THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

RECEIVED
JUN 30 2014
SC Court of Appeals

Lower Court Case No. 2012-CP-42-5017
Appellate Case No. 2013-002699

Gretchen A. Rogers, as Guardian *ad litem*
for Mark A. Malloy. . . . . Appellant,

vs.

Kenneth E. Lee and
Law Offices Of Lee & Smith, P.A.. . . . . Respondents.

RECORD ON APPEAL

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Counsel for Respondents

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STATE OF SOUTH CAROLINA)
)
COUNTY OF: LANCASTER)
)
IN THE MATTER OF: MARK MALLOY)
)

IN THE PROBATE COURT

ORDER APPOINTING COUNSEL

CASE NUMBER: ~~2010~~ 2011GC2900002

Upon reading the petition in the above matter, this court finds that the appointment of counsel is appropriate for the allegedly incapacitated person or minor.

THEREFORE, IT IS HEREBY ORDERED that GRETCHEN ROGERS, Esquire, be appointed attorney for the allegedly incapacitated person or minor and granted the powers and duties of that position. The attorney also has the powers and duties of a guardian ad litem.

Executed this 5th day of Jan., 2010.

Sandra S. Estridge, Probate Court Judge

ACCEPTANCE

I agree to serve as attorney and guardian ad litem in this matter.

Executed this 9th day of November, 2010.

Signature: [signature]
Name: Gretchen Rogers
Address: Post Office Box 10751
Rock Hill, SC 29731
Telephone (O): 803-980-0083
(H): 803-328-2525

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2011 JAN -5 P 12:07
SANDRA S. ESTRIDGE
LANCASTER COUNTY
PROBATE JUDGE

FORM #532PC (1/89)
62-5-303, 62-5-407

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-42-5017

GRETCHEN A. ROGERS, AS GAL FOR MARK A. MALLOY

PLAINTIFF(S)

KENNETH E. LEE AND LAW OFFICES OF LEE AND SMITH, P.A.

DEFENDANT(S)

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

Disposition Type (Check One)

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

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

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

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

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

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

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

This matter comes before the court on Defendant's motion for summary judgment. Plaintiff and Defendants are residents of South Carolina. Plaintiff contracted with Defendant to represent Plaintiff on a workers compensation case arising out of injuries sustained in North Carolina. The contract contained a choice of law clause stating that the substantive law of North Carolina would govern the contract. Under North Carolina law, that state's statute of repose would bar the present action; South Carolina has no similar provision with regard to legal malpractice claims. Plaintiff alleges that Defendant negligently settled the North Carolina worker's comp action. For the foregoing reasons, the court finds that summary judgment is proper in this case.

Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81 (S.C. App. 2007) controls. In that case, the Court of Appeals held that injuries sustained in the collapse of a walkway in North Carolina were subject to the North Carolina statute of repose under the principle of *lex loci delicti*. The court in *Nash* even noted that Nash had alleged the defective tees used to construct the walkway were manufactured in South Carolina.

Plaintiff in the present case makes a very seductive argument that, because the contract between Plaintiff and Defendant was entered into in South Carolina, because the final release was signed in South Carolina, and because the damage to Plaintiff manifested itself in South Carolina, the court should deny summary judgment. However, this court is unable to logically distinguish *Nash* and its precedent from the present facts, and the court is unable to disentangle the nexus linking Plaintiff's present cause of action to the underlying workers comp action in North Carolina. The underlying cause of action involved application of the worker's comp laws of North Carolina. Although the parties entered into their relationship in South Carolina, that relationship was governed by the substantive law of North Carolina. The workers comp action was filed, mediated, settled and approved in North Carolina. Clearly, the court is constrained to find that the *lex loci delicti* of this action arose in North Carolina.

Having found that this action arose in North Carolina, application of North Carolina's statute of repose is required because the protection afforded by the statute of repose constitutes a substantive right. *Nash, supra*. Under North Carolina law, Plaintiff's incapacity does not toll application of the statute. Although the court is extremely sympathetic with the allegations concerning Plaintiff's situation and plight, this court is required to follow the law as written. Accordingly, Defendant's motion for summary judgment is granted. Counsel for Defendant is requested to prepare a formal order.

Order Information

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

Complete if judgment requires payment of a sum of money or affects title to real or personal property			
JUDGMENT AGAINST PLAINTIFF:		**JUDGMENT AGAINST DEFENDANT:**	
Judgment Amount	$_____	Judgment Amount	$_____
Taxable Costs	$_____	Taxable Costs	$_____
Attorney's Fees	$_____	Attorney's Fees	$_____
Interest	$_____	Interest	$_____
Other:	$_____	Other:	$_____
Total Amount to be Enrolled:	$_____	**Total Amount to be Enrolled:**	$_____
If applicable, describe the property, including tax map information and address, referenced in the order:			

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

_____ 2159 8/29/13

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on the 5th day of September, 2013 and a copy mailed first class this 5th day of September, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Thomas A. Pendarvis **David W. Overstreet**

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley / Martha Long, o.c.

CLERK OF COURT

2013 SEP -5 AM 8:35

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, PLAINTIFF, vs. Kenneth E. Lee and Law Offices of Lee & Smith, P.A., DEFENDANTS.	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-42-5017 **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court on Defendants' Motion for Summary Judgment. A hearing was held on August 28, 2013. For the foregoing reasons, the Court finds that summary judgment is proper and grants Defendants' motion.

STANDARD

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24, 25 (S.C. 1988).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 545 (S.C. 1991). "Once moving party carries its initial

burden, opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings." Id. (internal citations and quotations omitted).

FACTS

Plaintiff Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy ("Plaintiff" or "Malloy") filed this is a legal malpractice action arising out of an allegedly inadequate settlement of Malloy's North Carolina workers' compensation claim following an accident that occurred in 2002 while Malloy was working in North Carolina for a North Carolina employer. Plaintiff retained Defendant Kenneth E. Lee to represent him to pursue the North Carolina workers' compensation claim in April of 2003.

The attorney-client relationship was entered into pursuant to a Contract of Representation, which contains a provision stating that the contract is governed by the substantive law of North Carolina. The contract was entered into in South Carolina, which is where Plaintiff has resided at all relevant times. Defendant Lee also resides in South Carolina, but he was at all relevant times licensed to practice law in North Carolina and remains licensed to practice law in North Carolina.

Defendant Lee filed Plaintiff's underlying workers' compensation claim in North Carolina pursuant to North Carolina law, and the underlying claim was governed by North Carolina law. Plaintiff settled his underlying workers' compensation claim for $100,000 at mediation on November 25, 2003. The mediation was in North Carolina, and Malloy and Lee were physically present at mediation when Malloy relied on Lee's advice and recommendation

to settle the claim. Malloy executed a binding mediated settlement agreement at mediation that same day, and subsequently executed a clincher agreement consistent with those terms. The settlement was approved in North Carolina by order of the North Carolina Industrial Commission dated February 3, 2004, and the settlement funds were subsequently disbursed to Plaintiff by mail to his home address in South Carolina.

Plaintiff filed this lawsuit on December 6, 2012, which asserts legal malpractice claims arising out of the allegedly inadequate settlement of the underlying workers' compensation claim. Plaintiff's Complaint seeks to recover damages for injuries sustained "[a]s a direct and proximate result of accepting the Defendant [Lee's] advice to settle his workers' compensation claim . . . ." The alleged acts or omissions giving rise to the causes of action alleged in the Complaint all occurred more than four years prior to the date the Complaint was filed.

CONCLUSIONS OF LAW

I. North Carolina's Statute of Repose

At issue in the present motion is the application of North Carolina substantive law, which includes in relevant part, a four-year statute of repose for legal malpractice claims. N.C. Gen. Stat. § 1-15(c) (2003). *See* Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242, 243 (S.C. 1993) ("[a] statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation."); Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81, 83 (S.C. App. 2007) (applying North Carolina's statute of repose pursuant to *lex loci delicti*).

North Carolina's four-year statute of repose applies to claims "arising out of the performance of or failure to perform professional services[,]" and runs from "the last act of the defendant giving rise to the cause of action . . . ." N.C. Gen. Stat. § 1-15(c) (2003). All of Plaintiff's claims in this case arise out of the performance of or failure to perform professional

services and are therefore "malpractice" claims within the scope of North Carolina's four-year statute of repose. Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792, 793 (N.C. App. 1994) (plaintiff's claims against attorney for negligence, breach of contract and breach of fiduciary duty arising out of the performance of or failure to perform professional services are "malpractice" claims governed by N.C. Gen. Stat. § 1-15(c)).

Unlike a statute of limitations, North Carolina's statute of repose is not subject to the discovery rule, and cannot be tolled for an alleged disability, including incompetency. Livingston v. Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., 163 N.C.App. 397, 594 S.E.2d 44, 51 (N.C. App. 2004) (tolling provisions are not applicable to the statute of repose, such that plaintiff's legal malpractice claim was time-barred under statute of repose notwithstanding her alleged incompetency); Hargett v. Holland, 337 N.C. 651, 447 S.E.2d 784, 788 (N.C. 1994) ("[r]egardless of when plaintiff's claim might have accrued, or when plaintiffs might have discovered their injury, because of the four-year statute of repose, their claim is not maintainable unless it was brought within four years of the last act of defendant giving rise to the claim.").

Accordingly, because it is undisputed that all of the alleged acts or omissions giving rise to Plaintiff's causes of action alleged in the Complaint occurred more than four years prior to the date the Complaint was filed, the dispositive question for purposes of this motion is whether Plaintiff's action is governed by North Carolina law.

II. Choice of Law

As the forum state, South Carolina's choice of law rules govern this choice of law dispute. "Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred. . . Procedural matters are to be determined in accordance with the law of South

Carolina, the *lex fori*." Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81, 83 (S.C. App. 2007); *see* id. (citing Black's Law Dictionary (7th ed. 1999) in defining *lex fori* as "the law of the forum."); *see also* Black's Law Dictionary (9th ed. 2009) (defining *lex loci delicti* as "[t]he law of the place where the tort or other wrong was committed.").

In Nash, 650 S.E.2d 81 at 83, the Court of Appeals held that plaintiffs' claims arising out of the collapse of a footbridge in North Carolina were governed by North Carolina substantive law notwithstanding that the footbridge was allegedly manufactured in South Carolina. The substantive law of North Carolina included a six-year statute of repose, which operated to bar to plaintiffs' claims. Id. The Nash court further held that applying North Carolina's statute of repose did not offend the public policy exception to *lex loci delicti*, despite that plaintiffs' action would have been timely under South Carolina's equivalent statute of repose. Id. at 83-84.

As in Nash, the alleged tort in this case occurred in North Carolina. Plaintiff's claims are premised on the allegedly inadequate settlement of his North Carolina workers' compensation claim, which was filed, mediated, settled, and approved in North Carolina. Plaintiff alleges his injuries were directly and proximately caused by "accepting the Defendant [Lee's] advice to settle his workers' compensation claim[,]" and that advice was given at mediation in North Carolina and Plaintiff relied on that advice when he agreed to the settlement and executed the mediated settlement agreement in North Carolina that same day. *See* Lemly v. Colvard Oil Co., 577 S.E.2d 712, 716 (N.C. App. 2003) (finding a mediated settlement agreement executed by the parties at mediation and intended to be followed by a formal clincher agreement was binding and enforceable where plaintiff subsequently refused to sign clincher). The Court is unable to logically distinguish Nash and its precedent from the present facts.

Likewise, the Court is further unable to disentangle the nexus linking Plaintiff's present cause of action to the underlying workers' compensation action in North Carolina. Plaintiff sought out and retained an attorney licensed to practice in North Carolina for the purpose of pursuing a workers' compensation claim in North Carolina. His underlying claim was for injuries he sustained in North Carolina while working for a North Carolina employer, which was filed in North Carolina and governed by North Carolina law. Although the parties entered into their relationship in South Carolina, that relationship was governed by the substantive law of North Carolina pursuant to the terms of the Contract of Representation. *E.g.*, Team IA, Inc. v. Lucas, 395 S.C. 237, 717 S.E.2d 103, 108 (S.C. App. 2011) ("[c]hoice of law clauses are generally honored in South Carolina."); Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007) ("Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law.").

Having found that the *lex loci delicti* of this action is North Carolina, the Court turns to the public policy exception at issue in Nash, 650 S.E.2d at 84, which provides that "[f]oreign law may not be given effect in this State if 'it is against good morals or natural justice.'" (*quoting* Boone v. Boone, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (S.C. 2001)). "Examples of cases against good morals and natural justice are 'prohibited marriages, wagers, lotteries, racing, contracts for gaming or the sale of liquors, and others.'" Id. (*quoting* Dawkins v. State, 306 S.C. 391, 412 S.E.2d 407, 408 (S.C. 1991)).

Plaintiff argues the exception should apply here because of the preclusive effect of North Carolina's statute and the lack of a comparable statute in South Carolina. However, "[t]he fact that the law of two states may differ does not necessarily imply that the law of one state violates

the public policy of the other." Id. (*quoting* Boone v. Boone, 345 S.C. 8, 546 S.E.2d 191, 193 (S.C. 2001)). Moreover, as our courts have recognized,

> [t]he 'good morals or natural justice' of our State are not violated when foreign law is applied to preclude a tort action for money damages, whether against an individual or the State, even if recovery may be had upon application of South Carolina law.

Dawkins, 412 S.E.2d at 408 (*citing* Rauton v. Pullman Co., 183 S.C. 495, 191 S.E. 416, 422 (S.C. 1937)); *see also* Butler v. Ford Motor Co., 724 F. Supp. 2d 575, 582 (D.S.C. 2010) ("South Carolina courts have 'repeatedly adhered to the *lex loci delicti* rule to apply foreign law that defeated claims which would have survived under South Carolina law.'") (*quoting* Thornton v. Cessna Aircraft Co., 703 F.Supp. 1228, 1232 (D.S.C.1988), *aff'd* 886 F.2d 85 (4th Cir. 1989)).

The Court finds, consistent with Nash, and the precedent relied on by the Nash court, that North Carolina's statute of repose does not violate the public policy of South Carolina, and the statute should therefore be applied to Plaintiff's claims under the principle of *lex loci delicti*.

Accordingly, the Court finds that this action is governed by the substantive law of North Carolina, that North Carolina's four-year statute of repose operates to bar Plaintiff's claims, and that Defendants are entitled to judgment as a matter of law.

IT IS SO ORDERED.

Frank R. Addy, Jr., Circuit Court Judge

September 17, 2013
Greenwood, South Carolina

FORM 4

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG IN THE COURT OF COMMON PLEAS	**JUDGMENT IN A CIVIL CASE** CASE NO. 2012-CP-42-5017
GRETCHEN A. ROGERS, AS GAL FOR MARK A. MALLOY PLAINTIFF(S)	KENNETH E. LEE AND LAW OFFICES OF LEE AND SMITH, P.A. DEFENDANT(S)

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

Disposition Type (Check One)

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

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

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

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

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

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

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

This matter comes before the court on November 13, 2013 on Plaintiff's motion for reconsideration of the court's prior order dismissing this case. With the consent of all concerned, the hearing was held in Greenwood during a CPNJ term. Having considered the argument of counsel, the court declines to modify the previous order.

Plaintiff cites the cases of Lister v. Nationsbank, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997) and Bannister v. Hertz Corp., 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994) for the proposition that, because Plaintiff's injuries manifested themselves in South Carolina, this court should apply South Carolina law as opposed to the law of North Carolina. The court finds that *Lister* and *Bannister* are distinguishable.

The court in *Lister* did state, "Since the [plaintiffs] suffered their financial loss as a result of this misrepresentation in South Carolina, we conclude South Carolina law applies under the choice of law test for torts." 329 S.C. at 455, 494 S.E.2d at 144. However, the court in Lister was addressing choice of law questions for the tort of fraudulent misrepresentation. The present case concerns professional malpractice, and for the reasons stated in the original opinion, the law of North Carolina controls.

In *Bannister*, the court restated the established principle that "the substantive law governing a tort action is determined by the state in which the injury occurred." Plaintiff encourages the court should read this maxim as meaning "the state in which the *results of the injury manifest themselves*." Clearly, the financial harm to Plaintiff manifested itself in South Carolina because Plaintiff is and has always been a citizen of this state. However, the court cannot ignore that the entire transaction which led to Plaintiff's damages occurred in North Carolina. *Lex loci delicti* controls, and the law of North Carolina applies to this action.

For the foregoing reasons, the court declines to alter or amend its prior orders.

FILED
2013 DEC -4 AM 8:
CLERK OF COURT
SPARTANBURG
M HOPE BLACKLEY

Order Information

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

Complete if judgment requires payment of a sum of money or affects title to real or personal property

RECEIVED DEC 11 2013

JUDGMENT AGAINST PLAINTIFF:		JUDGMENT AGAINST DEFENDANT:	
Judgment Amount	$_____	Judgment Amount	$_____
Taxable Costs	$_____	Taxable Costs	$_____
Attorney's Fees	$_____	Attorney's Fees	$_____
Interest	$_____	Interest	$_____
Other:	$_____	Other:	$_____
Total Amount to be Enrolled:	$_____	**Total Amount to be Enrolled:**	$_____

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

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

Circuit Court Judge

2159
Judge Code

11/26/13
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20___ and a copy mailed first class this _____day of _____, 20____to attorneys of record or to parties (when appearing pro se) as follows:

Thomas A. Pendarvis

ATTORNEY(S) FOR THE PLAINTIFF(S)

David W. Overstreet

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

FILED
CLERK OF COURT
SPARTANBURG CO.
2013 DEC -4 AM 8:37
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2012-CP-42-5017
Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, Plaintiff, vs. Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A., Defendants.	**COMPLAINT** **(Jury Trial Demanded)** (Legal Professional Negligence) (Breach of Fiduciary Duty) (Breach of Contract)

Plaintiff, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, complaining of Defendants, Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A., would respectfully show unto the Court as follows:

SUMMARY OF THE CASE

1. This legal malpractice action centers upon a) the Defendant Lawyer's professional negligence when he advised Plaintiff to settle his workers' compensation claim for far below the fair value and b) the Defendant Lawyer's breach of fiduciary duty when he included statements in the clincher agreement about Plaintiff's condition that were not accurate and not consistent with the medical information concerning Plaintiff that was in the Defendant lawyer's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Plaintiff's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement recommended by the Defendant Lawyer if the Defendant Lawyer had included all of the true medical information

concerning Plaintiff in the clincher agreement.

Plaintiff trusted the Defendant Lawyer to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct and proximate result of accepting the Defendant Lawyer's advice to settle his workers' compensation claim, Plaintiff suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had the Defendant Lawyer properly advised the Plaintiff of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Plaintiff would not have settled his workers' compensation claim for far below the value, would have obtained greater wage indemnity recovery, would have secured coverage of his current and future medical costs, and would have otherwise obtained a better result.

Because the Defendant Lawyer breached his fiduciary duty of loyalty to Plaintiff, the Defendant Lawyer should be required to disgorge all fees and all benefits obtained from the representation of Plaintiff as a remedy.

PARTIES

2. Plaintiff, Gretchen A. Rogers, is serving in this litigation as Guardian *ad litem* for Mark A. Malloy, who is a citizen and resident of Lancaster County, South Carolina.

3. Defendant, Kenneth E. Lee, is, upon information and belief, a citizen and resident of Spartanburg County, South Carolina, and is a lawyer licensed to practice law in the State.

4. Defendant, LAW OFFICES OF LEE & SMITH, P.A., is or was, upon information and belief,

a limited liability corporation organized and existing under the laws of South Carolina, with its principal place of business in Spartanburg 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 Spartanburg County as the principal place of business of Defendants, Kenneth E. Lee and/OR LAW OFFICES OF LEE & SMITH, P.A., is in Spartanburg County, South Carolina. Upon information and belief, Defendant, Kenneth E. Lee, also resides in Spartanburg County, South Carolina.

FACTS

7. Defendant, Kenneth E. Lee, is a lawyer licensed to practice law in South Carolina and North Carolina and is or was a member of Defendant, LAW OFFICES OF LEE & SMITH, P.A. (collectively "LEE").

8. At all times relevant hereto, Kenneth E. Lee is or was acting as an agent for LAW OFFICES OF LEE & SMITH, P.A.

9. The negligent acts, omissions, and liability of LAW OFFICES OF LEE & SMITH, P.A. includes the acts and/or omissions of their agents, principals, employees and/or servants, including but not limited to those by Kenneth E. Lee, both directly and vicariously, pursuant to principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or *respondeat superior*.

10. Upon information and belief, at all times relevant hereto, LAW OFFICES OF LEE & SMITH, P.A., herein acted by and through its employees and agents, including but not limited to Defendant, Kenneth E. Lee, who acted within the course and scope of his employment and/or agency with all implied, inherent, apparent and express authority to so bind his master and principal by his negligent, wanton and reckless actions and/or omissions making it vicariously liable for same under the principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or *respondeat superior.*

11. Plaintiff, Mark Malloy ("Malloy") sustained compensable injuries when he fell 10 feet to 12 feet off a ladder while working in North Carolina for a North Carolina employer causing injuries to his brain.

12. The only evidence in the record showed Malloy's fall was caused by the ladder swaying.

13. The injuries to Malloy's brain from the fall created new injuries to Malloy or, at a minimum, substantially aggravated a prior injury, either or both of which constituted an injury compensable under North Carolina workers' compensation laws.

14. As a result of the compensable injuries Malloy sustained during the course and scope of his employment, a very valuable workers' compensation claim arose in favor of Malloy under the laws of the State of North Carolina.

15. Prior to his injuries Malloy made approximately $400 per week, which meant his workers' compensation rate was approximately $233 per week.

16. After Malloy was injured his employer, ANECO, INC., filed a form titled, "Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission" with

the North Carolina Industrial Commission, effectively commencing Malloy's workers' compensation claim.

17. After the workers' compensation claim was commenced LEE accepted the legal representation of Malloy thereby creating a client-lawyer relationship.

18. The scope of LEE's representation of Malloy included all matters associated with or affecting recovery and resolution of Malloy's workers' compensation claim arising from the injuries Malloy sustained while working.

19. During the representation Malloy was treated by several physicians including Dr. Alexander A. Manning, during which Dr. Manning developed opinions concerning the nature, severity, and permanency of Malloy's brain injuries and mental competency that were expressed in medical records that were requested by LEE and in LEE's possession prior to the resolution of Malloy's workers' compensation claim.

20. Based on the evidence in the record regarding timing, location, and cause of Malloy's fall from the ladder while working, Malloy's employer, ANECO, INC., would not have been able to obtain an order in the workers' compensation proceeding finding that Malloy was not entitled to workers' compensation benefits.

21. Based on the nature, severity, and permanency of Malloy's injuries, Malloy's employer, ANECO, INC., would not have been able to obtain an order in the workers' compensation proceeding finding that Malloy was no longer disabled from work as a result of a compensable injury or that there was any likelihood that Malloy would be able to resume the work he had been doing prior to his injuries.

22. The benefits and remedies available on Malloy's workers' compensation claim, like any other workers' compensation claim under North Carolina law, had essentially two

components of financial value: a) a financial value for wages and b) a financial value for medical benefits.

23. Prior to the resolution of Malloy's workers' compensation claim, LEE had not fully developed the evidence that was reasonably required in order to competently evaluate the monetary value of Malloy's future indemnity claims.

24. Prior to the resolution of Malloy's workers' compensation claim, LEE had not fully developed the evidence that was reasonably required in order to competently evaluate the monetary value of Malloy's future medical claims.

25. Prior to the resolution of Malloy's workers' compensation claim, LEE calculated the present value of Malloy's wage portion of his claim to be over $250,000.

26. Based on Malloy's brain injuries and/or aggravation of Malloy's brain injuries caused by the injuries he sustained while working, the present value of the medical benefits portion of Malloy's workers' compensation claim was in excess of $700,000.

27. During a mediation of the workers' compensation claim that took place less than one year after LEE accepted the representation of Malloy, LEE strongly recommended Malloy settle all of his workers' compensation claim for a total payment of only $100,000.

28. LEE told Malloy and his wife, among other things, that if they did not settle the workers' compensation claim, then a deputy commissioner or court would find Malloy incompetent and then the money would be handled by an outsider and Malloy and his family would not get any of the settlement money.

29. LEE never told or did not effectively explain to Malloy and his wife the fact that because Malloy had suffered permanent injuries to his brain the value of the wage portion

of his claim was substantially increased or that he was entitled to payment over his entire lifetime for medical expenses related to treatment for the injuries sustained while working.

30. Relying on LEE's legal advice and forceful recommendations, Malloy agreed to settle forever all of his workers' compensation claim for a total payment of only $100,000, which as a matter of course excluded all payments for any and all of the future medical treatments necessary for Malloy as shown in the medical records that were in LEE's possession prior to the settlement.

31. LEE should have recommended that Malloy reject the $100,000 offer made on behalf of his employer.

32. LEE should have recommended that Malloy reject the $100,000 offer made on behalf of his employer because the settlement accepted was less than the reasonable settlement value of Malloy's claims given the evidence contained in the records in LEE's legal file.

33. Had LEE recommended that Malloy reject the $100,000 offer, Malloy would have accepted such advice and would not have settled on those terms.

34. Upon information and belief, LEE withheld crucial information from the North Carolina workers' compensation Deputy, including Dr. Manning's medical records and opinions about the nature, severity, and permanency of Malloy's brain injuries, a) in an effort to expedite the settlement of Malloy's claim to speed up LEE's recovery of attorneys' fees and/or b) to ensure the Deputy would not question whether the settlement was for less than fair value given the nature, severity, and permanency of Malloy's brain injuries, the true value of his wage indemnity claim, and the value of the future medical benefits.

35. After the settlement was approved the insurance carrier for Malloy's employer caused the workers' compensation settlement proceeds to be paid.

36. After the workers' compensation settlement proceeds were paid and after the client-lawyer relationship with LEE was concluded, Malloy was found incompetent to handle his financial affairs based on Malloy's mental condition that, upon information and belief, was unchanged from the state of his mental condition during Malloy's client-lawyer relationship with LEE.

37. After Malloy was found incompetent to handle his financial affairs, Malloy, with the assistance of his wife, learned of LEE's errors.

38. After Malloy was found incompetent to handle his financial affairs, Malloy and his wife learned that LEE should have advised them not to accept the $100,000 offered to settle his workers' compensation claim as that amount was a) far below the fair and true settlement value of Malloy's claim and/or b) far below the value of Malloy's claim had it proceed to a hearing on the merits.

39. Had LEE provided Malloy with the advice that would have been provided by a reasonable and ordinary lawyer with the requisite degree of learning, skill, and ability necessary to the practice of the profession exercising reasonable and ordinary care and diligence in the use of those skills and in the application of the lawyer's knowledge to the cause of the client, Malloy would have obtained a more favorable result on his workers' compensation claim.

40. As a direct and proximate result of LEE's acts and omissions, Malloy incurred pecuniary losses well in excess of $100,000.

41. Because of LEE's actions in derogation of his fiduciary duties to Malloy, including, among other things, withholding information from the North Carolina Industrial Commission regarding the true nature and severity of Malloy's injuries in order to get the clincher

agreement approved, the Court should impose the remedy of disgorgement of all fees and other benefits LEE obtained through his representation of Malloy.

FOR A FIRST CAUSE OF ACTION
(Legal Professional Negligence)

42. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

43. At all times relevant hereto, a client-lawyer relationship existed between LEE and Malloy.

44. By virtue of their client-lawyer relationship, LEE owed professional duties to Malloy, including the duty to provide competent legal advice and representation on Malloy's worker's compensation claim.

45. By virtue of their client-lawyer relationship, LEE owed professional duties to Malloy to fully develop and obtain the evidence that was reasonably required in order to competently evaluate the monetary value of Malloy's future indemnity claims.

46. By virtue of their client-lawyer relationship, LEE owed professional duties to Malloy to fully develop and obtain the evidence that was reasonably required in order to competently evaluate the monetary value of Malloy's future medical claims.

47. By virtue of their client-lawyer relationship, LEE owed professional duties to Malloy, including the duty to provide competent legal advice and representation as to whether it was in Malloy's best interest to settle that claim on the terms offered on behalf of his employer.

48. LEE failed to meet the minimum standard of care thereby breaching their professional duties to Malloy and otherwise acted in a negligent, grossly negligent, wanton

and reckless manner by failing to provide accurate and appropriate legal advice on Malloy's worker's compensation claim.

49. LEE failed to meet the minimum standard of care thereby breaching their professional duties to Malloy and otherwise acted in a negligent, grossly negligent, wanton and reckless manner by failing to provide accurate and appropriate legal advice as to whether it was in Malloy's best interest to settle that claim on the terms proposed.

50. LEE failed to meet the minimum standard of care thereby breaching their professional duties to Malloy by other such particulars as the evidence in this case may demonstrate.

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

52. In addition to the actual, consequential, and incidental damages Malloy suffered, LEE's highly reckless, wanton, and irresponsible conduct as specified in certain causes of action in this Complaint entitles Malloy to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty)

53. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

54. At all relevant times LEE were in a fiduciary relationship with Malloy.

55. At all relevant times LEE owed Malloy fiduciary duties of a very delicate, exacting and confidential nature, requiring a high degree of fidelity and good faith, undivided loyalty, and competence, as well as the duty to act single-mindedly in preserving, protecting, and advancing the rights and interests of Malloy.

56. LEE failed to meet the minimum standard of conduct thereby breaching their fiduciary duties to Malloy by failing to satisfy their duties of competency.

57. LEE failed to meet the minimum standard of conduct thereby breaching their fiduciary duties to Malloy by failing to satisfy their duties of loyalty by withholding crucial information from the workers' compensation Deputy and/or the North Carolina Industrial Commission in order to expedite settlement of Malloy's claim and thereby expediting LEE's recovery of fees.

58. LEE failed to meet the minimum standard of conduct thereby breaching their fiduciary duties to Malloy and otherwise acted in a manner inconsistent with their fiduciary duties to Malloy.

59. LEE failed to meet the minimum standard of conduct thereby breaching their fiduciary duties to Malloy and otherwise acted in a manner inconsistent with their fiduciary duties by other such particulars as the evidence in this case may demonstrate.

60. LEE's breach of their fiduciary duties proximately caused material adverse effects on Malloy's interests and proximately caused substantial financial losses to Malloy.

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

62. Because LEE obtained substantial legal fees while in derogation of his fiduciary duties, LEE should be ordered to disgorge all legal fees and other benefits obtained from the representation of Malloy.

63. In addition to the actual, consequential, and incidental damages Malloy suffered, LEE's highly reckless, wanton, and irresponsible conduct in breach of their fiduciary duties as specified herein entitles Malloy to an award of punitive damages.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract)

64. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

65. LEE entered into a contract with Malloy, the terms of which LEE agreed and contracted to provide competent and prudent legal services.

66. Malloy fulfilled all necessary preconditions, if any, of the contract with LEE.

67. By virtue of their contract, LEE owed duties to Malloy, including the duty to protect, preserve and advance Malloy's rights and interests 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.

