

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM THE CLARENDON COUNTY Court of Common Pleas **S.C. Supreme Court**

The Honorable George C. James, Jr.

Case No. 2010-CP-14- 0457

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

Appellant,

v.

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

Respondents.

APPELLANT'S MOTION TO ARGUE AGAINST PRECEDENT &
MEMORANDUM IN SUPPORT

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

I. Introduction

“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)). “*Stare 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 *Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n*, 277 S.C. 1, 4, 282 S.E.2d 230, 231 (S.C.1981), superseded by statute on other grounds, S.C. Code Ann.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).

Appellant moves pursuant to Rule 217 SCRAP to argue against the precedent set forth *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (S.C. 2005), specifically the *Epstein* majority's rejection of the continuous representation rule and failure to adopt a bright line rule that the statute of limitations does not commence in legal malpractice actions until a remittitur has been issued.

II. Epstein v. Brown

In *Epstein*, this Court held that the continuous representation rule did not apply to a legal malpractice action and, therefore, summary judgment was properly granted to an attorney, because the plaintiff knew or should have known of his malpractice action by the date of the adverse verdicts against him as called for by S.C. Code Ann. § 15-3-535.

The *Epstein* majority based its holding on (1) the Court's previous rejection of the analogous continuous treatment rule in medical malpractice actions in *Harrison v. Bevilacqua*, 354 S.C. 129, 135, 580 S.E.2d 109, 112 (S.C. 2003), (2) the reasoning of "numerous jurisdictions

[which] refuse to judicially adopt the continuous representation rule", and (3) the notion that adopting the rule would "directly contradict" S.C. Code §15-3-535. *Id.* However, analyzing these justifications reveals the holding's diminished precedential strength.

III. The Difference Between Medical and Legal Malpractice Actions – the Statute of Repose and *Harrison v. Bevilacqua*:

The *Epstein* Court's rationale for rejecting the continuous representation rule parallels the Court's prior rationale for rejecting the continuous treatment rule in medical malpractice actions as set forth in *Harrison v. Bevilacqua*.

In *Harrison*, the Court began its analysis of whether to adopt the continuous treatment rule by recognizing the many important public policy concerns that are protected by such a rule. For example, the *Harrison* Court quoted the Court of Appeals for the Fourth Circuit, which stated that the "continuous treatment doctrine is based on a patient's right to place trust and confidence in his physician." *Otto v. Nat'l Inst. of Health*, 815 F.2d 985, 988 (4th Cir. 1987); citing *Haberle v. Buchwald*, 480 N.W.2d 351, 355 (Minn. Ct. App. 1992) (the rule is based on the policy "the patient must repose reliance upon his physician in the completion of the course of curative treatment, a relationship of trust which inhibits the patient's ability to discover acts of omission or commission constituting malpractice."). The *Harrison* Court went on to reason that "basic tort principles of fairness and deterrence also provide justifications for the rule."

However, the *Harrison* Court reasoned that the "clear policy set by the Legislature in its adoption of statutes of limitations and statutes of repose" outweighs the policy arguments in favor of adopting the continuous treatment rule. The *Harrison* Court accepted the argument that "adoption of the rule would be 'entirely inconsistent' with the six-year statute of repose for medical malpractice actions. See S.C. Code Ann. § 15-3-545 (Supp. 2001)." *Id.*

The *Harrison* Court interpreted § 15-3-545 as an "outer limit beyond which a medical

malpractice claim is barred, regardless of whether it has or should have been discovered" and emphasized that section 15-3-545(D) creates a statute of repose establishing an "absolute time limit beyond which liability no longer exists" in medical malpractice actions. The *Harrison* Court summarized its holding as follows: "Put simply, we find judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set via [§ 15-3-545]." Thus, its interpretation of § 15-3-545 constitutes the *Harrison* Court's sole basis for rejecting the continuous treatment rule.

The justifications favoring adoption of the continuous treatment rule are similar to those justifying the continuous representation rule, e.g. to avoid disruption of the attorney client relationship, to allow an attorney to continue efforts to remedy a bad result, even if some damages have occurred and the client is aware of the attorney's errors. The *Epstein* majority recognized these "very legitimate policy rationales," but ultimately rejected the continuous representation rule based on the statute of limitations set forth in § 15-3-535. However, there is no statute of repose applicable to legal malpractice actions. Rather, § 15-3-535 creates a general three-year statute of limitations in legal malpractice actions. The importance of this distinction is recognized in this Court's precedent.

