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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-001266

RECEIVED
AUG 29 2016
SC Court of Appeals

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.

APPELLANT'S RETURN TO JOINT MOTION TO DISMISS APPEAL

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The present appeal raises issues concerning the role, if any, that Rule 40(j), SCRCP should play in the trial court's dismissal of a case, the application of *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003), and the application of a summary judgment standard to a Rule 40(j) motion when there was no pending motion for summary judgment. After the trial court below issued a set of erroneous orders which essentially ended Appellant's ability to pursue its claims, Appellant filed a Notice of Appeal. The next day, on July 15, 2016, Appellant was mailed a notice that an Order was entered by the trial court (the "July 15 Order"), wherein the trial court concluded that it "does not have any Substantive impact" on any of the trial court's rulings. More than two months after the Notice of Appeal was filed, and after an extension for time for Appellant to file its initial brief had already been granted, Respondents filed the present Joint Motion to Dismiss the Appeal (without the required certificate of service that is fatal to the motion) arguing that the non-substantive July 15 Order should have served as the basis for the present appeal. Appellant now submits this Return to the Joint Motion arguing that the Motion should be denied: pursuant to Rules 240(c)(1) and (g), SCACR; because the Orders appealed from were final orders; and because this appeal should be reviewed and decided on the merits. In the alternative and with this Return, Appellant is filing a Motion to Amend the Notice of Appeal to include the July 15 Order.

1. **Everyone agrees that the July 15 Order is of no consequence and has no effect on the issues raised in this appeal.**

The July 15 Order was filed—without any hearing on the motion—less than ten days after the date Respondents filed a MOTION FOR SUBSTITUTION OF ORDER PURSUANT TO RULE 59(E) OR ALTERNATIVELY UNDER RULE 60(B) SCRCP ("Motion for Substitution"). Respondent's Motion for Substitution was withdrawn as per the public records with the

Charleston County Clerk of Court's office.[i] The July 15 Order was entered by the trial court without notice of a hearing or any actual hearing on Respondent's Motion for Substitution, nor any other prior notice to Appellants. On the first page of the July 15 Order, at the last sentence, the Order recites that '[w]hile the substituted opinion in *Stokes-Craven* does not have any Substantive impact upon the outcome of the matters pending before the Court, [the *trial court*] is issuing this Substituted Order to conform the references to the substituted Opinion in *Stokes-Craven* and clarify those references." Likewise, Respondents acknowledged in their Motion for Substitution, which was later withdrawn, that the change from the first *Stokes-Craven* opinion to the second version of that opinion "does not have any substantive impact upon the outcome of the matters pending before the Court."

Despite recognition in both the trial court's July 15 Order and Respondents' *admission in judicio* that the July 15 Order is of no consequence to the merits and substance of the present appeal, inexplicably, Respondents have filed the present "gotcha" Motion to Dismiss premised on an argument that Appellant was required to amend its appeal to include the July 15 Order that both Respondents and the trial court agree has no substantive impact on the matters subject of this Appeal.

While Appellant agrees with the trial court and Respondents that the July 15 Order is of no consequence to the merits of the present appeal, at a minimum, a hearing on Respondents' Motion for Substitution was necessary and required, because the July 15 Order was not necessary for the issues on appeal and simply clouds the record. Appellant would have opposed the motion. In the trial court proceedings pursuant to Rule 40(j), SCRCP, which are actually the subject of this Appeal, the trial court should never have

been analyzing and applying *Stokes-Craven* to begin with as there was no Motion to Dismiss nor a Motion for Summary Judgment before the Court and Rule 40(j), SCRCP does not allow a trial court to conduct an analysis of the merits of the affirmative defense of statute of limitations in the context of a Motion to Restore the case pursuant to Rule 40(j), SCRCP. Thus it would seem that every *stakeholder* in this appeal, Appellant, Respondent, and the trial court, all agree that the July 15 Order, correcting to the application of *Stokes-Carven* II, is of no consequence.

In explicably, more than two months later, Respondents have filed the present Joint Motion to Dismiss to argue that Appellants are forced to include the July 15 Order in the present appeal.

The actions of the trial court subject of this appeal deprived Appellant of meaningful rights well before the substitution of references from *Stokes-Craven II* for those of *Stokes-Craven I* which are addressed in the July 15 Order and the Joint Motion to Dismiss. This Appeal concerns the denial of substantive rights of Appellant, and the misapplication of Rule 40(j), SCRCP and *Maxwell* – not the procedural mishap of a non-noticed *sua sponte* inconsequential order mailed a day after Appellants filed the Notice of Appeal in the present matter.

Despite universal agreement that the July 15 Order has no substantive impact on the substance of this Appeal, Respondents, while violating of Rule 240(c)(1), SCACR in the process, filed this Joint Motion to Dismiss to argue that the appeal should be based on the non-substantive *sua sponte* order, thereby requiring Appellant to file the present Return, with the only real net result being to simply add to the size of the file in this Appeal. The Joint Motion to Dismiss should be denied.

