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IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. Supreme Court

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.....Petitioner

v.

Philip E. Wright.....Respondent

BRIEF OF RESPONDENT PHILIP E. WRIGHT

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QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR IN FINDING THAT THE STATUTE OF LIMITATIONS COMMENCED TO RUN ON PETITIONER'S ("KIMMER'S") CLAIMS ON FEBRUARY 24, 2000?
- II. DID THE COURT OF APPEALS ERR IN ITS REFUSAL TO APPLY THE DOCTRINE OF EQUITABLE TOLLING TO THIS CASE?

STATEMENT OF THE CASE

Richard Kimmer, Petitioner, was involved in an automobile accident on January 29, 1999, while driving to work. He was later diagnosed with knee and back injuries as well as posttraumatic stress syndrome. On June 16, 1999, Kimmer, on the advice of Respondent Philip Wright, his attorney, settled the claims against the tortfeasor in the automobile accident for the tortfeasor's minimum limits insurance policy, Fifteen Thousand and No/100 (\$15,000.00) Dollars. On June 18, 1999, Wright, on Kimmer's behalf, filed a workers' compensation claim against Kimmer's employer.

The workers' compensation insurance carrier denied Kimmer's claim on the grounds, among others, that Kimmer's release of the auto tortfeasor without notice to or consent by the employer and its workers' compensation carrier was an election of remedies and a bar to any workers' compensation benefits. Wright informed Kimmer during January 2000 that he "screwed this up" in that he had made the mistake of settling the auto case without notice to the carrier and Kimmer would need to obtain new counsel.

As of February 1, 2000, Kimmer understood he was not receiving his workers' compensation benefits because Wright made a mistake. By February 2000, Kimmer blamed Wright for his PTSD problems which started in 1999. Kimmer testified that by

February 2000 Wright had told him that Kimmer's not receiving his workers' compensation benefits was in part Wright's fault. By February 2000, Kimmer also believed he should have been receiving his workers' compensation benefits from shortly after his January 1999 auto accident. Wright also informed Kimmer that Kimmer may have a claim against him based Wright's mistake. On February 1, 2000, Kimmer stated in writing 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.." Wright informed Kimmer he would need separate counsel, and by February 24, 2000, Wright no longer represented Kimmer in any matter.

Kimmer, through separate counsel, lost his workers' compensation claim before the single commissioner, the full Commission and the South Carolina Court of Appeals. The reason for this result as stated by all three tribunals was that Kimmer had settled the third-party claim against the auto tortfeasor without notice to or consent by the employer or its workers' compensation insurance carrier and in so doing had elected his remedy to the exclusion of remedies available under the Workers' Compensation Act. The Court of Appeals decision in he workers' comp. case was decided December 8, 2006, and Certiorari denied October 8, 2007. Kimmer v. Murata of America, Inc., 372 S.C. 39, 640 S.E.2d 507 (Ct.App.2006).

The instant action for legal malpractice was filed October 14, 2004. Wright filed his first motion for summary judgment on May 13, 2005. That motion was denied in an order issued by The Honorable S. Jackson Kimball, II, York County Master sitting as Special Circuit Judge who, at some later time, recused himself from any further involvement in this case.

During 2008 Plaintiff (Kimmer) and Defendant (Wright) filed cross motions for summary judgment, the primary issue being the commencement of the running of the Statute of Limitations. A hearing was held on September 5, 2008 before The Honorable John C. Hayes, III on the parties' cross motions. Judge Hayes ruled that the findings contained in Judge Kimball's Order dated June 20, 2005 which denied Wright's prior Motion for Summary Judgment had become the law of the case and, therefore, became binding for purposes of ruling on the parties' cross motions for summary judgment. In consequence of that ruling, he denied Wright's motion but granted Kimmer's motion for summary judgment.

The Court of Appeals issued its November 2, 2011, Opinion No. 4902 which found that Kimmer's legal malpractice action was barred by the Statute of Limitations and accordingly reversed the Order of the trial court and remanded the case for further proceedings consistent with the opinion of the Court of Appeals. Kimmer's Petition for Rehearing was denied by the Court of Appeals on December 19, 2011.

Petitioner filed the Petition for Writ of Certiorari on January 17, 2012 which was granted on June 6, 2013.

STATEMENT OF FACTS

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

On June 18, 1999, Wright on Kimmer's behalf filed a workers' compensation claim against Kimmer's employer (R. p. 563) The workers' compensation insurance carrier denied Kimmer's claim on the ground that Kimmer elected his remedy by giving a release to the third-party auto tortfeasor without notice to or consent of the employer and its workers' compensation carrier. (R. p. 564). The law in South Carolina since 1959 has been that a petitioner who settles his third-party case without notice to the employer or carrier has elected his remedy and in so doing waives any right to workers' compensation benefits (Story v. Millwood Drug Store, Inc., 235 S.C. 52, 109 S.E.2d 706 (1959); Fisher v. S.C. Dept. of Mental Retardation, 277 S.C. 573, 291 S.E.2d 200 (1982)).

By February 2000 Kimmer was aware of his damages in the form of medical bills, lost wages, and posttraumatic stress disorder, all beginning in 1999. (R. pp. 202-205, 227, 228, 241, 242) Kimmer testified that by February 2000, Wright told him that he "screwed this up," and that Kimmer's workers' compensation claim had been denied because Wright made a mistake by settling the claim against the tortfeasor without obtaining the consent of the employer and its workers' compensation carrier. (R. pp. 201-202) Kimmer's wage loss through January 3, 2000 was twenty-eight thousand seventy-one and 68/100 (\$28,071.68) dollars. (R. pp. 228-29) Prior to February 24, 2000, Kimmer spoke to Wright and was told that because Wright "screwed this up" Kimmer would have to get another attorney. (R. pp. 201-202) Kimmer blamed his PTSD on Wright. (R. pp. 85-88)

On February 1, 2000, Wright wrote Kimmer that he may be entitled to file a claim against Wright for an error Wright made in the workers' compensation case. (R. pp. 199; 559-560) Kimmer consulted with separate counsel during late January and early February

2000. Kimmer, during early February 2000, desired that Wright continue to represent him in other matters and signed his waiver of conflict which stated, "I understand that I may have a right to make a claim against Mr. Wright concerning his representation related to my workers' compensation action." (R. p. 558) On February 1, 2000, Kimmer authorized Wright to release the workers' compensation portion of his file to his new attorney. (R. pp. 231-232) On February 24, 2000, Kimmer wrote Wright stating "I know that as of this time, you are still handling the suit against Anthony Pendergrass. I have problems with this since it looks like the workers compensation case and the suit against Mr. Pendergrass are all related from the same incident," and discharged Wright as his counsel for all matters. Kimmer had by then retained new counsel (R. pp. 236-38; R. p. 561)

By February 2000, Kimmer believed that his posttraumatic stress disorder, which started in 1999, was in part caused by Wright's conduct (R. pp. 241-242). Also by that time, Wright had told Kimmer that his not getting paid was in part Wright's fault in that Wright made a mistake by settling Kimmer's third-party case without notice to the employer or carrier resulting in the election of remedies bar. (R. pp. 201; 242)

Kimmer, through separate counsel, lost his workers' compensation claim before the single commissioner, the full Commission and the South Carolina Court of Appeals on the grounds that Kimmer had settled the third-party claim against the auto tortfeasor without notice to or consent by the employer or its workers' compensation insurance carrier. The Court of Appeals Opinion in Kimmer v Murata was issued on December 18, 2006, and Certiorari denied October 18, 2007.

