THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-000092

Stokes-Craven Holding Corp.,
d/b/a Stokes-Craven Ford, ... Appellant,

v.

Scott L. Robinson and Johnson
McKenzie & Robinson, LLC, ... Respondents.

RESPONDENTS' JOINT MEMORANDUM
REGARDING LACK OF APPELLATE JURISDICTION

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Attorneys for Respondent Johnson McKenzie & Robinson, LLC

Scott L. Robinson and Johnson McKenzie & Robinson, LLC ("Respondents"), by and through their counsel, pursuant to this Court's request dated February 6, 2018, for a memorandum on the issue of appealability, file this response requesting that the Court dismiss the appeal filed by Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford ("Appellant"). For reasons discussed in more detail below, dismissal is warranted because this Court lacks appellate jurisdiction over the appeal because the Circuit Court Order challenged is not immediately appealable.

I. BACKGROUND

This legal malpractice action arises from an underlying case involving fraud committed by Appellant, a car dealership. Respondents represented Appellant in the underlying case, which resulted in a jury verdict against Appellant in August 2006. After an appeal, the Supreme Court upheld the verdict. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010).

On August 16, 2018, this lawsuit against Respondents will enter its eighth year. Appellant filed this legal malpractice action in 2010 against Respondents, complaining about their representation in the *Austin* case. On June 4, 2013, the circuit court granted Respondents' motion for summary judgment based on the statute of limitations. Appellant appealed the grant of summary judgment and, on May 25, 2016, the Supreme Court reversed and remanded. *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016).

On remand, the circuit court entered a Scheduling Order Subsequent to the Remittitur (the "Scheduling Order") providing that Appellant was required to "list all experts it intends to use as witnesses at trial" by October 2, 2017. (Scheduling Order, attached hereto as Exhibit 1.) On that date, Appellant's counsel, Andrew K. Epting, Jr., served an expert disclosure that named expert witnesses, ***one of which was himself***. (Plaintiff's Expert Disclosure, attached hereto as Exhibit 2.) On October 4, 2017, Respondents filed a Joint Motion to Exclude Expert Witnesses, or, in the

Alternative, to Disqualify Plaintiff's Counsel and Compel Discovery (the "Motion to Exclude"), arguing, among other things, that it was improper for Mr. Epting to serve as both Appellant's lawyer and its expert witness. (Motion to Exclude, attached hereto as Exhibit 3.)

On Friday, October 13, 2017, the circuit court held a hearing on various outstanding motions, including Respondents' Motion to Exclude. At the hearing, *Mr. Epting stated that* he could not both testify as an expert witness at trial and continue to serve as Appellant's counsel in this matter. (Tr. of Oct. 13, 2017 H'rg at 7:4-7, attached hereto as Exhibit 4.) Mr. Epting argued, however, that he should be permitted to continue to represent Appellant until the time of trial. (*Id.* at 7:4-7.) The Court disagreed, noting that the case was sufficiently close to trial that it was time for Mr. Epting to make a choice whether he was going to be an expert witness or a lawyer. (*Id.* at 17:5-7; 19:23-20:19.)[1] In response to Mr. Epting's request, the Court gave Appellant until Monday, October 16, 2017 to decide which role—expert witness or lawyer—Mr. Epting was going to play. (*Id.* at 21:18-21.)

On October 16, 2017, Mr. Epting sent a letter to the Court informing it that Appellant had elected to have him serve as an expert witness. (Letter from Mr. Epting to Court dated October 16, 2017, attached hereto as Exhibit 5.) In the letter, Mr. Epting again noted that he agreed he could not serve as Appellant's expert witness and trial counsel. (*Id.*) Mr. Epting stated, however, that he "**viewed this as a matter of timing**," and that he believed he should be permitted to continue as Appellant's counsel until trial. (*Id.*) Finally, Mr. Epting argued that, even if he personally were not permitted to continue as Appellant's counsel, another lawyer from his firm should be permitted to do so. (*Id.*)

[1] Under the Scheduling Order, the close of discovery was February 26, 2018 and the trial was to be held not before April 30, 2018.

On October 17, 2017, Robert Ransom, Esq., an attorney who is outside Mr. Epting's law firm, made an appearance on behalf of Appellant. (Notice of Appearance, attached hereto as Exhibit 6.)

On October 19, 2017, the Court held another hearing on the Motion to Exclude. The hearing did not go forward, however, because Mr. Epting insisted on being given ten days' notice of the hearing. (Tr. of Oct. 19, 2017 H'rg at 12:10-11, attached hereto as Exhibit 7.) Nevertheless, at that hearing, the Court clarified its reasoning for requiring Mr. Epting to make his choice now:

> The Court: Mr. Epting, the problem that I see is that, I think, the case is scheduled to be tried what May or June of next year?
>
> Mr. Powell: May.
>
> The Court: In May of next year. And if you were to do all the discovery in this case and like you had envision [sic] prepare the case for trial and then on the eve of trial, you start cogitating, well, I need to testify as a witness. Then we're still six months out because there's another lawyer's going to have to get involved to try the case, so that's why we need to address the issue now.

(*Id.* at 7:23-8:10.)

On November 2, 2017, the Court held a final hearing on the Motion to Exclude. At that hearing, Mr. Epting again confirmed that he agreed that he could not be both Appellant's expert witness and trial counsel. (Tr. of Nov. 2, 2017 H'rg at 16:9-10, attached hereto as Exhibit 8 ("***Judge, I do not believe that I can be an advocate and an expert at trial.***").) Mr. Epting argued, however, that the sole issue was one of "**timing**," and that he should not be required to choose between these two options until a later date. (*Id.* at 16:17; 17:6-10.)

On November 30, 2017, the Court entered its order (the "Order"). (Order, attached hereto as Exhibit 9.) Consistent with Mr. Epting's statements at the various hearings on the Motion to Exclude, the Order stated that, "this dispute, as framed by the Plaintiff on the record, concerns the ***timing*** of withdrawal, that is, ***when*** must the Plaintiff's counsel withdraw as Plaintiff's counsel,

not if he and his firm must withdraw." (*Id.* at 2 (emphases added).) The Order ruled that, based on Mr. Epting's previously announced choice to testify as an expert witness, Mr. Epting and his firm would be required to withdraw as Plaintiff's counsel within five days after entry of the Order. (*Id.* at 9.) The Order, observing that this case was already over seven years old, stated that any further "delay would increase the likelihood that the opportunity for a timely trial is missed." (*Id.*) Further, the Order noted that Appellant had made no effort to show hardship and that, in any event, there was none, particularly considering that another attorney outside of Mr. Epting's firm had already made an appearance in the case. (*Id.* at 8.) Finally, the Order stated that "the Court is mindful of the negative implications and resulting taint to the judicial system and to the public's perception of the judicial system by allowing Plaintiff's counsel to remain as Plaintiff's advocate while also serving as a designated expert witness." (*Id.* at 7.)

On December 11, 2017, Appellant filed a motion for reconsideration. On December 21, 2017, the Court held a hearing on the motion for reconsideration. On January 12, 2018, the Court denied the motion for reconsideration. This appeal followed.

II. ARGUMENT

This Court lacks appellate jurisdiction over the appeal.