For example, in *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), the plaintiff sued her former physician for medical malpractice. The *Langley* Court refused to toll the limitations period, recognizing the distinction between a statute of repose and a statute of limitations and holding "[a] statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action [while a] statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Id.* The *Langley* Court further distinguished its holding from precedent by

stating, “each of these cases involved a statute of limitations, not one of repose.” *Id.* Thus, the distinction between statutes of limitation and statutes of repose has proven critical to whether the South Carolina Supreme Court will allow tolling exceptions to apply to a particular statutory period. As the *Epstein* Majority failed to acknowledge this distinction, there is little support for the holding that because this Court has rejected the continuous treatment rule, it must therefore reject the continuous representation rule.

IV. The Continuous Representation Rule is consistent with § 15-3-535, the Discovery Rule, and South Carolina Law interpreting the Same

Moreover, this Court has recognized the distinction between the six-year statute of repose contained in § 15-3-545 and the discovery rule articulated by § 15-3-535. In *Hoffman*, this Court held § 15-3-545 "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." *Hoffman v. Powell*, 298 S.C. 338, 339, 380 S.E.2d 821, 821 (S.C. 1989). By contrast, § 15-3-535 and the discovery rule provide that the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (S.C. 2005). Further this Court’s precedent recognizes that § 15-3-535 does not create an “absolute time limit beyond which liability no longer exists.” See e.g. *Hooper v. Ebenezer Sr. Services*, 386 S.C. 108, 687 S.E.2d 29 (S.C. 2009). Indeed, this Court has formally adopted the doctrine of equitable tolling, finding § 15-3-535 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. Additionally, South Carolina courts have applied estoppel in a quasi-tolling manner to prevent defendants from claiming the statute of limitations as a defense. See *Kleckley v. N.W. Nat. Cas. Co.*, 338 S.C. 131, 136, 526 S.E.2d 218, 220 (S.C. 2000). In his dissent in *Epstein*, Justice Pleicones advocated for

this very result, reasoning “I would therefore hold that Brown is estopped from asserting the statute of limitations as a defense.”¹

If this Court adopted the continuous representation rule, it would toll the statute of limitations where a malpracticing attorney continued to represent a client on the same underlying action that formed the basis for the legal malpractice claim. Allowing tolling in these limited circumstances conforms to the Supreme Court’s recent interpretation of the purpose of a statute of limitations in *Mortuary v. Garden Sanctuary Church of God*, 341 S.C. 320, 333, 534 S.E.2d 672, 678-79 (2000), overruled in part on other grounds. The *Mortuary* court stated, “The limitations period is intended to run against those who are neglectful of their rights and who fail to exercise reasonable diligence in enforcing their rights. However, it is not the policy of the law to unjustly deprive an injured person of a remedy.” Id. at 333, 678-679. A client that relies on his attorney’s advice that an appeal will correct a trial’s adverse result is not neglecting his rights.

Additionally, adopting the continuous representation rule would protect the sanctity of the attorney-client relationship. This contention is supported by this Court’s previous statement that “[a] client should not be expected to investigate an attorney’s loyalty every time the attorney provides the client with counsel the client dislikes. Instead, absent other facts, the client should be able to rely on the attorney’s advice and should be able to follow this advice without fear the attorney is not acting in the client’s best interest. *True v. Monteith*, 327 S.C. 116, 116, 489 S.E.2d 615, 616 (1997). Adopting the continuous representation rule would allow clients to rely on his

¹ The problem with failing to adopt the continuous representation rule or a bright line rule that the statute of limitations in legal malpractice actions is tolled until remittitur is highlighted by the fact that Justice Pleicones’ opinion is the dissent and not the majority. South Carolina Courts have held that the doctrines of estoppel and 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 omitted). Therefore, these doctrines do not provide adequate protection to clients of malpracticing attorneys who fail to disclose their malpractice.

or her attorney's advice as the *True* court encouraged.

Thus, considering this Court's reasoning in *True* and *Mortiarty* and considering that the doctrines of equitable estoppel and equitable tolling are already applied to toll the commencement of § 15-3-535, adopting the continuous representation rule is consistent with South Carolina jurisprudence.

