THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-001266

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.

BRIEF OF APPELLANT

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Did the trial court err in:

A. its application of Rule 40(j), SCRCP?

B. in holding that, in the context of a Rule 40(j) motion to restore, *Maxwell v. Genez*, 356 S.C. 617, 620-621, 591 S.E.2d 26, 28 (2003) provides the trial court the authority to conduct a *sua sponte* inquiry into the merits of the claims and/or defenses of the parties?

C. in holding that, in the context of a Rule 40(j) motion to restore, *Maxwell* provides the trial court the authority to conduct a sua sponte ad hoc inquiry into the merits of the affirmative defenses of the defendant parties where no defendant had filed any responsive pleadings or any dispositive motions?

D. in the context of a Rule 40(j) motion to restore, making the factual determination of when Appellant knew or should have known of it claims against Respondents?

E. in the context of a Rule 40(j) motion to restore, failing to apply the law under *Stokes-Craven* that holds the 3 year statute of limitations on a client's legal malpractice claim against a lawyer representing the client on a lawsuit matter begins to run from the date of an "adverse verdict, judgment, or ruling" in the underlying lawsuit?

F. in the context of a Rule 40(j) motion to restore, failing to allow Personal Care to do any discovery before ruling on an unfiled dispositive motion turning on disputed issues of material fact?

G. in the context of a Rule 40(j) motion to restore, effectively granting an unfiled dispositive motion for summary judgment when there is a scintilla of evidence as to a genuine issue of material fact on each element of the statute of limitations affirmative defense?

STATEMENT OF THE CASE

This is an appeal from an order denying a Motion to Restore filed pursuant to Rule 40(j), SCRCP, on behalf of Appellant, Personal Care, Inc. ("Personal Care") to have its' case restored to the active trial docket; and an order denying Personal Care's Motion to Alter or Amend Judgment, the consequence of each effectively dismissing Personal Care's claims against Respondents. Based on the procedural context for this appeal, the Statement of the Case and the Statement of Facts overlap somewhat.

On March 8, 2013, Personal Care filed a Complaint against Respondents and later on April 19, 2013, filed an Amended Complaint. (R. 233, Verified Compl.; (R. 252, Amend. Verified Compl.). On August 27, 2013, the Hon. R. Markley Dennis, Jr., signed a consent order entered by counsel for all parties[1] striking the case from the docket pursuant to Rule 40(j). (R. 2, Consent Order). On September 22, 2014, Personal Care filed a Motion to Restore the Circuit Court case to the active trial roster. (R. 331, App. Motion to Restore).

On November 13, 2014, the day before the hearing, Respondents Jerry N. Theos and Uricchio, Howe, Krell, Johnson, Toporek, Theos & Keith, PA filed a Memorandum in Opposition to Plaintiff's Motion to Restore Pursuant to Prior Order of the Court and Rule 40(j), SCRCP. On November 14, 2014, Respondent Cheryl Shoun filed a Motion for Sanctions and Expedited Hearing pursuant to Rule 11, SCRCP, and on November 17, 2014, Respondent Shoun also filed a Memorandum in Opposition to Plaintiff's Motion to Restore pursuant to Rule 40(j), SCRCP. Also on November 17, 2014, Respondent Taylor, Bowley and Byrd, LLC filed both a Motion for

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[1] In August 2013, all Respondents were represented by David W. Overstreet and other lawyers practicing with Carlock, Copeland & 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.

Sanctions and Expedited Hearing pursuant to Rule 11, SCRCP; and a Memorandum in Opposition to Plaintiff's Motion to Restore pursuant to Rule 40(j).

On November 19, 2014, the trial court heard oral arguments on Appellants' Motion to Restore; there were no other motions filed by any party. Thereafter, the Respondents filed supplemental memorandums in opposition to the Motion to Restore and Personal Care filed a Memorandum in Support of its Motion. (R. 575, App. Memorandum in Support of Motion to Restore).

On March 3, 2015, the trial court issued an Order ("March 2015 Order") denying Personal Care's Motion to Restore. (R. 7, March 3, 2015, Order). On March 16, 2015, Personal Care filed a Motion to Alter or Amend the March 2015 Order, pursuant to Rules 52(a) and 59(e), SCRCP. (R. 633, App. Motion to Alter or Amend). On May 21, 2015, Personal Care filed Plaintiff's Memorandum as to the Procedural Requirements Governing a Motion Pursuant to Rule 40j), SCRCP. (R. 750, App. Memo as to 40(j) Procedure).

