IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ERNESTINE ELLIOTT, individually and as Personal Representative of the Estate of KATRINA M. COOK,

Plaintiff,

-against -

GARY, WILLIAMS, PARENTI, WATSON AND GARY, P.L.L.C., WILLIE E. GARY, CHANTHINA B. ABNEY, and LERONNIE MASON,

Defendants.

Civil Action File No.

COMPLAINT

COMES NOW Plaintiff ERNESTINE ELLIOTT, individually, and as Personal Representative of the Estate of her daughter KATRINA M. COOK, who alleges as follows for her complaint against Defendants GARY, WILLIAMS, PARENTI, WATSON AND GARY, P.L.L.C. (the "Gary Firm"), WILLIE E. GARY, CHANTHINA B. ABNEY,and LERONNIE MASON:

NATURE OF ACTION

1. This is a civil action for legal malpractice, fraud, conversion, civil theft, and bad faith to recover compensatory and punitive damages arising from Defendants representation of Ms. Elliott in wrongful death claims related to a March 14, 2014 automobile accident in which Ms. Elliott's daughter, Katrina M. Cook, was killed.

2. Defendants failed to bring two meritorious wrongful death claims on behalf of Ms. Cook's estate in a timely manner: (i) a products liability claim against the manufacturer of the car Ms. Cook was driving, a 2005 Nissan Infiniti; and (ii) a personal injury action against the owner and driver of a Freightliner tractor-trailer responsible for the accident, Schneider National Carrier, Inc. ("Schneider") and its employee-driver, Mr. Alhassane Dansoko. Defendants commenced a lawsuit against Nissan, but because they commenced the lawsuit after the 10-year statute of repose expired, it was dismissed. Defendants never commenced a lawsuit against Schneider and Dansoko and the statute of limitations is now expired.

3. Defendant Willie Gary also fraudulently induced Ms. Elliott to turn over a $100,000 death benefit under the uninsured motorist coverage of her daughter's automobile policy, even though the insurer was willing to pay the death benefit directly to Ms. Elliott shortly after the March 10, 2014 accident without any intervention from Gary. In April 2016, Gary promised he would pay the entire $100,000 death benefit to Ms. Elliott if she signed the release required by the insurer. In reliance on his representations, Ms. Elliott did so, but Gary thereafter deducted a 40% contingency fee and alleged expenses from the policy proceeds, even though the uninsured motorist policy was outside the scope of his retention and no work on his part was required to obtain the death benefit. On the contrary, because of Gary's fraudulent interference,

Ms. Elliott had to wait more than two years to receive any portion of the death benefit and has still not received $52,357.21 plus interest.

THE PARTIES

4. Plaintiff Ernestine Elliott is a citizen of Georgia. She is the personal representative of the estate of her deceased daughter, Katrina M. Cook.

5. Defendant Gary, Williams, Parenti, Watson and Gary, P.L.L.C. ("Gary Firm") is a Florida professional limited liability company whose members, Willie E. Gary, Lorenzo Williams, Robert V. Parenti, Donald N. Watson, Sekou Gary and Chanthina B. Abney, are Florida citizens.

6. Defendant Willie E. Gary, the managing member of the Gary Law Firm, is a citizen of Florida.

7. Defendant Chanthina R. Abney is a citizen of Florida and a member of the Gary Firm.

8. Defendant LeRonnie Mason is a citizen of Florida and an attorney formerly employed by the Gary Firm.

JURISDICTION AND VENUE

9. This Court has diversity subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a) because this is a civil action where the matter in controversy exceeds $75,000 and is between citizens of different States.

10. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

BACKGROUND

A. The Fatal Automobile Accident.

11. On March 10, 2014, the 2005 Nissan Infiniti G35 that Ms. Cook was driving burst into flames when a Freightliner tractor-trailer traveling north on the C.H. James Parkway in Cobb County crashed into the rear of Ms. Cook's Infiniti. Ms. Cook, who was the only occupant in her Infiniti, was trapped and died in the fire. The driver of the Freightliner owned and operated by Schneider was uninjured.

12. The fatal crash was precipitated when two cars traveling south on the Parkway, a 1998 Mazda and a 2001 Toyota Tundra, collided, sending the Toyota across the center lane to hit Ms. Cook's north-traveling Infiniti. Because the Freightliner tractor-trailer was tailgating directly behind Ms. Cook's Infiniti and exceeding the speed limit, it could not stop before rear-ending the Infiniti. Design defects in the Infiniti caused it to burst into flames upon impact. None of the drivers or occupants of the three other cars involved in the accident died and, other than Ms. Cook, only the driver of the Mazda sustained any personal injuries.

C. Willie Gary Solicits Plaintiff to Retain Him and His Firm.

13. On March 11, 2014, the day after Ms. Cook's death, Willie Gary, a lawyer based in Stuart, Florida, contacted Ms. Cook's mother, Plaintiff Ernestine Elliott, to solicit her to retain him and the Gary Firm to bring wrongful death claims on behalf of Ms. Cook's estate. On Saturday, March 15, 2014, Gary travelled to Georgia to meet personally with Ms. Elliott and Ms. Cook's father, Robert Elliott.

14. Although Ms. Cook's parents wanted to wait until after their daughter's funeral to discuss legal action, Gary insisted that they retain him immediately to "preserve critical evidence." Gary asserted that doing so was critical in order to bring two clams against the parties responsible for Ms. Cook's death: a "crashworthiness" product liability clam against the manufacturer, Nissan, because the car should not have burst into flames when it was rear-ended by the tractor-trailer; and (ii) a negligence claim against the owner-operator of tractor-trailer, Schneider National Carrier, Inc. ("Schneider"), and its employee-driver, Mr. Alhassane Dansoko, because the truck shouldn't have been speeding or tailgating. Gary represented that he had obtained billion-dollar verdicts in similar cases and that he could obtain such a recovery for Ms. Cook's estate if she retained him immediately.

15. Ms. Elliott believed Gary's representations and executed the retainer agreement annexed hereto as Exhibit 1 on or about March 15, 2014.

16. Despite Gary's insistence that immediate action was required to protect Ms. Elliott's rights, he and the other defendants did nothing to do so. On the contrary, Defendants took no action to preserve the wrecked Infiniti and other vehicles involved in the crash. As a result, critical evidence was lost.

D. Defendants Fail to Commence an Action Against Nissan Prior to the Expiration of the Statute of Repose.

17. On May 24, 2016, over two years after Ms. Cook's fatal crash, the Gary Firm commenced a wrongful death action in the Superior Court of Cobb County against Nissan North America, Inc., *Ernestine Elliott, as Personal Representative of the Estate of Katrina Cook v. Nissan North America, Inc.*, Case No. 16-1-4096-99 (the "Nissan Action"). The Nissan Action asserted claims for strict liability, negligent design and failure to warn, and breach of implied warranties.

18. Nissan removed the action to the United States District Court for the Northern District of Georgia, where it was assigned Civil Action Number 1:16-cv-02400-LMM. Defendants Gary, Mason and Abney appeared on behalf of Ms. Elliott.

19. On April 20, 2017, Nissan moved for summary judgment on the grounds that (i) the claims seeking wrongful death damages were time barred under the two-year statute of limitations set forth in O.C.G.A. § 9-3-33; and (ii) the product liability claims were barred under Georgia's ten-year statute of repose set forth in

O.C.G.A. § 51-1-11(c), which requires that such claims be brought no later than ten years after the first sale of the product alleged to have caused plaintiff's injuries.

20. In this case, the first sale of Ms. Cook's 2005 Infiniti G35 was on September 3, 2005, which required that any product liability claims be commenced on or before September 3, 2015. Here, Gary insisted that Ms. Elliott retain him only a few days after Ms. Cook's death on March 10, 2014, which provided Defendants with almost 18 months to file product liability claims against the manufacturer. Defendants failed to do so, however, waiting until May 24, 2016 – more than eight months after the statute of repose expired.

21. Defendants did not oppose the summary judgment motion. On May 16, 2017, the court granted the motion and entered judgment in favor of Nissan. On May 18, 2017, Defendants filed a motion for reconsideration. On May 27, 2017, the court granted the motion for reconsideration, but upon reconsideration, reaffirmed its decision granting summary judgment in favor of Nissan, holding that "Plaintiff's claims remain dismissed."

E. Defendants Fail to Commence an Action Against Schneider.

22. Defendants took no action to commence an action against Schneider, the owner-operator of the Freightliner tractor-trailer that rear-ended Ms. Cook's Infiniti, or its employee driver, Mr. Alhassane Dansoko. The two-year statute of

limitations for wrongful death claims expired on March 10, 2016, two years after Ms. Cook's death on March 10, 2014. Because the two-year statute of limitations for tort claims commenced on the date of Ms. Elliott's appointment as Ms. Cook's Personal Representative, September 26, 2014, the statute of limitations for torts expired on September 26, 2016.

F. Gary Fraudulently Retains the Death Benefit under Ms. Cook's Uninsured Motorist Policy.

23. Ms. Cook had an automobile insurance policy issued by GEICO General Insurance Company that included a $100,000 death benefit under the policy's uninsured motorist coverage. Shortly after the accident, a GEICO representative informed Ms. Elliott that Ms. Cook had named her as the policy beneficiary and that she was entitled to the death benefit because the driver of the Mazda that had commenced the multi-car accident was uninsured.

24. When Ms. Elliott mentioned that to Gary, he insisted that she direct GEICO to send him the $100,000 check. He said that as her lawyer, he would, as "courtesy" to her, review all payments and issues relating to the accident, including the GEICO $100,000 death benefit. In reliance on Gary's representations, Ms. Elliott authorized GEICO to send the check to Gary and to communicate with him regarding the uninsured motorist coverage under her daughter's policy.

25. Gary thereafter stopped returning Ms. Elliott's calls and generally became unavailable. On the few occasions Ms. Elliott managed to speak with Gary, he asserted that he was "getting close" and "waiting to hear from the courts." He continued to promise that Ms. Elliott would obtain a "billion-dollar recovery" and that he would make arrangements for her to receive the $100,000 death benefit soon, but that amount would be dwarfed by the "billion-dollar recovery" he would obtain from Nissan and Schneider.

26. Rather than work on the "billion-dollar" claims against Nissan and Schneider, however, Defendants asserted a claim for the $25,000 policy limits under the insurance policy of the Mazda's owner. While the Mazda driver was uninsured because her license had expired, the owner, who was the driver's mother, had an insurance policy. Like Ms. Cook's policy, that policy was also issued by GEICO.

27. GEICO agreed to tender the $25,000 policy limits under the Mazda owner's policy. In October 2014, without any prior explanation to Ms. Elliott, Gary sent her a "Closing Statement" that incorrectly showed the total amount of the settlement under the Mazda owner's GEICO policy as $125,000. A copy of that Closing Statement is annexed hereto as Exhibit 2.

28. After receiving the Closing Statement, Ms. Elliot called Gary to find out what it meant. In a telephone conversation on or about October 15, 2014, Gary

falsely told Ms. Elliott that he had negotiated a $125,000 settlement under the Mazda owner's GEICO policy. He also falsely stated that his work to obtain the settlement required him to incur over $8,000 in expenses and that after deducting his 40% contingency fee and a $5,000 future expense reserve, Ms. Elliott would receive $62,642.79.

29. Ms. Elliott asked if that was all she would receive for her claims arising from her daughter's death. Gary assured her that it was not. He said that the settlement under the Mazda owner's policy was "peanuts" compared to the "billion-dollar" recovery he expected to obtain from Nissan and Schneider. In response to Ms. Elliott's question as to the status of those claims, Gary falsely stated that the lawsuits had been commenced and that he and his team were aggressively prosecuting them.

30. In reliance on Gary's representations, Ms. Elliott signed the Closing Statement. Ms. Elliott therefore expected to receive the $62,642.79, which Gary had represented was her share of the $125,000 settlement under the Mazda owner's insurance policy. Weeks and months went by, however, without receiving either the funds or any communication from Gary or anyone else at his firm.

31. Ms. Elliott again started calling Gary regularly, but was told he wasn't available. Finally, in May 2015, Ms. Elliott concluded that Gary was not adequately

representing her interests. On May 26, 2015, she sent Gary a termination letter requesting the return of her complete file. A copy of that letter is annexed hereto as Exhibit 3. Gary ignored that letter, however, and continued avoid Ms. Elliott's calls.

32. In December 2015, Gary's assistant sent Ms. Elliot a GEICO release form for the $100,000 death benefit under the uninsured motorist coverage in Ms. Cook's automobile policy. Ms. Elliott was confused and upset over the release because she didn't understand what it was or why Gary had not responded to her termination letter and her many unanswered telephone messages.

33. Shortly before Christmas 2015, Gary finally called Ms. Elliott. He claimed not to have received her May 26, 2015 termination letter and assured her that everything was "on track" for a billion-dollar recovery. He told Ms. Elliott that he was "her lawyer for life" and that "quick settlements" are never a good idea because defendants and their insurers refuse to make reasonable settlement offers until shortly before trial. He falsely asserted that GEICO had delayed issuing the $100,000 death benefit but, due to his efforts, it had finally agreed to issue a check. GEICO would not do so, however, unless Ms. Elliott executed the release.

34. In reliance on Gary's representations, Ms. Elliott agreed to reconsider firing him. She was still skeptical of signing the GEICO release, however, and she did not do so immediately.

35. In April 2016, Gary called again asking for the release. He repeated his prior false representations regarding the status of the claims against Nissan and Schneider and he promised that he would pay Ms. Elliott the entire $100,000 death benefit as soon as GEICO sent it to him. In reliance on Gary's representations, Ms. Elliott may have signed and returned the GEICO release, but she believes Gary may have forged her signature. The unexecuted release is annexed hereto as Exhibit 4.

36. In June 2016, Ms. Elliot received the $62,642.79 payment that Gary had promised was her share of the $125,000 settlement under the Mazda owner's automobile policy. She did not understand why it had taken so long to receive that payment, since the settlement had allegedly been negotiated, and she had signed the Closing Statement, almost two years previously in October 2014. She was glad to receive the money, however, and although she repeatedly tried to call Gary to inquire about the payment and the status of the $100,000 death benefit, he again was unavailable and did not return her phone calls.

G. Defendants Conceal Their Misconduct.

37. The final order in the Nissan Action, which reaffirms the court's summary judgment in favor of Nissan, was filed on May 30, 2017. Defendants did not inform Ms. Elliott that the Nissan Action had been dismissed, however, until over a year and a half later, in January 2019. On the contrary, Defendants failed to

advise Ms. Elliott of any developments in the Nissan Action and Willie Gary falsely told her that Defendants had commenced an action against Schneider when, in fact, no such action had been commenced.

38. By mid-2017, one year after receiving the $62,642.79 payment Gary had represented was her share of the settlement under the Mazda owner's policy, Ms. Elliott again embarked on a concerted effort to speak to Gary and his colleague, defendant LeRonnie Mason, about the status of her litigation and the $100,000 death benefit. They ignored her inquires, however, and their assistants made excuses that they were very busy with "emergencies" and other priority matters. Ms. Elliott left messages for them to send her the case so she could verify for herself the status of the cases, but they did not respond to her messages or send the files.

39. Finally, on January 17, 2019, LeRonnie Mason telephoned Ms. Elliott and advised her that the Nissan Action had been dismissed due to the expiration of the statute of repose. She subsequently received a letter dated January 17, 2019 from Mr. Mason, which is annexed hereto as Exhibit 5, stating:

> [T]he Court granted the motion for Summary Judgement filed by Nissan North America based on the Statute of Repose. As such we were unable to appeal this issue as the Statute of Repose is not appealable and therefore had no alternative but to close our file.

> This letter will also confirm our conversation this morning where I told you we were in the process of retrieving your file from our storage facility. As I explained this could take a couple of weeks as we have thousands of files in storage. In the interim, I will be forwarding to you a complete copy of your file on a computer disc within the next few days.

40. While Mr. Mason asserted that he sent a prior letter on November 17, 2017, Ms. Elliott never received such a letter. Nor has she received her case files despite Mr. Mason's promise to send them to her.

H. The Gary Firm's Pattern and Practice of Missing Deadlines and Defrauding Clients.

41. Ms. Elliott's meritorious claims against the parties responsible for her daughter's tragic death are not the first claims that the Gary Firm and its lawyers have lost due to missed deadlines. On the contrary, the Gary Firm and its lawyers maintain no coherent system to keep track of the expiration of statutes of limitations and other deadlines imposed by court rules or orders. A series of lost cases, each one of critical importance to the Gary Firm's client, due to the Gary Firm's inability to keep track of or comply with deadlines, establishes that the circumstances of the loss of Ms. Elliott's claims establish an entire want of care and an indifference to consequences sufficient to warrant an award of punitive damages.