"The right to appeal arises from and is controlled by statutory law." *North Carolina Federal Sav. and Loan Ass'n v. Twin States Development Corp.*, 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986). In the absence of a specific statute or rule granting a party the right to appeal, none of which are present here, S.C. Code Ann. § 14-3-330 generally governs the situations in which the right to appeal exists. *See Woodard v. Westvaco Corp.*, 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995) (overruled on other grounds by *Sabb v. South Carolina State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002)).

Under § 14-3-330, a party may appeal four different types of orders: (1) "final order[s] in special proceedings," (2) "interlocutory orders continuing, modifying or refusing injunctions" or refusing the appointment of a receiver (3) "intermediate judgments, orders or decrees involving the merits," (4) "orders affecting substantial rights when such orders in effect determine the action and prevent a judgment from which an appeal may be taken or when the orders discontinue the action." *Crout v. South Carolina Nat'l Bank*, 278 S.C. 120, 124, 293 S.E.2d 422, 424 (1982). The Supreme Court has narrowly construed § 14-3-330 "to serve the underlying policy favoring judicial economy by avoiding piecemeal appeals." *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015) (internal quotation marks omitted); *see also Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 302, 705 S.E.2d 475, 478 (2011).

Here, the Order does not fall within any of the four categories of appealable orders under § 14-3-330:

First, the Order is not a "final order" for purposes of § 14-3-330(3) because it does not "finally dispose of the whole-subject matter . . . of the . . . action, leaving nothing to be done but to enforce . . . what has been determined." *Kriti Ripley, LLC v. Emerald Invs., LLC*, 404 S.C. 367, 379, 746 S.E.2d 26, 32 (2013) (internal quotation marks omitted). Instead, the Order is an interlocutory order. *See Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) ("If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory."). Moreover, this case is a run-of-the mill civil action and does not involve any "special proceeding." Accordingly, the Order is not appealable under § 14-3-330(3).

Second, the Order does not "continue, modify, or refuse an injunction," nor does it deny the appointment of a receiver for purposes of § 14-3-330(4). Thus, the Order is not appealable under § 14-3-330(4).

Third, the Order does not "involv[e] the merits" of the dispute for purposes of § 14-3-330(1) because it does not "finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Knowles v. Standard Sav. & Loan Asso.*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979) (holding that class certification orders do not "involv[e] the merits" for purposes of § 14-3-330(1)). Indeed, the Order pertains to the timing of a lawyer's withdrawal, which plainly does not involve the underlying merits of the dispute at issue here. *See State v. Wilson*, 387 S.C. 597, 601, 693 S.E.2d 923, 925 (2010) (holding that order disqualifying solicitor in criminal matter did not "involv[e] the merits" for purposes of § 14-3-330(1)); *see also Crout*, 278 S.C. at 124, 293 S.E.2d at 424 (holding that denial of motion for continuance does not "involv[e] the merits" for purposes of § 14-3-330(1)). As such, the Order is not appealable under § 14-3-330(1).

Fourth, the Order does not "affect[] a substantial right" that "determines the action and prevents a judgment from which an appeal may be taken" for purposes of § 14-3-330(2)(a).[2] In evaluating this issue, it is important to emphasize that the Order did not disqualify Mr. Epting, but rather, ordered him to withdraw as Appellant's attorney because Appellant chose to use him as an expert witness. Indeed, as noted, ***Mr. Epting agreed*** that he would be required to withdraw because he could not serve as Appellant's expert witness and its lawyer at trial. Thus, as agreed by Appellant's counsel, the issue before the circuit court here was simply a matter of "timing." In

[2] Plainly, §§ 14-3-330(b) and (c) are not implicated here. The Order does not grant or refuse a new trial or strike an Answer or part thereof.

other words, the issue was not whether Mr. Epting would be permitted to be Appellant's trial counsel or not. Rather, the only issue was whether Mr. Epting would be required to withdraw now or at some time in the future.

The Supreme Court has never held that any other similar issue relating to timing affects a substantial right for purposes of § 14-3-330(2). Based on Respondents' research, the only other South Carolina cases that have similar timing issues involve motions for continuance of trial, which the Supreme Court has consistently held are not immediately appealable. *Townsend v. Townsend*, 323 S.C. 309, 313, 474 S.E.2d 424, 427 (1996) (denial of motion for continuance of trial not immediately appealable); *Crout*, 278 S.C. at 124, 293 S.E.2d at 424 (same). Similarly, it is well-settled that orders reflecting the trial court's management of its own docket are not immediately appealable. *Bahn v. Korean Airlines Co.*, 642 F.3d 685, 700 (9th Cir. 2011) ("A district court's case management orders are generally not appealable on an interlocutory basis."). Moreover, the Supreme Court has consistently held that similar pre-trial orders on matters ancillary to the merits do not affect a substantive right. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93-95, 529 S.E.2d 11, 13-14 (2000) (holding that order denying a motion to change venue is not immediately appealable under section 14-3-330(2)); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 77-79, 533 S.E.2d 575, 577-78 (2000) (same with respect to an order denying a motion to bifurcate liability and damages); *Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995) (same with respect to an order denying a motion to approve a settlement agreement). Accordingly, the timing issue at the heart of the Order here does not affect a substantial right.

To be sure, the Supreme Court has held that an order disqualifying counsel is immediately appealable under § 14-3-330(2). *Hagood v. Sommerville*, 363 S.C. 191, 199, 607 S.E.2d 707, 711 (2004). Unlike the situation here, however, in *Hagood*, the lawyer being disqualified did not admit

that he would eventually be unable to serve dual capacities at trial. *Id.*, 607 S.E.2d at 711. Thus, the Supreme Court held that the order disqualifying the attorney fell within the rule that the denial of a particular "mode of trial" can affect a substantial right. *Id.* at 196-98, 607 S.E.2d at 709-10; *see also Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (order referring action for which right to trial by jury applied to master in equity, who lacked power to conduct trial by jury, affects the mode of trial and is thus immediately appealable because it is affects a substantial right).

Here, by contrast, Mr. Epting admits that he would be required to withdraw as counsel ***no later than trial***. Because of this admission, it follows as a matter of logic that the Order could have no impact whatsoever on the mode of trial. In other words, because Mr. Epting admits he could not serve as Appellant's counsel at trial, the timing of his withdrawal—whether it be now or the day before trial—can have no impact on the mode of the trial. Moreover, because Mr. Epting admits he would not be able to serve as Appellant's attorney at trial, the Order in no way impacts Appellant's choice of trial counsel or otherwise prejudices Appellant. By Mr. Epting's own admission, ***the Order*** does not deny Appellant the right to its choice of counsel; rather, ***Appellant's own choice*** to name Mr. Epting as an expert witness affected Appellant's right to choice of counsel. Furthermore, denying Appellant the right to appeal now would not work any injustice because Appellant may choose to appeal the Order after the final judgment in this case is rendered. *Cf.* S.C. Code Ann. § 14-3-330(2)(a) (providing for appeal over order affecting a substantial right that "determines the action" and "prevents a judgment from which an appeal may be taken"). For these reasons, the policy considerations that drove the Supreme Court's decision in *Hagood* simply are not present here.

