

87879

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
SEP 19 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.

RESPONDENTS' JOINT MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL

M. Dawes Cooke, Jr.
Phillip S. Ferderigos
Barnwell Whaley Patterson & Helms, LLC
288 Meeting Street, Suite 200
Charleston, SC 29401
843-577-7700
mdc@barnwell-whaley.com
pferderigos@barnwell-whaley.com

Jennifer H. Thiem
Karen E. Spain
K&L Gates, LLP
134 Meeting Street, Suite 500
Charleston, SC 29401
843-579-5600
jennifer.thiem@klgates.com

Oana D. Johnson
Attorney at Law
151 King Street
Second Floor
Charleston, SC 29401
843-709-1025
oana@odjlaw.com

The Respondents, by their respective counsel, hereby move, pursuant to Rule 212(b), SCACR, for leave to supplement the Record on Appeal to include copies of certain documents filed in the Court of Common Pleas for Charleston County, South Carolina, relating to this Appeal. Specifically, the Respondents move to supplement the Record on Appeal to include file-stamped copies of the complaint, including all attachments thereto, in the case of *Personal Care, Inc. v. Thomas A. Pendarvis and Pendarvis Law Offices, P.C.*, 2018-CP-10-1084, an action filed on February 28, 2018, by Appellant Personal Care, Inc. (“Personal Care”) against its former appellate counsel, Thomas A. Pendarvis and Pendarvis Law Offices, PC (collectively, “Pendarvis”). Copies of these documents are attached hereto as **Exhibit A**.

In this new action, Personal Care alleges legal malpractice claims arising from Pendarvis’s failure to file a motion to restore the circuit court case against Respondents within one year of the entry of the consent order striking the case from the docket pursuant to Rule 40(j), SCRCR. (Ex. A, Summons and Complaint with attachments.) In its Complaint against Pendarvis, Personal Care avers 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 p. 7, Complaint ¶ 23.) In support of its legal malpractice claims against Pendarvis, Personal Care also filed an expert affidavit of Stephen E. Darling. (Ex. A pp. 28–31, Darling Aff.) Mr. Darling opines that Pendarvis’s failure to file “the motion to restore the case pursuant to Rule 40(j) within one year of Judge Dennis’ Order filed August 28, 2013[,] . . . resulted in the case being dismissed as time barred by Judge Nicholson’s Order.” (Ex. A p. 31, Darling Aff. ¶ 16.) Mr. Darling further explains that “S.C.R.C.P. 40(j) and cases decided thereunder clearly require that in order to toll the statute of limitations a motion to restore must be filed within one year of the date the case was stricken under the rule.” (Ex. A p. 31, Darling

Aff. ¶ 15.) In short, Personal Care acknowledges in this new action that Personal Care's claims against the Respondents are barred by the statute of limitations.

These official court records are relevant and essential to the determination of this proceeding for the following reasons. The instant Appeal is an appeal of the circuit court's denial of Personal Care's Motion to Restore under Rule 40(j), SCRCF, based on the circuit court's finding that Personal Care's claims against Respondents are time barred. In its malpractice complaint against Pendarvis, Personal Care concedes that Personal Care's claims against Respondents are time barred due to its failure to timely file its Motion to Restore in the circuit court. Personal Care's concession that its claims against the Respondents are time barred effectively nullifies the arguments it asserts in this Appeal.

South Carolina appellate courts have granted motions to supplement the record to include lower court documents, filed after the initiation of the appeal, which may render the appeal moot or otherwise affect the outcome of the appeal. *See Curtis v. State*, 345 S.C. 557, 567 & n.4, 549 S.E.2d 591, 596 & n.4 (2001) (granting motion to supplement the appellate record with related trial court order entered after initiation of the appeal); *Clay v. Burckle*, 369 S.C. 651, 655, 633 S.E.2d 173, 175 (Ct. App. 2006) (granting motion to supplement the appellate record in custody case with related court proceedings that occurred after the family court rendered its decision). Because Personal Care's malpractice complaint against Pendarvis was filed in 2018, the filing was not available to include in the Record on Appeal. Supplementation is appropriate because Personal Care's admission in the new action that Personal Care's claims against the Respondents are barred by the statute of limitations, which is precisely what the circuit court concluded, goes to the core issue raised in this Appeal and nullifies Personal Care's arguments regarding the

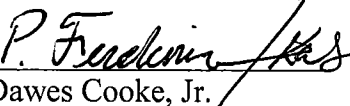
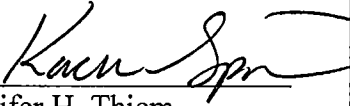

statute of limitations. Thus, Personal Care's new circuit court filing likely affects the outcome of this Appeal and should be included in the Record on Appeal.

Counsel for Respondents have communicated with counsel for Personal Care to attempt to resolve the matter contained herein, but as of the time of filing, they were unable to reach resolution.

For the foregoing reasons, Respondents respectfully request that the Court grant their Motion for Leave to Supplement the Record on Appeal to include copies of the aforementioned documents.

[Signatures on the following page]

Respectfully submitted,

| | | |
|--|--|---|
| <p>Barnwell Whaley Patterson & Helms, LLC</p> <p>By:  M. Dawes Cooke, Jr. Phillip S. Ferderigos 288 Meeting Street, Suite 200 Charleston, SC 29401</p> <p><i>Attorneys for Jerry N. Theos and Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A.</i></p> | <p>K&L Gates, LLP</p> <p>By:  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:  Oana D. Johnson Attorney at Law 151 King Street Second Floor Charleston, SC 29401</p> <p><i>Attorney for Taylor Bowley and Byrd, LLC</i></p> |
|--|--|---|

Date: September 17, 2018

Date: September 17, 2018

Date: September 17, 2018

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF Charleston)

Persoanl Care, Inc.)

