THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Appellate Case No. 2013-001452

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

v.

Scott L. Robinson and Johnson
McKenzie & Robinson, LLC, ... Respondents.

RESPONDENTS' RETURN TO STOKES-CRAVEN'S MOTION TO ARGUE AGAINST PRECEDENT ON NEW AND UNPRESERVED GROUNDS AND MOTION TO RECONSIDER ORDER PERMITTING ARGUMENT AGAINST PRECEDENT

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INTRODUCTION

By motion dated November 19, 2014, Appellant Stokes-Craven Holding Corp. ("Stokes-Craven") moved under Rule 217, SCACR, for permission to argue against precedent at oral argument. On November 20, 2014, the Court granted the motion, before Respondents Scott L. Robinson and Johnson, McKenzie & Robinson, LLC (together, "Trial Counsel") had an opportunity to file a return. Under Rule 240(e), SCACR, Respondents' 10-day timeframe for filing a return has not yet run. Accordingly, Respondents hereby file their return and respectfully request that the Court reconsider its order allowing Stokes-Craven to argue against precedent.

Stokes-Craven, whose legal malpractice claims against Trial Counsel were dismissed as barred by the statute of limitations, seeks leave to argue against this Court's decision in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005), on two grounds. ***First***, Stokes-Craven advances the new argument that this Court should overturn *Epstein* and adopt the so-called "continuous representation" doctrine whereby the statute of limitations on a legal malpractice claim is automatically tolled – **regardless of the claimant's knowledge of the alleged malpractice** – until the lawyer's representation of the client ends. This argument was not made in Stokes-Craven's briefing to this Court and appears for the first time in the instant Motion. ***Second***, Stokes-Craven argues that, contrary to *Epstein*, the Court should adopt a bright-line rule – **again, regardless of the claimant's knowledge of the alleged malpractice** – that a legal malpractice claim does not accrue until the appellate process in the underlying case is fully exhausted and the case is remitted to the trial court.

Stokes-Craven should not be permitted to argue against precedent. As an initial matter, Stokes-Craven's new argument concerning the continuous representation doctrine

is plainly improper because Stokes-Craven did not raise it in its briefing to the Court. The issue is therefore not properly before the Court.

More fundamentally, both of Stokes-Craven's arguments against *Epstein* would require the Court to disregard the discovery rule enacted by the General Assembly and codified at S.C. Code Ann. § 15-3-35. **However, this Court has held time and again that, in light of the legislature's clear adoption of the discovery rule, the Court is not at liberty to ignore it**. Thus, adopting either of Stokes-Craven's argument would not merely overturn *Epstein*, but would overturn decades of precedent recognizing that the Court must apply the discovery rule as enacted by the legislature of our State. There is no need to spend time on such an exercise. The discovery rule is the law of this State, and the only question properly before this Court – and the only question that should be addressed at oral argument – is how the discovery rule applies to this case.

ARGUMENT

I. STOKES-CRAVEN HAS FAILED TO PRESERVE ANY ARGUMENT CONCERNING THE CONTINUOUS REPRESENTATION DOCTRINE

In its prior briefing, Stokes-Craven made no argument whatsoever concerning the adoption of the continuous representation doctrine. Rather, Stokes-Craven's only argument against *Epstein* was for the adoption of a bright-line rule that a legal malpractice claim should not accrue until all appeals of the underlying case are exhausted and the case is remitted to the trial court—often called the "exhaustion of appeals" doctrine. (Appellant's Final Brief pp. 24-27.) As Stokes-Craven itself explained in its Motion to Argue Against Precedent, the continuous representation doctrine and the exhaustion of appeals doctrine are distinct:

> 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**.

(Mot. to Argue Against Precedent p.8, n.2 (emphasis added).) Thus, in now arguing for the continuous representation doctrine, Stokes-Craven is making an entirely new argument that it failed to raise to the trial court or in its briefing to this Court.

It is well-settled that arguments not raised in an appellant's opening brief are deemed abandoned. *See, e.g.*, *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."); *Nienow v. Nienow*, 268 S.C. 161, 173, 232 S.E.2d 504, 510 (1977) ("However, appellant has failed to specifically argue this contention in her brief and is deemed to have abandoned this exception."). Under the Appellate Court Rules, Stokes-Craven could have argued against precedent in any way it deemed appropriate in its briefing. Rule 217, SCACR ("Permission of the appellate court shall not be required to argue against precedent in the brief."). Indeed, Stokes-Craven expressly argued against precedent in its briefing by arguing for adoption of the exhaustion of appeals doctrine, in direct contravention of one of the holdings in *Epstein*. (Appellant's Final Brief, pp. 24-27.) Stokes-Craven, however, made **no** argument concerning adoption of the continuous representation doctrine, and, under this Court's decision, that argument is now abandoned. Stokes-Craven, therefore, should not be permitted at oral argument to advance the continuous representation doctrine.

