

65997

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

RECEIVED  
OCT 24 2012  
SC Court of Appeals

Case No. 2011-CP-40-3989

QBE Insurance Corporation as assignee of  
P.V., Inc. d/b/a Harbor Inn, ..... Appellant,

vs.

William Fincher, Harrison, Fincher &  
Associates, LLC, and Harrison, Fincher &  
Associates, Inc., ..... Respondents.

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**RESPONDENTS WILLIAM FINCHER, HARRISON, FINCHER &  
ASSOCIATES, LLC, AND HARRISON, FINCHER & ASSOCIATES, INC.'S  
MOTION TO DISMISS APPEAL**

---

Susan Taylor Wall  
Amanda C. Williams  
MCNAIR LAW FIRM. P.A.  
100 Calhoun Street, Suite 400  
Charleston, SC 29401  
Phone: (843) 723-7831

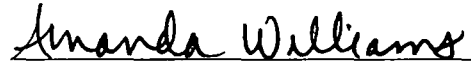
**Attorneys for Respondents William Fincher,  
Harrison, Fincher & Associates, LLC, and  
Harrison, Fincher & Associates, Inc.**

Respondents William Fincher, Harrison Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc. (collectively, "Respondents"), by and through their undersigned counsel, hereby move the Court, pursuant to Rule 201 of the South Carolina Appellate Court Rules, to dismiss Appellant's appeal on the grounds that there is no final judgment, and thus, the appeal is premature.

On August 1, 2012, the court entered a Form 4 order of dismissal granting Respondents' Motion to Dismiss and ordered Respondents' attorney to submit a proposed order within ten days for the court's review. (Form 4 Order, Ex. A.) Respondents submitted a proposed order and thereafter, Appellant filed a Motion to Reconsider. (8/15/12 Motion to Reconsider, Ex. B.) The court found Appellant's Motion premature since the judge had not yet signed the formal order granting Respondents' Motion to Dismiss. (8/15/12 Email, Ex. C.) The court filed its formal order granting Respondents' Motion to Dismiss on September 11, 2012. (9/11/12 Order, Ex. D.) On September 26, 2012, Appellant filed a second Motion to Reconsider. (9/26/12 Motion to Reconsider, Ex. E.) On September 26, 2012, the court asked Respondents to submit any response to Appellant's Motion to Reconsider within ten days. (9/26/12 Email, Ex. F.) Respondents filed a memorandum opposing Appellant's Motion. (Opp. to Motion to Reconsider, Ex. G.) Despite the fact that the judge has not yet ruled on Appellant's Motion to Reconsider, Appellant proceeded with filing a Notice of Appeal with this Court on October 17, 2012. Appellant acknowledges in its letter to the Court enclosing its Notice of Appeal that it filed a Motion to Reconsider which the trial court has not yet ruled upon.

The trial court has not yet ruled on Appellant's Motion to Reconsider, therefore, we respectfully request that this Court Dismiss Appellants' appeal on the grounds that there is no final judgment from which to appeal, and thus, the appeal is premature.

Respectfully submitted,



Susan Taylor Wall  
Amanda C. Williams  
MCNAIR LAW FIRM, P.A.  
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Phone: (843) 723-7831  
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ATTORNEYS FOR RESPONDENTS  
WILLIAM FINCHER, HARRISON, FINCHER &  
ASSOCIATES, LLC, AND HARRISON,  
FINCHER & ASSOCIATES, INC.

October 22, 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

RECEIVED  
OCT 24 2012  
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-3989

QBE Insurance Corporation as assignee of  
P.V., Inc. d/b/a Harbor Inn, .....Appellant,

vs.

William Fincher, Harrison, Fincher &  
Associates, LLC, and Harrison, Fincher &  
Associates, Inc., ..... Respondents.

**PROOF OF SERVICE**

The undersigned hereby certifies that on October 22, 2012, the foregoing  
**RESPONDENTS WILLIAM FINCHER, HARRISON, FINCHER &  
ASSOCIATES, LLC, AND HARRISON, FINCHER & ASSOCIATES, INC.'S  
MOTION TO DISMISS APPEAL** was served on all counsel of record via U.S. Mail,  
postage prepaid and addressed as follows:

Stephen L. Brown, Esq.  
Jeffrey Wiseman, Esq.  
Young Clement Rivers, LLP  
25 Calhoun Street, Suite 400  
Charleston, SC 29401  
*Attorneys for Respondent*

*Amanda Williams*  
MCNAIR LAW FIRM, P.A.  
100 Calhoun Street, Suite 400  
Charleston, South Carolina 29401  
Phone: (843) 723-7831

FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-40-3989

QBE Insurance Corporation as assignee of P.V., Inc.  
d/b/a Harbor Inn  
PLAINTIFF(S)

William Fincher, Harrison, Fincher & Associates,  
LLC and Harrison, Fincher & Associates  
DEFENDANT(S)

Submitted by: Attorney for  Plaintiff  Defendant  
 Self-Represented Litigant

Disposition Type (Check One)

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

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

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court: After a thorough review of the facts and the relevant law, Defendant's Motion to Dismiss is GRANTED. Defendant's attorney must prepare the Order within ten days and submit it electronically for the Court's review.

Order Information

This order  ends  does not end the case.  
Additional Information for the Clerk:

Complete if judgment requires payment of a sum of money or affects title to real or personal property

JUDGMENT AGAINST PLAINTIFF:		JUDGMENT AGAINST DEFENDANT:	
Judgment Amount	\$	Judgment Amount	\$
Taxable Costs	\$	Taxable Costs	\$
Attorney's Fees	\$	Attorney's Fees	\$
Interest	\$	Interest	\$
Other:	\$	Other:	\$
Total Amount to be Enrolled:	\$	Total Amount to be Enrolled:	\$

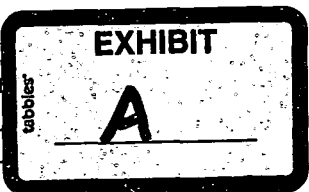
If applicable, describe the property, including tax map information and address, referenced in the order:

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

Circuit Court Judge [Signature] Judge Code \_\_\_\_\_ Date 7/31/2012

For Clerk of Court Office Use Only

This judgment was entered on the 1 day of Aug, 2012 and a copy mailed first class to attorneys of record or to parties (when appearing pro se)



ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT [Signature]

2012 AUG - 1 AM 10: 25  
RICHLAND COUNTY FILED  
ANETTE W. McBRIDE  
C.C.P. & S.S.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
 )  
QBE INSURANCE CORPORATION )  
as assignee of P.V. INC., d/b/a HARBOR )  
INN, )

PLAINTIFF, )

vs. )

WILLIAM FINCHER, HARRISON, )  
FINCHER & ASSOCIATES, LLC, AND )  
HARRISON, FINCHER & )  
ASSOCIATES, INC., )

DEFENDANTS. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS )  
 )  
FIFTH JUDICIAL CIRCUIT )  
 )  
CASE NO. 2011-CP-40-3989 )

**PLAINTIFF'S MOTION TO  
RECONSIDER ORDER GRANTING  
DEFENDANTS' MOTION TO DISMISS  
AND/OR AMEND**

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Plaintiff, QBE Insurance Corporation as assignee of P.V. Inc., d/b/a Harbor Inn ("P.V. Inc"), will move before the Honorable Alison Renee Lee, Presiding Judge for the Fifth Judicial Circuit, within ten (10) days of service of this Notice, or as soon thereafter as counsel may be heard, for an order to reconsider and set aside the Order Granting Defendant's Motion to Dismiss and/or Amend entered August 1, 2012 (Exhibit A).

NOW COMES Plaintiff, P.V. Inc., pursuant to Rule 59 of the *South Carolina Rules of Civil Procedure* and other applicable law, and moves this Court for an order to reconsider and set aside the Order Granting Defendant's Motion to Dismiss and/or Amend (Order). The Order specified that "Defendant's attorney must prepare [an] Order within ten days and submit it electronically for the Court's review." Out of an abundance of caution so as to comply with the South Carolina Rules of Civil Procedure and deadlines for filing a motion to reconsider, and reserving any and all rights to alter, amend, and/or supplement this motion or otherwise respond



to the order prepared by the Defendant's attorney, the Plaintiff submits this Motion to Reconsider based on the "Form 4" order from Judge Lee.<sup>1</sup>

Respectfully, the Order failed to follow the well-established standard that for purposes of a Rule 12(b)(6) motion to dismiss, a court must consider all the facts alleged in the complaint as true and must construe the complaint in the light most favorable to the non-moving party. See, e.g., Woodell, Allen v. Marion Sch. Dist. One, 307 S.C. 297, 414 S.E.2d 794 (Ct. App. 1992). In addition, the Order failed to accurately apply the law related to equitable tolling, statute of limitations, res judicata and Rule 12(b)(8) defense. The Plaintiff respectfully submits that the Order is in error and makes this motion based upon the following grounds:

1. The Order failed to properly apply the established requirement that a court must construe the complaint in a light most favorable to the non-moving part and must consider the facts alleged in the complaint as true. The complaint plainly contains facts and inferences that would entitle the Plaintiff relief.
2. The Order was incorrect to conclude that the statute of limitations had run. P.V. Inc.'s negligence cause of action did not exist until November 2009 when it suffered \$1.5 million in damages pursuant to the November 2009 default judgment. There was no cause of action in June 2005, as alleged by the Defendant, because at that time it was pure speculation and conjecture that P.V. Inc. would suffer any damages, and P.V. Inc. did not even know of the 2005 entry of default at the time. The statute of limitations cannot begin to run until a cause of action exists, and without any damages there was no cause of action. See King v. James, 694 S.E.2d 35, 40 (S.C. Ct. App. 2010). According to the Defendants, P.V. Inc. was required to file its lawsuit almost a year and a half before actually suffering any damages. According to the Defendant's argument and theory, P.V., Inc.'s lawsuit against the Defendants, if forced to file when the Defendants claim, would have gone to trial before P.V., Inc. had suffered one penny of damage.
3. The Order failed to recognize that the Plaintiff pled equitable tolling in its complaint and that tolling is appropriate. The complaint plainly provides facts that the Defendants repeatedly misrepresented and misled the Plaintiff to believe that the original claim had been reported. Equitable tolling applies when "the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to filing a timely lawsuit." Hooper v. Ebenezer Senior Servs. & Rehab., 386 S.C. 108, 116, 687 S.E.2d 29 (2009). The Defendants actively misled Plaintiff and should not benefit from the repeated misrepresentations to cover up the negligence.

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<sup>1</sup> P.V. Inc. received written notice of entry of Judge Lee's Form 4 order on August 6, 2012.

Equitable tolling is appropriate and was raised as a material issue in the complaint. Whether or not equitable tolling applies is a question for the jury. See id.

