

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Appellate Case No. 2016 – 001266

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

Case No. 2013-CP-10-1396

**RECEIVED**  
JUN 12 2018  
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.

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RESPONDENTS' JOINT REPLY TO APPELLANT'S RETURN  
TO THE JOINT MOTION TO DISMISS APPEAL AS MOOT

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The Respondents, by their respective counsel, file this Joint Reply to Appellant’s Return to the Joint Motion to Dismiss Appeal as Moot. In their Joint Motion to Dismiss Appeal as Moot (“Joint Motion to Dismiss”), Respondents argue that this appellate action should be dismissed as moot because Appellant, Personal Care, Inc. (“Personal Care”), admitted in a Circuit Court filing—after the briefing for this Appeal was complete—that the statute of limitations has expired on all of its claims against Respondents; therefore, there is no actual controversy over whether Personal Care has any viable, justiciable claims against Respondents.

In its Return to the Joint Motion to Dismiss, Personal Care does not dispute that the statute of limitations has expired on all of its claims against Respondents, nor does it dispute that it conceded such in its malpractice complaint filed in February 2018 in Circuit Court against its previous counsel, Thomas A. Pendarvis and Pendarvis Law Offices, PC (collectively, “Pendarvis”).

More importantly, Personal Care does not even contest Respondents’ argument that this Appeal is now moot because there remain no viable, justiciable claims against Respondents. Indeed, Personal Care does not set forth any case law or citations addressing the mootness standard, nor does it present any argument explaining how there could still be an actual controversy regarding the statute of limitations when Personal Care has conceded that the statute of limitations expired on all of its claims against Respondents, making it “impossible for [Personal Care] to pursue its [allegedly] valid claims against the [Respondents].” (Ex. A to Motion to Dismiss, Complaint ¶ 23.)

Instead, Personal Care sets forth erroneous and unavailing arguments that it was “under a compulsion” to file its action against Pendarvis in February 2018 because the statute of limitations was “arguably fast approaching.” (Return at 6.) However, under *Stokes–Craven*

*Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016), it is neither arguable nor “debatable” that the expiration of the statute of limitations was imminent in February 2018. (Return at 5 & n.4.) To the contrary, pursuant to the holding in *Stokes–Craven*, “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.” 416 S.C. at 537, 787 S.E.2d at 496. In overruling its previous decision in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005), which had found that the statute of limitations began to run on the date of an adverse verdict, the Supreme Court explained:

[I]f 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. . . . 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.

*Stokes–Craven*, 416 S.C. at 534, 787 S.E.2d at 494. Because Personal Care appealed the denial of the motion to restore, which denial is also the basis for its malpractice action against Pendarvis, and because that appeal is still pending before this Court, the statute of limitations for the legal malpractice claim against Pendarvis has not been triggered yet. Accordingly, Personal Care was not “under a compulsion” to file its action against Pendarvis in February 2018, as the expiration of the statute of limitations was not “arguably fast approaching” at that time. (Return at 6.)

But even if the statute of limitations on Personal Care’s malpractice claim against Pendarvis was about to expire in February 2018, that fact would have no effect on the issue of whether any justiciable claim remains in this Appeal. In the underlying case on appeal, the Circuit Court denied Personal Care’s untimely Rule 40(j) motion to restore upon finding that the statute of limitations had expired on all of Personal Care’s claims against Respondents. Thus,

the Circuit Court concluded that all of Personal Care’s claims against Respondents were time barred. In its February 2018 malpractice complaint against Pendarvis, Personal Care similarly alleges that Pendarvis’s failure to file the motion to restore within the one-year deadline made it “impossible for [Personal Care] to pursue its valid claims against the [Respondents].” (Ex. A to Motion to Dismiss, Complaint ¶ 23.) As stated in the Joint Motion to Dismiss, “by acknowledging that its claims became ‘impossible’ to pursue once the one-year restoration deadline passed, Personal Care has admitted that the statute of limitations had run on all of its claims against Respondents before it filed its untimely Motion to Restore on September 22, 2014.” (Motion to Dismiss at 5.) Personal Care does not dispute or counter this argument in its Return.

“An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.” *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). Unlike unripe appeals, “moot appeals result when intervening events render a case nonjusticiable.” *Id.* “A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.” *Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006).

