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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE CLARENDON COUNTY
Court of Common Pleas

The Honorable George C. James, Jr.

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.

FINAL REPLY BRIEF OF APPELLANT

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Appellant Stokes-Craven Holding Corp. d/b/a/ Stokes-Craven Ford ("Stokes-Craven") replies to respondents' brief as follows:

I. Introduction

Respondents argue Scott Robinson, who represented Stokes-Craven from the filing of the underlying suit and throughout the appeal (and who was a close personal friend of Dennis Craven), had no duty to speak or to reveal his trial and pre-trial errors to his client, but that Young Clement Rivers, LLP's ("Young Clement's"), alleged knowledge of Mr. Robinson's malpractice is imputed to Stokes-Craven, despite that Young Clement was solely appellate counsel. Thus, respondents argue, the statute of limitations ran years before the appeal was decided. This Court should not permit such a result.

II. The Lower Court Erred in Viewing the Facts in the Light Most Favorable to the MOVING party and in Granting Summary Judgment as Material Questions of Fact are Abundant

Respondents essentially argue that the malpractice of Robinson was so obvious that it would, "at the very least, lead a reasonable person to an investigation of Trial Counsel's performance" and therefore, summary judgment was appropriate. (R. Brief p. 17). Respondents state:

> The injury, for which Craven was purportedly unprepared, was merely the final step in a long line of circumstances before and during trial that would have alerted a person of common knowledge and experience that something was amiss, and that would have led a reasonable person to undertake an investigation of Trial Counsel's conduct within the three-year statute of limitations.

(R. Brief p. 17). However, 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). Respondents' recitation of the facts, which is in large part quoted from the lower court's order, illustrates the lower court's error in viewing the facts in the light most favorable to the *moving* party and paints the clearest picture for why the application of the discovery rule is properly submitted to a jury.

In its brief, Stokes-Craven details the numerous mischaracterizations of the testimony in the case as well as the evidence that, in the very least, creates a material question of fact as to when the statute of limitations began to run on Stokes-Craven's malpractice claim. Stokes-Craven will not rehash all of the evidence here, but will discuss once such instance by way of example. Respondents allege, and the lower court held, 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." (R. Vol. I p. 9). "Using basic arithmetic, as soon as the verdict was handed down, Stokes-Craven knew (or, at the very least, should have known) that it would have been better off settling the case." (R. Brief p. 18).

Mr. Craven testified that he turned the case and the demand letter made by Mr. Polito, Austin's then 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.

(R. Vol. I p. 302; deposition p. 58 line 19 through p. 59 line 21). Mr. Craven believed his attorney had tried to settle the case and could not as he was rebuffed by Mr. Austin. Mr. Craven did not know that Mr. Robinson had failed to pursue a settlement in the first place.

III. Overruling *Epstein v. Brown*

Respondents note: "In considering challenges to prior precedent, this Court has held that '[s]tare decisis exists to insure a quality of justice which results from certainty and stability.'" (R. Brief p. 10). This Court has also held "[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). "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, 638 (1924)).

Respondents argue that a bright-line rule preserving claims until *remittitur* does not enjoy "wide support" in other jurisdiction and downplays the policy concerns of those Court that have established such a rule. Respondents argue that a bright-line rule preserving claims comes with

its own adverse effects, including litigating stale claims and reduced ability to obtain global settlements. However, this reasoning does not follow considering the alternative proposed by respondents is to enter into a tolling agreement. Assuming malpractice carriers will agree to a tolling agreement, the malpractice case is tolled until the final conclusion of the underlying case; thus, the same issue of litigating stale claims is present. Further, if the case is tolled, there is no incentive to settle until final conclusion of the underlying case, especially when the underlying case is complex and the result is uncertain.

The more pressing policy concerns are alleviated by a bright line rule tolling the statute until *remittitur*. In *Hughes v. Mahaney & Higgins,* 821 S.W.2d 154, 157 (Tex. 1991) the Texas Supreme Court established a tolling rule for the statute of limitations in legal malpractice cases: "[W]hen an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted." *Id.* at 157; *see also Murphy v. Campbell,* 964 S.W.2d 265, 272 (Tex.1997). In *Hughes,* the Texas Supreme Court expressed two policy reasons for tolling the statute of limitations when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation. *Id.* at 156-57. The court first pointed out that the legal injury rule and the discovery rule can force a client into the untenable position of having to adopt inherently inconsistent litigation postures in the underlying case and the malpractice case. *Id.* at 156 (noting that a party might be placed in the position of asserting that her attorney committed malpractice, and but for malpractice her claim would have succeeded, while at same time asserting in the underlying appeal that her attorney's actions were correct, or at least not fatal to her claim). The court then explained that limitations should be tolled for the malpractice claim because the viability of that claim depends on the outcome of the underlying litigation. *Id.* at