Moreover, the continuous representation rule simply defines the date when legal malpractice actions accrue. *See Pittman, supra*, 752 P.2d at 715 ("The continuous representation rule -- the client's cause of action does not accrue until the attorney-client relationship is terminated.' . . . *Pancake House, Inc. v. Redmond*, 239 Kan. 83, 87, 716 P.2d 575, 579 (1986)."); *Siegel, supra* note 2, 288 N.Y.S.2d 831, 29 A.D.2d 477; *Omni-Food & Fashion, Inc., supra*, 528 N.E.2d at 944 (holding the cause of action accrues either when the client discovers or should have discovered, or when the attorney/client relationship for that matter terminates, whichever occurs later); *Keller, supra*, 352 S.E.2d at 330 ("the statute of limitations begins to run when the attorney's services rendered in connection with that particular undertaking or transaction have terminated"). Defining accrual is a matter which is better left to the judicial function. *Farris, supra* note 2, 652 A.2d at 61-62 ("In the absence of any clarifying legislation, it is our obligation to construe the word "accrues" in the existing statute, D.C. Code § 12-301 (1989).") When faced with an undefined statutory term, the court must interpret it. *Branch v. City of Myrtle Beach*, 340 S.C. 405, 409-10, 532 S.E.2d 289, 292 (S.C. 2000). As the Court of Appeals District of Columbia stated:

Because the court has the authority to adopt the discovery rule as a way of defining 'accrual,' there can be no doubt that the court has the authority to adopt the continuous representation rule, an exception to the discovery rule, as a way of defining 'accrual' in these cases. This is 'a situation -- as in the case of the discovery rule -- where there is no expression of legislative intent to assist us in construing when a cause of action accrues,' and thus 'the question is one for

judicial resolution, absent legislative limitation.’

(internal citations and quotations omitted). *R.D.H. Communs. v. Winston*, 700 A.2d 766, 774-75 (D.C. 1997). Adoption of the continuous representation rule is consistent with the discovery rule and serves as a tolling exception much like equitable estoppel and equitable tolling.

V. The Authority the Epstein Majority relied on:

The Epstein majority relied on authority from Alaska, California, the District of Columbia, Illinois, and Tennessee to support its rejection of the continuous representation rule. However, an analysis of the specific authorities cited as well as subsequent case law from these jurisdictions shows little support for the *Epstein* Court’s reasoning.

The *Epstein* Court first cited the Alaska case of *Beesley v. Van Doren*, 873 P.2d 1280 (Alaska 1994). The Epstein court indicated *Beesley* supported the conclusion that the “statute of limitations in attorney malpractice cases is not tolled pending final resolution of litigation underlying [the] malpractice claim.” However, though the *Beesley* court did reject the ‘exhaustion of appeals’ doctrine, it did not address the continuous representation rule. In fact, the *Beesley* Court reasoned:

[B]ecause *Beesley* retained a different attorney before the motion for summary judgment against him was filed, we are not asked to consider the adoption of the ‘continuous representation’ rule.² Under that rule, the statute of limitations is tolled as long as the client is represented by the same attorney who committed the alleged malpractice. We have opined that we might adopt the rule. *Wettanen*, 749 P.2d at 365. Such a rule would resolve the concern for the attorney-client relationship raised by some courts which have rejected the ‘exhaustion of appeals’ rule.

Beesley v. Van Doren, 873 P.2d 1280, 1283 n.4 (Alaska 1994). There is no support for declining to adopt the continuous representation rule in *Beesley*.

² The exhaustive appeals doctrine differs from the continuous representation rule because it tolls the statutory period throughout the appellate process, regardless of whether an allegedly negligent attorney remained the plaintiff’s attorney on appeal.

Next, the *Epstein* Court cited *Laird v. Blacker*, 2 Cal. 4th 606, 7 Cal. Rptr. 2d 550, 828 P.2d 691 (1992), for the proposition that the "limitations period commences and is not tolled by filing an appeal absent continuous representation by the trial attorney." (emphasis added). This quote appears to lend support for the continuous representation rule, but in any event, the *Laird* Court did not address whether to adopt the continuous representation rule because the defendant-attorneys did not continue to represent the plaintiff-client in the period between the alleged negligent representation and the malpractice action. Further, there is no need for California courts to consider the continuous representation rule because the rule has been codified in California. Cal Code Civ Proc § 340.6 states:

...in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

...

