

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No.: 2015-CP-23-05875

Lois G. and William K.
Washington,

Plaintiffs,

vs.

C. Dan Joyner, Realtors; aka
Prudential C. Dan Joyner,
Realtors; Bill Brandt, individually,
and as agent for C. Dan Joyner,
Realtors; and Jason Jones,
buyer's agent, individually

Defendants,

of which

C. Dan Joyner, Realtors; aka
Prudential C. Dan Joyner,
Realtors; Bill Brandt, individually,
and as agent for C. Dan Joyner,
Realtors are

Respondents,

and

Amy Finn is

Appellant.

INITIAL BRIEF OF NON-PARTY APPELLANT

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1. Black's Law Dictionary (1991): p. 43
2. Land Goldstein Trial Technique § 13:97 (3d ed.): p. 34
3. Leonard Gross, Ethical Problems of Law Firm Associates, 26 Wm. & Mary L. Rev. 259, 265 (1985): p. 42
4. Paul Rice, Attorney Client Privilege in the United States § 6:14 (2015): p. 28
5. Restatement (Third) of the Law Governing Lawyers § 69 (2000): pp. 32, 33
6. S.C. Bar Advisory Op. 90-14: p. 20
7. Webster's New American Dictionary 475 (1995): p. 27

STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err by allowing Respondents C. Dan Joyner, Realtors; aka Prudential C. Dan Joyner, Realtors; Bill Brandt, individually, and as agent for C. Dan Joyner, Realtors (collectively, "CDJ") to change its list of deposition topics less than three business days before the motion hearing and then by including those topics in its Order after CDJ indicated at the hearing that it only wanted "a date"?
2. Did the circuit court err by allowing CDJ to proceed with the deposition of Appellant Amy Finn without determining that the information requested was relevant and necessary to CDJ's case and that there were no reasonable alternatives to discover the information?
3. Did the circuit court err by listing deposition "topics"—the last of which is very broad—rather than specific questions Ms. Finn is required to and can properly answer at the deposition?
4. Did the circuit court err by including as deposition topics information that is privileged?
5. Did the circuit court err by including as a deposition topic a question concerning Ms. Finn's former law firm when she neither has access to the firm's records nor authority to speak on the firm's behalf?

STATEMENT OF THE CASE

The underlying action arises out of the Plaintiffs' purchase of a home located at 601 Bryson Drive in Simpsonville, South Carolina in 2010. Finn's Motion to Quash or Alternatively for a Protective Order at 1, ¶ 2. Prior to retaining their current attorney, Robert C. Ray, Plaintiffs were represented in a limited capacity by Ms. Finn. Id. at 1, ¶ 2-3; Hr'g Tr. 3:16-19. In connection with her representation of the Plaintiffs, Ms. Finn wrote a letter dated October 16, 2012 to Mr. Brandt, a realtor for C. Dan Joyner, Realtors (aka Prudential C. Dan Joyner). See Exhibit A to Finn's Motion to Quash or Alternatively for a Protective Order.

In her letter of October 16, 2012, Ms. Finn stated that Mr. Brandt had misrepresented that the home was connected to a public sewer system when, in fact, it was serviced by a septic tank. She further stated that the Plaintiffs' septic system had backed up in September 2012 and that the Plaintiffs incurred

economic damages as a result. See id.

On September 25, 2015, more than thirty-five months after Ms. Finn sent her letter, Plaintiffs, represented then by Mr. Ray, filed the current action in the Greenville County Court of Common Pleas concerning the matters discussed in her letter. See CDJ's Motion to Compel at 2, ¶ 4 (attached as Exhibit B to Finn's Motion to Quash or Alternatively for a Protective Order). CDJ subsequently filed an answer, contending that the Plaintiffs' claims were barred by the statute of limitations. See id. at 2, ¶ 6.

On December 17, 2015, CDJ's counsel, Samuel W. Outten emailed Ms. Finn to ask the following:

- (1) When was the first discussion or meeting you had with Ms. Washington regarding this claim?
- (2) What is the date in September 2012 when the sewer system backed up?
- (3) How soon after Ms. Washington moved into the house did she discover that she was not connected to a public sewer?

See Exhibit B to CDJ's August 17, 2016 Memorandum.

On December 23, 2015, Ms. Finn mailed Mr. Outten a letter responding to his email. In her letter, Ms. Finn notified Mr. Outten that she would not be able to provide this information to him without the Plaintiffs' informed consent, as required under Rule 1.6(a) of the Rules of Professional Conduct. See Exhibit B to Finn's Opposition to Motion to Compel, which is attached as Exhibit C to Finn's Motion to Quash. Ms. Finn sent a courtesy copy of her letter to the Plaintiffs' current attorney, Mr. Ray, so that he could notify Mr. Outten if and when the Plaintiffs provided their consent. See id.

Subsequently, on January 4, 2016, Mr. Outten emailed Ms. Finn and stated that he had not received a response from her regarding his December 17, 2015 email. That same day, Ms. Finn emailed Mr. Outten her December 23, 2015 letter. See Exhibit C to Finn's Opposition to Motion to Compel, which is attached as Exhibit C to Ms. Finn's Motion to Quash.¹

Approximately five months later, on June 1, 2016, CDJ's counsel, Sarah R. Anderson, emailed Ms.

¹ Although Ms. Finn included her December 23, 2015 letter and January 4, 2016 email in her Opposition to Motion to Compel to dispute CDJ's claim that she had not responded to Mr. Outten, CDJ continued to allege in its August 17, 2016 memorandum to the circuit court that Ms. Finn had not responded to him. See CDJ's August 17, 2016 Memorandum at 3.

Finn, requesting to schedule a time to depose her. See Exhibit D to Finn's Opposition to Motion to Compel, which is attached as Exhibit C to Ms. Finn's Motion to Quash. In her email, Ms. Anderson stated that the deposition would be limited to "nonprivileged" information such as the dates when Ms. Washington first contacted her and when her representation of Ms. Washington began in connection with her October 16, 2012 letter. See id.

On June 15, 2016, CDJ issued a subpoena for Ms. Finn to appear at a deposition on July 7, 2016, but they mailed it by regular mail, not certified mail, and to a former address that had not been valid for over a year. Also, according to the certificate of service, CDJ mailed a copy of the subpoena to Robert Childs not to Mr. Ray, the sole attorney for Plaintiffs. Ms. Finn never received the June 15th subpoena.

By letter dated June 24, 2015, Cindy L. Buzhardt, Esq., writing on behalf of Ms. Finn, responded to Ms. Anderson's June 1st email. In her letter, Ms. Buzhardt explained that since Ms. Finn had not received informed consent from the Plaintiffs, she was precluded by Rule 1.6(a) of the South Carolina Rules of Professional Conduct from disclosing information regarding her representation of Plaintiffs. Ms. Buzhardt concluded her letter by saying, "Should you attempt to subpoena Ms. Finn to provide testimony concerning this matter, she will file a motion to quash." See Exhibit E to CDJ's August 17, 2016 Memorandum.

On June 28, 2016, CDJ filed a motion in Greenville County to compel Ms. Finn's appearance at a deposition on July 7, 2016. See Exhibit B to Finn's Motion to Quash. CDJ further requested that "Ms. Finn be required to pay the amount of reasonable expenses incurred in obtaining the order, including reasonable attorneys' fees." See id. CDJ stated that they intended to ask Ms. Finn the following questions, which were basically identical to the questions set forth in Mr. Outten's December 17, 2015 email: (i) the date when she first met with Plaintiffs about the facts contained in her October 16, 2012 letter to Mr. Brandt; (ii) the date in September 2012 when the Plaintiffs' septic system backed up; and (iii) the amount of time after the Plaintiffs moved into their house when they discovered that they were not connected to a public sewer.

See id. In their motion, CDJ deemed these questions “nonprivileged” and “nonconfidential.” See id.

On July 5, 2016, Ms. Finn mailed, via overnight delivery, a response to CDJ's motion to the Greenville County Court of Common Pleas and sent courtesy copies to Plaintiffs' and CDJ's counsel. See Exhibit C to Finn's Motion to Quash. In her response, Ms. Finn argued that CDJ's motion should be denied because she was not properly served with a subpoena and the information requested was protected from disclosure by the attorney-client privilege and Rule 1.6(a) of the South Carolina Rules of Professional Conduct. See id.

On July 8, 2016, CDJ served a Rule 45 Subpoena and Notice of Deposition on Ms. Finn commanding her to appear at a deposition on July 19, 2016 at the offices of CDJ's counsel in Columbia, South Carolina. See Exhibit D to Finn's Motion to Quash. Thereafter, on July 13, 2016, CDJ filed a Supplemental Motion to Compel in which they stated that they had remedied its deficiency in service by serving Ms. Finn with a new subpoena on July 8, 2016 and contending that its Motion to Compel remained ripe for review.²

On July 15, 2016, in response to receiving CDJ's July 8th subpoena, Ms. Finn filed her Motion to Quash or Alternatively for a Protective Order. In her motion, she moved for an Order by the Court, under the provisions of Rule 45(c)(3)(A)(iii) of the South Carolina Rules of Civil Procedure, to quash the subpoena on the basis that the information sought by Defendants was privileged. In the alternative, Ms. Finn sought a protective order pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure specifying the scope of discovery to ensure that the Plaintiffs' attorney-client privilege was protected and Rule 1.6(a) of the South Carolina Rules of Professional Conduct was not violated.

On July 21, 2016, Ms. Finn, a resident of Richland County, filed a Supplement to her Opposition

² CDJ's Supplemental Motion to Compel is available from Greenville County's Public Index by visiting the following website: <https://www2.greenvillecounty.org/SCJD/PublicIndex/CaseDetails.aspx?County=23&CourtAgency=23002&Casenum=2015CP2305875&CaseType=V>.

to Motion to Compel ("Supplement").³ In her Supplement, Ms. Finn argued that the Richland County, not Greenville County, was the appropriate forum for a Motion to Compel under Rule 37(a)(1) of the Rules of Civil Procedure given that she was not a party to the case and the deposition was scheduled to take place in Richland County.⁴

On August 2, 2016, the circuit court in Richland County contacted Ms. Finn and CDJ via email to inform them that proposed orders/memoranda would be due on August 17, 2016.

