THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE CLARENDON COUNTY
Court of Common Pleas

The Honorable Clifton Newman
The Honorable George C. James, Jr.

Case No. 2010-CP-14-457

STOKES-CRAVEN HOLDING CORP.,
d/b/a STOKES-CRAVEN FORD, Appellants,

v.

SCOTT L. ROBINSON AND JOHNSON
MCKENZIE & ROBINSON, LLC, Respondents.

NOTICE OF APPEAL

Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford ("Stokes-Craven") appeals the interlocutory order of the Honorable Clifton Newman dated September 24, 2012 and filed on October 4, 2012. (Exhibit A). Stokes-Craven further appeals the judgment of the Honorable George C. James, Jr. dated June 4, 2013 and filed on June 6, 2013. (Exhibit B). Appellant received written notice of entry of Judge James' order on June 12, 2013.

June 27, 2013

ANDREW K. EPTING, JR., LLC

Andrew K. Epting Jr

Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
ANDREW K. EPTING, JR., LLC
46a State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310

ATTORNEYS FOR APPELLANT

Counsel of Record for Respondents:
Susan T. Wall, Esquire
Amanda C. Williams, Esquire
Warren C. Powell, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUL - 3 2013
S.C. Supreme Court

APPEAL FROM THE CLARENDON COUNTY
Court of Common Pleas

The Honorable Clifton Newman
The Honorable George C. James, Jr.

Case No. 2010-CP-14-457

STOKES-CRAVEN HOLDING CORP.,
d/b/a STOKES-CRAVEN FORD, Appellants,

v.

SCOTT L. ROBINSON AND JOHNSON
MCKENZIE & ROBINSON, LLC, Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on all Respondents by depositing a copy of it in the United States Mail, Postage prepaid, on June 27, 2013, addressed to their attorneys of record as follows:

Susan Taylor Wall, Esquire Amanda C. Williams, Esquire McNair Law Firm, PA 100 Calhoun Street, Suite 400 Charleston, SC 29401 ***Attorneys for Scott Robinson***	Warren Powell, Esquire Bruner Powell Wall & Mullins, LLC 1735 St. Julian Place (29204) PO Box 61110 Columbia, SC 29206 ***Attorneys for Johnson McKenzie & Robinson***

ANDREW K. EPTING, JR., LLC

By ______________________
Andrew K. Epting, Jr.
Michelle N. Endemann
46A State Street, Charleston, SC 29401
843-377-1871; Fax: 843-377-1310
Attorneys for Appellant Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford

State of South Carolina
Third Judicial Circuit

GEORGE C. JAMES, JR.
CIRCUIT COURT JUDGE

141 NORTH MAIN STREET, SUITE 303
POST OFFICE BOX 1716
SUMTER, SOUTH CAROLINA 29151-1716
TELEPHONE: (803) 436-2150
FAX: (803) 436-2403
E-MAIL: gjamesj@sccourts.org

June 4, 2013

2013 JUN -5 PM 12:23

Honorable Beulah G. Roberts
Clarendon County Clerk of Court
Post Office Box 136
Manning, South Carolina 29102

RE: Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford v Scott L. Robinson and Johnson, McKenzie & Robinson, LLC (10-CP-14-457)

Dear Beulah:

I am enclosing an Order Granting Defendants' Motions for Summary Judgment for filing in the above matter. Please file the order and send **certified copies to all counsel of record**.

If you have any questions, please let me know.

Yours very sincerely,

George C. James, Jr.

GCJjr:djf

Enclosures

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 6/6/13
Beulah G. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT
STOKES-CRAVEN HOLDING CORP. D/B/A STOKES-CRAVEN FORD, Plaintiff, vs. SCOTT L. ROBINSON AND JOHNSON MCKENZIE & ROBINSON, LLC, Defendants.	)	C/A No.: 2010-CP-14-457 **ORDER**

THIS MATTER COMES BEFORE THE COURT on the Defendants' Motion for Reconsideration of the Court's Order of May 18, 2012 granting Plaintiff's Motion to Compel.

The Motion for Reconsideration was heard on July 11, 2012 with counsel for the parties in attendance.

The primary argument for reconsideration was the defense's contention that the Court's application of Rule 34 of the South Carolina Rules of Civil Procedure, compelling the Defendants to produce expert reports and other documents not in the Defendants' possession, is contrary to South Carolina law.

