THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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SC Court of Appeals

Case No. 2013-CP-10-1396

Appellate Case No. 2016-001266

Personal Care, Inc., ...Appellant,

v.

Jerry N. Theos; Uricchio, Howe, Krell, Johnson, Toporek, Theos & Keith, PA; Cheryl D. Shoun; and Taylor, Shoun, Bowley & Byrd, LLC, ...Respondents.

FINAL BRIEF OF RESPONDENTS
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STATEMENT OF THE ISSUES ON APPEAL

I. Whether, in the context of a motion to restore a case dismissed pursuant to Rule 40(j), SCRCP, the Circuit Court can consider whether the statute of limitations has expired on a party's claims.

II. Whether the Circuit Court properly applied the discovery rule under *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016).

III. Whether the Circuit Court properly found that the statute of limitations had expired prior to the date on which Personal Care filed its Motion to Restore.

IV. Whether the Circuit Court was within its discretion to deny Personal Care's Motion to Restore.

STATEMENT OF THE CASE

On March 8, 2013, Appellant Personal Care, Inc. (hereinafter "Personal Care") filed a Verified Complaint in Charleston County Circuit Court against Respondents Jerry N. Theos; Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, PA; Cheryl D. Shoun; and Taylor, Shoun, Bowley, and Byrd, LLC. (R. p. 233.) Personal Care filed an Amended Verified Complaint against the same defendants on April 19, 2013. (R. p. 252.) Jerry N. Theos and Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, PA filed an Answer to the Amended Complaint on July 10, 2013. (R. p. 280.) On August 28, 2013, the Honorable R. Markley Dennis, Jr., filed a consent order signed by counsel for all parties striking the case from the docket pursuant to Rule 40(j). (R. p. 2.)

On September 22, 2014, Personal Care filed a Motion to Restore the case to the docket. (R. p. 331.) On October 16, 2014, Personal Care filed a Motion for Default and Default Judgment against Cheryl D. Shoun and Taylor, Bowley, and Byrd, LLC. (R. p. 339.) On November 14, 2014, Cheryl D. Shoun responded by filing a Motion for Sanctions and Expedited Hearing. (R. p. 369.) Taylor, Bowley, and Byrd, LLC filed a Motion for Sanctions and Expedited Hearing on November 17, 2014. (R. p. 480.) On November 19, 2014, the Honorable J.C. Nicholson held a hearing on Personal Care's Motion to Restore and Motion for Default. Judge Nicholson, ruling from the bench, denied Personal Care's Motion for Default. (R. pp. 325, line 23–p. 326, line 6.) Judge Nicholson did not hear arguments on, but retained jurisdiction over, the Motion for Sanctions, and he took the Motion to Restore under advisement. (R. p. 327, lines 5–8.)

On March 3, 2015, the Circuit Court issued its Order Denying Plaintiff's Motion to Restore and Denying Defendants' Motion for Sanctions. (R. p. 7.) On March 16, 2015, Personal Care filed Plaintiff's Motion to Alter or Amend Judgment. (R. p. 633.) On June 22, 2015, the

Circuit Court filed an Order on Plaintiff's Motion to Alter or Amend Judgment, ordering the parties to notify the court whether they wished to supplement the Record regarding the statute of limitations issue. (R. p. 105.) Personal Care filed a memorandum on July 9, 2015, notifying the Court that it intended to file an additional affidavit, (R. p. 763), and it filed the affidavit on January 7, 2016, (R. p. 773.). On April 15, 2016, the Circuit Court held a telephonic status conference with counsel for all of the parties. On May 23, 2016, the Circuit Court entered a Modified Order on Plaintiff's Motion to Alter or Amend Judgment. (R. p. 110.) On June 14, 2016, the Circuit Court entered a Substituted Modified Order on Plaintiff's Motion to Alter or Amend Judgment. (R. p. 212.)

On June 15, 2016, Personal Care filed its Notice of Appeal, appealing the March 2015 Order, the June 2015 Order, and the May 2016 Order. On or about August 16, 2016, all Respondents filed a Joint Motion to Dismiss Appeal. On or about August 25, 2016, Personal Care filed a Motion for Leave to Amend Notice of Appeal. On October 25, 2016, the South Carolina Court of Appeals issued an Order denying Respondents' Joint Motion to Dismiss Appeal and granting Personal Care's Motion for Leave to Amend. On or about October 31, 2016, Personal Care filed its Amended Notice of Appeal, appealing the March 2015 Order, the June 2015 Order, the May 2016 Order, and the June 2016 Order. Personal Care filed its Initial Brief of Appellant on or about November 30, 2016.

STATEMENT OF THE FACTS

This case arises from events that occurred in 2009 and early 2010. Beginning in 2009, Jerry N. Theos (hereinafter "Theos") of Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, PA (hereinafter "Uricchio Howe") and Cheryl D. Shoun (hereinafter "Shoun") of Taylor,

Shoun, Bowley, and Byrd, LLC, (hereinafter "TBB")[1] were retained by Personal Care to pursue a potential claim against a former employee who ran a competing company. (R. p. 256–57, ¶¶ 16, 19.) On or about September 14, 2009, at the direction of Personal Care, Theos sent a letter to the competitor, with a copy allegedly sent to a third-party dialysis clinic, addressing the competitor's alleged wrongful use of Personal Care's confidential information allegedly obtained by former employees of Personal Care. (R. p. 127–28.) On December 10, 2009, Theos and Shoun filed the underlying lawsuit on behalf of Personal Care against the competitor (hereinafter, the "*Askew* lawsuit"). (R. p. 257, ¶ 19.) On or about March 9, 2010, the defendant in the underlying *Askew* lawsuit filed a Counterclaim for defamation against Personal Care based solely on the September 2009 letter. (R. p. 130–32.)

