

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

S.C. Supreme Court

George C. James, Jr., Circuit Court Judge

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.

**RESPONDENTS SCOTT L. ROBINSON AND JOHNSON MCKENZIE &
ROBINSON, LLC'S AMENDED JOINT FINAL BRIEF**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT	2
STATEMENT OF FACTS	5
STANDARD OF REVIEW	10
I. SUMMARY JUDGMENT STANDARD	10
II. DISCOVERY ORDER STANDARD	11
ARGUMENT.....	11
I. STOKES-CRAVEN HAD ACTUAL AND CONSTRUCTIVE KNOWLEDGE OF ITS CLAIMS MORE THAN THREE YEARS BEFORE FILING THE MALPRACTICE LAWSUIT.	11
A. During the August 2006 Trial, Craven Realized that His Attorney Had Not, According to Stokes-Craven’s Allegations, Prepared the Case as He Would Have Expected.	13
B. When the Underlying Verdict Was Handed Down, Craven Knew that it Was Substantially Less Favorable than Austin’s Previous Settlement Demands.	18
C. The Problems with Issue Preservation “Jumped Out” at Appellate Counsel when Reviewing the Trial Transcript in Early 2007, and Appellate Counsel’s Knowledge Is Imputed to Stokes-Craven.....	19
II. DEPARTING FROM A STRAIGHTFORWARD APPLICATION OF THE DISCOVERY RULE IN LEGAL MALPRACTICE CASES WOULD UNDERMINE THE PURPOSE OF THE STATUTE OF LIMITATIONS AND LEAD TO RESULTS CONTRARY TO THE INTENT OF THE STATUTE.....	21
A. Statutes of Limitations and the Discovery Rule Protect Important Public Interests, and the Court’s Prior Interpretation of the Statutory Discovery Rule Is Entitled to Substantial Deference	23

B.	Tolling the Statute of Limitations until <i>Remittitur</i> Regardless of the Underlying Facts Would Lead to Perverse Results and Unnecessarily Multiply the Amount and Expense of Litigation	24
C.	There Is No Serious Risk of Forcing Litigants to Take Inconsistent Positions.....	25
D.	The Majority of American Jurisdictions Reject any Bright-Line Rule Preserving Claims until <i>Remittitur</i> and Hold that Claims Often Accrue at the Conclusion of the Underlying Trial	27
III.	EQUITABLE ESTOPPEL AND TOLLING DO NOT APPLY BECAUSE THERE IS NO EVIDENCE OF FRAUD, CONCEALMENT, OR ANY OTHER EXTRAORDINARY CIRCUMSTANCES PREVENTING STOKES-CRAVEN FROM FILING THIS ACTION IN A TIMELY MANNER	31
A.	There Is No Evidence of Fraud or Concealment, as Required to Estop a Party from Asserting the Statute of Limitations as a Defense.....	31
B.	There Are No Extraordinary Circumstances Justifying the Application of Equitable Tolling.	33
IV.	THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT DOCUMENTS PREPARED IN ANTICIPATION OF LITIGATION WERE PROTECTED BY THE WORK PRODUCT DOCTRINE.....	34
A.	The Documents at Issue Were Prepared in Anticipation of Litigation.....	35
B.	Stokes-Craven Made No Argument Below Concerning a Substantial Need for the Documents and Has Therefore Waived any Such Argument on Appeal	37
C.	Stokes-Craven Has Not Demonstrated a Substantial Need for the Documents at Issue	38
	CONCLUSION.....	40

TABLE OF AUTHORITIES

Cases

<i>Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.</i> , 319 S.C. 556, 462 S.E.2d 858 (1997)	23
<i>Austin v. Stokes-Craven Hldg. Corp.</i> , 387 S.C. 22, 691 S.E.2d 135 (2010)	2, 7, 8, 9, 10, 18, 19, 20
<i>Bayle v. S.C. Dep't of Transp.</i> , 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001).....	11
<i>Beesley v. Van Doren</i> , 873 P.2d 1280 (Alaska 1994).....	27, 28
<i>Belden v. Emmerman</i> , 560 N.E.2d 1180 (Ill. Ct. App. 1990)	28
<i>Beyer v. Metze</i> , 326 S.C. 356, 482 S.E.2d 789 (Ct. App. 1997).....	11, 39
<i>Bowman v. Abramson</i> , 545 F. Supp. 227 (E.D. Pa. 1982)	27
<i>Brunacini v. Kavanagh</i> , 869 P.2d 821 (N.M. Ct. App. 1993)	29
<i>Burgess v. Am. Cancer Soc'y, S.C. Div.</i> , 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989).....	17
<i>Cantu v. St. Paul Cos.</i> , 514 N.E.2d 666 (Mass. 1987)	28
<i>Cf. McLeod v. Starnes</i> , 396 S.C. 647, 723 S.E.2d 198 (2012)	24
<i>Chambers v. Dillow</i> , 713 S.W.2d 896 (Tenn. 1986).....	29
<i>City of North Myrtle Beach v. Lewis-Davis</i> , 360 S.C. 225 599 S.E.2d 462 (Ct. App. 2004).....	23
<i>Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.</i> , 273 S.C. 306, 257 S.E.2d 496 (1979)	19
<i>Dean v. Ruscon Corp.</i> , 321 S.C. 360, 468 S.E.2d 645 (1996)	30, 33
<i>Dearborn Animal Clinic, P.A. v. Wilson</i> , 806 P.2d 997 (Kan. 1991).....	28
<i>Diaz v. Piquette</i> , 496 So.2d 239 (Fla. Dist. Ct. App. 1986)	29
<i>Doe v. Crooks</i> , 364 S.C. 349, 613 S.E.2d 536 (2005)	30
<i>Dorman v. Campbell</i> , 331 S.C. 179, 500 S.E.2d 786 (Ct. App. 1998).....	20
<i>Epstein v. Brown</i> , 363 S.C. 372, 610 S.E.2d 816 (2005)	3, 4, 11, 12, 13, 14, 15, 21, 24, 27, 30
<i>Ex parte Panell</i> , 756 So.2d 862 (Ala. 1999).....	29
<i>Fairway Dev. Co. v. Petersen, Moss, Olsen, Meacham & Carr</i> , 865 P.2d 957 (Idaho 1993).....	28

<i>Faulkner v. Millar</i> , 319 S.C. 216, 460 S.E.2d 378 (1995)	20
<i>Fritzeen v. Gravel</i> , 830 A.2d 49 (Vt. 2003).....	28
<i>Front Royal Ins. Co. v. Gold Players, Inc.</i> , 187 F.R.D. 252 (W.D. Va. 1999).....	36
<i>Goodyear Tire & Rubber Co. v. Chiles Pwr. Supply, Inc.</i> , 190 F.R.D. 532 (S.D. Ind. 1999).....	36
<i>Grunwald v. Bronkesh</i> , 621 A.2d 459 (N.J. 1993).....	28
<i>Hauger v. Chicago, R.I. & P.R. Co.</i> , 216 F.2d 501 (7 th Cir. 1954)	38
<i>Hayden v. Green</i> , 429 N.W.2d 604 (Mich. 1988).....	28
<i>Heidebrink v. Moriwaki</i> , 706 P.2d 212 (Wash. 1965).....	38
<i>Herron v. Century BMW</i> , 395 S.C. 461, 719 S.E.2d 640 (2012)	38
<i>Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.</i> , 386 S.C. 108, 687 S.E.2d 29 (2009)	33, 34
<i>Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.</i> , Case No. 2011–194189 (Shearouse Adv. Sheets Jan. 8, 2014).....	25
<i>Joe v. Two Thirty Nine Joint Venture</i> , 145 S.W.3d 150 (Tex. 2004).....	21
<i>Kelly v. Logan, Jolley, & Smith, L.L.P.</i> , 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009).....	12, 16, 31
<i>Kidwiler v. Progressive Paloverde Ins. Co.</i> , 192 F.R.D. 536, (N.D.W. Va. 2000).....	37
<i>Knight v. Furlow</i> , 553 A.2d 1232 (D.C. 1989)	28
<i>Laird v. Blacker</i> , 828 P.2d 691 (Cal. 1992).....	28
<i>Law v. S.C. Dep't Corr.</i> , 368 S.C. 424, 629 S.E.2d 642 (2006).....	10
<i>McDougall v. Dunn</i> , 468 F.2d 468 (4th Cir. 1972)	37, 39
<i>McNair v. Fairfield County</i> , 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008).....	11
<i>Michael v. Beasley</i> , 583 So.2d 245 (Ala. 1991).....	28, 29
<i>Moates v. Bobb</i> , 322 S.C. 172, 470 S.E.2d 402 (Ct. App. 1996).....	23
<i>Morrison v. Goff</i> , 91 P.3d 1050 (Colo. 2004).....	28
<i>Nationwide Mut. Ins. Co. v. Winslow</i> , 382 S.E.2d 872 (N.C. Ct. App. 1989).....	28

