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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Appellate Case No. 2016 – 001266

RECEIVED
AUG 18 2016
SC Court of Appeals

J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-CP-10-1396

PERSONAL CARE, INC. ....Appellant,

vs.

JERRY N. THEOS; URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; CHERYL D. SHOUN; AND TAYLOR SHOUN, BOWLEY & BYRD, LLC..Respondents.

JOINT MOTION TO DISMISS APPEAL

M. Dawes Cooke, Jr.
Phillip S. Ferderigos
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COME NOW the Respondents, by their respective counsel, and file a Motion to Dismiss the above-referenced Appeal for lack of subject matter jurisdiction. This Motion is based on the fact that the Appellant has appealed Interlocutory Orders, rather than the Final Order of the Court, attached as Exhibit 1. The Charleston Clerk of Court records indicate that the Substituted Modified Order on Plaintiff's Motion to Alter or Amend Judgment (modified under rule 60) was mailed to counsel on June 15, 2016. However, Plaintiff erroneously appealed the prior Interlocutory Orders which were not the Final Order for this case. Plaintiff's Notice of Appeal was filed on June 15, 2016, one day after the modified Order. Despite notice that the Orders appealed have been modified and substituted by the June 14 Order, Plaintiff failed to amend its notice or file notice appealing the Final Order.

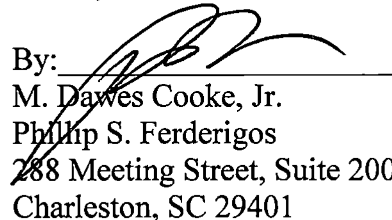
In South Carolina, generally, an interlocutory order is not immediately appealable and, as a general rule, only final judgments are appealable. Burkey v. Noce, 398 S.C. 35, 726 S.C. 2d 229 (Ct. App. 2012); Ex parte Wilson, 367 S.C. 7, 625 S.E.2d 205, 208 (2005). Further, failure to appeal of final Order within 30 days bars later appeals. Rule 203(b), SCACR, requires a party to serve his notice of appeal within 30 days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal. USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) quoting Canal Ins. Co. v. Caldwell, 338 S.C. 1, 4, 524 S.E.2d 416, 418 (Ct. App. 1999). Appellant's failure to timely appeal the correct Final Order is a jurisdictional defect and bars the Appellant from attempting to appeal the Final Order thereafter. If a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of

the notice. Id. quoting Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004).

For the foregoing reasons, Respondents respectfully request that the present Appeal be dismissed as the Court lacks subject matter jurisdiction to hear the appeal.

Respectfully submitted,

Barnwell Whaley Patterson & Helms, LLC



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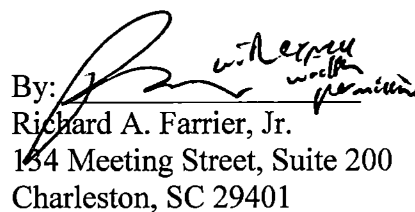
Attorneys for Jerry N. Theos and Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A.

Date: August 16, 2016

K&L Gates, LLP



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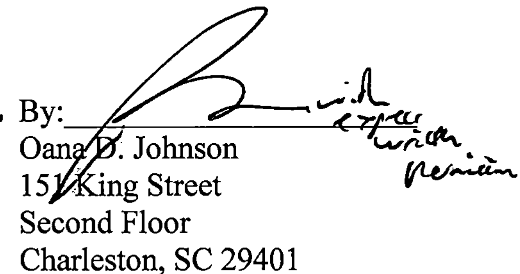
Date August 16, 2016



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Date: August 16, 2016

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AUG 18 2016
SC Court of Appeals

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258
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M DAWES COOKE JR
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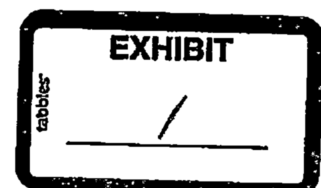
NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCP

Order/Personal Care's Mot to Restore Case is Denied

CASE NO: 2013CP1001396
Personal Care Inc VS Jerry N Theos , defendant, et al

This judgment was entered on the 14th day of June, 2016, and notice mailed first class on Wednesday, June 15, 2016, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at http://clerkofcourt.charlestoncounty.org or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.



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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
Personal Care, Inc., Plaintiff,	)	Civil Action No. 2013-CP-10-1396
v.	)	
Jerry N. Theos; Uricchio, Howe, Krell, Johnson, Toporek, Theos and Keith, PA; Cheryl D. Shoun; and Taylor, Shoun, Bowley and Byrd, LLC, Defendants.	)	**SUBSTITUTED MODIFIED ORDER ON PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT**

FILED
2016 JUN 14 AM 11: 03
JULIE J. ARMSTRONG
CLERK OF COURT

Basis of Substitution of Order Entered May 23, 2016

This Order is substituted for the Court's Modified Order on Plaintiff's Motion to Alter or Amend Judgment ("Prior Order") entered May 23, 2016 in order to comport with and properly cite to the latest opinion in Stokes-Craven Holding Corp. v. Robinson, No. 27572, 2016 WL 3040160 (May 25, 2016). On April 22, 2016, defendants were requested to submit a proposed order consistent with the Court's ruling on the motion described herein. The Court on May 23, 2016 entered as an order the proposal submitted by Defendants. The Prior Order was in part premised upon the recent Supreme Court opinion of Stokes-Craven. On May 25, 2016, the Supreme Court, in response to a petition for rehearing in Stokes Craven issued a substituted opinion in Stokes-Craven. While the substituted opinion in Stokes-Craven does not have any Substantive impact upon the outcome of the matters pending before the Court, it is issuing this Substituted Order to conform the references to the substituted Opinion in Stokes-Craven and clarify those references.

Introduction

This matter is before this Court on Plaintiff Personal Care, Inc.'s (hereinafter "Personal Care") Motion to Alter or Amend Judgment, filed on March 16, 2015 ("Motion to Amend"). The Motion seeks to amend this Court's Order Denying Plaintiff's Motion to Restore, filed on March 3, 2015. Defendants Jerry N. Theos and Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, PA (hereinafter collectively referred to as "Theos"); Cheryl D. Shoun (hereinafter "Shoun"); and Taylor, Bowley and Byrd (hereinafter "TBB")[1] oppose Plaintiff's Motion. After review of the entire Record, including, but not limited to, the motions, the memoranda and affidavits submitted by the parties, the original Orders filed by this Court, and the relevant case law, this Court hereby modifies its Prior Order of March 3, 2015 and makes the following findings of fact and conclusions of law.