On August 10, 2016, less than three hours before the hearing on CDJ's Motion to Compel was scheduled to take place in Greenville County, CDJ withdrew its motion "without prejudice." See Exhibit A to Finn's August 17, 2016 Memorandum in Support of Motion to Quash or Alternatively for a Protective Order; see also CDJ's August 17, 2016 Memorandum.

On August 17, 2016, Ms. Finn filed her memorandum of law in support of her argument, based on the information sought by CDJ in their June 28, 2016 Motion to Compel. Also on August 17, 2016, CDJ filed a memorandum in support of their position. This was CDJ's first response to Ms. Finn's Motion to Quash or Alternatively for a Protective Order, which had been filed thirty-three days earlier. In their memorandum, CDJ explained their withdrawal without prejudice of their Motion to Compel by stating that they agreed to "proceed on the instant Motion pending before the Richland Court of Common Pleas, which was filed on behalf of Ms. Finn on July 15, 2016." See CDJ's August 17, 2016 Memorandum at 4.

CDJ's memorandum was largely identical to their Motion to Compel.⁵ However, with no fanfare, CDJ changed their questions for Ms. Finn from those they posed in their Motion to Compel. Near the end

³ Finn's Supplement can be downloaded from Greenville County's Public Index by visiting the following website: <https://www2.greenvillecounty.org/SCJD/PublicIndex/CaseDetails.aspx?County=23&CourtAgency=23002&Casenum=2015CP2305875&CaseType=V>.

⁴ Rule 37(a)(1) of the South Carolina Rules of Civil Procedure states that "[a]n application for an order to a deponent who is not a party shall be made to the court in the place where the deposition is being taken." Rule 37(a)(1), SCRCP.

⁵ In fact, CDJ included in their August 17, 2016 memorandum their disproven (see footnote 1 *supra*) allegations that Ms. Finn had not responded to Mr. Outten's December 17, 2015 and January 4, 2016 emails. See CDJ's August 17, 2016 Memorandum at 3.

of their main section, CDJ introduced their new request by stating, "Examples of the nonconfidential, nonprivileged information that CDJ intends to question Ms. Finn about include: (i) the date when Ms. Finn and her firm were first contacted by the Plaintiffs; (ii) the date when Ms. Finn was first retained by Plaintiffs; (iii) the date when Ms. Finn first met with the Plaintiffs in relation to Ms. Finn's October 16, 2012 letter that she sent to Mr. Brandt of CDJ; and (iv) any communications Ms. Finn had with third parties regarding the subject property, the septic tank, or connecting the subject property to the public sewer." The first (firm records), second (retainer agreements), and fourth (work product) topics were new and/or different.

At the hearing on August 22, 2016, Ms. Finn confirmed that she wrote her October 16, 2012 letter to Mr. Brandt, and she objected to CDJ's changing of their questions from their Motion to Compel to their August 17th memorandum. She explained that despite not knowing specifically what questions CDJ intended to ask her, she believed that they were privileged and confidential under Rule 1.6(a) of the Rules of Professional Conduct. Alternatively, Ms. Finn requested a protective order consistent with Rule 26(c). Relying on Hollman v. Woolfson, she argued that CDJ should not be allowed to depose her until they could establish that there were no reasonable alternatives available to discover the information.

Also at the hearing on August 22, 2016, CDJ's counsel Ms. Anderson stated on at least five occasions – at the beginning, at the end, and throughout – that all CDJ wanted to obtain from Ms. Finn was the date that she first met with Plaintiffs. Ms. Anderson also read into the record CDJ's new topics, argued that CDJ could discover anything nonprivileged that was relevant to their defense, admitted that CDJ had not yet deposed Plaintiffs, and denied knowing of any case law that required CDJ to exhaust reasonable alternatives.

On August 24, 2016, the circuit court issued an order denying Ms. Finn's motion to quash and granting her motion for a protective order ("Order"). The Order did not present Ms. Finn's argument relating to her motion to quash that the entire setting of attorney-client meetings was privileged. Instead, the Order

found that the attorney-client privilege “does not protect the fact of whether there was a meeting, the date of the meeting, or the general subject matter of the consultation.” Based on that limited finding, the court ruled that all four deposition topics were not privileged. Concerning Ms. Finn’s alternative motion for a protective order, the Order did not address her Rule 26(c) argument that CDJ did not meet their burden to show that the information sought was relevant and necessary, with all reasonable alternatives exhausted. Instead, the Order found only one fact “relevant” to CDJ’s statute of limitations defense—when the Plaintiffs had notice of their claims. It then held that all four of CDJ’s new deposition topics were allowed, without specifically ordering Ms. Finn to answer any of CDJ’s questions.

On August 31, 2016, Ms. Finn filed a motion to alter or amend judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. CDJ filed their response to the Rule 59(e) Motion on September 9, 2016, and Ms. Finn filed her Reply on September 12, 2016. The circuit court held a hearing on Ms. Finn’s Rule 59(e) Motion on September 14, 2016. At the hearing, Ms. Finn was represented by Kimberly Simmons, Esq. The circuit court denied Ms. Finn’s motion by order dated September 21, 2016.

Ms. Finn served notice of this appeal on September 22, 2016.

SUMMARY OF ARGUMENT

Requiring Ms. Finn to appear at a deposition and answer questions regarding when the statute of limitations began to run on Plaintiffs’ causes of action would be a futile act, as any information Ms. Finn has concerning that matter is both confidential and privileged. Ms. Finn is a non-party to this action and her representation of Plaintiffs was limited. No evidence has been presented to suggest that Ms. Finn has any independent knowledge concerning when the statute of limitations commenced other than through confidential and privileged communications. There is no evidence that Ms. Finn was a friend or acquaintance of the Plaintiffs or that she ever visited their home. In fact, the Plaintiffs’ home is located in Simpsonville, South Carolina, which is nearly ninety miles from Columbia, South Carolina, where Ms. Finn

resides.

Furthermore, requiring Ms. Finn to testify against the Plaintiffs, without any showing of need by CDJ, would be anathema to our adversarial system. "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation." Rule 1.6, RPC, cmt. 2, Rule 407, SCACR. Clients should be able to change attorneys—should they choose—without concern that their former attorney will be forced to disclose all of their confidential information to opposing counsel. In this case, CDJ has failed to demonstrate that the information is not reasonably available from other sources.

Despite the foregoing, CDJ was nevertheless able to persuade the circuit court to order Ms. Finn to appear for a deposition. How did they do this? First, by claiming that Ms. Finn's testimony was necessary to prevent "a fraud perpetrated on the court." Hr'g Tr. 25:19-22; 25:24-26:3. The alleged "fraud" CDJ pointed to was the inherent conflict between Ms. Finn's October 16, 2012 letter and the allegation in the Plaintiffs' Complaint that they did not discover that they were connected to a septic tank (rather than to the public sewer) until March 6, 2013. However, Ms. Finn, who did not prepare the Plaintiffs' Complaint, confirmed in her Motion to Quash or Alternatively for a Protective Order (as well as at the hearing), that she wrote the October 16, 2012 letter. Therefore, there is simply no reason that Ms. Finn should be required to attend a deposition to testify to that fact. Indeed, the list of deposition topics in the Court's Order does even not include questioning regarding the authentication of Ms. Finn's letter.

Second, CDJ insinuated that Ms. Finn had a financial interest in the underlying case by adding as a deposition topic—less than three business days before the hearing—"the date when Ms. Finn was first retained by Plaintiffs." However, no retainer agreement between the Plaintiffs and Ms. Finn or her former

firm, Merritt, Webb, Wilson, & Caruso, PLLC ("MWWC"), was ever offered into evidence.⁶ Moreover, no evidence was presented to show that Ms. Finn had the authority to enter into retainer agreements on behalf of MWWC or the right to share in the firm's profits. Rather, Ms. Finn stated at the hearing that she provided "limited representation to the Plaintiffs in this matter."

Third, and finally, CDJ changed its deposition topics less than three business days before the hearing and then repeatedly stated at the hearing that they were only seeking to discover the date that Ms. Finn first spoke to the Plaintiffs. Ms. Finn was substantially prejudiced by these actions. Both her Motion to Quash or Alternatively for a Protective Order and her August 17th memorandum were based on the questions set forth in CDJ's June 28, 2016 Motion to Compel, not the new topics first introduced in CDJ's August 17, 2016 memorandum. Moreover, because CDJ repeatedly stated at the hearing that all they wanted was a date, the court focused on that one issue and neglected all others.

As a result of all this, Ms. Finn is left with an Order that ostensibly grants her a protective order, but in reality provides her no protection at all. It is unclear from the Order whether she has actually been directed to provide testimony concerning the four deposition topics. The Court did not rule on whether or not this information was confidential, nor did the Court expressly order her to disclose it.

Additionally, the Order allows Ms. Finn to be deposed regarding when "her firm" was first contacted by the Plaintiffs. However, only Ms. Finn was subpoenaed, and she represented herself at the hearing. No one from MWWC made a formal appearance at the hearing. Clearly, CDJ should have subpoenaed MWWC—not Ms. Finn—if they wanted firm records.

ARGUMENT

- 1. The circuit court erred by allowing CDJ to change deposition topics less than three business days before the motion hearing and then by including those topics in its Order**

⁶ Ms. Finn's last day of work at her firm was on Friday, August 19. See Finn's Rule 59(e) Motion.

after CDJ's counsel repeatedly stated at the hearing that CDJ sought only the date of first contact between Ms. Finn and the Plaintiffs.

In its Order, the circuit court allowed Ms. Finn to be deposed about all four of the topics first introduced in CDJ's August 17th memorandum. However, at the hearing on August 22nd, CDJ's counsel Ms. Anderson stated – at the beginning, at the end, and repeatedly throughout – that CDJ was only seeking to discover the date when the Plaintiffs first contacted Ms. Finn. As explained below, it appears that CDJ withdrew its request for everything but a date.⁷ At the very least, CDJ muddied the waters so much regarding the scope of the issues that Ms. Finn was denied her due process rights. Furthermore, because CDJ repeatedly told the circuit court at the hearing that it was seeking only to discover the date that Ms. Finn first spoke to the Plaintiffs, it should have been estopped from seeking any additional information.