This action for legal malpractice was filed October 14, 2004. (R. pp. 41-55) Defendant Wright filed his first motion for summary judgment based upon the Statute of Limitations on May 13, 2005. (R. pp. 75-76) Judge Kimball issued an interlocutory order of June 20, 2005 denying Wright's motion finding "...there is at least an issue of fact in the present case as to when the 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 claim against Defendant...". (R. pp. 1-5) Over Wright's objection this action was stayed by Judge Kimball pending conclusion of the worker's compensation claim. (R. pp. 1-5)

During 2008, Plaintiff and Defendant filed cross motions for summary judgment, the primary issue underlying both motions being the commencement of the running of the Statute of Limitations. (R. pp. 82; 101-102) Kimmer argued that the Statute could not commence to run until after the Workers' Compensation Commissioner issued her Order denying Kimmer's claim on July 31, 2003. (R. pp. 103-124) At some point after issuing the 2005 interlocutory order Judge Kimball recused himself from any further involvement in this case. (R. p. 305) The Honorable John C. Hayes, III ruled in his September 16, 2008, Order that findings of the interlocutory order of June 20, 2005, issued by Judge Kimball, denying Defendant's motion for summary judgment had become the law of the case. (R. pp. 7-14) Judge Hayes, in deference to the 2005 interlocutory order, denied Defendant's motion for summary judgment, and granted Plaintiff's motion for summary judgment on the Statute of Limitations issue in his September 16, 2008 Order. (R. pp. 7-14)

Judge Hayes considered the facts in Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) and in his order recited that the facts of this case weighed 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 but because he was bound by Judge Kimball's order found that the Statute of Limitations commenced to run on July 31, 2003, the day the Workers' Compensation Commissioner issued her Order denying Kimmer's compensation claim finding that he had elected his remedy by releasing the third party auto tortfeasor. (R. pp. 7-14).

Wright appealed Judge Hayes' order resulting in the decision of November 2, 2011, Opinion No. 4902 of the Court of Appeals which found that Kimmer's legal malpractice action was barred by the Statute of Limitations and reversed the order of the trial court and remanded the case for further proceedings consistent with the opinion of the Court of Appeals. Kimmer's Petition for Rehearing was denied on December 19, 2011. Kimmer filed his Petition for Writ of Certiorari on January 17, 2012 which was granted on June 6, 2013.

ARGUMENTS

I. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT THE STATUTE OF LIMITATIONS COMMENCED TO RUN BY FEBRUARY 24, 2000 WHEN BY THAT TIME:

1. KIMMER CORRECTLY BELIEVED THE WORKERS' COMPENSATION CARRIER SHOULD HAVE BEEN PAYING HIM FROM THE TIME OF HIS AUTOMOBILE ACCIDENT IN EARLY 1999 (R. pp. 192-94);

2. ON JUNE 16, 1999, KIMMER, UPON ADVICE OF RESPONDENT ("WRIGHT") AND WITHOUT CONSENT OF HIS EMPLOYER, SETTLED HIS CLAIMS AGAINST THE AUTO TORTFEASOR FOR THE LIMITS OF THE TORTFEASOR'S INSURANCE POLICY, FIFTEEN THOUSAND AND NO/100 (\$15,000.00) DOLLARS (R. pp. 228-29);

3. ON JUNE 18, 1999, WRIGHT FILED A WORKERS' COMPENSATION CLAIM FOR KIMMER AGAINST MURATA OF AMERICA, KIMMER'S EMPLOYER (R. p. 563);

4. WRIGHT HAD INFORMED KIMMER THAT THE REASON HE WAS NOT BEING PAID HIS WORKERS' COMPENSATION BENEFITS WAS IN PART WRIGHT'S FAULT BY SETTling KIMMER'S THIRD-PARTY CASE WITHOUT NOTICE TO THE EMPLOYER OR CARRIER, RESULTING IN AN ELECTION OF REMEDIES AND WAIVER OF ANY RIGHT TO WORKERS' COMPENSATION BENEFITS (R. p. 201; R. p. 242);

5. THE LAW IN SOUTH CAROLINA SINCE 1959 HAS HELD THAT A PETITIONER WHO SETTLES HIS THIRD-PARTY CASE WITHOUT NOTICE TO THE EMPLOYER OR CARRIER HAS ELECTED HIS REMEDY AND IN SO DOING WAIVES ANY RIGHT TO WORKERS' COMPENSATION BENEFITS (Stroy v. Millwood Drug Store, Inc., 235 S.C. 52, 109 S.E.2d 706 (1959); Fisher v. S.C. Dept. of Mental Retardation, 277 S.C. 573, 291 S.E.2d 200 (1982));

6. KIMMER WAS DENIED TEMPORARY TOTAL BENEFITS AND PAYMENT OF HIS MEDICAL EXPENSES BEGINNING IN 1999 BY THE WORKERS' COMPENSATION CARRIER WHICH ASSERTED THE BAR OF KIMMER'S ELECTION OF HIS REMEDY BY GIVING A RELEASE TO THE TORTFEASOR IN VIOLATION OF S.C. CODE §42-1-560 (R.pp. 7-14);

7. ON JANUARY 13, 2000, THE WORKERS' COMPENSATION CARRIER FILED AND SERVED ITS FORM 51 WITH THE WORKERS' COMPENSATION COMMISSION, WHICH DENIED LIABILITY BECAUSE THE "THIRD-PARTY ACTION SETTLED WITHOUT CONSENT" (R. p. 564);

8. KIMMER SUSTAINED DAMAGES IN THE FORM OF MEDICAL BILLS, LOST WAGES, AND PAIN AND SUFFERING BEGINNING IN 1999 RESULTING FROM THE JANUARY 1999 AUTOMOBILE ACCIDENT (R. pp. 202-05);

9. WRIGHT TOLD KIMMER THAT HE "SCREWED THIS UP" AND THAT HIS WORKERS' COMPENSATION CLAIM HAD BEEN DENIED BECAUSE WRIGHT MADE A MISTAKE BY SETTling THE CLAIM AGAINST THE TORTFEASOR WITHOUT OBTAINING THE CONSENT OF THE EMPLOYER AND ITS WORKERS' COMPENSATION CARRIER AND AS A RESULT KIMMER WOULD HAVE TO FIND ANOTHER ATTORNEY TO HANDLE THE WORKERS' COMPENSATION PART OF HIS CASE (R. pp. 199-200);

10. KIMMER HAD SIGNED A FEBRUARY 1, 2000 STATEMENT WHICH PROVIDED, "I UNDERSTAND THAT I MAY HAVE A RIGHT TO MAKE A CLAIM AGAINST MR. WRIGHT CONCERNING HIS REPRESENTATION RELATED TO MY WORKERS' COMPENSATION ACTION." (R. p. 558);

11. KIMMER UNDERSTOOD THAT HE WAS NOT RECEIVING HIS WORKERS' COMPENSATION PAYMENTS BECAUSE WRIGHT MADE A MISTAKE (R. pp. 201-02; R. p. 242);

12. KIMMER'S WAGE LOSS THROUGH JANUARY 3, 2000 WAS TWENTY-EIGHT THOUSAND SEVENTY-ONE AND 68/100 (\$28,071.68) DOLLARS (R. pp. 228-29);

13. KIMMER BLAMED WRIGHT FOR HIS POSTTRAUMATIC STRESS DISORDER ("PTSD") PROBLEMS WHICH WERE CAUSED BY HIS NOT BEING TIMELY PAID WAGES AND HAVING HIS MEDICAL BILLS PAID DUE TO WRIGHT'S MISTAKE (R. pp. 85-88);

14. KIMMER WROTE WRIGHT THAT HE HAD "PROBLEMS" WITH WRIGHT'S CONTINUED REPRESENTATION AND HAD ENGAGED SEPARATE COUNSEL TO REPRESENT HIM IN THE WORKERS' COMPENSATION CLAIM AND WRIGHT DID NOT REPRESENT KIMMER IN ANY MATTER (R. pp. 236-38; R. p. 561)

A. Summary Judgment Standard

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000). "Under Rule 56(c), 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 (Ct.App.2002) citing Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). "Once the moving party carries its initial burden, the opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a **genuine issue for trial**." (emphasis in original) Hedgepath at 335 (citations and internal quotations omitted).