On June 22, 2015, the trial court filed an Order ("June 2015 Order") concerning the Motion to Alter or Amend, requesting a response as to whether the parties wished to supplement the record. (R. 105, June 22, 2015, Order). On July 9, 2015, as authorized by the trial court, Personal Care filed a Memorandum regarding its desire to supplement the record, objecting to the trial court's request for record materials in the context of a Motion to Restore, but of an abundance of caution, Personal Care did later supplement the record with an Affidavit, albeit within the context of reserving all objections to the trial court's request. (R. 763, App. Memorandum regarding its desire to supplement the record; (R. 773, Aff. of Cignavitch, filed Jan. 7, 2016).

Thereafter, the trial court conducted a telephone status conference and upon hearing that the parties did not intend to provide further information, the trial court informed the parties it would

issue a final order on Personal Care's Motion to Alter or Amend. On May 23, 2016, the trial court filed a modified Order ("May 2016 Order") on Plaintiff's Motion to Alter or Amend Judgment, denying Personal Care's Motion to Alter or Amend Judgment under Rules 52(a) and 59(e), SCRCP, and also again denying Personal Care's Motion to Restore. (R. 110, May 23, 2016, Order).

On June 14, 2016, Personal Care timely filed and served Respondents the Notice of Appeal for this matter. On July 18, 2016, the South Carolina Court of Appeals granted Personal Care's first request for extension to file its initial brief. On or about August 16, 2016, Respondents filed a Joint Motion to Dismiss the present appeal. Said Motion was denied on October 25, 2016, and pursuant to an Order of this Court, Appellant filed and served an Amended Notice of Appeal on October 31, 2016. The Initial Brief of Appellant is timely filed.

STATEMENT OF FACTS

This lawsuit arises from Respondents' representation of Personal Care to pursue its claims against a former employee, Hattie M. Askew. In September 2009, Respondent Theos sent a letter to counsel for Askew, with a simultaneous copy to a third-party containing statements that Askew would later allege were defamatory. (R. 252, 257, Amend. Verified Compl., ¶¶ 1, 18). In December 2009, Respondents commenced an action in Charleston County on behalf of Personal Care, styled *Personal Care, Inc. vs. Hattie M. Askew d/b/a Lowcountry Medical Transport, Inc.*; Civil Action No. 2010-CP-23-626 ("the *Askew* lawsuit"). (R. 257, Amend. Verified Compl., ¶ 19). In March of 2010, Askew filed an Answer and Counterclaim asserting a claim for defamation ("Askew counterclaim") against Personal Care based on the alleged defamatory statements in the letter published by Respondent Theos. (R. 257, Amend. Verified Compl., ¶ 20). After Respondents chose not to produce any evidence in opposition to a motion to change venue, in July of 2012, Personal Care's case was moved to Askew's home venue, Hampton County, South Carolina. (R. 258-254,

257-260, Amend. Verified Compl., ¶¶ 1, 20-29).

More than two years later, in August of 2012, Respondents filed a motion to be relieved as counsel for Personal Care in the *Askew* lawsuit based on a conflict of interest under Rule 1.7, RPC, which was created in September of 2009 when Respondent Theos sent the defamatory letter. (R. 259, Amend. Verified Compl., ¶ 32). On November 1, 2012, the trial court in the *Askew* lawsuit signed an Order prepared by Respondents relieving Respondents as counsel of record for Personal Care; and leaving Personal Care 60 days to find substitute counsel, or Personal Care, a corporation, would be forced to proceed *pro se*, despite clear prohibitions in South Carolina concerning a corporate entity's ability to proceed *pro se* in Circuit Court. (R. 259, Amend. Verified Compl., ¶¶ 34-35).

[*This is where the overlap begins between the Statement of Case and Statement of Facts.*]

On March 8, 2013, Personal Care filed the present lawsuit alleging damages sustained because of various failures of Respondents during their representation of Personal Care in the *Askew* lawsuit, including Respondents' handling of the venue matter and Respondents' failure to inform Personal Care of the conflict which served as the basis for Respondents successfully withdrawing as counsel until more than two years after the conflict materialized. (R. 252-254, 257-260, Amend. Verified Compl., ¶¶ 1, 20-29). On April 19, 2013, Personal Care filed an Amended Complaint in the malpractice case, while the underlying *Askew* lawsuit was still pending. (R. 252-254, Amend. Verified Compl.).

On August 27, 2013, Judge Dennis signed the Consent Order pursuant to Rule 40(j) striking the present case from the docket. (R. 2, Aug. 27, 2013, Order). Thereafter, in November 2013, the *Askew* lawsuit was settled.