157. The Texas Supreme Court reinforced these policy considerations in *Sanchez v. Hastings,* 898 S.W.2d 287 (Tex.1995), stating that "if the client must carefully scrutinize every stage of the case for possible missteps it would erode the trust between client and lawyer necessary for the successful prosecution of litigation." *Id.* at 288 (Tex.1995). In *Apex Towing Co. v. Tolin,* 41 S.W.3d 118 (Tex. 2001), the Texas Supreme Court instructed lower courts to "simply apply the *Hughes* tolling rule to the category of legal-malpractice cases encompassed within its definition." *Id.* at 122. The court stated, "in the area of limitations, bright-line rules generally represent the better approach." *Id.*

The Florida Supreme Court has determined that a client's claim for legal or professional malpractice resulting from an adverse judgment does not begin to run until after the judgment is determined on appeal. *See Peat, Marwick, Mitchell & Co. v. Lane*, 565 So. 2d 1323, 1324 (Fla. 1990). The Court reasoned that accrual in a legal or professional malpractice action does not occur until the underlying legal process has been completed on appellate review because until that time, one cannot determine if there was any actionable error by the attorney. As was explained in *Diaz v. Piquette,* 496 So.2d 239, 240 (Fla. Dist. Ct. App. 1986) review denied, 506 So.2d 1042 (Fla.1987):

> 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, possible 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.

Likewise, in *U.S. National Bank v. Davies,* the Oregon Supreme Court held that a legal malpractice action accrues only when the plaintiff has both been damaged in fact and knows or should know that the defendant's negligence is the cause of the damage. The Court reasoned:

> 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. In the present case, plaintiff's decedent would have been defending one suit or action, claiming he had acted in conformance with the law, while simultaneously maintaining an action against defendants, claiming that he had not acted in conformance with the law because of faulty advice from defendants. Such an inconsistent position would have given rise to impeachment of decedent in his defense of the action brought against him, which certainly is not desirable from either of the present parties' point of view.

U. S. Nat. Bank of Oregon v. Davies, 274 Or. 663, 670, 548 P.2d 966, 970 (1976).

In *Ranier v. Stuart & Freida, P.C.*, 887 P.2d 339, 342 (1994 OK Civ App 155), the Oklahoma Court of Appeals stated that whether the client continues to be represented by the alleged malpracticing attorney throughout the appeal of the underlying action is "an important factor in considering when the malpractice action accrues." The Court held that the "continuous representation rule has been consistently recognized even in jurisdictions which hold that the statute of limitations is not tolled pending final resolution of the underlying litigation." *Id.* citing *Beesley v. Van Doren,* 873 P.2d 1280 (Alaska 1994) (holding the statute of limitations in a legal malpractice case was not tolled pending final resolution of the litigation of the underlying claim, but acknowledging that this rule might not be applicable when a lawyer continues representation on appeal).

IV. Appellate Counsel

Respondents, while downplaying Robinson's role as appellate counsel for Stokes-Craven, argue that Stokes-Craven is charged with knowledge of Robinson's malpractice as of May 2007, the first date that appellate counsel reviewed the trial transcript.

Both Steven Brown and Ed Buckley, the two Young Clement 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. (R. Vol. I p. 342, 347). Mr. Buckley and Mr. Brown were strictly appellate counsel and did not undertake to advise Stokes-Craven regarding the malpractice of its trial lawyers (R. Vol. I p. 347; deposition p. 58, lines 12-20), and Mr. Robinson was still involved with the case throughout the appeal. (R. Vol. I p. 337; deposition p. 20, lines 9-14). 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."

First, contrary to the respondents' assertion, 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). Second, how is it that 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?