68. LEE failed to meet the minimum standard of care thereby breaching their contractual duties to Malloy by other such particulars as the evidence in this case may demonstrate.

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

PUNITIVE DAMAGES

70. In addition to the actual, consequential, and incidental damages suffered by Malloy, LEE's highly reckless disregard for their obligations to their client and irresponsible conduct as specified by the evidence available and as identified in this Complaint entitles Malloy to an award of punitive damages.

TRIAL BY JURY.

71. Malloy demands a jury trial on all claims and issues so triable.

EXPERT AFFIDAVIT

72. 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 R. James Lore, J.D., an expert witness and lawyer licensed to practice law in North Carolina and South Carolina, 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, Plaintiff, Gretchen A. Rogers, as Guardian *ad litem* for Mark Malloy, prays for judgment against Defendants, Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A., jointly and severally, for all actual damages, consequential damages, disgorgement of legal fees and other benefits, and incidental damages, for prejudgment interest, and for punitive damages, 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,

PENDARVIS LAW OFFICES, P.C.

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Attorneys for Plaintiff, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy

Beaufort, South Carolina

December 3, 2012

STATE OF SOUTH CAROLINA COUNTY OF SPARTENBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2012-CP-42-_____
Gretchen A. Rogers, as Guardian *ad litem* for Mark Malloy, Plaintiff, vs. Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A., Defendants.	2012-CP-42-5017 **Affidavit of Expert Opinion** **By** **R. James Lore**

PERSONALLY APPEARED before me R. James Lore who, being duly sworn, deposes and says that:

1) It is my expert opinion, held to a reasonable degree of professional certainty, that the Complaint in this matter alleges facts establishing that the defendant lawyer and defendant law firm committed acts of professional negligence proximately damaging the plaintiff and that the defendant lawyer and defendant law firm breached their fiduciary duties to the plaintiff, as more particularly set forth below:

   a) An attorney-client relationship existed between plaintiff and the defendant lawyer and defendant law firms;

   b) These attorney-client relationships created professional, ethical, contractual, and fiduciary duties from the lawyer and law firm to plaintiff;

   c) The lawyer and law firm violated their duties to plaintiff in numerous ways, including

      i) by failing to provide their client with competent advice and representation; by failing to use the legal knowledge, skill, thoroughness, and preparation reasonably necessary in the circumstances; and by violating the standard of care, which required them to

EXHIBIT
1

render their services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the legal profession;

ii) Failing to advise plaintiff against the proposed $100,000.00 settlement in his workers' compensation case of *Malloy v. Aneco Electrical* (IC 301187) because he had not fully developed the evidence that was reasonably required in order to competently evaluate the monetary value of the future medical claims released;

iii) Failing to advise plaintiff against the proposed $100,000.00 settlement in his workers' compensation case of *Malloy v. Aneco Electrical* (IC 301187) because he had not fully developed the evidence that was reasonably required in order to competently evaluate the monetary value of the future indemnity claims released; and

iv) Failing to advise plaintiff against the proposed $100,000.00 settlement in his workers' compensation case of *Malloy v. Aneco Electrical* (IC 301187) because the settlement accepted is less than the reasonable settlement value in this case given the evidence contained in the records in the attorney's own legal file.

2) In reaching these expert opinions, I have reviewed and relied on the following evidence and other materials, which are the kinds of factual sources customarily relied upon by experts in this field:

a) The North Carolina Industrial Commission file for the case in question; and

b) The plaintiff's attorneys' file for the case in question;

3) My resume, attached as Exhibit A, demonstrates my qualified as an expert witness and thus am qualified to conduct the review required by S.C. CODE ANN. § 15-36-100(B).

4) I have been retained as an expert witness by counsel for plaintiff. I offer this affidavit to express my expert opinions in this case.

5) Discovery is continuing in this case. As a result, my expert opinions are necessarily subject to modification following my review of additional materials, to reflect new information, knowledge and insights.

The Affiant further sayeth not.

R. James Lore
Affiant

SWORN AND SUBSCRIBED BEFORE ME
this 1st day of June, 2012.

Velda B. Wall
Notary Pubic for the State of North Carolina
My Commission Expires: 6-16-2014

EXHIBIT A

R. James Lore
R. JAMES LORE, ATTORNEY AT LAW
102-I Commonwealth Court
Cary, NC 27511
Telephone: (919) 469-9103

BIOGRAPHICAL INFORMATION
1973 B.S. Electrical Engineering, N.C. State University
1976 J.D. Law, Magna Cum Laude, N.C. Central University

I am licensed to practice law in the State of North Carolina and have practiced since 1976. For 33 years my practice has been primarily focused on the field of workers' compensation law. In the 1980s I and a few others formed the group of workers' compensation lawyers which ultimately joined and became the Workers' Compensation Section of the North Carolina Academy of Trial Lawyers. Thereafter, I was the Chair of the Workers' Compensation Section, the Workers' Compensation Committee, and/or the Legislative Committee for many years. During part of this time I also served on the Workers' Compensation Committee of the North Carolina Bar Association and on the Litigation Council for that organization.

I have litigated hundreds of workers' compensation cases before the North Carolina Industrial Commission. If you include my ghost-written briefs for other counsel and Amicus briefs, I have handled more than 100 appeals involving workers' compensation benefits before the North Carolina Court of Appeals and the Supreme Court of North Carolina. Many of these decisions are considered significant cases in this field of jurisprudence.

I still serve as an original plaintiffs' counsel representative to the Advisory Council to the North Carolina Industrial Commission as set forth in Chapter 97 of the Act. The Advisory Council gives input to the Industrial Commission with respect to planning, policy, and resolution of issues. In 1993-1994 I was a member of a small group that drafted what was later enacted

verbatim by the Legislature as the 1994 comprehensive revisions to the Workers' Compensation Act.

I was selected by the North Carolina State Bar as the original co-chair of the Legal Specialization Sub-Committee for Workers' Compensation. I along with several colleagues set the standards necessary to become a Board Certified attorney in Workers' Compensation, prepared the examination and tested other counsel seeking to become a board certified specialist in the field. As the co chair, I was at the time deemed-in as a specialist in the field of workers' compensation.

I have lectured and written on the topic numerous times before the North Carolina Academy of Trial Lawyers, (now the North Carolina Advocates for Justice) and the North Carolina Bar Association. For 15-20 years I co-chaired the annual Workplace Torts and Workers' Compensation Seminar of the North Carolina Advocates for Justice which was always their most widely attended seminar of any type. For many years I, along with attorney Hank Patterson, conducted a "practical skills course" on the topic of workers' compensation at the NCAJ annual meetings. In 2007 I was among the first group of attorneys nationally to be inducted as fellows into the National College of Workers' Compensation Lawyers.

STATE OF SOUTH CAROLINA **COURT OF COMMON PLEAS**

COUNTY OF SPARTANBURG **2012-CP-42-5017**

Gretchen A. Rogers, as Guardian ad Litem for Mark A. Malloy, Plaintiff, -vs- **Kenneth E. Lee and Law Offices of Lee & Smith, P.A.,** Defendants.	**TRANSCRIPT OF RECORD**

August 28, 2013
Spartanburg, South Carolina

Ordered: December 13, 2013

Delivered: January 27, 2014

B E F O R E:

THE HONORABLE FRANK R. ADDY, JR., Presiding Judge.

A P P E A R A N C E S:

Mr. Thomas A. Pendarvis, Esquire
Attorney Appearing for the Plaintiff

Mr. David W. Overstreet, Esquire
Mr. Michael B. McCall, Esquire
Attorneys Appearing for the Defendant

Pamela Faucette, CVR-M
Circuit Court Reporter

ARGUMENTS OF COUNSEL

EXHIBITS

Plaintiff's Exhibits:	**Marked:**	**Received:**
(None)		

Defendants' Exhibits:	**Marked:**	**Received:**
(None)		

Court's Exhibits:	**Marked:**	**Received:**
(None)		

REPORTER'S NOTES: This transcript contains quoted material. Such material is reproduced as read or quoted by the speaker.

REPORTER'S NOTES: Some of the names in this transcript are spelled phonetically.

NOTE: PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT REPORTER SHALL RECEIVE THE FEE OF $.75 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT."

August 28, 2013 9:45 A.M.

(Brief Pause)

(Off-the-Record Comments)

THE COURT: All right. I think the next one up is the Rogers-Lee case; is that correct, gentlemen?

(No Response)

THE COURT: Is that right? Which one are you all on?

MR. PENDARVIS: Yes, Your Honor.

THE COURT: All right. I think we're on the record on 12-CP-42-5017. There are various motions involved in this particular case. This is I believe *Gretchen Rogers v. Kenneth E. Lee*, a legal malpractice action I believe.

This is involving a situation out of North Carolina that you all provided me with briefs on?

MR. PENDARVIS: Yes, Your Honor.

THE COURT: All right. Very good. I have had a chance to review the briefs that were previously submitted. I think that this originates out of a Worker's Comp action filed in North Carolina. The — there's an issue concerning the statute of repose under North Carolina and application of North Carolina law. The summary judgment, I would suggest that we address that first and, then, look at the motion to compel if that's okay. Or how do you feel about it? Or what do we need — what's you all's opinion on it?

MR. PENDARVIS: Yes, Your Honor. Good morning, Your Honor.

THE COURT: Good morning.

MR. PENDARVIS: Thomas Pendarvis for the Plaintiff.

THE COURT: Yes, sir.

MR. PENDARVIS: I believe that Dave — Mr. Overstreet and I have worked out the motion to compel.

THE COURT: Perfect.

MR. PENDARVIS: And mostly it relates to the summary judgment motion. And we've worked through some facts I think will be not in dispute.

THE COURT: Okay.

MR. PENDARVIS: But that's — that's been resolved.

THE COURT: All right. Very good. If the motion to compel has been resolved, then, let's just go forward with the summary judgment.

MR. OVERSTREET: Thank you, Your Honor. May I approach?

THE COURT: Please.

(Documents handed up.)

MR. OVERSTREET: Judge, this is a copy of Defendants' reply memo that we just filed yesterday. Obviously it was in reply to the Plaintiff's opposition to our motion. It's real short, so...

I apologize for the late notice. It just was filed this morning. And we provided a copy to Mr. Pendarvis.

THE COURT: Not a problem at all.

MR. OVERSTREET: Your Honor, if I may briefly, I'll provide a little bit of background and get into the argument and try to be quick about it.

THE COURT: That's okay.

MR. OVERSTREET: I'm David Overstreet. I represent Ken Lee and his law firm. We're here today, on our motion for summary judgment, in

a legal malpractice case.

Essentially the background is that Mr. Malloy, Mark Malloy, who is the Plaintiff in this action, suffered an on-the-job injury in North Carolina in 2003. He had a North Carolina employer. He was working in North Carolina. He got hurt in North Carolina. And Mr. Lee is licensed in North Carolina, although his office is here in Spartanburg.

Mr. Lee was retained to represent Mr. Malloy. They entered into a representation agreement. It also laid out the fact that the representation would be bound by the terms of the State of North Carolina.

This case was filed in North Carolina. It was mediated in North Carolina. It was eventually settled on the day of mediation in North Carolina, with Mr. Malloy's wife there sitting next to him all day in mediation.

And, then, it was approved by the North Carolina Commission in early 2004. And, Judge, that's the last thing that was done in this case.

A legal malpractice case was filed eight years later against Mr. Lee alleging a number of things; legal malpractice, breach of fiduciary duty. But essentially the argument is that Mr. Lee convinced the Plaintiff to enter into a bad settlement.

The settlement was for a hundred thousand dollars ($100,000). The argument is that he should not have convinced him to enter into that settlement because it was too low.

There have been some references to arguments that not everything that was submitted to the North Carolina Commission should of been submitted.

There's — there are arguments that Mr. Lee acted the way he did so

that he could get a quick settlement and stuff like that. But really we're only here to talk about one thing: Does North Carolina law apply?

And if it applies, Judge, we submit that it's clear that the statute of repose applies. North Carolina has a four-year statute of repose for professional malpractice actions. And it is non-giving in any way. There's very little way you can ever toll it whatsoever.

I would point to the Court too that — that this is not a procedural law. This statute of repose is not like the statute of limitations. The statute of repose, as mentioned in our brief, has been determined by the Courts to be substantive law.

So, if North Carolina law applies, the statue of repose clearly applies here.

There's also an allegation that Mr. Malloy is incompetent at this point. And that's why he has a guardian who's been appointed here to represent his interests in this suit.

With all candor, Your Honor, our position is that, that's calculated to try and get around some of these time limitation issues. But, more importantly, North Carolina unbelievably has actually addressed the incompetence issue on the statute of repose and said it does not toll it.

So that is essentially our argument, Judge. The arguments that — that we've seen on the other side from the Plaintiff have been a couple. One is that, in considering some law, it says that the Court should take into consideration where the Plaintiff resides in determining the jurisdiction.

However, Judge, the choice of law provision in South Carolina is lex loco delicti; where the injury occurred, where the wrong occurred.

The cases that have been cited, for the most part, Your Honor, by — by Mr. Pendarvis have to do or are in jurisdictions where different law applies; the significant relations test.

And the significant relations test we contend, if it was applied, it's still good in North Carolina anyway. But that's not the law of this state. The law of this state is lex loci delicti.

Your Honor, there's some public policy arguments that they shouldn't be enforced because South Carolina has not created a statute of repose for professional negligence actions. But, again, the statute of repose, in its implication and its enforcement, has been upheld by the South Carolina Courts. And, Your Honor, we think it's — it's a pretty clear case laying out all the things that I did that occurred in North Carolina. North Carolina law should simply apply here.

And, if so, the statute of repose should kick in, which should cause this case to be dismissed at this point.

Judge, it's been pending about eight (8) months. It took us a long time to get a hearing the first time. And, then, Judge Hayes was unable to hear it. So we appreciate Your Honor agreeing to hear it.

We've done no discovery. We have essentially been waiting to get this heard. So we're glad to have it heard by Your Honor. Thank you.

THE COURT: All right. Mr. Pendarvis, what's your position?

MR. PENDARVIS: Good morning, Your Honor.

THE COURT: Good morning.

MR. OVERSTREET: Well, we did do some discovery. We've traded some written discovery, but no depositions up to — up to this point.

THE COURT: Sure.

MR. PENDARVIS: I'm going to get right to the — to the point, Your Honor. And I"ll — and, you know, it's really great when you go to the Defendant's memorandum.

This reply brief is a retreat, an absolute tail tucked retreat, from their brief filed with this Court in support of the motion.

I'm going to read to Your Honor — and we — and we agree with every stand that I'm going to read to you. From the Defendant's brief, Page 8:

"Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the lex loci delicti, the law of the state in which the injury occurred," citing *Nash vs. Tindell* (phonetic), a 2007 Court of Appeals case.

It was citing *Banister v. Hertz* (phonetic), another Court of Appeals case from 1994. And that Court, the *Banister* Court, said, "Under South Carolina law, conflict of law principles, the substantive law governing Court actions is determine by the state in which the injury occurred."

So the real question is, where did Mr. Malloy's injury occur? Mr. Malloy, as stated in his affidavit, Exhibit 4 to our memorandum in opposition, has always lived in Lancaster, South Carolina, Lancaster County.

He worked in North Carolina, was injured in North Carolina; we agree. And we — and we recognize, as stated in the memorandum, that — that North Carolina law will apply, but only to the proximate cause element of the professional negligence claims.

Here's the point: The injuries in this lawsuit are not personal, physical injuries. South Carolina professional negligence law basically says the only

thing you can recover, from a lawyer's errors, are financial.

Mr. Malloy got this check, on the settlement from his lawyer, written from a South Carolina law firm address to a South Carolina residence. The injuries that Mr. Malloy sustained are injuries that he — the benefits that he would have received at his house in Lancaster.

He's being treated by South Carolina doctors. The — to the extent the underlying case included medical benefits, those benefits would have been paid to a South Carolina healthcare provider.

He's not been treated in North Carolina. He's — he never — he would have never received any payment in North Carolina ever, ever.

To the extent the Defense wants to dive into the underlying case -- and we agree. We recognize we're going to have to prove that he had a valid North Carolina Worker's Compensation claim.

But he entered into a professional negligence relationship in South Carolina. And I'm going to take a careful look, Your Honor, at contract representation (phonetic) because I'm going to tell you what it doesn't have: Mr. Malloy never entered into a contact with Kenneth E. Lee.

Mr. Malloy entered into a contract with an entity, a professional association, known as Law Offices of Lee & Smith. That contract is governed by North Carolina law.

If you really want to get down to it, Your Honor, a law firm cannot be professionally negligent. Element number one of a legal malpractice claim in South Carolina, element number one in every case, the client Plaintiff has to establish a client/lawyer relationship.

The South Carolina Supreme Court does not issue law licenses to law

firms. And so, technically, a Plaintiff can only sue a law firm for breach of contract. It entered into a contract with a law firm for the law firm to have its employees and agents provide legal services.

But, as to the legal malpractice claim itself, it can only be between a — an — an entity; it can be a corporation or a person as the client. But it can only be against a human being that holds a law license as a defendant.

So the choice of law provision and the fee agreement simply has no bearing on the tort claims at issue in this case.

South Carolina is the foreign state. The foreign state's choice of law provision says the Defense has acknowledged apply law where the injury occurred. Mr. Malloy's injuries occurred here in South Carolina, which is virtually undisputed.

Therefore, the application of North Carolina law, on the malpractice claim, simply does not control here.

North Carolina law, the only extent it applies is in what Worker's Compensation remedies were available to Mr. Malloy, not whether the lawyer/client relationship and the malpractice claims are — are — just simply don't ---

There is no North Carolina law application to that because Mr. Malloy hired — well, excuse me — Mr. Lee accepted the representation of Mr. Malloy.

Mr. Lee is a South Carolina resident, a South Carolina lawyer; South Carolina Plaintiff, error happened in this South Carolina lawyer's handling of a North Carolina Worker's Compensation claim.

But the professional relationship has nothing do with North Carolina because Mr. Malloy [sic] had a choice. He didn't have to take representation

even though his law firm did. I mean, technically speaking, they set up this entity and have to, you know, live by its contracts.

But our point of all of this is the lawyer/client relationship is governed by South Carolina law because Mr. Malloy's injuries occurred here.

Now, the cases cited, the Defense complained about, there are some – several different theories of choice of law; the significant relationship test, lex loci, it matters not because all of those cases and the cases that – that were cited from other jurisdictions that dealt with that place of injury, are all in concert with the facts in this case because the injury did occur here.

And, obviously, because Mr. Malloy is a South Carolina resident, he meets the test under significant relationships and lex loci.

And it's – it's — so that's our point, Your Honor.

(Brief Pause)

MR. PENDARVIS: One other last little issue —

THE COURT: Well ----

MR. PENDARVIS: I'm sorry.

THE COURT: — before we get there, let's — let's — let's play with that a little bit more if we could.

(Brief Pause)

THE COURT: I believe that you'd — you'd be — you'd be willing to agree that, if — because we're dealing with an attorney licensed in South Carolina and North Carolina, and the Plaintiff in this case is a South Carolina resident, if he had, during the course of representing the Plaintiff, if he had done something in North Carolina that was unethical, he would still be subject to discipline under South Carolina rules of disciplinary procedure, right?

MR. OVERSTREET: Yes, Judge, because that's procedural.

THE COURT: Right.

(Brief Pause)

MR. OVERSTREET: Can I comment?

THE COURT: And that's kind of your point.

MR. OVERSTREET: I think they're very substantive. I mean, South Carolina lawyers have got to abide by South Carolina rules of conduct no matter where they are.

I don't care they're in another country, I mean, a South Carolina lawyer can't violate rules of professional conduct period. And they would always be subject to the South Carolina judicial — I mean, grievance disciplinary proceeding for violating the rules of conduct they're bound by.

THE COURT: I — I — I would agree with that. But the problem I have is that we routinely see, in the advance sheets, some lawyer disciplined because they failed to pay taxes or did something in Massachusetts or California.

And the point that he's making is that while there — or the point that — give him a little bit of room — they may be subject to South Carolina discipline okay, and they might be subject to whatever procedural rules govern not only discipline, but also the practice of law and maybe even negligent causes of actions in the state.

But let's have a lawyer — let's say we have a lawyer that's licensed in South Carolina and California and he does something wrong in California that affects his license here. What I'm having a hard time getting around is that all of this took place up in North Carolina.

I mean, the — the injury — I'm trying to see how the injury took place in South Carolina, when everything that caused your client injury, flowed directly from the negligent settlement of the Worker's Comp action up there. And that's what I'm really having a problem with.

MR. PENDARVIS: Okay. They've acknowledged that the — there was a mediation of the Worker's Compensation case.

THE COURT: Okay.

MR. PENDARVIS: An agreement was reached. That agreement could have been turned down by the North Carolina Industrial Commission. It wouldn't matter what the parties say; it has to be approved by the North Carolina Industrial Commission.

Mr. Lee and my client, Mr. Malloy, and — and Mrs. Malloy left that mediation and drove back to South Carolina. Papers were submitted to the North Carolina Court -- the Industrial Commission.

It approved it. We contend there were some material omissions. And the expert, this very well-respected Worker's Compensation lawyer in North Carolina, who actually wrote — helped write the laws, said there were some material omissions that if they had been — if Mr. Lee had submitted those materials, there's no way an Industrial Commissioner would have ever approved the settlement at this low value.

That aside — that aside, when the Industrial Commission approved the agreement, the North Carolina lawyer for the Worker's Comp — for the employer prepares a settlement agreement.

Guess where it was signed? The final act that settled that case happened in South Carolina.

And, again, Mister — and so that final act was consummated; signed, executed, deal done here in South Carolina. The South Carolina final act of causation that gives rise to Mr. Malloy's damages happened here.

And, more importantly, for a lot of Courts that are considering this around the country, the financial consequences happened here. The payments came to Mr. Lee's office in North Carolina — excuse me, in South Carolina. And, from South Carolina, those payments were made to Mr. Malloy.

All that happened; the final act of the settlement, the final — final act, the release, that -- that gave the employer — I'm certain Your Honor has handled plenty of cases; no Defendant is just going to give you money until they get a release that's delivered to you in trust pending signature of a final release document that concludes the claim.

That happened here in South Carolina. My final — my money is paid here in South Carolina. And it all started in South Carolina.

And, for that variety of reasons, we simply say North Carolina law cannot control the legal relationship, while at the same time, it does govern the available Worker's Compensation relief that was available to Mr. Malloy, which will be a proximate cause element in the negligence claim.

But that doesn't change the South Carolina location of injury.

(Brief Pause)

MR. PENDARVIS: And, therefore, application of South Carolina law, not North Carolina, as I said in the memorandum. South Carolina has an interest.

South Carolina, in 2005, when the Legislature amended several

provisions in the South Carolina Tort Claims Act, had discussions about the statutes of repose. It's in the legislative history.

They chose -- there's another Malloy, who is a senator. Mr. Malloy, Senator Malloy, is the reason I think, if you look at history — and I've — I've looked at this — he's one of the principles that had that carved out.

The medical — the medical group was successful in convincing the Legislature to impose a statute of repose on the medical healthcare providers. That is not a decision this state made for lawyers.

And it, by that act, chose to protect South Carolinians; we're in a South Carolina court.

There would have been arguments, Your Honor, if this case had been filed the week after the settlement was approved, finally signed in South Carolina, there would have been personal jurisdiction questions over Mr. Lee's — Mister — the North Carolina Court's personal jurisdiction over Mr. Lee might could have established specific jurisdiction, but it would have been challenged.

He's a South Carolina resident. He would have an argument he was subject to a South Carolina Court — I mean, a North Carolina Court. So, for a lot of reasons, this is the place this lawsuit ought to be.

That's where these people — where both of the Plaintiff and Defendant reside and —

THE COURT: Well, he's licensed to practice in North Carolina and it's practicing up there, he's met the substantial contacts -----

MR. PENDARVIS: And you — you — I — I — but I"ll tell you, you never know. I doubt I wouldn't – I wouldn't be surprised if we had gotten a 12(b)(2)

motion if it had been filed in North Carolina.

THE COURT: I'd be — I'd be very surprised, if the North Carolina Courts took the position that someone, who is licensed to practice in their state is not subject to the Courts of their state.

MR. PENDARVIS: Well, we know this: This Court — there is no personal jurisdiction challenge to this Court's jurisdiction over Mr. Lee or his law firm in this state.

Again, this state's laws govern the negligence claims in this case, the — the tort claims, the fiduciary — the breach of fiduciary duty claims are South Carolina law.

This is where the injury occurred, where the final act of the settlement took place. And now I — I don't know if I can really concede the breach of contract claim, but in the third cause of action for breach of contract, I'm acknowledging that the contract itself, as to any claims, are going to be governed by North Carolina law.

And it's — Dave is correct, Mr. Overstreet is correct. The North Carolina statute of repose -- there's a case that came out since the date of Dave's brief that says — it's called Haykos vs. (phonetic) — I forgot the last name, but the North Carolina Court of Appeals basically said it wouldn't matter if the Plaintiff could not have — a client could not have brought a legal malpractice case within four years — the North Carolina statute of limitations — for lack of damages.

So, again, in other words — and I think the Court of Appeals in North Carolina said, even if the final act of damage happened on year — you know, year four — four years and two days after the act, they couldn't bring a claim

even if they knew — you know, because of the statute of repose.

So we would acknowledge that we would probably lose the breach of contract cause of action by that statute — the North Carolina repose because it is — that claim is governed by North Carolina law.

THE COURT: All right. Anything in reply?

MR. OVERSTREET: Just — just briefly, Your Honor.

THE COURT: Sure.

MR. OVERSTREET: Respectfully, Plaintiff is now conceding that one of his three causes of action is governed by North Carolina law; arguing that the other two are not, which we think is wholly inconsistent.

And, secondly, Judge, as I point out in my brief, my reply brief, in Paragraph 1 of the complaint, the Plaintiff alleges that, "The injuries were sustained as a direct and proximate result of accepting the Defendant lawyer's advice to settle."

That occurred at mediation in North Carolina. And there was a signed agreement at the mediation.

Judge, that's all I have. Thank you.

(Brief Pause)

THE COURT: All right. I thought I knew where I was on this. Let me take this under advisement. I'll hopefully have an order out to you by tomorrow. But I want to take a second look at this, gentlemen.

MR. PENDARVIS: Your Honor, do you need copies of anything, affidavits?

THE COURT: I've — I've got I think everything you all had emailed me. And that's what I pulled up a short while ago.

The — I've got you all's briefs and, then, I got the — the Defendant's reply that — that you just handed me. So I think I'm in good shape.

MR. PENDARVIS: Thank you, Your Honor.

THE COURT: Thank you all very much.

MR. OVERSTREET: A pleasure to be before you today.

THE COURT: Good to see you all.

(Whereupon, the proceeding concluded at 10:10 a.m.)

REPORTER'S CERTIFICATE

I, the undersigned **PAMELA FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 18, were transcribed by me and represent a true and accurate transcript of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

January 26, 2014

Pamela S. Faucette
Official Court Reporter
Seventh Judicial Circuit

STATE OF SOUTH CAROLINA) COURT OF CIVIL PLEAS
COUNTY OF SPARTANBURG)

Gretchen A. ROGERS, as Guardian ad litem for MARK MALLOY, PLAINTIFF V. KENNETH E. LEE and LAW OFFICES OF LEE & SMITH, P.A., DEFENDANT.

TRANSCRIPT OF RECORD
2012-CP-42-5017

NOVEMBER 13, 2013
GREENWOOD, SOUTH CAROLINA

B E F O R E:

THE HONORABLE FRANK R. ADDY, JR., JUDGE

A P P E A R A N C E S:

Thomas A. Pendarvis, Esquire
Attorney for the Plaintiff

David W. Overstreet, Esquire
Attorney for the Defendant

STACY S. JOHNSON, RPR
CIRCUIT COURT REPORTER

ORIGINAL

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EXHIBITS

NO EXHIBITS WERE INTRODUCED

P R O C E E D I N G S

THE COURT: All right. We're back on the record on case 12-CP-42-5017. This is Gretchen Rogers, as Guardian ad litem for Mark Malloy, versus Keith Lee, et al. This is a motion for reconsideration. I do recall the underlying facts involving this incident. It involved an action against an attorney, application of the North Carolina statute of repose, and the Court found that North Carolina law -- previously found that North Carolina law would apply, and this, I believe, is the Plaintiff's Motion for Reconsideration, so I'd be happy to hear from y'all.

MR. PENDARVIS: It is. Your Honor, Thomas Pendarvis for the Plaintiff.

THE COURT: Yes, sir.

MR. PENDARVIS: I sent a fairly well-developed motion that has some arguments and I'm sure the Court's probably read it.

THE COURT: I have. I reviewed it, I think, when you -- I reviewed it when you sent it and I looked at it again last night.

MR. PENDARVIS: Very good. And now I was gonna go through the arguments today from -- sequentially they're identified in the motion, but I thought of something that might help a little to frame the choice

of law issue.

THE COURT: Okay.

MR. PENDARVIS: I understand that toward the fourth, maybe fifth page of the order the Court mentioned it was a little -- it was difficult to disentangle the workers compensation underlying case and the legal malpractice claims, and I think it would be helpful to consider the nature of the injuries in order to go back to the choice of law issue.

As I said in the motion itself, probably the easiest way to sort that out, Your Honor, is the underlying workers compensation case was based on physical injuries Mr. Malloy sustained when he fell off of a ladder while working. The legal malpractice and related claims are focussed on purely financial injuries that occurred by the alleged negligence of his lawyer's handling the workers compensation claim.

So as we consider the nature of the injury, which is the focus of the lawsuit that's been filed here in South Carolina, it is on financial injuries Mr. Malloy sustained. The case law -- and the Court cited the Nash case, and the Nash case, as I briefed, dealt with, in part, alleged negligent acts that took place in South Carolina where portions of this bridge were constructed and manufactured that caused later an injury in North

Carolina, and so when the plaintiffs in Nash versus Tindall brought their case in South Carolina and there were statute of repose issues, the South Carolina court said well, if your injury occurred in North Carolina, North Carolina law, therefore, controls, and, therefore, the statute of repose results in a dismissal of your case.

The follow-up argument was in Nash well, it's a public policy exception, you know, it's not correct and South Carolina ought to acknowledge this claim as an exception, and the court rejected that and said basically there's nothing repugnant about North Carolina's law on the statute of repose and didn't allow that exception to happen, and so the case was dismissed.

We are almost exactly opposite of that. The negligent acts, many of which that the Court listed in the order, all occurred in North Carolina. No question about it. There were some other negligent acts we contend in South Carolina, but the thrust of the errors that led to the harm to the client occurred in the mediation that took place in North Carolina, but one thing that's certain, all of the evidence in the case, the affidavit of Mr. Malloy and the other assertions about -- factually, all deal with Mr. Malloy receiving

compensation in South Carolina. He lives here, always has lived here in Lancaster, always -- you know, whatever benefits he would have obtained through the workers compensation proceeding would have been received in South Carolina.