On September 22, 2014, Personal Care filed a Motion to Restore this case to the active trial

roster (R. 331, App. Motion to Restore) and the hearing on that motion took place on November 19, 2014. (R. 7, March 3, 2015, Order). None of the Respondents filed a Motion to Dismiss, Motion for Summary Judgment, or any other dispositive motion. On December 8, 2014, Personal Care filed a Memorandum in Support of its Motion to Restore indicating that:

A. A "Consent Order Restoring Case to Docket" was timely filed one day before the one year anniversary of the "Consent Order Striking Case From Docket" was equivalent to and should be treated as a motion to restore and be granted[2];

B. Personal Care's Motion to Restore should be granted pursuant to the express language of Rule 40(j), SCRCP;

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

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

E. Rule 40(j) does not provide a procedural mechanism by which Respondents could assert affirmative defenses to the merits of Appellant's claims in opposition to the motion to restore;

F. Even if the Respondents had filed a dispositive motion asserting the affirmative defense of statute of limitations, which they had not, the verified facts in the record established:

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[2] A "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.

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

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

(R. 575-586, App. Memorandum in Support of its Motion to Restore).

In its March 2015 Order, the trial court disregarded the Consent Order and held that the Motion to Restore was impermissibly filed after the statute of limitations time-barred Personal Care's claims against the Respondents (R. 11-12, March 3, 2015, Order). The March 2015 Order relied on the trial court's findings of fact conducted based on a review of documents in the record; and the trial court's application of *Maxwell v. Genez*, 356 S.C. 617, 620-621, 591 S.E.2d 26, 28 (2003), for the proposition that a "party cannot take advantage of the one year tolling period provided by [Rule 40(j)]" if the party moving to restore has done so more than one year after the claim was stricken from the docket. (R. 12, March 3, 2015, Order). Based on its read of *Maxwell* and a finding of a filed date of the Motion to Restore in excess of the one year anniversary of when the case was stricken from the docket, the court went on to review South Carolina law concerning the affirmative defense that this case is barred by the statute of limitations which started to run as soon as it could be said that Personal Care might have known a claim to exist, citing to *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816,818 (2005). (R. 14, March 3, 2015, Order). *Epstein* was later overruled by *Stokes-Craven Holding Corp. v. Robinson,* 416 S.C.517, 534, 787 S.E.2d 485, 494

(2016), which requires "an adverse verdict, judgment, or ruling" before a legal malpractice action accrues "that is predicated on an injury or damage caused by the failure of an underlying suit due to an attorney's alleged malpractice." There was no "an adverse verdict, judgment, or ruling" in the *Askew* lawsuit until the matter was settled and dismissed in November 2012, a mere six months or so before this lawsuit was filed in March 2013.

On March 16, 2015, Personal Care filed a Motion to Alter or Amend the March Order, pursuant to Rules 52(a) and 59(e), SCRCP, on the following bases:

1. The March Order should not have been issued in the Rule 40(j) context because:
    a. Rule 40(j) is administrative only and does not provide for dismissal of a suit;
    b. The motion to restore should be granted based on the plain language of Rule 40(j);
    c. Either party could move to restore without violating the Consent Rule 40(j) Order;
    d. Rule 40(j) does not provide or allow the Defendants to assert affirmative defenses;
    e. Rule 40(j) does not provide the trial court with authority to evaluate the merits of the claims in this suit; and
    f. While some facts were improperly included in the Order as they were irrelevant to a Motion to Restore, other facts in the record were improperly ignored.
2. The March 2015 Order should not have been issued because no defendant (Respondent) filed a motion to dismiss or for summary judgment such that the Order should be limited to the relief requested in the Motion to Restore; and

3. Substantively, there was evidence in the record which was ignored and not addressed in the March 2015 Order that directly contradicted, or gave rise to inferences that contradicted, the position adopted by the trial court as to questions of fact regarding Personal Care's discovery of the claims giving rise to this malpractice suit; and that regardless, there was evidence in the record to suggest directly or by inference that Personal Care sought to restore claims that the statute of limitations would not bar at the time of the filing of the Motion to Restore, all of which raised issues triable to a jury.

(R. 633, App. Motion to Alter or Amend the March Order).

More than a year after Personal Care filed the Motion to Alter or Amend the March 2015 Order, on June 22, 2015, the trial court filed the June 2015 Order requesting a response as to whether the parties wished to supplement the record with affidavits or present live testimony as to the statute of limitations issue the trial court was considering in the context of a motion to restore. (R. 106, June 22, 2015, Order). In the June 2015 Order, the trial court concluded as a matter of law that *Maxwell v. Genez*, 356 S.C. 617, 621 (2003) specifically allows a party to challenge a motion to restore, while, at the same time *Maxwell* does not address the actual procedural timing for such a challenge. (R. 108-109, June 22, 2015, Order). In this June 2015 Order, the trial court concluded–as a matter of law and without citation to any authority–that the time for a trial court to address a challenge to a motion to restore based on the merits of the case is within proceedings on a Motion to Alter or Amend. (R. 109, June 22, 2015, Order). With this pronouncement, the trial court acknowledged that Personal Care had not had an opportunity to address the statute of limitations issue at the November 19, 2014, hearing on the Motion to Restore, and for that reason, the trial court concluded, as a matter of law, that it should address the statute of limitations issue by

allowing the parties to submit affidavits or conduct live testimony at a motion hearing to alter or amend a judgment as to a motion to restore. (R. 106, June 22, 2015, Order). These conclusions were presumably all based on the trial court's reading of *Maxwell*, as the June 2015 Order did not contain reference to any other decisions (R. 105-109, June 22, 2015, Order). Personal Care, to this day, remains unaware of any persuasive or binding jurisprudence that would support the trial court's determinations, as discussed in Plaintiff's Memorandum as to the Procedural Requirements Governing a Motion Pursuant to Rule 40(j). R.750, Memorandum filed May 21, 2015).

