

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM THE CLARENDON COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable George C. James, Jr.

Case No. 2010-CP-14-0457
Appellate Case No. 2013-001452

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

Appellant,

v.

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

Respondents.

**RECORD ON APPEAL
VOLUME I**

Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
ANDREW K. EPTING, JR., LLC
46a State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310

**Attorneys for Appellant Stokes-Craven
Holding Corp., d/b/a/ Stokes-Craven Ford**

Susan Taylor Wall, Esquire
Amanda C. Williams, Esquire
McNair Law Firm, PA
100 Calhoun Street, Suite 400
Charleston, SC 29401
Attorneys for Respondent Scott Robinson

Warren Powell, Esquire
Bruner Powell Wall & Mullins, LLC
1735 St. Julian Place (29204)
PO Box 61110
Columbia, SC 29206
**Attorney for Respondent Johnson
McKenzie & Robinson, LLC**

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STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

STOKES-CRAVEN HOLDING CORP.
D/B/A STOKES-CRAVEN FORD,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

C/A No.: 2010-CP-14-457

**ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT**

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE 6/6/13
Bertha H. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

CLERK OF COURT
CLARENDON COUNTY, SC

THIS MATTER CAME BEFORE THE COURT by way of defendant Scott L. Robinson's motion for summary judgment filed on November 29, 2012 and defendant Johnson McKenzie & Robinson, LLC's motion for summary judgment filed on November 26, 2012. Also before the court was the plaintiff's motion to compel production of certain documents. After due notice, a hearing was held on January 9, 2013 in Clarendon County, South Carolina. Present at the hearing were counsel for all interested parties: Andrew K. Epting, Jr., for plaintiff Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford; Susan Taylor Wall, Esq., for defendant Scott L. Robinson ("Robinson"); and Warren C. Powell, Jr., Esq., for defendant Johnson McKenzie & Robinson, LLC ("Johnson McKenzie"). The Court has carefully considered the motions, arguments of counsel, and the law.

I. BACKGROUND

This case arises from an underlying action known as *Donald C. Austin v. Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford*, Case No. 2004-CP-14-135 ("Underlying Action"). Robinson and Johnson McKenzie represented Stokes-Craven Holding Corporation ("Stokes-Craven"), a car dealership, in the Underlying Action which was tried in Clarendon County in

August 2006. In August 2010, Stokes-Craven filed this legal malpractice action against defendants Robinson and Johnson McKenzie asserting that defendants were negligent in their representation of Stokes-Craven in the Underlying Action. After the completion of discovery, defendants filed motions for summary judgment on statute of limitations grounds.

II. PROCEDURAL HISTORY

On March 15, 2004, Donald Austin filed a lawsuit against Stokes Craven. The case was tried in Clarendon County for three days beginning on August 14, 2006. The jury awarded Austin \$26,371.10 in actual damages and \$216,600.00 in punitive damages. Following the verdict, Stokes-Craven and Austin filed cross-appeals. On March 8, 2010, the Supreme Court issued its opinion in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) and upheld the jury's damages award.

On August 16, 2010, Stokes-Craven filed a legal malpractice action against Robinson and Johnson McKenzie claiming that defendants were negligent in their representation of Stokes-Craven both prior to and during the trial by allegedly failing to: conduct discovery, prepare a pretrial brief, prepare trial exhibits, prepare voir dire, notify plaintiff's insurance carrier, preserve certain issues for appeal or settle the case before the jury verdict. Stokes-Craven contends that as a result of these alleged failings, an adverse jury verdict was returned against the dealership.

On August 26, 2011, Stokes-Craven filed an amended complaint. All defendants timely answered the amended complaint asserting the statute of limitations as one of their affirmative defenses. Specifically, defendants maintain that the statute was triggered on August 17, 2006, the date the verdict was rendered against Stokes-Craven in the Underlying Action. For the reasons set forth herein, the defendants' motions for summary judgment are granted.

III. STANDARD OF REVIEW

Rule 56, SCRCF, requires the entry of summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). While viewing the evidence in a light most favorable to plaintiffs, under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

IV. FACTS¹

Stokes-Craven, located in Manning, South Carolina, is an automobile and truck dealership of new and used vehicles. Dennis Craven is part owner, officer of the company, principal of the dealership, and serves as on site manager. The Underlying Action, which gives rise to this legal malpractice action, arose from Stokes-Craven's sale of a used Ford truck to Donald Austin, the plaintiff in the Underlying Action. Austin was not told that the truck he purchased was previously owned by an individual named Gary Bailey who wrecked the truck, repaired it at an expense of \$20,309.38 and traded it back in to Stokes-Craven in April 2002. On June 1, 2002, Austin purchased the truck for \$26,371.10. Stokes-Craven knew the truck was wrecked when the dealership bought it back from Bailey but did not tell Austin even when Austin inquired about the truck's history before purchase. One of Stokes-Craven's salesmen, William Frierson, denied the truck had been wrecked and told Austin that it had a 5-year, 100,000 mile powertrain warranty.

¹ The facts set forth are stated in the light most favorable to plaintiff.

A few months after purchasing the truck, Austin discovered an oil leak at which time he was told by Dennis Craven that the truck was not covered by a 5 year, 100,000 mile powertrain warranty. Craven told him the dealership would cover this repair but that Austin would be responsible for any future repairs. In response, Austin asked Craven to return his purchase price and he would return the truck, but Craven rejected this request. Austin nevertheless scheduled the oil leak repair for September 13, 2002. Just before this appointment, Austin learned the truck had been previously wrecked. When Austin arrived at the dealership on September 13, 2002 for the repair on his truck, he met with Craven and again requested that he be allowed to return the truck given his new discoveries regarding the wreck and the lack of a powertrain warranty. In response to this demand, Craven showed Austin a Buyers Guide that was purportedly signed by Austin. The Buyers Guide stated the truck was covered only by a warranty of "up to 100,000 on diesel engine." Austin denied he signed the document.

When Austin returned to pick up his truck a week later, he again met with Craven to discuss the situation. Austin reiterated that he did not sign the Buyers Guide at which time Craven compared the signature on the signed document with Austin's driver's license. Craven admits that after comparing the signature contained on the warranty document with the signature contained on Austin's driver's license in 2002, he concluded that Austin's purported signature on the warranty document was a forgery. (Craven deposition, May 19, 2011, p. 105.) However, Craven again refused Austin's request to return the truck for a refund.

On February 18, 2003, Craven received a comprehensive letter from Austin's attorney, John Polito, which set forth the problems with the truck and the forgery and also included an analysis from two experts (one on auto body repair and one on the appraisal and valuation process). In the letter, Mr. Polito renewed Austin's request for a refund of the purchase price of the truck and, additionally, requested payment of Polito's fees in the sum of \$1,500.00. Craven

claims he turned this letter over to his attorney, defendant Robinson, to handle. Craven, however, never agreed to the terms contained in the Polito letter.

On March 15, 2004, Austin filed suit against Stokes-Craven Ford alleging various causes of action including breach of contract, negligence, constructive fraud, common law fraud, violation of the South Carolina Motor Vehicles Dealer's Act, and violation of the South Carolina Unfair Trade Practices Act. Austin sought actual and punitive damages, prejudgment interest, attorney fees and costs. Stokes-Craven, represented by attorney Robinson, answered and denied each of Austin's material allegations.

After a three day trial, on August 16, 2006, the jury found in favor of Austin and awarded damages for negligence and fraud in the amount of \$26,371.10 actual damages and \$216,600.00 punitive damages. The jury also found Stokes-Craven had violated the Federal Odometer Act. The jury found in favor of Stokes-Craven on Austin's claim under the UTPA. Austin and Stokes-Craven then filed cross-appeals. Stokes-Craven was represented Young Clement Rivers, LLP, during the course of the appeal. Though Robinson was included as counsel of record on the appellate pleadings, he was not involved in the drafting of the appellate briefs or the oral argument, and had no input on the handling of the appeal. The Supreme Court issued the Austin opinion on March 8, 2010. Thereafter, on August 16, 2012, Stokes-Craven filed the subject legal malpractice action against defendants Robinson and Johnson McKenzie.

V. DISCUSSION

Statutes of limitations are designed to protect important public policy concerns.

Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his [or her] rights. Another purpose of a statute of limitations is to protect potential defendants from

protracted fear of litigation. Statutes of limitations are, indeed, fundamental to our judicial system.

Kelly v. Logan, Jolley, & Smith, LLP, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009) (internal citations and quotations omitted).

It is well settled in South Carolina that claims for negligence and breach of fiduciary duty must be brought within three years. See S.C. Code Ann. § 15-3-530. The statutory period begins to run when the claimant could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his favor, rather than when the claimant obtains actual knowledge of either the potential claim or the facts giving rise thereto. *Austin v. Conway Hosp., Inc.*, 292 S.C. 334, 338, 356 S.E.2d 153, 156 (Ct. App. 1987). The discovery rule focuses upon whether the complaining party acquired knowledge of any facts "sufficient to put said party on inquiry, which, if developed, will disclose" the alleged conduct. *Burgess v. American Cancer Soc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989) (quoting *Walter J. Klein Co. v. Kneece*, 239 S.C. 478, 483, 123 S.E.2d 870, 874 (1962)).

It is not necessary that the claimant acquire precise information of the alleged wrongful conduct for the statute to begin to run, but merely acquire "such facts as would have led to the knowledge thereof, if pursued with reasonable diligence." *Grayson v. Fidelity Life Ins. Co. of Philadelphia*, 114 S.C. 130, 103 S.E. 477, 478 (1920). South Carolina law requires a party to exercise reasonable diligence once he is on notice that some right of his has been affected. See *Dean v. Ruscon*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996); *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). "The fact that the injured party may not comprehend the full extent of the damage is immaterial." *Dean*, 321 S.C. at 364, 468 S.E.2d at 647; see also *Epstein v. Brown*, 363 S.C. 372, 382, 610 S.E.2d 816, 821 (2005).

The standard as to when the limitations period begins to run is objective, rather than subjective. *Kelly*, 383 S.C. at 633, 4; *Kreutner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995); *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800.

In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

Moore v. Benson, 390 S.C. 153, 161, 700 S.E.2d 273, 277 (Ct. App. 2010) (quoting *Young v. SC Dept. Corrections*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999)).

A. Stokes-Craven's Motion to Compel

The court notes that since it is granting summary judgment to the defendants, a ruling on the motion to compel is technically not necessary. However, the plaintiff has requested the court to rule on this motion in the event its decision on summary judgment is overturned. Stokes-Craven has requested production of (1) the defendant law firm's professional liability policy applications for the years 2002 through 2012, (2) all correspondence between the defendants' malpractice carrier and the defendants and the defendants or their attorneys, (3) all billing for computer research from any research providers to the defendant law firm from 2003 through 2006.

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), SCRCPP. 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.

As for (1) above, the court has reviewed the applications submitted *in camera* to the court by the defendants for the years 2002 through 2006. The court concludes that the applications are

discoverable, but that any issues of ultimate admissibility will be left to the trial judge. The court concludes that personal financial information may be redacted, and that social security and tax identification numbers may also be redacted. The parties will either enter into a consent confidentiality order or the court will order that only the plaintiff's attorneys will have access to the applications pending further order of the court. None of the information shall be disclosed to any person other than counsel without further order of the court, and if anyone violates this order, he or she or it will suffer risk of being held in contempt of court.

B. Stokes-Craven's Claims are Barred by the Statute of Limitations.

Under South Carolina law, "[t]he statute of limitations begins to run at the time the [plaintiff] has inquiry or constructive notice [that a claim might exist]." *Berry v. McLeod*, 328 S.C. 435, 445, 492, S.E.2d 794, 800 (Cl. App. 1997) (emphasis added). Either form of notice is sufficient. *Id.* In viewing the facts in the light most favorable to Stokes-Craven, I find Stokes-Craven had both inquiry and constructive notice of the claim more than three years before the lawsuit was filed. The deposition testimony of Dennis Craven compels the conclusion that Stokes-Craven had inquiry notice of the claim against defendants by August 17, 2006, the date of the verdict in the Underlying Action. 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.

1. Inquiry Notice.

Stokes-Craven contends, through its pleadings, deposition testimony, and/or written discovery and arguments in opposition to summary judgment, that defendants were negligent in the following respects:

1. failing to diligently investigate the facts (Craven 5/19/11 Dep. p. 33);

2. failing to obtain a handwriting sample from Billy Frierson (Craven 5/19/11 Dep. p. 37);
3. failing to interview Kenny Craven sooner than two days before trial (Craven 5/19/11 Dep. p. 41);
4. failing to contact Barry Thornall to testify, which testimony, according to Mr. Craven, would have benefitted Stokes-Craven and would more than likely have led to a different result (Craven 5/19/11 Dep. p. 43);
5. failing to show Mr. Craven, or otherwise review with him, interrogatory answers prior to trial (Craven 5/19/11 Dep. pp. 44-46). Mr. Craven testified at trial and during his deposition that the first time he saw the answers to interrogatories was the day of his trial testimony and only then did he notice that some of the answers gave incorrect information. Mr. Craven claims that if he had seen the answers beforehand, he may have been better prepared, or would have been able to plan better, and the results of the trial would more than likely have been different;
6. failing to keep Stokes-Craven more informed and failing to prepare Mr. Craven for cross-examination. Mr. Craven testified that if Stokes-Craven had been more informed and if Mr. Robinson had better prepared him for cross-examination, the trial likely would have turned out more favorably to Stokes-Craven (Craven 5/19/11 Dep. pp. 53-54);
7. failing to settle the case. Stokes-Craven argued at the hearing that the failure to settle was the major failure on the part of defendants. In his deposition, Mr. Craven testified that Stokes-Craven was not confident of its position going into trial. He further stated in his deposition that he felt Stokes-Craven had done something wrong in its dealings with Mr. Austin (Craven 5/19/11 Dep. p. 56), and that he knew the forgery of the buyer's warranty was a major part of the case and had been an issue for some time (Craven 5/19/11 Dep. p. 57). Mr. Craven admitted that he concluded in 2002 that there had been a forgery (Craven 5/19/11 Dep. p. 105). Insofar as failure to settle is concerned, all of these factors were well within Mr. Craven's grasp at the time the verdict was rendered and it was then that he 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.

With regard to points (1) – (6) above, Mr. Craven was asked the following by Johnson

McKenzie's counsel:

Q. Okay. And would it be a fair statement that the allegations, the specific things we were talking about, that is the failure to keep you advised and the other issues and that deficiencies that the plaintiff contends that the defendants made through the course of handling the case and at trial, when the verdict was handed down it became evident that that was a serious problem for the plaintiff?

A. Correct.

(Craven 5/19/11 Dep. p. 61.) Defendants maintain that this exchange amounts to an admission on the part of Mr. Craven that he immediately knew the alleged negligence of Mr. Robinson had resulted in the adverse verdict. I do not agree this is an outright admission, at least for summary judgment purposes, because the quoted exchange is somewhat disjointed and the question to Mr. Craven was not clearly stated. I tend to agree with the plaintiff that Mr. Craven's "serious problem" testimony on page 61 can be interpreted to mean that he knew the verdict itself was a serious problem for Stokes-Craven.

Nevertheless, regardless of whether Mr. Craven's testimony on page 61 in and of itself amounts to an outright admission that he knew Stokes-Craven might have a claim against defendants, his testimony as a whole (points 1-6 above) compels the conclusion 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. S.C. Code Section 15-3-530 provides for a three year statute of limitations for legal malpractice actions. The statute amounts to a "discovery rule" under which the statute begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for wrongful conduct. As our Supreme Court has observed on more than one occasion, it has long been the law in South Carolina that "the exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed." *Epstein*, 363 S.C. at 376, 610 S.E.2d at 818 (emphasis supplied by the Supreme Court) (citing *Berry v. McLeod*, 328 SC 435, 445, 492 S.E.2d 794, 799 (Ct. App. 1997) quoting Supreme Court opinions of *Snell* at 303, 334 and *Mitchell v. Holler*, 311 S.C. 406, 429 S.E.2d 793 (1993);

accord, *Dean*): *Rogers v. Efir's Exterminating Co.*, 284 S.C. 377, 379, 325 S.E.2d 541, 542 (1985). The *Epstein* Court also stated the rule in similar language that the statute "begins to run when a reasonable person of common knowledge and experience would be on notice that a claim against another party might exist. The fact that the injured party may not comprehend the full extent of the damages is immaterial." *Id.* at 382, 821. The standard is an objective one, rather than a subjective one. *Kelly*, 383 S.C. at 633, 4, 682 S.E.2d at 7; *Kreutner*, 320 S.C. at 285, 90.

Following a line of Supreme Court opinions now spanning over thirty years, the *Epstein* Court's emphasis of the word "might" and the remaining bold-print language that emphasizes the duty to act even when no "advice from counsel is sought or a full blown theory of recovery developed." In *Epstein*, the facts leading to the grant and affirmation of summary judgment were clear insofar as the majority's application of the discovery rule was concerned. *Epstein's* lawyer in the underlying trial had allegedly done or not done certain things that were known to *Epstein* to such an extent that the evidence was rather clear that the client knew at the time the verdict was rendered he might have a claim against his attorney. 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. Mr. Craven was the principal Stokes-Craven contact for Mr. Robinson, and in essence was the Stokes-Craven "point man" for the underlying Austin litigation. His knowledge of these shortcomings is imputed to Stokes-Craven.

Stokes-Craven contends that Mr. Craven had never been involved in a trial before and that he was totally uneducated as to how litigation (pre-trial and during trial) should be conducted by an attorney. However, Mr. Craven, and therefore Stokes-Craven, knew at the time of the verdict (or at the least should have known) that Stokes-Craven **might** have a claim against defendants for their negligence in handling the case. The law does not permit the client to wait until he consults with other counsel to become educated and does not allow the client to wait until he has a full-blown theory of recovery.

Stokes-Craven maintains that the deposition testimony of Mr. Craven does not establish that he knew or should have known at the conclusion of the trial that a claim might exist against defendants. Stokes-Craven points to some rather generic testimony of Mr. Craven for this proposition. (Pl.'s Mem. in Opp. to Summ. J. pp. 6-8.) However, as noted above, the testimony of Mr. Craven as a whole establishes otherwise as a matter of law.

Stokes-Craven argues that the first time it was put on notice of a malpractice claim was at a meeting with its appellate counsel on June 9, 2009, when appellate counsel pointed out that Austin's attorneys were claiming that Mr. Robinson had made error preservation mistakes during trial. That may create a factual issue on that specific point, but this argument ignores the fact that Mr. Craven knew or should have known a claim might exist because of the other actionable errors he claims were made by Mr. Robinson as discussed above. In addition, this argument also ignores the fact that the knowledge of an attorney is imputed to his client. Here Stokes-Craven's appellate counsel knew that issue preservation was an issue as soon as counsel read the trial transcript, as further discussed below.

2. Constructive Notice.

The defendants claim that Stokes-Craven was also on constructive notice of its claim against defendants more than three years before it filed its claim. As set forth above, the statute

of limitations begins to run when a plaintiff has either inquiry or constructive notice. *Berry*, 328 S.C. at 445, 800. The defendants argue Stokes-Craven had constructive notice of the potential issue preservation concerns through its appellate lawyers at Young Clement Rivers, LLP. One of Stokes-Craven's appellate lawyers testified that issue preservation is one of the first items he evaluates when he is handling an appellate case, and he knew issue preservation was going to be an issue in this case. He testified that when he was reviewing the trial transcript in April and May of 2007, the issue preservation concern "jumped out" to him. (Brown Dep. pp. 65, 67; Young Clement Time Sheets). Thus, according to the defendants, Young Clement was aware of the potential issue preservation concerns in May 2007 (at the latest), more than three years before Stokes-Craven filed suit.

The defendants claim that Young Clement's knowledge of the issue preservation concerns on appeal is imputed as a matter of law to Stokes-Craven because Young Clement, as Stokes-Craven's appellate attorney, was Stokes-Craven's agent. "It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority." *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979); *see also Dorman v. Campbell*, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Cl. App. 1998) (holding that knowledge of information in letter to plaintiff's attorney was imputed to plaintiff for purposes of determining commencement of the statute of limitations even though plaintiff never saw the letter). The defendants claim Young Clement was acting within the scope of its authority when it reviewed the trial transcript and identified the potential issues on appeal. In addition, there is no dispute that the issue preservation concerns were material to the appeal. The court concludes there is an issue of fact as to whether Young Clement's knowledge is imputed to Stokes-Craven in this instance and therefore denies summary judgment on this ground.

C. Equitable Estoppel and Equitable Tolling Do Not Bar Defendants' Statute of Limitations Defense.

I hold as a matter of law that the doctrines of equitable estoppel and equitable tolling do not apply to the facts of this case.

1. Equitable Estoppel

The doctrine of equitable estoppel rests on a general principle of fairness which prevents one party, with knowledge of the situation, from misleading another by words, conduct, or silence in such a way that the other party would be prejudiced if the first party were allowed to later take an inconsistent position. *See Kelly*, 383 S.C. at 638, 682 S.E.2d at 7.

To establish equitable estoppel, the party claiming estoppel must prove that he or she (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped. The party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts.

Id. at 638, 682 S.E.2d at 7 (internal citations omitted).

Estoppel by silence arises when the party estopped owes a duty to speak to the other party but refrains from doing so, thereby leading the other party to believe in an erroneous state of facts. 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)

There is nothing in the record to support the conclusion that defendants did anything to mislead Stokes-Craven, or that Mr. Robinson engaged in conduct calculated to convey an impression that facts were inconsistent with those which Mr. Robinson subsequently attempted to assert. There is no evidence that Mr. Robinson engaged in any conduct to prevent Stokes-Craven from filing a malpractice action, nor is there any evidence that Stokes-Craven relied upon

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any conduct or representation of Mr. Robinson in delaying suit. Also, Stokes-Craven did not lack the means of knowing of the alleged malpractice on the part of Mr. Robinson, as set forth above in Points 1 – 7 discussed on pages 7 – 8 of this order.

Much of Stokes-Craven's discussion about the trigger date of June 2009 is based on matters pertaining to issue preservation (failure to object to vehicle value testimony). 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. However, this again ignores the fact that Stokes-Craven knew of other alleged acts of negligence well before June 2009, and Stokes-Craven cannot use this one issue to excuse its failure to timely commence this action. Furthermore, it ignores the fact that Stokes-Craven's appellate counsel, Young Clement, knew of the issue as soon as they reviewed the trial transcript.

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.

2. Equitable Tolling.

The statute of limitations should be tolled when, in view of all the circumstances, a party would otherwise suffer a gross wrong at the hand of the other party. *Hooper v. Ebenezer Sr. Services & Rehab. Ctr.*, 386 S.C. 108, 116-117, 687 S.E.2d 29, 33 (2009). In reviewing holdings from other jurisdictions, the *Hooper* Court noted that equitable tolling typically applies in cases

in which a litigant was prevented from filing suit because of an extraordinary event beyond his control, but that other jurisdictions have considered the doctrine "in a variety of contexts and have developed differing parameters for its application." *Id.* at 116, 687 S.E.2d at 32. The *Hooper* court quoted with approval the ruling of a Texas appellate court that "[t]he equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Id.* at 116-17, 687 S.E.2d at 33 (quoting *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. App. 2006)). Our Supreme Court went on to say that equitable tolling may be applied where justified under all the circumstances, but that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Id.* at 117, 687 S.E.2d at 33.

Here, there were no extraordinary events beyond Stokes-Craven's control that prevented it from commencing its action within three years after the verdict was rendered. 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 must present evidence that defendants prevented it from timely filing by an extraordinary event beyond its control. There is nothing in the record that would allow Stokes-Craven to invoke equitable tolling to escape the running of the statute of limitations.

D. Stokes-Craven's Motion for Summary Judgment.

Because the claims asserted by Stokes-Craven against defendants are barred by the statute of limitations, there is no need to address Stokes-Craven's motion for summary judgment.

VI. CONCLUSION

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Stokes-Craven's motion to compel is granted in part and denied in part, and that Stokes-Craven's claims

against defendants are barred by the applicable statute of limitations. Accordingly, defendant Scott L. Robinson's and defendant Johnson McKenzie & Robinson, LLC's motions for summary judgment are GRANTED and the case as to defendants is dismissed, with prejudice.

AND IT IS SO ORDERED.



George C. James, Jr.
Circuit Judge

June 4, 2013.

Sumter, South Carolina

B/17

Filters Used:
1 Tagged Record

Email Report

Form Format

Date Printed: 5/28/2014

Time Printed: 1:12PM

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Date 2/28/2013 Time 1:32PM 12:00AM Duration 0.00 (hours) Code
Subject Stokes-Craven v. Scott Robinson, et al Staff
Client Craven, Dennis MatterRef Craven MatterNo 2046-001
From James, George C. <GJamesJ@sccourts.org>
To WPowell@brunerpowell.com; Wall, Susan (SWall@mcna1r.net); Andrew K. Epting; Michelle Endemann
CC To "James, George C. Law Clerk (Benjamin H. Joyce)" <GJamesLC@sccourts.org>
BCC To
Reminders (days before) Follow N Done N Notify N Hide N Trigger N Private N Status
User1 User3
User2 User4

Dear All

I have reviewed and re-reviewed all of your submissions in the above case and have concluded that the defendants' motion for summary judgment must be granted. I have attached an outline of my reasoning. I am requesting Mr. Powell and Ms. Wall to prepare a proposed order in Word format that is to include the points raised in the attachment. The proposed order is to also include a procedural history of this case and a pertinent history of the underlying case. It is also to include a recitation of: the appearances of the attorneys at the hearing, the date of the hearing, case citations concerning the standard to be employed for consideration of summary judgment motions, a summary of the facts taken in the light most favorable to the plaintiff, and the plaintiffs' arguments against summary judgment. I will edit the proposed order accordingly.

Please note that the order is not to include any reference to the case cited by Mr. Powell on page 17 of his amended memorandum, Clearwater Trust, as that is an unpublished US District Court case. If you feel this is incorrect on my part, please advise.

For whatever it is worth, I prefer that "plaintiff", "defendants", and generic document descriptions such as "complaint", "answer", "motion", etc., not be capitalized. Since Stokes-Craven was a defendant in the underlying action and is now a plaintiff, please refer to Stokes-Craven as Stokes-Craven or SC.

Please forward the order to me in Word format by March 15, with a copy to Mr. Epting and Ms. Endemann. If you need more time, please let me know. I will certainly allow Mr. Epting to comment on the proposed order, provided that his input does not turn into a pre-emptive motion for reconsideration. I realize the plaintiff will emphatically disagree with the conclusions I have reached, and I respectfully request that Mr. Epting's comments at the stage of receiving the proposed order be restricted to the accuracy of the summary of the plaintiff's arguments, the summary of the facts taken in the light most favorable to the plaintiff, and the accuracy of the summary of the procedural histories.

After I receive the proposed order, I will edit it as necessary. Of course, I reserve the right to change my mind, but in saying that, I am not asking for any additional argument at this stage.

Your arguments were very well-stated, and I have not made my decision lightly. Thank you for your efforts.

George C. James, Jr.

Filters Used:

1 Tagged Record

Email Report

Form Format

Date Printed: 5/28/2014

Time Printed: 1:12PM

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P.O. Box 1716, Sumter, SC 29151

Phone: 803-436-2150

Fax: 803-436-2403

gjamesj@sccourts.org

Outline of Ruling in Stokes-Craven Holding Corp. v. Scott L. Robinson, et al

In addition to the points that are to be included in the proposed order per my email, the following points are to be included:

Date of hearing, appearances, purpose of hearing

The defendants claim they are entitled to summary judgment on the ground that the statute of limitations expired before this action was commenced. Specifically, the defendants maintain that the statute was triggered on August 17, 2006, the date the verdict was rendered against Stokes-Craven (referred to as "SC" in this memo) in the underlying action. For the reasons set forth herein, the motion is granted.

The following in no particular order:

- Procedural history of this and of the underlying case
- Plaintiff's theory of recovery in this case
- Defenses raised in answer
- Standard for summary judgment- Rule 56, case citations, etc.
- Facts taken in the light most favorable to the plaintiff (include the observation that these facts are disputed by the defendants but that they are stated herein in the light most favorable to plaintiff)
- Defendants' grounds for summary judgment in this case
- Summary of case law setting forth the basic purpose of having limitations periods, and a summary of case law addressing the S. O. L. discovery rule specifically.

Discussion

The deposition testimony of Mr. Craven compels the conclusion that the statute began to run on the date the verdict was entered. He stated that SC contends attorney Robinson was negligent in:

- (1) failing to diligently investigate the facts (Page 33, Craven transcript);
- (2) not obtaining a handwriting sample from Mr. Frierson (p. 37);
- (3) not interviewing Kenny Craven sooner than 2 days before trial (p. 41);
- (4) not contacting Mr. Thornall to testify, which testimony, according to Mr. Craven, would have benefitted SC and would more than likely have led to a different result (p. 43);

(5) failing to show him or otherwise review interrogatory answers with him prior to trial (pp. 44-46). Mr. Craven testified at trial and during his deposition that the first time he saw that document was the day of his trial testimony, and only then did he notice that some of the answers gave incorrect information. SC claims that if he'd seen them beforehand, he may have been able to be better prepared, or would have been able to plan something better and the results of the trial would more than likely have been different;

(6) failing to keep SC more informed and in failing to prepare Mr. Craven for cross-examination, and that if SC had been more informed and if Mr. Robinson had better prepared Mr. Craven for cross-examination, the trial would have turned out more favorably to SC (pp. 53-54);

(7) SC also maintains (and Mr. Epting cited this at the hearing as the major failure on the part of the defendants) that the defendants were negligent in failing to settle the case (see also paragraph 14 (l) of second amended complaint). On page 55 of his deposition, Mr. Craven stated that SC was not confident of its position going into trial, on page 56 he stated he felt that that SC had done something wrong in its dealings with Mr. Austin (p. 56), and on page 57 he states that the forgery of the buyer's warranty was a major part of the case. There is no dispute that Mr. Craven knew before and during trial that the signature was forged. Insofar as failure to settle is concerned, all of these factors were well within Mr. Craven's grasp at the time the verdict was rendered and it was then that he knew, or at least as a matter of law should have known, that SC might have a claim against its attorney for failing to settle the case.

With regard to points (1) – (6) above, Mr. Craven stated (p. 61) that the failure to keep him advised "and the other issues and the other deficiencies that the plaintiff contends the defendants made through the course of handling the case and at trial, when the verdict was handed down it became evident that that was a serious problem" for SC. The defendants maintain that this exchange between counsel for Mr. Robinson and Mr. Craven amounts to an admission on the part of Mr. Craven that he immediately knew the alleged negligence of Mr. Robinson had resulted in the adverse verdict. I do not agree this is an outright admission, at least for summary judgment purposes, because the quoted exchange is somewhat disjointed and the question to Mr. Craven was not clearly stated. I tend to agree with the plaintiff that Mr. Craven's "serious problem" testimony on page 61 can be interpreted to mean that he knew the verdict itself was a serious problem for SC.

However, regardless of whether Mr. Craven's testimony on page 61 in and of itself amounts to an outright admission that he knew SC might have a claim against the defendants, his testimony as a whole (points 1-6 above) compels the conclusion as a matter of law that SC knew or should have known it might have a claim on the date the verdict was rendered. S.C. Code Section 15-3-530 provides for a three year statute of limitations for legal malpractice actions. The statute amounts to a "discovery rule" under which the statute begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. Our Supreme Court has observed more than once that the "exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. **The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.**" Epstein v. Brown, 610 SE 2d at 818 (emphasis supplied by the Supreme Court) (citing Berry v. McLeod, 328 SC 435, 492 SE 2d 794 (Ct. App. 1997)). The Epstein Court also stated the rule in similar language that the statute "begins to run when a reasonable person of common knowledge and experience would be on notice that a claim against another party might exist. The fact that the injured party may not comprehend the full extent of the damages is immaterial." 610 SE 2d at 821. The standard is an objective one, rather than a subjective one.

It is the Epstein Court's emphasis of the word "might" and the remaining bold-print language that potentially make application of the discovery rule in a legal malpractice setting so harsh in any given case. In Epstein, the facts leading to the grant and affirmation of summary judgment were clear insofar as the majority's application of the discovery rule was concerned. Epstein's lawyer in the underlying trial had allegedly done or not done certain things that were known to Epstein to such an extent that the evidence was rather clear that the client knew at the time the verdict was rendered he might have a claim against his attorney. Here, Mr. Craven testified in his deposition that when he testified at trial he realized he'd 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 Mr. Robinson had not adequately investigated the case. Mr. Craven was the principal SC contact for Mr. Robinson, and in essence was the SC "point man" for the underlying Austin litigation. His knowledge of these shortcomings was certainly imputed to SC.

SC contends that Mr. Craven had never been involved in a trial before and that he was totally uneducated as to how litigation (pre-trial and during trial) should be conducted by an attorney. However, Mr. Craven, and therefore SC, knew at the time of the verdict (or at the least should have known) that SC **might** have a claim against the defendants for their negligence in handling the case. The law does not permit the client to wait until he consults with other counsel to become educated and does not allow the client to wait until he has a full-blown theory of recovery.

SC maintains that the deposition testimony of Mr. Craven does not establish that he knew or should have known at the conclusion of the trial that a claim might exist against the defendants. SC points to some rather generic testimony (pp. 6-8 of plaintiff's memo in opposition to summary judgment) of Mr. Craven for this proposition. However, as noted above, the testimony of Mr. Craven as a whole establishes otherwise as a matter of law.

SC argues that the first time it was put on notice of a malpractice claim was at a meeting with its appellate counsel on June 9, 2009, when appellate counsel pointed out that Austin's attorneys were claiming that Mr. Robinson had made error preservation mistakes during trial. That may well create a factual issue on that specific point, but this argument ignores the fact that Mr. Craven knew or should have known a claim might exist because of the other actionable errors allegedly made by Mr. Robinson as discussed above.

Equitable Estoppel and Equitable Tolling

I conclude as a matter of law that neither of these doctrines applies to the facts of this case.

Equitable Estoppel- this doctrine rests on a general principle of fairness which prevents one party, with knowledge of the situation, from misleading another by words, conduct, or silence in such a way that the other party would be prejudiced if the first party were allowed to later take an inconsistent position. (Include case citations setting forth the factors to be considered). Estoppel by silence arises when the party estopped owes a duty to speak to the other party but refrains from doing so, thereby leading the other party to believe in an erroneous state of facts. 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.

There is nothing in the record to support the conclusion that Mr. Robinson did anything to mislead SC, or that he engaged in conduct calculated to convey an impression that facts were inconsistent with those which Mr. Robinson subsequently attempted to assert. There is no evidence that Mr. Robinson engaged in any conduct to prevent SC from filing a malpractice action, nor is there any evidence that SC relied upon any conduct or representation of Mr. Robinson delaying suit. Also, SC did not lack the means of knowing of alleged malpractice on the part of Mr. Robinson, as set forth above (Points (1)-(7)).

Much of SC's discussion about the trigger date of June 2009 is based on matters pertaining to issue preservation (failure to object to vehicle value testimony). SC claims there is evidence that Mr. Robinson knew all along that this issue would be raised on appeal, and that his failure to advise SC amounted to conducting creating an issue of fact on the issue of equitable estoppel. However, this again ignores the fact that SC knew of other alleged acts of negligence well before June 2009, and SC cannot use this one issue to excuse its failure to timely commence this action.

SC also argues that the defendants failed to disclose breaches in their duty to SC, blamed the verdict on the unpredictability of juries, and continued to represent SC during the appeal. None of these points lead to any genuine issue of fact on the issue of equitable estoppel. Again, SC, through Mr. Craven, had knowledge on the day of the verdict that SC might have a cause of action against the

defendants. There is no evidence that the defendants misled SC by words, conduct, or silence to the detriment of SC.

Equitable Tolling- The SOL should be tolled when, in view of all the circumstances, a party would otherwise suffer a gross wrong at the hand of the other party. Hooper v. Ebenezer Senior Services and Rehabilitation Center. In reviewing holdings from other jurisdictions, the Hooper Court noted that equitable tolling typically applies in cases in which a litigant was prevented from filing suit because of an extraordinary event beyond his control, but that other jurisdictions have considered the doctrine "in a variety of contexts and have developed differing parameters for its application." Hooper, 386 SC at 116. The Hooper court quoted with approval the ruling of a Texas appellate court that "[t]he equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." (Quoting Hausman v. Hausman, 199 SW 3d 38, 42 (Tex. App. 2006)). Our Supreme Court went on to say that equitable tolling may be applied where justified under all the circumstances, but that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." Hooper, 386 SC at 117.

Here, there were no extraordinary events beyond SC's control that prevented it from commencing its action within three years after the verdict was rendered. Obviously, SC need not establish that the defendants did anything to mislead them, as that is a component of equitable estoppel and not necessarily equitable tolling. There is nothing in the record that would allow SC to invoke equitable tolling to escape the running of the statute of limitations.

The conclusion the court reaches is undeniably harsh, but it is clear that this result is in accordance with the law in this state.

Summary Judgment motion of plaintiff

Since the above ruling disposes of the action, there is no need to address the plaintiff's motion for summary judgment.

ANDREW K. EPTING, JR., LLC

ATTORNEYS AT LAW

April 5, 2013

The Honorable George C. James, Jr.
Post Office Box 1716
Sumter, SC 29150

Re: Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford v. Scott Robinson, et al
Case No. 10-CP-14-457

Dear Judge James,

Enclosed please find Stokes-Craven's redlined version of the proposed order submitted to you by the defendants.

First, we have corrected some typos, including an error on the date of the filing of the malpractice action on page six of the order.

Second, we take exception to the inclusion of a ground not presented to the court in the defendants' memorandums and not included in Your Honor's e-mail or outline of the order. The defendants argue Stokes-Craven had "constructive notice" of the defendants' malpractice at the time Stokes-Craven's appellate counsel reviewed the trial transcript. While this argument does call attention to the fact that Scott Robinson, who remained Stokes-Craven's attorney throughout the appeal, never said anything about his trial and pre-trial errors, this ground is not found anywhere in Your Honor's e-mail regarding your decision, nor is it found in the outline you provided. This argument was not made to the Court by the defendants in either of their memorandums in support of their motions for summary judgment, nor were the agency cases they have inserted in the proposed order cited by the defendants in their briefs.

Both Steven Brown and Ed Buckley, the two Young Clement Rivers, LLP ("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 defendants. (Depo of Brown pg 37, lines 4-19, pg 58, lines 12-20)(Depo of Buckley pg 37, lines 13-21, pg 53, lines 7-17). 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

ANDREW K. EPTING, JR. | AKE@EPTING-LAW.COM
MICHELLE N. ENDEMANN | MNE@EPTING-LAW.COM
46A STATE STREET • CHARLESTON, S.C. 29401
PHONE: (843) 377-1871 • FAX: (843) 377-1310
ALT FAX: (843) 628-2411

(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 did not undertake to advise Stokes-Craven regarding the malpractice of its trial lawyers; holding that attorneys are agents for their clients for all purposes dangerously expands the scope of an attorney's representation.

Finally Judge, your instruction to the defendants was to present the facts in the light most favorable to Stokes-Craven. We do not believe the defendants have followed your instructions. Rather than quote Mr. Craven, the defendants have inserted summaries of Mr. Craven's testimony, which we believe are inaccurate and certainly not presented in a light most favorable to Stokes-Craven. For example, on page 10 of the proposed order, the defendants claim Mr. Craven testified the defendants were negligent in "failing to obtain a handwriting sample from Billy Frierson." However, Mr. Craven's actual testimony is as follows:

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)(emphasis added).

On page 12 of the proposed order, the defendants claim Mr. Craven testified that the defendants were negligent in "failing to keep Stokes-Craven more informed and failing to prepare Mr. Craven for cross-examination. If Stokes-Craven had been more informed and if Mr. Robinson had better prepared Mr. Craven for cross-examination, Mr. Craven testified the trial likely would have turned out more favorably to Stokes-Craven." Mr. Craven actually testified that even if he had been better prepared, his answers on cross-examination would not have been any different:

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)(emphasis added).

The above quotes are but two examples of the defendants failing to state the facts in a light most favorable to Stokes-Craven. For your convenience, we have inserted, in the body of the order, Mr. Craven's actual testimony after each of the defendants "summaries."

Thank you for the opportunity to respond to the defendants proposed order.

With kindest regards,



Andrew K. Epting, Jr., LLC

AKE:agg

Enclosure

Cc: Susan T. Wall, Esquire
Warren Powell, Esquire

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

STOKES-CRAVEN HOLDING CORP)
d/b/a STOKES-CRAVEN FORD)

Plaintiff

vs.

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

Defendants

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

CASE NO. 2010-CP-

SUMMONS

FILED
CLERK OF COURT
CLARENDON COUNTY, SC
AUG 16 PM 4:05

TO THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address show below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted:

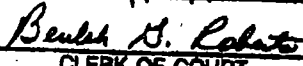
ANDREW K. EPTING, JR., LLC


Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
3 State Street, Charleston, SC 29401
P: 843.377.1871
F: 843.377.1310
ake@epting-law.com

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE

8/16/10


CLERK OF COURT
CLARENDON COUNTY, SC

On this 5 day of August 2010
Charleston, SC

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

STOKES-CRAVEN HOLDING CORP)
d/b/a STOKES-CRAVEN FORD)

CASE NO. 2010-CP-

Plaintiff

vs.

SCOTT L. ROBINSON and JOHNSON
McKENZIE & ROBINSON, LLC

Defendants

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OF ORIGINAL FILED IN THIS OFFICE
DATE 8/16/10
Beverly S. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

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CLARENDON COUNTY, SC
AUG 16 2010 1:05 PM

Plaintiff, Stokes-Craven Holding Corp d/b/a Stokes-Craven Ford ("Stokes-Craven"), files this action for professional malpractice against Defendants Scott L. Robinson and Johnson & Robinson, LLC. In support of this action, Plaintiff would show the Court the following:

1. Plaintiff, Stokes-Craven, is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Clarendon County, South Carolina.
2. The Defendant, Scott L. Robinson, is admitted to the bar and is licensed to practice law in the State of South Carolina. The Robinson is a resident of the city of Manning, County of Clarendon and maintains an office for the practice of law at 8 S. Brooks St, Manning, South Carolina, 29102.
3. The Defendant, Johnson & Robinson, LLC is a company organized and existing under the laws of the State of South Carolina with its principal place of business in Clarendon County, South Carolina.
4. In February of 2003, the Plaintiff retained Robinson and his law firm for the purpose of defending it in the action styled *Donald C. Austin v. Stokes-Craven Holding Corp. d/b/a Stokes-*

Craven Ford, case no. 2004-CP-14-135 filed in Clarendon County, South Carolina ("the underlying case").

5. As a result of the attorney-client relationship created by the above conduct of the parties, Defendants had a duty to represent Plaintiff with the reasonable care, skill, and diligence possessed and exercised by the ordinary attorney in similar circumstances.

6. The underlying complaint contained causes of action for revocation of acceptance, breach of contract, negligence, constructive fraud, common law fraud, violation of the South Carolina Motor Vehicle Dealer's Act, violation of the South Carolina Unfair Trade Practices Act (UTPA), and violation of the Federal Odometer Act, and was brought by Donald Austin who discovered the used pickup truck he purchased from Stokes-Craven had been in an accident.

7. Defendants were negligent in their defense of Stokes-Craven, and failed to exercise reasonable care, skill and diligence in the following ways:

- a. In failing to use due diligence in the investigation of the facts of the underlying case;
- b. In failing to prepare or serve any written discovery to aid in the defense of Stokes-Craven;
- c. In failing to depose any witnesses including the plaintiff and the testifying experts in the underlying matter;
- d. In failing to obtain copies of the expert vitas or reports prior to trial;
- e. In failing to prepare a pretrial brief, trial exhibits, voir dire, requests to charge, or any other documents for use at trial;
- f. In failing to provide any evidence of the value of the vehicle at trial;
- g. In failing to contemporaneously object to the testimony offered by Plaintiff and Plaintiff's expert with regard to the value of the vehicle being "\$0";

- h. In failing to preserve for appeal the issue of whether the Plaintiff in the underlying matter presented competent evidence of the vehicle's fair market value for appeal;
 - i. In failing to preserve for appeal the question of whether plaintiff's experts in the underlying matter were qualified to give expert opinions;
 - j. In failing to contemporaneously object to or preserve for appeal the trial court's misstatement with respect to Stokes-Craven's total profit for 2005;
 - k. In advising Plaintiff's counsel in responses to discovery that Stokes-Craven did not have any insurance policies relevant to the claims made in the underlying lawsuit;
 - l. In advising Stokes-Craven that it did not have coverage under its insurance policy for the claims made in the underlying case when Stokes-Craven was sued for negligence and constructive fraud; and
 - m. In failing to notify Stokes-Craven's insurance carrier of the claims made against its insured in the underlying matter.
8. The Defendants' conduct as described above constitutes negligence as well as a breach of the contractual obligation owed to the Plaintiff, and Stokes-Craven is entitled to damages.
9. The underlying case was tried on or about August 14, 2206, and as a direct and proximate result of Defendants failure to exercise reasonable care, skill, and diligence in representing Stokes-Craven, a jury verdict in the amount \$26,371.10 actual and \$216,600.00 punitive damages was returned against Stokes-Craven.
10. As a further proximate result of the Defendants' negligence, Stokes-Craven was forced to pay approximately \$60,000 in its own defense, despite having insurance coverage.
11. The verdict was appealed, and the South Carolina Supreme Court issued a majority opinion as well as several separate opinions concurring in part and dissenting in part.

12. The Supreme Court, in its opinions styled, *Austin v. Stokes-Craven*, 387 S.C.22, 691 S.E.2d 135 (S.C. 2010), upheld both the actual and punitive damages awards, specifically citing errors by Defendants in the handling of Stokes-Craven's defense. In particular, the Supreme Court stated:

- a. "Initially, we find Stokes-Craven failed to preserve any challenge to the admissibility of Disher's testimony." Opinion at 39.
- b. "First, when Austin moved to qualify Disher as an expert witness in the field of auto body repair, counsel for Stokes-Craven did not question Disher and made no objection to his qualifications." Opinion at 39.
- c. "Furthermore, it appears that the testimony that Stokes-Craven primarily challenges on appeal was that produced by its own cross-examination of Morris." Opinion at 41.
- d. "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." Opinion at 60.
- e. "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." Opinion at 60.
- f. "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." Opinion at 60.
- g. "As explained above, no issue relating to the actual damage award is preserved for appellate review, and thus Stokes-Craven's first argument fails." Opinion at 61.

- h. "In its order reviewing punitive damages, the trial judge wrote that the witness had testified to this "total profit," which is incorrect. However, Stokes-Craven never called this misstatement to the trial judge's attention." Opinion at 61.
- i. "Given that there was no objection to the extrapolation of total profit in Austin's closing argument, its alleged impropriety cannot be the basis for reversal here." Opinion at 61.

WHEREFORE, Stokes-Craven prays for judgment against the Defendants for damages in the amount of the jury verdict awarded against it, plus post-judgment interest, the attorneys' fees paid to Defendants in the underlying case, and costs and attorneys' fees associated with this lawsuit, together with such other relief the Court deems appropriate.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
3 State Street, Charleston, SC 29401
P: 843.377.1871
F: 843.377.1310
ake@epting-law.com

ATTORNEYS FOR PLAINTIFF

On this 5 day of August 2010
Charleston, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT OF RONALD L. RICHTER, JR.

The affiant, Ronald L. Richter, Jr., being duly sworn, deposes and says as follows:

1. My name is Ronald L. Richter, Jr. and I am an attorney in good standing and licensed to practice law in the State of South Carolina.
2. I was admitted to the Bar for the State of South Carolina in 1993. Throughout my tenure as an attorney, I have practiced predominantly as a trial attorney.
3. As a trial attorney, I have tried cases on a wide range of subject matters, including but not limited to negligence actions, contract actions, medical malpractice actions and legal malpractice actions. I have served as trial counsel on matters both large and small, as well as both simple and very complex.
4. Based upon my years of training, education and years of practice as a trial attorney, I am familiar with the standards of care pertaining to trial lawyers in the State of South Carolina.
5. I have been asked to review the record in the matter of Donald C. Austin vs. Stokes-Craven Holding Corp. (hereinafter the "Action") and to opine as to whether attorney Scott L. Robinson ("Robinson") complied with the appropriate standards of care in his representation of Stokes-Craven Holding Corp. ("Stokes Craven") in the Action.
6. In my review of this matter, I have analyzed the opinion of the South Carolina Supreme Court in Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010), and have further reviewed the record on appeal, post trial motions and appellate briefs from the Action.

7. Based upon my review of the record and my years of experience as a trial attorney, it is my opinion that the conduct of attorney Robinson in his representation of Stokes Craven in the Action fell below the level of care, skill and learning expected of other reasonable and competent attorneys under the same or similar circumstances in a number of particulars, including but not limited to the following:

a. Mr. Robinson failed preserve for appeal the Plaintiff's failure to introduce any competent evidence as to the fair market value of the truck in its repaired condition. Mr. Robinson first failed to raise any timely objection to the Plaintiff's testimony that the truck had "zero" value to him, and likewise failed to make a timely objection to the Plaintiff's expert who opined that the truck had a fair market value of "zero" in light of the Plaintiff's testimony that it was worth nothing to the Plaintiff personally. Mr. Robinson thereafter failed to move for a directed verdict based upon the Plaintiff's failure to introduce any competent evidence as to the true fair market value of the truck in its repaired condition.

i. As a direct result of the failure to object to the admissibility of the testimony of the Plaintiff and his expert as it relates to the fair market value of the truck in its repaired condition and the failure to move for a directed verdict on the same grounds, the issue regarding the Plaintiff's failure to introduce evidence necessary to support his claim was not preserved for appeal. It is my opinion that had Mr. Robinson made timely objections to the testimony and moved for directed verdict, the entire verdict would have been reversed on appeal as a majority of the Supreme Court so held.

b. Mr. Robinson could have and should have preserved the error set forth in 7a above and still should have introduced testimony as to the fair market value of the truck which was the subject matter of the action. However, Mr. Robinson failed to introduce any testimony and/or evidence (expert testimony included) as to the value of the truck. This is true despite the fact that Mr. Robinson knew or should have known from as early as the pleadings and initial discovery in the Action that the value of the truck as represented at the time of sale versus its true value given its repaired condition would be a central issue in the Action.

i. As a direct result of the failure to introduce any evidence as to the true value of the truck, which unquestionably had some value even in a repaired condition, the uncontested evidence in the Action was that the truck in its repaired condition had "zero" value. As a result, the sum of \$26,371.10, representing the purchase price which the Plaintiff paid for the repaired truck, became the measure of the Plaintiff's actual damages. It is my opinion that the introduction of any counter-opposing evidence as to the value of the truck in its repaired condition would most probably have resulted in an award of actual damages less than \$26,371.10.

ii. As a further direct result of the failure to introduce any evidence as to the true value of the truck, which unquestionably had some value even in a repaired condition, the sum of \$26,371.10 became the basis of actual damages upon which punitive damages of \$216,000.00 was awarded. It is my opinion that a smaller measure of actual damages based upon the difference in the value of the truck as represented at the time of sale versus

its repaired condition, would have yielded a smaller punitive award more commensurate with the actual damages. It is my further opinion that a smaller measure of actual damages based upon the difference in the value of the truck as represented at the time of sale versus its repaired condition, would not have supported the punitive damages award of \$216,000.00 and that the punitive award would have been rejected by the trial court or reversed on appeal.

c. Mr. Robinson breached his duties to provide competent, diligent and zealous representation throughout the duration of his representation as evidenced by the failure to conduct discovery, the failure to determine the testimony of experts retained by the Plaintiff, the failure to identify experts in defense and the apparent failure to enter into settlement discussions with the Plaintiff.

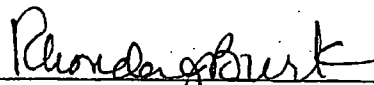
8. As a direct and proximate result of the negligence of attorney Robinson, an award of \$26,371.00 in actual damages and \$216,000.00 was granted against Stokes-Craven and upheld on appeal. But for the negligence of attorney Robinson, Stokes-Craven would not have suffered these adverse awards.

FURTHER AFFIANT SAYETH NOT!

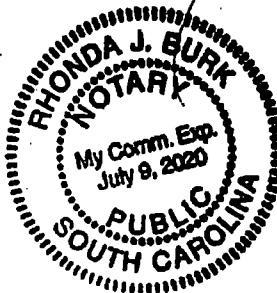


Ronald L. Richter, Jr.

SWORN BEFORE ME THIS THE
4th DAY OF AUGUST, 2010



Notary Public for South Carolina
Commission Expires: _____



STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

STOKES-CRAVEN HOLDING CORP)
d/b/a STOKES-CRAVEN FORD)

CASE NO. 2010-CP-14-457

Plaintiff)

vs.)

AMENDED COMPLAINT

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

Defendants)

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC
2011 AUG 26 PM 1:44

Plaintiff, Stokes-Craven Holding Corp d/b/a Stokes-Craven Ford ("Stokes-Craven"), files this action for professional malpractice, inter alia, against Defendants Scott L. Robinson and Johnson & Robinson, LLC. In support of this action, Plaintiff would show the Court the following:

1. Plaintiff, Stokes-Craven, is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Clarendon County, South Carolina.
2. The Defendant, Scott L. Robinson, is admitted to the bar and is licensed to practice law in the State of South Carolina. The Robinson is a resident of the city of Manning, County of Clarendon and maintains an office for the practice of law at 8 S. Brooks St, Manning, South Carolina, 29102.
3. The Defendant, Johnson McKenzie & Robinson, LLC is a company organized and existing under the laws of the State of South Carolina with its principal place of business in Clarendon County, South Carolina.

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CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 8/26/11
Beulah G. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

4. In February of 2003, the Plaintiff retained Robinson and his law firm for the purpose of defending it in the action styled *Donald C. Austin v. Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford*, case no. 2004-CP-14-135 filed in Clarendon County, South Carolina ("the underlying case").

5. As a result of the attorney-client relationship created by the above conduct of the parties, Defendants had a duty to represent Plaintiff with the reasonable care, skill, and diligence possessed and exercised by the ordinary attorney in similar circumstances.

6. The underlying complaint contained causes of action for revocation of acceptance, breach of contract, negligence, constructive fraud, common law fraud, violation of the South Carolina Motor Vehicle Dealer's Act, violation of the South Carolina Unfair Trade Practices Act (UTPA), and violation of the Federal Odometer Act, and was brought by Donald Austin who discovered the used pickup truck he purchased from Stokes-Craven had been in an accident.

**FOR A FIRST CAUSE OF ACTION
NEGLIGENCE**

7. Defendants were negligent in their defense of Stokes-Craven, and failed to exercise reasonable care, skill and diligence in the following ways:

- a. In failing to use due diligence in the investigation of the facts of the underlying case;
- b. In failing to prepare or serve any written discovery to aid in the defense of Stokes-Craven;
- c. In failing to depose any witnesses including the plaintiff and the testifying experts in the underlying matter;
- d. In failing to obtain copies of the expert vitas or reports prior to trial;

- e. In failing to prepare a pretrial brief, trial exhibits, voir dire, requests to charge, or any other documents for use at trial;
- f. In failing to provide any evidence of the value of the vehicle at trial;
- g. In failing to contemporaneously object to the testimony offered by Plaintiff and Plaintiff's expert with regard to the value of the vehicle being "\$0";
- h. In failing to preserve for appeal the issue of whether the Plaintiff in the underlying matter presented competent evidence of the vehicle's fair market value for appeal;
- i. In failing to preserve for appeal the question of whether plaintiff's experts in the underlying matter were qualified to give expert opinions;
- j. In failing to contemporaneously object to or preserve for appeal the trial court's misstatement with respect to Stokes-Craven's total profit for 2005;
- k. In advising Plaintiff's counsel in responses to discovery that Stokes-Craven did not have any insurance policies relevant to the claims made in the underlying lawsuit;
- l. In advising Stokes-Craven that it did not have coverage under its insurance policy for the claims made in the underlying case when Stokes-Craven was sued for negligence and constructive fraud; and
- m. In failing to notify Stokes-Craven's insurance carrier of the claims made against its insured in the underlying matter.
- n. In omitting to advise Plaintiff on the date of the oral argument when Plaintiff and Defendant Scott Robinson traveled together to Columbia and at which time Scott Robinson discussed the nature of the appeal with Plaintiff's representative Dennis Craven, that the statute of limitations might run and further failed to advise that the merits of the appeal actually involved Scott Robinson's negligent acts.

- o. In concealing the fact of the malpractice from the Plaintiff up to the time the Supreme Court render its opinions and at a time when the Defendants were counsel for Plaintiff.
8. The Defendants' conduct as described above constitutes negligence as well as a breach of the contractual obligation owed to the Plaintiff, and Stokes-Craven is entitled to damages.
9. The underlying case was tried on or about August 14, 2006, and as a direct and proximate result of Defendants failure to exercise reasonable care, skill, and diligence in representing Stokes-Craven, a jury verdict in the amount \$26,371.10 actual and \$216,600.00 punitive damages was returned against Stokes-Craven.
10. As a further proximate result of the Defendants' negligence, Stokes-Craven was forced to pay approximately \$60,000 in legal expenses despite having insurance coverage.
11. As a further proximate result of the Defendants' negligence, Stokes-Craven has suffered lost revenues as a result of the fallout from the trial in the small community of Manning and Clarendon County since the 2006 verdict was rendered in the amount of \$869,641.09.
12. The verdict was appealed, and the South Carolina Supreme Court issued a majority opinion as well as several separate opinions concurring in part and dissenting in part.
13. The Supreme Court, in its opinions styled, *Austin v. Stokes-Craven*, 387 S.C.22, 691 S.E.2d 135 (S.C. 2010), upheld both the actual and punitive damages awards, specifically citing errors by Defendants in the handling of Stokes-Craven's defense. In particular, the Supreme Court stated:
- a. "Initially, we find Stokes-Craven failed to preserve any challenge to the admissibility of Disher's testimony." Opinion at 39.

b. "First, when Austin moved to qualify Disher as an expert witness in the field of auto body repair, counsel for Stokes-Craven did not question Disher and made no objection to his qualifications." Opinion at 39.

c. "Furthermore, it appears that the testimony that Stokes-Craven primarily challenges on appeal was that produced by its own cross-examination of Morris." Opinion at 41.

d. "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." Opinion at 60.

e. "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." Opinion at 60.

f. "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." Opinion at 60.

g. "As explained above, no issue relating to the actual damage award is preserved for appellate review, and thus Stokes-Craven's first argument fails." Opinion at 61.

h. "In its order reviewing punitive damages, the trial judge wrote that the witness had testified to this "total profit," which is incorrect. However, Stokes-Craven never called this misstatement to the trial judge's attention." Opinion at 61.

i. "Given that there was no objection to the extrapolation of total profit in Austin's closing argument, its alleged impropriety cannot be the basis for reversal here." Opinion at 61.

14. Further Defendants were reckless in the handling of the case in the following particulars:

- a. In failing to acknowledge the severity of the potential for a large verdict against Stokes-Craven and placing a worst case scenario value on the case of no more than the value of the vehicle in question;
- b. In acknowledging that they were aware at the time of the underlying action that in order to make a JNOV post trial motion it first required an objection at trial and/or a motion for Directed Verdict;
- c. In acknowledging that they were aware at the time of the underlying action that in order for a jury to award punitive damages, the jury first had to award actual damages;
- d. In acknowledging that they were aware at the time of the underlying action that testimony of a zero value was not competent or credible testimony and that there had to be competent evidence of actual value for the plaintiff to survive a directed verdict motion;
- e. In acknowledging that they were aware at the time of the underlying action that if there was no proof of value of Plaintiff's claim that a motion to move to dismiss at the directed verdict stage for lack of evidence would have been appropriate and that if the motion were not made at that time then it could not be made at JNOV;
- f. In acknowledging that evidence received without objection becomes competent and cannot be disregarded when considering directed verdict motion;
- g. In acknowledging that at no time in the underlying action did they confirm or preserve any communication with their client, Stokes-Craven, with regard to concerns of the danger of exposure, advising settlement, discovery strategy, or trial strategy or preparation, and in fact never even preserved a representation agreement with the client;
- h. In acknowledging that the attorney-client relationship between them and Stokes-Craven began when they received the demand letter from attorney Polito;

i. In acknowledging that competent counsel would conduct discovery and meet with witnesses prior to testimony and that there was no discovery served, no voir dire, and no witness preparation;

j. In acknowledging that they did not enter any rejected jury charges into evidence to protect for appeal;

k. In acknowledging that any JNOV motion has to set forth the grounds for appeal with specificity;

l. In acknowledging that a competent lawyer would have advised their client to settle the underlying case due to a bad fact situation and would be remiss not to do so;

m. In acknowledging that Stokes-Craven itself had no ability to protect the record through objections and post-trial motions and must rely on competent counsel to do same;

n. In acknowledging that they did not advise Stokes-Craven to pay the judgment into the court in order to mitigate his damages by halting the accrual of interest on the judgment;

o. In covering up the total lack of discovery, client communication, insurance tender and trial preparation by saying this was done at the direction of the client; and

p. In concealing the acts of malpractice throughout the time of the attorney/client relationship, which included the time up to oral argument in the Supreme Court and the date the Supreme Court ruled.

15. As a direct and proximate result of the Defendants' negligence, the Plaintiff has been injured and suffered damage. Plaintiff is entitled to a judgment against the Defendants for actual, compensatory, consequential, incidental, and punitive damages, in an amount sufficient to deter similar conduct by these Defendants and others, in an amount determined by this Court.

**FOR A SECOND CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY**

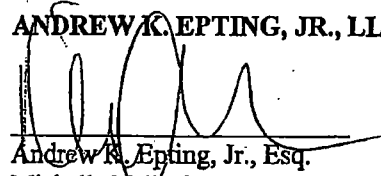
16. The foregoing allegations are fully incorporated herein.
17. The Defendants entered into a fiduciary relationship with the Plaintiff.
18. By entering into a fiduciary relationship with the Plaintiff, the Defendants obligated themselves to act only in the best interests of the Plaintiff.
19. The Defendants' conduct, more particularly described above, constitutes a breach of this duty.
20. As a direct and proximate result of the Defendants' actions, inactions, and breach of fiduciary duty, the Plaintiff has been injured and suffered damage. Plaintiff is entitled to a judgment against the Defendants for actual, compensatory, consequential, incidental, and punitive damages, in an amount sufficient to deter similar conduct by these Defendants and others, in an amount determined by this Court.

WHEREFORE, Stokes-Craven prays for judgment against the Defendants for actual and punitive damages in the amount of the jury verdict awarded against it, plus post-judgment interest, lost profits, the attorneys' fees paid to Defendants in the underlying case, and costs and attorneys' fees associated with this lawsuit, together with such other relief the Court deems appropriate.

[signatures on following page]

Respectfully submitted:

ANDREW K. EPTING, JR., LLC



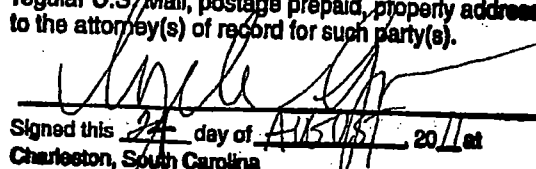
Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
3 State Street, Charleston, SC 29401
P: 843.377.1871
F: 843.377.1310
ake@epting-law.com

ATTORNEYS FOR PLAINTIFFS

Charleston, South Carolina
August 24, 2011

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).


Signed this 24 day of August, 2011 at
Charleston, South Carolina

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC
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CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE 8/24/11

Beulah G. Roberts

CLERK OF COURT
CLARENDON COUNTY, SC

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

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FOR A FIRST DEFENSE

1. Robinson denies each and every allegation of the Amended Complaint not hereinafter specifically admitted.
2. Robinson admits, upon information and belief, the allegations of Paragraph 1 of the Amended Complaint.
3. Robinson admits the allegations of Paragraph 2 of the Amended Complaint.
4. As to the allegations of Paragraph 3 of the Amended Complaint, Robinson admits only that Johnson McKenzie & Robinson, LLC was a company organized and existing under the law of the State of South Carolina with its principal place of business in Clarendon County, South Carolina and denies all allegations not fully consistent therewith.
5. As to the allegations of Paragraph 4 of the Amended Complaint, Robinson admits only that Plaintiff retained Robinson and his law firm for the purpose of defending it in the action styled *Donald C. Austin v. Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford*, case

no. 2004-CP-14-135 filed in Clarendon County, South Carolina and denies all remaining allegations contained in said Paragraph.

6. The allegations of Paragraph 5 of the Amended Complaint constitute conclusions of law, to which this Defendant is required neither to admit nor deny; to the extent a response is required, Robinson admits only that an attorney-client relationship existed for a particular matter with a duty of representation as recognized under South Carolina law and denies all allegations not fully consistent therewith.

7. As to the allegations of Paragraph 6 of the Amended Complaint, Robinson craves reference to the underlying complaint which speaks for itself and is the best evidence of the information and allegations contained therein, and denies any allegations contained in Paragraph 6 of the Amended Complaint not fully consistent therewith.

AS TO THE FIRST CAUSE OF ACTION
(Negligence)

8. Robinson denies the allegations of Paragraph 7 (including subparagraphs (a) through (o)) and Paragraph 8 of the Amended Complaint.

9. As to the allegations of Paragraph 9 of the Amended Complaint, Robinson admits only that the underlying case was tried on or about August 14 through August 16, with a jury verdict in an amount set forth in the jury verdict form, which speaks for itself and is the best evidence of the information therein, and denies all remaining allegations contained in said Paragraph.

10. Robinson denies the allegations of Paragraphs 10 and 11 of the Amended Complaint.

11. As to the allegations of Paragraph 12 of the Amended Complaint, Robinson admits only that the verdict was appealed and as to the remaining allegations contained in said

Paragraph, Robinson craves reference to the referenced South Carolina Supreme Court opinion which speaks for itself and is the best evidence of the information and allegations contained therein, and denies any allegations contained in Paragraph 12 of the Amended Complaint not fully consistent therewith.

12. As to the allegations of Paragraph 13 of the Amended Complaint, including subparagraphs (a) through (i), Robinson craves reference to the Supreme Court opinion in *Austin v. Stokes-Craven*, 387 S.C. 22, 691 S.E.2d 135 (2010), which speaks for itself and is the best evidence of the information and allegations contained therein, and denies any allegations contained in Paragraph 12 of the Amended Complaint not fully consistent therewith.

