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IN THE SUPREME COURT OF THE STATE OF IDAHO

LOIS M. BISHOP, Personal Representative of PATRICIA J. SHELTON, deceased,

Plaintiff/Respondent,

vs.

R. BRUCE OWENS AND JANE DOE OWENS, husband and wife and the marital community composed thereof; OWENS & CRANDALL, PLLC, a limited liability company operating in the State of Idaho; R. BRUCE OWENS and JEFFREY J. CRANDALL, individually, and in their capacities as principals, managers, agents, partners, representatives and employees of OWENS & CRANDALL, PLLC.;

Defendants/Appellants,

OWENS & CRANDALL, PLLC,

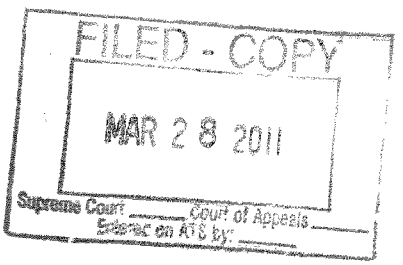
Third party Plaintiff,

vs.

IDAHO STATE INSURANCE FUND,

Third party Defendant.

Docket No. 37992-2010



RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, Judge John P. Luster presiding, Case No. CV-09-3597

Attorney for Defendants/Appellants

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. STATEMENT OF THE CASE

Appellants have accurately described the nature of the case in their Brief. They have also accurately described the procedural history and relevant facts.

II. ISSUES PRESENTED ON APPEAL

The Brief filed by Appellants does not accurately state the issues listed in their Notice of Appeal. They have dropped the third issue in their Notice of Appeal, "Whether the trial court erred in ruling that the claim for malpractice asserted by the plaintiff's personal representative is not barred by the economic loss rule." In its place, they have substituted an unrelated issue, "Whether the trial court erred in granting the motion for substitution of Bishop, personal representative of Shelton, as plaintiff."

The dropped issue should be considered no longer at issue, since it has not been briefed; and the newly added issue should not be considered, since it was not included in the Appellants' Notice of Appeal.

III. ARGUMENT

A. Standard of Review.

Appellants accurately describe the standard of review in their Brief.

B. Shelton's Legal Malpractice Claim Did Not Abate Upon Her Death.

A due respect for this Court's past decisions on survival of claims leads one to conclude that legal malpractice claims should and do survive the death of a claimant. However, no direct decision on that issue has been rendered by this Court. Therefore, any decision the Court now makes will be entirely within its discretion.

As a result, and in hopes of guiding the Court's consideration, Appellee will discuss the origin and development of the abatement rule in Idaho, along with its eventual death by statute. Appellee will then discuss the legal application of the relevant cases and the newly-enacted Idaho Code § 5-327. Finally, Appellee will discuss the policies impacted by the Court's eventual decision on the survivability of legal malpractice claims.

Other than a bare legal argument based on past decisions, none of these items have been discussed by Appellants in their Brief. That omission may be because the trend of the law in Idaho does not favor the results Appellants seek; or it may be because common sense reveals unjust results and improper motivations in a rule that allows a wrongdoer to escape liability simply because his former client dies during litigation.

In any event, not only legal arguments from this Court's past decisions, but also policy arguments drawn both from the new I.C. § 5-327 and from general common sense urge the Court to adopt a rule allowing the survivability of legal malpractice claims after the death of the claimant.

1. History of the non-abatement rule.

Idaho's law on abatement of tort claims has a long and winding history. The rule was apparently adopted to deal with violent personal injuries or felonies. The Supreme Court in *Doggett v. Boiler Engineering and Supply Co,* 93 Idaho 888 (1970) wrote, "The origin and effect of the rule and maxim *actio personalis moritur cum persona* in the early common law is obscure. Students of the common law seem to agree that the maxim and rule, if it ever had any significant validity, was greatly restricted to trespasses and torts that constituted a felony.