To abide the June 2015 Order, on July 9, 2015, Personal Care filed a Memorandum objecting to the June 2015 Order because:

1. The Order and the discovery plan it embodied eviscerated Personal Care's right to conduct discovery as to its claims and defenses;
2. The trial court's *sua sponte* inquiry, or any inquiry at all into the statute of limitations was and is inappropriate in the context of a motion to restore a case to the active trial docket;
3. The *Maxwell* case does not hold that a party has a right to challenge a Rule 40(j) Motion to Restore based on the merits of the case and/or an affirmative defense premised on the statute of limitations;
4. The June 2015 Order, concerning a Motion to Restore creates a dispositive ruling, as if a Motion for Summary Judgment had been filed, and does so while ignoring the rights of Personal Care and the standard of review applicable to a summary judgment analysis;
5. Without waiving its objections, Personal Care, would file additional affidavit testimony, even though the Respondents should have been estopped to assert a

statute of limitations defense based on their statements and assurances to Personal Care's principal, Bernard Cignavitch, and based on the limited record available to Personal Care at such a preliminary phase of the suit.

(R. 763, App. Memorandum dated July 9, 2015).

Personal Care did later supplement the record with an Affidavit by Mr. Cignavitch, albeit without abandoning its objections to the trial court's insistence that such information could be germane to a Rule 40(j) Motion to Restore. (R. 733, Affidavit of Bernard Cignavitch, dated August 25, 2015).

Thereafter, the trial court conducted a telephone status conference and upon hearing that the parties were all in agreement that no further submissions to the "*Record*" for the Motion to Restore were forthcoming, the trial court informed the parties it would issue a final order on Personal Care's Motion to Alter or Amend.

On May 23, 2016, the trial court filed the May 2016 Order denying Personal Care's Motion to Alter or Amend Judgment and also denying the Motion to Restore, because the trial court found that Personal Care's claims against Respondents were time-barred at the time of the filing of the Motion to Restore. (R. 110, May 23, 2016, Order). The May 2016 Order references the Consent Order striking this case from the docket as the law of the case because no appeal had been taken from the consent order to remove the case, although at the time of the consent order and thereafter, the only appropriate procedural mechanism to address the Consent Order was a motion to restore pursuant to Rule 40(j). (R. 112-114, May 23, 2016, Order). Among other citations, the May 2016 Order relies substantially upon the initial opinion in *Stokes-Craven Holding Corp. v. Robinson*, No. 2013-001452, 2015 WL5247124, (S.C. Sept. 9, 2015), which was later substituted with *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C.517, 787 S.E.2d 485 (S.C. May 25, 2016). (R. 119-120,

May 23, 2016, Order). The May 2016 Order purports to utilize the substituted version of *Stokes-Craven* as the basis of its analysis and application of the discovery rule to the facts before the trial court in the context of addressing a motion to restore. (R. 124, May 23, 2016, Order).

Contrary to the trial court's ruling and as stated earlier, the Supreme Court's ruling in *Stokes-Craven* holds that "an adverse verdict, judgment, or ruling" must occur before a legal malpractice action accrues when the claim "is predicated on an injury or damage caused by the failure of an underlying suit due to an attorney's alleged malpractice" as it was in this case. There was no "adverse verdict, judgment, or ruling" in the *Askew* lawsuit until the matter was settled and dismissed in November 2012, six months or so before this lawsuit was filed in March 2013.

The May 2016 Order erroneously concludes that:

1. Since the trial court conducted an inquiry in the context of a Motion to Restore pursuant to authority the trial court cited as having been provided in *Maxwell*, and
2. after having seemingly analyzing the record under a summary judgment type of analysis without a basis for application of such analysis, nor deference to the applicable standard of review attendant to such an analysis,
3. that the claims sought to be restored would be restored in a time period outside of the time the trial court determined applicable to an affirmative statute of limitations defense, and finally then
4. that the statute of limitations had run, and the Motion to Restore was properly denied on that basis.

(R. 110-211, May 23, 2016, Order).

On June 14, 2016, the trial court file a Substituted Modified Order on Plaintiff's Motion to Alter or Amend Judgment ("Substituted Modified Order"). (R. 212, May June 14, 2016, Order).