13. Robinson denies the allegations of Paragraph 14 (including subparagraphs (a) through (p)) and Paragraph 15 of the Amended Complaint.

AS TO THE SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty)

14. Responding to the allegations of Paragraph 16 of the Amended Complaint, Robinson repeats and realleges as if set forth verbatim herein the responses set forth above.

15. The allegations of Paragraphs 17 and 18 of the Amended Complaint constitute conclusions of law and, therefore, require no response; to the extent a response is required, Robinson denies the same and demands strict proof thereof.

16. Robinson denies the allegations of Paragraphs 19 and 20 of the Amended Complaint.

17. Robinson denies the allegations of the Wherefore Clause and Prayer for Relief and specifically alleges that he has no liability to Plaintiff and denies all damages claimed.

FOR A SECOND DEFENSE
(Failure to State a Claim)

18. Further answering the Amended Complaint, and as and for a further defense thereto, Robinson alleges that the Amended Complaint fails to state a claim upon which relief can be granted, and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE
(Equity)

19. Further answering the Amended Complaint, and as and for a further defense thereto, Plaintiff's claims are barred in whole or in part by the equitable doctrines of unclean hands and laches.

FOR A FOURTH DEFENSE
(Failure to Mitigate)

20. Further answering the Amended Complaint, and as and for a further defense thereto, upon information and belief, Plaintiff has failed to mitigate its damages, which are expressly denied, and its failure to do so constitutes a bar and/or limitation of Plaintiff's ability to recover against Robinson.

FOR A FIFTH DEFENSE
(Comparative Negligence)

21. Further answering the Amended Complaint, and as and for a further defense thereto, Robinson would allege and show that even if Robinson was negligent in any respect, which is denied, Plaintiff was comparatively negligent and/or otherwise at fault, which fault exceeded any fault on the part of Robinson, which is denied, and which fault proximately caused Plaintiff's alleged damages, if any, which are denied, so as to bar any recovery herein pursuant to the doctrine of comparative negligence. Alternatively, Plaintiff was comparatively negligent and/or otherwise at fault in an amount equal to or less than any fault of Robinson, which is

denied, which fault proximately caused Plaintiff's alleged damages, if any, which are denied, so as to proportionally reduce any recovery herein pursuant to the doctrine of comparative negligence.

FOR A SIXTH DEFENSE
(Estoppel and Waiver)

22. Further answering the Amended Complaint, and as and for a further defense thereto, Robinson alleges that Plaintiff is estopped from asserting the claim for the recovery sought herein and Plaintiff has waived any claims against Robinson by and through its conduct so as to bar in whole or in part recovery herein.

FOR A SEVENTH DEFENSE
(Assumption of the Risk)

23. Further answering the Amended Complaint, and as and for a further defense thereto, the claims in the Amended Complaint are barred by the doctrine of assumption of the risk.

FOR AN EIGHTH DEFENSE
(Incorporation of Defenses Raised by Others)

24. Further answering the Amended Complaint, and as and for a further defense thereto, Robinson hereby incorporates the defenses of any other Defendant as said defenses may be applicable to Robinson.

FOR A NINTH DEFENSE
(Reservation of Rights)

25. Further answering the Amended Complaint, and as and for a further defense thereto, Robinson hereby gives notice that it reserves the right to assert, and does not waive, any additional or further defenses as may be revealed by additional information acquired during discovery or otherwise, and reserves the right to amend this Answer to assert any such defenses.

FOR A TENTH DEFENSE
(Statute of Limitations)

26. Further answering the Amended Complaint, and as and for a further defense thereto, Plaintiff's claims are barred by the applicable statute of limitations.

FOR AN ELEVENTH DEFENSE
(No Basis for Punitive Damages)

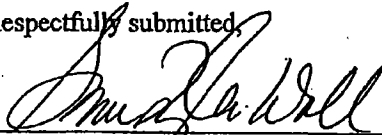
27. Further answering the Amended Complaint, and as and for a further defense thereto, Plaintiff fails to state any basis upon which punitive damages are recoverable against Robinson and accordingly, Plaintiff's prayer for such damages should be dismissed and/or stricken from the Amended Complaint pursuant to Rules 12(b)(6) and/or 12(f) of the South Carolina Rules of Civil Procedure.

FOR A TWELFTH DEFENSE
(Constitution)

28. Further answering the Amended Complaint, and as and for a further defense thereto, Plaintiff's claim for recovery of punitive damages is barred by the South Carolina Constitution and the Constitution of the United States, because no reasonable and well-defined limits are placed on such punitive damages award; because the award and payment of punitive damages would constitute an imposition of punishment on Robinson without adequate notice of the substantive rules governing the conduct giving rise to such punitive damages.

WHEREFORE, having fully responded to the Amended Complaint, Robinson prays that prays that the same be dismissed as to him and the relief demanded by Plaintiff be denied; that costs and fees be awarded to Robinson; and for such other relief as this Court deems just and proper.

Respectfully submitted,



Susan Taylor Wall

Email: susanwall@parkerpoe.com

Amanda C. Williams

Email: amandawilliams@parkerpoe.com

PARKER POE ADAMS & BERNSTEIN LLP

200 Meeting Street, Suite 301

Charleston, SC 29401

Phone: 843-727-2650

Fax: 843-727-2680

ATTORNEYS FOR DEFENDANT
SCOTT L. ROBINSON

August 30, 2011

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

STOKES-CRAVEN HOLDING CORP.
D/B/A STOKES-CRAVEN FORD,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

C/A No.: 2010-CP-14-457

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **ANSWER OF DEFENDANT SCOTT L. ROBINSON TO PLAINTIFF'S AMENDED COMPLAINT** has been served upon the following counsel of record by mailing a copy of the same to them, postage prepaid, in the United States Mail, addressed as shown below this 30 day of August 2011:

Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
Andrew K. Epting, Jr., LLC
3 State Street
Charleston, SC 29401

Attorneys for Plaintiffs

Warren C. Powell, Jr., Esq.
Bruner, Powell, Robbins, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260

Attorney for Defendant Johnson McKenzie &
Robinson, LLC

Teri Reust
PARKER POE ADAMS & BERNSTEIN LLP
200 Meeting Street, Suite 301
Post Office Box 160
Charleston, South Carolina 29401

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)
Plaintiff,)

v.)

Scott L. Robinson and Johnson)
McKenzie & Robinson, LLC,)
Defendants.)

**Answer to Amended Complaint of Defendant
Johnson McKenzie & Robinson, LLC**

Defendant Johnson McKenzie & Robinson, LLC answering Plaintiff's Amended
Complaint respectfully offers the following:

**For a First Defense
(General Denial)**

1. Each and every allegation of the Amended Complaint not hereinafter admitted, qualified, or explained is hereby denied, and strict proof demanded thereof.
2. This Defendant admits the allegations contained in Amended Complaint Paragraph 1.
3. This Defendant admits so much of the allegations of Amended Complaint Paragraph 2 that Defendant Scott L. Robinson is admitted to the South Carolina Bar and is licensed to practice law in the State of South Carolina, is a resident of Clarendon County and maintains an office for the practice of law at 8 S. Brooks Street, Manning, South Carolina, 29102. As to the remaining allegations, this Defendant respectfully denies same.
4. This Defendant admits so much of the allegations of Amended Complaint Paragraph 3 which state or imply that Johnson McKenzie & Robinson, LLC was a company

organized and existing under the laws of the State of South Carolina with its principal place of business in Clarendon County. In August of 2009, Johnson, McKenzie & Robinson, LLC changed its name to Johnson & Robinson, LLC. As to the remaining allegations of said Paragraph, this Defendant respectfully denies same.

5. As to the allegations contained in Amended Complaint Paragraph 4, this Defendant denies that it was retained in 2003 for the purposes of defending Plaintiff in the action styled *Donald C. Austin v. Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford*, Civil Action No. 2004-CP-14-135, filed in Clarendon County, South Carolina (the "underlying action").

6. This Defendant admits so much of the allegations contained in Amended Complaint Paragraph 5 that an attorney-client relationship was created between Plaintiff and this Defendant in this action and this Defendant had a duty to represent Plaintiff in the underlying action, consistent with the standard of care normally observed by an attorney in South Carolina. As to the remaining allegations contained in said Paragraph, this Defendant respectfully denies same.

7. As to the allegations contained in Amended Complaint Paragraph 6, the document referred to therein speaks for itself and any variation from said document is denied.

8. The allegations contained in Amended Complaint Paragraphs 7 and 8 constitute conclusions of law which this Defendant is not required to admit or deny. To the extent this Defendant is required to admit or deny the allegations contained in said Paragraphs, this Defendant respectfully denies same.

9. This Defendant admits so much of the allegations contained in Amended Complaint Paragraph 9 that a jury verdict for money damages was returned against Stokes-

Craven in the trial of the underlying action. As to the remaining allegations contained in said Paragraph, this Defendant respectfully denies same.

10. The allegations contained in Amended Complaint Paragraph 10 are denied.

11. The allegations contained in Amended Complaint Paragraph 11 are denied.

12. As to the allegations contained in Amended Complaint Paragraph 12, this Defendant admits that said verdict was appealed but the remaining allegations contained in said Paragraph are denied.

13. As to the allegations contained in Amended Complaint Paragraph 13, the document referred to therein speaks for itself and any variation from said document is denied.

14. The allegations contained in Amended Complaint Paragraph 14 constitute conclusions of law which this Defendant is not required to admit or deny. To the extent this Defendant is required to admit or deny the allegations contained in said Paragraph, this Defendant respectfully denies same.

15. The allegations contained in Amended Complaint Paragraph 15 are denied.

16. Responding to the allegations of Amended Complaint Paragraph 16, this Defendant fully incorporates its forgoing responses.

17. The allegations contained in Amended Complaint Paragraphs 17, 18, and 19 constitute conclusions of law which this Defendant is not required to admit or deny. To the extent this Defendant is required to admit or deny the allegations contained in said Paragraph, this Defendant respectfully denies same.

18. The allegations of Amended Complaint Paragraph 20 are denied.

**For a Second Defense
(Failure to State a Claim)**

19. This Defendant repeats and realleges the foregoing allegations to the extent that they are consistent with the following allegations and responses.

20. The allegations set forth in the Amended Complaint fail to state a claim against this Defendant and, therefore, the same should be dismissed, with costs.

**For a Third Defense
(Equity)**

21. This Defendant repeats and realleges the foregoing allegations to the extent that they are consistent with the following allegations and responses.

22. Plaintiff's claimed are barred, in whole or in part, by one or more of the Doctrines of Laches, Estoppel, Unclean Hands, or Waiver.

**For a Forth Defense
(Failure of Proximate Cause)**

23. This Defendant repeats and realleges the foregoing allegations to the extent that they are consistent with the following allegations and responses.

24. Plaintiff's claims against this Defendant are bared, in whole or in part, by virtue of that fact that no action or inaction of this Defendant constituted a proximate cause of any alleged injury or damages the Plaintiff alleges to have suffered.

**For a Fifth Defense
(Comparative Negligence)**

25. This Defendant repeats and realleges the foregoing allegations to the extent that they are consistent with the following allegations and responses.

26. This Defendant, upon information and belief, alleges that any injuries or damages allegedly suffered by Plaintiff, without admitting same to be true, were due to and caused entirely by the negligence of Plaintiff or Plaintiff's negligence which is more than this Defendant's negligence, which negligence it denies, and that such is a complete bar to Plaintiff's

recovery herein. Further, this Defendant, upon information and belief, alleges that if Plaintiff's negligence was less than this Defendant's negligence, if any there be, that such negligence should be compared to that negligence of this Defendant, so as to apportion the relative fault as to each party.

**For a Sixth Defense
(Failure to Mitigate)**

27. This Defendant repeats and realleges the foregoing allegations to the extent that they are consistent with the following allegations and responses.

28. Plaintiff's claims against this Defendant are barred in whole or in part by virtue of the fact that Plaintiff failed to mitigate its alleged damages.

**For a Seventh Defense
(Statute of Limitations)**

29. This Defendant repeats and realleges the foregoing allegations to the extent that they are consistent with the following allegations and responses.

30. Plaintiff's claims are barred in whole or in part by the applicable statute of limitations.

**For an Eighth Defense
(Incorporation of Other Defenses)**

31. This Defendant repeats and realleges the foregoing allegations to the extent that they are consistent with the following allegations and responses.

32. This Defendant pleads as a defense to the Amended Complaint any and all defenses raised by other defendants to the extent those defenses are applicable to this Defendant.

**For a Ninth Defense
(Preservation of Right to Plead Additional Defenses)**

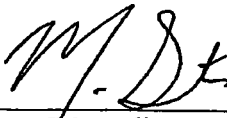
33. This Defendant repeats and realleges the foregoing allegations to the extent that they are consistent with the following allegations and responses.

34. This Defendant reserves the right to raise additional defenses during or after the completion of discovery in this case.

WHEREFORE, Defendant Johnson McKenzie & Robinson, LLC having fully answered the Amended Complaint prays for relief as follows:

A. That the Amended Complaint be dismissed as to Defendant Johnson McKenzie & Robinson, LLC, with costs; and,

B. For such other and further relief as This Honorable Court deems just and proper.



Warren C. Powell, Jr.
Matthew H. Stabler
Bruner Powell Wall & Mullins, LLC
PO Box 61110
Columbia SC 29260
803-252-7693
Attorneys for Defendant Johnson McKenzie & Robinson, LLC

Columbia, South Carolina
September 22, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)
Plaintiff,)

v.)

Certificate of Service

Scott L. Robinson and, Johnson)
McKenzie & Robinson, LLC,)
Defendants.)

I, Ann Allison Lee, a paralegal with the law firm of Bruner, Powell, Wall & Mullins, LLC, attorneys for Plaintiff, do hereby certify that on this 22nd day of September, 2011, I served the *Answer to Amended Complaint of Defendant Johnson McKenzie & Robinson, LLC* upon the following parties by depositing a copy of same in the U.S. Mail, first class, postage prepaid, addressed as follows:

Andrew K. Epting, Jr., Esquire
Andrew K. Epting, LLC
3 State St.
Charleston, SC 29401
Attorneys for Plaintiff

Susan Taylor Wall, Esquire
Parker Poe Adams & Bernstein, LLP
Suite 301
200 Meeting St.
Charleston, SC 29401
Attorneys for Defendant Scott L. Robinson


Ann Allison Lee

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	
Stokes-Craven Holding Corp	)	
d/b/a Stokes-Craven Ford,	)	
	)	
PLAINTIFF,	)	TRANSCRIPT OF HEARING
	)	C/A #:2010-CP-14-00457
v.	)	
	)	
Scott L. Robinson and Johnson	)	
McKenzie & Robinson, LLC	)	
	)	
DEFENDANTS.	)	

Clarendon County Courthouse
January 9, 2013

BEFORE:

HONORABLE GEORGE C. JAMES, PRESIDING JUDGE

APPEARANCES:

Andrew K. Epting, Jr., Esquire
Attorney for Plaintiff

Warren Powell, Esquire
Susan Wall, Esquire
Attorneys for Defendants

TAKEN BY MELISSA R. SINGLETARY
CERTIFIED VERBATIM REPORTER

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1 The Court: Alright, this is Stokes-Craven versus Robinson and Johnson
2 McKenzie, LLC. There are several motions. Are there any agreements as to
3 which one will go first? Well, I can make that decision.
4 Mr. Epting: I assumed that you would Judge; wherever you want to start.
5 The Court: Alright.
6 Ms. Wall: Your Honor, I'm Susan Wall and I represent Scott Robinson. Mr.
7 Robinson is here with me, but he has to be in a deposition. Is it alright
8 if the Court will excuse him?
9 The Court: Sure.
10 Ms. Wall: Thank you Your Honor.
11 Mr. Robinson: Thank you Your Honor.
12 The Court: Is there any position from the defense as to which we hear first?
13 Mr. Epting: Your Honor, logically I think the meat of the matter is our motion for
14 summary judgment, their motion for summary judgment and I think there's a
15 motion to compel also.
16 The Court: Alright, which one do you want me to hear first?
17 Mr. Epting: Well, the current motion for summary judgment, our motion was
18 filed first, so I'm prepared to go.
19 The Court: Okay.
20 Mr. Powell: Actually Judge, if it is any significance, our motion was filed first.
21 The Court: So do you want to go first?
22 Mr. Powell: If it pleases the Court.
23 The Court: I mean it really doesn't matter.
24 Mr. Powell: I agree.
25 Mr. Epting: I think that Mr. Powell ought to go first Your Honor. He seems to

1 want too.

2 The Court: Okay. Alright, go ahead Mr. Powell.

3 Mr. Powell: Yes sir. Your Honor I'm Warren Powell; I represent the former law
4 firm of Johnson, McKenzie and Robinson, in this case. This is, since my eyes
5 are failing me and I've got more stuff in front of me than I can put on the
6 podium, if it's alright, I'm going to speak from here.

7 The Court: Yes sir. By the way, I sent all of you an e-mail some weeks back about
8 the fact that I know Mr. Robinson, I know Mr. Johnson and I know Mr.
9 McKenzie. Do you have any objection? Have you discussed that with your
10 client?

11 Mr. Powell: Judge, you saw that I wrote a letter in essence suggesting that
12 sometimes local judges don't want to hear certain cases.

13 The Court: Yes.

14 Mr. Epting: But it has always been my position that if you feel that you should
15 hear it and you're here, you've taken an oath and we're here to try it.

16 The Court: Alright, thank you.

17 Mr. Powell: Your Honor this, in a nutshell is a case about local car dealer, a used
18 car dealer, that sells a rat truck to a customer. There was evidence in the
19 record and as the court concluded, the Supreme Court found that the customer
20 was misled about the condition of the truck and possibly the former owner of
21 the truck, who owned it.

22 The Court: Okay.

23 Mr. Powell: There's not much contest that the dealership forged the customer's
24 signature to a warranty document. The, and with that backdrop, the customer,
25 as I'll discuss, I'm going to try my best not to get bogged down in too many

1 of the facts, but the customer came in and the dealership had a chance to
2 maybe refund the customer's money in return for the truck to the company, to
3 return the truck after the customer discovered that it had been wrecked. He
4 just wanted to return the truck and get his money back. And before my client
5 and Ms. Wall's client were called on the matter, the dealership had the
6 opportunity and declined to return the man's money. This case needs to be
7 ended for the reason that we will recite this morning. It needs to end and often
8 in a case like this, the suit against the lawyers comes up; the bottom line is,
9 the theme of this case is how do I get my lawyers to pay for my fraud? For
10 my company's fraud? We are pleading the statute of limitations in the case.
11 Often times in literature and in seminars that we attend from time to time, a
12 number of legal matters and analysis that we -- are prepared to automobile
13 wrecks. And I suppose that's true, because there's so many litigation, so
14 many litigations in our juris prudence about automobile accidents. In an
15 automobile accident, the Plaintiff can allege that the driver was driving too
16 fast for conditions, not keeping a proper look out and generally negligent
17 while proceeding down the highway. However, that allegation, no right of the
18 Plaintiff has been invaded at that time, however, once the Defendant runs a
19 stop sign, fails to yield right of way, resulting in a collision with the
20 Plaintiff's car, then there is an invasion of Plaintiff's rights and for certain the
21 statute of limitations has commenced. So it is in many respects with a mal
22 practice case, when the allegations in the complaint and in the Plaintiff's
23 deposition recite that the lawyer didn't do a good job in investigating the
24 case, the lawyer didn't keep me informed, the lawyer failed to show me his,
25 our answers to interrogatories, failed to prepare me for cross examination. All

1 of those things may be some notice to the, to the client about his lawyer, so
2 he's says. Understand for purposes of this argument today, we have to accept
3 their case and what they allege to be so and we don't, not that we admit every
4 single one of these things, but that's what they allege and so for purposes of
5 this motion, we accept that. So, the lawyer allegedly has made all these errors
6 and didn't do this, or didn't do that and, but there's no real invasion of his
7 right at this time, until the verdict occurs. Now, when the verdict occurs, that
8 is liken to the automobile wreck; it is an automobile wreck in litigious form.
9 Once the verdict occurs, the Defendant, the Plaintiff or defendant in the case
10 understands they got a problem, a serious problem, which has been admitted
11 to in this case. Now, and it's being admitted to at the time of the verdict that
12 they knew they had a serious problem and they were aware of some of the
13 items I've just mentioned that we'll recite. I'm going to try to, to give the
14 background. We haven't put this in our memorandum, but I want to try to just
15 briefly discuss some of the facts. Alright, June of 2002, Donald Austin, who
16 was the customer went looking for a Ford F-250 pick up truck and drove to
17 the Stokes-Craven lot here in Manning and he is from the Moncks Corner
18 area. He approached one Mr. Frierson and he was one of the Stokes-Craven
19 salesman and Austin testified that Frierson told him the truck had a five year,
20 one hundred thousand mile, power trained warranty and denied the truck had
21 been wrecked. Mr. Austin again questioned whether there was, if there
22 existed a five year, one hundred thousand mile, power trained warranty when
23 he was signing documents to complete the purchase and he says that he was
24 assured that he did. Austin purchased the truck from the Stokes-Craven
25 dealership for the sum of Twenty-Six Thousand, Three Hundred, Seventy

1 One Dollars and ten cents and after a short term loan, the man actually paid
2 cash for the truck. There were a number of facts not revealed to Mr. Austin
3 during this transaction, during the leading up to the sale. Those are, some of
4 the material facts are, Gary Bailey, a gentleman from the Charleston area
5 purchased the same 1990, purchased the same truck in 1999 from Stokes-
6 Craven Ford for Thirty Two Thousand Dollars. Bailey dealt with Kenny
7 Craven, the, the brother of Dennis Craven. Dennis Craven is the owner and
8 manager of Stokes-Craven Ford, one of the owners and manager of Stokes-
9 Craven Ford on site. In September 2001, Mr. Bailey's son was involved in a
10 single vehicle accident during which the, the, something broke in the front
11 end of the truck, the truck flipped over, spun around and slammed into a
12 guard rail. The truck was repaired at a cost of twenty thousand, almost four
13 hundred dollars; twenty thousand, four hundred dollars. Bailey drove the
14 truck until the repairs were made until he noticed, after the repairs were
15 made, until he noticed an oil leak in the front axil and decided to sell the
16 truck. Bailey testified at the trial against Stokes-Craven that he contacted
17 Kenny Craven in April of 2002 and told him of the wreck, the repairs and the
18 oil leak and Kenny Craven again, was an employee at the time of the Stokes-
19 Craven dealership as well as the owner. In April of 2002, Mr. Bailey traded in
20 the truck that we're talking about and purchased a new one also from Stokes-
21 Craven Ford. Austin discovered a number of these problems as time went on.
22 After purchasing the truck in June of 2002, Austin drove the truck for a while
23 without noticing problems, until he discovered a oil leak in the front of the
24 vehicle in August of that year. In an effort to have the truck repaired, Austin
25 contacted the Ford dealership in his area, seeking to make good on the

1 warranty that he was told that he had and the dealership in the Moncks Corner
2 area told him you don't have a warranty on the power train, it's on the diesel
3 engine only and he called them, and they told him to call Stokes-Craven, so
4 he did. Over there he got conflicting answers from the Stokes-Craven repair
5 department as to what warranty he had and then they referred him to Dennis
6 Craven. Austin called Mr. Craven and explained what he had been told when
7 he bought the truck about the power train warranty and Mr. Craven denied
8 that anyone at the dealership had told him that, made that representation to
9 him and Austin offered, he said look, can I just get a refund? Just, let me
10 bring you the truck and get my money back and I will move on? Mr. Craven
11 told him no; ultimately he told him I'll trade you out of the truck and sell you
12 a better one and do it that way and the gentleman was disinclined to do that.
13 Mr. Craven ultimately told him he would fix the oil leak, but after that
14 everything was going to be on him. The repair was scheduled for the
15 following month. Prior to the next scheduled repair, Mr. Austin, by accident,
16 discovered the vehicle had been wrecked when he came in contact with a
17 gentleman named William Norton, who owned a repair shop in Summerville,
18 where Mr. Bailey had taken the man, the very man that bought the truck
19 originally, where he had taken it to be repaired. Pulled up in Mr. Norton's
20 yard, he knew him, Mr. Austin knew him and Mr. Billy said is that, is that
21 your truck? And he says yeah and thereupon a conversation ensued and he
22 said you need to know that truck was in some, had some serious wreck
23 happened. He gave him the list of what was damaged and the repairs were
24 rather, around twenty four thousand dollars, or over twenty thousand dollars.
25 Mr. Austin had two conferences with Mr. Craven when he dropped off and

1 picked up the truck for the oil leak repair. He again requested that he be
2 allowed to return the truck for the purchase price, given the new discoveries
3 regarding prior ownership, the fact that the vehicle had been in a serious
4 accident and the lack of a power train warranty. During these conferences,
5 Mr. Austin testified that he found out that Mr. Thornall who was the used car
6 manager at Stokes-Craven Ford and the neighbor of Mr. Bailey's, the man
7 that originally bought it, most likely was aware of the truck's history. In the
8 meeting with Austin, Dennis Craven produced a buyer's guide document,
9 reporting to contain Austin's signature. It stated that the truck was covered by
10 a warranty of up to a hundred thousand miles on the diesel engine only. This
11 warranty document was presented, here's your signature, you signed the
12 warranty document, so you don't have what you say you've got. Mr. Austin
13 looked at it, denied that was his signature and informed Mr. Craven that he
14 had not received that document at the time that he purchased the car, the
15 truck, and Mr. Craven said well let me look at your driver's license and he
16 compared the signatures on his driver's license and although the signatures
17 did not look the same, he, his response to the question, can I just get my
18 money back? Mr. Craven slid his driver's license across the conference table
19 to him and said can't happen and walked out. Craven, nonetheless, despite all
20 this, and admitting in this case and at that time he looked at the signature, it
21 appeared to him that the signature was a forgery. Knowing all that, he still
22 declined to refund the man's money. Now ...

23 The Court: ... to the litigation part.

24 Mr. Powell: Yeah, yes sir.

25 The Court: I'm just kind of curious while I'm thinking about it; I've read the

1 letters where a lawyer said hey, pay and we will go away. I understand that,
2 but during the course of the trial, during the course of discovery, were there
3 any settlement negotiations? I'm just curious as to why Stokes-Craven didn't
4 settle this case.

5 Mr. Powell: Your Honor the discussion about that is in conflict. Mr. Robinson
6 would insists that he pressed upon him that this is a dangerous case, it's got
7 punitive damage potential and Mr. Craven, on the other hand, despite being a
8 used car dealer, selling used cars, knowing the public's attitude about that,
9 claims that he never knew that this could, that the trial could result, as it did.

10 The Court: Alright.

11 Mr. Powell: So, you're right; Your Honor the Polito letter of February 18, 2003,
12 does, as Your Honor states it's a detailed document, it is a detailed letter with
13 a number of attachments discuss Kenny Craven's involvement, it discusses
14 all of the background, sets it out and still, that was never agreed to. The terms
15 requested, it was essentially refund the money plus fifteen hundred dollars for
16 the legal fee to prepare the letter and still that was refused.

17 The Court: Okay.

18 Mr. Powell: The litigation next Austin versus Stokes-Craven Ford, was entered
19 March 15, 2004. The case was called for trial during August of 2006 and after
20 a three day trial, on August 17, the jury found in favor of Austin and awarded
21 damages for fraud and the actual damages in the sum of twenty six thousand,
22 three hundred, seventy one dollars and ten cents. Punitive damages in the sum
23 of two hundred, sixteen thousand, six hundred dollars.

24 The Court: And you say the statute of limitations was triggered that day?

25 Mr. Powell: I say the statute, Your Honor ...

1 The Court: Mr. Craven says, well I didn't really even know anything until I was
2 sitting down in Mr. Brown's office getting ready to go to the appeal hearing
3 and he said hey, they're probably, or they are going to argue that certain
4 issues or objections or whatever weren't preserved and that was the first he'd
5 ever heard, that maybe there had been some on the part of Mr. Robinson?

6 Mr. Powell: That's what he says. Your Honor, we say and our position and I
7 believe you have a supplemental memo.

8 The Court: I've read all of it.

9 Mr. Powell: Yeah. We say two things; first, the statute was either triggered that
10 day, or the day of the verdict as was in Brown vs. Epstein and because
11 the allegations of the Plaintiff in Brown vs. Epstein are very similar to
12 the ones in this case.

13 The Court: Of course my question is how do you get around Brown versus
14 Upstate even if what Mr. Craven says is correct?

15 Mr. Powell: Right, but the second thing is very important; the second part of the
16 statute, even if one doesn't accept that the statute of limitations
17 commenced on the day of the verdict as we recite in our supplemental
18 memo, the statute without any doubt, would have commenced in April
19 or May of 2007, because that is when Mr. Brown, Mr. Craven testified
20 in his deposition within sixty days after the verdict, he had changed
21 lawyers. He said directly in his deposition, after that Young Clement
22 Rivers was handling the appeal and Mr. Robinson was no longer his
23 attorney in this matter.

24 The Court: And you know Mr. Robinson's name was on the briefs?

25 Mr. Powell: It was on the briefs and, and later on, but, but Mr. Brown testified

1 that he wrote none of the, none of the material, he didn't draft it he
2 had no input at all that he could recall on the briefs at all and all that
3 was done in Charleston. Now, after that, I believe by way of affidavit
4 he, Mr. Craven, changed his testimony and said that no, that Mr.
5 Robinson was still his lawyer, but in his deposition, under oath, in his
6 mind at that time, after Young Clement Rivers came on board, Mr.
7 Robinson does not engage as his lawyer for this case. It is, it is
8 without doubt that Young Clement Rivers was attorney for Stokes-
9 Craven Ford in this matter in May, April or May of 2007. Mr. Brown
10 admits and we attach as an exhibit to the supplemental to the memo
11 Mr. Brown admits in his deposition that he's looking through the trial
12 transcript and it jumps off the page at him about these issues
13 concerning issue preservation. He said that jumped off the page at me;
14 that's what ...

15 The Court: Jumped off the page at who?

16 Mr. Powell: Mr. Brown, who was a lawyer, who was Stokes-Craven lawyer at that
17 time. He, he, he saw that we got, we got a problem here, in his mind,
18 it's an issue in the case and in fact, that's one of the specifications of
19 negligence against my client that one matter or another was not
20 preserved for appeal. Mr. Brown sees that, certainly appreciates the
21 significance of it in April or May of 2007. What Mr. Brown knows
22 under the law of this state is in punitive to the client. It is clearly, he
23 is the agent of Stokes-Craven Ford. What he acquires, the information
24 he acquires and the knowledge he gains within the scope of what he's
25 doing and in this matter, it is all that grows out of the core of

1 operative facts of this trial. That's what they were working on and
2 he's looking at the transcript and it jumps off the page at him and so
3 the statute, even if one doesn't accept that it started at the time of the
4 verdict, it started without question, when the Plaintiff's agent acquired
5 that knowledge in April or May of 2007. That is more than three years
6 before this suit was entered in August 2010.

7 The Court: What's that date again?

8 Mr. Powell: April or May of 2007.

9 The Court: So eight months after the trial?

10 Mr. Powell: Something like that, yeah. We attached first of all to our
11 supplemental memo their bill and, Young Clement Rivers bill and on
12 April 18, 07, beginning with the trial transcript for appeal issues,
13 April the 24th continued review of trial transcript for appeal issues
14 and ,,,

15 The Court: You're saying that Mr. Craven has a beef with another lawyer?

16 Mr. Powell: That could be, that could be. But in any event, it is clear in this state
17 and the authority we've recited to Your Honor, that the agents, the
18 agent's knowledge and information gained is imputed to the client and
19 it is, we recite the Crystal Ice case and it really isn't much question
20 about that. So, even if, you get by the issue concerning the
21 commencement of statute on the day of the verdict, it really isn't any
22 way to get by Mr. Brown's testimony and his, and his bills when he's
23 reviewing the trial transcripts, sees that issue and the statute is
24 triggered then. At the very latest it's triggered then. This case was
25 instituted more than three years after that, accordingly, hence, we say

1 we're entitled to summary judgment based on the statute of
2 limitations. I'd like to ...

3 The Court: What's the sixty days after the verdict? What was that?

4 Mr. Powell: That was, I asked him in the deposition, Mr. Craven, I said within
5 sixty days after the verdict, had you changed lawyers?

6 The Court: Okay.

7 Mr. Powell: And he said ...

8 The Court: And you say that is circumstantially establishes that he had some
9 displeasure with Mr. Robinson?

10 Mr. Powell: No sir; not necessarily. Young, Clement they handle appeals, so the,
11 the consensus was, among the owner's of Stokes-Craven Ford, I take
12 it, is they wanted a larger law firm to do that. Someone that had been
13 in that arena.

14 The Court: But what, as a matter of law, what does the sixty days ...

15 Mr. Powell: It doesn't, it doesn't. It's just an, it indicates, I was trying to indicate
16 at that time when Mr. Robinson exited in Mr. Craven's mind as his
17 lawyer.

18 The Court: Didn't Mr. Craven also say that Mr. Robinson didn't really exit, he
19 was just kind of along for the ride at that point?

20 Mr. Powell: In his deposition he said he was no longer his attorney. I can ...

21 The Court: In the supplemental affidavit he said well he really kind of wasn't?

22 Mr. Powell: That's right. He, in his supplemental affidavit he says, he, he, he I
23 mis-spoke and I regarded him still as my attorney after that. But it
24 won't make any difference in this regard, because they had additional
25 counsel in the form of a separate law firm active in the case. Mr.

- 1 Robinson is not, it's uncontested, he was in-active in the case after
2 that, completely in-active. He didn't contribute at all to the, to the, to
3 the ---What I'd like to do ...
- 4 The Court: When did Mr. Craven write that letter saying hey is it okay if I look at
5 your mal practice laws? When did he write that letter? Because the in
6 the letter, somewhere in one of these things, Mr. Craven wrote to Mr.
7 Robinson and said things didn't go well ...
- 8 Mr. Powell: I think it was some time later.
- 9 The Court: ... go bankrupt. It was within three years?
- 10 Mr. Powell: Yes sir, it was in April of 2010.
- 11 The Court: Was there any discovery on what prompted that letter in rather
12 specific terms? Mr. Craven has testified he's not really educated in the
13 ways of litigation, coming into this courtroom; the day of the trial the
14 first time he's ever set foot in a courtroom in his life and is there any
15 discovery you have on how or way Mr. Craven came about to write
16 that letter? Was he advised to do that or was it on his own?
- 17 Mr. Powell: Your Honor, the only way that I can answer that is that, is that Mr.
18 Epting, about this same time had generated letters concerning
19 threatening litigation.
- 20 The Court: Okay.
- 21 Mr. Powell: So, this was, it was either then or maybe within weeks of that letter.
- 22 The Court: There's nothing wrong with writing that kind of letter; I was just
23 curious as to how it came about.
- 24 Mr. Powell: No, nothing wrong.
- 25 The Court: Okay.

1 Mr. Powell: Your Honor, I'd like to take a little while to examine the Plaintiff's
2 arguments against summary judgment and examine some of the cases
3 and comment on some of the case law that they have cited. They
4 argued, they try to distinguish the cases that we've cited, alleging a
5 number of things, one of which is the fact that, that the, in some of the
6 cases that we've cited, the Plaintiff admitted that they had information
7 that made them aware that they might have a claim. But ...

8 Mr. Epting: Judge, about this time, rather than having Mr. Powell make my
9 argument, it seems what he's trying to do is put his reply in front of
10 mine; I'd rather make my own argument.

11 The Court: Okay, we'll, we'll, let's just, let's, I've read everything that you both
12 have sent me. I don't recall, of course I got this morning the
13 Defendant's joint supplemental memorandum in support of your
14 motion for summary judgment; of course Mr. Epting's going to have a
15 chance to respond. I guess one of the best ways I can put it is, I've
16 read everything. I'm trying to find, as you go, some questions that I
17 have that I want both of you to answer. I don't really need to hear a
18 repeat of what I've already read.

19 Mr. Powell: Yes sir.

20 The Court: And I will note it in the context of oral argument there's certain
21 nuances you want to give that black and white paper may not offer,
22 but let's let it go along it's track just for a minute. If it gets to be
23 where he's just stealing all of your thunder then I'll put a stop to it.

24 Mr. Epting: Fair enough Judge, thanks.

25 Mr. Powell: Your Honor I was trying to, endeavoring to do is to instead of making

1 this argument, I was trying to compact it and give the responses.

2 The Court: Well, let me ask you this; he says, I think, Mr. Epting says the statue
3 of limitations triggered a — can be a factual issue, is that not true?

4 Mr. Powell: Under certain circumstances Your Honor; I'm glad you brought that
5 up because one of the first things I was going to offer was the first
6 case they cite ...

7 The Court: But you say, contrary to the assertions in this brief, in the Plaintiff's
8 brief, the application of the statute is a question of law.

9 Mr. Powell: The application as to when the statute begins, under what
10 circumstances it begins most often is a, is an objective analysis. That
11 is to say if, under our law, the issue is really not technically, it doesn't
12 have to be, technically what the player knows or what he admits to
13 knowing. Under the case law in this state, the test is under a given set
14 of facts, beforehand, would a person of common knowledge and
15 intelligence, common knowledge and experience, given those facts, be
16 on notice that he might, that some right of his has been invaded ...

17 The Court: That is absolutely the standard, but couldn't that not be, itself a
18 factor?

19 Mr. Powell: It can and I'll give you an example in the case law they cite.
20 Interestingly enough, the first case they cite for that proposition, Your
21 Honor is, is the case of, Johnston v. Bowen and it's odd that they cited
22 for that proposition because that case was a case in which the
23 Supreme Court, Justice Toal, granted summary judgment on the basis
24 of the statute of limitations. It was not a, the jury concluded, it was
25 not a jury question. But they do cite Santee v. Daniel, which recites

1 that, that the when the Plaintiff became aware can be a jury question
2 and, and I have some familiarity with that case, that's the second case
3 they refer to and I've got copies of these cases Your Honor, if you
4 want to see them, but I think you're familiar with them. Santee vs.
5 Daniel we represented Daniel International, what happened in that
6 case, the reason the Court concluded that the statute hadn't run as a
7 matter of law, is those were silos at Santee Portland they were huge
8 silos that were built to store dry cement and in the construction of
9 them there was a blow out at one point within the construction, they
10 had to use x-ray type equipment to see where the rebar was. Well,
11 when they discovered it, they discovered that the rebar had been
12 floating, not tied together such that within the first three feet of, of a
13 ten foot pour, you may have ten or twelve pieces of rebar and then
14 none for the next ten feet, so there wasn't any way, because the rebar,
15 as the Supreme Court said in that case, because the rebar was inside
16 the silos, they could not, you couldn't, the Plaintiff couldn't tell where
17 the rebar was and the, we tried to say, well there were these fine
18 cracks on the outside and the expert said no, that the fine cracks on
19 huge cement structures like this, a concrete structure, are normal, so
20 there wasn't really any, because the rods were inside, there wasn't any
21 notice until you got on x-ray, that is until there was a blow out.
22 Winning, in this case, was analogized the blow out to the verdict.
23 When the, there was a blow out, when the silos fell, spewing out tons
24 and tons of dry cement, certainly they were on notice. Here, the blow
25 out was the verdict. Once the verdict came along, then the allegations

1 that the Plaintiff makes against the, the Defendant lawyers failed to
2 investigate, failed, understand, Mr. Craven was on the witness stand
3 when he was handed the interrogatories that he claims now he's never
4 seen. He was on the witness stand and says that some of the answers
5 to interrogatories were incorrect, so to say that he wasn't aware at the
6 time of the verdict, and he also blames that defect on the, the adverse
7 verdict. He said the trial would have turned out differently, but for the
8 mistake. Well, he had to know about that mistake, because he was on
9 the witness stand when he became aware of it. Now the, so that, that
10 answers the, in the situation there are a number of cases cited, in fact
11 there are just tons of cases in this state that grant the statute of
12 limitation to the defense, grant the Defendant's motion on summary
13 judgment and the reason is because if those facts are there, the
14 circumstances are there, then it puts, as a matter of law, the court
15 makes that call, as a matter of law, it puts that Plaintiff on notice that
16 it might have a claim against somebody and if that's the case, then the
17 clock is running. The fourth circuit has recited that in South Carolina
18 it takes very little, historically, to start the clock running. We cited
19 cases to Your Honor and that's the result, that's the case.

20 The Court: How about when Mr. Craven says he asked Scott, what in the world
21 happened and Mr. Robinson says, I say Scott because he calls him
22 Scott in his deposition; he says I asked him what happened and Mr.
23 Robinson said, oh it's just a run away jury. Is that a reflection of the
24 trigger?

25 Mr. Powell: I wouldn't think so Your Honor, because the trigger relates to what

1 the, what facts and information are available to the Plaintiff; all of
2 them, that is only one bit of evidence, but what happened in the
3 courtroom and the information that came to his lawyer, as I've
4 discussed previously, in May of 2007, also triggers, would be a statute
5 of limitations trigger. Either one..

6 The Court: The analogy between the blow out on the silo a trial result, while both
7 might be equally shocking, depending on what shoes you're wearing
8 at the time. I don't think that analogy really applies. For one it's a
9 engineering thing where obviously something went wrong, because
10 something bad happened before. This trial result, I don't know
11 whether that's ...

12 Mr. Powell: It may not, but it is an instant. The analogy of the two in Brown vs.
13 Epstein are very close.

14 The Court: Epstein is the only case in this state that deals with a trigger date of
15 the statute of limitations against the lawyer, is that right?

16 Mr. Powell: No sir, no sir; there are a number of them that we cited to you. The,
17 the, I've got the ...

18 The Court: As far as trial results?

19 Mr. Powell: Well, it may be the only one that alleges trial and pre-trial errors I'm
20 thinking. I'll have to give that some thought, but there are a number
21 of cases that Ms. Wall and I both have handled where, where there,
22 we've got summary judgment because the Plaintiff sat on his rights
23 after they knew ...

24 The Court: Certainly. I'm talking about a trial result where, to the client, there's a
25 lot of foreign language being spoken in the courtroom. Error

1 preservation some people don't even know what that means.

2 Mr. Powell: Right, that's right. And we don't, I don't take the position here that
3 Mr. Craven should have known that. That about error preservation, at
4 the conclusion of the verdict, at the time the verdict was handed
5 down, but his lawyer did and his lawyer acquired that information in
6 May of '07.

7 The Court: If, let's just assume there had been no appeal and there had been no
8 Mr. Brown, would the issue be the same?

9 Mr. Powell: Probably.

10 The Court: Because Mr. Craven said, I knew I had a problem. I read that part of
11 his deposition. I don't know, I don't know what a problem means.

12 Mr. Powell: Well if, if it was only the words, the magic words in the case law
13 seem to be serious problem and that's why I asked it that way.

14 The Court: But a serious problem because he had a verdict against him for two
15 hundred and thirty six thousand dollars.

16 Mr. Powell: Yes sir. And what he, what he alleges in this case and what he admits
17 that he understood there at the trial in 2006 was that his lawyer failed
18 to interview witnesses allegedly until two days before the trial, that his
19 lawyer did not show him, didn't keep him informed and didn't show
20 him the answers to interrogatories, that his lawyer did not prepare him
21 for cross examination on certain key issues, that his lawyer did not
22 call an expert witness on his behalf and all of those things, he knew,
23 there in that courtroom, he knew that in 2006 that, followed by the
24 verdict, we say is sufficient information to the Plaintiff to trigger the
25 statute because he admits also they had a serious problem resulting

1 from those errors and those, and that is under our case law, we
2 strenuously argue that it's very close to Brown v. Epstein because
3 there and also, he claims, forget about damages, about paying the
4 verdict, he alleges, they allege in this case, as they did in Brown vs.
5 Epstein, damage to reputation. He testified in this case, that is before
6 Your Honor, that shortly after that verdict, the reputation of the
7 dealership had been damaged and therefore, in light of the allegations,
8 what he knew, what they claim in this case the defects were, the errors
9 were, it's a serious problem, he gets the verdict, his reputation is
10 damaged. All of that occurring, all of that combined, even if there's
11 no appeal, we say, under our case law, the statute of limitation is
12 commence to run. The, the, this motion today assuming the motion is
13 denied, this motion today, is going to be the same one at directed
14 verdict, it's under the same standard. So we would argue that this
15 matter needs to end because there is really not much doubt that there
16 was an abundance of information in the hands of the Plaintiff. Now he
17 admits knowing it, he doesn't deny it. How can he deny it? He was on
18 the witness stand. And it does not take a lawyer to know when you
19 haven't seen answers to interrogatories, allegedly, it does not take
20 lawyers to know that you haven't been informed, allegedly, about the
21 progress of the trial and other matters. He had not been prepared for
22 cross-examination. It doesn't take a lawyer to know all that. Then the
23 verdict comes along and, and here we are. Aside from all that, even if
24 you reject all that, Mr. Brown admits in his deposition and I'm
25 reviewing those trial transcripts and I'm looking through it and I see

1 that, that failure to preserve issue there and that's a problem and so
2 that is notice to him and that was in the spring of May 07, more than
3 three years after the statute commence. Now, again, they would
4 distinguish some of the cases we cite, because the Plaintiff in these
5 case admitted knowing, admitted knowing that he had facts of this and
6 that and admitted knowing key pieces of information. Mr. Craven
7 does too; he admits knowing those things too. It is in part of his
8 deposition that we recited, Your Honor. I asked him if you knew all
9 this is in damaged because of this verdict, yes. So, given all of that,
10 there is and as we say it requires such a slight thing, in this state, to
11 start the statute running, in the case of Burgess v. American Cancer
12 Society, we cited, Your Honor, the lady admittedly, she says now
13 these are allegations and I don't want to besmirch Mr. McLeod. She
14 alleges that her attorney, Mr. McLeod, her attorney was having an
15 affair with the executive secretary of the opposing litigant, the Cancer
16 Society office in Florida. So, she said she was aware of the affair, but
17 she was not aware that they were exchanging confidential information
18 about the case and she claims she became aware of that much later.
19 Our Appellant Court said, no, sorry. You're aware of the affair,
20 therefore you're on inquiry notice to investigate. Since you're on
21 inquiry notice to investigate, the statute is running, so you see the
22 continuous there. Because she was aware there was that personal
23 relationship with someone on the other side, our Appellant Court said
24 you, you've got to start asking questions and looking and while you
25 do you're on inquiry notice and the clock's ticking. Now, they argued

1 estoppel. They argued that we should not be allowed to plea the
2 statute of limitations because ...

3 The Court: I'm going to hear his argument on that.

4 Mr. Powell: All right, sir. Your Honor, let me look over my notes to make sure --
5 - Ms. Wall has got some comments before we finish.

6 The Court: What was the date the Summons and Complaint were filed in this
7 matter.

8 Mr. Powell: I believe it was, unless I'm mistaken, I think it was August 6, 2010.
9 Your Honor, finally the elements that we would point to to
10 commence the statute, I think I should innumerate those with what the
11 information that goes into this pot to place the plaintiff on notice.
12 They accuse us, and you have to look at the allegation, you have to
13 look to what they say the Defendants did wrong and look as to when
14 they had that information available to them or with reasonable
15 diligence could make it available to them. They accuse the Defendants
16 in this case of failing to investigate the facts, that's in the Complaint.
17 Failure to use diligence in investigating the facts in this case. Second,
18 that they delayed interviewing key witnesses until two days before the
19 trial. Next, they failed to show Craven the draft of Stokes-Craven
20 answers to interrogatories and discovered this, Mr. Craven discovered
21 this during his testimony at trial. Next, they failed to prepare Craven
22 for his cross examination and certainly he would have been aware of
23 that during his testimony at trial. They accuse him, they accuse the
24 Defendants of failing to get the case settled, negligent failure to settle
25 the case. Well, naturally they knew that at trial. They had that

1 information available at trial. Next, if the Defendants, they also allege,
2 that if the Defendants had kept them better informed, and not made
3 the above errors the trial would have turned out differently. So, they
4 were aware of all of this and then here comes the verdict. The
5 Plaintiff's principal, Mr. Craven, testified that when the verdict in the
6 Austin trial was rendered in August of '06 it became evident it was a
7 serious problem for the Plaintiff. He said it was a big hit to the
8 plaintiff resulting in lower sales. He claims further the Plaintiff's
9 reputation was hurt shortly after the verdict and then finally, later
10 discovered or his lawyer discovered that they failed to preserve issues
11 for appeal in the case and that in Mr. Brown's deposition pages sixty
12 five and sixty seven and exhibits one and two to our supplemental
13 memo, they refer to the bills from Young Clement Rivers. Mr. Brown
14 talks about that being a big issue, jumping off the page to him and that
15 information being in punitive. Mr. Craven was asked a question, if
16 the verdict was a serious problem and you contend in this case that
17 you knew at that time it was a serious problem for Stokes-Craven,
18 answer, exactly, and for some of the reasons we've already
19 discussed? Answer, correct. So, he admits knowing this information,
20 he admits it's a serious problem for him at the time of the verdict and
21 under our case law, the clock's running and I'll address Your Honor,
22 if any questions you might have and, and also, would request an
23 opportunity to respond to the estoppel arguments at the appropriate
24 time.

25 The Court: Where is the Johnston case in your memo? That's the only one I'm

1 not quite sure of.

2 Mr. Powell: The Johnston case that I referred to just a minute ago, Your Honor?

3 The Court: Right.

4 Mr. Powell: That case, I responded to that because that's one they cited.

5 The Court: Oh, they cited it?

6 Mr. Powell: Yes sir, and I can, I can hand it up to you if you'd like.

7 The Court: Well, I may get copies of all of those. I'd much rather read them in

8 hard copy instead of up on the screen. I don't, I don't need them right

9 this second.

10 Mr. Powell: I hesitate to, to burden Your Honor with the tearing of another

11 notebook, but I do have their cases in a notebook if you so desire.

12 The Court: Okay. Alright, Ms. Wall?

13 Ms. Wall: Your Honor, thank you and I will be brief. I don't want to repeat

14 anything but I want to back up for a minute. First of all, let me

15 answer your question on our, we had filed a separate memorandum as

16 you're aware, Your Honor on behalf of Mr. Robinson for summary

17 judgment to, which is a little bit briefer. We tried to clarify some

18 points. You asked, Your Honor, when this lawsuit, this legal mal

19 practice lawsuit was filed. It was actually August 16, 2010, not

20 August 6th and that's on the second page. What I tried to do in this

21 memorandum is simply take the undisputed facts and certain

22 admissions from Mr. Craven and I set those out in essentially one

23 page. Your Honor, I don't want there to be any confusion and as Mr.

24 Powell mentioned he and I do a lot of legal mal practice defense and

25 frankly the majority of these statute of limitations cases and that we

1 have cited in our supplemental memorandum handed to the Court and
2 to counsel this morning. They're all legal mal practice cases, Your
3 Honor, the majority of them actually were my cases and so I'm very
4 familiar with them. Your Honor, the statute of limitations, the focus is
5 on what Mr. Craven as the principle at Stokes-Craven knew or, or,
6 Your Honor, what he should have known through the exercise of
7 reasonable diligence. The Plaintiff's argument is on Epstein and all of
8 these cases they all admitted they had all of this knowledge. That's not
9 the test, Your Honor. Obviously if Mr. Craven admits, which he does,
10 that he was at trial and he admits that at the time of the verdict he
11 knew he had a serious problem and that he believed that the reputation
12 of his company was injured, that's an admission that will be counted
13 against him, that is the Epstein case.

14 The Court: Isn't that arguably an admission that he had a problem because of his
15 financial hit and a cloud of a verdict for fraud?

16 Ms. Wall: Yes.

17 The Court: Not that he had a problem because of his lawyer ...

18 Ms. Wall: Well, Your Honor but as Mr. Powell pointed out and this is what the
19 Epstein, this is the Epstein case, Your Honor it's on all force with the
20 Epstein case because the Epstein case also had the same admissions
21 and claims, and claims, that we have in this case. That is I'm in trial,
22 you didn't call the witness who I think you should have, you didn't
23 hear, he claims, you should have had an expert witness, didn't call an
24 expert witness, same thing with Dr. Epstein, and there are a host of
25 things that happened during trial. Dr. Epstein sat through it, he heard

1 it, he saw it and here's the only point I'm making Your Honor. The
2 test is a reasonable person; it is an objective test and what I'm
3 concerned about is our whole focus here is on what Mr. Craven knew,
4 what he appreciated. That's what his affidavits all about. Oh I didn't
5 know, I'm not a lawyer, I've not been in trial before, how would I
6 know? The whole point of our statute of limitations law is that isn't
7 the test. The test is an objective one and that's where the Court comes
8 in. Because we place on Mr. Craven or any other claimant or Plaintiff
9 he must act as a reasonable person and in fact, our case and I quote
10 from Grayson. It is not necessary that the Claimant acquire precise
11 information of the alleged wrongful conduct for the statute to begin to
12 run, but merely acquire such facts as would have led to the knowledge
13 thereof if pursued with reasonable diligence. The point is this, Your
14 Honor, Mr. Craven had three years. It's not as if we're asking him oh
15 my gosh I've got a verdict and the next day you have to file a lawsuit,
16 not at all. All of the case law is clear on this and of course it goes back
17 to our statute. Our statute says it is that the actor or the claimant must
18 act as a reasonable person. This is a discovery statute; he has three
19 years to discover and file suit. That's quite a bit of time. In Kelly vs.
20 Logan and Jolly, which was my case Your Honor, the court made it
21 absolutely clear, yet once again, the standard as to when the
22 limitations period begins to run is objective rather than subjective. So
23 I don't want to spend all morning focusing on what Mr. Craven may
24 have admitted or didn't admit and what he knew and how
25 sophisticated he was; that's not the test. The test is a reasonable

1 person, it is an objective standard. It has to, otherwise, every single
2 claimant would come in and say that I didn't understand and I didn't
3 realize and I didn't get to a lawyer until six years later or ten years
4 later. That's the whole point of having an objective standard, Your
5 Honor. In Moore v. Vinson, our court stated, in other words, whether
6 the particular Plaintiff actually knew he had a claim is not the test.
7 Rather, Courts must decide whether the circumstances of the case
8 would put a person of common knowledge and experience on notice
9 that some right has been invaded or that some claim might exist, he
10 has three years in which to investigate. Your Honor, in a statute of
11 limitations inquiry, our focus this morning so far has been on, it seems
12 to me it's been too much on what Mr. Craven knew or claims he
13 didn't know. I want to turn our attention not only to the proper test,
14 which is what he could have learned through the exercise of
15 reasonable diligence in which he had three years to do, but then I also
16 want to turn our attention to the second or we could call it the third
17 statute of limitations test. Obviously, the first one being actual
18 knowledge where you admit, the second one and the true test being
19 the objective test; it's what you knew or what you should have known,
20 but then we also have the test of constructive knowledge. In
21 constructive knowledge, Your Honor, the knowledge of any agent is
22 imputed to the principal and clearly our case law is where you have a
23 lawyer, he's your agent, his knowledge is imputed to the client. It is
24 well established that a principle is effective with constructive
25 knowledge on all material facts of which his agent receives notice

1 while acting within the scope of his authority. Crystal Ice and a host
2 of other cases. The Dorman versus Campbell case, Your Honor,
3 absolutely on point. That is a legal mal practice case. And there the
4 clients lawyer got a letter, he didn't tell his client about it, but the
5 letter put the lawyer on notice that there was a problem in a real estate
6 transaction. He never told his client that, but the client, the court,
7 imputed that knowledge to the client for purposes of the statute of
8 limitations. Your Honor, there's no question and we've set it out in
9 our supplemental memorandum handed to the Court this morning, that
10 Mr. Brown, it doesn't matter if Mr. Robinson continued to have his
11 name or they placed his name, Young Clement Rivers did, on the
12 Appellant pleadings. There is no question that Young Clement Rivers
13 represented Mister., well, Stokes-Craven on this appeal on the Austin
14 case. I mean that's undisputed. It can't be disputed because it's been
15 admitted by Mr. Brown, one of the appellant lawyers at Young
16 Clement Rivers and he says it on page sixty of his deposition, Your
17 Honor, we cited it and given that page to you, I knew that issue
18 preservation was going to be an issue and when did he know it? When
19 he started going through the trial transcript.

20 The Court: For whatever it's worth, at this point, was there any question to Mr.
21 Brown as to whether or not he did relate that to Mr. Craven?

22 Ms. Wall: Mr. Brown actually recalls relating it to Mr. Craven not until June of
23 the following year.

24 The Court: Well, June 9 of '09 is when they had their meeting, that was two
25 years later right?

1 Ms. Wall: I'm sorry, two years later, that's right. That's right Your Honor, June
2 of '09 he's reading the transcript of April or May of '07. That's
3 correct Your Honor. At least that's what he recalled as to when there
4 was a discussion. But again, just as in the Dorman case, the agent, the
5 lawyer has the knowledge. The test is not when he actually gives that
6 knowledge to the claimant or to his client here Stokes-Craven. The
7 fact that he had that knowledge is imputed to the client, that is
8 constructive knowledge and there are a host of cases, Your Honor,
9 wherein the statute of limitations will run as to the client, based upon
10 the imputed knowledge to him from his attorney and here, that
11 absolutely has the statute of limitations, the three year statute running
12 more than, in other words, they filed this mal practice action against
13 these lawyers more than three years after Mr. Craven's, Stokes-
14 Craven's attorney Brown had that knowledge. He knew it was going
15 to be a problem and he was reviewing the trial transcript.

16 The Court: And here, regarding the error preservation was not a issue. Of
17 course, they say count three versus two. You hadn't gotten into that
18 yet, but ironically the majority opinion says there was no error of
19 preservation problem.

20 Ms. Wall: That's correct Your Honor, that's absolutely correct and that's very
21 clear in Judge Beatty's opinion, he sets that out. And it's also
22 interesting, as long as you bring it up, Your Honor, you know, that
23 whole, I can't even believe we're going to go down that road, because
24 even the descent which of course is nothing ... but even the descent
25 keeps referencing Judge Beatty's opinion as the majority opinion; it's

1 repeated throughout the descent. It's in every paragraph of Judge
2 Pleicones decent, but that's another issue. So, my only point, Your
3 Honor, is to make sure we're all remembering that it's not, for
4 purposes of the running of the statute of limitations, it's not what Mr.
5 Craven admits he knew, it's an objective standard of what he could
6 have known through the exercise of reasonable diligence and it's
7 never a test that, oh we're going to wait until you finally go to another
8 lawyer and another lawyer tells you that you might have a claim
9 against your first lawyer. That has never been the test and that's been
10 expressly rejected in every one of these statute of limitations, in the
11 legal mal practice arena that we have cited to Your Honor, every one
12 of them. Because, of course, then you wouldn't have a discovery test,
13 what's to, that's the whole point. You're supposed to go out there and
14 you've got three years to do it, which is a long time, to get the
15 information and make the determination, I think I'm going to go
16 ahead and sue, but you've got three years to do that. If we waited until
17 everybody decided well now I think I'll go talk to a lawyer, now
18 maybe now that I've gotten an appeal decision and that takes me to
19 the last point Your Honor. Epstein, and this is not the only case we
20 have, it's just that we focus on Epstein because it's so on all fours
21 Your Honor, but getting, waiting until you get a decision on appeal
22 has never been the test. That has been expressly rejected repeatedly by
23 our Supreme Court, because again, why is it? And you know, and
24 Plaintiff's love to argue this and they do it in the cases, Epstein is one
25 of them, but there are a number of other cases, that talk about this as

1 well. Kelly is another one, Plaintiff says, oh but gosh, you mean to tell
2 me I have to go ahead and sue my lawyer, even though I'm on appeal?
3 That's just so complicated and why should I have to do that? Our
4 Supreme Court has said, look, you gotta do it because this is a
5 discover, this is a, our statute of limitations requires that you bring
6 your action within three years of when you knew it or could have
7 known through the exercise of reasonable diligence and they say you
8 can enter into a tolling agreement or file your lawsuit and we'll stay it.
9 Our Supreme Court has said this in discussion in these cases when the
10 Plaintiff's say oh no there should be a tolling. Our Supreme Court has
11 expressly rejected any notion that the time to file your legal mal
12 practice action is tolled during the appeal. And of course, Kelly v.
13 Jolly, I think gives the best description of why that is. They talk about
14 how people can die, witnesses are absent, people lose their documents
15 and there's certainly --- and that's the whole reason we have statute
16 of limitations. The Kelly v. Jolly case gives a wonderful overview of
17 the public policy reasons as to why we uphold and why our court say
18 it's very important that we have a three year statute of limitations.
19 There's a public policy reason for it. And in that case it specifies this
20 isn't a mere technicality, that is a quote from that case. Statute of
21 limitations law, this isn't a mere technicality, we do this for reasons of
22 public policy so that we can have certainty and so that we don't have
23 people subject to a lawsuit long after they should be and when is long
24 after? Any time after three years. Our courts have determined, rightly
25 so, that three years is ample time to go out and find out whether or not

1 you have a cause of action and make your claim. Finally, Your Honor,
2 we do, in our responsive brief, talk about how equitable estoppel does
3 not apply. That again is the Kelly case but I think Your Honor, and
4 that's a legal mal practice case Your Honor, but I think you wanted
5 him to argue that first and we were going to respond to that. The last
6 thing I would mention, Your Honor, we did file this morning, a
7 responsive affidavit of Scott Robinson responding to Mr. Craven's
8 affidavit that Mr. Craven filed, I think on Monday of this week.

9 The Court: I don't believe I have it. Mr. Robinson's supplemental affidavit? Is
10 it a tab under your ...

11 Ms. Wall: Your Honor, it wasn't a tab, it was handed up and filed separately.

12 The Court: I see it.

13 Ms. Wall: And the only purpose for that is to clarify in paragraph two, his
14 involvement in the appeal. It doesn't frankly matter, for purposes of
15 statute of limitations because the constructive knowledge of any
16 lawyer in the appeal is going to go to the Plaintiff and we know Mr.
17 Brown, you know, you know that's undisputed, was his lawyer, but in
18 fact he makes it clear here he didn't draft the briefs, he didn't conduct
19 any research, he didn't argue before the Supreme Court, all of that
20 was done by Young Clement Rivers. He also makes it clear Your
21 Honor, in response to Mr. Craven's affidavit where again, Mr. Craven
22 is focusing is what he claims he actually knew and did it have any
23 import to him and we know that's not the test for summary judgment
24 on statute of limitations, but nevertheless, he does make it clear in
25 here, Mr. Craven says, oh this is the only case I've ever been involved

1 in ...

2 The Court: He said any lawsuit, any lawsuit.

3 Ms. Wall: ... except for one.

4 The Court: Mr. Robinson calls it litigation matters.

5 Ms. Wall: That's correct. Most of these were in Magistrate's court Your Honor,
6 but they were still ...

7 The Court: Are they all lawsuits?

8 Ms. Wall: As far as I know Your Honor, yes and that's why they're set up as for
9 example Taylor v. Stokes-Craven. There were disputes that purchasers
10 had.

11 The Court: But no docket numbers?

12 Ms. Wall: With the entity ... I don't, I don't have those docket numbers. No,
13 Your Honor.

14 The Court: Alright.

15 Ms. Wall: We were just clarifying that for the Court. And again, the important
16 thing is not to focus on what Mr. Craven is willing to admit, but what
17 he knew or should have known as a reasonable person A, he's on
18 notice, he admits, he does admit this. He's on notice, he has a serious
19 problem when he gets the verdict and he's got three years to find out
20 if this is his lawyer's fault, his trial lawyer's fault. And what would a
21 reasonable person do where he thinks he has a serious problem? He's
22 going to go out and investigate, you've got three years to do it, but in
23 addition we have the constructive knowledge of his lawyer, Mr.
24 Brown, that there was a serious issue as he went through the trial
25 transcript, Your Honor. Thank you, Your Honor.

1 The Court: Okay. We've been here a little over an hour; can we take about a five
2 minute break?

3 Mr. Powell: That's fine Your Honor. Thank you.

4 The Court: Alright I'll be back up in just a few minutes.

5 (Court Break 10:44 - Back on 10:57)

6 Mr. Epting: Judge, I had the privilege when I was in law school to take a class
7 under a fellow by the name of Dixie Walker. And Dixie Walker was
8 the fellow who went with Nixon and opened up China and his parents
9 had been missionaries and he was a Confucius scholar and he had a
10 poem by Confucius, the last line of which was, and when I was
11 seventy, I knew the ways of my heart and I followed them. Well, I'm
12 not seven, I'm sixty two and what I've realized is I can say just about
13 anything I want to say, I've been doing this long enough that I feel
14 comfortable doing that and the first thing I'm going to say Judge is it's
15 a pleasure to be apart of something in which you obviously have done
16 a lot of work, because one of the greatest fears we have as litigants is
17 judges making decisions about things they don't know and so, I start
18 by saying thank you. I'm glad it's an important case, I appreciate it.
19 Judge, let me answer a few questions that you asked and I put these
20 questions sort of in the category of they aren't really related to my
21 argument, but I think I should go back and pick them up. Mr. Craven,
22 when he got his deposition, realized there were some errors in it and
23 so, one of the things he changed in his deposition was he remembered
24 that in fact, he had ridden up with Mr. Robinson to the oral argument
25 and so what's in his affidavit is in fact, what is in his deposition

1 agreed it was done at the time he prepared the errata sheet he made
2 four or five other changes.

3 The Court: So, he didn't waive reading and signing?

4 Mr. Epting: No sir, he did not.

5 The Court: Okay.

6 Mr. Epting: Secondly Judge, this notion of Young Clement Rivers, the most
7 important thing, and Ms. Wall read the law correctly, within the scope
8 of their undertaking. Young Clement Rivers undertook to handle the
9 appeal, that's all. But I want to turn it on its end, Judge. Scott
10 Robinson is getting all of these briefs alleging all of his wrong doing.
11 Young, Clement never sent anything to the client. Mr. Brown testified
12 it went to Mr. Robinson. Now in this context Judge, Mr. Robinson is
13 one of Mr. Craven's best friends. Mr. Craven said send me a bill, I
14 want to pay you and he paid him. Young, Clement and what they
15 knew, they knew in the scope of representation for an appeal, they
16 never undertook to advise Stokes-Craven in any way with regard to
17 anything about this lawsuit, the mal practice, nothing. But the notion
18 that appellant counsel in the one that should be ratting out the lawyer;
19 when the lawyer, himself is receiving the allegations of all his own
20 wrongdoing and never says a word. Nothing. And in fact, it's
21 undisputed that Mr. Craven knew that something was amiss in June of
22 '09 when Steve Brown said here's the way we're going to argue this
23 case. That's what Mr. Brown testified to, that's what Mr. Craven
24 testified to. Judge, I want to talk a moment about this objective
25 standard because I want to make sure we're all talking about the same

1 thing. An objective standard means a reasonable man's standard, so in
2 other words, it's not like an eggshell Plaintiff theory, where you take,
3 if this person is truly a moron to judge it by his moronic standard is a
4 subjective standard. So we agree this is an objective standard, it's
5 what a reasonable man or woman would know. It changes nothing
6 Judge, it doesn't have anything to do with it becomes a legal question
7 because it's an objective standard. No. It's just that it's the reasonable
8 man's standard. So, with that judge, what I'd like to do is to start with
9 the basic proposition in Johnston v. Bowen because as you know
10 Judge, how many contexts in the course of a year do you charge a jury
11 about reasonableness. Was the conduct of the Defendant in driving an
12 automobile, was it reasonable? It's not for the Court to determine
13 reasonableness in any context. And it's no different in the statute of
14 limitations and the cases Judge are clear on that. This is Johnson v.
15 Bowen, whether claimant knew or should have known the claimant
16 had a cause of action and thus whether the statute of limitations
17 commenced to run is a question for the jury and it's just very logical
18 Judge, it's a reasonable man's standard.