A. CDJ changed their request from three questions to four topics.

Ms. Finn filed her July 15, 2016 Motion to Quash based on the following three questions that CDJ's counsel, Mr. Outten, had stated in his December 17, 2015 email and that were in CDJ's June 28, 2016 Motion to Compel that he wanted to ask her: (i) the date when she first met with Plaintiffs about the facts contained in her October 16, 2012 letter to Mr. Brandt; (ii) the date in September 2012 when the Plaintiffs' septic system backed up; and (iii) the amount of time after the Plaintiffs moved into their house when they discovered that they were not connected to a public sewer. See Finn Motion to Quash at 2, ¶ 4.

CDJ did not file any sort of response to Ms. Finn's motion until August 17, 2016 (33 days later), when they filed their Memorandum In Opposition to Third Party Amy Finn's Motion to Quash or Alternatively for a Protective Order. In their memorandum, CDJ changed its stated list of questions for Ms. Finn to the following: (1) the date when Ms. Finn and her firm were first contacted by the Plaintiffs; (2) the date when Ms. Finn was first retained by Plaintiffs; (3) the date when Ms. Finn first met with the Plaintiffs in relation to

⁷ Waiver is the "voluntary and intentional relinquishment or abandonment of a known right." Strickland v. Strickland, 650 S.E.2d 465, 471, 375 S.C. 76 (S.C. 2007).

Ms. Finn's October 16, 2012 letter that she sent to Mr. Brandt of CDJ; and (4) any communications Ms. Finn had with third parties regarding the subject property, the septic tank, or connecting the subject property to the public sewer. The first (firm records), second (retainer agreements), and fourth (work product) topics were new and/or different.

B. CDJ requested only a "date" at the hearing.

At the beginning of the hearing on August 22, 2016, Ms. Finn noted the amorphous nature of CDJ's request: "I'm not completely clear as to the scope of the questions they want to ask me. They provided me some sample questions, but not a comprehensive list. Moreover, in their latest memo that they just filed on August 17th, or their memorandum in support, they added more sample questions." Hr'g Tr. 3:25-4:5. When the circuit court turned to Ms. Anderson, she explained that "*[w]e are here today because we are trying to discover the date when the plaintiffs first contacted Ms. Finn, communicated with her and possibly retained her* in an effort to discover whether, in fact, their claims are barred by the statute of limitations." Hr'g Tr. 8:14-19. Ms. Anderson then gave the factual background of the case and stated:

So, Your Honor, all we are seeking to discover here is when was Ms. Finn contacted by the plaintiff about the circumstances of this case. We respect the attorney-client privilege. We don't want to know what they talked about, ***we don't want to know the substance of their communications whatsoever***, but we are under an ethical obligation to our client to discover whether or not, in fact, the cause of action are barred.

Hr'g Tr. 12:12-19. Thereafter, Ms. Anderson argued that CDJ was not seeking to discover privileged information but only seeking a date, as indicated in the following exchange:

Ms. Anderson: And as Your Honor knows when we're arguing over attorney-client privilege, work product doctrine, dates and general subject matter does not constitute attorney-client privilege because it is necessary to, in fact –

The Court: ***So, for example, the date that the client came to the office?***

Ms. Anderson: We would believe that's not protected by the privilege and that's discoverable.

The Court: ***Isn't that one of the things you want to know?***

Ms. Anderson: ***That's really all we want to know.***

Hr'g Tr. 13:22-14:8.

Later, Ms. Anderson stated in unambiguous terms, "***we're not seeking any kind of***

communications whatsoever. We merely want a date...." Hr'g Tr. 15:9-10. Thus, in her opening statement and in these two portions of the Hearing, CDJ's counsel Ms. Anderson explained specifically what CDJ wanted. Ms. Anderson stated in plain terms that CDJ wanted only to ask Ms. Finn the date she was first contacted by Plaintiffs.

Next, the circuit court asked Ms. Anderson, "So what are these questions that she – sample questions that she says that you-all generally proposed and changed them and she doesn't know what you want to know?" Hr'g Tr. 15:11-14. This led to Ms. Anderson reading CDJ's four topics into the record, saying that they "*would probably be* all we would want to talk to her about." Hr'g Tr. 15:22-23. But the reason for the hearing was not to describe all the discussion topics that CDJ "*would probably*" want to have a conversation with Ms. Finn about. Rather, the Hearing's purpose was to determine what specific questions, if any, the circuit court would authorize CDJ to ask and order Ms. Finn to answer.⁸

And, importantly, Ms. Anderson subsequently restated that all CDJ was arguing for was a date: "[W]e would submit that we want to take a very limited, what would be brief, hopefully, deposition **solely regarding the dates of her representation**" Hr'g Tr. 18:4-6. And later, near the end of the hearing, Ms. Anderson advised the circuit court, "**We do not seek whatsoever to discover anything other than the date**" Hr'g Tr. 25:22-25.

Thus at the Hearing, CDJ narrowed its request to a date. Yet despite all of these statements by Ms. Anderson that all CDJ was asking for was the date Ms. Finn first spoke with Plaintiffs, the circuit court's Order listed CDJ's four topics from CDJ's August 17th memorandum in their entirety. This was error.

C. Ms. Finn's due process rights were violated.

Ms. Finn's due process rights were violated by including CDJ's four topics in the circuit court's

⁸ Because Ms. Finn had not received the Plaintiffs' informed consent under Rule 1.6(a) of the South Carolina Rules of Professional Conduct to disclose information to CDJ concerning her representation of the Plaintiffs, Ms. Finn expressly requested an order specifying the precise information she was required to disclose to CDJ so that she would not be in violation of Rule 1.6(a).

Order given that these topics were not the basis of Ms. Finn's motion and, at the hearing, CDJ claimed that all they were seeking was the date Ms. Finn first spoke with Plaintiffs. Requiring Ms. Finn to appear for a deposition regarding her former representation of the Plaintiffs not only infringes on her liberty, but it also threatens to infringe on her very livelihood. As discussed in more detail in section D(2)(C) of this brief, by disclosing confidential information to CDJ, Ms. Finn risks discipline by the South Carolina Bar (including disbarment), as well as a possible lawsuit against her by the Plaintiffs.

1. The four deposition topics were not the basis of Ms. Finn's motion and should not have been considered by the circuit court since they were raised more than thirty days after Ms. Finn's motion was filed and less than three business days before the hearing.

The South Carolina Rules of Civil Procedure contemplate that responsive pleadings will be filed within at least thirty (30) days after the initial pleading is served. For instance, Rule 12(a) of the South Carolina Rules of Civil Procedure states that "A defendant shall serve his answer within 30 days after the service of the complaint upon him" Rule 12(a), SCRPC. Additionally, Rule 12(b) states that "[e]very defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto." Rule 12(b), SCRPC. Under Rule 55(a) of the South Carolina Rules of Civil Procedure, if a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by the Rules of Civil Procedure, the clerk is directed to "enter his default upon the calendar." Rule 55(a), SCRPC.

While Ms. Finn did not file a complaint, but rather a Motion to Quash or Alternatively for a Protective Order, the principles behind these rules are nonetheless pertinent to this case. Here, CDJ did not file any response to Ms. Finn's motion until thirty-three days after Ms. Finn filed her motion. By failing to submit a response within thirty days, CDJ arguably waived its right to change its deposition topics. Although the circuit court sent an email to the parties on August 2, 2016 stating that proposed orders/memoranda were due by August 17th, its email did not grant CDJ the right to change its deposition

topics and thus completely change the relevant issues. Rather, at most, the email gave CDJ until August 17, 2016 to respond to the arguments raised by Ms. Finn in her motion. Had the court contemplated that CDJ would raise new issues in its memorandum, it presumably would have included a date for the submission of a reply brief by Ms. Finn.

2. Ms. Finn was not provided sufficient time to respond to the four topics.

The requirements of due process include notice and an opportunity to be heard in a meaningful way. Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659 (Ct. App. 2002). Due process mandates that a party be afforded sufficient time in which to prepare its case. See Lindey's, Inc. v. Goodover, , 264 Mont. 489 (Mont. 1994); see also National Educ. Association/South Bend v. South Bend Community School Corp., 655 N.E.2d 516 (Ind. App., 1995) (“[D]ue process is violated when the notice does not give an attorney adequate time to prepare a defense . . .”).

In this case, just three business days before the August 22, 2016 hearing, CDJ changed their stated deposition topics from the ones listed in their Motion to Compel. Three business days was hardly sufficient time for Ms. Finn to research the new issues and submit a reply brief. Ms. Finn had just devoted time away from her work and other responsibilities to prepare her own August 17th memorandum, which was rendered partially moot by CDJ's memorandum of the same date. This was in addition to the time Ms. Finn spent responding to CDJ's Motion to Compel.

For comparison purposes, when a party amends a pleading, the opposing party is given at least fifteen (15) days to respond. See Rule 15(a), SCRCP (“A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders.”).

Moreover, it should be noted that CDJ's August 17th memorandum did not highlight the change, but rather set forth the new four topics on page 6 of the memorandum without specifically noting that there had

been a change. In fact, at first blush, CDJ's August 17th memorandum appears to be practically identical to its Motion to Compel. Ms. Finn had absolutely no reason to suspect that CDJ might change its questions, as they had repeatedly asked Ms. Finn the same three questions for the previous eight months.

Furthermore, the changes were not insignificant. CDJ introduced new topics regarding when Ms. Finn's firm was first contacted by the Plaintiffs and when Ms. Finn was retained. Additionally, CDJ added a broad topic regarding "any communications Ms. Finn had with third parties about the subject property, the septic tank, or connecting the subject property to the public sewer."

Finally, it bears repeating that Ms. Finn is not a party to this case or an attorney representing one of the parties. The notion that she was expected to drop everything to respond to CDJ's memorandum (after spending so much time on her own) is unreasonable.

