THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE CLARENDON COUNTY
Court of Common Pleas

The Honorable George C. James, Jr.

Case No. 2010-CP-14- 0457

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

v.

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

AMENDED FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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

STATEMENT OF THE CASE

This appeal arises out of the Honorable George C. James, Jr.'s order dated June 6, 2013, in which he granted the respondents' summary judgment motions based upon the statute of limitations and denied Stokes-Craven's motion to compel discovery related to respondents' communications with their malpractice carrier.

Two significant issues are presented in this appeal. First, this appeal challenges the trial court's application of *Epstein v. Brown,* 363 S.C. 372, 610 S.E.2d 816 (S.C. 2005), and further challenges the viability of *Epstein* as precedent. The second issue the Court is asked to address concerns whether communications with an attorney and his malpractice carrier are subject to work

product protection.

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

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

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

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

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

STATEMENT OF THE FACTS

Stokes-Craven's malpractice claim is predicated on three separate allegations of malpractice. Failure by Stokes-Craven's counsel, Scott Robinson of Johnson, McKenzie and Robinson, in the

underlying case of *Austin v. Stokes-Craven* to:

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

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

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

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

i. Failed to serve Interrogatories or Requests for Production;

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

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

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

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

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

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

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

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

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

explain their conduct as follows:

i. No discovery was conducted because Stokes-Craven was concerned that if discovery was conducted Austin would conduct additional discovery in which Austin sought the customer list of Stokes-Craven. Stokes-Craven obviously disputes this, but there is no writing by Scott Robinson and Johnson, McKenzie and Robinson confirming their version, and in fact, Scott Robinson and Johnson, McKenzie, and Robinson have no retention letter and the writings are primarily numerous transmittal letters for consent orders for continuances. (See e.g. R. Vol. I pp. 254, 281).

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

iii. Scott Robinson and Johnson, McKenzie and Robinson respond to the allegations of no pretrial brief, no proposed *voir dire*, and no proposed jury charges to the effect it was not needed or required. (See e.g. R. Vol. I p. 322-325).

iv. As to the failure to preserve issues for appeal, neither respondents nor their expert contend this was a trial strategy, but rather Scott Robinson claims the court in *Austin v. Stokes-Craven* misapprehended his conduct. (See e.g. R. Vol. I p. 245 line 20 though p. 246, line 24).

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

v. This was Mr. Robinson's third common pleas/jury trial. (See R. Vol. I p. 230 lines 10-14). He had no assistance at trial from Johnson, McKenzie and Robinson. (See R. Vol. II p. 770 lines 5-7). Mr. McKenzie defends Johnson, McKenzie and Robinson's decision because Mr. Robinson told him the maximum exposure was no more than the value of the wrecked vehicle. (See R. Vol. II p. 769 line 23 through p. 770 line 4).

While it is difficult in a case alleging forgery against a used car dealership to accept that Mr. McKenzie would accept Mr. Robinson's evaluation, more interesting is that Mr. Robinson's now testimony is that Stokes-Craven was told of the danger and exposure of this case and Stokes-Craven would not settle. (See R. Vol. I p. 318-320). There is of course no writing, no case evaluation, and no explanation of exposure and no suggestion that the case be settled. Nothing.

Nowhere is Mr. Robinson's lack of experience more evident than in the conduct of the trial. This Court's opinion in *Austin v. Stokes-Craven* vividly recounts Mr. Robinson's actions but consider further that it never occurred to Mr. Robinson that Austin's counsel would call Stokes-Craven's witnesses to the stand in Austin's case. Mr. Robinson had not talked to any of his client's witnesses before trial. The trial vignette below captures perfectly Stokes-Craven's plight in Mr. Robinson's hands:

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

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reviewed the policy.

A. That's a fair statement.

(R. Vol. II p. 953, line 25 through p. 954, line 12; see also R. Vol. II pp. 493-495).