19 The Court: But it's not, that's not always the case. It's not always a jury issue.

20 Mr. Powell: Well no sir and that's the point that I want to try to make here before
21 the Court and I really am hoping Judge, there comes a dialogue, but I
22 want to first Judge, say this about Epstein; and I want to put it in this
23 context because I want to make several distinctions that are critical,
24 but are being blurred. Epstein says we do not hold that in all instances,
25 the date of the jury's adverse verdict is the date in which the statute of

1 limitations begins to run. To the contrary, we hold only, under the
2 facts of Epstein, that Epstein knew of a potential claim against Brown
3 at the date of trial.

4 The Court: Well how about the testimony of Mr. Craven that he was on the stand
5 in the trial, that he was shown the interrogatory answers and that he
6 knew that he had not seen those before?

7 Mr. Epting: Well, and I can ...

8 The Court: While I'm thinking about it, the other one, where he knew, I guess
9 that's the right term, that he had not been adequately prepared for
10 cross examination.

11 Mr. Epting: And Judge, that is my point. It's a two step process, you have to have
12 injury for there to be a claim against a lawyer and you have to have
13 notice that something is amiss. Actual notice, constructive notice, but
14 something must advise you that your lawyer did something wrong. So
15 the fact that this verdict is really of no moment here and it wasn't in
16 Epstein either. So, I just want to make sure to make the point that it's
17 injury and that a reasonable person would know that a lawyer has
18 done something that is wrong.

19 The Court: When do you say that ...

20 Mr. Epting: I think, in my estimation Judge, when Steve Brown began talking
21 about what he was going to argue in the Court of Appeals, Supreme
22 Court about the legal error. And the reason ...

23 The Court: Well, the ironic part about that , the error preservation is that
24 regarding, he said that was not of real importance.

25 Mr. Epting: Well, well, that true Judge. That is, that is true and that's another

1 way to look at it and many of these facts Judge, do cut several
2 different ways.

3 The Court: Right.

4 Mr. Epting: So, I want to read, and then this as my jumping off point for what I
5 hope will be a discussion of what really is in issue here. I'm reading
6 Judge, from a case True v Monteith.

7 The Court: Monteith?

8 Mr. Epting: Yes sir. The fact that petitioner knew of her injury would not
9 necessarily provide notice to her that she may have a cause of action
10 for legal malpractice. Contrary to respondent's contention, knowledge
11 of injury alone, does not give rise to a suspicion of any impropriety.
12 So, I'm closing the door on this notion of injury and turning to what I
13 think is an issue. And I want to turn it a little bit on its head Judge,
14 and I want you to challenge me, because I'm hoping that when you
15 and I get through discussing this, I'm not sure I know where this is
16 going exactly, but I want to make sure it's flushed out. So, Mr.
17 Craven knows on the day of trial that he's never seen his answers to
18 interrogatories.

19 The Court: He knows that when he's on the stand.

20 Mr. Epting: He knows that when he's on the stand. Now, is that malpractice? I
21 hate to admit it Judge, but I don't always send interrogatory responses
22 to every one of my clients. I mean, so Mr. Craven, first of all, does the
23 average person Judge, know ...

24 The Court: Well, that was one of my questions. When you try this case in front of
25 a jury, whenever it gets that far, you try this case in front of a jury,

1 what are you going to say that Mr. Robinson did to breach the
2 standard of care that in turn caused damage to Stokes-Craven? What
3 are the elements of your claim and of course they'll say, well you
4 can't just conveniently take only the ones at trial that somehow get
5 you beyond the statute of limitations problem. It's kind of a big ball of
6 wax there, but what, what did he do wrong?

7 Mr. Epting: Judge, he didn't do any discovery. He never wrote one letter. He
8 never served interrogatories, never took a deposition. Never did
9 anything.

10 The Court: Well, didn't most of the damaging testimony come in the context that
11 Stokes-Craven knew about Mr. Frierson, about Mr. Thornall, even
12 about by Mr. Dennis Craven and then by Kenny Craven. All those, I
13 mean who was he going to depose? The claimant?

14 Mr. Epting: Well Judge, he should have, because you don't know this Plaintiff
15 until you see this Plaintiff and if you want a real dog fight, and you
16 want to know you're going to get killed, you take that guy's
17 deposition and if you think you know what kind of witness he's going
18 to make because you read something that he wrote, I'm sorry. This
19 fellow was an incredible witness.

20 The Court: Mr. Craven had talked to him, so he would have to know he was an
21 incredible or convincing guy or ...

22 Mr. Epting: Well, and, and, and that may be Judge, but what I think ultimately,
23 because I don't want to shy away from that. I'm here to help you make
24 a decision.

25 The Court: Right.

1 Mr. Epting: But, the real crux of this Judge, and you asked the question, why
2 wouldn't the case settle?

3 The Court: I'm just ...

4 Mr. Epting: Well, well, the one thing that you weren't told is Mr. Craven said that
5 Mr. Robinson told him it's a twenty thousand dollar case and this man
6 wants fifty or a hundred and twenty thousand dollars. Now, Mr.
7 Robinson's view of that is different.

8 The Court: That could have been true depending on the jury.

9 Mr. Epting: Right, but what's interesting Judge, is Mr. McKenzie, Mr.
10 Robinson's law partner, says exactly the same thing. He says that's
11 what Mr. Robinson told him. That the maximum exposure in the case
12 was twenty thousand dollars. The other thing Judge ...

13 The Court: That's not negative to have that opinion.

14 Mr. Epting: No, I'm just saying, you, well, in this case, Judge, I think that's a
15 question for the jury. Whether or not this case should have been
16 settled, it obviously, in my mind, should have been settled. These are
17 dangerous cases, but that's for another day. I'm just saying that the
18 crux of this really is, here is a case that Mr. Robinson now says was
19 an extraordinarily dangerous case in which there is no discovery and
20 his explanation is, I didn't want the customer list to get out, so if we
21 did no discovery, they wouldn't. And what's the problem with that
22 Judge, is ...

23 The Court: That's not necessarily true.

24 Mr. Epting: No, of course not, but the information is publically available at the
25 DMV. So, we're getting far afield.

1 The Court: So, no discovery and what else?

2 Mr. Epting: Well, just that the case should have been settled Judge. I want to now
3 make the second distinction Judge that I think is important in Epstein
4 and I want to do it in, I want to bifurcate it, because I think there are
5 two pieces to it. In Epstein, they alleged that there was not enough
6 discovery, factual investigation and therefore, this case is like Epstein,
7 that's true. Those are the allegations, but let me ask you this question
8 Judge, so, I allege in a defective bridge case that the engineer, at the
9 time of drawing the drawings, that five years before, knew that this
10 defective steel from China was, throughout the country and made no
11 attempt to guard against it. The fact that I plead that he knew
12 something then isn't the issue. The issue is when did a reasonable
13 person know that there was an error made by the engineer, so that the
14 pleadings in this case seek the same, or allege the same thing that
15 Epstein alleges isn't no consequence at all. What is of a consequence,
16 Judge? And here's the paradigm that I have for you. They cited you
17 about ten cases. Epstein and Kember(sp) are the last two, if you look
18 and Judge, there are probably sixty or seventy malpractice, legal
19 malpractice cases and you'll find about ten of them are decided as a
20 matter of law. Epstein is one, Kember(sp) is another they cite, but if
21 you'll look at every one of these cases, what you will find is this. In
22 Epstein, Dr. Epstein was quarreling, and the record, incidentally
23 Judge, I'd ask you to take judicial notice of it on Westlaw, he was
24 quarreling with his lawyer before the trial, saying you are making
25 arguments that are inconsistent with my own medical records, what is

1 wrong with you? We can't win that case with you doing it that way.
2 He wrote his lawyer, his new lawyer, right after the verdict and said,
3 my lawyer didn't know what he was doing; he made all of these
4 errors. So, in Epstein Judge, it's a question of actual knowledge.

5 The Court: But that's not, that's just half the equation.

6 Mr. Epstein: That's just half the equation. But in Kember(sp), in Kember(sp), the
7 lawyer actually says to the client, I've made an error. You need to turn
8 it over to my malpractice carrier. You may have to sue me. So, the
9 model Judge, that I'm giving you is this. If Mr. Craven is on actual
10 notice of wrongdoing, then the statute starts. That's a fact, but the
11 question here is, who's to decide that? What does a reasonable person
12 Judge, who has no experience in the law, what do they know? Do they
13 even know what a deposition is? Mr. Craven never gave one. Do they
14 know what interrogatories are? Do they know that they're supposed to
15 see the interrogatories? Is it malpractice Judge not to talk to every
16 witness who to take the stand? Because the argument that I'm
17 advancing Judge is suppose I were in here, making an argument to
18 you, that the fact that that witness was not spoken to by Mr. Robinson
19 in advance, was it malpractice? Because if it's evidence of nothing, if
20 it happens everyday, if it's not malpractice, why did somebody who
21 knows nothing about the law jump to any conclusion?

22 The Court: Well, you're talking in a circle there . You are saying it's not
23 malpractice, then it's not a claim he would go forward on. So how is
24 that, how is that ...

25 Mr. Powell: My only point Judge, is if Mr. Craven is to be on notice of something,

1 he's to be on notice that his lawyer is doing something wrong and I'm
2 just saying to you, that is it wrong that the lawyer has never showed
3 Mr. Craven the interrogatories? Because if there's nothing wrong with
4 never having shown him the answers to interrogatories, then it's not
5 notice to Mr. Craven that there's anything wrong being done.

6 The Court: Well, if it's not wrong that he didn't show him the answers to
7 interrogatories, then obviously then you would not get into that at a
8 trial so your claim is kind of fizzling away as to what he did wrong. If
9 you're going, what is the center piece of your claim against Mr.
10 Robinson? What's the centerpiece?

11 Mr. Epting: Basically, this case, Judge, should have been settled.

12 The Court: Okay and Mr. Robinson was not there when Mr. Craven prepared the
13 suit. See I'm looking forward to a trial and see how this would all play
14 out. That's one of my big questions that I'm going to have at the end
15 of all this. The centerpiece is the fact that the case should have been
16 settled, Mr. Craven was there during a conversation with Mister,
17 what's his name?

18 Mr. Epting: Austin.

19 The Court: He was, I think Mr. Frierson was his employee, Kenny Craven was
20 his brother, Thornall was his employee. He kind of knew all that stuff
21 too and if he's in a car business and he has to know the public don't
22 like used car dealers or congressman or anybody else monkeying
23 around with the crew, so if the centerpiece of your case is that the case
24 should have been settled, Mr. Craven is the only one in the courtroom
25 who has a checkbook.

1 Mr. Epting: Well ...

2 The Court: And he could have said, you know, I've been in this business for a
3 long time, and Mr. Robinson or Scott, whatever he called him, you
4 can pay this guy. I don't care what you say, we need to pay him
5 because I know, I know, I was there when such and such conversation
6 happened. And that has nothing to do with summary judgment at this
7 stage, but if that's the centerpiece of your case, he had a pen and a
8 checkbook.

9 Mr. Epting: Well, Judge, he did and I am inclined to talk a little bit about this,
10 because you have raised it. I fully expect that that will be a defense
11 that they will raise and Mr. Craven will say I relied on Scott, he told
12 me my exposure was twenty thousand dollars and I felt like there was
13 no reason for me to being paying this guy fifty or a hundred and
14 twenty thousand dollars or whatever his demand was and so I took my
15 lawyer's advice and I went to trial.

16 The Court: Okay. And we're having a debate on the practicalities ...

17 Mr. Epting: Sure.

18 The Court: ... on the practicalities of advising clients because I did it an awful
19 long time. I don't know if Mr. Robinson did it, I don't know how Mr.
20 Craven would take it, but if a lawyer says this case is worth twenty
21 thousand dollars, you know what that means, it means nothing. It
22 means absolutely nothing. What matters is what twelve people ...

23 Mr. Epting: Well, and Judge, that's where, is there any, I want to make sure I've
24 explained myself here, that there is no actual notice ...

25 The Court: And I understand that, but what I, what I think all this may get down

1 to is the statute of limitations issue and I frankly don't know the
2 answer to it yet, is what should Mr. Craven, what should he have
3 done. There can always be a factual issue just by the client saying I
4 didn't know. That most of the time will create a factual issue on the
5 actual knowledge, I didn't know anything, I didn't know what a
6 deposition was, I didn't know I was supposed to get interrogatories, I
7 didn't know anything about error preservation. So, tell me about what
8 the cases say about the standard of should have known through the
9 exercise of a reasonable ...

10 Mr. Epting: I think Judge, I just ...

11 The Court: And it is somewhat a moving target.

12 Mr. Epting: It is Judge. I'm going to keep using the word paradigm. The paradigm
13 in Epstein says it's a two step process; an injury and notice that you
14 have a claim. Second inquiry, is there actual notice, because Epstein
15 and seven or eight other cases say that the client had actual notice of
16 the wrongdoing and those are the cases, Judge, that the Supreme
17 Court upholds the grant on a statute of limitations. When you get to
18 what a reasonable person knew or should have known and there are a
19 host of these cases, the law is whether a claimant knew or should have
20 known, the claimant has a cause of action, and thus whether the
21 statute of limitations commence to run is a question for the jury. So
22 when you get to, I think I said that pretty clearly, so that's how I think
23 this breaks down. Is there any question Judge, that I haven't answered,
24 if there's anything that you would like to direct me to would be ...

25 The Court: Going back to Mr. Brown, his testimony that the error preservation

1 matter jumped off the page at him, I think in one of your filings you
2 said that the statute was triggered on that date?

3 Mr. Epting: No sir.

4 The Court: The date that he said that at the meeting? Excuse me, on the date that
5 he told Mr. Craven at the meeting, hey, we've got a error preservation
6 issue that I know they're going to raise ...

7 Mr. Epting: Right.

8 The Court: So, is that part of your claim against Mr. Robinson about error
9 preservation?

10 Mr. Epting: It certainly is Judge and I think it's a very, very large part. And in
11 fact, it would be to me, it's the most obvious, you asked me a
12 question, sort of, what is the center load of my case? Maybe Judge, I
13 cut this case down, and the only issue I do try is issue preservation,
14 but it never should have gotten there, Judge.

15 The Court: How about the Burgess case where they knew or should have known,
16 was taken to the, I guess what we all consider the extreme, when the
17 client's lawyer, was having an affair with, I guess with the executive
18 secretary, is that what it was of the adverse party? The Supreme
19 Court, I guess it was the Supreme Court basically said, you know,
20 that's not the way it works, unless they actually knew that they were
21 exchanging confidential information, you knew something was up.
22 And I know that's an extreme case, but how do you, how do you
23 distinguish that, at least that academic approach?

24 Mr. Epstein: Well ...

25 The Court: Bad facts make bad law.

1 Mr. Epting: Well, that's probably my answer, but I'm always reminded when I
2 hear that of what allegedly Cadillac Jack said to Judge Ness in the
3 Dillon bust on the air strip. So, you're telling me that you find another
4 man in the closet of your wife's bedroom doesn't suggest anything to
5 you, whereupon, supposedly Senator Lindsey said, Judge, I have no
6 information in such matters as that and I would defer to the Court's
7 wisdom. I think Judge, that somebody is sleeping with somebody is
8 just such an outrageous fact that it would be hard not to draw some
9 negative inferences from that, because ...

10 The Court: The case could be distinguished just by the fact that it was extreme
11 facts.

12 Mr. Epting:: It's extreme facts Judge, number one. A layman has a pretty good
13 understanding of what that might mean. Interrogatories, what's done
14 in a courtroom, what should be done, what's left to be done. I don't
15 think that that's in the average laymen's experience, but what is there,
16 I think, is a question of was Mr. Craven's conduct reasonable and I
17 think that's a question for a jury.

18 The Court: So the jury as part of the charge, would be told, you have to
19 determine, ladies and gentlemen, whether or not Mr. Craven either
20 knew or should have known that he had some type of claim?

21 Mr. Epting: And if he ...

22 The Court: Mr. Robinson more than three years prior to the time this action was
23 commenced and the Defendants have the burden of proving that by
24 the greater weight and the evidence.

25 Mr. Epting: That's right sir.

1 The Court: And then so, there would be a lot of testimony obviously on what
2 we've just went over.

3 Mr. Epting: Yes sir.

4 The Court: But you agree that in many instances, appellant courts have said that
5 issue can be decided as a matter of law. It just depends on the taking
6 of the evidence in the light most favorable to Mr. Craven how that
7 shakes out in the case..

8 Mr. Epting: And whether or not if you conclude that he's on actual notice.

9 The Court: But actual notice is just half of it.

10 Mr. Epting: But I know ...

11 The Court: If it's on actual notice, he's gone?

12 Mr. Epting: Right.

13 The Court: And also it can be as a matter of law that in the exercise of reasonable
14 diligence he should have known.

15 Mr. Epting: Judge.

16 The Court: That can be a matter of law.

17 Mr. Epting: I would disagree Judge and say, I would say it this way and I'm glad
18 we're having this discussion, because I think it is important. I think all
19 of the factual predicates for all of these cases that the Supreme Court
20 has decided as a matter of law, they have said that the client knew.

21 The Court: Well, except for Burgess.

22 Mr. Epting: Well and it's always tough to generalize Judge, because a lot of times
23 there are other things going on and I shouldn't say, all, but for
24 example, an easement. You knew the easement was on your property
25 because you were told it was on your property and so the statute began

1 to run; not when some lawyer opined that there was an easement on
2 your property; you knew you weren't supposed to have an easement
3 and that's when the statute began to run. In Kember(sp), you knew
4 when your lawyer told you that he had made an error. And so the
5 distinction that I'm making Judge is, if this Court can't conclude that
6 it's actual notice.

7 The Court: It has to be a question ...

8 Mr. Epting: It becomes a question of the objective standard, what would or should
9 a reasonable person know and I think it becomes a question for the
10 jury.

11 The Court: Okay.

12 Mr. Epting: Now Judge, I'd like to turn a moment ...

13 The Court: ---- equitable estoppel.

14 Mr. Epting: Yes sir. You know, you ultimately get back to pretty simple things.
15 Things that really matter and I wish, as a younger lawyer, I had
16 understood a little better.

17 The Court: Okay.

18 Mr. Epting: I wish I had understood a little better some of the, just how important
19 practical things are. So, think about Mr. Craven; his lawyer, Scott
20 Robinson, is one of his best friends. And at no time did he say
21 anything and just at this point Judge, let's just imagine that there is no
22 allegation of malpractice, except related to the question of issue
23 preservation. So, Mr. Robinson's getting these briefs, alleging that he
24 didn't protect the record and of course Judge, here's the irony of this,
25 this is in June of 09, so, excuse me, when they're talking about this

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1 issue with Mr. Craven it's June of '09. I don't know when Mr.
2 Robinson is getting the briefs, but presumably, starting in mid 2007,
3 because Mr. Brown didn't get the record on appeal until April of '07,
4 but in any event, he's getting all this and according to the Defendants
5 in this case, he knows the statute of limitations is running, or should
6 know.

7 The Court: Against him?

8 Mr. Epting: Yeah, but he never says anything, even though he knows that the
9 briefs that are being written are about him. So, what I find, Judge, the
10 most chilling about that is what Justice Pleicones says and it takes a
11 while to really figure it out, because it's pretty nuance, but he says, I
12 would hold that the Circuit Court erred by holding that Brown's
13 representation coupled with his presence on the appellant team did not
14 reasonably induce Epstein's forbearance. That Brown did not
15 actually participate in the appeal and being counsel of record makes
16 this conclusion all the more compelling.

17 The Court: Was he descending?

18 Mr. Epting: Yes.

19 The Court: Alright, two key words there are would hold he said I would hold.

20 Mr. Epting: No question Judge, and I'm offering this because I think he says it
21 better than I do and it's his next words, as his watchful presence
22 bolstered his affirmative representations and I would hold that Brown
23 is stopped from asserting the statute of limitations as a defense. And
24 my point Judge ...

25 The Court: Is there a legal malpractice case out there where equitable estoppel

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1 has been adopted? Because quite frankly, I have issued several orders
2 ruling that the statute of limitations has been equitably holding and
3 defense lawyers they just can't believe it but I know it's rarely used
4 and that it's sparingly used, but that doesn't mean it can't be used.

5 Mr. Epting: Well ...

6 The Court: I agree with you there.

7 Mr. Epting: Right.

8 The Court: Where is a case that says that in this context, a watchful presence and
9 so forth is, is in that case an equitable tolling ...

10 Mr. Epting: I don't think Judge, there is such a case and in fact, you don't really
11 see, you see equitable estoppel talked about by the Court. The first
12 time ...

13 The Court: You're calling it equitable estoppel or equitable withholding?

14 Mr. Epting: They're actually two separate things Judge.

15 The Court: I see.

16 Mr. Epting: This concept of an equitable tolling really doesn't grab the entire
17 Supreme Court until 2009 and so, and it's like so many things Judge,
18 often times these words are run together, but in the case, Judge,
19 Hooper versus Ebenezer, Sr. and this is cited in our brief, and I'm
20 certain you have read it. The Court says, tolling may either
21 temporarily suspend the running of the limitations period or delay the
22 start of it. Where a statute sets a limitation period for an action,
23 Courts have invoked the equitable tolling doctrine to suspend or
24 extend the statutory period to ensure practicality and fairness.
25 Equitable tolling, unlike equitable estoppel does not require deception

1 or misrepresentation, rather it serves to ameliorate the harsh result
2 sometimes flowed from the strict, literalistic application of an
3 administrative time limit. The equitable power of the court is not
4 bound by cast iron rules, but exists to do fairness and is flexible and
5 practical and adaptable to particular exigencies so that relief will be
6 granted in view of all the circumstances and where to deny one party
7 would be a gross wrong. The irony Judge, is the question of equitable
8 estoppel is a question for the jury. The question of equitable tolling is
9 a question for the Court. And what I would say and Judge, I would
10 ask your clerk, these waters are murky enough, I'm fairly certain
11 that's accurate. I cite the case in our papers, Black versus Lexington
12 School, which says that estoppel is a question for the jury.

13 The Court: Not always.

14 Mr. Epting: Well, of course not Judge. But, I'm just back Judge to the fact that
15 here these guys are best friends, Mr. Craven has appellant counsel
16 whose role is to write an appeal and Mr. Robinson is receiving these
17 briefs that are alleging that he didn't protect the record and at no time
18 did he say anything and now the Defendants want to argue that it's too
19 late.

20 The Court: Alright, well, and I'll switch gears just for a second and know your
21 arguments later on, but three say this and two say that. How is that
22 going to go anywhere? In other words, the issue preservation on the
23 surface of that opinion, is not an issue as a matter of law, because
24 Justice Beatty said zero dollars that's his opinion. And that was, well I
25 think they said the error, the issue was preserved and I know you

1 disagree with that because you say on directed verdict made on the
2 basis of a zero dollar opinion. Where is a case that says you take a poll
3 of all of the justices on various opinions that they render and say three
4 said this, but those three are on the descending side, but since they
5 make this observation and say I would hold, that it was an error, that
6 that was improper testimony and we would remand it back or reversed
7 it or where ever it might go. Where are you going to go with that as a
8 matter of law?

9 Mr. Epting: Alright, let me ask this question, or no, I'm going to answer your
10 question by asking a question that goes this way. Suppose Justice
11 Toal, Pleicones and Kittredge had joined together and had said, we
12 find the issue was not preserved and accordingly we uphold the
13 verdict?

14 The Court: Then you have a holding that the error was not preserved and then
15 you have to have the testimony from an expert saying what the
16 standard of care is and the fact that he did not object and preserve the
17 error, he breached the standard of care and that is what caused the
18 damages.

19 Mr. Epting: Well, if it's alright with you Judge, I can make my argument on this
20 in five minutes so we can hopefully get out of here at a reasonable
21 time.

22 The Court: I've got plenty of time.

23 Mr. Epting: Well, here's the way I put this together Judge, suppose that I don't file
24 an answer and my client goes into default. I don't think you need
25 expert testimony, because it's obvious and there are cases out there

1 that say that and you would expect that.

2 The Court: Right.

3 Mr. Epting: Okay, so that you let in testimony that there's zero value, you don't
4 make a directed verdict motion at all, you don't raise it on anything
5 close to the issue and you don't make an JNOV motion, Now in this
6 case, Judge, I don't think that is something that is a subject of expert
7 testimony. And in this case, the way I break it down Judge, is as
8 follows. When I took the deposition of their expert and they're bound
9 by the testimony ...

10 The Court: He said that you got to preserve errors.

11 Mr. Epting: That's it.

12 The Court: And object to things that are objectionable.

13 Mr. Epting: That's it. And then Mr. Robinson said Judge, it was not a matter of
14 trial strategy. I didn't do this as part of trial strategy, I always would
15 protect the record, make the directed verdict motions.

16 The Court: You don't sit there and let things in that aren't admissible. Now
17 obviously, sometimes by way of strategy, you say well that's really
18 not a big deal, so I'm not going to object to that because I don't want
19 the jury mad at me.

20 Mr. Epting: That's why I asked him was it a matter of trial strategy.

21 The Court: Right.

22 Mr. Epting: And he said of course, no.

23 The Court: I read that.

24 Mr. Epting: Alright, so what I would say Judge is, in this case, there really is no
25 issue about the standard of care. I don't even think you need expert

1 testimony, this is just what any lawyer does, just like you file an
2 answer within thirty days or you go into default. So ...

3 The Court: What I'm looking at is this, when I was reading that opinion, and
4 obviously, I had read it before, but when I got the brief from all of
5 you, I read that in detail and it puts things more in perspective when
6 you're looking at the performance of the attorneys, but if I was Judge
7 Hayes and the objection had been made, I would overrule it, because
8 you got a man testifying, you know, try to get my money back for this
9 truck, I tried to do this, I tried to do that, the truck is worth zero and of
10 course a jury over there can sit there and say that guy's full of bull.
11 It's got to be worth something. And that's what the dissenting justices
12 said. Now the, the expert, Mr. Morris, I think that was his name, he
13 said it was worth nothing, retail value. Now, obviously, if that was
14 what he was using as his transportation, it probably had some value to
15 it, but it's a matter of evidentiary admissibility. He had the right to
16 testify to what it was worth and the expert had the right to testify to
17 what it was worth on the opening market and this is way past
18 summary judgment, I understand that but I'm trying to get to the point
19 of what you're talking about issue preservation being any type of
20 lynch pin in this case.

21 Mr. Epting: Well Judge, I think you pose exactly the example that I was searching
22 for and didn't get. Let's say the objection had been made and you
23 were the trial judge and you had overruled it, then you would have
24 been reversed by Justice Pleicones, Justice Toal and Justice Kittredge
25 and the verdict would be zero and there would be no punitive

1 damages.

2 The Court: Well maybe so. Well, I don't think so. That's not how I read their

3 opinion.

4 Mr. Epting: Well no Judge, this is probably the first ...

5 The Court: Let me ask you this, did any of them, what did they descend on? Issue

6 preservation?

7 Mr. Epting: Judge --- So much of the case had to do with technical claims of the

8 Dealer Act, the Odometer Act.

9 The Court: Right.

10 Mr. Epting: There were issues that related to ...

11 The Court: Election of remedies.

12 Mr. Epting: Election of remedies was a big one and so, and Justice Pleicones of

13 course said he would reduce the punitive damage to a hundred

14 thousand and so he descended ...

15 The Court: So, what you're saying is the two judge majority opinion, since it

16 didn't change the result of actual damages, is what everybody mostly

17 agreed with, the error of preservation the result is going to be the same

18 on the actual damages. Is that what you're saying?

19 Mr. Epting: I'm saying Judge, that if you, if the motion had been made, whether

20 the trial judge granted it or not ...

21 The Court: ---Right.

22 Mr. Epting: There was a three judge majority that would have then said there's a

23 zero proof of actual damages, the verdict fails and the punitive

24 damages fails, verdict for Stokes-Craven.

25 The Court: Alright, this is where it gets very interesting okay. Let's say this, and

1 you try this case and you go forward with that theory about a error
2 preservation. Are you going to have to bring an expert in here to say
3 what that truck is worth? Is Mr. X going to have to say what that truck
4 is worth? Because, let's assume this. Let's say Mr. Austin had said,
5 the truck was worth fifteen hundred dollars and Mr. Morris had said
6 the truck was worth eighteen hundred and fifty dollars. On the issue of
7 approximate cause damages to Mr. Craven because of Mr. Robinson's
8 failure to preserve that, do we do a whole bunch of math and then Mr.
9 Craven's stuck with a verdict against Mr. Robinson for two thousand
10 bucks? In other words, how do you get from that, assuming what you
11 say is correct, that he should have objected and it would have been
12 reversed and brought back for a new trial and somebody had said,
13 well, we got to give it a dollar value other than zero, so the car is
14 worth a dollar or fifty dollars or a hundred dollars. So who's going to
15 say that the issue of whether or not, how do you prove what you're
16 entitled to in the way of damages?

17 Mr. Epting: Well, I'm going to do Judge, what at sixty two, I now know to do,
18 which I didn't do at thirty five and say I don't know, but I will offer
19 this thought Judge, because you obviously are thinking. For example,
20 let's just take another context of a case within a case ...

21 The Court: Alright, this is kind of a hybrid case within a case.

22 Mr. Epting: Yes, it is. So let's take the case in which an insured fails to, an insurer
23 fails to defend its insured and as a consequence, a verdict is entered
24 against the insured. And the question then becomes, because there's a
25 lawsuit against the insurer by the insured, over whether or not there's

1 coverage. I think Judge, the way the law works is that there's certain
2 issues that are tried in the underlying case that the insurer cannot retry.
3 Let's say the question was who ran the red light? Well, if the insured
4 lost that issue at trial, the Supreme Court says you're not going to
5 retry what would have happened had you hired a lawyer, had there
6 been a proper defense and had this accident been explained differently
7 a jury would have reached the conclusion that the insured should have
8 been exonerated ...

9 The Court: They would uphold the verdict.

10 Mr. Epting: That's it and I think Judge, that's the answer here.

11 The Court: Well, that, that analogy is about as strange to me as the cement case
12 analogy. I understand that, that you've got to walk through this like
13 that and that's certainly an approach, but this is not just a refusal to
14 defend, this is a controversial decision not to object to something. So
15 that, that's one of the reasons this case, I assume you all have
16 mediated this case, if you haven't, I'm going to order it. But that's one
17 reason this case should be settled. I would be flabbergasted if this case
18 wasn't settled.

19 Mr. Epting: Well, and we have Judge, and of course the reason we don't get very
20 far, are the outstanding motions.

21 The Court: Right.

22 Mr. Epting: Yeah.

23 The Court: And I understand that and you and I have gone a little bit far afield,
24 but the equitable holding issue, it's a fact that they were very close
25 friends and I hate to use ...

1 Mr. Epting: They both say that.

2 The Court: I hate to use the word were. They were best friends; Mr. Robinson

3 had been receiving briefs with the arguments back and forth about

4 issue preservation and never said anything to Mr. Craven and all the

5 while he knows the statute of limitations is running against him. And

6 in your perspective he's kind of sleeping. Is that an estoppel issue or

7 tolling issue or both?

8 Mr. Epting: Well, you know, Judge, it would be both, but it would require me to

9 say to you that Mr. Robinson is deliberately concealing that from the

10 client.

11 The Court: That would be estoppel.

12 Mr. Epting: That would be estoppel. I think Judge, there's a pretty good

13 argument that that's true. On the other hand Judge, I'm sixty two

14 years old, I'm not usually looking to take the extreme position. My

15 attitude about that is a best friend should have said, you know Dennis,

16 this thing looks like I may have made a mistake and I think you need--

17 --

18 The Court: I don't think I did but they say I did.

19 Mr. Epting: Right and you really ought to maybe go and talk to somebody about it.

20 Yeah.

21 The Court: Well, that tolling is an interesting argument. How about one of the

22 things they point out that kind of caught my attention, when they

23 mention Mr. Robinson's supplemental affidavit. Mr. Carven said he'd

24 never been involved in any of the lawsuit before and then Mr.

25 Robinson points out five other things, I don't know if they were court

1 cases, at least were adversarial, but had he ever been in litigation
2 before?

3 Mr. Epting: Judge, he's here and I'd be happy to have ...

4 The Court: I just, he's saying this ones the only time?

5 Mr. Epting: Well, I'm careful Judge, because what Dennis, I think would say and
6 you can take judicial notice of it from the Magistrate. I think you're
7 going to find that they're all repossessions of automobiles in the
8 Magistrates court for people who haven't paid and they are trying to
9 get the automobile.

10 The Court: Alright, on the equitable tolling, you're saying that the case law, I
11 think you said Cooper stands for the proposition to avoid any strict,
12 literalistic applications of the statute of limitations, but don't we have
13 case law that says that's what the statute of limitations is for?

14 Mr. Epting: Judge ...

15 The Court: It's a matter of extreme right?

16 Mr. Epting: It is and I don't mean to be glib about this and maybe one day I'll get
17 a chance to say this to the Chief Justice. This is a terrible opinion.
18 They must cringe every time they think about it and what happens is,
19 and they, just like the rest of us, we're all human, how they got there, I
20 don't know, but we are the ones now that are dealing with it and so, I
21 don't know the answer to your question. I mean, I think that there are
22 cases in which judges think on this set of facts, the statute should be
23 tolled. Other judges might say no, but I think the answer is Judge, that
24 it probably is the tolling is probably an equitable question that is to
25 you and your discretion.

1 The Court: How long was it toll?
2 Mr. Epting: Well Judge, in this case, I would think Judge, it would be tolled until
3 Mr. Craven actually knew.
4 The Court: June 9?
5 Mr. Epting: Yes, yes I think that's the answer. Or you can look at it Judge, in
6 terms of it should be told at least for the period of time that Mr.
7 Robinson knew and never said anything.
8 The Court: He was not at the June9 meeting, I don't believe.
9 Mr. Epting: No, he was not.
10 The Court: Alright, Mr. Johnson of course is here. Is there anything in his
11 deposition that is of any import? I know you put it as exhibit D.
12 Mr. Epting: Well, yes sir. It has to do, again Judge, with the equitable tolling. I use
13 to be pretty good, I could put things down and pick them right back
14 up, I can't do that anymore. Mr. Johnson, Judge, and there's a lot of
15 his testimony, but generally it's to this effect, this is Mr. Johnson on
16 139 and 140 of his deposition: I asked the question of Mr. Johnson,
17 have you had any discussions, no sorry. Mr. Johnson testified, and I
18 know Dennis has confidence in Scott. Have you had any discussions
19 with Mr. Craven about this case? We had discussions early on just
20 generally about the disappointment in the result. Meaning after the
21 verdict? Yes. My point being, here's another lawyer, Judge, Mr.
22 Johnson, who's saying Dennis had confidence in Mr. Robinson and
23 was relying on him. I asked sort of the same question of Mr.
24 McKenzie. I said to Mr. McKenzie and I'm reading from page fifty.
25 Did you ever have any conversations with Dennis about understanding

1 the exposure? I had conversations with Dennis subsequent to the trial.
2 Okay, let's hold those. Did you have conversations with him before
3 the trial about him understanding the exposure? Never, this was
4 Scott's case. What Mr. McKenzie says, Judge, is recounted in our
5 brief. Mr. McKenzie, Mr. Craven said, and you asked this question
6 and I forgot to ask, it was at Mr. McKenzie's instruction that Mr.
7 Craven wrote the letter that you asked about in March of 2010 and
8 Mr. Craven, I'm sure you read the briefs relate what that conversation
9 was about and Mr. McKenzie recounting of it is probably not as
10 specific, but it doesn't contradict him.

11 The Court: Alright, anything else that you'd like to say in opposition to their
12 motion on the statute of limitations?

13 Mr. Epting: If you have no more questions Judge, I'm finished.

14 The Court: I may as we go along. Okay, does anybody need to take a break or is
15 everybody okay? Alright, Mr. Powell or Ms. Wall?

16 Mr. Powell: Your Honor I guess I'm going next, because I beat Susan up. I'm
17 restraining her for the moment. Your Honor let me backtrack. In other
18 words, let me address the equitable tolling issues, since I didn't get to
19 that during my first opportunity.

20 The Court: Okay.

21 Mr. Powell: What I think probably the most efficient thing for us to do is this; is
22 to look at the requirements. I think we are, we agree that, we are
23 agreeing that the requirements, that there are requirements for
24 equitable tolling or equitable estoppel and the fact of the matter is that
25 they do not, that this case does not meet the requirements for that and

1 I'm going to go to, to a case which they cite and Your Honor, any
2 time you say we'll hand these up to you, the case for you, but I'm
3 looking right at the case and they, they give here in the excuse me, let
4 me locate it. They give the elements that must be shown.

5 The Court: Which one, the tolling or estoppel?

6 Mr. Powell: This case, yes, this case right here is the estoppel case. This is South
7 Carolina Land and Golf versus South Carolina Public Service
8 Authority and I'm looking here at, at page, and I can refer to others,
9 but for our purposes now, let's just refer, this as related to, and I'm
10 looking now at a law analysis, this, for the record, this begins in the,
11 in the South Carolina Reporter on page thirty three and on page, it's
12 on page seven fifty of the Regional Reporter. And their talking, the
13 central elements of estoppel here and they say the essential elements
14 of estoppel as related to the party claiming the estoppel, the essential
15 elements are, one: lack of knowledge and the means of knowledge of
16 the truth as to the facts in question. That is lack of knowledge and
17 lack of the means of knowledge as to the truth of the facts in question.
18 Two: Reliance upon the conduct of the parties estoppel. That is what
19 did, what did the other party do that I relied on that caused me not to
20 file within the statute of limitations? And three; prejudicial change in
21 position. Trying a case. Now, Your Honor, what we've heard of
22 course, has been argument of counsel and we all know what that's
23 worth. I would direct the Court's attention and ask the Court to look at
24 exhibit B attached to the Plaintiff's Memorandum in Opposition to
25 Defendant's Motion for Summary Judgment.

1 The Court: That's Mr. Craven's affidavit?

2 Mr. Powell: Yes sir. And Your Honor, nowhere in that affidavit does it even
3 allege that he did not have the means of finding out the truth of
4 whatever was supposed to be mis-represented to him or withheld from
5 him. Nowhere in that affidavit does it say I relied on this, I relied on
6 him and I delayed filing because of that.

7 The Court: How can you overtly rely on something that was never given to you?

8 Mr. Powell: But he does not say that the reason he delayed filing was because Mr.
9 Robinson didn't tell him. He had other lawyers in this case; he had
10 other counsel and he doesn't even make the allegation that had, I
11 relied on Mr. Robinson for this purpose. They don't even say, he
12 doesn't even say that in his affidavit and that, we would insist is a
13 requirement. That's what takes it out of any sort of question of fact
14 here, because they don't meet the requirements, the elements of
15 estoppel, of equitable estoppel.

16 The Court: You're talking about reliance?

17 Mr. Powell: Yes sir, reliance or he lacked the means of knowing the truth. He
18 doesn't say that anywhere. It says again, as related to the party claiming
19 the estoppel, the essential elements are. One: lack of knowledge and
20 of the means of knowledge of the truth as to the facts in question. He
21 had other attorneys he could consult with. He had the ability, one of
22 the finest law firms in Charleston call up and talk to them. He had the
23 means of finding out.

24 The Court: So, how would you as a practical matter, exercise that?

25 Mr. Powell: He could have alleged in his affidavit, he could have alleged in his

1 affidavit that, well I don't know how he would have done it in this
2 case, because he had other lawyers that he could consult. My point,
3 the point I'm making ...

4 The Court: Should he have said my first lawyer screwed up, is that how you
5 would inquire ...

6 Mr. Powell: Or how did this happen? What is your explanation for how this
7 happened to me? I, you know, my lawyer didn't do this; I was on the
8 stand, I got these interrogatories, I had never seen them before, duty of
9 inquiry. That's what Burgess versus McLeod was all about. She, the
10 court said, look you knew they were sleeping together, that puts you
11 on a duty of inquiry, to start asking questions. And inquiry which, if
12 you had asked, you would have found out something.

13 The Court: And you're saying that the fact that the verdict was so high was the
14 equivalent of the sleeping together triggering the other case?

15 Mr. Powell: And compared to other cases too. There are other situations you
16 could compare it to, but that's, but the first response to equitable
17 estoppel is that they just don't meet the elements; they just can't meet
18 the elements and the Supreme Court made it clear, this doctrine is
19 applied very, very sparingly.

20 The Court: How about the tolling part?

21 Mr. Powell: The tolling part is, is, is there isn't any representation that he made to
22 justify tolling. Let me talk about the case that they refer to, the Hooper
23 case that he says he's relying on. That case, there are segments of
24 these cases that are cited and language given with no context. Let me
25 put the Hooper case in context and let's, Hooper involved a situation

1 where there was an elderly person in a nursing home up in York
2 county and they got bed sores, they got sick, allegedly, because of
3 poor treatment. So, Plaintiff's lawyer wants to sue them. He tries to
4 sue them and there is something messed up or the agent that the
5 nursing home has listed in the Secretary of State's office is enviable,
6 had moved away or was not responsive or was wrong in some
7 capacity. They have not named a viable agent as the Supreme Court
8 says as the law requires. He tried, he tried one time to serve and they
9 said, no you need to serve this other one; he tried to serve this other
10 one, but by the time he got around to getting service to where he
11 needed to be the statute had run and the Supreme Court said, no
12 Defendant, we're not going to let you have a, not comply with South
13 Carolina law and name the wrong enviable agent for service and then
14 plead the statute of limitations and that's radically different facts than
15 what we have here. In that situation, that's, they applied tolling there
16 for the period of time that they relied on what they had in the
17 Secretary of State's office, so , that case is far and away different from
18 what we have.

19 The Court: Do you see any important or do you attach any importance that Mr.
20 Craven and Mr. Robinson were relatively close friends?

1 21 Mr. Epting: Your Honor, I really do not. The, the, the reason for that is that the
2 22 legal matters and I understand and I would point out in Brown vs..
3 23 Epstein, in that case too, the lawyer was on the appellant team, okay.
4 24 The lawyer was on the, even though he didn't do anything. Much like
5 25 Mr. Robinson's role and there's a footnote to that, but in terms of that,

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no I don't assign any importance to it because the legal function had shifted to Charleston. All of the legal functions for this company had shifted from Mr. Robinson to Young Clement Rivers and so I really don't assign any importance. But in terms of equitable estoppel, we could spend, the, the other case they cite, to give the Court an example, an example of where the context makes it clear what the Court's talking about in True v. Monteith, that case involved a lady that was leasing a piece of property and she in talking to her, allegedly, talking to her lawyer, Mr. Monteith, wanted a cost of living increase in the lease. Well, her lawyer tells her, allegedly, that the other side won't agree to it and she says well, if they won't agree to it, then I guess I'll have to go along with it. So, time goes on. Later, some years later, she discovers that when her lawyer was telling her that, he was also representing the lessee. The tenant. So it was under those circumstances they said, no, just because you knew you had, you had the denial cost of living increase in your rent, in this lease, does not mean that you were on notice that there was a problem, because you didn't know that your lawyer represented the other side. So it was only then that she that she put two and two together and saw what happened. So, that's radically different facts from what we have here. That's the other case that they cite, trying to justify the delay in the statute or toll. So, Your Honor, the other thing that I would say about Brown v. Epstein, going back a little bit now, to the, to when the statute commence and when the imposition of the verdict as related to the commencement in the running of the statute. Mr. Epstein and it

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1 1 was, I'm sure it was inverted, because there was a lot of paper we've
2 2 got in front of us, but he read to Your Honor, a section from Brown v.
3 3 Epstein which states, we do not hold that in all instances, the date of a
4 4 jury's adverse verdict is the date on which the statute of limitations
5 5 begins to run. To the contrary, we hold only that under the facts of this
6 6 case, Dr. Epstein knew of a potential claim against Brown by this
7 7 date. What Mr. Epting slipped up on and did not quote, Your Honor,
8 8 was the last part of that sentence which says, Dr. Epstein knew of a
9 9 potential claim against Brown by this date at the latest. So the
10 10 Supreme Court said the verdict was the latest time that he knew.

11 11 The Court: That's not always the case.

12 12 Mr. Powell: It's not always the case, no sir it isn't. But in this case, what, the
13 13 proper analysis is to look at what they've allege, look what the
14 14 Plaintiff says, look what was going on and remember all we have to
15 15 show is that the Plaintiff was aware of one defect, one problem, which
16 16 he later says caused him damage and that is no contest.

17 17 The Court: So you don't have separate statute of limitation triggers.

18 18 Mr. Powell: Exactly.

19 19 The Court: What if they had filed this suit and the only thing they had alleged
20 20 was error preservation?

21 21 Mr. Powell: Well, it would not, Your Honor brings up the reason why it wouldn't
22 22 really matter, if we are doing our job, because in a deposition we
23 23 would have asked him what about this? What about that? And just as
24 24 he did in his deposition, yeah, he, he, that's another thing he did
25 25 wrong; he didn't keep me informed, he didn't show me the answers to

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1 1 interrogatories, he didn't prepare me for cross examination about,
2 2 about my brother appraising the truck and a number of other matters
3 3 and so that, then if Your Honor is correct, the Plaintiff cannot cherry
4 4 pick the issues in order to avoid the statute of limitations. That's not
5 5 how the way the game is played. What you do is, it is an objective
6 6 standard and it is ... look at the facts and information available to them
7 7 and I'm going to read that section in just a minute and directly answer
8 8 the question Your Honor presented earlier, but to address that, if that
9 9 had been the only thing they alleged, and we haven't done our job, it
10 10 might have slipped by but that's not what happened. We got to the
11 11 bottom. The other earlier there was this discussion, informal and
12 12 intellectual discussion concerning when a statute commences and
13 13 what the law is and when it's a jury question and when it is not. I'm
14 14 going, I'm going to try to, we could just cover this room in paper with
15 15 the decisions that recite this passage that I'm going to read and this
16 16 happens to also be from a case that they've cited. This is Epstein v.
17 17 Brown, but it quotes Dean v Ruscon and it quotes Burgess v. McLeod,
18 18 I mean there are just tons of cases that have this language and they're
19 19 talking about reasonable diligence. The Court says under the
20 20 discovery rules, the statute of limitations begins to run from the time
21 21 when the Plaintiff knows or with reasonable diligence should have
22 22 known. And then they say, the exercise of reasonable diligence,
23 23 means simply that an injured party must act with some promise when
24 24 the facts and circumstances of an injury would put a person of
25 25 common knowledge and experience on notice that some right of his

1 1 has been invaded or that some claim against another party might exist.
2 2 The statute of limitations begins to run from this point and not when
3 3 the advice of counsel is sought or a full blown theory of discovery
4 4 develops. So, it is sufficient in this state, to put the statute, to start the
5 5 statute of limitations clock long before you've got enough to get
6 6 passed directed verdict. All you, and in the case of Ms. Burgess, she
7 7 knew that the Appellant Court told her, you knew your lawyer had an
8 8 affair with this woman who was working on the other side. You're on
9 9 inquiry notice the clock is ticking. Now, she might, it might ultimately
10 10 prove out to not be a claim; the same way here, just the Supreme
11 11 Court, later on, as Your Honor points out, says it was preserved, this
12 12 issue preservation, the majority opinion says the issue was preserved.
13 13 That doesn't change the running of the statute, because the statute
14 14 starts to run when they have information that they might have a claim,
15 15 not that ...

16 16 The Court: ... Any act of negligence?

17 17 Mr. Powell: Yes sir, yes sir as to any act. Only one, only one. And the reason it
18 18 has to be that way is because the statute of limitations law, and we're
19 19 getting a little to hairy about it, but the statute of limitation law has to
20 20 work hand in hand with the restatement of judgments. The issues
21 21 about issue preclusion under res judicata. If you've got what is
22 22 precluded by the statute would have to be the same thing that would
23 23 be precluded under the restatement of judgements under res judicata if
24 24 the case had gone through to its conclusion. And that's why the law
25 25 has to be that way. Now there are some courts, I'll grant you, that get

1 1 away from that and you can find jurisdictions that can make that
2 2 mistake and later on --- you know we going to really mess this up. The
3 3 two have to work hand in hand together. Otherwise, the law becomes
4 4 a mess.

5 5 The Court: Mr. Epting says that the, it's always a question of fact that the issue
6 6 develops down to whether or not a reasonable person should have
7 7 know.

8 8 Mr. Powell: Your Honor ...

9 9 The Court: He says it's not always a question of fact.

10 10 Mr. Powell: If that were the case, Ms. Wall and I together probably have eight or
11 11 nine, I don't know how many together, we have approaching maybe a
12 12 dozen, statute of limitations cases, which we prevailed on in summary
13 13 judgement that have gone to the appellant court. Kember v Wright is
14 14 my case. It's not always, its not always a question of fact; it is a fact
15 15 in most often instances, it's rarely that way because, if the facts are
16 16 there. Now, the ones where there are questions of fact, you've got rods
17 17 in a silo. That's going to be a question of fact whether they should
18 18 have known, because you can't see that. But, this gentleman was in
19 19 the courtroom, this gentleman was there, saw the interrogatories,
20 20 claims they were wrong, he didn't get them. He claims that that is part
21 21 of the reason this case went the way it did. If he had been kept better
22 22 informed, and he had met with Mr. Austin, knew what kind of person
23 23 he was, all of that goes into it and under the law of this state, when a
24 24 verdict is handed down, all of that, you may just have suspicions up til
25 25 then, but just as Brown v. Epstein said, when the verdict arrives, you

1 1 knew at the latest at that time that you might have a claim. And so
2 2 Your Honor, inquiry notice. Then you ask your other lawyer if need
3 3 be. You ask Mr. Brown or some other attorney; you go out and seek
4 4 that information and find out what is what and investigate. Here, he
5 5 admits that he knew those matters; he knew and that it was a serious
6 6 problem when the verdict was handed down, very close to Brown v.
7 7 Epstein, so I'm sure Ms. Wall doesn't --- I'm going to have her
8 8 correct misstated words, but I'm sure she'll have a few words.

9 9 Ms. Wall: Your Honor, I will keep myself to a few words. I'm interested in
10 10 hearing the exchange this morning with regard to the cases cited.
11 11 What I would like to draw the Court's attention to is the cases that
12 12 I've cited in the supplemental memorandum in support of our motion
13 13 for summary judgment. These are legal malpractice cases on the
14 14 statute of limitations. I mean the Defendant's case is that he cited and
15 15 even some from, from my colleague here, I mean they have to do with
16 16 silos and all of that. I'm focused on the cases that are in the legal
17 17 malpractice context where the Court has ruled as a matter of law on
18 18 summary judgment, granting summary judgment and concluding the
19 19 case on the statute of limitations. I think one of the critical cases, I
20 20 mentioned it earlier, but it hasn't been discussed at all by Plaintiff's
21 21 counsel and I want to re-emphasize it, because it not only gives us the
22 22 importance behind the statute of limitations and why the Court will
23 23 make this determination as a matter of law, not a jury. Looking at
24 24 what a reasonable person knew or should have known through the
25 25 exercise of reasonable diligence, and you only need one little thing;

1 1 you don't have to have a whole table full of issues. There's just one
2 2 thing that would put a reasonable person on notice that he might have
3 3 a claim. Not that he does have a claim, but he might have a claim.
4 4 Three years to go out and investigate. That's the Kelly v. Jolly case,
5 5 Your Honor, and this is a 2009 case. A number of the cases cited are
6 6 far earlier than that and this is after Epstein versus Brown Your
7 7 Honor. There's another very good one, it's Kreutner vs. David and
8 8 these are all in our brief, Your Honor. That also happens to be my
9 9 case, just as Kelly v. Logan was my case, but just so you know, in this
10 10 Kelly case, we had a Plaintiff, Ms. Kelly had the equivalent of about a
11 11 fourth or fifth grade education and she's represented by a group of
12 12 attorneys and they ultimately withdraw from representing her and then
13 13 at some point in time she gets around to suing them because it had to
14 14 do with her right or non-right to recover monies paid from a hospital
15 15 during a birth that she had and there were complications and her child
16 16 was born with terrible injuries. And in that case, the Court made this
17 17 determination as a matter of law, because in here, and again, because
18 18 even though she did not have a higher education, she's still held to the
19 19 reasonable persons standard and I kept hearing when Mr. Epstein was
20 20 presenting to his Honor ...

21 21 The Court: Epting.

22 22 Ms. Wall: I'm sorry, Epting, I'm sorry.

23 23 The Court: Mr. Epstein is the ...

24 24 Ms. Wall: Is the case and I apologize Your Honor. But there seems to be a
25 25 continuing focus that is an improper focus; it is not what Mr. Craven

1 1 knew; we don't care what Mr. Craven knew. If he admits he knew
2 2 everything, end of matter. It's what a reasonable person could have
3 3 learned through the exercise of reasonable diligence. Mr. Craven must
4 4 exercise reasonable diligence. Ms. Kelly certainly was held to that and
5 5 she had far less education and understanding if you will, than Mr.
6 6 Craven. But none of that matters and that's why we have the objective
7 7 standard, because otherwise everyone would always come in and say,
8 8 what do I know? I'm a car salesman, I'm not a lawyer. I don't know
9 9 what's going on in this trial. That's precisely why we have the
10 10 objective standard, because otherwise the statute of limitations would
11 11 become meaningless and so we don't care when Mr. Craven
12 12 appreciated what was going on. He had the opportunity, the means to
13 13 go out and he had three years to do it, to find out is there a problem
14 14 here? Were there some things done during or before trial that
15 15 shouldn't have been done that would have given me a different
16 16 outcome? He had three years to discover that. Mister ... there's been
17 17 some discussion here that somehow, because Mr. Robinson and Mr.
18 18 Craven at one point, were friends, that somehow Mr. Robinson was
19 19 supposed to go to Mr. Craven and say wow, I goofed. To this minute
20 20 standing in this courtroom, Your Honor, we are not admitting that Mr.
21 21 Robinson goofed, because he didn't. In fact, when you read that trial
22 22 transcript, which is two to three volumes long, it was a three day trial,
23 23 Mr. Robinson did not goof; he did a good job. He did a good job in
24 24 defending a difficult case, which as Your Honor brought up himself,
25 25 any reasonable person knows this. It is the client who has control over

1 settlement. Lawyers don't settle cases and it was Mr. Craven who
2 didn't want to settle this case and how do we know that, because he
3 had three opportunities to do it before this lawsuit was ever even filed.
4 Twice he met with Mr. Austin, he knew it was a forgery and he told
5 Mr. Austin no can do, not going to happen. Then he gets the Polito
6 letter. The Polito letter, Your Honor, was addressed to Mr. Craven.
7 Dear Mr. Craven. He gets that letter, it lays out everything. There is
8 nothing hidden in this case. We know exactly in that Polito letter
9 when what all the experts for Mr. Austin are going to testify to. We
10 know about the forgery, there's a photograph of it. Everything is in
11 there.

12 The Court: Has that been established or is it just an eyeball, you can just tell by
13 eyeballing it or was there an expert who says it was a forgery?

14 Ms. Wall: Oh by eyeballing it, Your Honor and, of course, Mr. Craven had
15 already testified when he met the second time with Mr. Austin and
16 compared it to his, he asked for his driver's license and compared it.
17 He thought it looked like a forgery to him, so that's just ...

18 The Court: Where is Mr. Frierson now?

19 Ms. Wall: I think Mr. Frierson is deceased. He died, he has died in the
20 meantime. But, my only point here Your Honor, is to focus actually on the
21 legal malpractice statute of limitations cases, because we have so many of
22 them. And I will tell Your Honor, I did not list them all on the first page of
23 our supplemental memorandum. There are many, many more than those that
24 are listed. Because Kelly v. Jolly is also important because it goes to the
25 equitable estoppel. The discussion of whether equity comes into this and

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1 1 somehow Mr. Robinson and the law firm shouldn't be allowed to claim
2 2 statute of limitations, that was addressed in a legal malpractice context in
3 3 Kelly. Ms. Kelly raised this very issue and the Court took it on, head on and
4 4 said absolutely not, because again, Mr. Craven would have to prove that
5 5 either he lacked the knowledge, let's assume he wasn't at trial and he didn't
6 6 know anything and all of a sudden he hears this verdict. He doesn't even
7 7 know what a verdict is, he knows nothing, nothing, nothing. But, he cannot
8 8 prove and has not proven and never will that he lacked the means of
9 9 obtaining knowledge. He could have gone out and asked anyone, as I recall in
10 10 the record, I think, his brother in law is a lawyer. He could have asked his
11 11 brother in law, but you don't even have to go to a lawyer and we know that of
12 12 course from Burgess v. American Cancer Society, but this Kelly case is good
13 13 on this as well. And they say whether you want to call it equitable estoppel,
14 14 equitable tolling, what's interesting to me, Your Honor, also is our Supreme
15 15 Court, and this was also my case, it was the Holy Loch v. Hitchcock.
16 16 Hitchcock was an attorney case and this court, our Supreme Court directly
17 17 said we're not going to recognize the continuous representation rule. Now,
18 18 and, and, because in that case the lawyer, there was no other group, there was
19 19 no Young Clement Rivers coming in and it was the same lawyer that was
20 20 taking this, it had to do with getting a liquor license, taking this through an
21 21 appeal and the judge, and the Court said, just because the same lawyer
22 22 continues on, we are not going to toll the statute of limitations and there they
23 23 used it under a continuous representation rule. And the reason I bring it up,
24 24 it's the same concept as equitable tolling or equitable estoppel. It's a little
25 25 more loose if you will, because you don't have the hardened fast elements,

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1 1 but you certainly have equitable estoppel, which this Plaintiff, I mean, can't
2 2 possibly, we know, as a matter of law, he can't and does not satisfy. But
3 3 without continuous representation, you're not going to have equitable
4 4 estoppel, you're not going to have equitable tolling and you clearly don't have
5 5 it under the undisputed facts in this case, Your Honor. The only other thing
6 6 that Your Honor brought up this important issue, and we really, I don't want
7 7 to get off on a tangent on this at all, but I just want to take one moment to
8 8 reference it. Your Honor was absolutely right when you asked various
9 9 questions about proximate cause. I move for summary judgment not only on
10 10 the statute of limitations, but my second ground and I didn't brief it, because I
11 11 wanted to focus on only one thing today, Your Honor. But you're absolutely
12 12 right, Proximate cause, that's just never, it just, there is no proximate cause in
13 13 this case. That kind of ...

14 14 The Court: Proximate cause might be an issue on the amount of damage as far as
15 15 verdict is concerned, because if Mr. Robinson had objected and no
16 16 other proof presented and Mr. Epting says the whole thing should
17 17 have or would have been reversed by virtue of the three justices would
18 18 now become the three majority and say the case is dismissed because
19 19 there is no evidence of actual damages. My, my question was if Mr.
20 20 Robinson had objected, what, and it's just a two hundred and sixteen
21 21 thousand plus twenty thousand, minus zero proposition or is there
22 22 some type of factoring jury would have to do in this case to determine
23 23 what Mr. Robinson's failure ...

24 24 Ms. Wall: Well, my only, I'll briefly respond to that just this way, with one
25 25 sentence, pure speculation. That's the problem with all of this. Even

1 1 their own expert has admitted it would be pure speculation to say
2 2 what this jury, we don't even know who's on this jury, what this jury
3 3 would do.
4 4 The Court: Who is, who is your expert Mr. Epting?
5 5 Mr. Epting: Ron Richard.
6 6 The Court: Alright, I read it, that's alright, I read
7 7 Ms. Wall: Because Mr., Powell had asked him during his deposition, well
8 8 you're not here to say that if Mr. Robinson had zigged when he should
9 9 have zagged, that the verdict would have been different and he said,
10 10 no, I'm not here to say that. And he agreed it would be pure
11 11 speculation. He said I don't know if the verdict would have been ten
12 12 dollars, fifty dollars, twelve dollars. Because the interesting thing,
13 13 when you read the trial transcript, as to what went on, there wasn't
14 14 only a value of zero out there, because the Morris as an expert and
15 15 they had another one too. Both of those people had submitted in the
16 16 Polito letter, their opinions as to the value.
17 17 The Court: Right, I saw that.
18 18 Ms. Wall: And through cross examination, Scott Robinson got those opinions
19 19 out. So fourteen thousand dollars actually was before the jury as well.
20 20 So, but be that as it may, it simply shows you this entire case is
21 21 premised on pure, absolute speculation that you will never have down
22 22 the road. Who on earth is going to ever be able to say what a jury
23 23 would have done had Scott Robinson zigged instead of zagged, no
24 24 one. And so we don't ever see this going to be a trial for that.
25 25 The Court: Another jury would be picked to make that decision. That's the case,

1	1		this is kind of a case within a case, at least according to Mr. Epting.
2	2		This trial jury would have to decide what the verdict would have been
3	3		if he had objected.
4	4	Ms. Wall:	But how can this jury do that when it would be up to the first jury,
5	5		depending on, because they are different people, depending on if they
6	6		had heard something different. And then we have a total hypothetical
7	7		also under this argument that if, if something had occurred, then the
8	8		descent would have become the majority. No they wouldn't have,
9	9		because you can't just count the numbers, and I know we have, that's
10	10		a whole other issue that we may or may not be arguing. But the
11	11		descent is exactly that, it's dicta, not the holding of the case. And in
12	12		fact, the holding of the case is that value was preserved and there was
13	13		no error on Mr. Robinson's part.
14	14	The Court:	Is it anywhere in these briefs, or I know it's not in the opinion, is it in
15	15		the opinion that a fourteen thousand dollar figure was brought out?
16	16	Ms. Wall:	Not in any opinion, it's in the trial transcript.
17	17	The Court:	Alright, I don't have that.
18	18	Ms. Wall:	No, because I'm getting off of message and I don't mean to do that,
19	19		Your Honor.
20	20	The Court:	Alright.
21	21	Mr. Epting:	Your Honor, I just want to add ...
22	22	The Court:	Two minutes.
23	23	Mr. Powell:	Yes sir, I just want to add, I forgot, but was looking over my notes as
24	24		Susan was talking, I just wanted to add there's been a lot of
25	25		conversation, argument about briefs that went to Mr. Robinson that

1 1 would, if he, regrettable he isn't here to speak up for himself, but
2 2 briefs that went to Mr. Robinson that would put him on notice that
3 3 there is some allegation that he, he made some error; if that's the case,
4 4 where are those briefs? I mean, that's just oral argument of counsel.
5 5 I've not seen anything like that. That he was holding back some brief
6 6 from his, from Mr. Craven. Young Clement would have sent that to
7 7 their client; Mr. Robinson was not the client of Young Clement.
8 8 Young Clement would have sent that to their client if they were doing
9 9 what they should do.

10 10 The Court: Alright.

11 11 Mr. Epting: Well Judge, that's wrong because we have actual testimony on that
12 12 from Mr. Brown.

13 13 The Court: That he sent the briefs to Mr. Robinson's only?

14 14 Mr. Epting: Yes.

15 15 Ms. Wall: And not to Mr. Craven?

16 16 Mr. Epting: Not to Mr. Craven.

17 17 The Court: Alright. Well that will conclude the motions of the two defendants.
18 18 We can go off the record for just a minute.

19 19 (Court Break was taken)

20 20 The Court: Alright, we'll go ahead now and I hope you don't mind going
21 21 through, what some might consider lunch time, but we're just going
22 22 to keep on going.

23 23 Mr. Epting: I would appreciate that, Judge.

24 24 The Court: Alright, we'll move forward now with Stokes-Craven's motion for
25 25 summary judgment and Mr. Epting I'd be glad to hear from you.

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1	1	Mr. Epting:	Judge, in order to save you the trouble, I have a copy of that Johnson
2	2		vs. Bowen case and I'll just hand it to you.
3	3	The Court:	Okay, I am going to take Mr. Powell up on getting copies of those
4	4		cases.
5	5	Mr. Epting:	Alright.
6	6	The Court:	If he's got any available. I don't want to take all of his copies. I can
7	7		make them as easily as anybody, but if they're available, I'd love to
8	8		have them. Alright, I do have Johnston vs. Bowen which you handed
9	9		up. Okay, thank you.
10	10	Mr. Powell:	Your Honor, I have ...
11	11	The Court:	I don't need them now. Before I leave you can just lay them on the
12	12		rail right there and that way nobody will forget. Thank you.
13	13	Mr. Epting:	Judge, I appreciate your giving me, what I would be smart enough to
14	14		recognize as a second bite at the apple. I really made my argument, it
15	15		goes pretty well this way; I don't think reasonable lawyers can differ
16	16		on the question of preservation of evidence in directed verdict,
17	17		number one. So, it's not even a question of expert testimony being
18	18		required. But, if it is a question of expert testimony, then you have the
19	19		Defendant's expert confirming that yes, that is what would be
20	20		required of a competent lawyer, using care and skill. You would keep
21	21		out incompetent testimony, you would make directed verdict motions;
22	22		if you don't' make the direct verdict motion, you can't make a JNOV
23	23		motion. If the verdict of actual damages is zero, there can be no
24	24		punitive damages. And the point of the Judge is, so all of that is
25	25		agreed upon in this case, because one's bound by one's own expert.

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1 1 So again Judge, just to construct a paradigm in order, in the way that I
2 2 see this case. I think so you say, alright is the issue a standard of care?
3 3 No, legally that's the way it is, but if not, Mr. Durant says that is the
4 4 law and so you're bound by your own expert if that's done. What is
5 5 the defense to trial error? The defense is to say it was trial strategy,
6 6 because indeed, as Your Honor remarked, as to some matters that are
7 7 not pivotal, you make choose to say nothing and in order not to anger
8 8 a jury, but Mr. Robinson conceded that was not the case here, he
9 9 would not do that.

