

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

Appellate Case No. 2016-001266

**RECEIVED**

JUN 20 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.

**RECORD ON APPEAL**

Volume 2

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**Cc:** M. Dawes Cooke; Phillip Ferderigos; Andrea Goodreau; Leslie Toia; Shoun, Cheryl D.  
**Subject:** RE: 2013-CP-10-1396

Ms. Coffey:

Thank you very much for your message below.

As for your question on the missing consent for Ms. Shoun, it was not done in error. Ms. Shoun was originally represented by Amanda Dudgeon with Carlock Copeland & Stair, who on Ms. Shoun's behalf accepted service of the Summons and Complaint, consented to the Rule 40j Order striking the case of the active docket, but was later relieved as counsel. Ms. Shoun was included on all of the written or electronic communications leading to the proposed consent Order restoring the case and has not raised any objection. Counsel for all of the other defendants have consented. Therefore, we believe the Order restoring the case should be issued.

Notwithstanding the foregoing, we will be happy to attend a hearing on the motion to restore if Judge Dennis believes it is necessary. Again, thank you very much for your time and attention to this matter.

Regards,

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**From:** Dennis, R. Markley Jr. Law Clerk (Lindsey M. Coffey) [<mailto:MDennisLC@sccourts.org>]  
**Sent:** Monday, September 15, 2014 10:13 AM  
**To:** Thomas A. Pendarvis  
**Cc:** M. Dawes Cooke  
**Subject:** 2013-CP-10-1396

Thomas:

We received your proposed consent order restoring the case to the docket pursuant to rule 40j on 9/5/14. I have reviewed the order and noticed that it is missing the consent of Cheryl D. Shoun. Was this done in error? Just wanting to make sure all proper consents are obtained. I will print a copy of our correspondence for Judge Dennis when I give him this to be signed. If this was an accident, simply send me her signature by mail or courier to our office in the Charleston County Judicial Center and I will attach it to this order. Please let me know—thank you.

*Lindsey M. Coffey*  
Law Clerk to the Honorable R. Markley Dennis, Jr.



----- Forwarded message -----

From: **Thomas A. Pendarvis** <[tpendarvis@pendarvislaw.com](mailto:tpendarvis@pendarvislaw.com)>

Date: Wed, Sep 17, 2014 at 12:55 PM

Subject: RE: 2013-CP-10-1396

To: "Dennis, R. Markley Jr. Law Clerk (Lindsey M. Coffey)" <[MDennisLC@sccourts.org](mailto:MDennisLC@sccourts.org)>

Cc: "M. Dawes Cooke" <[mdc@barnwell-whaley.com](mailto:mdc@barnwell-whaley.com)>, Phillip Ferderigos

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([DMichel@charlestoncounty.org](mailto:DMichel@charlestoncounty.org))" <[DMichel@charlestoncounty.org](mailto:DMichel@charlestoncounty.org)>

Ms. Coffey:

Please extend my apologies to Judge Dennis for the circumstances, but **Plaintiff is withdrawing the proposed Consent Order to restore** the case to the active trial roster as not all parties have consented to the restoration.

I called Ms. Byrd on the telephone after she forwarded to me a copy of her message to you and Judge Dennis, and apologized for not including her in the recent correspondence related to the proposed Consent Order to restore this case to the active trial roster. I was under the mistaken understanding that Ms. Shoun was communicating information about this matter to her former law firm, Taylor, Bowley & Byrd, LLC. In the future, we will be sure to have Taylor, Bowley & Byrd, LLC served with all materials requiring service and included in all communications, both electronic and written.

It was 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 and, as stated earlier, Taylor, Bowley & Byrd, LLC will be included on the service list. Again, under the circumstances the proposed Consent Order is being withdrawn, and we will proceed with a formal motion to restore.

Thank you very much for your time and attention to this matter.

Regards,

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**From:** Dennis, R. Markley Jr. Law Clerk (Lindsey M. Coffey)

[mailto:[MDennisLC@sccourts.org](mailto:MDennisLC@sccourts.org)]

**Sent:** Wednesday, September 17, 2014 11:35 AM

**To:** Thomas A. Pendarvis

**Cc:** M. Dawes Cooke; Phillip Ferderigos; Andrea Goodreau; Leslie Toia;

[cshoun@nexsenpruet.com](mailto:cshoun@nexsenpruet.com); Catherine Byrd; Don Michel ([DMichel@charlestoncounty.org](mailto:DMichel@charlestoncounty.org))

**Subject:** RE: 2013-CP-10-1396

Thomas:

No order will not be signed until I discuss the matter fully with Judge Dennis. When he lets me know how to move forward, I will let everyone know. Thank you.

*Lindsey M. Coffey*

Law Clerk to the Honorable R. Markley Dennis, Jr.

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Phone: (843)958-5062

Email: MDennisLC@sccourts.org

STATE OF SOUTH CAROLINA )

COUNTY OF CHARLESTON )

PERSONAL CARE, INC., )

Plaintiff, )

-vs. )

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

Defendants. )

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1396

FILED  
2014 DEC -4 3:01 PM  
JULIE J. ARMSTRONG  
CLERK OF COURT

**DEFENDANT SHOUN'S**  
**SUPPLEMENTAL MEMORANDUM IN**  
**OPPOSITION TO PLAINTIFF'S**  
**MOTION TO RESTORE**

Defendant Cheryl D. Shoun ("Shoun"), through undersigned counsel, hereby submits this supplemental memorandum in opposition to Plaintiff's Motion to Restore Pursuant to Rule 40(j), SCRCP ("Motion to Restore"). At the hearing on the Motion to Restore, held on November 19, 2014, the Court invited all of the parties to submit supplemental memoranda and exhibits. Shoun submits this memorandum and its accompanying attachments in further support of her original Memorandum in Opposition. In addition to the following arguments, Shoun hereby incorporates the arguments she made in her original Memorandum, those made by her counsel at the hearing, and the supplemental memoranda filed by co-defendants. Specifically, Shoun maintains her position that the statute of limitations began to run no later than June 2010, was not tolled following the Rule 40(j) dismissal, and thus has objectively run. Accordingly, Shoun believes that Plaintiff's Motion to Restore is futile and should be denied.

**LEGAL ANALYSIS**

At the hearing, Plaintiff's counsel argued that the statute of limitations on Plaintiff's claims did not begin to run until 2012, even though the allegedly defamatory letter was sent in

September 2009 and the Counterclaim was filed in March 2010. According to Plaintiff's counsel, the statute of limitations did not begin to run until July 2012 because the "first financial injury" did not occur until July 2012. (Nov. 19, 2014 Hrg. Tr. 8:2-13). According to counsel, although there were "alleged errors that these lawyers were making, . . . there was no cost specific" injury until after May 2012. (*Id.* at 10:18-21).

Counsel's argument has two major flaws. First, counsel misstates the standard for determining when the statute of limitations begins to run. In South Carolina, the statute of limitations begins to run not from the date of the first financial injury, but rather from the date the injured party either knows or should have known, by the exercise of reasonable diligence, that a cause of action might exist against another party. *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). Upon receiving notice of the Counterclaim in 2010, Plaintiff either knew or should have known that a cause of action against its attorneys might exist. Second, even if the first financial injury were the proper standard, Plaintiff cannot reasonably argue that it experienced the first financial injury arising from the Counterclaim any later than June 2010, when it was billed by its attorneys for work they performed to answer the Counterclaim. Therefore, the statute of limitations began to run no later than June 2010.

**I. The discovery rule governs when the statute of limitations begins to run.**

"South Carolina's statute of limitations requires very little to start the clock." *Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (internal quotation marks omitted). South Carolina follows the discovery rule, which means that the statute of limitations begins to run from the date the injured party either knows or should have known, by the exercise of reasonable diligence, that a cause of action arises from the wrongful conduct. *Holmes v. Haynsworth, Sinkler & Boyd, PA*, 408 S.C. 620, 632, 760 S.E.2d 399, 405 (2014); *see* S.C. Code

Ann. § 15-3-535. “The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist.” *Epstein*, 363 S.C. at 376, 610 S.E.2d at 818 (emphasis in original). The statute of limitations begins to run from this point of discovery and “**not when advice of counsel is sought or a full-blown theory of recovery developed.**” *Id.* (emphasis in original). Moreover, in a legal malpractice action, the statute begins to run upon discovery of the cause of action and is not tolled during the period the attorney continues to represent the client on the matter that forms the basis for the malpractice action. *Id.* at 377, 610 S.E.2d at 818 (declining to adopt the continuous representation rule in the context of a legal malpractice claim).

In determining when the statute of limitations starts to run, courts are to apply an objective, rather than subjective, standard. *Kelly v. Logan, Jolley, & Smith, LLP*, 383 S.C. 626, 633, 682 S.E.2d 1, 4 (Ct. App. 2009). “The fact that the injured party may not comprehend the full extent of the damage is immaterial.” *Holmes*, 408 S.C. at 632, 760 S.E.2d at 405. Instead, the relevant inquiry is at what point in time, given the facts and circumstances of the case, would a person of common knowledge and experience have been put on notice that some right of his had been invaded or that some claim might exist. *Epstein*, 363 S.C. at 376, 610 S.E.2d at 818. Importantly, identification of the “first financial injury” is not a factor in the discovery rule’s objective test. *See, e.g., Holmes*, 408 S.C. at 632, 760 S.E.2d at 405 (containing no mention of the first financial injury); *Epstein*, 363 S.C. at 376, 610 S.E.2d at 818 (same); *Kelly*, 383 S.C. at 633, 682 S.E.2d at 4 (same).

Plaintiff should have known that claims for legal malpractice and breach of fiduciary duty might exist against Defendants when it received a copy of the Counterclaim. The Counterclaim alleged that “On or about September 14, 2009, a lawyer representing Plaintiff, 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.” (Exhibit A, Askew Counterclaim ¶ 11). The Counterclaim further alleged that a third party, Low Country Dialysis, 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 Plaintiff to Low Country Dialysis, were defamatory per se and constituted libel and slander. (*Id.* at ¶¶ 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 Epstein*, 363 S.C. at 376, 610 S.E.2d at 818.

Plaintiff was put on notice that malpractice and fiduciary duty claims might exist as early as March 2010. Plaintiff received a copy of the Counterclaim via e-mail on March 19, 2010. (Exhibit B, Shoun Aff. ¶ 5; Exhibit 1 to Shoun Aff., March 19, 2010 e-mail from J. Smith to B. Cignavitch). On that same date, Shoun advised Plaintiff that the Counterclaim had been served and asked Plaintiff 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. (Shoun Aff. ¶¶ 3-4; Exhibit 1 to Shoun Aff., March 19, 2010 e-mail from C. Shoun to B. Cignavitch). During the following weeks, Plaintiff received a number of other e-mails referencing the Counterclaim. (*See, e.g.*, Exhibit 2 to Shoun Aff., March 26, 2010 e-mail from Shoun to B. Cignavitch; Exhibits 3 and 4 to Shoun Aff., April 6, 2010 e-mails from Shoun to B. Cignavitch;

Exhibit 5 to Shoun Aff., June 7, 2010 e-mail from Shoun's assistant to B. Cignavitch with attached Reply to Counterclaim; Exhibit 6 to Shoun Aff., June 7, 2010 e-mail from Shoun's assistant to B. Cignavitch with attached discovery requests). Upon receiving a copy of the Counterclaim, multiple e-mails referencing the Counterclaim, a request for insurance information so that Plaintiff could get coverage for defense of the Counterclaim, and a copy of the Reply 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 Epstein*, 363 S.C. at 376, 610 S.E.2d at 818. Accordingly, the statute of limitations on Plaintiff's claims began to run no later than June 2010.

**II. Plaintiff experienced its alleged "first financial injury" no later than June 2010.**

As explained above, the discovery rule governs when the statute of limitations began to run on Plaintiff's claims, and the record evidence clearly establishes that once Plaintiff received notice of the Counterclaim, Plaintiff should have known that claims against its lawyers might exist. However, at the hearing, although Plaintiff's counsel conceded that Plaintiff knew both about the Counterclaim and that there were alleged issues with the defense of the case, (Nov. 19, 2014 Hrg. Tr. 24:14-20), Plaintiff's counsel asserted that the statute of limitations did not begin to run until Plaintiff experienced, in the summer of 2012, the "first financial consequence" caused by Defendants' alleged errors, (*id.* at 8:19-9:1). As explained above, the discovery rule does not require identification of the "first financial consequence" or injury. Nevertheless, even if the statute did not begin to run until the first financial injury, Plaintiff allegedly experienced its "first financial injury" arising from the letter and Counterclaim no later than June 2010.

Plaintiff's alleged "first financial injury" occurred when Plaintiff first incurred expenses arising from the defense of the Counterclaim. In its Amended Complaint, Plaintiff alleges that it

was damaged by Defendants' 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." (Am. Compl. ¶ 40). Furthermore, Plaintiff alleges that by "August 2012, Personal Care had already paid Defendants approximately \$40,000 in legal fees and expenses" and that "legal fees and expenses continue[d] to be incurred to defend Personal Care against the *Askew* counterclaim." (*Id.* at ¶ 33). Therefore, according to the Amended Complaint, Plaintiff was damaged when it incurred expenses arising from the defense of the Counterclaim.

According to record evidence, Plaintiff first received a bill for legal fees arising from the defense of the Counterclaim in 2010. In an invoice dated and mailed June 2, 2010, Plaintiff was charged \$1200 for work performed by Shoun to respond to the Counterclaim. (Exhibit 7 to Shoun Aff., June 2, 2010 billing statement). For instance, Plaintiff was charged for the following services: "Review counterclaim; conduct research as to elements of defamation and affirmative defenses thereto; forward to Mr. Theos for review and comment[;] [c]onference with Mr. Theos regarding merit of defamation claim"; and "file and serve reply to counterclaim." (*Id.* at Shoun 00353). Plaintiff was charged \$80 for an April 27, 2010 "conference with Mr. Cignavitch regarding meeting to discuss counterclaim and preparation of reply thereto." (*Id.*). The record evidence clearly establishes that Plaintiff had experienced its alleged "first financial injury" by June 2010, long before the summer of 2012. Accordingly, Plaintiff's argument that the statute of limitations did not begin to run until 2012 is meritless.

### CONCLUSION

All of Plaintiff's claims are objectively barred by the statute of limitations. It is undeniable that by at least June 2010, Plaintiff was in possession of a Counterclaim that objectively set forth claims seeking a financial recovery against Plaintiff for the alleged acts of

its lawyers. The records and affidavits of counsel clearly indicate that the nature of the Counterclaim was discussed between lawyer and client, and further indicate that Plaintiff was being charged legal fees for defending the Counterclaim. All of these immutable facts took place prior to the expiration of June 2010. Even if credence were given to Plaintiff's fairly incredible claim that it lacked understanding of the nature of the Counterclaim, this self-serving assertion of its personal understanding is not relevant to an objective analysis of the statute of limitations. Clearly, Plaintiff should have known that the sands of the hour glass began running in June 2010 and expired in June 2013. Thus, the statute of limitations expired eighteen months ago.


In the Iconic *Star Wars* movies, the heroic Jedi are able to suspend reality through the use of Jedi Mind Tricks. With a simple wave of his hand, Jedi Master Obi-Wan Kenobi can make others say, do, and believe whatever he pleases. Plaintiff seeks to employ a similar act of obfuscation, vainly hoping to convince the Court of an alternative reality belied by the facts and its own verified pleadings. Plaintiff, however, is not a Jedi, and this proceeding does not take place in a galaxy far, far away. Rather, in this real world setting, the Court is guided by objective facts and not illusion. Because Plaintiff does not have any viable claim against Shoun or any of the other Defendants, restoration of this case to the docket would be futile. Consequently, Plaintiff's Motion to Restore this case to the docket is moot. For these reasons, Defendant Shoun respectfully requests that this Court deny Plaintiff's Motion to Restore.

**SIGNATURE BLOCK ON NEXT PAGE**

Respectfully submitted,

Charleston, South Carolina

Dated: December 4, 2014



---

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ATTORNEY FOR DEFENDANT SHOUN

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1396

CERTIFICATE OF SERVICE

2013 DEC -14 3:04  
FILED  
JULIE A. BRISTOL  
CLERK OF COURT

I hereby certify that a copy of **DEFENDANT SHOUN'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO RESTORE** was served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed as shown below this 4th day of December, 2014:

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STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON )

CIVIL ACTION NO. 09-CP-10-7692

PERSONAL CARE, INC., )

Plaintiff, )

v. )

**ANSWER AND COUNTERCLAIM**

*(Jury Trial Demanded)*

HATTIE M. ASKEW d/b/a LOW )  
COUNTRY MEDICAL TRANSPORT, )  
f/k/a LOW COUNTRY MEDICAL )  
TRANSPORT, INC., )

Defendants. )

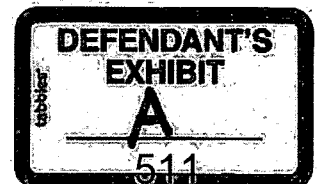
FILED  
2010 MAR 12 PM 4:23  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY

The Defendant, Hattie M. Askew d/b/a Low Country Medical Transport, f/k/a Low Country Medical Transport, Inc., answer the Complaint as follows:

1. The Defendant denies each and every allegation of the Complaint that is not expressly admitted, modified, or explained.
2. Defendant admits the allegations of paragraphs 1, 2, 3, 4, 5, 8, and 35.
3. Defendant denies the allegations of paragraphs 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 36.
4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 6, 7, 9, 12, and 21, and therefore, denies those allegations.
5. Defendant admits the allegations of paragraph 10 to the extent Defendant hired two of Plaintiff's former employees. The remaining allegations of paragraph 10 are expressly denied.

**FOR A FIRST AFFIRMATIVE DEFENSE**  
**(Failure to State a Claim)**

5. Defendant realleges and incorporates its responses above as if repeated verbatim.
6. The Complaint fails to state a claim upon which relief can be based and the Defendant is entitled to judgment as a matter of law pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.



**FOR A SECOND AFFIRMATIVE DEFENSE**  
**(Punitive Damages)**

7. Defendant realleges and incorporates its responses above as if repeated verbatim.
8. Defendant would show, upon information and belief, that the Plaintiff's claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the United States Constitution.

**FOR A THIRD AFFIRMATIVE DEFENSE**  
**(Improper Venue)**

9. Venue is improper in Charleston County and must be transferred to Hampton County, where the Defendant is a citizen and resident, and maintains an office and agent for the transaction of business.

**FIRST COUNTERCLAIM**  
**(Defamation)**

10. Defendant realleges and incorporates its responses above as if repeated verbatim.
11. On or about September 14, 2009, a lawyer representing Plaintiff, 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."
12. Also receiving the letter, by way of carbon copy, were four individuals and Low Country Dialysis. Low Country Dialysis is a Beaufort County based dialysis center that often employs the use of private medical transportation services, which Plaintiff and Defendant both provide.
13. The letter falsely accused Defendant of utilizing "personal health information taken from Personal Care's files."
14. The letter falsely accused Defendant of "engaging in the tortuous interference of Personal Care's business relationships. . . ."


15. The letter also falsely accused Defendant and asserted that “[u]nwarranted and baseless reclassifications [of wheelchair patients], which result in significantly higher costs, constitute insurance fraud.”

16. The above described statements about Defendant were false and published by Plaintiff to Low Country Dialysis.

17. These false and malicious statements made by Plaintiff are defamatory per se and constitute libel and slander. These false statements damaged Defendant’s professional and personal reputation as a provider of medical transportation. Because of Plaintiff’s conscious disregard for Defendant’s rights, Defendant is entitled to actual and punitive damages.

PETERS, MURDAUGH, PARKER, ELTZROTH  
& DETRICK, P.A.

BY:



John E. Parker

William F. Barnes, III

101 Mulberry Street East

Post Office Box 457

Hampton, SC 29924

(803) 943-2111

ATTORNEYS FOR DEFENDANT

March 8, 2010  
Hampton, South Carolina

CERTIFICATE OF SERVICE

This is to certify that I, *Sareeta M. DuBois*, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Defendant, have this date forwarded, via U.S. first class mail with prepaid postage, a true and correct copy of *Defendant's Answer and Counterclaim* to:

Jerry N. Theos, Esquire  
URICCHIO, HOWE, KRELL  
JACOBSON, TOPOREK,  
THEOS & KEITH, P.A.  
17 1/2 Broad Street  
Charleston, South Carolina 29401

Cheryl D. Shoun, Esquire  
TAYLOR, SHOUN, BOWLEY  
& BYRD, LLC  
39 Broad Street, Suite 103  
Charleston, South Carolina 29401

2010 MAR 12 PM 4:26  
JULIE J. ARMSTRONG  
CLERK OF COURT

FILED

PETERS, MURDAUGH, PARKER, ELTZROTH  
& DETRICK, P.A.

BY: *Sareeta M. DuBois*  
Sareeta M. DuBois

March 9<sup>th</sup>, 2010  
Hampton, South Carolina

LAW OFFICES  
**PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK**

JOHN E. PARKER  
CLYDE A. ELTZROTH, JR.  
J. PAUL DETRICK  
DANIEL E. HENDERSON  
MARK D. BALL  
RANDOLPH MURDAUGH IV  
RONNIE L. CROSBY  
R. ALEXANDER MURDAUGH  
BERT G. UTSEY, III  
RANDOLPH MURDAUGH III  
GRAHAME E. HOLMES  
LEE D. COPE  
MATTHEW V. CREECH  
M. LEAGUE BOYLSTON

PROFESSIONAL ASSOCIATION  
101 MULBERRY STREET EAST  
P.O. BOX 457  
HAMPTON, SOUTH CAROLINA  
29924-0457

RANDOLPH MURDAUGH, SR.  
(1887-1940)  
RANDOLPH MURDAUGH, JR.  
(1915-1998)  
J. ROBERT PETERS, JR.  
(1927-2008)

TELEPHONE  
(803) 943-2111  
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(866) 943-2113  
FACSIMILE  
(803) 943-3943  
(803) 914-2014

Extension: 259  
E-mail: [SDuBois@pmped.com](mailto:SDuBois@pmped.com)

March 9, 2010

The Honorable Julie J. Armstrong  
Charleston County Clerk of Court  
100 Broad Street, Suite 106  
Charleston, South Carolina 29401-2258

**Re: *Personal Care, Inc. vs. Hattie M. Askew, et al.***  
**Case Number: 09-CP-10-7692**

Dear Ms. Armstrong:

You will find enclosed the original and <sup>two</sup> ~~two~~ (1) copies of the Defendant's Answer and Counterclaim and Motion to Change Venue with regard to the above-referenced matter. A Motion Cover Sheet and this firm's check in the amount of \$25.00 are also enclosed.

Once these documents have been filed, please return the clocked copies in the self-addressed stamped envelope provided.

By copy of this letter to counsel for the Plaintiff, I am hereby providing them with copies of the same.

Sincerely,

  
Sareeta M. DuBois  
Office of William F. Barnes, III, Esquire

/smd

Enclosures as stated

Cc: Jerry N. Theos, Esquire (w/encls.)  
Cheryl D. Shoun, Esquire (w/encls.)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Personal Care, Inc.,

Plaintiff,

v.

Jerry N. Theos, et al.

Defendants.

IN THE COURT OF COMMON PLEAS

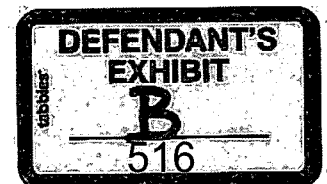
NINTH JUDICIAL CIRCUIT

Case No.: 2013-CP-10-1396

AFFIDAVIT OF CHERYL D. SHOUN

PERSONALLY APPEARED before me, the undersigned, Cheryl D. Shoun, who first being duly sworn states and deposes as follows:

1. That she is over the age of eighteen years, is otherwise competent to make this Affidavit, submits this Affidavit with information based on her personal knowledge, and if called as a witness, could and would testify to the truth of the facts stated herein;
2. That she was one of the attorneys representing Personal Care in the action titled *Personal Care, Inc. v. Hattie M. Askew*;
3. As one of the attorneys for Personal Care she did, on or about March 19, 2010, advise Bernie Cignavitch, a principal of Personal Care, that an Answer and Counterclaim had been served in this matter, as evidenced by the email attached hereto as Exhibit 1 and made a part hereof by reference;
4. That, pursuant to the request of Mr. Cignavitch, evidenced in his email found in Exhibit 1 hereto, she called and spoke with Mr. Cignavitch, during which call she reiterated the receipt of the Answer on behalf of Hattie M. Askew, and advised that



a copy of said Answer and Counterclaim would be sent to Mr. Cignavitch in the immediate future;

5. That on or about March 19, 2010, she caused to be forwarded to Mr. Cignavitch a copy of the Answer and Counterclaim entered against Personal Care by Hattie M. Askew, as evidenced by the emails found in Exhibit 1 hereto;
6. On or about March 19, 2010, the undersigned also requested of Personal Care the contact information for its insurance carrier, which would allow counsel to submit the Counterclaim to Personal Care's carrier, requesting a defense and indemnification therefor;
7. That on or about March 26, 2010, she once again communicated with Mr. Cignavitch, as the principal of Personal Care, concerning the Counterclaim filed against it, as evidenced by Exhibit 2 attached hereto and made a part hereof by reference. Further, that in that communication, she advised Mr. Cignavitch that she was going to request an extension of time in which to respond to said Counterclaim, and she attached a copy of her letter to opposing counsel, requesting such extension of time. Finally, in that communication to Mr. Cignavitch, she emphasized the date a response would be required to the Counterclaim;
8. On or about April 6, 2010, Ms. Shoun notified Bernie Cignavitch that she was in receipt of the letter, signed by opposing counsel, confirming an extension of time in which to enter a Reply to the Counterclaim. She further requested that Mr. Cignavitch advise when he and Ms. Shoun could discuss the allegations of the Counterclaim so to formulate the Reply thereto, all as evidenced by Exhibit 3 attached hereto and made a part hereof by reference;

9. Further, on April 6, 2010, Ms. Shoun again requested Personal Care's insurance information so as to allow for the submission of the Counterclaim, together with a request for defense and indemnity, to Personal Care's insurance carrier, as evidenced by Exhibit 4 attached hereto and made a part hereof by reference;
10. That prior to May 5, 2010, counsel for Personal Care spoke with a representative of that entity, confirming that the information previously provided to counsel concerning Hattie M. Askew, and the business practices in which she had allegedly engaged were true and accurate and further, that the contents of the letter dated September 14, 2009, and sent on behalf of Personal Care to Low Country Medical Transport was correct and accurate;
11. That prior to May 7, 2010, a draft of the Reply to the Counterclaim filed against Personal Care was forwarded to that entity for review and consideration;
12. That on or about June 7, 2010, a copy of the filed Reply to the Counterclaim was provided to Personal Care, as evidenced by Exhibit 5 attached hereto and made a part hereof by reference;
13. That on or about June 7, 2010, a copy of the Second Request for Production served on behalf of Personal Care upon the Defendant Hattie M. Askew was forwarded to Mr. Cignavitch and that the first item included in the Second Request for Production sought from the Defendant the following, as evidenced by Exhibit 6 attached hereto and made a part hereof by reference:

Each and every document, which supports the Defendants claim that it was damaged as a result of the letter dated September 14, 2009, as alleged in the Defendant's Counterclaim. This shall include, without limitation, any and all letters or memoranda or other written documents pursuant to which any business contracts were cancelled or otherwise modified as a result of the referenced letter; written documents

pursuant to which the Defendant was advised that any third party changed its position with the Defendant, either personally or professionally, as a result of the referenced letter, and all other documents which support Defendants claim for damages.

14. That Personal Care was and had been made aware on several occasions, of the Counterclaim filed against it by Hattie M. Askew; that in that Counterclaim Ms. Askew was seeking damages from Personal Care, and that counsel for Personal Care sought to secure documentation of the damages allegedly suffered by Hattie M. Askew as a result of the letter written on behalf of Personal Care on September 19, 2009;

15. That prior to the expiration of June 2010, Personal Care was billed for attorneys' fees incurred in defending the Counterclaim, as evidenced by Exhibit 7 attached hereto and made a part hereof by reference, and that, upon information and belief, Personal Care paid these charges in full by the end of March 2011.

AFFIANT FURTHER SAYETH NOT.

Cheryl D. Shoun  
Cheryl D. Shoun

Sworn to and subscribed before me

This 3<sup>rd</sup> day of December, 2014.

Marian Parish  
Notary Public for South Carolina

My Commission expires: 3/8/22

**Janet Smith**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]  
**Sent:** Friday, March 19, 2010 4:00 PM  
**To:** Janet Smith  
**Subject:** Fw: Personal Care vs. Askew ( could u please call me 568 0236)

~~Janet if you're still there could you e-mail the Answer and Counterclaim to Bernie? If not I'll do it Monday.~~

Have a great weekend.

----- Original Message -----

**From:** [bcignavitch@comcast.net](mailto:bcignavitch@comcast.net)  
**To:** Cheryl Shoun  
**Sent:** Friday, March 19, 2010 2:06 PM  
**Subject:** Re: Personal Care vs. Askew ( could u please call me 568 0236)

----- Original Message -----

**From:** "Cheryl Shoun" <[cherylshoun@bellsouth.net](mailto:cherylshoun@bellsouth.net)>  
**To:** [bcignavitch@comcast.net](mailto:bcignavitch@comcast.net)  
**Cc:** "Jerry" <[Jerry@uricchio.com](mailto:Jerry@uricchio.com)>  
**Sent:** Friday, March 19, 2010 1:00:00 PM GMT -05:00 US/Canada Eastern  
**Subject:** Personal Care vs. Askew

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 9. 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.

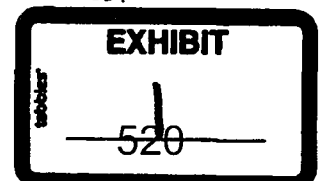
Thanks. I look forward to hearing from you.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0054



3/19/2010

**Janet Smith**

---

**From:** Janet Smith  
**Sent:** Friday, March 19, 2010 4:19 PM  
**To:** bcignavitch@comcast.net  
**Cc:** Cheryl Shoun; Janet Smith  
**Subject:** Answer and Counterclaim  
**Attachments:** 4481\_001.pdf

Mr. Cignavitch: Attached please find a filed copy of the Answer and Counterclaim. Janet

---

**From:** Copier  
**Sent:** Friday, March 19, 2010 4:26 PM  
**To:** Janet Smith  
**Subject:** Attached Image

THEOS 0055

Janet Smith

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]  
**Sent:** Friday, March 26, 2010 10:23 AM  
**To:** bcignavitch@comcast.net  
**Cc:** Jerry Theos; Janet Smith  
**Subject:** Personal Care v. Askew  
**Attachments:** personal care extension ltr..tif

Bernie:

I am so sorry that I have not had the opportunity to call and discuss the pleadings sent to you last week. I am going to be out of town next week, and as usual, everything seems to fall on my desk when that happens.

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 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 will be back in my office on April 6, 2010.

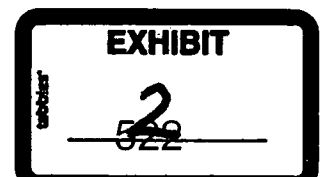
I sincerely appreciate your patience in this matter, and look forward to talking with you regarding the Counterclaim. I hope all else is well with you.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0057



3/26/2010

TAYLOR, SHOUN, BOWLEY & BYRD, LLC

ATTORNEYS AT LAW

39 BROAD STREET, SUITE 101  
CHARLESTON, SOUTH CAROLINA 29401

PHONE: (843) 723-4020

FAX: (843) 723-4021

March 26, 2010

John E. Parker, Esquire  
William F. Barnes, III  
101 Mulberry Street East  
P. O. Box 457  
Hampton, S.C. 29924

RE: Personal Care, Inc. vs. Hattie Askew, et al

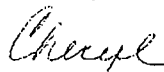
Gentlemen:

I am in receipt of the Answer and Counterclaim filed by you on behalf of the Defendant, and served, via United States Mail on March 9, 2010, making a Reply due on or before April 13, 2010.

I would appreciate it if you would kindly grant an extension of time, allowing an additional thirty (30) days in which we may Reply or otherwise plead in response to the Counterclaim.

If you will agree to this extension, please sign the enclosed copy of this letter and return it to me in the envelope provided for your convenience.

Very truly yours,



Cheryl D. Shoun

We consent:

CDS/get

Enc.

CC: Jerry N. Theos, Esquire  
Personal Care, Inc.

DONNA K. TAYLOR

CHEYL D. SHOUN

D. LYNN BOWLEY

CATHERINE D. BYRD

THEOS 0058

**Jerry Theos**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]  
**Sent:** Tuesday, April 06, 2010 12:50 PM  
**To:** bcignavitch@comcast.net  
**Cc:** Jerry Theos; Janet Smith  
**Subject:** Personal Care v. Hattie Askew

Bernie: Hey. I am back in my office today, and have received confirmation of our thirty 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.

Thanks.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0059



4/6/2010

**Jerry Theos**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]

**Sent:** Tuesday, April 06, 2010 12:54 PM

**To:** bcignavitch@comcast.net

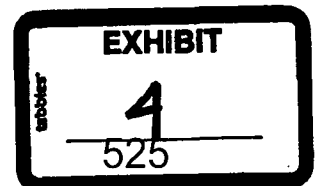
**Cc:** Jerry Theos; Janet Smith

**Bernie:** I forgot to mention this again -- please get your insurance information to me as quickly as you can. Thanks.

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0060



4/6/2010

**Kerr, Michelle T.**

---

**From:** Kerr, Michelle T.  
**Sent:** Monday, June 07, 2010 10:20 AM  
**To:** 'bcignavitch@comcast.net'  
**Cc:** Shoun, Cheryl D.; 'jerry@uricchio.com'; 'janet@uricchio.com'  
**Subject:** Personal Care, Inc. v. Hattie M. Askew = Attached filed Reply for your review  
**Attachments:** 576565\_1.PDF

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.

Thanks,  
Michelle

**Michelle T. Kerr**

*Assistant to Cherie W. Blackburn,  
Paul A. Dominick, Cheryl D. Shoun  
and Marilyn Trevino*

**NEXSEN PRUET**

205 King Street, Suite 400  
Charleston, South Carolina 29401  
P.O. Box 486 (29402)  
DD: 843.720.1780, F: 843.720.1777  
[mkerr@nexsenpruet.com](mailto:mkerr@nexsenpruet.com)  
[www.nexsenpruet.com](http://www.nexsenpruet.com)



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6/7/2010



#3226-47700  
Shoun 00666  
526

**Spain, Karen E.**

---

**From:** Shoun, Cheryl D. <CShoun@nexsenpruet.com>  
**Sent:** Wednesday, December 03, 2014 8:39 AM  
**To:** Spain, Karen E.  
**Subject:** FW: Personal Care, Inc. v. Hattie M. Askew = Attached letter and discovery for your review  
**Attachments:** 20100607120914397.pdf

---

**From:** Kerr, Michelle T.  
**Sent:** Monday, June 07, 2010 12:15 PM  
**To:** 'bcignavitch@comcast.net'  
**Cc:** Shoun, Cheryl D.; 'jerry@uricchio.com'; 'janet@uricchio.com'  
**Subject:** Personal Care, Inc. v. Hattie M. Askew = Attached letter and discovery for your review

Bernie:

Attached please find a copy of discovery Cheryl served defense counsel with today. Should you have any questions, please let us know.

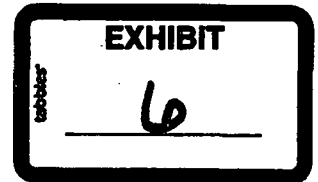
Thanks,  
Michelle

**Michelle T. Kerr**

*Assistant to Cherie W. Blackburn,  
Paul A. Dominick, Cheryl D. Shoun  
and Marilyn Trevino*

**NEXSEN | PRUET**

205 King Street, Suite 400  
Charleston, South Carolina 29401  
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[www.nexsenpruet.com](http://www.nexsenpruet.com)



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# NEXSEN | PRUET

**Cheryl D. Shoun**  
Special Counsel  
Admitted in SC

June 7, 2010

John E. Parker, Esquire  
William F. Barnes, III, Esquire  
101 Mulberry Street East  
P. O. Box 457  
Hampton, SC 29924-0457

Re: Personal Care, Inc. vs. Hattie Askew, d/b/a Low Country Medical  
Transport, f/k/a Low Country Medical Transport, Inc.  
Civil Action No.: 2009-CP-10-7692

Gentlemen:

Enclosed for service upon you please find Plaintiff's Second Set of Interrogatories to the Defendant and Plaintiff's Second Request for Production of Documents to the Defendant.

Should you have any questions or concerns, please do not hesitate to contact me.

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Very truly yours,



Cheryl D. Shoun  
CDS/mtk  
Enclosures

cc: Jerry N. Theos, Esq. (w/enclosures)

205 King Street  
Suite 400 (29401)  
PO Box 486  
Charleston, SC 29402  
www.nexsenpruet.com

T 843.720.1762  
F 843.414.8236  
E CShoun@nexsenpruet.com  
Nexsen Pruet, LLC  
Attorneys and Counselors at Law

NPCHAR1:576579.1-LT-(CSHOUN) 047020-00001

John E. Parker, Esquire  
William F. Barnes, III, Esquire  
June 7, 2010  
Page 2

bcc: Bernie Cignavitch (w/enclosures via e-mail)

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

PERSONAL CARE, INC.,

Plaintiff,

vs.

HATTIE M. ASKEW d/b/a LOW COUNTRY  
MEDICAL TRANSPORT, f/k/a LOW  
COUNTRY MEDICAL TRANSPORT, INC.,

Defendant.

Case No. 2009-CP-10-7692

**PLAINTIFF'S SECOND REQUEST FOR  
PRODUCTION  
OF DOCUMENTS TO THE DEFENDANT**

The Plaintiff, by and through its undersigned counsel, and pursuant to Rule 34 of the SCRCPP, and subject to the Definitions and Instructions set forth in Plaintiff's First Request for Production of Documents to the Defendant, requests that the Defendants hereinabove named, answer under oath the following Requests for Production hereinafter set forth within thirty (30) days after service hereof, producing, permitting the inspection, copying and/or photographing of the documents and things hereinafter specified:

1. Each and every document, which supports the Defendants claim that it was damaged as a result of the letter dated September 14, 2009, as alleged in the Defendant's Counterclaim. This shall include, without limitation, any and all letters or memoranda or other written documents pursuant to which any business contracts were cancelled or otherwise modified as a result of the referenced letter; written documents pursuant to which the Defendant was advised that any third party changed its position with the Defendant, either personally or professionally, as a result of the referenced letter; and, all other documents which support Defendants claim for damages.

2. A copy of all documents which set forth any marketing strategy followed, or to be followed by the Defendant, within the last three years. This shall include, without limitation, any internal memoranda.

3. Any and all documents that relate, in any fashion, to efforts undertaken or to be undertaken by or on behalf of the Defendant in targeting the clients of the Plaintiff. This shall include all e-mails, internal memoranda, notes and other documents. This shall also include notices of any meetings with such potential clients, activities, and/or entertainment scheduled to include such potential clients, bills, invoices or requests for reimbursement for any monies spent on behalf of the Defendant to make contact with such potential clients.

4. Any and all documents which establish the procedure to be followed by the Defendant, its agents, servants and employees, relative to protected health information. This shall include, without limitation, any relative excerpts from manuals, handbooks and other written policies.

5. Copies of any and all documents provided to the Defendant by any former employees of the Plaintiff.

6. Any and all documents created by any former employees of the Plaintiff for the use of the Defendant.

7. Copies of all "right to choose" letters directed to any clients or former clients of the Defendant by the Plaintiff. This shall include all such letters, those sent to potential clients as well as those returned by potential clients.

URICCHIO, HOWE, KRELL, JACOBSON  
TOPOREK, THEOS & KEITH, P.A.

*Cheryl D. Shoun for*

Jerry N. Theos, Esquire (Bar No. 5518)  
17 ½ Broad Street  
Charleston, S. C. 29401  
Phone (843) 723-7491  
Fax (843) 577-4179

*Cheryl D. Shoun*

Cheryl D. Shoun, Esquire (Bar No. 5092)  
NEXSEN PRUET, LLC  
205 King Street, Suite 400 (29401)  
P. O. Box 486  
Charleston, S. C. 29402  
Phone (843) 720.1762


ATTORNEYS FOR THE PLAINTIFF

June 7, 2010

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing **PLAINTIFF'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS TO THE DEFENDANT** has been served upon the following counsel of record either by facsimile, e-mail and/or by U. S. Mail, postage pre-paid, to the following addresses as shown below this 7<sup>th</sup> day of June, 2010:

John E. Parker William F. Barnes, III Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A. 101 Mulberry Street East P.O. Box 457 Hampton, SC 29924 Phone: 803.943.2111 Fax: 803.943.3943  <i>Counsel for Defendant</i>	Jerry N. Theos Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A. 17 ½ Broad Street Charleston, SC 29492 Phone: 843.723.7491 Fax: 843.577.4179  <i>Counsel for Plaintiff</i>
--	---

  
NEXSEN PRUET, LLC  
205 King Street, Suite 400 (29401)  
P.O. Box 486  
Charleston, South Carolina 29402  
Telephone: 843.577.9440

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

PERSONAL CARE, INC.,

Plaintiff,

vs.

HATTIE M. ASKEW d/b/a LOW COUNTRY  
MEDICAL TRANSPORT, INC., f/k/a LOW  
COUNTRY MEDICAL TRANSPORT, INC.

IN THE COURT OF COMMON PLEAS

Case No. 2009-CP-10-7692

**PLAINTIFF'S SECOND SET OF  
INTERROGATORIES  
TO THE DEFENDANT**

The Plaintiff, by and through its undersigned counsel, and pursuant to Rule 33 of the SCRCPC, and subject to the Definitions and Directions set forth in Plaintiff's First Set of Interrogatories to the Defendants, hereby requires the Defendant to respond to the following Interrogatories:

1. Set forth an itemized list of all damages claimed to have been sustained by the Defendant.
2. As to each element of damages set forth in response to Number One above, provide the following:
  - a. if the alleged damage is to the Defendants' professional reputation or personal reputation;
  - b. the exact nature of the damage;
  - c. any and all documents which support Defendants claim as to each damage.
3. Any and all actions of the Plaintiff which constitute slander, as set forth in Defendant's Counterclaim.
4. As to each individual and/or entity previously serviced by the Plaintiff, with whom the

Defendants now have any business relationship, provide the name and address of each.

URICCHIO, HOWE, KRELL, JACOBSON  
TOPOREK, THEOS & KEITH, P.A.

*Cheryl D. Shoun for*

Jerry N. Theos, Esquire (Bar No. 5518)  
17 ½ Broad Street  
Charleston, S. C. 29401  
Phone (843) 723-7491  
Fax (843) 577-4179

*Cheryl D. Shoun*

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NEXSEN PRUET, LLC  
205 King Street, Suite 400 (29401)  
P. O. Box 486  
Charleston, S. C. 29402  
Phone (843) 720.1762

ATTORNEYS FOR THE PLAINTIFF

June 7, 2010

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing **PLAINTIFF'S SECOND SET OF INTERROGATORIES TO THE DEFENDANT** has been served upon the following counsel of record either by facsimile, e-mail and/or by U. S. Mail, postage pre-paid, to the following addresses as shown below this 7<sup>th</sup> day of June, 2010:

<p>John E. Parker William F. Barnes, III Peters, Murdaugh, Parker, Eltzroth &amp; Detrick, P.A. 101 Mulberry Street East P.O. Box 457 Hampton, SC 29924 Phone: 803.943.2111 Fax: 803.943.3943</p> <p><i>Counsel for Defendant</i></p>	<p>Jerry N. Theos Uriechio, Howe, Krell, Jacobson, Toporek, Theos &amp; Keith, P.A. 17 ½ Broad Street Charleston, SC 29492 Phone: 843.723.7491 Fax: 843.577.4179</p> <p><i>Counsel for Plaintiff</i></p>
---	--



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205 King Street, Suite 400 (29401)  
P.O. Box 486  
Charleston, South Carolina 29402  
Telephone: 843.577.9440

NEXSEN | PRUET

June 2, 2010.

Invoice No. 53368064

Matter: 047020-00001

PERSONAL CARE, INC.  
C/O JERRY N. THEOS, ESQUIRE  
URICCHIO, HOWE, KRELL, JACOBSON, TOPOREK, THEOS & KEITH, PA  
17 1/2 BROAD STREET  
CHARLESTON, SC 29401

Re: PERSONAL CARE, INC. - VS. HATTIE M. ASKEW D/B/A  
LOW COUNTRY MEDICAL TRANSPORT, F/K/A LOW COUNTRY  
MEDICAL TRANSPORT, INC.

Enclosed please find our statement for the period ending May 18, 2010. We trust that you will find this statement to be in order and will place it in line for payment.

If you have any questions, please do not hesitate to contact us. You can also reach our finance department at 803-253-8242.

Very truly yours,

Nexsen Pruet, LLC

PLEASE SEND REMITTANCE TO: NEXSEN PRUET, LLC  
Attorneys and Counselors at Law  
Post Office Drawer 2426  
Columbia SC 29202  
ID# 047020-00001

205 KING STREET, SUITE 400, CHARLESTON, SC (29401) ■ POST OFFICE BOX 488, CHARLESTON, SC (29402)  
843-577-9440 ■ FAX 843-720-1777  
www.NexsenPruet.com

OFFICES ALSO IN:

CHARLOTTE,  
NC

COLUMBIA,  
SC

GREENSBORO,  
NC

GREENVILLE,  
SC

HILTON HEAD,  
SC

MYRTLE BEACH,  
SC

RALEIGH,  
NC



#3226-47700  
Shoun 00352

538

NEXSEN | PRUET

IRS # [REDACTED]

PERSONAL CARE, INC.  
C/O JERRY N. THEOS, ESQUIRE  
URICCHIO, HOWE, KRELL, JACOBSON,  
TOPOREK, THEOS & KEITH, PA  
17 1/2 BROAD STREET  
CHARLESTON, SC 29401

Remit Address:  
Post Office Drawer 2426  
Columbia, SC 29202

Matter No. 047020-00001  
Invoice No. 53368064  
Invoice Date June 2, 2010  
Attorney CD SHOUN

Re: PERSONAL CARE, INC. - VS. HATTIE M. ASKEW D/B/A  
LOW COUNTRY MEDICAL TRANSPORT, F/K/A LOW COUNTRY  
MEDICAL TRANSPORT, INC.

*For Professional Services Rendered Through May 18, 2010.*  
**PLEASE SEE REVERSE FOR DETAILS.**

Current Charges .....\$1,444.88  
New Balance .....\$1,444.88

ALL BILLS ARE DUE AND PAYABLE IN FULL UPON RECEIPT OF THIS INVOICE. A LATE PAYMENT CHARGE  
OF 1 1/2% PER MONTH WILL BE ADDED TO ANY BALANCE REMAINING UNPAID 30 DAYS AFTER THE  
BILLING DATE.

OFFICES IN:

CHARLESTON, SC CHARLOTTE, NC COLUMBIA, SC GREENSBORO, NC GREENVILLE, SC HILTON HEAD, SC MYRTLE BEACH, SC RALEIGH, NC

#3226-47700  
Shoun 00353  
539

NEXSEN | PRUET

Invoice Date: 6/2/10

Invoice No. 53368064

Matter No. 047020-00001

FEEES

Date	Timekeeper	Description	Hours	Amount
04/27/10	CDS	PERSONAL CARE - CONFERENCE WITH MR. CIGNAVITCH REGARDING MEETING TO DISCUSS COUNTERCLAIM AND PREPARATION OF REPLY THERETO; DISCUSS DEFENDANT'S MOTION TO CHANGE VENUE.	0.20	80.00
05/03/10	CDS	REVIEW COUNTERCLAIM; CONDUCT RESEARCH AS TO ELEMENTS OF DEFAMATION AND AFFIRMATIVE DEFENSES THERETO; FORWARD TO MR. THEOS FOR REVIEW AND COMMENT. CONFERENCE WITH MR. THEOS REGARDING MERIT OF DEFAMATION CLAIM. LETTER TO DEFENDANT'S COUNSEL REQUESTING DEFENDANT'S RESPONSES TO DISCOVERY WHICH ARE OVERDUE. REVIEW FILE NOTES AND BEGIN DRAFTING ADDITIONAL INTERROGATORIES AND SECOND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT.	2.60	1,040.00
05/04/10	CDS	FILE AND SERVE REPLY TO COUNTERCLAIM.	0.20	80.00
05/05/10	CDS	REVIEW FILE NOTES; PREPARE ADDITIONAL INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS; FORWARD TO MR. THEOS FOR REVIEW AND COMMENT.	0.60	240.00
<b>Total Fees:</b>				<b>\$1,440.00</b>

EXPENSES

Date	Description	Amount
05/04/10	COPIES	2.00
05/05/10	COURIER SERVICES	2.00
05/05/10	POSTAGE	0.88
<b>Total Expenses:</b>		<b>\$4.88</b>

OFFICES IN:

CHARLESTON, SC    CHARLOTTE, NC    COLUMBIA, SC    GREENSBORO, NC    GREENVILLE, SC    HILTON HEAD, SC    MYRTLE BEACH, SC    RALEIGH, NC

#3226-47700  
Shoun 00354  
540

NEXSEN | PRUET

TIME SUMMARY RECAP

Timekeeper	Title	Hours	Rate	Amount
CD SHOUN	COUNSEL	3.60	\$400.00	\$1,440.00
Total:		3.60		\$1,440.00

OFFICES IN:

CHARLESTON, SC    CHARLOTTE, NC    COLUMBIA, SC    GREENSBORO, NC    GREENVILLE, SC    HILTON HEAD, SC    MYRTLE BEACH, SC    RALEIGH, NC

#3226-47700  
Shoun 00355  
541

NEXSEN | PRUET

IRS # [REDACTED]

PERSONAL CARE, INC.  
C/O JERRY N. THEOS, ESQUIRE  
URICCHIO, HOWE, KRELL, JACOBSON,  
TOPOREK, THEOS & KEITH, PA  
17 1/2 BROAD STREET  
CHARLESTON, SC 29401

Remit Address:  
Post Office Drawer 2426  
Columbia, SC 29202

Matter No. 047020-00001  
Invoice No. 53368064  
Invoice Date June 2, 2010  
Attorney CD SHOUN

Re: PERSONAL CARE, INC. - VS. HATTIE M. ASKEW D/B/A  
LOW COUNTRY MEDICAL TRANSPORT, F/K/A LOW COUNTRY  
MEDICAL TRANSPORT, INC.

*For Professional Services Rendered Through May 18, 2010*  
**PLEASE SEE REVERSE FOR DETAILS**

Current Charges .....	\$1,444.88
New Balance .....	\$1,444.88

**REMITTANCE**

ALL BILLS ARE DUE AND PAYABLE IN FULL UPON RECEIPT OF THIS INVOICE. A LATE PAYMENT CHARGE OF 1 1/2% PER MONTH WILL BE ADDED TO ANY BALANCE REMAINING UNPAID 30 DAYS AFTER THE BILLING DATE.

OFFICES IN:

CHARLESTON, SC CHARLOTTE, NC COLUMBIA, SC GREENSBORO, NC GREENVILLE, SC HILTON HEAD, SC MYRTLE BEACH, SC RALEIGH, NC

#3226-47700  
Shoun 00356

542

NEXSEN PRUET

IRS # [REDACTED]

PERSONAL CARE, INC.  
C/O JERRY N. THEOS, ESQUIRE  
URICCHIO, HOWE, KRELL, JACOBSON,  
TOPOREK, THEOS & KEITH, PA  
17 1/2 BROAD STREET  
CHARLESTON, SC 29401

Remit Address:  
Post Office Drawer 2426  
Columbia, SC 29202

Matter No. 047020-00001  
Invoice No. 53368064  
Invoice Date June 2, 2010  
Attorney CD SHOUN

Re: PERSONAL CARE, INC. - VS. HATTIE M. ASKEW D/B/A  
LOW COUNTRY MEDICAL TRANSPORT, F/K/A LOW COUNTRY  
MEDICAL TRANSPORT, INC.

*For Professional Services Rendered Through May 18, 2010*  
**PLEASE SEE REVERSE FOR DETAILS**

Current Charges ..... \$1,444.88  
New Balance ..... \$1,444.88

**PAID**

**COPIED**

ALL BILLS ARE DUE AND PAYABLE IN FULL UPON RECEIPT OF THIS INVOICE. A LATE PAYMENT CHARGE OF 1 1/2% PER MONTH WILL BE ADDED TO ANY BALANCE REMAINING UNPAID 30 DAYS AFTER THE BILLING DATE.

OFFICES IN:  
CHARLESTON, SC CHARLOTTE, NC COLUMBIA, SC GREENSBORO, NC GREENVILLE, SC HILTON HEAD, SC MYRTLE BEACH, SC RALEIGH, NC

#3226-47700  
Shoun 00357

543

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
C/A NO. 2013-CP-10-1396


PERSONAL CARE, INC. )  
 )  
Plaintiff, )

vs. )

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

Defendant. )

**SUPPLEMENTAL MEMORANDUM  
IN OPPOSITION TO PLAINTIFF'S  
MOTION TO RESTORE PURSUANT  
TO PRIOR ORDER OF THE COURT  
AND SCRPC RULE 40(j)**

BY 

JULIE J. ARMSTRONG  
CLERK OF COURT

2014 DEC -5 PM 2:34

FILED

TO: THOMAS A. PENDARVIS, ESQUIRE, COUNSEL FOR THE PLAINTIFF:

Defendants Jerry N. Theos and Uricchio, Howe, Krell, Johnson, Toporek, Theos & Keith, PA (hereinafter collectively referred to as "Defendant Theos") hereby respectfully submit their Supplemental Memorandum in Opposition to Plaintiff's Motion to Restore Case.<sup>1</sup> Defendant Theos supplements its prior brief as the statute of limitations has run for the Plaintiff's claims and it would be futile for the Court to restore the case at this juncture.

Initially, Defendant Theos reasserts his threshold argument that Plaintiff's Motion to Restore violates the prior Order of Judge Dennis, which is the "law of the case." As the Plaintiff did not seek a rehearing or appeal the Consent Order, the Order that Plaintiff agreed to, Plaintiff is bound by the previous ruling/findings as the law of the case. As Plaintiff failed to comply with the express terms of Judge Dennis's Order itself, which required that the case be restored by August 28, 2014, Plaintiff's Motion to Restore should be denied based on Plaintiff's failure to even file a Motion to Restore the Case prior to the expiration of the Court-ordered deadline. However, based on the merits of Plaintiff's motion, the Court should similarly deny Plaintiff's Motion to Restore the Case for the following reasons:

<sup>1</sup> Defendant Theos contemporaneously files his Affidavit in Support of this Supplemental Memorandum, which by reference is incorporated and made a part hereof.

**A. The statute of limitations bars Personal Care's claims as a matter of law.**

In South Carolina law, the discovery rule applies to this action. According to the discovery rule, 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. Abba Equip., Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999). Under § 15-3-530 and the South Carolina common law, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of diligently acquired facts sufficient to put an injured person on notice of the existence of a cause of action against another. Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). The date on which discovery of the cause of action should have been made is an objective question. Joubert v. S.C. Dep't of Soc. Servs., 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). In Young v. South Carolina Department of Corrections, the Court of Appeals stated:

In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist. 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999); Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010) (Emphasis added).

Furthermore, “[t]he statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to ‘act with some promptness.’” Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).

Importantly, under South Carolina law, “[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). The law presumes at least nominal damages at that point. Livingston v. Sims, 197 S.C. 458, 15 S.E.2d 770 (1941) modified by Santee Portland Cement v. Daniel Internat'l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989) (discovery rule applies to contract statute of limitations). The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose. Livingston v. Sims, supra; Stephens v. Druffin, 327 S.C. 1, 488 S.E.2d 3 of 7 (S.C. 1997). The date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). In other words, whether the particular plaintiff actually knew he had a claim is not

the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

The seminal statute of limitations case for a legal malpractice claim in South Carolina is the Supreme Court Epstein v. Brown,<sup>2</sup> 363 S.C. 372 (2005) decision. In Epstein, the Supreme Court refused to adopt a “continuous representation” rule (that the statute of limitations is tolled while an attorney represents a client) by holding it would strictly comply with the discovery rule set forth by the Legislature. In his complaint, Dr. Epstein alleged Brown was negligent in numerous particulars, including: failing to conduct an adequate investigation, failing to advise Epstein to settle, failing to keep Epstein adequately informed during the pendency of the case, representing multiple defendants with conflicts of interest, forgetting to call expert witnesses, and adopting a defense which was contrary to Dr. Epstein’s medical opinion. Counsel for Dr. Epstein conceded that many of these allegations were within Dr. Epstein’s knowledge at the time of the jury’s verdict. The court found the majority of the damages alleged by Dr. Epstein stemmed from the adverse jury verdict and the damages to his reputation resulting from the publicity were all damages suffered at the time of the verdict. Accordingly, the trial court ruled, as a matter of law, Dr. Epstein either knew, or should have known, of a possible claim against Brown by the date of the adverse verdict, such that the statute of limitations began to run on that date.

Dr. Epstein contended that because Brown remained counsel of record during the pendency of the appeal, the statute of limitations did not begin to run until the Supreme Court denied certiorari in January 2001. Dr. Epstein urged the Supreme Court to adopt the “continuous representation” rule to toll the statute of limitations during the period an attorney continues to

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<sup>2</sup> As set forth in Epstein, South Carolina Code Ann. § 15-3-530 (Supp. 2003) provides a three year statute of limitations for legal malpractice lawsuits. Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. See Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996); S.C. Code Ann. § 15-3-535. See also Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997). The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed. Id. Under § 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. True v. Monteith, 327 S.C. 116, 489 S.E.2d 615, 617 (1997).

represent a client on the same matter which forms the basis of a legal malpractice action. The Supreme Court declined to adopt the continuous representation rule in the context of a legal malpractice claim and adhered, instead, to the discovery rule set forth by the Legislature. In the alternative, Dr. Epstein asserted that, even if the Supreme Court did not adopt the continuous representation rule, the statute of limitations should not be deemed to have begun to run until the date on which the Supreme Court denied certiorari because it was not until that date upon which he suffered "legal damages." The Supreme Court disagreed.

Importantly, in Epstein, in the context of a legal malpractice claim, the Supreme Court held that a client sustains an injury as soon as he or she is forced to incur costs. In other words, on the date of the adverse jury verdict, the plaintiffs became obligated to expend additional monies for the appellate process, including the continuing service of an attorney, the cost of the transcript, the cost of the appeal, and the inconvenience of the appeal. In finding that the plaintiffs' injury accrued on the date of the jury's verdict, plaintiff was held to have suffered harm when trial court's judgment was entered because plaintiff was then required to either pay the judgment or the costs of appeal, noting that a client who has suffered an adverse result because of a lawyer's negligence has both knowledge of the negligence and present damage.

The Supreme Court noted:

This Court has recognized that, under the discovery rule, the statute of limitations begins to run when a reasonable person of common knowledge and experience would be on notice that a claim against another party **might** exist. The fact that the injured party may not comprehend the full extent of the damage is immaterial. Dean v. Ruscon Corp., 321 S.C. 360, 363-364, 468 S.E.2d 645, 647 (1996). See also Wiggings v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994) (reasonable diligence means simply that injured party must act with some promptness where facts and circumstances of injury would put person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist; statute of limitations begins to run from this point and not when advice of counsel is sought or full-blown theory of recovery is developed); Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333 (1981) (Emphasis added).