Mr. Robinson's inexperience was compounded by his lack of effort. Truly he did nothing to prepare. His explanation was that Stokes-Craven worried that if he attempted discovery that Austin would seek Stokes-Craven's customer list and a class action would be filed. (ROA Vol. I pp 289-291). While denied by Stokes-Craven and evidenced by no writings, the names of the buyers of automobiles were available to Austin's counsel, a lawyer whose practice is largely related to claims such as this, from the Department of Motor Vehicles.

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

ARGUMENT

1. Standard of Review

a) Summary Judgment Appeals

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

viewed in the light most favorable to the nonmoving party. *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625,628,541 S.E.2d 831, 833 (S.C. 2001).

b) Discovery Appeal

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

2. Statute of Limitations

Stokes-Craven first maintains that under existing law, the lower court erred in granting the respondents' motion for summary judgment on the basis of the statute of limitations. Further, Stokes-Craven contends that *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (S.C. 2005) should be overruled to the extent that it holds the statute of limitations on a legal malpractice claim commences before remittitur or that the statute of limitations commences when counsel in the trial court remains counsel in the appeal and concedes his wrongful conduct (in other words, Stokes-Craven urges the statute of limitations is tolled in such circumstances).

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

The lower court erred in granting summary judgment in favor of respondents based upon existing law as there is a genuine issue of material fact.

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

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

> Here, Mr. Craven stated in his deposition that when he testified at trial in the Underlying Action, he realized he had never seen the interrogatory answers prepared by his lawyer and that some of the answers were incorrect. He knew during trial that Mr. Robinson had not interviewed Kenny Craven until two days before trial. He knew during trial that forgery was an important issue and that no handwriting sample had been taken from Mr. Frierson. He knew during trial that Mr. Robinson had not attempted to locate and call Mr. Thornall as a trial witness. He knew during trial that he was of the opinion that Mr. Robinson had not adequately investigated the case.

(R. Vol. I p. 11). The order signed by Judge James and quoted above mischaracterizes Mr. Craven's deposition testimony as is illustrated below.

i. failing to diligently investigate the facts and interview potential witnesses:

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

> Q. So my question to you is, going back to the complaint, you allege in -- Stokes-Craven, the plaintiff, alleges in the complaint that the defendants were negligent in failing to use due diligence in the investigation of the facts of the underlying case, and so is this an example – would you have expected your attorney to speak to Mr. Frierson before two days before the trial?
> A. Yes.
> Q. Okay. Is that an example of what you're alleging here in the complaint of their failing to use --
> A. Yes.
> Q. -- due diligence? Okay. Okay. You see how -- you see the dialogue we're getting into? I'm trying to isolate what -- examples of what you mean in the complaint. Fair enough?
> A. Got you.
> Q. Okay. Now, and I'd say to -- just to make this clear, a number of these issues, as you might expect, are contested in this case. This is the plaintiff's opportunity to provide their side of it.
> A. Got you.
> Q. Fair enough?
> A. Fair.
> **Q. Okay. Okay. Next, we're going to get into some other examples, but can you -- can you right now off the top of your head provide other instances which the plaintiff would contend that the defendants did not investigate the facts of the case sufficiently prior to the trial? We'll get into -- we'll get into the transcript which might -- which might refresh your memory.**
> **A. Okay.**
> **Q. But can you think of anything else right now off the top of your head?**
> **A. The things that was not done --**
> **Q. Yeah.**
> **A. -- that I felt like they should have been done.**
> **Q. Investigate the facts. We're on this --**
> **A. Right.**

Q. -- specific allegation right now.
A. There's a lot of things now that I see that should have been done. At the particular time, I wouldn't have known of what needed to be done or not needed to be done.
Q. Okay. Let's go through --
A. Yes, there are some things now, yes.