Procedural Background

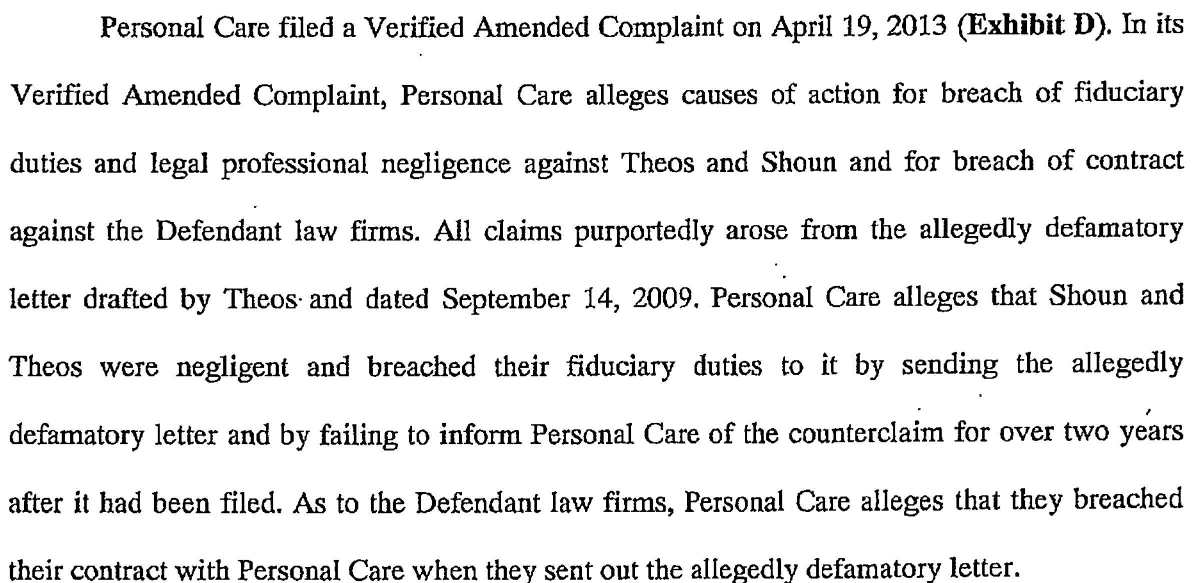
This case arises from events that occurred in 2009 and early 2010. Beginning in 2009, Theos and Taylor, Shoun, Bowley, and Byrd, LLC, were retained by Personal Care to pursue a potential claim against one of its competitors. Two former employees of Personal Care went to work for the competitor and allegedly disclosed and otherwise utilized protected client information, gained while in Personal Care's employ, to the advantage of the competitor. On or about September 14, 2009, at the direction of Personal Care, Theos sent a letter to the competitor **(Exhibit A)**, with a copy allegedly sent to a third-party dialysis clinic, addressing the competitor's alleged wrongful use of the protected information. On December 10, 2009, Theos and Shoun filed the underlying lawsuit on behalf of Personal Care against the competitor. On or

[1] After Defendant Cheryl Shoun left the law firm of Taylor, Shoun, Bowley, and Byrd, LLC, in April 2010, the firm became Taylor, Bowley and Byrd, LLC.

about March 9, 2010, the defendant in the underlying suit filed a counterclaim for defamation against Personal Care based solely on the September 2009 letter **(Exhibit B)**.

On or about March 8, 2013, Personal Care filed the instant action against Theos, Shoun, and TBB[2] **(Exhibit C)**.[3] In its Verified Complaint, Personal Care asserted that its failure to attach the required S.C. Code Ann. § 15-36-100(B) Expert Affidavit for a legal malpractice claim was excused "because this Complaint is being filed when there is a good faith basis to believe the expiration of the statute of limitations is imminent."

Personal Care filed a Verified Amended Complaint on April 19, 2013 **(Exhibit D)**. In its Verified Amended Complaint, Personal Care alleges causes of action for breach of fiduciary duties and legal professional negligence against Theos and Shoun and for breach of contract against the Defendant law firms. All claims purportedly arose from the allegedly defamatory letter drafted by Theos and dated September 14, 2009. Personal Care alleges that Shoun and Theos were negligent and breached their fiduciary duties to it by sending the allegedly defamatory letter and by failing to inform Personal Care of the counterclaim for over two years after it had been filed. As to the Defendant law firms, Personal Care alleges that they breached their contract with Personal Care when they sent out the allegedly defamatory letter.



After filing the Verified Amended Complaint, Personal Care took no action via formal discovery (written discovery or depositions) to prosecute its claims before the matter was administratively dismissed by an order dated August 28, 2013. Personal Care's counsel requested a Consent Order Striking the Case from the Docket pursuant to Rule 40(j), SCRCP. All of the Defendants agreed to the Consent Order, which Judge Dennis executed on August 27, 2013

[2] Shoun continued to represent Personal Care after her departure from TBB in April, 2010. TBB ended its representation of and had no contact with Personal Care after Shoun's departure from the firm.

[3] On March 7, 2013, the day before, Personal Care's counsel expressed his concerns that the statute of limitations may bar his client's litigation if it were commenced <u>after</u> March 8, 2013: "We also discussed my concerns about an argument that the statute of limitations might expire on Friday, March 8."

(**Exhibit E**). Pursuant to its express terms, the Consent Order (hereinafter the "2013 Judge Dennis Order") set forth the following:

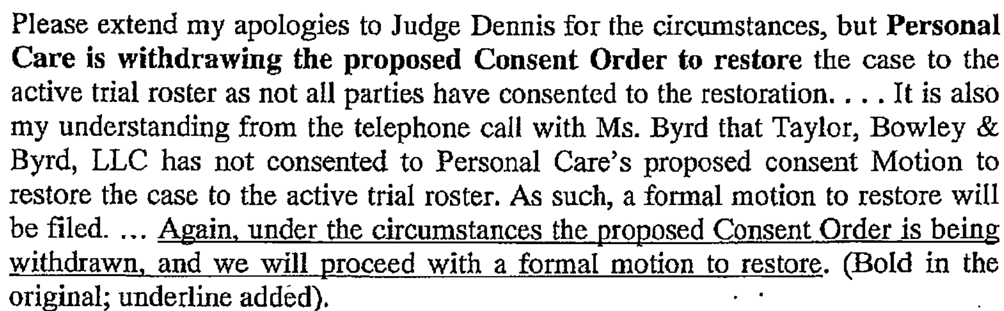
> IT FURTHER APPEARING that each party agrees that if the claim is restored within one year from the date of this Order, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations as of the date of this Order shall remain and begin to run on the date the claim is restored. (Emphasis added).