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.

The *Laird* Court reasoned:

This "continuous representation" rule was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." (Sen. Com. on Judiciary, 2d reading analysis of Assem. Bill No. 298 (1977-1978 Reg. Sess.) as amended May 17, 1977.)

Id. at 698 (internal citations omitted).³ Rather than support the *Epstein* Court's holding, *Laird* lends support for the adoption of the continuous representation rule.

Next, the *Epstein* Court cited *Law Offices of Jerris Leonard, P.C. v. Mideast Sys. Ltd.*, 111 F.R.D. 359, 361 (D.D.C. 1986) for the proposition that "under [the] discovery rule, [a] legal

³ The continuous representation rule has also been legislatively adopted in Michigan. See *Seebacher v. Fitzgerald, Hodgman, Cawthorne & King, P.C.*, 181 Mich. App. 642, 449 N.W.2d 673 (Mich. Ct. App. 1989) (continuous representation rule is codified in statute of limitations).

malpractice claim was deemed to have occurred when summary judgment [was] entered against it or at latest when [the] answer was due in [a] suit for legal fees." The *Jerris* Court did not address adopting the continuous representation rule. Rather, the *Jerris* Court held that a legal malpractice claim was a compulsory counterclaim in an action filed by the attorney for the failure to pay legal fees. *Id.* Thus, *Jerris* does not support the *Epstein* Court's holding that "notwithstanding such justifications, numerous jurisdictions refuse to judicially adopt the continuous representation rule." Further, the District of Columbia adopted the continuous representation rule in 1997. See *R.D.H. Communs. v. Winston*, 700 A.2d 766, 774-75 (D.C. 1997)("Moreover we are adopting the continuous representation rule as an exception to our discovery rule.").

The *Epstein* court then cited *Zupan v. Berman*, 142 Ill. App. 3d 396, 96 Ill. Dec. 889, 491 N.E.2d 1349 (1986), for the proposition that the "statute of limitations for legal malpractice began to run when [an] adverse judgment was entered, not when [the] appellate court modified [the] judgment." In *Zupan*, the malpracticing attorney did not continue to represent the plaintiff-client on appeal. Therefore, even if the *Zupan* Court had addressed the continuous representation rule, the rule would not have been applicable. Further, unlike in South Carolina, there is a statute of repose for legal malpractice claims in Illinois. See Sections 13-214.3(b) and (c) of the Illinois Code of Civil Procedure which provides:

(b) An action for damages based on tort, contract, or otherwise ... against an attorney arising out of an act or omission in the performance of professional services ... must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

(c) ...An action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.

Serafin v. Seith, 284 Ill. App. 3d 577, 583-84, 219 Ill. Dec. 794, 799-800, 672 N.E.2d 302, 307-08 (1996).

Finally, the *Epstein* Court cited *Chambers v. Dillow*, 713 S.W.2d 896, 898 (Tenn. 1986), for the proposition that an injury for malpractice accrues when the court initially dismisses the action. In *Chambers*, the plaintiff did not present a tolling theory based on the malpracticing attorney's continued representation because the facts indicated continuous representation did not occur. Rather, Tennessee Courts focus on the date that "negligence becomes irremediable". See *Cherry v. Williams*, 36 S.W.3d 78, 84 (Tenn. Ct. App. 2000) reasoning:

Not surprisingly then, the rules governing when a person suffers legally cognizable injury from litigation malpractice must take into account that not every misstep leads to a fall. Because negligence without injury is not actionable, the legal malpractice statute of limitations does not begin to run until an attorney's negligence has actually injured the client. See *Security Bank & Trust Co. v. Fabricating, Inc.*, 673 S.W.2d 860, 864 (Tenn. 1983). And there is no injury until there is the loss of a right, remedy, or interest or the imposition of a liability. *John Kohl & Co., P.C. v. Dearborn & Ewing*, 977 S.W.2d at 532. Before that time, any injury is only prospective and uncertain. See *K.J.B. Inc. v. Drakulich*, 107 Nev. 367, 811 P.2d 1305, 1306 (Nev. 1991); 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 21.11, at 791 (4th ed. 1996) ("Mallen & Smith"). There is no legally cognizable injury where there exists only the mere possibility of harm.