Finally, the Supreme Court has strictly construed *Hagood* in later cases involving similar issues of attorney disqualification. In *Enersys Del., Inc. v. Hopkins*, the Supreme Court held that

an order denying a motion to disqualify is not immediately appealable. 401 S.C. 615, 618, 738 S.E.2d 478, 480 (2013). And in *State v. Wilson*, the Supreme Court held that an order disqualifying a solicitor is not immediately appealable. 387 S.C. at 601, 693 S.E.2d at 926. Given this narrow construction that the Supreme Court has given *Hagood*, this Court should not extend *Hagood* further than its boundaries allow. Instead, the Court should conclude that the Order does not "affect[] a substantial right" that "determines the action and prevents a judgment from which an appeal may be taken" under § 14-3-330(2).

III. CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction over the appeal. Accordingly, the Court should dismiss the appeal.

[SIGNATURES APPEAR ON FOLLOWING PAGE]

Respectfully submitted,

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February 16, 2018

Scheduling Order

Exhibit 1

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT Civil Action No. 2010-CP-14-457
Stokes-Craven Holding Corp, d/b/a Stokes-Craven Ford, Plaintiff, v. Scott L. Robinson and, Johnson McKenzie & Robinson, LLC, Defendants.	)	**Scheduling Order Subsequent to the Remittitur**

This legal malpractice action was remitted to this Court on June 10, 2016. On October 24, 2016, the Order was filed designating this case as complex and assigned to the Honorable George C. James, Jr. After the Honorable Judge James' election to the South Carolina Supreme Court, an order was filed on April 5, 2017 designating this case as complex and assigned to the Honorable Michael G. Nettles. Now, therefore, the Court orders that the deadlines in this action are as follows:

1. **October 2, 2017**- Plaintiff shall name all experts it intends to use as witnesses at trial;

2. **November 13, 2017**- Defendants shall name all experts they intend to use as witnesses at trial;

3. **February 26, 2018**- Discovery shall be completed.

4. **March 15, 2018**-All motions except: (a) those relating to the admissibility of evidence at trial; and (b) those to compel discovery must be filed on or before this date;

5. **March 30, 2018**- Mediation shall be completed.

6. **April 30, 2018**- This case is not to be called for trial before this date.

This Scheduling Order may be modified upon approval of the parties and the Court.

IT IS SO ORDERED.

The Honorable Michael G. Nettles

8-7, 2017
Florence, South Carolina

Plaintiff's Expert Disclosure

Exhibit 2

STATE OF SOUTH CAROLINA **COUNTY OF CLARENDON**	)	**IN THE COURT OF COMMON PLEAS** **FOR THE THIRD JUDICIAL CIRCUIT**
STOKES-CRAVEN HOLDING CORP d/b/a STOKES-CRAVEN FORD, Plaintiff, vs. SCOTT L. ROBINSON and JOHNSON, McKENZIE & ROBINSON, LLC, Defendants.	)	CASE NO. 2010-CP-14-457 **PLAINTIFF'S EXPERT DISCLOSURE**

TO: Susan T. Wall, Esquire and Warren Powell, Esquire, Attorneys for Defendants Scott Robinson and Johnson, McKenzie & Robinson, LLC

Pursuant to the Scheduling Order in this matter, the Plaintiff, Stokes-Craven Holding Corp d/b/a Stokes-Craven Ford, by and through undersigned counsel, names the following witnesses who may offer opinion testimony and other testimony based on scientific, technical or other specialized knowledge.

1. Steve Luoma, CPA
   McGregor & Company
   3830 Forest Drive
   Columbia, SC 29204
   Telephone: (803) 787-0003

2. John Flack
   2601 Paxville Highway
   Manning, SC 29102
   Telephone: (803) 433-5400

3. Andrew K. Epting, Jr.
   46 A State Street
   Charleston, SC 29401
   Telephone: (843) 377-1871

4. In addition, although not retained experts, Plaintiff reserves the right to elicit opinions from any of the witnesses named in any interrogatory responses of any party or otherwise to the extent that they are an expert in their field relative to the issues that are the subject of this litigation.

5. Plaintiff also reserves the right to elicit opinions from expert witnesses named or retained by any party to this litigation.

6. To the extent certain witnesses may qualify as experts by virtue of skill, training, or experience, they may be called upon to render opinions, and Plaintiff reserves the right to elicit opinion testimony from fact witnesses who have scientific, technical, or other specialized knowledge that will assist the trier of fact in understanding the evidence or issues in this matter.

7. Furthermore, discovery is ongoing and Plaintiff reserves the right to amend/supplement this disclosure as may be revealed during discovery.

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ATTORNEYS FOR PLAINTIFF

DATED: October 02 2017
Charleston, S.C.

CERTIFICATE 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 accordance with the applicable Court Rules by electronic transmission only, 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 2nd day of October 2017
Charleston, South Carolina

Motion to Exclude

Exhibit 3

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT
STOKES-CRAVEN HOLDING CORP. D/B/A STOKES-CRAVEN FORD, Plaintiff, vs. SCOTT L. ROBINSON AND JOHNSON MCKENZIE & ROBINSON, LLC, Defendants.	)	C/A No.: 2010-CP-14-457 **DEFENDANTS' JOINT MOTION TO EXCLUDE EXPERT WITNESSES, OR, IN THE ALTERNATIVE, TO DISQUALIFY PLAINTIFF'S COUNSEL AND COMPEL DISCOVERY**

Defendants Scott L. Robinson and Johnson McKenzie & Robinson, LLC (together, "Defendants"), by and through undersigned counsel, hereby move the Court, pursuant to Rule 37(b)(2), SCRCP, for an Order excluding any experts Plaintiff may attempt to call at trial, or in the alternative, to disqualify Plaintiff's counsel and compel discovery.

Motion to Exclude Expert Witnesses

Plaintiff has failed to properly disclose experts in accordance with this Court's Scheduling Order, and under the Rules of Court. This Court issued its Scheduling Order requiring Plaintiff to name "all experts it intends to use as witnesses at trial" by October 2, 2017. (Scheduling Order, Exhibit "A"). Plaintiff's Expert Disclosure is in clear violation of this Court's Order and in violation of the rules of court and the purpose behind the rules.

Plaintiff's disclosure lists three persons as witnesses who "may be" experts without stating the area of possible expertise or the opinions held. (Plaintiff's Expert Disclosure, Exhibit "B"). Plaintiff was required by this Court's Scheduling Order, and under its duty to update interrogatory and request for production responses to provide information concerning any

proposed experts' name and qualifications and opinions, as well as producing a copy of each experts' entire file, as requested in Defendants' written discovery requests.

The purpose of a court ordered disclosure is to apprise all counsel of the names of all expert witnesses who have been retained by a party to testify at trial and, if not revealed through prior written answers to interrogatories and requests for production, the area of testimony to be elicited and the documents forming the basis for all opinions. In this case, the interrogatories and requests for production pertinent to Plaintiff's intended experts were served upon Plaintiff on October 20, 2010.

> 5. List the name(s), address(es) and telephone numbers of any expert witness whom YOU propose to use as a witness at the trial of this case, describe his/her qualifications as an expert, state the subject matter upon which he/she is expected to testify, state the substance of the facts and opinions to which he/she is expected to testify, give a summary of the grounds for each of his/her opinions; and the amount and manner in which he/she is being compensated.

Defendant Scott L. Robinson's First Set of Interrogatories to Plaintiff, number 5. See also, Defendants Robinson's Requests for Production, October 20, 2010, numbers 7 and 8. (Interrogatories and Requests for Production, Exhibit "C").

