THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE CLARENDON COUNTY
Court of Common Pleas

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

Case No. 2010-CP-14- 0457

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

v.

SCOTT L. ROBINSON and JOHNSON
McKENZIE & ROBINSON, LLC, Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the lower court erred in holding Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford ("Stokes-Craven") knew or should have known that it had a legal malpractice claim against its lawyer as of the date of the adverse verdict against it in *Austin v. Stokes-Craven* and that therefore, the statute of limitations bars Stokes-Craven's legal malpractice suit?
2. Whether *Epstein v. Brown* should be overruled to the extent that it holds the statute of limitations in a legal malpractice action commences before a remittitur, and whether this Court should adopt a bright line rule that the statute of limitations does not commence until a remittitur has been issued?
3. Whether the lower court erred in holding as a matter of law that neither equitable estoppel nor equitable tolling is applicable to Stokes-Craven's legal malpractice claim?
4. Whether the lower court erred in failing to grant Stokes-Craven's motion for partial summary judgment as to the legal malpractice of the Respondents?
5. Whether the lower court erred in holding respondents' communications with their malpractice carrier are subject to work product protection?
6. Whether the lower court erred in holding that Respondents complied with certain of Stokes-Craven's discovery requests, and in further denying sanctions to Stokes-Craven where Stokes-Craven prevailed on its motion to compel discovery?

STATEMENT OF THE CASE

This appeal arises out of the Honorable George C. James, Jr.'s order dated June 6, 2013, in which he granted the respondents' summary judgment motions based upon the statute of limitations and the order of the Honorable Clifton Newman dated September 24, 2012, related to Stokes-

Craven's motion to compel discovery. Three significant issues are presented in this appeal. First, this appeal challenges the trial courts application of *Epstein v. Brown,* 363 S.C. 372, 610 S.E.2d 816 (S.C. 2005), and further challenges the viability of *Epstein* as precedent.

The second issue the Court is asked to address concerns the interpretation of the Court's opinion in *Austin v. Stokes-Craven*, 387 S.C. 22, 691 S.E.2d 135 (S.C.2010). Specifically the Court is asked to address what constitutes the majority holding of the Court as to issue preservation by Stokes-Craven's trial counsel (the defendants/respondents in this suit) in *Austin v. Stokes-Craven.*

The third issue presented by this appeal concerns discovery and, at bottom, focuses upon the point at which the respondents actions are not advocacy but rather evasive and obstructionist.

This legal malpractice action arises out of the conduct of Stokes-Craven's trial counsel in the case of *Donald C. Austin v. Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford*, case no. 2004-CP-14-135 ("the underlying case"). A verdict was rendered against Stokes-Craven in the amount $26,371.10 actual and $216,600.00 punitive damages. Stokes-Craven was represented by attorney Scott L. Robinson of Johnson, McKenzie, and Robinson, LLC, the defendants/respondents in this case.

On August 16, 2010, Stokes-Craven filed a legal malpractice action against Mr. Robinson and his firm, claiming that respondents were negligent in their representation of Stokes-Craven.

Stokes-Craven filed a motion for partial summary judgment based primarily upon this Court's opinion in *Austin v. Stokes-Craven* in which a majority of Justices of this Court ruled that Stokes-Craven's trial counsel failed to preserve certain issues for appellate review. The respondents filed their motions for summary judgment based upon the statute of limitations, arguing that the statute was triggered on August 17, 2006, the date of the adverse jury verdict against Stokes-Craven.

On June 6, 2013, the Honorable George C. James, Jr. granted respondents' motions for summary judgment, finding that the statute of limitations commenced on August 17, 2006, and therefore, Stokes-Craven's malpractice claim was barred. Judge James declined to consider Stokes-Craven's motion for summary judgment on the grounds that he granted respondents' motions.

Stokes-Craven timely noticed its appeal on June 27, 2013.

STATEMENT OF THE FACTS

Stokes-Craven's malpractice claim is predicated on three separate allegations of malpractice. Failure by Stokes-Craven's counsel, Scott Robinson of Johnson, McKenzie and Robinson, in the underlying case of *Austin v. Stokes-Craven* to:

i. Investigate and discover the case being brought by Austin against Stokes-Craven;

ii. Settle the case brought by Austin against Stokes-Craven rather than try the underlying case;

iii. Object at the actual trial of the case to incompetent evidence and move for a directed verdict on the basis that there was no proof of actual damages.

The following facts are not in dispute. Scott Robinson of Johnson, McKenzie and Robinson:

i. Failed to serve Interrogatories or Requests for Production;

ii. Failed to depose any witness, lay or expert;

iii. Failed to request the name of experts, vitae of experts, or expert reports;

iv. Failed to prepare or submit a pretrial brief, voir dire, or requests to charge;

v. Failed to notify Stokes-Craven's insurance company of the covered claims;

vi. Advised counsel for Austin in interrogatory responses that there was no insurance coverage applicable to the case;

vii. Failed to object at trial to testimony that the vehicle the subject of the lawsuit had "zero"

value;

viii. Failed to move for a directed verdict on the grounds that the Plaintiff had offered no competent evidence of the value of the vehicle, the subject of the suit;

ix. Withheld from Stokes-Craven that their lack of trial preparation and the conduct of the trial resulted in the adverse verdict against Stokes-Craven.

While Scott Robinson and Johnson, McKenzie and Robinson cannot dispute the above as Scott Robinson and Johnson, McKenzie, and Robinson's file, depositions, and the opinion of this Court in *Austin v. Stokes-Craven* prevent this, Scott Robinson and Johnson, McKenzie and Robinson explain their conduct as follows:

i. No discovery was conducted because Stokes-Craven was concerned that if discovery was conducted that Austin would conduct additional discovery in which Austin sought the customer list of Stokes-Craven. Stokes-Craven obviously disputes this but there is no writing by Scott Robinson and Johnson, McKenzie and Robinson confirming their version and in fact, Scott Robinson and Johnson, McKenzie, and Robinson have no retention letter and the writings are primarily numerous transmittal letters for consent orders for continuances. (See e.g. Depo of Scott Robinson pg 31, pgs 54-55).

ii. The claim was not reported to Stokes-Craven's insurers because Stokes-Craven did not want it reported. Stokes-Craven obviously disputes this but further Scott Robinson and Johnson, McKenzie and Robinson misrepresented in interrogatory responses that there was no coverage.[1] That Scott Robinson and Johnson, McKenzie and Robinson claim Stokes-Craven

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1 After repeated objections and being asked the same question over and over again, respondents' expert finally conceded that it would be inappropriate for Mr. Robinson to have represented in interrogatory responses that there was no insurance coverage when Mr. Robinson never asked for or

did not want to report the claim would not explain the misrepresentation in the interrogatory response.

iii. Scott Robinson and Johnson, McKenzie and Robinson respond to the allegations of no pretrial brief, no proposed voir dire, and no proposed jury charges to the effect it was not needed or required. (See e.g. Depo of Scott Robinson pg 101).

iv. As to the failure to preserve issues for appeal, neither respondents nor their expert contend this was a trial strategy, but rather Scott Robinson claims the court in *Austin v. Stokes-Craven* misapprehended his conduct. (See e.g. Depo of Scott Robinson pgs 21-22).

v. This was Mr. Robinson's third common pleas/jury trial. (See Depo of Scott Robinson pg 7).

He had no assistance at trial from Johnson, McKenzie and Robinson. (See Depo. of Steven McKenzie, pg 54). Mr. McKenzie defends Johnson, McKenzie and Robinson's decision because Mr. Robinson told him the maximum exposure was no more than the value of the wrecked vehicle. (See Depo. of Steve McKenzie pgs 43-44).

While it is difficult in a case alleging forgery against a used car dealership to accept that Mr. McKenzie would accept Mr. Robinson's evaluation, more interesting is that Mr. Robinson's now testimony is that Stokes-Craven was told of the danger and exposure of this case and Stokes-Craven would not settle. (See Depo of Scott Robinson pgs 95-96). There is of course no writing, no case evaluation, and no explanation of exposure and no suggestion that the case be settled. Nothing.

Nowhere is Mr. Robinson's lack of experience more evident than in the conduct of the trial. This Court's opinion in *Austin v. Stokes-Craven* vividly recounts Mr. Robinson's actions but consider further that it never occurred to Mr. Robinson that Austin's counsel would call Stokes-

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reviewed the policy. (Depo of William Durant, Esq. pgs 70-83, generally; specifically pg 83).

Craven witnesses to the stand in Austin's case. Mr. Robinson had not talked to any of his client's witnesses before trial. The trial vignette below captures perfectly Stokes-Craven's plight in Mr. Robinson's hands:

> **Q.** Okay. Now you've discussed this matter with Mr. Craven, Dennis Craven, Before Today, Right?
> **A.** A couple years ago that whenever this started up he had mentioned it to me if I remembered the deal at all and...
> **Q.** When was the last time you talked to him about it?
> **A.** Well, yesterday he told me he was gonna call me up here and...but we didn't discuss anything about it. I don't know exactly.
> **Q.** So you really haven't discussed this case with anybody since June, July...well, maybe August or September of 2002. Is that...is that a fair statement?
> **A.** That's a fair statement.

(Trial Transcript of Austin v. Stokes-Craven, Mr. Moskos' direct of Mr. Frierson pg 460, line 25 to 461 line 12; Depo of Dennis Craven pgs 32-34).

Mr. Robinson's inexperience was compounded by his lack of effort. Truly he did nothing to prepare. His explanation was that Stokes-Craven worried that if he attempted discovery that Austin would seek Stokes-Craven's customer list and a class action would be filed. (Depo. of Scott Robinson pgs 67-68, 71). While denied by Stokes-Craven and evidenced by no writings, the names of the buyers of automobiles was available to Austin's counsel, a lawyer whose practice is largely related to claims such as this, from the Department of Motor Vehicles.

Regrettably, one simple act would have protected Stokes-Craven from Mr. Robinson's inexperience; turning the claim over to Stokes-Craven's insurer. The indemnity provided by the coverage would have been useful in settlement. More valuable is that there are only experienced lawyers on the approved list of counsel for writers of "garage liability" coverage. This mishap was preventable and reporting this claim with the attendant appointment of seasoned counsel would have

assured a very different result.

ARGUMENT

1. Standard of Review

a) Summary Judgment Appeals

In reviewing the grant of a summary judgment motion, the appellate court applies the same standard as the trial court under Rule 56(c) SCRCP: "summary judgment is proper when 'there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.'" *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438–439 (S.C.2003). In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625,628,541 S.E.2d 831, 833 (S.C. 2001).

b) Discovery Appeals

A trial judge's ruling on discovery matters will not be disturbed on appeal absent an abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (S.C.1989). An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law. *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., Inc.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) (internal citations omitted).