<i>Peterson v. Richland County</i> , 335 S.C. 135, 515 S.E.2d 553 (Ct. App. 1999).....	11, 30
<i>Powers v. Powers</i> , 239 S.C. 423, 123 S.E.2d 646 (1962)	10, 23
<i>Ragar v. Brown</i> , 964 S.W.2d 372 (Ark. 1998).....	28
<i>Riemers v. Omdahl</i> , 687 N.W.2d 445 (N.D. 2004)	29
<i>Robbins v. Seventko Orthopedic Surgeons, Inc. v. Geisenberger</i> , 674 A.2d 244 (Pa. Super. Ct. 1996).....	27, 29
<i>Rosenfield v. I. David Marder & Assocs., LLC</i> , 956 A.2d 581 (Conn. Ct. App. 2008).....	28
<i>Santee Portland Cement Co. v. Daniel Int'l Corp.</i> , 299 S.C. 269, 384 S.E.2d 693 (1989)	23, 24
<i>Snell v. Columbia Gun Exchange, Inc.</i> , 276 S.C. 301, 278 S.E.2d 333 (1981)	12
<i>Southern Dev. Land & Golf Co., Ltd. v. S.C. Pub. Serv. Auth.</i> , 311 S.C. 29, 426 S.E.2d 748 (1993)	32
<i>State v. One Coin-Operated Video Game Mach.</i> , 321 S.C. 176, 467 S.E.2d 443 (1996)	10
<i>Suzuki v. Holthaus</i> , 375 N.W.2d 126 (Neb. 1985).....	28
<i>Taylor v. Temple & Cutler</i> , 192 F.R.D. 552 (E.D. Mich. 1999)	36
<i>Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund</i> , 389 S.C. 422, 699 S.E.2d 687 (2010)	12, 23
<i>True v. Monteith</i> , 327 S.C. 116, 489 S.E.2d 615 (1997)	16, 17
<i>Trustees of Chicago Plastering Inst. Pension Trust v. Elite Plastering Co.</i> , 603 F. Supp. 2d 1143 (N.D. Ill. 2009)	21
<i>Underwriters Ins. Co. v. Atlanta Gas Light Co.</i> , 248 F.R.D. 663 (N.D. Ga. 2008).....	36
<i>VanSickle v. Kohout</i> , 599 S.E.2d 856 (W. Va. 2004).....	28
<i>Wehle v. S.C. Ret. Sys.</i> , 363 S.C. 394, 611 S.E.2d 240 (2005)	10, 23, 30
<i>Weitzman v. Blazing Pedals, Inc.</i> , 151 F.R.D. 125 (D. Colo. 1993)	36
<i>Westbury v. Bauer</i> , 284 S.C. 385, 326 S.E.2d 151 (1985)	10
<i>Wilson v. Moseley</i> , 327 S.C. 144, 488 S.E.2d 862 (1997)	34
<i>Young v. S.C. Dep't of Corr.</i> , 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).....	16
<i>Zimmie v. Calfee, Halter & Griswold</i> , 538 N.E.2d 398 (Ohio 1989).....	29

Statutes

Rule 26(b)(3), SCRCP 35, 36, 37
Rule 56(c), SCRCP 10
Rule 8(e)(2), SCRCP 26

Other Authorities

S.C. Code Ann. § 15-3-530(5) 11
S.C. Code Ann. § 15-3-535 11

Rules

Charles Alan Wright, et al.,
 Fed. Prac. & Proc. § 2025 38
Restatement (Third) of Agency § 5.03 (2006) 20
Restatement (Third) of the Law Governing Lawyers § 28A cmt. b. (2000) 21

STATEMENT OF ISSUES ON APPEAL

1. WHETHER APPELLANT'S LEGAL MALPRACTICE CLAIM AGAINST ITS TRIAL COUNSEL IS BARRED BY THE STATUTE OF LIMITATIONS WHEN APPELLANT'S PRINCIPAL ADMITTED WITNESSING THE ATTORNEY COMMITTING NUMEROUS PURPORTED ERRORS DURING TRIAL, AND WHEN APPELLANT'S SEPARATE APPELLATE ATTORNEYS ADMITTED RECOGNIZING SERIOUS PROBLEMS WITH TRIAL COUNSEL'S REPRESENTATION, ALL MORE THAN THREE YEARS BEFORE THIS LAWSUIT WAS FILED.
2. WHETHER THE COURT ON APPEAL SHOULD ABANDON THE DISCOVERY RULE AND, DEPARTING FROM THE VAST MAJORITY OF AMERICAN JURISDICTIONS, INSTEAD CREATE A BRIGHT LINE RULE THAT A LEGAL MALPRACTICE ACTION DOES NOT ACCRUE UNTIL A *REMITTITUR* IS ISSUED IN THE UNDERLYING CASE, REGARDLESS OF THE PLAINTIFF'S KNOWLEDGE OF POTENTIAL CLAIMS MORE THAN THREE YEARS BEFOREHAND.
3. WHETHER THE LOWER COURT CORRECTLY HELD THAT NEITHER EQUITABLE ESTOPPEL NOR TOLLING APPLIED WHERE THERE WAS NO EVIDENCE OF FRAUD, CONCEALMENT, OR OTHER EXTRAORDINARY CIRCUMSTANCES.
4. WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN RULING THAT CORRESPONDENCE BETWEEN TRIAL COUNSEL AND ITS INSURER IN ANTICIPATION OF LITIGATION WAS PROTECTED BY THE WORK PRODUCT DOCTRINE.

STATEMENT OF THE CASE

On August 16, 2010, Appellant Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford (“Stokes-Craven”) filed the instant case against Respondents Scott L. Robinson (“Mr. Robinson”) and Johnson, McKenzie and Robinson, LLC (“the “Firm”) (together, “Trial Counsel”), alleging legal malpractice and breach of fiduciary duty in Trial Counsel’s representation of Stokes-Craven in an underlying dealership fraud case styled *Donald C. Austin v. Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford*, Case No. 2004-CP-14-135. The underlying case involved allegations of fraud and forgery in the sale of an automobile. The underlying case was tried to a jury in August 2006, and, on August 16, 2006, the jury rendered a verdict in favor of the plaintiff in the amount of \$26,371.10 in actual damages and \$216,000 in punitive damages. The verdict was appealed on numerous grounds, and this Court affirmed the verdict in *Austin v. Stokes-Craven Hldg. Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010).

In the instant legal malpractice case against Trial Counsel, filed on August 16, 2010, the lower court granted Trial Counsel’s motion for summary judgment because the case was not filed within the statute of limitations and denied a motion to compel filed by Stokes-Craven because the documents sought were protected by the work product doctrine. The lower court’s ruling on summary judgment was dated June 6, 2013. On June 27, 2013, Stokes-Craven filed a Notice of Appeal.

SUMMARY OF ARGUMENT

Under a straightforward application of the discovery rule, which is established law in South Carolina, the lower court’s grant of summary judgment in favor of Trial Counsel should be affirmed. In this legal malpractice case arising out of Trial Counsel’s

representation of Stokes-Craven in a fraud and forgery trial brought by Donald Austin, a customer of the dealership, it is undisputed that Stokes-Craven's principal, Dennis Craven ("Craven"), was uncomfortable with the defense of the case and personally witnessed at trial the errors that Stokes-Craven now claims Trial Counsel committed. According to Craven, the dealership suffered immediate reputational harm from the six-figure verdict rendered by the jury. Thus, applying the discovery rule mandated by statute and as articulated by this Court in dozens of cases, including *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005) – a remarkably similar case factually and legally – Stokes-Craven's legal malpractice claim accrued at or shortly after the conclusion of the underlying trial in August 2006 - well over three years before this malpractice lawsuit was filed.

Not only did Craven know or have reason to know facts giving rise to a malpractice claim in August 2006, Stokes-Craven's separate appellate counsel, the Young Clement Rivers law firm ("Appellate Counsel"), specifically identified trial issue preservation concerns while preparing the appeal of the jury verdict more than three years before this malpractice suit was filed. Stokes-Craven attempts to argue that its Appellate Counsel's knowledge is not imputed to it, but this argument ignores settled South Carolina law that an agent's knowledge acquired within the scope of his or her duties is imputed to the principal. Here, issue preservation was plainly within the scope of Appellate Counsel's duties, and, in fact, Appellate Counsel briefed the matter extensively. Thus, this additional ground satisfies South Carolina law and compels the conclusion that the legal malpractice claim is barred by the statute of limitations.

Stokes-Craven seeks to avoid the conclusion that the statute of limitations has run by asking this Court to overrule decades of decisions, including *Epstein*, and, instead, create a special exception to the discovery rule in legal malpractice cases, tolling the statute of limitations until the underlying case is fully resolved on appeal. Such an exception, however, would ignore the strong principles of *stare decisis* that attach when this Court interprets a statute. It would also ignore the public policies of fairness, efficiency, and repose that undergird statute of limitations law. Stokes-Craven articulates no cogent or compelling reason for creating such an exception, and, unsurprisingly, the vast majority of courts across the country addressing the issue have declined to create such an exception. Accordingly, Stokes-Craven's appeal of the summary judgment ruling should be rejected in all respects and the order granting summary judgment in Trial Counsel's favor should be affirmed.

Stokes-Craven also seeks to avoid the statute of limitations bar by arguing for the application of equitable estoppel or equitable tolling, but it identifies no fraud, no concealment, and no extraordinary circumstances that would justify the application of either doctrine. In similar cases, this Court has held time and again that these doctrines do not apply, and the lower court's refusal to apply the doctrines should be affirmed.

Stokes-Craven also appeals the lower court's discovery ruling holding that communications between Trial Counsel and its malpractice insurer concerning the malpractice claim are not discoverable under the work product doctrine. The Court need not reach this issue because affirming the summary judgment order would fully dispose of the case. If the Court were to consider the issue, the lower court's ruling was correct, as these communications were made *after* Stokes-Craven threatened litigation and were

clearly made in anticipation of litigation. Thus, the work product doctrine applies. Moreover, Stokes-Craven cannot show any substantial need for the communications, and, indeed, Stokes-Craven made no substantial need argument to the lower court. Thus, there is no reason to vitiate the protections and expectations attendant to an insurer and insured's communications in preparing to defend a threatened claim, and the lower court's determination that the communications are entitled to work product protection should be affirmed.

STATEMENT OF FACTS

Stokes-Craven is an automobile dealership affiliated with Ford Motor Company, selling both new and used vehicles. (Order Granting Defendants' Motions for Summary Judgment (the "Summary Judgment Order"), R. pp. 1-17.) Dennis Craven is the dealership's managing owner and principal. (*Id.*) It is undisputed that Craven speaks for the company.

