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

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Case No. 2013-CP-10-1396

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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 JERRY N. THEOS; URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK, THEOS & KEITH, PA'S SUPPLEMENTAL BRIEF

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## STATEMENT OF ISSUES ON APPEAL

Respondents incorporate the Statement of the Case set forth in the Joint Initial Brief.

## STATEMENT OF FACTS

Respondents incorporate the Statement of the Facts set forth in the Joint Initial Brief.

## ARGUMENT

Respondents Jerry N. Theos, Uricchio, Howe, Krell, Johnson, Toporek, Theos & Keith, PA join in the joint brief of Respondents Cheryl D. Shoun and Taylor Shoun Bowley & Byrd, LLC ("Respondents' Joint Brief") and further incorporate the Respondents' Joint Brief as set forth fully herein. In addition, for the Court's ease of reference, Respondents Jerry N. Theos, Uricchio, Howe, Krell, Johnson, Toporek, Theos & Keith, PA further submit this streamlined "Supplemental Brief" to simplify the key legal issues of dispute between Appellant and Respondents.

The arguments raised by Appellant in its initial brief fail for the following reasons:

1. The Appellant failed to comply with Judge Dennis's Order of August 28, 2013, which is the "law of the case";

2. The procedural history is not as complex as Appellant would have the Court believe;

3. SCRCP Rule 40(j) allows discretion for a judge to have a meaningful hearing;

4. Appellant had numerous opportunities to present evidence (and had <u>two</u> oral argument opportunities) to present evidence and argue its position to the Court;

5. Appellant's argument fails on its own merits.

Appellant intentionally presents a false picture of muddled proceedings and over-complicates the procedural history and issues in order to confuse the Court. Respondents' key points are as follows:

1. Rule 40 allows for a meaningful hearing and the Court is not required to do a futile act/conduct a futile hearing.

2. The judge provided multiple opportunities for Appellant to present any evidence Appellant wished to present.

3. Based on the evidence, the Motion to Reinstate was correctly denied as the statute of limitations barred the Appellant's claim.

## I. APPELLANT'S MOTION TO REINSTATE FAILS BECAUSE IT VIOLATES JUDGE DENNIS'S ORDER OF AUGUST 28, 2013, WHICH IS THE "LAW OF THE CASE."

Initially, Appellant completely ignores its fatal and dispositive failure to reinstate its claim within the express parameters set forth in Judge Dennis's Order of August 28, 2013 (R.pp. 2 – 6). Judge Dennis's Order sets forth procedural requirements, separate and apart from SCRCP Rule 40(j). As his Order was not appealed, however, the Order of Judge Dennis is the "law of the case" and governs Appellant's attempted reinstatement. Judge Dennis's Order, in turn, sets forth more restrictive requirements which Appellant failed to comply with.

As such, as Judge Dennis's Order of August 28, 2013 is the "law of the case," and Appellant failed to strictly comply with the terms and requirements of such Order in order to timely reinstate the case, Appellant's core arguments are superfluous and the Order of the lower court should be affirmed.

## II. THE PROCEDURAL HISTORY IS NOT OVERLY COMPLEX.

In relevant parts, the procedural history of this case is not as complicated as Appellant represents. The gravamen of Appellant's case against the Respondents arose from a 2009 letter (R.pp. 127 – 128). Because of the 2009 letter, the Appellant was sued via a counterclaim on or about March 9, 2010 (R.pp. 130 – 132). On the day before the three year statute of limitations period ran,[1] Appellant then sued Respondents for legal malpractice on March 8, 2013 (R.pp. 134 – 150; 152 – 168). Appellant subsequently dismissed its lawsuit, pursuant to Rule 40(j), SCRCP,

[1] Appellant acknowledged the statute of limitations deadline when it invoked the safe harbor provision of S.C. Code Ann. § 15-36-100(c)(1) in its verified Complaint (R.pp. 149; 320).

via Order of Judge Dennis on August 28, 2013 (R.pp. 2 – 6; 170 – 171). Appellant then failed to comply with Judge Dennis's Order or SCRCP Rule 40(j) in order to properly reinstate its case.