Similarly, here, as a matter of law, this present action is barred by the statute of limitations. Pursuant to the allegations of the Complaint, paragraph 18 sets forth that, on September 19, 2009, Jerry Theos, as an agent of Personal Care, wrote a letter and a simultaneous copy to a third party concerning a statement about Askew that Askew later claimed was defamatory about her. Per the Complaint, the first act of alleged negligence that Personal Care

alleges as to Defendant Theos occurred on September 17, 2009. Paragraph 20 alleges that, on March 9, 2010, Askew filed an Answer and Counterclaim asserting a claim for defamation, i.e., that Askew counterclaimed against Personal Care based on the alleged defamatory statements in the letter published by Theos. Finally, paragraph 40 alleges Plaintiff was damaged by Defendant'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."

Here, as a matter of law, Plaintiff suffered damages "as soon as he or she is forced to incur costs" defending against Askew's counterclaim on March 9, 2010. Once Ms. Askew's counterclaim was filed, Plaintiff "became obligated to expend additional monies," including the "continuing service of an attorney" to defend against the counterclaim, the additional attorney's fees in responding and defending against the counterclaim, and to otherwise contend with "the inconvenience" of the counterclaim. As such, as a matter of law, Plaintiff suffered damage when the counterclaim was alleged i.e., the client suffered an adverse result (the counterclaim) because of the alleged lawyer's negligence and Personal Care had both "knowledge of the negligence and present damage" as a matter of law. In other words, South Carolina law recognizes at least "nominal damages" at such point and Personal Care's claim/causes of action – the elements of duty, breach and damages – were all present in March of 2010.

Accordingly, as "a cause of action accrues at the moment when the Plaintiff has a legal right to sue on it," and "the law at least presumes at least nominal damages at that point," here, as a matter of law, Personal Care's causes of action accrued and Plaintiff had a legal right to sue Defendant Theos on March 9, 2010. Accordingly, the statute of limitations bars Personal Care's claims as a matter of law.

**B. The statute of limitations bars Plaintiff's claims based on the uncontroverted evidence in the Record.**

Personal Care has conceded to the Court that it did not restore or move to restore its case pursuant to Judge Dennis's prior Order or SCRPC Rule 40(j) and that it does not receive the benefit of the tolling provision. However, for the first time at the hearing, Personal Care now asserts that the statute of limitations has not run because it did not suffer any actual injury until a mediation took place in 2012, at which time the underlying Defendant demanded money for her counterclaim.

Importantly, Plaintiff initially asserted in his verified Complaint – filed with the Court – that the gravamen of its claim was that Mr. Cignavitch was not advised of the counterclaim for a period of over two years. Further, Plaintiff’s sworn-to allegation (verified in his Complaint) that Mr. Cignavitch did not know that there had been a counterclaim filed against him for two years is (1) now acknowledged by Personal Care’s counsel to be a misrepresentation (where Pendarvis admitted to the Court: “and there’s just simply fact questions that are all throughout this. Certainly he knew about the counterclaim. Certainly he knew there were issues with the defense of the case, but he’s being told the whole time this is, you know, I have a meritorious claim.” (Transcript of Hearing, p. 22, l. 77 – 11), and (2) belied by evidence which is on the Record. Exhibits I, J and K to the response of the Defendant Shoun, including a copy of her email to Mr. Cignavitch dated April 6, 2010 (in which she attached the counterclaim) and Exhibit K (which is Shoun’s itemized statement of her time where she specifically has an entry for a meeting with her client to discuss the Askew counterclaim) specifically refute Personal Care’s original sworn allegations. Personal Care has now abandoned such assertion/misrepresentation to the Court. Similarly, Plaintiff now seeks to avoid his prior sworn verification to the Court that the statute of limitations would expire by seeking to split his cause of action and argue that the statute has not run because it did not suffer any “real” injury until the mediation took place in 2012.

Personal Care’s assertions are meritless for the following reasons:

**1. Personal Care was notified of the Counterclaim on March 19, 2010.**

The following emails (attached to the Affidavit of Jerry N. Theos) refute Mr. Cignavitch’s original sworn assertions to the Court:

1. Email 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 9<sup>th</sup>. May I fax to you? Will you provide the correct number? ... Thanks, I look forward to hearing from you.” Bates number: Theos 56.
2. Email from Smith to Cignavitch dated March 19, 2010: “Mr. Cignavitch, attached please find a filed copy of the Answer and Counterclaim.” Bates number Theos 54 - 55.
3. Email 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 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." Bates number Theos 57 - 58.

4. Email 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." Bates number Theos 59.

5. Email 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." Bates number Theos 61.

6. Email 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." Bates number Theos 62.

Based on these email communications alone, Theos and Shoun unequivocally and timely informed Mr. Cignavitch of the counterclaim asserted against Personal Care.

**2. Personal Care was advised to put its insurance carrier on notice in order to defend and indemnify Personal Care on March 19, 2010, but Personal Care chose not to notify its insurance carrier.**

Mr. Cignavitch was advised to put his insurance carrier on notice of the Askew counterclaim and Defendants Theos/Shoun asked Cignavitch to provide his insurance carrier information to them, but he refused to do so:

1. Email from Shoun to Cignavitch dated March 19, 2010: "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." Bates number Theos 54.

2. Email 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."

Mr. Cignavitch decided he did not want to put his insurance carrier on notice of the Askew counterclaim and expressly told Defendants Theos/Shoun that he did not want to put his insurance carrier on notice, despite being advised to do so. Instead, Mr. Cignavitch told Defendants Theos/Shoun to also defend against Ms. Askew's counterclaim allegations. Again, as

of March 19, 2010, Mr. Cignavitch was notified that Askew's counterclaim was seeking money damages and that he should put his insurance carrier on notice to defend and indemnify Personal Care. Mr. Cignavitch chose to have Defendants Theos and Shoun defend against the counterclaim, i.e., to incur additional attorney's fees and costs to defend against Askew's counterclaim, rather than put his insurance carrier on notice.

**3. Personal Care suffered "damages" when Personal Care incurred attorney's fees for Defendants Theos and Shoun to defend against the Askew counterclaim.**

Personal Care's Complaint alleges one of the elements of damage that it is seeking for its legal malpractice claims is Defendants Theos and Shoun's attorneys' fees incurred in defending the counterclaim (See Section A to this Memorandum); accordingly, based on Personal Care's own Complaint, the damages of Personal Care are alleged to have begun by March of 2010. Personal Care cannot attempt to split its legal malpractice cause of action so it arises only once its full blown damages are discovered or it subjectively recognizes the "full extent" of its damage, which is immaterial under South Carolina law.

**4. Based on the Verified Complaint S.C. Code Ann. § 15-36-100 (c)(1) Expert Affidavit verification, Personal Care admitted the statute of limitations ran, at the latest, on March 18, 2013.<sup>3</sup>**

Paragraph 97 of the Complaint, filed on March 8, 2013, takes advantage of the provision of South Carolina Code Section 15-36-100(b), (c)(1) which sets forth: "Pursuant to the code, 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 an expert licensed by the Supreme Court of the State of South Carolina." S.C. Code Ann. § 15-36-100 (c)(1), sets forth:

"The contemporaneous filing requirements of Subsection (b) does not apply to any case in which the period of limitations will expire or there is a good faith basis to believe it will expire on a claim stated in the complaint within 10 days of filing."

Accordingly, as a matter of law, Plaintiff verified for this Court that the statute of limitations would likely expire within 10 days of filing, on March 18, 2013. At the hearing, Your Honor recognized Plaintiff's prior verified admission and current disingenuousness in trying to undo his Verified Complaint:

---

<sup>3</sup> Plaintiff's Verified Complaint expert Affidavit verification is consistent with Pendarvis' March 7, 2013 email raising his concerns that the statute of limitations would run the following day, March 8, 2013.

The Court: Well, you filed your complaint that said you got – I want the 45 days to file my affidavit because the statute's getting ready to run. Now you coming into court saying the statute didn't run. Which am I supposed to believe? When you filed the paperwork with the Court erroneously saying, hey, the statue about to run, now you come into Court and say it hasn't run. Which is it? It's like you take whatever position suits you at the particular time.

Transcript of Hearing, p. 26, l. 1 – 13.

Simply put, Plaintiff verified for the Court in his sworn/verified Complaint that the statute of limitations would likely expire within 10 days and Plaintiff's counsel's arguments to the contrary, which amounts to Plaintiff taking whatever inconsistent position suits him at the time, should fall on deaf ears. Moreover, mere arguments of counsel should not trump Plaintiff's sworn-to admissions which were previously submitted to the Court.

#### Conclusion

For the reasons stated, Defendant Theos respectfully requests this Honorable Court deny Plaintiff's Motion to Restore.

Respectfully Submitted,

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: 

M. Dawes Cooke, Jr.

Phillip S. Ferderigos

288 Meeting Street, Suite 200

Charleston, SC 29401

P.O. Drawer H

Charleston, SC 29402

(843) 577-7700

December <sup>4<sup>th</sup></sup>, 2014  
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby that on the 11 day of December, 2014, I mailed a true and correct copy of the foregoing Supplemental Memorandum to counsel of Record with sufficient postage, addressed as follows:

PENDARVIS LAW OFFICES, P.C.  
Thomas A. Pendarvis, Esq.  
Catherine B. Kerney, Esq.  
500 Carteret Street, Suite A  
Beaufort, SC 29902-5066

GEORGE J. KEFALOS, PA  
Oana Dobrescu Johnson, Esq.  
46A State Street  
Charleston, SC 29401

K & L GATES, LLP  
Richard A. Farrier, Jr., Esq.  
134 Meeting Street, Suite 200  
Charleston, SC 29401

Barnwell Whaley Patterson & Helms, LLC

By: *Burley Mitter*  
Legal Assistant

FILED  
2014 DEC -5 PM 2:34  
JULIE J. ARMSTRONG  
CLERK OF COURT

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
C/A NO. 2013-CP-10-1396

PERSONAL CARE, INC. )  
 )  
Plaintiff, )

**AFFIDAVIT OF JERRY N. THEOS**

vs. )

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

Defendant. )

2014 DEC -5 PM 2:35  
JULIE J. ARMSTRONG  
CLERK OF COURT

BY 

**FILED**

The undersigned, Jerry N. Theos, having been duly sworn, hereby deposes and says that:

1. I am a partner of Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A.
2. I am over the age of eighteen, I am a party in this action, and I am competent to testify concerning the matters contained in this Affidavit, and I submit this Affidavit with information based on my personal knowledge, and, if called as a witness, could or would testify to the truth of the facts stated here.
3. That, prior to representing Personal Care, I met with Bernie Cignavitch to discuss Askew's actions and the harm her actions caused Personal Care; at our meeting, Mr. Cignavitch insisted that I write the allegedly defamatory letter (attached as Exhibit 1) and to copy the letter to a third party (a dialysis clinic) in order to ensure that the dialysis clinic was aware of Ms. Askew's actions which Mr. Cignavitch alleged caused Personal Care harm; I advised Mr. Cignavitch that sending such a letter to a third party could expose Personal Care to a defamation counterclaim, but Mr. Cignavitch insisted that the letter be sent to the dialysis clinic as well.
4. Further, before the allegedly defamatory letter was sent, Mr. Cignavitch and his manager Tim Pitko were again advised of the potential of a defamation counterclaim arising out of the allegedly defamatory letter. Again, my co-counsel Shoun and I expressed our concerns about forwarding the letter to a third party: See Email from Shoun to Theos dated September 4, 2009 stating: "I told Tim I am hesitant to write the dialysis clinic ..." Bates numbers Theos 12 and 13.
5. Despite these warnings, Mr. Cignavitch insisted that I forward the letter to a third party, and the letter was prepared with information that Mr. Cignavitch provided to Ms. Shoun and me.

6. Initially, as sworn to in both his initial Verified Complaint and Amended Verified Complaint, the gravamen of Mr. Cignavitch's claim was that Shoun and I did not advise Cignavitch of the counterclaim for over two years. In his verified Complaint, Mr. Cignavitch swore: "This legal malpractice Complaint centers upon the Defendant Lawyers' approximate two (2) year delay in telling the Plaintiff, their client in an underlying lawsuit, that a defamation counterclaim had been filed against the Plaintiff." Mr. Cignavitch's sworn allegation is repeated by his expert Robert D. Dodson, J.D., where, in his sworn Affidavit, he asserts:

"I am also extremely critical of Theos and Shoun for not timely advising their client about the counterclaims against it." According to the Verified Complaint Theos and Shoun 'neglected to tell their client, Plaintiff, for more than two years about the fact the Plaintiff was being sued for money damages because of their own allegedly defamatory statements.' ... Theos and Shoun's conduct in not telling their client about the counterclaims, the very counterclaims that were created because of their own incompetence, negligence and recklessness, violated these provisions and were also contradictory to what reasonably prudent lawyers would do under like or similar circumstances. These omissions (failing to timely inform their client about the counterclaims) were significant for numerous reasons."

However, the following emails (attached as Exhibits 3 to 8) refute Mr. Cignavitch's and his expert's original sworn assertions:

1. Email 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 9<sup>th</sup>. May I fax to you? Will you provide the correct number? ... Thanks, I look forward to hearing from you." Bates number: Theos 56.

2. Email from Smith to Cignavitch dated March 19, 2010: "Mr. Cignavitch, attached please find a filed copy of the Answer and Counterclaim." Bates number Theos 54 - 55.

3. Email 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 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." Bates number Theos 57 - 58.

4. Email 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." Bates number Theos 59.

5. Email 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." Bates number Theos 61.

6. Email 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." Bates number Theos 72.

Based on these email communications alone, Shoun and I unequivocally and timely informed Mr. Cignavitch of the Askew counterclaim asserted against Personal Care. However, when I attended the hearing for Personal Care's Motion to Restore, which Your Honor presided over, I was stunned when Tom Pendarvis cavalierly told the Court: "And there's just simply fact questions that are all throughout this. Certainly he knew about the counterclaim. Certainly he knew there were issues with the defense of the case, but he's being told the whole time this is, you know, I have a meritorious claim." (Transcript of Hearing, p. 22, l. 7 - 11).

With Pendarvis' statement to the Court, he admitted to the Court that Personal Care's central allegation in its Verified Complaint - sworn to by Mr. Cignavitch - was a lie.

7. As Mr. Cignavitch's central assertion was easily proved to be false, Mr. Cignavitch has now shifted gears alleging that he did not fully understand and comprehend what the counterclaim meant (i.e., that Personal Care was being sued for money damages) until some time between the first mediation of the underlying case (which was May, 2012) to August, 2012 (when he alleges was the first time he was notified a conflict of interest had arisen). Indeed, Mr. Cignavitch's Affidavit (submitted to the Court in regard to his Motion to Restore) states that Theos and Shoun did not explain the legal nature of Askew's counterclaim or that it was a separate lawsuit seeking money damages against Personal Care. Now Mr. Cignavitch swears that he was unaware of the "true nature of the counterclaim" and thus "began to realize the adverse circumstances" after the first mediation in May of 2012. However, as before, such sworn assertion, is also patently false.
8. Indeed, Shoun and I explained to Mr. Cignavitch that Askew had filed a counterclaim for defamation (the exact type of counterclaim Mr. Cignavitch was warned might occur). Mr. Cignavitch was advised to put his insurance carrier on notice of the Askew Counterclaim and Shoun and I asked Cignavitch to provide his insurance carrier information to us (attached as Exhibits 9 to 10), but he refused to do so:
  1. Email from Shoun to Cignavitch dated March 19, 2010: "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." Bates number Theos 54.

2. Email 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."

Mr. Cignavitch decided he did not want to put his insurance carrier on notice of the Askew counterclaim and expressly told us that he did not want to put his insurance carrier on notice, despite being advised to do so. Instead, Mr. Cignavitch told us to also defend against Ms. Askew's counterclaim allegations. Again, as of March 19, 2010, Mr. Cignavitch was notified that Askew's counterclaim was seeking money damages and that he should put his insurance carrier on notice to defend and indemnify Personal Care.

9. Mr. Cignavitch was made aware that Ms. Askew had filed a counterclaim and was seeking damages against Personal Care based on the allegedly defamatory letter and, at Mr. Cignavitch's direction, Shoun and I began defending against the counterclaim as well, including preparing a Reply with Mr. Cignavitch's input.
10. Significantly, Personal Care's Complaint specifically alleges negligence against Shoun and me for sending the alleged defamatory letter. The Complaint alleges that the counterclaim was filed in 2010, and one of the elements of damage that Mr. Cignavitch is seeking is our attorneys' fees incurred in defending against the counterclaim; accordingly, based on Personal Care's own Complaint, the damages of Personal Care are alleged to have begun at the latest by May of 2010.
11. As set forth in Cheryl Shoun's exhibits I, J and K to her Memorandum, Ms. Shoun discussed the counterclaim with Cignavitch in May of 2010, so Mr. Cignavitch was aware of the counterclaim and he was aware he was incurring additional attorneys' fees because of the counterclaim, i.e., Mr. Cignavitch was aware of the damages he is now claiming in his present lawsuit in May of 2010.
12. I was also copied on Mr. Cignavitch's counsel Tom Pendarvis' email on March 7, 2013, attached as Exhibit 11, where Mr. Pendarvis admitted that he had concerns that the statute of limitations on Mr. Cignavitch's claim would run on March 8, 2013; further, Mr. Pendarvis filed an initial Verified Complaint where, under oath, his client verified that the statute of limitations was going to expire within 10 days, thereby excusing Personal Care's requirement to have an expert affidavit with the filing.
13. It is unbelievable for Mr. Pendarvis, Mr. Cignavitch's counsel, to miss the specific time period deadline set forth in the Order of Judge Dennis and, after having confirmed in writing that the statute of limitations was going to expire on March 8, 2013, and he and his client filing a verified complaint to the same effect, Mr. Pendarvis now asserts that the statute of limitations has not run based on a subjective belief of Mr. Cignavitch not fully grasping his full damages until a mediation of the underlying case.

FURTHER, AFFIANT SAYETH NOT.

Sworn to and subscribed before me  
This 2nd day of December, 2014.

  
Jerry N. Theos

Janet Scott Smith  
Notary Public for South Carolina  
My Commission expires: 6/14/17

URICCHIO, HOWE, KRELL, JACOBSON, TOPOREK, THEOS & KEITH, P.A.

ATTORNEYS AT LAW  
17½ BROAD STREET  
CHARLESTON, SC 29401

PAUL N. URICCHIO, JR. (1922-2000)  
ARTHUR G. HOWE (1927-2004)  
BARRY KRELL  
CARL H. JACOBSON  
ALAN D. TOPOREK  
JERRY N. THEOS  
GREGORY D. KEITH  
JAMES R. BRAUCHLE  
JONATHAN F. KRELL

September 14, 2009

MAILING ADDRESS:  
P.O. BOX 389  
CHAS., SC 29402-0389

TELEPHONES:  
(843) 723-7491  
1-800-899-1683  
FAX (843) 577-4179

Low Country Medical Transport  
61 Hickory Hill Road  
Varnville, South Carolina 29944

RE: Personal Care, Inc.

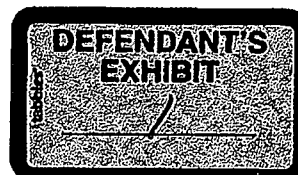
To Whom It May Concern:

This law firm, along with the law firm of Taylor, Shoun, Bowley & Bryd, LLC, has been retained by Personal Care, Inc., to investigate certain wrongful conduct on the part of Low Country Medical Transport and pursue appropriate legal remedies.

On January 9, 2009, Low Country Medical Transport was sent a letter on behalf of Personal Care requesting that it cease and desist from soliciting Personal Care's patients through the use of confidential information obtained from patients' medical records. Employees of Low Country Medical Transport, previously employed by Personal Care, were utilizing confidential information accessed from Personal Care's patient files, for the purpose of soliciting Personal Care's patients.

While Personal Care had hoped that the correspondence sent earlier this year would result in the cessation of this wrongful conduct, it has not. In fact, it appears as though the wrongful activity has accelerated and expanded in scope. Low Country Medical Transport continues to utilize personal health information taken from Personal Care's files. As Low Country Medical Transport has been previously advised, this constitutes an impermissible disclosure of information pursuant to the Health Insurance Portability and Accountability Act (HIPAA). Such violations can result in a myriad of penalties. We understand further that some patients have filed formal complaints against and/or with Low Country Medical Transport.

Moreover, Low Country Medical Transport is engaging in the tortuous interference of Personal Care's business relationships and, in at least one instance, the tortuous interference of a contract. We have confirmed that Low Country Medical Transport, through its employees, has engaged in the direct, as well as indirect, solicitation of patients from Bay View Manor in Beaufort, South Carolina. Personal Care operates under a written contract with that entity. As such, we hereby demand that this tortuous conduct, as well as the direct solicitation of Personal Care patients, cease immediately.



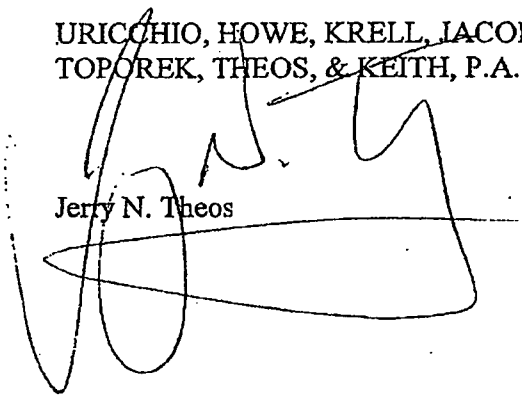
THEOS 0014

Furthermore, we have information that, in some instances when Low Country Medical Transport has been successful in wrongfully procuring the transfer of Personal Care's patients, unnecessary wheelchair patients have been redesignated as stretcher transfers, in the absence of a legitimate medical need or basis. Unwarranted and baseless reclassifications such as this, which result in significantly higher costs, constitute insurance fraud.

We hereby recommend that this letter be forwarded to your legal counsel, requesting that they contact us immediately. Please be advised that if we do not receive contact on behalf of Low Country Medical Transport by Monday, September 28, 2009, we will institute appropriate legal action to address the aforementioned misconduct, and protect Personal Care and the patients they service.

Sincerely,

URICCHIO, HOWE, KRELL, JACOBSON,  
TOPOREK, THEOS, & KEITH, P.A.



Jerry N. Theos

JNT/jss

cc: Low Country Dialysis  
Ms. Tanekia Miller  
Ms. Patricia Shelton  
Mr. Bernie Cignavitch  
Ms. Cheryl D. Shoun, Esquire

THEOS 0015

Gmail - FW: Personal Care



Maggie Theos <mags386@gmail.com>

**FW: Personal Care**

2 messages

Wed, Sep 2, 2009 at 4:30 PM

Jerry <jerry@uricchio.com>  
To: Maggie Theos <mags386@gmail.com>

**From:** bcignavitch@comcast.net [mailto:bcignavitch@comcast.net]  
**Sent:** Tuesday, September 01, 2009 4:10 PM  
**To:** Jerry  
**Cc:** cherylshoun  
**Subject:** Personal Care

Jerry,

The women who has power of attorney over Patient "Scott" wants to talk to u about the law suite.

She is very upset because Mr. Scott had a stroke right after all the talk about switching Amb co.

How is the letter going?

Bernie

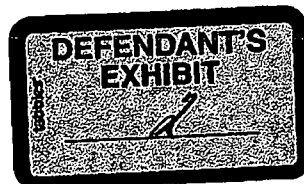
Fri, Sep 4, 2009 at 3:31 PM

Jerry <jerry@uricchio.com>  
To: Maggie Theos <mags386@gmail.com>

Please file.

**From:** Cheryl Shoun [mailto:cherylshoun@bellsouth.net]  
**Sent:** Friday, September 04, 2009 9:53 AM  
**To:** Jerry  
**Subject:** Personal Care

Hey.  
I just spoke, at some length, with Tim Pitko.



THEOS 0012

He is not aware of any other name under which Low Country does business. As you and I discussed yesterday, it was registered with the SC Sec. of State as Low Country Medical Transport, Inc. It was dissolved by forfeiture on 10/01/07.

I told Tim I am hesitant to write to the dialysis clinic - he had a great suggestion - the Scott family is very interested in helping out. It is their family member that had a stroke when Low Country returned him from Dialysis - he was very upset about changing to that company. Tim also said something about the Low Country people laughing and talking on a speaker phone(?) - they were discussing Mr. Scott's personal information. Tim was breaking up a bit on the phone, so I'm not entirely sure I got all of that. Regardless, the Scott family would love for us to call them, and they will help. Tim's suggestion is that we contact the Scotts and write the letter to the dialysis clinic on behalf of the Scotts.

And, Tim says Personal Care does not have a written contract with Bay View, except for evacuation transport. But, he says they have an 'agreement' with Bay View that Personal Care is its transport co.

So----where did you stop reading?  
C.

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

This e-mail, as well as any information transmitted with it, is confidential attorney-client communication or may otherwise be privileged or confidential and is intended solely for the individual or entity to whom it is addressed. If you are not the intended recipient, please do not read, copy or retransmit this communication but destroy it immediately. Any unauthorized dissemination, distribution or copying is strictly prohibited.

THEOS 0013

**Janet Smith**

---

**From:** Jerry Theos  
**Sent:** Friday, March 19, 2010 4:40 PM  
**To:** Janet Smith  
**Subject:** FW: Personal Care vs. Askew  
Please file.

---

**From:** Cheryl Shoun [mailto:cheryishoun@bellsouth.net]  
**Sent:** Friday, March 19, 2010 1:00 PM  
**To:** bcignavitch@comcast.net  
**Cc:** Jerry Theos  
**Subject:** Personal Care vs. Askew

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 9. 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.

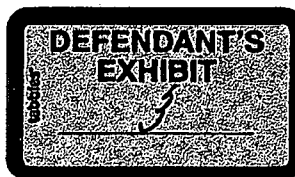
Thanks. I look forward to hearing from you.

Cheryl

---

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

This e-mail, as well as any information transmitted with it, is confidential attorney-client communication or may otherwise be privileged or confidential and is intended solely for the individual or entity to whom it is addressed. If you are not the intended recipient, please do not read, copy or retransmit this communication but destroy it immediately. Any unauthorized dissemination, distribution or copying is strictly prohibited.



THEOS 0056

3/19/2010

563

**Janet Smith**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]  
**Sent:** Friday, March 19, 2010 4:00 PM  
**To:** Janet Smith  
**Subject:** Fw: Personal Care vs. Askew ( could u please call me 568 0236)

~~Janet if you're still there could you e-mail the Answer and Counterclaim to Bernie? If not I'll do it Monday.~~

Have a great weekend.

----- Original Message -----

**From:** bcignavitch@comcast.net  
**To:** Cheryl Shoun  
**Sent:** Friday, March 19, 2010 2:06 PM  
**Subject:** Re: Personal Care vs. Askew ( could u please call me 568 0236)

----- Original Message -----

**From:** "Cheryl Shoun" <cherylshoun@bellsouth.net>  
**To:** bcignavitch@comcast.net  
**Cc:** "Jerry" <Jerry@uricchio.com>  
**Sent:** Friday, March 19, 2010 1:00:00 PM GMT -05:00 US/Canada Eastern  
**Subject:** Personal Care vs. Askew

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 9. May I fax to you? Will you provide the correct number?

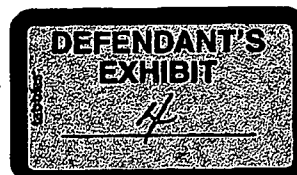
Also, if you will please provide your insurance information, we will submit the Counterclaim to your carrier, asking it to defend and indemnify you. We will need a copy of the policy if you have it.

Thanks. I look forward to hearing from you.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0054

3/19/2010

564

**Janet Smith**

---

**From:** Janet Smith  
**Sent:** Friday, March 19, 2010 4:19 PM  
**To:** bcignavitch@comcast.net  
**Cc:** Cheryl Shoun; Janet Smith  
**Subject:** Answer and Counterclaim  
**Attachments:** 4481\_001.pdf  
Mr. Cignavitch: Attached please find a filed copy of the Answer and Counterclaim. Janet

---

**From:** Copier  
**Sent:** Friday, March 19, 2010 4:26 PM  
**To:** Janet Smith  
**Subject:** Attached Image

THEOS 0055

3/19/2010

565

**Janet Smith**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]  
**Sent:** Friday, March 26, 2010 10:23 AM  
**To:** bcignavitch@comcast.net  
**Cc:** Jerry Theos; Janet Smith  
**Subject:** Personal Care v. Askew  
**Attachments:** personal care extension ltr..tif

Bernie:

I am so sorry that I have not had the opportunity to call and discuss the pleadings sent to you last week. I am going to be out of town next week, and as usual, everything seems to fall on my desk when that happens.

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 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 will be back in my office on April 6, 2010.

I sincerely appreciate your patience in this matter, and look forward to talking with you regarding the Counterclaim. I hope all else is well with you.

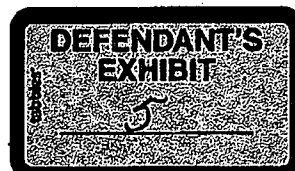
Cheryl

---

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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3/26/2010



THEOS 0057

566

TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
ATTORNEYS AT LAW  
39 BROAD STREET, SUITE 101  
CHARLESTON, SOUTH CAROLINA 29401

PHONE: (843) 723-4020

FAX: (843) 723-4021

March 26, 2010

John E. Parker, Esquire  
William F. Barnes, III  
101 Mulberry Street East  
P. O. Box 457  
Hampton, S.C. 29924

RE: Personal Care, Inc. vs. Hattie Askew, et al

Gentlemen:

I am in receipt of the Answer and Counterclaim filed by you on behalf of the Defendant and served, via United States Mail on March 9, 2010, making a Reply due on or before April 13, 2010.

I would appreciate it if you would kindly grant an extension of time, allowing an additional thirty (30) days in which we may Reply or otherwise plead in response to the Counterclaim.

If you will agree to this extension, please sign the enclosed copy of this letter and return it to me in the envelope provided for your convenience.

Very truly yours,



Cheryl D. Shoun

We consent:

CDS/get

Enc.

CC: Jerry N. Theos, Esquire  
Personal Care, Inc.

DONNA K. TAYLOR

CHERYL D. SHOUN

D. LYNN BOWLEY

CATHERINE D. BYRD

THEOS 0058

**Jerry Theos**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]  
**Sent:** Tuesday, April 06, 2010 12:50 PM  
**To:** bcignavitch@comcast.net  
**Cc:** Jerry Theos; Janet Smith  
**Subject:** Personal Care v. Hattie Askew

Bernie: Hey. I am back in my office today, and have received confirmation of our thirty day extension to respond to the Counterclaim in this case. Our Reply is due on or before May 13, 2010.

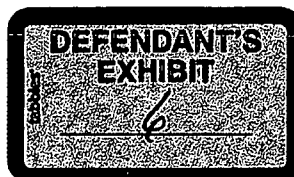
Please let me know a time that is good for you for us to get together to talk over our response. We may even be able to do it by phone if your schedule is full. In the meantime I will probably prepare a draft and send it to you as a starting point.

Thanks.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0059

**Janet Smith**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]  
**Sent:** Tuesday, April 13, 2010 9:51 AM  
**To:** bcignavitch@comcast.net  
**Cc:** Jerry Theos; Janet Smith  
**Bernie:** Good morning. Hope this finds you well.

I want to let you know that I have withdrawn from my former firm, and have begun practicing with Nexsen Pruet, LLC. I wanted to be able to give that news to you, rather than have you hear the news via the form letter to clients.

Nexsen Pruet has offices throughout South Carolina and North Carolina, and enjoys a wonderful reputation. Of course you will have the choice of whether you wish for me to take this matter or whether you wish for it to remain at my former firm. If you choose to have me take the file with me, it will be handled at Nexsen Pruet on the same terms and conditions under which it is currently pending.

You should be receiving a letter in the immediate future, perhaps as early as today, advising you of this change and requesting that you indicate your choice. Hopefully the letter gives you the option of returning it to me as well as to my former firm. It can be faxed directly to me at 414-8238. If you want me to continue handling your matters, please return the letter as quickly as possible; I can not physically removed the file from my old office until your designation is received.

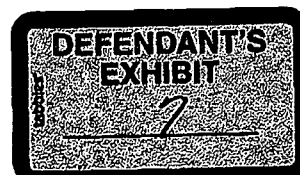
You may reach me at this e-mail address or at [cshoun@nexsenpruet.com](mailto:cshoun@nexsenpruet.com). You may also feel free to call my office at 720-1762. And, of course, you can discuss this matter with Jerry.

Thanks so much, and I hope to hear from you in the immediate future. Please remember that a Reply needs to the Counterclaim by Ms. Askew will have to be served by the latter part of May.

Cheryl

Cheryl D. Shoun

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THEOS 0081

## Maggie Theos

---

**From:** Janet Smith  
**Sent:** Monday, June 07, 2010 12:14 PM  
**To:** Maggie Theos  
**Subject:** FW: Personal Care, Inc. v. Hattie M. Askew = Attached filed Reply for your review  
**Attachments:** np.png; links\_s.png; 576565\_1.PDF

Please print out with attachments and put .50 for receipt and review of Bernie Cignavitch's timesheet

---

**From:** Kerr, Michelle T. [mailto:MKerr@nexsenpruet.com]  
**Sent:** Monday, June 07, 2010 10:20 AM  
**To:** 'bcignavitch@comcast.net'  
**Cc:** Shoun, Cheryl D.; Jerry Theos; Janet Smith  
**Subject:** Personal Care, Inc. v. Hattie M. Askew = Attached filed Reply for your review

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.

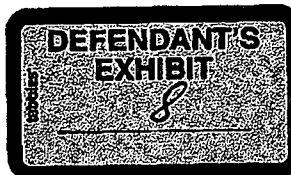
Thanks,  
Michelle

### Michelle T. Kerr

*Assistant to Cherie W. Blackburn,  
Paul A. Dominick, Cheryl D. Shoun  
and Marilyn Trevino*

## NEXSEN | PRUET

205 King Street, Suite 400  
Charleston, South Carolina 29401  
P.O. Box 486 (29402)  
DD: 843.720.1780, F: 843.720.1777  
[mkerr@nexsenpruet.com](mailto:mkerr@nexsenpruet.com)  
[www.nexsenpruet.com](http://www.nexsenpruet.com)



THEOS 0072

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**Janet Smith**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]  
**Sent:** Friday, March 19, 2010 4:00 PM  
**To:** Janet Smith  
**Subject:** Fw: Personal Care vs. Askew ( could u please call me 568 0236)

~~Janet if you're still there could you e-mail the Answer and Counterclaim to Bernie?--If not I'll do it Monday.~~

Have a great weekend.

----- Original Message -----

**From:** bcignavitch@comcast.net  
**To:** Cheryl Shoun  
**Sent:** Friday, March 19, 2010 2:06 PM  
**Subject:** Re: Personal Care vs. Askew ( could u please call me 568 0236)

----- Original Message -----

**From:** "Cheryl Shoun" <cherylshoun@bellsouth.net>  
**To:** bcignavitch@comcast.net  
**Cc:** "Jerry" <Jerry@uricchio.com>  
**Sent:** Friday, March 19, 2010 1:00:00 PM GMT -05:00 US/Canada Eastern  
**Subject:** Personal Care vs. Askew

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 9. 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.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0054

3/19/2010

571

**Jerry Theos**

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**From:** Cheryl Shoun [cherylshoun@bellsouth.net]

**Sent:** Tuesday, April 06, 2010 12:54 PM

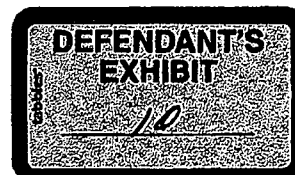
**To:** bcignavitch@comcast.net

**Cc:** Jerry Theos; Janet Smith

Bernie: I forgot to mention this again -- please get your Insurance information to me as quickly as you can. Thanks.

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0060

4/6/2010

572

-----Original Message-----

From: Thomas A. Pendarvis  
Sent: Thursday, March 07, 2013 5:55 PM  
To: 'Cole, Mary'  
Cc: 'Andrea Goodreau'  
Bcc: '[bcignavitch@comcast.net](mailto:bcignavitch@comcast.net)'

Hello Mary:

Thank you for the message this afternoon and revisions to the proposed Tolling Agreement.

When we spoke on Monday, you were not able to confirm whether Ms. Shoun and her law firm would agree to toll the statute. We also discussed my concerns about an argument that the statute of limitations might expire on Friday, March 8. Since we spoke on Monday you should have received my e-mail advising that we needed to have a signed tolling agreement in place by the close of business yesterday, otherwise we were putting a letter in the mail to the Charleston County Clerk of Court filing a Summons & Complaint to make sure it was filed on time. Receiving no response to the e-mail and no signed tolling agreement, attached please find a copy of the letter to the Clerk with enclosures that was mailed yesterday filing suit. We have not received the clocked copies of the pleadings back from the Clerk but should have them by sometime next week. Please remember that we sent the proposed tolling agreement to your insureds back in September.

Also attached please find the tolling agreement you sent this afternoon with a few additional changes to properly identify the law firm where Ms. Shoun practiced at the relevant times.

Please let me know of your thoughts on how your insureds, Ms. Shoun, and her former law firm wish to proceed now that suit has been filed. There are several options to be considered. Thank you for your attention to this matter.

Regards,

Thomas A. Pendarvis  
Pendarvis Law Offices, P.C.  
500 Carteret St., Ste. A  
Beaufort, SC 29202-5066  
843.524.9500 tel  
843.524.9501 fax  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)  
[www.PendarvisLaw.com](http://www.PendarvisLaw.com) <<http://www.PendarvisLaw.com>>

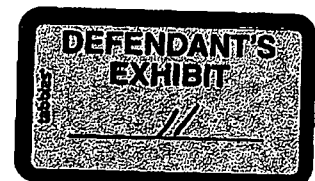
Admitted in South Carolina and Georgia

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-----Original Message-----



CERTIFICATE OF SERVICE

I hereby certify that, this 4TH day of DECEMBER, 2014, I served a copy of the foregoing Affidavit on counsel of Record via U.S. Mail, with sufficient postage affixed thereto, properly 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

GEORGE J. KEFALOS, PA  
Oana Dobrescu Johnson, Esq.  
46A State Street  
Charleston, SC 29401

K & L GATES, LLP  
Richard A. Farrier, Jr., Esq.  
134 Meeting Street, Suite 200  
Charleston, SC 29401

**FILED**

DEC 05 2014

JULIE J. ARMSTRONG  
CLERK, C.P. & G.S.

Barnwell Whaley Patterson & Helms, LLC

By: Brucey Milton  
Legal Assistant

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

BY  
JULIE J. AMSTONG  
CLERK OF COURT

2014 DEC - 8 PM 2: 08

FILED

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

**PLAINTIFF'S MEMORANDUM IN  
SUPPORT OF MOTION TO RESTORE  
PURSUANT TO RULE 40(J), SCRPC**

**COPY TO: M. Dawes Cooke, Jr., JD and Phillip S. Ferderigos, JD, counsel for Defendants Jerry N. Theos and URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; Richard A. Farrier, Jr., JD, counsel for Defendant, Cheryl D. Shoun; and Oana D. Johnson, JD, counsel for Defendant, TAYLOR, SHOUN, BOWLEY & BYRD, LLC, n/k/a TAYLOR, BOWLEY & BYRD, LLC:**

Plaintiff, PERSONAL CARE, INC., respectfully submits this memorandum of law in support of its motion to restore this case to the active docket pursuant to Rule 40(j), SCRPC.

**Summary of the Arguments**

1. The "Consent Order Restoring Case to Docket" timely filed one day before the one year anniversary of the "Consent Order Striking Case From Docket" is equivalent to and should be treated as a motion to restore and be granted.
2. The motion to restore should be granted pursuant to the express language of Rule 40(j), SCRPC.
3. A party can move to restore the case to the docket more than one year after the claim was the stricken without violating Rule 40(j).
4. Because Rule 40(j) is exclusively an administrative rule, there is no basis for an

evaluation of the merits of the claims or merits of any affirmative defenses before applying the Rule to restore the case.

5. Rule 40(j) does not provide or allow the Defendants to assert affirmative defenses in opposition to the motion to restore.
6. In the event the Defendants were to file a dispositive motion asserting the affirmative defense of statute of limitations, the verified facts in the record establish the lawsuit was filed within one year of the time when Personal Care knew or should have known of an injury sufficient to trigger objective notice that a claim against the Defendants might exist, and the motion to restore was filed a little more than two years from that same date, both of which are well within the three year statute of limitations.
7. In the event the Defendants were to file a dispositive motion asserting the affirmative defense of statute of limitations, the verified facts in the record establish at least a jury question as to whether Defendants should be estopped from asserting a statute of limitations defense based on Defendants' assurances to Plaintiff.

#### Facts Relevant to the Motion to Restore

This lawsuit was stricken from the active docket pursuant to Rule 40(j), SCRCP, by the "Consent Order Striking Case From Docket [Rule 40(j), SCRCP]" entered on **August 28, 2013**, a copy of which is included as **Exhibit 1**.

Less than one year later, on August 22, 2014, a letter was sent to counsel for Mr. Theos and Mr. Theos' law firm *and also to Ms. Shoun* with a proposed "Consent Order

Restoring Case to Docket,” following up on a telephone conversation about restoring the case, a copy of which is included as **Exhibit 2**. On August 26, counsel for Mr. Theos and Mr. Theos’ law firm sent an email indicating he was “signing your order on behalf of my client and putting it in the mail today” and also a letter to counsel for Plaintiff with his signature indicating consent on behalf of Mr. Theos and Mr. Theos’ law firm to the case being restored to the active docket, copies of which are included as **Exhibit 3** and **Exhibit 4**. The next day, on **August 27, 2014**, one day before the one year anniversary of the Order striking the case from the active docket, counsel for Plaintiff sent a letter to the Clerk of Court (with copies to counsel for Mr. Theos and Mr. Theos’ law firm *as well a copy to Ms. Shoun*) filing the “Consent Order Restoring Case to Docket.” This proposed “Consent Order Restoring Case to Docket” was signed only by counsel for Plaintiff and counsel for Mr. Theos and Mr. Theos’ law firm, but without the signature of Ms. Shoun or her former law firm, TAYLOR, SHOUN, BOWLEY & BYRD, LLC (hereinafter TAYLOR, SHOUN), based on what is now-known to be a mistaken understanding that Ms. Shoun and TAYLOR, SHOUN had no objection to restoring the case. A copy of the August 27 letter is included as **Exhibit 5**.

On September 2, 2014, the Clerk of Court sent a letter to counsel for Plaintiff advising that the motion information coversheet had not been enclosed and that there was a \$150 filing fee to restore the case per Rule 40(j), a copy of which is included as **Exhibit 6**. On September 4, 2014, (the same day the September 2 letter was received from the Clerk) counsel for Plaintiff sent a letter to the Clerk of Court (again with copies to counsel for Mr. Theos and Mr. Theos’ law firm *as well a copy to Ms. Shoun*) containing the same

"Consent Order Restoring Case to Docket" that was missing Ms. Shoun's signature, a motion information coversheet, and the \$150 filing fee, a copy of which is included as **Exhibit 7**. No objections were filed by or on behalf of Ms. Shoun or TAYLOR, SHOUN, which was consistent with counsel for Plaintiff's understanding that there was no objection to restoring the case.

On September 15, 2014, Judge Dennis' law clerk sent an email to counsel for Plaintiff with questions about the proposed Consent Order to which counsel for Plaintiff responded on September 16, 2014, with copies to counsel for Mr. Theos and Mr. Theos' law firm and to Ms. Shoun. It is important to note that at this point in time, Mr. Shoun and TAYLOR, SHOUN had been jointly represented by one law firm (CARLOCK COPELAND & STAIR, prior to their withdrawal as counsel) and appeared to have co-equal positions on all matters relevant to the claims in this lawsuit. At this point, no lawyers or law firms had made separate appearances on behalf of Ms. Shoun and on behalf of TAYLOR, SHOUN, respectively. A copy of the September 16 email thread is included as **Exhibit 7**. Counsel for Plaintiff explained that Ms. Shoun had been copied on all correspondence concerning the proposed Consent Order, had raised no objections, and that the Order restoring the case should be issued. Significantly, the email from counsel for Plaintiff contains a statement treating the proposed Consent Order as a motion to restore: "Notwithstanding the foregoing, we will be happy to attend a hearing on the *motion to restore* if Judge Dennis believes it is necessary." (Exhibit 7, p. 1, emphasis added).

On September 17, 2014, counsel for Plaintiff communicated for the first time with Ms. Catherine Byrd, a lawyer and apparent member of TAYLOR, SHOUN. A copy of the

email summarizing that communication is attached as **Exhibit 8**. Significantly, the email from counsel for Plaintiff contains another statement treating the proposed Consent Order as a motion to restore: "It was also my understanding from the telephone call that Taylor, Bowley & Byrd, LLC has not consented to Personal Care's proposed consent ***Motion to restore*** the case to the active trial roster." (Exhibit 8, p. 1, emphasis added). Counsel for Plaintiff followed up immediately with an email to Judge Dennis' law clerk explaining the circumstances and advising that a formal motion would be filed, a copy of which is included as **Exhibit 9**. Later that same day, September 17, 2014, Plaintiff filed what amounts to a supplemental Motion to Restore Pursuant to Rule 40(j), SCRCP, once again seeking to have the case restored to the active trial docket, a copy of which is included as **Exhibit 10**.

#### **ARGUMENTS**

- I. **The "Consent Order Restoring Case to Docket" timely filed one day before the one year anniversary of the "Consent Order Striking Case From Docket" is equivalent to and should be treated as a motion to restore and granted.**

The Defendants are attempting to create a procedural defect on a timely filed "motion to restore" where none exists. It is particularly notable that two of the defendants, Defendant, Jerry N. Theos, and Defendant, URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA., actually consented in a writing filed with the court to restore the case to the active trial roster before the one year the one year anniversary of the Order striking the case from the active trial docket. See (Exhibit 3 and Exhibit 4). And another defendant, Defendant, Cheryl D. Shoun, in "gotcha" lawyering fashion, did not object to the timely filed consent "motion to restore" until *after* the one year anniversary even though she had actual notice of the timely filed consent "motion to restore." Furthermore, Rule 40(j) does not

provide a basis for any party, including the Defendants in this case, to make an objection to the motion to restore. The only requirement is that “[a] party moving to restore case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard.” There is no dispute that 10 days notice of the motion to restore was provided to all parties.

The “Consent Order Restoring Case to Docket” satisfies all the requirements to constitute a “motion” pursuant to Rule 7(b), SCRCP, as it was in writing, states particularly the grounds for the motion, and the relief sought. *Camp v. Camp*, 386 S.C. 571, 689 S.E.2d 634, 636 n. 2 (2010) (“The particularity requirement should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized.”). In addition, restoring this case would cause no prejudice to any Defendant. No Defendant will be denied an opportunity to present any defenses to the claims in this case. See *M & M Group, Inc. v. Holmes*, 379 S.C. 468, 474, 666 S.E.2d 262, 265 (Ct. App. 2008) (Subjecting Rule 7, SCRCP, to a prejudice analysis).

The “Consent Order Restoring Case to Docket” was in writing, filed before the one-year anniversary, and sought to have the case restored pursuant Rule 40(j).

**II. The motion to restore should be granted pursuant to the express language of Rule 40(j), SCRCP.**

Rule 40(j) provides no basis for any party to object to the matter being restored to the active trial docket. The Comments to Rule 40(j) states in relevant part and with emphasis added as follows:

Rule 40(j) now requires all adverse parties to consent to the dismissal in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken from

the docket as to each consenting party. ***Any remaining portion of the statute of limitations begins to run one year after the case was stricken unless the case has previously been restored to the General Docket. A party moving to restore a case must give 10 days notice of the motion, and upon being restored*** the case is placed on the General Docket where it proceeds as a newly filed action on the General Docket. A case can also be dismissed voluntarily under Rule 41(a).

The Defendants effectively consented to the case being restored when they consented to the case being stricken from the active trial docket, pursuant Rule 40(j). The Rules of Civil Procedure and their own conduct in consenting to the Rule 40(j) dismissal, provide no basis for a subsequent objection to the motion to restore. Plaintiff's motion to restore should be granted as a matter of right.

**III. A party can move to restore the case to the docket more than one year after the claim was the stricken without violating Rule 40(j).**

The "Consent Order Restoring Case to Docket" was a "motion" pursuant to Rule 7(b), SCRPC, and should be granted. Even if the Court were to consider only the second, supplemental, motion to restore filed on September 17, 2014, that motion should be granted. As our Supreme Court held in *Maxwell v. Genez*, 356 S.C. 617, 620-21, 591 S.E.2d 26, 28 (2003),

Rule 40(j) does not require that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that, if the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period. Fn.1. This conclusion is supported by the Notes to Rule 40 ('Rule 40(j) now requires all adverse parties to consent to the dismissal in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party.') and language in *Graham v. Dorchester County School Dist.*, 339 S.C. 121, 125, 528 S.E.2d 80, 82 (Ct.

App. 2000) (Rule 40(j) requires motions to restore within one year of case being stricken 'to take advantage of the tolling of the statute of limitations.'). **A party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j)**; the party simply cannot take advantage of the one year tolling period provided by the rule.

*Id.* (emphasis added).

Plaintiff's motion to restore should be granted without regard to the date the case was originally stricken from the active trial docket, pursuant to the express language in Rule 40(j), the Comments to that Rule, and the Supreme Court's holding in *Maxwell v. Genez*, 356 S.C. 617, 620-21, 622, 591 S.E.2d 26, 28 (2003) ("As explained above, Rule 40(j) does not have a deadline during which a motion to restore must be filed.").

**IV. Because Rule 40(j) is exclusively an administrative rule, there is no basis for an evaluation of the merits of the claims or merits of any affirmative defenses before applying the Rule to restore the case.**

This motion to restore should be granted, and once it is restored, the holdings in *Maxwell v. Genez* make it clear that the Defendants have the right during the litigation of this case – after it is restored – to challenge the timeliness of the action. Rule 40(j) is simply an administrative rule. *Cf.*, *Paschal v. Price*, 380 S.C. 419, 442, 670 S.E.2d 374, 386 (Ct. App. 2008) (reversed on other grounds) ("Quite simply, the procedural or administrative rule as to the cover sheet does not act to deprive the court of subject matter jurisdiction."), *citing and quoting Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 668 S.E.2d 795, 797 (2008) ("Failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of appellate jurisdiction over the case, but does not affect the court's subject matter jurisdiction.").

Presently, there is no dispositive motion filed by any Defendant prior to the motion to restore, such as a motion to dismiss or a motion for summary judgment, asserting any affirmative defenses, seeking to have Plaintiff's Complaint dismissed, or any other relief of that nature. Therefore, there is simply no basis for any inquiry into the merits of Plaintiff's claims or the merits of any affirmative defenses alleged by any Defendant.

**V. The verified facts in the record establish the lawsuit was filed within one year of the time when Personal Care knew or should have known of an injury sufficient to trigger objective notice that a claim against the Defendants might exist, and the motion to restore was filed a little more than two years of that same date, both of which are well within the three year statute of limitations.**

Even if any of the Defendants had filed a dispositive motion seeking dismissal of this action based on the affirmative defense of the statute of limitations, which there is not, the Verified Amended Complaint (with its exhibits) and the Affidavit of Bernie Cignavitch (with its exhibits), dated November 18, 2014 and filed in this action on November 19, 2014, establish this lawsuit was both timely filed and timely restored. The Verified Amended Complaint (with its exhibits) and the Affidavit of Bernie Cignavitch also raise disputed questions of material fact as to when Personal Care or a reasonable person would have known of an injury sufficient to put it on notice that a claim against the Defendants might exist. See (Affidavit of Bernard Cignavitch, pp. 1 - 5).

Even though it was not until July or August 2012 when Personal Care first incurred financial damages resulting from the Defendants' errors, see (Affidavit of Bernard Cignavitch, p. 4), Plaintiff had a good faith belief that Defendants would try to claim that the statute of limitations began to run in March 2010, which prompted the filing of a Summons and Verified Complaint on March 6, 2013, without an expert affidavit, and the subsequent

filing on April 19, 2013, of a Verify Amended Complaint with an expert affidavit. There is at a minimum, a disputed as to when, if at all, before July or August 2012, Personal Care suffered any damages resulting from Defendants' conduct.

**VI. The facts in the record establish at least a jury question as to whether Defendants should be estopped from asserting a statute of limitations defense based on Defendants' assurances to Plaintiff.**

Once again, even if any of the Defendants had filed a dispositive motion seeking dismissal of this action based on the affirmative defense of the statute of limitations, which there is not, there is evidence that the Defendants repeatedly assured and advised Personal Care that the defamation counterclaim in the underlying case as "meritless." As late as July 2012, Mr. Theos sent emails to Personal Care stating, "As we have previously advised you, we believe and contend that their counterclaim is meritless, as truth is an absolute defense to such a claim." See (Exhibit 11, email from Mr. Theos to Mr. Gignavitch, dated July 12, 2012). Personal Care had no reason to doubt that advice, at least until the summer of 2012, less than one year before this lawsuit was filed.

It is important to remember that the Defendants were lawyers charged with explaining legal matters to the client, Personal Care, and Personal Care, in turn, had a right to rely on the legal advise and assurances from its lawyers, the Defendants, that the counterclaim was "meritless." See *True v. Monteith*, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997) ("[A]bsent other facts, the client should be able to rely on the attorney's advice and should be able to follow this advice without fear the attorney is not acting in the client's best interest."). See also *RFT Management Co., L.L.C. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 336, 732 S.E.2d 166, 173 (2012) (a client-lawyer relationship is by its nature a

fiduciary relationship); *Spence v. Wingate*, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011); *Holtz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991).

During the entire representation, Personal Care was not “sleeping on its rights” to pursue a malpractice claim when it was relying on its fiduciary relationship with and specific advice from its lawyers, the Defendants, concerning these intricate legal matters concerning defamation and related legal procedural matters. Personal Care had a right to rely on the Defendants advice to protect the integrity of the client-lawyer relationship and to allow the Defendants the opportunity to prove the truth and accuracy of their advice, or to establish that there has been no error, while simultaneously preventing the Defendants from defeating Personal Care’s malpractice causes of action based on a statute of limitations defense. See *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1, 8 (Ct. App. 2009) (lawyer’s conduct inducing a client to delay in filing malpractice suit may include “actions suggesting that a lawsuit is unnecessary.”).

To claim equitable estoppel, a plaintiff must prove (1) conduct by the defendant which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the plaintiff; (3) the defendants’ knowledge, actual or constructive, of the true facts; (4) plaintiff’s lack of knowledge and of the means of knowledge of the truth as to the facts in question; and (5) plaintiff’s reliance upon the defendants’ conduct. See *Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998). The doctrine of equitable estoppel applies when there is an argument that the statute of limitations has run and the defendant asserts the running of the statute of limitations as a defense. See *Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 209 (Ct. App. 1998). However, the defendant is estopped from benefitting from using the

statute of limitations as a defense when the defendant's act or omissions operated to suggest that a lawsuit was unnecessary. *See id.*; *Moates v. Bobb*, 322 S.C. 172, 175, 470 S.E.2d 402, 403 (Ct. App. 1996).

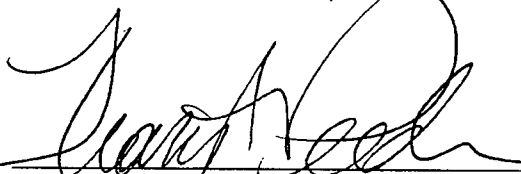
Based on the facts presented, the Defendants' conduct and assurances that the counterclaim in the underlying case was "meritless" at least creates a jury question as to whether that advice and assurances should operate to estop Defendants from claiming a statute of limitations defense, which is especially true given there is no dispositive motion before the Court seeking to have Personal Care's case dismissed.

**CONCLUSION**

Based on the foregoing, Plaintiffs respectfully request this Court issue an Order granting Plaintiff's motion to restore pursuant to Rule 40(J), SCRCP, and allow Personal Care to proceed to litigate its claims on the merits.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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Lawyer for Plaintiff, PERSONAL CARE, INC.

Beaufort, South Carolina

December 4, 2014

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
Personal Care, Inc., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Jerry N. Theos, Uricchio, Howe, Krell, )  
Johnson, Toporek, Theos & Keith, P.A., )  
Cheryl D. Shoun, and Taylor, Shoun, )  
Bowley & Byrd, LLC, )  
 )  
Defendants. )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CASE NO.: 2013-CP-10-1396

FILED  
2013 AUG 28 PM 12:54  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY

**CONSENT ORDER  
STRIKING CASE FROM DOCKET  
[RULE 40(j), SCRPC]**

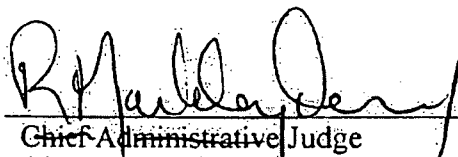
IT APPEARING to the Court that Plaintiff Personal Care Inc. ("Plaintiff") and Defendants Jerry N. Theos, Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A., Cheryl D. Shoun, and Taylor Shoun, Bowley & Byrd, LLC ("Defendants"), pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, agree to strike the above-captioned case from the docket.

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.

IT IS HEREBY ORDERED that the above-captioned case be stricken from the docket in accordance with the agreement of the parties pursuant to Rule 40(j), SCRPC.

[SIGNATURES ON FOLLOWING 4 PAGES]

IT IS SO ORDERED.

  
Chief Administrative Judge  
Ninth Judicial Circuit

Charleston, South Carolina

August 27, 2013

RWJ 2

WE SO CONSENT:

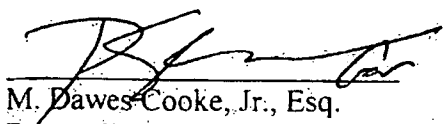
Catherine B. Kerney

Thomas A. Pendarvis, Esq.  
Catherine B. Kerney, Esq.  
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Beaufort, SC 29902-5066  
(843) 524-9500  
(843) 524-9501 fax

**Counsel for the Plaintiff**

RW/3

WE SO CONSENT:

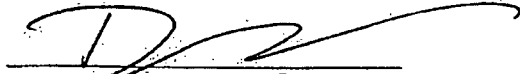


M. Dawes-Cooke, Jr., Esq.  
Barnwell Whaley Patterson & Helms, LLC  
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(843) 577-7708 fax

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

RW/4

WE SO CONSENT:



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Amanda K. Dudgeon, Esq.  
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**Counsel for Defendants Cheryl D. Shoun  
and Taylor, Shoun, Bowley & Byrd, LLC**



PENDARVIS LAW OFFICES, PC



EXHIBIT  
2

August 22, 2014

VIA E-MAIL AND US MAIL

Phillip S. Ferderigos, J.D.  
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[pferderigos@barnwell-whaley.com](mailto:pferderigos@barnwell-whaley.com)

Cheryl D. Shoun, J.D.  
NEXSEN PRUET, LLC  
PO Box 486  
Charleston SC 29402  
[cshoun@nexsenpruet.com](mailto:cshoun@nexsenpruet.com)

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

Counsel:

As discussed with Phillip earlier this morning, enclosed please find a proposed Consent Order Restoring Case to Docket for the above-referenced matter. Please let us know as soon as possible, and hopefully by next week, if you will consent to this Order. If not, we will be filing a motion to restore as of right per Rule 40(j), SCRPC.

Review of the 2000+ pages of material in his file has taken longer than expected, but now that this process is wrapping-up, the vitality of Personal Care's claims is much clearer. We are in the process of preparing a demand letter and should have the letter to you in the next few weeks.

