THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes III, Circuit Court Judge

Opinion No. 4902 (S.C. Ct. App. filed November 2, 2011)

Carol M. Kimmer, Personal Representative
of the Estate of Richard Kimmer, deceased,

Petitioner,

v.

Philip E. Wright,

Respondent.

BRIEF OF PETITIONER

Thomas H. Pope III
Pope & Hudgens, P.A.
PO Box 190
1508 College Street
Newberry, SC 29108
P: 803-276-2532; F: 803-276-8684
thpope@popeandhudgens.com
Attorneys for Petitioner Carol M. Kimmer
PR of Estate of Richard Kimmer, deceased

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QUESTIONS PRESENTED

Does the decision and holding in Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) apply to the facts of this case such that the trigger date for the commencement of the statute of limitations herein was the date of the adverse ruling of the Workers Compensation Commission in the underlying action?

Does the doctrine of equitable tolling apply in this case such that the running of the statute of limitations did not commence until the adverse ruling of the Workers Compensation Commission in the underlying case?

STATEMENT OF THE CASE

The South Carolina Court of Appeals issued Kimmer v. Wright, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011), in which the panel by a 2 – 1 majority reversed the lower court and held that Kimmer's legal malpractice action is barred because it was brought outside the three year statute of limitations. The lower court had held that Kimmer's claim was timely pursuant to this Court's ruling in Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) because it was brought within three years of the adverse decision of the Workers Compensation Commission. The Opinion of the Court of Appeals found that under the facts of this case it was not bound by the decision in Epstein.

Richard Kimmer died on March 2, 2008, and Carol M. Kimmer, as personal representative of the Estate of Richard Kimmer, has been substituted as plaintiff in this case.

This case arises out of the handling of a workers compensation matter. Richard Kimmer was involved in a head on collision with an at-fault third party named Pendergrass on January 29, 1999, when he was enroute to work. He received injuries to

his knees and his back. Kimmer retained the appellant, Philip Wright, as his attorney. Pendergrass had minimum coverage of only $15,000. Wright settled the third party claim for the policy limits of $15,000 (out of which he received $5,000 in attorney's fees) with Pendergrass' automobile liability carrier. On June 16, 1999, on the advice of Wright, Kimmer signed a release of all claims against Pendergrass. Wright's settlement was made without notice to the workers compensation carrier. (R., p. 562).

On June 18, 1999, Appellant Wright filed a Form 50 with the Workers' Compensation Commission seeking benefits for Petitioner Kimmer. (R., p. 563). In early 2000, Thomas H. Pope III was substituted as counsel for Kimmer. On December 10, 2002, a hearing was held before the single commissioner. As set forth in the Form 51 (R., p. 564), there were three issues in dispute at the hearing:

(1) whether Kimmer's claim was compensable (i.e., whether or not the accident occurred while Kimmer was within the course and scope of his employment);

(2) whether or not Kimmer was totally disabled from same; and,

(3) whether or not Kimmer's claim was barred for failure to give notice of the third party settlement.

On July 31, 2003, the single commissioner issued a Decision and Order in which she ruled that Kimmer's claim was compensable; that he was totally disabled from the accident; but that his claim was barred because of failure to give notice of the third party settlement to the workers comp carrier. (R., pp. 24, 25). The Order of the single commissioner was affirmed by the appellate panel on May 27, 2004.

Kimmer appealed the Order of the Workers Compensation Commission to the circuit court, and a hearing on the appeal was held by the circuit court on May 18, 2005. On September 1, 2005, the circuit court issued an Amended Order which reversed the

Order of the Workers Compensation Commission. (R., pp. 28-40). The circuit court ruled that the decision of the Commission was based on substantial error of law, as there was no prejudice to the workers compensation carrier as a result of the third party settlement without notice, given that the settlement was for the policy limits and the third party individually was judgment-proof. The circuit court order ruled that Kimmer was entitled to an award of total and permanent disability, less an offset for the third party settlement of $15,000. The circuit court then remanded the matter to the Commission. Kimmer's employer, Murata of America, Inc., appealed the circuit court order to the South Carolina Court of Appeals. On December 18, 2006, the Court of Appeals reversed the lower court order and ruled in Kimmer v. Murata of America, Inc., et al., 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2007) that prejudice is not an element to be considered where the employee fails to give the mandated statutory notice.

