

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

**AMENDED
RECORD ON APPEAL**

Volume I of III

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2004-CP-46-2659

Richard Kimmer

Phillip Wright

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

ORDER

Dated at YORK, South Carolina, this 20th day of JUNE, 2005.

S/ S. JACKSON KIMBALL
MASTER IN EQUITY

This judgment was entered on the 23RD day of JUNE, 2005, and a copy mailed first class this 23RD day of JUNE, 2005 to attorneys of record or to parties (when appearing pro se) as follows:

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Columbia, SC 29260-1110

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

DAVID HAMILTON
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Richard Kimmer,

Plaintiff,

vs.

Phillip Wright,

Defendants.

IN THE COURT OF COMMON PLEAS

ORDER

Case No. 2004CP46-2659

FILED-RECEIVED
2005 JUN 23 AM 10:35
DAVID HAMILTON
C.C.P. & C.S.
YORK COUNTY, SC

On June 9, 2005, this matter came before me for a hearing on Defendant's Motion for Summary Judgment and Plaintiff's Motion for Stay. Present at the hearing were Plaintiff's attorney, Thomas H. Pope, III, and Warren C. Powell, Jr., attorney for Defendant.

PROCEDURAL HISTORY

The history giving rise to this legal malpractice action is as follows. Plaintiff was injured in a vehicle collision, and engaged Defendant, an attorney, to represent him. At the time of the collision, Plaintiff was on his way to work. Defendant obtained a settlement of the personal injury action with the insurer of the adverse driver, and Plaintiff signed a release. Defendant then filed a worker's compensation claim, which was denied by the carrier. One basis for the denial was Plaintiff's settlement of the claim without the employer's (the carrier's) consent.

After this, Defendant advised Plaintiff that he may have erred in settling the personal injury claim without first obtaining approval from the employer. This concern was communicated more than once. Plaintiff ultimately signed a "Waiver Of Conflict" form concerning Defendant's continued representation of Plaintiff. In the document, he acknowledged that he "may have" a claim against Defendant due to the premature settlement.

The issue of the premature settlement, and other grounds for the denial of the claim, ultimately came before the Circuit Court on an appeal from the Commission. The Circuit Court ruled in favor of Plaintiff, finding that Plaintiff did have a viable worker's compensation claim, and finding that Plaintiff was entitled to benefits. The order of the Circuit Court confirming his intended ruling has not yet been signed and filed, and may yet be appealed.

—Defendant moves for summary judgment in this case claiming that Plaintiff is barred in his

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legal malpractice claim by the applicable statute of limitations. Plaintiff moves to stay this case until there is a final order of a court either granting, or refusing, Plaintiff's worker's compensation claim based on the premature settlement issue.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where it is clear that there are no genuine issues of material fact and that the moving parties are entitled to judgment as a matter of law. *Hunter v Nationwide Mutual Insurance Company*, 317 S.C. 402, 453 S.E.2d 900 (Ct.App.1994). In determining whether to grant summary judgment, the Court is required to view the evidence and all inferences therefrom in the light most favorable to the nonmoving party. *Strickland v Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct.App.1994). The purpose of summary judgment is to obviate delay when there is no material issue of material fact involved. *Manly v Manly*, 291 S.C. 325, 353 S.E.2d 312 (Ct.App.1987). Summary judgment is not appropriate when facts exist on which reasonable minds can differ, and it is not appropriate where further inquiry into the facts is desirable to clarify the application of law. *Rothrock v Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991).

STANDARD FOR GRANTING STAY OF ACTION

"The granting of a motion for a stay of proceedings rests entirely within the discretion of the trial Judge." *City of Spartanburg v. Belk's Dept. Store of Clinton*, 199 S.C. 458, 20 S.E.2d 157, 167 (1942). See, also, *Midlands Utility, Inc. v. South Carolina Dept. of Health and Environmental Control*, 287 S.C. 483, 339 S.E.2d 862 (1986). The ruling of the trial will not be disturbed absent an abuse of discretion. *Midlands Utility, Inc., supra*, 287 S.C. at 487.

An equitable stay may be invoked if justified by circumstances which outweigh any potential harm to the party against whom it is operative. In making this determination, the court must weigh competing interests and maintain an even balance. *Merritt Bros., Inc. v. Marine Midland Realty Credit Corp.*, 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary Judgment.

In the present action, while Defendant expressed his concern that he may have erred in settling the personal injury claim without first securing the permission of the worker's compensation insurer, he did not render a legal opinion in that regard. Although Plaintiff acknowledged the possibility of error on Defendant's part in a "Waiver of Conflict" dated February 1, 2000, there was not a finding that Plaintiff's claim was precluded by the settlement with the adverse driver until July

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31, 2003. Until that time, the worker's compensation insurer also maintained that the accident and injuries were not covered at all because they occurred outside the scope of Plaintiff's employment.

As already recited, the circuit judge overruled the decision of the Commission, finding that Plaintiff did have a right to make a claim, that he was disabled due to the accident, and that he was not precluded from receiving benefits due to the settlement. The disposition of the worker's compensation claim will not be known finally until there is a final order deciding the issue.

The statute of limitations begins to run on a cause of action from the date a party claiming injury or damage "... either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816, 818 (2005). See, also, *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996). Reasonable diligence requires action "... with some promptness where the facts and circumstances ... put a person of common knowledge and experience on notice ..." that he might have a claim against another party. *Id.* Under S.C. Code Ann. § 15-3-535, mere knowledge of an injury does not trigger the statute. Rather, the statute is triggered "... by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another." *Id.*, quoting *True v. Monteith*, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997).

In *Epstein, supra*, which involved a legal malpractice claim, a three judge majority of the Court found that the statute of limitations began to run when an adverse jury verdict was rendered. In the present case, the similar "trigger" event would be the adverse ruling of the Industrial Commission. This Court believes that there is at least an issue of fact in the present case as to when Plaintiff's awareness of the possibility of an error by Defendant became sufficient to put him on notice that he actually had an existing legal malpractice claim against Defendant, 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.

Based on this discussion, Defendant's Motion for Summary Judgment must be denied.

B. Stay of action.

The ultimate outcome of the worker's compensation action is, as it now stands, uncertain. The final result of that action will be dispositive of this action. Plaintiff's counsel has represented that Plaintiff claims, and will claim, no damage in this action except those which may flow directly from the worker's compensation claim.

It is apparent that the continuation of the prosecution of this action will entail considerable

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time and expense on both sides. That effort will be wasted if Plaintiff is successful in the worker's compensation case. Further, in the Court's opinion, Defendant will not be unduly prejudiced by holding this action in abeyance until the other action is finally resolved. He will incur no additional substantial expense, and his legal defenses are entirely preserved. On the other hand, Plaintiff will expend considerable time, effort and money, which may well be for naught.

Thus, in balancing the competing interests involved (*See Merritt Bros., Inc., supra.*), the Court finds that a stay of the present action is the proper course of action. There will be substantial judicial economy in allowing completion of the worker's compensation case, because it will be determinative of this case.

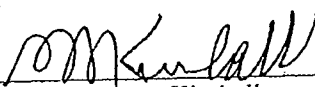
ORDER

Based on the findings and conclusions herein, the arguments presented, the exhibits submitted for the Court's consideration, and the applicable law, it is ordered that Defendant's Motion for Summary Judgment be denied, and that Plaintiff's Motion for Stay be granted.

AND IT IS SO ORDERED.

York, S.C.

June 20, 2005



S. Jackson Kimball
Special Circuit Judge

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

FILED-RECEIVED

CASE NO. 2004CP46-2659

2005 AUG -5 AM 10:44

JUDGMENT IN A CIVIL SUIT

RICHARD KIMMER

PLAINTIFF

DAVID HAMILTON vs PHILLIP WRIGHT

CLERK, vs
YORK COUNTY, SC

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit; Rule 43(k), SCRPC (Settled); ☐ Other.
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other.

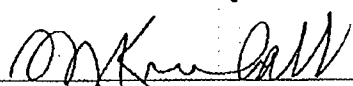
IT IS ORDERED AND ADJUDGED: ☐ See attached Order. ☒ Statement of Judgment by Court.

Having considered the record in regard to Defendant's motion pursuant to Rule 59, SCRPC, I find that all issues raised were considered and ruled on by the court, either expressly or impliedly. Further, I decline to reconsider the ruling made.

Therefore, Defendant's Rule 59(e) motion is denied.

AND IT IS SO ORDERED.

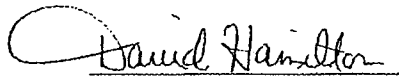
August 1, 2005.


S. Jackson Kimball
Special Circuit Judge, York County

This judgment was entered on the 5th day of August, 2005, and a copy mailed first class this 5th day of August, 2005, to attorneys of record or to parties (when appearing pro se) as follows:

Thomas H. Pope, III
P.O. Box 190 Newberry SC 29108
ATTORNEY(S) FOR PLAINTIFF(S)

Warren C. Powell, Jr.
P.O. Box 61110 Columbia SC 29260-1110
ATTORNEY(S) FOR DEFENDANT(S)


CLERK OF COURT

SCRPC APP-24

SCRPC FORM 4 (REVISED 5/00)

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2004CP4602659

Richard Kimmer vs. Phillip E Wright

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCp; ☐ Rule 41(a), SCRCp (Vol. Nonsuit); ☐ Rule 43(k), SCRCp (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCp; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

Order

Dated at York, South Carolina, this 16th day of September, 2008.

Court Reporter:

s/ John C. Hayes, III

PRESIDING JUDGE - JOHN C. HAYES, III

This judgment was entered on the 26th day of September, 2008, and a copy mailed first class this 26th day of September, 2008, to attorneys of record or to parties (when appearing pro se) as follows:

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291080000

ATTORNEY(S) FOR THE PLAINTIFF(S) .

Warren C Powell Jr P O Box 61110 Columbia,
SC 292600000

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

CP-APP-24/FORM 4

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
Richard Kimmer,)
)
Plaintiff,)
)
v.)
)
Phillip Wright,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE 16th JUDICIAL CIRCUIT
Case No.: 04-CP-46-2659

ORDER

FILED-RECEIVED
2008 SEP 26 PM 2:06
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

This matter comes before the court on Plaintiff and Defendant's separate Motions for Summary Judgment in a legal malpractice case.

Posture

Defendant Phillip Wright ("Wright") represented Plaintiff Richard Kimmer ("Kimmer") in a third-party settlement of claims for personal injury sustained by Kimmer in an automobile accident he was involved in while travelling to work. Wright settled the personal injury claim with the insurance carrier of the at-fault driver and then filed a claim with the South Carolina Workers' Compensation Commission (the "Commission") on behalf of Kimmer. On July 31, 2003, the Commission ruled that Kimmer had a compensable claim but that he was barred from compensation because the third-party settlement was without notice to Kimmer's employer or its workers' compensation insurance carrier, a violation of S.C. Code Ann. § 42-1-560, 1976, as amended. On appeal, the Circuit Court held that there was no bar to workers' compensation benefits. However, the Court of Appeals reversed and issued an opinion agreeing with the Commission that Kimmer was barred from claiming workers' compensation benefits. Kimmer v. Murata of America, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006) (*cert denied* Oct. 18, 2007).

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Kimmer brought this legal malpractice action on October 14, 2004, and Wright moved for summary judgment on the grounds that the applicable three-year statute of limitations barred the claim.¹ Wright argued that February 24, 2000, was the latest date the statute of limitations began to run, the date Kimmer terminated Wright's representation. Kimmer argued that the statute of limitations did not begin to run until July 31, 2003, when the Workers' Compensation Commissioner issued its Decision and Order finding Kimmer had a compensable claim but that he was barred from compensation because of his attorney's third-party settlement without proper notice. Judge S. Jackson Kimball, sitting as a Special Circuit Judge, denied Wright's motion. Judge Kimball based his ruling on Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005), and held that the "'trigger' event would be the adverse ruling of the [Workers' Compensation Commission]" and "that there is at least an issue of fact in the present case as to when Plaintiff's awareness of the possibility of an error by Defendant became sufficient to put him on notice that he actually had an existing legal malpractice claim against Defendant [. . .]." Order, June 20, 2005 ("Kimball Order").²

Summary Judgment Standard of Review

Under Rule 56, South Carolina Rules of Civil Procedure, summary judgment is appropriate when it is clear from the record that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. McClanahan v. Richland County Council, 350 S.C. 433, 437, 567 S.E.2d 240, 242 (2002); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001). In determining whether any genuine issues of material fact exist to preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most

¹ South Carolina Code Ann. § 15-3-530, 1976, as amended, provides a three-year statute of limitations for legal malpractice lawsuits.

² All documents referenced herein are of record through memoranda filings.

favorable to the non-moving party. Moseley v. Oswald, 376 S.C. 251, 254, 656 S.E.2d 380, 381 (2008). Where the moving party established its burden of showing an absence of evidentiary support for the opponent's case as set forth above, the burden then shifts to the opponent to present specific facts to the Court which demonstrates that there is a genuine issue for trial. Rule 56(c), South Carolina Rules of Civil Procedure; SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990); Peterson v. West American Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999).

As to Defendant Phillip Wright

In the present matter, Wright has filed a second Motion for Summary Judgment based on the same grounds as his first, i.e. the statute of limitations bars Kimmer's legal malpractice claim. The motion was heard before the undersigned in open court on September 5, 2008. Appearances are of record.

A threshold issue this court must decide is whether it can rule differently on a motion for summary judgment that is similar, if not exactly the same, as a motion ruled on earlier by a different circuit court judge in the same case. Judge Kimball's June 2005 Order denied Wright's first Motion for Summary Judgment. Essentially, in the present case, Wright is asking this court to overrule Judge Kimball's Order.

It appears to be well settled law in South Carolina that "[o]ne circuit court judge cannot set aside an order of another circuit judge; the remedy is by appeal." Lipman v. Perry, 129 S.C. 83, 123 S.E.772 (1924). See also, Nixon Grocery Co. v. Spann, 108 S.C. 329, 94 S.E. 531, 534 (1917) ("It is well settled that one circuit judge cannot set aside or modify the orders of another, except in cases where the right to do so has been reserved to the succeeding judge, or when it is allowed by rule of court or statute"). The proper avenue for a party aggrieved by a judge's order

on a motion for summary judgment is to file a motion pursuant to Rule 60,³ move for a directed verdict at the appropriate stage, file the appropriate post-trial motions, or file an appeal after there has been a final adjudication.

The reasons behind not allowing one circuit court judge to set aside or modify another circuit court judge's order are the desire to maintain uniformity and harmony in the judicial process. In Crawell v. Littlefield, 2 Rich. 17, 31 S.C.L. 17 (1845), the court held that

[u]niformity and harmony are essential ingredients in the satisfactory administration of justice. Uniformity is preserved by a direct appeal to all the judges--whilst an appeal from one [circuit] judge to another would produce collusion and confusion. It is proper, therefore, that when one judge has made or refused an order, the same should not be reversed or granted by another judge, without a change of circumstances, or a new exhibition of facts.

In Steele v. Charlotte, C. & A. Railroad Co., 14 S.C. 324, 329 (1880), the court best articulated the "authority granted a circuit judge over the acts of a colleague":

The Court of Common Pleas is a unity, although its jurisdiction is administered by a number of judges who are, in some sense, the exponents of the court. When one of these judges makes a decision upon the merits of a matter within his jurisdiction, that is not merely the personal opinion of the judge, but a judgment of the Court of Common Pleas, which exhausts the power of the court upon that subject and must stand until reversed or set aside in the manner prescribed by law. There is no appeal from one Circuit Judge to another. All are of equal dignity and have the same right to pronounce the judgments of the court. One Circuit Judge Upon the same state of facts, has no power to change, alter or reverse a decision of a brother judge of the same Circuit.

Considerations of comity and courtesy also preclude one circuit court judge from setting aside or modifying another judge's order absent a clerical mistake or new facts or circumstances.⁴

³ All references to rules are to the South Carolina Rules of Civil Procedure.

⁴ See also, W. W. Allen, *Interlocutory Ruling or Order of One Judge as Binding on Another in the Same Case*, 132 A.L.R. 14 (1941) ("[...] where one judge presides today and another tomorrow, a special problem is presented. In such circumstances emphasis is naturally given to the impropriety of applying to one judge for relief which another has denied, particularly where the two applications are made at the same stage of the case").

Rule 60, SCRCP, does allow this court to provide relief from an order denying summary judgment but only if there is a clerical mistake or, upon a motion from one of the parties, a showing of

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. Rule 60(b), SCRCP.

Wright does not allege any clerical mistake or any reason under Rule 60(b) for this court to set aside or modify Judge Kimball's Order. The only newly discovered evidence in Wright's second Motion for Summary Judgment is that after Judge Kimball issued his Order, the Court of Appeals issued an opinion affirming the denial of worker's compensation benefits. However, that opinion does not affect Judge Kimball's determination that the triggering event for the statute of limitations was the Commission's Decision and Order denying benefits.

Judge Kimball's Order has dealt with and disposed of the issue of when the statute of limitations began to run. Absent a reason under Rule 60, this Court is bound to accept Judge Kimball's Order as the law of the case. Therefore, Defendant's Motion for Summary Judgment is denied.

As to Plaintiff Richard Kimmer

The motion was heard by the undersigned in open court on September 5, 2008. Appearances are of record.

Unlike Wright, Kimmer has only filed one Motion for Summary Judgment in this case. However, like the disposition of Wright's second motion, Kimmer's motion's is affected by Judge Kimball's Order as well. Applying Epstein, Judge Kimball held that the trigger event for statute

of limitations purposes was the adverse ruling of the Workers' Compensation Commission on July 31, 2003.⁵

In Epstein, the Supreme Court found that the statute of limitations began to run in a legal malpractice action when an adverse jury verdict was rendered. Applying the three-year statute of limitations and the discovery rule, the court ruled that the Plaintiff "Dr. Epstein clearly knew, or should have known he might have had some claim against Brown [Epstein's attorney] at the conclusion of his trial." 363 S.C. at 382, 610 S.E.2d at 821. Similarly, in the present case, Judge Kimball found that the trigger event for when Kimmer knew or should have known he may have a claim against Wright was when the Commission issued its adverse ruling on July 31, 2003.

However, it is important to note the Epstein Court did hold in a footnote that

[w]e 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. The facts in 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

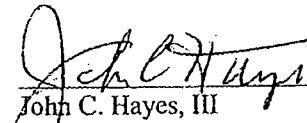
⁵ In his Order, after finding the July 31, 2003 date to be the trigger event, there is some language about an issue of fact not yet resolved at that time. The Court is not clear on what Judge Kimball meant other than that he cites a difference of opinion by the Workers' Compensation Commission and the circuit court. The Court believes this issue now having been resolved in favor of the Workers' Compensation Commission is in support of Judge Kimball's ruling.

because of Wright's improper handling of the 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 a legal malpractice action begins to run.

Nevertheless, Judge Kimball's Order sets the adverse workers' compensation Decision as the triggering event for statute of limitations purposes, and this court, absent a motion under Rule 60, is bound to accept Judge Kimball's Order. Therefore, Kimmer's legal malpractice action was timely filed. The time at which the statute of limitations began to run was July 31, 2003. As a result, Kimmer is entitled to judgment as a matter of law.

Wherefore, Defendant Phillip 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.⁶

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge

September 16th, 2008
York, South Carolina

⁶ In his brief Plaintiff asks for summary judgment as to Defendant's liability and damages. The Court cannot consider either of these issues as the record establishes factual issues as to both at this point. There are no affidavits or deposition testimony establishing liability or the amount of any resultant damages. Therefore, genuine issues of material fact exist as to liability and damages.

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C. FILE NO. 9908422

Richard Kimmer,

Claimant,

vs.

Murata of America, Employer, and
Liberty Mutual Insurance Company,
Carrier,

Defendants

HEARING:

Held on December 10, 2002 in Greenwood, SC

APPEARANCES:

Claimant was represented by the Firm of Pope & Hedges, P.A. of Newberry, South Carolina, with Thomas H. Pope, III appearing.

Defendants were represented by the Firm of McCutchen Blanton Johnson & Barnette, LLP of Columbia, South Carolina, with Pope D. Johnson, III appearing.

PURPOSE OF HEARING:

To determine the issues set forth in the Form 50 and Form 51.

OPINION AND AWARD:

J. Michelle Childs, Commissioner

FILED:

July 31, 2003

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STATEMENT OF THE CASE

This matter came before the undersigned Commissioner for a hearing on December 10, 2002, pursuant to notices timely served, at which time the parties and/or their representatives appeared.

This is a denied case arising out of an accident that occurred on January 29, 1999 when the Claimant was involved in an on-the-job motor vehicle accident and sustained injuries to his knees, neck and back.

The purpose of the hearing was to determine the issues set forth in the Form 50 and Form 51. The issues to be determined include whether the Claimant's claim is compensable, whether his claim is barred by settlement of a third party action, whether the Claimant should be limited to the scheduled members for his disability rating, whether the Claimant is totally and permanently disabled, and the applicable average weekly wage and compensation rate. The defendants asserted that if the claim was compensable and not otherwise barred, then the Claimant was entitled to the maximum compensation rate at the time of his injury, which was \$483.47. The Claimant asserted that he was entitled to the maximum compensation rate in 1999 and the maximum rate for each successive year.

MEDICAL EVIDENCE/RATINGS - APA SUBMISSIONS

Under the Administrative Procedures Act, the following records were submitted into evidence:

SUBMISSIONS BY CLAIMANT:

<u>PHYSICIAN</u>	<u>MEDICAL FACILITY</u>	<u>DATE OF REPORT</u>	<u>PAGES</u>
Dr. William Stewart	USC School of Medicine - University Speciality Clinics	4/29/02	1-7
	Social Security Disability Determination	5/1/01 & 4/13/01	8-10
Dr. Howard Mandell	Metrolina Neurological Associates, PA	2/1/02 - 2/16/01	11-19
Dr. Scott James and Dr. David Mitchell	Carolina Orthopaedic Surgery Associates	1/18/00 - 7/30/99	20-37
	BLANK PAGE		38
Dr. Stephen M. Kana	Orthopaedic Surgery & Sports Medicine	8/3/00 & 8/17/00	39-42
	Wallace Thompson Hospital	8/30/99; 4/15/99 & 4/5/99	43-45
	Wallace Thompson Hospital - Radiology Department	2/18/00 - 3/10/99	46-57
Dr. Peter J. Kinahan	Advanced Orthopaedics & Medical Assoc.	11/15/99 - 2/2/99	58-158
Dr. Carol S. Nichols	Carolina Neurology	10/17/00 & 11/22/00	159-162
Dr Donald R Johnson	Carolina Spine Institute	5/17/00	163
	Deposition of David Stalvey		164-169
	Murata of America, Inc. Employee Manual		170-198
	Documents Relative to Third Party Claim		199-218
	Documents from Attorney Phillip Wright	6/18/99 - 2/1/00	219-233

SUBMISSIONS BY DEFENDANTS:

<u>PHYSICIAN</u>	<u>MEDICAL FACILITY</u>	<u>DATE OF REPORT</u>	<u>PAGES</u>
Dr. Consuelo Kinah	Advanced Orthopaedic & Medical Assoc.	08/24/98 - 07/13/00	234-257
	Wallace Thompson Hospital	03/10/99 - 10/16/00	258-274
	Springs Memorial Hospital	02/02/93 - 11/29/00	275-343
	Chester County Hospital & Nursing Center	10/08/97 - 01/29/99	344-377
	Carolina Orthopedic Surgery Center	06/21/88 - 02/15/01	378-408
	Carolina Spine Institute	5/17/00	409-417
	Carolina Center for Advanced Pain Management	07/12/00 - 09/26/00	418-426

Orthopedic Surgery & Sports Medicine	08/03/00 - 8/17/00	427-431
Orthopaedic Associates	04/21/00 - 5/12/00	432-437

EVIDENCE IN THE CASE

1. Claimant Richard Kimmer. The Claimant testified on his own behalf. He was born on October 11, 1946, is married, and has five children. He completed the sixth grade in school. His work history included work as a carpenter for over 30 years and then work as a technician installing and servicing textile machinery.

The Claimant was hired by Murata of America in December, 1995 as a technician installing and servicing machinery. The Claimant testified that he received a salary based upon a per hour rate and \$300.00+ dollars every other week for car allowance plus \$.06 per mile for each mile he drove to and from work. The Claimant worked out of his home. If he had to drive more than an hour to a particular plant, he was paid for the travel time in excess of an hour.

The Claimant's work as a service technician involved heavy, physically demanding activity. His work involved bending, stooping, climbing, pushing, lifting, and reaching.

The Claimant testified that the accident occurred on January 29, 1999 when he was enroute from his home in Whitmire to work at the Springs Catherine Plant in Chester. He was involved in a head-on collision with another vehicle. Both cars were total losses. The Claimant testified that his head broke the windshield, he injured his neck and his back, and he injured his knees against the dashboard. Thereafter, the Claimant had three arthroscopic surgeries on his right knee and one arthroscopic surgery on his left knee. In

addition, he was treated for back problems and depression. The Claimant testified that he had not worked since the date of the accident and that he did not feel that there was any other job he could do. He testified that his right knee, lower back, neck and depression gave him the most problems. He testified that he was taking eleven (11) different kinds of medicines for his injuries and problems. Further, he testified that he was now unable to do things such as fish, bowl, or play golf, which he did before the accident.

The Claimant employed Attorney Phillip E. Wright to help him with his injury claims. He testified that a settlement was reached with the at-fault party for \$15,000.00 and he signed a release of all claims against the at-fault party on June 16, 1999, two days before his attorney filed a Form 50 with the South Carolina Workers' Compensation Commission.

On cross-examination, the Claimant admitted that he was treated at the emergency room on the day of the accident and released. He admitted that his arthroscopic surgeries were outpatient type surgeries and that he had not had to have any surgical procedure for the problem related to his back. Further, he admitted that his medical bills were being paid by the group medical carrier and that he applied for and received short term disability benefits and then long term disability benefits. His long term disability benefits were \$1,700+ dollars per month, before taxes, which he acknowledged was about 70% of what he was getting by way of a salary. He drew short term disability benefits for 30 days and then long term disability benefits for eleven (11) months. He admitted that the long term disability benefits were cut off because the doctor released him to return to work and he failed to do so. The Claimant also admitted that he had not gone to vocational

rehabilitation, job service, or any other type service to try to get back into the work force. The Claimant also admitted that he had had problems with both knees and his back prior to the accident and that he had had an epidural injection for his back pain. He denied that he had knowledge of his problem with degenerative disc disease prior to the automobile accident. He also admitted that he had cut his grass and fished occasionally since the accident. He admitted that he planned to go back to work if he was able to do so.

2. Phillip E. Wright. Mr. Wright is a practicing attorney. He testified that he had represented the Claimant for several matters and that he was retained to represent him in connection with the automobile accident of January 29, 1999. He testified that he handled the Claimant's case for about a year and that he was familiar with the medical costs and treatment the Claimant had received and that his case involved a substantial claim.

Mr. Wright testified that Mr. Pendegrass was the at-fault party in the automobile accident. Mr. Pendegrass lived in Chester. He testified that he sent a private investigator over to find him and serve him because he had evaded law enforcement when law enforcement attempted to serve him. He testified that he personally looked at the records in the Chester County Courthouse to determine if Mr. Pendegrass had any assets and that he did not have any that he could find at the courthouse. He testified that he hired a private investigator to look for assets and the private investigator could not find any assets.

Mr. Pendegrass had automobile liability insurance minimal limits coverage. Mr. Wright talked with the adjuster and negotiated a settlement directly with the adjuster. No suit was ever filed. The minimum limits were tendered by the insurance company. Mr.

Wright testified that after he concluded the \$15,000.00 liability settlement, he conducted a further investigation and could find no assets. He testified that the \$15,000.00 settlement with the carrier for the at fault driver went to pay attorney's fees and medical expenses.

Mr. Wright testified that the release with the at-fault party was signed on June 16, 1999. Mr. Wright filed the Claimant's Form 50 by mail with the Workers' Compensation Commission on June 18, 1999. The Form 50 was received by the Commission on June 21, 1999. Mr. Wright testified that he had notified the Claimant, prior to settling the \$15,000.00 liability claim, that there might be a potential workers' compensation claim. This was discussed at the same time they signed the paperwork to settle the \$15,000.00 liability claim. Mr. Wright admitted that he was aware of a potential workers' compensation claim prior to settling the liability claim. He admitted that he settled the liability claim before he filed the Form 50 with the Commission and before he put the defendants on notice of the claim. He admitted that he had no recollection or documentation of talking to the workers' compensation carrier before he settled the third party liability claim.

On cross-examination, Mr. Wright admitted that the Claimant settled the third party liability claim before he gave notice to the carrier and the Commission of the workers' compensation claim. Mr. Wright admitted that he never spoke with the at-fault party himself. Mr. Wright admitted that checking records at the Chester County Courthouse would did not provide information about stocks, bonds, savings accounts or other such assets of the at fault driver and that checking at the courthouse in one county would not reflect what was owned in another county. He also acknowledged that speaking with the

carrier for the one policy on the vehicle did not reveal whether other insurance was available to the at-fault party. He admitted that there may have been other policies on other vehicles in the at-fault party's name or in the name of his other family members that might have provided coverage. He admitted that he never interviewed or deposed the at-fault party or any other party regarding the nature or extent of the at-fault party's assets or insurance coverage. He likewise admitted that the workers' compensation carrier had no opportunity to do so prior to the settlement of the claim against the at-fault party. He admitted that the workers' compensation carrier lost the opportunity to participate in or conduct its own investigation or to guide him or employ counsel to do the investigation prior to the third party case being settled.

3. William A. Manning, Jr. Mr. Manning testified he worked with Murata of America at the time the Claimant did. Initially, he had responsibility for all of the technical staff, including the Claimant. Thereafter, he worked in a trouble shooting slot and worked with the Claimant from time to time. He testified that the Claimant was one of the hardest workers he had ever worked with, on occasion working at 14 to 15 hour day. He testified that he knew the Claimant had a bad back but that it never slowed him up and he simply kept working. He testified that technicians such as the Claimant received an hourly pay rate plus a car allowance and mileage expense. He also testified that technicians, traveling, did not get paid for the first hour of travel but did get a mileage allowance for each mile driving. He also testified that he had spoken with the Claimant from time to time since the accident and that the Claimant seemed to be down in the dumps.

On cross-examination, Mr. Manning admitted that he had not worked with the Claimant on a day to day basis, that he was a friend of the Claimant, and that he came to testify on his behalf without being subpoenaed. He testified that the Claimant had back problems. On re-cross examination, he testified that he knew the Claimant was out for a period of time in the first part of 1998 for back problems.

4. John Pate. The Claimant's attorney called John Pate, a Liberty Mutual Senior Field Investigator, as a witness. Mr. Pate testified that he had not been involved in the handling of the file and that he had no knowledge of what was done or not done by Liberty Mutual regarding an investigation of a third party claim or the assets of the at-fault third party.

FINDINGS OF FACT

Based upon the stipulations of the parties, testimony and evidence received and produced at this hearing, as well as my personal observation of the witnesses, the undersigned Commissioner finds the following facts based on a preponderance of the evidence:

1. The parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. The applicable compensation rate is \$438.47, the maximum allowable rate at the time of the accident.
3. The Claimant had pre-existing conditions, including without limitation, osteoarthritis, bursitis, and degenerative arthritis, and multi-level cervical spondylosis with

degenerative disc disease of the cervical spine.

4. The Claimant sustained compensable injuries to his back, neck, both knees and depression as a result of an on-the-job motor vehicle accident. Claimant was paid mileage to and from his home to various plants, as well as a monthly car allowance and an hourly rate for travel time.

5. The Claimant timely notified the employer of his injuries.

6. As a result of the accident, the Claimant was diagnosed with several injuries, including, without limitation, right knee meniscal tear, left knee lateral meniscal tear, bulging discs, and post-traumatic stress syndrome. As a result of these injuries, the Claimant had three surgeries on his right knee and one surgery on his left knee, and chronic pain in all areas of his body related to his injuries.

7. The Claimant has reached maximum medical improvement.

8. The Claimant is permanently and totally disabled as a result of the combination of injuries to his back, neck, both knees and depression.

9. The Claimant settled his claim for \$15,000 (the policy limits) against the driver of the other vehicle without filing a lawsuit.

10. The Claimant executed a release of the at fault party on June 16, 1999.

11. The Claimant filed his Form 50 on June 18, 1999, which was received by the Commission on June 21, 1999.

10. In settling his claim, the Claimant proceeded solely against the third party tortfeasor. The Claimant did not provide notice to the carrier or the Commission before

settling his claim, and thus, provided the carrier no opportunity to protect its interest against the claim. Under the circumstances of this case, it would appear that there was no prejudice to the carrier since the claim was settled for the policy limits, since there seemed to be no other assets available to the Claimant from the third party, and since the carrier also has a right of subrogation or off-set against the proceeds of the settlement. However, the Claimant's settling of this claim was prejudicial to the carrier since it was not able to participate in the litigation or affect the full and final release executed by the Claimant. The carrier had no opportunity to investigate whether there was other assets or other coverage available to the Claimant from the third party. The Claimant, by settling the claim, made an election of his remedies to proceed against the third party.

RULINGS OF LAW

Accordingly, as provided by §42-17-40 of the 1976 South Carolina Code of Laws, as amended, it is the determination and finding of this Commissioner:

1. That at the time of the accident, the Claimant and the defendant/employer were covered parties under the provisions of the South Carolina Workers' Compensation Act pursuant to §42-1-130 and §42-1-140.

2. That the Claimant suffered a compensable injury by accident arising out of and in the course of his employment pursuant to §42-1-160.

3. Under the case law, a claimant has three remedies for job-related injuries, which are as follows:

(a) To proceed solely against the employer thereby allowing the employer-carrier the opportunity to pursue reimbursement against the third

party for its obligated payments.

(b) To proceed solely against the third party tortfeasor under §42-1-550 by instituting and prosecuting an action at law; and

(c) To proceed against both the employer-carrier and the third party tortfeasor by complying with §42-1-560. *Fisher v. SC Department of Mental Retardation*, 227 S.C. 573, 291 S.E.2d 200 (1982).

4. Section 42-1-560 sets forth the terms and conditions which must be met if the injured employee is to pursue both remedies simultaneously. It further provides for a carrier's lien on the proceeds of the third party recovery to the extent of the total amount of compensation including medical and other expenses paid or to be paid. Moreover, the carrier's lien cannot be reduced without its consent and no compromise settlement between the employee and third party can be made binding on the carrier without its consent or either approval of the commission. *Fisher v. SC Department of Mental Retardation*, 227 S.C. 573, 291 S.E.2d 200 (1982).

5. While Section 42-1-560 does not specifically state that settlement with a third party without the carrier's consent constitutes an election of remedies, it is clear from a reading of the statute that the legislature did not intend for a claimant to settle his third party case without regard to the employer's rights for subrogation under §42-1-550 and still maintain a workmen's compensation claim. *Fisher v. SC Department of Mental Retardation*, 227 S.C. 573, 291 S.E.2d 200 (1982).

6. The object of §42-1-560 is to effect an equitable adjustment of the rights of all parties. It would "defeat this objective to allow the employee to demand compensation from the employer after having destroyed the employer's normal right to obtain

reimbursement from the third party." *Stroy v. Millwood Drug Store, Inc.*, 235 S.C. 52 at 59, 109 S.E.2d 706 (1959). *Fisher v. SC Department of Mental Retardation*, 227 S.C. 573, 291 S.E.2d 200 (1982).

7. The Claimant's noncompliance with the statutory procedure and disregard for the rights and remedies of the workers' compensation carrier violates the spirit of the Act. This settlement with the at-fault party was consummated by the Claimant before the workers' compensation carrier had notice of the claim and any opportunity to conduct its own investigation into the insurance coverage and assets of the at fault party. The Claimant made an election and has waived any rights he may have had under the S.C. Workers' Compensation Law. As a result thereof, his claim for workers' compensation benefits is barred.

ORDER

IT IS ORDERED that the claim of Richard Kimmer against Murata of America and Liberty Mutual Insurance Company for benefits under the S.C. Workers' Compensation Law for an accident of January 29, 1999 be and it hereby is denied, for the reasons set forth above.

No hearing costs are assessed in this instance.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 31 day of July, 2003.

By Elaine M. Boyd

Administrative Assistant to the Commissioner

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

By:

J. Michelle Childs
Commissioner

STATE OF SOUTH CAROLINA)
COUNTY OF CHESTER)

IN THE COURT OF COMMON PLEAS
Civil Action No. 2004-CP-12-0251

Richard Kimmer,)
Plaintiff,)

v.)

Murata of America, Inc. and Liberty)
Mutual Insurance Company,)
Respondents.)

**AMENDED ORDER REVERSING
WORKERS' COMPENSATION DECISION**

CLERK OF COURT
JUL 19 2005
7:19 PM

Upon receipt of this Court's original Order Reversing Workers' Compensation Decision, Respondents timely filed a Motion for Reconsideration. Respondents' Motion for Reconsideration is hereby Denied. However, the Respondents' Motion for Reconsideration raised several technical issues which require this Amended Order to be filed. This Amended Order shall replace the original Order dated June 20, 2005.

BACKGROUND

This matter came before this Court for a hearing on May 18, 2005. This hearing involved a Petition for Judicial Review challenging the decision of the Workers' Compensation Commission affirming the Decision and Order of Commissioner Michelle Childs. Present at the hearing were petitioner and his attorney, W. Chad Jenkins, Esquire of Pope and Hudgens and Pope D. Johnson III, Esquire of McCutchen, Blanton, Johnson and Barnett for the respondents. For the reasons set forth herein, the Order of the Workers' Compensation Commission denying benefits is reversed.

In the Decision and Order of July 31, 2003, Commissioner Childs made rulings on three contested issues:

- 1) that the claim was a compensable, on the job injury;
- 2) that the petitioner sustained total disability from the compensable accident; and,

- 3) that the petitioner was barred from recovery because he settled the third party claim without notice to the employer/carrier.

The Workers' Compensation Appeal Panel issued its Order dated 5/27/2004 sustaining the single commissioner's Order in its entirety. Petitioner appeals the last ruling. The compensability and total disability rulings, which were contested at the hearing, were not appealed and are the law of the case.

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The record in this matter consists of the following: the Form 50 and Amended Form 50 of petitioner; the Form 51 of employer; the transcript of the hearing before Commissioner Michelle Childs held on December 10, 2002, including the APA submissions and exhibits submitted by all parties; the Decision and Order of Commissioner Childs dated July 31, 2003; the Petition for Review (Form 30) of Petitioner dated October 2, 2003; the Decision of the Review Panel dated May 27, 2004; and the Petition for Administrative Review of Petitioner dated June 15, 2004 in the instant case. The Court has carefully considered these materials in reviewing this matter, as well as the arguments and briefs of both counsels. For the reasons set forth herein, the decision of the Workers' Compensation Commission holding that petitioner is barred from recovery by §42-1-560 is reversed.

FACTS

On January 29, 1999, the petitioner was injured in a head-on collision on Highway 9 near Chester, South Carolina, when he was operating his personal vehicle on the way to the Katherine Plant of Springs Mills. At the time, the petitioner was going to his job as an installer of air jet looms for Murata¹. Even though the respondents contested that the accident occurred on the job and took

¹Kimmer had been working as an installer of looms for approximately 31 years; he was well-respected in the company and was described by his supervisor, Bill Manning, as one of the hardest working employees he had ever known, oftentimes working 14 and 15 hour days.

the position that it was not compensable, the Commissioner found that it was compensable based upon the fact that the claimant received a car allowance and mileage to work.

The petitioner sought the services of attorney Philip Wright in connection with his injuries in the accident. Attorney Wright did an investigation of the courthouse records to ascertain whether the negligent third party, Ronald Pendergrass, had any assets. Also, he hired a private investigator. Attorney Wright concluded that there were no assets other than the minimum limits coverage on the vehicle which was applicable to this matter. The investigation by Wright which included a review of courthouse records led Wright to conclude that Pendergrass owned nothing. This Court finds and concludes that this investigation was thorough and that the only insurance coverage or assets available to respond to any judgment against the third party were the liability limits of \$15,000 on the vehicle that Pendergrass was driving.

On June 16, 1999, the minimum limits of \$15,000 were tendered and were received by claimant and his attorney. On that same date, petitioner executed a covenant/release against Pendergrass' carrier. The \$15,000 was applied as follows: \$10,000 for medical providers and subrogation interests and \$5,000 to Mr. Wright for attorneys' fees. The petitioner received none of these proceeds. On June 18, 1999, Mr. Wright prepared a Form 50 to initiate the Workers' Compensation claim on behalf of Kimmer. This Form 50 was actually filed at the Workers' Compensation Commission on June 21, 1999. At some time in January or February 2000, the employer advised Mr. Wright that they were taking the position, in addition to their other defenses, that the claim was barred because the third party claim was settled without notice to the carrier or the employer.

The claim was pursued by counsel on behalf of petitioner, and a hearing was held before single commissioner, Michelle Childs, on December 10, 2002. Included in the APA submissions

for claimant were the deposition of supervisor David Stalvey, the Murata employee manual, and payroll records relating to the fact that petitioner received mileage to go to work, as well as a car allowance each month. Also introduced were numerous medical reports as to the extent of Kimmer's disability. At the hearing, evidence was introduced on the issue of petitioner's total disability, the compensability of petitioner's injury (due to the car allowance and mileage), and the circumstances under which the third party claim was settled. Petitioner acknowledged that the net proceeds of the settlement should and would be set off against any Workers' Compensation award. The employer produced no evidence that it or the carrier had been prejudiced because the third party settlement was settled without notice to them. This Court finds and concludes that, as set forth herein, there was no prejudice to the employer or to the carrier because of the fact that the claimant and his attorney settled the third party claim without providing them notice. It is clear that there was no prejudice because there were no assets to pay the third party judgment other than the liability insurance policy. The third party was judgment-proof, and there was no reasonable possibility or likelihood of any other insurance coverage or assets.

CONCLUSIONS OF LAW

In reviewing cases from the Workers' Compensation Commission, this Court sits in an appellate capacity and reviews the record for substantial errors of law or findings of fact that are clearly erroneous. Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005), S.C. Code Ann. §1-23-380 and S.C. Code §42-17-60. For the reasons set forth herein, this Court has determined that the decision of the Commission was based upon a substantial error of law and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The only reasonable inference from the evidence is that the employer was not prejudiced by the third party

settlement and that the petitioner did not elect his third party remedy to the exclusion of his substantial workers compensation claim.

The sole issue on appeal is whether, under the facts of this case, the petitioner is barred from receiving workers' compensation benefits because he settled a third party claim without notice or prejudice to the employer. It is a case of first impression involving the application of §42-1-560, which does not provide a penalty, nor does it specify a consequence, when a claimant settles a third party claim without notice or prejudice to the employer. This statute is, therefore, ambiguous. Our courts have always construed the workers' compensation laws liberally in favor of coverage. Peay v. U.S. Silica Co., 313 S.C. 91, 437 S.E.2d 64 (1993); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); Talley v. John-Mansville Sales Corp., 285 S.C. 117, 328 S.E.2d 621 (1985); Bailey v. Santee River Hardwood Co., 205 S.C. 433, 32 S.E.2d 365 (1944).

Because the statute is silent on this subject, the petitioner's non-compliance with the notice provision of the statute should not bar him from recovery unless there has been prejudice to the employer or carrier from this non-compliance.

Our statutory scheme contemplates that an injured employee may pursue three possible options with regard to injury claims:

- 1) he can pursue a claim solely against the employer under the workers' comp laws;
- 2) he can pursue a claim solely against the third party tortfeasor; or,
- 3) he can sue both the employer and the third party.

See S.C. Code §42-1-550, et seq. Under the third option, if the employee recovers from both the third party and the employer, he is not allowed to have a double recovery, as the benefits received from the third party are subject to a subrogation lien by the workers' comp carrier or the employer.

If an employee were allowed to keep third party benefits and pursue workers' comp remedies without any set off, that would result in prejudice to the employer. This Court finds and concludes in the instant case that the petitioner's pursuit of his workers' comp remedy should be allowed, subject only to a set off for the net proceeds of the third party benefits he has received.

There is no reported South Carolina case in which an employee has been barred from pursuing workers' compensation benefits when the employer's subrogation rights as to third party benefits were not impaired or prejudiced. There are three South Carolina cases which address S.C. Code §42-1-560, but all are factually distinguishable from the instant case. Nevertheless, this Court believes that these cases are consistent with the ruling of the undersigned in this case.

146 In the case of Hudson v. Townsend Saw Chain Co., 296 S.C. 17, 370 S.E.2d 104 (Ct. App. 1988), the employee was in a wreck on the job. He brought a third party action, did not give notice, and the jury verdict was for the third party defendant. Thereafter he filed a workers' compensation claim. The employer did not have an opportunity to participate in the third party trial and clearly suffered prejudice, as it was not able to assist in presenting the case, in offering evidence or in cross examining witnesses, all of which could have quite likely changed the verdict. Even though it was not an issue before the court in Hudson, that decision left open the question of how SC Code § 42-1-560 would be applied in a future case where there was no prejudice to an employer. See also Stroy v. Millwood Drug Store, Inc., 235 S.C. 52, 109 S.E. 2d 706 (1959) (employee's workers' comp claim, filed after the third party suit which resulted in a defense verdict, was barred where the prejudice to the employer was obvious, as employee had rejected a settlement offer before the verdict and had given no notice to employer).

In Fisher v. South Carolina Department of Retardation-Coastal Center, 277 S.C. 573, 291 S.E.2d 200 (1982), our Supreme Court was faced with an appeal by an employee who had reached

a compromise settlement with a third party without notifying the employer. The lower court granted summary judgment in favor of the employer because in that case the employee had settled with Sears, which was the negligent third party in her claim. In reaching the compromise with Sears, the employee prejudiced her employer because the settlement was reached by compromise. The employer's position was sustained by the Supreme Court for the obvious reason that the employer was not able to participate in settlement negotiations with the solvent corporate defendant (Sears). Had the employer been allowed to participate, it would have been able to get a better settlement against Sears. There was clear prejudice to the employer in Fisher.

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Gardner v. City of Columbia Police Dept., 216 S.C. 219, 575 S.E.2d 308 (1950) and Taylor v. Mt. Vernon-Woodberry Mills, Inc., 211 S.C. 414, 45 S.E.2d 809 (1947), were both decided under a previous version of the Workers' Compensation law. At the time these cases arose, the statute read that accepting a third party award or a workers' compensation award was "a bar to proceeding further with the alternate remedy." There is no such limitation today as our statute specifically provides for recovery from both a third-party and the employer. See S.C. Code §42-1-550, et seq. Furthermore, in both Gardner and Taylor, the employee reached a compromise settlement with the third-party, unlike the petitioner in this matter.

In the case at bar, the petitioner did not reach a compromise settlement but rather settled for the maximum amount of insurance coverage. Under S.C. Code §42-1-560, the employer has an absolute right to a set off of \$10,000 of that minimum limits third party recovery (the net amount after attorneys' fees). That set-off is specifically the protection the statute allows. To rule otherwise would put words into the statute that the legislature clearly did not intend.

S.C. Code §42-1-560 is ambiguous and should be construed liberally in favor of coverage. The cases of Fisher, 291 S.E.2d at 200, Stroy, 109 S.E.2d at 706, Hudson, 370 S.E.2d at 104,

Gardner, 57 S.E.2d at 308, and Taylor, 45 S.E.2d 809 relied upon by respondents, are all distinguishable from the present case. This is a case of first impression in the state. Counsel is aware of no reported case in South Carolina where a claimant's total disability claim has been barred when his then-attorney settled a minimum limits third party action against a judgment-proof defendant and the employer was not prejudiced. Since Murata suffered no prejudice from the settlement, it is only fair to allow Kimmer to recover fully for his injuries. The purpose and goal of South Carolina's third party statute will have been met: Kimmer will not receive a double recovery, and the employer's subrogation rights will be protected.

Other jurisdictions with statutes that are silent on the subject of the consequences of failure to give notice of a third party settlement have awarded workers' compensation benefits so long as the third party recovery did not prejudice the employer. In Darbonne v. M & M Right of Way Contractors, 693 So.2d 299 (La. App. 3rd Cir. 1997), the injured employee was in a car accident arising out of the course of employment. He settled with the third party before bringing his workers' compensation claim, not giving notice to his employer of the third party settlement. Like South Carolina, Louisiana's statute does not have penalties for noncompliance. In allowing the claimant's workers' compensation claim to proceed, the court acknowledged that the purpose behind the notice provision was to protect the employer's rights of intervention and reimbursement. However, the court reasoned that these interests could still be protected even if the employee continued his workers' compensation claim. Similarly, respondents' interest can still be protected if Kimmer is allowed to continue his workers' compensation claim by deducting up to \$10,000 of the third party settlement from his workers' compensation total disability award.

In holding that an employee's workers' compensation claim was not terminated by an unauthorized settlement of their third-party claim, the Montana Supreme Court emphasized that there

was no express statutory authority for the termination of the claim: "If the legislature wanted the insurer to exercise such control over the insured, they would have so stated." Wildin v. CNA Insur. Co., 846 P.2d 1022, 1024 (Mont. 1993). Similarly, the lack of any express statutory consequences for failing to provide notice of a third-party claim in South Carolina's Workers' Compensation statute illustrates that South Carolina's Legislature did not intend for an employee's claim to be barred for such failure under the unique facts of this case.

Maryland's statute is also silent as to the consequences of settling a third party claim without the consent or knowledge of the employer. In Ankney v. Franch, 652 A.2d 1138 (Ct. Sp. App. 1995), *reversed on other grounds*, 670 A.2d 951 (1996), the Maryland Court of Special Appeals decided that absent an express statutory intent clearly ending the claimant's rights under the workers' compensation statute, any unauthorized settlement will be handled as if it was authorized, with the employer retaining subrogation rights in the settlement proceeds. In finding that "it would be both unjust and unreasonable to allow the termination of an employee's claim without a showing that the employer suffered material prejudice," the Maryland Court noted that the law must be interpreted to effectuate its general purpose and that any ambiguities should be liberally construed in favor of the injured employees. Id. at 1150.