Subsequently, after failing to reinstate the case pursuant to the terms of Judge Dennis's Order, Appellant belatedly submitted an incomplete Consent Order to the Court, while apparently misrepresenting to the Court the untimeliness and the lack of consent to the proposed Consent Order (R.pp. 176 – 179; 369 – 371; 429 – 479; 480 - 490). Thereafter, Appellant withdrew such request and then belatedly filed a motion to reinstate the case pursuant to SCRCP Rule 40(j) late (R.pp. 295; 331; 365 – 367). Respondents opposed the motion to reinstate procedurally and substantively (R.pp. 352 – 367; 373 – 405; 491 – 501; 502 – 554; 619 – 632).

After receiving written submissions by all parties, the Court held a hearing on Appellant's motion to reinstate on November 19, 2014. After considering the arguments of counsel and the evidence presented, the Court thereafter issued its decision via its Order dated March 3, 2015 ( R.pp. 7 – 104). Appellant then filed a motion to reconsider (R.pp. 633 – 637), and the Court issued a revised Opinion filed June 22, 2015, providing Appellant with an additional opportunity to present additional evidence for the Court to consider (R.pp. 105 – 190). Thereafter, the Appellant submitted an additional Affidavit in its favor and chose not to submit any additional evidence (or advise the Court of any evidence Appellant wished it could present, but was unable to present). The Court again held a telephonic status conference with counsel for all of the parties on April 15, 2016, again allowing counsel an opportunity to provide oral arguments to the Court. Based on a full Record, and after having heard arguments of counsel on two occasions, the Court then issued its decision on May 23, 2016 (R.pp. 110 – 125).

Thereafter, the Supreme Court modified the South Carolina law concerning legal malpractice claims in South Carolina, and the Court subsequently amended its prior Order on

June 14, 2016 to confirm and conform its findings in lieu of the modified/final Stokes-Craven decision (R.pp. 212 – 230). [2]

## III. SCRCP RULE 40(J) ALLOWS FOR A MEANINGFUL HEARING.

Appellant's oddest argument is that SCRCP Rule 40(j) does not allow for a hearing, when Rule 40(j) expressly requires a hearing. Moreover, Appellant's insistence that Rule 40(j) prohibits a meaningful hearing, but instead requires a perfunctory, administrative reinstatement, is equally peculiar. Rather, Appellant would have the Court believe that the Court cannot issue a decision as to the merits of a motion to reinstate until after the Court allows the reinstatement automatically. In other words, the Court is neutered from determining the merits of reinstatement until a party files a summary judgment motion to oppose the reinstatement, after the matter has already been reinstated. Such an absurd procedural result, however, is contrary to the Rule itself, amounts to a waste of time and resources for the Court and the parties, and simply makes little sense from a common sense and Court efficiency point of view.

## IV. APPELLANT HAD NUMEROUS OPPORTUNITIES TO PRESENT ITS EVIDENCE IN SUPPORT OF ITS MOTION TO REINSTATE THE CASE.

After dispensing with Appellant's odd argument that the Court cannot have a meaningful hearing concerning a reinstatement motion by a moving party, Appellant shifts focus to asserting that it was ambushed or sideswiped by the Court holding a meaningful hearing on its motion to reinstate because it was not prepared and did not have an opportunity to present evidence to defend against Respondents' defenses to Appellant's attempt to reinstate the case. However, Appellant's arguments *in the abstract*, give way to the full opportunity it had *in reality* to

[2]As such, as the Court provided multiple opportunities for Appellant to present any evidence it wished to present, any procedural complexity benefitted the Appellant. Further, the procedural history is not overly complex as it is the Appellant which failed to strictly comply with Judge Dennis's Order of August 28, 2013, and it is the Appellant which is attempting to resurrect its stale claim via a belated motion to reinstate. Finally, the procedural history is exactly what one would expect it to be given the Supreme Court's reversal of Epstein, issuance of the first Stokes-Craven decision, and the subsequent vacating of Stokes-Craven via the Court's substituted Stokes-Craven opinion.

provide any evidence it wished to present to the Court in support of its motion. Any theoretical prejudice Appellant may have encountered by the Court having a meaningful hearing on Appellant's motion was corrected by the Court's Order of June 22, 2015 wherein the Appellant was given an additional opportunity to present any evidence it wished to support its motion (R.pp. 105 – 109). Further, Appellant had two opportunities for oral argument on November 19, 2014 and again on April 15, 2016.