The issues before the court in this case primarily concern the commencement of the running of the Statute of Limitations. Determining when a cause of action arises or

accrues under the discovery rule requires an objective analysis, not a subjective one. Burgess v. American Cancer Soc’y, 300 S.C. 182, 386 S.E.2d 798, (Ct.App.1989) at 800. Therefore, such a determination is properly one for the court, not a jury. An action arising or accruing on or after April 5, 1988 must be commenced within three years after the party knows, or by the exercise of reasonable diligence, should know he might have a claim. (S.C.Code Ann. §15-3-530 (2005); §15-3-535 (2005))

B. The Statute of Limitations is an absolute bar to actions brought outside the limitations set forth in S.C. Code Ann. §§15-3-530 & 535 (2005).

S.C. Code Ann. §§15-3-530 (2005) & 535 (2005) 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. §15-3-535 provides that actions “must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.” The focal point of most litigation surrounding the Statute of Limitations, as is true in this case, is when the Statute of Limitations begins to run.

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

It is well settled in this state that the accrual of most causes of action, whether in tort or in contract, is governed by the discovery rule. This statutory period begins to run, therefore, when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. Austin v. Conway Hosp., Inc., 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct.App.1987) quoting Rogers v. Efirid'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 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. 478, 483, 123 S.E.2d 870, 874 (1962) quoting Tucker v. Weathersbee, 98 S.C. 402, 82 S.E. 638 (1914).

The controversy between the parties as to the commencement of the running of the Statute of Limitations on Petitioner's claims against Philip Wright centers on the following: The record reflects that by February 24, 2000, Petitioner Kimmer had been told by Wright that Kimmer was not receiving his workers' compensation benefits because of Wright's error, that because Wright "screwed this up" Kimmer would need to obtain new counsel, and that Kimmer as a result of these events may have a claim against Wright. Also, by February 2000, Kimmer had acknowledged in writing that he understood he may have a right to make a claim against Wright and had discharged Wright as his attorney for all matters and retained new counsel. Further, by February 2000 Kimmer assigned blame to Wright for his posttraumatic stress disorder.

Forty years of South Carolina precedent held that when a claimant settles a third-party action without consent of his employer or his employer's comp. carrier he has elected his remedy and waived his right to workers' compensation benefits. Story v. Millwood Drug Store, Inc., 235 S.C. 52, 109 S.E.2d 706 (1959); Fisher v. S.C. Dept. Mental Retardation, 277 S.C. 573, 291 S.E.2d 200 (1982). Wright contends that the Statute of Limitations commenced to run during February 2000, more than three years prior to Kimmer's filing suit.

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. A number of South Carolina appellate cases provide guidance as to when the Statute commences to run under a given set of facts.

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

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

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

The Supreme Court reversed the Court of Appeals and restated the long standing standard that, "the Statute runs from the date the injured party either knows or should

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

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

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

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

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

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

Dr. Epstein filed an action against his former attorney asserting legal malpractice. The trial court found 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).

The District Court in Clearwater Trust v. Wyche, Burgess, 2007 WL 179 57 979 (D.S.C. 2007) makes it clear that an aggrieved client cannot wait to sue until the disposition of the underlying case, and in so doing observed:

Under the discovery rule, a party must exercise “reasonable diligence.” S.C. Code Ann. §15-3-535 (2005). The South Carolina Supreme Court has defined “reasonable diligence” as simply “act[ing] with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party *might* exist.” Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). **The Court further established that “[t]he Statute of Limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.” Id. at 376, 610 S.E.2d at 818.** (emphasis added)

Id.

Binkley v. Burry, Haynsworth, Marion, McKay & Guerard, LLP, 352 S.C. 296, 572 S.E.2d 838 (Ct.App.2002)(cert. denied).

Plaintiffs Binkley entered a legal malpractice suit against closing attorneys Haynsworth, Marion, McKay & Guerard, LLP for failing to disclose the existence of a flood easement or its impact at the time of purchase. Later, Haynsworth closed on a mortgage for the Binkleys’ on November 4, 1991. Mr. Binkley admitted that on November 4, 1991 he saw the plat of the property showing the dam elevation and signed a document at closing that they were aware their home was within the 100-year floodplain level. Binkley also admits he became aware of the easement during May 1991. The dam did not overflow, flooding the Binkleys’ home, until 1995. Both the trial

court and the Court of Appeals found that by November 4, 1991, the Binkleys had actual notice of both the easement and the risk of flooding to their property and accordingly were on notice that they may have a claim triggering the running of the Statute of Limitations.

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

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

Id. at 844-845

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

Binkley reaffirms that the statute starts to run when the plaintiff becomes aware that some right of his has been invaded or that some claim against another party **might** exist and that once the plaintiff is in possession of such information the statutory period commences despite the plaintiff's "inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all." *Accord Sharts v. Natelson*, 885

P.2d 642 (N.M. 1994); Magnuson v. Lake, 717 P.2d 1212 (Or. Ct.App.1986); Thorpe v. DeMent, 317 S.E.2d 692 (N.C. Ct.App.1984).

D. The Statute of Limitations as to any claim against Wright commenced 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.” (R. p. 201, line 16 – p. 202, line 16)

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

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

- (1) On January 29, 1999, Kimmer was involved in a two-car collision between Chester and Lancaster. (R. p. 183, line 16 - p. 184, line 8)
- (2) By March of 1999, Kimmer believed that the workers' compensation carrier should have been paying him from the beginning. (R. p. 192, line 24 - p. 194, line 6)
- (3) Kimmer recalls having a conversation with Wright in January 2000, during which Wright told him that "he screwed this up" and that Kimmer would have to find another attorney to handle the workmen's comp part of his case. (R. p. 199, line 25 - p. 200, line 4)
- (4) Kimmer signed a February 1, 2000, "Waiver of Conflict" document which provides that, **"I understand that I may have a right to make a claim against Mr. Wright concerning his representation related to my worker's compensation action."** (R. p. 558)
- (5) As of February 1, 2000, Kimmer understood (a) **that he was not receiving his workers' compensation payments because Wright made a mistake**, (b) Wright did not try to hide his mistake and (c) Wright told him plainly, "I screwed this up; you have to get another attorney to take the case." (R. p. 201, line 2 - p. 202, line 16)
- (6) Kimmer recalls receiving and reading Wright's February 1, 2000 letter, addressed to Richard Kimmer. (R. p. 199, line 2-6).

The following is an excerpt from that letter:

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

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

(R. p. 560, ¶ 1).