4. The Order mistakenly considered QBE and P.V. Inc. as the same party because this action was brought by QBE as assignee of P.V. Inc. By operation of law, an assignment lets "an assignee stand in the shoes of its assignor." Moore v. M.M. Weinberg, 644 S.E.2d 740, 745 (S.C. Ct. App. 2007). As such, QBE as assignee of P.V. Inc. is legally the party P.V. Inc. and legally distinct from QBE. The Order was in error to consider these legally distinct parties as the same party. Thus, even in the court were to determine that QBE was on notice or a potential claim in 2005, that does not mean that P.V. Inc. understood or reasonably comprehended it might have had a claim. P.V. Inc. owned a hotel and simply knew that its insurer was defending it in a lawsuit. To say that P.V. Inc. knew or understood the meaning of any default notice is error. This is properly a question of fact for the jury.
5. The Order failed to recognize the fact that the requirements for res judicata are not present in this case. The elements for res judicata include: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Judy v. Judy, 712 S.E.2d 408, 412 (S.C. 2011). Specifically, there is no identity of the parties, the subject matter of the claims is different, and there was not a prior adjudication of the issue in a former lawsuit involving the same parties and claims. If these requirements are not present, then there is no res judicata of the claims.
6. The Order failed to recognize that a Rule 12(b)(8) defense pursuant to the *South Carolina Rules of Civil Procedure* is unavailable. The 12(b)(8) defense is unavailable because the action does not involve the same parties or the same claims.
7. The Order failed to recognize that granting the Defendant's Motion to Dismiss and/or Amend would allow an impermissible end-run around the Rule 12 requirements because it would allow Defendant to raise the 12(b)(8) defense after-the-fact, which is not allowed under the rule.

WHEREFORE, the Plaintiff, P.V. Inc., moves this Court for an order to reconsider and set aside the Order Granting Defendant's Motion to Dismiss and/or Amend. All prior arguments, written or oral, previously presented in opposition to the Defendant's motion are fully incorporated herein by reference. Additionally, this motion will be supported by a memorandum of law to be submitted to this Court and served on all Counsel in a timely manner as prescribed by the *South Carolina Rules of Civil Procedure* and any further orders of this Court.

YOUNG CLEMENT RIVERS, LLP

By:   
Stephen L. Brown

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E-Mail: sbrown@yrcrlaw.com

Jeffrey Wiseman

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Facsimile: (843) 579-1393

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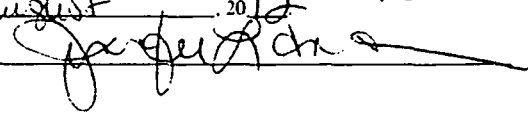
Attorneys for Plaintiff

Charleston, South Carolina

Dated: 8/15/12

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 15 day of

August, 2012  


FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF RICHLAND  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-40-3989

QBE Insurance Corporation as assignee of P.V., Inc.  
d/b/a Harbor Inn  
 PLAINTIFF(S)

William Fincher, Harrison, Fincher & Associates.  
LLC and Harrison, Fincher & Associates  
 DEFENDANT(S)

Submitted by: \_\_\_\_\_ Attorney for  Plaintiff  Defendant  
 Self-Represented Litigant

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

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

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court: After a thorough review of the facts and the relevant law, Defendant's Motion to Dismiss is GRANTED. Defendant's attorney must prepare the Order within ten days and submit it electronically for the Court's review.

Order Information

This order  ends  does not end the case.  
 Additional Information for the Clerk :

Complete if judgment requires payment of a sum of money or affects title to real or personal property			
JUDGMENT AGAINST PLAINTIFF:		JUDGMENT AGAINST DEFENDANT:	
Judgment Amount	\$ _____	Judgment Amount	\$ _____
Taxable Costs	\$ _____	Taxable Costs	\$ _____
Attorney's Fees	\$ _____	Attorney's Fees	\$ _____
Interest	\$ _____	Interest	\$ _____
Other:	\$ _____	Other:	\$ _____
Total Amount to be Enrolled:	\$ _____	Total Amount to be Enrolled:	\$ _____

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

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

Alfred Lee \_\_\_\_\_ Judge Code \_\_\_\_\_ Date 7/31/2012  
 Circuit Court Judge

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 2012 and a copy mailed first class this \_\_\_\_\_ day of Aug, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
 ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
 ATTORNEY(S) FOR THE DEFENDANT

\_\_\_\_\_  
 CLERK OF COURT



Janette W. Grude

ANNETTE W. McBRIDE  
 C. CP. & S.S.  
 2012 AUG - 1 AM 10: 25  
 RICHLAND COUNTY  
 FILED

## Williams, Amanda

---

**From:** Lee, Alison Renee Law Clerk (Joseph P. Bias) [ALeeLC@sccourts.org]  
**Sent:** Wednesday, August 15, 2012 4:56 PM  
**To:** Anderson, Jennifer; Wall, Susan; Williams, Amanda  
**Cc:** Wiseman, Jeffrey; Brown, Stephen L.; O'Neil, Lynn  
**Subject:** RE: QBE Insurance Corporation v. William Fincher, Case Number 2011-CP-40-3989

Dear Counsel,

This motion is premature. The Judge has the Defendant's proposed order under review and has not signed it yet. After the Judge edits and reviews this Order, it will be signed and sent to the Clerk's office.

### Joseph P. Bias

Law Clerk to the Honorable Alison Renee Lee  
Fifth Judicial Circuit  
Richland County Judicial Center  
1701 Main Street, Suite 324  
Columbia, SC 29201  
(803) 576-1767 (Direct Dial)  
(803) 576-1765 (Office)  
(803) 576-1768 (Fax)  
[aleelc@sccourts.org](mailto:aleelc@sccourts.org)

---

**From:** Anderson, Jennifer [<mailto:janderson@ycrlaw.com>]  
**Sent:** Wednesday, August 15, 2012 4:26 PM  
**To:** Lee, Alison Renee Law Clerk (Joseph P. Bias); Wall, Susan; Williams, Amanda  
**Cc:** Wiseman, Jeffrey; Brown, Stephen L.; O'Neil, Lynn  
**Subject:** QBE Insurance Corporation v. William Fincher, Case Number 2011-CP-40-3989

Good afternoon,

Attached please find correspondence that was sent to the Clerk of Court this afternoon. Please let me know if you have any difficulty with the attachments.

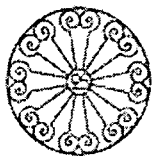
Sincerely,

### Jennifer L. Anderson

Legal Secretary to Stephen L. Brown  
Jeffrey J. Wiseman, Russell G. Hines and Catherine H. Chase  
Phone: (843) 720-5488  
Fax: (843) 579-1369  
[janderson@ycrlaw.com](mailto:janderson@ycrlaw.com)

PLEASE NOTE NEW ADDRESS





**YCR LAW**  
Young Clement Rivers, LLP

25 Calhoun Street  
Suite 400  
Charleston, SC 29401  
[www.ycrlaw.com](http://www.ycrlaw.com)

Building on a strong foundation.

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Young Clement Rivers, LLP  
<http://www.ycrlaw.com>  
Charleston: (843) 577-4000

**"ATTORNEY-CLIENT PRIVILEGED; DO NOT FORWARD WITHOUT PERMISSION."** The information contained in this transmission is privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone or by email to [email@ycrlaw.com](mailto:email@ycrlaw.com) or by replying to this message and destroy all copies of this message and all attachments.

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
  
QBE INSURANCE CORPORATION AS  
ASSIGNEE OF P.V. INC. D/B/A HARBOR  
INN,

Plaintiff,

v.

WILLIAM FINCHER, HARRISON,  
FINCHER & ASSOCIATES, LLC, AND  
HARRISON, FINCHER &  
ASSOCIATES, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-40-3989

ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS

JANETTE W. McBRIDE  
C.C.P. & G.S.

2012 SEP 11 AM 10:47

RICHLAND COUNTY  
FILED

This matter came before the Court on May 9, 2012 on a Motion to Dismiss filed by William Fincher ("Fincher"), Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc. (collectively "HFA"). Present at the hearing were Jeffrey J. Wiseman, Esq. and Susan Taylor Wall, Esq., counsel for Plaintiff, and Amanda C. Williams, Esq., counsel for Defendants. After considering the law, the briefs filed by both parties, the arguments of counsel, and all matters submitted, the Motion to Dismiss is **GRANTED** and Defendants' Motion for Reconsideration is **DENIED**.

**FACTS**

QBE Insurance Corporation ("QBE") is an insurance company. Defendant William Fincher is a licensed insurance agent for HFA. HFA is an insurance agency which provides professional services in the industry. On or about June 19, 2004, a child tragically drowned in the pool of the Harbor Inn Hotel, owned by P.V. Inc. and located in Georgetown, South Carolina. At the time of the accident, QBE had a contract of insurance sold by Defendant Fincher to P.V. Inc. The estate of the child, Dominick Antonyo Richardson ("Richardson"), filed suit against P.V. Inc. in March 2005, alleging that P.V. Inc. was liable for the death of Richardson.

Fincher and HFA received notice of the claim from P.V. Inc. as well as copies of various pleadings and correspondence from the attorney representing the estate of Richardson ("Estate"). These documents were not timely forwarded to QBE, and as a result, QBE failed to initiate a

*and #1*



**SCANNED**

defense of P.V. Inc. In June 2005, an Entry of Default was entered against P.V. Inc. for failure to answer or respond to the Estate's Complaint. In October 2005, Fincher and HFA reported the claim to QBE by notifying QBE of the suit and the Entry of Default.

QBE hired counsel for P.V. Inc. to defend against the claims made by the Estate. P.V. Inc.'s counsel was unable to remove the Entry of Default and in November of 2009, a Default Judgment was entered against P.V. Inc. in the amount of \$1,500,000.00 in Georgetown County. QBE subsequently informed Fincher that it intended to make a claim against him as a result of the November 2009 Default Judgment and that he should place his "errors and omissions" ("E&O") carrier on notice. QBE's counsel continued to attempt to communicate with Fincher through letters and telephone calls yet received no response. QBE subsequently filed a suit against Fincher in Richland County styled *QBE Insurance Corporation v. William Fincher, Harrison, Fincher & Associates, LLC and Harrison, Fincher, & Associates*, Docket No. 2009-CP-40-8717 ("2009 Action"). After being served, Fincher requested and was granted an extension by QBE to file an answer. When no answer was filed, QBE filed a Petition for Entry of Default on March 30, 2010. Fincher eventually retained counsel; however, no pleadings to set aside QBE's Entry of Default were filed until February 22, 2011. Defendants' Motion to Set Aside Entry of Default in the 2009 Action was denied on June 27, 2011 and Defendants' Motion to Reconsider was similarly denied on March 27, 2012.