Analyzing these cases reveals little support for the *Epstein* court's reasoning that "notwithstanding such justifications, numerous jurisdictions refuse to judicially adopt the continuous representation rule." The *Epstein* Court held: "In accord with these authorities, and in light of the Legislature's declaration that an action 'must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known he had a cause of action,' we decline to adopt the continuous representation rule." *Epstein v. Brown*, 363 S.C. 372, 380, 610 S.E.2d 816, 820 (S.C. 2005). However, the *Epstein* Court's use of these authorities to bolster its rejection of the continuous representation rule is unpersuasive. Further, a review of the precedent from those jurisdictions that have considered whether to adopt the continuous representation rule shows that the majority of jurisdictions now recognize the rule.

VI. The Majority of Jurisdictions Now Hold Public Policy Favors Adoption of the Continuous Representation or Exhaustion of Appeals Rules:

a. The Continuous Representation Rule

The continuous representation rule finds support in numerous jurisdictions, including the **District of Columbia**, *see R.D.H. Communs. v. Winston*, 700 A.2d 766, 775 (D.C. 1997) (“In judicially adopting the continuous representation rule, this court joins many jurisdictions, as related earlier.”); **New York**, *see Greene v. Greene*, 56 N.Y.2d 86, 436 N.E.2d 496, 501, 451 N.Y.S.2d 46 (N.Y. 1982) (“A client who entrusts his assets to an attorney for professional assistance often faces the same dilemma as the client who entrusts his case to an attorney for possible litigation. In neither instance can the client be expected, in the normal course, to oversee or supervise the attorney's handling of the matter, and thus in neither case is it realistic to say that the client's right of action accrued before he terminated the relationship with the attorney.”); **Florida**, *see Wilder v. Meyer*, 779 F. Supp. 164, 169 (S.D. Fla. 1991) (two-year statute of limitations runs from the date the cause of action is discovered or should have been discovered but is tolled by the continuing representation doctrine); **North Dakota**, *see Wall v. Lewis*, 393 N.W.2d 758, 763 (N.D. 1986) (“We believe that the continuous representation rule appropriately protects the integrity of the attorney-client relationship and affords the attorney an opportunity to remedy his error (or to establish that there has been no error), while simultaneously preventing the attorney from defeating the client's cause of action through delay.”); **Massachusetts**, *see Murphy v. Smith*, 411 Mass. 133, 579 N.E.2d 165, 167-68 (Mass. 1991) (cause of action governed by discovery rule but continuous representation rule tolls the statute of limitations until attorney's termination); **West Virginia**, *see Smith v. Stacy*, 198 W. Va. 498, 503, 482 S.E.2d 115,

120 (1996)(“This doctrine tolls the running of the statute in an attorney malpractice action until the professional relationship terminates with respect to the matter underlying the malpractice action. It is...designed, in part, to protect the integrity of the professional relationship by permitting the allegedly negligent attorney to attempt to remedy the effects of the malpractice and providing uninterrupted service to the client.”); **New Mexico**, see *Brunacini v. Kavanagh*, 117 N.M. 122, 869 P.2d 821, 828-29 (N.M. Ct. App. 1993) (“We assume, but do not decide, that the continuous representation rule is applicable in New Mexico. In the present case, however, the rule does not aid Plaintiffs.”); **North Carolina**, see *Sharp v. Teague*, 113 N.C. App. 589, 439 S.E.2d 792 (N.C. Ct. App. 1994) (assumes without deciding that North Carolina recognizes the continuous representation doctrine but the doctrine is inapplicable in the present case where complaint is insufficient to allege that the defendants continued to represent the plaintiff with regard to her claims which are the basis of the malpractice action); **Kentucky**, see *Alagia, Day, Trautwein & Smith v. Broadbent*, 882 S.W.2d 121, 125 (Ky. 1994) (deciding the case on other grounds but noting there “are sound theoretical and practical reasons for adoption of the continuous representation rule” and had this been “the decisive issue, appellees would prevail as their claim was brought within one year of the date appellants’ representation came to an end”); **Kansas**, see *Pittman v. McDowell, Rice & Smith, Chartered*, 12 Kan. App. 2d 603, 613, 752 P.2d 711, 718 (1988)(“Having determined the three-year contract statute of limitations applies and that K.S.A. 60-512(1) was tolled by Bucher’s “continuing representation” until May 31, 1983, we hold the action was timely filed.”); **Louisiana**, see *Carter v. Haygood*, 04-0646 (La. 01/19/05), 892 So. 2d 1261, 1271 (“This suspension principle, labeled the ‘continuous representation rule,’ has been recognized by a host of Louisiana appellate decisions and has been widely recognized in other jurisdictions. See Annot., 32 A.L.R. 4th 260 (1984). ‘The continuous

