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

Opinion No. 27572
Heard December 10, 2014 – Filed September 9, 2015

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

v.

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

RESPONDENTS' PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Respondents Scott L. Robinson and Johnson McKenzie & Robinson LLC petition the Court for rehearing concerning Opinion No. 27572, filed on September 9, 2015.

INTRODUCTION

Respondents request that the Court rehear this matter because the Court overlooked or misapprehended the following issues:

- ***First***, in violation of the statutory discovery rule, the Court's opinion creates a subjective standard for applying the statute of limitations in legal malpractice actions. Because the statute unambiguously mandates an objective standard, the Court's opinion impermissibly modifies a legislative enactment.

- ***Second***, the Court bases its new subjective standard on an intermediate appellate decision from Oklahoma that is not controlling law even in that state, and on a misreading of a Kansas Supreme Court decision that actually sets forth an objective standard. Indeed, Respondents have been unable to find a single state with a statutory discovery rule that commences the statute of limitations for a negligence claim upon the plaintiff's subjective knowledge or understanding. This is not surprising because a subjective standard incentivizes false testimony, promotes disorder, and rewards ignorance.

- ***Third***, because the statutory discovery rule applies to a wide variety of tort claims and is not specific to legal malpractice claims, the statute does not permit the Court to create a special standard that applies only to legal malpractice claims. Rather than bringing clarity, this opinion will touch off years of appellate litigation concerning the expansion of the Court's new subjective standard to other types of tort claims.

- ***Fourth***, in the case on appeal, Craven admitted that he was harmed shortly after receiving the jury verdict; therefore, summary judgment was appropriate under a subjective ***or*** objective standard, and the decision below should be summarily affirmed without further exposition of the standard.

In light of these issues, Respondents respectfully urge that the Court withdraw its opinion, rehear the case, and affirm the lower court's grant of summary judgment in favor of Respondents.

THE COURT'S OPINION

This is a legal malpractice case arising out of a jury verdict entered against Petitioners because of their fraud and forgery in selling an automobile to a customer. Petitioners brought this action against their trial counsel four years after the adverse verdict was returned. Though Petitioners do not dispute the underlying fraud and forgery, they contend that trial counsel should have better prepared the case for trial.

Applying the statutory discovery rule and settled principles of South Carolina law, the lower court granted summary judgment in Respondents' favor on statute of limitations grounds because the record amply demonstrated that Petitioner knew or should have known that he might have a cause of action against his trial counsel when or very shortly after the verdict was entered. While the most recent case supporting the lower court's decision was *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005), in which the Court held that the statutory discovery rule applies in a straightforward fashion to legal malpractice claims brought against trial counsel for alleged errors and omissions at trial, the lower court's decision in this case was ultimately rooted in both the text of the statutory discovery rule and this Court's longstanding plain-language interpretation of that text.

On appeal, this Court overruled *Epstein* by name and cast doubt on decades of cases applying the statutory discovery rule. The *Epstein* Court had rejected two proposed exceptions to the statutory discovery rule: (1) the continuous representation doctrine, by which the statute of limitations is tolled as long as the allegedly negligent counsel continues to represent the would-be plaintiff, and (2) the exhaustion of appeals rule, by which the statute of limitations is tolled until the underlying matter is finally resolved on appeal. In declining to adopt either exception, the *Epstein* Court held that no special rules were appropriate for this category of legal malpractice claim, and that the proper approach was

the one mandated by the plain text of the statute—that is, negligence claims "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 (emphasis added).

In this case, the Court overruled *Epstein* but did not adopt the continuous representation doctrine or the exhaustion of appeals rule. Instead, the Court adopted a special rule set forth in a 1994 intermediate appellate court decision in Oklahoma that appears designed to apply only to legal malpractice cases brought against trial counsel following an adverse trial court judgment. Under this special rule, the statute of limitations does not begin to run until all appeals of the underlying judgment are exhausted ***unless the client had actual knowledge of the harm before all appeals were decided***, in which case the statute begins to run upon the client's ***actual knowledge***.

The only apparent difference between *Epstein* and the special rule created here is the shift from the objective standard (knew ***or reasonably should have known*** as set forth in the statutory text and confirmed in *Epstein*) to the subjective standard (***actually knew*** as set forth in the Court's opinion in this case).

