

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge
Appellate Case No. 2018-000092

RECEIVED
SEP 24 2018
SC Court of Appeals

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

v.

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

RECORD ON APPEAL

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Index

June 6, 2013 Order Granting Defendants' Motions for Summary Judgment	001
August 18, 2017 Scheduling Order Subsequent to Remittitur	018
April 5, 2017 Order assigning case to Judge Nettles	020
October 17, 2017 Order	021
October 19, 2017 Order	023
November 30, 2017 Order disqualifying Mr. Epting and his firm	027
January 12, 2018 Order on Plaintiff's Motion for Reconsideration	037
Complaint	039
Affidavit of Ronald L. Richter, Jr.	044
Defendants' Joint Motion to Exclude Expert Witnesses, etc.	048
Exhibit A Scheduling Order	053
Exhibit B Plaintiff's Expert Disclosure	056
Exhibit C Interrogatories and Requests for Production	059
Plaintiff's Objections to Proposed Order	071
Defendants' Joint Response to Plaintiff's Objections to Proposed Order	075
Defendants' Joint Memorandum in Response to Plaintiff's Objections to Proposed Order ..	079
October 18, 2017 letter to Clerk of Court from Mr. Rannick	086
October 16, 2017 letter to Judge Nettles from Mr. Epting	087
October 16, 2017 letter to Judge Nettles from Ms. Wall	089
October 18, 2017 letter to Judge Nettles from Mr. Epting	092
Stokes-Craven's Objections to Defendants' Proposed Order	094
Exhibit A Bank Statement	102
Exhibit B Satisfaction of Judgment and Full and Final Release	104
Exhibit C July 11, 2012 Order of Judge Hayes	107
Exhibit D August 8, 2013 letter to Clerk of Court from Judge James	113

Exhibit E	Memorandum of Law in Support of Motion to Direct Clerk of Court to Enter Judgment, etc.	121
Exhibit F	Disbursement Statement	161
	Stokes-Craven's Motion to Reconsider	163
Exhibit A	November 30, 2017 Order	166
Exhibit B	November 20, 2017 email to Judge Nettles from Mr. Epting	176
Exhibit C	October 16, 2017 letter to Judge Nettles from Mr. Epting	177
Exhibit D	Stokes-Craven's Objections to Proposed Order	179
	Defendants' Response to Plaintiff's Motion to Reconsider	191
	Plaintiff's Supplemental Answers to First Set of Interrogatories	194
	Notice of Appearance by Mr. Ransom	196
	Transcript of October 13, 2017 hearing	197
	Transcript of October 19, 2017 hearing	228
	Transcript of November 2, 2017 hearing	253
	Transcript of December 21, 2017 hearing	300

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

STOKES-CRAVEN HOLDING CORP.
D/B/A STOKES-CRAVEN FORD,

Plaintiff,

vs.

SCOTT L. ROBINSON AND JOHNSON
MCKENZIE & ROBINSON, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

C/A No.: 2010-CP-14-457

**ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY**

JUDGMENT

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE

6/6/13

Baile H. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

THIS MATTER CAME BEFORE THE COURT by way of defendant Scott L. Robinson's motion for summary judgment filed on November 29, 2012 and defendant Johnson McKenzie & Robinson, LLC's motion for summary judgment filed on November 26, 2012. Also before the court was the plaintiff's motion to compel production of certain documents. After due notice, a hearing was held on January 9, 2013 in Clarendon County, South Carolina. Present at the hearing were counsel for all interested parties: Andrew K. Epting, Jr., for plaintiff Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford; Susan Taylor Wall, Esq., for defendant Scott L. Robinson ("Robinson"); and Warren C. Powell, Jr., Esq., for defendant Johnson McKenzie & Robinson, LLC ("Johnson McKenzie"). The Court has carefully considered the motions, arguments of counsel, and the law.

I. BACKGROUND

This case arises from an underlying action known as *Donald C. Austin v. Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford*, Case No. 2004-CP-14-135 ("Underlying Action"). Robinson and Johnson McKenzie represented Stokes-Craven Holding Corporation ("Stokes-Craven"), a car dealership, in the Underlying Action which was tried in Clarendon County in

August 2006. In August 2010, Stokes-Craven filed this legal malpractice action against defendants Robinson and Johnson McKenzie asserting that defendants were negligent in their representation of Stokes-Craven in the Underlying Action. After the completion of discovery, defendants filed motions for summary judgment on statute of limitations grounds.

II. PROCEDURAL HISTORY

On March 15, 2004, Donald Austin filed a lawsuit against Stokes Craven. The case was tried in Clarendon County for three days beginning on August 14, 2006. The jury awarded Austin \$26,371.10 in actual damages and \$216,600.00 in punitive damages. Following the verdict, Stokes-Craven and Austin filed cross-appeals. On March 8, 2010, the Supreme Court issued its opinion in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) and upheld the jury's damages award.

On August 16, 2010, Stokes-Craven filed a legal malpractice action against Robinson and Johnson McKenzie claiming that defendants were negligent in their representation of Stokes-Craven both prior to and during the trial by allegedly failing to: conduct discovery, prepare a pretrial brief, prepare trial exhibits, prepare voir dire, notify plaintiff's insurance carrier, preserve certain issues for appeal or settle the case before the jury verdict. Stokes-Craven contends that as a result of these alleged failings, an adverse jury verdict was returned against the dealership.

On August 26, 2011, Stokes-Craven filed an amended complaint. All defendants timely answered the amended complaint asserting the statute of limitations as one of their affirmative defenses. Specifically, defendants maintain that the statute was triggered on August 17, 2006, the date the verdict was rendered against Stokes-Craven in the Underlying Action. For the reasons set forth herein, the defendants' motions for summary judgment are granted.

III. STANDARD OF REVIEW

Rule 56, SCRCF, requires the entry of summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). While viewing the evidence in a light most favorable to plaintiffs, under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

IV. FACTS¹

Stokes-Craven, located in Manning, South Carolina, is an automobile and truck dealership of new and used vehicles. Dennis Craven is part owner, officer of the company, principal of the dealership, and serves as on site manager. The Underlying Action, which gives rise to this legal malpractice action, arose from Stokes-Craven's sale of a used Ford truck to Donald Austin, the plaintiff in the Underlying Action. Austin was not told that the truck he purchased was previously owned by an individual named Gary Bailey who wrecked the truck, repaired it at an expense of \$20,309.38 and traded it back in to Stokes-Craven in April 2002. On June 1, 2002, Austin purchased the truck for \$26,371.10. Stokes-Craven knew the truck was wrecked when the dealership bought it back from Bailey but did not tell Austin even when Austin inquired about the truck's history before purchase. One of Stokes-Craven's salesmen, William Frierson, denied the truck had been wrecked and told Austin that it had a 5-year, 100,000 mile powertrain warranty.

¹ The facts set forth are stated in the light most favorable to plaintiff.

A few months after purchasing the truck, Austin discovered an oil leak at which time he was told by Dennis Craven that the truck was not covered by a 5 year, 100,000 mile powertrain warranty. Craven told him the dealership would cover this repair but that Austin would be responsible for any future repairs. In response, Austin asked Craven to return his purchase price and he would return the truck, but Craven rejected this request. Austin nevertheless scheduled the oil leak repair for September 13, 2002. Just before this appointment, Austin learned the truck had been previously wrecked. When Austin arrived at the dealership on September 13, 2002 for the repair on his truck, he met with Craven and again requested that he be allowed to return the truck given his new discoveries regarding the wreck and the lack of a powertrain warranty. In response to this demand, Craven showed Austin a Buyers Guide that was purportedly signed by Austin. The Buyers Guide stated the truck was covered only by a warranty of "up to 100,000 on diesel engine." Austin denied he signed the document.

When Austin returned to pick up his truck a week later, he again met with Craven to discuss the situation. Austin reiterated that he did not sign the Buyers Guide at which time Craven compared the signature on the signed document with Austin's driver's license. Craven admits that after comparing the signature contained on the warranty document with the signature contained on Austin's driver's license in 2002, he concluded that Austin's purported signature on the warranty document was a forgery. (Craven deposition, May 19, 2011, p. 105.) However, Craven again refused Austin's request to return the truck for a refund.

On February 18, 2003, Craven received a comprehensive letter from Austin's attorney, John Polito, which set forth the problems with the truck and the forgery and also included an analysis from two experts (one on auto body repair and one on the appraisal and valuation process). In the letter, Mr. Polito renewed Austin's request for a refund of the purchase price of the truck and, additionally, requested payment of Polito's fees in the sum of \$1,500.00. Craven

claims he turned this letter over to his attorney, defendant Robinson, to handle. Craven, however, never agreed to the terms contained in the Polito letter.

On March 15, 2004, Austin filed suit against Stokes-Craven Ford alleging various causes of action including breach of contract, negligence, constructive fraud, common law fraud, violation of the South Carolina Motor Vehicles Dealer's Act, and violation of the South Carolina Unfair Trade Practices Act. Austin sought actual and punitive damages, prejudgment interest, attorney fees and costs. Stokes-Craven, represented by attorney Robinson, answered and denied each of Austin's material allegations.

After a three day trial, on August 16, 2006, the jury found in favor of Austin and awarded damages for negligence and fraud in the amount of \$26,371.10 actual damages and \$216,600.00 punitive damages. The jury also found Stokes-Craven had violated the Federal Odometer Act. The jury found in favor of Stokes-Craven on Austin's claim under the UTPA. Austin and Stokes-Craven then filed cross-appeals. Stokes-Craven was represented Young Clement Rivers, LLP, during the course of the appeal. Though Robinson was included as counsel of record on the appellate pleadings, he was not involved in the drafting of the appellate briefs or the oral argument, and had no input on the handling of the appeal. The Supreme Court issued the Austin opinion on March 8, 2010. Thereafter, on August 16, 2012, Stokes-Craven filed the subject legal malpractice action against defendants Robinson and Johnson McKenzie.

V. DISCUSSION

Statutes of limitations are designed to protect important public policy concerns.

Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his [or her] rights. Another purpose of a statute of limitations is to protect potential defendants from

protracted fear of litigation. Statutes of limitations are, indeed, fundamental to our judicial system.

Kelly v. Logan, Jolley, & Smith, LLP, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009) (internal citations and quotations omitted).

It is well settled in South Carolina that claims for negligence and breach of fiduciary duty must be brought within three years. *See* S.C. Code Ann. § 15-3-530. The statutory period begins to run when the claimant could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his favor, rather than when the claimant obtains actual knowledge of either the potential claim or the facts giving rise thereto. *Austin v. Conway Hosp., Inc.*, 292 S.C. 334, 338, 356 S.E.2d 153, 156 (Ct. App. 1987). The discovery rule focuses upon whether the complaining party acquired knowledge of any facts “sufficient to put said party on inquiry, which, if developed, will disclose” the alleged conduct. *Burgess v. American Cancer Soc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989) (quoting *Walter J. Klein Co. v. Kneece*, 239 S.C. 478, 483, 123 S.E.2d 870, 874 (1962)).

It is not necessary that the claimant acquire precise information of the alleged wrongful conduct for the statute to begin to run, but merely acquire “such facts as would have led to the knowledge thereof, if pursued with reasonable diligence.” *Grayson v. Fidelity Life Ins. Co. of Philadelphia*, 114 S.C. 130, 103 S.E. 477, 478 (1920). South Carolina law requires a party to exercise reasonable diligence once he is on notice that some right of his has been affected. *See Dean v. Ruscon*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996); *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). “The fact that the injured party may not comprehend the full extent of the damage is immaterial.” *Dean*, 321 S.C. at 364, 468 S.E.2d at 647; *see also Epstein v. Brown*, 363 S.C. 372, 382, 610 S.E.2d 816, 821 (2005).

The standard as to when the limitations period begins to run is objective, rather than subjective. *Kelly*, 383 S.C. at 633, 4; *Kreutner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995); *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800.

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.

Moore v. Benson, 390 S.C. 153, 161, 700 S.E.2d 273, 277 (Ct. App. 2010) (quoting *Young v. SC Dept. Corrections*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999)).

A. Stokes-Craven's Motion to Compel

The court notes that since it is granting summary judgment to the defendants, a ruling on the motion to compel is technically not necessary. However, the plaintiff has requested the court to rule on this motion in the event its decision on summary judgment is overturned. Stokes-Craven has requested production of (1) the defendant law firm's professional liability policy applications for the years 2002 through 2012, (2) all correspondence between the defendants' malpractice carrier and the defendants and the defendants or their attorneys, (3) all billing for computer research from any research providers to the defendant law firm from 2003 through 2006.

I conclude that the correspondence requested in (2) above is not discoverable, as it was at the least prepared in anticipation of or during litigation. See Rule 26(b) (3), SCRPC. There has been no showing that the plaintiff is in need of this information for any good reason, and there has been no showing that it cannot obtain the substantial equivalent by other means. The court has not received a privilege log of these communications but is of the view that one is not necessary. This information is simply not discoverable.

As for (1) above, the court has reviewed the applications submitted *in camera* to the court by the defendants for the years 2002 through 2006. The court concludes that the applications are

discoverable, but that any issues of ultimate admissibility will be left to the trial judge. The court concludes that personal financial information may be redacted, and that social security and tax identification numbers may also be redacted. The parties will either enter into a consent confidentiality order or the court will order that only the plaintiff's attorneys will have access to the applications pending further order of the court. None of the information shall be disclosed to any person other than counsel without further order of the court, and if anyone violates this order, he or she or it will suffer risk of being held in contempt of court.

B. Stokes-Craven's Claims are Barred by the Statute of Limitations.

Under South Carolina law, "[t]he statute of limitations begins to run at the time the [plaintiff] has inquiry or constructive notice [that a claim might exist]." *Berry v. McLeod*, 328 S.C. 435, 445, 492, S.E.2d 794, 800 (Ct. App. 1997) (emphasis added). Either form of notice is sufficient. *Id.* In viewing the facts in the light most favorable to Stokes-Craven, I find Stokes-Craven had both inquiry and constructive notice of the claim more than three years before the lawsuit was filed. The deposition testimony of Dennis Craven compels the conclusion that Stokes-Craven had inquiry notice of the claim against defendants by August 17, 2006, the date of the verdict in the Underlying Action. In addition, the testimony of Stokes-Craven's appellate attorney compels the conclusion that Stokes-Craven had constructive notice of the claim by May 2007 (at the latest), the date its appellate lawyers reviewed the transcript and identified issue preservation concerns.

1. Inquiry Notice.

Stokes-Craven contends, through its pleadings, deposition testimony, and/or written discovery and arguments in opposition to summary judgment, that defendants were negligent in the following respects:

1. failing to diligently investigate the facts (Craven 5/19/11 Dep. p. 33);

2. failing to obtain a handwriting sample from Billy Frierson (Craven 5/19/11 Dep. p. 37);
3. failing to interview Kenny Craven sooner than two days before trial (Craven 5/19/11 Dep. p. 41);
4. failing to contact Barry Thornall to testify, which testimony, according to Mr. Craven, would have benefitted Stokes-Craven and would more than likely have led to a different result (Craven 5/19/11 Dep. p. 43);
5. failing to show Mr. Craven, or otherwise review with him, interrogatory answers prior to trial (Craven 5/19/11 Dep. pp. 44-46). Mr. Craven testified at trial and during his deposition that the first time he saw the answers to interrogatories was the day of his trial testimony and only then did he notice that some of the answers gave incorrect information. Mr. Craven claims that if he had seen the answers beforehand, he may have been better prepared, or would have been able to plan better, and the results of the trial would more than likely have been different;
6. failing to keep Stokes-Craven more informed and failing to prepare Mr. Craven for cross-examination. Mr. Craven testified that if Stokes-Craven had been more informed and if Mr. Robinson had better prepared him for cross-examination, the trial likely would have turned out more favorably to Stokes-Craven (Craven 5/19/11 Dep. pp. 53-54);
7. failing to settle the case. Stokes-Craven argued at the hearing that the failure to settle was the major failure on the part of defendants. In his deposition, Mr. Craven testified that Stokes-Craven was not confident of its position going into trial. He further stated in his deposition that he felt Stokes-Craven had done something wrong in its dealings with Mr. Austin (Craven 5/19/11 Dep. p. 56), and that he knew the forgery of the buyer's warranty was a major part of the case and had been an issue for some time (Craven 5/19/11 Dep. p. 57). Mr. Craven admitted that he concluded in 2002 that there had been a forgery (Craven 5/19/11 Dep. p. 105). Insofar as failure to settle is concerned, all of these factors were well within Mr. Craven's grasp at the time the verdict was rendered and it was then that he knew, or at least as a matter of law should have known, that Stokes-Craven **might** have a claim against its attorney for failing to settle the case.

With regard to points (1) – (6) above, Mr. Craven was asked the following by Johnson

McKenzie's counsel:

Q. Okay. And would it be a fair statement that the allegations, the specific things we were talking about, that is the failure to keep you advised and the other issues and that deficiencies that the plaintiff contends that the defendants made through the course of handling the case and at trial, when the verdict was handed down it became evident that that was a serious problem for the plaintiff?

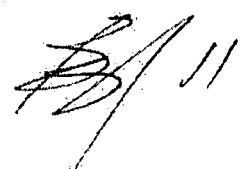
A. Correct.

(Craven 5/19/11 Dep. p. 61.) Defendants maintain that this exchange amounts to an admission on the part of Mr. Craven that he immediately knew the alleged negligence of Mr. Robinson had resulted in the adverse verdict. I do not agree this is an outright admission, at least for summary judgment purposes, because the quoted exchange is somewhat disjointed and the question to Mr. Craven was not clearly stated. I tend to agree with the plaintiff that Mr. Craven's "serious problem" testimony on page 61 can be interpreted to mean that he knew the verdict itself was a serious problem for Stokes-Craven.

Nevertheless, regardless of whether Mr. Craven's testimony on page 61 in and of itself amounts to an outright admission that he knew Stokes-Craven might have a claim against defendants, his testimony as a whole (points 1-6 above) compels the conclusion as a matter of law that Stokes-Craven knew or should have known it might have a claim on the date the verdict was rendered. S.C. Code Section 15-3-530 provides for a three year statute of limitations for legal malpractice actions. The statute amounts to a "discovery rule" under which the statute begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for wrongful conduct. As our Supreme Court has observed on more than one occasion, it has long been the law in South Carolina that "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. **The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.**" *Epstein*, 363 S.C. at 376, 610 S.E.2d at 818 (emphasis supplied by the Supreme Court) (citing *Berry v. McLeod*, 328 SC 435, 445, 492 S.E.2d 794, 799 (Ct. App. 1997) quoting Supreme Court opinions of *Snell* at 303, 334 and *Mitchell v. Holler*, 311 S.C. 406, 429 S.E.2d 793 (1993);

accord, *Dean*): *Rogers v. Efir's Exterminating Co.*, 284 S.C. 377, 379, 325 S.E.2d 541, 542 (1985). The *Epstein* Court also stated the rule in similar language that the statute "begins to run when a reasonable person of common knowledge and experience would be on notice that a claim against another party might exist. The fact that the injured party may not comprehend the full extent of the damages is immaterial." *Id.* at 382, 821. The standard is an objective one, rather than a subjective one. *Kelly*, 383 S.C. at 633, 4, 682 S.E.2d at 7; *Kreutner*, 320 S.C. at 285, 90.

Following a line of Supreme Court opinions now spanning over thirty years, the *Epstein* Court's emphasis of the word "might" and the remaining bold-print language that emphasizes the duty to act even when no "advice from counsel is sought or a full blown theory of recovery developed." In *Epstein*, the facts leading to the grant and affirmation of summary judgment were clear insofar as the majority's application of the discovery rule was concerned. Epstein's lawyer in the underlying trial had allegedly done or not done certain things that were known to Epstein to such an extent that the evidence was rather clear that the client knew at the time the verdict was rendered he might have a claim against his attorney. Here, Mr. Craven stated in his deposition that when he testified at trial in the Underlying Action, he realized he had never seen the interrogatory answers prepared by his lawyer and that some of the answers were incorrect. He knew during trial that Mr. Robinson had not interviewed Kenny Craven until two days before trial. He knew during trial that forgery was an important issue and that no handwriting sample had been taken from Mr. Fricson. He knew during trial that Mr. Robinson had not attempted to locate and call Mr. Thornall as a trial witness. He knew during trial that he was of the opinion that Mr. Robinson had not adequately investigated the case. Mr. Craven was the principal Stokes-Craven contact for Mr. Robinson, and in essence was the Stokes-Craven "point man" for the underlying Austin litigation. His knowledge of these shortcomings is imputed to Stokes-Craven.



Stokes-Craven contends that Mr. Craven had never been involved in a trial before and that he was totally uneducated as to how litigation (pre-trial and during trial) should be conducted by an attorney. However, Mr. Craven, and therefore Stokes-Craven, knew at the time of the verdict (or at the least should have known) that Stokes-Craven **might** have a claim against defendants for their negligence in handling the case. The law does not permit the client to wait until he consults with other counsel to become educated and does not allow the client to wait until he has a full-blown theory of recovery.

Stokes-Craven maintains that the deposition testimony of Mr. Craven does not establish that he knew or should have known at the conclusion of the trial that a claim might exist against defendants. Stokes-Craven points to some rather generic testimony of Mr. Craven for this proposition. (Pl.'s Mem. in Opp. to Summ. J. pp. 6-8.) However, as noted above, the testimony of Mr. Craven as a whole establishes otherwise as a matter of law.

Stokes-Craven argues that the first time it was put on notice of a malpractice claim was at a meeting with its appellate counsel on June 9, 2009, when appellate counsel pointed out that Austin's attorneys were claiming that Mr. Robinson had made error preservation mistakes during trial. That may create a factual issue on that specific point, but this argument ignores the fact that Mr. Craven knew or should have known a claim might exist because of the other actionable errors he claims were made by Mr. Robinson as discussed above. In addition, this argument also ignores the fact that the knowledge of an attorney is imputed to his client. Here Stokes-Craven's appellate counsel knew that issue preservation was an issue as soon as counsel read the trial transcript, as further discussed below.