Over the next three months, Personal Care's counsel contacted Bernie Cignavitch ("Cignavitch"), a principal for Personal Care, multiple times regarding the Counterclaim:

1. E-mail from Shoun to Cignavitch dated March 19, 2010: "Hey Bernie: Hope this finds you well. We have received an Answer and Counterclaim on behalf of the Defendant in this action. I need to get a copy of the Counterclaim to you; a response is due April 9th. May I fax to you? Will you provide the correct number? Also, if you will please provide your insurance information, we will submit the Counterclaim to your carrier, asking it to defend and indemnify you. We will need a copy of the policy if you have it. Thanks. I look forward to hearing from you." (R. p. 516, ¶¶ 3–4; R. p. 520.)

2. E-mail from Smith to Cignavitch dated March 19, 2010: "Mr. Cignavitch, attached please find a filed copy of the Answer and Counterclaim." (R. p. 517, ¶ 5; R. p. 521.)

3. E-mail from Shoun to Cignavitch dated March 26, 2010: "I am attaching a copy of a letter I am sending to Askew's counsel requesting an extension of time in which to respond to the Counterclaim. As I think we discussed earlier, when we granted an extension to Askew's attorneys, this is a routine practice, and I have no reason to think it will not be granted. You will see, if

[1] After Shoun left the law firm of Taylor, Shoun, Bowley, and Byrd, LLC, in April 2010, the firm became Taylor, Bowley and Byrd, LLC.

granted, our response will be due mid-May giving us plenty of time to talk over the allegations. Even if it is not granted, the response isn't due until mid-April. . . . I sincerely appreciate your patience in this matter, and look forward to talking with you regarding the Counterclaim." (R. p. 517, ¶ 7; R. p. 522.)

4. E-mail from Shoun to Cignavitch dated April 6, 2010: "Bernie: Hey. I am back in the office today and have received confirmation of our 30-day extension to respond to the Counterclaim in this case. Our reply is due on or before May 13, 2010. Please let me know a time that is good for you for us to get together to talk over our response. We may even be able to do it by phone if your schedule is full. In the meantime, I will probably prepare a draft and send it to you as a starting point." (R. p. 517, ¶ 8; R. p. 524)

5. E-mail from Shoun to Cignavitch dated April 6, 2010: "Bernie: I forgot to mention this again – please get your insurance information to me as quickly as you can. Thanks." (R. p. 518, ¶ 9; R. p. 525.)

6. E-mail from Shoun to Cignavitch dated April 13, 2010: "Please remember that a reply to the Counterclaim by Ms. Askew will have to be served by the latter part of May." (R. p. 191).

7. Invoice from Nexsen Pruet to Personal Care dated June 2, 2010: Charging $1440 for services related to answering Counterclaim (R. p. 519, ¶ 15; R. pp. 538–43.)

8. E-mail from Kerr to Cignavitch dated June 7, 2010: "Bernie: Attached please find for your review and file a filed stamped copy of the Reply to Counterclaim in the above-referenced matter. Should you have any questions or concerns, please let us know." (R. p. 518, ¶ 12; R. p. 526.)

By mid-June 2010, Shoun and others had communicated with Personal Care regarding the Counterclaim no fewer than eight times.

On or about March 8, 2013, Personal Care filed an action in Charleston County against Theos, Shoun, Uricchio Howe, and TBB.[2] (R. p. 232.) In its Verified Complaint, Personal Care invoked the safe harbor provision of S.C. Code Ann. § 15-36-100 and averred that its failure to attach the required S.C. Code Ann. § 15-36-100(B) expert affidavit for a legal malpractice claim

[2] Shoun continued to represent Personal Care after her departure from TBB in April 2010. TBB ended its representation of and had no contact with Personal Care after Shoun's departure from the firm.

was excused "because this Complaint is being filed when there is a good faith basis to believe the expiration of the statute of limitations is imminent." (R. p. 248, ¶ 97.) It had been almost three years since the defendant in the *Askew* lawsuit had filed the Counterclaim against Personal Care. It had also been almost three years since Shoun had repeatedly informed Personal Care of the Counterclaim and requested Personal Care's insurance information so that the carrier could defend and indemnify Personal Care against the Counterclaim.

Personal Care filed a Verified Amended Complaint, along with an expert affidavit, on April 19, 2013. (R. p. 252.). In its Verified Amended Complaint, Personal Care alleged causes of action for breach of fiduciary duties and legal professional negligence against Theos and Shoun and for breach of contract against the law firms. All claims purportedly arose from the allegedly defamatory letter dated September 14, 2009. Personal Care alleged that Shoun and Theos were negligent and breached their fiduciary duties to it by sending the allegedly defamatory letter and by failing to inform Personal Care of the Counterclaim for over two years after it had been filed. (R. p. 263, ¶ 64.) As to the law firms, Personal Care alleged that they breached their contract with Personal Care when they sent out the allegedly defamatory letter. (R. p. 266, ¶ 93.) Defendant Theos and his law firm filed an Answer to Personal Care's Verified Amended Complaint on July 10, 2013. (R. p. 280.) Defendants Shoun and TBB were given an extension until August 30, 2013, to file their Answer. (R. p. 382–83.)

Days before Shoun and TBB's Answer was due under the extended deadline, Personal Care's counsel requested a Consent Order Striking the Case from the Docket pursuant to Rule 40(j), SCRCP. All of the Defendants agreed to the Consent Order, which the Honorable J. Markley Dennis executed on August 27, 2013. (R. pp. 2–6.) Pursuant to its express terms, the Consent Order (hereinafter the "2013 Judge Dennis Order") set forth the following:

> IT FURTHER APPEARING that each party agrees that if the claim is restored within one year from the date of this Order, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations as of the date of this Order shall remain and begin to run on the date the claim is restored. (Emphasis added).