A copy of the Substituted Modified Order was apparently mailed to counsel for Personal Care on June 15, 2016. The Substituted Modified Order recites, on its face, that it is of no real consequence, and only serves to comport with and properly cite to the latest opinion in the *Stokes-Craven* case. (R. 212, June 14, 2016, Order). The Substituted Modified Order contains the same findings of fact and conclusions of law that are the subject of this appeal: that the trial court is empowered under Footnote 2 of the *Maxwell* decision and considerations of judicial economy to conduct an analysis of an un-pleaded and unproven affirmative defense of statute of limitations in the context of a Motion to Restore, and that under the findings of fact that the trial court made in the ad hoc proceedings on the Motion to Restore; the un-pleaded and un-proven affirmative defense of statute of limitations would bar Personal Care's claims such that the trial court could and did, *sua sponte*, dismiss Personal Care's case with prejudice, as Personal Care's claims are, under the trial court's findings of fact and conclusions of law, time-barred. (R. 230, May June 14, 2016, Order).

ARGUMENTS

I. The trial court committed an error of law when, exclusively in the context of a Rule 40(j) Motion to Restore and with no dispositive motion pending, it conducted a *sua sponte* inquiry concerning an un-pled and unproven statute of limitations defense.

A motion pursuant to Rule 40(j) did not provide the trial court with the authority to dismiss Personal Care's claims as time-barred under a statute of limitations theory. The rulings regarding the un-pleaded and un-proven statute of limitations defense were unnecessary to the circuit court's disposition of the motion to restore, and therefore improper. *Coastal Fed. Credit Union v. Brown*, 417 S.C. 544, 549, 790 S.E.2d 417, 420 (Ct. App. 2016), reh'g denied (Sept. 15, 2016)(*citing Brading v. County of Georgetown*, 327 S.C. 107, 112 n. 3, 490 S.E.2d 4, 6 n. 3 (1997) (vacating a ruling related to an issue because the issue "was not before the referee and was unnecessary to his ruling")).

A trial court's mistake or action taken outside of its authority may be subject to direct attack on appeal. *Fryer v. South Carolina Law Enforcement Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006) (internal citations omitted). Here, the trial court simply was without authority in ruling on a motion to restore pursuant to Rule 40(j) to conduct a factual inquiry into an affirmative defense. The height of this error is substantially increased when no defendant filed an Answer or any dispositive motion.

> Rule 40(j) does not require that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that, if the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period.

Maxwell v. Genez, 356 S.C. 617, 620–21, 591 S.E.2d 26, 28 (2003).

When a case is stricken from the active trial roster pursuant to Rule 40(j), the applicable deadline remains the statute of limitations, with the effect of the Rule not being to set a new deadline but to extend the statute of limitations deadline through the rule's tolling provision when a motion to restore is make within a year. *See Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 630, 779 S.E.2d 826, 830 (Ct. App. 2015), *reh'g granted* (Dec. 16, 2015), *cert. denied* (Oct. 20, 2016). The South Carolina Rules of Civil Procedure contemplate and allow multiple methods to accomplish restoration of an action that has been dismissed by stipulation of the parties to a lawsuit. *See* Rule 40(j), SCRCP, Case Stricken From Docket by Agreement, and Rule 41(a)(1), SCRCP, Voluntary Dismissal: Effect Thereof. None of these restoration Rules have mechanisms where a trial court evaluates the merits of the claims or defenses, as such actions are left to the parties to deal with once the lawsuit has been restored.

In the June 2015 Order, citing to *Maxwell v. Genez*, 356 S.C. 617, 621 (2003), the trial court stated:

> ... Maxwell specifically allows that a party may challenge a motion to restore, but the case does not address the procedural point for doing so. Therefore, this Court finds that the issue of whether the Plaintiff is entitled to the tolling of the statute of limitations is one that must be addressed at the hearing for a Motion to Restore. If the Court cannot address this issue at the hearing, then there would be no reason to hold a motion hearing in the first place. The Court would be required to automatically grant all Motions to Restore, and deal with issues such as the statute of limitations at later motion hearings. From a judicial economy standpoint, this does not make sense.

(R. 109, June 22, 2015, Order, p.4). The trial court's above cited conclusions are beyond the authority provided by Rule 40(j) and/or *Maxwell* for several reasons.