2. Constructive Notice.

The defendants claim that Stokes-Craven was also on constructive notice of its claim against defendants more than three years before it filed its claim. As set forth above, the statute

of limitations begins to run when a plaintiff has either inquiry or constructive notice. *Berry*, 328 S.C. at 445, 800. The defendants argue Stokes-Craven had constructive notice of the potential issue preservation concerns through its appellate lawyers at Young Clement Rivers, LLP. One of Stokes-Craven's appellate lawyers testified that issue preservation is one of the first items he evaluates when he is handling an appellate case, and he knew issue preservation was going to be an issue in this case. He testified that when he was reviewing the trial transcript in April and May of 2007, the issue preservation concern "jumped out" to him. (Brown Dep. pp. 65, 67; Young Clement Time Sheets). Thus, according to the defendants, Young Clement was aware of the potential issue preservation concerns in May 2007 (at the latest), more than three years before Stokes-Craven filed suit.

The defendants claim that Young Clement's knowledge of the issue preservation concerns on appeal is imputed as a matter of law to Stokes-Craven because Young Clement, as Stokes-Craven's appellate attorney, was Stokes-Craven's agent. "It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority." *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979); *see also Dorman v. Campbell*, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998) (holding that knowledge of information in letter to plaintiff's attorney was imputed to plaintiff for purposes of determining commencement of the statute of limitations even though plaintiff never saw the letter). The defendants claim Young Clement was acting within the scope of its authority when it reviewed the trial transcript and identified the potential issues on appeal. In addition, there is no dispute that the issue preservation concerns were material to the appeal. The court concludes there is an issue of fact as to whether Young Clement's knowledge is imputed to Stokes-Craven in this instance and therefore denies summary judgment on this ground.

C. Equitable Estoppel and Equitable Tolling Do Not Bar Defendants' Statute of Limitations Defense.

I hold as a matter of law that the doctrines of equitable estoppel and equitable tolling do not apply to the facts of this case.

1. Equitable Estoppel

The doctrine of equitable estoppel rests on a general principle of fairness which prevents one party, with knowledge of the situation, from misleading another by words, conduct, or silence in such a way that the other party would be prejudiced if the first party were allowed to later take an inconsistent position. *See Kelly*, 383 S.C. at 638, 682 S.E.2d at 7.

To establish equitable estoppel, the party claiming estoppel must prove that he or she (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped. The party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts.

Id. at 638, 682 S.E.2d at 7 (internal citations omitted).

Estoppel by silence arises when the party estopped owes a duty to speak to the other party but refrains from doing so, thereby leading the other party to believe in an erroneous state of facts. A manifest intent to mislead is not required for estoppel by silence; it arises when the silence is intended or has the effect of misleading the other party, provided the other party acts reasonably. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006)

There is nothing in the record to support the conclusion that defendants did anything to mislead Stokes-Craven, or that Mr. Robinson engaged in conduct calculated to convey an impression that facts were inconsistent with those which Mr. Robinson subsequently attempted to assert. There is no evidence that Mr. Robinson engaged in any conduct to prevent Stokes-Craven from filing a malpractice action, nor is there any evidence that Stokes-Craven relied upon

BJ 14

any conduct or representation of Mr. Robinson in delaying suit. Also, Stokes-Craven did not lack the means of knowing of the alleged malpractice on the part of Mr. Robinson, as set forth above in Points 1 – 7 discussed on pages 7 – 8 of this order.

Much of Stokes-Craven's discussion about the trigger date of June 2009 is based on matters pertaining to issue preservation (failure to object to vehicle value testimony). Stokes-Craven claims there is evidence that Mr. Robinson knew all along that this issue would be raised on appeal, and that his failure to advise Stokes-Craven created an issue of fact on the issue of equitable estoppel. However, this again ignores the fact that Stokes-Craven knew of other alleged acts of negligence well before June 2009, and Stokes-Craven cannot use this one issue to excuse its failure to timely commence this action. Furthermore, it ignores the fact that Stokes-Craven's appellate counsel, Young Clement, knew of the issue as soon as they reviewed the trial transcript.

Stokes-Craven also argues that defendants failed to disclose breaches in their duty to Stokes-Craven, blamed the verdict on the unpredictability of juries, and continued to represent Stokes-Craven during the appeal. None of these points lead to any genuine issue of fact on the issue of equitable estoppel. Again, Stokes-Craven, through Mr. Craven, had knowledge on the day of the verdict that Stokes-Craven might have a cause of action against defendants. There is no evidence that defendants misled Stokes-Craven by words, conduct, or silence to the detriment of Stokes-Craven.

2. Equitable Tolling.

The statute of limitations should be tolled when, in view of all the circumstances, a party would otherwise suffer a gross wrong at the hand of the other party. *Hooper v. Ebenezer Sr. Services & Rehab. Ctr.*, 386 S.C. 108, 116-117, 687 S.E.2d 29, 33 (2009). In reviewing holdings from other jurisdictions, the *Hooper* Court noted that equitable tolling typically applies in cases

BJ 15

in which a litigant was prevented from filing suit because of an extraordinary event beyond his control, but that other jurisdictions have considered the doctrine “in a variety of contexts and have developed differing parameters for its application.” *Id.* at 116, 687 S.E.2d at 32. The *Hooper* court quoted with approval the ruling of a Texas appellate court that “[t]he equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.” *Id.* at 116-17, 687 S.E.2d at 33 (quoting *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. App. 2006)). Our Supreme Court went on to say that equitable tolling may be applied where justified under all the circumstances, but that “equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.” *Id.* at 117, 687 S.E.2d at 33.

Here, there were no extraordinary events beyond Stokes-Craven’s control that prevented it from commencing its action within three years after the verdict was rendered. While Stokes-Craven need not establish that defendants did anything to mislead it, as that is a component of equitable estoppel and not necessarily equitable tolling, Stokes-Craven must present evidence that defendants prevented it from timely filing by an extraordinary event beyond its control. There is nothing in the record that would allow Stokes-Craven to invoke equitable tolling to escape the running of the statute of limitations.

D. Stokes-Craven’s Motion for Summary Judgment.

Because the claims asserted by Stokes-Craven against defendants are barred by the statute of limitations, there is no need to address Stokes-Craven’s motion for summary judgment.

VI. CONCLUSION

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Stokes-Craven’s motion to compel is granted in part and denied in part, and that Stokes-Craven’s claims

against defendants are barred by the applicable statute of limitations. Accordingly, defendant Scott L. Robinson's and defendant Johnson McKenzie & Robinson, LLC's motions for summary judgment are GRANTED and the case as to defendants is dismissed, with prejudice.

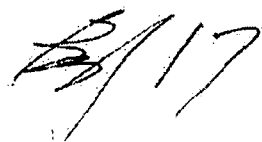
AND IT IS SO ORDERED.



George C. James, Jr.
Circuit Judge

June 4, 2013.

Sumter, South Carolina



STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)

Plaintiff,)

v.)

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

Defendants.)

**Scheduling Order Subsequent
to the Remittitur**

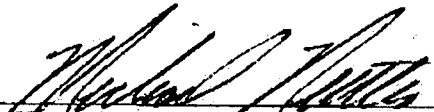
REC'D
CLERK
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AUG 18 PM 2:5

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

1. **October 2, 2017**- Plaintiff shall name all experts it intends to use as witnesses at trial;
2. **November 13, 2017**- Defendants shall name all experts they intend to use as witnesses at trial;
3. **February 26, 2018**- Discovery shall be completed.
4. **March 15, 2018**-All motions except: (a) those relating to the admissibility of evidence at trial; and (b) those to compel discovery must be filed on or before this date;
5. **March 30, 2018**- Mediation shall be completed.
6. **April 30, 2018**- This case is not to be called for trial before this date.

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

IT IS SO ORDERED.


The Honorable Michael G. Nettles

8-7, 2017
Florence, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	
STOKES-CRAVEN HOLDING CORP.	)	
D/B/A STOKES-CRAVEN FORD,	)	C/A No.: 2010CP1400457
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
SCOTT L. ROBINSON AND JOHNSON,	)	
MCKENZIE & ROBINSON, LLC,	)	
	)	
Defendants.	)	
	)	

This case was previously being administered by the Honorable George C. James, Jr. It is now necessary for another judge to administer the case. The Court hereby designates this case as complex and assigns it to the Honorable Michael G. Nettles for handling and disposition.

AND IT IS SO ORDERED

ELECTRONIC SIGNATURE PAGE TO FOLLOW

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)
Plaintiff,)

v.)

Scott L. Robinson and, Johnson)
McKenzie & Robinson, LLC,)
Defendants.)

ORDER

This Court held a hearing on October 13, 2017 on three motions filed by the Defendants, as follows:

1) Defendants' Motion for Sanctions. This motion was not heard, and will be set for a hearing at the Court's and Parties' convenience.

2) Defendants' Motion for Summary Judgment. Defendants argued that Plaintiff had failed to designate an expert to testify as to the standard of care as required in legal malpractice cases. Stokes-Craven had listed Ronald Richter, Esquire as an expert on the standard of care in its interrogatory responses. Defendants took his deposition in 2011. Accordingly, Defendants Motion for Summary Judgment was denied as Stokes-Craven had listed an expert to testify to the breach of the standard of care.

3) The third and final motion was to disqualify Mr. Epting as counsel pursuant to Rule 3.7 of the South Carolina Rules of Professional Conduct. At the hearing, the Court instructed Mr. Epting to state by midday on October 16, 2017 whether he would elect to be a witness or trial counsel. He complied with this Court's directive.

The larger issue before this Court is one of fairness to all Parties and this Court's docket. It is unclear whether Mr. Epting will in fact be a witness at the trial, or whether any testimony he would give would be lay or expert testimony. Given this Court's directive to list expert witnesses by October 2, 2017, Mr. Epting's precautionary self-disclosure is understandable, but this is a different question than whether he should be disqualified under Rule 3.7. This is a decision that this Court need not reach and may never have to decide depending on how this case develops.¹

IT IS SO ORDERED.

The Honorable Michael G. Nettles
Presiding Judge
Third Judicial Circuit

Florence, South Carolina
_____, 2017

¹ The Court also notes that Stokes-Craven, mindful of the issues facing this Court and the Court's interest in moving this case forward, has acted in good faith in retaining additional counsel, Mr. Rob Ransom.

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)
Plaintiff,)

v.)

ORDER

Scott L. Robinson and, Johnson)
McKenzie & Robinson, LLC,)
Defendants.)

Defendants' discovery related and sanctions Motions, specifically Defendants' Joint Motion to Exclude Expert Witnesses, or, in the Alternative, to Disqualify Plaintiff's Counsel and Compel Discovery, Defendants' Joint Motion for summary Judgment, and Defendants' Joint Motion for Sanctions, came before the Court for hearing on Friday, October 13, 2017 in the Florence County Courthouse after due notice to all parties. Present at the hearing for Plaintiff were Andrew K. Epting, Esquire, and Jaan G. Rannik, Esquire; for Defendant Scott L. Robinson, Susan Taylor Wall, Esquire; and for Defendant Johnson, McKenzie & Robinson, LLC, Warren C. Powell, Jr., Esquire. This lawsuit has been pending since August 2010.

The plaintiff contended that its October 2, 2017 Disclosure of Experts responsive to this Court's scheduling order was intended to be an "update" of Plaintiff's experts as opposed to a statement of all experts the plaintiff intended to use at the trial of this action. There is no misunderstanding, however, that this Court's scheduling order provided that by October 2, 2017, "The plaintiff shall name all experts it intends to use as a witness at trial." In response to the Court's inquiries at the hearing on October 13 as to the

plaintiff's complete list of experts Plaintiff's counsel responded that the expert witnesses the plaintiff would use at trial are as follows:

1. Steve Luoma, CPA
McGregor & Company
3830 Forest Dr.
Columbia SC 29204
803-787-0003
2. John Flack
2601 Paxville Hwy.
Manning SC 29102
803-433-5400
3. Andrew K. Epting, Jr.
46-A State St.
Charleston SC 29401
843-377-1871
4. Ronald L. Richter, Jr., Esquire
Bland & Richter, LLP
18 Broad Street
Charleston SC 29401
803-256-9664

After review of the October 2, 2017 Plaintiff's Expert Disclosure, it is evident that the plaintiff, in response to this Court's scheduling order, has named its attorney of record, Mr. Epting, as an expert witness. After taking into consideration the arguments of counsel, submittals by way of memoranda, case law, the rules of Professional Conduct and the Rules of Civil Procedure, this Court advised Plaintiff that its counsel, Mr. Epting, could serve either as an expert witness or as counsel for Plaintiff, but could not do both. The Court also ruled at the October 13 hearing that:

Plaintiff's counsel will not be allowed to continue to serve as an attorney of record for the plaintiff and at the same time be listed in the plaintiff's answers in response to this Court's scheduling order as an expert witness for the plaintiff. Accordingly, the

plaintiff, through its counsel, was directed by this Court to notify this Court and defense counsel by email no later than Noon on Monday, October 16, 2017 as to whether attorney Andrew K. Epting, Jr. would continue as Plaintiff's counsel in this case or whether Mr. Epting would serve as an expert witness for the plaintiff in this action.

Events following the October 13, 2017 hearing were:

1. On Monday, October 16, 2017, Plaintiff's counsel notified the Court and defense counsel as the Court instructed that the plaintiff had decided to have Mr. Epting continue in his role as Plaintiff's expert witness, as set forth in Plaintiff's Expert Disclosure dated October 2, 2017. Plaintiff also filed Objections to Defendants' Proposed Order and submitted a separate proposed order wherein, inter alia, he argued that another lawyer in Mr. Epting's law firm could continue to act as Plaintiff's counsel. In addition, a notice of appearance of counsel for Plaintiff was filed by Robert B. Ransom, Esquire, an attorney in Columbia not practicing with Mr. Epting's law firm.

2. On Tuesday, October 17, 2017, this Court set a conference call with all counsel during which the Court again stated its opinion that it would not be appropriate for Mr. Epting to serve as an expert witness for the plaintiff and that neither he nor any other attorney in Mr. Epting's firm could serve as Plaintiff's counsel. Plaintiff's counsel represented to the Court during the hearing on October 13 that he had been in touch with another lawyer to serve as Plaintiff's counsel. In fact, another attorney, not a member of Mr. Epting's firm, filed a notice of appearance on Monday, October 16, 2017.

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

1. Given the plaintiff's choice that Mr. Epting will serve as one of Plaintiff's expert witnesses in this case, both Mr. Epting and the other lawyers in his office are disqualified as Plaintiff's counsel effective upon filing and service of this order.

2. The only witnesses the plaintiff will be allowed to seek expert opinions from at trial are the four individuals named by the plaintiff through its counsel at the October 13 hearing, as listed above.

3. The plaintiff shall comply with the mandate of SCRCP 26(e) which provides in material part that "...a party is under a duty reasonably to supplement his response with respect to ... (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony."

4. All other issues before the Court raised in Defendants' motions will be held in abeyance until after this order is served.

IT IS SO ORDERED.

The Honorable Michael G. Nettles
Presiding Judge
Third Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)

Plaintiff,)

vs.)

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

Defendants.)

ORDER

2017 NOV 30 PM 4:56
CLERK
CLARENDON COUNTY, SC

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

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

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

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

1. Steve Luoma, CPA
McGregor & Company
3830 Forest Dr.
Columbia SC 29204
803-787-0003
2. John Flack
2601 Paxville Hwy.
Manning SC 29102
803-433-5400
3. Andrew K. Epting, Jr.
46-A State St.
Charleston SC 29401
843-377-1871
4. Ronald L. Richter, Jr., Esquire
Bland & Richter, LLP
18 Broad Street
Charleston SC 29401
803-256-9664

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

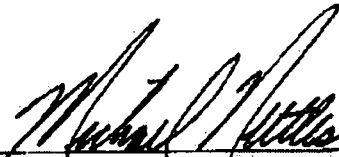
Furthermore, Defendants would be prejudiced by any delay in withdrawal for a number of reasons. First, a delay would increase the likelihood that the opportunity for a timely trial is missed. This case is already seven years old and a decision to unnecessarily push back a trial date should be avoided.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

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

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

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

IT IS SO ORDERED.



The Honorable Michael G. Nettles
Presiding Judge
Third Judicial Circuit

Florence, South Carolina
11-22-, 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)
)

Plaintiff,)
)

v.)
)

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

Defendants.)
)

**ORDER ON PLAINTIFF'S
MOTION FOR RECONSIDERATION**

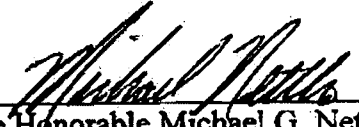
Plaintiff's Rule 59(e) Motion for Reconsideration of this Court's Order filed November 30, 2017 ordering Andrew K. Epting, Jr. and the firm Andrew k. Epting, Jr., LLC, to withdraw from their representation of Plaintiff came before the Court for hearing on Thursday, December 21, 2017 in the Florence County Courthouse after due notice to all parties. Present at the hearing for Plaintiff were Robert C. Ransom, Esquire, and Jaan G. Rannik, Esquire; and for Defendants Warren C. Powell, Jr., Esquire. Counsel for Defendant Scott L. Robinson, Susan Taylor Wall, Esquire, was not present due to a death in the family. Mr. Powell had authority from Ms. Wall to speak on her behalf at the hearing.

After taking into consideration the arguments of and submittals by counsel, and all other matter before the Court, this Court denies Plaintiff's Motion for Reconsideration.

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CLARENDON COUNTY, SC
COURT
CLERK'S OFFICE



The Honorable Michael G. Nettles
Presiding Judge
Third Judicial Circuit

Jan 3, 2018
~~December~~

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

STOKES-CRAVEN HOLDING CORP)
d/b/a STOKES-CRAVEN FORD)

CASE NO. 2010-CP-

Plaintiff

vs.

SCOTT L. ROBINSON and JOHNSON
McKENZIE & ROBINSON, LLC

Defendants

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 8/16/10
Beverly S. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

Plaintiff, Stokes-Craven Holding Corp d/b/a Stokes-Craven Ford ("Stokes-Craven"), files this action for professional malpractice against Defendants Scott L. Robinson and Johnson & Robinson, LLC. In support of this action, Plaintiff would show the Court the following:

1. Plaintiff, Stokes-Craven, is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Clarendon County, South Carolina.
2. The Defendant, Scott L. Robinson, is admitted to the bar and is licensed to practice law in the State of South Carolina. The Robinson is a resident of the city of Manning, County of Clarendon and maintains an office for the practice of law at 8 S. Brooks St, Manning, South Carolina, 29102.
3. The Defendant, Johnson & Robinson, LLC is a company organized and existing under the laws of the State of South Carolina with its principal place of business in Clarendon County, South Carolina.
4. In February of 2003, the Plaintiff retained Robinson and his law firm for the purpose of defending it in the action styled *Donald C. Austin v. Stokes-Craven Holding Corp. d/b/a Stokes-*

Craven Ford, case no. 2004-CP-14-135 filed in Clarendon County, South Carolina ("the underlying case").

5. As a result of the attorney-client relationship created by the above conduct of the parties, Defendants had a duty to represent Plaintiff with the reasonable care, skill, and diligence possessed and exercised by the ordinary attorney in similar circumstances.

6. The underlying complaint contained causes of action for revocation of acceptance, breach of contract, negligence, constructive fraud, common law fraud, violation of the South Carolina Motor Vehicle Dealer's Act, violation of the South Carolina Unfair Trade Practices Act (UTPA), and violation of the Federal Odometer Act, and was brought by Donald Austin who discovered the used pickup truck he purchased from Stokes-Craven had been in an accident.

7. Defendants were negligent in their defense of Stokes-Craven, and failed to exercise reasonable care, skill and diligence in the following ways:

- a. In failing to use due diligence in the investigation of the facts of the underlying case;
- b. In failing to prepare or serve any written discovery to aid in the defense of Stokes-Craven;
- c. In failing to depose any witnesses including the plaintiff and the testifying experts in the underlying matter;
- d. In failing to obtain copies of the expert vitas or reports prior to trial;
- e. In failing to prepare a pretrial brief, trial exhibits, voir dire, requests to charge, or any other documents for use at trial;
- f. In failing to provide any evidence of the value of the vehicle at trial;
- g. In failing to contemporaneously object to the testimony offered by Plaintiff and Plaintiff's expert with regard to the value of the vehicle being "\$0";

- h. In failing to preserve for appeal the issue of whether the Plaintiff in the underlying matter presented competent evidence of the vehicle's fair market value for appeal;
 - i. In failing to preserve for appeal the question of whether plaintiff's experts in the underlying matter were qualified to give expert opinions;
 - j. In failing to contemporaneously object to or preserve for appeal the trial court's misstatement with respect to Stokes-Craven's total profit for 2005;
 - k. In advising Plaintiff's counsel in responses to discovery that Stokes-Craven did not have any insurance policies relevant to the claims made in the underlying lawsuit;
 - l. In advising Stokes-Craven that it did not have coverage under its insurance policy for the claims made in the underlying case when Stokes-Craven was sued for negligence and constructive fraud; and
 - m. In failing to notify Stokes-Craven's insurance carrier of the claims made against its insured in the underlying matter.
8. The Defendants' conduct as described above constitutes negligence as well as a breach of the contractual obligation owed to the Plaintiff, and Stokes-Craven is entitled to damages.
9. The underlying case was tried on or about August 14, 2206, and as a direct and proximate result of Defendants failure to exercise reasonable care, skill, and diligence in representing Stokes-Craven, a jury verdict in the amount \$26,371.10 actual and \$216,600.00 punitive damages was returned against Stokes-Craven.
10. As a further proximate result of the Defendants' negligence, Stokes-Craven was forced to pay approximately \$60,000 in its own defense, despite having insurance coverage.
11. The verdict was appealed, and the South Carolina Supreme Court issued a majority opinion as well as several separate opinions concurring in part and dissenting in part.