After the Decision and Order of the single commissioner was handed down on July 31, 2003 (R., pp. 15-27), Kimmer and Wright entered into a tolling agreement on October 30, 2003 (R., pp. 556-557), so that Kimmer could pursue the workers compensation appeal referenced above (i.e., the malpractice action would be obviated if Kimmer were successful on his appeal from the Decision of the Workers Compensation Commission). Thereafter, the instant action for legal malpractice against Wright was filed on October 14, 2004 (R., pp. 41-47). Wright filed an Answer dated October 28, 2004 (R., pp. 56-59), which generally denied all allegations and asserted the defenses of comparative negligence and lack of proximate cause. Wright, on March 8, 2005, moved to amend his Answer to add the affirmative defense of statute of limitations. (R., p. 147).

On May 10, 2005, after obtaining leave of court, the Amended Answer was filed (R., pp. 71-74).

Respondent Wright filed a motion for summary judgment on May 13, 2005, based upon the assertion that the malpractice action was barred by the statute of limitations. (R., pp. 75-76). This motion was denied in an Order dated June 20, 2005 by The Honorable S. Jackson Kimball II, York County Master, sitting as special circuit judge. (R., pp. 1-5). Judge Kimball ruled that under the case of Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005), the statute of limitations in this case did not begin to run until the adverse ruling of the Workers Compensation Commission was handed down on July 31, 2003 (R., p. 4).

In addition to denying Respondent Wright's motion for summary judgment, the Order of Judge Kimball also stayed the action entirely for the reason that the workers compensation case was still at that time unresolved and was on appeal. The Kimball Order noted that the stay should be granted because Plaintiff Kimmer did not claim any damage in the pending matter, other than those that flowed from the workers compensation claim. (R., p. 5). Judge Kimball imposed the stay because the workers compensation appeal would be "determinative of this case." (R., p. 5).

After the Court of Appeals ruled against Petitioner Kimmer in the Murata case and this Court denied the Petition for Certiorari on October 18, 2007, the stay of Judge Kimball was lifted in this case.

During 2008, Petitioner Kimmer and Respondent Wright filed cross motions for summary judgment, the primary issue being the commencement of the statute of limitations. On September 5, 2008, Circuit Judge John C. Hayes III held a hearing on

these cross motions. In his Order dated September 16, 2008 (R., pp. 7-14), Judge Hayes denied Wright's motion for summary judgment and ruled that "the time at which the statute of limitations began to run was July 31, 2003 [the date of the adverse ruling of the Workers Compensation Commission]....Wherefore, Defendant Philip Wright's motion for summary judgment is denied and Plaintiff Richard Kimmer's motion for summary judgment is granted on the statute of limitations issue." He relied at least in part on the Kimball Order. This appeal followed.

On November 2, 2011, the Court of Appeals issued its Opinion No. 4902 reversing the lower court ruling and concluding that Petitioner's legal malpractice claim was barred by the statute of limitations. The panel majority determined that this Court's decision in Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) did not apply to the instant case. Chief Judge Few dissented and asserted that Epstein was controlling. Kimmer timely filed a petition for rehearing and on December 19, 2011, the Court of Appeals issued its Order denying the petition for rehearing. By its Order dated June 6, 2013, this Honorable Court granted Petitioner's Petition for Writ of Certiorari.

STATEMENT OF FACTS

In the early morning of January 29, 1999, the petitioner was injured in a head-on collision on Highway 9 near Chester, South Carolina, when he was operating his personal vehicle on the way from his home in Whitmire to the Katherine plant of Springs Mills in Chester. (R., p. 346, ll 2-12). At that time, Kimmer[1] was going to his job as an installer of air jet looms for his employer, Murata of America, Inc. His vehicle

[1] Richard Kimmer, who died in March 2008, will be referred to herein as the "petitioner" or "Kimmer" although he is technically "plaintiff's decedent" as referred to in the Complaint.

was in a head-on collision with a vehicle operated by Anthony Pendergrass, a resident of Chester County.