QBE as assignee of P.V., Inc. filed the present action on June 21, 2011. Defendants filed a Motion to Dismiss the present action on September 22, 2011. Defendants' Motion to Dismiss was granted on August 1, 2012 by entry of a "Form 4" Order indicating a formal order of dismissal would be forthcoming. QBE thereafter made a Motion to Reconsider the Order Granting Defendants' Motion to Dismiss on August 16, 2012 on the grounds that the Order failed to accurately apply the law related to equitable tolling, statute of limitations, *res judicata*, and a Rule 12(b)(8) defense. Defendants' Motion to Reconsider is premature because no formal order had been issued providing the applicable facts and law which the Court determined in dismissing the case. However, this Order provides the Court's reasoning and addresses the Defendants' Motion for Reconsideration.

ad #2

## STANDARD OF REVIEW

When deciding a motion to dismiss, the question to be considered is whether, in a light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 614 S.E.2d 619 (2005). "A motion to dismiss should not be granted if facts alleged and inferences reasonably deductible therefrom would entitle the plaintiff to any relief on any theory of the case." *Slack v. James*, 356 S.C. 479, 483 S.E.2d 772, 773-774 (Ct. App. 2003). Where allegations of the complaint give rise to competing inferences on a question of material fact, dismissal under Rule 12(b)(6) is not appropriate. *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 306 (1993).

## DISCUSSION

In their motion, the Defendants raise the issues of the statute of limitations and res judicata to support their motion.

### **A. STATUTE OF LIMITATIONS**

Defendants assert the action is barred by the statute of limitations because Plaintiff's three year statute of limitations began to run, at the latest, by October 2005, six years before this lawsuit was filed in June 2011. South Carolina case law is well settled that the three year statutory period begins to run when the claimant could or should have known, through the exercise of reasonable diligence, that a cause of action might exist. See *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981). The standard for determining when the statute begins to run is objective, not subjective to the claimant. *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88 (1995). The statute of limitations is not tolled while advice of counsel is sought or a full blown theory of recovery is developed, even where the injured party does not comprehend the full extent of his damage. *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005).

In its argument opposing Defendants' Motion to Dismiss, QBE claims that until a default judgment in the amount of \$1,500,000.00 was rendered against P.V. Inc., the company did not know whether it had a claim against the agent or was damaged. Such an argument is expressly rejected by South Carolina case law. "Once a reasonable person has reason to believe that some right of his has been invaded or that some claim against another party *might* exist, the requirement of reasonable diligence to investigate this information further takes precedence over

by  
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the inability to ascertain the amount of damages or even the possibility the damages may be forthcoming at all.” *Binkley v. Burry*, 352 S.C. 286, 297-98, 573 S.E.2d 838, 844-45 (Ct. App. 2002)(emphasis added); see also *Kimmer v. Wright*, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011).

QBE, through the exercise of reasonable diligence, knew or should have known that it might have a claim against the Defendants in June 2005, and at the latest, in October 2005. In its Complaint, QBE alleges that an Entry of Default was entered against P.V. Inc. in June 2005, and QBE, as P.V. Inc.’s insurer, received notice of the underlying lawsuit and Entry of Default in October 2005. As asserted by QBE in its Supplemental Memorandum in Opposition to Motion to Dismiss, P.V. Inc. was represented by an attorney hired by QBE by October 2005, at which time efforts were made by P.V. Inc. to set aside the default judgment. See *Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009). Thus, P.V. Inc. and QBE knew of the lawsuit and the default by October 2005 and the errors and omissions by Defendants had occurred by that time.

QBE argues that statute of limitations is equitably tolled. Under South Carolina law, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations “if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights.” *American Legion Post 15 v. Horry County*, 381 S.C. 576, 583, 674 S.E.2d 181, 184 (Ct. App. 2009)(citing *Hooper v. Ebenezer Senior Services & Rehabilitation Center*, 377 S.C. 217, 231-232, 659 S.E.2d 213, 220-21 (Ct. App. 2008), *rev’d*, 386 S.C. 108, 687 S.E.2d 29 (2009)). Equitable tolling may ‘serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits.’ *Kimmer*, 396 S.C. 53, 719 S.E.2d 265 (citing *Hooper*, 386 S.C. at 115, 687 S.E.2d at 32 (2009)). “The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use.” *Id.* The court has cautioned that the doctrine of equitable tolling “should be used sparingly and only when the interests of justice compel its use.” *Id.*

QBE alleges in its Complaint that “Fincher and HFA represented on numerous occasions to QBE that the claim was originally reported to QBE in November of 2004.” However, there are no allegations in QBE’s Complaint that the Defendants made any false or misleading statements or engaged in any activity so as to prevent QBE from asserting a lawsuit against Defendants. Second, it cannot be disputed that QBE, P.V. Inc.’s own insurer and the carrier to whom these representations were allegedly made, knew or should have known, by October 2005

of the Estate's lawsuit. Thereafter, P.V. Inc. and QBE had three years from June 2005 and, at the latest, October 2005, to investigate with reasonable diligence whether Defendants provided timely notice of the underlying action. Thus, equitable tolling is inapplicable.

Based on the facts alleged by Plaintiff in its Complaint and the clear case law in South Carolina, the statute of limitations expired before this suit was initiated against the Defendants.

**B. RES JUDICATA**

Defendants also claim the instant action ("2011 Action") is barred because QBE obtained a default judgment against Fincher for the same claims in an identical action (the 2009 Action). "*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of *res judicata*, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (quoting *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). The fundamental purpose of *res judicata* is to ensure that "no one should be twice sued for the same cause of action." *Id.* at 173, 712 S.E.2d at 414.

*Res judicata* operates as a bar to a subsequent action where the following elements are met: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Id.* at 167, 712 S.E.2d at 412. Because the determination as to whether a subsequent suit is barred by *res judicata* cannot be reduced to a formulaic process, South Carolina courts have declined to adopt or define a single standard. *Id.* at 171-72, 712 S.E.2d at 414.

First, both the 2011 Action and the 2009 Action involve the same parties. The 2011 action is styled *QBE Insurance Corporation as Assignee of P.V. Inc. d/b/a Harbor Inn v. William Fincher, Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc* (Docket No. 2011-CP-40-3989). The 2009 action is styled *QBE Insurance Corporation v. William Fincher, Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc* (Docket No. 2009-CP-40-8717). Plaintiff alleges that QBE, as assignee of P.V. Inc., is legally P.V. Inc. and thus legally distinct from QBE. However, there is an identity of parties between the 2011 Action and the 2009 Action because QBE and P.V. Inc. are privies. For *res judicata*, "the concept of privity rests not on the relationship between the parties asserting it, but

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rather on each party's relationship to the subject matter of the litigation." *Yelsen Land Co., Inc. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). QBE and P.V. Inc.'s relationship to the subject matter of the litigation arises from their relationship as insurer and insured. QBE is subject to paying the \$1,500,000.00 judgment in the Estate Action only to the extent that its insured, P.V. Inc., d/b/a Harbor Inn, is required to pay the judgment. QBE in the 2009 Action asserts the same claims that P.V. Inc. could assert and has asserted in the 2011 Action. As a result, P.V. Inc. has the same relationship to the issues presented in the subject action as those litigated by QBE in the 2009 Action.

Furthermore, not only are QBE and P.V. Inc. privies as a result of their insurer/insured relationship, but also as a result of their relationship as assignor and assignee. P.V. Inc. assigned to QBE any rights it had against Defendants as a result of Fincher's alleged failure to report the claim to QBE. This claim has already been litigated by QBE in the 2009 Action, and thus QBE is barred from attempting to recover another \$1.5 million judgment from Defendants for the same claim.

Second, the 2009 Action and the 2011 Action arise out of the same occurrence and involve the same facts, circumstances, and claim for damages. A paragraph-by-paragraph comparison of the Complaints in the two lawsuits reveals nearly an identical word-for-word recitation of facts and allegations. Both actions contain the same causes of action for negligence and indemnity and assert that Defendants failed to timely notify QBE of the claim which resulted in a \$1.5 million default judgment. The purpose of *res judicata* is to prevent a person or entity from being sued twice for the same cause of action. *Judy v. Judy, supra*.

If Plaintiff is permitted to continue litigating the 2011 action, Defendants may be subject to a second judgment for the same claim arising from the same occurrence as the 2009 Action. The law does not allow such a result. Because Plaintiff seeks to recover twice from Defendants for the same alleged acts and omissions, it is barred by the doctrine of *res judicata* from bringing the 2011 action. See *Clanton's Auto Auction Sales, Inc. v. Campbell*, 230 S.C. 65, 94 S.E.2d 172 (1956) (holding second lawsuit brought by an assignee against the same defendants that assignee sued in the first action was barred by *res judicata* because the parties and the issues in both actions were identical).

Third, a final judgment is one that terminates the litigation. James F. Flanagan, *South Carolina Civil Procedure* 668 (3d ed. 2010). A default judgment is a final judgment for *res*

*judicata* purposes. *Orca Yachts, LLC v. Mollicam, Inc.*, 287 F.3d 316 (4th Cir. 2002). On March 30, 2010, the Court filed an Entry of Default in the 2009 Action. On February 22, 2011, the Fincher Defendants filed a Motion to Set Aside the Entry of Default. On June 27, 2011, the Court denied Fincher's Motion to Set Aside and agreed to sign QBE's proposed Order of Judgment by Default. Fincher filed a Motion to Reconsider, Alter, or Amend. On March 28, 2012, the Court denied Fincher's Motion to Reconsider. Accordingly, there is a final judgment in the 2009 Action. On April 25, 2012, Fincher filed a Notice of Appeal. Despite the appeal, there is still a final judgment for *res judicata* purposes which bars a second identical action. See James F. Flanagan, *South Carolina Civil Procedure* 668 (3d ed. 2010).

**C. PLAINTIFF'S MOTION FOR RECONSIDERATION**

Defendants request leave to amend their Motion to Dismiss to assert a Rule 12(b)(8) defense. A Rule 12(b)(8) defense may be appropriate where "another action is pending between the same parties for the same claim." Rule 12(b)(8), SCRCP. However, Rule 12(b)(8) need not be addressed in this Order because this Court has determined that *res judicata* applies. Plaintiff argues in its Motion to Reconsider that the Rule 12(b)(8) defense is unavailable because the action does not involve the same parties or the same claims. The Rule 12(b)(8) defense is, in essence the same as the *res judicata* defense asserted by Defendants in their Motion to Dismiss. Both Rule 12(b)(8) and *res judicata* permit dismissal of a subsequent action that involves the same parties and same claims as a prior action. The only difference between the two defenses is the finality of the judgment requirement: (1) under Rule 12(b)(8), both actions are still pending, and (2) under *res judicata*, there is a final judgment in one of the actions. Because Rule 12(b)(8) serves the same purpose as *res judicata* in this case, and this Court has already determined that *res judicata* applies to prevent Plaintiff from recovering twice from the Defendants for the same alleged acts and omissions, Rule 12(b)(8) need not be separately addressed. However, as an alternative basis to dismiss this action, there is another pending action between the same parties asserting the same claim. Therefore, even if *res judicata* does not apply, Rule 12(b)(8) would bar the current action.

Based on the allegations asserted by Plaintiff in both Complaints and the clear case law in South Carolina, this action is barred by the principle of *res judicata*.

**ORDER**

For the reasons set forth above, it is **ORDERED** that the Motion to Dismiss of Defendants William Fincher, Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc. is **GRANTED** and the within causes of action as against these Defendants are **DISMISSED WITH PREJUDICE**. Plaintiff's Motion to Reconsider is **DENIED**.