It is apparent that the wrongs which later came to be represented by writs of trespass had a criminal and later a quasi-criminal origin. See Holdsworth, A History of the English Law, Vol. 3."

Denigrating the rule further, the Supreme Court cited Professor Percy Winfield of Columbia University thus: "[I]t may fairly be said of these that with scarcely a single exception the maxim was always uttered in circumstances, or with qualifications, that cut down its application to the law of torts and usually comes from counsel who are snatching at another language in order to screen a hopeless argument of their own." *Doggett*, at 889.

The Supreme Court recognized that the rule was originally "pointed toward serious intentional wrongs." *Doggett,* at 889. Yet, over the years, the manner in which the rule was defined encouraged its application to all torts, both intentional and negligent. And it was enforced in that manner for many decades. It has long been recognized as an anomaly and an unfair rule. Yet Idaho courts have continued to honor the rule under the principles of *stare decisis*.

In the early case of *Kloepfer v. Forch,* 32 Idaho 415, 184 P. 477 (1919) the Idaho Supreme Court honored the abatement rule for truly personal injuries, but it launched the state on the long road to entire elimination of this unfair rule. That decision provided that the nature of an action, rather than its form, determines whether an action survives the death of the claimant.

In *Kloepfer*, six people were harmed financially when the local druggist sold them sodium arsenate instead of sodium arsenite to kill the weeds on their farms. The druggist

died while the case was on appeal, and his estate argued that the cause of action had died with him.

The Idaho Supreme Court said:

> As a general rule, in the absence of a statute providing otherwise, causes of action *ex contractu* survive, while causes *ex delictu* do not. However, there are well-recognized exceptions to both branches of the rule. As was said by the Supreme Court of Virginia in Lee's Administrator v. Hill, 87 Va. 497, 12 S.E. 1052 24 Am. St. Rep 666:
>
> > The true test is not so much the form of the action, as the nature of the cause of action. Where the latter is a tort unconnected with contract, and which affects the person only, and not the estate, such as assault, libel, slander, and the like, there the rule "action personalis," etc., applies. But where, as in the present case, the action is founded on a contract, it is virtually ex contractu, although nominally in tort, and there it survives.
>
> We have no statutory provision abrogating the common-law rule of survival of causes of action above referred to. Applying that rule to this case, it may be said that while the action is, in form, ex delicto, the cause is, in fact, ex contractu. The injury for which recovery is sought grows out of the contract of purchase of sodium arsenate represented by the vendor to be sodium arsenite, and the application thereof to the crops of appellant and his assignors whereby those specific pieces of property were destroyed. These facts distinguish this case from those where recovery is sought for injury to the person or for torts resulting in damage to the estate, generally, and make these claims assignable and cause them to survive the death of a party to the action.

(*Kloepfer,* at 418, citations omitted).

This ruling stood without serious challenge for many years. Then in 1944, the Idaho Supreme Court decided *Moon v. Bullock,* 65 Idaho 954, 151 P.2d 765, which presented the issue whether a tort claim would survive the death of the tortfeasor. The Supreme Court decided it did not. Following the common law rule, the Court decided such a claim would

abate. Immediately, the Idaho legislature struck down this ruling by enacting the first statutory limit on the abatement rule's applicability, Idaho Code § 5-327. The new law provided that an action did not abate upon the death of the tortfeasor.

A couple decades later, the Supreme Court was faced with a case in which the Plaintiff (the injured party) had died during the litigation, *Doggett v. Boiler Engineering and Supply Co.,* 93 Idaho 888, 477 P.2d 511 (1970). In that case, the Court looked back at the *Bullock* case and wrote, "[T]o the extent that *Bullock* suggests that an action ex delicto abates upon the death of the plaintiff in a case such as presented herein, it is overruled." *Id.* at 890.