The 2013 Judge Dennis Order was filed on August 28, 2013, two days before Shoun and TBB's Answer was due. Thereafter, the status of the case was shown as "Dismissed."

After the malpractice case was dismissed pursuant to Rule 40(j), Personal Care continued to litigate the underlying *Askew* lawsuit, filing a motion for summary judgment on August 29, 2013. (R. p. 386–88.) The parties in the underlying lawsuit voluntarily settled the case in or around November 2013, and Personal Care filed a form with the court on November 18, 2013, notifying the court of the settlement. (R. p. 386.) Personal Care filed a stipulation of dismissal on December 13, 2013. (*Id.*)

Approximately eight months later, on August 22, 2014, Personal Care's counsel contacted Theos's counsel to request his consent to a proposed Consent Order Restoring Case to Docket (Rule 40(j), SCRCP), (hereinafter "2014 Proposed Consent Order"), which purported to reinstate the case pursuant to the 2013 Judge Dennis Order. (R. p. 176–77.) On August 26, 2014, defense counsel for Theos and Uricchio Howe signed the 2014 Proposed Consent Order and forwarded it to Personal Care's counsel on August 26, 2014.[3] (*Id.*) Shoun and TBB, however, did not consent to the 2014 Proposed Consent Order. (*Id.*) In fact, TBB did not receive a copy of the 2014 Proposed Consent Order until on or around September 17, 2014.

Despite the fact that Personal Care's counsel did not have the consent of all the parties, Personal Care submitted the 2014 Proposed Consent Order on September 4, 2014, for Judge

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[3] On August 26, 2014, Theos did not have an overt reason not to consent to the 2014 Proposed Consent Order, subject to the requirement set forth in the 2013 Judge Dennis Order filed on August 28, 2013.

Dennis's signature. (R. pp. 390–93.) Upon review, Judge Dennis's clerk noted that the 2014 Proposed Consent Order did not have the consent of all of the parties, and the clerk contacted Personal Care's counsel to inquire about the missing consents. (R. p. 395.) During the e-mail exchange between Judge Dennis's clerk and Personal Care's counsel, Personal Care's counsel asserted that Shoun's failure to object to his 2014 Proposed Consent Order was tantamount to consent and that counsel for all of the other defendants had consented. (R. p. 394.) On September 17, 2014, TBB contacted Judge Dennis's clerk to inform her that Personal Care had never given TBB notice of its intent to restore nor asked TBB to consent to restoration. (R. pp. 396–98.) Shortly thereafter, Personal Care's counsel withdrew the 2014 Proposed Consent Order via his communication with the Court on September 17, 2014 (R. p. 179), wherein Personal Care's counsel stated:

> Please extend my apologies to Judge Dennis for the circumstances, but **Personal Care is withdrawing the proposed Consent Order to restore** the case to the active trial roster as not all parties have consented to the restoration. . . . It is also my understanding from the telephone call with Ms. Byrd that Taylor, Bowley & Byrd, LLC has not consented to Personal Care's proposed consent Motion to restore the case to the active trial roster. As such, a formal motion to restore will be filed. … Again, under the circumstances the proposed Consent Order is being withdrawn, and we will proceed with a formal motion to restore. (Bold in the original; underline added).

After withdrawal of the 2014 Proposed Consent Order, on September 22, 2014, over three weeks after the one-year deadline pursuant to the 2013 Judge Dennis Order and Rule 40(j), SCRCP, Personal Care's counsel subsequently filed a formal Motion to Restore the case to the active roster. (R. p. 331.) Defendants filed memoranda in opposition to Personal Care's Motion to Restore on the grounds that the motion was untimely and that the statute of limitations had run on all of the claims. (R. p. 352, Theos's Memo. in Opp. to Motion to Restore; R. p. 373, Shoun's Memo. in Opp. to Motion to Restore; R. p. 491, TBB's Memo. in Opp. to Motion to Restore.)

On October 13, 2014, despite the fact that the Motion to Restore was still pending and the docket clearly listed the status of this case as "Dismissed," Personal Care filed an application for Entry of Default and a Motion for Default Judgment against Shoun and TBB. (R. p. 339.) In its Motion for Default Judgment, Personal Care asserted that more than four hundred sixty-nine days had passed since Shoun and TBB had been served and that Shoun and TBB had not filed an answer, motion, or other responsive pleading. (R. p. 340.) However, Personal Care failed to state in its Motion for Default Judgment (and its counsel failed to state in his Affidavit of Default) either that the case had been dismissed or that the 2013 Judge Dennis Order striking the case had been signed days before the deadline governing the filing of Shoun and TBB's Answer was to expire. (R. pp. 339–344.) Thus, Plaintiff's Motion for Default Judgment and application for Entry of Default omitted material facts and misrepresented the status of the case. Shoun and TBB each filed a Motion for Sanctions and Expedited Hearing based on the foregoing. (R. p. 369, Shoun's Motion for Sanctions & Expedited Hearing; R. p. 480, TBB's Motion for Sanctions & Expedited Hearing.)

The Honorable J.C. Nicholson of the Circuit Court (the "Circuit Court") heard oral arguments on the Motion to Restore and the Motion for Default Judgment on November 19, 2014. At the hearing, Personal Care conceded that it had known throughout the course of the *Askew* litigation both about the Counterclaim and that there were alleged issues with the defense of the case. (R. p. 315, lines 7–10; R. p. 316, lines 14–20.) Nonetheless, Personal Care asserted that the statute of limitations did not begin to run until Personal Care experienced, in the summer of 2012, the "first financial injury" caused by the attorneys' alleged errors. (R. p. 300, lines 2–9.) Personal Care's counsel acknowledged that Personal Care had averred in the Verified Complaint that it had a good-faith basis to believe that the statute of limitations was going to

expire in March 2010. (R. p. 322, line 22–p. 323, line 8.) However, he explained that, contrary to what was written in the Verified Complaint, he included that allegation because he had a good-faith basis to believe that the parties would raise a statute of limitations defense, not that the statute of limitations was about to expire. (*Id.*) According to counsel, he "knew there was time on the statute." (R. p. 323, line 1.)