representation rule appropriately protects the integrity of the attorney-client relationship and affords the attorney an opportunity to remedy his error (or to establish that there has been no error), while simultaneously preventing the attorney from defeating the client's cause of action through delay.’) **Ohio**, see *Omni-Food & Fashion v. Smith*, 38 Ohio St. 3d 385, 387, 528 N.E.2d 941, 943 (1988)(“The policy considerations and logic which led this court to modify the discovery rule and supplement it with the termination rule for medical malpractice actions in *Frysinger*, supra, should and must apply with the same force in legal malpractice actions.”); **South Dakota**, see *Keegan v. First Bank*, 519 N.W.2d 607, 613 (S.D. 1994)(“We apply the continuous representation doctrine to legal malpractice actions when there is a: ‘Clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney. . . .’”); **Virginia**, see *Keller v. Denny*, 232 Va. 512, 518, 352 S.E.2d 327, 330-31 (1987) (“As a general rule, the statute of limitations begins to run against a cause of action at the time of its accrual. But where there is an undertaking which requires a continuation of services, the statute of limitations does not begin to run until the termination of the undertaking. This special rule is applicable to a continuing agreement between attorney and client. Indeed, it is particularly appropriate to an attorney-client agreement in view of the confidence and trust inherent in that relationship.”)(internal citations omitted); **Nebraska**, see *Guinn v. Murray*, 286 Neb. 584, 598, 837 N.W.2d 805, 817 (2013)(“This court has also recognized that the continuous representation rule may toll the statute of limitations in a legal malpractice case. Under this rule, the statute of limitations for a claim of professional negligence is tolled if there is a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.”)(internal citations omitted); **Minnesota**, see *Fletcher v. Zellmer*, 909 F. Supp. 678, 685 (D. Minn. 1995) (limiting the continuous representation to situations of continuous and

repented breaches); **New Jersey**, see *Grunwald v. Bronkesh*, 131 N.J. 483, 498, 621 A.2d 459, 466 (1993) (The continuing course of negligent representation postpones accrual of cause of action until that representation is terminated)(internal citations omitted); **Connecticut**, see *DeLeo v. Nusbaum*, 263 Conn. 588, 597, 821 A.2d 744 (2003) (recognizing the continuous representation doctrine could toll the limitations period of § 52-577 in a legal malpractice claim); and **Washington**, see *Janicki Logging v. Schwabe, Williamson*, 109 Wash. App. 655, 663, 37 P.3d 309, 314-15 (2001)(“Most courts that have considered the continuous representation rule for attorneys have approved or adopted it...Further, while this court is always hesitant to announce new rules, Washington courts have long considered the decision of when to toll the statute of limitations to be a ‘matter of judicial policy.’”)(internal citations omitted).

Two states, California and Michigan, have codified the continuous representation rule. See *Seebacher v. Fitzgerald, Hodgman, Cawthorne & King, P.C.* and *Laird v. Blacker, supra*.

Still others have adopted an exhaustion of appeals rule similar to that of the position advocated by Chief Justice Toal in her dissent in *Epstein*, including Texas, Oklahoma, Florida, Arizona, Nevada, Iowa, and Oregon. See section “VI, b” of this memorandum, *infra*.

A synthesis of cases dealing with the continuous representation and exhaustion of appeals rules reveals that the purpose of both is to benefit both the client and attorney by allowing the attorney to attempt to correct or mitigate damages caused by the attorney's error and allowing the client to refrain from discharging the attorney upon discovery of the error. See *Williams v. Mordkofsky*, 284 U.S. App. D.C. at 57, 901 F.2d at 63 (quoting *Glamm v. Allen*, 57 N.Y.2d 87, 439 N.E.2d 390, 393, 453 N.Y.S.2d 674 (N.Y. 1982) (“The rule's primary purpose is to avoid placing a client in the untenable position of suing his attorney while the latter continues to represent him. For that reason, the rule is limited ‘to situations in which the attorney who

allegedly was responsible for the malpractice continues to represent the client in that case.”). A much cited treatise on legal malpractice reasons:

The premise of the continuous representation rule is to avoid unnecessarily disrupting the attorney-client relationship. Adoption of this rule was a direct reaction to the absurd requirement of the occurrence rule which requires the client to sue his attorney even though the relationship continues and there has not been and may never be any damage. The rule, limited to the context of continuous representation, is consistent with the purpose of the statute of limitations which is to prevent stale claims and enable the defendant to preserve evidence. Where the attorney continues to represent the client in the subject matter in which the error has occurred, all such objectives are achieved and preserved. The attorney-client relationship is maintained and speculative malpractice litigation is avoided.