In discussing forfeiture of a workers' compensation claim, Larson's Workers' Compensation Law explains that, where a statute is silent as to the consequences of failing to give consent/notice,

the effect of the absence of consent generally turns on the question of whether the employee prejudiced the carrier by impairing its subrogation rights....[i]f the carrier retains its subrogation rights in these circumstances, it has been held that the employer is not prejudiced, and accordingly that the compensation claim is not affected by the settlement.

Id. at §116.07[7] (emphasis added). Some state statutes place an absolute bar on recovery for failing to notify the employer of the third party settlement, while others have no explicit consequences.

Larson's Workers' Compensation Law, §116.07[2]. Several states, including South Carolina, have notice provisions that do not spell out the penalties for failure to comply. Larson's discusses cases from these states which have allowed workers' compensation benefits so long as there is no double recovery to the employee or prejudice to the employer.²

According to Larson's, the central objective of a good subrogation statute is to provide a mechanism that will achieve three results:

- 1) the third-party should pay what it would normally pay if no compensation question were involved;
- 2) the employer and carrier should "come out even" by being reimbursed for their compensation expenditure, and
- 3) the employee should get any excess of the damage recovery over compensation.

Id. at §116.02. By allowing petitioner to receive his compensation benefits, all of these objectives would be achieved. Since the petitioner settled with the third party for his policy limits, and he had no other assets, the first objective has been met. The second objective is satisfied since the employer and his carrier have been allowed an offset for the third party recovery. The respondents' subrogation rights have been fully protected to the extent of the available third party coverage. §42-

²See Larson's Workers' Compensation Law, §116.07[7] and §116.07D[2]; See Millican v. Home Stores, 270 S.W.2d 372 (Tenn. 1954) (Even after employee settled without notifying employer, employer remained liable for compensation benefits subrogated against settlement amount.); White Electric Co. Inc. v. Bak, 467 S.E.2d 827 (Va. App. 1996) (Virginia Court of Appeals ruled that claimant's settlement with third party tortfeasor did not bar his workers' comp rights where employer was not prejudiced.); Hendrickson v. Industrial Commission of Arizona, 46 P.3d 1063 (Ariz. 2002) (Recovery of workers' comp benefits for employee was allowed if employee carried the burden of proof.); Cook v. A.H. Davis & Son, Inc., 567 A.2d 29 (Del. Super. Ct. Ct. 1989) (Claimant who settled third party claim can still pursue workers' comp benefits.); Overend v. Elan I Corp., 441 A.2d 311 (Me. 1982) (Legislature's silence means that the third party suit does not preclude plaintiff from recovering workers' compensation benefits.); Forest v. Safeway Stores, Inc., 830 P.2d 778 (Alaska 1992) (Claimant could pursue compensation claims after third party claim was dismissed to prevent a windfall to the employer.); Weiss v. Salvation Army, 556 P.2d 598 (Okla. 1976) (Employee could receive compensation because the employer was not prejudiced by the settlement.)

1-560 allows these objectives to be met as it does not prohibit continuation of the workers' compensation claim absent prejudice to the employer.

The South Carolina statute does not address which party has the burden of proving the presence or absence of prejudice to the employer from a third party settlement without notice. This Court finds and concludes that, because the issue of non-compliance with §42-1-560 is raised as a defense to this claim, the employer/carrier has the burden of proving that it was prejudiced. This Court also finds and concludes that the respondents have not sustained the burden of proving prejudice. At the hearing before the single commissioner, the employer took the position that the third party Pendergrass "may" have had some assets, such as cash or stocks which would not have been discoverable by the private investigator hired by the claimant's attorney who went through Pendergrass' neighborhood to ascertain that he was judgment-proof. The testimony was that Mr. Wright himself went to the courthouse, as well as hired a private investigator, and that he was convinced that Pendergrass had no assets nor any other insurance policies. At the hearing, the employer raised only a theoretical possibility of more assets. This Court finds and concludes that the employer did not sustain its burden of proving that there had been prejudice by Kimmer's settlement of the third party action for \$15,000.

In the alternative, even if the employee had the burden of proving that the employer was not prejudiced by settlement of the third party action without notice, the employee has met his burden of proof.³ Petitioner's attorney took the extra step of not only checking the courthouse records

³The petition for review seeks reversal of the Commission Order, or, in the alternative, a remand. A remand would allow the party with the burden of proof to depose the third party defendant Pendergrass (or pursue other discovery) as to assets, etc. This Court believes that the record is sufficiently complete to clearly demonstrate there are no other assets or insurance and, thus, no prejudice to the employer from the third party settlement. A remand is not necessary.

himself but hiring a private investigator. Also, petitioner's attorney was familiar with the neighborhood where the third party Pendergrass lived and knew that it was a low income neighborhood. In summary, the record in this case demonstrates that the employee established that there was no prejudice to the employer/carrier by his settlement of the third party claim for the available minimum limits coverage.

This Court finds and concludes that the finding of the Workers' Compensation Commission that there was prejudice to the employer⁴ was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

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The Order of the Commission also found that, by not giving notice of the third party claim, the employee had made an election of remedies. This Court finds and concludes that the employee Kimmer did not elect a third party remedy to the exclusion of his workers' comp claim, either explicitly or implicitly. At the time the settlement was reached for the minimum limits of \$15,000, the claimant's medical bills already exceeded \$20,000. It is both illogical and unfair to think that the petitioner intended to forego a serious workers' compensation claim for a minimum limits third party settlement. In fact, the attorney for Kimmer testified that the main reason he settled the third party claim was because there were mounting medical bills that needed payment so that plaintiff could continue getting treatment for his injuries. This Court finds and concludes that the petitioner did not make an election of remedies and that the findings and conclusions of the Commission to the

⁴The Order of the single commissioner is contradictory, as it refers to the fact that there appeared to be "no prejudice to the carrier" in one place (p. 11, lines 2 and 3) and that settling the claim "was prejudicial to the carrier" since it was not able to participate in the litigation in another place (p. 11, lines 6 and 7).

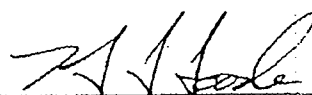
contrary were clearly erroneous, in view of the reliable, probative, and substantial evidence on the whole record.

It is undisputed that the applicable compensation rate for petitioner is \$438.47. Because he is permanently and totally disabled, he is entitled to 500 weeks at that compensation rate which computes to be \$219,235, plus respondents are obligated to pay all of claimant's medicals related to these injuries, plus lifetime medical benefits. The Respondent is entitled to an off-set for the third party settlement.

THEREFORE IT IS ORDERED that the decision of the Workers' Compensation Commission dated May 27, 2004 affirming the Decision and Order of the single commissioner filed on July 31, 2003 is hereby **REVERSED** and this matter is remanded to the Commission for an award consistent with this Order.

IT IS FURTHER ORDERED that this Amended Order modifies and replaces this Court's Order of June 20, 2005, and that the Respondents' Motion for Reconsideration is **DENIED**.

AND IT IS SO ORDERED.



Kenneth G. Goode
Presiding Judge, Sixth Judicial Circuit

Winnston, S.C.

August 1, 2005
Sp

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
Civil Action No. 2004 CP - 46 - 2659

Richard Kimmer)

Plaintiff,)

v.)

Philip E. Wright,)

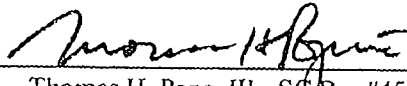
Defendant.)

SUMMONS
(Complaint Served)
Jury Trial Requested

TO DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the subscriber at Post Office Box 190, Newberry, South Carolina, within thirty (30) days from the service hereof, exclusive of the date of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

POPE AND HUDGENS, P.A.

By: 

Thomas H. Pope, III - SC Bar #4508
1508 College Street
Post Office Box 190
Newberry, South Carolina 29108
(803) 276-2532

Attorneys for Plaintiff

October 13, 2004

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) Civil Action No. 2004 CP - 46 - 2659

Richard Kimmer)
)
Plaintiff,)

v.)

COMPLAINT

Philip E. Wright,)
)
Defendant.)

Jury Trial Requested

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CLERK OF COURT
JAN 29 11 19AM '00

The plaintiff above named, complaining of the defendant, asserts as follows:

1. The plaintiff is a resident and citizen of Newberry County, State of South Carolina.
2. The defendant, upon information and belief, is a resident and citizen of York County, State of South Carolina, is an attorney licensed in South Carolina and is engaged in the practice of law in various counties of South Carolina, including York, Lancaster, and Chester.
3. The plaintiff was injured in a head-on collision on SC Highway 9 in Chester County, SC at approximately 7:00 AM on January 29, 1999 when the vehicle that he was driving to work was hit by a vehicle operated by Anthony Pendergrass. Both vehicles were totaled, and the third party driver, Pendergrass, at said time and place was negligent.
4. On said date, the plaintiff was employed by Murata of America ("Murata") as a service technician/installer whose job required him to work at various plants designated by Murata regarding the service and installation of complicated textile machinery. Murata's workers compensation carrier is Liberty Mutual Insurance Company ("Liberty Mutual").
5. On said date, the plaintiff was scheduled to work, and was on the way to work, for Murata at the Katherine plant of Springs Mills in Chester County, SC.

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6. The plaintiff received serious injuries from the accident of 1/29/99, including injuries to his knees, back and neck.

7. The plaintiff was represented by Defendant Philip E. Wright in connection with the recovery of damages/compensation for injuries that he received in that accident.

8. The plaintiff engaged defendant as his attorney in the matters referenced above in approximately February 1999. Defendant agreed to represent plaintiff on a one-third contingency fee basis - i.e., defendant would be paid one-third of all amounts that were recovered by him for plaintiff, whether by settlement or otherwise (plus reimbursement for costs advanced).

9. After undertaking to represent plaintiff, the defendant conducted a factual investigation of plaintiff's claims and, prior to June 10, 1999, determined that the liability carrier for the vehicle Pendergrass was operating was Auto Owners Insurance Company (Policy No. 971016) and that the liability policy limits on said policy were \$15,000, the minimum limits under South Carolina law.

10. In the first or second week of June 1999, the defendant, on behalf of the plaintiff, entered into a settlement agreement with Auto Owners Insurance Company for the payment of the \$15,000 policy limits.

11. On behalf of the plaintiff, the defendant consummated the settlement with Auto Owners for the policy limits of \$15,000 on June 16, 1999. Attached herewith and incorporated by reference as Exhibit A is the settlement statement prepared by plaintiff which was executed by defendant.

12. The defendant negotiated, settled and concluded the said third party claim with Auto Owners Insurance Company without conferring with, giving notice to, or obtaining the consent of, Murata or its carrier, Liberty Mutual.

13. Upon information and belief, it is believed that there was no prejudice or damage to Murata or Liberty Mutual by virtue of defendant's settlement of the third party claim for the minimum limits (see testimony of Defendant Philip Wright at the workers compensation hearing on December 10, 2002).

14. On June 18, 1999, the defendant prepared and submitted a Form 50 claim form to commence the workers comp claim on behalf of his client, the plaintiff. The Form 50 prepared by the defendant was filed with the Workers Compensation Commission on June 21, 1999, and a copy of same is attached herewith and incorporated herein by reference as Exhibit B.

15. The defendant was notified by the representative of Liberty Mutual at or after the filing of Murata's/Liberty Mutual's Form 51 that defendant's actions in settling the third party claim without notice to Liberty Mutual was allegedly violative of the SC Workers Compensation Law, including but not limited to SC Code §42-1-560.

16. On February 1, 2000, the defendant wrote plaintiff and explained the position of Murata/Liberty Mutual in the workers comp matter and the potential problem with his continued representation. A copy of that letter is attached herewith and incorporated by reference as Exhibit C. Thereafter, plaintiff obtained other counsel in connection with the workers compensation claim.

17. A hearing was conducted on plaintiff's claim on December 10, 2002 presided over by Commissioner Michelle Childs, at which time evidence was presented by plaintiff and by Murata/Liberty Mutual relating to the claim.

18. At said hearing, Murata/Liberty Mutual asserted the following positions:

- (a) the accident of 1/29/99 was not compensable (because it did not arise out of, nor was it within the scope of, plaintiff's employment) and should be denied;
- (b) the plaintiff/claimant was not seriously injured and, if the accident were compensable, he would not be entitled to total disability; and/or,
- (c) the plaintiff/claimant was barred from pursuing his workers comp remedy because the third party claim has been settled without notice to or with the consent of Murata/Liberty Mutual.

19. The Decision and Order of Commissioner Childs dated July 31, 2003 (WCC File No. 9908422) made the following rulings:

- (a) the plaintiff's accident of 1/29/99 was compensable;
- (b) the claimant was totally disabled due to this compensable accident; and,
- (c) however, the plaintiff's claim was barred pursuant to the Workers Compensation Law (SC Code §42-1-560) because his third party claim had been settled without notice to the employer or carrier and amounted to an election of remedies.

20. The Decision and Order of 7/31/03 was appealed to the Appellate Panel of the Workers Compensation Commission and the Panel issued its Order on May 27, 2004, affirming the Decision and Order of the single commissioner.

21. The plaintiff appealed the Order of the Appellate Panel to the Court of Common Pleas of Chester County by filing and serving his Petition for Judicial Review (Civil Action No. 2004 CP-12-251) and that appeal is presently still pending.

22. The plaintiff's workers compensation claim consists of the following elements: total disability; past medical bills; and lifetime medical treatment and benefits (per SC Code §42-15-60).

23. The value of the plaintiff's workers compensation claim, including all elements, exceeds \$1,000,000.

24. If the position of Murata/Liberty Mutual (as determined by the single commissioner in the Decision and Order of July 31, 2003) is correct, then defendant's actions have caused plaintiff to suffer damages and to lose his entitlement to disability benefits, as well as the payment of past medical bills and lifetime medical benefits (and plaintiff's mileage to and from medical providers).

FOR A FIRST CAUSE OF ACTION

25. The plaintiff repeats all of the foregoing allegations as if repeated fully and completely verbatim herein.

26. The defendant owed plaintiff a duty of care, skill and diligence in his handling of the legal representation of plaintiff in connection with his claims arising out of his injuries on January 29, 1999.

27. The defendant was negligent, breached his duty to plaintiff, and/or deviated from the standard of care for lawyers in one or more of the following particulars:

- (a) he failed to consult with, give notice to, or get the consent of Murata/Liberty Mutual before settling the third party action;
- (b) he failed to determine in a timely manner that plaintiff had a valid workers compensation claim that needed protecting before settling the third party claim for \$15,000;
- (c) he failed to follow the implicit requirements of SC Code §42-1-560 while pursuing both third party remedies and workers compensation remedy; and,
- (d) he failed to protect the plaintiff's workers compensation remedies which had a lifetime value in excess of \$1 million.

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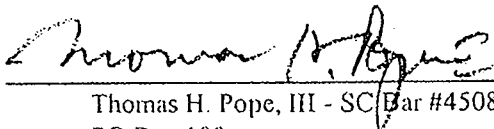
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28. As the direct and proximate result of said breaches of duty and negligence by defendant, the plaintiff has been damaged as set forth above and is entitled to judgment against the defendant for actual damages.

29. Because the appeal of the workers compensation case (2004 CP-12-251) is pending (and the action herein may not be ripe for adjudication), the plaintiff requests that this Court conduct a hearing to consider directing and ordering that the trial of this action be stayed pending the outcome of the appeal of the workers compensation decision.

WHEREFORE, plaintiff prays for judgment for actual damages against the defendant in an amount to be determined by the jury and for the costs of this action. **Plaintiff demands trial by jury.**

POPE AND HUDGENS, P.A.

By: 

Thomas H. Pope, III - SC Bar #4508
PO Box 190
1508 College Street
Newberry, SC 29108
Telephone: 803-276-2532

Attorneys for Plaintiff

October 13, 2004

SETTLEMENT STATEMENT

Richard Kimmer

Accident Date: January 29, 1999

Auto-Owners Insurance Company
(liability settlement proceeds)

\$ 15,000.00

DISBURSEMENTS:

Philip E. Wright - fee

\$ 5,000.00

Medical Costs - Held to negotiate
with medical creditors

\$ 10,000.00

Total Disbursements/Withholding:

\$ 15,000.00

I AGREE WITH THE ABOVE DISBURSEMENTS:

Richard Kimmer
Richard Kimmer

June 16, 1999

EXHIBIT A

48

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49

THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND ON WHITE PAPER		
Auto-Owners Insurance		
Life Home Car Business		
714 1/2 Rockwood Road Lansing, Michigan 48909		
RICHARD KIMMER & INDIVIDUALLY & AS HUSBAND & WIFE & THEIR ATTORNEY PHILLIP WRIGHT ADVANCED ORTHO & MEDICAL ASSOC & CIGNA HEALTHCARE		9-80 DRAFT NO. 720 DATE: 06/14/99
AT SIGHT PAY TO THE ORDER OF FIFTEEN THOUSAND AND 00/100 DOLLARS	VOID IF NOT CASHED WITHIN ONE YEAR	\$*****15,000.00
01/29/99 16768		AUTO OWNERS INS. CO.
MICHAEL J. KIMMER		<i>John P. Deen</i> AUTHORIZED SIGNATURE
POLICY LIMIT EXCHANGE FOR A SIGNED COVENANT NOT TO EXECUTE		

PHILIP E. WRIGHT, P.A.
ATTORNEY AT LAW

803-286-4343
REAL ESTATE: 803-286-4378
FAX NO. 803-286-9996

June 23, 1999

408 N. MAIN STREET
LANCASTER, S.C. 29720

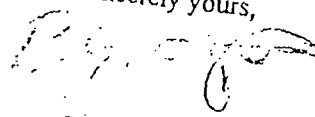
Mr. Dean Holler
Auto Owners Insurance
Post Office Box 2678
Rock Hill, SC 29732

RE: My Client: Richard Kimmer
Your Insured: Barbara Hughes
Date of Accident: 01/29/99

Dear Mr. Holler:

I enclose the executed Release and Settlement Agreement in this matter.

Sincerely yours,



Philip E. Wright

PEW:jb
Enclosure
cc: Mr. Richard Kimmer

Auto-Owners Insurance

STATE OF SOUTH CAROLINA
COUNTY OF Chester

RELEASE AND SETTLEMENT AGREEMENT

For the sole consideration of Fifteen Thousand

Dollars, the receipt of sufficiency whereof is hereby acknowledged, the undersigned hereby releases and forever discharges Barbara J. Hughes, Anthony Podgrass, i Auto Owners Insurance Co. heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations liable or who might be claimed to be liable, none of whom admit any liability to the undersigned but all expressly deny any liability, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, or damages, known and unknown, both to person and property which have resulted or may in the future develop from an accident which occurred on or about the 29th day of Jan, 19 99 at or near Lancaster Highway, Chester SC.

This release is not intended to and does not release any claim that the undersigned may have for underinsured motorist coverage through the underinsured motorist provision of any policy which by statute or policy definition the undersigned qualifies as an insured. The undersigned expressly reserves the right to prosecute a legal action in tort against the releasee solely for the purpose of establishing a claim for underinsured motorist benefits under a personal automobile policy applicable to the undersigned. For the consideration recited above, the undersigned specifically agrees and covenants never seek to execute any judgment obtained against the releasee and will not seek to collect any such judgment out of the personal assets of the releasee. If any judgment is obtained against the releasee, undersigned agrees to seek to collect such judgment from the underinsured motorist carrier. The undersigned further agrees and covenants that if a verdict is returned against the releasee, the undersigned will move the court to order that the judgment be entered against the underinsured motorist carrier and not the releasee, in the appropriate amount. If a judgment is entered against the releasee, it is specifically agreed and covenanted that the undersigned and our attorney will mark the judgment paid and satisfied as soon as is legally practicable without making any effort to collect any amount from the releasee.

Undersigned hereby accepts draft or drafts as final payment of the consideration set forth above.

In Witness Whereof, Richard Kimmer and Martha Kimmer have hereunto set their hand(s) and seal(s) this 16th day of June, year 1999.

In the presence of:

Witness: Gunnar A. Bantz

Signed: Richard Kimmer

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715

WCC File # _____
Carrier File # _____
Carrier Code # _____
Employer FEIN _____

<u>Richard Kimmer</u>				<u>Murata of America</u>			
Claimant's Name				Employer's Name			
SCN _____				Charlotte NC 28266			
Address _____	City _____	State _____	Zip _____	Address _____	City _____	State _____	Zip _____
Home Phone # _____				Insurance Carrier _____			
Work Phone # _____				Preparer's Name _____			
<u>Philip E. Wright</u>				Phone # _____			
Preparer's Name				Phone #			

Complete each information blank. To request a hearing, check box 13 b. Indicate the kinds of benefits claimed by checking the box(es) at lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for worker's compensation benefits is made based on the following grounds:

- 1 a. The claimant sustained an accidental injury to knee, back, neck on 1/29/99 in Chester County, State of South Carolina
part of body hurt month day year
- 1 b. Describe briefly how the accident occurred car wreck
2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the employer on 1/29/99 in the following manner:
reported to supervisor
month day year
- ☐ 6. Due to injury the claimant is in need of (check one):
☒ (a) medical examination and treatment for knee, back and neck
☐ (b) additional medical examination and treatment for knee, back and neck
- ☐ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: 1/29/99 to present
- ☐ 8. Due to the injury, the claimant has permanent disability of the following nature and extent: (check one)
☐ (1) General Disability: ☐ Total ☒ (2) Specific Disability: ☐ Total ☒ Partial
☐ Partial
Body part(s) affected are: knee, back and neck
- ☐ 9. Due to the injury, the claimant has a serious bodily disfigurement consisting of limp
- 10 a. At the time of injury, the claimant was paid weekly wages of \$ 582.40; and demands accounting of days worked and wages earned as provided by law.
- 10 b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident none
- 11 a. Further grounds of claim: all benefits provided by the Act
- 11 b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident: Dr. Consuelo Kinahan, Advanced Orthopaedic and Medical Assoc., Columbia, SC 29379
- 11 c. To the best of your knowledge, did you have any prior permanent disability? unknown
If yes, describe: _____
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- ☒ 13 a. I am filing a claim. I am not requesting a hearing at this time.
- ☐ 13 b. I am requesting a hearing.

Philip E. Wright
Signature of Claimant/Representative

ATTY. ADDED

JUN 25 1999

JUN 21 1999

JUN 21 '99

Division of Claims
Claims Administrator

SCWCC
COLUMBIA

Refer to R.67-205, R.67-206, R.67-207, and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department.

52

PHILIP E. WRIGHT, P.A.
ATTORNEY AT LAW

803-286-4343
REAL ESTATE: 803-286-4378
FAX NO. 803-286-9996

February 1, 2000

LANCASTER, SC 29720

Mr. Richard Kimmer

Dear Richard:

I understand you have talked with attorney Thomas Pope in Newberry and that you wish for him to undertake representation in your workers' compensation case. I understand he is also talking with you about an employment law case against Murata concerning your termination.

I need you to authorize me to release your workers' compensation file to him in writing. Since you are coming by the office Tuesday, February 1, you can sign the authorization then.

I have received a notice from the attorney in the workers' compensation case that they want to take your deposition in the workers' compensation case on February 10. Please have Mr. Pope contact Mr. Morgan, attorney for Murata, to confirm that deposition date or move it if necessary.

As I explained to you when you were in the office last, I have received an answer from Mr. Morgan in the workers' compensation case in which they deny that you are entitled to workers' compensation benefits because I settled with the liability carrier in the wreck case without notifying them or getting their approval. We settled the liability portion of your wreck claim in mid-June and I filed the workers' compensation Form 50 on June 18. I did not communicate with the workers' compensation carrier concerning settling the liability case. There are still four policies of insurance to collect from which will pay very shortly.

Our workers' compensation statute requires that the Workers' Compensation Commission and the employer and the insurance carrier for the employer be notified in the event of a settlement with a liable party. 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. I understand you have talked with Mr. Pope about that issue and that he will be advising you in that regard.

For the present time, I understand that you wish for me to proceed to represent you in the pending underinsurance matters related to your car wreck. Mr. Foster, attorney for your ~~underinsurance carrier Farm Bureau~~ has requested that we schedule your deposition so that he can confirm your injuries and the facts of the collision. I have not scheduled that deposition yet and will wait to hear from Mr. Pope concerning on how he wishes to proceed in the workers' compensation case.

Philip E. Wright

53

Richard Kimmer
January 1, 2000

pg 2

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.

I appreciate your willingness to let me continue to represent you in this matter and want you to protect your interest as fully as you possibly can. I will be glad to cooperate with Mr. Pope in resolving the issues on your workers' compensation case as quickly as possible.

Sincerely yours,



Philip E. Wright

PEW:jb
Enclosures

54¹¹⁰

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Richard Kimmer,)

Plaintiff,)

vs.)

Phillip E. Wright,)

Defendant.)

IN THE COURT OF COMMON PLEAS

Civil Action Number: 2004-CP-46-2659

ACCEPTANCE OF SERVICE

Due and legal service of the within Summons and Complaint with exhibits thereto are hereby acknowledged and copy of same retained at Lancaster, SC this 26th day of October 2004.



Phillip E. Wright

paragraph 7 as alleges that he represented the plaintiff for injuries sustained in his automobile accident against the at fault driver but the remaining allegations contained in said paragraph are denied.

6. Subject to the responses given above the defendant admits the allegations contained in complaint paragraph 8.

7. As to the allegations contained in complaint paragraph 11 the defendant admits that the settlement with the at fault driver was concluded on or about June 16, 1999 but any remaining allegations contained in said paragraph are denied.

8. As to the allegations contained in complaint paragraph's 17 through 21 the defendant would affirmatively assert that he was not a party to the action referred to in subparagraphs and that the results and proceedings of which known by the defendant are purely hearsay. Accordingly, the defendant is without first-hand knowledge of said proceedings and, therefore, denies same.

9. As to the allegations contained in complaint paragraph 25 the defendant reiterates the above allegations.

10. As to the allegations contained in complaint paragraph 26 the defendant admits that he owed the specified duty of care within the scope of the services rendered to the plaintiff.

11. As to the allegations contained in complaint paragraph 29 that allegations do not set forth facts requiring a response from this defendant.

FOR A SECOND DEFENSE

12. The defendant reiterates the allegations set forth hereinabove as fully as if repeated herein verbatim.

13. The allegations contained in the complaint fail to set forth facts sufficient to

constitute a cause of action against the defendant.

FOR A THIRD DEFENSE

14. Defendant reiterates the allegations set forth hereinabove as fully as if repeated herein verbatim.

15. The Plaintiff was negligent, reckless, willful and wanton in the manner in which he conducted his affairs throughout the transactions described in the Complaint and, therefore, the negligence, recklessness, willfulness, and wantonness of the Plaintiff, combined and concurred with this Defendant, if any, and the same is denied, was a direct and proximate cause of the Plaintiff's damages and without which the same would not have occurred, and was greater in proportion to that of this defendant, if any, and the same is denied, and, therefore, the Plaintiff may not recover from this defendant for any of his alleged injuries or damages complained of in the complaint. This Defendant, therefore, expressly pleads contributory and comparative negligence, recklessness, willfulness, and wantonness of the Plaintiff as a bar to any recovery against this Defendant. As an alternative, this Defendant is entitled to a reduction of damages based upon the percentage of the Plaintiff's negligence, recklessness, willfulness, and wantonness.

FOR A FOURTH DEFENSE

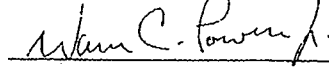
16. The defendant reiterates the allegations contained hereinabove as fully as if repeated herein verbatim.

17. The defendant's conduct is not the proximate cause of any damages asserted in the plaintiff's complaint.

WHEREFORE, Defendant Wright having fully answered the Complaint, prays that the same be dismissed with costs.

BRUNER, POWELL, ROBBINS, WALL

& MULLINS, LLC



Warren C. Powell, Jr.
1735 St. Julian Place, Suite 200 (29204) •
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693

Columbia, South Carolina

October 28, 2004

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) Civil Action No. 2004 CP - 46-2659

Richard Kimmer)
)
Plaintiff,)

v.)

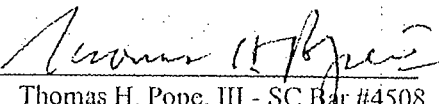
Philip E. Wright,)
)
Defendant.)

AMENDED SUMMONS
(Amended Complaint Served)
Jury Trial Requested

**TO: THE DEFENDANT AND HIS ATTORNEY, WARREN C. POWELL, JR., ESQUIRE,
BRUNER, POWELL, ROBBINS, WALL & MULLINS, LLC, PO BOX 61110,
COLUMBIA, SC 29260-1110: :**

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Amended Complaint upon the subscriber at Post Office Box 190, Newberry, South Carolina, within thirty (30) days from the service hereof, exclusive of the date of such service; and if you fail to answer the Amended Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

POPE AND HUDGENS, P.A.

By: 
Thomas H. Pope, III - SC Bar #4508
1508 College Street
Post Office Box 190
Newberry, South Carolina 29108
(803) 276-2532

Attorneys for Plaintiff

October 29 2004

60

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
Civil Action No. 2004 CP 46-2659

Richard Kimmer)
Plaintiff,)

v.)

AMENDED COMPLAINT

Philip E. Wright,)
Defendant.)

Jury Trial Requested

The plaintiff above named, complaining of the defendant, asserts as follows:

1. The plaintiff is a resident and citizen of Newberry County, State of South Carolina.
2. The defendant, upon information and belief, is a resident and citizen of York County, State of South Carolina, is an attorney licensed in South Carolina and is engaged in the practice of law in various counties of South Carolina, including York, Lancaster, and Chester.
3. The plaintiff was injured in a head-on collision on SC Highway 9 in Chester County, SC at approximately 7:00 AM on January 29, 1999 when the vehicle that he was driving to work was hit by a vehicle operated by Anthony Pendergrass. Both vehicles were totaled, and the third party driver, Pendergrass, at said time and place was negligent.
4. On said date, the plaintiff was employed by Murata of America ("Murata") as a service technician/installer whose job required him to work at various plants designated by Murata regarding the service and installation of complicated textile machinery. Murata's workers compensation carrier is Liberty Mutual Insurance Company ("Liberty Mutual").
5. On said date, the plaintiff was scheduled to work, and was on the way to work, for Murata at the Katherine plant of Springs Mills in Chester County, SC.

6. The plaintiff received serious injuries from the accident of 1/29/99, including injuries to his knees, back and neck.

7. The plaintiff was represented by Defendant Philip E. Wright in connection with the recovery of damages/compensation for injuries that he received in that accident.

8. The plaintiff engaged defendant as his attorney in the matters referenced above in approximately February 1999. Defendant agreed to represent plaintiff on a one-third contingency fee basis - i.e., defendant would be paid one-third of all amounts that were recovered by him for plaintiff, whether by settlement or otherwise (plus reimbursement for costs advanced).

9. After undertaking to represent plaintiff, the defendant conducted a factual investigation of plaintiff's claims and, prior to June 10, 1999, determined that the liability carrier for the vehicle Pendergrass was operating was Auto Owners Insurance Company (Policy No. 971016) and that the liability policy limits on said policy were \$15,000, the minimum limits under South Carolina law.

10. In the first or second week of June 1999, the defendant, on behalf of the plaintiff, entered into a settlement agreement with Auto Owners Insurance Company for the payment of the \$15,000 policy limits.

11. On behalf of the plaintiff, the defendant consummated the settlement with Auto Owners for the policy limits of \$15,000 on June 16, 1999. Attached herewith and incorporated by reference as Exhibit A is the settlement statement prepared by plaintiff which was executed by defendant.

12. The defendant negotiated, settled and concluded the said third party claim with Auto Owners Insurance Company without conferring with, giving notice to, or obtaining the consent of, Murata or its carrier, Liberty Mutual.

13. Upon information and belief, it is believed that there was no prejudice or damage to Murata or Liberty Mutual by virtue of defendant's settlement of the third party claim for the minimum limits (see testimony of Defendant Philip Wright at the workers compensation hearing on December 10, 2002).

14. On June 18, 1999, the defendant prepared and submitted a Form 50 claim form to commence the workers comp claim on behalf of his client, the plaintiff. The Form 50 prepared by the defendant was filed with the Workers Compensation Commission on June 21, 1999, and a copy of same is attached herewith and incorporated herein by reference as Exhibit B.

15. The defendant was notified by the representative of Liberty Mutual at or after the filing of Murata's/Liberty Mutual's Form 51 that defendant's actions in settling the third party claim without notice to Liberty Mutual was allegedly violative of the SC Workers Compensation Law, including but not limited to SC Code §42-1-560.

16. On February 1, 2000, the defendant wrote plaintiff and explained the position of Murata/Liberty Mutual in the workers comp matter and the potential problem with his continued representation. A copy of that letter is attached herewith and incorporated by reference as Exhibit C. Thereafter, plaintiff obtained other counsel in connection with the workers compensation claim.

17. A hearing was conducted on plaintiff's claim on December 10, 2002 presided over by Commissioner Michelle Childs, at which time evidence was presented by plaintiff and by Murata/Liberty Mutual relating to the claim.

18. At said hearing, Murata/Liberty Mutual asserted the following positions:

- (a) the accident of 1/29/99 was not compensable (because it did not arise out of, nor was it within the scope of, plaintiff's employment) and should be denied;
- (b) the plaintiff/claimant was not seriously injured and, if the accident were compensable, he would not be entitled to total disability; and/or,
- (c) the plaintiff/claimant was barred from pursuing his workers comp remedy because the third party claim has been settled without notice to or with the consent of Murata/Liberty Mutual.

19. The Decision and Order of Commissioner Childs dated July 31, 2003 (WCC File No. 9908422) made the following rulings:

- (a) the plaintiff's accident of 1/29/99 was compensable;
- (b) the claimant was totally disabled due to this compensable accident; and,
- (c) however, the plaintiff's claim was barred pursuant to the Workers Compensation Law (SC Code §42-1-560) because his third party claim had been settled without notice to the employer or carrier and amounted to an election of remedies.

20. The Decision and Order of 7/31/03 was appealed to the Appellate Panel of the Workers Compensation Commission and the Panel issued its Order on May 27, 2004, affirming the Decision and Order of the single commissioner.

21. The plaintiff appealed the Order of the Appellate Panel to the Court of Common Pleas of Chester County by filing and serving his Petition for Judicial Review (Civil Action No. 2004 CP-12-251) and that appeal is presently still pending.

22. The plaintiff's workers compensation claim consists of the following elements: total disability; past medical bills; and lifetime medical treatment and benefits (per SC Code §42-15-60).

23. The value of the plaintiff's workers compensation claim, including all elements, exceeds \$1,000,000.

24. If the position of Murata/Liberty Mutual (as determined by the single commissioner in the Decision and Order of July 31, 2003) is correct, then defendant's actions have caused plaintiff to suffer damages and to lose his entitlement to disability benefits, as well as the payment of past medical bills and lifetime medical benefits (and plaintiff's mileage to and from medical providers).

FOR A FIRST CAUSE OF ACTION

25. The plaintiff repeats all of the foregoing allegations as if repeated fully and completely verbatim herein.

26. The defendant owed plaintiff a duty of care, skill and diligence in his handling of the legal representation of plaintiff in connection with his claims arising out of his injuries on January 29, 1999.

27. The defendant was negligent, reckless or wanton, breached his duty to plaintiff, and/or deviated from the standard of care for lawyers in one or more of the following particulars:

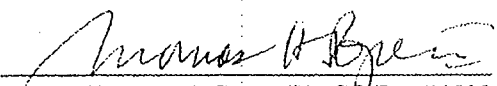
- (a) he failed to consult with, give notice to, or get the consent of Murata/Liberty Mutual before settling the third party action;
- (b) he failed to determine in a timely manner that plaintiff had a valid workers compensation claim that needed protecting before settling the third party claim for \$15,000;
- (c) he failed to follow the implicit requirements of SC Code §42-1-560 while pursuing both third party remedies and workers compensation remedy; and,
- (d) he failed to protect the plaintiff's workers compensation remedies which had a lifetime value in excess of \$1 million.

28. As the direct and proximate result of said breaches of duty, negligence, reckless, 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.

29. Because the appeal of the workers compensation case (2004 CP-12-251) is pending (and the action herein may not be ripe for adjudication), the plaintiff requests that this Court conduct a hearing to consider directing and ordering that the trial of this action be stayed pending the outcome of the appeal of the workers compensation decision.

WHEREFORE, plaintiff prays for judgment for actual and punitive damages against the defendant in an amount to be determined by the jury and for the costs of this action. **Plaintiff demands trial by jury.**

POPE AND HUDGENS, P.A.

By: 

Thomas H. Pope, III - SC Bar #4508
PO Box 190
1508 College Street
Newberry, SC 29108
Telephone: 803-276-2532

Attorneys for Plaintiff

October 29, 2004

SETTLEMENT STATEMENT

Richard Kimmer

Accident Date: January 29, 1999

Auto-Owners Insurance Company
(liability settlement proceeds)

\$ 15,000.00

DISBURSEMENTS:

Philip E. Wright - fee

\$ 5,000.00

Medical Costs - Held to negotiate
with medical creditors

\$ 10,000.00

Total Disbursements/Withholding:

\$ 15,000.00

I AGREE WITH THE ABOVE DISBURSEMENTS:

Richard Kimmer
Richard Kimmer

June 16, 1999

EXHIBIT A

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715

WCC File # _____
Carrier File # _____
Carrier Code # _____
Employer FEIN # _____

Richard Kimmer				Murata of America			
Claimant's Name				Employer's Name			
CCN _____				Charlotte NC 28266			
Address _____				City State Zip			
Home Phone # _____				Insurance Carrier			
Work Phone # _____				(803) 286-4343			
Philip E. Wright				Phone # _____			
Preparer's Name				Phone # _____			

Complete each information blank. To request a hearing, check box 13 b., indicate the kinds of benefits claimed by checking the box(es) at lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for worker's compensation benefits is made based on the following grounds:

- 1 a. The claimant sustained an accidental injury to knee, back, neck on 1/29/99 in Chester County, State of South Carolina part of body hurt month day year
- 1 b. Describe briefly how the accident occurred car wreck
2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the employer on 1/29/99 in the following manner: reported to supervisor month day year
6. Due to injury the claimant is in need of (check one):
☒ (a) medical examination and treatment for knee, back and neck
☒ (b) additional medical examination and treatment for knee, back and neck
- ☐ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: 1/29/99 to present
- ☐ 8. Due to the injury, the claimant has permanent disability of the following nature and extent: (check one)
☐ (1) General Disability: ☐ Total ☒ (2) Specific Disability: ☐ Total ☒ Partial
Body part(s) affected are: knee, back and neck
- ☐ 9. Due to the injury, the claimant has a serious bodily disfigurement consisting of limp
- 10 a. At the time of injury, the claimant was paid weekly wages of \$ 582.40; and demands accounting of days worked and wages earned as provided by law.
- 10 b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident none
- 11 a. Further grounds of claim: all benefits provided by the Act
- 11 b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident: Dr. Consuelo Kinahan, Advanced Orthopaedic and Medical Assoc., Union, SC 29379
- 11 c. To the best of your knowledge, did you have any prior permanent disability? unknown
If yes, describe: _____
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- ☐ 13 a. I am filing a claim. I am not requesting a hearing at this time.
- ☐ 13 b. I am requesting a hearing.

Signature of Claimant/Representative [Signature]

ATTY. ADDED
JUN 25 1999

RECEIVED
JUN 21 1999 JUN 21 '99
Division of Claims
Claims Administrator SCW
6/18/99

Refer to R.67-205, R.67-206, R.67-207, and R.67-601 through R.67-615. Questions about the use of this form may be directed to

65

PHILIP E. WRIGHT, P.A.
ATTORNEY AT LAW

803-286-4343
REAL ESTATE: 803-286-4378
FAX NO. 803-286-9996

February 1, 2000

408 N. MAIN STREET
LANCASTER, SC 29720

Mr. Richard Kimmer



Dear Richard:

I understand you have talked with attorney Thomas Pope in Newberry and that you wish for him to undertake representation in your workers' compensation case. I understand he is also talking with you about an employment law case against Murata concerning your termination.

I need you to authorize me to release your workers' compensation file to him in writing. Since you are coming by the office Tuesday, February 1, you can sign the authorization then.

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For the present time, I understand that you wish for me to proceed to represent you in the pending underinsurance matters related to your car wreck. Mr. Foster, attorney for your underinsurance carrier Farm Bureau, has requested that we schedule your deposition so that he can confirm your injuries and the facts of the collision. I have not scheduled that deposition yet and will wait to hear from Mr. Pope concerning on how he wishes to proceed in the workers' compensation case.

RF 93

609

Mr. Richard Kimmer

February 1, 2000

Page 2

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I appreciate your willingness to let me continue to represent you in this matter and want you to protect your interest as fully as you possibly can. I will be glad to cooperate with Mr. Pope in resolving the issues on your workers' compensation case as quickly as possible.

Sincerely yours,



Philip E. Wright

PEW:jb
Enclosures

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FILED-RECEIVED

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

Richard Kimmer,

Plaintiff,

vs.

Phillip E. Wright

Defendant.

DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC
VIL ACTION NO.: 2004-CP-46-2659

AMENDED ANSWER OF
DEFENDANT WRIGHT

The Defendant, Phillip E. Wright, specifically reserving his right to move under Rule 12, South Carolina Rules of Civil Procedure, amends his answers the Plaintiff's Complaint by offering unto this Honorable Court:

FOR A FIRST DEFENSE

1. The defendant denies each and every allegation contained in the complaint not admitted or otherwise explained herein.
2. The defendant admits the allegations contained in complaint paragraphs 1, 2, 3, 5, 9, 10, 12, 13, 14, 15, and 16.
3. The defendant admits so much of the allegations as contained in complaint paragraph 4 as alleges that the plaintiff was an employee of Murata of America. The defendant is without information as to the remaining allegations and, therefore, the same are denied.
4. The defendant admits so much of the allegations as contained in complaint paragraph 6 as alleges that the plaintiff was injured from his accident of January 29, 1999, but the remaining allegations contained in said paragraph are denied.
5. The defendant admits so much of the allegations as contained in complaint

paragraph 7 as alleges that he represented the plaintiff for injuries sustained in his automobile accident against the at fault driver but the remaining allegations contained in said paragraph are denied.

6. Subject to the responses given above the defendant admits the allegations contained in complaint paragraph 8.

7. As to the allegations contained in complaint paragraph 11 the defendant admits that the settlement with the at fault driver was concluded on or about June 16, 1999 but any remaining allegations contained in said paragraph are denied.

8. As to the allegations contained in complaint paragraph's 17 through 21 the defendant would affirmatively assert that he was not a party to the action referred to in subparagraphs and that the results and proceedings of which known by the defendant are purely hearsay. Accordingly, the defendant is without first-hand knowledge of said proceedings and, therefore, denies same.

9. As to the allegations contained in complaint paragraph 25 the defendant reiterates the above allegations.

10. As to the allegations contained in complaint paragraph 26 the defendant admits that he owed the specified duty of care within the scope of the services rendered to the plaintiff.

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FOR A SECOND DEFENSE

12. The defendant reiterates the allegations set forth hereinabove as fully as if repeated herein verbatim.

13. The allegations contained in the complaint fail to set forth facts sufficient to constitute a cause of action against the defendant.

FOR A THIRD DEFENSE

14. Defendant reiterates the allegations set forth hereinabove as fully as if repeated herein verbatim.

15. The Plaintiff was negligent, reckless, willful and wanton in the manner in which he conducted his affairs throughout the transactions described in the Complaint and, therefore, the negligence, recklessness, willfulness, and wantonness of the Plaintiff, combined and concurred with this Defendant, if any, and the same is denied, was a direct and proximate cause of the Plaintiff's damages and without which the same would not have occurred, and was greater in proportion to that of this defendant, if any, and the same is denied, and, therefore, the Plaintiff may not recover from this defendant for any of his alleged injuries or damages complained of in the complaint. This Defendant, therefore, expressly pleads contributory and comparative negligence, recklessness, willfulness, and wantonness of the Plaintiff as a bar to any recovery against this Defendant. As an alternative, this Defendant is entitled to a reduction of damages based upon the percentage of the Plaintiff's negligence, recklessness, willfulness, and wantonness.

FOR A FOURTH DEFENSE

16. The defendant reiterates the allegations contained hereinabove as fully as if repeated herein verbatim.

17. The defendants' conduct is not the proximate cause of any damages asserted in the plaintiff's complaint.

FOR A FIFTH DEFENSE

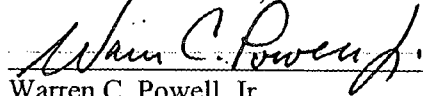
18. The defendant reiterates the allegations contained hereinabove as fully as if repeated herein verbatim.

19. This action was commenced after the expiration of the applicable Statutes of Limitations South Carolina Code Ann. Sec. 15-3-530 and Sec. 15-3-545, and the defendant pleads said statutes as a complete bar to this action.

WHEREFORE, Defendant Wright having fully answered the Complaint, prays that the same be dismissed with costs.

BRUNER, POWELL, ROBBINS, WALL

& MULLINS, LLC



Warren C. Powell, Jr.
1735 St. Julian Place, Suite 200 (29204)
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693

Columbia, South Carolina

May 20, 2005

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

FILED-RECEIVED
2005 MAY 13 AM 9:47
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2004-CP-46-2659

Richard Kimmer,

Plaintiff,)

vs.)

Phillip E. Wright)

Defendant.)

**DEFENDANT'S NOTICE
OF MOTION & MOTION
FOR SUMMARY JUDGMENT
(Rule 56, SCRCP)**

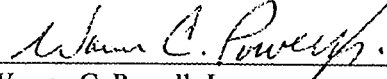
TO: THOMAS H. POPE III, COUNSEL FOR THE PLAINTIFF:

You will please take notice that Defendant, Phillip E. Wright, will move before the Presiding Judge of the York County Court of Common Pleas in York, South Carolina, on the tenth day after service hereof, or at such time as the Court may schedule, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an Order granting the Defendant, Phillip E. Wright, Summary Judgment as to all causes of action asserted by the Plaintiff on the grounds that there is no material issue of fact to be decided by a trier of fact as to the Statute of Limitations and that the Defendant, Phillip E. Wright, is entitled to judgment as a matter of law.

The grounds for this motion is that the Statute of Limitations has run on all of Plaintiff's claims against the Defendant, Phillip E. Wright, pursuant to S.C. Code § 15-3-530 & S.C. Code § 15-3-535 and the common law of South Carolina.

This Motion is based upon the affidavits on file and/or filed with the Clerk of Court, the depositions in this matter and all Memoranda in Support of this motion, which will be filed hereafter.

BRUNER, POWELL, ROBBINS,
WALL & MULLINS, LLC



Warren C. Powell, Jr.
1735 St. Julian Place, Suite 200
Post Office Box 61110
Columbia, SC 29260
(803)252-7693
Attorneys for Defendant
Phillip E. Wright

Columbia, South Carolina

May 11, 2005

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) CIVIL ACTION NO.: 2004-CP-46-2659

Richard Kimmer,

Plaintiff,

vs.

Phillip E. Wright

Defendant.

DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

MOTION TO ALTER OR AMEND
RELIEF FROM ORDER
(Rule 59, SCRCP)

TO: THOMAS H. POPE III, COUNSEL FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that ten days after service hereof, or as soon thereafter as counsel may be heard, the Defendant, through his undersigned counsel, will move, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, for an order altering or amending the judgment of this Honorable Court dated June 20, 2005, and received by the Defendant on June 27, 2005, denying the Defendant's motion for summary judgment based upon the argument that this action was commenced more than three years after commencement of the running of the statutory period.

The Defendant offers the following as grounds for this motion:

1. The Court's order denying the Defendant's motion for summary judgment states that, "Although Plaintiff acknowledged the possibility of error on Defendant's part in a "waiver of conflict" dated February 1, 2000, there was not a finding that Plaintiff's claim was precluded by the settlement with the adverse driver until July 31, 2003."

The Defendant submits very respectfully that this Honorable Court inadvertently disregarded the following evidence:

- By March of 1999, Kimmer believed that the workers' compensation carrier should have been paying him from the beginning. (Plaintiff's deposition, p. 38, line 24 – p. 40, line 6)
 - During a January 2000 office conference Mr. Wright told the Plaintiff that he had failed to comply with the statutory mandate and that, "I screwed this up, you have to get another attorney to take the case." (Plaintiff's deposition, p. 47, line 16 – p. 48, line 16)
 - By February 1, 2000, Kimmer understood that he was not receiving his workers' compensation payments because Wright made a mistake and that Wright did not try to hide his mistake. (Plaintiff's deposition, p. 47, line 2 – p. 48, line 16)
 - Beginning in 1999 Kimmer had developed post-traumatic stress disorder because of the events following his auto accident and blamed Wright for this condition. (Plaintiff's deposition, p. 87, line 2 – p. 88, line 10)
 - By February 2000, Kimmer admits that Wright had represented to him that part of Kimmer's not getting paid was Wright's fault. (Plaintiff's deposition, p. 88, lines 2-10)
2. The Court's reliance upon Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) is misplaced. The Order recites, "In Epstein, id., which involved a legal malpractice claim, a three-judge majority of the Court found that the Statute of Limitations began to run when an adverse jury verdict was rendered." In Epstein, id., the Circuit Court ruled that the statute commenced to run, **at the latest** when Dr. Epstein suffered an adverse jury verdict. It was this order which was affirmed by the Supreme Court. There was certainly no pronouncement that in all situations a potential claim against

an attorney does not commence to run until an adverse ruling by a court or commission.

