

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes III, Circuit Court Judge

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S.C. Supreme Court

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.

APPENDIX

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

Philip E. Wright, Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4902
Heard March 23, 2011 – Filed November 2, 2011

REVERSED AND REMANDED

Warren C. Powell, Jr., of Columbia, for
Appellant.

Thomas H. Pope, III, of Newberry, for
Respondent.

HUFF, J.: Philip Wright appeals the trial court's order granting partial summary judgment to Carol M. Kimmer, as personal representative of the estate of Richard Kimmer, [1] in which the court held the statute of limitations had not run on Kimmer's legal malpractice action. We reverse and remand.

FACTS/PROCEDURAL HISTORY

On January 29, 1999, Kimmer was injured in a motor vehicle accident as he was driving to work for his employer, Murata. He hired attorney Philip Wright to represent him. Without notice to Murata, Wright settled Kimmer's claims with the at-fault driver's insurance carrier for his policy limit of \$15,000 on June 16, 1999. Kimmer filed a Form 50 on June 18, 1999, and an Amended Form 50 on May 29, 2002, seeking workers' compensation benefits. Murata filed its Form 51 denying Kimmer's claim and asserting as a defense the third party action had been settled without consent. In a meeting at Wright's office, Wright informed

Kimmer about his mistake in settling the third party claim and advised him to get another attorney due to the potential for Kimmer to file a claim against him. Wright followed up this conversation with a letter dated February 1, 2000. On that same date Kimmer signed a waiver of conflict recognizing he might have a right to make a claim against Wright due to his representation in the workers' compensation action but agreeing to let Wright continue to represent him in the personal injury case. Kimmer terminated Wright's representation of him on February 24, 2000.

In an order dated July 31, 2003, the single commissioner found Kimmer's injuries compensable because Murata provided him with a car allowance and mileage. However, the single commissioner denied Kimmer's claim, concluding the settlement of the third party claim, without notice to Murata, constituted an election of remedies and barred the workers' compensation claim. The Appellate Panel affirmed and adopted the order of the single commissioner. In its amended order, the circuit court reversed the order of the Appellate Panel, finding Murata suffered no prejudice as a result of the settlement without notice. It held Kimmer was totally and permanently disabled and was entitled to an award of total and permanent disability, less an offset for the third party settlement. This court reversed the order of the circuit court and reinstated the order of the Appellate Panel. Kimmer v. Murata of Am., 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006), cert. denied, (Oct. 18, 2007).

While the appeal was proceeding in the workers' compensation case, Wright and Kimmer entered into a tolling agreement on October 30, 2003, which provided the time period between the date of the agreement and its termination at no later than November 1, 2004, would not be included in determining a statute of limitations or laches defense. However, the agreement provided it would not be deemed to revive any claim that was already barred on that date. Kimmer brought this action on October 14, 2004. On May 13, 2005, Wright filed an amended answer asserting Kimmer's legal malpractice action was barred by the statute of limitations.

On June 20, 2005, the Honorable S. Jackson Kimball denied Wright's motion for summary judgment on the statute of limitations defense. The judge explained that the adverse ruling of the Workers' Compensation Commission would be the similar "trigger" event as the adverse jury verdict that triggered the running of the statute of limitations in Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). The court held, "This Court believes that there is at least an issue of fact in the present case as to when [Kimmer's] awareness of the possibility of an error by [Wright] became sufficient to put him on notice that he actually had an existing legal malpractice claim against [Wright] as opposed to being told merely that he 'may have' a claim. The resolution of that possibility involved legal issues upon which, to this point, the Commission and the Circuit Court disagree." Judge Kimball granted a stay of the legal malpractice action until the appeal of the workers' compensation case was completed.

After the supreme court denied certiorari of this court's decision in the workers' compensation case, both parties moved for summary judgment in the legal malpractice action. The motions were heard before the Honorable John C. Hayes. While Judge Hayes noted the facts suggested Kimmer had notice of a potential claim before the Commission's adverse decision, he held he was bound by Judge Kimball's determination that the statute of limitations was triggered by the Commission's order denying benefits. This appeal followed.

LAW/ANALYSIS

A. Law of the Case

Wright argues Judge Hayes erred in holding Judge Kimball's order was the law of the case. Kimmer conceded this issue in his brief. "A denial of summary judgment does not establish the law of the case and is not directly appealable." In re Rabens, 386 S.C. 469, 473, 688 S.E.2d 602, 604 (Ct. App. 2010). Accordingly, we find Judge Hayes erred in this ruling.

B. Statute of Limitations

Wright argues the trial court erred in holding as a matter of law the statute of limitations had not run on Kimmer's malpractice claim. We agree.

The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005) (stating the statute of limitations for "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law" is three years); see also Berry v. McLeod, 328 S.C. 435, 444, 492 S.E.2d 794, 799 (Ct. App. 1997) (finding section 15-3-530(5) provides a three-year statute of limitations for legal malpractice actions). The discovery rule applies in this action. See Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 632-33, 682 S.E.2d 1, 4 (Ct. App. 2009) (applying discovery rule in legal malpractice action). Under the discovery rule, "the three-year clock starts ticking on the 'date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.'" Martin v. Companion Healthcare Corp., 357 S.C. 570, 575-76, 593 S.E.2d 624, 627 (Ct. App. 2004) (quoting Bayle v. S.C. Dep't. of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001)); see also S.C. Code Ann. § 15-3-535 (2005) ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."). The supreme court explained reasonable diligence means

simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. **The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.** Under § 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another.

Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (citation omitted).

Kimmer relies on Epstein to support her position the statute of limitations in a legal malpractice case does not start to run until an adverse judgment in the underlying action. We find this reliance is misplaced. In Epstein the supreme court refused to adopt the continuous representation rule, which holds the statute of limitations is tolled during the period an attorney continues to represent the client on the same matter out of which the alleged malpractice arose. Id. 363 S.C. at 380, 610 S.E.2d at 820. The supreme court

similarly rejected Epstein's argument the statute of limitations should not be deemed to have run until the conclusion of the appeal of the underlying action because it was not until that date upon which he suffered "legal damages." Id. Instead, the court held the statute of limitations had begun to run by the conclusion of the trial in the underlying action. Id. at 382, 610 S.E.2d at 821. The court cautioned:

We do not hold that, in all instances, the date of a jury's adverse verdict is the date on which the [statute of limitations] begins to run. To the contrary, we hold only that, under the facts of this case, Dr. Epstein knew of a potential claim against Brown by this date, at the latest.

Id. at 383 n.8, at 610 S.E.2d at 821 n.8 (emphasis added).

Thus, the court did not establish a bright-line test the statute of limitations cannot begin to run until the jury's adverse verdict, but held, in that particular case, the latest it began to run was the conclusion of the trial. See also Kelly, 383 S.C. at 637, 682 S.E.2d at 6 (holding statute of limitations on Kelly's legal malpractice action began to run well before Kelly was dismissed from underlying action).

Kimmer asserts the statute of limitations was not triggered until the Commission's adverse ruling because until then he could not have established an injury that was proximately caused by Wright's negligence. He asserts until then there was a possibility the Commission would hold his claim was not compensable because it was not work-related or that the third-party settlement did not bar his claim. These issues could have been litigated in the legal malpractice action if necessary. See Doe v. Howe, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005) (holding as to damages, the plaintiff must show he most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice and the question of the success of the underlying claim, if suit had been brought, is a question of law). In a case cited by Epstein, the Indiana Court of Appeals rejected such a contention and held the statute of limitations in a legal malpractice claim began to run when the attorney informed the clients that he had failed to timely file a medical malpractice claim and not when summary judgment was granted on the declaratory judgment action. Basinger v. Sullivan, 540 N.E.2d 91, 93-94 (Ind. Ct. App. 1989). The court explained:

Where legal malpractice is claimed for an attorney's failure to commence an action within the period of limitations it is generally held that one of the necessary ultimate proofs for a recovery of damages is that a recovery would have been had if the suit had been properly brought. Can it then be contended that the limitation period does not commence to run on the attorney's negligence until plaintiff's right to recovery on the original claim has been judicially established? Clearly, the answer is no. To permit such reasoning would for all practical purposes preclude the statute from ever commencing to run.

Id. at 93 (citations omitted).

Further, we find Kimmer's assertion does not comply with our precedent. This court held: "[O]nce a reasonable person has reason to believe that some right of his has been invaded or that some claim against another party might exist, the requirement of

reasonable diligence to investigate this information further takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all." Binkley v. Burry, 352 S.C. 286, 297-98, 573 S.E.2d 838, 844-45 (Ct. App. 2002) (citation and internal quotation marks omitted).

In Wright's February 1, 2000 letter, Wright explained that the workers' compensation statutes require the claimant to notify the Commission, the employer, and the employer's insurance carrier in the event of a settlement with a third party. He admitted, "I did not give those parties 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." He informed Kimmer the attorney for Murata denied Kimmer was entitled to workers' compensation benefits because Wright had settled with the third party without providing the required notice. Kimmer signed a Waiver of Conflict dated February 1, 2000, which provided: "I understand that I may have a right to make a claim against Mr. Wright concerning his representation related to my workers' compensation action."

In his deposition, Kimmer stated that during an office conference some time before February 1, 2000, Wright told him he had "screwed this up" and Kimmer would have to get another attorney to take the workers' compensation case. Kimmer acknowledged he understood from Wright's February 1, 2000 letter the reason he was not receiving workers' compensation benefits was because Wright had made a mistake and Kimmer might have a claim against him. Kimmer admitted beginning in 1999, the failure to receive workers' compensation payments caused him problems. He stated the failure to receive benefits contributed to his having post-traumatic stress disorder and depression problems. A medical report dated October 17, 2000, refers to Kimmer having severe post-traumatic stress syndrome.

Thus, more than three years before he and Wright entered into the tolling agreement, Kimmer was aware Wright had made a significant error in settling the third-party claim without notice, that he was not receiving workers' compensation benefits because of Wright's error, and he was suffering financial and emotional damages due to the error. Accordingly, the trial court erred in holding the statute of limitations did not begin to run until the single commissioner issued her order.

C. Equitable Tolling

As an additional sustaining ground, Kimmer urges this court to apply the doctrine of equitable tolling. The South Carolina Supreme Court recently adopted this doctrine. Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009). The court explained the doctrine of equitable tolling may be applied to toll the running of the statute of limitations "to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits." *Id.* at 115, 687 S.E.2d at 32. The court explained:

The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances.

Id. at 116-17, 687 S.E.2d at 33 (citation and quotation marks omitted). The court noted the party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. Id. at 115, 687 S.E.2d at 32. It cautioned equitable tolling was a doctrine that should be used sparingly and only when the interests of justice compel its use. Id. at 117, 687 S.E.2d at 33.

Kimmer argues the court should apply the doctrine because 1) Wright testified for Kimmer in the workers' compensation hearing; 2) Wright entered into the tolling agreement a year after he contends the statute ran; and 3) Wright did not assert the statute of limitations defense until 2005 when his insurance counsel moved to amend his answer. He asserts he "should not be penalized for pursuing his quasi-judicial rights at the workers' Compensation Commission."

The tolling agreement specifically provided it would not be deemed to revive any claim that was already barred on that date. Kimmer does not direct this court's attention to any action by Wright that would establish Wright led Kimmer to believe he would not assert the statute of limitations as a defense. Further, Kimmer could have protected his claim against Wright while pursuing his workers' compensation claim. In Epstein, the supreme court rejected Epstein's argument that requiring him to pursue an appeal while simultaneously filing a malpractice suit against his attorney would have put him in the awkward position of arguing inconsistent positions in two different courts. Epstein v. Brown, 363 S.C. 372, 381-82, 610 S.E.2d 816, 821 (2005). The court noted a plaintiff could take measures to avoid such inconsistent positions such as filing the malpractice action and then seeking a stay of the malpractice agreement during the appeal or entering into a tolling agreement for the malpractice claim for the pendency of the appeal. Id. Kimmer could have requested a tolling agreement earlier or brought his malpractice action and requested a stay.

Although we are sympathetic to Kimmer's situation, we are mindful the supreme court cautioned the doctrine of equitable tolling was to be used sparingly. We find application of the doctrine is not justified under the circumstances of this case.

CONCLUSION

We find the trial court erred in holding the statute of limitations did not bar Kimmer's legal malpractice action. Accordingly we reverse the order of the trial court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

PIEPER, J., concurs.

FEW, C.J., dissenting: Attorney Philip Wright concedes that a mistake he made in the course of representing Richard Kimmer in a workers' compensation case was a breach of the duty he owed to his client. He thus concedes the first two elements of a legal malpractice claim existed as of the date of the mistake. However, as with many mistakes lawyers make in the course of litigation, no damage resulted from the mistake 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. I respectfully dissent.

The statute of limitations requires that legal malpractice actions "be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." Berry v. McLeod, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct. App. 1997). A legal malpractice cause of action consists of four elements: "(1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). When any one of these elements is missing, the client does not have a legal malpractice cause of action against the lawyer. Thus, the statute of limitations does not begin to run until all four elements, including damage, are present.

A lawyer's breach of duty to the client necessarily occurs before the damage resulting from the breach. In other words, damage is always the last element of a legal malpractice claim to occur. Therefore, our courts have described the point at which the statute of limitations begins to run as "where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." Mitchell v. Holler, 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993) (emphasis added) (internal quotation marks and citation omitted). In Mitchell, as in every published decision on the statute of limitations in a legal malpractice case except for one, the prospective plaintiff discovered the injury before learning of the negligent act or omission that caused it. In each of those cases, the court held that the occurrence of the injury put the client on notice to inquire as to whether the injury was caused by the attorney's negligence.[2]

Here, the situation is different. Wright made Kimmer aware of the negligence, but Kimmer did not suffer an actionable injury for another three years. The majority has taken language from these prior cases, inapplicable to the facts of this case,[3] and used it to hold that when the client learns of his lawyer's negligence, the statute of limitations begins to run even though he has yet to suffer any injury. I respectfully disagree.

My point is illustrated by Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005), the one decision in which the factual scenario is similar, although not identical, to this one. Dr. Epstein sued Brown for legal malpractice Brown allegedly committed in the course of defending Dr. Epstein in a medical malpractice lawsuit. 363 S.C. at 374-75, 610 S.E.2d at 817. The medical malpractice lawsuit resulted in a \$6,028,535.88 verdict against Dr. Epstein. Id. The trial court granted summary judgment to Brown on the basis that Dr. Epstein had not complied with the statute of limitations. 363 S.C. at 375, 610 S.E.2d at 817. The supreme court affirmed, holding "Dr. Epstein clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial." 363 S.C. at 382, 610 S.E.2d at 821.

I will discuss below my contention that Epstein is controlling, and that the statute therefore began to run "at the conclusion of [Kimmer's] trial," the date of the single commissioner's ruling. However, even if Epstein is not controlling, the supreme court's holding illustrates an important reality about litigation that requires us to affirm the circuit court: lawyers make mistakes during the course of litigation, and yet if the client wins the case, no damage results from those mistakes. Recognizing this reality is essential to the analysis of a

statute of limitations question in a legal malpractice action arising out of litigation because the existence of damage is one of the elements. Rydde, 381 S.C. at 646, 675 S.E.2d at 433 (stating the elements of a legal malpractice claim include "damage to the client"). Like Kimmer in this case, Dr. Epstein made allegations of malpractice against Brown arising out of events that occurred long before the trial.^[4] However, if the jury found in Dr. Epstein's favor, he would not have suffered damages, and no cause of action would ever have accrued against Brown.

The same is true here. The effect of Wright's negligence on Kimmer's right to recover workers' compensation benefits was not known until at least July 31, 2003, when the single commissioner ruled against Kimmer and denied his claim for benefits. Until then, Kimmer and his lawyers were working hard to win the case, despite Wright's negligence. The damages element was missing because the possibility remained that Kimmer would prevail on the claim. When the single commissioner ruled, however, Kimmer knew Wright's negligence caused him to lose his workers' compensation case. Because damage existed then for the first time, Wright's negligence became actionable malpractice for the first time. Kimmer commenced this action on October 14, 2004, well within the statute of limitations.

The majority's reliance on Binkley and the "reasonable diligence" language from Epstein is misplaced. In Binkley, and in all cases in which the reasonable diligence language is important, the prospective plaintiff was aware of the damage, but was unaware of the attorney's negligent conduct that caused the damage. In Binkley, for example, we held the statute of limitations began to run when the plaintiffs knew of the existence of an easement allowing a conservation district to cause flooding on the plaintiffs' property. 352 S.C. at 297, 573 S.E.2d at 844. We held this even though no flooding had yet occurred, and the plaintiffs had no idea the defendant law firm had negligently failed to disclose the easement. Id. We explained that the mere existence of the easement was sufficient damage to put the plaintiff on inquiry notice. Id. ("An easement by its very nature involves the right to encroach upon another's property."). Because the plaintiffs knew of the easement, we held they "had inquiry notice of a possible claim against [the law firm] regarding the easement." Id. In Binkley, it was knowledge of the existence of damage that caused the statute of limitations to begin to run.

However, the majority relies on the following language from Binkley: "the requirement of reasonable diligence to investigate this information further takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all." 352 S.C. at 298, 573 S.E.2d at 845 (emphasis added). The majority interprets the emphasized language to support its position that a legal malpractice cause of action can accrue, and thus the statute of limitations begins to run, before any damage has occurred. I respectfully disagree with the majority's interpretation. Rather, the Binkley court's previous statement that the mere existence of the easement caused the landowner damage, taken in the context of the case, indicates this emphasized language refers to the insignificance of the fact that no flooding had yet occurred. My point is supported by a footnote at the end of the emphasized language, in which we cited Dean v. Ruscon Corp., 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996), for the principle "the fact that the injured party may not comprehend the full extent of the damage is immaterial." 352 S.C. at 298 n.21, 573 S.E.2d at 845 n.21. These circumstances demonstrate that the language from Binkley relied on by the majority does not indicate that a legal malpractice cause of action can accrue before there is damage. Rather, we used the language relied on by the

majority to indicate that on those facts, the circumstance that the flooding had not yet occurred did not delay the commencement of the statute of limitations.

The majority also relies on the following language from Epstein:

The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.

363 S.C. at 376, 610 S.E.2d at 818. The majority quotes this language, which emphasizes the word "might." Here, the correct language to emphasize is "injured party" and "the facts and circumstances of an injury." The language is used to describe a situation when a known injury "might" have resulted from a lawyer's negligence. The language was never intended to apply to a situation like we have here, where a lawyer's known negligence "might" later result in injury. The same is true in all of our published decisions on the statute of limitations in legal malpractice cases, except Epstein. In each case, the prospective plaintiff was aware of the injury, and that awareness put the plaintiff on notice to inquire into whether the injury was caused by the lawyer's negligence.[5]

Wright asserts several additional reasons the statute of limitations began to run earlier than the date of the single commissioner's ruling. First, he argues the "unmistakable" quality of his malpractice caused the statute to begin to run immediately. I disagree. As an initial matter, to condition the commencement of the statute of limitations in a legal malpractice case on the degree of the lawyer's negligence creates an unmanageable standard for courts to apply. Even assuming Wright is correct that his malpractice was unmistakable, how would the court treat malpractice that was barely mistakable, or merely probable? Second, the circuit court's ruling on appeal from the commission establishes that Wright's malpractice was not unmistakable. It would be patently unfair for this court to say Kimmer should have known he would eventually be damaged, and thus had a cause of action against Wright, when a circuit judge made precisely the opposite ruling in the same case. The fact that this court later reversed the circuit judge is not important. The circuit court's ruling established that Kimmer retained a reasonable chance of winning his workers' compensation claim even after Wright's "unmistakable" negligence.

Wright also argues the statute of limitations began to run because Kimmer did in fact suffer damage before the single commissioner's ruling due to the carrier's denial of temporary benefits. I disagree. First, this also creates an unmanageable standard. The courts cannot condition the commencement of the statute of limitations on whether a workers' compensation insurance adjuster agrees or refuses to pay temporary benefits. Taken not even to its extreme, Wright's argument provides that a cause of action accrues against a workers' compensation claimant's lawyer any time some minor mistake in the lawyer's office results in even a brief delay in requesting temporary benefits. Second, and more importantly, a claimant who is denied temporary benefits but later prevails at the final hearing is entitled to receive retroactive benefits. See Langdale v. Harris Carpets, Op. No. 4853 (S.C. Ct. App. filed July 20, 2011) (Shearouse Adv. Sh. No. 24 at 97, 106) (affirming commission's award of temporary benefits after employer denied payment). Thus, Kimmer did not suffer any damage resulting from his interim loss of temporary benefits. Rather, as with any other type of contested workers' compensation benefits, his entitlement to

temporary benefits depended on the ultimate decision of the commission. See Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 343, 513 S.E.2d 843, 848 (1999) (affirming commission's award of temporary total benefits).

Finally, and most importantly, the supreme court addressed this question in Epstein, and held that in an action based on alleged malpractice during the course of litigation, the statute of limitations begins to run when a lawyer's negligence results in a ruling adverse to the client in a trial. "Dr. Epstein clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial." Epstein, 363 S.C. at 382, 610 S.E.2d at 821 (emphasis added). The comparable point in time in this case, when under Epstein the statute of limitations began to run, is the single commissioner's ruling. I believe we are bound to apply Epstein to this appeal, and must affirm.

The majority argues, however, that Epstein is not controlling, emphasizing a footnote in which the court stated:

We do not hold that, in all instances, the date of a jury's adverse verdict is the date on which the [statute of limitations] begins to run. To the contrary, we hold only that, under the facts of this case, Dr. Epstein knew of a potential claim against Brown by this date, at the latest.