2. Statute of Limitations

Stokes-Craven first maintains that under existing law, the lower court erred in granting the Respondents' motion for summary judgment on the basis of the statute of limitations. Further, Stokes-Craven contends that *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (S.C. 2005) should be overruled to the extent that it holds the statute of limitations on a legal malpractice claim commences

before remittitur or that the statute of limitations commences when counsel in the trial court remains counsel in the appeal and concedes his wrongful conduct (in other words, Stokes-Craven urges the statute of limitations is tolled in such circumstances).

a) The Lower Court Erred in Holding as a Matter of Law that the Statue of Limitations on Stokes-Craven's Legal Malpractice Claim Began to Run as of the Date of the Adverse Jury Verdict Against Stokes-Craven

The Lower Court erred in granting summary judgment in favor of Respondents based upon existing law as there is a genuine issue of material fact.

Application of the discovery rule contained in S.C.Code Ann. § 15-3-535, as well as the determination of the date the statute began to run in a particular case, are questions of fact for the jury. *See Johnston* v. *Bowen,* 313 S.C. 61, 64, 437 S.E.2d 45,47 (S.C. 1993) (whether a claimant knew or should have known that they had a cause of action is question for the jury); *Santee Portland Cement Co.* v. *Daniel Int'l Corp.,* 299 S.C. 269, 274, 384 S.E.2d 693, 696 (S.C. 1989) (application of discovery rule to a claim is a question of fact for the jury), overruled on other grounds by *Atlas Food Sys. and Servs., Inc.* v. *Crane Nat'l Vendors Div. of Unidynamics Corp.,* 319 S.C. 556,462 S.E.2d 858 (S.C. 1995).

Despite the foregoing, the lower court held as a matter of law that, after a review of the deposition testimony of Dennis Craven, a principal of Stokes Craven, that Mr. Craven's testimony "**as a whole**" establishes as a matter of law that Stokes Craven knew or should have known it **might** have a claim on the date the verdict was rendered." (Order pg 10)(emphasis in original). Specifically, the lower court held that Stokes Craven had "inquiry notice" of the following errors made by Respondents at or during the trial of the underlying case:

> Here, Mr. Craven stated in his deposition that when he testified at trial in the Underlying Action, he realized he had never seen the interrogatory answers

> prepared by his lawyer and that some of the answers were incorrect. He knew during trial that Mr. Robinson had not interviewed Kenny Craven until two days before trial. He knew during trial that forgery was an important issue and that no handwriting sample had been taken from Mr. Frierson. He knew during trial that Mr. Robinson had not attempted to locate and call Mr. Thornall as a trial witness. He knew during trial that he was of the opinion that Mr. Robinson had not adequately investigated the case.

(Order pg 11). The Order signed by Judge James and quoted above mischaracterizes Mr. Craven's deposition testimony as is illustrated below.

i. <u>failing to diligently investigate the facts and interview potential witnesses</u>:

With regard to investigating the facts, including interviewing potential witnesses, Mr. Craven testified that <u>*today*</u> he recognizes Mr. Robinson failed to adequately prepare the case for trial, but that at the time, he had no previous experience with litigation and did not know there was an issue with Mr. Robinson's trial preparation or investigation of the facts. Judge James' Order does not accurately portray the deposition testimony. Mr. Craven testified at his deposition:

> Q. So my question to you is, going back to the complaint, you allege in -- Stokes-Craven, the plaintiff, alleges in the complaint that the defendants were negligent in failing to use due diligence in the investigation of the facts of the underlying case, and so is this an example – would you have expected your attorney to speak to Mr. Frierson before two days before the trial?
> A. Yes.
> Q. Okay. Is that an example of what you're alleging here in the complaint of their failing to use --
> A. Yes.
> Q. -- due diligence? Okay. Okay. You see how -- you see the dialogue we're getting into? I'm trying to isolate what -- examples of what you mean in the complaint. Fair enough?
> A. Got you.
> Q. Okay. Now, and I'd say to -- just to make this clear, a number of these issues, as you might expect, are contested in this case. This is the plaintiff's opportunity to provide their side of it.
> A. Got you.
> Q. Fair enough?
> A. Fair.
> **<u>Q. Okay. Okay. Next, we're going to get into some other examples, but</u>**

can you -- can you right now off the top of your head provide other instances which the plaintiff would contend that the defendants did not investigate the facts of the case sufficiently prior to the trial? We'll get into -- we'll get into the transcript which might -- which might refresh your memory.
A. Okay.
Q. But can you think of anything else right now off the top of your head?
A. The things that was not done --
Q. Yeah.
A. -- that I felt like they should have been done.
Q. Investigate the facts. We're on this --
A. Right.
Q. -- specific allegation right now.
A. There's a lot of things now that I see that should have been done. At the particular time, I wouldn't have known of what needed to be done or not needed to be done.
Q. Okay. Let's go through --
A. Yes, there are some things now, yes.

(Deposition of Dennis Craven, pg 33, line 4 through pg 35, line 18). The lower court erred in finding as a matter of law that Mr. Craven "knew during trial that he was of the opinion that Mr. Robinson had not adequately investigated the case." This finding is contrary to the testimony of Mr. Craven.

ii. failing to obtain a handwriting sample:

Mr. Craven had no opinion at the time of trial and still has no opinion on whether a handwriting sample should have been obtained by Respondents. Thus, it was error for the Court to find as a matter of law that Mr. Craven's knowledge that no handwriting sample was obtained somehow constitutes knowledge of the Respondents' malpractice such that the statute of limitations commenced. Mr. Craven testified:

Q. Okay. And why was the handwriting sample an important thing?
A. There was a as-is form that was presented to Mr. Austin at the time that I did and that was shown that was signed as-is, and he denied that that was his signature, and that's where all this came from.
Q. So the authenticity of his signature became an issue?
A. Exactly.
Q. Okay.

A. Right.
Q. All right. And it was -- came – did you -- is it the plaintiff's position that Mr. Robinson should have objected to the witness giving his handwriting sample there in court that day?
A. I mean, I wouldn't have an opinion.
Q. You don't have an opinion one way or the other about that?
A. No.

(Depo of Dennis Craven, pg 37, line 17 through pg 38, line 12).

iii. failing to show Mr. Craven, or otherwise review with him, interrogatory answers prior to trial and the knowledge that some of the answers were incorrect:

As to Stokes-Craven's interrogatory responses, the lower court held that because Mr. Craven had not seen Stokes-Craven's answers to interrogatories prepared by the respondents until the day of trial and that allegedly some of the answers were incorrect, Stokes-Craven had knowledge of the respondents malpractice such that the statute of limitations commenced as of the date of the verdict in the Austin case. This finding is in error as: 1) Mr. Craven never testified that any of the interrogatories prepared by Mr. Robinson were incorrect and 2) as quoted above, Mr. Craven repeatedly testified that, at the time of the trial, he had never been sued before, had never participated in litigation, and had no idea what an attorney should or should not do to prepare a case for trial. Mr. Craven did not have any idea that he should have seen the interrogatories response long before trial.

As to the "errors" in the responses, Mr. Craven actually testified:

Mr. Powell:
A. Number 14?
Q. Yes, sir. And you say what?
A. Barry Thornall visually inspected and appraised the subject vehicle prior to the trade. Trade in by Mr. Bailey.
Q. So going on to the next page, so back in 2005, Stokes-Craven was saying that Mr. Thornall actually did the inspection, right?
A. That's what the documents say.
Q. Are you telling me the document is wrong? And your answer's what?
A. No, I told you earlier that that wasn't true who appraised the car. The

document -- Mr. Robinson could have gotten this from one of my managers also.
Q. Let's -- excuse me, Mr. Craig. (sic) Let's go back. The court reporter's got to pick this up. If you could, read that a little more slowly if I could -- beginning at line 5. **Are you telling me the document is wrong, and your answer was?**
A. **No, I told you earlier that I wasn't sure who appraised the car. This document, Mr. Robinson could have gotten this form from one of my managers also.** There are various questions here.

(Depo of Dennis Craven pg 51, line 9 to pg 52, line 2).

iv. failing to keep Stokes-Craven more informed and failing to prepare Mr. Craven for cross-examination:

The lower court found Mr. Craven testified the trial likely would have turned out more favorably to Stokes-Craven if Stokes-Craven had been more informed and if Mr. Robinson had better prepared Mr. Craven for cross-examination. (Order pg 9). This finding too is in error and conflict with the testimony of Mr. Craven. Mr. Craven actually testified that even if he had been better prepared, his answers on cross-examination would not have been any different:

Mr. Powell:
Q. So Kenny shouldn't have been appraising this truck, right, based on this response?
A. Correct.
Q. Was that -- were you ready for that question at trial?
A. Ready as did someone prep me or did --
Q. Yes, sir. Were you prepared for that question?
A. No.
Q. If you had been more prepared, would you have given a different answer?
A. No.
Q. That would have been the same answer?
A. Same answer.

(Depo of Dennis Craven pg 46, lines 10-23).

v. failing to settle the case:

The lower court found that because Mr. Craven testified : 1) he was not "confident in Stokes-Craven's position" going into trail; 2) he felt that Stokes-Craven may have "done something wrong in its dealings with Mr. Austin;" and 3) he admitted that he "concluded in 2002 that there had been a forgery" that Stokes-Craven "knew, or at least as a matter of law should have known, that Stokes-Craven **might** have a claim against its attorney for failing to settle the case" as "all of these factors were well within Mr. Craven's grasp at the time the verdict was rendered." (Order pg 9).

First, the lower court erred in finding the facts as Mr. Craven testified that he was unsure whether there was a forgery:

> Q. Okay. And that was -- were you – going into the trial, did you feel that that had been --
> were you satisfied in your own mind that that document had been forged?
> A. I didn't know. I knew that the customer clearly stated that that was not his, so that leaves no other option, you know, that -- well, who's signature is it? And there's an uncertainty. I didn't know where we were going to go with that.