CIVIL ACTION COVERSHEET

Plaintiff(s))

2018-CP - 10- 1084

vs.)

Thomas A. Pendarvis and Pendarvis Law Offices, P.C.)

Defendant(s))

Submitted By: John Blincow, Jr.
Address: Blincow Griffin law Firm
126 Meeting St.
Charleston, S.C. 29401

SC Bar #: 738
Telephone #: 843-872-6449

Fax #: _____

Other: _____

E-mail: jbincow@blincowgriffin.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. **This form is NOT required to be filed in E-Filed Cases.**

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- JURY TRIAL** demanded in complaint. **NON-JURY TRIAL** demanded in complaint.
- This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|---|---|
| <input type="checkbox"/> Contracts | <input type="checkbox"/> Torts - Professional Malpractice | <input type="checkbox"/> Torts - Personal Injury | <input type="checkbox"/> Real Property |
| <input type="checkbox"/> Constructions (100) | <input type="checkbox"/> Dental Malpractice (200) | <input type="checkbox"/> Conversion (310) | <input type="checkbox"/> Claim & Delivery (400) |
| <input type="checkbox"/> Debt Collection (110) | <input type="checkbox"/> Legal Malpractice (210) | <input type="checkbox"/> Motor Vehicle Accident (320) | <input type="checkbox"/> Condemnation (410) |
| <input type="checkbox"/> General (130) | <input checked="" type="checkbox"/> Medical Malpractice (220) | <input type="checkbox"/> Premises Liability (330) | <input type="checkbox"/> Foreclosure (420) |
| <input type="checkbox"/> Breach of Contract (140) | Previous Notice of Intent Case # | <input type="checkbox"/> Products Liability (340) | <input type="checkbox"/> Mechanic's Lien (430) |
| <input type="checkbox"/> Fraud/Bad Faith (150) | 20 <u>-NI-</u> | <input type="checkbox"/> Personal Injury (350) | <input type="checkbox"/> Partition (440) |
| <input type="checkbox"/> Failure to Deliver/ Warranty (160) | <input type="checkbox"/> Notice/ File Med Mal (230) | <input type="checkbox"/> Wrongful Death (360) | <input type="checkbox"/> Possession (450) |
| <input type="checkbox"/> Employment Discrim (170) | <input type="checkbox"/> Other (299) _____ | <input type="checkbox"/> Assault/Battery (370) | <input type="checkbox"/> Building Code Violation (460) |
| <input type="checkbox"/> Employment (180) | | <input type="checkbox"/> Slander/Libel (380) | <input type="checkbox"/> Other (499) _____ |
| <input type="checkbox"/> Other (199) _____ | | <input type="checkbox"/> Other (399) _____ | |
| <input type="checkbox"/> Inmate Petitions | <input type="checkbox"/> Administrative Law/Relief | <input type="checkbox"/> Judgments/Settlements | <input type="checkbox"/> Appeals |
| <input type="checkbox"/> PCR (500) | <input type="checkbox"/> Reinstate Drv. License (800) | <input type="checkbox"/> Death Settlement (700) | <input type="checkbox"/> Arbitration (900) |
| <input type="checkbox"/> Mandamus (520) | <input type="checkbox"/> Judicial Review (810) | <input type="checkbox"/> Foreign Judgment (710) | <input type="checkbox"/> Magistrate-Civil (910) |
| <input type="checkbox"/> Habeas Corpus (530) | <input type="checkbox"/> Relief (820) | <input type="checkbox"/> Magistrate's Judgment (720) | <input type="checkbox"/> Magistrate-Criminal (920) |
| <input type="checkbox"/> Other (599) | <input type="checkbox"/> Permanent Injunction (830) | <input type="checkbox"/> Minor Settlement (730) | <input type="checkbox"/> Municipal (930) |
| | <input type="checkbox"/> Forfeiture-Petition (840) | <input type="checkbox"/> Transcript Judgment (740) | <input type="checkbox"/> Probate Court (940) |
| | <input type="checkbox"/> Forfeiture-Consent Order (850) | <input type="checkbox"/> Lis Pendens (750) | <input type="checkbox"/> SCDOT (950) |
| | <input type="checkbox"/> Other (899) _____ | <input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760) | <input type="checkbox"/> Worker's Comp (960) |
| <input type="checkbox"/> Special/Complex /Other | <input type="checkbox"/> Pharmaceuticals (630) | <input type="checkbox"/> Confession of Judgment (770) | <input type="checkbox"/> Zoning Board (970) |
| <input type="checkbox"/> Environmental (600) | <input type="checkbox"/> Unfair Trade Practices (640) | <input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780) | <input type="checkbox"/> Public Service Comm. (990) |
| <input type="checkbox"/> Automobile Arb. (610) | <input type="checkbox"/> Out-of-State Depositions (650) | <input type="checkbox"/> Incapacitated Adult Settlement (790) | <input type="checkbox"/> Employment Security Comm (991) |
| <input type="checkbox"/> Medical (620) | <input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660) | <input type="checkbox"/> Other (799) _____ | <input type="checkbox"/> Other (999) |
| <input type="checkbox"/> Other (699) _____ | <input type="checkbox"/> Pre-Suit Discovery (670) | | |
| <input type="checkbox"/> Sexual Predator (510) | | | |
| <input type="checkbox"/> Permanent Restraining Order (680) | | | |
| <input type="checkbox"/> Interpleader (690) | | | |