In reviewing the pleadings, arguments, and the prior order. I find that the Motion for Reconsideration should be granted to the extent that it can be interpreted to compel production of documents pursuant to Rule 34, SCRCP.

I find, however, that the Motion for Reconsideration should be denied as to compelling responses to interrogatories proposed under Rule 33, SCRCP.

wv

I further find that due to the manner in which the plaintiff combined permissible interrogatories with impermissible requests for production, the Defendants had a substantial good faith basis for not responding to the Plaintiff's interrogatories and as a result no sanctions should be imposed.

Analysis

This case presents a classic tug of war between the applicability of state versus federal rules of procedure.

The Defendants vigorously argue that the Plaintiff is seeking to apply federal procedural rules to a state court proceeding through the use of standard federal interrogatories, particularly considering the fact that the interrogatories include requests for production of documents.

The Plaintiff argues that pursuant to Rule 26(b)(4)(A), SCRCP, the plaintiff is entitled to "facts known and opinions held by experts" and that this information may be obtained by "any discovery method," including Rule 33, SCRCP.

As expressed in my Order of May 18, 2012, I fully concur with Plaintiff's argument entitling Plaintiff to discovery of facts and opinions held by experts through the service of interrogatories. It appears, however, that the defense has essentially complied with the mandates of Rule 26, SCRCP, in the response to Plaintiff's supplemental interrogatories, except for providing the list of publications by William E. Durant, Jr., Esquire and the list of cases of Durant and Hugh Penny, CPA as requested in interrogatory 1d and 1e, respectively.

The remaining interrogatories and production requests sought by Plaintiff exceed the scope of discovery allowed by South Carolina discovery rules and treads in the impermissible

cw

realm of seeking to compel the defense to produce, among other things, an expert report that is not in the possession of the defense in violation of Rule 34(c), SCRCP.

Based on the foregoing, the Motion for Reconsideration is denied to the extent that it orders that the Defendants provide, within in ten days of receipt of this order, the Plaintiff with a listing of all publications authored by expert William E. Durant within the last ten years and a list of all cases in which defense experts, Durant and Hugh Penny, have testified as experts at trial or deposition within the last four years.

The Motion for Reconsideration is otherwise granted and the Order dated May 18, 2012 is vacated except as ordered herein.

IT IS SO ORDERED.

Clifton Newman
Presiding Judge

This 24th day of September, 2012

Manning, South Carolina

EXHIBIT B

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT
STOKES-CRAVEN HOLDING CORP. D/B/A STOKES-CRAVEN FORD, Plaintiff, vs. SCOTT L. ROBINSON AND JOHNSON MCKENZIE & ROBINSON, LLC, Defendants.	)	C/A No.: 2010-CP-14-457 **ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT** CERTIFIED TRUE COPY OF ORIGINAL FILED IN THIS OFFICE DATE 6/6/13 Beulah B. Roberts CLERK OF COURT CLARENDON COUNTY, SC

THIS MATTER CAME BEFORE THE COURT by way of defendant Scott L. Robinson's motion for summary judgment filed on November 29, 2012 and defendant Johnson McKenzie & Robinson, LLC's motion for summary judgment filed on November 26, 2012. Also before the court was the plaintiff's motion to compel production of certain documents. After due notice, a hearing was held on January 9, 2013 in Clarendon County, South Carolina. Present at the hearing were counsel for all interested parties: Andrew K. Epting, Jr., for plaintiff Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford; Susan Taylor Wall, Esq., for defendant Scott L. Robinson ("Robinson"); and Warren C. Powell, Jr., Esq., for defendant Johnson McKenzie & Robinson, LLC ("Johnson McKenzie"). The Court has carefully considered the motions, arguments of counsel, and the law.

I. BACKGROUND

This case arises from an underlying action known as *Donald C. Austin v. Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford*, Case No. 2004-CP-14-135 ("Underlying Action"). Robinson and Johnson McKenzie represented Stokes-Craven Holding Corporation ("Stokes-Craven"), a car dealership, in the Underlying Action which was tried in Clarendon County in

August 2006. In August 2010, Stokes-Craven filed this legal malpractice action against defendants Robinson and Johnson McKenzie asserting that defendants were negligent in their representation of Stokes-Craven in the Underlying Action. After the completion of discovery, defendants filed motions for summary judgment on statute of limitations grounds.