(Depo of Dennis Craven pg 56 line 19 through pg 57 line 2). Second, Mr. Craven testified that he turned the case and the demand letter made by Mr. Polito, Austin's attorney, over to Mr. Robinson and that he believed Mr. Robinson had attempted to settle the case, but had never received a response. Mr. Craven testified:

> Q. After those two meetings, there was never an opportunity to settle the dispute with Mr. Austin, between he and Stokes-Craven Ford, over this entire matter?
> A. Yes. There was a -- his first attorney sent a question in to us asking for us to make good. I handed the documents over to Mr. Robinson, and I said, you tell me what needs to be done and you handle it. And his reply was, you know, what are their damages back to them, and they never replied back to him.
> Q. You say he wrote a letter?
> A. I don't know if he wrote a letter or he called them, but I know he called -- made a contact with them of saying, you know, what are your -- tell me what your damages are and we'll be glad to take care of them.

Q. Okay.
A. And there was never no reply back from that comment.
Q. Okay.
A. Now, I don't know if that was a no comment back to Scott or was it no -- I know it was no contact back to me, but I don't think it was a contact back to Scott.

(Depo of Dennis Craven pg 58 line 19 through pg 59 line 21). If Mr. Craven believed his attorney had made a good faith effort to settle the case, but had been rebuffed by Mr. Austin and his lawyers, how could the failure to settle the case put Mr. Craven on notice, at the time of the jury verdict, that Stokes-Craven had a legal malpractice claim against its attorneys? Mr. Craven's testimony, taken "as a whole" or "point by point," establishes that there is, in the very least, a question of material fact regarding when the statute of limitations commenced on Stokes-Craven's legal malpractice claim.

b) The Lower Court's Reliance on *Epstein* is misplaced as the Facts of *Epstein* are Quite Different

The lower court relied primarily on *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (S.C. 2005) in holding that the statute of limitations on Stokes-Craven's claim began to run as of the date of the jury verdict and likened the facts of Epstein to those in the present case.

In *Epstein*, the Supreme Court specifically held, "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. This Court reasoned:

> Under the facts of this case, we find Dr. Epstein clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial. The damages he claims are largely those to his reputation, and the claims he raises in his complaint are primarily related to trial and pre-trial errors. **Counsel for Dr. Epstein conceded at oral argument on the summary judgment motion that "some of the allegations down there, your Honor, were within the man's knowledge when the verdict came in."** Further, in a letter from Dr. Epstein to his appellate attorney, Steven Groves, **Dr. Epstein**

> **indicated both that he would not deal with Mr. Brown, and that "I believe that my representation was so egregiously lacking."** It is patent Dr. Epstein knew, or should have known, of a possible claim against Brown long before this Court denied certiorari in January 2001. Accordingly, we find the trial court properly granted summary judgment on this issue.

Id. at 382-83. (emphasis added). The Court does not hold that clients are automatically charged with knowledge of trial and pre-trial errors. Instead the Court held that, on the record before it, Epstein was charged with such knowledge. A review of the lower court documents in Epstein is helpful as the record is more developed in these documents. For example, some of the trial and pre-trial errors alleged by Dr. Epstein were as follows:

> 'failing to assert claims and causes of action against other parties involved in the care and treatment of Mr. Welch, including other parties to the original Welch case as well as certain other third parties'

(See Exhibit A: 2002 WL 34459537, Memo in Support of David Brown, Esq.'s Motion to Dismiss based on the Statute of Limitations, pg 3, paragraph c). This alleged error is in the purview of a person of common knowledge as a layperson can read a caption and understand a party who they believe should be named in the complaint is not named.[2]

Dr. Epstein further alleged his attorney erred in:

> 'adopting and attempting to assert at trial a substantive defense that was contrary to the Plaintiff's own medical opinions and contradictory to the medical record for Mr. Welch'

(See Exhibit A: 2002 WL 34459537, Memo in Support of David Brown, Esq.'s Motion to Dismiss based on the Statute of Limitations, pg 3, paragraph f). This alleged error was known to Dr. Epstein as, in the words of Mr. Brown, "Dr. Epstein as a medical professional was more than capable of understanding the medical defense presented by David Brown. It is beyond dispute that Dr. Epstein

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2 See *Kelley v. Logan, Jolley and Smith, LLP* 383 S.C. 626 (S.C. 2009) so holding.

would have known the defenses asserted by David Brown were contrary to his own opinions; indeed, the Complaint expressly allege [sic] as much." Id. pg 6.

Dr. Epstein further alleged his attorney erred in:

> 'not providing the Plaintiff's file material to the Plaintiff, despite repeated requests'

See Exhibit A: 2002 WL 34459537, Memo in Support of David Brown, Esq.'s Motion to Dismiss based on the Statute of Limitations, pg 3, paragraph n). This alleged error is clearly in the purview of a person of common knowledge as one would know if a file that was requested by the client was not provided to him.

Most importantly, Epstein was charged with **actual knowledge** of Brown's malpractice. See *Epstein v. Brown*, 2003 WL 25774844 (Common Pleas 2003) ("Dr. Epstein was on **actual notice of Brown's conduct before and during trial**")(emphasis added).

Finally, as cited above, the Supreme Court stated counsel for Dr. Epstein conceded some of the allegations of malpractice were within Dr. Epstein's knowledge when the verdict was returned and that Dr. Epstein was writing letters referring to the representation by his lawyer as "egregiously lacking." By contrast, Mr. Craven, who had no notice of any facts to suggest the malpractice of Mr. Robinson let alone actual knowledge, "insisted" that the respondents provide him a bill for legal services, expressed his confidence in Mr. Robinson, and even rode up to Columbia for the Supreme Court arguments with Mr. Robinson. (See Exhibit B: Affidavit of Dennis Craven ¶ 12).

Mr. Robinson testified:

> 24 THE WITNESS: To some extent. Again,
> 25 I wasn't looking to make sure I got recouped
> 140
> 1 every penny for every minute I spent on this
> 2 case. But Dennis insisted that I send him a bill

so I got him a bill.
BY MR. EPTING:
Q. And was the bill paid?
A. Yes.

(Exhibit C: Deposition of Scott Robinson, pgs 139-140). Mr. Johnson testified:

And I know Dennis had confidence in Scott.
BY MR. EPTING:
Q. Have you had any discussions with Mr. Craven about this case?
A. We had discussions early on. Just general, about the disappointment in the result.
Q. Meaning after the verdict?
A. Yes.
Q. And what do you recall he said?
A. I just recall that he said he was just stunned. That he had no idea that that could happen.

(Exhibit D: Deposition of William Johnson, pg 49, lines 12-23).

In his legal malpractice suit, Dr. Epstein alleged pre-trial and trial errors committed by his attorney. In the present case, Stokes-Craven alleges pre-trial and trial errors committed by his attorneys. This is where the similarities between the facts in *Epstein* and the facts in the present case begin and end. Even after Mr. Powell, counsel for the defendant Johnson, McKenzie and Robinson, LLC, tried to walk Mr. Craven into testifying in accord with the facts in *Epstein*, it is clear that factually, the present case is easily distinguished from *Epstein*. For example, Mr. Powell attempted to use the trial transcript to get Mr. Craven to concede that he knew, at the time of the Austin trial, that Mr. Robinson had failed to adequately investigate the facts of the case.

Q. Okay. Okay. Next, we're going to get into some other examples, but can you -- can you right now off the top of your head provide other instances which the plaintiff would contend that the defendants did not investigate the facts of the case sufficiently prior to the trial? We'll get

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into -- we'll get into the transcript which might -- which might refresh your memory.
A. Okay.
Q. But can you think of anything else right now off the top of your head?
A. The things that was not done --
Q. Yeah.
A. -- that I felt like they should have been done.
Q. Investigate the facts. We're on this --
A. Right.
Q. -- specific allegation right now.
A. There's a lot of things now that I see that should have been done. At the particular time, I wouldn't have known of what needed to be done or not needed to be done.
Q. Okay. Let's go through --
A. Yes, there are some things now, yes.

(Exhibit E: May 19, 2011 Deposition of Dennis Craven page 35). Mr. Powell continued along this vein, and Mr. Craven continued to testify that **today** he believes Mr. Robinson should have shown him a copy of Stokes-Craven's interrogatory responses before trial, should have better prepared him for cross examination, and should have interviewed witnesses earlier. However, Mr. Craven consistently stated that he did not know or understand any of this at the time of trial or for years after as he was not knowledgeable regarding an attorney's duties in preparing for trial or trying cases. Mr. Craven testified:

Q. Now, the question was -- going back a couple questions -- prior to the case -- prior to

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the commencement of the trial, was Stokes-Craven Ford -- were you on its behalf -- did you feel good about your defense of the case? Were you confident of a good outcome?
A. Let's define that a little bit if we could. Do I feel like I'm confident by going in the courtroom, no. **Am I confident about are we --**

8 all the preparation is done in advance? I wouldn't
9 know that answer.

(Exhibit E: May 19, 2011 Deposition of Dennis Craven pg 55, line 24 to pg 56, line 9).

19 Q. Okay. So getting back to the question,
20 then, prior to the beginning of the trial, the day
21 before the trial, did Stokes-Craven Ford have a --
22 did it feel like it had a 50/50 chance of winning
23 or a 60/40 chance of winning or can you speak to
24 that at all?
25 A. No, I really can't because never been in
1 this position before. I didn't know what was
2 headed of me.

(Exhibit E: May 19, 2011 Deposition of Dennis Craven pg 57, line 19 to pg 58, line 2).

9 Q. When you went into trial the first day of
10 the Austin trial on August the 14th, 2006, what
11 expectation did you have as to the outcome of the
12 trial? Did you have any?
13 A. No, I didn't. It was first time I've ever
14 been in a courtroom, so I was just hanging on.

(Exhibit E: May 19, 2011 Deposition of Dennis Craven pg 161, lines 9-14).

The simple truth is, Mr. Craven, together with the vast majority of laypeople, reasonable people with common knowledge and experience, are not knowledgeable regarding the duties of attorneys in preparing a case for trial, and they are certainly not knowledgeable regarding trial practices and evidentiary objections – nor does the law require them to be. The only possible indication, apparent to a lay person, of any error made by the respondents was the adverse verdict itself, and South Carolina law is clear: "[K]knowledge of injury alone does not, *a fortiori*, give rise to a suspicion of any impropriety by [its] attorney." *True v. Monteith*, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (S.C.1997); *See also Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275 (S.C. 2010) (Rejecting as a matter of law that a "bad result" is evidence of the breach of the standard of

care). In *True,* the Supreme Court reasoned:

> **If we accept as true petitioner's allegations that Monteith did not disclose to her the conflict of interest and she was unaware of the dual representation, the fact that petitioner knew of her injury (no cost-of-living clause) in 1973 would not necessarily provide notice to her that she may have a cause of action for legal malpractice**. Contrary to respondents' contention, knowledge of injury alone does not, *a fortiori,* give rise to a suspicion of any impropriety by her attorney. **Under § 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another.**
>
> **Although petitioner knew of the lack of the cost-of-living clause in the lease, this knowledge alone is insufficient to put petitioner on notice to investigate the possible malfeasance of her attorney**.