363 S.C. at 383 n.8, 610 S.E.2d at 821 n.8 (emphasis added). The majority argues the emphasized language "at the latest" means that under some circumstances the statute could begin to run before an adverse decision by a trial court or administrative agency, but could never begin to run afterwards.

However, I believe "at the latest" means the opposite of what the majority contends. In order to understand this point, consider the dissenting opinion filed by the Chief Justice and the unique damages claim made by Dr. Epstein. In her dissent, the Chief Justice argued that no injury occurred, and thus the statute of limitations did not begin to run, until all appeals were exhausted and the remittitur had been sent to the lower court. 363 S.C. at 383, 610 S.E.2d at 822. As to Dr. Epstein's damages claim, he alleged damages to his reputation arising from adverse publicity when the verdict was announced, in addition to economic losses arising from the \$6 million judgment against him. See 363 S.C. at 376, 382, 610 S.E.2d at 818, 821.

Several paragraphs before the Epstein majority's "at the conclusion of his trial" holding, and the "at the latest" language of footnote 8, the majority began discussing the position the Chief Justice took in her dissent as follows:

Dr. Epstein asserts that, even if we do not adopt the continuous representation rule, the statute of limitations should not be deemed to have begun to run until the date on which this Court denied certiorari (January 11, 2001), because it was not until that date upon which he suffered "legal damages." We disagree.

363 S.C. at 380, 610 S.E.2d at 820. The Epstein majority then gave several reasons it disagreed. First, the court cited a number of decisions from other jurisdictions which "tend to hold that a plaintiff may institute a malpractice action prior to the conclusion of the appeal." 363 S.C. at 380-81, 610 S.E.2d at 820-21. Second, the court refuted the argument "that requiring [a plaintiff] to pursue an appeal while simultaneously filing a

malpractice suit against his attorney puts him in the awkward position of arguing inconsistent positions in two different courts." 363 S.C. at 381-82, 610 S.E.2d at 821.

Then the Epstein majority cited the "discovery rule," and noted "[t]he fact that the injured party may not comprehend the full extent of the damage is immaterial." 363 S.C. at 382, 610 S.E.2d at 821. Applying the discovery rule "[u]nder the facts of this case," the Epstein majority pointed out: "The damages [Dr. Epstein] claims are largely those to his reputation." Id. After discussing what Dr. Epstein knew before the trial and during the course of the appeal about his lawyer's performance, the court concluded: "It is patent Dr. Epstein knew, or should have known, of a possible claim against Brown long before this Court denied certiorari in January 2001." 363 S.C. at 383, 610 S.E.2d at 821. Footnote 8 is found at the end of the next sentence.

I believe the purpose of footnote 8 and the "at the latest" statement is to demonstrate that the Chief Justice's argument would not change the outcome of Epstein because of the allegation of injury to reputation. In other words, the purpose of footnote 8 is to explain that even if an appellate court had reversed the verdict, thereby eliminating the economic portion of Dr. Epstein's damages claim, the alleged injury to his reputation was at least partially irreversible and would have remained. In that situation, regardless of what the appellate court did to reverse his economic injury, Dr. Epstein suffered injury to his reputation as of the date of the jury verdict. Therefore, the court stated "under the facts of this case, Dr. Epstein knew of a potential claim against Brown by [the date of the jury's verdict], at the latest." 363 S.C. at 383 n.8, 610 S.E.2d at 821 n.8.

Under this reading, the Epstein majority did not intend the "at the latest" statement to indicate that the statute might have started to run before the verdict. Rather, the statement is part of the majority's response to the argument that the statute begins to run after the appeals have been exhausted, and specifically recognizes that the unique allegation of damage to Dr. Epstein's reputation makes that argument inapplicable to the facts of that case. Thus, the majority's reason for distinguishing Epstein is unfounded, and we are left with no basis on which to conclude that the supreme court did not mean what it said when it chose these words: "Dr. Epstein clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial." 363 S.C. at 382, 610 S.E.2d at 821. Epstein therefore controls the outcome of this case: the statute of limitations did not run on Kimmer's claim.

The practice of law is an imperfect art in which lawyers necessarily take risks and make mistakes. However, when a litigator makes a mistake—indeed commits malpractice, such as Wright did in this case—nobody knows whether the mistake will cause damage until the damage materializes in the form of an adverse judgment. For this reason, the statute of limitations did not begin to run on Kimmer's claim against Wright until July 31, 2003, when the single commissioner denied workers' compensation benefits. Kimmer filed suit on October 14, 2004. Because he commenced his action against Wright within the three-year statute of limitations, the circuit court correctly granted partial summary judgment to Kimmer.

I would affirm.

[1] Richard Kimmer passed away March 2, 2008, while this case was pending. For ease of reference, the name "Kimmer" will refer interchangeably to either Richard Kimmer, the personal representative, or to both parties collectively.

[2] See Christensen v. Mikell, 324 S.C. 70, 73, 476 S.E.2d 692, 694 (1996) (finding statute ran from point when client knew he did not have title insurance); Mitchell, 311 S.C. at 409, 429 S.E.2d at 795 (holding knowledge of murder conviction, coupled with complaint about trial counsel's performance, commenced running of statute); Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 145, 697 S.E.2d 644, 654 (Ct. App. 2010) (holding there was conflicting evidence on when client should have known deed of trust with priority over client's interest caused damage); Kelly v. Logan, Jolley, & Smith, LLP, 383 S.C. 626, 635-36, 682 S.E.2d 1, 6 (Ct. App. 2009) (finding statute ran from client's knowledge she had not been named as a plaintiff in medical malpractice action); Binkley v. Burry, 352 S.C. 286, 297, 573 S.E.2d 838, 844 (Ct. App. 2002) (holding statute ran from date landowners knew their property was encumbered by easement not disclosed at closing); Peterson v. Richland Cnty., 335 S.C. 135, 139, 515 S.E.2d 553, 555 (Ct. App. 1999) (holding statute ran from client's knowledge of improperly indexed judgment); Holy Loch Distribs., Inc. v. Hitchcock, 332 S.C. 247, 254, 503 S.E.2d 787, 791 (Ct. App. 1998) (holding statute began to run when ATF agents notified plaintiffs they were operating their business in violation of federal law due to lack of appropriate permits and licenses), rev'd on other grounds, 340 S.C. 20, 531 S.E.2d 282 (2000); Berry, 328 S.C. at 445-46, 492 S.E.2d at 800 (holding that where plaintiffs claimed a right to hold referendum on municipal bond, statute began to run when plaintiffs knew bond was issued without a referendum); Burgess v. Am. Cancer Soc'y, S.C. Div., Inc., 300 S.C. 182, 187, 386 S.E.2d 798, 800 (Ct. App. 1989) (holding statute was triggered by client's knowledge of attorney's affair with officer of company client was suing). But see True v. Monteith, 327 S.C. 116, 120-21, 489 S.E.2d 615, 617 (1997) (holding although client knew of injury for years, there was a question of fact as to when she should have learned of attorney's conflict of interest in transaction causing the injury).

[3] See discussion of Binkley below.

[4] For example, as the supreme court stated:

In his complaint, Dr. Epstein alleged Brown was negligent in numerous particulars, including: failing to conduct an adequate investigation, failing to advise Epstein to settle, failing to keep Epstein adequately informed during the pendency of the case, representing multiple defendants with conflicts of interest, . . . and adopting a defense which was contrary to Dr. Epstein's medical opinion.

Epstein, 363 S.C. at 376, 610 S.E.2d at 818. Several of these allegations arise out of actions Brown took before he even filed an answer. Presumably, for example, Brown made the decision to represent multiple defendants almost as soon as Dr. Epstein's complaint was served.

[5] See footnote 2.

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM YORK COUNTY
Court of Common Pleas**

John C. Hayes III, Circuit Court Judge

Opinion No. 4902, Filed November 2, 2011

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

Respondent/Petitioner,

v.

Philip E. Wright,

Appellant.

PETITION FOR REHEARING

In accordance with the provisions of Rule 221(a), SCACR, the respondent in this appeal petitions this Honorable Court for rehearing of published Opinion No. 4902 ("The Opinion"), filed on November 2, 2011. The respondent received notice of the filing of The Opinion on November 2, 2011.

Attached to this Petition is a Memorandum in Support of Petition for Rehearing which identifies and analyzes the points which the respondent contends The Opinion has overlooked or misapprehended. This Petition incorporates herein the respondent's analysis and arguments in the attached Memorandum.

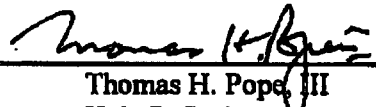
WHEREFORE, the respondent respectfully requests that this Honorable Court rehear the matters contained in The Opinion and affirm the judgment of the circuit court in the following particulars:

- (a) affirming the lower court's ruling that under the decision of the Supreme Court in Epstein v. Brown, 610 S.E.2d 816 (2005), respondent Kimmer was entitled to summary judgment and was not barred by the statute of limitations, because the statute did not commence to run until the date of the adverse ruling of the Workers Compensation Commission; and,
- (b) affirming the lower court's order granting summary judgment to respondent under the doctrine of equitable tolling.

Respectfully submitted,

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November 9, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes III, Circuit Court Judge

Opinion No. 4902, Filed November 2, 2011

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

Respondent/Petitioner,

v.

Philip E. Wright,

Appellant.

MEMORANDUM IN SUPPORT OF PETITION
FOR REHEARING

In support of her Petition for Rehearing of Opinion No. 4902 (the "Opinion"), the respondent respectfully submits this Memorandum.

INTRODUCTION

The respondent submits that the Opinion overlooked or misapprehended that this Honorable Court was bound by the decision and holding in Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) that the trigger date for the commencement of the statute of limitations was the date of the adverse ruling in the underlying action. The Opinion also overlooked or misapprehended the application of the doctrine of equitable tolling to this case. The bases for these assertions are discussed herein.

ARGUMENTS

I. THE EPSTEIN CASE APPLIED TO THE FACTS OF THIS CASE, AND THIS COURT IS BOUND BY ITS HOLDINGS AND ANALYSIS.

The Opinion overlooked or misapprehended that, under Epstein and S.C. Code §15-3-535, the statute of limitations for the Kimmer¹ 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. Under the analysis of Epstein, the Order of the lower court granting partial summary judgment to Kimmer should be affirmed. The Supreme Court in Epstein meant what it said when it ruled that:

“Dr. Epstein knew, or should have known, he might have had some claim against Brown at the conclusion of the trial.” 363 S.C. at 382, 610 S.E.2d at 821.

Epstein controls the outcome of this case: The statute of limitations did not run on Kimmer's claim. The effect of the Panel decision set forth in the Opinion is that respondent 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 misapprehended or overlooked the cases from the Supreme Court of South Carolina which are cited in the dissent. Our Supreme Court has held that 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.” 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.

¹ “Kimmer” or “Respondent” 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.

Respondent asserts that the analysis in the dissent to the Opinion is the correct one. 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.

"A legal malpractice cause of action consists of four elements: (1) the existence of an attorney client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and, (4) proximate cause of the client's damages by the breach." See Berry v. McLeod, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct. App. 1997), See also Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009).

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 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. It also ruled then in favor of the claimant that the claim was compensable and that claimant was totally disabled from his job injury. That was the adverse verdict and the earliest point at which Kimmer should have known that his claim was compensable, that he had been damaged by Wright's failure to give notice, and that he had a malpractice cause of action. 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 case².

The Court's view as expressed in the majority Opinion 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, and 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 Opinion overlooked or misapprehended that Epstein controlled and that Kimmer should not have known he had a cause of action for malpractice until the ruling of the SC Workers Compensation Commission.

II. THE DOCTRINE OF EQUITABLE TOLLING APPLIED TO TOLL THE RUNNING OF THE STATUTE OF LIMITATION.

The Opinion overlooked or misapprehended the application of the doctrine of equitable tolling. This doctrine was raised as an additional sustaining ground by respondent.

The Opinion overlooked its applicability to this case. Under the doctrine of equitable tolling, a plaintiff is allowed to initiate an action beyond the statute of

² In fact, in her dissent in the Epstein case, the Chief Justice opined that the rule in malpractice cases such as this should be that the statute of limitations did not begin to run until all appeals were exhausted and the remittur had been sent to the lower court. 363 S.C. at 383, 610 S.E.2d at 822.

³ Wright testified that when he filed the workers compensation claim he did not think 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).

limitations deadlines if, in view of all the circumstances, the interests of justice compel its application. Hooper v. Ebenezer Senior Services, 386 S.C. 108, 687 S.E.2d 29, 33 (2009). There are extraordinary circumstances that exist in the present case to justify the application of this doctrine. First, appellant has not been surprised or prejudiced by any "late" filing of the Summons and Complaint. Indeed, Wright himself believed and expected that a workers compensation determination had to be obtained before a case against him would be known³. In his letter of February 1, 2000, Wright told Kimmer that, notwithstanding that he (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). Secondly, Wright participated in the workers compensation claim as a witness. He testified at the December 2002 hearing to the effect that his settling the third party claim without notice was not prejudicial to the carrier and was not intended to waive or bar the workers compensation claim. (R., p. 379, l.8 – p. 382, l.18). Thirdly, before this action commenced and over a year after appellant now contends the statute has expired, Wright and his carrier agreed to a tolling agreement and agreed to participate in mediation. (R., p. 1070). Fourthly, appellant never asserted a limitation defense until March 8, 2005, when he moved to amend his original Answer which included no such defense. Finally, Wright's letter of February 1, 2000 clearly shows that Wright was expecting that either (a) Kimmer would win his workers compensation claim and not sue Wright or (b) Kimmer would lose his workers compensation case because of Wright's error and bring a malpractice claim against him.

³ Wright testified that when he filed the workers compensation claim he did not think 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).

Either way, Wright knew in 2000 that a determination was needed from the Commission before a claim, if any, would be filed against him.

Under these unusual facts, respondent asserts, alternatively, that the doctrine of equitable tolling should apply and that the lower court order should be affirmed on that basis. The Opinion misapprehended or overlooked the application of the doctrine of equitable tolling.

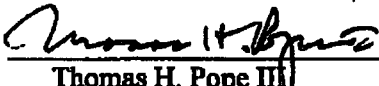
CONCLUSION

For the reasons set forth in this Memorandum, the respondent requests that this Honorable Court grant this petition for rehearing and issue its opinion:

- (a) affirming the lower court's ruling that under the decision of the Supreme Court of South Carolina in Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005), respondent Kimmer was entitled to summary judgment and was not barred by the statute of limitations, because the statute did not commence to run until the date of the adverse ruling of the Workers Compensation Commission; and,
- (b) affirming the lower court's order granting summary judgment to respondent under the additional sustaining ground of the doctrine of equitable tolling.

Respectfully submitted,

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November 9, 2011

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes III, Circuit Court Judge

Opinion No. 4902, Filed November 2, 2011

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

Respondent/Petitioner,

v.

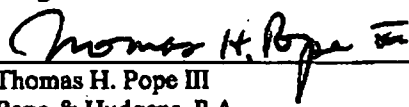
Philip E. Wright,

Appellant.

PROOF OF SERVICE

I certify that I have served three (3) copies of the Petition for Rehearing and Memorandum in Support of Petition for Rehearing on the appellant, Philip E. Wright, by depositing said copies in the United States mail, postage prepaid, on November 9, 2011, addressed to his attorney of record:

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November 9, 2011

The South Carolina Court of Appeals

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

Respondent,

v.

Philip E. Wright,

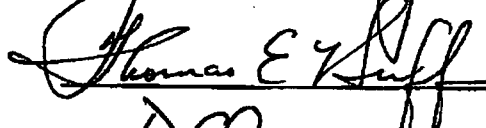
Appellant.

The Honorable John C. Hayes, III
York County
Trial Court Case No. 2004-CP-46-02659

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

 C. J.
 J.
 J.

FILED

19 December 2011

Columbia, South Carolina

**cc: Warren C. Powell, Jr, Esquire
Thomas H. Pope, III, Esquire**

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Case No: 2004-CP-46-2659

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

v.

Philip E. Wright.....Appellant

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STATEMENT OF THE ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN FINDING THAT THE STATUTE OF LIMITATIONS DID NOT COMMENCE TO RUN UNTIL JULY 31, 2003 ON PLAINTIFF/RESPONDENT'S ("KIMMER'S") CLAIMS WHEN BY FEBRUARY 24, 2000 KIMMER KNEW AND/OR ASSERTED:

A. BY MARCH, 1999, KIMMER BELIEVED HE SHOULD HAVE BEEN RECEIVING WORKERS' COMPENSATION BENEFITS SINCE HIS INJURIES WERE SUSTAINED IN THE JANUARY, 29, 1999 AUTO COLLISION;

B. ON JUNE 16, 1999, KIMMER, UPON ADVICE OF APPELLANT ("WRIGHT") AND WITHOUT CONSENT OF HIS EMPLOYER, SETTLED HIS CLAIMS AGAINST THE AUTO TORTFEASOR FOR THE LIMITS OF THE TORTFEASOR'S INSURANCE POLICY, FIFTEEN THOUSAND AND/NO (\$15,000.00) DOLLARS;

C. ON JUNE 18, 1999, WRIGHT FILED A WORKERS' COMPENSATION CLAIM FOR KIMMER AGAINST MURATA OF AMERICA, KIMMER'S EMPLOYER;

D. KIMMER WAS DENIED TEMPORARY TOTAL BENEFITS AND PAYMENT OF HIS MEDICAL EXPENSES BEGINNING IN 1999 BY THE WORKERS' COMPENSATION CARRIER ON MULTIPLE GROUNDS INCLUDING KIMMER'S ELECTION OF HIS REMEDY BY GIVING A RELEASE TO THE TORTFEASOR IN VIOLATION OF S.C. CODE §42-1-560;

E. ON JANUARY 13, 2000, THE WORKERS' COMPENSATION CARRIER FILED AND SERVED ITS FORM 51 WITH THE WORKERS'

COMPENSATION COMMISSION, WHICH DENIED LIABILITY BECAUSE THE
"THIRD-PARTY ACTION [WAS] SETTLED WITHOUT CONSENT."

F. KIMMER SUSTAINED DAMAGES IN THE FORM OF MEDICAL
BILLS, LOST WAGES, AND PAIN AND SUFFERING BEGINNING IN 1999
RESULTING FROM THE JANUARY 1999 AUTOMOBILE ACCIDENT;

G. KIMMER WAS TOLD BY WRIGHT THAT "HE SCREWED THIS UP"
AND THAT HIS WORKERS' COMPENSATION CLAIM HAD BEEN DENIED
BECAUSE WRIGHT MADE A MISTAKE BY SETTLING THE CLAIM AGAINST
THE TORTFEASOR WITHOUT OBTAINING THE CONSENT OF THE EMPLOYER
AND ITS WORKERS' COMPENSATION CARRIER AND AS A RESULT KIMMER
"WOULD HAVE TO GET ANOTHER ATTORNEY TO TAKE THE CASE";

H. WRIGHT'S FEBRUARY 1, 2000, LETTER ADDRESSED TO
KIMMER INFORMED HIM HE "MAY BE ENTITLED TO EVENTUALLY FILE A
CLAIM AGAINST ME [WRIGHT] FOR SOME ALLEGED ERROR IN THE
WORKERS' COMPENSATION CASE";

I. KIMMER CONSULTED WITH SEPARATE COUNSEL DURING
LATE JANUARY AND EARLY FEBRUARY 2000;

J. KIMMER, IN HIS FEBRUARY 1, 2000 WAIVER OF CONFLICT,
STATED, "I UNDERSTAND THAT I MAY HAVE A RIGHT TO MAKE A CLAIM
AGAINST MR. WRIGHT CONCERNING HIS REPRESENTATION RELATED TO
MY WORKERS' COMPENSATION ACTION";

K. ON FEBRUARY 1, 2000, KIMMER AUTHORIZED WRIGHT TO RELEASE THE WORKERS' COMPENSATION PORTION OF HIS FILE TO HIS NEW ATTORNEY;

L. KIMMER BELIEVED THAT HIS POST TRAUMATIC STRESS DISORDER WAS IN PART THE FAULT OF WRIGHT;

M. WRIGHT TOLD KIMMER THAT KIMMER'S NOT GETTING PAID HIS WORKERS' COMPENSATION BENEFITS WAS IN PART WRIGHT'S FAULT; AND,

N. ON FEBRUARY 24, 2000, KIMMER DISCHARGED WRIGHT AS HIS COUNSEL FOR ALL MATTERS AND HAD RETAINED NEW COUNSEL.

II. DID THE TRIAL COURT ERR IN HOLDING THAT THE FINDINGS CONTAINED IN A PRIOR INTERLOCUTORY ORDER DENYING APPELLANT'S ("WRIGHT'S") MOTION FOR SUMMARY JUDGMENT BECAME THE LAW OF THE CASE WHICH THEN FORMED THE BASIS OF THE TRIAL COURT'S AWARDING SUMMARY JUDGMENT TO PLAINTIFF ON THE ISSUE OF THE STATUE OF LIMITATIONS?

STATEMENT OF THE CASE

Richard Kimmer was involved in an automobile accident on January 29, 1999, while driving to work. He was later diagnosed with meniscal tears in the knees, a ruptured disc at L-4-5, and posttraumatic stress syndrome. On June 16, 1999, Kimmer, on the advice of Philip Wright, his attorney, settled the claims against the tortfeasor in the automobile accident for the minimum limits of the tortfeasor's insurance policy, Fifteen Thousand and No/100 \$15,000.00 (Dollars). On June 18, 1999, Wright, on Kimmer's behalf, filed a workers' compensation claim against Kimmer's employer.