12. The Supreme Court, in its opinions styled, *Austin v. Stokes-Craven*, 387 S.C.22, 691 S.E.2d 135 (S.C. 2010), upheld both the actual and punitive damages awards, specifically citing errors by Defendants in the handling of Stokes-Craven's defense. In particular, the Supreme Court stated:

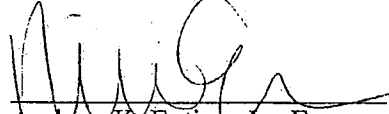
- a. "Initially, we find Stokes-Craven failed to preserve any challenge to the admissibility of Disher's testimony." Opinion at 39.
- b. "First, when Austin moved to qualify Disher as an expert witness in the field of auto body repair, counsel for Stokes-Craven did not question Disher and made no objection to his qualifications." Opinion at 39.
- c. "Furthermore, it appears that the testimony that Stokes-Craven primarily challenges on appeal was that produced by its own cross-examination of Morris." Opinion at 41.
- d. "Moreover, since there was no contemporaneous objection either to the expert's or to the owner's testimony that the truck had a value of \$0, I agree that there was evidence of value for the jury's consideration." Opinion at 60.
- e. "Had the issue been properly preserved, however, I would agree that Austin failed to present any competent evidence of the truck's fair market value, which clearly is more than \$0." Opinion at 60.
- f. "Stokes-Craven also contends that it was entitled to a new trial as there is no evidence in the record to support the jury's verdict valuing the truck at \$26,371.10, that is, the amount Austin paid for it. Since there was no objection to Austin's or Morris' \$0 value testimony, there is evidence in the record to support this verdict." Opinion at 60.
- g. "As explained above, no issue relating to the actual damage award is preserved for appellate review, and thus Stokes-Craven's first argument fails." Opinion at 61.

- h. "In its order reviewing punitive damages, the trial judge wrote that the witness had testified to this "total profit," which is incorrect. However, Stokes-Craven never called this misstatement to the trial judge's attention." Opinion at 61.
- i. "Given that there was no objection to the extrapolation of total profit in Austin's closing argument, its alleged impropriety cannot be the basis for reversal here." Opinion at 61.

WHEREFORE, Stokes-Craven prays for judgment against the Defendants for damages in the amount of the jury verdict awarded against it, plus post-judgment interest, the attorneys' fees paid to Defendants in the underlying case, and costs and attorneys' fees associated with this lawsuit, together with such other relief the Court deems appropriate.

Respectfully submitted:

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr., Esq.

Michelle N. Endemann, Esq.

3 State Street, Charleston, SC 29401

P: 843.377.1871

F: 843.377.1310

ake@epting-law.com

ATTORNEYS FOR PLAINTIFF

On this 5 day of August 2010
Charleston, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT OF RONALD L. RICHTER, JR.

The affiant, Ronald L. Richter, Jr., being duly sworn, deposes and says as follows:

1. My name is Ronald L. Richter, Jr. and I am an attorney in good standing and licensed to practice law in the State of South Carolina.
2. I was admitted to the Bar for the State of South Carolina in 1993. Throughout my tenure as an attorney, I have practiced predominantly as a trial attorney.
3. As a trial attorney, I have tried cases on a wide range of subject matters, including but not limited to negligence actions, contract actions, medical malpractice actions and legal malpractice actions. I have served as trial counsel on matters both large and small, as well as both simple and very complex.
4. Based upon my years of training, education and years of practice as a trial attorney, I am familiar with the standards of care pertaining to trial lawyers in the State of South Carolina.
5. I have been asked to review the record in the matter of Donald C. Austin vs. Stokes-Craven Holding Corp. (hereinafter the "Action") and to opine as to whether attorney Scott L. Robinson ("Robinson") complied with the appropriate standards of care in his representation of Stokes-Craven Holding Corp. ("Stokes Craven") in the Action.
6. In my review of this matter, I have analyzed the opinion of the South Carolina Supreme Court in Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010), and have further reviewed the record on appeal, post trial motions and appellate briefs from the Action.

7. Based upon my review of the record and my years of experience as a trial attorney, it is my opinion that the conduct of attorney Robinson in his representation of Stokes Craven in the Action fell below the level of care, skill and learning expected of other reasonable and competent attorneys under the same or similar circumstances in a number of particulars, including but not limited to the following:

a. Mr. Robinson failed preserve for appeal the Plaintiff's failure to introduce any competent evidence as to the fair market value of the truck in its repaired condition. Mr. Robinson first failed to raise any timely objection to the Plaintiff's testimony that the truck had "zero" value to him, and likewise failed to make a timely objection to the Plaintiff's expert who opined that the truck had a fair market value of "zero" in light of the Plaintiff's testimony that it was worth nothing to the Plaintiff personally. Mr. Robinson thereafter failed to move for a directed verdict based upon the Plaintiff's failure to introduce any competent evidence as to the true fair market value of the truck in its repaired condition.

i. As a direct result of the failure to object to the admissibility of the testimony of the Plaintiff and his expert as it relates to the fair market value of the truck in its repaired condition and the failure to move for a directed verdict on the same grounds, the issue regarding the Plaintiff's failure to introduce evidence necessary to support his claim was not preserved for appeal. It is my opinion that had Mr. Robinson made timely objections to the testimony and moved for directed verdict, the entire verdict would have been reversed on appeal as a majority of the Supreme Court so held.

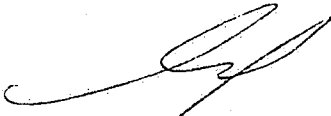
- b. Mr. Robinson could have and should have preserved the error set forth in 7a above and still should have introduced testimony as to the fair market value of the truck which was the subject matter of the action. However, Mr. Robinson failed to introduce any testimony and/or evidence (expert testimony included) as to the value of the truck. This is true despite the fact that Mr. Robinson knew or should have known from as early as the pleadings and initial discovery in the Action that the value of the truck as represented at the time of sale versus its true value given its repaired condition would be a central issue in the Action.
- i. As a direct result of the failure to introduce any evidence as to the true value of the truck, which unquestionably had some value even in a repaired condition, the uncontested evidence in the Action was that the truck in its repaired condition had "zero" value. As a result, the sum of \$26,371.10, representing the purchase price which the Plaintiff paid for the repaired truck, became the measure of the Plaintiff's actual damages. It is my opinion that the introduction of any counter-opposing evidence as to the value of the truck in its repaired condition would most probably have resulted in an award of actual damages less than \$26,371.10.
 - ii. As a further direct result of the failure to introduce any evidence as to the true value of the truck, which unquestionably had some value even in a repaired condition, the sum of \$26,371.10 became the basis of actual damages upon which punitive damages of \$216,000.00 was awarded. It is my opinion that a smaller measure of actual damages based upon the difference in the value of the truck as represented at the time of sale versus

its repaired condition, would have yielded a smaller punitive award more commensurate with the actual damages. It is my further opinion that a smaller measure of actual damages based upon the difference in the value of the truck as represented at the time of sale versus its repaired condition, would not have supported the punitive damages award of \$216,000.00 and that the punitive award would have been rejected by the trial court or reversed on appeal.

- c. Mr. Robinson breached his duties to provide competent, diligent and zealous representation throughout the duration of his representation as evidenced by the failure to conduct discovery, the failure to determine the testimony of experts retained by the Plaintiff, the failure to identify experts in defense and the apparent failure to enter into settlement discussions with the Plaintiff.

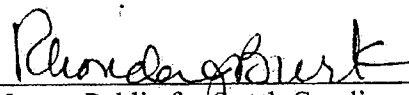
8. As a direct and proximate result of the negligence of attorney Robinson, an award of \$26,371.00 in actual damages and \$216,000.00 was granted against Stokes-Craven and upheld on appeal. But for the negligence of attorney Robinson, Stokes-Craven would not have suffered these adverse awards.

FURTHER AFFIANT SAYETH NOT!

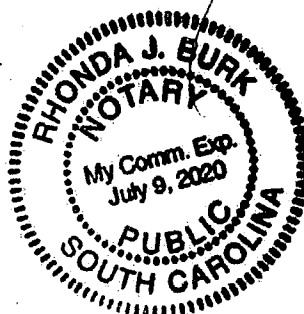


Ronald L. Richter, Jr.

SWORN BEFORE ME THIS THE
4th DAY OF AUGUST, 2010



Notary Public for South Carolina
Commission Expires: _____



STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

STOKES-CRAVEN HOLDING CORP.
D/B/A STOKES-CRAVEN FORD,

Plaintiff,

vs.

SCOTT L. ROBINSON AND JOHNSON
MCKENZIE & ROBINSON, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

C/A No.: 2010-CP-14-457

**DEFENDANTS' JOINT
MOTION TO EXCLUDE EXPERT
WITNESSES, OR, IN THE
ALTERNATIVE, TO DISQUALIFY
PLAINTIFF'S COUNSEL
AND COMPEL DISCOVERY**

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

Motion to Exclude Expert Witnesses

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

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

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

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

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

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

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

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

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

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

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

Alternative Motion to Disqualify Counsel and Compel Discovery

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

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

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

* * * * *

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

[SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE]

Respectfully submitted,

/s/ Susan Taylor Wall

Susan Taylor Wall

Email: swall@grsm.com

Henry W. Frampton, IV

Email: hframpton@grsm.com

Gordon & Rees LLP

170 Meeting Street, Suite 110

Charleston, SC 29401

Phone: (843) 278-5900

ATTORNEYS FOR DEFENDANT

SCOTT L. ROBINSON

/s/ Warren C. Powell, Jr.

Warren C. Powell, Jr., Esq.

Email: wpowell@brunerpowell.com

Bruner Powell Wall & Mullins, LLP

Post Office Box 61110

Columbia, SC 29260

Phone: (803) 252-7693

ATTORNEYS FOR DEFENDANT JOHNSON

MCKENZIE & ROBINSON, LLC

October 4, 2017

Charleston, South Carolina

Scheduling Order
Exhibit "A"

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)

Plaintiff,)

v.)

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

Defendants.)

Scheduling Order Subsequent
CERTIFICATE OF Remittitur
OF ORIGINAL FILED IN THIS OFFICE
DATE 8/18/17
Baudin B. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

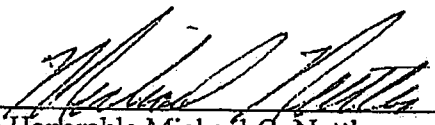
CLERK OF COURT
CLARENDON COUNTY, SC

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

1. **October 2, 2017-** Plaintiff shall name all experts it intends to use as witnesses at trial;
2. **November 13, 2017-** Defendants shall name all experts they intend to use as witnesses at trial;
3. **February 26, 2018-** Discovery shall be completed.
4. **March 15, 2018-** All motions except: (a) those relating to the admissibility of evidence at trial; and (b) those to compel discovery must be filed on or before this date;
5. **March 30, 2018-** Mediation shall be completed.
6. **April 30, 2018-** This case is not to be called for trial before this date.

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

IT IS SO ORDERED.


The Honorable Michael G. Nettles

8-7, 2017
Florence, South Carolina

Plaintiff's Expert Disclosure
Exhibit "B"

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

STOKES-CRAVEN HOLDING CORP
d/b/a STOKES-CRAVEN FORD,

Plaintiff,

vs.

SCOTT L. ROBINSON and JOHNSON,
McKENZIE & ROBINSON, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

CASE NO. 2010-CP-14-457

PLAINTIFF'S EXPERT DISCLOSURE

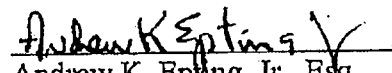
TO: Susan T. Wall, Esquire and Warren Powell, Esquire, Attorneys for Defendants Scott Robinson and Johnson, McKenzie & Robinson, LLC

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

1. Steve Luoma, CPA
McGregor & Company
3830 Forest Drive
Columbia, SC 29204
Telephone: (803) 787-0003
2. John Flack
2601 Paxville Highway
Manning, SC 29102
Telephone: (803) 433-5400
3. Andrew K. Epting, Jr.
46 A State Street
Charleston, SC 29401
Telephone: (843) 377-1871

4. In addition, although not retained experts, Plaintiff reserves the right to elicit opinions from any of the witnesses named in any interrogatory responses of any party or otherwise to the extent that they are an expert in their field relative to the issues that are the subject of this litigation.
5. Plaintiff also reserves the right to elicit opinions from expert witnesses named or retained by any party to this litigation.
6. To the extent certain witnesses may qualify as experts by virtue of skill, training, or experience, they may be called upon to render opinions, and Plaintiff reserves the right to elicit opinion testimony from fact witnesses who have scientific, technical, or other specialized knowledge that will assist the trier of fact in understanding the evidence or issues in this matter.
7. Furthermore, discovery is ongoing and Plaintiff reserves the right to amend/supplement this disclosure as may be revealed during discovery.

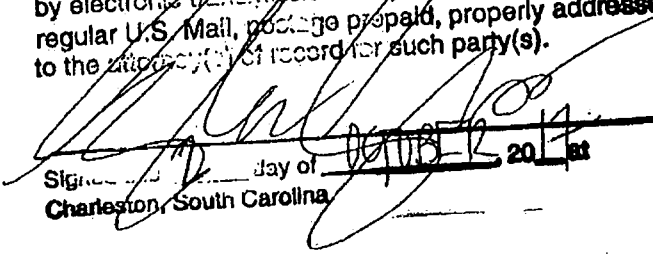
ANDREW K. EPTING, JR., LLC


 Andrew K. Epting, Jr., Esq.
 Jaan G. Rannik, Esq.
 46A State Street, Charleston, SC 29401
 P: 843.377.1871
 F: 843.377.1310
ake@epting-law.com
jgr@epting-law.com

ATTORNEYS FOR PLAINTIFF

DATED: October 02 2017
 Charleston, S.C.

CERTIFICATE OF SERVICE
 THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).


 Signed _____ day of October 2017 at
 Charleston, South Carolina

Interrogatories and Requests for Production
October 20, 2010
Exhibit "C"

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	
STOKES-CRAVEN HOLDING CORP.	)	
D/B/A STOKES-CRAVEN FORD,	)	C/A No.: 2010-CP-14-457
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANT SCOTT L. ROBINSON'S
	)	FIRST SET OF INTERROGATORIES
	)	TO PLAINTIFF
SCOTT L. ROBINSON AND JOHNSON)	)	
MCKENZIE & ROBINSON, LLC,	)	
	)	
Defendants.	)	
	)	
	)	

TO: ANDREW K. EPTING, JR., ESQ. AND MICHELLE N. ENDEMANN, ESQ.,
ATTORNEYS FOR PLAINTIFF:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Defendant Scott L. Robinson ("Robinson"), by and through his undersigned counsel, hereby serves upon counsel for Plaintiff Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford ("Plaintiff"), Robinson's First Set of Interrogatories to Plaintiff, to which written answers must be served within thirty (30) days from the date of service hereof. These Interrogatories shall be continuing in nature until the date of trial, and Plaintiff is required to serve supplemental answers as additional information is found or becomes available, in accordance with the South Carolina Rules of Civil Procedure.

DEFINITIONS

Unless otherwise stated, the terms set forth below are defined as follows:

1. "YOU" and/or "YOUR" shall mean Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford and all other persons acting on its behalf, including counsel.
2. "Complaint" shall mean the Complaint in this action.
3. Unless otherwise noted, "Underlying Lawsuit" shall mean the Complaint filed on or about March 15, 2004 in the Court of Common Pleas in Clarendon County, South Carolina,

styled *Donald C. Austin v. Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford*, Case No.: 2004-CP-14-135.

4. "Document" or "documents" shall mean all written or printed matter of any kind including the originals and all non-identical copies thereof, whether different from the originals by reason of any notation made on such copies or otherwise, including without limitation: minutes, agendas, bills, contracts, leases, assignments, agreements, reports, summaries, inner-office and inter-office communications, offers, notations of any sort of any sort of conversation, diaries, appointments books or calendars, teletype, telefax, thermofax, confirmations, computer data (including E-Mail and all other information or programs stored in the computer whether or not ever printed or displayed), statistics, graphs, minutes, lists, appraisals, brochures, pamphlets, advertising or promotional materials; all drafts, alterations, modifications, changes and amendments of any of the foregoing; all graphics or manual records or representations of any kind, including, without limitation, photographs, microfilm, videotape records, motion pictures and electronic, mechanical or electric records or representations of any kind including, without limitation, tapes, cassettes, discs, magnetic cards and recordings.

5. "Identify" or "identity", when used in reference to an individual person, shall mean to state his or her full name, present or last known business address, telephone number and the name of such person's present or last known employer, place of employment and position, and place of employment and position during the time period of any event addressed by the interrogatory in question.

6. "Identify" or "identity" when used in reference to an entity shall mean to state its full and complete name and the present and last known address and telephone number of its headquarters or principal place of business.

7. "Identify" or "identity" when used in reference to a document shall mean to state the nature of the document (e.g., letter, memorandum, etc.); the date, if any, appearing on the document; the identity of the persons who wrote, signed, dictated, or otherwise participated in the preparation of the document; the identity of all persons to whom the document was addressed or who received copies of the document; and the present location and custodian of the document.

INSTRUCTIONS

8. If YOU claim any form of privilege, whether based on statute or otherwise, as a ground for not answering an interrogatory or any part of an interrogatory, set forth all facts from which the claim of privilege is based.

9. If YOU claim any form of privilege, whether based on statute or otherwise, as a ground for not identifying requested oral communications or documents, set forth all facts upon which the claim of privilege is based, and for each document as to which YOU claim any form of privilege, identify the date, subject matter, location, author or authors, and recipient/recipients of the document, including all persons to whom the document has been provided or who have it in their possession.

10. Whenever a date, amount, or other computation or figure is requested, the exact date, amount or other computation or figure is to be given unless it is not known; and in that case, the approximate date, amount, or other computation or figure should be given or the best estimate thereof, and the answer should state that the date, amount, or other computation provided is an estimate or approximation.

11. Where facts are set forth in the answers or portions thereof and are supplied upon information and belief rather than YOUR direct personal knowledge, YOU should so state and specifically identify each source of information and belief. Should YOU be unable to answer

any interrogatory or portion thereof by either actual knowledge or upon information and belief, YOU should so state.

12. Whenever a full and complete answer to any interrogatory or subpart is contained in the document identified as answering a specific numbered interrogatory or subpart, the document or a copy may be supplied in lieu of a written answer.

13. Whenever an interrogatory calls for information which is not available to YOU in the form requested but is available in another form or can be obtained at least in part from other sources in YOUR possession, so state and either supply the information requested in the form in which it is available or supply the sources from which the information can be obtained.

14. Each interrogatory shall be construed independently and not by reference to any other interrogatory herein for purposes of limitation.

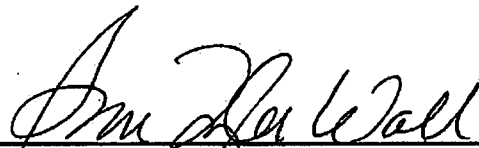
15. Treat each numbered and lettered item in each interrogatory and on all attachments and exhibits as a separate interrogatory requiring a separate response. If YOU object to or are unable to answer one item, so state and respond to all other items.

INTERROGATORIES

1. Give the full name, address, and telephone number of all persons known to Plaintiff to be witnesses and/or to have knowledge concerning the facts, events, circumstances, claims, or allegations surrounding this case and indicate whether or not written or recorded statements have been taken from each person and, if so, indicate who has possession of such statements and, if not, set forth a specific summary sufficient to inform Robinson of the important facts known to or observed by the witness(es).
2. Give the full name, address and telephone number for each person (apart from counsel) with whom YOU have communicated about the facts of this case and/or the status of this case.

3. Set forth a list of photographs, plats, sketches, exhibits, or other documents, whether in written, electronic, computerized, or audit form, in possession of YOU or YOUR counsel that relate to YOUR claims in this case and/or that YOU may seek to introduce, whether as evidence or otherwise, at any deposition, hearing, or trial of this action.
4. List and describe each and every document, drawing, map, diagram, model or other documentary material or tangible object which YOU intend to rely on to support YOUR claims in this case, which YOU intend to offer into evidence, or which YOU intend to use as an exhibit at the time of trial.
5. List the name(s), address(es) and telephone numbers of any expert witness whom YOU propose to use as a witness at the trial of this case, describe his/her qualifications as an expert, state the subject matter upon which he/she is expected to testify, state the substance of the facts and opinions to which he/she is expected to testify, give a summary of the grounds for each of his/her opinions; and the amount and manner in which he/she is being compensated.
6. Set forth a list of every lawsuit that YOU have been involved in as a plaintiff or defendant. In YOUR response, please set forth the name of the case, the case number, the county in which the case was filed, and the disposition of the case.
7. Set forth a list of every attorney who provided legal services to YOU, whether litigation or real estate, over the last fifteen years.
8. Set forth a specific itemized statement of all damages claimed to have been suffered by YOU, including, but not limited to, the actual damages, consequential damages, and other damages alleged in the Complaint. For each item of damage, state the specific method used in calculating each amount. If any payment has been made toward YOUR claimed damages, set forth the amount of payment and date of payment.

9. Describe in detail the corporate structure of YOUR company, including, but not limited to, the date of incorporation, list of addresses for all places of business, registered agent and registered office of Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford.
10. Set forth a list of all YOUR officers and directors from 2000 through the present, including the name, address and telephone number of each individual listed, as well as his or her specific job title.
11. Set forth a list of all YOUR shareholders and the percentage of ownership held by each.
12. Set forth a list of all YOUR affiliates, sister companies, and/or parent companies.