3. CDJ's counsel further confused the issues by repeatedly stating at the hearing that they were only seeking a date.

Not only did CDJ change their deposition topics in its August 17th memorandum, their counsel further confused the issues by repeatedly stating at the August 22nd hearing that they were only seeking to discover the date that Ms. Finn was first contacted by the Plaintiffs. Indeed, the court itself indicated an understanding that CDJ had "limited" its questions to just this one topic and thus did not seem interested in Ms. Finn's arguments. This can be seen by the following exchange between Ms. Finn and the court:

Ms. Finn: [T]he whole purpose of the attorney-client privilege is -- is to create, you know, a relationship of trust between a client and an attorney so they feel comfortable coming to an attorney, disclosing material facts, and I think that would be abridged by making me testify. Now I understand if I have to, I have to, but I think they can get this other ways and I think they should be asked to get that other ways before they come to me.

The Court: All right. But they -- what they're asking you **would be limited**, these questions that she mentioned.

Ms. Finn: Well, yeah, and that's why I did ask for a protective order. Besides I do have --

The Court: **Not what the person said to you, but when they came.**

Hr'g Tr. 23:21-24:15.

Thus, the circuit court demonstrated an understanding that CDJ was not seeking the substance of any confidential communications ("not what the person said to you"), but rather the date that the Plaintiffs met with Ms. Finn ("but when they came"). Therefore, it certainly was not unreasonable for Ms. Finn to reach the conclusion that CDJ was seeking nothing more than a date.

"Due process requires that litigants be placed on notice of the issues which a court is to consider." Bryan v. Bryan, 28 S.C. 506, 508, 319 S.E.2d 360, 360-61 (Ct. App. 1984). Here, CDJ muddled the issues so much that Ms. Finn was denied due process. CDJ coaxed Ms. Finn into believing that they were merely seeking the date that she first met with the Plaintiffs. Such tactics should not be condoned. The South Carolina Rules of Professional Conduct require candor towards the tribunal. See Rule 3.3, RPC, Rule 407, SCACR. If CDJ wanted information concerning when Ms. Finn's firm was first contacted by the Plaintiffs and information concerning third parties communications, they should not have told the court that "all we are seeking to discover here is when was Ms. Finn contacted by the plaintiff about the circumstances of this case" or that "we're not seeking any kind of communications whatsoever."

D. **CDJ was estopped from seeking anything more than the date Ms. Finn was first contacted by the Plaintiffs.**

By repeatedly stating at the hearing that it was seeking only to discover the date that Ms. Finn first spoke to the Plaintiffs, CDJ was estopped from seeking any additional information from Ms. Finn.

The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel. Strickland v. Strickland, 650 S.E.2d 465, 375 S.C. 76 (S.C., 2007). Each element is discussed below.

1. **Elements for Party Estopped**

The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts

are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. Id.

The above elements are met in this case. Regarding the first element, as noted above, CDJ repeatedly stated at the August 22, 2016 hearing that it was only seeking the date that Ms. Finn was first contacted by Plaintiffs. This was inconsistent with the position set forth in their September 9, 2016 Memorandum in Opposition to Ms. Finn's Motion to Alter or Amend Judgment, in which they requested that the circuit court "compel [Ms. Finn] to testify concerning the deposition topics provided in this Court's August 24, 2016 Order." As to the second element, given the number of times that CDJ stated throughout the hearing that it did not seek anything more than the date of Ms. Finn's first contact with Plaintiffs, it can be reasonably inferred that they intended Ms. Finn to rely on those statements. Finally, with regard to the third element, CDJ certainly knew or should have known what information they were really seeking.

2. Elements for Party Asserting Estoppel

The elements of equitable estoppel as related to the party asserting estoppel are: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped. Id.

These elements are met here. As to the first element, Ms. Finn had no way of knowing that CDJ's repeated statements throughout the hearing that they only wanted the date that she first spoke to the Plaintiffs were not accurate. While CDJ did read the four deposition topics from its August 17th memorandum into the record, they subsequently restated that "[w]e do not seek whatsoever to discover anything other than the date...." Hr'g Tr. 25:22-25.

Regarding the second element, Ms. Finn clearly relied on CDJ's statements. For instance, she did

not mention at the hearing that she was merely an associate at MWWC and did not have authority to disclose firm records, notwithstanding the fact that this information was clearly relevant to whether she should be deposed regarding when "her firm" was first contacted by the Plaintiffs.

Finally, as to the third element, Ms. Finn was prejudiced by her reliance on CDJ's statements. The circuit court refused to address arguments that Ms. Finn raised in her Rule 59(e) motion because Ms. Finn did not raise them at the original hearing. See Order Denying Non-party Amy Finn's Rule 59(e) Motion to Alter or Amend Judgment.

2. The circuit court erred by listing deposition "topics"—the last of which is very broad—rather than specific questions Ms. Finn was required to and could properly answer at the deposition.

As stated at the hearing, Ms. Finn has not received the Plaintiffs' informed consent under Rule 1.6(a) of the South Carolina Rules of Professional Conduct to disclose information to CDJ concerning her representation of the Plaintiffs. Therefore, as an alternative to her request that the subpoena be quashed, Ms. Finn requested an order specifying the precise information she had to disclose to CDJ so that she would not be in violation of Rule 1.6(a).

However, rather than provide such a list, the court simply ruled that CDJ was allowed to proceed with the deposition of Ms. Finn concerning the same range of "topics" that CDJ included in its August 17th memorandum. This list of topics includes broad subjects such as "any communications Ms. Finn had with third parties regarding the subject property, the septic tank, or connecting the subject property to the public sewer." The court did not set forth the specific questions Ms. Finn must answer, as she had requested. Neither did the court hold that the information was nonconfidential under Rule 1.6(a). Therefore, Ms. Finn was left to face the same conundrum as she did before the hearing—being forced to appear for a deposition concerning confidential information under Rule 1.6(a), all while under the pending threat of CDJ re-filing their motion to compel and seeking attorneys' fees.

A. **Rule 26(c), South Carolina Rules of Civil Procedure allows a court to grant a protective order where a particularized harm is shown to a deponent.**

Rule 26(c) of the South Carolina Rules of Civil Procedure states in pertinent part:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters

Rule 26(c), SCRPC. Under Rule 26(c), “[i]f the discovery process threatens to become abusive or create a particularized harm to a litigant or third party, the trial judge may issue an order ‘to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense.’” Hollman v. Woolfson, 683 S.E.2d 495, 498, 384 S.C. 571 (2009) (quoting Rule 26(c)).

B. **Rule 1.6(a) of the South Carolina Rules of Professional Conduct requires Ms. Finn to keep all information relating to her representation of Plaintiffs confidential absent a court order holding otherwise.**

In this case, Ms. Finn risks violating her ethical duties under Rule 1.6(a) of the South Carolina Rules of Profession if she discloses the information sought by CDJ. Rule 1.6(a) provides that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent” See Rule 1.6(a), RPC, Rule 407, SCACR. The comments to Rule 1.6 make it clear that the scope of the rule is very broad—in fact, quite broader than that of the attorney-client privilege:

The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, ***whatever its source***. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Rule 1.6, RPC, cmt. 3, Rule 407, SCACR (emphasis added); see also Rule 1.6, RPC, cmt. 5, Rule 407, SCACR (“Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected

information but could reasonably lead to the discovery of such information by a third person.”) (emphasis added).

Ethics opinions interpreting Rule 1.6(a) have similarly made it clear that the scope of the rule is quite extensive. For example, in S.C. Bar Advisory Op. 90-14, the Ethics Advisory Committee addressed a case in which an attorney’s estranged wife was attempting to obtain the names of the attorney’s clients, and the financial records of the attorney’s practice. The financial records, the attorney argued, would reveal the volume of work done for each client, and were therefore confidential under Rule 1.6(a). The Committee agreed, finding that the names of the attorney’s clients and the amount or volume of work done for those clients were confidential under Rule 1.6(a). In doing so, the Committee cited several ABA opinions finding that a client’s name and identity are secret, and concluded that “[i]f the identity of a client is a secret which cannot be revealed absent his informed consent, it logically follows that the amount of work done for him is also a secret disclosable only with his informed consent.”

Here, the information requested by CDJ clearly relates to Ms. Finn’s representation of the Plaintiffs, who have not provided Ms. Finn with informed consent to disclose this information to CDJ. Therefore, absent a court order requiring disclosure, providing this information to CDJ would violate Rule 1.6(a).⁹

C. Ms. Finn faced a particularized harm in light of her ethical obligations under Rule 1.6(a) to keep the information confidential and CDJ’s threats to seek attorney’s fees if she did not disclose the information.

Ms. Finn faced a clear particularized harm in this case. At the time she filed her Motion to Quash or Alternatively for a Protective Order on July 15, 2016, CDJ had already filed its June 28, 2016 Motion to Compel seeking attorneys’ fees from Ms. Finn. See Exhibit B to Finn’s Motion to Quash. Given the experience and caliber of CDJ’s counsel, Ms. Finn expected that such fees would be substantial. Although

⁹ The only exception to the confidentiality rule under Rule 1.6(a) applicable to the present case is set forth in subsection (b)(7) of the rule, which provides that “[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order.”. See Rule 1.6(b)(7), RPC, Rule 407, SCACR.

CDJ later withdrew its Motion to Compel due to a jurisdictional issue, they specifically asked that it be dismissed without prejudice, so that they could later re-file it if necessary.

However, at the same time, Ms. Finn knew that she was ethically required under Rule 1.6 of the Rules of Professional Conduct to assert all nonfrivolous claims that the information sought by CDJ was protected against disclosure by applicable South Carolina law. See Rule 1.6, RPC, cmt. 16 (“A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. *Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.*”) (emphasis added). She also knew that she could not reveal any confidential information to CDJ without a court order requiring her to do so.

Importantly, a violation of Rule 1.6(a) would have subjected Ms. Finn to discipline by the South Carolina Bar. See Rule 8.4(a), RPC, Rule 407, SCACR (providing that it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.5(a), RPC, Rule 407, SCACR (“A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction . . .”). Among other sanctions, such discipline could include public reprimand, suspension of Ms. Finn's law license for up to three years, or even disbarment. See Rule 7(b) RLDE, Rule 413, SCACR.