Summarizing its decision, the Court wrote, "We have examined the precedents and the reasons for the rule of non-survivability of causes of action following the death of a plaintiff. We find the precedents unclear and unsatisfactory and the purported reasons for the rule virtually non-existent. We suggest therefore that a continuation of such a rule serves no purpose." *Id.* at 892.

It seemed that the common law rule was dead, and having died, its claim on plaintiffs and defendants alike had abated.

But as it was with Mark Twain, so it was with the common law rule of abatement; reports of its death were greatly exaggerated. While it was universally recognized as unfair, apparently the concept would not die so easily. The Idaho Supreme Court recognized its continued validity in several subsequent decisions, many of which have been cited by Appellant. The Court made it clear that despite the language in *Doggett*, the rule was still alive.

In December of 2009, the Idaho Court of Appeals was asked to review the rule in *Craig v. Gellings,* 148 Idaho 192 (Ct. App. 2009). The Court of Appeals noted the criticism the Supreme Court had laid out in *Doggett* thus:

> Appellant argues that there is inconsistency and injustice in the current state of Idaho's tort law that allows creditors, including tort claimants, to pursue their claims against a decedent's estate while disallowing the same estate from carrying forward the decedent's personal injury claim against a tortfeasor whose wrongful act has depleted the estate's assets. Appellant also argues that the interest of a surviving spouse, whose community interest in a personal injury claim was preserved by the *Doggett* decision, is functionally equivalent to the interest of an unmarried decedent's estate when a personal injury resulted in economic damages to the estate. Because the abatement rule does not apply when community property was depleted, the argument goes, it should not apply when the estate of an unmarried person has been depleted. Appellant claims support for these arguments in comments made by the Supreme Court in its *Doggett* opinion.

Id. at 194.

Nevertheless, the Court of Appeals did not feel at liberty to reverse the rule, given the Supreme Court's adherence to the rule in cases subsequent to *Doggett.*

Finally, in 2010, the maxim "The law's mill grinds slowly, but exceedingly fine" was proved true when the Idaho legislature completed this long and arduous journey, enacting a second paragraph for Idaho Code § 5-327 that ended the abatement doctrine for injured parties. Because the common law never did abate claims based on contract, no legislation was necessary on that account.

This history of abatement of tort actions may seem long and unnecessary, since Appellee is claiming that her claim is based on contract, but it places the entire doctrine of

abatement in context. It is not a favored doctrine and never has been. Thus, its applicability should be restricted, not expanded.

2. Legal Arguments.

a. Abatement is for cases "unconnected with contract."

For purposes of legal argumentation, we need to return to *Kloepfer v. Forch*, *supra,* first. The language of that case that is most important to our understanding of the abatement doctrine is the sentence that says, "Where the latter is a tort unconnected with contract, and which affects the person only, and not the estate, such as assault, libel, slander, and the like, there the rule, 'action personalis,' etc. applies." *Id.* at 418 (emphasis added).

In other words, in order to abate, the tort must be "unconnected with contract." The test is not a "predominance" test, where we see which element is most important. Rather, the tort must be "unconnected with contract" for the claim to abate. Where there is any element of contract present, as in *Kloepfer,* then, there is no abatement. This is especially true since the abatement doctrine is unfavored generally and has eventually been discarded in its entirety.

The importance of this language becomes apparent in a legal malpractice case, where elements of both tort and contract are involved. *Harrigfeld v. Hancock,* 140 Idaho 134 (2003), citing this Court's decision in *Johnson v. Jones,* 103 Idaho 702, 706-07 (1982), stated, "Legal malpractice actions are an amalgam of tort and contract theories. . . . An attorney's duty arises out of the contract between the attorney and his or her client. *Johnson v Jones,* 103 Idaho 702, 704, 652 P.2d 650, 652 (1982) ("The scope of an attorney's

contractual duty is defined by the purposes for which the attorney is retained."); *Fuller v. Wolters,* 119 Idaho 415, 807 P.2d 633 (1991) (tort of legal malpractice is also a breach of the attorney-client contract)."