Plaintiff has the continuing duty to update its responses under Rule 26(e), SCRCP. The three names just advanced were never previously listed as experts by Plaintiff nor was identifying information provided by way of update. Now, in responding to this Court's Order, Plaintiff intimates, but does not state, that these three individuals "may be" experts without revealing their opinions or areas of expertise, if any. Such gamesmanship is prohibited: the point of discovery is to allow the parties the information necessary to prepare for trial.

The Plaintiff's disclosure further obfuscates by stating the Plaintiff reserves the right to elicit opinions from unnamed persons who are not retained as experts but who "may be" experts and that Plaintiff reserves the right to elicit opinions from experts named or retained by "any

party". Plaintiff does not provide any names or other identifying information as to these so called possible experts or what party Plaintiff is referring to. The point of this Court's Order was to require each party to separately provide required information by a given date; the purpose of the Order was not to allow Plaintiff to hide the required information from the parties and the Court.

Perhaps most egregiously, **Plaintiff's counsel attempts to name himself, Andrew K. Epting, Jr., as an expert witness**, though he provides no information on his qualifications or proposed testimony. This is wholly improper, as the Rules of Professional Conduct, with minor exceptions not remotely applicable here, prohibit an attorney from serving as both an advocate and "necessary fact witness" because of the potential for jury confusion, prejudice to Defendants, conflicts of interest with the client and for numerous other reasons. See, e.g., RPC 3.7, Rule 407, SCACR. Here, Plaintiff's counsel, who is not a "necessary fact witness", is asking the Court to allow him to present himself to the jury **as an expert witness**, as well as Plaintiff's advocate which is clearly not allowed and wholly prejudicial.

Plaintiff's bad faith in serving an expert disclosure that does nothing to advise the parties or this Court as to information required to prepare for trial is the basis to exclude Plaintiff's newly named expert witnesses. Because the Court clearly has limited the dates upon which a party must act under the Scheduling Order, Plaintiff should be precluded from attempting to amend its disclosure and add new names. Defendants therefore request that Plaintiff be precluded from naming or calling any expert at trial.

Alternative Motion to Disqualify Counsel and Compel Discovery

In the alternative, if Mr. Epting is to be permitted to serve as an expert witness in this case (and he should not be for the reasons set forth above and as will be fully briefed at time of hearing), he must be disqualified as counsel. Absent truly exceptional circumstances not present

here, the Rules of Professional Conduct do not allow an attorney to serve as both an advocate and as a necessary fact witness in a case, much less do they permit an attorney to present himself to the jury as both the attorney for Plaintiff and as an expert witness for Plaintiff's case. Therefore, if Mr. Epting is allowed to stand on his expert designation of October 2, 2017, he should be immediately disqualified from his role as attorney for the Plaintiff. Moreover, as this choice was of Plaintiff's own making, no extensions of time should be provided to find new counsel.

In addition, because testifying experts have no attorney-client privilege or work product protection, if Mr. Epting is allowed to serve as an expert witness, he must be compelled to produce to Defendants his entire file on this matter, including but not limited to all correspondence with Plaintiff and its agents, all notes, drafts, research, etc. Defendants previously requested the file materials of all experts by Request for Production dated October 20, 2010. To date, no file materials from Mr. Epting have been produced.

* * * * *

WHEREFORE, Defendants respectfully request that Plaintiff be precluded from naming or calling any expert witnesses at trial. In the alternative, Defendants respectfully requests that, if the Court allows Mr. Epting to serve as an expert witness for Plaintiff, the Court order that (1) Mr. Epting is immediately disqualified from serving as counsel for Plaintiff in this case and (2) Mr. Epting is compelled to produce his entire file concerning this case to Defendants.

[SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE]

Respectfully submitted,

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October 4, 2017

Charleston, South Carolina

Excerpts – Transcript
October 13, 2017 Hearing

Exhibit 4

State of South Carolina	)	Court of Common Pleas
	)	Third Judicial Circuit
County of Clarendon	)	Case No. 2010-CP-14-00457
	)	
Stokes-Craven Holding Corp.,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Transcript of Record
	)	
	)	
Scott L. Robinson, et. al.,	)	
	)	
Defendants.	)	
	)	

October 13, 2017
Florence, South Carolina

B E F O R E:

The Honorable Michael G. Nettles, Judge

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Krystal J. Smith
Circuit Court Reporter

MR. EPTING: Well, I'm not sure, Judge, that I -- well, it doesn't matter if you and I agree. You're wearing the robe. I think there's a place, Judge, that I can continue in this case and try to advance this case. And if I'm called upon to testify, then I'll have to step down. And in that way, Judge, I understand the predicament. I've made arrangements for some other lawyer, who will be filing an appearance next week --

THE COURT: All right.

MR. EPTING: -- in case that is what happens.

THE COURT: Okay. What do you have to say about that, Ms. Wall?

MS. WALL: Well, Your Honor, what I have to say about that is, of course, the Court is absolutely right and what I was prepared to argue with the Court this morning or present to on the record this morning was the case law that is crystal clear, including South Carolina case law.

First of all, we look at Rule 3.7 and then we go from there and we look at the case law in South Carolina interpreting Rule 3.7. And under Rule 3.7, the only time an attorney -- and Mr. Epting has been the attorney now almost 7 years that we've had this case.

THE COURT: I think -- I think I kind of agree with you on that. I think without looking at the law and looking at particular rules, the general proposition of law is you can't

because we were placed in that very situation --

THE COURT: Well, we --

MS. WALL: -- where we saw his name and he's still, as of this moment, the lawyer for the plaintiff.

THE COURT: Right. Well, Mr. Epting, I do think that it's time to fish or cut bait. Are you going to be a witness or a lawyer?

MR. EPTING: I --

THE COURT: And I think you -- I really don't think that Ms. Wall or I can make that determination. If you're going to be a witness in it, you can -- and if your party indicates they've got -- they feel like they need to call you, then that can happen.

MR. EPTING: Judge, put yourself for a moment in my position. I agree it's my call. I'm not sure that I would be a witness because I'm not sure exactly how they're going to defend this case. But the position that -- but the position I'm put in with this interrogatory is, if I don't disclose myself, then there's going to be a motion to exclude me because I didn't.

And what my thinking was, Judge -- and I'll be happy to accept whatever guidance you want to offer me. What is essentially not discovered in this case is financial. I know you want to get this case off your docket. There's a way and I think I can assist with this and make this happen more

choice, but he can't be wearing two hats as we proceed down the road --

THE COURT: All right.

MR. POWELL: -- of discovery in this case.

THE COURT: All right. Well, I think that we're -- is precipice the right word? We're right there at it. So what we need to do is you need to make a determination about that and we need to do it posthaste, I imagine.

MR. POWELL: I might add, Your Honor -- excuse me. In response to Mr. Epting's sage remarks about he's not knowing or can't make a decision because he's not knowing how the defendant is going to defend the case, well, listen. The way it works is the plaintiff -- you know, the plaintiff names their experts first and we respond to that.

THE COURT: Right.

MR. POWELL: I mean it isn't the other way around.

THE COURT: All right. Mr. Epting, have you discussed this with your clients about -- about their waiving of privilege and everything else?

MR. EPTING: I have discussed with them, Judge, that I think I have to be a witness in some aspects of this case, yes.

THE COURT: Okay. Well, okay. Well, then -- then I'm going to -- since that has already been contemplated, you've listed your name as a prospective witness, I'm going to ask

you here today to elect do you want to be a lawyer or do you want to be an expert, and I think that is -- that is indeed what we're going to have to do because we're going to have to proceed forward on the discovery and -- and move in that direction.