The 2013 Judge Dennis Order was filed on August 28, 2013, and thereafter the status of the case was shown as "Dismissed."

Approximately one year later, on August 22, 2014, Personal Care's counsel contacted Theos's counsel to request his consent to a proposed Consent Order Restoring Case to Docket (Rule 40(j), SCRCP), (hereinafter "2014 Proposed Consent Order") (**Exhibit F**), which purported to reinstate the case pursuant to the 2013 Judge Dennis Order. On August 26, 2014, Theos did not have an overt reason not to consent to the 2014 Proposed Consent Order. Defense counsel for Theos signed the 2014 Proposed Consent Order and forwarded it to Personal Care's counsel on August 26, 2014. The other co-Defendants, Shoun and TBB, however, did not consent to the 2014 Proposed Consent Order. In fact, TBB did not receive a copy of the 2014 Proposed Consent Order until September 17, 2014.

Despite the fact that Personal Care's counsel did not have the consent of all the parties to submit the 2014 Proposed Consent Order to the Court, on or about August 27, 2014, Personal Care's counsel mailed the partial consent to the 2014 Proposed Consent Order to the clerk of court, requesting that the clerk present it to Judge Dennis for his consideration. The clerk returned the mailing unfiled because Personal Care did not include a proper cover sheet and filing fee. Personal Care submitted the 2014 Proposed Consent Order on September 4, 2014, along with the requisite fee and cover sheet. On September 15, 2014, Judge Dennis and his law

clerk received the 2014 Proposed Consent Order. Upon review, Judge Dennis's clerk noted that the 2014 Proposed Consent Order did not have the consent of all of the parties. The clerk contacted Personal Care's counsel to inquire about the missing consents. During the email exchange between Judge Dennis's clerk and Personal Care's counsel, Personal Care's counsel asserted that Shoun's failure to object to his 2014 Proposed Consent Order was tantamount to consent and that counsel for all of the other defendants had consented. On September 17, 2014, TBB contacted Judge Dennis's clerk to inform her that Personal Care had never given TBB notice of its intent to restore nor asked TBB to consent to restoration. Shortly thereafter, Personal Care's counsel withdrew the 2014 Proposed Consent Order via his communication with the Court on September 17, 2014 (**Exhibit G**), wherein Personal Care's counsel stated:



> Please extend my apologies to Judge Dennis for the circumstances, but **Personal Care is withdrawing the proposed Consent Order to restore** the case to the active trial roster as not all parties have consented to the restoration. . . . It is also my understanding from the telephone call with Ms. Byrd that Taylor, Bowley & Byrd, LLC has not consented to Personal Care's proposed consent Motion to restore the case to the active trial roster. As such, a formal motion to restore will be filed. ... Again, under the circumstances the proposed Consent Order is being withdrawn, and we will proceed with a formal motion to restore. (Bold in the original; underline added).

After withdrawal of the 2014 Proposed Consent Order, on September 22, 2014, over three weeks after the one-year deadline pursuant to the 2013 Judge Dennis Order and SCRCP Rule 40(j), Personal Care's counsel subsequently filed a formal Motion to Restore the case to the active roster. Defendants opposed Personal Care's Motion to Restore. In support of its Motion to Restore, in addition to other arguments, Personal Care argued 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 disagreed, arguing that, in addition to other

arguments, the Proposed Order was not signed by all parties and therefore was invalid and, further, that the proposed Order had been voluntarily withdrawn and was void. Defendants also argued that the formal Motion to Restore, filed on September 22, 2014, should be denied because the statute of limitations had run on this action.

This Court heard oral arguments on the Motion to Restore on November 19, 2014, and took the matter under advisement. After reviewing the Motion to Restore and the memoranda in support of and in opposition to the motion, and considering the arguments of counsel, the Court issued its Order on March 3, 2015, denying Personal Care's Motion to Restore. In the Order, the Court agreed with Defendants and held that the Proposed Order was invalid because it lacked a signature and that the Proposed Order was not a Motion to Restore. The Court also held that the formal Motion to Restore must be denied because the statute of limitations on this action had run.

On March 16, 2015, Personal Care filed the instant Motion to Amend, arguing that Rule 40(j) does not provide for or allow Defendants to assert affirmative defenses nor does it allow the Court the authority to evaluate the merits of a statute of limitations defense. Defendants filed memoranda in opposition to the Motion to Amend. As a result of Personal Care's Motion to Amend, the Court requested additional briefing addressing whether Rule 40(j) requires the Court to perfunctorily restore a case to the active roster without considering the statute of limitations issue.

Following receipt of the parties' additional briefing, the Court issued an Order dated June 19, 2015 (the "June Order"), modifying its prior March 3, 2015 order. In the June Order, the Court held that, pursuant to Maxwell v. Genez, 356 S.C. 617, 591 S.E.2d 26 (2003), a party may challenge a motion to restore on grounds of the expiration of the statute of limitations. See Maxwell, 356 S.C. at 622 n.2 (rejecting plaintiff's argument that since defendants agreed to the

Rule 40(j) dismissal after the statute of limitations had expired, they waived their right to oppose the motion to restore on grounds of the expiration of the statute of limitations). The Court further found that the issue of whether a 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. The Court reasoned that, if a court cannot address the statute-of-limitations issue at the hearing, then there would be no reason to hold a hearing in the first place, because the court would be required to automatically grant all motions to restore and address issues such as the statute of limitations at later motion hearings. The Court concluded that such outcome would be nonsensical from a judicial economy standpoint.