10 10 The Court: The general sense he conceded.

11 11 Mr. Epting: Yes sir, and I quote what he says, so then Judge, it does come down
12 12 to, if that is the case, is there anything for a jury to try, because what I
13 13 say Judge, is the majority opinion in this case on the issue of issue
14 14 preservation. Is Judge Pleicones decision joined by two judges?

15 15 The Court: His opinion in other words?

16 16 Mr. Epting: Yes. And I, and I will tell you Judge, I quote from the United States
17 17 Supreme Court a case on how you read the concurring opinions, but
18 18 just think of this Judge, is there a majority opinion that the issue was
19 19 preserved? No, because there are only two judges on that separate
20 20 issue.

21 21 The Court: But those justices have the responsibility to basically decide the
22 22 ultimate issue and that was, that verdict didn't stand...

23 23 Mr. Epting: Well ...

24 24 The Court: What we have is, is, I guess the best word I can use is that evidence,
25 25 by counting up the number of justices, the evidence that he failed to

1 1 do, failed to preserve as issue, is that evidence?

2 2 Mr. Epting: Well, I have to tell you this Judge, I don't understand the question

3 3 and so, can I ask you to maybe rephrase it?

4 4 The Court: Okay, you say that there is no majority of the Court that says the error

5 5 or the issue was preserved.

6 6 Mr. Epting: No, I say that the majority opinion on the issue of issue preservation

7 7 in making a directed verdict, that issue, the majority opinion, is

8 8 Justice Pleicones, because that is how that issue was decided. The two

9 9 judges who said the issue was preserved, there are only two of those

10 10 ...

11 11 The Court: Okay, in a legal malpractice setting, is there any appellant decision

12 12 anywhere that sponsors or upholds what you say? And I guess it

13 13 would have to be restricted to a legal malpractice case because that's

14 14 the only reason, where it would make any difference.

15 15 Mr. Epting: Alright now, are you asking me Judge, what is the, are you assuming,

16 16 let's just say, perhaps I'm not understanding; but if you're asking me

17 17 is the question if the Supreme Court decides an issue, is it finally

18 18 decided so that it can't be re-litigated then I'm saying yes, there are

19 19 three judges who say, had this motion been made, had the evidence

20 20 been objected to, then we would direct a verdict in favor of the

21 21 Defendant. The verdict would be zero actual punitive would fail. I'm

22 22 saying that that is the legal holding in that case and therefore ...

23 23 The Court: Or that the verdict would be remitted to using the hundred and forty

24 24 thousand dollar figure which they say is in the record.

25 25 Mr. Epting: Well, that may be ...

1 1 The Court: Or the net of that, excuse me.

2 2 Mr. Epting: That may be Judge, but just in, I'm trying to think of another context
3 3 but ...

4 4 The Court: It's hard to do.

5 5 Mr. Epting: Well, I'm just, the point I'm trying to make is, let's just imagine that
6 6 I'm convicted on a criminal charge and that's upheld in the Supreme
7 7 Court. I don't think if there is a civil case to be decided, I don't think I
8 8 can argue that I was guilty. I've lost that. It's been decided by the
9 9 Supreme Court. It is an ironic thing that a majority of this Court has
10 10 decided that this lawyer committed legal error and that the effect was
11 11 the verdict stands. And you know Judge, and I, I offer you this,
12 12 because I think it matters. I have been silent and tried to stay on the
13 13 record and not talk about the underlying fraud. You know, I heard
14 14 Bob Wallace make an argument one time in front of Judge Lott and
15 15 it's probably the best argument that I've ever heard and it's an
16 16 argument that I will use in this case. So, his client is charged with
17 17 perjury and Bob Wallace's argument is he lied and he lied for his
18 18 brother and who among us wouldn't lie for their brother? Well, tough,
19 19 tough case Judge, very understandable; perjury is perjury. You know,
20 20 what Dennis Craven does, it's his brother who supposed to have done
21 21 these wrong things. He believes his brother. His best friend, his
22 22 lawyer tells him this is your maximum exposure and incidentally
23 23 Judge, in this case Mr. Robinson in the interrogatories, in response to
24 24 Austin's questions, denied it was a forgery and denied that the truck
25 25 had ever been wrecked. So none of this is quite ...

1	1	The Court:	Well, so did Mr. Craven before the trial.
2	2	Mr. Epting:	Right.
3	3	The Court:	I mean before the suit was brought.
4	4	Mr. Epting:	Right, so I am truly wandering here but my, my point is it is a very
5	5		unusual case, but what I think you do Judge, and you are probably
6	6		destined to read the U.S. Supreme Court opinion, you aggregate by
7	7		issue, the judges who decide an issue and you decide the narrowest
8	8		ground and that is the majority opinion on the issue. And I think
9	9		Judge, maybe your question offers the most clarity to it. If you had
10	10		been the trial judge and if the motion had been made and if you had
11	11		let it go to the jury, the answer is it would have been reversed, it
12	12		would have been reversed on a three/two opinion of Justice Pleicones
13	13		saying the issue was preserved; there was no proof of actual damage,
14	14		the testimony was objected to, the verdict is zero. We wouldn't be
15	15		here, so in this case, it's odd and I'm going to sit down, because I've
16	16		said that about five times now, but I believe this is hardly obiter
17	17		dictum. I wish it were obiter dictum.
18	18	The Court:	Well, it's dicta between Austin and Stokes Craven and that leads to
19	19		my next question. Because it doesn't matter if the actual award stood.
20	20		If the US Supreme Court case you're talking about when you count up
21	21		the number of justices who rule on the narrowest of issues. That
22	22		matters as to those parties in that case. Where is there a case that says
23	23		that counting up the justices and working from the narrowest to the
24	24		broadest, where is there a case that says, that is, as a matter of law,
25	25		binding on a party who is not a party to that case, that being Mr.

1 Robinson and the lawyer. That's what I asked earlier. Is there a case
2 across the country where, and you know and everybody in this
3 courtroom knows, who's a lawyer, knows that error preservation is
4 always something that especially court of appeals likes to chew on
5 first and that's why I always tell lawyers you object all you have to,
6 because I don't know what the Court of Appeals, I have a feeling what
7 the Supreme Court might do. But, there are certain rules that require
8 the lawyers to argue to the judge and risk the chance of ticking off the
9 jury. Put that aside for a minute, where is there a case that says an
10 error preservation observation or I would hold on part of justices is
11 evidence as a matter of law of malpractice in a subsequent malpractice
12 case. There's got to be one. It might be hard to find, but there's got to
13 be one somewhere in these fifty states.

14 Mr. Epting: Well, Judge, I will read up on my efforts on that, but I go back hoping
15 that if I use the word, that you'll to think of it the way that I have
16 come to think of it. I don't think that that verdict in Austin v. Stokes-
17 Craven would be binding on Mr. Robinson in terms of he's guilty of
18 malpractice; I think he is free to prove any other ground that he says
19 would exonerate him from malpractice. He could have gotten an
20 expert that would have said this is not the standard of care; the
21 standard of care is something else. He could have said I didn't have an
22 attorney client relationship. There are any number of grounds that he
23 could defend on. It's just in this case, he didn't defend on the standard
24 of care and he didn't defend ...

25 The Court: This case here?

1 1 Mr. Epting: Yes, in this case, the standard of care is agreed upon by Mr. Durant.

2 2 In this case, Mr. Robinson is not making the argument that it was a
3 3 matter of trial strategy. So what I'm saying in essence Judge, is what
4 4 you're asking me is this some form of judicial estoppel? I'm saying
5 5 no, I'm just saying on this one issue. It was decided by three judges
6 6 this way, so that if there's no question of standard of care, there's no
7 7 contention it was a matter of trial strategy, then the Supreme Court
8 8 has spoken, the record was not preserved, the verdict was entered, it
9 9 would have been zero. It was two hundred and forty three thousand
10 10 dollars.

11 11 The Court: And I guess my question, is there a case out there somewhere that
12 12 says that?

13 13 Mr. Epting: Judge, I've looked. If you'll give me, today's Wednesday, until
14 14 Monday I'll look to see.

15 15 The Court: Alright. Okay.

16 16 Mr. Epting: Thank you sir.

17 17 The Court: Yes sir. We'll come back to you, of course at the end and you'll have
18 18 the last word on this motion. Ms. Wall?

19 19 Ms. Wall: Thank you Your Honor.

20 20 The Court: If you have three justices who say the error wasn't preserved or, or
21 21 the objection wasn't made, motion to strike, testimony wasn't made,
22 22 not part of the directed verdict motion, if those three said that, why
23 23 isn't that enough?

24 24 Ms. Wall: Because it absolutely isn't. First of all, let me back up and start with
25 25 the Supreme Court and I'll be happy to ...

1	1	The Court:	The one he was talking about.
2	2	Ms. Wall:	Pardon me?
3	3	The Court:	Are you talking about the one Mr. Epting was talking about?
4	4	Ms. Wall:	Yes sir, yes, absolutely and let's just start with that one right now. We
5	5		start with the Supreme Court case and this was a discussion of what
6	6		that, in that Supreme Court case, this was a matter of a state statute,
7	7		criminal statute that had do with obscenity and the definition of
8	8		obscenity, pornography and so forth. So what they, the Supreme
9	9		Court says and it's on, Your Honor, the third page and under the
10	10		bracket four. When a, and I'm quoting, when a fragmented court
11	11		decides a case and no single rational explaining the result enjoins the
12	12		justices, the holding of the court may be viewed as that position taken
13	13		by those members who concurred. Not dissented, who concurred in
14	14		the judgments on the narrowest grounds. This Supreme Court case has
15	15		nothing to do with our Supreme Court's holding in Austin v. Craven.
16	16	The Court:	The way I would read this case is that it may be viewed as the
17	17		position taken by those members as to the litigants of case. What I'm
18	18		looking for, is Mr. Epting makes an argument and it's more of a
19	19		factual or common sense argument. Three people on the Supreme
20	20		Court say the error wasn't preserved, then how can you say it was?
21	21	Ms. Wall:	Because the three people who are dissenting, that isn't the opinion of
22	22		the Court.
23	23	The Court:	So, in other words, it's just kind of and no offense obviously to the
24	24		people at the Supreme Court it's wasted paper as far as ...
25	25	Ms. Wall:	Absolutely, it's obiter dicta. And Your Honor that leads me to the

1 next thing. When, in our Austin v. Stokes-Craven case after the Supreme Court made
2 its opinion, remember the opinion, written by Justice Beatty the opinion remanded
3 for actions in accord with the opinion. The opinion is not the dissent; the opinion is
4 Justice Beatty's writing over the ten pages that he does it and so I'll hand up to the
5 Court what of course is part of the record in that, which is the, when it came back to
6 Judge Hayes. Judge Hayes then issued his order, because he was required to do that,
7 according to our Supreme Court, so what did Judge Hayes rule? Judge Hayes ruled,
8 he says, I think it's his fourth page in at the top of his opinion. And by the way, Your
9 Honor, Stokes-Craven never took an appeal from this opinion of Judge Hayes that
10 came in after it was brought back down to the trial court. He says at the top. First as
11 to the web of opinions, concurrences and dissents, the Court finds Justice Beatty's
12 opinion is the opinion of the majority and establishes the law that the undersigned
13 must follow in deciding, and here he was deciding Plaintiff's motion as modified.
14 Then he goes on in the next paragraph and he refers to Justice Pleicones, but then
15 what does he say about that dissent? The next paragraph; the discussion by Justice
16 Pleicones of the dealer free issue, or dealer fee issue, excuse me, presented after the
17 statement that it is not preserved for review can only in the undersigned's opinion be
18 considered obiter dicta and then it gives us the definition of what obiter dictum is.
19 And then it goes on, Justice Kittredge with concurrence of Chief Justice Toal joins in
20 Justice Beatty's well written opinion except to the two issues, neither which
21 addresses the issue in dealer acts attorneys fees. The point I'm making Your Honor,
22 is that our trial court recognized in reading the Austin v. Stokes-Craven Supreme
23 Court holding, that the holding of the Court, the opinion of the Court and it's
24 consistently referred to as the majority opinion, even in the dissent it is and I'm
25 looking at it right now and Your Honor, I have attached it to our moving papers and I

1 1 have another copy if you need it Your Honor. But Justice Beatty writes the opinion
2 2 and then when we get to the dissent, first dissent is Justice Pleicones and he repeats
3 3 in every paragraph of his dissent, he says he either agrees with the majority or he
4 4 disagrees with the majority. So this isn't an issue of we just get to count heads all
5 5 over the place, we have an opinion of the Supreme Court and the only opinion that
6 6 has any precedential value whatsoever and can be used in any manner is the opinion
7 7 written by Justice Beatty, not Pleicones or any other dissent. I would draw this
8 8 Court's attention to one of our cases before our Supreme Court called State v.
9 9 Walker. and in that case there was a question of, oh my gosh we have this underlined
10 10 case and everybody's all over the lot and here's what our Supreme Court said back in
11 11 1969 and I have this in my brief as well Your Honor. It said as follows. This was a
12 12 case in which two justices concurred in the main or controlling opinion. Justice
13 13 Beatty's opinion referenced as the majority opinion, is the only controlling opinion in
14 14 this case. The dissent is obiter dictum as the trial court found and was never appealed
15 15 from. But they went on to say that two justices concurred in the controlling opinion;
16 16 one concurred only as a result, two justices dissented due to such circumstances, the
17 17 value of the decision as a precedent is at best questionable. But here's what our
18 18 Supreme Court goes on to say a decision by an equally divided court does not
19 19 establish a precedent required to be followed under the Stare decisis doctrine. Well,
20 20 surely if that's the case, as to a divided opinion, surely we cannot argue that we get to
21 21 take dissent and all of sudden they become the law of the case.

22 22 The Court: I don't see it as his --- that they become the law of the case. It is
23 23 evidence that establishes a matter of law, three out of five find that he
24 24 didn't preserve the issue. I may be semantically different, I may be off
25 25 base here, but that's how I take it. It is not binding precedent in the

1 way that we think of binding precedent. It seems to me that there is
2 some food for thought that three out of five said the issue wasn't
3 preserved and what do you do with that. Let me ask it this way, if
4 Justice Beatty and I think it was Justice Hearn, is that right?

5 Mr. Epting: Judge Waller..

6 The Court: Had in what you style as the majority opinion, said the issue was not
7 preserved and therefore the verdict stands; let's just assume they said
8 that and Justice Pleicones, Justice Kittredge and Chief Justice Toal
9 had said, well we think it was preserved, but we think zero dollars is
10 fine, it's okay. Would your argument be, what would your argument
11 be then?

12 Ms. Wall: My argument wouldn't be any different Your Honor because my ...

13 The Court: Your argument wouldn't be that Mr. Robinson didn't preserve it?

14 Ms. Wall: Well, my argument Your Honor would be that the opinion of the
15 Court is the only thing that we can look at and hang our hats on and
16 make an argument.

17 The Court: In that case, the opinion would be ... what you can hang your hat on is
18 that he did not preserve the error.

19 Ms. Wall: Or that the error was not preserved for that particular issue.

20 The Court: So you would have me in a hole there; you wouldn't argue that, well
21 at least it's a factual issue whether or not the error was preserved?

22 Ms. Wall: No, because the, because the whole point that I'm trying to make
23 Your Honor is that we don't get to pick and choose and if the dissent
24 works for us then we're going to put our hats, hang our hats on the
25 dissent. Well, that didn't happen to work for us, so then we, no we

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1 1 don't get to do that under the law. There is only one holding in this
2 2 case and that is that it was preserved because that's what the holding
3 3 of this case says, written by Justice Beatty, that is this case. Anything
4 4 else is obiter dicta and that's all the dissent goes to and our case State
5 5 v. Walker says that the Supreme Court case that he cites does not say
6 6 otherwise. It is referencing concurrences, not dissents. You can't turn
7 7 a dissent into something other than a dissent.

8 8 The Court: Along with the lines that you're arguing would the Plaintiff Stokes-
9 9 Craven even be permitted to present the error of issue preservation to
10 10 a trial jury in this case or is it barred as a matter of law because of the
11 11 majority opinions?

12 12 Ms. Wall: I would argue that it's barred. If they're going to try to take the
13 13 position and I have a second part to my argument that is more
14 14 fundamental than all of this, but if they are going to take the position
15 15 that they get to use this case, this underlying case of Austin v. Stokes-
16 16 Craven and Your Honor brings up a great point. Show me a case that
17 17 this in turn binds a defendant in a legal malpractice case. I would
18 18 suggest to Your Honor not only is there no such case, but in fact,
19 19 we've cited to Your Honor the Grimm case which is a new case,
20 20 granted it's not in South Carolina; it's out of Connecticut, and I will
21 21 hand to the Court, well I did. I attached it to my moving papers. But in
22 22 that Grimm case it says exactly that. It says you can't use this to
23 23 establish the two prongs that the Plaintiff has the burden to prove, a
24 24 breach in the standard of care and proximate cause. And here's the
25 25 reason why. In order to establish a breach in the standard of care it's

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1 far more than just taking an underlying opinion and saying I do or I
2 don't think that this was preserved or not preserved. Standard of care
3 is more than that. You have to examine what the attorney does under
4 the facts and circumstances then existing and in addition, as I believe
5 this Court is well aware of the Harris Teeter case had a lot of these
6 same issues in it and they talk about in that case, they talk about
7 lawyers make decisions during trial or pre-trial that happen to be in
8 arbitration or mediation, but it's the same concept. You make a
9 decision and that doesn't mean that because you did or didn't keep out
10 evidence or you did or didn't object, that that in and of itself
11 constitutes legal malpractice and why is that? Because you have to
12 examine all the facts and circumstances then existing and known to
13 the attorney. They can't use this underlying opinion and now run to
14 the conclusion, oh that constitutes legal malpractice, no it doesn't.
15 You need a lot more than that to establish legal malpractice and then
16 the other prong that Your Honor has brought up several times today,
17 which is proximate cause ...

18 The Court: Which is really not an issue in this case.

19 Ms. Wall: Well, right now it's not an issue Your Honor, that's correct, but it's
20 one more element that they have to prove.

21 The Court: My question of you is can you use the majority opinion as an
22 argument that they are barred from presenting the issue of issue
23 preservation even if they've got expert testimony up and down the
24 wall. Let's say they have five experts that said standard care is this,
25 taking into account all the defendant's circumstances, that Mr.

Robinson breached the standard of care by not objecting, moving for a directed verdict on the zero testimony. Could that get to a jury in spite of what the majority opinion holds, that the issue was preserved or would you be claiming ...

Ms. Wall: I think I can claim differently and here's why. Stokes-Craven was a party to that opinion. It then was remanded to the trial court who made certain subsequent rulings and reading of that opinion and I think they are held to that Your Honor, because they were parties to it. My client wasn't a party to it. And everyone keeps characterizing what's in that, and when I say everyone, I don't mean you, Your Honor, but we seem to be talking about that somehow in this opinion one or more people said Scott Robinson did a terrible job at trial and he should have done this, should have zigged when he should have zagged or whatever. That opinion doesn't say that, the opinion never mentions Scott Robinson or the law firm.

The Court: Alright.

Ms. Wall: So, Your Honor, we along with the fact that there is a case that says you have to, a Plaintiff has to prove their own legal malpractice action. They can't be taking and that was a Supreme Court opinion in Connecticut. They can't just take that opinion and say, oops, there it goes. We have a breach in the standard of care and damages proximately caused. You have an independent burden in your legal malpractice case to prove all four of your elements and you can't just bootstrap onto an opinion and in that case, just as we have here, in the Grimm case, they tried to use the underlying opinion, it was a divorce

1	1		action in the Family Court. They tried to use the underlying opinion to
2	2		prove negligence and damages proximately caused and the Court,
3	3		Supreme Court in Grimm said you can't do that. You still have your
4	4		own independent obligation to do that. So, in ...
5	5	The Court:	And that was a Connecticut case where the majority opinion is what
6	6		they were going to?
7	7	Ms. Wall:	Yes. So Your Honor, just in, as we've argued in our brief, first of all,
8	8		and as we have here today, the majority opinion, the holding of this
9	9		case is all that we have for precedential value, not the dissents and we
10	10		have a South Carolina case that I think speaks to that, that State v.
11	11		Walker case. Our United States Supreme Court case does not talk
12	12		about using a dissent to count heads and find the narrowest holding;
13	13		what it's talking about is concurring opinions and the basis for
14	14		concurring opinions, so that doesn't apply to what we have at all. And
15	15		then in turn, Your Honor, regardless of all of these arguments, in a
16	16		legal malpractice case, the Plaintiff has the burden to prove breach in
17	17		the standard of care, damages proximately caused and they cannot
18	18		simply bootstrap onto an underlying opinion in which the lawyer was
19	19		not a party. Thank you.
20	20	The Court:	I have one more question.
21	21	Ms. Wall:	Certainly
22	22	The Court:	The opinions of Pleicones, Kittredge and Chief Justice Toal not only
23	23		dissent, but they also they concur how do I count heads there, if at all?
24	24	Ms. Wall:	Well, Your Honor ...
25	25	The Court:	Because they do concur ...

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1 1 Ms. Wall: They do, that's correct Your Honor. I don't know that this Court is
2 2 required to count heads. It's not a head counting exercise I would
3 3 submit to the court; it is simply an exercise of recognizing that the
4 4 only opinion of this Court that has any precedential value whatsoever,
5 5 is the opinion written by Justice Beatty. That is the holding of this
6 6 case, period. We don't count heads. The three dissents didn't have to
7 7 concur in part in order for Justice Beatty's opinion to still be the
8 8 opinion ...

9 9 The Court: In other words ...

10 10 Ms. Wall: ... of the Court.

11 11 The Court: ... they didn't concur on the issue preservation.

12 12 Ms. Wall: But it didn't matter if they concurred or didn't concur on any issues,
13 13 because the only opinion of this, of the Austin v. Stokes-Craven is the
14 14 opinion written by Justice Beatty, period.

15 15 The Court: Alright.

16 16 Ms. Wall: Thank you Your Honor.

17 17 The Court: Okay, Mr. Powell?

18 18 Mr. Powell: Your Honor, I don't want to take too long, but I want to address
19 19 inquiry you make in terms of what effect such a case would have on a
20 20 subsequent civil action and I would suggest, I must confess I don't
21 21 know, and I suspect that there isn't a case addressing it out there in the
22 22 way that you would prefer. But I would suggest that it has some, the
23 23 analysis has some similarities to the law of collateral estoppel. Some
24 24 years ago I tried a case, Middleboro v. Monesicen PA, just to boil it
25 25 down, Monesicen was a manufacturing roofing material. They sold

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1 the roof that was put on a church in Minnesota. They were sued. That
2 case went to the Minnesota Supreme Court. Monesicen SPA
3 European Italy, the largest corporation in Europe in fact, lost that case.
4 We sued, I represented a high rise condominium in Columbia, I sued
5 alleging collateral estoppel. Issue, went to the Court of Appeal. I won
6 at motion on summary judgment. Issue of liability was predetermined
7 Monesicen claimed that they won a similar case in New Jersey and
8 wanted to apply the results of that to my client, to which I said, can't
9 do that, because my client was not a party, precisely the reason Susan
10 offered and it's pretty strong, because it's due process reasons. The
11 results of that case were not admissible or anyway affected my client
12 in that case because we weren't there. Why is it fair to impose the on
13 Monesicen out of Minnesota because they were a party. Here, my
14 client had nothing to say about this case, because he was not a party to
15 it. Wasn't represented, had no counsel there, so for the same reason, I
16 don't think anything results from, from the case in terms of
17 admission into evidence, it's not probative of anything, it doesn't go
18 to an issue of what they did was proper or improper. You do that
19 through other testimony.

20 The Court: Okay, Mr. Epting anything else?

21 Mr. Epting: Judge, only this, it's ironic that Mr. Craven and Stokes-Craven is
22 bound by all the conduct of its lawyers, but its lawyer for purposes of
23 this opinion is not privity with Mr. Craven and I just keep coming
24 back to this one issue Judge; but for those three judges, this verdict
25 would have been reversed. Justice Beatty and Justice Waller would

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1 1 not have constituted a majority opinion and the verdict would have
2 2 been reversed. Judge, and I'm finished, but you know there are a
3 3 couple of discovery motions as well.

4 4 The Court: Yes sir.

5 5 Mr. Epting: Oh good.

6 6 The Court: I'll make one comment about what you all have been talking about.
7 7 Ironically, in the appeal in Austin v. Stokes-Craven, Stokes-Craven
8 8 was trying mightily to establish that the issue was preserved.

9 9 Mr. Epting: Right.

10 10 The Court: From that standpoint, it's a legal issue. An issue, the question of issue
11 11 preservation is a legal issue, for the Appellant Court to decide and
12 12 ironically, it is now Stokes-Craven is trying to establish as a factual
13 13 matter, a malpractice case that the issue was not preserved. I'm not
14 14 smart enough to sit here and try to figure that out, but we have issue
15 15 preservation as a matter of law in the appeal and issue preservation is
16 16 arguably a issue of fact in a subsequent malpractice case. Like I said,
17 17 I'm not smart enough to sit here right now an figure that out. Mr.
18 18 Epting says that if the objection had simply been made, then what we
19 19 would have is a verdict that would have been reversed. I don't know,
20 20 because I heard this business about a fourteen thousand opinion that
21 21 was brought out on cross, but in any event, that parts not really
22 22 pertinent to what I have to resolve. Alright, how long do you think
23 23 the discovery motion will take?

24 24 Mr. Epting: Judge, I would love to get it done and ...-

25 25 The Court: Well we can do it. How long do you think ...

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1	1	Mr. Epting:	I can make my argument and will agree to make my argument in five
2	2		minutes.
3	3	The Court:	Well, I don't want to hold you to that.
4	4	Mr. Epting:	Well the thing is Judge, I'm going to rely on two trial court opinions
5	5		in this case and I'm just going to more or less say here's the issue,
6	6		here's what two trial judges have decided and you can take it from
7	7		there.
8	8	The Court:	Alright, you take all the time you need. I'd be glad to hear from you.
9	9		I've got your ...
10	10	Mr. Epting:	Judge, I would ask that ...
11	11	The Court:	I do have your, well I don't think I have anything on it. I have their
12	12		motion in opposition to your motion to compel, but do I have any
13	13		memo from you on that?
14	14	Mr. Epting:	You do not, Judge.
15	15	The Court:	Okay.
16	16	Mr. Epting:	Judge, what I have asked you to do is to take judicial notice of three
17	17		things; one is Judge Dennis' opinion in a case James LaVanway v.
18	18		Strickland Marine. A order of Judge Cooper in the case of Henry v.
19	19		Harris.
20	20	The Court:	How do you spell that?
21	21	Mr. Epting:	H-E-N-R-Y versus Harris.
22	22	The Court:	Henry?
23	23	Mr. Epting:	Yes sir and Judge, I have and will present to you copies of all of it,
24	24		but let me just bring what the issue is here; there were two pieces of
25	25		discovery that were served by the Plaintiff. One asked in essence for

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1 1 the adjuster's file and the request Judge, was worded exactly the way
2 2 it was worded in the case decided by Judge Dennis and it was done for
3 3 just that reason, so that the language of my request in this case, for
4 4 what I'll call the adjuster's file, is exactly the same language that
5 5 Judge Dennis was dealing with in the LaVanway case.
6 6 The Court: What kind of case was that?
7 7 Mr. Epting: Well, it's essentially Judge, a case involving an insurance company,
8 8 my law partner is trying to get a hold of the insurance company's
9 9 adjuster's file. The insurance company is represented by Ms. Wall.
10 10 The Court: Was it a bad faith case?
11 11 Mr. Epting: Well, Susan would know better than me. What kind of case was it? I
12 12 think the answer is yes, but I'll let her address it.
13 13 Ms. Wall: I can tell you ...
14 14 The Court: Was it a bad faith case? That's all I want to know.
15 15 Ms. Wall: I understand Your Honor. It was not a legal malpractice case, I can
16 16 tell you that. I don't recall, I'm sorry, but I don't recall, it was in 2008
17 17 and I don't recall whether it was styled as a bad faith case. It had to do
18 18 with procuring insurance for a boat.
19 19 The Court: Okay.
20 20 Ms. Wall: That's what I remember.
21 21 Mr. Epting: Failure to provide insurance and it was brought on a negligence
22 22 ground.
23 23 The Court: I see.
24 24 Mr. Epting: Okay. So, the objection Judge, is attorney client privilege and the
25 25 objection is work product and what both Judge Dennis and Judge

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1	1	Cooper say is that the party asserting the attorney client, work product
2	2	privilege bears the burden of proof that challenges to the assertion of
3	3	the attorney client or work product privilege are usually decided after
4	4	an in camera inspection and in this case Judge, no information has
5	5	been provided pursuant to a request to the Court in order ... Nothing.
6	6	The Court: Okay.
7	7	Mr. Epting: Judge Dennis held there is no insured privilege protecting
8	8	communications between an insured and its liability or indemnity
9	9	insurer. The only privilege normally is protective of communications
10	10	involving attorney client. Judge Dennis went on to hold in South
11	11	Carolina, the attorney client privilege is strictly construed to protect
12	12	only confidences disclosed within the attorney client relationship and
13	13	then he quotes from the fourth circuit and says that reports or
14	14	statement made by or to a parties agent, which has not been requested
15	15	by, nor prepared for an attorney nor which otherwise reflect the
16	16	employment of an attorney's legal experience, must be conclusively
17	17	presumed to have been made in the ordinary cost of business and thus
18	18	not privileged and ...
19	19	The Court: How about Rule 26?
20	20	Mr. Epting: In ...
21	21	The Court: In anticipation of litigation is something you haven't used yet, but
22	22	that's a privilege some way.
23	23	Mr. Epting: It is Judge and here's what Judge Dennis say and once again he's
24	24	quoting from the fourth circuit. The fourth circuit reason, reading
25	25	from Judge Dennis, with the nature of the insurance business requires

1 1 an investigation prior to the determination of an insured's claim and
2 2 that therefore statements taken by an insurance adjuster in the course
3 3 of the claim are made during the regular course of the insure's
4 4 business and not in anticipation of trial and are therefore discoverable.
5 5 What Judge Cooper adds to the mix is to saying the Fourth circuit law
6 6 to this effect as well, Judge, that if there's an attorney involved and
7 7 appointed that it's at that time that the privilege attaches. So, in other
8 8 words, in this case, I'm not asking for anything that would be after
9 9 Mr. Powell and Ms. Wall were retained. I'm simply asking for the
10 10 State of the insurer's file at or prior to their being retained. That's all.

11 11 The Court: That's not what Rule 26 says. It says, I don't have, hand me the book.
12 12 And on the surface of it, the fundamental matter I don't know about
13 13 this case, but from the fundamental matter, I respectfully disagree
14 14 with Judge Dennis because that's not what Rule 26 says and is not
15 15 conclusively to be presumed. In other words, Rule 26 says that, I
16 16 guess it is Rule 26.

17 17 Mr. Powell: It is, Your Honor.

18 18 Mr. Powell: B3

19 19 The Court: B3. Let me find it. Subject to provisions of subdivision B4, which I
20 20 really don't think has anything to do with what we're talking about. A
21 21 party may obtain discovery of documents and tangible things in an
22 22 adjuster's file, otherwise discoverable and prepared in anticipation of
23 23 litigation and I'll jump ahead, only upon a showing that the parties
24 24 seeking the discovery of that stuff has substantial need of materials
25 25 and that you are unable without undo hardship to obtain the

1 1 substantial equipment. So that's what the rule says.

2 2 Mr. Epting: Right.

3 3 The Court: It doesn't say there's a blanket matter you can get everything in that

4 4 adjuster's file up until the time that they retain counsel. That is not

5 5 what the rule says.

6 6 Mr. Epting: I agree with that Judge, but for example, in this case, let's just take

7 7 the letter that Mr. Robinson wrote to his insurance company.

8 8 The Court: Yes sir.

9 9 Mr. Epting: That's probably as a practical matter, what is in dispute. Now, I don't

10 10 know that, but that's not going to be something that I can acquire in

11 11 any other means, because ...

12 12 The Court: Could you ask him what did you tell him in the letter?

13 13 Mr. Epting: I, in essence, Judge, that's what I asked for in the request.

14 14 The Court: When you deposed him?

15 15 Mr. Epting: I didn't ask him that question in his deposition, Judge, no sir.

16 16 The Court: Alright.

17 17 Mr. Epting: The second thing Judge, that I raise is, I asked in my motion to

18 18 compel that also that I be given copies of their applications for

19 19 malpractice insurance and ...

20 20 The Court: Okay, why?

21 21 Mr. Epting: Because ...

22 22 The Court: Why do you have a substantial need of that?

23 23 Mr. Epting: Well, I think Judge, it may have some bearing in the case on the

24 24 question of impeachment. Because in this case, I asked things like,

25 25 well does your firm have any policy about writing clients? Do you

1	1	have a policy to ...
2	2	The Court: Did you tell the carrier that you do that?
3	3	Mr. Epting: That's what I'm trying to find out Judge. In this case, no, we didn't
4	4	write Dennis Craven. There's nothing in writing; there's no retention
5	5	letter, it's not standard policy to do that and so I'm simply trying to
6	6	get the applications to see or to judge if there were contradictions in
7	7	the applications with their testimony in this case and you know Judge,
8	8	I'd be happy to consent to any type of redaction. I'm not interested in
9	9	gross receipts or whatever else may be in the application, but rather
10	10	just matters related to firm policy that might be ... bear on the facts of
11	11	this case. So, Judge, I'm relying and I would say Judge, Ms. Wall
12	12	makes the same arguments and I'd like to present her brief, Judge
13	13	Dennis' order and Judge Cooper's order.
14	14	The Court: Which Cooper?
15	15	Mr. Epting: I am fairly sure it is this Judge Cooper.
16	16	The Court: It doesn't really matter, I'm just curious. How about, and one
17	17	question I'm going to ask Ms. Wall. Who represents Mr. Robinson?
18	18	Ms. Wall: I do Your Honor.
19	19	The Court: Alright, to what extent it matters, the next paragraph, 26 B3 says a
20	20	party may obtain without the required showing, a statement
21	21	concerning the action or its subject matter previously made by a party.
22	22	Would Mr. Robinson's letter be a statement? In other words, I'm sure
23	23	they have asked for production of all statements made by Mr.
24	24	Robinson, that's a generic request of production.
25	25	Ms. Wall: And you, and your question Your Honor?

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1	1	The Court:	26(b)3 says the second full paragraph. A party, in this case Stokes-
2	2		Craven, may obtain without the required showing, which would be
3	3		substantial need or unable to obtain without undo hardship, a
4	4		statement concerning the action or its subject matter previously made
5	5		by that party.
6	6	Ms. Wall:	And that section also talks about those things that are otherwise
7	7		discoverable and I think Your Honor, we've made it clear that we
8	8		have the Affidavit of Scott Robinson. That his first contact with the
9	9		insurance carrier was after he received a demand letter from Mr.
10	10		Craven ...
11	11	The Court:	The Dear Scott letter?
12	12	Ms. Wall:	Yes, that's right Your Honor. And so, everything follows from that;
13	13		that's clearly, I mean on the face of it, in anticipation of litigation,
14	14		he's being threatened with litigation, he says my lawyer has told me,
15	15		that because of some evidence on your part, I have a verdict against
16	16		me in a very large amount ...
17	17	The Court:	And I, I, tend to agree with you there, but does that second paragraph
18	18		of 26(b)3 trump the anticipation of litigation if it is you're talking
19	19		about obtaining discovery of a statement by a party concerning the
20	20		subject matter of the action ...
21	21	Ms. Wall:	No Your Honor.
22	22	The Court:	... subject matter in dispute?
23	23	Ms. Wall:	No Your Honor, because I think you have to read Rule 26 in its
24	24		entirety.
25	25	The Court:	Well, 26(b)3 in its entirety, not the whole rule.

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1 1 Ms. Wall: Well, but earlier parts of the rule are talking about the scope of
2 2 discovery and then we have in general and under the in general it says
3 3 partys may obtain discovery regarding any matter not privileged and
4 4 ...

5 5 The Court: Anticipation of litigation is not a privilege.

6 6 Ms. Wall: I'm sorry?

7 7 The Court: Anticipation of litigation is not a sub-privilege. It is not a privilege. It
8 8 is just an exemption of disclosure under Rule 26.

9 9 Ms. Wall: I agree Your Honor, I agree.

10 10 The Court: I've never taken it apart in that fashion, but typically, if let's just go
11 11 back to the wreck case. Mr. Powell says that's the simplest one to use.
12 12 If a plaintiff, let's say a defendant is called up and interviewed by his
13 13 insurance adjuster. You know, who had the green light? What
14 14 happened during? What happened after? Had you been drinking and
15 15 all that kind of stuff. That is a statement made by a party. Now, I'm
16 16 one of the Judges who would be inclined to hold that after an
17 17 automobile accident in today's society, when that adjuster takes that
18 18 statement, that's in anticipation of litigation. I'm one of those.
19 19 There's a 1960 case, I think, called Sox v. United States. S-O-X, I
20 20 don't know what the cite it is and I'm kind of afraid that I remember
21 21 it, but in any event, doesn't the second full paragraph of 26(b)3 say
22 22 that regardless of anticipation of litigation, regardless of this, that or
23 23 the other, isn't that statement taken over the phone, by the adjuster of
24 24 that person's insured, of that carriers insured, something that can be
25 25 obtained without the required showing of substantial need or unable to

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1 1 obtain it by other means?

2 2 Ms. Wall: Potentially yes, Your Honor. But here's why and you used the perfect

3 3 example, it's a first party claim. An automobile accident is what is

4 4 known as a first party claim and this is what we tried to, as opposed to

5 5 a third party claim. It's completely different, because we have cases

6 6 that discuss the difference between the two. A third party claim is

7 7 when you contact your insurance carrier and say oh my gosh, I think

8 8 I'm going to get sued. I got this demand letter and because a claim is

9 9 going to be made under my policy by a third person ...

10 10 The Court: In this case Stokes-Craven.

11 11 Ms. Wall: Exactly and that's what's known as a third party claim and the case is,

12 12 and there is case law that says that when you have a third party claim,

13 13 the contact between the insured and its carrier is protected because the

14 14 reason he contacted his carrier is because he anticipates getting sued.

15 15 This portion does not take it out of that, this portion is referencing

16 16 exactly what Your Honor was just using as an example. Automobile

17 17 accidents, and that's what's called a first party claim ...

18 18 The Court: No, I'm talking about the defendant driver who's accused of being

19 19 negligent ...

20 20 Ms. Wall: ...Right ...

21 21 The Court: An adjuster takes his statement ...

22 22 Ms. Wall: Yes sir.

23 23 The Court: ...Because they anticipate litigation, then the plaintiff comes along

24 24 and sues and says I want a copy of any and all statement you gave. I

25 25 would require the defendant to turn that over.

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1 1 Ms. Wall: Because?

2 2 The Court: Because it is a statement concerning the action made by the party. So
3 3 you're talking about the party in the first part of the sentence means
4 4 the same party in the last part in the sentence? Is that what you're
5 5 saying? A party may obtain without the required showing the
6 6 statement concerning the action or subject matter previously made by
7 7 that part. So you're saying the defendant can get his own statement?
8 8 But the plaintiff can't get the defendant's statement?

9 9 Ms. Wall: No he should not, if it's made in anticipation of litigation.

10 10 The Court: Why?

11 11 Ms. Wall: Because you're required, arguably, depending on what your policy
12 12 says, to give statements to your carrier in order for them to assist in
13 13 your defense. Once you're on notice of a claim, and in this case,
14 14 there's no factual disagreement, because of course, it would be Scott
15 15 Robinson who knows when he first put the carrier on notice, and he
16 16 first put his carrier on notice after he received the demand letter from
17 17 Mr. Craven saying I think you made a mistake and the clear intent
18 18 was, I'm going to sue you. There's no question about it.

19 19 The Court: He didn't have any conversations with him before?

20 20 Ms. Wall: No sir.

21 21 The Court: Alright, how about the application part? To get at representations
22 22 made — in the application about what their policies are, if any?

23 23 Ms. Wall: Your Honor I don't know anything about the application. That would
24 24 have been done by the firm itself.

25 25 The Court: But the carrier has a copy of it. I hope.

1	1	Ms. Wall:	Well, and that's an interesting question. Applications often go to the
2	2		underwriting department, which would be wholly separate from the
3	3		section in an insurance carrier that assists in defense. You know, once
4	4		you have a claim or you anticipate a claim and then they find a lawyer
5	5		and so forth.
6	6	The Court:	But it would be the same carrier?
7	7	Ms. Wall:	Yes Your Honor, it would be the same carrier, but it would be a , I
8	8		just don't have any information on that.
9	9	The Court:	But y'all don't have the Affidavit?
10	10	Mr. Powell:	I don't know Your Honor. I know that it is an unusual circumstance
11	11		here. We have submitted affidavits from both Mr. Johnson and Mr.
12	12		Robinson that all communications that they have about this matter
13	13		with the insurance company, occurred after this, this letter and there is
14	14		also a letter from Mr. Epting that went out. So it was in anticipation
15	15		of litigation, but in terms of the, in terms of the insurance application,
16	16		unless, Mr. Johnson, of course is not here, I would like to ask him
17	17		something, he had to leave. But this law firm Johnson, McKenzie and
18	18		Robinson was, it would have been only one application that would
19	19		have been, that would have had that. By the time, it would have been
20	20		right before the renewal date was in January, so, so and this was in
21	21		April. The renewal date was in January before April, so it would be
22	22		just one that would address, you know, what they knew before this
23	23		came out.
24	24	The Court:	Okay, alright, let me back up. Mr. Epting I did cut you short when I
25	25		asked Ms. Wall a question. Do you have any further argument about

1 1 any entitlement to the adjuster's file?

2 2 Mr. Epting: I think that's it Judge. All I want to do is just put something on the
3 3 record.

4 4 The Court: Alright, go ahead.

5 5 Mr. Epting: Nothing further, but I do want to address the question of the
6 6 application. And of course Judge, the problem is there's just a flat out,
7 7 we aren't going to produce it, but I think it would be first appropriate
8 8 to find out how many applications are there, because there might be
9 9 four or five applications with this carrier. Because there's one for
10 10 every year and so I don't want to, by my silence, say that it's just one
11 11 application. I think any application, and I don't mean Judge, we
12 12 should be going back say more than three years, but I think we just
13 13 need to make some inquiry as to what we got and I don't know what
14 14 they got. I don't know how to respond to it, because they just object ...

15 15 The Court: Well, what I'm going to require the defendants to do, I'm going to
16 16 require the defendants to number one, find out how many applications
17 17 there were with this carrier. I assume this carrier will do?

18 18 Mr. Epting: Yes sir.

19 19 The Court: And get those in hand and produce those in camera to me. I am going
20 20 to ... If your argument would be that you are not interested in just
21 21 bearing out anything you can bring out to try to embarrass somebody
22 22 or put their business on the street, you want to know what they
23 23 represented to the carrier was any policies involving client
24 24 communications.

25 25 Mr. Epting: That's it, that's it.

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1 1 The Court: Well, I am going to require that the defendants to produce those to
2 2 me. It's been a long time since I've filled out those questionnaires, but
3 3 I remember you had to do a percentage of how much real estate do
4 4 you do and how much defense work do you do? How much
5 5 government work do you do? And there was all those percentages, I
6 6 don't ...
7 7 Mr. Epting: I'm not interested in that.
8 8 The Court: I think we had to do things like do you have a conflict check system
9 9 and that kind of thing.
10 10 Mr. Epting: Well, that sort of stuff Judge, more specific, do you have a policy of
11 11 writing retainer letters? Do you have a policy of forwarding pleadings,
12 12 communications, etc. to clients?
13 13 The Court: The existence or nonexistence of a retainer letter, is that relevant in
14 14 this case?
15 15 Mr. Epting: Well, I just used that as a writing Judge.
16 16 The Court: I understand what you're saying. So I think the defendants understand
17 17 that I'm going to require you to get that information and present it to
18 18 me, so I can look at it?
19 19 Mr. Powell: How many, how many years back?
20 20 The Court: When was Mr. Robinson retained in this case? Sometime in '05
21 21 probably? Well it's a 2004 case.
22 22 Mr. Epting: It was in '03.
23 23 The Court: Okay, how long had ...
24 24 Ms. Wall: ...I think it was ...
25 25 The Court: How long had Johnson ...Johnson, McKenzie and Robinson been in

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1	1	existence at that point?
2	2	Mr. Powell: They weren't in existence at that time Your Honor. Wait a minute, I
3	3	may be wrong. Yeah, in '03.
4	4	The Court: When he was retained was he with Johnson, McKenzie and
5	5	Robinson?
6	6	Mr. Powell: I think that's right. I think that's right.
7	7	The Court: Okay. When the time was held he was. I guess to find out from those
8	8	principals when they partnered up. Probably it was not terribly long
9	9	before that; that's just my reflection from being around here. I don't
10	10	remember.
11	11	Mr. Powell: It was in '04, March of '04 when the suit was filed.
12	12	Mr. Epting: But he says he was retained at the time of the Polito letter in March of
13	13	'03.
14	14	Mr. Powell: And I, and I frankly I don't know how many ...
15	15	The Court: We can find out.
16	16	Mr. Powell: That's ten years ago, I'm not sure what we're going to find out.
17	17	The Court: Well, I'm sure the lawyers know. I'm sure they did.
18	18	Ms. Wall: Until they are on notice, Your Honor ?
19	19	The Court: Ma'am?
20	20	Ms. Wall: Starting in 2003 until, and then we stop in what year, Your Honor ?
21	21	The Court: Well, for the applications, I think '03 and '04 would be more
22	22	irrelevant. What they represented in the applications, well, let's go
23	23	with, let's go with '05, '04 and '03 and '02 applications.
24	24	Mr. Epting: Judge, I really think if I get '03, '04, '05, '05, '06 ...
25	25	The Court: I think that's very reasonable for you to get to me and I would beg

1 1 you , don't send them to me by email, please.

2 2 Mr. Powell: Yes sir.

3 3 The Court: I don't, I think everybody realize I don't much like using, I don't'

4 4 mind reading emails, but I can't stand reading attachments.

5 5 Mr. Epting: Judge, on the, on the first point, you know, I really have to say I have

6 6 never thought of the court's observation about the issue of the

7 7 statement as a reason that this information ought to be turned over to

8 8 me.

9 9 The Court: Well, I may have misread that sentence to be honest with you.

10 10 Mr. Epting: Well, but Judge, here's where I think is important and indeed, that's

11 11 the letter that I'm looking for, because this testimony in this case that

12 12 one of these principals admitted that there was malpractice.

13 13 The Court: Who?

14 14 Mr. Epting: Mr. Craven testified Judge, that Mr. McKenzie told him that Scott

15 15 Robinson had fouled this thing up and that's in Mr. Craven's ...

16 16 The Court: That Mr. McKenzie said that or said Mr. Robinson told him that?

17 17 Mr. Epting: Well, it's not that specific Judge. It's just Mr. Craven relating what

18 18 Mr. McKenzie told him and as I told you it's one of the reasons that

19 19 this case was turned over in March of 2010. But my point is, Judge,

20 20 I'm looking to see if there is an admission against interest in the letter.

21 21 The Court: I see.

22 22 Mr. Epting: Judge, can I make these ...

23 23 The Court: Yes sir.

24 24 Mr. Epting: Judge would you like copies just handed up to your clerk as well?

25 25 The Court: If you've got extras.

1 1 Mr. Epting: I do. So, madame clerk, judicial ...

2 2 The Court: Those are persuasive perhaps but not binding. Those are the opinions

3 3 of Judge Dennis and Judge Cooper?

4 4 Mr. Epting: And the brief in the Lavanaway case that Judge Dennis was dealing

5 5 with and I'm offering that brief Judge, it was filed mainly because the

6 6 arguments in this case were the same ones Judge Dennis heard. But I

7 7 certainly understand that this Court is not bound what some other trial

8 8 court, that would be exhibit two. I think I would like to mark it.

9 9 The Court: If he wants to mark it, they'll be marked.

10 10 Mr. Epting: Alright. One, two and there's three.

11 11 Court Reporter: Judge I'm going to mark them as Court's ?

12 12 The Court: Court's is fine.

13 13 (Court's Exhibit Numbers 1, 2 and 3)

14 14 Mr. Epting: And Judge here are those and if you'll give those to the judge's clerk.

15 15 The Court: Thank you. Okay, anything else Mr. Epting?

16 16 Mr. Epting: Nothing Your Honor.

17 17 The Court: Alright, who would like to go first?

18 18 Mr. Powell: Your Honor I will try not to ...

19 19 The Court: ... And keep in mind I have read your memo.

20 20 Mr. Powell: I understand, I'll try not to, to re-plow any grounds, I do want to

21 21 make the observation that we have cited a number of appellant cases,

22 22 appellant decisions on this judgment and what another circuit judge

23 23 may have done in another case. I'm not sure, it's certainly not binding

24 24 precedent on Your Honor.

25 25 The Court: I agree. Certainly I can look at it.

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Mr. Powell: It's just for information. I'll submit to Your Honor that the reason that there are South Carolina cases on the subject, is precisely what Your Honor points out. Rule 26(b)3 addresses it and it discusses communications. You can't get them unless you show substantial need. Respectfully Your Honor, in that, in that second paragraph, I would respectfully assert that that is speaking to a situation where if I gave a statement, I no longer have a copy ...

The Court: I agree. I misread that sentence.

Mr. Powell: Okay, Your Honor, so if that were the case, it would cut the heart out of the previous paragraph and that would, for purposes, we've cited any number of appellant cases in our memorandum, but and Your Honor is exactly right. It's not a privilege we're talking about. This is a rule adopted work product document. That's what it is. And it specifically says an insurer in there and so if there are no communications to the insurer until after the letter asking the insured to be put on notice, then all of those communications, in whatever form are going to be made in anticipation of litigation.

The Court: But, everybody in here has been around a long time. How can they, how can I determine whether or not they have a substantial need or that, and that they're unable to obtain the substantial equivalent by other means if y'all don't show it to them?

Mr. Powell: Well, Your Honor I'll answer that by some of the examples given with case law. That burden is on them. They have to show the substantial need and here's an example. Insurance adjuster whoever, goes out and there is a horrible accident or there is some event, a fire

1 1 or whatever it might be, and there is a subsequent third party claim.
2 2 He goes out, he interviews someone, he takes a statement from that
3 3 witness, whether that witness is a party or whether he's not, but he
4 4 takes a statement and that's in his file. That witness later dies and so
5 5 that is the substantial need that they're talking about. It's a heavy
6 6 burden to get into that carriers file on a third party claim. Under that
7 7 circumstance, yes he, the person is dead, he can't depose him, he can't
8 8 go about it any other way. He can get into the file to get that
9 9 statement, those aren't the facts. There's been no showing, no
10 10 argument at all that there is any substantial need on the part of the
11 11 plaintiff to get this information. He says he wants to get it to see if
12 12 there's a contrary statement against interest. That's fishing. That is
13 13 fishing. He, he had an opportunity to depose the gentleman, ask him
14 14 every question, I don't think any questions were arguably objected to.
15 15 We told him certain, we told him not to answer, so he could, he could
16 16 get that by asking questions about it, about in great detail. But what it
17 17 communicates to his insurer in terms of getting into that, the burden is
18 18 and we pointed out in our memorandum, is on the party seeking
19 19 discovery. If we were asserting a privilege, that would be, under
20 20 26(b)I, that would be our burden, but what we have to show is that
21 21 the communications we're talking about, all communications that fit
22 22 this request to the insurer were after the initial letter in anticipation of
23 23 litigation and that is contained in both affidavits of these two lawyers.
24 24 Both Mr. Johnson and Mr. Robinson gave affidavits to that effect, so
25 25 that wraps it up. I mean, I can talk at length about the law recited and

1 1 the purposes and the trial protection and relationship and the policy
2 2 reasons behind it. Of course, the carrier wants to get in and get the
3 3 good, the bad and the ugly from its insurer and why they want to
4 4 know that, if it's horrible, they want to know it to settle the case.
5 5 That's the entire idea behind that work product protection, behind
6 6 26(b)3, you want the insured to open up. You don't want them to
7 7 close up, you want them to give the complete story to the insurer and
8 8 if the Court were, if the Courts were to open those files up, that would
9 9 be discouraged knowing it would end up in the hands of the opposing
10 10 party later on if it was ordered. But it's, it would chill
11 11 communications between the insured and its insured and that's not
12 12 what we want to do. As a practical matter here, as the affidavits
13 13 demonstrate, all of the communications were made after the threat to
14 14 pursue ...

15 15 The Court: Did any one from the carrier interview any witnesses? In other words
16 16 you used the example of a witness to an accident. Were there any
17 17 witnesses who were interviewed by a ...

18 18 Mr. Powell: No.

19 19 The Court: ... or another lawyer or another witness in the case, was anybody
20 20 interviewed?

21 21 Ms. Wall: No, Your Honor.

22 22 The Court: Or spoken to on the phone?

23 23 Mr. Powell: Not to my knowledge.

24 24 Ms. Wall: Not, not to my knowledge and counsel was retained relatively soon.

25 25 The Court: Alright, Ms. Wall anything?

1	1	Ms. Wall:	No Your Honor, thank you.
2	2	Mr. Epting:	Judge, just one final thing. Underneath all of this Judge, there is a
3	3		large dispute about what has to produced and not produced and we've
4	4		argued motions and motions to reconsider up here with Judge ...
5	5	The Court:	You have?
6	6	Mr. Epting:	... Judge Newman. Completely unrelated to this limited subject, but
7	7		again, I'm back Judge to 62. I'm not a fan of responses to
8	8		interrogatories that tell me here are the twenty conditions under which
9	9		they're answering ...
10	10	The Court:	I totally disregard that.
11	11	Mr. Epting:	Well and what I am trying to do Judge is, this is a pretty significant
12	12		case and there's a good likelihood that it's going to end up in the
13	13		Supreme Court. There are some discovery issued here that I just think
14	14		the bar needs and the bench needs to have decided and my view is
15	15		often times it gets unnecessary and what I would ask is no matter what
16	16		this Court does about my first request, concerning the insurance file,
17	17		I'm willing to concede that anything in that file, after they appointed
18	18		counsel is off limits. I would ask that anything that is in that file
19	19		before that date, at least be turned over to this Court for this Court to
20	20		evaluate, so that at least there's record of it and on appeal it may be
21	21		you decide I'm not entitled to see it, but I would like it to be on file,
22	22		because I just, Judge, for the life of me, cannot understand how an
23	23		insurance adjusters' file, prior to appointing counsel, is somehow
24	24		protected either by the attorney client privilege or work product. I may
25	25		be completely wrong.

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1	1	The Court:	Well, I don't think work product is mentioned anywhere in the Rule.
2	2	Mr. Epting:	Well ...
3	3	The Court:	I may be. It's in anticipation ...
4	4	Mr. Epting:	I'm using it in a global sense. So, I would ask that at least it be
5	5		supplied to you for in camera without regard to what decision you
6	6		may reach.
7	7	The Court:	Any response to that?
8	8	Mr. Powell:	Your Honor the response to it ...
9	9	The Court:	If I tell you to do it, you've got to do it ...
10	10	Mr. Powell:	Sure. I mean our only choice would be to refuse and be held in
11	11		contempt and then take it up. You know. I'm not excited about that
12	12		prospect. But Your Honor, the only, I just don't know what to say. I
13	13		mean the rule says communications to insured lawyers, da-da, da-da,
14	14		da-da in anticipation of litigation can only be obtained through
15	15		substantial need and they haven't offered anything like that. They just
16	16		said we want it. And that's not substantial need.
17	17	The Court:	Judge Newman ruled on all the other, all the other discovery?
18	18	Mr. Epting:	We have, we have orders, yes sir.
19	19	The Court:	Okay, alright, anything else from the defense on this point?
20	20	Mr. Powell:	No sir.
21	21	The Court:	Okay, anything else from Mr. Epting?
22	22	Mr. Epting:	No Judge, thank you for your time.
23	23	The Court:	I appreciate your arguments. I know we've took a good long while,
24	24		but I appreciate you putting it together in the way that you did. It was
25	25		very helpful. I'll be in touch with all of you. I know I've got Mr.

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1 1 Powell, Ms. Wall, Mr. Epting's, Ms. Inman's phone numbers. That's
2 2 you?
3 3 Mr. Epting: That's my paralegal, yes.
4 4 The Court: I'm sorry. I think the lady that I talked to from your office is ...
5 5 Mr. Epting: Ms. Inman.
6 6 The Court: Is she going to email some things to me and I think I cut her off. I
7 7 think I said absolutely not.
8 8 Mr. Epting: Well, Judge, it was, she was just giggling to me. She said Drew I
9 9 talked to the judge and I said really? What did he say? I don't think he
10 10 likes emails.
11 11 (Off the Record Discussion)
12 12 Mr. Powell: Your Honor I just, there's one other issue and I, I believe I should
13 13 have taken this up earlier, but we brought and I assume that Drew will
14 14 waive any issues with respect to the original depositions. We brought
15 15 them, but just so we can go on the record.
16 16 The Court: I've got condensed ones that are ...
17 17 Ms. Wall: Your Honor, would you like the originals?
18 18 The Court: No, I've got, I've got the deposition of Mr. Robinson, Mr. Johnson,
19 19 Mr. Craven, Mr. Brown and Mr. McKenzie. That's what I have in the
20 20 condensed transcripts provided to me by Mr. Epting and those are
21 21 fine. And I'll get those notebooks from all those cases.
22 22 Mr. Powell: Your Honor, here's one for you and one for the clerk,
23 23 The Court: Okay. Anything else?
24 24 Mr. Epting: Judge, we also filed in reference to Mr. Durant and Mr. Richter, you
25 25 should have either here or in the clerk's office, those two depositions.

STOKES-CRAVEN VS. ROBINSON, JOHNSON AND MCKENZIE, LLC 23

1 1 The Court: I know I saw Ronnie Richter's excerpts and mister. who?

2 2 Mr. Epting: Durant.

3 3 The Court: Oh, I have parts of, I think parts of his, I don't know if I have all of it.

4 4 Mr. Epting: Well, it's, we filed it this morning.

5 5 The Court: Okay.

6 6 Ms. Wall: Your Honor, we do reference in one of our moving papers of course,

7 7 because it's so critical, the deposition testimony of Steve Brown at

8 8 Young Clement Rivers and I did not provide to Your Honor the entire

9 9 deposition. Would you like for me to do so? I have only the sealed

10 10 right now.

11 11 The Court: I think they did.

12 12 Mr. Epting: We did.

13 13 Ms. Wall: All of Brown?

14 14 Mr. Epting: Yes.

15 15 The Court: Alright if I find that I don't have anything I will let you know. Where

16 16 is this case on the trial roster? I assume pretty high up?

17 17 Mr. Powell: Yes sir.

18 18 Ms. Robert's: Yes sir it is.

19 19 The Court: Alright, well who's scheduled to be here that week?

20 20 Clerk: Hold on just a second. I've got a copy right here.

21 21 The Court: One of the things you're going to have to decide, if summary

22 22 judgment is not granted, that either side, you'll need more than a

23 23 week. If you do those things have to be, because we get really fussed

24 24 at.

25 25 Mr. Epting: Right sir.

THIRD JUDICIAL CIRCUIT
(803) 436-2150

STOKES-CRAVEN VS. ROBINSON, JOHNSON AND MCKENZIE, LLC24

1 Clerk: Judge Young.

2 The Court: Can Judge Young try this case? He doesn't have any conflict, does
3 he?

4 Mr. Epting: You know Judge ...

5 The Court: We don't need to be on the record now.

6 (Hearing Adjourned)
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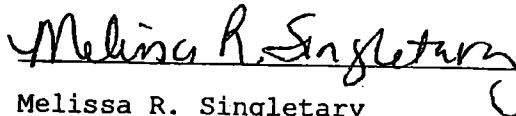
THIRD JUDICIAL CIRCUIT
(803) 436-2150

CERTIFICATE

This is to certify that the transcript in the matter of Stokes-Craven Holding Corp d/b/a Stokes-Craven Ford vs. Scott L. Robinson and Johnson McKenzie & Robinson, LLC, consisting of One Hundred Twenty-Four (124) pages is a true and correct transcript; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am not employed by any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 11th day of April, 2013.



Melissa R. Singletary
Certified Court Reporter

Notary Public for South Carolina
My Commission Expires: 3-5-2014

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

STOKES-CRAVEN HOLDING CORP
d/b/a STOKES-CRAVEN FORD

Plaintiff

vs.

SCOTT L. ROBINSON and JOHNSON
McKENZIE & ROBINSON, LLC

Defendants

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

CASE NO. 2010-CP- 14-457

PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO THE DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

The defendants Scott Robinson, Esq. and Johnson, McKenzie, and Robinson, L. ("JMR") argue Stokes-Craven Holding Corp.'s, d/b/a Stokes-Craven Ford ("Stokes-Craven") claims against them for legal malpractice are barred by the statute of limitations as Stokes-Craven knew or should have known it had a cause of action against the defendants when the jury returned its verdict against Stokes-Craven on August 16, 2006. The defendants claim this is so because Stokes-Craven alleges the defendants failed to "conduct discovery, prepare a pretrial brief, prepare trial exhibits, prepare voir dire, notify Plaintiff's insurance carrier, preserve certain issue for appeal, or settle the case before verdict." (Robinson Memo in Support, pg 4; see also JMR Memo in Support, pgs 6-7).

The defendants' argument presupposes that South Carolina law, in particular, the case of *Epstein v. Brown*, requires a "reasonable person of common knowledge and experience" to be knowledgeable regarding an attorneys' duties in preparing for trial and making evidentiary objections and motions. This supposition fails and so too does the defendants' argument.

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OF ORIGINAL FILED IN THIS OFFICE

DATE 1-9-13

Brenda B. Roberts
CLERK OF COURT

CLARENDON COUNTY, SC

ARGUMENT

1. Standard of Review

Summary judgment is appropriate only when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. *Etheredge v. Richland County School Dist. One*, 341 S.C. 307, 534 S.E.2d 275 (S.C. 2000). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should 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).

2. Application of the Discovery Rule and When the Statue of Limitations Begins to Run Are Questions of Fact for the Jury

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).

3. The Defendants Misconstrue the Supreme Court's Holding in *Epstein v. Brown* and its application to the facts in the present case

To read the defendants' briefs, one would presume the Supreme Court's holding in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (S.C. 2005) is that the statute of limitations in a legal malpractice action begins to run from the date of the verdict in the underlying case and further, that a "reasonable person of common knowledge and experience" is charged with

knowledge of the requirements of attorneys to investigate the facts of a case, to engage in discovery, to advise clients with regard to settlement and the exposure in various types of cases, and to understand trial and evidentiary procedure. The defendants are wrong on both counts.

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. *Epstein* cites and follows *True v. Monteith*, 327 S.C. 116, 489 S.E.2d 615 (S.C.1997), in which the law that governs this case is concisely stated: "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." *True* at 120. In other words, the Court followed decades of South Carolina law which holds a statute of limitations inquiry is fact specific to every case and held only that Dr. Epstein, was charged with knowledge of his lawyer's breach of the standard of care as of the date of the verdict against him. The Supreme 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 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.¹

- “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 “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 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.

- “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.

¹ See *Kelley v. Logan, Jolley and Smith, LLP* 383 S.C. 626 (2009) so holding.

Finally, and 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"). 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 notice, "insisted" that the defendants 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
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1 every penny for every minute I spent on this
2 case. But Dennis insisted that I send him a bill
3 so I got him a bill.
4 BY MR. EPTING:
5 Q. And was the bill paid?
6 A. Yes.

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

Mr. Johnson testified:

12 And I know Dennis had confidence in Scott.
13 BY MR. EPTING:
14 Q. Have you had any discussions with
15 Mr. Craven about this case?
16 A. We had discussions early on. Just
17 general, about the disappointment in the result.
18 Q. Meaning after the verdict?

19 A. Yes.
20 Q. And what do you recall he said?
21 A. I just recall that he said he was just
22 stunned. That he had no idea that that could
23 happen.

(Exhibit D: Deposition of William Johnson, pg 49).

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 JMR, 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.

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

35

1 into -- we'll get into the transcript which
2 might -- which might refresh your memory.

3 A. Okay.

4 Q. But can you think of anything else right
5 now off the top of your head?

6 A. The things that was not done --

7 Q. Yeah.

8 A. -- that I felt like they should have been
9 done.

10 Q. Investigate the facts. We're on this --

11 A. Right.

12 Q. -- specific allegation right now.

13 A. There's a lot of things now that I see
14 that should have been done. At the particular

15 time, I wouldn't have known of what needed to be
16 done or not needed to be done.
17 Q. Okay. Let's go through --
18 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 and continually stated that he didn't know or understand any of these things 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:

24 Q. Now, the question was -- going back a
25 couple questions -- prior to the case -- prior to
56
1 the commencement of the trial, was Stokes-Craven
2 Ford -- were you on its behalf -- did you feel good
3 about your defense of the case? Were you confident
4 of a good outcome?
5 A. Let's define that a little bit if we
6 could. Do I feel like I'm confident by going in
7 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 pgs 55-56).

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).

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).

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 first time that Mr. Craven was put on notice of a potential malpractice claim against the defendants 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 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 reserved. (See Exhibit B: Affidavit of Dennis Craven ¶ 11). Mr. Brown corroborates Mr. Craven's testimony:

5 Q Did you have a discussion with either
6 Charity Chastain, Mr. Craven or anyone else on
7 behalf of Stokes-Craven Holding Corporation with
8 regard to the merits of the appeal, the likelihood
9 of success, the weaknesses, the strengths?

10 A We went over the issues that had been
11 raised, both by Mr. Moskos and by our sides on
12 whatever that meeting was in the summer before the
13 oral argument. I think it was, like I said, late
14 May or early June. It'll be reflected in the
15 billing records.

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4 Q Were there -- one of the things that I did

5 not see looking through, were there any status
6 reports to Mr. Craven or to Charity Chastain about
7 your opinion as to where things were going in the
8 case?

9 A No, they did not require status reports.
10 And until the briefing was completed, I don't think
11 I really provided any that I know of.

12 Q Were these sometimes given to Ms. Chastain
13 verbally?

14 A I don't -- I don't recall giving her any
15 verbally. I don't know whether she received copies
16 of the briefs or not. I just don't know.

17 Q Did you express an opinion to her as to
18 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). Thus, the undisputed testimony establishes that the earliest Stokes-Craven was on notice of a potential claim was June 9, 2009.