I anticipate -- I don't know anything about this case, but just the feel that I have for it, all I've had is just a couple of motions, but I bet you all of the information that you are going to be testifying to could be done indirectly, I would think, but I don't know the whole picture. I wasn't there. I didn't live it, but you seem to think that it is necessary that you do that and you've named yourself as a witness.

So I'm going to call upon you now to decide whether you want to be a lawyer or a witness, and then I think if you elect to be a witness as opposed to a lawyer, then I think we all probably ought to hold the rest of the stuff in abeyance and then let the new lawyer argue the substantive motions that still remain before the Court now.

MR. EPTING: Judge, could I ask that you give me until Monday? I have met with my clients. I've told them what I thought needed to happen, and I want to make sure that we are together on the scope because I have no intention, Judge, of offering any testimony about the underlying trial and the underlying malpractice. I think my testimony has to relate

to --

THE COURT: To damages.

MR. EPTING: Well, it's not even to damages, Judge. It's -- it's what happened after the verdict, all the decisions that were made about --

THE COURT: Okay. That very well might be imperative for you to do that.

MR. EPTING: Right. Because I don't think the client, Judge, has that kind of knowledge.

THE COURT: Okay. All right. I'll tell you one thing that --

MR. EPTING: And I just --

THE COURT: I'll tell you one thing that I am going to do is I'm going to ask that you supplement this response right here and say in great detail what Luoma is going to say and what Flack is going to say and what you are going to say.

MR. EPTING: All right, sir.

THE COURT: And then I'm also going to -- going to order that by 12:00 Monday that there be a decision and you inform them by email and inform me as to which direction you're taking.

MR. EPTING: All right, sir.

THE COURT: All right. And what else do we have to tend to? I think there's some discovery issues about responses to particularly documentary-type things that there's been --

Letter from Mr. Epting to Court dated October 16, 2017

Exhibit 5

ANDREW K. EPTING, JR., LLC
ATTORNEYS AT LAW
ANDREW K. EPTING, JR. · AKE@EPTING-LAW.COM
JAAN G. RANNIK · JGR@EPTING-LAW.COM

October 16, 2017

VIA EMAIL mnettlessc@sccourts.org

The Honorable Michael G. Nettles
Florence City-County Complex
180 N. Irby Street, MSC-ZZ
Florence, SC 29501

RE: *Stokes-Craven v. Robinson et al.*
Case No.: 2010-CP-14-457

Dear Judge Nettles,

Your Honor instructed me to inform the Court by "high noon" today whether I would elect to be counsel at trial or a witness in this case. To answer this Court's question, I would be a witness.

Rule 3.7 of the South Carolina Rules of Professional Conduct is the basis for the Defendants' motion. That rule states that "[a] lawyer shall not act as advocate *at a trial* in which the lawyer is likely to be a necessary witness," unless one of the listed exceptions applies. Rule 3.7(a) (emphasis added). The meaning of that rule is clear: a lawyer cannot serve as both advocate and witness *at trial*, in order to avoid confusing jurors. *See, e.g.*, *Hagood v. Sommerville*, 362 S.C. 191, 199 (2005) (noting that a lawyer's employee can testify without violating Rule 3.7 because "[j]urors are not likely to be confused by a lawyer's employee testifying as a witness for a client while the lawyer serves as the client's advocate")[1]; *Brooks v. S.C. Comm'n on Indigent Defense*, 419 S.C. 319, 324 (2017) (affirming the trial court's disqualification of an attorney where "there may be confusion as to whether statements made by [Appellant] as advocate witness would be taken as proof as a fact witness or as an analysis of proof as an attorney"); *see also* Comments to Rule 3.7 ("A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear

[1] The *Hagood* court also held that the disqualification of an attorney was immediately appealable as it affected a substantial right of the client. 362 S.C. at 197–98.

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whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.").

I expressed at the hearing that I viewed this as a matter of timing. If the Court wants my deposition to be taken sooner rather than later, I will cooperate, but I also want to ensure a smooth transition. As Comment 4 to Rule 3.7 notes, "due regard must be given to the effect of disqualification on the lawyer's client."

Defendants did not seek to disqualify my firm if I were to serve as a witness, but the proposed Order Defendants submitted to this Court suggests this. As Defendants should be aware, Rule 3.7(b) states that "[a] lawyer *may* act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness" (emphasis added), unless precluded by another rule. Accordingly, even if I were to be a witness, my firm would not be disqualified. The Rule's aim is to protect a party's choice of counsel and ensure adequate representation.

Stokes-Craven will, by the end of the day today, respond to the proposed Order submitted by Defendants.

Additionally, as instructed by the Court, Stokes-Craven has served an updated interrogatory response on Defendants prior to submitting this letter to the Court.

With thanks and kindest regards,

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr.
AKE/JGR

Cc: Susan Wall, Esquire
Warren Powell, Esquire

Notice of Appearance

Exhibit 6

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2010CP1400457

Official File Stamp:	10-17-2017 11:37:35 AM
Court:	CIRCUIT COURT
	Common Pleas
	Clarendon
Case Caption:	Stokes Craven Holding Corp , plaintiff, et al VS Scott L. Robinson , defendant, et al
Event(s):	
Notice/Notice of Appearance	**Filed by or on behalf of:**
Robert B. Ransom	

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Susan Taylor Wall for Scott L. Robinson

Warren C. Powell, Jr. for Scott L. Robinson et al

Andrew K. Epting, Jr. for Stokes Craven Holding Corp et al

Michelle Nicole Endemann for Stokes Craven Holding Corp

Jaan Gunnar Rannik for Stokes Craven Holding Corp et al

Henry Wilkins Frampton, IV for Scott L. Robinson

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Amanda C Williams for Scott L. Robinson

Excerpts – Transcript
October 19, 2017 Hearing

Exhibit 7

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	2010-CP-14-00457
	)	
	)	
	)	
	)	
Stokes-Craven Holding Corporation	)	
D/B/A Stokes-Craven Ford	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Scott L. Robinson and Johnson	)	
McKenzie and Robinson, LLC	)	
DEFENDANT	)	October 19, 2017
		Florence, South Carolina

B E F O R E:

THE HONORABLE MICHAEL G. NETTLES, JUDGE.

A P P E A R A N C E S:

ANDREW K. EPTING, ESQ.
JAAN G. RANNIK, ESQ.
Attorney for the Plaintiffs

SUSAN T. WALL, ESQ.
WARREN C. POWELL, ESQ.
Attorney for the Defendants

KESHIA REED
Official Court Reporter

not interlocutory. It's a matter of right.

THE COURT: I was asking. I wasn't wanting to argue about it. I was just asking because you knew and I didn't, but apparently it's something and I think I was right in that you need put it on the record.

MR. EPTING: Judge, in light of this discussion and perhaps there being some uncertainty in your mind about what we -- where we are in what you -- well, I'll leave it at that. If there's any uncertainty about this, yes, Judge, especially in light of this conversation, I would like ten days notice.

THE COURT: Okay.

MR. EPTING: And I will appear and we can put every bit of this on the record and then we'll make certain we're all on the same page.

THE COURT: All right. Mr. Powell, what do you have to say about this whole situation?