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Phone: 843-727-2640
ATTORNEYS FOR DEFENDANT
SCOTT L. ROBINSON

October 20, 2010
Charleston, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF CLARENDON)

STOKES-CRAVEN HOLDING CORP.)
D/B/A STOKES-CRAVEN FORD,)

Plaintiff,)

vs.)

SCOTT L. ROBINSON AND JOHNSON)
MCKENZIE & ROBINSON, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

C/A No.: 2010-CP-14-457

**DEFENDANT SCOTT L. ROBINSON'S
FIRST SET OF REQUESTS FOR
PRODUCTION TO PLAINTIFF**

TO: ANDREW K. EPTING, JR., ESQ. AND MICHELLE N. ENDEMANN, ESQ.,
ATTORNEYS FOR PLAINTIFF:

Defendant Scott L. Robinson ("Defendant"), by and through his undersigned counsel, hereby requires, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, that Plaintiff Stokes-Craven Holding Corp, d/b/a Stokes-Craven Ford ("Plaintiff") respond within thirty (30) days after the service hereof to the following requests, to wit, that Plaintiff produce and permit Robinson to inspect, copy or photograph each of the following documents or things, which may be in the possession, custody or control of Plaintiff or its attorneys which constitute or contain evidence relating to the claim or defense of the within cause.

DEFINITIONS AND INSTRUCTIONS

Unless otherwise specified, Robinson's First Set of Requests for Production shall be governed by the following Definitions and Instructions, in addition to the South Carolina Rules of Civil Procedure:

1. The term "document," as used in these Requests for Production, shall mean and include the original and all drafts of any and every kind of any and all writings (including handwritings, typed writings and printed writings, and also including electronically embedded or encoded

writings or writings otherwise made), however produced or reproduced, of any kind or description, whether sent or received or neither, and all copies thereof which are different in any way from the original, regardless of whether designated "confidential," "privileged" or otherwise, including, without limitation, any paper, drawing, graph, chart, photograph, computer program, source code, electronic or mechanical matter, microfilm of any kind or nature, disk, diskette, hard drive, tape, recording or other compilation from which information can be obtained (translated, if necessary, by Plaintiff through detection devices into reasonably usable forms) book, account, photograph, letter of intent, agreement, contract, correspondence, e-mail, Internet transmission, telegram, teletype, computer printout, study, memorandum, advertising material, letter, telegram, object, report, schedule, price list, quotation, record, journal entry, account(s), ledger, newspaper clipping, log book entry, transmittal, transcript, study, note, notation, working paper, intra-office and inter-office communication, chart, minutes, index sheet, deed of trust, partnership agreement, certificate of limited partnership, computer software, check, check stub, plan, specification, delivery ticket, bill of lading, invoice and all other writing(s) and paper(s) of every kind and nature, recordings of telephone or other conversations, or of interviews, or of conferences, or any other written, recorded, transcribed, punched, tabled, filmed or graphic matter, however produced or reproduced, to which Plaintiff has or has had access and/or of which Plaintiff has knowledge.

2. "Complaint" shall mean the Complaint in this action.
3. Unless otherwise noted, "Underlying Lawsuit" shall mean the Complaint filed on or about March 15, 2004 in the Court of Common Pleas in Clarendon County, South Carolina, styled *Donald C. Austin v. Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford*, Case No.: 2004-CP-14-135.

4. Whenever these Requests for Production seek the production of a document or thing claimed by Plaintiff or its counsel to be privileged or subject to a qualified immunity, such as, without limitation, the qualified immunity for materials prepared in anticipation of litigation or in preparation for trial (whether referred to as "attorney work product" or otherwise), Plaintiff and its legal counsel shall specifically identify by name the particular privilege or immunity that they allege is applicable to each such individual document. In addition, in any and all such cases, Plaintiff shall identify each such document in a sufficient manner to afford Robinson an opportunity to evaluate and, if appropriate, challenge Plaintiff's assertion of privilege or qualified immunity. Without limitation, this shall be understood to mean that Plaintiff shall identify any such allegedly privileged or immune document by its date, title, author(s) and recipient(s), and Plaintiff shall also provide Robinson with a complete summary of the substance and contents of the document.

5. The terms "and" and "or," as used in these Requests for Production, shall be both conjunctive and disjunctive, such that, unless the context of the Request clearly indicates otherwise, each of these terms shall be understood to mean "and/or."

6. Unless the context of these Requests for Production clearly indicates otherwise, the term "YOU" or "YOUR," as used in these Requests for Production, shall mean and refer solely to the Plaintiff and all other persons or entities acting on its behalf.

7. Pursuant to the South Carolina Rules of Civil Procedure, these Requests for Production shall be deemed to be continuing in nature until the date of trial, and you are required to serve Supplemental Responses to these Requests for Production as required by the South Carolina Rules of Civil Procedure as additional responsive documents and/or things are found or become available to you.

REQUESTS FOR PRODUCTION

1. All documents identified in YOUR responses to Defendant Robinson's First Set of Interrogatories.
2. All documents YOU consulted or referred to in preparing answers to Defendant Robinson's First Set of Interrogatories.
3. All documents (including but not limited to e-mail) reflecting communications between YOU and Defendant Robinson regarding the allegations set forth in the Complaint and/or any other allegation regarding this action.
4. All documents (including but not limited to e-mail) reflecting communications between YOU and the other named Defendants in this action regarding the allegations set forth in the Complaint.
5. All documents (including but not limited to e-mail) reflecting communications between YOU and any third persons or entities regarding the allegations set forth in the Complaint.
6. All statements given by YOU or witnesses in this case, whether written or recorded or otherwise, that relate in any way to the allegations set forth in the Complaint.
7. All documents (including but not limited to reports and e-mail) to and from any expert who may testify or who will testify on YOUR behalf at the trial of this case.
8. For each witness identified by YOU as an expert, produce a complete curriculum vitae, resume or professional profile. Also, please provide all documents used and/or provided to you by the expert in arriving at his/her opinions in this action.
9. All documents showing or otherwise indicating any statement, representation or comment which YOU contend constitutes an admission by Defendant Robinson concerning the facts of this case.

10. All documents which evidence, relate or otherwise pertain to notes or other writings made by YOU that relate in any way to the allegations set forth in the Complaint.
11. All documents that demonstrate, reflect, relate to, or evidence the damages alleged in the Complaint.
12. All correspondence between YOU and Young Clement Rivers, LLP relating to the appeal of the matter known as *Austin vs. Stokes-Craven Holding Corp.*, case no. 2004-CP-14-135, and the subsequent legal malpractice action filed by YOU against Robinson, including but not limited to, all appellate correspondence and all correspondence with third persons regarding the malpractice action against Robinson.
13. All correspondence between YOU, Robinson, or other third parties regarding the Underlying Lawsuit.
14. All documents in YOUR possession, custody, or control relating to the Underlying Lawsuit and subsequent appeal of the same.



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ATTORNEYS FOR DEFENDANT
SCOTT L. ROBINSON

October 20, 2010
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)
Plaintiff,)

v.)

Scott L. Robinson and, Johnson)
McKenzie & Robinson, LLC,)
Defendants.)

OBJECTIONS TO PROPOSED ORDER

Stokes-Craven Holding Corp. ("Stokes-Craven") submits the following objections to Defendants' proposed Order submitted to the Court following the November 2, 2017 hearing in this matter.

I. No Discovery Motion is Pending

Pending the motion to disqualify Mr. Epting as counsel in this case, the Court held all other motions in abeyance. Accordingly, no outstanding discovery motions have been argued or are pending before this Court. Nevertheless, a discussion as to who Stokes-Craven may use as experts permeates the proposed order. Stokes-Craven objects to any reference to any such discovery issue in this Order.

As has been repeatedly stated by Stokes-Craven's counsel, there is no certainty that Mr. Epting *will* be a witness at the trial, nor an expert witness. This is why the restrictions of Rule 3.7 are limited to the time of trial.

II. Nature of the Disclosure of Mr. Epting

As has also been stated repeatedly by Stokes-Craven, the Court's Scheduling Order required that Stokes-Craven list those persons it intends to call as expert witnesses by October 2, 2017. As the possibility existed that Mr. Epting would be a witness, and as Defendants would likely object to his testimony as being expert testimony were he not listed among the potential experts, the prudent course of action was to name Mr. Epting among the expert witnesses. This was not a statement that he would be an expert witness, or even that he would be a witness at all.

Defendants' argument to the contrary would mean that any person listed on Plaintiff's disclosure would *have* to be called as a witness. This argument puts the cart before the horse and is inconsistent with the plain language of the Court's Scheduling Order.

III. Withdrawal vs. Disqualification

To the extent a distinction exists between disqualification and court-ordered withdrawal, Stokes-Craven objects to any requirement that Mr. Epting withdraw as counsel. There has been no motion seeking his withdrawal; rather, the motion was that he be disqualified as counsel.¹

IV. Use of Disqualification for Tactical Advantage

Stokes-Craven objects to Defendants' improper use of the disqualification of Stokes-Craven's counsel for tactical purposes. Defendants attempt to disqualify Plaintiff's counsel while demanding that the current Scheduling Order be maintained,² which will substantially prejudice

¹ "Therefore, if Mr. Epting is allowed to stand on his expert designation of October 2, 2017, he should be immediately disqualified from his role as attorney for the Plaintiff." Motion at 4.

² "Moreover, as this choice was of Plaintiff's own making, no extensions of time should be provided to find new counsel." Motion at 4.

Plaintiff. Moreover, Defendants seek to prevent Mr. Epting or his firm from consulting with and assisting Plaintiff's new counsel in preparing the case for trial. This is not the purpose of Rule 3.7.

In addition, Defendants seek extensions of their own deadlines under the Court's Scheduling Order, having requested that they be allowed to name their intended experts sometime after the motion to disqualify is finally resolved. If this Court is inclined to maintain the existing Scheduling Order, Stokes-Craven requests that Defendants immediately name their intended experts, as they were required to do on November 13, 2017 under that Order. Defendants cannot demand the schedule be adhered to on one hand while seeking extensions of their own deadlines on the other. The due-process rights of all parties must be protected.

V. The Court's Discretion

Recognizing that disqualification of counsel is immediately appealable under South Carolina law, Defendants seek to cast the Court's ruling as a matter of the Court's discretion. However, this Court lacks the discretion to disqualify Mr. Epting prior to trial or to disqualify his firm at any time under the plain language of Rule 3.7, the rule forming the sole basis for Defendants' motion. Nor does Rule 3.7 empower the Court to prevent the orderly transfer of the case file from Mr. Epting's firm to Plaintiff's new counsel.

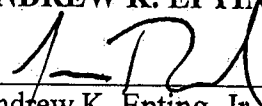
VI. Further Objections

Plaintiff objects to any argument Defendants make with regard to waiver of privilege as this issue is not before the Court. While Defendants' motion and proposed order say nothing that would prevent Mr. Epting from consulting with new counsel to prepare the case, Defendants will undoubtedly argue that all privilege is waived, which will have the effect of preventing Mr. Epting from consulting in this manner, causing prejudice to Plaintiff. Stokes-Craven objects to the citing

of out-of-state cases that say one cannot be an expert and have an economic interest in the case as that issue was not raised in Defendants' motion and is not before this Court. Stokes-Craven objects to the inclusion of language suggesting Mr. Epting's prudent conduct would nevertheless result in "negative implications," "taint to the judicial system and the public's perception of the judicial system," damage to the "dignity of the judicial system," and "the public's interest in fair, open and appropriate proceedings."

Respectfully submitted:

ANDREW K. EPTING, JR., LLC



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ATTORNEYS FOR PLAINTIFF

Dated: November 16, 2017
Charleston, SC

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)
Plaintiff,)

vs.)

Scott L. Robinson and, Johnson)
McKenzie & Robinson, LLC,)
Defendants.)

**DEFENDANTS' JOINT RESPONSE
TO PLAINTIFF'S OBJECTIONS
TO PROPOSED ORDER**

Defendants herein respond to Plaintiff's objections to the proposed order submitted by Defendants by order of the Court. In brief response to each category raised, Defendants state the following:

I. Plaintiff's Expert Witnesses

It is uncontested that prior to the filing of motions, on October 2, Plaintiff named its expert witnesses as required by the Court's Scheduling Order. At the October 13 hearing, the Court asked whether Plaintiff had additional expert witnesses to declare and, in response, Plaintiff's counsel stated that Plaintiff had no other expert witnesses other than the (4) disclosed. Plaintiff cannot now object to the confirmation Plaintiff itself made to the Court on the record. The Court and the parties have a right to rely on an unequivocal statement made by a party's counsel on the record.

Plaintiff's argument that Mr. Epting may not "in fact" be called at trial is of no moment. The rules governing discovery are not triggered by the "certainty" that an expert witness will be called to testify at trial; rather, as the Scheduling Order requires, a party must declare the

expert witnesses it “intends” to call, without any requirement that those named experts in fact be called to testify.

II. Disclosure of Experts

Plaintiff’s claim that Mr. Epting may not even be an expert witness is belied by counsel’s repeated statements on the record that he would be a witness, as corroborated by his October 16 letter to the Court re-stating “I would be a witness” as well as the October 2 “Plaintiff’s Expert Disclosure” naming Mr. Epting as an expert witness. The Court and the parties have a right to rely and act on the statements of Plaintiff’s counsel that he will be a witness and the fact that Plaintiff listed its counsel as an expert witness. Any present attempt to equivocate is to no avail.

III. Withdrawal/Disqualification

Plaintiff cannot ignore the admissions and positions taken by its counsel concerning the matters before the Court. As the document reveals, Defendants’ initial motion was to exclude a proposed expert witness *or in the alternative* to disqualify counsel, not, as Plaintiff states, simply a motion to disqualify counsel. At the hearings, Plaintiff’s position in response shifted; Plaintiff recognized that the issue to be determined was when withdrawal as counsel must take place, not if such withdrawal was necessary. Plaintiff’s counsel stated at the November 2 hearing that he would withdraw “at the right time” but then he admitted that the timing of such withdrawal was a matter for the Court to decide.

IV. Tactical Argument

The proposed order does not speak to preventing Plaintiff’s counsel from sharing information with Plaintiff’s new counsel, thus, there is no basis for Plaintiff to argue prejudice under the language of the proposed order. The issues of waiver of privilege and related matters are not currently before the court.

Plaintiff's argument that it should not be held to the current scheduling order in naming experts it intends to call is also without merit. The scheduling order required Plaintiff to name experts by October 2, a date that preceded the filing of Defendants' motions, which motions led to numerous hearings that are the basis for the proposed order. The Court extended the date for Defendants to name the experts it intends to call for the practical reason that more than a month had gone by due to the time necessary for scheduling and holding the numerous hearings. Furthermore, Plaintiff not only did not object to Defendants' request for a date extension, Plaintiff's counsel affirmatively confirmed it had no problem with the extension.

V. The Court's Discretion

Plaintiff contends that prior to trial the Court lacks the discretion to disqualify Plaintiff's counsel from continuing as counsel while serving as an expert witness for Plaintiff. This position was already argued by Plaintiff and is incorrect under the law and is contrary to the admission of Plaintiff's counsel on the record at the November 2 hearing, wherein Plaintiff's counsel agreed that the issue was one of timing and that it was for the Court to decide the right time for counsel's withdrawal.

In addition, Plaintiff attempts to use Rule 3.7 to advance arguments that Plaintiff has already made. Plaintiff incorrectly states that Rule 3.7 forms the "sole basis" for Defendants' motion when, in fact, Defendants' motion refers to Rule 3.7 while pointing out that Mr. Epting is not a "necessary fact witness" as is discussed in Rule 3.7; rather, he is named as an expert witness. Furthermore, Defendants' counsel argued at each hearing that Rule 3.7 speaks only to fact witnesses and not expert witnesses and that a named expert witness has additional prohibitions that preclude serving in a dual capacity, including the prohibition against holding an economic

interest in the outcome. The Court has every right and obligation to consider and apply the law, learned commentary, as well as practical logic in making its ruling on the issues and all of the bases for the Court's decision as set forth in the proposed order were presented to the Court for its consideration.

VI. Further Objections

Plaintiff's objection to language concerning the public view of the litigation process and the sanctity of the judicial system are, at best, misplaced and, at worst, an affront to this Court. In ruling on important matters, the Court has every right and obligation to be mindful of, and express in its order the Court's support of, a legal process that is fair, open and appropriate, recognizing the importance of the public's perception of the legal process. To suggest otherwise is offensive.

s/Susan Taylor Wall
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Charleston, South Carolina
November 17, 2017

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Columbia, South Carolina
November 17, 2017

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

STOKES-CRAVEN HOLDING CORP.,
D/B/A STOKES-CRAVEN FORD,

Plaintiff,

vs.

SCOTT L. ROBINSON and JOHNSON
MCKENZIE & ROBINSON, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

C/A No.: 2010-CP-14-457

**DEFENDANTS' JOINT
MEMORANDUM IN RESPONSE TO
PLAINTIFF'S OBJECTIONS TO
PROPOSED ORDER AND IN
SUPPORT OF UPDATED PROPOSED
ORDER**

Defendants Scott L. Robinson and Johnson McKenzie & Robinson LLC (together, "Defendants") hereby file this memorandum in response to Plaintiff's objections to the original proposed order prepared by Defendants at the Court's request and in support of the updated order submitted to the Court by Defendants. For the foregoing reasons, Plaintiff's objections should be overruled, and the updated order should be entered.

Background

On October 13, 2017, the Court held a hearing on various outstanding motions, including Defendants' motions to disqualify Plaintiff's counsel and to disqualify Plaintiff's experts because of Plaintiff's failure to abide by the Court's scheduling order. At the end of the hearing, the Court announced several oral rulings and directed Defendants to prepare an order reflecting those rulings. Plaintiff now argues that the order does not accurately reflect the court's rulings and attempts to argue new matter that is contrary to the position advanced by Plaintiff through its attorney at the hearing. Furthermore, Plaintiff attempts to circumvent this court's ruling by serving, after the hearing in which its own attorney certified on the record that only four expert witnesses were named and would be called, the name of an additional expert by way of "updated

interrogatory responses”. This is illustrative of the ongoing gamesmanship and improper tactics that this party continues to employ.

Plaintiff’s objections fall into two main categories: (1) Plaintiff objects to the Court’s decision to disqualify Plaintiff’s counsel and his firm from continuing to represent Plaintiff in this case and (2) Plaintiff contends that it was proper for him to name an additional expert witness following the October 13 hearing. For the reasons that follow, both objections are spurious. Moreover, because Plaintiff has now confirmed to the Court that Plaintiff’s counsel is named as an expert witness, several updates to the original proposed order are appropriate.

Argument

Issue: Disqualification

It is undisputed that Plaintiff listed the name of its own attorney, Andrew K. Epting, Jr., as an expert witness in its Expert Disclosure dated October 2, 2017, which disclosure was mandated by the Scheduling Order entered by the Court, requiring Plaintiff to “list all experts it intends to use as witnesses at trial”. Plaintiff’s expert disclosure provided three names, one of which was Mr. Epting. As a result of that listing, Defendants filed various motions including a motion to exclude or in the alternative to disqualify counsel from continuing to serve as both expert and counsel for Plaintiff.

At the hearing on October 13, 2017, and in its subsequent filing, Plaintiff attempts to manipulate the rules of professional conduct and the rules of court by arguing that it is “not yet clear” whether Mr. Epting will be an expert witness (despite listing him as such) and requesting that the Court allow Plaintiff to wait until partway through trial, at which point when and if Plaintiff wishes, Plaintiff would have the right to call its trial attorney as an expert to testify on Plaintiff’s behalf. This is a procedure that is patently contrary to the rules as it is grossly

prejudicial to the opposing party, flies in the face of fair and equitable dealings, and is precluded by the law and common sense.

The claim that Mr. Epting can remain as counsel for Plaintiff until or even at time of trial and then decide that he will also serve as an expert witness is precluded by Rule 3.7 of the South Carolina Rules of Professional Conduct, the ABA Standing Committee on Ethics and Professional Responsibility, and South Carolina rules of court and case law. Rule 3.7 limits the circumstances in which a lawyer may serve as both the client's advocate and as a necessary fact witness. Those circumstances do not apply here, especially since the rule does not speak to expert witnesses, only fact witnesses. Counsel has been listed as an expert witness and the Rule does not permit such a dual role. The ABA Standing Committee on Ethics and Professional Responsibility clearly states that the "duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert." Formal Op. 97-407.

As the opinion further states, "if an expert may testify at trial and his name has been provided to opposing counsel pursuant to applicable procedural rules, he may be deposed by the opposing party." The opinion then makes clear that communication between the expert and the retaining law firm and its client are ordinarily discoverable. Formal Op. 97-407. The discoverability of all communications between the expert and the client/law firm and the fact that a testifying expert has no work product privilege is one of the reasons why an attorney for a party may not also continue to serve as the party's testifying expert witness. Discovery allows all of the expert's file materials. If the expert were to be allowed to continue to serve as counsel to the Plaintiff, all matters concerning the case, including trial strategy, discussions with the principals in the Plaintiff entity and memos to the file, to name a few, would be discoverable. In short, the roles of advocate and testifying expert are irreconcilable.

“Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.” Rule 3.7, RPC, Comment 1.

Without any doubt, the ploy requested by Plaintiff to allow his attorney to continue to advocate for his position in the litigation yet be allowed to be presented to the jury as an expert on its behalf is prejudicial to this court because of the confusion that a jury would find occasioned by such a tactic and because of the extreme prejudice to the Defendants in this case. As Comment to Rule 3.7 states,

“The opposing party has proper objection when the combination of rules may prejudice that party’s rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.”

South Carolina courts have adopted this rationale, stating, “The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively”. *Brooks v. SC Comm’n on Indigent Def. & Office of Indigent Def.*, 419 S.C. 319, 797 S.E. 2d 402 (Ct. App. 2017). Counsel for the Plaintiff could not possibly be objective where he has represented and advocated his client’s position for seven years, especially where the Defendants have and continue to dispute every allegation.