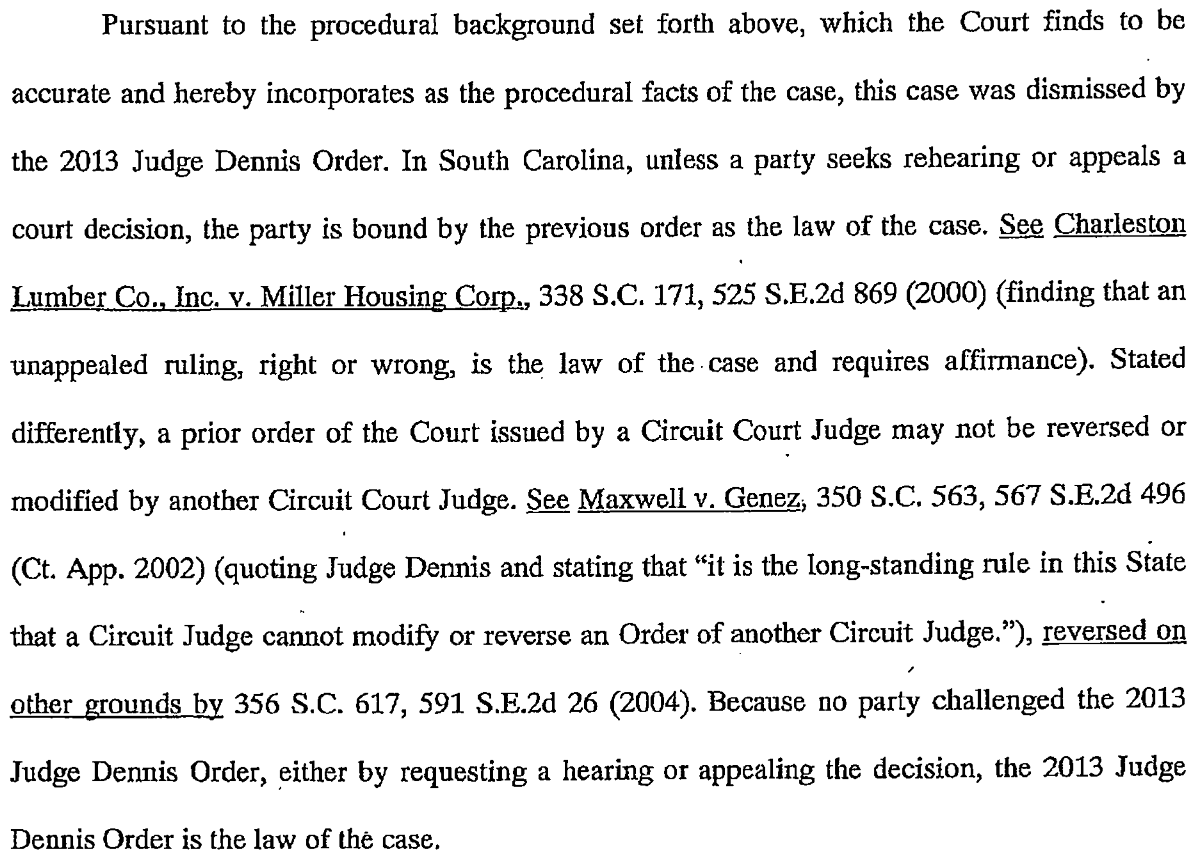
However, because the Court found that it did not afford Personal Care an opportunity to address the statute of limitations issue at the motion hearing on November 19, 2014, the Court announced that it would hold this matter in abeyance to allow all parties to present live testimony and affidavits as to the statute of limitations issue, thereby providing the parties an additional opportunity to provide additional evidence that any party wished to present to the Court prior to its issuing a decision. The parties were given fourteen days from the date of the Order to notify the Court as to whether they wished to supplement the Record with affidavits or live testimony.

Defendants thereafter informed the Court that they did not wish to supplement the Record further with either affidavits or live testimony, although they did reserve the right to cross-examine witnesses called by Personal Care or to submit response affidavits. On July 9, 2015, Personal Care filed Plaintiff's Memorandum as Directed by Court's Order on Plaintiff's Motion to Alter or Amend Judgment, in which it informed the Court that it intended to submit additional affidavit testimony. The Court gave the parties a deadline of September 4, 2015, by which to submit affidavits. On September 2, 2015, Personal Care mailed a letter to the Clerk of Court with

a copy of an Affidavit of Bernard Cignavitch for filing. However, the affidavit was not filed at that time. Personal Care resubmitted the affidavit to the Clerk of Court for filing on January 7, 2016, at which time the affidavit was properly filed and made part of the Record.

On April 15, 2016, this Court held a telephonic status conference with counsel for all of the parties. Upon hearing from the parties that the Record was complete, the Court informed the parties that it would review the entire Record and issue a final order on Personal Care's Motion to Amend.

Findings of Fact and Conclusions of Law



Pursuant to the procedural background set forth above, which the Court finds to be accurate and hereby incorporates as the procedural facts of the case, this case was dismissed by the 2013 Judge Dennis Order. In South Carolina, unless a party seeks rehearing or appeals a court decision, the party is bound by the previous order as the law of the case. See Charleston Lumber Co., Inc. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000) (finding that an unappealed ruling, right or wrong, is the law of the case and requires affirmance). Stated differently, a prior order of the Court issued by a Circuit Court Judge may not be reversed or modified by another Circuit Court Judge. See Maxwell v. Genez, 350 S.C. 563, 567 S.E.2d 496 (Ct. App. 2002) (quoting Judge Dennis and stating that "it is the long-standing rule in this State that a Circuit Judge cannot modify or reverse an Order of another Circuit Judge."), reversed on other grounds by 356 S.C. 617, 591 S.E.2d 26 (2004). Because no party challenged the 2013 Judge Dennis Order, either by requesting a hearing or appealing the decision, the 2013 Judge Dennis Order is the law of the case.

Under the express terms of the 2013 Judge Dennis Order, the statute of limitations was not tolled after the case was dismissed in 2013. That Order required the case to be restored

within one year of the date of the Order (i.e., by August 28, 2014) in order for the statute of limitations to be tolled during the period of dismissal. However, it is undisputed that Personal Care failed to restore the case within the one-year deadline. Thus, the statute of limitations was not tolled following the entry of the 2013 Judge Dennis Order.

Similarly, the statute of limitations was not tolled under Rule 40(j). Unlike the 2013 Judge Dennis Order, which required the case to be restored within one year in order for the statute of limitations to be tolled, Rule 40(j) provides that the statute will be tolled "if the claim is restored upon motion made within 1 year of the date stricken."[4] Although 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 "cannot take advantage of the one year tolling period provided by the rule." Maxwell v. Genez, 356 S.C. at 620-621. It is undisputed that the Motion to Restore currently pending in this Court was not filed until September 22, 2014, long after the expiration of the one-year period. Therefore, the statute of limitations cannot be tolled by Rule 40(j).

At oral argument, Personal Care conceded as much to the Court when it acknowledged that it did not restore or move to restore its case within the timeframe set forth in either the 2013 Judge Dennis Order or SCRCP Rule 40(j). Personal Care further conceded that it should not receive the benefit of the tolling provision of SCRCP Rule 40(j). Instead, Personal Care argued that there is still time left on the statute of limitations because the statute did not begin to run

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[4] SCRCP Rule 40(j) sets forth the following:

> **(j) Case Stricken From Docket by Agreement**
> A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. (Emphasis added).

until the summer of 2012. However, Personal Care subsequently reversed course, asserting in its Memorandum submitted to the Court after the hearing that the withdrawn 2014 Proposed Consent Order is equivalent to and should be treated as a Motion to Restore. There is no merit to either argument.