In the collision, the petitioner's head hit the windshield and his neck and back were injured, as well as his knees. Kimmer was diagnosed with meniscal tears in both knees, ruptured discs at L4-5, along with post-traumatic stress syndrome and depression. (R., pp. 350-351). He had three surgeries on his right knee and one surgery on his left knee. The at-fault driver, Pendergrass, had automobile liability insurance with minimum limits of $15,000 through Auto Owners Insurance Company. (R., p. 360, ll. 9- 12; p. 361, ll. 7-12; 382, ll. 1-8; pp. 549-552).

Kimmer retained the services of respondent attorney Wright in connection with his injuries in that accident. Wright conducted an assets investigation on the at-fault driver Pendergrass and determined that he had no assets or additional insurance policies. (R., p. 382, ll. 6-18). On June 16, 1999, Wright reached a settlement on behalf of petitioner with Pendergrass' carrier for the policy limits of $15,000. Kimmer was presented with a Release of All Claims against the at-fault party, which he signed upon the advice of the respondent. At the subsequent workers compensation hearing, both the petitioner (R., p. 366, ll. 4-16) and Respondent Wright (R., p. 388, ll. 4-5) testified that, in making this settlement, petitioner did not intend to bar any workers compensation remedies he might have had. The settlement proceeds were disbursed as follows: $10,000 to medical providers and subrogation interests and $5,000 to Wright for attorneys' fees. (R., p. 382, l. 21 – p. 383, l. 9). Kimmer received no proceeds from this third party settlement.

On June 18, 1999, Wright filed a WCC Form 50 (R., p. 563) with the SC Workers Compensation Commission claiming disability benefits on behalf of petitioner[2]. During the pendency of the workers compensation claim, Wright wrote a letter to Kimmer on February 1, 2000, in which he acknowledged as follows:

> "I did not give...notification, so that may prejudice your right to recover workers compensation benefits if, in fact, you were entitled based on the facts of the case to receive those benefits...you may be entitled to eventually file a claim against me for some alleged error in the workers compensation case....I will be glad to cooperate with Mr. Pope in resolving the issues on your workers compensation case...." (R., pp. 559-560).

It was not until December 10, 2002 that the hearing was held by the commissioner.

At that hearing, Commissioner Michelle Childs was presented with three disputed issues: (a) whether the accident was compensable; (b) the extent of petitioner's injuries; and, (c) whether or not Kimmer's settlement with the third party was a bar to the workers compensation recovery. (R., p. 16). Wright testified at the hearing that, while he had not given notice to the carrier, the third party settlement was for the full minimum policy limits and the third party was judgment-proof. (R., p. 379, l. 22 to p. 382, l. 18).

In her Decision and Order, the single commissioner determined that Kimmer's injuries did arise out of the course and scope of employment and that he was totally disabled as a result of the compensable accident; however, she ruled that the third party settlement without notice to the carrier was a bar to workers compensation benefits. (R.,

[2] Wright testified in his deposition in 2005 that since Kimmer was driving to work when the accident occurred, he did not think that his injuries were "comp related." (R., p. 315, ll. 2-3; p. 328, ll. 19-20; p. 330, ll. 2-3). .

pp. 25-27). The commissioner first concluded that "there appears to be no prejudice" to Murata and its carrier, but then found that there was prejudice to the carrier. (R., p. 25).

After the single commissioner issued her Decision and Order dated July 31, 2003, the undersigned attorney for the petitioner wrote Wright a letter dated August 5, 2003, in which he informed Wright that, while Commissioner Childs had found that Kimmer was injured on the job and that he was totally disabled from the accident, she had, however, ruled that the workers comp claim was barred because the third party claim was settled without notice to the carrier. The letter also advised Wright that an appeal was taken from that Decision and Order but that counsel wanted to enter into a tolling agreement which would toll the statute of limitations so that the appeal could be taken on the workers compensation case (R., p. 1061).

On appeal to the full Workers Compensation Commission, the Order of the single commissioner was affirmed, and a decision was rendered by the review panel dated May 27, 2004.

Petitioner then brought an action in the Court of Common Pleas in Chester County under SC Code §1-23-380 to seek reversal of the decision of the Workers Compensation Commission. Upon review of the entire record in this matter, Circuit Judge Kenneth Goode agreed and reversed the ruling of the Commission. He determined that the provisions of SC Code §42-1-550, et seq., were not a bar to workers compensation benefits under the facts of this case because the employer and its workers compensation carrier were not prejudiced by the lack of notice of the settlement of the third party claim, and the subrogation rights of the carrier were protected. (R., p. 31).