In its Return, Personal Care does not dispute that judgment for Personal Care in this Appeal would have no practical legal effect. Indeed, even if this Court reversed the Circuit Court’s order denying the Motion to Restore, the Circuit Court would conclude—based on the record and on Personal Care’s own pleading against Pendarvis, the corresponding expert affidavit, and Personal Care’s implicit admissions in its Return to the instant Joint Motion to Dismiss—that Personal Care’s claims against Respondents are time barred. Thus, it is

impossible for this Court to grant effectual relief to Personal Care, as there is no actual controversy over whether the statute of limitations has expired on Personal Care's claims against Respondents. Respondents and Personal Care agree that the statute of limitations on those claims expired before Personal Care filed the untimely motion to restore, just as the Circuit Court found in the underlying case. Because there is no actual controversy over whether Personal Care has any viable, justiciable claims against Respondents, this case is moot.<sup>1</sup>

For the foregoing reasons, and for the reasons stated in their Joint Motion to Dismiss Appeal as Moot, Respondents respectfully request that the present Appeal be dismissed as moot.

[Signatures on the following page]

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<sup>1</sup> Personal Care's appeal to equity is without merit. First, Personal Care cites a case involving equitable liens and forfeiture, which has nothing to do with legal malpractice, statutes of limitations, or mootness. (Return at 7 (citing *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011).) Second, as explained above, Personal Care was not compelled to file a malpractice claim against Pendarvis or to concede that the statute of limitations had expired on all of its claims against Respondents. Dismissal of this Appeal as moot would not violate either law or equity.

Respectfully submitted,

<p>Barnwell Whaley Patterson &amp; Helms, LLC</p> <p>By: <u>P. Ferderigos</u> M. Dawes Cooke, Jr. Phillip S. Ferderigos <i>KES</i> 288 Meeting Street, Suite 200 Charleston, SC 29401</p> <p><i>Attorneys for Jerry N. Theos and Uricchio, Howe, Krell, Jacobson, Toporek, Theos &amp; Keith, P.A.</i></p>	<p>K&amp;L Gates, LLP</p> <p>By: <u>Karen Spain</u> Jennifer H. Thiem Karen E. Spain 134 Meeting Street, Suite 500 Charleston, SC 29401</p> <p><i>Attorney for Cheryl D. Shoun</i></p>	<p>By: <u>O. Johnson</u> Oana D. Johnson <i>KES</i> Attorney at Law 151 King Street Second Floor Charleston, SC 29401</p> <p><i>Attorney for Taylor Bowley and Byrd, LLC</i></p>
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Date: June 11, 2018

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BOWLEY & BYRD, LLC..... Respondents.

CERTIFICATE OF SERVICE

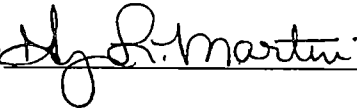
I hereby certify that on the 11th day of June, 2018, I served a copy of the foregoing Respondents’ Joint Reply to Appellant’s Return to the Joint Motion to Dismiss Appeal as Moot on counsel for the Appellant via U.S. Mail with sufficient postage, correctly addressed as follows:

PENDARVIS LAW OFFICES, P.C.  
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K&L Gates LLP

By 

June 11, 2018

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

RECEIVED  
JUN 12 2018  
SC Court of Appeals

Re: Personal Care, Inc. v. Jerry N. Theos, *et al.*  
Appellate Case No. 2016-001266

Dear Ms. Kitchings:

Enclosed herewith please find the original and seven (7) copies of Respondents' Joint Reply to Appellant's Return to the Joint Motion to Dismiss Appeal as Moot in connection with the above-referenced matter. Please file the original and return a file-stamped copy to me in the enclosed self-addressed stamped envelope. By copy of this letter, we are serving all counsel of record.

Thank you for your assistance with this matter. Please do not hesitate to contact me if you have any questions.

With kind regards, I remain

Very truly yours,



Karen E. Spain

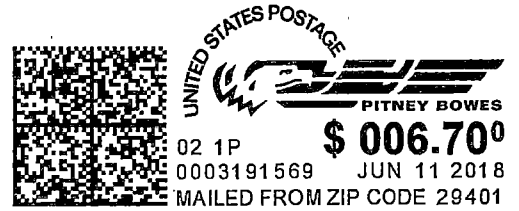
KES/glm  
Enclosures

cc: Thomas A. Pendarvis, Esq.  
Christopher W. Lempeis, Jr., Esq.  
John K. Blincow, Esq.  
Kelsey J. Brudvig, Esq.  
Christian Stegmaier, Esq.  
M. Dawes Cooke, Jr., Esq.  
Phillip S. Ferderigos, Esq.  
Oana D. Johnson, Esq.  
(all via US Mail, w/encl.)

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**K&L GATES**

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The Honorable Jenny Abbott Kitchings  
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