(7) There was a drop in Kimmer's income between 1998 and 1999 because Kimmer only worked one month in 1999. Since Kimmer did not receive any workers' compensation benefits, it caused him problems in that his medical bills were not being paid. (R. p. 202, line 24 – p. 205, line 12)

(8) Kimmer knew that he had sustained a wage loss through December 10, 1999. (R. p. 227, line 15 – p. 228, line 15)

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

(10) **As of February 24, 2000, Wright did not represent Kimmer in any matter.** (R. p. 236, line 11 – p. 238, line 19)

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

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

As demonstrated in the litany of facts and circumstances above, the Statute of Limitations began to run no later than February 2000, the month during which Kimmer was told and understood that the reason he was not receiving his worker's compensation

payments was because Wright had made a mistake. The tolling agreement was entered October 30, 2003, three years and eight months after the Statute commenced to run.

The Fourth Circuit Court of Appeals observed that South Carolina's Statute of Limitations requires "very little to start the clock." Roe v. Doe, 28 F3d 404, 407 (4th Cir. 1994)(applying South Carolina law) and cited with approval in Maher v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204, (Ct.App.1998). There was an abundance of information and facts known to Kimmer by February of 2000 sufficient to put him on notice that some right of his had been invaded and that he had a potential claim against Wright. Therefore, the Court of Appeals did not err in finding that the Statute of Limitations commenced to run as to any claim against Wright in February, 2000.

E. Application of Law to Facts

At the outset it should be pointed out that Petitioner mischaracterizes the substance of Judge Hayes' September 16, 2008 Order (R. 7-14). Petitioner states, "[t]he lower court held that Kimmer's claim was timely pursuant to this Court's ruling in Epstein v. Brown because it was brought within three years of the adverse decision of the Workers' Compensation Commission." (Petitioner's Brief, p. 3) Judge Hayes did analyze Epstein v. Brown but drew more distinctions than similarities between the facts of this case and those of Epstein and in so doing stated:

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.

The facts of the present case distinguish it from Epstein. Epstein involved an adverse jury verdict while the present case involves an adverse

administrative ruling of the Workers' Compensation Commission. Moreover, the facts in the present case weigh more in favor of a ruling that Kimmer had notice of a potential injury caused by Wright earlier than the date of the Commission's adverse decision. For example, Kimmer signed a waiver of conflict on February 1, 2000, stating that he, "may have a right to a claim against Mr. Wright concerning his representation relating to my workers compensation claim." Wright also sent a letter to Kimmer on February 1, 2000, informing Kimmer that Kimmer may need to file a claim against Wright because of Wright's improper handling of 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 facts 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. (R. pp. 7-14)

Judge Hayes went on to state that he felt bound by the Order of Judge Kimball and for that reason denied Wright's motion for summary judgment.

Petitioner also mischaracterizes the decision of the Court of Appeals. Petitioner states, "The opinion of the Court of Appeals found that under the facts of this case it was not bound by the decision in Epstein." (Petitioner's Brief, p. 3) The Court of Appeals, after reciting the traditional standard trigger for the running of the statute of limitations, addressed Epstein. The Court of Appeals opinion cited to Footnote No. 8 of the Epstein opinion which clarified that the court was not holding that the statute of limitations would commence in each instance on the date of the adverse verdict but, rather, commenced in that case on the date of the jury verdict *at the latest* as to any claim Dr. Epstein may have had. Kimmer v. Wright, 719 S.E.2d 265 at 268 (Ct.App.2011). Accordingly, the Court of Appeals in this case was not at odds with Epstein.

Petitioner alleges in the Second Amended Complaint that Wright was negligent in that, "he failed to consult with, give notice to, or get the consent of Murata/Liberty Mutual before settling the third party action" (R. p. 88, para. 27(a)) and "as the direct and

proximate result of said breaches of duty, negligence, recklessness, and willfulness by Defendant, the Plaintiff has been damaged as set forth above and is entitled to judgment against the Defendant for actual and punitive damages.” (R. p. 88, para. 28)

The fact that Kimmer 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.

Id.

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

The application of the principles set out in Dean supports the Court of Appeals holding below. In the same way the trial court and the S.C. Supreme Court found that the Statute commenced at the time Dean attributed damage to her building to Ruscon’s 1984 pile driving activities, so, too, the statute commenced to run in this case as to any claim against Wright during February 2000 because that is when Kimmer attributed damages he

had sustained to Wright's mistake. (R. p. 241, line 12 – p. 242. line 10) Because all of the Plaintiff's damages grow out of the same core of operative facts, as in Dean, they are not capable of being severed into multiple claims against Wright merely because some of the Plaintiff's damages are recoverable under the Compensation Act and some are not.

F. Petitioner's acknowledgment of notice of a potential claim and damages sustained as of February 2000 are uncontested in the record.

The record on appeal is void of any statement by Petitioner through affidavit or otherwise that he was confused or misapprehended any of the questions presented to him during his deposition such as those relating to Mr. Wright's notice to him that he "screwed up" his workers' compensation case and may need to file a suit against Wright and, accordingly, must change attorneys. Further, it is also undisputed that Kimmer, as of February 2000, had been told his not receiving his workers' compensation benefits including lost wages and the payment of his medical bills was Wright's fault. The record on appeal is also void of any evidence that Mr. Kimmer had not sustained damage as of February 2000, save argument of counsel. Counsel's protestations that Mr. Kimmer had not sustained any damage until July 2003, no matter how many times repeated, does not make it so and does not constitute evidence before this court.

G. Petitioner's argument as to Statute of Limitations and Respondent's responses

Petitioner's arguments that the statute of limitations did not commence during February of 2000 and, accordingly, the decision of the Court of Appeals should be reversed, can be grouped into three categories; first Epstein v. Brown, controls the outcome of this case which mandates reversal; second, Kimmer could not have

discovered the malpractice until July of 2003; and, third, Kimmer's cause of action did not accrue until July 2003 and, therefore, he had no right to enter suit against Philip Wright until that date.

Before responding in detail to Petitioner's arguments as to the commencement of the running of the Statute of Limitations, Respondent respectfully points out the fundamental flaw in Kimmer's reasoning. Petitioner argues that Wright's informing Kimmer in February of 2000 that Kimmer **may** have a claim against Wright and that he must change lawyers for his compensation claim is not sufficient to commence the running of the statute. Further, Petitioner argues that the statute could not have commenced to run in February 2000, despite Kimmer's knowledge of a potential claim and his damages sustained by that time, because Kimmer could not have proved proximate cause until after the compensation hearing on July 31, 2003, because the employer defended on both the election of remedies bar and that the claim was not compensable due to the "going and coming rule" and that compensability was not determined until the 2003 hearing.

The fundamental flaw permeating Petitioner's argument is that it views the commencement of the running of the Statute of Limitations through legally trained eyes falsely in search of facts and legal theory sufficient to go to the jury as the statutory trigger, a position specifically rejected by this Court on numerous occasions. Over thirty years ago the South Carolina Supreme Court interpreted the statutory language 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 had been invaded or that some claim against

another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full blown theory of recovery developed. Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2e 333 (1981)(emphasis added).