The Amended Order of September 1, 2005 of Judge Goode determined that this case was one of first impression, since SC Code §42-1-560 did not provide a penalty, nor did it specify a consequence, where a claimant settled a third party claim without notice or prejudice to the employer. (R., pp. 32-35). Based on its interpretation, the circuit court determined the decision of the Commission was based on error of law and clearly erroneous in view of the substantial evidence in the record. (R., p. 31). At this point in time, Kimmer had neither suffered, nor claimed, any damages.

The Court of Appeals ultimately reversed the decision of Circuit Judge Goode. *See* Kimmer v. Murata of America, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2007). This Court denied Plaintiff's Petition for Writ of Certiorari on October 18, 2007.

During the pendency of the above-referenced workers compensation appeal process, Wright moved for summary judgment on May 13, 2005. (R., pp. 75-76). Kimmer opposed the motion and moved the circuit court to issue a stay of the instant case until the conclusion of the workers compensation appeal. Judge Kimball issued an Order of June 20, 2005, denying Wright's motion and granting the stay. (R., pp. 1-5). Judge Kimball noted that, in the interest of judicial economy, the action should be stayed, because if respondent were successful on the workers compensation appeal[3], this case would be moot. (R., p. 4).

After the Supreme Court denied Kimmer's petition for writ of certiorari on October 18, 2007, Judge Kimball's stay in this case was lifted. In 2008, Kimmer and Wright filed motions for summary judgment. (R., pp. 82; 101-102). Petitioner submitted an affidavit of counsel, with exhibits from the record in support of the motion.

[3] As noted in the Kimball Order, Circuit Judge Goode had already ruled in favor of Kimmer and reversed the decision of the Workers Compensation Commission. (R., p. 4).

These motions were heard on September 5, 2008 before the Honorable John C. Hayes III, circuit judge. Judge Hayes entered his Order dated September 16, 2008 (R., pp. 8-14) in which he ruled that, based on Judge Kimball's order, the triggering event for the statute of limitations was July 31, 2003, when the adverse ruling was handed down by the Workers Compensation Commission. (R., p. 14). Wright did not file a motion to reconsider the rulings of Judge Hayes.

On appeal by Respondent Wright, the South Carolina Court of Appeals issued its Opinion reversing the lower court ruling. Kimmer v. Wright, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011). The Court of Appeals ruled that the trial court erred in ruling that as a matter of law the statute of limitations had not run on Kimmer's malpractice claim. It further ruled that the lower court order erred in relying on the decision of this Court in Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) to the effect that the statute of limitations did not commence to run until an adverse verdict was rendered in the underlying action. In dissent, the Chief Judge of the Court of Appeals concluded that this case fell within the holding of Epstein and that the Court of Appeals should have affirmed the lower court. Chief Judge Few noted:

> "[a]s with many mistakes lawyers make in the course of litigation, no damage resulted from the mistake [of Wright] until the Workers Compensation Commission denied benefits to Kimmer. At that point, the other two elements which must be present before a cause of action for legal malpractice accrues – causation and damage – came into existence for the first time. Kimmer filed suit against Wright within three years of the date all four elements existed, and thus complied with the Statute of Limitations."
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> Kimmer v. Wright, 396 S.C. 53, 63, 719 S.E.2d 265 (Ct. App. 2011)

ARGUMENTS

I. THE DECISION OF THE COURT OF APPEALS ERRONEOUSLY HELD THAT EPSTEIN V. BROWN, 363 S.C. 372, 610 S.E.2d 816 (2005) DID NOT APPLY TO THE FACTS OF THIS CASE. THE DECISION ERRED IN REVERSING THE LOWER COURT ORDER WHICH RULED THAT THE STATUTE OF LIMITATIONS DID NOT COMMENCE TO RUN UNTILTHE DATE OF THE ADVERSE RULING OF THE WORKERS COMPENSATION COMMISSION.