Id.

Here, as in *True*, the Respondents did not disclose that Mr. Robinson failed to adequately prepare the *Austin* case for trial, failed to properly advise Stokes-Craven as to settlement, and made errors during the trial of the Austin case. Rather, the Respondents blamed the large verdict on the unpredictable nature of juries and advised Stokes-Craven to appeal. The first and only time the Respondents disclosed any possible malpractice to Stokes-Craven was after the Supreme Court's opinion was issued in March of 2010, when Mr. McKenzie admitted to Dennis Craven that Mr. Robinson had failed to appreciate Stokes-Craven's exposure in the *Austin* case.

See Exhibit E: May 19, 2011 Deposition of Dennis Craven pages 90-91:

Q. Yeah. And I'll ask you directly, did Mr. McKenzie during those conversations within a couple weeks after the verdict mention anything to you about whether they had -- whether his partner in the firm had messed up the case or screwed up the case?
A. Weeks after?
Q. Yes, sir.
A. No.
Q. Did he ever do that?
A. Yes.

Q. When?
A. I'd say within the last year.
Q. Just within the last year?
A. Yes.
Q. Okay. And in what -- under what circumstance?
A. That they were over their head in this

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particular incident, didn't see the liability that was coming -- forthcoming, and wanted to know what -- excuse me, he used the term exposure, what was -- didn't realize my exposure was that big.
Q. And where was this -- where did this conversation take place?
A. In my office.
Q. Okay. And what was he doing there?
A. I invited him there.
Q. To -- for what purpose?
A. To ask his opinion in what should I do to go forward because I was getting ready to lose my business.
Q. And what did he tell you?
A. What I just said, that, you know -- all those things that I just mentioned to you.
Q. Okay.
A. Yes, you need to do what you need to do and go forward.

Mr. McKenzie corroborated the timing of his discussion with Mr. Craven "...the time that I did talk to Dennis about the case was...this was after the Supreme Court opinion had come down" (Exhibit G: Deposition of Steven McKenzie, pg 55).[3]

3 Mr. McKenzie also corroborated that fact the Mr. Robinson failed to appreciate Stokes-Craven's exposure. Mr. McKenzie testified: "So I said, Scott, what do you believe your exposure in this case to be? And I recall him saying that he believed it to be no more than the value of the vehicle. That Dennis may have to buy the vehicle back." (Exhibit G: Deposition of Steven McKenzie, Esq. pgs 43-44); "And, of course, it was a large verdict, it was $200,000 plus I believe. And, you know, to be honest with you, I was a little stunned. Not a little stunned, I was stunned. Because I had not expected it to be anywhere near that. Obviously, I mean, I thought probably Scott -- like I was relying on Scott's judgment, and he thought it was a verdict that was going to be -- the exposure was going to be limited." (Exhibit G: Deposition of Steven McKenzie, Esq. pgs 51-52).

The first time that Mr. Craven became aware of any facts that would put a person of common knowledge and experience on notice that he might have a claim against the Respondents was at a meeting on June 9, 2009 with his appellate counsel, after the appellate briefing was completed and before the oral arguments in the Supreme Court. Mr. Craven stated that at the meeting Mr. Brown and Mr. Buckley, of Young Clement Rivers, LLP explained that Austin's attorneys were claiming Mr. Robinson had made mistakes in failing to make proper objections during the trial which might mean the verdict would not be reversed. (See Exhibit B: Affidavit of Dennis Craven ¶ 11). Mr. Brown corroborates Mr. Craven's testimony:

Q Did you have a discussion with either Charity Chastain, Mr. Craven or anyone else on behalf of Stokes-Craven Holding Corporation with regard to the merits of the appeal, the likelihood of success, the weaknesses, the strengths?
A We went over the issues that had been raised, both by Mr. Moskos and by our sides on whatever that meeting was in the summer before the oral argument. I think it was, like I said, late May or early June. It'll be reflected in the billing records.

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Q Were there -- one of the things that I did not see looking through, were there any status reports to Mr. Craven or to Charity Chastain about your opinion as to where things were going in the case?
A No, they did not require status reports. And until the briefing was completed, I don't think I really provided any that I know of.
Q Were these sometimes given to Ms. Chastain verbally?
A I don't -- I don't recall giving her any verbally. I don't know whether she received copies of the briefs or not. I just don't know.
Q Did you express an opinion to her as to the bad parts of the appeal, the good parts of the

19 appeal, where it seemed to be going, what you were
20 doing with the money you were being paid to handle
21 the appeal or anything like that?
22 A We had a big conversation about that.
23 That's the June entry that we discussed earlier
24 where we talked about the issues that had been
25 raised, what we had said in response to them, what

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1 could happen, what could not happen, the
2 unpredictable nature of our Supreme Court.

(Exhibit F: Deposition of Steven Brown, Esq. pgs 45, 70-71).

Epstein is a far different case on the facts: Stokes-Craven was on notice of a potential claim no earlier than June 09, 2009.

c) The Lower Court Erred in Finding as a Matter of Law that Stokes-Craven had "Constructive Notice" of its claim against Respondents as a result of Appellate Counsel's Representation

The lower court held: "In addition, the testimony of Stokes-Craven's appellate attorney compels the conclusion that Stokes-Craven had constructive notice of the claim by May 2007 (at the latest), the date its appellate lawyers reviewed the transcript and identified issue preservation concerns." (Order pg 8).

Both Steven Brown and Ed Buckley, the two Young Clement Rivers appellate lawyers that represented Stokes-Craven in the appeal, stated that they had not been retained to advise Stokes-Craven with regard to any legal malpractice committed by the defendants, nor had they formed any opinions about the malpractice of the respondents. (Depo of Brown pg 37, lines 4-19) (Depo of Buckley pg 37, lines 13-21, pg 53, lines 7-17). Mr. Buckley and Mr. Brown were strictly appellate counsel and did not undertake to advise Stokes-Craven regarding the malpractice of its trial lawyers. (See Brown Depo, pg 58 lines 12-20). Mr. Brown testified as follows:

A. Whenever I would go through and read the transcript, if I had questions, I

> would call Mr. Robinson. He was on the -- remained on the appeal with us. He was very -- always happy to answer any question I provided to him, and we ultimately got the case briefed."
>
> Depo of Brown, pg 20, lines 9-14). Mr. Brown Further testified:
>
> Q Are you aware of any -- after Young, Clement, Rivers was engaged by Stokes-Craven as its attorney, were you aware of any substantive communications between Mr. Robinson or anyone in his law firm with Stokes-Craven Ford?
> A I don't -- I don't know one way or the other. I --
> Q But you're just not aware of it?
> A I'm not aware of it. I knew that – that I was -- Mr. Robinson -- we were retained to be appellate counsel. Mr. Robinson was still to be on the file. He was still available to answer questions. He was available to me to assist in whatever I needed, and so I don't know what he did in terms of his communications with other people, including Stokes-Craven. I just don't know. I wasn't privy to that.

(See Brown Depo, pg 58 lines 4-20). Further, the representation agreement between Stokes-Craven and Young Clement limits the scope of Young Clement's representation to "all purposes in connection with an appeal."

The South Carolina Rules of Professional Conduct as well as South Carolina case law allow an attorney to limit the scope of his or her representation of a client. See SC RPC 1.2(c); see also *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.,* 399 S.C. 322, 334-35, 732 S.E.2d 166, 172 (S.C.2012), reh'g denied (Sept. 19, 2012), cert. denied, 133 S. Ct. 1255 (U.S.S.C. 2013) ("The scope of representation offered by Law Firm was strictly limited in the retainer agreement Law Firm had with RFT...Thus, a jury could have properly found there was no deceitful action by Law Firm"). Mr. Buckley and Mr. Brown were strictly appellate counsel and to impute their knowledge, if any, of the respondents' malpractice vitiates SC RPC 1.2(c).

Imputation of knowledge from a lawyer to his client does not extend to matters beyond the scope of the representation. *See Imputation of Attorney's Knowledge of Facts to His Client,* 4 A.L.R.

1592 (originally published in 1919); *Joe v. Two Thirty Nine Joint Venture*, 145 S.W. 150, 160 (Tex. 2004). "A client is not charged with a lawyer's knowledge concerning a transaction in which the lawyer does not represent the client." Restatement (Third) of the Law Governing Lawyers § 28A cmt. b (2000); *see also Trustees of Chicago Plastering Inst. Pension Trust v. Elite Plastering Co.*, 603 F. Supp. 2d 1143, 1150 (N.D. Ill. 2009).

The law aside, looking at this from an ethics point of view, respondents remain counsel for Stokes-Craven. Mr. Robinson is a good friend of Dennis Craven and they actually ride together to Colombia for the oral argument in the underlying case. Mr. Robinson has no duty to speak and can remain silent, while counsel which have assumed a limited appellate representation, have a duty to inform Stokes-Craven of its co-counsel's malpractice.[4]

d) *Epstein v. Brown* should be overruled to the extent that it holds the statute of limitations in a legal malpractice action commences before a remittitur. This Court should adopt a bright line rule that the statute of limitations does not commence until a remittitur has been issued.

Stokes-Craven respectfully requests this Court overrule *Epstein v. Brown* to the extent that it holds the statute of limitations in a legal malpractice action commences before remittitur.

Stare decisis is not an inexorable command: "There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right.... There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." *Smith v. Daniel Const. Co.,* 253 S.C. 248, 255-56, 169 S.E.2d 767, 771 (S.C.1969) (Bussey, J., dissenting) (*quoting Sidney Spitzer & Co. v. Comm'rs of Franklin County,* 188 N.C. 30,123 S.E. 636,

4 As to why the statute of limitations should commence on remittitur, this is the reason. The client is in the hopeless position of having counsel who does not speak and appellate counsel who, because of their limited representation, have no duty to speak and in this case, according to respondents, the statute of limitations runs before the appeal is decided.

638 (1924)). Therefore, *"[s]tare decisis* should be used to foster stability and certainty in the law, but[] ***not to perpetuate error.***" *Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n,* 277 S.C. 1, 4, 282 S.E.2d 230, 231 (S.C.1981), *superseded by statute on other grounds,* S.C. Code Ann. § 33-55-200 *et seq.* (2006).