On June 1, 2002, Donald Austin ("Austin") purchased a used Ford F-250 from Stokes-Craven for \$26,371.10. (*Id.*) At the time of the purchase, a Stokes-Craven's salesman lied to Austin by telling him that the truck had never been in a wreck, even though he and other Stokes-Craven employees (including Craven's own brother) knew the truck's prior owner and were aware that the truck had been in a very serious wreck. (*Id.*; Letter from John Polito, Esq. to Dennis Craven dated February 18, 2003 ("Polito Letter"), R. pp. 841-92.) In addition, Stokes-Craven's salesman lied to Austin by telling him that the truck was still under the manufacturer's full powertrain warranty, when in fact only the engine was under warranty. (Summary Judgment Order, R. pp. 1-17.) To cover

up this lie, Stokes-Craven forged Austin's signature on a warranty disclosure document. (*Id.*, R. p. 4.)

In September 2002, Austin discovered the fraud and forgery and twice met with Craven to try to resolve the situation. (*Id.*, R. p. 4.) During these meetings, Austin made clear that all he wanted was to return the truck and get his money back. (*Id.*) At the second meeting, Craven physically compared the signature on Austin's driver's license to the signature on the forged warranty document and admitted that they did not match. (Dep. of Dennis Craven of May 19, 2011, R. p. 569.) Nonetheless, at both of those meetings, Craven, as principal of Stokes-Craven, refused to settle with Austin. (Summary Judgment Order, R. p. 4.)

Thereafter, Craven had and squandered a third opportunity to settle with Austin. In February 2003, Austin's attorney sent Craven a detailed letter outlining the claims that Austin had against the dealership based upon the fraud and forgery, together with affidavits of experts in Austin's favor. (Polito Letter, R. pp. 841-92.) The letter laid out Austin's case against Stokes-Craven in great detail. In the letter, Austin offered to settle his claims if Stokes-Craven would take possession of the vehicle, reimburse Austin for all loan payments made to date on the vehicle, satisfy the remaining indebtedness, and pay fees and costs in the amount of \$1,625. (*Id.*, R. p. 845.) For the third time, Craven, speaking for the dealership, refused to resolve the matter. (Summary Judgment Order, R. pp. 4-5, Craven Dep., R. pp. 571-72.) As a consequence, in March 2004, Austin filed suit against Stokes-Craven, alleging, among other things, fraud and a violation of the South Carolina Unfair Trade Practices Act. (Summary Judgment Order, R. p. 4.)

In August 2006, Austin's fraud lawsuit against Stokes-Craven proceeded to trial. (*Id.*) Attorney Scott Robinson of Johnson McKenzie and Robinson, LLC represented Stokes-Craven. (*Id.* at 5.) At trial, Austin and his expert, Ray Morris, testified that the truck had no value and requested actual damages in the amount of the cost of the truck: \$26,371.10. *Austin v. Stokes-Craven Hldg. Corp.*, 387 S.C. 22, 40, 42, 691 S.E.2d 135, 144-45 (2010). At the conclusion of the trial, the jury handed down a verdict: (a) for Austin on his negligence claim in the amount of \$26,371.10 actual damages and \$144,000 punitive damages; (b) for Austin on his fraud claim with an award of \$26,371.10 actual damages and \$216,600 punitive damages; (c) for Austin on his constructive fraud claim with an award of \$26,371.10 actual damages; (d) for Austin on his Dealer's Act claim with an award of \$26,371.10 actual damages, (e) for Austin on his Federal Odometer Act claim with no award, and (f) for Stokes-Craven on the unfair trade practices claim. *Austin*, 387 S.C. at 35, 691 S.E.2d at 142.

According to Craven, Stokes-Craven's principal, he noticed before, during, and immediately after the trial that, in his mind, there were serious problems with his lawyer's handling of the case. Specifically, Craven testified that:

- Heading into trial, he was not comfortable with Stokes-Craven's defense because he believed that the warranty document was forged and he thought that the dealership was at fault in the matter. (Craven Dep., R. pp. 519-21.)
- At trial, he did not believe that he was adequately informed about the matter by his counsel, and he believed that the trial would have gone better if he had been better informed and prepared. (*Id.*, R. pp. 517-18.)
- At trial, he discovered that interrogatory answers had been presented to the other side without his review, forcing him to correct those interrogatory answers during his trial testimony without the benefit of preparation. (*Id.*, R. pp. 509-10.)

- At trial, he knew that his counsel had not, allegedly, sufficiently investigated the facts of the case, including the sale of the damaged truck to Mr. Austin or the purportedly forged signature on the warranty document. (*Id.*, R. pp. 495-98, 500-01, 505.)
- At trial, he knew that he was not prepared for cross-examination. (*Id.*, R. p. 510.)
- At trial, he knew that his counsel had not brought important defense witnesses to trial, including the Stokes-Craven employee who visually appraised the truck. (*Id.*, R. p. 507.) According to Craven, that individual would have provided testimony helpful to Stokes-Craven. (*Id.*)
- As soon as he received the verdict, Craven recognized that there was a serious problem. (*Id.*, R. pp. 525, 538.)
- Shortly after the verdict was handed down, Stokes-Craven's reputation suffered. Craven therefore recognized shortly after the verdict that Stokes-Craven had been damaged. (*Id.*, R. p. 544.)

After the verdict, both parties filed post-trial motions. *Austin*, 387 S.C. at 35, 691 S.E.2d at 142. After consideration, the trial judge ruled that Austin must elect among the remedies awarded for his negligence, fraud, constructive fraud, Dealer's Act, and Federal Odometer Act claims. *Id.* The trial court also ruled that Austin was entitled to statutory damages of \$1,500 on his Federal Odometer Act claims; attorneys' fees in the amount of \$4,500, and costs in the amount of \$602.36 from Stokes-Craven, and the trial court denied Austin's request for pre-judgment interest. *Id.*

Both parties then appealed. *Id.* Stokes-Craven engaged separate Appellate Counsel – Steven Brown and Edward Buckley of Young Clement Rivers LLP – to handle the appeal. (Craven Dep., R. p. 548.) Although Mr. Robinson's name appeared on the appellate pleadings, Craven testified that Mr. Robinson was no longer his lawyer. (*Id.*)

Stokes-Craven appealed on five grounds: (1) Stokes-Craven challenged the trial court's qualification of Austin's experts, (2) Stokes-Craven argued that Austin failed to present evidence of the fair market value of the truck, (3) Stokes-Craven argued that there

was no evidence of a violation of the Federal Odometer Act, (4) Stokes-Craven contended that the jury issued an inconsistent verdict by finding for Austin on the fraud claim while finding for Stokes-Craven on the unfair trade practices claim, and (5) Stokes-Craven contended that the award of punitive damages was excessive and based on an improper closing argument made by Austin's counsel. *Austin*, 387 S.C. at 38-55, 691 S.E.2d at 142-53.

Austin appealed on two grounds: (1) that he should be permitted to recover actual and punitive damages for his fraud claim, as well as attorneys' fees on his Dealer's Act claim, and (2) that he should be awarded pre-judgment interest. *Id.* at 55-59, 691 S.E.2d at 152-53.

When Stokes-Craven's Appellate Counsel began working on the appeal, they were concerned as to whether Mr. Robinson had properly preserved all appropriate issues for appeal; indeed, issue preservation concerns "jumped out" at [them]. (Deposition of Stephen L. Brown, R. pp. 660, 701-03, 710-11; Young Clement Rivers Time Sheets, R. pp. 946-50.) Accordingly, as early as May 2007, Stokes-Craven's Appellate Counsel knew that issue preservation was a serious problem for Stokes-Craven on appeal. (Brown Dep., R. p. 701; Young Clement Rivers Time Sheets, R. pp. 946-50.)

On March 8, 2010, this Court rendered its decision in *Austin v. Stokes-Craven*. As relevant here, the Court affirmed the admission of expert testimony concerning the value of the truck, the verdict of actual damages in the amount of \$26,317.10, the fraud verdict against Stokes-Craven as not inconsistent with the unfair trade practices verdict, and the award of punitive damages in the amount of \$216,000.

On August 16, 2010, more than five months after this Court issued its decision in *Austin v. Stokes-Craven*, Stokes-Craven filed this action against Trial Counsel, alleging legal malpractice and breach of fiduciary duty in their handling of the case.

STANDARD OF REVIEW

I. SUMMARY JUDGMENT STANDARD

This Court reviews the grant of a summary judgment motion using “the same standard that governs the trial court under Rule 56(c), SCRCP.” *Law v. S.C. Dep’t Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). Specifically, “a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” *Id.* Though the Court applies the same standard applied by the trial court, it is not bound by the trial court’s reasoning. Rather, “[t]his Court . . . may affirm a trial judge’s decision on any ground appearing in the record.” *Westbury v. Bauer*, 284 S.C. 385, 387, 326 S.E.2d 151, 152 (1985).

In this case, Stokes-Craven urges this Court to overrule prior precedent and make an exception to the statutory discovery rule in legal malpractice cases. In considering challenges to prior precedent, this Court has held that “[s]tare decisis exists to insure a quality of justice which results from certainty and stability.” *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996). This Court has further noted that “[i]t is manifestly in the public interest that the law remain permanently settled. Especially is this so in the construction of statutes, for if any change in the statutory law is desired, the General Assembly may readily accomplish it.” *Wehle v. S.C. Ret. Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005) (quoting *Powers v. Powers*, 239 S.C. 423, 427, 123 S.E.2d 646, 647 (1962)).

II. DISCOVERY ORDER STANDARD

On appeal, a lower court's ruling on discovery matters will not be overturned "absent a showing of a clear abuse of discretion." *Beyer v. Metze*, 326 S.C. 356, 360, 482 S.E.2d 789, 791-92 (Ct. App. 1997). An abuse of discretion will only be found when the lower court's factual conclusions are wholly "without evidentiary support" or the court committed an error of law. *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001). The appellant bears the burden of demonstrating an abuse of discretion. *McNair v. Fairfield County*, 379 S.C. 462, 465-66, 665 S.E.2d 830, 832 (Ct. App. 2008).