Submitting Party Signature: [Signature]

Date: 2/27/2018

Exhibit A to Motion to Supplement p.2

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Personal Care, Inc.)
)
 Plaintiff,)
 v.)
 Thomas A. Pendarvis and)
 Pendarvis Law Offices, PC)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CIVIL ACTION NUMBER:

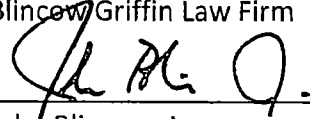
2018-CP-10-1084

SUMMONS

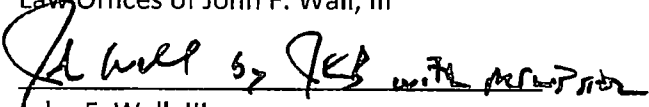
FILED
 2018 FEB 28 AM 9:31
 JULEE J. ARMSTRONG
 CLERK OF COURT

TO THE DEFENDANTS ABOVE NAMED:

You are hereby summoned and required to answer the Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the Complaint on the subscriber at their offices located at 126 Meeting Street, Charleston, SC 29401, within thirty (30) days after service hereof, exclusive of the date of such service. If you fail to answer the Complaint within the time aforesaid judgment by default will be rendered against you for the relief demanded in the Complaint.

Blinco Griffin Law Firm


 John Blincow, Jr.
 126 Meeting Street
 Charleston, SC 29401

Law Offices of John F. Wall, III


 John F. Wall, III
 288 Meeting St. Suite 400
 Charleston, SC 29401

Date: *2/27/18*
 Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Personal Care, Inc.)
)
 Plaintiff,)
)
 vs.)
)
 Thomas A. Pendarvis and)
 Pendarvis Law Offices, PC)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CIVIL ACTION NUMBER:

2018-CP-16-1084

**COMPLAINT
 (JURY TRIAL DEMANDED)**

FILED
 2018 FEB 28 AM 9:31
 JULIE J. ARMSTRONG
 CLERK OF COURT

The Plaintiff, Personal Care, Inc., (Personal Care) alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. The Plaintiff, Personal Care Inc., is a corporation organized and existing under the laws of the State of South Carolina with its principle place of business in Charleston, South Carolina.

2. The Defendant, Thomas A. Pendarvis, Esquire, is a citizen and resident of Beaufort County, South Carolina and is an attorney licensed to practice law in South Carolina. At all relevant times Mr. Pendarvis was a shareholder in Pendarvis Law Offices, PC. and does business in Charleston, South Carolina.

3. The Defendant Pendarvis Law Offices, PC is a professional corporation organized and existing under the laws of the State of South Carolina and does business in Charleston, South Carolina.

4. That jurisdiction and venue are proper in this Court.

5. The Plaintiff originally filed and served its action on August 25, 2017. Thereafter the Defendants answered and filed a Motion to Dismiss on the basis that the Plaintiff's expert

affidavit had not been timely filed. Thereafter, on November 3, 2017, before any substantive work had been done and without any prejudice to the Defendants, the Plaintiff filed and served its expert affidavit. The Plaintiff now files this action, together with its expert affidavit, in order to remove the basis for the Motion to Dismiss.

FACTS RELATIVE TO THE UNDERLYING LAWSUIT

6. Mr. Pendarvis, individually and on behalf of Pendarvis Law Offices, was engaged and retained to represent the Plaintiff with respect to claims against two (2) other lawyers and their respective law firms (attorneys in the underlying lawsuit).

7. That the Plaintiff retained the Attorneys in the underlying lawsuit to represent it in a dispute with a competitor. The essence of the dispute was that two (2) of the Plaintiff's former employees went to work for the competitor. Thereafter, the competitor began to wrongfully use the Plaintiff's proprietary list of clients to its advantage and in violation of the HIPPA statutes by attempting to solicit business away from the Plaintiff, causing certain damages.

8. That on September 14, 2009, one of the Attorneys in the underlying lawsuit wrote a letter to the competitor of the Plaintiff and sent a copy to a third party dialysis clinic.

9. That on December 10, 2009, the Attorneys in the underlying lawsuit filed suit in Charleston County against the competitor of the Plaintiff.

10. That on or about March 8, 2010, the competitor filed its Answer and Counter claim. The Counterclaim contained a single cause of action for defamation. The defamation was based solely on the September 14, 2009, letter written by one of the Attorneys in the underlying law suit. The Counterclaim alleged that several statements in the letter were false and defamatory and made with malice and published to a third party. The Counterclaim sought actual and punitive damages.

11. That on or about March 8, 2010, the competitor filed a Motion to Change Venue.

12. Following a hearing on July 13, 2010, the Court entered an Order transferring venue to Hampton County.

13. Over two years later, on or about August 30, 2012, the Attorneys in the underlying lawsuit filed a Motion to be Relieved as Counsel for the Plaintiff. The Plaintiff was forced to hire separate counsel and opposed the Motion.

14. After an in-camera hearing, the Court entered an Order dated November 9, 2012, filed under seal, which relieved the Attorneys in the underlying lawsuit as counsel for the Plaintiff. At least one basis for the Court's ruling was that the key factual issue at trial would be the accuracy and truthfulness of the letter written by one of the Attorneys in the underlying lawsuit which would necessarily require the testimony of the Defendants. The Attorneys in the underlying lawsuit could not simultaneously be witnesses on this key factual issue and serve as counsel for the Plaintiff.

15. The Plaintiff was required to retain new lawyers to represent it in the defense of the Counterclaim thereby incurring additional fees and expenses.