Mallen and Levit, *Legal Malpractice* § 391, pp. 460-61 (2d ed. 1981).

The *Epstein* Court recognized these “compelling” policy concerns citing *United States National Bank of Oregon v. Davies*, 274 Ore. 663, 548 P.2d 966, 970 (Or. 1976) for the proposition that “it seems anomalous to force a plaintiff to contend in the underlying litigation on appeal that he is entitled to a favorable decision, while in a simultaneous legal malpractice action he is forced to contend his attorney's negligence was why he received an unfavorable judgment at the trial level.” *Epstein v. Brown*, 363 S.C. 372, 378-79, 610 S.E.2d 816, 819 (2005). However, the *Epstein* Court failed to adopt the continuous representation rule claiming it conflicts with the discovery rule. The majority of jurisdictions that have adopted the continuous representation rule also follow the discovery rule and do not find discord between the two rules. See e.g. *Pittman v. McDowell, Rice & Smith, Chartered*, 12 Kan. App. 2d 603, 613, 752 P.2d 711, 718 (1988) quoting Mallen and Levit, *Legal Malpractice* § 391, pp. 460-61 (2d ed. 1981):

The rule of continuous representation is equally available and appropriate in those jurisdictions adopting the damage and discovery rules. The policy reasons are as compelling for permitting an attorney to continue his efforts to remedy a bad result, even if some damages have occurred and even if the client is fully aware of the attorney's error. The doctrine is fair to all parties concerned. The attorney has the opportunity to remedy, avoid or establish that there was no

error or attempt to mitigate the damages. The client is not forced to terminate this relationship, although the option exists. This result is consistent with any expressed policy basis for the statute of limitations."

Further, adopting the continuous representation rule would have prevented a potential problem that is latent in the *Epstein* majority opinion. Under current South Carolina law, negligent attorneys can avoid the consequences of their negligence (and increase the amount of hours billed) by convincing a potential plaintiff-client that the appellate process will rectify an adverse result. In doing so, a negligent attorney can extend the process long enough for the statute of limitations to accrue. However, "the continuous representation rule prevents the attorney from delaying the eventual outcome of the case in order to take advantage of the statute of limitations." *R.D.H. Communs. v. Winston*, 700 A.2d 766, 768-69 (D.C. 1997) citing *Farris v. Compton*, 652 A.2d 49, 55 (D.C. 1994) (quoting *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232, 3 L. Ed. 2d 770, 79 S. Ct. 760 (1959), where "the Court applied the principle, 'deeply rooted in our jurisprudence,' that 'no man may take advantage of his own wrong'").

b. Bright Line Rule – Exhaustion of Appeals

In her dissent in *Epstein*, Chief Justice Toal advocated for 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:

I disagree with the majority's decision holding that the appellants should have known of the existence of a cause of action arising from respondent's alleged malpractice at the conclusion of the trial. 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 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.

Epstein v. Brown, Chief Justice Toal Dissenting, 363 S.C. 372, 384, 610 S.E.2d 816, 822 (S.C. 2005).

Chief Justice Toal's view finds support in many jurisdictions, as the more pressing policy concerns are alleviated by a bright line rule tolling the statute until remittitur.⁴ In *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991) the Texas Supreme Court established a similar tolling rule for the statute of limitations in legal malpractice cases: "[W]hen an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted." *Id.* at 157; see also *Murphy v. Campbell*, 964 S.W.2d 265, 272 (Tex.1997). In *Hughes*, the Texas Supreme Court expressed two policy reasons for tolling the statute of limitations when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation. *Id.* at 156-57. The court first pointed out that the legal injury rule and the discovery rule can force a client into the untenable position of having to adopt inherently inconsistent litigation postures in the underlying case and the malpractice case. *Id.* at 156 (noting that a party might be placed in the position of asserting that her attorney committed malpractice, and but for malpractice her claim would have succeeded, while at same time asserting in the underlying appeal that her attorney's actions were correct, or at least not fatal to her claim). The court then explained that limitations should be tolled for the malpractice claim because the viability of that claim depends on the outcome of the underlying litigation. *Id.* at 157. The Texas