4. Knowledge of on Injury Alone Is Insufficient to put a Client on Notice to Investigate the Possible Malfeasance of His Attorney

The defendants cannot point to any facts and circumstances that would have put Stokes-Craven on notice of a potential malpractice claim before June of 2009. Therefore, they are relegated to arguing Mr. Craven's knowledge that the verdict was a "serious problem" and damaging to Stokes-Craven's business and reputation begins the running of the statute. However, Mr. Craven has consistently maintained that, at the time of the *Austin* trial and for years afterward, he had no reason to believe that the large verdict against Stokes-Craven resulted from the malpractice of the defendants.

Mr. Craven's testimony with regard to the verdict is only that he knew it was a serious problem for the business and that the verdict was damaging to Stokes-Craven's reputation.

South Carolina law is clear: "[K]nowledge 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. A client should not be expected to investigate an attorney's loyalty every time the attorney provides the client with counsel the client dislikes. Instead, absent other facts, the client should be able to rely on the attorney's advice and should be able to follow this advice without fear the attorney is not acting in the client's best interest.

Id.

Here, as in *True*, the defendants 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 defendants blamed the large verdict on the unpredictable nature of juries and advised Stokes-Craven to appeal. The first and only time either of the defendants 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:

8 Q. Yeah. And I'll ask you directly, did
9 Mr. McKenzie during those conversations within a
10 couple weeks after the verdict mention anything to
11 you about whether they had -- whether his partner
12 in the firm had messed up the case or screwed up
13 the case?

14 A. Weeks after?

15 Q. Yes, sir.

16 A. No.

17 Q. Did he ever do that?

18 A. Yes.

19 Q. When?

20 A. I'd say within the last year.

21 Q. Just within the last year?

22 A. Yes.

23 Q. Okay. And in what -- under what
24 circumstance?

25 A. That they were over their head in this

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1 particular incident, didn't see the liability that
2 was coming -- forthcoming, and wanted to know
3 what -- excuse me, he used the term exposure, what
4 was -- didn't realize my exposure was that big.

5 Q. And where was this -- where did this
6 conversation take place?

7 A. In my office.

8 Q. Okay. And what was he doing there?

9 A. I invited him there.

10 Q. To -- for what purpose?

11 A. To ask his opinion in what should I do to
12 go forward because I was getting ready to lose my
13 business.

14 Q. And what did he tell you?

15 A. What I just said, that, you know -- all
16 those things that I just mentioned to you.

17 Q. Okay.

18 A. Yes, you need to do what you need to do
19 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).²

5. All of the Cases Relied on by Defendants are Distinguishable from the Present Case

The primary case relied on by the defendants in support of their motions for summary judgment is *Epstein v. Brown* discussed above. However, the defendants cite several other cases – all of which are easily distinguished from the present case as in each case, the Plaintiff admitted to knowing of facts and circumstances sufficient to give rise to inquiry notice. Stokes-Craven specifically maintains that the only fact it was aware of prior to the June 2009 meeting with appellate counsel, was the verdict itself.

For example, Defendant JMR cites *Dean v. Ruscon*, 321 S.C. 360, 468 S.E.2d 645 (1996). In *Dean*, the Plaintiff noticed a crack in her foundation in 1984, which she discovered was attributable to Ruscon's pile driving. Dean filed suit in 1991 after the crack expanded. The Supreme Court held that statute barred her claims as "Dean admitted that she personally believed the damage to her building resulted from the pile driving activities of 1984..." Id. at 363. (emphasis added).

The next case cited by the defendants is *Burgess v. American Cancer Society*, 300 S.C. 182, 386 S.E.2d 798 (Ct.App. 1989). *Burgess* sued her attorney, alleging that her attorney was passing information about Burgess to an American Cancer Society employee with whom the

² 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).

attorney was having an affair and that, in turn, the employee was passing the information obtained from Burgess' attorney to management at the Cancer Society. Burgess admitted knowledge of the affair, and the Court held this knowledge was sufficient to put Burgess on inquiry notice.

Finally, the defendants cite *Peterson v. Richland County, et al*, 335 S.C. 135, 515 S.E.2d 553 (Ct.App. 1999) in support of their motions. Peterson obtained a judgment against a third-party and hired a lawyer by the name of Register to try and collect on it. The judgment was not properly indexed by the clerk of court and Register did not notice the error, allowing the debtor to sell his property without first satisfying the judgment. Further, the collection case filed by Register was dismissed when he did not show up for trial. Peterson admitted she learned of both errors in 1993 when she hired new counsel. She filed suit against the clerk of court in 1994, but failed to add Register as a defendant until 1997. The Court held as Peterson undisputedly had knowledge of the indexing error and the dismissal of the collection suit in 1993, the statute had run.

The Defendants cannot find support for their argument in any of the authority they cite.

6. The Defendants are Estopped from Claiming the Statute of Limitations as a Defense

The statute of limitations has not run in this case, but, in any event, the defendants are 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).

In *Hooper v. Ebenezer Sr. Services*, 386 S.C. 108, 687 S.E.2d 29 (S.C. 2009), the Supreme 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.

The Defendants 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. Silence, when it is intended, or when it has the effect of misleading a party, may operate as estoppel. See *S. Dev. Land & Golf Co., Ltd. v. S. Carolina Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993). Further, Mr. Robinson continued to represent Stokes-Craven throughout the appeal, while not actively participating in the appeal of the case. As Justice Pleicones wrote in his dissent in *Epstein*, the defendants' failure to disclose breaches in the standard of care, their representations regarding the verdict, and their "watchful presence" rather than actual participation in the appeal of the case compels an equitable tolling of the statute. See *Epstein v. Brown*, J. Pleicones dissenting 363 S.C. 372, 384-85, 610 S.E.2d 816, 822 (2005) ("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).

7. Whether the Defendants are Estopped from Claiming the Statute as a Defense is a Question for the Jury

The issue of whether a defendant is estopped from claiming the statute of limitations is a question of fact for the jury. *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (S.C. 1997).

CONCLUSION

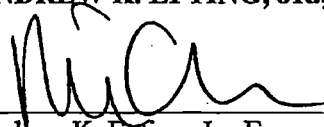
Viewing the facts in the light most favorable to Stokes-Craven as this Court is required to do at the summary judgment stage, the earliest possible date that the statute began to run is June 9, 2009, the date of Mr. Craven's meeting with appellate counsel. At the very least, material questions of fact exist as to when Stokes-Craven should have known it has a cause of action against its lawyers and whether the defendants should be estopped from claiming the statute of limitations as a defense based on their conduct.

Respectfully Submitted By:

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 7 day of JANUARY, 2013
Charleston, South Carolina

ANDREW K. EPTING, JR., LLC


Andrew K. Epting, Jr., Esq.
Michelle N. Endemann, Esq.
46a State Street, Charleston, SC 29401
P: 843.377.1871
F: 843.377.1310
ake@epting-law.com
mne@epting-law.com

ATTORNEYS FOR PLAINTIFF

On this 7 day of January 2013
Charleston, SC

**Index of Stokes-Craven's Exhibits to its Memorandum in Opposition to the
Defendants' Motions for Summary Judgment**

- Exhibit A: *Epstein v. Brown*, Trial Court documents: Memorandum in Support of David Brown, Esq.'s Motion for Summary Judgment on the Statute of Limitations 2002 WL 34459537 and Order of the Honorable James C. Williams, Jr. 2003 WL 25774844 (2003)
- Exhibit B: Affidavit of Dennis Craven
- Exhibit C: Deposition of Scott Robinson, Esq.
- Exhibit D: Deposition of William Johnson, Esq.
- Exhibit E: Deposition of Dennis Craven
- Exhibit F: Deposition of Steven Brown, Esq.
- Exhibit G: Deposition of Steven McKenzie, Esq.

EXHIBIT A

2003 WL 25774844 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Aiken County

Franklin M. EPSTEIN, M.D. and Southern Neurological Institute, Plaintiffs,

v.

David A. BROWN, Esquire, Defendant.

No. 02-CP-02-14.

February 19, 2003.

Order Granting Summary Judgment

James C. Williams, Jr., Judge.

This matter comes before the Court on Defendant's Amended Motion for Summary Judgment. Jurisdiction over this matter was transferred to the Chief Administrative Judge of the First Judicial Circuit by an Order to Transfer Administrative Control signed by the Honorable William P. Keesley and filed on September 17, 2002. This Court heard oral arguments from counsel for all parties on November 14, 2002. In addition to oral arguments, the Court reviewed and considered the Memorandum of Law submitted by each party and the exhibits attached thereto.¹ Based upon the information before it, the Court finds that Plaintiffs failed to commence this lawsuit within the applicable statute of limitations and grants Defendant's Motion for Summary Judgment.

FACTS

Defendant David A. Brown is an attorney licensed in the State of South Carolina and practicing in Aiken, South Carolina. Plaintiff Franklin Epstein, M.D. is a physician licensed to practice medicine in South Carolina and specializing in neurosurgery. Plaintiff Southern Neurological Institute is Dr. Epstein's practice.

On February 22, 1996, Dr. Epstein undertook the treatment of Mr. Marshall O. Welch, Jr. performing surgery in an effort to alleviate back pain. During the post-operative recovery, Mr. Welch encountered several complications and, as a result, passed away on February 29, 1996. Thereafter, Mr. Welch's widow filed a lawsuit against Dr. Epstein, Southern Neurological Institute, and several other Defendants, alleging negligence in the care and treatment of her husband.

Defendant David Brown was hired by Dr. Epstein's malpractice insurer to defend Dr. Epstein and his practice. In February of 1998, the case was tried in front of the Honorable William P. Keesley in Aiken County. Defendant Dr. Epstein attended and testified at trial. On February 18, 1998, the jury returned a verdict against Dr. Epstein and his practice, awarding three million dollars in damages for the Wrongful Death claim and \$ 28,535.88 for the Survival claim. On February 19, 1998, the jury returned a verdict against Dr. Epstein for punitive damages in the amount of three million dollars.

Judge Keesley denied post-trial motions for new trial and JNOV. Thereafter, Mr. Brown filed an appeal on behalf of Dr. Epstein. Dr. Epstein was represented on appeal by Stephen Groves, John Hamilton Smith, and Steve Brown of Young Clement Rivers & Tisdale. Defendant Brown also remained counsel of record. The judgments were affirmed by the Court of Appeals on July 31, 2000 in the opinion *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (2000).

On or about June 13, 2001, Dr. Epstein's present counsel spoke with a representative of Brown's professional liability insurance carrier, and they agreed in principle to toll the statute of limitations for a period of time while counsel investigated the case.

Counsel for Dr. Epstein and counsel for Brown exchanged drafts of a written tolling agreement. Though no such agreement was ever signed, Brown admits for purposes of this motion that at least a question of fact exists as to whether the statute was tolled between June 13, 2001 and January 9, 2002. David Brown was served with the Summons and Complaint in this case on January 10, 2002, via certified mail, the Complaint alleges three causes of action against Mr. Brown: breach of fiduciary duty, negligence, and breach of contract. Defendant Brown contends that Plaintiffs have failed to commence this lawsuit within the period prescribed by law. For the reasons stated below, this Court agrees.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Hunt v. Happy Valley Ltd. Partnership*, 315 S.C. 428, 434 S.E.2d 285 (Ct. App. 1993). In ruling upon a motion for summary judgment, the trial judge must view all of the facts and reasonable inferences in the light most favorable to the non-moving party; however, the trial court is not required to single out "some one morsel" of evidence to create an issue of fact that is not genuine. *Engbert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993).

Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ. It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984). The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine. *Id.* 316 S.E.2d at 407.

Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990).

The statute of limitations for bringing legal malpractice claims in South Carolina, whether based on negligence or a breach of fiduciary duty, is three years, S.C. Code Ann. §15-3-30(5) (Supp. 2001). The statute of limitations for bringing a contract action is also three years. S.C. Code Ann. §15-3-530(1) (Supp. 2001). South Carolina has adopted the discovery rule for both professional negligence and contract actions.² The discovery rule provides that the statute of limitations begins to run when the plaintiff knew or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor - not when a full-blown theory of recovery is developed. *Christensen v. Mitell*, 324 S.C. 70, 476 S.E.2d (1996).

The South Carolina Supreme Court has defined "reasonable diligence" as follows:

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

Mitchell v. Holler, 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993), (citing *Snell v. Columbia Gum Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)). The test of whether a person should have known the operative facts is objective rather than subjective. *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 99 (1995).

In the present case, Defendant David Brown represented Dr. Epstein in a medical malpractice case in which a jury returned a verdict in excess of six million dollars. The verdicts were rendered on February 18 and 19, 1998.

An analysis of the allegations of the Complaint shows that Dr. Epstein and the Institute knew or should have known of a possible claim against David Brown by February 18, 1998. It is important to remember that, under the law relating to limitations of actions, the limitations period began to run when Dr. Epstein knew or should have known that he *might* have some claim against

Brown, not when he knew the full extent of his claims. See *Bunkley v. Burry*, Opinion No. 3558 (S.C. Ct. App. filed October 28, 2002) (citing *Dorman v. Campbell*, 331 S.C. 129, 500 S.E.2d (Ct. App. 1998)). Thus, to establish the bar of the statute of limitations, Brown need only show that Epstein knew or should have known of one alleged error or omission by Brown that might have contributed to some injury to him. Most of the negligent acts or omissions alleged in the complaint necessarily occurred prior to or during trial. These include, for example, failing to conduct an adequate investigation; failing to advise Epstein to settle and failing to pursue settlement; failing to keep Epstein adequately informed during the pendency of the case; representing multiple defendants with conflicts of interest; adopting a substantive defense that was contrary to Epstein's own medical opinions; and forgetting to call expert witnesses. Dr. Epstein, by his attendance at trial, knew or should have known by the exercise of reasonable diligence of some if not all of the allegations of negligence or breach of fiduciary duty. Plaintiffs' counsel conceded during oral argument that Dr. Epstein had concerns during trial about how the trial was handled.

Plaintiffs allege that their damages included "severe injury and damage, including but not limited to great financial losses and significant damage to professional reputation." In their proposed Second Amended Complaint, they would allege damage of "severe emotional distress." The alleged damages stem from the adverse jury verdict. The verdict itself was ultimately paid by Dr. Epstein's malpractice carrier. The damages alleged by Dr. Epstein are due to the effect that the publicity of a multimillion-dollar verdict had on his reputation. Importantly, a reversal of the jury verdict by an appellate court could never wholly eliminate the effects of this publicity. The injury, therefore, began on the date of the jury verdict, February 18, 1998. Plaintiff conceded at oral argument that Dr. Epstein suffered injury when the jury returned its verdicts, but he argues that he was not aware of the causal link between the alleged negligence and the jury verdicts. This argument is not persuasive under existing case law. As stated in *Mitchell Holler*, "a party must act with some promptness where the factual circumstances of an injury would put a person of common knowledge and experience on notice that a claim might exist." 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993) (emphasis added). Knowledge of all the evidence supporting every element of a cause of action is not required. In the present case, Plaintiffs' acknowledged awareness of alleged negligent conduct, combined with significant evidence of injury in the form of a substantial jury verdict, were, without question, sufficient facts to put Dr. Epstein on notice of a potential claim.

Plaintiffs also argue that the statute of limitations does not begin to run until the appeals process was completed because David Brown remained an attorney-of-record. This argument is in direct conflict with existing case law that holds that South Carolina does not recognize the continuous representation rule. See *Holy Loch Distributors v. Hitchcock*, 322 S.C. 247, 503 S.E.2d 787 (S.C. App. 1998), rev'd on other grounds, 340 S.C. 20, 531 S.E.2d 282 (2000) citing *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) and *Preer v. Mims*, 323 S.C. 516, 476 S.E.2d 472 (1996). Plaintiffs' similar argument, that the statute of limitations is tolled by the appeal, must fail because the damages, as alleged by Plaintiffs, cannot be undone by the appeals process. The rule that Plaintiffs advocate is recognized only in a minority of jurisdictions. See 2 Mallen & Smith, *Legal Malpractice* (5th Ed.) §21.11 (1996 Supp. pp. 802-803). Application of this rule in this case would be irreconcilable with our appellate courts' rigorous adherence to the discovery rule in professional liability cases.

Finally, Plaintiffs assert that the Defendant should be estopped to assert the statute of limitations. The Plaintiff relies upon a line of cases represented by *Hedgepath v. American Telephone and Telegraph Co.*, 348 S.C. 340, 539 S.E.2d 327 (S.C. App. 2001). *Dillon County School District v. Lewis Metal Works*, 286 S.C. 207, 332 S.E. 2d 555 (S.C. App. 1985), and *Brown v. Pearson*, 326 S.C. 409, 483 S.E. 2d 477 (S.C. App. 1997). Under certain circumstances, when a defendant has induced the plaintiff into delaying filing suit until after the statute of limitations has run, the defendant may be estopped from asserting the statute as a defense. "The conduct may involve either inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit or inducing the plaintiff in some other way to forbear exercising his right to sue." *Dillon County*, supra, 332 S.E. 2d at 561. The conduct warranting estoppel can be affirmative representations, or it can be silence in the face of a duty to speak or disclose. *Hedgepath*, supra, 539 S.E. 2d at 339. In this case Dr. Epstein does not allege any conduct on the part of Brown that will support a claim of estoppel. He does not claim that, prior to June 13, 2001, he and Brown had any discussions whatsoever about whether Epstein should file suit. Epstein instead alleges that Brown concealed his negligence by blaming the bad trial outcome on the judge and the jury, by continuing to represent Epstein after the trial, and by assuring Epstein that he would win on appeal. None of this conduct, if proved, would estop Brown from asserting the statute of limitations. As explained above, Dr. Epstein was on actual notice of Brown's conduct before and during trial, and he suffered unmistakable injury as soon

as the jury returned its verdicts. That injury could have been mitigated by a favorable outcome on appeal, but it could not have been eliminated. Thus, nothing that Brown might have said or not said after trial could have negated the notice that Epstein had that he might have a claim against Brown for professional malpractice.

MOTION TO AMEND

Prior to the hearing on this matter, Plaintiffs moved to amend their Complaint to include new allegations, new causes of action for conspiracy and for spoliation of evidence, and a new defendant, Dr. Epstein's medical malpractice insurer. Plaintiffs conceded during the motions hearing that if summary judgment is granted, the Motion to Amend would become moot. The motion to amend was, therefore, not argued. It does now become moot.

Based upon the foregoing, the Court ORDERS, ADJUDGES AND DECREES that the Defendant's Motion for Summary judgment is GRANTED; and, as a result, Plaintiffs' claims are dismissed with prejudice.

AND IT IS SO ORDERED.

<<signature>>

Judge James C. Williams, Jr.

Feb 19, 2003

Orangeburg, SC

Footnotes

- 1 On November 22, 2002, the Court received a letter written by Dr. Franklin Epstein. This letter was not considered by the Court in reaching this decision. Counsel for the parties were promptly notified of the communication.
- 2 *Mills v Killian*, 273 S.C. 66, 254 S.E.2d 556 (1979); *Santee Portland Cement Co v Daniel International Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989); S.C. Code Ann. §15-3-535 (Supp. 2001).

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2002 WL 34459537 (S.C.Com.Pl.) (Trial Motion, Memorandum and Affidavit)
Court of Common Pleas of South Carolina.
Aiken County

Franklin M. EPSTEIN, M.D. and Southern Neurological Institute, Plaintiffs,

v.

David A. BROWN, Esquire, Defendant.

No. 02-CP-02-14.
November 18, 2002.

Memorandum of Law

Barnwell Whaley Patterson & Helms, LLC, M. Dawes Cooke, Jr., P. Gunnar Nistad, P.O. Drawer H, Charleston, SC 29402, (843) 577-7700, Attorneys For the Defendant.

Defendant David A. Brown, Esquire respectfully submits this Memorandum of Law in Support of his Amended Motion for Summary Judgment.

SUMMARY OF ARGUMENT

The statute of limitations issues in this case can be summed up very simply. Dr. Epstein claims that Mr. Brown mishandled the defense of a medical malpractice suit against him, resulting in a multi-million dollar verdict. That verdict allegedly caused Dr. Epstein "severe injury and damage, including but not limited to great financial losses and significant damage to professional reputation".¹ Dr. Epstein's alleged damages commenced on February 18, 1998, the day that the jury awarded its first verdict against him.² Dr. Epstein was undeniably aware of the verdict as soon as it occurred. He was also aware of at least some of the errors that he now alleges that Brown committed: adopting a substantive defense that was contrary to Dr. Epstein's own medical opinions; forgetting to call witnesses; representing multiple defendants; failing to keep Dr. Epstein informed of the progress of the case; and failing to recommend settlement, as a few examples (cited *infra* at pp. 5-7.). Thus, by February 18, 1998 Epstein was aware of all of the elements of his alleged cause of action against Brown. He was therefore obliged to bring this suit, if at all, by February 18, 2001. He did not do so, so the suit is barred by the statute of limitations. There are no material issues of fact for a jury to resolve.

FACTS

Defendant David A. Brown is an attorney licensed in the State of South Carolina and practicing in Aiken, South Carolina. Plaintiff Franklin Epstein, M.D. is a physician licensed to practice medicine in South Carolina and specializing in neurosurgery. Plaintiff Southern Neurological Institute is Dr. Epstein's practice.

On February 22, 1996, Dr. Epstein undertook the treatment of Mr. Marshall O. Welch, Jr., performing spinal surgery in an effort to alleviate back pain. During the post-operative recovery, Mr. Welch encountered several complications and, as a result, passed away on February 29, 1996. Thereafter, Mr. Welch's widow filed a lawsuit against Dr. Epstein, Southern Neurological Institute, and several other Defendants, alleging negligence in the care and treatment of her husband.

Defendant David Brown was hired by Dr. Epstein's malpractice insurer to defend Dr. Epstein and his practice. In February of 1998, the case was tried in front of the Honorable William P. Keesley in Aiken County. Defendant Dr. Epstein attended and testified at trial (See Affidavit of David Brown at Exhibit "A" and transcript of Dr. Epstein at Exhibit "B").³ On February 18, 1998 the jury returned a verdict against Dr. Epstein and his practice, awarding \$3 million in damages for the Wrongful Death claim and \$28,535.88 for the Survival claim. (Exhibit "C"). On February 19, 1998, the jury returned a verdict against Dr. Epstein for punitive damages in the amount of \$3 million. (Exhibit "D").

Judge Keesley denied post-trial motions. Thereafter, Dr. Epstein filed an appeal. Dr. Epstein was represented on appeal by Stephen Groves, John Hamilton Smith, and Steve Brown of Young Clement Rivers & Tisdale (Deposition of David Brown attached as Exhibit "E"). The judgments were affirmed by the Court of Appeals on July 31, 2000 in the opinion *Welch v. Epstein*, 342, S.C. 279, 536 S.E.2d 408 (2000).

On or about June 13, 2001, Dr. Epstein's present counsel spoke with a representative of Brown's professional liability insurance carrier, and they agreed in principle to toll the statute for a period of time while counsel investigated the case. Brown denies ever reaching agreement on all terms. Drafts of an agreement were exchanged between counsel for Epstein and for Brown, but none was ever signed. Nevertheless, for purposes of this motion it will be assumed that the statute of limitations was tolled on June 13, 2001. The Court need not decide the effect of counsel's discussions with Brown's insurer and attorney.

Plaintiffs filed the Complaint in the present action on January 9, 2002. (Exhibit "F"). David Brown was served with the Summons and Complaint on January 10, 2002, via certified mail. (Exhibit "G"). The Complaint alleges three causes of action against Mr. Brown: breach of fiduciary duty, negligence, and breach of contract.⁴ Defendant Brown contends that Plaintiff has failed to commence this lawsuit within the period prescribed by law.

STANDARD FOR SUMMARY JUDGMENT

Summary Judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Hunt v. Happy Valley Ltd. Partnership*, 434 S.E.2d 285 (Ct. App. 1993). In ruling upon a motion for summary judgment, the trial judge must view all of the facts and reasonable inferences in the light most favorable to the non-moving party, however, the trial court is not required to single out "some one morsel" of evidence to create an issue of fact that is not genuine. *Enghert, Inc. v. Netherlands Ins. Co.*, 433 S.E.2d 871 (S.C. App. 1993).

Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ. It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984). The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine. *Id.* 316 S.E.2d at 407.

Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990).

LEGAL ARGUMENT AND ANALYSIS

Plaintiffs failed to commence this lawsuit against David Brown within the statute of limitations. The statute of limitations for bringing legal malpractice claims, whether based on negligence or a breach of fiduciary duty, in South Carolina is three years. S.C. Code Ann. § 15-3-530(5) (Supp. 2001). The statute of limitations for bringing a contract action is also three years. S.C. Code Ann. § 15-3-530(1) (Supp. 2001). South Carolina has adopted the discovery rule for both professional negligence and contract actions.⁵ The discovery rule provides that the statute of limitations begins to run when the Plaintiff could or should

have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor - not when a full-blown theory of recovery is developed. *Christensen v. Mikell*, 324 SC 70, 476 S.E.2d (1996).

The South Carolina Supreme Court has defined "reasonable diligence" as follows:

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

Mitchell v. Holler, 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993), (citing *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)). The test of whether a person, should have known the operative facts is objective rather than subjective. *Kreitner v. David*, 320 S.C. 283, 465 S.E.2d 99 (1995).

In the present case. Defendant David Brown represented Dr. Epstein in a medical malpractice case in which a jury returned a verdict in excess of \$6 million dollars. This final verdict was rendered on February 19, 1998. (Exhibits "C" and "D"). Dr. Epstein claims that he has suffered emotional distress, loss of reputation, and financial loss as a result of Brown's errors and omissions leading to that verdict.

Dr. Epstein alleges in his Complaint that David Brown was negligent and/or breached his fiduciary duty in the following particulars:

The Defendant breached the duty of care expected of all attorneys under the same or similar circumstances, and breached his duty of care as an expert, and his fiduciary duty to the Plaintiffs, in one or more of the following particulars:

- a. In misrepresenting his skills regarding the defense of medical malpractice actions;
- b. In failing to conduct an adequate investigation regarding other persons involved in the care and treatment of Mr. Welch;
- c. In 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;
- d. In failing to pursue a reasonable settlement on behalf of the Plaintiffs;
- e. In forgetting to call expert witnesses to testify at trial on behalf of these Plaintiffs;
- f. In adopting and attempting to assert at trial a substantive defense that was contrary to the Plaintiffs' own medical opinions and contradictory to the medical record for Mr. Welch;
- g. In failing to pursue the workers' compensation defense;
- h. In failing to properly and effectively cross-examine witnesses who testified on behalf of Ms. Welch;
- i. In failing to pursue post-trial promises and responsibilities to the Plaintiffs;
- j. In failing to keep the Plaintiffs adequately informed during the pendency of the Welch case;
- k. In misrepresenting to the Plaintiffs their chances of success at trial;
- l. In misrepresenting to the Plaintiffs their chances of success after trial;

- m. In abandoning his post-trial obligations to the Plaintiffs;
- n. In not providing the Plaintiffs' file materials to the Plaintiffs, despite repeated requests;
- o. In failing to provide the Plaintiffs written disclosure regarding potential conflicts of interest between or among the various parties being represented simultaneously by Defendant in the underlying litigation;
- p. In failing to provide the Plaintiffs written disclosure regarding potentially divergent interests between or among the various parties being represented simultaneously by Defendant in the underlying litigation;
- q. In failing to provide the Plaintiffs oral disclosure regarding potential conflicts of interest between or among the various parties being represented simultaneously by Defendant in the underlying litigation;
- r. In failing to provide the Plaintiffs oral disclosure regarding potentially divergent interests between or among the various parties being represented simultaneously by Defendant in the underlying litigation;
- s. In failing to recommend to the Plaintiffs that they seek the advice of independent legal counsel;
- t. In failing to obtain from the Plaintiffs written consent after full disclosure of the Defendant's simultaneous representation of multiple parties in the underlying action;
- u. In failing to withdraw from representation when the interests of various defendants in the underlying action diverged;
- v. In failing to withdraw from representation when conflicts of interest developed between the Plaintiffs and other parties being represented simultaneously by the Defendant in the underlying action;
- w. By violating the Rules of Civil Professional Conduct promulgated by the State of South Carolina, including but not limited to Rule 1.7(a) by failing to disclose to these Plaintiffs the existence of or potential for direct conflicts of interest, and by failing to obtain these Plaintiffs' consent; Rule 1.7(b) by continuing to represent these Plaintiffs when the Defendant's representation of them was materially limited by the Defendant's responsibilities to other clients in the same action; and Rule 1.4 by failing to explain to these Plaintiffs the risks of multiple representation to the extent necessary to allow these Plaintiffs to make an informed decision regarding the representation;
- x. By continuing to represent the Plaintiffs during the existence of actual conflicts of interest with a reckless and wanton disregard for the Plaintiffs' interests; and
- y. In such other particulars as the evidence may establish at trial.

An analysis of the allegations of the Complaint shows that Dr. Epstein and the Institute knew or should have known of a possible claim against David Brown by February 18, 1996. In an attempt to be as thorough as possible, each of the categories of allegations of negligence and/or breach of fiduciary duty are discussed below, demonstrating that Dr. Epstein and the Institute knew or should have known of a possible claim against David Brown by February of 1996. It is important to remember that, under the law relating to limitations of actions, the limitations period began to run when Epstein knew or should have known that he *might* have some claim against Brown, not when he knew the full extent of his claims. See, *Binkley v. Burry*, Opinion No. 3558 (S.C. Ct. App. filed October 28, 2002) (citing *Dorman v. Campbell*, 331 S.C. 179 500 S.E. 2d 786 (Ct. App. 1998)). Thus, to establish the bar of the statute of limitations, Brown need only show that Epstein knew or should have known of *one* alleged error or omission by Brown that might have contributed to *some* injury to Epstein.

A. Misrepresentation of Skills

In Paragraph 34(c) of the Amended Complaint, Plaintiffs allege negligence "[i]n misrepresenting his skills regarding the defense of medical malpractice action." To satisfy elements of reliance and proximate cause, that alleged misrepresentation must have occurred prior to trial. See *AMA Management Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992). Dr. Epstein was present at trial and, as a result had the opportunity to directly observe David Brown's skill in preparing for a medical malpractice case and to directly observe his skill as a trial attorney. Dr. Epstein was also present when the jury read its verdict on February 18, 2002. With knowledge of the adverse verdict, Dr. Epstein clearly had sufficient information by which to form an impression of David Brown's skill regarding the defense of medical malpractice actions and was on notice that some claim against David Brown might exist.

B. Inadequate Investigation

In Paragraph 34(b) of the amended Complaint, Plaintiffs allege negligence "[i]n failing to conduct an adequate investigation...." As stated above, Dr. Epstein was present at trial. He certainly had the opportunity to observe the results of David Brown's investigation by observing the evidence presented to the jury. If Dr. Epstein knew of material evidence that was not presented to the jury, he would have known this by the close of evidence. Thus, Dr. Epstein was clearly on notice of a potential claim for an inadequate investigation when he lost the case.

C. Failing to Assert Claims

In Paragraph 34(c) of the Amended Complaint, Plaintiffs allege negligence "[i]n failing to assert claims and causes of actions against other parties...or third persons." Plaintiffs allege that David Brown represented Dr. Martin Greenberg, Dr. Douglas Holford, and Dr. William Duret as well as Dr. Epstein (Amended Complaint at Paragraph 11) (Exhibit H). Plaintiffs also allege that David Brown obtained dismissals or settlement on behalf of Dr. Holford and Dr. Duret prior to trial (Amended Complaint at Paragraph 18).⁶ Obviously, Dr. Epstein became aware of settlements and or dismissals by the time of trial, because these defendants did not go to trial. Dr. Epstein was also able to observe all the claims and defenses that were presented, by attending trial. If there was any failure to assert a claim or a cause of action, Dr. Epstein knew or should have known that by the close of evidence.

D. Failing to Pursue a Settlement

In Paragraph 34(d) of the Amended Complaint, Plaintiffs allege negligence "[i]n failing to pursue a reasonable settlement...." Plaintiffs also allege that David Brown was able to obtain settlements and/or dismissals of co-Defendants prior to trial. (Amended Complaint at Paragraph 18). Once again, Dr. Epstein knew or should have known about these settlements when the case went to trial without the co-Defendants. As soon as the verdict was rendered against him, Dr. Epstein should have also known that he had missed an opportunity to settle the case for an amount less than the verdict.

E. Witnesses

In Paragraph 34(e) of the Amended Complaint, Plaintiffs allege negligence "[i]n forgetting to call expert witnesses to testify at trial...." In Paragraph 34(h), Plaintiffs allege negligence "[i]n failing to properly and effectively cross-examine witnesses...." The analysis of these allegations is consistent with the previous arguments. Dr. Epstein attended trial. He observed the witnesses that were called to testify. He observed the direct and cross-examinations performed by David Brown. He knew many of the facts of the case as well as or better than David Brown, by the simple fact that his actions were the subject matter of the lawsuit. If a more effective cross-examination was possible, Dr. Epstein should have known or at least suspected - this by the close of evidence.

The same argument holds true for the allegation of forgetting to call experts. Dr. Epstein observed the trial and the expert testimony that was presented on his behalf. He, himself, qualifies as an expert on many of the medical issues that were relevant to this case. He therefore should have known of any expert witnesses or testimony that were omitted, by the close of evidence. Significantly, Dr. Epstein does not claim that he "discovered" Brown's failure to call witnesses only after the trial ended.

F. Defenses

In Paragraph 34(f), Plaintiffs allege negligence "[i]n adopting and attempting to assert at trial a substantive defense that was contrary to the Plaintiffs' own medical opinions...." In Paragraph 34(g) of the Amended Complaint, Plaintiffs allege negligence "[i]n failing to pursue a workers' compensation defense." Ignoring the fact that the workers compensation defense was not viable because Mr. Welch was not injured in the scope and course of his employment, if Dr. Epstein thought that this defense should have been pursued, he certainly would have known by the close of evidence that it was not being pursued. Furthermore, 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 would have known the defenses asserted by David Brown were contrary to his own opinions; indeed, the Complaint expressly allege as much. This allegation, perhaps more than any other, removes any possibility that Dr. Epstein did not or could not reasonably discover, at the time of trial, that he might have a claim against Mr. Brown.

G. The Appeal

In Paragraph 34(i), Plaintiffs allege negligence "[i]n failing to pursue post trial promises and responsibilities." In Paragraph 34(m) of the Amended Complaint, Plaintiffs allege negligence "[i]n abandoning... post-trial obligations." These allegations are the only allegations where the statute of limitations cannot be triggered by the verdict. These allegations, however, are merely part of the broader allegations of the Complaint because they are not alleged to have caused separate injury. As the Court stated in *Mitchell v. Holler, Supra*, a full blown theory "of recovery "need not be developed for the statute of limitations be triggered. 311 S.C. at 409, 429 S.E.2d at 795. Furthermore, once the statute of limitations begins to run, it runs for all actions related to a particular injury. " '[T]he statute [of limitations] runs from the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence.' " *Tollison v. B.J. Machinery Co.*, 812 F. Supp 618, 620 (D.S.C. 1993). (quoting *Dillon County Sch. Dist. Number Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 215, 332 S.E.2d 555, 559 (Ct. App. 1985)). It should be noted that Dr. Epstein's insurance carrier paid the judgment, so the gravamen of this suit is emotional distress and damage to his reputation from the verdict. Nothing that occurred during the appeal process could have eliminated the harm that Epstein claims in this suit. Moreover, Dr. Epstein has offered no evidence that the appeal was in any way mishandled or that he would have prevailed had the appeal (which was prosecuted by a different law firm) been handled differently.

H. File Materials

In Paragraph 34(n), Plaintiffs allege negligence "[i]n not providing the Plaintiffs' file materials..." They also now seek to amend their Complaint to include a cause of action for spoliation of evidence. These claims derive from the fact that Mr. Brown retains only an electronic version of his files once a case is closed. Plaintiffs' counsel have, since filing this suit, complained about not having access to a paper file. Epstein does not allege that he ever requested his file before the end of the trial, and he doesn't allege that Brown's failure to give him his file caused him to lose the case. Assuming that it is grounds for negligence, Plaintiffs' first request for his file from Mr. Brown occurred after the statute of limitations had already expired. (See Exhibit "T"). Furthermore, even if Mr. Brown did not respond to Plaintiffs' requests immediately, Plaintiffs could have obtained a copy of the relevant file material from Young Clement Rivers & Tisdale (who handled the appeal) at any point after the case was transformed for the purposes of the appeal. The statute of limitations demands diligence. Plaintiffs' inability to obtain a paper file has absolutely nothing to do with the running of the statute of limitations in this case.⁷

I. Conflicts of Interest

In Paragraphs 34(o), (p), (q), (r), (s), (t), (u), (v), (w), and (x), Plaintiffs allege negligence in various forms related to an allegation of an impermissible conflict of interest. Once again, Plaintiffs should have known of a possible claim prior to trial if not by the verdict. David Brown represented Plaintiffs as well as Dr. Greenberg, Dr. Duret, and Dr. Holford from the beginning of the case. Any conflict of interest that existed would have been exposed to Plaintiffs as different co-Defendants were dismissed from the underlying case, because Dr. Epstein has, from the outset, obviously believed that responsibility for Mr. Welch's death belongs to anyone but himself.

J. Continuous Representation

Dr. Epstein relies exclusively upon the continuous representation doctrine to avoid the statute of limitations bar. He claims that he continued to rely upon Mr. Brown as his attorney right up until February, 2001 when the Supreme Court denied certiorari in his appeal. He states as follows:

At all times from the latter part of 1996 when I was first contacted by the Defendant, until late January or early February of 2001 when I learned about the decision of the Supreme Court, the Defendant was representing me and SNI as our lawyer in the *Welch* case. We relied upon the Defendant to represent us throughout that time, and to do the things he promised he would do on our behalf. Although several attorneys from Charleston, South Carolina got involved in representing us on the appeal, the Defendant remained our attorney. (Affidavit of Franklin M. Epstein, Paragraph 9).

In their Brief the Plaintiffs state that they "had absolutely no knowledge of any facts which would have reasonably put them on notice of the existence of a cause of action against the Defendant prior to January of 2001. In fact, it was not until the Supreme Court denied cert in January 2001 that the Plaintiffs became concerned that the Defendant might have committed malpractice, and stopped relying upon him to protect their best interests." (Response Memorandum of Law and Brief in Opposition to Defendant's Motion for Summary Judgment, p.10). As will be discussed below, these representations are legally irrelevant because South Carolina law does not follow the continuous representation rule. However, it is worth noting at the outset that these representations are also false. In November 1999 Dr. Epstein wrote a letter to Stephen Groves of Young Clement Rivers & Tisdale, who was handling the appeal for Epstein. In that letter he stated, among other things, "since I will not deal with Mr. David Brown, who do I view as the attorney representing my interests in this appeal?" Further, "since I believe that my representation was so egregiously lacking, why is it not possible for any further presentations of fact, as opposed to the legal contrivances of the court case, to be presented to the Court of Appeals? Do the judges sitting on the Court of Appeals view it as a descent into vulgarity to have to confront the Defendant himself bringing the appeal?" Dr. Epstein concluded, "the result of this judgment has led to five more lawsuits served on me by Mr. Early. Each of these lawsuits have also been presented to the newspapers in Aiken and Augusta prior to my being formally presented with papers. The result of this endless barrage of damaging and humiliating stories in the press by both sides of the Savannah River has led to a nearly wholesale destruction of my referral practice. What remedies may I seek, Mr. Groves, and who must I turn to for representation?" (Exhibit K). Notwithstanding that Mr. Brown was never formally relieved as counsel for the Plaintiffs, it is disingenuous for them now to claim that they continued to rely upon him throughout the appeal. Mr. Brown's time records, which he discussed in his deposition in this case, reflect only five entries for Mr. Brown after June 13, 1998 (the latest date that the statute of limitations could possibly have begun to run in order for this suit to be timely): On June 29, 1998 Mr. Brown received the trial transcript and the Notice of Appeal and wrote a letter to the insurance company and to Mr. Smith, appellate counsel. On July 6 he received correspondence with the Court, had a telephone conversation with Mr. Early (counsel for the Welch family) and Mr. Smith, and wrote a letter to the Court. On July 13 he had a telephone conversation with Norma Je?? (an associate of Mr. Early) and the Court, had a call to Mr. Smith, and wrote a letter to the Court. On July 21 he had a telephone conversation with Mr. Smith and "Browers" regarding the transcript. Finally, on July 30 he accompanied Dr. Epstein to a meeting regarding his hospital privileges. (Exhibit

L). Nothing in the Plaintiffs' Complaint alleges any negligence in the performance of these ministerial duties, and certainly they had no bearing on the outcome of the case or on the damages that the Plaintiffs now claim Mr. Brown caused them.

Even if Dr. Epstein's claim of continued representation by Mr. Brown were factually true, it would be irrelevant. Most of the Plaintiffs' Brief, including the Affidavit of Desa Ballard and the Affidavit of Dr. Epstein submitted in opposition to summary judgment, are devoted to proving that as a matter of law Mr. Brown remained counsel of record for the Plaintiffs herein throughout the pendency of the appeal. This "continued representation" does not toll the statute of limitations. South Carolina law applies the discovery rule rather than the continuous representation rule for commencing the running of the statute of limitations in professional liability cases. In *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996), the Supreme Court rejected application of the continuous treatment rule in medical malpractice cases. The Court stated, "many states have adopted some version of the continuous treatment rule. However, most Courts will not apply the rule to toll the running of a statute of limitations if before treatment ends the patient discovers or should have discovered the injury giving rise to the cause of action. [citations omitted] Were we to adopt the continuous treatment rule in this state, we would be inclined to conform with the majority of jurisdictions in limiting its application in the matter described above." 232 S.C. at 525. In *Holy Loch Distributors v. Hitchcock*, 322 S.C. 247, 503 S.E.2d 787 (S.C. App. 1998), reversed on other grounds, 340 S.C. 20, 531 S.E.2d 282 (2000), the Court of Appeals applied the same reasoning in rejecting the continuous representation rule in legal malpractice actions. The Court instead applied the discovery rule generally applicable to professional liability actions. The Court referred to its earlier decision in *Dillon County School District No. 2*, 286 S.C. 207, 332 S.E.2d 555 (S.C. App. 1985) (a case involving repeated efforts to repair a defective roof) and observed, "in *Dillon* we doubted our Supreme Court would apply the [continuous treatment] rule, especially since the discovery rule is applicable in South Carolina and is itself an exception to the traditional rule of accrual. *Id.* at 216-17, 332 S.E.2d at 560. Our Supreme Court has since considered the rule in several medical malpractice cases but declined to apply it where the application of the discovery rule served to bar the Plaintiff's action. See, e.g., *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996); *Preer v. Mims*, 323 S.C. 516 476 S.E.2d 472 [1996]. "We decline to apply this rule." 332 S.C. at 258. Thus, the statute of limitations begins to run not when the relationship between the parties ended, but when the Plaintiff knew or reasonably should have known that he might have a claim against the Defendant.

As a corollary to the continuous representation rule, the Plaintiffs urge this Court to adopt a rule followed in a few Courts, that the statute of limitations in claims arising out of litigation matters does not begin to run until the judgment becomes final, i.e. when all appeals have been exhausted (Response Memorandum of Law and Brief in Opposition to Defendant's Motion for Summary Judgment, p. 9). This is a distinctly minority rule, and it runs counter to the South Carolina courts' rejection of the continuous representation rule in favor of the discovery rule. Plaintiffs cite the authoritative treatise *Legal Malpractice* by Mallen and Smith (Memorandum at 9) for the proposition that "in a discovery rule jurisdiction [like South Carolina], rarely would the client be charged with knowledge of a legal malpractice cause of action if an essential element of the cause of action appears to be missing." However, the Plaintiffs fail to disclose what Mallen and Smith have to say about the specific issue of the effect of an appeal on the running of the statute of limitations:

What is the effect of subsequent events, such as an appeal, which can undo an adverse result? The client who has suffered an adverse result because of the lawyer's negligence has both knowledge of the negligence and present damages. The damages remain if there is no post-judgment relief. An injury does not disappear or become suspended while a more final adjudication of the result is sought. On the other hand, success can reveal that there was judicial error, and reverse or minimize the adverse result. Although there is jurisdictional meconsistency, most courts have concluded that a cause of action for presently identifiable damages is not tolled pending an appeal or motion by the injured party." 2 Mallen and Smith, *Legal Malpractice* (47th Ed.) §21.11 (1996 Supp. pp. 802-803) (attached).

The affirmance of the judgment in this case was virtually irrelevant to the claims now asserted by Dr. Epstein. He claims that he suffered emotional distress, injury to his reputation, and financial loss. His insurance carrier paid the judgment; thus, the damages for which he seeks recovery in this action began when the jury rendered its verdicts on February 18 and 19, 1998. At least some, if not all, of the alleged errors and omissions of Mr. Brown were well known to Dr. Epstein before and during the

trial. Thus, he was on notice at that time that he might have a claim against Mr. Brown, and his duty to exercise reasonable diligence began then. Under the settled South Carolina jurisprudence discussed above, it is immaterial whether Epstein suffered additional damages later or discovered other evidence of Brown's alleged negligence. He had three years to put his case together and file suit, but he did not do so.

MOTION TO AMEND

Plaintiffs have recently moved to amend their Complaint to include new allegations, new causes of action, and a new defendant, Epstein's medical malpractice insurer. These new claims would be time-barred, just as the existing claims are. The proposed amendment should be denied as futile. It should also be denied as untimely. On July 27, 2002 Judge Peebles entered an Order giving Plaintiffs until August 1 to amend their Complaint. (Exhibit M). They did amend the Complaint, but they did not add the claims or the new party that they now seek to add. This motion for summary judgment has been pending since July 23, 2002. It would be unfairly prejudicial to permit amendment at this late date.

CONCLUSION

Based upon the foregoing, Defendant David A. Brown respectfully requests that the Court enter an Order granting Summary Judgment in his favor.

BARNWELL WHALEY PATTERSON & HELMS, LLC

<<signature>>

M. Dawes Cooke, Jr.

P. Gunnar Nistad

P.O. Drawer H

Charleston, SC 29402

(843) 577-7700

ATTORNEYS FOR THE DEFENDANT

Charleston, SC

November 18, 2002.

Footnotes

- 1 In his proposed Second Amended Complaint Dr. Epstein would change the alleged damage to "severe injury and damage, including but not limited to the extreme emotional distress suffered by Dr. Epstein, in sums exceeding One Million Dollars actual damage." (Paragraphs 35, 40).
- 2 The jury rendered its verdict for actual damages on February 18 and its award for punitive damages the next day, February 19.
- 3 The Court of Appeals, in its opinion affirming the verdict, quoted Dr. Epstein as testifying on cross-examination that he knew more about the drug Fentanyl than "people down here" and that "[t]his has been a recurrent theme to try to undercut me when I came here

because the Augusta physicians and Columbia physicians were practicing like Eisenhower was still in office." *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (S.C. App. 2000).

4 The proposed Second amended Complaint would add causes of action for spoliation of evidence and civil conspiracy with Epstein's malpractice insurer.

5 *Mills v. Killian*, 273 S.C. 66, 254 S.E.2d 556 (1979); *Santee Portland Cement Co. v. Daniel International Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989); S.C. Code Ann. § 15-3-535 (Supp. 2001).

6 The Complaint is curiously vague as to how Brown's representation of the Epstein's colleagues injured him, but of course we must assume for the sake of this motion that it did.

7 Plaintiffs' claim to have learned only on October 8 of Mr. Brown's file retention policy is curious, given that his lawyer was told about it over a year ago. (See correspondence, Exhibit J).

End of Document

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EXHIBIT B

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

STOKES-CRAVEN HOLDING CORP)
d/b/a STOKES-CRAVEN FORD)

CASE NO. 2010-CP-14-457

Plaintiff)

vs.)

AFFIDAVIT OF DENNIS CRAVEN

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

Defendants)
_____)

1. My name is Dennis Craven and I am part owner and manager of Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford ("Stokes-Craven").
2. In February of 2003, I, on behalf of Stokes-Craven, hired the law firm Johnson, McKenzie & Robinson, LLC ("JMR") to defend Stokes-Craven against the claims made by Donald Austin and the lawsuit captioned, *Donald C. Austin v. Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford*, case no. 2004-CP-14-135. The firm designated Scott Robinson to be the primary lawyer on the case.
3. I had known and been friends with Scott Robinson for several years.
4. At the time of the suit filed by Austin, I had little to no experience with the legal system, personally or professionally. At the time of the *Austin* suit, Stokes-Craven had only been involved in one lawsuit, a sexual harassment complaint, which was dismissed after Stokes-Craven agreed to implement sexual harassment training.
5. The first time I ever stepped into a courtroom was the first day of the *Austin* trial.
6. At the time of the *Austin* trial and for years after, I was unaware of what a competent lawyer would do to prepare a case like *Austin v. Stokes-Craven* for trial and assumed Mr. Robinson had done all the things he was supposed to do to adequately prepare the case.

7. I was not, and am not knowledgeable about trial procedures, evidentiary objections, preserving issues for appeal, making motions before the Court, and I did not know that Mr. Robinson made any error in the preparation of the *Austin* case or in any facet of the case or its trial.
8. I was surprised by the large verdict against Stokes-Craven, but I did not believe at the time that the large verdict was the result of any error made by Mr. Robinson. There was nothing that would indicate to me that Mr. Robinson had done anything wrong. Mr. Robinson explained to me it was a runaway jury.
9. After the verdict, I asked Mr. Robinson to bill Stokes-Craven for his work during and leading up to the trial and was issued a bill for \$5,600.00, which Stokes-Craven promptly paid.
10. I spoke to Mr. McKenzie and Mr. Robinson shortly after the trial, but neither of them had mentioned any mistakes made by Mr. Robinson. Our discussions were about getting the verdict reversed and filing an appeal. I hired Young Clement Rivers law firm as appellate counsel in consultation with Mr. Robinson.
11. The first time I became aware that Mr. Robinson may have made errors in preparing and trying the *Austin* case was at a meeting in June of 2009 with appellate counsel just before the Supreme Court arguments. Mr. Brown and Mr. Buckley, Stokes-Craven's lawyers in the appeal, 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. I never received copies of the briefs from either appellate counsel or Mr. Robinson and his firm. Mr. Robinson never talked to me about the briefs.
12. Mr. Robinson continued to be involved in the case throughout the appeal, and we rode to Columbia together for the oral arguments before the Supreme Court.
13. It was not until after the Supreme Court's opinion came out in March of 2010 and my discussions with my lawyers in this case that I understood Mr. Robinson's mistakes.

Dennis N. Craven

Dennis N. Craven

SWORN to before me this
6th day of January, 2013

Frank K. Samuels (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 12/5/2020

EXHIBIT C

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CLARENDON

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

Plaintiff,

vs.

CASE NO. 10-CP-14-457

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

Defendants.

DEPOSITION OF: SCOTT L. ROBINSON

DATE: MAY 26, 2011

TIME: 1:00 P.M.

LOCATION: CLARENDON COUNTY COURTHOUSE
3 W. Keitt Street
Grand Jury Room
Manning, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: G. MICHAEL ALEXANDER, Registered
Professional Reporter, CSR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFF
3 STOKES-CRAVEN HOLDING CORP
d/b/a STOKES-CRAVEN FORD:

4 ANDREW K. EPTING, JR., LLC
5 BY: ANDREW K. EPTING, JR.
3 State Street
6 Charleston, SC 29401
(843) 377-1871
ake@epting-law.com

7
8 ATTORNEYS FOR THE DEFENDANT
SCOTT L. ROBINSON:

9 PARKER POE ADAMS & BERNSTEIN, LLP
10 BY: SUSAN TAYLOR WALL
200 Meeting Street, Suite 301
11 Charleston, SC 29401
(843) 727-2640
susanwall@parkerpoe.com

12
13 ATTORNEYS FOR THE DEFENDANT
JOHNSON MCKENZIE & ROBINSON:

14 BRUNER POWELL WALL & MULLINS, LLC
15 BY: WARREN C. POWELL, JR.
1735 St. Julian Place, Suite 200
16 Columbia, SC 29260
(803) 254-5719
wpowell@brunerpowell.com

17 ALSO PRESENT:

18 DENNIS CRAVEN
19 RHONDA MCCREW

20

21

22

(INDEX AT REAR OF TRANSCRIPT)

23

24

25

1 STIPULATION

2 It is stipulated by and among
3 Counsel that this deposition is being taken in
4 accordance with the South Carolina Rules of Civil
5 Procedure, Rule 30; that all objections as to
6 Notice of this deposition are hereby waived; that
7 all objections except as to form are reserved
8 until the time of trial; and that the deponent
9 does not waive reading and signing of this
10 deposition.

11 * * * * * * * *

12 SCOTT L. ROBINSON

13 being first duly sworn, testified as follows:

14 MR. EPTING: This is going to be 1 and
15 2 to Mr. Robinson's deposition which is the
16 30(b)(6) notice and his personal deposition. You
17 can mark those as 1 and 2 to his deposition.

18 (PLF. EXH. 1, Amended Notice of Taking
19 30(b)(6) Deposition of Johnson McKenzie &
20 Robinson, LLC, was marked for identification.)

21 (PLF. EXH. 2, Amended Notice of Taking
22 Deposition of Scott L. Robinson, was marked for
23 identification.)

24 EXAMINATION

25 BY MR. EPTING:

1 Q. Mr. Robinson, let me show you what has
2 previously been marked as Exhibits 1 and 2 to
3 your deposition. I will tell you there are later
4 versions of these, but it only changes the
5 address, and just ask you if you're appearing
6 here in your individual name as well as the
7 30(b)(6) of Johnson McKenzie and Robinson?

8 A. I am.

9 Q. Okay. Tell me a little bit about
10 yourself.

11 A. I'm 40 years old, married, got two
12 kids. Grew up in Clarendon County. Went to a
13 small private school, called Salem, through the
14 tenth grade. It closed. Graduated from Lawrence
15 Manor, which is right here in Manning. Went to
16 Newberry for my undergrad, and then Carolina to
17 law school, and been practicing in Manning ever
18 since.

19 Q. And when you first came to Manning who
20 did you work for?

21 A. I worked for Tommy Geddings. I
22 practiced with him for I think it was about 13
23 months.

24 Left there and went to work with
25 Ferrell Cothrin, practiced with him for a little

1 better than three years.

2 And then went with Johnson McKenzie
3 and Robinson, I think it was May of 2000 up until
4 May of 2010 when I started with what is now
5 Coffee Chandler and McKenzie.

6 Q. When you were with Mr. Geddings, what
7 kind of work did y'all do?

8 A. Small town general practice of law.
9 Family court, personal injury, real estate, that
10 kind of stuff.

11 Q. And you left Mr. Geddings and went
12 where?

13 A. It became Cothrin and Robinson. It is
14 Judge Cothrin now. It was Cothrin Law Firm. It
15 later changed to Cothrin and Robinson.

16 Q. You said you were there about three
17 years?

18 A. A little over three years.

19 Q. What sort of work were you doing
20 there?

21 A. Same kind of work, small town general
22 practice.

23 Q. Let's just go forward to when you
24 started with Johnson McKenzie and Robinson.

25 A. Okay.

1 Q. During the time you were there how
2 would you characterize your practice in terms of
3 the amount of time that you spent in various
4 subject matters?

5 A. Criminal, obviously, I'm trying to
6 remember whether it was 2001, 2001 that I took
7 the part-time position with the public defender's
8 office. Ferrell, when I practiced law with him,
9 was a solicitor, and so I could not take criminal
10 cases. I had handled a couple prior to that,
11 when I was with Mr. Geddings, and so we decided
12 in order to get some good experience, there were
13 lots of criminal cases, that I would do the
14 part-time public defender job. So that was
15 probably a third of my practice. Family court
16 was a third. And then the other third was a
17 mixture of real estate, probate, and just general
18 litigation of different kinds.

19 Q. How much of your work in this period
20 2003, '4, '5, was civil litigation?

21 A. That's hard to put a number and a
22 percentage on. I really don't know. Because if
23 you have to start backing up and thinking claim,
24 and delivery, magistrate's court, all those.
25 It's hard to put a number on it.

1 Q. How much of your work was in the court
2 of common pleas in civil litigation?

3 A. Again, it's difficult to put a number
4 on. I haven't tried a tremendous number of
5 cases. Some have been tried in front of a
6 master. And the majority of them obviously
7 settled. You know, I have had, I think during
8 that period of time, I think I probably had three
9 or four trials.

10 Q. Prior to 2006 how many civil trials
11 had you had?

12 A. Jury trials in common pleas court?

13 Q. Yes.

14 A. Two or three.

15 Q. And what were the nature of the cases?

16 A. One of them was a lawsuit brought by I
17 think it was a rental center out of Sumter
18 against a business here in town that had rented a
19 piece of equipment, and done some 24-plus
20 thousand dollars worth of damage to it, plus loss
21 of use, things of that nature. And I was
22 defending the business here in Manning.

23 One of them was a condemnation action,
24 a highway department condemnation action, where I
25 was representing the land owner.

1 And I think there was a construction
2 case where I represented the homeowner. It was a
3 mechanic's lien that spawned into a counterclaim,
4 that kind of thing.

5 Q. Had you ever had any experience with
6 what I'll call lemon law consumer transactions in
7 the civil litigation context prior to
8 Stokes-Craven?

9 MS. WALL: Object to the form.

10 THE WITNESS: Prior to this
11 Stokes-Craven case or any case of the
12 Stokes-Craven?

13 BY MR. EPTING:

14 Q. This case with Stokes-Craven.

15 A. I don't think I had had any in circuit
16 court, no. But I had had a number of them in
17 magistrate's court, and different places, but not
18 in circuit court.

19 Q. And when you say in magistrate's
20 court, tell me a little bit about what the nature
21 of those claims would be.

22 A. Some of them, same type situation.
23 You sold me a car, it wasn't painted right, or
24 there was something wrong with the paint, I want
25 you to fix it. I took it to your shop for

1 service work and you didn't fix it properly or
2 didn't fix the problem. Things of that nature.

3 Q. Had you handled any of those cases for
4 Stokes-Craven prior to taking on this assignment?

5 A. Oh, yes.

6 Q. And were they non-jury or jury?

7 A. I don't think we actually made it into
8 trial with any of them. We went to court a
9 couple of time. I think they were the equivalent
10 of summary judgment type stuff in magistrate's
11 court, but never actually had to try one prior to
12 this one.

13 Q. All right. Were some of them settled?

14 A. One that I can remember.

15 Q. Okay. In 2006 did you realize that in
16 order to make a JNOV motion you had to make a
17 directed verdict notion in a civil trial? Is
18 that something you knew?

19 A. Yes, sir.

20 Q. All right.. Did you know that for
21 there to be a punitive award there had to be an
22 actual damage award?

23 A. Yes, sir.

24 Q. And did you know that a vehicle, for
25 example this truck, that it was not competent

1 testimony that the vehicle was worth zero? Did
2 you know that?

3 A. Well, I believed that. I mean, you
4 know, that's for a judge or jury to decide, in my
5 opinion. But, certainly, I believed saying it
6 was worth nothing was not credible or competent.
7 That's why I asked them the questions about the
8 value and the use and things of that nature.

9 Q. Was it a conscious decision, if you
10 knew -- well, just to rephrase your answer. You
11 believe that that was not competent testimony of
12 value?

13 MS. WALL: Object to the form.

14 THE WITNESS: I didn't believe it was
15 credible for somebody to sit in there and say
16 that a vehicle had been used, and driven, and not
17 had any repairs to be made, other than 2- or
18 \$300, was worth nothing.

19 Whether it was competent, again, I
20 think that's a legal conclusion for the court to
21 draw. Now, I may be of the opinion that that's
22 not competent, but, you know, whether it be an
23 expert or an owner, they're allowed to testify as
24 to their opinion of value. And all I can do,
25 once they're qualified and allowed to do that, is

1 try to harm the credibility or bring out the
2 fallacy of that through cross-examination or
3 however else.

4 BY MR. EPTING:

5 Q. Were you aware in 2006 that there had
6 to be competent evidence of actual value in order
7 for the plaintiff to survive a directed verdict
8 motion? Did you know that?

9 MS. WALL: Object to the form.

10 THE WITNESS: I think there had to be
11 competent evidence of any matter, that somebody
12 has the burden of proof on, for them to survive a
13 directed verdict motion or anything of that
14 nature. Now, who decides what's competent,
15 again, that's up to the court to decide.

16 BY MR. EPTING:

17 Q. All right. Well, let's just stop
18 there and let me make sure I understood you.

19 I think you just told me that in order
20 to survive a directed verdict motion or a nonsuit
21 motion that there has to be competent evidence
22 for the various issues that need to be proven by
23 a plaintiff. True?

24 MS. WALL: Object to the form.

25 THE WITNESS: That they have to

1 introduce evidence, yes, to get past -- they have
2 to put in evidence of what they're claiming.

3 BY MR. EPTING:

4 Q. Right. And that evidence has to be
5 competent evidence.

6 A. And I guess, and I don't mean to be
7 coy, but struggling a bit with competent. I'm
8 assuming that if the court allows it in that they
9 have determined that it's competent evidence, and
10 then it's just a question of weight and
11 credibility for a jury at that point.

12 BY MR. EPTING:

13 Q. Well, for example, suppose there is no
14 evidence put in of value --

15 A. Okay.

16 Q. -- of a vehicle. And the trial is
17 about the damage done to the plaintiff. And
18 there is no testimony in the record that
19 establishes the value of the vehicle. I would
20 say that there's no competent evidence to
21 establish the amount of the plaintiff's damage
22 and, therefore, the plaintiff would be
23 non-suited. That's what I mean by competent
24 evidence.

25 A. Okay.

1 MS. WALL: Objection.

2 THE WITNESS: What it sounds like you
3 just said was there was no evidence. So if
4 there's no evidence there can't be any competent
5 evidence. If evidence comes in, and the court
6 allows evidence in, at that point the judge has
7 decided it's competent evidence. It then becomes
8 a question of weight.

9 MS. WALL: Objection.

10 BY MR. EPTING:

11 Q. If, in your view, or if there is in
12 competent evidence of the proof of some element
13 of the plaintiff's claim, do you understand or
14 did you understand then that the motion that you
15 would make would be to dismiss the plaintiff's
16 case for failure to offer evidence of value at
17 the directed verdict stage?

18 MS. WALL: Object to the form.

19 THE WITNESS: I don't know if I would
20 exactly phrase it that way, but that would be if
21 I win at the directed verdict stage the ultimate
22 outcome of that cause of action goes away, yes.

23 BY MR. EPTING:

24 Q. All right. Let me rephrase it again
25 to make sure we're on the same wavelength.

1 I'm leaving out the word competent.
2 I'm just saying to you did you understand, in
3 2006, that if the plaintiff had put in no value
4 of what the vehicle was worth, and was suing for
5 the value or the damage to the vehicle, that
6 without any proof of the value of the vehicle
7 that your motion would be for a directed verdict
8 for failure to offer evidence and that cause of
9 action would be dismissed.

10 A. That would be my hope that if they
11 didn't put in any testimony or evidence about the
12 value that it certainly would not survive a
13 directed verdict.

14 Q. All right. And you understood that if
15 there was no competent evidence of value in 2003
16 that your motion would be a directed verdict, on
17 the basis that there was no proof of value of the
18 vehicle, and you would ask that that cause of
19 action or that claim be dismissed

20 MS. WALL: Object to the form.

21 THE WITNESS: And I think you said
22 2003. You mean the trial in 2006?

23 BY MR. EPTING:

24 Q. 2006.

25 A. Right. I think I'm following the

1 question. If they don't put in any evidence, and
2 they rest their case, I make a directed verdict
3 motion, say, and that cause of action fails
4 because of no evidence as to damages. Yes.

5 Q. All right. And you, I think,
6 previously testified that if you didn't make the
7 motion at the directed verdict motion stage that
8 you couldn't make that notion at the JNOV stage
9 because you would have waived it by not making it
10 at the directed verdict stage. You understood
11 that in 2006?

12 A. Yes, I believe that's a correct
13 interpretation.

14 Q. All right. A correct interpretation
15 of the law?

16 A. Yes, sir.

17 Q. And you understood that.

18 A. Yes, sir.

19 Q. All right. Did you understand in 2006
20 that testimony that the vehicle was worth zero
21 was not competent --

22 MS. WALL: Object to the form.

23 BY MR. EPTING:

24 Q. -- evidence of value?

25 A. No. I don't understand that today.

1 Q. All right. Have you read the supreme
2 court opinion?

3 A. I have.

4 Q. All right. And are you aware that the
5 supreme court, we'll just keep it with Justice
6 Pleicones, said that testimony of a value of zero
7 is not competent evidence of value, and that had
8 a directed verdict motion been made that you
9 would have been entitled to have that motion
10 granted?

11 MS. WALL: Object to the form.

12 THE WITNESS: I don't believe that's
13 exactly what he -- I think my recollection is he
14 said that had that been preserved and objected to
15 that the case should have gone away. I don't
16 know that he specifically said that evidence of
17 zero is not competent evidence.

18 Q. All right. Let's look at the opinion
19 and we'll spend a few moments with it.

20 MS. WALL: Let me put on the record
21 that we're reserving our right under the rules to
22 discuss any documents with the witness since none
23 were designated prior to this deposition. Do you
24 have a copy for us?

25 MR. EPTING: This is one of the

1 documents, Susan, that I didn't look at it as a
2 piece of evidence or a document but the answer is
3 no.

4 MS. WALL: Well, hold on. No more
5 questions until I find it so I can follow what
6 you're doing.

7 MR. POWELL: Go off the record.

8 (A recess transpired.)

9 BY MR. EPTING:

10 Q. Turn to page 27 with me.

11 A. Okay.

12 Q. In the second column, the first full
13 paragraph, this is Pleicones. He says, I agree
14 with Austin that the issue whether Stokes-Craven
15 was entitled to --

16 A. Wait a minute. I'm sorry. I'm on
17 page 28 of the fax page.

18 Q. Now you've got it.

19 A. Sorry. Page 28 at the top.

20 Q. All right. It says I agree with
21 Austin that the issue whether Stokes-Craven was
22 entitled to a directed verdict, because Austin
23 offered no evidence of fair market value, is not
24 preserved for appeal, as his failure of proof was
25 not raised as a ground for a directed verdict.

1 Okay?

2 A. Uh-huh.

3 Q. What do you think that says?

4 MS. WALL: Object to the form.

5 THE WITNESS: I think it says what it
6 says. I mean, apparently, Austin, and its
7 belief or memo or whatever asserted that it was
8 not -- that that issue was not preserved and he
9 agreed.