2. The Notice of Appeal timely appealed the appropriate final orders.

Rule 262(a)(2) provides that the date of mailing is the date of filing of a document with the Court. As indicated in the Proof of Service filed by Appellant contemporaneously with the Notice of Appeal in this matter, Appellant filed the Notice of Appeal by depositing it in the mail on June 14, 2016. The July 15 Order was mailed to Appellants on July 15, 2016. The Notice of Appeal as to the orders which are the subject of this appeal was timely filed.

An interlocutory order is immediately appealable if it involves the merits of the case or affects a substantial right. *See Brown v. Cty. of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005). To involve the merits of a case, the order must "finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Woodard v. Westvaco Corp.*, 319 S.C. 240, 243, 460 S.E.2d 392, 394 (1995) (*Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995), was later overruled by *Sabb v. South Carolina State University*, 350 S.C. 416, 567 S.E.2d 231 (2002), on other grounds.) Under South Carolina Code Section 14-3-330(2), an appeal from an order may be taken when the order affects a substantial right, such as in effect, determining the action and preventing a judgment from which an appeal might be taken. *See Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004); *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991); *Brown v. County of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005); S.C. CODE ANN. § 14–3–330 (1976 & Supp. 2006). A trial court's mistake or action taken outside of its authority may be subject to direct attack on appeal. *Fryer v. South Carolina Law Enforcement Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006) (*internal citations omitted*). Regardless of how a circuit

court rules on a Motion to Alter or Amend, the fact that issues were raised and a ruling obtained as to the underlying judgment is sufficient to preserve such issues for appeal. *BPS, Inc. v. Worthy*, 362 S.C. 319, 331, 608 S.E.2d 155, 162 (Ct. App. 2005). The orders listed in the Notice of Appeal in this matter ended Appellant's ability to pursue its claims against Respondents, finding that the statute of limitations barred Appellant's claims against Respondents; and concluding that the case could not be restored because the statute of limitations barred the claims that Appellant would make.

The orders addressed in the Notice of Appeal finally determined that the case could not be restored pursuant to Rule 40(j), and also finally determined that Appellant's claims were barred by an affirmative statute of limitations defense. Those orders in effect determined the action and prevented a judgment from which an appeal might have been taken. The issues in this appeal were raised to and ruled upon by the trial court, thus the issues of substance in this appeal have been preserved, and the Notice of Appeal was filed within the proper amount of time after the final substantive order in the case below. Based on all of the foregoing premises, the Joint Motion to Dismiss should be denied. See *Woodard v. Westvaco Corp.*, 319 S.C. 240, 243, 460 S.E.2d 392, 394 (1995), South Carolina Code Section 14-3-330(2), *Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004); *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991); *Brown v. County of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005); *Fryer v. South Carolina Law Enforcement Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006); and *BPS, Inc. v. Worthy*, 362 S.C. 319, 331, 608 S.E.2d 155, 162 (Ct. App. 2005).

Elam also provides additional rationale to deny the Joint Motion to Dismiss. In the Joint Motion to Dismiss, Respondents indirectly reference *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) through citation of *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008). *Elam* explained that once an Order addresses the substance of a Rule 59 Motion, a second Motion is not required, nor can a second motion toll the time to appeal because where the issues have been raised, argued and ruled upon, those issues are already perfected for appeal. *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 18–20, 602 S.E.2d 772, 777–78 (2004). The logic of *Elam* is essentially that an Appellant cannot claim shelter from the 30 day time requirement for the filing of an appeal by virtue of the filing of a Motion of no consequence to the merits of an appeal. Despite having argued *Elam*, through this Joint Motion to Dismiss Respondents seek shelter in an Order that Respondents, the trial court, and Appellant all agree is an Order of no consequence to the merits of the present appeal. Thus *Elam* provides a common-sense reason to deny the Joint Motion to Dismiss – the existence of the July 15 Order has no bearing on the present appeal and should not be a basis to dismiss the present appeal.

3. A decision on the merits is preferable so the Joint Motion to Dismiss should be denied.

The orders subject of this Appeal, as referenced in the Notice of Appeal effectively create new law in the State of South Carolina, in that the trial court has fashioned its own procedures and standard of reviewing evidence and the merits of a case in the context of a Motion to Restore pursuant to Rule 40(j), SCRCP. In that the trial court has created new law and procedure, this appeal should be reviewed by the Court of Appeals, and the trial court's application of Rule 40(j), SCRCP and *Maxwell* either be ratified (affirmed) or

censured (remanded). In addition to the implications that this case has on many facets of trial practice in South Carolina, the Appellant is deserving of a decision on the merits. Decisions on the merits are strongly favored in South Carolina (See *Mictronics, Inc. v. S. Carolina Dep't of Revenue*, 345 S.C. 506, 548 S.E.2d 223, 226 (Ct. App. 2001)), so in the context of the July 15 Order, an order particularly without any substantive impact on the orders which are the subject of this Appeal, the Joint Motion to Dismiss should be denied so as to allow Appellants to seek and the Court of Appeals to issue a decision on the merits.