Thank you for your time and attention to this matter, and if you and your clients agree with the proposed Consent Order, please execute it and return it to me next week. Otherwise, please call or contact me so we can discuss this matter further.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

Thomas A. Pendarvis

TAP/lat

cc: Bernie Cignavitch  
M. Dawes Cooke, Jr. J.D.

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

**CONSENT ORDER RESTORING  
CASE TO DOCKET  
(RULE 40(j), SCRCP)**

IT APPEARING to the Court that Plaintiff Personal Care Inc. ("Plaintiff") and Defendants Jerry N. Theos, Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A., Cheryl D. Shoun, and Taylor Shoun, Bowley & Byrd, LLC ("Defendants"), pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, agree to restore the above-captioned case to the docket, which was removed by Consent Order on August 28, 2013.

IT IS HEREBY ORDERED that the above-captioned case be restored to the docket in accordance with the agreement of the parties pursuant to Rule 40(j), SCRCP.

AND IT IS SO ORDERED.

---

Chief Administrative Judge  
Ninth Judicial Circuit

Charleston, South Carolina

\_\_\_\_\_, 2014

WE SO CONSENT:

---

Thomas A. Pendarvis (SC Bar # 064918)  
Catherine "Carey" B. Kerney (SC Bar # 81429)  
PENDARVIS LAW OFFICES, P.C.  
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[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)

Counsel for Plaintiff, PERSONAL CARE, INC.

---

Phillip S. Ferderigos, J.D.  
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Counsel for Defendants Jerry N. Theos and  
URICCHIO, HOWE, KRELL, JACOBSON, TOPOREK, THEOS & KEITH, P.A.

---

Cheryl D. Shoun, J.D.  
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[cshoun@nexsenpruet.com](mailto:cshoun@nexsenpruet.com)  
(843)720-1762

*Pro se* for Cheryl D. Shoun  
and Counsel for TAYLOR, SHOUN, BOWLEY & BYRD, LLC

**Thomas A. Pendarvis**

**From:** Phillip Ferderigos <pferderigos@barnwell-whaley.com>  
**Sent:** Tuesday, August 26, 2014 9:45 AM  
**To:** Thomas A. Pendarvis  
**Subject:** Personal Care

**AmicusFileIds:** 796  
**AmicusFileName:** Personal Care, Inc. v Theos, et al.  
**AmicusId:** 146498  
**AmicusStatus:** Saved  
**AmicusTimeEntry:** Yes

Tom, I am signing your order on behalf of my client and putting it in the mail today.

We look forward to receiving your demand letter in the near future.

Thanks, Phillip.

Phillip S. Ferderigos, Esq.  
Member



288 Meeting St., Ste 200 (29401)  
PO Drawer H  
Charleston, SC 29402  
Phone: (843) 577-7700  
Facsimilie: (843) 577-7708

Email: pferderigos@barnwell-whaley.com



**Phillip S. Ferderigos, Member**  
pferderigos@barnwell-whaley.com

August 26, 2014

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

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 Tom:

Please find enclosed the proposed Consent Order Restoring Case to Docket which I have signed indicating my consent.

With kind regards,

Phillip S. Ferderigos

Enc.

PSF/bbm

00485474.DOC.1  
M. Dawes Cooke, Jr.  
B.C. Killough\*  
Randell C. Stoney, Jr.  
Phillip S. Ferderigos  
K. Michael Barheid

William C. Helms, III\*  
\* Registered patent attorney  
\* Retired

Ernest B. Lipscomb, III\*  
J. Gail Rahn  
Todd M. Musheff  
John A. Jones  
Lucinda D. Gardner  
John W. Fletcher

Alissa D. Fleming  
Barbara J. Wagner, Ph.D.  
Jeremy E. Bowers  
D. Summers Clarke, II  
Jeffrey M. Bogdan

288 Meeting Street, Suite 200, Charleston, SC 29401  
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AUG 27 2014

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

**CONSENT ORDER RESTORING  
CASE TO DOCKET  
(RULE 40(j), SCRCP)**

IT APPEARING to the Court that Plaintiff Personal Care Inc. ("Plaintiff") and Defendants Jerry N. Theos, Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A., Cheryl D. Shoun, and Taylor Shoun, Bowley & Byrd, LLC ("Defendants"), pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, agree to restore the above-captioned case to the docket, which was removed by Consent Order on August 28, 2013.

IT IS HEREBY ORDERED that the above-captioned case be restored to the docket in accordance with the agreement of the parties pursuant to Rule 40(j), SCRCP.

AND IT IS SO ORDERED.

\_\_\_\_\_  
Chief Administrative Judge  
Ninth Judicial Circuit

Charleston, South Carolina

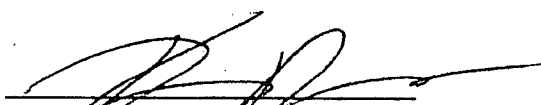
\_\_\_\_\_, 2014

WE SO CONSENT:

---

Thomas A. Pendarvis (SC Bar # 064918)  
Catherine "Carey" B. Kerney (SC Bar # 81429)  
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Thomas@PendarvisLaw.com

Counsel for Plaintiff, PERSONAL CARE, INC.



---

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Counsel for Defendants Jerry N. Theos and  
URICCHIO, HOWE, KRELL, JACOBSON, TOPOREK, THEOS & KEITH, P.A.

---

Cheryl D. Shoun, J.D.  
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cshoun@nexsenpruet.com  
(843)720-1762

*Pro se* for Cheryl D. Shoun  
and Counsel for TAYLOR, SHOUN, BOWLEY & BYRD, LLC

PENDARVIS LAW OFFICES, PC



EXHIBIT  
5

August 27, 2014

**VIA US MAIL**

Ms. Julie J. Armstrong  
Charleston County Clerk of Court  
100 Broad Street, Suite 106  
Charleston, SC 29401

Re: **Personal Care, Inc. V. 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. Armstrong:

Enclosed for filing, please find an original and one copy of a proposed CONSENT ORDER RESTORING CASE TO DOCKET (RULE 40(J), SCRCP). Please present this to Judge Dennis for consideration to restore the above-referenced matter to the active trial docket.

Please return clocked copies in the stamped, self-addressed return envelope enclosed for your convenience.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

Thomas A. Pendarvis

TAP/alg  
Enclosures  
ec w/enc:

Bernie Cignavitch  
Phillip S. Ferderigos, J.D.  
M. Dawes Cooke, Jr., J.D.  
Cheryl D. Shoun, J.D.

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

**CONSENT ORDER RESTORING  
CASE TO DOCKET  
(RULE 40(j), SCRCP)**

IT APPEARING to the Court that Plaintiff Personal Care Inc. ("Plaintiff") and Defendants Jerry N. Theos, Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A., Cheryl D. Shoun, and Taylor Shoun, Bowley & Byrd, LLC ("Defendants"), pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, agree to restore the above-captioned case to the docket, which was removed by Consent Order on August 28, 2013.

IT IS HEREBY ORDERED that the above-captioned case be restored to the docket in accordance with the agreement of the parties pursuant to Rule 40(j), SCRCP.

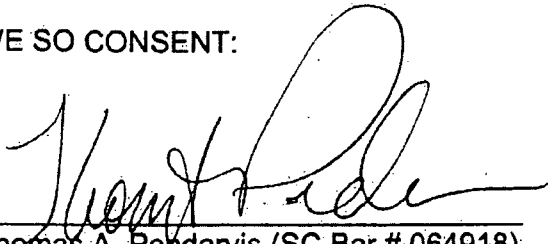
AND IT IS SO ORDERED.

\_\_\_\_\_  
Chief Administrative Judge  
Ninth Judicial Circuit

Charleston, South Carolina

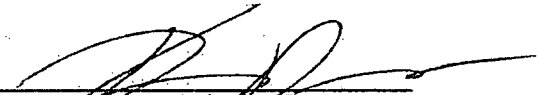
\_\_\_\_\_, 2014

WE SO CONSENT:



Thomas A. Pendarvis (SC Bar # 064918)  
Catherine "Carey" B. Kerney (SC Bar # 81429)  
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Counsel for Plaintiff, PERSONAL CARE, INC.



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Counsel for Defendants Jerry N. Theos and  
URICCHIO, HOWE, KRELL, JACOBSON, TOPOREK, THEOS & KEITH, P.A.

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*Pro se* for Cheryl D. Shoun  
and Counsel for TAYLOR, SHOUN, BOWLEY & BYRD, LLC

COURT OF COMMON PLEAS  
AND GENERAL SESSIONS  
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FAMILY COURT OF THE  
NINTH JUDICIAL CIRCUIT  
CHARLESTON COUNTY  
100 BROAD STREET, SUITE 143  
CHARLESTON, S.C. 29401-2265  
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**JULIE J. ARMSTRONG**  
CLERK OF COURT  
CHARLESTON COUNTY

From: Clerk of Court, Charleston County, South Carolina.

The enclosed document is being returned for the following reason(s);

- The document is not signed / notarized.
- The filing fee is insufficient. The correct amount is: \$150.<sup>00</sup>
- This document is a copy. We must have an original. to restore
- This is not a Charleston County case. 406)
- The check or money order must be made payable to the Clerk of Court.
- This case is ended. Date ended: \_\_\_\_\_  
Reason-ended: \_\_\_\_\_
- Your check must be signed.
- Inmate litigation must comply with S. C. Code of Laws, Title 24, Chapter 27.
- There is not a case listed in our system that matches this caption.
- Information may be obtained from our web-site at www3.charlestoncounty.org.
- The required new case coversheet is not included. (SCCA234)
- The required motion/order coversheet is not included. (SCCA/233)
- The required order (Form 4) coversheet is not included. (SCRCP Form 4C)
- Other: \_\_\_\_\_

Please make the necessary corrections and return this document for filing. Thank you for your assistance.

Staff initials

Date 9/2/14

**Andrea Goodreau**

**From:** Thomas A. Pendarvis  
**Sent:** Tuesday, September 16, 2014 1:26 PM  
**To:** Dennis, R. Markley Jr. Law Clerk (Lindsey M. Coffey)  
**Cc:** M. Dawes Cooke; Phillip Ferderigos; Andrea Goodreau; Leslie Toia; cshoun@nexsenpruet.com  
**Subject:** RE: 2013-CP-10-1396

Ms. Coffey:

Thank you very much for your message below.

As for your question on the missing consent for Ms. Shoun, it was not done in error. Ms. Shoun was originally represented by Amanda Dudgeon with Carlock Copeland & Stair, who on Ms. Shoun's behalf accepted service of the Summons and Complaint, consented to the Rule 40j Order striking the case of the active docket, but was later relieved as counsel. Ms. Shoun was included on all of the written or electronic communications leading to the purposed consent Order restoring the case and has not raised any objection. Counsel for all of the other defendants have consented. Therefore, we believe the Order restoring the case should be issued.

Notwithstanding the foregoing, we will be happy to attend a hearing on the motion to restore if Judge Dennis believes it is necessary. Again, thank you very much for your time and attention to this matter.

Regards,

*Thomas A. Pendarvis*  
**Pendarvis Law Offices, P.C.**  
500 Carteret St., Ste. A  
Beaufort, SC 29902-5066  
843.524.9500 tel  
843.524.9501 fax  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)  
[www.PendarvisLaw.com](http://www.PendarvisLaw.com)

Admitted in South Carolina and Georgia

Board Certified by the American Board of Professional Liability Attorneys in Legal Malpractice

Practice concentrated in lawyer professional responsibility matters (plaintiff lawyer-malpractice claims, law-firm dissolutions, and lawyer moves between firms).

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---

**From:** Dennis, R. Markley Jr. Law Clerk (Lindsey M. Coffey) [mailto:MDennisLC@sccourts.org]  
**Sent:** Monday, September 15, 2014 10:13 AM  
**To:** Thomas A. Pendarvis  
**Cc:** M. Dawes Cooke  
**Subject:** 2013-CP-10-1396

Thomas:

We received your proposed consent order restoring the case to the docket pursuant to rule 40j on 9/5/14. I have reviewed the order and noticed that it is missing the consent of Cheryl D. Shoun. Was this done in error? Just wanting to make sure all proper consents are obtained. I will print a copy of our correspondence for Judge Dennis when I give him this to be signed. If this was an accident, simply send me her signature by mail or courier to our office in the Charleston County Judicial Center and I will attach it to this order. Please let me know—thank you.

Lindsey M. Coffey  
Law Clerk to the Honorable R. Markley Dennis, Jr.  
100 Broad Street, Suite 439  
Charleston, SC 29401  
Phone: (843)958-5062  
Email: [MDennisLC@sccourts.org](mailto:MDennisLC@sccourts.org)

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**Andrea Goodreau**

**From:** Thomas A. Pendarvis  
**Sent:** Wednesday, September 17, 2014 12:47 PM  
**To:** Catherine Byrd; mdc@barnwell-whaley.com; Phillip Ferderigos; cshoun@nexsenpruet.com  
**Cc:** Andrea Goodreau; Leslie Toia  
**Subject:** RE: 2013-CP-10-1396

The reply message transmitted below was returned undeliverable as apparently Ms. Byrd did not have Ms. Shoun's e-address typed in correctly.

Regards,

*Thomas A. Pendarvis*  
**Pendarvis Law Offices, P.C.**  
500 Carteret St., Ste. A  
Beaufort, SC 29902-5066  
843.524.9500 tel  
843.524.9501 fax  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)  
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---

**From:** Thomas A. Pendarvis  
**Sent:** Wednesday, September 17, 2014 12:44 PM  
**To:** 'Catherine Byrd'; mdc@barnwell-whaley.com; cshoun@nexsunpruet.com; 'Phillip Ferderigos'  
**Cc:** Andrea Goodreau; Leslie Toia  
**Subject:** RE: 2013-CP-10-1396

Ms. Byrd:

Thank you for your time on the telephone a few moments ago. Again, please accept my apologies for not including you in the recent correspondence related to the proposed Consent Order to restore this case to the active trial roster. I was under the mistaken understanding that Ms. Shoun was communicating information about this matter to her former law firm. In the future Taylor, Bowley & Byrd, LLC be served with all materials requiring service and included in all communications, both electronic and written. You advised that at this point Taylor, Bowley & Byrd, LLC has not retained counsel to represent it in the foregoing lawsuit. As you directed, until we are advised otherwise, all future correspondence is to be directed to your attention

It was also my understanding from the telephone call 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 and, as stated earlier, Taylor, Bowley & Byrd, LLC will be included on the service list.

An email will be transmitted shortly to the law clerk for Judge Dennis basically restating the substance of this message.

Is worthy of mention, given the content of your communication below, that you did not include me, Dawes Cooke, or Ms. Shoun on you email communication with Judge Dennis and his law clerk.

Again, please accept my apologies and it was a pleasure speaking with you.

Regards,

*Thomas A. Pendarvis*  
**Pendarvis Law Offices, P.C.**  
500 Carteret St., Ste. A  
Beaufort, SC 29902-5066  
843.524.9500 tel  
843.524.9501 fax  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)  
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**From:** Catherine Byrd [<mailto:catherine@tbbesq.com>]  
**Sent:** Wednesday, September 17, 2014 11:21 AM  
**To:** Thomas A. Pendarvis; [mdc@barnwell-whaley.com](mailto:mdc@barnwell-whaley.com); [cshoun@nexsunpruet.com](mailto:cshoun@nexsunpruet.com)  
**Subject:** Fwd: 2013-CP-10-1396

----- Forwarded message -----

**From:** Catherine Byrd <[catherine@tbbesq.com](mailto:catherine@tbbesq.com)>  
**Date:** Wed, Sep 17, 2014 at 10:36 AM  
**Subject:** 2013-CP-10-1396  
**To:** [MDennisLC@sccourts.org](mailto:MDennisLC@sccourts.org)  
**Cc:** "[lynnbowley@netzero.net](mailto:lynnbowley@netzero.net) Bowley" <[lynnbowley@netzero.net](mailto:lynnbowley@netzero.net)>, Donna Taylor <[donna@tbbesq.com](mailto:donna@tbbesq.com)>

Dear Lindsey and Judge Dennis

It has come to our attention in a roundabout way that there has been an attempt to file a "consent order" restoring to the docket the above matter in which our firm is a defendant. Please be advised that :

1. Mr. Pendarvis did not give us notice of intent to restore and did not send us a consent order. In fact, he has not contacted us in any manner, whether directly or by copy of any of his correspondence with other defendants or the court..
2. Cheryl Shoun does not represent this firm, nor has she ever represented this firm.

3. Mr. Pendarvis is aware that we do not have counsel, there having been no notice of appearance on our behalf since the withdrawal of our counsel at the time of the 40 J more than a year ago.

--

Catherine Doscher Byrd  
**TAYLOR, BOWLEY & BYRD,LLC**  
39 Broad Street, Suite 101  
Charleston, SC 29401  
843-723-4020 (fax 4021)

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--

Catherine Doscher Byrd  
**TAYLOR, BOWLEY & BYRD,LLC**  
39 Broad Street, Suite 101  
Charleston, SC 29401  
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**Andrea Goodreau**

**From:** Thomas A. Pendarvis  
**Sent:** Wednesday, September 17, 2014 12:55 PM  
**To:** Dennis, R. Markley Jr. Law Clerk (Lindsey M. Coffey)  
**Cc:** M. Dawes Cooke; Phillip Ferderigos; Andrea Goodreau; Leslie Toia; cshoun@nexsenpruet.com; Catherine Byrd; Don Michel (DMichel@charlestoncounty.org)  
**Subject:** RE: 2013-CP-10-1396

Ms. Coffey:

Please extend my apologies to Judge Dennis for the circumstances, but **Plaintiff is withdrawing the proposed Consent Order to restore** the case to the active trial roster as not all parties have consented to the restoration.

I called Ms. Byrd on the telephone after she forwarded to me a copy of her message to you and Judge Dennis, and apologized for not including her in the recent correspondence related to the proposed Consent Order to restore this case to the active trial roster. I was under the mistaken understanding that Ms. Shoun was communicating information about this matter to her former law firm, Taylor, Bowley & Byrd, LLC. In the future, we will be sure to have Taylor, Bowley & Byrd, LLC served with all materials requiring service and included in all communications, both electronic and written.

It was 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 and, as stated earlier, Taylor, Bowley & Byrd, LLC will be included on the service list. Again, under the circumstances the proposed Consent Order is being withdrawn, and we will proceed with a formal motion to restore.

Thank you very much for your time and attention to this matter.

Regards,

*Thomas A. Pendarvis*  
**Pendarvis Law Offices, P.C.**  
500 Carteret St., Ste. A  
Beaufort, SC 29902-5066  
843.524.9500 tel  
843.524.9501 fax  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)  
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---

**From:** Dennis, R. Markley Jr. Law Clerk (Lindsey M. Coffey) [mailto:MDennisLC@sccourts.org]  
**Sent:** Wednesday, September 17, 2014 11:35 AM  
**To:** Thomas A. Pendarvis  
**Cc:** M. Dawes Cooke; Phillip Ferderigos; Andrea Goodreau; Leslie Toia; cshoun@nexsenpruet.com; Catherine Byrd; Don

Michel (DMichel@charlestoncounty.org)

**Subject:** RE: 2013-CP-10-1396

Thomas:

No order will not be signed until I discuss the matter fully with Judge Dennis. When he lets me know how to move forward, I will let everyone know. Thank you.

Lindsey M. Coffey

Law Clerk to the Honorable R. Markley Dennis, Jr.

100 Broad Street, Suite 439

Charleston, SC 29401

Phone: (843)958-5062

Email: [MDennisLC@sccourts.org](mailto:MDennisLC@sccourts.org)

---

**From:** Dennis, R. Markley Jr. Law Clerk (Lindsey M. Coffey)

**Sent:** Tuesday, September 16, 2014 1:39 PM

**To:** Thomas A. Pendarvis

**Cc:** M. Dawes Cooke; Phillip Ferderigos; Andrea Goodreau; Leslie Toia; [cshoun@nexsenpruet.com](mailto:cshoun@nexsenpruet.com)

**Subject:** Re: 2013-CP-10-1396

No problem. I just wanted to verify this before presenting the order to Judge Dennis. Thank you.

Lindsey M. Coffey

Law Clerk to the Honorable R. Markley Dennis, Jr.

On Sep 16, 2014, at 1:26 PM, "Thomas A. Pendarvis" <[tpendarvis@pendarvislaw.com](mailto:tpendarvis@pendarvislaw.com)> wrote:

Ms. Coffey:

Thank you very much for your message below.

As for your question on the missing consent for Ms. Shoun, it was not done in error. Ms. Shoun was originally represented by Amanda Dudgeon with Carlock Copeland & Stair, who on Ms. Shoun's behalf accepted service of the Summons and Complaint, consented to the Rule 40j Order striking the case of the active docket, but was later relieved as counsel. Ms. Shoun was included on all of the written or electronic communications leading to the purposed consent Order restoring the case and has not raised any objection. Counsel for all of the other defendants have consented. Therefore, we believe the Order restoring the case should be issued.

Notwithstanding the foregoing, we will be happy to attend a hearing on the motion to restore if Judge Dennis believes it is necessary. Again, thank you very much for your time and attention to this matter.

Regards,

*Thomas A. Pendarvis*

**Pendarvis Law Offices, P.C.**

500 Carteret St., Ste. A

Beaufort, SC 29902-5066

843.524.9500 tel

843.524.9501 fax

[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)

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---

**From:** Dennis, R. Markley Jr. Law Clerk (Lindsey M. Coffey) [<mailto:MDennisLC@sccourts.org>]  
**Sent:** Monday, September 15, 2014 10:13 AM  
**To:** Thomas A. Pendarvis  
**Cc:** M. Dawes Cooke  
**Subject:** 2013-CP-10-1396

Thomas:

We received your proposed consent order restoring the case to the docket pursuant to rule 40j on 9/5/14. I have reviewed the order and noticed that it is missing the consent of Cheryl D. Shoun. Was this done in error? Just wanting to make sure all proper consents are obtained. I will print a copy of our correspondence for Judge Dennis when I give him this to be signed. If this was an accident, simply send me her signature by mail or courier to our office in the Charleston County Judicial Center and I will attach it to this order. Please let me know—thank you.

Lindsey M. Coffey  
Law Clerk to the Honorable R. Markley Dennis, Jr.  
100 Broad Street, Suite 439  
Charleston, SC 29401  
Phone: (843)958-5062  
Email: [MDennisLC@sccourts.org](mailto:MDennisLC@sccourts.org)

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## PENDARVIS LAW OFFICES, PC



September 4, 2014

**VIA US MAIL**

Ms. Julie J. Armstrong  
Charleston County Clerk of Court  
100 Broad Street, Suite 106  
Charleston, SC 29401

Re: **Personal Care, Inc. V. 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. Armstrong:

Enclosed for filing, please find an original and one copy of a proposed CONSENT ORDER RESTORING CASE TO DOCKET (RULE 40(J), SCRCP) along with our MOTION INFORMATION COVER SHEET. Please present this to Judge Dennis for consideration to restore the above-referenced matter to the active trial docket.

Also enclosed is our firms check in the amount of \$150.00 representing the filing fee. Please return clocked copies in the stamped, self-addressed return envelope enclosed for your convenience.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink that reads "Thomas A. Pendarvis". The signature is written in a cursive, flowing style.

Thomas A. Pendarvis

TAP/alg  
Enclosures  
cc w/enc:

Bernie Cignavitch  
Phillip S. Ferderigos, J.D.  
M. Dawes Cooke, Jr., J.D.  
Cheryl D. Shoun, J.D.

Personal Care, Inc.,

Plaintiff,

vs.

Case No. 2013-CP-10-1396

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

**MOTION INFORMATION COVER SHEET**

Defendants.

name, S.C. Bar no. and address of Plaintiff's attorney

name, S.C. Bar no. and address of Defendant's attorney

|  |   |
|--|---|
| <p><b>Thomas A. Pendarvis, J.D.</b><br/> <b>Catherine B. Kerney, J.D.</b><br/> <b>Pendarvis Law Offices, PC</b><br/> <b>500 Carteret Street, Suite A</b><br/> <b>Beaufort, SC 29902</b><br/> telephone: 843.524.9500 fax: 843.524.9501<br/> e-mail: <a href="mailto:thomas@pendarvislaw.com">thomas@pendarvislaw.com</a><br/> e-mail: <a href="mailto:carey@pendarvislaw.com">carey@pendarvislaw.com</a></p> | <p><b>M. Dawes Cooke, Jr., J.D.</b><br/> <b>Phillip S. Ferderigos, J.D.</b><br/> <b>Barnwell, Whaley, Patterson &amp; Helms, LLC</b><br/> <b>PO. Drawer H</b><br/> <b>Charleston, SC 29402</b><br/> telephone: 843.577.7700 fax: 843.577.7708<br/> e-mail: <a href="mailto:mdc@barnwell-whaley.com">mdc@barnwell-whaley.com</a><br/> e-mail: <a href="mailto:pferderigos@barnwell-whaley.com">pferderigos@barnwell-whaley.com</a></p> <p><b>Cheryl D. Shoun, J.D.</b><br/> <b>Nexsen Pruet, LLC</b><br/> <b>PO. Box 486</b><br/> <b>Charleston, SC 29402</b><br/> telephone: 843.577.9440 fax: 843.720.1777<br/> e-mail: <a href="mailto:cshoun@nexsenpruet.com">cshoun@nexsenpruet.com</a></p> |
|--|---|

MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I AND III)

FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III)

**SECTION I: Hearing Information**

Nature of Motion: **Consent Order Restoring Case To Docket (Rule 40(j), SCRCP)**

Estimated Time Needed: 15 Minutes

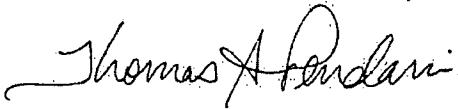
Court Reporter Needed: Yes / No

**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.



Signature of Attorney for Plaintiff / Defendant

09/04/2014

Date Submitted

**SECTION III: Motion Fee**

PAID - AMOUNT: \$150.00

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

Other: Consent Order Restoring Case To Docket (Rule 40(j), SCRCP)

**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: \_\_\_\_\_

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

**CONSENT ORDER RESTORING  
CASE TO DOCKET  
(RULE 40(j), SCRCP)**

IT APPEARING to the Court that Plaintiff Personal Care Inc. ("Plaintiff") and Defendants Jerry N. Theos, Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A., Cheryl D. Shoun, and Taylor Shoun, Bowley & Byrd, LLC ("Defendants"), pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, agree to restore the above-captioned case to the docket, which was removed by Consent Order on August 28, 2013.

IT IS HEREBY ORDERED that the above-captioned case be restored to the docket in accordance with the agreement of the parties pursuant to Rule 40(j), SCRCP.

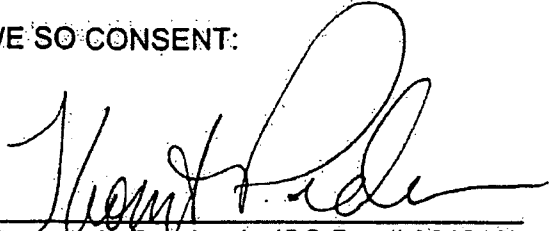
AND IT IS SO ORDERED.

\_\_\_\_\_  
Chief Administrative Judge  
Ninth Judicial Circuit

Charleston, South Carolina

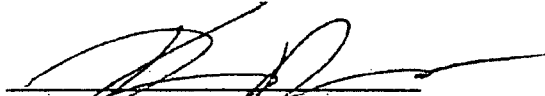
\_\_\_\_\_, 2014

WE SO CONSENT:



Thomas A. Pendarvis (SC Bar # 064918)  
Catherine "Carey" B. Kerney (SC Bar # 81429)  
PENDARVIS LAW OFFICES, P.C.  
500 Carteret St., Suite A  
Beaufort, SC 29902-5066  
843.524.9500 Tel.  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)

Counsel for Plaintiff, PERSONAL CARE, INC.



Phillip S. Ferderigos, J.D.  
BARNWELL WHALEY PATTERSON & HELMS, LLC  
P.O. Drawer H  
Charleston, SC 29402  
(843) 577-7700  
(843) 577-7708 fax

Counsel for Defendants Jerry N. Theos and  
URICCHIO, HOWE, KRELL, JACOBSON, TOPOREK, THEOS & KEITH, P.A.

Cheryl D. Shoun, J.D.  
NEXSEN PRUET, LLC  
PO Box 486  
Charleston SC 29402  
[cshoun@nexsenpruet.com](mailto:cshoun@nexsenpruet.com)  
(843)720-1762

*Pro se* for Cheryl D. Shoun  
and Counsel for TAYLOR, SHOUN, BOWLEY & BYRD, LLC

**Baker, Charles**

**Subject:** FW: Defendants' Answer & Counterclaim

---

**From:** "Jerry Theos" <jerry@uricchio.com>  
**To:** bcignavitch@comcast.net, "Tina B. Sessions" <TSessions@nexsenpruet.com>, "Kenyatta L. Gardner" <KGardner@nexsenpruet.com>, CShoun@nexsenpruet.com  
**Cc:** "Janet Smith" <janet@uricchio.com>  
**Sent:** Thursday, July 12, 2012 6:09:10 PM  
**Subject:** RE: Defendants' Answer & Counterclaim

Bernie:

As we previously indicated to you and as we have discussed in the past, in particular during Mediation, the Defendant asserts in her Answer and Counterclaim a cause of action for "Defamation". The basis for the claim is that the letter sent on Personal Care's behalf on September 14<sup>th</sup>, 2009 stated that the Defendant was guilty of "wrongful conduct", that the Defendant utilized "personal health information taken from Personal Care's file", that the Defendant engaged in the "tortuous interference of Personal Care's business relationships", and that the Defendant was guilty of "unwarranted and baseless reclassifications of wheelchair patients, which resulted in significantly higher costs, and constituted insurance fraud". As we have previously advised you, we believe and contend that their counterclaim is meritless, as truth is an absolute defense to such a claim.

Jerry N. Theos, Esquire

URICCHIO, HOWE, KRELL, JACOBSON,  
TOPOREK, THEOS & KEITH, P.A.  
17 1/2 Broad Street  
Charleston, South Carolina 29401  
Telephone: (843) 723-7491  
Fax: (843) 577-4179

---

**From:** bcignavitch@comcast.net [mailto:bcignavitch@comcast.net]  
**Sent:** Thursday, July 12, 2012 9:43 AM  
**To:** Tina B. Sessions; Jerry Theos; Kenyatta L. Gardner; CShoun@nexsenpruet.com  
**Subject:** Re: Defendants' Answer & Counterclaim

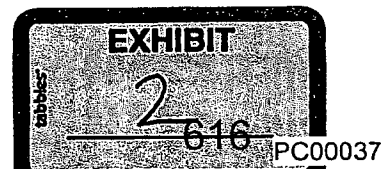
Cheryl,

Thanks for your response, with all due respect- Why are they suing me?

What did I do wrong?

What slander did I commit???

I don't understand?



STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

**CERTIFICATE OF  
SERVICE**

BY

JULIE J. ARMSTRONG  
CLERK OF COURT

2014 DEC - 8 PM 2: 09

FILED

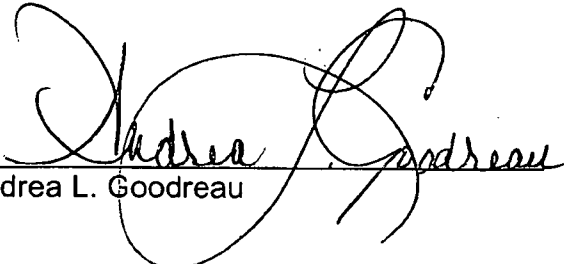
I, Andrea L. Goodreau, paralegal for Pendarvis Law Offices, PC, hereby certify that I have served the document listed below upon counsel of record by e-mailing and mailing a copy of same, postage prepaid and return address clearly indicated on said envelope, to said Defendants at the following addresses:

M. Dawes Cooke, Jr., J.D.  
Phillip S. Ferderigos, J.D.  
BARNWELL, WHALEY, PATTERSON & HELMS, LLC  
PO. Drawer H  
Charleston, SC 29402  
[mdc@barnwell-whaley.com](mailto:mdc@barnwell-whaley.com)  
[pferderigos@barnwell-whaley.com](mailto:pferderigos@barnwell-whaley.com)  
Attorneys for Defendants Jerry N. Theos  
and URICCHIO, HOWE, KRELL, JACOBSON,  
TOPOREK, THEOS & KEITH, P.A.

George J. Kefalos, J.D.  
Oana D. Johnson, J.D.  
GEORGE J. KEFALOS, PA  
46 A State Street  
Charleston, SC 29401  
[george@kefaloslaw.com](mailto:george@kefaloslaw.com)  
[oana@kefaloslaw.com](mailto:oana@kefaloslaw.com)  
Attorneys for Defendant TAYLOR BOWLEY  
AND BYRD, LLC

Richard A. Farrier, Jr., J.D.  
K & L GATES LLP  
134 Meeting Street, Suite 200  
Charleston, SC 29401  
[richard.farrier@klgates.com](mailto:richard.farrier@klgates.com)  
Attorneys for Cheryl D. Shoun

**Documents Served:** PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO RESTORE  
PURSUANT TO RULE 40(J), SCRPC

  
Andrea L. Goodreau

Beaufort, South Carolina  
December 4, 2014

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )


IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
C/A NO. 2013-CP-10-1396

PERSONAL CARE, INC. )  
 )  
Plaintiff, )

vs. )

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

**SUPPLEMENTAL MEMORANDUM  
IN OPPOSITION TO PLAINTIFF'S  
MOTION TO RESTORE PURSUANT  
TO PRIOR ORDER OF THE COURT  
AND SCRCP RULE 40(j)**

FILED  
2014 DEC 10 PM 4:40  
JULIE J. ARNSTROG  
CLERK OF COURT  
BY 

Defendant Taylor Bowley and Byrd, LLC (hereinafter "TBB") respectfully submits its Supplemental Memorandum in Opposition to Plaintiff's Motion to Restore Case. Defendant TBB renews and supplements its prior brief as the statute of limitations has run for the Plaintiff's claim for breach of contract against TBB and it would be futile for the Court to restore the case at this juncture.

Plaintiff failed to comply with the express terms of Judge Dennis's Order itself, or the requirements of Rule 40 (j) of the SCRCP which required that the case be restored by August 28, 2014, or a Motion to Restore be filed by August 28, 2014, therefore, Plaintiff's Motion to Restore should be denied as a matter of law. However, even if the Court is inclined to restore the case, the granting of the Motion to Restore would be futile because the statute of limitations bars any claim for breach of contract that the plaintiff may have had against TBB.

**ARGUMENT**

**PERSONAL CARE'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS**

The only claim that Plaintiff asserted against TBB is one for breach of contract. Assuming *arguendo* that a contract existed, Plaintiff alleges in its Amended Verified Complaint that TBB breached the contract by sending a letter containing allegedly defamatory

statements (this letter was sent in September 2009) about Askew to third parties and by failing to inform Plaintiff about the counterclaim (filed in March 2010) in a timely manner.

An action for breach of contract must be brought within three years from the date the action accrues S.C. Code Ann § 15-3-530(1). South Carolina applies the discovery rule in determining when a cause of action accrues. "Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, **or could or should have discovered the breach through the exercise of reasonable diligence**. Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), cert. dismissed by 288 S.C. 468, 343 S.E.2d 613 (1986), and overruled on other grounds by Atlas Food, 319 S.C. 556, 462 S.E.2d 858." *Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (emphasis added). Furthermore, "South Carolina's statute of limitations requires "very little to start the clock." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994) (applying South Carolina law)". *Id.* at 208

Here, Plaintiff submitted its affidavit asserting that it did not know or have any reason to know of the Defendant Lawyers conflict of interest because the Defendant Lawyers were fact witnesses to the events that formed the basis of a counterclaim asserted against Personal Care. This affidavit has no bearing on when Plaintiff new or should have known that a counterclaim was brought against it in the underlying matter.

Plaintiff argues that it has no legal training and could not know the legal import of the counterclaim, but this is not the standard by which her conduct is measured. See *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 634, 682 S.E.2d 1, 5 (Ct. App. 2009) holding that when a party had the ability to examine the pleadings, its failure to do so did not prevent the statute from beginning to run. Kelly was a medical malpractice suit where Kelly was not initially named as an individual party plaintiff. She had the opportunity and ability to review the complaint, but failed to do so. A week after the complaint was filed, Kelly signed a letter stating she did not wish to participate in the lawsuit individually. Later, Kelly alleged that she did not understand the importance of the caption not containing her name and the letter she signed. The court found that "from an objective view point, the complaint and letter were sufficient to put Kelly on notice".

Similarly here, there is no dispute that Plaintiffs should have known that a claim for breach of contract might exist against Defendant when it received a copy of the Counterclaim on March 19, 2010 (Exhibit 1, e-mail from J. Smith to B. Cignavits). If that is not enough, Plaintiff

was advised on multiple occasions to put its insurance carrier on notice of the counterclaim so that the insurer could defend and indemnify Plaintiff for the counterclaims (Exhibit 2, March 26, 2010 email from Shoun to Plaintiff, Exhibit 3, April 6, 2010 Email from Shoun to Plaintiff, Exhibit 4, June 7, 2010 email from Shoun's assistant to Plaintiff with attached Reply to Counterclaim). Plaintiff's failure to review the documents and act upon them does not prevent the statute from beginning to run. The emails advising Plaintiff that it should seek insurance coverage for the counterclaims, together with copies of the Counterclaim itself and the Reply to Counterclaim should have put any person of common knowledge and experience on notice that the alleged contract with TBB was breached. Therefore, Plaintiff's motion to restore the case is futile and should be denied.

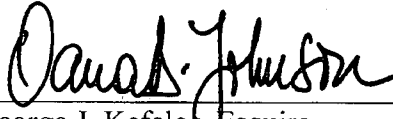
At the hearing on November 19, Plaintiff argued that the statute of limitations did not begin to run until Plaintiff experienced financial consequences of Defendant's acts. This argument fails on its face because financial consequences are not relevant to the statute of limitations in a contract action. Plaintiff's lawyer conceded that Plaintiff knew of the Counterclaim in 2010. The statute of limitations on a breach of contract cause of action, as explained above, does not begin to run when a party sustained financial injury, but when a party knew or should have known that its rights have been violated.

In this case, even if the statute did not begin to run until the first financial injury, Plaintiff's first financial injury occurred when it began to pay for the defense of the Counterclaim in 2010. (See Exhibit 5, June 2, 2010 invoice where Plaintiff was charged \$1200 for work performed by Shoun - who by then was practicing with a different firm, not TBB - to respond to Counterclaim). Even in its affidavit submitted to the Court on November 19, at page 6, Plaintiff concedes that part of its damages were the fees that were paid to Mr. Theos and Ms. Shoun for the defense of the counterclaim prior to 2012. Interestingly enough, there is no indication in Plaintiff's affidavit that any fees were paid to TBB. The only legal fees identified were paid to Uricchio, Howe, Krell, Jacobson, Toporek & Theos and to Ms. Shoun/Nexen Pruet. Clearly the fees contemplated in Plaintiff's affidavit include the fees billed in June of 2010. Therefore it is undisputable that Plaintiff sustained "financial injury" well before the summer of 2012.

**Conclusion**

For the reasons stated, Defendant TBB respectfully requests this Honorable Court deny Plaintiff's Motion to Restore.

GEORGE J. KEFALOS, PA

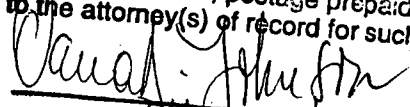


George J. Kefalos, Esquire  
Oana D. Johnson, Esquire  
46 A State Street  
Charleston, SC 29401  
(843) 722-6612  
[george@kefaloslaw.com](mailto:george@kefaloslaw.com)  
[oana@kefaloslaw.com](mailto:oana@kefaloslaw.com)

ATTORNEYS FOR DEFENDANT TAYLOR  
BOWLEY AND BYRD, LLC

This 4<sup>th</sup> day of December, 2014  
Charleston, South Carolina

VERIFICATION OF SERVICE  
THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

  
Signed this 4<sup>th</sup> day of December, 2014 at  
Charleston, South Carolina

**Janet Smith**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]  
**Sent:** Friday, March 19, 2010 4:00 PM  
**To:** Janet Smith  
**Subject:** Fw: Personal Care vs. Askew ( could u please call me 568 0236)

Janet if you're still there could you e-mail the Answer and Counterclaim to Bernie? - If not I'll do it Monday.

Have a great weekend.

----- Original Message -----

**From:** [bcignavitch@comcast.net](mailto:bcignavitch@comcast.net)  
**To:** Cheryl Shoun  
**Sent:** Friday, March 19, 2010 2:06 PM  
**Subject:** Re: Personal Care vs. Askew ( could u please call me 568 0236)

----- Original Message -----

**From:** "Cheryl Shoun" <[cherylshoun@bellsouth.net](mailto:cherylshoun@bellsouth.net)>  
**To:** [bcignavitch@comcast.net](mailto:bcignavitch@comcast.net)  
**Cc:** "Jerry" <[Jerry@uricchio.com](mailto:Jerry@uricchio.com)>  
**Sent:** Friday, March 19, 2010 1:00:00 PM GMT -05:00 US/Canada Eastern  
**Subject:** Personal Care vs. Askew

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 9. 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.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0054

623

3/19/2010

**Janet Smith**

---

**From:** Janet Smith  
**Sent:** Friday, March 19, 2010 4:19 PM  
**To:** bcignavitch@comcast.net  
**Cc:** Cheryl Shoun; Janet Smith  
**Subject:** Answer and Counterclaim  
**Attachments:** 4481\_001.pdf

Mr. Cignavitch: Attached please find a filed copy of the Answer and Counterclaim. Janet

---

**From:** Copier  
**Sent:** Friday, March 19, 2010 4:26 PM  
**To:** Janet Smith  
**Subject:** Attached Image

THEOS 0055

624

3/19/2010

**Janet Smith**

---

**From:** Jerry Theos  
**Sent:** Friday, March 19, 2010 4:40 PM  
**To:** Janet Smith  
**Subject:** FW: Personal Care vs. Askew  
Please file.

---

**From:** Cheryl Shoun [mailto:cherylshoun@bellsouth.net]  
**Sent:** Friday, March 19, 2010 1:00 PM  
**To:** bcignavitch@comcast.net  
**Cc:** Jerry Theos  
**Subject:** Personal Care vs. Askew

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 9. 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.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0056

625

3/19/2010

**Janet Smith**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]  
**Sent:** Friday, March 26, 2010 10:23 AM  
**To:** bcignavitch@comcast.net  
**Cc:** Jerry Theos; Janet Smith  
**Subject:** Personal Care v. Askew  
**Attachments:** personal care extension ltr..tif

Bernie:

I am so sorry that I have not had the opportunity to call and discuss the pleadings sent to you last week. I am going to be out of town next week, and as usual, everything seems to fall on my desk when that happens.

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 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 will be back in my office on April 6, 2010.

I sincerely appreciate your patience in this matter, and look forward to talking with you regarding the Counterclaim. I hope all else is well with you.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0057

626

3/26/2010

TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
ATTORNEYS AT LAW  
39 BROAD STREET, SUITE 101  
CHARLESTON, SOUTH CAROLINA 29401

PHONE: (843) 723-4020

FAX: (843) 723-4021

March 26, 2010

John E. Parker, Esquire  
William F. Barnes, III  
101 Mulberry Street East  
P. O. Box 457  
Hampton, S.C. 29924

RE: Personal Care, Inc. vs. Hattie Askew, et al

Gentlemen:

I am in receipt of the Answer and Counterclaim filed by you on behalf of the Defendant, and served, via United States Mail on March 9, 2010, making a Reply due on or before April 13, 2010.

I would appreciate it if you would kindly grant an extension of time, allowing an additional thirty (30) days in which we may Reply or otherwise plead in response to the Counterclaim.

If you will agree to this extension, please sign the enclosed copy of this letter and return it to me in the envelope provided for your convenience.

Very truly yours,



Cheryl D. Shoun

We consent:

CDS/get

Enc.

CC: Jerry N. Theos, Esquire  
Personal Care, Inc.

DONNA K. TAYLOR

CHERYL D. SHOUN

D. LYNN BOWLEY

CATHERINE D. BYRD

THEOS 0058

**Cheryl Shoun**

---

**From:** "Cheryl Shoun" <cherylshoun@bellsouth.net>  
**To:** <bcignavitch@comcast.net>  
**Cc:** "Jerry" <Jerry@uricchio.com>; "Janet" <janet@uricchio.com>  
**Sent:** Tuesday, April 06, 2010 12:50 PM  
**Subject:** Personal Care v. Hattie Askew

Bernie: Hey. I am back in my office today, and have received confirmation of our thirty 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.

Thanks.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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**Cheryl Shoun**

---

**From:** "Cheryl Shoun" <cherylshoun@bellsouth.net>  
**To:** <bcignavitch@comcast.net>  
**Cc:** "Jerry" <Jerry@uricchio.com>; "janet" <janet@uricchio.com>  
**Sent:** Tuesday, April 06, 2010 12:53 PM

Bernie: I forgot to mention this again -- please get your insurance information to me as quickly as you can. Thanks.

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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**Kerr, Michelle T.**

---

**From:** Kerr, Michelle T.  
**Sent:** Monday, June 07, 2010 10:20 AM  
**To:** 'bcignavitch@comcast.net'  
**Cc:** Shoun, Cheryl D.; 'jerry@uricchio.com'; 'janet@uricchio.com'  
**Subject:** Personal Care, Inc. v. Hattie M. Askew = Attached filed Reply for your review  
**Attachments:** 576565\_1.PDF

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.

Thanks,  
 Michelle

**Michelle T. Kerr**

*Assistant to Cherie W. Blackburn,  
 Paul A. Dominick, Cheryl D. Shoun  
 and Marilyn Trevino*

**NEXSEN PRUET**

205 King Street, Suite 400  
 Charleston, South Carolina 29401  
 P.O. Box 486 (29402)  
 DD: 843.720.1780, F: 843.720.1777  
[mkerr@nexsenpruet.com](mailto:mkerr@nexsenpruet.com)  
[www.nexsenpruet.com](http://www.nexsenpruet.com)

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Attorneys

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6/7/2010

# NEXSEN | PRUET

Invoice Date: 6/2/10

Invoice No. 53368064

Matter No. 047020-00001

## FEES

| Date               | Timekeeper | Description  | Hours | Amount            |
|--------------------|------------|--|-------|-------------------|
| 04/27/10           | CDS        | PERSONAL CARE - CONFERENCE WITH MR. CIGNAVITCH REGARDING MEETING TO DISCUSS COUNTERCLAIM AND PREPARATION OF REPLY THERETO; DISCUSS DEFENDANT'S MOTION TO CHANGE VENUE.   | 0.20  | 80.00             |
| 05/03/10           | CDS        | REVIEW COUNTERCLAIM; CONDUCT RESEARCH AS TO ELEMENTS OF DEFAMATION AND AFFIRMATIVE DEFENSES THERETO; FORWARD TO MR. THEOS FOR REVIEW AND COMMENT. CONFERENCE WITH MR. THEOS REGARDING MERIT OF DEFAMATION CLAIM. LETTER TO DEFENDANT'S COUNSEL REQUESTING DEFENDANT'S RESPONSES TO DISCOVERY WHICH ARE OVERDUE. REVIEW FILE NOTES AND BEGIN DRAFTING ADDITIONAL INTERROGATORIES AND SECOND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT. | 2.60  | 1,040.00          |
| 05/04/10           | CDS        | FILE AND SERVE REPLY TO COUNTERCLAIM.  | 0.20  | 80.00             |
| 05/05/10           | CDS        | REVIEW FILE NOTES; PREPARE ADDITIONAL INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS; FORWARD TO MR. THEOS FOR REVIEW AND COMMENT.   | 0.60  | 240.00            |
| <b>Total Fees:</b> |            |  |       | <b>\$1,440.00</b> |

## EXPENSES

| Date                   | Description      | Amount        |
|------------------------|------------------|---------------|
| 05/04/10               | COPIES           | 2.00          |
| 05/05/10               | COURIER SERVICES | 2.00          |
| 05/05/10               | POSTAGE          | 0.88          |
| <b>Total Expenses:</b> |                  | <b>\$4.88</b> |



OFFICES IN:

CHARLESTON, SC    CHARLOTTE, NC    COLUMBIA, SC    GREENSBORO, NC    GREENVILLE, SC    HILTON HEAD, SC    MYRTLE BEACH, SC    RALEIGH, NC

NEXSEN | PRUET

TIME SUMMARY RECAP

| Timekeeper | Title   | Hours | Rate     | Amount     |
|------------|---------|-------|----------|------------|
| CD SHOUN   | COUNSEL | 3.60  | \$400.00 | \$1,440.00 |
| Total:     |         | 3.60  |          | \$1,440.00 |

OFFICES IN:

CHARLESTON, SC CHARLOTTE, NC COLUMBIA, SC GREENSBORO, NC GREENVILLE, SC HILTON HEAD, SC MYRTLE BEACH, SC RALEIGH, NC

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

**PLAINTIFF'S MOTION TO ALTER OR  
AMEND JUDGMENT**

FILED  
2015 MAR 16 PM 4:36  
JULIE J. ARMSTRONG  
CLERK OF COURT

**COPY TO: M. Dawes Cooke, Jr., JD and Phillip S. Ferderigos, JD, counsel for Defendants Jerry N. Theos and URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; Richard A. Farrier, Jr., JD, counsel for Defendant, Cheryl D. Shoun; and Oana D. Johnson, JD, counsel for Defendant, TAYLOR, SHOUN, BOWLEY & BYRD, LLC, n/k/a TAYLOR, BOWLEY & BYRD, LLC:**

**NOTICE**

PLEASE TAKE NOTICE THAT Plaintiff, PERSONAL CARE, INC., through its undersigned counsel, will move ten days after service of this motion or as soon thereafter as counsel can be heard before the Hon. J. C. Nicholson, Jr. at the Charleston County Judicial Center, Charleston, South Carolina, for an Order pursuant to Rule 52(a) and Rule 59(e), SCRPC, altering or amending the Order ("the Order") issued by Judge Nicholson, dated March 2, 2015, filed with the clerk on March 5, 2015, and received by counsel for the Plaintiff on March 9, 2015, denying Plaintiff's Motion to Restore and Denying Defendants' Motion for Sanctions.

**MOTION**

The motion filed on behalf of Plaintiff, PERSONAL CARE, INC., seeking an order altering or amending the Order pursuant to Rule 52(a) and Rule 59(e), SCRPC, is based

on the testimony and evidence in the record, and the mistakes and omissions identified in the factual findings and errors and omissions contained in the conclusions of law set forth in the Order. A copy of the Order is attached and incorporated herein by reference as **Exhibit 1.**

### ARGUMENTS

The following is a list of the mistakes and omissions identified in the factual findings and errors and omissions contained in the conclusions of law set forth in the Order and arguments why the Order should be altered or amended.

1. The Order should be altered or amended to remove the entire first paragraph in the "Procedural Background" section and the factual findings on pp. 7 - 10 related to the claims asserted in the lawsuit and Plaintiff's knowledge of those claims, because these facts are not relevant to the motion to restore, are not recited accurately and completely, omit critical facts in the record, and are not necessary to resolve a Motion to Restore pursuant to Rule 40(J), SCRCP.
2. The "Consent Order Restoring Case to Docket" timely filed one day before the one year anniversary of the "Consent Order Striking Case From Docket" is equivalent to and should be treated as a motion to restore and be granted. Therefore there is a factual dispute and actual evidence that some form of a motion to restore was timely filed, notwithstanding any statements during oral argument.
3. The motion to restore should be granted pursuant to the express language of Rule 40(j), SCRCP.
4. A party can move to restore the case to the docket more than one year after the

claim was the stricken without violating Rule 40(j) or the Order signed by the Hon. R. Markely Dennis, Jr. that removed the case from the active roster.

5. Because Rule 40(j) is exclusively an administrative rule, there is no basis for an evaluation of the merits of the claims or merits of any affirmative defenses before applying the Rule to restore the case.

6. There was no dispositive motion filed by Defendants to dismiss the case, and therefore the Order should be altered or amended to come within the scope of the Motion to Restore, which was the only active motion ruled upon in the Order.

7. Findings by the Court as to the merits of the Plaintiff's claims were not necessary to resolve a Motion to Restore.

8. Rule 40(j) does not provide or allow the Defendants to assert affirmative defenses in opposition to the motion to restore.

9. Rule 40(j) does not provide the Court with authority to evaluate the merits of the claims asserted in the lawsuit.

10. There is time left on the statute limitations for Personal Care's claims. Any findings in the Order should be altered or amended to remove those findings to the contrary.

11. Personal Care did not have a right to sue until it sustained damages. There is disputed question of fact as to when Personal Care sustained damages, including sworn testimony by Personal Care's principle that it did not sustain damages until July 2012.

12. The Order failed to take into account or make any reference to the testimony contained in the Affidavit of Bernard Cignavitch, dated November 18, 2014, which was of record in before the Court prior to the issuance of the Order, on March 2, 2015. The Order should be altered or omitted to include reference to that testimony.

13. Evidence was before the Court – but omitted from the Order – showing that the Defendants repeatedly assured and advised Personal Care that the defamation counterclaim in the underlying case as “meritless.” As late as July 2012, Mr. Theos sent emails to Personal Care stating, “***As we have previously advised you, we believe and contend that their counterclaim is meritless, as truth is an absolute defense to such a claim.***” See (E-mail from Mr. Theos to Mr. Cignavitch, dated July 12, 2012, Exhibit 11 to Plaintiff’s Plaintiff’s Memorandum in Support of Motion to Restore Pursuant to Rule 40(J), SCRPC).

14. In the event the Defendants were to file a dispositive motion asserting the affirmative defense of statute of limitations, the verified facts in the record establish at least a jury question as to whether Defendants should be estopped from asserting a statute of limitations defense based on Defendants’ assurances to Plaintiff.

15. In the event the Defendants were to file a dispositive motion asserting the affirmative defense of statute of limitations, which Defendants have not done, the verified facts in the record establish the lawsuit was filed within one year of the time when Personal Care knew or should have known of an injury sufficient to trigger objective notice that a claim against the Defendants might exist, and the motion to restore was filed a little more than two years from that same date, both of which are well within the three year statute of limitations.

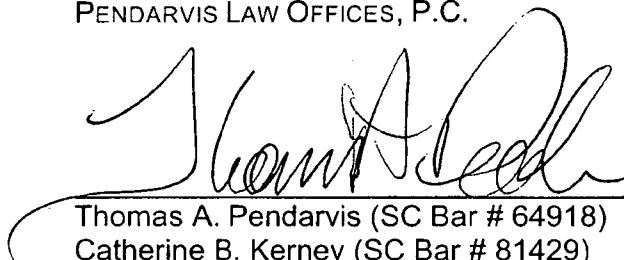
#### CONCLUSION

Based on the foregoing arguments, the record, prior memoranda and exhibits, the Order should be altered or amend to find that Plaintiff’s motion to restore should be granted, the Order should be altered or amended to allow Personal Care to proceed with

litigating its claims on the merits.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, appearing to read "Thomas A. Pendarvis", written over a horizontal line.

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Catherine B. Kerney (SC Bar # 81429)  
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Lawyers for Plaintiff, PERSONAL CARE, INC.

Beaufort, South Carolina

March 13, 2015

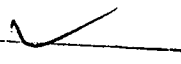
**FILED** CASE NO. 2013-CP-10-1396

2015 MAR -3 PM 2:31

Personal Care, Inc.  
 PLAINTIFF(S)

Jerry N. Theos, et al.  
 DEFENDANT(S)

JULIE J. ARNOLD  
 CLERK OF COURT

|               |  |  |
|---------------|--|--|
| Submitted by: | BY  | Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant |
|               |  | or<br><input type="checkbox"/> 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:

**ORDER INFORMATION**

This order  ends  does not end the case.

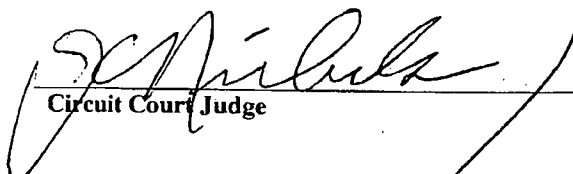
Additional Information for the Clerk : \_\_\_\_\_

**INFORMATION FOR THE PUBLIC 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.

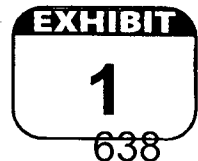
| Judgment in Favor of<br>(List name(s) below)   | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|--|--|--|
| N/A  |  | \$   |
| If applicable, describe the property, including tax map information and address, referenced in the order:<br>N/A |  |  |

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

2117  
 Judge Code

3/2/15  
 Date



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 PERSONAL CARE, INC. )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JERRY N. THEOS; URICCHIO, HOWE, )  
 KRELL, JOHNSON, TOPOREK, THEOS )  
 & KEITH, PA; CHERYL D. SHOUN; AND )  
 TAYLOR, SHOUN, BOWLEY & BYRD, )  
 LLC, )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 NINTH JUDICIAL CIRCUIT  
 C/A NO. 2013-CP-10-1396

**ORDER DENYING PLAINTIFF'S  
 MOTION TO RESTORE AND  
 DENYING DEFENDANTS' MOTION  
 FOR SANCTIONS**

FILED  
 2015 MAR -3 PM 2:31  
 JULEA HARRINGTON  
 CLERK OF COURT  
 BY \_\_\_\_\_

THIS MATTER came before me on the 19th day of November 2014 for a hearing on Plaintiff Personal Care Inc.'s (hereinafter "Personal Care") Motion to Restore. Present in the courtroom were Thomas A. Pendarvis, Esquire, counsel for Personal Care and its representative Bernie Cignavitch; M. Dawes Cooke, Esquire, counsel for Defendants Jerry N. Theos and Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, PA (hereinafter collectively referred to as "Theos"); Oana Dobrescu Johnson, Esquire, counsel for Defendant Taylor, Bowley and Byrd (hereinafter "TBB");<sup>1</sup> and Richard A. Farrier, Jr., Esquire, counsel for Defendant Cheryl D. Shoun (hereinafter "Shoun").

After reviewing Personal Care's Motion to Restore and the memoranda in support of and in opposition to the motion, and considering the arguments of counsel, the Court makes the following findings of fact and conclusions of law.<sup>2</sup>

**Procedural Background**

This case arises from events that occurred in 2009 and early 2010. Beginning in 2009, Theos and Shoun were retained by Personal Care to pursue a potential claim against one of its competitors. Two former employees of Personal Care went to work for the competitor and allegedly disclosed and otherwise utilized protected client information, gained while in Personal

<sup>1</sup> After Defendant Cheryl Shoun left the law firm of Taylor, Shoun, Bowley, and Byrd, LLC, in April 2010, the firm became Taylor, Bowley and Byrd, LLC.  
<sup>2</sup> Also before the Court are two Motions for Sanctions against Personal Care's counsel, filed by Defendants Shoun and TBB. The Court denies these Motions for Sanctions.

Care's employ, to the advantage of the competitor. On or about September 14, 2009, at the direction of Personal Care, Theos sent a letter to the competitor (**Exhibit A**), with a copy allegedly sent to a third-party dialysis clinic, addressing the competitor's alleged wrongful use of the protected information. On December 10, 2009, Theos and Shoun filed the underlying lawsuit on behalf of Personal Care against the competitor. On March 9, 2010, the defendant in the underlying suit filed a counterclaim for defamation against Personal Care based solely on the September 2009 letter (**Exhibit B**).