**AND IT IS SO ORDERED.**

  
ALISON RENEE LEE  
Presiding Judge

September 10, 2012  
Columbia, South Carolina



STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4003989

QBE Insurance Corporation

William Fincher

P V Inc

Harrison Fincher & Associates LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

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

RICHLAND COUNTY  
FILED  
AM 10:40  
SEP 11  
LEAH METZ WITH BRIDE  
& P.S.

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

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

**ORDER INFORMATION**

This order  ends  does not end the case.

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

**INFORMATION FOR THE JUDGMENT INDEX**

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

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

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

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

Circuit Court Judge

*Al. Bruce Lee*

Judge Code \_\_\_\_\_

Date

*9/10/2012*

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

Jeffrey J. Wiseman

Jennifer Kirk Dunlap

Susan Taylor Wall

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court \_\_\_\_\_

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
 )  
QBE INSURANCE CORPORATION )  
as assignee of P.V. INC., d/b/a HARBOR )  
INN, )

PLAINTIFF, )

vs. )

WILLIAM FINCHER, HARRISON, )  
FINCHER & ASSOCIATES, LLC, AND )  
HARRISON, FINCHER & )  
ASSOCIATES, INC., )

DEFENDANTS. )

IN THE COURT OF COMMON PLEAS )  
 )  
FIFTH JUDICIAL CIRCUIT )  
 )  
CASE NO. 2011-CP-40-3989 )

**PLAINTIFF'S MOTION TO  
RECONSIDER ORDER GRANTING  
DEFENDANTS' MOTION TO DISMISS  
AND/OR AMEND**

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Plaintiff, QBE Insurance Corporation as assignee of P.V. Inc., d/b/a Harbor Inn ("P.V. Inc"), will move before the Honorable Alison Renee Lee, Presiding Judge for the Fifth Judicial Circuit, within ten (10) days of service of this Notice, or as soon thereafter as counsel may be heard, for an order to reconsider and set aside the Order Granting Defendant's Motion to Dismiss filed September 11, 2012 (Exhibit A) and which was received by P.V., Inc. on September 17, 2012.

NOW COMES Plaintiff, P.V. Inc., pursuant to Rule 59 of the *South Carolina Rules of Civil Procedure* and other applicable law, and moves this Court for an order to reconsider and set aside the Order Granting Defendant's Motion to Dismiss. Respectfully, the Order failed to follow the well-established standard that for purposes of a Rule 12(b)(6) motion to dismiss, a court must consider all the facts alleged in the complaint as true and must construe the complaint in the light most favorable to the non-moving party. See, e.g., Woodell, Allen v. Marion Sch. Dist. One, 307 S.C. 297, 414 S.E.2d 794 (Ct. App. 1992). In addition, the Order failed to



accurately apply the law related to equitable tolling, statute of limitations, res judicata and Rule 12(b)(8) defense. The Plaintiff respectfully submits that the Order is in error and makes this motion based upon the following grounds:

1. The Order failed to properly apply the established requirement that a court must construe the complaint in a light most favorable to the non-moving part and must consider the facts alleged in the complaint as true. The complaint plainly contains facts and inferences that would entitle the Plaintiff relief.
2. The Order was incorrect to conclude that the statute of limitations had run. P.V. Inc.'s negligence cause of action did not exist until November 2009 when it suffered \$1.5 million in damages pursuant to the November 2009 default judgment. There was no cause of action in June 2005, as alleged by the Defendant, because at that time it was pure speculation and conjecture that P.V. Inc. would suffer any damages, and P.V. Inc. did not even know of the 2005 entry of default at the time. The statute of limitations cannot begin to run until a cause of action exists, and without any damages there was no cause of action. See King v. James, 694 S.E.2d 35, 40 (S.C. Ct. App. 2010). According to the Defendants, P.V. Inc. was required to file its lawsuit almost a year and a half before actually suffering any damages. Following the Defendant's argument and theory, P.V., Inc.'s lawsuit against the Defendants, if forced to file when the Defendants claim, would have gone to trial before P.V., Inc. had suffered one penny of damage. This is an absurd theory by Defendants.
3. The Order failed to recognize that the Plaintiff pled equitable tolling in its complaint and that tolling is appropriate. The complaint plainly provides facts that the Defendants repeatedly misrepresented and misled the Plaintiff to believe that the original claim had been reported. Equitable tolling applies when "the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to filing a timely lawsuit." Hooper v. Ebenezer Senior Servs. & Rehab., 386 S.C. 108, 116, 687 S.E.2d 29 (2009). The Defendants actively misled Plaintiff and should not benefit from the repeated misrepresentations to cover up the negligence. Equitable tolling is appropriate and was raised as a material issue in the complaint. Whether or not equitable tolling applies is a question for the jury. See id.
4. The Order mistakenly considered QBE and P.V. Inc. as the same party because this action was brought by QBE as assignee of P.V. Inc. By operation of law, an assignment lets "an assignee stand in the shoes of its assignor." Moore v. M.M. Weinberg, 644 S.E.2d 740, 745 (S.C. Ct. App. 2007). As such, QBE as assignee of P.V. Inc. is legally the party P.V. Inc. and legally distinct from QBE. The Order was in error to consider these legally distinct parties as the same party. Thus, even if the court were to determine that QBE was on notice of a potential claim in 2005, that does not mean that P.V. Inc. understood or reasonably comprehended it might have had a claim. P.V. Inc. owned a hotel and simply knew that its insurer was defending it in a lawsuit. To say that P.V. Inc.

knew or understood the meaning of any default notice is error. This is properly a question of fact for the jury.

5. The Order mistakenly considered QBE and P.V. Inc. to be "privies." Related to res judicata, "the concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation." Yelsen Land Co. v. State, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citing Richburg v. Baughman, 290 S.C. 431, 351 S.E.2d 164, 166 (1986)). "Privity is not established from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action." Roberts v. Recovery Bureau, Inc., 450 S.E.2d 616, 619 (S.C. Ct. App. 1994) (citing 46 Am.Jur.2d Judgments § 532 at 685-686 (1969)). "One whose interest is almost identical with that of a party, but who does not claim through him, is not in privity with him." Id. (citing 50 C.J.S. Judgments § 788 at 327 (1947)). Even though P.V. Inc. has an interest almost identical to QBE, the claims of P.V. Inc. were not part of the 2009 action, and P.V. Inc. did not have a full and fair opportunity to litigate its claims. The insurer and insured relationship does make the parties privies. Therefore, QBE and P.V. Inc. are not privies, and are in fact separate parties entitled to independent trials. See e.g., Ex parte Allstate Ins. Co., 339 S.C. 202, 528 S.E.2d 679 (Ct. App. 2000)(holding insurer had separate and distinct rights, "not the least of which was its own independent right to a jury trial"); Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995)(holding "[a]lthough the UIM carrier 'steps into the shoes' of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist").
6. The Order failed to recognize the fact that the requirements for res judicata are not present in this case. The elements for res judicata include: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Judy v. Judy, 712 S.E.2d 408, 412 (S.C. 2011). Specifically, there is no identity of the parties, the subject matter of the claims is different, and there was not a prior adjudication of the issue in a former lawsuit involving the same parties and claims. If these requirements are not present, then there is no res judicata of the claims.
7. The Order failed to recognize that the subject matter of the claims is plainly different between the two actions because the claims of QBE concern QBE's liability to pay policy limits of the insurance policy providing coverage to P.V. Inc., while the claims of P.V. Inc. concern P.V., Inc.'s liability for damages in excess of the insurance policy limits as well as other legally recognizable damages arising from having the judgment in the underlying lawsuit rendered against it. It does not matter that the claims arose from the same underlying transaction and occurrence, because the claims by QBE and P.V. Inc. involve different subject matter as to liability. QBE and P.V. were each harmed by the same occurrence but in their own separate ways.
8. The Order mistakenly found adjudication of the issue in the former suit. The default judgment issued in the 2009 action only pertains to QBE and not P.V. Inc. As previously discussed, QBE and P.V. Inc. are different parties harmed by the Defendants and have

different claims. The fact that QBE litigated its claims to judgment has no preclusive effect on the ability of P.V. Inc. to litigate its claims. Therefore, the default judgment from the 2009 action was not a final adjudication of P.V. Inc.'s claims.

9. The Order failed to recognize that a Rule 12(b)(8) defense pursuant to the *South Carolina Rules of Civil Procedure* is unavailable. The 12(b)(8) defense is unavailable because the action does not involve the same parties or the same claims. "To prevail on a motion to dismiss pursuant to Rule 12(b)(8), the movant must show that the actions in question are between the same parties in the same capacities." Cricket Cove Ventures, Inc. v. Gilland, 701 S.E.2d 39, 44 (S.C. Ct. App. 2010) (citing 1 C.J.S. *Abatement and Revival* § 54 (2005)). Further, South Carolina courts "interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." Capital City Ins. Co. v. BP Staff, Inc., 674 S.E.2d 524, 532 (S.C. Ct. App. 2009); see also Cricket Cove, 701 S.E.2d at 45 (quoting Capital City, 674 S.E.2d at 532).
10. The Order failed to recognize that granting the Defendant's Motion to Dismiss and/or Amend would allow an impermissible end-run around the Rule 12 requirements because it would allow Defendant to raise the 12(b)(8) defense after-the-fact, which is not allowed under the rule.

WHEREFORE, the Plaintiff, P.V. Inc., moves this Court for an order to reconsider and set aside the Order Granting Defendant's Motion to Dismiss. All prior arguments, written or oral, previously presented in opposition to the Defendant's motion are fully incorporated herein by reference. Additionally, this motion will be supported by a memorandum of law to be submitted to this Court and served on all Counsel in a timely manner as prescribed by the *South Carolina Rules of Civil Procedure* and any further orders of this Court.

YOUNG CLEMENT RIVERS, LLP

By:  \_\_\_\_\_

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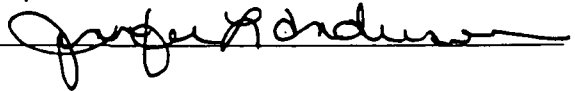
Attorneys for Plaintiff

Charleston, South Carolina

Dated: 9/26/12

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 26 day of September, 2012

 \_\_\_\_\_

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS )

COUNTY OF Richland )

CASE NO.: 2011-CP-40-3989 )

QBE Insurance Corporation as assignee of P.V., )  
Inc. d/b/a Harbor Inn )

Plaintiff(s) )

vs. )

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET )

William Fincher, Harrison, Fincher & Associates, )  
LLC and Harrison, Fincher & Associates, Inc. )

Defendant(s) )

Check box above indicating submitting party )

Name, SC Bar No. and Address of Plaintiff's Attorney  
Jeffrey J. Wiseman SC Bar #:  
Address: Young Clement Rivers, LLP  
Post Office Box 993  
Charleston, SC 29402-0993  
Telephone: (843) 720-5488 fax: (843) 579-1393  
e-mail: jwiseman@yrcrlaw.com

Name, SC Bar No. and Address of Defendant's Attorney  
Susan Taylor Wall, Esquire  
McNair Law Firm, P.A.  
Post Office Box 1431  
Charleston, SC 29402  
Telephone: 843-723-7831  
Email: swall@mcnair.net

- MOTION HEARING REQUESTED (attach *written* motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (COMPLETE SECTIONS II and III)

SECTION I: HEARING INFORMATION

Nature of Motion: Motion to Reconsider  
Estimated Time Needed: 15 minutes

Court Reporter Needed?:  YES  NO

SECTION II: MOTION TYPE

- Written Motion Attached
- Form Motion -

I hereby move for relief or action by the Court as set forth in the attached proposed order.

