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South Carolina Tort Law: For Whom the Statute of Limitations Tolls - The Epstein Court's Rejection of the Continuous Representation Rule

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SOUTH CAROLINA TORT LAW: FOR WHOM THE STATUTE OF LIMITATIONS TOLLS—THE *EPSTEIN* COURT'S REJECTION OF THE CONTINUOUS REPRESENTATION RULE

I. INTRODUCTION

Recently, in *Epstein v. Brown*,[1] Dr. Franklin M. Epstein appealed the circuit court's judgment that section 15-3-530(5)[2] barred his legal malpractice suit against David A. Brown.[3] Prior to the court of appeals' consideration of Epstein's appeal, the South Carolina Supreme Court certified his case from the court of appeals pursuant to South Carolina Appellate Court Rule 204(b),[4] heard it on January 4, 2005, and filed judgment on March 21, 2005.[5] In deciding the case, the *Epstein* court addressed whether to adopt the "continuous representation" rule.[6] The continuous representation rule tolls the statute of limitations in legal malpractice actions until the lawyer-defendant no longer represents the client in the underlying subject matter.[7] A divided court rejected the rule and affirmed the circuit court's judgment that section 15-3-530(5) barred Epstein's legal malpractice action because the statute of limitations began to run at his trial's conclusion on February 18, 1998.[8]

The *Epstein* court's holding problematically rejects the continuous representation rule in legal malpractice actions. *Epstein*'s precedential strength is uncertain because of: (1) the absence of a statute of repose governing legal malpractice actions, unlike the six year statute of repose governing medical malpractice actions in South Carolina;[9] (2) the strength and applicability of the

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1. 363 S.C. 372, 610 S.E.2d 816 (2005).

2. S.C. CODE ANN. § 15-3-530(5) (2005). The statute provides the following statute of limitations: "three years . . . [for] an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and those provided for in section 15-3-545." South Carolina Code section 15-3-545 does not affect legal malpractice actions because it only applies to medical malpractice actions. *See id.* § 15-3-545.

3. *Epstein*, 363 S.C. at 374–75, 610 S.E. 2d at 817.

4. South Carolina Appellate Court Rule 204(b) provides:

> In any case which is pending before the Court of Appeals, the Supreme Court may, in its discretion, on motion of any party to the case, on request by the Court of Appeals, or on its own motion, certify the case for review by the Supreme Court before it has been determined by the Court of Appeals. Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance. The effect of such certification shall be to transfer jurisdiction over the case to the Supreme Court for all purposes.

S.C. APP. CT. R. 204(b).

5. *Epstein*, 363 S.C. at 372, 610 S.E.2d at 816.

6. *Id.* at 377, 610 S.E. 2d at 818.

7. *Id.* at 377, 610 S.E. 2d at 818

8. *See id.* at 374, 382–83, 610 S.E.2d at 817, 821–22.

9. *See* S.C. CODE ANN § 15-3-545(D) (2005).

secondary authority the *Epstein* court relied upon; and (3) the specific facts of *Epstein*.

This Note analyzes current South Carolina jurisprudence regarding legal malpractice actions, the applicable statute of limitations, and the continuous representation rule. Further, it compares current South Carolina jurisprudence in medical malpractice actions with legal malpractice actions and evaluates what steps the South Carolina Supreme Court might take in shaping South Carolina's legal malpractice jurisprudence.

II. THE STATUTE OF LIMITATIONS AND TOLLING PROVISIONS: SOUTH CAROLINA LAW PRIOR TO *EPSTEIN*

The general three-year statute of limitations period in section 15-3-530(5) governs legal malpractice actions in South Carolina.[10] Additionally, South Carolina courts apply the "reasonable diligence" principle established in section 15-3-535 to determine when the statute of limitations begins to run in legal malpractice actions.[11]

A. South Carolina's "Discovery Rule": Determining When a Cause of Action Accrues

For actions listed in section 15-3-530(5),[12] section 15-3-535 shifts the start of the statutory period from "the time of the injury"[13] to when "the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."[14] Occasionally, South Carolina courts have mistakenly interchanged the "discovery rule" provision with the "notice standard."[15] The discovery rule,

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10. *Id.* § 15-3-530(5). This statute establishes the general three-year statute of limitations for most tort actions in South Carolina that arise or accrue after April 5, 1988, including legal malpractice actions. *Id.*; *see* Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005); Berry v. McLeod, 328 S.C. 435, 444–45, 492 S.E.2d 794, 799 (Ct. App. 1997). For negligence actions arising before April 5, 1988, a six-year statute of limitations governed. *See* Mitchell v. Holler, 311 S.C. 406, 408–09, 429 S.E.2d 793, 795 (1993) (citing S.C. CODE ANN. § 15-3-530 (Supp. 1992)).

11. S.C. CODE ANN. § 15-3-535 (2005).

12. *Id.* § 15-3-530(5).

13. Holy Loch Distribs., Inc. v. Hitchcock, 332 S.C. 247, 252, 503 S.E.2d 787, 790 (Ct. App. 1998), *rev'd on other grounds*, 340 S.C. 20, 531 S.E.2d 282 (2000). Under early South Carolina common law, "an action based on negligence accrues for statute of limitations purposes, when the negligent act is committed." Mills v. Killian, 273 S.C. 66, 70, 254 S.E.2d 556, 558 (1979) (citing Thomas' Ex'rs. v. Ervin's Ex'rs., 25 S.C.L. (Chev.) 22, 25 (1839)).

14. § 15-3-535.

15. Sections 15-3-535 and 15-3-545 establish similar rules for determining the date when the statutory period begins to run. However, they do not create identical standards. Nevertheless, South Carolina courts often use the language "the discovery rule" to refer to both sections even though section 15-3-535 only creates an exercise of reasonable diligence standard. *Compare Epstein*, 363 S.C. at 376, 610 S.E.2d at 818 (expounding both rules), *and* True v. Monteith, 327 S.C. 116, 119, 498 S.E.2d 615, 616–17 (1997) (using the discovery rule to refer to the standard section 15-3-535), *and* Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (combining language from section 15-3-535 and

established in section 15-3-545(A)–(B),[16] governs medical malpractice actions, while the notice standard governs legal malpractice actions.[17] This double standard has not caused many problems in practice. However, South Carolina courts' tendency to interchange language between medical malpractice and legal malpractice cases reveals why the *Epstein* court may have improperly decided that rejecting the "continuous treatment"[18] rule in medical malpractice actions equally supported rejecting the continuous representation rule in legal malpractice actions.[19]

B. Applying Section 15-3-535: The Exercise of Reasonable Diligence

Since section 15-3-535's enactment, South Carolina courts have developed an extensive body of case law that applies and interprets the reasonable diligence principle for beginning the statutory period in negligence actions. Shortly after section 15-3-535's enactment, the South Carolina Supreme Court in *Snell v. Columbia Gun Exchange, Inc.*[20] attempted to define the exercise of reasonable diligence.[21] The *Snell* court held:

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section 15-3-545 to describe the discovery rule), *and Holy Loch Distribs.*, 332 S.C. at 252–53, 503 S.E.2d at 790 (stating that section 15-3-535 creates the discovery rule for tort actions), *with* Smith v. Smith, 291 S.C. 420, 425–26, 354 S.E.2d 36, 39–40 (1987) (noting that the provisions in section 15-3-535 and section 15-3-545 are similar but not identical).

16. Section 15-3-545(A) provides:

> In any action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider as defined in Article 5, Chapter 79, Title 38 acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years *from the date of discovery or when it reasonably ought to have been discovered*, not to exceed six years from the date of occurrence, or as tolled by this section.

S.C. CODE ANN. § 15-3-545(A) (2005) (emphasis added).