Indeed, the Epstein court, after reciting the accepted principle that the statute begins to run when the plaintiff knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct, it went on to define reasonable diligence as follows:

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. (*emphasis added*)

All the law requires is that the Plaintiff be on notice that some claim against another **might** exist. Coincidentally, that is precisely what the Plaintiff was told in both the waiver of conflict document and Mr. Wright's letter of February 1, 2000.

3. Because Kimmer believed in March of 1999 that he should be receiving his workers compensation benefits at that time, but was not, he was on notice then that "some right of his has been invaded." As the Plaintiff admits, by February 2000 he believed that his failure to receive his compensation benefits was Wright's fault. Under South Carolina law the statute had commenced to run as early as 1999, but no later than February 2000.
4. The Court's order accepts as fact the following false premise: that all damages the Plaintiff allegedly sustained as a result of the Defendant's conduct are recoverable in the pending workers' compensation claim.

This is a false premise because Kimmer attributes his post-traumatic stress disorder problems which started in 1999 to Mr. Wright's conduct because of the delay in getting his benefits. These PTSD problems allegedly caused by Wright are not recoverable through his workers' compensation claim. Therefore, even if Kimmer is successful in receiving his workers compensation benefits at some future date, this would not compensate him for his PTSD damages, which he lays at Wright's doorstep because of the delay in receiving the benefits. Therefore, it is clear that the statute commenced to run as to these damages no later than February 2000 when the Plaintiff admits to assigning blame to Wright for his alleged loss. There cannot be one statutory period applicable to some damages and another statutory period applicable to yet other damages when all of the damages grow out of the same core of operative facts.

South Carolina law is in accord. In order for the Statute of Limitations to commence to run it is not necessary that the Plaintiff appreciate the full extent of his damages. Dillon County School Dist. #2 v. Lewis Sheet Metalworks, 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985) citing The Town of Mannsville v. GAI Corp., 364 N.E.2d 1292 (Mass. App. Ct. 1977); Also see Dean v. Ruscon, 321 S.C. 360, 468 S.E.2d 645 (1996).

Conclusion

Because the Plaintiff admits to having sustained damages caused by Wright and that by February of 2000 he assigned blame to Wright for those damages that Statute of Limitations under South Carolina law commenced to run at that time for all damages resulting from the same core of operative facts.

**Defendant's Motion to Alter or Amend
Kimmer v. Wright**

RESPECTFULLY SUBMITTED.

BRUNER, POWELL, ROBBINS,

WALL & MULLINS, LLC

for Brian P. Robbins
Warren C. Powell, Jr.
1735 St. Julian Place, Suite 200 (29204)
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693
Attorneys for the Defendant

Columbia, South Carolina

July 5, 2005

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
Civil Action No. 2004 CP 46-2659

Richard Kimmer,)
)
Plaintiff,)

v.)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

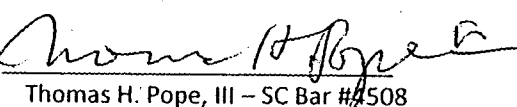
Phillip E. Wright,)
)
Defendant.)

TO: DEFENDANT PHILLIP E. WRIGHT AND HIS ATTORNEY WARREN C. POWELL, JR., ESQUIRE:

The plaintiff, by and through his undersigned counsel, does hereby move this Court, pursuant to the provisions of Rule 56, SCRPC, for an Order of this Court granting him summary judgment against the defendant for the reason that plaintiff is entitled to judgment against the defendant as a matter of law.

This motion is based on the record in this case, including the decision in the case of Kimmer v. Murata of America, Inc. and Liberty Mutual Insurance Company, S.C. Ct. App. Op. No. 4187, filed December 18, 2006, cert. denied by the SC Supreme Court (October 18, 2007), discovery undertaken in the case, the applicable law of South Carolina, and any affidavits or memoranda that have been furnished or which will be furnished prior to the hearing in this matter.

POPE AND HUDGENS, P.A.

By: 

Thomas H. Pope, III – SC Bar #4508
PO Box 190
1508 College Street
Newberry, SC 29108
803-276-2532

Attorneys for Plaintiff

February 12, 2008

82

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2004 CP 46-2659

Carol M. Kimmer, Personal)

Representative of the Estate of)

Richard Kimmer, deceased,)

Plaintiff,)

v.)

SECOND AMENDED SUMMONS

Jury Trial Requested

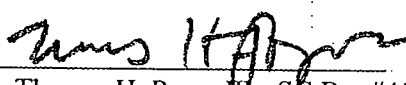
Philip E. Wright,)

Defendant.)

**TO: THE DEFENDANT AND HIS ATTORNEY, WARREN C. POWELL, JR.,
ESQUIRE, BRUNER, POWELL, ROBINS, WALL & MULLINS, LLC, PO BOX
61110, COLUMBIA, SC 29260:**

YOU ARE HEREBY SUMMONED and required to answer the Second Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Second Amended Complaint upon the subscriber at Post Office Box 190, Newberry, South Carolina, within thirty (30) days from the service hereof, exclusive of the date of such service; and if you fail to answer the said Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Second Amended Complaint.

POPE AND HUDGENS, P.A.

By: 

Thomas H. Pope, III - SC Bar #4508

PO Box 190

1508 College Street

Newberry, SC 29108

Telephone: 803-276-2532

Attorneys for Plaintiff

Newberry, SC

July 14, 2008

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STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2004 CP 46-2659

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

v.

) **SECOND AMENDED COMPLAINT**
Jury Trial Requested

Philip E. Wright,)
Defendant.)

The plaintiff above named, complaining of the defendant, asserts as follows:

1. The plaintiff is a resident and citizen of Newberry County, State of South Carolina and is the duly-appointed personal representative of the Estate of Richard Kimmer, who died on March 2, 2008.
2. The defendant, upon information and belief, is a resident and citizen of York County, State of South Carolina, is an attorney licensed in South Carolina and is engaged in the practice of law in various counties of South Carolina, including York, Lancaster, and Chester.
3. The plaintiff's decedent was injured in a head-on collision on SC Highway 9 in Chester County, SC at approximately 7:00 AM on January 29, 1999 when the vehicle that he was driving to work was hit by a vehicle operated by Anthony Pendergrass. Both vehicles were totaled, and the third party driver, Pendergrass, at said time and place was negligent.
4. On said date, the plaintiff's decedent was employed by Murata of America ("Murata") as a service technician/installer whose job required him to work at various plants designated by Murata regarding the service and installation of complicated textile machinery. Murata's workers compensation carrier is Liberty Mutual Insurance Company ("Liberty Mutual").

5. On said date, the plaintiff's decedent was scheduled to work, and was on the way to work, for Murata at the Katherine plant of Springs Mills in Chester County, SC.
6. The plaintiff's decedent received serious injuries from the accident of 1/29/99, including injuries to his knees, back and neck.
7. The plaintiff's decedent was represented by Defendant Philip E. Wright in connection with the recovery of damages/compensation for injuries that he received in that accident.
8. The plaintiff's decedent engaged defendant as his attorney in the matters referenced above in approximately February 1999. Defendant agreed to represent plaintiff's decedent on a one-third contingency fee basis - i.e., defendant would be paid one-third of all amounts that were recovered by him for plaintiff's decedent, whether by settlement or otherwise (plus reimbursement for costs advanced).
9. After undertaking to represent plaintiff's decedent, the defendant conducted a factual investigation of plaintiff's decedent's claims and, prior to June 10, 1999, determined that the liability carrier for the vehicle Pendergrass was operating was Auto Owners Insurance Company (Policy No. 971016) and that the liability policy limits on said policy were \$15,000, the minimum limits under South Carolina law.
10. In the first or second week of June 1999, the defendant, on behalf of the plaintiff's decedent, entered into a settlement agreement with Auto Owners Insurance Company for the payment of the \$15,000 policy limits.
11. On behalf of the plaintiff's decedent, the defendant consummated the settlement with Auto Owners for the policy limits of \$15,000 on June 16, 1999. Attached herewith and incorporated by reference as Exhibit A is the settlement statement prepared by defendant which was executed by plaintiff's decedent.
12. The defendant negotiated, settled and concluded the said third party claim with Auto Owners Insurance Company without conferring with, giving notice to, or obtaining the consent of, Murata or its carrier, Liberty Mutual.
13. Upon information and belief, it was believed that there was no prejudice or damage to Murata or Liberty Mutual by virtue of defendant's settlement of the third party claim for the minimum limits, but it has now been determined otherwise by the SC Court of Appeals in the case of Kimmer v. Murata of America, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2007), cert. denied by the SC Supreme Court.

14. On June 18, 1999, the defendant prepared and submitted a Form 50 claim form to commence the workers comp claim on behalf of his client, the plaintiff's decedent. The Form 50 prepared by the defendant was filed with the Workers Compensation Commission on June 21, 1999, and a copy of same is attached herewith and incorporated herein by reference as Exhibit B.
15. The defendant was notified by the representative of Liberty Mutual at or after the filing of Murata's/Liberty Mutual's Form 51 that defendant's actions in settling the third party claim without notice to Liberty Mutual was allegedly violative of the SC Workers Compensation Law, including but not limited to SC Code §42-1-560.
16. On February 1, 2000, the defendant wrote plaintiff's decedent and explained the position of Murata/Liberty Mutual in the workers comp matter and the potential problem with his continued representation. A copy of that letter is attached herewith and incorporated by reference as Exhibit C. Thereafter, plaintiff's decedent obtained other counsel in connection with the workers compensation claim.
17. A hearing was conducted on plaintiff's decedent's claim on December 10, 2002 presided over by Commissioner Michelle Childs, at which time evidence was presented by plaintiff's decedent and by Murata/Liberty Mutual relating to the claim.
18. At said hearing, Murata/Liberty Mutual asserted the following positions:
 - (a) the accident of 1/29/99 was not compensable (because it did not arise out of, nor was it within the scope of, plaintiff's employment) and should be denied;
 - (b) the claimant was not seriously injured and, if the accident were compensable, he would not be entitled to total disability; and/or,
 - (c) the claimant was barred from pursuing his workers comp remedy because the third party claim has been settled without notice to or with the consent of Murata/Liberty Mutual.

19. The Decision and Order of Commissioner Childs dated July 31, 2003 (WCC File No. 9908422) made the following rulings:
 - (a) the plaintiff's accident of 1/29/99 was compensable;
 - (b) the claimant was totally disabled due to this compensable accident; and,
 - (c) however, the plaintiff's claim was barred pursuant to the Workers Compensation Law (SC Code §42-1-560) because his third party claim had been settled without notice to the employer or carrier and amounted to an election of remedies.
20. The Decision and Order of 7/31/03 was appealed to the Appellate Panel of the Workers Compensation Commission and the Panel issued its Order on May 27, 2004, affirming the Decision and Order of the single commissioner.
21. Kimmer appealed the Order of the Appellate Panel to the Court of Common Pleas of Chester County by filing and serving his Petition for Judicial Review (Civil Action No. 2004 CP-12-251), and the decision was reversed in favor of Kimmer by the Order Reversing Workers' Compensation Decision of Circuit Judge Kenneth Goode dated June 20, 2005; that Order was reversed in 2007 by the Court of Appeals as referred to herein.
22. The plaintiff's decedent's workers compensation claim consisted of the following elements: total disability; past medical bills; and lifetime medical treatment and benefits (per SC Code §42-15-60).
23. The value of the plaintiff's decedent's workers compensation claim, including interest, exceeds \$500,000.
24. Now that the position of Murata/Liberty Mutual (as determined by the single commissioner in the Decision and Order of July 31, 2003) has been adopted by the SC Court of Appeals in Kimmer v. Murata of America, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2007), defendant's actions have caused plaintiff's decedent to suffer damages and to lose his entitlement to disability benefits, as well as prejudgment interest.

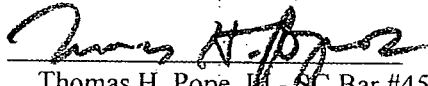
FOR A FIRST CAUSE OF ACTION

25. The plaintiff repeats all of the foregoing allegations as if repeated fully and completely verbatim herein.
26. The defendant owed plaintiff's decedent a duty of care, skill and diligence in his handling of the legal representation of plaintiff's decedent in connection with his claims arising out of his injuries on January 29, 1999.
27. The defendant was negligent, reckless or wanton, breached his duty to plaintiff's decedent and/or deviated from the standard of care for lawyers in one or more of the following particulars:
 - (a) he failed to consult with, give notice to, or get the consent of Murata/Liberty Mutual before settling the third party action;
 - (b) he failed to determine in a timely manner that plaintiff's decedent had a valid workers compensation claim that needed protecting before settling the third party claim for \$15,000;
 - (c) he failed to follow the implicit requirements of SC Code §42-1-560 while pursuing both third party remedies and workers compensation remedy; and,
 - (d) he failed to protect the plaintiff's decedent's workers compensation remedies.
28. As the direct and proximate result of said breaches of duty, negligence, recklessness, willfulness by defendant, the plaintiff's decedent has been damaged as set forth above and he is entitled to judgment against the defendant for actual and punitive damages.
29. The appeal of the workers compensation case (2004 CP-12-251) has now been ended, the stay of this action has been lifted, and this matter is ripe for adjudication.
30. The amount owed plaintiff's decedent by defendant is for a liquidated amount (disability benefits) and a sum certain as set forth herein, entitling plaintiff's decedent to prejudgment interest on said sum certain.

31. The amount of damages to plaintiff as owed by defendant is \$219,235 (500 weeks x \$438.47), plus prejudgment interest at 8 ¾% compounded annually since at least July 31, 2003.

WHEREFORE, plaintiff prays for judgment for actual and punitive damages against the defendant in an amount to be determined by the jury, plus prejudgment interest at least since July 31, 2003, and for the costs of this action. **Plaintiff demands trial by jury.**

POPE AND HUDGENS, P.A.

By: 

Thomas H. Pope, III - SC Bar #4508
PO Box 190
1508 College Street
Newberry, SC 29108
Telephone: 803-276-2532

Attorneys for Plaintiff

July 14, 2008

SETTLEMENT STATEMENT

Richard Kimmer

Accident Date: January 29, 1999

Auto-Owners Insurance Company
(liability settlement proceeds)

\$ 15,000.00

DISBURSEMENTS:

Philip E. Wright - fee

\$ 5,000.00

Medical Costs - Held to negotiate
with medical creditors

\$ 10,000.00

Total Disbursements/Withholding:

\$ 15,000.00

I AGREE WITH THE ABOVE DISBURSEMENTS:

Richard Kimmer
Richard Kimmer

June 16, 1999

EXHIBIT A

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THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND ON WHITE PAPER

Auto-Owners Insurance

Life Home Car Business

The No Accident Award

Lansing, Michigan 48909

RICHARD KIMMER & MARTHA KIMMER

INDIVIDUALLY & AS HUSBAND & WIFE &

AT SIGHT THEIR ATTORNEY PHILLIP WRIGHT

PAY TO THE
ORDER OF

ADVANCED ORTHO & MEDICAL ASSOC & CIGNA HEALTHCARE

FIFTEEN THOUSAND AND 00/100 DOLLARS

9-80
720

DRAFT NO. 1-

DATE 06/14/99

CLAIMS DRAFT
PAYABLE THROUGH
MICHIGAN NATIONAL BANK
LANSING, MI 48201

VOID IF NOT CASHED
WITHIN ONE YEAR

\$*****15,000.00

AUTO OWNERS INS. CO.

John P. Dunn
AUTHORIZED SIGNATURE

BARBARA J. HUGHES

REMARKS

POLICY LIMIT EXCHANGE FOR A SIGNED COVENANT NOT TO EXECUTE

PHILIP E. WRIGHT, P.A.
ATTORNEY AT LAW

803-286-4343
REAL ESTATE: 803-286-4378
FAX NO. 803-286-9996

June 23, 1999

408 N. MAIN STREET
LANCASTER, S.C. 29720

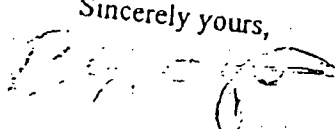
Mr. Dean Holler
Auto Owners Insurance
Post Office Box 2678
Rock Hill, SC 29732

RE: My Client: Richard Kimmer
Your Insured: Barbara Hughes
Date of Accident: 01/29/99

Dear Mr. Holler:

I enclose the executed Release and Settlement Agreement in this matter.

Sincerely yours,


Philip E. Wright

PEW:jb
Enclosure
cc: Mr. Richard Kimmer

Auto-Owners Insurance

STATE OF SOUTH CAROLINA
COUNTY OF Chester

RELEASE AND SETTLEMENT AGREEMENT

For the sole consideration of Fifteen Thousand Dollars, the

receipt of sufficiency whereof is hereby acknowledged, the undersigned hereby releases and forever discharges Barbara J. Hughes, Anthony Perlegrass, & Auto Owners Insurance Co. heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations liable or who might be claimed to be liable, none of whom admit any liability to the undersigned but all expressly deny any liability, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, or damages, known and unknown, both to person and property which have resulted or may in the future develop from an accident which occurred on or about the 29th day of Jan, 19 99 at or near Laurel Highway, Chester SC.

This release is not intended to and does not release any claim that the undersigned may have for underinsured motorist coverage through the underinsured motorist provision of any policy which by statute or policy definition the undersigned qualifies as an insured. The undersigned expressly reserves the right to prosecute a legal action in tort against the releasee solely for the purpose of establishing a claim for underinsured motorist benefits under a personal automobile policy applicable to the undersigned. For the consideration recited above, the undersigned specifically agrees and covenants never seek to execute any judgment obtained against the releasee and will not seek to collect any such judgment out of the personal assets of the releasee. If any judgment is obtained against the releasee, undersigned agrees to seek to collect such judgment from the underinsured motorist carrier. The undersigned further agrees and covenants that if a verdict is returned against the releasee, the undersigned will move the court to order that the judgment be entered against the underinsured motorist carrier and not the releasee, in the appropriate amount. If a judgment is entered against the releasee, it is specifically agreed and covenanted that the undersigned and our attorney will mark the judgment paid and satisfied as soon as is legally practicable without making any effort to collect any amount from the releasee.

Undersigned hereby accepts draft or drafts as final payment of the consideration set forth above.

In Witness Whereof, Richard Kimmer and Martha Kimmer have hereunto set their hand(s) and seal(s) this 16th day of June, year 1999.

In the presence of:
Witness: James A. Brant

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South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715

WCC File # _____
Carrier File # _____
Carrier Code # _____
Employer FEI _____

9908422

Richard Kimmer
Claimant's Name
Address City State Zip
Home Phone # _____
Work Phone # _____
Philip E. Wright
Preparer's Name

Murata of America
Employer's Name
P.O. Box 667609 Charlotte NC 28266
Address City State Zip
Insurance Carrier
(803) 286-4343
Phone #

Complete each information blank. To request a hearing, check box 13 b., indicate the kinds of benefits claimed by checking the box(es) at lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for worker's compensation benefits is made based on the following grounds:

- 1 a. The claimant sustained an accidental injury to knee, back, neck on 1/29/99 in Chester County, State of South Carolina
part of body hurt month day year
- 1 b. Describe briefly how the accident occurred car wreck
2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the employer on 1/29/99 in the following manner:
reported to supervisor
month day year
- ☐ 6. Due to injury the claimant is in need of (check one):
☒ (a) medical examination and treatment for knee, back and neck
☒ (b) additional medical examination and treatment for knee, back and neck
- ☐ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: 1/29/99 to present
- ☐ 8. Due to the injury, the claimant has permanent disability of the following nature and extent: (check one)
☐ (1) General Disability: ☐ Total ☒ (2) Specific Disability: ☐ Total ☒ Partial
☐ Partial
Body part(s) affected are: knee, back and neck
- ☐ 9. Due to the injury, the claimant has a serious bodily disfigurement consisting of limp
- 10 a. At the time of injury, the claimant was paid weekly wages of \$ 582.40; and demands accounting of days worked and wages earned as provided by law.
- 10 b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident none
- 11 a. Further grounds of claim: all benefits provided by the Act
- 11 b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident: Dr. Consuelo Kinahan, Advanced Orthopaedic and Medical Assoc., Union, SC 29379
- 11 c. To the best of your knowledge, did you have any prior permanent disability? unknown
If yes, describe: _____
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- ☒ 13 a. I am filing a claim. I am not requesting a hearing at this time.
- ☐ 13 b. I am requesting a hearing.

Phet

Enchilada

ATTY. ADDED

JUN 21 1999

JUN 21 1999

1/18/99

RECEIVED

94

PHILIP E. WRIGHT, P.A.
ATTORNEY AT LAW

803-286-4343
REAL ESTATE: 803-286-4378
FAX NO. 803-286-9996

February 1, 2000

408 N. MAIN STREET
LANCASTER, SC 29720

Mr. Richard Kimmer

Dear Richard:

I understand you have talked with attorney Thomas Pope in Newberry and that you wish for him to undertake representation in your workers' compensation case. I understand he is also talking with you about an employment law case against Murata concerning your termination.

I need you to authorize me to release your workers' compensation file to him in writing. Since you are coming by the office Tuesday, February 1, you can sign the authorization then.

I have received a notice from the attorney in the workers' compensation case that they want to take your deposition in the workers' compensation case on February 10. Please have Mr. Pope contact Mr. Morgan, attorney for Murata, to confirm that deposition date or move it if necessary.

As I explained to you when you were in the office last, I have received an answer from Mr. Morgan in the workers' compensation case in which they deny that you are entitled to workers' compensation benefits because I settled with the liability carrier in the wreck case without notifying them or getting their approval. We settled the liability portion of your wreck claim in mid-June and I filed the workers' compensation Form 50 on June 18. I did not communicate with the workers' compensation carrier concerning settling the liability case. There are still four policies of insurance to collect from which will pay very shortly.

Our workers' compensation statute requires that the Workers' Compensation Commission and the employer and the insurance carrier for the employer be notified in the event of a settlement with a liable party. 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. I understand you have talked with Mr. Pope about that issue and that he will be advising you in that regard.

For the present time, I understand that you wish for me to proceed to represent you in the pending underinsurance matters related to your car wreck. Mr. Foster, attorney for your underinsurance carrier Farm Bureau, has requested that we schedule your deposition so that he can confirm your injuries and the facts of the collision. I have not scheduled that deposition yet and will wait to hear from Mr. Pope concerning on how he wishes to proceed in the workers' compensation case.

EXHIBIT C

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Mr. Richard Kimmer

February 1, 2000

Page 2

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.

I appreciate your willingness to let me continue to represent you in this matter and want you to protect your interest as fully as you possibly can. I will be glad to cooperate with Mr. Pope in resolving the issues on your workers' compensation case as quickly as possible.

Sincerely yours,



Philip E. Wright

PEW:jb
Enclosures

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STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

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

Plaintiff,)

vs.)

Phillip E. Wright)

Defendant.)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2004-CP-46-2659

FILED - RECEIVED
2008 AUG 18 AM 9:50

DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

Answer to Second Amended Complaint

Defendant, Phillip E. Wright, specifically reserving his right to move under Rule 12 or 56, South Carolina Rules of Civil Procedure, answers the Plaintiff's Second Amended Complaint by offering unto this Honorable Court:

FOR A FIRST DEFENSE

1. Defendant denies each and every allegation contained in the complaint not admitted or otherwise explained herein.
2. Defendant admits the allegations contained in Complaint Paragraphs 1, 2, 3, 5, 9, 10, 12, 13, 14, 15, and 16.
3. Defendant admits so much of the allegations as contained in Complaint Paragraph 4 as alleges that Plaintiff was an employee of Murata of America. Defendant is without information as to the remaining allegations and, therefore, the same are denied.
4. Defendant admits so much of the allegations as contained in Complaint Paragraph 6 as alleges that Plaintiff was injured from his accident of January 29, 1999, but the remaining allegations contained in said paragraph are denied.
5. Defendant admits so much of the allegations as contained in Complaint

Paragraph 7 as alleges that he represented Plaintiff for injuries sustained in his automobile accident against the at-fault driver but the remaining allegations contained in said paragraph are denied.

6. Subject to the responses given above Defendant admits the allegations contained in Complaint Paragraph 8.

7. As to the allegations contained in Complaint Paragraph 11, Defendant admits that the settlement with the at-fault driver was concluded on or about June 16, 1999 but any remaining allegations contained in said paragraph are denied.

8. As to the allegations contained in Complaint Paragraphs 17 - 21 Defendant would affirmatively assert that he was not a party to the action referred to in subparagraphs and that the results and proceedings of which known by Defendant are purely hearsay. Accordingly, Defendant is without first-hand knowledge of said proceedings and, therefore, denies same.

9. As to the allegations of Complaint Paragraph 22 Defendant admits the Workers' Compensation claim consisted of past medical bills and temporary total disability payments; the remaining allegations are denied.

10. Defendant denies the allegations contained in Complaint Paragraphs 23, 24, 28, and 31.

11. As to the allegations contained in Complaint Paragraph 25 Defendant reiterates the above allegations.

12. As to the allegations contained in Complaint Paragraph 26 Defendant admits that he owed the specified duty of care within the scope of the services rendered to

Plaintiff; Defendant admits the allegations of Complaint Paragraph 27 except for the allegation of recklessness.

13. As to the allegations contained in Complaint Paragraph 29 those allegations do not set forth facts requiring a response from Defendant.

FOR A SECOND DEFENSE

14. Defendant reiterates the allegations set forth hereinabove as fully as if repeated herein verbatim.

15. The allegations contained in the Complaint fail to set forth facts sufficient to constitute a cause of action against Defendant.

FOR A THIRD DEFENSE

16. Defendant reiterates the allegations set forth hereinabove as fully as if repeated herein verbatim.

17. Plaintiff was negligent, reckless, willful and wanton in the manner in which he conducted his affairs throughout the transactions described in the Complaint and, therefore, the negligence, recklessness, willfulness, and wantonness of Plaintiff, combined and concurred with Defendant, if any, and the same is denied, was a direct and proximate cause of Plaintiff's damages and without which the same would not have occurred, and was greater in proportion to that of this defendant, if any, and the same is denied, and, therefore, Plaintiff may not recover from Defendant for any of his alleged injuries or damages complained of in the complaint. Defendant, therefore, expressly pleads contributory and comparative negligence, recklessness, willfulness, and wantonness of Plaintiff as a bar to any recovery against Defendant. As an alternative, Defendant is

entitled to a reduction of damages based upon the percentage of Plaintiff's negligence, recklessness, willfulness, and wantonness.

FOR A FOURTH DEFENSE

18. Defendant reiterates the allegations contained hereinabove as fully as if repeated herein verbatim.

19. Defendant's conduct is not the proximate cause of any damages asserted in Plaintiff's Complaint.

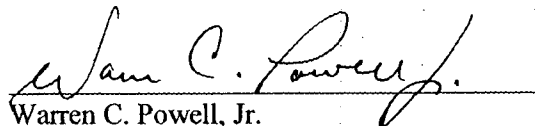
FOR A FIFTH DEFENSE

20. Defendant reiterates the allegations contained hereinabove as fully as if repeated herein verbatim.

21. This action was commenced after the expiration of the applicable Statutes of Limitations South Carolina Code Ann. Sec. 15-3-530 and Sec. 15-3-545, and Defendant pleads said statutes as a complete bar to this action.

WHEREFORE, Defendant, having fully answered the Complaint, prays that the same be dismissed with costs.

BRUNER, POWELL, ROBBINS, WALL
& MULLINS, LLC



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Columbia, SC 29260
(803) 252-7693
Attorneys for Defendant

Columbia, South Carolina
August 13, 2008

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

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

Plaintiff,)

vs.)

Philip E. Wright)

Defendant.)

FILED - RECEIVED
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DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2004-CP-46-2659

**DEFENDANT'S NOTICE
OF MOTION & MOTION
FOR SUMMARY JUDGMENT
(Rule 56, SCRCP)**

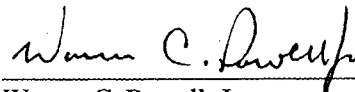
TO: THOMAS H. POPE III, COUNSEL FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that Defendant, Philip E. Wright, will move before the Presiding Judge of the York County Court of Common Pleas in York, South Carolina, on the tenth (10th) day after service hereof, or at such time as the Court may schedule, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an Order granting Defendant Summary Judgment as to all causes of action asserted by Plaintiff on the grounds that there is no material issue of fact to be decided by a trier of fact on this issue that the Statute of Limitations expired more than three (3) years after Plaintiff decedent knew or with the exercise of reasonable diligence should have known that he had a claim against Defendant, and, accordingly, the defendant is entitled to judgment as a matter of law.

The ground for this motion is that the Statute of Limitations has run on all of Plaintiff's claims against Defendant, pursuant to S.C. Code § 15-3-530 & S.C. Code § 15-3-535 and the common law of South Carolina.

This Motion is based upon the affidavits on file and/or filed with the Clerk of Court, the depositions in this matter and all Memoranda in Support of this motion, which will be filed hereafter.

BRUNER, POWELL, ROBBINS,
WALL & MULLINS, LLC



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Post Office Box 61110
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(803)252-7693
Attorneys for Defendant

Columbia, South Carolina
August 15, 2008

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Richard Kimmer,

Plaintiff,

v.

Phillip E. Wright,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2004 CP 46-2659

**PLAINTIFF'S MEMORANDUM IN SUPPORT
OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This is an action by the plaintiff against his former lawyer alleging malpractice on the part of the former lawyer. The malpractice was alleged to have occurred by the defendant who represented the plaintiff in a third-party settlement of claims for personal injuries sustained in an automobile accident which occurred while the plaintiff was on his way to work from his home.

The defendant settled the injury claim with the insurance carrier of the at-fault driver of the other automobile for the minimum limits of \$15,000. The defendant settled the claim without notice to defendant, employer or its insurer.

Thereafter, the defendant filed a claim with the South Carolina Workers Compensation Commission. The Commission found that the claim was compensable. However, the Commission ruled that the plaintiff was barred from compensation because of the third party settlement without notice to the plaintiff's employer and its carrier.

On appeal, the circuit court reversed the ruling that the plaintiff was barred from benefits because of the third party settlement without notice and awarded full disability benefits to the plaintiff. On appeal to the Court of Appeals, that court reversed the circuit court and reinstated the decision of the Commission. Kimmer v. Murata of America, 372 S.C. 640 S.E.2d 507 (Ct. App. 2007).

The plaintiff then brought the present action alleging negligence on the part of the defendant in the third party settlement without notice. Discovery is now completed in the case.

On June 20, 2005, the circuit court denied a motion for summary judgment filed by the defendant. The plaintiff has now filed a motion for summary judgment on the grounds that plaintiff is entitled to judgment as a matter of law. Liability is established and damages, plus prejudgment interest, are liquidated.

STATEMENT OF FACTS

On the early morning of January 29, 1999, the plaintiff 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., pp. 136, 173). 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. (R., p. 166).

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. p. 141). The plaintiff had three surgeries on his right knee and one surgery on his left knee. At the time of the workers compensation hearing, he was taking various medications as a result of the accident. (R., p. 144). The at-fault driver, Pendergrass, had automobile liability insurance with minimum limits of \$15,000 through Auto Owners Insurance Company. (R., pp. 100, 149, 150, and 166).

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

The plaintiff sought 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., pp. 166-168, 179). 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., pp. 150, 175) and Defendant Wright (R., p. 176) 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., pp. 104, 168). The plaintiff received no proceeds from this third party settlement.

On June 18, 1999, Defendant Wright filed a WCC Form 50 with the SC Workers Compensation Commission claiming disability entitlement on behalf of plaintiff. A hearing was held by the single commissioner on December 10, 2002. 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. 30).

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. 39, 41). 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. 39). 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 (letter of Pope to Wright dated August 5, 2003).

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 (R., p. 27).

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 employee had settled a third party claim for the policy limits without prejudice to the employer or its carrier and where the subrogation rights of the carrier were protected. (R., p. 4).

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. 5, 8). 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. 4).

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.

The Amended Complaint in this case is based on the simple fact that Defendant Wright was negligent in representing his client Kimmer. Had defendant properly handled the third party claim, Kimmer would have been entitled to total disability (plus lifetime medical benefits) under the workers compensation act. These benefits were as follows: \$438.47 per week (plaintiff's compensation rate) for 500 weeks, for a total amount of \$219,235, plus prejudgment interest from July 31, 2003. The following are plaintiff's damages as of July 31, 2008:

(a)	500 weeks x \$438.47/week.....	\$219,235
(b)	Prejudgment interest at 8 ¾% from 7/31/03.....	114,231
	TOTAL DAMAGES (as of 7/31/08).....	\$333,466

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a finder of fact. Where a verdict for the party opposing the motion is not reasonably possible under the undisputed facts presented, summary judgment is proper. Evans v Stuart, 370 S.C. 522, 526, 636 S.E. 2d 632, 634(2006). Summary judgment is proper where there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. Rule 56, SCRCP (2008). It is not sufficient to avoid summary judgment for the opposing party, in this context, to create an inference that is not reasonable or an issue of fact that is not genuine. Evans, supra. Summary judgment should be granted where it is clear that no

issue of fact is involved. State ex rel. McCleod v. Brown, 278 S.C. 281, 283, 294 S.E. 2d 781, 782 (1982). In determining whether any genuine issues of material fact exist to 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. Moseley v. Oswald, 376 S.C. 251, 254, 656 S.E. 2d 380,381 (2008).

ARGUMENT

There are no genuine issues of material fact as to liability or damages. Once 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 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 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 defendant. In Santee Portland Cement v. Daniel International Corp., 299 S.C. at 271,

384 S.E. 2d at 694, 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 Court of Appeals 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 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. The discovery rule exists to avoid the harsh and unjust result of the closing of the courtroom doors to a plaintiff whose "blameless ignorance" resulted in a failure to pursue a cause of action within the time period set forth in a statute of limitations. Id.

Statutes 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). A cause of action arises when it should have been discovered through the exercise of reasonable diligence if the facts and circumstances would have put a person of common knowledge and experience on notice that a claim against another party might exist. Id. 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."

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); see also, Matthews v. City of Greenwood, 305 S.C. 267, 269, 407 S.E. 2d 668, 669 (Ct. App. 1991), *citing*, Brown v. Finger, 240 S.C. 102, 124 S.E. 2d 781 (1962).

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

In the case of Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005)², a case involving legal malpractice, 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 in that case has particular bearing upon the case at bar. There, the plaintiff, Dr. Franklin Epstein, was previously represented by David Brown, the defendant, in connection with his defense of a medical malpractice wrongful death and survival action. At the conclusion of the trial, the jury rendered a verdict against Dr. Epstein for over \$3,000,000. Dr. Epstein then filed a complaint 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. 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

² Epstein v. Brown has been cited with approval in numerous cases. See, for example, Anonymous Taxpayer v. S.C. Dept. of Revenue, 377 S.C. 425, 661 S.E.2d 73 (2008).

statute of limitations began to run, as it was then that 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 upheld 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 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. The fact that Defendant Wright "may" have made an error, as he said in his letter, did not give rise to a cause of action until it as determined that his workers comp claim was compensable (but barred by the defendant's settlement of the third party claim).

(c) Other jurisdictions follow the Epstein v. Brown Analysis

Other jurisdictions have held that the statute of limitations on lawyer negligence accrues on the date of the jury's verdict. 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 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:

"[I]f the prior action does not prevent enforcement of the remedy sought in the later action, then the pendency of the prior action can toll the statute of limitations in the later action. In this case, the viability of the malpractice [claim]...was contingent on the outcome of the underlying product liability case."

Id., at 700. The Supreme Court of California in Samuels v. Mix, 22 Cal.4th 1, 989P.2d 701 (1999), ruled that when a defendant attempts to apply the common law statute of limitations deriving from the "discovery rule" as a defense to an attorney malpractice claim the burden of proof is on the defendant to show that the injury was or should have been discovered sometime before the adverse verdict for the plaintiff. California courts have also shown that the statute of limitations can be tolled until the adverse judgment that caused accrual of the actual injury to a plaintiff. See Archdale 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 a client who has suffered an adverse result because of a lawyer's negligence has both knowledge of the negligence and present damage).

The court in Jordach Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 958 P.2d 1062 (1998), held that a statute of limitations can begin to run before an adverse judgment if the actual injury was suffered by the client before such judgment, and was know or should have been known by the client. However, the Jordache court held that the facts of each case must be examined to find out when, under the particular

circumstances, the "actual damage" first occurred. The Jordache court recognized the need for an ad hoc approach to the discovery rule and adverse verdicts.

In the instant case the plaintiff had no way of discovering the malpractice until the adverse ruling of the Worker's Compensation Commission on July 31, 2003. It was noted in 87 A.L.R 5th 473 Attorney Malpractice – Tolling or Other Exceptions to Running of the Statute of Limitations (2001) that

"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."

The plaintiff here did not have a compensable claim until the adverse ruling.

The employer and its carrier defended the workers compensation claim based on the "going and coming" rule to establish that the plaintiff's injuries from the accident were not compensable. The plaintiff was involved in a head-on collision while driving his personal vehicle en route to a job site located at Springs Catherine Plant in Chester from his home in Whitmire. 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 because he had been given an express order not to use the truck, not because such an action was outside the scope of his general "course of employment.") In response, the plaintiff asserted that the injuries were compensable as arising out of his employment by virtue of an exception to the "going and

coming" rule requiring that the plaintiff show the employer either paid him for the time during which the accident occurred or provided the means of transportation.

It was finally established at the workers' compensation hearing that the plaintiff was paid a car allowance and a mileage stipend, and, therefore, the Workers' Compensation Commission found the "going and coming" rule did not apply and the plaintiff's injuries were compensable. 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 defendant 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 [the Plaintiff's] right to recover workers' compensation benefits *if, in fact, [the Plaintiff was] entitled based on the facts of the case to receive those benefits.*" (emphasis added) (Affidavit of Thomas H. Pope, III, Exhibit C, letter of Defendant Wright dated February 1, 2000 to Kimmer).

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, 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 and that the cause of action accrued.

Consequently, the statute of limitations began to run on July 31, 2003, and the plaintiff timely filed this action on October 14, 2004³. The defendant's defense in this regard is without merit, and the plaintiff is entitled to judgment as a matter of law.

The defendant would have this Court believe that the applicable statute of limitations began to run in February or March of 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.

As stated above, in the instant case, this Court has previously found and concluded in its Order of Special Circuit Judge Jackson Kimball dated June 20, 2005 that the triggering event for liability was the adverse ruling of the Worker's Compensation Commission on July 31, 2003. This is especially the case here where the employer and its carrier were, prior to that date, asserting that Kimmer's injury was not compensable, i.e. was not an on-the-job injury.

³ 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).

Special Circuit Judge S. Jackson Kimball's Order of June 20, 2005, noted that there was not a finding that plaintiff's claim was precluded by the third party settlement until July 31, 2003 and that until that time the workers compensation insurer also maintained that the accident and injuries were not covered because they occurred outside the scope of plaintiff's employment – i.e., they occurred on the way to work. He denied defendant's motion for summary judgment, based at least in part on the fact that the circuit court had reversed the ruling of the workers compensation commissioner on the issue of whether the defendant's actions in settling the third party claim without notice were a bar to workers compensation where there was no prejudice to the workers compensation carrier. Judge Kimball further ordered that this action be stayed until the appeal of this issue was concluded. The Court of Appeals did not overturn the circuit court's ruling until Kimmer v. Murata of America, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2007).

**d. The Defendant's "Waiver of Conflict"
Was Not Notice of a Claim**

The defendant has pointed to a "Waiver of Conflict" signed by the plaintiff in February 2000 to allege that the plaintiff had notice of a claim against the defendant for his negligent settling of the third party claim without notice to the employer or its carrier. Specifically, the defendant directed the Court's attention to the language in such waiver providing, "[the Plaintiff understands] that [the Plaintiff] may have a right to make a claim against Mr. Wright concerning his representation related to my workers' compensation action." First, it is inequitable and unconscionable that defendant would utilize a document he prepared and which he advised the plaintiff was necessary to sign in order that he might continue representing the plaintiff in the prosecution of other third party claims in his defense against the very same claim mentioned in the waiver. The South Carolina Rules of Professional Conduct Rule 407, SCACR, Rule 1.8.

holds that: No lawyer shall make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement. Such, agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. See, Matter of Clarke, 278 S.C. 627, 300 S.E.2d 595 (1983) ("A lawyer should not seek by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so." 300 S.E.2d at 597).

Second, as discussed above, there is a difference between having notice that one might have a future claim against a defendant and actually having the ability and the legal right to maintain the claim. See Bergstrom, supra. Had the plaintiff prematurely brought an action against the defendant prior to the decision of the Workers' Compensation Commission of July 31, 2003, the defendant would be asking this Court to dismiss the action for having failed to allege facts upon which relief could be granted because it had not been determined that plaintiff's claim was compensable under the Workers Compensation Act, or that he had been injured, or that such injury was proximately caused by the defendant's actions.

e. The Defendant Erroneously Argues that the Cause of Action Arose in June 1999.

The defendant further 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 the Peterson case, the court held that, under the discovery rule, the statute of limitations runs from the date an injured party either knows or should have known through the exercise of reasonable diligence that a cause of action arises from the wrongful conduct, and that the fact that the injured party may not comprehend the full extent of his damages is immaterial. *Id.* 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.* Therefore, under *Dean*, it is clear the action at bar did not arise until facts presented themselves to allow the plaintiff to establish that: (1) he had a compensable workers compensation claim; (2) the defendant's negligent conduct prevented plaintiff's recovery of benefits on that compensable claim; (3) the plaintiff sustained damage **and the extent of damage ??**; and (4) his damages were the proximate result of the defendant's negligent conduct.

Secondly, the instant matter does not involve circumstances where the plaintiff simply did not comprehend the full extent of his damages. Instead, the issue was, until July 31, 2003, whether his injury was compensable, and if so, whether the injuries were legally caused by the defendant. Stated differently, this is a case of whether there was a case at all, not the size of the case. The cause of action accrued on July 31, 2003, when the Workers' Compensation Commission ruled that the case was compensable under the Worker's Compensation law (i.e., not barred by the going and coming rule), and that the plaintiff was entitled to full, total and permanent disability benefits but for the defendant's settlement of the third party claim without notice.

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 or March of 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 plaintiff was not diligent in his inquiry as to whether a claim existed against the defendant. As a matter of fact, the plaintiff'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 cited the case of Walter J. Kline, Co. v. Kneece, 239 S.C. 478, 123 S.E.2d 870 (1962), for the proposition that the "statute of limitations clock" began "ticking" when the plaintiff acquired knowledge of facts "sufficient to put him on inquiry, which, if developed, will disclose" the claim. The plaintiff would assert that such analysis is not applicable to the instant matter. However, to the extent it is, the only fact which the defendant asserts was sufficient to put the plaintiff on "inquiry" is simply that the defendant's wrongful settlement of the plaintiff's third party claim without notice to the employer or its carrier may have prejudiced the plaintiff's entitlement to workers' compensation benefits "if he was entitled to them at all." (emphasis added). (See Exhibit C to Affidavit of Thomas H. Pope, III, letter of defendant to Kimmer). The

defendant contends the plaintiff acquired knowledge of this fact in February or March of 2000. At that time, it was not yet established that the plaintiff's injuries were compensable in the first instance and that it was unknown then as to whether the defendant's wrongful conduct barred the plaintiff from receiving workers' compensation benefits. These salient facts were only established for the first time on July 31, 2003, only a little over a year before this action was commenced. As a result, this action was timely, and the defendant's argument in this regard is, again, incorrect.

In any event, 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. While the defendant argues, based on a federal case, that South Carolina's statutes of limitations require "very little to start the clock" (citing Roe v. Doe, 28 F3d 404 (4th Cir. 1994)). This is not the case. 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 or March of 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 or March of 2000, the defendant 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." (Deposition of Phillip Wright, p. 21, line 23 thru p. 22, line 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..." (Deposition of Wright, p. 33, lines 18-20) (emphasis added). In light of these representations to the plaintiff, the plaintiff was not on notice that he had a malpractice claim against the defendant despite his wrongful and misguided settlement of the third party claim.

**f. The Defendant's Conduct Estops Him from
Asserting the Defense of Statute of Limitations**

A defendant is estopped from claiming the statute of limitations as a defense if any delay that otherwise would give operation to the statute had been induced by defendant's conduct. This may consist of an express representation that a lawsuit is not necessary. Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (2000). The defendant's conduct may also involve inducing the plaintiff to forbear exercising the right to sue. Id. "This conduct may be either an express representation that the claim will be settled without litigation or actions suggesting a lawsuit is unnecessary." Harvey v. South Carolina Dept. of Corrections, 338 S.C.

500, 509, 527 S.E.2d 765, 770 (Ct. App. 2000), quoting Moates v. Bobb, 322 S.C. 172, 175, 470 S.E.2d 402, 403 (Ct.App.1996).

Here, even if the statute of limitations began to run before the July 31, 2003, decision of the Workers' Compensation Commission, the defendant is equitably stopped from asserting the statute of limitations defense due to his representations to the plaintiff that he did not believe the plaintiff had a viable workers compensation claim. It would be unjust and inequitable to allow the defendant in these circumstances to rely on a statute of limitation defense where the defendant either gave advice or created the impression that his "mistake" was of no affect.

The defendant disingenuously argues that the plaintiff should have known to bring an action against him at the very time he was (while representing the plaintiff) telling the plaintiff he did not have a compensable workers compensation claim, and therefore, would not have a claim against him. Therefore, although the plaintiff's cause of action accrued on July 31, 2003, and this action was then timely filed on October 14, 2004, the defendant is, nonetheless, equitably stopped from asserting a statute of limitations defense.

In order to recover for legal malpractice, a plaintiff must prove the existence of an attorney-client relationship, a breach of duty by the attorney, damages to the client, and that such damages are proximately caused by the breach of the attorney. Doe v Howe, 367 S.C. 432, 442, 626 S.E. 2d 25, 30 (Ct. App. 2005), citing Brown v. Theos, 345 S.C. 626, 629, 550 S.E. 2d 304, 306 (2001). A lawyer shall provide competent representation to a client, which requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Rule 407, SCACR, Rule 1.1. In a legal malpractice action, the plaintiff must establish that he would have obtained a better result in the underlying action absent the alleged the malpractice of the attorney, and it is not necessary that the client demonstrate that he would have won the

underlying case, rather, it is enough to show he lost a valuable right, the settlement of the underlying case. Doe, supra.

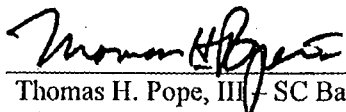
Proximate cause in a legal malpractice action requires proof of causation in fact and legal cause. Sims v Hall, 357 S.C. 288, 298, 592 S.E. 2d 315, 320 (Ct. App. 2003). Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. Id. Legal cause is proved by establishing foreseeability. Id. For an act to be a proximate cause of the injury, the injury must be a foreseeable consequence of the act. Id. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the actor should have contemplated the particular injury that occurred. Id. It is undisputed that at all times relevant to the allegations contained in the amended complaint the defendant represented the plaintiff in connection with his injuries. This fact is evidenced by the defendant's filing of a Form 50 with the Worker's Compensation Commission on the plaintiff's behalf on or about June 18, 1999. (See deposition of Phillip E. Wright, p. 33, line 17 through p. 336, line 11.) It is further undisputed that the plaintiff would not have suffered the injury complained of but for the defendant's recommendation and settlement of the third party under insurance claim without notice to the worker's compensation carrier.

Due to the defendant's negligence, plaintiff was denied total disability under the Workers Compensation Act. But for the defendant's failure to notify the employer's compensation insurance carrier of the third party settlement as set forth in S.C. Code Ann. §42-1-5660, plaintiff Kimmer would have been entitled to an award on July 31, 2003 of \$219,235 (\$438.47 per week x 500 weeks), plus prejudgment interest in the amount of \$114,231 from that date to July 31, 2008, and continuing at the legal rate of 8 ¾% until judgment is entered.

CONCLUSION

There are no genuine issues of material fact. Defendant was negligent in representing Kimmer, and his negligence caused Kimmer to lose his benefits under the Workers Compensation Act. The plaintiff is entitled to summary judgment on the negligence cause of action. Plaintiff is entitled to an Order directing the entry of judgment in his favor, against Defendant Wright in the amount of \$219,235, plus prejudgment interest from July 31, 2003. Judgment should be entered in this matter for \$333,466, plus interest at 8 ¾% from July 31, 2003 until the date that judgment is entered.

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September 3, 2008
Newberry, SC

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

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

CASE NO.: 2004-CP-46-2659

vs.)

Phillip E. Wright,)
Defendant.)

**MEMORANDUM IN SUPPORT
OF DEFENDANT PHILLIP E.
WRIGHT'S MOTION FOR
SUMMARY JUDGMENT**

The Defendant Phillip E. Wright ("Wright") moves this Honorable Court for summary judgment on the basis that the statute of limitations expired on all claims asserted by the Plaintiff Richard Kimmer ("Kimmer") before Kimmer filed this lawsuit.

I. FACTS

This case is a legal malpractice action, whereby the Plaintiff, Kimmer, alleges that the Defendant, Wright, breached the duty of care, skill and diligence while handling a claim on his behalf during 1999. The underlying case from which this action arises resulted from Kimmer's personal injuries sustained in an automobile accident that occurred on January 29, 1999, while Kimmer was traveling to work. (Plaintiff's Amended Complaint, ¶ 6).

Wright represented Kimmer during Kimmer's pursuit of a claim against the tortfeasor in the automobile accident. On June 16, 1999, Wright settled the claim against the tortfeasor, on behalf of Kimmer, for the minimum limits of the tortfeasor's insurance policy, \$15,000.00. (Release & Settlement Agreement attached hereto as Exhibit 1). In

conjunction with settling the claim, Kimmer signed a release dated June 16, 1999, whereupon he released the tortfeasor from all liability.