Dated: 9/26/12

Signature of Attorney for  Plaintiff (s)  Defendant(s)

SECTION III: MOTION FEE

- PAID - AMOUNT \$ 25.00
- EXEMPT:
  - Rule to Show Cause in Child or Spousal Support
  - Domestic Abuse or Abuse and Neglect
  - Indigent Status  State Agency w. Indigent Party
  - Sexually Violent Predator Act
  - Post-Conviction Relief
  - Motion for Stay Bankruptcy
  - Motion for Publication
  - Motion for Execution (Rule 69, SCRPC)
  - Proposed order submitted at request of the Court; or, reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter: \_\_\_\_\_
- Other: \_\_\_\_\_

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order
- Other: \_\_\_\_\_

JUDGE: \_\_\_\_\_

CODE: \_\_\_\_\_ DATE: \_\_\_\_\_

CLERK'S VERIFICATION

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_  
(print name)

- MOTION FEE COLLECTED: \_\_\_\_\_
- CONTESTED - AMOUNT DUE: \_\_\_\_\_

## Williams, Amanda

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**From:** Lee, Alison Renee Law Clerk (Kate Loveland) [ALeeLC@sccourts.org]  
**Sent:** Wednesday, September 26, 2012 2:18 PM  
**To:** Anderson, Jennifer; Williams, Amanda; Wall, Susan  
**Cc:** Brown, Stephen L.; Wiseman, Jeffrey; O'Neil, Lynn  
**Subject:** RE: QBE v. Fincher Case Number 2011-CP-40-3989

Dear Counsel,

Judge Lee has requested that any response to the Motion to Reconsider be filed within 10 days. Please let me know if you have any questions.

### Kate K. Loveland

Law Clerk to the Honorable Alison Renee Lee  
Fifth Judicial Circuit  
Richland County Judicial Center  
1701 Main Street, Suite 324  
Columbia, SC 29201  
(803) 576-1767 (Direct Dial)  
(803) 576-1765 (Office)  
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[aleelc@sccourts.org](mailto:aleelc@sccourts.org)

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**From:** Anderson, Jennifer [<mailto:janderson@ycrlaw.com>]  
**Sent:** Wednesday, September 26, 2012 11:55 AM  
**To:** Lee, Alison Renee Law Clerk (Kate Loveland); Williams, Amanda; Wall, Susan  
**Cc:** Brown, Stephen L.; Wiseman, Jeffrey; O'Neil, Lynn  
**Subject:** QBE v. Fincher Case Number 2011-CP-40-3989

Good morning,

Attached please find a letter that was sent to the Clerk of Court and a Motion to Reconsider for the above-referenced matter. Please let me know if you have difficulty with the attachments.

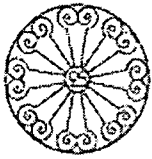
Sincerely,

### Jennifer L. Anderson

Legal Secretary to Stephen L. Brown  
Jeffrey J. Wiseman, Russell G. Hines and Catherine H. Chase  
Phone: (843) 720-5488  
Fax: (843) 579-1369  
[janderson@ycrlaw.com](mailto:janderson@ycrlaw.com)

PLEASE NOTE NEW ADDRESS





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Charleston, SC 29401  
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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
 )  
 QBE INSURANCE CORPORATION AS )  
 ASSIGNEE OF P.V. INC. D/B/A HARBOR )  
 INN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 WILLIAM FINCHER, HARRISON, )  
 FINCHER & ASSOCIATES, LLC, AND )  
 HARRISON, FINCHER & )  
 ASSOCIATES, INC., )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 FIFTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-40-3989

**DEFENDANTS' MEMORANDUM IN  
 OPPOSITION TO PLAINTIFF'S  
 MOTION TO RECONSIDER ORDER  
 GRANTING DEFENDANTS' MOTION  
 TO DISMISS AND/OR AMEND**

RICHLAND COUNTY  
 FILED  
 2012 OCT -5 AM 1:55  
 JEANETTE W. M...  
 C. P. & G. S.

Defendants William Fincher, Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc. (referred to herein as "Fincher" or "Defendants"), by and through their undersigned counsel, respectfully submit this Memorandum of Law in Opposition to Plaintiff's Motion to Reconsider Order Granting Defendants' Motion to Dismiss and/or Amend.

Plaintiff filed a Motion to Reconsider Order Granting Defendants' Motion to Dismiss and/or Amend on August 15, 2012. (Pl. Mot. to Reconsider dated 8/15/12, Ex. A.) The Court found Plaintiff's Motion premature because "no formal order had been issued providing the applicable facts and law which the Court determined in dismissing the case." (9/11/12 Order, Ex. B.) Subsequently, the Court filed its formal Order granting Defendants' Motion to Dismiss and/or Amend and, in so doing, addressed the Motion to Reconsider filed prematurely by Plaintiff on August 15, 2012. (9/11/12 Order, Ex. B.) After the Court filed its formal Order, Plaintiff filed a second Motion to Reconsider on September 26, 2012. (Pl. Mot. to Reconsider dated 9/26/12, Ex. C.) Grounds 1, 2, 3, 4, 6, 9, and 10 were all raised in Plaintiff's first Motion



to Reconsider and were addressed by the Court in its formal Order, therefore, in this Memorandum, Fincher focuses solely on grounds 5, 7, and 8 – the only new grounds asserted by Plaintiff in its September 26, 2012 Motion to Reconsider.

Plaintiff now argues that the “Order mistakenly considered QBE and P.V., Inc. to be ‘privies.’” The Order is not in error in finding that QBE and P.V., Inc. are privies. As the Court Order recognized, QBE is P.V., Inc.’s assignee and thus, its privy. Furthermore, the relationship to the subject matter in the 2009 Action brought by QBE, and the 2011 Action brought by QBE as assignee of P.V., Inc., is identical. Both QBE and P.V., Inc. seek recovery of a \$1.5 million default judgment that they claim resulted from Defendants’ alleged failure to timely notify QBE of the underlying lawsuit. P.V., Inc. has the same relationship to the issues presented in the subject action as those litigated by QBE in the 2009 Action because of their relationship as insurer and insured. Accordingly, the Court properly held that QBE and P.V., Inc. are privies.

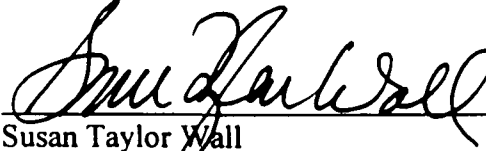
Plaintiff also claims that the “Order failed to recognize that the subject matter of the claims is plainly different between the two actions....” This is an incorrect statement of the undisputed fact that both Complaints are identical. The 2009 Complaint filed by QBE and the 2011 Complaint filed by QBE as assignee of P.V., Inc. are identical in language and subject matter. Both Complaints seek \$1.5 million in damages for Defendants’ alleged failure to timely notify QBE of the underlying lawsuit. Neither Complaint distinguishes between the subject matter of QBE’s claim versus the subject matter of P.V., Inc.’s claim. Because both Complaints seek to recover the same amount of money for the same alleged negligence of Defendants, the Court properly dismissed this lawsuit.

Finally, Plaintiff argues that the “Order mistakenly found adjudication of the issue in the former suit”, claiming that QBE and P.V., Inc. are different parties and the default judgment

from the 2009 action was not a final adjudication of P.V., Inc.'s claims. Again, Plaintiff's argument is contrary to the undisputed facts and law. Because the Complaints in both lawsuits are identical, the subject matter of both lawsuits is identical, and the recovery sought in both lawsuits as stated therein is identical, P.V., Inc. is precluded, as a matter of law, from asserting a claim against Defendants in this litigation. Defendants cannot be subject to two \$1.5 million judgments for the same claims. *See Judy v. Judy*, 393 S.C. 160, 173, 712 S.E.2d 408, 414 (2011) (holding that the fundamental purpose of res judicata is to ensure that "no one should be twice sued for the same cause of action"). Accordingly, the Court properly dismissed Plaintiff's Complaint.

#### CONCLUSION

For all the foregoing reasons and any others in the record, Defendants respectfully request that the Court issue an Order DENYING Plaintiff's Motion to Reconsider Order Granting Defendants' Motion to Dismiss and/or Amend.



Susan Taylor Wall  
[swall@mcnair.net](mailto:swall@mcnair.net)

Amanda C. Williams  
[awilliams@mcnair.net](mailto:awilliams@mcnair.net)

MCNAIR LAW FIRM, P.A.  
100 Calhoun Street, Suite 400  
Charleston, SC 29401  
Phone: 843-723-7831  
Fax: 843-722-3227

ATTORNEYS FOR DEFENDANTS  
WILLIAM FINCHER, HARRISON,  
FINCHER & ASSOCIATES, LLC, AND  
HARRISON, FINCHER & ASSOCIATES, INC.

October 3, 2012

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
 )  
 QBE INSURANCE CORPORATION AS )  
 ASSIGNEE OF P.V. INC. D/B/A HARBOR )  
 INN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 WILLIAM FINCHER, HARRISON, )  
 FINCHER & ASSOCIATES, LLC, AND )  
 HARRISON, FINCHER & )  
 ASSOCIATES, INC., )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 FIFTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-40-3989

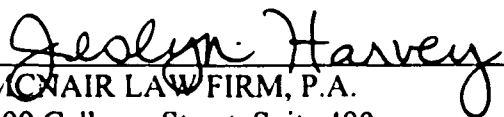
**CERTIFICATE OF SERVICE**

RICHLAND COUNTY  
 FILED  
 2012 OCT -5 AM 8:49  
 JEANETTE W. MCBRIDE  
 C.C.P. S.S.

This is to certify that a copy of the foregoing **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND/OR AMEND** has been served upon the following counsel of record via email and U.S. Mail, postage prepaid and addressed as shown below this 3 day of October, 2012.