(R. Vol. II p. 497, line 18 through p. 499, line 18). The lower court erred in finding as a matter of law that Mr. Craven "knew during trial that he was of the opinion that Mr. Robinson had not adequately investigated the case." This finding is contrary to the testimony of Mr. Craven.

ii. failing to obtain a handwriting sample:

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

Q. Okay. And why was the handwriting sample an important thing?
A. There was a as-is form that was presented to Mr. Austin at the time that I did and that was shown that was signed as-is, and he denied that that was his signature, and that's where all this came from.
Q. So the authenticity of his signature became an issue?
A. Exactly.
Q. Okay.
A. Right.
Q. All right. And it was -- came – did you -- is it the plaintiff's position that Mr. Robinson should have objected to the witness giving his handwriting sample there in court that day?
A. I mean, I wouldn't have an opinion.
Q. You don't have an opinion one way or the other about that?
A. No.

(R. Vol. II p. 501, line 17 through p. 502, line 12).

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

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

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

> Mr. Powell:
> A. Number 14?
> Q. Yes, sir. And you say what?
> A. Barry Thornall visually inspected and appraised the subject vehicle prior to the trade. Trade in by Mr. Bailey.
> Q. So going on to the next page, so back in 2005, Stokes-Craven was saying that Mr. Thornall actually did the inspection, right?
> A. That's what the documents say.
> Q. Are you telling me the document is wrong? And your answer's what?
> A. No, I told you earlier that that wasn't true who appraised the car. The document -- Mr. Robinson could have gotten this from one of my managers also.
> Q. Let's -- excuse me, Mr. Craig. (sic) Let's go back. The court reporter's got to pick this up. If you could, read that a little more slowly if I could -- beginning at line 5. **Are you telling me the document is wrong, and your answer was?**
> A. **No, I told you earlier that I wasn't sure who appraised the car. This document, Mr. Robinson could have gotten this form from one of my managers also.** There are various questions here.

(R. Vol. II p. 515, line 4 through p. 516, line 2).

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

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

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

(R. Vol. II p. 512, lines 10-23).

v. failing to settle the case:

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

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

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

(R. Vol. II p. 520, line 19 through p. 521, line 2). Second, Mr. Craven testified that he turned the case and the demand letter made by Mr. Polito, Austin's then attorney, over to Mr. Robinson and that he believed Mr. Robinson had attempted to settle the case, but had never received a response. Mr. Craven testified:

> Q. After those two meetings, there was never an opportunity to settle the dispute with Mr. Austin, between he and Stokes-Craven Ford, over this entire matter?
> A. Yes. There was a -- his first attorney sent a question in to us asking for us to make good. I handed the documents over to Mr. Robinson, and I said, you tell me what needs to be done and you handle it. And his reply was, you know, what are their damages back to them, and they never replied back to him.
> Q. You say he wrote a letter?
> A. I don't know if he wrote a letter or he called them, but I know he called -- made a contact with them of saying, you know, what are your -- tell me what your damages are and we'll be glad to take care of them.
> Q. Okay.
> A. And there was never no reply back from that comment.
> Q. Okay.
> A. Now, I don't know if that was a no comment back to Scott or was it no -- I know it was no contact back to me, but I don't think it was a contact back to Scott.

(R. Vol. II p. 522, line 22 through p. 523, line 21). If Mr. Craven believed his attorney had made a good faith effort to settle the case, but had been rebuffed by Mr. Austin and his lawyers, how could the failure to settle the case put Mr. Craven on notice, at the time of the jury verdict, that Stokes-Craven had a legal malpractice claim against its attorneys? Mr. Craven's testimony, taken "as a

whole" or "point by point," establishes that there is, in the very least, a question of material fact regarding when the statute of limitations commenced on Stokes-Craven's legal malpractice claim.

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

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

In *Epstein*, the Supreme Court specifically held, "We do not hold that, in all instances, the date of a jury's adverse verdict is the date on which the SOL begins to run. To the contrary, we hold only that, under the facts of this case, Dr. Epstein knew of a potential claim against Brown by this date, at the latest." *Id.* at 383. This Court reasoned:

> Under the facts of this case, we find Dr. Epstein clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial. The damages he claims are largely those to his reputation, and the claims he raises in his complaint are primarily related to trial and pre-trial errors. **Counsel for Dr. Epstein conceded at oral argument on the summary judgment motion that "some of the allegations down there, your Honor, were within the man's knowledge when the verdict came in."** Further, in a letter from Dr. Epstein to his appellate attorney, Steven Groves, **Dr. Epstein indicated both that he would not deal with Mr. Brown, and that "I believe that my representation was so egregiously lacking."** It is patent Dr. Epstein knew, or should have known, of a possible claim against Brown long before this Court denied certiorari in January 2001. Accordingly, we find the trial court properly granted summary judgment on this issue.