The Circuit Court took the Motion to Restore under advisement and deferred consideration of Shoun and TBB's Motions for Sanctions, over which it retained jurisdiction. It did, however, rule from the bench on Personal Care's Motion for Default Judgment, calling Personal Care's position "absolute poppycock" and explaining that a party "can't be in default to a dismissed case[,] because there's no case pending." (R. p. 326, lines 2–6.)

After reviewing the Motion to Restore and the memoranda in support of and in opposition to the motion, and considering the arguments of counsel, the Circuit Court issued its Order on March 3, 2015, denying Personal Care's Motion to Restore. (R. p. 8.) In the Order, the Circuit Court found the following: (a) the 2014 Proposed Consent Order is a nullity; (b) Personal Care failed to restore the case within the one-year timeframe provided in the 2013 Judge Dennis Order; (c) Personal Care did not file a timely Motion to Restore, which Rule 40(j) requires in order to benefit from the tolling provision of Rule 40(j); (d) at no point did any of the Defendants agree that the statute of limitations would be further tolled above and beyond the parameters set forth in the 2013 Judge Dennis Order or SCRCP Rule 40(j); (e) the statute of limitations was not tolled following entry of the 2013 Judge Dennis Order and thus had expired prior to the filing of the formal Motion to Restore; and (f) Personal Care's claims against Defendants are time barred. (R. pp. 11–18.)

The Circuit Court found that Personal Care's counsel had conceded during oral argument that his client knew about the Counterclaim "throughout the course of this entire . . . underlying case," thus acknowledging that Personal Care's sworn allegation in Paragraph 21 of the Verified Amended Complaint—that Defendants had not informed Personal Care about the Counterclaim until over two years after the Counterclaim had been filed—was a misrepresentation. (R. p. 15.) This finding was supported not only by counsel's acknowledgment in open court but also by the multiple e-mails sent to Personal Care in the spring of 2010 regarding the Counterclaim and the June 2010 invoice billing Personal Care for legal work done to respond to the Counterclaim. (R. pp. 15–17.) Finally, the Circuit Court found that Personal Care, by averring in its Verified Complaint that it had a "good faith basis to believe the expiration of the statute of limitations is imminent," admitted that the statute of limitations would expire, at the latest, on March 18, 2013. (R. pp. 17–18.) For all of these reasons, the Circuit Court concluded that the statute of limitations had expired on Personal Care's claims and denied Personal Care's Motion to Restore. (R. pp. 15–18.)

On March 16, 2015, Personal Care filed a Motion to Alter or Amend Judgment ("Motion to Amend"). (R. p. 633.) Defendants filed memoranda in opposition to the Motion to Amend. (R. p. 738, Theos and TBB's Memo. in Opp. to Mot. to Amend; R. p. 741, Shoun's Memo. in Opp. to Mot. to Amend.) At the Circuit Court's request, the parties submitted additional briefing addressing whether, under *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003), Rule 40(j) requires the Circuit Court to perfunctorily restore a case to the active roster without considering the statute of limitations. Personal Care argued that it did, (R. pp. 750–54), while Defendants argued that *Maxwell* contemplated and allowed for a meaningful hearing, (R. pp. 745–48, Shoun

and TBB's Memo. Addressing *Maxwell v. Genez*; R. pp. 757–61, Theos' Brief Concerning *Maxwell* Decision).

Following receipt of the parties' additional briefing, the Circuit Court issued an Order on Plaintiff's Motion to Alter or Amend Judgment, dated June 19, 2015 (the "June 2015 Order"), modifying its prior March 3, 2015 Order. (R. p. 106.) In the June 2015 Order, the Circuit Court held that, pursuant to *Maxwell*, a party may challenge a motion to restore and that the issue of whether a plaintiff is entitled to the tolling of the statute of limitations is one that must be addressed at the hearing for a motion to restore. (R. p. 109.) The Circuit Court reasoned that if a court cannot address the statute-of-limitations issue at the hearing, then there would be no reason to hold a hearing in the first place, because the court would be required to automatically grant all motions to restore and address issues such as the statute of limitations at later motion hearings. (*Id.*) The Circuit Court concluded that such an outcome would be nonsensical from a judicial economy standpoint. (*Id.*)

However, because the Circuit Court found that it did not afford Personal Care an opportunity to address the statute of limitations issue at the motion hearing on November 19, 2014, the Circuit Court announced that it would hold the matter in abeyance to allow all parties to present live testimony and affidavits as to the statute of limitations issue, thereby providing the parties an additional opportunity to provide any evidence that any party wished to present to the Circuit Court prior to its issuing a decision. (*Id.*) The parties were given fourteen days from the date of the Order to notify the Circuit Court as to whether they wished to supplement the Record with affidavits or live testimony. (*Id.*)

The Defendants thereafter informed the Circuit Court that they did not wish to supplement the Record further with either affidavits or live testimony. On July 9, 2015, Personal

Care filed Plaintiff's Memorandum as Directed by Court's Order on Plaintiff's Motion to Alter or Amend Judgment, in which it informed the Circuit Court that it intended to submit additional affidavit testimony. (R. pp. 763, 767–68.) Personal Care filed the affidavit on January 7, 2016. (R. p. 773, Aff. of Bernard Cignavitch.)