42. The irony of the Gary Firm's gross incompetence is that it is one of the most financially successful plaintiffs' firms in the country. The firm's founding and

managing partner, Willie Gary, describes himself as the "Giant Killer" because of his track record of winning multimillion-dollar verdicts against some of the largest and most powerful companies in the world.

43. Yet the Gary Firm has repeatedly been accused by former clients of malpractice, fraud, and other misconduct. In 2003, for example, a group of former clients sued the Gary Firm for fraud and breach of fiduciary duty, alleging that Gary had defrauded them out of $51.5 million in a settlement of an employee gender discrimination lawsuit. The former clients alleged that although Gary concealed the actual settlement amount from them, Gary's local Michigan counsel inadvertently disclosed a spreadsheet setting forth the actual settlement amount to one of the clients. The clients then sued Gary for fraudulently stealing $51.5 million of the settlement. *See Kubik, v. Gary,* 03-cv-73350 (E.D. Mich.) (the "*Kubik* Action").

44. Gary defended against the Michigan allegations by asserting that they were implausible, *i.e*., that a successful law firm such as the Gary Firm would never defraud its clients. After examining some of Gary's emails *in camera*, however, the Michigan court granted the plaintiffs' motion to compel, finding:

> *There is probable cause to believe that a fraud has been attempted or committed* and that the [allegedly privileged] communications at issue were made in furtherance of it.

Exhibit 6 (Feb. 17, 2005 Order in the *Kubik* Action) at 9 (emphasis added).

45. The Michigan court also determined that the Gary Firm may regularly engage in fraud against its clients and that otherwise privileged emails had to be produced under the crime/fraud exception to the attorney-client privilege:

> *[The Gary Firm] may have used a common fraudulent settlement agreement scheme in a variety of cases*, and that discussions [among the Gary Lawyers] about the prospective structure of this scheme may have involved advice in furtherance of fraud.

Id. at 8 (emphasis added).

46. In fact, an expert report by Yale Law Professor Lawrence Fox prepared for the *Kubik* plaintiffs recently became publicly available. A copy of that report is annexed hereto as Exhibit 7. Professor Fox, one of the country's leading experts in legal ethics, explains:

> This is the saddest example of lawyer misconduct I have directly encountered in years of practice. The defendants here, masquerading as champions of their clients and others they categorize as down-trodden or oppressed, in fact used their representation of their clients and these others they purported to represent, to advance their own financial interests, literally taking money out of the hands of their clients and systematically violating multiple duties these lawyers owed them. Their conduct not only injured their clients but also brought opprobrium on the entire profession.

Fox Report (Exhibit 7) at 1-2, 3.

47. The Gary Firm has also repeatedly lost meritorious cases due to gross negligence in missing deadlines and failing to comply with basic court rules and

procedures – conduct that is difficult to explain considering the firm's track record of success and the qualifications and experience of the firm's lawyers. In a potentially landmark race discrimination case brought against the entertainment industry, for example, the Gary Firm failed to obtain racially derogatory emails sent by the defendants' employees. After the Gary Firm retained a specialized e-discovery firm to review emails produced by defendants William Morris and Creative Artists Agency, the e-discovery firm produced a memorandum identifying hundreds of emails containing racially derogatory terms. The Gary Firm never bothered to obtain the racially derogatory emails, however, and instead allowed the e-discovery firm to return them to the defendants. A federal district court judge reviewing the facts of that case concluded,

> It is inexplicable why the Gary Firm failed to obtain the actual underlying emails [identified on the e-discovery memorandum].

Rowe v. Gary, 181 F. Supp. 3d 1161, 1192 (N.D. Ga. 2016) (the "*Rowe* Action").

48. Between 2014 and 2016, the two years in which Defendants were allowing Ms. Elliott's claims to languish and become time-barred, the Gary Firm and its lawyers lost several other cases due to missed deadlines and failure to comply with court orders. In 2014, for example, Ms. Zella Darleen Teague retained Gary to bring a wrongful death case against the tobacco industry when her husband, a life-

long smoker, died of lung cancer. Gary waited until June 24, 2016 – three days after the statute of limitations expired – before filing the complaint. Although the case proceeded because Gary had filed a "civil cover sheet" shortly before the statute expired, it was ultimately dismissed because Gary and his firm repeatedly missed court deadlines, failed to disclose mandatory experts, and failed to offer any coherent explanation for their misconduct. The court explained why it could not grant the Gary Firm's motion to excuse its repeated defaults:

> There is a procedure in place. *There are rules of the court [that] must be complied with . . . or else cases will just run amuck, and the justice system really will fall, and no one will benefit from that.*
>
> So when the Court takes the totality of the circumstances under consideration . . . *the [applicable] factors do weigh against finding excusable neglect in this instance;* and with no excusable neglect, the plaintiff's motion to modify and extend the deadlines is denied.

(emphasis added).

49. During Gary's disastrous prosecution of the *Teague* case, Gary and the same lawyers working on Teague also represented Ms. Geneva Cook-Gervais in a similar wrongful death case against the tobacco industry. The pre-trial deadlines in the *Cook-Gervais* case were approximately two months after the deadlines in *Teague*. Thus, even though the Gary lawyers knew they had failed to comply with the *Teague* deadlines, including the *Teague* court's admonition quoted above, they

did nothing to attempt to comply with the *Cook-Gervais* deadline. When the tobacco defendants moved for summary judgment based on the failure to disclose mandatory experts, the Gary lawyers told Ms. Cook-Gervais that she had no choice but to accept a "nuisance value" settlement of $50,000 to avoid outright dismissal of her case. Like Ms. Elliott and Ms. Teague, Ms. Cook-Gervais had been solicited by Gary's promises that her claim would result in a "billion-dollar recovery."

50. In 2015, before losing the *Teague* and *Cook-Gervais* cases, the Gary Firm lost other meritorious cases due to its repeated failure to comply with court orders and deadlines. On August 25, 2015, for example, a Florida state court dismissed three cases based on a finding that the Gary Firm had failed to comply with multiple court-imposed deadlines and engaged in a "contumacious disregard of the Court's authority." At a hearing on that date, Judge Roby of Florida's 19th Judicial Circuit found that the firm had repeatedly failed to comply with his orders, holding:

> The Court further *finds that this is a contumacious disregard of the Court's authority*, that had there been an issue relating to need, being an extension of the order*, the plaintiff could have very well filed a motion to that effect and waiting until today and coming up with what the Court finds to be specious arguments are inappropriate, and this matter is dismissed*.

(emphasis added).

51. The August 25, 2015 date of that hearing was still well within the two-year statute of limitations governing Ms. Elliott's claims. Had the Gary Firm and its lawyers decided to implement a general review of applicable deadlines in its cases at that time, there was still more than six months to file timely actions on behalf of Ms. Elliott and Ms. Cook's estate. The Gary Firm's failure to do so reflects a level of gross negligence and reckless indifference to consequences that mandates the imposition of punitive damages.

FIRST CLAIM FOR RELIEF
(Legal Malpractice, Breach of Contract, Breach of Fiduciary Duty)

52. Ms. Elliott, individually and on behalf of Ms. Cook's estate, repeats the allegations set forth in paragraphs 1 through 51, as though fully set forth herein.

53. On or about March 15, 2014, Ms. Elliott entered into the Retainer Agreement with the Gary Firm annexed hereto as Exhibit 1.

54. Under the Retainer Agreement, Ms. Elliott entrusted Gary, the Gary Firm and its other lawyers with representing her interests in prosecuting claims arising from Ms. Cook's death, including claims against Nissan and Schneider.

55. Under the Retainer Agreement, the Gary Firm, Willie E. Gary, Chanthina Abney and LeRonnie Mason (collectively, with the Gary Firm, the "Gary Lawyers") agreed to represent Ms. Elliott in prosecuting such claims.

56. The Retainer Agreement gave rise to an attorney-client relationship between Ms. Elliott, as client, and the Gary Lawyers, as attorneys, which existed from March 11, 2014 through January 17, 2019.

57. Defendants owed a duty under the Retainer Agreement to represent Ms. Elliott with ordinary care, skill, and diligence in accordance with the accepted standards of professional service and competence expected of lawyers representing clients in Georgia wrongful death cases.

58. Defendants breached their duty under the Retainer Agreement by failing to exercise the ordinary care, skill, and diligence in accordance with the accepted standards of professional service and competence expected of lawyers representing clients in Georgia wrongful death cases.

59. Defendants owed a fiduciary duty under the Retainer Agreement to place Ms. Elliott's interests over Defendants' own interests.

60. Defendants breached their fiduciary duties under the Retainer Agreement by placing their own interests over Ms. Elliott's interests.

61. Defendants breached their fiduciary duties, contractual duties, and duties of ordinary care, skill, and diligence under the Retainer Agreement by, *inter alia*, engaging in the following conduct:

(i) failing to commence the Nissan Action in a timely fashion, before expiration of the statute of repose on September 3, 2015 and the expiration of the statute of limitations for wrongful death claims on March 10, 2016;

(ii) failing to commence any action against Schneider before expiration of the statutes of limitations for wrongful death and tort claims on March 10, 2016 and September 17, 2016, respectively;

(iii) failing to keep Ms. Elliott advised of the developments in the Nissan Action and Defendants' failure to commence an action against Schneider National;

(iv) misrepresenting that actions against Nissan and Schneider had been commenced when they had not been;

(v) fraudulently representing to Ms. Elliott that they would protect her interests in the $100,000 death benefit under the uninsured motorist coverage of her daughter's automobile policy;

(vi) falsely promising to pay the entire $100,000 death benefit to Ms. Elliott once GEICO paid the death benefit to them;

(vii) deducting a contingency fee from the $100,000 death benefit even though it did not fall within the scope of their retainer agreement and no work was required to obtain the death benefit;

(viii) deducting alleged expenses from the $100,000 death benefit even though no expenses were required to obtain the death benefit; and

(ix) fraudulently retaining $52,357.21 of the death benefit and Ms. Elliott's share of the $25,000 settlement under the Mazda owner's GEICO policy.

62. These breaches of Defendants' fiduciary, contractual and professional duties caused injury to Ms. Elliott, including, but not limited to:

(i) dismissal of the Nissan Action, which according to Willie Gary would have resulted in a "billion-dollar recovery;"

(ii) the loss of the right to start an action against Schneider, which Gary said would have resulted in a "billion-dollar recovery;"

(iii) the delay in receiving any portion of Ms. Elliott's $100,000 death benefit under Ms. Cook's GEICO policy and the loss of $52,357.21 of that death benefit to date; and

(iv) the loss of her share of the $25,000 settlement under the Mazda owner's GEICO policy.

63. An affidavit of merit pursuant to O.C.G.A. § 9-11-9.1 is annexed hereto as Exhibit 8.

SECOND CLAIM FOR RELIEF
(Fraud – Against the Gary Firm and Willie Gary)

64. Ms. Elliott repeats the allegations set forth in paragraphs 1 through 63, as though fully set forth herein.

65. In telephone calls beginning shortly after Ms. Cook's death on March 10, 2014 and extending through October 2014, Willie Gary represented to Ms. Elliott that she should authorize GEICO to send the death benefit under the uninsured motorist coverage of Ms. Cook's automobile insurance policy to him because he

would protect Ms. Elliott's rights under the policy as a "courtesy." Gary's fraudulent representations are set forth in detail, *supra*, at ¶¶ 24-25, 28-30.

66. When GEICO refused to issue a check for the $100,000 death benefit without a signed release from Ms. Elliott, Gary fraudulently induced Ms. Elliott to sign the release by promising to send her the entire $100,000 once he received it. Gary's fraudulent representations are set forth in detail, *supra*, at ¶¶ 33-35.

67. In reliance on Gary's fraudulent representations and promises, Ms. Elliott signed the GEICO release annexed hereto as Exhibit 4.

68. By relying on Gary's false representations, Ms. Elliott incurred damages, including:

(i) The delay in receiving any portion of her $100,000 death benefit under Ms. Cook's GEICO policy and the loss of $52,357.21 of that death benefit to date; and

(ii) The loss of her share of the $25,000 settlement under the Mazda owner's GEICO policy.

THIRD CLAIM FOR RELIEF
(Conversion – Against the Gary Firm and Willie Gary)

69. Ms. Elliott repeats the allegations set forth in paragraphs 1 through 68, as though fully set forth herein.

70. The Gary Firm and Willie Gary assumed and exercised the right of ownership over the $100,000 check representing the $100,000 death benefit under

Ms. Cook's insurance policy without authorization and in hostility to Ms. Elliott's rights.

71. That conduct by the Gary Firm and Willie Gary constitutes (i) an act of dominion over Ms. Elliott's personal property inconsistent with her rights; and (ii) an unauthorized appropriation.

72. That conduct by the Gary Firm and Willie Gary caused Ms. Elliott to incur damages, including:

(i) The delay in receiving any portion of her $100,000 death benefit under Ms. Cook's GEICO policy and the loss of $52,357.21 of that death benefit to date; and

(ii) The loss of her share of the $25,000 settlement under the Mazda owner's GEICO policy.

FOURTH CLAIM FOR RELIEF
(Bad Faith Liability under O.C.G.A. § 13-6-11 – Against the Gary Firm and Willie Gary)

73. Ms. Elliott repeats the allegations set forth in paragraphs 1 through 72, as though fully set forth herein.

74. The Gary Firm and Willie Gary have acted in bad faith in their assumption and exercise of ownership rights over Ms. Elliott's $100,000 death benefit under Ms. Cook's insurance policy.

75. Their fraudulent misrepresentations that they would protect Ms. Elliott's rights under the policy and pay her the entire $100,000 death benefit and their subsequent retention of $52,537.21 of the death benefit constitutes stubbornly litigious behavior.

76. In addition, their false representations that they had commenced timely lawsuits against Nissan and Schneider were made intentionally to prevent Ms. Elliott from firing them and taking other actions to protect her rights.

77. Their conduct caused Ms. Elliott unnecessary trouble and expense, including forcing her to bring this action to recover her property and damages for their inexplicable failure to commence timely claims against Nissan and Schneider.

78. Ms. Elliott is therefore entitled to recover the expenses of this action, including reasonable legal fees, under O.C.G.A. § 13-6-11.

FIFTH CLAIM FOR RELIEF
(Punitive Damages – Against the Gary Firm and Willie Gary)

79. Ms. Elliott repeats the allegations set forth in paragraphs 1 through 78, as though fully set forth herein.

80. The conduct of the Gary Firm and Willie Gary described above, including their failure to commence timely actions against the parties responsible for Ms. Cook's death, their failure to implement an effective system to keep track of

critical deadlines, their repeated loss of meritorious cases due to missed deadlines and failure to comply with court rules and orders and their unauthorized assumption and exercise of Ms. Elliott's rights of ownership to the $100,000 death benefit under Ms. Cook's insurance policy constitutes clear and convincing evidence that their actions showed willful misconduct, malice, fraud, wantonness, oppression or that entire want of care which would raise the presumption of conscious indifference to consequence.

81. The Gary Firm and Willie Gary acted, or failed to act, with the specific intent to cause harm to their clients, including Ms. Elliott.

82. The Gary Firm and Willie Gary are therefore liable for punitive damages under O.C.G.A. § 51-11-2 in an amount to be proven at trial.

JURY DEMAND

83. Ms. Elliott demands a jury on all issues that may be tried by jury.

PRAYER FOR RELIEF

WHEREFORE Ms. Elliott demands judgment as follows:

(i) under the First Claim for Relief, an award of compensatory damages against all Defendants to be proven at trial, but at least $100 million;

(ii) under the Second through Sixth Claims for Relief, an award against the Gary Firm and Willie Gary including:

(a) compensatory damages in an amount to be proven at trial;

(b) punitive damages in an amount to be proven at trial;

(iii) under all Claims for Relief, an award against all Defendants including:

(a) the expenses of this litigation including reasonable legal fees; and

(b) such other legal or equitable relief as the Court deems appropriate and just.

Dated: December 30, 2020

/s/ Todd K. Maziar

Todd K. Maziar
Ga. Bar No. 479860
P.O. Box 56205
Atlanta, Ga 30343
(404) 355-3444

Of counsel:

Edward Griffith
(to be admitted pro hac vice)
The Griffith Firm
45 Broadway, Suite 2200
New York, New York 10006
(646) 645-3784 (mobile)

Counsel for Plaintiff Ernestine Elliott, individually and as Personal Representative of the Estate of Katrina M. Cook

GARY, WILLIAMS, PARENTI & WATSON, P.L.L.C.
221 E. Osceola Street
Stuart, FL 34994
(772) 283-8260
1-800-329-4279
Fax: (772) 283-4996

CONTINGENCY FEE AGREEMENT
(Out of State/Co-Counsel)

In consideration of legal services to be rendered by the Law Firm of **GARY, WILLIAMS, PARENTI & WATSON, P.L.L.C.**, the undersigned client (s) retain(s) said Law Firm to prosecute all personal injury claims, including wrongful death claims, for Client(s) injuries and damages sustained on or about the 10th day of March, 2014.