II. STOKES-CRAVEN'S ARGUMENTS ARE ENTIRELY INCONSISTENT WITH THE STATUTORY DISCOVERY RULE AND THUS DO NOT MERIT CONSIDERATION

In South Carolina, the discovery rule is a creature of statute. S.C. Code Ann. § 15-3-535 ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."). The statute is not a common law rule subject to judicial modification, nor does it arise from an interpretation of ambiguous statutory language. Rather, it is a clear pronouncement from the legislature that the statute of limitations begins to run at the time when the claimant "knew or by the exercise of reasonable diligence should have known" that a cause of action might exist. *Id.*

Stokes-Craven's request to argue for the continuous representation doctrine and the exhaustion of appeals doctrine, though phrased as an innocuous request to argue against a single decision of this Court, is really a request to argue against the statutory discovery rule itself, which, as this Court has held on numerous occasions, is not up for judicial debate or modification. Stokes-Craven's request should therefore be denied, and oral argument should focus on the application of the discovery rule to the case at hand.

A. This Court's Continuous Treatment Decisions Highlight the Preeminence of the Statutory Discovery Rule

Stokes-Craven claims that, in *Epstein*, this Court failed to appreciate the differences between medical and legal malpractice actions, and thus improperly relied on its rejection of the continuous treatment doctrine in the context of medical malpractice in *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003), to support its rejection of the continuous representation doctrine and exhaustion of appeals doctrine in the context of legal malpractice. Specifically, Stokes-Craven claims that this Court's decision to reject the

continuous treatment doctrine was based primarily on the medical malpractice statute of repose, which does not apply to legal malpractice actions. According to Stokes-Craven, because this distinction weakens any analogy between medical malpractice and legal malpractice actions, the Court should have disregarded its continuous treatment jurisprudence in considering the continuous representation doctrine and exhaustion of appeals doctrine in the legal malpractice context.

Stokes-Craven's contention is simply wrong, as this Court's continuous treatment decisions, culminating in *Harrison*, go out of their way to emphasize the importance of the statutory discovery rule, which applies in both medical and legal malpractice actions. The principle at the core of all of the Court's continuous treatment decisions is that any tolling of the statute of limitations based on a professional's continued services to the plaintiff **cannot** except the plaintiff from the obligation to bring suit once he knows or should know that a cause of action might exist. This principle applies equally to medical and legal malpractice – indeed, **it applies to all professional negligence claims**. It was therefore wholly appropriate for the *Epstein* Court to rely on the continuous treatment cases and their emphasis on the importance of the discovery rule to reject the continuous representation doctrine and exhaustion of appeals doctrine.

Generally speaking, the continuous treatment doctrine adopted in some states provides that the statute of limitations on a medical malpractice action does not begin to run until the doctor's treatment of the patient for the medical condition at issue concludes. *Preer v. Mims*, 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 476-77 (1996). This Court first considered the doctrine in the *Preer* and *Anderson* cases in 1996. In both cases, the Court held that, even if it were

to adopt some version of the continuous treatment doctrine, **under no circumstances would the doctrine serve as an exception to the statutory discovery rule**. *Id.* at 520, 476 S.E.2d at 474 ("If we chose to adopt [the continuous treatment doctrine], the formulation of the doctrine would include a discovery exception."); *Anderson*, 323 S.C. at 525, 476 S.E.2d at 476-77 (same).[1] In both cases, the Court did not reach the issue of whether to adopt the continuous treatment doctrine because the respective plaintiffs discovered or should have discovered their causes of action more than three years before filing suit, which barred their claims under the discovery rule, regardless of the continuous treatment doctrine. *Preer*, 323 S.C. at 520,476 S.E.2d at 474; *Anderson*, 323 S.C. at 525; 476 S.E.2d at 476-77. **Accordingly, these cases stand for the proposition that the discovery rule trumps any continuous services doctrine**.

In *Harrison*, the Court reaffirmed that, even if it adopted the continuous treatment rule, the rule would **not** apply if "during treatment the patient learns or should learn of negligence, **in which case the statute runs from the time of discovery, actual or constructive**." 354 S.C. at 135; 580 S.E.2d at 112 (emphasis added). The Court referred to this as the "discovery exception" to the continuous treatment rule and stated that the discovery exception – which is no more than a straightforward application of the statutory discovery rule – "would be part of the [continuous treatment] rule were we inclined to adopt it." *Id.* at 136; 580 S.E.2d at 113. Thus, **for the third time**, the Court held that the

[1] Though the argument is not entirely clear, Stokes-Craven appears to cite *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993) for the proposition that courts may toll statutes of limitations but not repose. But that is not what *Langley* says. Rather, in *Langley*, the Court held that a *statute* tolling the limitations period would not be interpreted to also toll the repose period. 313 S.C. at 403, 438 S.E.2d 243. Nowhere in *Langley* did the court suggest that the judiciary should blithely create exceptions to the limitations rules enacted by the legislature, be they statute of limitations or statute of repose.

discovery rule would trump any doctrine tolling the statute of limitations based on a professional's continued services.