It is the duty of the court to disqualify not only the attorney named as the expert for Plaintiff but all counsel in his law firm. Expert witnesses must be qualified by the court, and once the court does so, the witness is cloaked with special credibility as an “expert” before the jury. It would be grossly unfair and prejudicial for a member of the firm representing one side of a case to receive the court’s qualification as an expert while the firms representing the opposing party do not receive such qualification. Indeed, it is particularly prejudicial in this instance

because the expert's name is the name of the law firm currently representing the Plaintiff. Furthermore, as the most senior and experienced attorney in the Andrew K. Epting Jr. Law Firm, it is impossible to believe that Mr. Epting would not be involved in ongoing trial strategy and preparation with the attorneys working for him in his law firm. Although all such strategy, preparation and communication would be discoverable, it is not practical to take discovery of such matters as they develop, and it is frankly unfair to put Plaintiff in the position of having his legal strategy discovered by the other side. Plaintiff's proposed 'counsel of record as expert witness' is so far outside the bounds of propriety that neither plaintiff nor defendants have found any case in which such a dynamic was even attempted.

Litigation must proceed in a manner that is fair to all parties. "A violation of Rule 3.7(a) ordinarily will require disqualification...because the very purpose of the rule is to avoid the taint to a trial that results from jury confusion when a lawyer acts as both witness and advocate." *Merrill Lynch Bus. Fin. Servs. v. Nudell*, 239 F. Supp. 2d 1170 (USDC 2003). As the District Court found, a jury may attribute too much or too little weight to the attorney's testimony because of his dual role and would taint the trial and give one party or the other an unfair advantage. The integrity of the judicial process would be violated by such a process.

A motion to disqualify is addressed to the sound discretion of the court. No substantial hardship would be caused to Plaintiff by the disqualification of the Epting law firm. First, it was Plaintiff's choice to name its counsel as an expert witness and it must be noted that Plaintiff has not contended that its counsel is a necessary witness. Thus, the Plaintiff has made its own choice with the consequence of disqualification. In addition, under the current scheduling order, this case cannot be called for trial before May 1, 2018. Furthermore, Plaintiff has retained separate counsel, Robert Ransom, who filed a notice of appearance on October 17, 2017.

Plaintiff was given the opportunity by this Court to change the expert designation to delete the name of its counsel; instead, Plaintiff chose to stand by its designation of its counsel, Mr. Epting, as an expert witness. Plaintiff must therefore be bound to its own decision and the consequential disqualification of the Epting Law Firm from continuing to represent Plaintiff.

The updated proposed order submitted by Defendants accurately reflects Plaintiff's decision to go forward with its current attorney acting as an expert witness in this case, a decision confirmed to the Court on October 13 and again on October 16, 2017. This Court's ruling on October 13, 2017 was thus confirmed by Plaintiff's subsequent restatement of its choice to use its counsel as an expert witness. Therefore, the updated proposed order submitted by Defendants should be entered.

Issue: Adding Expert Names

This Court clearly ruled, and Plaintiff confirmed through its counsel at the hearing on Friday, October 13, that Plaintiff was limited by his own submission to four expert names, specifically Luoma, Flack, Epting and Richter. The Court specifically asked Plaintiff's counsel, on the record, if the four names were the only names of expert witnesses or if there were any other expert names that Plaintiff would call at trial and counsel for Plaintiff responded no. No mention was made of any other so-called expert, and the Court ruled that Plaintiff was thus limited to the four names. On the Monday after the hearing, Plaintiff attempted to "slip in", through a supplemental interrogatory response and without advising the Court, a new expert witness name. This attempt to add a name after the scheduling order date and after confirming to the Court on the record that no other experts would be called at trial, is in direct violation of the Court's ruling on October 13 and counsel's verification on the record that Plaintiff had only four expert witnesses. Therefore, the new expert should be excluded, as reflected in the updated proposed order.

Conclusion

For the foregoing reasons and all of those previously argued by counsel for the Defendants at and after the hearing on this matter, including counsel's e-mail correspondence with the Court, Plaintiff's objections to the proposed order should be overruled, the updated proposed order should be entered, and Plaintiff's attempt to name a new expert witness outside of the Scheduling Order be struck.

Respectfully submitted,

/s/ Susan Taylor Wall

Susan Taylor Wall

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October 18, 2017

Charleston, South Carolina

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October 18, 2017

The Honorable Beulah G. Roberts
Clerk Of Court
P.O. Box 136
Manning, SC 29102

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

Dear Ms. Roberts:

Enclosed are various items for filing related to pending motions in the above-captioned matter.

With kindest regards,

ANDREW K. EPTING, JR., LLC



Jaan G. Rannik

Enclosures

cc: Susan Wall, Esquire
Warren Powell, Esquire

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October 16, 2017

VIA EMAIL mnettlessc@sccourts.org

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

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

Dear Judge Nettles,

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

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

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

Warren C. Powell, Jr., Esquire
Susan Taylor Wall, Esquire
October 16, 2017
Page 2 of 2

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

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

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

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

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

With thanks and kindest regards,

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr.
AKE/JGR

Cc: Susan Wall, Esquire
Warren Powell, Esquire

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October 16, 2017

VIA EMAIL

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The Honorable Michael Nettles
South Carolina 12th Judicial Circuit
Florence City-County Complex
180 N. Irby Street MSC-XX
Florence, South Carolina 29501

Re: *Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford vs.*
Scott L. Robinson, et al.
Case No.: 2010-CP-14-00457

Dear Judge Nettles:

Counsel for the Defendants have received Mr. Epting's letter to Your Honor of today's date as well as the referenced "updated interrogatory responses". The letter and the interrogatory responses are contrary to the law and this Court's ruling in a number of respects.

First, Your Honor clearly ruled at the hearing on Friday, October 13, that Plaintiff was limited by his own submission to 4 expert witness names: Louma, Flack, Richter and, if declared by noon today, Epting. Mr. Epting has advised today that he will be an expert witness. However, as he continues to act both as attorney for Plaintiff and as an expert, Mr. Epting served today "updated interrogatory responses", in which Plaintiff attempts to add yet another expert witness name, Bill McCarthy, a Columbia attorney. Adding an expert witness name today is directly contrary to Your Honor's ruling on Friday, is contrary to Mr. Epting's own statement on the record that his client was limiting his request to the 4 names specified and is contrary to this Court's October 2, 2017 deadline for Plaintiff to name all expert witnesses. We ask that Your Honor not allow Mr. McCarthy's name to be added to the list of 4 expert witnesses.

Second, Mr. Epting claims that, under Rule 3.7 of the South Carolina Rules of Professional Conduct, he may serve as his client's expert witness, continue to serve as his client's lawyer until the time of trial, and ultimately hand the case over to other attorneys in his own law firm. This is incorrect under the law.

As an initial matter, Mr. Epting's claim that this is a "timing" issue because Rule 3.7 allows him to remain as counsel until the time of trial is meritless. Rule 3.7 sets forth the limited

October 16, 2017

Page 2

circumstances in which a lawyer may serve both as a client's advocate and as a necessary fact witness. The Rule does not permit—and, indeed, we have been unable to find any cases that permit—a lawyer to serve as both the client's advocate and as a voluntary expert witness, as Mr. Epting has proposed. To the contrary, the ABA Standing Committee on Ethics and Professional Responsibility is clear that “[a] duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert.” Formal Op. 97-407 (emphasis added). Put simply, a person may not serve as counsel and as a testifying expert witness at all.

Allowing Mr. Epting to serve as both counsel and expert witness for any period of time would work severe injustice to Defendants. The Rules of Civil Procedure permit extensive discovery of each side's experts. If Mr. Epting is an expert, as he has confirmed, then Defendants are entitled to take discovery from him now, not sometime in the future. This discovery includes taking his deposition and obtaining all of his file materials—none of which are privileged or constitute work product under Rule 26(b)(4), SCRCP. Defendants are entitled to this discovery now and will forthwith notice Mr. Epting's deposition and subpoena his files.

Mr. Epting further claims that an attorney from his firm may represent Plaintiff at trial but that is not correct under the law. While Rule 3.7 ordinarily allows members of a lawyer's firm to represent a party when the lawyer is a necessary fact witness, the Rule does not speak to members of the firm continuing to represent a party when the lawyer in the firm declares himself a voluntary expert witness. Expert witnesses, unlike fact witnesses, are cloaked with special credibility by virtue of the Court qualifying them as “experts” in front of the jury. It would be grossly unfair and prejudicial for a member of a firm representing one side of a case to receive the Court's qualification as “expert” while the firms on the other side receive no such qualification. Indeed, it would be particularly prejudicial in this instance because the expert's name is the same as the name of his law firm. Furthermore, as the senior and most experienced trial attorney in his firm, it would be impossible to believe that Mr. Epting would not be involved in ongoing trial strategy and preparation with the attorneys who work for him in his law firm, all of which would be discoverable yet would require Defendants to re-depose and re-subpoena Mr. Epting on a regular basis. This illustrates why the rules of court do not allow an expert's law firm to represent a party in the litigation and trial. Indeed, at last week's hearing, Mr. Epting advised the court that he had made arrangements for another lawyer to file an appearance. We therefore strongly object to anyone associated with Mr. Epting's firm representing Plaintiff.

In summary, and consistent with the proposed order sent to Your Honor and copied to counsel on Friday, Defendants request that this court:

- 1) Limit Plaintiff's expert opinion testimony to the four individuals named by Plaintiff through counsel in open court on Friday, October 13, 2017; and
- 2) Inasmuch as Plaintiff has chosen to have Mr. Epting serve as an expert witness in this case, rule that neither he nor any attorney in his law firm be allowed to serve as Plaintiff's counsel in this case.

October 16, 2017
Page 3

We will be happy to brief the issues more extensively to the Court if Your Honor would like for us to do so. The draft order submitted to Your Honor on Friday, October 13, we believe correctly reflects the law and the Court's ruling.

With highest professional regards,

Sincerely,



Susan Taylor Wall

Warren C. Powell, Esq.

STW:rgm

cc: Andrew K. Epting, Jr, Esq.
Jaan G. Rannik, Esq.
Ann F. Allison, Esq.
Henry W. Frampton, IV, Esq.

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October 18, 2017

VIA EMAIL mnettlessc@sccourts.org

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

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

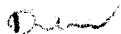
Dear Judge Nettles,

During the telephone conference on Tuesday, October 17, Your Honor stated that I could appear on Thursday, October 19, in order to make a record. I am comfortable with the record as it stands—*i.e.*, with the filings, letters, proposed orders, objections, etc. sent to Your Honor. I know nothing more that I can add to what was said at the hearing and in my subsequent submittals and objections.

If this hearing is mandatory, I would request that the hearing be held at a later time, as this Thursday and Friday I have a two-day mediation that has been scheduled for months in a large construction case involving the Gaillard auditorium and numerous parties. When I was on the phone with the Court, I did not appreciate the mediation dynamic as I do now having spent the morning preparing.

With kindest regards,

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr.
AKE/JGR

Cc: Susan Wall, Esquire
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STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)
)
Plaintiff,)

v.)

**STOKES-CRAVEN'S OBJECTIONS TO
DEFENDANTS' PROPOSED ORDER**

Scott L. Robinson and, Johnson)
McKenzie & Robinson, LLC,)
)
Defendants.)

Defendants submitted a proposed Order to the Court following a hearing held on October 13, 2017 regarding Defendants' motion to disqualify Andrew K. Epting as counsel for Stokes-Craven. Defendants' motion is based on S.C. Rule of Professional Conduct 3.7, which concerns whether a lawyer can be both a testifying witness and trial counsel. The proposed Order submitted by Defendants suggests that Mr. Epting's entire firm is disqualified. The proposed Order exceeds the scope of Defendants' motion and what was before the Court.

I. The Issue

Defendants' motion stems from the inclusion of Andrew K. Epting in Stokes-Craven's list of expert witnesses on October 2, 2017 pursuant to this Court's Scheduling Order. His testimony, if required at all, would concern his personal knowledge of actions taken by Stokes-Craven in the underlying suit between the Supreme Court's decision in that case and the ultimate settlement of

that case. If required at all, the testimony will be factual, but should Defendants contend it is expert testimony, then the Court's Scheduling Order disclosure requirement was met.¹

"Then why was he listed?" one might ask. Mr. Epting was listed in anticipation of certain defenses that Defendants may raise in trial and in recognition of the fact that, were he to testify without having listed himself as an expert, Defendants would object and seek to have his testimony excluded. Mr. Epting was listed on Plaintiff's expert disclosure out of an abundance of caution. Whether he will be required to testify is not yet clear and will depend on how the case progresses. His testimony is unlikely to be expert testimony but will be based upon his knowledge of events. But, rather than risk not being able to testify should he be obliged to, he was listed among the experts pursuant to this Court's deadline so as not to waive any claimed right. Defendants seek to turn this disclosure and its very uncertain future path to their tactical advantage and have Mr. Epting and his firm disqualified.

Additionally, in their letter of October 16, 2017, Defendants say Mr. Epting is not a "necessary fact witness," but rather a "voluntary expert witness." The Rule makes no distinction between expert and lay witnesses. This is not a voluntary act; to be sure, he would only testify if it were necessary, in his client's best interest, and to satisfy his ethical obligation to his client.

II. Disqualification of Andrew Epting's Firm

As an initial matter, the disqualification of the firm was not raised in Defendants' motion. Moreover, Rule 3.7(b) states: "A lawyer may act as advocate in a trial in which another lawyer in the layer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or

¹ Stokes-Craven supplemented its list of fact-witnesses on October 6 to add Mr. McCarthy. As with Mr. Epting, Stokes-Craven believes Mr. McCarthy will testify solely as a fact witness. However, should Defendants claim that his testimony crosses into expert testimony, Stokes-Craven has also listed him as an expert out of an abundance of caution.

Rule 1.9.” Accordingly, even if Mr. Epting were to testify as a witness, his firm would not be disqualified from representing Stokes-Craven through and at trial.

III. Disqualification of Andrew K. Epting, Jr.

As stated in Mr. Epting’s letter to the Court of October 16, Rule 3.7 of the South Carolina Rules of Professional Conduct would not provide for termination of Mr. Epting’s role as counsel at this stage, prior to trial. Rather, that Rule states “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.” Rule 3.7(a) (emphasis added). The reasoning behind this rule is that jurors would be confused by an advocate taking the stand and testifying directly to them, blurring the line between what is advocacy and what is factual testimony on the basis of personal knowledge. *See, e.g., Hagood v. Sommerville*, 362 S.C. 191, 199 (2005) (noting that a lawyer’s employee can testify without violating Rule 3.7 because “[j]urors are not likely to be confused by a lawyer’s employee testifying as a witness for a client while the lawyer serves as the client’s advocate”)²; *Brooks v. S.C. Comm’n on Indigent Defense*, 419 S.C. 319, 324 (2017) (affirming the trial court’s disqualification of an attorney where “there may be confusion as to whether statements made by [Appellant] as advocate witness would be taken as proof as a fact witness or as an analysis of proof as an attorney”); *see also* Comments to Rule 3.7 (“A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.”).

² The *Hagood* court also held that the disqualification of an attorney was immediately appealable as it affected a substantial right of the client. 362 S.C. at 197–98. This case has already been appealed once, and there is a way for this Court to fashion relief that is responsive to the Defendants’ right to discovery, Stokes-Craven’s right to counsel, and this Court’s docket. *See* Stokes-Craven’s Proposed Order.

Moreover, prejudice to the client is a primary consideration of a court faced with a motion to disqualify counsel. *See* Comment [4] to Rule 3.7 (“due regard must be given to the effect of disqualification on the lawyer’s client”). Here, Mr. Epting has served as Stokes-Craven’s counsel since approximately August 2010. To bring incoming counsel up to speed will take some time, and to disqualify Mr. Epting at this stage without allowing for some period of transition would prejudice the client. Mr. Epting remains in the best position to move this case through discovery.

In a letter to the Court on October 16, 2017, counsel for Defendant Robinson stated that Rule 3.7 applies “necessary fact witness[es]” rather than “voluntary expert witness[es].” However, the Rule makes no such distinction between fact and expert witnesses and refers only to “necessary witness[es].” To be sure, Mr. Epting would testify only if necessary.

The letter also states that, because Mr. Epting will testify as an expert, his deposition would have to be taken now and retaken periodically were he to continue as counsel. Stokes-Craven does not dispute that Defendants may have the right to depose Mr. Epting, but the subject matter of his testimony would be Stokes-Cravens actions to protect itself in response plaintiff Austin’s effort to collect interest, fees, and appoint a receiver, which occurred in the period between 2010 and 2014.³

Accordingly, Stokes-Craven objects to the proposed order to the extent it requires Mr. Epting to immediately withdraw as counsel.

IV. Motion for Sanctions

While the motion for sanctions was not heard by the Court, reference to it finds its way into the proposed holding of the Court submitted by Defendants. Moreover, that reference recasts

³ The scope of any waiver, which is not before the Court but is part of Defendants’ letter to the Court of October 16, is for a later day as it is not known whether Mr. Epting will even testify, let alone what the scope of that testimony would be.

Defendants' motion from one regarding noncompliance with this Court's August 8, 2017 Order⁴ to one regarding amended discovery responses generally.⁵ As no motion to compel has been filed with regard to Stokes-Craven's responses to interrogatories, there is no basis for a motion for sanctions under Rule 37, SCRCP. Moreover, Stokes Craven has complied with the letter and the spirit of this Court's August 8th Order.

A. Calculation of Damages

Defendants advance that (i) Plaintiff has not sufficiently explained how a settlement of \$1,060,000 was reached in the underlying case, (ii) Plaintiff has not provided a calculation of its loss of revenue damages, and (iii) Plaintiff has not produced certain documents, all purportedly in violation of this Court's Order.

1. Settlement Amount

The Order required Plaintiffs to produce "all documents evidencing moneys paid to satisfy the judgment and settle the underlying case (including identification of the source of the funds, and copies of any wire transfers and/or checks together with any correspondence pertinent thereto as well as court orders)." In response, Stokes-Craven produced what is attached hereto as **Exhibits A–E**, consisting of (i) copies of the bank statements showing wire transfers of \$100,000 and \$960,000 respectively to Dino Moskos (**Exh. A**), (ii) the satisfaction of judgment filed with the Court showing a settlement amount of \$1,060,000 (**Exh. B**), (iii) Court Orders setting forth actual damages, punitive damages, trial-level attorney's fees, and an interest rate of 11.25% (**Exhs. C &**

⁴ "Plaintiff continues to refuse to itemize and produce documents concerning damages, including but not limited to attorneys fees and loss of business value." Defendants' Joint Motion for Sanctions at 1.

⁵ Defendants' proposed Order refers to "Plaintiff's discovery responses including but not limited to Plaintiff's naming of experts and the information provided therewith" as the purportedly sanctionable conduct. Proposed Order at 1. This is not a part of the sanction motion based on compliance with the Court's Order of August 8, 2017.

D), and (iv) briefing regarding the motion for appellate-level attorney's fees that was pending at the time of settlement (**Exh. E**). Stokes-Craven has complied with the Court's Order and there are no other documents to produce. None.

In addition, and so there can be no further confusion, Stokes-Craven restates here what it stated in its updated interrogatory answer of August 9, 2017. The \$1,060,000 settlement amount represents the verdict of \$242,971.10 (**Exh. C**, Order of Judge Hayes), trial fees of \$49,936.50 (*id.*), interest at a fixed rate of 11.25% accruing from August 17, 2006 (**Exh. D**, Order of Judge James), an application for appellate and post-appellate attorney's fees to be increased by "an exceptional multiplier" (**Exh. E**, briefing regarding appellate attorney's fees, at SC003854), and the threat of receivership hanging over Stokes-Craven at the time of settlement. All documentation regarding the amount of the settlement has long since been produced to Defendants and there are no further damage documents.

2. Lost Revenue

Defendants have likewise stated that Plaintiff has not sufficiently explained the basis of its damages related to loss of revenue. The August 8 Order is silent on any such requirement, but Plaintiff has nonetheless provided Defendants with all documentation relating to lost revenue.

In addition to the \$1,060,000 settlement amount, Stokes-Craven's has disclosed damages resulting from Mr. Robinson's malpractice consist of (i) the loss of revenue following the verdict in *Austin* and (ii) the loss of revenue resulting from the sale of the business.

a. Following Austin Verdict

With regard to the loss of revenue following the verdict, Defendants took a second deposition of Mr. Craven devoted to this very issue and hired an expert to refute that claim of

damages, who was also deposed. These damages were not only disclosed, but discovery was conducted on this issue.

b. Resulting From Sale of Business

As to the loss of revenue resulting from the sale of the business, every document related to the sale that is in Stokes-Craven's possession, custody, or control has been produced to Defendants. Stokes-Craven has produced the closing documents, sales records, inventory records, income tax returns, sales tax returns, bank account statements, invoices, and other financial statements, totaling over 5,000 pages.

What Defendants now seek is Stokes-Craven's experts' opinions as to the valuation of Stokes-Craven's business. As the Court observed at its hearing, Defendants can depose Plaintiff's experts, and Messrs. Luoma and Flack are expected to testify to their opinion of how much revenue was lost as a result of the *Austin* verdict, which led to the ultimate sale of the business. Specifically, they are expected to opine that the dealership business was worth approximately \$2,500,000 more than Stokes-Craven received for it. These damages were disclosed to Defendants in response to interrogatories on January 19, 2017. However, there are no further sale-related documents to produce, and Stokes-Craven has complied with this Court's Order.