Indeed, should this Court delay the commencement of the running of the statute under the notion that the malpractice claim had not accrued due to a defect in legal theory which was remedied in July 2003 by the workers compensation hearing, well **after** a “full blown theory of recovery” was developed, such a ruling would directly or by implication overrule a multitude of South Carolina precedent.¹

For similar reasons South Carolina appellate courts have seized upon the term “might have a claim” to define the requisite scienter trigger. To require a greater level of knowledge than “might have a claim,” such as one requiring knowledge of facts sufficient to overcome a directed verdict, would require advice of counsel, a requirement

¹ City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 692 S.E.2d 510 (2010); Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005); Christensen v. Mikell, 324 S.C. 70, 476 S.E.2d 692 (1996); Strong v. University of South Carolina School of Medicine, 316 S.C. 189, 447 S.E.2d 850 (1994); Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994); Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993); Johnson v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (1993); Mitchell v. Holler, 311 S.C. 406, 429 S.E.2d 793 (1993); Smith v. Smith, 291 S.C. 420, 354 S.E.2d 36 (1987); Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333 (1981); Kelly v. Logan, Jolley & Smith, L.L.P., 383 S.C. 626, 682 S.E.2d 1 (Ct.App.2009); Gibson v. Bank of America, N.A., 383 S.C. 399, 680 S.E.2d 778 (Ct.App.2009); Martin v. Companion Healthcare Corp., 357 S.C. 570, 593 S.E.2d 624 (Ct.App.2004); Rumpf v. Massachusetts Mt. Live Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct.App.2004); Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct.App.2001); Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); Joubert v. South Carolina Dept. of Social Services, 341 S.C. 176, 534 S.E.2d 1 (S.C.App. 2000); Peterson v. Richland County, 335 S.C. 135, 515 S.E.2d 553 (Ct.App.1999); Young v. South Carolina Dept. of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Republic Contracting Corp. v. South Carolina Dept. of Highways and Public Transp., 332 S.C. 197, 503 S.E.2d 761 (Ct.App.1998); Maher v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204 (Ct.App.1998); Dorman v. Campbell, 331 S.C. 179, 500 S.E.2d 786 (Ct.App.1998); Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct.App.1997); Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 477 (Ct.App.1997); Tanyel v. Osborne, 312 S.C. 473, 441 S.E.2d 329 (Ct.App.1994); Auatin v. Conway Hosp., Inc., 292 S.C. 334, 356 S.E.2d 153 (Ct.App.1987).

rejected by our courts. Indeed, should the court reject this “might” standard it would be overruling directly or by implication a long line of South Carolina cases.²

The first argument Petitioner advances is that the S.C. Supreme Court case of Epstein v. Brown controls the outcome of this case because in that case the court ruled that Dr. Epstein, a defendant in a medical malpractice action, became aware of a potential claim against his attorney on the date the jury returned a verdict against Epstein. Petitioner argues that the verdict became the “trigger” and urges that is the standard applicable here.

² Holmes v. National Service Industries, Inc., 395 S.C. 305, 717 S.E.2d 751 (2011); City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 692 S.E.2d 510 (2010); Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005); Arant v. Kressler, 327 S.C. 225, 489 S.E.2d 206 (1997); Strong v. University of South Carolina School of Medicine, 316 S.C. 189, 447 S.E.2d 850 (1994); Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994); Benton v. Roger C. Peace Hosp., 313 S.C. 520, 443 S.E.2d 537 (1994); Johnston v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (1993); Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993); Mitchell v. Holler, 311 S.C. 406, 429 S.E.2d 793 (1993); Doe v. R.D., 308 S.C. 139, 417 S.E.2d 541 (1992); Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333 (1981); Graham v. Welch, Roberts and Amburn, LLP, --- S.E.2d ---, 2013 WL 2560988 (Ct.App.2013); Kimmer v. Wright, 396 S.C. 53, 719 S.E.2d 265 (Ct.App.2011); Gibson v. Bank of America, N.A., 383 S.C. 399, 680 S.E.2d 778 (Ct.App.2009); Hackworth v. Greenville County, 371 S.C. 99, 637 S.E.2d 320 (Ct.App.2006); Knox v. Greenville Hosp. System, 362 S.C. 566, 608 S.E.2d 459 (Ct.App.2005); Rumph v. Massachusetts Mut. Live Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct.App.2004); Martin v. Companion Healthcare Corp., 357 S.C. 570, 593 S.E.2d 624 (Ct.App.2004); McClain v. Jarrard, 354 S.C. 218, 580 S.E.2d 763 (Ct.App.2003); Binkley v. Burry, 352 S.C. 286, 573 S.E.2d 838 (Ct.App.2002); Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct.App.2001); Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); Joubert v. South Carolina Dept. of Social Services, 341 S.C. 176, 534 S.E.2d 1 (Ct.App.2000); Peterson v. Richland County, 335 S.C. 135, 515 S.E.2d 553 (Ct.App.1999); Young v. South Carolina Dept. of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Maher v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204 (Ct.App.1998); Dorman v. Campbell, 331 S.C. 179, 500 S.E.2d 786 (Ct.App.1998); Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct.App.1997); Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 477 (Ct.App.1997).

Respondent's Response

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

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

Id at 383. Epstein, therefore, stands only for the proposition that the Statute of Limitations commences to run when the plaintiff knows or should know that he might have a claim against some party and that point in time in Epstein was at the conclusion of the medical malpractice trial.

The facts in this case are far different from those in Epstein; just as the trial court pointed out and as recited above. However, the decision of the Court of Appeals is not in conflict with Epstein. The operative question in both cases is at what point in time would a reasonable person be on notice that they may have some claim against another party. In Epstein that point in time was the jury's verdict. Here it was during February of 2000. The factors which work to alter the time period in this case which did not exist in Epstein can be listed as follows:

1. Four (4) years before Dr. Epstein's trial he did not believe he should have been receiving benefits which under the law he was entitled to receive. (As to Kimmer, *see*, R. p. 192, line 124 – p. 194, line 6);
2. Three and one-half (3 ½) years before Dr. Epstein's trial he was not told by his attorney that, he "screwed this up" and that Dr. Epstein would have to find another attorney to handle his case. (As to Kimmer, *see*, R. p. 199, line 25 – p. 200, line 4);

3. Dr. Epstein did not sign a statement three and one-half (3 ½) years before his trial which provided that, "I understand that I may have a right to make a claim against [Mr. Brown] concerning his representation relating to my case". (As to Kimmer, *see*, R. p. 558);
4. Three and one-half (3 ½) years before Dr. Epstein's trial he did not understand: (a) that he was not receiving benefits to which he was entitled because his attorney made a mistake, and (b) his attorney did not tell him, "I screwed this up. You have to get another attorney to take the case." (As to Kimmer, *see*, R. p. 201, line 2 – p. 202, line 16);
5. Dr. Epstein did not sign a waiver three and one-half (3 ½) years before his trial in which he waived any conflict against Mr. Brown based upon matters that Mr. Brown did not do in his representation. (As to Kimmer, *see*, R. p. 560, Paragraph 1);
6. Dr. Epstein did not experience problems four (4) years before his trial because he was not having his medical bills paid from proceeds to which he was legally entitled under the law. (As to Kimmer, *see*, R. p. 202, line 24 – p. 205, line 12);
7. Three and one-half (3 ½) years before Dr. Epstein's trial he did not engage separate counsel to represent him in his case because Mr. Brown had made a mistake. (As to Kimmer, *see*, R. p. 231, line 18 – p. 232, line 14);
8. Dr. Epstein did not blame Mr. Brown for any posttraumatic stress disorder problems which started four (4) years before his trial. (As to Kimmer, *see*, R. p. 241, line 2 – p. 242, line 10);
9. Three and one-half (3 ½) years before Dr. Epstein's trial, Mr. Brown did not admit to Dr. Epstein that he was not getting paid benefits and that this was Mr. Brown's fault. (As to Kimmer, *see*, R. p. 242, lines 2-10).