The facts of *Harrison* did not require additional discussion of the discovery rule because the plaintiff was an institutionalized schizophrenic who could not reasonably be expected to discover his doctor's negligence. *Id.* Thus, unlike the plaintiffs in *Preer* and *Anderson*, the discovery rule did not bar the *Harrison* plaintiff's claims. Because the discovery rule was not implicated, the Court went on to consider the continuous treatment doctrine and held that it should not be adopted, primarily because it would create an extra-statutory exception to both the medical malpractice statute of repose codified at S.C. Code Ann. § 15-3-545 and the disability tolling statute codified at S.C. Code Ann. § 15-3-40, which tolls the statute of limitations for a maximum of five (5) years in the event of disability. 354 S.C. at 138, 580 S.E.2d at 114 ("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 the [statute of repose and the disability tolling statute]."). The Court thereby confirmed that it would not be appropriate to "judicially adopt[]" exceptions to the limitations policies enacted by the legislature. *Id.*

In *Epstein*, this Court recognized that the continuous treatment doctrine, the continuous representation doctrine, and the exhaustion of appeals doctrine have a fundamental problem: **they all require disregarding the limitations rules enacted by the General Assembly**. *Epstein*, 363 S.C. 378-80, 610 S.E.2d 816, 819-20 (noting that the continuous treatment doctrine is inconsistent with the medical malpractice statute of repose and the continuous representation doctrine is inconsistent with the discovery rule). Indeed, the *Epstein* Court's rejection of the continuous representation doctrine was based primarily

on the "**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**.'" *Id.* at 380, 610 S.E.2d at 820 (quoting S.C. Code Ann. § 15-3-535) (emphasis added). Likewise, its rejection of the exhaustion of appeals doctrine was based on the Court's longstanding jurisprudence that, **under the discovery rule**, the statute of limitations begins running when a plaintiff should know that a cause of action might exist, not when he "comprehend[s] the full extent of damages," a "'full-blown theory of recovery is developed,'" or "'advice of counsel is sought.'" *Id.* at 382; 610 S.E.2d at 821 (quoting *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)).

In sum, the holding at the core of *Preer*, *Anderson*, *Harrison*, and *Epstein* is that this Court will not create judicial exceptions to the legislature's clear declaration that a malpractice action – medical, legal, or otherwise – "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535. The legislature's pronouncement of the discovery rule is as clear today as it was when those cases were decided, and there is no need to revisit it.

B. Stokes-Craven Cannot Square the Continuous Representation Doctrine with South Carolina Law

In its Motion, Stokes-Craven argues that the continuous representation doctrine is consistent with South Carolina law, even though it violates the discovery rule, for four reasons. ***First***, Stokes-Craven argues that the continuous representation doctrine is akin to equitable tolling and equitable estoppel, even though this Court has held those doctrines should be "used sparingly." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108,

117, 687 S.E.2d 29, 33 (2009). ***Second***, Stokes-Craven argues that the continuous representation doctrine is consistent with the policies of statutes of limitation as expressed by the Court in *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000), which is puzzling given that the *Moriarty* Court did not make an exception to the discovery rule. ***Third***, Stokes-Craven claims that the continuous representation doctrine permits clients to rely on their attorney, even though any abuse of the attorney-client relationship is already covered by equitable estoppel and tolling. ***Fourth***, Stokes-Craven argues that the continuous representation rule merely defines the time of "accrual," which, according to Stokes-Craven, is a proper judicial function, relying on cases from jurisdictions that lack a statutory discovery rule. All of these arguments fail.

Equitable Estoppel and Tolling. This Court has recognized two situations in which the statute of limitations may tolled on equitable grounds, both of which are rooted in this Court's longstanding equity jurisprudence. The first is equitable tolling, which "typically applies in cases where a litigant was prevented from filing suit because of an **extraordinary event beyond his or her control**." *Hooper*, 386 S.C. at 116, 687 S.E.2d at 32 (internal citations and quotation marks omitted) (emphasis added). In *Hooper*, the statute of limitations was tolled because of the extraordinary circumstance that the defendant could not be located, despite the plaintiff's reasonable diligence and because of the defendant's own failure to provide accurate information to the Secretary of State, within the limitations period. *Id.* at 118, 687 S.E.2d at 34.

This Court has held that equitable tolling should be "sparingly used" and reserved for cases in which truly extraordinary circumstances preclude a timely filing. *Id.* at 117, 687 S.E.2d at 33. In practice, this Court and the Court of Appeals have only applied

equitable tolling when a circumstance actually prevented a timely filing. *See, e.g., id.* (plaintiff could not use within limitations period because defendant's erroneous filings precluded locating defendant for service of process); *Magnolia N. Prop. Owners' Ass'n v. Heritage Communities, Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012) (plaintiff property owners' association could not sue during limitation period because defendant developer controlled the board throughout that period and refused to sue itself).

Similarly, this Court has held that a defendant may be equitably estopped from asserting the statute of limitations when the failure to timely file was induced by the defendant's wrongful conduct. *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997). Again, however, this doctrine is rarely used and requires some active attempt by the defendant to mislead the plaintiff so that the plaintiff will not file suit on time. *See Gadsden v. S. Railroad*, 262 S.C. 590, 592, 206 S.E.2d 882, 882 (1974). In this case, there is no evidence of any act by Trial Counsel to prevent Stokes-Craven from filing suit within three years of the adverse verdict.