In dissent in *Epstein,* Chief Justice Toal urged the adoption of a "bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until an appellate court disposes of the action by sending a remittitur to the trial court." *Epstein v. Brown,* 363 S.C. 372, 383-84, 610 S.E.2d 816, 822 (S.C.2005). The Chief Justice reasoned:

> In my opinion, there was no evidence that appellants were injured as a result of respondent's alleged malpractice until the court of appeals disposed of the case by sending a remittitur to the trial court. Therefore, I would establish a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until a remittitur has been sent to the trial court. As a result, in my opinion, the statute of limitations does not bar Appellants' claim.

Id. Stokes-Craven urges the Court to adopt the Chief Justice's holding and make it the law in South Carolina. Many foreign jurisdictions have adopted such a rule and have articulated various policy reasons for so holding.

In Pennsylvania, the rule has been articulated this way:

> [T]he discovery rule is founded upon simple notions of equity and fairness. **It is only used to toll the statute of limitations to prevent an injustice, never to start the statute to create one.** Since the discovery rule is appropriately invoked only when the occurrence rule would lead to an unjust result, it logically follows that the discovery rule can only apply after an injury has occurred...**It does not follow from my decision that the plaintiff is without a remedy; only that the remedy must await a wrong**. Plaintiff is free to renew his claim should be unsuccessfully exhaust his appeals in the underlying cases. Only then will he have suffered an injury to which the law may grant redress.

Bowman v. Abramson, 545 F. Supp. 227, 231 (E.D. Pa. 1982)(emphasis added). Texas courts have

held:

> [W]hen an attorney commits malpractice while providing legal services in the prosecution or defense of a claim which results in litigation, the legal injury and discovery rules can force the client into adopting inherently inconsistent litigation postures in the underlying case and in the malpractice case. This case demonstrates the untenability of that conflict. In pursuing their appeal of the underlying claim, however, the Hugheses had to make the inconsistent claim that Mahaney's actions were correct, or, at least not fatal to their claims. As a result of this conflict, the likelihood of their success in both suits would have been compromised.

Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 157 (Tex. 1991)(internal citations omitted). Florida courts have held:

> Most important, since it is plain that no claim would even have existed if the temporary results of the attorney's conduct had been reversed on appeal, this decision is in accordance with the salutary concomitant principles that premature, possibly useless, litigation should be discouraged and that no cause of action should therefore be deemed to have accrued until the existence of redressable harm has been established. Since, under this holding, the instant action was timely commenced, the judgment is reversed and the cause remanded for further consistent proceedings.

Diaz v. Piquette, 496 So. 2d 239, 240 (Fla. Dist. Ct. App. 1986) (internal citations omitted). In his Dissent, Justice Rabinowitz of the Supreme Court of Alaska reasoned:

> To force malpractice plaintiffs to file their actions before they know the outcome of the case upon which their claim is based does not promote judicial economy. The status of the malpractice claim is uncertain until the appeal in the underlying case is resolved, because if it is ultimately decided in the client's favor the malpractice suit may well become moot for lack of damages...The majority's opinion forces an attorney and client to take into account strategic considerations that would play no role under other rules. Suppose that a client sues for legal malpractice while the underlying suit is proceeding. Soon thereafter, the malpractice court enters summary judgment against the client, and the client appeals. The client's new attorney might decide that making the best argument in the malpractice action might result in an admission or ruling that would undermine the viability of the underlying suit. If the underlying suit seems more important, the attorney might decline to make the argument, even when the actions proceed in different courts.

Beesley v. Van Doren, Justice Rabinowitz dissenting, 873 P.2d 1280, 1285 (Alaska 1994)(internal citations omitted). Oklahoma Courts have made the following observations:

> A statute of limitations for a legal malpractice action may be tolled until resolution on appeal of the underlying case if the client has not become aware of the harm prior to the decision on appeal. We come to this conclusion as a matter of common sense because in many situations, a client has no viable cause of action until he discovers whether his case is reversed on appeal.

Ranier v. Stuart & Freida, P.C., 1994 OK CIV APP 155, 887 P.2d 339, 343. The Kansas court states it this way:

> In a legal malpractice action in which there is underlying litigation which may be determinative of the alleged negligence of the attorney, the better rule, and the one which generally will be applicable under K.S.A. 60–513(b), is that the statute of limitations does not begin to run until the underlying litigation is finally determined.

Dearborn Animal Clinic, P.A. v. Wilson, 248 Kan. 257, 270, 806 P.2d 997, 1006 (1991). Oregon courts have held:

> Plaintiff's decedent could have played it safe by filing an action against defendants immediately upon his being sued, in the event it subsequently appeared defendants' negligent advice was the cause of the action brought against him. However, it does not seem wise to encourage the filing of such provisional actions. More important, it could prove to be disastrous to a plaintiff's defense of the action brought against him and, thus, perhaps disastrous to his former legal advisor as well.

U. S. Nat. Bank of Oregon v. Davies, 274 Or. 663, 669-70, 548 P.2d 966, 970 (1976). The Supreme Court of Arizona has likewise held the statute of limitations in a legal malpractice action commences upon remittitur.

> The issue before us is when a cause of action accrues for legal malpractice which occurs during the course of litigation. The Court of Appeals held that the cause of action in such a situation accrues "when the plaintiff knew or should reasonably have known of the malpractice and when the plaintiff's damages are certain and not contingent upon the outcome of an appeal." *Id.* at 156, 673 P.2d at 796. Defendant, attorney Miller, petitioned this Court to review the opinion of the Court of Appeals. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5 and

Ariz.R.Civ.App.P. 23. We agree with and approve the opinion of the Court of Appeals as supplemented herein

Amfac Distribution Corp. v. Miller, 138 Ariz. 152, 153, 673 P.2d 792, 793 (1983).

e) The Lower Court Erred in Failing to Hold that Equitable Estoppel or Equitable Tolling Bar Respondents from Raising the Statute of Limitations as a Defense to Stokes-Craven's Legal Malpractice Claim

i. Equitable Estoppel

The statute of limitations has not run in this case; however, the respondents should be estopped from claiming the statute as a defense. Under South Carolina law, "a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." *Wiggins v. Edwards*, 314 S.C. 126, 130,442 S.E.2d 169, 171 (S.C. 1994) (internal citations omitted).

The respondents failed to inform Stokes-Craven that any breaches of the standard of care had occurred, and blamed the large verdict on the unpredictable nature of jury trials, recommending Stokes-Craven appeal. Further, Mr. Robinson remained counsel of record for Stokes-Craven throughout the appeal process and actually drove with Mr. Craven to Columbia for the oral argument of the Austin case. Mr. Craven testified that he was surprised by the large verdict against Stokes-Craven, but did not believe at the time that the verdict was the result of any error made by Mr. Robinson and further explained that there was nothing that would indicate to him that Mr. Robinson had done anything wrong. Mr. Craven further testified that he had discussions with and Mr. Robinson and his partner Mr. McKenzie shortly after the trial, but neither of them mentioned any mistakes made by Mr. Robinson; rather Mr. Craven explained that the discussions were about how juries were unpredictable and about getting the verdict reversed and filing an appeal. (See Affidavit of Dennis Craven ¶¶ 8, 10).

Silence, when it has the effect of misleading a party, may operate as estoppel. *See S. Dev. Land & Golf Co., Ltd v. S. Carolina Pub. Servo Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748 (S.C.1993). A manifest intent to mislead is not required for estoppel by silence; it arises when the silence is intended or has the effect of misleading the other party, provided the other party acts reasonably. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342,358, 628 S.E.2d 902, 911 (Ct. App. 2006). This rule should be rigorously enforced in legal malpractice actions because of the fiduciary relationship between an attorney and his client. *See Hotz v. Minyard*, 304 S.C. 225, 230, 403 S.E.2d 634, 637 (S.C.1991) ("An attorney/client relationship is by nature a fiduciary one."). "Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004) (internal citations omitted). Here, not only was Mr. Robinson a fiduciary of Stokes-Craven, but also a personal friend of Mr. Craven. Mr. Craven trusted Mr. Robinson, and Mr. Robinson's silence as well as his affirmative representations regarding runaway juries and reversal on appeal had the effect of misleading Stokes-Craven.

With regard to estoppel, the lower court held that because Stokes-Craven allegedly knew or should have known as of the date of the verdict that it had a claim against the Respondents, the fact that Mr. Robinson, despite being Stokes-Craven's attorney and a close personal friend of Dennis Craven, failed to disclose his errors even though he remained counsel of record during the appeal and blamed the verdict on the unpredictable nature of juries is irrelevant. Specifically the lower court held:

> Stokes-Craven claims there is evidence that Mr. Robinson knew all along that this issue would be raised on appeal, and that his failure to advise Stokes-

> Craven created an issue of fact on the issue of equitable estoppel...Stokes-Craven also argues that defendants failed to disclose breaches in their duty to Stokes-Craven, blamed the verdict on the unpredictability of juries, and continued to represent Stokes-Craven during the appeal. None of these points lead to any genuine issue of fact on the issue of equitable estoppel. Again, Stokes-Craven, through Mr. Craven, had knowledge on the day of the verdict that Stokes-Craven might have a cause of action against defendants. There is no evidence that defendants misled Stokes-Craven by words, conduct, or silence to the detriment of Stokes-Craven. (Order pgs 18-19).

However, the lower court's reasoning does not follow. For example, in *Epstein*, a case where the trial court held Dr. Epstein had **actual notice** of his attorney's malpractice Justice Pleicones, in his dissent reasoned:

> In my opinion, however, Brown should be estopped from asserting the statute of limitations as a defense. I would therefore reverse and remand to the circuit court for trial...Brown affirmatively represented to Epstein that the adverse verdict had resulted from errors of law committed by the trial judge which had in turn affected the jury's fact-finding role. Brown also remained nominally as counsel to Epstein throughout the appeal from the verdict. I would hold that the circuit court erred by holding that Brown's representations coupled with his presence on the appellate team did not reasonably induce Epstein's forbearance. That Brown did not actually participate in the appellate representation, other than filing the appeal and being counsel of record, makes this conclusion all the more compelling, as his watchful presence bolstered his affirmative representations. I would therefore hold that Brown is estopped from asserting the statute of limitations as a defense.