And Idaho is not alone in this reasoning. The opening sentence of American Jurisprudence 2d, Abatement, Survival, and Revival, Section 84 states, "The failure of an attorney to properly represent a client, whether by a breach of duty or by negligence, constitutes a breach of contract, and an action based on such breach survives the death of either party." Page 164.

b. Attorney fees cases provide no guidance.

Appellants have cited *Rice v. Litster,* 132 Idaho 897, 901, 980 P.2d 561, 565 (1991) (which references other similar cases), in which the Supreme Court referred to an attorney malpractice action as a tort. If an attorney malpractice claim is a tort, Appellants conclude, then it must abate upon the death of the client.

What Appellants fail to note, however, is that the *Rice* language was rendered in a case discussing whether attorney fees were allowable in an attorney malpractice case under I.C. § 12-120. That section reads as follows: "In any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs. The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes....."

So when the Court called an attorney malpractice action a tort, that statement was in the context of attorney fees under I.C. § 12-120. The Court was saying that for purposes of determining whether attorney fees were payable, an attorney malpractice action is a tort, rather than being "commercial." What mattered to the Court in *Rice* and its predecessors was whether the attorney relationship was a commercial transaction. Finding that it was not a commercial transaction, the Court did not need to determine what it was. Thus, the language was *dicta* at best, and in any event inapplicable to the current question.

It is important to remember that the measure required for abatement is that the action be "unconnected to contract." Finding that a transaction is not commercial, or even finding calling an action a "tort" is not dispositive under *Kloepfer.* This is especially true in light of *Kloepfer's* statement that it is the nature, not the form, of the action that governs survival.

(It is also helpful to note that in the *Rice* decision, the cause of action was negligence alone. There is no evidence that the plaintiff in that case also asserted a contract cause of action, as the Appellee has in this case. So it was accurate to say that the cause of action was a "tort.")

Consequently, the *Rice v. Lister* line of cases does not shed any useful light on whether the claims in attorney malpractice cases abate upon the death of the claimant.

c. Medical malpractice cases provide no guidance.

Appellants cite a line of medical malpractice cases, all of which clearly state that medical malpractice claims abate upon the death of the plaintiff. They then extend those

rulings to attorney malpractice actions. While the original citation is accurate, the extension is unwarranted.

Extending medical malpractice reasoning to attorney malpractice cases fails to consider the important differences between actions for medical malpractice and those for attorney malpractice.

First, and most importantly, medical malpractice cases rarely involve a contract at all, except perhaps quasi-contracts. Attorney malpractice cases, by contrast, almost always involve a written contract.

Second, a medical malpractice is all about personal injury. In almost every case, the doctor has done (or failed to do) something that has caused a physical injury to the claimant. Nothing could be more "personal" and relate more directly to the purposes of the abatement rule. By contrast, most attorney-client relationships involve the recovery of money damages. Failure to perform as provided in the contract very rarely (if ever) results in a physical injury. Rather, the damages are always measured in dollars.

These important differences are highlighted in *Corpus Juris Secundum,* Abatement and Revival, Section 142, where the differences in attorney malpractice and medical malpractice are addressed in adjacent sections. Their placement is instructive. The two sections read as follows:

> *Negligence or malpractice of attorney.* Under statutory provision, a cause of action for damages arising out of an attorney's malpractice survives either his death or the death of the injured party. Under some authority, a malpractice cause of action is based upon contract, and, therefore, survives the death of the attorney at common law. A cause of action for malpractice may also survive since it is considered to involve injury to personal property.

> *Negligence of physician or surgeon.* Except under some statutes providing that a cause of action and a pending action survive against a physician or surgeon for damages for want of skill, negligence, or malpractice, the cause of action does not survive regardless of whether it is based on contract or tort.