And in the original memoranda in opposition we filed to Mr. Lee's motion for summary judgment, we listed a number of cases across the country that dealt with the acknowledgment of the financial injuries in a legal malpractice case are financial and the choice of law triggered by that is where was the client located. The malpractice may have occurred in another state, another jurisdiction, but the choice of law is sourced upon the injury and the location of the injury.

I found -- and this is cited in some case, and I've got a copy, Your Honor, so I'll read a brief point from a case called Lister versus Nations Bank, and it's cited in the opinion, but I want to focus on that just for a moment. The client -- the plaintiffs, the Listers, were in Aruba and rented a car and there were some problems with what happened with the financial transactions that led to the payments and what have you for the rental car in Aruba. They come back to the United States where they live here in South Carolina, the credit card's declined, they found out that some bad

things have happened in Aruba with their credit card information and they bring a claim against Nations Bank and the chain who owned the credit card, and one of the claims was for breach of contract accompanied with a fraudulent act. And what the court in Lister said, it's very helpful for us here, is -- and I'm citing now from Page 455 in the opinion, and it says in this case -- in the case of fraudulent misrepresentation, the law of the place of the wrong controls. The place of the wrong is not where the misrepresentations were made, but where the plaintiff as a result of the misrepresentation suffered a loss. Substitute misrepresentation for legal malpractice and we are exactly on point here. The same issue in Nash. The injury occurred to Mr. Malloy here in South Carolina and as a result we contend that the law is -- under South Carolina choice of law rules, the injury occurred here, South Carolina substantive law controls the legal malpractice claims; negligence and breach of fiduciary duty.

I saw the memorandum in opposition that cites as its best authority to counter this point, Black's Law Dictionary. It talks about the location of where the acts occurred that caused the negligence. Well, I think everyone agrees that Black's Law Dictionary is not authority in South Carolina. Lister, Nash and all the

cases cited are. Our courts -- regardless of what Black's Law Dictionary defines lex loci delicti, our courts have absolutely held that the location of the injury is where it -- that the law of that state controls.

Now it's the last little part we have -- I have conceded basically the last argument, and I did it in a footnote here, the breach of contract claim clearly is controlled by North Carolina law. We concede that that third cause of action, the breach of contract, is not available to the Plaintiff under the choice of law rules, but as I argued in the motion -- I briefly mentioned this when we met together back in Spartanburg on the original motion hearing, but basically a law firm can't be a defendant in a negligence case.

Element number one of a legal malpractice case is the existence of a lawyer/client relationship. Law firms don't have law licenses, law firms can't go to court. There are cases around the country that talk about this, but basically your negligence claim in this type of circumstance, if there's a claim, is client versus the individual lawyer with a pulse, a human being. Now that client may have a contract with a law firm and if the law firm failed to provide proper legal services under the terms of the contract, that's a

breach of contract, and the client may have a claim against the law firm for, you know, not supplying competent counsel, and we, as I've just said, acknowledge that claim for breach of contract as asserted in the complaint was only alleged against the law firm, not Mr. Lee.

So we -- our position is, Your Honor, that that contract can't grab the negligence action as part of the dismissal of the case. That's a separate matter and the claims for negligence of fiduciary duty as we've argued on this choice of law matter are separate and independent from the contract claim, so that's basically what it means.

You know, we believe the Court needs to amend the order. At a minimum, Your Honor, there's a dispute as to where the financial injuries occurred, and we did preserve that in our original memorandum, so at a minimum there's a question of fact as to where Mr. Malloy's injuries occurred. We contend the affidavit makes a disputed fact, Mr. Malloy's affidavit, as to South Carolina being his residence and location, so we believe that the Court should reconsider this order, amend it and deny the motion for summary judgment, allow these parties to proceed. This won't change anything for any defense available to Mr. Lee

to defend the claim, but we believe that the law, especially with Lister, and I've got a copy of that case if Your Honor would like to look at it. And there are some other cases, the Banister case as well, that says basically the same thing.

THE COURT: All right. I'll turn to you in a minute, but let's go ahead and deal with the Court's biggest concern and biggest hesitation in going along with this. There are aspects of Nash that I just don't like, and I'll throw that out there for the benefit of anybody who wants to listen since everything I'm saying is being taken down anyway. The very idea that you can have something manufactured in South Carolina and just because it's incorporated into a primary piece of construction equipment or primary brace because it's incorporated into a pedestrian bridge in North Carolina that means you can't sue in South Carolina and those people who got injured are out of luck, so I have issues with the fact that the Nash decision stands for what it stands for, but it is -- it's the law that the Court has to apply.

I'm wondering if we were to take your argument to the logical extreme and we focus on, as you're suggesting, the place where the injury took place, and for purposes of this argument I'm going to agree that

he was injured and that the injury manifested itself in South Carolina, okay? The ramifications of the malpractice took place in South Carolina. He was clearly a resident of Lancaster County, so any harms -- or any financial harms that befell him manifested themselves in South Carolina.

In an attorney malpractice case though, what I'm worried about is it is not unusual for a Florida resident or a resident from California to be injured while travelling upon the interstates of South Carolina. They become injured in a wreck, retain counsel in South Carolina, and they're just passing through. They have no reason to stay in South Carolina, no reason to visit here again. They're just passing through when they're injured by the negligence of someone else. The lawyer they retain negligently handles that negligence action, that simple wreck case, and they return home to Florida or California or Maine or wherever they're from and they then realize, okay, he mishandled the malpractice case and because of that I didn't get enough money, so I have been damaged.

To take your argument to the logical extreme, that person could sue in Maine or in California the South Carolina lawyer because the harm, the financial harm, manifested itself in those states as opposed to

having to come to South Carolina and sue the lawyer here. Forget the choice of law stuff, forget the long-arm statute for a moment. That's sort of the gist of your argument and that's kind of where we lead if we focus on -- or am I wrong? Tell me why I'm wrong.

MR. PENDARVIS: No, you're on the money, and all the cases that I've cited in the original memorandum in opposition are dealing with the struggle of that very issue. What protects, if you want to use that word, protection for the South Carolina lawyer is the proximate cause element of -- what was one of the states, Utah? Let's go way out there.

THE COURT: That sounds fine.

MR. PENDARVIS: Utah. Utah's the law in the negligence case, the professional negligence case that will go down in Utah in this hypothetical, would require the Utah plaintiff suing the South Carolina lawyer to establish that under the standards of care applicable to a South Carolina lawyer handling a personal injury claim arising out of a motor vehicle accident or the lawyer fell below that standard of care, not Utah's, not anywhere else, but it is an issue and a risk that any lawyer taking a case from an out-of-state client would be dealing with. It's just that's the way it is, but that doesn't mean that that lawyer has to go explain

things under Utah law as to why he or she handled the case wrong or right. It's South Carolina law controls.

Just like in this case. We are gonna have to have -- this was a -- Mr. Lee was retained to handle a North Carolina workers compensation matter. Under South Carolina legal malpractice law, we are gonna have to establish to a jury's satisfaction more likely than not that Mr. Lee fell below the standard of care of a lawyer handling a North Carolina workers compensation matter. We are gonna have to have an expert. We've got one, Mr. Jim Loehr (ph.), who's gonna give an opinion under North Carolina law that in his opinion Mr. Lee did not meet the standard of care. So the protections, again that word, are there.

It's not like just because this out-of-state lawyer -- I know Mr. Lee's here, but let's just pretend he's -- we're in Utah. We're still gonna have to establish law that Mr. Lee knows well and handles well and we, the out-of-state plaintiff in that hypothetical, are gonna have to prove North Carolina law to a jury's satisfaction, so the protection for the lawyer is they're gonna be dealing and responding to law they know well as to why or why they didn't meet the standard of care, and so I guess the risk the lawyer's got is if you take a case from out-of-state, which is precisely, by

the way, Your Honor, Banister versus Hertz.

In Banister versus Hertz, some people rented a car from Hertz in New York to come to South Carolina. On the way down, they were in a motor vehicle collision in North Carolina. They bring a lawsuit and the parties are all over the board on what law controlled. The Court of Appeals figured it out and the Court of Appeals says this is from a one-car accident in North Carolina. They say that under -- and this is now on South Carolina -- Southeastern, sorry. 450 Southeastern -- I'm gonna get the page number for you, Your Honor. I'll get it in a moment, but the ---

THE COURT: You cited that case in your brief.

MR. PENDARVIS: I did. I did. And Banister said under South Carolina conflict of law principles, the substantive law governing a tort claim is determined by the state in which the injury occurs.

Back to Your Honor's point earlier. The state in which the injury occurs. The state in Banister was North Carolina. Even though South Carolina residents rented a car in New York, the defendant was trying to get New York law to apply and the court said no, it's North Carolina law, and the substantive law of this state for legal malpractice is gonna require the plaintiff in this case to employ North Carolina law on

the proximate cause element of this claim.

So it's all -- even though the substantive law is South Carolina's, our own law is gonna require North Carolina law in this case, which is the confusion, and I understand the Court's concern with the entanglement of these cases, but still we believe South Carolina law controls the statute of limitations and the substantive law of North Carolina as to the claim of malpractice is not available.

THE COURT: Well, if you have to apply North Carolina law in this case, and there's a statute of repose which South Carolina doesn't have which protects the North Carolina lawyer, how do you get around that then?

MR. PENDARVIS: Well, Your Honor, that's -- because they're different. The only thing that North Carolina law deals with is the workers compensation claim. It's -- the claim that the lawyer was hired to handle was a North Carolina workers compensation claim that's the proximate cause element. It's only one element. One of four.

Let's assume one more thing, Your Honor. Let's assume that South Carolina's legal malpractice law had a cap on recovery and North Carolina's didn't. We would be bound by that because the elements of the South

Carolina negligence act -- professional negligence claim, five elements; lawyer/client relationship, duty, breach, causation, damages. If there were some South Carolina-imposed limit on damages, we'd be stuck. Our proximate cause element shouldn't require because only -- the concern spot for Your Honor, the proximate cause element shows, you know, what would a reasonably prudent lawyer have done under these circumstances. Well, that is all dealing with North Carolina workers compensation law, but negligence, proximate cause, damages, are all South Carolina concerns, so the claim should be asserted here.

THE COURT: Okay. Mr. Lee?

MR. OVERSTREET: Thank you, Your Honor. David Overstreet. Mr. Lee, the Defendant, is here, and I would ask, Judge, if it's okay if we make our brief a part of the record?

THE COURT: Sure. Please. I'll take care of that.

MR. OVERSTREET: Thank you. Your Honor, again, we're here because of the lex loci delecti. I don't know if I'm saying it right or if Thomas was saying it right, but basically it's the law of the place where the legal injury occurred and made conduct actionable, and what I'm hearing is that the argument is --

according to the pleadings and the Plaintiff's argument, the negligence or whatever actionable conduct occurred at the mediation in North Carolina, appears to be a claim that the recommendation of settlement for less than the case was worth occurred in South Carolina; that their signing the enforceable settlement agreement was the negligence, allowing them to do that, and the problem is if that's the case, then the legal injury of being unable to go forward and get additional damages or additional money in a workers comp case happened in North Carolina. That's the legal injury.

The reliance, Judge, on Nash, and I have some issues with Nash myself, frankly, Your Honor, but the reliance on Nash is misplaced for this reason. I read it a few times yesterday and if the Court reviews the case carefully, essentially the case stands for two points. One, is the statute of repose procedural or substantive? The Court found substantiative. Two, is there a public policy exception? That's it. The parties agreed that the lex loci delecti was North Carolina, and that was not even an issue in that case and yet that is what's being relied upon here as the sole case to get them where they need to be. The only mention of South Carolina is in Footnote 2 the court says there's an allegation by the plaintiff that the

structure related to the bridge was made in South Carolina. There's no finding of fact by the court. There's no attestation that it was even considered. It just mentions in a footnote that there's an allegation it was made in South Carolina, and that's it. So I would beg to differ on this case being a flipped version of that case. We're talking about lex loci, they were not.

And Your Honor also provided an example that's very similar to an example I thought of dealing with parties who live in different states and have actions. Under Mr. Pendarvis's reasoning, if you were to play it out logically, I assume if Mr. Malloy had decided to move to Alaska the day after the settlement and had failed to recover certain monies going forward in Alaska, then he would be able to bring a claim in Alaska because that's where his financial injury would have been, but, again, that obviously is not the result that the Court meant. The same type of thing. Say someone were to get in an accident in South Carolina and then go back to Oregon or Alaska and then incur medical bills there, does that mean that's where the injury occurred, so they all determine the place where they can bring suit is in Oregon.

Our argument would be simply, Judge, that Your

Honor considered all the issues appropriately and ruled appropriately last time and that the order should not be altered or amended. And, secondarily, we would argue that the provision in the contract with the client in and of itself does give a solid basis to make North Carolina the binding law as well. Thank you.

THE COURT: All right.

MR. PENDARVIS: Your Honor, a brief response?

THE COURT: Sure. Please.

MR. PENDARVIS: In the Plaintiff's memorandum in opposition to the motion for summary judgment that was filed way back, but on the fourth page I would invite the Court to look at the extreme cites of cases that we put there. It begins off with Bobbitt versus Milberg, but the one case I really would like to hone in on just for the moment is the St. Paul Fire and Marine Insurance Company versus Birch, Stewart -- it's a long -- a long law firm name, but it's midway through, and what it's talking about is the client was sued in Florida. This was a Massachusetts client. The defendant in a Florida case allegedly agreed to settle for two million dollars during the trial in Florida, a legal malpractice action later brought, and the court agreed that the injury to that client occurred in Massachusetts. They sued Florida lawyers handling a Florida case in Massachusetts

and it got sustained. That's just -- because that's where the injury to the client occurred. All the cases that we've cited the Court say that exact thing; the place where the injury occurred.

There's an old, old case in South Carolina, 1964. A couple in Savannah, Georgia in car wreck, husband and wife, bring a lawsuit in South Carolina. I think this is the Oshiek case. At the time, Georgia law had it where husband and wife were considered one entity of common law and couldn't sue each other, but you could do it in South Carolina and the court said because the injury occurred in Georgia, you can't -- this law controls.

THE COURT: I remember that case. I remember seeing that.

MR. PENDARVIS: This law controls even though you're here and the jurisdiction is South Carolina, and so we're at that point here and that's where this injury occurred and there's really no dispute that no one was gonna hand Mr. Malloy a check in North Carolina at the mediation and all the -- and the other thing, too, I do want to bring this up, Mr. Malloy did not hire Mr. Lee to watch him do legal services. It didn't matter to Mr. Malloy. Any client -- any of my clients anyway, whether I could just call them up, call the defendants

or soon to be defendants up and get a check or whether I've got to go all the way through a trial and an appeal and a remand, the client doesn't care. The client didn't hire Mr. Lee to watch him do legal proceedings in North Carolina. The purpose of Mr. Malloy engaging Mr. Lee was to recover money. Money that was gonna be paid in South Carolina to Mr. Malloy, so the idea that all Mr. Malloy lost was a chance to do further proceedings, that's just not what Mr. Malloy hired Mr. Lee to do. He hired him to recover money, so the injury and the focus of where all this happened, happened here in South Carolina.

THE COURT: All right. I'm gonna think about it overnight just to make sure I've covered all the bases and I want to look at the Oshiek case. Maybe not so much Oshiek, but the Lister v. Delaware {sic} case, which you have cited.

MR. PENDARVIS: I'm gonna pass up both -- the Banister case, if you don't mind.

THE COURT: Sure.

MR. PENDARVIS: I've got copies for you. I'll pass those up.

THE COURT: Sure. Let me look at those tonight and I'll issue another Form 4 one way or another.

MR. PENDARVIS: You know, Your Honor, one more

thing. Of all the concerns, we're here in South Carolina. Mr. Lee is here in South Carolina. He's in -- I mean, Brer Rabbit and the Briar Patch. I mean, we're here in his home state, so it's not like this is one of those extreme moments where you go into Alaska -- and I'll give Dave credit, he got a better state than Utah, I'll give him that, but, I mean, it's not like he's really -- and listen, handle the case right and he's got good experts and he can defend himself, you know, everything is good to go.

THE COURT: And a large part of me agrees with you. We may as well go ahead and acknowledge the elephant in the room though. If North Carolina didn't have this statute of repose, you would have been associating somebody in North Carolina in five seconds probably to bring this action there just so that we don't have to deal with this kind of a question on whether we should go forward in South Carolina or North Carolina.

I'm very sympathetic to your client. If what he says is correct, I'm extremely sympathetic to your client, but it is what it is. Let me review Banister, if I may, and Lister and the Oshiek, and I'll have something for y'all tomorrow.

MR. PENDARVIS: Thank you, Your Honor.

MR. OVERSTREET: Thank you, Your Honor.

THE COURT: What I'll probably do is just e-mail y'all a Form 4, an unsigned Form 4, just to let you know where we stand and y'all can do whatever you need to do based upon that, okay?

MR. PENDARVIS: Thank you, Your Honor.

MR. OVERSTREET: Thank you, Your Honor.

THE COURT: Thank you.

(Proceedings concluded at 2:53 p.m.)

C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 13th day of November, 2013.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

I do further certify that I am neither of kin, counsel, nor have an interest to any party hereto.

January 31, 2014

Stacy S. Johnson

STACY S. JOHNSON
CIRCUIT COURT REPORTER

LAW OFFICES OF LEE & SMITH, P.A.

Michael R. Lee (✣†)
Richard J. Smith (✣†)
Patrick H. Allan (✣†✚◆▲)
D. Andrew Turman (✣†)
Kenneth E. Lee (✣†)
Scott A. Beckey (✣†)

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Telephone: (864) 577-0977
Facsimile: (864) 577-9661

Employer ID #56-2015407

February 25, 2004

VIA CERTIFIED MAIL

Mr. Mark A. Malloy
311 E. Arch Street
Lancaster, South Carolina 29720

RE: Your Workers' Compensation Claim

Dear Mr. Malloy:

Enclosed please find your settlement check in the amount of $77,500.00, a copy of the Approved settlement paperwork and the Disbursement Sheet.

If you have any questions, please feel free to contact me.

Sincerely,

LAW OFFICES of LEE and SMITH

Ann Dyson
Paralegal to Kenneth E. Lee, Esquire

Enclosures

...5 Satellite Blvd., Suite 440
Duluth, GA 30096

441 | Date Issued 02-20-04 | Bank Acct

VOID IF GREEN BACKGROUND IS ABSENT — THIS DOCUMENT CONTAINS A WATERMARK - HOLD UP TO LIGHT TO VIEW

Claim Number	Desk Code	Insured	Issuing Off.
23823215	N2	Aneco, Inc.	No. 23
Prefix & Policy No.		**Claimant**	**Date of Loss**
WC1079693203		Mark Malloy	09-09-0.

From-Thru (Dates)		In Payment of
02-03-04	02-03-04	CSA Full And Final Settlement

PAY Seventy-Seven Thousand Five Hundred Dollars & 00/100---- Dollars ▶ | Dollars • Cents ***$77,500.00***

BANK ONE, NA OHIO

TO THE ORDER OF Mark Malloy

Stephanie A Hellman

VOID IF NOT CASHED IN SIX MONTHS FROM MONTH OF ISSUE

G-59516-F

II"

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, Plaintiff, vs. Kenneth E. Lee and Law Offices of Lee & Smith, P.A., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-42-5017 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that Defendants Kenneth E. Lee and Law Offices of Lee & Smith, P.A., by and through their undersigned attorneys, will move before the Presiding Circuit Court Judge for Spartanburg County, South Carolina, for an Order granting summary judgment in favor of Defendants pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

Defendants move for summary judgment on grounds that Plaintiff's claims are barred by North Carolina's four-year professional negligence statute of repose as there is no genuine issue of material fact that more than four years have elapsed since the date of the last alleged act or omission giving rise to causes of action alleged in Plaintiff's Complaint. Defendants' Motion is based upon the following:

- Plaintiff's professional negligence action arises out of an allegedly inadequate settlement of a North Carolina workers' compensation claim that occurred more than 9 years before this lawsuit was filed.
- Plaintiff's claims are governed by the substantive law of the State of North Carolina, which provides for a four-year statute of repose that runs from the date of the last act or omission giving rise to the claim and is not subject to tolling for any alleged disability.
- The underlying settlement that is the subject of Plaintiff's Complaint was reached at mediation in North Carolina in November of 2003 and the settlement funds were disbursed to Plaintiff in February of 2004.

- It is undisputed that the last alleged act or omission of Defendants giving rise to Plaintiff's causes of action occurred more than four years before this lawsuit was filed on December 6, 2012.

This Motion is brought pursuant to Rule 56, SCRCP and is supported by the Affidavit of Kenneth E. Lee attached hereto as "Exhibit 1," applicable statutory law and case law, the pleadings and discovery in this case, and any and all affidavits, memoranda and supporting material as may be filed with the Court prior to the hearing of this Motion or presented during oral arguments of the same.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: _____

DAVID W. OVERSTREET
State Bar No.: 16965

MICHAEL B. McCALL
State Bar No.: 73028

Attorneys for Defendants Kenneth E. Lee and Law Offices of Lee & Smith, P.A.

40 Calhoun Street, Suite 400
Charleston, SC 29401
843-727-0307

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, Plaintiff, vs. Kenneth E. Lee and Law Offices of Lee & Smith, P.A., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-42-5017 **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Thomas A. Pendarvis
Pendarvis Law Offices, PC
500 Carteret Street, Suite A
Beaufort, SC 29902-5066

This 1st day of March, 2013.

Anna H. Crowder
Legal Assistant to Michael B. McCall

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	CASE NO.: 2012-CP-42-5017
	)	
Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy,	)	
	)	**AFFIDAVIT OF KENNETH E. LEE**
Plaintiff,	)	
	)	
vs.	)	
	)	
Kenneth E. Lee and Law Offices of Lee & Smith, P.A.,	)	
	)	
Defendants.	)	
	)	

Personally appeared before me, Kenneth E. Lee, who being duly sworn, deposes and says:

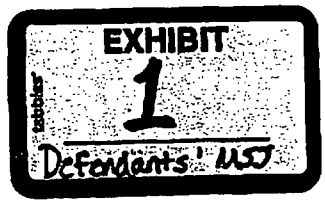
1. I am over the age of 18, I have personal knowledge of the matters contained herein, and I am competent to make this affidavit.

2. The attorney-client relationship with Mark A. Malloy was entered into pursuant to the terms of the Contract of Representation attached hereto as "Exhibit A."

3. The purpose of the representation of Mark A. Malloy was to pursue a North Carolina workers' compensation claim.

4. I was licensed to practice law in the State of North Carolina at the time of the representation, and I remain licensed to practice law in the State of North Carolina.

5. The underlying settlement that is the subject of the Complaint was reached at mediation in North Carolina on November 25, 2003.



6. Mark A. Malloy and I were physically present at the mediation in North Carolina when the underlying settlement was reached on November 25, 2003.

7. Mark A. Malloy and I executed the written settlement confirmation attached hereto as "Exhibit B" at the mediation in North Carolina on November 25, 2003.

8. The underlying settlement that is the subject of the Complaint was approved by the North Carolina Industrial Commission.

9. The underlying settlement that is the subject of the Complaint was memorialized in the Agreement and Release attached hereto as "Exhibit C."

10. Mark A. Malloy's wife Angela Malloy joined in the Agreement and Release attached hereto as "Exhibit C" to indicate her consent to the settlement and to confirm that Mark A. Malloy was mentally competent and able to make proper decisions concerning the settlement of his claim.

11. The attorney-client relationship with Mark A. Malloy concluded upon disbursement of the settlement funds.

12. The settlement funds were disbursed to Mark A. Malloy by way of a check enclosed with the letter dated February 25, 2004 attached hereto as "Exhibit D."

13. My office last corresponded with Mark A. Malloy on January 10, 2005 to provide him with a copy of the Form 28C (Report of Carrier Compensation Paid) in regard to his workers' compensation claim.

14. All of the alleged acts or omissions giving rise to the causes of action alleged in the Complaint occurred before December 5, 2008.

15. I am informed and believe that the Social Security Administration Office of Hearings and Appeals issued a decision dated June 30, 2006 attached hereto as "Exhibit E" finding that Mark A. Malloy had not been under a disability as defined in the Social Security Act from the period beginning on September 9, 2002 through the date of the decision.

16. I am informed and believe that Mark A. Malloy pursued a civil action in 2009 without having a Guardian *ad litem* appointed on his behalf in the Lancaster County Court of Common Pleas case captioned Mark A. Malloy, *et al.* v. James Alford Blackmon, *et al.*, Civil Action No.: 2009-CP-29-0858, which was filed on June 11, 2009 and dismissed on October 4, 2010.

FURTHER AFFIANT SAYETH NOT.

Kenneth E. Lee

SWORN TO and subscribed
before me this 28th day of February, 2013.

Notary Public for South Carolina
My Commission Expires: 6-8-2015

3162703v.1

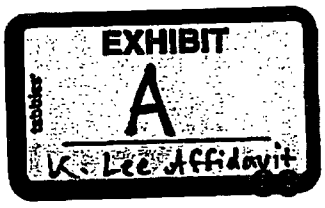
STATE OF NORTH CAROLINA)
)
COUNTY OF BUNCOMBE)

CONTRACT OF REPRESENTATION
WORKERS' COMPENSATION CLAIM

BY THIS AGREEMENT dated the 16 Day of April, 2003, the client, Mark Malloy retains **The Law Offices of Lee and Smith, P.A.** to represent him/her in connection with a claim for Workers' Compensation benefits for accidental injuries sustained to client's head arising out of client's employment with Aneco Electrical on or about the 9 Day of September, 2002. The client authorizes the attorneys to take all appropriate actions to resolve the claim including, but no limited to: conducting an investigation into the facts; communicating with third parties; obtaining records or documents relating to the client's personal background, health, employment; and financial condition; entering into settlement negotiations; and preparing for, instituting, and discontinuing a claim for Workers' Compensation benefits. The client agrees not to discuss this claim with third parties without the knowledge and consent of the attorneys. The client agrees not to settle the claim without the knowledge and consent of the attorneys. The client certifies he/she first approached the attorneys for representation and has not retained the services of any other attorney.

The client understands that the representation by the firm is limited to representation for the client's Workers' Compensation claim. This contract does not govern appeals. Representation of the client ends when the case is either settled or decided at a hearing and a new contract will have to be entered into should the parties agree to appeal the decision from the Hearing Commissioner. The attorney's representation is for a Workers' Compensation claim only and does not include other North Carolina statutory causes of action or Federal claims associated with the client's on the job injury including but not limited to, wrongful discharge and employment discrimination under the Americans With Disabilities Act.

Client hereby agrees with said attorneys to pay them a 25% contingency fee based upon the total gross recovery made in the claim by way of settlement or 33 1/3% of the total gross recovery of the claim by way of hearing, as approved by the North Carolina Industrial Commission. In addition to the fees from an Opinion and Award or from settlements by clincher, Forms 21 or 26, the Industrial Commission may award attorneys a periodic fee from client's compensation benefits once client has reached maximum medical improvement and is rated with permanent partial disability; if claimant receives an award of continuing disability by the commission; if attorneys successfully defend against a benefit termination request, or if client's periodic payments start or are re-started through attorney's efforts. If attorneys receive a periodic fee, it is not deducted from the fee on the final settlement or resolution of the claim, should the case ultimately be resolved. If the claim is concluded on a structured settlement agreement, the contingency fee shall be computed on the present value of the structured settlement and the attorney shall have the right to take payment of the attorney's fee at the time of the settlement or in deferred payments as approved by the Commission. In addition to the above contingency fee, the client agrees to reimburse the attorneys out of the total gross recovery for all expenses incurred in representing the client. Expenses or costs shall include, but are not to be limited, to charges for: filing fees, service of process, medical reports, medical evaluations, x-rays, diagnostic studies, physician and expert witness fees, private investigation costs, witness fees, documents copying costs, photographs and video recordings, depositions and transcripts, preparations of exhibits, travel and lodging expenses.



If the client discharges the attorneys or obtains substitute legal representation, the client agrees to pay the attorneys either the percentage attorneys' contingency fee set forth above on any settlement offer made at the time of discharge or an attorneys' fee of $150.00 per hour and a paralegal fee of $75.00 per hour, plus reimbursement for all costs incurred as of the date of discharge, whichever is greater. The attorneys have the right to withdraw from representation, on that circumstances have developed precluding continued effective representation, indicate continued representation would not be cost effective, or the client has engaged in conduct that renders it difficult or impossible for the attorneys to carry out this agreement. If the attorneys withdraw from representation, the attorneys shall not receive an attorneys' fee, but shall be entitled to recover any costs incurred as of the time of withdrawal.

The attorneys make no representations concerning the successful conclusion of the claim. In the event no recovery is obtained on the claim, the client shall not be required to pay for the attorneys' time or costs, unless otherwise agreed upon. The attorneys assume no liability to pay debts incurred by the client for medical treatment, transportation, or insurance subrogation liens unless in writing and signed by the attorneys. The client understands the law does not allow attorneys to lend money on cases.

This agreement shall be governed by the law of the State of North Carolina and the Rules and Regulations of the North Carolina Industrial Commission. The agreement contains the entire agreement between the parties. No modification of this agreement or waiver of its provision shall be binding unless made in writing and signed by the parties. The client agrees to promptly sign any further documents that are reasonably necessary to conclude the claim. The client directs the attorneys to disburse any recovery through a trust account maintained at a bank in South Carolina. The attorneys shall disburse any settlement proceeds upon obtaining any necessary Commission approvals of the settlement. The client agrees that attorney may destroy all contents of client's file five (5) years after client's file is closed by attorney.

The client certifies that the contents of this agreement have been read and explained to him/her and the client has received a copy of the agreement.

THE LAW OFFICES of LEE and SMITH, P.A.

X _____ By: _____
Client

October 18, 2000

NORTH CAROLINA INDUSTRIAL COMMISSION **IC File No. 301187**

Name of Plaintiff: **Mark Malloy**
Versus
Name of Defendant(s): **Aneco Electrical Construction**
Name of Carrier(s): Continental Cas. Co. (CNA)

CONTINGENT
MEDIATED SETTLEMENT AGREEMENT

At the Mediated Settlement Conference held on the 25th day of November, 2003 in Gastonia, N.C., the parties hereby stipulate and agree to the following:

1. Defendant(s) shall pay Plaintiff the total sum of $100,000.00. The timing of said payment shall be as set forth in N.C.G.S. 97-18. ✓ In consideration of this payment, Plaintiff and Defendant shall execute all necessary Forms and/or a standard Compromise Settlement Agreement that complies with N.C.G.S. 97-17. Such Forms and/or Agreement shall be prepared by the defendant and submitted to the Commission by the parties within the time prescribed by the Commission.

2. Issues, if any, not settled by this agreement are as follows: A. CNA supervisor is on vacation. Settlement is contingent upon supervisor's approval of settlement.