Epstein v. Brown, Justice Pleicones Dissenting, 363 S.C. 372, 384-85, 610 S.E.2d 816, 822 (S.C.2005). The actions and inaction of the respondents are the proper focus of an estoppel argument and the court erred in dismissing these facts as irreverent. As Justice Pleicones wrote in his dissent in *Epstein*, the respondents' failure to disclose Mr. Robinson's breaches in the standard of care, their representations regarding the verdict, and their "watchful presence" in the appeal of the case compels that the respondents be estopped from arguing the statute of limitations as a defense.

ii. Equitable Tolling

In *Hooper* v. *Ebenezer Sr. Services,* 386 S.C. 108, 687 S.E.2d 29 (S.C. 2009), this Court formally adopted the doctrine of equitable tolling, finding the statute of limitations should be tolled when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. *Id.* at 117. The Court further held that equitable tolling does not require deception or misrepresentation by the defendant; rather it serves to ameliorate the harsh results that sometimes flow from a strict literalistic application of administrative time limits. *Id.* at 116. Where applicable, the equitable tolling doctrine suspends or extends the statutory period to ensure fundamental practicality and fairness. *Id.*

As to the doctrine of equitable tolling, the lower court held:

> While Stokes-Craven need not establish that defendants did anything to mislead it, as that is a component of equitable estoppel and not necessarily equitable tolling, Stokes-Craven needs evidence that defendants prevented it from timely filing by an extraordinary event beyond its control. (Order pg 20).

However, extraordinary circumstances do exist. If the lower court is correct and the statute of limitations began to run on Stokes-Craven's legal malpractice claim as of the date of the adverse verdict, August 17, 2006, then the statute of limitations would have run almost a year before this Court issued its opinion in *Austin v. Stokes-Craven* on March 8, 2010. Respondents never disclosed any breaches of the standard of care and instead blamed the verdict on the unpredictable jury and advised Stokes-Craven to proceed with the appeal to reverse the verdict. As discussed above, Stokes-Craven has a considerable legal malpractice claim against the respondents such that members of this Court recognized many of the errors committed by Mr. Robinson in *Austin v. Stokes-Craven.* Stokes-Craven has suffered a wrong, and this is the archetypal case for equitable tolling.

3. Appeal Related to the Trial Court's Failure to Grant Stokes-Craven Partial Summary Judgment

a) The lower court erred in failing to grant Stokes-Craven's motion for partial summary judgment as to the legal malpractice of the Respondents

Stokes-Craven moved for summary judgment on August 16, 2010 and again on November 29, 2012, on the grounds that the three Justice majority of Justices Pleicones, Kittredge, and Chief Justice Toal establishes as a matter of law that the defendants committed legal malpractice. Justice Pleicones, Kittredge, and the Chief Justice held that had Mr. Robinson made a contemporaneous objection either to Austin or Austin's expert's testimony that the truck had a value of $0.00, and moved for directed verdict on the issue, they would have held Austin failed to present any competent evidence of the truck's fair market value and that the trial court erred in failing to grant Stokes-Craven a directed verdict. But for the respondents' failure to protect the record and make the proper' motions, there would have been a verdict in favor of Stokes-Craven. The verdict is the result of Mr. Robinson's errors.

The lower court declined to consider Stokes-Craven's motion on the grounds that he granted the respondents motions for summary judgment as to the running of the statute of limitations. However, Stokes-Craven's motion is ripe for this Court's review as the motion concerns the interpretation of this Court's order in *Austin v. Stokes-Craven.*

i. The Respondents' Malpractice

In an action for legal malpractice, the claimant must prove for elements: (1) the existence of an attorney-client relationship, (2) breach of a duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. *Smith v. Haynsworth, Marion, McKay Geurard,* 322 S.C. 433, 472 S.E.2d 612 (S.C. 1996). The defendants concede their attorney-client

relationship with Stokes-Craven and that Stokes-Craven was damaged by the verdict. At issue then, are the elements of breach and causation.

1. Breaches of the Standard of Care

The issue relevant to Stokes-Craven's malpractice claim against the defendants is found in the Opinion of Justice Pleicones as well as Justice Kittredge and Chief Justice Toal's concurrence with Justice Pleicones on the issue of Austin's failure to present competence evidence of the fair market value of the truck and the defendants' failure to preserve this issue for appellate review.

Justice PLEICONES, concurring in part and dissenting in part:

> **I agree with Austin that the issue whether Stokes-Craven was entitled to a directed verdict because Austin offered no evidence of fair market value is not preserved for appeal as this failure of proof was not raised as a ground for a directed verdict.** Consequently, whether it was raised in the judgment non obstante veredicto (JNOV) motion and/or is discussed in the detailed post-trial memorandum is irrelevant. E.g., *In re McCracken*, 346 S.C. 87,551 S.E.2d 235 (2001) (only issues raised at directed verdict can properly be raised a JNOV). **Moreover, since there was no contemporaneous objection either to the expert's or to the owner's testimony that the truck had a value of $0, I agree that there was evidence of value for the jury's consideration**. E.g., *Cantrell v. Carruth,* 250 S.C. 415, 158 S.E.2d 208 (1967) (evidence received without objection becomes competent and cannot be disregarded when considering directed verdict motion). **Had the issue been properly preserved, however, I would agree that Austin failed to present any competent evidence of the truck's fair market value, which clearly is more than $0**. Stokes-Craven also contends that it was entitled to a new trial as there is no evidence in the record to support the jury's verdict valuing the truck at $26,371.10, that is, the amount Austin paid for it. **Since there was no objection to Austin's or Morris' $0 value testimony, there is evidence in the record to support this verdict.**[FN12] **I therefore agree with the majority that Stokes-Craven has not shown an abuse of discretion in the trial court's denial of a new trial.** E.g., *Dillon v. Frazer,* 383 S.C. 59,678 S.E.2d 251 (2009).

Austin v. Stokes-Craven Holding Corp. 387 S.C. 22, 60, 691 S.E.2d 135, 155 (S.C.2010)(emphasis added).

Justice KITTREDGE, concurring in part and dissenting in part:

> I concur in part and dissent in part. I join the well-written majority opinion of Justice Beatty save two exceptions. **Concerning the trial court's failure to grant a directed verdict due to the lack of evidence of fair market value and the election of remedies issue, I join the dissent of Justice Pleicones.**
>
> **TOAL, C.J., concurs.**

Austin v. Stokes-Craven Holding Corp. 387 S.C. 22, 66, 691 S.E.2d 135, 158 (S.C.2010)(emphasis added). Respondents argued that Justices Beatty's opinion is that of the majority and therefore it is irrelevant what Justices Pleicones, Kittredge and Toal held in their separate opinions. However, the United States Supreme Court has held, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five[5] Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks* v. *United States,* 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (S.Ct. 1977).

As explained above, three written opinions and several separate concurrences and dissents were issued by the fragmented Supreme Court in *Austin* v. *Stokes-Craven.* Justice Beatty's opinion, in which Justice Waller concurred, holds that even though Mr. Robinson failed to make contemporaneous objections as to the evidence of fair market value of the truck presented by Austin, and even though Mr. Robinson failed to move for directed verdict on this issue, the issue is preserved because Mr. Robinson moved for JNOV and included this issue in the briefing.[6] On this issue,

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5 As five rather than nine Justices sit on the South Carolina Supreme Court, a concurrence of three Justices is required to constitute the holding of the Court. See S.C. Constitution, Article 5 Section 2 (1972 (57) 3176; 1973 (58) 161; 1985 Act No. 9.)(" In all cases decided by the Supreme Court, the concurrence of three of the Justices shall be necessary for a reversal of the judgment below.")

6The "extensive briefing" provided to the trial court in support of Mr. Robinson's JNOV motion was actually filed after the trial court had already denied the JNOV motion.

Justice Beatty did not command a majority. Rather, the opinions of Justice Pleicones, Justice Kittredge, and Chief Justice Toal, concurring in the judgment (i.e. that Austin's verdict should be upheld) constitute the majority holding that the failure to offer competent evidence of value and to move for a directed verdict on this ground resulted in the jury verdict being sustained.

This Court's opinion establishes Mr. Robinson's breach of duties owed to Stokes-Craven rather explicitly:

> **Since there was no objection to Austin's or Morris' $0 value testimony, there is evidence in the record to support this verdict.**
>
> **Moreover, since there was no contemporaneous objection either to the expert's or to the owner's testimony that the truck had a value of $0, I agree that there was evidence of value for the jury's consideration.**
>
> **[T]he issue whether Stokes-Craven was entitled to a directed verdict because Austin offered no evidence of fair market value is not preserved for appeal as this failure of proof was not raised as a ground for a directed verdict.**
>
> **Consequently, whether it was raised in the judgment non obstante veredicto (JNOV) motion and/or is discussed in the detailed post-trial memorandum is irrelevant. E.g., In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (only issues raised at directed verdict can properly be raised a JNOV).**

Austin v. Stokes-Craven Holding Corp. 387 S.C. 22, 60, 691 S.E.2d 135, 155 (S.C.2010)(emphasis added).

If the opinion of this Court is not sufficient on its own to establish the respondents' breach, the standard of care with regard to a lawyer's duty to make contemporaneous objections to incompetent evidence and take the steps necessary to preserve issues for appellate review is established by Scott Robinson's testimony. Generally, a plaintiff in a legal malpractice case must establish the standard of care by expert testimony, and in this case there is such expert testimony

from both Plaintiff and Defendants' experts;[7] however, expert testimony is not required where the defendant admits the applicable standard of care. *Sims* v. *Hall,* 357 S.C. 288, 592 S.E.2d 315 (Ct.App. 2003). "The admission of the standard of care need not be an admission of wrongdoing by the defendant. To the contrary, the purpose of establishing the appropriate standard of care is simply to arm the finder of fact with the appropriate criteria by which to judge the defendant's conduct." *Id.* at 297. (internal citations omitted).

Scott Robinson testified:

> BY MR. EPTING:
> Q. All right. But let me just ask you my more limited question. I think you gave me an
> answer. You had no deliberate trial strategy to fail to object to something related to preserving
> the ground for directed verdict or letting evidence in that was incompetent.
> MR. POWELL: Object to the form.
> MS. WALL: Object to the form.
> THE WITNESS: I certainly would have not had a trial strategy to intentionally let in evidence that was competent, incompetent, or otherwise, evidence that was harmful. Again, my understanding then and now is that an expert, qualified to give an opinion as to value, can give an opinion as to value. Whether I like that opinion or not is for me to deal with otherwise. The same thing with an owner of property. So, no, there would be no intentional strategy to let them get into evidence what they shouldn't get in.
> Q. And by the same token there would be no deliberate strategy, if you realized there was no competent evidence of value, to have omitted making the directed verdict motion on that ground.
> MS. WALL: Object to the form.
> THE WITNESS: I cannot recall cases specifically where I would have intentionally not argued, objected, or preserved something that I thought was there to deal with, no.