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

employer defended the claim on multiple grounds, and that Kimmer, “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 defendants’ negligent settlement of the third-party claim without notice.” (Petitioner’s Brief, p. 15)

The Respondent offers the following six arguments in response:

1. Petitioner’s contention that he could not have discovered the malpractice until July 31, 2003, when the Commissioner ruled on the comp claim³, directly conflicts with the respondent’s signed statement of February 1, 2000, in which Kimmer states, “I understand that I may have a right to make a claim against Mr. Wright concerning his representation related to my workers’ compensation action.” Even if there were no other supporting evidence in this case this signed statement alone would be sufficient to commence the running of the statute.

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

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

³ Petitioner argued before the Court of Appeals that the appeal on the election of remedies issue was a case of first impression. This was hardly the case. The Court of Appeals in Kimmer v. Murata of America, Inc., 372 S.C. 39, 640 S.E.2d 507 (Ct.App. 2006) noted that the principle requiring notice to an employer prior to settling a third party claim dates back to Stroy v. Millwood Drug Store, Inc., 235 S.C. 52, 109 S.E.2d 706 (1959), a case decided under prior statutes. Since 1959 our appellate courts have reaffirmed this principle in an unbroken line of cases and as to Respondent’s case the Court of Appeals stated, “The undisputed facts of the instant case are nearly identical to those in Fisher.” (Fisher v. S.C. Dept. of Mental Retardation, 277 S.C. 573, 291 S.E.2d 200 (1982)) Therefore, given the long history in our case law requiring notice to the employer prior to giving a release in order to retain workers’ compensation benefits the outcome of Kimmer’s contest with Murata was entirely predictable.

A: Right. Yes, sir.

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

A: That's true.

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

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

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

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

Petitioner essentially contends that until all multiple defenses asserted by the defendant in the underlying action are resolved the statute cannot commence to run. This is not and should not be the law. When the plaintiff is told "plainly" that his not receiving compensation for his damages was his lawyer's fault, the Statute of Limitations is not suspended merely because the underlying automobile case has not been resolved and the automobile tortfeasor has defended on multiple grounds. The following example illustrates the fallacy of the Petitioner's argument.

A plaintiff is in an automobile accident and hires an attorney to represent him. The attorney enters suit for the plaintiff. The auto tortfeasor answers asserting as defenses the Statute of Limitations, and that the plaintiff was in fact the driver to run the red light which caused the collision. Plaintiff's attorney informs the plaintiff that he has in fact missed the Statute of Limitations and this is the reason that the defendant's insurance carrier has not settled the case. Under the Petitioner's interpretation of the law, the factual issue as to which party ran the red light would be required to be tried in the automobile case before his malpractice claim against the attorney has accrued. This is not the law. The "case within the case" dynamic of a legal malpractice action allows the plaintiff to litigate his automobile claims in the suit against his former attorney and determine in the malpractice action which driver ran the red light. The plaintiff may not ultimately prevail as to who ran the red light in the malpractice trial but that does not mean he is not on notice of a claim after his attorney tells him he missed the Statute of Limitations and this circumstance certainly does not mean the plaintiff's claim has not accrued until the trial of the underlying case.

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

In Binkley, the plaintiff became aware of the existence of an easement and the relevant elevations on or before November 4, 1991. The trial court and Court of Appeals

found the Statute of Limitations started to run on that date because that is when the plaintiffs became aware of the easement and the elevations which gave them actual notice of the risk of flooding to their property. This was the result despite the fact that in the underlying action with Rabon Creek, the easement owner, the order ruling that it was estopped to assert the easement against the homeowners was not issued until May 5, 1998.⁴ The Court of Appeals found no reason to delay the running of the Statute of Limitations merely because the Binkleys defended on multiple grounds, including the interpretation of the easement favorable to them, as well as the equitable defense that Rabon Creek was estopped to assert the easement.

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

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

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

⁴ Binkley v. Rabon Creek Watershed Conservation District, 348 S.C. 58, 558 S.E.2d 902 (2001), reversed the trial court's finding that Rabon Creek was equitably estopped from enforcing the easement.

1983. Under the discovery rule, her cause of action accrued and the Statute of Limitations began to run at that time.

Mitchell v. Holler at 795 (emphasis added)

Just as the Supreme Court would not delay the running of the statute in Mitchell v. Holler until the appellate court reversal based upon ineffective assistance of counsel because Mitchell believed she may have had a claim in March 1983, the Court of Appeals did not err in this case because it refused to delay the running of the statute until the Commissioner ruled in July 2003 because in February 2000 Kimmer believed he should have been receiving his compensation benefits since the accident, assigned blame to Wright for damages he sustained, and also understood by that date he “may have a right to make a claim against Mr. Wright concerning his representation related to my workers’ compensation.”

4. As an aside, although the workers’ compensation carrier did deny the compensability of the claim and assert that as a defense, there was little doubt that the claim was compensable from the facts apparent to Mr. Kimmer. Kimmer received a \$300 payment every other week for a car allowance plus 6 cents per mile for each mile he drove to and from work. In addition, if Kimmer had to drive more than an hour to a particular plant, he was paid for the travel time in excess of an hour. (R. pp. 254-255) Of course, an exception to the going and coming rule is when the employer furnishes means of transportation or pays the employee during the travel time. Bickley v. South Carolina Elec. & Gas Co., 269 S.C. 463, 192 S.E.2d (1972). Therefore, it is no wonder that Kimmer’s belief that he should have been receiving workers’ compensation benefits from the time of the accident was in fact justified and reasonable.

5. The finding by the Commissioner in July of 2003 told Kimmer very little as to his malpractice claim against Wright because such a finding was not binding upon Wright because Wright was not a party to the workers' compensation claim nor was he in privity with anyone who was a party. Such findings were not collateral estoppel or res judicata as to Wright. For due process reasons Kimmer would have had to re-litigate the compensability issue in the malpractice action against Wright if Wright chose to contest it. (Restatement of Judgments, Second, Sections 27; 28(1) (1982); South Carolina Property and Casualty Insurance Guaranty Association v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991).

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

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

Respondent's Response

1. Petitioner's argument that the cause of action for legal malpractice could not arise until the workers' compensation claim had been concluded cannot and should not be the law. The following hypothetical, shifting the sequence of events in this case, illustrates why. Assume Kimmer is injured driving to work for the same employer with the same benefits just as he was in this case and that after Kimmer settled the auto accident case giving a release without notice to the carrier/employer, all on Wright's advice, Wright realizes his mistake and, instead of filing the workers' compensation claim, he calls Kimmer to his office for a conference. He informs Kimmer of his mistake, that Kimmer is not receiving his workers' compensation payments because of Wright's mistake and that he may need to sue Wright. Wright also tells him he will need to retain separate counsel to go forward on his workers' compensation claim. Wright confirms this in writing with Kimmer and their attorney-client relationship ends.

Two years and one week later, Kimmer retains new counsel seeking relief. His new counsel informs Kimmer that the statute of limitations on filing the workers' compensation claim is two years from the date of the accident and, therefore, a claim under the Act is not an option. (S.C.Code Ann. § 42-15-40 (Supp.2012) Kimmer's new counsel files the malpractice action alleging Wright's mistake and Kimmer's lost workers' compensation benefits as damages.