3. Each of the parties hereto shall bear their own attorney fees, costs and pro rata share of the mediator's fees for this Mediated Settlement Conference except as set forth herein: CNA will pay all of mediator's fee.

4. ✓ Attached to this agreement and incorporated herein is a list of all known unpaid medical expenses of the employee, including both disputed expenses and expenses that will be paid by the employer pursuant to the IC Fee Schedule under this settlement agreement; with a cap of $1400.

OR

___ The parties shall include the above referenced list as part of the Compromise Settlement Agreement to be submitted to the Commission. ✓ All authorized unpaid medical expenses through the date of this agreement will be paid by the employer. ___ All medical expenses through the date of this agreement will be paid by the employer, except the following, which are disputed:

5. The parties hereto have considered their interests and the interests of any health plan that may have paid medical expenses of the employee and agree that their positions as to the payment of medical expenses are reasonable.

6. The parties agree that ✓ the employer admitted this claim or ___ reasonably denied the employee's claim for compensation and that there is a need for finality in this litigation.

7. The parties and their respective attorneys acknowledge that all material terms are included in this agreement, that it is fair and in the best interests of all parties and consent to the Industrial Commission reviewing this Agreement and entering an Order approving a settlement agreement based on the terms and conditions contained herein.

8. Other: a. Wife, Angela Malloy, will sign clincher to indicate consent to settlement and waiver of attendant care payment.
b. Soc. Sec. offset language. c. MSA of $5000 to be self adm. by plff. If CMS assigns a different amt, automatic amendment. (After all appeals exhausted)
d. Plff. will consider structuring part of settlement but not required to do so.

For Plaintiff: ~~For Defendant:~~

[signature]

[signature] Angela Malloy

Date: November 25, 2003

[signature] [signature]
Mediator

Authorized Agent of CNA.

EXHIBIT B
K. Lee Affidavit

NORTH CAROLINA INDUSTRIAL COMMISSION

I. C. No. 301187, MARK MALLOY, Employee, Plaintiff v. ANECO ELECTRICAL CONSTRUCTION,, Employer; CONTINENTAL CASUALTY COMPANY, Carrier; Defendants.

AGREEMENT AND RELEASE

THIS AGREEMENT, for final compromise settlement release made and entered into this 25th day of November, 2003, by MARK MALLOY, hereinafter sometimes referred to as "Employee"; and ANECO ELECTRICAL CONSTRUCTION, hereinafter sometimes referred to as "Employer"; and CONTINENTAL CASUALTY COMPANY, hereinafter sometimes referred to as "Carrier";

W I T N E S S E T H:

WHEREAS, the parties agree that the Employer employed more than three persons at the time of the injury or injuries, that Continental Casualty Company was the Carrier, and that the Employer and Employee were both bound by the provisions of the workers' compensation laws of North Carolina, during the time herein stated; and

WHEREAS, the Employee was employed by the Employer from mid-July 2002, until September 9, 2002; and

WHEREAS, prior to his employment with the Employer, the Employee had a very serious brain injury on July 2, 1996, and as a result of that 1996 injury the Employee required the insertion of a steel plate into his skull, and he was in a coma for approximately 29 days, and he was out of work from July 1996 through November 1997, inclusive; and

WHEREAS, the Employee received extensive physical therapy and vocational rehabilitation following his 1996 brain injury, but the records of Charlotte Institute of Rehabilitation from 1997 and the Employee's testimony from a hearing on 11-12-97 indicated that the Employee was left with pain and deficits involving his right side including his right arm and his right leg, as well as memory and other cognitive deficits; and

WHEREAS, the Employee returned to work for Alamo Car Rental on approximately 12-1-97 and worked for Alamo until approximately 2002, when Alamo shut down the location where the Employee was working, whereupon the Employee went to work for the Employer as an electrician's helper in approximately mid-July 2002; and

EXHIBIT C K. Lee Affidavit

WHEREAS, the Employee suffered an injury by accident that arose out of and in the course of his employment with the Employer on 9-9-02; and

WHEREAS, Dr. Mark Schaper wrote on 9-11-02 that the Employee had fallen from a ladder at work; that he reportedly was found on the ground having a seizure; that he had a CT scan and an EKG at the hospital which were unremarkable; that the Employee has a history which includes a closed head injury in 1996 which resulted in a cranial fracture and the insertion of a plate; that the Employee also complains of low back and hip pain; and that the assessment is post-concussion syndrome and back pain; and

WHEREAS, Dr. Michael Dockery of Miller Orthopedic Clinic wrote on 10-7-02 that the Employee had a motor vehicle accident several years ago in which a rear view mirror went into his skull, following which he had surgery and a metal plate was inserted; that he then fell off of a ladder on September 9, 2002; that last Wednesday he had a seizure in Lancaster, following which he had a CT scan, and he was told that there were no changes on the CT scan from a prior CT scan; that he has complaints and pain in his upper lumbar region and he also reports an episode in which his right knee gave way; that he did not have any injury to his right knee of which he is aware; and that the impression is 1) right knee sprain without definite underlying pathology and 2) history of closed head injury with prior trauma and craniotomy; and that it is believed that most of the symptoms are attributable to the head injury;

WHEREAS, Dr. Allan S. Ryder-Cook wrote on 11-12-02 that an EEG report indicated frequent epileptiform discharges; and that there is very little in the way of slowing seen, nor is there any evidence of any actual seizures; and

WHEREAS, Dr. Ryder-Cook wrote on 1-3-03 that the Employee reports no seizures since last seen on 11-27-02; that he reports that he has been clumsy and fallen on a couple of occasions; that he reports headaches about every other day; and that the impression is seizures most likely related to encephalomalacia; and

WHEREAS, Dr. Ryder-Cook wrote on 3-19-03 that the Employee's job involves working at heights and he probably remains unable to return to that job; and

WHEREAS, the summary of medical treatment set forth above is just a summary of some of the Employee's treatment, and it is not intended to be a comprehensive summary, and reference is made to all of the medical records which have been submitted to the Commission for a more thorough summary of the treatment received by the Employee; and

WHEREAS, the Employee retained the services of Kenneth Lee, Esquire, and Mr. Lee has negotiated with representatives of the Employer and Carrier for a settlement of the Employee's claim; and

WHEREAS, the contentions of the Employee include but are not limited to the following:

a. The Employee made an excellent recovery from the accident that he had on 7-2-96;

b. While he did suffer some seizures following the 1996 accident, he had not had any seizures in the last several years before his accident on 9-9-02;

c. He suffered a concussion as a result of the accident of 9-9-02, and the seizures that he has had since that date are a result of said accident;

d. The fact that he has seizures makes it difficult for him to return to work for a variety of reasons, including an inability to drive vehicles;

e. As a result of his accident of 9-9-02, combined with the injuries that he suffered in the prior motor vehicle accident on 7-2-96, renders him totally disabled from working at this time, and he is concerned that he will never be able to return to work as a result of his cognitive deficits;

f. He will never be able to return to work for the Employer, because his work for the Employer required him to work at heights, and he will never again be able to work at heights because of difficulties that he has with balance, etc.; and

WHEREAS, the contentions of the Employer and Carrier include but are not limited to the following:

a. The deficits that the Employee has exhibited since 9-9-02 are the same deficits that he had following the initial non-work related motor vehicle accident on 7-2-96;

b. If the Employee has any permanent deficits or permanent disability, it is as a result of his motor vehicle accident of 7-2-96 and not his work related accident of 9-9-02;

c. He is not entitled to any benefits over and above those he has already been paid; and

WHEREAS, the Carrier offered to pay the Employee $100,000 in a lump sum, subject to attorneys' fees for the employee's attorneys; and the Employee, through counsel, accepted said offer; and

WHEREAS, attached hereto as **Exhibit A** is a list of the medical bills which have been paid by the Carrier; and

WHEREAS, the Carrier has paid all known medical expenses of the Employee related to the injury, and the Employee and the Carrier are both unaware of any medical expenses which the Employee has incurred arising out of and in the course of employment which have not been paid; and

WHEREAS, the Carrier does not dispute its responsibility for any of the medical bills for treatment that it has authorized arising out of the accident of September 9, 2002; and

WHEREAS, the Employee agrees that he knowingly and intentionally waives his right to further benefits under the Workers' Compensation Act; and

WHEREAS, no rights other than those arising under the provisions of the Workers' Compensation Act are compromised or released; and

WHEREAS, the Carrier will pay all costs incurred; and

WHEREAS, the Employer and Carrier hereby certify that they have supplied the North Carolina Industrial Commission with copies of all vocational, medical, and nursing rehabilitation reports, opinions, bills, and information relative to the Employee, of which the Employer and Carrier now have knowledge or have in their possession, and the Employee certifies that those records constitute a full and complete medical record as required by N. C. Gen. Stat. § 97-82 and North Carolina Industrial Commission Rule 502, and the Employer and Carrier have agreed to the terms of this settlement in reliance upon that certification and the Employee's agreement that this settlement cannot be voided on the basis that the records provided to the Industrial Commission do not constitute a complete medical report on the Employee; and

WHEREAS, the positions of the parties to this Agreement are reasonable as to the payment of medical expenses and this Agreement is in furtherance of the need for finality in the litigation; and

WHEREAS, the Employee has reached maximum medical improvement.

NOW, THEREFORE, in consideration of the premises and in further consideration of the payment hereinafter specified to be paid by Continental Casualty

Company to the Employee, it is mutually covenanted and agreed between the parties hereto as follows:

1. This Agreement shall be submitted to the North Carolina Industrial Commission for approval by the Commission. In the event this Agreement is not approved by the Commission, then the same shall become null and void and none of the statements made herein shall be taken as an admission by any of the parties hereto; but if this Agreement is approved by the North Carolina Industrial Commission, then the same shall be in full force and effect and binding upon the parties hereto from the date of execution hereof by said parties, and the Continental Casualty Company shall promptly make the payment herein specified.

2. Subject to the provisions of paragraph 1 above, Continental Casualty Company shall pay to the said Mark Malloy the sum of One Hundred Thousand Dollars ($100,000). The aforesaid sum of $100,000 is subject to the attorney's fee which the Commission awards to Law Offices of Lee & Smith, P.A., which attorney's fee shall be deducted from the aforesaid $100,000. In addition, the Carrier agrees to pay all authorized unpaid medical bills arising out of the accident of September 9, 2002, incurred through the date of this Agreement and no further, to the extent that such bills are approved by the Commission; provided that the Carrier will pay for one future visit to Dr. Van Der Veer so long as the visit occurs by April 1, 2004. The Carrier will not pay for any tests ordered by Dr. Van Der Veer, who was the Employee's doctor for the 1996 accident. In addition to the medical treatment that was authorized by the Carrier, the Employee contends that he has the following medical bills: $548 payable to EMS for Mecklenburg County; $500 for an ambulance bill in Lancaster, SC; $124.65 balance owed to Metrolina Neurological; $134 balance owed to University Family Physicians; and $75 balance owed to the emergency room in connection with of his visits. The foregoing totals $1,260.65. The Carrier agrees that it will pay those enumerated unpaid bills, subject to the NCIC fee schedule, regardless of whether the Carrier authorized the treatment; provided that the Carrier will have a cap or maximum payment of $1,400 for the total of those enumerated unpaid bills.

3. The Employee was born on February 3, 1974, and he is currently 29 years old. His life expectancy is 48.5 years (2,522 weeks) according to the mortality table contained in N. C. Gen. Stat. § 8-46. The Employee contends that he may be entitled to weekly workers' compensation benefits for the remainder of his life but for this final settlement agreement. The Employee further contends that he may be entitled to Social Security Disability Benefits, although he has not been approved for same at the time of this Agreement and Release. The parties agree that the Carrier shall deduct 22.5% of the lump sum of $100,000, or $22,500, from the settlement agreement, if as anticipated and agreed by the Employee, said amount is approved as attorney's fees. The parties further agree that $5,000 of the lump sum settlement agreement represents compensation for future medical expenses because the Employee may require certain medical monitoring of his condition. Considering the Employee's life expectancy, the

anticipated attorney's fees of $22,500, and the allocation of $5,000 for future medical benefits, the Employee's effective weekly compensation rate is $28.75 ($100,000 - $22,500 = $77,500 - $5,000 = $72,500 ÷ 2,522 weeks), and that the effective monthly compensation rate is $123.62 ($28.75 X 4.3 weeks) payable in one lump sum of $100,000 beginning as of the date of this Agreement if approved by the Industrial Commission. In the event this settlement agreement is reviewed by Medicare, or by any agency acting on behalf of Medicare, and in the further event that there is a final determination (after any appeals) that an allocation for future medical expenses other than referenced herein is appropriate, the parties stipulate and agree that this settlement agreement shall be deemed amended without further action of the parties to comply with the set aside amount, if any, mandated by Medicare; provided, however, that the Employee retains the right to dispute and appeal from any determination by Medicare that the allocation is more than $5,000 for future medical benefits which would otherwise be covered by Medicare. The Employee further agrees to be solely responsible for managing and accounting for any set aside amount mandated by Medicare from the settlement referred to herein.

4. The said Mark Malloy does hereby specifically covenant and agree to accept the aforesaid payment in full satisfaction of any and all claims, demands, suits, actions, or rights of action, which he now has, or may hereafter have, or claim to have as a result of the accident of on or about September 9, 2002, and any subsequent disability found by the North Carolina Industrial Commission to exist, if any, and the said Mark Malloy by these presents, does for himself, his heirs, next of kin and personal representatives, remise, release, and forever discharge the Employer aforesaid and Continental Casualty Company, their successors and assigns, of and from every and all manner of action, actions, causes of action, suits, debts, duties, demands, sums of money, medical or other bills, damages, judgments and claims whatsoever which against said Employer and said Carrier the said Mark Malloy ever had, now has or may have, or which his heirs, next of kin, personal representatives, or any other person whatsoever hereinafter can, shall or may have for or by reason of or growing out of the terms or provisions of the North Carolina Workers' Compensation Act, arising out of or resulting from said injury, or injuries, or accident or disability incurred thereby, if any, and the said Mark Malloy does hereby further expressly agree that any and all rights which he may have as the result of Sections 97-25, 97-25.1, 97-38 and 97-47, as amended, of the General Statutes of North Carolina, which sections provide for benefits in the future, are expressly waived and said Employer and Carrier are hereby expressly and forever released and discharged of and from any and all further liability to the said Mark Malloy by reason of any further or additional disability or any other benefit arising or growing out of the injury, or injuries, or accident. This instrument contains the entire agreement between the parties hereto, and the terms of this Agreement and Release are contractual and not mere recitals and the sum of money recited in this Agreement to be paid upon order of the Industrial Commission is all that the said Employee will ever receive from the Employer and Carrier.

5. Nothing contained in this Agreement and Release shall be construed as an admission by the Employer and Carrier that the Employee is responsible for any benefits over and above what they had already paid to the Employee. It is the position of the Employer and Carrier that any ongoing disability which the Employee has, and any need for medical treatment which the Employee needs in the future, is due to the non-work related accident that the Employee had on July 2, 1996.

6. The Carrier agrees that it will pay all of the mediator's fee in connection with the mediation that took place on November 25, 2003.

7. The Employee's wife, Angela Malloy, joins in this Agreement and Release to indicate her consent to the settlement and also her waiver of any amounts that she might otherwise be entitled to receive for attendant care that the Employee required in the first few months following his accident, and which attendant care was provided by said Angela Malloy. Angela Malloy also joins in this Agreement and Release to confirm that, despite that the Employee has suffered two head injuries, he is mentally competent and able to make proper decisions concerning the settlement of his claim.

IN WITNESS WHEREOF, the parties hereto have set their respective hands and seals the day and year first above written.

_____ (SEAL)
Mark Malloy, Employee

CONSENT:

_____
Angela Malloy, Wife of the Employee

ANECO ELECTRICAL CONSTRUCTION

By: _____ (SEAL)
Attorney for the Employer
State Bar #5845

CONTINENTAL CASUALTY COMPANY

By: _____ (SEAL)
Attorney for the Carrier

APPROVED:

_____
Kenneth W. Lee, Attorney for
Employee-Plaintiff, State Bar # 25667

LAW OFFICES OF LEE & SMITH, P.A.

Michael R. Lee (+†)
Richard J. Smith (+†)
Patrick H. Allan (+†✚◆▲)
D. Andrew Turman (+†)
Kenneth E. Lee (+†)
Scott A. Beckey (+†)

POST OFFICE BOX 2229
SPARTANBURG, SOUTH CAROLINA 29304-2229

Licensed in SC(+),NC(†), MN(✚), ND (◆), and GA (▲)

Telephone: (864) 577-0977
Facsimile: (864) 577-9661

Employer ID #56-2015407

February 25, 2004

VIA CERTIFIED MAIL

Mr. Mark A. Malloy
311 E. Arch Street
Lancaster, South Carolina 29720

RE: Your Workers' Compensation Claim

Dear Mr. Malloy:

Enclosed please find your settlement check in the amount of $77,500.00, a copy of the Approved settlement paperwork and the Disbursement Sheet.

If you have any questions, please feel free to contact me.

Sincerely,

LAW OFFICES of LEE and SMITH

Ann Dyson
Paralegal to Kenneth E. Lee, Esquire

Enclosures

EXHIBIT
D
K. Lee Affidavit

CNA 3175 Satellite Blvd., Suite 440
Duluth, GA 30096

Countersignature Req.

56-1544
441

4040000547

Date Issued	Bank Acct.
02-20-04	

VOID IF GREEN BACKGROUND IS ABSENT — THIS DOCUMENT CONTAINS A WATERMARK - HOLD UP TO LIGHT TO VIEW

Claim Number	Desk Code	Insured	Issuing Off.
23823215	N2	Aneco, Inc.	No. 23
Prefix & Policy No.		**Claimant**	**Date of Loss**
WC1079693203		Mark Malloy	09-09-02

From-Thru (Dates)		In Payment of
02-03-04	02-03-04	CSA Full And Final Settlement

PAY Seventy-Seven Thousand Five Hundred Dollars & 00/100---- Dollars ▶

Dollars • Cents
$77,500.00

BANK ONE, NA OHIO

TO THE ORDER OF Mark Malloy

Stephanie A Hellman

VOID IF NOT CASHED IN SIX MONTHS FROM MONTH OF ISSUE

G-59516-F

II⁸

SOCIAL SECURITY ADMINISTRATION

Refer To:

Office of Disability Adjudication and Review
800 S. Gay Street, Suite 700
First Tennessee Plaza
Knoxville, TN 37929-9703

Date: JUN 3 0 2006

Mark A. Malloy
3026-C Miller Street
Lancaster, SC 29720

NOTICE OF DECISION – UNFAVORABLE

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you disagree with my decision, you may file an appeal with the Appeals Council.

How to File an Appeal

To file an appeal you or your representative must request that the Appeals Council review the decision. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter.

You may file your request at any local Social Security office or a hearing office. You may also mail your request right to the **Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255**. Please put the Social Security number shown above on any appeal you file.

Time to File an Appeal

To file an appeal, you must file your request for review **within 60 days** from the date you get this notice.

The Appeals Council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The Council will dismiss a late request unless you show you had a good reason for not filing it on time.

Time to Submit New Evidence

You should submit any new evidence you wish to the Appeals Council to consider **with** your request for review.

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EXHIBIT E
K. Lee Affidavit

How an Appeal Works

Our regulations state the rules the Appeals Council applies to decide when and how to review a case. These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 404 (Subpart J) and Part 416 (Subpart N).

If you file an appeal, the Council will consider all of my decision, even the parts with which you agree. The Council may review your case for any reason. It **will** review your case if one of the reasons for review listed in our regulation exists. Section 404.970 and Section 416.1470 of the regulation list these reasons.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision more or less favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

The Appeals Council May Review The Decision On Its Own

The Appeals Council can review my decision even without your request to do so. If it decides to do that, the Council will mail you a notice about its review within 60 days from the date of this notice.

If No Appeal and No Appeals Council Review

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

If You Have Any Questions

If you have any questions, you may call, write or visit any Social Security office. If you visit an office, please bring this notice and decision with you. The telephone number of the local office that serves your area is (803)328-6271. Its address is Social Security, 498 Lakeshore Pkwy, Rock Hill, SC 29730.

George L. Evans, III
Administrative Law Judge

cc: Patrick H. Allan
P. O. Box 2229
Spartanburg, SC 29304

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	CLAIM FOR
Mark A. Malloy (Claimant)	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
(Wage Earner)	(Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

On September 30, 2002, the claimant filed a Title II application for a period of disability and disability insurance benefits. The claimant also protectively filed a Title XVI application for supplemental security income on September 18, 2002. In both applications, the claimant alleged disability beginning September 9, 2002. The claims were denied initially on January 6, 2003, and upon reconsideration on January 8, 2004. Thereafter, the claimant filed a timely written request for hearing on February 25, 2004 (20 CFR 404.929 *et seq.* and 416.1429 *et seq.*). The claimant appeared and testified at a hearing held on March 29, 2006, in Charlotte, North Carolina. Also appearing and testifying were Kathryn H. Mooney, an impartial vocational expert, and wife, Angela Malloy. The claimant is represented by Patrick H. Allan, an attorney.

ISSUES

The issue is whether the claimant is or has been disabled under sections 216(i), 223(d) and 1614(a)(3)(A) of the Social Security Act. Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.

With respect to the claim for a period of disability and disability insurance benefits, there is an additional issue whether the insured status requirements of sections 216(i) and 223 of the Social Security Act are met. The claimant's earnings record shows that the claimant has acquired sufficient quarters of coverage to remain insured through December 31, 2007. Thus, the claimant must establish disability on or before that date in order to be entitled to a period of disability and disability insurance benefits.

After careful consideration of all the evidence, the undersigned Administrative Law Judge concludes the claimant has not been under a disability within the meaning of the Social Security Act at any time through the date of this decision.

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APPLICABLE LAW

Under the authority of the Social Security Act, the Social Security Administration has established a five-step sequential evaluation process for determining whether an individual is disabled (20 CFR 404.1520(a) and 416.920(a)). The steps are followed in order. If it is determined that the claimant is or is not disabled at a step of the evaluation process, the evaluation will not go on to the next step.

At step one, the undersigned must determine whether the claimant is engaging in substantial gainful activity (20 CFR 404.1520(b) and 416.920(b)). Substantial gainful activity (SGA) is defined as work activity that is both substantial and gainful. "Substantial work activity" is work activity that involves doing significant physical or mental activities (20 CFR 404.1572(a) and 416.972(a)). "Gainful work activity" is work that is usually done for pay or profit, whether or not a profit is realized (20 CFR 404.1572(b) and 416.972(b)). Generally, if an individual has earnings from employment or self-employment above a specific level set out in the regulations, it is presumed that he has demonstrated the ability to engage in SGA (20 CFR 404.1574, 404.1575, 416.974, and 416.975). If an individual engages in SGA, he is not disabled regardless of how severe his physical or mental impairments are and regardless of his age, education, and work experience. If the individual is not engaging in SGA, the analysis proceeds to the second step.

At step two, the undersigned must determine whether the claimant has a medically determinable impairment that is "severe" or a combination of impairments that is "severe" (20 CFR 404.1520(c) and 416.920(c)). An impairment or combination of impairments is "severe" within the meaning of the regulations if it significantly limits an individual's ability to perform basic work activities. An impairment or combination of impairments is "not severe" when medical and other evidence establish only a slight abnormality or a combination of slight abnormalities that would have no more than a minimal effect on an individual's ability to work (20 CFR 404.1521 and 416.921; Social Security Rulings (SSRs) 85-28, 96-3p, and 96-4p). If the claimant does not have a severe medically determinable impairment or combination of impairments, he is not disabled. If the claimant has a severe impairment or combination of impairments, the analysis proceeds to the third step.

At step three, the undersigned must determine whether the claimant's impairment or combination of impairments meets or medically equals the criteria of an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, and 416.926). If the claimant's impairment or combination of impairments meets or medically equals the criteria of a listing and meets the duration requirement (20 CFR 404.1509 and 416.909), the claimant is disabled. If it does not, the analysis proceeds to the next step.

Before considering step four of the sequential evaluation process, the undersigned must first determine the claimant's residual functional capacity (20 CFR 404.1520(e) and 416.920(e)). An individual's residual functional capacity is his ability to do physical and mental work activities on a sustained basis despite limitations from his impairments. In making this finding, the undersigned must consider all of the claimant's impairments, including impairments that are not severe (20 CFR 404.1520(e), 404.1545, 416.920(e), and 416.945; SSR 96-8p).

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Next, the undersigned must determine at step four whether the claimant has the residual functional capacity to perform the requirements of his past relevant work (20 CFR 404.1520(f) and 416.920(f)). The term past relevant work means work performed (either as the claimant actually performed it or as it is generally performed in the national economy) within the last 15 years or 15 years prior to the date that disability must be established. In addition, the work must have lasted long enough for the claimant to learn to do the job and have been SGA (20 CFR 404.1560(b), 404.1565, 416.960(b), and 416.965). If the claimant has the residual functional capacity to do his past relevant work, the claimant is not disabled. If the claimant is unable to do any past relevant work, the analysis proceeds to the fifth and last step.

At the last step of the sequential evaluation process (20 CFR 404.1520(g) and 416.920(g)), the undersigned must determine whether the claimant is able to do any other work considering his residual functional capacity, age, education, and work experience. If the claimant is able to do other work, he is not disabled. If the claimant is not able to do other work and meets the duration requirement, he is disabled. Although the claimant generally continues to have the burden of proving disability at this step, a limited burden of going forward with the evidence shifts to the Social Security Administration. In order to support a finding that an individual is not disabled at this step, the Social Security Administration is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the claimant can do, given the residual functional capacity, age, education, and work experience (20 CFR 404.1512(g), 404.1560(c), 416.912(g) and 416.960(c)).

In the present case, the claimant received a favorable Administrative Law Judge decision in February 26, 1998, but when the claimant underwent a continuing disability review he was terminated in February 1998. However, new evidence has been submitted since said decision was rendered, as well as the claimant's testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After careful consideration of the entire record, the undersigned makes the following findings:

1. The claimant meets the insured status requirements of the Social Security Act through December 31, 2007.

2. The claimant has not engaged in substantial gainful activity at any time relevant to this decision (20 CFR 404.1520(b), 404.1571 *et seq.*, 416.920(b) and 416.971 *et seq.*).

The claimant testified under oath that he had not engaged in any work activity since the alleged onset date of disability and no evidence or record contradicts this testimony.

3. The claimant has the following severe impairments; seizure disorder, headaches, right sided numbness and speech problem (20 CFR 404.1520(c) and 416.920(c)).

The medical evidence reveals that the claimant suffered a head injury in 1996 in a motor vehicle accident, resulting in placement of a metal plate in his head. The claimant reported sporadic

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seizure activity, but had almost recovered completely before a second accident. Subsequently he underwent rehabilitation, but reported a paralysis affecting the right side of his body. In September 2002, he had an on-the-job injury associated with hitting his head and loss of consciousness resulting in seizure activity. The claimant reported no recollection of the fall or subsequent events. Before referral for a neurological evaluation with Dr. Ryder-Cook, he had a seizure in church. At the emergency room, a CT scan of the brain showed a process of repair associated with the right frontal lobe from the previous head injury, but otherwise unremarkable (Exhibit 3F). On discharge, he was prescribed Dilantin. In November 2002, an EEG report demonstrated very little evidence of actual seizures. Progress notes in January 2003 revealed that his headaches were better, but his medication regimen was changed.
Dr. Ryder-Cook diagnosed focal seizures with secondary generalization due to his head injuries, and a number of symptoms associated with post concussion syndrome such as headaches, vertigo, and memory problems. Progress notes indicated that the neurologist prescribed Lamictal in addition to Dilantin. In January 2003, the neurologist noted that he is unable to work at heights, around heavy machinery, and drive for approximately 6 months (June 2003). Further, he opined that the claimant could return to employment if he has no other seizures by April 2003. An x-ray in July 2003 revealed his prior injury with overall diminished brain volume (Exhibit 8F). Follow-up note in October 2003 revealed no seizure activity for several months; however, he is bothered by lights when he has a headache. Motor and sensory examinations were normal in the upper and lower extremities with a normal gait. The neurologist noted that the claimant should be out of work while trying to get his headaches and seizures under control, but that he could undergo retraining (Exhibit 8F). CT brain scan in April 2005 revealed his remote injury but was unremarkable in comparison to 2002 study. In January 2006, Dr. Ryder-Cook noted that despite prescribed anticonvulsant medications the claimant's seizure disorder was not controlled. Additionally, he commented that he is unsure that medications alone will bring his seizures uncontrolled and is considering the possibility of referring him for surgical evaluation. Until that time, Dr. Ryder-Cook opined that the claimant was disabled (Exhibit 14F).

Dr. Dockery, orthopedist, in October 2002 examined the claimant for reported right sided weakness, but the claimant reported return of his strength. During the physical examination his mood, affect, coordination, and orientation were unremarkable. He had normal sensation to pin prick in both upper extremities. He has 5/5 muscle strength for both, upper and lower extremities. He has full symmetrical range of motion of both shoulders. He had good cervical motion with no midline neck tenderness. He demonstrated that he could bend over and touch his toes. He had no right knee pain on examination with no evidence of effusion. Muscle strength was normal. Four view x-rays of the right knee were unremarkable with no evidence of arthritis, fracture, or any significant tarticular cartilage narrowing. X-ray of the lumbar spine revealed no acute fractures. Dr. Dockery impression was that of right knee sprain without definite underlying pathology. His recommendation included observation of the right knee with no limiting factor nor any impairment or disability (Exhibit 4F).

A neuropsychological evaluation by Dr. Manning in May 2003 revealed an intellectual assessment that placed the claimant in the borderline range of intelligence (Exhibit 7F). His WAIS vocabulary test and other testing suggested that his intellectual abilities were probably somewhat higher (Exhibit 7F). The claimant demonstrated some lateralized deficits implicating

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each cerebral hemisphere towards the left hemisphere that were most prominent. He had some impaired immediate and delayed nonverbal memory scores on the Russell Version of the Wechsler Memory Scale, which adds to the impression of right hemisphere dysfunction. Dr. Manning opined that without prior records it is impossible to determine from the present test findings to which his abilities have been compromised by the latest injury. Further, Dr. Manning recommended a course of cognitive rehabilitation because he may experience some recovery of neurocognitive abilities by means of spontaneous recovery of brain function. Also, a brief course of psychological counseling should be provided to help alleviate the adverse emotional/psychological sequelae of his head injury and recommended a treating source. Follow-up evaluation was recommended with other testing to note his progress towards recovery and document any deficits that remain; however, the record is silent for any further progress notes (Exhibit 7F).