MR. POWELL: Your Honor, the reason that Mr. Epting's argument the plan he would set out to conduct this is absolutely in error is that were the law, were the courts to operate as he suggest, then he would continue on I take it as plaintiff's counsel and then at some unknown time a week before trial, at the pretrial, during the -- in the middle of the case decide to put himself on the stand and another lawyer take it from there.

MR. EPTING: I'm sorry, Judge, I cut you off.

THE COURT: I say what do you have to say about that?

MR. EPTING: First thing, Judge, I don't think I ever said that I was going to be an expert witness. I listed myself as an expert witness in an abundance of precaution and I said on the record and I repeatedly said that these are the issues that I might be called upon to testify to. And since there things that I did and actions that I took, I believe that they weren't subject to expert testimony, but I listed myself as an expert witness due to an abundance of precaution ---

THE COURT: Well, see Mr. Epting ---

MR. EPTING: I been characterized as an expert witness.

THE COURT: Mr. Epting, see the problem ---

MR. EPTING: I don't think that's true. If I list myself as a potential expert witness, yes. Why? For the reason that had I not and at trial someone said, well, you're testifying as an expert witness. You can't do that because you didn't list your yourself as a witness, so that's the only reason my name is on there.

THE COURT: Mr. Epting, the problem that I see is that, I think, this case is scheduled to be tried what May or June of next year?

MR. POWELL: May.

THE COURT: In May of next year. And if you were to do all the discovery in this case and like you had envision prepare the case for trial and then on the eve of trial, you start cogitating, well, I need to testify as a witness. Then we're still six months out because there's another lawyer's going to have to get involved to try the case, so that's why we need to address the issue now. And that's why I ask you to make a determination as to whether or not you were going to be an expert. And I said you needed to answer that by high noon this past Monday and your response was, yes, I'm going to be an expert or yes I'm listing myself as an expert.

MR. EPTING: Judge, what my response says is Rule 3.7 only has to do with me if I testify and disqualify myself. Rule 3.7 doesn't apply to the preparation of a case by a lawyer who may be a witness, only to a lawyer who has testified because the worry of the -- the concern of the rule is that if a lawyer can serve at trial as a lawyer and a witness, a jury will get confused. So Rule 3.7 doesn't have a thing to do with this period of discovery coming up to trial.

Judge, I want to go back to your point because it's exactly why I reached out to Mr. Ranson. I did not want to put the Court in the position that if I were to

Excerpts – Transcript
November 2, 2017 Hearing

Exhibit 8

State of South Carolina	)	Court of Common Pleas
	)	Third Judicial Circuit
County of Clarendon	)	Case No. 2010-CP-14-00457
	)	
Stokes-Craven Holding Corp.,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Transcript of Record
	)	
	)	
Scott L. Robinson, et. al.,	)	
	)	
Defendants.	)	
	)	

November 2, 2017
Florence, South Carolina

B E F O R E:

The Honorable Michael G. Nettles, Judge

A P P E A R A N C E S:

Andrew K. Epting, Jr., Esquire
Jaan Rannik, Esquire
Attorneys for the Plaintiff

Warren C. Powell, Jr., Esquire
Susan Wall, Esquire - via telephone
Attorneys for the Defendants

Krystal J. Smith
Circuit Court Reporter

problem if he withdraws himself as an expert witness, but I don't anticipate that to be the case.

MR. POWELL: Right.

THE COURT: What do you think about -- let me ask Mr. Epting what he has -- you know, we've sort of been through all of -- all of this. We know what the issues are. And is your position still that of wanting to be an advocate and an expert?

MR. EPTING: Judge, I do not believe that I can be an advocate and an expert at trial. The whole, in my estimation, misunderstanding is they are confusing all of these issues with the role as expert or as witness and as lawyer at the trial, and we're not there. And the rule makes that clear and that's where I would like to start with, Your Honor.

What I would ask this Court, Judge -- so if you think of this as a question of timing, you entered an order, a scheduling order, that said name people who may be experts in the trial of this case. I think you would agree with me, Judge, if I had any idea that I might be testifying as an expert that I should list myself. Isn't that the reasonable thing to do?

THE COURT: It is. But if you intend on doing that, we need to address the problems that it's going to present when it happens, and we can't wait until the day before trial to

do that.

MR. EPTING: And, Judge, just as an aside, because I am losing the public relations war with this Court. I see that. But as an aside, everything I have done I believe you would say was extremely professional and considerate of this Court because, when I started thinking that I may have to testify, I went out and started interviewing lawyers just so that when the appropriate time came, Judge, for me to step down, this Court's scheduling would not be disrupted and I could move out normally.

And so that's how I came to Mr. Rob Ransom. That was not an easy thing, Judge. So many people are disqualified because they're lawyers in this area. And so it took quite some time and I alluded to the problem, Judge, as early as our first hearing with you in July, but at all times I've understood the rule and still want to have a discussion with you about the rule and the way the rule works because it only concerns the time of trial.

And with that, Judge, let me just pass up to you --

THE COURT: While you're looking at that, what do you think about the fact that we've got a lawyer who's already filed a notice of appearance and, as it stands now, he's the lawyer, isn't he? Or he's at least an attorney of record.

MR. EPTING: He certainly, Judge, is an attorney of record and here's what I think of that. I believed pretty

Order

Exhibit 9

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	)	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT Civil Action No. 2010-CP-14-457
Stokes-Craven Holding Corp, d/b/a Stokes-Craven Ford, Plaintiff, vs. Scott L. Robinson and, Johnson McKenzie & Robinson, LLC, Defendants.	)	**ORDER**

Defendants' discovery and scheduling order related motions came before this Court for hearings, after due notice, on October 13, 2017 in Florence County; on October 17, 2017 via telephone conference; on October 19, 2017 in Florence County; and, on November 2, 2017 in Florence County. Participating at each hearing for the Plaintiff were Andrew K. Epting, Jr., Esquire, and Jaan G. Rannik, Esquire; for Defendant Scott L. Robinson, Susan Taylor Wall, Esquire; and for Defendant Johnson, McKenzie & Robinson, LLC, (hereafter "JMR") Warren C. Powell, Jr., Esquire.

This lawsuit has been pending since August 2010. The current matter in dispute began with the Plaintiff's response to the Court's scheduling order's October 2, 2017 deadline to respond to the following: "Plaintiff shall name all experts it intends to use as witnesses at trial". The Plaintiff responded by naming its counsel of record, Andrew K. Epting, Jr., as an expert witness. The Plaintiff has not withdrawn or altered this response notwithstanding argument of counsel suggesting otherwise and despite this Court's multiple invitations to do so. In response, Defendants filed a Joint Motion to Exclude Expert Witness, or, in the Alternative, to Disqualify Plaintiff's Counsel and Compel

Discovery. After several hearings, this dispute, as framed by the Plaintiff on the record, concerns the timing of the withdrawal, that is, when must the Plaintiff's counsel withdraw as Plaintiff's counsel, not if he and his firm must withdraw.

