

**RECEIVED**

JUN 15 2016

Personal Care, Inc.  
 PLAINTIFF(S)

Jerry N. Theos, et al.  
 DEFENDANT(S)

**SC Court of Appeals**

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant
	or	
	<input type="checkbox"/> Self-Represented Litigant	

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

2015 JUN 22 PM 1:15  
 FILED  
 CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

**INFORMATION FOR THE PUBLIC INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$

If applicable, describe the property, including tax map information and address, referenced in the order:  
 N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

*[Signature]*  
 Circuit Court Judge

2117  
 Judge Code

6/22/15  
 Date

ATTEST: A TRUE COPY  
 JULIE J. ARMSTRONG (SEAL)  
 CLERK, C.P. & C.V.  
 BY: *[Signature]*  
 DEPUTY CLERK

**EXHIBIT**  
**2**

9  
STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS )  
IN THE NINTH JUDICIAL CIRCUIT )

Personal Care, Inc., )

Civil Action No. 2013-CP-10-1396 )

Plaintiff, )

**ORDER ON PLAINTIFF'S MOTION )  
TO ALTER OR AMEND JUDGMENT )**

v. )

Jerry N. Theos; Uricchio, Howe, Krell, )  
Johnson, Toporek, Theos and Keith, PA; )  
Cheryl D. Shoun; and Taylor, Shoun, )  
Bowley and Byrd, LLC, )

Defendants. )

FILED  
2015 JUN 22 PM 1:15  
JULIE S. HARRIS RONG  
CLERK OF COURT

This Matter is before this Court on Plaintiff Personal Care, Inc.'s Motion to Alter or Amend Judgment, filed on March 16, 2015. The Motion seeks to amend this Court's Order Denying Plaintiff's Motion to Restore, filed on March 3, 2015. After review of the Motion, the memoranda submitted by the parties, and the original Order filed by this Court, this Court hereby modifies its March 3, 2015 Order and will hold this matter in abeyance to allow the parties the opportunity to present live testimony and submit affidavits as to the statute of limitations issue. The parties shall have fifteen days from the date of this Order to notify the Court whether they would like to present live testimony or present additional affidavits for this issue.

**PROCEDURAL REVIEW**

This matter was before this Court on a Plaintiff's Motion to Restore, filed on September 22, 2014. As a brief procedural history, Plaintiff Personal Care initially filed this action against the Defendants for legal malpractice on March 8, 2013. On August 27, 2013, the parties submitted and Judge R. Markley Dennis signed a Consent Order Striking this Case from the

Active Docket. The Order was filed the next day on August 28, 2013. The Order specifically stated that "if the claim is restored within one year . . . the statute of limitations shall be tolled as to all consenting parties." On August 27, 2014, the Plaintiff submitted a Proposed Consent Order Restoring the Case to the Docket under Rule 40(j) to the clerk of court to present it to Judge Dennis for his consideration. The Proposed Order lacked the signature of Co-Defendants Cheryl Shoun and Taylor, Shoun Bowley and Byrd, LLC.

The clerk of court returned the Proposed Order to the Plaintiff because it did not have a proper cover sheet and filing fee. On September 4, 2014, the Plaintiff resubmitted the Proposed Order with the correct sheet and filing fee. Upon review, Judge Dennis's law clerk noted the missing signature and contacted the Plaintiff on September 15, 2014 to inquire about the missing signature. There was a discussion over whether the Defendants failure to object to the Proposed Order was tantamount to consent. The missing Defendants stated that they did not receive notice of the intent to restore nor were they asked to give consent. Several days later, the Plaintiff stated in an email that it was withdrawing the Proposed Order and filed a formal Motion to Restore the Case to the active roster on September 22, 2014.

The Plaintiff argues that the Proposed Order Restoring the Case to the Docket, arguably filed one day before the one year anniversary of the Consent Order Striking the Case from the Active Roster, should be treated as a Motion to Restore and should be granted based on that timeline. Defendants disagree, arguing that the Proposed Order was not signed by all parties, and therefore is invalid. Defendants then argue that the present Motion to Restore, filed on September 22, 2015, should be denied because the statute of limitations had run on this action. This Court heard oral arguments on this matter on November 19, 2014, took the matter under advisement and issued its Order on March 3, 2015.