These limited doctrines – well rooted in equity – are a far cry from the bright line continuous representation doctrine advance by Stokes-Craven. For one thing, unlike the basic principles of equity, the continuous representation doctrine has no longstanding basis in the law of this state, as evidenced by the fact that it was first considered by an appellate court in 2005. For another thing, both equitable tolling and equitable estoppel are doctrines applied on a case-by-case basis to determine the specific equities of the case before the court and whether an extraordinary remedy is warranted. The continuous representation doctrine, on the other hand, is a bright-line rule that would automatically toll the statute of limitations in every legal malpractice case, regardless of the equities of the situation and

regardless of whether exceptional circumstances justify relief from the discovery rule. The continuous representation doctrine is therefore different in kind from traditional equitable doctrines like tolling and estoppel, and the recognition of those traditional equitable doctrines in no way supports the adoption of the continuous representation doctrine. To the contrary, adopting the continuous representation doctrine would violate this Court's own pronouncements that equitable relief from the discovery rule is to be "used sparingly." *Hooper*, 386 S.C. at 117, 687 S.E.2d at 33.

Moriarty. Stokes-Craven claims that the continuous representation doctrine is consistent with the purposes of statute of limitations as expressed by this Court in *Moriarty*: "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." 341 S.C. at 340, 534 S.E.2d at 682. In this quotation, however, **the Court was expressing the policy considerations that undergird the discovery rule itself, not justifying an exception to the discovery rule**. Indeed, the sentence before the quotation reads: "In sum, **the discovery rule exists** to avoid the harsh and unjust result of closing the courtroom doors to a plaintiff whose 'blameless ignorance' resulted in a failure to pursue a cause of action within the limitations period." *Id.* (emphases added). In *Moriarty*, the Court applied the discovery rule to hold that a victim of sexual abuse with a repressed memory does not discover the abuse until he or she remembers it. *Id.* This was a straightforward application of the discovery rule, and *Moriarty* represents yet another instance in which the Court reaffirmed that the discovery rule is the law of the State and needs no additions or exceptions.

Attorney Reliance. Stokes-Craven argues that the continuous representation doctrine is needed to ensure that clients are entitled to rely on their attorneys and need not second guess them. But the discovery rule, combined with equitable estoppel and tolling, already account for these concerns. As this Court held in *True v. Monteith*, 327 S.C. 116, 118, 489 S.E.2d 615, 617 (1997), clients **are** entitled to rely on their attorneys, and the discovery rule does not require them to second-guess their attorney's loyalty or competence every time the attorney provides "counsel the client dislikes." *Id.* All the discovery rule requires is that the client bring a cause of action within three years of objectively being on notice that a cause of action might exist. S.C. Code Ann. § 15-3-535. Moreover, equitable estoppel and tolling operate to toll the statute of limitations when an attorney engages in misconduct by misleading the client and preventing the filing of a malpractice suit. These doctrines already strike the appropriate balance between requiring diligence on the part of the injured party while disallowing an attorney from profiting from their own misconduct. It is the continuous representation rule that would eviscerate this balance by requiring no diligence on the part of the client, allowing the statute to be tolled by the lawyer's continued representation, **even if the client knows the representation is negligent**. Nothing in South Carolina law justifies such a result.

Accrual. Stokes-Craven argues that the Court may adopt the continuous representation rule as part of its function in defining the word "accrual." But the South Carolina statute of limitations, unlike the statutes in other states cited by Stokes-Craven, **does not** contain the word "accrual," so this argument misses the mark. Indeed, Stokes-Craven relies primarily on a case from the District of Columbia, where the discovery rule is **not** a creature of statute, but a judge-made rule created by the D.C. Court of Appeals.

To the contrary, the D.C. Court of Appeals expressly stated that, in adopting the continuous representation rule, it was adopting a judicial exception to the **judicial** discovery rule:

> 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.

R.D.H. Commns. v. Winston, 700 A.2d 766, 775 (D.C. 1997) (emphasis added). In South Carolina, however, we have a **statutory** discovery rule, and no statute calling for a judicial interpretation of the word "accrual." Accordingly, the accrual cases cited by Stokes-Craven are wholly inapposite and do not militate in favor of altering this Court's longstanding position that the Court should not create judicial doctrines inconsistent with the discovery rule enacted by the legislature.

In sum, try as it might, Stokes-Craven simply cannot square the continuous representation doctrine with South Carolina law. To the contrary, it is clear that the doctrine is a **direct violation of the discovery rule enacted by our legislature**. Accordingly, there is no reason to consider the continuous representation doctrine at oral argument.

C. Jurisdictions that Have Adopted the Continuous Representation Doctrine Generally Do Not Have a Statutory Discovery Rule and/or Include a Discovery Exception

Stokes-Craven next argues that the continuous representation doctrine should be adopted because a number of other jurisdictions have adopted it. As an initial matter, there is nothing in Stokes-Craven's Motion that this Court was not aware of when it decided *Epstein* in 2005. Indeed, **every single jurisdiction cited by Stokes-Craven adopted the**

continuous representation doctrine *before* 2005.[2] Yet, in *Epstein*, not a single justice of this Court supported adoption of the doctrine. 363 S.C. at 380, 610 S.E. 2d at 820 (majority opinion rejecting continuous representation doctrine); 363 S.C. at 383, 610 S.E.2d 822 (Toal, C.J., dissenting) (not supporting continuous representation doctrine); 363 S.C. at 384, 610 S.E.2d at 822 (Pleicones, J., dissenting) ("I concur in the majority's rejection of the continuous-representation rule and in its retention of the discovery rule."). Nothing in the law of South Carolina or any other jurisdiction has changed that would warrant reconsideration of a doctrine that was squarely considered and roundly rejected fewer than 10 years ago.