By way of background, the Court's Scheduling Order required Plaintiff to disclose all experts it intended to call at trial by October 2, 2017. On that date, Plaintiff listed 3 names, including the name of Plaintiff's counsel of record, Andrew K. Epting, Jr., as stated above. As a result, Defendants filed Joint Motions described above and the Court set a hearing date for October 13, 2017. In response to the Court's inquiries at the hearing on October 13 as to Plaintiff's complete list of experts, Plaintiff's counsel responded on the record that the complete list of expert witnesses Plaintiff intended to call at trial was follows:

1. Steve Luoma, CPA
   McGregor & Company
   3830 Forest Dr.
   Columbia SC 29204
   803-787-0003

2. John Flack
   2601 Paxville Hwy.
   Manning SC 29102
   803-433-5400

3. Andrew K. Epting, Jr.
   46-A State St.
   Charleston SC 29401
   843-377-1871

4. Ronald L. Richter, Jr., Esquire
   Bland & Richter, LLP
   18 Broad Street
   Charleston SC 29401
   803-256-9664

This list, therefore, is the definitive list of Plaintiff's experts. Plaintiff's counsel requested until Monday, October 16, 2017 to confirm that Plaintiff would continue to name Mr. Epting as an expert witness. The Court granted the request, allowing Plaintiff until October 16, 2017 to definitively advise the Court as to Mr. Epting's status as an expert witness for Plaintiff in this case.

At the October 13 hearing, and after taking into consideration the arguments of counsel, submittals by way of memoranda, case law, the Rules of Professional Conduct and the Rules of Civil Procedure, this Court advised Plaintiff that its counsel, Mr. Epting, could serve either as an expert witness or as counsel for Plaintiff, but could not do both. Plaintiff's counsel represented to the Court that in anticipation of the need to withdraw as Plaintiff's counsel, he had been in touch with another lawyer to serve as Plaintiff's counsel in this case.

On Monday, October 16, 2017, the Plaintiff supplemented its answers to Defendant JMR's First Set of Interrogatories and, again, named its attorney (Epting) as an expert witness, in response to "... list the name and addresses of any and all expert witnesses whom you propose to use as a witness at the trial of this case." Plaintiff's counsel's October 16, 2017 letter to the Court stated, "Your Honor instructed me to inform the Court by "high noon" today whether I would elect to be counsel at trial or a witness in this case. To answer this Court's question, I would be a witness." Further in Mr. Epting's October 16, 2017 letter he states, "I expressed at the hearing that I viewed this as a matter of timing."

The Plaintiff attempted in this answer to interrogatories dated October 16 to add an additional expert witness, contrary to counsel's representation to the Court on October 13, 2017 that Plaintiff's experts would come from the four individuals listed at the hearing.

The listing of this additional witness is untimely as it is after the scheduling order deadline of October 2, 2017. Plaintiff also filed objections to the proposed order submitted by Defendants and submitted a separate proposed order wherein, *inter alia*, he argued that another lawyer in Mr. Epting's law firm could continue to act as Plaintiff's counsel. As the Plaintiff's counsel stated, he had been in touch with another attorney, and a notice of appearance of counsel for the Plaintiff was in fact filed on October 17, 2017 by Robert B. Ransom, Esquire, an attorney in Columbia not practicing with Mr. Epting's law firm. Mr. Ransom is, as the Plaintiff acknowledges, attorney of record for the Plaintiff.

Thereafter, on Tuesday, October 17, 2017, this Court held a conference call with all counsel during which the Court again stated its opinion, subject to being persuaded otherwise, that, given Plaintiff's decision to continue to list Mr. Epting as an expert witness, it would not be appropriate for Mr. Epting to serve in both capacities, that is, as an expert witness for the Plaintiff and as Plaintiff's counsel and that, given the Plaintiff's reaffirmed decision to designate Mr. Epting as an expert witness, Mr. Epting and his firm must now withdraw as the Plaintiff's counsel. The Court further stated that Plaintiff would be given the opportunity to persuade the Court otherwise. The Court scheduled a hearing for October 19, 2017, to provide Plaintiff another opportunity to fully set forth its position.

On Thursday, October 19, 2017, a hearing was held in the Florence County Courthouse on Defendants' Joint Motion with Attorneys Epting and Wall participating by telephone and Attorney Powell participating in person. Plaintiff's counsel then announced during the hearing that he insisted on 10 days' notice before a hearing concluding the issue could be held. The Court thus continued the hearing until November 2, 2017 at 11:00 am in the Florence County Courthouse.

On November 2, 2017, all parties, through their counsel, appeared and were heard on the record. Plaintiff's counsel conceded that he did not believe he could be an advocate and an expert at trial. Despite argument that Mr. Epting would withdraw when he concluded it was time to do so, Plaintiff's counsel stated when he used the term "appropriate time" for his withdrawal he meant the time the Court thought would serve to move this case forward and that he was not suggesting that Plaintiff's counsel would be in control of that decision. Plaintiff's counsel, however, sought the Court's leave for him to stay in his dual capacity until it "appeared" to be time to withdraw. The Court asked Plaintiff's counsel if he had a suggestion as to when the appropriate time would be and Mr. Epting declined to answer, "in terms of time." In fact, it is for the Court to determine the appropriate time for withdrawal and the trial court is vested with broad discretion to order the timing of such withdrawal. 81 Am.Jur. 2d Witnesses, Sec. 262.

Rule 3.7, RCP, Rule 407, SCACR (hereafter "Rule 3.7") states that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness. Plaintiff contends Mr. Epting is a necessary witness for the Plaintiff in this action. Although the Rule then cites several exceptions, which under narrow circumstances would allow an advocate to testify, none apply in this case.

The Plaintiff asserts in its supplemental answers to Defendant's interrogatories that Mr. Epting's expected testimony as expert witness is: "...as to those matters related to the plaintiff Austin's efforts to collect interest and fees, close the business, and decisions made and actions taken by Stokes-Craven following the Supreme Court's decision in *Austin v. Stokes-Craven* up to the resolution of the Austin matter in order to protect Stokes-Craven's interest." Plaintiff offers no affidavit or argument that this expected testimony involves

uncontested issues in this litigation. (*See*, Rule 3.7(a)(1)). Rather, it appears from the Plaintiff's description of the anticipated expert testimony of Mr. Epting that the issues presented relate to post verdict damages and the handling of appeals, neither of which can reasonably be termed uncontested issues in this case. Accordingly, even as a fact witness, neither Mr. Epting nor his firm could continue as counsel for the Plaintiff under the Rule 37 (a)(1) exception.

Further, it may be argued that Rule 3.7, SCRCP has no application to the facts of this case as that rule does not address "expert witnesses." Defendants point out that Rule 3.7 applies to necessary witnesses and that an expert witness is not, by definition, a necessary witness. Taking this line of argument, the Court recognizes additional reasons why an advocate cannot also serve as an expert witness, which roles are inconsistent. These reasons include the concern that an expert witness must not hold a fee agreement that is tied to the outcome of the case in which he/she is testifying to avoid an impetus to lie or bend testimony in order to increase the chances of earning a fee. In this case, Mr. Epting has admitted that he/his firm has a contingency payment agreement with Plaintiff. In addition, while an attorney for a party can and must invoke the protections afforded by the attorney-client privilege and has the right to assert the work product doctrine, an expert witness has no such ability or protection. The implications to the maintenance of these protections for the benefit of a client when an attorney takes on a dual role are troubling.

In addition, it is clear under the authorities that in this case, the Defendants have proper objection to such a dual role continuing because of the obvious prejudice to Defendants if the Court were to allow such activity. As an advocate, Plaintiff's counsel has a role in the litigation that is not compatible with the role of an expert witness. An

advocate's role is to zealously state his client's position both in pretrial proceedings and at trial; an expert witness has no client and no agenda to pursue, instead, an expert is tasked with providing his objective opinions based on the facts provided to him and his specialized knowledge.