First, a defendant in *Maxwell* had filed a Motion for Summary Judgment. The reason that the trial court in *Maxwell* considered Summary Judgment in the context of a Rule 40(j) motion is because those summary judgment issues were already properly before the trial court. As illustrated in *Maxwell*, by the time the Rule 40(j) motion came before the *Maxwell* trial court, the parties had already conducted extensive discovery in a straightforward motor vehicle collision case, including depositions of two of the involved drivers. It makes sense that the trial court in *Maxwell* was able to reach summary judgment and statute of limitations issues because those issues were already properly before the trial court and an evidentiary record to support review of those issues had already been developed. *Maxwell* does not and cannot stand for the proposition that a trial court can conduct an inquiry into a statute of limitations defense in the context of every Rule 40(j) motion to restore simply because the information for such an inquiry was available to the trial court in *Maxwell*. Of course, *Maxwell* does not address the procedural point for review of a statute of limitations defense in the Rule 40(j) context – because there is no such procedural point and in *Maxwell*, the procedural point arose in the context of much more developed litigation and an appropriate motion for summary judgment based on properly pleaded defenses and defenses supported by facts developed during the litigation.

Second, addressing whether or not a plaintiff has the right to toll a year under Rule 40(j) is entirely separate and distinct from addressing whether a plaintiff's claims are time-barred by a statute of limitations. Questions as to whether Personal Care has the benefit of the one-year tolling period under Rule 40(j) would be relevant in the event any Respondent were to assert a statute of limitations affirmative defenses in their pleadings or file a dispositive motion, none of which has happened. Any inquiry that the trial court could have or would have or should have made in the Rule 40(j) context should have stopped with this conclusion. The trial court's continued deeper inquiry into the merits of Personal Care's claims was completely without authority, support or rationale in the Rules of Civil Procedure, any reported cases, or statutory law that could be even remotely applicable, especially in the context of the present case, where there was no Answers filed, no dispositive motions, and no discovery yet conducted.

Third, trial courts are specifically tasked with "deal[ing] with issues such as the statute of limitations" at appropriate motion hearings, and no judicial or statutory authority exists to support the trial court's contention that judicial economy dictates that a plaintiff's rights to conduct discovery and to litigate should be suspended in a Motion to Restore proceeding so that the trial court can avoid later dealing with a statute of limitations argument at a later hearing.

For the reasons stated, it was reversible error for the trial court to deny Personal Care's Motion to Restore. These Orders should be reversed and the matter should be remanded to the trial court with instructions to restore the case to the active trial roster.

II. The trial court committed reversible error when, exclusively in the context of a Rule 40(j) Motion to Restore with no dispositive motion pending, it failed to apply the law under *Stokes-Craven*, did not allow Personal Care to do any discovery, and improperly applied the standard of review to the evidence in the record showing that the lawsuit had been filed well within 3 years of an "adverse verdict, judgment, or ruling" in the underlying *Askew* lawsuit.

Even if the Respondents had filed Answers or dispositive motions asserting a statute of limitations defense, which they did not, the trial court did not apply the appropriate law under *Stokes-Craven*, did not allow Personal Care to conduct any discovery, and did not apply the appropriate standard of review to the limited evidence in the record, any one of which is reversible error.

A. The three-year statute of limitations on a client's legal malpractice claim against a lawyer representing the client on a lawsuit matter begins to run from the date of an "adverse verdict, judgment, or ruling" in the lawsuit under *Stokes-Craven.*

In *Stokes-Craven,* the Supreme Court analyzed and restated the law on when the three-year statute of limitations commences on a legal malpractice claim against a lawyer who represented the client on a matter that was litigated. The Supreme Court reviewed its decision in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005), in which the statute of limitations commencement date was analyzed, including , among other things, its rejection of the continuous representation rule where the statute of limitations is tolled until the client-lawyer relationship is terminated. 787 S.E.2d at 488-95. The Court noted the difficulties in determining an accrual date in the context of a lawyer handling a litigation matter for a client:

> As evidenced by this case, the key question is when the claimant's cause of action accrues to trigger the running of the three-year statute of limitations. The answer to this question is complicated by the seemingly endless factual scenarios surrounding the underlying claim of a legal malpractice cause of action. For example, legal malpractice claims may stem from matters involving litigation or negotiated settlements while others may arise out of matters involving the probate of a will or a divorce.
>
> Our decision regarding the accrual date must also take into consideration the preservation of the attorney-client relationship as well as the public policy that is fundamental to the efficient management of our judicial system.

> As previously stated, a legal malpractice cause of action is predicated on an injury or damage to a client caused by an alleged breach of duty by the client's attorney. This predicate injury or damage may take many forms, including one that stems from a favorable court ruling or successful yet insufficient award.
> However, the case that we address today is a legal malpractice cause of action that is predicated on an injury or damage caused by the failure of an underlying suit due to an attorney's alleged malpractice. **In that particular scenario, there can be no legal malpractice cause of action without an adverse verdict, judgment, or ruling.**

787 S.E.2d at 493-94 (footnote omitted) (emphasis added).

Before the trial court in this case was evidence establishing that no "an adverse verdict, judgment, or ruling" in the *Askew* lawsuit occurred until the matter was settled and dismissed in November 2012, a mere six months or so before this lawsuit was filed in March 2013. The statue of limitations was satisfied by filing date in March 2013, as well as the "refiling" day in September 2014 when the Motion to Restore was filed along with the $150 filing fee.