10 BY MR. EPTING:

11 Q. But if the issue not preserved is that
12 no directed verdict motion was made on the basis
13 of there being no competent evidence of fair
14 market value, is that the way you read that?

15 MS. WALL: Object to the form.

16 THE WITNESS: It just says offered no
17 evidence of fair market value is not preserved.

18 BY MR. EPTING:

19 Q. All right. With that clarification do
20 you understand that to mean that there was no
21 directed motion made on the basis of there being
22 no evidence of fair market value and, therefore,
23 the issue is not preserved for appeal?

24 A. I understand that's what Justice
25 Pleicones is saying, yes.

1 Q. All right. And, then, if we go down
2 to the next sentence, do you understand that even
3 if it was raised at the JNOV stage, it's of no
4 effect, because it wasn't preserved at the
5 directed verdict stage.

6 A. Again, that is what Justice Pleicones
7 says, yes.

8 Q. And is that your understanding of the
9 law as well?

10 A. That if you don't raise an issue
11 initially that you can't raise it later, yes.

12 Q. All right. He then goes on to say,
13 moreover, since there was no contemporaneous
14 objection to the expert or the owner's testimony
15 that the truck had a value of zero, I agree there
16 was evidence of value for the jury's
17 consideration. What does that mean to you?

18 A. That the plaintiff, through two
19 witnesses, put in some evidence of value.

20 Q. And the value they put in was zero.

21 A. On their direct, yes.

22 Q. All right. Now, Al Cantrell, in
23 parenthesis he says evidence received without
24 objection becomes competent and cannot be
25 disregarded when considering the directed verdict

1 motion. What does that mean to you?

2 A. That he is of the opinion that if I
3 did not object and it came in that it was then
4 evidence to be considered.

5 Q. All right. And it said had the issue
6 been properly preserved, however, I would agree
7 that Austin failed to present any competent
8 evidence of the truck's fair market value which
9 is clearly more than zero. What do you think
10 he's saying there?

11 MS. WALL: Object to the form.

12 THE WITNESS: I think he's saying what
13 I agreed with. That there's no way that a
14 truck's worth zero.

15 BY MR. EPTING:

16 Q. But is he also saying that the issue
17 was not preserved?

18 A. He's apparently saying that that is
19 this opinion, that I did not properly preserve
20 that issue, yes.

21 Q. All right. And is he also saying that
22 in essence that because Austin had a value of
23 zero, and that was allowed in, that there was
24 competent evidence and, therefore, the verdict
25 would stand?

1 MS. WALL: Object to the form.

2 THE WITNESS: Which verdict? Are you
3 talking about the verdict in the entire case or
4 surviving the directed verdict motion?

5 BY MR. EPTING:

6 Q. Surviving the directed verdict motion.

7 A. I think he's saying that because that
8 testimony came in, they gave a value, they used
9 value, even though they said it has no value,
10 they talked about value, that that was some
11 evidence for the jury to consider. That that was
12 what they considered the value to be. That there
13 was some evidence for the jury to consider, which
14 gets you past directed verdict.

15 Q. All right. But does he also say in
16 this sentence, I would agree that Austin failed
17 to present any competent evidence of the truck's
18 market value?

19 A. He does say that.

20 MS. WALL: Object.

21 BY MR. EPTING:

22 Q. Which is clearly more than zero?

23 A. Which I agree with.

24 Q. All right. Did you have a trial
25 strategy of not preserving an issue or of not

1 preserving this issue that we've been discussing?

2 MS. WALL: Object to the form.

3 THE WITNESS: Obviously not. And it
4 is my understanding then and now, and I think
5 that holding in this particular case is that an
6 owner of property can testify about value. That
7 was my understanding then, regardless of what
8 their qualifications are, when they own a piece
9 of property they can testify about it.

10 Likewise, when the judge qualified
11 Morris as an expert, which I disagreed with, but
12 he did it anyway, once he's qualified as an
13 expert to give an opinion as to opinion of value,
14 he can give a value. And that's where we were
15 with that.

16 So, no. I mean I don't think there's
17 any way to object to evidence that the court and
18 the law say you can put in.

19 BY MR. EPTING:

20 Q. All right. But let me just ask you my
21 more limited question. I think you gave me an
22 answer. You had no deliberate trial strategy to
23 fail to object to something related to preserving
24 the ground for directed verdict or letting
25 evidence in that was incompetent.

1 MR. POWELL: Object to the form.

2 MS. WALL: Object to the form.

3 THE WITNESS: I certainly would have
4 not had a trial strategy to intentionally let in
5 evidence that was competent, incompetent, or
6 otherwise, evidence that was harmful. Again, my
7 understanding then and now is that an expert,
8 qualified to give an opinion as to value, can
9 give an opinion as to value. Whether I like that
10 opinion or not is for me to deal with otherwise.
11 The same thing with an owner of property. So,
12 no, there would be no intentional strategy to let
13 them get into evidence what they shouldn't get
14 in.

15 Q. And by the same token there would be
16 no deliberate strategy, if you realized there was
17 no competent evidence of value, to have omitted
18 making the directed verdict motion on that
19 ground.

20 MS. WALL: Object to the form.

21 THE WITNESS: I cannot recall cases
22 specifically where I would have intentionally not
23 argued, objected, or preserved something that I
24 thought was there to deal with, no.

25 BY MR. EPTING:

1 Q. All right. Tell me when this case
2 first came to you and what the circumstances were
3 as you recall it.

4 A. This lawsuit or the letter from Polito
5 or?

6 Q. The very beginning. Your first
7 contact with this event.

8 A. Whatever the date on the letter from
9 Polito is. I think that was sometime in early
10 2003. Sometime after that. I don't recall
11 exactly when it was.

12 MR. EPTING: Let's do this. Let's
13 mark this opinion as Exhibit 3. And I think the
14 reason I want to do it is I realize that Susan is
15 looking at a different printout and the page
16 numbers aren't the same. And that really was
17 sort of elusive to me. So why don't we mark this
18 as 3 and that way they'll both be able to follow
19 the page number in the record.

20 (PLF. EXH. 3, Opinion, was marked for
21 identification.)

22 MR. EPTING: If you would mark this
23 group of documents as Exhibit 4.

24 (PLF. EXH. 4, Group of documents, was
25 marked for identification.)

1 MR. EPTING: We're going to look at a
2 lot of documents. Why don't you put those some
3 place where you have access to them. Just put
4 them to one side or the other.

5 BY MR. EPTING:

6 Q. I'm going to represent to you,
7 Mr. Robinson, Exhibit 4 is Mr. Polito's letter of
8 February 18th, 2003, together with attachments.
9 But why don't you take a look at that and verify
10 that.

11 A. (Witness complies.) Okay. That
12 appears to be what it is.

13 Q. I'm not going to ask you a lot of
14 in-depth questions about this document.

15 A. Okay.

16 Q. Do you recall when you got this
17 document?

18 A. Obviously after Dennis got it but,
19 honestly, the specific date, no.

20 Q. All right. You wrote a letter within
21 a, I can tell you, let me show you --

22 MR. EPTING: We'll mark this as
23 Exhibit 5.

24 (PLF. EXH. 5, Letter dated 3/6/03, was
25 marked for identification.)

1 BY MR. EPTING:

2 Q. What is the date of your letter?

3 A. March 6th, apparently.

4 Q. So we can assume that you received
5 this somewhere after the 18th but before March
6 the 6th.

7 A. Or perhaps on March 6th. But, yes,
8 somewhere between those dates.

9 Q. And you note in your letter, which is
10 marked as Exhibit 5, that you have been given
11 Mr. Polito's letter and the exhibits.

12 A. Correct

13 Q. Do you recall what, if anything, you
14 did with these documents or with whom you might
15 have talked? And when I say these documents I
16 mean Exhibit 4.

17 A. Certainly with Dennis. Beyond that
18 I ... At that point in time I don't know that
19 I -- I can't recall specifically talking to
20 anybody else. I could have talked with Mr. Billy
21 or Barry or somebody but it would all have been
22 with Dennis present.

23 Q. All right. Do you recall anything
24 about the conversation with Dennis about this
25 document, Exhibit 4?

1 A. Just, you know, saying what do you
2 want me to do with it?

3 Q. And what did you understand him to
4 want to do with it?

5 A. That he basically had already made an
6 offer to Mr. Austin, and thought it was
7 reasonable, and he wasn't going to give them what
8 they were asking for.

9 Q. All right. So would that have been
10 before you wrote your letter of March the 6th?

11 A. He may -- it could have been. I mean
12 obviously what I wanted to do was talk more with
13 Dennis about it and make sure before they just
14 pulled it off the table. If it was a good offer
15 we needed some time to talk it. So I don't know
16 how long I had it and whether that
17 conversation -- I'm sure he gave me the letter
18 and I said what do you want me to do with this?
19 Get rid of this guy, make him go away, break it
20 off in him, something to that effect. But I
21 would certainly want to look at it and be sure
22 rather than just out of hand say, okay, fine,
23 I'll do whatever you say.

24 Q. When you read the letter, and you
25 looked at the attached exhibits, what impressions

1 did you have of the case or the claim?

2 A. That the facts weren't great at all.

3 I mean, you know -- and let me look in here and
4 see if they had it at that time. I knew -- I was
5 looking for the buyer's order where you could
6 look at it and clearly tell that the signatures
7 did not match.

8 Q. This is with regard to the warranty.

9 A. Right, yeah. I think.

10 Q. And you're referring to what number,
11 Bates?

12 A. YCR 548.

13 Q. And what about that troubled you?

14 A. The fact that obviously somebody other
15 than Donald Austin had signed a document saying
16 as is no warranty.

17 Q. How many years had you been
18 practicing, at this time, which would have been
19 2003?

20 A. Somewhere between seven and eight.

21 Q. What was your general feeling about
22 dealerships as defendants?

23 A. That they might have been, and I used
24 to joke with Dennis about it, that the only
25 people that people liked less than lawyers were

1 car dealers.

2 Q. So you get this and you realize that
3 there's no question this truck has been wrecked.

4 A. Based on that evidence, it appears,
5 yeah.

6 Q. Right. So that issue is out. You
7 look at the signatures, and you recognize that
8 the two signatures are not the same, and so you
9 understand that there's potential forgery.

10 A. Correct.

11 Q. And you understand that this is
12 against a not very popular class of defendant, a
13 car dealer.

14 A. Somebody that would certainly not be
15 sympathetic.

16 Q. All right. So would it be fair to
17 say, Mr. Robinson, that you regarded this case as
18 having some danger associated with it in the
19 hands of a jury?

20 A. I think I did. I told Dennis that. I
21 think Dennis knew that. I mean anybody that's
22 been in the car business more than a week or two
23 could probably look at, you know, knowing the
24 jokes, and the reality of how some car dealers
25 and salesmen, you know, just the general

1 reputation, would know that that's not a good
2 scenario.

3 Q. Okay. All right. So let me show you
4 this letter. Did you speak with Mr. Polito?

5 A. I honestly don't recall whether I
6 spoke with him on the phone, sent him a letter,
7 or just ignored him.

8 MR. EPTING: Let me give you this
9 letter, which is going to be Exhibit 6.

10 (PLF. EXH. 6, Letter dated 4/10/03,
11 was marked for identification.)

12 BY MR. EPTING:

13 Q. So you received this letter on April
14 the 10th.

15 A. Okay.

16 Q. Is it fair to say that from this
17 letter one would glean that Mr. Polito has not
18 heard from you?

19 A. Probably so, yes. Apparently so.

20 Q. All right. Is there any reason that,
21 as you sit here today, that you recall that you
22 did not respond to his letter of March 18, 2003?

23 A. The only reason I could give was that
24 that was what Dennis and I decided how we wanted
25 to deal with this particular case. Not to make

1 any offer, just to basically be indignant about
2 it. To say we're not even considering that.

3 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.

19 Q. Did you ever have occasion to put any
20 of this in writing?

21 A. No, sir.

22 Q. All right. I notice, for example,
23 looking at Exhibit 5, did you copy anybody with
24 Stokes-Craven?

25 A. Did I copy anybody at Stokes-Craven?

1 Q. Yes.

2 A. Obviously not by mail. Dennis and I,
3 we just didn't mail stuff. If he needed a copy
4 of something or if I had a copy I would generally
5 take it to him, the next time I was there, which
6 was very regularly. And most of the time his
7 response was for me to keep it in my file so he
8 would know where to find it. In other words he
9 didn't maintain voluminous separate files that
10 just had copies of what I had. I would keep it
11 at the office. We did that for lots of things,
12 real estate, corporate stuff.

13 Q. Did you have a problem with a lease of
14 Dennis's and not being able to find the lease?

15 A. A lease?

16 Q. Yes. Do you remember anything about
17 that?

18 A. Where I leased a vehicle from Dennis?

19 Q. No. A lease of some property in which
20 the original of the lease couldn't be found?

21 A. The lease of some property?

22 Q. It was the house.

23 A. Okay. Somebody was leasing their
24 house.

25 Q. A house lease. And the lease couldn't

1 be found.

2 A. Right.

3 Q. Do you remember that?

4 A. Yes.

5 Q. Do you remember what happened as a
6 result of nobody being able to find the lease?

7 A. That we weren't able to file suit
8 because he couldn't prove the terms of the lease.

9 Q. So your testimony would be that when
10 you were there copies of all of this would have
11 been given to be Dennis, and to the extent that
12 he wanted it he would have kept his own file, and
13 to the extent he thought it was unimportant or
14 whatever he would say, you just keep it in your
15 file.

16 MS. WALL: Object to the form.

17 THE WITNESS: More or less. I
18 wouldn't say every time I went I carried a piece
19 of paper. Sometimes I would say, Dennis, I wrote
20 a letter or I did this. Do you want a copy?
21 I'll bring it back by, I'll fax it, I'll mail it,
22 whatever. And he would tell me yes, no,
23 whatever.

24 MR. EPTING: All right. Let me show
25 you what we're going to mark as Exhibit 7.

1 (PLF. EXH. 7, Summons, was marked for
2 identification.)

3 (PLF. EXH. 8, Letter dated 4/26/04
4 with Answer, was marked for identification.)

5 BY MR. EPTING:

6 Q. So I've marked as Exhibits 7 and 8 the
7 summons and complaint. Before we discuss these,
8 Mr. Robinson, when did you believe that the
9 attorney/client relationship was created with
10 Stokes-Craven with regard to this matter?

11 A. To the lawsuit or just anything
12 involving Mr. Austin?

13 Q. Anything involving Mr. Austin.

14 A. I would assume the first time Dennis
15 called me into the office and asked me to do
16 something for him about that case.

17 Q. All right. So I'm just going to use
18 the date somewhere in around February 18th, which
19 is the date of Mr. Polito's letter, somewhere
20 between there and your letter of March 6th.

21 A. Uh-huh.

22 Q. Is that --

23 A. Fair enough.

24 Q. All right. So I've shown you the
25 complaint which was drafted. And I have shown

1 you Exhibit 8 which is your answer. Okay?

2 A. Uh-huh.

3 Q. The complaint is filed on what date?

4 A. March 15th, 2004.

5 Q. What do you recall doing in
6 preparation for filing the answer?

7 A. Probably reviewing the letter or the
8 documents from Polito, because it was the same
9 plaintiff, the same situation, and talking with
10 Dennis. Again perhaps Barry and Kenny or Mr.
11 Billy.

12 Q. All right. And when you say Barry?

13 A. Barry Thornhall.

14 Q. And when I say Kenny you mean?

15 A. Craven, Kenny Craven, Dennis's
16 brother.

17 Q. And Mr. Billy?

18 A. Billy Frierson.

19 Q. All right. Had you talked to all of
20 them by the time you filed your answer?

21 A. I honestly cannot recall. I don't
22 know.

23 Q. Is there any reason that you would not
24 want to have understood the allegations of the
25 complaint as related by the people with

1 Stokes-Craven that were involved in the
2 transaction?

3 MS. WALL: Object to the form.

4 THE WITNESS: No. And I would be sure
5 that I did talk with them. That information was
6 conveyed through Dennis as to what they say
7 happened or whether they told me directly,
8 certainly, that would have been.

9 BY MR. EPTING:

10 Q. All right. Let me ask you about
11 paragraph 4 of the answer.

12 A. Okay.

13 Q. You answer paragraph 4 and 5 by saying
14 that you don't have any information with which to
15 admit that the vehicle was involved in a rollover
16 or that the collision required about \$13,000 to
17 repair it. On what basis did you make that
18 answer?

19 MS. WALL: Object to the form.

20 THE WITNESS: I'm not sure I
21 understand what you're asking me.

22 BY MR. EPTING:

23 Q. In other words the allegation in the
24 complaint, paragraph 4, is that the truck was
25 involved in a rollover collision. Is that not

1 what 4 says?

2 A. Yes.

3 MS. WALL: Object to the form.

4 BY MR. EPTING:

5 Q. All right. And 5 says that roughly
6 \$13,000 was spent on it.

7 A. Uh-huh.

8 Q. And your response to that is you don't
9 have any knowledge about that.

10 A. Right.

11 Q. Is there some reason that you had to
12 doubt the information in your possession about
13 this vehicle being owned by Mr. Bailey and it
14 being involved in a rollover?

15 A. Well, I certainly didn't want to take
16 just whatever some attorney had told, based on a
17 client, that that was factually correct, the date
18 of the rollover, the amount of the damages,
19 et cetera. So I thought it was, you know ... we
20 had been told that, but did not have any of our
21 own knowledge, did not know that to be a fact.
22 That's what we were told, but I thought it was
23 safer to answer that correctly, that we did not
24 know that to be a fact. That's what we had been
25 told.

1 Q. Let's look at paragraph 8 of the
2 complaint.

3 A. Paragraph 8?

4 Q. Of the complaint

5 A. All right.

6 Q. It says Mr. Bailey informed the
7 defendant of the repairs done to the vehicle as a
8 result of the rollover collision.

9 A. Yes.

10 Q. All right. Did you understand that
11 Mr. Bailey was a long-term customer of
12 Stokes-Craven?

13 A. Yes. That he had bought a number of
14 vehicles from them.

15 Q. Did you, prior to filing the answer,
16 call Mr. Bailey?

17 A. No. I did not, no. I didn't have any
18 contact information, that I'm aware of, for
19 Mr. Bailey.

20 Q. Do you think someone could have given
21 it to you?

22 A. Sure.

23 Q. Did, at any time, prior to Mr. Bailey
24 taking the stand in the trial of this case, did
25 you ever talk to Mr. Bailey?

1 A. Not that I can recall.

2 Q. Let's look at Exhibit 7. Go to page
3 5.

4 A. Okay.

5 Q. Do you see on page 5 that there's an
6 allegation of negligence?

7 A. Yes.

8 Q. All right. Do you understand
9 generally that negligent conduct is covered by
10 comprehensive general liability policies, I'll
11 call them CGLs?

12 A. Depending on the policy but, yes,
13 typically they would be.

14 Q. All right. When you saw that there
15 was a negligence count did you solicit from
16 Dennis his insurers for the period in which these
17 events unfolded?

18 A. I don't think I specifically asked him
19 for their names. We certainly, at some point,
20 during this talked about insurance, and asked him
21 about whether he had insurance, did he want to
22 turn it over to his insurance carrier? Things of
23 that nature, yes.

24 Q. Would, in your estimation,
25 Mr. Robinson, it be a good thing if in this case

1 an insurance company had accepted the defense and
2 paid the defense cost and have accepted the
3 indemnity and paid the judgment?

4 A. Clearly, because none of us would be
5 sitting here today if that had been the case.
6 And that's obviously one of the reasons for the
7 case, that had facts of this nature, and a good
8 friend, that I'm representing, that I'm, you
9 know, thinking this may not turn out so good. I
10 don't want to be sitting in this chair. That's
11 why we had that discussion, more than one time,
12 about the insurance.

13 Q. Did you ever put anything -- well,
14 first of all, what was the discussion about?

15 A. Did he have insurance? Did he want to
16 consider, now that they had filed a lawsuit, I
17 think we had talked about it when the letter
18 came, but no action came from Mr. Polito's
19 office, and it kind of died on the vine, until
20 Mr. Moskos filed suit. But once suit was filed,
21 certainly, that evidence, that they were not
22 going to just go away. And I talked to him and
23 said, you know, this may be something you want to
24 consider turning over to your insurance carrier.
25 Do you have insurance? Do y'all have an umbrella

1 policy, a general liability policy, something of
2 that nature?

3 Q. And did you explain to him that in
4 your belief, because of this negligence count,
5 that it might well be covered by insurance, and
6 that you recommended that it be done?

7 A. I told him I thought that would
8 probably be best. Because if they covered it it
9 wouldn't, other than his deductible, it wouldn't
10 cost him anything.

11 Q. And what was his response when you
12 explained to him that you thought it was
13 advisable and it would be a good thing?

14 A. He told me he didn't want to do that,
15 because they had filed a couple of claims in the
16 past. And if they filed another one that they
17 were scared the insurance was going to be
18 cancelled, and there weren't but a handful of
19 them that wrote that. I don't remember what he
20 called it, a Rodgeman's liability, something to
21 that effect. And it was hard to get. And he
22 didn't want to do that. Didn't want to have his
23 insurance canceled, he just wanted me to handle
24 it.

25 Q. Did you say anything to him about that

1 being a bad idea, telling him you think that's a
2 mistake, you'll be much better off to turn this
3 over to an insurance company and have them handle
4 it?

5 A. Probably not in those identical words.
6 But, yes, I tried to convey that idea to
7 Mr. Craven, that that would certainly be the
8 safer route to go. But, you know, this was
9 Dennis's dealership, his insurance. You know, he
10 had been in business for a long time, and this
11 wasn't necessarily a legal determination, for him
12 it was a business determination. Kind of like
13 Mr. McKenzie talked about, a cost benefit. And
14 in his opinion, despite what I told him, he
15 thought it would be better not to risk having his
16 insurance cancelled.

17 Q. Did you ever put any of that in
18 writing?

19 A. No, sir. No.

20 Q. Who, typically, if you wanted to get a
21 document from Stokes-Craven, who is sort of the
22 operations guy out there that you would go to?

23 A. Directly to Dennis. And Dennis
24 wouldn't necessarily get the document.
25 Typically, I guess it would be -- I guess John

1 Flack had the deal jacket, some of them in his
2 office, and some of them somewhere else. But I
3 know he had the key, and I would always go
4 through Dennis first, to kind of get
5 authorization, because I didn't want to be
6 pulling stuff without his permission. But
7 typically John Flack.

8 Q. Did you find that, in conversations
9 with Dennis, that ultimately, if the deal jacket
10 was going to be produced, or the insurance policy
11 was going to be produced, that it likely was
12 going to come from John Flack as opposed to from
13 Dennis Craven?

14 A. Physically come from him, yes. But
15 the authorization always had to come through
16 Dennis.

17 Q. Did you have conversations, for
18 example, about the insurance? Was anyone else
19 present in those discussions other than Dennis?
20 For example Mr. Flack?

21 A. Not that I can recall. Most of the
22 time when we talked about the case, and the
23 things of that nature, there was nobody in there,
24 unless we were specifically asking Barry
25 Thornhall, Billy Frierson, Kenny Craven, or

1 somebody a specific question. But, typically, it
2 was just between me and Dennis, because he wanted
3 it, it was important to kind of keep this
4 private, not vent it all over the dealership and
5 beyond. So it was typically just he and I.

6 Q. Did you ever ask to be provided a copy
7 of the insurance policy?

8 A. I did not. He told me he didn't want
9 to do it and I, you know, talked to him about it
10 a couple of times. But I've known Dennis long
11 enough, and well enough, when he tells me
12 something, firmly, I honor his wishes.

13 (PLF. EXH. 9, Interrogatories and
14 Requests for Production, was marked for
15 identification.)

16 BY MR. EPTING:

17 Q. Do you recognize these documents,
18 Exhibit 9?

19 A. They appear to be what they say they
20 are.

21 Q. Let's look at the first set of
22 documents which are interrogatories.

23 A. Okay.

24 Q. In 2004 had you had any experience
25 with civil discovery?

1 A. Yes, sir.

2 Q. Were you familiar with what
3 interrogatories were?

4 A. Yes, sir.

5 Q. Do you believe them to be a
6 substantial tool, in the hands of competent
7 counsel, in discovering another party's case?

8 A. Not in all cases. But, certainly,
9 they can be, in certain cases, yes.

10 Q. How about in a case such as this, one
11 in which there's danger? Do you think that
12 discovery, knowing the witnesses, and what they
13 might testify to, would have been an effective
14 tool in the hands of a competent attorney?

15 A. It could have been if there was a
16 great deal of certainty or unknown issues.

17 Q. Does that mean in this case that you
18 didn't see the need for discovery?

19 A. Not at all. I talked with Mr. Craven
20 about this prepared, written discovery on his
21 behalf. One of the big problems or concerns that
22 Mr. Craven had, Dennis, I won't call him
23 Mr. Craven, Dennis, one of the things that
24 Moskos, Mr. Moskos, the attorney for Mr. Austin,
25 was after was Stokes-Craven's client list,

1 customer list, I'm sorry. He had asked for that
2 in his discovery. And he had, Mr. Moskos has or
3 had at that time, probably still does, a number
4 of lawsuits against different Stokes dealerships.
5 Dennis was absolutely adamant that that
6 information not get to Moskos, bar nothing.
7 Because he believed that that would be basically
8 a client list for Moskos. It would become from a
9 customer list of Stokes-Craven to a client list
10 for Moskos. And a lot of that had to do with the
11 Federal Odometer Act cause of action that he had
12 raised in his complaint. That was a great deal
13 of concern.

14 His allegation was that because
15 Stokes-Craven wasn't showing the original title,
16 from whoever traded the car in, to the new
17 purchaser, that that was a violation of the
18 Federal Odometer Act. Which meant that,
19 basically, every car, every used car that they
20 had ever sold, was a violation of that act. And
21 he did not want to put any of that in
22 Mr. Moskos's hands for any reason.

23 Q. Well, let's do this. Let's keep these
24 two things, and we're going to explore what you
25 say Dennis's concerns were about other customers

1 of Stokes-Craven. Let's just talk in general
2 about discovery. You have used interrogatories.

3 A. Yes, sir.

4 Q. You have used production requests.

5 A. I have.

6 Q. You have used request for admissions.

7 A. I have.

8 Q. You've taken depositions.

9 A. I have.

10 Q. All right. And what is the purpose of
11 taking depositions and sending out
12 interrogatories and sending out production
13 requests?

14 A. To find out what, basically, what the
15 case is about. What the other side has, what
16 evidence they may or may not produce at trial,
17 what their strategy may or may not be, what kind
18 of witnesses their witnesses may or may not be,
19 things of that nature.

20 Q. And do you view it as -- would
21 competent council, Mr. Robinson, view it as
22 preferable to be trying a case in which they have
23 done discovery, knew who the witnesses were, knew
24 what they looked like, had deposed them, had
25 prepared the cross-examination. Would that be

1 preferable to going in blind?

2 MS. WALL: Object to the form.

3 BY MR. EPTING:

4 Q. In a case such as this?

5 MS. WALL: Object to the form.

6 THE WITNESS: Well, I'm sure, being
7 somewhat prepared would always be preferable than
8 going in blind. Again, it depends on the case.
9 This particular case was fairly straightforward.
10 There was a wrecked vehicle. There was a
11 forgery. And that, you know, that was -- the
12 experts had already basically given the basis of
13 their testimony in their report. So even if they
14 strayed from that, substantially, at trial, they
15 had already given their earlier opinion.

16 So, yes, in a case, as opposed to
17 going in blind, it would certainly be preferable.
18 In a case where you have the majority of the
19 information in advance, and it is not a
20 complicated factual case, you know, the decision
21 to do that -- without some justification, yes,
22 you should do that. If there is a good, valid
23 reason not to do that, then, you know, ultimately
24 it's the client's call. And that's what it was
25 in this case. The only way to avoid producing

1 this information, that Mr. Craven was concerned
2 about, was kind of not to give them anything.

3 Q. Did I hear you say just then that but
4 for what you say is Mr. Craven's concern about
5 Mr. Moskos getting the customer list, this kind
6 of discovery, interrogatories, production
7 requests, depositions, would have been routine
8 and would have been preferable in a case such as
9 this?

10 MS. WALL: Object for the form.

11 THE WITNESS: It's normal, typical,
12 and routine, in most cases, unless there is some
13 valid reason not to do so, yes.

14 BY MR. EPTING:

15 Q. All right. And in this case the valid
16 reason that you're referring to is your
17 contention that Mr. Craven was concerned about
18 the customer list and Mr. Moskos getting ahold of
19 other names and bringing other lawsuits.

20 MS. WALL: Objection.

21 THE WITNESS: Not just Mr. Craven's
22 concern, the Stokes family or Stokes entity,
23 because there was a conversation with another
24 attorney, and I honestly do not recall this name,
25 that had a similar problem, and talked to me, at

1 some point, about keeping this information out of
2 Moskos's hands. So it was a concern of Dennis's,
3 obviously, because it was a concern of the
4 company as a whole.

5 BY MR. EPTING:

6 Q. What about asking Mr. Moskos to
7 produce his documents would reveal information
8 related to Dennis's customers?

9 A. If I asked Mr. Moskos to produce his
10 documents, then I'm certain he would have
11 expected me to reciprocate.

12 Q. But you did didn't you?

13 A. I answered very limitedly, and gave
14 him only the information that I thought was not
15 what Dennis needed to protect. And I only did
16 that after he filed a motion to compel.

17 Q. So your idea was not to respond to
18 his, and avoid responding, and not to initiate
19 any on your own, for fear that you might provoke
20 him to pursue discovery that he was already
21 pursuing or to pursuit it more vigorously?

22 MR. POWELL: Object to the form.

23 THE WITNESS: To pursure it, I guess,
24 more vigorously. He had obviously filed. I
25 waited, I think it was a year, somewhere in that

1 neighborhood, and only responded when he filed a
2 motion to compel. Because I, number one, didn't
3 want any sanctions and, number two, didn't want
4 to draw too much attention to it. And answer,
5 again, with information that I thought was
6 harmless, general information. And, again,
7 that's something that we talked about with
8 Dennis.

9 BY MR. EPTING:

10 Q. Tell me what those conversations were
11 like. How many conversations? So Dennis was
12 instructing you actively not to engage in any
13 discovery.

14 A. No. Dennis was instructing me, under
15 no circumstances, to let Moskos get at that
16 customer list, whatever that required. And my
17 discussion with him was, well, Dennis, the only
18 way I can do that, if he asks for it, and a judge
19 orders it, we have absolutely no choice. The
20 only way I can avoid doing that is put him off,
21 and not wake a sleeping dog, basically. And so
22 that's what we did.

23 Q. And when were those discussions?

24 A. Probably not long after we first got
25 the discovery served upon us.

1 Q. And were these conversations that you
2 continued to have with Dennis?

3 A. Not on a daily basis. Probably a
4 couple of times when the initial documents came
5 in. I'm sure we had it again when he filed his
6 motion to compel, and as time drew close, you
7 know, just to make sure he understood, you know,
8 what was going on.

9 Q. Did at any time you write Dennis a
10 letter?

11 A. I don't believe I have ever written
12 Dennis a letter in this particular file, and
13 probably not many in any other files, no.

14 Q. Do you think it would have been a good
15 idea, for example, with regard to the insurance,
16 or with regard to we're not going to do any
17 discovery, to have written a letter to Dennis to
18 your file saying that we agree that I'm not going
19 to do the following things that normally would be
20 done?

21 MR. POWELL: Object to the form.

22 THE WITNESS: I don't think that would
23 have changed anything that we did at the time.
24 It would probably be a good idea for me to have,
25 sitting here today. But, no, at the time that I

1 was handling this case, I was not worried about a
2 malpractice action, no.

3 BY MR. EPTING:

4 Q. Do you think it's good practice,
5 Mr. Robinson, when you're doing something that is
6 not customary, for example doing no discovery, to
7 confirm with a client that this is a decision
8 that you have made? Is that good practice?

9 MS. WALL: Object to the form.

10 MR. POWELL: Object to the form.

11 THE WITNESS: Well, I think not only
12 should you confirm it with a client, it should be
13 a decision that is ultimately made by the client.

14 BY MR. EPTING:

15 Q. Right. And we agree with that.

16 A. Okay.

17 Q. But I'm asking you is it good
18 practice, like for example where a client makes a
19 decision that, for example, he doesn't want to
20 turn something over to his insurance company,
21 according to you, or that he has some ulterior
22 motive, and doesn't want to do what is
23 customarily done in discovery by discovering the
24 other side's case. Do you think that it's good
25 practice to confirm those things in writing with

1 clients?

2 MR. POWELL: Object to the form.

3 MS. WALL: Object to form.

4 THE WITNESS: I don't think it harms
5 or benefits the client. My malpractice carrier
6 may think that's a best practice. But as far as
7 the quality of the representation that causes to
8 the client, I don't think it has any bearing on
9 that. If you have an understanding, whether it
10 be written, oral, or otherwise, as long as
11 there's an understanding, which I believe we
12 clearly had on this case.

13 BY MR. EPTING:

14 Q. Is it your view, Mr. Robinson, that
15 customarily that there are writings between
16 lawyers and clients in situations in which the
17 client is not taking the advice of the lawyer?

18 MS. WALL: Object to the form.

19 MR. POWELL: Object to the form.

20 THE WITNESS: It's very hard for me to
21 speculate what other lawyers do. It depends on
22 who the lawyer is, who the client is, what kind
23 of case it is, things of that nature.

24 BY MR. EPTING:

25 Q. Do you have a view of what is

1 customary in this bar with regard to confirming
2 in writing disagreements with clients about the
3 conduct of the litigation?

4 MS. WALL: Object to the form.

5 THE WITNESS: No. I don't really
6 think I've ever discussed that with any -- there
7 aren't a tremendous amount of malpractice claims
8 made here, things of that nature. So I can't
9 really say that I've had lengthy discussions or
10 numerous discussions with other attorneys about
11 what they would do if they had a client that
12 disagreed. I may have a strategy about how do
13 you talk sense into your client? But as far as
14 if that doesn't work, no.

15 BY MR. EPTING:

16 Q. What kind of input did you get from
17 anyone at Stokes-Craven into preparing the
18 answer?

19 A. I would imagine I would have had to
20 pretty much get all of the input.

21 Q. But were you getting it from
22 Mr. Frierson?

23 A. I don't know if I've gotten it
24 directly from Mr. Frierson. But either I did or
25 he talked to Dennis and Dennis told me what he

1 said. I met with Mr. Frierson, you know, talked
2 with the people that were involved, at some
3 point. I honestly cannot tell you whether that
4 was -- at what point that was.

5 Q. Have you looked at your file,
6 Mr. Robinson, after sending it to Young Clement
7 Rivers?

8 A. No, because I didn't have it. I gave
9 them my original file. I didn't bother to make
10 copies. And I told them that. This is my file.
11 Do what you need to do.

12 Q. All right. But you do know that the
13 file was sent back to you --

14 A. Yes.

15 Q. -- by Mr. Brown.

16 MS. WALL: No. Object.

17 THE WITNESS: It wasn't sent to me.
18 Nothing has ever been sent back to me. I think
19 it was sent to Ms. Wall, perhaps, or Mr. Powell.

20 MS. WALL: After numerous objections
21 and all kinds of things.

22 MR. EPTING: We'll come to that in a
23 minute.

24 BY MR. EPTING:

25 Q. Did you --

1 A. And let me back up. I think perhaps
2 they did simultaneously, I think I remember
3 getting two copies of that at the same time. I
4 was thinking both of them came from Ms. Wall, but
5 there may have been a file that was sent from
6 there. So I don't know. But it was after this
7 litigation began.

8 BY MR. EPTING:

9 Q. Well, no matter. I just wanted to
10 know if you had a chance to look at it. Have you
11 looked at your original file?

12 A. Yes, sir.

13 Q. All right.

14 A. Or a copy of my original file.

15 Q. Or a copy of your original file.

16 A. Yes, sir.

17 Q. Did it seem to you to be a copy of
18 your file?

19 A. I presumed that it was. I mean I
20 really didn't look at it for authenticity, and I
21 wasn't concerned that they had forged documents,
22 or anything like that, and put them in there.

23 Q. Was there anything that you thought
24 was not there? Did it strike you that something
25 was missing or did you think you were looking at

1 your complete file?

2 A. You're referring to the trial notes?

3 Q. Well, just everything that happened in
4 the file from February of '03 until it was sent
5 to Mr. Brown.

6 A. I don't know that I've ever looked
7 through it for that. Again, I've looked at it
8 for what the documents were and just to
9 refamiliarize myself with the case. But I ...

10 Q. Well, my question is a little simpler.
11 Do you believe that the file that you had indeed
12 was an exact duplicate of the file that you sent
13 to Mr. Brown?

14 A. Yes.

15 Q. All right. That's all I wanted to
16 know.

17 A. Okay.

18 Q. In looking at your file, I agree with
19 you, I don't see where you ever wrote one letter
20 to Stokes-Craven, which I think you said is true,
21 right?

22 A. Probably not. I'm not positive but
23 that would not surprise me, no.

24 Q. You have mentioned a lot of
25 conversations that you've had with Mr. Craven.

1 A. Yes.

2 Q. Did you take any notes of any of those
3 conversations?

4 A. Probably. I'm sure some of them I
5 would have, yes.

6 Q. All right. And would they be in your
7 file if you took them?

8 A. Perhaps. Perhaps, like responding to
9 the discovery, I may have rough drafted it, typed
10 it, and thrown the handwritten rough draft away,
11 things of that nature.

12 Q. Do you think that having notes of
13 conversations with clients is a good tool in
14 terms of being able to represent a client and to
15 remember what has transpired in a file?

16 MR. POWELL: Object to the form.

17 MS. WALL: Object.

18 THE WITNESS: Again I think that goes
19 more to this type of situation. And if it's,
20 again, a complicated situation, where there are
21 witnesses I don't know, addresses, specific
22 things that need to be done, the complexity of it
23 would certainly dictate that. But, again, in
24 this case, I knew Dennis's and the dealership's
25 side of the story, their version of the facts.

1 You know, it was just a situation where they
2 couldn't deny the facts. Only whether it was
3 intentional or not intentional, and a value
4 situation.

5 So there were not meetings where we
6 got into complex legal issues that we needed to
7 write notes about and things of that nature.
8 Dennis communicated very effectively with me, and
9 I think I did with him, and so I didn't really
10 see the need for that in this case. Now, in some
11 cases, yes, that would certainly be helpful.

12 Q. Do you remember that Mr. Frierson was
13 called by Mr. Moskos as a witness in the trial?

14 A. I think everybody was called by
15 Mr. Moskos as a witness, yes.

16 Q. All right. Do you remember
17 Mr. Frierson taking the stand and saying that no
18 one had talked to him since this lawsuit was
19 filed?

20 A. I honestly do not specifically
21 remember that. I'm not saying I disagree. I
22 just cannot remember verbatim what was said in
23 the transcript.

24 Q. Before you started this trial had you
25 talked with Mr. Frierson?

1 A. Yes.

2 Q. And Mr. Frierson would -- I guess
3 Mr. Frierson is dead now isn't he?

4 A. Yes, he passed.

5 Q. Did you talk with Mr. Frierson
6 immediately before the trial and prepare him for
7 his testimony?

8 A. I think I did immediately. Not
9 immediately before the trial, probably during the
10 trial, before he testified, yes.

11 Q. And when you say during the trial,
12 before he testified, what do you mean?

13 A. Afternoon, before the next day, or
14 that morning, or something of that nature.

15 Q. And did you talk to any of the other
16 witnesses from Stokes-Craven prior to them taking
17 the stand?

18 A. I don't know if I talked to Kenny or
19 not. I think it was just Dennis and Kenny and
20 Mr. Billy were the ones that actually testified.
21 I think Kenny was gone and not working there at
22 that time. If I did it would have been in
23 Dennis's office with Dennis present. I did not
24 talk to them, and he didn't want me to talk to
25 any of them, without him there, because I guess

1 he wanted to know what they were saying what was
2 going on. So there were no private discussions
3 between just me and Mr. Billy or just me and
4 anybody else.

5 Q. Do you think that you can effectively
6 try a case, Mr. Robinson, without working with
7 your witnesses and preparing them to testify?

8 A. It's possible. It's probably not the
9 most desirable method of being proficient, but I
10 guess it's possible. It would certainly be
11 preferable to plan, yes.

12 Q. All right. Do you think that
13 competent counsel, getting ready to try a
14 lawsuit, in advance of the trial, or in advance
15 of their testifying, would prepare his witnesses
16 either to be cross-examined by the other side or
17 to put them on the stand in his case in chief?

18 MS. WALL: Object to the form.

19 THE WITNESS: Yes. And I think you
20 may be misunderstanding. Immediately prior to
21 trial is not the only time I talked to Mr. Billy
22 or Dennis or whoever.

23 BY MR. EPTING:

24 Q. Right.

25 A. But certainly I did at that time also.

1 But, again, that may have been the only time I
2 talked to Kenny, because that may have been the
3 only time I had access to him. I really don't
4 specifically remember when Kenny left the
5 dealership. It was, obviously he was Dennis's
6 brother, so that was kind of touchy for me to
7 deal with Kenny a lot.

8 Q. Let me just make sure I understand
9 you.

10 You're saying that you may have talked
11 to Mr. Frierson, Kenny Stokes, Mr. Thornhall,
12 sometime prior, without regard to immediately
13 prior, but at the time the event arose, or
14 sometime shortly thereafter. And you're saying
15 that may have occurred and it probably occurred
16 with Dennis present.

17 MS. WALL: Object to the form.

18 THE WITNESS: I know it occurred with
19 Dennis present. I didn't talk to any of them
20 without Dennis being there.

21 BY MR. EPTING:

22 Q. All right. But you also said, I
23 think, that without regard to having talked to
24 them prior, say in this case, at the time the
25 summons and complaint was filed in '04, that it's

1 your view that competent counsel would meet with
2 his witnesses, immediately prior to trial, in
3 order to prepare them for cross-examination or
4 prepare then for direct in the trial itself.

5 MS. WALL: Object to form.

6 MR. POWELL: Same.

7 THE WITNESS: I don't know if it has
8 to be done immediately prior to trial. It
9 certainly needs to be done prior to them
10 testifying. And I'm not trying to split hairs.
11 But in a case where you're the defendant,
12 certainly the plaintiff is going to go first, to
13 put on his evidence, and that may change how you
14 want to prepare them. So sometimes ...
15 certainly, there is a pretrial preparation.

16 But I don't think competent, the word
17 competent counsel, is incompetent to prepare them
18 in addition at a later time or not to prepare
19 them the Monday before trial starts on a Tuesday.
20 If you talked to them two weeks prior, and you
21 talk with them again prior to their testimony,
22 after you have seen some of the plaintiff's
23 testimony.

24 I mean, you know, preparing them in
25 advance, whether it's 48 hours, 48 days. Again

1 it just kind depends on the situation and the
2 attorney. And, you know, you just want to make
3 sure it's fresh in their minds, so you don't want
4 to do it too much prior. But, again, the day
5 before or three days before I don't think is a
6 determinative factor quite frankly.

7 BY MR. EPTING:

8 Q. All right. Let me restate that. At
9 some point in time, before a witness takes the
10 stand, either in cross or direct, competent
11 counsel is going to meet with them, within some
12 window, whether it's 30 days, two weeks, or a
13 week, before they take the stand.

14 MS. WALL: Object to the form.

15 THE WITNESS: I would imagine you
16 should do that, yes.

17 MR. EPTING: All right. Why don't we
18 take a five-minute break. We've been going about
19 an hour and 15 minutes. Then we'll come back and
20 start again.

21 (A recess transpired.)

22 (PLF. EXH. 10, Letter dated 5/4/04
23 with Plaintiff's Interrogatories, was marked for
24 identification.)

25 BY MR. EPTING:

1 Q. Mr. Robinson, I don't think this adds
2 anything but I wanted to put it in. The
3 interrogatories are identical and it appears that
4 he served them twice.

5 A. Okay.

6 Q. I just wanted to make sort of one last
7 run at this.

8 A. That's what it looks like to me.

9 Q. You indicated that you had -- first of
10 all you indicated that Mr. Moskos, through his
11 discovery, was trying to get his -- if I use
12 customer list is that --

13 A. I think that term came from Dennis.
14 But, yes, that -- yes.

15 Q. The other lawyer, you said another
16 lawyer called you and indicated that Dino Moskos
17 was trying to get customer lists or maybe I
18 misunderstood you.

19 A. I talked with another lawyer. I was
20 at the dealership and he called or had called
21 Dennis and talked to him. And I don't remember
22 whether he called into the dealership or if
23 Dennis called him from the dealership. But it
24 was just a two- or three-minute conversation
25 about how are you keeping him from doing this or

1 what are you doing?

2 Q. Right. But other than this lawyer
3 calling in, and Mr. Moskos seeking this
4 information in discovery, is there any other,
5 anything in writing that indicates that
6 Stokes-Craven was making a decision for you not
7 to do discovery?

8 A. No.

9 Q. Because --

10 A. I can save you the rest of that
11 question, no.

12 Q. All right. So just the discovery
13 itself and this call. And, as a result of that,
14 you say Mr. Craven said, we're not doing any
15 discovery to risk giving up our customer list?

16 MS. WALL: Object to the form.

17 THE WITNESS: No. That was the end
18 result of how do we keep him -- the objective was
19 do not let him get this. How can we keep him
20 from getting this? The conversation was well,
21 Dennis, I don't know that we can. If he gets a
22 court order, we can certainly not give it to him
23 and see what happens. But if we serve discovery,
24 and pursue depositions, then certainly he's going
25 to do the same. And I said, so the only way we

1 can do that is just kind of sit back and hope
2 that we don't, and, again, I think I probably
3 used the term wake a sleeping dog. And so based
4 on that that's what we decided to do. Said,
5 well, let's see what happens.

6 Q. Did you think that that was a
7 justifiable tradeoff for not doing discovery?

8 MS. WALL: Object to the form.

9 THE WITNESS: In this particular case,
10 based on what Dennis had told me about the bigger
11 picture. You know, certainly, given just what I
12 knew initially, no. But once Dennis explained to
13 me that Moskos was kind of a small dog yapping at
14 their heels, and you give him a crumb, or gave
15 him something to boost his confidence, make him
16 bigger, whatever, that he was never going to go
17 away. And that the bigger concern was not just
18 this one particular case, which was certainly a
19 serious case of concern, but it's going to spawn
20 into numerous lawsuits, perhaps even a class
21 action lawsuit.

22 Q. Do you know of any other cases that
23 had been brought by Moskos against Stokes-Craven?

24 A. Not against Stokes-Craven, against
25 other Stokes dealerships, yes.

1 Q. And when you say you know of them, how
2 do you --

3 A. Based on Dennis telling me that. And
4 I think Young Clement and Rivers, when we went
5 down there with the file, they were familiar with
6 him, because I think they had defended some
7 against Moskos for Stokes dealership.

8 Q. Did you take the file to Young,
9 Clement? Is that how it got there?

10 A. Dennis and I rode down there together.

11 Q. All right. Your file, Mr. Robinson,
12 with several exceptions, which we're going to
13 come to, there are a few notes of yours related
14 to preparing some answers to interrogatories.
15 And there are a few notes that appear to be a
16 phone call. I don't see anything in your file
17 that is a series of notes made by you of a
18 conversation with any witness, or meeting with
19 any witness, or preparing for trial or appearing
20 at trial. Is it your policy not to take notes?
21 Is that just not something you do?

22 MS. WALL: Let me object to the form.
23 Because actually what you said is not true. We
24 produced documents to you.

25 MR. EPTING: And to the extent we have

1 notes we'll go over them.

2 THE WITNESS: Okay.

3 BY MR. EPTING:

4 Q. But you mentioned any number of
5 conversations with Dennis, meetings with
6 Mr. Frierson, I think you said, Mr. Billy,
7 Mr. Kenny Craven. Are you aware of any notes
8 related to any of those interviews or
9 conversations?

10 A. If they're not in the file, I ...
11 there may have been some that never made it to
12 the file, didn't make it to Young Clement, got
13 thrown out. Honestly, I don't know. But, I
14 mean, it ...

15 Q. Is it your policy to preserve your
16 file and your impressions and what you see
17 important to write down?

18 A. Yes.

19 MS. WALL: Object to the form.

20 BY MR. EPTING:

21 Q. Would you expect that if you created
22 it that it would be in your file?

23 A. Again, unless it was reduced to
24 writing or -- I mean typed, or something like
25 that, you know, if I took notes. But I'm not

1 saying I would always have taken notes. Again it
2 depends on the complexity of what we're talking
3 about. You know, what -- is it a complex factual
4 situation or is it like with Mr. Billy? Did you
5 tell him it was wrecked? What do you remember
6 telling him? And that, you know, is easily
7 remembered, yes, no, whatever.

8 (PLF. EXH. 11, Certified letter dated
9 5/19/04 with Subpoena, was marked for
10 identification.)

11 BY MR. EPTING:

12 Q. Let me show you what's been marked as
13 Exhibit 11. Do you recall this document?

14 A. I don't have any specific recollection
15 of this document. I mean it appears to be a copy
16 of a subpoena.

17 Q. Did you believe that your contention
18 that it was Mr. Craven's decision not to do
19 discovery extended not just to interrogatories
20 and production requests and depositions but also
21 to subpoenaing records of third parties?

22 A. Yes. It would have triggered a
23 response from Moskos. Because I would have, of
24 course, have to have copied him with the
25 subpoena.

1 Q. Did you ever, at any time, talk to
2 Mr. Gary Bailey before he testified at trial?

3 A. No. You've already asked me that and,
4 no, I did not.

5 Q. Do you recall what you did with regard
6 to the document that's been marked Exhibit 11, if
7 anything?

8 A. Maybe talked to Dennis or Barry
9 Thornhall about it and asked them what is it?
10 And I'm sure that the information was what they
11 reported in that initial letter from Polito about
12 the damage and the extent of the damage and
13 things of that nature.

14 Q. Did you understand or believe that
15 Mr. Bailey's testimony would be right critical?

16 MS. WALL: Object to form.

17 THE WITNESS: I don't know if I would
18 call it critical. I thought it would be
19 important. And because Mr. Moskos had listed him
20 as a witness, I knew he was going to testify that
21 he had told somebody about the damages, yes.

22 BY MR. EPTING:

23 Q. All right. Did you have the view that
24 the essential question at trial was going to be
25 whether or not Stokes-Craven knew?

1 A. One of the essentials, yes.

2 Q. What were the others?

3 A. Well, whether somebody there had
4 forged, you know, was there an intent, and again
5 the damages.

6 Q. Right. But you felt like because
7 Mr. Moskos had listed Mr. Bailey as a witness
8 that Mr. Bailey was going to testify against
9 Stokes-Craven and so there was no reason for you
10 to contact him?

11 MS. WALL: Object to the form.

12 THE WITNESS: Again, it wasn't that
13 there was no reason to contact him. But,
14 certainly, Moskos would not have called him there
15 to bolster Stokes-Craven's position.

16 (PLF. EXH. 12, Letter dated 6/1/04
17 with Plaintiff's Request to Admit, was marked for
18 identification.)

19 BY MR. EPTING:

20 Q. Let me show you what's been marked as
21 Exhibit 12. Do you recall receiving request for
22 admissions?

23 A. Not generally, but obviously I did.
24 It appears that I did, based on this exhibit.

25 Q. Did you ever revisit with Mr. Craven

1 this alleged decision not to do any discovery,
2 for fear of waking a sleeping dog, in light of
3 Mr. Moskos's continued pursuit of discovery?

4 MS. WALL: Object to the form.

5 THE WITNESS: I'm sure we had more
6 than one conversation about it, yes. We, I'm
7 trying to think, and certainly I think when the
8 roster came out it was noticed that we were high
9 on the trial roster list coming out. I may have
10 again talked to him and said, listen, maybe we
11 need to do this, do that, or the other. Not
12 specifically to say, quote/unquote, we need to
13 conduct discovery. But something to that nature.
14 Yes, I'm sure we talked about it more than one
15 time and, yes, I'm sure it was revisited.

16 Q. Do you recall if anybody, in these
17 conversations related to doing no discovery, and
18 when I say no discovery, I'm just using that
19 generically, Mr. Robinson, for notes, subpoenas,
20 no interrogatories, no production request, no
21 request for admissions, no depositions. Do you
22 understand that's generically how I'm using the
23 word discovery?

24 A. I mean I assume that's what you meant,
25 more or less, yes.

1 (PLF. EXH. 13, Letter dated 6/21/04
2 with Subpoena, was marked for identification.)

3 BY MR. EPTING:

4 Q. All right. Let me show you Exhibit 13
5 and ask you if you remember this? Do you recall
6 receiving that subpoena and ultimately the
7 information that went with it?

8 A. I don't, again, independently remember
9 this or the information. Are you talking about
10 the information attached to this exhibit or the
11 information requested by the subpoena?

12 Q. Both.

13 A. Again, I don't doubt that I got it.
14 But nothing special stand out about that to me,
15 no.

16 MR. EPTING: Let me show you what is
17 going to be marked as Exhibit 14.

18 (PLF. EXH. 14, Handwritten notes, was
19 marked for identification.)

20 BY MR. EPTING:

21 Q. This is one of what I think is three
22 examples of some notes or memos of yours.

23 A. Uh-huh.

24 Q. Do you recall anything about what is
25 written here?

1 A. I mean it looks like answers to the
2 requests to admit, and interrogatories,
3 and ... that looks like the first three pages of
4 Exhibit 14. The next two pages appear to be kind
5 of -- I'm not sure what the next two are. Page
6 or exhibit or Bates stamped YCR 446 appears to be
7 some other discovery written by somebody else.

8 Q. Well, let me make a suggestion here.

9 A. Okay.

10 MR. EPTING: Let me show you what's
11 going to be marked as the next exhibit.

12 (PLF. EXH. 15, Letter dated 6/23/04
13 with Defendants' Responses, was marked for
14 identification.)

15 BY MR. EPTING:

16 Q. Which is Exhibit 15. I want you to
17 look at the date of it.

18 A. Okay.

19 Q. I'm going to assume or suggest to you
20 that the first three pages appear to me to be
21 your notes for responding to the request for
22 admissions which in fact you answer on June 23rd.
23 And appear to be a rough draft of some proposed
24 answers to interrogatories that had been prepared
25 and sent to you several months before.

1 A. Oh, to the interrogatories.

2 Q. Right. But I want you to look at
3 them. Because I'm also going to suggest, do you
4 think that the next two pages actually relate to
5 Polito?

6 A. And they may. They appear to be -- it
7 appears to be out of order. And those may be the
8 notes that I took at the initial meeting, and
9 then there's a file -- that's what it appears to
10 be. I cannot testify with absolute certainty
11 based on those notes. But it looks like I got
12 some specific information from somebody, which
13 would have had to have been Dennis, or somebody
14 at the dealership, and then write a letter asking
15 for documentation of the 16 trade-ins.

16 Q. Well, let's go to page 4 and 5. Let
17 me ask you this, Mr. Robinson. Why don't you
18 take a look at the interrogatories, which are in
19 that pile in front of you, and I think they're
20 filed sometime in May. And let's see if you can
21 agree with me that first three pages relate to --

22 A. No. I agree with that. The first
23 three pages, the 1 through 7 obviously appear to
24 be the request to admit, and then it says
25 interogs, and the next three pages, pages 1

1 through 3, appear to be answers.

2 Q. All right. Now, let's go to the next
3 two pages.

4 A. Okay.

5 Q. What is the 03-1051RM, Mr. Robinson?

6 A. I'm assuming that's a file number.

7 That appears to be a file number. 2003, the
8 number of the file, Robinson, miscellaneous.

9 Q. Okay. All right. And so that's the
10 file that you would have opened within your
11 office.

12 A. Correct.

13 Q. All right. And if it says write
14 letter asking for justification, that would
15 appear to be to write Polito to ask for
16 justification for where he's getting his damages
17 from.

18 A. Right.

19 Q. That letter, I think we agreed, was
20 never written.

21 A. Right. I sent asking for time. And
22 then, apparently, after that we didn't do
23 anything else with it. And that may have just
24 been -- I don't know whether these are notes that
25 I made in front of Dennis or just from talking

1 that was my observation. I need him to tell me
2 how is he coming up with these numbers. That
3 part I cannot tell you.

4 Q. All right. Let's go to the next two
5 pages.

6 A. Okay. Bates stamped 445 or 446?

7 Q. 446 and 447.

8 A. Okay.

9 Q. Where do you think these are coming
10 from? And what are they related to?

11 A. They appear to be and, again, because
12 some of this is not my handwriting, these appear
13 to be the responses or notes about responses to
14 request for production.

15 Q. All right. You see over here it says
16 4/15/05.

17 A. Yes.

18 Q. Is that your handwriting?

19 A. No.

20 Q. All right. What on here is your
21 handwriting, if anything?

22 A. The REQ at the top, underlined, 24,
23 26, 21, the circled numbers, and the thing says
24 last three financial statements showing net
25 worth, and then the writing down at the bottom

1 that says add Roy Touchberry. That appears to be
2 mine.

3 Q. Okay.

4 A. The circled numbers, and let me just
5 be clear, to the right. No. 13, 16, 19, with the
6 letters, that's not my handwriting, just the 24,
7 26, 21, 28, 29 appear to be, 30, 35, 34, and then
8 says last three financial statements showing net
9 worth, that appears to be my handwriting. And
10 then from the Roy Touchberry line down.

11 Q. All right. Is your handwriting.

12 A. Yes.

13 Q. Okay. It says do not send credit out
14 for Bailey. What is that about?

15 A. Apparently there was perhaps a
16 document that I was instructed not to send.

17 Q. Okay. And it says Kenny on payoff
18 verification, question mark, ask Kenny, salesman.
19 What does that mean?

20 A. Again, in isolation, I'm not positive.
21 The payoff, and I don't know if that referred to
22 when the vehicle was traded in by Mr. Bailey or
23 when it was -- I guess it would have had to have
24 been. And the question was was Kenny the
25 salesman, I guess. That's what it appears.

1 Again, I'm not positive what that means.

2 Q. It says insurance info, question mark,
3 question mark.

4 A. Right.

5 Q. Liability.

6 A. Right.

7 Q. And then what are the other two words?

8 A. Something covering. I'm not sure what
9 the first one is. I really don't know.

10 Q. Okay.

11 A. I cannot read that first. It looks
12 like covering. Insurance info, question mark,
13 question mark, liability, something covering.

14 Q. Do you think that has something to do
15 with a discussion or a question about should this
16 be turned over to the insurance company? Or is
17 it unrelated?

18 A. No, I would think that's what -- the
19 note add Roy Touchberry, do not send credit out,
20 Kenny on payoff. These are either notes that I
21 got from Dennis or for me to talk to Dennis about
22 and at some point I would have.

23 (PLF. EXH. 16, Letter dated 8/25/04
24 with enclosure, was marked for identification.)

25 BY MR. EPTING:

1 Q. Okay. This is Exhibit 16. And I'm
2 just asking you do you recall these documents
3 being provided to you by Mr. Moskos concerning
4 the Allstate trial?

5 A. Apparently.

6 Q. Okay.

7 A. And I think I do, because I remember
8 the guy that testified about them, used to work
9 for Dennis, at trial.

10 Q. Okay. All right. Had you talked to
11 the Allstate representative prior to him taking
12 the stand?

13 A. Yes.

14 Q. And when did you talk to him?

15 A. It may have been that day or a couple
16 of -- I mean, it was right around the time of
17 trial. Because these were sent right around the
18 time of trial. No, I'm sorry, two weeks prior to
19 that.

20 Q. Yes. Do you think that you talked
21 to -- is the gentleman you talked to Mr. Garrity?

22 A. No. It was Woody Michau. the guy that
23 testified at trial.

24 Q. Woody Michau. Do you think that you
25 talked to Mr. Michau in and about the time you

1 received these documents?

2 A. No. It would have been after.

3 Q. And would it have been in and about
4 the time of trial?

5 A. Yes.

6 Q. Was it after the trial started?

7 A. It could have been. I don't know
8 that it -- I'm not positive. It could have been.

9 MR. EPTING: I've already marked this
10 but we'll mark it again. It's Exhibit 2 to Mr.
11 McKenzie's deposition. This will be Exhibit 17
12 to your deposition.

13 (PLF. EXH. 17, Description of work
14 performed, was marked for identification.)

15 BY MR. EPTING:

16 Q. Do you recognize that, Exhibit 17?

17 A. Yes. It is a form, and I don't know
18 whether William gave it to me or it's one I got
19 from somewhere else, but it's just a time slip,
20 and that is my handwriting on there.

21 Q. All right. I did not see any fee
22 agreement in your file.

23 A. That is correct.

24 Q. And when you undertook this case what
25 was your fee agreement with Stokes-Craven?

1 A. I did not have a set fee agreement. I
2 think I told Dennis what my typical hourly wage
3 was, and I don't remember if it was two or 250 at
4 that time. And it was basically the same
5 agreement that we had in all the other cases that
6 I had done with them before. We were friends, we
7 had been doing business since the late '90s, I
8 had been doing work for them. And I don't think
9 we ever had a written fee agreement on anything.
10 We would talk about how much do you think it's
11 going to cost, or after the fact how much do I
12 owe you, or sometimes he would just write me a
13 check beforehand and say, please do this, and if
14 that's not enough let me know.

15 Q. Was he pretty easy to deal with about
16 fees?

17 A. Oh, sure. We never had any issues
18 ever, even in this particular case, about fees.
19 Sometimes he would say, you know, I'm giving you,
20 because I know you did some work that you haven't
21 sent me a bill for, things of that nature. He
22 was very fair about that.

23 Q. This is the only time entry that I
24 find in your file. Was it something that you
25 would have done throughout and the records simply

1 don't exist anymore because you prepared a bill?

2 A. In all reality I think that's probably
3 an anomaly. I probably did not keep -- I think
4 there was some notes on there that had a date and
5 a time, and sometimes when I thought about
6 billing. But that honestly was not my primary
7 concern in this case. It was getting the
8 information, trying to cover Dennis's dealership
9 on this. So I did not do -- every time I did
10 something I didn't write down a bill or a time,
11 because I honestly wasn't worried about getting
12 paid or justifying my bill to Dennis.

13 Q. How then did you prepare a bill? Just
14 estimate your hours when you were finished and
15 send him a bill?

16 A. I think we probably talked about it.
17 He told me you need to send me a bill. I went
18 back through the file and looked at documents,
19 and the time we had spent at trial, and tried to
20 come up with what I thought was fair, and asked
21 him about it. We agreed on it.

22 Q. But would it have been ultimately a
23 function of the amount -- or ultimately was it a
24 function of what you thought the amount of time
25 you had put into the file?

1 A. It would be a representation of the
2 amount of time. Again, it would not be every
3 minute, every second, every phone call, every
4 trip to his office. Because a lot of times I was
5 out there anyway. Not necessarily doing this,
6 and sometimes we would just have a casual
7 conversation, sometimes I specifically went out
8 there. But I didn't charge him every time I
9 picked up a piece of paper or talked to him on
10 the phone or mentioned the file to him, no.

11 Q. But I gather, Mr. Robinson, that you
12 were a frequent visitor at Stokes-Craven, because
13 there are a lot of people that you would go out
14 there to talk to, not just Mr. Craven.

15 A. Correct.

16 Q. And you might spend your lunch out
17 there, for example, or if you were driving by,
18 you had been some place, you would pull in and
19 say hello.

20 A. Correct. Yes.

21 (PLF. EXH. 18, Letter dated 4/5/05,
22 was marked for identification.)

23 BY MR. EPTING:

24 Q. I'm handing you what's been marked as
25 Exhibit 18. Do you remember that Mr. Moskos, in

1 order to get discovery from you, about a year
2 later, asked you to either get it to him or he
3 was going to file a motion to compel?

4 A. I do remember that, yes.

5 Q. And ultimately he did file a motion to
6 compel.

7 A. I believe he did, yes. That is my
8 recollection. I don't know or say a hundred
9 percent but I believe.

10 MR. EPTING: Let's look at the next
11 series of documents. Let me show you what I'm
12 going to mark as Exhibit 20.

13 (PLF. EXH. 19, Letter dated 4/8/05
14 with Plaintiff's Motions to Compel and Motion for
15 Continuance, was marked for identification.)

16 (PLF. EXH. 20, Mileage to Charleston,
17 was marked for identification.)

18 BY MR. EPTING:

19 Q. This appears to be --

20 MR. POWELL: Excuse me, counsel. This
21 is what number?

22 MR. EPTING: 20.

23 BY MR. EPTING:

24 Q. This appears to be a billing for
25 somebody to have driven down to --

1 A. Charleston.

2 Q. -- Charleston.

3 A. Correct.

4 Q. And it looks to be about the time that
5 the answers to interrogatories were delivered,
6 because you had said that you would go to a
7 hearing on the 25th if in fact you didn't have
8 the discovery by the 25th. And I'm not telling
9 you my story is right here, I'm just trying to
10 figure out why it is there's an entry for
11 somebody to be driving something to Charleston.
12 Do you have any recollection of this?

13 A. Honestly, no. I mean it may have have
14 been this -- Ferris worked in our office, at that
15 time, and I think she was originally -- I think
16 she actually still had a house in Charleston.
17 Her daughter worked for us and she lived up here
18 during the weekend and would go back. And it may
19 have been -- \$25 is not going to reach your
20 mileage to Charleston.

21 Q. Right.

22 A. So it may have been that she said, I'm
23 going anyway and I'll drop something by. If that
24 was the case. I honestly don't recall.

25 Q. Who is DAM?

1 A. Deborah A. Meeks.

2 Q. And who is she?

3 A. She was a secretary of mine.

4 Q. Of yours?

5 A. Yes.

6 Q. And where is Ms. Meeks?

7 A. I think she lives -- she doesn't work
8 for me anymore. She hasn't worked for me for
9 awhile. But I think she lives in Sumter.

10 Q. Is she still in the legal secretary
11 business?

12 A. I honestly don't know. She had had
13 some health problems, and some things of that
14 nature, and was out of it at one time. I haven't
15 seen her in several years. I don't really know.

16 (PLF. EXH. 21, Letter dated 4/22/05
17 with First Responses, was marked for
18 identification.)

19 BY MR. EPTING:

20 Q. Let me show you what we're going to
21 mark as Exhibit 21. These are your interrogatory
22 responses. Look at answer No. 4.