Section 15-3-545(B) provides:

> When the action is for damages arising out of the placement and inadvertent, accidental, or unintentional leaving of a foreign object in the body or person of any one or the negligent placement of any appliance or apparatus in or upon any such person by any licensed health care provider acting within the scope of his profession by reason of any medical, surgical, or dental treatment or operation, the action must be commenced within two years from the *date of discovery or when it reasonably ought to have been discovered*; provided, that, in no event shall there be a limitation on the commencement of the action less than three years after the placement or leaving of the appliance or apparatus.

§ 15-3-545(B) (emphasis added).

17. § 15-3-535.

18. Harrison v. Bevilacqua, 354 S.C. 129, 138, 580 S.E.2d 109, 114 (2003).

19. For more detail regarding the differences between the applicable statutory period governing legal malpractice actions and those governing medical malpractice actions, see *infra* Part IV.A.1.

20. 276 S.C. 301, 278 S.E.2d 333 (1981).

21. *Id.* at 303, 278 S.E.2d at 334.

> The exercise of reasonable diligence means simply that an injured party must act with some promptness where 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. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.[22]

South Carolina courts continue to apply this interpretation of the reasonable diligence principle in negligence actions.[23] After *Snell*, the supreme court determined an objective test determines when a person should have known operative facts.[24]

In *Wiggins v. Edwards*,[25] the supreme court held an objective test applied and, without directly citing precedent, broadly stated that adopting a subjective test would have gone against "well-settled law."[26] Accordingly, South Carolina courts have based their decisions about when the statutory period began on whether "person[s] of common knowledge"[27] should have known they might have a claim against another party.[28] The *Wiggins* court attempted to further clarify the proper way to determine the operative date and established:

> "The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury."[29]

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22. *Id.* at 303, 278 S.E.2d at 334.

23. Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (applying the principle in a legal malpractice action); *see also* Dean v. Ruscon Corp., 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996) (applying the principle in an action for damage to real property); Mitchell v. Holler, 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993) (applying the principle in a legal malpractice action); Smith v. Smith, 291 S.C. 420, 425, 354 S.E.2d 36, 40 (1987) (applying the principle as persuasive authority in a medical malpractice action).

24. Holy Loch Distribs., Inc. v. Hitchcock, 332 S.C. 247, 253–55, 503 S.E.2d 787, 791 (Ct. App. 1998), *rev'd on other grounds*, 340 S.C. 20, 531 S.E.2d 282 (2000).

25. 314 S.C. 126, 442 S.E.2d 169 (1994).

26. *Id.* at 128–29, 442 S.E.2d at 170.

27. Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995).

28. *Epstein*, 363 S.C. at 376, 610 S.E.2d at 818; *see Kreutner*, 320 S.C. at 285, 465 S.E.2d at 90; *Mitchell*, 311 S.C. at 409, 429 S.E.2d at 795; Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981); *Holy Loch*, 332 S.C. at 253–54, 503 S.E.2d at 790–91; Berry v. McLeod, 328 S.C. 435, 444–45, 492 S.E.2d 794, 799 (Ct. App. 1997); Wilson v. Shannon, 299 S.C. 512, 513, 386 S.E.2d 257, 258 (Ct. App. 1989).

29. *Wiggins*, 314 S.C. at 128–29, 442 S.E.2d at 170 (1994) (quoting Tollison v. B & J Mach. Co., 812 F. Supp. 618, 620 (D.S.C. 1993)).

Consequently, a plaintiff's discovery of new or different tortfeasors "has absolutely no bearing on the timing of the statute of limitations."[30] Thus, a hypothetical victim who discovered his injury when the accident occurred but did not know the tortfeasor's identity until three years after the accident would have his claim barred against the true tortfeasor and could only bring an action against another alleged torfeasor.[31]

C. Section 15-3-40: Tolling the Statutory Period for Disabilities

In addition to the discovery rule, section 15-3-40 creates a tolling provision applicable to legal and medical malpractice cases.[32] Section 15-3-40 provides the general tolling provisions for cases involving minors and the insane.[33] The phrase "an action mentioned in Article 5 of this chapter" within section 15-3-40, brings legal malpractice actions under this section's tolling provisions.[34]

D. The Effects of Adopting the Continuous Representation Rule in Legal Malpractice Actions

In *Harrison v. Bevilacqua*,[35] the South Carolina Supreme Court emphasized it had only entertained adopting a version of the continuous treatment rule that contained a discovery exception in prior cases.[36] Thus, only the application of a continuous representation rule with a discovery exception is relevant to the discussion in this Note.

The *Epstein* court did not directly define a version of the continuous representation rule with a discovery exception. However, the *Epstein* court

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30. Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 371, 597 S.E.2d 27, 29 (Ct. App. 2004).

31. This hypothetical assumes the plaintiff cannot use South Carolina's relation back doctrine to amend his complaint to bring in the proper tortfeasor as a defendant. *See* S.C. R. CIV. P. 15(c).

32. S.C. CODE ANN. § 15-3-40 (2005).

33. *Id.* Section 15-3-40, entitled "Exceptions as to persons under disability," states:

> If a person entitled to bring an action mentioned in Article 5 of this chapter [actions other than recovery of real property] or an action under Chapter 78 of this title [the South Carolina Tort Claims Act], except for a penalty or forfeiture or against a sheriff or other officer for an escape, is at the time the cause of action accrued either:
>
> (1) within the age of eighteen years; or
>
> (2) insane;
>
> the time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended:
>
> (a) more than five years by any such disability, except infancy; nor
>
> (b) in any case longer than one year after the disability ceases.

Id.

34. *Id.*

35. 354 S.C. 129, 580 S.E.2d 109 (2003).

36. *Id.* at 135, 580 S.E.2d at 112.

indicated it recognized a version analogous to the *Harrison* court's continuous treatment rule:

> "The so-called continuous treatment rule as generally formulated is that if the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated—unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive."[37]

However, prior to acknowledging the *Harrison* rule, the *Epstein* court enunciated a version of the rule that did not include a discovery exception.[38] Under this version "the SOL is tolled during the period an attorney continues to represent the client on the same matter out of which the alleged malpractice arose."[39] This version would only toll the statute of limitations during the period the defendant-attorney continued to represent the plaintiff-client, seemingly in contradiction to section 15-3-535.[40]

In contrast, if South Carolina adopted a version of the continuous representation rule that contained a discovery exception, the rule would toll the three year statutory period[41] only during the time between the alleged negligence and the time when the plaintiff should have known he had a cause of action. Additionally, the rule would toll the statute of limitations during that period only if the defendant-attorney continued to represent the client-plaintiff throughout that period, and the statutory period would begin to run immediately after the defendant-attorney's continued representation ends.[42]

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37. Epstein v. Brown, 363 S.C. 372, 610 S.E.2d, 819 (2005) (quoting *Harrison*, 354 S.C. at 135, 580 S.E.2d at 112).

38. *Compare id.* at 378, 610 S.E.2d at 819 (describing a version of the continuous treatment rule that contains a discovery provision), *with id.* at 377, 610 S.E.2d at 818 (describing a version of the continuous representation rule that does not include a discovery provision).

39. *Id.* at 377, 610 S.E.2d at 818 (citing George L. Blum, Annotation, *Attorney Malpractice—Tolling or Other Exceptions to Running of Statute of Limitations*, 87 A.L.R. 5th 473 (2001)).

40. S.C. CODE ANN. § 15-3-535 (2005).

41. S.C. CODE ANN. § 15-3-530(5) (2005).

42. For more on the importance of this formulation of the continuous representation rule and its application in the context of *Epstein*, see *infra* Part IV.A.3.