3. Other Documents

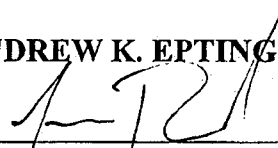
Defendants have subsequently requested additional documents outside of the scope of this Court's Order, which Stokes-Craven has provided or is working to provide. See Plaintiff's Amended Response in Opposition to Plaintiff's Motion for Sanctions (filed October 12, 2017). If Defendants think the responses to its subsequent requests are inadequate, Stokes-Craven will continue to attempt in good faith to remedy any inadequacy brought to its attention. However, to

the extent these additional requests form the basis of Defendants' motion for sanctions, Defendants must first file a motion to compel.

Respectfully submitted:

Dated: October 17th, 2017
Charleston, SC

ANDREW K. EPTING, JR., LLC



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jgr@epting-law.com

ATTORNEYS FOR PLAINTIFF

Statement



Member FDIC

Date 11/29/13
Account
Enclosures

Page 15
830033932
271

BUSINESS CHECKING

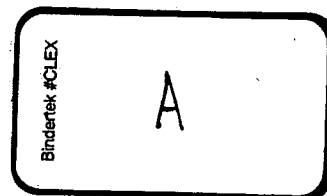
830033932 (Continued)

Date	Description	Amount
11/21	DEBIT NADART	199.15
	1900212136 11/21/13	
	ID #-380273	
11/21	ADP - TAX ADP TX/FINCL SVC	5,660.19
	1223006057 11/21/13	
	ID #-S300XB112248A01	
11/21	AUTO PAY WHOLESale	23,989.00
	DESNOTDR00 11/21/13	
11/21	AUTO PAY WHOLESale	31,465.00
	DESNOTDR00 11/21/13	
11/21	AUTO PAY WHOLESale	37,296.58
	DESNOTDR00 11/21/13	
11/22	AUTO PAY WHOLESale	29,085.00
	DESNOTDR00 11/22/13	
11/25	AUTO PAY WHOLESale	27,385.00
	DESNOTDR00 11/25/13	
11/26	WIRE TRANSFER FEE	12.00
11/26	WIRE TRANSFER TO	100,000.00
	C STEVEN MOSKOS PA	
11/26	PAYMENTS CHRYSLER GROUP L	315.77
	9000040181 11/26/13	
	ID #-G58945867231023	
11/26	AUTO PAY WHOLESale	19,845.00
	DESNOTDR00 11/26/13	
11/27	STOP PAYMENT CHARGE	32.00
11/27	AUTO PAY WHOLESale	21,107.00
	DESNOTDR00 11/27/13	
11/27	AUTO PAY WHOLESale	64,675.00
	DESNOTDR00 11/27/13	
11/27	AUTO PAY WHOLESale	67,418.16
	DESNOTDR00 11/27/13	
11/29	Xfer to Payroll Account	20,883.53
	payroll w/e 11/27/2013 48w	
11/29	AUTO PAY WHOLESale	22,710.00
	DESNOTDR00 11/29/13	

CONFIDENTIAL

102

SC001127



Statement



Member FDIC

Date 12/31/13
Account
Enclosures

Page 16
830033932
264

BUSINESS CHECKING

830033932 (Continued)

===== Withdrawals and Deductions =====		
Date	Description	Amount
	ID #-S300XB122052A01	
12/20	AUTO PAY WHOLESale	93,189.00
	DESNOTDR00 12/20/13	
12/24	WIRE TRANSFER FEE	12.00
12/24	WIRE TRANSFER TO	960,000.00
	C. STEVEN MOSKOS, P.A.	
12/24	DEBIT NADART	169.91
	1900212136 12/24/13	
	ID #-380273	
12/24	FEES CVR	236.49
	CVR 12/24/13	
	ID #-76073320	
12/24	AUTO PAY WHOLESale	12,100.00
	DESNOTDR00 12/24/13	
12/24	AUTO PAY WHOLESale	45,576.00
	DESNOTDR00 12/24/13	
12/24	AUTO PAY WHOLESale	61,517.00
	DESNOTDR00 12/24/13	
12/26	Xfer to Payroll Account	18,149.99
	payroll w/e 12/25/2013 52w	
12/26	AUTO PAY WHOLESale	10,000.00
	DESNOTDR00 12/26/13	
12/27	ACH P/R FILE FEES	11.15
12/27	ADP - TAX ADP TX/FINCL SVC	6,169.56
	1223006057 12/27/13	
	ID #-S300XB122753A01	
12/27	AUTO PAY WHOLESale	15,715.00
	DESNOTDR00 12/27/13	
12/27	AUTO PAY WHOLESale	17,526.80
	DESNOTDR00 12/27/13	
12/30	Xfer to Payroll Account	1,249.59
	Demo allowance	
12/30	WIRE TRANSFER FEE	12.00
12/30	WIRE TRANSFER TO	23,000.00
	FOREIGN AFFAIRS AUTO	

CONFIDENTIAL

103

SC001043

ELECTRONICALLY FILED - 2017 Oct 17 2:53 PM - CLARENDON - COMMON PLEAS - CASE#2010CP1400457

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

DONALD C. AUSTIN,

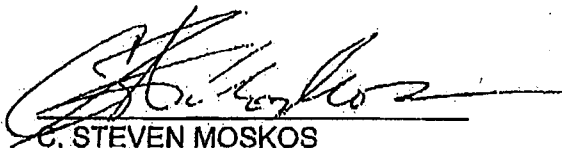
Plaintiff,

vs.

STOKES-CRAVEN HOLDING CORP.
D/B/A STOKES CRAVEN FORDDefendantIN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
CASE NO. 04-CP-14-135SATISFACTION OF
JUDGMENT

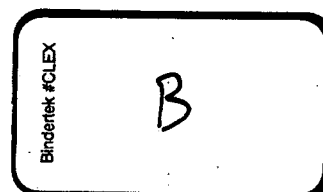
JUDGMENT entered upon the 16th day of August, 2006, afterwards, to-wit: Now comes C. Steven Moskos, the attorney for the Plaintiff above named, and acknowledges to have received of and from the said Defendant Stokes-Craven Holding Corp. d/b/a Stokes Craven Ford on the 24th day of December 2013, full satisfaction of the debt and Damages, Costs, and Charges aforesaid in the amount of One Million Sixty Thousand and 00/100 (\$1,060,000.00):

THEREFORE, the said judgment against Stokes-Craven Holding Corp. d/b/a Stokes Craven Ford should be marked satisfied and discharged.



C. STEVEN MOSKOS
4000 Faber Place Drive, Ste. 300
North Charleston, SC 29405
(843) 763-5297

Charleston, South Carolina
January 14, 2014



SC003826

**FULL AND FINAL RELEASE
THIS RELEASES ALL CLAIMS**

Parties. The parties to this release are:

Donald C. Austin
Jerry A Stokes

Stokes-Craven Holding Corp.
William E Stokes Sr

Dennis N Craven
Stokes-Craven Ford

Mutual Release. Each of the parties signing below hereby releases, and forever discharges, each of the signing parties and all of them, and their agents, employees, attorneys, officers, lessors, employees, shareholders, directors, servants, insurance carriers, assignees, assignors, successors, administrators and any and all other people or corporations who might otherwise be claimed to be liable at some point, from any and all claims that arose, are arising, or may arise out of the matters relating to the issues in Donald C. Austin v. Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford, Case No. 04-CP-14-135, 387 S.C. 22, 691 S.E.2d 135 (2010), 750 S.E.2d 78 (2013), including matters involved in, arising out of or connected to the litigation. This includes claims of any and all kinds whatsoever. Notwithstanding any of the language herein, Stokes Craven retains its interest in the litigation against its former professionals.

The provisions of this Release are contractual and not merely a recital and may be used as a defense in any action or proceeding instituted or undertaken by the undersigned.

Moreover, each of the undersigned states affirmatively that he, she or it (as the case may be) has read carefully this Release, that he has been afforded an opportunity to consult with his attorney concerning the provisions, conditions and effect thereof, and that he knows and understands the contents hereof.

It is further agreed that this agreement shall be deemed to have been drafted by each of the parties in equal extent.

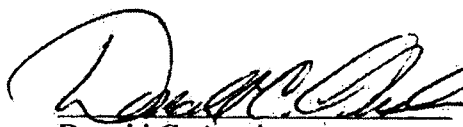
It is further agreed that this Release is to be governed by and interpreted in accordance with the laws of the State of South Carolina.

This release shall become effective upon the completion of each of the below:

(1) Signing by all the parties listed above; and

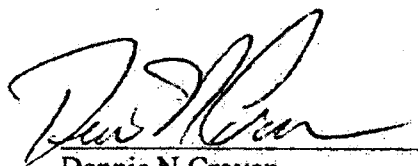
(2) The clearing of funds or the wire transfer of funds to the trust account of C. Steven Moskos, PA, in the amount of \$960,000.00 to be added to the previous \$100,000 already forwarded to counsel for Austin.

Signed:


Donald C. Austin Date 12-27-13

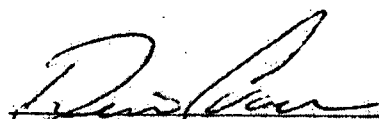

Stokes-Craven Holding Corp. Date 12/24/2013

By: V.P.
Title:


Dennis N Craven Date 12/24/2013

Jerry A Stokes Date _____

William E Stokes Sr Date _____


Stokes-Craven Ford Date 12/24/2013

By: V.P.
Title:

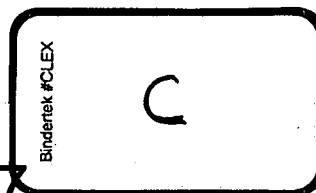
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	THIRD JUDICIAL CIRCUIT
Donald C. Austin,	)	C.A. No. 04-CP-14-135
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
Stokes-Craven Holding Corp., d/b/a	)	
Stokes Craven Ford,	)	
	)	
Defendant.	)	

Before the Court is "Plaintiff's Motion to Direct the Clerk of Court to Enter Judgment Consistent with the Remittur and Motion for Attorneys' Fee." The Motion follows The Supreme Court's issuance of its Opinion on cross appeals of various rulings by the undersigned at the trial level. This Opinion is reported as Austin v. Stokes-Craven, 387 S.C. 22, 691 S.E.2d 135 (S.C. 2010).

Wading through the morass of paperwork which has inundated the Court relative to the motion, and numerous readings of the Opinion, recall to the Court the words of the then presiding Bishop of the Episcopal Church, USA. Bishop Allin said in a speech "being head of the church is like putting together a jigsaw puzzle while riding on a roller coaster."

In our small four man law firm, we used to, on most mornings, gather around a small kitchen table, and drink coffee and talk. Often we would discuss at length legal issues one or more of us were trying to wrestle to the ground. Our wisest partner would sit and quietly listen for fifteen or twenty minutes as two or three of us square off on the topic under debate.

After listening for fifteen or twenty minutes, the wise partner would lean in and say, "Isn't this the real issue" and "isn't this the solution." In practically every instance he was right.



He had the gift of taking all of the jumbled bundle of issues and arguments and reducing them to what I call the least common denominator.

In addressing the issues here extant, I have tried, and hopefully succeeded in reducing the jigsaw puzzle presented by The Supreme Court's Opinion and counsels' submissions to the least common denominator which I address herein below.

The next to the last salvo in this tug-of-war, a July 2, 2012 letter from Plaintiff's counsel, appears to modify the noted motion and requests that the Court:

Accept jurisdiction over the issues previously litigated before [the undersigned], and issue an Order directing the Clarendon County Clerk of Court to enter judgment consistent with the remittur on these issues. We will then request that judge in the Third Circuit hear the motion for Appellate and subsequent attorneys' fees.

This modification appears reasonable as the posture of this case has the undersigned very confused as to whether or not I have any jurisdiction as to the issues raised by the motion, particularly the issue of Appellate and "subsequent" fees.¹ The Supreme Court remanded this case with this directive:

"[W]e remand this case to the Circuit Court for entry of judgment consistent with our decision." (387 S.C. at p. 59).

While it appears the modification suggested by Plaintiff set forth above is a "kick the can down the road" approach, the Court finds it is the appropriate resolution of the issues the initial motion presented.

Ordinarily, a judge in our system of rotation of judges, duly assigned and empowered to hold court in another circuit, must exercise his judicial powers while within the territorial boundaries of such circuit. Shillito v. City of Spartanburg, 215 S.C. 83, 88, 54 S.E.2d 521, 522

¹ In addition to what is written herein, Rule 205 SCRAP, which provides that upon service of notice of an appeal, the Appellate Court shall have exclusive jurisdiction over the appeal (emphasis added) gives me pause as to the court's jurisdiction as to Appellate attorneys' fees.

John H. 2

(1949). Further, a judge assigned to hold court in a circuit in which he is not a resident must generally exercise judicial duties relating to the circuit during the period of the assignment. *Id.* These limitations, however, are subject to several exceptions. One of these exceptions is that the judge may issue an order regarding matters which were submitted to the judge while presiding in the circuit. Cox v. Fleetwood Homes of Georgia, Inc., 334 S.C. 55, 58, 512 S.E.2d 498, 500 (2010); *citing* Barnett v. Piedmont Shirt Corp., 230 S.C. 34, 94 S.E.2d 1 (1956); *citing* Shillito v. City of Spartanburg, *supra*. Another exception is that a judge retains jurisdiction to consider timely post-trial motions even though no longer assigned to the circuit.

Finally, in Cox v. Fleetwood Homes of Georgia, Inc., *supra*, the South Carolina Supreme Court held that “[W]here a case is remanded on appeal to make more specific factual findings or conclusions of law which do not require any additional hearing, the judge who issued the original order has the authority to issue an amended order even though the judge is not a resident of or then assigned to hold court in the judicial circuit where the case arose.” As trial judge in the above-referenced case, the undersigned has jurisdiction to issue an order in this matter as to the trial issue of attorneys’ fees under the South Carolina Motor Vehicle Dealers Act. (The Dealers Act).

Supporting this conclusion is The Supreme Court’s opinion in American Sur. Co. v. Hamrick Mills, 194 S.C. 221, 9 S.E.2d 433 (S.C. 1940). Therein the Court states the following:

In the tenth paragraph, counsel takes the position that the judgment of The Supreme Court cannot be altered, modified or enlarged upon by the Circuit Court and that the Circuit Court is powerless to do other than is specifically directed by the mandate of the Appellate Court. This appears to be a statement of sound law ... 9 S.E.2d at 437.

So, sound law is what the Court herein intends to apply.

John H. 7

First, as to the web of opinions, concurrences and dissents, the Court finds Justice Beaty's opinion is the opinion of the majority and establishes the law that the undersigned must follow in deciding Plaintiff's motion as modified.

As to the issue of attorneys' fees under The Dealer's Act, Justice Pleicones did not address same as he found the issue was not preserved, but found that the law as to this issue as applied by Justice Beaty, writing for the majority, is the correct legal disposition of the underlying issue. Justice Pleicones wrote;

I agree with the majority that a plaintiff who elects to receive damages awarded under a common law theory may also be entitled to recover statutory costs and attorneys fees to which he is entitled under a separate verdict, without running afoul of the public policies underlying the doctrine of election of remedies. *See, e.g., United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (1993). As explained below, however I do not believe this issue is preserved for our consideration. 387 S.C. at p. 64.

The discussion by Justice Pleicones of the Dealer fee issue, presented after the statement that it is not preserved for review can only, in the undersigned's opinion, be considered obiter dictum.² Justice Kittredge, with concurrence by Chief Justice Toal, joins in Justice Beaty's "well written opinion," except as to two issues neither of which address the issue of The Dealers Act attorneys' fees.

Therefore, the opinion of The Supreme Court and its remand place the issue of The Dealers Act attorneys fees squarely before this Court for consideration. The Supreme Court has appeared at one point to frame the sole issue for the undersigned as "whether [Plaintiff] should be awarded the entire amount of his request or should the amount be limited to the fees incurred in establishing his claims under The Dealers Act." 387 at p. 57.

² A judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). Black's Law Dictionary, 7th Ed. p. 1100.

gc [signature]
SC003872

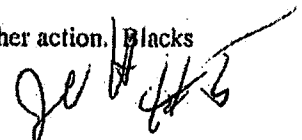
However, the majority opinion held that Austin "is entitled to the entire amount of his request for attorneys fees and costs under the South Carolina Dealers Act." 387 S.C. at 58. Thus, The Supreme Court has remanded³ the case to this Court for the simple task of directing the Clerk of Court to enter judgment and to confirm the award of attorneys fees sought by Plaintiff under The Dealers Act. The Supreme Court's ruling, while making no particularized analysis as this Court would be required to do, made an award of The Dealer Act attorneys fees without use of the analysis required by Taylor v. Nix, 307 S.C. 551, 416 S.C.2d 619 (S.C. 1992) at 307 S.C. p. 557 or that set forth in Blumberg v. Nealco, 310 S.C. 492, 427 S.E.2d 654 (S.C. 1993) in the amount of \$49,936.50

It therefore appears that this Court's sole authority and sole responsibility is to direct the Court to enter judgment in favor of Plaintiff for the amounts of the verdicts, as upheld by The Supreme Court, to wit: \$26,371.10 actual damages; \$216,600.00 punitive damages; and trial level attorneys' fees and costs of \$49,936.50.

Therefore, it is Ordered that the Clerk of Court for Clarendon County shall enter judgment in favor of Plaintiff against Defendant in the following amount:

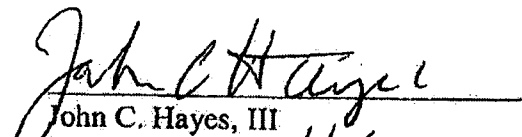
1. Actual Damages: \$26,371.10
2. Punitive Damages: \$216,600.00
3. Trial level Attorneys' Fees and Costs: \$49,936.50.

³ Remand, to send (a case or akin) back to the court or tribunal from which it came for some further action. Blacks Law Dictionary, 7th Ed. p. 1292.



IT IS SO ORDERED.

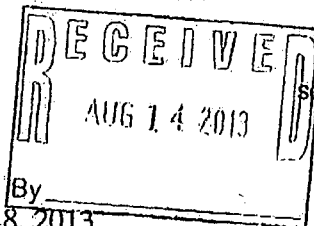
July 11th, 2012
York, South Carolina


John C. Hayes, III
Presiding Judge #16



State of South Carolina
Third Judicial Circuit

GEORGE C. JAMES, JR.
CIRCUIT COURT JUDGE



#1 NORTH MAIN STREET, SUITE 303
POST OFFICE BOX 1718
SUMTER, SOUTH CAROLINA 29151-1718
TELEPHONE: (803) 436-2160
FAX: (803) 436-2403
E-MAIL: gjamesj@sccourts.org

By
August 8, 2013

Honorable Beulah G. Roberts
Clarendon County Clerk of Court
Post Office Box 136
Manning, South Carolina 29102

RE: Donald C. Austin v Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford
(04-CP-14-135)

Dear Ms. Roberts:

Please file the enclosed order and send filed copies to all counsel.

If you have any questions, please advise.

Yours very sincerely,

George C. James, Jr.

GCJjr:djf

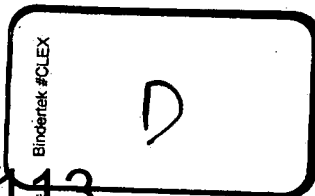
Enclosures

*Beulah-
I have
your entire file.
Debbie can bring
it to you
next
week.*

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE 8/12/13

Beulah B. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC



SC003875

STATE OF SOUTH CAROLINA)

COUNTY OF CLARENDON)

Donald C. Austin,)

Plaintiff,)

vs)

Stokes-Craven Holding Corp.)

D/B/A Stokes Craven Ford,)

Defendant.)

IN THE COURT OF COMMON PLEAS

FOR THE THIRD JUDICIAL CIRCUIT

04-CP-14-135

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OF ORIGINAL FILED IN THIS OFFICE

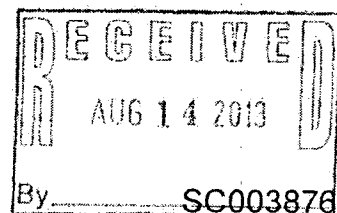
DATE

8/12/13

Brenda B. Roberts
CLERK OF COURT
CLARENDON COUNTY, SCRECEIVED
CLERK OF COURT
CLARENDON COUNTY, SC
2013 AUG 12 PM 3:13

This matter was before the court on July 18, 2013 for hearing of (1) the plaintiff's motion to determine interest on a money judgment, (2) the plaintiff's motion to order execution on the money judgment, and (3) the defendant's motion to require the plaintiff to post a bond before execution on the judgment. The plaintiff is represented by C. Steven Moskos, Esq., and Brooks R. Fudenberg, Esq. The defendant is represented by Andrew K. Epting, Esq., Michelle Endemann, Esq., and John C. Land, III, Esq.

The current disputes stem from an August 17, 2006 jury verdict in favor of the plaintiff on his fraud cause of action in the amount of \$26,371.10 actual damages and \$216,600.00 punitive damages, for a total verdict of \$242,971.10. The verdict was appealed and affirmed by the Supreme Court of South Carolina in a reported decision, 387 S.C. 22, 691 SE2d 135 (2010). The Supreme Court remanded to the trial court the issue of attorney's fees in a cause of action unrelated to the fraud cause of action. On remand, the Honorable John C. Hayes (the trial judge) awarded the plaintiff the sum of \$49,936.50 in trial level attorney's fees. That award is now on appeal to the Supreme Court. Other issues are also pending before the Supreme Court, but the



actual and punitive damage awards are final. In its order dated June 20, 2013, the Supreme Court, *inter alia*, indicated it would "issue an opinion forthwith" on the issues before it.

Until now, all other post-trial proceedings have been presided over by Judge Hayes. In his order filed May 10, 2013, Judge Hayes determined that he had no authority to rule on any remaining issues in the case and that a Third Circuit judge must resolve the instant motions.