The workers' compensation insurance carrier denied Kimmer's claim on grounds, among others, that Kimmer's release of the auto tortfeasor without notice to or consent by the employer and its workers' compensation carrier was an election of remedies to the exclusion of any workers' compensation benefits. Wright informed Kimmer during January 2000 that he had made the mistake of settling the auto case without notice to the carrier and Kimmer would need to obtain new counsel. Wright also informed Kimmer that Kimmer may have a claim against him based upon this error. By February 24, 2000, Wright no longer represented Kimmer in any matter.

Kimmer, through separate counsel, lost his workers' compensation claim before the single commissioner, the full commission and the South Carolina Court of Appeals. The reason for this result as stated by the single commissioner, the full commission, and the Court of Appeals was that Kimmer had settled the third party claim against the auto tortfeasor without notice to or consent by the employer or its workers' compensation

insurance carrier and in so doing had elected his remedy to the exclusion of remedies available under the Workers' Compensation Act. The Court of Appeals decision was decided December 8, 2006, and Certiorari denied October 8, 2007. Kimmer v. Murata of America, Inc., 372 S.C. 39, 640 S.E.2d 507 (Ct.App. 2006)

The instant action for legal malpractice was filed October 14, 2004. Defendant filed his first motion for summary judgment on May 13, 2005. This motion was denied in an order issued by The Honorable S. Jackson Kimball, II, York County Master sitting as Special Circuit Judge.

During 2008 Plaintiff (Respondent) and Defendant (Appellant) filed cross motions for summary judgment, the primary issue being the commencement of the running of the Statute of Limitations. At some point after the 2005 interlocutory Order was issued, Judge Kimball recused himself from any further involvement in this case. A hearing was held on September 5, 2008 before The Honorable John C. Hayes, III on the parties' cross motions. Judge Hayes ruled that the findings contained in the Order dated June 20, 2005, issued by The Honorable S. Jackson Kimball, II, which denied Wright's prior Motion for Summary Judgment became the law of the case and, therefore, became binding for purposes of ruling on the parties' cross motions for summary judgment. Accordingly, Judge Hayes in his September 16, 2008, Order denied Wright's Motion for Summary Judgment and stated, "the time at which the Statute of Limitations began to run was July 31, 2003...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."

Richard Kimmer died on March 2, 2008, and Carol M. Kimmer, as personal representative was substituted as Plaintiff. This appeal followed.

STATEMENT OF FACTS

On January 29, 1999, Kimmer was injured in an automobile accident and by March 1999 believed that he should have been receiving workers' compensation benefits since the accident. (Kimmer Deposition, pp 29-30; 38-40) (R. pp. 183-184; 192-194) Kimmer retained Wright as his counsel and on Wright's advice on June 16, 1999, gave a release, without prior notice to or consent from his employer, to the auto tortfeasor in exchange for payment of the limits of the tortfeasor's liability insurance policy. (Kimmer June 16, 1999 Release)(R. p. 562)

On June 18, 1999, Wright on Kimmer's behalf filed a workers' compensation claim against Kimmer's employer on Kimmer's behalf (Kimmer Form 50, June 18, 1999) V. (R. p. 563) The workers' compensation insurance carrier denied Kimmer's claim on grounds including Kimmer's election of his remedy by giving a release to the third party auto tortfeasor without notice to or consent of the employer and its workers' compensation carrier. (Murata Form 51) (R. p. 564)

By February 2000 Kimmer was aware of his damages in the form of medical bills, lost wages, and post traumatic stress disorder, all beginning in 1999. (Kimmer Deposition, pp 48-51, 73, 74, 87, 88) (R. pp. 202-205, 227, 228, 241, 242) Kimmer testified that by February 2000, Wright told him that, "He screwed this up" and that Kimmer's workers' compensation claim had been denied because Wright made a mistake by settling the claim against the tortfeasor without obtaining the consent of the employer and its workers' compensation carrier. (Kimmer Deposition, pp 47-48) (R. pp. 201-202) Prior to February 24, 2000, Kimmer spoke to Wright and was told that because Wright

"screwed this up" Kimmer would have to get another attorney. (Kimmer Deposition, pp 47-48) (R. pp. 201-202)

On February 1, 2000, Wright wrote Kimmer that he may be entitled to file a claim against Wright for an error Wright made in the workers' compensation case. (Kimmer Deposition, p 45; Wright 2/1/00 letter) (R. pp. 199; 559-560) Kimmer consulted with separate counsel during late January and early February, 2000. Kimmer, during early February 2000, desired that Wright continue to represent him in other matters and signed his waiver of conflict which stated, "I understand that I may have a right to make a claim against Mr. Wright concerning his representation related to my workers' compensation action." (Kimmer 2/1/00 Waiver of Conflict) (R. p. 558) On February 1, 2000, Kimmer authorized Wright to release the workers' compensation portion of his file to his new attorney. (Kimmer Deposition, pp 77-78) (R. pp. 231-232) On February 24, 2000, Kimmer discharged Wright as his counsel for all matters and had retained new counsel (Kimmer deposition, pp 82-84) (R. p. 236-238)

By February 2000, Kimmer believed that his posttraumatic stress disorder, which started in 1999, was in part caused by Wright's conduct (Kimmer Deposition, pp 87-88) (R. pp. 241-242). Also by that time, Wright had told Kimmer that his not getting paid was in part Wright's fault. (Kimmer Deposition, p 88) (R. p. 242)

Kimmer, through separate counsel, lost his workers' compensation claim before the single commissioner, the full commission and the South Carolina Court of Appeals on the grounds that Kimmer had settled the third party claim against the auto tortfeasor without notice to or consent by the employer or its workers' compensation insurance

carrier. The Court of Appeals Opinion was issued on December 18, 2006, and Certiorari denied October 18, 2007. Kimmer v. Murata

This action for legal malpractice was filed October 14, 2004. (Summons and Complaint, September 14, 2004) (R. pp. 41-55) Defendant Wright filed his first motion for summary judgment based upon the Statute of Limitations on May 13, 2005. (Wright Motion for Summary Judgment) (R. pp. 75-76) Judge Kimball issued an interlocutory order of June 20, 2005 denying Wright's motion. (Kimball Order of June 20, 2005) (R. pp. 1-5) Over Wright's objection this action was stayed by Judge Kimball pending conclusion of the worker's compensation claim. (Kimball Order of June 20, 2005) (R. pp. 1-5)

During 2008, Plaintiff and Defendant filed cross motions for summary judgment, the primary issue underlying both motions being the commencement of the running of the Statute of Limitations. (Respondent's Motion for Summary Judgment; Defendant's Motion for Summary Judgment) (R. pp. 82; 101-102) At some point after issuing the 2005 interlocutory order Judge Kimball recused himself from hearing any further involvement in this case. (Hearing Transcript of September 5, 2008 Hearing, p. 50) (R. p. 305) The Honorable John C. Hayes, III ruled in his September 16, 2008, Order that findings of the interlocutory order of June 20, 2005, issued by Judge Kimball, York County Master sitting as Special Circuit Judge, denying Defendant's motion for summary judgment became the law of the case. (Order, September 16, 2008) (R. pp. 7-14) Kimmer argued that the statute could not commence to run until after the Workers' Compensation Commissioner issued her Order denying Kimmer's claim on July 31, 2003. (Kimmer Memorandum in Support of Motion for Summary Judgment, September 3, 2008) (R. pp. 103-124)

Judge Hayes concluded the findings of the 2005 interlocutory order became the law of the case and were binding, denied the defendant's motion for summary judgment, and granted Plaintiff's motion for summary judgment on the Statute of Limitations issue in his September 16, 2008 Order. (Order, September 16, 2008) (R. pp. 7-14) Judge Hayes found, that based upon the foregoing the Statute of Limitations commenced to run on July 31, 2003, the day the Workers' Compensation Commissioner issued her Order denying Kimmer's compensation claim finding that he had elected his remedy by releasing the third party auto tortfeasor. (Order of September 16, 2008) (R. pp. 7-14) This appeal followed.

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT (PLAINTIFF) SUMMARY JUDGMENT BY FINDING THAT THE STATUTE OF LIMITATIONS DID NOT COMMENCE TO RUN UNTIL JULY 31, 2003 ON PLAINTIFF/RESPONDENT'S ("KIMMER'S") CLAIMS WHEN BY FEBRUARY 24, 2000 KIMMER KNEW AND/OR ASSERTED:

A. BY MARCH, 1999, KIMMER BELIEVED HE SHOULD HAVE BEEN RECEIVING WORKERS' COMPENSATION BENEFITS SINCE HIS INJURIES WERE SUSTAINED IN THE JANUARY, 29, 1999 AUTO COLLISION;

B. ON JUNE 16, 1999, KIMMER, UPON ADVICE OF APPELLANT ("WRIGHT") AND WITHOUT CONSENT OF HIS EMPLOYER, SETTLED HIS CLAIMS AGAINST THE AUTO TORTFEASOR FOR THE LIMITS OF THE

TORTFEASOR'S INSURANCE POLICY, FIFTEEN THOUSAND AND/NO (\$15,000.00) DOLLARS;

C. ON JUNE 18, 1999, WRIGHT FILED A WORKERS' COMPENSATION CLAIM FOR KIMMER AGAINST MURATA OF AMERICA, KIMMER'S EMPLOYER;

D. KIMMER WAS DENIED TEMPORARY TOTAL BENEFITS AND PAYMENT OF HIS MEDICAL EXPENSES BEGINNING IN 1999 BY THE WORKERS' COMPENSATION CARRIER ON MULTIPLE GROUNDS INCLUDING KIMMER'S ELECTION OF HIS REMEDY BY GIVING A RELEASE TO THE TORTFEASOR IN VIOLATION OF S.C. CODE §42-1-560;

E. ON JANUARY 13, 2000, THE WORKERS' COMPENSATION CARRIER FILED AND SERVED ITS FORM 51 WITH THE WORKERS' COMPENSATION COMMISSION, WHICH DENIED LIABILITY BECAUSE THE "THIRD-PARTY ACTION [WAS] SETTLED WITHOUT CONSENT."

F. KIMMER SUSTAINED DAMAGES IN THE FORM OF MEDICAL BILLS, LOST WAGES, AND PAIN AND SUFFERING BEGINNING IN 1999 RESULTING FROM THE JANUARY 1999 AUTOMOBILE ACCIDENT;

G. KIMMER WAS TOLD BY WRIGHT THAT "HE SCREWED THIS UP" AND THAT HIS WORKERS' COMPENSATION CLAIM HAD BEEN DENIED BECAUSE WRIGHT MADE A MISTAKE BY SETTLING THE CLAIM AGAINST THE TORTFEASOR WITHOUT OBTAINING THE CONSENT OF THE EMPLOYER AND ITS WORKERS' COMPENSATION CARRIER AND AS A RESULT KIMMER "WOULD HAVE TO GET ANOTHER ATTORNEY TO TAKE THE CASE";

H. WRIGHT'S FEBRUARY 1, 2000, LETTER ADDRESSED TO KIMMER INFORMED HIM HE "MAY BE ENTITLED TO EVENTUALLY FILE A CLAIM AGAINST ME [WRIGHT] FOR SOME ALLEGED ERROR IN THE WORKERS' COMPENSATION CASE";

I. KIMMER CONSULTED WITH SEPARATE COUNSEL DURING LATE JANUARY AND EARLY FEBRUARY 2000;

J. KIMMER, IN HIS FEBRUARY 1, 2000 WAIVER OF CONFLICT, STATED, "I UNDERSTAND THAT I MAY HAVE A RIGHT TO MAKE A CLAIM AGAINST MR. WRIGHT CONCERNING HIS REPRESENTATION RELATED TO MY WORKERS' COMPENSATION ACTION";

K. ON FEBRUARY 1, 2000, KIMMER AUTHORIZED WRIGHT TO RELEASE THE WORKERS' COMPENSATION PORTION OF HIS FILE TO HIS NEW ATTORNEY;

L. KIMMER BELIEVED THAT HIS POST TRAUMATIC STRESS DISORDER WAS IN PART THE FAULT OF WRIGHT;

M. WRIGHT TOLD KIMMER THAT KIMMER'S NOT GETTING PAID HIS WORKERS' COMPENSATION BENEFITS WAS IN PART WRIGHT'S FAULT; AND,

N. ON FEBRUARY 24, 2000, KIMMER DISCHARGED WRIGHT AS HIS COUNSEL FOR ALL MATTERS AND HAD RETAINED NEW COUNSEL.

A. Summary Judgment Standard

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000). "Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact." Hedgepath v. American Telephone and Telegraph Company, 348 S.C. 340, 559 S.E.2d 327 (Ct.App.2002) citing Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). "Once the moving party carries its initial burden, the "opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with specific facts showing that there is a genuine issue for trial.'" (emphasis in original) Hedgepath at 335, citations omitted. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).

The issues before the court in this case primarily concern the commencement of the running of the Statute of Limitations. Determining when a cause of action arises or accrues under the discovery rule requires an objective analysis, not a subjective one. Burgess v. American Cancer Soc'y, 300 S.C. 182, 386 S.E.2d 798, (Ct. App. 1989) at p. 800. Therefore, such a determination is properly one for the court, not a jury. An action arising or accruing on or after April 5, 1988, must be commenced within three years after the party knows, or by the exercise of reasonable diligence, should know he might have a claim. (S.C. Code Ann. §15-3-530 (1976); §15-3-535 (1976))

B. The Statute of Limitations is an absolute bar to actions brought outside the limitations set forth in S.C. Code Ann. § 15-3-530 & 535 (1976 as amended).

S.C. Code Ann. §§ 15-3-530 & 535 (1976) are the statutory provisions that create an absolute bar to any recovery when a claim or lawsuit is filed over three years from the date that the claim arose. Section 15-3-535 provides that actions "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." The focal point of most litigation surrounding the Statute of Limitations is when the Statute of Limitations begins to run or when the cause of action accrued.

C. Controlling Law as To When the Clock Starts: The Discovery Rule

It is well settled in this state that the accrual of most causes of action, whether in tort or in contract, is governed by the discovery rule. This statutory period begins to run, therefore, when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. Austin v. Conway Hosp., Inc., 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct. App. 1987) quoting Rogers v. Bfird's Exterminating Co., Inc., 284 S.C. 377, 379, 325 S.E.2d 541, 542 (1985). Specifically, the discovery rule focuses upon whether the complaining party acquired knowledge of any facts "sufficient to put said party on inquiry, which, if developed, will disclose" the alleged conduct. Walter J. Kline, Co. v.

Kneecs, 239 S.C. at 478, 483, 123 S.E.2d 870, 874 (1962) quoting Tucker v. Weathersbee, 98 S.C. 402, 82 S.E. 638 (1914).

The Parties' Dispute: When did the Statute of Limitations commence to run?

The controversy between the parties as to the commencement of the running of the statute of limitations on Respondent's claims against Philip Wright centers on the following: The record reflects that by February 24, 2000, Respondent Kimmer had been told by Wright that Kimmer was not receiving his workers' compensation benefits because of Wright's error, that because Wright "screwed this up" Kimmer would need to obtain new counsel, and that Kimmer as a result of these events may have a claim against Wright. Also, by February 2000, Kimmer had acknowledged in writing that he understood he may have a right to make a claim against Wright and had discharged Wright as his attorney for all matters as of February 24, 2000. Further, by February 2000 Kimmer assigned blame to Wright for his Posttraumatic stress disorder. Kimmer had also retained new counsel during February 2000. Appellant contends that the Statute of Limitations commenced to run during February 2000, more than three (3) years prior to Kimmer's filing suit. Respondent contends that, because the workers' compensation carrier defended Kimmer's compensation claim on multiple grounds, the malpractice could not have been discovered by Kimmer until July 31, 2003, when the Commissioner issued her ruling denying Kimmer's claim on the grounds that he had elected his remedy by releasing the third party tortfeasor without notice to Kimmer's employer.

The application of the discovery rule is in large measure a function of determining what facts and circumstances were known or discoverable by the plaintiff and when they

were known or discoverable. Several South Carolina appellate cases provide guidance as to when the Statute commences to run under a given set of facts.

Dean v. Ruscon, 321 S.C. 360, 468 S.E.2d 645 (1996)

In Dean, the plaintiff observed a fine crack approximately three feet in length at the front right corner of her building in November 1984 and concluded that the crack was attributable to Ruscon's pile driving, which commenced in October and November of 1984. After hiring a structural engineer, Dean was informed that unless there was a change in the gauge or crack, the damage could be corrected by placing right angle steel on the building's corners. Ruscon resumed pile driving activities adjacent to the block where Dean's building was located. In August of 1985, Dean noticed that the original crack had expanded and the facade of the building was bulging and buckling at the location of the original crack. Dean closed her business in the building after being informed that the building was no longer structurally sound. Dean filed suit in April of 1991.

The trial court directed a verdict for Ruscon, concluding that Dean discovered potential damage to her building in 1984 and associated it with Ruscon's pile driving activities. The Court of Appeals reversed, concluding that a question of fact existed as to whether Dean was reasonably diligent in determining whether the damage to her building was attributable to Ruscon, thereby triggering the running of the Statute of Limitations in 1984.

The Supreme Court reversed the Court of Appeals and restated the long standing standard that, "the Statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the

wrongful conduct." The Supreme Court went further to define "exercise of reasonable diligence" to mean that "the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial." Id. at 363-364.

Dean argued that the crack, which appeared in 1984, and the bulging of the bricks which appeared in 1985, present two distinct harms and, therefore, separate statutory periods should be imposed as to each harm. The Supreme Court took notice that, "Dean admitted that she personally believed the damage to her building resulted from the pile driving activities of 1984, and that when she first noticed the crack, she thought the structure of the building was compromised." Id. at 364, 648. at 364, 648. The Supreme Court found that because the subsequent harm was not separate and distinguishable, it was discoverable in 1984 and, accordingly, the Statute commenced to run at that time, entitling Ruscon to judgment as a matter of law.

Burgess v. American Cancer Soc'y, 300 S.C. 182, 386 S.E.2d 798, (Ct. App. 1989)

Burgess sued her former attorney for legal malpractice, contending that although she was aware that a Cancer Society employee, Oullah, was having an affair with her former attorney, McLeod, she was unaware that Oullah was passing information Oullah had allegedly learned from McLeod about Burgess's claim on to managerial level personnel at the Cancer Society office.

The trial court and the Court of Appeals held "as a matter of law, that Burgess' knowledge of the alleged affair between McLeod, her attorney, and Oullah, then

Executive Secretary of ACS, constitutes such knowledge of existing facts which were sufficient to put Burgess on inquiry and had she pursued such inquiry, it would have disclosed alleged communications between McLeod and Oullah." Id. at 800-801. Hence, in order for the statute to commence to run it is not necessary that the Plaintiff need acquire precise information of the attorney's incorrect or negligent conduct but merely acquire "such facts as would have led to the knowledge thereof, if pursued with reasonable diligence." Id. at 800. Because Burgess was aware of the affair, the appellate court held that she was on notice to inquire further and, inasmuch as she was on inquiry notice, the statute had commenced to run.

Peterson v. Richland County, 335 S.C. 515 S.E.2d 553 (Ct. App. 1999)

Peterson received a confession of judgment from Scarscella in December 1988. The confession of judgment was attached to the summons and complaint filed on Peterson's behalf by her attorney, Frank Register, on December 28, 1988. The judgment was not properly indexed by the Office of the Clerk of Court, enabling Scarscella to sell his property in 1990 without first paying the judgment. This case was dismissed in August of 1989, pursuant to Rule 40(c)(3), SCRPC, after there was no response when the case was called for trial. The Rule 40(c)(3) document listed Register as Peterson's attorney.

Peterson changed attorneys in October 1993 when she hired Attorney Harold Swafford to foreclose on the judgment. Swafford retained a title abstractor to examine the title. The abstractor reported that the judgment had been clocked in and placed in the Clerk's folder, but was not properly indexed in the Abstract of Judgments. In addition, the plaintiff learned through Swafford that the original case against Scarscella had been

dismissed in August of 1989 pursuant to Rule 40(c)(3). The plaintiff received this information from Swafford in October or November of 1993. On November 4, 1993, within two or three weeks of the abstractor's report to him, Swafford filed a summons and complaint to foreclose on the property previously owned by Scarscella. That litigation was unsuccessful.

In October 1994, Peterson commenced suit against Richland County and the Clerk of Court. In February 1997 Peterson amended her pleadings to add Register as a party defendant. In her amended complaint, Peterson alleged Register was negligent in failing to follow up on the case, once he received the August 17, 1989, Rule 40(c)(3) order. Peterson argued that the order was notice to Register that the earlier filed confession of judgment had not been properly indexed, and had he inquired into the issuance of the order, the improper indexing of the judgment would have been cured.

Register filed a motion for summary judgment arguing that the Statute of Limitations commenced to run in the fall of 1993 when Peterson learned that the judgment had not been properly enrolled. Although Peterson knew in the fall of 1993 that the judgment had not been properly enrolled, she claimed she had no knowledge of a potential claim against Register until discovery commenced and the attorney for the Clerk of Court indicated Register might be liable. The trial court granted Register's motion, finding Peterson "knew or should have known she had been injured shortly after retaining Swafford to represent her . . . in October 1993." *Id.* at 138, 554

The Court of Appeals found:

It is undisputed that Peterson had knowledge of her injury by November 4, 1993, the date she commenced an action to foreclose on the judgment. By that time, she knew that an error had been committed in the indexing of

her judgment. It is further undisputed that she had knowledge at that time that a Rule 40(c)(3) order had been issued dismissing her action against Scarscella. Although she may have believed that the Clerk's office was to blame for the erroneous indexing of her judgment, she had facts before her that, by the exercise of reasonable diligence, would put a person of common knowledge and experience on notice that she might have a claim against her attorney.