III. *EPSTEIN V. BROWN*: THE FACTUAL BACKGROUND, PROCEDURAL BACKGROUND, AND JUDGMENT

A. Welch v. Epstein: *Giving Rise to Epstein's Legal Malpractice Claim*

Epstein v. Brown arose out of a medical malpractice action brought against Dr. Epstein.[43] Epstein performed neurosurgery on Marshall O. Welch, Jr. Due to complications arising from the neurosurgery, Welsh died on February 29, 1996, while in post-operative care.[44] Subsequently, Welch's estate brought wrongful death and survival actions against Epstein.[45] Welch's estate alleged that Epstein's negligence during Welch's post-operative treatment proximately caused the patient's death.[46] Brown, a licensed South Carolina attorney, represented Epstein in the medical malpractice action.[47] On February 18, 1998, the jury returned a verdict against Epstein.[48] "The jury awarded actual damages of $28,535.88 in the survival suit, $3,000,000 in the wrongful death claim, and punitive damages of $3,900,000."[49] Brown advised Epstein to appeal the judgment,[50] and "Brown filed a notice of appeal on behalf of Dr. Epstein."[51]

On appeal, Epstein raised three issues: "(1) the denial of their motions for directed verdict and judgment notwithstanding the verdict (JNOV); (2) the denial of their new trial motion based upon the excessiveness of the actual and punitive damages verdicts; and (3) the jury charge on punitive damages."[52] Attorneys Stephen P. Groves, Sr., John Hamilton Smith, and Stephen L. Brown actively represented Epstein in the appeal, and during the appeal, David A. Brown only remained as Epstein's counsel of record.[53] The appellate court affirmed the trial court's judgment.[54]

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43. Welch v. Epstein, 342 S.C. 279, 288–94, 536 S.E.2d 408, 413–16 (Ct. App. 2000).

44. *Id.* at 288–94, 536 S.E.2d at 413–16. On February 22, 1996, Epstein performed neurosurgery on Welch to try to cure Welch's persistent and severe back pain. Welch remained in post-operative care at Aiken Regional Medical Center from his admission on the morning of February 22, 1996, until his removal from life support on February 29, 1996. *Id. at* 288-94, 536 S.E.2d at 413-16.

45. Epstein v. Brown, 363 S.C. 372, 374, 610 S.E.2d 816, 817 (2005).

46. *See Welch*, 342 S.C. at 288–94, 536 S.E.2d at 413–16.

47. *Epstein*, 363 S.C. at 374, 610 S.E.2d at 817.

48. *Id.* at 374, 610 S.E.2d at 817.

49. *Welch*, 342 S.C. at 287, 536 S.E.2d at 412. Following the verdict, the trial judge ordered a partial set-off against the verdicts based on a settlement with a prior defendant. *Id.* The *Welch* court used "Doe" to refer to the defendant to "protect the anonymity of the settling co-defendant pursuant to a confidentiality agreement." *Id.* at 312 n.3, 536 S.E.2d at 425 n.3.

50. *Epstein*, 363 S.C. at 384, 610 S.E.2d at 822 (Pleicones, J., dissenting).

51. *Id.* at 375, 536 S.E.2d at 817.

52. Welch v. Epstein, 342 S.C. 279, 287–88, 536 S.E.2d 408, 412 (Ct. App. 2000).

53. *Epstein*, 363 S.C. at 375, 610 S.E.2d at 817 (noting that Brown, the defendant in *Epstein*, did not actively represent Epstein on appeal).

54. *Welch*, 342 S.C. at 314–15, 536 S.E.2d at 426. The appellate court upheld the trial court's "denial of Dr. Epstein's motions for directed verdict and JNOV as to actual and punitive damages" and its denial of a new trial motion "based upon the size of the actual damages award," but the appellate court did reverse the jury instruction regarding punitive damages and ruled that "Dr. Epstein is entitled to a set-off in the sum of $421,464.12 as to the wrongful death verdict" based on the defendant's

B. Epstein's Legal Malpractice Claim and Appeal

On January 9, 2002, Epstein filed a legal malpractice action against Brown.[55] In describing Epstein's allegations, the *Epstein* court stated:

> In his complaint, Dr. Epstein alleged Brown was negligent in numerous particulars, including: failing to conduct an adequate investigation, failing to advise Epstein to settle, failing to keep Epstein adequately informed during the pendency of the case, representing multiple defendants with conflicts of interest, forgetting to call expert witnesses, and adopting a defense which was contrary to Dr. Epstein's medical opinion.[56]

Additionally, the *Epstein* court noted that Epstein conceded he was already aware of many of his allegations when the jury rendered the verdict.[57] Brown moved for summary judgment asserting the statute of limitations barred Epstein's legal malpractice action.[58]

The circuit court granted Brown's motion for summary judgment and ruled the statutory period began to run no later than February 18, 1998, the date of the jury's verdict.[59] The circuit court made this determination based on the following findings: 1) the majority of Epstein's alleged damages stemmed from the jury's adverse verdict; 2) Epstein suffered the claimed damages resulting from negative publicity at the time of the verdict; and 3) a successful appeal could have only mitigated these damages.[60] Based on these findings, the circuit court ruled that "Dr. Epstein either knew, or should have known, of a possible claim against Brown by the date of the adverse verdict, such that the SOL began to run on that date."[61]

Epstein appealed the circuit court's decision, arguing that South Carolina should adopt the continuous representation rule "to toll the SOL during the period an attorney continues to represent a client on the same matter which forms the basis

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settlement with the prior defendant Doe. *Id.* at 314–15, 536 S.E.2d at 426.

55. Epstein v. Brown, 363 S.C. 372, 375, 610 S.E.2d 816, 817 (2005).

56. *Id.* at 376, 610 S.E.2d at 818. The *Epstein* court did not evaluate the merits of Epstein's claim because the court's holding that the statue of limitations barred Epstein's claim precluded any need for substantive evaluation. *See id.* at 382–83, 610 S.E.2d at 821. Therefore, whether Epstein's claim would have satisfied the elements for a successful legal malpractice claim remains unclear because a successful legal malpractice claim in South Carolina requires that a plaintiff "must prove several elements: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the plaintiff's damages by the breach." *See* Hall v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 656 (Ct. App. 2002) (citing Smith v. Haynesworth, Marion, McKay, & Guerard, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996)); Henkel v. Winn, 346 S.C. 14, 18, 550 S.E.2d 577, 579 (Ct. App. 2001); McNair v. Rainsford, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998)).

57. *Epstein*, 363 S.C. at 376, 610 S.E.2d at 818.

58. *Id.* at 375, 610 S.E.2d at 817.

59. *Id.* at 375, 610 S.E.2d at 817.

60. Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005).

61. *Id.* at 376–77, 610 S.E.2d at 818.

of a legal malpractice claim."[62] Thus, Epstein asserted that the statute of limitations should not bar his legal malpractice action because Brown remained Epstein's counsel of record throughout the appeal.[63]

C. Epstein: *The Majority's Reasoning and Basis for Rejecting the Continuous Representation Rule*

The majority determined the issue they had to decide was whether the circuit court erred in ruling that "Dr. Epstein knew, or should have known, he had a possible claim against Brown by the date of the jury's adverse verdict, such that the SOL began to run on that date."[64] The *Epstein* court determined the three year statute of limitations period[65] and the discovery rule governed Epstein's legal malpractice action.[66] The majority then addressed Epstein's argument for adopting the continuous representation rule but declined to adopt the rule in legal malpractice actions.[67]

The majority offered three authorities to justify rejecting the continuous representation rule.[68] First, the majority concluded the basis and reasoning for rejecting the continuous treatment rule in medical malpractice suits also supports rejecting the continuous representation rule in legal malpractice suits.[69] Second, the majority cited "numerous jurisdictions [which] refuse to judicially adopt the continuous representation rule"[70] and opined that "[g]enerally, those jurisdictions which adopt the continuous representation rule also adopt the continuous treatment [rule] in the context of medical malpractice."[71] Third, the majority rejected the rule based on "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.'"[72]

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62. *Id.* at 377, 610 S.E.2d at 818.

63. *Id.* at 377, 610 S.E.2d at 818.

64. *Id.* at 375, 610 S.E.2d at 818.

65. For further discussion, see *supra* Part II and note 10, which explain that section 15-3-530(5) establishes the three-year period governing negligence actions in South Carolina.