ARGUMENT

I. STOKES-CRAVEN HAD ACTUAL AND CONSTRUCTIVE KNOWLEDGE OF ITS CLAIMS MORE THAN THREE YEARS BEFORE FILING THE MALPRACTICE LAWSUIT.

The statute of limitations for legal malpractice and breach of fiduciary duty claims is three (3) years. S.C. Code Ann. § 15-3-530(5); *Peterson v. Richland County*, 335 S.C. 135, 138, 515 S.E.2d 553, 555 (Ct. App. 1999). Stokes-Craven filed its original Complaint in this action on August 16, 2010; accordingly, Stokes-Craven is barred by the statute of limitations for any claims that accrued before **August 16, 2007**. (Complaint, R. p. 30.)

With respect to tort claims such as legal malpractice and breach of fiduciary duty, South Carolina follows the discovery rule, which is codified at S.C. Code Ann. § 15-3-535. Under the discovery rule, the statute of limitations begins to run when "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." *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005)

(emphasis in original). The injured party need not “comprehend the full extent of the damages.” *Id.* at 382, 610 S.E.2d at 821. Rather, it is enough that the injured party has sufficient information to know or to discover through reasonable diligence that “some right of his has been invaded or that some claim against another party might exist.” *Id.* (quoting *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)).

Notably, “statutes of limitations are not simply technicalities”; rather, they “ensure [that] litigation is brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation.” *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 428, 699 S.E.2d 687, 690 (2010) (internal citations and quotation marks omitted). Statutes of limitations are “fundamental to a well-ordered judicial system,” because they “relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights” and “protect potential defendants from protracted fear of litigation.” *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009) (internal citations, quotation marks, and brackets omitted).

Here, Stokes-Craven has alleged three categories of purported malpractice: (1) the alleged failure to properly investigate, conduct discovery, prepare for trial, and keep Stokes-Craven’s manager informed, (2) the alleged failure to settle rather than try the case, and (3) the alleged failure to object at trial to testimony that the truck had no value and to move for a directed verdict on that basis. (Appellant’s Br. at 3.) As set forth more fully below, Stokes-Craven had sufficient knowledge of all three categories of purported error and the alleged resulting damage well before August 16, 2007. Indeed, all of the errors

alleged by Stokes-Craven occurred before or during the underlying trial, which occurred in August 2006. Therefore, Stokes-Craven's claims are barred by the statute of limitations.

A. During the August 2006 Trial, Craven Realized that His Attorney Had Not, According to Stokes-Craven's Allegations, Prepared the Case as He Would Have Expected.

It cannot be disputed that Craven received sufficient information during the underlying trial to put him on notice of a potential claim:

- Craven admits that, going into trial, he was concerned about Stokes-Craven's case because he believed that the warranty document was likely forged. (Craven Dep., R. pp. 501, 520, 569.)
- As the trial proceeded, Craven became aware that his counsel had not shown him Stokes-Craven's interrogatory responses before submitting them to the plaintiff, forcing Craven to testify that he had never seen the responses and to testify about them without any advance preparation. (*Id.*, R. pp. 509-10.)
- Craven also recognized that he was not prepared for cross-examination and he noted that his counsel had not adequately investigated the dealership's knowledge of the truck's wreck history or whether the signature on the warranty documents was forged. (*Id.*, R. pp. 497-98, 515, 517-18.)
- Craven further noted that Barry Thornall, who he considered to be an important witness for the defense, had not been asked by his counsel to testify and was not present. (*Id.*, R. pp. 506-07.)

Craven's concerns with Trial Counsel's handling of the trial became all the more obvious to him when he received the six-figure adverse verdict at the close of the trial. At that point, Craven realized that there was a "serious problem." (*Id.*, R. pp. 525, 538.) According to Craven, that "serious problem" quickly translated into concrete harm, as the dealership began losing business shortly after the verdict came down because of the damage to the dealership's reputation. (*Id.*, R. p. 544.)

This confluence of circumstances was more than sufficient to alert Stokes-Craven, no later than the August 16, 2006, the date of the adverse verdict, that "a claim against [its counsel] might exist." *Epstein*, 363 S.C. at 382, 610 S.E.2d at 821. Indeed, in *Epstein*, this

Court so held on remarkably similar facts. In *Epstein*, the plaintiff argued that his trial counsel failed to conduct an adequate investigation, failed to advise him to settle, failed to keep him informed during the pendency of the case, did not call appropriate witnesses, and failed to develop an appropriate defense - essentially the same allegations that Stokes-Craven makes in this case. 363 S.C. at 377, 610 S.E.2d 818. Like Stokes-Craven, the *Epstein* plaintiff was so disappointed with his trial counsel that he hired new counsel for his appeal (though, like Stokes-Craven, he allowed his trial counsel to be nominally on the appellate pleadings). *Id.* This Court held that the purported errors raised in *Epstein* were apparent, at the latest, by the conclusion of the trial and the rendering of an adverse verdict. *Id.* at 382-83, 610 S.E.2d at 821. The same logic applies here, and, under *Epstein*, the award of summary judgment on statute of limitations grounds should be affirmed.

Stokes-Craven attempts to distinguish *Epstein* on two grounds: (1) that *Epstein* involved pre-trial errors more obvious to a lay person than those at issue in this case, and (2) that Mr. Craven did not subjectively appreciate his counsel's purported errors for some time after the trial. Neither argument is availing.

First, as even a cursory review of this Court's opinion in *Epstein* reveals, the alleged errors in *Epstein* and this case are essentially the same. In its *Epstein* opinion, this Court highlighted the following errors, all of which are alleged to be present in this case: failing to conduct an adequate investigation of the case, failing to keep Epstein adequately informed during the pendency of the case, failing to call key witnesses, and failing to prepare an appropriate defense. 363 S.C. at 376, 610 S.E.2d at 818. Stokes-Craven's contention that *Epstein* is somehow distinguishable on the facts is therefore spurious.

Stokes-Craven attempts to distinguish *Epstein* by citing in its brief two errors allegedly made by Epstein's counsel that are not part of this case – failing to assert claims against third parties and failing to provide Epstein with file material despite repeated requests. (Appellant's Br. at 15.) Notably, however, Stokes-Craven's attorneys pulled the trial court briefs in *Epstein* to locate these alleged errors, as the errors were not cited by this Court in its *Epstein* opinion at all, much less as errors that were material to this Court's determination that Dr. Epstein was on notice of his potential legal malpractice claim.¹ In short, there is no meaningful distinction between the facts of *Epstein* and the facts in this case, and summary judgment was therefore properly granted on the statute of limitations.

Second, Stokes-Craven argues that Craven did not appreciate the significance of the purported errors until years after the conclusion of the trial. As an initial matter, Stokes-Craven misconstrues the deposition testimony. Although Craven peppered his testimony with statements asserting his lack of litigation experience, he admitted that he thought *going into trial* that Stokes-Craven was at fault in the matter. (Craven Dep., R. p. 520.) He further admitted that, *during the trial*, he became aware that: (1) he was not prepared for cross-examination (*Id.*, R. p. 510), (2) he had not been shown Stokes-Craven's interrogatory responses or prepared to answer questions about them (*Id.*, R. pp. 509-10), and (3) Barry Thornall, though an important witness for the defense, had not been asked to

¹ Stokes-Craven also notes that, in *Epstein*, trial counsel asserted "at trial a substantive defense that was contrary to [Dr. Epstein's] own medical opinions and contradictory to the medical record" (Appellant's Br. at 15), as if that alleged error somehow distinguishes *Epstein* from this case. It does not. The core of this purported error in *Epstein* was that counsel asserted a defense that his own client thought was false instead of developing a more appropriate defense. The same is claimed here: according to Craven, he thought the warranty document was forged and faulted Trial Counsel for not investigating the case and developing a better defense on that issue. (Craven Dep., R. pp. 501, 520, 569.)

testify (*Id.*, R. p. 507). *Immediately after the trial*, Craven told William Johnson, one of Mr. Robinson's law partners, that he "had no idea" such a large verdict was possible (Deposition of Williams Johnson, R. p. 450.) Craven further admitted that his dealership suffered damages immediately following the verdict. (Craven Dep. R. p. 544.) Putting these factual circumstances together, regardless of any testimony about a claimed lack of litigation experience, Craven plainly recognized by the end of the trial that there was a disconnect between what he expected from Trial Counsel in this case and what he had received.

More fundamentally, Craven's subjective appreciation of Trial Counsel's purported errors is irrelevant because the discovery rule utilizes an objective standard. *Kelly*, 383 S.C. at 633, 682 S.E.2d at 5 ("[T]he standard as to when the limitations period begins to run is objective rather than subjective."). "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." *Young v. S.C. Dep't of Corr.*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999) (emphasis added).

Here, Stokes-Craven argues that the only evidence of attorney negligence available to a lay person was the adverse result itself, which, under South Carolina law, is insufficient. *True v. Monteith*, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997). This is incorrect. To the contrary, it is manifest that a person of common knowledge and experience with all of the information that Craven admits to having – that is, a recognition heading into trial that he was not comfortable with his company's defenses, a recognition

at trial that Trial Counsel did not appear to have investigated the case or prepared the witnesses, a recognition at trial that he was being shown discovery documents prepared by Trial Counsel that he had never before seen, a recognition at trial that a key witness was missing for no obvious reason, and, ultimately, a verdict so large that he was “stunned” and afraid of losing his business – would, at the very least, lead a reasonable person to an investigation of Trial Counsel’s performance. Indeed, the mere fact that Craven “had no idea” the verdict could be so large was enough to put him on notice that something had gone wrong in the attorney-client relationship. (Johnson Dep., R. p. 450.) In other words, Craven had at his disposal knowledge of much more than “injury alone,” *True*, 327 S.C. at 120, 489 S.E.2d at 617. The injury, for which Craven was purportedly unprepared, was merely the final step in a long line of circumstances before and during trial that would have alerted a person of common knowledge and experience that something was amiss, and that would have led a reasonable person to undertake an investigation of Trial Counsel’s conduct within the three-year statute of limitations.