II. PROCEDURAL HISTORY

On March 15, 2004, Donald Austin filed a lawsuit against Stokes Craven. The case was tried in Clarendon County for three days beginning on August 14, 2006. The jury awarded Austin $26,371.10 in actual damages and $216,600.00 in punitive damages. Following the verdict, Stokes-Craven and Austin filed cross-appeals. On March 8, 2010, the Supreme Court issued its opinion in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) and upheld the jury's damages award.

On August 16, 2010, Stokes-Craven filed a legal malpractice action against Robinson and Johnson McKenzie claiming that defendants were negligent in their representation of Stokes-Craven both prior to and during the trial by allegedly failing to: conduct discovery, prepare a pretrial brief, prepare trial exhibits, prepare voir dire, notify plaintiff's insurance carrier, preserve certain issues for appeal or settle the case before the jury verdict. Stokes-Craven contends that as a result of these alleged failings, an adverse jury verdict was returned against the dealership.

On August 26, 2011, Stokes-Craven filed an amended complaint. All defendants timely answered the amended complaint asserting the statute of limitations as one of their affirmative defenses. Specifically, defendants maintain that the statute was triggered on August 17, 2006, the date the verdict was rendered against Stokes-Craven in the Underlying Action. For the reasons set forth herein, the defendants' motions for summary judgment are granted.

III. STANDARD OF REVIEW

Rule 56, SCRCP, requires the entry of summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). While viewing the evidence in a light most favorable to plaintiffs, under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

IV. FACTS[1]

Stokes-Craven, located in Manning, South Carolina, is an automobile and truck dealership of new and used vehicles. Dennis Craven is part owner, officer of the company, principal of the dealership, and serves as on site manager. The Underlying Action, which gives rise to this legal malpractice action, arose from Stokes-Craven's sale of a used Ford truck to Donald Austin, the plaintiff in the Underlying Action. Austin was not told that the truck he purchased was previously owned by an individual named Gary Bailey who wrecked the truck, repaired it at an expense of $20,309.38 and traded it back in to Stokes-Craven in April 2002. On June 1, 2002, Austin purchased the truck for $26,371.10. Stokes-Craven knew the truck was wrecked when the dealership bought it back from Bailey but did not tell Austin even when Austin inquired about the truck's history before purchase. One of Stokes-Craven's salesmen, William Frierson, denied the truck had been wrecked and told Austin that it had a 5-year, 100,000 mile powertrain warranty.

[1] The facts set forth are stated in the light most favorable to plaintiff.

8/13

A few months after purchasing the truck, Austin discovered an oil leak at which time he was told by Dennis Craven that the truck was not covered by a 5 year, 100,000 mile powertrain warranty. Craven told him the dealership would cover this repair but that Austin would be responsible for any future repairs. In response, Austin asked Craven to return his purchase price and he would return the truck, but Craven rejected this request. Austin nevertheless scheduled the oil leak repair for September 13, 2002. Just before this appointment, Austin learned the truck had been previously wrecked. When Austin arrived at the dealership on September 13, 2002 for the repair on his truck, he met with Craven and again requested that he be allowed to return the truck given his new discoveries regarding the wreck and the lack of a powertrain warranty. In response to this demand, Craven showed Austin a Buyers Guide that was purportedly signed by Austin. The Buyers Guide stated the truck was covered only by a warranty of "up to 100,000 on diesel engine." Austin denied he signed the document.

When Austin returned to pick up his truck a week later, he again met with Craven to discuss the situation. Austin reiterated that he did not sign the Buyers Guide at which time Craven compared the signature on the signed document with Austin's driver's license. Craven admits that after comparing the signature contained on the warranty document with the signature contained on Austin's driver's license in 2002, he concluded that Austin's purported signature on the warranty document was a forgery. (Craven deposition, May 19, 2011, p. 105.) However, Craven again refused Austin's request to return the truck for a refund.

On February 18, 2003, Craven received a comprehensive letter from Austin's attorney, John Polito, which set forth the problems with the truck and the forgery and also included an analysis from two experts (one on auto body repair and one on the appraisal and valuation process). In the letter, Mr. Polito renewed Austin's request for a refund of the purchase price of the truck and, additionally, requested payment of Polito's fees in the sum of $1,500.00. Craven claims he turned this letter over to his attorney, defendant Robinson, to handle. Craven, however, never agreed to the terms contained in the Polito letter.

