THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes III, Circuit Court Judge

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

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

v.

Philip E. Wright.....Respondent.

REPLY BRIEF OF PETITIONER

Thomas H. Pope III, SC Bar #4508
Pope & Hudgens, P.A.
Post Office Box 190
Newberry, South Carolina 29108
(803) 276-2532
thpope@popeandhudgens.com

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

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INTRODUCTION

Petitioner Carol M. Kimmer, personal representative, ("Kimmer") submits this Reply Brief to the Brief of Respondent Philip E. Wright ("Wright"). In his brief, Wright asserts that the decision of the Court of Appeals from which this Court issued its writ of certiorari to review does not conflict with a decision of this Court and does not raise a novel issue of law. On the contrary, it does both. Just as the efforts of the Court of Appeals to distinguish this Court's precedent and to rationalize its illogic in construing the applicable law falls short, so do the efforts of Wright to justify the reasoning and results in the Opinion of the Court of Appeals. The arguments which Wright now advances represent an effort for this Court to construe the discovery rule for statutes of limitation to mean that if a person's lawyer has committed an act believed to be negligent, even though no damage has accrued from that negligence, that suit must be filed within three years of the negligent act, even though the administrative body (here, the Workers Compensation Commission) has not determined whether or not claimant has lost his benefits and, thus, has been damaged.

The Brief of Respondent ignores a number of crucial facts: that Circuit Judge Goode ruled in favor of Kimmer in 2005 and reversed the workers compensation decision (meaning Kimmer had not been damaged); that Special Circuit Judge Jackson Kimball in 2006 determined in this case that resolution of the workers compensation appeal would be dispositive of the malpractice case against Wright and ordered this case to be stayed pending the outcome of the workers compensation appeal to avoid potentially unnecessary legal work; and that as set forth in his Complaint (R. 45, p.22), Kimmer stipulated that his damages were only those that directly flowed from his workers

compensation claim. The Brief of Respondent also ignores that the Court of Appeals misapplied important decisions of this Court, specifically Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) and its progeny. See City of Newberry v. Newberry Electric Cooperative, Inc., 387 S.C. 254, 692 S.E.2d 510 (2010); and Grier v. AMISUB, 397 S.C. 532, 725 S.E.2d 693 (2012).

This Reply Brief incorporates, without repeating, all previous arguments presented in the Appendix and prior filings.

ARGUMENT

I. THE OPINION OF THE COURT OF APPEALS ERRONEOUSLY HELD THAT EPSTEIN v. BROWN DID NOT APPLY TO THE FACTS OF THIS CASE. IT ALSO ERRED IN REVERSING THE LOWER COURT RULING THAT THE STATUTE OF LIMITATIONS DID NOT COMMENCE TO RUN UNTIL THE DATE OF THE ADVERSE RULING OF THE WORKERS COMPENSATION COMMISSION.

In determining the trigger date for the running of a statute of limitations ("SOL"), the focus is on whether an injured party knows or should know "that a cause of action exists for the wrongful conduct." Epstein v. Brown, 610 S.E.2d 816, 818 (2005), citing Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996).

The Opinion of the Court of Appeals misunderstood this point. Wright's brief ignores this point. Indeed, Wright argues the facts incorrectly. He asserts that Kimmer was damaged in 2000 because he [Kimmer] said so in his deposition. (Brief, pp. 7 – 9). As a matter of law, this is incorrect. Kimmer did not have damages then. Grier v. AMISUB, 725 S.E.2d 693 (2012). Circuit Judge Goode ruled in favor of Kimmer (R., p. 28) and reversed the Workers Compensation Commission ruling.[1] That ruling was reversed in Kimmer v. Murata, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006). Had the lower court order been affirmed, Kimmer would have recovered his benefits and not been

[1] Despite Wright's argument that it was crystal clear his actions were actionable in the year 2000, it was not crystal clear until the Court ruled in Kimmer v. Murata, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006). No case in South Carolina had ever held that a claimant who settles a third party case for the policy limits of $15,000 against a judgment-proof defendant is barred from pursuing his workers comp remedies where no prejudice has resulted to the carrier. In Murata, Kimmer was arguing that Liberty Mutual was not prejudiced when Kimmer settled for minimum policy limits of $15,000 since the at-fault party was a pauper with no assets or other insurance. The applicable statute, S.C. Code §42-1-560, does not specify the penalty for settling a third claim without notice to the workers comp carrier. It is now established in the Murata case that no prejudice to the carrier is required. Until this ruling was handed down, no court had addressed prejudice as a factor. It was a case of first impression.

damaged. Special Circuit Judge Kimball agreed. He stayed this action and concluded that Kimmer claims "no damage in this action except those that flow directly from the workers compensation claim." (R., p. 4). His Complaint confirms this. (R., p. 45).