More fundamentally, all of the jurisdictions cited by Stokes-Craven bear substantial differences from South Carolina that render their adoption of the continuous representation doctrine unpersuasive. Initially, as set forth more fully below, it is worth noting that several of the jurisdictions cited by Stokes-Craven have **not** adopted the continuous representation doctrine. In addition, many of the jurisdictions cited by Stokes-Craven have no statutory discovery rule (indeed, many do not follow the discovery rule at all), and thus no cognate pronouncement from their respective legislatures as to when the statute of limitations begins to run. These jurisdictions' analyses of the issues are therefore unhelpful and unpersuasive. Other jurisdictions have adopted a "discovery exception" to the continuous

[2] All of cases cited by Stokes-Craven for the proposition that other jurisdictions have adopted the continuous representation doctrine pre-date 2005, except for one. (Motion pp. 12-17.) Stokes-Craven cites a 2013 case from Nebraska, but Nebraska has followed the doctrine since at least 1994. *See Lindsay Mfg. Co. v. Universal Sur. Co.*, 519 N.W.2d 530, 539 (Neb. 1994) (applying continuous representation doctrine). Notably, however, Nebraska courts hold that the continuous representation doctrine does not serve as an exception to the discovery rule and does not apply when the claimant discovered or should have discovered the alleged malpractice during the representation. *Id.*

representation doctrine, whereby the discovery rule trumps the continuous representation doctrine. As the following summary demonstrates (presented in the order set forth in Stokes-Craven's motion), none of the jurisdictions cited by Stokes-Craven provide persuasive authority for adopting the continuous representation doctrine in South Carolina:

- **District of Columbia**. The District of Columbia does not have a statutory discovery rule. *R.D.H. Commns.*, 700 A.2d at 775 (explaining that the discovery rule is a judicially created doctrine in the District of Columbia, not a create of statute).

- **New York**. New York follows the occurrence rule, not the discovery rule. Thus, the statute of limitations on a legal malpractice action begins to run when the malpractice occurs, not when it could reasonably be discovered, and the continuous representation doctrine is utilized to avoid the harsh results of the occurrence rule. *See Shumsky v. Eisenstein*, 750 N.E.2d 67, 69 (N.Y. 1993) (discussing occurrence rule and application of the continuous representation doctrine). In South Carolina, our legislature elected to avoid the harsh results of the occurrence rule by adopting the discovery rule.

- **Florida**. Contrary to the authority cited in Stokes-Craven's Motion (a federal district court decision from 1991), the Florida Supreme Court has expressly rejected the continuous representation doctrine as inconsistent with Florida's statutory discovery rule. *Larson & Larson, P.A. v. TSE Indus.*, 22 So.3d 36, 46 (Fla. 2009) ("[I]n the absence of a specific statutory authorization for doing so, we are precluded [by the statutory discovery rule] from tolling the statute of limitations based on the continuous representation doctrine.").

- **North Dakota**. North Dakota does not have a statutory discovery rule. *See* N.D. Cent. Code Ann. § 28-01-18(3); *Hubbard v. Libi*, 229 N.W.2d 82, 83 (N.D. 1975) ("The time of accrual having been left to judicial decision, this court adopted the discovery rule.").

- **Massachusetts**. Massachusetts does not have a statutory discovery rule. *Poieglo v. Monsanto Co.*, 521 N.E.2d 728, 731 (Mass. 1988) ("[T]he discovery rule is a judicial creation.").

- **West Virginia**. West Virginia does not have a statutory discovery rule. Rather, it applies the discovery rule to certain cause of actions as a judicial exception to the general rule that the statute of limitations begins to run upon occurrence of the tort. *See, e.g., Jones v. Trustees of Bethany Coll.*, 351 S.E.2d 183, 187 (W. Va. 1986) (explaining limited use of discovery rule).

- **New Mexico**. Contrary to the citation in Stokes-Craven's Motion (an intermediate appellate decision from 1993), the New Mexico Supreme Court has expressly stated it is "not inclined" to adopt the continuous representation doctrine, and that doctrine has never been applied by an appellate court in New Mexico to salvage an otherwise time-barred claim. *Sharts v. Nelson*, 885 P.2d 642, 647 (N.M. 1994).

- **North Carolina**. North Carolina has not adopted the continuous representation doctrine, and the North Carolina Court of Appeals has held that the discovery rule would take precedence over the doctrine in any event. *Teague v. Isenhower*, 579 S.E.2d 600, 604 n.2 (N.C. Ct. App. 2003) (holding that continuous representation doctrine could not salvage plaintiff's claim because claim was barred by the discovery rule).

- **Kentucky**. Kentucky has not adopted the continuous representation rule and has a one-year statute of limitations with occurrence and discovery-rule components that causes substantially harsher results than our legislature's three-year discovery rule. *See Alagia, Day, Trautwein & Smith v. Broadbent*, 882 S.W.2d 121, 126 (Ky. 1994) (holding that continuous representation doctrine does not apply); Ken. Rev. Stat. § 413.245 (setting forth one-year statute of limitations).