On March 15, 2004, Austin filed suit against Stokes-Craven Ford alleging various causes of action including breach of contract, negligence, constructive fraud, common law fraud, violation of the South Carolina Motor Vehicles Dealer's Act, and violation of the South Carolina Unfair Trade Practices Act. Austin sought actual and punitive damages, prejudgment interest, attorney fees and costs. Stokes-Craven, represented by attorney Robinson, answered and denied each of Austin's material allegations.

After a three day trial, on August 16, 2006, the jury found in favor of Austin and awarded damages for negligence and fraud in the amount of $26,371.10 actual damages and $216,600.00 punitive damages. The jury also found Stokes-Craven had violated the Federal Odometer Act. The jury found in favor of Stokes-Craven on Austin's claim under the UTPA. Austin and Stokes-Craven then filed cross-appeals. Stokes-Craven was represented Young Clement Rivers, LLP, during the course of the appeal. Though Robinson was included as counsel of record on the appellate pleadings, he was not involved in the drafting of the appellate briefs or the oral argument, and had no input on the handling of the appeal. The Supreme Court issued the Austin opinion on March 8, 2010. Thereafter, on August 16, 2012, Stokes-Craven filed the subject legal malpractice action against defendants Robinson and Johnson McKenzie.

V. DISCUSSION

Statutes of limitations are designed to protect important public policy concerns.

> Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his [or her] rights. Another purpose of a statute of limitations is to protect potential defendants from

protracted fear of litigation. Statutes of limitations are, indeed, fundamental to our judicial system.

Kelly v. Logan, Jolley, & Smith, LLP, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009) (internal citations and quotations omitted).

It is well settled in South Carolina that claims for negligence and breach of fiduciary duty must be brought within three years. *See* S.C. Code Ann. § 15-3-530. The statutory period begins to run when the claimant could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his favor, rather than when the claimant obtains actual knowledge of either the potential claim or the facts giving rise thereto. *Austin v. Conway Hosp., Inc.*, 292 S.C. 334, 338, 356 S.E.2d 153, 156 (Ct. App. 1987). 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. *Burgess v. American Cancer Soc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989) (quoting *Walter J. Klein Co. v. Kneece*, 239 S.C. 478, 483, 123 S.E.2d 870, 874 (1962)).

It is not necessary that the claimant acquire precise information of the alleged wrongful conduct for the statute to begin to run, but merely acquire "such facts as would have led to the knowledge thereof, if pursued with reasonable diligence." *Grayson v. Fidelity Life Ins. Co. of Philadelphia*, 114 S.C. 130, 103 S.E. 477, 478 (1920). South Carolina law requires a party to exercise reasonable diligence once he is on notice that some right of his has been affected. *See Dean v. Ruscon*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996); *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). "The fact that the injured party may not comprehend the full extent of the damage is immaterial." *Dean*, 321 S.C. at 364, 468 S.E.2d at 647; *see also Epstein v. Brown*, 363 S.C. 372, 382, 610 S.E.2d 816, 821 (2005).

B/6

The standard as to when the limitations period begins to run is objective, rather than subjective. *Kelly,* 383 S.C. at 633, 4; *Kreutner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995); *Burgess,* 300 S.C. at 186, 386 S.E.2d at 800.

> In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case 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.

Moore v. Benson, 390 S.C. 153, 161, 700 S.E.2d 273, 277 (Ct. App. 2010) (quoting *Young v. SC Dept. Corrections*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999)).

A. **Stokes-Craven's Motion to Compel**

The court notes that since it is granting summary judgment to the defendants, a ruling on the motion to compel is technically not necessary. However, the plaintiff has requested the court to rule on this motion in the event its decision on summary judgment is overturned. Stokes-Craven has requested production of (1) the defendant law firm's professional liability policy applications for the years 2002 through 2012, (2) all correspondence between the defendants' malpractice carrier and the defendants and the defendants or their attorneys, (3) all billing for computer research from any research providers to the defendant law firm from 2003 through 2006.