On June 18, 1999, Wright filed a worker's compensation claim for Kimmer against Murata of America, Kimmer's employer. (Workers' Compensation Commission "Form 50" attached hereto as Exhibit 2). Liberty Mutual, the workers' compensation carrier refused to pay temporary total wage payments or medical expenses and notified Wright that the settlement and release of the 3rd party tortfeasor was in violation of S.C. Code § 42-1-560. On January 13, 2000, Liberty Mutual filed a Form 51 with the Worker's Compensation Commission, which specifically denied liability because the "third party action [was] settled without consent." (Workers' Compensation Commission "Form 51" attached hereto as Exhibit 3).

Beginning in 1999 Kimmer was aware that he had sustained damages from the automobile accident which included medical bills, lost wages, and pain and suffering. (Plaintiff's deposition, pp. 51, 53, 55-56, 59-60, attached as Ex. 4) Kimmer continued to have knee problems in 1999. (Plaintiff's deposition, pp. 63-64, attached as Ex. 5) In addition, Kimmer states that as a result of not having his bills timely paid contributed to his post-traumatic stress disorder. (Plaintiff's deposition, pp. 70-73, attached as Ex. 6)

At some point during January 2000, the Plaintiff traveled to Mr. Wright's office for a conference during which Mr. Wright told the Plaintiff that that, "he screwed this up" and that the Plaintiff's workers compensation claim had been denied because Wright had made a mistake by settling the claim against the tortfeasor without obtaining the consent of the employer and its workers compensation carrier. Kimmer also recalls that Wright told him that Kimmer would have to find another attorney to handle the workmen's comp

case. (Plaintiff's deposition, p. 47, lines 10-20, attached as Ex. 7) On February 1, 2000, Wright drafted a letter to Kimmer, wherein Wright informed Kimmer that he "may be entitled to eventually file a claim against me [Wright] for some alleged error in the workers' compensation case." (February 1, 2000 letter from Wright to Kimmer attached hereto as Exhibit 8). Kimmer testified during his deposition that he did in fact remember reading that particular letter. (Plaintiff's deposition, pp. 45-46, attached as Ex. 9). During the latter part of January and early February 2000, Kimmer began consulting with separate counsel regarding his worker's compensation claim as evidenced by the attorney's letter to Phillip E. Wright on February 10, 2000. (February 10, 2000 letter to Phillip E. Wright attached hereto as Exhibit 10).

At this point in time, February 2000, Kimmer had two pending claims arising from the January 29, 1999, automobile accident: (1) workers' compensation claim and (2) underinsurance motorist claim against State Farm. In early February, Kimmer agreed to allow Wright to continue representing him in his underinsurance claim against State Farm as evidenced by the February 1, 2000 "Waiver of Conflict" that Kimmer executed. (Waiver of Conflict attached hereto as Exhibit 11). Notably, the "Waiver of Conflict," signed by the Plaintiff, 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."** (emphasis added). On the same day that Kimmer executed the Waiver of Conflict, Kimmer Authorized Wright to release the Workers' Compensation portion of his file to his new attorney. (Authorization to Release File attached hereto as Exhibit 12).

On February 24, 2000, Kimmer transmitted a letter to Wright, wherein Kimmer terminated Wright as his counsel for all matters and instructed Wright to release his entire file to his new attorney. (February 24, 2000 letter from Kimmer to Wright attached hereto as Exhibit 13). As of February 24, 2000, Wright did not represent Kimmer on any matter. After February 24, 2000, Kimmer had retained new counsel to represent him with regards to both of his pending claims.

The Plaintiff by February of 2000 believed that his post-traumatic stress disorder was in part the fault of Mr. Wright. Also, by February of 2000, the Plaintiff had been informed that he had not received workers compensation benefits because Mr. Wright had made a mistake. (Plaintiff's deposition, p. 87, line 2 - p. 88, line 10. , attached as Ex. 14)

On October 30, 2003, Kimmer and Wright entered into a Tolling Agreement. (Tolling Agreement attached hereto as Exhibit 15). The Plaintiff entered suit against the Defendant on October 14, 2004 (Summons and Complaint attached as Exhibit 16) in which he alleges that Wright was notified by the workers compensation carrier that Wright's actions in settling the third party claim without giving notice to the carrier was allegedly violative of §42-1-560 of the S.C. Code and this information was disclosed to the Plaintiff in Wright's letter of February 1, 2000. (Amended Complaint, paragraphs 15 and 16, attached as Ex. 17)

II. ISSUE TO BE DECIDED BY THE COURT

When did the Statute of Limitations commence to run as to any claim against Defendant Wright?

III. 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), SCRPC, 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, 335 (Ct.App.2002) citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537, 545 (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).

IV. ARGUMENT

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

S.C. Code §§ 15-3-530 & 535 (1976 as amended) 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. S.C. Code § 15-3-535 (1976 as amended) 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.

B. Controlling Law As To When The Clock Starts: The Discovery Rule

It is well settled in this state that the accrual of a cause 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. Efir'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. Kneece, 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). Therefore, 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), attached as Ex. 18,

In Dean, id., the plaintiff observed in November 1984 a fine crack approximately three feet in length at the front right corner of her building 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 recited the standard language 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."

Dean, id. at pp. 363-364.

Dean argued that the crack which appeared in 1984 and the bulging of the bricks 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." 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)(Attached as Ex. 19)

Burgess sued her former attorney for legal malpractice, contending that although the Plaintiff claimed she was aware that a Cancer Society employee, Oulla, was having an affair with her former attorney, McLeod, she was unaware that Oullah was passing information she had allegedly learned from McLeod about Burgess's claim 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 p. 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 p. 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 notice, the statute had commenced to run.

Burgess illustrates how little information the Plaintiff must possess to cause the Statute of Limitations to commence to run in South Carolina. The Fourth Circuit of Appeals observed, "South Carolina's Statute of Limitations requires 'very little to start the clock'". Roe v. Doe, 28 F.3d 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).

Determining when a cause of action arises or accrues under the discovery rule requires an objective analysis, not a subjective one. Burgess, 386 S.E.2d 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. Section 15-3-535 (1976, as amended).

Peterson v. Richland County, et al, 335 S.C. 135, 515 S.E.2d 553 (Ct. App. 1999), attached as Ex. 20

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 1999, pursuant to Rule 40(c)(3), SCRCF, 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."

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.

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, 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.

Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005)(attached as Ex. 21)

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 failed 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 up 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, but:

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.

C. 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." (Plaintiff's deposition, p. 47, line 16 - p. 48 l. 16, attached as Ex. 22) 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 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. 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, the Defendant is entitled to summary judgment as a matter of law.

During Kimmer's deposition, he testified about the following facts and circumstances that provide conclusive evidence that Kimmer was 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. (Plaintiff's Deposition p. 29, l. 16-p. 30, line 8, attached as Ex. 23).
- (2) By March of 1999, Kimmer believed that the workers' compensation carrier should have been paying him from the beginning. (Plaintiff's Deposition p. 38, l. 24-p. 40, l. 6, attached as Ex. 24).
- (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 this. (Plaintiff's Deposition p. 45, line 6 - p. 46, line 4, attached as Ex. 9).
- (4) The Plaintiff 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."** (Attached as Ex. 11)
- (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.” (Plaintiff's Deposition pp. 47, line 2- p. 48, line 16, attached as Ex. 22).

- (6) Kimmer recalls receiving and reading Wright's February 1, 2000 letter, addressed to Richard Kimmer. (Plaintiff's Deposition pp. 45, lines 2-6, attached as Ex. 25).

The following is an excerpt from the February 1, 2000 letter from Wright to Kimmer:

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. attached as Ex. 8).

- (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. (Plaintiff's Deposition p. 48, l. 24-51, l. 12, attached as Ex. 26).
- (8) Kimmer knew that he had sustained a wage loss through December 10, 1999. (Plaintiff's deposition, p. 73, l. 15- p. 74, l. 15, attached as Ex. 27)
- (9) As of February 1, 2000, Kimmer had another attorney representing him in the workers' compensation claim and related matters. (Plaintiff's Deposition p. 77, l. 18-p. 78, l.14, attached as Ex. 28).

(10) As of February 24, 2000, Wright did not represent Kimmer in any matter. (Plaintiff's Deposition p. 82, l. 11- p.84, l. 19, attached as Ex. 29).

(11) Kimmer blames Wright for his post-traumatic stress disorder problems which started in 1999; (Plaintiff's deposition, p. 87, l. 2-p. 88, l. 10, attached as Ex. 14)

(12) By February 2000, Kimmer admits that Wright had represented to him that part of Kimmer's not getting paid was Wright's fault. (Plaintiff's Deposition p. 88, lines 2-10, attached as Ex. 30).

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 in *Roe v. Doe*, 28 F.3d 404 (4th Cir. 1994) that South Carolina's Statute of Limitations requires "very little to start the clock." *Roe v. Doe*, 28 F.3d 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 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, Wright is entitled to summary judgment as a matter of law.

D. Application of Law to Facts

The Plaintiff alleges that the Defendant 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" (Amended Complaint, paragraph 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." (Amended Complaint, paragraph 28)

The facts in this case insofar as they relate to 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, id. 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, he blamed Wright not only for his not receiving his compensation benefits but also for his post-traumatic stress disorder damages which commenced during 1999.

The fact that the Plaintiff did not know as of February 2000, the full extent of the damages 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.

Likewise, the Plaintiff admits that by February 2000, he assigned blame to Wright for the damages he seeks to recover in this action.

The application of the principles set out in Dean, 468 S.E.2d 645 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, it commenced in this case as to any claim against Wright during February 2000 because that is when the Plaintiff attributed damages he had sustained to Wright's mistake. Because all of the Plaintiff's damages grow out of the same core of operative facts, as in Dean, id., they are not capable of being severed into multiple claims merely because some of the Plaintiff's damages are recoverable under the Compensation Act and some are not.

E. Plaintiff's Argument as to the Statute of Limitations

The Plaintiff will likely argue that the Statute of Limitations did not commence to run until July 31, 2003, when the workers compensation commissioner ruled against the Plaintiff at the hearing on his workers compensation claim against Murata of America, Inc. because until then, so the Plaintiff argues, he had not sustained any damages. In any event, so the Plaintiff argues, this motion is premature because if the commissioner is reversed on appeal, this case will become moot and, therefore, it should be stayed pending the appeal. These arguments are without merit for the following reasons.

First, these arguments lack merit because the Plaintiff 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 of 2000, the Plaintiff blamed upon Wright's alleged negligence. A reversal may reduce the Plaintiff's damages, but it would not under any circumstance satisfy the Plaintiff's bills in a timely manner as he expected and about which he now complains. Indeed, because worker's compensation benefits involve the receipt of weekly wage benefits the Plaintiff's failure to receive those created damages each week during 1999.

Second, the Plaintiff attributes damages to the Defendant's alleged negligence which has nothing whatever to do with his workers compensation claim because, under the facts of this case, those damages would not be compensable under the workers compensation statute. Recall that the Plaintiff testified that his post-traumatic stress disorder was caused partly by his inability to timely 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. Clearly, post-traumatic 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 act. Therefore, reversal of the adverse ruling by the commissioner would not make these alleged damages moot because they cannot be recovered under the Act. Post-traumatic 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 922 (Ct. App. 1988). Post-traumatic stress disorder resulting from the late payment of bills because one's attorney failed to give statutory notice does not meet that standard.

Although the Plaintiff 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 comp. carrier prior to settling the tort action. All of the Plaintiff's alleged damages flow from this failure.

The Plaintiff would ask the Court to 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 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 pp. 363-364.

Third, when the "statute of limitations clock" starts ticking in large part depends upon what information becomes available to the Plaintiff and when that information appears. This is the reason that the results of the Statute of Limitations cases are fact-driven. The commencement of the running of the Statute as to claims for professional negligence against an attorney depends upon when the plaintiff acquires sufficient information to place him on inquiry notice that the attorney may have breached a standard of care such that a claim may exist as a result. In some cases the plaintiff may not acquire that information until some adverse result in the case¹, or, as in Dean, *id.* the plaintiff attributes her damages to the defendant's conduct.

The Plaintiff argues that the "case within a case" doctrine supports its position that the statute did not begin to run until the Commissioner ruled against Kimmer. The

¹ In Epstein, 610 S.E.2d 816, the trial court ruled that the Statute of Limitations commenced to run "at the latest" on the date of the adverse verdict. An "adverse judicial result", however, is not the event which, according to the case law, starts the "Statute of Limitations clock" ticking. That event is when the plaintiff acquired knowledge of any facts "sufficient to put said party on inquiry, which, if developed, will disclose" a claim. Walter J. Kline, Co. v. Kneece, 123 S.E.2d 870 quoting Tucker v. Weathersbee, 82 S.E. 638

Plaintiff argues that because this doctrine requires that the Plaintiff's underlying claim most probably would have been successful, that it could not run until the ruling. As pointed out by the Defendant's, expert, F. Earl Ellis, Jr., in order to prevail in a legal malpractice action the plaintiff must prove: (1) the existence off 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. The proximate causation prong is explained as the Plaintiff "most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice." See Doe v. Howe, 367 SC 432, 626 S.E. 2d 25 (Ct. App. 2005). These requirements only speak to the proof needed to prevail on a claim, not to the issue of whether or not there are sufficient facts to place the plaintiff on notice that he may have a claim.

In Doe v. Howe, the plaintiff sued Howe for what he perceived was an inadequate settlement of the underlying matter. Because the underlying case was settled, there was no chance that it could be tried to a conclusion and demonstrate proximate cause as argued by Mr. Kimmer. Therefore, the Plaintiff in a legal malpractice action cannot wait for the outcome of the underlying case, but must file suit within three years of being aware of sufficient facts that he may have a claim.

In the case before the Court it is not a close question as to when the Statute commenced to run. The above evidence and testimony leads to the conclusion that the Plaintiff had sufficient information by February 2000 that at the very least he was on inquiry notice of a claim.

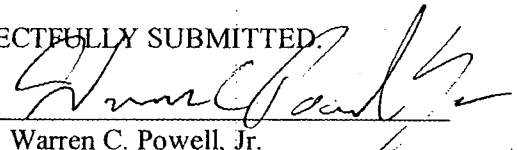
V. No Tolling

There are no facts active in this case to support the tolling of the Statute of Limitations. The Defendant did not represent the Plaintiff in any matter after February 24, 2000. (Plaintiff's deposition, p. 84, attached as Ex. 31) Further, the tolling agreement entered between the parties (attached as Ex. 15) tolled the Statute beginning with the date of the Agreement. The Statute expired prior to the date the agreement was signed.

VI. Conclusion

For the reasons set forth herein, the Defendant, Phillip E. Wright, is entitled to summary judgment on all claims asserted by the Plaintiff.

RESPECTFULLY SUBMITTED

By: 

Warren C. Powell, Jr.
BRUNER, POWELL, ROBBINS, WALL
& MULLINS, LLC
1735 St. Julian Place, Suite 200 (29204)
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Columbia, SC 29260

(803) 252-7693

Attorneys for Defendant
Philip E. Wright

Columbia, South Carolina

September 5, 2008

2005 MAR 10 PM 3:13

COUNTY OF YORK

C.C.O.P. & GS
YORK COUNTY, SC

Plaintiff,

MOTION TO AMEND ANSWER OF
DEFENDANT

(Rule 15, SCRCP)

Defendant.

You will please take notice that Defendant Phillip E. Wright will move before the Presiding Judge of the York County Court of Common Pleas in York, South Carolina, on the tenth day after service hereof, or at such time as the Court may schedule, pursuant to Rule 35 of the South Carolina Rules of Civil Procedure, for an Order allowing the Defendant to amend his Answer.

The grounds for this motion are that information which has been revealed during discovery, both written and most recently during the deposition of the Plaintiff taken on March 2, 2005, has disclosed evidence to support a defense of the Statute of Limitations.

WHEREFORE, Defendant Wright respectfully requests that this Court enter an Order allowing him to file and serve the Amended Answer attached hereto.

BRUNER, POWELL, ROBBINS,
WALL & MULLINS, LLC

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Post Office Box 61110
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147

(803)252-7693
Attorneys for Defendant
Phillip E. Wright

Columbia, South Carolina

March ___, 2005

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	CIVIL ACTION NO.: 2004-CP-46-2659
	)	
Richard Kimmer,	)	
	)	
Plaintiff,	)	
	)	AMENDED ANSWER OF
vs.	)	DEFENDANT WRIGHT
	)	
Phillip E. Wright	)	
	)	
Defendant.	)	
	)	

The Defendant, Phillip E. Wright, specifically reserving his right to move under Rule 12, South Carolina Rules of Civil Procedure, amends his answers the Plaintiff's Complaint by offering unto this Honorable Court:

FOR A FIRST DEFENSE

1. The defendant denies each and every allegation contained in the complaint not admitted or otherwise explained herein.
2. The defendant admits the allegations contained in complaint paragraphs 1, 2, 3, 5, 9, 10, 12, 13, 14, 15, and 16.
3. The defendant admits so much of the allegations as contained in complaint paragraph 4 as alleges that the plaintiff was an employee of Murata of America. The defendant is without information as to the remaining allegations and, therefore, the same are denied.
4. The defendant admits so much of the allegations as contained in complaint paragraph 6 as alleges that the plaintiff was injured from his accident of January 29, 1999, but the remaining allegations contained in said paragraph are denied.
5. The defendant admits so much of the allegations as contained in complaint

paragraph 7 as alleges that he represented the plaintiff for injuries sustained in his automobile accident against the at fault driver but the remaining allegations contained in said paragraph are denied.

6. Subject to the responses given above the defendant admits the allegations contained in complaint paragraph 8.

7. As to the allegations contained in complaint paragraph 11 the defendant admits that the settlement with the at fault driver was concluded on or about June 16, 1999 but any remaining allegations contained in said paragraph are denied.

8. As to the allegations contained in complaint paragraph's 17 through 21 the defendant would affirmatively assert that he was not a party to the action referred to in subparagraphs and that the results and proceedings of which known by the defendant are purely hearsay. Accordingly, the defendant is without first-hand knowledge of said proceedings and, therefore, denies same.

9. As to the allegations contained in complaint paragraph 25 the defendant reiterates the above allegations.

10. As to the allegations contained in complaint paragraph 26 the defendant admits that he owed the specified duty of care within the scope of the services rendered to the plaintiff.

11. As to the allegations contained in complaint paragraph 29 that allegations do not set forth facts requiring a response from this defendant.

FOR A SECOND DEFENSE

12. The defendant reiterates the allegations set forth hereinabove as fully as if repeated herein verbatim.

13. The allegations contained in the complaint fail to set forth facts sufficient to constitute a cause of action against the defendant.

FOR A THIRD DEFENSE

14. Defendant reiterates the allegations set forth hereinabove as fully as if repeated herein verbatim.

15. The Plaintiff was negligent, reckless, willful and wanton in the manner in which he conducted his affairs throughout the transactions described in the Complaint and, therefore, the negligence, recklessness, willfulness, and wantonness of the Plaintiff, combined and concurred with this Defendant, if any, and the same is denied, was a direct and proximate cause of the Plaintiff's damages and without which the same would not have occurred, and was greater in proportion to that of this defendant, if any, and the same is denied, and, therefore, the Plaintiff may not recover from this defendant for any of his alleged injuries or damages complained of in the complaint. This Defendant, therefore, expressly pleads contributory and comparative negligence, recklessness, willfulness, and wantonness of the Plaintiff as a bar to any recovery against this Defendant. As an alternative, this Defendant is entitled to a reduction of damages based upon the percentage of the Plaintiff's negligence, recklessness, willfulness, and wantonness.

FOR A FOURTH DEFENSE

16. The defendant reiterates the allegations contained hereinabove as fully as if repeated herein verbatim.

17. The defendants' conduct is not the proximate cause of any damages asserted in the plaintiff's complaint.

FOR A FIFTH DEFENSE

18. The defendant reiterates the allegations contained hereinabove as fully as if repeated herein verbatim.

19. This action was commenced after the expiration of the applicable Statutes of Limitations South Carolina Code Ann. Sec. 15-3-530 and Sec. 15-3-545, and the defendant pleads said statutes as a complete bar to this action.

WHEREFORE, Defendant Wright having fully answered the Complaint, prays that the same be dismissed with costs.

BRUNER, POWELL, ROBBINS, WALL
& MULLINS, LLC

Warren C. Powell, Jr.
1735 St. Julian Place, Suite 200 (29204)
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693

Columbia, South Carolina

March __, 2005

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Richard Kimmer)

Plaintiff,)

v.)

Philip E. Wright,)

Defendant.)

IN THE COURT OF COMMON PLEAS
Civil Action No. 2004 CP 46-2659

PLAINTIFF'S MOTION FOR STAY

**TO: DEFENDANT PHILIP E. WRIGHT AND HIS ATTORNEY,
WARREN C. POWELL, JR., ESQUIRE**

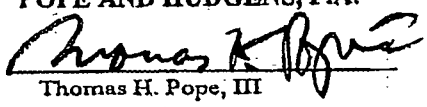
PLEASE TAKE NOTICE that the plaintiff, by and through his undersigned counsel, will move before The Honorable S. Jackson Kimball at 10 AM on June 9, 2005, in the York County Court of Common Pleas, or as soon thereafter and at such time and place as designated by the Court, for an Order staying this action until the case of Richard Kimmer v. Murata of America and Liberty Mutual Insurance Company (Civil Action No. 2004 CP 12-0251) which is presently pending in the Chester County Court of Common Pleas, is concluded with finality.

This motion is based upon the record in this case and in the case of Kimmer v. Murata, et al. the applicable law, the South Carolina Rules of Civil Procedure, and any documents or affidavits to be supplied to the Court prior to a hearing in this matter.

The thrust of this motion is that the case in Chester County Common Pleas (Kimmer v. Murata, et al.) has been resolved favorably to Plaintiff Kimmer (see Exhibit A attached herewith, which is the letter of Judge Kenneth Goode's law clerk directing counsel for Kimmer to prepare an Order reversing the Workers Compensation Commission and awarding total disability and lifetime medical benefits to Kimmer) and, the ruling in that case is dispositive of this one. If the decision in the Chester case of Kimmer v. Murata is appealed and upheld on appeal, it will obviate the issues raised in the instant case. If plaintiff prevails ultimately in Kimmer v. Murata, et al., he would, upon payment of the disability called for therein, dismiss the instant action (Case No. 2004 CP 46-2659).

The Court should defer and stay ruling on any motions, including any motions for summary judgment at this time, and issue its Order staying the instant case until the ultimate, final conclusion of Kimmer v. Murata of America, et al., Civil Action No. 2004 CP 12-0251.

POPE AND HUDGENS, P.A.

By: 

Thomas H. Pope, III

PO Box 190

1508 College Street

Newberry, SC 29108

803-276-2532

Attorneys for Plaintiff Richard Kimmer

May 26, 2005

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STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Richard Kimmer)

Plaintiff,)

v.)

Philip E. Wright,)

Defendant.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2004 CP 46-2659

PLAINTIFF'S MEMORANDUM

IN SUPPORT OF MOTION FOR STAY

AND IN OPPOSITION TO SUMMARY

JUDGMENT MOTION BY DEFENDANT

INTRODUCTION

This is a professional negligence action arising out of Defendant Wright's failure to give notice to plaintiff's workers compensation carrier/employer of a settlement of a third party action. The alleged professional negligence by attorney Wright arose out of the workers compensation claim in Richard Kimmer v. Murata of America and Liberty Mutual Insurance Company (WCC File No. 9908422). The appeal of the workers comp decision in Kimmer v. Murata of America, et al. is presently pending in Chester County, Civil Action No. 2004-CP-12-0251. In that case The Honorable Kenneth Goode conducted a hearing on the appeal on May 18, 2005 and by his letter dated May 25, 2005, Judge Goode ruled in favor of the claimant and reversed the decision of the Workers Compensation Commission which had denied Kimmer benefits based on the failure to give notice of the settlement of the third party claim. In that letter (Exhibit B to affidavit of counsel dated 6/7/05), Judge Goode directed plaintiff's counsel to prepare a proposed Order granting full relief to claimant. An Order is being prepared to be submitted to Judge Goode, but the Order has not yet been signed.

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The ruling of Judge Goode, unless it is reversed on appeal, will resolve all issues in the instant case of Kimmer v. Wright and will render the instant case moot. It is plaintiff's position that this Court should issue its Order granting a stay of all matters in Kimmer v. Wright until there has been a final determination in the case of Kimmer v. Murata of America, et al., Civil Action No. 2004-CP-12-0251¹.

In the alternative, it is plaintiff's position that more depositions need to be taken in Kimmer v. Wright and the Defendant's Motion for Summary Judgement, filed one day after the filing of defendant's amended answer adding the statute of limitations as a defense, is premature and should be denied.

STATEMENT OF FACTS

A review of the Petition for Judicial Review dated June 16, 2004 in the case of Kimmer v. Murata of America and Liberty Mutual Insurance Company (2004 CP 12-0251) and the Amended Complaint in the instant action of Kimmer v. Wright reveals that the factual underpinnings of both cases revolve around the identical facts.

In the Petition for Judicial Review, Plaintiff Kimmer seeks to overturn the decision of the Workers Comp Commission so that he can get an award of total disability, plus past medical bills and lifetime medical benefits, with a set-off for the net proceeds of a third party settlement in the amount of \$10,000. If Judge Goode's letter ruling of May 25, 2005, (Exhibit B) once reduced to a

¹ When this action was commenced with the filing of a Summons & Complaint in October 2004 it was expected that a stay of this action would be needed. See Paragraph 29 of the Complaint, where it is asserted that a stay of this action would be needed "pending the outcome of the appeal of the workers compensation decision" in 2004 CP-12-0251 (Kimmer v. Murata, et al.).

written order, is not appealed or is affirmed on appeal it will obviate and render moot the instant case of Kimmer v. Wright.

In the instant case, the plaintiff alleges professional negligence by his then-attorney Wright for settling the third party claim without giving notice to the employer/carrier. The plaintiff would not have a case against Wright unless and until the workers comp appeal results in an unfavorable ruling to Kimmer.

The only reason the instant action was commenced was because of a conversation between counsel, confirmed by a letter dated October 11, 2004, which was written to Wright's carrier's attorney, Mr. Powell, confirming that Mr. Powell wanted plaintiff to bring the action before the case was mediated. Prior to that letter, the parties had been discussing a 3-way mediation which would include the plaintiff, Defendant Wright and his carrier, and the workers comp carrier (see Affidavit of Thomas H. Pope, III dated June 7, 2005). A tolling agreement had previously been entered between Kimmer and Wright which was to end on November 1, 2004. Rather than mediate, as previously agreed, or extend the tolling agreement, Wright's carrier's attorney suggested that plaintiff bring suit against Wright so that Wright could subpoena records to understand the claim better.

But for the conversation with carrier's counsel in October 2004, this case would have either been mediated or stayed by the extension of the tolling agreement.

ARGUMENT

A. The Motion for Stay Should Be Granted.

Because a favorable resolution of Kimmer v. Murata (2004 CP 12-0251) will render the instant case completely moot,² plaintiff's motion for stay should be granted.

The controlling case is Talley v. John-Mansville Sales Corp., 285 S.C. 117, 328 S.E.2d 621 (1985), where the Supreme Court said that it was reversible error for the trial court to have denied a motion for stay of a third party action pending the conclusion of the workers compensation action. In that case, the court said that it was an abuse of discretion for the trial court not to have granted the motion for a stay.

In the Talley case, as noted by Judge Alex Sanders in Trial Handbook for South Carolina Lawyers, the trial judge committed reversible error in not granting the motion to stay because his failure to do so put the moving party (the plaintiff) "between a rock and a hard place" through no fault of his own. In the instant case, the plaintiff would also be put "between a rock and a hard place" if this Court does not grant the stay because if this case proceeds forward, the plaintiff will incur costs for this litigation which might be for naught, and the defendant would no doubt take the position that the plaintiff has not been damaged unless and until there is a final determination against him in his workers compensation appeal.

In fact, stays have been employed in a variety of circumstances, particularly there are two cases which are directly related to one another, and a determination of one case might obviate the

²If plaintiff is ultimately successful in the workers comp appeal, the instant action would be dismissed. Indeed, it was only brought because Defendant Wright's carrier requested that it be commenced before they could mediate.

necessity for the other. See Sanders, Trial Handbook for South Carolina Lawyers 2d ed. (§3:16). In the case of McConnell v. Williams, 252 S.C. 573, 167 S.E.2d 429 (1969), our Supreme Court held that a stay of a second case until the trial of the first case was completed was appropriate where the issues in the two cases were intertwined, even though they were not identical. In the instant case, both cases by Mr. Kimmer arise out of the identical facts.

**B. Defendant's Motion for Summary Judgment
Should Be Denied As Premature.**

The defendant filed his Amended Answer on May 10, 2005 and filed a motion for summary judgment one day later. It is possible that the plaintiff will file an Amended Complaint in view of the Amended Answer and other factors. As set forth in the affidavit of plaintiff's counsel, Thomas H. Pope, III, there needs to be further discovery. Plaintiff will have to be redeposed as will the claims adjuster and others. It is expected that an expert witness will have to be retained. It is clearly premature to be considering a motion for summary judgment in a case this new when the pleadings have just been amended.

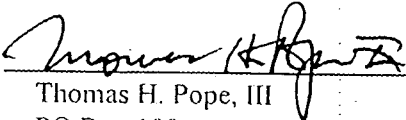
The allegations in the Amended Answer to add statute of limitations as a defense are all the more reason to stay this action. It would be a waste of time, money and judicial resources to proceed with this matter when it may very well become moot based upon a case arising out of the identical facts.

CONCLUSION

For the reasons set forth in the affidavit of counsel herein, the motion for a stay of this action until the final resolution of Kimmer v. Murata (2004 CP 12-0251) should be granted. The defendant's motion for summary judgment should be denied as premature.

Respectfully submitted,

POPE AND HUDGENS, P.A.

By: 
Thomas H. Pope, III
PO Box 190
Newberry, SC 29108
803-276-2532
Attorneys for Plaintiff Richard Kimmer

June 7, 2005

1 STIPULATION

2 It is stipulated by and between Counsel that
3 this deposition is being taken in accordance with the
4 South Carolina Rules of Civil Procedure, Rule 30; that
5 all objections as to Notice of this deposition are
6 hereby waived; that all objections except as to form
7 are reserved until the time of trial; and that the
8 deponent waives reading and signing of this
9 deposition.

10 * * * * *

11 RICHARD KIMMER,

12 being first duly sworn, testified as follows:

13 EXAMINATION

14 BY MR. POWELL:

15 Q. Mr. Kimmer, state your full name, please.

16 A. Richard Kimmer.

17 Q. No middle name?

18 A. No, sir.

19 Q. And tell me where you're from originally.

20 A. Born and raised in Lancaster, South Carolina,
21 Lancaster County.

22
23 Q.

24 A.

25 Q. All right.

1 County?

2 A. About seven years.

3 Q. Are you under the influence of anything, drugs,
4 or anything else that would interfere with your
5 ability to understand my questions today?

6 A. I take medication for several different things,
7 but I don't think that any of it will interfere with
8 my ability to answer your questions.

9 Q. All right. Don't be offended by this question
10 because this is something that's asked in almost every
11 deposition: You don't have any criminal record, do
12 you?

13 A. Criminal, no.

14 Q. Criminal record, that's something we ask all
15 the time.

16 A. No, I do not.

17 Q. I just assumed you did not.

18 Do you have any relatives by blood or marriage
19 in York County?

20 A. No, sir.

21 Q. You're not related to anyone up there?

22 A. No, sir.

23 Q. Do you have any close friends in York County?

24 A. I think my ex-supervisor from Murata is in York
25 County.

1 Q. What's his name?

2 A. William A. Manning. He goes by Bill.

3 Q. He lives where in Rock Hill?

4 A. He lives in York.

5 Q. In York. In the town of York?

6 A. Yes, sir. I'm assuming that's in York County.

7 Q. Anyone else that you can think of?

8 A. No, sir, not that I can think of.

9 Q. Okay. Do people call you Richard?

10 A. Yes.

11 Q. Do you mind if I call you Richard?

12 A. That's fine.

13 Q. Tell me about your education.

14 A. Dropped out of school. I went through the
15 seventh grade and failed it and I never did go back,
16 so I really just got a sixth grade education.

17 Q. That was in Lancaster?

18 A. Yes, sir.

19 Q. And what did you do after you left school? Did
20 you go to work or --

21 A. I went to work for a guy building Jim Walter
22 Homes, worked with him for two years. When I turned
23 18, I went to work in textiles at Springs Industries.

24 Q. Which Springs Mills did you work at?

25 A. The Lancaster plant.

1 Q. And how long did you do that?

2 A. I worked there for 31 years, one month and one
3 week.

4 Q. Good for you. You know, you're pretty sure how
5 long you worked there then.

6 A. Absolutely.

7 Q. Tell me this, while you were working for
8 Springs Mills, did they give you any training,
9 on-the-job training while you were there?

10 A. On the job I was doing for Springs, sure.

11 Q. Tell me what kind of training you had.

12 A. When I went to work there in 1964, I started
13 off as a sweeper. They train you for, put you with
14 someone for so long. I did the sweeping job for some
15 time, and then they -- I learned to doff, which is in
16 the spinning department where I was sweeping. I
17 learned to doff on my own, in my spare time when I was
18 sweeping.

19 Q. Explain what that is.

20 A. Doffing is taking full balls of yarn off of a
21 spinning frame, putting an empty one on, start the
22 frame up, make sure all your ends are up, thread, you
23 know, then you have to go and dump your box and fill
24 it back up with empty bobbins, and that sort of...

25 Q. I see. Part of the textile process?

1 A. Yes, sir.

2 Q. When did you start working on machinery?

3 A. I started working on the old ring spinning
4 machinery there in the plant. After I had been
5 doffing for approximately ten years or so, they wanted
6 me to learn to fix, and they put me in training to
7 learn to fix on the old type ring spinning. I did
8 that for several years. And then the new air jet
9 spinning, the Murata air jet spinning came into the
10 plant, taking the place of the old ring spinning, and
11 I got on those immediately, helping install them. And
12 as we got them installed and they put them in
13 production, then I started, you know, fixing, being a
14 technician on those.

15 We had learned a great deal of the machine, you
16 know, while we were installing it. But after we got
17 so many installed, then they took different people,
18 you know. I think we went by seniority at that time.
19 We got like enough of machinery to make a fixing job,
20 you know, so many machines per fixer.

21 They had a guy that they had sent to another
22 plant to learn the machines, to be the instructor to
23 train the fixers as the Murata machinery came in
24 there.

25 Q. Did you do that? You went off to be trained?

1 A. No, sir, another guy did.

2 Q. You trained under him?

3 A. Under him in the Lancaster plant.

4 Q. I see. And what was the name of the machine
5 that you first started working on, if you can
6 remember?

7 A. There was Fells and Jinks (phonetic) ring
8 spinning.

9 Q. How long did you do that?

10 A. Approximately 15 years or so.

11 Q. Okay. What happened after that, Richard? Was
12 the machinery updated or modernized?

13 A. Well, yeah, it wasn't updated. It's just the
14 air jet spinning for Murata came in, you know. They
15 did away with the old type ring spinning and replaced
16 it with the Murata air jet spinning.

17 Q. So Murata, the company you were working for
18 when this event happened, when this automobile
19 accident happened, installed its own machinery in its
20 plants?

21 A. Yes, sir.

22 Q. Do they still sell them to the plant?

23 A. Yeah, they sell them.

24 Q. Or are they just leased, do you know?

25 A. They are sold to the plants, yes, sir.

1 Q. And so tell me how it works, if you know? Does
2 the employer sell -- I mean, does the employer provide
3 a contract or enter a contract with Springs Mills to
4 your employer? Does Murata enter the contract with
5 Springs Mills to provide its employees, to service
6 machinery? Is that how it works?

7 A. I'm not sure I really understood. Repeat that
8 for me, please.

9 Q. Certainly. After you went to work for Murata,
10 I get the impression from what I've read that your job
11 would be to go maintain machinery, to work on the
12 machinery that was put in the plant, or either to
13 install it?

14 A. To install it, sometimes do modifications on
15 some -- after, you know, down the years, from 1985
16 when we started putting them in the Lancaster plant,
17 to '95, when I went to work for Murata, some of the
18 first machines that was put in the plant had, you
19 know, gotten ten years old and they needed
20 modification; so I wasn't only installing the
21 machinery at times, I was doing modifications, even
22 putting in used machinery in some plants, you know,
23 where they had bought them from other plants.

24 Q. Okay. Was your involvement limited -- after
25 you went to work for Murata now, was it limited to

1 either installing new machinery, used machinery, or
2 making modifications to machinery? Would you maintain
3 them, do maintenance on them after they were
4 installed?

5 A. Not exactly maintenance, no. Modifications at
6 times, yes.

7 Q. Okay. And you would receive your instructions
8 from somebody in Charlotte, somebody in North Carolina
9 to go to a certain place?

10 A. Yes, sir.

11 Q. The machinery that you installed, Murata
12 machinery installed and worked on at the Springs
13 plants, if I said that that machinery was essential to
14 Springs Mills' business, would that be true that they
15 have to have that machinery to operate?

16 A. What does the word "essential" mean?

17 Q. In other words, do they have to have that
18 machinery in order to conduct their business?

19 A. Well, it would cut out so many employees for
20 them to add the air jet spinning and do away with the
21 old type ring spinning. It cut out, you know, a lot
22 of processes throughout the textile plant.

23 Q. You're right, it was an inartful question.

24 What I was really getting to is not the
25 comparison of the new machinery with the old

1 machinery.

2 A. Okay.

3 Q. Would it be accurate or would it be correct to
4 say that Springs Mills has to have textile machinery
5 of some type in order for them to produce the cloth or
6 the material that they are selling?

7 A. Yes.

8 Q. Okay. So with that in mind, it would be true
9 then that the machinery you were installing or
10 modifying, that kind of machinery -- whether it's that
11 particular model or not is not important -- but that
12 kind of machinery would be essential, or necessary,
13 for Springs Mills to conduct their business?

14 A. Yes.

15 Q. Okay. That's all I wanted to know.

16 Without any machinery, they couldn't produce
17 any cloth basically?

18 A. Any yarn.

19 Q. Any yarn to make cloth?

20 A. To make cloth, yes.

21 Q. Okay. You mentioned working under, studying
22 under this fellow to learn how to work on this
23 machinery. And what was the man's name, if you
24 remember, that went off to be trained on the
25 equipment?

1 A. They sent two guys, but the one that I worked
2 under was David Marie.

3 Q. Other than learning under David Marie how to
4 work on this machinery, have you had any other
5 training at Springs Mills other than that?

6 A. On the air jet spinning machinery?

7 Q. Yes, sir.

8 A. Only what I learned on my own, you know.

9 Q. Anything else other than on the air jet
10 spinning machine?

11 A. Not to my recollection.

12 Q. Did they ever teach you typing?

13 A. No, sir.

14 Q. Did you ever learn on your own to type?

15 A. No, sir.

16 Q. Have you taken any courses on your own at any
17 of the technical colleges or trade schools outside of
18 Springs to pick up other skills?

19 A. No, sir.

20 Q. You may have told me this, but when did you
21 start working on the air jet machine?

22 A. It was 1985. To the best of my recollection,
23 it was 1985 when we started putting them in the plant
24 there at Springs in the Lancaster plant.

25 Q. And then you went with Murata in '95?

1 A. Right.

2 Q. So from 1985 to 1995, you were working for
3 Springs Mills installing and modifying machinery?

4 A. Well --

5 Q. Air jet machinery?

6 A. Yeah, there in the Lancaster plant.

7 Q. Right.

8 A. But from 1990 to 1995, I also worked for Murata
9 through an outside contractor.

10 Q. I see.

11 A. I worked for them during the week and worked
12 what they called the mini shift for Springs on the
13 weekend. I worked, sometimes it was hardly ever under
14 80 hours a week between the two jobs.

15 Q. Richard, beginning in '85 on through the period
16 of time that you worked with Springs for this outside
17 contractor or with Murata, were you doing essentially
18 the same thing on this machinery?

19 A. Yes, sir.

20 Q. You just worked for different entities?

21 A. Yes, sir.

22 Q. Different companies, right?

23 A. Right.

24 Q. So your day-to-day functions, that is, what you
25 were doing for Springs Mills and what you were doing

1 for this outside contractor and what you were doing
2 for Murata, you were doing the same thing?

3 A. Right. Yes, sir.

4 Q. All right. This is a part of the deposition
5 where we're going to look at some documents as we go
6 along, and a number, most of them, I think, we
7 obtained from Mr. Pope. Some of them, maybe not, that
8 you've signed, and we'll identify them as we go along.
9 Hopefully we won't spend too long doing that.

10 But I don't want to try and trick you now;
11 that's not my objective. The next series of
12 questions, I'm going to ask you about illnesses you've
13 had, injuries you've had before and after this wreck
14 of January 29th, 1999, and treatment for those things,
15 you know, what was done for you and whether you got
16 any benefit from that treatment.

17 And in addition to that, the damages that
18 you're claiming in this lawsuit that you want to be
19 paid for and the problems that were created for you as
20 a result of the wreck of January 29th, 1999, and
21 subsequent events, whether that be from the workmen's
22 comp people or from Philip Wright or whoever.

23 This is the time for you to explain, at least
24 in this deposition, the problems you've had and the
25 damages you seek about that, do you understand, as we

1 go forward?

2 A. Yes, sir.

3 Q. And I give you that preface to these series of
4 questions so we both have an idea where we're going
5 and what we're going to do.

6 A. Yes, sir.

7 Q. I want to know if there was a problem created
8 for you, or if it's cost you money, or if you're
9 looking for something, I need to know it. This is the
10 time to tell me.

11 A. Right.

12 Q. Okay. And the reason I am, perhaps, offering
13 that to you, I'll suggest, is that you don't appear to
14 me to be a complainer, and I'm not trying to make you
15 a complainer. And I don't want to speak for your
16 lawyer, but there are times when -- I think he might
17 agree, there are times when you need to set out what
18 problems you have. If you've got a problem, you need
19 to tell me about it. If you had difficulty with this
20 or that, this is the time to talk about that.

21 A. Yes, sir.

22 Q. Okay. Tell me, have you had any serious
23 illnesses in your life, other than mumps or measles or
24 something like that.

25 A. I had a, you might say it was a poor muscle in

1 my back, back in the early '70s. When I used to cut
2 firewood and burn firewood, I pulled a muscle in my
3 back and had some minor treatment for that. I might
4 have been out of work maybe a week or so with a
5 strained muscle.

6 Q. And you were with Springs Mills at that time?

7 A. Right.

8 Q. Were you hospitalized at all?

9 A. No, sir.

10 Q. And you say you pulled your muscle in your back
11 as a result of doing what?

12 A. Best of my recollection, it was just a strained
13 muscle. It's been a long time ago.

14 Q. I mean, what were you doing when you did that?
15 Were you at work?

16 A. Cutting firewood. I was at home.

17 Q. Cutting firewood?

18 A. Yes.

19 Q. Okay. Who was your doctor for that, if you
20 remember?

21 A. I do not remember that.

22 Q. I assume you went to the doctor.

23 A. Yeah, yeah. I was under a doctor's care,
24 taking muscle relaxers or pain pills. I don't
25 remember, you know, which.

1 Q. And did the doctor tell you to stay in bed
2 during that week?

3 A. Well, he put me on a heating pad, you know,
4 using the heating pad and stuff, and not lifting
5 anything.

6 Q. He told you to take it easy, basically?

7 A. Yeah.

8 Q. This was in the early '70s, a long time before
9 any of this?

10 A. Yes, sir.

11 Q. And before that, after that week, did you have
12 any trouble with your back as a result of cutting the
13 firewood?

14 A. No, sir.

15 Q. Anything else?

16 A. Sometime in the late '70s -- to the best of my
17 recollection it was in the late '70s -- I got a little
18 bit of the end of my thumb on my right hand cut off on
19 some gears in Spring's plant there working on
20 machinery.

21 Q. And you made a workmen's compensation claim as
22 a result of that?

23 A. I guess there was a workmen's comp claim on
24 that, because I remember them -- I don't know if I
25 filed a claim or the company filed a claim, you know.

1 I don't remember.

2 Q. Were you out of work?

3 A. No, sir.

4 Q. You didn't miss any work as a result?

5 A. Didn't miss any work. I was on light-duty
6 stuff.

7 Q. They bandaged up your thumb?

8 A. Bandaged it up. It just took the end of the
9 thumb and a little bit of the nail off.

10 Q. I see.

11 A. It was just, I called it pretty minor, but, you
12 know, I do remember that workmen's comp paid the
13 doctor bills and -- but as far as me filing a claim, I
14 don't think I filed a claim.

15 Q. Did you receive any money as a result of that
16 injury?

17 A. I did. They compensated me \$1,000 for the
18 damage.

19 Q. That was sometime in the late '70s?

20 A. Yes, sir, best as I can remember it was in this
21 '70s. I'm thinking it was the late '70s.

22 Q. And I assume this, I don't know this, but I
23 assume from the way you talk that you were not
24 represented by an attorney for that?

25 A. No. Well, the same attorney that Springs had

1 was the attorney that I had to go see.

2 Q. But he didn't represent you in the case. He
3 was Springs' lawyer?

4 A. He was Springs' lawyer.

5 Q. He wasn't Richard Kimmer's lawyer.

6 A. I don't remember exactly, but I don't remember
7 ever going to see an attorney before they wanted to
8 settle the thing. And I just remember that he told
9 me, he said, you know, I'm Spring's attorney and we
10 need to, you know, settle this and get it off the
11 record.

12 Q. I understand. I understand.

13 I forgot to ask you this earlier, sorry. I
14 need to ask your family association. Are you married
15 currently?

16 A. Currently going through a divorce.

17 Q. You're not divorced yet?

18 A. No, sir.

19 Q. Do you have any children?

20 A. I do.

21 Q. How many?

22 A. Three.

23 Q. What are their ages?

24 A. My oldest daughter is 36.

25 Q. Is she married?

1 A. Yes, sir. Well, she's not legally married,
2 but her and her boyfriend have been together 18 years
3 or so.

4 Q. Might as well be.

5 A. So I think they call it common-law marriage.

6 Q. Does she use his last name?

7 A. No, she don't, but her child does. She has a
8 daughter.

9 Q. And her name is?

10 A. Bonnie.

11 Q. Bonnie Kimmer?

12 A. Bonnie Sue Kimmer.

13 Q. Where does she live?

14 A. She lives in Lancaster.

15 Q. Your next child?

16 A. My next child is 35, and she is married.

17 Q. What's her married name?

18 A. Gilmore.

19 Q. And her first name is what?

20 A. Melissa Fay Gilmore.

21 Q. Where does she live?

22 A. She lives down in Chesterfield.

23 Q. Your oldest daughter's boyfriend, what's his
24 name? I forgot to ask you.

25 A. He's a Whitaker. The only thing I ever know

1 him to be called is Pimper, but I know that's not his
2 first name. That's the only name I know him by.

3 Q. What does he do for a living?

4 A. He works construction.

5 Q. Do you know for who?

6 A. He's got a brother that lives down in Myrtle
7 Beach, and they do something with old lumber, like
8 tear down old buildings and re-salvage the lumber for
9 different things. That's the only thing I know, that
10 he works for his brother.

11 Q. And your second child, what does her husband
12 do?

13 A. Right now I really don't know. At one time
14 he -- the last place I remember him working was the
15 Wal-Mart warehouse over in Pageland.

16 Q. Okay. And your third child?

17 A. My third child is my son, Richard Buddy Kimmer,
18 and he lives also in Lancaster.

19 Q. What does he do?

20 A. He works at -- I don't know the name of the
21 place. He works up in Indian Land, some place that
22 makes septic tanks, the concrete tank, you know.

23 Q. Somewhere near Rock Hill?

24 A. Indian Lane.

25 Q. Just outside of there?

1 A. That's between Monroe and Charlotte.

2 Q. I know where you're talking about.

3 A. Did I say Indian Land? No, it's not Indian
4 Land. It's between Monroe and Charlotte.

5 Q. That's not important. Don't worry about it,
6 that's okay.

7 We were talking about your other injuries and
8 illnesses. You told me about the early '70s, long
9 time ago with cutting the firewood and you told me
10 about cutting off the end of your thumb. Any other
11 events that you can think of?

12 A. Somewhere in the mid, well, not the mid-'90s,
13 in '92 or '93, I had an auto accident.

14 Q. Tell me about that.

15 A. Well, I was traveling east on Highway 9 from
16 Chester to Lancaster, and there was a livestock sales
17 barn there, and this was at night. And when I topped
18 the hill at that livestock barn, it was all lit up.
19 So I glanced to the left to see what all the lights --
20 it surprised me being lit up at night because I didn't
21 know that, you know, they were there that late at
22 night. But, anyway, when I looked, glanced left at,
23 you know, the lit-up place, then I looked back in
24 front of me and there was a tractor-trailer truck
25 making a wide turn coming out of the sale barn, and I

1 hit that truck.

2 Q. How fast were you going, do you think?

3 A. I had my cruise set. I was doing 55.

4 Q. Tell me about your injuries from that event.

5 A. Okay. When I hit the truck, I wasn't wearing
6 my seatbelt and my face hit the steering wheel and the
7 windshield broke my nose and bruised my face up pretty
8 bad. I was out of work, I don't remember exactly,
9 three or four weeks or so. May have been a little
10 longer than that, I'm not sure. That's some time
11 back.

12 Q. Tell me about your injuries. I mean, what part
13 of your body was injured and so forth.

14 A. Well, I thought I just did. My face hit the
15 steering wheel. My nose, my head busted the
16 windshield.

17 Q. That was all. You didn't hurt your back or
18 knees or legs or anything, or hips?

19 A. No, sir. I had no problem with nothing but my
20 face and head hitting the windshield.

21 Q. You don't need to start into the January 1999
22 wreck. We're going to talk about that at length, you
23 know.

24 A. Right.

25 Q. But anything other than what you've already

1 told me?