66. *Epstein*, 363 S.C. at 372, 376–77, 610 S.E.2d 816, 818–19 (2005) (citing S.C. CODE ANN. § 15-3-530 (2005)). For more detail regarding the discovery rule and how South Carolina courts have interpreted and applied the rule, see *supra* Part II.A–B (analyzing the statute's language and how the statute has been interpreted and applied).

67. Epstein v. Brown, 363 S.C. 372, 376–77, 610 S.E.2d 816, 818–19 (2005) ("We decline to adopt the continuous representation rule in the context of a legal malpractice claim and adhere, instead, to the discovery rule set forth by the Legislature.").

68. *See id.* at 377–80, 610 S.E.2d at 818–20.

69. *Id.* at 378–80, 610 S.E.2d at 819–20.

70. *Id.* at 379, 610 S.E.2d at 819–20 (citing Law Offices of Jerris Leonard, P.C. v. Mideast Sys., Ltd., 111 F.R.D. 359, 363 (D.D.C. 1986); Beesley v. Van Doren, 873 P.2d 1280 (Alaska 1994); Laird v. Blacker, 828 P.2d 691, 696 (Cal. 1992); Zupan v. Berman, 491 N.E.2d 1349, 1351–52 (Ill. 1986); Chambers v. Dillow, 713 S.W.2d 896, 898–99 (Tenn. 1986)).

71. *Id.* at 379, 610 S.E.2d at 820.

72. *Id.* at 380, 610 S.E.2d at 820 (quoting S.C. CODE ANN. § 15-3-535 (2005)).

The majority then addressed and rejected Epstein's argument that "even if [the court does] not adopt the continuous representation rule, the statute of limitations should not be deemed to have begun to run until the date on which this Court denied certiorari (January 11, 2001), because it was not until that date upon which he suffered legal damages."[73] The majority recognized a split of authority regarding "whether a plaintiff has suffered legally cognizable damages prior to the conclusion of an appeal"[74] and noted that "those jurisdictions which decline to adopt the continuous representation rule tend to hold that a plaintiff may institute a malpractice action prior to the conclusion of an appeal."[75] The majority thus rejected Epstein's contention based on these authorities.[76]

The majority then addressed and rejected Epstein's argument "that requiring him to pursue an appeal while simultaneously filing a malpractice suit against his attorney puts him in the awkward position of arguing inconsistent positions in two different courts."[77] In addressing this argument, the majority pointed to other jurisdictions that allow certain measures "to avoid such inconsistent positions."[78] The court also discussed past interpretations of the discovery rule and asserted that it is immaterial "that the injured party may not comprehend the full extent of the damage."[79]

Finally, the majority referenced the record, which indicated that even at trial Epstein knew of some of Brown's alleged negligence and that the damages he claimed primarily related to his reputation, errors at trial, and pre-trial errors—thus,"[i]t is patent Dr. Epstein knew, or should have known, of a possible claim against Brown long before this Court denied certiorari in January 2001."[80] Appropriately, the *Epstein* court affirmed the circuit court's grant of summary judgment.[81]

D. Chief Justice Toal's Dissent

In Chief Justice Toal's short dissent, she opined that she would "adopt a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until an appellate court disposes of the action by sending a remittitur to the

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73. Epstein v. Brown, 363 S.C. 372, 380, 610 S.E.2d 816, 820 (2005) (internal quotations omitted).

74. *Id.* at 380, 610 S.E.2d at 820 (citing Hunt v. Bittman, 482 F. Supp. 1017, 1022 (D.D.C. 1980), *aff'd*, 652 F.2d 196 (D.C. Cir 1981); Beesley v. Van Doren, 873 P.2d. 1280, 1283 (Alaska 1994); Laird v. Blacker, 828 P.2d 691, 696 (Cal. 1992); Michael v. Beasley, 583 So. 2d 245, 252 (Ala. 1991), *overruled on other grounds by* Borden v. Clement, 261 B.R. 275, 283 n.3 (N.D. Ala. 2001); St. Paul Fire & Marine Ins. Co. v. Speerstra, 666 P.2d 255, 258 (Or. Ct. App. 1983)).

75. *Id.* at 380, 610 S.E.2d at 820.

76. *Id.* at 380–81, 610 S.E.2d at 820–21.

77. *Id.* at 381–82, 610 S.E.2d at 821.

78. *Id.* at 381–82, 610 S.E.2d at 821 (citing Morrison v. Goff, 91 P.3d 1050, 1056 (Colo. 2004); Gebhardt v. O'Rourke, 510 N.W.2d 900, 907 (Mich. 1994)).

79. Epstein v. Brown, 363 S.C. 372, 382, 610 S.E.2d 816, 821 (2005).

80. *Id.* at 382, 610 S.E.2d at 821.

81. *Id.* at 383, 610 S.E.2d at 821.

trial court."[82] Chief Justice Toal recognized the discovery rule and the nature of reasonable diligence but disagreed with the majority's "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."[83]

Instead, Chief Justice Toal indicated that evidence of the appellant's injury did not exist "until the court of appeals disposed of the case by sending a remittitur to the trial court."[84] Under Chief Justice Toal's rule, the statute of limitations would not have barred Epstein's legal malpractice action because the statutory period would have tolled throughout Epstein's appeal.[85]

E. Justice Pleicones's Dissent

In Justice Pleicones's dissent, he agreed with the majority's rejection of the continuous representation rule and the retention of the discovery rule.[86] However, Justice Pleicones concluded the statute of limitations did not bar Epstein's action because "Brown should be estopped from asserting the statute of limitations as a defense."[87]

Justice Pleicones primarily based his conclusion on *Kleckley* v. *Northwestern National Casualty Co.*[88] *Kleckley* addressed when a South Carolina court should estop a defendant from asserting the statute of limitations to defeat an action.[89] The court determined that applying estoppel in this quasi-tolling form requires "the delay that otherwise would give operation to the statute ha[ve] been induced by the defendant's conduct."[90] The *Kleckley* court further established "[s]uch inducement may consist of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary" and "may also involve inducing the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to forbear exercising the right to sue."[91]

According to Justice Pleicones, the court should have estopped Brown from asserting the statute of limitations as a defense because "Brown affirmatively represented to Epstein that the adverse verdict had resulted from errors of law committed by the trial judge" and because "Brown [ ] remained nominally as

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82. *Id.* at 383, 610 S.E.2d. at 822 (Toal, C.J., dissenting).
83. *Id.* at 383–84, 610 S.E.2d at 822.
84. *Id.* at 384, 610 S.E.2d at 822.
85. Epstein v. Brown, 363 S.C. 372, 382, 610 S.E.2d 816, 821 (2005).
86. *Id.* at 384, 610 S.E.2d at 822 (Pleicones, J., dissenting).
87. *Id.* at 384, 610 S.E.2d at 822.
88. *Id.* at 384, 610 S.E.2d at 822 (citing Kleckley v. Nw. Nat'l Cas. Co., 338 S.C. 131, 136–37, 526 S.E.2d 218, 220 (2000)).
89. *Kleckley*, 338 S.C. at 136, 526 S.E.2d at 220.
90. *Id.* at 136, 526 S.E.2d at 220 (quoting Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997)).
91. *Id.* at 136, 526 S.E.2d at 220 (citing *Black*, 327 S.C. at 61, 488 S.E.2d at 330; Republic Contracting Corp. v. S.C. Dep't of Highways and Pub. Transp., 332 S.C. 197, 211, 503 S.E.2d 761, 768 (Ct. App. 1998)).

counsel to Epstein throughout the appeal from the verdict."[92] Thus, "the circuit court erred by holding that Brown's representations coupled with his presence on the appellate team did not reasonably induce Epstein's forbearance."[93] Therefore, under Justice Pleicones's dissent, the statute of limitations would not have barred Epstein's legal malpractice action.