The Court of Appeals reversed the lower court ruling that, under Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) and S.C. Code §15-3-535, the statute of limitations for the Kimmer[4] claim began to run on July 31, 2003, which is the date on which the Decision and Order of the single workers compensation commissioner was handed down. Following the analysis of Epstein, the lower court order correctly granted partial summary judgment to Kimmer on this issue. The effect of the Panel decision of the Court of Appeals is that Kimmer should have sued his attorney, Philip E. Wright, no later than February 1, 2003, on a case that he did not yet have and may never have had. The Opinion of the Court of Appeals misapplied the cases from this Court which are cited in the dissent.

Petitioner asserts that Chief Judge Few's analysis is correct. Under the discovery rule, the statute of limitations begins to run from the date the injured party "either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." Id., 610 S.E.2d at 818 (emphasis added), citing Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996); S. C. Code §15-3-535.

[4] "Kimmer" or "Petitioner" herein refers interchangeably to Claimant Richard Kimmer, who died during the pendency of this action, and his surviving wife, Carol M. Kimmer, personal representative of his estate.

A legal malpractice cause of action cannot accrue before there is damage. The existence of damage is but one element which must be proved in a legal malpractice case. Berry v. McLeod, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct. App. 1997). The dissent correctly notes that when any one of these elements is missing, a client does not have a legal malpractice cause of action against the attorney; "thus, the statute of limitations does not begin to run until all four elements, including damage, are present." Opinion, p. 9.

The opinion of the Court of Appeals incorrectly assumes that Wright's malpractice was clear in early 2000 because that is when Kimmer learned that Wright failed to notify the workers comp carrier when he settled the third party claim. However, it was not until July 31, 2003, that the workers compensation commissioner ruled that Kimmer was barred from seeking compensation benefits because this notice was not given to the carrier.

In the underlying workers compensation case, the employer and its carrier defended Kimmer's claim based on the "going and coming" rule to establish that the plaintiff's injuries from the accident were not compensable. The employer and its carrier argued that an employee going to or coming from the place where his work is to be performed in his personal vehicle was not engaged in performing any service growing out of and incidental to his employment and, therefore, an injury sustained by an accident at such time was not compensable as it did not arise out of and in the course of his employment. See, *e.g.*, Pratt v. Morris Roofing, 357 S.C. 619, 594 S.E.2d 272 (2004) (claimant barred by "going and coming" rule when he was injured returning to work in a

company truck). The plaintiff was able to overcome this defense by presenting evidence that he received a car allowance from the employer.

The Workers' Compensation Commission found the "going and coming" rule did not apply and the plaintiff's injuries were compensable. (R., p. 24). Accordingly, the plaintiff could not have known whether he had a claim against the defendant unless and until it was determined, as it was on July 31, 2003, that his injuries were, in fact, compensable but for the defendant's negligent settlement of the third party claim without notice. Appellant admits this in a letter to plaintiff dated February 1, 2000 in which he stated:

> "I did not give [the employer or its carrier] notification [of the third party settlement], so that may prejudice your right to recover workers' compensation benefits ***if, in fact, you were entitled based on the facts of the case to receive those benefits.***"
>
> "...you may be entitled to eventually file a claim against me for some alleged error in the workers compensation case....I will be glad to cooperate with Mr. Pope in resolving the issues on your workers compensation case as quickly as possible." (R., pp. 559-560). (emphasis added).

Interestingly, the workers compensation commission order was later reversed by Circuit Judge Kenneth Goode who ruled that Wright's actions in not giving notice to the carrier were not a bar to Kimmer's claim. This ruling was handed down on September 1, 2005. As of that date, Kimmer had a right to total disability under the workers compensation laws and did not have a malpractice case. If that order had not been appealed and reversed, Kimmer could not have sued Wright for malpractice.

As in Epstein, the legal malpractice in this matter involves a "case within a case." This Court ruled in Epstein that the statute of limitations began to run when an adverse jury verdict was rendered. While this Court cautioned in Epstein that it was not

ruling that an adverse jury verdict is automatically the triggering event in all cases of legal malpractice, the reasoning in that case has particular bearing upon the case at bar. There, the plaintiff, Dr. Franklin Epstein, was previously represented by David Brown, the defendant, in connection with his defense of a medical malpractice wrongful death and survival action. Epstein's action against Brown was based on his failure to investigate, his failure to advise Epstein to settle, and his failure to call expert witnesses. At the conclusion of the trial in February 1998, the jury rendered a verdict against Dr. Epstein for over $3,000,000. Thereafter, his case was affirmed on appeal in January 2000.