16. On or about December 5, 2013, the Plaintiff settled the Counterclaim for \$90,000.

FACTS RELATIVE TO THIS CASE

17. That, at all relevant times, an attorney client relationship existed between the parties.

18. As part of the acceptance of representation, the Defendants entered into a written contract of representation with the Plaintiff.

19. That on or about March 8, 2013, the Defendants filed a lawsuit on the Plaintiff's behalf against the Attorneys in the underlying lawsuit. This was a legal malpractice action. Among other things, the suit alleged that the letter, written by one of the Attorneys in the underlying lawsuit, directly caused the Plaintiff to be sued for defamation in a difficult venue in South Carolina. In addition, the suit alleged that the two-year delay between writing and sending the letter and moving to be relieved as counsel caused the Plaintiff additional damages. Thereafter, the respective Attorneys in the underlying lawsuit filed their Answers and the issues were joined between the parties.

20. After filing suit, the Defendant failed to serve any written discovery requests and failed to take any depositions to advance the case.

21. That on or about August 28, 2013, the Defendants filed a Consent Order pursuant to Rule 40(j) SCRPC striking the case from the docket. A copy of that Order is attached as Exhibit 1 to the Complaint.

22. That on September 22, 2014, after the one-year deadline to restore the case pursuant to the Court's Order and Rule 40(j) SCRPC, the Defendant filed a Motion to Restore. A copy of the Motion is attached as Exhibit 2 to the Complaint.

23. The Motion came before the Court for a hearing on November 19, 2014. The Court denied the Motion. A copy of the Court's Order is attached as Exhibit 3 to the Complaint. The net effect of the Defendants' negligent and careless acts and omissions was to make it impossible for Plaintiff to pursue its valid claims against the Attorneys in the underlying case in Court.

24. That the matter is currently on appeal and pending before the South Carolina Court of Appeals.

25. At all relevant times, the acts and omissions of the Pendarvis Law Offices included the acts and omissions of its agents, principles, employees, and servants, including but not limited to those by Mr. Pendarvis, pursuant to the principles of non-delegable duty, corporate liability, apparent authority, ostensible agency and respondeat superior.

26. At all relevant times, Pendarvis Law Offices acted by and through its agents and principles, including but not limited to Mr. Pendarvis, who acted within the course and scope of his employment or agency so as to make the Defendant law firm vicariously liable.

FOR A FIRST CAUSE OF ACTION

(PROFESSIONAL NEGLIGENCE)

27. The Plaintiff reiterates and re-alleges each of its previous allegations as if set forth fully herein.

28. The nature of the lawyer client relationship herein required, among other things, that the Defendants protect the Plaintiff's interests and pursue its claims against its former attorneys with reasonable diligence.

29. By undertaking to represent Personal Care, the Defendants impliedly represented that they possessed the requisite degree of learning, skill and ability necessary for the practice of the profession that other lawyers ordinarily possess and would exercise reasonable and ordinary care and diligence in the use and application of skill and knowledge in their representation of Personal Care.

30. By virtue of the lawyer client relationship the Defendants owed certain duties of care to Personal Care including the duty to protect, preserve, and prosecute Personal Care's rights and interests to the same degree as would be exercised by reasonably competent lawyers under the same or similar circumstances.

31. That the Defendants deviated from the accepted standard of care in one or more of the following particulars:

- a) By not moving to restore the case within one year as required by the Court's order.
- b) By not moving to restore the case within one year as required by Rule 40(j) SCRPC.
- c) By not following the requirements of the law when handling the client's case.
- d) By failing to take reasonable steps to prosecute the case.
- e) By doing things that required the client to spend more money on legal fees and other expenses than he otherwise would have been required to spend.
- f) By not adequately protecting the client's interest and in failing to take the appropriate steps so that the Plaintiff could pursue its claims in Court.
- g) By not keeping the client properly informed regarding all matters concerning the case.
- h) In such other particulars as will be established during discovery.

32. The Defendants conduct herein did not involve the exercise of his or its professional judgment, but is instead actionable and resulted from the Defendant's failure to exercise ordinary skill and knowledge.

33. The Defendant's failed to meet the minimum standard of care and thereby breached their duties to perform competent legal services for Personal Care and otherwise acted in a negligent and careless manner.

34. As a direct and proximate cause of the Defendant's actions Personal Care incurred actual damages, special damages, and incidental damages all in an amount to be proven at trial.

FOR A SECOND CAUSE OF ACTION

(BREACH OF FIDUCIARY DUTIES)

35. The Plaintiff reiterates and re-alleges each of its previous allegations as if set forth fully herein.

36. At all relevant times the Defendants owed certain fiduciary duties to Personal Care.

37. The Defendants' fiduciary duties included, but were not limited to, duties of competence and loyalty as well as a duty to act diligently and carefully to protect, preserve and advance the rights and interests of Personal Care.

38. The Defendants had a duty to keep Personal Care fully informed of all facts material to the lawsuit.

39. The Defendants failed to meet the minimum standard of care and thereby breached their fiduciary duties to provide competent legal services to Personal Care.

40. As a direct and proximate cause of the Defendant's conduct and breach of their fiduciary duties, Personal Care sustained compensatory damages in an amount to be proven at trial. The Defendants should also be required to disgorge all fees and other benefits obtained from their relationship with Personal Care.

FOR A THIRD DEFENSE

(BREACH OF CONTRACT)

41. The Plaintiff reiterates and re-alleges each of its previous allegations as if set forth fully herein.

42. The Defendant law firm entered into a contract with Personal Care and contracted to provide competent legal services to pursue a recovery for Personal Care against the Defendants in the underlying law suit.