Respectfully, Respondents suggest that this shift is impermissible and ill-advised. First and foremost, it conflicts with the statutory text, which unambiguously mandates an objective standard. What is more, the Court's new subjective standard is based on an Oklahoma intermediate appellate decision that is *not* controlling law, ***even in Oklahoma***. In addition, because the statutory discovery rule of § 15-3-535 applies to most common law torts, there is no basis in the statutory text for a special rule applicable only to a small category of legal malpractice actions. Indeed, if the Court's opinion stands, years of

appellate litigation will ensue concerning the extension of the new subjective standard to myriad other claims governed by § 15-3-535. Finally, because Appellant's admissions in this case plainly establish his actual knowledge of the harm when or shortly after the jury verdict was rendered, there is no reason in this case to confirm or reject *Epstein*, as the statute ran either way before this case was filed.

For all of these reasons, Respondents request that the Court withdraw its opinion, rehear this case, and affirm the decision below.

ARGUMENT

A. The Court's Opinion Impermissible Modifies the Statutory Discovery Rule

As the Court's opinion acknowledges, the statute of limitations in this case is subject to a statutory discovery rule codified at S.C. Code Ann. § 15-3-535. Under the statutory discovery rule, the statute of limitations begins to run when the plaintiff "kn[ows] or by the exercise of reasonable diligence should . . . know[]" that a cause of action may exist. S.C. Code Ann. § 15-3-535. By referencing what a person ***should know through the exercise of reasonable diligence***, the General Assembly created an objective standard for commencing the statute of limitations that focuses on the understanding of a reasonably diligent person, not the subjective understanding of the specific plaintiff before the court.

This Court's first decision interpreting § 15-3-535, which was enacted in 1977, confirmed the objective standard, holding that the statute of limitations commences when "the facts and circumstances of an injury would put ***a person of common knowledge and experience*** on notice that some right of his has been invaded or that some claim against another party might exist." *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981) (emphasis added). By focusing the inquiry on the understanding

of a person of common knowledge and experience rather than the subjective understanding of the specific plaintiff, the Court made it clear that § 15-3-535 creates an objective standard. Since that time, this Court has consistently and repeatedly emphasized that the commencement of the statute of limitations is an objective inquiry and that the subjective understanding of the plaintiff does not matter. *See, e.g.*, *Wiggins v. Edwards*, 314 S.C. 126, 128-29, 442 S.E.2d 169, 170 (1994) (holding that commencement of statute of limitations is "an objective determination"); *Kreutner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995) ("The date on which discovery should have been made is an objective, not subjective, question.").

In the opinion is this case, however, the Court adopts a rule that the statute of limitations in a legal malpractice action based on counsel's alleged acts or omissions at trial does not commence until the conclusion of all appeals unless "the client knew of the harm before [that time]." The opinion makes no provision for what the client "in the exercise of reasonable diligence should have known," as required by the statute, § 15-3-535.

The subjective standard set forth in the Court's opinion does not comport with this Court's own decisions regarding the interpretation and enforcement of unambiguous statutes, nor does it comport with Article III of the South Carolina Constitution, which states that the "legislative power of this State shall be vested in [the Senate and the House of Representatives]." S.C. Const. Art. III, sec. 1. As this Court has held many times, a court is not at liberty "to ignore the intent of the legislature as expressed in the plain language of [a] statute." *D&D Leasing Co. v. Gentry*, 298 S.C. 342, 345, 380 S.E.2d 823, 825 (1989); *accord Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535-36, 725 S.E.2d 693,

695 (2012) ("[W]e must follow the plain and unambiguous language in a statute and have no right to impose another meaning." (internal citations and quotation marks omitted)); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("[I]t is not the court's place to change the meaning of a clear and unambiguous statute."). Thus, a rule that ignores the "in the exercise of reasonable diligence should have known" language in § 15-3-535, and instead purports to base commencement of the statute of limitations solely on the plaintiff's actual knowledge, is impermissible. The Court's modification of an unambiguous statute is arguably an improper exercise of the legislative power constitutionally reserved for the General Assembly. S.C. Const. Art. III, sec. 1. For this reason, Respondents request that the Court withdraw its prior opinion, rehear this matter, and affirm based on the objective standard set forth in S.C. Code Ann. § 15-3-535 as applied by the lower court.