On April 15, 2016, the Circuit Court held a telephonic status conference with counsel for all of the parties. Upon hearing from the parties that the Record was complete, the Circuit Court informed the parties that it would review the entire Record and issue a final order on Personal Care's Motion to Amend. On May 23, 2016, the Circuit Court entered a Modified Order on Plaintiff's Motion to Alter or Amend Judgment. (R. p. 110.) Two days later, the Supreme Court of South Carolina withdrew its previous opinion in *Stokes-Craven Holding Corp. v. Robinson*, which the Circuit Court had cited in the Modified Order, and replaced it with a new opinion. *See Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016).

On June 14, 2016, the Circuit Court substituted the May 2016 Order with an order that discussed and cited the new *Stokes-Craven* decision. (R. p. 212.) The Substituted Modified Order on Plaintiff's Motion to Alter or Amend Judgment, filed June 14, 2016, found the following: (a) the 2014 Proposed Consent Order is a nullity; (b) Personal Care failed to restore the case within the one-year timeframe provided in the 2013 Judge Dennis Order; (c) Personal Care did not file a timely Motion to Restore, which Rule 40(j) requires in order to benefit from the tolling provision of Rule 40(j); (d) at no point did any of the Defendants agree that the statute of limitations would be further tolled above and beyond the parameters set forth in the 2013 Judge Dennis Order or SCRCP Rule 40(j); (e) the statute of limitations was not tolled following entry of the 2013 Judge Dennis Order and thus had expired prior to the filing of the formal

Motion to Restore; and (f) Personal Care's claims against Defendants are time-barred. (R. p. 230.)

ARGUMENT

I. The Circuit Court's Denial of Personal Care's Motion to Restore Was Proper and Should be Affirmed.

On appeal, Personal Care argues that the Circuit Court erred when it denied Personal Care's Motion to Restore on the basis that the statute of limitations had run on Personal Care's claims. In setting forth its arguments, Personal Care repeatedly misstates and misrepresents the facts and procedural posture of this action. For the reasons set forth below, in addition to any other ground appearing on the Record, Respondents respectfully request that the Circuit Court's orders be affirmed.

A. The Circuit Court properly considered, in the context of the Motion to Restore, whether the statute of limitations had expired on Personal Care's claims.

Restoration of a case stricken from the docket pursuant to Rule 40(j), SCRCP, is not automatic. Instead, the Circuit Court must hold a hearing on the motion to restore and has the discretion to deny the motion to restore. Rule 40(j), SCRCP, provides the following:

> A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days <u>before it is heard</u>. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

Rule 40(j), SCRCP (emphasis added).

In *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003), the Supreme Court of South Carolina held that a party cannot take advantage of the one-year tolling period provided by Rule 40(j), SCRCP, if the party moves to restore the case to the docket more than one year after the claim had been stricken pursuant to Rule 40(j). *Id.* at 621. The Court further found that defendants can oppose a motion to restore on grounds of the expiration of the statute of limitations. *Id.* at 622 n.2. According to the Court, parties who consent to strike a case from the docket pursuant to Rule 40(j) agree not to challenge the statute of limitations for one year; however, after that one-year period, the parties can challenge restoration of the action on statute-of-limitations grounds. *Id.* Thus, in hearing a motion to restore, a circuit court can properly consider whether the statute of limitations on the movant's claims has expired. Indeed, such consideration furthers one of the objectives of the statute of limitations, which is to "relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights." *See Stokes–Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485, 490 (2016).

In the instant case, the statute of limitations on Personal Care's claims was not tolled following entry of the 2013 Judge Dennis Order striking the case from the docket. It is undisputed that Personal Care did not file its Motion to Restore until September 22, 2014, which was more than one year after the Circuit Court entered the 2013 Judge Dennis Order dismissing the case on August 28, 2013. Because Personal Care filed its Motion to Restore more than one year after entry of the 2013 Judge Dennis Order, Defendants could challenge the Motion to Restore based on statute-of-limitations grounds. *See Maxwell*, 356 S.C. at 622 n.2; *see also Graham v. Dorchester Cnty. Sch. Dist.*, 339 S.C. 121, 125, 528 S.E.2d 80, 82 (Ct. App. 2000). Therefore, the Circuit Court's consideration of the statute of limitations in the context of a Motion to Restore was proper.

Personal Care appears to take the position that consideration of the statute of limitations during a hearing on a motion to restore is appropriate only where a party pleads a statute of limitations defense. If that is the case, then the Circuit Court properly considered the statute of limitations for the additional reason that Theos and Urrichio Howe filed an Answer on July 10, 2013, asserting, in their Second Defense, that Personal Care's claims were barred by the statute of limitations. (R. 287, ¶ 40.) Indeed, Personal Care's counsel admitted, during the Hearing on the Motion to Restore held on November 19, 2014, that Theos and his law firm had filed an Answer and had raised the statute of limitations as a defense. (R. p. 301, lines 8–10; R. p. 322, line 22–p. 323, line 8; R. p. 325, lines 18–20.) Nonetheless, in its initial appellate brief, Personal Care repeatedly, and incorrectly, avows that no defendant filed an Answer before the case was stricken from the docket. (App. Br. at 14 (arguing that the Circuit Court should not have considered the statute of limitations "when no defendant filed an Answer"); *id.* at 16 (stating that no Respondent asserted a statute of limitations affirmative defense and that no Answers were filed); *id.* at 17 (stating that Respondents had not filed Answers asserting a statute of limitations defense); *id.* at 19 (contending that the "trial court should not have *de facto* granted summary judgment as to the unpleaded statute of limitations defense").