Dr. Britt, a consultative psychological examiner in November 2002 noted that the claimant appeared as relatively physically healthy. The claimant reported limitations in his ability to sit, stand, carry, lift, reach, squat, bend, and unable to climb or run. The examiner opined that this was grossly exaggerated (Exhibit 5F). The claimant could remember two out of three objects with a delay of five minutes, which the examiner assessed as adequate, but noted that he was slow in answering. The claimant reported depression but was unable to explain his feelings. The examiner noted that this was a rather strange response given the fact that he could not describe any particular feelings associated with depression. His speech was clear, extremely low in fluency, but largely grammatical and of average volume. The WRAT-3 reading test was administered, and the examiner noted that his score of 90 was consistent with average intellect. Administration of the WMS-III revealed significant weakness in delayed auditory recognition, but his memory impairment was rather mild and extremely circumscribed. Dr. Britt's impression was that of mild memory impairment. Moreover, that the claimant has no psychological problems and that he exhibited a great deal of exaggeration. His ability to carry out work related activities appeared only mildly impaired. He demonstrated that he could understand, retain, and follow instructions. He showed that he was able to sustain attention sufficiently and perform simple, repetitive tasks. The examiner noted that the claimant would be able too satisfactorily relate to fellow workers and supervisors. Additionally, the examiner assessed that testing and interviewing appeared valid, but that the claimant exaggerates his answers, which are given very slowly, and calculating. The examiner opined some symptom magnification exaggeration was involved during the examination. Moreover, his current level of adaptive functioning is estimated to be only slightly lower than premorbidly with no evidence of impairment in terms of depression or anxiety. Dr. Britt recommended that he be referred to vocational rehabilitation for assistive services in getting back to work (Exhibit 5F).

4. The claimant does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).

Since the claimant has alleged depression, anxiety, and the record reveals an organic mental disorder affecting his memory and speech, it is necessary to rate the degree of functional limitation resulting from the impairments. As specified in 20 C.F.R. §§ 404.1520a(c) and 416.920a(c), the undersigned must consider whether those impairments result in any limitation in

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four broad functional areas: activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation.

Relative to the determination of disability and in analyzing the necessary criteria cited above, *activities of daily living* generally encompasses general adaptive activities such as cleaning, shopping, cooking, taking public transportation, driving an automobile, paying bills, maintaining a residence, caring appropriately for grooming and hygiene, using telephones, using simple household appliances, using small tools, and other self-care activities. (Listing of Impairments, § 12.00(C)(1)). In this case, all of the pertinent exhibits have been reviewed and the claimant's testimony has been fully considered. The overall record fails to show any evidence of significant deficits in daily functioning due to mental disorders. The claimant reported that he was still capable of taking care of his personal grooming, performing some household chores, and simple cooking. Moreover, he cares for his dependent children, while his wife works.

In the area of *social functioning*, the record shows that the claimant retains the capacity to interact appropriately and communicate effectively with others. The claimant is able to function in an appropriate manner in the public domain in such places as doctor's offices, grocery stores, and other facilities. The claimant demonstrated no abnormal social behaviors during the hearing, and he was able to understand and follow the hearing proceedings and all lines of questioning. Additionally, the claimant is able to travel on a bus with a chorus and entertain at other churches.

As to *concentration, persistence, or pace,* the record contains no evidence that the claimant's concentration skills do not allow for the completion of assigned low-level tasks. Mr. Malloy was able to understand and follow the hearing proceedings and all lines of questioning. By virtue of the claimant's ability to drive a car, sing, and read his bible, he has demonstrated the ability, at least, to successfully perform simple, routine, one to two step tasks (Exhibit 6E).

Finally, there is no evidence of repeated *episodes of decompensation.* (Listing of Impairments, § 12.00(C)(4)).

Likewise, regarding the "C" criteria of Section 12.02 and 12.04, relating to organic mental disorders and affective disorders, requires a manic, depressive, or bipolar syndrome that results in at least two of the following:

1. Marked restriction of activities of daily living;
2. Marked difficulties in maintaining social functioning;
3. Marked difficulties in maintaining concentration, persistence, and pace; or
4. Repeated episodes of decompensation, each of extended duration.

Said section may also be satisfied if the disorder results has lasted at least 2 years, has caused more than a minimal limitation of the ability to do basic work activity, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following applies:

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1. Repeated episodes of decompensation, each of extended duration;
2. A residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or
3. A current history of one or more years' inability to function outside a highly supportive living arrangement with an indication of continued need for such an arrangement.

Accordingly, the undersigned finds that the claimant's mental impairments have resulted in mild restriction of activities of daily living; mild difficulties in maintaining social functioning; mild difficulties in maintaining concentration, persistence or pace; and no repeated episodes of decompensation. This assessment is also consistent with the opinion of the examining State agency medical consultant who evaluated the claimant's mental impairments after his lastest brain injury (Exhibit 5F). The undersigned finds that his memory and ability to understand are sufficient for simple, but not detailed tasks. He was able to perform serial 7's slowly but accurately. He was able to perform simple calculations. His sustained attention and concentration are limited, in that he would be precluded from performing production work, but he could sustain attention sufficiently to perform simple, repetitive tasks. His social interactions are limtied, such that the claimant would require a non-public setting. He would satisfactorily relate to fellow workers and supervisors. He goes to church weekly, watches children during the day, and presented himself well before physicians during examinations, and to the undersigned, at the hearing. At the consultative examination, he demonstrated that he could remember 2/3 objects with a delay of five minutes, but he was slow in answering. His demeanor was calm, comfortable, friendly, and pleasant. Generally unremarkable. He had no signs of emotional lability but he tended to be somewhat flat and dull. His remote memory seemed fairly intact. The examiner noted that his recent memory was intact because he remembered recent meals, newspaper headlines, and relatives phone numbers. He demonstrated that he could repeat 6 digits forward and 5 digits in reverse. The examiner noted that his alleged memory impairment, with testing, seemed rather mild and extremely circumscribed. The claimant states having difficulty with anxiety and a depressed mood. The undersigned finds no psychological impairment; however, given his slight slowing of speech, the undersigned will give the claimant the benefit of doubt and will accommodate this alleged symptom by the below residual functional capacity with simple one to two-step instructions. Therefore, the undersigned is persuaded that, while the claimant's mental impairments affects his ability to function, they do not significantly erode his occupational base.

5. **After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to lift/carry 20 pounds on an "occasional" basis and 10 pounds on a "frequent" basis; stand and/or walk six hours; and sit about six hours during the course of an 8-hour workday. Further, the claimant is precluded from being around hazardous machinery or operating motor vehicles. The claimant is able to complete simple one to two-step instructions, but has difficulties dealing with the public.**

In making this finding, the undersigned considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 404.1529 and 416.929 and SSRs 96-4p and

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96-7p. The undersigned also considered opinion evidence in accordance with the requirements of 20 CFR 404.1527 and 416.927 and SSRs 96-2p, 96-5p and 96-6p.

At the hearing, the claimant testified that he has a high school education with additional training regarding car rentals. He is married, his wife works, and he has three dependent children, which he cares for while his wife works. He stated that he does not have a driver's license since expiration in 2001, but that he drove to work in 2002. The claimant reported that he is involved in his church choir, as a background singer, and they travel to different states to perform. He stated that he attends church every Sunday and choir rehearsal every other Thursday. His hobby includes fishing from the bank. The claimant testified that his past jobs included customer representative at a rental car agency for about six months, which was the easiest job, but he was laid off. He reported that he drew his unemployment while pursuing other job searches and would have gone back to work, if hired. He was an electrician's helper for about 4 months, before he got hurt resulting in drawing worker's compensation. He worked as a housekeeper about eight months, making beds and occasionally helping with luggage. Another job was as a bagger and/or stocker. The claimant testified that his impairments are seizures; numbness in right side related to his upper and lower extremities; headaches; walking and stumbling; occasional memory loss, but no depression, nerve problems, or speech problems. The claimant reported that his seizures started the day he had an on-the-job injury resulting in a fall from a ladder. He stated that now he has daily headaches and limps when walking. He reported several years ago that he had a plate inserted in his head after a motor vehicle accident. During the day, he will wash dishes. The claimant's wife testified that he had bad headaches every morning and that his medications make him drowsy, fatigued, and the inability to complete tasks. A church member checks on him daily. She reported that he has not had a seizure in several weeks but they are usually grand mal type. She testified that his physicians stated that he would be observed for some 10 years before sending him to the epilepsy foundation.

After considering the evidence of record, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to produce the alleged symptoms, but that the claimant's statements concerning the intensity, duration and limiting effects of these symptoms are not entirely credible.

He testified that he received unemployment insurance, which requires a certification that you are ready and willing to work. Further, the claimant testified that he went on job searches and would have gone back to work, if he had been offered a job. Dr. Ryder-Cook has described the claimant as disabled in January 2006. The opinion of a treating physician must ordinarily be given substantial or considerable weight unless good cause is shown to the contrary. A treating physician's medical opinion, on the issue of the nature and severity of an impairment, is entitled to special significance; and, when supported by objective medical evidence of record, entitled to controlling weight. (SSR 96-2p) On the other hand, statements that a claimant is "disabled," "unable to work," can or cannot perform a past job, meets a Listing or the like are not medical opinions but are administrative findings dispositive of a case, which require familiarity with the Regulations and legal standards set forth therein. Such issues are reserved to the Commissioner, who cannot abdicate his statutory responsibility to determine the ultimate issue of disability. Opinions on issues reserved to the Commissioner can never be entitled to controlling weight, but must be carefully considered to determine the extent to which they are supported by the record as

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a whole or contradicted by persuasive evidence (20 CFR 404.1527 (d)(2) and 416.927 (d)(2); SSR 96-5p). Dr. Ryder-Cook's statement seems somewhat inconsistent when the physician also recommended the claimant for vocational rehabilitation (Exhibit 14F).

The Administrative Law Judge does not question the fact that the claimant suffers some degree of limitations and recognizes that the claimant cannot perform strenuous work activity but is, essentially, limited to no more than a range of light exertion. Although the claimant has short-term memory loss, blurred vision, some seizures, traumatic brain injury, and some pain associated with his back and knees the medical records reveal that he has the ability to perform many normal activities. The medical records reveal that he has some night seizures and headaches since the latest date of injury; however, his seizures are better controlled with consistent treatment and his headaches should improve with continued treatment. The record indicates that the claimant has missed several medial appointments, which discredits his sincerity of allegations and/or symptoms. Also, that the claimant has not followed-up with recommended cognitive rehabilitation (Exhibits 7F). The undersigned finds that due to his brain injury, the claimant may have some problems with learning and carrying out complex and detailed tasks; however, he can think clearly, follow, and carry out simple instructions such as he demonstrates the ability to learn songs for the chorus that he participates in weekly. Even if he does experience nervousness, anxiety, and depression, the records show that he is able to communicate with others, act in his own best interest, and perform most ordinary activities. The evidence shows that he has the ability to do work that requires little or no training.

As for the opinion evidence, the undersigned has also considered the opinion of the State Agency reviewing physicians in Exhibit 1F, who only reviewed the medical evidence, and gave the claimant a greater residual functional capacity than the undersigned. The undersigned has considered the opinion of Dr. Ryder-Cook and finds inconsistencies in his opinion, such as he refers him for vocational retraining; but opines that he is disabled. Dr. Ryder-Cook also opined without a function-by-function assessment (Exhibits 8F, 14F); however, the Administrative Law Judge gave the claimant the benefit of doubt, and gave him a reduced range of light exertion. Psychological examiner, Dr. Britt has been given controlling weight because of his personal examination of the claimant, which the undersigned has accommodated by the above residual functional capacity (Exhibit 5F).

6. The claimant is unable to perform any past relevant work (20 CFR 404.1565 and 416.965).

At the hearing, the vocational expert testified that the claimant has past relevant work as an electrician helper, medium exertion, semi-skilled work; customer service representative, sedentary exertion, semi-skilled work; hotel housekeeper, light work, unskilled work, and bagger or stocker, medium to heavy exertion, unskilled work. The vocational expert testified that most of the jobs are of greater exertion, which is now beyond his capacity, except hotel housekeeper. The vocational expert testified that this job is not beyond his exertional capacity and would not preclude his inability to get along with the general public. Accordingly, the claimant could perform only past relevant work as a housekeeper as generally and normally performed in the regional and nationally economy.

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7. The claimant was born on February 3, 1974 and was 28 years old on the alleged disability onset date, which is defined as a younger individual 18-44 (20 CFR 404.1563 and 416.963).

8. The claimant has at least a high school education and is able to communicate in English (20 CFR 404.1564 and 416.964).

9. Transferability of job skills is not material to the determination of disability due to the claimant's age (20 CFR 404.1568 and 416.968).

10. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 404.1560(c), 404.1566, 416.960(c), and 416.966).

In determining whether a successful adjustment to other work can be made, the undersigned must consider the claimant's residual functional capacity, age, education, and work experience in conjunction with the Medical-Vocational Guidelines, 20 CFR Part 404, Subpart P, Appendix 2. If the claimant can perform all or substantially all of the exertional demands at a given level of exertion, the medical-vocational rules direct a conclusion of either "disabled" or "not disabled" depending upon the claimant's specific vocational profile (SSR 83-11). When the claimant cannot perform substantially all of the exertional demands of work at a given level of exertion and/or has nonexertional limitations, the medical-vocational rules are used as a framework for decisionmaking unless there is a rule that directs a conclusion of "disabled" without considering the additional exertional and/or nonexertional limitations (SSRs 83-12 and 83-14). If the claimant has solely nonexertional limitations, section 204.00 in the Medical-Vocational Guidelines provides a framework for decisionmaking (SSR 85-15).

If the claimant had the residual functional capacity to perform the full range of light work, a finding of "not disabled" would be directed by Medical-Vocational Rule 202.20. However, the claimant's ability to perform all or substantially all of the requirements of this level of work has been impeded by additional limitations. To determine the extent to which these limitations erode the unskilled light occupational base, the Administrative Law Judge asked the vocational expert whether other jobs existed in the national economy given the claimant's age, education, work experience, and residual functional capacity. The vocational expert testified that given all of these factors the individual would also be able to perform the requirements of representative occupations such as sorting agriculture products; night business cleaner; laundry folder with some 3, 672 in the region and some 281,000 such jobs nationally. Pursuant to SSR 00-4p, the vocational expert's testimony is consistent with the information contained in the Dictionary of Occupational Titles.

Based on the testimony of the vocational expert, the undersigned concludes that, considering the claimant's age, education, work experience, and residual functional capacity, the claimant has been capable of making a successful adjustment to other work that exists in significant numbers in the national economy. A finding of "not disabled" is therefore appropriate under the framework of the above-cited rule.

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11. The claimant has not been under a "disability," as defined in the Social Security Act, from September 9, 2002 through the date of this decision (20 CFR 404.1520(g) and 416.920(g)).

DECISION

Based on the application for a period of disability and disability insurance benefits filed on September 30, 2002, the claimant is not disabled under sections 216(i) and 223(d) of the Social Security Act.

Based on the application for supplemental security income protectively filed on September 18, 2002, the claimant is not disabled under section 1614(a)(3)(A) of the Social Security Act.

George E. Evans III

George E. Evans, III
Administrative Law Judge

JUN 3 0 2006

Date

LIST OF EXHIBITS

Claimant: Mark A. Malloy **SSN:**

Exh. No.	Part No.	Description	No. of Pages
		PAYMENT DOCUMENTS/DECISIONS	
1	A	Initial Disability Determination by State Agency, Title II, dated 1-6-03	1
2	A	Reconsideration Disability Determination by State Agency, Title II, dated 1-8-04	1
		JURISDICTIONAL DOCUMENTS/NOTICES	
1	B	Social Security Notice dated 1-6-03	5
2	B	Request for Reconsideration filed 4-23-03 (with attached good cause statements)	5
3	B	Social Security Notice of Reconsideration dated 1-8-04	3
4	B	Request for Hearing filed 2-25-04 (with atch)	3
5	B	Letter of Acknowledgement of Request for Hearing dated 3-19-04	2
6	B	Letter to Attorney dated 1-24-06 submitting Proposed Exhibit List & Request for Updates	2
7	B	Copy of letter dated 2/10/06, to Kathryn Mooney, Vocational Expert, requesting attendance at hearing	1
8	B	Resume for Vocational Expert	2
		NON-DISABILITY DEVELOPMENT	
1	D	Leads/Protective Filing Worksheet dated 9-18-02	2

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2012-CP-42-5017

Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy,

Plaintiff,

vs.

Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A.,

Defendants.

PLAINTIFF'S AMENDED RESPONSES TO DEFENDANT KENNETH E. LEE'S FIRST REQUESTS TO ADMIT TO PLAINTIFF

TO: DAVID W. OVERSTREET, J.D. AND MICHAEL B. MCCALL, J.D., LAWYERS FOR DEFENDANTS:

Pursuant to Rule 36, SCRCP, Plaintiff Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy hereby amends the responses to Defendant Kenneth E. Lee's First Requests to Admit to Plaintiff as follows:

REQUEST TO ADMIT NO. 1: Admit that the attorney-client relationship between you and Defendant Lee was entered into pursuant to the terms of the Contract of Representation attached hereto as "Exhibit A."

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about

Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff admits that Mr. Lee was obligated to act – but did not act – as any reasonably prudent lawyer would under the circumstances pursuant to the standard of care for lawyers handling workers compensation matters for clients, the Rules of Professional Conduct and the terms of the Contract of Representation, a copy of which was attached as Exhibit A to Defendants' Requests to Admit. Plaintiff admits that the lawyer-client relationship between Plaintiff and Defendant

Lee was entered into pursuant to the terms of the Contract of Representation requiring Mr. Lee to satisfy the standard of care for lawyers handling workers compensation matters and the Rules of Professional Conduct.

REQUEST TO ADMIT NO. 2: Admit that the purpose of Defendant Lee's representation of you was to pursue a North Carolina workers' compensation claim.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct

result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff admits that the purpose of Mr. Lee's representation was "to represent [Mr. Malloy] in connection with a claim for Workers' Compensation benefits for accidental injuries sustained to client's head arising out of client's employment," which Mr. Lee determined would be accomplished by filing a North Carolina workers' compensation claim.

REQUEST TO ADMIT NO. 3: Admit that the underlying settlement that is the subject of the Complaint was reached at mediation in North Carolina on November 25, 2003.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle

his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff admits that, as a result of Mr. Lee's breach of the standard of care and breach of his fiduciary duties in failing to properly represent Mr. Malloy and properly advise and disclose material information to Mr. Malloy, a settlement of Mr. Malloy's workers compensation claims were reached at

mediation in North Carolina, whereby Mr. Lee recommended Mr. Malloy settle his workers compensation claims for an amount tens of thousands of dollars below the fair value of his claims.

REQUEST TO ADMIT NO. 4: Admit that the underlying settlement that is the subject of the Complaint was approved by the North Carolina Industrial Commission.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct

result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, Plaintiff admits that, as a result of Mr. Lee's breach of the standard of care and breach of his fiduciary duties in failing to properly advise Mr. Malloy concerning the terms of the settlement and failing to properly disclose material information to the North Carolina Industrial Commission, a settlement of Mr. Malloy's workers compensation claims was approved by the North Carolina Industrial Commission for an amount tens of thousands of dollars below the fair value of his claims.

REQUEST TO ADMIT NO. 5: Admit that the underlying settlement that is the subject of the Complaint was memorialized in the Agreement and Release attached hereto as "Exhibit B."

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of

the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, Plaintiff admits that, as a result of Mr. Lee's breach of the standard of care and breach of his fiduciary duties in failing to properly advise Mr. Malloy concerning the terms of the settlement and failing to properly disclose

material information to the North Carolina Industrial Commission, a settlement of Mr. Malloy's workers compensation claims was approved by the North Carolina Industrial Commission as memorialized in the Agreement and Release attached to Defendants' Requests to Admit as "Exhibit B" for an amount tens of thousands of dollars below the fair value of his claims.

REQUEST TO ADMIT NO. 6: Admit that your wife, Angela Malloy, joined in the Agreement and Release attached hereto as "Exhibit B" to indicate her consent to the settlement and to confirm that you were mentally competent and able to make proper decisions concerning the settlement of your claim.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have

approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff admits that although Mrs. Malloy was not a client and did not have a workers compensation claim, Mr. Lee required Mrs. Malloy to sign the Agreement and Release, which released Mr. Malloy's workers compensation claims for an amount tens of thousands of dollars below the fair value of his claims. Plaintiff denies that Mrs. Malloy's signature was intended to indicate her consent to the settlement or confirm that Mr. Malloy was competent and able to make proper decisions concerning the settlement of his claims.

REQUEST TO ADMIT NO. 7: Admit that the attorney-client relationship between you and Defendant Lee concluded upon disbursement of the settlement funds.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

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from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff denies that the client-lawyer relationship between Mr. Malloy and Mr. Lee concluded upon disbursement of the funds to settle Mr. Malloy's workers compensation claims that were settled for an amount tens of thousands of dollars below the fair value. The reason for the Plaintiff's denial is based on Mr. Lee's continue involvement on Mr. Malloy's claims after the settlement funds were disbursed, including communications from Mr. Lee's office to Mr. Malloy providing information about the "Form 28C (Report of Carrier of Compensation Paid) in regards to your workers' compensation claim. Line 3 of this document indicates that the date of last compensation paid was February 9, 2004."

REQUEST TO ADMIT NO. 8: Admit that the settlement funds were disbursed to you by way of a check enclosed with the letter dated February 25, 2004 attached hereto as "Exhibit C."

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his

fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

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Incorporating all of the foregoing response, the Plaintiff admits that the settlement funds settling his workers compensation claims for tens of thousand of dollars less than the fair value of his claim were disbursed to Mr. Malloy by way of a check enclosed with the letter dated February 25, 2004, attached as a copy to Defendants' Requests to Admit as "Exhibit C."

REQUEST TO ADMIT NO. 9: Admit that the Social Security Administration Office of Hearings and Appeals issued a decision dated June 30, 2006 attached hereto as "Exhibit D" finding that you had not been under a disability as defined in the Social Security Act from the period beginning on September 9, 2002 through the date of the decision.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim

portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff admits that, based on the application for a period of disability and disability insurance benefits filed on September 30, 2002, an administrative law judge found that Mr. Malloy was not disabled under sections 216(I) and 223(d) of the Social Security Act and that, based on the application for supplemental security income protectively filed on September 18, 2002, an administrative law judge found that Mr. Malloy was not disabled under section 1614(a)(3)(A) of the Social Security Act. Mr. Malloy's medical records, however, that were in possession of Mr. Lee at the time Mr. Lee recommended Mr. Malloy settle his workers compensation claims for tens of thousands of dollars below fair value, concluded that Mr. Malloy's "neurocognitive abilities were compromised by the second accident" that occurred while Malloy was on his job. In addition, Mr. Lee refused to release Mr. Malloy's files "without copies of the conservatorship or Guardian Order and an authorization signed by said Conservator or Guardian" because Mr. Malloy had been found incompetent. Plaintiff denies any attempts by Defendants to qualify or interpret the ruling of the Administrative Law Judge beyond what is contained in the opinion attached as Exhibit D to Defendants' Requests to Admit.

REQUEST TO ADMIT NO. 10: Admit that the last alleged act or omission of Defendant Lee giving rise to the causes of action alleged in the Complaint occurred before December 5, 2008.

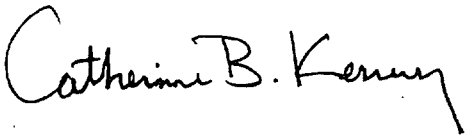
RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly

advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff denies that he knew or should have known or discovered the last alleged act or omission of Mr. Lee giving rise to the causes of action alleged in the Complaint occurred on before December 5, 2008. Because Mr. Lee accepted the representation of Mr. Malloy in South Carolina, because Mr. Lee's offices were located in South Carolina, and because Mr. Malloy resided in South Carolina at the time he engaged Mr. Lee, South Carolina law will control the Plaintiff's claims for professional negligence, breach of fiduciary duty, and breach of contract. In addition, North Carolina's law regarding the statute of limitations will have no bearing whatsoever on the claims asserted in this lawsuit. Plaintiff admits that the last act or omission of Defendant Lee that gave rise to the claim alleged in the Complaint occurred before December 5, 2008 even though Mr. Malloy did not know and no reasonable lay person would have known of Mr. Lee's errors on that date. Mr. Malloy did not know, and neither he nor a reasonable person should have known that he had a claim against Mr. Lee until 2010, when another lawyer told him that Mr. Lee did not handle the North Carolina Workers Compensation claim properly.

PENDARVIS LAW OFFICES, P.C.



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Lawyers for Plaintiff, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy

Beaufort, South Carolina
March 5, 2013

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2012-CP-42-5017

Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy,

Plaintiff,

vs.

Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A.,

Defendants.

AFFIDAVIT OF MARK A. MALLOY

Personally appeared before me, Mark A. Malloy, after being duly sworn, states as follows:

1. I am South Carolina resident over the age of eighteen (18) and I make this Affidavit based on my personal knowledge.

2. I was injured when I fell about 10 feet to 12 feet off a ladder while I was working in North Carolina for ANECO, INC., which I believe caused injuries to my brain.

3. I believe the injuries to my brain from the fall created new injuries or, at least, aggravated an earlier injury.

4. Before the fall, I made about $400 per week working for ANECO, INC.

5. After the fall, I hired Kenneth E. Lee and the LAW OFFICES OF LEE & SMITH, P.A. to represent me on my workers' compensation claims. I went to Mr. Lee's office in South Carolina to meet with him and that is where and when I retained him to represent me.

6. I have lived my entire life in South Carolina, including at the time I hired Mr. Lee all the way through the time when the workers' compensation matter was settled, and I still live in South Carolina.

7. While Mr. Lee was representing me, I was treated by several doctors, including Dr. Alexander A. Manning.

8. During the mediation of my workers' compensation claim Mr. Lee strongly recommended to me and my wife, Angela, that I settle all of my workers' compensation claim for a total payment of only $100,000.

9. Mr. Lee told me and Angela that if we did not settle the workers' compensation claim, then I would be declared incompetent and then the money would be handled by an outsider and that my family and I would not get any of the settlement money.

10. Mr. Lee never told me or at least did not explain that under the workers compensation laws in North Carolina I could receive payments over my entire life for medical expenses to treat the injuries from when I fell at work.

11. Based on what Mr. Lee told me, I agreed to settle my workers' compensation claim for a total payment of only $100,000, and the papers show that I paid about $22,500 to Mr. Lee from the settlement.

12. After the workers' compensation settlement proceeds were paid, the South Carolina Probate Court found me to be incompetent to handle my and my family's financial affairs.

13. Long after the settlement, and with Angela's help, we learned that Mr. Lee did not handle my North Carolina workers compensation matter the right way and that I should have gotten a much larger settlement.

14. If Mr. Lee had explained what the North Carolina workers compensation laws provided, I would not have settled for only $100,000 and have continued until either the insurance company for ANECO agreed to pay a lot more money or until the North Carolina Industrial Commission ruled for a more favorable result on my workers' compensation

claim.

15. My wife and I learned of Mr. Lee's errors for the first time when the we met with another workers' compensation lawyer.

Dated: June 3, 2013

Mark A. Malloy

Sworn to and subscribed before me
this 3rd day of June, 2013.

Notary Public for South Carolina
My commission expires: Jan. 7, 2015

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2012-CP-42-5017
Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, Plaintiff, vs. Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A., Defendants.	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

TO: DAVID W. OVERSTREET, J.D. AND MICHAEL B. MCCALL, J.D., COUNSEL FOR DEFENDANTS:

Plaintiff, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, submits this Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.

SUMMARY OF THE ARGUMENTS

1. South Carolina law governs Plaintiff's tort claims therefore, Plaintiff's claims are controlled by the relevant South Carolina Statute of Limitations, not the North Carolina statute of repose as argued by Defendants in their incorrect choice of law analysis.

2. South Carolina follows traditional choice of law principles whereby the substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred.

3. Because Mr. Malloy resided in South Carolina at the time when he sustained financial injuries proximately resulting from Defendants' errors, South Carolina substantive law governs the tort claims in this lawsuit, including the professional negligence claim and the breach of fiduciary duty claim.

4. South Carolina does not have a statute of repose controlling professional negligence

claims against lawyers or breach of fiduciary duty claims.

5. Notwithstanding that South Carolina law governs the professional negligence and breach of fiduciary duty claims, North Carolina law is applicable, but only to the proximate cause element of the professional negligence claim to establish the financial benefits that would have been available to Mr. Malloy, but for the acts and omissions of Defendant Lee.

KEY UNDISPUTED FACTS

1. Mark A. Malloy is and was a resident of South Carolina residing in Lancaster County, South Carolina at all times relevant to the claims in this lawsuit. *See* Complaint, ¶ 2 ("Mark A. Malloy, . . . is a citizen and resident of Lancaster County, South Carolina."), incorporated by reference and attached as **Exhibit 1**; Lee letter to Mark Malloy, dated Feb. 25, 2004, incorporated by reference and attached as **Exhibit 2**; Affidavit of Mark A. Malloy, ¶ 5, incorporated by reference and attached as **Exhibit 4**.

2. The Complaint seeks recovery for financial damages Mr. Malloy is alleged to have sustained as a direct and proximate result of Defendants' errors in handling his underlying workers compensation claims. *See* Complaint, ¶¶ 1, 39, 40, 51, 52, 61, 62, 69, and 70, attached as Exhibit 1.

ARGUMENTS IN OPPOSITION

I. Because Mr. Malloy resided in South Carolina at the time he suffered financial injuries as a result of Mr. Lee's errors, South Carolina law governs his tort claims.

A. Summary judgment is not available because South Carolina Statute of Limitations governs Mr. Malloy's claims under a South Carolina choice of law analysis.

"Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred." *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001); *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449 (Ct. App.1997); *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App.1994). The claims in this case are for legal professional negligence and breach of fiduciary duty asserted on behalf of a former client against his lawyer, all of which could be summarily described as "legal malpractice" claims. The only damages recoverable for legal malpractice claims under South Carolina law are for financial injuries. *Cf., Caddel v. Gates*, 284 S.C. 481, 327 S.E.2d 351 (Ct. App. 1984) ("We adopt the almost universal rule that damages for mental anguish are not recoverable in these cases, regardless of whether they allege causes of action for tort, breach of contract, breach of warranty or agreements to insure; and we so hold."). Thus, the place of financial injury determines the *lex loci delicti*.

In an inaccurate choice of law analysis, Defendants argue that Mr. Malloy's claims are controlled by the North Carolina statute of repose because his injuries involve North Carolina workers' compensation claims. However, Mr. Malloy's legal malpractice claims originated in South Carolina, were filed in a South Carolina Court and are controlled by South Carolina substantive and procedural law. The *lex loci delicti* of Plaintiff's injuries is South Carolina and his claims were brought in a South Carolina Court, therefore Mr. Malloy's claims are governed under South Carolina substantive and procedural law. North Carolina's statute of repose is simply irrelevant and Defendants' Motion for Summary Judgment should be denied.