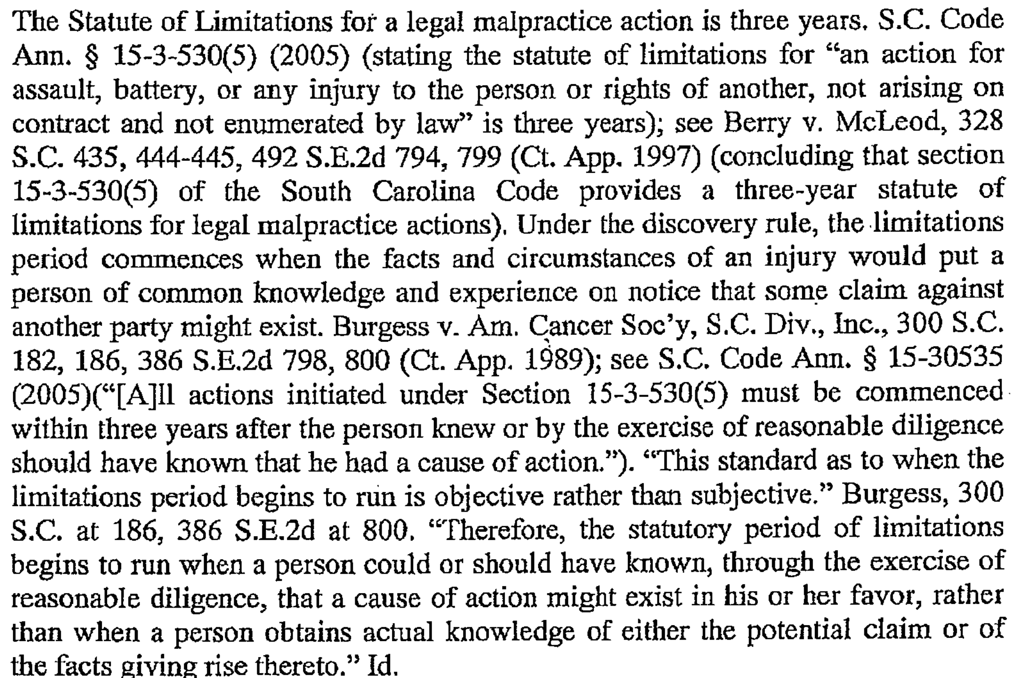
The Court finds that the 2014 Proposed Consent Order is a nullity. It is undisputed that not all of the parties consented to the proposed order. Moreover, Personal Care did not comply with SCRCP Rule 5 and Rule 7, which govern the filing and service of motions. Finally, and most importantly, Personal Care withdrew the 2014 Proposed Consent Order, rendering it a nullity. Thus, even if the 2014 Proposed Consent Order could have been construed as a Motion to Restore, it no longer is before this Court. Therefore, if this case is restored, it will not be restored "upon motion made within one year of the date stricken." SCRCP Rule 40(j). The Court concludes that Personal Care did not file the instant Motion to Restore within one year after the case was stricken from the docket.

Accordingly, in regard to Personal Care's 2014 Proposed Consent Order submitted to the Court, the Court finds that (1) all parties had not consented to the Order and the Order was defective on its face; (2) the case had not been "restored" by August 28, 2014, as the 2013 Judge Dennis Order striking it required; and (3) Personal Care withdrew the 2014 Proposed Consent Order, so it is not properly before the Court and is a nullity. The Court further finds that Personal Care filed its Motion to Restore approximately three weeks after August 28, 2014. Accordingly, under the terms of either the 2013 Judge Dennis Order or Rule 40(j), the statute of limitations was not tolled following the dismissal of the case.

Personal Care argues that it is of no consequence that the statute of limitations was not tolled because, according to Personal Care, the statute of limitations did not start running until

July 2012. At the hearing, although Personal Care's counsel conceded that Personal Care knew both about the Counterclaim and that there were alleged issues with the defense of the case, Personal Care's counsel asserted that the statute of limitations did not begin to run until Personal Care experienced, in the summer of 2012, the "first financial consequence" caused by Defendants' alleged errors.[5] The Court finds Personal Care's argument wholly unpersuasive and concludes that the statute of limitations has expired.

As set forth in the recent Stokes-Craven Holding Corp. v. Robinson, No. 27572, 2016 WL 3040160 (May 25, 2016), the Supreme Court held:



> The Statute of Limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005) (stating the statute of limitations 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" is three years); see Berry v. McLeod, 328 S.C. 435, 444-445, 492 S.E.2d 794, 799 (Ct. App. 1997) (concluding that section 15-3-530(5) of the South Carolina Code provides a three-year statute of limitations for legal malpractice actions). Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. Burgess v. Am. Cancer Soc'y, S.C. Div., Inc., 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989); see S.C. Code Ann. § 15-30535 (2005)("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."). "This standard as to when the limitations period begins to run is objective rather than subjective." Burgess, 300 S.C. at 186, 386 S.E.2d at 800. "Therefore, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." Id.
>
> "Statutes of limitations are not simply technicalities." Kelly v. Logan, Jolley & Smith, L.L.P., 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009). "On the contrary, they have long been respected as fundamental to a well-ordered judicial system." Id. Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Id. "One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a

[5] In essence, Plaintiff desires this Court to adopt a version of the continuous representation rule which the Stokes-Craven court declines to adopt and cites as "problematic."

plaintiff has slept on his or her rights." Id. (citations omitted). "Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation." Id. "Statutes of limitations are, indeed, fundamental to our judicial system." Id. (citation omitted).