Personal Care's argument on appeal that the Circuit Court improperly considered the statute of limitations because no party had filed an Answer or raised a statute of limitations defense is belied by the Record and by Personal Care's own arguments at the Hearing on the Motion to Restore. As the Supreme Court found in *Maxwell*, defendants can oppose a motion to restore on grounds of the expiration of the statute of limitations when the motion to restore was

filed more than one year after the case was stricken from the docket. Thus, the Circuit Court properly considered the statute of limitations at the Hearing on the Motion to Restore.[4]

B. The Circuit Court properly found that the statute of limitations had expired prior to the date on which Personal Care filed the Motion to Restore.

i. The Circuit Court applied the proper standard to the statute of limitations.

This action is governed by a three-year statute of limitations. S.C. Code Ann. § 15-3-530 (2005); *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485 (2016) (applying three-year statute of limitations in legal malpractice action); *Mazloom v. Mazloom*, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (Ct. App. 2009), *aff'd*, 392 S.C. 403, 709 S.E.2d 661 (2011) (citing three-year statute of limitations in breach of fiduciary duty action). "A cause of action accrues at the moment when the plaintiff has a legal right to sue on it." *Brown v. Finger*, 240 S.C. 102, 124 S.E.2d 781 (1962). At that point, the law presumes at least nominal damages, and the fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose. *Livingston v. Sims*, 197 S.C. 458, 15 S.E.2d 770 (1941), *modified by Santee Portland Cement v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989) (discovery rule applies to contract statute of limitations); *see Stephens v. Druffin*, 327 S.C. 1, 488 S.E.2d 3, 7 (1997).

"Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice

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[4] Personal Care discusses at length on page 15 of its Initial Brief a motion for summary judgment filed in *Maxwell v. Genez*. According to Personal Care, this argument regarding *Maxwell*'s motion for summary judgment was "presented to the trial court in this case." (App. Br. at 15.) Respondents have reviewed the Record from below and have not found any occasion during which Personal Care provided to the Circuit Court the motion for summary judgment in *Maxwell* or otherwise presented argument regarding the same, and Personal Care's citations to "Motion For Summary Judgment in *Maxwell*" do not indicate that this motion was ever presented in the case below or in any way made part of the Record.

that some claim against another party might exist." *Stokes–Craven*, 416 S.C. at 525–26. The statute of limitations "begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Stokes-Craven*, 416 S.C. at 526 (quoting *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989)). Thus, in determining when the statute of limitations starts to run, courts are to apply an objective, rather than subjective, standard. *Id.*

Pursuant to the legislatively-mandated discovery rule, "all legal malpractice actions must be commenced within three years after the claimant knew or by the exercise of reasonable diligence should have known that he or she had a cause of action." *Stokes-Craven*, 416 S.C. at 531. A legal malpractice claim "is predicated on an injury or damage to a client caused by an alleged breach of duty by the client's attorney." *Id.* at 533, 787 S.E.2d at 493–94. Personal Care incorrectly suggests that the *Stokes-Craven* case stands for the proposition that no legal malpractice cause of action can accrue until there is an adverse verdict, judgment or ruling. Rather, the *Stokes-Craven* Court acknowledged that "[t]his predicate injury or damage may take many forms," including malpractice arising out of a law firm's alleged failure to settle a dispute prior to arbitration or failure to include all defendants in a settlement. *Id.* at 534 & n.6.

Personal Care's claim for legal malpractice is predicated on a Counterclaim for defamation filed against Plaintiff in the underlying *Askew* case. According to Personal Care's Verified Complaint and Verified Amended Complaint, Defendants allegedly breached their duty to Personal Care by sending an allegedly defamatory letter in September 2009, thus exposing Personal Care to liability, as evidenced by a Counterclaim filed in March 2010. Paragraph 18 of the Verified Amended Complaint alleges that the first act of negligence occurred in September

2009 when Theos allegedly sent a defamatory letter to a third party. Paragraph 20 of the Verified Amended Complaint further alleges that, on March 9, 2010, the underlying defendant filed an Answer and Counterclaim asserting a claim for defamation based on the allegedly defamatory statements in the letter published by Theos in September 2009. Finally, Paragraph 40 of the Verified Amended Complaint alleges that Personal Care was damaged by Theos and Shoun's errors when "it was forced to spend additional funds and commit time and other resources to mitigate the damages caused as a direct and proximate result of Defendants' errors." Therefore, the Circuit Court correctly found that Personal Care's malpractice claim is predicated on the *Askew* Counterclaim and that Personal Care suffered damages as soon as it was forced to incur costs to defend against the Counterclaim.

Throughout the course of this case, Personal Care has taken multiple, inconsistent positions regarding when the statute of limitations began to run. First, Personal Care acknowledged in its Verified Complaint that the statute of limitations began to run in March 2010 and would expire within ten days of March 8, 2013. (R. p. 248, ¶ 97 (invoking the safe harbor provision of S.C. Code Ann. § 15-36-100(C)(1) and asserting that "there is a good faith basis to believe the expiration of the statute of limitations is imminent")). When Personal Care first filed this action on March 8, 2013, the Verified Complaint contained the following statement:

> Pursuant to S.C. Code Ann. § 15-36-100(B) (2006), because this Complaint is being filed when there is a good faith basis to believe the expiration of the statute of limitations is imminent, it is filed without an affidavit by expert licensed by the Supreme Court of the State of South Carolina specifying at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit. Plaintiff intends to file an Amended Complaint with an expert affidavit within forty-five (45) days.

(*Id.*) Pursuant to S.C. Code Ann. § 15-36-100(B), a plaintiff alleging professional negligence "must file as part of the complaint an affidavit of an expert witness which must specify at least

one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." However, the statute also provides the following safe harbor provision:

> The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit.

S.C. Code Ann. § 15-36-100(C)(1). Thus, by seeking safe harbor in subsection (C)(1), Plaintiff alleged in its sworn Verified Complaint that it had a good-faith basis to believe that the statute of limitations on its claims would expire no later than March 18, 2013.