B. The law of the State where the client resided at the time of the injury governs the legal malpractice claims.

For legal malpractice cases, the place where the injury occurred, that is, where the client sustained a financial injury or an economic loss, is the State where the client resided or was located at the time of the injury. *See Bobbitt v. Milberg, LLP*, 285 F.R.D. 424, 429 (D. Ariz. 2012), *certificate of appealability denied* (Nov. 8, 2012) (legal malpractice plaintiffs and putative class members' economic loss "injury" occurred in the States where the absent class members were located); *Ennenga v. Starns*, 677 F.3d 766 (7th Cir. 2012) (Illinois statute of limitations applied to Illinois clients' legal malpractice claims even though defendant lawyers resided and practiced law in Minnesota, and their firm was a Minnesota law firm); *Dow v. Jones*, 311 F. Supp.2d 461, 466 n. 3 (D. Maryland 2004) (Under Maryland conflict of law rules, plaintiff's legal malpractice tort claim was governed by law of place where injury occurred, which is place where last act required to complete tort occurred); *St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP*, 233 F. Supp.2d 171, 172–175, 179 (D. Mass. 2002) (client was sued in Florida arising from actions taken based on bad legal advice; the client settled for two million dollars on the second day of trial in Florida; as to the legal malpractice action, the Court found that the client was injured where its business was located which was in Massachusetts; "[The client's] injury occurred in Massachusetts where, as the result of the malpractice, it would have to dispense funds.")); *Streber v. Hunter*, 14 F. Supp. 2d 978 (W.D. Tex. 1998) (Under Texas choice of law principles, Texas statute of limitations for legal malpractice actions, under which discovery rule applies, and not Louisiana statute of limitations, under which

discovery rule is not recognized, would be applied to legal malpractice action brought by Texas residents against Louisiana lawyer who had represented them in tax matter); *David B. Lilly Co., Inc. v. Fisher*, 18 F.3d 1112, 1119 (3d Cir. 1994) (Delaware law applied to Delaware corporation's legal malpractice claims against New York law firm based on its rendering of advice to corporation's Missouri lawyers on structuring acquisition of corporation so that it could retain its small business status; place where injury occurred was Delaware which also was center of web of relationships among the parties, and Delaware had particular stake in protecting its legal consumers from negligent lawyers when resulting injury occurred in Delaware).

Based on the evidence before the Court, Mr. Malloy's economic injuries occurred in South Carolina because that is where he resides now and at the time of the underlying representation by Mr. Lee. *See* Mark Malloy Affidavit, attached as Exhibit 4. In fact, when Mr. Lee's office mailed Mr. Malloy the settlement proceeds check during the underlying representation, the check was mailed to Mr. Malloy's home address in Lancaster, South Carolina. *See* Lee letter to Mark Malloy, dated Feb. 25, 2004, attached as Exhibit 2.

In addition, Mr. Lee resides in South Carolina and the LAW OFFICES OF LEE & SMITH, P.A. is a Professional Association formed under South Carolina law and with its principal place of business in South Carolina. Also, all meetings between Mr. Malloy and Mr. Lee took place at the LAW OFFICES OF LEE & SMITH, P.A. in their South Carolina offices. Furthermore, Mr. Lee's errors took place, presumably, in his offices located in South Carolina.[1]

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[1] Because discovery is incomplete and because the deposition of Mr. Lee has not been taken, it would be premature to grant summary judgment on the issue of

Since Mr. Malloy was a resident of South Carolina at the time of his injury from Defendants' negligence, South Carolina law governs Mr. Malloy's malpractice claims and summary judgement is improper.

C. South Carolina has an interest in providing tort remedies for clients injured by a lawyer's acts or omissions.

South Carolina has an interest in compensating victims for injuries resulting from legal professional negligence and breach of fiduciary duty claims, and provides causes of action for such injuries. *See Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612 (1996); *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 140, 697 S.E.2d 644 (Ct. App. 2010); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); *Sims v. Hall*, 357 S.C. 288, 592 S.E.2d 315 (Ct. App. 2003); *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); *Henkel v. Winn*, 346 S.C. 14, 550 S.E.2d 577 (Ct. App. 2001); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). Moreover, South Carolina has a particular stake in protecting its legal consumers from negligent lawyers when the resulting injury occurs in South Carolina. "[A] state has an obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. d (1971). The basic policy underlying an action for professional negligence, to compensate the victim, further supports South Carolina's interest as the state where the injury occurred and where its citizens, including Mr. Malloy, reside. *See id.* § 145 cmt. c.

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where Mr. Lee's acts and/or omissions took place.

Unlike North Carolina, when South Carolina adopted the "South Carolina Noneconomic Damages Awards Act of 2005," a choice was made not to create a statute of repose for professional negligence claims other than claims against medical professionals. *See* S.C. CODE ANN. § 15-3-545 (six year statute of repose on suits to "recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . .."). There is no statute of repose for legal malpractice claims under South Carolina law.

A statute of repose serves to limit the time within which a claim must be brought or the claim is forever lost even if a reasonable person did not know or had no reason to know of his claims. Defendants cannot take advantage of a North Carolina statute of repose to avoid a South Carolina cause of action, especially given that South Carolina has chosen not to enact a statute of repose for legal malpractice. South Carolina has an interest in providing a cause of action and a remedy for legal malpractice and has chosen only to limit a plaintiff's claims by requiring a lawsuit to be filed within three years of discovering the malpractice. Since the North Carolina statute of repose does not control the claims in this matter, summary judgment is unavailable.

D. The proximate cause element of South Carolina's legal professional negligence cause of action is the only instance where North Carolina Law is applicable to Mr. Malloy's claims.

Plaintiff acknowledges that North Carolina law is applicable in this case, but only in establishing that Defendants' acts and omissions proximately caused financial injuries to him. This is because Defendant Lee's alleged errors occurred while handling Mr. Malloy's underlying North Carolina workers' compensation matter. When the negligence in a legal malpractice matter involves the lawyer's alleged negligence in handling a litigation matter,

South Carolina employs the "case within the case" methodology. *See e.g., Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997) ("In a legal malpractice action, ... [P]laintiff must show she most probably would have been successful in the underlying suit if the lawyer had not committed the alleged malpractice"). In this lawsuit, Plaintiff will have the burden to establish that a lawyer exercising reasonable care would have obtained a better result on Mr. Malloy's workers compensation claims under the laws of North Carolina, where Mr. Malloy was injured while working. *See e.g., Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010) (lawyer may be liable for damages to a client for failure to act with a reasonable degree of skill and care). In other words, while South Carolina law governs Mr. Malloy's legal malpractice claims, South Carolina law also will require Mr. Malloy to convince a jury that a reasonable and prudent lawyer handling his workers' compensation matter would have obtained a better result under North Carolina workers' compensation law..

It is not unusual in legal malpractice cases for the trial court to consider choice of law issues controlling the underlying action because of the case-within-the-case methodology for proximate cause. *See e.g., Boyson, Inc. v. Archer & Greiner, P.C.*, 308 N.J. Super. 287, 705 A.2d 1252 (App. Div. 1998); *Burns v. Geres*, 140 Wis. 2d 197, 409 N.W.2d 428 (Ct. App. 1987). Generally, the law governing the underlying matter is applied. *See Burns v. Geres*, 409 N.W.2d at 430 (because the slip and fall occurred in Arizona, the case-within-a-case methodology required the Wisconsin trial court to apply Arizona law to the underlying claim).

Because North Carolina law is only applicable to the proximate cause element of Mr. Malloy's South Carolina legal malpractice claim, summary judgment is not available.

II. Summary judgment is not available because Plaintiff filed this lawsuit prior to the expiration of the Statute of Limitations and there is no Statute of Repose on legal malpractice claims in South Carolina.

Malloy, along with the assistance of his wife, learned of Lee's errors when the Malloys met with another workers' compensation lawyer. *See* Affidavit of Mark Malloy, Exhibit 4. After having a guardian and conservator appointed to represent his interests, Malloy brought this lawsuit well within the three-year statute of limitations governing his claims. *See* Order Appointing Physician/Examiner, incorporated by reference and attached as **Exhibit 3**.

A three year statute of limitations period applies to legal malpractice lawsuits. *See* S.C. CODE ANN. § 15-3-530 (Supp. 2007). Beginning with *Mills v. Killian*, 273 S.C. 66, 254 S.E.2d 556 (1979), South Carolina adopted the discovery rule for the accrual of legal malpractice claims for the purposes of when the statute of limitations begins to run. *Id.* "Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (citing *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996); S.C. CODE ANN. § 15-3-535; and *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct.App. 1997)). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown

theory of recovery developed." *Id.* "Under § 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another." *Epstein*, 363 S.C. at 376, 610 S.E.2d at 818 (citing *True v. Monteith*, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997)).

The statute of limitations is a procedural issue and, in the question of the choice of law, the forum state prevails in procedural issues. "A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time." *Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) quoting *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006).

South Carolina procedural law applies to Mr. Malloy's claims therefore the South Carolina statute of limitations required him to file within three years of discovering Mr. Lee's malpractice. Mr. Malloy discovered Defendants' malpractice, with the help of his wife, upon meeting with another workers' compensation lawyer and file his lawsuit well within the three years required under the South Carolina statute of limitations. *See* Mark Malloy Affidavit, Exhibit 4. Further, South Carolina procedural law applies to Mr. Malloy's legal malpractice claims and therefore, the North Carolina statute of repose has no bearing on this matter. Summary judgment is improper.

EVIDENCE IN OPPOSITION TO MOTION

1. Complaint, including the Affidavit of R. James Lore, Exhibit 1;
2. Lee letter to Mark Malloy, dated Feb. 25, 2004, Exhibit 2;
3. Order Appointing Physician/Examiner, Examiner Report and Doctor's Affidavit Regarding Capacity, Exhibit 3;
4. Affidavit of Mark A. Malloy, Exhibit 4.

STANDARD OF REVIEW

Summary judgment is a drastic remedy and should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is not proper when there are genuine issues as to material facts in dispute on the elements of the claim. *See Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 16-17 (Ct. App. 2005); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). Under Rule 56(c), SCRCP, the party seeking summary judgment has the burden of demonstrating the absence of a genuine issue of material fact. *See 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. *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) (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). "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).

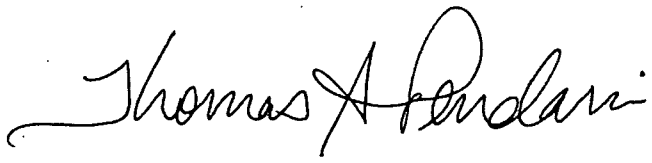
As demonstrated in this memorandum and accompanying exhibits, the existence of genuine issues of material fact prohibit summary judgment in this case. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to Mr. Malloy. *Id.* Mr. Malloy's claims are not barred by the North Carolina statute of repose. Under the relevant South Carolina statute of limitations, Mr. Malloy's claims were timely filed within three years of discovery of Mr. Lee's Malpractice. Summary judgment is not available.

CONCLUSION

Based on the foregoing arguments, the affidavits, testimony, and other evidence, Defendants' motion for summary judgment must be denied. Genuine issues of material fact are in dispute on each element of Plaintiff's claims for breach of fiduciary duty and professional malpractice, such that granting Defendants' motion for summary judgment would be inappropriate. Plaintiff respectfully requests that Defendant's Motion for Summary Judgment be denied.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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Lawyers for Plaintiff, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy

Beaufort, South Carolina

June 5, 2013

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2012-CP-42-5017
Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, Plaintiff, vs. Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A., Defendants.	**COMPLAINT** **(Jury Trial Demanded)** (Legal Professional Negligence) (Breach of Fiduciary Duty) (Breach of Contract)

Plaintiff, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, complaining of Defendants, Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A., would respectfully show unto the Court as follows:

SUMMARY OF THE CASE

1. This legal malpractice action centers upon a) the Defendant Lawyer's professional negligence when he advised Plaintiff to settle his workers' compensation claim for far below the fair value and b) the Defendant Lawyer's breach of fiduciary duty when he included statements in the clincher agreement about Plaintiff's condition that were not accurate and not consistent with the medical information concerning Plaintiff that was in the Defendant lawyer's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Plaintiff's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement recommended by the Defendant Lawyer if the Defendant Lawyer had included all of the true medical information

concerning Plaintiff in the clincher agreement.

Plaintiff trusted the Defendant Lawyer to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct and proximate result of accepting the Defendant Lawyer's advice to settle his workers' compensation claim, Plaintiff suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had the Defendant Lawyer properly advised the Plaintiff of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Plaintiff would not have settled his workers' compensation claim for far below the value, would have obtained greater wage indemnity recovery, would have secured coverage of his current and future medical costs, and would have otherwise obtained a better result.

Because the Defendant Lawyer breached his fiduciary duty of loyalty to Plaintiff, the Defendant Lawyer should be required to disgorge all fees and all benefits obtained from the representation of Plaintiff as a remedy.

PARTIES

2. Plaintiff, Gretchen A. Rogers, is serving in this litigation as Guardian *ad litem* for Mark A. Malloy, who is a citizen and resident of Lancaster County, South Carolina.

3. Defendant, Kenneth E. Lee, is, upon information and belief, a citizen and resident of Spartanburg County, South Carolina, and is a lawyer licensed to practice law in the State.

4. Defendant, LAW OFFICES OF LEE & SMITH, P.A., is or was, upon information and belief,

a limited liability corporation organized and existing under the laws of South Carolina, with its principal place of business in Spartanburg 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 Spartanburg County as the principal place of business of Defendants, Kenneth E. Lee and/OR LAW OFFICES OF LEE & SMITH, P.A., is in Spartanburg County, South Carolina. Upon information and belief, Defendant, Kenneth E. Lee, also resides in Spartanburg County, South Carolina.

FACTS

7. Defendant, Kenneth E. Lee, is a lawyer licensed to practice law in South Carolina and North Carolina and is or was a member of Defendant, LAW OFFICES OF LEE & SMITH, P.A. (collectively "LEE").

8. At all times relevant hereto, Kenneth E. Lee is or was acting as an agent for LAW OFFICES OF LEE & SMITH, P.A.

9. The negligent acts, omissions, and liability of LAW OFFICES OF LEE & SMITH, P.A. includes the acts and/or omissions of their agents, principals, employees and/or servants, including but not limited to those by Kenneth E. Lee, both directly and vicariously, pursuant to principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or *respondeat superior*.

10. Upon information and belief, at all times relevant hereto, LAW OFFICES OF LEE & SMITH, P.A., herein acted by and through its employees and agents, including but not limited to Defendant, Kenneth E. Lee, who acted within the course and scope of his employment and/or agency with all implied, inherent, apparent and express authority to so bind his master and principal by his negligent, wanton and reckless actions and/or omissions making it vicariously liable for same under the principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or *respondeat superior*.

11. Plaintiff, Mark Malloy ("Malloy") sustained compensable injuries when he fell 10 feet to 12 feet off a ladder while working in North Carolina for a North Carolina employer causing injuries to his brain.

12. The only evidence in the record showed Malloy's fall was caused by the ladder swaying.

13. The injuries to Malloy's brain from the fall created new injuries to Malloy or, at a minimum, substantially aggravated a prior injury, either or both of which constituted an injury compensable under North Carolina workers' compensation laws.

14. As a result of the compensable injuries Malloy sustained during the course and scope of his employment, a very valuable workers' compensation claim arose in favor of Malloy under the laws of the State of North Carolina.

15. Prior to his injuries Malloy made approximately $400 per week, which meant his workers' compensation rate was approximately $233 per week.

16. After Malloy was injured his employer, ANECO, INC., filed a form titled, "Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission" with

the North Carolina Industrial Commission, effectively commencing Malloy's workers' compensation claim.

17. After the workers' compensation claim was commenced LEE accepted the legal representation of Malloy thereby creating a client-lawyer relationship.

18. The scope of LEE's representation of Malloy included all matters associated with or affecting recovery and resolution of Malloy's workers' compensation claim arising from the injuries Malloy sustained while working.

19. During the representation Malloy was treated by several physicians including Dr. Alexander A. Manning, during which Dr. Manning developed opinions concerning the nature, severity, and permanency of Malloy's brain injuries and mental competency that were expressed in medical records that were requested by LEE and in LEE's possession prior to the resolution of Malloy's workers' compensation claim.

20. Based on the evidence in the record regarding timing, location, and cause of Malloy's fall from the ladder while working, Malloy's employer, ANECO, INC., would not have been able to obtain an order in the workers' compensation proceeding finding that Malloy was not entitled to workers' compensation benefits.

21. Based on the nature, severity, and permanency of Malloy's injuries, Malloy's employer, ANECO, INC., would not have been able to obtain an order in the workers' compensation proceeding finding that Malloy was no longer disabled from work as a result of a compensable injury or that there was any likelihood that Malloy would be able to resume the work he had been doing prior to his injuries.

22. The benefits and remedies available on Malloy's workers' compensation claim, like any other workers' compensation claim under North Carolina law, had essentially two

components of financial value: a) a financial value for wages and b) a financial value for medical benefits.

23. Prior to the resolution of Malloy's workers' compensation claim, LEE had not fully developed the evidence that was reasonably required in order to competently evaluate the monetary value of Malloy's future indemnity claims.

24. Prior to the resolution of Malloy's workers' compensation claim, LEE had not fully developed the evidence that was reasonably required in order to competently evaluate the monetary value of Malloy's future medical claims.

25. Prior to the resolution of Malloy's workers' compensation claim, LEE calculated the present value of Malloy's wage portion of his claim to be over $250,000.

26. Based on Malloy's brain injuries and/or aggravation of Malloy's brain injuries caused by the injuries he sustained while working, the present value of the medical benefits portion of Malloy's workers' compensation claim was in excess of $700,000.

27. During a mediation of the workers' compensation claim that took place less than one year after LEE accepted the representation of Malloy, LEE strongly recommended Malloy settle all of his workers' compensation claim for a total payment of only $100,000.

28. LEE told Malloy and his wife, among other things, that if they did not settle the workers' compensation claim, then a deputy commissioner or court would find Malloy incompetent and then the money would be handled by an outsider and Malloy and his family would not get any of the settlement money.

29. LEE never told or did not effectively explain to Malloy and his wife the fact that because Malloy had suffered permanent injuries to his brain the value of the wage portion

of his claim was substantially increased or that he was entitled to payment over his entire lifetime for medical expenses related to treatment for the injuries sustained while working.

30. Relying on LEE's legal advice and forceful recommendations, Malloy agreed to settle forever all of his workers' compensation claim for a total payment of only $100,000, which as a matter of course excluded all payments for any and all of the future medical treatments necessary for Malloy as shown in the medical records that were in LEE's possession prior to the settlement.

31. LEE should have recommended that Malloy reject the $100,000 offer made on behalf of his employer.

32. LEE should have recommended that Malloy reject the $100,000 offer made on behalf of his employer because the settlement accepted was less than the reasonable settlement value of Malloy's claims given the evidence contained in the records in LEE's legal file.

33. Had LEE recommended that Malloy reject the $100,000 offer, Malloy would have accepted such advice and would not have settled on those terms.

34. Upon information and belief, LEE withheld crucial information from the North Carolina workers' compensation Deputy, including Dr. Manning's medical records and opinions about the nature, severity, and permanency of Malloy's brain injuries, a) in an effort to expedite the settlement of Malloy's claim to speed up LEE's recovery of attorneys' fees and/or b) to ensure the Deputy would not question whether the settlement was for less than fair value given the nature, severity, and permanency of Malloy's brain injuries, the true value of his wage indemnity claim, and the value of the future medical benefits.

35. After the settlement was approved the insurance carrier for Malloy's employer caused the workers' compensation settlement proceeds to be paid.

36. After the workers' compensation settlement proceeds were paid and after the client-lawyer relationship with LEE was concluded, Malloy was found incompetent to handle his financial affairs based on Malloy's mental condition that, upon information and belief, was unchanged from the state of his mental condition during Malloy's client-lawyer relationship with LEE.

37. After Malloy was found incompetent to handle his financial affairs, Malloy, with the assistance of his wife, learned of LEE's errors.

38. After Malloy was found incompetent to handle his financial affairs, Malloy and his wife learned that LEE should have advised them not to accept the $100,000 offered to settle his workers' compensation claim as that amount was a) far below the fair and true settlement value of Malloy's claim and/or b) far below the value of Malloy's claim had it proceed to a hearing on the merits.

39. Had LEE provided Malloy with the advice that would have been provided by a reasonable and ordinary lawyer with the requisite degree of learning, skill, and ability necessary to the practice of the profession exercising reasonable and ordinary care and diligence in the use of those skills and in the application of the lawyer's knowledge to the cause of the client, Malloy would have obtained a more favorable result on his workers' compensation claim.

40. As a direct and proximate result of LEE's acts and omissions, Malloy incurred pecuniary losses well in excess of $100,000.

41. Because of LEE's actions in derogation of his fiduciary duties to Malloy, including, among other things, withholding information from the North Carolina Industrial Commission regarding the true nature and severity of Malloy's injuries in order to get the clincher

agreement approved, the Court should impose the remedy of disgorgement of all fees and other benefits LEE obtained through his representation of Malloy.

FOR A FIRST CAUSE OF ACTION
(Legal Professional Negligence)

42. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

43. At all times relevant hereto, a client-lawyer relationship existed between LEE and Malloy.

44. By virtue of their client-lawyer relationship, LEE owed professional duties to Malloy, including the duty to provide competent legal advice and representation on Malloy's worker's compensation claim.

45. By virtue of their client-lawyer relationship, LEE owed professional duties to Malloy to fully develop and obtain the evidence that was reasonably required in order to competently evaluate the monetary value of Malloy's future indemnity claims.

46. By virtue of their client-lawyer relationship, LEE owed professional duties to Malloy to fully develop and obtain the evidence that was reasonably required in order to competently evaluate the monetary value of Malloy's future medical claims.

47. By virtue of their client-lawyer relationship, LEE owed professional duties to Malloy, including the duty to provide competent legal advice and representation as to whether it was in Malloy's best interest to settle that claim on the terms offered on behalf of his employer.

48. LEE failed to meet the minimum standard of care thereby breaching their professional duties to Malloy and otherwise acted in a negligent, grossly negligent, wanton

and reckless manner by failing to provide accurate and appropriate legal advice on Malloy's worker's compensation claim.

49. LEE failed to meet the minimum standard of care thereby breaching their professional duties to Malloy and otherwise acted in a negligent, grossly negligent, wanton and reckless manner by failing to provide accurate and appropriate legal advice as to whether it was in Malloy's best interest to settle that claim on the terms proposed.

50. LEE failed to meet the minimum standard of care thereby breaching their professional duties to Malloy by other such particulars as the evidence in this case may demonstrate.

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

52. In addition to the actual, consequential, and incidental damages Malloy suffered, LEE's highly reckless, wanton, and irresponsible conduct as specified in certain causes of action in this Complaint entitles Malloy to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty)

53. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

54. At all relevant times LEE were in a fiduciary relationship with Malloy.

55. At all relevant times LEE owed Malloy fiduciary duties of a very delicate, exacting and confidential nature, requiring a high degree of fidelity and good faith, undivided loyalty, and competence, as well as the duty to act single-mindedly in preserving, protecting, and advancing the rights and interests of Malloy.

56. LEE failed to meet the minimum standard of conduct thereby breaching their fiduciary duties to Malloy by failing to satisfy their duties of competency.

57. LEE failed to meet the minimum standard of conduct thereby breaching their fiduciary duties to Malloy by failing to satisfy their duties of loyalty by withholding crucial information from the workers' compensation Deputy and/or the North Carolina Industrial Commission in order to expedite settlement of Malloy's claim and thereby expediting LEE's recovery of fees.

58. LEE failed to meet the minimum standard of conduct thereby breaching their fiduciary duties to Malloy and otherwise acted in a manner inconsistent with their fiduciary duties to Malloy.

59. LEE failed to meet the minimum standard of conduct thereby breaching their fiduciary duties to Malloy and otherwise acted in a manner inconsistent with their fiduciary duties by other such particulars as the evidence in this case may demonstrate.

60. LEE's breach of their fiduciary duties proximately caused material adverse effects on Malloy's interests and proximately caused substantial financial losses to Malloy.

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

62. Because LEE obtained substantial legal fees while in derogation of his fiduciary duties, LEE should be ordered to disgorge all legal fees and other benefits obtained from the representation of Malloy.

63. In addition to the actual, consequential, and incidental damages Malloy suffered, LEE's highly reckless, wanton, and irresponsible conduct in breach of their fiduciary duties as specified herein entitles Malloy to an award of punitive damages.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract)

64. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

65. LEE entered into a contract with Malloy, the terms of which LEE agreed and contracted to provide competent and prudent legal services.

66. Malloy fulfilled all necessary preconditions, if any, of the contract with LEE.

67. By virtue of their contract, LEE owed duties to Malloy, including the duty to protect, preserve and advance Malloy's rights and interests 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.

68. LEE failed to meet the minimum standard of care thereby breaching their contractual duties to Malloy by other such particulars as the evidence in this case may demonstrate.

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

PUNITIVE DAMAGES

70. In addition to the actual, consequential, and incidental damages suffered by Malloy, LEE's highly reckless disregard for their obligations to their client and irresponsible conduct as specified by the evidence available and as identified in this Complaint entitles Malloy to an award of punitive damages.

TRIAL BY JURY.

71. Malloy demands a jury trial on all claims and issues so triable.

EXPERT AFFIDAVIT

72. 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 R. James Lore, J.D., an expert witness and lawyer licensed to practice law in North Carolina and South Carolina, 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, Plaintiff, Gretchen A. Rogers, as Guardian *ad litem* for Mark Malloy, prays for judgment against Defendants, Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A., jointly and severally, for all actual damages, consequential damages, disgorgement of legal fees and other benefits, and incidental damages, for prejudgment interest, and for punitive damages, 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,

PENDARVIS LAW OFFICES, P.C.

Thomas A. Pendarvis (SC Bar # 064918)
Catherine B. Kerney (SC Bar # 81429)
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Attorneys for Plaintiff, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy

Beaufort, South Carolina

December 3, 2012

STATE OF SOUTH CAROLINA COUNTY OF SPARTENBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2012-CP-42-_____
Gretchen A. Rogers, as Guardian *ad litem* for Mark Malloy, Plaintiff, vs. Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A., Defendants.	2012-CP-42-5017 **Affidavit of Expert Opinion** **By** **R. James Lore**

PERSONALLY APPEARED before me R. James Lore who, being duly sworn, deposes and says that:

1) It is my expert opinion, held to a reasonable degree of professional certainty, that the Complaint in this matter alleges facts establishing that the defendant lawyer and defendant law firm committed acts of professional negligence proximately damaging the plaintiff and that the defendant lawyer and defendant law firm breached their fiduciary duties to the plaintiff, as more particularly set forth below:

   a) An attorney-client relationship existed between plaintiff and the defendant lawyer and defendant law firms;

   b) These attorney-client relationships created professional, ethical, contractual, and fiduciary duties from the lawyer and law firm to plaintiff;

   c) The lawyer and law firm violated their duties to plaintiff in numerous ways, including

      i) by failing to provide their client with competent advice and representation; by failing to use the legal knowledge, skill, thoroughness, and preparation reasonably necessary in the circumstances; and by violating the standard of care, which required them to

EXHIBIT
1

render their services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the legal profession;

ii) Failing to advise plaintiff against the proposed $100,000.00 settlement in his workers' compensation case of *Malloy v. Aneco Electrical* (IC 301187) because he had not fully developed the evidence that was reasonably required in order to competently evaluate the monetary value of the future medical claims released;

iii) Failing to advise plaintiff against the proposed $100,000.00 settlement in his workers' compensation case of *Malloy v. Aneco Electrical* (IC 301187) because he had not fully developed the evidence that was reasonably required in order to competently evaluate the monetary value of the future indemnity claims released; and

iv) Failing to advise plaintiff against the proposed $100,000.00 settlement in his workers' compensation case of *Malloy v. Aneco Electrical* (IC 301187) because the settlement accepted is less than the reasonable settlement value in this case given the evidence contained in the records in the attorney's own legal file.

2) In reaching these expert opinions, I have reviewed and relied on the following evidence and other materials, which are the kinds of factual sources customarily relied upon by experts in this field:

a) The North Carolina Industrial Commission file for the case in question; and

b) The plaintiff's attorneys' file for the case in question;

3) My resume, attached as Exhibit A, demonstrates my qualified as an expert witness and thus am qualified to conduct the review required by S.C. CODE ANN. § 15-36-100(B).

4) I have been retained as an expert witness by counsel for plaintiff. I offer this affidavit to express my expert opinions in this case.

5) Discovery is continuing in this case. As a result, my expert opinions are necessarily subject to modification following my review of additional materials, to reflect new information, knowledge and insights.

The Affiant further sayeth not.

R. James Lore
Affiant

SWORN AND SUBSCRIBED BEFORE ME
this 1st day of June, 2012.

Velda B. Wall
Notary Pubic for the State of North Carolina
My Commission Expires: 6-16-2014

VELDA B. WALL NOTARY PUBLIC WAKE COUNTY, NC Comm. Exp. 6-16-2014.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 DEC -6 AM 9:52
M. HOPE BLACKLEY

EXHIBIT A

R. James Lore
R. JAMES LORE, ATTORNEY AT LAW
102-I Commonwealth Court
Cary, NC 27511
Telephone: (919) 469-9103

BIOGRAPHICAL INFORMATION
1973 B.S. Electrical Engineering, N.C. State University
1976 J.D. Law, Magna Cum Laude, N.C. Central University

I am licensed to practice law in the State of North Carolina and have practiced since 1976. For 33 years my practice has been primarily focused on the field of workers' compensation law. In the 1980s I and a few others formed the group of workers' compensation lawyers which ultimately joined and became the Workers' Compensation Section of the North Carolina Academy of Trial Lawyers. Thereafter, I was the Chair of the Workers' Compensation Section, the Workers' Compensation Committee, and/or the Legislative Committee for many years. During part of this time I also served on the Workers' Compensation Committee of the North Carolina Bar Association and on the Litigation Council for that organization.

I have litigated hundreds of workers' compensation cases before the North Carolina Industrial Commission. If you include my ghost-written briefs for other counsel and Amicus briefs, I have handled more than 100 appeals involving workers' compensation benefits before the North Carolina Court of Appeals and the Supreme Court of North Carolina. Many of these decisions are considered significant cases in this field of jurisprudence.

I still serve as an original plaintiffs' counsel representative to the Advisory Council to the North Carolina Industrial Commission as set forth in Chapter 97 of the Act. The Advisory Council gives input to the Industrial Commission with respect to planning, policy, and resolution of issues. In 1993-1994 I was a member of a small group that drafted what was later enacted

verbatim by the Legislature as the 1994 comprehensive revisions to the Workers' Compensation Act.

I was selected by the North Carolina State Bar as the original co-chair of the Legal Specialization Sub-Committee for Workers' Compensation. I along with several colleagues set the standards necessary to become a Board Certified attorney in Workers' Compensation, prepared the examination and tested other counsel seeking to become a board certified specialist in the field. As the co chair, I was at the time deemed-in as a specialist in the field of workers' compensation.