B. Parties are allowed to complete discovery before a trial court is allowed to rule on disputed factual issues.

It is black letter law that Personal Care should have been allowed to complete discovery before the trial court made any ruling on any dispositive motion involving factual issues. The fact that the trial court did not allow Personal Care to complete discovery is reversible error.

Summary judgement cannot be entered against Personal Care because discovery is not completed. *Baughmman v. AT&T*, 306 S.C. 101, 410 S.E.2d 537 (1991). "[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Baird v. Charleston Cty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) (citing *Baughman v. AT & T*, 306 S.C. 101, 410 S.E.2d 537 (1991)); *see also George v. Empire Fire & Marine Ins. Co.*, 344 S.C. 582, 594, 545 S.E.2d 500, 506 (2001) (where non-moving party had a full and fair opportunity to develop the record on the issue under consideration summary judgment may

be appropriate); *Spence v. Spence*, 368 S.C. 106, 131, 628 S.E.2d 869, 882 (2006) (where non-moving party has not asserted or shown the need for additional time to discover facts pertaining to another party's potential liability summary judgment may be appropriate). It was reversible error for the trial court not to allow Personal Care to complete discovery before making a ruling on a disputed factual issue as to the statute of limitations affirmative defense.

C. A summary judgment motion should be denied when there is a scintilla of evidence as to a genuine issue of material fact on each element of a claim or defense.

Even though no dispositive motions had been filed, before the trial court, and prior to its Orders denying Personal Care's motion to restore, was at least a scintilla a of evidence as to the genuine issue of material fact of whether the principal of Personal Care was aware that Respondents committed legal malpractice within a period of time which would time-bar Appellant's subsequent malpractice claims. (R. 763, App. Memorandum regarding its desire to supplement the record; R. 773, Aff. Of Cignavitch).

In reviewing a grant of summary judgment, our appellate courts apply the same standard as the trial court under Rule 56(c), SCRCP. *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 753 S.E2d 428 (2014). Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, show that there is no genuine issue of material fact and it is clear the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP; *Id.* at 528.

Our Supreme Court directs that cases applying the preponderance of the evidence burden of proof require the non-moving party submit only "a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S Mgmt. Co., Inc.*, 381 S.C. 236, 673 S.E.2d 801

(2009). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1984). Even when there is no dispute as to the evidentiary facts, but only as to the conclusions and inferences to be drawn from them, summary judgment should not be granted. *Rice v. School Dist. of Fairfield*, 317 S.C. 87, 452 S.E.2d 352 (Ct. App. 1994); *Koester*, 313 S.C. at 493, 443 S.E.2d at 394. To defeat a motion for summary judgement, the nonmoving party need not produce all of its evidence or prove its case but instead must only show the existence of a genuine factual dispute. 73 AM. JUR. 2d., Summary Judgment §29 (2015). Summary judgment is a drastic remedy and should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Hooper v. Ebenezer Senior Svcs. & Rehabilitation Ctr.*, 377 S.C. 217, 226-27, 659 S.E.2d 213, 217 (Ct. App. 2008).

The trial court should not have *de facto* granted summary judgment as to the unpleaded statue of limitations defense because, viewing the evidence and inferences to be drawn therefrom in a light most favorable to Personal Care, the pleadings and affidavits show that 1) the lawsuit was filed around six months after the "adverse verdict, judgment, or ruling" occurred via the settlement in the underlying Askew lawsuit, 2) there is a genuine issue of material fact as to when Personal Care become aware or should have become aware of the existence of a malpractice claim, and 3) factual disputes as to whether Respondents would be equitably estopped from raising the statute of limitations affirmative defense. (R. 575, App. Memorandum in Support of its Motion to Restore).

As to whether Respondents should be equitably estopped from asserting the statute of limitations defense, the Affidavit of Mr. Cignavitch contains abundant testimony and exhibits showing the assurances Respondents provided on during the representation effectively not to worry

about the counterclaims. *See, e.g.*, (R. 779, Affidavit of Cignavitch, p. 7, ¶ 8 and Exhibit 7).

Viewing the evidence and testimony in the light most favorable to Personal Care, a jury may conclude that Respondents are estopped from asserting a statute of limitations defense, given the assurances they gave regarding Askew's defamation claim in the underlying lawsuit. Before the trial court was at least a scintilla of evidence so as to withstand a motion for summary judgment, even if one had been filed. Personal Care is entitled to an order granting its Motion to Restore, refusing to rule as to whether any triable issues of fact exist as to any unpled affirmative defenses, and otherwise viewing the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to Personal Care as to any potential dispositive motion, all of which did not happen at the trial court level.