Jeffrey Wiseman, Esquire  
 Young Clement Rivers, LLP  
 P.O. Box 993  
 Charleston, SC 29402  
[jwiseman@ycrlaw.com](mailto:jwiseman@ycrlaw.com)

*Attorneys for Plaintiff*

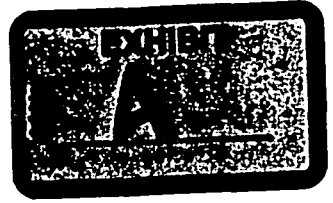
  
 MCNAIR LAW FIRM, P.A.  
 100 Calhoun Street, Suite 400  
 Charleston, South Carolina 29401  
 (843) 723-7831

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
QBE INSURANCE CORPORATION	)	CASE NO. 2011-CP-40-3989
as assignee of P.V. INC., d/b/a HARBOR	)	
INN,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
WILLIAM FINCHER, HARRISON,	)	
FINCHER & ASSOCIATES, LLC, AND	)	
HARRISON, FINCHER &	)	
ASSOCIATES, INC.,	)	
	)	
DEFENDANTS.	)	
	)	

**PLAINTIFF'S MOTION TO  
RECONSIDER ORDER GRANTING  
DEFENDANTS' MOTION TO DISMISS  
AND/OR AMEND**

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Plaintiff, QBE Insurance Corporation as assignee of P.V. Inc., d/b/a Harbor Inn ("P.V. Inc"), will move before the Honorable Alison Renee Lee, Presiding Judge for the Fifth Judicial Circuit, within ten (10) days of service of this Notice, or as soon thereafter as counsel may be heard, for an order to reconsider and set aside the Order Granting Defendant's Motion to Dismiss and/or Amend entered August 1, 2012 (Exhibit A).

NOW COMES Plaintiff, P.V. Inc., pursuant to Rule 59 of the *South Carolina Rules of Civil Procedure* and other applicable law, and moves this Court for an order to reconsider and set aside the Order Granting Defendant's Motion to Dismiss and/or Amend (Order). The Order specified that "Defendant's attorney must prepare [an] Order within ten days and submit it electronically for the Court's review." Out of an abundance of caution so as to comply with the South Carolina Rules of Civil Procedure and deadlines for filing a motion to reconsider, and reserving any and all rights to alter, amend, and/or supplement this motion or otherwise respond



to the order prepared by the Defendant's attorney, the Plaintiff submits this Motion to Reconsider based on the "Form 4" order from Judge Lee.<sup>1</sup>

Respectfully, the Order failed to follow the well-established standard that for purposes of a Rule 12(b)(6) motion to dismiss, a court must consider all the facts alleged in the complaint as true and must construe the complaint in the light most favorable to the non-moving party. See, e.g., Woodell, Allen v. Marion Sch. Dist. One, 307 S.C. 297, 414 S.E.2d 794 (Ct. App. 1992). In addition, the Order failed to accurately apply the law related to equitable tolling, statute of limitations, res judicata and Rule 12(b)(8) defense. The Plaintiff respectfully submits that the Order is in error and makes this motion based upon the following grounds:

1. The Order failed to properly apply the established requirement that a court must construe the complaint in a light most favorable to the non-moving part and must consider the facts alleged in the complaint as true. The complaint plainly contains facts and inferences that would entitle the Plaintiff relief.
2. The Order was incorrect to conclude that the statute of limitations had run. P.V. Inc.'s negligence cause of action did not exist until November 2009 when it suffered \$1.5 million in damages pursuant to the November 2009 default judgment. There was no cause of action in June 2005, as alleged by the Defendant, because at that time it was pure speculation and conjecture that P.V. Inc. would suffer any damages, and P.V. Inc. did not even know of the 2005 entry of default at the time. The statute of limitations cannot begin to run until a cause of action exists, and without any damages there was no cause of action. See King v. James, 694 S.E.2d 35, 40 (S.C. Ct. App. 2010). According to the Defendants, P.V. Inc. was required to file its lawsuit almost a year and a half before actually suffering any damages. According to the Defendant's argument and theory, P.V., Inc.'s lawsuit against the Defendants, if forced to file when the Defendants claim, would have gone to trial before P.V., Inc. had suffered one penny of damage.
3. The Order failed to recognize that the Plaintiff pled equitable tolling in its complaint and that tolling is appropriate. The complaint plainly provides facts that the Defendants repeatedly misrepresented and misled the Plaintiff to believe that the original claim had been reported. Equitable tolling applies when "the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to filing a timely lawsuit." Hooper v. Ebenezer Senior Servs. & Rehab., 386 S.C. 108, 116, 687 S.E.2d 29 (2009). The Defendants actively misled Plaintiff and should not benefit from the repeated misrepresentations to cover up the negligence.

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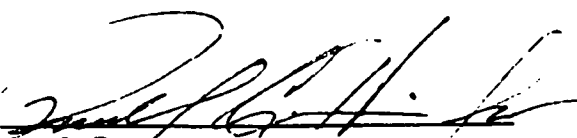
<sup>1</sup> P.V. Inc. received written notice of entry of Judge Lee's Form 4 order on August 6, 2012.

Equitable tolling is appropriate and was raised as a material issue in the complaint. Whether or not equitable tolling applies is a question for the jury. See id.

4. The Order mistakenly considered QBE and P.V. Inc. as the same party because this action was brought by QBE as assignee of P.V. Inc. By operation of law, an assignment lets "an assignee stand in the shoes of its assignor." Moore v. M.M. Weinberg, 644 S.E.2d 740, 745 (S.C. Ct. App. 2007). As such, QBE as assignee of P.V. Inc. is legally the party P.V. Inc. and legally distinct from QBE. The Order was in error to consider these legally distinct parties as the same party. Thus, even in the court were to determine that QBE was on notice or a potential claim in 2005, that does not mean that P.V. Inc. understood or reasonably comprehended it might have had a claim. P.V. Inc. owned a hotel and simply knew that its insurer was defending it in a lawsuit. To say that P.V. Inc. knew or understood the meaning of any default notice is error. This is properly a question of fact for the jury.
5. The Order failed to recognize the fact that the requirements for res judicata are not present in this case. The elements for res judicata include: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Judy v. Judy, 712 S.E.2d 408, 412 (S.C. 2011). Specifically, there is no identity of the parties, the subject matter of the claims is different, and there was not a prior adjudication of the issue in a former lawsuit involving the same parties and claims. If these requirements are not present, then there is no res judicata of the claims.
6. The Order failed to recognize that a Rule 12(b)(8) defense pursuant to the *South Carolina Rules of Civil Procedure* is unavailable. The 12(b)(8) defense is unavailable because the action does not involve the same parties or the same claims.
7. The Order failed to recognize that granting the Defendant's Motion to Dismiss and/or Amend would allow an impermissible end-run around the Rule 12 requirements because it would allow Defendant to raise the 12(b)(8) defense after-the-fact, which is not allowed under the rule.

WHEREFORE, the Plaintiff, P.V. Inc., moves this Court for an order to reconsider and set aside the Order Granting Defendant's Motion to Dismiss and/or Amend. All prior arguments, written or oral, previously presented in opposition to the Defendant's motion are fully incorporated herein by reference. Additionally, this motion will be supported by a memorandum of law to be submitted to this Court and served on all Counsel in a timely manner as prescribed by the *South Carolina Rules of Civil Procedure* and any further orders of this Court.

YOUNG CLEMENT RIVERS, LLP

By:   
Stephen L. Brown

Telephone: (843) 720-5488  
Facsimile: (843) 579-1351  
E-Mail: sbrown@ycrlaw.com

Jeffrey Wiseman  
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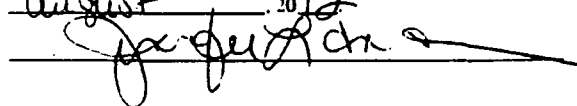
25 Calhoun Street, Charleston, SC 29401  
Post Office Box 993, Charleston, SC 29402  
Attorneys for Plaintiff

Charleston, South Carolina

Dated: 8/15/12

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 15 day of August, 2012



FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF RICHLAND  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-40-3989

QBE Insurance Corporation as assignee of P.V., Inc.  
d/b/a Harbor Inn  
 PLAINTIFF(S)

William Fincher, Harrison, Fincher & Associates,  
LLC and Harrison, Fincher & Associates  
 DEFENDANT(S)

Submitted by: \_\_\_\_\_ Attorney for  Plaintiff  Defendant  
 Self-Represented Litigant

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

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

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court: After a thorough review of the facts and the relevant law, Defendant's Motion to Dismiss is GRANTED. Defendant's attorney must prepare the Order within ten days and submit it electronically for the Court's review.

Order Information

This order  ends  does not end the case.  
 Additional Information for the Clerk :

Complete if judgment requires payment of a sum of money or affects title to real or personal property			
JUDGMENT AGAINST PLAINTIFF:		JUDGMENT AGAINST DEFENDANT:	
Judgment Amount	\$ _____	Judgment Amount	\$ _____
Taxable Costs	\$ _____	Taxable Costs	\$ _____
Attorney's Fees	\$ _____	Attorney's Fees	\$ _____
Interest	\$ _____	Interest	\$ _____
Other:	\$ _____	Other:	\$ _____
Total Amount to be Enrolled:	\$ _____	Total Amount to be Enrolled:	\$ _____

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

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

Circuit Court Judge: Janette W. McBride Judge Code: \_\_\_\_\_ Date: 7/31/2012

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 2012 and a copy mailed first class this \_\_\_\_\_ day of Aug, 2012 to attorneys of record or to parties (when appearing pro se) at:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT

CLERK OF COURT

Janette W. McBride



2012 AUG - 1 AM 10:25  
 FILED  
 RICHLAND COUNTY  
 JANETTE W. McBRIDE  
 C.C.P. & S.

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
  
QBE INSURANCE CORPORATION AS  
ASSIGNEE OF P.V. INC. D/B/A HARBOR  
INN,

Plaintiff,

v.

WILLIAM FINCHER, HARRISON,  
FINCHER & ASSOCIATES, LLC, AND  
HARRISON, FINCHER &  
ASSOCIATES, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-40-3989

ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS

JERRETTE W. McBRIDE  
C.C.P. & G.S.

2012 SEP 11 AM 10:47

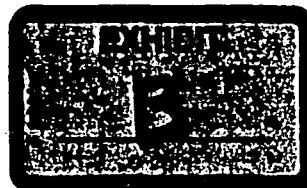
RICHLAND COUNTY  
FILED

This matter came before the Court on May 9, 2012 on a Motion to Dismiss filed by William Fincher ("Fincher"), Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc. (collectively "HFA"). Present at the hearing were Jeffrey J. Wiseman, Esq. and Susan Taylor Wall, Esq., counsel for Plaintiff, and Amanda C. Williams, Esq., counsel for Defendants. After considering the law, the briefs filed by both parties, the arguments of counsel, and all matters submitted, the Motion to Dismiss is **GRANTED** and Defendants' Motion for Reconsideration is **DENIED**.

#### FACTS

QBE Insurance Corporation ("QBE") is an insurance company. Defendant William Fincher is a licensed insurance agent for HFA. HFA is an insurance agency which provides professional services in the industry. On or about June 19, 2004, a child tragically drowned in the pool of the Harbor Inn Hotel, owned by P.V. Inc. and located in Georgetown, South Carolina. At the time of the accident, QBE had a contract of insurance sold by Defendant Fincher to P.V. Inc. The estate of the child, Dominick Antonyo Richardson ("Richardson"), filed suit against P.V. Inc. in March 2005, alleging that P.V. Inc. was liable for the death of Richardson.