Were the court to adopt the Petitioner's argument, the legal malpractice cause of action could not accrue until the workers' compensation claim had been decided. Since under these facts there will be no decision from the Worker's Compensation Commission on the merits of Kimmer's comp. claim, will this constitute a bar to his malpractice action? Under Petitioner's view of the law the answer would be YES. The correct answer is decidedly NO. The obvious reason why is that all of the issues which could have been litigated before the Commission can and must be litigated in the malpractice case and, therefore, the adjudication of the comp. claim does not in any way affect the accrual of the malpractice cause of action.

2. Kimmer had a right to enter suit against Wright for professional negligence during February of 2000. Petitioner maintains that Wright owed him a duty and breached that duty in his representation of Kimmer in the workers' compensation claim. Further, it is uncontested in the record that by February 2000 Kimmer was aware that he was not receiving his workers' compensation payments because Mr. Wright made a mistake (R. pp. 201-02), that his unpaid medical bills had caused him problems, and that Kimmer blamed Wright for his posttraumatic stress disorder problems which started during 1999. Kimmer also admitted that by February of 2000 he was aware that Mr.

Wright had represented to him that Kimmer's not getting paid was in part Wright's fault and that he was instructed to and did change attorney's because of these circumstances. (R. p. 242) Kimmer's workers compensation claim was worth less because of Wright's mistake and that damage is sufficient of itself to support a suit in February 2000. How much less Kimmer's claim was worth would remain to be seen. Petitioner's claims against Wright satisfied all of the elements during February 2000; duty, breach, damages and proximate causation. The fact that Kimmer may not have known all of his damages by that time is not material. Dean.

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

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

In Binkley v. Burry the Court of Appeals held that because the Binkleys were on notice of the easement and elevations in November 1991, the statute commenced to run at that time, almost four years before their property was actually flooded. The Binkleys claimed that their closing attorneys did not make them aware of the easement at the time

they purchased the property, but admitted that they became aware of it at the time of a subsequent mortgage closing. To reiterate this salient point, the Court of Appeals stated:

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

Id. at 844-845

The Court of Appeals correctly found that when the Binkleys were aware that some right of theirs had been invaded, i.e. the easement existed in 1991, the Statute of Limitations began to run at that time and was not delayed until 1995 when the property actually flooded. Had the Court adopted the Binkley’s argument that the Statute of Limitations commenced only upon a flood event and the property had not flooded until 2011, the statute would not have commenced until 20 years after the closing.

Binkley is instructive also on the issue of the conclusion of the underlying action or a judicial decree as triggering the running of the Statute of Limitations. Note that in Binkley the damage to the plaintiff’s property by way of flooding did not occur until August of 1995, the Binkleys were not specifically told of the developer’s intent to claim the easement to the top of the dam until 1995, and Judge Kittredge’s first order in that case was not issued until December 23, 1996. Nonetheless, the trial court and Court of Appeals found that because Binkley knew or had facts before him on November 4, 1991 that some right of his had been invaded, i.e. the easement across his property, that the Statute of Limitations commenced to run at that time. A similar analysis can be found in Peterson v. Richland County, 335 S.C. 135, 515 S.E.2d 553 (Ct.App.1999) in which the

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

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

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

Id. at 308-309 (emphasis added)⁵

Kimmer also argues that, if he had not proceeded with the workers’ compensation claim and appeal to receive the determinations on the contested issues, he would have faced a summary judgment motion like the one faced by the plaintiff in Doe v. Howe, 367 S.C. 432, 626 S.E.2d 25 (Ct.App.2005)(cert. denied). Kimmer states further that the plaintiff must show that he “most probably”⁶ would have been successful in the underlying suit if the attorney had not committed the alleged malpractice. (Petitioner’s

⁵ Petitioner seems to argue that special damages must exist before the SOL commences to run. Binkley involved a circumstance in which the plaintiffs’ property was encumbered by an easement which the plaintiffs were made aware of at closing. Their property was worth some amount less because of the easement and that sum constitutes “damages” in the legal sense, although no special damages were sustained until years later. The SOL commenced to run from the time of closing, years before any damages were suffered.

⁶ Petitioner implies/argues that the law would require he have all the evidence at hand to defeat a directed verdict for the SOL to commence to run. No South Carolina court has so held. It has long been the law in SC that, “...the client need not show a perfect claim. But the client must show at least that he has lost a probability of success as a result of the attorney’s negligence.” Doe v. Howe, Id. at 32. Petitioner had three years after he sustained damage and became aware of Wright’s mistake to show this via an expert’s affidavit and, during that time, the SOL clock was ticking.

Brief, p. 17). Kimmer argues that the plaintiff in Doe could not provide evidence that he “most probably” would have prevailed on the underlying claim at trial and suggests that the rules of Doe mandated that Kimmer try his workers’ compensation claim to conclusion before he either had a claim at all or the SOL commenced to run on his malpractice claim.

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

The client’s burden of establishing proximate cause in a legal malpractice action requires that he prove that he would have obtained a better result in

the underlying matter if the attorney had exercised reasonable care. The burden does not necessarily compel the client to demonstrate that he would have won the underlying case. Rather, **it is enough for the legal malpractice plaintiff to show that he has lost a valuable right; e.g., the settlement value of the underlying case.** Stated otherwise, “the client need not show a perfect claim. But **the client must show at least that he has lost a probability of success as a result of the attorney’s negligence.**”

Id. at 446, 32. (emphasis added).

This is a recognized and long-standing statement of the plaintiff’s burden in a legal malpractice action and demonstrates why Kimmer could have maintained a suit against Wright prior to conclusion of the workers’ compensation claim through an expert’s opinion that he had “lost a probability of success as a result of the attorney’s negligence.” Kimmer need not have shown the loss of a perfect claim to defeat summary judgment; merely that because of the attorney’s mistake he lost “a probability of success” and this can (and must) be shown through the use of expert testimony in the malpractice action.

South Carolina would not require the conclusion of the underlying case before the statutory period commences. Other jurisdictions are in accord.⁷

4. Even if one accepts the Petitioner’s argument that he had sustained no damage to his workers’ compensation claim prior to issuance of the Commissioner’s ruling on July 31, 2003, the Petitioner attributes damages to Wright’s professional error which have nothing to do whatever with Kimmer’s workers’ compensation claim because, under the facts of this case, those damages would not be compensable under the Workers’ Compensation Act. A successful workers’ compensation claim would not recover for Kimmer his PTSD related damages.

⁷ Basinger v. Sullivan, 540 N.E.2d 91 (Ind. Ct.App.1989); Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692 (N.C. Ct.App.1984)

Kimmer believed and testified that his posttraumatic stress disorder was caused partly by his inability to pay his medical and other bills due to the fact that the workers' compensation carrier denied his claim and that by February 2000 he blamed this upon Wright. Therefore, Kimmer's prevailing before the single commissioner and on appeal would not make these damages moot because they cannot be recovered under the Act. Posttraumatic stress disorder damages are only recoverable under the Workers' Compensation Act if the "emotional stimuli or stressors are incident to or arise from unusual or extraordinary conditions of employment." See Stokes v. First National Bank, 298 S.C. 13, 377 S.E.2d 942 (Ct.App.1988). The facts do not exist here to allow Kimmer's recovery for PTSD under the Act. However, PTSD damages would be recoverable against an attorney in a professional negligence claim given the right facts. Rowell v. Holt, 850 So.2d 474 (Fla. 2003); Chatelain v. Rublais, 877 So.2d 324 (La. App. 3 Cir. 2004); Guiles v. Simser, 804 NY2d 904 (2005).