The Supreme Court further stated:

> As legislatively mandated, we being our analysis with the well-established discovery rule. Pursuant to this rule, all legal malpractice actions must be commenced within three years after the claimant knew or by the exercise of reasonable diligence should have known that he or she had a cause of action. See S.C. Code Ann. § 15-3-535 (2005) ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action").
>
> Thus, a claimant seeking recovery for a legal malpractice claim is constrained by two constants: (1) filing the claim within the statute of limitations,[6] and (2) establishing the four requisite elements of his or her claim. Because a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued. See 3 Ronald E. Mallen & Allison Martin Rhodes, Legal Malpractice § 23:14 (2015) ("Since a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued. Thus, 'accrual' means the existence of a legally cognizable cause of action.").
>
> As evidenced by this case, the key question is when the claimant's cause of action accrues to trigger the running of the three-year statute of limitations. The answer to this question is complicated by the seemingly endless factual scenarios surrounding the underlying claim of a legal malpractice cause of action.
>
> While this approach may be perceived as impermissibly requiring a person to have actual knowledge of a potential claim before the statute of limitations begins to run, we find that it is mandated by our appellate court rules and, as a result, effectuates the objective standard provided by the Legislature. See Black's Law Dictionary 1624 (10th ed. 2014) (An objective standard is defined as "[a] legal standard that is based on conduct and perceptions external to a particular person." (emphasis added)); Id. at 1529 (A rule is generally defined as "an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.").

[6] "A legal malpractice cause of action is governed by the applicable statute of limitations whether it sounds in tort, contract or fraud." 1 S.C. Jur. Attorney & Client, § 69 (Supp. 2016) (citing section 15-3-530 of the South Carolina Code).

In so doing, the Supreme Court affirmed an objective standard for the discovery rule in legal malpractice cases. Finally, the Stokes-Craven court also found that, "based upon existing appellate court rules," an appeal tolls the statute of limitations for a legal malpractice action, stating:

> "In doing so, we hold that the statute of limitations for a legal malpractice cause of action may e·tolled if the client appeals the matter in which the alleged malpractice occurred. We conclude that this rule is mandated by our appellate court rules and, as a result, effectuates the objective standard provided by the Legislature.
>
> Applying this rule to the facts of the instant case, we find the circuit court erred in granting Respondents' motions for summary judgment because Stokes-Craven's lawsuit was timely filed after this Court affirmed the verdict against Stokes-Craven. Additionally, we find the circuit court abused its discretion in denying Stokes-Craven's motion to compel the production of communications between Respondents and their malpractice carrier given there was no evidence to support the court's ruling."

However, here, in the present case, there was no appeal to stay the statute of limitations in accordance with the Stokes-Craven decision.

Clearly, "South Carolina's statute of limitations requires very little to start the clock." Maher v. Tietex Corp., 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (internal quotation marks omitted). South Carolina follows the discovery rule, which means that the statute of limitations begins to run from the date the injured party either knows or should have known, by the exercise of reasonable diligence, that a cause of action arises from the wrongful conduct. Stokes-Craven Holding Corp. v. Robinson, No. 27572, 2016 WL 3040160 (May 25, 2016); see S.C. Code Ann. § 15-3-535. "Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." Id. (emphasis added). Moreover, in a legal malpractice action, like other actions, the date on which discovery of the cause of action should have been made is an objective question. Joubert v. S.C.

Dep't of Soc. Servs., 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). In Young v. South Carolina Department of Corrections, the Court of Appeals stated:

> In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case 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. 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999); Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010).

"Therefore, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." Stokes-Craven Holding Corp., No. 27572, 2016 WL 3040160 (May 25, 2016).

Importantly, under South Carolina law, "[a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it." Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962). The law presumes at least nominal damages at that point. Livingston v. Sims, 197 S.C. 458, 15 S.E.2d 770 (1941), modified by Santee Portland Cement v. Daniel Int'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989) (discovery rule applies to contract statute of limitations). The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose. Livingston, 197 S.C. 458, 15 S.E.2d 770; Stephens v. Druffin, 327 S.C. 1, 488 S.E.2d 3, 7 (S.C. 1997). Finally, both within and outside of the context of "existing appellate court rules" (which allows a stay of the statute of limitations for a legal malpractice claim, if an appeal is filed), an objective standard "based on the conduct and perceptions *external to a particular person*" (emphasis added by Supreme Court) applies when a party has actual knowledge of a potential legal malpractice claim before the statute of limitations begins to run.

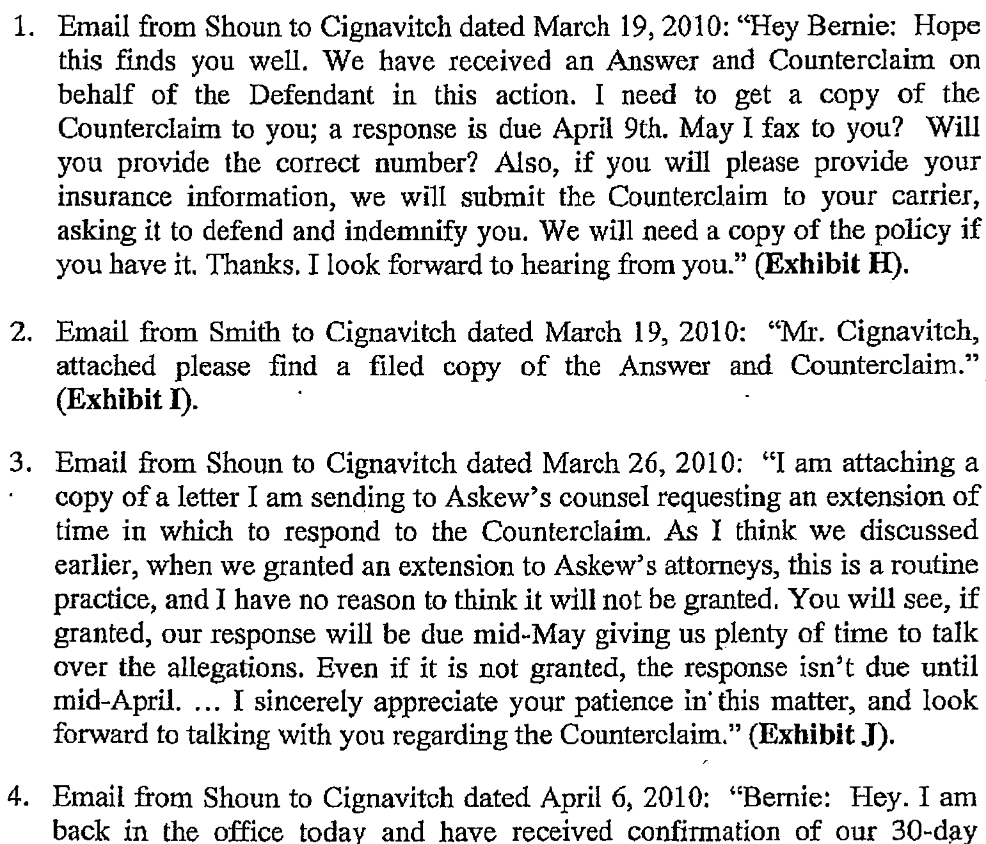
Here, based on the allegations in the Amended Complaint and the clear evidence in the Record, the Court finds that the statute of limitations has expired on Personal Care's claims against Defendants. According to Paragraph 18 of the Amended Complaint, the first act of alleged negligence occurred in September 2009 when Theos allegedly sent a defamatory letter to a third party. Paragraph 20 alleges that, on March 9, 2010, the underlying defendant filed an Answer and Counterclaim asserting a claim for defamation based on the allegedly defamatory statements in the letter published by Theos in September 2009. Finally, Paragraph 40 alleges that Personal Care was damaged by Theos and Shoun's errors when "it was forced to spend additional funds and commit time and other resources to mitigate the damages caused as a direct and proximate result of Defendants' errors." Based on such allegations and the clear evidence in the Record, the Court finds Personal Care suffered damages as soon as it was forced to incur costs to defend against the competitor's counterclaim.