On March 8, 2013, Personal Care filed the instant action against Theos, Shoun, and TBB (**Exhibit C**).<sup>3</sup> In its Verified Complaint, Personal Care asserted that its failure to attach the required S.C. Code Ann. § 15-36-100(B) Expert Affidavit for a legal malpractice claim 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."

Personal Care filed a Verified Amended Complaint on April 19, 2013 (**Exhibit D**). In its Verified Amended Complaint, Personal Care alleges causes of action for breach of fiduciary duties and legal professional negligence against Theos and Shoun and for breach of contract against the Defendant law firms. All claims purportedly arose from the allegedly defamatory letter drafted by Theos and dated September 14, 2009. Personal Care alleges 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. As to the Defendant law firms, Personal Care alleges that they breached their contract with Personal Care when they sent out the allegedly defamatory letter.

After filing the Verified Amended Complaint, Personal Care took no action via formal discovery (written discovery or depositions) to prosecute its claims before the matter was administratively dismissed by an order dated August 28, 2013. Personal Care's counsel requested a Consent Order Striking the Case from the Docket pursuant to Rule 40(j), SCRPC. All of the Defendants agreed to the Consent Order, which Judge Dennis executed on August 27, 2013 (**Exhibit E**). Pursuant to its express terms, the Consent Order (hereinafter "2013 Judge Dennis Order") set forth the following:


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<sup>3</sup> On March 7, 2013, the day before, Personal Care's counsel expressed his concerns that the statute of limitations may bar his client's litigation if it were commenced after March 8, 2013: "We also discussed my concerns about an argument that the statute of limitations might expire on Friday, March 8."

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, and thereafter the status of the case was shown as "Dismissed."

Approximately one year 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") (**Exhibit F**), which purported to reinstate the case pursuant to the 2013 Judge Dennis Order. On August 26, 2014, Theos did not have an overt reason not to consent to the 2014 Proposed Consent Order. Defense counsel for Theos signed the 2014 Proposed Consent Order and forwarded it to Personal Care's counsel on August 26, 2014. The other Co-Defendants, Shoun and TBB, however, did not consent to the 2014 Proposed Consent Order. In fact, TBB did not receive a copy of the 2014 Proposed Consent Order until September 17, 2014.


 Despite the fact that Personal Care's counsel did not have the consent of all the parties to submit the 2014 Proposed Consent Order to the Court, on or about August 27, 2014, Personal Care's counsel mailed the partial consent to the 2014 Proposed Consent Order to the clerk of court, requesting that the clerk present it to Judge Dennis for his consideration. The clerk returned the mailing unfiled because Personal Care did not include a proper cover sheet and filing fee. Personal Care submitted the 2014 Proposed Consent Order on September 4, 2014, along with the requisite fee and cover sheet. On September 15, 2014, Judge Dennis and his law clerk received the 2014 Proposed Consent Order. Upon review, Judge Dennis's clerk noted that the 2014 Proposed Consent Order did not have the consent of all of the parties. The clerk contacted Personal Care's counsel and to inquire about the missing consents. During the email 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. 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. Shortly thereafter, Personal

Care's counsel withdrew the 2014 Proposed Consent Order via his communication with the Court on September 17, 2014 (**Exhibit G**), 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 SCRCP Rule 40(j), Personal Care's counsel subsequently filed the instant Motion to Restore the case.

#### **Findings of Fact and Conclusions of Law**

 Pursuant to the procedural background set forth above, which I find to be accurate and hereby incorporate as the procedural facts of the case, this case was dismissed by the 2013 Judge Dennis Order. In South Carolina, unless a party seeks rehearing and/or appeals a court decision, the party is bound by the previous order as the law of the case. See Charleston Lumber Co., Inc. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000) (finding that an unappealed ruling, right or wrong, is the law of the case and requires affirmance). Stated differently, a prior order of the Court issued by a Circuit Court Judge may not be reversed or modified by another Circuit Court Judge. See Maxwell v. Genez, 350 S.C. 563, 567 S.E.2d 496 (Ct. App. 2002) (quoting Judge Dennis and stating that "it is the long-standing rule in this State that a Circuit Judge cannot modify or reverse an Order of another Circuit Judge."), reversed on other grounds by 356 S.C. 617, 591 S.E.2d 26 (2004). Because no party challenged the 2013 Judge Dennis Order, either by requesting a hearing or appealing the decision, the 2013 Judge Dennis Order is the law of the case.

Under the express terms of the 2013 Judge Dennis Order, the statute of limitations was not tolled after the case was dismissed in 2013. That Order required the case to be restored within one year of the date of the Order (i.e., by August 28, 2014) in order for the statute of limitations to be tolled during the period of dismissal. However, it is undisputed that Personal

Care failed to restore the case within the one-year deadline. Thus, the statute of limitations was not tolled following the entry of the 2013 Judge Dennis Order.

Similarly, the statute of limitations was not tolled under Rule 40(j). Unlike the 2013 Judge Dennis Order, which required the case to be restored within one year in order for the statute of limitations to be tolled, Rule 40(j) provides that the statute will be tolled "if the claim is restored upon motion made within 1 year of the date stricken."<sup>4</sup> Although a party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j), the party "cannot take advantage of the one year tolling period provided by the rule." Maxwell v. Genez, 356 S.C. 617, 620-621, 591 S.E.2d 26, 28 (2003). It is undisputed that the Motion to Restore currently pending in this Court was not filed until September 22, 2014, long after the expiration of the one-year period. Therefore, the statute of limitations cannot be tolled by Rule 40(j).

At oral argument, Personal Care conceded as much to the Court when it acknowledged that it did not restore or move to restore its case within the timeframe set forth in either the 2013 Judge Dennis Order or SCRPC Rule 40(j). Personal Care further conceded that it should not receive the benefit of the tolling provision of SCRPC Rule 40(j). Instead, Personal Care argued that there is still time left on the statute of limitations because the statute did not begin to run until the summer of 2012. However, Personal Care has subsequently reversed course, asserting in its Memorandum submitted to the Court after the hearing that the withdrawn 2014 Proposed Consent Order is equivalent to and should be treated as a Motion to Restore. There is no merit to this argument.

I find that the 2014 Proposed Consent Order is a nullity. It is undisputed that not all of the parties consented to the proposed order. Moreover, Personal Care did not comply with SCRPC Rule 5 and Rule 7, which govern the filing and service of motions. Finally, and most

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<sup>4</sup> SCRPC Rule 40(j) sets forth:

**(j) Case Stricken From Docket by Agreement**

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 before it is heard. (Emphasis added).

importantly, Personal Care withdrew the 2014 Proposed Consent Order, rendering it a nullity. Thus, even if the 2014 Proposed Consent Order could have been construed as a Motion to Restore, it no longer is before this Court. Therefore, if this case is restored, it will not be restored “upon motion made within one year of the date stricken.” SCRCF Rule 40(j). Accordingly, I conclude that Personal Care did not file the instant Motion to Restore within one year after the case was stricken from the docket.

Accordingly, in regard to Personal Care’s 2014 Proposed Consent Order submitted to the Court, I find that (1) all parties had not consented to the Order and the Order was defective on its face; (2) the case had not been “restored” by August 28, 2014, as the 2013 Judge Dennis Order striking it required; and (3) Personal Care withdrew the 2014 Proposed Consent Order, so it is not properly before the Court and is a nullity. I further find that Personal Care filed its Motion to Restore three weeks after August 28, 2014. Accordingly, under the terms of either the 2013 Judge Dennis Order or Rule 40(j), the statute of limitations was not tolled following the dismissal of the case.

Personal Care argues that it is of no consequence that the statute of limitations was not tolled because, according to Personal Care, the statute of limitations did not start running until July 2012.<sup>5</sup> At the hearing, although Personal Care’s counsel conceded that Personal Care knew both about the Counterclaim and that there were alleged issues with the defense of the case, Personal Care’s counsel asserted that the statute of limitations did not begin to run until Personal Care experienced, in the summer of 2012, the “first financial consequence” caused by Defendants’ alleged errors. The Court finds Personal Care’s argument unpersuasive and concludes that the statute of limitations has expired.

“South Carolina’s statute of limitations requires very little to start the clock.” Maier v. Tietex Corp., 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (internal quotation marks omitted). South Carolina follows the discovery rule, which means that the statute of limitations begins to run from the date the injured party either knows or should have known, by the exercise of reasonable diligence, that a cause of action arises from the wrongful conduct. Holmes v. Haynsworth, Sinkler & Boyd, PA, 408 S.C. 620, 632, 760 S.E.2d 399, 405 (2014); see S.C. Code

<sup>5</sup> All of the claims in this action are governed by a three-year statute of limitations. S.C. Code Ann. § 15-3-530(1) (governing contract claims); Holmes v. Haynsworth, Sinkler & Boyd, PA, 408 S.C. 620, 632, 760 S.E.2d 399, 405 (2014) (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).

Ann. § 15-3-535. “The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist.” Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (emphasis in original). The statute of limitations begins to run from this point of discovery and “**not when advice of counsel is sought or a full-blown theory of recovery developed.**” Id. (emphasis in original). Moreover, in a legal malpractice action, the statute begins to run upon discovery of the cause of action and is not tolled during the period the attorney continues to represent the client on the matter that forms the basis for the malpractice action. Id. at 377, 610 S.E.2d at 818 (declining to adopt the continuous representation rule in the context of a legal malpractice claim).

The date on which discovery of the cause of action should have been made is an objective question. Joubert v. S.C. Dep’t of Soc. Servs., 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). In Young v. South Carolina Department of Corrections, the Court of Appeals stated:

In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party **might** exist. 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999); Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010).

Importantly, under South Carolina law, “[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). The law presumes at least nominal damages at that point. 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). The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose. Livingston, 197 S.C. 458, 15 S.E.2d 770; Stephens v. Druffin, 327 S.C. 1, 488 S.E.2d 3, 7 (S.C. 1997). Thus, in a legal malpractice case, “a client sustains an injury as soon as he or she is forced to incur costs” as a result of counsel’s alleged negligence. Epstein, 363 S.C. at 380, 610 S.E.2d 816 (quoting Laird v. Blacker, 7 Cal. Rptr. 2d 550, 828 P.2d 691, 696 (1992)).

Here, based on the allegations in the Amended Complaint and the clear evidence in the record, I find that the statute of limitations has run on Personal Care’s claims against Defendants.

According to Paragraph 18 of the Amended Complaint, the first act of alleged negligence occurred in September 2009 when Theos allegedly sent a defamatory letter to a third party. Paragraph 20 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 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." Based on such allegations and the clear evidence in the record, I find Personal Care suffered damages as soon as it was forced to incur costs to defend against the competitor's counterclaim.

Once the counterclaim was filed on March 9, 2010, Personal Care became obligated to expend additional monies, including the additional attorney's fees in responding and defending against the counterclaim, and to otherwise contend with the inconvenience of the counterclaim. Accordingly, as a cause of action accrues at the moment when the plaintiff has a legal right to sue on it, and the law presumes at least nominal damages at that point, I find that Personal Care's causes of action accrued and Personal Care had a legal right to sue Defendants on March 9, 2010.

Moreover, Defendants notified Personal Care multiple times of the counterclaim in the spring of 2010. Plaintiff's position with respect to when it received notice has shifted over time. In Paragraph 21 of its Verified Amended Complaint, Personal Care alleges that Defendants did not inform Personal Care about the counterclaim until over two years after the counterclaim had been filed. Personal Care's expert repeated such assertion in his Affidavit supporting Personal Care's legal malpractice claim. However, at the hearing, Personal Care's counsel conceded that his client knew about the counterclaim "throughout the course of this entire . . . underlying case." (Hrg. Tr. at 23; *id.* at 24 ("Certainly he knew about the counterclaim.")) Therefore, Personal Care's sworn allegation in the Verified Amended Complaint not only is belied by the overwhelming evidence in the record, but also has been subsequently acknowledged by Personal Care's counsel to be a misrepresentation.

I hereby find that Personal Care (and Mr. Cignavitch in particular) was notified of the underlying Counterclaim multiple times beginning on March 19, 2010. Overwhelming evidence

refutes Mr. Cignavitch's original sworn assertions to the Court including, but limited to, the following:

1. Email 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." (Exhibit H).

2. Email from Smith to Cignavitch dated March 19, 2010: "Mr. Cignavitch, attached please find a filed copy of the Answer and Counterclaim." (Exhibit I).

3. Email 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 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." (Exhibit J).

4. Email 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." (Exhibit K).

5. Email 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." (Exhibit L).

6. Email 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." (Exhibit M).

7. Invoice from Nexsen Pruet to Personal Care dated June 2, 2010: Charging \$1440 for services related to answering counterclaim (Exhibit N).

8. Email 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.” (Exhibit O).

9. Affidavit of Jerry N. Theos (Exhibit P).

10. Affidavit of Cheryl D. Shoun (Exhibit Q).

Based on these communications alone, I find that Theos and Shoun unequivocally and timely informed Mr. Cignavitch of the counterclaim asserted against Personal Care and advised Personal Care to put its insurance carrier on notice in order to defend and indemnify Personal Care against the counterclaim. I further find that Personal Care was first billed for charges resulting from the counterclaim no later than June 2, 2010.

The Court hereby concludes that, upon receiving a copy of the counterclaim, multiple e-mails referencing the counterclaim, a request for insurance information so that the client could get coverage for defense of the counterclaim, an invoice charging for services rendered to reply to the counterclaim, and a copy of the Reply 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 Epstein, 363 S.C. at 376, 610 S.E.2d at 818. Therefore, I find that Personal Care had both knowledge of the alleged negligence and present damage by the first half of 2010. Accordingly, the Court hereby concludes that the statute of limitations on Plaintiff’s claims began to run in the spring of 2010.

Furthermore, I find that, based on the Verified Complaint’s S.C. Code Ann. § 15-36-100 (c)(1) Expert Affidavit verification, Personal Care has also admitted that the statute of limitations ran, at the latest, on March 18, 2013.<sup>6</sup> Paragraph 97 of the Complaint, filed on March 8, 2013, takes advantage of the provision of South Carolina Code Section 15-36-100(b), (c)(1): “Pursuant to the code, 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 an expert licensed by the Supreme Court of the State of South Carolina.” S.C. Code Ann. § 15-36-100 (c)(1), sets forth the following: “The contemporaneous filing requirements of Subsection (b) do not apply to any case in which the period of limitations will expire or there is a good faith basis to believe it will expire on a claim stated in the complaint within 10 days of filing.” Accordingly,

<sup>6</sup> Personal Care’s Verified Complaint’s expert affidavit verification is consistent with Personal Care’s counsel’s March 7, 2013 email raising his concerns that the statute of limitations would run the following day, March 8, 2013.

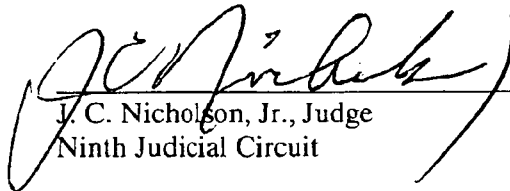
Personal Care verified for this Court that the statute of limitations would likely expire within ten days of filing, i.e., on March 18, 2013.<sup>7</sup>

In summary, I find that the 2014 Proposed Consent Order is a nullity. Moreover, I find that Personal Care failed to restore the case within the one-year timeframe provided in the 2013 Judge Dennis Order. Furthermore, 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). I further find that 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 SCRCF Rule 40(j). As Personal Care did not file its Motion to Restore the case within one year of the administrative dismissal, I hereby find that the statute of limitations is not tolled, and, accordingly, Personal Care's claims against Defendants are time-barred.

**Conclusion**

Based on the foregoing discussion, I hereby Order that Personal Care's Motion to Restore Case is hereby denied. In addition, I hereby deny Shoun's and TBB's Motion for Sanctions. The Exhibits are attached and made a part of this Order by reference.

IT IS SO ORDERED!

  
J. C. Nicholson, Jr., Judge  
Ninth Judicial Circuit

Dated: 3/2/15

<sup>7</sup> At the hearing, Personal Care sought to undo his prior verified admission. This Court rejects Personal Care's attempt to retract via argument that to which it admitted via its verified Complaint. Mere self-serving arguments of counsel do not trump Personal Care's sworn admissions, which were previously submitted to the Court.

# Exhibit A

URICCHIO, HOWE, KRELL, JACOBSON, TOPOREK, THEOS & KEITH, P.A.

ATTORNEYS AT LAW  
17<sup>th</sup> BROAD STREET  
CHARLESTON, SC 29401

PAUL N. URICCHIO, JR. (1922-2000)  
ARTHUR G. HOWE (1927-2004)  
BARRY KRELL  
CARL H. JACOBSON  
ALAN D. TOPOREK  
JERRY N. THEOS  
GREGORY D. KEITH  
JAMES R. BRAUCHLE  
JONATHAN F. KRELL

September 14, 2009

MAILING ADDRESS:  
P.O. BOX 399  
CHAS., SC 29402-0399

TELEPHONES:  
(843) 723-7491  
1-800-899-1883  
FAX (843) 677-4179

Low Country Medical Transport  
61 Hickory Hill Road  
Varnville, South Carolina 29944

RE: Personal Care, Inc.

To Whom It May Concern:

This law firm, along with the law firm of Taylor, Shoun, Bowley & Bryd, LLC, has been retained by Personal Care, Inc., to investigate certain wrongful conduct on the part of Low Country Medical Transport and pursue appropriate legal remedies.

On January 9, 2009, Low Country Medical Transport was sent a letter on behalf of Personal Care requesting that it cease and desist from soliciting Personal Care's patients through the use of confidential information obtained from patients' medical records. Employees of Low Country Medical Transport, previously employed by Personal Care, were utilizing confidential information accessed from Personal Care's patient files, for the purpose of soliciting Personal Care's patients.

While Personal Care had hoped that the correspondence sent earlier this year would result in the cessation of this wrongful conduct, it has not. In fact, it appears as though the wrongful activity has accelerated and expanded in scope. Low Country Medical Transport continues to utilize personal health information taken from Personal Care's files. As Low Country Medical Transport has been previously advised, this constitutes an impermissible disclosure of information pursuant to the Health Insurance Portability and Accountability Act (HIPAA). Such violations can result in a myriad of penalties. We understand further that some patients have filed formal complaints against and/or with Low Country Medical Transport.

Moreover, Low Country Medical Transport is engaging in the tortuous interference of Personal Care's business relationships and, in at least one instance, the tortuous interference of a contract. We have confirmed that Low Country Medical Transport, through its employees, has engaged in the direct, as well as indirect, solicitation of patients from Bay View Manor in Beaufort, South Carolina. Personal Care operates under a written contract with that entity. As such, we hereby demand that this tortuous conduct, as well as the direct solicitation of Personal Care patients, cease immediately.

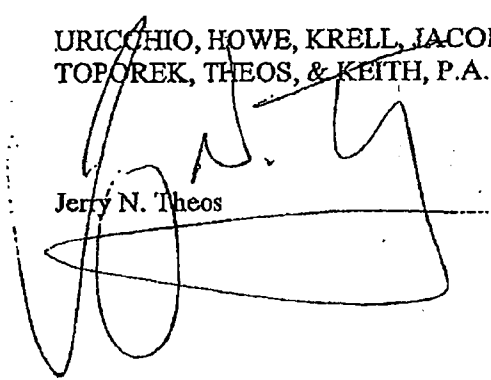
THEOS 0014

Furthermore, we have information that, in some instances when Low Country Medical Transport has been successful in wrongfully procuring the transfer of Personal Care's patients, unnecessary wheelchair patients have been redesignated as stretcher transfers, in the absence of a legitimate medical need or basis. Unwarranted and baseless reclassifications such as this, which result in significantly higher costs, constitute insurance fraud.

We hereby recommend that this letter be forwarded to your legal counsel, requesting that they contact us immediately. Please be advised that if we do not receive contact on behalf of Low Country Medical Transport by Monday, September 28, 2009, we will institute appropriate legal action to address the aforementioned misconduct, and protect Personal Care and the patients they service.

Sincerely,

URICCHIO, HOWE, KRELL, JACOBSON,  
TOPOREK, THEOS, & KEITH, P.A.

  
Jerry N. Theos

JNT/jss

cc: Low Country Dialysis  
Ms. Tanekia Miller  
Ms. Patricia Shelton  
Mr. Bernie Cignavitch  
Ms. Cheryl D. Shoun, Esquire

THEOS 0015

# Exhibit B

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON )

CIVIL ACTION NO.: 09-CP-10-7692

PERSONAL CARE, INC., )

Plaintiff, )

v. )

**ANSWER AND COUNTERCLAIM**

*(Jury Trial Demanded)*

HATTIE M. ASKEW d/b/a LOW  
COUNTRY MEDICAL TRANSPORT,  
f/k/a LOW COUNTRY MEDICAL  
TRANSPORT, INC., )

Defendants. )

FILED  
2010 MAR 12 PM 4:25  
JUDICIAL CLERK OF COURT  
BY

The Defendant, Hattie M. Askew d/b/a Low Country Medical Transport, f/k/a Low Country Medical Transport, Inc., answer the Complaint as follows:

1. The Defendant denies each and every allegation of the Complaint that is not expressly admitted, modified, or explained.
2. Defendant admits the allegations of paragraphs 1, 2, 3, 4, 5, 8, and 35.
3. Defendant denies the allegations of paragraphs 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 36.
4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 6, 7, 9, 12, and 21, and therefore, denies those allegations.
5. Defendant admits the allegations of paragraph 10 to the extent Defendant hired two of Plaintiff's former employees. The remaining allegations of paragraph 10 are expressly denied.

**FOR A FIRST AFFIRMATIVE DEFENSE**  
**(Failure to State a Claim)**

5. Defendant realleges and incorporates its responses above as if repeated verbatim.
6. The Complaint fails to state a claim upon which relief can be based and the Defendant is entitled to judgment as a matter of law pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

**FOR A SECOND AFFIRMATIVE DEFENSE**  
**(Punitive Damages)**

7. Defendant realleges and incorporates its responses above as if repeated verbatim.
8. Defendant would show, upon information and belief, that the Plaintiff's claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the United States Constitution.

**FOR A THIRD AFFIRMATIVE DEFENSE**  
**(Improper Venue)**

9. Venue is improper in Charleston County and must be transferred to Hampton County, where the Defendant is a citizen and resident, and maintains an office and agent for the transaction of business.

**FIRST COUNTERCLAIM**  
**(Defamation)**

10. Defendant realleges and incorporates its responses above as if repeated verbatim.
11. On or about September 14, 2009, a lawyer representing Plaintiff, 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."
12. Also receiving the letter, by way of carbon copy, were four individuals and Low Country Dialysis. Low Country Dialysis is a Beaufort County based dialysis center that often employs the use of private medical transportation services, which Plaintiff and Defendant both provide.
13. The letter falsely accused Defendant of utilizing "personal health information taken from Personal Care's files."
14. The letter falsely accused Defendant of "engaging in the tortuous interference of Personal Care's business relationships. . . ."

15. The letter also falsely accused Defendant and asserted that “[u]nwarranted and baseless reclassifications [of wheelchair patients], which result in significantly higher costs, constitute insurance fraud.”

16. The above described statements about Defendant were false and published by Plaintiff to Low Country Dialysis.

17. These false and malicious statements made by Plaintiff are defamatory per se and constitute libel and slander. These false statements damaged Defendant’s professional and personal reputation as a provider of medical transportation. Because of Plaintiff’s conscious disregard for Defendant’s rights, Defendant is entitled to actual and punitive damages.

PETERS, MURDAUGH, PARKER, ELTZROTH  
& DETRICK, P.A.

BY: 

John E. Parker  
William F. Barnes, III  
101 Mulberry Street East  
Post Office Box 457  
Hampton, SC 29924  
(803) 943-2111

ATTORNEYS FOR DEFENDANT

March 8, 2010  
Hampton, South Carolina

# Exhibit C

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-13911

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

**VERIFIED COMPLAINT**  
(Jury Trial Demanded)

1. Professional Negligence;
2. Breach of Fiduciary Duty;
3. Breach of Contract.

2013 MAR - 8 PM 4: 20  
JULIE J. ARMSTRONG  
CLERK OF COURT

FILED

Plaintiff, PERSONAL CARE, INC., on information, belief, and established facts, by and through their undersigned counsel, complaining of Defendants, Jerry N. Theos; URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; Cheryl D. Shoun; and TAYLOR, SHOUN, BOWLEY & BYRD, LLC, would respectfully show to this Honorable Court the following:

**SUMMARY OF THE CASE**

1. This legal malpractice Complaint centers upon the Defendant lawyers' approximate two (2) year delay in telling Plaintiff, their client in an underlying lawsuit, that a defamation counterclaim had been filed against Plaintiff based on alleged defamatory statements in a letter one of the Defendant lawyers sent prior to filing the underlying lawsuit. Defendants accepted the representation of Plaintiff on its' claims against a former employee for breaching her duty of loyalty and profiting from use of Plaintiff's propriety client lists. Prior to suit being filed, one of the Defendant lawyers published a letter to third-parties—on behalf of Plaintiff—containing allegedly defamatory statements about the former employee, and not

long after that the Defendant lawyers filed suit on behalf of Plaintiff against the employee. Based on the Defendant lawyer's allegedly defamatory statements, the former employee filed an answer and *counterclaim for defamation* against Plaintiff. On top of the damage from the liability exposure, another damage caused by the counterclaim is that it does, of course, takes away from a jury's full attention to Plaintiff's claims, which the Defendant lawyers had agreed to pursue. Further compounding the error, the Defendant lawyers and law firms neglected to tell their client, Plaintiff, *for more than two years* about the fact the Plaintiff was being sued for money damages because of their own allegedly defamatory statements. Defendants also neglected to tell Plaintiff that the Defendant lawyers were "necessary witnesses" because the Defendant lawyers' alleged tortious conduct took place prior to suit being filed and that those circumstances created a non-waiveable conflict of interest and an immediate need for substitute counsel. At the trial-ripe age of about 2 ½+ years, the Defendant lawyers' filed a motion to be relieved based on that non-waiveable conflict, which was granted, causing the need for other lawyers to be engaged and compensated to take over the representation to defend the counterclaim. Plaintiff's insurance coverage would not pay for a lawyer to take over the representation on *Plaintiff's* claims, only for defense of the counterclaim. With no lawyer at the helm for Plaintiff's claims, Plaintiff was tasked with the difficult challenge considering the age of the underlying case to find replacement counsel to finish the job on its claims against the employee. The underlying case remains pending. Because the three year anniversary of the counterclaim is approaching, because Defendants may claim the statute of limitations on Plaintiff's malpractice claims runs on that date, and because Defendants have not agreed to Plaintiff's proposal to toll the statute of limitations, the circumstances created by

Defendants require Plaintiff to commence this lawsuit and simultaneously move to stay this case until the underlying lawsuit has been resolved as per the Supreme Court's instructions in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816, 821 (2005) (citing cases and other authorities commenting on motions to stay legal malpractice cases while underlying matter is pending and tolling agreements between the parties to toll the statute of limitations).

#### **PARTIES**

2. Defendant, Jerry N. Theos, is, upon information and belief, a citizen and resident of Charleston County, South Carolina, and is licensed to practice law and render legal services in South Carolina.
3. Defendant, URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA, is, upon information and belief, a Professional Association organized and existing under the laws of South Carolina, with its principal place of business in Charleston County, South Carolina.
4. Defendant, Cheryl D. Shoun, is, upon information and belief, a citizen and resident of Charleston County, South Carolina, and is licensed to practice law and render legal services in South Carolina.
5. Defendant, TAYLOR, SHOUN, BOWLEY & BYRD, LLC, is or was, upon information and belief, a Limited Liability Corporation organized and existing under the laws of South Carolina, with its principal place of business in Charleston County, South Carolina.
6. Plaintiff, PERSONAL CARE, INC., is a Corporation organized and existing under the laws of South Carolina, providing ambulance services for the community in Beaufort, Charleston, Colleton, Hampton, and Jasper counties in South Carolina.

#### **JURISDICTION**

7. This Court has jurisdiction over these matters based upon Article V of the South

Carolina Constitution, S.C. Code Ann. §§ 36-2-802 and 36-2-803, and its plenary powers.

**VENUE**

8. Venue in this Court is proper as Defendant, Jerry N. Theos, and Defendant, Cheryl D. Shoun, are, upon information and belief, citizens and residents of Charleston County, South Carolina. Upon information and belief, Defendant, Jerry N. Theos, Defendant, URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA, Defendant, Cheryl D. Shoun, and Defendant, TAYLOR, SHOUN, BOWLEY & BYRD, LLC, maintain offices in and provide legal services for clients in Charleston County, South Carolina.

**FACTS**

9. At all relevant times, Defendant, Jerry N. Theos ("Theos"), was, upon information and belief, a Member and owner of Defendant, URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA ("URICCHIO, HOWE"), and was acting as its agent.

10. At all relevant times, the acts, omissions, and liability of URICCHIO, HOWE includes the acts and/or omissions of its agents, principals, employees and/or servants, including but not limited to those by Theos, both directly and vicariously, as well as jointly and severally, pursuant to principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency, and/or *respondeat superior*.

11. At all relevant times, URICCHIO, HOWE acted by and through its employees and agents, including but not limited to Theos, who acted within the course and scope of his employment and/or agency with all implied, inherent, apparent and express authority to so bind his master and principal by his willful, wanton and reckless actions and/or omissions making URICCHIO, HOWE vicariously liable for same under the principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency

and/or *respondeat superior*.

12. At all relevant times, Defendant, Cheryl D. Shoun ("Shoun"), was, upon information and belief, a Member and owner of Defendant, TAYLOR, SHOUN, BOWLEY & BYRD, LLC ("TAYLOR, SHOUN"), and was acting as its agent.

13. At all relevant times, the acts, omissions, and liability of TAYLOR, SHOUN includes the acts and/or omissions of its agents, principals, employees and/or servants, including but not limited to those by Shoun, both directly and vicariously, as well as jointly and severally, pursuant to principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency, and/or *respondeat superior*.

14. At all times relevant, TAYLOR, SHOUN acted by and through its employees and agents, including but not limited to Shoun, who acted within the course and scope of her employment and/or agency with all implied, inherent, apparent and express authority to so bind her master and principal by their her willful, wanton and reckless actions and/or omissions making TAYLOR, SHOUN vicariously liable for same under the principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or *respondeat superior*.

15. At all relevant times, and upon information and belief, Theos and Shoun (collectively "Defendant Lawyers") acted as co-counsel for Plaintiff, PERSONAL CARE, INC., ("PERSONAL CARE").

16. Defendant Lawyers accepted the representation of PERSONAL CARE to pursue claims against its former employee, Hattie M. Askew ("Askew"), who resided in Hampton County, South Carolina, for her allegedly tortious activities in violation of her contract with PERSONAL CARE, a majority of which took place and/or had consequences in Beaufort County, South

Carolina.

17. As an integral part of the Defendant Lawyers' acceptance of the representation, a contract of representation was entered by and between URICCHIO, HOWE and TAYLOR, SHOUN, on the first part, and PERSONAL CARE, on the second part. URICCHIO, HOWE and TAYLOR, SHOUN will be referred to as the "Defendant Law Firms."

18. On September 14, 2009, Theos sent a letter, as agent for PERSONAL CARE, to counsel for Askew and a simultaneous copy to third-parties containing statements about Askew that Askew later claimed were allegedly defamatory about her.

19. On December 10, 2009, the Defendant Lawyers commenced an action in Charleston County, styled *Personal Care, Inc. vs. Hattie M. Askew d/b/a Lowcountry Medical Transport, Inc.*; Civil Action No. 2010-CP-23-626 ("the Askew lawsuit").

20. On March 9, 2010, Askew filed an Answer and Counterclaim asserting a claim for defamation ("Askew counterclaim") against PERSONAL CARE based on the alleged defamatory statements in the letter published by Theos.

21. Defendants did not inform PERSONAL CARE about the Askew counterclaim until May 2012, more than two years after the counterclaim had been filed.

22. Defendants did not inform PERSONAL CARE for more than two years that because the Askew counterclaim was based on the letter written by Theos, a conflict of interest had arisen between Defendants, on the one hand, and their client, PERSONAL CARE, on the other.

23. Defendants did not to inform PERSONAL CARE for more than two years that because the Askew counterclaim was based on the letter written by Theos, it was highly likely that they would be called at trial as witnesses and therefore would not be able to serve as trial

counsel, which would cause substantial prejudice to *Askew* counterclaim.

24. The existence of the *Askew* counterclaim, the factual basis for that counterclaim, and the prosecution of that counterclaim at the trial of *Askew* lawsuit will, as a matter of necessity, require the jury to reduce its focus from 100% on PERSONAL CARE' claims against *Askew* and direct attention to the *Askew* counterclaim, thereby causing injury to PERSONAL CARE and reducing the chances of success on its claims.

25. On March 12, 2010, *Askew's* counsel filed a motion to change venue from Charleston County to Hampton County, which was heard and granted in July 2010.

26. At the time of the July 2010 hearing, Defendants were required to, but did not, produce evidence showing that venue was proper in some county other than Hampton County.

27. At the *Askew* lawsuit was filed and at time of the July 2010 hearing, evidence was available to establish venue in Beaufort County, South Carolina.

28. Prior to filing the *Askew* lawsuit, Defendants knew or should have known that Beaufort County was where the most substantial part of the *Askew's* acts or omissions occurred, where PERSONAL CARE primarily operates, and where a substantial number of witnesses resided.

29. Defendants should have filed the *Askew* lawsuit in Beaufort County, or prior to the hearing in July 2010, submitted affidavits and other evidence opposing the motion to transfer venue to Hampton County.

30. Shortly after May 2012, after the Defendant Lawyers first disclosed to PERSONAL CARE the existence of the *Askew* counterclaim, new lawyers were retained on an hourly fee basis plus expenses to take over the representation of PERSONAL CARE in defense of the

Askew counterclaim.

31. The Defendant lawyer's errors proximately caused the Askew counterclaim and their delay in informing their client about it caused new lawyers to be retained on an hourly fee basis plus expenses to take over the representation of PERSONAL CARE in defense of that counterclaim.

32. In August 2012, in the Askew lawsuit, Defendants filed a motion to be relieved as counsel for PERSONAL CARE based on a conflict of interest under Rule 1.7, RPC.

33. By August 2012, PERSONAL CARE had already paid Defendants approximately \$40,000 in legal fees and expenses. Additional legal fees and expenses continue to be incurred to defend PERSONAL CARE against the Askew counterclaim.

34. After August 2012, the Defendants prepared a proposed Order granting their motion to be relieved as *Personal Care*' counsel.

35. On November 1, 2012, the trial court signed the proposed Order prepared by Defendants granting their motion to be relieved almost three (3) years after Defendants filed the Askew lawsuit.

36. The Order granting Defendants' motion to be relieved only allowed PERSONAL CARE sixty (60) days, until December 31, 2012, to obtain new counsel.

37. The Order goes on to state that PERSONAL CARE would be required to proceed *pro se* if new counsel was not obtained, even though Defendants knew or should have known that a corporation cannot represent itself and Mr. Cignavitch, PERSONAL CARE' representative, is not licensed to practice law.

38. After November 1, 2012, a hearing was held on PERSONAL CARE' second motion to change venue.

39. The court denied PERSONAL CARE' second motion to change venue on the grounds that the Defendants failed to submit evidence supporting venue in Beaufort County when the first venue motion was heard in July 2010.

40. As a direct and proximate result of the Defendants' errors, PERSONAL CARE 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.

41. The claims and counterclaims in the *Askew* lawsuit remain unresolved.

42. As a direct and proximate result of the Defendants' errors, PERSONAL CARE is at substantial risk of a verdict on the *Askew* counterclaim.

43. Had Defendants followed the rules for client safety and protection followed by all reasonably prudent lawyers in South Carolina and thereby meeting the standard of care for lawyers in South Carolina handling the same or similar matters, PERSONAL CARE would not have suffered the financial losses it incurred, including actual damages, consequential damages, and prejudgment interest.

44. Defendants have refused to admit their fault for the financial losses they caused to PERSONAL CARE.

45. Defendants have refused to accept their responsibility to make PERSONAL CARE whole for the financial losses they caused to PERSONAL CARE.

46. Defendants have refused to offer even one penny to make PERSONAL CARE whole for the financial losses they caused to PERSONAL CARE.

**FOR A FIRST CAUSE OF ACTION**  
**(Legal Professional Negligence)**  
**(Against Theos and Shoun Only)**

47. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

48. At all relevant times, a client-lawyer relationship existed between PERSONAL CARE and the Defendant Lawyers.

49. The scope of the client-lawyer relationship required the Defendant Lawyers, among other things, to protect PERSONAL CARE' interests and pursue its claims against its former employee, Hattie M. Askew, for her allegedly tortious activities in violation of her duties of loyalty and in violation of her contract with PERSONAL CARE.

50. Upon agreeing to represent PERSONAL CARE, Defendant Lawyers impliedly represented that they (a) possessed the requisite degree of learning, skill, and ability necessary to the practice of the profession that other lawyers ordinarily possess; (b) would exercise the best professional judgement; and (c) would exercise reasonable and ordinary care and diligence in the use and application of skill and knowledge to their pursuit of PERSONAL CARE' claims against Askew.

51. By virtue of their client-lawyer relationship, Defendant Lawyers owed duties to PERSONAL CARE, including the duty to protect, preserve and advance PERSONAL CARE' rights and interests by possessing and exercising that degree of care, skill and learning which other reasonable and competent lawyers would be expected to possess and exercise under the same or similar circumstances.

52. The standards by which the Defendant Lawyers' satisfaction of their professional duties are measured are referred to as "the standard of care," which can also be described as "client safety rules."

53. The "client safety rules" are general principals by which competent and reasonably prudent lawyers carry out their duties in handling their client's matter so their client's interests are protected.
54. It is a client safety rule that a lawyer should be trained on how to handle their client's matter so their client's interests are protected.
55. It is a client safety rule that a lawyer should follow the requirements of the law when handling the client's matter so their client's interests are protected.
56. It is a client safety rule that a lawyer should avoid doing or saying things that create legal claims against their client so their client's interests are protected.
57. It is a client safety rule that a lawyer should avoid doing or saying things that cause the client to spend more money on legal fees so their client's interests are protected.
58. It is a client safety rule that a lawyer should keep the client informed on all matters concerning the client so their client's interests are protected.
59. It is a client safety rule that a lawyer should avoid saying or doing things that create a conflict of interest between the lawyer and the client so that the client's interests are protected.
60. It is a client safety rule that no lawyer should ever needlessly endanger their client.
61. When a lawyer breaks a client safety rule the client is needlessly endangered.
62. When a lawyer breaks a client safety rule the client's interests are at risk.
63. When a lawyer breaks a client safety rule that causes harm to the client, the lawyer should pay the client for the damages.
64. The Defendant lawyers violated the client safety rule to follow the requirements of the law when handling the client's matter when they sent a letter to a third party containing

allegedly defamatory statements about Askew.

65. The Defendant lawyers violated the client safety rule to avoid doing or saying things that create legal claims against PERSONAL CARE.

66. The Defendant lawyers violated the client safety rule to avoid doing or saying things that cause PERSONAL CARE to spend more money on legal fees.

67. The Defendant lawyers violated the client safety rule to keep PERSONAL CARE informed on all matters concerning PERSONAL CARE, including the *Askew* counterclaim.

68. The Defendant lawyers violated the client safety rule to avoid saying or doing things that create a conflict of interest between the Defendant Lawyers and PERSONAL CARE.

69. Because the Defendant Lawyers violated the client safety rules, the Defendant Lawyers needlessly endangered their client, PERSONAL CARE, to a risk of an adverse verdict on the *Askew* counterclaim.

70. Because the Defendant Lawyers violated the client safety rules, the Defendant Lawyers needlessly endangered their client, PERSONAL CARE, causing it to incur thousands of dollars in legal fees to defend against the *Askew* counterclaim.

71. The obligation to inform PERSONAL CARE about the *Askew* counterclaim did not involve Defendant Lawyers' exercise of professional judgment.

72. Defendant Lawyers' errors in failing to inform PERSONAL CARE about the *Askew* counterclaim were not a result of the exercise of professional judgement, but were instead errors resulting from Defendant Lawyers' failure to exercise ordinary skill and knowledge.

73. Based on the foregoing, Defendant Lawyers failed to meet the minimum standard of care and thereby breached their duties to perform competent and prudent legal services to PERSONAL CARE as would ordinary and reasonable lawyers under similar circumstances.

74. Defendant Lawyers failed to meet the minimum standard of care and thereby breached their duties to perform competent and prudent legal services and otherwise acted in a negligent, grossly negligent, willful, wanton and reckless manner in such other particulars as the evidence in this case may demonstrate.

75. It is reasonably foreseeable that PERSONAL CARE would incur substantial damages in the event Defendant Lawyers failed to meet the minimum standard of care in handling the *Askew* lawsuit.

76. As a direct and proximate cause of Defendant Lawyers' actions, PERSONAL CARE incurred actual damages; special damages; and incidental damages, all in an amount to be more specifically proven at trial.

77. WHEREFORE, PERSONAL CARE prays for judgment on its professional negligence cause of action against Defendant Lawyers for actual damages; special damages; and incidental damages, and such other relief as the Court may deem reasonable and proper.

**FOR A SECOND CAUSE OF ACTION**  
**(Breach of Fiduciary Duties)**  
**(Against Theos and Shoun Only)**

78. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

79. At all relevant times, Defendant Lawyers had and owed fiduciary duties to PERSONAL CARE.

80. Defendant Lawyers' fiduciary duties to PERSONAL CARE included, but were not limited to, the duties of competence and loyalty, as well as the duty to act single-mindedly in preserving, protecting and advancing the rights and interests of PERSONAL CARE.

81. Defendant Lawyers had a duty to keep PERSONAL CARE fully informed on all facts material to the *Askew* lawsuit.

82. Defendant Lawyers had a duty to inform PERSONAL CARE about the *Askew* counterclaim promptly upon learning it had been filed.

83. Defendant Lawyers had a duty to avoid continuing to represent PERSONAL CARE once a conflict of interest arose based on the factual basis for the *Askew* counterclaim alleged in the *Askew* lawsuit.

84. Defendant Lawyers failed to meet the minimum standard of conduct and thereby breached their fiduciary duties to provide competent and prudent legal services to PERSONAL CARE as would ordinary and reasonable fiduciaries under similar circumstances.

85. Defendant Lawyers failed to meet the minimum standard of conduct and thereby breached their fiduciary duties to PERSONAL CARE, when, among other things, the Defendant Lawyers did not inform PERSONAL CARE in a timely manner about the *Askew* counterclaim.

86. Defendant Lawyers failed to meet the minimum standard of conduct and thereby breached their fiduciary duties to PERSONAL CARE in such other particulars as the evidence in this case may demonstrate.

87. As a direct and proximate cause of Defendant Lawyers' conduct in breach of their fiduciary duties, PERSONAL CARE sustained compensatory damages in an amount to be more specifically proven at trial.

88. Based upon Defendant Lawyers' conduct in breach of their fiduciary duties of loyalty, PERSONAL CARE should be entitled to an Order requiring Defendant Lawyers and Defendant Law Firms to disgorge all fees and other benefits obtained from their relationship with PERSONAL CARE.

89. WHEREFORE, PERSONAL CARE prays for judgment on this breach of fiduciary duty

cause of action against Defendant Lawyers for actual compensatory damages, disgorgement of legal fees and all other benefits from their relationship with PERSONAL CARE, and such other relief as the Court may deem reasonable and proper.

**FOR A THIRD CAUSE OF ACTION**  
**(Breach of Contract)**  
**(Against DEFENDANT LAW FIRMS Only).**

90. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

91. Defendant Law Firms entered into a contract with PERSONAL CARE, the terms of which Defendant Law Firms agreed and contracted to provide competent and prudent legal services to pursue recovery on PERSONAL CARE' claim against its former employee, Askew.

92. PERSONAL CARE fulfilled all necessary preconditions of the contract and escrow contract, if any, with Defendant Law Firms.

93. Defendant Law Firms breached the contract with PERSONAL CARE when Defendant Law Firms sent a letter containing allegedly defamatory statements about Askew to third-parties and when they failed to inform PERSONAL CARE about the Askew counterclaim in a timely manner.

94. As a direct and proximate result of Defendant Law Firms' breach of contract, PERSONAL CARE sustained actual damages in an amount to be more specifically proven at trial.

95. WHEREFORE, PERSONAL CARE prays for judgment on this cause of action against Defendant Law Firms for actual damages suffered and such other relief as the Court may deem reasonable and proper.

**TRIAL BY JURY**

96. Plaintiff demands a jury trial on all claims and issues so triable.

**EXPERT AFFIDAVIT**

97. 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.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, PERSONAL CARE, LLC, prays for a judgment against Defendants, Jerry N. Theos; URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; Cheryl D. Shoun; and TAYLOR, SHOUN, BOWLEY & BYRD, LLC, as follows:

1. As to the Professional Negligence cause of action, for a judgment against Defendants, Jerry N. Theos and Cheryl D. Shoun, jointly and severally, for all actual damages, special damages, and incidental damages, all in an amount to be more specifically proven at trial; the costs of this lawsuit; and such other relief as the Court may deem reasonable and proper.

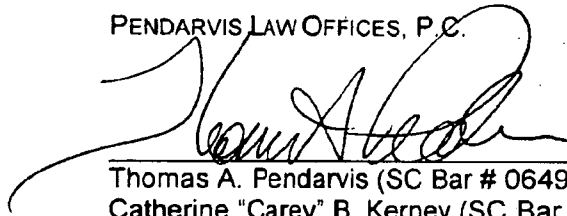
2. As to the Breach of Fiduciary Duty cause of action, for a judgment against Defendants, Jerry N. Theos and Cheryl D. Shoun, jointly and severally, for all actual damages, special damages, and incidental damages, all in an amount to be more

specifically proven at trial; for an order for disgorgement of all legal fees and other benefits; for punitive damages; the costs of this lawsuit; and such other relief as the Court may deem reasonable and proper.

3. As to the Breach of Contract cause of action, for a judgment against Defendant URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA and TAYLOR, SHOUN, BOWLEY & BYRD, LLC, jointly and severally, for actual damages suffered and such other relief as the Court may deem reasonable and proper.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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Lawyers for Plaintiff, PERSONAL CARE, INC.

Beaufort, South Carolina

March 4, 2013

# Exhibit D

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

**VERIFIED  
AMENDED COMPLAINT**  
(Jury Trial Demanded)

1. Professional Negligence
2. Breach of Fiduciary Duty;
3. Breach of Contract.

BY

JULIE J. ARMSTRONG  
CLERK OF COURT

2013 APR 19 PM 3:00

FILED

Plaintiff, PERSONAL CARE, INC., on information, belief, and established facts, by and through their undersigned counsel, complaining of Defendants, Jerry N. Theos; URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; Cheryl D. Shoun; and TAYLOR, SHOUN, BOWLEY & BYRD, LLC, would respectfully show to this Honorable Court the following:

**SUMMARY OF THE CASE**

1. This legal malpractice Amended Complaint centers upon the Defendant lawyers' approximate two (2) year delay in telling Plaintiff, their client in an underlying lawsuit, that a defamation counterclaim had been filed against Plaintiff based on alleged defamatory statements in a letter one of the Defendant lawyers sent prior to filing the underlying lawsuit. Defendants accepted the representation of Plaintiff on its' claims against a former employee for breaching her duty of loyalty and profiting from use of Plaintiff's propriety client lists. Prior to suit being filed, one of the Defendant lawyers published a letter to third-parties—on behalf of Plaintiff—containing allegedly defamatory statements about the former

employee, and not long after that the Defendant lawyers filed suit on behalf of Plaintiff against the employee. Based on the Defendant lawyer's allegedly defamatory statements, the former employee filed an answer and *counterclaim for defamation* against Plaintiff. On top of the damage from the liability exposure, another damage caused by the counterclaim is that it does, of course, takes away from a jury's full attention to Plaintiff's claims, which the Defendant lawyers had agreed to pursue. Further compounding the error, the Defendant lawyers and law firms neglected to tell their client, Plaintiff, *for more than two years* about the fact the Plaintiff was being sued for money damages because of their own allegedly defamatory statements. Defendants also neglected to tell Plaintiff that the Defendant lawyers were "necessary witnesses" because the Defendant lawyers' alleged tortious conduct took place prior to suit being filed and that those circumstances created a non-waiveable conflict of interest and an immediate need for substitute counsel. At the trial-ripe age of about 2 ½+ years, the Defendant lawyers' filed a motion to be relieved based on that non-waiveable conflict, which was granted, causing the need for other lawyers to be engaged and compensated to take over the representation to defend the counterclaim. Plaintiff's insurance coverage would not pay for a lawyer to take over the representation on *Plaintiff's* claims, only for defense of the counterclaim. With no lawyer at the helm for Plaintiff's claims, Plaintiff was tasked with the difficult challenge considering the age of the underlying case to find replacement counsel to finish the job on its claims against the employee. The underlying case remains pending. Because the three year anniversary of the counterclaim is approaching, because Defendants may claim the statute of limitations on Plaintiff's malpractice claims runs on that date, and because Defendants have not agreed to Plaintiff's proposal to toll the statute of limitations, the circumstances

created by Defendants require Plaintiff to commence this lawsuit and simultaneously move to stay this case until the underlying lawsuit has been resolved as per the Supreme Court's instructions in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816, 821 (2005) (citing cases and other authorities commenting on motions to stay legal malpractice cases while underlying matter is pending and tolling agreements between the parties to toll the statute of limitations).

### PARTIES

2. Defendant, Jerry N. Theos, is, upon information and belief, a citizen and resident of Charleston County, South Carolina, and is licensed to practice law and render legal services in South Carolina.

3. Defendant, URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA, is, upon information and belief, a Professional Association organized and existing under the laws of South Carolina, with its principal place of business in Charleston County, South Carolina.

4. Defendant, Cheryl D. Shoun, is, upon information and belief, a citizen and resident of Charleston County, South Carolina, and is licensed to practice law and render legal services in South Carolina.

5. Defendant, TAYLOR, SHOUN, BOWLEY & BYRD, LLC, is or was, upon information and belief, a Limited Liability Corporation organized and existing under the laws of South Carolina, with its principal place of business in Charleston County, South Carolina.

6. Plaintiff, PERSONAL CARE, INC., is a Corporation organized and existing under the laws of South Carolina, providing ambulance services for the community in Beaufort, Charleston, Colleton, Hampton, and Jasper counties in South Carolina.

### JURISDICTION

7. This Court has jurisdiction over these matters based upon Article V of the South Carolina Constitution, S.C. Code Ann. §§ 36-2-802 and 36-2-803, and its plenary powers.

### VENUE

8. Venue in this Court is proper as Defendant, Jerry N. Theos, and Defendant, Cheryl D. Shoun, are, upon information and belief, citizens and residents of Charleston County, South Carolina. Upon information and belief, Defendant, Jerry N. Theos, Defendant, URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA, Defendant, Cheryl D. Shoun, and Defendant, TAYLOR, SHOUN, BOWLEY & BYRD, LLC, maintain offices in and provide legal services for clients in Charleston County, South Carolina.

### FACTS

9. At all relevant times, Defendant, Jerry N. Theos ("Theos"), was, upon information and belief, a Member and owner of Defendant, URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA ("URICCHIO, HOWE"), and was acting as its agent.

10. At all relevant times, the acts, omissions, and liability of URICCHIO, HOWE includes the acts and/or omissions of its agents, principals, employees and/or servants, including but not limited to those by Theos, both directly and vicariously, as well as jointly and severally, pursuant to principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency, and/or *respondeat superior*.

11. At all relevant times, URICCHIO, HOWE acted by and through its employees and agents, including but not limited to Theos, who acted within the course and scope of his employment and/or agency with all implied, inherent, apparent and express authority to so

bind his master and principal by his willful, wanton and reckless actions and/or omissions making URICCHIO, HOWE vicariously liable for same under the principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or *respondeat superior*.

12. At all relevant times, Defendant, Cheryl D. Shoun ("Shoun"), was, upon information and belief, a Member and owner of Defendant, TAYLOR, SHOUN, BOWLEY & BYRD, LLC ("TAYLOR, SHOUN"), and was acting as its agent.

13. At all relevant times, the acts, omissions, and liability of TAYLOR, SHOUN includes the acts and/or omissions of its agents, principals, employees and/or servants, including but not limited to those by Shoun, both directly and vicariously, as well as jointly and severally, pursuant to principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency, and/or *respondeat superior*.

14. At all times relevant, TAYLOR, SHOUN acted by and through its employees and agents, including but not limited to Shoun, who acted within the course and scope of her employment and/or agency with all implied, inherent, apparent and express authority to so bind her master and principal by their her willful, wanton and reckless actions and/or omissions making TAYLOR, SHOUN vicariously liable for same under the principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or *respondeat superior*.

15. At all relevant times, and upon information and belief, Theos and Shoun (collectively "Defendant Lawyers") acted as co-counsel for Plaintiff, PERSONAL CARE, INC., ("PERSONAL CARE").

16. Defendant Lawyers accepted the representation of PERSONAL CARE to pursue claims

against its former employee, Hattie M. Askew ("Askew"), who resided in Hampton County, South Carolina, for her allegedly tortious activities in violation of her contract with PERSONAL CARE, a majority of which took place and/or had consequences in Beaufort County, South Carolina.

17. As an integral part of the Defendant Lawyers' acceptance of the representation, a contract of representation was entered by and between URICCHIO, HOWE and TAYLOR, SHOUN, on the first part, and PERSONAL CARE, on the second part. URICCHIO, HOWE and TAYLOR, SHOUN will be referred to as the "Defendant Law Firms."

18. On September 14, 2009, Theos sent a letter, as agent for PERSONAL CARE, to counsel for Askew and a simultaneous copy to third-parties containing statements about Askew that Askew later claimed were allegedly defamatory about her.

19. On December 10, 2009, the Defendant Lawyers commenced an action in Charleston County, styled *Personal Care, Inc. vs. Hattie M. Askew d/b/a Lowcountry Medical Transport, Inc.*; Civil Action No. 2010-CP-23-626 ("the Askew lawsuit").

20. On March 9, 2010, Askew filed an Answer and Counterclaim asserting a claim for defamation ("Askew counterclaim") against PERSONAL CARE based on the alleged defamatory statements in the letter published by Theos.

21. Defendants did not inform PERSONAL CARE about the Askew counterclaim until May 2012, more than two years after the counterclaim had been filed.

22. Defendants did not inform PERSONAL CARE for more than two years that because the Askew counterclaim was based on the letter written by Theos, a conflict of interest had arisen between Defendants, on the one hand, and their client, PERSONAL CARE, on the other.

23. Defendants did not to inform PERSONAL CARE for more than two years that because the *Askew* counterclaim was based on the letter written by Theos, it was highly likely that they would be called at trial as witnesses and therefore would not be able to serve as trial counsel, which would cause substantial prejudice to *Askew* counterclaim.

24. The existence of the *Askew* counterclaim, the factual basis for that counterclaim, and the prosecution of that counterclaim at the trial of *Askew* lawsuit will, as a matter of necessity, require the jury to reduce its focus from 100% on PERSONAL CARE' claims against *Askew* and direct attention to the *Askew* counterclaim, thereby causing injury to PERSONAL CARE and reducing the chances of success on its claims.

25. On March 12, 2010, *Askew's* counsel filed a motion to change venue from Charleston County to Hampton County, which was heard and granted in July 2010.

26. At the time of the July 2010 hearing, Defendants were required to, but did not, produce evidence showing that venue was proper in some county other than Hampton County.

27. At the *Askew* lawsuit was filed and at time of the July 2010 hearing, evidence was available to establish venue in Beaufort County, South Carolina.

28. Prior to filing the *Askew* lawsuit, Defendants knew or should have known that Beaufort County was where the most substantial part of the *Askew's* acts or omissions occurred, where PERSONAL CARE primarily operates, and where a substantial number of witnesses resided.

29. Defendants should have filed the *Askew* lawsuit in Beaufort County, or prior to the hearing in July 2010, submitted affidavits and other evidence opposing the motion to

transfer venue to Hampton County.

30. Shortly after May 2012, after the Defendant Lawyers first disclosed to PERSONAL CARE the existence of the *Askew* counterclaim, new lawyers were retained on an hourly fee basis plus expenses to take over the representation of PERSONAL CARE in defense of the *Askew* counterclaim.

31. The Defendant lawyer's errors proximately caused the *Askew* counterclaim and their delay in informing their client about it caused new lawyers to be retained on an hourly fee basis plus expenses to take over the representation of PERSONAL CARE in defense of that counterclaim.

32. In August 2012, in the *Askew* lawsuit, Defendants filed a motion to be relieved as counsel for PERSONAL CARE based on a conflict of interest under Rule 1.7, RPC.

33. By August 2012, PERSONAL CARE had already paid Defendants approximately \$40,000 in legal fees and expenses. Additional legal fees and expenses continue to be incurred to defend PERSONAL CARE against the *Askew* counterclaim.

34. After August 2012, the Defendants prepared a proposed Order granting their motion to be relieved as *Personal Care*' counsel.

35. On November 1, 2012, the trial court signed the proposed Order prepared by Defendants granting their motion to be relieved almost three (3) years after Defendants filed the *Askew* lawsuit.

36. The Order granting Defendants' motion to be relieved only allowed PERSONAL CARE sixty (60) days, until December 31, 2012, to obtain new counsel.

37. The Order goes on to state that PERSONAL CARE would be required to proceed *pro*

se if new counsel was not obtained, even though Defendants knew or should have known that a corporation cannot represent itself and Mr. Cignavitch, PERSONAL CARE' representative, is not licensed to practice law.

38. After November 1, 2012, a hearing was held on PERSONAL CARE' second motion to change venue.

39. The court denied PERSONAL CARE' second motion to change venue on the grounds that the Defendants failed to submit evidence supporting venue in Beaufort County when the first venue motion was heard in July 2010.

40. As a direct and proximate result of the Defendants' errors, PERSONAL CARE 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.

41. The claims and counterclaims in the *Askew* lawsuit remain unresolved.

42. As a direct and proximate result of the Defendants' errors, PERSONAL CARE is at substantial risk of a verdict on the *Askew* counterclaim.

43. Had Defendants followed the rules for client safety and protection followed by all reasonably prudent lawyers in South Carolina and thereby meeting the standard of care for lawyers in South Carolina handling the same or similar matters, PERSONAL CARE would not have suffered the financial losses it incurred, including actual damages, consequential damages, and prejudgment interest.

44. Defendants have refused to admit their fault for the financial losses they caused to PERSONAL CARE.

45. Defendants have refused to accept their responsibility to make PERSONAL CARE whole for the financial losses they caused to PERSONAL CARE.

46. Defendants have refused to offer even one penny to make PERSONAL CARE whole for the financial losses they caused to PERSONAL CARE.

**FOR A FIRST CAUSE OF ACTION**  
**(Legal Professional Negligence)**  
**(Against Theos and Shoun Only)**

47. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

48. At all relevant times, a client-lawyer relationship existed between PERSONAL CARE and the Defendant Lawyers.

49. The scope of the client-lawyer relationship required the Defendant Lawyers, among other things, to protect PERSONAL CARE' interests and pursue its claims against its former employee, Hattie M. Askew, for her allegedly tortious activities in violation of her duties of loyalty and in violation of her contract with PERSONAL CARE.

50. Upon agreeing to represent PERSONAL CARE, Defendant Lawyers impliedly represented that they (a) possessed the requisite degree of learning, skill, and ability necessary to the practice of the profession that other lawyers ordinarily possess; (b) would exercise the best professional judgement; and (c) would exercise reasonable and ordinary care and diligence in the use and application of skill and knowledge to their pursuit of PERSONAL CARE' claims against Askew.