Id. at 139, 555

It is important to note here that the Court of Appeals found that under these facts the Statute commenced to run before the conclusion of the foreclosure suit brought by Peterson. This is because in the words of the Court, "... she had facts before her that, by the exercise of reasonable diligence, would put a person of common knowledge and experience on notice that she might have a claim against her attorney." The unsuccessful conclusion of her foreclosure suit was not necessary for the Statute to commence to run, in the same way the conclusion of Kimmer's workers' compensation claim was not necessary for the statute to commence to run in this case.

Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005)

Dr. Epstein filed an action against his former attorney asserting legal malpractice. As a defense, Dr. Epstein's attorney, Brown, asserted that Dr. Epstein's claims against him were barred by the Statute of Limitations. In analyzing Brown's defense, the South Carolina Supreme Court affirmed application of the "discovery rule" in this legal malpractice action. In particular, the Court stated:

South Carolina Code Ann. § 15-3-530 (Supp.2003) provides a three year Statute of Limitations for legal malpractice lawsuits. 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. See Dean v. Ruscon Corp. 321 S.C. 360, 468

S.E.2d 645 (1996); S.C.Code Ann. § 15-3- 535. *See also* Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct.App.1997). The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The Statute of Limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed. *Id.* (emphasis supplied).

This rule was followed by the South Carolina District Court in Clearwater Trust v. Wyche, Burgess, Freeman & Parham, 2007 WL 17957979 (D.S.C. 2007). There the Plaintiff sued the defendant law firm for failing to file its action in a timely manner. Two separate trial judges determined that the underlying action had not been filed in a timely manner. First, Judge Herlong dismissed the case as having been untimely filed on July 11, 2002. Thereafter, the case was remanded and seven months later, Judge Patterson ruled from the bench that the action was dismissed because it had not been timely commenced, which was followed with a written order on May 15, 2003. The Plaintiff's were aware of the rulings. The South Carolina Supreme Court affirmed the ruling in February 2006. The Clearwater Trust filed the malpractice action on June 22, 2006, after the final ruling.

The District Court makes it clear that an aggrieved client cannot wait until the disposition of the underlying case, and in so doing observed:

Under the discovery rule, a party must exercise "reasonable diligence." S.C. Code Ann. §15-3-535 (2005). The South Carolina Supreme Court has defined "reasonable diligence" as simply "act[ing] with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party *might* exist." Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). The Court further established that "[t]he Statute of Limitations begins to

run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed." Id. at 376, 610 S.E.2d at 818.
(emphasis added)

Id.

Binkley v. Burry, Haynsworth, Marion, McKay & Guerard, LLP, 352 S.C. 296, 572 S.E.2d 838 (Ct. App. 2002) Cert. den Aug. 6, 2003.

Plaintiffs Binkley entered a legal malpractice suit against closing attorneys Haynsworth, Marion, McKay & Guerard, LLP for failing to disclose the existence of a flood easement or its impact at the time Plaintiffs purchased the subject property. Haynsworth later closed on the Binkleys' mortgage on November 4, 1991. Mr. Binkley admitted that on November 4, 1991 he saw the plat of the property showing the dam elevation and signed a document at closing that they were aware their home was within the 100-year floodplain level. Binkley also admits he became aware of the easement during May 1991. The dam did not overflow, flooding the Binkleys' home, until 1995. Both the trial court and the Court of Appeals found that by November 4, 1991, the Binkleys had actual notice of both the easement and the risk of flooding to their property and accordingly were on notice that they may have a claim triggering the running of the Statute of Limitations.

The Binkleys argued that the statute cannot commence to run until there are damages and their knowledge of the existence of the easement was insufficient to provide them with notice that they may have sustained damages. As to this argument the Court of Appeals held:

...once a reasonable person has reason to believe that some right of his has been invaded or that some claim against another party might exist, the requirement of reasonable diligence to investigate

this information further takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all.

Id. at 844-845

Because the Binkleys were on notice of the easement and elevations in November 1991 the statutory period was found to have commenced at that time, almost four years before the 1995 flood which damaged the Binkleys' home. Because suit was not commenced until February 1997, the attorneys' motion for summary judgment was granted by the trial court and upheld by the Court of Appeals.

Binkley teaches that the statute starts to run when the plaintiff becomes aware that some right of his has been invaded or that some claim against another party might exist and that once the plaintiff is in possession of such information the statutory period commences despite the plaintiff's "inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all." Accord Sharts v. Natelson, 885 P.2d 642 (N.M. 1994); Magnuson v. Lake, 717 P.2d 1212 (Or. Ct.App. 1986); Thorpe v. DeMent, 317 S.E.2d 692 (N.C. Ct. App. 1984).

D. The Statute of Limitations commenced as to any claim against Wright during February 2000.

In the case *sub judice*, the Plaintiff knew, or with the exercise of reasonable diligence, should have known, that some right of his had been invaded when he was told by Wright during the January 2000 office conference that Wright had made a mistake. Kimmer testified that during this conference Wright told him, "I screwed this up, you have to get another attorney to take the case." (Kimmer's Deposition, p 47, line 16 - p. 48 l. 16) (R. p. 201, line 16 - p. 202, line 16)

Allowing some chance for confusion from the January conference, Kimmer certainly was on inquiry notice that he may have had a claim against Wright upon receipt of the February 1, 2000 letter from Wright. Arguably, Kimmer had actual knowledge that he may have a claim against Wright upon receipt of Wright's February 1, 2000 letter. (Kimmer Deposition, p 45; Wright 2/1/00 letter) (R. pp. 199; 565) Kimmer had terminated Wright for all matters and had obtained new counsel by February 24, 2000, thus eliminating any tolling of the Statute as of that date (Kimmer Deposition, pp 82-84) (R. pp. 236-238). This lawsuit was filed on October 14, 2004. The parties' tolling agreement was entered October 30, 2003. Therefore, if the Statute of Limitations clock started ticking at any time prior to October 30, 2000, Defendant would be entitled to summary judgment as a matter of law and the summary judgment granted to Plaintiff should be reversed.

During Kimmer's deposition, he testified about the following facts and circumstances that mandate the conclusion that Kimmer, or any person of common knowledge or experience, would have been on notice that some right of his had been invaded or that he may have a claim against Wright, which started the Statute of Limitations clock ticking no later than February 2000:

- (1) On January 29, 1999, Kimmer was involved in a two-car collision between Chester and Lancaster. (Kimmer's Deposition p. 29, l. 16-p. 30, line 8) (R. p. 183, line 16 - p. 184, line 8)
- (2) By March of 1999, Kimmer believed that the workers' compensation carrier should have been paying him from the beginning. (Kimmer's Deposition p. 38, l. 24-p. 40, l. 6) (R. p. 192, line 24 - p. 194, line 6)

- (3) Kimmer recalls having a conversation with Wright in January 2000, during which Wright told him that "he screwed this up" and that Kimmer would have to find another attorney to handle the workmen's comp part of his case. (Plaintiff's Deposition p. 45, line 25 - p. 46, line 4) (R. p. 199, line 25 - p. 200, line 4)
- (4) Kimmer signed a February 1, 2000, "Waiver of Conflict" document which provides that, "I understand that I may have a right to make a claim against Mr. Wright concerning his representation related to my worker's compensation action." (February 1, 2000 Waiver of Conflict, signed by Kimmer) (R. p. 558)
- (5) As of February 1, 2000, Kimmer understood (a) that he was not receiving his workers' compensation payments because Wright made a mistake, (b) Wright did not try to hide his mistake and (c) Wright told him plainly, "I screwed this up; you have to get another attorney to take the case." (Kimmer's Deposition pp. 47, line 2- p. 48, line 16) (R. p. 201, line 2 - p. 202, line 16)
- (6) Kimmer recalls receiving and reading Wright's February 1, 2000 letter, addressed to Richard Kimmer. (Kimmer's Deposition pp. 45, lines 2-6) (R. p. 199, line 2-6).

The following is an excerpt from that letter:

Since you may be entitled to eventually file a claim against me for some alleged error in the workers compensation case, I need for you to confirm in writing that you agree for me to continue working on the underinsurance portion of your wreck case and that you waive any claim of conflict of interest that might arise in that representation. Since you

would be saying on the one hand that I have not done what I should have in the workers' compensation case, I need to be sure that you still want me to continue with the wreck case as your attorney.

(February 1, 2000 letter from Wright to Kimmer, Page 2, ¶ 1) (R. p. 560, ¶ 1).

- (7) There was a drop in Kimmer's income between 1998 and 1999 because Kimmer only worked one month in 1999. Since Kimmer did not receive any workers' compensation benefits, it caused him problems in that his medical bills were not being paid. (Kimmer's Deposition, p. 48, l. 24-51, l. 12) (R. p. 202, line 24 - p. 205, line 12)
- (8) Kimmer knew that he had sustained a wage loss through December 10, 1999. (Kimmer's deposition, p. 73, l. 15- p. 74, l. 15) (R. p. 227, line 15 - p. 228, line 15)
- (9) As of February 1, 2000, Kimmer had engaged separate counsel to represent him in the workers' compensation claim and related matters. (Kimmer's Deposition, p. 77, l. 18-p. 78, l. 14) (R. p. 231, line 18 - p. 232, line 14)
- (10) As of February 24, 2000, Wright did not represent Kimmer in any matter. (Kimmer's Deposition, p. 82, l. 11- p. 84, l. 19) (R. p. 236, line 11 - p. 238, line 19)
- (11) Kimmer blames Wright for his post-traumatic stress disorder problems which started in 1999; (Kimmer's Deposition, p. 87, l. 2-p. 88, l. 10) (R. p. 241, line 2 - p. 242, line 10)
- (12) By February 2000, Kimmer admits that Wright had represented to him that Kimmer's not getting paid his workers'

compensation benefits was in part Wright's fault. (Kimmer's Deposition, p. 88, lines 2-10) (R. p. 242, line 2-10).

As demonstrated in the litany of facts and circumstances above, the Statute of Limitations began to run no later than February 2000, the month during which Kimmer was told and understood the reason he was not receiving his worker's compensation payments was because Wright had made a mistake. The tolling agreement was entered October 30, 2003, three years and eight months after the Statute commenced to run.

The Fourth Circuit Court of Appeals observed that South Carolina's Statute of Limitations requires "very little to start the clock." Roe v. Doe, 28 F3d 404, 407 (4th Cir. 1994)(applying South Carolina law) and cited with approval in Maher v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204, (Ct. App. 1998). As demonstrated by facts cited above, there was an abundance of information and facts known to Kimmer by February of 2000 sufficient to put him on notice that some right of his had been invaded and that he had a potential claim against Wright. Accordingly, the Statute of Limitations ran on Kimmer's claim against Wright during February 2003; therefore, the September 16, 2008, Order granting summary judgment to the respondent should be reversed.

E. Application of Law to Facts

Respondent alleges that Wright was negligent in that "he failed to consult with, give notice to, or get the consent of Murata/Liberty Mutual before settling the third party action" (Second Amended Complaint, paragraph 27(a)) (R. p. 88, para. 27(a)) and "as the direct and proximate result of said breaches of duty, negligence, recklessness, and willfulness by Defendant, the Plaintiff has been damaged as set forth above and is

entitled to judgment against the Defendant for actual and punitive damages." (Second Amended Complaint, paragraph 28) (R. p. 88, para. 28)

The facts in this case insofar as they would weigh in favor of the commencement of the running of the Statute of Limitations are more compelling than those in Burgess, 386 S.E.2d 798 (Ct. App. 1989). In Burgess, there was no evidence that the plaintiff was directly told of her attorney's potential liability because of his conduct. In contrast, not only are the facts present in this action sufficient to place the Plaintiff on notice that the Defendant had made a mistake regarding settlement of the tort claim but that, in addition, the Plaintiff admits that by February of 2000, Wright told him that his not receiving his compensation benefits was Wright's fault. Kimmer also blamed Wright for his post-traumatic stress disorder damages which commenced during 1999.

Wright told Kimmer that, because Wright had made an error which was preventing Kimmer from receiving his workers' compensation benefits, Kimmer would need to obtain a new attorney to handle the workers' compensation claim. Kimmer did so and by February 24, 2000, Kimmer had discharged Wright as his counsel for all matters.

The fact that Kimmer did not know as of February 2000 the full extent of the damage he claims as a result of the Defendant's alleged negligence is immaterial. In Dillon County School District #2 v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), the school district argued that the Statute of Limitations did not commence to run until it learned it needed a new roof and, accordingly, when all of its damages could be ascertained. The Court of Appeals disagreed and in so doing stated:

The fact, however, the school district did not appreciate the full extent of the damage until later is immaterial, The

Town of Mannsville v. G.A.F. Corp., 364 N.E.2d 1292 (Mass. App. Ct. 1977). The Statute of Limitations began to run at the point in time when the school district either discovered or reasonably should have discovered it had a serious roof problem and not when it learned it needed a new roof.

Id.

Likewise, Respondent admits that by February 2000, Wright had told him the reason he was not being paid his workers' compensation benefits was because Wright made a mistake and as a result Respondent changed attorneys during February 2000. Respondent also maintains that his not having his medical bills paid and receiving no wages caused him hardship.

The application of the principles set out in Dean leads to the same conclusion. In the same way the trial court and the Supreme Court found that because Dean attributed damage to her building to Ruscon's 1984 pile driving activities the Statute commenced at that time, so too the statute commenced to run in this case as to any claim against Wright during February 2000 because that is when Kimmer attributed damages he had sustained to Wright's mistake. (Kimmer Deposition, p 87, line 12 - p 88, line 10) (R. p. 241, line 12 - p. 242, line 10) Because all of the Plaintiff's damages grow out of the same core of operative facts, as in Dean, they are not capable of being severed into multiple claims against Wright merely because some of the Plaintiff's damages are recoverable under the Compensation Act and some are not.

F. Respondent's argument as to Statute of Limitations and Appellant's responses

The Respondent asserted various arguments to the trial court related to the Statute of Limitations, but these can be grouped into two categories, First, Epstein v.

Brown, controls the outcome of this case and second, Kimmer had no legal right to sue until July 31, 2003. Respondent's arguments and Appellant's responses appear below.

First, Respondent asserts that the South Carolina Supreme Court case Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) controls the outcome of this case because in that case the court ruled that Dr. Epstein, a defendant in a medical malpractice action, became aware of a potential claim against his attorney on the date the jury returned a verdict against Epstein. Respondent argues that the verdict became the "trigger" and urges that is the standard applicable here.

Appellant's Response

Respondent argues the jury verdict in Epstein is synonymous to the Commissioner's decision in Kimmer's compensation claim, that both events made the plaintiff aware of a potential claim. However, the Supreme Court in the Epstein opinion was quick to add the following in a footnote.

"We do not hold that, in all instances, the date of a jury's adverse verdict is the date on which the SOL begins to run. To the contrary, we hold only that, under the facts of this case, Dr. Epstein knew of a potential claim against Brown by this date, at the latest."

Id at 383.

Epstein v. Brown, therefore, stands only for the proposition that the Statute of Limitations commences to run when the plaintiff knows or should know that he might have a claim against some party and that point in time in Epstein was at the conclusion of the medical malpractice trial.

The facts in this case are far different from those in Epstein. Just as the trial court stated in its Order:

The facts of the present case distinguish it from Epstein. Epstein involved an adverse jury verdict while the present case involves an adverse administrative ruling of the Workers' Compensation Commission. Moreover, the facts in the present case weigh more in favor of a ruling that Kimmer had notice of a potential injury caused by Wright earlier than the date of the Commission's adverse decision. For example, Kimmer signed a waiver of conflict on February 1, 2000, stating that he "may have a right to a claim against Mr. Wright concerning his representation related to my workers compensation claim." Wright also sent a letter to Kimmer on February 1, 2000, informing Kimmer that Kimmer may need to file a claim against Wright because of Wright's improper handling of a workers compensation claim. And, as mentioned, Kimmer terminated Wright's representation on February 24, 2000 as a direct result of Wright's mishandling of Kimmer's workers compensation claim. These facts distinguish the present case from Epstein and suggest that Epstein should not have been controlling on the issue of when the trigger event for legal malpractice begins to run.

(Order granting summary judgment to Plaintiff, dated September 16, 2008, issued by The Honorable John C. Hayes, III, pp. 6-7) (R. pp. 13-14)

Second, Respondent argues that despite Kimmer's being told by his attorney that he, "screwed this up" and Appellant's also telling him that his not receiving his workers' compensation benefits was in part Wright's fault, and that because of Wright's error he would have to obtain new counsel, the Statute of Limitations nonetheless could not have commenced to run until the Workers' Compensation Commissioner had rendered her decision on July 31, 2003 and in so doing argues the following:

a. Kimmer had no way of discovering the malpractice until the single commissioner rendered her ruling. Additionally, Respondent argues that because the workers' compensation insurance carrier defended Kimmer's compensation claim not only on the election of remedies defense but also on the grounds that Kimmer's claim was not compensable because of the "going and coming rule," it was not known that Kimmer's claim was compensable until the Commissioner ruled. Respondent argued to

the trial court, "[O]nce it was determined on July 31, 2003, that Kimmer had a compensable claim, it was then apparent that Defendant Wright's failure to give notice to the workers' compensation carrier caused claimant Kimmer to lose his compensation benefits." (Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment, dated September 3, 2008, p. 6) (R. p. 108)

Appellant's Response

1. Respondent's contention that he could not have discovered the malpractice until July 31, 2003, when the Commissioner ruled on the comp claim¹, directly conflicts with the respondent's signed statement of February 1, 2000, in which Kimmer states, "I understand that I may have a right to make a claim against Mr. Wright concerning his representation related to my workers' compensation action." (February 1, 2000, Waiver of Conflict, signed by Kimmer)² (R. p. 558) Therefore, even if there were no other supporting evidence in this case this signed statement alone would be sufficient to commence the running of the statute.

¹ Although Respondent argues that the appeal on the election of remedies issue was a case of first impression this was hardly the case. The Court of Appeals in Kimmer v. Murata of America, Inc., 372 S.C. 39, 640 S.E.2d 507 noted that the principle requiring notice to an employer prior to settling a third party claim dates back to Stroy v. Milkwood Drug Store, Inc., 235 S.C. 52, 109 S.E.2d 706 (1959), a case decided under prior statutes. Since 1959 our appellate courts have reaffirmed this principle in an unbroken line of cases and as to Respondent's case the Court of Appeals stated, "The undisputed facts of the instant case are nearly identical to those in Fisher." (Fisher v. S.C. Dept. of Mental Retardation, 277 S.C. 573, 291 S.E.2d 200 (1982)) Therefore, given the long history in our case law requiring notice to the employer prior to giving a release in order to retain workers' compensation benefits the outcome of Kimmer's contest with Murata could not have been a surprise.

² Respondent argues the February 1, 2000, Waiver of Conflict which Kimmer signed constitutes a violation of SCRAP 407, 1.8 which provides that a "lawyer shall not make an agreement limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." (Plaintiff's Memorandum in Support of Motion for Summary Judgment, dated September 3, 2008, p 14) (R. p. 116) The 'Waiver of Conflict' signed by Kimmer does not purport to limit Wright's liability in any way. The document does precisely the opposite; place Kimmer on notice of his claim.

2. Respondent's contention that the malpractice could not have been discovered until July 31, 2003, conflicts with Kimmer's own testimony. The following appears in Kimmer's deposition transcript:

Q: And you understand Mr. Wright is telling you in this letter, and apparently had explained to you in his office, that the reason they were denying it is because he made a mistake.

A: Right. Yes, sir.

Q: And he also says in here that you might have a claim against him as a result of that?

A: That's true.

Q: Okay. And so my question to you really is, he didn't try to hide that from you?

A: Oh, no. When I went in to talk to him, you know, he told me plainly, you know, I screwed this up, you have to get another attorney to take the case. (Kimmer deposition, pp 47-48) (R. pp. 201-202)

Therefore, Kimmer fully admits that Mr. Wright had told him by February of 2000 that he had made an error, that Wright's error had caused the workers' compensation carrier to decline payment to Kimmer, that as a result of this Kimmer may have a claim against Wright and finally, because of the above circumstances Kimmer would need to obtain separate counsel to handle the workers' compensation claim.

3. The fact that the workers' compensation carrier submitted a Form 51 asserting multiple defenses to Kimmer's claim does not serve to delay the running or toll the Statute of Limitations until a judicial ruling in the underlying case.

Respondent essentially contends that until all multiple defenses asserted by the defendant in the underlying action are resolved the statute cannot commence to run. This is not and should not be the law. When the plaintiff is told "plainly" that his

not receiving compensation for his damages was his lawyer's fault, the Statute of Limitations is not suspended merely because the underlying automobile case has not been resolved and the automobile tortfeasor has defended on multiple grounds. The following example illustrates the fallacy of the respondent's argument.