Thus, it is clear that Ms. Finn faced a particularized harm in this case. She was ethically required to assert that the information sought by CDJ was privileged and confidential. However, she knew that if the circuit court disagreed with her, she could be forced to pay CDJ's attorneys fees. Therefore, Ms. Finn asked the circuit court for a protective order in the event it determined that the subpoena should not be quashed.

- D. **Because the circuit court neither ordered Ms. Finn to answer any specific questions nor held the information requested is nonconfidential, Ms. Finn is left in the same precarious position she was in before she filed her motion.**

Although the circuit court granted Ms. Finn a protective order, it did not order her to answer any specific questions. Rather, it merely limited the deposition to four topics—the last of which was very broad. Moreover, the court did not rule that the information requested by CDJ was nonconfidential under Rule 1.6(a). Therefore, Ms. Finn is left in the same precarious position she was before the hearing—facing the prospect of being deposed on information that she is ethically required to keep confidential under Rule 1.6(a) of the Rules of Professional Conduct, without any apparent applicable exception to the rule.

3. **The circuit court erred by allowing CDJ to proceed with the deposition of Ms. Finn without determining that the information was relevant and necessary to CDJ's case and that there were no reasonable alternatives to discover the information.**

The circuit court's Order states that Ms. Finn's motion for a protective order has been granted. Thus, it appears that the court determined that Ms. Finn successfully demonstrated that CDJ's subpoena created a particularized harm to her, as is required under Rule 26(c) of the South Carolina Rules of Civil Procedure for the granting of a protective order. However, the court erred by giving CDJ carte blanche to question Ms. Finn concerning every single matter set forth in their August 17, 2016 Memorandum without determining that the information was relevant and necessary to CDJ's case and that there were no reasonable alternatives to discover the information.

- A. **Under *Hollman v. Woolfson*, 683 S.E.2d 495, 498, 384 S.C. 571 (2009), the circuit court was required to determine that information sought by CDJ was "relevant and necessary" to their case and that no reasonable alternatives existed to obtain the information.**

Under Rule 26(c), "[i]f the discovery process threatens to become abusive or create a particularized harm to a litigant or third party, the trial judge may issue an order 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense.'" *Hollman v. Woolfson*, 683 S.E.2d 495, 498, 384 S.C. 571 (2009) (quoting Rule 26(c)). "If a person requesting a protective order

shows a particularized harm which will be caused by allowing the discovery, the opposing party has the burden of showing the information sought is 'relevant and necessary' to the case." Id. (quoting Laffitte v. Bridgestone Corp., 381 S.C. 460, 674 S.E.2d 154 (2009)). In determining whether information is necessary, the party seeking the information must "demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." Id. at 498 (quoting Laffitte, 674 S.E.2d at 163). Moreover, "[t]he trial court **must determine whether there are reasonable alternatives available to discover the information.**" Id. at 498 (emphasis added).

B. CDJ failed to show that information was relevant and necessary to their case.

Here, as evidenced by the granting of her motion for a protective order, Ms. Finn successfully demonstrated that CDJ's barrage of emails, letters, subpoenas, and motions attempting to obtain confidential and privileged information from her regarding her former representation of the Plaintiffs threatened to become abusive and/or create a particularized harm to her. Once Ms. Finn made that showing, the burden then shifted to CDJ show that the information was "relevant and necessary" to their case.

However, CDJ did not meet that burden. It failed to "demonstrate with specificity" exactly how the lack of information would impair the presentation of its case on the merits to the point that an unjust result was a "real, rather than a merely possible, threat." Notably, CDJ's stated intention for deposing Ms. Finn was to determine whether the statute of limitations had run on the Plaintiffs' claims—not to determine the actual merit of those claims. Moreover, CDJ merely speculated that Plaintiffs' claims may be stale; they failed to show that this was a real, rather than a possible, issue. While CDJ summarily claimed at the hearing that the proper statute of limitations for the Plaintiffs' causes of action was three years, they cited no legal authority for their claim and the circuit court's Order does not address the issue in a substantive

way. Moreover, Ms. Finn's letter of October 16, 2012 and the Corley Plumbing and Air invoice of October 3, 2012 are both dated less than three years before the Plaintiffs filed their September 25, 2015 Complaint.

Furthermore, courts routinely allow stale claims to proceed forward; South Carolina law clearly states the statute of limitations is an affirmative defense that can be waived under various circumstances, including by a defendant's simple failure to raise the issue. See Rule 8(c), SCRPC (stating that the statute of limitations is an affirmative defense); Mende v. Conway Hosp., Inc., 304 S.C. 313, 314, 404 S.E.2d 33, 34 (1990) (stating that waiver of the statute of limitations may result from express agreement, failure to claim the defense, or by any action or inaction manifestly inconsistent with an intention to insist on the statute). Thus, it is difficult to see how the failure of Ms. Finn to be deposed would lead to an "unjust result."

While CDJ has claimed that Ms. Finn's testimony is necessary to prevent a "fraud on the court," this is a red herring. In making this argument, CDJ noted that Plaintiffs' allegation (contained in their Complaint) that they did not discover that they were connected to a public sewer until March 6, 2013 conflicts with Ms. Finn's October 16, 2012 letter. However, Ms. Finn, who did not prepare or file the Plaintiffs' Complaint, confirmed in her Motion to Quash and Alternatively for a Protective Order that she wrote the October 16, 2012 letter. She also verified that fact in her opening statements at the hearing. Therefore, there is no reason that Ms. Finn should be required to attend a deposition to testify to such fact. Indeed, the list of deposition topics in the circuit court's Order does even not include questioning regarding the authentication of Ms. Finn's letter.

C. CDJ failed to show the lack of reasonable alternatives for obtaining the information.

Furthermore, CDJ failed to establish that there were no "reasonable alternatives available to discover the information." Importantly, CDJ has not claimed that they were unable to obtain this information from the Plaintiffs through the normal discovery process. In fact, at the Hearing, CDJ's counsel admitted

that they had not deposed the Plaintiffs about the deposition topics. Hr'g Tr. 16:16-18.

Inexplicably, CDJ has decided to seek this information from Ms. Finn, the Plaintiffs' former attorney, before exhausting other channels. It appears that CDJ simply wants to shortcut the normal discovery process and get a free ride at the expense of Ms. Finn and her ethical duties under Rule 1.6(a) of the Rules of Professional Conduct. Such action is anathema to our adversarial system. Ruling in favor of CDJ would mean that plaintiff attorneys could be routinely deposed concerning former clients' confidential information, without any showing of need, so that defendants can engage in fishing expeditions to inquire into potential defenses.

4. The circuit court erred by including as deposition topics information that is privileged.

A. Rule 45(c)(3)(A)(iii) of the South Carolina Rules of Civil Procedure mandates a court to quash a subpoena if the subpoena requires disclosure of privileged or otherwise protected matter.

In her Motion to Quash or Alternatively for a Protective Order, Ms. Finn sought an order pursuant to Rule 45(c)(3)(A)(iii) of the South Carolina Rules of Civil Procedure quashing CDJ's July 6, 2016 subpoena on the basis that the information sought by CDJ was privileged.

Rule 45(c)(3)(A)(iii) of the South Carolina Rules of Civil Procedure states:

On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it: . . . (iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies

Rule 45(c)(3)(A)(iii), SCRPC.

B. Attorney-Client Privilege

The circuit court erred by allowing Ms. Finn to be questioned concerning the dates of confidential conferences with the Plaintiffs, including the "general subject matter" of those consultations, because that information is protected under the attorney-client privilege.

The attorney-client privilege is a longstanding privilege that serves a crucial role in our legal

system. It is difficult to overstate the importance of the attorney-client privilege. In Upjohn Co. v. United States, 449 U.S. 383 (1981), the United States Supreme Court noted:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.

Id. at 389 (internal citations omitted). Similarly, the South Carolina Supreme Court has stated:

The attorney-client privilege has long been recognized in this State. The privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained.

Floyd v. Floyd, 615 S.E.2d 465, 482, 365 S.C. 56 (2005); see also State v. James, 34 S.C. 49, 57, 12 S.E. 657, 660 (1891) (“[T]he rule of evidence which holds as inviolable professional communications between attorney and client is one of the most important, and in all forms must be maintained in all its integrity.”).

To establish the attorney-client privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were confidential in nature. Marshall v. Marshall, 282 S.C. 534, 538, 320 S.E.2d 44, 47 (Ct. App. 1984). In order to obtain the status of a client, the person must communicate in confidence with an attorney for the purpose of obtaining legal advice. Id. at 539, 320 S.E.2d at 47.

Here, the Plaintiffs communicated in confidence with Ms. Finn for the purpose of obtaining legal advice and assistance. Therefore, any information Ms. Finn obtained from these communications was privileged, as discussed in more detail below.

1. Under State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), the attorney-client privilege extends both to the substance of the communications as well as the “entire setting of the confidential conference.”

Because of the importance of the public policy that underlies the attorney-client privilege, the South

Carolina Supreme Court has been reluctant to allow an attorney to disclose information obtained through confidential communications with a client. For instance, in State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), the South Carolina Supreme Court addressed whether the attorney-client privilege was violated where the appellant's former attorney testified as to his opinion on the voluntariness of the appellant's confession. The court found that the testimony violated the attorney-client privilege because the attorney's opinion was based in part on observations made during confidential conversations with the appellant. In reaching that conclusion, the court explained:

We believe that the spirit of this policy dictates that not only is the conversation protected but the entire setting of the confidential conference must be protected as well. To lend privilege to the words spoken but to allow disclosure of professional impressions drawn from the manner of their delivery all but destroys the substance of the privilege.

Id. at 122, 283 S.E.2d at 586, overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Here, for Ms. Finn to disclose the "general subject matter" of any consultation between her and the Plaintiffs would clearly require disclosure of portions of the conversation itself, which is protected under Adams. Moreover, the date of confidential conferences with the Plaintiffs would be protected as well, as they are part of the conference's "setting." The ordinary dictionary definition of the term "setting" is "the **time**, place, and circumstances in which something occurs or develops." Webster's New American Dictionary 475 (1995) (emphasis added). Thus, under Adams, this information is protected under the attorney-client privilege.