The Opinion of the Court of Appeals misconstrued the applicable law as to the inception of the statute of limitations in a legal negligence case. Under the discovery rule, the SOL 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." Epstein v. Brown, 610 S.E.2d 816, 818 (2005) (emphasis added), citing Dean v. Ruscon Corp., 468 S.E.2d 645 (1996); S.C. Code §15-3-535. For the reasons set forth in Kimmer's original brief and herein, the Court of Appeals committed reversible error in failing to follow the Epstein case.

Neither the Opinion nor the Brief of Respondent properly analyze other recent opinions of this Court which bear on the issues in this case. In Grier v. AMISUB, 725 S.E.2d 693 (2012), this Court made it clear that a plaintiff must prove four elements to establish a cause of action in a professional negligence case: (1) a duty of care; (2) breach of that duty; (3) resulting in damages to the plaintiff; and, (4) damages proximately resulting from that breach. Id. at p. 696. According to this Court's ruling, the term "negligent act" has consistently been used to refer "only to breach and never to causation." Id. at 696. Without proof of damages and causation, simply breaching a duty does not establish a "cause of action."

In the case of City of Newberry v. Newberry Electric Cooperative, Inc., 387 S.C. 254, 692 S.E.2d 510 (2010), this Court ruled that the statute of limitations did not bar the City of Newberry's ("City") action which was filed to prohibit Newberry Electric

Cooperative, Inc. ("Cooperative") from serving Wal-Mart as its customer inside the annexed territory of the City. In that case, the Cooperative entered into a contract with Wal-Mart to provide electric service before the City annexed the property. Notwithstanding that the Cooperative had a contract to serve, and intended to serve, Wal-Mart in 1999, this Court ruled that the suit commenced in mid-2003 was not barred by the statute of limitations. The ruling was that the statute did not commence to run until after the Cooperative began providing electric service to the customer in the annexed area during the year 2000. Because suit was filed within three years of the date that the Cooperative commenced to provide service, the statute of limitations was not a bar.

In City of Newberry, this Court cited Epstein v. Brown in support of its ruling that a statute of limitations begins to run only when a party either knew or should have known that some legal right had been invaded. The Court also cited its prior ruling in Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996), where it held:

> "The statute runs from the date the injured party either knows or should have known of the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." (emphasis added).

In City of Newberry, this Court clarified when the statute of limitations is triggered. Despite the fact that the City and the Cooperative had been highly competitive over commercial customers, despite the fact that in that case the customer, Wal-Mart, was in negotiation with both for electric service, and despite the fact that the Cooperative obtained the contract to serve the Wal-Mart premises before annexation, this Court declined to hold that the statute began to run at the time the contract for electric service was entered into between the Cooperative and Wal-Mart. It declined to find that the statute of limitations began to run when the City annexed the property. Instead, this

Court clarified that the statute of limitations did not began to run until the Cooperative actually began providing service to the completed Wal-Mart store. This is the date when the City first suffered injury.

Applying City of Newberry to the instant case leads ineluctably to the conclusion that Kimmer had no suit against Wright until, most probably, this Court denied certification in Kimmer v. Murata, 640 S.E.2d 507 (Ct. App. 2006), cert. denied October 18, 2007. At the earliest, the statute, under the majority ruling in Epstein, did not begin to run until Kimmer had a cause of action – i.e., until the determination on July 31, 2003 from the SC Workers Compensation Commission that Wright's action had caused him to lose his workers comp benefits.

In the instant case, while it is true that Wright was negligent when he prematurely settled the third party action without notice to the workers comp carrier, his conduct did not rise to the level of a cause of action until Kimmer had suffered damages in July 2003. In fact, the Circuit Court of the Sixth Judicial Circuit, hearing Kimmer's workers compensation appeal, reversed the decision of the SC Workers Compensation Commission in its Order dated September 1, 2005. (R., p. 2). From that date forward until the Court of Appeals reversed the circuit court order and reinstated the workers compensation decision, Kimmer was the prevailing party on his workers compensation claim and could not have had a claim against Wright.

Also important in this case is the ruling of Special Circuit Judge Jackson Kimball, who ordered that the present case be stayed entirely on June 20, 2005. His Order granted the stay because the workers compensation case was unresolved and was on appeal at that time. His Order further noted that the stay should be granted because Kimmer "...claims,

and will claim, no damage in this action except those that may flow directly from the workers compensation claim."[2] (R., p. 4). The stay was imposed by Judge Kimball because he concluded that the workers compensation appeal would be "dispositive of this action," (R., p. 4), and he opined that if the malpractice action were not stayed pending a final determination of the workers compensation appeal, that Kimmer would have to "expend considerable time, effort and money" for naught.