Under the discovery rule, a party cannot simply ignore circumstances like the ones at issue here. Indeed, “[a] party cannot escape the application of [the discovery] rule by claiming ignorance of existing facts and circumstances, because the law also provides that if such facts and circumstances *could have been known* to the party through the exercise of ordinary care and reasonable diligence,” the statute of limitations begins to run just as if the party had exercised reasonable diligence and actually discovered the claim. *Burgess v. Am. Cancer Soc’y, S.C. Div.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989) (emphasis in original) (barring legal malpractice claim where client was on inquiry notice of affair between her lawyer and opposing party because she would have discovered that

the lawyer was colluding with the opposing party in her litigation through reasonable diligence). Here, in light of all of the facts available concerning the handling of the trial and the unexpected result thereof, Stokes-Craven cannot avoid the statute of limitations by appealing to Craven's own unreasonable failure to investigate Trial Counsel's performance in a timely fashion.

B. When the Underlying Verdict Was Handed Down, Craven Knew that it Was Substantially Less Favorable than Austin's Previous Settlement Demands.

Stokes-Craven claims that Trial Counsel committed malpractice by failing to settle the case. (Appellant's Br. at 3.) Putting aside the obvious fact that counsel cannot settle a case without client consent, which, indisputably, was never given by Craven (Craven Dep., R. pp. 522-23, 571-73), simple math demonstrates that Stokes-Craven knew of this purported error in failing to settle the minute the jury returned the verdict in the underlying trial. It is undisputed that Stokes-Craven received a February 2003 pre-suit settlement offer in the approximate amount of \$30,000. (Polito Letter, R. pp. 841-92.) According to Craven, the offer to settle was given to Trial Counsel, and he expected Trial Counsel to tell him whether to accept the offer, which, according to Craven, never happened before trial. (Craven Dep., R. pp. 522-23, 571-73.) At the conclusion of the trial, the jury handed down a verdict of nearly \$250,000. *Austin*, 387 S.C. at 35, 691 S.E.2d at 142. Using basic arithmetic, as soon as the verdict was handed down, Stokes-Craven knew (or, at the very least, should have known) that it would have been better off settling the case. At that point, Stokes-Craven was on notice of a potential claim concerning Trial Counsel's purported failure to settle.

C. The Problems with Issue Preservation “Jumped Out” at Appellate Counsel when Reviewing the Trial Transcript in Early 2007, and Appellate Counsel’s Knowledge Is Imputed to Stokes-Craven.

Stokes-Craven contends that Trial Counsel should have objected at trial to the admission of testimony that the truck at issue had a value of zero and then moved for a directed verdict based on a lack of competent evidence of the truck’s value. (Appellant’s Br. at 3.) On appeal, three of this Court’s justices (albeit none in the primary opinion) opined that any objection to the admission of such evidence was not preserved. *Austin*, 387 S.C. at 60, 692 S.E.2d at 155 (Pleicones, J., concurring in part and dissenting in part), 387 S.C. at 65-66, 691 S.E.2d at 158 (Kittredge, J., concurring in part and dissenting in part). This view was no surprise to Stokes-Craven’s Appellate Counsel because, before briefing the appeal, they identified issue preservation as a key concern the first time they read the trial transcript. (Brown Dep., R. pp. 660, 701.) Indeed, it is undisputed that Appellate Counsel knew no later than May 2007 – when Appellate Counsel completed their review of the trial transcript – that there were potential problems with Trial Counsel’s preservation of evidentiary issues at trial. (*Id.*; *Young Clement Rivers Time Records*, R. pp. 946-50.) Thus, it is undisputed that Appellate Counsel knew of a potential claim against Trial Counsel by May 2007.

Under South Carolina law, Appellate Counsel’s knowledge concerning Trial Counsel’s potential failure to preserve evidence is imputed to their client, Stokes-Craven, for “[i]t 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, 257 S.E.2d 496, 497 (1979). Numerous South Carolina cases confirm that an attorney’s knowledge is imputed to his client, even if the attorney fails to notify the client of the

relevant facts, and even in the context of running the statute of limitations against the client. *See, e.g., Dorman v. Campbell*, 331 S.C. 179, 185-86, 500 S.E.2d 786, 789 (Ct. App. 1998) (holding that facts known to attorney were sufficient to begin running the statute of limitations against the attorney's client, *even though the attorney failed to inform the client of such facts*); *Faulkner v. Millar*, 319 S.C. 216, 221, 460 S.E.2d 378, 381 (1995) (holding that notice to an attorney is notice to the client).

Here, Stokes-Craven does not dispute the substance or timing of Appellate Counsel's knowledge that Trial Counsel may have failed to preserve important issues for appeal. Instead, Stokes-Craven argues that such knowledge should not be imputed because Appellate Counsel was not engaged to handle a malpractice claim. This argument exhibits a fundamental misunderstanding of the law. As noted above, the imputation of an attorney's knowledge to the client derives from agency law, where the general rule is that an agent's knowledge "is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal." Restatement (Third) of Agency § 5.03 (2006). Here, there is no question that Trial Counsel's purported failure to preserve issues for appeal was material to Appellate Counsel's duties; indeed, Mr. Brown admitted as much in his deposition (Brown Dep., R. pp. 660-63), and Appellate Counsel's briefing to this Court on appeal in *Austin v. Stokes-Craven* discussed issue preservation extensively. Thus, as a matter of black letter law, Appellate Counsel's knowledge of Trial Counsel's potential failure to preserve issues is imputed to their client, Stokes-Craven.

The fact that Appellate Counsel was not engaged to handle a malpractice claim is of no consequence because the relevant knowledge – that Trial Counsel may not have preserved important issues for appeal – was acquired as part of Appellate Counsel's

representation of Stokes-Craven on appeal and was material to that representation. Appellate Counsel represented Stokes-Craven on the same core of operative facts as the suit involving Austin. The knowledge is therefore imputed to Stokes-Craven, and none of the authorities cited by Stokes-Craven suggest otherwise. To the contrary, *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 159-60 (Tex. 2004) and *Trustees of Chicago Plastering Inst. Pension Trust v. Elite Plastering Co.*, 603 F. Supp. 2d 1143, 1145 (N.D. Ill. 2009), both involve knowledge acquired while the attorney was **not** acting on the principal's behalf and that was **not** material to the attorneys' representation. Likewise, the Restatement of the Law Governing Lawyers notes that knowledge "concerning a transaction in which the lawyer does not represent the client" is not imputed. Restatement (Third) of the Law Governing Lawyers § 28A cmt. b. (2000) (emphasis added). Here, the relevant knowledge concerned issue preservation in a matter in which Appellate Counsel **was** representing Stokes-Craven. Thus, the authority cited by Stokes-Craven actually supports the argument that the Appellate Counsel's knowledge – being plainly material to its representation of Stokes-Craven – is imputed to Stokes-Craven, and the statute of limitations began running no later than May 2007.

II. DEPARTING FROM A STRAIGHTFORWARD APPLICATION OF THE DISCOVERY RULE IN LEGAL MALPRACTICE CASES WOULD UNDERMINE THE PURPOSE OF THE STATUTE OF LIMITATIONS AND LEAD TO RESULTS CONTRARY TO THE INTENT OF THE STATUTE.

Stokes-Craven suggests that this Court should overturn *Epstein* and establish a bright-line rule that a legal malpractice claim does not accrue until *remittitur* by the appellate court - regardless of the claimant's knowledge or any other relevant facts. Stokes-Craven admits that this would be a departure from the discovery rule that otherwise applies to all statutes of limitations in South Carolina, but contends that such a departure is

warranted to avoid a situation in which a litigant has to take “inconsistent” positions in a pending appeal of the underlying action and a collateral action against his attorney. In support of its position, Stokes-Craven cites a mishmash of decisions from other state courts (often dissents, intermediate appellate court decisions, and federal district court decisions), presumably to suggest that its position enjoys substantial support in other American jurisdictions.

Stokes-Craven is wrong on all counts. A bright-line rule preventing the accrual of a legal malpractice claim until *remittitur* would eviscerate the important public policies that underlie statutes of limitations generally and the discovery rule specifically, and would violate the principle that decisions interpreting statutes should not be overturned absent action by the General Assembly. It would also lead to perverse results without any notable benefits. The risk of forcing a litigant to take inconsistent positions is vastly overblown, and, as this Court has noted, litigants are well able to mitigate any risk that may exist through tolling agreements or other arrangements. Moreover, as this Court has noted, preserving stale claims will only multiply the amount and expense of litigation. As a result, contrary to Stokes-Craven’s implication, a bright-line rule preserving claims until *remittitur* does not enjoy wide support among other American jurisdictions; rather, a majority of other jurisdictions recognize – like South Carolina – that accrual is a fact-intensive inquiry based on an objective, reasonable person standard, and that legal malpractice claims regularly accrue in advance of any appellate decision in the underlying matter.

A. Statutes of Limitations and the Discovery Rule Protect Important Public Interests, and the Court's Prior Interpretation of the Statutory Discovery Rule Is Entitled to Substantial Deference.

Statutes of limitations promote critical public interests in the efficiency and fairness of the judicial system, the avoidance of stale claims, and the speedy and final resolution of disputed matters. As this Court has noted, “[s]tatutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs.” *Transp. Ins. Co. and Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 428, 699 S.E.2d 687, 690 (2010) (quoting *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996)). Further, they “ensure litigation is ‘brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation.’” *City of North Myrtle Beach v. Lewis–Davis*, 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct. App. 2004)). The discovery rule promotes these public policy goals by giving plaintiffs a fair opportunity to pursue their claims once they are on notice, or should be on notice through the exercise of reasonable diligence, of a potential claim, while also requiring that claims be brought within a reasonable period of time so that claims do not become stale. See *Santee Portland Cement Co. v. Daniel Int’l Corp.*, 299 S.C. 269, 271, 384 S.E.2d 693, 694 (1989), *overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat’l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1997).