Furthermore, like in Adams, requiring Ms. Finn to disclose the date she first spoke to Plaintiffs about the facts in her letter would destroy the substance of the privilege. Clients will be far less likely to seek the advice of an attorney and provide material information concerning their case if they are not confident that the details of their discussions will be kept confidential. As noted by the U.S. Supreme Court,

the attorney-client privilege “recognizes that sound legal advice or advocacy serves public ends.” Upjohn, 449 U.S. at 389. If clients are discouraged from seeking the advice of an attorney, then this objective will be contravened. See Paul Rice, Attorney Client Privilege in the United States § 6:14 (2015) (stating that the attorney-client privilege “can only succeed if the range of information protected is sufficiently broad to encompass what the client might reasonably . . . believe is important to that end”).

2. Pursuant to *State v. Doster*, 276 S.C. 647, 284 S.E.2d 218 (S.C. 1981), CDJ should not be granted a “license to fish into privileged communications” given that other means remain available to them to establish their statute of limitations defense.

Like in Adams, in State v. Doster, 276 S.C. 647, 284 S.E.2d 218 (S.C. 1981), the South Carolina Supreme Court again determined that the attorney-client privilege applied in a case where an attorney was asked to testify about communications with a former client. In that case, the appellant Doster appealed his conviction for conspiracy to possess and distribute marijuana and possession with intent to distribute marijuana. He claimed that the trial court blocked his entrapment defense because it ruled that communications between George Anderson, an unpaid, non-police, confidential informant, and Mr. Anderson’s attorney were privileged. The court rejected Doster’s argument, stating:

We do not believe the trial judge abused his discretion under these circumstances. . . . It is clear that appellant was not denied a right to establish his defense, **he was merely denied the license to fish into privileged communications**. Doster had the right to present his affirmative defense **by whatever means remained available to him**.

State v. Doster, 276 S.C. 647, 284 S.E.2d 218 (S.C. 1981) (emphases added).

Like in Doster, CDJ is merely seeking a license to fish into privileged communications. It has not shown that Ms. Finn’s testimony is necessary to establish its statute of limitations defense. In fact, CDJ’s counsel admitted at the hearing that they had not even deposed the Plaintiffs, who presumably would be a much better source of the information they are seeking. Nor is there any evidence that CDJ deposed other individuals who may have firsthand knowledge of when the Plaintiffs had notice of their claims, such as the Plaintiffs’ neighbors or local plumbers.

3. Cloninger v. Cloninger, 261 S.C. 603, 193 S.E.2d 647 (1973), is distinguishable from the present case.

The lone South Carolina case that the circuit court relied upon in determining that the above information is not privileged is Cloninger v. Cloninger, 261 S.C. 603, 193 S.E.2d 647 (1973). Cloninger involved a dispute between two brothers regarding a verbal contract to convey land. On appeal, the defendant argued that the plaintiff's attorney, Mr. Spratt, should not have been allowed to testify at trial because of an alleged prior attorney-client relationship that existed between the defendant and Mr. Spratt. The court rejected the defendant's argument, stating:

Even where the relationship of attorney and client does exist, ***which was found not to be the case here***, only confidential communications are protected by the privilege. Neither Mr. Spratt nor his secretary testified to any disclosure by the defendant which could be regarded as confidential, and no objection was made to any specific testimony on this ground.

Id. at 610, 193 S.E.2d at 652 (emphasis added).

Cloninger is clearly distinguishable from the present case. First, in that case, no attorney-client relationship was found to exist. Therefore, the court's ruling on the scope of the privilege was unnecessary and arguably dicta. See Nash v. Tindall Corp., 650 S.E.2d 81, 83, 375 S.C. 36, (Ct. App. 2007) ("Dicta or, as it is also known, dictum 'is a statement on a matter not necessarily involved in the case, and is not binding as authority.'"). Here, in contrast, there is no question that an attorney-client relationship existed between Ms. Finn and the Plaintiffs.

Second, unlike in Cloninger, the disclosures between Ms. Finn and the Plaintiffs were confidential. No one other than Ms. Finn and the Plaintiffs were present during their discussions regarding this matter. Therefore, Cloninger is inapposite to the present case.

4. The legal authority from outside South Carolina relied on by circuit court is also distinguishable.

In addition to Cloninger, the circuit court's order relied on quotes from three federal cases and two legal treatises as support for its argument that the date when Ms. Finn first met with Plaintiffs and the

general subject matter discussed was not privileged. Like Cloninger, they can be distinguished from the present case.

a. Upjohn v. United States, 449 U.S. 383 (1981)

The first non-South Carolina case that the circuit court relied on in its order was Upjohn Co. v. United States, 449 U.S. 383 (1981), where the U.S. Supreme Court held: "[T]he protection of privilege extends only to communications and not to facts." 449 U.S. at 395 (quoting Philadelphia v. Westinghouse Electric Corp., 205 F.Supp. 830, 831 (E.D. Penn 1962)). A review of Upjohn shows that this quote is not about an attorney disclosing confidential communications with the client (as the present case is). Rather, the case is about a corporate defendant attempting to shield facts from discovery merely because its employees communicated those facts to an attorney. A quotation of the full paragraph of the Court's decision is necessary to understand its ruling:

The privilege only protects disclosure of communications; ***it does not protect disclosure of the underlying facts by those who communicated with the attorney . . .*** "[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. ***The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.***" Here the Government was free to question the employees who communicated with Thomas and outside counsel.

Id. at 395-96 (internal citations omitted).

Thus, Upjohn holds that a litigant should not be able to shield material information from discovery merely by disclosing the information to an attorney. Notably, Ms. Finn's position has been thoroughly consistent with this holding, as she has repeatedly argued that CDJ should obtain the information they want directly from the Plaintiffs. Ms. Finn, unlike the Plaintiffs, has no firsthand knowledge concerning when the Plaintiffs had notice of their claims. Rather, any information she has concerning this issue was obtained through privileged communications. Therefore, because Upjohn does not involve the situation here –

where an attorney is being asked to disclose information concerning confidential communications with a client—it is clearly distinguishable from the present case.

b. United States v. Bollin, 264 F.3d 391 (4th Cir. 2001)

The second non-South Carolina case that the circuit court relied on in its Order was United States v. Bollin, 264 F.3d 391 (4th Cir. 2001), where the Fourth Circuit held: "It is well-established . . . that the attorney-client privilege protects only confidential communications made for the purpose of seeking legal advice," but "does not prevent an attorney from testifying as to non-confidential matters." Id. at 421. This case is clearly distinguishable from the present case.

In Bollin, the appellant Bollin was a broker who was involved with conspirators in a fraudulent investment program, and he contacted escrow agent and attorney Edwards for escrow agent services, *rather than for legal advice*. Nevertheless, Bollin challenged the admissibility of Edwards's testimony by claiming Edwards was revealing privileged communications. The Fourth Circuit disagreed with Bollin, and it upheld the district court's finding that "Bollin waived any privilege that may have attached when he testified to the grand jury regarding the same transactions and communications about which Edwards testified." 264 F.3d at 391.

In the present case, Plaintiffs have not yet been deposed and have not waived the attorney-client privilege regarding the topics that CDJ intends to ask Ms. Finn about. Moreover, the statement from Bollin is about *nonconfidential* matters, not confidential matters discussed during the scope of legal representation. Unlike in Bollin, there is no evidence that Ms. Finn knew Plaintiffs in any capacity except as their attorney. Rather, the evidence clearly shows that any knowledge Ms. Finn has about this case was obtained through confidential communications with the Plaintiffs for the purpose of providing legal advice. Thus, Bollin is clearly distinguishable from the present case.

c. United States v. Kendrick, 331 F.2d 110, 113 (4th Cir. 1964)

The third non-South Carolina case that the circuit court relied on in its Order was United States v. Kendrick, 331 F.2d 110, 113 (4th Cir. 1964), where the Fourth Circuit held: "It is the substance of the communications which is protected, however, not the fact that there have been communications."

Kendrick involved an appeal of a post-conviction relief petition in which the appellant claimed that he had been incompetent to stand trial. The attorney that represented the appellant during his criminal trial testified at his post-conviction hearing to non-confidential observations that medical experts had previously testified about. The Fourth Circuit ultimately approved of the attorney's specific testimony, concluding: "All of the matters to which the attorney testified are objectively observable particularizations of the client's demeanor and attitude. **Made at a time when neither client nor lawyer manifested any reason to suppose they were confidential, they were not within the privilege.**" 331 F.2d at 114 (emphasis added).

In the present case, all communications between Ms. Finn and Plaintiffs have been confidential, the Plaintiffs have not yet been to trial, and CDJ neither intends nor has any reason to ask Ms. Finn about "observable particularizations" of Plaintiffs' demeanor and attitude. Moreover, the holding in Kendrick, a Fourth Circuit case, conflicts with Adams, a binding South Carolina Supreme Court case. Therefore, it is inapposite to the present case.

d. Restatement (Third) of the Law Governing Lawyers § 69 (2000)

In addition to the foregoing cases, the circuit court also relied upon Restatement (Third) of the Law Governing Lawyers § 69 (2000) for the proposition that "the attorney-client privilege categorically does not apply to such matters as the following: the identity of a client; the fact that the client consulted the lawyer and the general subject matter of the consultation." In the Order, only a partial quote from that treatise was given, when, again, a fuller quotation is necessary to understand its meaning:

Courts have ***sometimes*** asserted that the attorney-client privilege categorically does not apply to such matters as the following: the identity of a client; the fact that the client consulted the lawyer and the general subject matter of the consultation; the identity of a nonclient who retained or paid the lawyer to represent the client; the details of any retainer agreement; the amount of the agreed-upon fee; and the client's whereabouts. Testimony about such matters normally does not reveal the content of communications from the client. ***However, admissibility of such testimony should be based on the extent to which it reveals the content of a privileged communication. The privilege applies if the testimony directly or by reasonable inference would reveal the content of a confidential communication***

Restatement (Third) of the Law Governing Lawyers § 69 cmt. g (2000) (emphases added).