43. Personal Care fulfilled all necessary conditions of the contract with the Defendants.

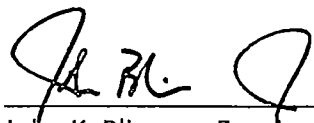
44. The Defendant law firm breached its contract with Personal Care by failing to restore the case in a timely manner thereby causing the Plaintiff certain damages.

45. As a direct and proximate result of the Defendant law firm's breach of contract, Personal Care sustained actual damages in an amount to be proven at trial.

EXPERT AFFIDAVIT

46. The Plaintiff's expert affidavit is attached to this Complaint.

WHEREFORE, Personal Care prays for judgment against the Defendants on each cause of action and for actual damages, special damages, and incidental damages and for such other relief as this Court deems appropriate.



John K. Blincow, Esquire
Blincow Griffin Law Firm
126 Meeting Street
Charleston, SC 29401
843-872-6449
jblincow@blincowgriffin.com

Date: 2/27/18
Charleston, South Carolina

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

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

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

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

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

IT FURTHER APPEARING that each party agrees that if the claim is restored within one year from the date of this Order, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations as of the date of this Order shall remain and begin to run on the date the claim is restored.

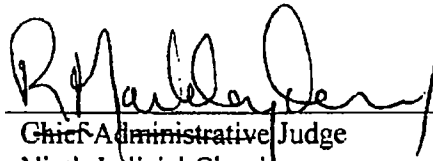
IT IS HEREBY ORDERED that the above-captioned case be stricken from the docket in accordance with the agreement of the parties pursuant to Rule 40(j), SCRCP.

[SIGNATURES ON FOLLOWING 4 PAGES]

[Handwritten signature]

Ex 1

IT IS SO ORDERED.



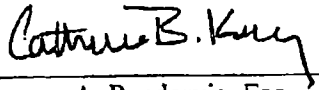
Chief Administrative Judge
Ninth Judicial Circuit

Charleston, South Carolina

August 27, 2013

RMA/2

WE SO CONSENT:

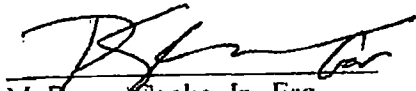


Thomas A. Pendarvis, Esq.
Catherine B. Kerney, Esq.
Pendarvis Law Offices, P.C.
500 Carteret Street, Suite A
Beaufort, SC 29902-5066
(843) 524-9500
(843) 524-9501 fax

Counsel for the Plaintiff



WE SO CONSENT:



M. Dawes Cooke, Jr., Esq.
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700
(843) 577-7708 fax

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

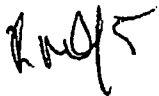
RW/4

WE SO CONSENT:



David W. Overstreet, Esq.
Amanda K. Dudgeon, Esq.
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307
(843) 727-2995 fax

**Counsel for Defendants Cheryl D. Shoun
and Taylor, Shoun, Bowley & Byrd, LLC**



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

SEP 22 PM 2:33
LEEL
COURT

PERSONAL CARE, INC.,

Plaintiff,

vs.

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

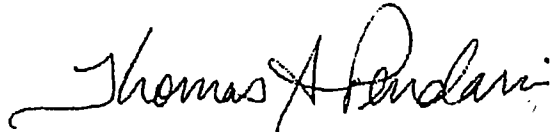
Defendants.

**MOTION TO RESTORE
PURSUANT TO RULE 40(J), SCRPC**

TO: M. Dawes Cooke, Jr. J.D. and Phillip S. Ferderigos, J.D., Lawyers for Defendants Jerry N. Theos and URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; and to Defendant, Cheryl D. Shoun, and Defendant, TAYLOR, SHOUN, BOWLEY & BYRD, LLC, n/k/a TAYLOR, BOWLEY & BYRD, LLC :

YOU WILL PLEASE TAKE NOTICE the Plaintiff hereby moves for an Order restoring this action to the active jury trial docket. This Motion is based upon the grounds that with the consent of all parties, this action was stricken pursuant to Rule 40(j), SCRPC, as shown by the "Consent Order Striking Case From Docket [Rule 40(j), SCRPC]" entered on August 28, 2013, a copy of which is attached as Exhibit 1, and Plaintiff desires to restore this action to the active trial docket.

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis
500 Carteret Street, Suite A
Beaufort, South Carolina 29902
(843) 524-9500 Tel.
(843) 524-9501 Fax.
Thomas@Pendarvislaw.com

Lawyer for Plaintiff PERSONAL CARE, INC.

Beaufort, South Carolina

September 17, 2014

Ex 2

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

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

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

FILED
 2015 MAR - 3 PM 2:31
 JULIE J. ARICCI, CLERK OF COURT
 BY _____

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

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

Procedural Background

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

¹ After Defendant Cheryl Shoun left the law firm of Taylor, Shoun, Bowley, and Byrd, LLC, in April 2010, the firm became Taylor, Bowley and Byrd, LLC.

² Also before the Court are two Motions for Sanctions against Personal Care's counsel, filed by Defendants Shoun and TBB. The Court denies these Motions for Sanctions.

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

On March 8, 2013, Personal Care filed the instant action against Theos, Shoun, and TBB (**Exhibit C**).³ In its Verified Complaint, Personal Care asserted that its failure to attach the required S.C. Code Ann. § 15-36-100(B) Expert Affidavit for a legal malpractice claim was excused "because this Complaint is being filed when there is a good faith basis to believe the expiration of the statute of limitations is imminent."