However, at the Hearing on the Motion to Restore, when Personal Care realized that its case was at risk of not being restored to the docket because the statute of limitations had expired, Personal Care argued that although Personal Care "[c]ertainly . . . knew about the counterclaim," (R. p. 316, line 14), the statute of limitations did not begin to run until the summer of 2012 when Personal Care allegedly suffered its first financial injury. Personal Care further argued that it had invoked the safe harbor provision in its Verified Complaint "to simply avoid even anyone raising an affirmative defense for statute of limitations." (R. p. 318, lines 3–12.) Personal Care's counsel explained that he "knew there was time on the statute," but that he filed the Verified Complaint invoking the safe harbor provision because he "had a good faith belief it was going to be raised as a defense, not that it was a meritorious defense, but good faith belief it was going to be raised as a defense, and it was." (R. p. 322, line 22– p. 323, line 8.) Not only does counsel's argument suggest that Personal Care knowingly misused the safe harbor provision in contravention of the Legislature's unambiguous intent, it also establishes that Personal Care made knowing misrepresentations to the Court, either when Personal Care averred in its Verified

Complaint that it had a good faith basis to believe that "expiration of the statute of limitations is imminent," (R. p. 248, ¶ 97), or when its counsel told the Circuit Court that he "knew there was time on the statute," (R. p. 318, lines 3–12; R. p. 322, line 22– p. 323, line 8).

Now, for the first time on appeal, Personal Care argues that the statute of limitations did not begin to run until the *Askew* matter was settled. According to Personal Care's initial brief, no adverse verdict, judgment, or ruling in the *Askew* lawsuit "occurred until the matter was settled and dismissed in November 2012, a mere six months or so before this lawsuit was filed in March 2013." (App. Br. at 18; *see id.* at 20 (stating that "the lawsuit was filed around six months after the 'adverse verdict, judgment, or ruling' occurred via settlement in the underlying Askew lawsuit").) Once again, Personal Care misstates the facts to the Court. According to the docket for the *Askew* lawsuit, that action was settled in November 2013 and dismissed in December 2013, not in November 2012. Therefore, contrary to Personal Care's assertion in its initial brief, the *Askew* lawsuit was settled more than six months *after* the instant malpractice action was filed. Moreover, there was no "adverse verdict, judgment, or ruling," in the *Askew* lawsuit because the parties thereto voluntarily settled the lawsuit, and Personal Care filed a stipulation of dismissal. A voluntary settlement is not akin to "the failure of an underlying suit" resulting in an "adverse verdict, judgment, or ruling." *See Stokes-Craven* 416 S.C. at 524. Thus, despite Personal Care's arguments to the contrary, its legal malpractice claim is not predicated on any failure of the underlying suit or on the voluntary settlement of the *Askew* lawsuit. Rather, it is predicated on the *Askew* Counterclaim filed in March 2010.

ii. The Circuit Court properly found that, under the discovery rule, the statute of limitations began to run no later than March 2010.

Pursuant to the discovery rule, Personal Care knew or should have known that claims for legal malpractice and breach of fiduciary duty might exist against Defendants beginning in

March 2010 when it received a copy of the Counterclaim. The Counterclaim alleged that "On or about September 14, 2009, a lawyer representing Personal Care, and acting as its agent, wrote Defendant and informed her that two law firms were retained to 'investigate certain wrongful conduct on the part of Low Country Medical Transport and pursue appropriate legal remedies.'" (R. p. 512, ¶ 11.) The Counterclaim further alleged that a third party also received the letter; that the letter contained a number of false and malicious statements about Low Country Medical Transport; and that the statements, published by Personal Care to the third party, were defamatory per se and constituted libel and slander. (R. pp. 512–13, ¶¶ 12–17.) Upon reading the simple and straightforward allegations in the Counterclaim, a person of common knowledge and experience would have been put on notice that claims against his lawyer might exist as a result of the letter and Counterclaim. *See Stokes–Craven*, 416 S.C. at 525–26.

As discussed above, Plaintiff acknowledged in Paragraph 97 of his Verified Complaint that the statute of limitations began to run in March 2010 and would expire within ten days of March 8, 2013. (R. p. 248, ¶ 97 (invoking the safe harbor provision of S.C. Code Ann. § 15-36-100(C)(1) and asserting that "there is a good faith basis to believe the expiration of the statute of limitations is imminent")). Moreover, at the Hearing on the Motion to Restore, Personal Care acknowledged that his client "knew about the counterclaim" throughout the course of the underlying case. (R. p. 315, lines 6–13; R. p. 316, line 14.) Finally, in its Verified Amended Complaint, Personal Care alleged that it was damaged when "it was forced to spend additional funds and commit time and other resources to mitigate the damages caused as a direct and proximate result of Defendants' errors." (R. p. 260, ¶ 40.) Thus, Personal Care's own pleadings and oral argument demonstrate that, pursuant to the discovery rule, the statute of limitations began to run in March 2010.