The Law Firm accepts said employment and is authorized to effect a settlement or compromise, subject to client(s) approval, or to institute such legal action or actions as may be advisable in attorneys' judgment in order to enforce client's rights. The parties acknowledge that the attorneys' fee is negotiable and said negotiated fee shall be equal to 40% of the total recovery. However, in no case shall the fee exceed the maximum amount allowed by law.

I hereby agree to pay for the costs incurred in the investigation, negotiation, litigation, trial, appeal and settlement of my claim. These costs include, but are not limited to, postage, express mail services, long distance telephone charges, travel expenses, faxes, document reproduction, fees for copies of records, photography, settlement brochure, exhibit production, court filing and service fees, process server fees, witness fees, computer research fees, library copy fees, videographer and stenographer (court reporter) fees, transcript fees, expert witness fees, artist, graphic design and other creative consultant fees, and jury consultant fees. The law firm which has advanced such costs shall have a lien on my claim, suit or recovery for costs advanced and for attorney's fees

In the event an appeal is taken, a new and separate agreement shall be entered into by the parties as to services and fees.

An additional 5% fee will be payable from any recovery if garnishment or any proceedings, after judgment, have been brought to collect the judgment or any portion thereof; or if any appellate proceedings are instituted from the lower Court by either side, either pre-judgment/settlement or post-judgment/settlement. These services shall be provided by **GARY, WILLIAMS, PARENTI & WATSON, P.L.L.C.** or at the law firm's discretion, I authorize **GARY, WILLIAMS, PARENTI & WATSON, P.L.L.C.** to employ a separate and independent law firm or appellate specialist on my behalf to perform the appellate services.

Client(s) understand that the law firm of **GARY, WILLIAMS, PARENTI & WATSON, P.L.L.C.** will be assisted by the law office of **FAULHABER FAMILY LAW, LLC** who will receive 5% of the fee from **GARY, WILLIAMS, PARENTI & WATSON, P.L.L.C.**

Client(s) further understand that all attorneys agree to assume the same legal responsibility to Client(s) for the performance of the services, that they will follow the course of Client(s)' case and that they will be available at all times for consultation in this matter. Client(s) do, therefore, acknowledge and consent to the division of fees in Client(s)' case as set forth above.

Client(s) grant the Law Firm authorization, at its discretion, to write letters of protection on any medical bills Client(s) incur and to pay same to the extent permitted by the proceeds of any recovery consistent with this Fee Agreement.

Client(s) further agree that in the event the Court should award attorneys' fees, then Client(s)' law firm shall be entitled to either a reasonable fee determined by the Court, or the percentage of the recovery, whichever is greater.

If a recovery is made and the Client is to receive a recovery which will be paid to the Client on a future structured or periodic basis, the contingent fee percentage shall be calculated on the present money value of the verdict or settlement and paid at the time of settlement.

The Law Firm may withdraw at any time by giving reasonable written notice and the Client(s) agree to sign a consent to withdraw or substitution of counsel in the event of such withdrawal.

Client(s) understand that this Law Firm and its lawyers are prohibited by ethical rules to provide any financial assistance to Client(s), directly or indirectly, for any reason, even if the need arises for food, medical care, shelter, transportation, etc. Client(s) further affirm that neither this law firm nor any of its lawyers have provided, promised or suggested any such financial assistance in connection with Client(s)' employment of this law firm to pursue this legal claim.

Should Client(s) terminate this Agreement at any time after three business days, the Law Firm shall be entitled to a reasonable fee, and if the Law Firm has advanced funds on *Client(s)' behalf in its' representation of Client(s)*, the Law Firm shall be reimbursed for such amounts advanced on Client(s)' behalf.

Should Client(s) have a separate worker's compensation, medicare, medicaid, personal injury protection or medical payment claim, probate or guardianship proceedings which would require additional work on the part of the Law Firm, Client(s) understand that Client(s) will have to enter into a separate contract with the Law Firm to represent Client(s) in those matters.

Client(s) agree that if a probate/guardianship will be necessary, they authorize the Law Firm to take the necessary actions to initiate such probate and/or guardianship proceedings, and agree that a reasonable fee shall be determined under the guidelines as set forth in the Florida Statutes sections 733.6171 and 744.108, which fees and costs will be deducted from any recovery and paid to the Law Firm at the time of disbursement of funds.

DATED this_____ day of _____, 20_____.

GARY, WILLIAMS, PARENTI, & WATSON, P.L.L.C.

Accepted by:

_____ _____
(Client)

_____ _____
(Co-Counsel) (Client)

GARY, WILLIAMS, PARENTI
WATSON & GARY, *P.L.*
CLOSING STATEMENT - CLIENT #46330

SUBJECT OF CASE:

WRONGFUL DEATH

_____/

THE ESTATE OF KATRINA COOK

- vs -

FRANCIS DARR, ET AL

_____/

MONIES RECEIVED FROM:

GEICO GENERAL INSURANCE COMPANY	:	**$ 125,000.00**

LESS DEDUCTIONS:

a)	**Attorney's fees (40%)**		
	Gary, Williams, Parenti	:	**$ 47,500.00**
	Tamar Faulhaber, Esq. (5% of $50,000.00)	:	**$ 2,500.00**

b)	**COSTS:**		
	Advanced by the Law Firm:		
	Postage	:	**$ 13.96**
	Fax	:	**$ .75**

October 10, 2014 @ 1:54pm

Travel and/or Expenses	:	$	713.00
Cobb County Police Department - Accident Report	:	$	5.00
TOTAL ADVANCED COSTS	:	$	732.71

c) **UNPAID COSTS:**

Tamar Faulhaber, Esq.	:	$	769.04
Expert Services:			
Swoope Reconstruction Corp.	:	$	389.09
Swoope Reconstruction Corp.	:	$	5,466.37
TOTAL UNPAID COSTS	:	$	6,624.50

d) **Funds Held in Trust for 90 days in the event any outstanding bills (medical or otherwise) are presented to the Law Firm for payment on behalf of the Estate of Katrina Cook** : $ 5,000.00

Never received funds After 90 day no B to b pa

TOTAL DEDUCTIONS:		
a) ATTORNEY'S FEES	$	50,000.00
b) ADVANCED COSTS	$	732.71
c) UNPAID COSTS	$	6,624.50
d) TRUST FUND HELD	$	5,000.00
TOTAL DEDUCTIONS	$	62,357.21
BALANCE DUE CLIENT	$	62,642.79

I, ERNESTINE INEAL ELLIOTT, hereby state that I have read or had the foregoing explained and authorize my attorney, WILLIE E. GARY, to make the above-mentioned disbursements. *I UNDERSTAND THAT I AM RESPONSIBLE FOR ANY BILLS AND/OR LIENS WHICH DO NOT APPEAR ON THE ABOVE CLOSING STATEMENT.*

DATED THIS 15 OF Oct, 2014

ERNESTINE INEAL ELLIOTT

WITNESS

WILLIE E GARY, ESQ
SENIOR PARTNER

October 20, 2014 @ 3:56pm

To: Gary, Williams, Parenti & Watson, P.L.L.C.

From: Ernestine Elliott

May 26, 2015

Mr. Gary

After much consideration and lack of communication regarding my case. I no longer need your services, please return my complete file to my attention as soon as possible.

Thank you for your prompt attention to my request.

Cordially,

Ernestine Elliott

RELEASE, TRUST INDEMNITY AND SUBROGATION AGREEMENT

KNOW ALL MEN BY THESE PRESENTS, THAT **Earnestine Ineal Elliott, as Administrator of the Estate of Katrina Cook**, the undersigned, for and in sole consideration of the sum of ONE HUNDRED THOUSAND 00/100 ($100,000.00) DOLLARS, receipt of which is hereby acknowledged, does hereby release GEICO General Insurance Company, hereinafter referred to as the insurer, from any further claims on Policy No. 4330055031 issued in the name of Katrina Cook for uninsured motorist benefits arising out of an occurrence on or about, Monday, March 10, 2014 on C. H. James Parkway (State Route 6) near Garrett Road in and about the city of Austell, Cobb County, Georgia.

The undersigned understands and agrees that the insurer is making this payment pursuant to O.C.G.A. § 33-7-11, the Georgia Uninsured Motorist Act. The undersigned further understands and agrees that the insurer is subrogated to all rights vested in the undersigned against the uninsured motorist or motorists involved in this occurrence to the extent of this payment pursuant to O.C.G.A. § 33-7-11(f). The undersigned therefore agrees that the insurer is entitled to be reimbursed fully from any recovery which is made from an uninsured motorist arising out of this occurrence to the extent of its payment and agrees to hold in trust for the benefit of GEICO General Insurance Company all rights, claims, and causes of action which the undersigned has or may have against the person or persons or organization legally responsible in whole or in part for the injuries and damages sustained by the undersigned arising from this occurrence. Any sum in excess of this full recovery by the insurer shall be the property of the undersigned, less a proportionate part of any reasonable costs, attorney's fees and expenses incurred in connection with the prosecution of this claim after the taking of this release. The insurer shall have the right to compromise the claim against the uninsured motorist or motorists for whatever sum it deems advisable without the consent of the undersigned. It is understood and agreed in consideration for this payment that an

attorney selected by the insurer shall have the right to become attorney of record for the undersigned; and the undersigned will execute any forms and take any other action necessary in order for the insurer to pursue its subrogation claim in the name of the undersigned. The undersigned agrees to be present and testify at any trial and to cooperate fully with the insurer in the prosecution of its subrogation interest. The undersigned will execute no release on behalf of any party for damages arising out of this occurrence without the concurrence of the insurer, and the undersigned covenants to keep the insurer or its attorneys advised of the address and phone number of the undersigned. The undersigned covenants that no settlement or agreement has been made or will be made by the undersigned or on behalf of the undersigned with any person or organization other than the company affecting liability to me for loss or damage resulting from the above described occurrence, and no release, receipt, covenant or agreement of any kind has been made or given by the undersigned or on behalf of the undersigned or will in the future be made or given by the undersigned or in the undersigned's behalf, without the written consent of the insurer.

As further consideration for payment of said sum, the undersigned hereby agrees to indemnify and hold harmless the insurer up to the total amount paid pursuant to this release against any and all claims for the value or cost of medical services rendered or provided, liens, (including but not limited to all medical provider liens pursuant to O.C.G.A. § 44-14-470, all Medicare and Medicaid liens, and all ERISA or other valid liens or rights of reimbursement and subrogation), arising out of injuries to the undersigned asserted by any other person, insurer, government or other entity resulting from the above-mentioned occurrence, said indemnity to include all reasonable costs in defending against such claims or liens, including attorney's fees and other expenses. This indemnity agreement shall include all reasonable attorney's fees, costs, and other expenses incurred by the insurer in asserting a claim against the undersigned for indemnity pursuant to this paragraph.

In further consideration for the payment made hereunder and as an inducement to the

insurer, the undersigned declares and represents that all medical bills, hospital expenses, doctor bills, nursing bills, and all other medical expenses incurred by the undersigned arising out of the occurrence described above have been paid and satisfied or will be paid and satisfied out of the proceeds of this release.

IT IS UNDERSTOOD AND AGREED that the insurer has relied upon the foregoing covenants and representations as material to its contractual obligations to the undersigned as evidenced by the payment referred to herein, and that in the event any such covenant or representation is not true, the undersigned will return and repay said amount to the insurer within thirty (30) days after the insurer has given written notice to the undersigned of the falsity of such representation or covenant and demand for such repayment; and that the within instrument and the aforesaid written notice and demand by the insurer shall be sufficient as evidence to establish the obligation of the undersigned to the insurer in any legal proceedings relating thereto.

It is expressly warranted and agreed that no promise or agreement not herein expressed has been made to the undersigned, and in executing this release the undersigned is not relying upon any statement or representation made by anyone who has acted for or in behalf of the insurer or on its behalf, but the undersigned is relying solely upon [his/her] own judgment.

The undersigned further represent that no promise, inducement, or agreement not expressed herein, has been made and that this Release, Trust, Indemnification and Subrogation Agreement contains the entire agreement between the parties. All agreements and understandings between the parties are expressed herein and the terms of this agreement are contractual in nature and not mere recitals and are made in order for the insurer to rely upon them in effecting this agreement. The undersigned authorizes and specifically directs [his/her] attorney of record to dismiss with prejudice the Insurer from any pending lawsuit in which the insurer was served with summons and process pursuant to the Georgia Uninsured Motorist Act or O.C.G.A. 33-7-11(D)(2)(d).

THE UNDERSIGNED WHO IS OVER EIGHTEEN, HAS READ THE FOREGOING RELEASE, TRUST, INDEMNIFICATION AND SUBROGATION AGREEMENT AND FULLY UNDERSTAND ITS TERMS and agrees that it is accepted knowingly and voluntarily for all claims of the undersigned arising pursuant to the Georgia Uninsured Motorist Act, O.C.G.A.§ 33-7-11 et seq., as amended.

This _____ day of January, 2016.

_____
Earnestine Ineal Elliott as Administrator
Of the Estate of Katrina Cook

Witnessed and approved by:

_____
Gary E. Willie
Attorney at Law

STATE OF GEORGIA

COUNTY OF _____

Personally appeared before me, Earnestine Ineal Elliott, as Administrator of the Estate of Katrina Cook, to me known to be the person herein and who executed the foregoing Release, Trust, Indemnity and Subrogation Agreement and acknowledged to me that it was voluntarily executed.

Sworn to and subscribed before me,

This ___ day of _____ 2016.

_____
Notary Public
My Commission Expires:_____

not Signing
Have Questions
Faxed 1/2016

GARY, WILLIAMS, PARENTI, WATSON & GARY, P.L.L.C.

ATTORNEYS AND COUNSELORS AT LAW

January 17, 2019

Ms. Ernestine Elliott
5045 Sophy Drive
Powder Springs, GA 30127

Re: Ernestine Elliott as Personal Representative of the Estate of Katrina Cook v. Nissan

Dear Ms. Elliott:

Pursuant to our telephone conversation this morning, enclosed please find a copy of the letter we sent you on November 17, 2017 regarding the status of the above noted matter. As I outlined in the letter, the Court granted the Motion for Summary Judgment filed by Nissan North America based on the Statute of Repose. As such we were unable to appeal this issue as the Statute of Repose is not appealable and therefore had no alternative but to close our file.

This letter will also confirm our conversation this morning where I told you we were in the process of retrieving your file from our storage facility. As I explained this could take a couple of weeks as we have thousands of files in storage. In the interim, I will be forwarding to you a complete copy of your file on a computer disc within the next few days.

Finally, my paralegal spoke with the Probate Court this morning and was informed that until the Estate is closed it is necessary for you to file the inventory with the Probate Court on an annual basis. I have left a message for Tamara Faulhaber to call me to discuss closing the Estate. I have also written to her regarding this matter and am enclosing a copy of that letter for your review.

WATERSIDE PROFESSIONAL BUILDING
221 S.E. OSCEOLA STREET * STUART, FLORIDA 34994
TOLL FREE (800) 329-4279 * (772) 283-8260 * FAX NO. (772) 220-3343

Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

GARY, WILLIAMS, PARENTI, WATSON & GARY, P.L.L.C.

LeRonnie M. Mason, Esquire
For the Firm.

LMM/mar
Enclosures – as stated

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WENDY KUBIK, et. al.,

Plaintiff,

vs.

WILLIE GARY, et al.,

Defendants.
_____/

CIVIL ACTION NO. 03-CV-73350-DT

DISTRICT JUDGE PAUL D. BORMAN

MAGISTRATE JUDGE MONA K. MAJZOUB

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR ORDER COMPELLING DISCOVERY (DOCKET # 64)

On December 15, 2004, Plaintiffs in the instant action filed a Motion For Order Compelling Discovery which was referred to the undersigned for hearing and determination pursuant to 28 U.S.C. § 636(b)(1)(A). The parties, through counsel, presented oral arguments on the matter on January 12, 2005.

The Defendants to this action formerly represented the Plaintiffs in several sexual harassment lawsuits filed against Company A and Company B. Ultimately, Defendants purportedly settled Plaintiffs' claims for $16 million of which Defendants allegedly took $6 million off the top as a separate fee owed them by Company A and/or Company B and retained 1/3 of the remaining $10 million on contingency. The remaining $6.7 million was divided among the 42 Plaintiffs in a structured settlement to be paid out in annuities over several years . Following the settlement, Plaintiff Harsen discovered, mixed in with other documents, a spreadsheet that references Defendants' $3,309,771.55 contingency fee, Defendants' $6 million fee for programs, and a $51.5 million line item for "programmatic relief." (Plaintiff's Brief in Support of Motion, pg. 11). The spreadsheet was prepared by Sofia McGuire, "an outside consultant used by Defendant Attorneys to

purchase the annuities for the structured settlements." Based on these allegations, Plaintiff filed the instant complaint alleging legal malpractice, common law conversion, breach of fiduciary duty, and contract in contravention of public policy, fraud and statutory conversion.