I conclude that the correspondence requested in (2) above is not discoverable, as it was at the least prepared in anticipation of or during litigation. See Rule 26(b) (3), SCRCP. There has been no showing that the plaintiff is in need of this information for any good reason, and there has been no showing that it cannot obtain the substantial equivalent by other means. The court has not received a privilege log of these communications but is of the view that one is not necessary. This information is simply not discoverable.

As for (1) above, the court has reviewed the applications submitted *in camera* to the court by the defendants for the years 2002 through 2006. The court concludes that the applications are discoverable, but that any issues of ultimate admissibility will be left to the trial judge. The court concludes that personal financial information may be redacted, and that social security and tax identification numbers may also be redacted. The parties will either enter into a consent confidentiality order or the court will order that only the plaintiff's attorneys will have access to the applications pending further order of the court. None of the information shall be disclosed to any person other than counsel without further order of the court, and if anyone violates this order, he or she or it will suffer risk of being held in contempt of court.

B. Stokes-Craven's Claims are Barred by the Statute of Limitations.

Under South Carolina law, "[t]he statute of limitations begins to run at the time the [plaintiff] has <u>inquiry</u> or <u>constructive</u> notice [that a claim might exist]." *Berry v. McLeod*, 328 S.C. 435, 445, 492, S.E.2d 794, 800 (Ct. App. 1997) (emphasis added). Either form of notice is sufficient. *Id.* In viewing the facts in the light most favorable to Stokes-Craven, I find Stokes-Craven had both inquiry and constructive notice of the claim more than three years before the lawsuit was filed. The deposition testimony of Dennis Craven compels the conclusion that Stokes-Craven had inquiry notice of the claim against defendants by August 17, 2006, the date of the verdict in the Underlying Action. In addition, the testimony of Stokes-Craven's appellate attorney compels the conclusion that Stokes-Craven had constructive notice of the claim by May 2007 (at the latest), the date its appellate lawyers reviewed the transcript and identified issue preservation concerns.

1. Inquiry Notice.

Stokes-Craven contends, through its pleadings, deposition testimony, and/or written discovery and arguments in opposition to summary judgment, that defendants were negligent in the following respects:

1. failing to diligently investigate the facts (Craven 5/19/11 Dep. p. 33);

B/8

2. failing to obtain a handwriting sample from Billy Frierson (Craven 5/19/11 Dep. p. 37);

3. failing to interview Kenny Craven sooner than two days before trial (Craven 5/19/11 Dep. p. 41);

4. failing to contact Barry Thornall to testify, which testimony, according to Mr. Craven, would have benefitted Stokes-Craven and would more than likely have led to a different result (Craven 5/19/11 Dep. p. 43);

5. failing to show Mr. Craven, or otherwise review with him, interrogatory answers prior to trial (Craven 5/19/11 Dep. pp. 44-46). Mr. Craven testified at trial and during his deposition that the first time he saw the answers to interrogatories was the day of his trial testimony and only then did he notice that some of the answers gave incorrect information. Mr. Craven claims that if he had seen the answers beforehand, he may have been better prepared, or would have been able to plan better, and the results of the trial would more than likely have been different;

6. failing to keep Stokes-Craven more informed and failing to prepare Mr. Craven for cross-examination. Mr. Craven testified that if Stokes-Craven had been more informed and if Mr. Robinson had better prepared him for cross-examination, the trial likely would have turned out more favorably to Stokes-Craven (Craven 5/19/11 Dep. pp. 53-54);

7. failing to settle the case. Stokes-Craven argued at the hearing that the failure to settle was the major failure on the part of defendants. In his deposition, Mr. Craven testified that Stokes-Craven was not confident of its position going into trial. He further stated in his deposition that he felt Stokes-Craven had done something wrong in its dealings with Mr. Austin (Craven 5/19/11 Dep. p. 56),and that he knew the forgery of the buyer's warranty was a major part of the case and had been an issue for some time (Craven 5/19/11 Dep. p. 57). Mr. Craven admitted that he concluded in 2002 that there had been a forgery (Craven 5/19/11 Dep. p. 105). Insofar as failure to settle is concerned, all of these factors were well within Mr. Craven's grasp at the time the verdict was rendered and it was then that he knew, or at least as a matter of law should have known, that Stokes-Craven **might** have a claim against its attorney for failing to settle the case.