The plaintiff asserts that he simply wants to execute on the actual and punitive damages judgment but that the Clarendon County Sheriff wants a court order authorizing execution. The plaintiff wants the court order to include a judicial calculation of post-judgment interest so the execution can proceed. The defendant maintains there is no "final judgment" and that execution would be premature before the Supreme Court issues its final opinion. In that regard, the defendant claims that it has its own claim for attorney's fees pending before the Supreme Court, and that if it is awarded fees, the net effect might be a reduction in the actual and punitive damages award payable to the plaintiff.

The defendant submits that execution is not appropriate as there is no "final judgment". S.C. Code §15-39-30 provides that executions "may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof...." The defendant claims that since monetary award issues are still before the Supreme Court, there is no "final judgment". The defendant cites *Kriti Ripley, LLC v. Emerald Investments, LLC*, (Opinion No. 27277, June 26, 2013) (opinion not yet released for publication) for this proposition. *Kriti Ripley* addresses "final judgments" in the context of S.C. Code §14-3-330 (the appellate jurisdiction of the Supreme Court) and notes that a final judgment is one that "disposes of the cause, ... reserving no further questions or directions for future determination. It must finally dispose of the whole

subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined.” (citing and quoting *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 41-42, 21 S.E. 2d 209, 212 (1942) (quoting 2 Am. Jur. 860 § 22)).

The issue in *Kriti Ripley* was the appealability of a final judgment, not whether a money judgment was subject to execution when other monetary issues were not judicially resolved. Though it could be said the foregoing definition of “final judgment” should apply across the board, in the instant case, the actual and punitive damage award is final and the judgment’s ten years of active energy under §15-39-30 have been ticking since August 17, 2006, the date of the damages award. At the motions hearing, when the court inquired of counsel for the defendant as to whether the defendant contended that the ten years of active energy of the actual and punitive damage award had begun to run on August 17, 2006 or had not yet begun to run at all, counsel replied that he did not want to commit to a position on that point. Though the Supreme Court’s ruling in *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 703 S.E. 2d 499 (2010) may relieve concerns in any given case about the expiration of the ten year active energy period, in my view, the actual and punitive damages award in this case constitutes a final judgment of some sort, and efforts to collect that judgment may proceed.

The defendant also cites *Calhoun v Calhoun*, 339 S.C. 96, 529 S.E. 2d 14 (2000) for the proposition that the actual and punitive award is not “final”; on the contrary, *Calhoun* simply stands for the proposition that when a money judgment is finalized, whether in a lower court or an appellate court, interest on that amount, whether it has been modified upward or downward, or remains the same, runs from the date of the original judgment. *Calhoun* does not include any holding or even any *dicta* that would lead to a conclusion that the current judgment is not final.

The question now becomes the calculation of post-judgment interest pursuant to S.C. Code §34-31-20 (B). Specifically, the question is whether the post-judgment interest rate is an annually adjusted rate or a fixed rate. This is an important question, as in this case there is a difference of approximately \$76,000.00 between adjusted and fixed accrued interest through August 7, 2013. The plaintiff maintains the rate is a fixed at 11.25% *per annum*. The defendant maintains the rate “could be as low as zero”, apparently a continuation of its assertion noted above that there is not yet a final judgment, and therefore, no right of execution.

§34-31-20 (B), amended for judgments entered on or after July 1, 2005, provides that a **“judgment of a court enrolled or entered must draw interest according to law”** and that **“[T]he legal rate of interest is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually.”** 34-31-20 (B) further provides that the Supreme Court shall issue an order by each January 15 “confirming the annual prime rate.” Finally, 34-31-20 (B) concludes by providing that **“[F]or judgments entered between July 1, 2005 and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points.”** (emphasis added). This language clearly provides that, at least for 2005 judgments, there is a fixed rate for the life of the judgment.

The instant judgment was entered on August 17, 2006. In its January 4, 2006 order, the Supreme Court stated **“for judgments entered between January 15, 2006 and January 14, 2007, the legal rate is 11.25% compounded annually.”** It appears clear that the Court was tracking the language of §34-31-20(B) for 2005 judgments and ordered the 11.25% rate to remain constant throughout the life of a judgment entered within the designated time frame. However, it is worth

noting that in its January 2007 order, the Court modified the 2006 language and stated "for the period January 15, 2007 through January 14, 2008, the legal rate of interest for judgments and money decrees is 12.25% compounded annually." For every year beginning in 2007, the Court's interest rate orders have been identical, except for publication of the new rate and new effective dates.

My decision must be guided by the plain language of the statute, and the statute provides for a judgment to accrue interest at a rate "equal to the prime rate ... published for each calendar year **for which** the damages are awarded plus four percentage points, compounded annually." The phrase "for which", in my view, can only be interpreted to mean "during which". Damages "are awarded" only once. The year during which the damages were awarded in this case was 2006. The legal interest rate for damages awards entered during that year was and is 11.25%, compounded annually. This court has never gone through the exercise of calculating post-judgment interest in a written order, but taking into account the contentious background of this litigation, the court will do so here. For the judgment year ending August 16, 2007, the balance of the judgment was \$270,305.34; for the judgment year ending August 16, 2008, the balance was \$300,714.69; for the year ending August 16, 2009, the balance was \$334,545.09; for the year ending August 16, 2010, the balance was \$372,181.41; for the year ending August 16, 2011, the balance was \$414,051.81; for the year ending August 16, 2012, the balance was \$460,632.63; and for the year ending August 16, 2013, the balance will be \$512,453.80. Beginning August 17,

2013, another compounding anniversary, the *per diem* for the next judgment year will be \$157.95.¹

In its motion, the defendant claims the current appeal precludes execution at this stage and that a bond should be required before any execution can proceed. The court is aware of no appellate court rule, statute, or case law that would require the posting of a bond or a delay in execution under the current circumstances. Rule 241, SCACR, does not apply to the execution sought by the plaintiff. S.C. Code §18-9-130 contemplates the posting of a bond in situations in which there is a notice of appeal from a judgment directing the payment of money. With regard to the actual and punitive damages award the plaintiff seeks to collect, there is no pending notice of appeal.

The defendant also claims the execution is "excessive in amount". The court agrees the amount sought is substantial, but the amount is based on a damages award affirmed by the Supreme Court, with post-judgment interest calculated according to statute. It is substantial, but not excessive.

The defendant claims the execution should not proceed because the plaintiff used certain confidential records to assist him in effecting the execution. The defendant has presented no evidence to prove this position.

The defendant complains that counsel for the plaintiff did not serve the execution notice on its counsel and that it was filed without notice to the defendant. The plaintiff correctly points out that there is no legal requirement for notice of an execution to be given to the judgment

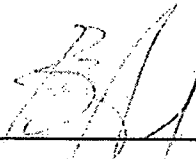
¹ In my view, the most equitable way to apply post-judgment interest would be through an interest rate adjusted annually; however, §34-31-20 (B) mandates a fixed rate, with the rate to be determined as of the calendar year in which the damages were awarded.

debtor or its counsel. Perhaps it would be advisable to give notice in certain circumstances, but it is not required.

Based upon the foregoing, it is

ORDERED that the Sheriff of Clarendon County execute on the plaintiff's judgment of \$242,971.10, plus accrued interest at the rate of 11.25% *per annum*, compounded annually, interest to begin on August 17, 2006, with the annual compounding anniversary being that date; it is further

ORDERED that no bond is required.



GEORGE C. JAMES, JR., JUDGE
THIRD JUDICIAL CIRCUIT

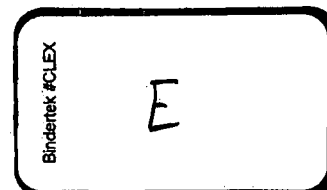
August 9, 2013


SC003882

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON Donald C. Austin, Plaintiff, vs. Stokes-Craven Holding Corp., d/b/a Stokes Craven Ford, Defendant.	IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT CASE NO. 04-CP-14-135 Memorandum of Law in Support of Motion to Direct the Clerk of Court to Enter Judgment Consistent with the Constitution and Motion for Attorneys' Fees CERTIFIED TRUE COPY OF ORIGINAL FILED IN THIS OFFICE DATE <u>5/24/17</u> <u>Bailey S. Roberts</u> CLERK OF COURT CLARENDON COUNTY, SC

This case concerns the fraudulent sale of a previously-wrecked, irreparable, and unsafe truck. It was tried to a jury in the Clarendon County Courthouse August 14-16, 2006, the Honorable John C. Hayes, III, presiding. For the Plaintiff was C. Steven Moskos; for the Defendant, Scott L. Robinson, Esq. On appeal, the Supreme Court held that Mr. Austin's recovery of actual and punitive damages for common-law fraud is no barrier to his recovery of fees and costs pursuant to the South Carolina Dealer's Act. and remanded for proceedings consistent with its opinion.

South Carolina law provides that statutory attorney fees include appellate and post-appellate fees. South Carolina law further provides that in awarding statutory fees, a court is to consider the nature of the statute, evaluate six common-law factors in establishing a lodestar amount, and in an appropriate case, enhance that lodestar award to ensure proper compensation. This is a proper case for an enhanced award. Accordingly, Mr. Austin respectfully moves the Court to instruct the Clarendon County Clerk of Court to enter judgment, including the trial-level fees ordered by the Supreme Court, against the Defendant per the remand, and to award attorney fees for the appellate and post-appellate work by Mr. Austin's counsel.



SC003829

Organization

1. The text of the Dealer's Act fee-shifting provision	2
2. Procedural history leading to the Supreme Court remand	2-12
3. Mr. Austin's entitlement to fees	12-13
4. The amount of the award	13-27
5. The Dealership's objections to the entitlement to fees	27-35
6. The Dealership's objections to the amount of the award	35-40

Pinpoint citations to the Supreme Court opinion are to the pagination as sent to counsel by the Clerk of that Court. That opinion, page numbers manually added by counsel, is attached as Tab 1.

The Statutory Text

The South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealer's Act") is codified at S.C. Code Ann. Sections 56-15-10 to -600 (2006 & Supp. 2009). Section 56-15-110 provides:

(1) In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common pleas and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

I. PROCEDURAL HISTORY

A. Trial-Level

Background facts. Mr. Austin purchased the vehicle from the Defendant Dealership on June 1, 2002. He then discovered the truck had previously been wrecked; that it had no warranty on the drive-train; and that the Dealership had forged his signature to an as-is clause. After asking the Dealership three times to accept the truck and refund his money, he asked the Ford Motor Company, the South Carolina Department of Motor Vehicles, and the South Carolina Department of Consumer Affairs to assist in obtaining a refund. He then engaged John Polito,

Esq., who wrote to the Dealership on February 18, 2003, offering to settle the matter if the Dealership would refund the purchase price and provide \$1,500.00 in attorney fees. The Dealership neither accepted nor counter-offered. Mr. Polito subsequently referred the matter to C. Steven Moskos, an experienced vehicular sales litigator.

The Lawsuit. Mr. Moskos filed suit on March 12, 2004. Between that date and the date of trial, activity was minimal. The Dealership served no discovery requests, engaged no experts, noticed no depositions. Nor did it make any offer to settle. Its answers to interrogatories stated that it had done nothing wrong and that Mr. Austin received what he paid for. The trial was largely a relatively straightforward credibility contest. It pitted Mr. Austin, his girlfriend, the former owner of the truck, and two expert witnesses against the Dealership's agents, who continued to deny all wrongdoing. The jury determined that the Dealership had defrauded Mr. Austin. It similarly determined the Dealership had violated the Dealer's Act, which forbids deceptive practices by automobile dealers. It also returned verdicts against the Defendant for constructive fraud and negligence. It awarded \$26,371.10, the entire price of the truck, including tax and tags, as actual damages under each of these. It awarded punitive damages on more than one cause of action, including \$216,600.00 for fraud.

The only complicated issue concerned an alleged violation of the federal odometer act in the Dealership's failure to show Mr. Austin the vehicle's title. It was resolved by sending to the jury the question of liability, but not asking it to determine damages. The jury found a violation.

Verdicts were returned on August 17.

This Court's Orders. Post-trial, the Dealership filed a single two-page document listing ten grounds for JNOV, new trial, and/or new trial *nisi remittitur*, dated August 24. The Court denied those motions via Orders signed August 30. The Dealership subsequently filed an

extensive memorandum in support of those motions, dated September 10. Mr. Austin filed no response to either the motion or the memorandum. He did file a memorandum in support of punitive damages, requests for prejudgment interest and attorney fees, and a memorandum regarding the election of remedies. On September 14, the Court (a) denied Mr. Austin's request for pre-judgment interest, (b) awarded \$1,500.00 in damages and \$4,500.00 in fees for what the Court considered a merely technical violation of the odometer act, ruling that Mr. Austin may recover those amounts in addition to an award under any other verdict, and (c) otherwise denied Mr. Austin's requests to recover damages under more than one cause of action or, alternatively, to recover fees and costs pursuant to the Dealer's Act in addition to damages under another cause of action. Mr. Austin elected the fraud verdict.

B. The Appeals

The Dealership filed a Notice of Appeal. Mr. Austin cross-appealed. The Dealership engaged Young Clement Rivers, LLP (Stephen L. Brown, Edward D. Buckley, Jr., and Russell G. Hines, Esquires) as additional counsel. Mr. Moskos then recruited Brooks R. Fudenberg to draft the briefs for Mr. Austin.

This section lists at some length the arguments raised on appeal. Ordinarily, Mr. Austin would devote only a sentence or two to such issues, as these would be basically the same issues previously argued to the trial court. That is not the present case.¹

As shown in the attached Briefs (Tabs 2-7), the Dealership argued that it should have been granted a directed verdict, judgment NOV, or new trial, on grounds (A) that Mr. Austin had failed to provide any evidence of fair market value. (1) Any evidence presented, the Dealership maintained, concerned not the "market value," but the "retail value," which the Dealership

¹ This is Mr. Austin's view. The Dealership disagrees.

maintained had never been recognized as a proper measure by South Carolina courts. (2) All testimony regarding value was inadmissible, as the Dealership had objected throughout the testimony of each of the two witnesses who so testified. (3) The evidence presented was insufficient to establish either "market" or "retail" value, as it concerned solely the value to one person. Mr. Austin had testified only to the value to himself, the Dealership urged, while the other witness, the expert Ray Morris, had estimated the "retail" value based on Mr. Austin's testimony. (4) To the extent, if any, that Mr. Morris's testimony regarding value went beyond the foundation of Mr. Austin's impermissible testimony, it was further inappropriate as it was based on the testimony of Mr. Austin's other expert, John Disher, that the vehicle was unsafe, which was independently improper because Mr. Disher had not been deemed qualified by the trial court to speak to safety issues, but only to auto body repair, and he was in fact unqualified to speak to safety issues, and his testimony had been objected to on those grounds. Moreover, the Dealership maintained, even if admissible, Mr. Disher's testimony had been insufficient to establish that a safety issue existed. (5) The entirety of Mr. Morris' testimony, as well as the entirety of Mr. Disher's testimony, should never have been admitted, as the Court should have refused to qualify either witness. The Dealership further argued (6) that the value assigned to the vehicle by both Mr. Austin and his expert of zero dollars was incoherent and in conflict with the evidence, given Mr. Austin's testimony that he had been driving the truck for a year, and the expert's testimony that the vehicle was probably worth something to somebody. It based all the above on the point (7) that a customer defrauded in the purchase of goods must either elect the remedy of return-and-rescission or the remedy of damages, but if he chooses damages, he must prove the measure of those damages. It additionally argued (8) that a new trial on all the issues was required due to the Court's error in sending the odometer act question to the jury (this

alleged error is discussed as "E" below). The jury's erroneous conclusion that federal law had been violated, the Dealership maintained, had tainted the other deliberations.

The Dealership further argued that a new trial, JNOV, or directed verdict should have been granted (B) due to the erroneous qualification of Mr. Morris and the further erroneous decision to allow him to testify to value, which not only failed to help establish value, as described above, but was so improper it constituted independently sufficient grounds for reversal and a new trial. (C) The admission of Mr. Disher's testimony required a new trial for reasons in addition to his erroneous qualification as an expert, and the further erroneous decision to qualify him to testify to safety issues, and the necessary role of that testimony in the erroneous establishment of the market value. His testimony about safety, even if otherwise admissible, (1) failed to establish that a safety problem existed. Allowing the jury to erroneously believe a safety problem existed had been incredibly prejudicial, and required reversal independently of its role in the market value issue. Moreover, (2) the erroneous belief that a potentially deadly safety problem existed was the only possible explanation for what it urged was the extraordinary punitive damage award (argument E below), which must therefore be reduced. (3) The trial court further erred, the Dealership argued, in allowing Mr. Disher to testify to how easy it would be for a competent inspection by the Dealership to have revealed the wreck damage.

It argued (D) that a new trial should have been granted due to inconsistent verdicts, and (E) that the odometer act award should be reversed on grounds that (1) the vehicle was not titled in the Dealership's name and (2) there was no intent to defraud specifically as to mileage in the failure to show title to the customer, and that each were required to make out a violation under the statute, as interpreted via its implementing regulations, as in turn interpreted by case law. As noted above, the Dealership further argued that, because the jury had been allowed to

erroneously conclude that federal law had been violated, the entirety of the deliberations were tainted and a new trial was required as to all causes of action. Moreover, (3) at a minimum, as the jury may have based its punitive damages award, at least in part, on its erroneous belief that federal law had been violated, the punitive damages award should be reduced.

The Dealership argued (F) that the punitive damages award should be reversed or vacated on grounds that the award was (1) exorbitant and extraordinary, and unconstitutionally excessive, especially given the unusually high 8.21 ratio of punitive to compensatory damages, which was erroneous for numerous reasons, including the above-mentioned problem of the inherent incredibility of the zero dollar valuation which, even if it passed muster for an actual damages award, was too uncertain to meet the heightened standard for punitive damages, and because it rested on a safety issue which did not exist, as discussed above, and which, even if it existed, the Dealership had not known about and should not be punished for, and (2) that the jury's award and this Court's affirmation were each based on Mr. Austin's closing argument, which the Dealership maintained to be both impermissible "testimony" and inaccurate. As this was the only evidence in the Record of the Dealership's ability to pay, the Dealership maintained, the award must be reversed for failure to provide any evidence of an essential element of any punitive damages award. The Dealership presented other arguments as well.

Mr. Austin responded to the great majority of these arguments (G) on preservation grounds, stating that a careful examination of the Record does not reveal where these grounds had been raised to the trial court; that although many objections were indeed raised by the Dealership and many arguments made, none were on grounds remotely similar to those raised on appeal. He further argued (H) that some of the Dealership's points, even had they been preserved and otherwise meritorious, would not establish that the supposed errors had prejudiced

the result. As to the underlying, pre-litigation facts and the trial testimony, (I) he presented a rendition dramatically different from the Dealership's. Finally, and most prominently, (J) he argued the merits of each issue.

In its Reply, the Dealership engaged more fully on the preservation aspects, and addressed Mr. Austin's arguments regarding the merits.

In his own appeal, Mr. Austin argued (K) that pre-judgment interest was proper, as the complete lack of retail value of the truck was capable of ascertainment without a trial.

He also argued (L)(1) that he should have been awarded fees and costs pursuant to the Dealer's Act, as the Supreme Court had indicated, in *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992), a preference that fees under a fee-shifting statute be the maximum allowable; (2) if there were a concern as to whether counsel's affidavits were sufficiently detailed to enable a determination as to which services, if any, were completely unrelated to the Dealer's Act claim, the Court should remand to enable the trial court to develop that record; (3) that the Dealer's Act is a remedial statute, enacted because too many car dealers were not playing fair with their customers; that the fee-shifting provision is especially remedial, as it is designed to enable deceived buyers of vehicles to engage attorneys when recovery for a proven violation might not justify the attorney time or expenses; and that as a remedial measure it should be read broadly, while even under a straightforward reading Mr. Austin would be entitled to his fees and costs; (4) the doctrine of election of remedies is to be narrowly confined and not lightly extended; and (5) the core of the election of remedies doctrine under South Carolina law is to prevent a duplicative recovery of the same class of award, such as a double recovery of the same actual damages, whereas recovering actual damages, punitive damages, and attorney fees is not a "double recovery." He extensively examined the law of other states on this final point.

The Dealership defended on grounds (M) that the value of the truck as provided to Mr. Austin had not been sufficiently certain to allow for prejudgment interest. As to fees and costs, it argued (N)(1) that the question of Dealer's Act fees in addition to common-law damages was not preserved, as this Court had not ruled on it; (2) that *Taylor v. Nix, supra*, did not evince a preference for large awards; rather, that case mandated that the hours and expenses incurred in litigating any claims other than the Dealer's Act claim must be excluded; (3) that Mr. Austin had forfeited his argument that the Dealer's Act is remedial by the failure of his Brief to cite any authority declaring that Act remedial; and he had similarly failed to provide any legislative history to support the proposition that the statute was enacted because too many car dealers were not playing fair; (4) that South Carolina case law clearly establishes that fee-shifting statutes must be strictly construed, as they are in derogation of the common law; and (5) on the merits, that the doctrine of election of remedies required Mr. Austin to choose only one cause of action on which to recover.

In his Reply, Mr. Austin addressed many of the Dealership's concerns.

After the briefs were filed, the Supreme Court, *sua sponte*, certified the case from the Court of Appeals. It did so pursuant to Rule 204(b), SCACR, which provides that certification is normally appropriate "where the case involves an issue of significant public interest or a legal principle of major importance."

C. The Remand

The Supreme Court issued an opinion notable for the number of issues addressed and their wide range of subject matter. Professor F. Patrick Hubbard of the University of South Carolina School of Law attests in the attached affidavit, Tab 8, ¶ 6, that he found no South Carolina torts case published that year addressing more issues than *Austin*.

The wide range of subject matter includes federal constitutional, regulatory, and statutory law; myriad South Carolina law questions—substantive, evidentiary, statutory construal, civil procedural; the law of various states regarding election of remedies; and, more narrowly, numerous questions concerning the content of the Record and the inferences to be made therefrom, and questions of appellate procedure, issue preservation, and prejudice.