This Court’s prior interpretation of the statutory discovery rule is also entitled to great deference. *Wehle*, 363 S.C. at 402, 611 S.E.2d at 244 (“It is manifestly in the public interest that the law remain permanently settled. Especially is this so in the construction of statutes, for if any change in the statutory law is desired, the General Assembly may readily accomplish it.” (quoting *Powers*, 239 S.C. at 427, 123 S.E.2d at 647)). Because the

discovery rule is statutory, and because this Court has previously ruled on whether, in a legal malpractice action, there is any exception to the discovery rule tolling the statute of limitations until the exhaustion of all underlying appeals, it is now up to the General Assembly to enact any changes to that determination. *Cf. McLeod v. Starnes*, 396 S.C. 647, 655, 723 S.E.2d 198, 203 (2012) (“*Stare decisis* applies with full force with respect to questions of statutory interpretation because the legislature is free to correct us if we misinterpret its words.”).

B. Tolling the Statute of Limitations until *Remittitur* Regardless of the Underlying Facts Would Lead to Perverse Results and Unnecessarily Multiply the Amount and Expense of Litigation.

As *Epstein* and myriad other cases demonstrate, it is not unusual for a client to realize at or before the conclusion of the underlying trial that his trial attorney appears to have made errors. The bright-line rule urged by Stokes-Craven, however, would toll those claims, notwithstanding the client’s admitted knowledge of potential errors (or knowledge that an objective standard would impose), for three years after *remittitur*, which could be ten or more years after the conclusion of the underlying trial. This result would be seriously detrimental to the functioning of the judicial system for at least two reasons.

First, such a rule would vastly increase the expense and reduce the fairness of the ultimate malpractice litigation. As this Court has recognized, litigating stale claims is both expensive and difficult because of fading memories, the death or other unavailability of key witnesses, and the loss of important evidence. *Santee Portland Cement*, 299 S.C. at 271, 384 S.E.2d at 694 (“One policy behind the statute of limitations is the protection of a defendant from false or fraudulent claims that might be difficult to disprove if not brought until after relevant evidence has been lost or destroyed and witnesses have become unavailable.”). The current system, under which individuals are not permitted to sleep on

their known rights, is vastly superior in promoting the fair and efficient resolution of claims.

Second, such a rule would discourage the global resolution of all extant claims, which will typically be the most efficient resolution. When a party waits until after the underlying litigation is fully resolved to bring a malpractice claim, an opportunity to resolve both the underlying claim and the malpractice claim at the same time is missed. Once the underlying claim is finally resolved by appeal, the amount of liability is fixed and accruing interest. While it is on appeal, the liability is uncertain and more amenable to negotiation, and engaging the attorney's malpractice coverage at that stage often leads to a global settlement. Put simply, when a person is on notice that there may have been attorney error at the trial level, it is in everyone's interest for that person to assert a malpractice claim before the underlying appeal is resolved, as doing so will often allow the parties to resolve both the underlying claim and the malpractice claim at one time, without wasting the time, money, and judicial resources associated with litigating the appeal of the underlying case and then an entirely separate malpractice case. Given this Court's strong policy in favor of the settlement of disputes, it follows that the Court should, as a matter of public policy, encourage, not discourage, the early filing of malpractice claims. *See, e.g., Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, Case No. 2011-194189 (Shearouse Adv. Sheets Jan. 8, 2014, at 91) ("Our courts have a long standing policy favoring settlements.").

C. There Is No Serious Risk of Forcing Litigants to Take Inconsistent Positions.

Stokes-Craven's primary public policy argument against application of the discovery rule in legal malpractice cases is that it forces litigants to take "inconsistent"

positions by pressing their substantive claims or defenses in an underlying appeal while suing their trial counsel for malpractice. The “inconsistency” of these positions is vastly overblown. For example, in the context of this case, Stokes-Craven could have argued on appeal (as it did) that the verdict was tainted by legal errors, such as the lack of record evidence of actual damages, while pursuing a claim that its trial counsel, through better front-end preparation, could have avoided an adverse verdict in the first place. These positions are not inconsistent, as they can both be true: an adverse verdict can be tainted by reversible error while at the same time have been avoidable through adequate trial preparation.

Under South Carolina law, a judgment is not reversible on appeal merely because one of the parties’ trial counsel made alleged mistakes. Rather, to have any appreciable chance of success, an appeal must be based on purported legal errors, abuses of discretion, or factual determinations for which there is no evidence in the record. Thus, on appeal, an individual will *always* be arguing that the judgment was erroneous on the record presented, whereas, in a collateral legal malpractice action, he will argue that a better result would most probably have been obtained on a different record. It is, therefore, not the case that parties will have to assert “inconsistent” positions on appeal and in their collateral legal malpractice action.

Moreover, any purported inconsistency is of little consequence. The South Carolina Rules of Civil Procedure expressly permit parties to plead claims in the alternative, even if inconsistent. Rule 8(e)(2), SCRCF states (“A party may set forth two or more statements of a cause of action or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. . . . A party may also state as many

separate causes of action or defenses as he has *regardless of consistency* and whether based on legal or on equitable grounds or on both.” (emphasis added)). Thus, it is neither unusual nor concerning for a party to assert alternative positions. Moreover, as this Court noted in *Epstein*, there are a variety of procedural mechanisms for dealing with interrelated cases, including moving for a stay of the malpractice case and/or entering into a tolling agreement. *Epstein*, 363 S.C. at 382, 610 S.E.2d at 821. Accordingly, the concern that plaintiffs will have to take inconsistent positions is vastly exaggerated and should not persuade the Court to abandon the discovery rule.

D. The Majority of American Jurisdictions Reject any Bright-Line Rule Preserving Claims until *Remittitur* and Hold that Claims Often Accrue at the Conclusion of the Underlying Trial.

Stokes-Craven argues for a bright-line rule that is well out of the mainstream of American jurisprudence. As an initial matter, many of Stokes-Craven’s citations to out-of-state authority are incomplete and misleading.

For example, *Bowman v. Abramson*, 545 F. Supp. 227 (E.D. Pa. 1982) is a federal district court decision that incorrectly predicted Pennsylvania law. Contrary to the *Bowman* court’s prediction, the Pennsylvania courts have expressly “reject[ed] the . . . argument to toll the statute of limitations in a legal malpractice claim while an appeal of the underlying action is pending.” *Robbins v. Seventko Orthopedic Surgeons, Inc. v. Geisenberger*, 674 A.2d 244, 245 (Pa. Super. Ct. 1996). Instead, Pennsylvania courts utilize the discovery rule in much the same manner as South Carolina courts. *Id.*

Likewise, the quoted portion of *Beesley v. Van Doren*, 873 P.2d 1280, 128 (Alaska 1994) is a dissenting view adopted by one justice. What is more, this Court has already considered and expressly rejected that justice’s views. *Epstein*, 363 S.C. 372, 379-80, 610 S.E.2d 816, 819-20 (citing with approval the majority opinion in *Beesley*).

For another example, Stokes-Craven quotes a portion of the opinion in *Dearborn Animal Clinic, P.A. v. Wilson*, 806 P.2d 997 (Kan. 1991) out of context. In that case, the Kansas Supreme Court held that the legal malpractice action at issue accrued **before the conclusion of the trial** in the underlying action. *Id.* at 271 (holding that statute of limitations began to run when plaintiff answered interrogatories in the underlying litigation, not when litigation was concluded).

More fundamentally, the vast majority of American jurisdictions to have considered the issue have rejected any bright-line rule that a legal malpractice action cannot accrue until *remittitur* of the underlying case, instead examining the facts of the case to determine when the plaintiff was (or should have been) on notice of his or her claim. *See, e.g., Nationwide Mut. Ins. Co. v. Winslow*, 382 S.E.2d 872, 874 (N.C. Ct. App. 1989) (expressly rejecting the “exhaustion of appeals” approach); *Fritzeen v. Gravel*, 830 A.2d 49, 54 (Vt. 2003) (same); *Knight v. Furlow*, 553 A.2d 1232, 1234-35 (D.C. 1989) (same); *Beesley v. Van Doren*, 873 P.2d 1280, 1282 (Alaska 1994) (same); *Ragar v. Brown*, 964 S.W.2d 372, 375-76 (Ark. 1998) (same); *Laird v. Blacker*, 828 P.2d 691, 696 (Cal. 1992) (same); *Belden v. Emmerman*, 560 N.E.2d 1180, 1183 (Ill. Ct. App. 1990) (same); *Hayden v. Green*, 429 N.W.2d 604, 604 (Mich. 1988) (same); *Suzuki v. Holthaus*, 375 N.W.2d 126, 129 (Neb. 1985) (same); *Rosenfield v. I. David Marder & Assocs., LLC*, 956 A.2d 581, 589 (Conn. Ct. App. 2008) (same); *VanSickle v. Kohout*, 599 S.E.2d 856, 860 (W. Va. 2004) (same); *Morrison v. Goff*, 91 P.3d 1050, 1058 (Colo. 2004) (same); *Fairway Dev. Co. v. Petersen, Moss, Olsen, Meacham & Carr*, 865 P.2d 957, 960 (Idaho 1993) (same); *Grunwald v. Bronkesh*, 621 A.2d 459, 465 (N.J. 1993) (same); *Cantu v. St. Paul Cos.*, 514 N.E.2d 666, 668-69 (Mass. 1987) (same); *Michael v. Beasley*, 583 So.2d 245, 252 (Ala.