## V. APPELLANT'S ARGUMENT FAILS ON ITS OWN MERITS (OR LACK THEREOF).

After distilling Appellant's arduous brief arguments to its key assertions (and after focusing on tedious and irrelevant procedural matters), Appellant's main argument appears to be that the judge erred because the judge could not consider the merits of the reinstatement at the 40(j) hearing; rather, the statute of limitations defense should only be considered and ruled upon after the case is initially reinstated automatically. The Appellant's key position is a hyper-technical, "form over substance" type argument that seeks to overturn court efficiency on its head. Whereas Appellant asserts that having a meaningful 40(j) hearing potentially robs a moving party of an opportunity to support its motion (or to oppose an opposing party's statute of limitations defense) *in the abstract,* Appellant ignores what *actually happened* in this present case. Appellant's arguments that it should prevail on the merits of the statute of limitations defense are so spurious that it must convolute and wrap its arguments by overly complicating and twisting the procedural history in a feeble attempt to convince the Court that Appellant was unable to present any evidence it desired in support of its motion. However, per the Court's express Order filed June 22, 2015, the Record shows such assertion to be untrue (R.pp. 105 – 109).

As the Record reflects, no issue of fact exists and the statute of limitations bars Appellant's claim as a matter of law. The uncontroverted evidence in the Record sets forth:

1. E-mail from Shoun to Cignavitch dated March 19, 2010: "Hey Bernie: Hope this finds you well. We have received an Answer and Counterclaim on behalf of the Defendant in this action. I need to get a copy of the Counterclaim to you; a response is due April 9th. May I fax to you? Will you provide the correct number? Also, if you will please provide your insurance information, we will submit the Counterclaim to your carrier, asking it to defend and indemnify you. We will need a copy of the policy if you have it. Thanks. I look forward to hearing from you." (R.pp. 180 - 181).

2. E-mail from Smith to Cignavitch dated March 19, 2010: "Mr. Cignavitch, attached please find a filed copy of the Answer and Counterclaim." (R.pp. 182 – 183).

3. E-mail from Shoun to Cignavitch dated March 26, 2010: "I am attaching a copy of a letter I am sending to Askew's counsel requesting an extension of time in which to respond to the Counterclaim. As I think we discussed earlier, when we granted an extension to Askew's attorneys, this is a routine practice, and I have no reason to think it will not be granted. You will see, if granted, our response will be due mid-May giving us plenty of time to talk over the allegations. Even if it is not granted, the response isn't due until mid-April. ... I sincerely appreciate your patience in this matter, and look forward to talking with you regarding the Counterclaim." (R.pp. 184 – 185).

4. E-mail from Shoun to Cignavitch dated April 6, 2010: "Bernie: Hey. I am back in the office today and have received confirmation of our 30-day extension to respond to the Counterclaim in this case. Our reply is due on or before May 13, 2010. Please let me know a time that is good for you for us to get together to talk over our response. We may even be able to do it by phone if your schedule is full. In the meantime, I will probably prepare a draft and send it to you as a starting point." (R.pp. 186 – 187).

5. E-mail from Shoun to Cignavitch dated April 6, 2010: "Bernie: I forgot to mention this again – please get your insurance information to me as quickly as you can. Thanks." (R.pp. 188 - 189).

6. E-mail from Shoun to Cignavitch dated April 13, 2010: "Please remember that a reply to the Counterclaim by Ms. Askew will have to be served by the latter part of May." (R.pp. 190 – 191).

7. Invoice from Nexsen Pruet to Personal Care dated June 2, 2010: Charging $1440 for services related to answering counterclaim (R.pp. 192 – 197).

8. E-mail from Kerr to Cignavitch dated June 7, 2010: "Bernie: Attached please find for your review and file a filed stamped copy of the Reply to Counterclaim in the above-referenced matter. Should you have any questions or concerns, please let us know." (R.pp. 198 - 199).