(Deposition of Scott Robinson pgs 22-24). Mr. Robinson affirmatively states that his failure to object to the testimony of Austin and Austin's expert's testimony that the value of the truck is $0.00 and his failure to move for directed verdict on this basis was not a trial strategy nor was it something

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7 See Depositions of Ronald Richter, Esq. and William E. Durant, Jr., Esq.

he, as an attorney, would ever intentionally do.

Further, a party is bound by the testimony of its own expert. Scott Robinson and Johnson, McKenzie and Robinson's expert, Mr. William Durant, testified as follows:

> Q. And would a lawyer, in order to comply with the standard of care, understand that if you don't object to evidence, that you waive the right to appeal on that ground?
> A. I think that he would be aware that his failure could constitute a waiver, and he would be barred from preserving on appeal, or you did not effectively preserve it for appeal.
> Q. And would a lawyer of reasonable care, skill, and competence, understand that if he didn't make a motion for a directed verdict on a particular ground, that he could not make a JNOV motion at the end of the trial on that ground?
> A. Yeah. If you neglect to make a directed verdict, you are not going to succeed on your motion for JNOV.
> Q. Would a lawyer of reasonable care, skill, competence, and judgment understand that if you didn't make a directed verdict motion on a certain ground, and could not make a JNOV motion, that that issue would not be preserved for appellate review?
> A. In general, yes.
> Q. And would a lawyer of ordinary care, skill, competence, and judgment, Mr. Durant, understand that if there are no actual damages, you can have no punitive damages?
> A. Yes, I think that's a correct statement.

(Exhibit B: Deposition of William Durant, Jr., Esq. pg 136). The Plaintiff's expert agreed with both Scott Robinson and Mr. Durant.

2. Proximate Cause

Several Federal Courts of Appeals have addressed the issue of legal malpractice in the context of the alleged failure to perfect an appeal. Specifically, both the Second Circuit and the Seventh Circuit have held that the determination of causation of damages in legal malpractice actions alleging appellate or preservation errors "lay exclusively with the court." *Tinelli v. Redl*, 199 F.3d 603, 606-07 (2d Cir. 1999); see also *Jones v. Psimos*, 882 F.2d 1277, 1281-82 (7th Cir. 1989). The Second Circuit went on to explain:

> To rule otherwise-and hold that a jury should decide how an appellate court would have ruled-would misconstrue the very nature of appellate review... Because "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803), the task of deciding how an appeal would have been resolved must be left to the judge and not the jury. *See Charles Reinhart Co.*, 513 N.W.2d at 777-78 (reasoning that 'the nature of appellate practice mandates judicial resolution of the issue' of whether an appellant would have prevailed); *Millhouse v. Wiesenthal*, 775 S.W.2d 626, 628 (Tex.1989) ('The question of whether an appeal would have been successful depends on an analysis of the law and the procedural rules.... A judge is clearly in a better position to make this determination.').

The Seventh Circuit defined the role of the court as follows: "When analyzing the merits of an attorney malpractice claim, the court must put itself into the role of the court that ought to have reviewed the underlying claim but missed its chance because of the attorney's negligence in perfecting the appeal." *Jones v. Psimos*, 882 F.2d 1277, 1281-82 (7th Cir. 1989) citing R.E. Mallen & V.B. Levit, Legal Malpractice § 583, at 738–40 (2d ed. 1981).

This Court has held that Scott Robinson and Johnson, McKenzie and Robinson failed to object to incompetent testimony or move for a directed verdict and had this been done, Stokes-Craven would have prevailed in its appeal. These findings in this malpractice case are immutable. The testimony by Scott Robinson and the experts are that such failures identified by this Court breach the standard of care. This Court should remand this case for trial on damages alone.

> **Since there was no objection to Austin's or Morris' $0 value testimony, there is evidence in the record to support this verdict.[FN12] I therefore agree with the majority that Stokes-Craven has not shown an abuse of discretion in the trial court's denial of a new trial.**

Id. (emphasis added).

> **Concerning the trial court's failure to grant a directed verdict due to the lack of evidence of fair market value and the election of remedies issue, I join the dissent of Justice Pleicones.**

TOAL, C.J., concurs. *Id* at 66. (emphasis added).

4. Appeal Related to Discovery Matters

a) The lower court erred in holding correspondence between respondents and their malpractice carrier are not discoverable

On July 10, 2012, Stokes-Craven served its second supplemental request for production on the respondents seeking, "Any and all correspondence (oral written or electronic), regarding the claim that gave rise to this matter, between you, your agents and/or attorneys acting on your behalf, and any adjuster or any other person acting on behalf of your malpractice insurance carrier."[8] (Stokes-Craven Second Supp. Requests for Production).

Respondents refused to produce any of the correspondence between the respondents and their insurance carrier and refused to provide a privilege log. Further, these documents were not identified as even existing at the time of the production of the respondents' files, let alone noted on a privilege log. Stokes-Craven filed its motion to compel on October 25, 2012. The motion to compel was heard by Judge James at the same hearing as the motions for summary judgment. Judge James held:

> I conclude that the correspondence requested in (2) above is not discoverable, as it was at the least prepared in anticipation of or during litigation. See Rule 26(b) (3), SCRCP. There has been no showing that the plaintiff is in need of this information for any good reason, and there has been no showing that it cannot obtain the substantial equivalent by other means. The court has not received a privilege log of these communications but is of the view that one is not necessary. This information is simply not discoverable. (Order pg 7).

8 Stokes Craven also sought billings from the respondents' legal research providers and the respondents' legal malpractice insurance applications from 2002-2012. As respondents failed to produce these documents, they too were the subject of Stokes-Craven's motion to compel; however, as Judge James ordered the production of the applications, Stokes-Craven does not take exception with this portion of Judge James' order. As to the billings, Stokes-Craven believes these documents are relevant and discoverable as they show when and what, if any, research was done in preparation for trial.

As several South Carolina circuit court judges have recognized, "[t]here is no insured-insurer privilege protecting communications between an insured and its liability or indemnity insurer." (See Stokes-Craven Materials in Support of Motion to Compel, Order of Judge Dennis pg 3; see also Order of Judge Cooper, pgs 3-4).

Judge James' order appears to hold the communications are protected by the work product privilege. Rule 26(b)(3), SCRCP, protects only documents prepared in anticipation of litigation. Documents prepared in the ordinary course of the insurance business are not protected by the work-product privilege. *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 536, 542 (N.D.W. Va. 2000) citing *Front Royal Ins. Co. v. Gold Players, Inc.*, 187 F.R.D. 252, 257 (W.D.Va.1999). (See also Stokes-Craven Materials in Support of Motion to Compel, Order of Judge Cooper, pg 4).

The Fourth Circuit held in *McDougal v. Dunn,* 468 F.2d 468 (4th Cir. 1972) that statements secured by an insurance company's claims adjuster from a defendant, before any claim was made or suit was begun, are secured in the regular course of the claims adjuster's duties, and thus the statements cannot be considered prepared in anticipation of litigation.

The party asserting the attorney client or work product privilege bears the burden of showing such privilege. *Wilson v. Preston*, 662 S.E.2d 580, 585 (S.C. 2008). "Challenges to the assertion of attorney-client or work-product privilege are usually decided after an *in camera* inspection of the materials by the court." (See Stokes-Craven Materials in Support of Motion to Compel, Order of Judge Dennis pg 2 citing the Comments to Rule 26, SCRCP).

Judge James erred in concluding that the correspondence between respondents and their insurer, in particular the statements made by respondents to put their carrier on notice of a potential claim, constitute protected work product. The judge further erred in allowing the respondents to

withhold these documents without even requiring them to provide a privilege log and in failing to order an *in camera* review. The judge essentially held the respondents' burden with regard to the work product privilege was met without any knowledge of the facts or circumstances surrounding any of the communications sought. Thus, the lower court's decision was without any factual support and constitutes an abuse of discretion. *See Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (S.C.1989).

As to the lower court's assertion that has been "no showing that the plaintiff is in need of this information for any good reason, and there has been no showing that it cannot obtain the substantial equivalent by other means," Stokes –Craven argues: (1) there is no need to make this showing as respondents have not met their burden with regard to the communications sought; and (2) even if the respondents *had* met their burden, Stokes-Craven has shown it has a substantial need for these documents and that there is no substantial equivalent.

There is ample evidence in the record to suggest that Mr. Robinson knew he had made significant breaches of the standard of care throughout the respondents' representation of Stokes-Craven. For example, Mr. Robison produced as part of his Stokes-Craven file, research he conducted during the time of the *Austin v. Stokes-Craven* trial on the ineffective assistance of counsel (See Deposition of Scott Robinson pg 120-122). Steven McKenzie, Mr. Robinson's law partner testified that Mr. Robinson failed to appreciate Stokes-Craven's exposure:

> So I said, Scott, what do you believe your exposure in this case to be? And I recall him saying that he believed it to be no more than the value of the vehicle. That Dennis may have to buy the vehicle back.

(Exhibit G: Deposition of Steven McKenzie, Esq. pgs 43-44)

> And, of course, it was a large verdict, it was $200,000 plus I believe. And, you know, to be honest with you, I was a little stunned. Not a little stunned, I was

> stunned. Because I had not expected it to be anywhere near that. Obviously, I mean, I thought probably Scott -- like I was relying on Scott's judgment, and he thought it was a verdict that was going to be -- the exposure was going to be limited

(Exhibit G: Deposition of Steven McKenzie, Esq. pgs 51-52). Despite evidence from his file that his trial efforts were ineffective and despite his then and now law partner's testimony that he misapprehended Stokes-Craven's exposure, Mr. Robinson now claims that he knew the case was dangerous and that the exposure to Stokes-Craven was great and that he warned Mr. Craven of the potential for punitive damages, explained that Stokes-Craven might get "popped." Mr. Robinson further testified that there are no writings evidencing any of his discussions with Mr. Craven:

> Q. Knowing yourself that it was a case of
> 4 some danger did you have discussions with Dennis
> 5 about the wisdom of ignoring a claim such as
> 6 this?
>
> 7 A. Yes.
>
> 8 Q. And what did you say to him?
> 9 A. I just told him, I said, Dennis, you
> 10 know, their offer, I understand you don't like
> 11 it. It's not the worst thing in the world I've
> 12 ever seen. It's going to cost you some money.
> 13 If they pursue it to trial, your legal expenses
> 14 may well exceed what they're asking for, and
> 15 there's a potential out there, with the forgery,
> 16 and the wreck, and a car dealership, for punitive
> 17 damages. People don't like that. You may get
> 18 popped I think is the word that I used.