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


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

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

IT FURTHER APPEARING that each party agrees that if the claim is restored within one year from the date of this Order, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations as of the date of this Order shall remain and begin to run on the date the claim is restored. (Emphasis added).

The 2013 Judge Dennis Order was filed on August 28, 2013, and thereafter the status of the case was shown as "Dismissed."

Approximately one year later, on August 22, 2014, Personal Care's counsel contacted Theos's counsel to request his consent to a proposed Consent Order Restoring Case to Docket (Rule 40(j), SCRCF), (hereinafter "2014 Proposed Consent Order") (**Exhibit F**), which purported to reinstate the case pursuant to the 2013 Judge Dennis Order. On August 26, 2014, Theos did not have an overt reason not to consent to the 2014 Proposed Consent Order. Defense counsel for Theos signed the 2014 Proposed Consent Order and forwarded it to Personal Care's counsel on August 26, 2014. The other Co-Defendants, Shoun and TBB, however, did not consent to the 2014 Proposed Consent Order. In fact, TBB did not receive a copy of the 2014 Proposed Consent Order until September 17, 2014.


 Despite the fact that Personal Care's counsel did not have the consent of all the parties to submit the 2014 Proposed Consent Order to the Court, on or about August 27, 2014, Personal Care's counsel mailed the partial consent to the 2014 Proposed Consent Order to the clerk of court, requesting that the clerk present it to Judge Dennis for his consideration. The clerk returned the mailing unfiled because Personal Care did not include a proper cover sheet and filing fee. Personal Care submitted the 2014 Proposed Consent Order on September 4, 2014, along with the requisite fee and cover sheet. On September 15, 2014, Judge Dennis and his law clerk received the 2014 Proposed Consent Order. Upon review, Judge Dennis's clerk noted that the 2014 Proposed Consent Order did not have the consent of all of the parties. The clerk contacted Personal Care's counsel and to inquire about the missing consents. During the email exchange between Judge Dennis's clerk and Personal Care's counsel, Personal Care's counsel asserted that Shoun's failure to object to his 2014 Proposed Consent Order was tantamount to consent and that counsel for all of the other defendants had consented. On September 17, 2014, TBB contacted Judge Dennis's clerk to inform her that Personal Care had never given TBB notice of its intent to restore nor asked TBB to consent to restoration. Shortly thereafter, Personal

Care's counsel withdrew the 2014 Proposed Consent Order via his communication with the Court on September 17, 2014 (**Exhibit G**), wherein Personal Care's counsel stated:

Please extend my apologies to Judge Dennis for the circumstances, but **Personal Care is withdrawing the proposed Consent Order to restore** the case to the active trial roster as not all parties have consented to the restoration. ... It is also my understanding from the telephone call with Ms. Byrd that Taylor, Bowley & Byrd, LLC has not consented to Personal Care's proposed consent Motion to restore the case to the active trial roster. As such, a formal motion to restore will be filed. ... Again, under the circumstances the proposed Consent Order is being withdrawn, and we will proceed with a formal motion to restore. (Bold in the original; underline added).

After withdrawal of the 2014 Proposed Consent Order, on September 22, 2014, over three weeks after the one-year deadline pursuant to the 2013 Judge Dennis Order and SCRPC Rule 40(j), Personal Care's counsel subsequently filed the instant Motion to Restore the case.

Findings of Fact and Conclusions of Law




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

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

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

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



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

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

⁴ SCRPC Rule 40(j) sets forth:

(j) Case Stricken From Docket by Agreement

A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. (Emphasis added).

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

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

Personal Care argues that it is of no consequence that the statute of limitations was not tolled because, according to Personal Care, the statute of limitations did not start running until July 2012.⁵ At the hearing, although Personal Care's counsel conceded that Personal Care knew both about the Counterclaim and that there were alleged issues with the defense of the case, Personal Care's counsel asserted that the statute of limitations did not begin to run until Personal Care experienced, in the summer of 2012, the "first financial consequence" caused by Defendants' alleged errors. The Court finds Personal Care's argument unpersuasive and concludes that the statute of limitations has expired.

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

⁵ All of the claims in this action are governed by a three-year statute of limitations. S.C. Code Ann. § 15-3-530(1) (governing contract claims); Holmes v. Haynsworth, Sinkler & Boyd, PA, 408 S.C. 620, 632, 760 S.E.2d 399, 405 (2014) (applying three-year statute of limitations in legal malpractice action); Mazloom v. Mazloom, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (Ct. App. 2009), aff'd, 392 S.C. 403, 709 S.E.2d 661 (2011) (citing three-year statute of limitations in breach of fiduciary duty action).

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

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

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

Importantly, under South Carolina law, “[a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it.” Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962). The law presumes at least nominal damages at that point. Livingston v. Sims, 197 S.C. 458, 15 S.E.2d 770 (1941), modified by Santee Portland Cement v. Daniel Int’l Corp., 299 S.C. 269, 384 S.E.2d 693 (1989) (discovery rule applies to contract statute of limitations). The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose. Livingston, 197 S.C. 458, 15 S.E.2d 770; Stephens v. Druffin, 327 S.C. 1, 488 S.E.2d 3, 7 (S.C. 1997). Thus, in a legal malpractice case, “a client sustains an injury as soon as he or she is forced to incur costs” as a result of counsel’s alleged negligence. Epstein, 363 S.C. at 380, 610 S.E.2d 816 (quoting Laird v. Blacker, 7 Cal. Rptr. 2d 550, 828 P.2d 691, 696 (1992)).