Dr. Epstein filed a complaint in January 2002 alleging several negligent acts or omissions of Brown occurring prior to and during the trial. Brown filed a motion for summary judgment asserting that Dr. Epstein's case was barred by the statute of limitations. It was granted and affirmed on appeal. The Epstein court, applying the discovery rule, paid particular attention to the moment at which Dr. Epstein both (1) had knowledge of the facts giving rise to his claim, and (2) suffered actual damages, whether monetary or to his reputation. It found that after the verdict was handed down by the jury Dr. Epstein admittedly had knowledge of facts giving rise to a claim, and it was at that time that the statute of limitations began to run, as it was then that causative damages occasioned by Brown's negligent acts were established[5]. Id., 363 S.C. at pp. 380-381, 610 S.E.2d at pp. 820-821.

[5]The United States District Court for the District of South Carolina followed a similar line of reasoning in Clearwater Trust v. Wyche, Burgess, Freeman & Parham, P.A., Civil Action No. 6:06-01854-GRA, 2007 WL 1795797 (D.S.C June 20, 2007), where the United States District Court held that entry of an adverse judgment was notice of potential attorney malpractice.

Petitioner is aware of no reported South Carolina case which has held that a suit for professional negligence accrues, and/or is discoverable, when a plaintiff-client thinks a lawyer "may" have made an error but before a plaintiff has a legal right to sue. The fact that Defendant Wright "may" have made an error in improperly settling the third party claim, as he said in his letter (R., pp. 559-560), did not give rise to a cause of action until it was determined that respondent's workers compensation claim was compensable[6] in the first place. (R., pp. 15-27).

The holding in the Epstein case has been cited with approval in Anonymous Taxpayer v. S.C. Dept. of Revenue, 377 S.C. 425, 661 S.E.2d 73 (2008) (the limitation period begins to run when the plaintiff knows or should know that a cause of action exists) and in Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009) (malpractice claim barred because plaintiff knew he had a cause of action and had been damaged).

It is the law in South Carolina in legal malpractice cases involving a "case within a case" that a plaintiff must show that he or she "most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice." Doe v. Howe, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005) (cert denied, 2007). The court in Doe noted that the issue of the success of the underlying claim was a question of law. Id., at p. 30, citing Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997) (where the Supreme Court affirmed the grant of summary judgment because the plaintiff had failed to prove that she "most probably" would have prevailed if her attorney had sued the highway department on a claim for negligent maintenance).

[6] Wright testified that when he filed the workers compensation claim he did not think Kimmer's injuries were "comp related," and he told Kimmer that when the claim was filed. (R., p. 314, l.19 – p. 315, l.6; R., p. 328, ll. 18 – 21; R., p. 330, ll. 2 – 5).

The court in Doe made clear that a plaintiff in a legal malpractice case must establish not only a breach of duty by the attorney but damages and proximate cause[7].

The analysis in Doe v. Howe, supra. is instructive and applicable to the case at bar because if Kimmer had not proceeded with his workers compensation appeal to get determinations on the three contested issues, he would have faced a summary judgment motion like the one in Doe, based on the fact that he could not produce evidence that he "most probably" would have prevailed at the workers comp claim because it was either not compensable, he was not disabled, or because §42-1-560 did not apply.

Under the facts of this case, and the analysis of Epstein v. Brown, respondent's cause of action against appellant did not accrue until his claim was determined to be both compensable and barred by appellant's actions.

In order to maintain a legal negligence cause of action, a plaintiff must show a duty, a breach of such duty, injury, and that such injury was proximately caused by the breach. See Brown v. Theos, 345 S.C. 626, 629, 550 S.E. 2d 304, 306 (2001). Prior to the workers compensation ruling of July 31, 2003 (R., pp. 15-27), Kimmer could not have maintained an action against Wright, and, therefore, had no legal right to sue him, as Kimmer could not have established any injury nor could he establish that any assumed injury was proximately caused by the respondent's negligent act. Brown, supra. Had the worker's compensation action not been pressed to conclusion (i.e., had it been abandoned), the defendant would be asserting that the workers' compensation claim was

[7] For example, in Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002), the court noted that summary judgment for the attorney was affirmed because the client could not show that he was damaged by the attorney's actions. See also Brown v. Theos, 345 S.C. 626, 550 S.E.2d 304 (2001), where the Supreme Court affirmed summary judgment for the defendant where the client could not establish proximate causation in a malpractice action involving legal representation in a criminal case.

barred by the "going and coming rule" and was not compensable. It was not until the Worker's Compensation Commission determined on July 31, 2003 that the case was compensable that the cause of action accrued.