2 A. In '98, I think it was, I was on my knees on
3 top of one of the machines, and I had an inflamed
4 tendon, what the doctor said it was, an inflamed
5 tendon. They treated me for that at Dr. Kinahan's. I
6 don't remember the name of the doctor's office.

7 Q. Which tendon? Was it in your back?

8 A. No, it was in my left knee.

9 Q. In the left knee?

10 A. Yes, sir.

11 Q. Who treated you?

12 A. Peter J. Kinahan.

13 Q. I see.

14 A. From Union.

15 Q. All right. And were you out of work as a
16 result of that?

17 A. I think I was out a few days, three or four
18 days or so.

19 Q. And then was this an accident, or was it you
20 were on top of the machinery and moved the wrong way
21 and pulled your tendon?

22 A. Yes, sir. It had a motor way down in the
23 machine, you know, and I was on top of the machine,
24 and that motor was maybe 50 pounds or so. When I went
25 to pick the motor up, it just put extra weight on my

1 knees or something, and maybe it did move the wrong
2 way, one way or the other or something, you know. And
3 it just hurt real bad at the time and the next day it
4 was all swollen up. I had to go to the doctor.

5 Q. In our world we call that an accident.

6 A. Yes, sir.

7 Q. It's nothing you intended to happen.

8 A. No, not at all.

9 Q. You were out of work a few days?

10 A. Yes, sir.

11 Q. And Dr. Kinahan treated you?

12 A. Right.

13 Q. What did he do for you, if you remember?

14 A. Put me on some medication. I don't know if it
15 was -- I don't remember if it was muscle relaxers or
16 pain pills, and also put a shot of cortisone.

17 Q. Was the 1998 injury as a result of this to your
18 left knee, as a result of this accident at work, was
19 that the first time you'd ever had any trouble with
20 your knees?

21 A. Yes, sir.

22 Q. You say you went back to work after a few days,
23 but did you have trouble with your knee for a while
24 after that?

25 A. Yeah. I was still under the doctor's care.

1 When I'd get on my knee, you know, at work, I would
2 have to put, either use a knee pad, or, if I didn't
3 have one handy, I'd ball up a ball of rags or
4 something, you know, and put it under my knee. That
5 went on for maybe a week to ten days or something and
6 it got okay.

7 Q. So after this 1998 event, you hurt yourself at
8 work; after a couple of weeks that resolved itself or
9 your knee was okay?

10 A. Yes, sir.

11 Q. Okay. Anything else?

12 A. No. That's it until the '99 accident.

13 Q. Did you go to any physical therapy for your
14 knee as a result of the 1998 work-related accident?

15 A. To my recollection, I did not, no.

16 Q. Tell me about the accident of, I think it was
17 January 29th, 1999; is that right?

18 A. Yes, sir.

19 Q. Tell me about that, how the accident happened.

20 A. Okay. I was on my way to work from the time I
21 lived in Whitmire, and I was on my way to work to
22 Springs Cathrine (phonetic) plant in Chester, and as I
23 was going east on Highway 9 from Chester towards
24 Lancaster, which the Cathrine plant was 3 miles out of
25 Chester, there was a guy came flying out of a store

1 yard, and lived just right up the road in apartments.
2 Instead of him going over on his side of the road, he
3 just came out of there and shot right up, you know, on
4 my side of the road, because he wasn't going but
5 50 yards or so. And, undoubtedly, he maybe looked
6 behind me or whatever the case was, but we hit head on
7 right there. That was on my way to work in the
8 morning on January 29th of '99.

9 Q. Were you wearing your seat belt that day?

10 A. No, sir, I wasn't.

11 Q. Do you normally wear it or not wear it?

12 A. At times I do. At times I don't.

13 Q. I hope you're wearing it now when you drive.

14 A. Well, at times I do and at times I don't. I'm
15 not going to tell you a story about it.

16 Q. You know, I'm not throwing any rocks. I would
17 just encourage you to wear it.

18 A. I appreciate that. Everybody does, but at
19 times, if I'm not going but just a little ways,
20 sometimes I do not put it on, I'm sorry.

21 Q. I understand. I understand.

22 Were you taken by ambulance from the scene?

23 A. No. The ambulance came to the scene and wanted
24 to take me to the hospital, and I wouldn't go. I knew
25 I was hurting but...

1 Q. You were in pain?

2 A. I was in pain, but I didn't want to go to the
3 hospital right then. I don't know why.

4 Q. I have to ask you why not if you were hurting.

5 A. I don't like hospitals, period. I mean, you
6 know, there have been a lot of times in my life when I
7 felt like I needed to go to a hospital or doctor
8 maybe. But I'm just that type person, if I don't have
9 to go, I don't go, but I knew I probably needed to go
10 because of how I was hurting. But I called my wife
11 immediately after the wreck and she came and picked me
12 up at the body shop where they took my car, and she
13 took me to the hospital then.

14 Q. Okay. I don't want to get too -- in fact, I
15 hope I don't have to get too personal with you,
16 Mr. Kimmer, but have you separated from your wife
17 since that accident?

18 A. Yeah, we separated January 12th a year ago.

19 Q. A year ago?

20 A. Yes, sir.

21 Q. Do you blame that accident with you and your
22 wife's separation at all?

23 A. It played a big part in it.

24 Q. Is that right?

25 A. I've lost two homes since this accident and a

1 wife. I spoiled my wife when I was working, and then
2 when I couldn't work, you know, just a lot of
3 difference in social security disability and what I
4 used to make.

5 Q. We're going to talk about that. You're going
6 to have plenty of time to talk about that as we go
7 along.

8 So you do assign part of the divorce you're
9 going through to the accident of January 29th?

10 A. Right.

11 Q. The ambulance driver said let me take you to
12 the hospital and you declined that, correct?

13 A. Right.

14 Q. Where did you go after that? Did you go to
15 work?

16 A. No.

17 Q. Right after the accident -- the accident
18 occurred, you were on the accident scene there.

19 A. I rode to the body shop with the guy that took
20 my car, B&B Body Shop in Chester, I think it was, and
21 I called my wife from there and she came and picked me
22 up.

23 Q. Did she take you home?

24 A. No, sir. She took me to the hospital there in
25 Chester.

1 Q. She took you to the hospital?

2 A. Yes, sir.

3 Q. Were you hurting bad enough at that point where
4 you needed to go?

5 A. Absolutely. Yeah.

6 Q. You changed your mind about going?

7 A. I was hurting bad enough there at the wreck
8 scene, but I just wouldn't go. But by the time she
9 got there, you know -- sometimes you can shake things
10 off after a little while, but by the time she got
11 there, I'd actually gotten worse. She took me on to
12 the hospital.

13 Q. What was hurting you at that time?

14 A. Well, my head, my neck, my knees, one of my
15 elbows. I don't remember if it was my right one or my
16 left, but it didn't give me any problem after a day or
17 two, so I reckon I just bumped it and no permanent
18 damage or anything to it.

19 Q. Right. And so you went to the hospital the day
20 of the accident?

21 A. Yes, sir.

22 Q. There in Chester?

23 A. Yes, sir.

24 Q. And were you admitted to the hospital there?

25 A. No, sir.

1 Q. What did they do for you?

2 A. They x-rayed me. They x-rayed my knee. To the
3 best of my recollection now, they x-rayed my knees and
4 my, if I'm not mistaken, my head to make sure I didn't
5 have a skull fracture. They gave me a prescription
6 for either pain pills, or I'm assuming it was pain
7 pills, I don't remember, and told me to see a doctor.

8 I think this was on Friday. The day of the
9 accident was on Friday. They told me to see my family
10 doctor or, you know, someone about the damages
11 immediately, you know, which it was on a Monday before
12 I seen anyone.

13 Q. What did you do that weekend?

14 A. Nothing.

15 Q. Just stayed in bed?

16 A. Pretty much stayed in bed and took the pain
17 medicine or muscle relaxers, whichever one they gave
18 me at the hospital.

19 Q. Tell me, you say you did go see your doctor on
20 Monday?

21 A. Monday.

22 Q. What was his name?

23 A. Dr. Peter J. Kinahan.

24 Q. Same doctor?

25 A. Same doctor I'd seen in '98.

1 Q. He's in Union?

2 A. Yes, sir.

3 Q. What did he do for you?

4 A. Best of my recollection, he also x-rayed my
5 knees, and I'm not sure about my head. But then he
6 started me on, for my knees, pain pills or muscle
7 relaxers, whichever. In a few days he had me in
8 physical therapy with my knees and my neck. They put
9 me in some kind of therapy where they put your head in
10 something and pull your neck or whatever it does to
11 it.

12 Q. Right. And did he give you any other advice?
13 Did he tell you not to go back to work?

14 A. Yeah. He told me, said, you know, you can't
15 work in this condition.

16 Q. Did he tell you on that Monday how long you
17 would be out of work?

18 A. Oh, no. To the best of my recollection he
19 didn't give me any time frame or anything about, you
20 know, my getting better or anything like that

21 Q. And then you went to physical therapy?

22 A. Right.

23 Q. Where did you go to physical therapy?

24 A. It was in the same building. I cannot remember
25 the name of the things over there, but it was in the

1 same building that Dr. Kinahan was in.

2 Q. How long did you go to physical therapy there
3 in the same building?

4 A. For a long time, months. Sometimes as many as
5 three times a week. It was for a long time. I'm not
6 sure how long, but it was for a long time.

7 Q. Okay. And at some point along the way did you
8 see another doctor other than Dr. Kinahan?

9 A. Yeah. After some time he, you know, kept me in
10 that physical therapy and putting shots of cortisone,
11 you know, in my knees and even in my neck. I don't
12 know, it was several months, I guess, later. I didn't
13 feel like I was getting any better with what he was
14 doing so I did go to see a different doctor.

15 Q. Who did you go see after that?

16 A. I am not real sure what his name was. It seems
17 like it was Dr. Thomas or it seems like it was
18 something that started with a T, but down in
19 Spartanburg.

20 Q. Was he a specialist?

21 A. Orthopedic.

22 Q. Orthopedic surgeon?

23 A. Orthopedic surgeon, yes.

24 Q. What did he do for you?

25 A. Nothing.

1 Q. Did Dr. Kinahan send you to him?

2 A. No. I just wasn't getting any better with what
3 Dr. Kinahan was doing. I just felt like I needed to
4 see somebody different because all doctors, you know,
5 don't treat things the same.

6 Q. Right. Tell me, I guess my question to you
7 really is, how did you get to him? Did a friend of
8 yours refer you, or how did you get to the doctor in
9 Spartanburg, the orthopedic surgeon?

10 A. I cannot remember to save my soul. I do not
11 remember.

12 Q. How long did you see the orthopedic surgeon?

13 A. Which one?

14 Q. The one in Spartanburg.

15 A. I only seen him twice.

16 Q. Do you remember what he told you?

17 A. Only thing I remember him telling me is that,
18 yes, you have some problems, but I don't know -- you
19 have a good doctor there in Union. Nothing that he
20 could do, you know, that Dr. Kinahan wasn't doing. I
21 just felt like I needed a second opinion, you know.

22 Q. I understand.

23 Dr. Kinahan, is he an orthopedic surgeon?

24 A. Yes, sir.

25 Q. So you just wanted to hear from another one?

1 A. Right.

2 Q. Fair enough.

3 And then after the orthopedic in Spartanburg,
4 did you consult another doctor? Did you go to someone
5 else?

6 A. I did see a doctor that specialized in sports
7 medicine. I guess he's an orthopedic surgeon too.

8 Q. Where is he?

9 A. He was also in Spartanburg, and I cannot
10 remember his name either, cannot.

11 Q. How long did you see him? How long after the
12 first orthopedic in Spartanburg, after you went to see
13 him, did you wait to see the third doctor?

14 A. It was several months. It may have been a
15 year, over a year, I'm not sure. I know it was quite
16 a while.

17 Q. Did you have surgery on your knee, or knees, at
18 some point?

19 A. I had the arthroscopic surgery. Dr. Kinahan
20 did two, on the right knee and one on the left knee.

21 Q. Okay. When was that, Richard, if you remember?

22 A. It was in '99 to 2000.

23 Q. I think you're right about that.

24 Richard, at some point you started receiving
25 what I'll call term disability through Murata.

1 A. That's correct.

2 Q. Isn't that right?

3 A. That's correct, yes, sir.

4 Q. But that ran out before --

5 A. Excuse me.

6 Q. That ran out. You understood that was going to
7 run out before long?

8 A. Yes, sir.

9 Q. That was a short-term thing?

10 A. Well, it started -- I did receive short-term
11 disability for three months, and then I was out of
12 work longer than that so I had to apply for the
13 long-term disability, which it lasted, I guess, a
14 year.

15 Q. Okay. But you understood that was going to run
16 out?

17 A. Oh, yeah, yeah.

18 Q. And you understood that what you wanted, if
19 possible, what you wanted was your workmen's comp
20 benefits?

21 A. Yeah. After about three months I realized, you
22 know, they should have been paying everything from day
23 one.

24 Q. From workmen's comp?

25 A. Right, from workmen's comp.

1 Q. And you say after about three months -- the
2 wreck was in January, so January, February, March,
3 sometime in the spring of '99 is when you realized
4 that the workmen's compensation people should have
5 been paying you from the beginning?

6 A. Right.

7 Q. We're going to go through some documents. I'm
8 going to ask you, I'm going to label this as Number 1,
9 Exhibit 1.

10 (DEF. EXH. 1, Amended Summons and
11 attachments (15 pages), was marked
12 for identification.)

13 Q. This is the Amended Summons and Complaint in
14 this lawsuit, Mr. Kimmer, with the exhibits attached
15 to it, documents behind it. I'll ask you to look at
16 that.

17 A. (Reviewing documents.) I can look at it, but
18 I'm not going to be able to read all of it.

19 Q. I'm not asking you to read every word of it.
20 I'm just asking you, have you seen it before?

21 A. I'm not sure.

22 Q. I don't want to mislead you or trick you in any
23 way, Mr. Kimmer. This is an amended version of the
24 complaint which Mr. Pope filed on your behalf, and it
25 makes certain allegations in there. We'll talk about

1 some of those in a little while, but I wanted to know,
2 Mr. Pope was certainly authorized to do this for you?

3 A. Yes, sir.

4 Q. The exhibits that are attached to it, if you
5 would, if you turn through the documents, Exhibit A.

6 A. (Complies.)

7 Q. It says Exhibit A at the bottom there?

8 A. Yes.

9 Q. See that?

10 A. Yes.

11 Q. That's a settlement statement dated June 16th,
12 1999?

13 A. Yes, sir.

14 Q. And was that a settlement statement you
15 received from Mr. Wright?

16 A. Yes, sir, I did receive that.

17 Q. And you signed that?

18 A. Yes, sir.

19 Q. And then the next, at least in my version, the
20 next page is the check from Auto-Owners Insurance for
21 \$15,000?

22 A. Yes, sir.

23 Q. That was the check. Did you endorse that
24 check?

25 A. I'm sure I had to, yes.

1 Q. And next is a letter from Mr. Wright to you,
2 actually to Mr. Holler of Auto-Owners Insurance with a
3 copy to you dated June 23rd, 1999?

4 A. If I got this, I don't remember it. I've
5 gotten so many papers.

6 Q. I understand.

7 A. But this particular one, I do not remember.

8 Q. Okay. And then the next document attached to
9 the complaint is the Release and Settlement Agreement,
10 and that's your signature at the bottom?

11 A. Yes, sir.

12 Q. You signed that?

13 A. Yes.

14 Q. And then the next document is a Form 50, which
15 Mr. Wright filed on your behalf, dated June 18th,
16 1999, and you received a copy of that?

17 A. I don't remember if I received a copy of it or
18 not. I just remember Mr. Wright saying he was going
19 to file it.

20 Q. He was authorized to do it for you?

21 A. Yes, sir.

22 Q. Okay. And look on page 3 of the complaint back
23 in here on page 3 -- maybe we can work at it from the
24 that way. Paragraph 16.

25 A. Okay.

1 Q. If you would, read this paragraph.

2 A. (Reading.) On February the 1st of 2000, the
3 defendant wrote the plaintiff and explained the
4 position of Murata/Liberty Mutual in the workers comp
5 matter and the potential problem with his continued
6 representation. A copy of that letter is attached
7 herewith and incorporated by reference and Exhibit C.
8 Thereafter, plaintiff obtained other counsel in
9 connection with the workers compensation claim.

10 Q. All right. Let's turn to Exhibit C. That's
11 the February 1st letter that -- you understand this
12 pleading is the allegations that you make in this
13 lawsuit? You understand that? This is your complaint
14 in this lawsuit.

15 A. I'm not exactly sure I understand the question.

16 Q. Okay. My question to you is, this is the
17 complaint, Exhibit 1 that we're looking at, this is
18 the document that started this lawsuit, that Mr. Pope
19 filed on your behalf. You understand that?

20 A. Yes, sir.

21 Q. Okay. And the items, the language that's in
22 the complaint, that's what you, Richard Kimmer,
23 contend in this lawsuit, do you understand that? That
24 when I say, this is what you are saying is true, do
25 you understand that's what the complaint is?

1 A. Yes. If I am saying it, it is true.

2 Q. I'm not trying to trick you. I'm just trying
3 to work through this with you.

4 A. Okay.

5 Q. And the letter of February 1st, 2000, you
6 received that from Mr. Wright?

7 A. I'm assuming I did. I can't remember.

8 MS. POPE: Let's find the
9 letter.

10 MR. POWELL: Yeah, find
11 letter back here.

12 Q. That's it. This is it right here. This one
13 right here.

14 MR. POPE: That's the letter
15 right there.

16 MR. POWELL: Richard, you can
17 take your time and read
18 it if you'd like.

19 THE WITNESS: I'm a slow
20 reader, it will take
21 me a little while.

22 MR. POWELL: Richard, you
23 take your time.

24 MR. POPE: Let's take a
25 little break.

1 (A recess transpired.)

2 Q. Okay. Mr. Kimmer, back on the record now.

3 Did you receive Mr. Wright's February 1st, 2000
4 letter, as the complaint alleges?

5 A. I'm assuming I did. Since I've read it now, I
6 do remember reading this letter, yes.

7 Q. Had you already obtained other counsel, another
8 attorney by the time Mr. Wright wrote you this letter?

9 A. No, I had not. No.

10 Q. Did Mr. Wright, now that you've read the
11 letter, was he up front with you and explain to you
12 what he did and what happened in the matter? I mean,
13 he didn't try to hide it from you?

14 A. Can we back up to the question before this one?

15 Q. I guess.

16 A. About having another attorney before he had
17 wrote this letter?

18 Q. You can change your answer if you want to. It
19 doesn't matter to me.

20 A. Well, according to this letter, you know, he
21 already knew that I was talking to Mr. Pope, but...

22 Q. You were in the process of changing attorneys
23 when you got the letter; is that fair? It's not a big
24 deal.

25 A. Well, I'm assuming that Phil had already told

1 me or something that he, in his words, screwed this
2 up, and that I would -- he couldn't proceed with it.
3 I would have to find another attorney to handle the
4 workmen's comp part of this. And I'm assuming that I
5 had talked to Mr. Pope before I got this letter,
6 because it states in this letter, you know, it has
7 Mr. Pope's name in here. And Phil Wright would not
8 have known, you know, that I was talking to Mr. Pope
9 if I had not, you know, told him.

10 Q. Right. And you turned this letter over to your
11 new attorneys?

12 A. I don't know about this particular letter. I
13 guess I had turned something over to him.

14 Q. Okay. But you made your entire file with
15 Mr. Wright available to Mr. Pope. I think there are
16 some documents to indicate that you understood
17 Mr. Pope was going to get your file?

18 A. Right, yeah.

19 Q. Okay. And Mr. Wright understood, you
20 understood Mr. Wright was telling you in this -- let
21 me see if I can find the right. You see in the
22 paragraph that begins there "as I explained to you
23 when you were in the office last"?

24 A. Yes.

25 Q. See that?

1 A. Yes.

2 Q. He may be referencing the conversation you were
3 talking about just a minute ago. (Reading.) As I
4 explained to you when you were in the office last, I
5 have received an answer from Mr. Morgan in the
6 workers' compensation case in which they deny that you
7 are entitled to workers' compensation benefits because
8 I settled with the liability carrier in the wreck case
9 without notifying them or getting their approval.

10 Now, when you found this out, that they were
11 denying your workers' compensation claim because the
12 underlying automobile case for \$15,000 was settled
13 without their notice, you hadn't been receiving your
14 workers' compensation payments; is that right?

15 A. Right.

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

20 A. Right. Yes, sir.

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

23 A. That's true.

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

1 A. Oh, no. When I went in to talk to him, you
2 know, he told me plainly, you know, I screwed this up,
3 you have to get another attorney to take the case.

4 Q. Yes, sir.

5 A. And we've been friends a long time and we
6 had -- I'd known Phil several years prior to this. I
7 had two divorces and another little domestic or what,
8 not domestic, but a thing with my daughter where I
9 signed for a loan for her and she wouldn't pay it
10 back. He had handled three things for me and I
11 trusted him.

12 Q. You're not contending in this case that he
13 misled you in any way? When I say misled you, tried
14 to hide his mistake?

15 A. No, because he told me plainly, and it's also
16 stated in this letter here that he had made a mistake.

17 Q. Right. I understand. Okay. Well, let's move
18 on. We may come back to that later on, but right now
19 I want to move on down the road here a little bit.

20 Mr. Kimmer, I want to show you what has been
21 marked as Exhibits 2, 3, 4 and 5.

22 (DEF. EXHs. 2,3,4,5, Tax Returns,
23 were marked for identification.)

24 Q. I'll represent to you that they are tax returns
25 that we received, your tax returns that we received,

1 I believe, through your attorneys. Identify those for
2 us, if you would. They are 1998, I think, through
3 2001.

4 A. Yeah, these are my tax returns.

5 Q. All right, sir. And your combined income on
6 Exhibit 2 there -- unless there's an objection from
7 your attorney, to move us along, there are a lot of
8 numbers on this page; can we both agree on that?

9 A. Yes, there are a lot of numbers on this page.
10 Yes.

11 Q. I'm going to point out to you, on the 1040X,
12 apparently your return was amended for some reason.
13 Whoever prepared it for you listed the gross income
14 for you and your wife as \$101,000. Do you see that?

15 A. Yes, sir.

16 Q. And then the next year, Exhibit 3, under line 7
17 lists gross income \$60,000. See that, wages, tips,
18 and salaries? Actually, I guess the gross income
19 would be down at the bottom, but, roughly, the money
20 from earnings would be \$60,000, is that right, in
21 1999?

22 A. Yes, sir.

23 Q. You're looking at number 3 right here?

24 A. Yeah.

25 Q. Is that right?

1 A. Yes, sir.

2 Q. Was that primarily your wife's income?

3 A. No. I'm assuming that this -- her income was
4 in the mid-30s.

5 Q. Okay. But there's obviously a huge difference
6 between your income in 1998 and your income in 1999,
7 60,000 to versus 101,000?

8 A. Yeah.

9 Q. And is that difference primarily because you
10 were injured and not able to work during 1999?

11 A. Yes, because I didn't work in 1999 except, you
12 know, the first month.

13 Q. And the reason you didn't work was as a result
14 of this automobile accident on January 29th?

15 A. Yes.

16 Q. And the reason that your income was down was
17 because you weren't receiving your workers'
18 compensation payments?

19 A. Well, that's correct, but -- go ahead.

20 Q. I mean, that's one of the -- what I'm trying to
21 do is to get an idea of what you were normally making
22 and what your household was bringing in after the
23 accident with no workers' compensation payments.

24 A. Okay.

25 Q. Right?

1 A. Right.

2 Q. And there was a difference there?

3 A. Yes, sir.

4 Q. And beginning in 1999, the failure to receive
5 those workers' compensation payments caused you
6 problems?

7 A. Yes, sir.

8 Q. And you knew that at the time?

9 A. Yes, sir.

10 Q. Because you had wages that weren't being paid
11 and medical bills that were outstanding, correct?

12 A. Yes, sir.

13 Q. And then look at Exhibit 4. This will be the
14 tax return for 2000?

15 A. Right.

16 Q. See that, Richard?

17 A. Yes, sir.

18 Q. And the amount goes down further. During 2000,
19 was almost all of the \$38,000, \$38,652 there from your
20 wife's income?

21 A. I'm assuming that is correct, yes, sir.

22 Q. Because you didn't work at all during 2000?

23 A. No, sir.

24 Q. And during 2001, this is Exhibit 5?

25 A. Right.

1 Q. Your wife's name is Martha?

2 A. Yes, sir.

3 Q. I see W2s, 1099s for her in 2001, and none for
4 you. You earned no wages at all during 2001?

5 A. No, I didn't work any in 2001. The long-term
6 disability came in, you know, somewhere in 2000 or
7 2001. I don't know which tax form it would be on.

8 Q. Okay.

9 A. Or if it was, I don't remember if it had to be
10 filed. I'm not sure.

11 Q. Right.

12 A. But as far as me earning, working and earning,
13 no.

14 Q. I understand. As you mentioned earlier, what
15 you were getting from your disability payments was far
16 short of what you were looking for in terms of your
17 wages?

18 A. Well --

19 Q. Or your workers' compensation?

20 A. I think it was like 75 percent of what I
21 normally would have been earning on the job.

22 Q. Right.

23 A. It was not far short but some short.

24 Q. But it wasn't paying your medical bills?

25 A. I was paying what I could, yeah.

1 Q. I understand, but, I mean, there were still
2 some medical bills that were mounting up as a result
3 of your not getting your workers' compensation?

4 A. Absolutely, yes, sir.

5 Q. And those medical bills started, well, I guess
6 they started in 1999, January 29th, 1999?

7 A. Yes.

8 (DEF. EXH. 6, Form 50, was marked for
9 identification.)

10 Q. This is Number 6. This is a Form 50 that
11 Mr. Wright filed for you. We looked at that earlier.
12 That was actually the workers' compensation claim he
13 filed for you, isn't it?

14 A. Yes, sir.

15 (DEF. EXH. 7, Form 51, was marked for
16 identification.)

17 MR. POPE: Can we go off the
18 record?

19 MR. POWELL: Sure.

20 (Off-the-record conference.)

21 Q. Back on the record, Mr. Kimmer.

22 Number 7 is the Form 51 filed by the lawyer for
23 the workers' compensation carrier, dated January 13th,
24 2000; is that correct?

25 A. That's what's on the form here. I don't

1 remember ever seeing this form. I guess I did get a
2 copy of it.

3 Q. And number 11 there says: Grounds or defenses
4 that they are asserting, see it says all statutory and
5 affirmative defenses?

6 A. Yes.

7 Q. Third party action settled without consent?

8 A. Yes.

9 Q. That was the third party action that Mr. Wright
10 was referring to in his letter of February 1st, 2000.

11 A. Right, of the auto insurance. Yes.

12 Q. And that was the third party action being
13 settled without the consent of the workers'
14 compensation carrier, is something that Mr. Wright
15 told you about in his office and in his letter of
16 February 1st, 2000?

17 A. Yes.

18 MR. POWELL: Number 8, Tom,
19 is a May 21st, 1999
20 letter.

21 (DEF. EXH. 8, Letter, 5/21/99, was
22 marked for identification.)

23 Q. Let me show this to you, Mr. Kimmer.

24 A. (Reviewing documents.)

25 Q. We'll see a number of letters like this. I'm

1 not even going to mark all of them, but this was a
2 letter that Mr. Wright wrote to Dean Holler at
3 Auto-Owners sending him your medical bills.

4 A. Yes.

5 Q. See that?

6 A. Yes.

7 Q. He sent you a copy of that letter?

8 A. I don't remember, you know, but I'm sure he
9 did.

10 Q. Right. You would routinely receive letters
11 from Mr. Wright?

12 A. Yes, sir.

13 Q. And see what he says here: The emergency room
14 visit at Chester County Hospital was \$407, and the
15 physical therapy bill through March 1st is \$3,596?

16 A. Yes.

17 Q. To the best of your knowledge, are those
18 accurate numbers?

19 A. I'm assuming, yes.

20 Q. Okay. And it says you're employed with Murata;
21 been out of the work since February 1; gives your
22 hourly rate; missed 80 days through work, and wage
23 loss, \$9,318.40. To the best of your knowledge, did
24 you realize, as of May 21st, 1999, that your wages
25 lost were \$9,318.40.

1 A. I knew I had lost wages, but the figure, I had
2 no idea, but I'm assuming that is correct, yes.

3 Q. You don't dispute that that's correct?

4 A. It sounds pretty accurate, yes.

5 Q. In May of 1999, while you may not have known
6 the exact figure, you were aware that you were out
7 thousands of dollars as a result of this accident?

8 A. Right.

9 Q. And as a result of not receiving your workers'
10 compensation benefits?

11 A. Yes, sir.

12 (DEF. EXH. 9, Release and Settlement
13 Agreement, was marked for
14 identification.)

15 Q. We've looked at this before. I'm marking it
16 separately here. This, I think is Exhibit 9; it's the
17 Release and Settlement Agreement. Mr. Kimmer, this
18 was also attached to the complaint in this case?

19 A. Yes.

20 Q. Is this the June 16th, 1999 Release and
21 Settlement Agreement that you and your wife signed?

22 A. Yes, sir.

23 Q. In return for the payment of \$15,000?

24 A. Yeah, that was the amount that Phil used to pay
25 the doctor bills and took his third out of it, which I

1 guess was \$5,000, but that was it, yeah.

2 Q. And that \$15,000, your medical bills far
3 exceeded -- that didn't pay all your medical bills?

4 A. Absolutely not, no.

5 Q. Okay. You understood that when this release
6 was signed, that it wouldn't pay everything?

7 A. Right, yeah.

8 (DEF. EXH. 10, Copy of Check No.
9 1-8639057, 6/14/99, for \$15,000, was
10 marked for identification.)

11 Q. Just identify the check. Number 10, we saw
12 that earlier?

13 A. Yes.

14 Q. I think it was also attached to the complaint.
15 That's the \$15,000 check that you received from the
16 insurance company for the other driver?

17 A. Yes, sir.

18 (DEF. EXH. 11, Letter, 6/18/99, was
19 marked for identification.)

20 Q. And Number 11 is Mr. Wright's letter to State
21 Farm with a copy to you; is that correct? His letter
22 of June 18th, 1999?

23 A. Yes, sir.

24 Q. And as of June 18th, 1999, you see Mr. Wright
25 says, He is still treating -- in the next to the last

1 sentence, He is still treating and his medicals will
2 probably exceed \$25,000 exclusive of his wage loss?

3 A. Yes, sir.

4 Q. While you may not have had an exact amount, did
5 you understand as of June 1999 that your medical bills
6 would probably be over \$25,000?

7 A. Yes, sir.

8 (DEF. EXH. 12, Physical Therapy Daily
9 Progress Notes, was marked for
10 identification.)

11 Q. I'm going to show you Number 12. That, I'll
12 represent to you, Mr. Kimmer, is something you may not
13 have seen. That's the physical therapy daily progress
14 notes. Have you seen any of those physical therapy
15 notes?

16 A. I don't remember seeing any of these, no.

17 Q. Okay. This one, Exhibit 12 is dated June 21st,
18 1999; is that right?

19 A. Yes.

20 Q. And it says "other" up at the top, and it says,
21 "Patient stated, 'My knee is giving me a lot of
22 problems, I'm cutting it short.'" Is that what it
23 says?

24 A. That's what it looks like.

25 Q. Do you remember what that was about? Do you

1 remember what you were talking about when you made
2 that statement?

3 A. No, I do not. I remember at times they'd tell
4 me to do so many different things, you know, so many,
5 lift a certain amount of weight, you know, with the
6 knee, with the foot, you know, working the knee.

7 Q. Yes, sir.

8 A. And sometimes I couldn't do as many as they
9 would want me to do, and I'm assuming that that is
10 what that -- that's the only thing.

11 Q. You wanted to stop because it was hurting you?

12 A. Right. I couldn't do what they required me to
13 do.

14 Q. Okay.

15 A. I had to cut it short.

16 Q. Because it was painful to you?

17 A. Too painful to continue. I stood a lot of
18 pain, you know, because they say no pain no gain, you
19 know, the more you work it, but sometimes you just
20 can't go any further.

21 Q. I understand.

22 A. I'm assuming that's what that "cutting it
23 short" is referring to.

24 Q. All right. So you were still having pain with
25 your knee in June of '99?

1 A. Yes.

2 (DEF. EXH. 13, Letter 6/23/99,
3 attachments (8 pages) Bates Numbers
4 211 - 218, was marked for
5 identification.)

6 Q. Number 13 is a multiple-page exhibit. I'll
7 show you that.

8 MR. POWELL: Tom, for your
9 reference, it's a June 23rd, 1999
10 cover letter, with a copy of checks,
11 and another letter and a release
12 agreement and a check and stuff
13 that's already been marked, actually.
14 And another letter, another check and
15 a settlement statement.

16 Q. I'm going to give you plenty of time to look
17 through all that.

18 A. (Reviewing documents.)

19 Q. Do you see that?

20 A. Yes.

21 Q. Now, the \$8,500 check in there to Subro Audit,
22 Inc., and the other check for \$1,500 to Advanced
23 Orthopedic & Medical Associates?

24 A. Yes, sir.

25 Q. You understood those checks went out from

1 Mr. Wright's office -- and I think he sent you a copy
2 of the one to Advanced Orthopedic & Medical
3 Associates. You understood those checks were going
4 out to pay your medical bills?

5 A. Yes, sir.

6 Q. But there wasn't enough money from that \$15,000
7 settlement to pay all your medical bills?

8 A. No, sir.

9 Q. You knew that to be true?

10 A. Yes, sir.

11 Q. And this, the settlement statement, the last
12 page in that exhibit signed by you is dated June 16th,
13 1999?

14 A. Yes, sir.

15 Q. You signed that settlement statement?

16 A. Yes, sir.

17 Q. And, Richard, you signed that settlement
18 statement knowing that not all of your medical bills
19 and lost wages were going to be compensated by that
20 \$15,000 settlement?

21 A. Yes, sir.

22 (DEF. EXH. 14, Physical Therapy Daily
23 Progress Notes, 6/23/99, was marked
24 for identification.)

25 Q. Let me show you Number 14 now. Number 14 is

1 more physical therapy notes. Do you see that? What's
2 the date on that, Richard?

3 A. 6/23 of '99.

4 Q. Okay. Your knee is still giving you trouble,
5 according to the note there. See where it says, "My
6 knees have been giving me trouble"?

7 A. Yes, sir. I see that, yeah.

8 Q. And was that true in June of '99?

9 A. Yes, sir.

10 (DEF. EXH. 15, Narrative Report,
11 8/19/99, was marked for
12 identification.)

13 Q. You may not have seen this before. I'm marking
14 it just for identification. Some people call this a
15 narrative report. Carolina Orthopedic Surgery
16 Associates in Rock Hill, do you remember going to see
17 them?

18 A. Yes, sir, I do now. Yes, sir.

19 Q. And this is a report from them. Down at the
20 bottom it says, "We discussed the problem and he is
21 not better after four months post-op."

22 This is after your surgery. This note is dated
23 August the 19th, 1999. I'll point that out to you.
24 Is that right?

25 A. Yes, sir.

1 Q. And this was four months after your surgery?

2 A. I don't remember the dates of the surgeries,
3 but I know Kinahan had done a couple of them before
4 then, probably, at least before then.

5 Q. And according to this note, you were not any
6 better four months after?

7 A. Right. Yes, sir.

8 Q. He says, "Further, he has only a few months
9 left before he loses his job."

10 Was that true at that time?

11 A. Yes, because my understanding was that, you
12 know, after I draw my disability from the company, if
13 I wasn't able to return to work, that I would be
14 terminated.

15 Q. I understand. And you apparently told your
16 doctor this?

17 A. Yeah. Yes, sir.

18 Q. You let him know that?

19 A. Yes, sir.

20 Q. And that was in August of 1999?

21 A. Yes, sir.

22 (DEF. EXH. 16, Physical Therapy Daily
23 Progress Notes, 9/17/99, was marked
24 for identification.)

25 THE WITNESS: Can I stand up for a

1 second?

2 MR. POWELL: Let's go off the
3 record for a second.

4 (Off-the-record conference.)

5 (A recess transpired.)

6 MR. POWELL: Back on the record.

7 Q. Mr. Kimmer, are you okay?

8 A. Yes, sir.

9 Q. Number 16 is the physical therapy daily
10 progress notes. This is in September of '99; is that
11 right?

12 A. Yes, sir.

13 Q. I assume you're talking about your knee, the
14 comment there, it says, "other, it hurts, it feels
15 like bone against bone"?

16 A. Yes, sir.

17 Q. Were you talking about your knees?

18 A. Yes, sir, because he took a lot of cartilage
19 out when he did the arthroscopic surgery.

20 Q. Was it both knees involved or just one?

21 A. Yes, both.

22 Q. You had both operated on at the same time?

23 A. Not at the same time. He did one that was a
24 couple months' difference in them. He give me time to
25 recuperate from the one before he did the other one.

1 Q. Okay.

2 A. Overall, I've had three arthroscopic surgeries
3 on the right and two on the left. And Dr. James, the
4 doctor I'm seeing at Carolina Orthopedics right now,
5 and he's informed me clearly there's nothing else he
6 can do unless it's a total knee replacement, because
7 the cartilage is, no cartilage left hardly.

8 Q. Richard, who would you regard as your primary
9 physician in the treatment of your problems from the
10 January 29th, 1999 wreck?

11 A. My primary?

12 Q. The one that you see most often, that you
13 regard as your doctor for those troubles.

14 A. Well, for a long time it was Dr. Kinahan. But
15 right now I've been seeing Dr. James at Lake Carolina
16 Orthopedics in Lancaster for, I guess, over two years
17 now, and he's my primary for now and forever with
18 these problems.

19 Q. Has he helped you?

20 A. Well, not exactly. He's giving me relief.
21 He's put shots in both knees different times that's
22 supposed to form like a cushion. It's a gel,
23 something that's supposed to form like a cartilage
24 cushion. He's keeping those shots in there to keep it
25 from feeling like bone on bone.

1 Q. You feel like he's a good doctor?

2 A. Yeah, absolutely.

3 Q. Okay.

4 A. I wish I'd been seeing him from day one.

5 (DEF. EXH. 17, Affidavit, 9/28/99,
6 attachments (3 pages), was marked for
7 identification.)

8 MR. POWELL: Skipping over to the
9 affidavit, Tom, for Number 17.

10 MR. POPE: Is there a number on
11 the bottom of it? What date is that?

12 MR. POWELL: It's the affidavit of
13 Ronnie Sowell.

14 MR. POPE: Oh, I've seen it
15 before. Is it near bottom of the
16 stack?

17 MR. POWELL: No. It should be
18 right after the -- right after this,
19 should be right after this. Let me
20 see.

21 MR. POPE: Seventeen?

22 MR. POWELL: Right.

23 Q. I'll show you Number 17, Mr. Kimmer, which is
24 an affidavit from Ronnie Sowell. This is someone that
25 Mr. Wright retained to look into the Pendergrass

1 matter?

2 A. Yes, sir.

3 Q. Have you seen this before?

4 A. Yes, sir, I have.

5 Q. So do you feel like Mr. Wright tried to
6 investigate to see whether Mr. Pendergrass had any
7 assets above and beyond the insurance?

8 A. Well, according to his letter and according to,
9 you know, what he told me in the office, you know,
10 about it, or either on the phone, yeah, I do feel like
11 that he tried to find out if he had anything else that
12 we could collect off of, yes.

13 Q. And have you learned, have you been provided
14 any information since this affidavit? This affidavit
15 is dated September 28th, 1999; is that right? See
16 where it says "sworn" right there?

17 A. Oh, yeah. Yeah, I see that now.

18 Q. Have you gained any information before or since
19 the date of this affidavit, with the attached report,
20 on the investigator's work as to whether
21 Mr. Pendergrass or his mother, Barbara Hughes, had any
22 significant assets out of which you could collect,
23 other than the insurance policy?

24 A. As far as I remember, no. I can't say that I
25 have, because I do remember this letter here, but any

1 other letter, I do not remember.

2 Q. My question really is simple. Since this
3 happened, since this was investigated by this
4 investigator for Mr. Wright, have you gotten any
5 information that this fellow Pendergrass, or his
6 mother, has a piece of land somewhere that's very
7 valuable, or had a bunch of money somewhere, or has
8 inherited anything that you could collect from?

9 A. Have I?

10 Q. Have you heard that from any source?

11 A. Oh, no, sir. No, sir.

12 Q. I mean, as far as you know, this investigation,
13 which is Number 17, was accurate when it was done and
14 it's accurate today?

15 A. As far as I know, yes, sir.

16 (DEF. EXH. 18, Medical Report,
17 11/2/99, was marked for
18 identification.)

19 Q. I don't want to blindside you. By that I mean,
20 I don't want to ask you something and then there is
21 something in the fine print. I'm not trying to catch
22 you on anything here. I'll represent to you before I
23 ask you the question that this is a medical report on
24 your treatment. It's dated November 2nd, 1999, and
25 it's concerning a diagnosis, lumbar sprain, your lower

1 back sprain. And it makes reference in here that you
2 were cutting a tree in, it says here: Two weeks ago
3 while cutting a tree down, you reinjured your low
4 back. Do you remember cutting a tree?

5 A. In '99?

6 Q. Yes, sir. This is dated November 2nd, 1999.
7 (Reading.) Patient is a 53-year old male who reports
8 having a history of back pain, but states he reinjured
9 the low back two weeks ago while cutting a tree down.

10 I'll let you look at that.

11 A. (Reviewing documents.) I don't remember that,
12 no, sir.

13 Q. You don't remember injuring your back when you
14 were cutting a tree down?

15 A. I don't remember cutting a tree down. I don't
16 remember using a chain saw, period, since this wreck
17 had happened.

18 Q. Okay. Do you think that this injury here could
19 just be a mistake? I'm not saying it isn't. It's
20 possible. I mean, you don't remember that event at
21 all?

22 A. No, sir, I do not. Like I say, I have not used
23 a chain saw, as far as I remember. And I'm pretty
24 positive I have not used a chain saw in years.

25 Q. Well, you understand, I'm not really asking you

1 about whether you used a chain saw or not. It could
2 have been an axe, for all I know. But, I mean, do you
3 remember hurting yourself trying to get a tree down in
4 October? It would have been in October of 1999. This
5 report says two weeks ago. I don't want to badger you
6 about it. I'm just asking you about whether it's so
7 or not, whether that happened.

8 A. I can't answer that with a yes or no. I can
9 answer it with I do not remember ever using a chain
10 saw since this wreck in '99.

11 Q. How about cutting a tree down?

12 A. No. No, not cutting no tree down either.

13 Q. You don't remember doing that?

14 A. No, sir, I do not.

15 Q. You understand I have to ask you.

16 A. Oh, I understand.

17 (DEF. EXH. 19, Bill Printout.

18 (26 pages), was marked for

19 identification.)

20 Q. Mr. Kimmer, I want to show you Exhibit 19,
21 which I'll represent to you is a bill printout.
22 Apparently this was mailed to you, it's got your
23 address on it. It's 25606 Highway 121, Whitmire,
24 29178. Was that your address at that time?

25 A. At that time, yes, sir.

1 Q. You received this from the Advanced Orthopedics
2 & Medical Associates. I'm showing you Exhibit 19.

3 A. I'm sure I did. I got all kind of these doctor
4 bills over the years.

5 Q. All right, sir. Richard, later in the
6 documents we'll see a reference to, in some of these
7 reports, to your having post-traumatic stress disorder
8 and maybe some depression problems as a result of
9 these events.

10 A. Yes, sir.

11 Q. Is that accurate?

12 A. Yes, sir.

13 Q. Did the failure of the workers' compensation
14 people to pay your lost wages and your medical bills
15 contribute to that?

16 A. Absolutely, because I've never had no problem
17 prior to this.

18 Q. And you were experiencing that post-traumatic
19 stress disorder when you would receive, for example,
20 documents like Exhibit 19?

21 A. Yes, sir.

22 Q. Did you call Mr. Wright and complain to him
23 about that, about why can't I get my bills paid?

24 A. I did talk to Mr. Wright several times, you
25 know, from early after, direct, whenever I turned the

1 auto accident stuff over to him. And then in late
2 April or early May when we started discussing the
3 workmen's comp, I talked to him lots of times, you
4 know, about I can't pay these bills, you know, and
5 different things of that sort.

6 Q. That would have been in April or May of 1999?

7 A. 1999, yes, sir.

8 Q. And I think, I can't remember now, I may be
9 wrong about suggesting this, you were there for
10 Mr. Wright's deposition, when he was deposed in
11 Columbia, I think?

12 A. Yeah. Yes, sir, at your office in Columbia,
13 yes.

14 Q. As I remember, he mentioned that a friend of
15 yours, maybe a coworker of yours is the one that told
16 you he thought you'd be covered for this workers'
17 compensation under this automobile accident.

18 A. Workmen's -- yeah. Yes, sir.

19 Q. Who was that, do you remember?

20 A. William A. Manning.

21 Q. That was the Bill Manning?

22 A. Bill Manning, yes. He was my ex-supervisor.
23 He was at Murata. He was still at Murata at the time
24 of this accident, but not my supervisor.

25 Q. I understand. But was he in a management

1 position at Murata?

2 A. Some sort of --

3 Q. He was somebody's boss?

4 A. I think he moved -- not somebody's boss, but
5 something to do with the fiber control stuff. That
6 was his specialty to start with.

7 Q. But he had been your boss at one time?

8 A. Yes, sir.

9 Q. And he told you he thought you were covered,
10 workmen's comp for Murata would cover you for this
11 accident of January 29th, 1999?

12 A. Yes, sir.

13 Q. And then you approached Mr. Wright about that?

14 A. I did, yes, sir.

15 Q. And you knew, of course, that your medical
16 bills and your lost wages weren't being paid for all
17 of 1999 and on into 2000?

18 A. Yes, sir.

19 (DEF. EXH. 20, Letter, 12/10/99, was
20 marked for identification.)

21 Q. Number 20 is another one of these bills that we
22 saw, letters we saw earlier. Exhibit 20 is a letter
23 from Philip Wright dated December 10th, 1999, to Scott
24 Wessinger at Farm Bureau?

25 A. Yes, sir.

1 Q. He sent a copy of that letter to you?

2 A. I'm sure he did, yes, sir.

3 Q. See at the bottom where it says, "cc Richard
4 Kimmer"?

5 A. Yes, sir.

6 Q. That indicates that a copy was sent to you?

7 A. Yes, sir.

8 Q. And he said you're still having problems with
9 your knee; and the wage loss, he's calculated your
10 wage loss through December 10th, \$26,208. Does that
11 sound about right to you?

12 A. In and about, yeah. That's pretty close, yes,
13 sir.

14 Q. And you were aware of that in December of 1999?

15 A. Yes, sir.

16 (DEF. EXH. 21, Letter, 1/4/00, was
17 marked for identification.)

18 Q. Exhibit 21, this is just another one of these
19 letters that Mr. Wright sent. This is to State Farm.
20 This letter, Exhibit 21, is it not, is a January 4th,
21 2000 letter?

22 A. Yes, sir.

23 Q. To State Farm with a copy to you?

24 A. Yes, sir.

25 Q. And in it, Mr. Wright states that your wage

1 loss through January 3rd was \$28,071.68; is that
2 correct? It would be in this letter here?

3 A. Yeah. I'm comparing that number to this
4 number.

5 Q. Right.

6 A. Yes, sir.

7 Q. And was that about right?

8 A. Yes, sir.

9 (DEF. EXH. 22, Letter, 1/11/00, was
10 marked for identification.)

11 Q. And then Exhibit 22 is Mr. Wright's January
12 11th letter to Liberty Mutual; is that right?

13 A. Yes, sir.

14 Q. And you received a copy of this letter also?

15 A. I'm sure I did, yes, sir.

16 Q. And Mr. Wright is saying to Mr. McNeill: I
17 need a response to my Form 50. He wants to know if
18 this is an admitted case. Do you see that?

19 A. Yes, sir.

20 Q. And you understood Liberty Mutual was the
21 workers' compensation carrier for Murata?

22 A. Yes, sir.

23 (DEF. EXH. 23, Letter, 2/1/00.
24 (2 pages), was marked for
25 identification.)

1 Q. Then Number 23, I'll mark it just because we've
2 seen it before, it might be excess. This happens to
3 be the copy that I got through your attorney. That's
4 the February 1st letter that we looked at earlier.

5 A. Yes.

6 Q. That's the letter you received from Mr. Wright?

7 A. Yes, sir.

8 Q. Okay. And Number 24?

9 (DEF. EXH. 24, Waiver of Conflict,
10 was marked for identification.)

11 Q. And Number 24.

12 Now, at the time of the letter of, the February
13 1st letter, had you and Mr. Wright discussed the
14 possibility of his continuing to be your lawyer for
15 the underinsured motorist coverage claim?

16 A. I think we had discussed that, but after a
17 while, you know, I turned that over to Mr. Pope,
18 because of the distance I'd have to travel, would have
19 to travel back and forth to Lancaster.

20 Q. We're going to get to that in just a minute.

21 A. Okay.

22 Q. The last paragraph of that February 2000
23 letter, Number 23, he says, "I appreciate your
24 willingness to let me to continue to represent you in
25 this matter, and want you to protect your interest,

1 that was with respect to the underinsured motorist
2 claim." Correct?

3 A. Yes, sir.

4 Q. It had nothing to do with the workers'
5 compensation claim?

6 A. Right.

7 Q. Because Mr. Pope was your lawyer for the
8 workers' compensation claim?

9 A. Right.

10 Q. And also on February 1st, I'll show you
11 Exhibit -- it's also dated February 1st, Exhibit 24.
12 That's a waiver of conflict. Is that your signature,
13 Mr. Kimmer?