B. The Court's Opinion Is Based on a Case That Is Not Controlling Law From a State That Does Not Have a Statutory Discovery Rule

In its opinion, the Court relied extensively on *Ranier v. Stuart & Freida P.C.*, 887 P.2d 339, 343 (Okla. Ct. App. 1994), a decision from an intermediate appellate court in Oklahoma. In that case, the court set forth a subjective standard for commencing the statute of limitations in a legal malpractice action against trial counsel arising out of an adverse judgment. Notably, Oklahoma, unlike South Carolina, does ***not*** have a statutory discovery rule, 12 Okla. Stat. § 95(A)(3); thus, any reliance on an Oklahoma decision is misplaced. What is more, when the Oklahoma Supreme Court addressed the commencement of the statute of limitations, it did not adopt or even mention *Ranier*, but instead held that a cause of action for legal malpractice based on trial counsel's alleged acts or omissions does not accrue until all appeals of the underlying matter are exhausted, at which point the cause of

action accrues and the plaintiff has two years to file. *Stephens v. GMC*, 905 P.2d 797, 800 (Okla. 1995). Under that case, the plaintiff's subjective knowledge is not relevant. *Id.* Thus, the rule announced by the *Ranier* court is not even controlling law in Oklahoma and the *Ranier* case should not be persuasive to this Court.

In addition, though the *Ranier* Court purported to rely on *Dearborn Animal Clinic P.A. v. Wilson*, 806 P.2d 997 (1991), a Kansas case, for the propriety of a subjective standard, the *Ranier* Court misread the *Dearborn* case. In *Dearborn*, the Kansas Supreme Court held that while the statute of limitations in a legal malpractice action will often commence upon the exhaustion of appeals in the underlying matter, the statute will commence earlier if the alleged negligence and the resulting injury were "reasonably ascertainable" before that time. *Id.* at 1007. And, indeed, in *Dearborn* itself, the court held that that the statute of limitations began to run at the point at which a ***reasonable person*** could have recognized the potential malpractice, which was well before the exhaustion of the appellate process. *Id.* In *Dearborn* itself and many cases since, the Kansas courts have noted that the "reasonably ascertainable" standard set forth in their statute of limitations is ***objective***, as it is based on a reasonable person's knowledge and understanding, not the plaintiff's subjective knowledge and understanding. *See, e.g., P.W.P. v. L.S.*, 969 P.2d 896, 901 (Kan. 1998) (holding that "reasonably ascertainable" language in statute of limitations creates an objective standard); *see also Newland v. Newland*, 82 F.3d 338, 343 (10th Cir. 1996) (holding that statute of limitations barred claim despite underlying litigation not being exhausted because claims were reasonably ascertainable); *Elder v. Herlocker*, 405 F. App'x 351, 354 (10th Cir. 2010) (same).

Looking beyond the Oklahoma and Kansas decision cited by the Court, Respondents have been unable to find a single state with a statutory discovery rule that commences the statute of limitations for negligence actions based solely on the plaintiff's subjective knowledge or understanding. This is no surprise because the creation of a subjective standard for commencement of the statute of limitations is poor public policy. As an initial matter, a subjective standard invites abuse because plaintiffs will have every incentive to provide false testimony that they lacked subjective knowledge of their injury, and there will be no objective backstop to curb such abuse. More fundamentally, a subjective standard rewards ignorance – feigned or otherwise – which is particularly inappropriate given that, as this Court noted, the purpose of a statute of limitations is to encourage reasonable diligence and competence. At its core, a system that incentivizes abuse and rewards ignorance will have the deleterious effect of punishing the honest and the competent, and will treat similarly situated people differently without good reason.

In sum, this Court's creation of a subjective standard for commencing the statute of limitations is unsupported by the text of the statutory discovery rule, is unsupported by this Court's longstanding interpretation of that statute, and is unsupported in the case law of other states – even those states cited in this Court's opinion. Such a standard is also ill-advised in light of the perverse incentives it will engender. Accordingly, Respondents request that the Court withdraw its prior opinion, rehear the matter, and affirm the lower court's grant of summary judgment under the objective standard that this Court has always followed.

