

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Appellate Case No. 2016 – 001266

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

Case No. 2013-CP-10-1396

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FEB 27 2017
SC Court of Appeals

PERSONAL CARE, INC.Appellant,

vs.

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

RESPONDENTS' MOTION TO STRIKE DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

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The Respondents move, pursuant to Rules 209(b) and 210(c), SCACR, to strike certain matters that the Appellant has proposed to be included in the Record on Appeal on the ground that they were not presented in the lower court.

Rule 209(b), SCACR provides that "... the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]." Rule 210(c), SCACR provides that: "The Record shall not, however, include matter which was not presented to the lower court or tribunal." See also, Argabright v. Argabright, 398 S.C. 176 (2012); State v. White, 372 S.C. 364 (Ct. App. 2007).

In the Appellant's Designation of Matter to be Included in the Record on Appeal, the Appellant listed Item No. 13: "Motion for Summary Judgment, filed in the trial court in Maxwell v. Genez, 356 S.C. 617, 620-621, 591 S.E.2d 26, 28 (2003), on March 12, 1999" which it proposes be included in the Record on Appeal. However, this document was never presented in the lower court. Nothing in the Record reflects that said item was even mentioned at oral arguments; however, even if such item was mentioned, Item No. 13 was never presented to the lower court. Further, Item No. 13 was not presented to the lower court as an exhibit by the Appellant or Respondents in any other respect. Accordingly, Rule 210(c) prohibits Item 13 from being included in the Record on Appeal and, thus, under Rule 209(b), the Appellant may not designate such item.

The undersigned counsel for the Respondents consulted with the Counsel for Appellant regarding this matter, and, while he could not confirm that said documents had ever been presented to the trial court as an exhibit, he declined to consent to amending Appellant's

designation to withdraw said document.¹ Therefore, the Respondents hereby move the Court for an order striking those matters.

Request to Hold Final Briefing in Abeyance

Pursuant to the Court's Order of January 31, 2017, the Respondents' initial brief and designations are due to be filed and served no later than March 1, 2017. Since the inclusion of this exhibit may affect the Respondents' argument in their brief(s), they request that the Court hold the due date in abeyance pending disposition of this motion.

Respectfully submitted,

Oana D. Johnson
Attorney at Law
215 East Bay Street
Suite 406
Charleston, SC 29401
Counsel for Taylor Bowley and Byrd

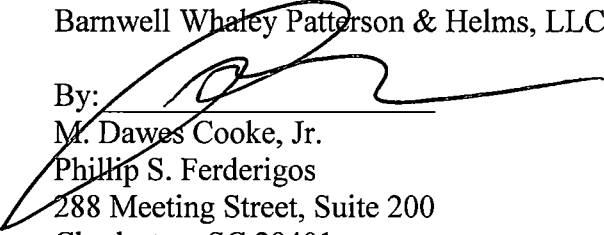
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SC Court of Appeals

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By: 
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Phillip S. Ferderigos
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Date: 2/24/2017

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

¹ Respondents believe Appellant's position is that Item No. 13 should be a part of the Record because the judge either discussed or relied upon the Maxwell decision. Therefore, Appellant reasons Item No. 13 should be allowed to be included in the Record on Appeal. As Appellant's argument violates SCACR 209 & 210, Respondents respectfully disagree with Appellant's argument.

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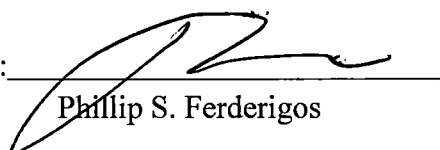
PROOF OF SERVICE

I hereby certify that on the 24 day of February, 2017, I served a copy of the Respondents' Motion to Strike Designation of Matter to be Included in the Record on Appeal on counsel for the Appellant via U.S. Mail with sufficient postage, correctly addressed as follows:

Pendarvis Law Offices, P.C.
Thomas A. Pendarvis, Esq.
Catherine B. Kerney, Esq.
500 Carteret Street, Ste. A
Beaufort, SC 29902-5066

Barnwell Whaley Patterson & Helms, LLC

By: _____


Phillip S. Ferderigos



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

February 24, 2017

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FEB 27 2017

SC Court of Appeals

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

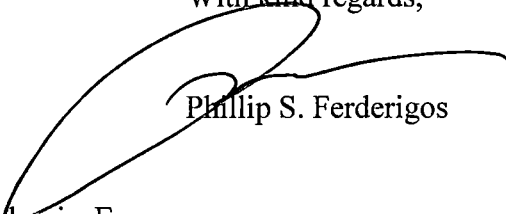
RE: Personal Care, Inc. v Jerry N. Theos; Uricchio, Howe, Krell, Johnson, Toporek, Theos & Keith, PA; Cheryl D. Shoun; and Taylor, Shoun, Bowley & Byrd
C/A No. 2013-CP-10-1396
Our File No. 59.014

Dear Jessica:

Please find enclosed the original and seven copies of Respondents' Motion to Strike Designation of Matter to be Included in the Record on Appeal and Proof of Service with regard to the above referenced matter. Also enclosed is our check for \$25. Please file the original and six copies and return the seventh clocked copy to me in the enclosed envelope. By copy of this letter and pursuant to the Certificate of Service I am serving copies the same on all counsel of Record.

Thank you for your attention and your assistance.

With kind regards,


Phillip S. Ferderigos

Enc.

Cc w/enc.: Thomas A. Penearvis, Esq.
Oana Dobrescu Johnson, Esq.
Richard A. Farrier, Jr., Esq.

PSF/bbm

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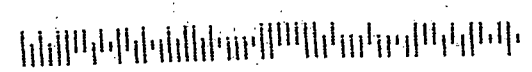
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REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE



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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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