I have lectured and written on the topic numerous times before the North Carolina Academy of Trial Lawyers, (now the North Carolina Advocates for Justice) and the North Carolina Bar Association. For 15-20 years I co-chaired the annual Workplace Torts and Workers' Compensation Seminar of the North Carolina Advocates for Justice which was always their most widely attended seminar of any type. For many years I, along with attorney Hank Patterson, conducted a "practical skills course" on the topic of workers' compensation at the NCAJ annual meetings. In 2007 I was among the first group of attorneys nationally to be inducted as fellows into the National College of Workers' Compensation Lawyers.

LAW OFFICES OF LEE & SMITH, P.A.

Michael R. Lee (+†)
Richard J. Smith (+†)
Patrick H. Allan (+†✚◆▲)
D. Andrew Turman (+†)
Kenneth E. Lee (+†)
Scott A. Beckey (+†)

POST OFFICE BOX 2229
SPARTANBURG, SOUTH CAROLINA 29304-2229

Licensed in SC(+),NC(†), MN(✚), ND (◆), and GA (▲)

Telephone: (864) 577-0977
Facsimile: (864) 577-9661

Employer ID #56-2015407

February 25, 2004

VIA CERTIFIED MAIL

Mr. Mark A. Malloy
311 E. Arch Street
Lancaster, South Carolina 29720

RE: Your Workers' Compensation Claim

Dear Mr. Malloy:

Enclosed please find your settlement check in the amount of $77,500.00, a copy of the Approved settlement paperwork and the Disbursement Sheet.

If you have any questions, please feel free to contact me.

Sincerely,

LAW OFFICES of LEE and SMITH

Ann Dyson
Paralegal to Kenneth E. Lee, Esquire

Enclosures

EXHIBIT
2

...5 Satellite Blvd., Suite 440
Duluth, GA 30096

441 | Date Issued 02-20-04 | Bank Acct

VOID IF GREEN BACKGROUND IS ABSENT | THIS DOCUMENT CONTAINS A WATERMARK - HOLD UP TO LIGHT TO VIEW

Claim Number	Desk Code	Insured	Issuing Off.
23823215	N2	Aneco, Inc.	No. 23

Prefix & Policy No.	Claimant	Date of Loss
WC1079693203	Mark Malloy	09-09-0.

From-Thru (Dates)		In Payment of
02-03-04	02-03-04	CSA Full And Final Settlement

PAY Seventy-Seven Thousand Five Hundred Dollars & 00/100---- Dollars ▶

Dollars • Cents
$77,500.00

BANK ONE, NA OHIO

TO THE ORDER OF Mark Malloy

Stephanie A Hellman

VOID IF NOT CASHED IN SIX MONTHS FROM MONTH OF ISSUE

G-59516-F

STATE OF SOUTH CAROLINA)
)
COUNTY OF: LANCASTER)
)
IN THE MATTER OF: MARK MALLOY)
)

IN THE PROBATE COURT

ORDER APPOINTING PHYSICIAN/EXAMINER

CASE NUMBER: ~~2010~~ 2011GC2900002

RECEIVED
2011 JAN -6 P 1:23
SANDRA S. ESTRIDGE
LANCASTER COUNTY
PROBATE JUDGE

☐ GUARDIANSHIP
☒ CONSERVATORSHIP

Upon reading the petition in the above matter, I hereby appoint ALLEN RYDER COOK M.D. and PAUL B. PRITCHARD, III, who are directed to report to this Court their findings as to the person's mental condition, utilizing the Court's established examiners guidelines, and their opinion as whether the captioned person is an incapacitated person*; and if so, whether that person needs a guardian** and/or conservator*** to be appointed by this Court for him or her.

Executed this 6th day of Jan, ~~2010~~ 2011.

Sandra S. Estridge
, Probate Court Judge

* "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic us of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or property.

** A "guardian" of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his unemancipated minor child; has custody of the person of his ward; shall make provision for the care, comfort, and maintenance of his ward and arrange for training and education; and may give consents for medical or other professional care, counsel, treatment, or service.

*** A "conservator" manages, protects, and preserves the estate, assets, money or property of any incapacitated person; and extends funds as needed for the support, care, and welfare of the person or those entitled to be supported by him.

PBP(II)

EXHIBIT
3

STATE OF SOUTH CAROLINA)
)
COUNTY OF: LANCASTER)
)
IN THE MATTER OF: MARK MALLOY)
)

IN THE PROBATE COURT

PROBATE COURT GUIDELINES FOR REPORTS BY APPOINTED PHYSICIAN(S) EXAMINER(S)

CASE NUMBER: 2011GC2900002

☐ GUARDIANSHIP

☒ CONSERVATORSHIP

A petition has been filed with this Probate Court for appointment of a Guardian and/or Conservator, as indicated above, for the captioned individual. The definitions of an "*incapacitated person*," "*guardian*," and "*conservator*" are given on your Order of Appointment (Form #533 PC). These are important and should be reviewed by you.

Your role as a designated examiner is to help the Court to determine if the above captioned person is an incapacitated person. If so, does his or her condition require a guardian or a conservator or both? You have been appointed because you possess some knowledge of the individual from a past professional contact, you possess expertise in a desired area, or both. Your assistance is important to the person in question as well as the Court.

In reviewing your definitions, please note that the standard is incapacity or impairment of the person, and *not* incompetency. Section 62-5-408(4) of the conservatorship statutes provides: "*An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person, except to the extent the order affects his estate or affairs.*" Section 62-5-304(A) of the guardianship statutes provides." The court shall exercise the authority conferred in this part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations or other conditions warranting the procedure." Degrees of impairment may exist, and the Court may well need to consider a number of factors or circumstances.

After you conduct any examinations, interviews or tests that are appropriate, please submit your report to the above captioned Court in written form, unless directed by the Court otherwise. Please give a fact basis for all conclusions. Please state your professional title if not otherwise evident. Give any general background information, specific concerns or findings, and a prognosis where possible. If you do not anticipate having to appear and testify at a hearing and use your own narrative report, please submit your report in Affidavit form (Starting out with "Personally appeared before me, (your name), who, after being duly sworn, deposes and states the following:") and have your signature notarized by a notary public.

Please also answer the specific questions on Form #538 PC, which should accompany these Guidelines. You may use the Form as your report, attach the Form to your written report, or may include the questions and your answers in your report.

PGP

STATE OF SOUTH CAROLINA)
)
COUNTY OF: LANCASTER)
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IN THE MATTER OF: MARK MALLOY)
)

IN THE PROBATE COURT

EXAMINER'S REPORT

CASE NUMBER: 2011GC2900002

Please answer the following questions concerning the above person. Please provide details at the end of this form or an attached sheet of paper.

1. Have you treated this person before — Yes ☑ No ☐
If yes, give brief history.

2. Has this person ever been rated or found:

disabled	Yes ☑	No ☐	Unknown ☐
mentally ill or incompetent	Yes ☑	No ☐	Unknown ☐
chemically dependent	Yes ☐	No ☑	Unknown ☐

3. Can the above person:

care for self (personal hygiene)	Yes ☑	No ☐	Unknown ☐
prepare meals and/or clean house	Yes ☑	No ☐	Unknown ☐
maintain bank accounts or funds	Yes ☐	No ☑	Unknown ☐
pay bills	Yes ☐	No ☑	Unknown ☐
live independently	Yes ☐	No ☑	Unknown ☐
operate a car	Yes ☑	No ☐	Unknown ☐
take medications unsupervised – needs to be checked	Yes ☐	No ☑	Unknown ☐

4. Would the above person benefit from:

further education	Yes ☐	No ☐	Unknown ☑
further training	Yes ☐	No ☐	Unknown ☑
therapy of some sort have recommended cognitive therapy	Yes ☑	No ☐	Unknown ☐
medical aids or equipment	Yes ☐	No ☑	Unknown ☐
an operation or medical procedure(s)	Yes ☐	No ☑	Unknown ☐
structured living arrangements	Yes ☐	No ☑	Unknown ☐

5. Has the above person had in the last six months:

hospitalization(s)	Yes ☐	No ☑	Unknown ☐
therapy or treatment	Yes ☐	No ☐	Unknown ☐
inpatient or outpatient surgery	Yes ☐	No ☑	Unknown ☐
major medical test(s)	Yes ☐	No ☑	Unknown ☐
psychological or psychiatric testing	Yes ☐	No ☑	Unknown ☐

6 In your opinion, does this person have the mental or physical capacity to effectively manage his/her property and financial affairs — Yes ☐ No ☑ – not without assistance

and /or make necessary daily living and health care decisions — Yes ☑ No ☐

↳ impaired ↳ yes

PBP

7. To your knowledge does this person have:

a power of attorney	Yes ☐	No ☐	Unknown ☑
a health care power of attorney or	Yes ☐	No ☐	Unknown ☑
a "living will"	Yes ☐	No ☐	Unknown ☑

8. Does the above person have any of the following coverages?

health insurance	Yes ☐	No ☐	Unknown ☐
medicare	Yes ☑	No ☐	Unknown ☐
medicaid	Yes ☐	No ☑	Unknown ☐
veteran's health care	Yes ☐	No ☑	Unknown ☐

9. Does this person have a primary caretaker? Yes ☑ No ☐ Unknown ☐
If yes, please give available information on name, address, and relationship to above person.

Wife, Angela Malloy

SWORN to before me this 25th day of April, 20 11

Kristen Thursby

Notary Public for South Carolina

My Commission Expires: 10/26/19

KRISTEN THURSBY NOTARY PUBLIC SOUTH CAROLINA COM. EXP. 10/26/2019

Date: 4/25/2011

Julie DesMarteau

Examiner's Signature

Julie DesMarteau PA-C

Examiner's Name

Use this space for explanations or additional comments.

PBP III

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF: LANCASTER)
) **DOCTOR'S AFFIDAVIT REGARDING CAPACITY**
IN THE MATTER OF: MARK MALLOY)
) CASE NUMBER: 2011GC2900002

All information MUST be typed or clearly printed.

PERSONALLY APPEARED BEFORE ME Julie DesMarteau PA-C
Name of Physician

who being duly swom deposes and says:

I am (Please set forth your medical credentials):
Physician Assistant (supervising physician: Dr. Paul Pritchard, MD)

Business address and phone: MUSC, 96 Jonathan Lucas St. MSC 606 Charleston, SC 29425-6060
843-792-5044

Date and Place of this examination: Medical University of South Carolina "Rutledge Tower" Neurology Clinic
02/04/11

I have had previous opportunities to evaluate the patient? ☑ Yes ☐ No
(If yes, indicate dates and circumstances within the last year and/or reference if you have been the patient's personal physician for a period of time and the time frame.)

Is the patient oriented to time and place? ☑ Yes ☐ No

What is the physical condition and age of the patient? (Detail any other significant factors that may be relevant to the Court.)

Set forth the results of any tests which bear on the issue of incapacity and date of test:

BASED UPON MY EVALUATION OF THIS PATIENT:

☐ I DO NOT believe this patient is an " incapacitated person".[1] I do not find any impairment by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause to the extent that he/she lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his/her person, property, or finances.

☑ I DO BELIEVE THIS PATIENT IS AN "INCAPACITATED PERSON" and in need of a Guardian and/or Conservator as I find him/her to be impaired by reason of (CHECK ALL THAT APPLY AND SET OUT AND DESCRIBE THE LIMITATIONS RESULTING FROM EACH.)

- ☐ Mental Illness
- ☑ Mental Deficiency
- ☐ Physical Illness or Disability
- ☐ Advanced Age
- ☐ Chronic Use of Drugs
- ☐ Chronic Intoxication
- ☐ Other

[1]"Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or property. (Section 62-5-101 of the South Carolina Code of Laws)

PB

PAGE 2

Is this condition (permanent) or temporary?

Can Patient perform activities of daily living? yes

What other information do you believe would assist the Court in making a determination of capacity?

Mr. Malloy is reporting increasing problems with short term memory in addition to the cognitive changes from his prior brain injuries, including personality changes & notable problems with impulsivity. On interview Mr. Malloy stated that "it would be better for Angela [Mrs. Malloy] to have control over the money and things. I just can't do that stuff." Our neuropsychologist Dr. Waagner evaluated Mr. Malloy in 2007. He reviewed his records & tells us he agrees with this petition.

FURTHER AFFIANT SAYETH NOT.

Physician's Signature: Paul B Pritchard III

Print Name: Dr. Paul Pritchard, MD

Examiner: Julie DesMarteau PA-C julie desmarteau PA-C
Credentials (M.D., Ph.D., D.O., R.N.)

Address: 96 Jonathan Lucas St MSC606
Charleston, SC 29425-6060

Telephone: 843-792-5044, Fax: 843-792-8626

SWORN to before me this 25th day of April, 20 11

Notary Public for South Carolina
My Commission Expires: 10/26/19

KRISTEN THURSBY NOTARY PUBLIC SOUTH CAROLINA COM. EXP. 10/26/2019

FAILURE TO PROVIDE DETAILED RESPONSES TO THE QUESTIONS ON THIS AFFIDAVIT MAY OBLIGATE YOU TO APPEAR AT THE PROBATE COURT HEARING.

PBP

All information MUST be typed or clearly printed.

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2012-CP-42-5017

Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy,

Plaintiff,

vs.

Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A.,

Defendants.

AFFIDAVIT OF MARK A. MALLOY

Personally appeared before me, Mark A. Malloy, after being duly sworn, states as follows:

1. I am South Carolina resident over the age of eighteen (18) and I make this Affidavit based on my personal knowledge.

2. I was injured when I fell about 10 feet to 12 feet off a ladder while I was working in North Carolina for ANECO, INC., which I believe caused injuries to my brain.

3. I believe the injuries to my brain from the fall created new injuries or, at least, aggravated an earlier injury.

4. Before the fall, I made about $400 per week working for ANECO, INC.

5. After the fall, I hired Kenneth E. Lee and the LAW OFFICES OF LEE & SMITH, P.A. to represent me on my workers' compensation claims. I went to Mr. Lee's office in South Carolina to meet with him and that is where and when I retained him to represent me.

6. I have lived my entire life in South Carolina, including at the time I hired Mr. Lee all the way through the time when the workers' compensation matter was settled, and I still live in South Carolina.

EXHIBIT 1714

7. While Mr. Lee was representing me, I was treated by several doctors, including Dr. Alexander A. Manning.

8. During the mediation of my workers' compensation claim Mr. Lee strongly recommended to me and my wife, Angela, that I settle all of my workers' compensation claim for a total payment of only $100,000.

9. Mr. Lee told me and Angela that if we did not settle the workers' compensation claim, then I would be declared incompetent and then the money would be handled by an outsider and that my family and I would not get any of the settlement money.

10. Mr. Lee never told me or at least did not explain that under the workers compensation laws in North Carolina I could receive payments over my entire life for medical expenses to treat the injuries from when I fell at work.

11. Based on what Mr. Lee told me, I agreed to settle my workers' compensation claim for a total payment of only $100,000, and the papers show that I paid about $22,500 to Mr. Lee from the settlement.

12. After the workers' compensation settlement proceeds were paid, the South Carolina Probate Court found me to be incompetent to handle my and my family's financial affairs.

13. Long after the settlement, and with Angela's help, we learned that Mr. Lee did not handle my North Carolina workers compensation matter the right way and that I should have gotten a much larger settlement.

14. If Mr. Lee had explained what the North Carolina workers compensation laws provided, I would not have settled for only $100,000 and have continued until either the insurance company for ANECO agreed to pay a lot more money or until the North Carolina Industrial Commission ruled for a more favorable result on my workers' compensation

claim.

15. My wife and I learned of Mr. Lee's errors for the first time when the we met with another workers' compensation lawyer.

Dated: June 3, 2013

Mark A. Malloy

Sworn to and subscribed before me
this 3rd day of June, 2013.

Notary Public for South Carolina
My commission expires: Jan. 7, 2015

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, PLAINTIFF, vs. Kenneth E. Lee and Law Offices of Lee & Smith, P.A., DEFENDANTS.	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-42-5017 **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy ("Plaintiff" or "Malloy") filed this is a legal malpractice action arising out of an allegedly inadequate settlement of Malloy's North Carolina workers' compensation claim following an accident that occurred in North Carolina in 2002 while he was working for a North Carolina employer. Plaintiff retained Defendant Kenneth E. Lee to represent him to pursue the North Carolina workers' compensation claim in April of 2003. The claim was settled at mediation in North Carolina in November of 2003 and subsequently approved by the North Carolina Industrial Commission. The settlement funds were disbursed to Plaintiff in February of 2004. Plaintiff filed this lawsuit on December 6, 2012.

Defendants move for summary judgment on grounds that Plaintiff's claims are barred by North Carolina's four-year professional malpractice statute of repose, which runs from the date of the last act of the defendant giving rise to the cause of action. As set forth in more detail below, Defendants submit that summary judgment is appropriate based on the following:

- Plaintiff's claims are governed by the substantive law of North Carolina based on the application of *lex loci delicti* and principles of contract law. The alleged tort occurred in North Carolina and the parties entered into a contract that provides for the application for North Carolina law.
- The substantive law of North Carolina includes a four-year statute of repose for professional malpractice claims, which provides that "in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c).
- It is undisputed that Plaintiff failed to commence this action within four years of the last act giving rise to the causes of action alleged in the Complaint.
- North Carolina's four-year statute of repose is not subject to tolling for any alleged disability or incapacity that existed at the time the cause of action accrued. Livingston v. Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., 163 N.C.App. 397, 594 S.E.2d 44 (N.C. App. 2004).
- The application of North Carolina law is dispositive.

STANDARD

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24, 25 (S.C. 1988).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 545 (S.C. 1991). "Once moving party carries its initial

burden, opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings." Id. (internal citations and quotations omitted).

SUMMARY OF UNDISPUTED MATERIAL FACTS

- Defendant Ken Lee was at all relevant times licensed to practice law in the State of North Carolina and remains licensed to practice law in North Carolina. (Lee Affidavit ¶ 4, previously filed as "Exhibit 1" to Defendants' Motion for Summary Judgment).
- In April of 2003, Mark A. Malloy retained Ken Lee to pursue a North Carolina workers' compensation claim. (Lee Affidavit ¶ 2; Exhibit A).
- Malloy's workers' compensation claim arose out of an on-the-job injury that occurred in North Carolina while Malloy was working for a North Carolina employer. (Lee Affidavit ¶ 3).
- The attorney-client relationship was entered into pursuant to the Contract of Representation executed by Malloy and Lee on April 16, 2003. (Lee Affidavit ¶ 2; Exhibit A).
- The Contract of Representation provides that "[t]his agreement shall be governed by the law of the State of North Carolina . . . ." (Lee Affidavit, Exhibit A).
- Malloy's workers' compensation claim was governed by North Carolina law. (Lee Affidavit, Exhibit C).
- Ken Lee filed the workers' compensation claim in North Carolina. (Lee Affidavit, Exhibit C).
- The claim was settled at mediation in North Carolina on November 25, 2003. (Lee Affidavit ¶ 5).

- Malloy and Lee were physically present at the mediation in North Carolina when Malloy agreed to the settlement. (Lee Affidavit ¶ 6).
- Malloy and Lee were physically present at the mediation in North Carolina when Malloy executed the written settlement confirmation. (Lee Affidavit ¶ 7; Exhibit B).
- The North Carolina Industrial Commission issued an order approving the settlement on February 3, 2004. (Lee Affidavit ¶ 8).
- The settlement funds were disbursed to Malloy on February 25, 2004. (Lee Affidavit ¶ 12; Exhibit D).
- Lee's representation of Malloy concluded upon disbursement of the settlement funds. (Lee Affidavit ¶ 11).
- The Contract of Representation provides that "[r]epresentation of the client ends when the case is either settled or decided at a hearing . . . ." (Lee Affidavit, Exhibit A).
- The last communication with Malloy was a letter dated January 10, 2005, which enclosed a copy of a workers' compensation form reflecting the compensation paid by the carrier. (Lee Affidavit ¶ 13).
- Gretchen A. Rogers as Guardian *ad litem* for Mark A. Malloy filed this lawsuit on December 6, 2012. (Complaint).
- All of the alleged acts or omissions giving rise to the causes of action alleged in the Complaint occurred more than four years prior to the date the Complaint was filed. (Lee Affidavit ¶ 14; Plaintiff's Amended Response to Defendant's Request to Admit No. 10, attached hereto as "Exhibit 2").

For the Complaint to be timely under North Carolina's statute of repose, the last act or omission giving rise to the causes of action must have occurred on or after December 6, 2008. Malloy alleges the following acts and omissions give rise to the causes of action in the Complaint:

- Prior to the resolution of the workers' compensation claim, Lee failed to fully develop the evidence to evaluate the workers' compensation claim. (Complaint ¶ 23, 24).
- At mediation, Lee strongly recommended that Malloy settle his claim for $100,000. (Complaint ¶ 27).
- Lee told Malloy that if he did not settle, he would be found incompetent and would not get any of the settlement money. (Complaint ¶ 28).
- Lee never explained or failed to effectively explain that Malloy's brain injury increased the value of the workers' compensation claim. (Complaint ¶ 29).
- Malloy relied on Lee's legal advice and forceful recommendations and agreed to settle the claim for $100,000. (Complaint ¶ 30).
- Lee should have recommended that Malloy reject the $100,000 offer. (Complaint ¶ 31).
- Had Lee recommended that Malloy not accept the $100,000 offer, Malloy would have accepted such advice and would not have settled on those terms. (Complaint ¶ 33).
- "[U]pon information and belief, Lee withheld crucial information from the North Carolina workers' compensation Deputy . . . to expedite the settlement . . . and/or ensure the Deputy would not question the settlement was for less than the fair value . . . ." (Complaint ¶ 34).

All of the claims asserted by Plaintiff in the Complaint are premised on these alleged acts and omissions. It is undisputed that all of these alleged acts and omissions occurred no later than the date the North Carolina Industrial Commission issued the order approving the settlement, which was February 3, 2004. It is likewise undisputed that Plaintiff has not and cannot show that any of the claims are based on any alleged acts or omissions that occurred on or after December 6, 2008.

ARGUMENT

I. The application of North Carolina law is dispositive.

North Carolina's statute of repose for malpractice claims provides in relevant part the following:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action . . . Provided further, that *in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .*

N.C. Gen. Stat. § 1-15(c) (2003) (emphasis added). All of Plaintiff's claims in this case arise out of the performance of or failure to perform professional services and are therefore "malpractice" claims subject to the four-year statute of repose. Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792, 793 (N.C. App. 1994) (plaintiff's claims against attorney for negligence, breach of contract and breach of fiduciary duty arising out of the performance of or failure to perform professional services are "malpractice" claims governed by N.C. Gen. Stat. § 1-15(c)).

The test for whether a claim is barred by North Carolina's statute of repose is a bright-line test: Was the action commenced more than four years from the last act of the defendant giving rise to the cause of action? If so, the action is time-barred. Here, Malloy admits that the last act or omission giving rise to the claims occurred before December 5, 2008. (Plaintiff's Amended Response to Defendant's Request to Admit No. 10). This admission alone is sufficient to establish that the application of North Carolina law is dispositive. Nonetheless, since Plaintiff's admission is subject to two pages of "qualifications," Defendants would reiterate the undisputed facts below.

Malloy's claims against Lee are wholly premised on alleged acts and omissions that occurred at or before the underlying mediation on November 25, 2003. The settlement that

Malloy now alleges was inadequate was agreed to and confirmed in writing at mediation that day. The North Carolina Industrial Commission approved the settlement on February 3, 2004. The settlement funds were disbursed to Malloy on February 25, 2004, and Lee's representation concluded upon disbursement. Even assuming for purposes of this Motion that Lee's last communication with Malloy – a letter dated January 10, 2005 enclosing a copy of a workers' compensation form – could be construed as an act or omission giving rise to a cause of action, Malloy's Complaint was still filed well outside of the statute of repose.

Malloy does not dispute these facts. Rather, Malloy appears to dispute the applicability of North Carolina's statute of repose and the impact, if any, of his alleged incompetency. Both of these issues present questions of law that are proper for this Court to decide on summary judgment. The choice of law issue is discussed in more detail below. If this Court applies North Carolina law, Malloy's alleged incapacity is irrelevant to whether his claims are barred by the statute of repose.

Unlike a statute of limitations, North Carolina's statute of repose is not subject to tolling for an alleged disability, including incompetency. This precise issue was addressed in Livingston v. Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., 163 N.C.App. 397, 594 S.E.2d 44 (N.C. App. 2004). In Livingston, the plaintiff argued that her alleged incompetency tolled the statute of repose on her legal malpractice claims, asserting that the tolling provision found in North Carolina's statute of limitations was also applicable to the four-year statute of repose. Id. at [illegible]. The court expressly rejected this argument and found that the plaintiff's claim was barred notwithstanding any alleged disability that may have tolled the statute of limitations. Id. "[A] statute of repose 'serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in

time when the elements necessary for a legal wrong coalesce.'" Id. (*quoting* Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469, 475 (N.C. 1985)). The Livingston court concluded that "there is no express statutory authority to toll the statute of repose, which is a bar to plaintiff's claim." Id.

Similarly, the date Malloy allegedly first became aware of his claims is irrelevant to whether the claims are barred by the statute of repose. As the Supreme Court of North Carolina explained in Hargett v. Holland, 337 N.C. 651, 447 S.E.2d 784, 788 (N.C. 1994), "[r]egardless of when plaintiff's claim might have accrued, or when plaintiffs might have discovered their injury, because of the four-year statute of repose, their claim is not maintainable unless it was brought within four years of the last act of defendant giving rise to the claim." Accordingly, the application of North Carolina law is dispositive.

II. North Carolina law governs.

Whether this choice of law issue is analyzed under principles of contract law or the application of *lex loci delicti*, the undisputed material facts show that Plaintiff's claims are governed by the substantive law of North Carolina law.

A. Traditional South Carolina choice of law principles require the application of North Carolina law.

"Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred." Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81, 83 (S.C. App. 2007); Bannister v. Hertz Corp., 316 S.C. 513, 450 S.E.2d 629, 630 (S.C. App. 1994) ("Under South Carolina conflict of law principles, the substantive law governing a tort action is determined by the state in which the injury occurred.").

At its very essence, Malloy's claims are premised on an allegedly inadequate settlement of his North Carolina workers' compensation claim that occurred at mediation in North Carolina

on November 30, 2003. The underlying workers' compensation claim was filed in North Carolina by an attorney licensed to practice in North Carolina and was governed by North Carolina law. The settlement was entered into pursuant to North Carolina law and was approved in North Carolina by the North Carolina Industrial Commission.

Moreover, the actual settlement was entered into in North Carolina. Malloy and Lee were physically present in North Carolina when, as alleged in the Complaint, Malloy relied on Lee's legal advice and forceful recommendations and agreed to settle the claim for $100,000. (Complaint ¶¶ 27-30; Lee Affidavit ¶ 6). Malloy executed a written settlement confirmation at mediation in North Carolina that day. (Lee Affidavit ¶ 7; Exhibit B).

Any connection that the parties have with South Carolina has no bearing on the application of *lex loci delicti*. The alleged tort happened in North Carolina. It is irrelevant that Malloy was a resident of South Carolina, or that Lee was a resident of South Carolina. Just as if Malloy and Lee were involved in an automobile accident in North Carolina, the alleged tort in this case happened in North Carolina, and the substantive law of North Carolina applies.

B. The Contract of Representation provides for the application of North Carolina law.

At the onset of the representation, Malloy entered into a Contract of Representation with Lee. The contract was executed by Malloy on April 16, 2003 and specifically provides that "[t]his agreement shall be governed by the law of the State of North Carolina . . . ." (Lee Affidavit, Exhibit A). Malloy admits that the attorney-client relationship was entered into pursuant to the terms of the Contract of Representation, (Plaintiff's Amended Response to Defendant's Request to Admit No. 1), and he alleges a breach of contract cause of action premised on this very contract. Moreover, the designation of North Carolina law in the Contract of Representation was reasonable in light of the purpose and subject matter of the representation.

Malloy retained an attorney licensed to practice in North Carolina to pursue a North Carolina workers' compensation claim.

"Choice of law clauses are generally honored in South Carolina." Team IA, Inc. v. Lucas, 395 S.C. 237, 717 S.E.2d 103, 108 (S.C. App. 2011); Nucor Corp. v. Bell, 482 F.Supp.2d 714, 728 (D.S.C. 2007) ("Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law."); Bazzle v. Green Tree Financial Corp., 351 S.C. 244, 569 S.E.2d 349, 358 (2002) ("Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly.").

Accordingly, Plaintiff's claims in this action are governed by the substantive law of North Carolina, whether through the application of *lex loci delicti* or well-established principles of contract law.

III. North Carolina's statute of repose is substantive law.

"A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242, 243 (S.C. 1993). "A statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation." Id. *See also* Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81, 84 (S.C. App. 2007) (action against South Carolina bridge component manufacturer was governed by substantive law of North Carolina pursuant to l*ex loci delicti*, and trial court properly granted summary judgment based on application of North Carolina's six-year statute of repose).

The only exception to *lex loci delicti* is that "foreign law may not be given effect in this State if it is against good morals or natural justice." Boone v. Boone, 345 S.C. 8, 546 S.E.2d 191,

193 (S.C. 2001) (*citing* Dawkins v. State, 306 S.C. 391, 412 S.E.2d 407, 408 (S.C. 1991)). Examples of cases against good morals and natural justice are "prohibited marriages, wagers, lotteries, racing, contracts for gaming or the sale of liquors, and others." Dawkins, 412 S.E.2d at 408. As the Dawkins court further explained,

> [t]he 'good morals or natural justice' of our State are not violated when foreign law is applied to preclude a tort action for money damages, whether against an individual or the State, even if recovery may be had upon application of South Carolina law. '[T]he fact that the law of two states may differ does not necessarily imply that the law of one state violates the public policy of the other.'

Id. at 408 (*citing* Rauton v. Pullman Co., 183 S.C. 495, 191 S.E. 416, 422 (S.C. 1937)).

North Carolina's four-year malpractice statute of repose does not offend "good morals or natural justice" simply because it operates to bar Plaintiff's claims in this case. "South Carolina courts have 'repeatedly adhered to the *lex loci delicti* rule to apply foreign law that defeated claims which would have survived under South Carolina law.'" Butler v. Ford Motor Co., 724 F.Supp.2d 575, 582 (D.S.C. 2010) (*citing* Thornton v. Cessna Aircraft Co., 703 F.Supp. 1228, 1232 (D.S.C.1988), *aff'd* 886 F.2d 85 (4th Cir. 1989)). *See e.g.* Thornton, 703 F.Supp. at 1232 (application of Tennessee statute of repose did not violate public policy despite that South Carolina does not have a comparable statute of repose); Butler, 724 F.Supp.2d at 582-83 (application of North Carolina statute of repose did not violate public policy despite lack of comparable statute in South Carolina); Nash, 650 S.E.2d at 84 (affirming summary judgment based on application of North Carolina's six-year statute of repose, notwithstanding that action would have been timely under South Carolina's eight-year statute of repose).