The Court of Appeals found that Epstein did not apply here and that the applicable statute of limitations began to run in February 2000. This is incorrect. This conclusion rests on the assumption that the statute of limitations began to run **before** the plaintiff's claim accrued. While Kimmer may have had notice that the defendant may have done something incorrectly in February or March of 2000, the plaintiff could not have maintained an action for damages against the defendant until July 31, 2003[8], and it is at this point that his claim accrued.

As expressed in the majority opinion, the decision of the Court of Appeals puts a lawyer in a position of bringing a malpractice law suit that is not ripe, and may never be, when the damage element is not present. This would constitute a violation of Rule 11, SCRCP:

> "...The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it...."

There cannot be good ground to support a cause of action for legal malpractice where an element is missing.

The Court of Appeals erroneously distinguished the facts of this case from the application of Epstein and erred in holding that Kimmer should have known he had a

[8] July 31, 2003 is the earliest date on which the statute began to run. In view of the September 1, 2005 circuit court order reversing the Workers Compensation Commission (R., p.38), the best rule would be that the limitations period does not start to run until the appeal of that order had been ruled on (which was on December 5, 2006). See Epstein at p.822 (Dissent of Chief Justice Toal).

cause of action for malpractice prior to the ruling of the SC Workers Compensation Commission on July 31, 2003.

II. THE COURT OF APPEALS ERRED IN RULING THAT THE DOCTRINE OF EQUITABLE ESTOPPEL DID NOT APPLY TO SUPPORT THE LOWER ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT.

The issue of equitable tolling was raised by petitioner as an additional sustaining ground at the Court of Appeals. The opinion of the Court of Appeals found that it "is not justified under the circumstances of this case." Opinion, p. 8. Based on the record of this case, this was error.

Under the doctrine of equitable tolling,[9] a plaintiff is allowed to initiate an action beyond the statute of limitations deadlines "in order to serve the ends of justice" if "justified under all the circumstances." Hooper v. Ebenezer Senior Services, 386 S.C. 108, 117, 687 S.E.2d 29 (2009). The doctrine is recognized to ensure "fundamental fairness" or to prevent unfairness to a diligent plaintiff."

While the facts of this case are distinguishable from those in Hooper v. Ebenezer Senior Citizens, supra., that case is instructive. This Court recognized in Hooper that equitable tolling of a limitations period, being judicially created, can arise wherever the facts lead a court to conclude that the "ends of justice" would be served by its application. This Court cited here with approval Irby v. Fairbanks Gold Mining, Inc., 203 P.3d 1138 (Alaska 2009) where the Supreme Court of Alaska applied the doctrine to toll the limitations period, when a party had more than one legal remedy available, while

[9] This doctrine is distinct from equitable estoppel, in that the latter requires wrongful conduct by the defendant (fraud or misrepresentation).

that party pursued one of those possible remedies. Here, Kimmer has only one remedy: his workers compensation benefits for total disability. He had to seek them first from the Commission. When the Commission denied them, he pursued his malpractice remedy for those same benefits.

This Court has held that the policy behind a statute of limitations is to protect defendants from false claims that might be difficult to disprove if brought after the loss of relevant evidence. Santee Portland Cement v. Daniel International Corp., 299 S.C. 270, 271, 384 S.E.2d 693, 694 (1988).

Equitable tolling is an equitable doctrine which gives relief where these reasons do not apply. There are extraordinary circumstances in this case that should invoke this doctrine. Appellant has not been surprised or prejudiced by any "late" filing. Indeed, Wright himself believed and expected that a workers compensation determination had to be obtained before a case against him would be known.[10] When he wrote Kimmer on February 1, 2000, Wright told him that, notwithstanding that appellant had failed to give the notice, Kimmer "may eventually" have a claim, "if based on the facts of the case [he was entitled] to receive those benefits." (R., pp. 559-560). This is a far cry from what Wright said through counsel beginning in March 2005 that Kimmer "had a cause of action against me starting in February 2000."