4. The Middle ground: Grant Appellant's contemporaneous Motion to Amend Notice of Appeal to include the July 15 Order.

If the Court of Appeals agrees with Respondents, the trial court, and Appellant that the July 15 Order is of no substance, Appellant requests that the Joint Motion to Dismiss simply be denied, however, in the alternative, if the Court of Appeals believes that incorporating the July 15 Order into the present appeal is appropriate and/or will benefit the bench and bar, Appellant hereby consents to inclusion of the July 15 Order in this Appeal. To provide the Court of Appeals the procedural mechanism by which to include the July 15 Order, Appellant has, contemporaneously with the filing of this Return, filed a Motion to Amend the Appeal to include the July 15 Order.

5. This Motion to Dismiss should be denied because Respondents failed to include a Certificate of Service with their Motion to Dismiss this Appeal thereby constituting an abandonment of the motion.

Respondents have abandoned their Motion to Dismiss. Rule 240(c)(1), SCACR, requires that any motion, including a motion to dismiss, "*shall include*" . . . [a] certificate or affidavit of service reflecting the date of service upon all parties." Respondents did not provide any such affidavit or certificate to Appellant, but instead decided to send a cover

letter bearing the date of August 15, 2016 and the Joint Motion to Dismiss bearing the later date of August 16, 2016, leaving counsel for Appellant to simply guess as to the correct date for the filing of this Return. The South Carolina Appellate Court Case Management Public Index has been reviewed and apparently the Respondents did not file any Certificate or Affidavit with the Court of Appeals as mandated by Rule 240(c)(1), SCACR.

Respondents' failure to file a Certificate of Service or an Affidavit of Service should be deemed an abandonment of the motion. Rule 240(g), SCACR, states that "[f]ailure of the moving party to perform any act required by this Rule [240] may be deemed an abandonment of the motion or petition." "Parties who assail others upon the purely technical grounds should be careful to see that their mode of attack is itself technically accurate." *Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563, 566 (1899)(citing and quoting *Ware v. Miller*, 9 S.C. 13 (1877). Respondents have failed to comply with Rule 240(c)(1), and this failure has prejudiced Appellant, and for these reasons the Joint Motion to Dismiss should be deemed abandoned and therefore denied.

Respectfully submitted,

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Counsel for PERSONAL CARE, INC.

Beaufort, South Carolina
August 25, 2016

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[i] Undersigned counsel communicated with Mr. Farrier, counsel for Respondent Cheryl D. Shoun, J.D., via telephone on August 18, 2016. In that telephone conversation, Mr. Farrier indicated that said Motion for Substitution had been withdrawn.

Additionally, on August 22, 2016, undersigned counsel communicated with Ms. Caroline Leonard, the non-jury docketing clerk at the Charleston County Clerk of Court's Office, via telephone. While Ms. Leonard was adamant during the phone conversation that her basis for marking the hearing off the court's docket is irrelevant to the discussion in this appeal, Ms. Leonard did confirm that she marked the Motion for Substitution that Mr. Farrier filed off of the court's docket as the motion having been withdrawn by Mr. Farrier.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2013-CP-10-1396

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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.

PROOF OF SERVICE

I, Sara E. Wood, a paralegal with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL on counsel for Respondents, by depositing a copy of the same in the United States Mail, postage prepaid, on the 25th day of August, 2016 addressed to:

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Respectfully submitted,

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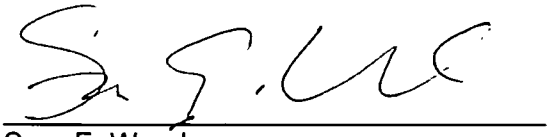

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August 25, 2016

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SC Court of Appeals

August 25, 2016

Jenny Abbott Kitchings, Clerk of Court
COURT OF APPEALS FOR THE STATE OF SOUTH CAROLINA
PO Box 11629
Columbia, SC 29211

Re: PERSONAL CARE, INC., Appellant v. Jerry N. Theos; URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; Cheryl D. Shoun; and TAYLOR, SHOUN, BOWLEY & BYRD, LLC, Respondents
Appellate Case No. 2016-001266

Dear Ms. Kitchings:

Enclosed for filing please find an original and seven copies of APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS along with PROOF OF SERVICE. Please file the original and six copies, and please return one clocked copy to me in the enclosed postage prepaid, self addressed envelope. If you have any questions or would like to discuss this, please feel free to call.

Thank you in advance for your attention to this matter.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

Thomas A. Pendarvis

TAP/sew
Enclosures
cc w/encls: M. Dawes Cooke, Jr., J.D.
Phillip S. Ferderigos, J.D.
George J. Kefalos, J.D.
Oana D. Johnson, J.D.
Richard A. Farrier, Jr., J.D.
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