As a result of these fundamental differences between medical malpractice cases and attorney malpractice cases, the cases that indicate medical malpractice cases do not survive the death of the injured party should not control the Court's decision in this case.

d. Attorney-client contracts do more than describe the scope.

Appellants argue that the attorney-client contract does nothing more than define the scope of engagement. They write, "Shelton confuses the contract of engagement of the attorney, which defines the scope of the duty owed, with the test for the breach of the duty, which is in tort. Appellants' Brief, page 10.

In a very narrow sense, Appellants may be right. When one thinks of an attorney malpractice action, one often pictures a standard of care that was breached. But failing to satisfy the standard of care is not the only way an attorney can breach a contract of engagement. Consider the contract in question in the current case attached hereto as "Exhibit A".

The first paragraph of the Contingent Fee Contract states, "Attorneys shall represent Client in said matter and do all things necessary, appropriate, or advisable, in regard thereto, whether the same be by representation in legal proceedings or otherwise." This obligation is considerably more expansive than the basic standard of care. Thus, failure to do all the

things that were "necessary, appropriate, or advisable," would be a breach of the attorney's obligations under the contract, but not necessarily under the applicable standard of care.

The third paragraph requires the attorney "to advance all necessary fees, costs and expenses incidental to handling of said matter." Failure to do so would not necessarily be a breach of the applicable standard of care, but it most certainly would be a breach of the attorney's duty under the contract.

So to say that an engagement contract serves only to define the scope of representation is not accurate. Breach of any of the terms of a contract of engagement entitles the client to enforce the contract—independent of any particular standard of care. Thus, an attorney malpractice case is most certainly based on a contract.

This is graphically portrayed by *Harrigfeld v. Hancock,* 140 Idaho 134, 90 P.3d 884 (2004), in which the Supreme Court addressed just this issue. It said, "An attorney's duty arises out of the contract between the attorney and his or her client. *Johnson v. Jones*, 103 Idaho 702, 704, 652 P.2d 650, 652 (1982) ("The scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained."); *Fuller v. Wolters*, 119 Idaho 415, 807 P.2d 633 (1991) (tort of legal malpractice is also a breach of the attorney-client contract)." *Id.* at 137.

It would be hard to make a statement any more clear than to say, "An attorney's duty arises out of the contract between the attorney and his or her client." The statement

absolutely precludes any finding that an attorney malpractice action is "unconnected with tort," as *Kloepfer* requires.

e. Appellee does state a breach of contract claim.

Appellants confidently argue that *Hayward v. Valley Vista Care Corporation,* 136 Idaho 3 42, 33 P.3d 816 (2001) precludes Appellee from asserting both negligence and contract claims. However, *Hayward* relates specifically to medical malpractice cases and has no relationship to attorney malpractice actions. This is especially important in light of the fact that the decision was based on a statute that strictly required all actions related to medical care to be pursued in the context of the local standard of care. The statute had the effect of eliminating contract claims. The Court wrote,

> In the case currently before the Court, the district court found that I.C. § 6-1012 precluded Alfred from bringing a claim based on a breach of contract theory. The district court noted that the claims were for malpractice, regardless of the label assigned to them.
>
> We agree. The basis of Alfred's remaining state court claims pertain to "the provision of or failure to provide health care." Consequently, I.C. § 6-1012 and the language set forth in Hough, preclude Alfred from bringing a contract claim against the nursing home.

There is no equivalent statute relating to legal malpractice cases. Consequently, *Hayward* does not provide helpful guidance in this context.

f. Substitution of Bishop was proper.

For the reasons described above, Shelton's claim did survive her death. Consequently, allowing her personal representative to pursue her claims was proper.

3. Policy Argument

There are important reasons, in addition to those stated above, for allowing attorney malpractice claims to survive the death of a claimant.

a. Abatement promotes behavior we don't condone.

