MOTION TO ALTER OR</b> |
| GARY P. COGGIN,                        | ) | <b>AMEND JUDGMENT</b>                 |
|                                        | ) |                                       |
| Defendant.                             | ) |                                       |
|                                        | ) |                                       |

**TO: THOMAS A. PENDARVIS AND CHRISTOPHER W. LEMPESIS, ATTORNEYS FOR PLAINTIFF**

After the Court granted Defendant's Motion for Summary Judgment, Plaintiffs filed a Motion to Alter or Amend Judgment pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure. Attorney Coggin filed a Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend Judgment and a hearing was held on December 12, 2016. At the hearing, Plaintiffs advanced arguments and facts that were not presented during the summary judgment proceedings, in addition to re-arguing the issues they did raise during the summary judgment proceedings. The Court did not request the parties to submit proposed orders, but rather requested that the parties notify the Court if no ruling had been issued within 30 days of the hearing.

On January 6, 2017, twenty-five days after the hearing, Plaintiffs submitted to the Court, but did not file, a Proposed Order Granting Plaintiffs' Motion to Alter or Amend Judgment. Plaintiffs stated in footnote one that they intended their proposed order to also serve as a Supplemental Memorandum in Support of Plaintiffs' Motion to Alter or Amend Judgment. Attorney Coggin submits this filing in response to Plaintiffs' January 6 proposed order/supplemental memorandum.

Attorney Coggin continues to request that the Court deny Plaintiffs' Motion to Alter or Amend Judgment, thereby affirming the Court's grant of Defendant's Motion for Summary Judgment.

This action for Legal Professional Negligence and Breach of Contract is based on only one theory of liability – that Attorney Coggin failed to serve Sarah Dickenson, the tortfeasor, with the Summons and Complaint in an underinsured motorist lawsuit. The Verified Complaint alleges no facts to support any other theory of liability, and the expert affidavit attached to the Complaint asserts no other theory of liability. Attorney Coggin's Motion for Summary Judgment demonstrated that even if Plaintiffs could establish that Attorney Coggin failed to serve Dickenson, that theory of liability could not support this legal malpractice action because the defendant in the UIM action failed to timely assert lack of service of the at-fault driver and under prevailing South Carolina law therefore could not defend the action on that basis.<sup>1</sup>

Despite filing three separate briefs and arguing at a hearing at the summary judgment stage, Plaintiffs never addressed Attorney Coggin's argument, and instead argued that Attorney Coggin could be held liable under a separate theory of liability – that he failed to properly prepare the UIM action for settlement or trial. While Plaintiffs claim that this failure-to-prepare theory is already included in its pending Verified Complaint, they sought leave to file an Amended Verified Complaint to include this new theory. Before the Motion for Leave to File the Amended Verified Complaint was ruled on, the Court succinctly granted Attorney Coggin's Motion for Summary Judgment in full, rendering the Motion for Leave moot.

Plaintiffs now present the same argument they did at the summary judgment phase – that

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<sup>1</sup> Attorney Coggin incorporates herein the arguments presented in his Memorandum in Support of Motion for Summary Judgment, at the hearing on the Motion for Summary Judgment, and in his Reply to Plaintiff's Supplemental Memorandum in Opposition to Motion for Summary Judgment. In short, Attorney Coggin argued at summary judgment that his alleged failure to serve Dickenson in the UIM Action had absolutely no effect on the UIM Action and did not proximately cause Plaintiffs any damages because the UIM insurer waived its right to challenge service on Dickenson by not specifically raising that issue in its answer and by actively litigating the UIM Action as if service was appropriate, only to later move to dismiss after the statute of limitations had expired. See Unisun Inc. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000).

this case should proceed under the new theory that Attorney Coggin failed to prepare the UIM action for settlement or trial. Plaintiffs again fail to address Attorney Coggin's argument at summary judgment that his alleged failure to serve Dickenson cannot support this case. Plaintiffs do suggest, rather nebulously, that both Attorney Coggin's alleged failure to serve and alleged failure to prepare diminished the settlement value of the UIM Action and, therefore, proximately caused the Plaintiffs to suffer damages. While Plaintiffs have now provided more emphasis for the argument that Attorney Coggin's alleged failure to serve proximately caused Plaintiffs damages because it diminished the settlement value of the UIM action, Plaintiffs did not present any facts at the summary judgment stage to support this theory, nor have they done so here.<sup>2</sup>

The sole issue in this case is whether Attorney Coggin's alleged failure to serve Dickenson with the Summons and Complaint in the UIM action amounts to compensable negligence or breach of contract. South Carolina case law is clear that Attorney Coggin's alleged failure to serve Dickenson in the UIM case was waived because the defense was not properly pled, and thus had no effect on the UIM action or the Plaintiffs' ability to recover therein. See Unisun Inc. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559. Plaintiffs have repeatedly characterized Attorney Coggin's summary judgment argument as stating that there can be no liability because Attorney Coggin "could have" been successful in defeating the motion to dismiss the UIM Action for failure to service on Dickenson. Attorney Coggin's argument is and always have been that the motion to dismiss the UIM Action was meritless as a matter of law,

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<sup>2</sup> At the hearing on Plaintiffs' Motion to Alter or Amend Judgment, Plaintiffs for the first time pointed to facts and evidence that they believed supported their theory that Attorney Coggin's alleged failure to serve diminished the settlement value of the UIM action. While Attorney Coggin pointed out that these arguments were not a part of the summary judgment record, and thus not appropriate at the Motion to Alter or Amend Judgment stage (See Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990)), these facts also did not create a genuine issue of material facts or arise to a scintilla of evidence to deny Attorney Coggin's Motion for Summary Judgment. Despite six separate filings/submissions between the summary judgment motion and this motion, Plaintiffs have still not identified in writing any facts or a scintilla of evidence that could support their theory that Attorney Coggin's alleged failure to serve diminished the settlement value of the UIM Action.

not just that it “could have” been denied. Plaintiffs have still not set forth any arguments attempting to distinguish Unisun, specifying how the motion to dismiss the UIM Action had any merit, or how it could have possibly reduced the settlement value of the UIM Action.

Despite now having a sixth opportunity, Plaintiffs have yet to present any argument that Attorney Coggin’s alleged failure to serve could have proximately caused the Plaintiffs any damages. Despite Plaintiffs’ unsupported claim, Attorney Coggin’s alleged failure to serve could not have diminished the settlement value of the UIM Action because it was of no legal consequence to the UIM Action, since the improper service defense was waived at the pleadings stage. Further, while Plaintiffs continue to claim generally that additional discovery is necessary, they have still not identified any specific discovery that they believe is germane to Attorney Coggin’s Motion for Summary Judgment. In fact, no additional discovery is necessary for the Court to decide as a matter of law, as it did, that Attorney Coggin is entitled to Summary Judgment on Plaintiff’s pending Verified Complaint. Unisun is dispositive of this issue, and Plaintiffs have not argued against it.

Attorney Coggin requests that the Court deny Plaintiffs’ Motion to Alter or Amend Judgment and uphold its previous correct decision granting summary judgment.

[Signature block on following page]

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: /s/ Jeffrey M. Bogdan

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*Attorneys for Defendant*

January 10, 2017  
Charleston, South Carolina

P