

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

MAR 13 2017

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

SC Court of Appeals

Appellate Case No. 2016-001266

PERSONAL CARE, INC.Appellant,

vs.

Jerry N. Theos; URICCHIO, HOWE, KRELL,
JOHNSON, TOPOREK THEOS & KEITH, PA;
Cheryl D. Shoun; and TAYLOR, SHOUN,
BOWLEY & BYRD, LLC,Respondents.

**APPELLANT'S RETURN TO
MOTION TO STRIKE**

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The present appeal raises issues concerning the role, if any, that Rule 40(j), SCRPC should play in dismissal of a case, the application of *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003), and the application of a summary judgment standard to a Rule 40(j) motion. One of the three facets of this Appeal, the application of *Maxwell*, implicitly and necessarily involves the trial court's misplaced interpretation of the *Maxwell* case. Respondent's Motion to Strike argues that the procedural posture of the *Maxwell* case giving rise to the reported *Maxwell* decision should not be considered part of the record on an appeal, which seeks this Court's review of the trial court's application of *Maxwell*. Specifically, Respondent asks this Court to strike from the record the motion for summary judgment filed in the *Maxwell* case that gave rise to the *Maxwell* opinion, referenced as item number thirteen in Appellant's proposed Record on Appeal.

The trial court orders forming the bass for this appeal place the procedural history of *Maxwell* squarely at issue, and implicitly, the procedural posture of the *Maxwell* that led to the *Maxwell* opinion was, therefore, always under the trial court's consideration. As a result, item thirteen does not contain matter not presented to the lower court. As a practical matter, there is no prejudice to Respondents if, item thirteen, the actual motion for summary judgment giving rise to the *Maxwell* decision, is included on the record for this appeal; item thirteen itself does not render the record unwieldy; and having item thirteen that gave rise to *Maxwell* readily available to this Court only serves to provide this Court a more full and complete picture of the issues presented in the present appeal. Taken from another direction, Respondent has not and cannot show why the motion for summary judgment giving rise to *Maxwell* should not be included, except to incorrectly

state that item thirteen, the procedural basis of the *Maxwell* decision, contains “new matters.”

In the context of deciding if an item is to be included in a record for appellate purposes, past jurisprudence of this state suggests that where material does not materially encumber the record and no prejudice by reason of its inclusion has been shown, such material may be considered as part of an appellate record. See *Peoples Nat. Bank of Greenville v. Manos Bros.*, 226 S.C. 257, 289, 84 S.E.2d 857, 873 (1954) (superseded by statute, concerning a separate issue, as stated in *S.C. Dep’t of Soc. Servs., on Behalf of Roseboro v. Burris*, 297 S.C. 537, 538, 377 S.E.2d 578, 579 (1989)). The Court of Appeals should have the benefit of a full understanding of the context of the *Maxwell* decision, with a record that is clear and direct, devoid where necessary of paraphrasing or fragmentary summary. (By including the material in the record ... “[t]he case has thereby been presented more clearly and directly than by paraphrasing or too fragmentary a narrative or summary” *Copeland v. Craig*, 193 S.C. 484, 8 S.E.2d 858, 870 (1940).

It is important to note that Rule 210(c), SCACR, provides that the Record shall not include *matter which was not presented to the lower court or tribunal*. It is impossible that the motion for summary judgment that gave rise to the *Maxwell* opinion was not implicated in the orders referenced in the subject appeal. *Maxwell* owes its genesis to that motion for summary judgment and thus including item thirteen does not present a matter which was not presented to the lower court in this case. The *matter* contained in item number thirteen was also present and presented to the trial court that issued the orders subject of this appeal – without item number thirteen, the trial court in *Maxwell*

could not have issued its ruling and the Court of Appeals could not have issued *Maxwell*, and the trial court subject of this appeal relied on the existence of a motion for summary judgment giving rise to the *Maxwell* decision even though no such motion existed in the case subject of the present appeal.

Also, Respondents have apparently cited footnote three from *Argabright v. Argabright*, 398 S.C. 176, 179, 727 S.E.2d 748, 750 (2012), however, that footnote and the reference to Rule 210(c), SCACR, refer to that appellant's attempt to supplement the record with later factual developments that would change the legal relationship of that appellant to a non-party to the case ("Appellant's brief indicates she and Doe have since married. We are, of course, bound by the record established at trial. See Rule 210(c), SCACR ("The Record shall not ... include matter which was not presented to the lower court or tribunal.")) *Id.* That discussion is wholly unrelated and distinguishable from the present discussion, where the trial court judge implicitly and necessarily relied on the Motion for Summary Judgment that gave rise to the Court of Appeals decision in *Maxwell*. Respondent also cites *State v. White*, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007), *aff'd* but criticized, 382 S.C. 265, 676 S.E.2d 684 (2009). Here again, the issue was if a piece of evidence could be introduced to supplement the record from a factual standpoint, not if the pleadings of record are implicitly and necessarily implicated in the Court of Appeals opinion upon which a trial court relied ("Morris' statement was not presented to the lower court and cannot be properly included in the Record on Appeal." *Id.* at 387, 642 S.E.2d at 619 (Ct. App. 2007). To be clear, item number thirteen raises the issue of whether a pleading of record which illustrates the procedural posture in *Maxwell* serves as the basis