With regard to points (1) – (6) above, Mr. Craven was asked the following by Johnson McKenzie's counsel:

Q. Okay. And would it be a fair statement that the allegations, the specific things we were talking about, that is the failure to keep you advised and the other issues and that deficiencies that the plaintiff contends that the defendants made through the course of handling the case and at trial, when the verdict was handed down it became evident that that was a serious problem for the plaintiff?

A. Correct.

8/19

(Craven 5/19/11 Dep. p. 61.) Defendants maintain that this exchange amounts to an admission on the part of Mr. Craven that he immediately knew the alleged negligence of Mr. Robinson had resulted in the adverse verdict. I do not agree this is an outright admission, at least for summary judgment purposes, because the quoted exchange is somewhat disjointed and the question to Mr. Craven was not clearly stated. I tend to agree with the plaintiff that Mr. Craven's "serious problem" testimony on page 61 can be interpreted to mean that he knew the verdict itself was a serious problem for Stokes-Craven.

Nevertheless, regardless of whether Mr. Craven's testimony on page 61 in and of itself amounts to an outright admission that he knew Stokes-Craven might have a claim against defendants, his testimony **as a whole** (points 1-6 above) compels the conclusion as a matter of law that Stokes-Craven knew or should have known it **might** have a claim on the date the verdict was rendered. S.C. Code Section 15-3-530 provides for a three year statute of limitations for legal malpractice actions. The statute amounts to a "discovery rule" under which the statute 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 wrongful conduct. As our Supreme Court has observed on more than one occasion, it has long been the law in South Carolina that "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."** *Epstein,* 363 S.C. at 376, 610 S.E.2d at 818 (emphasis supplied by the Supreme Court) (citing *Berry v. McLeod*, 328 SC 435, 445, 492 S.E.2d 794, 799 (Ct. App. 1997) quoting Supreme Court opinions of *Snell* at 303, 334 and *Mitchell v. Holler*, 311 S.C. 406, 429 S.E.2d 793 (1993);

FB/10

accord, *Dean*): *Rogers v. Efird's Exterminating Co., 284 S.C. 377, 379, 325 S.E.2d 541, 542 (1985)*. The *Epstein* Court also stated the rule in similar language that the statute "begins to run when a reasonable person of common knowledge and experience would be on notice that a claim against another party might exist. The fact that the injured party may not comprehend the full extent of the damages is immaterial." *Id.* at 382, 821. The standard is an objective one, rather than a subjective one. *Kelly*, 383 S.C. at 633, 4, 682 S.E.2d at 7; *Kreutner*, 320 S.C. at 285, 90.

Following a line of Supreme Court opinions now spanning over thirty years, the *Epstein* Court's emphasis of the word "might" and the remaining bold-print language that emphasizes the duty to act even when no "advice from counsel is sought or a full blown theory of recovery developed." In *Epstein*, the facts leading to the grant and affirmation of summary judgment were clear insofar as the majority's application of the discovery rule was concerned. Epstein's lawyer in the underlying trial had allegedly done or not done certain things that were known to Epstein to such an extent that the evidence was rather clear that the client knew at the time the verdict was rendered he might have a claim against his attorney. Here, Mr. Craven stated in his deposition that when he testified at trial in the Underlying Action, he realized he had never seen the interrogatory answers prepared by his lawyer and that some of the answers were incorrect. He knew during trial that Mr. Robinson had not interviewed Kenny Craven until two days before trial. He knew during trial that forgery was an important issue and that no handwriting sample had been taken from Mr. Frierson. He knew during trial that Mr. Robinson had not attempted to locate and call Mr. Thornall as a trial witness. He knew during trial that he was of the opinion that Mr. Robinson had not adequately investigated the case. Mr. Craven was the principal Stokes-Craven contact for Mr. Robinson, and in essence was the Stokes-Craven "point man" for the underlying Austin litigation. His knowledge of these shortcomings is imputed to Stokes-Craven.

/11

Stokes-Craven contends that Mr. Craven had never been involved in a trial before and that he was totally uneducated as to how litigation (pre-trial and during trial) should be conducted by an attorney. However, Mr. Craven, and therefore Stokes-Craven, knew at the time of the verdict (or at the least should have known) that Stokes-Craven **might** have a claim against defendants for their negligence in handling the case. The law does not permit the client to wait until he consults with other counsel to become educated and does not allow the client to wait until he has a full-blown theory of recovery.