A plaintiff is in an automobile accident and hires an attorney to represent him. The attorney enters suit for the plaintiff. The auto tortfeasor answers asserting as defenses the Statute of Limitations, and that the plaintiff was not in fact injured in the accident and sustained no damages. Plaintiff's attorney informs the plaintiff that he has in fact missed the Statute of Limitations and this is the reason that the defendant's insurance carrier has not settled the case. Under the respondent's interpretation of the law, the plaintiff would be required to try the automobile case to an unsuccessful conclusion before his claim against the attorney has accrued. This is not the law. The "case within the case" dynamic of a legal malpractice action allows the plaintiff to litigate his automobile claims in the suit against his former attorney.

Respondent would have the court accept the proposition that before the Statute of Limitations may commence to run on a malpractice claim against the plaintiff's former attorney, the plaintiff must have acquired facts or evidence which would not only support the primary elements of the malpractice cause of action but which would also defeat defenses asserted by the defendant in the underlying case. This is also not the law.

Respondent's argument is refuted by Binkley v. Burry, Haynsworth, Marion, McKay & Guerard, LLP. The plaintiff became aware of the existence of the subject easement and the relevant elevations on or before November 4, 1991. The trial court and Court of Appeals found the Statute of Limitations started to run on that date

because that is when the plaintiffs became aware of the easement and the elevations which gave them actual notice of the risk of flooding to their property. This was the result despite the fact that in the underlying action with Rabon Creek, the easement owner, the order ruling that it was estopped to assert the easement against the homeowners was not issued until May 5, 1998.³ The Court of Appeals found no reason to delay the running of the Statute of Limitations merely because the Binkleys defended on multiple grounds including the interpretation of the easement favorable to them as well as the equitable defense that Rabon Creek was estopped to assert the easement.

Respondent's contention the statute did not commence to run until "it was determined on July 31, 2003, that Kimmer had a compensable claim by the Commissioner" is the same argument asserted by the plaintiff in Mitchell v. Holler, 311 S.C. 406, 429 S.E.2d 793 (1993). Chief Justice Harwell writing the opinion for a unanimous court on the Statute of Limitations issue stated:

The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist. The Statute of Limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.

Mitchell argues that she did not discover Holler's alleged malpractice until we reversed her conviction based upon ineffective assistance of counsel. However, the record establishes that Mitchell contacted two (2) attorneys in March 1983 complaining of Holler's conduct at trial. The affidavits of both attorneys indicate that Mitchell thought she had a claim against Holler based on his performance at her trial. We find that Mitchell knew or should have known that she might have a

³ Binkley v. Rabon Creek Watershed Conservation District, 348 S.C. 58, 558 S.E.2d 902 (2001), reversed the trial court's finding that Rabon Creek was equitably estopped from enforcing the easement.

claim against Holler in March 1983. Under the discovery rule, her cause of action accrued and the Statute of Limitations began to run at that time:

Mitchell v. Holler at 795 (emphasis added)

Just as the Supreme Court would not delay the running of the statute in Mitchell v. Holler until the appellate court reversal based upon ineffective assistance of counsel because Mitchell believed she may have had a claim in March 1983, the Court of Appeals in this case should not delay the running of the statute until the Commissioner ruled in July 2003 because in February 2000 Kimmer believed he should have been receiving his compensation benefits since the accident (Kimmer Deposition, pp 38-40) (R. pp. 192-194), assigned blame to Wright for damages he sustained, and also understood by that date he "may have a right to make a claim against Mr. Wright concerning his representation related to my workers' compensation." (February 1, 2000, Waiver of Conflict, signed by Kimmer) (R. p. 558)

4. As an aside, although the workers' compensation carrier did deny the compensability of the claim and assert that as a defense, there was little doubt that the claim was compensable from the facts apparent to Mr. Kimmer. Kimmer received a \$300 payment every other week for a car allowance plus 6 cents per mile for each mile he drove to and from work. In addition, if Kimmer had to drive more than an hour to a particular plant, he was paid for the travel time in excess of an hour. (Kimmer Deposition, pp 100-101) (R. pp. 254-255) Of course, an exception to the going and coming rule is when the employer furnishes means of transportation or pays the employee during the travel time. Therefore, it is no wonder that Kimmer's belief that he

should have been receiving workers' compensation benefits from the time of the accident was in fact justified and reasonable.

5. The finding by the Commissioner in July of 2003 told Kimmer very little as to his malpractice claim against Wright because such a finding was not binding upon Wright as Wright was not a party to the workers' compensation claim nor was he in privity with anyone who was a party. For due process reasons Kimmer would have had to re-litigate the compensability issue in the malpractice action against Wright if Wright chose to contest it. (Restatement of Judgments, Second, Sections 27; 28(1))

6. Respondent's argument that the statute could not commence to run until the Commissioner finally ruled on July 31, 2003 that the case was compensable but Kimmer's claim denied because he had elected his remedy reveals the policy reasons against artificially delaying the running of the statute. Under such a standard proposed by Respondent why would the date of the Commissioner's Order be the appropriate trigger date because it was not final in any substantive sense? The ruling could be reversed and remanded for future testimony on appeal which might then lead to another appeal postponing for years an ultimate decision in the underlying case and, if the Statute of Limitations on the malpractice claims were held in abeyance pending a final ruling in the underlying action which may be years in the making, the policy goal of bringing an end to potential litigation has been defeated. Instead, South Carolina and the great majority of jurisdictions hold that the statute commences to run when the plaintiff (or a person of common knowledge and experience) acquires information sufficient to place him on notice that they may have a claim.

b. Respondent argues that he had no legal right to enter suit against Philip Wright until July 31, 2003, when Commissioner Childs entered her decision in the workers' compensation claim and that, until that time, there was no malpractice at all. In support, the respondent argues that in order to maintain a cause of action for legal malpractice one must show the following: a duty flowing from the defendant to the plaintiff, a breach of that duty, and injury to the plaintiff as a result of the breach which was proximately caused by the defendant's negligent conduct. Further, Respondent contends that had he entered suit against Wright and abandoned the workers' compensation claim, Wright would argue that the malpractice case was barred by the "going and coming rule."

Appellant's Response

1. Respondent's argument that the Statute of Limitations does not commence to run until litigation of the underlying case has concluded, thereby producing an injury to the client-plaintiff, despite the fact that the client-plaintiff has been specifically told by his former attorney that he made a mistake, that a reason he was not being compensated for his claim was the attorney's mistake and that he may have a claim against the attorney, is without support in the case law.

Leaving aside for the moment that Kimmer did in fact sustain damages as of February 2000 and assigned fault to Wright's conduct for those damages, the law is such that once the plaintiff becomes aware that some legal right of his has been invaded the law presumes at least nominal damages.

In Binkley v. Burry, Haynsworth, Marion, McKay & Guerard, LLP the Court of Appeals held that because the Binkleys were on notice of the easement and

elevations in November 1991, the statute commenced to run at that time, almost four years before their property was actually flooded. The Binkleys claimed that their closing attorneys did not make them aware of the easement at the time they purchased the property, but admitted that they became aware of it at the time of a subsequent mortgage closing. To reiterate this salient point, the Court of Appeals stated:

"...Once a reasonable person has reason to believe that some right of his has been invaded or that some claim against another party might exist, the requirement of reasonable diligence to investigate this information further takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all."

Id. at 844-845

The Court of Appeals correctly found that when the Binkleys were aware that some right of theirs had been invaded, i.e. the subject easement in 1991, the Statute of Limitations began to run at that time and was not delayed until 1995 when the property actually flooded.

Binkley is instructive also on the issue of the conclusion of the underlying action or a judicial decree as triggering the running of the Statute of Limitations. Note that in Binkley the damage to the plaintiff's property by way of flooding did not occur until August of 1995, the Binkleys were not specifically told of the developer's intent to claim the easement to the top of the dam until 1995, and Judge Kittredge's first order in that case was not issued until December 23, 1996. Nonetheless, the trial court and Court of Appeals found that because Binkley knew or had facts before him on November 4, 1991 that some right of his had been invaded, i.e. the easement across his property, that the Statute of Limitations commenced to run at that time. A similar analysis can be found in Peterson v. Richland County in which the Court of Appeals found that under the

facts of that case the Statute of Limitations commenced to run before the conclusion of the foreclosure suit brought by Peterson.

The Supreme Court is in accord on the question of damage accrual as it relates to the commencement of the running of the Statute of Limitations. The Supreme Court in Stephens v. Draffin, 327 S.C. 1, 488 S.E.2d 307 (1997) stated:

"The dispositive question is when did Stephens' cause of action arise? Nelson v. Concrete Supply Co., Supra. "A cause of action accrues at the moment when the plaintiff has a legal right to sue on it." Brown v. Finger, 248 S.C. 102, 124 S.E.2d 781 (1962). The law presumes at least nominal damages at that point. Livingston v. Sims, 197 S.C. 458, 15 S.E.2d 770 (1941); modified Santee Portland Cement v. Daniel International Court, 299 S.C. 269, 384 S.E.2d 693 (1989) (discovery Rule applies to contract Statute of Limitations) The fact that substantial damages do not occur until later is immaterial to determining when the action accrued or arose.

Id. at 308-309 (emphasis added)

Even discounting all of the information which Kimmer had in his possession concerning his claim against Philip Wright, a reasonable person would be on notice that their claim is worth less because their attorney, through an error, had elected a remedy to the exclusion of the plaintiff's workers' compensation benefits just as he would be aware that his claim were worth less if he had been informed that his attorney had missed the Statute of Limitations.

Other jurisdictions are aligned with South Carolina on this point. The court in Basinger v. Sullivan, 540 N.E.2d 91, (Ind. Ct. App: 1989) stated:

Can it then be contended that the limitation period does not commence to run on the attorney's negligence until Plaintiff's right to recovery on the original claim has been judicially established? Clearly, the answer is no. To permit such reasoning would for all practical purposes preclude the statute from ever commencing to run.

North Carolina also follows this reasoning in Thorpe v. DeMent, 69 N.C. App. 355, 317

S.E.2d 692 (N.C. Ct. App. 1984) The court stated on this subject:

The plaintiff's argument depends upon the conclusion that their loss could not have occurred, and thus could not have been discovered, until their damages were made clear to them and that this happened only when the trial court ruled on the summary judgment in August, 1979. The conclusion confuses the fact of the loss with the extent of that loss. The only question resolved by the trial court's ruling on August 16, 1979 concerned the extent to which Plaintiff's potential recovery in the wrongful death action would be barred by the defendant's omission.

2. Kimmer had a right to enter suit against Wright for professional negligence during February of 2000. Appellant maintains that Wright owed him a duty and breached that duty in his representation of Kimmer in the workers' compensation claim. Further, it is uncontested through the evidence in the record that by February 2000 Kimmer was aware that he was not receiving his workers' compensation payments because Mr. Wright made a mistake (Plaintiff's deposition, pp 47-48) (R. pp. 201-202), that his unpaid medical bills had caused him problems, and that Kimmer blamed Wright for his posttraumatic stress disorder problems which started during 1999. Kimmer also admitted that by February of 2000 he was aware that Mr. Wright had represented to him that Kimmer's not getting paid was in part Wright's fault. (Kimmer's deposition, p 88) (R. p. 242) Respondent's claims against Wright satisfied all of the elements during February 2000; duty, breach, damages and proximate causation. The fact that Kimmer may not have known all of his damages by that time is not material.

3. Even if one accepts the respondent's argument that he had sustained no damage to his workers' compensation claim prior to issuance of the Commissioner's

ruling on July 31, 2003, the respondent attributes damages to Wright's professional error which have nothing to do whatever with Kimmer's workers' compensation claim because, under the facts of this case, those damages would not be compensable under the Workers' Compensation Act. A successful workers' compensation claim would not recover for Kimmer his PTSD related damages.

The respondent testified that his posttraumatic stress disorder was caused partly by his inability to pay his medical and other bills due to the fact that the workers' compensation carrier denied his claim and that by February 2000 he blamed this upon Wright. (Kimmer Deposition, pp 87-88) (R. pp. 241-242) Therefore, Kimmer's prevailing before the single commissioner and on appeal would not make these damages moot because they cannot be recovered under the Act. Posttraumatic stress disorder damages are only recoverable under the Workers' Compensation Act if the "emotional stimuli or stressors are incident to or arise from unusual or extraordinary conditions of employment." See Stokes v. First National Bank, 298 S.C. 13, 377 S.E.2d 942 (Ct. App. 1988). The facts do not exist here to allow Kimmer's recovery for PTSD under the Act. Posttraumatic stress disorder damages allegedly caused by the failure to timely pay medical and other bills because the claimant's attorney did not give notice before settling a third party claim are not compensable under the Workers' Compensation Act. However, PTSD damages would be recoverable against an attorney in a professional negligence claim given the right facts. Rowell v. Holt, 850 So.2d 474 (Fla. 2003); Chatelain v. Rublais, 877 So.2d 324, 2004-2008 (La. App. 3 Cir. 2004); Gulles v. Simser, 9 Misc. 3d 1083, 804 N.Y.S 2d 904 (2005).

4. Kimmer admits to sustaining damage during 1999 and 2000 in the form of not having his medical and other bills paid timely from the workers' compensation carrier which, by February 2000, Kimmer blamed upon Wright's alleged negligence. Even if Kimmer had prevailed before the Workers' Compensation Commission and the successful order had been upheld on appeal, this would not under any circumstance have satisfied Kimmer's bills in a timely manner as he expected and about which he complained in his legal malpractice action. Because the workers' compensation benefits involved the receipt of weekly wage benefits Kimmer's failure to receive those created damages each week during 1999.

5. Although the respondent asserts a number of specifications of negligence against Wright, they are all based upon the allegation that Wright failed to protect Kimmer's workers' compensation claim by not giving notice to the compensation carrier prior to settling the automobile tort action. All of Respondent's alleged damages flow from this failure.

The respondent seeks to have the court accept the proposition that one statutory period applies for some damages and another applies to yet other damages, even though all of the damages are alleged to have been caused by the same negligent or wrongful act. This is not the law. Indeed, our Supreme Court has made it clear that, "....the fact that the injured party may not comprehend the full extent of the damage is immaterial. Dean, 468 S.E.2d 645 at 363-364. Indeed, because all of the damages Kimmer testified he sustained grow out of the same core of operative facts, the Statute of Limitations commences to run under any view of South Carolina law at the latest upon

Kimmer's sustaining any damages which Kimmier (or a man of common knowledge and experience) would attribute to Wright's conduct.

Respondent would invite South Carolina to join the minority of jurisdictions which would have the courts inquire as to the degree of damage necessary to commence the Statute of Limitations running rather than focus upon whether there is injury in fact. This question is addressed in the 2009 edition of Legal Malpractice by Ronald E. Mallen and Jeffrey E. Smith, in Section 23:11, "The Damages Rule." The California decision of Budd v. Nixen, 491 P.2d 433 (Cal. 1971) initiated the requirement in that state that there be a sufficient quantity of damage to start the Statute of Limitations running. However, in the California legislature there was a proposal to replace the "appreciable and actual" test of Budd by "significant" injury, but the final statutory enactment required only "actual" injury. Commenting favorably on this approach the treatise at page 369 states, "For a Statute of Limitations to effectively preclude litigation of stale claims, the inquiry of damage should not invariably raise an issue of fact. An issue of fact subjects lawyers and clients to uncertainty and the expense of litigating the merits of the claim and statute defense." Respondent would have South Carolina join the minority of states which would litigate the degree of damage necessary to start the Statute of Limitations running. The legal malpractice treatise at page 370 concludes as follows: "For these reasons, the prevailing rule is that there only need be the fact of an injury rather than a specific quantity of damage, even if significant damages may not occur until the future, if at all." South Carolina has long followed the majority rule and should continue to do so.

6. Respondent contends that had he entered suit against Wright and abandoned the compensation claim Wright would have argued the suit was barred by the "going and coming rule." The respondent asserts this argument presumably to urge the court to accept the proposition that the workers' compensation action had to be concluded before the Statute of Limitations would commence to run on Kimmers' claims. This is a false assumption for a number of reasons.

First, the findings of the Workers' Compensation Commission arising from Kimmer's claim would not be binding upon Appellant Wright. Those findings are neither collateral estoppel nor are they *res judicata* because Wright was not a party to the workers' compensation claim and was not in privity with the litigants in the workers' compensation claim. (Restatement of Judgments, Second, Sections 27, 28(1))

Second, Respondent is correct that the attorney in a legal malpractice action, could contest issues in the compensation action, but not because the compensation action remained pending prior to filing the malpractice action as Respondent suggests. Because the defendant in a legal malpractice action is not a party to the underlying case, he would be free to contest the issues concluded in the underlying action. For example, merely because Kimmer lost on the issue of the election of remedies defense before the Commissioner does not preclude Wright from defending in a malpractice action that Kimmer's counsel missed something or otherwise failed to make an argument that may have carried the day on that issue, or perhaps the result reached by the Commissioner was simply wrong. Hence, the litigation of the legal malpractice action is the "case within the case" as to all issues presented or which could have been presented in the workers' compensation claim because the malpractice defendant was not a party to the

compensation claim. This is true whether the compensation claim is concluded before or after the malpractice action is commenced.

Third, the respondent has the ability to file the malpractice action within the Statute of Limitations and, if he so chooses, to conclude the workers' compensation claim prior to the malpractice trial. The simple way to guarantee this sequence is to file the malpractice action and move for a partial or limited stay of the malpractice action pending the compensation claim. This procedure is often used in the litigation of mechanics lien cases when the underlying contract contains a compulsory arbitration clause. The suit to foreclose the lien is filed to comply with the statutory mandate and usually stayed pending the arbitration results. Stier, Kent & Canady, Inc. v. Jackson, 317 S.C. 179, 452 S.E.2d 606 (S.C. App. 1994).

II. THE TRIAL COURT ERRED IN HOLDING THAT THE FINDINGS CONTAINED IN A PRIOR INTERLOCUTORY ORDER DENYING APPELLANT'S ("WRIGHT'S") MOTION FOR SUMMARY JUDGMENT BECAME THE LAW OF THE CASE WHICH THEN FORMED THE BASIS OF THE TRIAL COURT'S AWARDING SUMMARY JUDGMENT TO PLAINTIFF ON THE ISSUE OF THE STATUE OF LIMITATIONS.

The trial court's September 16, 2008 Order issued by Judge Hayes found that the findings and conclusions of law of Judge Kimball's 2005 interlocutory order denying Defendant's motion for summary judgment became the law of the case and, accordingly, binding upon the trial court in ruling on the parties' cross motions heard on September 5, 2008 in York. Judge Hayes rejected the plaintiff's contention that Epstein v. Brown, 363

S.C. 372, 610 S.E.2d 816 (2005) controls the outcome of this case and gives as reasons the passage contained on page 21 of this brief.

Despite these cogent reasons, the trial court went on to conclude that it was bound by the conclusions of law found in Judge Kimball's interlocutory order of June 20, 2005. The trial court's conclusion that the findings of a prior interlocutory order were the law of the case and the reliance upon those findings in granting the plaintiff summary judgment was error.

An order denying a motion for summary judgment is not appealable. Fulmer v. Cain, 380 S.C. 466, 370 S.E.2d 652 (2008); Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994)

Judge Kimball's order denying Defendant's motion for summary judgment was not a final order and it was not an adjudication on the merits. Accordingly, reliance upon the conclusions of law contained in said order, if any there were, in granting Plaintiff's motion for summary judgment, is error requiring reversal.

A finding becomes the "law of the case" when it is an unappealed ruling of the judge or jury. However, that necessarily implies that the ruling can be appealed from. Because a denial of summary judgment cannot be appealed from, *See e.g., Fulmer, Id.* the ruling therein cannot become the law of the case. McMillan v. S.C. Dept. of Agriculture, 364 S.C. 60, 611 S.E.2d 323 (Ct. App. 2005) (Reversed on other grounds) 380 S.C. 212, 670 S.E.2d 368 (2008) (Denial of summary judgment does not establish law of the case, issues raised in motion may be raised later.)

Notwithstanding the foregoing, Judge Kimball's order did not find, as the trial court seems to believe it did, that the "triggering event for the Statute of Limitations was

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Case No. 2004-CP-46-2659

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

v.

Philip E. Wright.....Appellant

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Carol M. Kimmer, Personal Representative
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Respondent

Philip E. Wright,

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STATEMENT OF ISSUES ON APPEAL

- I WAS THE LOWER COURT CORRECT IN RULING THAT THE TRIGGER DATE FOR THE COMMENCEMENT OF THE STATUTE OF LIMITATIONS IN THIS PROFESSIONAL NEGLIGENCE ACTION WAS THE DATE OF THE ADVERSE DECISION OF THE WORKERS' COMPENSTION COMMISSION?
- II AS AN ADDITIONAL SUSTAINING GROUND, EVEN IF JUDGE HAYES WAS NOT BOUND BY THE KIMBALL ORDER, SHOULD THE HAYES ORDER BE AFFIRMED BASED ON THE RECORD IN THIS CASE?
- III AS AN ADDITIONAL SUSTAINING GROUND, AND IN THE ALTERNATIVE, SHOULD THE RULING OF THE LOWER COURT (HAYES ORDER) BE AFFIRMED BASED UPON THE DOCTRINE OF EQUITABLE TOLLING?

STATEMENT OF THE CASE

This legal malpractice 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 policy limits of minimum coverage of \$15,000. Wright settled the third party claim for those 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 Respondent 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) and at the hearing, there were three issues in dispute:

- (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 in view of the substantial evidence that there was no prejudice to the workers compensation carrier as a result of the third party settlement without notice, and 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 (2006) 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). The appellant 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. Appellant, 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).