Thus, sometimes such matters are privileged and sometimes they are not. As stated above, the "admissibility of such testimony should be based on the extent to which it reveals the content of a privileged communication." In the present case, Ms. Finn has already told CDJ the identity of her clients, the fact that they consulted her, and the general subject matter of the consultation. Also, in her October 2012 letter, Ms. Finn disclosed specific information she was authorized by Plaintiffs to disclose at that time. She has not been authorized by her former clients to reveal any other information. Ms. Finn cannot disclose anything else to CDJ because anything else would, to some extent, reveal the content of a confidential communication.

Significantly in this regard, the Plaintiffs were members of legal service that allowed them to seek legal advice from attorneys at Ms. Finn's law firm on a variety of legal matters. Thus, little could be inferred from the fact that Ms. Finn spoke to Plaintiffs on a certain date. Absent additional information concerning what was discussed on such date, a date alone would have little evidentiary value.

CDJ wants to infer what Ms. Finn and Plaintiffs spoke about on a specific date simply by being given the date. That is their aim—to get the content of a confidential communication by getting the date the confidential communication occurred. However, as the above treatise states, "the privilege applies if the testimony directly or by reasonable inference would reveal the content of a confidential communication." (emphasis added). Therefore, the treatise actually supports Ms. Finn's argument that the information

sought by CDJ is privileged.

e. Land Goldstein Trial Technique § 13:97 (3d ed.)

Lastly, the circuit court relied on Land Goldstein Trial Technique § 13:97 (3d ed.), which states: “[W]hile the privilege protects the substance of a meeting between an attorney and his or her client, it does not protect the fact of whether or not there was a meeting or the date of the meeting.” Again, statements such as this one must be read in context. In the treatise, the sole legal authority cited for this proposition is Ramseur v. Chase Manhattan Bank, 865 F.2d 460 (2d Cir. 1989). In Ramseur, the plaintiff Ramseur appealed a summary judgment order dismissing her employment discrimination case—which was based on her treatment by her supervisors Conticello and Douglas—against Chase Manhattan Bank (“Chase”). The plaintiff argued that summary judgment was improperly granted to Chase because the trial court failed to draw permissible inferences in her favor. Specifically, the plaintiff pointed to a Chase internal memorandum regarding a meeting where Conticello, Douglas, and a vice president from the bank’s human resources department consulted Chase’s attorney. Chase claimed that the court should not consider the memorandum because it had not been properly authenticated and was protected by attorney-client privilege. The Second Circuit determined that while the memorandum could ultimately be excluded from evidence, it could not be “ignored entirely” at the summary judgment stage because, at that stage, the court was “required to draw all factual inferences in favor of the party against whom summary judgment is sought.” Id. at 465, 467. Specifically, the court stated:

Plainly the bank is correct that Ramseur would have to lay an appropriate foundation in order to have the memorandum admitted into evidence. ***Equally plainly, even if authenticity were established, the document reflects the request for and the giving of legal advice, which could result in its exclusion. We do not attempt to determine here whether either of these objections will be sustainable***, but for the reason indicated below, we do not think that on this summary judgment motion the memorandum could appropriately be ignored entirely.

Id. at 467 (emphasis added).

Thus, in Ramseur, the court did not rule on the admissibility of the internal memorandum, and, in fact, posited that it could be inadmissible because it included “the request for and the giving of legal advice.” Rather, the court merely held that the memorandum could not be completely ignored due to the standard used at summary judgment—a standard which is very favorable to nonmoving parties.

Here, unlike in Ramseuer, this is not an appeal of a decision granting summary judgment—it is an appeal of a decision denying a motion to quash. The standard for granting a motion to quash and granting a summary judgment motion are completely different. Moreover, in Ramseur, the court did not even rule on the admissibility of the contested memorandum. Therefore, Ramseur is distinguishable from the present case.

5. Other cases outside of South Carolina support Ms. Finn’s position.

Ms. Finn believes that State v. Adams is dispositive of the issue of whether the information sought by CDJ is privileged. However, in the event the court opts to consider cases outside of South Carolina in determining this issue, Ms. Finn would note that not all courts rely on hard and fast rules. Rather, they take the position that each situation must be evaluated on a case by case basis to determine whether the disclosure threatens to reveal the substance of confidential communications. See, e.g., In the Matter of Witnesses Before The Special March 1980 Grand Jury, 729 F.2d 489, 492 (7th Cir. 1984) (“[I]nformation which is ordinarily not privileged . . . may be privileged if, under the circumstances, its disclosure would result in the disclosure of confidential communications.”); In re Grand Jury Proceedings, 791 F.2d 663, 665 (8th Cir. 1986) (“[C]ertain information ordinarily outside the privilege may become privileged if, by revealing the information, the attorney would necessarily disclose confidential communications.”).

In this case, it must be emphasized that the circuit court’s ruling regarding the scope of the attorney-client privilege was not limited to the date of Ms. Finn’s first meeting with the Plaintiffs. Rather, the circuit court specifically ruled that not only was the date not privileged, “the general subject matter of the

consultation" was not privileged either. As another court has noted, allowing questions about the subject matter of an attorney-client consultation would be gravely problematic. See Lee Nat. Corp. v. Deramus, 313 F. Supp. 224, 226-27 (D. Del. 1970) (holding that questions which would require disclosure of the subject matter discussed confidentially between an attorney and client would be privileged and explaining that "if the responses were merely limited to the most general terms of the subject discussed, it would be of little benefit or enlightenment to an opponent or to the Court, for certainly the privilege would prevent further questions going to the content of the discussions"). Furthermore, Ms. Finn would point out that at the hearing, CDJ specifically stated that "we don't want to know the substance of their communications *whatsoever*." Hr'g Tr. 12:16-17.

6. Conclusion

The circuit court erred by allowing Ms. Finn to be questioned concerning the dates of confidential conferences with the Plaintiffs, including the "general subject matter" of those consultations, because, as Adams makes clear, that information is protected under the attorney-client privilege. Moreover, CDJ expressly stated at the hearing that it was not seeking the substance of the communications "whatsoever." As a practical matter, it is difficult to see how Ms. Finn could possibly disclose any information relevant to CDJ's statute of limitations defense without also revealing the substance of confidential communications.

C. Attorney Work Product Privilege

In addition to three questions concerning "dates," the circuit court's Order allows for broad questioning concerning "any communications Ms. Finn had with third parties regarding the Subject Property, the septic tank, or connecting the Subject Property to the public sewer." Including this extensive line of questioning as a deposition topic was error because communications between an attorney and a third party

in anticipation of litigation are privileged under the work product doctrine.¹⁰

The seminal case regarding the work product doctrine is Hickman v. Taylor, 329 U.S. 495 (1947). In that case, a tugboat sank while towing a railroad car float across the Delaware River, killing five of nine of the tugboat's crew members. The attorney at issue, Fortenbaugh, was retained by the owners of the tugboat to defend them against potential suits by representatives of the deceased crew members and to sue the railroad for damages to the tug. In anticipation of litigation, Fortenbaugh interviewed the surviving crew members. Fortenbaugh was later asked by the petitioner to disclose the content of the statements he had taken from the crew members. He declined, contending that "such requests called 'for privileged matter obtained in preparation for litigation.'" Id. at 499. The matter was appealed to the U.S. Supreme Court, which agreed with Fortenbaugh. In making its decision, the Court noted that the information sought by the petitioner was "**readily available to him direct from the witnesses for the asking.**" Id. at 509 (emphasis added). It then reasoned:

Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney. . . . ***In performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.*** Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. ***The effect on the legal profession would be demoralizing. And the interests of the clients***

¹⁰ CDJ argued in its response to Ms. Finn's Rule 59(e) motion that Ms. Finn did not properly raise the issue of the work product doctrine. However, Ms. Finn clearly stated at the hearing that she believed that the information CDJ was seeking was both confidential (Hr'g Tr. 4:6-8) and privileged (Hr'g Tr. 7:6-9), and attorney-work product is clearly a type of privilege. See, e.g., Spannaus v. U.S. Dep't. of Justice, 942 F. Supp. 656 (D.D.C. 1996) (referring to "attorney-work product privilege"); Piper v. Wittman, 504 N.W.2d 876 (Wis. Ct. App. 1993) (same). And in response, at the hearing, Ms. Anderson described Ms. Finn's privilege objection as encompassing both attorney-client communications privilege and attorney-work product privilege. Hr'g Tr. 13:22-14:1. Thus, Ms. Finn did in fact properly raise this issue at the hearing. The only reason Ms. Finn did not mention this argument in her August 17, 2016 memorandum is because CDJ never asked for third party communications until their memorandum of the same date.

and the cause of justice would be poorly served.

Id. at 510 (emphases added).

The Court also noted that requiring an attorney to relay information provided to him by a third party witness would give rise to "grave dangers of inaccuracy or untrustworthiness":

But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. **Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production.** The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Id. at 512-513 (emphasis added).

The attorney work product doctrine has been codified in Rule 26(b)(3) of the South Carolina Rules of Civil Procedure. The Rule states:

A party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for the trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) **only** upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Rule 26(b)(3), SCRPC (emphasis added).

Here, the court's order would allow the questioning of Ms. Finn concerning "any communications Ms. Finn had with third parties regarding the subject property, the septic tank, or connecting the subject property to the public sewer." However, CDJ has not presented any evidence to show that they have a substantial need for this information or that they cannot, without undue hardship, obtain the same

information directly from the third party sources themselves. Therefore, this line of questioning should not be permitted.

D. Conclusion: Deposing Ms. Finn concerning the four deposition topics would be futile, as the information is confidential and protected under the attorney-client and attorney work product privileges.

If Ms. Finn were to sit for a deposition (as the circuit court ordered), it would be an exercise in futility and therefore the court erred by denying Ms. Finn's motion to quash. "It is well established that the law does not require the doing of a futile act." Iverson v. Xpert Tune, Inc., 553 So.2d 82, 88 (Ala. 1989). Here, it would be futile for Ms. Finn to be deposed by CDJ because the information covered by the four deposition topics is confidential and protected under the attorney-client and attorney work product privileges.