C. The New Subjective Standard Will Have Deleterious Effects in Myriad Tort Actions, Not Merely a Small Category of Legal Malpractice Claims

The statutory discovery rule applicable to this case also applies to actions for "assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law." S.C. Code Ann. § 15-3-530(5). In other words, it applies to a wide variety of common law tort claims, not just to legal malpractice. In its opinion, however, this Court attempts to craft an exception to the statutory discovery rule that would apply only to a specific category of legal malpractice actions: actions against trial counsel following an adverse judgment. This is problematic because there is no basis in the statutory text for treating legal malpractice actions—much less a small, discrete category of legal malpractice actions—differently from the other various tort actions covered by the same statutory discovery rule.

The arguments in favor of a special rule for certain legal malpractice claims largely originated as arguments for a "continuous treatment" rule in medical malpractice cases, under which the statute of limitations would not commence until a doctor concluded his or her treatment of a patient for a particular condition. The "continuous treatment" arguments were then transmogrified to the context of legal malpractice, and they became arguments for not commencing the statute of limitations following an adverse judgment until the lawyer's representation of the client concluded and/or all appeals were exhausted. Indeed, this Court's first encounter with the argument came in a trilogy of medical malpractice cases in which the Court extensively discussed the continuous treatment rule, ultimately deciding in the *Harrison* case not to adopt that rule. *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003) (declining to adopt continuous treatment rule); *Preer v. Mims*, 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996) (discussing but not deciding propriety of

continuous treatment rule); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 476-77 (1996) (same).

Notably, in South Carolina, medical malpractice has its own statutes of limitations and repose and its own statutory discovery rule, all of which are ***separate and apart*** from the more general statute of limitations and statutory discovery rule that apply in legal malpractice and other general negligence cases. S.C. Code Ann. § 15-3-545; *see also* S.C. Code Ann. § 15-3-535 (specifically excepting medical malpractice from the statutory discovery rule applicable here). Accordingly, arguments concerning the "continuous treatment" rule legitimately focused on one cause of action only – medical malpractice – and its particular statutes of limitations, repose, and discovery rule.

In *Epstein*, this Court expressly analogized the continuous treatment arguments in medical malpractice to the continuous representation arguments in legal malpractice. As the Court's opinion in this case notes, the *Epstein* Court may have made too much of this analogy because medical malpractice and legal malpractice are governed by completely separate limitations, repose, and discovery rule statutes.

The focus in a legal malpractice case must be on the applicable statutory discovery rule, § 15-3-535, and any interpretation of § 15-3-535 necessarily has implications for all of the various types of tort actions to which that statute applies. Since the General Assembly has not enacted a special discovery rule for legal malpractice actions, there is no statutory basis for an interpretation of the discovery rule that is specific to legal malpractice actions. Rather, if the rule announced in this case stands, this case will be the tip of the iceberg in attempts to apply the newly announced subjective standard to a wide variety of tort cases. And, if the rule announced in this case is carried to its logical conclusion, it will

effectively undermine the objective standard created by the South Carolina legislature well beyond the confines of legal malpractice cases.

This Court's opinion does not take into account the fact that it is interpreting a statute that is not limited to legal malpractice actions or that it is adopting arguments that could be transposed to myriad other actions. Indeed, nearly any professional relationship could give rise to a continuous practice-type rule under which the statute of limitations would not commence until the professional relationship ended, absent actual knowledge of the harm. One can easily imagine the clients of accountants, insurance agents, financial planners, architects, and other professionals arguing that their statute of limitations should not begin to run until the end of the relationship, and, lacking any statutory basis for distinguishing legal malpractice, rejecting these arguments would be difficult. Indeed, such broadening of the continuous representation doctrine has already occurred in some states. *See, e.g.*, *Seattle First Nat'l Bank, N.A. v. Siebol*, 824 P.2d 1252, 155 (Wash. Ct. App. 1992) (holding that continuous representation doctrine "applies to doctors, attorneys, dentists, architects, accountants, surveyors, executors and investment advisers"); *Cuccolo v. Lipsky, Goodkin & Co.*, 826 F. Supp. 763, 768 (S.D.N.Y. 1993) (applying continuous representation doctrine to accountant malpractice). Even in the context of ordinary negligence or other torts, one can imagine scenarios in which the plaintiff contends that the statute should not begin to run absent actual knowledge because of his or her relationship with the tortfeasor.