23 A. Okay.

24 Q. It says the defendant is not currently
25 aware of any insurance policies that would be

1 applicable to this case.

2 Any reason that you chose that
3 language in light of your claim that Dennis
4 didn't want to turn it in?

5 A. Well, I didn't want to tell them that,
6 based on Mr. Craven's instructions. And I
7 honestly did not know the name of the insurance
8 company. He had told me that he had had some but
9 that -- that's basically the way I thought, based
10 on his instructions, would be best to write that.

11 Q. Okay.

12 A. Because of the concern if I had sent
13 the defendant does not want to tell you this
14 information, then I'm sure they're going to
15 contact the insurance company, which would kind
16 of have defeated the purpose.

17 Q. Look at No. 28.

18 A. Okay.

19 Q. This is Mr. Bailey.

20 A. Okay.

21 Q. It says here the defendant contacted
22 Gary W. Bailey.

23 A. Okay.

24 Q. You said you never contacted
25 Mr. Bailey.

1 A. Not to my recollection. I don't
2 recall that. I would assume that that meant that
3 at some point perhaps Dennis or somebody working
4 for Dennis had contacted Gary Bailey.

5 Q. Is there any way, Mr. Robinson, like
6 the answers here, other than your rough notes, is
7 there any way to know where this information came
8 from and from whom?

9 A. It would have had to have come from
10 Dennis or a Stokes-Craven employee.

11 Q. Well, in preparing these interrogatory
12 responses, do you recall who all you contacted or
13 consulted with?

14 A. I know I talked with Dennis
15 specifically. And, again, I can't remember
16 if -- I think Barry and Kenny were both gone at
17 that time. I think it said that in those
18 answers. And Mr. Billy, and Roy, again I
19 can't -- Roy Touchberry. I can't specifically
20 say that I talked with them, at that time, but I
21 had talked to them prior and, you know, this was
22 just information that we had already covered kind
23 of confirming it with Dennis.

24 Q. But would it be a situation that
25 whoever was present, if anyone, in addition to

1 Dennis, Dennis would have been there because he
2 was present at all these meetings in which you
3 were talking to the other functionaries in the
4 business?

5 A. Yes. As best I can recall, I never
6 met with anybody without Dennis being there.

7 (PLF. EXH. 22, Letter dated 5/19/05,
8 was marked for identification.)

9 BY MR. EPTING:

10 Q. Okay. Let me show you what's been
11 marked as Exhibit 22.

12 MS. WALL: Do you have another one?

13 MR. EPTING: I'm sorry. Yes, I do.

14 BY MR. EPTING:

15 Q. Did you do anything with regard to the
16 information that is requested here or did you
17 just ignore it?

18 A. I did not supplement any answers, I
19 know that. Or to the best of my recollection.
20 You may pull one out but I don't recall doing
21 that. Because the -- you know, that's -- part of
22 the reason I did that is because that's, again,
23 what they asked me for. And I think it's under
24 No. 3, on the second page, where he talks about
25 since discovery rules are liberally construed, I

1 am entitled to this information as it as may
2 contain some requirement on the part of the
3 defendant to identify vehicles similarly situated
4 to the plaintiff's vehicle. The customer list
5 where he's again digging for tomorrow's client.

6 Q. Was he pretty consistent about
7 wanting, either through discovery, or letters
8 such as this, that he wanted these other vehicle
9 identifications?

10 A. A customer list, yes. He just
11 wanted -- which would have names, addresses,
12 phone numbers, and the year, make, model car
13 identification.

14 Q. Did you have, once again, the
15 conversation with Dennis, according to you, about
16 the advisability of doing no discovery versus
17 Mr. Moskos's ability to get this information if
18 he really wanted it?

19 MS. WALL: Object to the form.

20 THE WITNESS: We probably had a
21 discussion, and I said, you know, he sent me
22 this. What I sent him apparently hasn't
23 satisfied him. We may have to give him that.
24 Again he was adamant, you know, don't let him get
25 it.

1 (PLF. EXH. 23, Handwritten notes, was
2 marked for identification.)

3 BY MR. EPTING:

4 Q. Let me show you what's marked as
5 Exhibit 23. Do you recognize that handwriting?

6 A. Not really. I mean it's not mine.
7 I'm not sure whose it is. It may be somebody in
8 my office but I do not recognize the handwriting.

9 Q. So none of this handwriting is yours.

10 A. It does not appear to be, no, sir.

11 Q. And you don't have any idea what it
12 may be.

13 A. Well, just based on what it says, it
14 looks like somebody called an 84 -- or faxed
15 something. Somebody will continue with -- will
16 continue with a scheduling order. I don't know
17 if that's Moskos's phone number. Sent a proposal
18 and doesn't know what he wants to do about
19 mediation. I do order. So it apparently was
20 somebody that was in my office prepared that,
21 yes.

22 Q. Were there any discussions with
23 Dennis, through this period of time, about trying
24 to settle this case?

25 A. I would certainly think so. Because

1 it addresses mediation. I'm sure I talked to him
2 about that process, as he pursued things, and as
3 it got closer and closer to the hour. And,
4 apparently, again, it says he will continue. So
5 apparently we are on the docket at some point in
6 time.

7 Q. Did you have an opinion whether this
8 case ought to be settled or not?

9 A. Yes, I did.

10 Q. And what was that?

11 A. I thought that it would have been
12 better for Dennis to settle this case.

13 Q. And what recommendations did you make
14 to him?

15 A. A dollar figure or what behavior to
16 engage in? I'm not sure what you mean.

17 Q. Either one, whatever you meant by it.

18 A. I just --

19 Q. What kind of conversations did you
20 have with him?

21 A. That we probably needed to settle.
22 That this was a case that had a lot of exposure,
23 and the facts were horrible, absolutely horrible,
24 and there was nothing that we could do to change
25 the facts. It wasn't a subjective something that

1 maybe they would believe one person's word over
2 the other. There was a vehicle that was clearly
3 wrecked, undeniably wrecked, and a signature that
4 was clearly, undeniably forged. And that what we
5 need to do, in my opinion, it was in his best
6 interest to settle it. But he had, not
7 necessarily that I agreed with him, but at least
8 understood his reasoning for not wanting to do
9 that because of who it was.

10 Perhaps if it was Polito it would have
11 been a different story. But because of Moskos,
12 and his hounding the Stokes dealerships,
13 basically, if we settle with him, and give him
14 money, we're then funding his next lawsuit, and
15 giving him the ability to keep going in the
16 lawsuits that he has going. So he just felt like
17 in that position he couldn't really afford to
18 show any weakness, or give him any assistance,
19 monetarily, give him new life, so to speak.

20 Q. So these are conversations that seem
21 to be occurring, according to you, from the very
22 beginning, from the Polito letter right up, we're
23 up now to July of '05. So they just continued
24 throughout this entire case?

25 A. Well, I don't want to say they

1 continued. I mean they happened. Obviously I
2 didn't talk to him about that every day, didn't
3 talk to him about this case every day.
4 Certainly, it appears that on July 28th I had to
5 get a continuance, or request a continuance, or
6 address being on the docket, and address
7 mediation, which would have spurred this thing is
8 coming. We need to, we really need to consider
9 not going to trial.

10 Q. All right. Well, let me rephrase it.
11 I didn't mean that the conversations were every
12 day.

13 A. I understand. I just want to be clear
14 that I'm not saying that either.

15 Q. But your point to me is that the
16 conversations that you had with Dennis, about
17 this being a bad case, that it's a dangerous
18 case, that there is enormous exposure, and
19 Dennis's unwillingness to deal with it, because
20 of the larger issue of Stokes and Moskos, it's
21 something that occurred regularly throughout the
22 dealings of this case.

23 MS. WALL: Object to the form.

24 BY MR. EPTING:

25 Q. And you can define regularly.

1 A. I am going to say regularly, no. It
2 came up as issues came up. In other words when
3 the motion to compel came up, and certain vital
4 information, or when it appeared on the trial
5 roster for the first time, things of that nature,
6 would certainly prompt those discussions again.

7 Q. Well, let me be a little more specific
8 then. Here we are in July of '05. So we're now
9 two and a quarter years down the road.

10 A. Okay.

11 Q. This is a conversation that you and
12 Dennis are having now for -- how many times do
13 you think you have told him: Dennis, this is
14 dangerous, you need to get out. And Dennis says
15 to you: no, we're not encouraging Moskos. How
16 often do you think that conversation --

17 MS. WALL: Object to the form.

18 THE WITNESS: Half a dozen, six,
19 eight, ten times, something like that, over that
20 period of time. I mean it wasn't once a month or
21 once every other month. It was just as the
22 occasion gave rise for me to kind of open that
23 door and talk about it.

24 BY MR. EPTING:

25 Q. And were you, in your description of

1 the dangers of the case that Dennis was taking,
2 were you clear in your description of what you
3 recommended? What your advice was?

4 A. Absolutely. Because, again, this was
5 not the first time that Dennis and I had dealt
6 with a case or a case like this. It was the
7 first time that it had gotten this close to trial
8 or something of that nature. But no doubt in my
9 mind I knew what he was saying and he knew what I
10 was saying. We had done business and been
11 friends long enough. I don't think we had a
12 communications breakdown, no.

13 Can we take quick break?

14 MS. WALL: You can take a break any
15 time you want.

16 (A recess transpired.)

17 (PLF. EXH. 24, Voir Dire, was marked
18 for identification.)

19 BY MR. EPTING:

20 Q. Mr. Robinson, let me show you what's
21 been marked as Exhibit 24. Is there any reason,
22 Mr. Robinson, that you did not prepare Exhibit
23 24?

24 A. That I didn't prepare it? Prepare a
25 written voir dire?

1 Q. Yes.

2 A. I didn't really feel like I needed to.

3 Q. Was there any reason you didn't
4 prepare any request for charges?

5 A. I did prepare a request for charges.

6 Q. I've not seen those.

7 A. I believe I just gave them to the
8 judge and Mr. Moskos. Or perhaps just to the
9 judge. We talked about them and then kept what
10 he felt was appropriate and that was it.

11 (PLF. EXH. 25, Plaintiff's Requests to
12 Charge, was marked for identification.)

13 BY MR. EPTING:

14 Q. Well, let me show you Exhibit 25,
15 which were requests for charges.

16 A. Okay.

17 Q. You think you prepared something like
18 this?

19 A. I know I did.

20 Q. All right. And did the judge grant
21 them?

22 A. Some of them.

23 Q. And --

24 A. Denied some and granted some, yes.

25 Q. And what form were they in?

1 A. Probably very similar to this.
2 Because I'm sure they would have come out of the
3 civil request to charge and just -- or something
4 to that effect. Maybe there was a case or two,
5 but probably the majority came out of -- I think
6 it was Irvin's request to charge, I believe.

7 Q. Why would there be no copies of them
8 in your file?

9 A. Again, I guess, perhaps I just gave
10 them to the judge, and made independent copies,
11 and I went by the physical book itself. Had the
12 pages marked or something.

13 Q. Did you prepare any pretrial brief?

14 A. I did not prepare a pretrial brief.

15 Q. What do the local rules require about
16 pretrial briefs?

17 A. The local rules?

18 Q. Yes. The state rules for circuit
19 court. Are you familiar with rules requiring the
20 filing of a pretrial brief?

21 MS. WALL: Object to form.

22 THE WITNESS: I have never filed a
23 pretrial brief unless a judge specifically
24 contacted me and asked me. That's typically not
25 done here, quite frankly, in this circuit, that I

1 know of.

2 BY MR. EPTING:

3 Q. Did you prepare an opening statement?

4 A. I didn't write an opening statement,
5 no, sir.

6 Q. Did you prepare any examinations for
7 the witnesses that you were calling to the stand?

8 A. I mean I prepared to do an opening
9 statement and to, obviously, to examine all of
10 the witnesses.

11 Q. Right. But is there anything in
12 writing where you prepared an opening statement?

13 A. I did not prepare one, no.

14 Q. All right. Did you prepare any of
15 your examinations for your witnesses on direct in
16 writing?

17 A. I did not do any direct.

18 Q. Did you prepare any documents for your
19 cross-examination of witnesses?

20 A. Yes.

21 Q. And would those writings be in your
22 file?

23 A. They are. And I'm pretty sure those
24 are what were turned over in the supplementary
25 discovery. Those were the notes we thought

1 Mr. Brown had that I later found.

2 Q. All right. Now, I'm not sure I'm
3 familiar with this.

4 A. Okay. I gave them to Susan later.
5 There were some --

6 Q. What do they look like?

7 A. They're just a bunch of handwritten
8 notes, you know, similar to that, but just notes
9 in my handwriting.

10 Q. Okay.

11 MS. WALL: Drew, they were produced to
12 you and co-counsel on, the supplement discussion,
13 Bates numbered --

14 MR. EPTING: Do you have a copy of
15 them?

16 MS. WALL: Are you asking me?

17 MR. EPTING: Yes.

18 MS. WALL: That's what I'm looking
19 for.

20 MS. WALL: I gave them to you 2/11/11.

21 MR. EPTING: Let me just take a look
22 at them, Susan.

23 MS. WALL: Handwritten. Let me see.
24 I don't want to give you my work product.

25 MR. POWELL: Susan, if you can give

1 us -- just tell us what those Bates numbers are.

2 MS. WALL: Well, they are Bates
3 numbered 1 through 41. Remembering, we didn't
4 have his file, because that was with Young
5 Clement Rivers.

6 MR. EPTING: Right.

7 MS. WALL: So that's why it's 1
8 through 14 dated February 11, 2011. Let me take
9 off my -- I'll show you my cover letter to you.

10 MR. EPTING: I don't even need to see
11 that. What I was going to do is take a quick
12 look through the documents because, obviously, I
13 have not seen these because --

14 MS. WALL: Well, your office has them.

15 MR. EPTING: Right. Susan, let me
16 make this suggestion. I don't doubt that you
17 sent them, but I can tell you I have not reviewed
18 them to prepare to be here. And I don't know
19 that I would have any questions about them at
20 all. But what I would propose is just let me
21 just make sure I know what I'm looking at, and
22 then if I feel like I need to reconvene this I
23 can reconvene it. And if you feel like you need
24 to object you can do that. If you don't mind can
25 we just mark this as an exhibit, and let me ask

1 him to identify what they are, and then we'll
2 just sort of go through it that way, and then you
3 can produce them afterwards.

4 MR. POWELL: I did not bring my copy.
5 So we don't have them. Susan is the only --

6 MR. EPTING: Well, I literally was
7 just going to mark them, hand them over, and ask
8 them what are these. And it looks like to me,
9 Susan, it's sort of two pieces. One has to do
10 with his notes from trial and the rest of it
11 looks like it has to do with getting this case to
12 Steve Brown, the appeals, the continuances, the
13 request for transcripts, and that sort of stuff.
14 Is that generically right?

15 MS. WALL: I mean I don't know. They
16 are whatever they are. We produced everything
17 that was found.

18 MR. EPTING: All right. Do you mind
19 if we mark them?

20 MS. WALL: Well, if we're going to
21 mark -- well, that will be all right. But I'm
22 not going to agree that we're going to reconvene
23 this deposition at a later time. You have had
24 this since February or whatever my cover letter
25 date is. But go ahead and mark my copy.

1 MR. EPTING: Let's mark that as the
2 next exhibit.

3 MS. WALL: Is that Exhibit 25?

4 THE WITNESS: 26.

5 (PLF. EXH. 26, Letter dated 2/11/11
6 with group of documents, was marked for
7 identification.)

8 BY MR. EPTING:

9 Q. Take a look at what's been marked as
10 Exhibit 26 and tell me, just generally, what is
11 in there. And, Mr. Robinson, I described it as
12 two pieces. The first part looks like a lot to
13 do with getting the record on appeal, getting
14 extensions of time, and somewhere toward the end
15 it looks like it turns into your notes from
16 trial.

17 A. Okay. What this is, I believe, we
18 had, obviously, some discussions about we were
19 missing parts of the file, and there were some
20 subpoenas exchanged. I had moved offices, went
21 over there one weekend, as part of getting
22 prepared to move back over there, found a box
23 with just some miscellaneous files in it, and in
24 there was basically this entire package, just
25 jumbled and necessarily non-sequential as it is,

1 that's what was in that. So everything that
2 related to this case I sent to Susan so she could
3 disclose it.

4 Q. No problem. I'm fine with that.

5 A. Okay.

6 Q. But back to my question. Where do
7 your trial notes start?

8 A. What page?

9 Q. Yes. Are there Bates?

10 A. Let's see. 42 maybe.

11 Q. And they go through what?

12 A. Well, they're out of order. I'll say
13 that. It's actually -- 74 is the highest number
14 I see on here. They're kind of shuffled. The
15 last, 75, then there's a 36, a 37, so they kind
16 of apparently have gotten out of order somehow.
17 But apparently it's about 40 pages worth, give or
18 take, depending on how many are shuffled out of
19 order. But it appears -- well, there's a 36. So
20 maybe it's 36 through 75. Again it's hard to
21 tell right now.

22 Q. The handwritten notes that are in this
23 Exhibit 26 are they your notes from trial?

24 A. They appear to be my notes before,
25 during, yes, trial.

1 Q. Well, can you identify anything in
2 there that is your notes before trial?

3 MS. WALL: I'm putting them
4 in -- trying to put them in order.

5 THE WITNESS: Okay. What was your
6 question?

7 BY MR. EPTING:

8 Q. My question is are those your notes at
9 trial? And I'll tell you the trial was the 14th,
10 15th, and 16th.

11 A. It appears to be. A number of them
12 are dated 14th, 15th, and so on.

13 Q. Are there any dated before the 14th?

14 A. No. There are some undated but none
15 are dated prior to that.

16 Q. Do the undated ones look like that
17 they were notes from trial?

18 A. They do, yes.

19 Q. All right. What research did you do
20 in advance of trial?

21 A. I'm sure I looked at it to see if
22 there was any case law, you know, that was
23 helpful, on point, things of that nature, request
24 for charge. Legal research or just research in
25 general.

1 Q. Legal research.

2 A. That's it.

3 Q. Let me ask you this. Do you have any
4 notes related to, I think you said there
5 were -- there is nothing in writing related to
6 preparation of an opening statement.

7 A. Probably not.

8 Q. There's nothing in writing about what
9 you might ask witnesses on direct that was
10 prepared in advance of trial.

11 A. Nothing that I separately wrote, no.

12 Q. All right. That there's no prepared
13 cross-examination of a witness who might testify
14 at trial that was done before trial.

15 A. Not specific questions, no.

16 Q. All right. And the notes that you
17 have in front of you appear to be notes that were
18 taken during trial.

19 A. Correct.

20 Q. All right. Let me show you, and I'm
21 going to hand you the research, and this is just
22 from your folder.

23 A. Okay.

24 Q. And I only have one copy. And I do
25 not intend to mark these as exhibits. But I just

1 want to go through them with you and we can refer
2 to them. And I'm more interested in the date,
3 Mr. Robinson.

4 MS. WALL: I may want to talk to the
5 client about this.

6 MR. EPTING: You're welcome. Let me
7 tell what you I've done. And it may help you.
8 It looks like to me you're doing various research
9 on various dates. The first clip are the
10 documents that are dated August 13th, the next
11 August 14th, the next August 15th, August 16th,
12 and so on. And so I am more interested in the
13 time of this work than I am going through these
14 cases and what they're about.

15 MS. WALL: Let's step outside.

16 (A recess transpired.)

17 BY MR. EPTING:

18 Q. If you would, Mr. Robinson, is it your
19 practice, if you do legal research, that if cases
20 are germane, or you might rely on them, to print
21 those cases and make then a part of your file?

22 A. At some point, yes.

23 Q. All right. And I note in looking at
24 your file, and first I'm referring you to the
25 361540 South Carolina Code which is Bates labeled

1 289 through 198, and then 361 through 367, which
2 is the federal code 4932705. This is work that
3 was done on these cases that were printed on the
4 13th. Do you believe you would have done this or
5 could someone else have done this for you?

6 A. Someone could have done it for me, but
7 I wouldn't have any reason -- it very easily
8 could have been me.

9 Q. All right. Do you have or are you
10 aware of any research you did in this case, legal
11 research, prior to August 13th?

12 A. Whatever was in the file. And if it
13 wasn't in the file it just was not printed prior
14 to that or, you know, looked at on the computer.

15 Q. Or that there was no research done?

16 A. Yeah, there was research done.

17 Q. All right. Do you have any records of
18 it other than what you've produced in this file?

19 A. I don't have it on me --

20 MS. WALL: Let me object.

21 THE WITNESS: -- today.

22 MS. WALL: Because this file you're
23 referencing is Young Clement Rivers.

24 THE WITNESS: Again, I don't know.

25 Whatever was in the file was in the file. There

1 may have been stuff that never got put in the
2 file, or when I printed out clean copies to hand
3 up in court, or do whatever, I took the older
4 copies or stuff that I had written on, scribbled
5 on, underlined, highlighted, and threw them out
6 and just had the clean copies.

7 BY MR. EPTING:

8 Q. Do you remember what, if any, research
9 you did before August 13th?

10 A. The research that I've already told
11 you about. Looking at case law. Certainly, when
12 I got the complaint, the different causes of
13 action, I would have looked at the Federal
14 Odometer Act, the Dealer's Act, different things
15 of that nature, and would have done some research
16 at that point in time. Because, certainly, it
17 would be germane, based on their factual
18 allegations, there may be certain things I needed
19 to respond to or raise in my initial answer or it
20 could be waived. So I'm sure I did research at
21 that time also.

22 Q. Did you share any of that research
23 with Mr. Craven?

24 A. I didn't give him copies, I wouldn't
25 think. Because, again, that was something that

1 he normally didn't do and it wouldn't have done
2 him any good to have a copy of the case. I may
3 have talked to him and told him that this act
4 says this, and explained it to him, or things of
5 that nature. I may have discussed it with him.
6 But actually giving him a paper copy, I doubt it.

7 Q. This is research that you would have
8 done over the computer?

9 A. I would imagine so. The majority of
10 it.

11 Q. How do you keep records of the
12 research that you do on the computer?

13 A. I don't know that I keep records of
14 the research that I do on the computer.

15 Q. Are you not billed by in this case
16 Lois Law for the time that you spend in the
17 research that you do?

18 A. I believe, and I'm not positive, but I
19 believe that the reason we were using Lois Law
20 was it may have been a flat monthly fee. It
21 didn't have all the case notes and things that
22 Lexus and West Law had. It was a much simpler
23 version. But it was cheaper. So, no, I don't
24 believe it was a time charge that we had to keep
25 up with. But I may be wrong. I never paid the

1 Lois Law bill but that was my understanding.

2 Q. Who would have been responsible for
3 the records of the billings and the charges from
4 Lois Law? Who would have handled that with
5 Johnson McKenzie and Robinson?

6 A. I'm trying to remember who would have
7 done it at what point in time. We had, I guess,
8 two basic different part-time ladies that came in
9 to pay bills, and I would assume they would open
10 the bill and pay it.

11 Q. And what were their names?

12 A. Dee Dee Sykes was one of of them and
13 Bobbie Jo Elmore was the other.

14 Q. And where are they now?

15 A. I think they're both here in Manning.

16 Q. If you would, look at the next set of
17 documents, which is the CarFax, Bates 456 through
18 458, and then a case, Longshore. Bates 278 to
19 286.

20 A. Uh-huh.

21 Q. Do you have any recollection about
22 what this research was related to or why you
23 might be requesting this on the day of trial?

24 A. The CarFax, I guess that was the
25 particular vehicle in question, just to show or

1 to make sure that there wasn't something on
2 there, whether it was or not. The rest of it
3 looks like it was something, again, that it was
4 kind of prepared, and this appears it would have
5 been my copy of case law that I was prepared to
6 hand up to argue something, because it has the
7 word punitives written in my handwriting at the
8 top. So probably that was a, again, a clean copy
9 of something I had already read, looked at,
10 decided to use, and just printed clean copies.
11 And it may have been opposing counseling, or
12 something like that, on one, and I wouldn't have
13 written anything on the court's copy, and then
14 something of that nature.

15 Q. How much time do you estimate, in the
16 weeks coming into this trial, that you spent
17 preparing your witnesses and preparing for trial?

18 A. That would be difficult for me to
19 answer without looking back at the entire file.
20 Actually I would just be totally guessing.

21 Q. Look at the next group of documents,
22 which is your Bates labeled 324 through 354, and
23 a series of cases dated August 15th.

24 MS. WALL: Again, for the record, to
25 clarify we're talking about YCR Bates numbers.

1 MR. EPTING: Right.

2 THE WITNESS: This is the next packet
3 of documents.

4 BY MR. EPTING:

5 Q. Right.

6 A. Okay.

7 Q. Is there some issue, Mr. Robinson,
8 about these being part of your file as opposed to
9 somebody else's file? I mean they're YCR, but
10 you delivered your file to Young Clement Rivers,
11 did you not?

12 A. Yes.

13 Q. All right. Is there some question? I
14 mean these say that they're from loislaw.com.

15 MS. WALL: Are you taking something I
16 said? I'm trying to make sure, since you're not
17 giving us a copy, I'm wanting to know if you're
18 referencing Robinson number, YCR, plaintiff?
19 We've got a lot of documents here in the case,
20 and they all are Bates numbered 1 through
21 whatever. I am simply trying to establish for the
22 record that when you put in numbers, in this
23 series of questions, you're referring to YCR
24 Bates numbers.

25 MR. EPTING: Understood.

1 MR. POWELL: I thought that was in
2 connection with my comment.

3 MR. EPTING: Well, I completely missed
4 the whole thing, because every document that I've
5 used is a YCR document, because that's where his
6 files came from. And so I apologize.

7 MS. WALL: Not these.

8 MR. EPTING: Well, I know that Susan,
9 it came from your file.

10 THE WITNESS: I don't have any
11 independent reason to contest that these came out
12 of the file I took to Young Clement Rivers.

13 MR. EPTING: All right.

14 BY MR. EPTING:

15 Q. But would these have been cases that
16 you thought were of some significance to you in
17 the trial of this case?

18 A. I would imagine so. I don't think I
19 would have printed them otherwise.

20 Q. Okay. How did you think the trial
21 went?

22 A. The end of it went terrible.

23 Q. I understand that.

24 A. The trial itself? I think it was much
25 longer than it should have been, but I don't

1 think I had anything to do with that. I think
2 Judge Hayes kind of let Mr. Moskos parade a good
3 bit. But he shot me down when I tried to reel
4 him in on that.

5 As far as what was testified to, you
6 know, I guess it went as good as it could, with
7 the facts that we had. There were no startling
8 revelations, nobody confessed to a heinous crime
9 from the witness stand. Dennis and Mr. Billy or
10 any of our witnesses didn't shock me. I wasn't
11 shocked by anything that their -- I mean it was
12 more or less as expected. I was disappointed,
13 quite honestly, that the judge had allowed
14 Mr. Morris to testify as an expert to anything,
15 other than being able to hold down a job, but ...

16 Q. Were there any other discussions about
17 trying to settle this case?

18 A. The, and I'm trying to remember what
19 day of the week the 14th was, sometimes they will
20 bring a jury in on a Tuesday.

21 Q. The 14th was a Monday.

22 A. Monday? Okay. That morning I did
23 talk to Dennis, because Dennis does not like to
24 be, you know, made a public figure in a courtroom
25 or somewhere where he's got to do public

1 speaking, things of that nature. And he made it
2 known to me that, you know, I don't want to be
3 hassled. We've either got to try the case or
4 we've got to settle the case.

5 He did authorize me at that point to
6 offer them some money to settle the case, which I
7 did.

8 Q. And do you remember what that offer
9 was?

10 A. I think it was \$50,000.

11 Q. And was there any response to it?

12 A. Well, I mean, Moskos -- I don't
13 believe that he countered, he just said that
14 ain't gonna do it. And I asked him for a counter
15 and he said we're ready for trial.

16 So I went back and told Dennis that.
17 And, you know, he said, well, what do you think?
18 And I said, well, I think, you know, it's going
19 to take 75 to a hundred, probably, to get his
20 attention to settle this case. He said he wasn't
21 interested in doing that. I said, well, your
22 exposure is punitive, and God only knows, there's
23 twelve people that you don't know sitting on that
24 jury. But he did not want to counter back
25 beyond, that was kind of my recommended range,

1 that we need to go back, because Moskos did not
2 make a counter. So we needed to go back probably
3 75 to a hundred to be serious. Because he didn't
4 even blink at 50.

5 Q. And so your conversations with Dennis
6 about you need to settle this case, that there's
7 great exposure in this case, they continued right
8 on through this trial, you made an effort to
9 settle this case, and got a settlement
10 authorization from Dennis, offered it, and at
11 some point Dennis wouldn't give any more
12 authority to try to settle it.

13 A. That was it pretty much.

14 Q. But you believed throughout all of
15 this that the case should have been settled?

16 A. Yes.

17 Q. Look at the case in here on the 15th.
18 The name of it is Simpson.

19 A. What's the -- the easiest thing is the
20 number at the bottom.

21 Q. Let's see if I can get you a Bates
22 stamp number. It's 306.

23 A. Okay.

24 Q. This is a case about the
25 ineffectiveness of counsel. In fact the entire

1 case is about the ineffectiveness of counsel.

2 A. Okay.

3 Q. What is the reason that this opinion
4 is in your file? Is it because you believe
5 Mr. Moskos was doing an ineffective job?

6 A. I doubt it. I really don't, without
7 rereading the case, I don't have a clue. It may
8 have been something that was printed by another
9 attorney and got picked up out of the printer at
10 the same time. I really don't have ...

11 Q. There's several cases in here,
12 Mr. Robinson, that have to do with counsel
13 binding clients and the ineffectiveness of
14 counsel. Were you doing any research, as this
15 trial wound on, along that line?

16 A. Absolutely, I understand what you're
17 getting at, no. I was not worrying about CYA, or
18 anything of that nature, during the trial, no,
19 sir.

20 MR. EPTING: Well, let me show you
21 this document. Let's mark this as Exhibit 27.

22 (PLF. EXH. 27, Notes from trial dated
23 8/14/06, was marked for identification.)

24 BY MR. EPTING:

25 Q. Before I ask you a question about

1 this. Did you ever say anything to Dennis like
2 the exposure in this case is not very great, he's
3 been driving the truck for four years. He only
4 paid 20-some-odd-thousand dollars for it. Did
5 you ever tell him that?

6 A. I'm sorry. I was reading that.

7 Q. Yes. Did you ever have any
8 conversations with Dennis and tell him that the
9 exposure in this case was not very great, he's
10 been driving the truck for four years, that the
11 vehicle only cost 20-some-odd-thousand dollars?

12 A. No, sir. He may have asked me what's
13 the best case scenario? And I may have told him
14 20-some-thousand dollars, because that's what he
15 paid for the vehicle, or the difference between
16 14 and 26, something like that. But, no, I would
17 never have said that that was the worst case
18 scenario.

19 Q. And so your memory of your
20 conversation with Mr. McKenzie is different.

21 A. Just like he said, I do not remember
22 having. And, again, it may be that he asked me
23 what's your best case scenario? And I may have
24 said \$26,000 on the low side and bad on the high
25 side.

1 Q. What kind of conversations did you
2 have with Mr. McKenzie about this case?

3 A. Just basically like he said. You
4 know, no in-depth, bouncing, you know, making
5 sure he agreed with the thought I had, Steve,
6 what do you think about this? Or what do you
7 think about settlement? Don't you think this is
8 something I ought to settle? Should I push
9 Dennis to settle? Something like that. I mean
10 there weren't a ton of them. This again, in my
11 opinion, was pretty simple and straightforward.
12 The facts didn't change, there were no startling
13 revelations. It was, at the end, very similar to
14 what it was at the beginning. And it was just
15 trying to do a good job, and do what Dennis
16 wanted me to do. And take into consideration all
17 of the concerns about the dealership, and the
18 dealerships, not just this one particular one.

19 Q. Look at what has been marked as
20 Exhibit 27.

21 A. Okay.

22 Q. What can you tell me about this?

23 A. It says notes from trial. I have -- I
24 mean I don't know if I dictated these or if I
25 went back and typed them up trying to be

1 proficient. Sometimes, as with the little
2 billing note, I have these little flashes of
3 determination that I'm going to be better, and
4 neater, whatever. That's what it looks like to
5 me. It looks like something I typed after trial
6 that day or dictated and somebody else typed.

7 Q. Well, the notes that you have here,
8 Mr. Robinson, I would describe as pretty upbeat
9 about what was going on at trial. In the first
10 paragraph you say Mr. Moskos stated that
11 Mr. Austin bought a truck, it was the truck of
12 his dreams. That there was a pattern of
13 deception and lies. That they knew, they meaning
14 Craven, knew the truck was wrecked, was unsafe,
15 and they needed to award him damages. That was
16 sort of, I guess, your description of his opening
17 statement.

18 A. Yes.

19 Q. And then you talk about the first
20 witness, Mr. Bailey. Mr. Bailey said it was in
21 excellent condition. It was repaired by Norton
22 and Richardson. Their reputation was impeccable.
23 And the only thing that was wrong with it was a
24 leaky oil seal.

25 Is that an accurate description? This

1 is done the day of trial with what you thought
2 Mr. Bailey's testimony was?

3 A. No. Probably -- well, it would
4 be -- more than likely -- I make notes, during
5 the trial, of what people said. Some of them are
6 important, and some of them end up being
7 absolutely worthless. Probably what I did,
8 looking at this, and just knowing from the past
9 what I do, is I pull out certain pieces that I
10 want to use in my closing argument. If you wait
11 until the end of the trial to go back through all
12 the notes and prepare your closing arguments, you
13 kind of ... certainly, I would hope it would
14 sound upbeat. Because it would need to be the
15 things that were positive for our case, to point
16 out to the jury, that occurred from these
17 witnesses, for closing argument purposes. That,
18 again, I'm not one hundred percent positive. But
19 that appears, from reading and looking at that,
20 that that's pulling out what's important for me
21 to point out to the jury that's good for our
22 case, bad for theirs, for closing argument
23 purposes.

24 Q. So this you would say is more your
25 pulling out the best that could be said about the

1 witnesses that testified as opposed to the whole
2 of their testimony. And this was something you
3 were going to be using in your closing argument.

4 A. Again, that's what I believe, yes.

5 Q. All right. Did you do something the
6 following day similar to this?

7 A. Probably not. I was probably too
8 tired. I think I wrote on the notes, there's
9 some pages that say closing, and then some of
10 them that don't have dates, where I would again
11 just kind of go back. It was not nearly as neat
12 and organized and wonderful as this. But, yes, I
13 would do something similar to that -- similar to
14 this for every witness that testified.

15 Q. When you say similar to this for every
16 witness that testified?

17 A. I would have circled on the, and I
18 don't remember what, maybe 26, the different
19 things on there, circled some things, put stars
20 by the things that I thought were really
21 important, and then there may be some pages that,
22 you know, just had certain things written on it.
23 Just things that I wanted to set out from all of
24 the notes and so I could concentrate on those for
25 closing.

1 Q. Let me show you another packet of
2 documents, YCR 287, 288, 355 through 360.

3 A. Where are they?

4 Q. They're the --

5 A. I'm sorry. It's still part of this.
6 I'm sorry. I was looking for something marked.
7 I apologize. Start me with the numbers, the
8 first numbers.

9 Q. Those are the ones.

10 A. 287?

11 Q. Yes.

12 A. Okay.

13 Q. This is on the 16th. This is the day
14 the case went to the jury.

15 A. Okay.

16 Q. Do these look like what you might have
17 turned up to the judge for charges? Have you
18 reviewed the transcript to know what charges, if
19 any, you asked?

20 A. I did review the transcript. It
21 referenced a settlement conference that was
22 apparently done in chambers off the record.
23 That's what it indicates to me. This may have
24 been similar to that. Like I said, I'm very
25 confident that I printed some things out of the

1 Irvin's request for charge book that I would have
2 literally handed to the judge, and I probably
3 tried to make them look similar to Moskos's, that
4 just said defendant's request for charge.

5 Q. Did you make them a part of the record
6 in order to have them as grounds for appeal if
7 they were not charged?

8 A. I really cannot recall what we did in
9 chambers. I thought that we had some discussion
10 that they would all be put in but I can't recall.
11 It was done in chambers at the judge's request.

12 Q. Well, I understand there was a
13 settlement conference. Do you have or do you
14 understand that if you don't make charges, that
15 are refused, part of the record, that you have no
16 basis to appeal or object on the basis?

17 A. Right. Because there's nothing in the
18 record to appeal from, correct.

19 Q. Right. Did you take any of the
20 charges that you offered that were refused and
21 make them part of the record?

22 A. Apparently I did not. I don't
23 remember seeing that in the transcript, and it
24 was probably because I didn't find it to be
25 detrimental, or appealable, or important, quite

1 frankly. In other words I think I made a
2 reference to the exhibit numbers or the numbers
3 of Moskos's that I objected to, that he let in,
4 so we would have that protected for appeal. I do
5 remember seeing that. But I think in reality he
6 more or less charged everything I asked him to
7 charge or something close enough that I wasn't
8 concerned about it. My bigger concern was some
9 of the charges he had allowed or agreed to give
10 that Moskos had proffered. And so I do remember
11 seeing a reference where I had read those into
12 the record.

13 Q. So your testimony, with regard to the
14 legal research, would be that the research that
15 we've gone over, from the 13th through the 16th,
16 is not all the legal research that you would have
17 done in this case, and that there would have been
18 other legal research done, and that for whatever
19 reason it wasn't put in the file, thrown away, or
20 you just read it on a computer screen.

21 A. Yes, that would be accurate.

22 Q. All right. But whatever you would
23 have done would most probably have been done over
24 Lois Law.

25 A. Lois Law. Perhaps some hard copies,

1 at that time, may have been done, just generally,
2 off the Internet, depending on where I was when I
3 did it. I may have done it off the laptop at
4 home. But probably, yes, Lois Law would have
5 been the most likely place, yes.

6 (PLF. EXH. 28, E-mail dated 8/1/06
7 with Memo, was marked for identification.)

8 BY MR. EPTING:

9 Q. Let me show you what I've marked as
10 Exhibit 28. Do you remember getting an e-mail
11 from Judge Hayes about filing a brief or stating
12 your position with regard to election of
13 remedies?

14 A. I mean this e-mail.

15 Q. Do you remember if you filed anything
16 with regard to Judge Hayes' request?

17 A. I don't recall. I don't remember
18 doing a separate something, but I could have. It
19 may have been included in the post-trial motions.

20 Q. What was your understanding with
21 regard to the specificity of JNOV motions in
22 order to have them properly considered by a
23 court?

24 MS. WALL: Object to the form.

25 THE WITNESS: To the specificity?

1 BY MR. EPTING:

2 Q. Yes.

3 A. I had to make them clear enough that
4 the court knew what I was talking about so they
5 could rule on it.

6 Q. Did Judge Hayes and the supreme court
7 find that some of your motions in the JNOV were
8 too vague to even be understood? Do you recall
9 that?

10 MS. WALL: Object to the form.

11 THE WITNESS: No, I don't recall
12 that.

13 MR. EPTING: Let's mark this as
14 Exhibit No. 29.

15 (PLF. EXH. 29, Certified letter dated
16 9/27/06 with attachments, was marked for
17 identification.)

18 MR. EPTING: Let's mark this as
19 Exhibit 30.

20 (PLF. EXH. 30, Letter dated 8/25/06
21 with enclosures, was marked for identification.)

22 BY MR. EPTING:

23 Q. Let's look at Exhibit 30.

24 MS. WALL: Take your time and read
25 these.

1 THE WITNESS: Okay.

2 BY MR. EPTING:

3 Q. Let's look at Exhibit 30 first.

4 A. Okay. (Witness complies.)

5 Q. Do you agree, Mr. Robinson, that a
6 client, such as Mr. Craven, has the right to
7 expect that he will be represented competently by
8 a lawyer?

9 A. He has a competent lawyer, yes, sir.

10 Q. All right. And do you think that he
11 has the right to expect that his lawyer is going
12 to be thorough and accurate and diligent in the
13 presentation of his case?

14 MS. WALL: Object to the form.

15 THE WITNESS: Certainly. He or
16 anybody else that has a lawyer for that matter.

17 BY MR. EPTING:

18 Q. Let's look at your JNOV number one.

19 A. Okay.

20 Q. You state the trial court failed to
21 direct a verdict in favor of the defendant on
22 numerous of the plaintiff's causes of action, and
23 failed to follow proper procedure and analysis in
24 the consideration and denial of defendant's
25 motions for directed verdict.

1 Which causes of action are you
2 referring to here? Which ones are you asking
3 Judge Hayes to consider?

4 A. I believe that was probably set out in
5 the memorandum in more specificity.

6 Q. Understood. But do you understand
7 that a JNOV motion has to specifically set forth
8 the grounds and what it is that you're attacking?

9 A. Right. Denial of the directed verdict
10 motion.

11 Q. All right. What directed verdict
12 motions did you make?

13 A. I made one when the plaintiff rested
14 and one when I rested.

15 Q. But what was the basis of it?

16 A. It's in the transcript. I don't
17 remember verbatim.

18 Q. But what do you recall?

19 A. It was pretty lengthy. Apparently
20 that they didn't put in, they, the plaintiff, did
21 not introduce evidence to get to the jury on the
22 causes of action that I wanted them to. And I
23 went through in the transcript one by one.

24 Q. In No. 2 you state the trial court
25 erred in allowing testimony that was irrelevant

1 and failing to admit relevant and admissible
2 evidence offered by the defendant.

3 A. Correct.

4 Q. What relevant and admissible evidence
5 did Judge Hayes prevent you from putting in that
6 you're referring to here?

7 A. Again, I'm sure that was spelled out
8 specifically in the post-trial or the memorandum
9 in support of it. Probably, certainly, one of
10 the things would have been the photographs of the
11 vehicle that we took while it was sitting. He
12 drove the vehicle, that he was suing about, to
13 court, and it was sitting outside, and I sent
14 somebody out there to take pictures of it, while
15 it was here, to show the jury that there were no
16 problems with it. He wouldn't let me introduce
17 those.

18 Q. Had you ever thought of having the
19 vehicle inspected by a third-party expert prior
20 to trial and calling that person as a witness to
21 testify to the condition of the vehicle?

22 A. I had thought about it, but I didn't
23 really think it was necessary, because there was
24 no contention or allegation that the vehicle had
25 fallen apart, was terrible. That the admissions,

1 the report just said it was clear that it was
2 extensively damaged. Any expert that we would
3 have called, quite frankly, posited the question
4 in the right way, would have had to agree with
5 that, that a reasonable person, with experience
6 looking at cars, should have known this was
7 wrecked, which would have been worse for us
8 rather than better. So that was part of the
9 process.

10 Q. And had Mr. Craven told you that you
11 shouldn't hire experts?

12 A. Not specifically, no, he never said
13 don't hire any experts. I mean that was ...

14 Q. Your third one is improperly charged
15 the law to the jury and failed to charge the
16 current and correct law to the jury.

17 A. Uh-huh.

18 Q. Did you submit any charges that you
19 felt like should have been charged and put those
20 on the record or object to charges that were
21 given --

22 A. Yes.

23 Q. -- and make those part of the record?

24 A. Yes.

25 Q. You did both?

1 A. I don't recall about charges that I
2 introduced that he denied or whatever. But I do
3 remember that I put on the record that I objected
4 to charges number X, Y, and Z of the plaintiff,
5 yes.

6 Q. You state in No. 5 that the trial
7 court allowed improper closing arguments by
8 plaintiff's counsel, allowing him to argue facts
9 not in evidence. And to improperly characterize
10 the jury's role in awarding punitive damages, and
11 appealing to their passion and caprice. Did you
12 object, ever, during the closing argument of the
13 plaintiff?

14 A. Yes, sir, I did.

15 Q. And in what respect did you object?

16 A. To the way he was arguing to the jury
17 that if you don't stop them, if you don't stop
18 Stokes-Craven, they're going to do this again.
19 You've got to punish them or other people are
20 going to get hurt, get sold a bad vehicle, things
21 of that nature. He did that two or three
22 different times, and I objected, and sometimes
23 was sustained and sometimes overruled.

24 Q. No. 8, the jury returned
25 irreconcilably inconsistent verdicts. What do

1 you mean by that?

2 A. Again, I cannot remember verbatim, yet
3 I'm sure I set it out in my memorandum. But I
4 think it dealt with -- I think we prevailed on
5 the Unfair Trade Practices Act and lost on the
6 fraud, and my argument that that was
7 inconsistent. I mean it was something that, you
8 know, to -- trying to make sure I left no stone
9 unturned or no ground unaddressed, for the
10 benefit of my client, for appeal purposes, quite
11 frankly.

12 Q. Well, look at Exhibit 29, which is the
13 judge's orders.

14 A. Okay.

15 Q. Look at No. 4.

16 A. Okay.

17 Q. What do you make out of the judge's
18 notation that the defendant uses the term expert
19 and the court recalls more than one witness was
20 qualified as an expert?

21 MS. WALL: Object to the form.

22 THE WITNESS: Because my -- No. 4, and
23 I believe it's 30, says that the trial court
24 improperly qualified a witness as an expert, and
25 allowed the plaintiff's experts, plural, to

1 render opinions that were misleading. Apparently
2 he was confused or thought that was inconsistent.
3 That is exactly what I meant it to say. That
4 related to him qualifying Morris as an expert,
5 period, at all, for any reason, to testify about
6 anything, because I thought that -- he didn't
7 meet the criteria. So that was the issue that I
8 had with him being qualified.

9 I had no issue with Disher being
10 qualified as an expert in automotive body repair.
11 I had objection to him being allowed to testify
12 about safety concerns and things of that nature.
13 Because I thought that was beyond the scope of
14 his expertise.

15 And, apparently Judge Hayes just kind
16 of missed that, and thought I was either not
17 paying attention or being a smart aleck, one or
18 the other.

19 Q. Look at No. 5. Judge Hayes says the
20 ground is too vague for consideration. The court
21 recalls no rulings regarding plaintiff's closing
22 arguments which it considers warrants defendant
23 any relief under these motions.

24 Do you think that your grounds, the
25 grounds that you stated in your JNOV,

1 Mr. Robinson, were specific enough for a court to
2 consider them?

3 A. I think they should have been, sure.
4 Because I only objected three or maybe four
5 times. It's not like I objected a thousand
6 times. When you object to somebody's closing
7 argument, that is not a very common thing, and
8 courts don't really like you to do that. So,
9 especially within ten days after trial, should
10 have been able to recall that, yes.

11 (PLF. EXH. 31, Invoice dated 12/1/06,
12 was marked for identification.)

13 BY MR. EPTING:

14 Q. Let me show you Exhibit 31.

15 A. Okay.

16 Q. Is this the bill that you rendered for
17 your efforts in your file No. 3219RM?

18 A. Apparently, yes, sir.

19 Q. And you, prior to preparing this, you
20 would have gone back, I think you said, and
21 reviewed your file to see what all you had done
22 before sending this bill out?

23 MS. WALL: Object to the form.

24 THE WITNESS: To some extent. Again,
25 I wasn't looking to make sure I got recouped

1 every penny for every minute I spent on this
2 case. But Dennis insisted that I send him a bill
3 so I got him a bill.

4 BY MR. EPTING:

5 Q. And was the bill paid?

6 A. Yes.

7 Q. And do you think that the bill is
8 representative of the efforts and the expense
9 that you or expended or incurred?

10 A. No. It is not, no.

11 Q. And in what way is it not?

12 A. Dennis insisted on a bill. We talked
13 about it. You know, I didn't, you know, wasn't
14 again worried about charging him a whole lot.
15 Had discussions about it. I didn't know what to
16 charge him. He wanted me to charge him. We went
17 back, and this was obviously December, so it was
18 some period of time that we discussed that. And
19 so I just basically said, fine, here's a number.
20 I don't think I put \$5,600 worth of time into it,
21 I think it was a lot more than that. But ...

22 Q. How much time do you think you put
23 into it?

24 A. You've asked me that already. I
25 really could not render an accurate guess without

1 going through everything.

2 MR. EPTING: Let's take a break here
3 just a second. Then we'll finish.

4 (A recess transpired.)

5 (PLF. EXH. 32, Answer of Defendant,
6 Scott L. Robinson, was marked for
7 identification.)

8 BY MR. EPTING:

9 Q. This is a copy of your answer in this
10 case.

11 A. Okay.

12 MR. EPTING: Warren, I'm sorry, I have
13 a copy for Susan but not for you.

14 (Off-the-record conference.)

15 BY MR. EPTING:

16 Q. Mr. Robinson, let me call your
17 attention to page 3.

18 A. Okay.

19 Q. You understand that you have been sued
20 in this case for essentially legal malpractice.

21 A. Yes, sir.

22 Q. Your defense here is failure to state
23 a claim. Can you give me any basis that you
24 personally believe that a claim is not stated?

25 MS. WALL: And let me interpose -- I

1 apologize. Can you repeat your question. I want
2 to make sure you're not asking --

3 MR. POWELL: Before we get started. I
4 would like to speak to the witness about this
5 document.

6 MR. EPTING: Sure. Well, let me say
7 this. I'm not real sure that this is a document
8 contemplated under the rule. This is a pleading.
9 And I don't really think you're entitled to
10 speak with him. But, you know, Warren, I'm not a
11 stickler for details. But I think that's
12 probably a little bit of a cheap shot. But I'll
13 let you be the judge of that.

14 MR. POWELL: Okay. Let's step
15 outside, Scott.

16 (A recess transpired.)

17 BY MR. EPTING:

18 Q. I want to go through your affirmative
19 defenses.

20 A. Okay.

21 Q. What's the factual basis for your
22 second affirmative defense?

23 MS. WALL: Just let me interpose an
24 objection. You can answer it based on your
25 knowledge, but you can't answer it if the answer

1 is based exclusively on what your attorney may
2 have told you. Because that, of course, would be
3 privileged. So he's asking for your factual
4 knowledge. Am I right?

5 MR. EPTING: Yes.

6 MS. WALL: Okay.

7 THE WITNESS: At this point I don't
8 think that I can answer that as to that cause of
9 action based on independent knowledge.

10 BY MR. EPTING:

11 Q. Your third defense is the plaintiff is
12 barred because of unclean hands. What factual
13 basis do you have, having handled this case, to
14 say that Mr. Craven did anything wrong or has
15 unclean hands in this case?

16 A. Well, again, much like the case
17 itself, it's not Mr. Craven, it's the entity that
18 has brought this lawsuit is charged with knowing
19 what happened. Somebody there forged the
20 document, somebody knew about the wreck, damage,
21 that wasn't disclosed. I followed the
22 instructions that I was given. We consulted.
23 Did what I was asked to do and now am turned
24 around and being sued for that.

25 Q. And what is it that you feel like you

1 were asked to do that you did that you're being
2 sued for?

3 A. Well, not engaging in discovery, and
4 the things of that nature, that we've talked
5 about here today, that are set out specifically
6 in the complaint. I would say all of that, from
7 my recollection, I talked about with Dennis, at
8 some point in time. And the insurance, things of
9 that nature, all of that.

10 Q. Well, let's try to be exhaustive here.
11 The discovery, which I will give you, we'll use
12 my definition, request for admissions,
13 production. You've mentioned the insurance.
14 What else?

15 A. I would honestly -- do you have any
16 idea what exhibit number the complaint is?

17 Q. While we're getting a copy of the
18 complaint. Do you think that Mr. Craven had
19 anything to do with your failing to protect the
20 record at the directed verdict stage?

21 MS. WALL: Objection to the form.

22 BY MR. EPTING:

23 Q. Is that something that is within his,
24 within your view, within his realm of expertise?

25 MS. WALL: Object to the form.

1 THE WITNESS: I don't believe that is
2 in his realm and I don't believe that I failed to
3 protect the record.

4 BY MR. EPTING:

5 Q. But you wouldn't attribute, if there's
6 an error in protecting the record, by objecting,
7 filing directed verdicts, and JNOVs, that's not
8 something that you think Mr. Craven had anything
9 to do with or Stokes-Craven.

10 A. That part, no, sir.

11 Q. All right. Failure to mitigate.

12 A. Correct.

13 MS. WALL: So you don't want to be
14 exhaustive or you don't want him to reply?

15 MR. EPTING: No, no, no. I assumed
16 somebody was looking for it, and while you were I
17 was just pressing forward. But I don't mind
18 stopping.

19 MS. WALL: I don't know. This is your
20 exhibit.

21 MR. EPTING: Pull Exhibit 7.

22 MR. POWELL: Exhibit 7.

23 THE WITNESS: No. That's the
24 complaint that Donald Austin filed. I'm talking
25 about the complaint that was filed against myself

1 and Johnson McKenzie Robinson.

2 MR. EPTING: We can get that.

3 THE WITNESS: That's the one I was
4 talking about.

5 (Off-the-record conference.)

6 (PLF. EXH. 33, Complaint, was marked
7 for identification.)

8 BY MR. EPTING:

9 Q. We've marked the complaint as 33.

10 A. Okay.

11 Q. And I'll refer you back to No. 2, the
12 equity defense and unclean hands. And you have
13 told me that Mr. Craven directed you not to
14 engage in discovery and not to file it with the
15 insurance company. And we're looking to see
16 what, if anything else, you think Mr. Craven or
17 Stokes-Craven did wrong.

18 MS. WALL: Object to the form.

19 BY MR. EPTING:

20 Q. Rephrase. That constitutes unclean
21 hands.

22 A. The failing to obtain copies of the
23 expert reports. We had those. Providing -- that
24 was something different for trial. Just mainly
25 the discovery issues, and the insurance, the

1 allegations relating to that. Because those were
2 certain things that we had covered and were
3 there.

4 Q. The failure to mitigate, your forth
5 defense.

6 A. Yes.

7 Q. On what factual basis do you or are
8 you aware of that Stokes-Craven has failed to
9 mitigate?

10 A. They could have paid the judgment into
11 the court, prior to the appeal, or at the time of
12 the appeal, which would have certainly have
13 affected the interest that has, as I understand,
14 become quite sizeable at this point. And we
15 talked about that, and I advised Dennis that I
16 thought he should do that. And he talked about,
17 I believe it was a Robert Birch that was doing
18 the accounting for all the Stokes things, and
19 after consulting with him told me that they
20 weren't going to pay any.

21 Q. Are you familiar with what has
22 happened to Stokes-Craven, financially, after
23 this verdict, Mr. Robinson?

24 A. No, sir. What has happened?

25 Q. Did you have any discussions with your

1 partners or your malpractice carrier about paying
2 the money into court in order to mitigate the
3 process?

4 MR. POWELL: Objection.

5 MS. WALL: Yes.

6 MR. POWELL: Go ahead.

7 THE WITNESS: I'm not sure what you
8 asked me.

9 BY MR. EPTING:

10 Q. In light of the supreme court opinion
11 or in light of the verdict did you and your
12 partners ever discuss paying the money into court
13 in order to mitigate the interest in this case?

14 A. Discuss who paying the money into the
15 court?

16 Q. You and the firm.

17 A. No.

18 Q. Your fifth defense, comparative
19 negligence. What is the factual basis upon which
20 you predicate the fifth defense?

21 A. A lot of them are similar. Same as
22 the duty to mitigate. I mean, certainly, this
23 case could have been settled, when Moskos
24 originally bought the vehicle, and first came
25 back into the dealership, long before I ever got

1 involved.

2 MS. WALL: For the record not Moskos.

3 THE WITNESS: I'm sorry, Austin.

4 Mr. Austin bought the vehicle. It became
5 apparent, at some point, based on everything that
6 I know now, that they found out, they being
7 Stokes-Craven, Dennis, whoever the employees were
8 involved with this, that the vehicle had in fact
9 been wrecked, extensively, belonged to Gary
10 Bailey, and that somebody other than Mr. Austin
11 had signed that as is no warranty. So there was
12 some bad facts. At that point in time, within a
13 couple of months of the transaction, and
14 everything coming to light, he just said give me
15 my money back, take your truck back, and be done
16 with it. And so, you know, certainly, there were
17 opportunities from that point forward to settle
18 the case.

19 BY MR. EPTING:

20 Q. Do you think in this case if a lawyer,
21 starting in February, and knowing -- assume this
22 lawyer knew what you knew in February of '03, and
23 continued to learn, as this case went forward.
24 Would any competent lawyer have recommended to
25 Mr. Craven that this case be settled?

1 MS. WALL: Object to the form.

2 THE WITNESS: I would think a lawyer
3 that knew what they were doing, yes, would say
4 you probably need to settle this.

5 BY MR. EPTING:

6 Q. A competent lawyer in this case would
7 have given the advice that this case should have
8 been settled.

9 A. Yes.

10 Q. And that would have been obvious, or
11 not obvious, that would have been something a
12 competent lawyer would have recognized early on
13 in this case?

14 MS. WALL: Object to the form.

15 THE WITNESS: I agree with the
16 characterization of obvious. I believe it would
17 have been obvious not only to a lawyer but,
18 again, to anybody that had dealt with car
19 dealerships, dealing with the public. These kind
20 of facts just don't ever come out good.

21 BY MR. EPTING:

22 Q. And as a lawyer were you not to advise
23 his client, in a case like this, that the case
24 should be settled, and explained the risks to
25 him, would you agree with me that that would

1 constitute legal malpractice?

2 MS. WALL: Object to the form.

3 THE WITNESS: I certainly would agree
4 that a lawyer would be remiss if they didn't
5 advise their client, with a set of facts like
6 this, to settle, yes.

7 BY MR. EPTING:

8 Q. You being a lawyer, I'm going to push
9 you a little harder. Remiss, legal remiss, legal
10 malpractice.

11 MS. WALL: Object to the form.

12 THE WITNESS: That is not an area,
13 honestly, in which I practice. Probably, I'm
14 sure you would get sued for it, yes.

15 BY MR. EPTING:

16 Q. All right. You next set out waiver
17 and estoppel. What factual basis do you have for
18 waiver and estoppel?

19 A. The same basic things that I've
20 already given you. The causes of action relating
21 to not turning it over to the insurance, things
22 of that nature, where I was following their
23 request. Protect the client list, don't turn it
24 over to the insurance, the insurance will get
25 cancelled. You know, you can't ask me to do

1 something, and then say why did you do that, and
2 then sue me. You should be estopped from doing
3 that.

4 Q. Going back to the estoppel and waiver.
5 Do you think that a lawyer, who's seen the
6 complaint, and understanding the facts of this
7 case, would be remiss in failing to advise that
8 the matter be turned over to an insurance company
9 for handling in order to pay the defense and the
10 indemnity?

11 MS. WALL: Object to the form.

12 THE WITNESS: Repeat. Just the
13 failing to advise?

14 BY MR. EPTING:

15 Q. Yes. If a lawyer in this case failed
16 to involve the insurance company, or advise the
17 client to turn it over to the insurance company,
18 would that lawyer be legally remiss?

19 A. I would think so. Given the facts,
20 and if there's insurance available, certainly you
21 have a duty to tell your client here's the risk
22 you're facing. This is what you pay insurance
23 premiums for. Here's the benefit of turning it
24 over. It's not coming out of your pocket. You
25 pay a deductible, that kind of deal.

1 Q. And in a case like this the deductible
2 might have been a few thousand dollars?

3 A. Right, five thousand, ten thousand, I
4 think, whatever it might be.

5 Q. Assumption of the risk. What is the
6 factual basis for that?

7 A. Again, just when Dennis and the
8 organization asked me to perform certain tasks or
9 decides not to take certain actions with full
10 advice. In other words turn it over to your
11 insurance company. No, we don't want to do that.
12 Here's the reasons. No, we don't want to settle.
13 Here's the reasons. Once they have been informed
14 and advised of the risk, and they decide not do
15 to do as I have advised them, I believe they
16 assume the risk of what may happen at trial, not
17 settling the case, not turning it over to
18 insurance, not mitigating their damages, things
19 of that nature.

20 Q. Who in deciding not to turn this over
21 to the insurance company, or not to settle it, or
22 not to do discovery, who was, in your opinion,
23 Dennis in consultation with in reaching these
24 decisions?

25 A. Only an assumption. I'm assuming he

1 would have consulted Edward Stokes and Jerry
2 Stokes who were the Stokes part of Stokes-Craven.

3 Q. Were there any discussions with regard
4 to turning it over to the insurance company,
5 doing no discovery, the benefits of settling, and
6 Dennis, according to you, not wanting to settle.
7 Were those discussions discussions that you had
8 with Dennis in the presence of some other person?
9 Like John Flack for example?

10 A. It may have been. But, again,
11 probably not. Because Dennis doesn't like
12 employees knowing the bigger goings-on.
13 Obviously they knew there was a lawsuit being
14 filed, things of that nature. But he was very
15 private about any kind of things that happened
16 with customers, didn't want salesmen talking to
17 each other. Because the problem is, especially
18 in the car business, or one of them, there's a
19 lot of turnover with salesmen. And somebody
20 that's selling the cars today is on the street
21 tomorrow, and the more they know, they're mad,
22 leave on bad terms, they're badmouthing you,
23 things of that nature. So he was very precise
24 about limiting who was in on our discussions,
25 especially the more detailed hard discussions

1 like these are bad facts. Somebody's lying to
2 you. You know, that kind of stuff. He would not
3 have wanted a bunch of people to know.

4 MR. EPTING: Mr. Robinson, thank you
5 very much for your time. I appreciate it.

6 THE WITNESS: Yes, sir.

7 EXAMINATION

8 BY MS. WALL:

9 Q. Scott --

10 A. Yes, ma'am.

11 Q. -- this is a group of documents that
12 were handed to you to take a look at that were
13 Bates numbered Young Clement Rivers, and they're
14 already on the record. But the documents weren't
15 actually made an exhibit. Do you recall that?

16 A. Yes, ma'am.

17 Q. And do you recall that one grouping
18 within that appear to be Bates YCR 324 through
19 354. Do you recall that?

20 A. Yes, ma'am.

21 Q. And you were asked some questions with
22 regard to the various cases that are attached
23 within that section of Bates numbers. Do you
24 recall that?

25 A. I do.

1 Q. Okay. And do you recall that it was
2 suggested to you on the record that many of the
3 cases attached thereto had to do with cases
4 addressed to the incompetence of counsel. Do you
5 recall that?

6 A. Right, they were.

7 Q. Take a look at each one of those cases
8 in there. The very first one is the Wynn Burton
9 case, correct?

10 A. Yes, ma'am.

11 Q. And that doesn't have anything do with
12 competence of counsel does it? That has to do
13 with things such as fraud causes of action,
14 evidentiary issues and the like. Isn't that
15 right? And I can say that because it's actually
16 my case.

17 A. Yes. Withdrawal, sufficiency of
18 evidence. It doesn't -- negligent
19 misrepresentation, et cetera.

20 Q. Okay.

21 A. I don't see anything in there about
22 ineffective assistance of counsel.

23 Q. All right. So then look at the second
24 case which is entitled factually I believe.

25 A. Yes.

1 Q. All right. Now, that case also
2 doesn't have anything to do with that does it?
3 It has to do with contributory negligence,
4 assumption of the risk, and other various things.
5 Is that right?

6 A. Yes, ma'am.

7 Q. Now look at the third case in the
8 group. And that's the Simpson case.

9 A. Right.

10 Q. And that's actually a criminal case
11 isn't it?

12 A. Well, it stems from a criminal case.
13 It's a post-conviction relief case that was
14 actually posited as a civil case.

15 Q. Right. At the time that you were
16 involved in the representation of Stokes-Craven,
17 with regard to the lawsuit filed by Mr. Austin,
18 were you doing any criminal work at all for any
19 clients?

20 A. During that period of time?

21 Q. Obviously not during the trial but --

22 A. No, I didn't think I should.

23 Q. -- during the entire period of time?

24 A. Yes. I had been a part-time public
25 defender since it was either 2000 or 2001. And

1 may have honestly just quit that job at that
2 point in time. But a PCR, much like a
3 malpractice action, comes after the fact. So it
4 would have been after somebody went to prison.
5 So they may have been coming up. They're
6 typically done twice a year. So it may have been
7 there were some coming up, and it may have been
8 one was appointed to represent the applicant. Or
9 it may very well have been one that some inmate
10 had alleged that I had been ineffective.

11 Q. All right. Now look at No. 4. And
12 that's the Nixon case, right?

13 A. Tom Nixon. Yes, ma'am.

14 Q. Right. And that doesn't have anything
15 to do with ineffective assistance of counsel does
16 it? Isn't that breach of contract and election
17 of remedies is really the big issue in that case
18 isn't it?

19 A. Yes, ma'am.

20 Q. All right. Then let's look at the
21 fifth case, the last one, which appears to be
22 Groover versus Santee. Right?

23 A. Yes, ma'am.

24 Q. And that doesn't have anything do with
25 ineffective assistance of counsel. It has to do

1 with jury charges and the like, correct?

2 A. Right.

3 Q. Also by matter of housekeeping.

4 Looking at what has been marked as Exhibit No.

5 14, if you would, please.

6 A. Okay.

7 Q. Look at the third page in -- excuse

8 me.

9 A. Fourth page in.

10 Q. Fourth page in. And counsel asked you

11 some questions with regard to that. There's no

12 Bates stamp number on the bottom of that document

13 is there?

14 A. No, ma'am. Not on the copy that's

15 been marked as an exhibit.

16 Q. What was your understanding from

17 Dennis Craven as to why he was adamant about

18 keeping Stokes-Craven's customer list away from

19 discovery in this case, i.e., from the

20 plaintiff's counsel, Mr. Moskos?

21 A. This particular lawsuit, the

22 underlying lawsuit, the Austin versus

23 Stokes-Craven, was the first lawsuit that I think

24 Moskos had filed against Stokes-Craven. But I

25 learned from Dennis that there were a couple

1 pending, maybe there was one that was over. It
2 was kind of an ongoing process. That they, being
3 the Stokes organization, was familiar with Moskos
4 because he sued them a lot. And the concern was
5 that if he got the customer list, especially in
6 light of the allegations of the Federal Odometer
7 Act thing, cause of action in his complaint, the
8 assertion by Moskos, under the Federal Odometer
9 Act, which we ended up winning at trial, but was
10 a very big deal to the dealership trial, we spent
11 a lot of time, at the end of trial, arguing about
12 that, especially on directed verdict.

13 Moskos's interpretation was wrong, but
14 it was also something that basically meant that
15 every car that Dennis, every used car they sold,
16 violated the Federal Odometer Act. And if he got
17 the customer list, and with that cause of action
18 already being set forth, he would literally have
19 either had a giant class action lawsuit against
20 all -- it just would kind of have mushroomed from
21 there. But it would certainly have -- you know,
22 he just basically said that would be his client
23 base for the next umpteen years.