Of course, between that date and 2005, when Wright developed his new theory that all elements of the cause of action against him accrued in 2000, several things happened that belie the position that Wright took for the first time in his Amended Answer.

[10] Wright testified that when he filed the workers compensation claim he did not think that the respondent's injuries were "comp related," and he told Kimmer that when the claim was filed. (R., p. 314, l.19 – p.315, l.6; R., p. 328, ll. 18-21; R., p. 330, ll. 2-5).

First, Wright testified for Kimmer at the December 2002 hearing to try to convince the Workers Compensation Commission that appellant's settling the third party claim was not prejudicial to the carrier and not intended to waive or bar the workers compensation claim. (R., p. 379, l.8 – p., 382, l.18).

Secondly, before this action commenced, and over a year after appellant now contends the statute had expired, Wright and his carrier agreed to a tolling agreement and agreed to participate in mediation. (R., p. 1070). Thirdly, appellant never asserted a limitations defense until March 8, 2005, when he moved to amend his Answer. It was created by insurance counsel.

The facts of the instant case strongly support the application of this doctrine pursuant to the holding in Hooper v. Ebenezer Senior Citizens, supra. The respondent should not be penalized for pursuing his quasi-judicial rights at the Workers Compensation Commission. In fact, he was required to do so. The appellant would have been entirely free of this malpractice claim if respondent had prevailed in that underlying matter.

In the event it is concluded that the limitations period began running before July 31, 2003, as Wright urges, petitioner asserts alternatively that the doctrine of equitable tolling should apply, and the Court of Appeals should be reversed on that basis.

CONCLUSION

The decision of the Court of Appeals, in misunderstanding or misapplying Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005), should be reversed. Kimmer's suit against Wright seeks damages for the workers compensation benefits he lost due to Wright's negligence – nothing more (except prejudgment interest). Petitioner did not

have all elements of a malpractice claim until, at the earliest, July 31, 2003, when the Workers Compensation Commission issued its ruling against him. There is a difference between when one breaches a duty and when damages flow from the breach. This distinction was misapprehended by the majority of the panel in the Opinion. Kimmer's suit was not time-barred. The lower court correctly granted summary judgment in favor of petitioner.

The Opinion of the Court of Appeals erred in misapplying Epstein. The effect of the Opinion is that it would require litigants to commence litigation of malpractice claims that are not yet ripe, and may not ever be, because no damage has been suffered and all elements of the cause of action are not present. This Opinion should be reversed, and the Order of the lower court should be reinstated.

Respectfully submitted,

POPE AND HUDGENS, P.A.

By: _____

Thomas H. Pope III – S.C. Bar No. 4508
PO Box 190
1508 College Street
Newberry, SC 29108
P: (803) 276-2532; F: (803) 276-8684
thpope@popeandhudgens.com

Attorneys for Petitioner Carol M. Kimmer, Personal Representative of the Estate of Richard Kimmer, deceased

June 21, 2013
Newberry, SC

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes III, Circuit Court Judge

Opinion No. 4902 (S.C. Ct. App. filed November 2, 2011)

Carol M. Kimmer, Personal Representative
of the Estate of Richard Kimmer, deceased,

Petitioner,

v.

Philip E. Wright,

Defendant-Respondent.

PROOF OF SERVICE

I certify that I have served one copy of the Brief of Petitioner, together with one copy of the Appendix, in the above matter on Warren C. Powell, Jr., attorney of record for the defendant-respondent, Philip E. Wright, by hand delivering copies of same to him on June 24, 2013 at the following address:

Warren C. Powell, Jr.
Bruner, Powell, Wall & Mullins, LLC
1735 St. Julian Place, Suite
Columbia, SC 29260
Attorneys for Defendant-Respondent Philip E. Wright

Allison Martin, Courier for:
Pope & Hudgens, P.A.
PO Box 190
Newberry, SC 29108
803-276-2532

Newberry, SC
June 24, 2013