of the trial court's opinion and a later opinion of the Court of Appeals is properly considered within a subsequent appeal.

Appellants would be remiss not to point out a case that appears to address the present discussion, concluding that "... records in another proceeding cannot be considered by an appellate court unless they were introduced and made a part of the record in the same manner as other evidence." *Beall v. Doe*, 281 S.C. 363, 372, 315 S.E.2d 186, 191 (Ct. App. 1984). The key difference in *Beall*, *Argabright*, and *State v. White*, from the present situation is that in each of these three cases, the question was whether additional *factual evidence* concerning underlying *facts* could be included as gained from a source outside of the trial court proceeding. Here, the *Maxwell* motion for summary judgment is more in the nature of legal authority explaining the nature and basis for the *Maxwell* opinion; and only involves the procedural posture that resulted in the *Maxwell* opinion. The question is whether information clearly showing the procedural posture of the lower court case that gave rise to *Maxwell* should be included as that procedural posture, including the fact that the 40(j), SCRCP, discussion in *Maxwell* only arose because of the existence of item thirteen, the motion for summary judgment. This is not a question of supplementing the present trial court record, but rather a question of the full and proper interpretation of *Maxwell*.

The orders subject of this Appeal effectively create new law in the State of South Carolina, in that the trial court has fashioned its own procedures and standard of reviewing evidence and the merits of a case in the context of a Motion to Restore pursuant to Rule 40(j), SCRCP. The trial court's misapplication of *Maxwell*, and the trial court ignoring the existence of a motion for summary judgment set the stage for the *Maxwell* decision, and

such a motion did not exist in the trial court case which is the subject of the present appeal. In that the trial court has created new law and procedure, and the implications that this case will have on many facets of trial practice in South Carolina, the Appellant, the South Carolina Bench and the South Carolina Bar, are all deserving of a decision on the merits that fully considers the *Maxwell* decision and the context of the *Maxwell* decision as decisions on the merits are strongly favored in South Carolina (See *Micronics, Inc. v. S. Carolina Dep't of Revenue*, 345 S.C. 506, 548 S.E.2d 223, 226 (Ct. App. 2001).

Mindful of all the foregoing, Appellant respectfully requests that this Court deny Respondents' motion to strike such that item number thirteen is included in the Record on Appeal in this matter.

Respectfully submitted,

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March 9, 2017

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Personal Care, Inc.,

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JOHNSON, TOPOREK THEOS & KEITH, PA;
Cheryl D. Shoun; and TAYLOR, SHOUN,
BOWLEY & BYRD, LLC,

Respondents.

PROOF OF SERVICE

I, Christopher W. Lempeis, Jr., a lawyer with PENDARVIS LAW OFFICES, P.C.,
certify that I have served one (1) copy of Appellant's Return to Motion to Strike on
counsel for Respondents, by depositing a copy of the same in the United States
Mail, postage prepaid, on the 9th day of March, 2017, addressed to:

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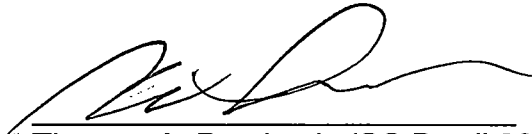
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Respectfully submitted,

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March 9, 2017

PENDARVIS LAW OFFICES, PC



March 9, 2017

Via US Mail

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

Re: **PERSONAL CARE, INC. vs. Jerry N. Theos; URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; Cheryl D. Shoun; and TAYLOR, SHOUN, BOWLEY & BYRD, LLC; Civil Action No. 2013-CP-10-1396**

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of APPELLANT'S RETURN TO MOTION TO STRIKE, and PROOF OF SERVICE in regard to the above-referenced matter. Kindly file the original and six copies and return one clocked copy in the stamped, self-addressed return envelope enclosed for your convenience.

By copy of this letter and pursuant to the Proof of Service, I am serving copies of same on all counsel of record.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.
SC Court of Appeals

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Christopher W. Lempesis, Jr.

CWL/ses
Enclosures

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The Honorable Jenny Abbott Kitchings
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