Stokes-Craven maintains that the deposition testimony of Mr. Craven does not establish that he knew or should have known at the conclusion of the trial that a claim might exist against defendants. Stokes-Craven points to some rather generic testimony of Mr. Craven for this proposition. (Pl.'s Mem. in Opp. to Summ. J. pp. 6-8.) However, as noted above, the testimony of Mr. Craven as a whole establishes otherwise as a matter of law.

Stokes-Craven argues that the first time it was put on notice of a malpractice claim was at a meeting with its appellate counsel on June 9, 2009, when appellate counsel pointed out that Austin's attorneys were claiming that Mr. Robinson had made error preservation mistakes during trial. That may create a factual issue on that specific point, but this argument ignores the fact that Mr. Craven knew or should have known a claim might exist because of the other actionable errors he claims were made by Mr. Robinson as discussed above. In addition, this argument also ignores the fact that the knowledge of an attorney is imputed to his client. Here Stokes-Craven's appellate counsel knew that issue preservation was an issue as soon as counsel read the trial transcript, as further discussed below.

2. Constructive Notice.

The defendants claim that Stokes-Craven was also on constructive notice of its claim against defendants more than three years before it filed its claim. As set forth above, the statute

8/12

of limitations begins to run when a plaintiff has either inquiry or constructive notice. *Berry*, 328 S.C. at 445, 800. The defendants argue Stokes-Craven had constructive notice of the potential issue preservation concerns through its appellate lawyers at Young Clement Rivers, LLP. One of Stokes-Craven's appellate lawyers testified that issue preservation is one of the first items he evaluates when he is handling an appellate case, and he knew issue preservation was going to be an issue in this case. He testified that when he was reviewing the trial transcript in April and May of 2007, the issue preservation concern "jumped out" to him. (Brown Dep. pp. 65, 67; Young Clement Time Sheets). Thus, according to the defendants, Young Clement was aware of the potential issue preservation concerns in May 2007 (at the latest), more than three years before Stokes-Craven filed suit.

The defendants claim that Young Clement's knowledge of the issue preservation concerns on appeal is imputed as a matter of law to Stokes-Craven because Young Clement, as Stokes-Craven's appellate attorney, was Stokes-Craven's agent. "It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority." *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979); *see also Dorman v. Campbell*, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998) (holding that knowledge of information in letter to plaintiff's attorney was imputed to plaintiff for purposes of determining commencement of the statute of limitations even though plaintiff never saw the letter). The defendants claim Young Clement was acting within the scope of its authority when it reviewed the trial transcript and identified the potential issues on appeal. In addition, there is no dispute that the issue preservation concerns were material to the appeal. The court concludes there is an issue of fact as to whether Young Clement's knowledge is imputed to Stokes-Craven in this instance and therefore denies summary judgment on this ground.

B/13

C. Equitable Estoppel and Equitable Tolling Do Not Bar Defendants' Statute of Limitations Defense.

I hold as a matter of law that the doctrines of equitable estoppel and equitable tolling do not apply to the facts of this case.

1. Equitable Estoppel

The doctrine of equitable estoppel rests on a general principle of fairness which prevents one party, with knowledge of the situation, from misleading another by words, conduct, or silence in such a way that the other party would be prejudiced if the first party were allowed to later take an inconsistent position. *See Kelly*, 383 S.C. at 638, 682 S.E.2d at 7.

> To establish equitable estoppel, the party claiming estoppel must prove that he or she (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped. The party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts.

Id. at 638, 682 S.E.2d at 7 (internal citations omitted).

Estoppel by silence arises when the party estopped owes a duty to speak to the other party but refrains from doing so, thereby leading the other party to believe in an erroneous state of facts. A manifest intent to mislead is not required for estoppel by silence; it arises when the silence is intended or has the effect of misleading the other party, provided the other party acts reasonably. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006)

There is nothing in the record to support the conclusion that defendants did anything to mislead Stokes-Craven, or that Mr. Robinson engaged in conduct calculated to convey an impression that facts were inconsistent with those which Mr. Robinson subsequently attempted to assert. There is no evidence that Mr. Robinson engaged in any conduct to prevent Stokes-Craven from filing a malpractice action, nor is there any evidence that Stokes-Craven relied upon

AB/ 14

any conduct or representation of Mr. Robinson in delaying suit. Also, Stokes-Craven did not lack the means of knowing of the alleged malpractice on the part or Mr. Robinson, as set forth above in Points 1 – 7 discussed on pages 7 – 8 of this order.