⁴ See e.g. *Amfac Distrib. Corp. v. Miller*, 138 Ariz. 155, 673 P.2d 795 (Ariz. Ct. App.) (limiting the exhaustion of appeals rule to malpractice occurring during the course of litigation and citing, as giving "direct support to our holding," the New York cases applying the continuous representation rule that highlight the client's confidence in the attorney's ability and good faith), approved as supplemented, 673 P.2d 792, 138 Ariz. 152 (Ariz. 1983); *Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 765 P.2d 184 (Nev. 1988) (citing *Amfac*); *Neylan v. Moser*, 400 N.W.2d 538 (Iowa 1987) (same).

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

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

Most important, since it is plain that no claim would even have existed if the temporary results of the attorney's conduct had been reversed on appeal, this decision is in accordance with the salutary concomitant principles that premature, possible useless, litigation should be discouraged and that no cause of action should therefore be deemed to have accrued until the existence of redressable harm has been established.

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

Plaintiff's decedent could have played it safe by filing an action against defendants immediately upon his being sued, in the event it subsequently appeared defendants' negligent advice was the cause of the action brought against him. However, it does not seem wise to encourage the filing of such provisional actions. More important, it could prove to be disastrous to a plaintiff's defense of the action brought against him and, thus, perhaps disastrous to his former legal advisor as well. In the present case, plaintiff's decedent would have been defending one suit or action, claiming he had acted in conformance with the law, while simultaneously maintaining an action against defendants, claiming that he had not acted in conformance with the law because of faulty advice from defendants. Such an inconsistent position would have given rise to impeachment of decedent in his defense of the action brought against him, which certainly is not desirable from either of the present parties' point of view.

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

In *Ranier v. Stuart & Freida, P.C.*, 887 P.2d 339, 342 (1994 OK Civ App 155), the Oklahoma Court of Appeals stated that whether the client continues to be represented by the alleged malpracticing attorney throughout the appeal of the underlying action is "an important factor in considering when the malpractice action accrues." The Court held that the "continuous representation rule has been consistently recognized even in jurisdictions which hold that the statute of limitations is not tolled pending final resolution of the underlying litigation." *Id.* citing *Beesley v. Van Doren*, 873 P.2d 1280 (Alaska 1994) (holding the statute of limitations in a legal malpractice case was not tolled pending final resolution of the litigation of the underlying claim, but acknowledging that this rule might not be applicable when a lawyer continues representation on appeal). Ultimately, the Oklahoma Supreme Court decided the statute of limitations on a legal malpractice claim does not begin to run until the appeal is decided in the underlying case. *Stephens v. GMC*, 1995 OK 114, ¶ 9, 905 P.2d 797, 799 (1995).

VII. Conclusion

In light of the diminished precedential value of *Epstein v. Brown* and the important public policy concerns implicated by the adoption of the continuous representation rule, especially the

impact on the attorney/client relationship, counsel for the Appellant respectfully requests that they be allowed to argue against the *Epstein* majority's rejection of the continuous representation rule and failure to adopt a bright line rule that the statute of limitations does not commence in legal malpractice actions until a remittitur has been issued, "for nothing is settled until it is settled right."

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On this 19 day of November, 2014
Charleston, South Carolina

THE SUPREME COURT OF SOUTH CAROLIA

RECEIVED

APPEAL FROM THE CLARENDON COUNTY
Court of Common Pleas

NOV 20 2014

The Honorable George C. James, Jr.

S.C. Supreme Court

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,

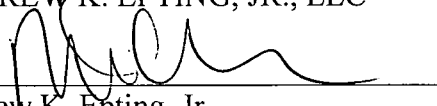
Respondents.

PROOF OF SERVICE

I certify that I have served Respondents with the APPELLANT'S MOTION TO ARGUE AGAINST PRECEDENT & MEMORANDUM IN SUPPORT by delivering a copy via regular U.S. Mail on November 19, 2014, addressed to their attorneys of record as follows:

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