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

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

(ROA Vol. I p. 211, ¶ c). This alleged error is in the purview of a person of common knowledge as a layperson can read a caption and understand a party who they believe should be named in the complaint is not named.[2]

Dr. Epstein further alleged his attorney erred in:

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

(ROA Vol. I p 211, ¶ f). This alleged error was known to Dr. Epstein as, in the words of Mr. Brown, "Dr. Epstein as a medical professional was more than capable of understanding the medical defense presented by David Brown. It is beyond dispute that Dr. Epstein would have known the defenses asserted by David Brown were contrary to his own opinions; indeed, the Complaint expressly allege [sic] as much." (ROA Vol. I p 214).

Dr. Epstein further alleged his attorney erred in:

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

(ROA Vol. I p 212, ¶ n). This alleged error is clearly in the purview of a person of common knowledge as one would know if a file that was requested by the client was not provided to him.

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

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

Finally, as cited above, the Supreme Court stated counsel for Dr. Epstein conceded some of the allegations of malpractice were within Dr. Epstein's knowledge when the verdict was returned and that Dr. Epstein was writing letters referring to the representation by his lawyer as "egregiously lacking." By contrast, Mr. Craven, who had no notice of any facts to suggest the malpractice of Mr. Robinson let alone actual knowledge, "insisted" that the respondents provide him a bill for legal services, expressed his confidence in Mr. Robinson, and even rode up to Columbia for the Supreme Court arguments with Mr. Robinson. (ROA Vol. I p 221, ¶ 12).

Mr. Robinson testified:

> A. To some extent. Again, I wasn't looking to make sure I got recouped every penny for every minute I spent on this case. But Dennis insisted that I send him a bill so I got him a bill.
> Q. And was the bill paid?
> A. Yes.

(R. Vol. I p. 362, line 24 through p. 363, line 6). Mr. Johnson testified:

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

(R. Vol. I p. 450, lines 12-23).

In his legal malpractice suit, Dr. Epstein alleged pre-trial and trial errors committed by his attorney. In the present case, Stokes-Craven alleges pre-trial and trial errors committed by its attorney. This is where the similarities between the facts in *Epstein* and the facts in the present case begin and end. Even after Mr. Powell, counsel for the defendant Johnson, McKenzie and Robinson,

LLC, tried to walk Mr. Craven into testifying in accord with the facts in *Epstein*, it is clear that factually, the present case is easily distinguished from *Epstein*. For example, Mr. Powell attempted to use the trial transcript to have Mr. Craven concede that he knew, at the time of the Austin trial, that Mr. Robinson had failed to adequately investigate the facts of the case.

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

(R. Vol. II p. 498, line 20 through p. 499, line 18). Mr. Powell continued along this vein, and Mr. Craven continued to testify that **today** he believes Mr. Robinson should have shown him a copy of Stokes-Craven's interrogatory responses before trial, should have better prepared him for cross examination, and should have interviewed witnesses earlier. However, Mr. Craven consistently stated that he did not know or understand any of this at the time of trial or for years after as he was not knowledgeable regarding an attorney's duties in preparing for trial or trying cases. Mr. Craven testified:

> Q. Now, the question was -- going back a couple questions -- prior to the case -- prior to the commencement of the trial, was Stokes-Craven Ford -- were you

on its behalf -- did you feel good about your defense of the case? Were you confident of a good outcome?
A. Let's define that a little bit if we could. Do I feel like I'm confident by going in the courtroom, no. **Am I confident about are we -- all the preparation is done in advance? I wouldn't know that answer.**

(R. Vol. II p. 519, line 24 through p. 520, line 9).