- **Kansas**. Kansas employs a complex accrual scheme under which it may apply any of four accrual theories – occurrence, damage, discovery, or a version of continuous representation – to a legal malpractice claim, depending on the facts of the case and depending on which theory best approximates the "point in time at which the plaintiff could first have filed and prosecuted his action to a successful conclusion." *Pancake House, Inc. v. Redmond*, 716 P.2d 575, 579 (Kan. 1986). In South Carolina, our legislature has adopted a far simpler scheme by which most tort actions accrue when they were or should have been discovered.

- **Louisiana**. Contrary to the citations in Stokes-Craven's Motion, the Louisiana Supreme Court recently held that the continuous representation doctrine does **not** supersede the state's statutory discovery rule. *Jenkins v. Starns*, 85 So.3d 612, 628 (La. 2012) (holding that statutory discovery rule was not tolled by lawyer's continued representation of plaintiff).

- **Ohio**. Ohio does not have a statutory discovery rule. *Skidmore & Hall v. Rottman*, 450 N.E.2d 684, 685 (Ohio 1983) (judicially adopting discovery rule in legal malpractice actions); Ohio Rev. Code § 2305.11(A) (one-year statute of limitations that does not define "accrual" of claim).

- **South Dakota**. South Dakota follows the occurrence rule, not the discovery rule, in legal malpractice actions. *Greene v. Morgan, Theeler, Cogley & Petersen*, 575 N.W.2d 457, 459 (S.D. 1998) ("We have often stated that, absent fraudulent concealment of an attorney's negligent advice, the statute

of limitations begins to run from the "occurrence" of the alleged negligence, and not from when the negligence is discovered or the consequential damages are imposed.") Its law with respect to the continuous representation doctrine is therefore inapposite.

- **Virginia**. Virginia follows the occurrence rule, not the discovery rule, in legal malpractice actions. *Shipman v. Kruck*, 593 S.E.2d 319, 324 (Va. 2004) ("Code § 8.01-230 dictates the right of action [for legal malpractice] shall accrue at the time of the breach."). Its law with respect to the continuous representation doctrine is therefore inapposite.

- **Nebraska**. In Nebraska, the discovery rule supersedes the continuous representation doctrine. *Lindsay Mfg. Co.*, 519 N.W.2d at 538-39 (holding that continuous representation rule is inapplicable when malpractice was or should have been discovered during the representation).

- **Minnesota**. Minnesota does not follow the discovery rule. *Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 644 (Minn. 1999) ("We have declined to adopt the discovery rule in the past and neither Herrmann and AHC's argument nor the court of appeals decision provide any justification for doing so now.") Moreover, it has never adopted the continuous representation doctrine and is unlikely to do so. *Carlson v. Houk*, 2014 Minn. App. Unpub. LEXIS 1171, at 4-8 (Minn. Ct. App. 2014) (discussing numerous demerits of the continuous representation doctrine).

- **New Jersey**. New Jersey does not have a statutory discovery rule, nor has it adopted the continuous representation doctrine. To the contrary, in *Grunwald v. Bronkesh*, 621 A.2d 459 (N.J. 1993), the case cited by Stokes-Craven, the New Jersey Supreme Court judicially adopted the discovery rule in legal malpractice actions and did not adopt a bright-line continuous representation doctrine, holding instead that the point in time when a client should discover a legal malpractice claim requires a case-by-case analysis of the facts. *Id.* at 493, 498.

- **Connecticut**. Connecticut follows the occurrence rule, not the discovery rule, in legal malpractice actions, and has noted that the primary purpose of the continuous representation doctrine is to alleviate "the harsh consequences of the occurrence rule." *DeLeo v. Nusbaum*, 821 A.2d 744, 752 (Conn. 2003); Conn. Gen. Stat. § 52-577 (setting forth occurrence rule). Connecticut's application of the continuous representation doctrine is therefore inapposite.

- **Washington**. Washington does not have a statutory discovery rule. *Peters v. Simmons*, 552 P.2d 1053, 1056 (Wash. 1976) ("[W]hether or not to extend the discovery rule is a matter of judicial policy."); Rev. Code Wash. § 4.16.080(3) (statute of limitations, which does not contain a discovery rule).

- **California and Michigan**. Stokes-Craven notes that California and Michigan apply statutory continuous representation doctrines. Plainly, our General Assembly could enact a similar statute if it so chose. Until and unless that occurs, our statutory discovery rule must be followed.

In sum, there are vast differences between the limitations laws of those jurisdictions that have adopted some form of the continuous representation doctrine and South Carolina, most notably that those states generally have shorter statutes of limitation, do not have a statutory discovery rule, and often follow the much harsher occurrence rule, under which the statute of limitations begins to run upon the breach of duty, not the reasonable discovery of that breach, or have much more complex accrual rules. In South Carolina, by contrast, we have a generous three-year statute of limitations, and our legislature has adopted the discovery rule as the sole determinant of the accrual of a cause of action. As such, there is no reason to consider the adoption of a tolling doctrine that is found nowhere in our law and is contrary to the discovery rule adopted by our legislature.