14 A. Yes, sir.

15 (DEF. EXH. 25, Authorization to
16 Release File, was marked for
17 identification.)

18 Q. And Exhibit 25 is an authorization to release
19 the file.

20 A. Yes, sir.

21 Q. Now, did you authorize Mr. Wright to release
22 the portion of the file that he had related to your
23 workers' compensation claim to Attorney Tom Pope of
24 Newberry, South Carolina?

25 A. A portion of the workmen's comp file.

1 Q. The portion of your file. See it says, I,
2 Richard Kimmer, authorize Philip E. Wright to release
3 a portion of my file related to my workers'
4 compensation claim to Attorney Thomas Pope of
5 Newberry, South Carolina?

6 A. Yes, sir.

7 Q. Is it accurate, is it correct that for all
8 purposes relating to the workers' compensation claim
9 and related matters, that Mr. Pope was your attorney
10 after February 1st of 2000?

11 A. According to this letter, yes.

12 Q. That's correct, isn't it?

13 A. To the best of my recollection, that is
14 correct, yes.

15 (DEF. EXH. 26, Letter, 2/1/00 to G.D.
16 Morgan from Philip E. Wright, was
17 marked for identification.)

18 Q. And Exhibit Number 26 is a letter also from
19 Mr. Wright. That's to Mr. Morgan, a lawyer in
20 Columbia?

21 A. Yes, sir.

22 Q. You received, you and Mr. Pope received a copy
23 of that?

24 A. Yes, sir.

25 Q. And in there, Mr. Wright is telling Mr. Morgan

1 that he's now represented by Mr. Pope of Newberry?

2 A. Yes, sir.

3 (DEF. EXH. 27, Letter, 2/10/00, was
4 marked for identification.)

5 Q. Number 27, I'll show you that is a February
6 10th letter from Mr. Pope to Mr. Wright. Did you
7 receive a copy of Mr. Pope's letter, February 10th?

8 A. I'm sure I did, yeah.

9 (DEF. EXH. 28, Letter, 2/11/00 to
10 Reggie Foster from Philip Wright, was
11 marked for identification.)

12 Q. And Number 28, I'll show you, is a letter,
13 again another letter from Mr. Wright. Now, looking
14 back at Mr. Pope's letter, the next to the last
15 paragraph on Exhibit 27, this one right here, the next
16 to the last paragraph at the bottom where he says, "It
17 is my understanding that" -- and this letter from
18 Mr. Pope is to Mr. Wright, correct?

19 A. Yes, sir.

20 Q. And with a copy to you?

21 A. Yes, sir.

22 Q. And the paragraph says, "It is my understanding
23 that you settled with the liability carrier for policy
24 limits of \$15,000, but that the settlement funds
25 remain in your trust account and have not been

1 disbursed and will not be disbursed pending approval
2 of Mr. Kimmer upon consultation with me."

3 Do you see that?

4 A. Yes, sir.

5 Q. Then Mr. Wright writes him back in Exhibit 28,
6 the next exhibit there, and at the bottom he puts a
7 p.s.: "I tried to reach Reggie yesterday and today,
8 but he has been busy. The \$15,000 liability
9 settlement is not in my trust account."

10 Do you see that?

11 A. Yes, sir.

12 Q. (Reading.) "I took my one-third fee and paid
13 medical subrogation of \$8,500 and medical costs of
14 \$1,500. I enclose a copy of my escrow sheet showing
15 the disbursements."

16 I don't have the escrow sheet handy, but you
17 understood that Mr. Wright had paid your medical bills
18 and the \$15,000 was not in his account. You knew
19 that?

20 A. According to these letters.

21 Q. And did you approve that? You approved for him
22 to pay your medical bills?

23 A. Yeah. Yeah, I did.

24 Q. And, at the time, you approved for him to take
25 \$5,000 as his fee?

1 A. Well, that's what he told me he would charge to
2 do it, was one-third of the fee, I mean the amount.

3 Q. Right. My question to you, the reason I'm
4 going through that, do you in this case seek the
5 return of that \$5,000 from Mr. Wright? Do you think
6 he should be allowed to keep it and, if not, do you
7 seek the return of that in this lawsuit?

8 A. Well, I really don't know how to answer that.
9 Mr. Wright earned his third, I guess, for what he did.
10 But to settle that, you know, knowing that we may have
11 a workmen's comp, I don't feel good about him getting
12 any part of it and...

13 Q. Well, if you want it back, if you seek that in
14 this case, you need to tell me that.

15 A. I'm not a hard person to get along with. I'm
16 not going to say I seek that back, no. I'll, you
17 know, I feel like he earned it. Like I just said, I
18 feel like he earned what he got out of it, even though
19 things have not been the way they should be up to this
20 date, I don't guess. But, no, I do not seek the --

21 Q. The \$5,000?

22 A. The \$5,000 back.

23 Q. What you seek from Mr. Wright is the money that
24 the workers' compensation people should have paid you?

25 A. Yes, sir.

1 (DEF. EXH. 29, Letter, 2/11/00 to
2 Reggie Foster from Philip Wright, was
3 marked for identification.)

4 Q. The next letter is Exhibit 29. This has to do
5 with the postponement of the deposition.

6 A. Yes, sir.

7 Q. Another letter by Mr. Wright; is that correct?

8 A. I assume it is correct.

9 (DEF. EXH. 30, Letter, 2/24/00, was
10 marked for identification.)

11 Q. The next will be Exhibit 30. Is this your
12 February 24th letter to Mr. Wright, February 24th,
13 2000 letter to Mr. Philip Wright, the defendant in
14 this case?

15 A. (Reviewing documents.) I'm sorry. Would you
16 repeat the question? I was trying to read and listen
17 to you.

18 Q. That's all right, Richard.

19 Is Exhibit 30 a copy of your February 24th,
20 2000 letter to Philip Wright, the defendant in this
21 case?

22 A. Yes, sir.

23 Q. And in this letter of February 24th, 2000, you
24 say to Mr. Wright that, quote -- I'm looking at the
25 last sentence in the first paragraph. Quote: "I have

1 problems" -- you're discussing his representation of
2 you in the underinsured motorist claim, right?

3 A. Yes.

4 Q. And in that regard you say, quote, "I have
5 problems with this since it looks like the workers'
6 compensation case and the suit against Mr. Pendergrass
7 are all related from the same incident." See that?

8 A. Yes, sir.

9 Q. So you are, in effect, in this letter telling
10 Mr. Wright, I don't want you to represent me anymore
11 for this matter, for any part of it?

12 A. For the workmen's comp case.

13 Q. Or the underinsured motorist case. See, you're
14 asking him to send the entire file --

15 A. Yes, sir.

16 Q. -- to Mr. Pope.

17 A. Yes, sir.

18 Q. Do you see that?

19 A. Yes, sir.

20 Q. So is it fair then, is it accurate to say that
21 as of February 24th, after that time Mr. Philip E.
22 Wright did not represent you in any capacity for any
23 reason?

24 A. No, sir.

25 Q. What did he do after that time for you as your

1 attorney?

2 A. I must have misunderstood the question for you
3 ask me that again.

4 Q. You were answering yes. I think you meant to
5 agree with me, I think. Let me rephrase it. We'll go
6 at it again. My understanding of Exhibit 30, your
7 letter to Mr. Wright of February 24th, was that you
8 were saying I want Mr. Pope to represent me for all
9 matters related to this January 29th, 2000 accident,
10 and the workers' compensation and the underinsured
11 motorist and all matters related to it, and send my
12 file to Mr. Pope.

13 A. Yes, sir.

14 Q. That's correct?

15 A. Yes, sir.

16 Q. Okay. So now, after February 24th, 2000, did
17 Philip Wright represent you in any matter?

18 A. No, he did not.

19 Q. Okay. We agree now. We agree.

20 (DEF. EXH. 31, Letter, 3/21/00, was
21 marked for identification.)

22 Q. And Exhibit 31 is just a letter from Mr. Pope
23 to Mr. Wright sending orders substituting counsel,
24 that is, there were orders formally substituting
25 Mr. Pope for Mr. Wright as your lawyer. Were you

1 aware of that?

2 A. I'm not understanding the question, I'm sorry.

3 Q. Were you aware that shortly after your letter
4 of February 24th, 2000, machinery was put into place
5 to enter an order in Columbia with the workers'
6 compensation commission to show Mr. Pope as your
7 attorney and not Mr. Wright any longer? Were you
8 aware that that happened?

9 A. Yes, sir.

10 Q. And you authorized that?

11 A. I'm sure I did, yeah.

12 (DEF. EXH. 32, New Patient Evaluation
13 (3 pages) Bates Numbers 159-161, was
14 marked for identification.)

15 Q. Number 32, I don't see any -- well, 32 is an
16 October 17th, 2000 report from Carolina Neurology.
17 And on the third page of it, it makes reference to
18 severe post-traumatic stress syndrome, Mr. Kimmer. I
19 think I mentioned that to you earlier, we would get to
20 something eventually through this stack of stuff that
21 makes reference to it. Well, this is it.

22 Can you tell me how that affects you? The
23 post-traumatic stress disorder, you talked to your
24 doctor about that?

25 A. Yes, sir. I have seen two different

1 psychiatrists.

2 Q. Can you tell me about what those symptoms are,
3 what your trouble is in this regard?

4 A. Well, it makes me angry, makes me, makes my
5 mind wander, makes me sometimes feel like I want to do
6 bad things to people that's caused different things in
7 my life, you know, not only this but other things in
8 my life. I have had a serious problem with this
9 depression, because, you know. Forgetfulness, I guess
10 so much things on my mind I forget about other things.
11 I can't remember whether I've taken my medicine when
12 I'm supposed to take it, you know.

13 Q. Right.

14 A. My family life is just, sex life is -- that's
15 played a big part in my divorce that I'm going through
16 right now. Two years prior to her leaving, back in
17 January of last year, which was '04, we had sex three
18 or four times in two years. I can't. I've taken
19 medicine from doctors for that, it doesn't help.

20 Q. I understand. And would this be attributed, do
21 you assign or does the doctor assign the cause of this
22 to any of the conduct or things that Mr. Wright did or
23 didn't do?

24 A. Well, it's like I just said, it's not only
25 because of the matter that we're discussing here

1 today.

2 Q. But that's part of it.

3 A. I never had any problem with it until, you
4 know, I have been a workaholic all my life, and then
5 when you go from working, you know, making a decent
6 living to not working, that's, I guess -- I guess my
7 mind and my body just can't still -- even though it's
8 been six years, it still can't adjust to the
9 difference in the life I had before and what I have
10 now. And not being able to see where things are going
11 to get any better down road anywhere, you know.

12 Q. Do you blame in part, at least in part
13 Mr. Wright for that condition?

14 A. I've got to because, you know, I don't feel
15 like I would be in this financial and going through a
16 divorce and lost two homes since '99, if he had taken
17 care of the workmen's comp matter before he settled on
18 the car insurance settlement.

19 Q. So that is in part a cause for your
20 post-traumatic stress disorder?

21 A. It's the major part, I guess, you know. Maybe
22 not all him, but just what I'm having to go through
23 because of this.

24 Q. And you started having trouble with this back
25 in 1999?

1 A. Yes, sir.

2 Q. And you were aware in 1999 that you were going
3 through some changes because you weren't able to work
4 and get paid?

5 A. Absolutely, yes, sir.

6 Q. And the part about your not getting paid, you
7 were aware at least by February of 2000 that
8 Mr. Wright had at least represented to you that was in
9 part his fault?

10 A. Yes, sir.

11 (DEF. EXH. 33, Letter, 6/17/02,
12 attachment (2 pages), was marked for
13 identification.)

14 Q. Let's go to Exhibit 33. Exhibit 33 is a June
15 17th, 2002 letter by your attorney, Tom Pope, with an
16 attachment to it, on the back it says "Richard
17 Kimmer." Do you see that.

18 A. Yes, sir.

19 Q. Did you receive a copy of this letter with the
20 attachment to it? This is a letter from Mr. Pope to
21 Pope Johnson, correct?

22 A. I'm sure I did, yeah.

23 Q. Was Mr. Tom Pope authorized to send this letter
24 on your behalf, along with the attachment?

25 A. Well, I'm sure I did authorize it because, you

1 know, he's the lawyer. I'm sure he's not going to
2 send something -- I mean, I'm not educated. That's
3 why I have him now. That's why I had Philip Wright
4 from the beginning, because I know nothing about this
5 type situation.

6 Q. I understand. My question to you, though, is,
7 he was authorized to send information like this
8 generally on your behalf?

9 A. Well, explain to me what this information
10 really consists of, or, I mean, I'm seeing comp rate
11 one thing, the total another thing. Is this...

12 Q. That is a document that apparently was prepared
13 by Mr. Pope to send to Mr. Pope Johnson, and I'm just
14 asking you, was its transmittal, was he authorized to
15 send it for you in your workers' compensation
16 claiming?

17 A. I'm sure he was.

18 (DEF. EXH. 34, Letter, 12/6/02.

19 (2 pages), was marked for
20 identification.)

21 Q. The next letter is Exhibit 34. Mr. Pope again
22 writes a letter dated December 6th, 2002 to Pope
23 Johnson; is that right?

24 A. Yes, sir.

25 Q. And did you receive a copy of this letter?

1 A. I'm sure I did.

2 Q. You see in the first sentence of the letter:
3 On behalf of Richard Kimmer, I am writing to demand
4 \$220,000 in settlement of this claim. Do you see
5 that?

6 A. Yes, sir.

7 Q. Was Mr. Tom Pope authorized to make that
8 settlement demand on your behalf?

9 A. I'm sure he and I talked about it. I'm sure I
10 okayed it, yes.

11 (DEF. EXH. 35, Letter, 12/2/02, was
12 marked for identification.)

13 MR. POWELL: Let's go off the
14 record for just a minute.

15 (Off-the-record conference.)

16 Q. Mr. Kimmer, did you have anything to do with
17 the Time Warner/Pee Dee matter that's the subject of
18 this Exhibit 35? Was Mr. Pope representing you in
19 some other case?

20 A. No, sir, he is not.

21 (DEF. EXH. 36, Letter, 12/9/02, was
22 marked for identification.)

23 Q. Is Number 36 a December 9th, 2002 letter from
24 Mr. Pope to Pope Johnson?

25 A. Would you repeat the question? I'm sorry.

1 Q. Is Exhibit 36 Mr. Tom Pope's letter of December
2 9th, 2002 to Pope Johnson?

3 A. According to this, it is, yes.

4 Q. And your attorney was authorized to send
5 Exhibit Number 36 on your behalf?

6 A. Yes, sir.

7 (DEF. EXH. 37, Affidavit, 3/6/03, was
8 marked for identification.)

9 Q. Number 37, is that your affidavit of March
10 17th, 2003?

11 A. Yes, sir.

12 Q. The last sentence there says: I, Richard
13 Kimmer, and the words "was aware" is circled.

14 A. Yes, sir.

15 Q. (Reading.) Of my preexisting condition of
16 degenerative arthritis/osteoarthritis right knee prior
17 to my injury of 1/29/99.

18 Did you in fact have degenerative arthritis or
19 osteoarthritis?

20 MR. POPE: You didn't read all
21 this.

22 Q. (Reading.) Was aware of hurt knee before
23 1/29/99.

24 Were you aware of the hurt knee and/or were you
25 aware of your degenerative arthritis, if you had

1 degenerative arthritis, before the wreck?

2 A. Well, I can't say that I was aware of the
3 arthritis, but, yeah, I was aware of the hurt knee
4 before '99. That was the one we spoke about earlier
5 in '98.

6 Q. Okay. Had you been told of any arthritis
7 problems in your knees before January 29th of 1999?
8 Had a doctor told you that or had you been advised of
9 that?

10 A. No, sir.

11 Q. Okay. Mr. Kimmer, have any of the surgeries or
12 the physical therapy that you've gotten improved your
13 situation with your knees?

14 A. Temporarily. The shots that they put in there,
15 that is supposed to help form like a cartilage
16 cushion, they are good for three to five months.
17 After that it's like bone on bone again.

18 Q. Tell me this, the reason that you're unable to
19 work today, would that have anything to do with your
20 back or is it just confined to your knees?

21 A. No, it's combined between my neck, knees and
22 back.

23 Q. Okay.

24 A. I have chronic pain in my back all the time
25 from nerve damage from the wrecks.

1 Q. You say from the wrecks. Would it have been
2 from early January -- I mean, excuse me, the early
3 1990s wreck and the 1999 wreck?

4 A. Well, I can't say I had any problems before
5 '99, because if you look at my work record prior to
6 '99, it would be very plain to see, you know, that
7 there's been nothing, and I wasn't on any medications
8 for any type of back, you know. Looks like my prior
9 work record and not being on any medication for that
10 ought to speak for that.

11 Q. All right.

12 A. Before we go to anything else, could we back up
13 to this Exhibit 18, the one you asked me about using a
14 chain saw or an axe?

15 Q. Sure. Sure.

16 A. I've been sitting here trying to, you know,
17 remember, and there is a little something coming to me
18 about a limb breaking out of a pecan tree and hanging
19 down. And I sawed it off with the old hand type, what
20 you call it, bow saw, and drug it out of the yard.
21 That's the only thing I can remember anything about
22 that.

23 Chain saw, axe, no, but -- and I think, you
24 know, dragging it out of the yard, I may have flared
25 my back up worse than what it was. I'm not a hundred

1 percent sure. That's the only thing I can remember
2 about that, is a limb, you know, breaking out of the
3 pecan tree and me sawing it off with that hand bow
4 saw.

5 Q. Anything else you want to say about that,
6 Richard?

7 A. No, sir, that's all I can remember. I'm not a
8 hundred percent clear about that, but I do remember at
9 one time -- it was sometime, you know, after the wreck
10 had happened. I remember it was after the wreck had
11 happened.

12 MR. POWELL: We're winding down.
13 Give me just a minute or two.

14 MR. POPE: That's fine. We can
15 take a break.

16 MR. POWELL: That's okay.

17 (A recess transpired.)

18 (DEF. EXH. 38, Tolling Agreement.

19 (2 pages), was marked for
20 identification.)

21 Q. Back on the record, Mr. Kimmer?

22 A. Yes, sir.

23 Q. The tolling agreement that you signed and
24 Mr. Wright signed dated October 30th, 2003, do you see
25 that?

1 A. Yes.

2 Q. Are you aware of any other tolling agreement
3 between you and Mr. Wright other than this one?

4 A. I don't understand what tolling agreement
5 really means. I guess I've seen it before.

6 Q. My question to you is, the one document that I
7 have labeled tolling agreement, is this one that's
8 signed by the both of you?

9 A. Yes.

10 Q. If there is another one in this case, I need to
11 be made aware of it.

12 A. Well, I can't answer that because I don't know
13 if there's another one in this case.

14 Q. You haven't seen one if there is one?

15 A. Not in my recollection, no.

16 MR. POWELL: That's all I've got.

17 EXAMINATION

18 BY MR. POPE:

19 Q. Richard, I'm going to ask you a couple
20 questions, not about that.

21 When the complaint and the amended complaint
22 were filed, of course, you give me information as your
23 lawyer and I write it up; is that right?

24 A. Yes, sir.

25 Q. You're not a lawyer, so whatever your damages

1 are would be determined by a court, would they not?

2 A. That's correct.

3 Q. Now, could I see Number 6, please? I don't
4 know that you're going to know the answer because I
5 didn't and Mr. Powell didn't either; but if you look
6 at Number 6, it's got a date at the bottom of 12/9/99,
7 and the exhibit that -- we're talking now about
8 Exhibit 6, which is a Form 50. The Form 50 that is
9 attached to the complaint, the amended complaint is
10 the one that was, of course, filed 6/18/99; isn't that
11 right? That's the one we've been looking at?

12 A. Yes, sir.

13 Q. 6/18/99, which is attached as part of
14 Exhibit 1.

15 A. Yes, sir.

16 Q. Do you really ever remember seeing Number 6
17 where it has a date of 12/9/99? I'm just curious,
18 because I don't.

19 A. No, sir, I don't. To the best of my
20 recollection, I do not remember seeing one dated that.

21 Q. That's fine. All right. Now, Mr. Powell
22 didn't ask you about this, but Mr. Wright represented
23 you -- I mean, he's asked you a little about it, but
24 he represented you in your divorce against your former
25 wife, Cathy Kimmer; is that right?

1 A. Yes, sir.

2 Q. And in that case you presented him with -- I
3 mean you had to sign a financial declaration for
4 family court?

5 A. Yes.

6 Q. And you had to disclose truthfully what your
7 income is; is that right?

8 A. Yes.

9 Q. And when you got paid at that time, from the
10 whole time you've been working for Murata, since 1994
11 forward, you have been paid, in addition to your
12 hourly rate, what? What have you been paid in
13 addition to that?

14 A. Car allowance, which was \$310 every two weeks.
15 I think I got paid biweekly. Gas mileage to and from
16 wherever I traveled to; and hourly wage, as long as it
17 was more than one hour from my house or, you know,
18 back to my house.

19 Q. Was Mr. Wright aware of those terms of your
20 employment in 1996, when you got your divorce then?

21 A. I'm sure he was because I had to present him
22 with a check stub for him to get my, you know, my
23 financial statement.

24 Q. When you went to him in connection with your
25 car wreck, you didn't know it was workers' comp until

1 Mr. Manning told you; it was right?

2 A. That's true.

3 Q. And Mr. Manning was aware of the terms of your
4 employment that you just described: You got a salary
5 of a certain amount per hour, you got a car allowance,
6 you got mileage, and you got hours under some
7 conditions if you drove more than an hour to work?

8 A. That's true.

9 Q. And he was aware of all that; and as far as you
10 know, did he tell that to Mr. Wright?

11 A. He did.

12 Q. And did you talk to Mr. Wright about it on more
13 than one occasion, those terms of your employment?

14 A. I did.

15 Q. Did you also have a pay stub before he
16 proceeded to represent you in your workers' comp
17 claim?

18 A. I'm sure I did, yes, sir.

19 Q. Okay. If you look at Exhibit 1, the attachment
20 with the Form 50 being behind it, when he signed,
21 Mr. Wright signed on 6/18/99, he put 10A on the Form
22 50, on your weekly wages he's got 582.40. Did he get
23 that off your pay stub?

24 A. I'm assuming he did, because, you know, I had
25 to present him with actual figures, not what I thought

1 it was, but the actual figures. The only way I could
2 do that was with a pay stub.

3 Q. When Mr. Johnson -- he introduced a letter I
4 wrote to Mr. Johnson authorizing or suggesting or
5 demanding a settlement. That was a compromise offer,
6 was it not, before the hearing in the matter over two
7 years ago? It was a compromise, wasn't it?

8 MR. POWELL: Object to the form.

9 You may answer.

10 Q. Isn't that right?

11 A. A compromise before the settlement. Let me
12 make sure I understand.

13 Q. Never mind. It was an offer of settlement
14 below the amount of claim, was it not?

15 MR. POWELL: Object to the form.

16 Q. Subject to his objection.

17 MR. POWELL: You may answer.

18 THE WITNESS: Yes, sir.

19 Q. Richard, I'm going to show you this letter
20 dated November 27th, 1995. Is that approximately when
21 you started work for Murata that outlined the terms of
22 your employment?

23 A. Yes, sir.

24 (PLF. EXH. 1, Letter, 11/27/95 to
25 Richard Kimmer from Randy Chaney.

1 (2 pages), was marked for
2 identification.)

3 Q. Pursuant to that letter to you from Murata,
4 November 27th, 1995, you worked continuously under
5 that employment arrangement with Murata from that time
6 until you were injured in the car accident we've been
7 talking about; is that right?

8 A. That's correct, yes, sir.

9 Q. Full-time and continuously; is that right?

10 A. Yes.

11 Q. And did you get the car allowance and the
12 mileage the entire time you worked for them?

13 A. Yes, sir, I did.

14 Q. And it was on your pay stub, those items?

15 A. Yes, sir.

16 MR. POPE: That's all I have.

17 Thank you.

18 EXAMINATION

19 BY MR. POWELL:

20 Q. Mr. Kimmer, the information that Mr. Pope just
21 asked you about concerning your pay, that is, your
22 wages and your car allowance and your mileage and all
23 the parts of your compensation that Mr. Pope just got
24 through asking you about, you were aware of those
25 payments and that's how you were paid, you were aware

R. Kimmer/Exam by Mr. Powell

1 of that in 1999, correct?

2 A. Yes, sir.

3 MR. POWELL: That's all I have.

4 (The deposition was concluded at 1:10
5 p.m.)
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1 In the Court of Common Pleas

2 York County, South Carolina

3
4 Carol M. Kimmer, Person Representative of the Estate of
5 Richard Kimmer, deceased
6 versus

7 Philip E. Wright, Defendant

8 Case Number. 2004-CP-46-2659

9
10 Heard on Friday, September 5, 2008

11 Before the Honorable John C. Hayes, III

12 Appearances:

13
14 Thomas H. Pope, III

15 Post Office Box 190

16 Newberry, SC 29108

17
18 Warren C. Powell, Jr.

19 Post Office Box 61110

20 Columbia, SC 29260

21
22 Reported by: Janet M. Rich

23 Circuit Court Reporter

24 1992 Downey Street

25 Rock Hill, SC 29732

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1 The Court: This is Richard Kimmer versus
2 Philip Wright. Mr. Pope, you represent who?

3 Mr. Pope: I represent the plaintiff, Your
4 Honor, Kimmer and it's our motion for summary
5 judgment, and then I subsequently filed and the
6 defendant also filed a motion for summary
7 judgment.

8 The Court: So we got cross motions for summary
9 judgment. You filed first so you go first.

10 Mr. Pope: Thank you, Your Honor. Your Honor,
11 this case is a legal malpractice case in a worker's
12 compensation setting and it's our view and we think
13 the law is clear on this that when a lawyer is
14 negligent in such a case in handling a, the issue
15 would be whether the lawyer is negligent in handling
16 a compensable for claim for a claimant and that
17 claimant is thereby proximately injured due to that
18 negligence. It's a case within a case, in other
19 words.

20 And in Doe versus Howell which is a 2005 case,
21 the Court of Appeals held that a plaintiff must show
22 that he would have been successful in the underlying
23 suit if the attorney defendant had not committed
24 alleged malpractice.

25 It's our view, Your Honor, that the record in

1 this case is clear, that you've been sort of
2 inundated with information, Your Honor. I filed not
3 only the motion, I filed an affidavit, I filed a
4 number of exhibits with that affidavit and that was
5 last week; in fact, they were filed in a big
6 notebook. I don't think it's imperative that you
7 have it in front of you, but I'm just telling you
8 that we filed a lot, but notwithstanding those
9 filings we believe and I think Mr. Powell would
10 agree from the defense, that it is a matter of law,
11 and I filed all this so you would have the full
12 flavor of the history of the case.

13 But our view is and we think it's
14 uncontradicted that if suit had been filed in 2000
15 when they say the statute of limitations began to
16 run or in 2001 or in 2002 the plaintiff could not
17 possibly have prevailed in this matter. He maybe
18 had a case, but the reason he maybe had a case was
19 it had never been determined that the case was even
20 compensable until, and he submitted a time line,
21 Your Honor, but I'll, at the appropriate time,
22 submit my notes on a time line which would show that
23 he's eliminated something very important on that
24 time line, way over on the right side July 31, 2003,
25 that is when the worker's compensation commissioner

1 determined that this was indeed a compensable claim
2 and determined also that Mr. Kimmer was in fact
3 totally disabled, and thirdly, her third ruling,
4 because these three matters were all contested at
5 that hearing whether it was even compensable, he was
6 injured in a wreck on the way to work. He claims he
7 was totally disabled. They say he didn't, he was
8 limited to some scheduled injury; and thirdly, they
9 said he was barred from recovery and that's what
10 this lawsuit was about. He was barred from recovery
11 because his lawyer settled a third party claim for
12 \$15,000 with the at fault driver in the car wreck on
13 the way to work prior and without notice to the
14 carrier, so they filed the worker's comp claim after
15 that settlement had been reached.

16 Now importantly, Your Honor, I handed up and I
17 tried to limit my in court submissions to some
18 relatively simple things. I handed up Judge
19 Kimball's order and I handed up a summary of the
20 pertinent exhibits that I filed with the court
21 either last week or this week, depending on when it
22 came in. In June of 2005 Judge Kimball had a
23 hearing on the defendant's motion for summary
24 judgment and on my motion for a stay, and nothing
25 has happened since this order was decided except an

1 appeal was taken and resolved.

2 Now what this order recites, the claimant was
3 on his way to work, he was in a collision; the
4 defendant Mr. Wright got a settlement for him, he
5 was representing him in the case with a third party
6 defendant, and then he filed a worker's comp claim
7 which was denied. One basis for that denial, one
8 basis, was because he settled the claim without the
9 carrier's consent, the worker's comp carrier's
10 consent. And after that, Mr. Wright advised the
11 plaintiff that he may have erred in settling that
12 personal injury claim without first obtaining
13 approval from the employer. And then a document
14 that he presented, a waiver of conflict, the
15 document recited that he may have a claim against
16 defendant due to the premature settlement, and the
17 issue of that premature settlement and other grounds
18 for the denial of the claim came before the circuit
19 court on an appeal.

20 Now this, the circuit court action that he's
21 referring to here of Judge Kimball is we appealed
22 the determination that there shouldn't have been a
23 bar. If we had prevailed on that, Mr. Wright, there
24 would have been no case against Mr. Wright. Judge
25 Goode agreed, he reversed the worker's comp

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1 commission. The worker's comp commission said no,
2 that bar was valid, and when he settled the third
3 party claim without consent he got no worker's comp
4 benefits, he was barred. Judge Goode reversed that
5 and then the Court of Appeals took a different view
6 and then that all happened after Judge Kimball's
7 order and that's why he ran a stay at that moment.
8 But he made some important findings which we think
9 are important, are relevant to why we're here today,
10 and that is on page two he acknowledged that
11 although plaintiff acknowledged the possibility of
12 error on defendant Mr. Wright's part in the waiver
13 of conflict dated May of 2000, there was not a
14 finding that plaintiff's claim was precluded by the
15 settlement of the adverse driver until July 31,
16 2003. Until that time the worker's compensation
17 insurer also maintained that the accident and
18 injuries were not covered at all because they
19 occurred outside the scope of plaintiff's
20 employment.

21 And so the judge then following on near the
22 bottom or the middle of page three pointed out that
23 the case of Epstein versus Brown was controlling and
24 we'll be talking about that in a moment, but in
25 Epstein which involved a legal malpractice claim,

1 now it wasn't a worker's comp matter, it was a
2 different sort of setting, three judge majority of
3 the Court of Appeals found that the statute of
4 limitations began to run when an adverse jury
5 verdict was rendered. In the present case the
6 similar trigger event would be the adverse ruling of
7 the industrial commission, again that happened July
8 31, 2003, in this case. And the judge, Judge
9 Kimball, denied the motion for summary judgment
10 based on those findings which we submit are not only
11 good law but they are the law of this case. Judge
12 Kimball's order succinctly stated the predicament
13 that Mr. Kimmer found himself in. They are now
14 saying when the worker's comp, the injury occurred
15 in January of '99, the worker's comp ruling,
16 hearing, wasn't held until December 2002, and
17 Commissioner Childs, now Judge Childs, she made a
18 ruling, as I said earlier, on the three contested
19 issues in that case, but the ruling wasn't handed
20 down until July '03, and in July '03 she ruled that
21 claim was compensable, they had been fighting it the
22 whole way saying it wasn't compensable, he was on
23 the way to work but he did get a small mileage
24 allowance and a car allowance, it was modest, but
25 enough to convince the court that it's compensable,

1 it wasn't until that moment that he had a case. It
2 was not until that moment that he had a case. Now
3 you could have argue that he could go on to appeal
4 that further and, but if he had lost the point is,
5 if we had filed suit in 2000-2001 they would have
6 said it was not compensable. How do you know that
7 he's had been damaged if it's not a compensable
8 case? Mr. Wright, it wouldn't have mattered if he
9 had got the consent of the worker's comp carrier to
10 settle third party action or not, so they are now
11 saying, no, no, you should have sued us then, you
12 should have sued us in 2000. Well, I submit that
13 the record in this case is full of documents and
14 that's why I submitted the exhibit list to Your
15 Honor on the page which indicate that they never
16 were operating under the assumption that any statute
17 of limitations had begun to accrue at that time.
18 They were communicating with us in 2003. In 2004 we
19 had a mediation set up. We had, it wasn't until
20 they later got this brain storm that, hey, why don't
21 we claim he should have sued us in 2000 or '99 and
22 then it's barred now because we didn't bring this
23 suit, Your Honor, until 2004. We waited for the
24 ruling and then we communicated with Mr. Wright. We
25 wrote him a letter saying now we had this adverse

1 ruling so would you please, let's have a tolling
2 agreement until we appeal it, but let's have a
3 tolling agreement, and we did get a tolling
4 agreement; now that was without prejudice to any
5 party's rights of course. So we had a tolling
6 agreement and at no time during that period did they
7 ever say that the statute is barred.

8 Mr. Wright, on the issue of whether this case
9 was even compensable, he testified in his deposition
10 that he never saw this case as a compensable
11 worker's comp case, so compensability was a big
12 issue in this case and it was not resolved or
13 determined until July 31, 2003, so that's the
14 trigger date we say based on Epstein.

15 If you look at the Epstein case, in that case
16 the surgeon was the defendant, he got hit with a six
17 million dollar verdict, he claimed his lawyer didn't
18 investigate the case right, of course that would
19 have been preverdict, he should have advised him to
20 settle it, and he failed to look into some experts
21 he should have done and all that, and the court said
22 basically no, you had an adverse verdict, a six
23 million verdict, but that's the point,
24 notwithstanding the appeal possibilities, but that's
25 the point in which you should have taken action and

1 he apparently waited until the appeal before he
2 brought the case; and they said, no, go back to the
3 trigger date, the trigger date is the adverse
4 verdict, that's point in which you knew or should
5 have known you had a possible suit, if you had one,
6 against Mr. Brown the lawyer.

7 So the, and now the court in Epstein, Your
8 Honor, we say Epstein controls this case, controls
9 here, it's not a worker's comp case but it controls,
10 because it recognizes that there is a triggering
11 event when you have a case within a case. Our
12 worker's comp case had a triggering event. If they
13 weren't contesting compensability the triggering
14 event would be different, but they weren't
15 contesting it. The worker's comp employer and the
16 carrier were saying, oh, no, this isn't compensable
17 and oh, if it is compensable you weren't hurt; and
18 thirdly, if it is compensable and you were hurt,
19 it's barred because your lawyer didn't consult with
20 us when he settled the third party claim. But they
21 had a three prong attack and Judge Childs sided with
22 Mr. Kimmer on two of them but them on the third one
23 and we took that up on appeal to the Court of
24 Appeals and the Court of Appeals didn't agree. But
25 during the interim we were in touch with Mr. Wright

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1 and his carrier about what we were doing, we would
2 have saved them this entire lawsuit if we could have
3 prevailed in the Court of Appeals, but we did
4 prevail with Judge Goode, he reversed it, so we were
5 back and forth on that. But Epstein controls, Your
6 Honor. Epstein has a footnote where the court says,
7 they said, now in every case we're not saying that
8 the triggering event is automatically an adverse
9 result, but we're saying in this case it is, we just
10 take it by a case by case basis. But in this case,
11 Your Honor, the case we're here about today, we
12 submit that Richard Kimmer, he may have known
13 because Mr. Wright told him I may have goofed up.
14 When the worker's comp defense defended, among other
15 things, the third party settlement, he said I may
16 have goofed up, Richard, you know, and so he'd hired
17 me. I did not file suit then because there was
18 still an issue of whether the claim was compensable,
19 and that is absolutely critical and I submit that
20 Epstein controls and they have submitted no basis in
21 their memorandum, and I have memorandum and they
22 have a memorandum, but they have submitted no basis
23 in their memorandum of why Epstein would not
24 control.

25 The fact that Mr. Kimmer may have had a suit,

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1 Your Honor, the best, the best scenario, looking
2 back with hindsight is, you can say, well, you could
3 have sued and then asked for a stay until
4 compensability was determined, could have, but you
5 still did not have a claim. Mr. Kimmer could not
6 have prevailed in court until there was some
7 determination of the compensability.

8 And I will show you my redacted version with
9 red writing which I'll hand up which shows that's
10 what's been left off of this time line is the date
11 of the worker's comp commissioner held a lengthy
12 hearing and it's in the record, I submitted it,
13 filed it with the clerk the entire transcript of
14 that proceeding. Of course, the order of the
15 commissioner which she recites that it's compensable
16 because he had a car allowance and they got some
17 mileage. There is, there is no basis upon which
18 Mr. Kimmer could have filed this suit before that
19 was determined, and I think, just like in Epstein,
20 and I think it's a matter of law that Mr. Kimmer is
21 entitled to summary judgment because that's the
22 triggering event. We made it on time. They don't
23 contest the fact that there was negligence, at least
24 I hadn't heard they contest it, but Your Honor, this
25 is an important case notwithstanding Mr. Kimmer is

1 dead, he died in the interim and his wife has been
2 substituted; but they are saying basically that
3 Mr. Kimmer should have known that it was a
4 compensable worker's comp case before the commission
5 decided it and prematurely sued Mr. Wright.

6 Mr. Wright testified in his deposition he never
7 saw this as a worker's comp case. In fact, if you
8 look at page 35 of Mr. Wright's deposition:

9 "Frankly, I didn't really think that he had a comp
10 claim, but because of the possibility was out there
11 I went ahead and filed it." And he filed it late.
12 "I was never convinced that he had a comp claim
13 quite frankly."

14 So we have a hearing that proved that he did
15 have a comp claim which we had to do, otherwise we
16 would have had to have a lawsuit with witnesses as
17 to whether it was compensable or not, we now have
18 that established as a matter of fact, but it was not
19 established, Your Honor, until July 31, 2003, when
20 Commissioner Childs made that determination. And
21 the record is replete that there was back and forth
22 going on between Mr. Wright and me in this case
23 because I had him come to the worker's comp hearing
24 and testify that he never intended, and filed the
25 claim late without consent, he never intended to

1 waive Mr. Kimmer's rights, so he didn't
2 intentionally do it, but he negligently did it, and
3 Mr. Kimmer basically died a pauper because of this;
4 and we submit that if you look at Judge Kimball's
5 order, the index to the documents that I handed up
6 to Your Honor and the entire file in this matter
7 that as a matter of law Mr. Kimmer is entitled to
8 summary judgment in his favor. And the defendant
9 has, that nothing has happened in this case
10 discovery-wise at all since Judge Kimball denied the
11 defendant's motion for summary judgment before, and
12 he denied it based upon the Epstein case, so I
13 submit that for this court to see Epstein any
14 differently would require that you basically reverse
15 Judge Kimball's view of Epstein which I guess you
16 could or not do, but I would submit that he's got a
17 logical basis and his analysis of Epstein is correct
18 and he's applied it properly to these facts and I
19 think that under Epstein the triggering event was
20 July 31, 2003, and this case filed was less than 14
21 months after that, so it's time and that Mr. Kimmer
22 is entitled to judgment as a matter of law which is
23 500 weeks of disability which I referred to in the
24 memo.

25 Mr. Powell: Your Honor, first of all I would

1 like to thank the court for moving, I've been in a
2 trial all week and for moving today's hearing to
3 this afternoon because I got out of court late
4 yesterday in Greenville before Judge Hill, so I do
5 appreciate that.

6 Your Honor, the statute has run, the statute
7 ran on Mr. Kimmer's claim against Mr. Wright. This
8 isn't a close case for reasons I'll explain to you.
9 First of all in terms of the order that Mr. Pope
10 refers to, Judge Kimball's order, since that time he
11 disqualified himself from this case, he recused
12 himself on anything else to do with the case, and
13 I'm not sure why, but for reasons I'll point out to
14 you, there are good grounds for Your Honor to grant
15 the defendant's motion for summary judgment here.

16 Your Honor, I've given, first of all, Mr. Pope
17 may have been in error. If Mr. Pope has submitted a
18 memorandum to Your Honor I didn't get a copy.

19 Mr. Pope: I sent it to you by e-mail.

20 Mr. Powell: I've been away this week.

21 Mr. Pope: Right. It came the same day you
22 sent yours.

23 Mr. Powell: Okay. I've been away. I had an
24 associate send mine, so that's all right, we'll go
25 forward. He didn't raise anything, I'm sure, that I

1 can't respond to.

2 Your Honor, Mr. Pope mentioned the time line
3 we've offered up to you and that was folded in your
4 notebook there.

5 The Court: I've got it.

6 Mr. Powell: That gives the key dates. Your
7 Honor, the first thing I need to say is that there
8 is a fundamental misunderstanding on the argument
9 the plaintiff asserts here, and that fundamental
10 misunderstanding is that the statute or the basic
11 error in their premise is that the statute does not
12 commence to run until the plaintiff gets information
13 that he can prevail on his claim. That's not true.
14 That the law is not that. The law is that the
15 statute commences to run when the plaintiff knew or
16 should have known by the exercise of reasonable
17 diligence that he might have a claim.

18 You know the Fourth Circuit and the District
19 Court have commented on South Carolina's statute of
20 limitations and in the material I've submitted to
21 Your Honor, the Fourth Circuit has said that it's
22 legion that in South Carolina it requires very
23 little for the statute of limitations to commence.

24 Now the uncontested facts in the case, and in
25 the black notebook I handed up to Your Honor I have

1 sections of it tabbed, and a number of those
2 sections, Your Honor, refer to the Plaintiff's
3 depositions and Mr. Pope, I've got his original
4 deposition here, but for considering the late hour I
5 appreciate Mr. Pope's consent to not making us to
6 break this open, the copies that I have in the
7 notebook are right out of the deposition, I have the
8 original here which we can open, but Mr. Pope, I
9 think, has waived the necessity to do that.

10 Mr. Pope: Right, I do.

11 Mr. Powell: Now the facts, there is a,
12 Mr. Pope and I agree on one thing, this is a
13 question of law. When the statute of limitations
14 commences to run, that is, when that date starts, is
15 a matter for the court, that's not a matter for the
16 jury. Judge Kimball in effect concluded that there
17 were questions of fact, facts that needed to be
18 determined and that simply wasn't so. This case is
19 controlled by the court and when the statute
20 commences to run, and in order for me to fulfill my
21 duty for Mr. Wright, a member of our local bar here,
22 in order for me to fulfill my duty to him I'm going
23 to have to take a few minutes and review some facts
24 with Your Honor because as Mr. Pope correctly states
25 many of these cases are fact driven as to when the

1 statute would commence to run and I'll look at some
2 of the excerpts in some of our cases and look at the
3 facts in this case so that Your Honor can compare
4 the two and when you do that, I think you'll
5 conclude it's not even close.

6 It's true the underlying case arises, resulted
7 from Mr. Kimmer's personal injuries which he
8 sustained in an automobile accident that occurred on
9 January 29, 1999, while he was traveling to work.
10 Mr. Wright represented Mr. Kimmer during his pursuit
11 of a claim against the tort feisor in the automobile
12 accident. He first represented him in the
13 automobile case.

14 On June 16 of 1999 Mr. Kimmer, on the advice of
15 his counsel, settled that tort claim, that
16 automobile wreck, for \$15,000, the limits of the
17 policy. And the release, the agreement in the
18 release is attached to our submittals under tab one,
19 Your Honor. In conjunction with settling the claim
20 Mr. Kimmer signed a release dated June 16, 1999.

21 On June 18 Mr. Wright filed a worker's
22 compensation claim, and as Mr. Pope says, he wasn't
23 sure if it was a claim or not, but just in case he
24 filed one and that was submitted under form, under a
25 form 50, that was instituted, and that's attached as

1 exhibit two. That was on June 18, 1999, just two
2 days after the settlement.

3 Liberty Mutual worker's compensation carrier
4 denied on June 13 of 2000, they denied, January 13
5 of 2000, they denied through their form 51 that the
6 claim was compensable and also asserted that, the
7 defense that the parties had settled, that the
8 plaintiff had settled, there under paragraph 11, had
9 settled the case without the, settled the case with
10 the third party without the employer's or the
11 employers worker's compensation carrier's consent,
12 and therefore you've elected your remedy. That was
13 on January 13 of 2000 and that's attached under
14 exhibit three.

15 Beginning in 1999, it's without contest in this
16 case, that beginning in 1999 Mr. Kimmer was aware
17 that he had sustained damages from the automobile
18 accident which included his medical bills, his lost
19 wages and his pain and suffering, and that was
20 established in his testimony on which is tabbed
21 under exhibit four where he's asked, I simply asked
22 him that question: "Beginning in 1999 you were
23 aware that you had sustained damages, medical bills,
24 lost wages," on to page 53 of his deposition, "still
25 medical bills that are mounting up, not getting

1 paid, and those medical bills started in 1999 after
2 the accident?" He said, "That's right."

3 I said, "In May of '99", this is on page 56,
4 "In May of '99 while you were, you may not have
5 known the exact figure and you were aware that you
6 were out of thousands of dollars as a result of this
7 accident?" He said, "That's right."

8 "And as a result of not receiving your worker's
9 compensation benefits?" He said, "Yes, sir."

10 He said he was having pain with his knee, all
11 right. And on page 59 he acknowledged that he was
12 still having pain with his knee in June of '99.
13 Okay. He continued to have problems with his knee
14 throughout that year and into the following year and
15 that's under, that testimony is under exhibit five.

16 And under exhibit six, Your Honor, there is
17 this, there is this testimony, beginning on page 70
18 I asked him, "Mr. Kimmer, I want to show you exhibit
19 19 which I'll represent to you is a bill printout,
20 apparently this was mailed to you, it's got your
21 address on it." He said that was his address.

22 And then on page 71 I asked him, "You received
23 this from the Advance Orthopedic and Medical
24 Associates. I'm showing you exhibit 19."

25 "I'm sure I did. I got all kinds of these

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1 doctors bills over the years."

2 Question: "Richard, later in the documents
3 we'll see a reference to, in some these reports to,
4 your having post traumatic stress disorder and maybe
5 some depression problems as a result of these
6 events?"

7 His answer was: "Yes, sir."

8 "Is that accurate?"

9 "Yes, sir."

10 "Did the failure of the worker's compensation
11 people to pay your lost wages and your medical bills
12 contribute to that?"

13 Answer: "Absolutely because I never had no
14 problem prior to this."

15 "And you were experiencing post traumatic
16 stress disorder when you would receive for example
17 documents like exhibit 19?"

18 His answer was: "Yes, sir."

19 Then I asked him: "Did you call Mr. Wright and
20 complain to him about that when I got, about why I
21 can't get my bills paid?"

22 He said: "I did talk to Mr. Wright several
23 times from, you know, from after direct whenever I
24 turned the auto accident stuff over to him. And
25 then in late April or early May when we started

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1 discussing the worker's comp, workman's comp, I
2 talked to him lots of times, you know, and I can't
3 pay these bills."

4 "This would have been in April and May of
5 1999?"

6 "Yes, sir."

7 Page 73, line 15. "And you knew of course that
8 your medical bills and lost wages weren't paid in
9 '99 on into 2000?"

10 "That's right."

11 And then at some point in January of 2000 the
12 plaintiff traveled to Mr. Wright's office for a
13 conference during which time, this was after he had
14 received the form 51 and looked into it, and the
15 plaintiff said that Mr. Wright told him that he
16 screwed this up, and that the worker's comp, the
17 plaintiff's worker's compensation claim had been
18 denied because Mr. Wright made a mistake by settling
19 the claim against the tort feasor without obtaining
20 the consent of the employer or its worker's
21 compensation carrier. Mr. Kimmer also recalls that
22 Wright told him that he would have to find another
23 attorney to handle the worker's compensation case,
24 and that's under exhibit seven.

25 Page 47 said they were denying your claim. You

1 understand Mr. Wright is telling you in this letter,
2 he wrote him a letter, and apparently had explained
3 to you in the office that the reason they were
4 denying is it because he made a mistake.

5 The answer was: "Right. Yes, sir."

6 "And he also says in here that you might have a
7 claim against him as a result of that?"

8 And he says, "That's true."

9 Your Honor, that's all it takes for the statute
10 to start running is that he might have a claim, not
11 that he requires sufficient information that he's
12 going to prevail ultimately, but in South Carolina
13 that's the law that when the plaintiff acquires
14 sufficient information that he might have a claim
15 against the defendant that's when the statute starts
16 to run.

17 Under exhibit A you'll find Mr. Wright's
18 letter. In the middle of the page on the first page
19 he says, Mr. Wright tells him, "I've received an
20 answer from Mr. Morgan of the worker's compensation
21 case in which they deny you are entitled to worker's
22 compensation benefits because I settled with the
23 liability carrier in the wreck without notifying
24 them or getting their approval. We settled the
25 liability portion of your wreck claim in mid-June

1 and I filed the worker's compensation form 50 on
2 June 18. I did not communicate with the worker's
3 compensation carrier concerning settling the
4 liability case. There is still four policies of
5 insurance to collect from which will pay very
6 shortly.".

7 Then he says, "Our worker's compensation
8 statute requires that the worker's compensation
9 commission and the employer and the insurance
10 carrier for the employer be notified in the event of
11 a settlement with a liable party." So Mr. Wright
12 tells him directly on February first of 2000 that
13 the statute requires that.

14 He goes on to say, "I did not give these
15 parties notification, so that may prejudice your
16 right to recover worker's compensation benefits if
17 in fact you were entitled based on the facts of the
18 case to receive those benefits."

19 On the next page he says, "Since you may be
20 entitled to eventually file a claim against me for
21 some alleged error in the worker's compensation case
22 I need for you to confirm in writing that you agree
23 for me to continue working on the underinsurance
24 portion of your wreck case and that you may waive
25 any claim of conflict of interest that might arise

1 in that representation."