V. Equitable Estoppel and Equitable Tolling

Respondents allege there is no evidence of concealment as Mr. Craven "had all of the relevant facts at his disposal." (R. Brief p. 32). However, as Dennis Craven consistently testified, he did not know how a lawyer should prepare a case for trial, had full confidence in Mr. Robinson and his trial strategy, including what witnesses to interview and to call at trial, and believed that Mr. Robinson had reached out to Austin's attorneys in response to the settlement demand, but had been ignored. Mr. Craven would not have had the first idea whether Robinson

adequately prepared the case for trial, and believed Mr. Robinson when he blamed the large verdict on the unpredictable nature of juries and expressed optimism in getting the verdict overturned up until the day of oral argument when Mr. Craven and Mr. Robinson drove to Columbia together. Mr. Robinson's affirmative representations that factors other than his breaches of the standard of care led to the adverse result coupled with his continuous representation of Stokes-Craven throughout the appeal and his failure to inform Stokes-Craven of his mishandling of the case and the issue preservation errors alleged by Austin constitute sufficient evidence to invoke equitable estoppel. 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). Mr. Robinson's silence as well as his affirmative representations regarding runaway juries and reversal on appeal had the effect of misleading Stokes-Craven.

Respondents further allege there are no "extraordinary circumstances" justifying the application of the doctrine of equitable tolling. It would truly be an extraordinary circumstance if an attorney, whose malpractice was so egregious that his defense counsel argues that it would, "at the very least, lead a reasonable person to an investigation of Trial Counsel's performance" was allowed to avoid liability to his client by concealing his breaches of the standard of care until the statute of limitations expires. It would be even more extraordinary to hold appellate counsel liable for the failure to disclose trial counsel's potential malpractice, while finding the malpracticing attorney (who was also appellate counsel) had no duty to speak.

Respondents argue it would be unfair to equitably toll the statute and "expand" a fiduciary's duty to speak. (R. Brief p. 33). Respondents pledged faithfulness, competence, diligence, good judgment and prompt communication to their clients. Allowing a lawyer to conceal his wrongdoing in order to preclude a malpractice claim is anathema to the Oath we all take as lawyers and abhorred by equity. There was never a more compelling case for equitable tolling.

VI. Correspondence Between an Insured and its Insurer

Respondents contend the "lower court properly applied the work product doctrine in holding that Trial Counsel's communications with their malpractice insurer were not discoverable" and argue the authority cited by Stokes-Craven does not apply as the insurance at issue is third-party insurance. (R. Brief p. 35). Stokes-Craven disagrees with respondents' assertion, but, in any event, the distinct is one without a difference as the authority cited by Stokes-Craven deals with communications between insureds and their liability insurers – the same communications at issue here. *See e.g. Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 536, 540 (N.D.W. Va. 2000) ("This is a third-party bad faith action"); (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)("[t]here is no insured-insurer privilege protecting communications between an insured and its liability or indemnity insurer."); *McDougal v. Dunn,* 468 F.2d 468 (4th Cir. 1972) (third-party automobile insurance claim).

Respondents argue for a blanket privilege protecting all communications between an attorney and his malpractice carrier under the guise of the work product doctrine and claim no privilege log was necessary because these communications are "not discoverable. Respondents' argument completely ignores the fact that 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). As respondents refused to prepare a privilege log, there is nothing in the record that identifies the author or recipient of any communications, the date and number of any communications, or any other information that would demonstrate the communications at issue were made in anticipation of litigation. A mere statement that the privilege applies does not satisfy the burden of proof. *Cacamo v. Liberty Mut. Fire Ins. Co.*, 798 So.2d 1210 (La. App. 4 Cir.2001).

Respondents argue Stokes-Craven did not show a substantial need for the alleged privileged communications. However, only after the party claiming work product protection has met its burden, does the requesting party need to prove a substantial need for the protected documents. Respondents' argument, which the lower court accepted, turns the analysis on its head. The lower court 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). There is no need to show substantial need as respondents have not met their burden with regard to the communications sought.[1]

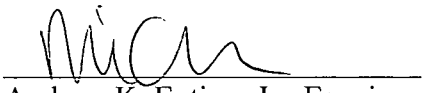
VII. Conclusion

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, or in the

1 Even if respondents had met their burden, Stokes-Craven has shown substantial need. (See Brief of Appellant pp. 34-36).

alternative, adopt the continuous representation rule; and (3) 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.

Respectfully Submitted By:



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On this 20 day of June, 2014
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CERTIFICATION

The undersigned certifies that Appellants' final reply brief complies with Rule 211(b) SCRAP.

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MCKENZIE & ROBINSON, LLC, Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's final briefs on all Respondents by delivering a copy via regular U.S. Mail on June 23, 2014, addressed to their attorneys of record as follows:

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