IV. ANALYZING THE *EPSTEIN* COURT'S REASONING

A. The Majority's Basis

The *Epstein* court's rejection of the continuous representation rule in legal malpractice actions seems to be a logical extension of South Carolina jurisprudence regarding the statute of limitations, the discovery rule, and the rejection of the continuous treatment rule in medical malpractice actions. Rejection of the rules appears logical because, although the rules apply to different contexts, the continuous representation rule and the continuous treatment rule share similar justifications[94] and similar effects.[95] However, the *Epstein* court's reasoning and its holding are questionable because: (1) the differences between the statute of limitations governing legal malpractice actions and the statute of repose governing medical malpractice actions, (2) the strength and applicability of the secondary authority upon which the *Epstein* court relied, and (3) *Epstein*'s operative facts.

1. Comparing the Statute of Limitations Governing Legal Malpractice and the Statute of Repose Governing Medical Malpractice in South Carolina

The *Epstein* court's rationale for rejecting the continuous representation rule paralleled the court's prior rationale for rejecting the continuous treatment rule in *Harrison v. Bevilacqua*.[96] Also, even though the South Carolina Supreme Court had not yet addressed adopting the rule, the *Epstein* court pointed to *Holy Loch Distributors, Inc. v. Hitchcock* to show the court of appeals had already rejected the continuous representation rule "based in large part on [the court of appeals'] refusal to adopt the 'continuous treatment' rule in the context of medical malpractice cases."[97] However, comparing the *Harrison* court's reasoning with the *Epstein*

92. *Epstein*, 363 S.C. at 384, 610 S.E.2d at 822.

93. *Id.* at 384, 610 S.E.2d at 822.

94. Epstein v. Brown, 363 S.C. 372, 378, 610 S.E.2d 816, 819 (2005).

95. *See* Holy Loch Distribs, Inc. v. Hitchcock, 332 S.C. 247, 258, 503 S.E.2d 787, 793 (Ct. App. 1998), *rev'd on other grounds*, 340 S.C. 20, 531 S.E.2d 282 (2000); *see also Epstein*, 363 S.C. at 377, 610 S.E.2d at 818 (describing the rule's effect by stating: "Under the continuous representation rule, the SOL is tolled during the period an attorney continues to represent the client on the same matter out of which the alleged malpractice arose.").

96. *Epstein*, 363 S.C. at 377–78, 610 S.E.2d at 818–19 (discussing Harrison v. Bevilacqua, 354 S.C. 129, 135, 580 S.E.2d 109, 112 (2003)).

97. *Id.* at 377, 610 S.E.2d at 818–19 (citing *Holy Loch Distribs., Inc.*, 332 S.C. at 258, 502 S.E.2d at 793).

court's basis exposes slight differences in the reasonings, making the application of the court of appeals' reasoning in *Harrison* to legal malpractice actions dubious.

In *Harrison*, a psychiatric patient remained in continuous care at a state hospital from the date of his involuntary commitment in 1982 until his discharge on March 6, 1995.[98] On June 1, 1995, the patient sued the South Carolina Department of Health, alleging medical malpractice.[99]

Initially, the *Harrison* court cited prior South Carolina Supreme Court cases that rejected the continuous treatment rule.[100] The *Harrison* court then summarized four policy arguments in favor of adopting the rule.[101] The *Harrison* court followed those policy arguments by stating that "[t]he primary argument against adoption of the continuous treatment rule is that it offends the clear policy set by the Legislature in its adoption of statutes of limitations and statutes of repose."[102]

Section 15-3-545 creates a six-year statute of repose governing medical malpractice actions in South Carolina.[103] The *Harrison* court interpreted section 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."[104] The court further asserted that "a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body."[105] The court offered only those statements in response to the four policy arguments in favor of adopting the continuous treatment rule.[106] Thus, its interpretation of section 15-3-545 constituted the *Harrison* court's sole basis for "find[ing] judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set via the statutes discussed above."[107] The *Harrison* court also opined, "Certainly, this is an area where the Legislature can create statutory law if it so chooses."[108]

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98. Harrison v. Bevilacqua, 354 S.C. 129, 132, 580 S.E.2d 109, 110–11 (2003).

99. Specifically, the patient alleged "the Department had been negligent because McLean [the patient]: (1) had been confined in the hospital too long; (2) should not have resided in a locked ward; and (3) had been improperly medicated." *Id.* at 132, 580 S.E.2d at 111.

100. *Id.* at 135, 580 S.E.2d at 112 (citing Preer v. Mims, 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996); Anderson v. Short, 323 S.C. 522, 524–25, 476 S.E.2d 475, 476–77 (1996)).

101. *Id.* at 136–37, 580 S.E.2d at 112–13. Generally, the four policy justifications the court recognized are: 1) the rule prevents requiring a plaintiff to sue his physician before termination of his treatment; 2) the rule supports a patient's right to place trust and confidence in his physician; 3) actionable treatment usually does not consist of a single act, and lessens the difficulty in determining a precise time of occurrence; and 4) tort law's basic principles are efficiency and fairness.

102. *Id.* at 137, 580 S.E.2d at 113.

103. *Id.* at 137, 580 S.E.2d at 113 (citing S.C. CODE ANN. §15-3-545 (2005)).

104. Harrison v. Bevilacqua, 354 S.C. 129, 137–38, 580 S.E.2d 109, 113 (2003) (quoting Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993)).

105. *Id.* at 138, 580 S.E.2d at 113–14 (emphasis omitted) (quoting *Langley*, 313 S.C. at 404, 438 S.E.2d at 243).

106. *See id.* at 133–39, 580 S.E.2d at 111–14.

107. *Id.* at 138, 580 S.E.2d at 114.

108. *Id.* at 138, 580 S.E.2d at 114.

In *Epstein*, the supreme court determined:

> [T]he justifications favoring adoption of the continuous treatment rule are similar to those justifying the continuous representation rule, to wit: 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.[109]

Ultimately, the *Epstein* court rejected the continuous representation rule based, at least partially, on the existence of section 15-3-535.[110] However, section 15-3-545 and section 15-3-535 differ in important ways.

The *Harrison* court emphasized that section 15-3-545(D)[111] creates a statute of repose establishing an "absolute time limit beyond which liability no longer exists" in medical malpractice actions.[112] However, neither section 15-3-535 nor section 15-3-530(5) create a statute of repose governing legal malpractice actions.[113] Instead, those sections create a general three-year statute of limitations in legal malpractice actions.[114] This distinction[115] may indicate the South Carolina Legislature is unwilling to create the same "absolute time limit"[116] for legal malpractice actions which is observed in medical malpractice actions. Indeed, prior case law indicates the importance of this distinction.[117]

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109. Epstein v. Brown, 363 S.C. 372, 378, 610 S.E.2d 816, 819 (2005).

110. Specifically, the *Epstein* court declared, "[i]n 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." *Id.* at 380, 610 S.E.2d at 820 (quoting S.C. CODE ANN. § 15-3-535 (2005) (emphasis added) (omissions in original)).

111. Section 15-3-545(D) states:

> Notwithstanding the provisions of Section 15-3-540, if a person entitled to bring an action against a licensed health care provider acting within the scope of his profession is under the age of majority at the date of the treatment, omission, or operation giving rise to the cause of action, the time period or periods limiting filing of the action are *not tolled for a period of more than seven years on account of minority, and in any case more than one year after the disability ceases.* Such time limitation is tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor.

S.C. CODE ANN. § 15-3-545(D) (2005) (emphasis added).

112. *Harrison*, 354 S.C. at 138, 580 S.E.2d at 113–14 (quoting Langley v. Pierce, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993)).

113. *See* S.C. Code Ann. §§ 15-3-530(5) & 535 (2005).

114. *See id.*

115. *See* BLACK'S LAW DICTIONARY 1450–51 (8th. ed. 2004) (defining a statute of limitation as "a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued" and a statute of repose as "[a] statute barring any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury").