51. By virtue of their client-lawyer relationship, Defendant Lawyers owed duties to PERSONAL CARE, including the duty to protect, preserve and advance PERSONAL CARE' rights and interests by possessing and exercising that degree of care, skill and learning which other reasonable and competent lawyers would be expected to possess and exercise under the same or similar circumstances.

52. The standards by which the Defendant Lawyers' satisfaction of their professional

duties are measured are referred to as "the standard of care," which can also be described as "client safety rules."

53. The "client safety rules" are general principals by which competent and reasonably prudent lawyers carry out their duties in handling their client's matter so their client's interests are protected.

54. It is a client safety rule that a lawyer should be trained on how to handle their client's matter so their client's interests are protected.

55. It is a client safety rule that a lawyer should follow the requirements of the law when handling the client's matter so their client's interests are protected.

56. It is a client safety rule that a lawyer should avoid doing or saying things that create legal claims against their client so their client's interests are protected.

57. It is a client safety rule that a lawyer should avoid doing or saying things that cause the client to spend more money on legal fees so their client's interests are protected.

58. It is a client safety rule that a lawyer should keep the client informed on all matters concerning the client so their client's interests are protected.

59. It is a client safety rule that a lawyer should avoid saying or doing things that create a conflict of interest between the lawyer and the client so that the client's interests are protected.

60. It is a client safety rule that no lawyer should ever needlessly endanger their client.

61. When a lawyer breaks a client safety rule the client is needlessly endangered.

62. When a lawyer breaks a client safety rule the client's interests are at risk.

63. When a lawyer breaks a client safety rule that causes harm to the client, the lawyer should pay the client for the damages.

64. The Defendant lawyers violated the client safety rule to follow the requirements of the law when handling the client's matter when they sent a letter to a third party containing allegedly defamatory statements about Askew.

65. The Defendant lawyers violated the client safety rule to avoid doing or saying things that create legal claims against PERSONAL CARE.

66. The Defendant lawyers violated the client safety rule to avoid doing or saying things that cause PERSONAL CARE to spend more money on legal fees.

67. The Defendant lawyers violated the client safety rule to keep PERSONAL CARE informed on all matters concerning PERSONAL CARE, including the Askew counterclaim.

68. The Defendant lawyers violated the client safety rule to avoid saying or doing things that create a conflict of interest between the Defendant Lawyers and PERSONAL CARE.

69. Because the Defendant Lawyers violated the client safety rules, the Defendant Lawyers needlessly endangered their client, PERSONAL CARE, to a risk of an adverse verdict on the Askew counterclaim.

70. Because the Defendant Lawyers violated the client safety rules, the Defendant Lawyers needlessly endangered their client, PERSONAL CARE, causing it to incur thousands of dollars in legal fees to defend against the Askew counterclaim.

71. The obligation to inform PERSONAL CARE about the Askew counterclaim did not involve Defendant Lawyers' exercise of professional judgment.

72. Defendant Lawyers' errors in failing to inform PERSONAL CARE about the Askew counterclaim were not a result of the exercise of professional judgement, but were instead errors resulting from Defendant Lawyers' failure to exercise ordinary skill and knowledge.

73. Based on the foregoing, Defendant Lawyers failed to meet the minimum standard

of care and thereby breached their duties to perform competent and prudent legal services to PERSONAL CARE as would ordinary and reasonable lawyers under similar circumstances.

74. Defendant Lawyers failed to meet the minimum standard of care and thereby breached their duties to perform competent and prudent legal services and otherwise acted in a negligent, grossly negligent, willful, wanton and reckless manner in such other particulars as the evidence in this case may demonstrate.

75. It is reasonably foreseeable that PERSONAL CARE would incur substantial damages in the event Defendant Lawyers failed to meet the minimum standard of care in handling the *Askew* lawsuit.

76. As a direct and proximate cause of Defendant Lawyers' actions, PERSONAL CARE incurred actual damages; special damages; and incidental damages, all in an amount to be more specifically proven at trial.

77. WHEREFORE, PERSONAL CARE prays for judgment on its professional negligence cause of action against Defendant Lawyers for actual damages; special damages; and incidental damages, and such other relief as the Court may deem reasonable and proper.

**FOR A SECOND CAUSE OF ACTION**  
**(Breach of Fiduciary Duties)**  
**(Against Theos and Shoun Only)**

78. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

79. At all relevant times, Defendant Lawyers had and owed fiduciary duties to PERSONAL CARE.

80. Defendant Lawyers' fiduciary duties to PERSONAL CARE included, but were not limited to, the duties of competence and loyalty, as well as the duty to act single-mindedly

in preserving, protecting and advancing the rights and interests of PERSONAL CARE.

81. Defendant Lawyers had a duty to keep PERSONAL CARE fully informed on all facts material to the *Askew* lawsuit.

82. Defendant Lawyers had a duty to inform PERSONAL CARE about the *Askew* counterclaim promptly upon learning it had been filed.

83. Defendant Lawyers had a duty to avoid continuing to represent PERSONAL CARE once a conflict of interest arose based on the factual basis for the *Askew* counterclaim alleged in the *Askew* lawsuit.

84. Defendant Lawyers failed to meet the minimum standard of conduct and thereby breached their fiduciary duties to provide competent and prudent legal services to PERSONAL CARE as would ordinary and reasonable fiduciaries under similar circumstances.

85. Defendant Lawyers failed to meet the minimum standard of conduct and thereby breached their fiduciary duties to PERSONAL CARE, when, among other things, the Defendant Lawyers did not inform PERSONAL CARE in a timely manner about the *Askew* counterclaim.

86. Defendant Lawyers failed to meet the minimum standard of conduct and thereby breached their fiduciary duties to PERSONAL CARE in such other particulars as the evidence in this case may demonstrate.

87. As a direct and proximate cause of Defendant Lawyers' conduct in breach of their fiduciary duties, PERSONAL CARE sustained compensatory damages in an amount to be more specifically proven at trial.

88. Based upon Defendant Lawyers' conduct in breach of their fiduciary duties of loyalty, PERSONAL CARE should be entitled to an Order requiring Defendant Lawyers and

Defendant Law Firms to disgorge all fees and other benefits obtained from their relationship with PERSONAL CARE.

89. WHEREFORE, PERSONAL CARE prays for judgment on this breach of fiduciary duty cause of action against Defendant Lawyers for actual compensatory damages, disgorgement of legal fees and all other benefits from their relationship with PERSONAL CARE, and such other relief as the Court may deem reasonable and proper.

**FOR A THIRD CAUSE OF ACTION**  
**(Breach of Contract)**  
**(Against DEFENDANT LAW FIRMS Only)**

90. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

91. Defendant Law Firms entered into a contract with PERSONAL CARE, the terms of which Defendant Law Firms agreed and contracted to provide competent and prudent legal services to pursue recovery on PERSONAL CARE' claim against its former employee, Askew.

92. PERSONAL CARE fulfilled all necessary preconditions of the contract and escrow contract, if any, with Defendant Law Firms.

93. Defendant Law Firms breached the contract with PERSONAL CARE when Defendant Law Firms sent a letter containing allegedly defamatory statements about Askew to third-parties and when they failed to inform PERSONAL CARE about the Askew counterclaim in a timely manner.

94. As a direct and proximate result of Defendant Law Firms' breach of contract, PERSONAL CARE sustained actual damages in an amount to be more specifically proven at trial.

95. WHEREFORE, PERSONAL CARE prays for judgment on this cause of action against

Defendant Law Firms for actual damages suffered and such other relief as the Court may deem reasonable and proper.

**TRIAL BY JURY**

96. Plaintiff demands a jury trial on all claims and issues so triable.

**EXPERT AFFIDAVIT**

97. Pursuant to S.C. CODE ANN. § 15-36-100(B) (2006), attached hereto and incorporated herein by reference as **Exhibit 1**, is the affidavit of Robert D. Dodson, J.D., an expert witness and lawyer licensed to practice law in South Carolina, which specifies 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.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, PERSONAL CARE, LLC, prays for a judgment against Defendants, Jerry N. Theos; URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; Cheryl D. Shoun; and TAYLOR, SHOUN, BOWLEY & BYRD, LLC, as follows:

1. As to the Professional Negligence cause of action, for a judgment against Defendants, Jerry N. Theos and Cheryl D. Shoun, jointly and severally, for all actual damages, special damages, and incidental damages, all in an amount to be more specifically proven at trial; the costs of this lawsuit; and such other relief as the Court may deem reasonable and proper.

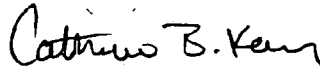
2. As to the Breach of Fiduciary Duty cause of action, for a judgment against Defendants, Jerry N. Theos and Cheryl D. Shoun, jointly and severally, for all actual damages, special damages, and incidental damages, all in an amount to be more

specifically proven at trial; for an order for disgorgement of all legal fees and other benefits; for punitive damages; the costs of this lawsuit; and such other relief as the Court may deem reasonable and proper.

3. As to the Breach of Contract cause of action, for a judgment against Defendant URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA and TAYLOR, SHOUN, BOWLEY & BYRD, LLC, jointly and severally, for actual damages suffered and such other relief as the Court may deem reasonable and proper.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis (SC Bar # 064918)  
Catherine "Carey" B. Kerney (SC Bar # )  
500 Carteret St., Suite A  
Beaufort, SC 29902-5066  
843.524.9500 Tel.  
843.524.9501 Fax.  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)  
[www.PendarvisLaw.com](http://www.PendarvisLaw.com)

Lawyers for Plaintiff, PERSONAL CARE, INC.

Beaufort, South Carolina

April 18, 2013

# Exhibit E

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 Personal Care, Inc., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Jerry N. Theos, Uricchio, Howe, Krell, )  
 Johnson, Toporek, Theos & Keith, P.A., )  
 Cheryl D. Shoun, and Taylor, Shoun, )  
 Bowley & Byrd, LLC, )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT  
 CASE NO.: 2013-CP-10-1396

**FILED**  
 2013 AUG 28 PM 12:54  
 JULIE J. ARMSTRONG  
 CLERK OF COURT  
 BY

**CONSENT ORDER  
 STRIKING CASE FROM DOCKET  
 [RULE 40(j), SCRCP]**

IT APPEARING to the Court that Plaintiff Personal Care Inc. ("Plaintiff") and Defendants Jerry N. Theos, Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A., Cheryl D. Shoun, and Taylor Shoun, Bowley & Byrd, LLC ("Defendants"), pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, agree to strike the above-captioned case from the docket.

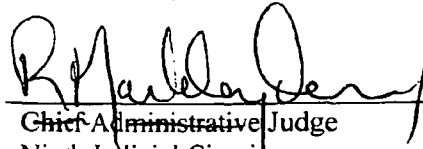
IT FURTHER APPEARING that each party agrees that if the claim is restored within one year from the date of this Order, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations as of the date of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

IT IS HEREBY ORDERED that the above-captioned case be stricken from the docket in accordance with the agreement of the parties pursuant to Rule 40(j), SCRCP.

[SIGNATURES ON FOLLOWING 4 PAGES]

*[Handwritten signature]*

IT IS SO ORDERED.

  
Chief Administrative Judge  
Ninth Judicial Circuit

Charleston, South Carolina

August 27, 2013

RWJ 2

WE SO CONSENT:

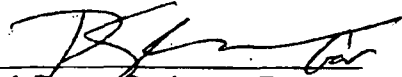
*Catherine B. Kerney*

Thomas A. Pendarvis, Esq.  
Catherine B. Kerney, Esq.  
Pendarvis Law Offices, P.C.  
500 Carteret Street, Suite A  
Beaufort, SC 29902-5066  
(843) 524-9500  
(843) 524-9501 fax

**Counsel for the Plaintiff**

*RW/3*

WE SO CONSENT:

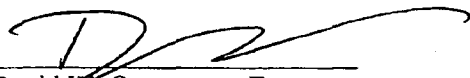


M. Dawes Cooke, Jr., Esq.  
Barnwell Whaley Patterson & Helms, LLC  
P.O. Drawer H  
Charleston, SC 29402  
(843) 577-7700  
(843) 577-7708 fax

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

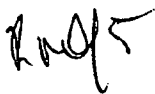
RW/4

WE SO CONSENT:



David W. Overstreet, Esq.  
Amanda K. Dudgeon, Esq.  
Carlock, Copeland & Stair, LLP  
40 Calhoun Street, Suite 400  
Charleston, SC 29401  
(843) 727-0307  
(843) 727-2995 fax

**Counsel for Defendants Cheryl D. Shoun  
and Taylor, Shoun, Bowley & Byrd, LLC**



# Exhibit F

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

**CONSENT ORDER RESTORING  
CASE TO DOCKET  
(RULE 40(j), SCRCP)**

IT APPEARING to the Court that Plaintiff Personal Care Inc. ("Plaintiff") and Defendants Jerry N. Theos, Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A., Cheryl D. Shoun, and Taylor Shoun, Bowley & Byrd, LLC ("Defendants"), pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, agree to restore the above-captioned case to the docket, which was removed by Consent Order on August 28, 2013.

IT IS HEREBY ORDERED that the above-captioned case be restored to the docket in accordance with the agreement of the parties pursuant to Rule 40(j), SCRCP.

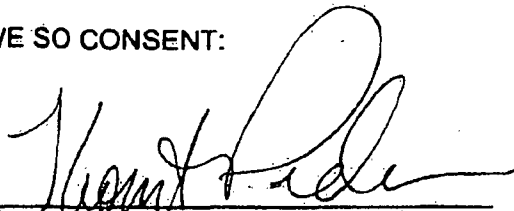
AND IT IS SO ORDERED.

\_\_\_\_\_  
Chief Administrative Judge  
Ninth Judicial Circuit

Charleston, South Carolina


\_\_\_\_\_, 2014

WE SO CONSENT:



Thomas A. Pendarvis (SC Bar # 064918)  
Catherine "Carey" B. Kerney (SC Bar # 81429)  
PENDARVIS LAW OFFICES, P.C.  
500 Carteret St., Suite A  
Beaufort, SC 29902-5066  
843.524.9500 Tel.  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)

Counsel for Plaintiff, PERSONAL CARE, INC.



Phillip S. Ferdigos, J.D.  
BARNWELL WHALEY PATTERSON & HELMS, LLC  
P.O. Drawer H  
Charleston, SC 29402  
(843) 577-7700  
(843) 577-7708 fax

Counsel for Defendants Jerry N. Theos and  
URICCHIO, HOWE, KRELL, JACOBSON, TOPOREK, THEOS & KEITH, P.A.

---

Cheryl D. Shoun, J.D.  
NEXSEN PRUET, LLC  
PO Box 486  
Charleston SC 29402  
[cshoun@nexsenpruet.com](mailto:cshoun@nexsenpruet.com)  
(843)720-1762

*Pro se* for Cheryl D. Shoun  
and Counsel for TAYLOR, SHOUN, BOWLEY & BYRD, LLC

# Exhibit G

----- Forwarded message -----

From: **Thomas A. Pendarvis** <[tpendarvis@pendarvislaw.com](mailto:tpendarvis@pendarvislaw.com)>  
Date: Wed, Sep 17, 2014 at 12:55 PM  
Subject: RE: 2013-CP-10-1396  
To: "Dennis, R. Markley Jr. Law Clerk (Lindsey M. Coffey)" <[MDennisLC@sccourts.org](mailto:MDennisLC@sccourts.org)>  
Cc: "M. Dawes Cooke" <[mdc@barnwell-whaley.com](mailto:mdc@barnwell-whaley.com)>, Phillip Ferderigos <[pferderigos@barnwell-whaley.com](mailto:pferderigos@barnwell-whaley.com)>, Andrea Goodreau <[AGoodreau@pendarvislaw.com](mailto:AGoodreau@pendarvislaw.com)>, Leslie Toia <[LToia@pendarvislaw.com](mailto:LToia@pendarvislaw.com)>, "cshoun@nexsenpruet.com" <[cshoun@nexsenpruet.com](mailto:cshoun@nexsenpruet.com)>, Catherine Byrd <[catherine@tbbesq.com](mailto:catherine@tbbesq.com)>, "Don Michel (DMichel@charlestoncounty.org)" <[DMichel@charlestoncounty.org](mailto:DMichel@charlestoncounty.org)>

Ms. Coffey:

Please extend my apologies to Judge Dennis for the circumstances, but **Plaintiff is withdrawing the proposed Consent Order to restore** the case to the active trial roster as not all parties have consented to the restoration.

I called Ms. Byrd on the telephone after she forwarded to me a copy of her message to you and Judge Dennis, and apologized for not including her in the recent correspondence related to the proposed Consent Order to restore this case to the active trial roster. I was under the mistaken understanding that Ms. Shoun was communicating information about this matter to her former law firm, Taylor, Bowley & Byrd, LLC. In the future, we will be sure to have Taylor, Bowley & Byrd, LLC served with all materials requiring service and included in all communications, both electronic and written.

It was 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 and, as stated earlier, Taylor, Bowley & Byrd, LLC will be included on the service list. Again, under the circumstances the proposed Consent Order is being withdrawn, and we will proceed with a formal motion to restore.

Thank you very much for your time and attention to this matter.

Regards,

*Thomas A. Pendarvis*

Pendarvis Law Offices, P.C.

# Exhibit H

Janet Smith

---

From: Cheryl Shoun [cherylshoun@bellsouth.net]  
Sent: Friday, March 19, 2010 4:00 PM  
To: Janet Smith  
Subject: Fw: Personal Care vs. Askew ( could u please call me 668 0236)

~~Janet if you're still there could you e-mail the Answer and Counterclaim to Bernie? If not I'll do it Monday.~~

Have a great weekend.

----- Original Message -----

From: [bcignavitch@comcast.net](mailto:bcignavitch@comcast.net)  
To: Cheryl Shoun  
Sent: Friday, March 19, 2010 2:06 PM  
Subject: Re: Personal Care vs. Askew ( could u please call me 668 0236)

----- Original Message -----

From: "Cheryl Shoun" <[cherylshoun@bellsouth.net](mailto:cherylshoun@bellsouth.net)>  
To: [bcignavitch@comcast.net](mailto:bcignavitch@comcast.net)  
Cc: "Jerry" <[Jerry@uricchio.com](mailto:Jerry@uricchio.com)>  
Sent: Friday, March 19, 2010 1:00:00 PM GMT -05:00 US/Canada Eastern  
Subject: Personal Care vs. Askew

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 9. 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.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0054

3/19/2010

705

# Exhibit I

**Janet Smith**

---

**From:** Janet Smith  
**Sent:** Friday, March 19, 2010 4:19 PM  
**To:** bcignavitch@comcast.net  
**Cc:** Cheryl Shoun; Janet Smith  
**Subject:** Answer and Counterclaim  
**Attachments:** 4481\_001.pdf  
Mr. Cignavitch: Attached please find a filed copy of the Answer and Counterclaim. Janet

---

**From:** Copler  
**Sent:** Friday, March 19, 2010 4:26 PM  
**To:** Janet Smith  
**Subject:** Attached Image

THEOS 0055

3/19/2010

707

# Exhibit J

Janet Smith

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]  
**Sent:** Friday, March 26, 2010 10:23 AM  
**To:** bcignavitch@comcast.net  
**Cc:** Jerry Theos; Janet Smith  
**Subject:** Personal Care v. Askew  
**Attachments:** personal care extension ltr..tif

Bernie:

I am so sorry that I have not had the opportunity to call and discuss the pleadings sent to you last week. I am going to be out of town next week, and as usual, everything seems to fall on my desk when that happens.

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 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 will be back in my office on April 6, 2010.

I sincerely appreciate your patience in this matter, and look forward to talking with you regarding the Counterclaim. I hope all else is well with you.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0057

3/26/2010

709

# Exhibit K

**Jerry Theos**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]  
**Sent:** Tuesday, April 06, 2010 12:50 PM  
**To:** bclgnavlch@comcast.net  
**Cc:** Jerry Theos; Janet Smith  
**Subject:** Personal Care v. Hattle Askew

Bernie: Hey. I am back in my office today, and have received confirmation of our thirty 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.

Thanks.

Cheryl

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0059

4/6/2010

711

# Exhibit L

**Jerry Theos**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]

**Sent:** Tuesday, April 06, 2010 12:54 PM

**To:** bcdgnavitch@comcast.net

**Cc:** Jerry Theos; Janet Smith

**Bernie:** I forgot to mention this again – please get your insurance information to me as quickly as you can. Thanks.

Cheryl D. Shoun  
TAYLOR, SHOUN, BOWLEY & BYRD, LLC  
39 Broad Street, Suite 101  
Charleston, S.C. 29401  
(843) 723-4020  
(843) 723-4021 Fax

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THEOS 0060

4/6/2010

713

# Exhibit M

**Janet Smith**

---

**From:** Cheryl Shoun [cherylshoun@bellsouth.net]

**Sent:** Tuesday, April 13, 2010 9:51 AM

**To:** bclgnavlch@comcast.net

**Cc:** Jerry Theos; Janet Smith

**Bernie:** Good morning. Hope this finds you well.

I want to let you know that I have withdrawn from my former firm, and have begun practicing with Nexsen Pruet, LLC. I wanted to be able to give that news to you, rather than have you hear the news via the form letter to clients.

Nexsen Pruet has offices throughout South Carolina and North Carolina, and enjoys a wonderful reputation. Of course you will have the choice of whether you wish for me to take this matter or whether you wish for it to remain at my former firm. If you choose to have me take the file with me, it will be handled at Nexsen Pruet on the same terms and conditions under which it is currently pending.

You should be receiving a letter in the immediate future, perhaps as early as today, advising you of this change and requesting that you indicate your choice. Hopefully the letter gives you the option of returning it to me as well as to my former firm. It can be faxed directly to me at 414-8238. If you want me to continue handling your matters, please return the letter as quickly as possible; I can not physically removed the file from my old office until your designation is received.

You may reach me at this e-mail address or at [cshoun@nexsenpruet.com](mailto:cshoun@nexsenpruet.com). You may also feel free to call my office at 720-1762. And, of course, you can discuss this matter with Jerry.

Thanks so much, and I hope to hear from you in the immediate future. Please remember that a Reply needs to the Counterclaim by Ms. Askew will have to be served by the latter part of May.

Cheryl

Cheryl D. Shoun

This e-mail, as well as any information transmitted with it, is confidential attorney-client communication or may otherwise be privileged or confidential and is intended solely for the individual or entity to whom it is addressed. If you are not the intended recipient, please do not read, copy or retransmit this communication but destroy it immediately. Any unauthorized dissemination, distribution or copying is strictly prohibited.

THEOS 0081

4/13/2010

715

# Exhibit N

NEXSEN|PRUET

IRS # [REDACTED]

PERSONAL CARE, INC.  
C/O JERRY N. THEOS, BSQUIRE  
URICCHIO, HOWE, KRELL, JACOBSON,  
TOPOREK, THEOS & KEITH, PA  
17 1/2 BROAD STREET  
CHARLESTON, SC 29401

Remit Address:  
Post Office Drawer 2426  
Columbia, SC 29202

Matter No. 047020-00001  
Invoice No. 53368064  
Invoice Date June 2, 2010  
Attorney CD SHOUN

Re: PERSONAL CARE, INC. - VS. HATTIE M. ASKEW D/B/A  
LOW COUNTRY MEDICAL TRANSPORT, F/K/A LOW COUNTRY  
MEDICAL TRANSPORT, INC.

*For Professional Services Rendered Through May 18, 2010.*  
**PLEASE SEE REVERSE FOR DETAILS.**

Current Charges .....\$1,444.88  
New Balance .....\$1,444.88

ALL BILLS ARE DUE AND PAYABLE IN FULL UPON RECEIPT OF THIS INVOICE. A LATE PAYMENT CHARGE  
OF 1 1/2% PER MONTH WILL BE ADDED TO ANY BALANCE REMAINING UNPAID 30 DAYS AFTER THE  
BILLING DATE.

OFFICES IN:  
CHARLESTON, SC CHARLOTTE, NC COLUMBIA, SC GREENSBORO, NC GREENVILLE, SC HILTON HEAD, SC MYRTLE BEACH, SC RALEIGH, NC

#3226-47700  
Shoun 00353

NEXSEN|PRUET

Invoice Date: 6/2/10

Invoice No. 53368064

Matter No. 047020-00001

**FEEES**

| Date               | Timekeeper | Description  | Hours | Amount            |
|--------------------|------------|--|-------|-------------------|
| 04/27/10           | CDS        | PERSONAL CARE - CONFERENCE WITH MR. CIGNAVITCH REGARDING MEETING TO DISCUSS COUNTERCLAIM AND PREPARATION OF REPLY THERETO; DISCUSS DEFENDANT'S MOTION TO CHANGE VENUE.   | 0.20  | 80.00             |
| 05/03/10           | CDS        | REVIEW COUNTERCLAIM; CONDUCT RESEARCH AS TO ELEMENTS OF DEFAMATION AND AFFIRMATIVE DEFENSES THERETO; FORWARD TO MR. THEOS FOR REVIEW AND COMMENT. CONFERENCE WITH MR. THEOS REGARDING MERIT OF DEFAMATION CLAIM. LETTER TO DEFENDANT'S COUNSEL REQUESTING DEFENDANT'S RESPONSES TO DISCOVERY WHICH ARE OVERDUE. REVIEW FILE NOTES AND BEGIN DRAFTING ADDITIONAL INTERROGATORIES AND SECOND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT. | 2.60  | 1,040.00          |
| 05/04/10           | CDS        | FILE AND SERVE REPLY TO COUNTERCLAIM.  | 0.20  | 80.00             |
| 05/05/10           | CDS        | REVIEW FILE NOTES; PREPARE ADDITIONAL INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS; FORWARD TO MR. THEOS FOR REVIEW AND COMMENT.   | 0.60  | 240.00            |
| <b>Total Fees:</b> |            |  |       | <b>\$1,440.00</b> |

**EXPENSES**

| Date                   | Description      | Amount        |
|------------------------|------------------|---------------|
| 05/04/10               | COPIES           | 2.00          |
| 05/05/10               | COURIER SERVICES | 2.00          |
| 05/05/10               | POSTAGE          | 0.88          |
| <b>Total Expenses:</b> |                  | <b>\$4.88</b> |

OFFICES IN:

CHARLESTON, SC CHARLOTTE, NC COLUMBIA, SC GREENSBORO, NC GREENVILLE, SC HILTON HEAD, SC MYRTLE BEACH, SC RALEIGH, NC

#3226-47700  
Shoun 00354

NEXSEN|PRUET

TIME SUMMARY RECAP

| Timekeeper | Title   | Hours | Rate     | Amount     |
|------------|---------|-------|----------|------------|
| CD SHOUN   | COUNSEL | 3.60  | \$400.00 | \$1,440.00 |
| Total:     |         | 3.60  |          | \$1,440.00 |

OFFICES IN:

CHARLESTON, SC CHARLOTTE, NC COLUMBIA, SC ORZENSBORO, NC GREENVILLE, SC HILTON HEAD, SC MYRTLE BEACH, SC RALEIGH, NC

#3226-47700  
Shoun 00355

NEXSEN|PRUET

IRS # [REDACTED]

PERSONAL CARE, INC.  
C/O JERRY N. THEOS, ESQUIRE  
URICCHIO, HOWE, KRELL, JACOBSON,  
TOPOREK, THEOS & KEITH, PA  
17 1/2 BROAD STREET  
CHARLESTON, SC 29401

Remit Address:  
Post Office Drawer 2426  
Columbia, SC 29202

Matter No. 047020-00001  
Invoice No. 53368064  
Invoice Date June 2, 2010  
Attorney CD SHOUN

Re: PERSONAL CARE, INC. - VS. HATTIE M. ASKEW D/B/A  
LOW COUNTRY MEDICAL TRANSPORT, F/K/A LOW COUNTRY  
MEDICAL TRANSPORT, INC.

*For Professional Services Rendered Through May 18, 2010.*

PLEASE SEE REVERSE FOR DETAILS

Current Charges .....\$1,444.88  
New Balance .....\$1,444.88

**REMITTANCE**

ALL BILLS ARE DUE AND PAYABLE IN FULL UPON RECEIPT OF THIS INVOICE. A LATE PAYMENT CHARGE OF 1 1/2% PER MONTH WILL BE ADDED TO ANY BALANCE REMAINING UNPAID 30 DAYS AFTER THE BILLING DATE.

OFFICES IN:

CHARLESTON, SC CHARLOTTE, NC COLUMBIA, SC GREENSBORO, NC GREENVILLE, SC KILTON HEAD, SC MYRTLE BEACH, SC RALEIGH, NC

#3226-47700  
Shoun 00356

NEXSEN | PRUET

IRS # [REDACTED]

PERSONAL CARE, INC.  
C/O JERRY N. THEOS, ESQUIRE  
URICCHIO, HOWE, KRELL, JACOBSON,  
TOPOREK, THEOS & KEITH, PA  
17 1/2 BROAD STREET  
CHARLESTON, SC 29401

Remit Address:  
Post Office Drawer 2426  
Columbia, SC 29202

Matter No. 047020-00001  
Invoice No. 53368064  
Invoice Date: June 2, 2010  
Attorney CD SHOUN

Re: PERSONAL CARE, INC. - VS. HATTIE M. ASKEW D/B/A  
LOW COUNTRY MEDICAL TRANSPORT, F/K/A LOW COUNTRY  
MEDICAL TRANSPORT, INC.

*For Professional Services Rendered Through May 15, 2010*  
**PLEASE SEE REVERSE FOR DETAILS**

Current Charges ..... \$1,444.88  
New Balance ..... \$1,444.88

**FILE COPY**

ALL BILLS ARE DUE AND PAYABLE IN FULL UPON RECEIPT OF THIS INVOICE. A LATE PAYMENT CHARGE OF 1 1/4% PER MONTH WILL BE ADDED TO ANY BALANCE REMAINING UNPAID 30 DAYS AFTER THE BILLING DATE.

OFFICES IN:  
CHARLESTON, SC    CHARLOTTE, NC    COLUMBIA, SC    GREENSBORO, NC    GREENVILLE, SC    HILTON HEAD, SC    MYRTLE BEACH, SC    RALEIGH, NC

#3226-47700  
Shoun 00357

# Exhibit O

**Kerr, Michelle T.**

---

**From:** Kerr, Michelle T.  
**Sent:** Monday, June 07, 2010 10:20 AM  
**To:** 'bdgnavitich@comcast.net'  
**Cc:** Shoun, Cheryl D.; 'jerry@uricchio.com'; 'janet@uricchio.com'  
**Subject:** Personal Care, Inc. v. Hattie M. Askew = Attached filed Reply for your review  
**Attachments:** 676665\_1.PDF

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.

Thanks,  
Michelle

**Michelle T. Kerr**  
*Assistant to Cherie W. Blackburn,  
Paul A. Dominick, Cheryl D. Shoun  
and Marilyn Trevino*

**NEXSEN PRUET**  
205 King Street, Suite 400  
Charleston, South Carolina 29401  
P.O. Box 486 (29402)  
DD: 843.720.1790, F: 843.720.1777  
[mkerr@nexsenpruet.com](mailto:mkerr@nexsenpruet.com)  
[www.nexsenpruet.com](http://www.nexsenpruet.com)



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6/7/2010

#3226-47700  
Shoun 00666

# Exhibit P

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
C/A NO. 2013-CP-10-1396

PERSONAL CARE, INC. )

Plaintiff, )

vs. )

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

Defendant. )

**AFFIDAVIT OF JERRY N. THEOS**

The undersigned, Jerry N. Theos, having been duly sworn, hereby deposes and says that:

1. I am a partner of Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A.
2. I am over the age of eighteen, I am a party in this action, and I am competent to testify concerning the matters contained in this Affidavit, and I submit this Affidavit with information based on my personal knowledge, and, if called as a witness, could or would testify to the truth of the facts stated here.
3. That, prior to representing Personal Care, I met with Bernie Cignavitch to discuss Askew's actions and the harm her actions caused Personal Care; at our meeting, Mr. Cignavitch insisted that I write the allegedly defamatory letter (attached as Exhibit 1) and to copy the letter to a third party (a dialysis clinic) in order to ensure that the dialysis clinic was aware of Ms. Askew's actions which Mr. Cignavitch alleged caused Personal Care harm; I advised Mr. Cignavitch that sending such a letter to a third party could expose Personal Care to a defamation counterclaim, but Mr. Cignavitch insisted that the letter be sent to the dialysis clinic as well.
4. Further, before the allegedly defamatory letter was sent, Mr. Cignavitch and his manager Tim Pitko were again advised of the potential of a defamation counterclaim arising out of the allegedly defamatory letter. Again, my co-counsel Shoun and I expressed our concerns about forwarding the letter to a third party: See Email from Shoun to Theos dated September 4, 2009 stating: "I told Tim I am hesitant to write the dialysis clinic ..." Bates numbers Theos 12 and 13.
5. Despite these warnings, Mr. Cignavitch insisted that I forward the letter to a third party, and the letter was prepared with information that Mr. Cignavitch provided to Ms. Shoun and me.

6. Initially, as sworn to in both his initial Verified Complaint and Amended Verified Complaint, the gravamen of Mr. Cignavitch's claim was that Shoun and I did not advise Cignavitch of the counterclaim for over two years. In his verified Complaint, Mr. Cignavitch swore: "This legal malpractice Complaint centers upon the Defendant Lawyers' approximate two (2) year delay in telling the Plaintiff, their client in an underlying lawsuit, that a defamation counterclaim had been filed against the Plaintiff." Mr. Cignavitch's sworn allegation is repeated by his expert Robert D. Dodson, J.D., where, in his sworn Affidavit, he asserts:

"I am also extremely critical of Theos and Shoun for not timely advising their client about the counterclaims against it." According to the Verified Complaint Theos and Shoun 'neglected to tell their client, Plaintiff, for more than two years about the fact the Plaintiff was being sued for money damages because of their own allegedly defamatory statements.' ... Theos and Shoun's conduct in not telling their client about the counterclaims, the very counterclaims that were created because of their own incompetence, negligence and recklessness, violated these provisions and were also contradictory to what reasonably prudent lawyers would do under like or similar circumstances. These omissions (failing to timely inform their client about the counterclaims) were significant for numerous reasons."

However, the following emails (attached as Exhibits 3 to 8) refute Mr. Cignavitch's and his expert's original sworn assertions:

1. Email 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 9<sup>th</sup>. May I fax to you? Will you provide the correct number? ... Thanks, I look forward to hearing from you." Bates number: Theos 56.
2. Email from Smith to Cignavitch dated March 19, 2010: "Mr. Cignavitch, attached please find a filed copy of the Answer and Counterclaim." Bates number Theos 54 - 55.
3. Email 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 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." Bates number Theos 57 - 58.
4. Email 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." Bates number Theos 59.

5. Email 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." Bates number Theos 61.

6. Email 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." Bates number Theos 72.

Based on these email communications alone, Shoun and I unequivocally and timely informed Mr. Cignavitch of the Askew counterclaim asserted against Personal Care. However, when I attended the hearing for Personal Care's Motion to Restore, which Your Honor presided over, I was stunned when Tom Pendarvis cavalierly told the Court: "And there's just simply fact questions that are all throughout this. Certainly he knew about the counterclaim. Certainly he knew there were issues with the defense of the case, but he's being told the whole time this is, you know, I have a meritorious claim." (Transcript of Hearing, p. 22, l. 7 - 11).

With Pendarvis' statement to the Court, he admitted to the Court that Personal Care's central allegation in its Verified Complaint - sworn to by Mr. Cignavitch - was a lie.

7. As Mr. Cignavitch's central assertion was easily proved to be false, Mr. Cignavitch has now shifted gears alleging that he did not fully understand and comprehend what the counterclaim meant (i.e., that Personal Care was being sued for money damages) until some time between the first mediation of the underlying case (which was May, 2012) to August, 2012 (when he alleges was the first time he was notified a conflict of interest had arisen). Indeed, Mr. Cignavitch's Affidavit (submitted to the Court in regard to his Motion to Restore) states that Theos and Shoun did not explain the legal nature of Askew's counterclaim or that it was a separate lawsuit seeking money damages against Personal Care. Now Mr. Cignavitch swears that he was unaware of the "true nature of the counterclaim" and thus "began to realize the adverse circumstances" after the first mediation in May of 2012. However, as before, such sworn assertion, is also patently false.
8. Indeed, Shoun and I explained to Mr. Cignavitch that Askew had filed a counterclaim for defamation (the exact type of counterclaim Mr. Cignavitch was warned might occur). Mr. Cignavitch was advised to put his insurance carrier on notice of the Askew Counterclaim and Shoun and I asked Cignavitch to provide his insurance carrier information to us (attached as Exhibits 9 to 10), but he refused to do so:
  1. Email from Shoun to Cignavitch dated March 19, 2010: "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." Bates number Theos 54.

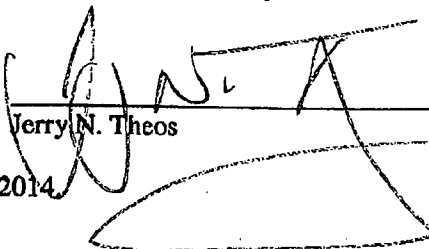
2. Email from Shoun to Cignavitch dated April 6, 2010: "Bernie: I forgot to mention this again – please get your insurance information to me as quickly as you can. Thanks."

Mr. Cignavitch decided he did not want to put his insurance carrier on notice of the Askew counterclaim and expressly told us that he did not want to put his insurance carrier on notice, despite being advised to do so. Instead, Mr. Cignavitch told us to also defend against Ms. Askew's counterclaim allegations. Again, as of March 19, 2010, Mr. Cignavitch was notified that Askew's counterclaim was seeking money damages and that he should put his insurance carrier on notice to defend and indemnify Personal Care.

9. Mr. Cignavitch was made aware that Ms. Askew had filed a counterclaim and was seeking damages against Personal Care based on the allegedly defamatory letter and, at Mr. Cignavitch's direction, Shoun and I began defending against the counterclaim as well, including preparing a Reply with Mr. Cignavitch's input.
10. Significantly, Personal Care's Complaint specifically alleges negligence against Shoun and me for sending the alleged defamatory letter. The Complaint alleges that the counterclaim was filed in 2010, and one of the elements of damage that Mr. Cignavitch is seeking is our attorneys' fees incurred in defending against the counterclaim; accordingly, based on Personal Care's own Complaint, the damages of Personal Care are alleged to have begun at the latest by May of 2010.
11. As set forth in Cheryl Shoun's exhibits I, J and K to her Memorandum, Ms. Shoun discussed the counterclaim with Cignavitch in May of 2010, so Mr. Cignavitch was aware of the counterclaim and he was aware he was incurring additional attorneys' fees because of the counterclaim, i.e., Mr. Cignavitch was aware of the damages he is now claiming in his present lawsuit in May of 2010.
12. I was also copied on Mr. Cignavitch's counsel Tom Pendarvis' email on March 7, 2013, attached as Exhibit 11, where Mr. Pendarvis admitted that he had concerns that the statute of limitations on Mr. Cignavitch's claim would run on March 8, 2013; further, Mr. Pendarvis filed an initial Verified Complaint where, under oath, his client verified that the statute of limitations was going to expire within 10 days, thereby excusing Personal Care's requirement to have an expert affidavit with the filing.
13. It is unbelievable for Mr. Pendarvis, Mr. Cignavitch's counsel, to miss the specific time period deadline set forth in the Order of Judge Dennis and, after having confirmed in writing that the statute of limitations was going to expire on March 8, 2013, and he and his client filing a verified complaint to the same effect, Mr. Pendarvis now asserts that the statute of limitations has not run based on a subjective belief of Mr. Cignavitch not fully grasping his full damages until a mediation of the underlying case.

FURTHER, AFFIANT SAYETH NOT.

Sworn to and subscribed before me  
This 2nd day of December, 2014

  
Jerry N. Theos

*Janet Scott Smith*  
Notary Public for South Carolina  
My Commission expires: 6/14/17

CERTIFICATE OF SERVICE

I hereby certify that, this 4<sup>TH</sup> day of DECEMBER, 2014, I served a copy of the foregoing Affidavit on counsel of Record via U.S. Mail, with sufficient postage affixed thereto, properly 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

GEORGE J. KEFALOS, PA  
Oana Dobrescu Johnson, Esq.  
46A State Street  
Charleston, SC 29401

K & L GATES, LLP  
Richard A. Farrier, Jr., Esq.  
134 Meeting Street, Suite 200  
Charleston, SC 29401

Barnwell Whaley Patterson & Helms, LLC

By: *Beverly Minton*  
Legal Assistant

# Exhibit Q

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Personal Care, Inc.,

Plaintiff,

v.

Jerry N. Theos, et al.

Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1396

AFFIDAVIT OF CHERYL D. SHOUN

PERSONALLY APPEARED before me, the undersigned, Cheryl D. Shoun, who first being duly sworn states and deposes as follows:

1. That she is over the age of eighteen years, is otherwise competent to make this Affidavit, submits this Affidavit with information based on her personal knowledge, and if called as a witness, could and would testify to the truth of the facts stated herein;
2. That she was one of the attorneys representing Personal Care in the action titled *Personal Care, Inc. v. Hattie M. Askew*;
3. As one of the attorneys for Personal Care she did, on or about March 19, 2010, advise Bernie Cignavitch, a principal of Personal Care, that an Answer and Counterclaim had been served in this matter, as evidenced by the email attached hereto as Exhibit 1 and made a part hereof by reference;
4. That, pursuant to the request of Mr. Cignavitch, evidenced in his email found in Exhibit 1 hereto, she called and spoke with Mr. Cignavitch, during which call she reiterated the receipt of the Answer on behalf of Hattie M. Askew, and advised that

a copy of said Answer and Counterclaim would be sent to Mr. Cignavitch in the immediate future;

5. That on or about March 19, 2010, she caused to be forwarded to Mr. Cignavitch a copy of the Answer and Counterclaim entered against Personal Care by Hattie M. Askew, as evidenced by the emails found in Exhibit 1 hereto;
6. On or about March 19, 2010, the undersigned also requested of Personal Care the contact information for its insurance carrier, which would allow counsel to submit the Counterclaim to Personal Care's carrier, requesting a defense and indemnification therefor;
7. That on or about March 26, 2010, she once again communicated with Mr. Cignavitch, as the principal of Personal Care, concerning the Counterclaim filed against it, as evidenced by Exhibit 2 attached hereto and made a part hereof by reference. Further, that in that communication, she advised Mr. Cignavitch that she was going to request an extension of time in which to respond to said Counterclaim, and she attached a copy of her letter to opposing counsel, requesting such extension of time. Finally, in that communication to Mr. Cignavitch, she emphasized the date a response would be required to the Counterclaim;
8. On or about April 6, 2010, Ms. Shoun notified Bernie Cignavitch that she was in receipt of the letter, signed by opposing counsel, confirming an extension of time in which to enter a Reply to the Counterclaim. She further requested that Mr. Cignavitch advise when he and Ms. Shoun could discuss the allegations of the Counterclaim so to formulate the Reply thereto, all as evidenced by Exhibit 3 attached hereto and made a part hereof by reference;

9. Further, on April 6, 2010, Ms. Shoun again requested Personal Care's insurance information so as to allow for the submission of the Counterclaim, together with a request for defense and indemnity, to Personal Care's insurance carrier, as evidenced by Exhibit 4 attached hereto and made a part hereof by reference;
10. That prior to May 5, 2010, counsel for Personal Care spoke with a representative of that entity, confirming that the information previously provided to counsel concerning Hattie M. Askew, and the business practices in which she had allegedly engaged were true and accurate and further, that the contents of the letter dated September 14, 2009, and sent on behalf of Personal Care to Low Country Medical Transport was correct and accurate;
11. That prior to May 7, 2010, a draft of the Reply to the Counterclaim filed against Personal Care was forwarded to that entity for review and consideration;
12. That on or about June 7, 2010, a copy of the filed Reply to the Counterclaim was provided to Personal Care, as evidenced by Exhibit 5 attached hereto and made a part hereof by reference;
13. That on or about June 7, 2010, a copy of the Second Request for Production served on behalf of Personal Care upon the Defendant Hattie M. Askew was forwarded to Mr. Cignavitch and that the first item included in the Second Request for Production sought from the Defendant the following, as evidenced by Exhibit 6 attached hereto and made a part hereof by reference:

Each and every document, which supports the Defendants claim that it was damaged as a result of the letter dated September 14, 2009, as alleged in the Defendant's Counterclaim. This shall include, without limitation, any and all letters or memoranda or other written documents pursuant to which any business contracts were cancelled or otherwise modified as a result of the referenced letter; written documents

pursuant to which the Defendant was advised that any third party changed its position with the Defendant, either personally or professionally, as a result of the referenced letter; and, all other documents which support Defendants claim for damages.

14. That Personal Care was and had been made aware on several occasions, of the Counterclaim filed against it by Hattie M. Askew; that in that Counterclaim Ms. Askew was seeking damages from Personal Care, and that counsel for Personal Care sought to secure documentation of the damages allegedly suffered by Hattie M. Askew as a result of the letter written on behalf of Personal Care on September 19, 2009;
15. That prior to the expiration of June 2010, Personal Care was billed for attorneys' fees incurred in defending the Counterclaim, as evidenced by Exhibit 7 attached hereto and made a part hereof by reference, and that, upon information and belief, Personal Care paid these charges in full by the end of March 2011.

AFFIANT FURTHER SAYETH NOT.

Cheryl D. Shoun  
Cheryl D. Shoun

Sworn to and subscribed before me

This 3<sup>rd</sup> day of December, 2014.

Marian Parish  
Notary Public for South Carolina

My Commission expires: 3/8/22

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

CERTIFICATE OF  
SERVICE

FILED  
2015 MAR 16 PM 4:36  
JULIE A. ARISTARONG  
CLERK OF COURT  
BY

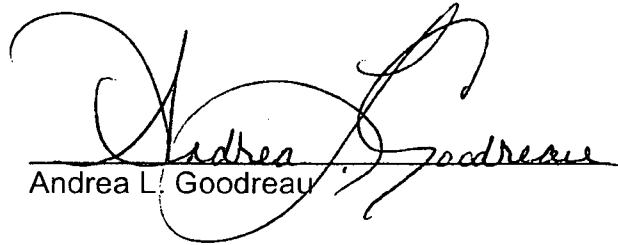
I, Andrea L. Goodreau, paralegal for Pendarvis Law Offices, PC, hereby certify that I have served the document listed below upon counsel of record by mailing a copy of same, postage prepaid and return address clearly indicated on said envelope, to said Defendants at the following addresses:

M. Dawes Cooke, Jr., J.D.  
Phillip S. Ferderigos, J.D.  
BARNWELL, WHALEY, PATTERSON & HELMS, LLC  
PO. Drawer H  
Charleston, SC 29402  
[mdc@barnwell-whaley.com](mailto:mdc@barnwell-whaley.com)  
[pferderigos@barnwell-whaley.com](mailto:pferderigos@barnwell-whaley.com)  
Attorneys for Defendants Jerry N. Theos  
and URICCHIO, HOWE, KRELL, JACOBSON,  
TOPOREK, THEOS & KEITH, P.A.

George J. Kefalos, J.D.  
Oana D. Johnson, J.D.  
GEORGE J. KEFALOS, PA  
46A State Street  
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[george@kefaloslaw.com](mailto:george@kefaloslaw.com)  
[oana@kefaloslaw.com](mailto:oana@kefaloslaw.com)  
Attorneys for Defendant TAYLOR BOWLEY  
AND BYRD, LLC

Richard A. Farrier, Jr., J.D.  
K&L GATES LLP  
134 Meeting Street, Suite 200  
Charleston, SC 29401  
[richard.farrier@klgates.com](mailto:richard.farrier@klgates.com)  
Attorneys for Cheryl D. Shoun

**Documents Served:** PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT, MOTION  
INFORMATION COVER SHEET

  
Andrea L. Goodreau

Beaufort, South Carolina  
March 13, 2015

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
C/A NO. 2013-CP-10-1396

PERSONAL CARE, INC. )  
 )  
Plaintiff, )

vs. )

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

Defendant. )

**MEMORANDUM IN OPPOSITION TO  
PLAINTIFF'S MOTION TO ALTER  
OR AMEND JUDGMENT**

FILED  
2015 MAR 26 AM 11:55  
JULIE J. ARMSTRONG  
CLERK OF COURT

TO: THOMAS A. PENDARVIS, ESQUIRE, COUNSEL FOR THE PLAINTIFF:

Jerry N. Theos and Uricchio, Howe, Krell, Johnson, Toporek, Theos & Keith, PA, and Taylor, Bowley & Byrd, LLC (hereinafter collectively referred to as "Defendants"), hereby respectfully submit their Memorandum in Opposition to Plaintiff's Motion to Alter or Amend Judgment.

Plaintiff has filed a Motion to Alter or Amend Judgment which presents no new evidence or issues to be considered by the Court; rather, the Plaintiff is merely rehashing the same prior arguments that Your Honor already rejected. For the same reasons Your Honor denied Defendants' Motion to Dismiss, Defendants respectfully request Your Honor summarily deny the Plaintiff's Motion to Alter or Amend Judgment.

Respectfully submitted,

[SIGNATURES ON FOLLOWING PAGE]

BARNWELL-WHALEY PATTERSON & HELMS, LLC

Dated: March \_\_\_\_\_, 2015

By: 

Phillip S. Ferderigos

288 Meeting Street, Suite 200

Charleston, South Carolina 29401

(843) 577-7700

[pferderigos@barnwell-whaley.com](mailto:pferderigos@barnwell-whaley.com)

COUNSEL FOR JERRY N. THEOS AND URICCHIO,  
HOWE, KRELL, JOHNSON, TOPOREK, THEOS &  
KEITH, PA

GEORGE J. KEFALOS, PA

By:  For Oana Johnson with express written permission

Oana Dobrescu Johnson, Esq.

46A State Street

Charleston, SC 29401

(843) 722-6612

[Oana@kefaloslaw.com](mailto:Oana@kefaloslaw.com)

COUNSEL FOR TAYLOR, BOWLEY & BYRD

**CERTIFICATE OF SERVICE**

I hereby certify that on the 13<sup>th</sup> day of March, 2015, I caused a copy of the foregoing Memorandum to be mailed to counsel of record with sufficient postage and correctly addressed as follows:

PENDARVIS LAW OFFICES, P.C.  
Thomas A. Pendarvis, Esq.  
Catherine B. Kerney, Esq.  
500 Carteret Street, Suite A  
Beaufort, SC 29902-5066

GEORGE J. KEFALOS, PA  
Oana Dobrescu Johnson, Esq.  
46A State Street  
Charleston, SC 29401

K & L GATES, LLP  
Richard A. Farrier, Jr., Esq.  
134 Meeting Street, Suite 200  
Charleston, SC 29401

Barnwell Whaley Patterson & Helms, LLC  
By: *Beverly Milton*  
Beverly Milton, Legal Assistant

FILED  
2015 MAR 26 AM 11:55  
JULIE J. ARMSTRONG  
CLERK OF COURT

FILED  
2015 APR 28 PM 2:11  
CLERK OF DISTRICT COURT  
BY [Signature]

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
Personal Care, Inc., )  
 ) Plaintiff, )  
 )  
 ) v. )  
 )  
Jerry N. Theos, et al. )  
 )  
 ) Defendants. )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
Case No.: 2013-CP-10-1396

**DEFENDANT SHOUN'S**  
**MEMORANDUM IN OPPOSITION TO**  
**PLAINTIFF'S MOTION TO ALTER OR**  
**AMEND JUDGMENT**

Defendant Cheryl D. Shoun ("Shoun"), through undersigned counsel, hereby submits this memorandum in opposition to Plaintiff's Motion to Alter or Amend Judgment ("Motion to Amend").

Plaintiff fails to cite any new evidence or change in controlling law to support its Motion to Amend. Instead, Plaintiff repeats the same arguments it raised before the Court at the hearing on the Motion to Restore as well as in its Memorandum in Support of the Motion to Restore. The Court wisely rejected these arguments in its well-reasoned and thorough Order, and Shoun respectfully submits that the Court should similarly deny Plaintiff's Motion to Amend.

Moreover, the Court can deny the Motion to Amend without holding a hearing or requiring additional briefing. A Rule 59(e) motion "may in the discretion of the court be determined on the briefs filed by the parties without oral argument." SCRCF 59(f); *see Pollard v. Cnty. of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994) (finding that plaintiff's Rule 59(e) motion constituted a "brief" where it was seven typewritten pages, set forth arguments on the issues raised, and gave citations to legal authority); *see also Pappas v. Ollie's Seafood Grille & Bar, L.L.C.*, No. 2007-UP-090, 2007 WL 8326636, at \*8 (S.C. Ct. App. Feb. 23, 2007) (unpublished) (finding plaintiffs' Rule 59(e) motion to be the functional equivalent of

a brief where the motion stated that the grounds for plaintiffs' arguments "are set forth in Plaintiffs' memoranda formerly filed with the Court, the arguments made by Plaintiffs at the June 22, 2004 hearing, and the arguments to be asserted by Plaintiffs at the hearing on this motion," and observing that there was no "meaningful distinction between Plaintiffs' incorporation by reference of their prior memoranda and oral arguments in the case and the detailed post-trial motion submitted in *Pollard*"). Like the motions in *Pollard* and *Pappas*, Personal Care's Motion to Restore sets forth arguments and incorporates the record, prior memoranda, and exhibits. See Motion to Restore at 4 ("Based on the foregoing arguments, the record, prior memoranda and exhibits, the Order should be altered or amend [sic] to find that Plaintiff's motion to restore should be granted[.]"). As any information conveyed by the movant through a hearing on the Motion will impliedly be a restatement of things thrice before argued to this court already, that proceeding would seem to be of little utility. Accordingly, the Court would be well within its discretion to deny the Motion without further briefing or argument.

#### **CONCLUSION**

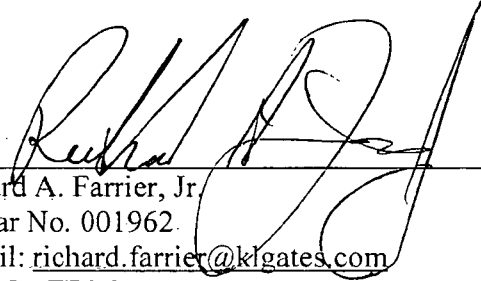
For the foregoing reasons, as well as for the reasons set forth in the Court's Order, in the memoranda and exhibits filed in this case by Shoun and the other Defendants, and the arguments made by each defense counsel at the hearing on the Motion to Restore, Defendant Shoun respectfully requests that this Court deny Plaintiff's Motion to Amend.

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Respectfully submitted,

Charleston, South Carolina

Dated: April 8, 2015



---

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ATTORNEY FOR DEFENDANT SHOUN



FILED

STATE OF SOUTH CAROLINA

2015 MAY 21 ) PM 2:43

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

JULIE J. ARMSTRONG NINTH JUDICIAL CIRCUIT  
CLERK OF COURT

Personal Care, Inc.,

Case No.: 2013-CP-10-1396

By Plaintiff, )

v. )

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

**DEFENDANTS' SUPPLEMENTAL  
MEMORANDUM ADDRESSING  
MAXWELL v. GENEZ**

Defendants. )

Defendants Cheryl D. Shoun and Taylor, Bowley & Byrd, LLC (hereinafter collectively referred to as "Defendants"), through undersigned counsel, hereby submit this memorandum in response to the Court's request for supplemental briefing. Specifically, the Court requested that the parties address the following questions:

- (1) Does *Maxwell v. Genez*, 356 S.C. 617 (2003), "require the Court to restore the case and subsequently address any Statute of Limitations issue only after the case is restored?"
- (2) "Or does [*Maxwell*] allow the Court to address the Statute of Limitations issue simultaneously with the Motion to Restore, as the Court has done so in its prior Order?"

As explained more fully below, the answer to the first question is no, and the answer to the second question is yes.

Nothing in *Maxwell* requires a court to restore a case upon a motion to restore. Indeed, the *Maxwell* Court did not even rule on when, if ever, a court must restore a case to the docket. Rather, the two questions before the Supreme Court in *Maxwell* were limited to issues surrounding the time period in which a party files its motion to restore. *Maxwell*, 356 S.C. at 619-20. In answering these questions, the Supreme Court held (1) that a party can move to restore a case to the docket more than one year after the claim was stricken without violating

Rule 40(j), and (2) that Rule 6(b) is inapplicable to Rule 40(j) because Rule 40(j) does not have a deadline during which a motion to restore must be filed. *Id.* at 621-22. Because the *Maxwell* Court's holding is confined to the timing of the filing of a motion to restore, *Maxwell* in no way dictates when a court must restore a case to the docket.

Far from requiring this Court to restore the instant case, *Maxwell* clearly contemplates that the Court has discretion to deny a motion to restore upon consideration of a party's statute-of-limitations argument. In Footnote 2 of the opinion, the Supreme Court expressly "disagree[s]" with the plaintiff's argument that the defendants could not "oppose the motion to restore on grounds of the expiration of the statute of limitations." *Id.* at 622 n.2. The Court instead explains that once one year had passed since the plaintiffs' complaint had been stricken from the docket pursuant to Rule 40(j), the defendants "were no longer bound by their agreement not to challenge the [plaintiffs'] action on statute of limitations grounds." *Id.* Thus, under *Maxwell*, a party is well within its rights to challenge a motion to restore on statute-of-limitations grounds. Moreover, the Court reversed the decision of the Court of Appeals, which had remanded the case to the circuit court with instructions to restore the case to the docket. The Court's reversal of the opinion mandating restoration to the docket, coupled with the Court's inclusion of Footnote 2, undermines any argument that restoration of a case is automatic upon a motion to restore. By explaining to the parties and the lower courts the Court's opinion on the propriety of a statute-of-limitations argument raised in opposition to a motion to restore, the Court made clear that motions to restore--far from being formalistic exercises resulting in automatic restoration--are subject to attack by opposing parties and denial by the court.

## CONCLUSION

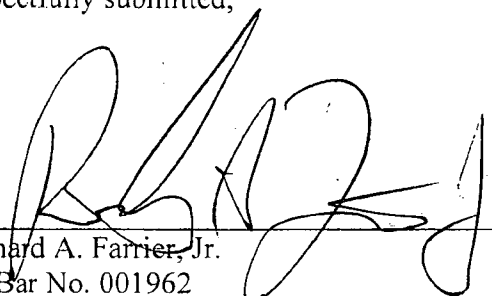
Although *Maxwell* held that a party may file its motion to restore more than a year after the case was stricken from the docket, the opinion makes clear that restoration is not automatic and that a court may consider a party's statute-of-limitations argument raised in opposition to the motion to restore. Therefore, *Maxwell* does not require this Court to restore the case prior to considering the Defendants' statute-of-limitations arguments. For the foregoing reasons, Defendants respectfully submit that, pursuant to *Maxwell*, the Court's previous Order denying the Motion to Restore was procedurally proper and within this Court's discretion.

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Charleston, South Carolina

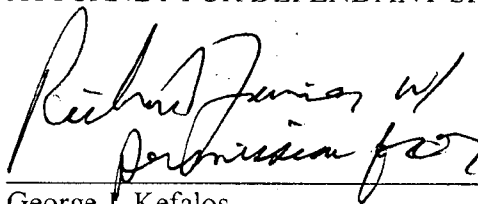
Dated: May 21, 2015

Respectfully submitted,



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STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS )

COUNTY OF CHARLESTON )

FOR THE NINTH JUDICIAL CIRCUIT )

PERSONAL CARE, INC., )

Case No.:2013-CP-10-1396 )

Plaintiff, )

vs. )

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

CERTIFICATE OF SERVICE )

Defendants. )

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2015 MAY 21 PM 2:43  
JULIE ANSTRONG  
CLERK OF COURT  
BY

I hereby certify that a copy of **DEFENDANTS' SUPPLEMENTAL MEMORANDUM ADDRESSING MAXWELL v. GENEZ** was served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed as shown below this 21st day of May, 2015:

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STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

PERSONAL CARE, INC.,

Plaintiff,

-vs.