Fincher and HFA received notice of the claim from P.V. Inc. as well as copies of various pleadings and correspondence from the attorney representing the estate of Richardson ("Estate"). These documents were not timely forwarded to QBE, and as a result, QBE failed to initiate a



SCANNED

*end  
#1*

defense of P.V. Inc. In June 2005, an Entry of Default was entered against P.V. Inc. for failure to answer or respond to the Estate's Complaint. In October 2005, Fincher and HFA reported the claim to QBE by notifying QBE of the suit and the Entry of Default.

QBE hired counsel for P.V. Inc. to defend against the claims made by the Estate. P.V. Inc.'s counsel was unable to remove the Entry of Default and in November of 2009, a Default Judgment was entered against P.V. Inc. in the amount of \$1,500,000.00 in Georgetown County. QBE subsequently informed Fincher that it intended to make a claim against him as a result of the November 2009 Default Judgment and that he should place his "errors and omissions" ("E&O") carrier on notice. QBE's counsel continued to attempt to communicate with Fincher through letters and telephone calls yet received no response. QBE subsequently filed a suit against Fincher in Richland County styled *QBE Insurance Corporation v. William Fincher, Harrison, Fincher & Associates, LLC and Harrison, Fincher, & Associates*, Docket No. 2009-CP-40-8717 ("2009 Action"). After being served, Fincher requested and was granted an extension by QBE to file an answer. When no answer was filed, QBE filed a Petition for Entry of Default on March 30, 2010. Fincher eventually retained counsel; however, no pleadings to set aside QBE's Entry of Default were filed until February 22, 2011. Defendants' Motion to Set Aside Entry of Default in the 2009 Action was denied on June 27, 2011 and Defendants' Motion to Reconsider was similarly denied on March 27, 2012.

QBE as assignee of P.V., Inc. filed the present action on June 21, 2011. Defendants filed a Motion to Dismiss the present action on September 22, 2011. Defendants' Motion to Dismiss was granted on August 1, 2012 by entry of a "Form 4" Order indicating a formal order of dismissal would be forthcoming. QBE thereafter made a Motion to Reconsider the Order Granting Defendants' Motion to Dismiss on August 16, 2012 on the grounds that the Order failed to accurately apply the law related to equitable tolling, statute of limitations, *res judicata*, and a Rule 12(b)(8) defense. Defendants' Motion to Reconsider is premature because no formal order had been issued providing the applicable facts and law which the Court determined in dismissing the case. However, this Order provides the Court's reasoning and addresses the Defendants' Motion for Reconsideration.



## STANDARD OF REVIEW

When deciding a motion to dismiss, the question to be considered is whether, in a light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 614 S.E.2d 619 (2005). "A motion to dismiss should not be granted if facts alleged and inferences reasonably deductible therefrom would entitle the plaintiff to any relief on any theory of the case." *Slack v. James*, 356 S.C. 479, 483 S.E.2d 772, 773-774 (Ct. App. 2003). Where allegations of the complaint give rise to competing inferences on a question of material fact, dismissal under Rule 12(b)(6) is not appropriate. *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 306 (1993).

## DISCUSSION

In their motion, the Defendants raise the issues of the statute of limitations and res judicata to support their motion.

### A. STATUTE OF LIMITATIONS

Defendants assert the action is barred by the statute of limitations because Plaintiff's three year statute of limitations began to run, at the latest, by October 2005, six years before this lawsuit was filed in June 2011. South Carolina case law is well settled that the three year statutory period begins to run when the claimant could or should have known, through the exercise of reasonable diligence, that a cause of action might exist. *See Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981). The standard for determining when the statute begins to run is objective, not subjective to the claimant. *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88 (1995). The statute of limitations is not tolled while advice of counsel is sought or a full blown theory of recovery is developed, even where the injured party does not comprehend the full extent of his damage. *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005).

In its argument opposing Defendants' Motion to Dismiss, QBE claims that until a default judgment in the amount of \$1,500,000.00 was rendered against P.V. Inc., the company did not know whether it had a claim against the agent or was damaged. Such an argument is expressly rejected by South Carolina case law. "Once a reasonable person has reason to believe that some right of his has been invaded or that some claim against another party *might* exist, the requirement of reasonable diligence to investigate this information further takes precedence over

the inability to ascertain the amount of damages or even the possibility the damages may be forthcoming at all." *Binkley v. Burry*, 352 S.C. 286, 297-98, 573 S.E.2d 838, 844-45 (Ct. App. 2002)(emphasis added); see also *Kimmer v. Wright*, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011).

QBE, through the exercise of reasonable diligence, knew or should have known that it might have a claim against the Defendants in June 2005, and at the latest, in October 2005. In its Complaint, QBE alleges that an Entry of Default was entered against P.V. Inc. in June 2005, and QBE, as P.V. Inc.'s insurer, received notice of the underlying lawsuit and Entry of Default in October 2005. As asserted by QBE in its Supplemental Memorandum in Opposition to Motion to Dismiss, P.V. Inc. was represented by an attorney hired by QBE by October 2005, at which time efforts were made by P.V. Inc. to set aside the default judgment. See *Richardson v. P.V. Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009). Thus, P.V. Inc. and QBE knew of the lawsuit and the default by October 2005 and the errors and omissions by Defendants had occurred by that time.

QBE argues that statute of limitations is equitably tolled. Under South Carolina law, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations "if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights." *American Legion Post 15 v. Horry County*, 381 S.C. 576, 583, 674 S.E.2d 181, 184 (Ct. App. 2009)(citing *Hooper v. Ebenezer Senior Services & Rehabilitation Center*, 377 S.C. 217, 231-232, 659 S.E.2d 213, 220-21 (Ct. App. 2008), *rev'd*, 386 S.C. 108, 687 S.E.2d 29 (2009)). Equitable tolling may 'serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits.' *Kimmer*, 396 S.C. 53, 719 S.E.2d 265 (citing *Hooper*, 386 S.C. at 115, 687 S.E.2d at 32 (2009)). "The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use." *Id.* The court has cautioned that the doctrine of equitable tolling "should be used sparingly and only when the interests of justice compel its use." *Id.*

QBE alleges in its Complaint that "Fincher and HFA represented on numerous occasions to QBE that the claim was originally reported to QBE in November of 2004." However, there are no allegations in QBE's Complaint that the Defendants made any false or misleading statements or engaged in any activity so as to prevent QBE from asserting a lawsuit against Defendants. Second, it cannot be disputed that QBE, P.V. Inc.'s own insurer and the carrier to whom these representations were allegedly made, knew or should have known, by October 2005

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of the Estate's lawsuit. Thereafter, P.V. Inc. and QBE had three years from June 2005 and, at the latest, October 2005, to investigate with reasonable diligence whether Defendants provided timely notice of the underlying action. Thus, equitable tolling is inapplicable.

Based on the facts alleged by Plaintiff in its Complaint and the clear case law in South Carolina, the statute of limitations expired before this suit was initiated against the Defendants.

**B. RES JUDICATA**

Defendants also claim the instant action ("2011 Action") is barred because QBE obtained a default judgment against Fincher for the same claims in an identical action (the 2009 Action). "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of *res judicata*, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (quoting *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). The fundamental purpose of *res judicata* is to ensure that "no one should be twice sued for the same cause of action." *Id.* at 173, 712 S.E.2d at 414.

*Res judicata* operates as a bar to a subsequent action where the following elements are met: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Id.* at 167, 712 S.E.2d at 412. Because the determination as to whether a subsequent suit is barred by *res judicata* cannot be reduced to a formulaic process, South Carolina courts have declined to adopt or define a single standard. *Id.* at 171-72, 712 S.E.2d at 414.

First, both the 2011 Action and the 2009 Action involve the same parties. The 2011 action is styled *QBE Insurance Corporation as Assignee of P.V. Inc. d/b/a Harbor Inn v. William Fincher, Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc* (Docket No. 2011-CP-40-3989). The 2009 action is styled *QBE Insurance Corporation v. William Fincher, Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc* (Docket No. 2009-CP-40-8717). Plaintiff alleges that QBE, as assignee of P.V. Inc., is legally P.V. Inc. and thus legally distinct from QBE. However, there is an identity of parties between the 2011 Action and the 2009 Action because QBE and P.V. Inc. are privies. For *res judicata*, "the concept of privity rests not on the relationship between the parties asserting it, but

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rather on each party's relationship to the subject matter of the litigation." *Yelsen Land Co., Inc. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). QBE and P.V. Inc.'s relationship to the subject matter of the litigation arises from their relationship as insurer and insured. QBE is subject to paying the \$1,500,000.00 judgment in the Estate Action only to the extent that its insured, P.V. Inc., d/b/a Harbor Inn, is required to pay the judgment. QBE in the 2009 Action asserts the same claims that P.V. Inc. could assert and has asserted in the 2011 Action. As a result, P.V. Inc. has the same relationship to the issues presented in the subject action as those litigated by QBE in the 2009 Action.

Furthermore, not only are QBE and P.V. Inc. privies as a result of their insurer/insured relationship, but also as a result of their relationship as assignor and assignee. P.V. Inc. assigned to QBE any rights it had against Defendants as a result of Fincher's alleged failure to report the claim to QBE. This claim has already been litigated by QBE in the 2009 Action, and thus QBE is barred from attempting to recover another \$1.5 million judgment from Defendants for the same claim.

Second, the 2009 Action and the 2011 Action arise out of the same occurrence and involve the same facts, circumstances, and claim for damages. A paragraph-by-paragraph comparison of the Complaints in the two lawsuits reveals nearly an identical word-for-word recitation of facts and allegations. Both actions contain the same causes of action for negligence and indemnity and assert that Defendants failed to timely notify QBE of the claim which resulted in a \$1.5 million default judgment. The purpose of *res judicata* is to prevent a person or entity from being sued twice for the same cause of action. *Judy v. Judy, supra*.

If Plaintiff is permitted to continue litigating the 2011 action, Defendants may be subject to a second judgment for the same claim arising from the same occurrence as the 2009 Action. The law does not allow such a result. Because Plaintiff seeks to recover twice from Defendants for the same alleged acts and omissions, it is barred by the doctrine of *res judicata* from bringing the 2011 action. See *Clanton's Auto Auction Sales, Inc. v. Campbell*, 230 S.C. 65, 94 S.E.2d 172 (1956) (holding second lawsuit brought by an assignee against the same defendants that assignee sued in the first action was barred by *res judicata* because the parties and the issues in both actions were identical).