In the Order, this Court agreed with the Defendants, and held that the Proposed Order was not a Motion to Restore and was invalid because it lacked a signature. It then held that the present Motion to Restore must be denied because the statute of limitations on this action had run. The Plaintiff then filed a Motion to Alter or Amend, arguing that Rule 40(j) does not provide for or allow the Defendants to assert affirmative defenses nor does it allow the Court the authority to evaluate the merits of the claims of the lawsuit. As a result of the Plaintiff's Motion to Alter or Amend, the Court requested additional briefing on the issue of whether Rule 40(j) requires the Court to restore a case to the active roster without considering the statute of limitations issue.

#### CONCLUSIONS OF LAW

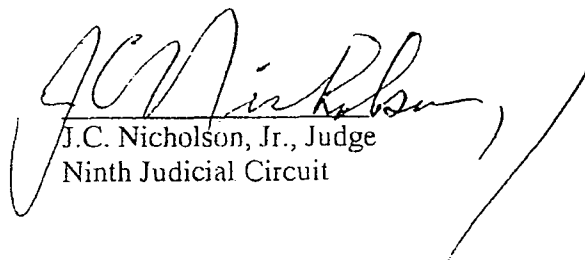
Upon careful reflection and consideration, this Court is of the opinion that it did not afford the Plaintiff an opportunity to address the statute of limitations issue at the November 19, 2014 motion hearing, and hereby holds the matter in abeyance for the parties to address this issue. The Court is still of the opinion that the Proposed Order submitted to Judge Dennis was not a Motion to Restore, but rather an invalid and incomplete Proposed Consent Order that lacked the consent of one of the parties. However, this Court finds that it made an error when it denied the Motion to Restore based on the statute of limitations without giving the Plaintiff the opportunity to properly address the issue at the motion hearing. The Court will therefore hold this matter in abeyance to allow both parties to present live testimony and affidavits as to the statute of limitations issue.

This ruling follows Maxwell v. Genez 356 S.C. 617, 621 (2003), which held that a "party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j); the party simply cannot take advantage of the one year tolling period

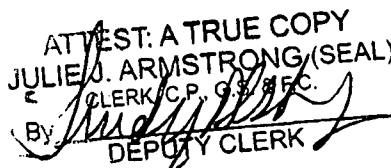
provided by the rule." As stated in the Defendant's brief, Maxwell specifically allows that a party may challenge a motion to restore, but the case does not address the procedural point for doing so. Therefore, this Court finds that the issue of whether the Plaintiff is entitled to the tolling of the statute of limitations is one that must be addressed at the hearing for a Motion to Restore. If the Court cannot address this issue at the hearing, then there would be no reason to hold a motion hearing in the first place. The Court would be required to automatically grant all Motions to Restore, and deal with issues such as the statute of limitations at later motion hearings. From a judicial economy standpoint, this does not make sense.

However, the Court finds that in the instant circumstance, the Court did not allow the Plaintiff a proper opportunity to address the statute of limitations issue at the November 19, 2014 motion hearing. Therefore, it is ordered that the parties shall have 14 days from the date of this Order to notify the Court whether they wish to supplement the record with affidavits or present live testimony as to the statute of limitations issue. After hearing from the parties, this Court will either set a date to resume the motion hearing to take live testimony, or it will make a decision based on the materials that have been submitted to the Court. This Order modifies the previous Order as of March 3, 2015 as to the findings and rulings on the statute of limitations issue.

AND IT IS SO ORDERED!

  
J.C. Nicholson, Jr., Judge  
Ninth Judicial Circuit

Dated June 19, 2015

ATTEST: A TRUE COPY  
JULIE J. ARMSTRONG (SEAL)  
CLERK, C.P., G.S. REC.  
By:   
DEPUTY CLERK