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

Defendants.

PLAINTIFF'S MEMORANDUM AS TO  
THE PROCEDURAL REQUIREMENTS  
GOVERNING A MOTION PURSUANT  
TO RULE 40(J), SCRCP

FILED  
2015 MAY 21 PM 12:16  
JULIE J. ARMSTRONG  
CLERK OF COURT

Copy to: M. Dawes Cooke, Jr., JD and Phillip S. Ferderigos, JD, counsel for Defendants; Jerry N. Theos and URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; Richard A. Farrier, Jr., JD, counsel for Defendant, Cheryl D. Shoun; and Oana D. Johnson, JD, counsel for Defendant, TAYLOR, SHOUN, BOWLEY & BYRD, LLC, n/k/a TAYLOR, BOWLEY & BYRD, LLC;

Per the Court's request, Plaintiff respectfully submits this memorandum of law regarding whether Rule 40(j), SCRCP, requires the Court to restore this case to the docket.

**A. Rule 40(j), SCRCP, requires the Court to restore a case to the docket upon motion and does not allow for a simultaneous ruling on statute of limitations issues.**

Rule 40(j) sets forth the procedure by which a party may strike its complaint "from any docket one time as a matter of right." Rule 40(j), SCRCP. Rule 40(j) is an administrative rule that requires the parties to consent to the removal, restoration and tolling of the statute of limitations. The Rule simply requires that "[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 before it is heard." *Id.* The Rule then requires that "[u]pon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule." *Id.* Rule 40(j) provides no basis for any party to object to the matter

being restored to the active trial docket, nor does it provide a basis for the Court to make a determination on the availability of a statute of limitations defense.

The Comments to Rule 40(j) states in relevant part and with emphasis added that “[a] party moving to restore a case must give 10 days notice of the motion, **and upon being restored** the case is placed on the General Docket where it proceeds as a newly filed action on the General Docket.” There simply is no discussion or implication of any party’s right to contest the restoration of the case.

In *Maxwell v. Genez*, 356 S.C. 617, 620-21, 591 S.E.2d 26, 28 (2003), our Supreme Court interpreted Rule 40(j), SCRCP, holding that “[a] party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j); the party simply cannot take advantage of the one year tolling period provided by the rule.” *Id.* (emphasis added).

Plaintiff’s motion to restore should be granted without regard to the date the case was originally stricken from the active trial docket, pursuant to the express language in Rule 40(j), the Comments to that Rule, and the Supreme Court’s holding in *Maxwell v. Genez*, 356 S.C. 617, 620-21, 622, 591 S.E.2d 26, 28 (2003) (“As explained above, Rule 40(j) does not have a deadline during which a motion to restore must be filed.”).

**B. There is no motion to dismiss or motion for summary judgment pending before the Court.**

No Defendant has filed a written motion making an application to the Court for an Order providing some form of relief stating with particularity the grounds for the motion and the relief sought, as required under Rule 7(b)(1), SCRCP. Because no motion to dismiss and no motion for summary judgment has been file stating, “with particularity the grounds

therefore,” Plaintiff is and will be substantially prejudiced by not understand the specific basis of the motion and not having the opportunity to conduct discovery to respond to the motion. See *Camp v. Camp*, 386 S.C. 571, 574, 689 S.E.2d 634, 636 (2010). In addition, none of the Defendants have provided written notice of a hearing on a motion to dismiss or a motion for summary judgment as required by Rule 6(d), SCRPC. See *Dedes v. Strickland*, 307 S.C. 152, 154, 414 S.E.2d 132, 134 (1992). Plaintiff has not had the opportunity to conduct discovery on issues related to the timeliness of this lawsuit, and therefore will be prejudiced by not having receive written notice of a motion to dismiss or motion for summary judgment. See *M & M Group, Inc. v. Holmes*, 379 S.C. 468, 474, 666 S.E.2d 262, 265 (Ct. App. 2008) (party must establish prejudice as a result of other party’s fair to comply with Rule 7(b)(1), SCRPC); *Chastain v. Hiltabidle*, 381 S.C. 508, 517, 673 S.E.2d 826, 831 (Ct. App. 2009).

Further, the statute of limitations defense is an affirmative defense that must be formally asserted and can even be waived. The statute of limitations defense is based on the facts of each individual case and, thus, Plaintiff is entitled to conduct discovery prior to the statute of limitations issue being ripe for determination. See *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (finding that summary judgment “must not be granted until the opposing party has had a full and fair opportunity to complete discovery.”). Not only can the statute of limitations defense be waived, but it can be defeated by claims such as equitable estoppel. See *McLendon v. South Carolina Dep’t of Highways & Pub. Transp.*, 313 S.C. 525, 525-26, 443 S.E.2d 539, 540 (1994) (finding that a party can waive a statute of limitations defense); *Kleckley v. Northwestern*

*Nat. Cas. Co.*, 338 S.C.131, 136, 526 S.E.2d 218, 220 (2000) (“Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant’s conduct.”).

Because Rule 40(j) is exclusively an administrative rule, there is no basis for an evaluation of the merits of the claims or merits of any alleged affirmative defenses before applying the Rule to restore the case. There was no dispositive motion filed by Defendants to dismiss the case, nor could there be until the case was restored to the docket. In fact, some Defendants have not even raised a statute of limitations defense as Defendants Cheryl D. Shoun and TAYLOR, SHOUN, BOWLEY & BYRD, LLC have yet to file an answer. Rule 40(j) does not allow the Defendants to assert affirmative defenses in opposition to the motion to restore nor does Rule 40(j) provide the Court with authority to evaluate the merits of the claims asserted in the lawsuit.

**C. The statute of limitations has not expired on Plaintiff’s claims.**

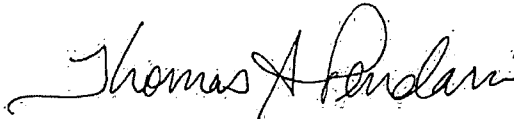
In the event Defendants were to file a dispositive motion asserting the affirmative defense of statute of limitations, which Defendants have not done, the verified facts in the record establish the lawsuit was filed within one year of the time when Personal Care knew or should have known of an injury sufficient to trigger objective notice that a claim against the Defendants might exist, and the motion to restore was filed a little more than two years from that same date, both of which are well within the three year statute of limitations. In addition, the verified facts in the record establish at least a jury question as to whether Defendants should be estopped from asserting a statute of limitations defense based on Defendants’ assurances to Plaintiff.

**CONCLUSION**

Rule 40(j), SCRCP, requires the Court to restore this case to the docket and does not allow the Court to conduct an analysis of whether the Plaintiff's claims may be barred by a statute of limitations defense. Rule 40(j), SCRCP is strictly an administrative rule and is not designed to allow for the defenses to be asserted or for judicial analysis on the merits of the claims asserted in the Complaint. There is no justiciable matter concerning the merits of Plaintiff's claims presently before the Court because no Defendant has filed a written motion pursuant to Rule 7(b)(1), SCRCP. Even if one of the Defendants had filed a motion for summary judgment, discovery has not been completed and Plaintiff would be prejudiced in responding to any motion for summary judgment without an opportunity to complete discovery, especially on facts related to whether Defendants should be estopped from asserting the statute of limitations based on their specific representations to Plaintiff.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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Lawyers for Plaintiff, PERSONAL CARE, INC.

Beaufort, South Carolina

May 20, 2015

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

**CERTIFICATE OF  
SERVICE**

FILED  
2015 MAY 21 PM 12:16  
JULIE J. ARMSTRONG  
CLERK OF COURT

I, Andrea L. Goodreau, paralegal for Pendarvis Law Offices, PC, hereby certify that I have served the document listed below upon counsel of record by emailing a copy of same to said Defendants at the following addresses:

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**Documents Served:** PLAINTIFF'S MEMORANDUM AS TO THE PROCEDURAL REQUIREMENTS  
GOVERNING A MOTION PURSUANT TO RULE 40(J), SCRCP

  
Andrea L. Goodreau

Beaufort, South Carolina  
May 20, 2015

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
C/A NO. 2013-CP-10-1396

PERSONAL CARE, INC. )  
 )  
Plaintiff, )

vs. )

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

Defendant. )

**DEFENDANT THEOS' BRIEF  
CONCERNING MAXWELL DECISION**

FILED  
2015 MAY 22 PM 12:55  
JULIE J. ARMSTRONG  
CLERK OF COURT

TO: THOMAS A. PENDARVIS, ESQUIRE, COUNSEL FOR THE PLAINTIFF:

Jerry N. Theos and Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, PA (hereinafter collectively referred to as "Defendant Theos"), hereby respectfully submits its brief concerning the procedural issue Your Honor raised referencing the Maxwell v. Genez, 356 S.C. 617 (2003) decision; i.e., does Maxwell require the court to restore the case and subsequently address any statute of limitations issue only after the case is restored? Or does it allow the court to address the statute of limitations issue simultaneously with the Motion to Restore, as the court has done so in its prior Order? In other words, what is the proper procedural method for this case?

The Maxwell decision does not *explicitly* address the procedural issue raised by Your Honor; however, Maxwell *explicitly* states that the court may certainly address the merits of the 40(j) reinstatement and *implies* a party does not have an automatic "right" to a reinstatement as a party may challenge the reinstatement at a hearing. The Maxwell decision, however, does not *explicitly* state when such a hearing is to occur because such procedural issue was not before the Maxwell court; nevertheless, the rule itself, common sense, and procedural case law dictate that, procedurally, a court certainly has the discretion to make a determination of whether or not it is proper for a case to be reinstated at the motion for reconsideration hearing itself. As noted in Maxwell, the resolution of this procedural issue begins with Rule 40(j) itself and "[i]f the

language of a rule of civil procedure is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced.”

Here, SCRCF Rule 40(j) unambiguously sets forth:

“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 before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.” (Emphasis added)

Nothing in Rule 40(j) provides that restoration is a matter of right. The rule does not expressly set forth an “automatic” right to re-instatement. In fact, it requires the party desiring to restore the case to file a motion. A motion, by definition, is a request addressed to the court, which implies that the court has a role in restoring the case or not.

Indeed, although the rule explicitly provides the parties a “right,” with consent of all counsel, to administratively dismiss a matter via a Rule 40(j) dismissal, it does not explicitly create a “right” to reinstate either by all of the parties jointly or a single party itself; rather, the rule allows a party to file a motion to reinstate and for the motion “to be heard.” Accordingly, the court certainly plays a role at a hearing to determine whether or not the matter should be restored, which is implied by the “before it [motion] is heard/upon being restored” verbiage of the rule, signifying the case would be placed on the General Docket if the court grants the motion.<sup>1</sup> In other words, pursuant to the Rule itself, the matter is not automatically restored, but parties may certainly advance and the court may certainly consider arguments at a hearing concerning why a reinstatement would be proper or improper, allowing a court to restore a matter or not.

Such result is not only required pursuant to the express terms of the rule itself, but is also supported by the Maxwell decision itself. A close reading of the Maxwell decision reveals that

<sup>1</sup> Indeed, what is the point of requiring a motion and a hearing to be heard if the reinstatement were “automatic” as Personal Care claims? Such a hearing would be a futile hearing, a waste of time for both the court and the parties. As set forth further in this brief, South Carolina law would abhor such a futile hearing and interpreting the rule to create such a futility would run contrary to clear precedent in South Carolina.

the specific procedural issue Your Honor raises is not explicitly addressed in Maxwell; rather, Maxwell solely addresses whether a motion to restore under Rule 40(j) must be filed within one year of the order striking the claim (and whether the Rule 40(j) motion to restore one year deadline may be extended for good cause pursuant to Rule 6(b)). The Supreme Court reversed the lower courts by finding that, per the express terms of the rule itself, the “filing” of the motion to reinstate is not required to occur within the one year time frame. Other than noting a party may oppose a motion to restore at a hearing, the Maxwell court does not specifically address the *timing* of such a hearing as such procedural issue was not before the court. As such, the Maxwell court was not faced with the specific procedural issue Your Honor raises.

Nevertheless, Maxwell does validate a right of a party to oppose a motion for reinstatement. Pursuant to Maxwell, although a party can file a motion to reinstate per Rule 40(j) after the one year deadline, Maxwell certainly does not stand for the proposition that the reinstatement is “automatic” or that the court has no role to play in making a determination whether or not a 40(j) reinstatement is appropriate. To the contrary, footnote 2 of the Maxwell decision clearly sets forth that it is appropriate for a court to make such a determination, a determination that the Maxwell court was not asked to make.<sup>2</sup>

In Maxwell, the trial court solely based its decision on its interpretation of Rule 40(j) itself, finding that a party can not even file a motion to restore after one year. The Supreme Court reversed the trial court’s finding; however, in so doing, the Supreme Court expressly acknowledged that a party may certainly challenge a motion to reinstate. Although the Supreme Court did not specifically address when a challenge to a motion to restore is appropriate, the Supreme Court clearly states such a challenge is appropriate. Indeed, in footnote 2, the Supreme Court held:

“We note the Maxwells assert that, since Genez and Doe agreed to the Rule 40(j) dismissal after the statute of limitations had expired, they waived their right to oppose the motion to restore on grounds of the expiration of the statute of limitations. We disagree.” (Emphasis added).

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<sup>2</sup> In other words, unlike the present case, the Maxwell court did not issue a decision that the statute of limitations barred the plaintiff’s claims and that restoring the case would be futile; rather, the Maxwell court merely held that a reinstatement motion may be filed even though the 40(j) deadline had expired. As such, the Maxwell court does not explicitly address when the court may make such a decision; thus, the procedural issue raised by Your Honor is not addressed by, and is irrelevant in, Maxwell.

Importantly, Maxwell expressly finds that a party may oppose a motion to restore on the grounds of the expiration of the statute of limitations. Also, nothing in Maxwell requires opposition to a motion to restore to occur at a specific procedural point; Maxwell merely confirms that such opposition at a hearing is appropriate.

Here, under the rule or Maxwell, Defendant Theos is not required to wait until the matter is reinstated to oppose the motion to restore, nor is the court prohibited from addressing the merits of the motion to restore until some later date. It is Defendant Theos' contention that the right for the court to make such a decision at the motion to reinstate hearing or thereafter is discretionary and the rule certainly allows the court to issue a decision at the motion to restore stage. To find otherwise would strip the court of its role in determining whether or not a reinstatement is proper and would also strip Defendants of their right to oppose the motion to restore in accordance with the express terms of the rule and Maxwell's footnote 2, which implicitly recognizes the court's role in making such a threshold determination before the matter is reinstated.

Finally, South Carolina precedent, like the rule itself, requires such a result. In South Carolina, a court does not have to take a futile act or have a futile hearing. Under South Carolina law, it is axiomatic that a court must presume that the General Assembly intended by its action to accomplish something and not to do a futile thing. State ex rel. McLeod vs. Montgomery, 244 S.C. 308, 146 S.E.2d 778 (1964).<sup>3</sup> In other words, South Carolina courts are required to interpret a statute [in this case, a rule] in order to effectuate the intent of the Legislature and South Carolina courts may not interpret a statute [in this case, a rule] to be meaningless or to render it a nullity. Id.<sup>4</sup>

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<sup>3</sup> The Supreme Court has "repeatedly held that there is a presumption that the Legislature intended to accomplish something with a statute rather than to engage in a futile exercise." See State ex rel McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964); Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840 (1938); Fulghum v. Bleakley, 177 S.C. 286, 181 S.E. 30 (1935); Berkebile v. Outen, 311 S.C. 50 (1993).

<sup>4</sup> This legal principle permeates throughout our jurisprudence: Staubes v. City of Folly Beach, 339 S.C. 406 (2000) (stating: "This court does not require parties to engage in futile actions..."); see, e.g., State v. Bryant, 316 S.C. 216, 220, 447 S.E.2d 852,855 (1994) (where the court found that it would have been futile to move to strike testimony which the trial court had already ruled was proper); under South Carolina law, it is axiomatic that a motion to amend a futile cause of action or one that is insufficient to state a claim should be denied. See, e.g., Garvin v. Owen, No. 2:09-202-HMH-RSC, 2009 WL 653007, at \*4 (D.S.C. March 12, 2009) (citing in re PEC Solutions, Inc. Sec. Litig., 418 F.3d 379, 391 (4<sup>th</sup> Cir. 2005)) (Leave to amend need not be granted if the proposed amendment would be futile or insufficient to state a claim); Red Oak Lands, Inc. v. Lane, 263 S.C. 631 (1977) (stating: "[t]he trial court was correct in holding that the two-year limitation is applicable to the present case and that, since the limitation has expired, it would be a futile gesture to grant Red Oak the right to re-plead. This ruling, having been founded on a correct application of the law, does not constitute error"); Health Promotion Specialists, LLC v. S.C. Board of

Although no South Carolina case law specifically deals with this express procedural issue in the context of Rule 40(j), in the context of a motion to amend, the case law is clear – there is no requirement for the court to grant a motion (to amend a pleading) that would be futile if the statute of limitations bars the requested relief (the amendment). Similarly, here, there is no requirement for a court to grant a motion to reinstate for a claim which is barred by the statute of limitations and is, therefore, futile. In other words, such an act or requiring such a “hearing,” where the court could not rule upon the merits of a reinstatement, would be futile – it is pointless for the court to hold a hearing where it is not allowed to rule based on the merits that are raised and argued to the court. It would be waste of time for the rule to require a court to go through a “form over substance,” futile exercise of having a pointless hearing, wasting both the parties’ and the court’s valuable time and resources, if the court has no purpose for holding a hearing.

In conclusion, having fully heard the arguments of both sides, both for and against the reinstatement of the case, it is certainly within Your Honor’s discretion and procedurally proper for Your Honor to issue your decision in accordance with your prior Order pursuant to the unambiguous terms of Rule 40(j) and the Maxwell decision.

Respectfully submitted,

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: 

M. Dawes Cooke, Jr.

Phillip S. Ferderigos

288 Meeting Street, Suite 200

Charleston, South Carolina 29401

(843) 577-7700

[pferderigos@barnwell-whaley.com](mailto:pferderigos@barnwell-whaley.com)

COUNSEL FOR JERRY N. THEOS AND URICCHIO,  
HOWE, KRELL, JACOBSON, TOPOREK, THEOS &  
KEITH, PA

Dated: May 20, 2015

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Detention, 403 S.C. 623 (2013) (wherein the Supreme Court affirmed that the amendments which were futile were properly denied); Couram v Davis, et al., 2015 WL 477266, Unpublished Opinion (stating: “Further, we find the circuit court properly denied Couram’s motion to amend her complaint on the grounds that any amendment would be futile because the SCTCA’s two year statute of limitations expired on all of her claims. See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 632, 743 S.E. 2d 808, 812-13 (2013) (affirming the circuit court’s denial of a party’s motion to amend its complaint when the amendment would be futile”); Coral Gables, Inc. v. Palmetto Brick Co., et al., 183 S.C. 478 (1937) (stating: “It is likewise clear in that case that such an action ... would be barred under the statute of limitations, which has run. In this view of the matter, it would be futile and unavailing to permit an amendment ... [t]he court will not do a useless and a futile thing, by allowing an opportunity for setting up a new cause of action by amendment, which is barred by the statute of limitations”); and Carmichael, Jr. v. Dan Nance Corporation, 274 S.C. 357 (1980) (stating “Equity will not require the doing off a futile task”).

CERTIFICATE OF SERVICE

13-CP-10-1396

I hereby that on the 20<sup>th</sup> day of May, 2015, I mailed a true and correct copy of the foregoing Supplemental Memorandum to counsel of Record with sufficient postage, addressed as follows:

PENDARVIS LAW OFFICES, P.C.  
Thomas A. Pendarvis, Esq.  
Catherine B. Kerney, Esq.  
500 Carteret Street, Suite A  
Beaufort, SC 29902-5066

GEORGE J. KEFALOS, PA  
Oana Dobrescu Johnson, Esq.  
46A State Street  
Charleston, SC 29401

K & L GATES, LLP  
Richard A. Farrier, Jr., Esq.  
134 Meeting Street, Suite 200  
Charleston, SC 29401

FILED  
2015 MAY 22 PM 12:55  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

Barnwell Whaley Patterson & Helms, LLC

By: Beverly Mutton  
Legal Assistant

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1396

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

PLAINTIFF'S MEMORANDUM AS  
DIRECTED BY COURT'S ORDER ON  
PLAINTIFF'S MOTION TO ALTER OR  
AMEND JUDGMENT

2015 JUL 14 3:31  
FILED  
JULIE J. STRONG  
CLERK OF COURT

Copy to: M. Dawes Cooke, Jr., JD and Phillip S. Ferderigos, JD, counsel for Defendants Jerry N. Theos and URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; Richard A. Farrier, Jr., JD, counsel for Defendant, Cheryl D. Shoun; and Oana D. Johnson, JD, counsel for Defendant, TAYLOR, SHOUN, BOWLEY & BYRD, LLC, n/k/a TAYLOR, BOWLEY & BYRD, LLC;

Per the Court's instructions in its Order filed on June 22, 2015 ("the Order"), Plaintiff respectfully submits this memorandum in response to the Court's direction "to notify the Court whether they would like to present live testimony or present additional affidavits for this issue [concerning the statute of limitations]."

#### **SUMMARY OF PLAINTIFF'S ARGUMENTS AND RESPONSE**

1. **The Court should issue an Order restoring the case.** Plaintiff respectfully renews its request for this Court issue an Order simply restoring this case to the active trial roster. All parties are entitled to discovery on the claims and defenses to the claims asserted in this lawsuit, including Defendants' alleged statute of limitations defense. The procedure envisioned by the Order deprives the Plaintiff of discovery rights and procedures available under the South Carolina Rules of Civil Procedure, including written interrogatories and depositions. The truth about what Plaintiff's principals knew and understood, if anything,

about any damages caused by conduct by these Defendants; about what these Defendants knew about their conduct and about what damages were being caused to their client by their conduct; and about what statements and assurances these Defendants were giving to Plaintiff that reasonably led Plaintiff to believe there was no claim against these Defendants, are all subjects for discovery in this case. Because “discovery serves as an important tool in the truth-seeking function of our legal system,” this Court should allow the parties full and complete discovery to allow the Court to make any decision on any dispositive motion that may be filed based on a fully developed and truthful factual record. See *Oncology & Hematology Associates of S.C., LLC v. S. Carolina Dep’t of Health & Envtl. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010).

2. **The proposed plan deprives Plaintiff of discovery.** The Order on page 2 under the Conclusions of Law heading recognizes that it has not “afford[ed] the Plaintiff an opportunity to address the statute of limitations issue at the November 19, 2014 motion hearing.” The proposed plan to “allow both parties to present live testimony and affidavits as to the statute of limitations issue” deprives Plaintiff of the discovery available under the Rules of Civil Procedure to fully develop facts, testimony, and other evidence concerning the statute limitations issue and equally importantly, whether Defendants should be equitably estopped from asserting the statute limitations defense based upon their conduct, statements, and legal advice provided to Plaintiff during the course of their representation.

The problems with the proposed plan and lack of any discovery in this case are highlighted by the communications to the Court by counsel for one of the Defendants. In an email dated July 7, 2015, counsel for the Defendants advised the Court that

The defendants will not be seeking to further supplement the

record on the issue of the SOL with either affidavits or live testimony. The defendants do reserve the right to either cross examine any witnesses called on the subject or submit response affidavits, and will promptly notify the court of their intent in this regard following the plaintiffs' submission(s).

**Exhibit 1** (Richard A. Farrier email dated July 7, 2015).

Defendants' attempt to reserve the right to submit response affidavits emphasizes just how the proposed plan compromises all parties' ability to present arguments on the claims and defenses based upon the facts developed in the record after all discovery is complete. If all the written discovery had been completed and depositions had been taken, Defendants would not need to reserve any rights to submit response affidavits; they would already have all the facts and testimony. Query whether the Court envisions allowing sur-reply affidavits to be submitted by Plaintiff in response to the "response affidavits."

The more secure path under Rule 40(j) would be to restore the case to the active roster, and enter a Scheduling Order allowing the parties sufficient time to complete discovery, set deadlines for dispositive motions, and a date for the trial of the case.

3. **The Maxwell case does not hold that a party has a right to challenge a Rule 40(j) motion to restore.** The Order is incorrect when it concludes that the *Maxwell* case "specifically allows that a party may challenge a motion to restore, but the case does not address the procedural point for doing so." The sole challenge in *Maxwell* was whether Rule 40(j) imposed an absolute one-year deadline to restore the case. In *Maxwell v. Genez*, 356 S.C. 617, 620-21, 591 S.E.2d 26, 28 (2003), our Supreme Court interpreted Rule 40(j), SCRCP, holding that "[a] party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j); the party

simply cannot take advantage of the one year tolling period provided by the rule." *Id.* (emphasis added).

Restoring this case to the active trial roster does not deprive Defendants of their ability during the discovery phase to develop their alleged statute of limitations defense, and will certainly allow Plaintiff to discover additional facts and evidence supporting its position that Defendant should be estopped to assert the statute of limitations defense based on their statements and advice given to Plaintiff during the course of the representation.

4. **Plaintiff objects to any ruling on the statute limitations at this stage of litigation.** Plaintiff objects to the proposed plan to allow the parties to present live testimony and/or affidavits without the benefit of the discovery provided by the Rules of Civil Procedure. In addition, Plaintiff objects to the Court making any dispositive ruling when there is no motion filed by any party seeking to have this case dismissed based on the allegations in the Complaint, based on the allegations in the pleadings, or to have the Court make a summary ruling based on the undisputed facts in the record after all parties have had an opportunity to complete discovery in this case. In other words, the only motion before the court is *Plaintiff's* motion to restore the case, which is not a dispositive motion.

The Order anticipates a ruling in the nature of a summary judgment based on the allegations in the Amended Complaint and the affidavit testimony and other records submitted, even though no motion for summary judgment has been filed by any Defendant. Such a ruling would be improper and certainly premature. Summary judgment is a drastic remedy and should be granted only when "the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is not proper when there are genuine issues as to material facts in dispute on the elements of the claim. See *Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 16-17 (Ct. App. 2005); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). Under Rule 56(c), SCRCP, the party seeking summary judgment has the burden of demonstrating the absence of a genuine issue of material fact. See *Baughman*, 306 S.C. at 102, 410 S.E.2d at 539.

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. See *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747 (1996); *Lattie v. SHS Enterprises, Inc.*, 300 S.C. 417, 389 S.E.2d 300 (Ct. App. 1990) (summary judgment standard of review is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom). “At the summary judgment stage of the proceedings, it is only necessary for the non-moving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied.” *Hill v. York County Sheriff’s Department*, 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993), *cert. denied* (1994) (emphasis added).

5. **Plaintiff intends to submit additional affidavit testimony.** Without waiving Plaintiff’s objections, Plaintiff intends to submit additional affidavit testimony to supplement the record concerning the alleged statute of limitations defense and its arguments that

Defendants should be equitably estopped from asserting the statute of limitations defense based on the extremely limited record available to Plaintiff at this preliminary phase of this lawsuit.

6. Plaintiff incorporates by reference all of its previously filed motions, memoranda, affidavits, and other evidence.

### CONCLUSION

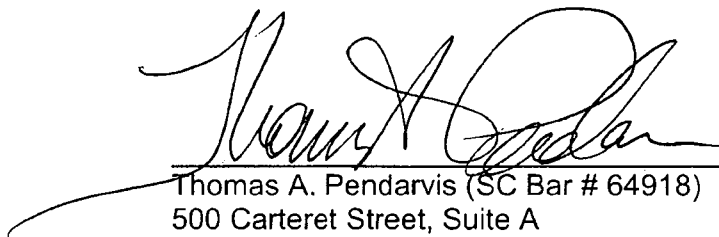
As an administrative provision, Rule 40(j), SCRCP, requires the Court to restore this case to the docket. Employing the Rule 40(j) provisions to take the case off the active trial roster does not deprive any party of the discovery procedures and methods set forth in the South Carolina Rules of Civil Procedure. A motion to restore the case pursuant to Rule 40(j), does not allow the Court to conduct an analysis of whether the Plaintiff's claims may be barred by a statute of limitations defense. Rule 40(j), SCRCP is strictly an administrative rule and is not designed to allow for the defenses to be asserted or for judicial analysis on the merits of the claims asserted in the Complaint. There is no justiciable matter concerning the merits of Plaintiff's claims presently before the Court because no Defendant has filed a written motion pursuant to Rule 7(b)(1), SCRCP. Even if one of the Defendants had filed a motion for summary judgment, discovery has not been completed and Plaintiff would be prejudiced in responding to any motion for summary judgment without an opportunity to complete discovery, especially on facts related to whether Defendants should be estopped from asserting the statute of limitations based on their specific representations to Plaintiff.

Reserving all objections to the plan proposed by the Order filed on June 22, 2015, Plaintiff intends to submit additional affidavit testimony by the date to be designated by the

Court, in the event the Court does not simply issue an Order to restore the case and allow the parties to conduct the discovery contemplated by the Rules of Civil Procedure.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, appearing to read 'Thomas A. Pendarvis', is written over a horizontal line. The signature is fluid and cursive.

Thomas A. Pendarvis (SC Bar # 64918)  
500 Carteret Street, Suite A  
Beaufort, SC 29902-5066  
843.524.9500 Tel.  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)

Counsel for Plaintiff, PERSONAL CARE, INC.

Beaufort, South Carolina

July 8, 2015



**Andrea Goodreau**

---

**From:** Farrier, Jr., Richard A. <Richard.Farrier@klgates.com>  
**Sent:** Tuesday, July 07, 2015 10:40 AM  
**To:** Nicholson, J. C. Law Clerk (Charles Patrick); Thomas A. Pendarvis  
**Cc:** george@kefaloslaw.com; oana@kefaloslaw.com; Andrea Goodreau; Spain, Karen E.; Phillip Ferderigos (pferderigos@barnwell-whaley.com); M. Dawes Cooke (mdc@barnwell-whaley.com)  
**Subject:** RE: Personal Care v. Theos et al.

Charlie: I am writing on behalf of the defendants. The court has offered to receive affidavits or live testimony to supplement the record on the issue of the statute of limitations. The defendants will not be seeking to further supplement the record on the issue of the SOL with either affidavits or live testimony. The defendants do reserve the right to either cross examine any witnesses called on the subject or submit response affidavits, and will promptly notify the court of their intent in this regard following the plaintiffs' submission(s).

---

**From:** Nicholson, J. C. Law Clerk (Charles Patrick) [mailto:JNicholsonLC@sccourts.org]  
**Sent:** Thursday, July 02, 2015 12:36 PM  
**To:** Thomas A. Pendarvis  
**Cc:** george@kefaloslaw.com; oana@kefaloslaw.com; Andrea Goodreau; Spain, Karen E.; Farrier, Jr., Richard A.; Phillip Ferderigos (pferderigos@barnwell-whaley.com); M. Dawes Cooke (mdc@barnwell-whaley.com)  
**Subject:** RE: Personal Care v. Theos et al.

Thomas,

I am just now finishing up meeting with him. He says that the deadline was the timeline for the parties to notify the Court how they wish to proceed (i.e. through affidavits or live testimony), and not the deadline for submissions. Once you have notified the Court how you wish to proceed, we can set either a new timeline for the submission of affidavits and reply affidavits, or set a hearing date to take live testimony. He does not expect submissions of affidavits by Monday. He will also allow you all until July 10<sup>th</sup> to notify the Court, as he forgot about the holiday weekend when he signed the Order. If you have any further questions, please let me know.

Sincerely,

Charlie

Charlie Patrick  
Law Clerk to The Honorable J.C. Nicholson, Jr.  
Circuit Court Judge  
100 Broad Street  
Charleston, South Carolina 29401  
Tel: (843) 958-5047  
[jnicholsonlc@sccourts.org](mailto:jnicholsonlc@sccourts.org)

---

**From:** Thomas A. Pendarvis [mailto:tpendarvis@pendarvislaw.com]  
**Sent:** Thursday, July 02, 2015 11:47 AM  
**To:** Nicholson, J. C. Law Clerk (Charles Patrick)  
**Cc:** george@kefaloslaw.com; oana@kefaloslaw.com; Andrea Goodreau; Spain, Karen E.; Farrier, Jr., Richard A.; Phillip Ferderigos (pferderigos@barnwell-whaley.com); M. Dawes Cooke (mdc@barnwell-whaley.com)  
**Subject:** RE: Personal Care v. Theos et al.

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2013-CP-10-1399

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

Defendants.

**CERTIFICATE OF  
SERVICE**

2015 JUL -9 11 PM 3:31  
WILLIE J. ARMSTRONG  
CLERK OF COURT

FILED

I, Andrea L. Goodreau, paralegal for Pendarvis Law Offices, PC, hereby certify that I have served the document listed below upon counsel of record by e-mailing and mailing a copy of same to said Defendants at the following addresses:

M. Dawes Cooke, Jr., J.D.  
Phillip S. Ferderigos, J.D.  
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[mdc@barnwell-whaley.com](mailto:mdc@barnwell-whaley.com)  
[pferderigos@barnwell-whaley.com](mailto:pferderigos@barnwell-whaley.com)  
Attorneys for Defendants Jerry N. Theos  
and URICCHIO, HOWE, KRELL, JACOBSON,  
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[oana@odjlaw.com](mailto:oana@odjlaw.com)  
Attorney for Defendant TAYLOR BOWLEY  
AND BYRD, LLC

**Documents Served:** PLAINTIFF'S MEMORANDUM AS DIRECTED BY COURT'S ORDER ON  
PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT



Andrea L. Goodreau

Beaufort, South Carolina  
July 8, 2015

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

PERSONAL CARE, INC.,

Plaintiff,

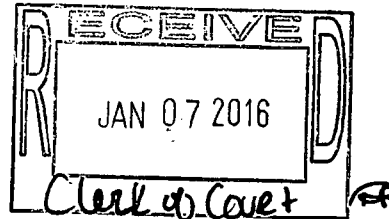
vs.

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

Defendants.

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT  
) CASE NO.: 2013-CP-10-1396

**AFFIDAVIT OF  
BERNARD CIGNAVITCH**



PERSONALLY appeared before me Bernie Cignavitch, who, first being duly sworn, says as follows:

1. I own a controlling interest in PERSONAL CARE, INC., the Plaintiff in the foregoing action. I am over the age of Eighteen (18) and the statements in this affidavit are based on my own personal knowledge. The statements contained in this Affidavit are true to the best of my knowledge except as to those stated to be based upon information and belief, as to which, I believe such matters to be true.

2. I retained Jerry Theos, Esq. to represent PERSONAL CARE in 2009 because Hattie Askew through her company, Low Country Ambulance, was interfering with the business of PERSONAL CARE by improperly soliciting and taking patients who were previously being transported by PERSONAL CARE. The patients were being transported on a regular basis to a kidney dialysis center.

3. The subject "defamatory" letter was written by Jerry Theos, Esq., and dated September 14, 2009.

4. It is my understanding that the letter should have been mailed to the dialysis center's corporate headquarters. Before the letter was mailed, Jerry Theos, Esq. expressed a concern to me regarding sending the letter to the individual dialysis center. However, a couple of weeks later, he indicated that it would be "OK" to send the letter to the Corporate Offices of the dialysis center. Also, he told me that I'll "have no problem." Based upon Jerry Theos' advice, I requested Tim Pitko, an employee at PERSONAL CARE, to secure the name and address of the Corporate Offices for the dialysis center. On August 24, 2009, I received an email from Tim Pitko which indicated that FRESenius MEDICAL CARE NORTH AMERICA, 920 Winter Street, Waltham, MA 02451-1457 was the name and address of the Corporate Headquarters for the dialysis center. – see below. Thereafter, I supplied Jerry Theos, Esq. with this information which was about 3 weeks before the letter was mailed. At no time before the letter was mailed was I advised by Jerry Theos, Esq that the letter could possibly give rise to a defamation lawsuit. If I was so advised, I would have never authorized or given permission for the mailing of the letter. I would not want to subject PERSONAL CARE to a potential claim for money damages. The reason I hired a lawyer was to protect me and my company from those problems. Furthermore, Jerry Theos, Esq. never presented me with a written document of any kind which indicated that he made me aware that the letter could possibly give rise to a defamation lawsuit nor did he request me to sign such a written document. Please refer to the attached emails of Tim Pitko, dated August 24, 2009, incorporated herein by reference as Exhibit 1.

5. I acknowledge that I did receive emails from Cheryl Shoun, Esq advising me of an "Answer and Counterclaim" in the Low Country case. However, I did not understand, at that time, that I was being sued by Low Country Ambulance. I did not understand that a Counterclaim was, in fact, a lawsuit against my company. I thought a Counterclaim was a

response to the lawsuit I just filed against Low Country Ambulance. I had no idea Low Country Ambulance was suing PERSONAL CARE for money damages based upon the letter that was prepared and sent by my then attorney, Jerry Theos, Esq., as I was previously advised by Mr. Theos that it was "OK" to send the letter and that I'll "have no problem." Please refer to the attached email from Janet Smith / Cheryl Shoun dated March 9, 2010, incorporated herein by reference as Exhibit 2.

6. In or about April of 2010, I had a follow-up telephone conversation with Cheryl Shoun, Esq. regarding the "Answer and Counterclaim" email. Even though I cannot recall verbatim the exact words I used in this conversation, the essence of the conversation was as follows: Cheryl Shoun, Esq. mentioned the idea of calling my insurance carrier. I responded by saying, "How could my Insurance Company cover me when I sued them. I then asked her - If I sue someone tomorrow can I simply call my Insurance Company to pay my attorneys and all fees?" Her response was simply "Ok". This conversation with Cheryl Shoun, Esq. took place via the telephone while I was in my car and to the best of my knowledge lasted about 4 minutes. A review of my T-MOBILE telephone statements for the months of April and May of 2010 indicates that I had one telephone conversation with phone number 843-720-1762 (Cheryl Shoun's phone number at NEXSEN PRUET, LLC). According to my telephone statement, this conversation took place on April 27, 2010 and lasted 4 minutes. (Please see attached T-MOBILE telephone statement). At no time during our conversation did she advise me that PERSONAL CARE was being sued, nor did she make reference to the letter which was prepared and mailed by Jerry Theos, Esq. Furthermore, she did not mention the word "defamatory" or indicate that PERSONAL CARE could be subject to a claim for money damages. She never advised me of her possible conflict in interest in this matter nor did she suggest that PERSONAL CARE secure another attorney

because of a conflict in interest. She never told me that there was a lawsuit pending against PERSONAL CARE with a venue in Hampton County and that Johnny Parker was representing Low Country Ambulance on that claim. Finally, during this conversation, she never advised me that the lawsuit was "not advantageous to your business." Please refer to the attached email from Cheryl Shoun dated June 8, 2012, incorporated herein by reference as **Exhibit 3**.

7. Subsequent to this conversation with Cheryl Shoun, Esq. and to the best of my knowledge and recollection I cannot recall having any other conversations or receiving any letters, emails or other correspondence (except for an email from Kerr at Cheryl Shoun's office dated June 7, 2010 enclosing a filed stamped copy of the Reply to Counterclaim) with either Cheryl Shoun, Esq. or Jerry Theos, Esq. concerning a lawsuit by Low Country Ambulance against PERSONAL CARE for money damages until the Mediation, which took place on May 8, 2012. There was SILENCE with respect to the defamation lawsuit from in or about April of 2010 to May 8, 2012. (Approximately 2 years of SILENCE).

8. At the Mediation, I was advised that Low Country Ambulance was seeking \$110,000 because of a "defamatory statement". This is how I came to understand that something was wrong. Furthermore, my attorneys (Theos and Shoun) told me that it would cost \$30,000 to \$40,000 for them to defend PERSONAL CARE.

9. After the Mediation, I received an email from Cheryl Shoun, Esq. dated June 8, 2012 in which she advised me that she was trying to get the Low Country case moved out of Hampton County. She was seeking my help to secure affidavits from potential witnesses that she could use in support of her Motion to have the Low Country Ambulance case removed out of Hampton County. Her email in part reads as follows:

We have stressed to you, particularly during mediation, as did John Tiller, the mediator that having this case remain in Hampton County will unquestionably be

the ultimate detriment of PERSONAL CARE. Bernie, you were there and you see that Ms. Eskew is ready to go forward to trial; she has nothing to lose and is sitting in a county in which her law firm is incredibly well know and a county in which large verdicts are frequently returned in favor of the local party.

10. Cheryl Shoun's email dated June 8, 2012 clearly points out the serious nature and potential gravity of harm to PERSONAL CARE because of having the lawsuit proceed in Hampton County against the Johnny Parker law firm. As I previously above stated in paragraph 5, there was SILENCE in my very brief telephone conversation with Cheryl Shoun, Esq. in or about April of 2010 concerning the issues raised by Cheryl Shoun, Esq. approximately two later in her email dated June 8, 2012. Please refer to the attached email of Cheryl Shoun, Esq dated June 8, 2012, attached hereto and incorporated herein by reference as **Exhibit 4**.

11. Also I received a letter from Cheryl Shoun, Esq. dated July 5, 2012 regarding her Motion to change the venue of the case from Hampton to Beaufort County. The last sentence of her July 5, 2012 letter reads as follows: "Having this matter tried in Hampton County with outstanding claims against your business operation being lodged by a local resident who is represented by Johnny Parker and his firm is not advantageous to your business."

12. Again, Cheryl Shoun, Esq. was SILENT in our telephone conversation in or about April of 2010, regarding the dangers posed to PERSONAL CARE by virtue of having the lawsuit proceed in Hampton County by a "local resident who" was "represented by" the Johnny Parker law firm. Please refer to the attached letter from Cheryl Shoun dated July 5, 2012, incorporated herein by reference as **Exhibit 5**.

13. Subsequently, in July of 2012, numerous emails were exchanged between myself and Jerry Theos and Cheryl Shoun. In one of my emails dated July 12, 2012 I wrote as follows: "Cheryl, Thanks for your response, with all due respect-Why are they suing me? What did I do wrong? What slander did I commit? I don't understand? Please Explain this to me?" In a separate

email dated July 12, 2012 I also wrote to Cheryl Shoun as follows: "Is Low Country suing me because I did not have the right to file a Hipaa law suit against them??? or because of what they say Tim Pitko said?" Please refer to the attached emails exchanged between myself and Cheryl Shoun and Jerry Theos in July of 2012, copies of which are incorporated herein by reference as **Exhibit 6.**

14. On July 19, 2012 I received an email from Jerry Theos which reads in part: "Bernie: This is in response to your recent questions regarding the Defendant's Answer and Counterclaim. Below is the chronology associated with the drafting and mailing of our initial demand letter:

(1) at the outset, you requested that a letter be sent to Lowcountry regarding their alleged unlawful misconduct and their tortuous interference with your business;

(2) you provided the information upon which the letter was to be based;

(3) drafts of the proposed letter were forwarded to you for your review and Tim Pitko's review;

(4) telephone conversations took place between Cheryl and Tim Pitko regarding the letter and its proposed and desired contents;

(5) Cheryl expressed to Tim in a telephone conversation her reservations regarding sending copies of the letter to the dialysis clinic(s), but Tim insisted in order that the clinic(s) be deterred from doing or continuing to do business with Lowcountry;

(6) the final draft of the letter was approved prior to our mailing it;

(7) the Counterclaim has been pending for some time, and there were both discussions and emails exchanged between us and you regarding our response to the Counterclaim; and,

(8) the Counterclaim was discussed in great detail with you during mediation, as was our defense to it .....All of the above being said, we reiterate that we believe the Counterclaim to be without merit and, moreover as we have previously advised, truth is an absolute defense to the defamation claim. Based upon the information you initially provided, as well as information gathered since that time, the letter in question contains nothing that is not true. This will all be presented at the appropriate time as part of our defense at the trial of the case." Please refer to the attached email of Jerry Theos Esq. dated July 19, 2012, included herein by reference as **Exhibit 7**.

15. Jerry Theos' email dated July 19, 2012 is SILENT concerning his alleged claim that he advised me of a potential defamation lawsuit before mailing the letter. Jerry Theos' alleged claim that he advised me of a potential defamation lawsuit before mailing the letter was set forth in his Affidavit dated December 2, 2014 which was previously submitted to this court. Paragraph 3 of Mr. Theos' Affidavit dated December 2, 2014 reads as follows: "3. That, prior to representing PERSONAL CARE, I met with Bernie Cignavitch to discuss Askew's actions and the harm her actions caused PERSONAL CARE; at our meeting, Mr. Cignavitch insisted that I write the allegedly defamatory letter (attached as Exhibit 1) and to copy the letter to a third party (a dialysis clinic) in order to ensure that the dialysis clinic was aware of Ms Askew's actions which Mr. Cignavitch alleged caused PERSONAL CARE harm; I advised Mr. Cignavitch that sending such a letter to a third party could expose PERSONAL CARE to a defamation counterclaim, but Mr. Cignavitch insisted that the letter be sent to the dialysis clinic as well." There was SILENCE in Mr. Theos' email dated July 19, 2012 with respect to his alleged claim that he advised me of a potential defamation lawsuit before mailing the letter because Jerry Theos, Esq. NEVER WARNED ME of a potential defamation lawsuit before mailing the letter, rather he told me that

it was "OK" to send the letter and that I'll "have no problem." Please refer to the attached Affidavit of Jerry Theos, Esq. dated December 2, 2014, incorporated herein by reference as **Exhibit 8**.

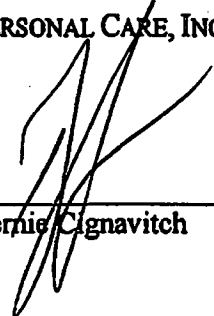
16. As stated in a previous affidavit, I operate an ambulance company, and am not a lawyer, and the Askew /Low Country lawsuit was my first experience with a "counterclaim."

17. Throughout the representation Mr. Theos repeatedly assured and advised me that the defamation counterclaim in the underlying case as "meritless." As late as July 2012, Mr. Theos sent emails to PERSONAL CARE stating, "As we have previously advised you, we believe and contend that their counterclaim is meritless, as truth is an absolute defense to such a claim." I had no reason to doubt or disbelieve Mr. Theos' repeated statements and assurances, at least until the mediation in May 2012. Please refer to the attached E-mail from Mr. Theos, dated July 12, 2012, incorporated herein by reference as **Exhibit 9**.


18. This affidavit incorporates by reference all of my prior testimony in earlier affidavits and in the Verified Complaint in The verified Amended Complaint.

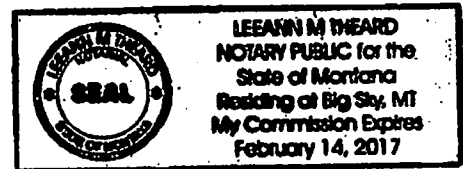
The Affiant further sayeth not.

PERSONAL CARE, INC.

  
\_\_\_\_\_  
Bernie Cignavitch

SWORN to before me this 25 day of August, 2015

  
\_\_\_\_\_  
Notary Public for the State of ~~South Carolina~~ Montana  
My commission expires 2/14/17



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 Personal Care, Inc., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Jerry N. Theos; Uricchio, Howe, Krell, )  
 Johnson; Toporek, Theos & Keith, PA; Cheryl )  
 D. Shoun; and Taylor, Bowley & Byrd, LLC, )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 NINTH JUDICIAL CIRCUIT  
 Case No.: 2013-CP-10-1396

**DEFENDANTS' SUPPLEMENTAL  
 MEMORANDUM ADDRESSING THE  
 STOKES-CRAVEN DECISION**

FILED  
 2015 SEP 18 PM 12:26  
 COURT OF COMMON PLEAS  
 NINTH JUDICIAL CIRCUIT

Defendants Jerry N. Theos; Uricchio, Howe, Krell, Johnson, Toporek, Theos & Keith, PA; Cheryl D. Shoun; and Taylor, Bowley & Byrd, LLC (hereinafter collectively referred to as "Defendants"), through undersigned counsel, hereby submit this supplemental memorandum to bring to the Court's attention a newly issued decision from the Supreme Court of South Carolina that may require the Court to revise certain citations in its Order denying Plaintiff Personal Care's Motion to Restore.

Defendants respectfully draw the Court's attention to the opinion of the South Carolina Supreme Court in *Stokes-Craven Holding Corp. v. Robinson*, Op. No. 27572 (S.C. Sup. Ct. filed Sept. 9, 2015) (Shearouse Adv. Sh. No. 35 at 42), attached hereto as Exhibit A. This decision addresses the statute of limitations in legal malpractice cases. In the opinion, the Supreme Court reaffirms the discovery rule: "As legislatively mandated, we begin our analysis with the well-established discovery rule. Pursuant to this 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." *Id.* at 52 (emphasis in original). The Supreme Court goes on to adopt the following statement as "the statute of limitations standard for legal malpractice suits: '*If it appears* that the client knew of the harm before the case is

finally determined on appeal, the statute of limitations begins to run from the time the underlying injury occurs or upon the client's awareness of the alleged negligence." *Id.* at 55 (emphasis added). The Supreme Court then overrules *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005), which held that the statute of limitations began to run at the time the jury rendered its adverse verdict and was not tolled while the case was on appeal. The *Stokes-Craven* Court instead holds that "the statute of limitations may be tolled until resolution on appeal of the underlying case if the client has not become aware of the injury prior to the decision on appeal." Shearouse Adv. Sh. No. 35 at 57. The Supreme Court concludes that this holding, which permits the tolling of the statute of limitations on appeal in certain situations, "comports with the discovery rule." *Id.*

This new opinion provides further support for this Court's previous finding that the statute of limitations on Personal Care's claims against Defendants began to run in the spring of 2010. Although the opinion overrules *Epstein*, the *Stokes-Craven* decision reaffirms the application of the discovery rule to legal malpractice claims. Furthermore, the issue of tolling the statute of limitations pending appeal is not relevant to this matter, where the underlying case was settled before trial but after Plaintiff had filed the instant case and had it dismissed pursuant to Rule 40(j). Moreover, the evidence and affidavits in the record clearly establish that Personal Care's president, Bernie Cignavitch, had become aware of the harm by June 2010. By that date, he had received a copy of the counterclaim, been told repeatedly that he needed to put his insurance carrier on notice so that it could defend and indemnify him for the counterclaim, received a filed answer to the counterclaim, and been billed for legal work performed in defense of the counterclaim. Thus, Personal Care was aware of, knew of, and should have known of the alleged injury and possible claim by June 2010. Accordingly, in light of the Supreme Court's

continued application of the discovery rule in legal malpractice claims, Defendants submit that the *Stokes-Craven* decision provides further support for this Court's finding that the statute of limitations has run on Personal Care's claims.

### CONCLUSION

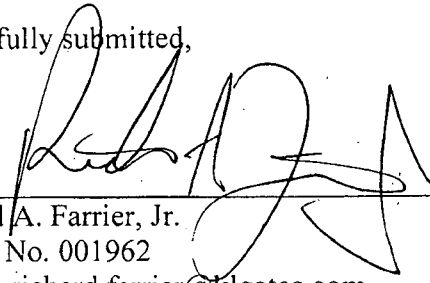
For the foregoing reasons, Defendants respectfully submit that the *Stokes-Craven* decision provides further support for this Court's previous Order denying the Motion to Restore. However, because the new *Stokes-Craven* decision overrules *Epstein*, the Court's previous Order may need to be revised in order to eliminate citation to *Epstein* and to cite *Stokes-Craven* for both the discovery rule and the standard applied to legal malpractice claims.

**SIGNATURE BLOCK ON NEXT PAGE**

Charleston, South Carolina

Dated: September 18, 2015

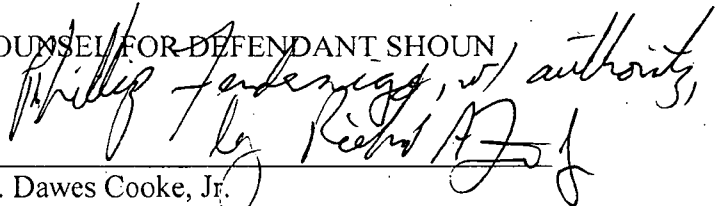
Respectfully submitted,



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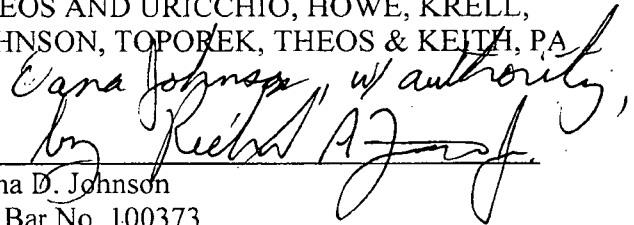
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# EXHIBIT A

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford,  
Appellant,

v.

Scott L. Robinson and Johnson McKenzie & Robinson,  
LLC, Respondents.

Appellate Case No. 2013-001452

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Appeal From Clarendon County  
George C. James, Jr., Circuit Court Judge

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Opinion No. 27572  
Heard December 10, 2014 – Filed September 9, 2015

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**REVERSED AND REMANDED**

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Andrew K. Epting, Jr. and Michelle Nicole Endemann,  
both of Andrew K. Epting, Jr., L.L.C., of Charleston, for  
Appellant.

Susan Taylor Wall and Henry Wilkins Frampton, IV,  
both of McNair Law Firm, P.A., of Charleston and  
Warren C. Powell, Jr., of Bruner Powell Wall & Mullins,  
L.L.C., of Columbia, for Respondent.

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**JUSTICE BEATTY:** In this legal malpractice case, Stokes-Craven Holding Corporation d/b/a Stokes-Craven Ford ("Stokes-Craven") appeals the circuit court's order granting summary judgment in favor of Scott L. Robinson and his law firm, Johnson, McKenzie & Robinson, L.L.C., (collectively "Respondents") based on the expiration of the three-year statute of limitations. Stokes-Craven contends the court erred in applying this Court's decision in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005),<sup>1</sup> and holding that Stokes-Craven knew or should have known that it had a legal malpractice claim against its trial counsel and his law firm on the date of the adverse jury verdict rather than after this Court affirmed the verdict and issued the remittitur in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). We overrule *Epstein*, reverse the circuit court's order, and remand the matter to the circuit court for further proceedings consistent with this opinion.

### I. Factual / Procedural History

Donald C. Austin filed suit against Stokes-Craven, an automobile dealership, after he experienced problems with his used truck and discovered the vehicle had sustained extensive damage prior to the sale. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). In his Complaint, Austin alleged the following causes of action: revocation of acceptance, breach of contract, negligence, constructive fraud, common law fraud, violation of the South Carolina Motor Vehicle Dealer's Act (the "Dealer's Act"), violation of the South Carolina Unfair Trade Practices Act ("UTPA"), and violation of the Federal Odometer Act. Based on these claims, Austin sought actual damages, punitive damages, prejudgment interest, and attorney's fees and costs. *Id.* at 35, 691 S.E.2d at 141-42. Stokes-Craven was represented by Scott L. Robinson of Johnson, McKenzie & Robinson, L.L.C. throughout the trial proceedings. On August 16, 2006, after a three-day trial, the jury found in favor of Austin and awarded \$26,371.10 in actual damages and \$216,600 in punitive damages. *Id.* at 35, 691 S.E.2d at 142.

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<sup>1</sup> See *Epstein*, 363 S.C. at 381, 610 S.E.2d at 820 (rejecting the continuous-representation rule and affirming the dismissal of a legal malpractice case based on the expiration of the statute of limitations on the ground the three-year limitations period began to run on the date that the adverse verdict was entered against claimant).

Austin and Stokes-Craven filed cross-appeals to this Court. Although Robinson was listed as counsel of record on the appellate pleadings, Stokes-Craven had employed attorneys with Young, Clement, Rivers, L.L.P. to represent it during the course of the appeal. On March 8, 2010, a majority of this Court affirmed the jury's verdict and held that: (1) there was no prejudicial abuse of discretion in admitting certain challenged testimony; (2) Austin offered proof of actual damages in the amount of \$26,371.10; (3) Austin failed to prove Stokes-Craven violated the Federal Odometer Act with the requisite intent to defraud him as to the mileage of the truck; (4) the verdicts of fraud and violation of the UTPA were not inconsistent; and (5) there was evidence to support the jury's award of \$216,000 in punitive damages. *Id.* at 59, 691 S.E.2d at 154. This Court issued the remittitur on April 21, 2010.<sup>2</sup>

On August 16, 2010, Stokes-Craven filed a legal malpractice action against Respondents, alleging negligence and breach of fiduciary duty in trial counsel's representation of Stokes-Craven both prior to and during the trial. Specifically, Stokes-Craven alleged that trial counsel failed to: adequately investigate the facts of the case; prepare or serve written discovery; depose witnesses; obtain copies of the plaintiff's experts' curriculum vitas; prepare a pretrial brief, trial exhibits, voir dire, and requests to charge; preserve certain evidentiary issues for appellate review; notify Stokes-Craven's insurance carrier about the claims; and settle the case prior to the jury verdict. Based on these purported errors, Stokes-Craven claimed the jury returned the adverse verdict. Respondents generally denied the allegations and asserted several defenses, including that Stokes-Craven's claims were barred by the expiration of the three-year statute of limitations.

Subsequently, Respondents filed motions for summary judgment. Stokes-Craven filed a cross-motion for partial summary judgment and a motion to compel discovery of Respondents' professional liability policy applications for the years 2002 through 2012, all correspondence between Respondents and their malpractice insurer, and the billing records for computer research from any research provider used by Respondents for the years 2003 through 2006.

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<sup>2</sup> In a related appeal, this Court (1) affirmed the circuit court's order that entered judgment in favor of Austin for his requested trial-level fees, and (2) remanded the matter to the circuit court to determine what amount of appellate and post-appellate fees should be awarded to Austin. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 750 S.E.2d 78 (2013).

Following a hearing, the circuit court granted Respondents' motions for summary judgment on the ground Stokes-Craven's legal malpractice claim was barred by the expiration of the statute of limitations. In so ruling, the court concluded that Dennis Craven, as agent of Stokes-Craven, had notice of the claim on August 17, 2006, the date of the jury's adverse verdict. Referencing portions of Craven's deposition testimony, the court determined that Craven's testimony as a whole indicated that he was aware that he might have a legal malpractice claim against Respondents because Craven: knew at the time of trial that counsel had not contacted and interviewed crucial witnesses prior to trial; was not shown the defendants' interrogatory responses until the day of trial; had not been prepared for cross-examination; and knew that counsel failed to settle the case despite the admission by Stokes-Craven that it "had done something wrong." The court also noted that Craven acknowledged the jury's verdict presented a "serious problem" for Stokes-Craven. Citing *Epstein*, the court found that Craven's knowledge of counsel's "shortcomings" and other "actionable errors" constituted evidence that Craven knew at the time of the verdict that he might have a claim against trial counsel.

The court also held that the doctrines of equitable estoppel and equitable tolling were inapplicable. In terms of equitable estoppel, the court found "nothing in the record to support the conclusion that [Respondents] did anything to mislead Stokes-Craven" or that Robinson "engaged in any conduct to prevent Stokes-Craven from filing a malpractice action." The court further found Stokes-Craven could not invoke equitable tolling because it failed to present evidence of an "extraordinary event" beyond its control that prevented it from timely filing its legal malpractice action.