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

According to Paragraph 18 of the Amended Complaint, the first act of alleged negligence occurred in September 2009 when Theos allegedly sent a defamatory letter to a third party. Paragraph 20 alleges that, on March 9, 2010, the underlying defendant filed an Answer and Counterclaim asserting a claim for defamation based on the allegedly defamatory statements in the letter published by Theos in September 2009. Finally, Paragraph 40 alleges that Personal Care was damaged by Theos and Shoun's errors when "it was forced to spend additional funds and commit time and other resources to mitigate the damages caused as a direct and proximate result of Defendants' errors." Based on such allegations and the clear evidence in the record, I find Personal Care suffered damages as soon as it was forced to incur costs to defend against the competitor's counterclaim.

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

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

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

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

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

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

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

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

5. Email from Shoun to Cignavitch dated April 6, 2010: "Bernie: I forgot to mention this again - please get your insurance information to me as quickly as you can. Thanks." (Exhibit L).

6. Email from Shoun to Cignavitch dated April 13, 2010: "Please remember that a reply to the Counterclaim by Ms. Askew will have to be served by the latter part of May." (Exhibit M).

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

8. Email from Kerr to Cignavitch dated June 7, 2010: "Bernie: Attached please find for your review and file a filed stamped copy of the Reply to

Counterclaim in the above-referenced matter. Should you have any questions or concerns, please let us know.” (Exhibit O).

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

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

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

The Court hereby concludes that, upon receiving a copy of the counterclaim, multiple e-mails referencing the counterclaim, a request for insurance information so that the client could get coverage for defense of the counterclaim, an invoice charging for services rendered to reply to the counterclaim, and a copy of the Reply to the Counterclaim, a person of common knowledge and experience would have been put on notice that claims against his lawyer might exist as a result of the letter and Counterclaim. See Epstein, 363 S.C. at 376, 610 S.E.2d at 818. Therefore, I find that Personal Care had both knowledge of the alleged negligence and present damage by the first half of 2010. Accordingly, the Court hereby concludes that the statute of limitations on Plaintiff's claims began to run in the spring of 2010.

Furthermore, I find that, based on the Verified Complaint's S.C. Code Ann. § 15-36-100 (c)(1) Expert Affidavit verification, Personal Care has also admitted that the statute of limitations ran, at the latest, on March 18, 2013.⁶ Paragraph 97 of the Complaint, filed on March 8, 2013, takes advantage of the provision of South Carolina Code Section 15-36-100(b), (c)(1): “Pursuant to the code, because this complaint is being filed when there is a good faith basis to believe the expiration of the statute of limitations is imminent, it is filed without an affidavit by an expert licensed by the Supreme Court of the State of South Carolina.” S.C. Code Ann. § 15-36-100 (c)(1), sets forth the following: “The contemporaneous filing requirements of Subsection (b) do not apply to any case in which the period of limitations will expire or there is a good faith basis to believe it will expire on a claim stated in the complaint within 10 days of filing.” Accordingly,

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

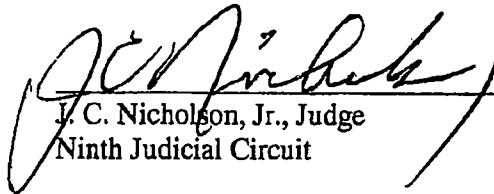
Personal Care verified for this Court that the statute of limitations would likely expire within ten days of filing, i.e., on March 18, 2013.⁷

In summary, I find that the 2014 Proposed Consent Order is a nullity. Moreover, I find that Personal Care failed to restore the case within the one-year timeframe provided in the 2013 Judge Dennis Order. Furthermore, Personal Care did not file a timely Motion to Restore, which Rule 40(j) requires in order to benefit from the tolling provision of Rule 40(j). I further find that at no point did any of the Defendants agree that the statute of limitations would be further tolled above and beyond the parameters set forth in the 2013 Judge Dennis Order or SCRCF Rule 40(j). As Personal Care did not file its Motion to Restore the case within one year of the administrative dismissal, I hereby find that the statute of limitations is not tolled, and, accordingly, Personal Care's claims against Defendants are time-barred.

Conclusion

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

IT IS SO ORDERED!


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

Dated: 3/2/15

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

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

PERSONAL CARE, INC.,
Plaintiff,

Case No. 2017-CP-10-04374

vs.

AFFIDAVIT OF STEPHEN E. DARLING

THOMAS A. PENDARVIS and PENDARVIS
LAW OFFICES, P.C.,
Defendants.

FILED
2017 NOV -3 PM 1:54
JULIE J. AMSTORNG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, STEPHEN E. DARLING who first being duly sworn, deposes and says:

1. I am an attorney at law who has practiced at the law firm of Haynsworth Sinkler Boyd, P.A., and its predecessor firms in Charleston, South Carolina, since 1974.
2. I graduated from the University of South Carolina with a Bachelor of Science degree in Business Administration in 1971 and the University of South Carolina School of Law with a Juris Doctor degree in 1974.
3. I was licensed to practice law and admitted to the Bar in South Carolina on November 14, 1974 and have continued to practice law in South Carolina as a member in good standing since that time.
4. I am also admitted to practice in the United States Supreme Court since 1982, the United State Court of Appeals for the Fourth Circuit since 1976, the United States Court of

Appeals for the Fifth Circuit since 1976, and the United States Court of Appeals for the Third Circuit since 2000.

5. I have been recognized by *The Best Lawyers in America*© for Personal Injury Litigation-Defendants (2013-2018) and Product Liability Litigation-Defendants (2013-2018) and *South Carolina Super Lawyers*® Personal Injury-Products: Defense (2008-2017).