D. A Clear Majority of Jurisdictions Reject the Exhaustion of Appeals Doctrine

Stokes-Craven identifies a small number of jurisdictions that follow a bright-line rule holding that a legal malpractice action does not accrue until all appeals of the underlying case are exhausted. As an initial matter, Stokes-Craven overstates the adoption of this approach, citing a case from Oklahoma in which the court specifically held that the statute of limitations would **not** be tolled during an appeal of the underlying matter if the client is damaged by the verdict itself. *Ranier v. Stuart & Frieda, P.C.*, 887 P.2d 339, 343 (Okla. Ct. App. 1994) ("If it appears that the client knew of the harm before the case is finally determined on appeal, the statute of limitations begins to run from the time the underlying injury occurs or upon the client's awareness of the alleged negligence.").

The few jurisdiction that follow the exhaustion of appeals approach universally base it on the erroneous assumption that a client suffers no cognizable damages until the appellate process is concluded. *See, e.g.*, *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991) (stating that the "viability" of the malpractice claim depends on the outcome of the underlying appeal); *Amfac Dist. Corp. v. Miller*, 673 P.2d 795, 796 (Ariz. Ct. App. 1983 ("Where there has been no final adjudication of the client's case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote."); *Semenza v. Nev. Med. Liab. Ins. Co.*, 764 P.2d 184, 186 (Nev. 1988) (same).

This assumption is incorrect, both as a general matter and in this case. Indeed, **Stokes-Craven claims that the adverse verdict damaged its reputation immediately**. (Craven Dep., R. pp. 507-20, 538, 544.) As an adjunct, Stokes-Craven expressly claims as an item of damages the fees paid to appellate counsel because Stokes-Craven's position is that Trial Counsel should have avoided a situation in which Stokes-Craven had to appeal. (Stokes-Craven's Answers to Scott Robinson's First Set of Interrogatories, R. p. 1047.) Plainly, even if the verdict had been overturned on appeal, Stokes-Craven could not have avoided the damage of having to pay for an appeal in the first place, nor could any appellate result have cured the reputational harm that Stokes-Craven purportedly suffered in the temporal window between the verdict and the appellate decision. In short, according to Stokes-Craven's own evidence, **it suffered damages because of the purported legal malpractice the minute the verdict was handed down, regardless of the result on appeal**.

Thus, it is no surprise that the clear majority of jurisdictions decline to follow the exhaustion of appeals approach. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Winslow*, 382 S.E.2d

872, 874 (N.C. Ct. App. 1989) (expressly rejecting the "exhaustion of appeals" approach); *Fritzeen v. Gravel*, 830 A.2d 49, 54 (Vt. 2003) (same); *Knight v. Furlow*, 553 A.2d 1232, 1234-35 (D.C. 1989) (same); *Beesley v. Van Doren*, 873 P.2d 1280, 1282 (Alaska 1994)(same); *Ragar v. Brown*, 964 S.W.2d 372, 375-76 (Ark. 1998) (same); *Laird v. Blacker*, 828 P.2d 691, 696 (Cal. 1992) (same); *Belden v. Emmerman*, 560 N.E.2d 1180, 1183 (Ill. Ct. App. 1990) (same); *Hayden v. Green*, 429 N.W.2d 604, 604 (Mich. 1988) (same); *Suzuki v. Holthaus*, 375 N.W.2d 126, 129 (Neb. 1985) (same); *Rosenfield v. I. David Marder & Assocs., LLC*, 956 A.2d 581, 589 (Conn. Ct. App. 2008) (same); *VanSickle v. Kohout*, 599 S.E.2d 856, 860 (W. Va. 2004) (same); *Morrison v. Goff*, 91 P.3d 1050, 1058 (Colo. 2004) (same); *Fairway Dev. Co. v. Petersen, Moss, Olsen, Meacham & Carr*, 865 P.2d 957, 960 (Idaho 1993) (same); *Grunwald*, 621 A.2d at 465 (N.J. 1993) (same); *Cantu v. St. Paul Cos.*, 514 N.E.2d 666, 668-69 (Mass. 1987) (same); *Michael v. Beasley*, 583 So.2d 245, 252 (Ala. 1991) (same), *overruled on other grounds by Ex parte Panell*, 756 So.2d 862 (Ala. 1999); *Riemers v. Omdahl*, 687 N.W.2d 445, 450-51 (N.D. 2004) (same); *Zimmie v. Calfee, Halter & Griswold*, 538 N.E.2d 398, 402 (Ohio 1989) (same); *Brunacini v. Kavanagh*, 869 P.2d 821, 828 (N.M. Ct. App. 1993) (same); *Robbins & Seventko Orthopedic Surgeons, Inc. v. Geisenberger*, 674 A.2d 244, 248 (Pa. Super. Ct. 1996)); *Chambers v. Dillow*, 713 S.W.2d 896, 898-99 (Tenn. 1986) (legal malpractice claim accrued despite pendency of post-judgment motion in underlying case).

More fundamentally, however, the exhaustion of appeals approach ignores the statutory discovery rule, because it tolls the statute of limitations, **even if the plaintiff has suffered damages and knows that he may have a cause of action against his lawyer**. In South Carolina, it has long been held that plaintiff need not "comprehend the full extent

of damages" for a cause of action to accrue. *Dean v. Ruscon Corp.*, 321 S.C. 360, 364; 468 S.E.2d 645, 647 (1996); *accord Epstein*, 363 S.C. at 382, 610 S.E.2d at 821; *Peterson v. Richland County*, 335 S.C. 135, 139, 515 S.E.2d 553, 555 (Ct. App. 1999); *Doe v. Crooks*, 364 S.C. 349, 352, 613 S.E.2d 536, 538 (2005). The case law from a few outlier jurisdiction provides no basis for overturning this well-settled principle, and there is no reason to spend time on such an argument.