2 Okay, now all of that is under tab A where
3 Mr. Wright writes him and tells him, says,
4 Mr. Kimmer, I made a mistake. The reason I made
5 mistake is that I didn't notify them prior to
6 settling the case. You may have a claim, "may" have
7 a claim against me, and for that, if you want me to
8 continue to handle your underinsured motorist claim,
9 you got to sign a conflict.

10 Under tab nine, Your Honor, Mr. Kimmer did in
11 fact at page 45 remember reading that letter. There
12 is no question that he did receive it and did read
13 it.

14 Under tab ten is the letter from Mr. Pope to
15 Mr. Wright of February 10 of 2000, and in the middle
16 of the page, the paragraph in the middle of the
17 page, this letter states: "Further, until I review
18 this matter in its entirety it appears to me that
19 there may be a potential problem with your continued
20 representation of Mr. Kimmer in this matter in view
21 of the correspondence that I read which indicates
22 you acknowledge that there may have been some
23 deficient action on your part in connection with
24 proceeding with the third party action."

25 So not only has Mr. Kimmer been notified by

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1 Mr. Wright, but now Mr. Pope, new counsel as of that
2 time, writes Mr. Kimmer and says, look, you've
3 admitted you've made a mistake and there may be a
4 claim against you in the future and for that reason
5 you are conflicted out of this thing of handling the
6 underinsured motorist claim so send all of that to
7 me which of course happens subsequently.

8 Under tab 11 is the, is Mr. Kimmer's waiver of
9 conflict. In there he states, contains the
10 statement, "I understand that I may have a right to
11 make a claim against Mr. Wright concerning his
12 representation related to my worker's compensation
13 action."

14 That alone, Your Honor, if there are nothing
15 else, that is alone in South Carolina to commence
16 the statute running, "that I may have a claim",
17 that's all that's necessary. There isn't any
18 requirement and no law, no case pointed to that says
19 that he's got to have information under the facts
20 of, as this matter is concerned, got to have
21 information that he's going to prevail on that
22 claim. Just enough to know that he might have a
23 claim. I'm going to speak to the Epstein case in
24 just a few minutes.

25 Now under tab 12 is the authorization signed by

1 Mr. Kimmer to release the file and he authorized him
2 to release that file to his new counsel which took
3 place.

4 And then under tab 13 he states that all of
5 this, since it all occurred; this is a letter from
6 Mr. Kimmer again dated February 24 of 2004 to
7 Mr. Wright where he says, "All of this occurred out
8 of same incident," which is correct, it all occurred
9 out of the same automobile accident, this lawsuit
10 this worker's compensation, "And for that reason I'm
11 discharging you, send everything to my new
12 attorney."

13 And Mr. Kimmer agreed in his testimony that
14 after February 24 of 2000 he was clear, actually it
15 was before that, but there isn't any doubt that
16 after February 24, 2000, Mr. Wright did not
17 represent him in anything, he's totally out of the
18 picture entirely by February 24 of 2000. Okay.

19 The plaintiff by February of 2000 believed that
20 his post traumatic stress disorder was in part the
21 fault of Mr. Wright and under tab 14, your Honor, is
22 his testimony. He says, "My mind and body just
23 can't still, even though it's been six years, it
24 still can't adjust to the difference in the life I
25 had before and what I have now, not being able to

1 see where things are going and getting any better
2 down the road, you know."

3 And I asked him a question, "Do you blame in
4 part, at least in part, Mr. Wright for that
5 condition?"

6 He says, "I've got to. You know, I don't feel
7 like I would be in this financial and going through
8 a divorce and lost two homes since '99 if he had
9 taken care of the worker's compensation matter
10 before he settled on the car insurance settlement."

11 "So that is in part a cause for your post
12 traumatic stress disorder?"

13 He says, "It's the major part, I guess you
14 know. Maybe not all of him but just what I'm having
15 to go through because of this."

16 "And you started having this trouble back in
17 1999?"

18 Answer: "Yes, sir."

19 "And you were aware in 1999 that you weren't
20 going through some change, that you were going
21 through some changes because you weren't able to
22 work and get paid?"

23 Answer: "Absolutely."

24 "And the part about your not -- question: "And
25 the part about your not getting paid, you were aware

1 at least by February 2000 that Mr. Wright had at
2 least represented to you that that was in part his
3 fault?"

4 Answer: "Yes, sir."

5 So here we are in the, and I refer to
6 this later on and I'm going to try not to repeat
7 myself for lateness of the day, but the importance
8 of this, Your Honor, is that Mr. Kimmer is blaming
9 Mr. Wright for his post traumatic stress disorder
10 problem because he says he sustained this when he
11 couldn't pay his bills, he's having various problems
12 in 1999 because he was not getting his worker's
13 compensation benefits, he blames Mr. Wright in part
14 for that. Well, that, Your Honor, is not
15 compensable under the act. That claim is totally
16 independent of the worker's compensation claim and
17 that is the reason if, for nothing else, go through
18 all this, but I've been to the Court of Appeals and
19 the Supreme Court once on the same issue, Court of
20 Appeals twice, that's the reason this case by the
21 Court of Appeals says or the appellate courts in
22 this state say the statute starts to run there. If
23 for nothing else because he is blaming this man for,
24 for damages that have nothing, totally not
25 compensable under the worker's compensation act, and

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1 in my memorandum, Your Honor, I give you examples.
2 I quote you the law, cite you the law of under what
3 circumstances post traumatic disorder damages would
4 be compensable under the worker's compensation act
5 and this isn't it, this doesn't fit under that.

6 So there was a tolling agreement entered and
7 that tolling agreement as Mr. Pope says is under our
8 tab 15. In paragraph two there it two states, as
9 Mr. Pope acknowledges, that nothing in this
10 agreement shall affect any defense available to any
11 party as of the date of the agreement and this
12 agreement shall not be deemed to revive any claim
13 that is or was barred on that date. So the tolling
14 agreement, you see, was not entered until the end of
15 October of 2003, and, Your Honor, the statute
16 clearly started to run during February of 2000. By
17 that time, at least by the last day of that month,
18 this gentleman knew all of his damages, he blamed
19 Mr. Wright for his damages, he was told that he
20 might have a claim against him, and he no, and
21 Mr. Wright no longer represented him at that time.
22 So the statute would have run in February of 2003.
23 The tolling agreement was not entered until October,
24 end of October of 2003, so it is ineffective to bar
25 the case, ineffective to estop the defendant from

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1 pleading the statute. The issue is to be decided by
2 the court.

3 Now, Your Honor, I would also mention I point
4 to the complaint and I established, I've attached
5 the the original complaint and the amended complaint
6 as tab 16 and 17 and even the complaint under
7 paragraph 16 and 17 states the defendant, this is
8 the complaint against Mr. Wright now, "The defendant
9 was notified by the representative of Liberty Mutual
10 at or after the filing Murata's Liberty Mutual's
11 Form 51 that defendant's actions in settling the
12 third party claim without notice to Liberty Mutual
13 was allegedly violative of the South Carolina
14 Worker's Compensation Law including but not limited
15 to Code Section 42-1-560."

16 Paragraph 16 states: "On February first",
17 refers to the letter, on February 1, 2000, the
18 defendant wrote plaintiff and explained the position
19 of Murata Liberty Mutual in the worker's comp matter
20 and the potential problem with his continued
21 representation. A copy of that letter is attached
22 herewith and incorporated by reference. Thereafter
23 plaintiff obtained other counsel in connection with
24 the worker's comp claim." The complaint itself
25 refers to the letter that I'm speaking of.

1 Exhibit 17 is the amended complaint. That was,
2 that also makes reference to it, it's essentially
3 the same language.

4 The issue to be decided by the court very
5 plainly, Your Honor, is when did the statute
6 commence to run, and I have attached at various
7 stages beginning at exhibit 18 a brief survey of
8 South Carolina law which gives the court some
9 insight as to when the statute does commence to run
10 under various circumstances.

11 Of course, the statute itself, our statute
12 actually has been codified, the discovery rule is in
13 embodied in our statute of limitations and the, it's
14 well settled in this State that the statute begins
15 to run when a person could have or should have known
16 through the exercise of reasonable diligence that a
17 cause of action might exist in his or her favor
18 rather than when a person obtains actual knowledge
19 of either the potential claim or the facts giving
20 rise thereto. So it, the law is plain, it is when
21 you discover you might have a claim. The discovery
22 rule focuses on whether the complaining party
23 acquired knowledge of any facts and I'm quoting now,
24 this is from the Kline v Neece case, sufficient to
25 put said party on inquiry which if developed will

1 disclose the alleged conduct.

2 In South Carolina the application of the
3 discovery rules in large measure a function of
4 determining what circumstances and facts were known
5 or available or discoverable by the plaintiff and
6 when they were known or discovered.

7 In Dean versus Westcom, Your Honor, that's a
8 situation where, it's a Charleston case, the
9 plaintiff there admitted she had, there was some
10 power driving going on next to her property and on
11 the copy that I provided Your Honor, this is under
12 tab 18, under, on page 3, the court stated that Dean
13 admitted that she personally believed the damage to
14 her building resulted from the power driving
15 activities of 1984 and that when she first noticed
16 the crack she thought the structure of the building
17 was compromised. The only reason, then the court
18 states, the only reasonable conclusions supported by
19 the evidence is that Dean's lawsuit accrued in
20 November of 1984 and by her filing suit in April
21 1991 she was barred by the six year statute of
22 limitations.

23 Likewise, Mr. Kimmer in this case blames
24 Mr. Wright in February of 2000 for his damages.
25 There isn't any reason and acknowledges knowing

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1 about the mistake, he blames him for his worker's
2 comp damages, but also extra worker's comp damages
3 which under any scenario would commence the statute
4 running there. So just like in Dean v Westcom,
5 plaintiff there acknowledged she believed that in
6 November of '84 that the power driving activities
7 had compromised her building and that was the cause
8 of her problem, and the Supreme Court said that
9 because experts later came in and told you that no,
10 we can fix it, we can fix it by shoring it up, and
11 we can do other things, that doesn't matter because
12 then you knew you might have a claim, and that's the
13 principle we learn from that case.

14 The next case, tab 19, Burgess versus American
15 Cancer Society, Your Honor. That was perhaps the
16 most extreme example in this State of when our
17 appellate courts indicated how little it required to
18 start the statute running. The Court of Appeals in
19 that case, the allegations were somewhat tawdry out
20 of Florence County where the plaintiff stated that
21 she had gained information that her attorney was
22 having an affair with executive secretary of the
23 American Cancer Society and she claimed that, and
24 lost her case, and down the road she claimed that
25 she found out that he may have been passing

1 information or alleged passing information to the
2 executive secretary of the American Cancer Society
3 and that compromised her case against that
4 defendant. Our Court of Appeals said wait a minute,
5 wait a minute, you found out back here that they
6 were having an affair, that was enough to put you on
7 notice of inquiry, because you found out that they
8 had this close relationship, you were on inquiry
9 notice and therefore the statute commenced to run
10 and therefore you are out of court. That's Burgess
11 versus American Cancer Society under tab 19.

12 Under tab 20, your Honor, which is Peterson
13 versus Richland County. And that case truly is very
14 likely the case that controls the outcome of this
15 suit. That case, Your Honor, was, briefly the facts
16 were as follows: In December of 1998 Mr. Peterson
17 received a confession of judgment from someone
18 called Scarcella and this confession of judgment was
19 attached to the complaint which was sent in by
20 Peterson's attorney Frank Register from over in
21 Lexington. In 1990 Scarcella sold the property
22 without paying the judgment and the way that, the
23 reason that was possible is that there was an error
24 in the clerk of courts office in not indexing the
25 judgment properly.

1 In August of 1989 that suit, the suit that had
2 been sent in by Mr. Register had been dismissed
3 under 40-C (3). In October of 1993, the plaintiff
4 Peterson hired a new attorney Mr. Schawford to
5 foreclose on the judgment. In November of 1993 the
6 court found that he learned, that Peterson learned,
7 that the case had been dismissed in August of 1989.
8 On November 4 Mr. Schawford sued to foreclose on
9 that judgment that was filed. In October of 1994
10 Peterson sued Richland County, said he was able to
11 sell the property because you didn't index it right.
12 And in February of 1997, three years later, Peterson
13 added attorney Frank Register as a party, and he
14 said register should have cured the improper
15 indexing after he learned of the August 1999 order
16 dismissing the suit. The defendant argued the
17 statute of limitations started in the fall of '03
18 when Peterson learned the judgment had not been
19 properly enrolled. The plaintiff argued she had no
20 knowledge of a potential claim against Register
21 until discovery commenced in the action against the
22 clerk of court and the lawyer for the clerk of court
23 indicated that Register might be liable. The trial
24 court granted summary judgment and the Supreme Court
25 and the Court of Appeals affirmed rather. The Court

1 of Appeals affirmed in so doing held that the
2 statute of limitations commenced to run before the
3 conclusion of the foreclose suit. The statute
4 commenced before the foreclose suit Mr. Schawford
5 brought for Peterson was concluded. It didn't have
6 to be concluded. It didn't have to exhaust the
7 remedies before the statute commences to run. If
8 that were the case and, Your Honor, the reason the
9 law is that way is that if the statute waited until
10 the conclusion of legal proceedings to commence to
11 run that can be years in the future, there could be
12 all kind of stuff going on, cases be continued, all
13 kind of stuff happening, so the law in this State as
14 in most jurisdictions the great weight of the
15 majority rule is that, no, the statute is not
16 held in abeyance just because there is some, some
17 case that is going on in the underlying case.

18 Your Honor, the next case that needs attention
19 is the case that Mr. Pope brings up and that case is
20 under tab 21, and I do want to give it special
21 attention because the defendant relies heavily on
22 that case. Plaintiff's position basically is that
23 they would have the court believe that Epstein
24 versus Brown stands for the proposition that the
25 plaintiff must know that they, in order for the

1 statute to commence to run, the plaintiff must
2 acquire information that tells the plaintiff you've
3 got all of the necessary elements to a potential
4 claim against the lawyer intact and then the statute
5 starts the run. That's not case.

6 On page two of that opinion, Your Honor, again
7 this is under tab 21 under page two at the top right
8 hand column it states: The trial court rule the
9 statute of limitations began to run at the latest on
10 February 18, 1998, the date of the jury's verdict
11 such that this action was untimely.

12 Also the footnote that Mr. Pope mentioned in
13 passing is very important, very critical. Sure they
14 said in this case and in this particular case the
15 statutes did start to run at the latest on the date
16 that the jury verdict was handed down, that the
17 doctor had, you know, he may didn't say he had
18 information prior to that, but they said at the
19 latest it started to run then and his suit against
20 the lawyer was three years postdated that.

21 The footnote number 8, you'll find that on page
22 six, the Appellate Court, our Appellate Court said,
23 "We do not hold that in all instances the date of a
24 jury's adverse verdict is the date on which the SOL,
25 statute of limitations, begins to run. To the

1 contrary, we hold only that under the facts of this
2 case Dr. Epstein knew of a potential claim against
3 Brown by this time, at the latest he knew that." So
4 this case does not stand at all for the proposition
5 that that is the trigger. The court went out of its
6 way to say that's what we found here, but there are
7 other things that can occur and other information
8 that can come into the hands of the plaintiff which
9 starts the statute much earlier than that. In our
10 case of course that was Mr. Wright telling him I
11 screwed this up.

12 Your Honor, we believe it's clear that the
13 statute started in light of these cases, in light of
14 comments, I'm going to take the time to examine a
15 few excerpts of the plaintiff's testimony under tab
16 22. We're discussing at page 47 of the plaintiff's
17 deposition beginning at line 16. We are discussing
18 the letter that you previously seen.

19 "Question: And you understand Mr. Wright is
20 telling you in this letter and apparently had
21 explained to you in his office that the reason they
22 were denying it is because he made a mistake?"

23 "Right. "Yes, sir."

24 "And he also says in here that you might have a
25 claim against him as a result of that?"

1 Answer: "That's true."

2 "So my question to you really is, he didn't try
3 to hide that from you?"

4 And then he says on page 48, "Oh, no. When I
5 went to talk to him, you know, he told me plainly,
6 you know, I screwed this up, you have to get another
7 attorney to take the case."

8 Down to line 12, "You are not contending in
9 this case that he mislead you in anyway? When I say
10 "mislead" tried to hide his mistake?"

11 Answer: "No, because he told plainly and it's
12 also stated in this letter here that he made a
13 mistake."

14 So at least as far as Mr. Kimmer was concerned
15 there wasn't any error, there wasn't any confusion
16 about the matter, the gentleman understood quite
17 clearly, that Mr. Wright told him plainly, I screwed
18 this up, you got to get another lawyer. You may
19 have have a claim against me.

20 So what we have, Your Honor, what we have is a
21 series of notices to Mr. Kimmer that an
22 acknowledgement on his behalf that by February of
23 2000 he had, there is no doubt that he had had a
24 drop in income, he had damages, he had had medical
25 bills that had not been paid, and that he

1 acknowledged that as of February 24 Mr. Wright
2 didn't represent him any longer.

3 That he says that also on page, under exhibit
4 30 Kimmer admits, this is on pages 88 under tab
5 number 30, exhibit 30, Your Honor, question at line
6 six, "And the part about you're not getting paid,
7 you were aware at least by February of 2000
8 Mr. Wright had at least represented to you that was
9 in part his fault?"

10 Answer, "Yes, sir."

11 So application of law to the facts, the facts
12 in this case, frankly, Your Honor, are much stronger
13 than a number of the appellate cases I've shown,
14 particularly in Burgess, in the Dean v Westcom case.
15 The plaintiff says that I laid it at his door step
16 on February 2000, not only for the worker's
17 compensation related damages, but also for the post
18 traumatic stress disorder damages, and what's the,
19 why is that important? Because if the statute
20 starts to run, even if he gets the worker's
21 compensation case fixed, that doesn't recover for
22 him, that doesn't fix for him, the fact that his
23 payments were late, he had sustained post traumatic,
24 he claimed he sustained post traumatic stress
25 disorder, and as we stand here today we must assume

1 what the plaintiff says is correct for purposes of
2 this motion, we must grant that, so he was laying
3 that at Mr. Wright's door step, so if his damages
4 start as to anything growing out of the same core of
5 operative facts, the restatement of judgment would
6 require that it starts as to everything, and so the
7 statute commenced at the very latest in February.

8 Now the plaintiff would argue, let me address
9 the plaintiff's arguments in response to the statute
10 of limitations. First the plaintiff's argument is
11 that because he wasn't aware that the case was
12 compensable he didn't have a claim, that may have
13 been in contest, but he knew that he might have a
14 claim. He knew that Mr. Wright had told him that it
15 was, the fact that he wasn't getting weekly worker's
16 comp payments was his fault. The fact that his
17 medical bills were not being paid, that was
18 Mr. Wright's fault, and also the post traumatic
19 stress that I talked about.

20 Plaintiff's arguments lack merit because the
21 plaintiff admits to sustaining damages in '99 and
22 2000 for those reasons, for the reasons I've given
23 you. The reversal of the worker's comp action would
24 not have corrected that, would not have eliminated
25 those damages.

1 Second, the plaintiff attributes damages to the
2 defendant's negligence which has nothing whatever to
3 do with his worker's compensation claim as I've
4 explained to Your Honor.

5 And I give you the law here, the post traumatic
6 stress, this is on page 19 of my memorandum, the
7 post traumatic stress disorder damages allegedly
8 caused by the failure to timely pay medical and
9 other bills because the claimant's attorney did not
10 give notice before settling the claim are not
11 compensable under the act.

12 And the post traumatic, Your Honor, I cite you,
13 Your Honor, Stokes versus First National Bank that
14 stands for the proposition that post traumatic
15 disorder damages are only recoverable under the
16 worker's compensation act if the emotional stimuli
17 or stressors are incident to or arise from unusual
18 or extraordinary conditions of employment. Not
19 getting his bills paid timely and blaming his lawyer
20 for that is not one of those. It doesn't fit it.
21 So what he lays at Mr. Wright's door step on the
22 post traumatic disorder wouldn't have been part of
23 his worker's compensation claim.

24 The plaintiff would ask the court, Your Honor,
25 to accept the proposition that one statutory period

1 applies for one set of damages and another statutory
2 period applies for a second set of damages all of
3 which grow out of the same core of operative facts
4 and that's just simply not not the law.

5 Indeed our court made it clear that the injured
6 party or the fact that the injured party may not
7 comprehend the full extent of his damages at one
8 particular time is immaterial. The fact that he may
9 have more damages in the future doesn't make any
10 difference. The statute, that won't stop the
11 statute from running.

12 Third, as I stated when we started here, when
13 the statute of limitations clock starts depends in
14 large measure on what information becomes available
15 to the plaintiff, from what could he find out. The
16 plaintiff argues the case within the case doctrine
17 to support his position that the statute did not
18 begin to run until the commissioner ruled against
19 Kimmer. The plaintiff argues that because this
20 doctrine requires the plaintiff's underlying claim
21 most probably would have been successful then it
22 could not run until that ruling. That's the problem
23 the plaintiff has got here and that's why the
24 statute's run is because, and it doesn't give me a
25 lot of pleasure to have to say it, but that's why

1 they lose because you see the law does not require
2 that the plaintiff have all the information that
3 he's going totally win the case, just that he might
4 have a claim. In order these requirements to
5 establish a legal malpractice case, that is to win a
6 legal malpractice case, are the existence of
7 attorney-client relationship, one; two, breach of
8 duty by the attorney; three, damage to the client;
9 and four, proximate cause for the client's damages.
10 These are the requirements in order to prevail, not
11 to start the statute running.

12 Your Honor, I believe that we've addressed
13 pretty much everything. If for nothing else, first
14 of all, primary premise that the statute is tolled
15 but doesn't commence to run until the worker's
16 compensation commission has ruled, there is no case
17 law to support that. The case that they cite goes
18 out of their way to say under this case the jury
19 verdict certainly started the statute running but
20 that's not what triggers it; what triggers it is
21 information putting plaintiff on notice of
22 information which would indicate to him that he
23 might have a claim. Now if the lawyer is sitting
24 down in front of the client and saying, looking in
25 his face and saying, I screwed this up, they denied

1 your claim because I didn't notify the employer or
2 the employer's carrier, you are going to have to get
3 another lawyer to handle this, if that doesn't start
4 the statute running then not much does. For these
5 reasons, Your Honor, the defendant's motion for
6 summary judgment based on the statute of limitations
7 should be granted. Thank you.

8 The Court: Mr. Pope, do you have any brief
9 reply?

10 Mr. Pope: Yes, sir, I'll be brief, Your Honor,
11 but I have a few points I need to address. I know
12 it's late. One is Mr. Powell said every single word
13 he said today in one form or another to Judge
14 Kimball when his motion was denied in 2005. He says
15 that it's, that the plaintiff may not comprehend the
16 full extent of his damages, that's not what we're
17 alleging, we're not talking about Mr. Kimmer didn't
18 know how bad he was damaged, so that's a false
19 standard that was never submitted.

20 One of the most aggregious things that counsel
21 said was post traumatic stress disorder, there is
22 not a word in our complaint or amended complaints
23 about emotional distress or post traumatic stress or
24 anything else. Mr. Kimmer had a sixth grade
25 education and he was deposed by a very intelligent

1 lawyer and goaded into saying, well, you don't like
2 that and you don't like this. He said, Well, I
3 guess not, what I know of a sixth grade education,
4 but he said this on redirect, "So you're not a
5 lawyer, so whatever your damages are would be
6 determined by a court, would they not? That's
7 correct." That's what he said on page 95 and 96 of
8 his deposition. He's not claiming post traumatic
9 stress, he's just saying, well, whatever I got with
10 worker's comp is what I --

11 The Court: Yeah, I all ready looked at the
12 complaint, and the amended complaint just for that
13 purpose and it indicated that the damages apparently
14 were those for which he would have been compensated,
15 lifetime benefits, and all that.

16 Mr. Pope: Yes, sir. The important thing I
17 think for me to stress and redirect, and I'm going
18 to be very brief, is the compensability issue of
19 this case. When a case exists in a worker's comp
20 setting, malpractice within a worker's comp context,
21 that's the case within a case, there has to be a
22 compensable case. If Mr. Wright settled the case
23 and it wasn't compensable, it wouldn't have mattered
24 if he settled it or didn't settle it until the
25 carrier, it wouldn't have mattered, the case had to

1 be compensable, so what their suggestion is in 2000,
2 before you had your worker's comp hearing because it
3 took forever to get a hearing, before you had your
4 worker's comp hearing, before there's been any
5 determination, we expect you to sue me, we expect
6 you to sue me, and then of course I'll say it's a
7 frivolous suit because of there has been no
8 determination made on its compensability or whether
9 you are even barred or anything else, and I think
10 that puts a plaintiff in a heck of a predicament in
11 this setting and it's a very narrow factual
12 situation. I think it's unfair for them to say you
13 should have sued us in 2000, you should have sued us
14 in 2001, you should have sued us in 2002 before we
15 had this determination and both parties would have
16 to get experts to determine whether the claim was
17 even compensable to start with, both parties would
18 have to get experts to determine about whether or
19 not he in fact goofed up or whether it's barred, so
20 legally these determinations had to be made and I
21 would say that if you look at Epstein, I don't think
22 Mr. Powell with all of his chips, I don't think he
23 put a dent in the fact that there is some meaning
24 into having a determination in some medical, in some
25 legal malpractice context. The determination has to

1 be made in this case because if it's not compensable
2 under worker's comp, there is nothing he could have
3 possibly been wrong. If there was no comp case and
4 that was not determined, that was false.

5 Commissioner Childs noted it was disputed, she took
6 testimony about what his car allowance was and what
7 his mileage allowance was and she said, well, based
8 on that I think it's compensable and I find that
9 he's totally disabled, has a psychological overlay
10 from this accident, but he's barred because the
11 lawyer did that. We didn't know that until July 31,
12 2003, Your Honor, and I think that puts us squarely
13 within Epstein and I think it would be outrageous to
14 have a result where Mr. Wright, who is a very fine
15 fellow in his own right, makes the statement in his
16 deposition in three different places that he never
17 was convinced that this was a worker's comp claim to
18 start with, therefore he acknowledged I should have
19 conferred with the carrier just to protect the
20 client but I knew this wasn't a comp case anyway, he
21 said this in 2005, so I think that summary judgment
22 should be granted for the plaintiff.

23 The Court: Mr. Powell, in 25 words or less
24 because it is six o'clock on Friday, what do I do
25 with Judge Kimball's.

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1 Mr. Powell: Your Honor, I'm sorry. I can't
2 hear you.

3 The Court: I said in 25 or words or less,
4 since it is six o'clock on Friday, what do I do with
5 Judge Kimball's order?

6 Mr. Powell: Well, Your Honor, he disqualified
7 himself.

8 The Court: Well, I know, but he's already made
9 a ruling. Just because he's disqualified himself
10 doesn't mean that his ruling isn't binding.

11 Mr. Powell: No, sir. It was interlocutory.

12 The Court: Well, all summary judgment motions
13 are interlocutory and I realize that you can make
14 multiple motions for summary judgment, but nothing
15 has changed.

16 Mr. Powell: Well.

17 The Court: Other than the appeal but that
18 didn't, other than the appeal was never disposed of
19 but that wouldn't affect the basis of his ruling.
20 He denied the motion for judgment stayed the pending
21 of the action based on the comp claim pending so,
22 yeah, you can make multiple summary judgment motions
23 but what can I do when a judge has ruled?

24 Mr. Powell: Well, if Your Honor, it's, I would
25 submit to you, if it is patently wrong, as it is in

1 this case, the court is up to Your Honor or Your
2 Honor has the power to correct that and it's, there
3 is nothing prohibiting rehearing a motion for
4 summary judgment.

5 The Court: Well, you usually ask the judge
6 that issued to rehear it, you got ten days to file a
7 motion to reconsider, but this isn't a rehearing,
8 this is another motion for summary judgment. I'm
9 not picking at you, I'm just real concerned about
10 how I'd feel if the shoe was on the other foot, and
11 I made a ruling that I thought it was good and
12 certainly at some point the Court of Appeals is
13 going to address and another judge came by and said,
14 Hayes, you are wrong.

15 Mr. Powell: At a very minimum --

16 The Court: And I tried to get on the Court of
17 Appeals and they wouldn't let me, so I don't have
18 any opinion if I'm wrong.

19 Mr. Powell: Judge, at the very minimum what
20 Your Honor can do is my motion can defeat his
21 motion. The facts, the law that I've offered Your
22 Honor are sufficient to establish an absolute
23 defense to his motion, now that has not been ruled
24 on.

25 The Court: Well, that's true, but I thought

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1 about that but where does that leave us because then
2 we've got no facts, the facts are all before the
3 court, and your motion has been denied and his
4 motion has been denied.

5 Mr. Pope: As a matter of law --

6 The Court: What if I deny both of your motions
7 for summary judgment, where would we be?

8 Mr. Pope: His motion has been denied, but he's
9 also made a motion to reconsider which was denied
10 also.

11 The Court: But following up to what he said,
12 if I just say I can't grant his motion for summary
13 judgment, but I can't grant yours either.

14 Mr. Pope: Well, unless you found that it was
15 an issue of fact which neither of us are arguing,
16 and I think if you read Judge Kimball he was headed
17 that way. I didn't make a motion for summary
18 judgment at that point because we didn't have a
19 ruling on the appeal.

20 The Court: Well, I got to make a ruling. I'll
21 figure out something.

22 Mr. Powell: All right, sir.

23 The Court: But I appreciate that. I'm sorry.
24 You got a grandson or a granddaughter?

25 Mr. Pope: Born at five o'clock yesterday.

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1 The Court: In the morning?

2 Mr. Pope: I called to say we might have a
3 problem and it happened like that before anybody could
4 get to the hospital.

5 The Court: In Newberry?

6 Mr. Pope: No, it was in Columbia, Lexington
7 actually. She works there.

8 The Court: Well, I thank y'all. I'll take it
9 under advisement.

10 (The end of the proceedings.)

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1 I, Janet Rich, official court reporter for the Sixteenth
2 Circuit of the State of South Carolina, do hereby certify
3 that the forgoing is a true, accurate, and complete
4 transcript of record of all the proceedings had and
5 evidence introduced in the trial of the captioned case,
6 relative to appeal, in the Court of Common Pleas for York
7 County, South Carolina, on the 5th day of September 2008.
8 I do further certify that I am neither kin, counsel, nor
9 interest to any party hereto.

10
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12 *Janet M. Rich*
13 Janet M. Rich ..
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1 PHILIP E. WRIGHT, ESQUIRE, being duly sworn, deposes
2 and testifies as follows:

3 MR. WRIGHT - EXAMINATION BY MR. POPE:

4 Q: Give us your name and address, please sir.

5 A: My name is Philip Edward Wright.
6
7

8 Q: And your legal office is in Lancaster only?

9 A: That's correct.

10 Q: Okay. And your actual style of your practice
11 is Philip Wright P.A., something like that?

12 A: Philip E. Wright, P.A.

13 Q: Okay. You don't have any partners or
14 associates in your law office, do you?

15 A: I do not.

16 Q: Okay. And they are ... you're, of course,
17 married?

18 A: Correct.

19 Q: And have how many children?

20 A: I have three daughters.

21 Q: Three daughters. How old are they?

22 A: My oldest one's twenty-eight. Then the middle
23 one's twenty-five. And the other one's twenty-
24 four. She'll be twenty-five next month.

25 Q: Are they in York county?

1 Q: Right.

2 A: And I remember when he called I said, oh no,
3 you didn't have another wreck. And it was on
4 Highway 9, the same highway he had the '93
5 wreck on.

6 Q: Uh-huh (affirmative response).

7 A: He said, yeah he did. And that's, I believe he
8 called first and later came in.

9 Q: Uh-huh. All right. Tell me, sort of
10 chronologically, about the first meeting, what
11 was said, what happened, what you did.

12 A: He came in and told me, well, he told me some
13 about it on the phone, I believe, and then when
14 he came in, we did, went through in more
15 detail, but he said he was coming from his
16 home. And I think he lived, at that time, in
17 Whitmire, and he was going to the Katherine
18 Plant to work. He was driving his own car. He
19 came through Chester and turned on to the,
20 what, turned off of what we called the bypass
21 of Chester to get on Number 9 to go out to the
22 Katherine Plant which is out Number 9. And as
23 he was coming out Number 9, a fellow came out
24 of a, from what appeared to be a convenient
25 store, about a quarter of a mile down the

1 case.

2 Q: That's a specific comp form. I don't know what
3 the number is.

4 A: Yeah, I don't know the number.

5 Q: So, so you determined ... when did you
6 determine that you were going to file a Form
7 50?

8 A: It was, it was right at the time when we
9 settled with the, with the liability carrier.
10 We, we filed it, filed it within a couple of
11 days of consummating settlement on the fifteen
12 thousand on the liability case. Because the
13 guy called me, end of May, first of June, when
14 I wrote the letter to Richard and it was a few
15 days before I talked to Richard about that, and
16 just decided to go ahead and file it to see if
17 there was a potential for claim there.

18 Q: And of course, workers' comp would provide on,
19 as much or more benefit to a claimant under
20 these circumstances, if it was available than
21 any disability policy?

22 A: The schedule of benefits would be different,
23 yes.

24 Q: And better, of course?

25 A: Probably, yeah.

1 Q: Do you have a pretty clear, chronological
2 recollection as to what was going on in June of
3 '99, as far as dealing with the liability
4 carrier, dealing with the medical providers,
5 considering Richard's injuries? I think you
6 said his, you knew in June, in early June, that
7 his injuries were significant, that it wasn't
8 going to be, it wasn't obviously a four
9 thousand dollar case, it was a significant
10 case.

11 A: By June, he had been through enough medical
12 treatment and has incurred enough medical
13 ~~expense to where it was obvious that the case~~
14 was going to exceed the base liability policy
15 of the Pendergraf man that hit him, it was
16 fifteen thousand minimum limits policy. And
17 the, and the ... well, the liability carrier
18 just tendered their limits. I mean, they, they
19 knew they were going to have to pay that
20 anyway, so they went ahead and tendered their,
21 their fifteen.

22 Q: Yeah, but from the standpoint of Richard Kimmer
23 and his injuries, you knew that he had
24 significant medical bills.

25 A: Sure.

1 Q: Early June ...

2 A: Yeah.

3 Q: ... it was it was over twenty-five thousand,
4 wasn't it?

5 A: Yeah. I'm sure they were probably that or more
6 by June. And he had, he had under insurance
7 through some vehicles at his home, I think
8 owned by his wife and some owned by him, with
9 State Farm and Farm Bureau. And those policies
10 were out there to go after, so there was
11 another fund to pursue after that. I mean
12 there was, that was probably going to be, well,
13 I don't remember the exact size of the policy,
14 there were several others though.

15 Q: Would, would it be ... would you agree there
16 was approximately a hundred thousand dollars in
17 UIM?

18 A: I'm, I'm thinking it was in that I'm
19 thinking a hundred, hundred and a quarter
20 maybe, somewhere in that range.

21 Q: Do you remember when you received, according to
22 ... well, we'll mark this as an exhibit,
23 Exhibit One.

24 (Plaintiff's Exhibit Number One was marked for
25 identification purposes.)

1 Q: This, this is a check, it's dated, June the
2 14th, '99 from ... was it State Auto?

3 A: Auto Owners.

4 Q: Auto Owners. And that's the limits of
5 Pendergraf's liability coverage?

6 A: Correct.

7 Q: And there was fifteen thousand of course?

8 A: Right.

9 Q: And it, plus it was paid out ... it was payable
10 to Mr. Kimmer and you, and of course two
11 providers?

12 A: That's correct.

13 Q: Who had, who had subrogation liens, is that
14 right?

15 A: Right.

16 Q: And so when that check was distributed, how,
17 what day was it that you got it? Do you
18 remember?

19 A: I probably got it the 15th or the 16th. I mean,
20 we've gotten it within a day or two after being
21 mailed. I don't, I don't remember where this
22 adjustor was physically located.

23 (Plaintiff's Exhibit Number Two was marked for
24 identification purposes.)

25 Q: Exhibit two is just a settlement sheet. That's

1 how the funds were distributed?

2 A: That's correct.

3 Q: So that settlement, of course, accomplished at
4 least getting some of Mr. Kimmer's bills
5 temporary, or a portion of them paid, and sort
6 of pleased those creditors temporarily?

7 A: We were having trouble with, with the medical
8 creditors at that point. They were clambering
9 that get something paid. So yeah, that, that
10 made them happy for the meantime.

11 Q: But it was obviously no cash to Mr. Kimmer on
12 Exhibit Two?

13 A: No.

14 Q: Now, exhibit ...

15 A: No, no, no. His medical, his medial exceeded
16 the ten that was left after my fee.

17 (Plaintiff's Exhibit Number Three was marked for
18 identification purposes.)

19 Q: Exhibit three is a, just a release that was
20 executed? Settlement agreement?

21 A: Correct.

22 Q: And that was signed on the 16th of June?

23 A: It was dated the 16th and witnessed by two of my
24 secretaries.

25 Q: All right. Do you, do you specifically

1 remember Mr. Kimmer coming in on the 16th? Do
2 you remember the occasion, but not maybe the
3 date? Do you remember the occasion when y'all
4 were sitting there, and of course, you had the
5 settlement check you had to sign there ...

6 A: Right.

7 Q: You signed the settlement statement, which was
8 the 16th of June also. And then you got the
9 settlement agreement release.

10 A: Right.

11 Q: Do you sort of remember, have a recollection of
12 sitting in your office or conference room or
13 something?

14 A: Six years ago. I don't have, I don't have any
15 clear recollection of it.

16 Q: Okay. Well, do you remember when it was
17 discussed about the, the Form 50? You had a
18 Form 50 in your office?

19 A: Right.

20 Q: And I guess you signed it, but do you remember
21 saying, now Richard we're going to file this or
22 any discussion about it? Because it, it
23 appears to be dated the 18th, I think. I've got
24 a copy somewhere.

25 (Plaintiff's Exhibit Number Four was marked for

1 identification purposes.)

2 Q: Exhibit Four is the Form 50 that you had in
3 your office. Of course, it was blank. I would
4 assume that at some point, you filled it in ...

5 A: Correct.

6 Q: ... or had your office do that?

7 A: They would type it in and I would sign it.

8 Q: And I guess the normal procedure is the lawyer
9 completes it the best he can and then he talks
10 to the client about it and if it needs to be
11 changed he does, if not, he shows it to him,
12 and then goes ahead and signs it as a lawyer,
13 ~~and sends it in? Is that the procedure that~~
14 was followed, do you think?

15 A: I don't know that Richard ever saw this before
16 we filed it. We, Richard and I talked about me
17 filing it, and I told him we were going to file
18 it. I also told him, as I recall when we filed
19 it, that I did not believe he had a compensable
20 injury, but that I was going to file the case
21 on the possibility he did. So, and it looks
22 like we did that on the 18th, because I signed
23 my name and I handwrote the 18th date on it,
24 when it was signed. But I don't think Richard
25 ever saw that form before it went to the

Commission.

Q: Is that partly ... as you noted that, that the area of the injury, that part of the body that was hurt, were the knee, back, and neck. And at that point, when it was signed, you knew that his medical bills were over twenty-five thousand?

A: Correct.

Q: And he was continuing to, of course, need surgery and other treatment?

A: He was, he was still seeing the doctor. One of the, one of the reasons for the liability settlement was to get the medical creditors paid so he could keep the seeing him, and he didn't have the money or the ability to keep paying him, and they want to get paid.

Q: But you determined that there was a possible workers' comp claim. I mean, correct me if I'm wrong. I thought I understood you say in early June.

A: Well, in, around the end of May, first of June, this Bill person called and told me some information contrary to what Richard told me about him getting paid from home, and that's when I wrote Richard and asked him about it.

1 It turned out that Richard still said that
2 information wasn't right. So I, frankly, I
3 really didn't think that he had a comp claim
4 but, because the possibility was out there, I
5 went ahead and filed it. I, I was never
6 convinced that he comp claim quite frankly.

7 Q: Uh-huh (affirmative response).

8 A: Not based on what I had.

9 Q: The letter you wrote, I don't, I don't recall
10 seeing it. Do, do you, do you have it in your
11 ...

12 A: It's in the documents that we, that, that my
13 counsel ...

14 MR. POWELL: Tom, I believe this is in the material
15 we've given y'all.

16 A: It's just a one, it's just a short letter.
17 It's like three or four lines.

18 Q: Okay. Well I'll ...

19 A: It had the June the 1st.

20 Q: We'll take a break in a second, and I'll look
21 right quick. I don't want to hold you up right
22 now.

23 A: Okay.

24 Q: But you knew that if there was a comp claim, it
25 needed to be investigated, and you were going

1 to file a Form 50 to protect his rights?

2 A: Correct.

3 Q: And you wouldn't have filed it if you thought
4 it was frivolous, you just didn't know for sure
5 what the factual basis was?

6 A: I, I didn't. I didn't know. At that point in
7 time, I didn't believe that he had factual
8 basis for a claim, but because people were
9 telling him, somebody was telling him he did,
10 I went ahead and filed it to try to protect his
11 rights in that regard.

12 Q: All right. You gave no notice, in doing that,
13 ~~you didn't give any notice to the workers' comp~~
14 ~~carrier?~~

15 A: No.

16 Q: What did you learn about the workers' comp
17 claim later, if anything?

18 A: After we filed a claim, they took a statement
19 from Richard, I think it was in September, I
20 guy named McNeill I think took it, and asked
21 Richard about his employment. At that point,
22 Richard told the fellow that was asking him
23 questions, that he got paid a car allowance
24 for, for transportation cost. And that was the
25 first I'd heard of that. I was, I was on the

1 ... I was part of the interview and Richard was
2 answering the questions. But he told the, he
3 told the fellow that was taking the statement,
4 that he had, that they paid him mileage and
5 that they paid him a car allowance, at I think
6 three hundred dollars a month.

7 Q: Uh-huh (affirmative response).

8 A: To, to basically, I don't recall how he put it.
9 They paid him a car allowance of three hundred
10 bucks.

11 Q: And that statement would have been several
12 months after the June filing of the Form 50?

13 A: ~~I think, I think they took that statement in~~
14 September. And I don't remember whether they
15 took it, I think they took it before they filed
16 their Fifty-one, their answer.

17 Q: Now the man that called you, you knew he was
18 some type of business, either co-employee or
19 somebody in the, up above the chain, at Murata;
20 is that right?

21 A: He was, he was somebody that knew Richard
22 through Murata.

23 Q: Yeah. It wasn't some neighbor, it was somebody
24 that worked with him? Presumably?

25 A: I'm not sure of that. It was somebody that

1 knew about his employment at Murata. I don't
2 know how they knew about it. I don't, I don't
3 think the person that called me, identified
4 themselves as to what they were or where they
5 worked. Just by name, they new Richard ...

6 Q: They were cooperative with Richard's position?

7 A: They relate ...

8 Q: They tried to help out Richard?

9 A: Yeah, yes. They thought they had information
10 that would help him, and they gave me, he gave
11 me that information that I related in the
12 letter to Richard.

13 Q: ~~You knew that Richard's education was somewhere~~
14 in the 7th grade level or something like that?

15 A: I knew that Richard didn't finish school and
16 that he had done mechanic labor, manual labor,
17 most of his life. So I didn't, no I, I know he
18 didn't have a real high level of education.

19 Q: Well Bill Manning, if that's the person, is a
20 graduate of Georgia Tech. Did you, did you get
21 the idea the fellow you were talking to was
22 somebody that had a degree of intelligence?

23 A: I don't, I didn't make a judgement about that.
24 I just talked to him on the phone.

25 Q: Well, I know you couldn't ...

1 A: I couldn't ...

2 Q: He'd didn't announce that he was a Georgia Tech
3 graduate, but I mean, did he seem to be
4 carrying on a conversation that was, you know,
5 had a relatively high level of sophistication
6 about terms and things like that?

7 A: Not particularly. I mean, he just called and
8 said, Richard's getting paid from the time he
9 leaves the house, which was contrary to what
10 Richard had told me.

11 Q: Yes. But you would assume that whoever was
12 calling would have, would have known that? It
13 ~~wouldn't have been, it wouldn't been just some~~
14 casual acquaintance, it had been somebody that
15 worked at Murata and knew significant about it,
16 amount about Murata's pay?

17 A: I didn't make any assumptions about that. I
18 don't know.

19 Q: So in that conversation with McNeill is when
20 you, you say you realize first that, that you
21 had enough knowledge to say that there was a
22 workers' comp claim?

23 A: Well, I had enough knowledge to know that he
24 was receiving more of a benefit related to
25 travel than he told me, and that that might

1 bring him within the definition of the Act, as
2 far as working, from the time he left home.
3 If, if that was, if that was deemed to be
4 substantial support from the employer to get
5 him to and from the job, he might be one of the
6 exceptions to the rule about work travel, and
7 generally not being covered ...

8 Q: People coming and going ...

9 A: Coming and going home. Going and coming,
10 right.

11 Q: Again, just being clear here, by early June of
12 '99, you thought that Richard might possibly
13 ~~have a workers' comp that you were going to~~
14 protect, even though you were doubtful that he
15 would win on it; is that fair to say?

16 A: I never ...

17 Q: Try to answer yes or no, and then explain it
18 all you want, but just ...

19 A: No. No. Pardon me ...

20 Q: Tell me what ...

21 A: As stated that's not correct.

22 Q: All right. Well tell me ...

23 A: I never thought that Richard had a comp claim.
24 I knew that somebody who he was talking to
25 thought he had a comp claim, but based on the

1 facts that Richard had given me, and I
2 confirmed with Richard, it did not appear to me
3 that he had a comp claim. In an effort to try
4 to protect his rights if he did have a comp
5 claim, I filed the Form 50. But I filed it two
6 days after I settled with the liability
7 carrier, that they raised the election issue.

8 Q: Correct. But the question is, when did you
9 decide to, to protect his rights by filing the
10 Form 50?

11 A: You know, I don't, I don't know that I could
12 say with specificity the date, but I ...

13 Q: Uh-huh (affirmative response).

14 A: ... think I had decided, by around the date he
15 came in to do the settlement on the, with the
16 liability carrier, to file the 50 just to try
17 to protect his rights.

18 Q: So around the 16th of June ...

19 A: Uh-huh (affirmative response).

20 Q: ... in '99, you thought that that would need to
21 be done?

22 A: Right.

23 Q: Do you remember what you said to Richard in
24 regards to that Form 50 or on the 16th or before
25 that?

1 A: My best recollection is, I said, Richard, I'm
2 going to file this but I don't think you're
3 going to get the benefit, but I'll file it.

4 Q: What, at that time, did you understand the
5 procedure was with regard to pursuing a third
6 party claim and the workers' comp benefit out
7 of the same transaction?

8 A: Could you restate that, I'm ...

9 Q: Sure.

10 A: I lost you somewhere.

11 Q: What was your understanding then about pursuing
12 both a workers' comp remedy for a client and
13 also pursuing a third party liability remedy
14 out of the same transaction?

15 A: I knew you had to notify the carrier that you
16 were going to do that. I did not, at that
17 point in time, recall that you needed to notify
18 them before you settled any portion of the
19 case. I did not recall that there was an
20 election problem by potentially settling that
21 portion of the case before notifying them.

22 Q: And this is attached to the Complaint. Your
23 note to Mr. Kimmer, February 1, 2000 ...

24 A: Right.

25 Q: ... that sets forth pretty much the history of

1 OUR POSITION IS THE COMP RATE IS DETERMINED AT
2 THE TIME OF THE INJURY AND THAT HE WAS AT THE MAXIMUM
3 RATE AT THAT TIME, WHICH IS 484.47. AND THAT THAT
4 WOULD BE THE APPLICABLE COMP RATE.

5 BY COMMISSIONER CHILDS:

6 I WILL LIST THAT AS ONE OF THE ISSUES FOR ME TO
7 DETERMINE. AND THEN JUST TO -- IS THE CLAIMANT WORKING
8 NOW OR HAS HE WORKED SINCE THE INJURY?

9 BY MR. POPE:

10 NO, MA'AM, HE HAS NOT.

11 BY COMMISSIONER CHILDS:

12 I JUST WANTED TO KNOW IF THERE WAS ANY OTHER
13 EVIDENCE IN THE RECORD TO ---

14 BY MR. POPE:

15 OTHER THAN THE TESTIMONY OF HIMSELF AND ONE OF
16 THE OTHER WITNESSES, THERE WON'T BE.

17 BY COMMISSIONER CHILDS:

18 OKAY. YOU CAN SWEAR THE WITNESS.

19 RICHARD KIMMER, BEING DULY SWORN, TESTIFIED AS FOLLOWS:

20 DIRECT EXAMINATION BY MR. POPE:

21 Q. YOU'RE RICHARD KIMMER?

22 A. YES, SIR.

23 Q. ALL RIGHT. WHAT'S YOUR ADDRESS?

24 A. 874 TWIN FAWN ROAD, NEWBERRY, SOUTH CAROLINA, 29108.

25 Q. YOUR DATE OF BIRTH IS 10-11-46, IS THAT RIGHT?

1 A. YES, SIR.

2 Q. YOU'RE 56 RIGHT NOW?

3 A. YES, SIR.

4 Q. YOUR WIFE IS MARTHA?

5 A. YES, SIR.

6 Q. YOU HAVE FIVE CHILDREN, CORRECT?

7 A. YES, SIR.

8 Q. THE GENERAL STATE OF YOUR HEALTH BEFORE YOUR ON-THE-JOB
9 ACCIDENT -- AND WHICH THE ACCIDENT WAS 1-29-99,
10 CORRECT?