(Deposition of Scott Robinson pg 31).

The Fourth Circuit has weighed in on the issue of "substantial need" and "inability to obtained equivalent information by other means. The Fourth Circuit, citing its own precedent in *New York Central Railroad Company v. Carr,* 251 F. 2d 433, 435 (4th Cir. 1957) observed:

> 'The lapse of many months and the dimming of memory provides much reason for his counsel to examine any substantially contemporaneous declarations or admissions. Aside from what assistance it may be in the preparation of a case for trial, the production of such a statement, after the lapse of time, permits a more realistic appraisal of cases and should stimulate the disposition of controversies without trials.'

McDougall v. Dunn, 468 F.2d 468, 474 (4th Cir. 1972). Here, just as in the Fourth Circuit precedent, the potential to discover contemporaneous declarations or admissions made by respondents to their insurance carriers is necessary, especially considering there is evidence of incompetence and misapprehension of exposure and a lack of any writings confirming Mr. Robinson's now version of events. The correspondence with the carrier may be consistent with respondents admitting errors were made.

b) The lower court erred in holding that Respondents complied with certain of Stokes-Craven's discovery requests and in further denying sanctions to Stokes-Craven where Stokes-Craven prevailed on its motion to compel discovery

On December 5, 2011, Stokes-Craven served supplemental discovery requests on respondents, seeking answers to what essentially amounts to the information required by the Federal Rules of Civil Procedure with regard to experts. Stokes-Craven requested the following:

a) A complete statement of all opinions the witness will express and the basis and reasons for them;
b) The data or other information considered by the witness in forming said opinions;
c) Any exhibits that will be used to summarize or support said opinions;
d) The witness's qualifications, including a list of all publications authored in the previous ten years;
e) A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by depositions; and
f) A statement of the compensation to be paid for the study and testimony in the case.

Respondents identified two testifying experts, Hugh Penny, a CPA, and William Durant, an

attorney, disclosed their expert's hourly rates, and listed documents provided to their experts. Respondent Scott Robinson further disclosed "Mr. DuRant will testify as to the applicable standard of care and proximate cause and that Mr. Penny will testify as to damages, including the Plaintiff's financial status and proximate cause." Respondents' interrogatory responses are five pages total of which three pages are general objections. Respondents' specific objections to the Stokes-Craven interrogatories are:

> The discovery requests at issue in the motion seek third party information which is not in our possession, custody or control.
>
> The identified experts are not agents or employees of any of the defendants or defense counsel and therefore the requests are outside the scope of discovery
>
> Furthermore, the experts have not produced reports to date.
>
> Defense counsel has no information as what opinions the experts may hold or what documents they used to form their opinions.
>
> The proper procedure to obtain the information you seek is to serve a deposition subpoena and/or a subpoena *duces tecum* upon the identified experts.

This court changed Rule 30j SCRCP as to the conduct of depositions; specifically, the Court ended attorneys' objections during the deposition that essentially instructed the witness what to say. While the intent of the change was to end a practice that offends the notion of justice, the secondary effect was to improve the relationship among lawyers. Writing personally, of all the changes to the rules governing the conduct of discovery and trials that have occurred in my 36 years, this has had the most positive effect in promoting civility among the bar. In this same vein, the vexatious conduct of written discovery and responses to written discovery remains a very contentious stumbling block in lawyer relations. Viewed at substantively, vexatious and evasive discovery is expensive to clients and bogs down deeply limited judicial resources.

Perhaps Stokes-Craven and its counsel are not sufficiently sophisticated in the rules to appreciate the nuance of the Scott Robinson and Johnson, McKenzie and Robinson objections but "really" the information "is not in our possession," the experts are "not our agents or employees," "the experts have not produced reports," they have "no information" as to what opinion the experts may hold or what documents they used to form their opinions. Yes, Stokes-Craven could have served a deposition subpoena, but counsel wanted to receive the requested information in advance of the depositions in order to better prepare for the deposition. Importantly, the rules allow Stokes-Craven, for the reasons stated by Judge Newman, to seek this discovery.

Stokes-Craven rests this appeal on its discovery request and the respondents' answers. The interrogatories are clear and reasonable; the responses are evasive and vexatious and confound the judicial process. As is explained below, it consumes enormous resources.

After over three months of discussion with defense counsel in an attempt to receive the information, Stokes-Craven filed its motion to compel discovery on March 10, 2012. Respondents filed memorandums and supplemental memorandums in opposition to the motion to compel, and the motion was set for oral argument on April 4, 2012.

On May 18, 2012, Judge Newman granted Stokes-Craven's motion, holding that discovery of facts known and opinions held by experts may be obtained by any discovery method, including interrogatories pursuant to South Carolina Rules of Civil Procedure 26(b)(4)(A). (See Newman Order pgs 5-6). Judge Newman went on to hold:

> Plaintiff has not asked that the experts prepare a report; the Plaintiff has asked interrogatories that seek from the Defendant parties responses to specific questions. That the Plaintiff has used the questions permitted under the Federal Rules of Civil Procedure in order to standardize and legitimize the scope of the questions does not convert, as the Defendants contend, Plaintiff's discovery into a quest pursuant to the Federal Rules as opposed to the South Carolina Rules of

Civil Procedure.

(Newman Order pg 3). Judge Newman, noting that there were less than two months until the discovery deadline, concluded: "That the experts have yet to form their opinions is also not an appropriate objection." In sum, Judge Newman ordered the respondents to answer the interrogatories propounded by Stokes-Craven and produce all responsive documents in respondents' possession, custody and control.

Judge Newman allowed Stokes-Craven ten days to provide the court with an affidavit for attorney's fees. (Newman Order pg 6). Stokes-Craven provided an affidavit of attorney's fees expended in pursing responses to its discovery requests (seeking a modest $4,320) together with a proposed order awarding the same.

On June 18, 2012, respondents filed a motion to reconsider Judge Newman's order and an objection to the proposed order awarding Stokes-Craven's attorney's fees as a discovery sanction. The respondents' motion and brief, together with exhibits, was over 85 pages long. Essentially, respondents argued that they had produced all responsive documents and, with regard to answering the interrogatories, posed the following question to the court "...**why would [the Court] impose the burden of interviewing the expert for purposes of answering detailed interrogatories?**" (See respondents motion to reconsider pg 4)(emphasis added).

The motion to reconsider was heard by Judge Newman on July 11, 2012 and went on for over four hours. Judge Newman granted respondents' motion to the extent that his May 18, 2012 order granting Plaintiff's motion to compel can be interpreted to order the production of documents not in the possession, custody, or control of the respondents. (Newman Reconsideration Order pg 1).

Judge Newman reconsidered sanctions, holding that because Stokes-Craven "combined

permissible interrogatories with impermissible requests for production" respondents' refusal to answer the interrogatories was in "good faith." (Newman Reconsideration Order pg 2). There were no impermissible requests as he ordered responses to the discovery and the documents were within the respondents' control.

However, Judge Newman declined to reconsider his order compelling the respondents to answer Stokes-Craven's interrogatories, reasoning "As expressed in my Order of May 18, 2012, I fully concur with Plaintiff's argument entitling Plaintiff to discovery of facts and opinions held by experts through the service of interrogatories." (Newman Reconsideration Order pgs 1, 2). Despite so holding, Judge Newman stated respondents have "essentially complied" in responding to Stokes-Craven interrogatories, save providing a list of cases and publications by respondents' experts. Judge Newman's Orders cannot be harmonized. In his initial order, Judge Newman required the defendants to provide Stokes-Craven with "a complete statement of all opinions the witness will express and the basis and reasons for them as well as the data or other information considered by the witness in forming said opinions," finding the respondents had failed to answer these interrogatories and even allowing Stokes-Craven's counsel to submit a fee affidavit as a discovery sanction for respondents failure to respond. The respondents did not provide Stokes-Craven with any new answers or additional information, and yet, the lower court, while finding that he would not reconsider his grant of Stokes-Craven's motion to compel answers to interrogatories, stated he would not order the respondents to answer the interrogatories, holding they had complied.

The trial court is given broad discretion with regard to discovery motions and sanctions for discovery violations and the trial court's decision will not be overruled absent an abuse of discretion]. *See Evening Post Pub Co. v. Berkeley School District*, 392 S.C. 76, 708 S.B.2d 745

(S.C.2011); *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (S.C.1990). However, an "abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (S.C.1989).

The scope of discovery in South Carolina is very broad. *Samples v. Mitchell,* 329 S.C. 105, 495 S.E.2d 213 (Ct. App 1997). The rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed, *Id.* at 114. The entire thrust of the discovery rules is to allow full and fair disclosure. *Id.* at 113. In this respect, the discovery process is designed to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *In re Anonymous Member of S. Carolina Bar*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (S.C.2001) citing *United States v. Procter & Gamble Co.,* 356 U.S. 677, 682, 78 S.Ct. 983, 986-87, 2 L.Ed.2d 1077 (U.S.S.C.1958).

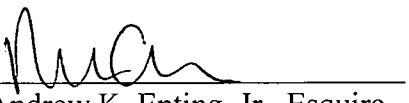
Stokes-Craven asks this Court to hold the discovery responses were woefully inadequate and that sanctions were appropriate. Perhaps, more importantly, Stokes-Craven asks this Court to wade into some troubled waters, trim the sails on over-zealous discovery, and use its hand on the rudder to provide a proper tack for lawyers to follow. The conduct of discovery by respondents exceeds what is permissible as advocacy; it is obstreperous.

CONCLUSION

For the reasons cited above, Stokes-Craven respectfully requests this Court: (1) Reverse the lower court's grant of summary judgment; (2) overrule *Epstein v. Brown* to the extent that it holds

the statute of limitations in a legal malpractice action commences before a remittitur and adopt a bright line rule that the statute of limitations does not commence until a remittitur has been issued; (3) grant Stokes-Craven's motion for partial summary judgment and remand the case for trial; (4) reverse the lower court as to Stokes-Craven's request for correspondence between respondents and their malpractice carrier and direct respondents to produce these documents; and (5) reverse the lower court as to Stokes-Craven's expert discovery and remand for a determination of discovery sanctions.

Respectfully Submitted By:



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Dated this 11 day of October, 2013
Charleston, South Carolina

THE SUPREME COURT OF SOUTH CAROLIA

APPEAL FROM THE CLARENDON COUNTY
Court of Common Pleas

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

Appellate Case No. 2013-001452

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

v.

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

PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matters on Appeal on all Respondents by delivering a copy via Federal Express on October 11, 2013, addressed to their attorneys of record as follows:

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