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

(R. Vol. II p. 521, line 19 through p. 522, line 2).

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

(R. Vol. II p. 625, lines 9-14).

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

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

Id.

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

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

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

(R. Vol. II p. 554, line 8 through p. 555, line 19). 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." (R. Vol. II p. 781, lines 11-19).[3]

The first time that Mr. Craven became aware of any facts that would put a person of common knowledge and experience on notice that he might have a claim against the respondents was at a meeting on June 9, 2009 with his appellate counsel, after the appellate briefing was completed and before the oral arguments in the Supreme Court. Mr. Craven stated that at the meeting Mr. Brown and Mr. Buckley, of Young Clement Rivers, LLP explained that Austin's attorneys were claiming Mr. Robinson had made mistakes in failing to make proper objections during the trial which might

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3 Mr. McKenzie also corroborated that fact the Mr. Robinson failed to appreciate Stokes-Craven's exposure. Mr. McKenzie testified: "So I said, Scott, what do you believe your exposure in this case to be? And I recall him saying that he believed it to be no more than the value of the vehicle. That Dennis may have to buy the vehicle back." (R. Vol. II p.769, line 23 through p. 770, line 2); "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

mean the verdict would not be reversed. (R. Vol. I p. 221, ¶ 11). Mr. Brown corroborates Mr. Craven's testimony:

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

(R. Vol. II p. 681, lines 5-15).

> Q Were there -- one of the things that I did not see looking through, were there any status reports to Mr. Craven or to Charity Chastain about your opinion as to where things were going in the case?
> A No, they did not require status reports. And until the briefing was completed, I don't think I really provided any that I know of.
> Q Were these sometimes given to Ms. Chastain verbally?
> A I don't -- I don't recall giving her any verbally. I don't know whether she received copies of the briefs or not. I just don't know.
> Q Did you express an opinion to her as to the bad parts of the appeal, the good parts of the appeal, where it seemed to be going, what you were doing with the money you were being paid to handle the appeal or anything like that?
> A We had a big conversation about that. That's the June entry that we discussed earlier where we talked about the issues that had been raised, what we had said in response to them, what could happen, what could not happen, the unpredictable nature of our Supreme Court.

(R. Vol. II p. 706, line 4 through p. 707, line 2).

Epstein is a far different case on the facts: Stokes-Craven was on notice of a potential claim no earlier than June 9, 2009.

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

The lower court held: "In addition, the testimony of Stokes-Craven's appellate attorney

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limited." (R. Vol. II p.777, line 23 through p. 778, line 7).

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." (R. Vol. I p. 8).

Both Steven Brown and Ed Buckley, the two Young Clement Rivers appellate lawyers that represented Stokes-Craven in the appeal, stated that they had not been retained to advise Stokes-Craven with regard to any legal malpractice committed by the defendants, nor had they formed any opinions about the malpractice of the respondents. (R. Vol. II p.673, lines 424, R. Vol. II p. 683, lines 22 to p. 686 line 5). Mr. Buckley and Mr. Brown were strictly appellate counsel and did not undertake to advise Stokes-Craven regarding the malpractice of its trial lawyers (R. Vol. II p. 694, lines 12-20), and Mr. Robinson was still involved with the case throughout the appeal. Mr. Brown testified as follows:

> A. Whenever I would go through and read the transcript, if I had questions, I would call Mr. Robinson. He was on the -- remained on the appeal with us. He was very -- always happy to answer any question I provided to him, and we ultimately got the case briefed."

(R. Vol. II p. 656, lines 9-14). Mr. Brown Further testified:

> Q Are you aware of any -- after Young, Clement, Rivers was engaged by Stokes-Craven as its attorney, were you aware of any substantive communications between Mr. Robinson or anyone in his law firm with Stokes-Craven Ford?
> A I don't -- I don't know one way or the other. I --
> Q But you're just not aware of it?
> A I'm not aware of it. I knew that – that I was -- Mr. Robinson -- we were retained to be appellate counsel. Mr. Robinson was still to be on the file. He was still available to answer questions. He was available to me to assist in whatever I needed, and so I don't know what he did in terms of his communications with other people, including Stokes-Craven. I just don't know. I wasn't privy to that.