Third, a final judgment is one that terminates the litigation. James F. Flanagan, *South Carolina Civil Procedure* 668 (3d ed. 2010). A default judgment is a final judgment for *res*

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*judicata* purposes. *Orca Yachts, LLC v. Mollicam, Inc.*, 287 F.3d 316 (4th Cir. 2002). On March 30, 2010, the Court filed an Entry of Default in the 2009 Action. On February 22, 2011, the Fincher Defendants filed a Motion to Set Aside the Entry of Default. On June 27, 2011, the Court denied Fincher's Motion to Set Aside and agreed to sign QBE's proposed Order of Judgment by Default. Fincher filed a Motion to Reconsider, Alter, or Amend. On March 28, 2012, the Court denied Fincher's Motion to Reconsider. Accordingly, there is a final judgment in the 2009 Action. On April 25, 2012, Fincher filed a Notice of Appeal. Despite the appeal, there is still a final judgment for *res judicata* purposes which bars a second identical action. See James F. Flanagan, *South Carolina Civil Procedure* 668 (3d ed. 2010).

**C. PLAINTIFF'S MOTION FOR RECONSIDERATION**

Defendants request leave to amend their Motion to Dismiss to assert a Rule 12(b)(8) defense. A Rule 12(b)(8) defense may be appropriate where "another action is pending between the same parties for the same claim." Rule 12(b)(8), SCRCF. However, Rule 12(b)(8) need not be addressed in this Order because this Court has determined that *res judicata* applies. Plaintiff argues in its Motion to Reconsider that the Rule 12(b)(8) defense is unavailable because the action does not involve the same parties or the same claims. The Rule 12(b)(8) defense is, in essence the same as the *res judicata* defense asserted by Defendants in their Motion to Dismiss. Both Rule 12(b)(8) and *res judicata* permit dismissal of a subsequent action that involves the same parties and same claims as a prior action. The only difference between the two defenses is the finality of the judgment requirement: (1) under Rule 12(b)(8), both actions are still pending, and (2) under *res judicata*, there is a final judgment in one of the actions. Because Rule 12(b)(8) serves the same purpose as *res judicata* in this case, and this Court has already determined that *res judicata* applies to prevent Plaintiff from recovering twice from the Defendants for the same alleged acts and omissions, Rule 12(b)(8) need not be separately addressed. However, as an alternative basis to dismiss this action, there is another pending action between the same parties asserting the same claim. Therefore, even if *res judicata* does not apply, Rule 12(b)(8) would bar the current action.

Based on the allegations asserted by Plaintiff in both Complaints and the clear case law in South Carolina, this action is barred by the principle of *res judicata*.

**ORDER**

For the reasons set forth above, it is **ORDERED** that the Motion to Dismiss of Defendants William Fincher, Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc. is **GRANTED** and the within causes of action as against these Defendants are **DISMISSED WITH PREJUDICE**. Plaintiff's Motion to Reconsider is **DENIED**.

**AND IT IS SO ORDERED.**

  
ALISON RENEE LEE  
Presiding Judge

September 10, 2012  
Columbia, South Carolina





accurately apply the law related to equitable tolling, statute of limitations, res judicata and Rule 12(b)(8) defense. The Plaintiff respectfully submits that the Order is in error and makes this motion based upon the following grounds:

1. The Order failed to properly apply the established requirement that a court must construe the complaint in a light most favorable to the non-moving part and must consider the facts alleged in the complaint as true. The complaint plainly contains facts and inferences that would entitle the Plaintiff relief.
2. The Order was incorrect to conclude that the statute of limitations had run. P.V. Inc.'s negligence cause of action did not exist until November 2009 when it suffered \$1.5 million in damages pursuant to the November 2009 default judgment. There was no cause of action in June 2005, as alleged by the Defendant, because at that time it was pure speculation and conjecture that P.V. Inc. would suffer any damages, and P.V. Inc. did not even know of the 2005 entry of default at the time. The statute of limitations cannot begin to run until a cause of action exists, and without any damages there was no cause of action. See King v. James, 694 S.E.2d 35, 40 (S.C. Ct. App. 2010). According to the Defendants, P.V. Inc. was required to file its lawsuit almost a year and a half before actually suffering any damages. Following the Defendant's argument and theory, P.V., Inc.'s lawsuit against the Defendants, if forced to file when the Defendants claim, would have gone to trial before P.V., Inc. had suffered one penny of damage. This is an absurd theory by Defendants.
3. The Order failed to recognize that the Plaintiff pled equitable tolling in its complaint and that tolling is appropriate. The complaint plainly provides facts that the Defendants repeatedly misrepresented and misled the Plaintiff to believe that the original claim had been reported. Equitable tolling applies when "the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to filing a timely lawsuit." Hooper v. Ebenezer Senior Servs. & Rehab., 386 S.C. 108, 116, 687 S.E.2d 29 (2009). The Defendants actively misled Plaintiff and should not benefit from the repeated misrepresentations to cover up the negligence. Equitable tolling is appropriate and was raised as a material issue in the complaint. Whether or not equitable tolling applies is a question for the jury. See id.
4. The Order mistakenly considered QBE and P.V. Inc. as the same party because this action was brought by QBE as assignee of P.V. Inc. By operation of law, an assignment lets "an assignee stand in the shoes of its assignor." Moore v. M.M. Weinberg, 644 S.E.2d 740, 745 (S.C. Ct. App. 2007). As such, QBE as assignee of P.V. Inc. is legally the party P.V. Inc. and legally distinct from QBE. The Order was in error to consider these legally distinct parties as the same party. Thus, even if the court were to determine that QBE was on notice of a potential claim in 2005, that does not mean that P.V. Inc. understood or reasonably comprehended it might have had a claim. P.V. Inc. owned a hotel and simply knew that its insurer was defending it in a lawsuit. To say that P.V. Inc.

knew or understood the meaning of any default notice is error. This is properly a question of fact for the jury.

5. The Order mistakenly considered QBE and P.V. Inc. to be "privies." Related to res judicata, "the concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation." Yelsen Land Co. v. State, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citing Richburg v. Baughman, 290 S.C. 431, 351 S.E.2d 164, 166 (1986)). "Privity is not established from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action." Roberts v. Recovery Bureau, Inc., 450 S.E.2d 616, 619 (S.C. Ct. App. 1994) (citing 46 Am.Jur.2d Judgments § 532 at 685-686 (1969)). "One whose interest is almost identical with that of a party, but who does not claim through him, is not in privity with him." Id. (citing 50 C.J.S. Judgments § 788 at 327 (1947)). Even though P.V. Inc. has an interest almost identical to QBE, the claims of P.V. Inc. were not part of the 2009 action, and P.V. Inc. did not have a full and fair opportunity to litigate its claims. The insurer and insured relationship does make the parties privies. Therefore, QBE and P.V. Inc. are not privies, and are in fact separate parties entitled to independent trials. See e.g., Ex parte Allstate Ins. Co., 339 S.C. 202, 528 S.E.2d 679 (Ct. App. 2000)(holding insurer had separate and distinct rights, "not the least of which was its own independent right to a jury trial"); Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995)(holding "[a]lthough the UIM carrier 'steps into the shoes' of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist").
6. The Order failed to recognize the fact that the requirements for res judicata are not present in this case. The elements for res judicata include: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Judy v. Judy, 712 S.E.2d 408, 412 (S.C. 2011). Specifically, there is no identity of the parties, the subject matter of the claims is different, and there was not a prior adjudication of the issue in a former lawsuit involving the same parties and claims. If these requirements are not present, then there is no res judicata of the claims.
7. The Order failed to recognize that the subject matter of the claims is plainly different between the two actions because the claims of QBE concern QBE's liability to pay policy limits of the insurance policy providing coverage to P.V. Inc., while the claims of P.V. Inc. concern P.V., Inc.'s liability for damages in excess of the insurance policy limits as well as other legally recognizable damages arising from having the judgment in the underlying lawsuit rendered against it. It does not matter that the claims arose from the same underlying transaction and occurrence, because the claims by QBE and P.V. Inc. involve different subject matter as to liability. QBE and P.V. were each harmed by the same occurrence but in their own separate ways.
8. The Order mistakenly found adjudication of the issue in the former suit. The default judgment issued in the 2009 action only pertains to QBE and not P.V. Inc. As previously discussed, QBE and P.V. Inc. are different parties harmed by the Defendants and have

different claims. The fact that QBE litigated its claims to judgment has no preclusive effect on the ability of P.V. Inc. to litigate its claims. Therefore, the default judgment from the 2009 action was not a final adjudication of P.V. Inc.'s claims.

9. The Order failed to recognize that a Rule 12(b)(8) defense pursuant to the *South Carolina Rules of Civil Procedure* is unavailable. The 12(b)(8) defense is unavailable because the action does not involve the same parties or the same claims. "To prevail on a motion to dismiss pursuant to Rule 12(b)(8), the movant must show that the actions in question are between the same parties in the same capacities." Cricket Cove Ventures, Inc. v. Gilland, 701 S.E.2d 39, 44 (S.C. Ct. App. 2010) (citing 1 C.J.S. *Abatement and Revival* § 54 (2005)). Further, South Carolina courts "interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." Capital City Ins. Co. v. BP Staff, Inc., 674 S.E.2d 524, 532 (S.C. Ct. App. 2009); see also Cricket Cove, 701 S.E.2d at 45 (quoting Capital City, 674 S.E.2d at 532).
10. The Order failed to recognize that granting the Defendant's Motion to Dismiss and/or Amend would allow an impermissible end-run around the Rule 12 requirements because it would allow Defendant to raise the 12(b)(8) defense after-the-fact, which is not allowed under the rule.

WHEREFORE, the Plaintiff, P.V. Inc., moves this Court for an order to reconsider and set aside the Order Granting Defendant's Motion to Dismiss. All prior arguments, written or oral, previously presented in opposition to the Defendant's motion are fully incorporated herein by reference. Additionally, this motion will be supported by a memorandum of law to be submitted to this Court and served on all Counsel in a timely manner as prescribed by the *South Carolina Rules of Civil Procedure* and any further orders of this Court.

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By: \_\_\_\_\_

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Attorneys for Plaintiff

Charleston, South Carolina

Dated: 9/26/12

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to  
all counsel of record in this proceeding this 26 day of  
September, 2012

Jeffrey Wiseman

October 22, 2012

RECEIVED

OCT 24 2012

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Via U.S. Mail

SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Clerk of Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: *QBE Insurance Corporation as assignee of P.V., Inc. d/b/a Harbor Inn  
vs. William Fincher, Harrison, Fincher & Associates, LLC, and  
Harrison, Fincher & Associates, Inc.*  
Case No.: 2011-CP-40-3989

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven (7) copies of Respondents William Fincher, Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc.'s Motion to Dismiss Appeal in the above-referenced case. I have also enclosed my office check in the amount of \$25.00 to cover the filing fee, as well as a Proof of Service. Please file these documents and return a stamp-filed copy to me in the enclosed self-addressed stamped envelope.

By copy of this letter, I am serving a copy of the same upon all counsel of record.

If you have any questions, please do not hesitate to call my office. With kind regards, I am

Very truly yours,

McNAIR LAW FIRM, P.A.



Amanda C. Williams

ACW:jh

Enclosures

cc: Jeffrey J. Wiseman, Esq. (w/ Enclosures, via U.S. Mail)  
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