11 A. YES, SIR.

12 Q. YOUR HEALTH BEFORE THAT DATE IN GENERAL WAS WHAT?

13 A. I'D HAVE TO SAY IT WAS EXCELLENT, BECAUSE I WORKED ALL
14 MY LIFE.

15 Q. HOW MANY GRADES DID YOU COMPLETE IN SCHOOL?

16 A. SIX.

17 Q. DID YOU EVER GO TO ANY TECH SCHOOL OR ANY VOCATIONAL
18 SCHOOL BEYOND THAT?

19 A. NO, SIR.

20 Q. OR THE GED OR ANYTHING?

21 A. NO, SIR.

22 Q. WHEN YOU FINISHED HIGH SCHOOL, YOUR FIRST JOB WAS A
23 CARPENTER, IS THAT RIGHT?

24 A. I'M SORRY?

25 Q. YOUR FIRST JOB AFTER HIGH SCHOOL WAS AS A CARPENTER,

- 1 RIGHT?
- 2 A. I DIDN'T FINISH HIGH SCHOOL. I'M SORRY.
- 3 Q. EXCUSE ME. AFTER SCHOOL I MEAN. NOT FINISHING.
- 4 A. YES, SIR. I WAS A CARPENTER.
- 5 Q. AND AFTER THAT YOU WORKED TWO YEARS AS A CARPENTER?
- 6 A. RIGHT, SIR. YES, SIR.
- 7 Q. HOW LONG DID YOU WORK FOR SPRINGS MILLS?
- 8 A. FOR 31 YEARS, ONE MONTH, AND ONE WEEK.
- 9 Q. ALL RIGHT, AND AT SPRINGS YOU WERE A TECHNICIAN, IS
- 10 THAT RIGHT?
- 11 A. YES, SIR.
- 12 Q. WAS THAT FAIRLY HEAVY WORK?
- 13 A. OCCASIONALLY, YES, SIR.
- 14 Q. AND YOU INSTALLED MACHINERY AND SERVICED MACHINERY; IS
- 15 THAT CORRECT?
- 16 A. RIGHT.
- 17 Q. ALL RIGHT. AND DID YOU GET WHERE YOU UNDERSTOOD THE
- 18 HIGHEST IN TECHNOLOGY MACHINES, LIKE AIR JET LOOMS AND
- 19 THINGS LIKE THAT?
- 20 A. YES, SIR.
- 21 Q. ALL RIGHT. WHILE YOU WERE WORKING AT SPRINGS THE LAST
- 22 FEW YEARS, DID YOU HAVE A SECOND JOB?
- 23 A. YES, SIR.
- 24 Q. WHO WAS THAT WITH?
- 25 A. PSI CONTRACTORS, MR. JIM PARNELL OUT OF ATLANTA,

1 GEORGIA.

2 Q. AND WHAT WERE THE YEARS THAT YOU WORKED YOUR SECOND JOB
3 IN ADDITION TO SPRINGS WITH THIS COMPANY?

4 A. FROM SOMETIME IN '90, TILL DECEMBER OF '95.

5 Q. SO FROM '90 TO '95, YOU WERE WORKING A FULL TIME JOB AT
6 SPRINGS, IN ADDITION TO THIS OTHER JOB WITH PSI, IS
7 THAT RIGHT?

8 A. YES, SIR.

9 Q. WHAT WERE YOU DOING WITH PSI?

10 A. INSTALLING AIR JET SPINNING FOR MURATA OF AMERICA.

11 Q. AND THEN LATER DID MURATA OF AMERICA HIRE YOU TO WORK
12 FOR THEM?

13 A. YES, SIR.

14 Q. AND THAT WAS IN DECEMBER OF '95, IS THAT RIGHT?

15 A. DECEMBER THE 1ST, '95, YES, SIR.

16 Q. NOW, AIR JET SPINNING FRAMES ARE -- THESE FRAMES ARE
17 MADE IN JAPAN, IS THAT RIGHT?

18 A. YES, SIR.

19 Q. THEY'RE 20 TIMES FASTER THAN CONVENTIONAL LOOMS, IS
20 THAT RIGHT?

21 A. YES, SIR. THE CONVENTIONAL SPINNING FRAMES.

22 Q. SPINNING FRAMES I MEAN, NOT ---

23 A. YES, SIR.

24 Q. ALL RIGHT. AND YOU WORKED WITH THIS MACHINERY, AS IT
25 DEVELOPED TECHNOLOGICALLY, THE WHOLE TIME YOU WERE

1 EITHER WITH SPRINGS OR WITH PSI OR WITH MURATA, IS THAT
2 RIGHT?

3 A. YES, SIR.

4 Q. ALL RIGHT. AND IN YOUR JOB WITH MURATA, WAS IT SIMILAR
5 TO THE JOB YOU'D HAD WITH PSI AND SPRINGS?

6 A. WITH PSI IT WAS THE SAME AS IT WAS WITH MURATA. AND AT
7 SPRINGS I WAS A TECHNICIAN ON THE MACHINERY AFTER IT
8 WAS PUT IN. BUT I ALSO HELPED PUT IN OVER 100 MACHINES
9 AT SPRINGS.

10 Q. OKAY. NOW, WHEN YOU WERE HIRED WITH MURATA, AND I'LL
11 TALK ABOUT THE NATURE OF THE JOB IN A MINUTE, BUT WHEN
12 YOU WERE HIRED IN DECEMBER OF '95, YOU WERE PAID OF
13 COURSE A SALARY PER HOUR OF FOURTEEN DOLLARS AND
14 SOMETHING AN HOUR, IS THAT RIGHT?

15 A. THAT WASN'T MY STARTING PAY, BUT THAT WAS WHAT I WAS
16 GETTING PAID AT THE TIME OF THE ACCIDENT, YES, SIR.

17 Q. AND IN ADDITION TO YOUR HOURLY RATE, WHAT WERE YOU PAID
18 TO -- IN ADDITION?

19 A. WE GOT THREE HUNDRED AND SOME ODD DOLLARS A MONTH -- I
20 MEAN, BI-WEEKLY, EVERY OTHER WEEK, FOR CAR ALLOWANCE,
21 PLUS SIX CENTS A MILE FOR EACH MILE WE DROVE TO AND
22 FROM WORK.

23 Q. WELL, TALKING ABOUT THE MURATA JOB. YOU WORKED OUT OF
24 WHERE?

25 A. FROM MY HOME.

1 Q. YOUR HOME WAS IN WHITMIRE THEN, IS THAT RIGHT?

2 A. YES, SIR.

3 Q. ALL RIGHT, NOW, FROM YOUR HOME YOU WOULD GO TO WHERE?
4 DIFFERENT PLACES OR THE SAME PLACE?

5 A. DIFFERENT PLANTS AT DIFFERENT TIMES.

6 Q. ALL RIGHT. SO EVERY WEEK, SO TO SPEAK, WAS DIFFERENT,
7 IS THAT RIGHT?

8 A. NOT EVERY WEEK. SOMETIMES I WAS IN THE SAME PLANT FOR
9 THREE OR FOUR MONTHS OR MAYBE EVEN LONGER.

10 Q. AND SOMETIMES A MATTER OF DAYS, IS THAT RIGHT?

11 A. YES, SIR.

12 Q. OKAY. WERE YOU PAID FOR EACH MILE THAT YOU DROVE FROM
13 YOUR HOME TO THOSE PLANTS, WHEREVER THEY WERE?

14 A. YES, SIR.

15 Q. AND YOU WERE ALSO PAID AT SIX CENTS A MILE?

16 A. YES, SIR.

17 Q. YOU WERE ALSO PAID \$620 A MONTH CAR ALLOWANCE, IS THAT
18 RIGHT?

19 A. YES, SIR. TO THE EXACT PENNY I'M NOT SURE OF, BUT IT
20 WAS OVER \$600 PER MONTH, YES, SIR.

21 Q. ALL RIGHT. AND IF YOU HAD TO DRIVE MORE THAN AN HOUR
22 TO A CERTAIN PLANT, WERE YOU PAID FOR THAT SALARY-WISE?

23 A. YES, SIR.

24 Q. SO IF YOU HAD TO DRIVE AN HOUR AND A HALF TO A PLANT
25 FOR YOUR REGULAR JOB TO FIX A LOOM OR INSTALL AN AIR

1 JET FRAME, YOU WOULD BE PAID HOW MUCH IF YOU HAD TO
2 DRIVE AN HOUR AND A HALF?

3 A. I'D BE PAID 30 MINUTES TRAVEL TIME.

4 Q. PLUS THE REGULAR CAR ALLOWANCE, IS THAT RIGHT?

5 A. AND THE SIX CENTS A MILE, YES, SIR.

6 Q. ALL RIGHT. NOW, AT MURATA DID -- THE PHYSICAL
7 REQUIREMENTS OF THAT JOB, DID IT INVOLVE LIFTING?

8 A. YES, SIR.

9 Q. TELL US THE DIMENSIONS OF THESE AIR JET FRAMES.

10 A. THE MACHINE ITSELF, AFTER IT WAS COMPLETELY INSTALLED,
11 WAS SOMEWHERE AROUND 80 FEET LONG AND IT CAME IN EIGHT
12 TO TEN DIFFERENT SECTIONS. AND SOME SECTIONS WERE AS
13 HEAVY AS 1,900 PLUS POUNDS. AND THE LIGHTEST ONE WAS
14 RIGHT AROUND 1,000 POUNDS.

15 Q. AND THE HEIGHT OF THESE FRAMES WOULD BE, WHAT, SIX OR
16 EIGHT FEET HIGH?

17 A. DEPENDING ON THE LEVEL OF THE FLOOR, YES, SIR. IT
18 VARIED.

19 Q. AND YOU WOULD LIFT AS MUCH AS HOW MUCH IN THAT JOB ON A
20 REGULAR BASIS?

21 A. ON A REGULAR BASIS PROBABLY 25 TO 50 POUNDS ON A
22 REGULAR BASIS. AT TIMES WE WOULD HAVE TO LIFT A LOT
23 MORE WHEN WE DIDN'T HAVE HELP TO DO THE LIFTING.

24 Q. WAS BENDING AND STOOPING AND CLIMBING AND PUSHING AND
25 REACHING, WAS THAT PART OF YOUR JOB AS WELL?

1 A. YES, SIR. A BIG PART.

2 Q. AND TWISTING AND TURNING, WAS THAT A BIG PART?

3 A. YES, SIR.

4 Q. WHAT KIND OF TOOLS DID YOU USE, FOR INSTANCE, WHEN YOU
5 WERE DEALING WITH PUTTING TOGETHER ONE OF THESE BIG AIR
6 JET FRAMES?

7 A. WE USED PALLET JACKS. PRY BARS.

8 Q. A PRY BAR IS LIKE A BIG CROWBAR, RIGHT?

9 A. YES, SIR. AND THEN WHEN WE GOT IT TOGETHER, YOU KNOW,
10 WE HAD TO LEVEL IT UP AND USE HAND TOOLS TO PUT THE
11 BOLTS AND STUFF IN IT.

12 Q. AND YOU ALSO HAD TO CLIMB ON TOP OF THAT EQUIPMENT,
13 TOO?

14 A. OCCASIONALLY, YES, SIR.

15 Q. AND IS THAT THE SAME JOB YOU HAD THE ENTIRE TIME YOU
16 WERE WITH MURATA?

17 A. YES, SIR.

18 Q. AND YOU WERE CALLED THE SERVICE TECHNICIAN, IS THAT THE
19 RIGHT WORD?

20 A. YES, SIR.

21 Q. YOU WERE CONSIDERED NON-EXEMPT, IS THAT THE RIGHT WORD?
22 IN THE EMPLOYEE MANUAL?

23 A. I'M SORRY?

24 Q. THEY CALL IT A NON-EXEMPT SERVICE TECHNICIAN IN THE
25 MANUAL?

345

1 A. I'M NOT REAL SURE, MR. POPE.

2 Q. OKAY, I'LL ASK YOUR BOSS. I'M GOING TO ASK YOU NOW
3 ABOUT THE ACCIDENT. ON JANUARY THE 29TH OF '99, AT
4 ABOUT 6:50 OR SO IN THE MORNING, YOU HAD AN ACCIDENT,
5 IS THAT RIGHT?

6 A. YES, SIR.

7 Q. WHAT TIME DID YOU GET UP THAT MORNING?

8 A. FIVE THIRTY OR QUARTER TO SIX.

9 Q. ALL RIGHT. WAS THIS A ROUTINE DAY?

10 A. IT WAS A ROUTINE DAY FOR THAT PLANT.

11 Q. AND YOU WERE HEADED TO WHICH PLANT?

12 A. SPRINGS KATHERINE PLANT IN CHESTER.

13 Q. YOU'D BEEN WORKING THERE FOR SEVERAL DAYS OR WEEKS OR
14 WHAT?

15 A. SEVERAL WEEKS.

16 Q. AND THIS WAS A FRIDAY?

17 A. YES, SIR.

18 Q. AND YOU WERE PAID -- WERE YOU PAID THAT DAY FOR MILEAGE
19 FROM YOUR HOME TO THE KATHERINE PLANT IN CHESTER AND
20 ALSO THE CAR ALLOWANCE?

21 A. THE DATE OF THE ACCIDENT?

22 Q. YES. WERE YOU TO BE PAID FOR IT ON ---

23 A. I WERE TO BE PAID, YES, SIR.

24 Q. ALL RIGHT. AND THE COLLISION -- AND I DON'T THINK IT'S
25 IN DISPUTE, SO I'LL LEAD YOU A LITTLE BIT. THIS WAS A

1 HEAD ON COLLISION, WAS IT NOT?

2 A. YES, SIR.

3 Q. THE OTHER CAR WAS IN YOUR LANE, RIGHT?

4 A. YES, SIR.

5 Q. THE OTHER CAR GOT TICKETED FOR IT, CORRECT?

6 A. YES, SIR.

7 Q. AND THE OTHER DRIVER, AS FAR AS YOU KNOW, WAS WHAT WE
8 CALL A DEADBEAT. SOMEBODY WITHOUT ANY ASSETS OR JOB?

9 BY MR. JOHNSON:

10 I'M GOING TO OBJECT. THAT WOULD REQUIRE HEARSAY
11 EVIDENCE, AND I OBJECT. I OBJECT TO THE FORM OF THE
12 QUESTION ALSO.

13 BY COMMISSIONER CHILDS:

14 SUSTAINED.

15 DIRECT EXAMINATION RESUMED BY MR. POPE:

16 Q. DID YOU AUTHORIZE YOUR THEN ATTORNEY TO INVESTIGATE
17 WHETHER OR NOT THE MAN THAT HIT YOU HAD ASSETS OR NOT?
18 YOU AUTHORIZED HIM TO CHECK INTO IT, RIGHT?

19 A. YES, SIR.

20 Q. ALL RIGHT. WELL, I'LL LET HIM EXPLAIN. YOUR CAR WAS
21 GOING ABOUT WHAT SPEED WHEN ---

22 A. 35 MILES PER HOUR.

23 Q. WAS HIS CAR GOING FASTER OR SLOWER?

24 A. SLOWER.

25 Q. YOUR CAR WAS A BUICK PARK AVENUE, CORRECT?

1 A. RIGHT.

2 Q. AND HIS WAS A WHAT?

3 A. IT WAS A LATE -- OLDER MODEL CADILLAC. A FULL SIZE
4 CADILLAC. I DON'T KNOW WHAT YEAR MODEL IT WAS.

5 Q. WERE BOTH CARS -- THERE WAS DAMAGE TO BOTH CARS?

6 A. RIGHT.

7 Q. WAS IT SUBSTANTIAL OR A LITTLE BIT OR WHAT?

8 A. TOTALLED. BOTH OF THE CARS.

9 Q. WHAT PARTS OF YOUR BODY WERE INJURED IN THAT ACCIDENT?

10 A. WELL, MY HEAD BUSTED THE WINDSHIELD. MY NECK SNAPPED
11 BACK, AND MY KNEES WENT UP INTO THE DASHBOARD. AND I
12 WAS THROWN IN THE FLOORBOARD. AND MY HEAD, MY NECK,
13 BACK, AND KNEES ALL GAVE ME THE PROBLEMS.

14 Q. AND THE POLICE CAME OF COURSE, IS THAT RIGHT?

15 A. YES, SIR.

16 Q. ALL RIGHT. DID YOU INFORM YOUR SUPERVISOR ON THE PHONE
17 ABOUT IT?

18 A. A CO-WORKER DID. AND AFTER I HAD WENT TO THE EMERGENCY
19 ROOM AND WAS RELEASED FROM THE EMERGENCY ROOM, I WENT
20 TO THE PLANT. MY WIFE TAKED ME TO THE PLANT, AND I
21 TALKED TO MY SUPERVISOR.

22 Q. THAT'S MR. STOLVIN?

23 A. YES, SIR, MR. STOLVIN.

24 Q. THEN YOU WENT TO WHAT HOSPITAL TO BE EXAMINED?

25 A. CHESTER COUNTY HOSPITAL IN CHESTER, SOUTH CAROLINA.

1 Q. AND YOU STAYED THERE FOR HOW LONG?

2 A. A COUPLE OF HOURS. I DON'T REMEMBER EXACTLY. THEY
3 TOOK X-RAYS OF MY HEAD AND KNEES.

4 Q. THE PARAMEDICS SENT YOU THERE?

5 A. THE PARAMEDICS CAME TO THE SCENE OF THE ACCIDENT. THEY
6 WANTED TO TAKE ME THEN, BUT I WOULD NOT GO BECAUSE I
7 WAS -- I GUESS I MAY HAVE BEEN SO SHOOK UP I DIDN'T
8 REALIZE HOW -- THAT I NEEDED TO GO. I KNEW I WAS HURT,
9 BUT I DIDN'T THINK OR KNOW JUST HOW BAD. SO I WOULDN'T
10 LET THEM TAKE ME. BUT WHEN I CALLED MY WIFE, SHE CAME
11 TO THE BODY SHOP AND PICKED ME UP WHERE THEY HAD TOOK
12 MY CAR. SHE TOOK ME TO THE HOSPITAL FOR THEM TO
13 EXAMINE ME.

14 Q. ALL RIGHT, NOW, OVER THE WEEKEND DID YOU GET BETTER OR
15 WORSE?

16 A. WORSE.

17 Q. AND MONDAY MORNING WHO DID YOU SEE?

18 A. THE ORTHOPEDIC SURGEON IN UNION. DR. PETER J. KINAHAN.

19 Q. NOW, I WANT TO GO BACK FOR A MINUTE. YOU MENTIONED DR.
20 KINAHAN. HAD YOU HAD ANY KNEE PROBLEM BEFORE THIS?

21 A. YES, SIR. I HAD A SLIGHT PROBLEM WITH MY RIGHT KNEE IN
22 AUGUST OR SEPTEMBER OF '98 BEFORE THIS ACCIDENT
23 HAPPENED. AND I DID SEE AN ORTHOPEDIC SURGEON A COUPLE
24 TIMES FOR AN INFLAMED TENDON.

25 Q. ALL RIGHT. HAD THAT PROBLEM COMPLETELY CORRECTED?

1 ITSELF BY THE TIME YOU HAD THIS ACCIDENT?

2 A. YES AND -- YES AND NO. IF I WAS ON MY KNEES A LOT, IT
3 AGGRAVATED ME. YES.

4 Q. DID YOU HAVE ANY DISABILITY IN YOUR KNEE BEFORE THIS
5 ACCIDENT HAPPENED FROM THAT?

6 A. NO DISABILITY. I WAS DOING MY JOB CONTINUOUSLY RIGHT
7 ON ---

8 Q. ALL RIGHT, NOW, WHAT HAS DR. KINAHAN DONE AS FAR AS
9 KNEE SURGERY FOR YOU SINCE THE DATE OF THIS ACCIDENT IN
10 RESPONSE TO THOSE INJURIES?

11 A. HE HAD DONE THREE ARTHROSCOPIC SURGERIES. TWO ON MY
12 RIGHT AND ONE ON MY LEFT.

13 Q. ALL RIGHT, NOW, DR. KINAHAN, IS HE IN SOUTH CAROLINA
14 NOW?

15 A. NOT THAT I'M AWARE OF. I THINK HE'S IN WASHINGTON
16 STATE SOMEWHERE.

17 Q. NOW, DID YOU HAVE ANY ADDITIONAL KNEE SURGERY BY ANYONE
18 ELSE?

19 A. YES, SIR. I DID. I HAD ONE MORE ON MY RIGHT KNEE.
20 DR. JAMES FROM CAROLINA ORTHOPEDIC IN LANCASTER, SOUTH
21 CAROLINA. HE DID ONE THERE AT THE HOSPITAL IN
22 LANCASTER. SPRINGS MEMORIAL HOSPITAL.

23 Q. HAS DR. JAMES ALSO TREATED YOUR BACK CONDITION?

24 A. NO, NOT DR. JAMES. IT'S DR. MANDELL IS THE ONE THAT'S
25 TAKING CARE OF MY BACK.

1 Q. AND DR. MANDELL OF COURSE IS THE NEUROLOGIST, CORRECT?

2 A. THE NEUROLOGIST, YES, SIR.

3 Q. AND IS HE ALSO TREATING, IN ADDITION TO YOUR BACK, YOUR
4 NECK AND YOUR DEPRESSION?

5 A. DR. MANDELL?

6 Q. RIGHT.

7 A. YEAH. MY NECK. HE STARTED WITH MY DEPRESSION, BUT HE
8 TURNED ME OVER TO THE PSYCHIATRIST IN COLUMBIA, DR.
9 MAJORS.

10 Q. HAD YOU EVER SEEN A PSYCHIATRIST OR HAD ANY DEPRESSION
11 BEFORE THIS ACCIDENT?

12 A. NO, SIR.

13 Q. HAVE YOU WORKED SINCE THE DATE OF THIS ACCIDENT?

14 A. NO, SIR.

15 Q. COULD YOU HAVE WORKED, GIVEN YOUR WORK HISTORY AND YOUR
16 BACKGROUND, YOUR EXPERIENCE AND YOUR EDUCATION, COULD
17 YOU HAVE WORKED AT ANY OTHER JOB?

18 A. I DON'T THINK SO, NO, SIR.

19 Q. YOU'RE NOT WORKING WITH MURATA OF COURSE. YOU'RE NOT
20 ON THEIR PAYROLL NOW, IS THAT RIGHT?

21 A. RIGHT.

22 Q. NOW, WHAT PROBLEMS ARE YOU HAVING NOW, MR. KIMMER?
23 TELL US WHAT THEY ARE. WHAT PHYSICAL PROBLEMS YOU'RE
24 HAVING OR MEDICAL PROBLEMS YOU'RE HAVING BECAUSE OF
25 THIS ACCIDENT.

1 A. WELL, I'M HAVING PROBLEMS WITH MY RIGHT KNEE. MY LEFT
2 KNEE DOESN'T BOTHER ME HARDLY AT ALL ANYMORE, BUT MY
3 RIGHT KNEE IS A TERRIBLE PROBLEM. MY LOWER BACK AND MY
4 NECK. MY DEPRESSION. IT'S BEEN A BAD THING.

5 Q. THE WORST AREA OR PROBLEM RIGHT NOW IS WHAT?

6 A. MY LOWER BACK.

7 Q. AND DO YOU HAVE PAIN IN THAT LOW BACK AND IN THE RIGHT
8 KNEE?

9 A. YES, SIR.

10 Q. HOW WOULD YOU DESCRIBE IT? AS OPPOSED TO STABBING,
11 BURNING, DULL, SHARP, WHATEVER.

12 A. IT'S STABBING AND SHARP MOST OF THE TIME. WHEN I GET
13 ALL MY MEDICATIONS IN ME UP IN THE DAY, YEAH, THE PAIN,
14 YOU KNOW, DOES EASE OFF. BUT NOT MUCH.

15 Q. WHEN THE PAIN IS THE WORST, HOW BAD -- WHAT TIME OF DAY
16 IS IT USUALLY THE WORST?

17 A. I'M WORSE WHEN I GET UP IN THE MORNINGS. BECAUSE I'VE
18 DONE WITHOUT MY MEDICATIONS OVER THE SEVEN TO EIGHT
19 HOURS AT NIGHT.

20 Q. HOW BAD IS THE PAIN, WITH TEN BEING THE WORST AND ONE
21 BEING BEST, IN THE MORNING?

22 A. AN EIGHT OR NINE.

23 Q. ONCE YOU TAKE YOUR MEDICINE ON A GOOD DAY, UNDER THE
24 BEST CONDITIONS, FOR INSTANCE, WHAT IS THE PAIN LEVEL
25 AT ITS BEST?

1 A. THREE TO FOUR.

2 Q. WHAT AGGRAVATES YOUR BACK AND YOUR KNEE THE MOST? WHAT
3 ACTIVITY WOULD AGGRAVATE IT THE MOST OR MAKE IT WORSE?

4 A. ABOUT ANYTHING I DO AGGRAVATES BOTH OF THEM. MY BACK
5 IS THE WORST -- IF I JUST STAND, IT'S BAD. IF I JUST
6 SIT, IT'S BAD. STOOPING, BENDING IS TERRIBLE. AND MY
7 KNEE IS -- I CAN'T SQUAT AT ALL BECAUSE OF THE KNEE
8 PROBLEM. I CAN'T PULL MY WEIGHT UP STEPS, OR I CAN'T
9 PUT MY RIGHT FOOT DOWN FIRST TO GO DOWN STEPS AND BEND
10 MY KNEE WITH THE WEIGHT ON IT.

11 Q. WHAT DO YOU DO NOW AND WHAT HAVE YOU BEEN DOING TO EASE
12 YOUR PAIN?

13 A. I'M TAKING THE MEDICATIONS.

14 Q. ALL RIGHT, I'LL ASK YOU WHAT THOSE MEDICINES ARE IN A
15 MINUTE, BUT WHAT ELSE DO YOU DO TO EASE YOUR ---

16 A. ONE OF THE FIRST THINGS IN THE MORNING IS GET IN THE
17 WHIRL -- IT'S NOT A WHIRLPOOL TUB. WE JUST HAVE A BIG
18 GARDEN TUB WITH THE JACUZZI MAT IN IT THAT WORKS BY
19 AIR. LIKE -- NOT WATER JETS, BUT AIR. AND THEN BEFORE
20 I GET IN THE SHOWER EARLY AT NIGHT, I'M BACK IN IT
21 AGAIN. MOST OF THE TIME 20 -- 20 MINUTES IS MY
22 PROBABLY LEAST TIME. A LOT OF TIMES I'M IN IT 30
23 MINUTES.

24 Q. IS THAT HOT WATER IN THERE?

25 A. YES, SIR. I GET IN IT AS HOT AS I CAN STAND AND THEN

- 1 I'M LETTING THE COLD OUT AS MY BODY GETS USED TO IT AND
2 GETS IT HOTTER. RUNNING MORE HOT WATER IN IT.
- 3 Q. WAS THAT RECOMMENDED BY A DOCTOR OR ---
- 4 A. YES, SIR.
- 5 Q. WHAT MEDICATIONS HAVE YOU BEEN TAKING OR ARE YOU
6 TAKING?
- 7 A. I'VE GOT THEM ALL RIGHT HERE. I'M TAKING 11 DIFFERENT
8 KINDS.
- 9 Q. JUST TELL US THE ONES -- DO YOU HAVE A LIST SOMEWHERE?
- 10 A. I THINK MY WIFE -- NO, I GOT ONE RIGHT HERE. LET ME
11 PUT MY GLASSES ON. OKAY, I'M TAKING NEURONTIN, WHICH
12 IS FOR NERVE DAMAGE. I TAKE A 600 MILLIGRAM TABLET,
13 ONE TABLET FOUR TIMES A DAY. THAT WAS PRESCRIBED BY MY
14 NEUROLOGIST, DR. HOWARD MANDELL.
- 15 Q. IS THAT WELLBUTRIN?
- 16 A. WELLBUTRIN.
- 17 Q. 150 MILLIGRAMS, THREE TIMES A DAY?
- 18 A. YES, SIR.
- 19 Q. IS THAT FOR -- AN ANTI-DEPRESSANT?
- 20 A. YES, SIR.
- 21 Q. YOU TAKE HYDROCODONE, 750 MILLIGRAMS EVERY FOUR TO SIX
22 HOURS?
- 23 A. YES, SIR.
- 24 Q. THAT'S FOR PAIN?
- 25 A. PAIN, YES, SIR.

1 Q. ALL RIGHT, YOU TAKE REMERON ---

2 BY MR. JOHNSON:

3 YOUR HONOR, I NEED TO ---

4 BY MR. POPE:

5 OKAY, IT WILL TAKE LONGER. BUT GO AHEAD AND TELL
6 US ABOUT ---

7 BY MR. JOHNSON:

8 I DON'T HAVE ANY OBJECTION TO HIM PUTTING IN
9 WHATEVER LIST HE'S GOT OF THE MEDICATIONS TO SHORTEN
10 IT. I'M NOT TRYING TO DRAW IT OUT. BUT I OBJECT TO
11 THE LEADING.

12 DIRECT EXAMINATION RESUMED BY MR. POPE:

13 Q. ALL RIGHT, WE HAVE THE REMERON. TELL US IF YOU TAKE
14 THAT, AND WHAT YOU TAKE, AND WHY YOU TAKE IT.

15 A. OKAY, THE REMERON IS 30 MILLIGRAMS, TWO TABLETS AT
16 NIGHT AT BEDTIME. AND THAT'S AN ANTI-DEPRESSANT
17 MEDICINE, TOO.

18 Q. DO YOU TAKE BEXTRA?

19 A. BEXTRA, YES, SIR.

20 Q. FOR WHAT?

21 A. TEN MILLIGRAMS, THREE -- THREE TIMES A DAY. AND THAT'S
22 FOR ARTHRITIS.

23 Q. NOW, SPEAKING OF ARTHRITIS, HAD YOU EVER BEEN TOLD
24 BEFORE THIS ACCIDENT THAT YOU HAD ARTHRITIS?

25 A. NO, SIR.

- 1 Q. HAD YOU EVER THOUGHT YOU EVEN HAD ARTHRITIS?
- 2 A. I'VE NEVER HAD NO PROBLEM TO MAKE ME AWARE THAT I DID.
- 3 WITH A 55 YEAR OLD BODY, I'M SURE I PROBABLY DID.
- 4 Q. ASSUMING YOU HAD ARTHRITIS, HAD IT EVER GIVEN YOU ANY
- 5 PROBLEMS PRIOR TO THIS ACCIDENT?
- 6 A. NO, SIR.
- 7 Q. ALL RIGHT, YOU MENTIONED BEXTRA FOR PAIN. ARE YOU ALSO
- 8 TAKING ISADARBID, ONE TABLET A DAY?
- 9 A. NO, SIR, THAT ONE IS NOT -- THAT'S HEART MEDICINE.
- 10 Q. DOES THAT COVER THE MEDICINES YOU'RE TAKING FOR EITHER
- 11 ARTHRITIS, DEPRESSION, OR PAIN? THE ONES WE'VE GONE
- 12 OVER?
- 13 A. YES, SIR.
- 14 Q. ALL RIGHT. NOW, THE ENTIRE TIME THAT YOU WORKED FOR
- 15 MURATA, DID YOU RECEIVE THIS SIX HUNDRED AND SOME ODD
- 16 DOLLARS A MONTH TRAVEL ALLOWANCE AND SIX CENTS A MILE
- 17 EVERY TIME YOU TRAVELED FROM YOUR HOME TO A DIFFERENT
- 18 MILL?
- 19 A. YES, SIR.
- 20 Q. DID YOU EVER HAVE AN OFFICE TO GO TO OTHER THAN YOUR
- 21 HOME THAT YOU WORKED OUT OF?
- 22 A. YEAH, I HAVE HAD TO GO FROM OFFICE -- FROM MY HOME TO
- 23 THE OFFICE.
- 24 Q. WHAT I MEAN IS YOUR OFFICE WAS YOUR HOME, WASN'T IT?
- 25 A. RIGHT.

1 Q. ALL RIGHT, THE WHIRLPOOL YOU SAID WAS RECOMMENDED BY A
2 DOCTOR. WAS THAT DR. JAMES?

3 A. DR. JAMES AND DR. MANDELL BOTH.

4 Q. WHAT ELSE DID DR. JAMES RECOMMEND THAT YOU TRY TO DO TO
5 EASE SOME OF YOUR PROBLEMS?

6 A. HE HAD ME TRYING TO WALK. AND I COULDN'T WALK LIKE
7 AROUND THE BLOCK OR ANYTHING, SO HE TOLD ME IF I'D GET
8 ME A TREADMILL WITH THE HANDRAILS ON IT, THAT I COULD
9 WALK HOLDING THOSE HANDRAILS, AND THAT WOULD TAKE SOME
10 OF THE PRESSURE OFF MY KNEE. AND DR. MANDELL TOLD ME
11 THE SAME THING ABOUT MY BACK.

12 Q. IS THAT WHAT YOU DID? YOU GOT A TREADMILL?

13 A. YES, SIR, I GOT A TREADMILL.

14 Q. DO YOU USE THAT JUST LIKE YOU DO YOUR WHIRLPOOL EVERY
15 DAY?

16 A. YES, SIR.

17 Q. WHAT OTHER RECOMMENDATIONS DID DR. JAMES HAVE FOR YOU?

18 A. HE TOLD ME TO USE ---

19 BY MR. JOHNSON:

20 I'M GOING TO OBJECT ---

21 BY MR. POPE:

22 DON'T GIVE US HEARSAY ---

23 BY MR. JOHNSON:

24 COMMISSIONER, OBVIOUSLY THE MEDICAL RECORDS WILL
25 SPEAK FOR THEMSELVES ABOUT WHAT THE RECOMMENDATIONS

1 WERE, SO I OBJECT TO IT.

2 BY MR. POPE:

3 I'M NOT ASKING HIM TO SAY THE WORDS THE DOCTOR
4 USED. I'M JUST ASKING HIM TO ---

5 BY MR. JOHNSON:

6 I THINK THE RECOMMENDATIONS, WHATEVER THEY ARE,
7 WOULD BE HEARSAY. I MEAN, HE CAN -- I OBJECT.

8 BY COMMISSIONER CHILDS:

9 TO THAT EXTENT JUST LET HIM TALK ABOUT HIS
10 TREATMENT.

11 BY MR. POPE:

12 OKAY.

13 DIRECT EXAMINATION RESUMED BY MR. POPE:

14 Q. YOU HAD MENTIONED THE WHIRLPOOL. YOU DO THAT TWICE A
15 DAY, IS THAT RIGHT?

16 A. YES, SIR.

17 Q. WHAT OTHER ACTIVITIES ARE YOU DOING NOW ON AN AVERAGE
18 DAY?

19 A. THE WHIRLPOOL AND TRYING TO WALK ON THE TREADMILL.
20 SOME DAYS I CAN SIT DOWN THERE AT THE POND A LITTLE BIT
21 AND FISH. NOT EVERY -- YOU KNOW, NOT EVERY DAY. AND I
22 CAN'T SIT THERE LONG WHEN I DO SIT.

23 Q. DO YOU EVER USE A RECLINER? DOES THAT PROVIDE ANY
24 BENEFIT FOR YOU?

25 A. AS LONG AS I DON'T SIT TOO LONG. THE RECLINER IS --

1 IT'S COMFORTABLE FOR A WHILE, YES.

2 Q. OF ALL THE THINGS YOU DO -- ROUTINE THINGS YOU DO,
3 WHAT'S THE MOST UNCOMFORTABLE THING THAT'S ROUTINE?
4 THAT USED TO BE ROUTINE FOR YOU.

5 A. MOWING GRASS.

6 Q. I'M TALKING ABOUT STANDING, SITTING, WALKING. WHICH OF
7 THOSE THINGS OF THE ROUTINE THINGS IS MOST
8 UNCOMFORTABLE?

9 A. STANDING AND WALKING BOTH IS BAD.

10 Q. WHEN YOU WERE WORKING DURING THAT FIVE YEAR PERIOD
11 BEFORE YOU WENT FULL TIME WITH MURATA, HOW MANY HOURS A
12 WEEK WERE YOU WORKING FROM 1990 TO 1995?

13 A. VERY FEW WEEKS I CAME UNDER 80 HOURS PER WEEK.

14 Q. BEFORE THIS ACCIDENT DID YOU DO SOME GARDENING AND SOME
15 YARD WORK, AND A LITTLE BIT OF PHYSICAL EXERTION?
16 MAYBE GOLF OR BOWLING OR SOMETHING LIKE THAT. DID YOU
17 DO THOSE THINGS?

18 A. YES, SIR.

19 Q. WHAT ABOUT SINCE 1-29-99?

20 A. FISHING IS, YOU KNOW, LIKE I TOLD YOU EARLIER, THE ONLY
21 THING THAT I CAN REALLY ENJOY ANYMORE.

22 Q. AFTER THIS ACCIDENT YOU WENT TO SEE MR. PHILIP WRIGHT,
23 OF COURSE, AS AN ATTORNEY, IS THAT RIGHT?

24 A. YES, SIR.

25 Q. HE WAS IN LANCASTER, CORRECT?

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1 A. YES, SIR.

2 Q. AND HE HELPED YOU WITH YOUR -- TRIED TO HELP YOU WITH
3 YOUR INJURY CLAIMS, IS THAT RIGHT?

4 A. YES, SIR.

5 Q. ALL RIGHT, DID YOU -- WERE YOU GETTING A LOT OF BILLS
6 FROM MEDICAL PROVIDERS DURING THE FIRST TWO, THREE,
7 FOUR MONTHS AFTER THE ACCIDENT?

8 A. YES, SIR.

9 Q. AND ARE YOU AWARE THAT MR. WRIGHT SETTLED THE THIRD
10 PARTY CLAIM AGAINST THE AT FAULT DRIVER FOR \$15,000?
11 THAT'S ALL THE POLICY THAT WAS AVAILABLE, IS THAT
12 RIGHT?

13 A. YES, SIR.

14 BY MR. JOHNSON:

15 OBJECT TO THE FORM OF THE QUESTION. AS BEING
16 LEADING. AND I ASSUME THE ONLY WAY HE WOULD KNOW WHAT
17 THE COVERAGE WAS WOULD BE HEARSAY, AND I OBJECT TO IT
18 ON THAT BASIS AS WELL.

19 BY COMMISSIONER CHILDS:

20 IS YOUR QUESTION MORE IN LINE WITH THAT HE
21 SETTLED THE CLAIM OR HAVING SOMETHING TO DO WITH THE
22 POLICY?

23 BY MR. POPE:

24 WELL, IT WOULD HAVE TO DO WITH BOTH THOSE ISSUES.
25 I MEAN, HIS LAWYER IS OUT HERE, AND I CAN ASK HIM ABOUT

1 IT.

2 BY COMMISSIONER CHILDS:

3 OKAY.

4 BY MR. POPE:

5 I'LL JUST MOVE ON.

6 DIRECT EXAMINATION RESUMED BY MR. POPE:

7 Q. THE SETTLEMENT, YOU DO KNOW THERE WAS A \$15,000
8 SETTLEMENT?

9 A. YES, SIR.

10 Q. AND IT WAS AGAINST THE AT FAULT PARTY'S INSURANCE
11 COMPANY?

12 A. YES, SIR.

13 Q. AND THAT MR. WRIGHT HANDLED THAT FOR YOU?

14 A. YES, SIR.

15 Q. AND OF COURSE THE RECORD SHOWS THAT AFTER YOU SIGNED
16 THE RELEASE ON JUNE 16TH OF '99, TWO DAYS LATER YOU
17 FILED A FORM 50 WITH THE COMMISSION?

18 A. YES, SIR.

19 Q. SO YOU KNEW THAT -- DID YOU OR DID YOU NOT KNOW THAT
20 THERE WAS BOTH A CLAIM AGAINST PENDERGRASS, THE
21 CARRIER, AND ALSO A CLAIM AGAINST YOUR EMPLOYER. YOU
22 KNEW THAT, IS THAT RIGHT?

23 BY MR. JOHNSON:

24 OBJECT TO THE FORM. I WANT TO OBJECT TO THE FORM
25 AS BEING LEADING AND ASK THAT HE -- THE QUESTION BE

1 REPHRASED..

2 BY MR. POPE:

3 I THINK I PHRASED IT PROPERLY. I SAID DID YOU OR
4 DID YOU NOT KNOW THAT YOU HAD BOTH CLAIMS.

5 BY COMMISSIONER CHILDS:

6 OVERRULED. GO AHEAD.

7 BY THE WITNESS:

8 A. I DID KNOW ABOUT BOTH CLAIMS, YES.

9 DIRECT EXAMINATION RESUMED BY MR. POPE:

10 Q. ALL RIGHT, DID YOU INTEND -- WHEN YOUR ATTORNEY
11 ACCEPTED THE \$15,000, DID YOU INTEND TO ONLY GO AFTER
12 THE THIRD PARTY CARRIER? DID YOU INTEND THAT?

13 BY MR. JOHNSON:

14 OBJECT. HIS INTENT IS IRRELEVANT TO THE QUESTION
15 OF WHAT HE DID AND WHAT THE LAW IS. AND I MEAN
16 OBVIOUSLY WE'RE GOING TO GET A SELF SERVING ANSWER THAT
17 SAYS I NEVER INTENDED THAT. AND I OBJECT TO IT ON THE
18 GROUNDS OF RELEVANCE.

19 BY MR. POPE:

20 I THINK IT'S ULTIMATELY QUITE RELEVANT, BECAUSE
21 IF SOMEBODY TAKES A CERTAIN COURSE OF ACTION, THEIR
22 INTENTION IN THIS CASE IS VERY IMPORTANT. IF HE SAYS I
23 INTENDED TO ELECT MY REMEDY EXCLUSIVELY WITH A THIRD
24 PARTY, THEN WE WOULD BE OUT OF A CLAIM. SO THAT
25 QUESTION NEEDS TO BE ANSWERED.

1 BY COMMISSIONER CHILDS:

2 BASED ON WHETHER OR NOT HE PROPERLY ELECTED
3 REMEDIES AND ---

4 BY MR. POPE:

5 WHETHER HE INTENDED TO ELECT A REMEDY OR WHETHER
6 HE WAS JUST FOLLOWING HIS LAWYER'S ADVICE.

7 BY MR. JOHNSON:

8 THE QUESTION I GUESS ON THE TABLE IS WHAT HIS
9 INTENTION WAS. THAT IS ABSOLUTELY IRRELEVANT TO WHAT
10 HE DID AND WHAT THE EFFECT OF WHAT HE DID WAS.

11 BY MR. POPE:

12 WELL, YOU'RE SAYING IT'S LEGALLY IRRELEVANT. IT
13 MAY OR MAY NOT BE LEGALLY IRRELEVANT, BUT IT'S NOT
14 INADMISSIBLE FOR QUESTIONING PURPOSES I DON'T THINK.

15 BY MR. JOHNSON:

16 I THINK THE TEST IS RELEVANCY TO THE ISSUES --
17 THE QUESTIONS OF LAW IN THE CASE, AND I DON'T THINK
18 IT'S RELEVANT, SO I OBJECT.

19 BY COMMISSIONER CHILDS:

20 SUSTAINED.

21 DIRECT EXAMINATION RESUMED BY MR. POPE:

22 Q. DID YOU GET ANY MONEY OUT OF THE \$15,000 SETTLEMENT?

23 A. NO, SIR, I DID NOT.

24 BY MR. JOHNSON:

25 OBJECT. AGAIN, I DON'T BELIEVE THAT'S RELEVANT.

1 BUT HE'S ANSWERED IT SO ---

2 BY COMMISSIONER CHILDS:

3 OKAY.

4 DIRECT EXAMINATION RESUMED BY MR. POPE:

5 Q. DID YOU OR DID YOU NOT KNOW WHICH OF THESE TWO CLAIMS
6 WOULD BE LARGER, THE \$15,000 THIRD PARTY CLAIM OR THE
7 WORKERS' COMP CLAIM FOR YOUR INJURIES IN THAT WRECK?

8 BY MR. JOHNSON:

9 OBJECTION, RELEVANCE.

10 BY MR. POPE:

11 WELL, I SAY IT'S RELEVANT, AND I'D LIKE AN
12 ANSWER.

13 BY MR. JOHNSON:

14 IT WOULDN'T MATTER WHETHER HE THOUGHT HE WAS
15 GOING TO GET MORE OUT OF ONE OR MORE OUT OF THE OTHER.
16 IT'S A QUESTION OF WHAT DID HE DO, AND THE EFFECT OF IT
17 UNDER THE LAW. AND THE RECORD IS CLEAR ON WHAT HE DID.
18 HE SETTLED IT WITH -- BEFORE HE GAVE NOTICE AND PURSUED
19 IT WITH ---

20 BY MR. POPE:

21 WELL, THESE ARE THE FACTS UNDERLYING THAT --
22 THERE'S NO QUESTION OF WHAT HAPPENED CHRONOLOGICALLY,
23 BUT THERE'S SOME QUESTION ABOUT WHAT IT ALL MEANS. THE
24 OBVIOUS POINT IS WHY WOULD ANYBODY TAKE \$15,000, IF IT
25 MEANT FOREGOING A COMP CLAIM THAT WAS WORTH 30 TIMES

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1 THAT MUCH. I MEAN, THAT'S THE OBVIOUS.

2 BY COMMISSIONER CHILDS:

3 BUT I DON'T KNOW THAT WHAT HE THINKS IT MEANS OR
4 NOT IS GOING TO ANSWER ---

5 BY MR. POPE:

6 IT MAY NOT.

7 BY COMMISSIONER CHILDS:

8 --- PROCEDURAL ISSUES. SO OBJECTION SUSTAINED.

9 DIRECT EXAMINATION RESUMED BY MR. POPE:

10 Q. ALL RIGHT, MR. KIMMER, BEFORE JUNE OF 1999, DID YOU
11 KNOW THAT A SETTLEMENT OF THE \$15,000, UNDER THE
12 CIRCUMSTANCES THAT IT WAS ACCEPTED BY YOUR LAWYER,
13 WOULD PRECLUDE YOU OR COULD PRECLUDE YOU PERHAPS FROM
14 WORKERS' COMP COMPENSABILITY?

15 BY MR. JOHNSON:

16 OBJECT, RELEVANCE.

17 BY MR. POPE:

18 I'D LIKE TO TENDER HIS ANSWER, NO MATTER WHAT THE
19 RULING IS.

20 BY COMMISSIONER CHILDS:

21 LET'S DO THIS. I'M GOING TO STEP OUT OF THE ROOM
22 AND JUST LET YOU PROFFER THAT WHOLE LINE OF TESTIMONY.

23 BY MR. POPE:

24 OKAY.

25 BY MR. JOHNSON:

1 ALL RIGHT.

2 (PROFFERED TESTIMONY)

3 DIRECT EXAMINATION RESUMED BY MR. POPE:

4 Q. MR. KIMMER, DID YOU KNOW BEFORE JUNE OF '99, THAT IF
5 YOU ACCEPTED THE \$15,000 FROM THE LIABILITY CARRIER
6 THAT YOU MIGHT BE PRECLUDED FROM HAVING ANY WORKERS'
7 COMPENSATION BENEFITS?

8 A. (NO RESPONSE)

9 Q. THAT YOU WOULDN'T GET ANY WORKERS' COMP IF YOU ACCEPTED
10 THAT SUM? IN OTHER WORDS, AT THE TIME OF THE
11 SETTLEMENT, WHEN MR. WRIGHT ACCEPTED THE 15,000 AND
12 DISBURSED IT, HOWEVER HE DISBURSED IT ON THE RECORDS,
13 AT THAT TIME DID YOU HAVE ANY KNOWLEDGE THAT THAT WOULD
14 IN ANY WAY AFFECT YOUR WORKERS' COMPENSATION CLAIM
15 ADVERSELY?

16 A. NO, SIR, I DID NOT.

17 Q. OKAY.

18 BY MR. POPE:

19 I THINK THAT'S ALL I HAVE ON THAT SUBJECT. I
20 GUESS WE BETTER GET HER BACK.

21 (OFF THE RECORD DISCUSSION)

22 (MR. KIMMER'S DIRECT TESTIMONY CONTINUES)

23 DIRECT EXAMINATION RESUMED BY MR. POPE:

24 Q. DURING THE COURSE OF YOUR EMPLOYMENT WITH MURATA,
25 RICHARD, YOU WENT TO HOW MANY -- YOU DON'T HAVE TO NAME

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1 THEM ALL, BUT APPROXIMATELY HOW MANY DIFFERENT PLANTS
2 TO EITHER INSTALL OR SERVICE MURATA EQUIPMENT?

3 A. TWENTY OR MORE.

4 Q. GOING BACK TO ANOTHER POINT THAT WAS COVERED IN YOUR
5 DEPOSITION. IN JANUARY OF '98, APPROXIMATELY A YEAR
6 BEFORE THIS ACCIDENT, DID YOU HAVE AN INJURY ON THE JOB
7 IN JANUARY OF '98, IN THE CANNON MILLS IN SALISBURY?

8 A. CANNON MILLS IN SALISBURY? YES, SIR, I DID.

9 Q. AND YOU DID NOT HIRE A LAWYER IN THAT CASE OR MAKE A
10 CLAIM, IS THAT RIGHT?

11 A. MR. POPE, I'M NOT SURE IF MURATA DID THAT ON A WORKERS'
12 COMP. I DO KNOW THAT I DIDN'T EVER GET ANY DOCTOR
13 BILLS. BUT IT WAS ---

14 Q. ALL RIGHT, FROM THAT INJURY IN JANUARY OF '98 TO YOUR
15 BACK, DID YOU MAKE A FULL RECOVERY OR NOT?

16 A. YES, SIR.

17 Q. DID YOU EVER RECEIVE ANY LUMP SUM PAYMENT FROM WORKERS'
18 COMP OR ANYBODY IN CONNECTION WITH THAT FOR ANY
19 DISABILITY?

20 A. THE ONLY THING I REMEMBER FROM WORKERS' COMP WAS
21 MILEAGE. AND THAT'S WHY I SAY THAT MURATA MUST HAVE
22 TURNED THAT IN TO WORKERS' COMP. BUT I THINK THAT ---

23 Q. YOU NEVER WENT BEFORE A HEARING OR GOT ANY ---

24 A. NO, SIR.

25 Q. --- FORM 16 OR ANYTHING LIKE THAT?

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