E. Dispensing with the Discovery Rule Will Unnecessarily Harm Small Firm Professionals and Permit Plaintiffs to Sleep on Their Rights

At its core, Stokes-Craven's Motion asks permission to argue for bright-line departures from the discovery rule on the grounds that doing so will better protect clients from professional negligence. In so arguing, Stokes-Craven fails to appreciate that "statutes of limitations are not simply technicalities"; rather, they "ensure [that] litigation is brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 428, 699 S.E.2d 687, 690 (2010) (internal citations and quotation marks omitted). Statutes of limitations are "fundamental to a well-ordered judicial system," because they "relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights" and "protect potential defendants from protracted fear of litigation." *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009) (internal citations, quotation marks, and brackets omitted).

Under either the continuous representation or exhaustion of appeals approach, a statute of limitations could be tolled for years, **despite the client's knowledge of the alleged malpractice**, after which the plaintiff would have **three more years** to bring the cause of action. In practical terms, there could easily be *more than a decade between the*

purported professional negligence and the expiration of the statute of limitations. Such a result would place an immense burden on all professionals, and particularly small practitioners who could spend years dealing with the administrative burden of responding to a stale claim, having trouble obtaining malpractice insurance, and not getting on with their professional lives—all because a plaintiff was permitted to wait years and years **after** discovering the alleged malpractice to bring a claim. This is the antithesis of a well-ordered and efficient judicial system. Indeed, as the Supreme Court of New Jersey put it:

> A system that would permit a plaintiff to commence a malpractice claim fifteen years after an attorney renders allegedly negligent advice is simply unacceptable . . . . Such a potential outcome would frustrate the purposes of limitations periods: to protect against the litigation of stale claims; to stimulate litigants to prosecute their claims diligently; and to penalize dilatoriness.

Grunwald, 621 A.2d at 469. Adopting either of the doctrines put forward by Stokes-Craven would risk placing a small practitioner in a never-ending cycle of litigation concerning stale claims for which little if any competent evidence remains, all for the benefit of a claimant who slept on his rights.

The discovery rule provides more than ample protection for individuals harmed by professional negligence. They have three years from the time when a reasonable person should have discovered that a claim may exist. As applied to this case, Stokes-Craven had three years from the time it received a verdict that, according to its own statements, was well outside the realm of anything for which its attorneys had prepared it. Plainly, with any diligence at all, this claim could have been brought on time, before it grew stale and before the purported damages were exponentially increased by the application of post-judgment interest. In accordance with the discovery rule set forth by our legislature, it is entirely reasonable to expect plaintiffs to bring claims within three years of reasonable

discovery. Any bright-line delay based on continued representation or the exhaustion of the appellate process would place an unreasonable and potentially catastrophic burden on South Carolina professionals to respond to – and attempt to insure against – stale claims that could be asserted more than a decade after the fact.

CONCLUSION

For the foregoing reasons and any others in the record, Respondents respectfully request that the Court's reconsider its order of November 20, 2014, and deny Stokes-Craven's attempt to argue against precedent.

Respectfully submitted,

November 25, 2014

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Appellate Case No. 2013-001452

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

v.

Scott L. Robinson and Johnson
McKenzie & Robinson, LLC,.....Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on November 25, 2014, the foregoing **RESPONDENTS' RETURN TO STOKES-CRAVEN'S MOTION TO ARGUE AGAINST PRECEDENT ON NEW AND UNPRESERVED GROUNDS AND MOTION TO RECONSIDER ORDER PERMITTING ARGUMENT AGAINST PRECEDENT** was served on all counsel of record via U.S. Mail, addressed as follows:

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November 25, 2014

Via U.S. Mail

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: *Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford vs. Scott L. Robinson and Johnson McKenzie & Robinson, LLC*
Appellate Case No.: 2013-001452

Dear Mr. Shearouse:

Enclosed for filing, please find the original and seven (7) copies of Respondents' Return to Stokes-Craven's Motion to Argue Against Precedent and Motion to Reconsider Order Permitting Argument Against Precedent. I have also enclosed my office check in the amount of $25.00 for the motion filing fee as well as the original and one copy of the Proof of Service.

Please file these documents and return a stamp-filed copy to us in the enclosed self-addressed stamped envelope. By copy of this letter, I am serving all counsel of record with a copy of the same.

If you have any questions, please do not hesitate to call me. With highest professional regards, I am

Very truly yours,

McNAIR LAW FIRM, P.A.

Susan Taylor Wall

STW:jh
Enclosures

cc: Andrew K. Epting, Jr., Esq. (*w/ Enclosures, via U.S. Mail*)
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The Supreme Court of South Carolina

McNair Law Firm 12/01/2014

RECEIPT #74318

Case No:	2013-001452
Case Short Title:	Stokes-Craven Holding Corp. v. Scott L. Robinson
Event:	
Fee Type:	Motion Fee
Amount:	$25.00
Payment Type:	Check
Reference No:	37838
Check/Money Order Date:	11/25/2014
Comments:	