(R. Vol. II p. 694, lines 4-20). Further, the representation agreement between Stokes-Craven and

Young Clement limits the scope of Young Clement's representation to "all purposes in connection with an appeal."

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

Imputation of knowledge from a lawyer to his client does not extend to matters beyond the scope of the representation. *See Imputation of Attorney's Knowledge of Facts to His Client*, 4 A.L.R. 1592 (originally published in 1919); *Joe v. Two Thirty Nine Joint Venture*, 145 S.W. 150, 160 (Tex. 2004). "A client is not charged with a lawyer's knowledge concerning a transaction in which the lawyer does not represent the client." Restatement (Third) of the Law Governing Lawyers § 28A cmt. b (2000); *see also Trustees of Chicago Plastering Inst. Pension Trust v. Elite Plastering Co.*, 603 F. Supp. 2d 1143, 1150 (N.D. Ill. 2009).

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

malpractice?[4]

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

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

Stare decisis is not an inexorable command: "There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right.... There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." *Smith v. Daniel Const. Co.,* 253 S.C. 248, 255-56, 169 S.E.2d 767, 771 (S.C.1969) (Bussey, J., dissenting) (*quoting Sidney Spitzer & Co. v. Comm'rs of Franklin County,* 188 N.C. 30,123 S.E. 636, 638 (1924)). Therefore, *"[s]tare decisis* should be used to foster stability and certainty in the law, but[] ***not to perpetuate error.***" *Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n,* 277 S.C. 1, 4, 282 S.E.2d 230, 231 (S.C.1981), *superseded by statute on other grounds,* S.C. Code Ann. § 33-55-200 *et seq.* (2006).

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

> In my opinion, there was no evidence that appellants were injured as a result of respondent's alleged malpractice until the court of appeals disposed of the case

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

> by sending a remittitur to the trial court. Therefore, I would establish a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until a remittitur has been sent to the trial court. As a result, in my opinion, the statute of limitations does not bar Appellants' claim.

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

In Pennsylvania, the rule has been articulated this way:

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

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

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

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

> Most important, since it is plain that no claim would even have existed if the temporary results of the attorney's conduct had been reversed on appeal, this decision is in accordance with the salutary concomitant principles that premature,

> possibly useless, litigation should be discouraged and that no cause of action should therefore be deemed to have accrued until the existence of redressable harm has been established. Since, under this holding, the instant action was timely commenced, the judgment is reversed and the cause remanded for further consistent proceedings.

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

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

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

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

Ranier v. Stuart & Freida, P.C., 1994 OK Civ. App. 155, 887 P.2d 339, 343. The Kansas courts state it this way:

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

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

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

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

> The issue before us is when a cause of action accrues for legal malpractice which occurs during the course of litigation. The Court of Appeals held that the cause of action in such a situation accrues "when the plaintiff knew or should reasonably have known of the malpractice and when the plaintiff's damages are certain and not contingent upon the outcome of an appeal." *Id.* at 156, 673 P.2d at 796. Defendant, attorney Miller, petitioned this Court to review the opinion of the Court of Appeals. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5 and Ariz.R.Civ.App.P. 23. We agree with and approve the opinion of the Court of Appeals as supplemented herein

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

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

i. Equitable Estoppel

The statute of limitations has not run in this case; however, the respondents should be estopped from claiming the statute as a defense. Under South Carolina law, "a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." *Wiggins v. Edwards*, 314 S.C.

126, 130,442 S.E.2d 169, 171 (S.C. 1994) (internal citations omitted).