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

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

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

Petitioner would invite South Carolina to join the minority of jurisdictions which would have the courts inquire as to the degree of damage necessary to commence the Statute of Limitations running rather than focus upon whether there is injury in fact. This question is addressed in the 2009 edition of Legal Malpractice by Ronald E. Mallen and Jeffrey E. Smith, in Section 23:11, "The Damages Rule." The California decision of Budd v. Nixen, 491 P.2d 433 (Cal. 1971) initiated the requirement in that state that there be a sufficient quantity of damage to start the Statute of Limitations running. However, the California legislature rejected that notion. The legal malpractice treatise at page 370

concludes as follows: “The prevailing rule is that there only need be the fact of an injury rather than a specific quantity of damage, even if significant damages may not occur until the future, if at all.” South Carolina has long followed the majority rule and should continue to do so.

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

First, the findings of the Workers’ Compensation Commission arising from Kimmer’s claim would not be binding upon Wright for the reasons set forth above.

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

compensation claim because the malpractice defendant was not a party to the compensation claim. This is true whether the compensation claim is concluded before or after the malpractice action is commenced.

Third, the petitioner has the ability to file the malpractice action within the Statute of Limitations and control the sequence of events by moving for a partial or limited stay of the malpractice action pending conclusion of the compensation claim. This procedure is often used in the litigation of mechanics lien cases when the underlying contract contains a compulsory arbitration clause. The suit to foreclose the lien is filed to comply with the statutory mandate and usually stayed pending the arbitration results. Stier, Kent & Canady, Inc. v. Jackson, 317 S.C. 179, 452 S.E.2d 606 (S.C. App. 1994).

8. Petitioner's argument that the SOL would not commence to run until events supported the plaintiff's ability to overcome a directed verdict motion would produce the result that the SOL would serve only to defeat meritorious claims. The SOL should put out to pasture all claims not filed before the end of the limitations period, the meritorious sheep as well as the capricious goats.

II. DID THE COURT OF APPEALS ERR IN ITS REFUSAL TO APPLY THE DOCTRINE OF EQUITABLE TOLLING TO THIS CASE?

Equitable tolling saves a plaintiff that misses the statute of limitations due to impediments caused by the defendant or when the plaintiff filed within the statute but in the wrong forum. It 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 hand of the other." Magnolia North Property Owners' Association Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112

(Ct.App.2012)(reh'g denied), quoting Hoper v. Ebenezer Senior Svc. and Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009). “[E]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control.” Hooper. “Equitable tolling applies either where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit, or where the plaintiff has timely raised the same claim in the wrong forum.” Id. quoting Abbott v. State, 979 P.2d 944 (Alaska 1999).

In each case where equitable tolling has been applied in South Carolina, the defendant did something to prevent the plaintiff from filing in a timely manner. Equitable tolling has been applied five times in South Carolina. In each case, the defendant prevented the plaintiff from filing within the statute. Magnolia., 397 S.C. 348, (defendant’s officers comprising the BOD of the HOA were unlikely to sue themselves; new BOD filed shortly after taking over); Ross v. Ross, 394 S.C. 261, 715 S.E.2d 359 (Ct.App.2011)(Husband physically attacked and terrified wife into not filing timely); Hoper, (Ebenezer named agent for service of process who could not be found, but had duty to keep agent information up to date; impossibility of service caused Hooper to miss statute); Hopkins v. Floyd’s Wholesale, 299 S.C. 127, 382 S.E.2d 907 (1989)(employer told Hopkins his worker’s comp would be paid without necessity of filing; Hopkins filed timely once payments stopped). The same holds true for equitable tolling in other jurisdictions. Irby v. Fairbanks Gold Mining, Inc., 203 P.3d 1138 (Alaska 2009)(father disappeared in mine accident; family prevented from filing worker’s comp. claim because no adjudication of death and employer denied his death; comp. claim filed shortly after

death confirmed); Abbott v. State, 979 P.2d 944 (Alaska 1999)(State law which kept Abbott from filing suit found in derogation of federal law, giving rights to Abbott only after statute ran; Abbott filed suit shortly thereafter); Schriber v. Anonymous, 848 N.E.2d 1061 (Ind. 2006)(Defendant failed to file public records required by statute which misled defendant into filing in wrong forum, causing her to miss deadline).

The federal rule largely comports with the state rules. “Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.” Machules v. Dept. of Administration, 523 So.2d 1132 (Fla. 1988) quoting federal law. The plaintiff in Machules was granted equitable tolling because “petitioner was misled or lulled into inaction by his Employer, and his appeal to DOA raised identical issue raised in the original timely claim filed in the wrong forum.”

On the other hand, equitable tolling has not been granted when the defendant did nothing to impede the plaintiff. American Legion Post v. 15 Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct.App.2009)(County did nothing to impede or mislead plaintiff, tolling denied); Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (Ct.App.2008)(State did nothing to mislead or impede plaintiff, tolling denied); Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005)(State did nothing to mislead or impede plaintiff, tolling denied). Other jurisdictions operate under the same principals. Kaplan v. Morgan Stanley & Co., Inc., 987 A.2d 258 (Vt. 2009)(Kaplan had retirement plan documents and was not misled by anyone, tolling denied); Beecher v. Stratton Corp., 743 A.2d 1093 (Vt. 1999)(Skier missed statute but was not misled by insurance adjuster, tolling denied).

Here, Kimmer was not misled by anyone. On the contrary, he was told by his attorney, Wright, that “I screwed this up” and “you may be entitled to eventually file a claim against me.” Kimmer could easily have determined when that claim became stale. Nor did Kimmer file the same claim in the wrong forum. Kimmer filed a workman’s compensation claim against his employer instead of filing a legal malpractice claim against Wright.

Equitable tolling simply does not lie under the facts of this case.

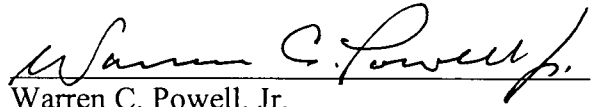
CONCLUSION

Kimmer’s testimony establishes that by February 2000 he was aware of a claim against Wright, had sustained damages, both comp. and non-comp. related, which he attributed to Wright’s mistake, and believed correctly that he should have been receiving his workers’ compensation benefits since early 1999. This suit was entered more than three years after Kimmer engaged new counsel. The Court of Appeals did not err in ruling the statute of limitations had run prior to suit being filed.

The Court of Appeals likewise did not err in its refusal to apply the doctrine of equitable tolling to this case. The facts here simply do not support such an application for reasons recited above. The opinion of the Court of Appeals should be affirmed.

The signature appears on the following page.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Warren C. Powell, Jr.", written in black ink.

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July 23rd, 2013.

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. Supreme Court

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.....Petitioner

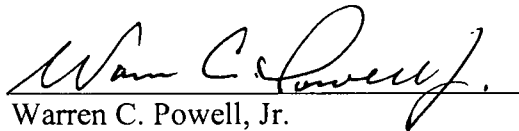
v.

Philip E. Wright.....Respondent

PROOF OF SERVICE

I certify that I have served one copy of the *Brief of Respondent Phillip E. Wright* upon Carol M. Kimmer, Personal Representative of the Estate of Richard Kimmer by depositing a copy of same in the United States Mail, postage prepaid, on July 24, 2013, addressed to her attorney of record addressed as follows:

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