Plaintiffs filed the instant Motion for Order Compelling Discovery on December 15, 2004 seeking an Order compelling: (1) Defendants Willie Gary, Tricia Hoffler and Sekou Gary to produce their W-2 and/or 1099 from the Gary Law Firm for 2002 and/or their 2002 routine salary and bonus checks; (2) Defendants Robert Parenti, Willie Gary, Tricia Hoffler and/or Sekou Gary to provide testimony regarding programmatic initiatives negotiated between Defendants and each company from whom any of the Defendants ever received any fee, compensation or remuneration; (3) Defendants Robert Parenti, Willie Gary, Tricia Hoffler and/or Sekou Gary to provide testimony regarding the prototype settlement agreement including use of Exhibit 74. On January 3, 2005, Defendants' filed an Answer to Plaintiff's Motion to Compel and a Request For Sanctions to be Imposed on Plaintiffs Pursuant to Court's Opinion.

GENERAL DISCOVERY STANDARDS

The Federal Rules of Civil Procedure provide for broad, liberal discovery of any information which may be relevant to a suit. The discovery rules, like all of the Rules of Civil Procedure, must "be construed and administered to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1; *accord North River Ins. Co. v. Greater N.Y. Mut. Ins. Co.*, 872 F. Supp. 1411, 1412 (E.D. Pa. 1995) (courts should apply discovery rules in accordance with "the important but often neglected Rule 1 of the Federal Rules of Civil Procedure[.]"). Under FED. R. CIV. P. 26(b)(1), discovery may be had "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . if the information sought appears reasonably calculated to the discovery of admissible evidence." The determination of "relevance" is within the court's sound

discretion. *See, e.g.*, *Watson v. Lowcountry Red Cross*, 974 F.2d 482 (4th Cir. 1992); *Todd v. Merrell Dow Pharm.*, 942 F.2d 1173 (7th Cir. 1991); *McGowan v. General Dynamics Corp.*, 794 F.2d 361 (8th Cir. 1986). In applying the discovery rules, "relevance" should be broadly and liberally construed. *Herbert v. Lando*, 441 U.S. 153 (1979); *Hickman v. Taylor*, 329 U.S. 495 (1947); *Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991). "The requirement of relevancy should be construed liberally and with common sense, rather than in terms of narrow legalisms." *Miller v. Pancucci*, 141 F.R.D. 292, 294 (C.D. Cal. 1992).

Generally, the party objecting to the discovery has the burden of showing irrelevancy. *McCleod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990); *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982); *Schaap v. Executive Indus., Inc.*, 130 F.R.D. 384 (N.D. Ill. 1990). Further, "[i]n ruling on a discovery motion, a court will not determine whether the theory of the complaint is sound, or whether, if proven, would support the relief requested." 4 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 26.07[1] (2d ed. 1995); *see also*, *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958). *But see*, *Todd v. Merrell Dow Pharm., Inc.*, 942 F.2d 1173 (7th Cir. 1991) (court may deny discovery when the claim or defense appears baseless or speculative).

1. Plaintiff's request to compel Defendants to produce bonus and salary checks

Here, Plaintiffs have requested Defendants to produce documents regarding Parenti's, Gary's, Sekou's, and Hoffler's share of the distribution of attorney fees received by the Gary Firm for the representation of Plaintiffs. Because Plaintiffs complaint contains allegations of conversion, breach of fiduciary duty, fraud, and breach of contract, these documents are relevant and should be produced. Therefore, Plaintiffs' Motion to Compel is GRANTED. Within fourteen days of the entry of this order, Defendants will produce those documents evidencing the money received by Parenti, Gary, Sekou, and Hoffler as a result of the settlements in Plaintiffs' case.

2. Plaintiff's request to compel testimony regarding programmatic initiatives

Next, the Court considers Plaintiffs' request to compel Defendants' testimony regarding programmatic initiatives. Plaintiffs want the Court to order Defendants to disclose settlement agreements Defendants entered while representing other individuals with claims against other corporations.

Defendants initially responded to Plaintiffs' motion by noting that Defendants were prevented from voluntarily disclosing the agreements by confidentiality and non-disclosure provisions in the agreements themselves. At the hearing on this matter, the parties appeared to resolve this issue when Defendants agreed that an order compelling production from this Court would be sufficient to protect Defendants' interests and that Defendant would not object to such an order. Defendants' Supplemental Brief in Opposition to Motion to Compel Discovery attempted to withdraw from this agreement, arguing that the settlement agreements should be produced *in camera*, at which time Plaintiffs ask the Court for any information in the agreements other than the identity of any of the third parties.

Evidence of a settlement agreement is not admissible to prove the validity or invalidity of the claim settled, but is admissible for other purposes, such as proving bias or prejudice of a witness, or proving an effort to obstruct a criminal investigation. Fed. R. Evid. 408. Defendants conduct in settling cases similar to the cases underlying this action is relevant to the present lawsuit because it may help demonstrate that certain conduct was intentional. The identity of the parties to these other settlements is reasonably calculated to lead to the discovery of admissible evidence regarding Defendants conduct in negotiating and settling cases.

Defendants' objection and alternative proposal are without serious merit. Defendants consented on the record to a Court order compelling disclosure of the settlement agreements. The

protective order in this case gives adequate assurance that the identity of third parties to settlement agreements will not become public knowledge. Defendants argue that the third parties to these settlement agreements cannot appear in the Eastern District because their lawyers are so eminent that their mere presence in the provincial backwater of Detroit, Michigan will inevitably disclose the identity of the parties and, presumably, set the entire town a-talking. This argument is without merit where the parties would be made to appear in a town with a number of persons capable of serving as local counsel. Therefore, Plaintiff's Motion to Compel is GRANTED.

IT IS ORDERED that, within fourteen days of the entry of this order, Defendants shall produce: (1) a complete copy of one of the settlement agreements with each company with the names of the individual claimants represented by the Gary firm redacted,[1] and (2) an affidavit signed by Willie Gary or Tricia Hoffler that lists (a) the name of the company, (b) the amount of the programmatic initiative fee paid by that company, (c) the amount of any other fees or payments received by Defendants from that company separate from the programmatic initiative fee, (d) the number of claimants Defendants represented against the company, (e) the month and year the company paid the programmatic initiative fee, (e) the name and address of opposing counsel, (e) if a lawsuit was involved, the identity of the court, case number and judge and (f) if a lawsuit was not involved, the counties and state where the company and claimants reside. Defendants must notify third-parties with whom they believe they have an obligation to do so about this order. All produced information shall be considered "Confidential Information" and shall be subject to this Court's March 31, 2004 Stipulated Protective Order.

[1]Defendants may redact the names of the individuals corporate third parties.

IT IS FURTHER ORDERED that at Plaintiffs' request, Defendants shall make available via telephone one of the Defendants for more detailed deposition questioning regarding this information.

3. Plaintiff's request to compel testimony regarding prototype settlement agreement as contained in Exhibit 74

Finally, Plaintiffs request this Court to compel redeposition of several Defendants on the subject of a prototype settlement agreement and a document described in the proceedings as Exhibit 74. Plaintiff alleges that Defendants have a "'prototype" settlement agreement used for "settling their multiple plaintiff employment discrimination claims where [Defendants] intend on taking a separate legal fee for determining programmatic relief." (Plaintiff's Brief in Support of Motion, pg. 18).

At deposition, Plaintiff asked several witnesses questions about the prototype agreement as contained in Exhibit 74. Defendants did not allow the witnesses to answer on the ground that the questions sought testimony about communications protected by the attorney-client privilege. Plaintiffs' motion does not ask the Court to compel production of Exhibit 74. Rather, Plaintiffs seek to have this Court order redeposition of the witnesses on the ground that communications about the prototype agreement are not privileged.

Defendants assert that Exhibit 74 and other communications concerning the prototype settlement agreement are protected by attorney-client privilege. Plaintiff contends these communications are not privileged because they are subject to the crime/fraud exception. Both parties appear to realize that an *in camera* inspection of Exhibit 74 is likely, and that the outcome of that inspection will likely determine the outcome of the instant motion.[2]

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[2]The following colloquy took place at the deposition of Mary Diaz after Plaintiffs' attorney attempted to ask about Exbihit 74.

Questions of privilege arising in the federal courts are "governed by principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. The attorney-client privilege covers "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391, 403 (1976).

The attorney client privilege, however, does not extend to communications made for the purpose of getting advice for the commission of a crime or fraud. *United States v. Zolin*, 491 U.S. 554, 563 (1989). The crime-fraud exception to the attorney-client privilege "is predicated on the recognition that where the attorney-client relationship advances the criminal enterprise or fraud, the reasons supporting the privilege fail." *People v. Paasche*, 207 Mich. App. 698 (1994). To establish that

---

> Mr. Wittlinger: Number one, we have established a foundation that Exhibit 74 is attorney-client privileged. And since it's attorney client privileged it was inadvertently produced.
>
> Here's my suggestion as to how we proceed. That I get back all of the copies you have of Exhibit 74. I will immediately then provide to you a privilege log on which probably the only thing will be Exhibit 74.
>
> Mr. Falzon: Okay.
>
> Mr. Wittlinger: Then you can file your motion and I can then argue to the magistrate that the magistrate should look at the document in camera and make a decision as to whether you get it or not.
>
> Mr. Falzon: Okay.
>
> Mr. Wittlinger: And at that point if you get it, we can discuss whether or not the witness needs to be redeposed. So that's my suggestion of how we're proceeding.
>
> Mr. Falzon: And I agree with that.

(Defendants' Answer to Plaintiffs' Motion to Compel, pg. 7-8, citing Diaz Deposition transcript at 49-51).

an otherwise privileged communication falls within the crime fraud exception, the proponent of the exception has the burden of proving (1) that there is probable cause to believe that a crime or fraud has been attempted or committed; and (2) probable cause to believe that the communication at issue was made in furtherance of it. *Zolin*, 491 U.S. at 563, *Sackman v. Ligget Group, Inc.*, 920 F. Supp. 357 (E.D.N.Y. 1996).

Either party may request that the communication be subject to review *in camera* to determine whether the crime-fraud exception applies. *Zolin*, at 574. A district court may not conduct review *in camera* at the behest of the proponent of the exception unless the proponent presents evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability. *Id.* Once this threshold showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court in light of the circumstances. *Id.* Before a court determines whether to do an *in camera* inspection of attorney-client documents to see if those documents contain evidence that the crime-fraud exception applies, the party seeking the disclosure must use "information extraneous to the attorney-client documents to demonstrate that it was reasonably possible that an in camera examination may show that the crime-fraud exception is applicable." *KW Muth Co. v. Bing-Lear Mfg.,* 219 F.R.D. 554 (E.D. Mich. 2003)(citing *United States v. Zolin*, 491 U.S. 554, 572 (1989).

Here, Plaintiffs' entire case rests on the notion that Defendants' settlement agreements were fraudulent. Plaintiff's brief points to several conversations and other documents extrinsic to Exhibit 74 tending to show that Defendants may have used a common fraudulent settlement agreement scheme in a variety of cases, and that discussions about the prospective structure of this scheme may have involved advice in furtherance of fraud. The parties seemed to agree during the deposition of Mary Diaz that Exhibit 74 would be presented for *in camera* review before this Court. More

importantly, the document has already been disclosed to opposing counsel. This Court can no longer protect Exhibit 74 from mere disclosure to Plaintiffs, since Plaintiffs have already seen it. While inadvertent disclosure does not always vitiate the privilege, reviewing an already disclosed document does less to damage the privilege than reviewing a document that has never been disclosed.

After reviewing Exhibit 74 *in camera*, the Court is convinced that there is probable cause to believe that a fraud has been attempted or committed and that there is probable cause to believe that the communications at issue were made in furtherance of it. Thus, any privilege that may have attached to Exhibit 74 and surrounding communications is waived under the crime-fraud exception.

Communications surrounding the production of the prototype settlement agreement are not privileged. Therefore, Plaintiff's Motion to Compel is GRANTED. Plaintiff may redepose any witness who, on the ground of attorney-client privilege, has either refused to testify or been prevented from testifying in response to questions concerning the prototype settlement agreement or Exhibit 74. Defendants will make the witnesses available within fourteen days of the entry of this order, unless Plaintiffs agree to hold the redepositions at a later date.

IT IS SO ORDERED.

Pursuant to Fed. R. Civ. P. 72(a), the parties have a period of ten days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. 636(b)(1).

Dated: 2/17/05

s/ Mona K. Majzoub
MONA K. MAJZOUB
UNITED STATES MAGISTRATE JUDGE

Certificate of Service

I hereby certify that a copy of this order was served upon Jay A. Schwartz, Lawrence C. Falzon, Eric E. Reed, Mark J. Zausmer, Reginald M. Turner, Jr., Timothy Wittlinger and Tricia Hoffler on this date February 17, 2005.

Dated: 2/17/05

s/ Lisa C. Bartlett
Courtroom Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WENDY KUBIK, et al.,	:	CIVIL ACTION NO. 03-73350
	:	Hon. Paul D. Borman
Michigan residents,	:	Mag. Judge Mona Majzoub
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
WILLIE GARY, et al.,	:	
	:	
Florida residents,	:	
	:	
Defendants.	:	

REPORT OF LAWRENCE J. FOX

I am a lawyer duly admitted to practice in the Supreme Court of the Commonwealth of Pennsylvania, the Appellate Division, Second Department of the Supreme Court of New York, the United States Supreme Court and numerous Federal Circuit Courts of Appeal and District Courts. I am a partner and former managing partner of Drinker Biddle & Reath LLP, a general practice firm of over 450 lawyers with a principal office in Philadelphia and branch offices in New Jersey, Pennsylvania, New York, California, Delaware and the District of Columbia.

I have been asked to opine on the conduct of the Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando firm ("Gary firm") in connection with its representation of the plaintiffs herein in their litigation against Visteon Corporation ("Visteon") and Ford Motor Company ("Ford") and the settlement thereof. I have concluded to a reasonable degree of professional certainty that the Gary firm systematically breached the standard of care, violated

the fiduciary duties it owed its clients and engaged in conduct that invoked fraud, misrepresentation and other actionable misconduct.

I have regularly been consulted and testified about the ethics and professional responsibility of lawyers in various proceedings in both state and federal courts throughout the United States. I have spent my entire career as a trial lawyer, first at Community Action for Legal Services in New York City and, since 1972, at Drinker Biddle & Reath. My specialties are general commercial litigation and the representation of and consultation with lawyers regarding their professional responsibilities.

I am the Thomas J. O'Boyle Adjunct Professor of Law teaching legal ethics at the University of Pennsylvania Law School. I was a Visiting Professor at Cornell University Law School in the Fall of 1999 teaching legal ethics and professional responsibility. I have lectured on legal ethics at law schools throughout the country, participated in teaching the first year legal ethics course at the University of Pennsylvania Law School for nearly a decade and was the Robert Anderson Fellow at Yale Law School in 1997.

I have produced and participated in more than one hundred continuing legal education seminars, and I have written extensively in the field. I am the author of *Traversing the Ethical Minefield* (with Professor Susan Martyn), a casebook in professional responsibility, *Legal Tender: A Lawyer's Guide to Professional Dilemmas* and dozens of articles and book chapters, including a chapter on the topic of expert witnesses. I am a former member and Chair of the ABA Standing Committee on Ethics and Professional Responsibility and a former Chair of the ABA Section of Litigation, the largest section of the ABA representing almost 60,000 trial lawyers. I was an advisor to the American Law Institute's twelve year project, *The Restatement of the Law Governing Lawyers*. I am a Fellow of the American College of Trial Lawyers and I

was a member of Ethics 2000, the ABA Commission established to review the Model Rules of Professional Conduct.

In particular, in my role as a member and the Chair of the American Bar Association Standing Committee on Ethics and Professional Responsibility, I had the primary responsibility for drafting three formal opinions addressing the ethics of lawyers' fees, to wit, 93-373 *Contingent Fees in Civil Cases*; 93-379 *Billing for Professional Fees, Disbursements and Other Expenses*; 94-389 *Contingent Fees*. I have also testified on a number of occasions on the reasonableness of fees in connection with lawyers' fee applications like this one, as well as in fee disputes between lawyers and clients. And I have written and lectured extensively on the professional responsibility issues relating to lawyers' fees.