The respondents failed to inform Stokes-Craven that any breaches of the standard of care had occurred, and blamed the large verdict on the unpredictable nature of jury trials, recommending Stokes-Craven appeal. Further, Mr. Robinson remained counsel of record for Stokes-Craven throughout the appeal process and actually drove with Mr. Craven to Columbia for the oral argument of the Austin case. Mr. Craven testified that he was surprised by the large verdict against Stokes-Craven, but did not believe at the time that the verdict was the result of any error made by Mr. Robinson and further explained that there was nothing that would indicate to him that Mr. Robinson had done anything wrong. Mr. Craven further testified that he had discussions with and Mr. Robinson and his partner Mr. McKenzie shortly after the trial, but neither of them mentioned any mistakes made by Mr. Robinson; rather Mr. Craven explained that the discussions were about how juries were unpredictable and about getting the verdict reversed and filing an appeal. (R. Vol. I p. 221, ¶¶ 8, 10).

Silence, when it has the effect of misleading a party, may operate as estoppel. *See S. Dev. Land & Golf Co., Ltd v. S. Carolina Pub. Servo Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748 (S.C.1993). A manifest intent to mislead is not required for estoppel by silence; it arises when the silence is intended or has the effect of misleading the other party, provided the other party acts reasonably. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342,358, 628 S.E.2d 902, 911 (Ct. App. 2006). This rule should be rigorously enforced in legal malpractice actions because of the fiduciary relationship between an attorney and his client. *See Hotz v. Minyard*, 304 S.C. 225, 230, 403 S.E.2d 634, 637 (S.C.1991) ("An attorney/client relationship is by nature a fiduciary one."). "Parties in a fiduciary relationship must fully disclose to each other all known

information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004) (internal citations omitted). Here, not only was Mr. Robinson a fiduciary of Stokes-Craven, but also a personal friend of Mr. Craven. Mr. Craven trusted Mr. Robinson, and Mr. Robinson's silence as well as his affirmative representations regarding runaway juries and reversal on appeal had the effect of misleading Stokes-Craven.

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

> Stokes-Craven claims there is evidence that Mr. Robinson knew all along that this issue would be raised on appeal, and that his failure to advise Stokes-Craven created an issue of fact on the issue of equitable estoppel...Stokes-Craven also argues that defendants failed to disclose breaches in their duty to Stokes-Craven, blamed the verdict on the unpredictability of juries, and continued to represent Stokes-Craven during the appeal. None of these points lead to any genuine issue of fact on the issue of equitable estoppel. Again, Stokes-Craven, through Mr. Craven, had knowledge on the day of the verdict that Stokes-Craven might have a cause of action against defendants. There is no evidence that defendants misled Stokes-Craven by words, conduct, or silence to the detriment of Stokes-Craven. (R. Vol. I pp. 18-19).

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

> In my opinion, however, Brown should be estopped from asserting the statute of limitations as a defense. I would therefore reverse and remand to the circuit

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

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

ii. Equitable Tolling

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

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

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

However, extraordinary circumstances do exist. If the lower court is correct and the statute of limitations began to run on Stokes-Craven's legal malpractice claim as of the date of the adverse verdict, August 17, 2006, then the statute of limitations would have run almost a year before this Court issued its opinion in *Austin v. Stokes-Craven* on March 8, 2010. Respondents never disclosed any breaches of the standard of care and instead blamed the verdict on the unpredictable jury and advised Stokes-Craven to proceed with the appeal to reverse the verdict. Stokes-Craven has a considerable legal malpractice claim against the respondents such that members of this Court recognized many of the errors committed by Mr. Robinson in *Austin v. Stokes-Craven*. Stokes-Craven has suffered a wrong, and this is the archetypal case for equitable tolling.[5]

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

3. Discovery Appeal: the Lower Court Erred in Holding Correspondence between Respondents and their Malpractice Carrier are Not Discoverable

On July 10, 2012, Stokes-Craven served its second supplemental request for production on the respondents seeking, "Any and all correspondence (oral written or electronic), regarding the claim that gave rise to this matter, between you, your agents and/or attorneys acting on your behalf, and any adjuster or any other person acting on behalf of your malpractice insurance carrier."[6] (R. Vol. III p. 957).