A policy of abatement promotes all kinds of behavior that would damage not only the claimant, but the entire legal profession, and even the cause of justice in general. Consider the hypothetical case of an attorney who represents an individual in a case against a dentist or other professional for medical malpractice. If the medical malpractice resulted in serious injury to the client, and the client were in bad medical condition and on the verge of dying, the attorney would have almost irresistible motivations in a subsequent legal malpractice action to take inappropriate actions he wouldn't otherwise take.

The attorney would be motivated to delay the resolution of the matter through fruitless mediations and discussions without any intention of settling the case.

The attorney would be motivated to engage in delaying conduct, such as filing frivolous interpleader actions, making multiple motions for summary judgment, and engaging in unnecessary discovery, all with the hope that the client will die and his claims abate before the matter can be resolved.

Surely this kind of conduct should not be encouraged. But the rule Appellant urges this Court to adopt would do just that.

b. The rule forces arbitrary decisions.

If the abatement rule urged by Appellant were adopted by this Court, when would the abatement be effective? What if a claimant received a judgment but the matter was still on appeal when the claimant died? What if the appeal had been unsuccessful, but execution on the judgment had not yet been completed? These questions require an acknowledgment that the answer is completely arbitrary. There is no good reason for abatement and no logical framework for its enforcement.

c. The rule is unfair.

It has been said that there are only two kinds of fair: County Fair and State Fair. Yet in deciding important cases such as this, the Court should at least attempt to promote fairness. And a doctrine that prevents the estate of a person from recovering against an attorney whose negligence has cost the estate hundreds of thousands of dollars, merely because the claimant has died, is manifestly unfair.

d. Abatement promotes unjust enrichment.

While the money an attorney retains because his former client dies is not unjust enrichment in a legal sense, it is not just to allow delaying actions of the type enumerated above to benefit the wrongdoer. It certainly is enrichment, and it certainly is unjust.

e. Abatement results in anomalous consequences.

Under the rule Appellant advocates, an attorney could recover his hourly fees against the estate of a decedent who had been a client, relying on the contract of engagement. But if

that same client was pursuing the attorney for negligence and breach of contract but died during the litigation, his claim would die with him. The attorney would walk away with his fees, while the client's estate would be left without recourse.

It seems strange that this could actually be the result of Appellants' arguments, but it is in essence what has occurred in this very case. Appellants have recovered over $400,000.00 in attorney fees. Yet their client, because of Appellants' breach, would have received nothing had she not gone out and hired another attorney. Even then, she was forced to pay $270,000.00 plus attorney fees out of her pocket to settle a lien Appellants had promised was taken care of. This result cannot be allowed.

f. Abatement reduces confidence in the law.

It is precisely this kind of unfair doctrine and the motivations it favors that sours public perception of the legal profession and the law that is the very foundation of our society. Every opportunity should be sought to make the law fair and just, and this case presents an opportunity for this Court to do just that.

IV. CONCLUSION

For the reasons delineated above, Appellee requests that Appellants' request for reversal of the district court be denied.

RESPECTFULLY SUBMITTED this 24 day of March, 2011.

ELSAESSER JARZABEK
ANDERSON
ELLIOTT & MACDONALD, Chtd.

By _____
Joseph Jarzabek, of the Firm
Attorneys for Plaintiff/Respondent

CERTIFICATE OF SERVICE

I certify that on the 24 day of March, 2011, I caused to be served two (2) true and correct copies of the foregoing by U.S. Mail, postage prepaid, addressed to:

Michael E. Ramsden
Ramsden & Lyons, LLP
700 Northwest Boulevard
P.O. Box 1336
Coeur d'Alene, Idaho 83816

_____
Joseph Jarzabek

CONTINGENT FEE CONTRACT

THIS AGREEMENT made and entered into this 25 day of December, 2007, by and between Tatum J. Dreyer, hereinafter called "Client", and OWENS & CRANDALL, PLLC, Attorneys at Law, hereinafter called "Attorneys".