Because the court granted Respondents' motions for summary judgment, it noted that it was unnecessary to rule on Stokes-Craven's motion to compel discovery. However, in the event the decision on summary judgment was overturned on appeal, the court proceeded to rule on the motion. Initially, the court found the correspondence between Respondents and their malpractice carrier was not discoverable as it was prepared in anticipation of or during litigation. The court further determined that Stokes-Craven had not established the need for this information. Although the court ruled Respondents' professional liability policy applications were discoverable, the court stated that any "issues of ultimate admissibility" would be left to the trial judge.

Stokes-Craven appealed the circuit court's order and filed a motion to argue against precedent pursuant to Rule 217, SCACR. This Court granted Stokes-Craven's motion to argue against *Epstein*.

## II. Standard of Review

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCRCP; *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

## III. Discussion

### A. Commencement of the Statute of Limitations

Stokes-Craven asserts the circuit court erred in holding as a matter of law that the statute of limitations began to run on the date of the adverse jury verdict against Stokes-Craven. Contrary to the circuit court's characterization of Craven's testimony, Stokes-Craven notes that Craven "repeatedly testified that, at the time of the trial, he had never been sued before, had never participated in litigation, and had no idea what an attorney should or should not do to prepare a case for trial." Based on this testimony, Stokes-Craven maintains that Craven did not know or could not have known that it might have a claim for legal malpractice on the date the verdict was rendered.

Stokes-Craven further argues the court erred in relying on *Epstein* as it is not only factually distinguishable from the instant case but is no longer viable precedent. Stokes-Craven requests that this Court overrule its decision in *Epstein* and adopt a bright-line rule that the statute of limitations in a legal malpractice case does not commence until the remittitur has been issued in the underlying lawsuit.

A claimant in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014). Furthermore, a claimant is required to demonstrate that "he or she 'most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.'" *Doe v. Howe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005) (quoting *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997)).

The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005) (stating the statute of limitations for "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law" is three years); see *Berry v. McLeod*, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct. App. 1997) (concluding that section 15-3-530(5) of the South Carolina Code provides a three-year statute of limitations for legal malpractice actions). 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 that some claim against another party might exist. *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989); see S.C. Code Ann. § 15-3-535 (2005) ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."). "This standard as to when the limitations period begins to run is *objective* rather than subjective." *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800. "Therefore, the statutory period 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." *Id.*

"Statutes of limitations are not simply technicalities." *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009). "On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Id.* "Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Id.* "One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on

his or her rights." *Id.* (citations omitted). "Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation." *Id.* "Statutes of limitations are, indeed, fundamental to our judicial system." *Id.* (citation omitted).

a. *Epstein*

As noted by the circuit court and the parties, the key case in the instant dispute is *Epstein*. In *Epstein*, a jury returned a verdict for a wrongful death and survival action on February 18, 1998 against Dr. Franklin Epstein in a medical-malpractice action that arose out of the death of one of his patients following spinal surgery. *Epstein*, 363 S.C. at 374, 610 S.E.2d at 817. David Brown represented Epstein throughout the trial and filed a notice of appeal after the jury verdict. *Id.* at 374-75, 610 S.E.2d at 817. Although Brown remained counsel of record during the appeal, Epstein was represented on appeal by Stephen Groves, John Hamilton Smith, and Steven Brown. *Id.* at 375, 610 S.E.2d at 817. The Court of Appeals affirmed the verdicts on July 31, 2000 in *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). *Id.* This Court denied Epstein's petition for a writ of certiorari in January 2001. *Id.*

On January 9, 2002, Epstein filed a legal malpractice claim against David Brown in which he alleged breach of fiduciary duty, negligence, and breach of contract. *Id.* In terms of specific deficiencies, Epstein asserted that Brown was negligent in failing to conduct an adequate investigation, failing to advise him to settle, forgetting to call expert witnesses, and adopting a defense contrary to Epstein's medical opinion. *Id.* at 376, 610 S.E.2d at 818. Brown moved for summary judgment on the ground that Epstein failed to commence the action within the applicable three-year statute of limitations. *Id.* at 375, 610 S.E.2d at 817. The circuit court found the majority of the damages alleged by Epstein stemmed from the adverse jury verdict, and the damages to Epstein's reputation resulting from the publicity were all damages suffered at the time of the verdict. *Id.* at 376, 610 S.E.2d at 818. The court concluded that, although these damages might have been mitigated by a successful appeal, they could not have been wholly eliminated by a reversal of the jury's verdict. *Id.* Accordingly, the circuit court ruled the statute of limitations began to run, at the latest, on February 18, 1998, the date of the jury's verdict. *Id.* at 375, 610 S.E.2d at 817. As a result, the court found the action was untimely and granted Brown's motion for summary judgment. *Id.* Epstein appealed the circuit court's order to this Court. *Id.*

Justice Waller, who was joined by Justices Moore and Burnett, affirmed the circuit court's order. *Id.* at 383, 610 S.E.2d at 821-22. In reaching this decision, the majority declined to adopt the continuous-representation rule, which permits the statute of limitations to be tolled during the period an attorney continues to represent the client on the same matter out of which the alleged legal malpractice arose. *Id.* at 380, 610 S.E.2d at 820. Instead, the majority chose to strictly adhere to the discovery rule set forth by the Legislature. *Id.*

The majority explained its decision by comparing a legal malpractice action to a medical malpractice action. Despite the "very legitimate policy rationales in favor of adoption of a continuous treatment rule" in medical malpractice cases, the majority noted that our appellate courts had declined to adopt it because the "Legislature [had] set absolute time restrictions for the bringing of medical malpractice actions in the statutes of repose both for medical malpractice and for persons operating under disability." *Id.* at 378, 610 S.E.2d at 819. The majority also noted that "numerous jurisdictions" had refused to adopt the continuous-representation rule. *Id.* at 379, 610 S.E.2d at 819.

Additionally, the majority disagreed with Epstein's alternative argument that, absent applying the continuous-representation rule, the limitations period did not begin to run until the Court denied certiorari in January 2001. *Id.* at 380-81, 610 S.E.2d at 820. The majority explained that "those jurisdictions which decline to adopt the continuous representation rule tend to hold that a plaintiff may institute a malpractice action prior to the conclusion of the appeal." *Id.* at 380, 610 S.E.2d at 820.

The majority also rejected Epstein's argument that appealing the ruling in the medical malpractice action against him while filing a legal malpractice claim against Brown would cause him to argue inconsistent positions in two different courts. *Id.* at 381, 610 S.E.2d at 821. The majority maintained that "there are measures which may be taken to avoid such inconsistent positions." *Id.* at 381-82, 610 S.E.2d at 821.

Ultimately, the majority applied the discovery rule and found that Epstein "clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial." *Id.* at 382, 610 S.E.2d at 821. The majority reasoned that the damages claimed by Epstein were "largely those to his reputation" and the claims he raised in his Complaint were "primarily related to trial and pre-trial errors." *Id.* The majority also noted that trial counsel conceded

during oral argument on the summary judgment motion that "some of the allegations down there, your Honor, were within the man's knowledge when the verdict came in." *Id.* at 382-83, 610 S.E.2d at 821. Finally, the majority referenced a letter from Epstein to his appellate attorney, Steven Groves, in which Epstein indicated that he would not deal with Brown and that he believed Brown's representation "was so egregiously lacking." *Id.* at 383, 610 S.E.2d at 821. The majority concluded that it was "patent Dr. Epstein knew, or should have known, of a possible claim against Brown long before this Court denied certiorari in January 2001." *Id.*

Chief Justice Toal dissented as she would have adopted "a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until an appellate court disposes of the action by sending a remittitur to the trial court." *Id.* at 383, 610 S.E.2d at 822. Although Justice Toal agreed with the application of the discovery rule, she disagreed with the majority's holding that Epstein should have known of the existence of a cause of action arising from Brown's alleged malpractice at the conclusion of the trial. *Id.* at 384, 610 S.E.2d at 822. Instead, Justice Toal found "there was no evidence that [Epstein] [was] injured as a result of [Brown's] alleged malpractice until the court of appeals disposed of the case by sending a remittitur to the trial court." *Id.*

Justice Pleicones concurred in the majority's rejection of the continuous-representation rule and the retention of the discovery rule; however, he dissented as he believed that Brown should have been estopped from asserting the statute of limitations as a defense. *Id.* at 384, 610 S.E.2d at 822. Justice Pleicones pointed out that: (1) Brown affirmatively represented to Epstein that the adverse verdict had resulted from errors of law committed by the trial judge and, in turn, affected the jury's fact-finding role; and (2) Brown remained nominally as counsel to Epstein throughout the appeal of the verdict. *Id.* Justice Pleicones concluded that Brown's representations and his presence on the appellate team "reasonably induce[d] Epstein's forbearance." *Id.* at 384-85, 610 S.E.2d at 822.

**b. Propriety of *Epstein***

Our appellate courts for the past ten years have continued to rely on the decision in *Epstein*.<sup>3</sup> However, *Epstein* is not without its critics. See James L.

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<sup>3</sup> See, e.g., *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 760 S.E.2d 399 (2014) (citing *Epstein* and affirming the circuit court's ruling that legal

Floyd, III, *South Carolina Tort Law: For Whom The Statute of Limitations Tolls—The Epstein Court's Rejection of the Continuous Representation Rule*, 57 S.C. L. Rev. 643 (2006). In this article, the author identified what he perceived to be fundamental flaws in the majority's analysis in *Epstein*. Specifically, the author found that the majority's reasoning and holding were questionable "because [of]: (1) the differences between the statute of limitations governing legal malpractice actions and the statute of repose governing medical malpractice actions, (2) the strength and applicability of the secondary authority upon which the *Epstein* court relied, and (3) *Epstein's* operative facts." *Id.* at 654.

Although the author distinguished the secondary authority relied on by the majority and noted that *Epstein* was limited to its facts, his primary challenge was to the majority's reliance on the statute of repose in medical malpractice actions. Specifically, the author stated that:

neither section 15-3-535 nor section 15-3-530(5) create a statute of repose governing legal malpractice actions. Instead, those sections create a general three-year statute of limitations in legal malpractice actions. This distinction may indicate the South Carolina Legislature is unwilling to create the same "absolute time limit" for legal malpractice actions which is observed in medical malpractice actions.

*Id.* at 656 (footnotes omitted). In addition to these distinctions, the author opined that the adoption of the "continuous representation rule would protect the sanctity of the attorney-client relationship" because a client should be able to rely on his attorney's advice, particularly where the attorney suggests filing an appeal of the underlying lawsuit. *Id.* at 658.

Notably, *Epstein* represents a minority position in this country as the majority of courts in other jurisdictions have adopted the continuous-representation rule. See 3 Ronald E. Mallen & Allison Martin Rhodes, *Legal Malpractice*, § 23:45 (2015) (discussing state cases which have adopted the majority and minority positions regarding the continuous-representation rule; identifying *Epstein* as within the minority position); George L. Blum, Annotation, *Attorney*

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malpractice claims were barred by the expiration of the statute of limitations); *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009) (citing *Epstein* and affirming grant of summary judgment in favor of attorneys in legal malpractice action based on the expiration of the statute of limitations).

*Malpractice—Tolling or Other Exceptions to Running of Statute of Limitations*, 87 A.L.R.5th 473, § 4 (2001 & Supp. 2015) (discussing state cases that have applied or found inapplicable the continuous-representation doctrine); *see also* George L. Blum, Annotation, *When Statute of Limitations Begins to Run on Action Against Attorney Based upon Negligence—View that Statute Begins to Run from Time Client Discovers, or Should Have Discovered, Negligent Act or Omission—Application of Rule to Conduct of Litigation and Delay or Inaction in Conducting Client's Affairs*, 14 A.L.R. 6th 1, § 8 (2006 & Supp. 2015) (collecting state and federal cases that applied or found inapplicable the discovery rule and highlighting *Epstein*).

The facts of the instant case present us with an appropriate opportunity to address the criticism and conflict that has arisen out of our decision in *Epstein*. As legislatively mandated, we begin our analysis with the well-established discovery rule. Pursuant to this 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.

Thus, a claimant seeking recovery for a legal malpractice claim is constrained by two constants: (1) filing the claim within the statute of limitations,<sup>4</sup> and (2) establishing the four requisite elements of his or her claim. As a result, a claimant must have knowledge of each element of the legal malpractice claim when it is filed. *See* 3 Ronald E. Mallen & Allison Martin Rhodes, *Legal Malpractice* § 23:14 (2015) ("Since a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued. Thus, 'accrual' means the existence of a legally cognizable cause of action.").

As evidenced by this case, the key question is when the claimant's cause of action accrues to trigger the running of the three-year statute of limitations. The answer to this question is complicated by the seemingly endless factual scenarios surrounding the underlying claim of a legal malpractice cause of action. For example, legal malpractice claims may stem from matters involving litigation or negotiated settlements while others may arise out of matters involving the probate

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<sup>4</sup> "A legal malpractice cause of action is governed by the applicable statute of limitations whether it sounds in tort, contract or fraud." 1 S.C. Jur. *Attorney & Client*, § 69 (Supp. 2015) (citing section 15-3-530 of the South Carolina Code).

of a will or a divorce. Further complicating the determination of when a cause of action accrues is if the claimant pursues an appeal of an unfavorable ruling.

Our decision regarding the accrual date must also take into consideration the preservation of the attorney-client relationship as well as the public policy that is fundamental to the efficient management of our judicial system. Clearly, if a client files a legal malpractice cause of action while the client is still represented by counsel during an appeal, the attorney-client relationship is compromised and there are simultaneous lawsuits advocating conflicting positions.

While the legal bases and policy reasons for adopting the continuous-representation rule are persuasive, we find its application may be problematic because we can foresee factual scenarios where it is unclear exactly at what point trial counsel ends its representation. Moreover, we acknowledge the merit of the remittitur rule espoused by the dissent in *Epstein* as it offers a clear and definitive date for the accrual of a legal malpractice cause of action. However, we decline to adopt such an unyielding rule because each case presents unique circumstances. Instead, we are guided by the position taken by the Oklahoma Court of Appeals in *Ranier v. Stuart & Freida*, 887 P.2d 339 (Okla. Civ. App. 1994).

In *Ranier*, appellant retained respondent attorney and his law firm to represent him in a lawsuit that was ultimately dismissed as time-barred on August 15, 1990. *Ranier*, 887 P.2d at 340. On September 12, 1990, respondent mailed a letter to appellant, which notified appellant that the lawsuit had been dismissed and an appeal had been filed. *Id.* In the letter, respondent stated that he believed they had a "good chance" of getting the trial judge's decision reversed. *Id.* On February 5, 1992, the trial judge's decision was affirmed on appeal. *Id.*

On April 19, 1993, appellant filed a legal malpractice action against respondent and his law firm. *Id.* Respondents filed a motion for summary judgment, alleging the action was time barred because more than two years had elapsed since appellant's cause of action accrued. *Id.* Appellant responded that the statute of limitations did not begin to run until the appeal was decided on February 5, 1992 and, alternatively, that his attorney's letter assuring him that they had a "good chance" of reversing the trial judge's decision on appeal tolled the running of the statute of limitations. *Id.* The trial court granted summary judgment in favor of respondents. *Id.*

On appeal, the Oklahoma Court of Appeals addressed "whether Appellant's malpractice action accrued at the time the trial court dismissed the underlying action, starting the statute of limitations period, or whether the statute of limitations was tolled until after the case was finally determined adversely to Appellant on appeal." *Id.* at 341. In analyzing this issue, the court noted that there was a split of authority in other jurisdictions regarding the appropriate rule. In particular, the court considered the exhaustion of appeals rule and the continuous-representation rule. *Id.* at 341-42. Ultimately, the court declined to adopt either rule and, instead, crafted a compromise position between these rules. *Id.* at 343.

Relying on a decision issued by the Kansas Supreme Court,<sup>5</sup> the Oklahoma Court of Appeals stated:

*A statute of limitations for a legal malpractice action may be tolled until resolution on appeal of the underlying case if the client has not become aware of the harm prior to the decision on appeal. We come to this conclusion as a matter of common sense because in many situations, a client has no viable cause of action until he discovers whether his case is reversed on appeal. We caution, however, that the resolution of the appeal is not necessarily always the critical event triggering ripeness of a legal malpractice claim, but rather it is knowledge of the injury, its cause and the wrongdoing. We emphasize the proper application of the discovery rule demands that the determinative factor be the client's knowledge of the injury, and each case must be decided under its own particular facts. If it appears that the client knew of the harm before the case is finally determined on appeal, the statute of limitations begins to run from the time the underlying injury occurs or upon the client's awareness of the alleged negligence.*

*Id.* at 343 (footnotes omitted) (emphasis added).

Based on the particular facts of the case, the Oklahoma Court of Appeals concluded that appellant had no knowledge of any harm suffered until the underlying judgment was affirmed on appeal. *Id.* at 343-44. Because the statute of

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<sup>5</sup> The Oklahoma Court of Appeals essentially adopted the rule enunciated by the Kansas Supreme Court in *Dearborn Animal Clinic, P.A. v. Wilson*, 806 P.2d 997 (Kan. 1991).

limitations was tolled until the appellate court issued its opinion, the Oklahoma Court of Appeals found that appellant's legal malpractice cause of action was timely filed. *Id.* at 344.

After carefully considering the rationale in *Ranier*, we conclude the rule adopted by the Oklahoma Court of Appeals comports with the discovery rule established by our Legislature and the purpose of the statute of limitations. Accordingly, we now adopt the following statement in *Ranier* as the statute of limitations standard for legal malpractice suits: "If it appears that the client knew of the harm before the case is finally determined on appeal, the statute of limitations begins to run from the time the underlying injury occurs or upon the client's awareness of the alleged negligence." *Ranier*, 887 P.2d at 343. We find the resolution on appeal rule provides a threshold limit to the tolling of the statute of limitations, eliminates the rigidity of the remittitur rule, and prevents arbitrary application of the rule with a case-by-case analysis. Furthermore, this rule advances the purpose of the statute of limitations, which is to punish plaintiffs who sleep on their rights, protect defendants from stale claims, and lend order to the judicial system.

Because the circuit court relied upon *Epstein* to hold that the statute of limitations began to run on the day of the jury's verdict, we reverse the court's grant of summary judgment without prejudice to either party's right to move for this relief under our newly announced statute of limitations standard for legal malpractice suits.<sup>6</sup>

#### **B. Motion to Compel Discovery**

Having reversed the circuit court's grant of summary judgment in favor of Respondents, the question becomes whether the court erred in denying a portion of Stokes-Craven's motion to compel. Stokes-Craven claims the circuit court erred in holding that Respondents' communications with their legal malpractice carrier were not discoverable. In particular, Stokes-Craven contends the documents are not protected by the work-product doctrine because they were "prepared in the

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<sup>6</sup> In view of our decision, we need not reach Stokes-Craven's contention that equitable doctrines precluded the application of the statute of limitations. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

ordinary course of insurance business" and not in anticipation of litigation. Additionally, Stokes-Craven maintains it has a "substantial need" for these documents and that it is unable to obtain equivalent information by other means.

A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009).

"The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party." *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010); see Rule 26(b)(3), SCRPC (stating, "a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for the trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means"). "Generally, in determining whether a document has been prepared 'in anticipation of litigation,' most courts look to whether or not the document was prepared because of the prospect of litigation." *Tobaccoville*, 387 S.C. at 294, 692 S.E.2d at 530.

We conclude the circuit court abused its discretion in ruling on Stokes-Craven's motion to compel production of communications between Respondents and their malpractice carrier because there was no evidentiary basis to support its factual conclusions. The court failed to conduct an in camera hearing to review the requested information and stated in its summary ruling that it had "not received a privilege log of these communications." Therefore, we find the court lacked sufficient information to determine whether the requested documents were prepared in anticipation of litigation and that Stokes-Craven had a substantial need of the materials in preparation of its case. Accordingly, we direct the circuit court on remand to conduct an in camera hearing, review the requested information, and issue a specific ruling.

#### IV. Conclusion

We overrule *Epstein* and now hold that the statute of limitations for a legal malpractice action may be tolled until resolution on appeal of the underlying case if the client has not become aware of the injury prior to the decision on appeal. We find this rule comports with the discovery rule and effectuates the purpose of the statute of limitations. Because the circuit court relied upon *Epstein* to hold that the statute of limitations began to run on the day of the jury's verdict, we reverse the court's grant of summary judgment without prejudice to either party's right to move for this relief under our newly announced statute of limitations standard for legal malpractice suits. Additionally, we find the circuit court abused its discretion in denying Stokes-Craven's motion to compel the production of communications between Respondents and their malpractice carrier because there was no evidence to support the court's ruling.

Based on the foregoing, we reverse the circuit court's order and remand the matter for further proceedings consistent with this opinion.

**REVERSED AND REMANDED.**

**PLEICONES and HEARN, JJ., concur. TOAL C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.**

**CHIEF JUSTICE TOAL:** I respectfully dissent. In determining when the statute of limitations period commences for legal malpractice actions, the majority adopts a subjective standard that is dependent on whether "the client has [] become aware of the injury prior to the decision on appeal." Because the General Assembly explicitly provided for an objective standard, rather than the majority's new subjective standard, I write separately.

In South Carolina, the statute of limitations for legal malpractice actions is three years. *See* S.C. Code Ann. § 15-3-530(5) (2005); *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005); *Berry v. McLeod*, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct. App. 1997). In determining when a legal malpractice action accrues, the General Assembly set forth the discovery rule, stating that such an action "must be commenced within three years after the person knew or *by the exercise of reasonable diligence should have known* that he had a cause of action." S.C. Code Ann. § 15-3-535 (2005) (emphasis added); *Burgess v. Am. Cancer Soc'y S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989) (citing *Rogers v. Eford's Exterminating Co.*, 284 S.C. 377, 325 S.E.2d 541 (1985)). Thus, under this objective standard, the statutory period of limitations may begin to run before the client has actual, subjective knowledge of the potential claim or of the facts giving rise thereto. *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800; *see also Epstein*, 363 S.C. at 382, 610 S.E.2d at 821 ("This Court has recognized that, under the discovery rule, the statute of limitations begins to run when a person of common knowledge and experience would be on notice that a claim against another party might exist. The fact that the injured party may not comprehend the full extent of the damage is immaterial." (citations omitted)).

Here, the majority states that in general, the statute of limitations for a legal malpractice action commences upon the final determination of the appeal in the underlying case. The majority then outlines an exception to the rule, holding that the statute may begin to run earlier if the client has *actual* knowledge of the alleged negligence on the part of his lawyer. *See supra* ("If it appears that the client knew of the harm before the case is finally determined on appeal, the statute of limitations begins to run . . . upon the client's awareness of the alleged negligence." (quoting *Ranier v. Stuart & Freida, P.C.*, 887 P.2d 339, 343 (Okla. Civ. App. 1994)). Thus, in effect, under the majority's rationale, the statute of limitations begins to run either when the client has actual knowledge of his lawyer's negligence, or at the conclusion of the appeal of the underlying case, whichever comes first.

While the majority claims its holding "comports with the discovery rule," in reality, it adopts a subjective standard contrary to the dictates of the General Assembly. As the Oklahoma Court of Appeals explained in *Ranier*, in Oklahoma, the client's actual knowledge of the injury is the "determinative factor" in deciding when a legal malpractice action accrues in that state. 887 P.2d at 343. However, in South Carolina, the statute of limitations begins to run when the client knows *or should know* that he has a cause of action. See S.C. Code Ann. § 15-3-535. Although the majority espouses a number of policy reasons in support of its holding, those policy reasons cannot override the General Assembly's decision to mandate an objective standard.

I further disagree with the majority's contention that the client's actual knowledge is the only way the statute of limitations may commence prior to the final decision on appeal of the underlying case. Although my dissent in *Epstein* espoused a similar rule to the majority's current formulation, I have now reconsidered my position, and would adhere to the majority's holding in *Epstein*. While it is certainly possible that a client would not know of his lawyer's alleged negligence until resolution of the underlying appeal, it is equally possible that a client would know of the alleged negligence far earlier in the proceedings, such as after the jury verdict. Cf. *Epstein*, 363 S.C. at 376-77, 610 S.E.2d at 818 ("[T]he majority of the damages alleged by [the client] stemmed from the adverse jury verdict, and the damages to his reputation resulting from the publicity were all damages suffered at the time of the verdict. . . . [A]lthough these damages might be mitigated by a successful appeal, they could never be wholly eliminated by a reversal of the jury's verdict. Accordingly, . . . [the client] either knew, or should have known, of a possible claim against [his lawyer] by the date of the adverse verdict, such that the [statute of limitations] began to run on that date."). Therefore, in my opinion, the better practice is for the Court to determine, on a case-by-case basis, the date that the client knew or should have known that he could file a legal malpractice suit. See S.C. Code Ann. § 15-3-535. In other words, the Court should not automatically assume that resolution of the underlying appeal is the "magic date" in all cases.

Applying the *Epstein* rule here, I would find that regardless of the date of Dennis Craven's actual notice of the possible claim against his lawyers, there is no genuine issue of material fact regarding whether he *should* have known of the alleged malpractice on August 17, 2006, the date of the jury's adverse verdict in the underlying case. As the majority succinctly outlines, at that time, Craven knew,

*inter alia*, that trial counsel did not contact or interview "crucial witnesses" prior to trial, and had failed to settle the case despite Stokes-Craven's admission that it "had done something wrong." Given those two allegedly critical mistakes, a reasonable person of common knowledge and experience should have known at the date of the jury's adverse verdict that he had a claim against his trial counsel.

Therefore, I would find the statute of limitations began to run on August 17, 2006, and in filing its malpractice action in 2010, Stokes-Craven allowed the three-year statute of limitations to expire. Accordingly, I would affirm the circuit court's ruling that the legal malpractice claim is time-barred.

**KITTREDGE, J., concurs.**

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS )

COUNTY OF CHARLESTON )

FOR THE NINTH JUDICIAL CIRCUIT )

PERSONAL CARE, INC., )

Case No.:2013-CP-10-1396 )

Plaintiff, )

vs. )

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

**CERTIFICATE OF SERVICE**

Defendants. )

FILED  
2015 SEP 18 PM 12:26  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY

I hereby certify that a copy of **DEFENDANTS' SUPPLEMENTAL MEMORANDUM ADDRESSING THE STOKES-CRAVEN DECISION** was served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed as shown below this 18<sup>th</sup> day of September, 2015:

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 Personal Care, Inc., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Jerry N. Theos; Uricchio, Howe, Krell, )  
 Johnson, Toporek, Theos and Keith, PA; )  
 Cheryl D. Shoun; and Taylor, Shoun, Bowley )  
 and Byrd, LLC, )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 IN THE NINTH JUDICIAL CIRCUIT  
 Civil Action No. 2013-CP-10-1396

**DEFENDANTS' MOTION FOR  
 SUBSTITUTION OF ORDER PURSUANT  
 TO RULE 59(E) OR ALTERNATIVELY  
 UNDER RULE 60(B) SCRPC**

FILED  
 JUN 10 PM 3:16  
 CLERK OF COURT

The Defendants hereby move for substitution of the Court's Modified Order on Plaintiff's Motion to Alter or Amend Judgment ("Prior Order") entered May 23, 2016 in order to comport with and properly cite to Stokes-Craven Holding Corp. v. Robinson, No. 27572, 2016 WL 3040160 (May 25, 2016). On April 22, 2016, defendants were requested to submit a proposed order consistent with the Court's ruling on the motion related to the restoration of this case to the trial roster. The defendants submitted a proposed order as requested. The Court on May 23, 2016 entered as an order the proposal submitted by Defendants. The Prior Order was in part premised upon the recent Supreme Court opinion of Stokes-Craven. On May 25, 2016, the Supreme Court, in response to a petition for rehearing in Stokes-Craven issued a substituted opinion in Stokes-Craven.

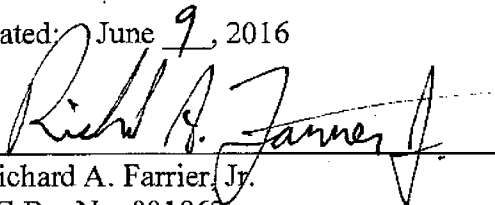
The Supreme Court's substituted opinion in Stokes-Craven does not have any substantive impact upon the outcome of the matters pending before the Court. Yet, the Prior Order cites to the earlier decision in Stokes-Craven, which has been withdrawn and the latest iteration has been substituted in its place. As a practical matter, the relief requested herein would avoid the

possibility of a remand for consideration of the subsequent ruling of the Supreme Court. Defendants request that this Substituted Order be entered in order to conform the references to the substituted Opinion in Stokes-Craven.

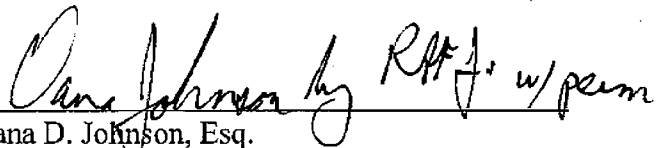
A copy of a redline comparison between the previously entered order and the proposed order is attached as Exhibit A, and the two latest opinions in Stokes-Craven are attached as Exhibits B and C.

Charleston, South Carolina

Dated: June 9, 2016

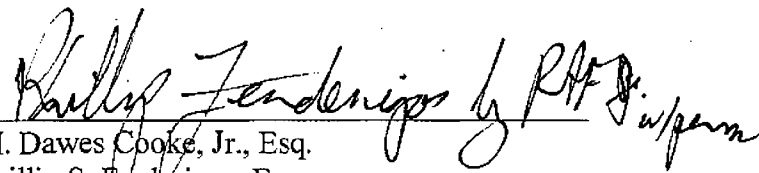


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STATE OF SOUTH CAROLINA )

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PERSONAL CARE, INC., )

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Defendants. )

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2013-CP-10-1396

CERTIFICATE OF SERVICE

FILED  
2016 JUN 10 PM 3:17  
JULIAN ARMSTRONG  
CLERK OF COURT

I hereby certify that a copy of **DEFENDANTS' MOTION FOR SUBSTITUTION OF ORDER PURSUANT TO RULE 59(E) OR ALTERNATIVELY UNDER RULE 60(B) SCRPC** was served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed as shown below this 10<sup>th</sup> day of June, 2016:

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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

Personal Care, Inc., )  
Plaintiff, )

v. )

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

IN THE COURT OF COMMON PLEAS  
IN THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2013-CP-10-1396

**SUBSTITUTED MODIFIED ORDER ON  
PLAINTIFF'S MOTION TO ALTER  
OR AMEND JUDGMENT**

**Basis of Substitution of Order Entered May 23, 2016.**

This Order is substituted for the Court's Modified Order on Plaintiff's Motion to Alter or Amend Judgment ("Prior Order") entered May 23, 2016 in order to comport with and properly cite to the latest opinion in Stokes-Craven Holding Corp. v. Robinson, No. 27572, 2016 WL 3040160 (May 25, 2016). On April 22, 2016, defendants were requested to submit a proposed order consistent with the Court's ruling on the motion described herein. The Court on May 23, 2016 entered as an order the proposal submitted by Defendants. The Prior Order was in part premised upon the recent Supreme Court opinion of Stokes-Craven. On May 25, 2016, the Supreme Court, in response to a petition for rehearing in Stokes Craven issued a substituted opinion in Stokes-Craven. While the substituted opinion in Stokes-Craven does not have any Substantive impact upon the outcome of the matters pending before the Court, it is issuing this Substituted Order to conform the references to the substituted Opinion in Stokes-Craven and clarify those references.

EXHIBIT  
A

### Introduction

This matter is before this Court on Plaintiff Personal Care, Inc.'s (hereinafter "Personal Care") Motion to Alter or Amend Judgment, filed on March 16, 2015 ("Motion to Amend"). The Motion seeks to amend this Court's Order Denying Plaintiff's Motion to Restore, filed on March 3, 2015. Defendants Jerry N. Theos and Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, PA (hereinafter collectively referred to as "Theos"); Cheryl D. Shoun (hereinafter "Shoun"); and Taylor, Bowley and Byrd (hereinafter "TBB")<sup>1</sup> oppose Plaintiff's Motion. After review of the entire Record, including, but not limited to, the motions, the memoranda and affidavits submitted by the parties, the original Orders filed by this Court, and the relevant case law, this Court hereby modifies its Prior Order of March 3, 2015 ~~Order~~ and makes the following findings of fact and conclusions of law.

### Procedural Background

This case arises from events that occurred in 2009 and early 2010. Beginning in 2009, Theos and Taylor, Shoun, Bowley, and Byrd, LLC, were retained by Personal Care to pursue a potential claim against one of its competitors. Two former employees of Personal Care went to work for the competitor and allegedly disclosed and otherwise utilized protected client information, gained while in Personal Care's employ, to the advantage of the competitor. On or about September 14, 2009, at the direction of Personal Care, Theos sent a letter to the competitor (Exhibit A), with a copy allegedly sent to a third-party dialysis clinic, addressing the competitor's alleged wrongful use of the protected information. On December 10, 2009,

<sup>1</sup> After Defendant Cheryl Shoun left the law firm of Taylor, Shoun, Bowley, and Byrd, LLC, in April 2010, the firm became Taylor, Bowley and Byrd, LLC.

Theos and Shoun filed the underlying lawsuit on behalf of Personal Care against the competitor. On or about March 9, 2010, the defendant in the underlying suit filed a counterclaim for defamation against Personal Care based solely on the September 2009 letter (**Exhibit B**).

On or about March 8, 2013, Personal Care filed the instant action against Theos, Shoun, and TBB<sup>2</sup> (**Exhibit C**).<sup>3</sup> In its Verified Complaint, Personal Care asserted that its failure to attach the required S.C. Code Ann. § 15-36-100(B) Expert Affidavit for a legal malpractice claim 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.”

Personal Care filed a Verified Amended Complaint on April 19, 2013 (**Exhibit D**). In its Verified Amended Complaint, Personal Care alleges causes of action for breach of fiduciary duties and legal professional negligence against Theos and Shoun and for breach of contract against the Defendant law firms. All claims purportedly arose from the allegedly defamatory letter drafted by Theos and dated September 14, 2009. Personal Care alleges 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. As to the Defendant law firms, Personal Care alleges that they breached their contract with Personal Care when they sent out the allegedly defamatory letter.

<sup>2</sup> 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.

<sup>3</sup> On March 7, 2013, the day before, Personal Care's counsel expressed his concerns that the statute of limitations may bar his client's litigation if it were commenced after March 8, 2013: “We also discussed my concerns about an argument that the statute of limitations might expire on Friday, March 8.”

After filing the Verified Amended Complaint, Personal Care took no action via formal discovery (written discovery or depositions) to prosecute its claims before the matter was administratively dismissed by an order dated August 28, 2013. 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 Judge Dennis executed on August 27, 2013 (Exhibit E). 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, and thereafter the status of the case was shown as "Dismissed."

Approximately one year 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") (Exhibit F), which purported to reinstate the case pursuant to the 2013 Judge Dennis Order. On August 26, 2014, Theos did not have an overt reason not to consent to the 2014 Proposed Consent Order. Defense counsel for Theos signed the 2014 Proposed Consent Order and forwarded it to Personal Care's counsel on August 26, 2014. The other co-Defendants, Shoun and TBB, however, did not consent to the 2014 Proposed Consent Order. In fact, TBB did not receive a copy of the 2014 Proposed Consent Order until September 17, 2014.

Despite the fact that Personal Care's counsel did not have the consent of all the parties to submit the 2014 Proposed Consent Order to the Court, on or about August 27, 2014,

Personal Care's counsel mailed the partial consent to the 2014 Proposed Consent Order to the clerk of court, requesting that the clerk present it to Judge Dennis for his consideration. The clerk returned the mailing unfiled because Personal Care did not include a proper cover sheet and filing fee. Personal Care submitted the 2014 Proposed Consent Order on September 4, 2014, along with the requisite fee and cover sheet. On September 15, 2014, Judge Dennis and his law clerk received the 2014 Proposed Consent Order. Upon review, Judge Dennis's clerk noted that the 2014 Proposed Consent Order did not have the consent of all of the parties. The clerk contacted Personal Care's counsel to inquire about the missing consents. During the email 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. 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. Shortly thereafter, Personal Care's counsel withdrew the 2014 Proposed Consent Order via his communication with the Court on September 17, 2014 (**Exhibit G**), 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 SCRCF

Rule 40(j), Personal Care's counsel subsequently filed a formal Motion to Restore the case to the active roster. Defendants opposed Personal Care's Motion to Restore. In support of its Motion to Restore, in addition to other arguments, Personal Care argued that the Proposed Order Restoring the Case to the Docket, arguably filed one day before the one-year anniversary of the Consent Order Striking the Case from the Active Roster, should be treated as a Motion to Restore and should be granted based on that timeline. Defendants disagreed, arguing that, in addition to other arguments, the Proposed Order was not signed by all parties and therefore was invalid and, further, that the proposed Order had been voluntarily withdrawn and was void. Defendants also argued that the formal Motion to Restore, filed on September 22, 2014, should be denied because the statute of limitations had run on this action.

This Court heard oral arguments on the Motion to Restore on November 19, 2014, and took the matter under advisement. 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 Court issued its Order on March 3, 2015, denying Personal Care's Motion to Restore. In the Order, the Court agreed with Defendants and held that the Proposed Order was invalid because it lacked a signature and that the Proposed Order was not a Motion to Restore. The Court also held that the formal Motion to Restore must be denied because the statute of limitations on this action had run.

On March 16, 2015, Personal Care filed the instant Motion to Amend, arguing that Rule 40(j) does not provide for or allow Defendants to assert affirmative defenses nor does it allow the Court the authority to evaluate the merits of a statute of limitations defense. Defendants filed memoranda in opposition to the Motion to Amend. As a result of Personal Care's Motion to Amend, the Court requested additional briefing addressing whether Rule

40(j) requires the Court to perfunctorily restore a case to the active roster without considering the statute of limitations issue.

Following receipt of the parties' additional briefing, the Court issued an Order dated June 19, 2015 (the "June Order"), modifying its prior March 3, 2015 order. In the June Order, the Court held that, pursuant to Maxwell v. Genez, 356 S.C. 617, 591 S.E.2d 26 (2003), a party may challenge a motion to restore on grounds of the expiration of the statute of limitations. See Maxwell, 356 S.C. at 622 n.2 (rejecting plaintiff's argument that since defendants agreed to the Rule 40(j) dismissal after the statute of limitations had expired, they waived their right to oppose the motion to restore on grounds of the expiration of the statute of limitations). The Court further found 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. The 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. The Court concluded that such outcome would be nonsensical from a judicial economy standpoint.

However, because the 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 Court announced that it would hold this 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 additional evidence that any party wished to present to the Court prior to its issuing a decision. The parties were given fourteen days from the date of the

Order to notify the Court as to whether they wished to supplement the Record with affidavits or live testimony.

Defendants thereafter informed the Court that they did not wish to supplement the Record further with either affidavits or live testimony, although they did reserve the right to cross-examine witnesses called by Personal Care or to submit response affidavits. 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 Court that it intended to submit additional affidavit testimony. The Court gave the parties a deadline of September 4, 2015, by which to submit affidavits. On September 2, 2015, Personal Care mailed a letter to the Clerk of Court with a copy of an Affidavit of Bernard Cignavitch for filing. However, the affidavit was not filed at that time. Personal Care resubmitted the affidavit to the Clerk of Court for filing on January 7, 2016, at which time the affidavit was properly filed and made part of the Record.

On April 15, 2016, this Court held a telephonic status conference with counsel for all of the parties. Upon hearing from the parties that the Record was complete, the Court informed the parties that it would review the entire Record and issue a final order on Personal Care's Motion to Amend.

#### **Findings of Fact and Conclusions of Law**

Pursuant to the procedural background set forth above, which the Court finds to be accurate and hereby incorporates as the procedural facts of the case, this case was dismissed by the 2013 Judge Dennis Order. In South Carolina, unless a party seeks rehearing or appeals a court decision, the party is bound by the previous order as the law of the case. See Charleston Lumber Co., Inc. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000)

(finding that an unappealed ruling, right or wrong, is the law of the case and requires affirmance). Stated differently, a prior order of the Court issued by a Circuit Court Judge may not be reversed or modified by another Circuit Court Judge. See Maxwell v. Genez, 350 S.C. 563, 567 S.E.2d 496 (Ct. App. 2002) (quoting Judge Dennis and stating that “it is the long-standing rule in this State that a Circuit Judge cannot modify or reverse an Order of another Circuit Judge.”), reversed on other grounds by 356 S.C. 617, 591 S.E.2d 26 (2004). Because no party challenged the 2013 Judge Dennis Order, either by requesting a hearing or appealing the decision, the 2013 Judge Dennis Order is the law of the case.

Under the express terms of the 2013 Judge Dennis Order, the statute of limitations was not tolled after the case was dismissed in 2013. That Order required the case to be restored within one year of the date of the Order (i.e., by August 28, 2014) in order for the statute of limitations to be tolled during the period of dismissal. However, it is undisputed that Personal Care failed to restore the case within the one-year deadline. Thus, the statute of limitations was not tolled following the entry of the 2013 Judge Dennis Order.

Similarly, the statute of limitations was not tolled under Rule 40(j). Unlike the 2013 Judge Dennis Order, which required the case to be restored within one year in order for the statute of limitations to be tolled, Rule 40(j) provides that the statute will be tolled “if the claim is restored upon motion made within 1 year of the date stricken.”<sup>4</sup> Although a party can

<sup>4</sup> SCRCF Rule 40(j) sets forth the following:

**(j) Case Stricken From Docket by Agreement**

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 before it is heard. (Emphasis added).

move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j), the party "cannot take advantage of the one year tolling period provided by the rule." Maxwell v. Genez, 356 S.C. at 620-621. It is undisputed that the Motion to Restore currently pending in this Court was not filed until September 22, 2014, long after the expiration of the one-year period. Therefore, the statute of limitations cannot be tolled by Rule 40(j).

At oral argument, Personal Care conceded as much to the Court when it acknowledged that it did not restore or move to restore its case within the timeframe set forth in either the 2013 Judge Dennis Order or SCRCP Rule 40(j). Personal Care further conceded that it should not receive the benefit of the tolling provision of SCRCP Rule 40(j). Instead, Personal Care argued that there is still time left on the statute of limitations because the statute did not begin to run until the summer of 2012. However, Personal Care subsequently reversed course, asserting in its Memorandum submitted to the Court after the hearing that the withdrawn 2014 Proposed Consent Order is equivalent to and should be treated as a Motion to Restore. There is no merit to either argument.

The Court finds that the 2014 Proposed Consent Order is a nullity. It is undisputed that not all of the parties consented to the proposed order. Moreover, Personal Care did not comply with SCRCP Rule 5 and Rule 7, which govern the filing and service of motions. Finally, and most importantly, Personal Care withdrew the 2014 Proposed Consent Order, rendering it a nullity. Thus, even if the 2014 Proposed Consent Order could have been construed as a Motion to Restore, it no longer is before this Court. Therefore, if this case is restored, it will not be restored "upon motion made within one year of the date stricken." SCRCP Rule 40(j).

The Court concludes that Personal Care did not file the instant Motion to Restore within one year after the case was stricken from the docket.

Accordingly, in regard to Personal Care's 2014 Proposed Consent Order submitted to the Court, the Court finds that (1) all parties had not consented to the Order and the Order was defective on its face; (2) the case had not been "restored" by August 28, 2014, as the 2013 Judge Dennis Order striking it required; and (3) Personal Care withdrew the 2014 Proposed Consent Order, so it is not properly before the Court and is a nullity. The Court further finds that Personal Care filed its Motion to Restore approximately three weeks after August 28, 2014. Accordingly, under the terms of either the 2013 Judge Dennis Order or Rule 40(j), the statute of limitations was not tolled following the dismissal of the case.

Personal Care argues that it is of no consequence that the statute of limitations was not tolled because, according to Personal Care, the statute of limitations did not start running until July 2012.<sup>5</sup> At the hearing, although Personal Care's counsel conceded that Personal Care knew both about the Counterclaim and that there were alleged issues with the defense of the case, Personal Care's counsel asserted that the statute of limitations did not begin to run until Personal Care experienced, in the summer of 2012, the "first financial consequence" caused by Defendants' alleged errors.<sup>5</sup> The Court finds Personal Care's argument wholly unpersuasive and concludes that the statute of limitations has expired.

<sup>5</sup> All of the claims in this action are governed by a three year statute of limitations, S.C. Code Ann. § 15-3-530(1) (governing contract claims); Stokes Craven Holding Corp. v. Robinson, No. 2013-001452, 2015 WL 5247124, at \*4 (S.C. Sept. 9, 2015) (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).

<sup>5</sup> In essence, Plaintiff desires this Court to adopt a version of the continuous representation rule which the Stokes-Craven court declines to adopt and cites as "problematic."

As set forth in the recent Stokes-Craven Holding Corp. v. Robinson, No. 27572, 2016

WL 3040160 (May 25, 2016), the Supreme Court held:

The Statute of Limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005) (stating the statute of limitations for “an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law” is three years); see Berry v. McLeod, 328 S.C. 435, 444-445, 492 S.E.2d 794, 799 (Ct. App. 1997) (concluding that section 15-3-530(5) of the South Carolina Code provides a three-year statute of limitations for legal malpractice actions). 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 that some claim against another party might exist. Burgess v. Am. Cancer Soc’y, S.C. Div., Inc., 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989); see S.C. Code Ann. § 15-3-535 (2005) (“[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.”). “This standard as to when the limitations period begins to run is objective rather than subjective.” Burgess, 300 S.C. at 186, 386 S.E.2d at 800. “Therefore, the statutory period 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.” Id.

“Statutes of limitations are not simply technicalities.” Kelly v. Logan, Jolley & Smith, L.L.P., 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009). “On the contrary, they have long been respected as fundamental to a well-ordered judicial system.” Id. Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs.” Id. “One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights.” Id. (citations omitted). “Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.” Id. “Statutes of limitations are, indeed, fundamental to our judicial system.” Id. (citation omitted).

The Supreme Court further stated:

As legislatively mandated, we bring our analysis with the well-established discovery rule. Pursuant to this 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. See S.C. Code Ann. § 15-3-535 (2005) (“[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by

the exercise of reasonable diligence should have known that he had a cause of action”).

Thus, a claimant seeking recovery for a legal malpractice claim is constrained by two constants: (1) filing the claim within the statute of limitations,<sup>6</sup> and (2) establishing the four requisite elements of his or her claim. Because a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued. See 3 Ronald E. Mallen & Allison Martin Rhodes, Legal Malpractice § 23:14 (2015) (“Since a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued. Thus, ‘accrual’ means the existence of a legally cognizable cause of action.”).

As evidenced by this case, the key question is when the claimant’s cause of action accrues to trigger the running of the three-year statute of limitations. The answer to this question is complicated by the seemingly endless factual scenarios surrounding the underlying claim of a legal malpractice cause of action.

While this approach may be perceived as impermissibly requiring a person to have actual knowledge of a potential claim before the statute of limitations begins to run, we find that it is mandated by our appellate court rules and, as a result, effectuates the objective standard provided by the Legislature. See Black’s Law Dictionary 1624 (10<sup>th</sup> ed. 2014) (An objective standard is defined as “[a] legal standard that is based on conduct and perceptions external to a particular person.” (emphasis added)); Id. at 1529 (A rule is generally defined as “an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.”).

In so doing, the Supreme Court affirmed an objective standard for the discovery rule in legal malpractice cases. Finally, the Stokes-Craven court also found that, “based upon existing appellate court rules,” an appeal tolls the statute of limitations for a legal malpractice action, stating:

“In doing so, we hold that the statute of limitations for a legal malpractice cause of action may be tolled if the client appeals the matter in which the alleged malpractice occurred. We conclude that this rule is mandated by our appellate court rules and, as a result, effectuates the objective standard provided by the Legislature.

<sup>6</sup> “A legal malpractice cause of action is governed by the applicable statute of limitations whether it sounds in tort, contract or fraud.” 1 S.C. Jur. Attorney & Client, § 69 (Supp. 2016) (citing section 15-3-530 of the South Carolina Code).

Applying this rule to the facts of the instant case, we find the circuit court erred in granting Respondents' motions for summary judgment because Stokes-Craven's lawsuit was timely filed after this Court affirmed the verdict against Stokes-Craven. Additionally, we find the circuit court abused its discretion in denying Stokes-Craven's motion to compel the production of communications between Respondents and their malpractice carrier given there was no evidence to support the court's ruling."

However, here, in the present case, there was no appeal to stay the statute of limitations in accordance with the Stokes-Craven decision.

Clearly, "South Carolina's statute of limitations requires very little to start the clock." Maher v. Tietex Corp., 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (internal quotation marks omitted). South Carolina follows the discovery rule, which means that the statute of limitations begins to run from the date the injured party either knows or should have known, by the exercise of reasonable diligence, that a cause of action arises from the wrongful conduct. Stokes-Craven Holding Corp. v. Robinson, No. 2013-001452, 2015 WL 5247124, at \*4 (S.C. Sept. 9, 2015) 27572, 2016 WL 3040160 (May 25, 2016); see S.C. Code Ann. § 15-3-535. "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 that some claim against another party might exist." Id. (emphasis added). Moreover, in a legal malpractice action, ~~"[i]f it appears that the client knew of the harm before the case is finally determined on appeal, the statute of limitations begins to run from the time the underlying injury occurs or upon the client's awareness of the alleged negligence." Id. at \*10 (explaining that "this rule advances the purpose of the statute of limitations, which is to punish plaintiffs who sleep on their rights, protect defendants from stale claims, and lend order to the judicial system").~~

like other actions, the ~~The~~ date on which discovery of the cause of action should have been made is an objective question. Joubert v. S.C. Dep't of Soc. Servs., 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). In Young v. South Carolina Department of Corrections, the Court of Appeals stated:

In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist. 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999); Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010).

“Therefore, the statutory period 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 Holding Corp., 2015 No. 27572, 2016 WL 5247124, at \*43040160 (May 25, 2016).

Importantly, under South Carolina law, “[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). The law presumes at least nominal damages at that point. 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). The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose. Livingston, 197 S.C. 458, 15 S.E.2d 770; Stephens v. Druffin, 327 S.C. 1, 488 S.E.2d 3, 7 (S.C. 1997). Finally, both within and outside of the context of “existing appellate court rules” (which allows a stay of the statute of limitations for a legal malpractice claim, if an appeal is filed), an objective standard “based on the conduct and

perceptions external to a particular person" (emphasis added by Supreme Court) applies when a party has actual knowledge of a potential legal malpractice claim before the statute of limitations begins to run.

Here, based on the allegations in the Amended Complaint and the clear evidence in the Record, the Court finds that the statute of limitations has expired on Personal Care's claims against Defendants. According to Paragraph 18 of the Amended Complaint, the first act of alleged negligence occurred in September 2009 when Theos allegedly sent a defamatory letter to a third party. Paragraph 20 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 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." Based on such allegations and the clear evidence in the Record, the Court finds Personal Care suffered damages as soon as it was forced to incur costs to defend against the competitor's counterclaim.

Once the counterclaim was filed on March 9, 2010, Personal Care became obligated to expend additional monies, including the additional attorney's fees in responding to and defending against the counterclaim, and to otherwise contend with the inconvenience of the counterclaim. Accordingly, as a cause of action accrues at the moment when the plaintiff has a legal right to sue on it, and the law presumes at least nominal damages at that point, the Court finds that Personal Care's causes of action accrued and Personal Care had a legal right to sue Defendants on March 9, 2010.

Moreover, Defendants notified Personal Care multiple times of the counterclaim in the spring of 2010. Plaintiff's position with respect to when it received notice has shifted over time. In Paragraph 21 of its Verified Amended Complaint, Personal Care alleges that Defendants did not inform Personal Care about the counterclaim until over two years after the counterclaim had been filed. Personal Care's expert repeated such assertion in his Affidavit supporting Personal Care's legal malpractice claim. However, at the hearing, Personal Care's counsel conceded that his client knew about the counterclaim "throughout the course of this entire . . . underlying case." (Hrg. Tr. at 23; *id.* at 24 ("Certainly he knew about the counterclaim.")) Therefore, Personal Care's sworn allegation in the Verified Amended Complaint not only is belied by the overwhelming evidence in the Record, but also has been subsequently acknowledged by Personal Care's counsel to be a misrepresentation.

The Court finds that Personal Care (and Mr. Cignavitch in particular) was notified of the underlying Counterclaim multiple times beginning on March 19, 2010. Overwhelming evidence refutes Mr. Cignavitch's original sworn assertions to the Court including, but limited to, the following:

1. Email 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." (Exhibit H).
2. Email from Smith to Cignavitch dated March 19, 2010: "Mr. Cignavitch, attached please find a filed copy of the Answer and Counterclaim." (Exhibit I).
3. Email 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 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." (Exhibit J).

4. Email 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." (Exhibit K).
5. Email 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." (Exhibit L).
6. Email 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." (Exhibit M).
7. Invoice from Nexsen Pruet to Personal Care dated June 2, 2010: Charging \$1440 for services related to answering counterclaim (Exhibit N).
8. Email 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." (Exhibit O).
9. Affidavit of Jerry N. Theos (Exhibit P).
10. Affidavit of Cheryl D. Shoun (Exhibit Q).

Based on these communications alone, the Court finds that Theos and Shoun unequivocally and timely informed Mr. Cignavitch of the counterclaim asserted against Personal Care and advised Personal Care to put its insurance carrier on notice in order to defend and indemnify Personal Care against the counterclaim. The Court further finds that Personal Care was first billed for charges resulting from the counterclaim no later than June 2, 2010.

The Court hereby concludes that, upon receiving a copy of the counterclaim, multiple e-mails referencing the counterclaim, a request for insurance information so that the client could get coverage for defense of the counterclaim, an invoice charging for services rendered to reply to the counterclaim, and a copy of the Reply to the Counterclaim, a person of common knowledge and experience would have been put on notice and have actual knowledge that claims against his lawyer might exist as a result of the letter and Counterclaim. See Stokes-Craven Holding Corp., 2015 No. 27572, 2016 WL 5247124, at \*43040160 (May 25, 2016). Therefore, the Court finds that Personal Care had both knowledge of the alleged negligence, the adverse counterclaim, and present damage, and Plaintiff's legal malpractice claim accrued and Plaintiff's legally cognizable claim existed by the first half of 2010. Accordingly, the Court hereby concludes and finds that the three-year statute of limitations on Plaintiff's claims began to run in the spring of 2010. Further, no appeal or existing "appellate court rules" stayed or tolled the statute of limitations from running.

Furthermore, the Court finds that, based on the Verified Complaint's S.C. Code Ann. § 15-36-100 (c)(1) Expert Affidavit verification, Personal Care has also admitted that the statute of limitations expired, at the latest, on March 18, 2013.<sup>67</sup> Paragraph 97 of the Complaint, filed on March 8, 2013, takes advantage of the provision of South Carolina Code Section 15-36-100(b), (c)(1): "Pursuant to the code, 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 an expert licensed by the Supreme Court of the State of South Carolina." S.C. Code Ann. § 15-36-100 (c)(1), sets forth the following: "The contemporaneous

<sup>67</sup> Personal Care's Verified Complaint's expert affidavit verification is consistent with Personal Care's counsel's March 7, 2013 email raising his concerns that the statute of limitations would run the following day, March 8, 2013.

filing requirements of Subsection (b) do not apply to any case in which the period of limitations will expire or there is a good faith basis to believe it will expire on a claim stated in the complaint within 10 days of filing.” Personal Care verified for this Court that the statute of limitations would likely expire within ten days of filing, i.e., on March 18, 2013.<sup>78</sup> The Court agrees that the statute of limitations, which began to run in the spring of 2010, was set to expire in the spring of 2013. Because Personal Care cannot benefit from the tolling provision of either the 2013 Judge Dennis Order or, Rule 40(j), or the existing appellate court rules, the Court concludes and finds that the statute of limitations on Personal Care’s claims expired prior to the filing of the formal Motion to Restore.

In summary, the Court finds that the 2014 Proposed Consent Order is a nullity. Moreover, the Court finds that Personal Care failed to restore the case within the one-year timeframe provided in the 2013 Judge Dennis Order. Furthermore, 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). The Court further finds that 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 SCRCF Rule 40(j). As Personal Care did not file its Motion to Restore the case within one year of the administrative dismissal, the Court hereby finds that 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. Accordingly, Personal Care’s claims against Defendants are time-barred.

### Conclusion

<sup>78</sup> At the hearing, Personal Care sought to undo his prior verified admission. This Court rejects Personal Care’s attempt to retract via argument that to which it admitted via its verified Complaint. Mere self-serving arguments of counsel do not trump Personal Care’s sworn admissions, which were previously submitted to the Court.

Based on the foregoing discussion, I hereby Order that Personal Care's Motion to Restore Case is denied. The Exhibits are attached and made a part of this Order by reference.

IT IS SO ORDERED!

J. C. Nicholson, Jr., Judge

Dated: \_\_\_\_\_

Ninth Judicial Circuit

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| <b>Embedded Graphics (Visio, ChemDraw, Images etc.)</b>                                      | 0         |
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**Supreme Court of South Carolina.**

**STOKES-CRAVEN HOLDING CORP., d/b/a Stokes-Craven Ford, Appellant, v. Scott L. ROBINSON and Johnson McKenzie & Robinson, LLC, Respondents.**

Appellate Case No. 2013-001452, Na. 27572.

Decided: September 9, 2015

Andrew K. Epting, Jr. and Michelle Nicole Endemann, both of Andrew K. Epting, Jr., L.L.C., of Charleston, for Appellant. Susan Taylor Wall and Henry Wilkins Frampton, IV, both of McNair Law Firm, P.A., of Charleston and Warren C. Powell, Jr., of Bruner Powell Wall & Mullins, L.L.C., of Columbia, for Respondent. In this legal malpractice case, Stokes-Craven Holding Corporation d/b/a Stokes-Craven Ford ("Stokes-Craven") appeals the circuit court's order granting summary judgment in favor of Scott L. Robinson and his law firm, Johnson, McKenzie & Robinson, L.L.C., (collectively "Respondents") based on the expiration of the three-year statute of limitations. Stokes-Craven contends the court erred in applying this Court's decision in Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005), and holding that Stokes-Craven knew or should have known that it had a legal malpractice claim against its trial counsel and his law firm on the date of the adverse jury verdict rather than after this Court affirmed the verdict and issued the remittitur in Austin v. Stokes-Craven Holding Corp., 357 S.C. 22, 691 S.E.2d 135 (2010). We affirm Epstein, reverse the circuit court's order, and remand the matter to the circuit court for further proceedings consistent with this opinion.

**I. Factual / Procedural History**

Donald C. Austin filed suit against Stokes-Craven, an automobile dealership, after he experienced problems with his used truck and discovered the vehicle had sustained extensive damage prior to the sale. Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010). In his Complaint, Austin alleged the following causes of action: revocation of acceptance, breach of contract, negligence, constructive fraud, common law fraud, violation of the South Carolina Motor Vehicle Dealer's Act (the "Dealer's Act"), violation of the South Carolina Unfair Trade Practices Act ("UTPA"), and violation of the Federal Ddameter Act. Based on these claims, Austin sought actual damages, punitive damages, prejudgment interest, and attorney's fees and costs. Id. at 35, 691 S.E.2d at 141-42. Stokes-Craven was represented by Scott L. Robinson of Johnson, McKenzie & Robinson, L.L.C. throughout the trial proceedings. On August 16, 2006, after a three-day trial, the jury found in favor of Austin and awarded \$26,371.10 in actual damages and \$216,600 in punitive damages. Id. at 35, 691 S.E.2d at 142.