Once the counterclaim was filed on March 9, 2010, Personal Care became obligated to expend additional monies, including the additional attorney's fees in responding to and defending against the counterclaim, and to otherwise contend with the inconvenience of the counterclaim. Accordingly, as a cause of action accrues at the moment when the plaintiff has a legal right to sue on it, and the law presumes at least nominal damages at that point, the Court finds that Personal Care's causes of action accrued and Personal Care had a legal right to sue Defendants on March 9, 2010.

Moreover, Defendants notified Personal Care multiple times of the counterclaim in the spring of 2010. Plaintiff's position with respect to when it received notice has shifted over time. In Paragraph 21 of its Verified Amended Complaint, Personal Care alleges that Defendants did not inform Personal Care about the counterclaim until over two years after the counterclaim had

been filed. Personal Care's expert repeated such assertion in his Affidavit supporting Personal Care's legal malpractice claim. However, at the hearing, Personal Care's counsel conceded that his client knew about the counterclaim "throughout the course of this entire . . . underlying case." (Hrg. Tr. at 23; id. at 24 ("Certainly he knew about the counterclaim.").) Therefore, Personal Care's sworn allegation in the Verified Amended Complaint not only is belied by the overwhelming evidence in the Record, but also has been subsequently acknowledged by Personal Care's counsel to be a misrepresentation.

The Court finds that Personal Care (and Mr. Cignavitch in particular) was notified of the underlying Counterclaim multiple times beginning on March 19, 2010. Overwhelming evidence refutes Mr. Cignavitch's original sworn assertions to the Court including, but limited to, the following:



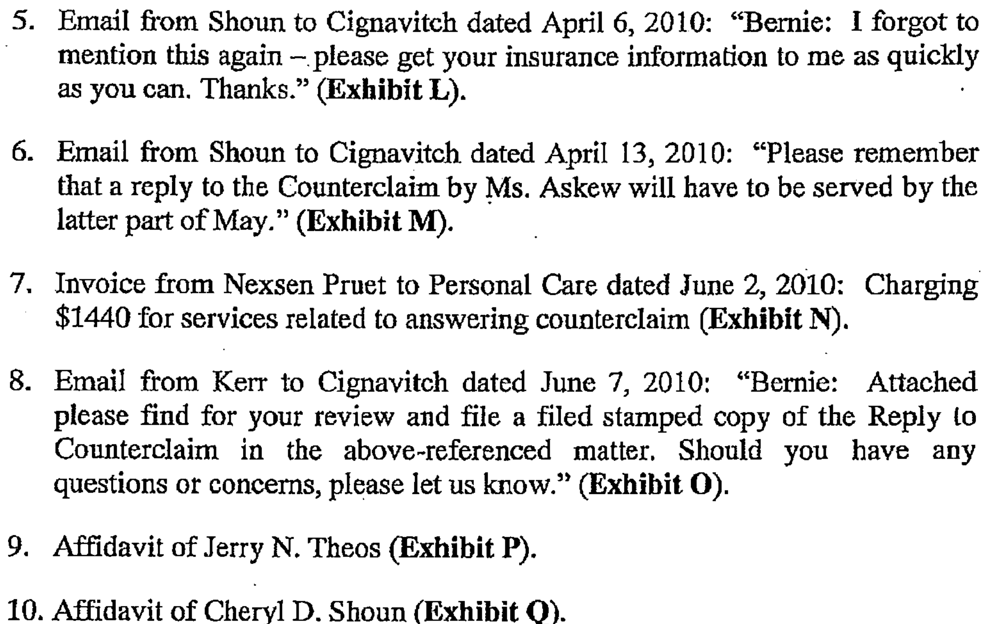
1. Email from Shoun to Cignavitch dated March 19, 2010: "Hey Bernie: Hope this finds you well. We have received an Answer and Counterclaim on behalf of the Defendant in this action. I need to get a copy of the Counterclaim to you; a response is due April 9th. May I fax to you? Will you provide the correct number? Also, if you will please provide your insurance information, we will submit the Counterclaim to your carrier, asking it to defend and indemnify you. We will need a copy of the policy if you have it. Thanks. I look forward to hearing from you." **(Exhibit H).**

2. Email from Smith to Cignavitch dated March 19, 2010: "Mr. Cignavitch, attached please find a filed copy of the Answer and Counterclaim." **(Exhibit I).**

3. Email from Shoun to Cignavitch dated March 26, 2010: "I am attaching a copy of a letter I am sending to Askew's counsel requesting an extension of time in which to respond to the Counterclaim. As I think we discussed earlier, when we granted an extension to Askew's attorneys, this is a routine practice, and I have no reason to think it will not be granted. You will see, if granted, our response will be due mid-May giving us plenty of time to talk over the allegations. Even if it is not granted, the response isn't due until mid-April. ... I sincerely appreciate your patience in this matter, and look forward to talking with you regarding the Counterclaim." **(Exhibit J).**

4. Email from Shoun to Cignavitch dated April 6, 2010: "Bernie: Hey. I am back in the office today and have received confirmation of our 30-day

extension to respond to the Counterclaim in this case. Our reply is due on or before May 13, 2010. Please let me know a time that is good for you for us to get together to talk over our response. We may even be able to do it by phone if your schedule is full. In the meantime, I will probably prepare a draft and send it to you as a starting point." **(Exhibit K).**



5. Email from Shoun to Cignavitch dated April 6, 2010: "Bernie: I forgot to mention this again – please get your insurance information to me as quickly as you can. Thanks." **(Exhibit L).**