My resume is annexed hereto as Exhibit A. The materials reviewed are listed on Exhibit B. Matters on which I have testified in the last four years are listed on Exhibit C. My compensation in this matter is $600 per hour.

Introduction

This is the saddest example of lawyer misconduct I have directly encountered in years of practice. The defendants here, masquerading as champions of their clients and others they categorize as down-trodden or oppressed, in fact used their representation of their clients and these others they purported to represent, to advance their own financial interests, literally taking money out of the hands of their clients and systematically violating multiple duties these lawyers owed them. Their conduct not only injured their clients but also brought opprobrium on the entire profession.

The Facts

The Gary firm represented 42 plaintiffs in employment discrimination claims against Visteon and Ford. They represented no other clients in the matter.

The matter was not a class action.

Visteon offered to "pay Mr. Gary, on behalf of the 42 claimants, $16,000,000" to settle all claims.

The Gary firm accepted that offer after the terms were changed to provide that as part of the settlement the Gary firm itself would receive directly $6,000,000 of the $16,000,000, it would agree to monitor Visteon's compliance with certain programs Visteon then had or planned to adopt as a result of the litigation and it would agree not to represent any future clients against Visteon or Ford.

The Gary firm had no retainer agreements with any of these clients until after July 29, 2002, after the Agreement in Principle was reached on July 26, 2002.

The Gary firm decided what each client would receive. There are no documents explaining the basis for the allocations. No client was told what any other client was receiving, nor was any client told the total recovery from Visteon. To the contrary, the clients were enjoined by the Gary firm from sharing that information with each other.

The only information the clients received regarding the $6,000,000 Visteon payment to the Gary firm was in a document presented to each client in very brief meetings to secure their consent to the settlement and buried in the final 40-page settlement agreement.

Pursuant to the retainer agreements that were not signed until the settlement with Visteon had been reached, the Gary firm deducted 33⅓% from each client's proceeds for its fee.

The $6,000,000 was fully paid to the Gary firm as part of the settlement.

There is no retainer agreement between Visteon and the Gary firm.

The Gary firm spent one day on Visteon matters in 2004. It plans to spend the same time on this matter next year. There is no contractual obligation on the Gary firm to do anything, outside the settlement agreement.

As soon as the Gary Firm Opened Discussions with Visteon as to any Payment to the Gary Firm, the Gary Firm had a Non-waiveable Conflict of Interest

The Gary firm was retained by the 42 clients to represent their interests. The Gary firm's sole obligation from that moment on was to act in the best interests of the 42 clients to maximize their recovery from Visteon. Whether the subject of compensation to the Gary firm was first raised by the Gary firm or Visteon, once that became a topic of conversation, the Gary firm had an impossible conflict of interest. That conflict is demonstrated in a term sheet offered by the General Counsel of Visteon that Visteon was prepared to pay $16,000,000 to the claimants. With a finite amount of money, the idea that the Gary firm would receive even one dollar of that sum (beyond the huge fees it would receive from the payments made to its clients) meant that the Gary firm's interests were now directly adverse to its clients. Every dollar the Gary firm received directly was a dollar less that the firm's clients would receive in the settlement.

Moreover, while the Gary firm was well represented by itself in these "negotiations" over allocating the amount to be received by the clients on the one hand and the firm on the other ("Let's see, how much of the $16,000,000 should we take for ourselves. Four million? No let's make it six."), the clients were not represented at all, a tragedy that was compounded by the fact that the clients were totally misled into thinking that the Gary firm was representing its clients' interests, not its own. The irony that this occurred from a firm whose stated goal is to give "voice" to little people is not lost on this observer.

Even if Visteon's characterization of its $16,000,000 offer is not accepted, the unwaiveable conflict of interest remains the same. Quite simply the Gary firm could not be negotiating with Visteon on behalf of its clients and even suggesting, hinting or winking at the idea that there should be negotiations between the Gary firm and Visteon regarding payments by the latter to the former. Not only would paying off the lawyer for the plaintiffs be viewed, quite correctly, as either an improper fee or payoff, but also the effect of a demand that as part of the settlement Visteon had to compensate the Gary firm would have an immediate, profound and incalculable effect on Visteon's willingness to pay the plaintiffs.

These clients hired the Gary firm to represent them. These clients were entitled to assurances that the Gary firm would represent only this set of clients vis-à-vis Visteon. These clients were entitled to lawyers whose single focus was maximizing plaintiffs' recovery. And as soon as the subject of compensation from Visteon to the Gary firm arose, all the fiduciary obligations to which these clients were entitled were systematically violated.

The Gary firm's assertion that it was helping all of the employees at Visteon as part of its negotiating for this outsized fee from Visteon is merely a transparent attempt to use alleged good deeds to excuse totally unethical conduct. The Gary firm's clients were the 42 plaintiffs; the firm represented no one else. Its attempt to cloak itself in the good it allegedly accomplished for the other employees at Visteon (to justify the illegal $6,000,000 payment) cannot hide the fact that the Gary firm did not represent any of these employees and acting on their behalf (even if it accomplished some good, a dubious proposition at best) was a violation of the firm's obligations to their actual clients who not only did not "authorize" this additional representation, but also lost $6,000,000 as a result of this "good deed."

Lawyers may not compromise their loyalty or zeal for their present clients no matter how good or well-intentioned the conflicting deed may be. A fortiori they cannot compromise their loyalty or zeal in order to line their own pockets with millions that otherwise would go to their clients.

Nor may the Gary firm "solve" the ethical problem by asserting that they were seeking all of these reforms (and payment for the Gary firm) in order to make the work place a better one for those of the Gary firm's clients who were returning to Visteon. If that were the case, then the Gary firm would have been required to counsel with their clients on the choices available to them. The clients should have been told on the one hand they could receive $16,000,000, and Visteon would implement the program, but the Gary firm would not be monitoring Visteon's compliance; on the other they could get $10,000,000, and the Gary firm would be paid $6,000,000 for compliance. It is hard to believe that, given the choice to which they were entitled, these clients would not have far preferred to receive the entire $16,000,000, particularly since Visteon already had agreed to make these changes, monitoring services could be bought for quite a bit less than $6,000,000, and the plant, in any event, closed within one year. But, of course, these clients never learned there was a choice (though, it must be remembered, either choice would have presented an unethical arrangement).

Rule 5.6(b) Violation

As part of the Gary firm's negotiations with Visteon, the firm agreed never to sue Visteon again. Even if the Gary firm had received no payoff from Visteon, the offering by either Visteon or Gary of this restriction on the Gary firm's future representations violates the rules of professional conduct. That it was done as part of a deal that brought the Gary firm $6,000,000 only makes it worse.

Michigan Rule of Professional Conduct 5.6(b) provides:

> A lawyer shall not participate in offering or making: ...
>
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

The Gary firm's conduct here could not more directly run afoul of this provision. Moreover, the Gary firm's conduct here demonstrates one of the reasons for the rule.

The rule essentially has two purposes. First, from a public policy point of view we do not want to take out of circulation some of the very best lawyers at what they do. But if adverse parties were permitted to bargain for such restrictions, that would be the net result.

Second, the demanding of such a restriction as a condition to a settlement immediately creates a conflict between clients and lawyers. If clients are told they can receive what they wish in settlement or even a little bit more if their lawyers will only agree never to sue the adverse party again, the clients' immediate reaction would be to agree to the restriction to secure what they want. Why not? The clients could care less that their lawyers are being restricted in this way. All they want (justifiably and totally properly) is the money.

But from the lawyers' point of view the situation looks quite different. Even the lawyer most dedicated to the client's best interests would be forced to pause over the detriment the lawyer will suffer in the future to benefit the client today.

Adding compensation for the lawyer as payment for the restriction not only does not cure the problem, it exacerbates it. As already described in Point I, once the lawyer starts negotiating for the lawyer's own account, the conflict with the client becomes even greater, whether the compensation is for a restriction on future practice, for monitoring certain programs or for whatever is offered as an excuse for compromising the lawyer's dedication to the present client and the lawyer's ability to represent future clients.

The bar in Rule 5.6 is explicit, admits to no exceptions and was blatantly violated here. But unlike many Rule 5.6 violating restrictions I have seen, this one directly and immediately caused harm not just to the system of justice, but to the 42 clients as well.

The Gary Firm Breached the Fiduciary Obligation to Communicate

The client's state of ignorance here was a direct violation of Rule 1.4, the rule that reflects the lawyer's fiduciary obligation to communicate with the clients. The clients were not informed of any of the earlier offers, of the $16,000,000 offer, the bases for their disloyal lawyers' allocation of that sum, the $10,000,000 amount allocated to them, the basis on which any decision was made to provide any given client a given amount, the amount the other 41 plaintiffs were receiving, the nature of the undertaking their lawyers had made with Visteon, the restriction on their lawyers' rights to sue Visteon in the future and, of course, the clients never saw documents relating to their lawyers "obligations" to Visteon in return for the $6,000,000 because none exist.

By definition, then, these clients were not consulted on any of these items. The decision to settle under our rules is exclusively within the domain of the clients under Michigan Rule of Professional Conduct 1.2(a). And though some so-called "consent" was extracted from these clients by the Gary firm, the lack of information and the short time dedicated to discussing these matters with each client meant that the client's consent was anything but informed. Where full disclosure was required, the information was affirmatively hidden. Even the alleged disclosure of the $6,000,000 payment extorted by the Gary firm was buried in a very long document, obfuscated with language without meaning and omitted any facts the clients were entitled to be told in full surrounding the negotiation for the $6,000,000 which, if disclosed, would have generated the most serious protest and refusal of the clients to agree to share the $6,000,000

except on the basis any funds received by the clients had to be reduced by the Gary firm's contingent fee (and then, if and only if, I am wrong when I conclude that the Gary firm is entitled to no contingent fee and, in fact, no fee at all in this matter because of the firm's unethical conduct).

The Gary Firm Violated the Aggregate Settlement Rule

The failure to disclose the foregoing information did not simply violate Rules 1.4 and 1.2, it also violated Rule 1.8(g) the aggregate settlement rule. This rule applies any time a lawyer is representing multiple clients seeking individual recoveries from adverse parties. Because we would not want to force each of these individuals to have his or her own lawyer while recognizing the potential conflict position, the lawyer for multiple claimants creates, our rules have a special provision that governs what are called aggregate settlements which is what the Gary firm negotiated here. The rule requires that each claimant be informed of the total recovery, what each claimant is receiving, the bases on which the lawyer is recommending the allocation among the claimants and the opportunity for each claimant to hire individual counsel to advise the claimant about the fairness of the allocation.

None of that, of course, occurred here. The clients were kept in the dark about the $16,000,000, the $10,000,000 assigned to them, the amounts every other claimant was receiving and the opportunity to get other counsel. The reason, of course, is transparent. If the clients had gone to other counsel before the settlement, this settlement would never have been approved and the $6,000,000 would never have been paid to the Gary firm. But there is no exception to the aggregate settlement rule to maintain client ignorance of payments to their lawyers. Nor is there an exception if the other side in violation of Michigan Rule of Professional Conduct 8.4(a) asked the Gary firm to keep this information confidential from the firm's clients.

The Gary firm seems to think that its conduct can be justified because it got a lot of money for its clients, perhaps in its view more than the facts of their cases deserve. It is not surprising and hardly improper for Visteon's General Counsel to assert that she did not want the Gary firm's clients to get a "windfall," it is totally unseemly for the Gary firm, in defending its conduct, to be disparaging its own clients or denigrating their claims.

Indeed, it is quite extraordinary to read the deposition transcript of the General Counsel of Visteon, Stacey Fox, and observe counsel for the Gary firm repeatedly attempt to get Ms. Fox to admit that she did not want the plaintiffs to get too much money, as if that assertion by Ms. Fox would somehow provide the Gary firm with a defense here. Putting aside for the moment Ms. Fox's repeated admissions that she had no concerns if all of the $16 million went to the 42 plaintiffs, what Ms. Fox thought then or thinks now about the amount received by the plaintiffs does not begin to affect the ethical obligation of the Gary firm whose obligation was clear. No matter what Visteon thought of the amounts the plaintiffs were being paid, it was the Gary firm's obligation to maximize that amount. In fact the more upset Visteon was with the amounts the plaintiffs were receiving, the more likely it was that the Gary firm was acting in an ethically proper way.

The Gary firm was not hired to judge what was a fair amount for its clients to receive. Rather, its sole duty was to maximize the amount each client recovered and, even if the Gary firm were really of the view that the clients were being amply rewarded, that did not permit it to secretly act as judge and jury in a "proceeding" of which the clients were entirely ignorant to take money away from the clients and put it in the Gary firm's own pocket on the ground that the clients did not deserve it.

The Gary firm had a fee agreement with these clients to retain one-third of each client's recovery for his fee. The whole purpose of that arrangement was to perfectly align the interests of the lawyer with the best interests of the clients. That alignment got destroyed when the law firm decided it was entitled to 100% of a portion of the client's recovery.

The Gary Firm's Conduct Violated Rule 1.5

1. The Contingent Fee Agreement

Putting aside for the moment the $6,000,000 payment to the Gary firm, a payment that clearly violated Rule 1.5, the Gary firm violated Rule 1.5 in other respects. Rule 1.5 requires that all contingent fee agreements be in writing. Yet virtually the entire time the Gary firm was allegedly representing plaintiffs there was no written contingent fee agreement between these clients and the Gary firm. This requirement of a written contingent fee agreement is no window dressing, mere surplusage intending to make lawyers' lives more difficult. Rather the rule is intended to protect clients in connection with their entering into a special relationship with a lawyer, one that is so special that even jurisdictions that do not generally require written fee agreements generally, always require contingent fee agreements to be documented. This is because the idea of a client sharing a portion of the client's recovery with a lawyer is such a remarkable concept, we want clients to fully understand the implications of their acceptance of this arrangement from the beginning. It is also intended to assure that the contingency is set at a time when client and lawyer are in similarly ignorant positions about what the future holds. As a result, when lawyers have sought to collect under an oral contingent fee agreement, courts have not hesitated to refuse to enforce those alleged agreements. See, e.g., *Starkey, Kelly, Blaney & White v. Nicolaysen*, 796 A.2d 238 (N.J. 2002).

Apparently, the Gary firm recognized its breach of its duty to its clients to have a written contingent fee agreement at the very last minute and at a time after a tentative settlement had been achieved. At that point the firm sprang into action and insisted the clients sign contingent fee agreements. But that process was fatally flawed from an ethical point of view. First, the clients were not informed at that time that the status of the case was such that a tentative settlement had already been achieved nor were they given the details of that settlement. Second, the clients were not told, as the rules and the lawyers' fiduciary duty clearly required, that it was in the best interests of the clients to retain these lawyers on an hourly basis and save themselves collectively millions of dollars of contingent fees. Mich. R. Prof. Conduct 1.5, comment [3]. Third, calling for a contingent fee of one-third when there was no contingency at all, was a clear violation of Rule 1.5's injunction against unreasonable fees. At the point at which these agreements were tendered to these clients, offering any contingent fee agreement was unreasonable, and even if one were reasonable, it would be on the order of a one or two percent fee, reflecting the near certainty that the result the clients hoped for would be achieved.

2. **The $6,000,000**

Even if there were any way to view the $6,000,000 payment to the Gary firm as proper (there is not), the firm could not seek or accept that money because it was an unreasonable fee. The Gary firm as described above already improperly received one-third of $10,000,000, or $3,333,333. Add to that $6,000,000 and it turns out, other improprieties and breaches aside, that the Gary firm received $9,333,333 of a total recovery of $16,000,000. Putting aside taking the $6,000,000 away from their own clients, that means the Gary firm snared for itself a 56% contingent fee – in a case in which the contingent fee agreement was not signed until the contingencies had been reduced to almost zero. This number is so beyond what lawyers

reasonably charge in cases that have real contingencies that it shocks the conscience; it also reflects the charging of an unreasonable fee in violation of Rule 1.5. See Michigan Court Rule 8.121 (any fee over one-third is prohibited).

The Gary Firm Lost Its Professional Independence

One of the most ethically problematic areas of professional responsibility is when a lawyer represents a client, but is paid by someone else. Our great concern, which Rule 1.8(f) was designed to address, is that while the lawyer owes absolute fidelity to the client, the fact of payment by a third person can compromise the lawyer's loyalty. One need only think of an insurance company paying a lawyer to defend its insured. The insured, the lawyer's client, may wish a certain defense, but the insurance company might balk at the cost of defense. The lawyer is conflicted, torn by the rules that tell the lawyer the client is the insured and the fact that the lawyer is being paid in this case – and perhaps many others – by the insurance company. As a result, the rule requires both that the client give informed consent to the third party payment and that the arrangement not interfere with the lawyer's independence of judgment nor interfere with the lawyer-client relationship.