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

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

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

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

As several South Carolina circuit court judges have recognized, "[t]here is no insured-insurer privilege protecting communications between an insured and its liability or indemnity insurer." (See R. Vol. III p. 985; R. Vol. III pp. 986-987).

Judge James' order appears to hold the communications are protected by the work product privilege. Rule 26(b)(3), SCRCP, protects only documents prepared in anticipation of litigation. Documents prepared in the ordinary course of the insurance business are not protected by the work-product privilege. *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 536, 542 (N.D.W. Va. 2000) citing *Front Royal Ins. Co. v. Gold Players, Inc.*, 187 F.R.D. 252, 257 (W.D.Va.1999). (See also R. Vol. III p. 997).

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

The party asserting the attorney client or work product privilege bears the burden of showing such privilege. *Wilson v. Preston*, 662 S.E.2d 580, 585 (S.C. 2008). "Challenges to the assertion of attorney-client or work-product privilege are usually decided after an *in camera* inspection of the materials by the court." (R. Vol. III p. 989).

Judge James erred in concluding that the correspondence between respondents and their insurer, in particular the statements made by respondents to put their carrier on notice of a potential claim, constitute protected work product. The lower court further erred in allowing the respondents to withhold these documents without even requiring them to provide a privilege log and in failing to order an *in camera* review. The lower court essentially held the respondents' burden with regard to

the work product privilege was met without any knowledge of the facts or circumstances surrounding any of the communications sought. Thus, the lower court's decision was without any factual support and constitutes an abuse of discretion. *See Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (S.C.1989).

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

There is ample evidence in the record to suggest that Mr. Robinson knew he had made significant breaches of the standard of care throughout the respondents' representation of Stokes-Craven. For example, Mr. Robison produced as part of his Stokes-Craven file, research he conducted during the time of the *Austin v. Stokes-Craven* trial on the ineffective assistance of counsel (See R. Vol. I pp. 343-344). Steven McKenzie, Mr. Robinson's law partner testified that Mr. Robinson failed to appreciate Stokes-Craven's exposure:

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

(R. Vol. II p.769, line 23 through p. 770, line 2).

> 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.

(R. Vol. II p.777, line 23 through p. 778, line 7). Despite evidence from his file that his trial efforts were ineffective and despite his then and now law partner's testimony that he misapprehended Stokes-Craven's exposure, Mr. Robinson now claims that he knew the case was dangerous and that the exposure to Stokes-Craven was great and that he warned Mr. Craven of the potential for punitive damages, explained that Stokes-Craven might get "popped." Mr. Robinson further testified that there are no writings evidencing any of his discussions with Mr. Craven:

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

(R. Vol. I p. 254, lines 3-18).

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

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

McDougall v. Dunn, 468 F.2d 468, 474 (4th Cir. 1972). Here, just as in the Fourth Circuit precedent, the potential to discover contemporaneous declarations or admissions made by respondents to their insurance carriers is necessary, especially considering there is evidence of incompetence and

misapprehension of exposure and a lack of any writings confirming Mr. Robinson's now version of events. The correspondence with the carrier may be consistent with respondents admitting errors were made.

CONCLUSION

For the reasons cited above, Stokes-Craven respectfully requests this Court: (1) reverse the lower court's grant of summary judgment; (2) overrule *Epstein v. Brown* to the extent that it holds the statute of limitations in a legal malpractice action commences before a remittitur and adopt a bright line rule that the statute of limitations does not commence until a remittitur has been issued; and (3) reverse the lower court as to Stokes-Craven's request for correspondence between respondents and their malpractice carrier and direct respondents to produce these documents.

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On this 28 day of July, 2014
Charleston, South Carolina

CERTIFICATION

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

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On this 28 day of July, 2014
Charleston, South Carolina

THE SUPREME COURT OF SOUTH CAROLIA

APPEAL FROM THE CLARENDON COUNTY
Court of Common Pleas

The Honorable George C. James, Jr.

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

I certify that I have served the Amended Briefs of the Appellant by delivering a copy via U.S. Priority Mail on July 29, 2014, addressed to their attorneys of record as follows:

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