The dissent by Chief Judge Few gave proper deference and respect to this Court's ruling in Epstein. For this reason, it is appropriate to discuss why his dissent was correct. It properly noted that, as with many mistakes lawyers make in the course of litigation, no damage resulted from Wright's mistake until the Workers Compensation Commission denied benefits to Kimmer. Notwithstanding that there was a breach of duty by Wright that he owed to Kimmer, it was not until the decision of the Workers Compensation Commission was handed down that a cause of action for legal malpractice accrued; it was at that time that causation and damage came into existence for the first time. The dissent properly noted that, as this Court found in the Epstein case, a client does not have a legal malpractice cause of action against the lawyer until all four elements of the cause of action exist. Thus, the statute of limitations does not begin to run until all four elements, including damage, are present.

Judge Few also pointed out that, logically speaking, a lawyer's breach of duty to a client necessarily occurs before the damage resulting from the breach. In other words, damage is always the last element of a legal malpractice claim to occur. Judge Few

[2] On page 8 of his Brief, Wright states that "Kimmer lost temporary total benefits...and sustained damages in the form of medical bills, lost wages, and pain and suffering in 1999...." All of these are part of Kimmer's workers compensation claim for total disability, temporary and permanent, based on his physical injuries with psychological overlay, as testified to in the workers compensation proceedings. (R., p. 352).

vigorously defended this Court's holding in Epstein and characterized the majority Opinion of the Court of Appeals as follows:

> "The majority has taken language from these prior cases, inapplicable to the facts of this case, and used it to hold that when the client learns of his lawyer's negligence, the statute of limitations begins to run even though he has yet to suffer any injury."
>
> Kimmer v. Wright, 719 S.E.2d 265, 272 (2011)

As discussed in the dissent, in the Epstein case, this Court decreed that, notwithstanding errors that Epstein's attorney may have made prior to trial, it was not until the verdict against Epstein was rendered that he had damage. As Judge Few noted: "If the jury found in Dr. Epstein's favor, he would not have suffered damages, and no cause of action would ever have accrued against Brown." Id., at p. 272.

Also, the following discussion by the dissent is persuasive here:

> "The effect of Wright's negligence on Kimmer's right to recover workers compensation benefits was not known until at least July 31, 2003, when the single commissioner ruled against Kimmer and denied his claim for benefits. Until then, Kimmer and his lawyers were working hard to win the case, despite Wright's negligence. The damages element was missing because the possibility remained that Kimmer would prevail on the claim. When the single commissioner ruled, however, Kimmer knew Wright's negligence caused him to lose his workers compensation case. Because damage existed then for the first time, Wright's negligence became actionable malpractice for the first time. Kimmer commenced this action on October 14, 2004, well within the Statute of Limitations." Id., at p. 272.

As the dissent further pointed out, the majority Opinion of the Court of Appeals misconstrues the applicability of Binkley v. Burry, 352 S.C. 286, 573 S.E.2d 838 (Ct. App. 2002). In that case, the Court of Appeals held that the statute of limitations began to run in that malpractice action when the plaintiffs knew of the existence of an easement

allowing a conservation district to cause flooding on plaintiff's property. In that case, no flooding had yet occurred. However, the law firm had failed to advise plaintiffs of the existence of the easement. As a matter of law and common sense, an easement by its very nature involves the right to encroach upon another's property, will devalue that property, and is damage. In Binkley, it was knowledge of the existence of damage (i.e., existence of the easement) that caused the statute of limitations to begin to run. The Court of Appeals erred in relying on that case to reverse the lower court.

Wright's brief argues, incorrectly, that Wright's acts were blatantly actionable in January 2000. The dissent disposed of the argument that his malpractice was "unmistakable," by pointing out that it "would be patently unfair for this Court to say Kimmer should have known that he would eventually be damaged and, thus, had a cause of action against Wright, when a circuit court had made precisely the opposite ruling in the same case." Id., at p. 273. See Order of Judge Goode dated September 1, 2005. (R., p. 28).

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

Equitable tolling has been held to be a flexible doctrine which is to be applied to ensure "fundamental fairness" or "to prevent unfairness to a diligent plaintiff." Hooper v. Ebenezer Senior Services, 386 S.C. 108, 687 S.E.2d 29 (2009). It is judicially created. The Court of Appeals rejected it dismissively as an additional sustaining ground. This was error.