WHEREAS, Client desires attorneys to represent Client's interest in prosecuting client's claim and causes of action arising out of negligent medical/Mississippi occurring on or about 10/29/06.

NOW, THEREFORE, it is mutually agreed and understood as follows:

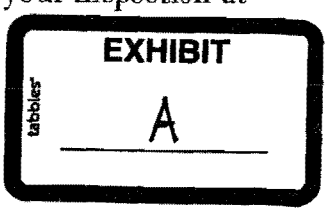
1. Attorneys shall represent Client in said matter and do all things necessary, appropriate, or advisable, in regard thereto, whether the same be by representation in legal proceedings or otherwise.

2. Client agrees to pay Attorneys for professional services thirty-three & one-third percent (33-1/3%) of the gross recovery of any and all funds received in settlement without an action having been filed in any Court; forty percent (40%) of the gross recovery of any and all funds received in settlement or recovered after filing an action in any Court; or forty-five percent (45%) of said sums if said matter is settled upon appeal or following post-verdict proceedings, and said sums payable to Attorneys for professional services are to be a lien upon any sums received in settlement or payment of any said claim, or upon any judgment recovered.

3. Attorneys agree to advance all necessary fees, costs and expenses incidental to handling of said matter. Attorneys shall, however, be reimbursed by Client for any and all costs and expenses incurred by Attorneys for and on behalf of Client in the representation of Client's claim, cause, or causes of action. Said reimbursement shall be deducted from the client's net recovery if sums are collected or received. In the event there is no recovery, Attorneys agree to forfeit all rights to recover any costs advanced.

4. Attorneys agree to accept said percentage of the amount received as aforesaid as full compensation for professional services; and, if there are no sums collected or received in the suit, action, compromise, or settlement of said claim or cause or causes of action, Attorneys agree to make no charge for professional services.

5. As Client, you are entitled to be informed on the progress. We will provide reasonably prompt responses to your inquiries. In the event a telephone call or request is not promptly answered, please assist us with a repeat call. The file and its progress are open to your inspection at any time.



6. It is the intention of Attorneys to represent you within the bounds of the law. Every reasonable effort will be made to handle your case promptly and efficiently according to the prevailing and legal ethical standards. In handling your case, we perform basically two functions: (1) assisting you in the decision-making process by giving legal advice, and (2) implementing the decision that is made by you, the Client. The ultimate decision belongs to you, the Client.

7. Client agrees to furnish attorneys with all information relevant to this matter, to assist and cooperate in negotiations for settlement or in any court action; to sign, acknowledge, and verify all necessary papers, documents, pleadings, or releases in connection with this matter; to be present at all proceedings, when requested, and to produce witnesses; and to use Client's best efforts to further the purpose of the contingent fee arrangement and Client's claims. Client further agrees not to compromise, settle, or offer to compromise or settle this matter in any way without the written consent of Attorneys.

8. Client agrees and hereby authorizes Attorneys to disburse from any funds, any medical liens, doctor's liens, etc. received as hereinabove provided all costs and expenses incurred in relation to Attorneys' services for Client hereunder and in addition thereto, all witness fees and other expenses incurred in the matter, the payment of such expenses to be deducted from Client's percentage of recovery as herein provided.

9. Should it appear to Attorneys at any time that Client's claim does not justify further action, or should Attorneys decide for any reason that the firm cannot represent Client any longer, Attorneys may withdraw as Attorneys for Client after notice to Client. In this event, Attorneys shall receive only a pro-rata share of an ultimate recovery for work done to the date of withdrawal for professional services, but shall be entitled to any and all expenses incurred. Attorneys shall turn over to Client all pertinent papers and data prepared or collected by Attorneys for Client in this matter after expenses are paid in full.

DATED and signed this 25 day of December, 2007

CLIENT(s):

ATTORNEYS:

A. Bruce Owens
OWENS & CRANDALL, PLLC