1991) (same), *overruled on other grounds by Ex parte Panell*, 756 So.2d 862 (Ala. 1999); *Riemers v. Omdahl*, 687 N.W.2d 445, 450-51 (N.D. 2004) (same); *Zimmie v. Calfee, Halter & Griswold*, 538 N.E.2d 398, 402 (Ohio 1989) (same); *Brunacini v. Kavanagh*, 869 P.2d 821, 828 (N.M. Ct. App. 1993) (same); *Robbins & Seventko Orthopedic Surgeons, Inc. v. Geisenberger*, 674 A.2d 244, 248 (Pa. Super. Ct. 1996); *Chambers v. Dillow*, 713 S.W.2d 896, 898-99 (Tenn. 1986) (legal malpractice claim accrued despite pendency of post-judgment motion in underlying case).

Only a small number of jurisdictions have adopted what is known as the “exhaustion of appeals” exception to the discovery rule in legal malpractice cases, under which a legal malpractice claim does not accrue until the resolution of any appeals in the underlying matter. *See, e.g., Diaz v. Piquette*, 496 So.2d 239, 240 (Fla. Dist. Ct. App. 1986). Notably, the “exhaustion of appeal” exception is universally based on the false premise that an attorney’s negligence in an underlying case cannot damage the client until all appeals are resolved.

This premise that a party lacks damages until the conclusion of an appeal is categorically false. Here, for example, Stokes-Craven claims that: (1) if Trial Counsel had better investigated and prepared for trial, he could have obtained a more favorable verdict from the outset, and (2) the adverse verdict damaged the dealership immediately. (Craven Dep., R. pp. 507-20, 538, 544.) As an adjunct, Stokes-Craven expressly claims as an item of damages the fees paid to appellate counsel **because Stokes-Craven’s position is that Trial Counsel should have avoided a situation in which Stokes-Craven had to appeal.** (Stokes-Craven’s Answers to Scott Robinson’s First Set of Interrogatories, R. p. 1047.) Plainly, even if the verdict had been overturned on appeal, Stokes-Craven could

not have avoided the damage of having to pay for an appeal in the first place, nor could any appellate result have cured the reputational harm that Stokes-Craven purportedly suffered in the temporal window between the verdict and the appellate decision. In short, the appeal in this matter is irrelevant to accrual because Stokes-Craven had a potential legal malpractice claim the minute the verdict was handed down, **regardless of the result on appeal.**

This reasoning is particularly compelling in South Carolina because this Court and the Court of Appeals have held time and again that it is not necessary for a plaintiff to “comprehend the full extent of damages” for a cause of action to accrue. *Dean v. Ruscon Corp.*, 321 S.C. 360, 364; 468 S.E.2d 645, 647 (1996); *accord Epstein*, 363 S.C. at 382, 610 S.E.2d at 821; *Peterson*, 335 S.C. at 139, 515 S.E.2d at 555; *Doe v. Crooks*, 364 S.C. 349, 352, 613 S.E.2d 536, 538 (2005). Adopting the “exhaustion of appeals” exception would turn this well-settled law on its head and effectively require that legal malpractice damages be entirely fixed and determined before a cause of action could accrue. So vast a change to settled law is neither necessary nor appropriate in light of the strong application of *stare decisis* to the interpretation of statutes. *Wehle*, 363 S.C. at 402, 611 S.E.2d at 244. Moreover, such a change would be detrimental to the legal system and would needlessly depart from the mainstream of American jurisprudence in this area. This Court, therefore, should not countenance Stokes-Craven’s attempt to change settled law and should instead reaffirm that, in legal malpractice cases – as in all other tort cases – the discovery rule applies.

III. EQUITABLE ESTOPPEL AND TOLLING DO NOT APPLY BECAUSE THERE IS NO EVIDENCE OF FRAUD, CONCEALMENT, OR ANY OTHER EXTRAORDINARY CIRCUMSTANCES PREVENTING STOKES-CRAVEN FROM FILING THIS ACTION IN A TIMELY MANNER.

A. There Is No Evidence of Fraud or Concealment, as Required to Estop a Party from Asserting the Statute of Limitations as a Defense.

Stokes-Craven argues that, even if the statute of limitations would otherwise bar its claims, Trial Counsel should be equitably estopped from asserting such a defense because Trial Counsel did not affirmatively tell Mr. Craven that they may have committed malpractice in the underlying trial. This argument is meritless, as it requests so broad an expansion of equitable estoppel that it would effectively swallow the discovery rule.

A party asserting equitable estoppel must prove that it: “(1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; . . . (2) relied upon the conduct of the party to be estopped.” *Kelly*, 383 S.C. at 638, 682 S.E.2d at 7. It must also demonstrate that the party being 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.* Here, Stokes-Craven cannot demonstrate its own lack of knowledge, nor can it show that Trial Counsel acted in a manner amounting to a false representation or concealment of material fact or intended that Stokes-Craven act upon such false activity.

As an initial matter, given the amount of information Stokes-Craven had concerning Trial Counsel’s conduct through Craven’s participation in the trial and through Appellate Counsel’s imputed knowledge, Stokes-Craven cannot show that it lacked knowledge or the means of obtaining the true facts. The very fact that Stokes-Craven had the knowledge and wherewithal to hire separate counsel for the appeal demonstrates its

ability to go out and obtain independent advice concerning the underlying case. Nothing prevented Stokes-Craven from seeking advice on Trial Counsel's performance during the three-year statutory period, and there is no evidence in the record through which Stokes-Craven can blame Trial Counsel for Stokes-Craven's own failure to protect itself. The claim for equitable estoppel fails for this reason alone.

There is also no evidence that Trial Counsel did anything to mislead Stokes-Craven or conceal anything from Stokes-Craven concerning their performance in the underlying trial, and, indeed, Stokes-Craven does not claim that Trial Counsel *did* anything misleading. Rather, Stokes-Craven argues that Trial Counsel should have affirmatively told Craven that they may have committed malpractice, and the failure to do so amounts to a false representation. This argument misconstrues the law. As this Court has held, estoppel by silence only arises when a person "owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts." *Southern Dev. Land & Golf Co., Ltd. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993) (emphasis added). Here, Craven already had all of the relevant facts at his disposal, as he had participated in the trial preparation and the trial, and, in fact, Craven admits to knowing such facts. What Craven claims not to have had was an appreciation that those facts might support a legal malpractice claim against Trial Counsel, and he asserts that Trial Counsel had a duty to tell him so. This is contrary to the law.

This Court has never expanded a fiduciary's duty to speak beyond the realm of making the client aware of the relevant facts. If Stokes-Craven's argument were accepted, every professional would have an effective duty to self-disclose any potential breaches of the standard of care, even where the professional did not think he had breached any such

duty, and the failure to self-disclose would prevent the statute of limitations from running. Such an outcome would destroy the discovery rule, which places the duty to act **on the complaining party** using reasonable diligence to discover and bring claims, **not** the party who allegedly caused the problem.

The discovery rule is based on the principle that once an individual has the facts necessary to put a person of common knowledge and experience on notice that a claim **might** exist, the statute of limitations begins running because the individual's claims can then be discovered through reasonable diligence. *Dean*, 321 S.C. at 363-64, 468 S.E.2d at 647 (“We have interpreted the ‘exercise of reasonable diligence’ to mean that the **injured party must act** with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist.” (emphasis added)). Stokes-Craven should not be permitted to short-circuit its own duty of reasonable diligence through a vast expansion of equitable estoppel. Trial Counsel did not do anything – affirmatively or through silence – that prevented Stokes-Craven from discovering any facts or circumstances concerning Trial Counsel's performance. Equitable estoppel, therefore, does not apply.

B. There Are No Extraordinary Circumstances Justifying the Application of Equitable Tolling.

Stokes-Craven argues that Trial Counsel's failure to self-disclose a potential legal malpractice claim justifies equitable tolling. This Court, however, has held that equitable tolling “should be used sparingly,” when some “extraordinary” event justifies suspension of the otherwise applicable limitations period. *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 32-33 (2009) (internal citations and quotation marks omitted). As noted above, a rule precluding the statute of limitations from running

whenever a professional does not self-disclose a potential negligent event would eviscerate the discovery rule and make the application of equitable tolling the norm rather than the exception. In this case, Stokes-Craven had actual and constructive knowledge of the facts and circumstances needed to discover a legal malpractice claim, and there is no record evidence that anything prevented Stokes-Craven from filing its claims within three years.

Indeed, Stokes-Craven's only arguments in favor of equitable tolling are that: (1) the statute of limitations ran before the underlying appeal was decided, and (2) Stokes-Craven's legal malpractice claim is, in Stokes-Craven's view, "considerable." (Appellant's Br. at 31.) The former argument is spurious because nothing prevented Stokes-Craven from filing this action before the underlying appeal was decided, and the latter argument is a non-sequitur, as equitable tolling has nothing to do with the purported strength of the underlying cause of action. Equitable tolling, therefore, does not apply. *Id.* at 116, 687 S.E.2d at 32 (noting that "equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control" (internal quotation marks, citations, and brackets omitted)).

IV. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT DOCUMENTS PREPARED IN ANTICIPATION OF LITIGATION WERE PROTECTED BY THE WORK PRODUCT DOCTRINE.

As an initial matter, the summary judgment issues discussed above fully resolve this case, and, in affirming the lower court's decision on summary judgment, this Court need not address the discovery issues raised in Stokes-Craven's appeal. *Wilson v. Moseley*, 327 S.C. 144, 147, 488 S.E.2d 862, 864 (1997) (holding that when an appellate court affirms the circuit court's grant of summary judgment on a dispositive ground, the appellate court need not address other issues raised on appeal). Should the Court determine to address the discovery issue, it is clear that the lower court properly applied the work

product doctrine in holding that Trial Counsel's communications with their malpractice insurer were not discoverable.