Of course, this rule never contemplated that the lawyer would be receiving compensation from the adverse party, since that kind of payment is clearly prohibited by other law. Yet here not only was the lawyer compensated by the other side, but precisely the deleterious effects the Rule was designed to prevent occurred in this matter. The clients never gave informed consent to this payment arrangement (nor would such consent, if secured, overcome the ethical problems thereby generated). More importantly, the payment by Visteon to the Gary firm clearly interfered with the Gary firm's independent professional judgment and the client lawyer relationship. A lawyer whose independence was not compromised by his own self interest

would have made the entire $16,000,000 available to the clients. A lawyer who recognized the importance of preserving the lawyer-client relationship would have done the same. But once these lawyers thought they could get any direct payment from Visteon, the conflict with the clients became profound and the violation of Rule 1.8(f) manifest.

The Gary Firm Railroaded the Settlement

A corollary of the violation of Rule 1.8(f) is the totally improper way the Gary firm handled the securing of agreements by its clients to this settlement. Totally uninformed of their lawyers' betrayal, these clients did not receive the careful, competent, diligent and independent advice to which they were entitled to consider the settlement with full knowledge of all its implications. Any review of the agreement process demonstrates that the Gary firm was so hell bent on getting the necessary approvals that none of the requirements for good advice and informed consent were met. How could it be otherwise? With a $6,000,000 "bonus" on the line, who could expect the independence of professional judgment to provide sage counsel in a conflict-free way. It would not only have been unrealistic to expect anything more under these unseemly circumstances, but as it turns out, our expectations were not dashed: the Gary firm misled their own clients into accepting this settlement by non-disclosure and artful misdisclosure. The result was a lot of signatures on pieces of paper, but shame on our profession.

The Gary Firm Seized an Improper Proprietary Interest in the Litigation

Rule 1.8(j) provides that a lawyer may not obtain a proprietary interest in the subject matter of litigation the lawyer is handling. The purpose of this Rule again is to protect the professional independence of the lawyer on behalf of the client. If the lawyer's stake is too large, then the lawyer may act in the lawyer's self-interest, not the best interest of the client. The

moment the Gary firm broached the subject of programmatic relief with lawyers representing Visteon, this rule was violated. Now the Gary firm was not only in conflict with its clients, its stake in the litigation became greater than that of all its clients combined to the point that its interest in the one-third fee its clients would pay paled in comparison to what the Gary firm saw itself collecting for its own account. This, of course, is precisely why Rule 1.8(j) was drafted: To reflect a lawyer's fiduciary duty to put the interests of its clients ahead of its own, a principle that became the first casualty in the Gary firm's representation of these 42 individuals.

The Great Unanswered Question: What is the $6,000,000?

One clear indication of the multiple fiduciary duty breaches here is the difficulty the Gary firm has in describing the $6,000,000 payment. The Gary firm lawyers seem united in the proposition that Visteon did not become a client of the Gary firm. Therefore they contend that this was not a professional fee for legal services. But, if it is not a professional fee, then the only alternative, from an analytical point of view, is that this is a payment being made from the adverse party to its opponents' lawyer. There is no polite way to characterize such a payment. Such payoffs are specifically prohibited by law. Yet if the Gary firm is to be taken at its word – that it never entered into a lawyer-client relationship with Visteon (an arrangement that itself would be totally improper) – then the Gary firm leaves us no choice but to conclude that the payment was unlawful.

The Gary firm seems to rely – quite incorrectly – as a justification for the receipt of the $6,000,000 on an analogy to fees that are received by lawyers who represent a group of individuals in class action litigation. It is true that in class action litigation the lawyers on behalf of the class will sometimes achieve non-monetary relief on behalf of the class and will be awarded a sum to be paid by the defendants on account of the lawyers' fees. But the difference

between that arrangement and the one that was struck here demonstrates the ethical propriety of the former and the professional responsibility disaster of the latter.

In the class action everything must be approved by the court, and that approval only comes after a full hearing with ample prior notice to everyone involved so that anyone with an interest in the matter can make a presentation to the court on why the petition by the lawyers for the class for fees should either be approved or rejected. The terms of the settlement are disclosed; the nature of the alleged affirmative relief is described in detail; the amount of the fee sought is made available to everyone; the lawyers are required to disclose in a fee petition in great detail the hours they spent, the activities they undertook, their normal hourly billing rates, any premium on their hourly rates that they are seeking, and their justification for the fee award.

Next, after carefully being able to review of all of this documentation (and the ability to seek additional documentation and discovery, including depositions), those who oppose the petition are able to argue why the fee petition should not be granted, to assert that the accomplishments achieved by these lawyers were not that great, that the lawyers churned hours and/or claim excessive hourly rates, that multiple lawyers were billed time to tasks where only one was needed, that far too much senior lawyer time was dedicated to the matter, and for those and other reasons the fee petition should be denied in whole or in part.

Then, and only then, after this full-fledged presentation by advocates on both sides, an independent judge determines the amount of the fee, if any, that will fairly compensate the lawyers for the class.

Compare that with what happened here. One version is that the Gary firm simply decided on its own to take $6,000,000 out of the $16,000,000 that was being offered by Visteon.

But even assuming that, in fact, the Gary firm engaged in real negotiations with the Visteon lawyers over the $16,000,000, the process contained none of the safeguards that are present in the class action to protect the individual plaintiff here. The Gary firm was negotiating with Visteon an allocation between its clients and the firm. The Gary firm had every incentive to allocate as much as possible to itself, and the party on the other side, Visteon, could not have cared less what the allocation was, so long as the plaintiffs signed releases and the settlement was approved.

When one looks at the valuing of the so-called programmatic relief that the Gary firm claims it achieved, things actually get worse. The Gary firm had every reason to value that relief at an extraordinary number like $52,000,000 because the Gary firm wanted to use that number to justify its fee. Visteon has an identical interest in exalting the value of the programmatic relief, simply for different reasons. Visteon wanted to proclaim that it was undertaking very expensive and far-reaching action to demonstrate what a great public citizen the company is. But nowhere in this process was there anyone to suggest that the fee for the programmatic relief was no more than a sham or that the Gary firm's contribution to achieving that relief was mere surplusage given the guidance Visteon was receiving from its real lawyers at Holland & Knight. More important, no one was participating in the process to represent the clients of the Gary firm that have been so quickly abandoned by that firm as it sought to justify its unethical, even criminal conduct. Finally, no one was participating in the process as a judge does in a class action settlement to decide what is fair.

And the result is just what one would expect: not a fee award that emerges from the adversary process approved by a court after a full hearing, but a "fee award" that is solely the

result of secret, undocumented negotiations where the clients' interests were systematically trampled.

The Ethical Violations Were Not Waiveable

While hardly well articulated (and not articulated at all as to those ethical violations the Gary firm did not even think about) there is a reliance by the Gary firm that somehow their clients waived the fiduciary obligation violations that are now being asserted. There are two reasons these post hoc rationalizations are unavailing. The first is that the transgressions by the Gary firm were not waiveable. And the second, addressed in the next section of this Report, is because the Gary firm clients never consented to these assaults on their rights as clients.

a. The Conflicts of Interest Were Not Waiveable.

A lawyer may only seek a waiver of a conflict of interest in situations in which a reasonable lawyer would conclude that, despite the conflict, the lawyer will be able to represent the clients with no material adverse affect on the representation, i.e. the conflict will not cause the representation to be "adversely affected," Michigan Rule of Professional Conduct 1.7(b)(1). A typical example of a waiveable conflict of interest would be when a lawyer represents a bank on an environmental claim and simultaneously seeks to represent a borrower from the bank in securing a loan. The matters are unrelated; the bank is in the business of making loans; nothing the lawyer does on behalf of borrower can be viewed as attacking, disparaging or injuring the bank.

Here, however, that situation is turned upside down. The Gary firm's obligation to the clients is to enhance the clients' recovery to the greatest extent possible. The Gary firm is required to argue that all of that $16,000,000 offered by Visteon should be paid to its clients. When the Visteon General Counsel tenders a settlement agreement in principle that pays

$16,000,000 to the clients, the Gary firm is supposed to notify the clients of the $16,000,000 offer and let the clients decide whether to accept that number or seek even more.

But the Gary firm's conduct here when that agreement in principle was tendered proves the unwaiveability of the conflict. Instead of popping champagne corks at their clients' good fortune, and without any disclosure to the clients of the terms of the agreements in principle and any consultation with the clients at all, the Gary firm asks Visteon for the agreement in principle to be amended to take $6,000,000 away from their clients and .... given to the Gary firm directly.

Unfortunately, that is precisely the dismal conduct one would expect as a result of the conflict under which the Gary firm was laboring, which is precisely why the conflict created by the Gary firm's first efforts to secure independent compensation (beyond its way too generous one-third fee) is a non-waiveable conflict. It is a conflict that literally turns the lawyers for the claimants into their direct adversaries, with every dollar the Gary firm is able to secure from the total representing one less dollar that goes to the clients. Indeed, this conflict situation is in every respect as bad as if the Gary firm tried to represent Visteon and the plaintiffs simultaneously. In my view no reasonable lawyer could ask for a waiver of this conflict of interest.

b. The Clients Cannot Consent to Rule 5.6 Violations

As described above, the Gary firm engaged in the worst form of violation of Rule 5.6 – it entered into an agreement never to sue Visteon again, and it received compensation of $6,000,000 for agreeing to the restriction. Quite simply, our rules of professional conduct do not permit a waiver of this provision. Nor could they since the entire purpose of the rule is to prevent the lawyer and the client from acting collusively to avoid the rule's purposes. The fact that here lawyers and clients did not act in tandem – that the lawyer snared all of the benefits of

the Rule 5.6 violating limitation – does not change the fact that the Gary firm was prohibited from seeking a waiver of the provisions of Rule 5.6 from anyone.

c. The Clients Cannot Waive the Protections of Michigan Rule 1.8(f)

Rule 1.8(f), as noted, is designed to provide certain minimum safeguards for clients who are parties to aggregate settlements. Aggregate settlements by definition carry with them conflicts of interest among the clients. The provisions of Rule 1.8(f) are designed to ameliorate the effects of these inherent conflicts of interest by requiring certain steps be taken by the lawyer representing these claimants. Therefore, it is never permissible for the lawyer or lawyers involved in an aggregate settlement to seek from the clients a waiver of the rule's requirements. At a minimum, the rule tells us, the clients must learn the specified information and receive the required advice. Having assumed the difficulty of representing these multiple clients, the lawyer may not then ask the clients, for example, to waive their entitlement to know the amount of the overall settlement and the amount every other claimant was receiving. Yet here the Gary firm not only refused to share that essential information, but also, by virtue of the draconian confidentiality shackles placed on the clients, prevented the clients from ever learning that information on their own. As a result, the Gary firm is prohibited from asserting that any of the documents it presented to its clients could possibly waive the clients' rights under Rule 1.8(f) or any of the other provisions of the rules that the Gary firm systematically violated.

d. There is an Absolute Prohibition on Lawyer's Obtaining a Proprietary Interest in Litigation.

Rule 1.8(i) is an absolute. A lawyer may not obtain a proprietary interest in litigation; the evil thereby created is too sinister to admit of an exception. Therefore it is impermissible for a lawyer to seek a waiver of the rule's protections and any waiver thereby obtained – as the Gary firm might assert based on the flawed retainer agreement – is of no ethical

significance. The fact is this Rule reflects a minimum standard below which no lawyer's conduct may fall no matter how the client might be misled into approving the lawyer's securing of a proprietary interest.

The Clients Did Not Consent After Consultation

Even if the Gary firm were permitted to argue that it was free to seek waivers here of the Gary firm's profound conflict of interest or any of these other violations of ethical safeguards, the uncontradicted record here demonstrates that any consent obtained was not secured after the required consultation. Simply a list of those items of information that – by the Gary firm's own admission – were systematically withheld from the clients will demonstrate the point.

1. All pre-settlement offers from Visteon.
2. The original offer to the Gary firm of $16,000,000 to the claimants.
3. The number was changed to $10,000,000 at the request of the Gary firm.
4. A settlement had been achieved before the first retainer agreement was tendered.
5. The total amount of the settlement.
6. The amount each client was receiving.
7. The bases for the allocation to each client.
8. The availability of compensation at an hourly rate.
9. The fact that the Gary firm was negotiating for its own direct payment.

Conclusion

The 42 clients of the Gary firm are not the only victims of that firm's systematic violations of its fiduciary obligations to its clients. The entire profession is besmirched when lawyers ignore the rules of professional conduct and take advantage of their power, privilege and

familiarity with the system to exalt their own interest at the expense of their clients. It is only that much worse when one realizes that the Gary firm has applied the very same modus operar to its representation of clients who are employees of other large companies. As a result, the G firm has not only subjected itself to serious disciplinary proceedings but also appropriate relief this action by its former clients. Under these circumstances, in my view, the Gary firm should required to pay the $6,000,000 to their clients, forfeit any fees that they deducted from the $10,000,000 that was paid to their clients and be liable for exemplary damages because of the clear violations here.

Make no mistake about it. What is outlined in this report is not one expert's carefully-crafted opinion coming down on one side of a very close question of professional responsibility Rather, this report reflects an extraordinary example of lawyers blatantly violating the clear mandate of their fiduciary duties to their clients and multiple specific rules of professional conduct designed to reflect those duties.

Lawrence J. Fox

Dated: February 24, 2005
Philadelphia, PA

Publications: Books

- "Accounting Experts" in Expert Witnesses, edited by Faust Rossi, published by ABA (1991).
- "The Law of the Third Circuit" in Sanctions, published by ABA (1991).
- "The Special Litigation Committee Investigation: No Undertaking for the Faint of Heart," edited by Brad D. Brian and Barry F. McNeil, published by ABA (1992) (rev'd 2002).
- *Legal Tender*, (American Bar Association 1995).
- "The Last Thing Dispute Resolution Needs Is Two Sets of Lawyers for Each Party," edited by Russ Bleemer, published by CPR Institute for Dispute Resolution and Alternatives (January 2001).
- "Mediation Values and Lawyer Ethics: For the Ethical Lawyer the Latter Trumps the Former," *Dispute Resolution Ethics, A Comprehensive Guide*, edited by Phyllis Bernard and Bryant Garth, published by ABA (2002).
- *Traversing the Ethical Minefield*, by Susan Martyn and Lawrence J. Fox, published by Aspen (2004).
- "The Academics Have It Wrong: Hysteria Is No Substitute for Sound Public Policy," *ENRON Corporate Fiascos and Their Implications*, edited by Nancy B. Rapoport and Bala G. Dharan, published by Foundation Press (2004).

Publications: Articles

- "Waivers of Future Conflicts of Interest: A Blessing Or A Nightmare?" and "Issue Conflicts: Genuine Ethical Dilemmas Or Problems Of Public Relations" published by Securities Regulation Institute (1989).
- "CB&H Announces New Public Service Initiative" published by The Pennsylvania Lawyer (March, 1991).
- "Two Views on Ancillary Business" published by South Carolina Lawyer (1991).
- "Restraint is Good in Trade," National Law Journal, April 29, 1991.
- "Litigation in 2050 - A Backward Forward, Topsy-Turvy Look at Dispute Resolution," and "Professionalism: Misplaced Nostalgia or Meaningful Loss?" ABA National Conference on Professional Responsibility (May, 1991).
- "Fie On The Purchasing Agents: An Outside Counsel's Reply to Ellis Mirsky's In-House Counsel Recognizing New Buying Opportunities," Corporate Counsel, September, 1991.
- "Slip-Sliding Away," The American Lawyer, October, 1991.
- "The Future Of The Law Firm As An Institution, International Society Of Barristers, October, 1991.
- "The Ghost of Litigation Future," Litigation, Fall, 1991.
- "It Wasn't the Money," The American Lawyer, December 1992.
- "The Inquiry," Business Law Today, December 1992.
- "Cowboy Ethics on the Main Line," Litigation, Winter 1993.
- "Can This Marriage Be Saved?" National Law Journal, June 1993.
- "OTS vs. Kaye Scholer," The Business Lawyer, August, 1993.
- "Mini-trials," Litigation, Summer 1993.
- Letter to Professor Hazard: Maybe Now He'll Get It, Vol. 7 Georgetown Journal of Legal Ethics, Summer 1993.
- "The Right Thing for the Wrong Reason," Alternatives, November 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ERNESTINE ELLIOTT, individually and as Personal Representative of the Estate of KATRINA M. COOK, Plaintiff, -against - GARY, WILLIAMS, PARENTI, WATSON AND GARY, P.L.L.C., WILLIE E. GARY, CHANTHINA B. ABNEY, and LERONNIE MASON, Defendants.	Civil Action File No. **AFFIDAVIT OF MERIT**

COUNTY OF FULTON)
) s.s.:
STATE OF GEORGIA)

DAVID H. MOSKOWITZ, being duly sworn, deposes and says:

1. I am a lawyer admitted to practice in Georgia. I make this affidavit of merit pursuant to O.C.G.A. § 9-11-9.1 in support of plaintiff's legal malpractice claims in this action. Plaintiff's legal malpractice claims are set forth in her complaint (ECF No. 1) in the First Cause of Action.