Austin and Stokes-Craven filed cross-appeals to this Court. Although Robinson was listed as counsel of record on the appellate pleadings, Stokes-Craven had employed attorneys with Young, Clement, Rivers, L.L.P. to represent it during the course of the appeal. On March 8, 2010, a majority of this Court affirmed the jury's verdict and held that: (1) there was no prejudicial abuse of discretion in admitting certain challenged testimony; (2) Austin offered proof of actual damages in the amount of \$26,371.10; (3) Austin failed to prove Stokes-Craven violated the Federal Ddameter Act with the requisite intent to defraud him as to the mileage of the truck; (4) the verdicts of fraud and violation of the UTPA were not inconsistent; and (5) there was evidence to support the jury's award of \$216,000 in punitive damages. Id. at 59, 691 S.E.2d at 154. This Court issued the remittitur on April 21, 2010.

On August 16, 2010, Stokes-Craven filed a legal malpractice action against Respondents, alleging negligence and breach of fiduciary duty in trial counsel's representation of Stokes-Craven both prior to and during the trial. Specifically, Stokes-Craven alleged that trial counsel failed to: adequately investigate the facts of the case; prepare or serve written discovery; depose witnesses; obtain copies of the plaintiff's experts' curriculum vitas; prepare a pretrial brief, trial exhibits, voir dire, and requests to charge; preserve certain evidentiary issues for appellate review; notify Stokes-Craven's insurance carrier about the claims; and settle the case prior to the jury verdict. Based on these purported errors, Stokes-Craven claimed the jury returned the adverse verdict. Respondents generally denied the allegations and asserted several defenses, including that Stokes-Craven's claims were barred by the expiration of the three-year statute of limitations.

Subsequently, Respondents filed motions for summary judgment. Stokes-Craven filed a cross-motion for partial summary judgment and a motion to compel discovery of Respondents' professional liability policy applications for the years 2002 through 2012, all correspondence between Respondents and their malpractice

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insurer, and the billing records for computer research from any research provider used by Respondents for the years 2003 through 2006.

Following a hearing, the circuit court granted Respondents' motions for summary judgment on the ground Stokes-Craven's legal malpractice claim was barred by the expiration of the statute of limitations. In so ruling, the court concluded that Dennis Craven, as agent of Stokes-Craven, had notice of the claim on August 17, 2006, the date of the jury's adverse verdict. Referencing portions of Craven's deposition testimony, the court determined that Craven's testimony as a whole indicated that he was aware that he might have a legal malpractice claim against Respondents because Craven: knew at the time of trial that counsel had not contacted and interviewed crucial witnesses prior to trial; was not shown the defendants' interrogatory responses until the day of trial; had not been prepared for cross-examination; and knew that counsel failed to settle the case despite the admission by Stokes-Craven that it "had done something wrong." The court also noted that Craven acknowledged the jury's verdict presented a "serious problem" for Stokes-Craven. Citing Epstein, the court found that Craven's knowledge of counsel's "shortcomings" and other "actionable errors" constituted evidence that Craven knew at the time of the verdict that he might have a claim against trial counsel.

The court also held that the doctrines of equitable estoppel and equitable tolling were inapplicable. In terms of equitable estoppel, the court found "nothing in the record to support the conclusion that [Respondents] did anything to mislead Stokes-Craven" or that Robinson "engaged in any conduct to prevent Stokes-Craven from filing a malpractice action." The court further found Stokes-Craven could not invoke equitable tolling because it failed to present evidence of an "extraordinary event" beyond its control that prevented it from timely filing its legal malpractice action.

Because the court granted Respondents' motions for summary judgment, it noted that it was unnecessary to rule on Stokes-Craven's motion to compel discovery. However, in the event the decision on summary judgment was overturned on appeal, the court proceeded to rule on the motion. Initially, the court found the correspondence between Respondents and their malpractice carrier was not discoverable as it was prepared in anticipation of or during litigation. The court further determined that Stokes-Craven had not established the need for this information. Although the court ruled Respondents' professional liability policy applications were discoverable, the court stated that any "issues of ultimate admissibility" would be left to the trial judge.

Stokes-Craven appealed the circuit court's order and filed a motion to argue against precedent pursuant to Rule 217, SCACR. This Court granted Stokes-Craven's motion to argue against Epstein.

#### II. Standard of Review

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(e), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(e), SCRCP; Fleming v. Rose, 350 S.C. 438, 493, 567 S.E.2d 857, 860 (2002). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

#### III. Discussion

##### A. Commencement of the Statute of Limitations

Stokes-Craven asserts the circuit court erred in holding as a matter of law that the statute of limitations began to run on the date of the adverse jury verdict against Stokes-Craven. Contrary to the circuit court's characterization of Craven's testimony, Stokes-Craven notes that Craven "repeatedly testified that, at the time of the trial, he had never been sued before, had never participated in litigation, and had no idea what an attorney should or should not do to prepare a case for trial." Based on this testimony, Stokes-Craven maintains that Craven did not know or could not have known that it might have a claim for legal malpractice on the date the verdict was rendered.

Stokes-Craven further argues the court erred in relying on Epstein as it is not only factually distinguishable from the instant case but is no longer viable precedent. Stokes-Craven requests that this Court overrule its decision in Epstein and adopt a bright-line rule that the statute of limitations in a legal malpractice case does not commence until the remittitur has been issued in the underlying lawsuit.

A claimant in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. *Halmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2004). Furthermore, a claimant is required to demonstrate that "he or she 'most probably' would have been successful in the underlying suit if the attorney had not committed the alleged malpractice." *Doe v. Howe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Cl.App.2005) (quoting *Summer v. Carpenter*, 325 S.C. 36, 42, 402 S.E.2d 55, 58 (1997)).

The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005) (stating the statute of limitations for "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law" is three years); see *Berry v. McLeod*, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Cl.App.1997) (concluding that section 15-3530(5) of the South Carolina Code provides a three-year statute of limitations for legal malpractice actions). 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 that some claim against another party might exist. *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 340 S.C. 182, 186, 386 S.E.2d 798, 800 (Cl.App.1989); see S.C. Code Ann. § 15-3-535

(2005) (“[A]ll actions initiated under Section 15–3–53 a(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.”). “This standard as to when the limitations period begins to run is objective rather than subjective.” Burgess, 300 S.C. at 186, 356 S.E.2d at 800. “Therefore, the statutory period 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.” Id.

“Statutes of limitations are not simply technicalities.” Kelly v. Logan, Jolley & Smith, L.L.P., 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct.App.2009). “On the contrary, they have long been respected as fundamental to a well-ordered judicial system.” Id. “Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs.” Id. “One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights.” Id. (citations omitted). “Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.” Id. “Statutes of limitations are, indeed, fundamental to our judicial system.” Id. (citation omitted).

#### a. Epstein

As noted by the circuit court and the parties, the key case in the instant dispute is Epstein. In Epstein, a jury returned a verdict for a wrongful death and survival action on February 18, 1998 against Dr. Franklin Epstein in a medical-malpractice action that arose out of the death of one of his patients following spinal surgery. Epstein, 363 S.C. at 374, 610 S.E.2d at 817. David Brown represented Epstein throughout the trial and filed a notice of appeal after the jury verdict. Id. at 374–75, 610 S.E.2d at 817. Although Brown remained counsel of record during the appeal, Epstein was represented on appeal by Stephen Groves, John Hamilton Smith, and Steven Brown. Id. at 375, 610 S.E.2d at 817. The Court of Appeals affirmed the verdicts on July 31, 2000 in Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). Id. This Court denied Epstein’s petition for a writ of certiorari in January 20 2011. Id.

On January 9, 2002, Epstein filed a legal malpractice claim against David Brown in which he alleged breach of fiduciary duty, negligence, and breach of contract. Id. In terms of specific deficiencies, Epstein asserted that Brown was negligent in failing to conduct an adequate investigation, failing to advise him to settle, forgetting to call expert witnesses, and adapting a defense contrary to Epstein’s medical opinion. Id. at 376, 536 S.E.2d 408, 610 S.E.2d at 818. Brown moved for summary judgment on the ground that Epstein failed to commence the action within the applicable three-year statute of limitations. Id. at 375, 610 S.E.2d at 817. The circuit court found the majority of the damages alleged by Epstein stemmed from the adverse jury verdict, and the damages to Epstein’s reputation resulting from the publicity were all damages suffered at the time of the verdict. Id. at 376, 610 S.E.2d at 818. The court concluded that, although these damages might have been mitigated by a successful appeal, they could not have been wholly eliminated by a reversal of the jury’s verdict. Id. Accordingly, the circuit court ruled the statute of limitations began to run, at the latest, on February 18, 1998, the date of the jury’s verdict. Id. at 375, 610 S.E.2d at 817. As a result, the court found the action was untimely and granted Brown’s motion for summary judgment. Id. Epstein appealed the circuit court’s order to this Court. Id.

Justice Waller, who was joined by Justices Moore and Burnett, affirmed the circuit court’s order. Id. at 383, 610 S.E.2d at 821–22. In reaching this decision, the majority declined to adapt the continuous-representation rule, which permits the statute of limitations to be tolled during the period an attorney continues to represent the client on the same matter out of which the alleged legal malpractice arose. Id. at 380, 610 S.E.2d at 820. Instead, the majority chose to strictly adhere to the discovery rule set forth by the Legislature. Id.

The majority explained its decision by comparing a legal malpractice action to a medical malpractice action. Despite the “very legitimate policy rationales in favor of adoption of a continuous treatment rule” in medical malpractice cases, the majority noted that our appellate courts had declined to adopt it because the “Legislature [had] set absolute time restrictions for the bringing of medical malpractice actions in the statutes of repose both for medical malpractice and for persons operating under disability.” Id. at 378, 610 S.E.2d at 819. The majority also noted that “numerous jurisdictions” had refused to adopt the continuous-representation rule. Id. at 379, 610 S.E.2d at 819.

Additionally, the majority disagreed with Epstein’s alternative argument that, absent applying the continuous-representation rule, the limitations period did not begin to run until the Court denied certiorari in January 2001. Id. at 380–81, 610 S.E.2d at 820. The majority explained that “these jurisdictions which decline to adopt the continuous representation rule tend to hold that a plaintiff may institute a malpractice action prior to the conclusion of the appeal.” Id. at 380, 610 S.E.2d at 820.

The majority also rejected Epstein’s argument that appealing the ruling in the medical malpractice action against him while filing a legal malpractice claim against Brown would cause him to argue inconsistent positions in two different courts. Id. at 381, 610 S.E.2d at 821. The majority maintained that “there are measures which may be taken to avoid such inconsistent positions.” Id. at 381–82, 610 S.E.2d at 821.

Ultimately, the majority applied the discovery rule and found that Epstein “clearly knew, or should have known he might have had same claim against Brown at the conclusion of his trial.” Id. at 382, 610 S.E.2d at 821. The majority reasoned that the damages claimed by Epstein were “largely those to his reputation” and the claims he raised in his Complaint were “primarily related to trial and pre-trial errors.” Id. The majority also noted that trial counsel conceded during oral argument on the summary judgment motion that “some of the allegations down there, your Honor, were within the man’s knowledge when the verdict came in.” Id. at 382–83, 610 S.E.2d at 821. Finally, the majority referenced a letter from Epstein to his appellate attorney, Steven Groves, in which Epstein indicated that he would not deal with Brown and that he believed Brown’s representation “was so egregiously lacking.” Id. at 383, 610 S.E.2d at 821. The majority concluded that it was “patent Dr. Epstein

knew, or should have known, of a possible claim against Brown long before this Court denied certiorari in January 2001." *Id.*

Chief Justice Toal dissented as she would have adopted "a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until an appellate court disposes of the action by sending a remittitur to the trial court." *Id.* at 383, 610 S.E.2d at 822. Although Justice Toal agreed with the application of the discovery rule, she disagreed with the majority's holding that Epstein should have known of the existence of a cause of action arising from Brown's alleged malpractice at the conclusion of the trial. *Id.* at 354, 610 S.E.2d at 822. Instead, Justice Toal found "there was no evidence that [Epstein] [was] injured as a result of [Brown's] alleged malpractice until the court of appeals disposed of the case by sending a remittitur to the trial court." *Id.*

Justice Pleianes concurred in the majority's rejection of the continuous-representation rule and the retention of the discovery rule; however, he dissented as he believed that Brown should have been stopped from asserting the statute of limitations as a defense. *Id.* at 384, 610 S.E.2d at 322. Justice Pleianes pointed out that: (1) Brown affirmatively represented to Epstein that the adverse verdict had resulted from errors of law committed by the trial judge and, in turn, affected the jury's fact-finding role; and (2) Brown remained nominally as counsel to Epstein throughout the appeal of the verdict. *Id.* Justice Pleianes concluded that Brown's representations and his presence on the appellate team "reasonably induce[d] Epstein's forbearance." *Id.* at 384-85, 610 S.E.2d at 822.

#### b. Propriety of Epstein

Our appellate courts for the past ten years have continued to rely on the decision in Epstein.<sup>4</sup> However, Epstein is not without its critics. See James L. Floyd, III, *South Carolina Tort Law: For Whom The Statute of Limitations Tolls—The Epstein Court's Rejection of the Continuous Representation Rule*, 57 S.C. L.Rev. 643 (2006). In this article, the author identified what he perceived to be fundamental flaws in the majority's analysis in Epstein. Specifically, the author found that the majority's reasoning and holding were questionable "because of: (1) the differences between the statute of limitations governing legal malpractice actions and the statute of repose governing medical malpractice actions, (2) the strength and applicability of the secondary authority upon which the Epstein court relied, and (3) Epstein's operative facts." *Id.* at 654, 610 S.E.2d 816.

Although the author distinguished the secondary authority relied on by the majority and noted that Epstein was limited to its facts, his primary challenge was to the majority's reliance on the statute of repose in medical malpractice actions. Specifically, the author stated that:

neither section 15-3-535 nor section 15-3-530(g) create a statute of repose governing legal malpractice actions. Instead, those sections create a general three-year statute of limitations in legal malpractice actions. This distinction may indicate the South Carolina Legislature is unwilling to create the same "absolute time limit" for legal malpractice actions which is observed in medical malpractice actions.

*Id.* at 656, 610 S.E.2d 816 (footnotes omitted). In addition to these distinctions, the author opined that the adoption of the "continuous representation rule would protect the sanctity of the attorney-client relationship" because a client should be able to rely on his attorney's advice, particularly where the attorney suggests filing an appeal of the underlying lawsuit. *Id.* at 658, 610 S.E.2d 816.

Notably, Epstein represents a minority position in this country as the majority of courts in other jurisdictions have adopted the continuous-representation rule. See 3 Ronald E. Mallen & Allison Martin Rhodes, *Legal Malpractice*, § 23:45 (2015) (discussing state cases which have adopted the majority and minority positions regarding the continuous-representation rule; identifying Epstein as within the minority position); George L. Blum, Annotation, *Attorney Malpractice—Tolling or Other Exceptions to Running of Statute of Limitations*, 87 A.L.R.5th 473, § 4 (2001 & Supp.2015) (discussing state cases that have applied or found inapplicable the continuous-representation doctrine); see also George L. Blum, Annotation, *When Statute of Limitations Begins to Run on Action Against Attorney Based upon Negligence—View that Statute Begins to Run from Time Client Discovers, or Should Have Discovered, Negligent Act or Omission—Application of Rule to Conduct of Litigation and Delay or Inaction in Conducting Client's Affairs*, 14 A.L.R. 6th 1, § 3 (2006 & Supp.2015) (collecting state and federal cases that applied or found inapplicable the discovery rule and highlighting Epstein).

The facts of the instant case present us with an appropriate opportunity to address the criticism and conflict that has arisen out of our decision in Epstein. As legislatively mandated, we begin our analysis with the well-established discovery rule. Pursuant to this 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.

Thus, a claimant seeking recovery for a legal malpractice claim is constrained by two constants: (1) filing the claim within the statute of limitations, and (2) establishing the four requisite elements of his or her claim. As a result, a claimant must have knowledge of each element of the legal malpractice claim when it is filed. See 3 Ronald E. Mallen & Allison Martin Rhodes, *Legal Malpractice* § 23:14 (2015) ("Since a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued. Thus, 'accrual' means the existence of a legally cognizable cause of action.").

As evidenced by this case, the key question is when the claimant's cause of action accrues to trigger the running of the three-year statute of limitations. The answer to this question is complicated by the seemingly endless factual scenarios surrounding the underlying claim of a legal malpractice cause of action. For example, legal malpractice claims may stem from matters involving litigation or negotiated settlements while others may arise out of matters involving the probate of a will or a divorce. Further complicating the determination of when a cause of action accrues is if the claimant pursues an appeal of an unfavorable ruling.

Our decision regarding the accrual date must also take into consideration the preservation of the attorney-client relationship as well as the public policy that is fundamental to the efficient management of our judicial system. Clearly, if a client files a legal malpractice cause of action while the client is still represented by counsel during an appeal, the attorney-client relationship is compromised and there are simultaneous lawsuits advocating conflicting positions.

While the legal bases and policy reasons for adapting the continuous-representation rule are persuasive, we find its application may be problematic because we can foresee factual scenarios where it is unclear exactly at what point trial counsel ends its representation. Moreover, we acknowledge the merit of the remittitur rule espoused by the dissent in Epstein as it offers a clear and definitive date for the accrual of a legal malpractice cause of action. However, we decline to adopt such an unyielding rule because each case presents unique circumstances. Instead, we are guided by the position taken by the Oklahoma Court of Appeals in *Ranier v. Stuart & Freida*, 887 P.2d 339 (Okla.Civ.App.1994).

In *Ranier*, appellant retained respondent attorney and his law firm to represent him in a lawsuit that was ultimately dismissed as time-barred on August 15, 1990. *Ranier*, 887 P.2d at 340. On September 12, 1990, respondent mailed a letter to appellant, which notified appellant that the lawsuit had been dismissed and an appeal had been filed. *Id.* In the letter, respondent stated that he believed they had a "good chance" of getting the trial judge's decision reversed. *Id.* On February 5, 1992, the trial judge's decision was affirmed on appeal. *Id.*

On April 19, 1993, appellant filed a legal malpractice action against respondent and his law firm. *Id.* Respondents filed a motion for summary judgment, alleging the action was time barred because more than two years had elapsed since appellant's cause of action accrued. *Id.* Appellant responded that the statute of limitations did not begin to run until the appeal was decided on February 5, 1992 and, alternatively, that his attorney's letter assuring him that they had a "good chance" of reversing the trial judge's decision on appeal tolled the running of the statute of limitations. *Id.* The trial court granted summary judgment in favor of respondents. *Id.*

On appeal, the Oklahoma Court of Appeals addressed "whether Appella's malpractice action accrued at the time the trial court dismissed the underlying action, starting the statute of limitations period, or whether the statute of limitations was tolled until after the case was finally determined adversely to Appellant on appeal." *Id.* at 341. In analyzing this issue, the court noted that there was a split of authority in other jurisdictions regarding the appropriate rule. In particular, the court considered the exhaustion of appeals rule and the continuous-representation rule. *Id.* at 341-42. Ultimately, the court declined to adopt either rule and, instead, created a compromise position between these rules. *Id.* at 343.

Relying on a decision issued by the Kansas Supreme Court, the Oklahoma Court of Appeals stated:

A statute of limitations for a legal malpractice action may be tolled until resolution on appeal of the underlying case if the client has not become aware of the harm prior to the decision on appeal. We come to this conclusion as a matter of common sense because in many situations, a client has no viable cause of action until he discovers whether his case is reversed on appeal. We caution, however, that the resolution of the appeal is not necessarily always the critical event triggering ripeness of a legal malpractice claim, but rather it is knowledge of the injury, its cause and the wrongdoing. We emphasize the proper application of the discovery rule demands that the determinative factor be the client's knowledge of the injury, and each case must be decided under its own particular facts. If it appears that the client knew of the harm before the case is finally determined on appeal, the statute of limitations begins to run from the time the underlying injury occurs or upon the client's awareness of the alleged negligence.

*Id.* at 343 (footnotes omitted) (emphasis added).

Based on the particular facts of the case, the Oklahoma Court of Appeals concluded that appellant had no knowledge of any harm suffered until the underlying judgment was affirmed on appeal. *Id.* at 343-44. Because the statute of limitations was tolled until the appellate court issued its opinion, the Oklahoma Court of Appeals found that appellant's legal malpractice cause of action was timely filed. *Id.* at 344.

After carefully considering the rationale in *Ranier*, we conclude the rule adopted by the Oklahoma Court of Appeals comports with the discovery rule established by our Legislature and the purpose of the statute of limitations. Accordingly, we now adopt the following statement in *Ranier* as the statute of limitations standard for legal malpractice suits: "If it appears that the client knew of the harm before the case is finally determined on appeal, the statute of limitations begins to run from the time the underlying injury occurs or upon the client's awareness of the alleged negligence." *Ranier*, 887 P.2d at 343. We find the resolution on appeal rule provides a threshold limit to the tolling of the statute of limitations, eliminates the rigidity of the remittitur rule, and prevents arbitrary application of the rule with a case-by-case analysis. Furthermore, this rule advances the purpose of the statute of limitations, which is to punish plaintiffs who sleep on their rights, protect defendants from stale claims, and lend order to the judicial system.

Because the circuit court relied upon Epstein to hold that the statute of limitations began to run on the day of the jury's verdict, we reverse the court's grant of summary judgment without prejudice to either party's right to move for this relief under our newly announced statute of limitations standard for legal malpractice suits.

#### B. Motion to Compel Discovery

Having reversed the circuit court's grant of summary judgment in favor of Respondents, the question becomes whether the court erred in denying a portion of Stokes-Craven's motion to compel. Stokes-Craven claims the circuit court erred in holding that Respondents' communications with their legal malpractice carrier were not discoverable. In particular, Stokes-Craven contends the documents are not protected by the work-product

doctrine because they were "prepared in the ordinary course of insurance business" and not in anticipation of litigation. Additionally, Stokes-Craven maintains it has a "substantial need" for these documents and that it is unable to obtain equivalent information by other means.

A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion. *Dunn v. Dunn*, 29 B.S.C. 499, 381 S.E.2d 734 (1989). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. *Bindawn Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009).

"The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party." *Tabacoville USA, Inc. v. McMaster*, 387 S.C. 287, 692 S.E.2d 526, 530 (2010); see Rule 46(b)(3), SCRPC (stating, "a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for the trial by or for another party or by or for that other party's representative, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means"). "Generally, in determining whether a document has been prepared 'in anticipation of litigation,' most courts look to whether or not the document was prepared because of the prospect of litigation." *Tabacoville*, 387 S.C. at 294, 692 S.E.2d at 530.

We conclude the circuit court abused its discretion in ruling on Stokes-Craven's motion to compel production of communications between Respondents and their malpractice carrier because there was no evidentiary basis to support its factual conclusions. The court failed to conduct an in camera hearing to review the requested information and stated in its summary ruling that it had "not received a privilege log of these communications." Therefore, we find the court lacked sufficient information to determine whether the requested documents were prepared in anticipation of litigation and that Stokes-Craven had a substantial need of the materials in preparation of its case. Accordingly, we direct the circuit court to remand to conduct an in camera hearing, review the requested information, and issue a specific ruling.

#### IV. Conclusion

We overrule *Epstein* and now hold that the statute of limitations for a legal malpractice action may be tolled until resolution on appeal of the underlying case if the client has not become aware of the injury prior to the decision on appeal. We find this rule comports with the discovery rule and effectuates the purpose of the statute of limitations. Because the circuit court relied upon *Epstein* to hold that the statute of limitations began to run on the day of the jury's verdict, we reverse the court's grant of summary judgment without prejudice to either party's right to move for this relief under our newly announced statute of limitations standard for legal malpractice suits. Additionally, we find the circuit court abused its discretion in denying Stokes-Craven's motion to compel the production of communications between Respondents and their malpractice carrier because there was no evidence to support the court's ruling.

Based on the foregoing, we reverse the circuit court's order and remand the matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

PLEICDNBS and HEARN, JJ., concur.

I respectfully dissent. In determining when the statute of limitations period commences for legal malpractice actions, the majority adopts a subjective standard that is dependent on whether "the client has [ ] become aware of the injury prior to the decision on appeal." Because the General Assembly explicitly provided for an objective standard, rather than the majority's new subjective standard, I write separately.

In South Carolina, the statute of limitations for legal malpractice actions is three years. See S.C. Code Ann. § 15-3-530(5) (2005); *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005); *Berry v. McLead*, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Cl.App.1997). In determining when a legal malpractice action accrues, the General Assembly set forth the discovery rule, stating that such an action "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535 (2005) (emphasis added); *Burgess v. Am. Cancer Soc'y S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Cl.App.1989) (citing *Rogers v. Efrid's Exterminating Co.*, 254 S.C. 877, 345 S.E.2d 541 (1985)). Thus, under this objective standard, the statutory period of limitations may begin to run before the client has actual, subjective knowledge of the potential claim or of the facts giving rise thereto. *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800; see also *Epstein*, 363 S.C. at 382, 610 S.E.2d at 821 ("This Court has recognized that, under the discovery rule, the statute of limitations begins to run when a person of common knowledge and experience would be on notice that a claim against another party might exist. The fact that the injured party may not comprehend the full extent of the damage is immaterial." (citations omitted)).

Here, the majority states that in general, the statute of limitations for a legal malpractice action commences upon the final determination of the appeal in the underlying case. The majority then outlines an exception to the rule, holding that the statute may begin to run earlier if the client has actual knowledge of the alleged negligence on the part of his lawyer. See *supra* ("If it appears that the client knew of the harm before the case is finally determined on appeal, the statute of limitations begins to run . . . upon the client's awareness of the alleged negligence." (quoting *Ranier v. Stuart & Freida, P.C.*, 887 P.2d 389, 843 (D.Kla. Civ. App. 1994))). Thus, in effect, under the majority's rationale, the statute of limitations begins to run either when the client has actual knowledge of his lawyer's negligence, or at the conclusion of the appeal of the underlying case, whichever comes first.

While the majority claims its holding "comports with the discovery rule," in reality, it adapts a subjective standard contrary to the dictates of the General Assembly. As the Oklahoma Court of Appeals explained in *Ranier*, in Oklahoma, the client's actual knowledge of the injury is the "determinative factor" in deciding when a legal malpractice action accrues in that state. 887 P.2d at 343. However, in South Carolina, the statute of limitations begins to run when the client knows or should know that he has a cause of action. See S.C. Code Ann. § 15-3-535. Although the majority espouses a number of policy reasons in support of its holding, those policy reasons cannot override the General Assembly's decision to mandate an objective standard.



I further disagree with the majority's contention that the client's actual knowledge is the only way the statute of limitations may commence prior to the final decision on appeal of the underlying case. Although my dissent in *Epstein* espoused a similar rule to the majority's current formulation, I have now reconsidered my position, and would adhere to the majority's holding in *Epstein*. While it is certainly possible that a client would not know of his lawyer's alleged negligence until resolution of the underlying appeal, it is equally possible that a client would know of the alleged negligence far earlier in the proceedings, such as after the jury verdict. Cf. *Epstein*, 363 S.C. at 376-77, 610 S.E.2d at 818 ("[T]he majority of the damages alleged by [the client] stemmed from the adverse jury verdict, and the damages to his reputation resulting from the publicity were all damages suffered at the time of the verdict. [A]lthough these damages might be mitigated by a successful appeal, they could never be wholly eliminated by a reversal of the jury's verdict. Accordingly, . . . [the client] either knew, or should have known, of a possible claim against [his lawyer] by the date of the adverse verdict, such that the [statute of limitations] began to run on that date."). Therefore, in my opinion, the better practice is for the Court to determine, on a case-by-case basis, the date that the client knew or should have known that he could file a legal malpractice suit. See S.C. Code Ann. § 15-3-536. In other words, the Court should not automatically assume that resolution of the underlying appeal is the "magic date" in all cases.

Applying the *Epstein* rule here, I would find that regardless of the date of Dennis Craven's actual notice of the possible claim against his lawyers, there is no genuine issue of material fact regarding whether he should have known of the alleged malpractice on August 17, 2006, the date of the jury's adverse verdict in the underlying case. As the majority succinctly outlines, at that time, Craven knew, *inter alia*, that trial counsel did not contact or interview "crucial witnesses" prior to trial, and had failed to settle the case despite Stokes-Craven's admission that it "had done something wrong." Given those two allegedly critical mistakes, a reasonable person of common knowledge and experience should have known at the date of the jury's adverse verdict that he had a claim against his trial counsel.

Therefore, I would find the statute of limitations began to run on August 17, 2006, and in filing its malpractice action in 2010, Stokes-Craven allowed the three-year statute of limitations to expire. Accordingly, I would affirm the circuit court's ruling that the legal malpractice claim is time-barred.

Chief Justice TOAL.

TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs. KITTREDGE, J., concurs.

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Supreme Court of South Carolina.

Stokes-Craven Holding Corp., d/b/  
a Stokes-Craven Ford, Appellants,

v.

Scott L. Robinson and Johnson McKenzie  
& Robinson, LLC, Respondents.

Opinion No. 27572

Heard December 10, 2014

Refiled May 25, 2016

Appeal From Clarendon County  
George C. James, Jr., Circuit Court Judge

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**ORDER**

Costa M. Pleicones C.J.

Donald W. Beatty J.

John W. Kittredge J.

Kaye G. Hearn J.

Jean H. Toal A.J.

\*I After careful consideration of Respondents' petition for rehearing, the Court grants the petition for rehearing,

dispenses with further briefing, and substitutes the attached opinions for the opinions previously filed in this matter.

KITTREDGE, HEARN, JJ., and Acting Justice Jean H. Toal, concur. PLEICONES, C.J., concurring in a separate opinion.

**REVERSED AND REMANDED**

**JUSTICE BEATTY:**

In this legal malpractice case, Stokes-Craven Holding Corporation d/b/a Stokes-Craven Ford ("Stokes-Craven") appeals the circuit court's order granting summary judgment in favor of Scott L. Robinson and his law firm, Johnson, McKenzie & Robinson, L.L.C., (collectively "Respondents") based on the expiration of the three-year statute of limitations. Stokes-Craven contends the court erred in applying this Court's decision in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005),<sup>1</sup> and holding that Stokes-Craven knew or should have known that it had a legal malpractice claim against its trial counsel and his law firm on the date of the adverse jury verdict rather than after this Court affirmed the verdict and issued the remittitur in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). We overrule *Epstein*, reverse the circuit court's order, and remand the matter to the circuit court for further proceedings consistent with this opinion.

**I. Factual / Procedural History**

Donald C. Austin filed suit against Stokes-Craven, an automobile dealership, after he experienced problems with his used truck and discovered the vehicle had sustained extensive damage prior to the sale. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). In his Complaint, Austin alleged the following causes of action: revocation of acceptance, breach of contract, negligence, constructive fraud, common law fraud, violation of the South Carolina Motor Vehicle Dealer's Act (the "Dealer's Act"), violation of the South Carolina Unfair Trade Practices Act ("UTPA"), and violation of the Federal Odometer Act. Based on these claims, Austin sought actual damages, punitive damages, prejudgment interest, and attorney's fees and costs. *Id.* at 35, 691 S.E.2d at 141-42. Stokes-Craven was represented by Scott L. Robinson of Johnson, McKenzie & Robinson, L.L.C. throughout the trial proceedings. On August 16, 2006, after a three-day trial, the jury found in

favor of Austin and awarded \$26,371.10 in actual damages and \$216,600 in punitive damages. *Id.* at 35, 691 S.E.2d at 142.

Austin and Stokes-Craven filed cross-appeals to this Court. Although Robinson was listed as counsel of record on the appellate pleadings, Stokes-Craven had employed attorneys with Young, Clement, Rivers, L.L.P. to represent it during the course of the appeal. On March 8, 2010, a majority of this Court affirmed the jury's verdict and held that: (1) there was no prejudicial abuse of discretion in admitting certain challenged testimony; (2) Austin offered proof of actual damages in the amount of \$26,371.10; (3) Austin failed to prove Stokes-Craven violated the Federal Odometer Act with the requisite intent to defraud him as to the mileage of the truck; (4) the verdicts of fraud and violation of the UTPA were not inconsistent; and (5) there was evidence to support the jury's award of \$216,000 in punitive damages. *Id.* at 59, 691 S.E.2d at 154. This Court issued the remittitur on April 21, 2010.<sup>2</sup>

\*2 On August 16, 2010, Stokes-Craven filed a legal malpractice action against Respondents, alleging negligence and breach of fiduciary duty in trial counsel's representation of Stokes-Craven both prior to and during the trial. Specifically, Stokes-Craven alleged that trial counsel failed to: adequately investigate the facts of the case; prepare or serve written discovery; depose witnesses; obtain copies of the plaintiff's experts' curricula vitae; prepare a pretrial brief, trial exhibits, voir dire, and requests to charge; preserve certain evidentiary issues for appellate review; notify Stokes-Craven's insurance carrier about the claims; and settle the case prior to the jury verdict. Based on these purported errors, Stokes-Craven claimed the jury returned the adverse verdict. Respondents generally denied the allegations and asserted several defenses, including that Stokes-Craven's claims were barred by the expiration of the three-year statute of limitations.

Subsequently, Respondents filed motions for summary judgment. Stokes-Craven filed a cross-motion for partial summary judgment and a motion to compel discovery of Respondents' professional liability policy applications for the years 2002 through 2012, all correspondence between Respondents and their malpractice insurer, and the billing records for computer research from any research provider used by Respondents for the years 2003 through 2006.

Following a hearing, the circuit court granted Respondents' motions for summary judgment on the ground Stokes-Craven's legal malpractice claim was barred by the expiration of the statute of limitations. In so ruling, the court concluded that Dennis Craven, as agent of Stokes-Craven, had notice of the claim on August 16, 2006, the date of the jury's adverse verdict. Referencing portions of Craven's deposition testimony, the court determined that Craven's testimony as a whole indicated that he was aware that he might have a legal malpractice claim against Respondents because Craven: knew at the time of trial that counsel had not contacted and interviewed crucial witnesses prior to trial; was not shown the defendants' interrogatory responses until the day of trial; had not been prepared for cross-examination; and knew that counsel failed to settle the case despite the admission by Stokes-Craven that it "had done something wrong." The court also noted that Craven acknowledged the jury's verdict presented a "serious problem" for Stokes-Craven. Citing *Epstein*, the court found that Craven's knowledge of counsel's "shortcomings" and other "actionable errors" constituted evidence that Craven knew at the time of the verdict that he might have a claim against trial counsel.

The court also held that the doctrines of equitable estoppel and equitable tolling were inapplicable. In terms of equitable estoppel, the court found "nothing in the record to support the conclusion that [Respondents] did anything to mislead Stokes-Craven" or that Robinson "engaged in any conduct to prevent Stokes-Craven from filing a malpractice action." The court further found Stokes-Craven could not invoke equitable tolling because it failed to present evidence of an "extraordinary event" beyond its control that prevented it from timely filing its legal malpractice action.

Because the court granted Respondents' motions for summary judgment, it noted that it was unnecessary to rule on Stokes-Craven's motion to compel discovery. However, in the event the decision on summary judgment was overturned on appeal, the court proceeded to rule on the motion. Initially, the court found the correspondence between Respondents and their malpractice carrier was not discoverable as it was prepared in anticipation of or during litigation. The court further determined that Stokes-Craven had not established the need for this information. Although the court ruled Respondents' professional liability policy applications were discoverable, the court stated that any "issues of ultimate admissibility" would be left to the trial judge.

\*3 Stokes-Craven appealed the circuit court's order and filed a motion to argue against precedent pursuant to Rule 217, SCACR. This Court granted Stokes-Craven's motion to argue against *Epstein*.

## II. Standard of Review

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

## III. Discussion

### A. Commencement of the Statute of Limitations

Stokes-Craven asserts the circuit court erred in holding as a matter of law that the statute of limitations began to run on the date of the adverse jury verdict against Stokes-Craven. Contrary to the circuit court's characterization of Craven's testimony, Stokes-Craven notes that Craven "repeatedly testified that, at the time of the trial, he had never been sued before, had never participated in litigation, and had no idea what an attorney should or should not do to prepare a case for trial." Based on this testimony, Stokes-Craven maintains Craven did not know or could not have known that it might have a claim for legal malpractice on the date the verdict was rendered.

Stokes-Craven further argues the court erred in relying on *Epstein* as it is not only factually distinguishable from the instant case but is no longer viable precedent. Stokes-Craven requests that this Court overrule its decision in *Epstein* and adopt a bright-line rule that the statute of limitations in a legal malpractice case does not commence until the remittitur has been issued in the underlying lawsuit.

A claimant in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship,

(2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014). Furthermore, a claimant is required to demonstrate that "he or she 'most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.'" *Doe v. Howe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005) (quoting *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997)).

The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005) (stating the statute of limitations for "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law" is three years); see *Berry v. McLeod*, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct. App. 1997) (concluding that section 15-3530(5) of the South Carolina Code provides a three-year statute of limitations for legal malpractice actions). 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 that some claim against another party might exist. *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989); see S.C. Code Ann. § 15-3-535 (2005) ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."). "This standard as to when the limitations period begins to run is *objective* rather than subjective." *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800. "Therefore, the statutory period 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." *Id.*

\*4 "Statutes of limitations are not simply technicalities." *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009). "On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Id.* "Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Id.* "One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights." *Id.* (citations omitted). "Another purpose of a statute of limitations is to protect

potential defendants from protracted fear of litigation.” *Id.* “Statutes of limitations are, indeed, fundamental to our judicial system.” *Id.* (citation omitted).

### 1. *Epstein*

As noted by the circuit court and the parties, the key case in the instant dispute is *Epstein*. In *Epstein*, a jury returned a verdict for a wrongful death and survival action on February 18, 1998 against Dr. Franklin Epstein in a medical-malpractice action that arose out of the death of one of his patients following spinal surgery. *Epstein*, 363 S.C. at 374, 610 S.E.2d at 817. David Brown represented Epstein throughout the trial and filed a notice of appeal after the jury verdict. *Id.* at 374-75, 610 S.E.2d at 817. Although Brown remained counsel of record during the appeal, Epstein was represented on appeal by Stephen Groves, John Hamilton Smith, and Steven Brown. *Id.* at 375, 610 S.E.2d at 817. The Court of Appeals affirmed the verdicts on July 31, 2000 in *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Cl. App. 2000). *Id.* This Court denied Epstein’s petition for a writ of certiorari in January 2001. *Id.*

On January 9, 2002, Epstein filed a legal malpractice claim against David Brown in which he alleged breach of fiduciary duty, negligence, and breach of contract. *Epstein*, 363 S.C. at 375, 610 S.E.2d at 817. In terms of specific deficiencies, Epstein asserted that Brown was negligent in failing to conduct an adequate investigation, failing to advise him to settle, forgetting to call expert witnesses, and adopting a defense contrary to Epstein’s medical opinion. *Id.* at 376, 610 S.E.2d at 818. Brown moved for summary judgment on the ground that Epstein failed to commence the action within the applicable three-year statute of limitations. *Id.* at 375; 610 S.E.2d at 817. The circuit court found the majority of the damages alleged by Epstein stemmed from the adverse jury verdict, and the damages to Epstein’s reputation resulting from the publicity were all damages suffered at the time of the verdict. *Id.* at 376, 610 S.E.2d at 818. The court concluded that, although these damages might have been mitigated by a successful appeal, they could not have been wholly eliminated by a reversal of the jury’s verdict. *Id.* Accordingly, the circuit court ruled the statute of limitations began to run, at the latest, on February 18, 1998, the date of the jury’s verdict. *Id.* at 375, 610 S.E.2d at 817. As a result, the court found the action was untimely and granted Brown’s motion for summary judgment. *Id.* Epstein appealed the circuit court’s order to this Court. *Id.*

Justice Waller, who was joined by Justices Moore and Burnett, affirmed the circuit court’s order. *Epstein*, 363 S.C. at 383, 610 S.E.2d at 821-22. In reaching this decision, the majority declined to adopt the continuous-representation rule, which permits the statute of limitations to be tolled during the period an attorney continues to represent the client on the same matter out of which the alleged legal malpractice arose. *Id.* at 380, 610 S.E.2d at 820. Instead, the majority chose to strictly adhere to the discovery rule set forth by the Legislature. *Id.*

\*5 The majority explained its decision by comparing a legal malpractice action to a medical malpractice action. *Epstein*, 363 S.C. at 377, 610 S.E.2d at 819. Despite the “very legitimate policy rationales in favor of adoption of a continuous treatment rule” in medical malpractice cases, the majority noted that our appellate courts had declined to adopt it because the “Legislature [had] set absolute time restrictions for the bringing of medical malpractice actions in the statutes of repose both for medical malpractice and for persons operating under disability.” *Id.* at 378, 610 S.E.2d at 819. The majority also noted that “numerous jurisdictions” had refused to adopt the continuous-representation rule. *Id.* at 379, 610 S.E.2d at 819.

Additionally, the majority disagreed with Epstein’s alternative argument that, absent applying the continuous-representation rule, the limitations period did not begin to run until the Court denied certiorari in January 2001. *Epstein*, 363 S.C. at 380-81, 610 S.E.2d at 820. The majority explained that “those jurisdictions which decline to adopt the continuous representation rule tend to hold that a plaintiff may institute a malpractice action prior to the conclusion of the appeal.” *Id.* at 380, 610 S.E.2d at 820.

The majority also rejected Epstein’s argument that appealing the ruling in the medical malpractice action against him while filing a legal malpractice claim against Brown would cause him to argue inconsistent positions in two different courts. *Epstein*, 363 S.C. at 381, 610 S.E.2d at 821. The majority maintained that “there are measures which may be taken to avoid such inconsistent positions.” *Id.* at 381-82, 610 S.E.2d at 821.

Ultimately, the majority applied the discovery rule and found that Epstein “clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial.” *Epstein*, 363 S.C. at 382, 610 S.E.2d at 821. The majority reasoned that the damages claimed by Epstein were

"largely those to his reputation" and the claims he raised in his Complaint were "primarily related to trial and pre-trial errors." *Id.* The majority also noted that trial counsel conceded during oral argument on the summary judgment motion that "some of the allegations down there, your Honor, were within the man's knowledge when the verdict came in." *Id.* at 382-83, 610 S.E.2d at 821. Finally, the majority referenced a letter from Epstein to his appellate attorney, Steven Groves, in which Epstein indicated that he would not deal with Brown and that he believed Brown's representation "was so egregiously lacking." *Id.* at 383, 610 S.E.2d at 821. The majority concluded that it was "patent Dr. Epstein knew, or should have known, of a possible claim against Brown long before this Court denied certiorari in January 2001." *Id.*

Then-Chief Justice Toal dissented as she would have adopted "a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until an appellate court disposes of the action by sending a remittitur to the trial court." *Epstein*, 363 S.C. at 383, 610 S.E.2d at 822. Although Justice Toal agreed with the application of the discovery rule, she disagreed with the majority's holding that Epstein should have known of the existence of a cause of action arising from Brown's alleged malpractice at the conclusion of the trial. *Id.* at 384, 610 S.E.2d at 822. Instead, Justice Toal found "there was no evidence that [Epstein] [was] injured as a result of [Brown's] alleged malpractice until the court of appeals disposed of the case by sending a remittitur to the trial court." *Id.*

Chief Justice Pleicones concurred in the majority's rejection of the continuous-representation rule and the retention of the discovery rule; however, he dissented as he believed that Brown should have been estopped from asserting the statute of limitations as a defense. *Epstein*, 363 S.C. at 384, 610 S.E.2d at 822. Justice Pleicones pointed out that: (1) Brown affirmatively represented to Epstein that the adverse verdict had resulted from errors of law committed by the trial judge and, in turn, affected the jury's fact-finding role; and (2) Brown remained nominally as counsel to Epstein throughout the appeal of the verdict. *Id.* Justice Pleicones concluded that Brown's representations and his presence on the appellate team "reasonably induce[d] Epstein's forbearance." *Id.* at 384-85, 610 S.E.2d at 822.

## 2. Propriety of *Epstein*

\*6 Our appellate courts for the past eleven years have continued to rely on the decision in *Epstein*.<sup>3</sup> However,

*Epstein* is not without its critics. See James L. Floyd, III, *South Carolina Tort Law: For Whom The Statute of Limitations Tolls-The Epstein Court's Rejection of the Continuous Representation Rule*, 57 S.C. L. Rev. 643 (2006). In this article, the author identified what he perceived to be fundamental flaws in the majority's analysis in *Epstein*. Specifically, the author found that the majority's reasoning and holding were questionable "because [of]: (1) the differences between the statute of limitations governing legal malpractice actions and the statute of repose governing medical malpractice actions, (2) the strength and applicability of the secondary authority upon which the *Epstein* court relied, and (3) *Epstein's* operative facts." *Id.* at 654.

Although the author distinguished the secondary authority relied on by the majority and noted that *Epstein* was limited to its facts, his primary challenge was to the majority's reliance on the statute of repose in medical malpractice actions. Specifically, the author stated that:

neither section 15-3-535 nor section 15-3-530(5) create a statute of repose governing legal malpractice actions. Instead, those sections create a general three-year statute of limitations in legal malpractice actions. This distinction may indicate the South Carolina Legislature is unwilling to create the same "absolute time limit" for legal malpractice actions which is observed in medical malpractice actions.

*Id.* at 656 (footnotes omitted). In addition to these distinctions, the author opined that the adoption of the "continuous representation rule would protect the sanctity of the attorney-client relationship" because a client should be able to rely on his attorney's advice, particularly where the attorney suggests filing an appeal of the underlying lawsuit. *Id.* at 658.

Notably, *Epstein* represents a minority position in this country as the majority of courts in other jurisdictions have adopted the continuous-representation rule. See 3 Ronald E. Mallen & Allison Martin Rhodes, *Legal Malpractice*, § 23:45 (2015) (discussing state cases which have adopted the majority and minority positions regarding the continuous-representation rule; identifying *Epstein* as within the minority position); George L. Blum, Annotation, *Attorney Malpractice -Tolling or Other Exceptions to Running of Statute of Limitations*, 87 A.L.R.5th 473, § 4 (2001 & Supp. 2015) (discussing state cases that have applied or found inapplicable the continuous-representation doctrine); see also George L. Blum, Annotation, *When Statute of Limitations Begins to Run on Action Against Attorney Based upon Negligence*->View

*that Statute Begins to Run from Time Client Discovers, or Should Have Discovered, Negligent Act or Omission -Application of Rule to Conduct of Litigation and Delay or Inaction in Conducting Client's Affairs*, 14 A.L.R. 6th 1, § 8 (2006 & Supp. 2015) (collecting state and federal cases that applied or found inapplicable the discovery rule and highlighting *Epstein*).

The facts of the instant case present us with an appropriate opportunity to address the criticism and conflict that has arisen out of our decision in *Epstein*. As legislatively mandated, we begin our analysis with the well-established discovery rule. Pursuant to this 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. See S.C. Code Ann. § 153-535 (2005) (“[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.”).

\*7 Thus, a claimant seeking recovery for a legal malpractice claim is constrained by two constants: (1) filing the claim within the statute of limitations,<sup>4</sup> and (2) establishing the four requisite elements of his or her claim. Because a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued. See 3 Ronald E. Mailen & Allison Martin Rhodes, *Legal Malpractice* § 23:14 (2015) (“Since a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued. Thus, ‘accrual’ means the existence of a legally cognizable cause of action.”).

As evidenced by this case, the key question is when the claimant’s cause of action accrues to trigger the running of the three-year statute of limitations. The answer to this question is complicated by the seemingly endless factual scenarios surrounding the underlying claim of a legal malpractice cause of action. For example, legal malpractice claims may stem from matters involving litigation or negotiated settlements while others may arise out of matters involving the probate of a will or a divorce. Further complicating the determination of when a cause of action accrues is if the claimant pursues an appeal of an unfavorable ruling, such as in the instant case.

Our decision regarding the accrual date must also take into consideration the preservation of the attorney-client relationship as well as the public policy that is fundamental to the efficient management of our judicial system. Clearly, if a

client files a legal malpractice cause of action while the client is still represented by counsel during an appeal, the attorney-client relationship is compromised and there are simultaneous lawsuits advocating conflicting positions.

While the legal bases and policy reasons for adopting the continuous-representation rule are persuasive, we find its application may be problematic because we can foresee factual scenarios where it is unclear exactly at what point trial counsel ends its representation. Moreover, we acknowledge the merit of the remittitur rule espoused by the dissent in *Epstein* as it offers a clear and definitive date for the accrual of a legal malpractice cause of action. We, however, decide to adopt a position that is analogous to the remittitur rule but is strictly based on existing appellate court rules.

Pursuant to Rule 205, the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal as it states:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding *with matters not affected by the appeal*.

Rule 205, SCACR (emphasis added). Rule 241(a), a corollary rule that governs matters stayed on appeal, provides:

As a general rule, the service of a *notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision*. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

\*8 Rule 241(a), SCACR (emphasis added).<sup>5</sup>

As previously stated, a legal malpractice cause of action is predicated on an injury or damage to a client caused by an alleged breach of duty by the client’s attorney. This predicate injury or damage may take many forms, including

one that stems from a favorable court ruling or successful yet insufficient award.<sup>6</sup>

However, the case that we address today is a legal malpractice cause of action that is predicated on an injury or damage caused by the failure of an underlying suit due to an attorney's alleged malpractice. In that particular scenario, there can be no legal malpractice cause of action without an adverse verdict, judgment, or ruling. Thus, if a client appeals the matter in which the alleged malpractice occurred, any basis for the legal malpractice cause of action is stayed by Rule 241(a) while the appeal is pending.

Furthermore, Rule 205 divests the lower court or administrative tribunal of jurisdiction over "matters affected by the appeal," which necessarily would include a legal malpractice cause of action that is based on the outcome of the appealed verdict, judgment, or ruling. See *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012) ("[T]he lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a 'matter affected by the appeal' under Rules 205 and 241(a)."); *Black's Law Dictionary* 68 (10th ed. 2014) (defining "affect" as "to produce an effect on; to influence in some way").

\*9 Consequently, until the appeal is resolved against the client, there is no legally cognizable cause of action for an attorney's alleged malpractice. Upon resolution of the appeal, a cause of action for legal malpractice accrues triggering the statute of limitations.<sup>7</sup>

This position is consistent with the discovery rule as a client either knows or should know that a cause of action arises out of his attorney's alleged malpractice if the appeal is unsuccessful. See *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) ("According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct."). In other words, a client knows or should know that he or she has a legally cognizable cause of action for legal malpractice at the conclusion of the appeal.

While this approach may be perceived as impermissibly requiring a person to have actual knowledge of a potential claim before the statute of limitations begins to run, we

find that it is mandated by our appellate court rules and, as a result, effectuates the objective standard provided by the Legislature. See *Black's Law Dictionary* 1624 (10th ed. 2014) (An objective standard is defined as "[a] legal standard that is based on conduct and perceptions external to a particular person." (emphasis added)); *id.* at 1529 (A rule is generally defined as "an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.")<sup>8</sup>

Our decision warrants overruling *Epstein* because the holding in that case is contrary to Rules 205 and 241, SCACR. In *Epstein*, the Court affirmed the dismissal of a legal malpractice case based on the expiration of the three-year statute of limitations, which the Court found began to run on the date that the adverse verdict was entered against claimant. *Epstein*, 363 S.C. at 383, 610 S.E.2d at 821. Yet, until the Court of Appeals affirmed the adverse verdict on appeal, there was no damage or harm to claimant for which to establish a claim for legal malpractice.

\*10 Applying this rule to the facts of the instant case, we find the circuit court erred in granting Respondents' motions for summary judgment because the stay, pending appeal, was not lifted and Stokes-Craven's lawsuit was timely filed after this Court affirmed the verdict against Stokes-Craven and issued the remittitur in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010).<sup>9</sup> Accordingly, we reverse the circuit court's order granting Respondents' motions for summary judgment.

#### B. Motion to Compel Discovery

Having reversed the circuit court's grant of summary judgment in favor of Respondents, the question becomes whether the court erred in denying a portion of Stokes-Craven's motion to compel. Stokes-Craven claims the circuit court erred in holding that Respondents' communications with their legal malpractice carrier were not discoverable. In particular, Stokes-Craven contends the documents are not protected by the work-product doctrine because they were "prepared in the ordinary course of insurance business" and not in anticipation of litigation. Additionally, Stokes-Craven maintains it has a "substantial need" for these documents and that it is unable to obtain equivalent information by other means.

A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. *Sundown Operating Co. v. Inledge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009).

"The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation; unless a substantial need can be shown by the requesting party." *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010); see Rule 26(b)(3), SCRPC (stating, "a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule and prepared in anticipation of litigation or for the trial by or for another party or by or for that other party's representative ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means"). "Generally, in determining whether a document has been prepared 'in anticipation of litigation,' most courts look to whether or not the document was prepared because of the prospect of litigation." *Tobaccoville*, 387 S.C. at 294, 692 S.E.2d at 530.

We conclude the circuit court abused its discretion in ruling on Stokes-Craven's motion to compel production of communications between Respondents and their malpractice carrier because there was no evidentiary basis to support its factual conclusions. The court failed to conduct an in camera hearing to review the requested information and stated in its summary ruling that it had "not received a privilege log of these communications." Therefore, we find the court lacked sufficient information to determine whether the requested documents were prepared in anticipation of litigation and that Stokes-Craven had a substantial need of the materials in preparation of its case. Accordingly, we direct the circuit court on remand to conduct an in camera hearing, review the requested information, and issue a specific ruling.

#### IV. Conclusion

\*11 This case presents us with an appropriate opportunity to reevaluate our decision in *Epstein*. We now overrule *Epstein*. In doing so, we hold that the statute of limitations for a legal

malpractice cause of action may be tolled if the client appeals the matter in which the alleged malpractice occurred. We conclude that this rule is mandated by our appellate court rules and, as a result, effectuates the objective standard provided by the Legislature.

Applying this rule to the facts of the instant case, we find the circuit court erred in granting Respondents' motions for summary judgment because Stokes-Craven's lawsuit was timely filed after this Court affirmed the verdict against Stokes-Craven. Additionally, we find the circuit court abused its discretion in denying Stokes-Craven's motion to compel the production of communications between Respondents and their malpractice carrier given there was no evidence to support the court's ruling.

Based on the foregoing, we reverse the circuit court's order and remand the matter for further proceedings consistent with this opinion.

#### REVERSED AND REMANDED.

#### CHIEF JUSTICE PLEICONES:

I concur in the decision to reverse the trial court's order granting summary judgment, and to reverse the discovery order but write separately because I would adhere to our decision in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005). The majority adopts Justice Toal's dissenting view in *Epstein*, but shrouds its decision in discussions of appellate court rules and practices. As explained below, I would not create a special statute of limitations for legal malpractice cases that is tied to the status of an appeal.<sup>10</sup>

First, I believe the majority unnecessarily expands the meaning of the term "matters affected by the appeal" under Rule 205, SCACR, to include inchoate and speculative collateral lawsuits. As this Court has explained, Rule 205 provides that an appeal deprives the trial court of jurisdiction to modify issues decided by that court which are the subject of a pending appeal, e.g., *Wingate v. Wingate*, 289 S.C. 574, 347 S.E.2d 878 (1985), or to entertain a settlement agreement, e.g., *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 742 S.E.2d 867 (2013), absent a remand from the appellate court. I do not understand how or why a Rule 205 operates to deprive a trial court of jurisdiction over a nonexistent lawsuit.

The majority also reinterprets Rule 241, SCACR, to include inchoate and speculative collateral lawsuits when, by its own

term, the rule governs stays only in "matters decided in the order, judgment, decree or decision on appeal. ..." Rule 241(a), SCACR. Further, in footnote 5, the majority reiterates that the Rule permits a party to an appeal which is subject to an automatic stay to "move for the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court for an order lifting [that stay] ...." I do not understand what the majority contemplates would be the benefit of superseding such a stay vis-à-vis a future malpractice suit, since the majority holds that "until the appeal is resolved against the client, there is no legally cognizable cause of action for an attorney's alleged malpractice."

\*12 I would adhere to the discovery rule adopted in *Epstein*, and reverse the trial court's order granting summary judgment because there are unresolved genuine issues of material fact that make that relief inappropriate. *E.g., McAlhany v. Carter*, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015). Further, I concur in the majority's decision to reverse the discovery order without prejudice.

All Citations

--- S.E.2d ----, 2016 WL 3040160

Footnotes

- 1 See *Epstein*, 363 S.C. at 381, 610 S.E.2d at 820 (rejecting the continuous-representation rule and affirming the dismissal of a legal malpractice case based on the expiration of the statute of limitations on the ground the three-year limitations period began to run on the date that the adverse verdict was entered against claimant).
- 2 In a related appeal, this Court (1) affirmed the circuit court's order that entered judgment in favor of Austin for his requested trial-level fees, and (2) remanded the matter to the circuit court to determine what amount of appellate and post-appellate fees should be awarded to Austin. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 750 S.E.2d 78 (2013).
- 3 See, e.g., *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 760 S.E.2d 399 (2014) (citing *Epstein* and affirming the circuit court's ruling that legal malpractice claims were barred by the expiration of the statute of limitations); *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009) (citing *Epstein* and affirming grant of summary judgment in favor of attorneys in legal malpractice action based on the expiration of the statute of limitations).
- 4 "A legal malpractice cause of action is governed by the applicable statute of limitations whether it sounds in tort, contract or fraud." 1 S.C. Jur. *Attorney & Client*, § 69 (Supp. 2016) (citing section 15-3-530 of the South Carolina Code).
- 5 As a general rule, an appeal acts as an automatic stay. However, exceptions to this rule are found in Rule 241(b), in statutes, court rules, and case law. See Rule 241(b), SCACR (providing eleven exceptions to the general rule that are found in statutes, court rules, and case law); Rule 246, SCACR (identifying rules regarding the stay of a sentence in a criminal case); see, e.g., S.C. Code Ann. § 19-9130(A)(1) (2014) ("A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution.").  
Further, after the service of a notice of appeal, any party may move for the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court for an order lifting the automatic stay in cases that involve the general rule. Rule 241(c)(1), SCACR; see *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 138, 742 S.E.2d 867, 868 (2013) (An "action on a settlement may not be taken by the lower court, except with regard to matters not affected by the appeal, while the matter is pending before this Court. The parties must first seek to have the matter remanded to the lower court.").
- 6 See, e.g., *Harris Teeter, Inc. v. Moore & Van Allen, P.L.L.C.*, 390 S.C. 275, 701 S.E.2d 742 (2010) (affirming grant of summary judgment in favor of law firm for legal malpractice action arising out law firm's alleged failure to settle dispute prior to arbitration); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997) (analyzing legal malpractice action arising out of attorney's alleged failure to include the South Carolina Department of Highways and Public Transportation as a defendant in plaintiff's settlement for injuries sustained during a car accident).
- 7 Generally, this will occur when the appellate court issues the remittitur. See *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 137, 742 S.E.2d 867, 868 (2013) ("Pursuant to Rule 205, SCACR, upon the service of a notice of appeal, the appellate [c]ourt has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court.").
- 8 We find additional support for our decision in the analogous civil proceeding of Post-Conviction Relief ("PCR"). Similar to a legal malpractice claimant, a PCR applicant is challenging the effectiveness of his or her trial counsel. Notably, a PCR application must be filed within one year after the entry of a judgment of conviction, or if there is an appeal, "within one

year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27-45(A) (2014).

- 9 In view of our decision, we need not reach Stokes-Craven's contention that equitable doctrines precluded the application of the statute of limitations. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).
- 10 That the statute of limitations in the Post-Conviction Relief Act, S.C. Code Ann. § 17-27-45(a) (2014), contains a specific post-appeal provision only emphasizes the extraordinary nature of the majority's decision to create a special rule here.

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