This Court is also mindful of the negative implications and resulting taint to the judicial system and to the public's perception of the judicial system by allowing Plaintiff's counsel to remain as Plaintiff's advocate while also serving as a designated expert witness. The dignity of the judicial system and of this Court as well as the public's interest in fair, open and appropriate proceedings further compels the Court to find that Plaintiff's counsel and his law firm must withdraw at this time from continuing to serve as Plaintiff's counsel in this case. Allowing Mr. Epting to serve in the dual capacity would be improper and prejudicial.

It is appropriate to consider the hardship, if any, which the Plaintiff might suffer as a result of Mr. Epting's pretrial withdrawal from this case as counsel for the Plaintiff. At the outset, the Plaintiff certainly considered and made the choice between Mr. Epting serving as Plaintiff's advocate/counsel or as an expert witness as evidenced by its letter and discovery responses of October 2, 2017 and October 16, 2017 and as reiterated at the hearings. Plaintiff's own decision outweighs any harm it might sustain by Mr. Epting and his firm's withdrawal from the suit as advocate. In addition, an independent attorney not affiliated with Mr. Epting's law firm has entered an appearance, the same being solicited by Mr. Epting personally. Therefore, the Plaintiff will not be without counsel in any event. Mr. Epting argues he requires time to confer with the Plaintiff's new attorney in order to provide him information that Mr. Epting perceives he will need and for that reason seeks

the Court's delay of his withdrawal. The Plaintiff, however, offers no reason why Mr. Epting, as expert witness, cannot provide the same data and information to the Plaintiff's new attorney in any less efficient manner than if Mr. Epting continued as counsel of record. Finally, Plaintiff has submitted no affidavits nor advanced any argument setting forth any "substantial hardship" it may suffer by Mr. Epting's assumption of the sole role of expert witness as of November 2017 with trial anticipated in the Spring of 2018. Having demonstrated no "substantial hardship", neither Mr. Epting nor his firm may continue in the dual role of advocate and expert or fact witness.

Mr. Epting's law firm must also withdraw as counsel. It is uncontested that the Plaintiff has a contingency fee contract with Mr. Epting and his firm. Expert witnesses in most jurisdictions are prohibited from having an economic interest in the outcome of the lawsuit. Restatement of the Law, Third, The Law Governing Lawyers, §117; Person v. Association of the Bar of the City of New York, 554 F.2d 534, 538 (2d Cir.) (Contingent expert witness fee is void), cert. denied, 434 U.S. 924, 98 S. Ct. 403, 54 L.Ed.2d 282 (1977); Belfonte v. Miller, 243 A.2d 150 (Pa. Super. Ct. 1968) (same); In re Schapiro, 128 N.Y.S. 852 (N.Y. App. Div. 1911) (disbarment for paying contingent fees to witnesses); Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72-73 (2d Cir. 1990), cert. denied, 505 U.S. 1222, 112 S. Ct. 3036, 120 L.Ed. 905 (1992) (lawyer disqualified from representing plaintiffs in suit against law firm, *inter alia*, because lawyer was necessary witness and had entered contract to receive one-sixth of funds recovered from law firm). Mr. Epting is named as an expert witness and he has an economic interest in the outcome of the case; were his law firm to continue as Plaintiff's counsel, Mr. Epting would still have an

economic interest in the outcome of the case under his firm's contingency fee contract because he is the owner of the law firm and its partner in charge.

Furthermore, Defendants would be prejudiced by any delay in withdrawal for a number of reasons. First, a delay would increase the likelihood that the opportunity for a timely trial is missed. This case is already seven years old and a decision to unnecessarily push back a trial date should be avoided. Second, a delay in ending the "dual role" runs a high risk of confusing the jury who would hear that the expert witness continued as the Plaintiff's advocate during the discovery phase of this case and it would prove difficult for the Court to explain why such a prejudicial situation was allowed to continue, and why the Court qualified this expert to testify at trial while allowing him to continue as the Plaintiff's advocate before trial. Third, the qualification by the Court of an expert witness adorns the expert as possessing superior knowledge, which could lead the jury to conclude that the Court favors the Plaintiff by allowing such dual role where Defendants' counsel are not serving in a dual role. Again, the issue before the Court is not if the Plaintiff's expert must withdraw as Plaintiff's counsel but when the withdrawal should take place. The timing and process of such issue is within the sound discretion of this Court.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that:

Considering all the facts and circumstances presented, the age of this case, Plaintiff's disclosures and admissions, the Rules of Professional Conduct, the Rules of Court, legal authorities, this Court's Scheduling Order, the Court concludes and rules that the appropriate time for Mr. Epting and the Epting Law Firm to withdraw as Plaintiff's counsel is on the filing of this Order and Mr. Epting, individually and for his law firm, shall file notice of withdrawal as counsel of record within five days thereafter. The Court makes

this ruling for the reasons set forth above as well as to preserve the dignity of this Court and the public interest, to avoid prejudice to the Defendants, and to allow all parties to engage in fair litigation practice. It is well within the Court's discretion to manage its docket and cases, including the scheduling of key events and the appropriate time for withdrawal of counsel comes within its case management authority. In addition, and as noted, Plaintiff's experts will be limited at trial to the four individuals named by Plaintiff as listed above. Given the significant time spent by the parties and the Court on the withdrawal issues, the Defendants' deadline to name experts shall be continued to 40 days after the signing and filing of this Order.

IT IS SO ORDERED.

The Honorable Michael G. Nettles
Presiding Judge
Third Judicial Circuit

Florence, South Carolina
11-22-, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-000092

Stokes-Craven Holding Corp.,
d/b/a Stokes-Craven Ford, ... Appellant,

v.

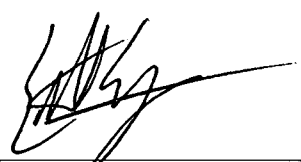
Scott L. Robinson and Johnson
McKenzie & Robinson, LLC, ... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on February 16, 2018, the foregoing **RESPONDENTS' JOINT MEMORANDUM REGARDING LACK OF APPELLATE JURISDICTION** was served on all counsel of record via Hand Delivery, addressed as follows:

Robert B. Ransom
Leventis & Ransom
1913 Bull Street
Columbia, SC 29201

Attorneys for Appellant



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February 16, 2018

VIA HAND-DELIVERY

The Honorable Jenny Abbot Kitchings
Clerk of Court
The Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Stokes-Craven Holding Corp, d/b/a Stokes-Craven Ford v. Scott Robinson, Esquire, and Johnson, McKenzie & Robinson LLC
Appellate Case No. 2018-000092
Our File No. 3-716-124

Dear Ms. Kitchings:

Please find herewith for filing an original and six (6) copies of ***Respondents' Joint Memorandum Regarding Lack of Appellate Jurisdiction*** and the ***Proof of Service*** evidencing service of same on counsel of record. Please mark as "filed" the additional copy of the Memorandum to be returned to us via our courier. Thank you for your time and assistance.

With kindest regards, I am

Sincerely,

Warren C. Powell, Jr.

WCPjr/afa
Encl.
CC: Robert B. Ransom, Esquire, w/ enclosures via hand-delivery
Susan T. Wall, Esquire, w/ enclosures as stated via email and U.S. Mail