I. My Qualifications.

2. I graduated from Emory University in 1979 with a B.A. in History and Economics. After two years in a work study program in Israel, I attended Emory

Law School, where I graduated with a J.D. in 1984. I was admitted to the Georgia bar in November 1984 and over the next three and a half decades, I've practiced law in Georgia and served on a variety of bar committees and organizations. In addition to my decades-long membership in the Georgia Trial Lawyers Association and the Workers' Compensation Claimants Lawyers, I have served as Board Member of the Georgia Labor Management Board (2016-present); Board Member of the National Association of Social Insurance (2018-present), Labor Union Chair for the American Bar Association, labor & Employment Law Section (2016); Board Member of the Workers' Injury Law & Advocacy Group (2004-present); Liaison Chair to review, revise workers' compensation rules and legislation (1994-2012); the Workers' Compensation Panels of the National Football League Players' Association (2004-2009), the Major League Baseball Players' Association (2004-2012), and the Professional Hockey Players' Association (2004-2012); the Executive Committee of the Atlanta Bar Association (1988-1991); the Workers' Compensation Claimants Association, where I've served as Executive Committee Member (1988-1998), Secretary (1991-1992), Treasurer (1992-1993), Vice-Chairman (1993-1994), Chairman (1994-1996), and Special Projects Chairman (1996).

3. I have also held a variety of government-appointed positions, including appointment by Lieutenant Governor Mark Taylor to the Georgia State Ethics

Commission (2004); appointment by Governor Roy Barnes to serve on the Judicial Nominating Committee (2000-2003), the Workers' Compensation Review Commission (2000), and the Governor's Commission on Certainty in Sentencing (1999-2000); appointment by Governor Zell Miller to serve on the Criminal Justice Coordinating Council as Committee Chairman on Crime Victims Compensation (1992-2012); and appointment by Governor Joe Frank Harris to serve as Chairman of the newly created State Board of Crime Victim Compensation (1990).

4. My legal practice has focused on workers' compensation law but includes a broad variety of litigation and non-litigation matters. During law school, I worked as a law clerk at the Atlanta firm of Marcus & Moskowitz, where I continued to work after graduation, first as an associate (1984-1988), then as a partner (1988-1992), and then as a senior partner at Moskowitz & Carraway (1992-2007). Between 2007 and 2018, I was an equity partner in the Atlanta office of Morgan & Morgan, where I was Head of all Workers' Compensation Departments for the State of Georgia. Since 2018, I have practiced at my own firm, The Law Offices of David H. Moskowitz, LLC.

5. Additional information about my background and experience, including my several speaking engagements on legal topics, is set forth on my resume annexed hereto as Exhibit 1.

II. Relevant Facts Alleged in the Complaint

A. The Fatal Car Accident.

6. On March 10, 2014, the plaintiff's daughter, Katrina M. Cook, was killed when her 2005 Nissan Infiniti was involved in a multi-car crash on C.H. James Parkway in Cobb County, Georgia. Ms. Cook was traveling northbound when two southbound cars collided, sending one of them into Ms. Cook's northbound Infiniti. A speeding and tailgating Freightliner tractor-trailer then crashed into the rear of the Infiniti, causing it to burst into flames. Complaint at ¶¶ 11-12.

B. Retention of Defendants to Commence Personal Injury and Wrongful Death Actions.

7. On March 15, 2014, plaintiff Ernestine Elliott retained Florida lawyer Willie Gary and his firm, Gary, Williams, Parenti, Watson and Gary, P.L.L.C., to represent her, individually and in her capacity as personal representative of her daughter's estate, in personal injury and wrongful death claims arising out of her daughter's accident. Complaint at ¶ 15, Ex. 1.

8. During the four days between the accident and Gary's retention, Gary traveled to Georgia to meet with Ms. Elliott. He told her she had two meritorious claims arising out of the accident: (i) a "crashworthiness" product liability claim against the manufacturer, Nissan, because the car should not have burst into flames

when it was rear-ended by the tractor-trailer; and (ii) a negligence claim against the owner-operator of tractor-trailer, Schneider National Carrier, Inc. ("Schneider"), and its employee-driver, Mr. Alhassane Dansoko, because the truck shouldn't have been speeding or tailgating. Gary said that each of these claims would result in a "billion-dollar recovery." Complaint at ¶ 14.

9. When Ms. Elliott told Gary that she would prefer to wait until after her daughter's funeral to discuss legal actions, Gary said that it was important to retain him immediately so he could take action to preserve "critical evidence," before it was lost or compromised. Relying on those representations, Ms. Elliott executed a written retainer agreement on March 15, 2014, only five days after her daughter's death. Complaint at ¶¶ 14-15.

10. In fact, however, Gary took no action to preserve evidence arising out of the crash. As a result, the four vehicles involved in the crash and related physical evidence has been lost and is no longer available. Complaint at ¶ 16.

C. Defendants Fail to Commence Actions before the Statute of Repose and Statute of Limitations Expire.

11. Gary waited until May 24, 2016, over two years after being retained, to commence a product lawsuit against Nissan. Because Georgia's 10-year statute of repose for product liability claims expired on September 3, 2015, however, the court

granted Nissan's motion for summary judgment and dismissed that lawsuit with prejudice. Complaint at ¶¶ 17-21.

12. Gary never commenced a wrongful death lawsuit against the tractor-trailer owner/operator, Schneider, or its driver, Mr. Dansoko. The two-year statute of limitations for wrongful death claims expired on March 10, 2016. Complaint at ¶ 22.

D. Defendants Charge a 40% Contingency Fee on Life Insurance Proceeds they did not Recover.

13. Ms. Cook had an automobile insurance policy issued by GEICO General Insurance Company that included a $100,000 death benefit under the policy's uninsured motorist coverage. In April 2014, GEICO informed Ms. Elliott that she was entitled to the $100,000 death benefit because one of the drivers involved in the crash was uninsured. Complaint at ¶ 23.

14. When Ms. Elliott mentioned the death benefit to Gary, he told her to instruct GEICO to send the death benefit to him so that he could review the policy terms and confirm that her rights were being protected as a "courtesy." Apparently, Gary did nothing to obtain the death benefit until December 2015, when he told Ms. Elliott that GEICO required her to execute a release before the death benefit could be paid. Complaint at ¶¶ 24-25, 32-33.

15. In April 2016, Ms. Elliott executed the release and GEICO subsequently forwarded a check for the $100,000 death benefit to Gary. He thereafter deducted alleged expenses and a 40% contingency fee before sending the balance to Ms. Elliot. Complaint at ¶¶ 35-36, 64-72.

16. Gary also misrepresented the death benefit as part of an unrelated $25,000 settlement under a different GEICO policy covering one of the other cars involved in the crash, falsely stating that the settlement was for $125,000 rather than only $25,000. Complaint at ¶¶ 26-31.

III. Defendants Acts of Professional Negligence.

A. Failure to Commence Timely Actions against Nissan and Schneider.

17. Defendants committed legal malpractice by failing to commence timely lawsuits against Nissan and Schneider. Three statutes limited the time Ms. Elliott had to commence such actions. First, the Georgia two-year statute of limitations for wrongful death claims commenced upon the death of Ms. Elliott's daughter on March 10, 2014 and expired two years later on March 10, 2016. O.C.G.A. § 9-3-33.[1]

18. Second, the two-year statute for tort actions commenced upon Ms.

[1] A wrongful death claim accrues on the date of death and is subject to the two-year statute of limitations for personal injury actions set forth in O.C.G.A. § 9-3-33. *Kitchens v. Brusman*, 280 Ga. App. 163, 164 (2006).

Elliott's appointment as the personal representative of her daughter's estate on September 26, 2014 and expired two years later on September 26, 2016. O.C.G.A. § 9-3-92 (tolling statute of limitations for actions brought by an estate during the period between the decedent's death and appointment of a personal representative).

19. Third, with respect to the product liability claim against Nissan, Georgia's ten-year statute of repose required that product liability claims involving Ms. Cook's 2005 Nissan Infiniti G35 be commenced no later than ten years after the first sale of that model car. Because the first sale of the Infiniti G35 took place on September 3, 2005, any product liability claim regarding that model must have been commenced by September 3, 2015. O.C.G.A. § 51-1-11(b)(2).

20. Defendants were retained on March 15, 2014, almost 18 months before the expiration of the ten-year statute of repose, almost two years before the expiration of the two-year wrongful death statute of limitations, and over two years before the expiration of the two-year tort statute of limitations. Thus, Defendants had more than enough time to commence timely actions against Nissan and Schneider.

21. Defendants failed to do so. They commenced an action against Nissan on May 24, 2016, more than eight months after the ten-year statute of limitations had expired and more than two months after the two-year wrongful death statute of

limitations had expired. As a result, the action was dismissed.

22. Defendants never commenced an action against Schneider. Such an action is now time-barred since both the two-year wrongful death statute of limitations and the two-year tort statute of limitations have now expired.

23. Had Defendants exercised the ordinary care, skill, and diligence in accordance with accepted standards of professional service and competence expected of lawyers representing clients in Georgia wrongful death cases, they would have commenced actions against Nissan and Schneider within the applicable limitation periods. Indeed, the American Bar Association has explained, "The classic example of [professional] negligence is the attorney who did not file a lawsuit before the statute of limitations expired."[2]

24. Here, Defendants' negligence is especially difficult to understand since Gary was aware of the claims against Nissan and Schneider when he convinced Ms. Elliott to retain him five days after her daughter was killed. Gary not only was aware of the claims, he correctly advised Ms. Elliott that preservation of the vehicles

[2] ABA Litigation Section Practice Pointers, "When Does a Mistake Become Legal Malpractice?", Feb. 8, 2019, https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2019/when-does-a-mistake-become-malpractice/.

involved in the crash was important to preserve critical evidence. He then did nothing for more than 26 months, after both the ten-year statute of repose and the two-year wrongful death statute of limitations had expired. His conduct constitutes gross negligence in my opinion.[3]

B. Failing to Communicate with Ms. Elliott and Misrepresenting the Status of the Claims Against Nissan and Schneider.

25. Defendants also committed legal malpractice by failing to communicate with Ms. Elliott, ignoring her phone calls, misrepresenting that timely claims had been asserted against Nissan and Schneider and delaying notice that her action against Nissan had been dismissed as untimely. Lawyers have an ethical and fiduciary duty to "keep the client reasonably informed about the status of the matter" and "promptly comply with reasonable requests for information."[4]

26. Here, there is no justification for Defendants not to have kept Ms. Elliott informed of the status of her claims. Their failure to do so probably arises

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[3] Defendants' failure to preserve the vehicles involved in the crash and take statements from witnesses to the multi-car accident also constitute independent acts of professional negligence. As Gary himself recognized, preserving critical evidence to support product liability and automobile negligence cases and doing so is expected of lawyers representing clients in such cases in Georgia.

[4] Georgia Rules of Professional Conduct, Rule 1.4 (Communication), https://www.gabar.org/Handbook/index.cfm#handbook/rule54.

because they took no action to prosecute her claims for more than two years. On the few occasions that Ms. Elliott was able to speak with Gary before the limitation periods expired, he falsely stated that the lawsuits had already been commenced. Had Gary told the truth, *i.e.*, that he had allowed months to elapse without doing anything, Ms. Elliott could have fired him and retained another lawyer to commence her claims against Nissan and Schneider. And when the lawsuit against Nissan was dismissed as untimely in May 2017, Defendants waited twenty months, until January 2019, before notifying Ms. Elliott.[5]

27. Defendants failure to communicate constitutes legal malpractice. Indeed, a lawyer exercising the ordinary care, skill, and diligence in accordance with accepted standards of professional service and competence expected of lawyers representing clients in Georgia would have honestly and promptly kept Ms. Elliott apprised of developments, or the lack thereof, in her matter.

[5] Defendants assert that they notified Ms. Elliott that the Nissan lawsuit had been dismissed in a November 2017 letter, although Ms. Elliott denies receiving that letter until it was annexed to Defendants' January 2019 letter. Even assuming that Defendants sent the November 2017 letter, however, that letter came six months after the Nissan action was dismissed. Waiting that long to disclose such a critical development constitutes professional negligence and legal malpractice.

C. Deducting Unrelated Expenses and a 40% Contingency Fee to the Death Benefit under Ms. Cook's Uninsured Motorist Coverage.

28. Gary also committed legal malpractice by deducting unrelated expenses and a 40% contingency fee from the $100,000 death benefit under the uninsured motorist coverage of Ms. Cook's GEICO automobile policy. Georgia lawyers have a strict duty to safeguard and preserve client funds.[6]

29. There was no reason for Gary to insert himself into the uninsured motorist coverage of Ms. Cook's GEICO automobile policy. GEICO notified Ms. Elliott that it was ready to send her the entire $100,000 death benefit shortly after Ms. Cook's tragic car accident. Had Gary not become involved, GEICO would have sent the release directly to Ms. Elliott, who would have executed it and received the $100,000 within weeks of the accident.

30. Instead, Gary convinced Ms. Elliott to authorize GEICO to communicate with him. He then did nothing for more than a year. In December 2015, he finally asked Ms. Elliott to sign the GEICO release. After she did so in April 2016, Gary received the death benefit and deducted unrelated expenses and a 40% contingency fee before sending the balance to Ms. Elliott.

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[6] *See*, *e.g.*, Georgia Rules of Professional Conduct, Rule 1.5 (Safekeeping Property), https://www.gabar.org/Handbook/index.cfm#handbook/rule42.

31. That conduct constitutes, at the very least, professional negligence. A lawyer exercising the ordinary care, skill, and diligence in accordance with accepted standards of professional service and competence expected of lawyers representing clients in Georgia would have refrained from getting involved until or unless Ms. Elliott encountered a problem in obtaining the death benefit directly from GEICO.

DAVID H. MOSKOWITZ

Sworn to before me this
7th day of December 2020

Notary Public

TAMMY FLYNN NOTARY PUBLIC GWINNETT COUNTY, GEORGIA MY COMMISSION EXPIRES APRIL 16, 2023

DAVID H. MOSKOWITZ
5462 Redbark Place
Dunwoody, Georgia 30338
(404) 551-0369 Home
(404) 965-8848 Office

CURRICULUM VITAE - UPDATED 12/1/2020

DATE OF BIRTH:	03/20/57
PLACE OF BIRTH:	LaGrange, Georgia
MARITAL STATUS:	Married, Debra
CHILDREN:	Two children, Daniel (27) & Jacob (24)

EDUCATION:

HIGH SCHOOL:	Hardaway High School, Columbus, Georgia Valedictorian
COLLEGE:	Emory University Atlanta, Georgia Minor: English Major: History/Economics 1975-79
WORK STUDY PROGRAM:	Israeli Work Studies Program Arad, Israel 1980-1981
LAW SCHOOL:	Emory University Atlanta, Georgia Degree: J.D. 1981-84

ACTIVITIES:

Admitted to State Bar of Georgia - November, 1984

Atlanta Bar Association, Executive Committee Member, 1988 - 1991

Georgia Trial Lawyer's Association, Workers' Compensation Claimant's Association, Executive Committee Member: 1988--1998; Secretary: 1991--1992; Treasurer: 1992--1993; Vice Chairman: 1993--1994; Chairman: 1994--1996, Special Projects Chairman 1996

Workers' Compensation Claimants Lawyers (WCCL), Liaison Committee Chair to review, revise workers' compensation rules and legislation: 1994-2012

Finance Committee to Elect Roy Barnes for Governor: 1998, 2002, and 2010

Poultry Justice Alliance Committee: 1999 to 2012

Poultry Justice Alliance Festival: April 2000 in Gainesville, Georgia

Member of Congregation B'nai Torah, Atlanta, GA

Member of Congregation Beth El, LaGrange, GA

Board Member, Georgia Conservation Voters: 2008-2012

Board Member, Interfaith Worker Justice: 2015 to 2018

Workers' Compensation Claimants Lawyers, Board of Directors member: 2012 – present

Treasurer of Campaign to Elect Madeleine Simmons, Brookhaven City Council: 2019

Treasurer of Campaign to Elect Sara Tindall Ghazal, State Representative House Seat 45: 2020

EMPLOYMENT EXPERIENCE:

Staff Assistant, Representative Jack Brinkley, Washington, D.C.
1977

Courier and Office Assistant, Swift, Currie, McGhee and Hiers
1977-1979

Teacher, Social Studies at Heritage High School & Sylvan Hill High School, Grades 9-12
1980

Teacher, Summit Institute, Jerusalem, Israel
1980-1981

Law Clerk, State Board of Workers' Compensation, Atlanta, Georgia - Assisted Administrative Law Judge John Andy Smith

1982

Marcus & Moskowitz, P.C.
1982 - 1984: Law Clerk
1984 - 1988: Associate Attorney
1988 - 1992: Partner

Moskowitz & Carraway, P.C.
1992 - 2007: Sr. Partner

Morgan & Morgan, Atlanta, LLC
2007 – 2018: Equity Partner, Department Head of all Workers Compensation Departments for the State of Georgia

Law Office of David H. Moskowitz, LLC
2018 – present: Sole Practitioner

APPOINTMENTS:

June 1990	Appointed by Governor Joe Frank Harris to serve as Chairman of the newly created State Board of Crime Victim Compensation.
August 1992-2012(?)	Appointed by Governor Zell Miller to serve on Criminal Justice Coordinating Counsel as Committee Chairman on Crime Victims Compensation.
1992 - 1994	Appointed to Chairman's Advisory Council for the State Board of Workers' Compensation.
1999 - 2000	Appointment by Governor Roy Barnes to Governor's Commission on Certainty in Sentencing.
2000	Appointed by Governor Roy Barnes to Workers' Compensation Review Commission.
2000 - 2003	Appointed by Governor Roy Barnes to Judicial Nominating Commission.
2004	Appointed by Lieutenant Governor Mark Taylor to Georgia State Ethics Commission.