116. Harrison v. Bevilacqua, 354 S.C. 129, 138, 580 S.E.2d 109, 113–14 (2003) (quoting *Langley*, 313 S.C. at 404, 438 S.E.2d at 243).

117. *Langley*, 313 S.C. at 402–04, 438 S.E.2d at 242–44.

In *Langley v. Pierce*, the plaintiff sued her former physician for medical malpractice.[118] The timing in *Langley* is as follows: the alleged negligence occurred in 1980, the physician moved to Florida in 1984, and the plaintiff filed suit in 1991.[119] The *Langley* court addressed whether the tolling provision created by section 15-3-30, specifically the language "in this chapter," applied to the statute of repose created by section 15-3-545.[120] The court held the tolling provision did not apply based on the distinction between a statute of repose and a statute of limitations.[121] To support this point, the opinion referenced a Fourth Circuit Court of Appeals holding which stated "[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."[122] The *Langley* court further distinguished its holding from precedent by stating, "However, each of these cases involved a statute of limitations, not one of repose."[123] Thus, this distinction has proven crucial to whether the South Carolina Supreme Court will allow tolling exceptions to apply to a particular statutory period.

Additionally, South Carolina courts have applied estoppel in a quasi-tolling manner[124] to prevent defendants "from claiming the statute of limitations as a defense."[125] The permissive use of the statute of limitations as a defense (by rejecting the continuous representation rule) does not comport with the traditional

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118. *See Langley*, 313 S.C. at 402, 438 S.E.2d at 242.

119. *Id.* at 402–04, 438 S.E.2d at 242–44.

120. The *Langley* court directly quoted the language:

> "[I]f when a cause of action shall accrue against any person he shall be out of the State, such *action may be commenced within the terms in this chapter* respectively limited after the return of such person into this State. And if, after such cause of action shall have accrued, such person shall depart from and reside out of this State . . . for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

Langley, 313 S.C. at 403, 438 S.E.2d at 243 (quoting S.C. CODE ANN. § 15-3-30 (2005)). Additionally, the South Carolina Supreme Court has determined section 15-3-30's tolling provision, based on an out-of-state defendant, does not apply "when the nonresident defendant is amenable to personal service of process and the defendant can be brought within the personal jurisdiction of our courts." Meyer v. Paschal, 330 S.C. 175, 184, 498 S.E.2d 635, 639 (1998).

121. *See* Langley v. Pierce, 313 S.C. 401, 403–05, 438 S.E.2d 242, 243–44 (1993).

122. *Langley*, 313 S.C. at 403–05, 438 S.E.2d at 243 (quoting First United Methodist Church of Hyattsville v. U.S. Gypsum, 882 F.2d 862, 865–66 (4th Cir. 1989) (internal citations omitted)).

123. *Id.* at 405, 438 S.E.2d at 244 (citing Cutino v. Ramsey, 285 S.C. 74, 328 S.E.2d 72 (1985); Harris v. Dunlap, 285 S.C. 226, 328 S.E.2d 908 (1985); Parker v. S.C. Pub. Serv. Comm'n, 285 S.C. 231, 328 S.E.2d 909 (1985)).

124. *See* Kleckley v. Nw. Nat'l Cas. Co., 338 S.C. 131, 136–37, 526 S.E.2d 218, 220 (2000); Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997); *Langley*, 313 S.C. at 384–85, 610 S.E.2d at 822 (Pleicones, J., dissenting); Holy Loch Distribs., Inc. v. Hitchcock, 332 S.C. 247, 254–57, 503 S.E.2d 787, 791–92 (Ct. App. 1998), *rev'd on other grounds*, 340 S.C. 20, 531 S.E.2d 282 (2000).

125. *Kleckley*, 338 S.C. at 136, 526 S.E.2d at 220 (quoting *Black*, 327 S.C. at 58, 488 S.E.2d at 328).

use of estoppel as a tolling mechanism. This discrepancy reveals a further basis to question the strength of the *Epstein* majority opinion.

If the South Carolina Supreme Court adopted the continuous representation rule, it would only toll the statute of limitations where a defendant-attorney continued to represent a plaintiff-client on the same underlying action that formed the basis for the legal malpractice claim.[126] Allowing tolling in these limited circumstances conforms to the supreme court's recent interpretation of the purpose of a statute of limitations in *Mortiarty v. Garden Sanctuary Church of God*.[127] The *Mortiarty* 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."[128] A client's reliance on his attorney's advice that an appeal will correct a trial's adverse result hardly seems neglectful of his rights.

Additionally, adopting the continuous representation rule would protect the sanctity of the attorney-client relationship. This contention finds support in the supreme 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.[129]

Thus, judicially adopting the continuous representation rule, at least where the defendant-attorney suggested filing an appeal, is consistent with South Carolina jurisprudence.

In the future, the supreme court could dispel potential inconsistencies while rejecting the continuous representation rule by determining that section 15-3-535 also establishes "an absolute time limit beyond which liability no longer exists."[130] However, that outcome seems unlikely because of the court's prior recognition of the difference between a statute of repose and a statute of limitations when deciding whether to allow additional tolling exceptions to a statutory period.[131]

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126. Epstein v. Brown, 363 S.C. 372, 377, 610 S.E.2d 816, 818 (2005). *See supra* Part II.D.

127. 341 S.C. 320, 534 S.E.2d 672 (2000), *abrogated by* State v. Cherry, 361 S.C. 588, 597, 606 S.E.2d 475, 479–80 (2004).

128. *Id.* at 333, 534 S.E.2d at 679.

129. True v. Monteith, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997).

130. Harrison v. Bevilacqua, 354 S.C. 129, 138, 580 S.E.2d 109, 113–14 (2003) (quoting Langley v. Pierce, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993)).

131. *Langley*, 313 S.C. at 405, 438 S.E.2d at 244.

2. *The* Epstein *Court's Support for Rejecting the Continuous Representation Rule: Persuasive Authority*

The *Epstein* court, without specifically addressing the policy arguments for adopting the rule, cited multiple cases from other jurisdictions and claimed those cases supported rejecting the continuous representation rule.[132] Analyzing those opinions reveals they offer limited, if any, support to the *Epstein* court's holding.

In the short parenthetical following a citation to *Beesley v. Van Doren*, the *Epstein* court indicated that the case supported the conclusion that the "statute of limitations in attorney malpractice cases is not tolled pending final resolution of litigation underlying [the] malpractice claim."[133] However, the *Beesley* court, after citing a principle similar to South Carolina's discovery rule,[134] rejected the "exhaustive appeals" doctrine, not the continuous representation rule.[135] 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.[136] It is helpful to note *Beesley* did not address the adoption of the continuous representation rule after the court opined it might adopt the rule to "resolve the concern for the attorney-client relationship raised by some courts which have rejected the 'exhaustion of appeals' rule."[137] Therefore, the *Beesley* court's opinion lends some support to the *Epstein* court's reasoning but does not completely support *Epstein's* rejection of the continuous representation rule.

Further, the *Epstein* court cited *Laird v. Blacker*, indicating that it stands for the proposition that the "limitations period commences and is not tolled by filing an

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132. Epstein v. Brown, 363 S.C. 372, 379–80, 610 S.E.2d 816, 819–20 (2005) (citing Law Offices of Jerris Leonard, P.C. v. Mideast Sys. Ltd., 111 F.R.D. 359 (D.D.C. 1986); Beesley v. Van Doren, 873 P.2d 1280 (Alaska 1994); Laird v. Blacker, 828 P.2d 691 (Cal. 1992); Chambers v. Dillow, 713 S.W.2d 896 (Tenn. 1986); Zupan v. Berman, 491 N.E.2d 1349 (Ill. 1986)).

133. *Id.* at 379–80, 610 S.E.2d 819–20 (citing *Beesley*, 873 P.2d at 1283).

134. *Compare Beesley*, 873 P.2d at 1283 ("The statute of limitations begins running when a client discovers or reasonably should have discovered all the elements of the cause of action, and suffers actual damages."), *with Epstein*, 363 S.C. at 376, 610 S.E.2d at 818 ("the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another").

