

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.

APPELLANT'S RESPONSE IN OPPOSITION TO RESPONDENTS'
MOTION TO STRIKE CERTAIN ISSUES ON APPEAL

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S.C. SUPREME COURT

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Appellant, Stokes-Craven Holding Corp. d/b/a/ Stokes-Craven Ford (“Stokes-Craven”) responds in opposition to the respondents’ joint motion to strike issues numbered four, five and six in the appellant’s initial brief as follows. Respondents argue Stokes-Craven has “improperly included” three issues in its initial brief as the issues are “unappealable and/or unrelated to the final appealable ruling granting summary judgment to Respondents on statute of limitations grounds, and thus, should be stricken from the appeal in the interests of judicial economy.” (Respondents’ Motion to Strike pgs 2-3).

A. Stokes-Craven’s Issue Number Four: 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?

Judge James declined to consider Stokes-Craven’s motion for summary judgment on the grounds that he granted the respondents’ motions for summary judgment as to the running of the statute of limitations. However, As Respondents state:

The purpose of the rule allowing the appellate courts to consider unappealable issues along with appealable issues is to promote judicial economy.” *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387,390 (2005) (holding the appellate court will consider an issue that is not otherwise appealable when there is another appealable issue before the court and the consideration of the unappealable issue will avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy)); *Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991) overruled on other grounds by *Huntley v. Young*, 319 S.C. 559,462 S.E.2d 860 (1995) (emphasis added) (“an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation”).(Respondents’ Motion to Strike pgs 7-8)

Respondents concede Judge James’ order granting them summary judgment is properly before this Court. The only question then is whether a review of the denial of Stokes-Craven’s motion for summary judgment by this Court will “avoid another appeal in the future and potentially

narrow the issues for trial (i.e. judicial economy).”¹ Undoubtedly, if Stokes-Craven were to prevail on the statute of limitations issue and were its motion for summary judgment, after remand, to be granted, Respondents would appeal. As to narrowing the issues on remand, the issue raised in Appellant’s motion for summary judgment: (1) involves the interpretation of this Court’s own order in *Austin v. Stokes-Craven*; (2) involves a novel question of law in South Carolina; and (3) involves a question of law that can be decided by an appellate court with no deference to the trial court.

In its motion for summary judgment Stokes-Craven sought an interpretation of this Court’s opinion in *Austin v. Stokes-Craven*, 387 S.C. 22, 691 S.E.2d 135 (S.C. 2010). Appellant argued before the lower court and argues now in its appeal that 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 of the Court on the narrowest grounds - the issue of evidence of fair market value is not preserved for review and therefore, the verdict stands. Respondents contend that Justice Beatty’s opinion is that of the majority and therefore it is irrelevant what Justices Pleicones, Kittredge and Toal held in their separate opinions. Though there is United States Supreme Court precedent on what constitutes the reasoning of the majority when a “fragmented” court decides an issue,² there is no South Carolina precedent addressing this issue.

Finally, the issue of legal malpractice in the context of the alleged failure to perfect an appeal and 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.

¹ While this is the substantive issue, respondents’ motion can be deferred until after full briefing and argument rather than out of the context of the entire case and after the parties’ positions are fully developed.

² 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 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).

1999); see also *Jones v. Psimos*, 882 F.2d 1277, 1281-82 (7th Cir. 1989). As the Supreme Court is “free to decide questions of law with no particular deference to the lower court,”³ it would be a waste of judicial resources to send a novel legal question to the lower court for decision when it is currently before the highest court in the state.

Thus, the denial of Stokes-Craven’s motion for summary judgment is ripe for review, and should be decided after full briefing and oral argument and not on a summary motion.

B. Stokes-Craven’s Issues Numbered Five and Six: Appeal of Certain Discovery Orders

Stokes-Craven, in its issue number four, has appealed the denial of its motion to compel correspondence between the respondents and their legal malpractice carrier, in particular the notice of a potential claim Mr. Robinson gave to his carrier. In its issue number five, Stokes-Craven appeals the discovery orders related to Stokes-Craven’s requests for expert discovery. Respondents argue that Stokes-Craven can never prove the denial of its discovery motions “substantially affected the outcome of the trial” and hearing an appeal of the discovery order would “waste judicial resources.”

As respondents state, pursuant to S.C. Code Ann. § 14-3-330(1), an interlocutory order may be appealable if there is an appealable issue before the appellate court and a ruling on an interlocutory order will avoid unnecessary litigation, and under S.C. Code Ann. § 14-3-330(2), an interlocutory order may also be appealable if the order affects a substantial right. Further, “unappealable” issues should be considered as part of an appeal if the issues will potentially narrow the issues for trial and avoid further appeals. *See Edge v. State Farm Mut. Auto. Ins. Co.*, supra.

However, most importantly, the discovery issues raised by Stokes-Craven reappear every week in the circuit courts of this state. Stokes-Craven presents issues to this Court for its review

³ *Berry v. South Carolina Dept. of Health and Environmental Control*, 402 S.C. 358, 742 S.E.2d 2 (2013).

which usually avoid appellate review as cases settle, discovery issues are interlocutory, etc. Presented here is an opportunity for this Court to provide guidance to the bar on very divisive, expensive, and time consuming discovery matters.

1. Expert Discovery

As to the issue of expert discovery, Stokes-Craven sought answers to what essentially amounts to the information required by the Federal Rules of Civil Procedure with regard to experts and sought answers to interrogatories regarding the opinions held by the respondents' experts. Respondents provided objections including that the information "is not in our possession," the experts are "not our agents or employees," and "we have no information" as to what opinion the experts may hold or what documents they used to form their opinions. Respondents argued the only available discovery method available under the South Carolina rules is to "serve a deposition subpoena and/or a subpoena *duces tecum* upon the identified experts." Judge Newman, after granting Stokes-Craven's motion to compel, reconsidered his order, finding the respondents had complied with the discovery rules. Vexatious and evasive discovery is expensive to clients and bogs down limited judicial resources.

2. Correspondence Between the Insured and Insurer

As to the issue of correspondence between respondents and their malpractice carrier, 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. Robinson 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 (Exhibit G: Deposition of Steven McKenzie, Esq. pgs 51-52). Despite this evidence, Mr. Robinson now claims that he knew the case was dangerous and that the exposure to Stokes-Craven was great, that he warned Mr. Craven of the potential for punitive damages, and explained that Stokes-Craven might get "popped." If the correspondence putting Mr. Robinson's carrier on notice of a potential claim contains an admission by Mr. Robinson of a breach of the standard of care, such an admission would limit the issue at trial or possibly obviate the need for a trial at all.

Secondly, there appears to be a split among the circuit court judges in South Carolina about whether the communications between an insured and insurer are privileged. 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). However, Judge James held that not only are these communications protected by the work product privilege, but that respondents did not have to produce the correspondence for *in camera* review or even prepare a privilege log. (Order pg 7). It appears a decision by this Court would promote judicial economy and resolve an issue that is being treated differently among the circuit court judges.

These discovery issues should not be discarded on a summary motion, but rather after full briefing and oral argument.

Conclusion

Stokes-Craven asks that Respondents' motion be denied and that this Court reach its decision only after full briefing and oral argument.

Respectfully Submitted By:



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Dated this 12 day of November, 2013
Charleston, South Carolina

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Appellate Case No. 2013-001452

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PROOF OF SERVICE

I certify that I have served the Appellant's Response in Opposition to Respondents' Motion to Strike Certain Issues on Appeal on all Respondents by delivering a copy via regular U.S. Mail on November 12, 2013, addressed to their attorneys of record as follows:

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