Therefore, based on such uncontroverted evidence, the reinstatement of the case amounts to a futile act, and the judge rightfully denied the reinstatement based on the merits of Appellant's motion and the evidence in the Record.

Furthermore, Appellant frequently takes liberties with the Record and the evidence set forth in the Record. For example, Appellant completely ignores the fact that the Appellant's initial key factual allegations as set forth in its original pleadings were that the Appellant was not aware of the counterclaim and its complete lack of knowledge of the counterclaim itself underpins the Respondents' liability for legal malpractice. The original complaint set forth such falsehood, which was verified by Appellant, and was also reasserted by Appellant's expert (R.pp. 134 – 150; 201 – 205). Indeed, Appellant's expert's opinion that it was unaware of the counterclaim altogether was the basis for the legal malpractice claim against the Respondents (R.pp. 270 – 279). However, the Record directly refutes the Appellant and its expert's original factual allegations, which Appellant has now admitted were simply factually false (R.pp. 201 – 205; 270 – 279; 316 line 13 – 17; 270 – 279). In light of Appellant's false factual allegations and evidence which proved the same to be false, Appellant subsequently changed course and later asserted that the statute of limitations did not begin to run until the resolution of the counterclaim at a mediation.[3]

[3] Similarly, Appellant initially admitted that the untimely Consent Order it presented to the judge (which was not consented to by all of the Respondents) was not a motion by Appellant and was void (R.pp. 179; 295 lines 9 – 20); however, after making such representations in open court, Appellant has again changed its position and now, for the first time at the reconsideration hearing below and on appeal, Appellant asserts that the withdrawn and void Consent Order should now be considered to be a timely motion with the Court to reinstate the case, where Appellant's actual Motion to Reinstate the case was admittedly filed late.

In addition, Appellant's Brief also contains factual errors as representations to the Court. For example, throughout its brief, Appellant hints that the Respondents did not oppose the Motion to Reinstate because they did not file a Motion for Summary Judgment as to the statute of limitations. On page 8 of its brief, Appellant argues that no Respondent filed a motion to dismiss or for summary judgment opposing Appellant's Motion to Reinstate and, therefore, Respondents did not oppose Appellant's motion. Such assertion is repeatedly asserted throughout the Appellant's brief and is simply nonsense. The Record is clear that the Respondents opposed Appellant's Motion to Reinstate based on their filings with the Court opposing the Motion to Reinstate and the Respondents were not required to, and had no affirmative duty to, file an additional motion in order to oppose Appellant's Motion to Reinstate the Case. (R.pp. 352 – 367; 373 – 405; 491 – 501; 502 – 554; 619 – 632). Appellant's argument is misplaced as the Respondents opposed Appellant's Motion to Reinstate by filing Memoranda opposing the Appellant's motion – there is no requirement or need for Respondents to file an additional motion in order to oppose the Appellant's Motion to Reinstate. Further, Respondent Theos and his law firm raised and asserted a statute of limitations defense in its filed Answer (R.pp. 287), a fact which Appellant ignores throughout its Brief.

Additional examples of factual errors contained in Appellant's Brief are as follows:

Footnote 1 on page 2 of Appellant's Statement of the Case sets forth that: "In August, 2013, all Respondents were represented by David W. Overstreet and other lawyers practicing with Carlock, Copeland and Stair. Between August 2013 and August 2014 and while this lawsuit was under the Rule 40(j) Order, a number of other lawyers took over the representation of the various Respondents." This statement is factually incorrect and unsupported by any evidence in the Record. Indeed, Jerry N. Theos and Uricchio Howe Krell Johnson Toporek Theos and Keith,

PA have always been represented by Dawes Cooke and Phillip Ferderigos and Barnwell Whaley Patterson & Helms, LLC, not any other attorneys.

On page 6 of Appellant's Brief, Appellant again misrepresents that it filed a "Consent Order Restoring Case to Docket" timely one day before the one year anniversary of the "Consent Order Striking Case From Docket," which it argues was the equivalent to and should be treated as a Motion to Reinstate. However, Appellant fails to advise the Court that Appellant previously admitted that the partially executed "Consent Order Restoring Case to Docket" was void and was not a motion by the Appellant. (R.pp. 295 line 9 – 20; 331; 365 – 367).