6. I am a member of the South Carolina Defense Trial Attorneys' Association and have served on its Board of Directors from 1994 to 1999, as Secretary in 2000, Treasurer in 2001, Present-Elect in 2002, and President in 2003.

7. I am also a member of the South Carolina Bar, Charleston County Bar Association, American Bar Association, Defense Research Institute, International Association of Defense Counsel, American Board of Trial Advocates and Litigation Counsel of America.

8. I devote the majority of my practice to the defense of civil litigation matters.

9. I have been asked to review file materials in this case on behalf of the Plaintiff and provide an expert witness affidavit pursuant to the provisions of §15-36-100, S.C. Code (2005).

10. I have been provided and reviewed the following pleadings, court documents and orders:

- (a) Complaint in *Personal Care, Inc. v. Hattie M. Askew, et al.*, Case No. 2009-CP-10-07692 filed December 20, 2009;
- (b) Verified Complaint in *Personal Care, Inc. v. Jerry N. Theos, et al.*, Case No. 2013-CP-10-01396 filed March 8, 2013;
- (c) Motion to Restore Pursuant to Rule 40(J), SCRPC in *Personal Care, Inc. v. Jerry N. Theos, et al.*
- (d) Order Denying Plaintiff's Motion to Restore and Denying Defendants' Motions for Sanctions in *Personal Care, Inc. v. Jerry N. Theos, et al.*; and

- (e) Complaint in *Personal Care, Inc., v. Thomas A. Pendarvis and Pendarvis Law Offices, P.C.*, Case No. 2017-CP-10-04374 filed August 25, 2017.

11. The relevant facts underlying this claim are set forth in the above-referenced Order Denying Plaintiff's Motion to Restore and Denying Defendant's Motion for Sanctions and the Complaint in *Personal Care, Inc. v. Thomas A. Pendarvis and Pendarvis Law Offices, P.C.*

12. On March 8, 2013, Personal Care, by its lawyers Thomas A. Pendarvis and Pendarvis Law Offices, P.C., filed its action against Jerry N. Theos, *et al.*, alleging legal malpractice. The Personal Care action against Theos, *et al.* was administratively dismissed by The Honorable R. Markey Dennis, Jr.'s Consent Order Striking Case From Docket [Rule 40(j), SCRCPP] That order set forth the following:

IT FURTHER APPEARING that each party agrees that if the claim is restored within one year from the date of this Order, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the status of limitations as of the date of this Order shall remain and begin to run on the date the claim is restored.

The Order was filed August 28, 2013.

13. Although Personal Care's lawyer Thomas A. Pendarvis attempted to get consent from all parties to restore the case within one year of the Rule 40(j) dismissal, he was unable to obtain all those consents. Thereafter, he filed the Motion to Restore September 22, 2014, over three weeks after the one year deadline set forth in Judge Dennis' 2013 Order and S.C.R.C.P. Rule 40(j).

14. The Honorable J.C. Nicholson, Jr., issued his Order Denying Plaintiff's Motion to Restore and Denying Defendants' Motion for Sanctions filed March 3, 2015 in which he found that Personal Care did not file a timely motion to restore in order to benefit from the tolling provisions of Rule 40(j). He then went on to find that because the Motion to Restore had not

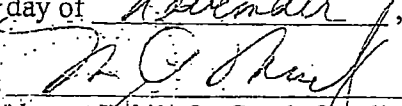
been filed within one year of the administrative dismissal, the statute of limitations was not tolled and, therefore, Personal Care's claims against the Defendants Theos, *et al.*, were time barred.

15. S.C.R.C.P. 40(j) and cases decided thereunder clearly require that in order to toll the statute of limitations a motion to restore must be filed within one year of the date the case was stricken under the rule.

16. In my judgment and opinion, based upon a reasonable degree of legal certainty, Thomas A. Pendarvis and Pendarvis Law Offices, PC, who were retained by Personal Care, Inc., to pursue the legal malpractice action against Jerry N. Theos, *et al.*, were and/or should have been aware of the provisions of S.C.R.C.P. 40(j) and when they could not get consent to restore, they should have filed the motion to restore the case pursuant to Rule 40(j) within one year of Judge Dennis' Order filed August 28, 2013. Their failure to do so resulted in the case being dismissed as time barred by Judge Nicholson's Order.

17. The failure of Thomas A. Pendarvis and Pendarvis Law Offices, PC timely to file the motion to restore pursuant to Rule 40(j) was violative of the standard of care for lawyers licensed to practice in South Carolina, was negligent and caused the case to be dismissed.


STEPHEN E. DARLING

Sworn to before me this 3rd
day of November, 2017.

Notary Public for South Carolina
My Commission Expires: 3-12-24
DM: 5176235 v.1

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
SEP 19 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.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2018, I served a copy of the foregoing Respondents' Joint Motion for Leave to Supplement Record on Appeal on counsel for the Appellant via U.S. Mail with sufficient postage, correctly addressed as follows:

COLLINS & LACY, P.C.
Christian Stegmaier, Esq.
Kelsey J. Brudvig, Esq.
1330 Lady Street, Sixth Floor
Columbia, SC 29201

BLINCOW GRIFFIN LAW FIRM
John K. Blincow, Esq.
126 Meeting Street
Charleston, SC 29401

K&L Gates LLP

By: 

September 17, 2018

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

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

RECEIVED
SEP 19 2018
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed herewith please find the original and seven (7) copies of Respondents' Joint Motion For Leave To Supplement Record 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.)



First Class Mail

RECEIVED

SEP 19 2018

SC Court of Appeals

K&L GATES
134 Meeting Street, Suite 500
Charleston, SC 29401
3900291.00001/39018

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