Moreover, Record evidence corroborates Personal Care's assertion in its Verified Complaint that the statute of limitations was set to expire in March 2013. According to this evidence, Personal Care was put on notice that malpractice and fiduciary duty claims might exist as early as March 19, 2010, when Plaintiff received a copy of the Counterclaim via e-mail and was advised by Shoun to provide its insurance information so that the Counterclaim could be submitted to its carrier along with a request that the carrier defend and indemnify it. (R. pp. 516–17, ¶¶ 3–5; R. pp. 520–21.) During the following weeks, Plaintiff received a number of other e-mails referencing the Counterclaim and a bill for legal fees arising from the defense of the Counterclaim in 2010. (R. pp. 516–19, ¶¶ 7–9, 12, 15; R. pp. 522–26, 538–43.) Upon receiving a copy of the Counterclaim, multiple e-mails referencing the Counterclaim, a request for insurance information so that the plaintiff could get coverage for defense of the Counterclaim, a copy of the Reply to the Counterclaim, and a bill for work performed to respond to the Counterclaim, a person of common knowledge and experience would have been put on notice that claims against his lawyer might exist as a result of the letter and Counterclaim. *See Stokes–Craven*, 416 S.C. at 525–26. Accordingly, and as pleaded by Personal Care in the Verified Complaint, the statute of limitations on Plaintiff's claims began to run in March 2010.[5]

[5] Personal Care's arguments regarding equitable estoppel are without merit. In South Carolina, a defendant may be estopped from claiming the statute of limitations as a defense if some conduct or representation by the defendant has induced the plaintiff to delay in filing suit, thus allowing the limitations period to expire. *See Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001); *Dillon Cty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 218, 332 S.E.2d 555, 561 (Ct. App. 1985), overruled on other grounds by *Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995). Personal Care has consistently taken the position that it filed its Verified Complaint prior to the expiration of the statute of limitations. (*See, e.g.*, R. p. 248, ¶ 97 (invoking the safe harbor provision of S.C. Code Ann. § 15-36-100(C)(1) so that it could file its suit without the required expert affidavit prior to the expiration of the statute of limitations); R. p. 323, line 1 (explaining that when Personal Care's counsel filed the Verified Complaint, he "knew there was time on the statute").)

iii. The Circuit Court properly found that the statute of limitations was not tolled following August 28, 2013, and had expired prior to the date Personal Care filed the Motion to Restore.

Personal Care does not challenge on appeal the Circuit Court's ruling that the statute of limitations was not tolled following August 28, 2013. Nor does it challenge the Circuit Court's holding that the 2014 Proposed Consent Order was a nullity. Thus, it is undisputed that because Personal Care filed its Motion to Restore on September 22, 2014, more than a year after the 2013 Judge Dennis Order striking the case from the docket pursuant to Rule 40(j) was entered on August 28, 2013, Personal Care cannot take advantage of the tolling provision of Rule 40(j). Moreover, and as Personal Care conceded in its Verified Complaint, the statute of limitations on Personal Care's claims began to run in March 2010. Therefore, the three-year statute of limitations was not tolled after August 28, 2013, and expired long before Personal Care filed its Motion to Restore in September 2014. Accordingly, the Circuit Court correctly found that that the statute of limitations on all of Personal Care's claims had expired prior to the filing of the Motion to Restore and that those claims were time-barred.

C. The Circuit Court Did Not Err When it Denied Personal Care's Motion to Restore.

The Circuit Court properly denied Personal Care's Motion to Restore. As discussed above, restoration of a case dismissed pursuant to Rule 40(j) is not automatic but rather requires a hearing and a court order. Pursuant to *Maxwell*, a motion to restore can be challenged on the basis of the statute of limitations so long as the motion to restore was filed more than one year after the case was dismissed from the docket. 356 S.C. at 622 n.2. Therefore, a circuit court hearing a motion to restore that was filed more than one year after the case was dismissed pursuant to Rule 40(j) can consider arguments that the statute of limitations has expired and can deny the motion to restore on that basis. Such action is consistent with one of the well-

established purposes of the statute of limitations, that is, to "relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights." *Stokes–Craven*, 416 S.C. at 526, 787 S.E.2d 485.

Personal Care's arguments regarding summary judgment are irrelevant. The Circuit Court did not grant summary judgment in this case, nor could it have, given that the parties had voluntarily dismissed the case in August 2013. *See Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 633, 779 S.E.2d 826, 832 (Ct. App. 2015), *reh'g granted* (Dec. 16, 2015), *cert. denied* (Oct. 20, 2016) (reviewing the history of Rule 40(j) and explaining that "stricken" equates to "dismissed" under Rule 40(j)). The Court could not dismiss Personal Care's claims because Personal Care had voluntarily consented to dismiss them a year earlier. In order to file a motion to restore a case that has been stricken from the docket pursuant to Rule 40(j), a party must pay the full $150 filing fee for a new case. If the case is restored, "the case is placed on the General Docket where it proceeds as a newly filed action on the General Docket." Rule 40, SCRCP Notes, Notes to 1993 Amendments. The case will be assigned a new case number and will be protected from trial for a year, just as any new case is. (R. p. 322, lines 4–11.) Simply put, there were no claims pending before the Circuit Court. Therefore, the Circuit Court's denial of Personal Care's Motion to Restore is not, and cannot be construed as, the equivalent of a grant of summary judgment against Personal Care, and any arguments related to summary judgment are irrelevant.

In this case, because Personal Care filed its Motion to Restore more than a year after the case was dismissed pursuant to Rule 40(j), the Circuit Court properly considered arguments that the statute of limitations on Personal Care's claims had expired. *See Maxwell*, 356 S.C. at 622 n.2. Upon finding that the claims were time-barred, the Circuit Court properly denied the

Motion to Restore in an effort to conserve judicial resources and to relieve the court of the burden of trying stale claims. Thus, the Circuit Court's denial of Personal Care's Motion to Restore was proper and should be affirmed.

CONCLUSION

For the foregoing reasons, as well as for any other ground appearing on the Record as provided by Rule 220(c), SCRAP, Respondents Shoun and TBB respectfully request that the Circuit Court's orders be affirmed.

Respectfully submitted,

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June 1, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

RECEIVED
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SC Court of Appeals

Case No. 2013-CP-10-1396

Appellate Case No. 2016-001266

Personal Care, Inc., ...Appellant,

v.

Jerry N. Theos; Uricchio, Howe, Krell, Johnson, Toporek, Theos & Keith, PA; Cheryl D. Shoun; and Taylor, Shoun, Bowley & Byrd, LLC, ...Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

June 1, 2017

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