In short, this Court's creation of a subjective standard that is antithetical to the statutory text will give rise to far more problems than it solves. Rather than providing clarity in a small category of cases, it will unsettle a decades-old statutory discovery rule

that applies to a substantial portion of common law tort actions. This will touch off a maelstrom of litigation concerning the extension of the new subjective standard to the many and various kinds of torts governed by § 15-3-535. Taking the Court's subjective standard to its logical conclusion, it will swallow the objective standard created by the legislature, at least as to professional negligence claims, and potentially for many other claims.

Such a drastic change in the statutory discovery rule set forth in § 15-3-535 and the objective standard set forth therein must come from the General Assembly, not from this Court. Rather than spending the next decades determining, through appellate litigation, the limits of an extra-statutory subjective standard for cases governed by § 15-3-535, the proper course is to apply the statutory discovery rule as written by the General Assembly and as understood by this Court for decades. Should a more lenient standard be advisable in legal malpractice or some other category of cases, the General Assembly is free to legislate such a change. Accordingly, Respondents request that the Court withdraw its prior opinion, rehear the case, and affirm the lower court's grant of summary judgment under a straightforward application of the statutory discovery rule.

D. Based on Petitioner's Admission that the Adverse Verdict Caused Him Immediate Harm, Summary Judgment Should Be Affirmed without Addressing the Propriety of *Epstein*

Regardless of the Court's ultimate view on the creation of a subjective standard, the undisputed facts of this case do not require rejection or confirmation of *Epstein*. Craven admitted in his deposition that he suffered substantial damage from the adverse jury verdict shortly after it was handed down because of his dealership's loss of reputation. (R. p. 544.) Indeed, Craven's testimony on this point was unequivocal:

> Q. And am I to take it that what you mean by that is that Stokes-Craven Ford suffered a damage to its reputation as a result of the verdict?

A. I feel it has, yes sir.

Q. Okay. And that's the position of the plaintiff in this case?

A. Right.

Q. Okay. And that began when the verdict was handed down?

A. Shortly after that.

Id. (emphasis added).

According to the subjective standard announced in this Court's opinion, the statute of limitations does not commence until the exhaustion of the appellate process unless "it appears that the client knew of the harm before the case is finally determined on appeal." (Op. at 12.) There is no question in this case that the client knew of the harm shortly after the verdict and well before the case was finally determined on appeal. Thus, even under a subjective standard, the statute of limitations began to run "from the time the underlying injury occur[ed]", which was shortly after trial and more than three years before this case was filed, or "the client's awareness of the alleged negligence," which was at the time of the verdict in light of Craven's admitted knowledge of the facts underlying the trial errors that he later alleged in his complaint. (Op. 12.) Under either a subjective or objective standard, the statute of limitations in this case began to run before the exhaustion of the appellate process and more than three years before this lawsuit was filed.

This Court has long held that it "will not issue advisory opinions and cannot alter precedent based on questions presented in the abstract." *Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 148, 414 S.E.2d 127, 130 (1992). Stated differently, this Court will not issue opinions on questions "for which no meaningful relief can be granted." *Gainey v. Gainey*, 279 S.C. 68, 69, 301 S.E.2d 763, 764 (1983). Here, because Respondents are

entitled to summary judgment under either the *Epstein* standard or the new subjective standard set forth in the Court's opinion, overturning *Epstein* accords Petitioner no meaningful relief and effectively acts as an advisory opinion. Therefore, based on the Court's longstanding refusal to issue an opinion that is without practical effect on the case before it, there is no need for the Court to overturn *Epstein* in this case. Instead, the Court should summarily affirm and, if it so inclined, reconsider *Epstein* in a case in which the facts are such that reconsideration would matter. Then, the Court would be in a position to consider this important legal issue in the context of a meaningful set of facts. Until that time, *Epstein* should stand, even if it stands without explicit confirmation by this Court in this case.

In sum, based on the facts of this case, the propriety of *Epstein* need not be decided. Accordingly, Respondents request that the Court withdraw its prior opinion, rehear the matter, and summarily affirm the lower court's order in favor of Respondents.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court withdraw its prior opinion, rehear the matter, and affirm the lower court's grant of summary judgment to Respondents.

Respectfully submitted,

September 23, 2015

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PROOF OF SERVICE

The undersigned hereby certifies that on September 23, 2015, the foregoing **RESPONDENTS' PETITION FOR REHEARING** was served on all counsel of record via U.S. Mail, addressed as follows:

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