In footnote 2 of page 6, Appellant states that the "Consent Order Restoring Case to Docket" was "inadvertently submitted for signature by the trial court unfortunately without signatures from all the new lawyers who had taken over the representation of all of the Respondents." This assertion, however, is refuted by the Record below, given what actually happened in this case. (R.pp. 179; 369-371; 429 – 479; 480 – 490). Appellant would have the Court believe that there was an inadvertent mistake by Appellant's counsel of submitting an unconsented to Consent Order without signatures from all the "new lawyers"; however, such is simply not the case. Appellant knew that the Consent Order was not timely. Appellant also knew that all Respondents had not consented to the proposed Order, yet Appellant submitted the Order to be signed by the judge. Once caught, Appellant then argued with the judge's law clerk that the Order should be approved by the judge because the Respondents did not timely object to the proposed Order and that the failure to object was tantamount to consent. Once the judge denied such ridiculous requests from the Appellant, the Appellant then withdrew the Consent Order altogether, making the Consent Order void. Appellant's actions are set forth in the Motion for Sanctions filed by Respondent Shoun (R.pp. 369 – 371; 429 – 479; 480 – 490). It is simply

unbelievable that Appellant would assert that its actions in this regard were an inadvertent submission based on new lawyers taking over the representation of all the Respondents, when the Record reveals otherwise.

Finally, Appellant repeatedly casts aspersions upon the lower court for conducting a sua sponte, ad hoc inquiry in regard to the statute of limitations during the Appellant's motion to reinstate the case. However, it is Appellant's burden to establish that it had a right to reinstate the case, and a comparison of the original pleadings, the evidence in the Record, and the present briefings of the Appellant, set forth that the Appellant itself is again asserting a hodgepodge of ad hoc inaccuracies and hyperbole asserting arguments of prejudice which are directly refuted by the evidence in the Record and the Orders of the underlying court. Like a chameleon, Appellant again attempts to shift focus away from its meritless position by changing its arguments and attempting to convolute the procedural history by asserting that it had no opportunity to produce evidence, when such arguments are directly refuted by the express Orders of the underlying court (R.pp. 105 – 109; 320 lines 12 – 20; 323 lines 17 – 24). [4]

[4] Another example of Appellant's "change of position" is set forth on page 22 of its Brief, where Appellant asserts "Here, the Record before the trial court showed that Respondents had assured Personal Care that there was no problem with Askew's defamation counterclaim, and never told them anything about conflicts of interest, having to serve as witnesses, or any other matter, forming the basis of a claim against the lawyers." However, again, the evidence in the Record refutes Appellant's counsel's arguments. Initially, the Appellant's original verified pleadings themselves claimed that it did not know of the counterclaim at all and such was the basis of the legal malpractice claim (R.pp. 134 – 150; 152 – 168; 270 – 279); after such unfounded factual assertions were easily refuted by Respondents, Appellant has now morphed its argument to now assert that "Respondents had assured Personal Care that there was no problem with Askew's defamation counterclaim," where the uncontroverted evidence in the Record (See pp. 6 – 7 of this Brief) sets forth that the Respondents advised Appellant to put his insurance carrier on notice of the counterclaim so it can seek a defense and indemnity of the counterclaim.

## CONCLUSION

For the reasons set forth, Respondents Jerry N. Theos; Uricchio, Howe, Krell, Johnson, Toporek Theos & Keith, PA, respectfully join in the Joint Brief of the Respondents, as well as submit this additional brief, and Respondents respectfully request the lower court dismissal below be affirmed.

Respectfully submitted,

Barnwell Whaley Patterson & Helms, LLC

By:_____

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Date: May 30 2017

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Respondents Jerry N. Theos; Uricchio, Howe, Krell, Johnson, Toporek, Theos & Keith, PA's Supplemental Brief complies with Rule 211(b), SCACR.

Barnwell Whaley Patterson & Helms, LLC

By: _____
Phillip S. Ferderigos