135. The *Beesley* court did not define the exhaustion of appeals doctrine; it cited to *Amfac Distribution Corporation v. Miller* (*Amfac II*), 673 P.2d 792 (Ariz. 1983). *See Beesley*, 873 P.2d at 1282. The *Amfac II* court determined, under the exhaustion of appeals doctrine, a cause of action for legal malpractice that occurs during the course of litigation does not accrue until "the plaintiff knew or should reasonably have known of the malpractice and when the plaintiff's damages are certain and not contingent upon the outcome of an appeal." *Amfac II*, 673 P.2d at 793 (quoting Amfac Distrib. Corp. v. Miller (*Amfac I*), 673 P2d 795, 796 (Ariz. Ct. App. 1983)). However, the continuous representation rule does not focus on the damages; instead, the rule tolls the statutory period based solely on "the period an attorney continues to represent the client on the same matter out of which the alleged malpractice arose." *Epstein*, 363 S.C. at 377, 610 S.E.2d at 818.

136. *See Beesley*, 873 P.2d at 1283 n.4.

137. *Id.* (citing Neylan v. Moser, 400 N.W.2d 538, 542 (Iowa 1987); *Amfac II*, 673 P.2d at 793–94).

appeal absent continuous representation by the trial attorney."[138] In *Laird*, the California Supreme 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.[139] Also, California courts would have no reason to address adopting the continuous representation rule because the rule is statutorily mandated in California.[140] Therefore, the *Epstein* court's use of this case to support rejection of the continuous representation doctrine is questionable.

Next, the *Epstein* court cited *Law Offices of Jerris Leonard, P.C. v. Mideast Systems Limited*, indicating that case stands for the proposition that "under [the] discovery rule, [a] legal 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."[141] The *Jerris* court did not address adopting the continuous representation rule.[142] Instead, the *Jerris* court only held, under the discovery rule, the plaintiff-client's knowledge affects the commencement of the statutory period.[143] Thus, *Jerris* does not support the *Epstein* court's proposition that "[n]otwithstanding such justifications, numerous jurisdictions refuse to judicially adopt the continuous representation rule."[144]

Additionally, the *Epstein* court cited *Zupan v. Berman*, indicating that case stands 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."[145] In *Zupan*, the court addressed the date when the alleged malpractice accrued; it did not address the continuous representation rule.[146] Furthermore, the allegedly negligent defendant-attorney in *Zupan* did not continue to represent the plaintiff-client on appeal.[147] Thus, even if the *Zupan* court had addressed adopting the continuous representation rule, the rule would not have tolled the statute of limitations in that particular case.

Finally, the *Epstein* court cited *Chambers v. Dillow*, indicating the *Chambers* court held an injury for malpractice accrued when the court initially dismissed the action.[148] In *Chambers*, the plaintiff did not present a tolling theory based on the

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138. *Epstein*, 363 S.C. at 379, 610 S.E.2d at 819 (citing Laird v. Blacker, 828 P.2d 691 (Cal. 1992)).

139. *Laird*, 828 P.2d at 692–93.

140. *Id.* at 692 (quoting CAL. CIV. PRO. CODE § 340.6 (a)(2) (1982) (providing that the statute of limitations governing legal malpractice actions tolls where "[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred")).

141. *Epstein*, 363 S.C. at 379, 610 S.E.2d at 819 (citing Law Offices of Jerris Leonard, P.C. v. Mideast Sys. Ltd., 111 F.R.D. 359 (D.D.C. 1986)).

142. *See Jerris*, 111 F.R.D. at 359–63.

143. *Id.* at 363.

144. Epstein v. Brown, 363 S.C. 372, 379, 610 S.E.2d 816, 819 (2005).

145. *Id.* at 379, 610 S.E.2d at 819–20 (citing Zupan v. Berman, 491 N.E.2d 1349 (Ill. 1986)).

146. *Zupan*, 491 N.E.2d at 1351–52.

147. *Id.* at 1350.

148. *Epstein*, 363 S.C. at 379, 610 S.E.2d at 820 (citing Chambers v. Dillow, 713 S.W.2d 896 (Tenn. 1986)).

defendant-attorney's continued representation because the facts indicated continuous representation did not occur.[149] Therefore, the *Chambers* court neither addressed whether to adopt the continuous representation rule nor mentioned the continuous representation rule or any similar tolling exceptions.[150]

Analyzing these cases reveals troubling differences between the positions they advocate and the *Epstein* court's use of them to support its statement that "[n]otwithstanding such justifications, numerous jurisdictions refuse to judicially adopt the continuous representation rule."[151] Therefore, the *Epstein* court's use of these authorities to bolster its reasoning for rejecting the continuous representation rule is unpersuasive.

3. Epstein: *The Operative Facts*

The *Epstein* court focused on: (1) Epstein's concession that he knew about many of his legal malpractice allegations against Brown at the time of the verdict[152] and (2) Brown's only nominal representation of Epstein during the appellate process.[153] Based on these facts, the court concluded the statute of limitations period began to run at the trial's conclusion[154] because the statute of limitations runs from the time when a person of common knowledge would have reason to know a claim might exist "and not when advice of counsel is sought or a full-blown theory of recovery developed."[155] However, the absence of either of these two facts in future legal malpractice actions could create problems for litigants in South Carolina.

Epstein's direct knowledge of Brown's negligence at the time of the trial verdict made adopting a version of the continuous representation rule with a discovery provision irrelevant in determining whether the statutory period barred Epstein's claim.[156] Indeed, allowing the continuous representation rule to toll the statutory period in *Epstein* would have directly contradicted South Carolina's discovery rule.[157] However, subsequent cases with facts similar to *Epstein* could present circumstances that make rejecting the continuous representation rule seem harsher than in *Epstein*. For example, given the complex nature of legal proceedings, equity is not served by barring a less sophisticated client's claim when

149. *See Chambers*, 713 S.W.2d at 896–97.
150. *See id.* at 896–99.
151. *Epstein*, 363 S.C. at 379, 610 S.E.2d at 819–20.
152. *Id.* at 376, 382–83, 610 S.E.2d at 818, 821.
153. *Id.* at 377 n.2, 610 S.E.2d at 818 n.2.
154. Epstein v. Brown, 363 S.C. 372, 382, 610 S.E.2d 816, 821 (2005).
155. *Id.* at 376, 610 S.E.2d at 818.
156. In *Harrison v. Bevilacqua*, the court addressed its previous rejections of the continuous treatment rule and stated, "[b]ecause in [prior] cases *the discovery exception would have precluded the plaintiffs' claims*, and thus they would not have benefited from the adoption of the continuous treatment rule, the Court expressly declined to adopt the rule." 354 S.C. 129, 135, 580 S.E.2d 109, 112 (2003) (citing Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 476–77 (1996); Preer v. Mims, 323 S.C. 516, 520, 476 S.E.2d 472, 474 (1996)).
157. *See* S.C. CODE ANN. § 15-3-535 (2005).

he did not concede subjective knowledge of the alleged negligence and trusted his attorney's advice to appeal but failed the discovery rule's objective test.[158]

The *Epstein* court also focused on the fact that the defendant-attorney Brown only remained Epstein's counsel of record and that another firm actively handled the appeal.[159] The reference to this fact suggests the result, and perhaps the court's rejection of the continuous representation rule, hinged on whether the defendant-attorney continued to actively represent the plaintiff-client. Thus, attorneys could attempt to distinguish *Epstein* from future legal malpractice actions on this basis. In this context, a defendant-attorney could argue *Epstein's* holding depended on Brown's lack of active representation during the appellate process. Otherwise, *Epstein* directly conflicts with the supreme court's stated principle that "*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."[160]

B. Chief Justice Toal's Dissent: A Call for a Bright-Line Rule

Chief Justice Toal's dissent advocated the adoption of a "bright-line rule" that "the statute of limitations does not begin to run in a legal malpractice action until an appellate court disposes of the action by sending a remittitur to the trial court."[161] Under this rule, the statute of limitations would not have barred Epstein's legal malpractice claim.[162] Adopting Chief Justice Toal's rule would simplify judicial attempts to determine when the statutory period begins to accrue in legal malpractice actions. However, the rule's general language requires clarification before one can evaluate its feasibility and consistency with South Carolina law.