Appellant 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 Appellant Wright's motion for summary judgment, Judge Kimball also stayed the action entirely for the reason that the workers compensation action by Kimmer was still 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. The Kimball Order noted that, in the interest of judicial economy, the underlying case was stayed until completion of the workers compensation appeal because it would be "determinative of this case." (R., p. 5).

After the Court of Appeals ruled against Respondent Kimmer and the Supreme Court denied the Petition for Certiorari on October 18, 2003, the stay of Judge Kimball was lifted.

During 2008, Respondent Kimmer and Appellant Wright filed cross motions for summary judgment, the primary issue being the commencement of the running 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....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. Carol M. Kimmer, as personal representative of the Estate of Richard Kimmer, has been substituted as plaintiff-respondent in this case because Richard Kimmer died on March 2, 2008.

STATEMENT OF FACTS

On the early morning of January 29, 1999, the plaintiff-respondent 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, the plaintiff¹ was going to his job as an installer of air jet looms for his employer, Murata of America, Inc. His vehicle was in a head-on collision with a vehicle operated by Anthony Pendergrass, a resident of Chester County.

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

In the collision, the plaintiff's head hit the windshield and his neck and back were injured, as well as his knees. The plaintiff 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). The plaintiff 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).

The plaintiff retained the services of defendant 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, defendant Wright reached a settlement on behalf of plaintiff with Pendergrass' carrier for the policy limits of \$15,000. The plaintiff was presented with a Release of All Claims against the at-fault party, which he signed upon the advice of the defendant. At the subsequent workers compensation hearing, both the plaintiff (R., p. 366, ll. 4-16) and defendant Wright (R., p. 388, ll. 4-5) testified that, in making this settlement, the plaintiff 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 defendant Wright for attorneys' fees. (R., p. 382, l.21 - p. 383, l 9). The plaintiff received no proceeds from this third party settlement.

On June 18, 1999, defendant Wright filed a WCC Form 50 (R., p. 563) with the SC Workers Compensation Commission claiming disability entitlement on behalf of

plaintiff². During the pendency of the workers compensation claim, appellant 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 plaintiff's injuries; and, (c) whether or not plaintiff'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 the plaintiff'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., 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).

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

After the single commissioner issued her Decision and Order dated July 31, 2003, the attorney for the plaintiff wrote Defendant Wright a letter dated August 5, 2003, in which he informed Defendant 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.

The plaintiff 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 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).

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). The Supreme Court of South Carolina denied Plaintiff's Petition for Writ of Certiorari on October 18, 2007.

During the pendency of the above-referenced workers compensation appeal process, Appellant Wright moved for summary judgment on May 13, 2005. (R., pp. 75-76). Respondent 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 appeal³, this case would be moot. (R., p. 4).

After the Supreme Court denied Kimmer's petition for writ of certiorari on October 18, 2007, the stay in this case was lifted. In 2008, Respondent Kimmer and Defendant Wright filed motions for summary judgment. (R., pp. 82; 101-102). The respondent 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). The appellant did not file a motion to reconsider the rulings of Judge Hayes.

ARGUMENT I

THE LOWER COURT CORRECTLY RULED THAT THE TRIGGER DATE FOR THE COMMENCEMENT OF THE STATUTE OF LIMITATIONS IN THIS PROFESSIONAL NEGLIGENCE ACTION WAS THE DATE OF THE ADVERSE DECISION OF THE WORKERS' COMPENSATION COMMISSION.

Introduction

This case involves alleged legal malpractice in the handling of a workers compensation claim by the appellant in settling a third party claim without notice to the workers compensation carrier. For a workers compensation claim to be valid, it must be "compensable" – i.e., it must have arisen out of one's employment and occurred in the course of that employment. S.C. Code §42-1-160; Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (Ct. App. 2007). In the underlying workers compensation case, not only was compensability disputed but also whether the respondent was barred from his benefits because of appellant's settlement of respondent's third party claim for minimum limits without notice to the compensation carrier. These issues were not determined until July 31, 2003, when the Workers Compensation Commission issued its Decision and Order⁴. (R., pp. 15-27). The issue in this case is when does respondent's cause of action

⁴ Also disputed was the extent of respondent's disability; the Decision and Order found that he was totally disabled. (R., p. 24).

for professional negligence accrue – i.e., when does the running of the statute of limitations commence? {

This case involves a “case within a case⁵.” In Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005), the Court noted that the plaintiff there would not have had a malpractice case at all if he had prevailed in his underlying case. The trigger for the statute of limitations in the Epstein case was the adverse jury verdict. In the instant case, Respondent Kimmer would not have had a malpractice case against Wright if the commissioner had ruled in his favor on S.C. Code §42-1-560,⁶ or if the commissioner had ruled the accident was not compensable.

There are no genuine issues of material fact as to the statute of limitations. Once it was determined on July 31, 2003 that Kimmer had a compensable claim, that was the earliest point at which it was determined that Defendant Wright’s failure to give notice of the third party settlement to the workers compensation carrier caused claimant Kimmer to lose his workers compensation benefits. Wright’s actions were negligent and the proximate cause of plaintiff’s damages. This action was timely filed and is not barred by any statute of limitations.

(a) The Discovery Rule Applies

The defendant argues that the plaintiff’s claims are barred by the applicable statute of limitations. In the instant matter, S.C. Code Ann §§15-3-530 & 535 set forth

⁵ In a “case within a case,” the plaintiff must establish the case within a case, which requires proof that the claim underlying the malpractice action should have been successful if the attorney had acted in accordance with his duty.

⁶ Notwithstanding the fact that the Court of Appeals ruled against Respondent Kimmer in the workers compensation case, the issue was a close one. In fact, the circuit court order in the underlying case of Kimmer v. Murata dated September 1, 2005, reversed the Decision and Order of the Commission. Had that circuit court order been affirmed, the respondent would not have had a malpractice case.

the controlling statute of limitations, which provide that this action must be commenced within three years after the plaintiff knew, or by the exercise of reasonable diligence should have known, that he had a cause of action against the defendant. This is simply a codification of what is commonly referred to as "the discovery rule". The discovery rule provides that the statutory period in which a plaintiff has to bring a cause of action begins to run when the plaintiff could or should have known through the exercise of reasonable diligence that a cause of action might exist against the defendant⁷. In Santee Portland Cement v. Daniel International Corp., 299 S.C. 270, 271, 384 S.E. 2d 693, 694 (1988), our Supreme Court stated that a statute of limitations should be construed in a manner consistent with its underlying purpose and the requirement of substantial justice for all parties involved. While 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, this concern must be balanced against the need to protect plaintiffs from suffering when circumstances prevent them from knowing they may have a right of action. Id.

In view of our Supreme Court's reasoning in Santee, our appellate courts have concluded that the discovery rule was intended only to expand the applicable limitations to disallow the operation of an arbitrary accrual date to prevent a deserving claimant from

⁷Statutes of limitations begin to run at the time the cause of action accrues. Walsh v. Woods, 358 S.C. 259, 264, 594 S.E. 2d 548, 551 (Ct. App. 2004). In analyzing a limitations defense,

"the fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it... and therefore, a particular cause of action accrues at the moment when the plaintiff has a legal right to sue upon it." Id., at p.551. (emphasis added).

Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 596 S.E.2d 42 (2004); Stephens v. Draffin, 327 S.C. 1, 488 S.E.2d 307 (1997).

pursuing legal recourse. Republic Contracting Corporation v. S.C. Dept. of Highways and Public Transportation, 332 S.C. 197, 212, 503 S. E. 2d 761, 769 (Ct. App. 1998). The Republic Court found that it would undermine public policy to apply the discovery rule to cut short the normal running of the statute of limitations Id.

**(b) The Case at Bar is Controlled by the Holding
and Analysis in Epstein v. Brown**

The instant case involves legal malpractice involving a "case within a case." In the case of Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005), a case involving legal malpractice arising out of a litigated case, our Supreme Court found that the statute of limitations began to run when an adverse jury verdict was rendered. While the Epstein court cautioned that it was not its ruling that an adverse jury verdict is automatically the triggering event in all cases of legal malpractice, its reasoning in arriving at its conclusion 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 plaintiff 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. *Id.*, 363 S.C. at pp. 380-381, 610 S.E.2d at pp. 820-821.

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), "that a person of common knowledge and experience would have known or should have known that some right of his had been invaded or that a claim against the defendants *might* exist when both a federal judge and state judge issued orders dismissing the plaintiffs' underlying action." In that case, the United States District Court held that entry of an adverse judgment was notice of potential attorney malpractice.

No reported South Carolina case 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, 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 but barred by the defendant's settlement of the third party claim. (R., pp. 15-27).

The focus here must be on 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 respondent was involved in a head-on collision while driving his personal vehicle en route from his home in Whitmire to a job site located at Springs Katherine Plant in Chester. The employer and its carrier argued that an employee going to or coming from the place where his work is to be performed is 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 is not compensable as it does 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 modest 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. The appellant admits this in a letter to the 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).

The holding in the Epstein case has been cited with approval by our appellate courts. See 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); Kelly v. Logan, Jolley & Smith, 2009 WL1424650 (Ct. App. 2009) (malpractice claim barred because plaintiff knew he had a cause of action and had been damaged).

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), the plaintiff could not have maintained an action against the defendant, and, therefore, had no legal right to sue him, as the plaintiff could not have established any injury nor could he establish that any assumed injury was proximately caused by the defendant'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 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.

Consequently, the statute of limitations began to run, at the earliest, on July 31, 2003, and the plaintiff timely filed this action on October 14, 2004⁸. (R., pp. 41-54).

⁸ See St. Paul Fire & Marine Insurance Co. v. Speerstra, 63 Or. App. 533, 666 P.2d 255, 258 (1983) (plaintiff was held to have suffered harm when trial court's judgment was entered); Hunt v. Bittman, 482 F.Supp. 1017 (D.D.C. 1980), *aff'd*, 652 F.2d 196 (D.C.Cir.), *cert. denied*, 454 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1981), (SOL began to run from date of Watergate conspirator's conviction, the date on which he suffered actual injury).

The appellant's defense in this regard is without merit, and the respondent is entitled to judgment as a matter of law.

The appellant argues that the applicable statute of limitations began to run in February 2000. This is incorrect. The defendant argues the application of the discovery rule to his interpretation of the facts of this case necessitates that the Court find that this action was untimely. However, such a contention rests on the assumption that the statute of limitations began to run before the plaintiff's claim accrued. This is the very circumstance that the Republic court, relying on Santee, supra, indicated was not the object of the discovery rule. While the plaintiff may have had some notice that the defendant may have done something incorrectly in February or March of 2000, the plaintiff could not have maintained an action against the defendant until July 31, 2003, and it is at this point that his claim accrued.

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). In that case, the lower court granted summary judgment for the defendant on the grounds that defendant could not provide evidence that he "most probably" would have prevailed on the underlying claim at trial. The Court of Appeals affirmed on the basis that the plaintiff could not show that he most probably would have prevailed.

The court in Doe noted that this question 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). The court addressed the elements of a legal malpractice case to include damage to the client and proximate cause of those damages due to the breach of duty by the attorney. In addition to breach of duty, a plaintiff in a legal malpractice action must prove the proximate cause of damages⁹.

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. The earliest date on which it accrued was July 31, 2003.

c. Other Jurisdictions Adopt the Epstein v. Brown Analysis

Other jurisdictions have held that the statute of limitations on lawyer negligence in a “case within a case” accrues on the date of the jury’s verdict or date of adverse decision. In the case of Fontanella v. Marcucci, 89 Conn. App. 690, 887 A.2d 828 (2005), the plaintiff had an underlying products liability action against an automobile

⁹ 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.

manufacture. The defendant, plaintiff's attorney, negligently failed to obtain and preserve a vehicle inspection concerning alleged seatbelt failure; however this did not cause any justiciable injury to the plaintiff until the adverse ruling in the product's liability suit. The Fontanella court held that the viability of the claim was contingent on the outcome of the underlying product liability case.

Courts have also held that the statute of limitations can be tolled until the adverse judgment that caused accrual of the actual injury to a plaintiff. See Archadale v. American Intern. Specialty Lines Ins. Co., 154 Cal.App.4th 449 (2007) (Once a client has been injured by an adverse judgment, the limitations period commences). See also, Peter v. Simmons, 87 Wash.2d 400, 522 P.2d 1053 (1976) (held that in professional malpractice cases, the action accrues upon its discovery, not upon the moment of breach). See generally, Ronald Mallen, Limitations and the Need for Damages in Legal Malpractice Actions, 60 Def. Couns. Journal, 234, 245-246 (April 1993) (noting that when a client suffers an adverse result because of a lawyer's negligence that client has both knowledge of the negligence and present damage).

A recent legal annotation has discussed Epstein favorably and cited numerous cases which agree that the accrual date for a "case within a case" is the adverse verdict. See, e.g., Gilbride, Heller and Brown, P.A. v. Watkins, 783 So. 2d 224 (Fla. 2001); Griffin v. Goldenhersh, 323 Ill. App. 3d 398, 257 Ill. Dec. 52, 752 N.E. 2d 1232 (5th Dist. 2001); Harvey v. Snow, 281 F. Supp. 2d 376 (D.R.I. 2003) (applying Rhode Island law); Hartman v. Rogers, 174 SW 3d 170 (Tenn. Ct. App. 2005), appeal denied, (Oct. 17, 2005); Underkofler v. Vanasek, 53 SW 3d 343 (Tex. 2001); Laird v. Flacker, 2 Cal. 4th 606, 7 Cal. Rptr. 2d 550, 828 P. 2d 691 (1992); Fischer v. Browne, 586 SW 2d 733 (Mo.

Ct. App. W.D. 1979); Watson v. Dorsey, 265 Md. 509, 290 A. 2d 530 (1972); Kopicko v. Young, 114 Nev. 1333, 971 P. 2d 789 (1998). The rationale for these holdings is that a client suing his or her former attorney may recover for legal malpractice only if it is established that the negligence of the attorney caused legally cognizable damages to the client¹⁰.

The general rule has been noted in 87 A.L.R. 5th 473 Attorney Malpractice – Tolling or Other Exceptions to Running of the Statute of Limitations (2001):

“as a general rule the statute of limitations on an action against an attorney for malpractice begins to run when the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, the wrongdoing , [but] that the limitation period [can be] tolled where the plaintiff has suffered no damage or injury at the time of discovery.” (emphasis added).

(d) Appellant’s Assertions of the Accrual Date for The Limitation Period Are Incorrect.

The appellant asserts in his brief that the limitation period began to accrue in February 2000 when Wright wrote Kimmer a letter stating that he “may” have a right to make a claim because of Wright’s premature settlement of the third party claim. (Brief of Appellant, p. 25). As argued elsewhere in this brief, this letter showed that Wright agreed with Kimmer’s position that a cause of action against him for malpractice, if any existed, would not commence until a determination was made on the workers compensation case. Wright’s letter asserted that Kimmer “may be entitled to eventually file a claim against me for some alleged error...” and that Wright would “be glad to cooperate with Mr. Pope

¹⁰ *George L. Blum, Annotation, When Statutes of Limitations Begin to Run on Action Against Attorney for Malpractice Based Upon Negligence – view that the statute begins to run from time client discovers, or should have discovered, a negligent act or admission – application of rule to conduct of litigation and delay or in action conducting client’s affairs*, 14 A.L.R. 6th 1 (2009).

in resolving the issues on your workers compensation case...." (R., p. 560). Clearly, Wright expected and believed that the determination of this claim would be the "trigger" for whether a cause of action even existed against him.

Appellant also argues that Kimmer's signing a waiver of conflict form on February 1, 2000, with that same letter shows respondent "knew" he had a cause of action then. Wright prepared this form, and it only stated that Kimmer "may" have a claim. (R., p. 558).

For the reasons set forth herein, respondent did not yet have a cause of action at that time. Also, the fact that respondent terminated Wright as his attorney on February 24, 2000, is not determinative as to when the limitations period began. (R., p. 561). At that point, and continuing until July 31, 2003, there was no causation. Had the claim been determined to be non-compensable, Kimmer could not have sued.

If respondent had filed this malpractice action before February 2003 without pursuing the workers compensation appeal, the appellant would have defended that action on the ground of "no harm, no foul" and would have asserted that the claim was not compensable; therefore, it would not have mattered if it was barred by appellant's settlement of the third party action without notice. Or, secondly, the appellant would have asserted, as found by Circuit Judge Goode in his Order reversing the workers compensation decision, that there was no bar under SC Code §42-1-560 because the workers compensation carrier was not prejudiced by the third party settlement, the settlement was for minimum limits, and the third party himself was judgment-proof. (R., p. 31). Thirdly, the appellant would likely have asserted that any such suit by respondent

[REDACTED]

[REDACTED]

[REDACTED]

was frivolous because no claim had matured in the absence of a determination of compensability and a determination of the applicability of §42-1-560.

The defendant mistakenly relies on a line of cases exemplified by Dean v. Ruscon, 321 S.C. 360, 468 S.E.2d 645 (1996). See also Burgess v. American Cancer Soc'y, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989); Peterson v. Richland County, et al, 335 S.C. 135; 515 S.E.2d 553 (Ct. App. 1999).

In Dean v. Ruscon, the lower court directed a verdict for the defendant based on the six year statute of limitations being a bar. The Court of Appeals reversed that decision concluding that a fact question existed as to whether the owner was reasonably diligent in determining whether damage to his building was attributable to the defendant. The Supreme Court granted certiorari and reversed the Court of Appeals. The Supreme Court held that since the owner knew that there was a crack in the building caused by the defendant that was the time at which the cause of action accrued, rather than later when the crack enlarged and revealed bulging bricks. The Supreme Court held that because the original cracking occurred in 1984 but her suit was filed in 1991, plaintiff was barred by the six year statute of limitations. The rule in Dean is that an injured party cannot claim that the statute commences when that party "comprehends the full extent of the damage." Id., at 647. See also Peterson v. Richland County, Id. (statute begins to run from the date the injured party has been wronged, not when the injured party comprehended the full extent of his damages).

In the instant case, the holding and analysis in Dean v. Ruscon does not apply to the instant case. Respondent Kimmer does not contend that he did not appreciate the full extent of his injuries until the decision of the commissioner, but rather he did not have a

legal right to sue upon it because the issue of compensability, as well as application of S.C. Code §42-1-560 was unresolved until that date.

There are two reasons this line of cases is inapplicable. First, wrongful conduct, in and of itself, does not give rise to a cause of action. In a negligence action, wrongful conduct must also be accompanied by an injury proximately caused by such wrongful conduct. Brown, supra. Otherwise, no cause of action has arisen. Id. Secondly, the instant matter does not involve circumstances where the plaintiff simply did not comprehend the full extent of his damages. Stated differently, this is a case of whether there was a case at all, not the size of the case.

The defendant also argues, citing Dean and Burgess v. American Cancer Soc'y, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989), that the plaintiff was on sufficient "notice" of facts that might give rise to a potential claim against him in February 2000 such that the law would demand that he diligently "inquire" into the matter in order to discover such presumptive claim. From March 2000 until July 31, 2003, the plaintiff was fully litigating the issue of the compensability of his injuries, the extent of his disability and the question of whether the defendant's settlement of the third party claim was, in fact, a bar to his workers' compensation benefits. It is absurd to insinuate that the respondent was not diligent in his inquiry as to whether a claim existed against the defendant. As a matter of fact, the respondent's efforts in litigating the compensability issue within the workers compensation claim is precisely what lead to the discovery of the actionable claim against the defendant. Once discovered, the plaintiff timely commenced this action despite continuing, to the benefit of the defendant, to litigate the

issue of whether the defendant's negligent settlement of the third party claim barred the plaintiff from receiving the benefits it was ruled he was otherwise entitled to.

The defendant rightly states that the determination as to when the statute of limitations began to run is an objective one, and not a subjective one. Therefore, what the plaintiff actually knew and when he knew it should not be the basis of the Court's decision. The determination of when the statute of limitations began to run must be based on when the plaintiff acquired facts, which by the exercise of reasonable diligence, would put a person of common knowledge and experience on notice that he had a claim against the defendant. A plaintiff must have, at least, been possessed of facts that would have established the elements of a negligence claim against the defendant. In Epstein, supra., the Supreme Court determined that a legal malpractice claim accrued when there was a judicial determination adverse to the plaintiff/client. Similarly, in the instant case, there was no determination of the compensability of Kimmer's claim until the Decision of the single commissioner on July 31, 2003. It is counterintuitive to contend that a person of common knowledge and experience would have been on notice of a negligence claim against the defendant for the wrongful settlement of a third party claim without notice which would bar recovery of workers compensation benefits in February 2000 at the very time when the plaintiff's employer and its carrier were defending the plaintiff's claim on the basis that his injuries were not compensable in the first instance, which, if correct, would render the defendant's wrongful conduct immaterial.

This is especially the case where, prior to and during February 2000, the appellant believed, and was advising the plaintiff, that he did not have a viable workers' compensation claim. The defendant testified in his deposition, "I didn't, frankly, think

[the Plaintiff's injuries] would be a successful comp. claim, but, you know, he, I went ahead and filed it just out of, protective (sic) it." (R., p. 316, l.23 – p. 317, l.1). The defendant further testified regarding his advice to the plaintiff, when filing the Workers Compensation Form 50, "I also told [the Plaintiff], as I recall

when we filed [the Form 50], that **I did not believe he had a compensable injury...**" (R, p. 328, ll.18-20). (emphasis added).

In light of these representations to the plaintiff, the plaintiff was not on notice that he had a malpractice claim despite appellant's misguided settlement of the third party claim.