24 Q. And is that because Dennis Craven told
25 you that they never complied with it?

1 A. I mean he said, of course I knew that,
2 they don't show the titles, and that came out in
3 trial. It's not that they weren't complying with
4 it. Moskos's interpretation, and if you read it,
5 just at a quick glance, it appears that you're
6 required to show the title to everybody. That
7 never happened. There are power of attorneys in
8 odometer disclosure, but he claimed that the act
9 required the actual title, and I knew and Dennis
10 told me, and I think Billy said, they never show
11 the actual title to a used car, unless the
12 customer specifically demands it, which can never
13 happen. So every car that he had sold, since the
14 dealership had opened, technically, under
15 Moskos's theory, failed to comply with the
16 Federal Odometer Disclosure Act, whatever it's
17 called.

18 Q. You were asked a number of questions
19 with regard to written discovery in this case.
20 Did you in fact prepare a set of interrogatories
21 and request for production in this case?

22 A. Yes.

23 Q. That is the case of Austin versus
24 Stokes-Craven?

25 A. I did. I never signed them and never

1 sent them. But they were, just as a kind of
2 matter of course, prepared.

3 Q. In looking back at Exhibit 31, if you
4 would, for a moment. And I'll just show you my
5 copy. That's the bill that went to
6 Stokes-Craven. And I think it was your testimony
7 that the bill was paid. Was it paid in fact in
8 the amount of \$6,325? As best you can recall?

9 A. I honestly thought he had paid more
10 than that. But I don't remember. It looks ...
11 well, the only thing that's attached was the
12 justification of the \$700 in expenses. I thought
13 somewhere there was a copy of a check. In my
14 mind it was actually more than that. But I can't
15 say with certainty.

16 Q. Were you involved in any way with
17 assisting Dennis Craven and Stokes-Craven with
18 regard to an unhappy customer in 2007 who had
19 painted a slogan on the side of his car to the
20 effect of I bought this lemon from Stokes-Craven?

21 A. Well, I guess indirectly I assisted
22 them.

23 Q. Were you aware of that?

24 A. Yes. I want to say it was when we,
25 myself and some other individuals, were on a

1 fishing trip, and we actually saw it, and I think
2 Ron Wall may have taken a picture of it and sent
3 it to Dennis. But Dennis knew about it and
4 called Steve McKenzie, and wanted something done
5 about it, and Steve talked with me. I think
6 Steve signed the pleadings but talked with him
7 about it and went to court in Kingstree. He had
8 an emergency temporary injunction put in place,
9 and served on the people, and I think that that
10 order provided that they had to appear in court,
11 in a very short period of time, ten days or less.

12 We weren't having court here. That was done in
13 Williamsburg County. And Steve and I went --
14 drove together and they ended up agreeing to make
15 that permanent. But, yeah, I'm familiar with
16 that.

17 Q. And when did this occur? Was this
18 after the verdict in this case?

19 A. Oh, yeah. Yes.

20 Q. As much as a year later?

21 A. Yes, a year give or take. Could have
22 been more but I know it was after.

23 Q. And what did it say on the side of the
24 car? To your best recollection.

25 A. Something to the effect of this lemon

1 came from Stokes-Craven or I bought this lemon at
2 Stokes-Craven or something. It was written in
3 yellow writing, big, like they write on the
4 windshield of cars.

5 Q. And where was that car parked?

6 A. I saw it at the IGA parking lot. I
7 think some other people had seen it. Maybe
8 Dennis heard about it from the Walmart parking
9 lot. Ron and I saw it at the IGA.

10 Q. Did you have copies of the expert
11 reports from the witnesses that Moskos intended
12 to and did call at trial of the Austin versus
13 Stokes-Craven case?

14 A. Yes. That was -- I think Disher and
15 Morris were their names. And those were sent
16 when Polito sent his letter back in early '03.
17 And I had those the entire time.

18 Q. Did you ever advise Dennis Craven or
19 anyone at Stokes-Craven that he did not have
20 coverage under the Stokes-Craven insurance
21 policy?

22 A. No. Again, we talked about the
23 insurance policy. Like I said, without looking
24 at it, I couldn't have told him that with
25 certainty. I said there may be some things it

1 may not cover. But I certainly, without looking
2 at it, I would never have said you don't have
3 insurance to cover this, because I wouldn't know.

4 Q. Did you ever have occasion to be given
5 information from a juror, from the Austin versus
6 Stokes-Craven trial, as to why the jury came back
7 with a punitive damage award against
8 Stokes-Craven?

9 A. I did. I talked with, and I don't
10 remember exactly when it was, it was some months
11 after the trial. And it was somebody that I had
12 recognized that was a friend of a friend I knew.
13 I had seen him out before. I wasn't closely
14 associated but I recognized him. I was somewhere
15 eating supper one night and he was there. And I
16 just went up to him and asked him, I said, would
17 you mind talking to me about this thing? Tell me
18 what happened. So he told me that there
19 were -- it wasn't as bad as it could have been.
20 That there were a couple of jurors on there that
21 wanted to give a whole lot of money. And I said
22 sounds like y'all already did already give a
23 whole lot of money. And I said what was the
24 deal? Because the truck was fine. And, in all
25 honesty, he just said they didn't really like

1 Dennis or Kenny Craven. And I never told Dennis
2 that because I didn't want to hurt his feelings.
3 That was his impression.

4 Q. Did you ever talk to Dennis Craven
5 about the possibility with regard to Mr. Austin's
6 signature on the document, that appeared to not
7 be Mr. Austin's signature? Did you ever talk to
8 Dennis Craven about possibly getting a
9 handwriting expert involved?

10 A. I did. I even, because I had just
11 recently had a case with a guy named Mickey
12 Dawson, who was a retired handwriting expert with
13 SLED, that I had used in a civil. It was
14 actually a foreclosure case, where it was
15 determined that the documents, mortgage, and
16 things like that, were forged, and they weren't
17 able to foreclose it. But I told him, yes, we
18 can figure out who did this and, you know,
19 determine that. And he wasn't, I guess, really
20 didn't want to know who had done it, because that
21 may create problems, you know, maybe even thought
22 his brother did it, didn't really want to know,
23 or Mr. Billy. I don't really know specifically
24 what the reason is, he didn't tell me that, but
25 he was not interested in pursuing and finding out

1 who had forged the document.

2 Q. Did Dennis Craven ever tell you to
3 defend the case to the max?

4 A. No, not those exact -- I don't think
5 the word defend was ever used. It was make it go
6 away, you know, that kind of thing. Make sure
7 this guy doesn't get anything, something to that
8 effect. But never defend in any sense of the
9 word. That was not the way we would have talked
10 to each other.

11 Q. Was this a complex case, to your
12 conclusion? Did you conclude this was a complex
13 case?

14 A. Honestly, no, I didn't think there was
15 anything. I think it was a bad case. But I
16 don't think the issues were complicated. I mean
17 the facts were the facts. It was literally a
18 question of whose version of the facts did you
19 believe? Was it an intentional pattern of
20 deception they engaged in and set out to do or
21 was it an innocent mistake that just happened?
22 That was basically the crux of the case in my
23 opinion.

24 EXAMINATION

25 BY MR. POWELL:

1 Q. Mr. Robinson, did Mr. Craven, or
2 anyone else from the dealership, provide you with
3 a copy of the declaration sheet or the insurance
4 policy, which would have been in effect at the
5 time either Mr. Austin purchased the vehicle or
6 at the time there were negotiations going on
7 between the two, between Mr. Austin and
8 Mr. Craven?

9 A. No, sir. To this day I haven't seen a
10 document of that nature. And, quite honestly,
11 couldn't tell you what the name of the insurance
12 was. Never knew that.

13 MR. POWELL: Okay. Just for the
14 record, counsel, in the depositions last week we
15 requested copies of those insurance policies.

16 MR. EPTING: Right. The year before
17 or year after, right?

18 MR. POWELL: Year before and year
19 after.

20 MR. EPTING: We're working on it.

21 MR. POWELL: And, just for the record,
22 we don't have those for use today. I will look
23 forward to getting that.

24 That's all I have.

25 EXAMINATION

1 BY MR. EPTING:

2 Q. Just one question. Regarding Exhibit
3 14, if you will pick it up.

4 A. Okay.

5 Q. It does appear that one of these pages
6 is not Bates labeled.

7 A. Right.

8 Q. And I assume that that occurred
9 somewhere when Young Clement produced this file.
10 But there isn't any question that the handwriting
11 that's on there is yours.

12 A. It very much appears to be my
13 handwriting.

14 Q. All right. Do you think that that
15 page is related to the following page which is
16 Bates labeled?

17 A. I honestly can't tell by looking at
18 it. Even if I -- I don't know. Well, I would
19 think -- well, I don't know. I really don't
20 know.

21 Q. There are a lot of the same numbers?

22 A. Yes. I don't know why I would have
23 written them twice. It looks like this was an
24 initial meeting, and this was sometime later in
25 time, perhaps even preparing for trial, just kind

1 of getting all the numbers and the dates straight
2 in my head. But, again, that's purely a guess.

3 Q. But in any event both of these
4 documents, the non-Bates labeled, and the
5 following 445, have to do with this case, the
6 Stokes-Craven Austin case?

7 A. Yes, sir, they appear to. Well, the
8 numbered page says that on there. And I'm
9 looking to see if it said that on the other page.
10 But the numbers appear to be. There's no name
11 that links it on the un-Bates stamped page, but
12 the numbers appear to be consistent, because they
13 match up. File number two.

14 MR. EPTING: Okay. Thanks so much. I
15 appreciate your time.

16 THE WITNESS: Yes, sir.

17 (The deposition was concluded at
18 5:45 p.m.)

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SIGNATURE OF DEPONENT

DEPONENT: SCOTT L. ROBINSON
DEPOSITION DATE: MAY 26, 2011
REPORTER: G. MICHAEL ALEXANDER
CASE CAPTION: STOKES-CRAVEN HOLDING CORP vs.
SCOTT L. ROBINSON and JOHNSON, MCKENZIE &
ROBINSON, LLC

(Please return both Signature of Deponent pages)

I, the undersigned, SCOTT L. ROBINSON,
do hereby certify that I have read the foregoing
deposition and find it to be a true and accurate
transcription of my testimony, with the following
corrections, if any:

PAGE	LINE	CHANGE	REASON

SIGNATURE OF DEPONENT (CONTINUED)

DEPOSITION DATE: MAY 26, 2011
REPORTER: G. MICHAEL ALEXANDER
CASE CAPTION: STOKES-CRAVEN HOLDING CORP vs.
SCOTT L. ROBINSON and JOHNSON, McKENZIE &
ROBINSON, LLC

PAGE	LINE	CHANGE	REASON

SCOTT L. ROBINSON	DATE

I, G. Michael Alexander, Notary Public
for the State of South Carolina at Large, do
hereby certify that the deponent was advised of
his or her right to read and sign said deposition
both verbally and in writing. If the deponent
fails to execute and return foregoing Signature
of Deponent pages within the thirty (30) days
allowed pursuant to the Rules of Civil Procedure,
the original transcript may be filed with the
court.

G. MICHAEL ALEXANDER, RPR, CSR
My Commission expires
May 24, 2016

1 CERTIFICATE OF REPORTER

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I, G. Michael Alexander, Registered
Professional Reporter and Notary Public for the
State of South Carolina at Large, do hereby
certify that the foregoing transcript is a true,
accurate, and complete record.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal this 2nd day of June,
2011 at Charleston, Charleston County, South
Carolina.

G. Michael Alexander
Registered Professional
Reporter, CSR
My Commission expires
May 24, 2016

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EXHIBIT D

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CLARENDON

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

Plaintiff,

vs.

CASE NO. 2010-CP-14-457

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

Defendants.

DEPOSITION OF: WILLIAM HOWARD JOHNSON

DATE: August 8, 2012

TIME: 10:42 AM

LOCATION: McNair Law Firm, PA
100 Calhoun Street, Suite 400
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: MARIA D. DEMPSEY, Registered
Professional Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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1 APPEARANCES OF COUNSEL:

2

3

ATTORNEYS FOR THE PLAINTIFF
STOKES-CRAVEN HOLDING CORP
d/b/a STOKES-CRAVEN FORD:

4

5

ANDREW K. EPTING, JR. LLC
BY: ANDREW K. EPTING, JR.
46-A State Street
Charleston, SC 29401
(843) 377-1871
Ake@epting-law.com

6

7

8

ATTORNEYS FOR THE DEFENDANT
SCOTT L. ROBINSON:

9

10

McNAIR LAW FIRM, PA
BY: SUSAN TAYLOR WALL
100 Calhoun Street
Suite 400
Charleston, SC 29401
(843) 723-7831
swall@mcnair.net

11

12

13

14

ATTORNEYS FOR THE DEFENDANT
JOHNSON MCKENZIE & ROBINSON, LLC

15

16

17

18

19

BRUNER, POWELL, ROBBINS,
WALL & MULLINS, LLC
BY: WARREN C. POWELL, JR.
1735 St. Julian Place
Suite 200
Columbia, SC 29260
(803) 252-7693
wpowell@brunerpowell.com

20

ALSO PRESENT:

21

22

23

24

(INDEX AT REAR OF TRANSCRIPT)

25

STIPULATION

It is stipulated by and between Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent does not waive reading and signing of this deposition.

* * * * *

WILLIAM HOWARD JOHNSON

being first duly sworn, testified as follows:

EXAMINATION

BY MR. EPTING:

Q. Good morning, Mr. Johnson.

A. Good morning, Mr. Epting.

Q. Thank you for indulging all of us lawyers by coming to Charleston. That was awfully kind of you. I offered to come up your way, so thank you very much.

A. You're welcome.

Q. Tell me a little bit about yourself. Start with where you were born.

A. I was born -- well, I was born in the hospital in Sumter, but I was raised in Sardinia, South Carolina, which is a crossroads community in

1 Clarendon County. From there I went to four years
2 of undergraduate education at Clemson. I obtained
3 an accounting degree. Went to USC law school,
4 graduated in 1990. My first job -- I've had some
5 clerking positions in law school. My first job as
6 an attorney, I was an associate with Turner, Padget,
7 Graham & Laney for about two years, and after which
8 point I moved, accepted a position with Coffey,
9 Chandler & Durant in Manning. And I have been an
10 attorney in Manning since 1992 or '93 sometime.

11 Q. Do you have family in Manning?

12 A. I do. My wife lives with me. And as
13 far as Clarendon County, I have a sister. Her name
14 is Kathy Morrison. She was married to Earl
15 Morrison. They live in Clarendon County. I have a
16 brother named Kirby, K-I-R-B-Y, Johnson. His wife
17 is Miriam. They live in Clarendon County. I have
18 some cousins. They're named Barrett, B-A-R-R-E-T-T,
19 and that's basically it.

20 Q. How about your mother or father's
21 brothers and sisters?

22 A. My parents moved in from North Carolina
23 in the '50s, so we don't have many. I don't have a
24 long list of cousins and whatnot that moved in,
25 so...

1 Q. When did you leave the Coffey Firm,
2 Chandler?

3 A. The beginning of the year 2000.

4 Q. So you and Mr. McKenzie left at the same
5 time?

6 A. We did, that's right.

7 Q. And the Durant in that firm is?

8 A. He's David Durant. He separated. He
9 broke away from the firm, I don't know, sometime
10 while I was there. So I guess in the '90s. He
11 practices in Surfside Beach.

12 Q. And so you and Mr. McKenzie left in
13 January of 2000?

14 A. That's correct.

15 Q. All right. At that time, how long had
16 you been practicing law?

17 A. Well, I took the oath in November 16th
18 of 1990. So approximately nine years, I guess.

19 Q. And how old were you when you went to
20 law school?

21 A. I never really -- I'd say I went to law
22 school, I guess in '87. So guess I was 22.

23 Q. Let me ask a better question. Did you
24 do anything after college before you went to law
25 school?

1 A. No, I went direct, direct to law school.

2 Q. What kind of law have you practiced?

3 A. I have had a general practice and in a
4 small town. And that involves real estate practice.
5 It involves probate work. It involves litigation,
6 both -- of course any litigation we get is primarily
7 plaintiffs or unit, but I have also defended cases
8 for clients who perhaps were uninsured or, you know,
9 had business interests. I've done some Social
10 Security Disability work.

11 And early in my practice, I did some
12 domestic work when I practiced with Steve McKenzie
13 and Scott Robinson. I didn't do domestic work, they
14 handled that. Now that I'm on my own, I'm back into
15 some domestic work. I don't do criminal work. I
16 don't practice in general sessions.

17 Q. What percentage of your practice would
18 you estimate, in the last five years, has been in
19 litigation versus transactional work?

20 Well, no litigation versus everything
21 else as you know it.

22 A. Okay. If you include in that, of
23 course, you know, all litigation is not a litigated
24 case. There are -- there are contested issues that
25 you represent clients on. I would say 50 to

1 60 percent.

2 Q. Okay. And what type of litigation does
3 it tend to be?

4 A. It tends to be business disputes,
5 perhaps between local that I come into, where
6 clients who are there have whatever type of disputes
7 with, you know, in their business arrangements.
8 Some personal injury litigation, we have done that.
9 A fair amount of non-jury work, which is kind of,
10 you know, kind of blended with real estate and
11 litigation, whether it's a quiet title action,
12 partition action with 55 heirs that we're sorting
13 those things out. So it's a mixed bag.

14 Q. What is your relationship, if any, now
15 with Mr. Robinson or Mr. McKenzie?

16 A. I really don't have a relationship with
17 them. I see them, we're cordial, and we speak, but
18 as far as anything that brings us together, not so
19 much. I've got a couple of cases pending with Steve
20 that we were on opposite sides. And actually, we
21 have one case that we've been working on, on the
22 same side, co-counsel for the same client, and
23 that's about it. Scott, I haven't encountered
24 professionally, but seen him from time to time, and
25 speak.

1 Q. When did he join you and Mr. McKenzie?

2 A. May of 2000.

3 Q. Okay. And when he joined your firm,
4 what had been his experience?

5 A. He had practiced with -- I believe his
6 first position was with Tommy Geddings, who was solo
7 practitioner in Manning. He had then moved to
8 practice with Ferrell Cothran, who's now the
9 presiding judge in our county. He had had those two
10 positions and then he came with us.

11 Q. And what was your knowledge of him? I
12 think he joined you in May of 2000.

13 A. That's right. My knowledge of him was
14 somewhat limited. I had encountered him some on,
15 you know, as you do in a small town, but I did not
16 really -- I had not had any social relationships
17 with him prior to that point. And so that was
18 limited.

19 Q. What did you understand his experience
20 to be, types of experience? What kind of law did he
21 practice?

22 A. Much like the rest of us, a general
23 practice. Had experience in real estate and
24 litigation and domestic areas.

25 Q. When he joined your firm, how long had

1 he been practicing?

2 A. My recollection is that Scott's about
3 five years behind me. I could be -- I would stand
4 corrected if he'd done differently, but somewhere in
5 that range.

6 Q. So you would -- if you graduated in '90,
7 you've been practicing law a little over 20 years,
8 you would say he would have been practicing a little
9 over 15 years now?

10 A. Sitting here today.

11 Q. Yeah.

12 A. That sounds right. Ten to 15, somewhere
13 in that range.

14 Q. When he joined the firm, did y'all have
15 any procedure in place to train him?

16 A. No, sir.

17 Q. All right. Did you have -- what was
18 your relationship with him within the firm after he
19 joined you?

20 A. I was a fellow attorney. He had been
21 practicing for some time and so it was a firm that
22 basically each of us were professional attorneys,
23 and we expected each other to carry ourselves in
24 that way. And so I did -- there was no particular
25 mentoring, no formal mentoring certainly. We

1 certainly discussed our cases and discussed things
2 that were going on.

3 Q. Did you understand that -- this case was
4 tried in 2006. Did you know anything about this
5 case?

6 A. I knew some things about it, yes.

7 Q. What did you know about the case in
8 2005, 2006?

9 A. I knew that it was a case that had very
10 bad facts. I knew that there was a forgery
11 involved. I knew that there was a misrepresentation
12 involved. And I knew that Scott was very concerned
13 about it. I knew that Scott wanted -- that Scott
14 had attempted to convince Dennis to settle this
15 case, and he was concerned because Dennis would not
16 do that.

17 Q. And when did you learn these facts?

18 A. Along -- along -- I can't, of course,
19 pinpoint a particular day. I do remember one
20 particular conversation we had prior to trial, and I
21 can remember the office we were in when we had it,
22 but I can't give you a particular time, but it was
23 prior to trial.

24 Q. What did you learn when the -- or what
25 did you know about the case when it first came in?

1 A. I probably did not know when it first
2 came in. That would have been a matter handled
3 between Dennis and Scott. It would have come up
4 sometime later. Probably when it was pending on the
5 trial docket.

6 Q. When do you think is the first time you
7 learned of the case?

8 A. I really cannot tell you.

9 Q. When do you think is the first time you
10 started talking to Scott Robinson about the case?

11 A. I would feel certain that once the case
12 appeared on the trial docket, because that's
13 something we all looked at, and we all -- that was
14 certainly a topic that we would discuss among
15 ourselves, I see you have this case on the roster,
16 what's the story? So that would be my expectation
17 when I saw it.

18 Q. What conversations did you have with
19 Steve McKenzie about the case?

20 A. Steve and I discussed the case. We
21 discussed the facts that -- well, that it was very
22 bad facts. We, as far as specifics, I know that
23 during the -- during the case, Steve and I spent
24 some time in the courtroom observing what was going
25 on. And that's about what I -- as far as when

1 Steven -- Steve and myself, that's about the limit
2 of my memory there.

3 Q. Did you have any conversations with
4 Mr. McKenzie about the bad facts?

5 A. Yes.

6 Q. And was he of the opinion that it was
7 really bad facts too?

8 A. Yes, yes.

9 Q. Okay. And did he think that the case
10 had a large exposure?

11 A. Yes.

12 Q. And did each of you, you, Mr. Robinson,
13 and Mr. McKenzie each think that the case had a very
14 large exposure?

15 A. Yes.

16 Q. And did you ever talk to -- and Steve
17 McKenzie told you that?

18 A. I cannot say that he used those words,
19 but I know that we spoke enough that we all shared
20 the same sentiment.

21 Q. And I use the word large exposure. What
22 does that mean to you?

23 A. More than actual damages.

24 Q. So you thought that -- you guys thought
25 the case had punitive exposure?

1 A. Yes.

2 Q. In any kind of order of magnitude?

3 A. I don't know that we ever placed any
4 type of verdict range on it, but I know there were
5 discussions that there was a possibility.

6 Q. And did anyone undertake to assist Scott
7 with the trial of the case?

8 A. No, I didn't. I did not really see the
9 need to assist Scott. It was a case -- I recall
10 that Scott's hands were tied in a large measure of
11 what he could do.

12 Q. And tell me about how they were tied.

13 A. The client did not allow or did not want
14 him to conduct a large amount of discovery. It
15 seemed to be a case where the facts were known, but
16 there was a concern from the client that the
17 particular attorney involved would obtain
18 information that could be used against not only this
19 dealership, but some of the sister or other
20 similarly owned dealerships.

21 Q. And were you surprised in a case of
22 large exposure that -- well, let me ask you this.
23 Do you know Dennis Craven?

24 A. Yes, I do.

25 Q. Is he the kind of guy who would

1 routinely do something like that, tie the hands of
2 lawyers, that in character, you think?

3 A. I don't think that's fair to say whether
4 that's in character or not. I really probably have
5 not dealt with him in business situations enough to
6 know that. I didn't -- I didn't routinely represent
7 Dennis. I was not routinely involved in the
8 Stokes-Craven matters.

9 Q. Tell me this: Did you ever talk to
10 Dennis about this case?

11 A. No.

12 Q. So the information that you got, you
13 either got from Mr. Robinson or from Mr. McKenzie?

14 A. I'd say primarily or almost totally
15 Mr. Robinson.

16 Q. So you had very few conversations with
17 Mr. McKenzie?

18 A. I would just -- I recall that at that
19 time, Mr. McKenzie was probably much in the same
20 position, I was getting his information from Scott
21 as well.

22 Q. So you said that -- what does Scott say
23 about having his -- when you say having his hands
24 tied, tell me what that means.

25 A. It means that because -- he could not

1 use some methods of discovery that we might normally
2 use to perhaps ferret out any type of deficiencies
3 in the case because of the concern that it would
4 generate similar type of discovery from the other
5 side, and that was something that the client wanted
6 to avoid.

7 Q. In a case of this magnitude, would it be
8 unusual not to serve interrogatories, in your
9 estimation?

10 MS. WALL: Object to the form.

11 THE WITNESS: I think it's difficult to
12 say what's usual or unusual in the practice of law,
13 and particularly in that practice. I think Scott
14 thought it was unusual not to do it in this case.

15 BY MR. EPTING:

16 Q. And you wouldn't disagree with that,
17 would you?

18 A case of substantial magnitude, you'd
19 want to know who the other side's witnesses were,
20 wouldn't you?

21 A. You always want to know that going into
22 a trial. That I believe in this case, that I don't
23 think -- they were many unknowns about who the
24 witnesses were going to be.

25 Q. Well, if you don't serve

1 interrogatories, Mr. Johnson, then you can call any
2 witness you want, right?

3 I mean, don't you want to serve
4 interrogatories for no other reason than to make
5 sure there's no surprise witness out there?

6 A. That's certainly one of the reasons to
7 serve interrogatories.

8 Q. Because you really would want to know
9 who's showing up, they're going to testify against
10 you, right?

11 A. You always do.

12 Q. Yeah. It would be bad, wouldn't be it,
13 to have some witness show up you'd never heard of
14 and just have him clean your clock, that wouldn't be
15 good, would it?

16 A. We all want to avoid that. Yes, sir.

17 Q. All right. So Scott thought it was
18 unusual that he was not being allowed to serve
19 interrogatories?

20 A. Yes.

21 Q. All right. And you wouldn't disagree
22 that in a case of this magnitude, that would be
23 unusual?

24 A. I would not disagree.

25 Q. All right. Did he speak with you about

1 not having the latitude to move to produce
2 documents, for example?

3 A. It was all categorized under the same
4 umbrella as discovery.

5 Q. Okay. So if I ask you the same
6 questions about production, it would be normal, in a
7 case of this magnitude, to serve a production
8 request asking to see the other side's documents,
9 right?

10 MS. WALL: Object to the form.

11 MR. POWELL: Same.

12 THE WITNESS: I think same, again, in
13 what we do, I don't know that there is a normal.
14 There are always facts and there are always concerns
15 and strategies that may cause you to take one action
16 or another.

17 BY MR. EPTING:

18 Q. Well, if you leave aside that the
19 client's tying of Scott Robinson's hands. In a
20 normal case, you would serve production requests,
21 right? Because you'd want to know what the other
22 side has by way of documents?

23 MS. WALL: Objection to form.

24 MR. POWELL: Object to the form.

25 BY MR. EPTING:

1 Q. Right?

2 A. I think if there were -- if there were
3 no other dynamic involved that would cause you to be
4 restrained on that, yes, you can do that.

5 Q. Because, I mean, this was known to be a
6 big case with bad facts, right?

7 MS. WALL: Object to the form.

8 MR. POWELL: Object to the form.

9 THE WITNESS: The term big case, I think
10 is -- I'm not going to adopt your words there.

11 BY MR. EPTING:

12 Q. Fair enough.

13 A. It was known that this case had bad
14 facts, yes.

15 Q. And had punitive exposure?

16 A. Yes.

17 Q. And punitive exposure, for the jury's
18 benefit, means that the conduct is so egregious that
19 it deserves to be punished, right?

20 A. It's my understanding.

21 MS. WALL: Objection to form.

22 MR. POWELL: Same objection.

23 BY MR. EPTING:

24 Q. All right. And so cases that have
25 punitive exposure, I would call dangerous cases.

1 What word would you use?

2 A. Dangerous perhaps may be appropriate, if
3 there's punitive exposure, yes.

4 Q. So back to the idea of production
5 requests. The interrogatories, you get to ask
6 questions of the other side. Production requests,
7 you get to ask for documents. Typically, a lawyer
8 serving in a litigation role in a dangerous case
9 would serve production requests in order to know
10 what the other side's documents are; would you agree
11 with that?

12 MS. WALL: Object to the form.

13 MR. POWELL: Same.

14 THE WITNESS: Again, I think that unless
15 there were circumstances that would give you a
16 reason, a strategical reason that you would not want
17 to do that, yes, I think that is correct.

18 BY MR. EPTING:

19 Q. All right. And in this case, was there
20 some strategic reason not to be asked, as you
21 understood from Scott, was there some strategic
22 reason for him not to ask for documents?

23 A. My understanding of the reason, from my
24 conversation with Scott, was that the client was
25 concerned that if we requested documents, it would

1 then lead to the plaintiff requesting similar or
2 perhaps more extensive documents, and that there
3 were reasons that Stokes-Craven did not want those
4 requests coming in. That there were things that
5 they did not want in the hands of this attorney.

6 And so they made a decision that the
7 risk of that information getting out exceeded the
8 benefits of obtaining that information for the
9 purposes of this case.

10 Q. Had the other lawyer, Ms. Damascus
11 (phonetic), served any interrogatories or production
12 requests was a concern if Scott did it that that
13 would provoke Ms. Damascus to do it?

14 A. That's my understanding, yes.

15 Q. All right. And you would have gotten
16 that from Scott?

17 A. That's correct. Yes, sir.

18 Q. Depositions, is that normally something
19 that you do in a dangerous case, is to take
20 depositions?

21 MS. WALL: Object to the form.

22 MR. POWELL: Same.

23 THE WITNESS: Again, use of the term
24 normal in a case, that there are certain rules and
25 theories that apply to every case, and I don't think

1 that is accurate. Is it normal? Do you -- do you
 2 see depositions in a certain percentage of cases?
 3 Yes, we all know that we do, but are there reasons
 4 in various cases that you don't do depositions?
 5 Well, sure there are. So I can't say that it's
 6 normal.

7 BY MR. EPTING:

8 Q. What's the benefit, in your estimation,
 9 of taking depositions?

10 A. The benefit of taking a deposition in
 11 my -- in my own estimation, and I do it so I can
 12 develop a preview of what the client -- or excuse
 13 me, of what the witness will say at trial.

14 Q. It affords you the opportunity to know
 15 what he's going to say, right?

16 A. Maybe or maybe not, but at least gives
 17 you some bases that perhaps you can bring him back
 18 to if he says anything differently.

19 Q. When you say bring him back, you're
 20 talking about a deposition can be used to impeach
 21 someone because he said something different in his
 22 deposition than he's saying at trial?

23 A. We all know that. Yes, sir.

24 Q. All right. So the idea is that either
 25 you know what he's going to say at trial because

1 you've taken his deposition, and if he says
2 something different than what he said, then you can
3 bring his credibility into question by pointing out
4 to the jury that he's changed his testimony?

5 A. That is a trial tactic, yes.

6 Q. Do you want -- don't you want to know,
7 Mr. Johnson, what the witness looks like and what
8 kind of credibility the witness may have? How the
9 witness projects? Isn't that a big advantage of a
10 deposition?

11 MS. WALL: Object to the form.

12 THE WITNESS: In some cases. In some
13 cases it might not matter.

14 BY MR. EPTING:

15 Q. But we can agree if you take a
16 deposition, you have the ability to know what the
17 witnesses is going to say, and if he says something
18 different, you can impeach him.

19 You also have the ability to size up the
20 witness and determine, is he one of these people who
21 has the credibility of Charlton Heston or the
22 credibility of some other kind of character, right?

23 MR. POWELL: Object to the form.

24 MS. WALL: Object to the form.

25 THE WITNESS: We like to think, as

1 lawyers, we can use depositions to assess
2 credibility of the witnesses, certainly. As you are
3 doing with me.

4 BY MR. EPTING:

5 Q. Yeah. And I am doing that because I've
6 been doing this for 35 years.

7 A. Right. Yes.

8 Q. And it's something that I want to know.

9 A. Yes.

10 Q. It would be a good thing to know,
11 wouldn't it?

12 MS. WALL: Object to the form.

13 THE WITNESS: Again, in some cases it's
14 pivotal. In some cases it really doesn't matter.

15 BY MR. EPTING:

16 Q. In this case, if you leave aside that
17 the client has tied Mr. Robinson's hands, according
18 to Mr. Robinson, is there any reason that if you're
19 handling this case, that you wouldn't recommend to
20 the client interrogatories, production requests, and
21 depositions in order to know what the exposure is in
22 this dangerous case?

23 MS. WALL: Object to the form.

24 MR. POWELL: Object to the form.

25 THE WITNESS: If my client has made it

1 very clear he's not going to settle the case, if
2 I've been in possession of facts, of the facts of
3 the case, assessing the credibility is really not
4 going to assist me. It's going to be what it's
5 going to be. If my client is telling me also, if
6 there's any concern about the cost of litigation,
7 all of those could be reasons that a deposition is
8 of no benefit.

9 BY MR. EPTING:

10 Q. Well, but my question was this: In a
11 case of this magnitude, punitive exposure, a
12 dangerous case, would you recommend to a client that
13 you engage in discovery and use interrogatories,
14 production requests, and depositions, in order to
15 know the other side's case?

16 MS. WALL: Object to the form.

17 MR. POWELL: Same.

18 THE WITNESS: I think you're -- again,
19 you're asking me to speculate. You're saying a case
20 of this magnitude. That requires an assessment of
21 the facts of the case, and a knowledge of all
22 aspects of the case that I don't really have.

23 BY MR. EPTING:

24 Q. Well, don't worry about this case. I'm
25 just saying, if a case comes in your office, you

1 think it has punitive exposure because there are bad
2 facts, forgery, lying, fraud. I mean, those are
3 things you think of as bad, right?

4 A. Yes.

5 Q. In a case like that, if it comes to you,
6 in which your client has been accused of fraud, and
7 you think there's punitive exposure, are you going
8 to recommend to that client that you engage in
9 discovery and learn who the witnesses are through
10 interrogatories, what documents the other side has
11 by way of production requests, taking depositions to
12 understand what witnesses are going to say? Would
13 you recommend that to a client?

14 MS. WALL: Object to the form.

15 MR. POWELL: Same.

16 THE WITNESS: We're going to have that
17 discussion. Whether, after I hear from my client,
18 any potential reasons that that should not be done,
19 that I continue to have that recommendation, I
20 certainly cannot speculate to.

21 BY MR. EPTING:

22 Q. But you're definitely going to have the
23 discussion about the advisability of all these
24 discovery tools that are available?

25 MR. POWELL: Object to the form.

1 THE WITNESS: I would have a discussion
2 where we would discuss the availability, the
3 benefits and disadvantages of those.

4 BY MR. EPTING:

5 Q. If your client failed to follow your
6 advice on some pivotal matter, do you think it would
7 be a good idea, customary in our business, meaning
8 the law business, to write him a letter and say, for
9 reasons X, Y, and Z, you have instructed me not to
10 engage in discovery; would that be prudent in your
11 mind?

12 MS. WALL: Object to the form.

13 THE WITNESS: You asked several
14 questions. Is it customary? Not in my practice,
15 because we represent people with whom we have
16 relationships, and that for many of my clients would
17 be seen as work on my behalf and not his.

18 Now, do I understand that in this
19 scenario would it be better for my own protection?
20 That could be -- that remains to be seen. But is it
21 customary? No, I would disagree with that in our
22 saying it's customary.

23 Q. So in Manning, the idea of writing
24 clients letters and confirming understandings with
25 them is not customary?

1 A. I didn't say that. The idea of writing
2 a client a self-serving letter, I do not believe --
3 I will certainly not testify to that as customary.

4 Q. Writing a client a letter and saying,
5 you have told me that I'm not to do discovery,
6 that's not customary?

7 A. No, sir.

8 Q. All right. That would be not done in
9 Manning?

10 MS. WALL: Object to form.

11 THE WITNESS: Not -- I'm not saying that
12 the standard is about the locality. I think the
13 standard is about the relationship you have with the
14 client.

15 BY MR. EPTING:

16 Q. So if you have a relationship with the
17 client, then you don't write a letter?

18 MR. POWELL: Object to the form.

19 THE WITNESS: Depends. We all have some
20 type of relationship with every client, with the
21 attorney-client at minimum. And what we do, we
22 often have very close professional and social
23 relationships with people, which create a different
24 dynamic.

25 BY MR. EPTING:

1 Q. Is the relationship that you have with a
2 client, Mr. Johnson, a fiduciary relationship?

3 A. Absolutely.

4 Q. And that means you owe to the client the
5 utmost loyalty?

6 A. Yes, sir.

7 Q. Competence?

8 A. According to the rules, yes, sir.

9 Q. And so in this fiduciary relationship,
10 you don't think it extends to keeping a client
11 involved in his case by writing to them?

12 MS. WALL: Object to the form.

13 MR. POWELL: Same.

14 THE WITNESS: Has nothing to do. We
15 certainly have a duty to keep the client involved.
16 The idea of whether it is a writing is my issue. If
17 it's a client that I see every day, that I spend
18 hours with both professionally and socially, and we
19 have these discussions, we know we have these
20 discussions, then that is the situation that I'm
21 discussing that a letter is not customary.

22 BY MR. EPTING:

23 Q. Okay. Do you prepare for trial or do
24 you just go in and try your lawsuits?

25 MS. WALL: Object to the form.

1 MR. POWELL: Same.

2 THE WITNESS: Certainly, I prepare for
3 trial.

4 BY MR. EPTING:

5 Q. And what would that preparation include?

6 A. Well, that's, again, it's hard to say.

7 Depends on the case and the parameters of what the
8 issues will be and what the client expects.

9 Q. What does the client expect, how does
10 that figure into the preparation?

11 A. Well, again, if I have a client who has
12 indicated reasons that the risk of discovery
13 outweigh the benefits, then discovery then is taken
14 out as one of the methods of trial preparation.

15 If I had a client who doesn't want me to
16 speak to certain people, then that method may be
17 taken out of trial preparation. It just -- I don't
18 see how you can put a generalized statement out.

19 Q. But one of the things you would do in
20 order to prepare a case, if you had responses to
21 interrogatories, is you would review that, right?

22 A. If I had responses to interrogatories
23 from the other side, yes, that would be reviewed
24 prior to trial.

25 Q. And if you had moved to produce

1 documents and you had documents, that's something
2 you would do to prepare for trial, review the
3 appropriate documents, the applicable documents that
4 might turn the case?

5 A. Again, that's a lot of speculation,
6 Mr. Epting, when you say if I had documents that
7 might be pivotal. I can't commit to all of that.

8 Q. Are you going to review documents that
9 relate to the case in preparing for trial?

10 A. Yes.

11 Q. Okay. Are you going to review
12 depositions, if you have them, in preparing for
13 trial?

14 A. If they are depositions of witnesses I
15 expect to be called at trial and I have them, yes.

16 Q. All right. Do you think that it is
17 customary and within the standard of care, if you
18 have interrogatories, production requests, and
19 depositions, to review them prior to going to trial?

20 MS. WALL: Object to the form.

21 MR. POWELL: Same.

22 THE WITNESS: I cannot testify to the
23 standard of care.

24 BY MR. EPTING:

25 Q. Okay. How about your standard?

1 A. My personal standard?

2 MR. POWELL: I am going to object to the
3 form.

4 THE WITNESS: I don't see how that's
5 relevant.

6 BY MR. EPTING:

7 Q. Well, neither you nor I are going to get
8 to determine that. Ultimately, a judge might
9 determine that. But I think it's relevant enough,
10 and I think I'm entitled to ask you the question.

11 A. In my general practice, if I have those
12 things, yes, I review them.

13 Q. In this case, did Mr. Craven instruct
14 Mr. Robinson not to talk to any of the witnesses for
15 Stokes-Craven?

16 A. I recall that being an issue.

17 Q. All right. And so --

18 A. According to Scott.

19 Q. Scott told you that he had been
20 instructed by Dennis not to discuss the case with
21 any of the witnesses in preparation for trial?

22 A. I didn't say that. I recall it being an
23 issue with whom Dennis wanted Scott to discuss the
24 facts of the case with. There was a -- there was a
25 concern that he -- there was desire that he not

1 discuss the case with certain -- with some people,
2 according to what I recall Scott telling me.

3 Q. And these would be Stokes-Craven
4 witnesses, right?

5 A. That's my recollection.

6 Q. That's what Scott said?

7 A. Yes.

8 Q. And Dennis had sort of drawn a wall
9 around who he could and could not talk to?

10 A. Okay.

11 Q. Is that right?

12 A. Right.

13 Q. That's what you understood from Scott?

14 A. That's what I understood, yes.

15 Q. Do you recall who those witnesses might
16 have been?

17 A. I don't.

18 Q. Do you, in your conversations with Scott
19 Robinson, did you conclude, though, that the
20 witnesses that Dennis didn't want him to talk to
21 were the very people who were involved in the
22 transaction?

23 A. That was actually yes, that was what I
24 concluded.

25 Q. That would be a serious liability for a

1 lawyer, wouldn't it? Not to even be able to talk to
2 your own witnesses in preparing for a trial?

3 MS. WALL: Objection to the form.

4 MR. POWELL: Same.

5 THE WITNESS: You used that term
6 liability. Do you mean would it be -- would it
7 impair his ability to try a case?

8 BY MR. EPTING:

9 Q. Yes.

10 A. I would agree, yes, it would.

11 Q. Because not to know what the other side
12 is going to say and not to know what your own side
13 is going to say, that would be a very bad place to
14 be as a lawyer, wouldn't it?

15 A. That would create a very difficult task.

16 MS. WALL: Object to the form.

17 BY MR. EPTING:

18 Q. And it's not just a difficult task, it's
19 a difficult task in a very dangerous case, in a
20 dangerous case with punitive exposure?

21 MS. WALL: Object to the form.

22 THE WITNESS: I think I have already
23 agreed that this case has punitive -- that our
24 discussion, we assessed that there was punitive
25 exposure here.

1 BY MR. EPTING:

2 Q. So, but it would be Mr. Craven put
3 Mr. Robinson in a very bad position according to
4 Mr. Robinson, didn't he?

5 A. Are you asking whether Mr. Craven did
6 that or whether Mr. Robinson says he did that?

7 Q. If Mr. Craven did do that, as
8 Mr. Robinson told you, then Mr. Craven put
9 Mr. Robinson in a very difficult position?

10 MS. WALL: Object to the form.

11 MR. POWELL: Object to the form.

12 THE WITNESS: I -- I believe that those
13 circumstances would definitely impair his ability to
14 provide adequate representation.

15 BY MR. EPTING:

16 Q. Would you agree with me, Mr. Johnson,
17 that if you can't use discovery to understand what
18 the other side is going to say, and you don't have
19 access to your own witnesses, that it wouldn't be
20 possible to provide adequate representation?

21 MR. POWELL: Objection to the form.

22 MS. WALL: Object to the form.

23 THE WITNESS: No, sir, I can't agree
24 with that. Number one, it may be that you know
25 you're able to anticipate the testimony without

1 those things. There are other means of ferreting
2 out facts that may be presented at trial, other than
3 formal discovery.

4 BY MR. EPTING:

5 Q. Well, so, let me just kind of sum this
6 up from your point of view. You've been instructed
7 by a client to serve no interrogatories. You've
8 been instructed by a client not to produce records,
9 move to produce records. You've been instructed to
10 take no depositions. And you've been instructed
11 that you're not to talk to your witnesses that are
12 pivotal. You are not going to write a letter
13 because it's not customary telling the client that
14 you've tied my hands and you're making it very
15 difficult for me to represent you adequately.
16 Accurate?

17 MS. WALL: Object to the form.

18 THE WITNESS: You're using a broad
19 brush, and I don't think I can say yes or no,
20 because there are different circumstances in every
21 case.

22 BY MR. EPTING:

23 Q. But in this case, Mr. Johnson, where the
24 things that lawyers do to prepare for trial, in this
25 circumstance, what can a lawyer do? What do you do

1 to prepare when you have no formal means of
2 discovery? You've done no discovery and you aren't
3 allowed to talk to your own witnesses. What do you
4 do to prepare?

5 MS. WALL: Object to the form.

6 MR. POWELL: Same.

7 THE WITNESS: Again, it depends on the
8 case.

9 BY MR. EPTING:

10 Q. Yeah.

11 A. I don't think that I can just use
12 generalities there.

13 Q. We can agree on this: You would never
14 want to be in that position, would you?

15 MS. WALL: Objection to the form.

16 MR. POWELL: Same.

17 THE WITNESS: I don't think you can say
18 never. Again, you just don't know the
19 circumstances.

20 BY MR. EPTING:

21 Q. All right. You would not want to be in
22 that position routinely, would you, Mr. Johnson?

23 MS. WALL: Objection to the form.

24 MR. POWELL: Same.

25 THE WITNESS: Routinely, we would like

1 to avoid those -- that situation.

2 BY MR. EPTING:

3 Q. Because you're being asked to deliver a
4 professional service with your hands tied behind
5 your back, right?

6 MS. WALL: Objection to form.

7 BY MR. EPTING:

8 Q. I mean, that's what's wrong with this,
9 isn't it?

10 MS. WALL: Object to the form.

11 MR. POWELL: Same.

12 THE WITNESS: I would agree that those
13 things would certainly impair what we consider to
14 be, in many ways, the traditional ability to -- or
15 restrict a lot of traditional things that we would
16 like to do to prepare.

17 BY MR. EPTING:

18 Q. But those are things -- the traditional
19 things are the things that a professional does,
20 professional lawyer would do those things?

21 MS. WALL: Object to the form.

22 MR. POWELL: Object to the form.

23 BY MR. EPTING:

24 Q. A lawyer exercising the skills of his
25 profession would do those things, wouldn't he?

1 MR. POWELL: Object.

2 MS. WALL: Object to the form.

3 MR. POWELL: Same.

4 THE WITNESS: Again, I do think you're
5 trying -- you're asking me to give some expert
6 testimony, and I'm not -- I'm not here for that, you
7 know. I'm here as a fact witness. And to speculate
8 on what may or may not, should have been done or
9 what another lawyer would have done, I don't have an
10 opinion on that.

11 BY MR. EPTING:

12 Q. But Scott -- excuse me -- but William
13 Johnson, in those circumstances would not have
14 written Mr. Craven a letter confirming those facts?

15 MS. WALL: Object to the form.

16 THE WITNESS: I don't know. I wasn't
17 there, but I cannot say that I would have.

18 BY MR. EPTING:

19 Q. Do the restrictions that you have
20 described that Mr. Robinson said Mr. Craven had put
21 in place on him, those restrictions don't rise to
22 such a level that William Johnson can say
23 affirmatively that in his practice he would have
24 confirmed that in writing?

25 MS. WALL: Object to the form.

1 MR. POWELL: Same.

2 THE WITNESS: No, sir.

3 BY MR. EPTING:

4 Q. All right. So when you prepare a case,
5 do you do any research?

6 A. Again, you're asking for answers that
7 would apply to every case. There may be cases that
8 I don't do research.

9 Q. Is this such a case, as you understood
10 it?

11 MS. WALL: Object to the form.

12 BY MR. EPTING:

13 Q. Allegations of fraud?

14 A. I don't know.

15 Q. When you prepare a case, Mr. Johnson, is
16 it your practice to look up what the applicable law
17 to the various causes of action is?

18 MS. WALL: Object to the form.

19 THE WITNESS: William Johnson prepares a
20 case, yes.

21 BY MR. EPTING:

22 Q. Do you think that that is a prudent
23 thing to do?

24 MS. WALL: Object to the form.

25 THE WITNESS: Normally, for William

1 Johnson, it is.

2 BY MR. EPTING:

3 Q. Did you understand from Scott Robinson
4 that Dennis Craven had restricted him because of his
5 concern about the defense cost?

6 Did he ever tell you that Dennis Craven
7 was worried about money?

8 A. I don't recall that.

9 Q. Did Mr. Robinson ever tell you that
10 Mr. Craven told him, don't do any research?

11 A. I don't recall him saying that.

12 Q. Do you, preparing for a case, do you
13 typically prepare a voir dire?

14 MS. WALL: Object to the form.

15 MR. POWELL: Same.

16 THE WITNESS: Not -- not necessarily.
17 We practice in a small town -- well, depending where
18 the case is. If it's in Manning, often I will not.
19 We normally are able to develop a fairly good body
20 of information on jurors without going through the
21 voir dire process.

22 BY MR. EPTING:

23 Q. Is it your practice, when you're
24 researching a case, to have some eye toward what you
25 want the judge to charge the jury in a case?

1 A. That is very minimal, very little on my
2 list of concerns, and it may be just William
3 Johnson, but I've never thought that a judge's
4 charge made much of an impression on a jury.

5 Q. So charges are not something that are,
6 in your practice, of great concern in the trial of
7 a case?

8 A. In some cases I submit jury charges, in
9 some cases I don't, because particularly in today's
10 world, judges have clerks, they are well-researched,
11 and they normally cover all areas.

12 Q. Did you understand -- what else did
13 Scott Robinson tell you that Dennis Craven had
14 restricted him from doing?

15 A. Well, he was -- primarily, is he
16 wouldn't settle the case.

17 Q. And he wanted it settled because --
18 Scott Robinson was telling you he thought it should
19 have been settled because he thought it was
20 dangerous?

21 A. Yes.

22 Q. Did he explain to you what the demand
23 was?

24 A. I don't recall the specific numbers, but
25 I recall that Scott was of the impression that the

1 case should have been settled.

2 Q. And did he indicate to you what kind of
3 money the plaintiff wanted to settle the case?

4 A. I don't -- I don't recall.

5 Q. Did he -- is it your practice in cases
6 in which you represent clients to talk to the other
7 lawyer?

8 MS. WALL: Object to the form.

9 THE WITNESS: I've dealt with some that
10 I wouldn't talk to.

11 BY MR. EPTING:

12 Q. Would that be uncommon?

13 MR. POWELL: Object to the form.

14 THE WITNESS: Yeah, common is a diff --
15 a very difficult -- that's a difficult question to
16 ask. Certainly in the best scenario, you would have
17 a colloquial relationship with the attorney on the
18 other side, we try to do that, but that doesn't
19 always happen.

20 BY MR. EPTING:

21 Q. How is it in your cases, Mr. Johnson,
22 you find out what the other side wants in order to
23 settle a case?

24 MS. WALL: Object to the form.

25 BY MR. EPTING:

1 Q. Or do you do that?

2 A. It depends on the client. If the client
3 is interested in resolving it, then we have that
4 discussion. If I have a client, as Scott did, who
5 was not interested in resolving it, then that is a
6 waste of time.

7 Q. Right. If Mr. Craven has said, we're
8 going to try this case, there's no reason to have
9 any dealings with the other lawyer.

10 A. Well, there's no reason to discuss
11 settlement.

12 Q. Right. Did Mr. Robinson tell you about
13 any discussions he had with Ms. Damascus?

14 A. I don't recall any discussion about
15 that.

16 Q. Do you recall Mr. Robinson telling you
17 his assessment of the case and what the exposure
18 was?

19 A. Not in a specific numbers.

20 Q. He certainly never told you that this
21 was a case that had a limited exposure?

22 A. No.

23 Q. I mean, this is not a case that he would
24 have told you, no big deal, we can't lose anything
25 more than the value of the truck?

1 A. No. This is a case he was concerned
2 about.

3 Q. I think you went to the trial?

4 A. For a limited period of time.

5 Q. Did you talk to Mr. Robinson at all
6 during the trial?

7 A. I believe we had some discussions at the
8 end of the day.

9 Q. And were those discussions along the
10 same lines as this is a dangerous case, do you think
11 it was going good, bad? What did he tell you?

12 MS. WALL: Object to the form.

13 THE WITNESS: I just recall him being
14 concerned.

15 BY MR. EPTING:

16 Q. So it's not like he was reporting to you
17 at the end of every day, we're killing them in here,
18 we're doing a beautiful job, we're going to win this
19 case, that's not what you're hearing?

20 A. No, I didn't -- I never heard that.

21 Q. Throughout the trial it was, I'm
22 concerned about this case?

23 MS. WALL: Object to the form.

24 MR. POWELL: Same.

25 BY MR. EPTING:

1 Q. Right?

2 A. That's my recollection, yes.

3 Q. Did you see anything when you were there
4 that would have caused you optimism, or did you
5 think that Mr. Robinson's description of this as a
6 dangerous case, what you were seeing was consistent
7 with the message that he had been giving you?

8 A. When we went, my recollection is that we
9 observed him cross-examining one of the plaintiff's
10 experts, and I recall our assessment that that went
11 very well.

12 Q. So the part you saw you thought actually
13 went well for --

14 A. That's correct.

15 Q. -- for Stokes-Craven?

16 A. That's correct.

17 Q. How long were you there?

18 A. I think maybe an hour.

19 Q. So y'all had just stopped by?

20 A. Well, just one afternoon that Steve and
21 I, both, I recall, looked at our schedules and said
22 we had some time, let's go see how things are going.

23 Q. What did Mr. Robinson tell you he
24 thought about Mr. Craven's instructions not to turn
25 it over to an insurance company?

1 A. As far as what -- he relayed that to me,
2 that he would not.

3 Q. Right.

4 A. I don't know that he commented on his
5 opinion of that decision, but he told me that that
6 was a decision.

7 Q. And what did you say to him?

8 A. I don't recall my specific words.

9 Q. I mean, normally speaking, Mr. Johnson,
10 in your practice, if there's insurance coverage and
11 your client can get a lawyer who is in that line of
12 work, paid for by an insurance company, rather than
13 paid out of his own pocket, would you recommend --
14 is it your practice to recommend, let's turn this
15 over to the insurance company?

16 MR. POWELL: Object to the form.

17 MS. WALL: Objection to form.

18 THE WITNESS: My experience has been
19 that that is a decision the client must make. That
20 there are repercussions of that, that it affects
21 your insurability, and I don't know if Stokes-Craven
22 had that situation or not.

23 BY MR. EPTING:

24 Q. Well, then, let me rephrase the
25 question. Are you going to have that discussion

1 with a client?

2 MS. WALL: Object to the form.

3 BY MR. EPTING:

4 Q. About the advisability of turning the
5 matter over to the insurance company?

6 A. William Johnson would have that
7 discussion, yes, if William Johnson thought there
8 were some coverage that may be applicable.

9 Q. And you would recommend that that be
10 done?

11 MS. WALL: Object to the form.

12 THE WITNESS: I would. William Johnson
13 would explain to the client the benefits of it.
14 Whether or not it's done would be a business
15 decision for the client to make.

16 BY MR. EPTING:

17 Q. What would be the benefits of it,
18 Mr. Johnson?

19 A. You never know. Depending on the causes
20 of action. As you know, for some causes of action,
21 there's coverage, for some there is not. If it is a
22 case where there's coverage, the immediate benefit
23 would be a defense, but then again, it would be a
24 lawyer who would not be of the client's choosing.
25 And if that were the case, then some of the issues

1 we've discussed would be impacted.

2 Q. Did you or Mr. McKenzie have any concern
3 about this dangerous case being tried by a fellow
4 who had only tried one other jury trial?

5 MS. WALL: Object to the form.

6 THE WITNESS: You talking about Scott?

7 BY MR. EPTING:

8 Q. Yes.

9 A. Well, I do not believe that's accurate,
10 that he had only tried one other jury trial.

11 Q. How many do you think he tried?

12 A. I believe there's an issue of how many
13 in the common pleas and how many in general
14 sessions. Scott's a very experienced trial lawyer.
15 He spent a lot of time in the courtroom. Yes, a
16 majority of it, perhaps, has been in the general
17 sessions side, but it's courtroom time.

18 I recall Scott -- I can recall two or
19 three cases that Scott tried to a conclusion.
20 Perhaps the timing, you know, was after this one.
21 It may have been.

22 Q. But the firm itself, how many common
23 pleas trials did you think he had?

24 A. I was thinking it was three or so.

25 Q. Did it concern you at all that there's

1 one lawyer going to try this case, where according
2 to Mr. Robinson, the client has tied his hands
3 behind his back, and the lawyer has tried, according
4 to you, two or three, four jury trial cases?

5 MS. WALL: Object to the form.

6 THE WITNESS: I -- I was, at that time,
7 familiar with Scott's ability in the courtroom.
8 That really did not concern me. I didn't know of
9 what I -- of what anyone else would add, me, Steve,
10 anybody else. I don't know what would have been
11 added by another warm body sitting at the table.
12 And I know Dennis had confidence in Scott.

13 BY MR. EPTING:

14 Q. Have you had any discussions with
15 Mr. Craven about this case?

16 A. We had discussions early on. Just
17 general, about the disappointment in the result.

18 Q. Meaning after the verdict?

19 A. Yes.

20 Q. And what do you recall he said?

21 A. I just recall that he said he was just
22 stunned. That he had no idea that that could
23 happen.

24 Q. Did he seem to be honest to you when he
25 said that, that he was stunned?

1 A. I wondered.

2 Q. You wondered. Because I mean, in this
3 case, Scott Robinson would have been telling him for
4 years how bad this case was, and that the result
5 could be terrible. So it would be very difficult
6 for him to say that he's stunned, right?

7 A. I had that thought. Yes.

8 Q. So did you think maybe he was just
9 setting this up for a lawsuit?

10 A. Honestly, I did not think that. I just
11 thought that it was just conversation that came out.

12 Q. What else did he say?

13 A. That is really -- I can't -- I don't
14 recall any other components of that conversation.

15 Q. What is your opinion of Dennis Craven,
16 Mr. Johnson? Do you like him?

17 I know he sued you, but I mean, before
18 this all happened, did you like him?

19 MS. WALL: Objection.

20 THE WITNESS: Well, Dennis and I have
21 been together socially. Dennis has been friendly,
22 and we've enjoyed each other, some conversation,
23 together. So liking is a -- there's certainly a
24 component there that, yes, we enjoyed.

25 BY MR. EPTING:

1 Q. But I mean, before this whole thing,
2 this verdict happened, did you believe that he was
3 an honest man?

4 A. As far as I knew, yeah.

5 Q. And someone that you could believe?

6 A. In a general sense, yes.

7 Q. You didn't have any reason not to
8 believe what Dennis told you, did you?

9 MR. POWELL: Object to the form.

10 THE WITNESS: I personally did not, no.

11 MR. EPTING: Let's take a break.

12 (A recess transpired.)

13 BY MR. EPTING:

14 Q. Okay. Tell me this. In Clarendon
15 County, how long does it take a case to get on the
16 trial roster, typically?

17 A. Normally, you know, normally the rules
18 require 18 months now. So typically, that to two
19 years. Actually, I think now, these days, as soon
20 as the 18-month period is over, it shows up.

21 Q. And how long does a case usually stay on
22 the trial roster?

23 MS. WALL: Object to form.

24 THE WITNESS: Yeah, that varies. And
25 certainly anybody can tell you, if you're on a

1 roster in Clarendon County, you're subject to being
2 called, because generally, the judges are looking
3 around for cases. But as a practical matter, very
4 few cases, that I'm aware of or actually tried the
5 first time are on the roster. And we normally have
6 court about once a quarter.

7 Q. So six months, something like that?

8 A. Something like that.

9 Q. You tied your conversations with Scott
10 Robinson to the -- you thought it began when the
11 case got on the trial roster. So would it be fair
12 to say that these conversations went on over some
13 months?

14 A. I think that that's speculation at this
15 point to say the period of time. And I realize what
16 you're saying. Yes, you're probably correct, it
17 probably was only on a roster for six months or so.
18 Would we have discussed it before, you know, I don't
19 know.

20 Q. Well, what I'm trying to gauge,
21 Mr. Johnson, is these conversations that you're
22 having with Scott Robinson. Well, what did you
23 think of them?

24 MR. POWELL: Object to the form.

25 THE WITNESS: What did I think of?

1 BY MR. EPTING:

2 Q. The restrictions that Mr. Robinson was
3 being placed under. When he would tell you those
4 things, what would you say?

5 A. I just accepted it.

6 Q. Did it concern you?

7 MS. WALL: Object to the form.

8 THE WITNESS: I recalled being
9 concerned, but also recall having the sentiment of a
10 larger scheme of things, it probably wouldn't make a
11 difference anyway.

12 BY MR. EPTING:

13 Q. And what do you mean by that, it
14 wouldn't make a difference?

15 A. There was very little question about
16 what the plaintiff was going to say. There's very
17 little question about what the facts were. They
18 were known, and I really don't know of anything that
19 was going to change those facts. And so that being
20 the case, it may be that additional discovery just
21 would not have benefited the defense at all.

22 Q. But what about the whole notion that of
23 Stokes-Craven was going to try this case and was not
24 going to have any settlement discussions with the
25 plaintiff?

1 A. I didn't think it was very wise, but
2 they're entitled to that decision.

3 Q. I mean, normally, you do have settlement
4 discussions --

5 MS. WALL: Object.

6 BY MR. EPTING:

7 Q. -- with the other side, right?

8 MS. WALL: Object to the form.

9 MR. POWELL: Same.

10 THE WITNESS: I've had cases where there
11 weren't.

12 BY MR. EPTING:

13 Q. Well, I understand you've had cases, but
14 I mean, typically, what percentage of cases have
15 settled?

16 MS. WALL: Object to form.

17 THE WITNESS: I would defer to some
18 other statistical compilation for that, but in my
19 practice most -- certainly, most cases are settled,
20 I agree with that.

21 BY MR. EPTING:

22 Q. And they're settled because somebody's
23 talking to the other person?

24 A. The issue comes up.

25 Q. Yeah, it's hard to settle a case if

1 you're not talking to the other side, isn't it?

2 MR. POWELL: Object to the form.

3 THE WITNESS: If you're not
4 communicating, I don't know that the spoken word
5 would be necessary.

6 BY MR. EPTING:

7 Q. Well, I do agree with that. Oftentimes,
8 you write letters, don't you?

9 A. Yes, and normally, it's the plaintiff
10 who submits a demand.

11 Q. Right. So you're having these
12 discussions with Scott Robinson about not
13 entertaining any settlement discussions. What was
14 your reaction to that?

15 MS. WALL: Object to the form.

16 MR. POWELL: Same.

17 THE WITNESS: I think I just said, I
18 didn't think it was a good idea, but I just
19 accepted, well, that's -- that's what your client
20 has asked you to do.

21 BY MR. EPTING:

22 Q. Did it ever occur to you to pick up the
23 phone and call Dennis Craven or have Steve McKenzie
24 call Dennis Craven? Talk to him?

25 A. I didn't see where I would have any

1 influence over Dennis that Scott would not have.

2 MR. EPTING: Okay. All right. Thank
3 you for your time.

4 THE WITNESS: Thank you, sir.

5 EXAMINATION

6 BY MS. WALL:

7 Q. I just have a few follow-up questions
8 for you. In these questions that you've received
9 from Mr. Epting, were bouncing back and forth from
10 general practice to this case. Were you aware, in
11 this case, that Dennis Craven, before suit was ever
12 filed, was sent a detailed letter that set forth all
13 of the operative facts, the theories of liability,
14 what the expert opinions on behalf of Mr. Austin
15 would be should he sue, and laid out the entire
16 case, which letter then later was given by
17 Mr. Craven to Mr. Robinson; were you aware of that?

18 A. I recall that there was a letter that
19 had the facts of the case in it. The details, I
20 don't.

21 Q. So there's been a lot of questioning of
22 you whether with regard to tying hands and that sort
23 of thing. Were you aware that Mr. Craven gave to
24 Scott Robinson this letter, which had attached,
25 among other things, expert opinions, documents and

1 the like?

2 A. I don't know. No, I was not aware of
3 that.

4 Q. So my having given you that information,
5 without the ability to understand, to actually look
6 at that extensive letter, would you agree with me
7 that Scott Robinson did not go in to try this case
8 without any information on either legal theories,
9 witnesses, facts, or expert opinions?

10 A. It's hard for -- I don't know exactly
11 what it would --

12 Q. If you take that as true, that there was
13 such a letter that Mr. Craven received, and in turn
14 he gave it to Mr. Robinson?

15 A. Yes, it makes sense that that would have
16 been the source of the information that he had, when
17 discussion was had about the discovery, was actually
18 that there wasn't much question about what was going
19 to -- what trial was -- what was going to come out
20 at trial.

21 Q. When you just testified that after the
22 verdict, you recall a discussion with Mr. Craven,
23 did Mr. Craven say to you he had no idea that could
24 happen or he had no idea that would happen?

25 A. I think it was that that would happen.

1 I think it was just in general conversation, just
2 expressing shock that that's the way it came out.

3 Q. And did he give you the impression that
4 he was surprised that the jury did what they did?

5 A. Yes.

6 MS. WALL: I have no other questions.

7 MR. POWELL: I don't have any questions.

8 MR. EPTING: Thank you, again. I
9 appreciate your coming here.

10 THE WITNESS: Yes, sir.

11 (The deposition was concluded at 12:00 PM.)
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1 SIGNATURE OF DEPONENT
DEPONENT: WILLIAM HOWARD JOHNSON
2 DEPOSITION DATE: AUGUST 8, 2012.
REPORTER: MARIA D. DEMPSEY
3 CASE CAPTION: STOKES-CRAVEN HOLDING CORP
d/b/a STOKES-CRAVEN FORD vs. SCOTT L. ROBINSON and
4 JOHNSON MCKENZIE & ROBINSON, LLC

5 (Please return both Signature of Deponent pages)

6 I, the undersigned, WILLIAM HOWARD JOHNSON, do
7 hereby certify that I have read the foregoing deposition
8 and find it to be a true and accurate transcription of my
9 testimony, with the following corrections, if any:

10	PAGE	LINE	CHANGE	REASON

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1 SIGNATURE OF DEPONENT (CONTINUED)
DEPONENT: WILLIAM HOWARD JOHNSON
2 DEPOSITION DATE: AUGUST 8, 2012
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4 JOHNSON MCKENZIE & ROBINSON, LLC

5 PAGE LINE CHANGE REASON

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WILLIAM HOWARD JOHNSON Date

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Maria D. Dempsey, RPR
My Commission expires:
25 October 13, 2019

1 CERTIFICATE OF REPORTER

2
3 I, Maria D. Dempsey, Registered Professional
4 Reporter and Notary Public for the State of South
5 Carolina at Large, do hereby certify that the foregoing
6 transcript is a true, accurate, and complete record.

7 I further certify that I am neither related
8 to nor counsel for any party to the cause pending or
9 interested in the events thereof.

10 Witness my hand, I have hereunto affixed my
11 official seal this 27th day of August, 2012, at
12 Charleston, Charleston County, South Carolina.

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24 _____
25 Maria D. Dempsey, RPR
My Commission expires:
October 13, 2019

I N D E X

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(No Information Requested)

E X H I B I T S

(No Exhibits Proffered)