Moreover, Ms. Finn cannot tell CDJ what they really want to know, which is ***when Plaintiffs had notice of their claims***. Notably, that specific piece of information is the only information that the circuit court actually ruled was relevant in its Order. Ms. Finn would, of course, have no way of knowing ***when Plaintiffs had notice of their claims*** except if they told her. Obviously such a communication would be privileged. Although CDJ could obtain this fact from Plaintiffs under Upjohn, Ms. Finn would not be allowed to disclose this fact to CDJ unless Plaintiffs waived the attorney-client privilege, which they have not.¹¹

Thus, it would be futile to require Ms. Finn to appear at a deposition because the information sought by CDJ is confidential and protected under the attorney-client and attorney work product privileges. Therefore, the circuit court erred by denying Ms. Finn's motion to quash.

5. The circuit court erred by including as a deposition topic a question concerning Ms. Finn's former law firm when she does not have authority to speak on the firm's behalf.

¹¹ "Even if the attorney-client relationship is terminated and the client retains new counsel, the information obtained by the prior attorney during the course of the attorney-client relationship remains privileged and may not be waived by the prior attorney." Lane Goldstein Trial Technique § 13.97; see also State v. Thompson, 329 S.C. 72, 76, 495 S.E.2d 437, 439 (S.C. 1997) ("The attorney-client privilege belongs solely to the client and can only be waived by the client.").

The circuit court erred by allowing Ms. Finn to be questioned concerning the date when "her firm" was first contacted by the Plaintiffs because no such firm was named in the subpoena, at the hearing, or in the Order. Because the subpoena is directed only at her, Ms. Finn can only testify concerning her own personal knowledge and thus cannot testify about information contained in her former firm's records. Had CDJ wanted firm records, it should have utilized the procedure set forth in Rule 30(b)(6), SCRCP.

A. Preservation of Issue

Before delving into the substance of this argument, Ms. Finn will first address CDJ's argument from their response to her Rule 59(e) motion that "Ms. Finn did not advise the Court during the August 22, 2016 hearing that she no longer worked at MWWC and did not have authority to testify, therefore this is not a ground that can be considered in her Rule 59(e) Motion." This argument has things exactly backwards. CDJ did not subpoena MWWC, it subpoenaed only Ms. Finn. Moreover, it never argued that Ms. Finn worked at MWWC or had the authority to testify to the firm records. Indeed, CDJ never specified what firm it was talking about or even if Ms. Finn worked for a firm. As the Order clearly states, Ms. Finn represented herself at the hearing, not any firm. If CDJ wanted records of MWWC, CDJ should have clearly said so at the hearing. However, a review of the transcript reveals absolutely no express mention of MWWC contained therein.

Furthermore, as noted above, CDJ stated on multiple occasions at the hearing that it only wanted the date that Ms. Finn was first contacted by Plaintiffs. CDJ should not be able to benefit from blatantly mischaracterizing the information it was seeking from Ms. Finn. If CDJ wanted Ms. Finn to testify about all four deposition topics in its August 17, 2016 memorandum, it should have been forthright about that fact. It should not have told the circuit court repeatedly that all it was seeking to discover was a date.

Ms. Finn would note that she is not the only one affected by this issue. In addition to the Plaintiffs, MWWC would be affected as well. However, MWWC was not put on sufficient notice of the issue, as they

were not named in the subpoena, and the deposition topic concerning Ms. Finn's firm was not added until August 17, 2016.

B. Ms. Finn's former law firm was not named in the subpoena and Ms. Finn is not ethically permitted to disclose firm information without the firm's consent.

CDJ's four topics specifically request firm information, yet MWWC was not named in the subpoena. Moreover, none of CDJ's original three questions directly involved her firm; the topic regarding her firm was not added until August 17, 2016. By ambushing Ms. Finn with a new topic about her firm in its memorandum the Wednesday before a Monday hearing, CDJ suddenly put Ms. Finn, an associate attorney,¹² in an impossible situation, as she was not prepared (or authorized) to represent MWWC.

Had these topics regarding Ms. Finn's firm been mentioned earlier, it is likely that the partners at MWWC would have played a more active role in this matter. A review of the court filings will show that Ms. Finn prepared all of her filings herself. Moreover, because neither the firm nor a firm partner was named in the subpoena, no one from the firm even made a formal appearance at the hearing.

Ms. Finn believes that if CDJ wanted firm information, it should have subpoenaed a partner at the firm or the firm itself, rather than an associate. As Ms. Finn noted in her original Motion to Quash or Alternatively for a Protective Order, the Plaintiffs were members of a legal service that enabled them to call attorneys at MWWC and seek legal advice on a variety of matters. Thus, determining when the Plaintiffs first called MWWC could require a review of multiple files. If CDJ desired this information, it should have subpoenaed someone with authority to access and turn over information from those files, not Ms. Finn. Because of her duty of loyalty to MWWC, Ms. Finn would not have the authority to disclose confidential firm

¹² MWWC's website clearly delineates which attorneys are partners and which are associates. See <http://merrittwebb.com/meet-the-attorneys/sc-attorneys/>. Moreover, MWWC's letterhead (on which Ms. Finn's August 17, 2016 cover letter to the circuit court was written) also separates the names of the four partners of the firm from the names of the associates. Ms. Finn would ask the Court to take judicial notice of the fact that Ms. Finn was an associate, as this fact is verifiable by readily available sources of indisputable reliability. See Masters v. Rodgers Development Group, 321 S.E.2d 194, 196, 283 S.C. 251, 254 (S.C. Ct. App. 1984) (stating that if a fact is capable of verification by reference to readily available sources of indisputable reliability, it is subject to judicial notice).

information to a third party without the firm's consent. As explained by one legal commentator:

[T]he duty of loyalty encompasses a duty to refrain from self-dealing and disclosure of confidential information. Confidentiality extends to client information covered by the ethics rules and privileges. As agents of clients, lawyers must preserve the confidentiality of information relating to the fiduciary relationship with clients. As agents of their law firms and partners, associates must also preserve information acquired while the associate was employed by the firm.

Susan Saab Fortney, Leaks, Lies, and Moonlight: Fiduciary Duties of Associates to their Law Firms, 41 St. Mary's L.J. 595 (2010); see also Leonard Gross, Ethical Problems of Law Firm Associates, 26 Wm. & Mary L. Rev. 259, 265 (1985) ("The associate's duty of loyalty prevents him from disclosing confidential information that he learned at the law firm, even if he has no profit motive for the disclosure.").

C. CDJ should have named Ms. Finn's former law firm as a deponent under Rule 30(b)(6), SCRPC if they wanted firm information.

Rule 30(b)(6) of the South Carolina Rules of Civil Procedure sets forth the proper procedure for deposing organizations. It provides in pertinent part:

A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. ***The persons so designated shall testify as to matters known or reasonably available to the organization.***

In this case, CDJ did not name MWWC as a deponent in its subpoena. Rather, it named Ms. Finn. CDJ cannot sidestep Rule 30(b)(6) by subpoenaing a MWWC employee of its choice. MWWC should have been subpoenaed, and it should have been given an opportunity to designate the appropriate person to testify on its behalf. To reach a contrary conclusion would mean that a litigant could obtain information from an organization by simply subpoenaing unsuspecting, low-level employees in hopes that they fail to raise a proper objection.

D. **Ms. Finn's lack of personal knowledge would preclude her from testifying about when others at her former law firm may have spoken with Plaintiffs.**

Because Ms. Finn alone was named in the subpoena, she can only testify as to matters within her personal knowledge. See State v. Brown, 768 S.E.2d 246, 411 S.C. 332 (Ct. App. 2015) (“[A] lay witness may only testify as to matters within his personal knowledge.”). Black’s Law Dictionary 604 (1991) defines “personal knowledge” as:

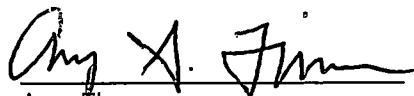
Knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay. Personal knowledge of an allegation in an answer is personal knowledge of its truth or falsity; and if the allegation is a negative one, this necessarily includes a knowledge of the truth or falsity of the allegation denied. ***In the law of evidence means something which the witness actually saw or heard, as distinguished from something he learned from some other person or sources.***

Here, the deposition topics include the date when Ms. Finn and “her firm” were first contacted by the Plaintiffs, as well as when Ms. Finn first “met with the Plaintiffs.” At the time the subpoena was issued, Ms. Finn was employed by MWWC, a law firm with dozens of employees. If another employee spoke to the Plaintiffs before Ms. Finn ever spoke or met with them herself, then she would not have firsthand knowledge of any such exchange. Rather, she would have to rely on “other person[s] or sources” in order to answer questions along that line of inquiry. Accordingly, it would be futile to require Ms. Finn to be deposed regarding when her firm was first contacted by the Plaintiffs.

CONCLUSION

The judgment of the circuit court denying Ms. Finn's motion to quash should be reversed.

Respectfully submitted,



Amy Finn
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Columbia, SC 29229
(803) 397-0526

Columbia, South Carolina
October 7, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No.: 2015-CP-23-05875

Lois G. and William K.
Washington,

Plaintiffs,

vs.

C. Dan Joyner, Realtors; aka
Prudential C. Dan Joyner,
Realtors; Bill Brandt,
individually, and as agent for
C. Dan Joyner, Realtors; and
Jason Jones, buyer's agent,
individually

Defendants,

of which

C. Dan Joyner, Realtors; aka
Prudential C. Dan Joyner,
Realtors; Bill Brandt,
individually, and as agent for
C. Dan Joyner, Realtors are

Respondents,

and

Amy Finn is

Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of Nonparty-Appellant Amy Finn's initial brief was served this day, October 7, 2016, via United States Mail, postage prepaid, upon the following:

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October 7, 2016

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

Re: Lois G. & William K. Washington v. C. Dan Joyner, Realtors et al.
Docket Number: 2015-CP-23-05875

Dear Ms. Kitchings:

Enclosed for filing please find Nonparty-Appellant Amy Finn's initial brief pursuant to Rule 208(a)(1), SCACR.

Sincerely,



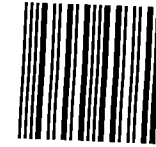
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