This case was not, by way of analogy, a rear-end collision case where the accrual date for the statute was clear, but the plaintiff was claiming that he "did not fully comprehend the extent of his injuries" until more than three years later, as in Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645, 647 (1996). The appellant's position in essence is either that the respondent was required to bring a suit and then seek a stay of the suit until the workers compensation claim was resolved and the appeal concluded, or he was required to litigate the workers compensation claim in the malpractice action.

The appellant here, unlike in cases where the statute of limitations is a legitimate defense, cannot claim "surprise" or "prejudice" because the respondent chose to ascertain his rights under the workers compensation laws via a determination from the commission. If respondent had succeeded in his workers compensation appeal, as Circuit Judge Goode ruled in the lower court, then appellant would not be liable for malpractice¹¹.

¹¹ In appellant's brief, it is incorrectly argued that respondent sought damages from appellant above his benefits under the workers compensation law – i.e., post traumatic stress damages. (Brief of Appellant, p. 42). As noted in the Kimball Order, respondent stipulated that he sought no additional damages from appellant beyond "those which may flow directly from the workers compensation claim." (R., p. 4).

It is important to note in this case that appellant was involved in the workers compensation process the entire way. He was a witness at the workers compensation hearing (R., p. 376, l.13 – p. 389, l.19), where he testified that there was no prejudice to the compensation carrier because the settlement was with a judgment-proof third party for minimum limits. (R., p. 379, l.22 – p. 382, l.18). Also, he testified that he had a private investigator check the courthouse records to determine that, in fact, the third party was judgment-proof. (R., p. 380, ll.17-18).

Less than six days after the adverse ruling of the single commissioner, the undersigned wrote appellant on August 5, 2003, sent him a copy of the decision, informed him that an appeal would be taken, and asked for a tolling agreement. (R., p. 1061). Shortly thereafter, since it had been determined that the case was compensable but that respondent was barred by appellant's actions, a tolling agreement was entered into between respondent and appellant so that respondent could pursue an appeal of the workers compensation decision¹². (R., pp. 556 – 557).

Appellant's argument is premised on the fact that respondent did not need to pursue his workers compensation remedies because appellant's actions were ipso facto actionable beginning in February 2000. If a suit had been commenced in February 2000 and had respondent not pursued the workers compensation appeal, defenses would have been raised by the appellant that the respondent's failure to pursue that appeal was a bar to recovering against him because the claim was not necessarily compensable, nor was he necessarily barred by §42-1-560. Under that scenario, it would follow that both respondent and appellant would have had to engage in malpractice litigation and would.

¹² If respondent had not pursued the workers compensation appeal, appellant would have asserted failure to do so – i.e., failure to exhaust his remedies – as a defense to the malpractice case.

have had to produce expert witnesses on the issue of whether the underlying case was or was not compensable, whether plaintiff was totally disabled or not, and on whether appellant's actions were a bar under the statute. This scenario refutes the appellant's argument, which seems to be that a plaintiff is required to bring suit where his attorney "may" have committed an error even though there is no proof that he "most probably" would prevail since there is no proof of causative damages at that point.

If appellant really believed the limitations period ended in February 2003, this is refuted by the interactions of the parties during 2004 and 2005, a period when appellant now contends the claim was already barred. After the tolling agreement was signed in October 2003, from May 2004 to September 2004, respondent's counsel was writing appellant's carrier and counsel to schedule a mediation (R., pp. 1065-1070). At no time did appellant or any party on his behalf assert that the statute had run. The original Answer of appellant dated October 28, 2004 to the Complaint did not assert the statute as a defense. (R., pp. 56-59).

Once it was determined on July 31, 2003 that Kimmer had a compensable claim, that was the earliest point at which Kimmer discovered that he most probably would prevail in a professional negligence cause of action. The lower court correctly found that this date was the trigger for the commencement of the statute of limitations. The lower court order granting summary judgment to the respondent on the issue of the statute of limitations should be affirmed.

ARGUMENT II

AS ADDITIONAL SUSTAINING GROUNDS, EVEN IF THE KIMBALL ORDER WAS NOT BINDING AS THE LAW OF THE CASE, THE HAYES ORDER SHOULD BE AFFIRMED BASED ON THE RECORD OF THE CASE.

Pursuant to Rule 220(c), SCACR, the appellate courts may affirm a judgment for any reason appearing in the record. The order of the lower court (R., pp. 7-14) found that the Court was bound by the prior ruling of Judge Kimball to the effect that Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) controlled. The Hayes Order appeared to doubt that Epstein controlled, but Judge Hayes ruled that it was bound by the Kimball Order that Epstein controlled and was the law of the case. Respondent would concede that the Kimball Order was not binding on Judge Hayes but asserts that the analysis in Epstein applies and leads to the same result: i.e., that the statute did not commence to run until July 31, 2003.

It is respondent's position that, as an additional sustaining ground, the holding and/or analysis of Epstein controls in the instant case. It was fully argued at the hearing on plaintiff's motion for summary judgment which Judge Hayes granted. (R., p. 264, l.15 to p. 266, l.24).

The respondent relies on the grounds expressed in this brief as supporting the holding and ruling in the Hayes Order granting summary judgment to respondent. See, for example, Shadwell v. Craigie, 361 S.. 492, 605 S.E.2d 567 (Ct. App. 2004), rehearing denied (an appellate court may affirm a trial court's order based on any grounds found in the record); Law v. S.C. Department of Corrections, 368 S.. 424, 629 S.E.2d 642 (2006), the Supreme Court may affirm the trial court based on any ground found in the record).

The ruling by Judge Hayes that the limitations period commenced on July 31, 2003, and granting respondent summary judgment, should be affirmed for the reasons set forth in this brief.

ARGUMENT III

AS ADDITIONAL SUSTAINING GROUNDS, AND IN THE ALTERNATIVE, THE RULING OF THE LOWER COURT (HAYES ORDER) SHOULD BE AFFIRMED ON THE DOCTRINE OF EQUITABLE TOLLING.

In the alternative, if the lower court is found to be incorrect, the record also supports the application of the doctrine of equitable tolling as a basis to affirm the lower court, as an additional sustaining ground. Under the doctrine of equitable tolling,¹³ a plaintiff is allowed to initiate an action beyond the statute of limitations deadlines if "relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine." Hooper v. Ebenezer Senior Services, 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008), cert. pending, citing 51 AmJur 2d Limitation of Actions §174 (2007). The doctrine is recognized to ensure "fundamental fairness," Hooper, Id. at 222,¹⁴ or to "prevent unfairness to a diligent plaintiff." Id., 51 AmJur at §174.

Under this doctrine, if extraordinary circumstances exist, the statute of limitations will begin to run when the plaintiff "acquires knowledge of the facts that comprise the cause of action..." 51 AmJur2d, Id. at §178, . 565. Because a negligence cause of action includes the element of proximate causation, the facts as to this element,

¹³ This doctrine is distinct from equitable estoppel, in that the latter requires wrongful conduct by the defendant (fraud or misrepresentation).

¹⁴ This doctrine has been reaffirmed in American Legion Post 15 v. Horry County, Op. No. 4509, S.C. Court of Appeals, filed February 25, 2009. The court reversed the lower court finding that the doctrine applied there and noted that "equitable estoppel is reserved for extraordinary circumstances." Id., p. 89, citing Hooper, Id., p. 219.

at a minimum,¹⁵ were not known until July 31, 2003. This is the date of the event which ended the tolling of the statute and on which the cause of action accrues.

The Supreme 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 known¹⁶. 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 began saying, through counsel, in March 2005, which is that Kimmer "had a cause of action against me starting in February 2000."

Of course, between that date and 2005, when appellant 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.

¹⁵ If Judge Goode's Order overruling the Workers Compensation Commission had been affirmed, there would have been no malpractice cause of action against Wright.

¹⁶ 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 limitation defense until March 8, 2005, when he moved to amend his Answer. Neither he nor his carrier raised this defense until 2005. It was created by insurance counsel.

Wright's letter of February 1, 2000 (R., pp. 559-560), clearly shows that Wright was expecting that (a) either Kimmer would win his workers compensation claim and not sue Wright, or (b) Kimmer would lose the compensation case because of Wright's error and bring a malpractice claim against him. Either way, Wright knew in 2000 that a determination was needed from the Commission before a claim, if any, would be filed against him.

The effect of this defense, if it would be determined to be a bar to Kimmer's claim, would be to deprive total disability benefits to the estate of a man described at the workers compensation hearing by his boss, Bill Manning, as "one of the hardest workers I have ever worked with." (R., p. 391, ll.9-10).

The facts of the instant case strongly support the application of this doctrine. 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 found that the limitations period began running before July 31, 2003, appellant asserts alternatively that the doctrine of equitable tolling should apply, and the lower court order should be affirmed on that basis. The facts of this case are compelling ones for the application of the doctrine.

CONCLUSION

The lower court ruling that the statute of limitations did not commence to run on the malpractice action until the adverse ruling of the workers compensation commission on July 31, 2003 was correct. Even if that ruling was based on an incorrect reliance on the prior order of Judge Kimball, it should be affirmed, as an additional sustaining ground, for the reasons set forth herein.

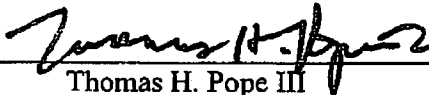
In the alternative, as a further additional sustaining ground, the order should be affirmed by application of the doctrine of equitable tolling.

For any of these reasons, the lower court was correct in granting summary judgment to the respondent on the issue of the statute of limitations. The order should be affirmed.

Respectfully submitted,

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September 2, 2009

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes III, Circuit Court Judge

Case No. 2004 CP 46-2659

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of the Estate of Richard Kimmer, deceased,

Respondent,

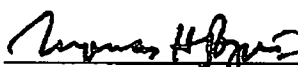
v.

Philip E. Wright,

Appellant.

CERTIFICATE OF COMPLIANCE

I, Thomas H. Pope III, Esquire, do hereby certify that the Final Brief of Respondent Kimmer complies with Supreme Court Order of August 13, 2007.



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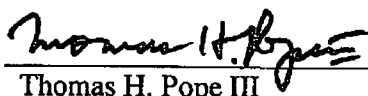
v.

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Appellant.

CERTIFICATE OF COUNSEL

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v.

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STATEMENT OF ISSUES IN REPLY

I. DID THE STATUTE OF LIMITATIONS COMMENCE TO RUN AT THE LATEST BY FEBRUARY 24, 2000 WHEN BY THAT TIME:

A. PLAINTIFF CORRECTLY BELIEVED THE WORKERS' COMPENSATION CARRIER SHOULD HAVE BEEN PAYING HIM FROM THE BEGINNING;

B. DEFENDANT HAD INFORMED PLAINTIFF THAT THE REASON HE WAS NOT BEING PAID HIS WORKERS' COMPENSATION BENEFITS WAS IN PART DEFENDANT'S FAULT BY SETTLING PLAINTIFF'S THIRD PARTY CASE WITHOUT NOTICE TO THE EMPLOYER OR CARRIER RESULTING IN AN ELECTION OF REMEDIES AND WAIVER OF ANY RIGHT TO WORKERS' COMPENSATION BENEFITS;

C. THE LAW IN SOUTH CAROLINA SINCE 1959 HELD THAT A PLAINTIFF WHO SETTLES HIS THIRD PARTY CASE WITHOUT NOTICE TO THE EMPLOYER OR CARRIER HAS ELECTED HIS REMEDY AND IN SO DOING WAIVED ANY RIGHT TO WORKERS' COMPENSATION BENEFITS;

D. DEFENDANT TOLD PLAINTIFF THAT HE "SCREWED THIS UP" AND THAT THE PLAINTIFF WOULD HAVE TO FIND ANOTHER ATTORNEY TO HANDLE THE WORKERS' COMPENSATION PART OF HIS CASE;

E. PLAINTIFF HAD SIGNED A FEBRUARY 1, 2000 STATEMENT WHICH PROVIDED, "I UNDERSTAND THAT I MAY HAVE A RIGHT TO MAKE A CLAIM AGAINST MR. WRIGHT CONCERNING HIS REPRESENTATION RELATED TO MY WORKERS' COMPENSATION ACTION;"

F. PLAINTIFF UNDERSTOOD THAT HE WAS NOT RECEIVING HIS WORKERS' COMPENSATION PAYMENTS BECAUSE WRIGHT MADE A MISTAKE;

G. PLAINTIFF HAD ENGAGED SEPARATE COUNSEL TO REPRESENT HIM IN THE WORKERS' COMPENSATION CLAIM AND WRIGHT DID NOT REPRESENT THE PLAINTIFF IN ANY MATTER;

H. PLAINTIFF BLAMED WRIGHT FOR HIS POST-TRAUMATIC STRESS DISORDER PROBLEMS WHICH WERE CAUSED BY HIS NOT BEING TIMELY PAID WAGES AND HAVING HIS MEDICAL BILLS PAID, ALL DUE TO WRIGHT'S MISTAKE; AND,

**I. THE PLAINTIFF'S DOCTOR HAD TOLD HIM HE WOULD NOT BE
ABLE TO WORK IN HIS CONDITION AS A RESULT OF INJURIES SUSTAINED
IN THE ACCIDENT.**

II IS EQUITABLE TOLLING APPLICABLE TO THE FACTS OF THIS CASE?

ARGUMENT I

THE STATUTE OF LIMITATIONS COMMENCED TO RUN AT THE LATEST ON FEBRUARY 24, 2000

Respondent has conceded that Judge Hayes' ruling that he was bound by the findings of Judge Kimball's 2005 Order denying the defendant summary judgment was error. (Respondent's Brief, p. 27) It was on this erroneous basis that the trial court granted the plaintiff summary judgment. The trial court felt the Kimball Order ruled that Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) controlled the outcome of this case. Judge Hayes specifically rejected such application of Epstein as discussed in this reply brief. For these and the other reasons discussed herein the Court of Appeals should reverse the trial court's order and in so doing determine that the statute of limitations commenced to run on February 24, 2000 and remand the case to the circuit court with instructions to enter judgment for Appellant.

Noticeably absent from Respondent's Statement of Facts section of his brief is any mention of the evidence contained in the plaintiff's testimony as to the events of January 1999 through February of 2000 which demonstrate that there existed sufficient information to alert the plaintiff that he might have a cause of action against the defendant. Specifically, Respondent's statement of facts omits the following:

1. By March of 1999, Kimmer correctly believed that the workers' compensation carrier should have been paying him from the beginning. (Kimmer Deposition p. 38, line 24 - p. 40, line 6) (R. p. 192, line 24 - p. 194, line 6).

2. Kimmer recalls having a conversation with Wright in January 2000, during which Wright told him that "he screwed this up" and that Kimmer would have to

find another attorney to handle the workers' compensation part of his case. (Kimmer Deposition, p. 45, line 25 – p. 46, line 4) (R. p. 199, line 25 – p. 200, line 4).

3. Kimmer signed a February 1, 2000, "Waiver of Conflict" document which provides that, "I understand that I may have a right to make a claim against Mr. Wright concerning his representation related to my workers' compensation action." (February 1, 2000, Waiver of Conflict, signed by Kimmer) (R. p. 558)

4. As of February 1, 2000, Kimmer understood: (a) that he was not receiving his workers' compensation payments because Wright made a mistake; (b) Wright did not try to hide his mistake; and, (c) Wright told him plainly "I screwed this up; you have to get another attorney to take the case." (Kimmer Deposition p. 47, line 2-p. 48, line 16) (R. p. 201, line 2 – p. 202, line 16).

5. Kimmer recalls receiving and reading Wright's February 1, 2000 letter, addressed to Richard Kimmer. (Kimmer Deposition, p. 45, lines 2-6) (R. p. 199, line 2-

6). The following is an excerpt from that letter:

Since you may be entitled to eventually file a claim against me for some alleged error in the workers' compensation case, I need for you to confirm in writing that you agree for me to continue working on the underinsurance portion of your wreck case and that you waive any claim of conflict of interest that might arise in that representation. Since you would be saying on the one hand that I have not done what I should have in the workers' compensation case, I need to be sure that you still want me to continue with the wreck case as your attorney.

(February 1, 2000 letter from Wright to Kimmer, Page 2, ¶ 1) (R. p. 559).

6. There was a drop in Kimmer's income between 1998 and 1999 because Kimmer only worked one month in 1999. Since Kimmer did not receive any workers' compensation benefits, it caused him problems in that his medical bills were not being

paid. (Kimmer Deposition, p. 48, line 24 - 51, line 12) (R. p. 202, line 24 - p. 51, line 12).

7. Kimmer knew that he had sustained a wage loss through December 10, 1999. (Kimmer Deposition, p. 73, line 15 - p. 74, line 15) (R. p. 227, line 15 - p. 228, line 15)

8. As of February 1, 2000, Kimmer had engaged separate counsel to represent him in the workers' compensation claim and related matters. (Kimmer Deposition, p. 77, line 18 - p. 78, line 14) (R. p. 231, line 18 - p. 232, line 14).

9. As of February 24, 2000, Wright did not represent Kimmer in any matter. (Kimmer Deposition, p. 82, line 11 - p. 84, line 19) (R. p. 236, line 11 - p. 238, line 19).

10. Kimmer blames Wright for his post-traumatic stress disorder problems which started in 1999; (Kimmer Deposition, p. 87, line 2 - p. 88, line 10) (R. p. 241, line 2 - p. 242, line 10)

11. By February 2000, Kimmer admits that Wright had represented to him that Kimmer's not getting paid his workers' compensation benefits was in part Wright's fault. (Kimmer Deposition, p. 88, lines 2-10) (R. p. 242, line 2-10)

12. During 1999 Respondent was informed by his doctor that he could not work in his condition as a result of the accident. (Kimmer Deposition, p. 32-35) (R. p. 186-189)

South Carolina law, both in February of 2000 as well as now, provides that a claimant who settles his third party case without notice to the employer or carrier has elected his remedy and waived any rights to workers' compensation benefits. Fisher v.

S.C. Dept. of Mental Retardation, 277 S.C. 573, 576, 291 S.E.2d 200, 201 (1982). The foundation for this precedent had existed for forty (40) years by February of 2000. Stroy v. Millwood Drug Store, Inc., 235 S.C. 52, 109 S.E.2d 706 (1959). The law remains the same today. During February of 2000 there was no reason to believe that after forty (40) years of precedent our courts would abandon these principles. Indeed, the Court of Appeals in ruling on this question in Kimmer v. Murata of America, Inc., 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006) stated that, "[t]he undisputed facts of the instant case are nearly identical to those in Fisher". Id. at 49, 512. The Court of Appeals commented on the question of whether prejudice was required when it pointed out that,

[n]either §42-1-550 nor §42-1-560 contain a provision establishing prejudice as a factor in considering whether a compensation claim is barred when an employee settles or concludes a third party claim without notice. Moreover, our precedent's strong and unwavering emphasis on the importance of notice outweighs the relevance of prejudice in considering whether a workers' compensation claim is barred.

Kimmer at 50, 512.

Respondent contends that despite his learning in February of 2000 that his workers' compensation payments had been denied because his attorney had settled the third party claim without notice to his employer he nonetheless lacked sufficient information that some right of his had been invaded. In light of Kimmer's testimony as to the information he possessed by February 2000 this position lacks merit without reference to anything further. It is particularly untenable in light of the forty (40) years of precedent on the election of remedies issue which existed as of February of 2000.

Appellant will reply to arguments advanced in Respondent's brief where such a reply would be meaningful here. Appellant will set forth Respondent's arguments and will offer replies as to each.

First, Respondent argues that Epstein v. Brown controls the outcome of this case. Respondent argues that the statute of limitations did not commence to run because the underlying workers' compensation claim had not been fully litigated until July 31, 2003.

Appellant's Response:

1. While it may certainly be true that in a given case the first notice that the client-plaintiff may have of a right of action against his attorney could occur at the time of an adverse jury verdict or similar order, Epstein v. Brown by no means stands for the proposition that such a verdict or order is always the trigger point to start the statute running. Respondent gives little attention to the Supreme Court's footnote in Epstein which states:

We do not hold that, in all instances, the date of a jury's adverse verdict is the date on which the statute of limitation begins to run. To the contrary, we hold only that, under the facts of this case, Dr. Epstein knew of a potential claim against Brown by this date, at the latest.

Id. n.8 at 383, 821

Therefore, the essential date is not necessarily the date of the jury verdict or similar order but rather, "...Where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed." Id. at 376, 818.