A. The Documents at Issue Were Prepared in Anticipation of Litigation.

Under South Carolina's version of the work product doctrine, documents "prepared in anticipation of litigation . . . by or for another party or by or for that other party's . . . attorney . . . [or] insurer" are not discoverable unless the requesting party demonstrates a "substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Rule 26(b)(3), SCRCF. Here, Stokes-Craven specifically requested communications between Trial Counsel or their attorneys and their malpractice carrier concerning the malpractice claim at issue. (Appellant's Br. at 32.) Trial Counsel objected on the grounds that such documents were prepared in anticipation of litigation and no substantial need for the documents had been shown. (Responses to Stokes-Craven's Supplemental Discovery Requests, R. pp. 1018-34.)

Stokes-Craven argues that communications between insurers and insureds about claims are a routine part of the insurance business and not prepared in anticipation of litigation. This argument has at least two substantial problems. *First*, it does not comport with the plain text of the Rule. There would be no reason for Trial Counsel (or their attorneys) to communicate with their malpractice carrier about this malpractice claim other than their anticipation of litigation, and Trial Counsel presented affidavits to this effect. (Affidavit of Scott Robinson, R. pp. 1035-36; Affidavit of William Johnson, R. pp. 1037-39.) By limiting its discovery requests to communications *about the malpractice claim*, Stokes-Craven effectively included in the request only those communications that were, by definition, made in anticipation of litigation. Thus, it is obvious that the documents

requested were prepared in anticipation of litigation. What Stokes-Craven seeks is not a straightforward application of the Rule, but an exception to the Rule for communications with insurance carriers. No such exception appears in the text. To the contrary, the rule expressly protects communications with “insurers.” Rule 26(b)(3), SCRCPP.

Second, Stokes-Craven fails to appreciate the difference between first party and third party insurance claims. In adjusting a first party insurance claim (e.g., a claim against homeowners insurance for hurricane damage), litigation may not be anticipated. Thus, it is unsurprising that communications between insured and insurer regarding first party claims often are not protected by the work product doctrine, and the cases cited by Stokes-Craven merely confirm this. *See, e.g., Front Royal Ins. Co. v. Gold Players, Inc.*, 187 F.R.D. 252, 256-57 (W.D. Va. 1999) (communications concerning first party fire insurance claim not protected).

Communications concerning third party claims – that is, claims made against one party’s liability insurance by a third party – are entirely different because litigation concerning the insured’s liability is typically the *raison d’etre* for any such communications. Accordingly, courts regularly hold that, “while files generated in relation to first party claims are made in the ordinary course of business and are discoverable, files generated during the investigation of third party claims are made in anticipation of litigation and are not discoverable.” *Weitzman v. Blazing Pedals, Inc.*, 151 F.R.D. 125, 126 (D. Colo. 1993); *accord Taylor v. Temple & Cutler*, 192 F.R.D. 552, 558 (E.D. Mich. 1999) (same); *Underwriters Ins. Co. v. Atlanta Gas Light Co.*, 248 F.R.D. 663, 668 (N.D. Ga. 2008) (same); *see also, Goodyear Tire & Rubber Co. v. Chiles Pwr. Supply, Inc.*, 190 F.R.D. 532, 536 (S.D. Ind. 1999) (documents memorializing witness interviews taken by

liability insurer's investigator in anticipation of liability claim protected by work product doctrine).²

Here, it is all the more obvious that litigation was anticipated because Trial Counsel reached out to their insurer *because Stokes-Craven threatened litigation*. (Robinson Aff. ¶ 2, R. p. 1035; Johnson Aff. ¶ 5, R. pp. 1037-38.) Accordingly, recognizing that this was a third party claim and that a concrete threat of litigation preceded and undergirded all communications between insurer and insured, the work product doctrine applies to the documents at issue.

B. Stokes-Craven Made No Argument Below Concerning a Substantial Need for the Documents and Has Therefore Waived any Such Argument on Appeal.

Having established that the documents at issue are covered by the work product doctrine, Stokes-Craven had the burden of establishing a substantial need for the documents under Rule 26(b)(3), SCRPC. Stokes-Craven, however, submitted no memorandum on its motion to compel and made no argument before the trial court concerning a substantial need for the documents. (Transcript of January 9, 2013 Hearing (“Hearing Tr.”), R. pp. 163-86.) Accordingly, Stokes-Craven cannot argue substantial

² In support of its request for the documents, Stokes-Craven cites several cases arising out of automobile claims, which are inapposite because auto insurers typically provide both first and third party insurance. Thus, at the time of an auto accident, it is often unclear whether there will be first party claims, third party claims, or both. As is evident from the cases cited by Stokes-Craven, courts often hold that the work product doctrine does not apply to auto insurance investigations until it becomes relatively clear that insured and insurer anticipate third party claims. *See, e.g., Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 536, 542 (N.D.W. Va. 2000) (communications made to first party insurer before third party claim was asserted are not protected); *McDougall v. Dunn*, 468 F.2d 468, 473 (4th Cir. 1972) (statements made two and a half years before assertion of third party claim not subject to work product doctrine). These cases have no application here because the only insurance at issue was third party liability insurance under an errors and omissions professional policy, and the only reason for Trial Counsel's communications with their malpractice carrier was their anticipation of a malpractice lawsuit by Stokes-Craven.

need for the first time on appeal, and any such arguments are waived. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012) (reaffirming that issues cannot be raised for the first time on appeal). Without any argument as to substantial need, the work product doctrine precludes Stokes-Craven from obtaining the documents at issue.

C. Stokes-Craven Has Not Demonstrated a Substantial Need for the Documents at Issue.

Even had the issue been preserved for appeal, which it was not, Stokes-Craven cannot show a substantial need for the documents at issue. According to Stokes-Craven's own brief, the request is nothing more than a "fishing expedition" launched in the hope that Trial Counsel made some kind of admission in its communications with its malpractice insurer. (Appellant's Br. at 35-36.) Courts regularly hold that "the substantial need standard is not met if the discovering party merely wants to be sure nothing has been overlooked or hopes to unearth damaging admissions." *Heidebrink v. Moriwaki*, 706 P.2d 212, 217 (Wash. 1965); *see also*, Charles Alan Wright, et al., Fed. Prac. & Proc. § 2025 ("[T]he mere surmise that production might reveal impeaching matter has been held not sufficient to justify production."); *Hauger v. Chicago, R.I. & P.R. Co.*, 216 F.2d 501, 507-08 (7th Cir. 1954) ("There are no special circumstances to distinguish the case at bar from the ordinary situation, where a lawyer would like to examine statements of witnesses procured by the opposing party."). Likewise, the availability of the witness for a deposition generally precludes any showing of substantial need. Fed. Prac. & Proc. § 2025. Here, not only were Mr. Robinson and Mr. Johnson deposed, but, as counsel for Stokes-Craven admitted to the trial court, *they weren't even asked about communications with their insurer*. (Hearing Tr., R. p. 167.) Having not even attempted to obtain the information

through a deposition, Stokes-Craven cannot possibly show a substantial need to overcome the work product doctrine.

Citing *McDougall*, Stokes-Craven argues that the production of insurer-insured communications are justified by the passage of time, claiming that any statements made to the insurer are more likely to be accurate because they were made closer in time to the events. *McDougall*, however, is inapposite. In that case, the Fourth Circuit permitted the plaintiff in a car accident case access to witness interviews conducted by the defendant's carrier *immediately after the auto accident*, because the plaintiff suffered memory loss and literally could not have investigated the accident himself. 468 F.2d at 475-76. Here, on the other hand, the communications that Stokes-Craven seeks were not made immediately after the events at issue, but rather *nearly four years after the underlying trial*. (Robinson Aff. ¶ 2, R. p. 1035.) Accordingly, these are not the kind of contemporaneous statements to which *McDougall* was directed. Moreover, Stokes-Craven suffered no disability preventing it from investigating its own case. Thus, *McDougall* does not apply, as Stokes-Craven has not demonstrated any substantial need for the documents at issue.

More fundamentally, discovery rulings should not be reversed on appeal absent an abuse of discretion. *Beyer*, 326 S.C. at 360, 482 at 791-92. Here, it is clear that the lower court thoughtfully considered the work product issue and reasonably concluded that, under the circumstances of this case, there was no substantial need for the documents. (Summary Judgment Order, R. pp. 7-8; Hearing Tr., R. pp. 163-86.) Given that the documents were not contemporaneous with the underlying trial and that Stokes-Craven could articulate no particular reason to think they contained any relevant information not attainable from other

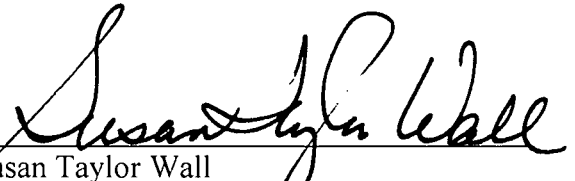
sources, that decision plainly was not an abuse of discretion and should not be overturned on the record presented here.

CONCLUSION

For the foregoing reasons and any others in the record, Respondents respectfully submit that the lower court's grant of Summary Judgment in their favor and the lower court's denial of Stokes-Craven's Motion to Compel should be AFFIRMED.

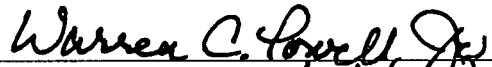
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL 29 2014

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

S.C. Supreme Court

George C. James, Jr., Circuit Court Judge

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.

PROOF OF SERVICE

The undersigned hereby certifies that on July 28, 2014, the foregoing **RESPONDENTS SCOTT L. ROBINSON AND JOHNSON MCKENZIE & ROBINSON, LLC'S AMENDED JOINT FINAL BRIEF** was served on all counsel of record via U.S. Mail, addressed as follows:

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CERTIFICATE OF COUNSEL

The undersigned counsel certifies that Respondents Scott L. Robinson and Johnson McKenzie & Robinson, LLC's Amended Joint Final Brief complies with Rule 211(b), SCACR.

July 28, 2014



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