In this case, there exist equitable grounds why Wright should not be allowed to have the malpractice claim against him barred by the statute of limitations. First, Kimmer diligently pursued his workers compensation claims to avoid a malpractice suit. He called Wright as a witness to say that the workers compensation carrier was not prejudiced by his $15,000 settlement without notifying the carrier and that he did not intend to waive Kimmer's remedy. (R., p. 388). He was informed that the commissioner had ruled against Kimmer on July 31, 2003 and sent a copy of the Order of the Workers Compensation Commission. (R., p. 1061). He was informed that Kimmer would need a tolling agreement in view of the adverse ruling of the Workers Compensation Commission. (R., p. 1061). He was informed that Kimmer had appealed the decision of the Workers Compensation Commission because Kimmer felt that Wright's actions may not have been, as a matter of law, actionable because the third party settlement had not prejudiced the workers compensation carrier. (R., p. 1065).

Kimmer was diligent in pursuing his rights which, if successful, would have exonerated Wright and never resulted in a suit against him. Wright was informed every step of the way. He was not "blind-sided" by a belated law suit he could not have expected.

Equitable tolling of a statute of limitations was held to have been justifiably and correctly applied in Magnolia North Property Owners Association v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). In that case, the plaintiff exercised due diligence in filing its action. In the instant case, Kimmer was likewise diligent in filing his action. The Court of Appeals erred in rejecting the application of this doctrine.

CONCLUSION

The Opinion of the Court of Appeals should be reversed because it misunderstood or misapplied this Court's ruling in Epstein v. Brown, 610 S.E.2d 816 (2005) and its progeny. See City of Newberry v. Newberry Electric Cooperative, Inc., 387 S.C. 254, 692 S.E.2d 510 (2010) and Grier v. AMISUB, 725 S.E.2d 693 (2012).

Kimmer seeks damages for the workers compensation benefits that he lost due to Wright's negligence. He seeks no other damages (except prejudgment interest). He did not know that those benefits were lost until – at the earliest (because in 2005 the Circuit Court reversed the July 2003 workers compensation commission ruling) – July 31, 2003, when the workers compensation ruling was issued.

The distinction between when a breach of duty occurs and when damages flow from that breach was delineated by this Court in Epstein and in City of Newberry. This point was misapprehended by the panel Opinion.

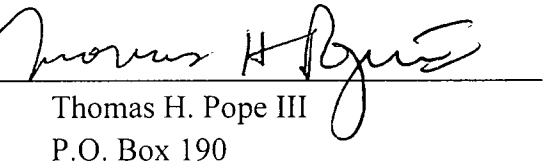
The effect of the Opinion of the Court of Appeals would be to require parties to commence malpractice suits that are not yet ripe, and may never be, because no damage has been suffered and all four elements of the cause of action are not present.

As argued herein, as an additional sustaining ground, the Opinion should be reversed under the doctrine of equitable tolling.

The Opinion of the Court of Appeals should be reversed, and the circuit court order granting partial summary judgment to Kimmer should be affirmed.

Respectfully submitted,

POPE AND HUDGENS, P.A.

By: 

Thomas H. Pope III
P.O. Box 190
1508 College Street
Newberry, SC 29108
P: 803-276-2532; F: 803-276-8684
thpope@popeandhudgens.com

Attorneys for Petitioner
Carol M. Kimmer

August 5, 2013

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Reply Brief of Petitioner Carol M. Kimmer, P.R. of the Estate of Richard Kimmer, deceased, complies with Rule 211(b), SCARC.

Respectfully submitted,

POPE AND HUDGENS, P.A.

By: _____

Thomas H. Pope III
Pope & Hudgens, P.A.
Post Office Box 190
Newberry, South Carolina 29108
(803) 276-2532
thpope@popeandhudgens.com

Attorneys for Petitioner Carol M. Kimmer, P.R.
of the Estate of Richard Kimmer, deceased

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PROOF OF SERVICE

I certify that I have served one copy of the Reply Brief of Petitioner Kimmer, together with one copy of the Proof of Service, in the above matter on Respondent Philip E. Wright, by depositing said copies in the United States mail, postage prepaid, on August 5, 2013, addressed to his attorney of record:

Warren C. Powell, Jr.
Bruner, Powell, Wall & Mullins, LLC
PO Box 61110
Columbia, SC 29260
Attorneys for Respondent Philip E. Wright

Thomas H. Pope III – S.C. Bar No. 4508
Pope & Hudgens, P.A.
PO Box 190
Newberry, SC 29108
803-276-2532
Attorneys for Petitioner Carol E. Kimmer, PR of
the Estate of Richard Kimmer, deceased

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