2. The trial court's order rejected Plaintiff's argument that Epstein controlled the outcome of this case. The trial court pointed out important facts in the case including the plaintiff's signing a Waiver of Conflict on February 1, 2000, stating he "may have a

right to a claim against Mr. Wright concerning his representation related to my workers' compensation claim", Wright's letter to Kimmer on February 1, 2000, informing Kimmer that he may need to file a claim against Wright because of Wrights' improper handling of a workers' compensation claim, and Kimmer's termination of Wrights' representation as a direct result of Wright's mishandling of Kimmer's workers' compensation claim. The trial court observed, "...the facts in the present case weigh more in favor of a ruling that Kimmer had notice of a potential injury caused by Wright earlier than the date of the Commission's adverse decision. Hayes then concluded, "These facts distinguish the present case from Epstein and suggest that Epstein should not have been controlling on the issue of when the trigger event for legal malpractice begins to run." (Order Granting Summary Judgment to Plaintiff, dated September 16, 2008, issued by The Honorable John C. Hayes, III, pp. 6-7) (R. p. 13-14)

Second, Respondent argues that despite Kimmer's being told of Wright's error, blaming Wright for his not receiving his workers' compensation payments, changing attorneys because of the claim against Wright, and signing a statement acknowledging he may have a claim against his former attorney, the statute of limitations could nonetheless not have commenced to run during February of 2000 because:

A. Respondent suggests that the concern to "protect defendants from false claims" must be balanced by the need "to protect plaintiffs from suffering *when circumstances prevent them from knowing they may have a right of action.*" (Emphasis added) (Respondent's Brief, p. 11)

Appellant's Response: Respondent cites the Supreme Court case of Santee Portland Cement v. Daniel International Corp., 299 S.C. 269, 384 S.E.2d 693 (1988)

implying that the facts of that case are applicable here. Santee Portland Cement concerned the construction of cement silos reinforced with rebar. The construction defect concerned improper placement of the rebar such that iron rods intended to provide structural integrity to the silos were unevenly distributed creating weak places in the silo wall. The Supreme Court refused to commence the running of the statute of limitations at the time of construction of the silos or on the appearance of small cracks in the cement structure because Santee Portland Cement was physically unable to ascertain improper placement of the rebar and, accordingly, had no knowledge of the construction defect until one of the silos suffered a catastrophic failure. These facts have no application to this case. Mr. Wright according to the plaintiff's testimony told him directly that Wright had made a mistake and that Kimmer was not receiving his workers' compensation benefits for that reason. Accordingly, Mr. Wright also informed Kimmer that he would need to change attorneys and Kimmer did so, all of this occurring by February 24, 2000.

Respondent's contention that the malpractice claim could not have been discovered until July 31, 2003, conflicts with Kimmer's following testimony regarding his February 2000 communications with Wright:

Q: And you understand Mr. Wright is telling you in this letter, and apparently had explained to you in his office, that the reason they were denying it is because he made a mistake.

A: Right. Yes, sir.

Q: And he also says in here that you might have a claim against him as a result of that?

A: That's true.

Q: Okay. And so my question to you really is, he didn't try to hide that from you?

A: Oh, no. When I went in to talk to him, you know, he told me plainly, you know, I screwed this up, you have to get another attorney to take the case. (Kimmer Deposition, pp. 47-48) (R. pp. 201-202)

B. Respondent contends that he did not have the legal right to sue until July 31, 2003 when the following issues were "determined" (Respondent's Brief, p. 10): compensability, interpretation of S.C. Code §42-1-56, Kimmer's disability, and that Kimmer's injury was proximately caused by the defendant's negligent act. (Respondent's Brief, p. 15-19)

Appellant's Response:

1. The statute of limitations commences to run once the plaintiff possesses information sufficient to place him on notice that some right of his has been invaded. The plaintiffs in Binkley v. Berry Haynesworth, Marion, McKay & Gerrard, LLP, 352 S.C. 286, 573 S.E.2d 838 (Ct. App. 2002) (Cert. denied, August 6, 2003), argued that the statute of limitations cannot commence to run until there are damages and their mere knowledge of the existence of the subject easement was insufficient to provide them with notice that they may have sustained damages. As to this argument the Court of Appeals held:

Once a reasonable person has reason to believe that some right of his has been invaded or that some claim against another party might exist, the requirement of reasonable diligence to investigate this information further takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all.

Id. at 297-298, 844-845

Because the Binkleys were on notice of the easement and elevations in November 1991, the statutory period was found to have commenced at that time, almost

four (4) years before the 1995 flood which damaged the Binkleys' home. Because suit was not commenced until February of 1997 the attorney's motion for summary judgment was granted by the trial court and upheld by the Court of Appeals. In any event, Kimmer did in fact sustain damage by February 2000, in the form of unpaid medical bills and his wages which he blamed upon Wright.

Binkley teaches that the statute starts to run when the plaintiff becomes aware that some right of his has been invaded or that some claim against another party might exist, and that once the plaintiff is in possession of such information the statutory period commences to run despite the plaintiff's "inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all." *Accord Sharts v. Natelson*, 885 P.2d 642 (NM 1994); *Magnuson v. Lake*, 717 P.2d 1216 (Or.App. 1986); *Thorpe v. DeMent*, 317 S.E.2d 692 (N.C.App. 1984). It is noteworthy that Respondent neither cited nor commented on the principles set forth in Binkley.

2. Respondent argues that if he had not proceeded with the workers' compensation claim and appeal to receive the determinations on the contested issues he would have faced a summary judgment motion like the one faced by the plaintiff in Doe v. Howe, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005) (Cert. denied, 2007). Respondent states further that the plaintiff must show that he "most probably" would have been successful in the underlying suit if the attorney had not committed the alleged malpractice. (Respondent's Brief, p. 16-17) Respondent argues that the plaintiff in Doe could not provide evidence that he "most probably" would have prevailed on the underlying claim at trial and suggests that the rules of Doe mandated that Kimmer try his

workers' compensation claim to conclusion before he either had a claim at all or the statute of limitations commenced to run on his malpractice claim.

The principles of Doe v. Howe do relate to this case although in radically different terms than those suggested by Respondent. The defendant in Doe was granted summary judgment for two reasons. First, the trial and appellate courts upheld that the statute of limitations had expired as a matter of law on Doe's cause of action in the underlying would-be suit against Porter-Gaud, ("even assuming each act of molestation gave rise to a distinct cause of action, the statute of limitations would have expired in 1988...more than ten (10) years before Doe even retained Howe, which occurred in 1999." Id. at 443, 30.) Therefore, what the court found was impossible for the plaintiff to overcome was a statute of limitations defense in the underlying claim (if it had been brought), not that the plaintiff had brought the malpractice suit without litigating to conclusion the affirmative defenses in the underlying claim. Second, Howe was granted summary judgment because the plaintiff's expert, Flowers, did not and/or would not state in his affidavit that Doe "most probably would have recovered more than the Eighty-Eight Thousand (\$88,000) Dollars he received in his settlement with Porter-Gaud" (Id. at 445, 31) through Howe's representation. Doe could have, but did not, present an expert's affidavit on this question in order to defeat summary judgment. The Court of Appeals cited favorably the following commentary as to the client-plaintiff's burden:

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

client need not show a perfect claim. But the client must show at least that he has lost a probability of success as a result of the attorney's negligence."

Id. at 446, 32. (emphasis added)

This is a recognized and long-standing statement of the plaintiff's burden in a legal malpractice action and demonstrates why Kimmer could have maintained a suit against Wright prior to conclusion of the workers' compensation claim. Kimmer could have done so, just as the Court of Appeals pointed out how Doe could have done so, through an expert's opinion that Kimmer had "lost a probability of success as a result of the attorney's negligence." Kimmer need not have shown the loss of a perfect claim to defeat summary judgment; merely that because of the attorney's mistake he lost "a probability of success" and this can be shown through the use of expert testimony.

3. Respondent further argues that if Kimmer had filed the malpractice action in February of 2000, without pursuing the workers' compensation claim, Appellant would have defended the action by claiming the failure to pursue the comp claim is a bar because the claim was not compensable, that Kimmer was not disabled, that §42-1-56, S.C. Code was not a barrier because the carrier was not prejudiced, and in any event during February of 2000, "and continuing until July 31, 2003, there was no causation." (Respondent's Brief, p. 20)

The more salient issue concerning compensability and Kimmer's disability as to triggering the statutory period during February 2000 is not that these issues had yet to be litigated in the workers' compensation action but rather that the facts to prove these issues were known or discoverable (should have been known by the exercise of reasonable diligence) by that date. Indeed, Kimmer believed that he should have been

receiving his workers' compensation benefits since his accident in 1999. (Kimmer Deposition, p. 29, line 16 – p. 30, line 8) (R. p. 183, line 16 – p. 184, line 8) Also by February of 2000 Kimmer blamed Wright for his post traumatic stress disorder (Kimmer Deposition, p. 37, line 2 – p. 38, line 10) (R. p. 191, line 2 – p. 192, line 10) In addition, during 1999 Dr. Peter J. Kinalan told the plaintiff that he could not work in his condition as a result of the accident. (Kimmer Deposition, pp. 32-35) (R. pp. 186-189) Kimmer had arthroscopic surgery during 1999 and was not any better for months after surgery. (Kimmer Deposition, pp. 62-63; Exhibit 15) (R. pp. 216-217; p. 490) These facts which would be offered to prove compensability and Kimmer's disability were known, as Kimmer testified, by February 2000. That being so, they could be relied upon by an expert in the malpractice action to form an opinion that "most probably" Kimmer's accident was compensable and that he sustained disability from the accident thereby allowing the plaintiff to avoid summary judgment as he suggests would have happened without a decision from the Workers' Compensation Commissioner.

Had suit been entered against Wright in February of 2000 the fact that the issue of compensability had not been litigated in the workers' compensation action would not have been a bar to a malpractice suit. As already demonstrated in Doe v. Howe, the client-plaintiff's malpractice claim can survive summary judgment through expert testimony that under the facts the claim was compensable for all the reasons known as of February 2000, the attorney had breached the minimum standard of care, and that the breach was a proximate cause of Plaintiff's loss of "a probability of success as a result of the attorney's negligence" (Id. at 446, 32). Respondent offers no reason why such an affidavit could not have been offered in this case during February 2000. (Deposition of

Richard Kimmer, March 30, 2000, p. 45-50)¹ (R. pp. 199-204) Such an affidavit would no doubt recite the facts justifying compensability of Kimmer's claim and the forty (40) years of South Carolina precedent holding that settlement of a third party action without notice to the employer constitutes a waiver of the workers' compensation benefits.

Respondent also asserts that had suit been entered during February 2000 or prior to July 31, 2003 Wright would have defended the suit on the grounds that Kimmer was not disabled and that §42-1-56 was not a barrier because the carrier was not prejudiced. Respondent is correct that if the defendant chose to do so the suit could have been defended on those grounds, but not because the workers' compensation claim remained outstanding. The reason these defenses were available to the defendant in the malpractice action, either before or after the workers' compensation claim is litigated, is because the attorney was not a party to the workers' compensation action, and, therefore, not bound by the results. Paradise Orchards General Partnership v. Fearing, 94 P.3d 372 (Wash.App. 2004). If he had chosen to do so Wright could have contested any of those issues in the malpractice case and the plaintiff would respond to defeat summary judgment, as pointed out in Doe v. Howe, through expert testimony.

Finally, Respondent argues that the statute could not have commenced to run until the workers' compensation commission ruled on July 31, 2003, because until that date it was impossible for the respondent to discover that he might have a claim because the claim had not been "determined" to be compensable until that date. As already pointed out, this finding was not binding upon Wright and therefore, had not been "determined"

¹ Kimmer was deposed in the workers' compensation claim on March 30, 2000, and testified at length regarding the details of his travel compensation from his employer. These facts were known by Kimmer in February 2000 and could have formed the basis of an expert's opinion that the plaintiff's claim was compensable.

as to the malpractice action against Wright. Moreover, this is the same argument asserted by the plaintiff in Mitchell v. Holler, 311 S.C. 406, 429 S.E.2d 793 (1993). Appellant cited and discussed Mitchell in his brief but Respondent failed to either cite or discuss it. Chief Justice Harwell writing for a unanimous court stated:

The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.

Mitchell argues that she did not discover Holler's alleged malpractice until we reversed her conviction based on ineffective assistance of counsel. However, the record establishes that Mitchell contacted two attorneys in March of 1983 complaining of Holler's conduct at trial ... We find that Mitchell knew or should have known that she might have a claim against Holler in March of 1983.

Id. at 409, 795.

Kimmer, like Mitchell, knew or should have known that he might have a claim against his former counsel well in advance of the judicial finding related to the underlying case or claim. In addition, both Kimmer and Mitchell had changed attorneys in the wake of discovering they may have a claim against former counsel.

It is curious that Respondent denies his ability to discover he might have a claim against Wright until 2003 when by February of 2000 he admits that Wright told him the reason he was not receiving his workers' compensation benefits was because Wright made a mistake. (Kimmer Deposition, p. 88) (R. p. 242) Further, the plaintiff directly alleges in the pleading that Wright was negligent in that he failed to give the employer notice prior to settling the third party action and as a direct result the plaintiff was

damaged entitling him to judgment against the defendant. (Second Amended Complaint, Paragraphs 27, 28) (R. p. 88)

ARGUMENT II

EQUITABLE TOLLING IS NOT APPLICABLE TO THE FACTS OF THIS CASE

Respondent argues that he is entitled to equitable tolling as an additional sustaining ground. Application of this doctrine to these facts is not justified.

Equitable tolling is "intended to prevent unfairness to a diligent plaintiff" American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009); Hooper v. Ebenezer Senior Services Rehabilitation Center, 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2009) (Cert. granted 2008). Equitable tolling is reserved for cases in: (a) extraordinary circumstances that prevent the plaintiff from filing despite his or her diligence; or when (b) the plaintiff filed a defective pleading during the statutory period, or was tricked by the defendant's misconduct into allowing the filing deadline to pass; or, (c) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim. Id.

Kimmer argues that: (A) He did not have facts sufficient to establish his cause of action until July 31, 2003; (B) Wright has not been surprised or prejudiced by any "late" filing; (C) Wright has taken different positions since the instant action was filed; (D) Wright and his attorney agreed to a tolling agreement dated October 30, 2003, over a year after the statute expired; (E) Wright either expected Kimmer to win his claim and not sue or lose and sue, and therefore Wright knew that a determination was needed from the Commission before Kimmer could sue him; (F) Wright would have been entirely free of the claim if Kimmer had prevailed before the Commission; and, (G) Equitable tolling

would provide relief for Kimmer's Estate. None of these considerations are grounds for the application of equitable tolling.

Respondent offers no testimony or affidavit from the plaintiff or any source to support its equitable tolling argument. All that is offered in support is argument of counsel which cannot provide an evidentiary foundation as a basis to invoke equitable tolling. There is absolutely no evidence in the record that the plaintiff relied on any action or representation of Mr. Wright in his decision to delay filing the suit after the statutory period had expired. Further, Respondent argued only equitable estoppel to the trial court which refused comment at all. Appellant will reply to arguments advanced in Respondent's brief where such a reply would be meaningful here. Appellant will set forth Respondent's arguments and will offer responses as to each.

A. Respondent argues he did not have facts sufficient to establish his cause of action until July 31, 2003. Kimmer claims he could not establish causation until after his appeal was finally determined.

Appellant's Response:

Kimmer had facts sufficient to establish his cause of action in 2000. A negligence cause of action requires only that the plaintiff assert a duty is owed to him by the defendant, the breach of that duty by the defendant, and some damages he suffered proximately caused by that breach. There is no doubt that Wright owed Kimmer a duty and that according to the plaintiff's testimony and the complaint he breached that duty when he settled Kimmer's third party claim without notice to the employer or his carrier. The case law on this issue has not changed since 1959. Kimmer sustained a loss of a valuable right and was aware of that loss during February 2000. He testified to those

damages in his deposition. (Kimmer Deposition, p. 48-51, 73, 74, 87, 88.) (R. pp. 202-205, 227, 228, 241, 242)

For reasons detailed by the trial court the evidence shows that the plaintiff was aware that he might have a claim long before the issuance of the Workers' Compensation Order on July 31, 2003. For additional reasons set forth in Argument I of this Reply Brief the plaintiff had a legal right to enter suit against the defendant during February, 2000.

If Kimmer believed he was disadvantaged because the workers' compensation case was not concluded when the statute ran, Kimmer could have sued Wright and moved the court for a stay. Edwards v. Suncom, 369 S.C. 91, 631 S.E.2d 529 (S.C. 2006)(stay granted defendant); Burgess v. Stern, 311 S.C. 326, 428 S.E.2d 880 (S.C. 1993)(stay granted defendant); Midlands Utility, Inc. v. SCDHEC, 287 S.C. 483, 339 S.E.2d 862 (S.C. 1986)(stay granted plaintiff; other stay denied plaintiff); Spartanburg v. Belk's Department Store of Clinton, 199 S.C. 458, 20 S.E.2d 157 (S.C. 1942)(stay granted defendant in judge's discretion); Brown v. Smith, 3 Rich.Eq. 465, 24 S.C.Eq. 465 (S.C.App.Eq. 1851)(stay addressed to sound discretion of trial court); what he could not do is ignore the statute and then claim equitable tolling.

B. Wright has not been surprised or prejudiced by any "late" filing.

Appellant's Response:

Equitable tolling does not turn on prejudice or surprise to the defendant. While California and Florida have adopted some form of balancing the defendant's prejudice, see Hooper at 222, 233, South Carolina has not. The surprise or prejudice to the

defendant is not one of the elements required for equitable tolling in South Carolina. See e.g. Hooper. This argument is not relevant to this doctrine.

C. Wright has taken different positions since the instant action was filed.

Appellant's Response:

Wright's opinions are not relevant to Kimmer's claim of equitable tolling. Within weeks after Wright was discharged the plaintiff had retained new counsel for all matters. It was therefore impossible for Wright's differing opinions to have influenced Kimmer in the timing of this suit.

D. Wright and his attorney agreed to a tolling agreement dated October 30, 2003, over a year after the statute expired, and entered mediation.

Appellant's Response:

Mediation is entered into for a number of reasons. Wright's conduct after the statute ran is irrelevant to equitable tolling, as it could have had no influence on the timing of Kimmer's suit against Wright. The tolling agreement did not waive any defenses existing on October 30, 2003.

E. Wright either expected Kimmer to win his claim and not sue or lose and sue, and therefore Wright knew that a determination was needed from the Commission before Kimmer could sue him

Appellant's Response:

Again, Wright's expectations, correct or incorrect, are not relevant to considerations of equitable tolling. What Wright knew or thought could have had no influence on when Kimmer sued him because Kimmer had separate counsel beginning in February, 2000.

F. Wright would have been entirely free of the claim if Kimmer had prevailed before the Commission.

Appellant's Response:

Respondent's argument is not only irrelevant to an equitable tolling theory, it is also incorrect. Respondent claimed he suffered additional injuries when he found out that Wright had settled the third party action without notice to the employer. Specifically, Kimmer claimed he suffered post-traumatic stress syndrome, as well as medical bills and lost wages. (Kimmer Deposition, pp. 48-51, 73, 74, 87, 88.) (R. pp. 202-205, 227, 228, 241, 242) Accordingly, Wright would not be free of Kimmer's claim even if Kimmer had received all he asked for from the Commission because post traumatic stress disorder damages would not be recoverable under the Act. Also, the failure to have his wages and medical bills paid timely by the workers' compensation carrier, according to Kimmer, was Wright's fault. This is also a damage that would not have been cured if Kimmer had prevailed in his compensation claim. The fact that Wright would still have been subject to suit by Kimmer even if Kimmer had prevailed in his claim shows that Kimmer could have sued Wright at any time after Wright told him of the election of remedies mistake. That fact alone is sufficient to show the entire additional sustaining ground is not sustaining at all.

G. Equitable tolling will provide relief to Kimmer's Estate.

Appellant's Response:

Respondent argues that failing to implement the doctrine of equitable tolling would bar Kimmer's estate from recovering his disability benefits. This is not relevant to the legal analysis. However, barring the estate from recovery was exactly the result in

Hooper. In Hooper, the court refused to apply equitable tolling, even though the decedent's estate was left without remedy for either the wrongful death or the survival actions when the decedent died from apparently negligent acts in the defendant's senior services home. In Hooper, the plaintiff failed to serve Ebenezer until the statute had run, and then served the summons and complaint 129 days after the papers were filed. Hooper tried to serve the suit on three separate occasions through the Sheriff, but finally hired a private detective, who served Ebenezer by serving its successor. The Hooper court held that "Hooper did not commence her action within the statute of limitations. . . We rule the doctrine of equitable tolling is inapposite because nothing prevented Hooper from timely filing her suit, and there are no extraordinary circumstances or encumbrances to hinder timely service by a diligent plaintiff." The same is true in this case.

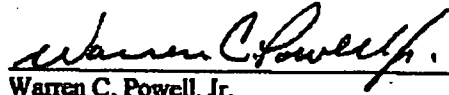
CONCLUSION

The statute of limitations commenced to run during February, 2000 because Respondent had abundant information that some right of his had been invaded and the Court of Appeals should so find in its reversal of the trial courts order of September 16, 2008.

Facts to support the doctrine of equitable tolling do not exist in this case. Appellant specifically told Respondent that he may have a claim against him and that he should find a new lawyer, all of this taking place by February, 2000. Finally, there is no evidence in the record that Kimmer relied upon any representation or conduct of Wright in the decision to delay filing the legal malpractice action until after the statutory period had expired.

Signature on Next Page

Respectfully Submitted,



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August 28, 2009

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Case No. 2004-CP-46-2659

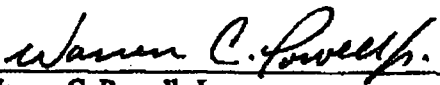
Carol M. Kimmer, Personal Representative of the Estate of Richard Kimmer,
deceased.....Respondent

v.

Philip E. Wright.....Appellant

CERTIFICATE OF COMPLIANCE

I, Warren C. Powell, Jr., Esquire do hereby certify that the Reply Brief of
Appellant Philip E. Wright complies with Supreme Court Order of August 13, 2007.


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APPEAL FROM YORK COUNTY
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The Honorable John C. Hayes, III, Circuit Court Judge

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deceased.....Respondent

v.

Philip E. Wright.....Appellant

CERTIFICATE OF COUNSEL

I, Warren C. Powell, Jr., Esquire do hereby certify that the Reply Brief of
Appellant Philip E. Wright complies with Rule 211(b).



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