CONCLUSION

For all of the foregoing reasons, Defendants respectfully submit that summary judgment should be granted in their favor as there are no genuine issues of material fact that Plaintiff's claims are barred by North Carolina's four-year statute of repose and Defendants are entitled to judgment as a matter of law.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: _____

DAVID W. OVERSTREET
State Bar No.: 16965

MICHAEL B. McCALL
State Bar No.: 73028

Attorneys for Defendants Kenneth E. Lee and Law Offices of Lee & Smith, P.A.

40 Calhoun Street, Suite 400
Charleston, SC 29401
843-727-0307

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, PLAINTIFF, vs. Kenneth E. Lee and Law Offices of Lee & Smith, P.A., DEFENDANTS.	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-42-5017 CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Thomas A. Pendarvis
Pendarvis Law Offices, PC
500 Carteret Street, Suite A
Beaufort, SC 29902-5066

This 5th day of June, 2013.

Qunar L. Crowder
Legal Assistant to Michael B. McCall

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JUN 10 AM 11:54
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2012-CP-42-5017

Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy,

Plaintiff,

vs.

Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A.,

Defendants.

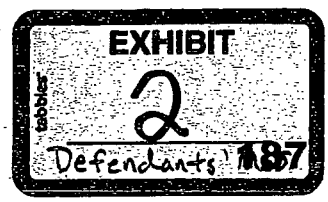
PLAINTIFF'S AMENDED RESPONSES TO DEFENDANT KENNETH E. LEE'S FIRST REQUESTS TO ADMIT TO PLAINTIFF

TO: DAVID W. OVERSTREET, J.D. AND MICHAEL B. MCCALL, J.D., LAWYERS FOR DEFENDANTS:

Pursuant to Rule 36, SCRCP, Plaintiff Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy hereby amends the responses to Defendant Kenneth E. Lee's First Requests to Admit to Plaintiff as follows:

REQUEST TO ADMIT NO. 1: Admit that the attorney-client relationship between you and Defendant Lee was entered into pursuant to the terms of the Contract of Representation attached hereto as "Exhibit A."

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about



Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff admits that Mr. Lee was obligated to act – but did not act – as any reasonably prudent lawyer would under the circumstances pursuant to the standard of care for lawyers handling workers compensation matters for clients, the Rules of Professional Conduct and the terms of the Contract of Representation, a copy of which was attached as Exhibit A to Defendants' Requests to Admit. Plaintiff admits that the lawyer-client relationship between Plaintiff and Defendant

Lee was entered into pursuant to the terms of the Contract of Representation requiring Mr. Lee to satisfy the standard of care for lawyers handling workers compensation matters and the Rules of Professional Conduct.

REQUEST TO ADMIT NO. 2: Admit that the purpose of Defendant Lee's representation of you was to pursue a North Carolina workers' compensation claim.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

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result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff admits that the purpose of Mr. Lee's representation was "to represent [Mr. Malloy] in connection with a claim for Workers' Compensation benefits for accidental injuries sustained to client's head arising out of client's employment," which Mr. Lee determined would be accomplished by filing a North Carolina workers' compensation claim.

REQUEST TO ADMIT NO. 3: Admit that the underlying settlement that is the subject of the Complaint was reached at mediation in North Carolina on November 25, 2003.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle

his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff admits that, as a result of Mr. Lee's breach of the standard of care and breach of his fiduciary duties in failing to properly represent Mr. Malloy and properly advise and disclose material information to Mr. Malloy, a settlement of Mr. Malloy's workers compensation claims were reached at

mediation in North Carolina, whereby Mr. Lee recommended Mr. Malloy settle his workers compensation claims for an amount tens of thousands of dollars below the fair value of his claims.

REQUEST TO ADMIT NO. 4: Admit that the underlying settlement that is the subject of the Complaint was approved by the North Carolina Industrial Commission.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

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result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, Plaintiff admits that, as a result of Mr. Lee's breach of the standard of care and breach of his fiduciary duties in failing to properly advise Mr. Malloy concerning the terms of the settlement and failing to properly disclose material information to the North Carolina Industrial Commission, a settlement of Mr. Malloy's workers compensation claims was approved by the North Carolina Industrial Commission for an amount tens of thousands of dollars below the fair value of his claims.

REQUEST TO ADMIT NO. 5: Admit that the underlying settlement that is the subject of the Complaint was memorialized in the Agreement and Release attached hereto as "Exhibit B."

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of

the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, Plaintiff admits that, as a result of Mr. Lee's breach of the standard of care and breach of his fiduciary duties in failing to properly advise Mr. Malloy concerning the terms of the settlement and failing to properly disclose

material information to the North Carolina Industrial Commission, a settlement of Mr. Malloy's workers compensation claims was approved by the North Carolina Industrial Commission as memorialized in the Agreement and Release attached to Defendants' Requests to Admit as "Exhibit B" for an amount tens of thousands of dollars below the fair value of his claims.

REQUEST TO ADMIT NO. 6: Admit that your wife, Angela Malloy, joined in the Agreement and Release attached hereto as "Exhibit B" to indicate her consent to the settlement and to confirm that you were mentally competent and able to make proper decisions concerning the settlement of your claim.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have

approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff admits that although Mrs. Malloy was not a client and did not have a workers compensation claim, Mr. Lee required Mrs. Malloy to sign the Agreement and Release, which released Mr. Malloy's workers compensation claims for an amount tens of thousands of dollars below the fair value of his claims. Plaintiff denies that Mrs. Malloy's signature was intended to indicate her consent to the settlement or confirm that Mr. Malloy was competent and able to make proper decisions concerning the settlement of his claims.

REQUEST TO ADMIT NO. 7: Admit that the attorney-client relationship between you and Defendant Lee concluded upon disbursement of the settlement funds.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

Mr. Malloy trusted Mr. Lee to represent him and protect his interests in a very valuable workers' compensation claim arising from work-related brain trauma. As a direct result of accepting Mr. Lee's advice to settle his workers' compensation claim, Mr. Malloy suffered significant damages, not only in the loss of settlement value on the wage claim portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money

from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff denies that the client-lawyer relationship between Mr. Malloy and Mr. Lee concluded upon disbursement of the funds to settle Mr. Malloy's workers compensation claims that were settled for an amount tens of thousands of dollars below the fair value. The reason for the Plaintiff's denial is based on Mr. Lee's continue involvement on Mr. Malloy's claims after the settlement funds were disbursed, including communications from Mr. Lee's office to Mr. Malloy providing information about the "Form 28C (Report of Carrier of Compensation Paid) in regards to your workers' compensation claim. Line 3 of this document indicates that the date of last compensation paid was February 9, 2004."

REQUEST TO ADMIT NO. 8: Admit that the settlement funds were disbursed to you by way of a check enclosed with the letter dated February 25, 2004 attached hereto as "Exhibit C."

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached this

fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

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Incorporating all of the foregoing response, the Plaintiff admits that the settlement funds settling his workers compensation claims for tens of thousand of dollars less than the fair value of his claim were disbursed to Mr. Malloy by way of a check enclosed with the letter dated February 25, 2004, attached as a copy to Defendants' Requests to Admit as "Exhibit C."

REQUEST TO ADMIT NO. 9: Admit that the Social Security Administration Office of Hearings and Appeals issued a decision dated June 30, 2006 attached hereto as "Exhibit D" finding that you had not been under a disability as defined in the Social Security Act from the period beginning on September 9, 2002 through the date of the decision.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

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portion but also in benefits for current and future medical costs. Had Mr. Lee properly advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff admits that, based on the application for a period of disability and disability insurance benefits filed on September 30, 2002, an administrative law judge found that Mr. Malloy was not disabled under sections 216(I) and 223(d) of the Social Security Act and that, based on the application for supplemental security income protectively filed on September 18, 2002, an administrative law judge found that Mr. Malloy was not disabled under section 1614(a)(3)(A) of the Social Security Act. Mr. Malloy's medical records, however, that were in possession of Mr. Lee at the time Mr. Lee recommended Mr. Malloy settle his workers compensation claims for tens of thousands of dollars below fair value, concluded that Mr. Malloy's "neurocognitive abilities were compromised by the second accident" that occurred while Malloy was on his job. In addition, Mr. Lee refused to release Mr. Malloy's files "without copies of the conservatorship or Guardian Order and an authorization signed by said Conservator or Guardian" because Mr. Malloy had been found incompetent. Plaintiff denies any attempts by Defendants to qualify or interpret the ruling of the Administrative Law Judge beyond what is contained in the opinion attached as Exhibit D to Defendants' Requests to Admit.

REQUEST TO ADMIT NO. 10: Admit that the last alleged act or omission of Defendant Lee giving rise to the causes of action alleged in the Complaint occurred before December 5, 2008.

RESPONSE: Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Mr. Lee") agreed to represent Mark Malloy in regards to injuries Mr. Malloy incurred during the course of his employment. The Plaintiff is Mr. Malloy's Guardian *ad litem* who was appointed because of Mr. Malloy's mental disabilities caused by the injury that was the basis of the underlying workers compensation. Mr. Lee was negligent under the terms of the engagement and the Contract of Representation when he advised Mr. Malloy to settle his workers' compensation claim for far below the fair value and Mr. Lee breached his fiduciary duties to Mr. Malloy when he included statements in the clincher agreement about Mr. Malloy's condition that were not accurate and not consistent with the medical information concerning Mr. Malloy that was in Mr. Lee's file in order to get the settlement approved by the North Carolina Industrial Commission. Based on the severity and permanency of Mr. Malloy's injuries and the long-term need for expensive future medical treatments, it is highly unlikely the North Carolina Industrial Commission would have approved the clincher agreement prepared by Mr. Lee if Mr. Lee had included all of the true medical information concerning Mr. Malloy in the clincher agreement.

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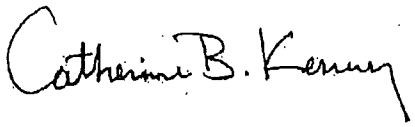
advised Mr. Malloy of the value of his workers' compensation claim as any competent lawyer would have provided in those circumstances, Mr. Malloy would not have settled his workers' compensation claim for far below the value, would have obtained more money from for his wage indemnity recovery, would have secured coverage for his current and future medical costs, and would have otherwise obtained a better result.

Incorporating all of the foregoing response, the Plaintiff denies that he knew or should have known or discovered the last alleged act or omission of Mr. Lee giving rise to the causes of action alleged in the Complaint occurred on before December 5, 2008. Because Mr. Lee accepted the representation of Mr. Malloy in South Carolina, because Mr. Lee's offices were located in South Carolina, and because Mr. Malloy resided in South Carolina at the time he engaged Mr. Lee, South Carolina law will control the Plaintiff's claims for professional negligence, breach of fiduciary duty, and breach of contract. In addition, North Carolina's law regarding the statute of limitations will have no bearing whatsoever on the claims asserted in this lawsuit. Plaintiff admits that the last act or omission of Defendant Lee that gave rise to the claim alleged in the Complaint occurred before December 5, 2008 even though Mr. Malloy did not know and no reasonable lay person would have known of Mr. Lee's errors on that date. Mr. Malloy did not know, and neither he nor a reasonable person should have known that he had a claim against Mr. Lee until 2010, when another lawyer told him that Mr. Lee did not handle the North Carolina Workers Compensation claim properly.

PENDARVIS LAW OFFICES, P.C.



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Lawyers for Plaintiff, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy

Beaufort, South Carolina
March 5, 2013

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, PLAINTIFF, vs. Kenneth E. Lee and Law Offices of Lee & Smith, P.A., DEFENDANTS.	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-42-5017 **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendants respectfully submit this Reply Memorandum to address the argument made by Plaintiff in Section I. B. of Plaintiff's Memorandum in Opposition to Summary Judgment.

Plaintiff provides a string of citations purportedly supporting the general proposition that a legal malpractice claim is governed by the law of the state where the plaintiff resided at the time of the injury. However, these cases are neither legally nor factually relevant to the application of South Carolina's choice of law rules in this case. Plaintiff has simply cherry-picked language from cases in jursidictions that follow an entirely different choice of law rule, the "most significant relationship" test found in the Restatement (Second) of Conflict of Laws § 145.[1] *See* Bobbitt v. Milberg, LLP, 285 F.R.D. 424, 428-29 (D. Ariz. 2012) (applying most significant relationship test under Arizona choice of law rules); Ennenga v. Starns, 677 F.3d 766, 774 (7th Cir. 2012) (finding it unnecessary to address the most significant relationship test under Illinois choice of law rules); St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch LLP, 233 F. Supp. 2d 171, 175-76 (D. Mass. 2002) (applying most significant relationship test

[1] Plaintiff also cites to this provision, which South Carolina has not adopted, in Section I. C. of Plaintiff's Memorandum in Opposition.

under Massachusetts choice of law rules); Streber v. Hunter, 14 F. Supp. 2d 978, 983 (W.D. Tex. 1998) (same, Texas choice of law rules); David B. Lilly Co., Inc. v. Fisher, 18 F.3d 1112, 1117 (3d. Cir. 1994) (same, Deleware choice of law rules).

Unlike the jurisdictions cited above, South Carolina follows the traditional rule of *lex loci delicti*, which literally translates to "[t]he law of the place where the tort or other wrong was committed." Black's Law Dictionary (9th ed. 2009). The only case in Plaintiff's string cite that does not involve the application of the most significant relationship test, Dow v. Jones, 311 F. Supp. 2d 461 (D. Md. 2004), merely explains the court's basis for applying Maryland law in the diversity jurisdiction action. *See* id. at 466 n. 3 ("the alleged tort occurred in Maryland, so the court will apply Maryland legal malpractice law.").

The alleged tort in this case occurred in North Carolina, and this Court should apply North Carolina law. Plaintiff's claim is wholly premised on the allegedly inadequate settlement of his North Carolina workers' compensation claim. All of Plaintiff's alleged injuries were sustained "[a]s a direct and proximate result of accepting the Defendant Lawyer's advice to settle his workers' compensation claim . . . ." (Complaint ¶ 1). Plaintiff agreed to the settlement at mediation in North Carolina. Defendant Lee's allegedly bad legal advice and forceful recommendations to settle were given and followed at mediation in North Carolina, and Plaintiff executed a settlement confirmation in North Carolina that same day.

Moreover, unlike Malloy, the plaintiffs in the most significant relationship cases did not:

- suffer underlying injuries in the course of employment in North Carolina;
- seek out and hire an attorney licensed to practice in North Carolina for the purpose of pursuing a workers' compensation claim in North Carolina;
- enter into a representation agreement with the attorney that expressly provides for the application of North Carolina law;
- file a workers' compensation claim in North Carolina governed by North Carolina law;

- agree to the settlement at mediation in North Carolina;
- rely on advice given by the attorney in North Carolina in agreeing to the settlement; or
- seek and receive approval of the settlement in North Carolina from the North Carolina Industrial Commission.

Plaintiff cannot escape the application of North Carolina law by arguing that his residency in South Carolina somehow changes these facts.

As to Plaintiff's remaining arguments, Defendants respectfully crave reference to their initial memorandum, motion and exhibits.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: _____

DAVID W. OVERSTREET
State Bar No.: 16965

MICHAEL B. McCALL
State Bar No.: 73028

Attorneys for Defendants Kenneth E. Lee and Law Offices of Lee & Smith, P.A.

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843-727-0307

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2012-CP-42-5017

Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy,

Plaintiff,

vs.

Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A.,

Defendants.

PLAINTIFF'S MOTION TO ALTER OR AMEND ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS

TO: DAVID W. OVERSTREET, J.D. AND MICHAEL B. MCCALL, J.D., COUNSEL FOR DEFENDANTS:

NOTICE

PLEASE TAKE NOTICE THAT Plaintiff, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, will move ten days after service of this motion or as soon thereafter as counsel can be heard at the Spartanburg County Judicial Center, Spartanburg, South Carolina, for an Order pursuant to Rule 52(a) and Rule 59(e), SCRCP, altering or amending the Form 4 Order, filed on September 5, 2013 and the formal Order (collectively "the Order") issued by the Honorable Frank R. Addy, Jr., dated September 17, 2013, filed with the clerk on September 19, 2013, and received by counsel for the Plaintiff on October 3, 2013, granting Defendants' Motion for Summary Judgment.

MOTION

The motion filed on behalf of Plaintiff, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, seeking an Order altering or amending the Order pursuant to Rule 52(a) and Rule 59(e), SCRCP, is based on errors and/or omissions identified in the factual findings and in the conclusions of law set forth in the Order. A copy of the Order is

attached and incorporated herein by reference as **Exhibit 1**.

ARGUMENTS

The location where Plaintiff's injury was manifested is the key to properly applying South Carolina's choice of law jurisprudence founded on the concept of *lex loci delicti*.

The substantive law governing Plaintiff's legal malpractice tort claims is South Carolina law because it was in South Carolina where all of Plaintiff's financial "injury occurred." No workers' compensation benefits, including the settlement proceeds, were ever planned or supposed to be paid, delivered to, or received by Mr. Malloy *in North Carolina*. Any and all financial benefits Mr. Malloy ever would have received as a result of Defendant Lee's legal services would have been received by Mr. Malloy *in South Carolina*.

For choice of law purposes, there is a significant distinction between the state where many of Defendant Lee's negligent acts and omissions occurred, North Carolina, and the state where all of Mr. Malloy's financial injuries occurred, which is South Carolina. South Carolina is where Mr. Malloy always has resided and where Defendant Lee delivered Mr. Malloy's settlement proceeds that were far below the fair and reasonable settlement value of his claims. In other words, it was in South Carolina alone where Mr. Malloy felt the financial consequences of Defendant Lee's negligent acts.

The *Nash* opinion, relied upon in the Order, concerned whether North Carolina law or South Carolina law governed personal injury claims arising from an allegedly defective footbridge, parts of which were manufactured here in South Carolina, which caused physical injuries in North Carolina where the footbridge was erected and later collapsed. The alleged negligent acts, that is, defective manufacturing, took place in South Carolina.

The injury, however, occurred in North Carolina were the plaintiffs were standing when they suffered personal injuries from the collapse of the footbridge. The *Nash* court's application of South Carolina's choice of law jurisprudence, therefore, resulted in the application of North Carolina substantive law, including its statute of repose, because it was "the law of the ***state in which the injury occurred***." *Nash v. Tindall Corp.*, 375 S.C. 36, 39, 650 S.E.2 81, 83 (Ct. App. 2007) (emphasis added).

The instant case presents the exactly opposite set of facts. The alleged negligent acts, that is, legal malpractice by Defendant Lee, took place primarily in North Carolina, although some of the final acts of negligence took place in South Carolina when the final settlement papers were executed. Plaintiff's injury, on the other hand, occurred only in South Carolina where he resided and where he should have received a substantially higher settlement recovery had Defendant Lee met the standard of care. (See Affidavit of R. James Lee, p. 2, attached to the Complaint; Defendant Lee erred in "[f]ailing to advise plaintiff against the proposed $100,000.00 settlement in his workers' compensation case of *Malloy v. Aneco Electrical* (IC 301187) because the settlement accepted is less than the reasonable settlement value in this case given the evidence contained in the records in the attorney's own legal file."). The Order finds that the settlement reached during the mediation had to be approved after the mediation by the North Carolina Industrial Commission and that the settlement proceeds were sent to and received by Mr. Malloy at his residence here in South Carolina. (Order, p. 3). The Order omits, however, any factual findings expressly recognizing that all financial benefits Mr. Malloy ever would have received as a result of Defendant Lee's legal services would have been received by Mr. Malloy *in South Carolina*. In other words, Mr. Malloy never could have suffered any

financial harm *in North Carolina* from Defendant Lee's legal errors because no one, including Mr. Malloy's employer or its workers compensation insurance carrier, ever planned or intended to deliver any of the settlement proceeds to Mr. Malloy while he was *in North Carolina*.

This Court's ruling applying North Carolina law is mistaken and should be altered or amended to apply South Carolina's choice of law rules as per *Nash* and other controlling South Carolina authority[1], which should have resulted in the application of South Carolina substantive tort law because it is "the law of the ***state in which the injury occurred***." The Order omits any reference to the fact that the plaintiffs in *Nash* were physically in North Carolina when their injuries occurred, which obviously was the basis on which the South Carolina trial and appellate courts concluded that North Carolina substantive law, including its statute of repose, controlled the claims in that case.

The Order bluntly states that "the alleged tort in this case occurred in North Carolina" without making any analysis or specific finding on the critical aspect of where Mr. Malloy's injuries occurred as a result of the tortious conduct by Defendant Lee. (Order, p. 5). The Order's summary of all of Defendant Lee's negligent acts simply has no bearing on South Carolina's choice of law rule that requires a determination of where Mr. Malloy was located when his "financial injuries occurred." In other words, a determination of the location

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[1] *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001); *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449, 454 (Ct. App. 1997) ("[T]he substantive law governing a tort action is determined by the state in which the injury occurred.") (holding as to claim for fraudulent misrepresentation that "[t]he place of the wrong is not where the misrepresentations were made but where the plaintiff, as a result of the misrepresentation, suffered a loss"); *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994); *Algie v. Algie*, 261 S.C. 103, 198 S.E.2d 529 (1973); *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964).

where Mr. Malloy's injuries were manifested is necessary to apply the South Carolina choice of law rule; a determination that is wholly absent in any of the findings of fact or conclusions of law in the Order. The Court of Appeals' opinion in *Nash* is the proof in the pudding because the negligent acts in that case, that is manufacturing an allegedly defective footbridge, happened here in South Carolina but the plaintiffs' personal injuries occurred in North Carolina when the footbridge collapsed; hence the application of North Carolina law.

Another important misapplication of law to facts that Plaintiff respectfully requests this Court reconsider is the portion of Order that states "the Court is further unable to disentangle the nexus linking Plaintiff's present cause of action to the underlying workers comp action in North Carolina." One way to "disentangle" Plaintiff's legal malpractice claims from "the underlying workers comp action North Carolina" is to consider the nature of the injuries sustained. Mr. Malloy's underlying workers compensation claims were based on physical injuries Mr. Malloy sustained "when he fell 10 feet to 12 feet off a ladder". (Complaint, ¶ 11). Mr. Malloy's legal malpractice claims, on the other hand, are based purely on financial injuries Mr. Malloy sustained (in South Carolina) when Defendants failed to meet the standard of care as lawyers handling his underlying claims.

The Order contains another misstatement with regard to the conclusion that the "parties . . .relationship was governed by the substantive law of North Carolina pursuant to the terms of the Contract of Representation." (Order, p. 6). The Contract was between Mr. Malloy and Defendant, LAW OFFICES OF LEE & SMITH, P.A., only. ("[T]he client, *Mark Malloy*, **retains The Law Offices of Lee and Smith, P.A.** to represent him/her in connection with a claim for Workers' Compensation benefits for accidental injuries

sustained to client's *head* arising out of client's employment with Aneco Electrical on or about the *9* Day of *September, 2002.*") (bold emphasis in original) (italic emphasis represents handwritten portions of the contract). Defendant Lee, individually, was not a party to that contract, but certainly could have been if he had chosen to include himself as a party.[2] Clearly, Defendant Lee (and other members of the firm) chose to set up a Professional Association and use that entity to enter into contracts with clients in an attempt to insulate themselves individually from personal liability. As the drafter of that contract and as a fiduciary to Mr. Malloy, Defendant Lee should not now be allowed to insert himself as a party to that contract and take individual cover under the choice of law provision when he could have done so at the outset of the client-lawyer relationship. That was not part of the contract Mr. Malloy signed.

Proper application of South Carolina's choice of law rules should have South Carolina substantive law governing Plaintiff's legal malpractice tort claims as set forth above and in Plaintiff's Memorandum in Opposition, previously provided to the Court. But even under South Carolina legal malpractice jurisprudence, to establish proximate cause Plaintiff will need to prove the financial benefits that would have been available to Mr. Malloy under North Carolina's workers compensation laws, but for the acts and omissions of Defendant Lee. In other words, while South Carolina law governs Plaintiff's professional negligence and breach of fiduciary duty claims, North Carolina Worker's Compensation laws will govern the proximate cause element of those claims as they relate to the recovery

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[2] Plaintiff concedes that the Contract of Representation between Mr. Malloy and the Defendant, THE LAW OFFICES OF LEE AND SMITH, P.A. contains a North Carolina choice of law provision, which under South Carolina law should operate to bar his third cause of action for breach of contract, but not the other tort claims.

of actual damages. Defendants will have ample opportunity to present their defenses to these legal malpractice claims.

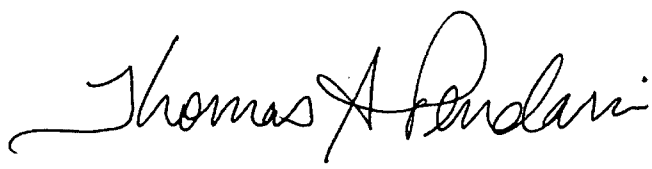
CONCLUSION

Based on the foregoing arguments, the affidavits, testimony, and other evidence before the Court, an Order should be issued pursuant to Rule 52(a) and Rule 59(e), SCRCP, altering or amending the Order Granting Defendants' Motion for Summary Judgment because that Order is based on an mistaken application of South Carolina's choice of law doctrine when it ruled that North Carolina law governed Plaintiff's tort claims when all of the injuries suffered by Plaintiff occurred here in South Carolina.

Because Plaintiff's only injuries from Defendants' errors occurred here in South Carolina, under South Carolina's choice of law jurisprudence, including *Nash*, it is South Carolina law that controls Mr. Malloy's tort claims. North Carolina's statute of repose is simply irrelevant and the Order Granting Defendants' Motion for Summary Judgment should be altered or amended such that it denies Defendants' motion. Plaintiff respectfully requests this Honorable Court reconsider then alter and amend its rulings.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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Beaufort, South Carolina

October 3, 2013

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, PLAINTIFF, vs. Kenneth E. Lee and Law Offices of Lee & Smith, P.A., DEFENDANTS.	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT CASE NO.: 2012-CP-42-5017 **DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION TO RECONSIDER**

Defendants respectfully submit this Memorandum in Opposition to Plaintiff's Motion to Reconsider. This Court's Order granting summary judgment correctly finds that Plaintiff's claims are governed by the substantive law of North Carolina, in large part based on the holding in Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81 (S.C. App. 2007). After extensive briefing and oral arguments, Plaintiff now requests reconsideration based on a reading of Nash that is not supported by the language in the decision.

The issue in Nash was not whether the *lex loci delicti* was North Carolina, but whether North Carolina's statute of repose was substantive or procedural, and whether South Carolina's public policy exception applied. Id. at 83-84. The *lex loci delicti* was not disputed by the parties or addressed by the court in Nash, because North Carolina is where the bridge collapsed and where the legal injuries that made the negligent conduct actionable – plaintiffs' personal injuries – occurred . *See e.g.* Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303, 306 (S.C. 1964) (". . . the situs of the tort is controlling . . . ."); Algie v. Algie, 261 S.C. 103, 198 S.E.2d 529, 530 (S.C. 1973) (cited with Oshiek in Plaintiff's Motion to Reconsider).

Here, Plaintiff's alleged legal injury was the loss of his right to further pursue the underlying workers' compensation claim for a larger recovery. Plaintiff's alleged legal injury occurred at the moment he followed Defendant Lee's advice and recommendation to settle the claim for $100,000 at mediation and executed a mediated settlement agreement in North Carolina.

This Court's Order granting summary judgment correctly found that the settlement reached at mediation was binding. Once the mediated settlement agreement was executed, Plaintiff lost any opportunity he had to pursue a larger recovery through a hearing on the merits. *See* Lemly v. Colvard Oil Co., 577 S.E.2d 712, 716 (N.C. App. 2003) (finding a mediated settlement agreement executed by the parties at mediation and intended to be followed by a formal clincher agreement was binding and enforceable where plaintiff subsequently refused to sign clincher).

Where Plaintiff received the allegedly inadequate settlement proceeds has no bearing on where he sustained his alleged legal injury. To the extent Plaintiff was injured, it was not by the receipt of settlement proceeds, but by the settlement that precluded his right to further pursue the underlying workers' compensation claim. Notably, Plaintiff's alleged "lost opportunity" was the opportunity to proceed with a hearing on the merits *in North Carolina*, which makes it even more difficult to reconcile Plaintiff's position that South Carolina law governs.

Plaintiff's assertion that "[t]he location where Plaintiff's injury was manifested is the key to properly applying . . . *lex loci delicti*" is unsupported by Nash or any other South Carolina jurisprudence. *Lex loci delicti* literally translates as "[t]he law of the place where the tort or other wrong was committed." Black's Law Dictionary (9th ed. 2009). The concept of injury encompassed in *lex loci delicti* is the legal injury that makes negligent conduct actionable.

Plaintiff's residency in South Carolina does not change the fact that his alleged legal injury was the loss of his right to further pursue the underlying workers' compensation claim, or that his alleged legal injury occurred when he settled the claim in North Carolina.

The Court did not err in concluding that the parties' relationship was governed by the substantive law of North Carolina pursuant to the Contract of Representation. The Court's finding is supported by Plaintiff's own allegations in the Complaint and discovery admissions:

- Defendant Lee "is or was a member of Defendant, Law Offices of Lee & Smith, P.A. (collectively 'Lee')"
- "At all relevant times hereto, Kenneth E. Lee is or was acting as an agent for Law Offices of Lee & Smith, P.A."
- "[A]t all relevant times hereto, Law Offices of Lee & Smith, P.A. herein acted by and through its employees and agents, including but not limited to Defendant, Kenneth E. Lee, who acted within the course and scope of his employment and/or agency with all implied, inherent, apparent and express authority to so bind his master and principal. . . ."

(Complaint ¶¶ 7-10). *See also* Plaintiff's Amended Responses to Defendant Ken Lee's First Requests to Admit, Request No. 1, attached as Exhibit 2 to Defendants' Memorandum in Support of Summary Judgment (". . . Plaintiff admits that the lawyer-client relationship between Plaintiff and Defendant Lee was entered into pursuant to the Contract of Representation. . . .).

The alleged tort in this case, including Plaintiff's alleged legal injury, occurred in North Carolina, and this Court correctly determined that Plaintiff's claims are governed by the substantive law of North Carolina. Accordingly, the Court should deny Plaintiff's Motion to Reconsider.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: _____

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Lower Court Case No. 2012-CP-42-5017
Appellate Case No. 2013-002699

Gretchen A. Rogers, as Guardian *ad litem*
for Mark A. Malloy. . . . . Appellant,

v.

Kenneth E. Lee and
LAW OFFICES OF LEE & SMITH, P.A. . . . . Respondents.

Certificate of Counsel

Pursuant to Rule 210(g) of the South Carolina Appellate Court Rules, the undersigned, as counsel for Appellant, hereby certifies that, to the best of my knowledge and belief, the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

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June 11, 2014

Beaufort, South Carolina