2004 – present	Board Member of Workers' Injury Law & Advocacy Group (WILG)
2004 - 2009	Appointed by National Football League Players' Association to Workers' Compensation Panel (NFLPA)
2004 – 2012	Appointed by Major League Baseball Players' Association to Workers' Compensation Panel (MLBPA)
2004 – 2012	Appointed by Professional Hockey Players' Association to Workers' Compensation Panel (PHPA)
2008	Appointed by Chief Justice Leah Spears to State Bar of Georgia Transition into Law Practice Program
2010	Inductee to College of Workers' Compensation Lawyers
2016	Labor Union Chair for American Bar Association, Labor & Employment Law Section
2016 – present	Georgia Labor Management Board, board member
2018 – present	National Association of Social Insurance, board member

SPEAKING ENGAGEMENTS:

1) Atlanta Bar Association - 1988
Topic: "Representing The Non-Covered Employee"

2) Atlanta Bar Association - 1989
Topic: "Strategy In Obtaining And Paying For Medical Treatment"

3) Georgia Trail Lawyers Association - 1989
Topic: "Wrestling With The Insolvency Pool"

4) PESI Seminar - 1989
Topic: "How A Claimant's Attorney Can Better Get Along With The Insurance Industry"

5) Atlanta Bar Association - 1990 Seminar
Chairperson
General Topic: "Workers' Compensation In Georgia: Working With The System"

6) PESI Seminar - 1990 Seminar
Chairperson
General Topic: "Federal Workers' Compensation Longshoreman's and Harbor Workers' Act"

7) Workers' Compensation Law Institute - 1990 Seminar
Chairperson

8) Workers' Compensation for the General Practitioner, 1994

9) Pursuing the Employer: Tactics and Pitfalls.

10) State Board of Workers' Compensation Annual Educational Seminar - 1998

11) Employment Law Section
General Topic: "American Disability Act and Workers' Compensation"

12) Workers' Compensation Institute - Guest Speaker

13) Georgia Trial Lawyers Association, Chairman W.C.C.L. Seminar 2001

14) Yale University symposium entitled The Chicken: Its Biological, Social, Cultural, and Industrial History *From Neolithic Middens to McNuggets*, May 2002, presented paper entitled *Representing the Injured Worker: America's Disposable Employee*.

15) Chairman/Organizer of the Georgia Trial Lawyers Association, Chairman W.C.C.L. Seminar: For Your Eyes Only – 1996 to the present

16) Assisted with Offsite Congressional Hearings on Poultry Industry, conducted by Congressman Joe Lewis (D-GA) and Wayne Gilchrist (R-MD) held in Atlanta, Spring, 1999.

17) Numerous tutorials for organized labor, including classes, seminar guest speaker, etc.: 1990 - present

JS44 (Rev. 10/2020 NDGA)

CIVIL COVER SHEET

The JS44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form is required for the use of the Clerk of Court for the purpose of initiating the civil docket record. (SEE INSTRUCTIONS ATTACHED)

I. (a) PLAINTIFF(S)

ERNESTINE ELLIOTT, individually and as Personal Representative of the Estate of KATRINA M. COOK,

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Cobb

(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANT(S)

GARY, WILLIAMS, PARENTI, WATSON AND GARY, P.L.L.C., WILLIE E. GARY, CHANTHIA B. ABNEY, and LERONNIE MASON,

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, TELEPHONE NUMBER, AND E-MAIL ADDRESS)

Todd Maziar
P.O. Box 56205
Atlanta, Georgia 30343
(404) 355-3444
mazjd@aol.com

ATTORNEYS (IF KNOWN)

Darren Summerville, The Summerville Firm, LLC
1226 Ponce De Leon Ave NE
Atlanta, Georgia 30306
(770) 635-0030
darren@summervillefirm.com

II. BASIS OF JURISDICTION

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. GOVERNMENT PLAINTIFF
- ☐ 3 FEDERAL QUESTION (U.S. GOVERNMENT NOT A PARTY)
- ☐ 2 U.S. GOVERNMENT DEFENDANT
- ☑ 4 DIVERSITY (INDICATE CITIZENSHIP OF PARTIES IN ITEM III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(FOR DIVERSITY CASES ONLY)

PLF	DEF		PLF	DEF	
☑ 1	☐ 1	CITIZEN OF THIS STATE	☐ 4	☐ 4	INCORPORATED OR PRINCIPAL PLACE OF BUSINESS IN THIS STATE
☐ 2	☑ 2	CITIZEN OF ANOTHER STATE	☐ 5	☐ 5	INCORPORATED AND PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE
☐ 3	☐ 3	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY	☐ 6	☐ 6	FOREIGN NATION

IV. ORIGIN (PLACE AN "X "IN ONE BOX ONLY)

- ☑ 1 ORIGINAL PROCEEDING
- ☐ 2 REMOVED FROM STATE COURT
- ☐ 3 REMANDED FROM APPELLATE COURT
- ☐ 4 REINSTATED OR REOPENED
- ☐ 5 TRANSFERRED FROM ANOTHER DISTRICT (Specify District)
- ☐ 6 MULTIDISTRICT LITIGATION - TRANSFER
- ☐ 7 APPEAL TO DISTRICT JUDGE FROM MAGISTRATE JUDGE JUDGMENT
- ☐ 8 MULTIDISTRICT LITIGATION - DIRECT FILE

V. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE - DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

28 U.S.C. 1332 (diversity)

(IF COMPLEX, CHECK REASON BELOW)

- ☐ 1. Unusually large number of parties.
- ☐ 2. Unusually large number of claims or defenses.
- ☐ 3. Factual issues are exceptionally complex
- ☐ 4. Greater than normal volume of evidence.
- ☐ 5. Extended discovery period is needed.
- ☐ 6. Problems locating or preserving evidence
- ☐ 7. Pending parallel investigations or actions by government.
- ☐ 8. Multiple use of experts.
- ☐ 9. Need for discovery outside United States boundaries.
- ☐ 10. Existence of highly technical issues and proof.

CONTINUED ON REVERSE

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT $_____ APPLYING IFP _____ MAG. JUDGE (IFP) _____

JUDGE _____ MAG. JUDGE _____ NATURE OF SUIT _____ CAUSE OF ACTION _____

(Referral)

VI. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT - "0" MONTHS DISCOVERY TRACK
- ☐ 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT
- ☐ 152 RECOVERY OF DEFAULTED STUDENT LOANS (Excl. Veterans)
- ☐ 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS

CONTRACT - "4" MONTHS DISCOVERY TRACK
- ☐ 110 INSURANCE
- ☐ 120 MARINE
- ☐ 130 MILLER ACT
- ☐ 140 NEGOTIABLE INSTRUMENT
- ☐ 151 MEDICARE ACT
- ☐ 160 STOCKHOLDERS' SUITS
- ☑ 190 OTHER CONTRACT
- ☐ 195 CONTRACT PRODUCT LIABILITY
- ☐ 196 FRANCHISE

REAL PROPERTY - "4" MONTHS DISCOVERY TRACK
- ☐ 210 LAND CONDEMNATION
- ☐ 220 FORECLOSURE
- ☐ 230 RENT LEASE & EJECTMENT
- ☐ 240 TORTS TO LAND
- ☐ 245 TORT PRODUCT LIABILITY
- ☐ 290 ALL OTHER REAL PROPERTY

TORTS - PERSONAL INJURY - "4" MONTHS DISCOVERY TRACK
- ☐ 310 AIRPLANE
- ☐ 315 AIRPLANE PRODUCT LIABILITY
- ☐ 320 ASSAULT, LIBEL & SLANDER
- ☐ 330 FEDERAL EMPLOYERS' LIABILITY
- ☐ 340 MARINE
- ☐ 345 MARINE PRODUCT LIABILITY
- ☐ 350 MOTOR VEHICLE
- ☐ 355 MOTOR VEHICLE PRODUCT LIABILITY
- ☐ 360 OTHER PERSONAL INJURY
- ☐ 362 PERSONAL INJURY - MEDICAL MALPRACTICE
- ☐ 365 PERSONAL INJURY - PRODUCT LIABILITY
- ☐ 367 PERSONAL INJURY - HEALTH CARE/ PHARMACEUTICAL PRODUCT LIABILITY
- ☐ 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY

TORTS - PERSONAL PROPERTY - "4" MONTHS DISCOVERY TRACK
- ☐ 370 OTHER FRAUD
- ☐ 371 TRUTH IN LENDING
- ☐ 380 OTHER PERSONAL PROPERTY DAMAGE
- ☐ 385 PROPERTY DAMAGE PRODUCT LIABILITY

BANKRUPTCY - "0" MONTHS DISCOVERY TRACK
- ☐ 422 APPEAL 28 USC 158
- ☐ 423 WITHDRAWAL 28 USC 157

CIVIL RIGHTS - "4" MONTHS DISCOVERY TRACK
- ☐ 440 OTHER CIVIL RIGHTS
- ☐ 441 VOTING
- ☐ 442 EMPLOYMENT
- ☐ 443 HOUSING/ ACCOMMODATIONS
- ☐ 445 AMERICANS with DISABILITIES - Employment
- ☐ 446 AMERICANS with DISABILITIES - Other
- ☐ 448 EDUCATION

IMMIGRATION - "0" MONTHS DISCOVERY TRACK
- ☐ 462 NATURALIZATION APPLICATION
- ☐ 465 OTHER IMMIGRATION ACTIONS

PRISONER PETITIONS - "0" MONTHS DISCOVERY TRACK
- ☐ 463 HABEAS CORPUS- Alien Detainee
- ☐ 510 MOTIONS TO VACATE SENTENCE
- ☐ 530 HABEAS CORPUS
- ☐ 535 HABEAS CORPUS DEATH PENALTY
- ☐ 540 MANDAMUS & OTHER
- ☐ 550 CIVIL RIGHTS - Filed Pro se
- ☐ 555 PRISON CONDITION(S) - Filed Pro se
- ☐ 560 CIVIL DETAINEE: CONDITIONS OF CONFINEMENT

PRISONER PETITIONS - "4" MONTHS DISCOVERY TRACK
- ☐ 550 CIVIL RIGHTS - Filed by Counsel
- ☐ 555 PRISON CONDITION(S) - Filed by Counsel

FORFEITURE/PENALTY - "4" MONTHS DISCOVERY TRACK
- ☐ 625 DRUG RELATED SEIZURE OF PROPERTY 21 USC 881
- ☐ 690 OTHER

LABOR - "4" MONTHS DISCOVERY TRACK
- ☐ 710 FAIR LABOR STANDARDS ACT
- ☐ 720 LABOR/MGMT. RELATIONS
- ☐ 740 RAILWAY LABOR ACT
- ☐ 751 FAMILY and MEDICAL LEAVE ACT
- ☐ 790 OTHER LABOR LITIGATION
- ☐ 791 EMPL. RET. INC. SECURITY ACT

PROPERTY RIGHTS - "4" MONTHS DISCOVERY TRACK
- ☐ 820 COPYRIGHTS
- ☐ 840 TRADEMARK
- ☐ 880 DEFEND TRADE SECRETS ACT OF 2016 (DTSA)

PROPERTY RIGHTS - "8" MONTHS DISCOVERY TRACK
- ☐ 830 PATENT
- ☐ 835 PATENT-ABBREVIATED NEW DRUG APPLICATIONS (ANDA) - a/k/a Hatch-Waxman cases

SOCIAL SECURITY - "0" MONTHS DISCOVERY TRACK
- ☐ 861 HIA (1395ff)
- ☐ 862 BLACK LUNG (923)
- ☐ 863 DIWC (405(g))
- ☐ 863 DIWW (405(g))
- ☐ 864 SSID TITLE XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS - "4" MONTHS DISCOVERY TRACK
- ☐ 870 TAXES (U.S. Plaintiff or Defendant)
- ☐ 871 IRS - THIRD PARTY 26 USC 7609

OTHER STATUTES - "4" MONTHS DISCOVERY TRACK
- ☐ 375 FALSE CLAIMS ACT
- ☐ 376 Qui Tam 31 USC 3729(a)
- ☐ 400 STATE REAPPORTIONMENT
- ☐ 430 BANKS AND BANKING
- ☐ 450 COMMERCE/ICC RATES/ETC.
- ☐ 460 DEPORTATION
- ☐ 470 RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
- ☐ 480 CONSUMER CREDIT
- ☐ 485 TELEPHONE CONSUMER PROTECTION ACT
- ☐ 490 CABLE/SATELLITE TV
- ☐ 890 OTHER STATUTORY ACTIONS
- ☐ 891 AGRICULTURAL ACTS
- ☐ 893 ENVIRONMENTAL MATTERS
- ☐ 895 FREEDOM OF INFORMATION ACT 899
- ☐ 899 ADMINISTRATIVE PROCEDURES ACT / REVIEW OR APPEAL OF AGENCY DECISION
- ☐ 950 CONSTITUTIONALITY OF STATE STATUTES

OTHER STATUTES - "8" MONTHS DISCOVERY TRACK
- ☐ 410 ANTITRUST
- ☐ 850 SECURITIES / COMMODITIES / EXCHANGE

OTHER STATUTES - "0" MONTHS DISCOVERY TRACK
- ☐ 896 ARBITRATION (Confirm / Vacate / Order / Modify)

*** PLEASE NOTE DISCOVERY TRACK FOR EACH CASE TYPE. SEE LOCAL RULE 26.3**

VII. REQUESTED IN COMPLAINT:

☐ **CHECK IF CLASS ACTION UNDER F.R.Civ.P. 23** **DEMAND $** 100,000,000

JURY DEMAND ☑ **YES** ☐ **NO (CHECK YES ONLY IF DEMANDED IN COMPLAINT)**

VIII. RELATED/REFILED CASE(S) IF ANY

JUDGE_____ **DOCKET NO.**_____

CIVIL CASES ARE DEEMED RELATED IF THE PENDING CASE INVOLVES: (CHECK APPROPRIATE BOX)

- ☐ **1. PROPERTY INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.**
- ☐ **2. SAME ISSUE OF FACT OR ARISES OUT OF THE SAME EVENT OR TRANSACTION INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.**
- ☐ **3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT, COPYRIGHT OR TRADEMARK INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.**
- ☐ **4. APPEALS ARISING OUT OF THE SAME BANKRUPTCY CASE AND ANY CASE RELATED THERETO WHICH HAVE BEEN DECIDED BY THE SAME BANKRUPTCY JUDGE.**
- ☐ **5. REPETITIVE CASES FILED BY PRO SE LITIGANTS.**
- ☐ **6. COMPANION OR RELATED CASE TO CASE(S) BEING SIMULTANEOUSLY FILED (INCLUDE ABBREVIATED STYLE OF OTHER CASE(S)):**

☐ **7. EITHER SAME OR ALL OF THE PARTIES AND ISSUES IN THIS CASE WERE PREVIOUSLY INVOLVED IN CASE NO. , WHICH WAS DISMISSED. This case ☐ IS ☐ IS NOT (check one box) SUBSTANTIALLY THE SAME CASE.**

SIGNATURE OF ATTORNEY OF RECORD **DATE**