Chief Justice Toal's general formulation of the rule and short analysis provides little guidance regarding the possible effects of adopting her rule. Taking the dissent's language on its face, Chief Justice Toal seems to have advocated a rule similar—if not identical—to the exhaustion of appeals rule. The exhaustion of appeals rule tolls the statute of limitations period during the appellate process, regardless of continued representation.[163] Thus, Chief Justice Toal's proposed rule creates an even more expansive tolling exception than the continuous representation rule. Furthermore, in legal malpractice cases where the defendant-attorney does not

158. For more detail regarding the objective standard South Carolina courts apply under the discovery rule established in section 15-3-535, see *supra* Part II.B.

159. *Epstein*, 363 S.C. at 377 n.2, 610 S.E.2d at 818 n.2.

160. True v. Monteith, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997) (emphasis added).

161. *Epstein*, 363 S.C. at 383, 610 S.E.2d at 822 (Toal, C.J., dissenting).

162. *See supra* Part III.D (addressing the effect of Chief Justice Toal's rule on Epstein's legal malpractice action).

163. *See supra* note 135 and accompanying text (addressing the exhaustion of appeals rule and comparing it to the continuous representation rule).

continue to represent the plaintiff-client, the primary policy justifications for tolling the statute of limitations no longer exist.[164]

C. *Justice Pleicones's Dissent: Applying Estoppel in* Epstein

Justice Pleicones agreed with the *Epstein* majority's rejection of the continuous representation rule and its retention of the discovery rule.[165] However, he would have estopped Brown from asserting the statute of limitations to defend against Epstein's claim.[166] Justice Pleicones based his opinion on the principle established in *Kleckley v. Northwestern National Casualty Co.*[167] Justice Pleicones's reasoning and application of estoppel seems to promote the most logical resolution to the *Epstein* problem.

First, the South Carolina Supreme Court has not overruled or limited the *Kleckley* principle. The *Kleckley* court did not address using estoppel to toll the statute of limitations in a legal malpractice action.[168] However, the *Kleckley* court did not limit the principle to the facts of the particular case. Instead, the *Kleckley* court phrased the principle broadly—asserting "[t]he defendant's conduct may also involve inducing the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to forbear exercising the right to sue."[169] Given the *Kleckley* court's broad language and the holding's undiminished precedential strength, Justice Pleicones correctly concluded that the fact that Brown advised Epstein to appeal estopped Brown from asserting the statute of limitations as a defense.

Also, the supreme court in *Vines v. Self Memorial Hospital*, entertained allowing estoppel to bar a defendant's assertion of the statute of limitations to defend against an action for negligence.[170] Although section 15-3-530(5) did not govern that action,[171] the *Vines* court addressed whether estoppel tolled the statute of limitations governing the plaintiff's negligence claim and ultimately determined estoppel did not apply.[172] However, the *Vines* court made this ruling because

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164. *Epstein*, 363 S.C. at 378, 610 S.E.2d at 819 ("We find the justifications favoring adoption of the continuous treatment rule are similar to those justifying the continuous representation rule, to wit: 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.").

165. *Id.* at 384, 610 S.E.2d at 822 (Pleicones, J., dissenting).

166. Epstein v. Brown, 363 S.C. 372, 372, 610 S.E.2d 816, 822 (2005).

167. *Id.* at 372, 610 S.E.2d at 822 (quoting Kleckley v. Nw. Nat'l Cas. Co., 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000) ("Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute ha[s] been induced by the defendant's conduct." (alterations in original)).

168. *Kleckley*, 338 S.C. at 134–35, 526 S.E.2d at 219 (addressing a bad faith refusal to pay a benefits action).

169. *Id.* at 137, 526 S.E.2d at 220.

170. 314 S.C. 305, 443 S.E.2d 909 (1994).

171. *See id.* at 306–07, 443 S.E.2d at 910 (determining the Tort Claims Act, S.C. CODE ANN. § 15-78-100 (2005), governed the action because the plaintiff brought a negligence claim against a state owned hospital).

172. *Id.* at 308–09, 443 S.E.2d at 911.

"[h]ere, there is no showing that Vines delayed filing suit in reliance upon Hospital's conduct;"[173] the court did not decide that estoppel does not ever apply in actions for general negligence. Thus, South Carolina courts can estop a defendant's use of the statute of limitations in general negligence actions that sections 15-3-530(5) and 15-3-535 normally govern.[174]

Therefore, if the facts in a legal malpractice action satisfy the *Kleckley* requirements,[175] applying estoppel to toll the statute of limitations during the period the defendant-attorney continued to represent the plaintiff-client on appeal does not conflict with South Carolina law.[176]

Additionally, applying estoppel in *Epstein* would have allowed the court to avoid the apparent contradiction between the continuous representation rule and the court's decision in *True v. Monteith* without requiring the adoption of the continuous representation rule.[177] Applying estoppel principles also would have allowed the client to rely on his attorney's advice, which the *True* court promoted,[178] and would not have required adopting another tolling exception to section 15-3-535. This compromise would have been acceptable because South Carolina law already permits using estoppel in this quasi-tolling manner.[179]

Lastly, applying estoppel in legal malpractice actions 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.[180] In doing so, a negligent attorney can extend the process long enough for the statute of limitations to accrue. Applying estoppel to bar the statute of limitations defense in legal malpractice actions would greatly reduce the potential for this type of abuse.

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173. *Id.* at 308, 443 S.E.2d at 911.

174. Section 15-3-530 would have governed the plaintiff's general negligence action, instead of section 15-78-100, had he sued a private party and not a state owned institution. *See* S.C. CODE ANN. § 15-3-530(5) (2005).

175. The *Kleckley* court appeared to outline these requirements when it stated:

> "[A] defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." Such inducement may consist of an express representation that the claim will be settled without litigation or conduct that suggests a law suit is not necessary. The defendant's conduct may also involve inducing the plaintiff to either believe that an amicable adjustment of the claim will be made without suit or to forebear exercising the right to sue.

Kleckley v. Nw. Nat'l Cas. Co., 338 S.C. 131, 136–37, 526 S.E.2d 218, 220 (2000) (citations omitted) (quoting Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997)).

176. *See* Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001) (analyzing whether the facts warranted using the doctrine of equitable estoppel to toll the statutory period when the plaintiffs alleged property damage or personal injury in a class action).

177. *See* True v. Monteith, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997); *supra* note 160 and accompanying text (addressing the rule regarding a client's right to rely on his attorney's advice).

178. *See True*, 327 S.C. at 120, 489 S.E.2d at 617.

179. *Kleckley*, 338 S.C. at 136–37, 526 S.E.2d at 220; *Black*, 327 S.C. at 61, 488 S.E.2d at 330.

180. *See supra* Parts II, III (analyzing current South Carolina jurisprudence regarding legal malpractice actions, the three year statutory period, the discovery rule, and the holding in *Epstein*).

V. CONCLUSION

Given *Epstein*'s operative facts and the majority's justifications for rejecting the continuous representation rule, the supreme court's holding constitutes a problematic rejection of the continuous representation rule. The majority justified its holding on its previous rejection of the analogous continuous treatment rule, multiple other jurisdictions' rejections of the continuous representation rule, and the belief that adopting the rule would directly contradict section 15-3-535.[181] However, analyzing these justifications reveals potential flaws in the *Epstein* court's reasoning, reveals the holding's diminished precedential strength, and reveals potential problems that could arise under current South Carolina law.

James L. Floyd, III

181. *See supra* Part IV.

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