The doctrine of equitable estoppel applies when there is an argument that the statute of limitations has run and the defendant asserts the running of the statute of limitations as a defense. *See Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 209 (Ct. App. 1998). However, such a defendant is estopped from benefitting from using the statute of limitations as a defense when the defendant's act or omissions operated to suggest that a lawsuit was unnecessary. *See id.; Moates v. Bobb*, 322 S.C. 172, 175, 470 S.E.2d 402, 403 (Ct. App. 1996). Whether based on the facts eventually presented at trial or based on the record that was before the trial court, the Respondents' conduct, acts, or omissions should operate to estop Respondents from claiming the statute of limitations defense. (Because equitable estoppel is equitable in nature, this Court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. *See Gaymon v. Richland Mem'l Hosp.*, 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997); *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); and *Rushing v. McKinney*, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006)). 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 a witness, or any other matter, forming the basis of a claim against the lawyers.

The pleadings and affidavits filed in response to the underlying Orders that are the subject of this Appeal establish at least a mere scintilla of evidence demonstrating genuine issues of material fact as well as conclusions and inferences to be drawn from such facts that would preclude a grant of summary judgment as to statute of limitations issues – even assuming that a dispositive motion was filed, and that the summary judgment standard is applicable in the context of a motion to restore. The trial court's Orders should be reversed and this matter should be remanded for a trial on the merits.

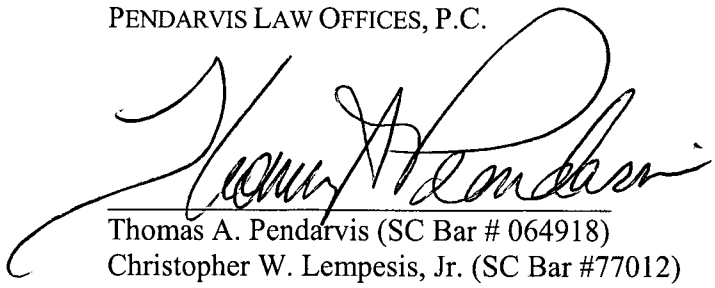
CONCLUSION

The trial court err in its application of Rule 40(j), SCRCP; and in holding that, in the context of a Rule 40(j) Motion to Restore, *Maxwell v. Genez*, 356 S.C. 617, 620-621, 591 S.E.2d 26, 28 (2003) provides the trial court the authority to conduct a sua sponte ad hoc inquiry into the merits of the claims and/or defenses of the parties. The proper standard of the trial court's review in the context of a Motion to Restore pursuant to Rule 40(j) is limited to whether such a Motion has been properly filed. The trial court in the proceedings subject of this appeal did not properly apply the standard under Rules 40(j), nor 41, SCRCP. Further, the evidence before the circuit court raise disputed questions of material fact as to a statute of limitations defense, precluding a de facto grant of summary judgment in favor of Respondents.

The trial court's orders should be reversed.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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May 30, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-001266

Personal Care, Inc.,

Appellant,

vs.

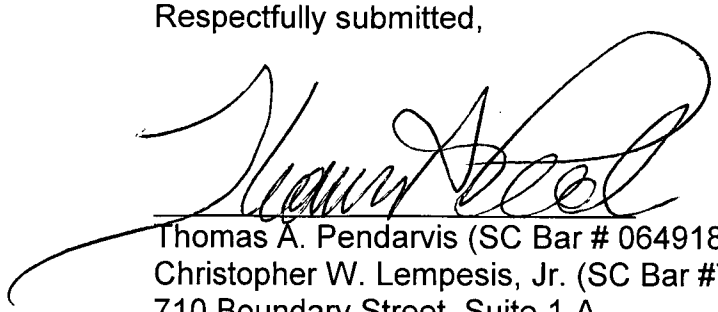
Jerry N. Theos; URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; Cheryl D. Shoun; and TAYLOR, SHOUN, BOWLEY & BYRD, LLC,

Respondents.

APPELLANT'S CERTIFICATE OF COMPLIANCE

I, Thomas A. Pendarvis, J.D., counsel for Appellant, hereby certify pursuant to Rule 211(b), SCACR, that BRIEF OF APPELLANT; REPLY BRIEF OF APPELLANT TO INITIAL BRIEF OF RESPONDENTS CHERYL D. SHOUN AND TAYLOR, SHOUN, BOWLEY & BYRD, LLC; REPLY BRIEF OF APPELLANT TO SUPPLEMENTAL BRIEF OF RESPONDENTS JERRY N. THEOS AND URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK, THEOS & KEITH, P.A.; and RECORD ON APPEAL comply with the Supreme Court's Order dated August 13, 2007.

Respectfully submitted,



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June 7, 2017