6. Email from Shoun to Cignavitch dated April 13, 2010: "Please remember that a reply to the Counterclaim by Ms. Askew will have to be served by the latter part of May." **(Exhibit M).**

7. Invoice from Nexsen Pruet to Personal Care dated June 2, 2010: Charging $1440 for services related to answering counterclaim **(Exhibit N).**

8. Email from Kerr to Cignavitch dated June 7, 2010: "Bernie: Attached please find for your review and file a filed stamped copy of the Reply to Counterclaim in the above-referenced matter. Should you have any questions or concerns, please let us know." **(Exhibit O).**

9. Affidavit of Jerry N. Theos **(Exhibit P).**

10. Affidavit of Cheryl D. Shoun **(Exhibit Q).**

Based on these communications alone, the Court finds that Theos and Shoun unequivocally and timely informed Mr. Cignavitch of the counterclaim asserted against Personal Care and advised Personal Care to put its insurance carrier on notice in order to defend and indemnify Personal Care against the counterclaim. The Court further finds that Personal Care was first billed for charges resulting from the counterclaim no later than June 2, 2010.

The Court hereby concludes that, upon receiving a copy of the counterclaim, multiple e-mails referencing the counterclaim, a request for insurance information so that the client could get coverage for defense of the counterclaim, an invoice charging for services rendered to reply to the counterclaim, and a copy of the Reply to the Counterclaim, a person of common knowledge and experience would have been put on notice and have actual knowledge that claims against his lawyer might exist as a result of the letter and Counterclaim. <u>See</u> <u>Stokes-Craven</u>

Holding Corp., No. 27572, 2016 WL 3040160 (May 25, 2016). Therefore, the Court finds that Personal Care had both knowledge of the alleged negligence, the adverse counterclaim, and present damage, and Plaintiff's legal malpractice claim accrued and Plaintiff's legally cognizable claim existed by the first half of 2010. Accordingly, the Court hereby concludes and finds that the three-year statute of limitations on Plaintiff's claims began to run in the spring of 2010. Further, no appeal or existing "appellate court rules" stayed or tolled the statute of limitations from running.

Furthermore, the Court finds that, based on the Verified Complaint's S.C. Code Ann. § 15-36-100 (c)(1) Expert Affidavit verification, Personal Care has also admitted that the statute of limitations expired, at the latest, on March 18, 2013.[7] Paragraph 97 of the Complaint, filed on March 8, 2013, takes advantage of the provision of South Carolina Code Section 15-36-100(b), (c)(1): "Pursuant to the code, because this complaint is being filed when there is a good faith basis to believe the expiration of the statute of limitations is imminent, it is filed without an affidavit by an expert licensed by the Supreme Court of the State of South Carolina." S.C. Code Ann. § 15-36-100 (c)(1), sets forth the following: "The contemporaneous filing requirements of Subsection (b) do not apply to any case in which the period of limitations will expire or there is a good faith basis to believe it will expire on a claim stated in the complaint within 10 days of filing." Personal Care verified for this Court that the statute of limitations would likely expire within ten days of filing, i.e., on March 18, 2013.[8] The Court agrees that the statute of limitations, which began to run in the spring of 2010, was set to expire in the spring of 2013. Because Personal Care cannot benefit from the tolling provision of either the 2013 Judge Dennis

[7] Personal Care's Verified Complaint's expert affidavit verification is consistent with Personal Care's counsel's March 7, 2013 email raising his concerns that the statute of limitations would run the following day, March 8, 2013.
[8] At the hearing, Personal Care sought to undo his prior verified admission. This Court rejects Personal Care's attempt to retract via argument that to which it admitted via its verified Complaint. Mere self-serving arguments of counsel do not trump Personal Care's sworn admissions, which were previously submitted to the Court.

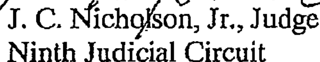
Order, Rule 40(j), or the existing appellate court rules, the Court concludes and finds that the statute of limitations on Personal Care's claims expired prior to the filing of the formal Motion to Restore.

In summary, the Court finds that the 2014 Proposed Consent Order is a nullity. Moreover, the Court finds that Personal Care failed to restore the case within the one-year timeframe provided in the 2013 Judge Dennis Order. Furthermore, Personal Care did not file a timely Motion to Restore, which Rule 40(j) requires in order to benefit from the tolling provision of Rule 40(j). The Court further finds that at no point did any of the Defendants agree that the statute of limitations would be further tolled above and beyond the parameters set forth in the 2013 Judge Dennis Order or SCRCP Rule 40(j). As Personal Care did not file its Motion to Restore the case within one year of the administrative dismissal, the Court hereby finds that the statute of limitations was not tolled following entry of the 2013 Judge Dennis Order and thus had expired prior to the filing of the formal Motion to Restore. Accordingly, Personal Care's claims against Defendants are time-barred.

Conclusion

Based on the foregoing discussion, I hereby Order that Personal Care's Motion to Restore Case is denied. The Exhibits are attached and made a part of this Order by reference.

IT IS SO ORDERED!



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

Dated: 6/13/16

Phillip S. Ferderigos, Partner
pferderigos@barnwell-whaley.com

RECEIVED
AUG 18 2016
SC Court of Appeals

August 15, 2016

The Honorable Jenny Abbott Kitchings
Clerk, Court of Appeals
1220 Senate St
Columbia, SC 29201

RE: Personal Care, Inc. v Jerry N. Theos; Uricchio, Howe, Krell, Johnson, Toporek, Theos & Keith, PA; Cheryl D. Shoun; and Taylor, Shoun, Bowley & Byrd
C/A No. 2013-CP-10-1396
Our File No. 59.014

Dear Ms. Kitchings:

Please find enclosed the original and one copy of a Joint Motion to Dismiss Appeal with regard to the above referenced matter. Please file the original and return the clocked copy to me in the enclosed envelope.

Thank you for your assistance.

With kind regards,

Phillip S. Ferderigos

Enc.
Cc w/enc.: Thomas A. Pendarvis, Esq. (w/enclosure)
Oana Dobrescu Johnson, Esq. (w/enclosure)
Richard A. Farrier, Jr., Esq. (w/enclosure)

PSF/lap

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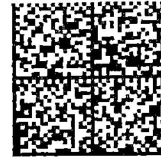

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P.O. Drawer H, Charleston, SC 29402-0197

RECEIVED
AUG 18 2016
SC Court of Appeals

59.014
The Honorable Jenny Abbott Kitchings
Clerk, Court of Appeals
1220 Senate St
Columbia, SC 29201