Much of Stokes-Craven's discussion about the trigger date of June 2009 is based on matters pertaining to issue preservation (failure to object to vehicle value testimony). Stokes-Craven claims there is evidence that Mr. Robinson knew all along that this issue would be raised on appeal, and that his failure to advise Stokes-Craven created an issue of fact on the issue of equitable estoppel. However, this again ignores the fact that Stokes-Craven knew of other alleged acts of negligence well before June 2009, and Stokes-Craven cannot use this one issue to excuse its failure to timely commence this action. Furthermore, it ignores the fact that Stokes-Craven's appellate counsel, Young Clement, knew of the issue as soon as they reviewed the trial transcript.

Stokes-Craven also argues that defendants failed to disclose breaches in their duty to Stokes-Craven, blamed the verdict on the unpredictability of juries, and continued to represent Stokes-Craven during the appeal. None of these points lead to any genuine issue of fact on the issue of equitable estoppel. Again, Stokes-Craven, through Mr. Craven, had knowledge on the day of the verdict that Stokes-Craven might have a cause of action against defendants. There is no evidence that defendants misled Stokes-Craven by words, conduct, or silence to the detriment of Stokes-Craven.

2. Equitable Tolling.

The statute of limitations should be tolled when, in view of all the circumstances, a party would otherwise suffer a gross wrong at the hand of the other party. *Hooper v. Ebenezer Sr. Services & Rehab. Ctr.*, 386 S.C. 108, 116-117, 687 S.E.2d 29, 33 (2009). In reviewing holdings from other jurisdictions, the *Hooper* Court noted that equitable tolling typically applies in cases in which a litigant was prevented from filing suit because of an extraordinary event beyond his control, but that other jurisdictions have considered the doctrine "in a variety of contexts and have developed differing parameters for its application." *Id.* at 116, 687 S.E.2d at 32. The *Hooper* court quoted with approval the ruling of a Texas appellate court that "[t]he equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Id.* at 116-17, 687 S.E.2d at 33 (quoting *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. App. 2006). Our Supreme Court went on to say that equitable tolling may be applied where justified under all the circumstances, but that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Id.* at 117, 687 S.E.2d at 33.

Here, there were no extraordinary events beyond Stokes-Craven's control that prevented it from commencing its action within three years after the verdict was rendered. While Stokes-Craven need not establish that defendants did anything to mislead it, as that is a component of equitable estoppel and not necessarily equitable tolling, Stokes-Craven must present evidence that defendants prevented it from timely filing by an extraordinary event beyond its control. There is nothing in the record that would allow Stokes-Craven to invoke equitable tolling to escape the running of the statute of limitations.

D. Stokes-Craven's Motion for Summary Judgment.

Because the claims asserted by Stokes-Craven against defendants are barred by the statute of limitations, there is no need to address Stokes-Craven's motion for summary judgment.

VI. CONCLUSION

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Stokes-Craven's motion to compel is granted in part and denied in part, and that Stokes-Craven's claims

3/16

against defendants are barred by the applicable statute of limitations. Accordingly, defendant Scott L. Robinson's and defendant Johnson McKenzie & Robinson, LLC's motions for summary judgment are GRANTED and the case as to defendants is dismissed, with prejudice.

AND IT IS SO ORDERED.

George C. James, Jr.
Circuit Judge

June 4, 2013.

Sumter, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NO. 2013-CP-14-457

Stokes Craven Holding Corp

PLAINTIFF(S)

Scott Robinson
Johnson McKenzie & Robinson

DEFENDANT(S)

RECEIVED
JUN 12 2013
By

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:

Dated at ________, South Carolina, this ____ day of ________, 20___.

____
PRESIDING JUDGE

~~This judgment was entered on the ___ day of ________, 20___~~, and a copy mailed first class this 6th day of June, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Michelle Endemann
Andrew Epting, Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

Warren C. Powell, Jr.
Susan Wall
Amanda C. Williams

ATTORNEY(S) FOR THE DEFENDANT(S)

Sharon Orang
Deputy CLERK OF COURT - CLARENDON COUNTY

SCRCP APP-24

SCRCP FORM 4 (Revised 5/00)