Perhaps a result, the opinion is also notable for the sheer quantity of analysis. It spans forty (40) pages as sent by the Supreme Court to counsel. It is also notable for the rare 2-1-2 division among the Justices. Notable, too, is that the divisions almost exclusively concerned rationales. On only two issues did the Court divide as to results, and each was by a vote of four to one.

The Supreme Court (A) affirmed this Court's orders approving the jury's verdicts and awards; (B) reversed its award for violation of the federal odometer act; (C) affirmed this Court's denial of Mr. Austin's request for prejudgment interest; and (D) held Mr. Austin was entitled to his attorney fees and costs. Op. p. 31.

As to the facts, the Supreme Court conducted its own review of the Record and found the Dealership's conduct highly reprehensible. "Stokes-Craven's conduct can only be construed as exhibiting an extremely high degree of reprehensibility." Op. p. 25. *See also id.* p. 40 (Kittredge, J., concurring in part) (similar).

The holdings are too numerous to list. Three are especially notable: (1) It upheld punitive damages in a ratio of 8.21 times the actual damages. (2) It resolved a novel question of South Carolina's interpretation of federal law. (3) It resolved a novel question of South Carolina law, whether one may recover fees and costs pursuant to a statute that awards fees and costs for proving a violation of that statute, while recovering damages under a different cause of action

based on the same facts. In so doing, it addressed the basic conflict between the scope of the election of remedies doctrine as stated in the case law and the underlying purpose of that doctrine. Many cases have held that the doctrine prevents recovery under more than one cause of action based on the same facts. *E.g.*, *Williams v. Reidman*, 339 S.C. 251, 257, 529 S.E.2d 28, 40 (Ct. App. 2000) ("When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both, however, the plaintiff may not recover both."). Yet many decisions hold that the purpose is to prevent a double recovery. These two propositions are often stated in the same decision. *E.g.*, *Williams, id.* As the two conflicted, the Court limited the scope to the purpose. As recovery of both attorney fees and damages is not a "double recovery," there is no bar to recovering both under alternative causes of action. the Court held.²

More narrowly, regarding the Dealer's Act and its fee-shifting provision, the Court issued several holdings. Most conspicuously, it held (a) That provision is highly remedial. It "epitomizes the definition of a remedy." Op. p. 30. (b) Its purpose is to prevent "costly attorney fees" from "deter[ring]" deceived customers from bringing suit against "dealers who engage in deceptive practices." *Id.*, p. 29. (c) Accordingly, it requires "full[] compensat[ion]." *Id.* In so holding, the Court resolved the meaning of *Taylor v. Nix* favorably to Mr. Austin. "[T]o award Austin his claim in its entirety would be consistent with the precedent of this Court." Op. p. 30 (citing *Taylor v. Nix, supra*).

As to Mr. Austin specifically, (d) he was entitled to recover fees and costs; (e) he was entitled to "full compensat[ion]" for those fees and costs; (f) full compensation included compensation for fees and costs involved in the lawsuit as a whole, including time devoted to

² It so held unanimously. Op. p. 31 (majority); Op. p. 37 (Pleicones, J.) (concurring in part) ("I agree with the majority" on this point).

other causes of action involved in the lawsuit. *Id.* pp. 29-30. Summarizing its conclusions as to Mr. Austin's entitlement to attorneys' fees and costs, the Court reiterated, *id.*, p. 31, "In terms of Austin's cross-appeal, we hold: (1) he is entitled to the entire amount of his request for attorney's fees and costs"

It remanded for entry of judgment consistent with its opinion. *Id.*

II. THE ENTITLEMENT TO FEES

Mr. Austin is entitled to his trial-level fees and costs, for the Supreme Court explicitly so held.

He is also entitled to his appellate and post-appellate fees. South Carolina law provides that where appellate and later fees are not inconsistent with the purposes of a fee-shifting statute, a trial court has the power and the duty on remand to award such fees. These specifically include fees incurred in seeking a fee award. "[A]ppellant is entitled to attorney's fees under § 15-77-300 for this litigation and appeal seeking to secure such fees." *McDowell v. South Carolina Department of Social Services*, 304 S.C. 539, 544, 405 S.E.2d 830, 833 (1991) (reversing trial court which had refused to award such fees). *See also Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993) (Circuit Court erred in "holding that, absent a directive of the Supreme Court, it was without jurisdiction to act" on requests for "appellate and post-appellate" fees under a fee-shifting statute; these fees should properly have been awarded); *Parker v. Shecut*, 359 S.C. 143, 152, 597 S.E.2d 793, 799 (2004) (citation and footnote omitted) (the master properly awarded appellate fees on remand; "When the Supreme Court remits a case to the circuit court, the circuit court 'acquires jurisdiction to enforce the judgment and take any action consistent with the Supreme Court ruling.' Additionally, whether respondents are entitled to appellate attorney's fees pursuant to a statute is a determination for the

circuit court."); *Layman v. State*, 376 S.C. 434, 463–64, 658 S.E.2d 320, 335–37 (2008) (under a fee-shifting statute, awarding fees incurred in litigating the issue of the fee award; these fees, although larger than the fees incurred in the underlying action, would be multiplied by 1.25 to ensure proper compensation).

Mr. Austin seeks recovery of fees incurred in defending against the Dealership's appeal and pursuing his own appeal, and his fees incurred post-appeal in seeking his fees. He is entitled to these fees under the above authorities. He is, if anything, more entitled than were the plaintiffs in *McDowell*, *Muller*, *Parker*, and *Layman*, due to (a) the mandatory language of the provision here (the plaintiff "shall recover" under this statute, whereas whether to award fees was left to the court's discretion under the other statutes); (b) the remedial nature of the statute, Op. p. 29; and (c) its purposes of encouraging Dealer's Act suits and removing the deterrent effect of costly attorney fees. *id.*

III. THE AMOUNT OF THE AWARD

The concern here is exclusively with the appellate and post-appellate fees, as the award for Mr. Austin's trial-level fees, including his immediate post-trial work, has been set by the Supreme Court at \$49,360.00, the entire amount requested. Op. p. 31. The overarching analysis under a fee-shifting statute was explained in *Layman v. State*, 376 S.C. 434, 442–58, 658 S.E.2d 320, 324–33 (2008). A court is to determine the nature and purpose of the fee-shifting provision and its theory. *See especially id.* at 457–58, 658 S.E.2d at 332 (applying a method of calculating fees that "embraces the theory of fee shifting embodied in the [relevant] statute"). Within that framework, a court is to establish a lodestar figure, and determine the appropriate magnitude, if any, of a multiplier. *Id.*

A. The Theory, Nature and Purpose of the Fee-Shifting Provision

The Supreme Court's opinion explains the theory, purpose and nature of the Dealer's Act fee-shifting provision. Op. pp. 29–30. Its theory is that “costly attorney fees” required for such cases “may deter” plaintiffs from prosecuting their claims. Its purposes are to make such claims more economically viable, and to encourage private enforcement of the Dealer's Act. Its nature is remedial; it is the epitome of such a measure.

More generally, the scholarly literature concerning fee-shifting provisions was gathered in *Covenant Mutual Ins. Co. v. Young*, 179 Cal. App. 3d 318, 324–328, 225 Cal. Rptr. 861, 864–68 (Cal. App. 1986), which concludes, not surprisingly, that statutes shifting fees only in favor of successful plaintiffs “are created by legislators as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy,” *id.* at 324, 225 Cal. Rptr. at 865. “[W]here the Legislature wants to encourage litigation it can intervene to alter the decision-making equation by instituting unilateral fee-shifting. Then the injured person knows he will not have to absorb his own lawyer's legal fees, at least if he wins.” *Id.* at 325, 225 Cal. Rptr. at 865. It has similarly been said by the United States Supreme Court that such a statute is enacted only where the legislature deems standard fee agreements to provide insufficient compensation. It reasons that the legislature would not enact such a provision if it believed standard contingency contracts were sufficient to attract the needed numbers of quality counsel to vigorously litigate the cases. *Riverside v. Rivera*, 477 U.S. 561, 579–80 (1986) (plurality); *id.* at 586 (Powell, J., concurring) (same).

Such statutes are vigorously enforced to ensure adequate compensation. *In re Warner Communications Sec. Litigation*, 618 F. Supp. 735, 750–51 (S.D.N.Y. 1985) (collecting cases) (“‘generous’” awards are appropriate under such statutes); *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 363 (E.D.N.Y. 2010) (collecting additional cases) (“‘generous fee awards in

cases such as this serve the dual purpose of encouraging plaintiffs' attorneys to act as private attorneys general and discouraging wrongdoing"). The vigorous enforcement of the statutes is often linked to their remedial nature, *e.g.*, *Warner*, 618 F. Supp. at 750 ("The federal securities laws are remedial in nature and, in order to effectuate their statutory purpose of protecting investors and consumers, private lawsuits should be encouraged.").

South Carolina decisions generally, and the remand here specifically, accord with these sound principles. As to the theory and purposes, *see, e.g.*, *Taylor v. Medenica*, 331 S.C. 575, 578, 503 S.E.2d 458, 460 (1998) (quoting *Bradley v. Hullander*, 277 S.C. 327, 287 S.E.2d 140 (1982) ("requiring the unsuccessful defendant to pay the plaintiff's attorney's fees is a legitimate tool in enforcing the underlying public policy of the [securities] statute."); *id.* at 579, 503 S.E.2d at 460 ("Allowing plaintiffs who successfully pursue an action under the UTPA to recover their attorney's fees encourages individuals to pursue litigation to protect the public interest."); *Op.*, p. 29 (the statute was enacted because "costly" attorney fees "may deter" such lawsuits). As to the vigorous enforcement of such statutes, *see, e.g.*, *Op.* p. 31 (awarding approximately \$50,000 in trial-level fees in dispute over \$25,000 truck); *id.* p. 29 (statute's purposes are facilitated by recovering fees and costs in addition to common-law damages); *id.* p. 30 (precedent supports rejection of argument that would limit the award) (citing *Taylor v. Nix, supra*); *Taylor v. Medenica, supra* (affirming award of \$500,000 in fees and \$24,068 in costs incurred in obtaining an actual damages award of \$36,242.00).

More broadly, South Carolina law holds that remedial statutes are to be vigorously enforced. "This is a remedial statute, and as such should receive . . . a construction 'giving the words the largest, the fullest, the most extensive meaning of which they are susceptible.'" *Allen v. Union Oil & Mfg. Co.*, 59 S.C. 571, 577, 38 S.E. 274, 276 (1901) (quoting *Endlich on Int.*

Stat., sec. 107); *South Carolina Dep't of Mental Health v. Hanna*, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978) (similar).

B. The Lodestar

A lodestar figure is reached by multiplying a reasonable number of hours by a reasonable hourly rate. In determining the reasonable hours and rate, one looks to six common-law factors, “(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services.” *Layman*, 376 SC at 457–58, 658 S.E.2d at 333.

Mr. Austin requests an appellate-stage lodestar award of \$115,450.00, consisting of 300.2 hours for Mr. Fudenberg and 165.6 hours for Mr. Moskos at \$250 per hour. He requests a post-appellate award of \$225.78 in itemized costs, and lodestar fees of \$121,825.00. The hours are detailed in counsel’s timesheets attached to their affidavits. Tabs 9–10. The Dealership’s claim that the fees are unreasonable because they are multiples of the fees incurred at the circuit court level, and the Dealership’s own ten-fold increase in fees at the appellate stage, are discussed in Part IV.

(1) The nature, extent and difficulty of the appellate and post-appellate cases were exceptional. As directly detailed in the timesheets, and as apparent in the Opinion, the six Briefs and two Petitions, the extent and difficulty of the appellate and post-appellate stages were exceptional. The 1,108-page Record included 800 pages of transcript and 300 pages of other materials.

The Supreme Court opinion speaks for itself. It is exceptional in length, in the number of issues discussed, and in their range of subject matter and their difficulty. The opinion spans forty

pages as formatted in the remittitur; as published in the South Carolina Reports, it consumes 44 pages, 24 in the Southeastern, Second. These are exceptional for a South Carolina Supreme Court decision. The Supreme Court obviously found the case to be exceptional in the number of issues requiring explicit analysis. The difficulty and complexity of the case are apparent in the content of the discussions, and again in the length—the Court does not generally require 40 pages to discuss easy issues, no matter how great their number, nor to discuss numerous issues, no matter how great their difficulty.

The difficulty is also apparent in the unusual 2-1-2 division among the Justices—a division that goes to rationales, not results. On only two issues were there disagreements as to results. Yet the Court repeatedly divided on the rationale by which to reject the Dealership's various claims for relief. The multitude of rationales reflects the complexity of the issues and the great number of decision-points.

The Chief Justice has described the work of Professor Hubbard as “the most significant authority on tort law in South Carolina.” Jean H. Toal, “BOOK REVIEW: The South Carolina Law of Torts,” 50 S.C. L. Rev. 261, 261 (Fall, 1998). His *curriculum vita* is attached. Ex. 1 to Tab 8. As noted above, he attests that he could find no reported South Carolina torts decision of 2010 with more issues than *Austin*. Tab 8 (Aff. F. Patrick Hubbard), ¶¶ 4–6. *See also id.* ¶¶ 5–6 (“so many issues,” “so many legal points.”). Prof. Hubbard speaks of the substantive issues that concern his work as a torts scholar; yet the opinion actually has many more issues still, for it also addresses an unusually large number of questions regarding error preservation and prejudice. Prof. Hubbard further notes the complexity of the case, and concludes that the Court's unusual division was both created by and added to the complexity. Hubbard Aff. ¶ 8. *See also* Aff. John

S. Nichols, Esq. (Tab 11) (“the difficulty of the issues [is] evidenced by the three (3) separate opinions,” *id.* ¶ 14.)

The breadth of subject matters is also exceptional: federal constitutional law, in the punitive damages issues; federal regulatory and statutory law, in the Odometer Act issues; a survey of the law of various states concerning a mixed statutory- and common-law question, the recovery of statutory fees in addition to common-law damages, which further required deep and detailed analysis of the election of remedies doctrine under South Carolina law; and numerous and diverse questions under South Carolina law, including questions of substantive law, e.g., whether “retail” value is “market value,” and whether fraud and violating the UTPA are so similar that one may not properly receive an award for fraud in the sale of goods while being denied recovery under the UTPA; of statutory construction, e.g., whether the Dealer’s Act is remedial, and whether under South Carolina law a remedial fee-shifting statute is broadly or narrowly construed; of evidence, e.g., the qualification of experts, the scope of their testimony, the quantum of evidence required for valuation when the defendant has refused multiple requests to return the item; as well as numerous questions about the content of the Record and the inferences to be made there from: and many, many others. Additional issues were raised in the Dealership’s 44-page Petition for Rehearing (Tab 12) and its Supplemental Petition for Rehearing (Tab 13). Not mere rehashes of prior arguments, each relied on new cases decided by the South Carolina Supreme Court subsequent to the decision in *Austin*. Additionally, the Dealership skillfully, if ultimately unsuccessfully, exploited the 2-1-2 division to argue for rehearing on the fair market value issues.

The Dealership again exploited that division to argue against any award of fees, and has raised additional objections, as discussed in the closing sections of this memorandum. The

parties are still arguing over the meaning of the Supreme Court decision. Issues on which Mr. Austin prevailed before the Supreme Court have now reappeared in new variants, such as the plain language of the statute. Or they appear under a new lens, such as the question of whether one who proves a Dealer's Act claim and related claims must segregate his fees and costs by type of claim. On appeal of the present case, this was largely a question of the proper interpretation of the Supreme Court's decision in *Taylor v. Nix*. It has now become a question of the proper interpretation of the Supreme Court's discussion in the present case of its decision in *Taylor v. Nix*. Other questions are entirely new, such as the Dealership's argument that appellate fees may not be much greater than trial-level fees.

Finally, as to the nature of the case: the nature is cross-appeals on novel and complex issues and subsequent disputes regarding fees. As with the extent and difficulty, the nature is evident in the timesheets, the Opinion, and the filings; *see also* Nichols Aff. ¶ 14 ("cross-appeals on novel and complex issues"). The case as a whole is a torts action, involving three affirmative misrepresentations, evidence of forgery, an unsafe vehicle, and fraud which had to be proven by clear and convincing evidence. It was brought pursuant to a statute designed to provide customers deceived by an automobile dealership the right to sue, and contains a fee-shifting provision designed to transfer the costs of the litigation to the deceptive dealership. The case was thus unusual in nature, as well as exceptional in difficulty and extent.

(2) The time devoted to the case was a direct result of its extent and difficulty. *See* the timesheets attached to counsel's affidavits, Tabs 9–10. The reasonableness of the hours is also evidenced by the quality of the six Briefs filed in this case, three by Mr. Austin and three to which he had to respond.

In view of the extent and difficulty. John S. Nichols, Esq., attests, Tab 11, ¶ 15, "It is my opinion that the various activities claimed on the time records as well as the time stated for that activity is reasonable and expected in light of the nature and difficulty of this case." The experienced appellate practitioner analyzed the timesheets of Mr. Austin's counsel, and reviewed the opinion, the Record, the Briefs, and other documents. *Id.*, ¶ 12. As detailed in his affidavit, he has served as a clerk to three judges on the South Carolina Court of Appeals, and as Chief Staff Attorney for that Court. *Id.* ¶ 8. In private practice over the last fifteen years, he has worked on more than 100 appellate matters in the South Carolina and federal courts. *id.* ¶ 10, and is the author of the South Carolina Bar's annual Case Law Update, which summarizes every appellate case published by the South Carolina courts, *id.* ¶ 7.

(3) **Mr. Austin's counsel are well-qualified.** Each receives numerous cases brought to him by other practitioners due to his reputation for quality work in his area of concentration. Mr. Fudenberg, who was graduated from Yale Law School 20 years ago, and has published in nationally prominent lay and scholarly periodicals, focuses his practice on appellate and similar matters. Mr. Moskos, who was graduated from law school in 1986, and has published on warranty law in the *South Carolina Bar Journal* and in a national paralegal magazine, focuses his practice on vehicular sales litigation. He selected Mr. Fudenberg for the appeal only after the Dealership had selected Young Clement Rivers, LLP, and Mr. Moskos realized that greater appellate skill would be necessary. He collaborated closely with Mr. Fudenberg in addressing questions regarding the events surrounding the trial, the intricacies of South Carolina automobile titling law, the implementation of titling in practice, and the ins and outs of the operations of automobile dealerships, and more generally in developing the theory of the case, which

necessarily rested on the above. *See also* the attached affidavits of counsel, Tabs 9–10 (noting additional credentials).

(4) The compensation was contingent. Both attorneys worked on contingency bases. Moreover, Mr. Austin, who works in a paper mill, would be unable to afford to hire his attorneys on an hourly basis for the amount of work required here.

(5) The results were highly beneficial. The actual damages award of the entire price of the truck was completely defended, as was the jury's award of significant punitive damages. In addition, attorney fees and costs were awarded—again, in the entire amount requested. New law was set for cases under the Dealer's Act and other fee-shifting statutes.

The public interest is served by the successful defense of the award of punitive damages, and with it, the jury's strong message to car dealerships about defrauding customers. The public interest will be further served by the Supreme Court's award of fees, and with it, the Supreme Court's strong message to deceived customers and their potential attorneys that they should not hesitate to vigorously pursue Dealer's Act claims when they have solid facts, as the costly fees involved will be borne by the defendant if they prove their case—provided that the Court resists the Dealership's enticements to counteract that message. The Dealership would prefer that this Court send a message at war with the Supreme Court's. It would prefer a message that even if one prevails at trial and is awarded trial-level fees and costs, those fees can be consumed by the more costly appeal, for which there will be little or no compensation, and/or by the difficulty in extracting fees from an unwilling defendant. The Court should instead follow the reasoning of the Supreme Court, vigorously enforce the Act to maximize its remedial purposes, and send a message allied with the Supreme Court's. The public interest will thereby be further served.

(6) The customary fees for similar services are greater than those requested here. Mr.

Austin's counsel request a baseline hourly rate of \$250, well within the customary rates for appellate work in South Carolina. Aff. John S. Nichols (Tab 11) ¶ 14 (the rates requested are "well within" the customary range); Exs. 2 & 3 to Tab 10 (orders of other courts awarding Mr. Moskos \$250 to \$300 an hour): *Layman*, 376 S.C. at 457, 658 S.E.2d at 332 (approving hourly rates from \$200 for junior counsel to \$600 for senior counsel, pre-multiplier).

Thus the baseline request is fully justified, and the Court should consider an enhancement.

C. Enhancement of the Award

A court may increase a fee award beyond a straight hours-times-customary rate calculation by either of two methods. It may do so because of a special import of any of the six common-law factors. Alternatively, it may include other factors as well to determine a "multiplier." As the multiplier approach is more comprehensive, it is discussed first.

1. The Multiplier

A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended. Using this as a starting point for reasonableness, a court may consider other factors justifying an enhancement of the lodestar figure with a "multiplier" before arriving at a final amount.

Layman, 376 S.C. at 457, 658 S.E.2d at 332 (citation omitted). There, the Supreme Court awarded \$588,873.13 in fees for a stage of litigation that concerned solely the issue of fees. The award represented a 25% increase over the lodestar amount. It was greater than the award for litigating the merits, which had also been increased by 25%. The Court approved pre-multiplier hourly rates of \$350–\$600 for senior counsel and \$200–\$250 for junior counsel. The \$250 rate was for counsel two years out of law school. *Id.* at 464, 658 S.E.2d at 336 (approving \$250 per hour, pre-multiplier, for work beginning in June 2006 by Graham Newman, Esq., who was graduated in 2004, Tab 14 (official Member Profile from the South Carolina Bar)). The Court

also awarded \$41,602.01 in related costs. It awarded those costs and multiplied those fees under a statute whose discretionary language (the court "may allow" fees) is weaker than the mandatory language of the Dealer's Act ("shall recover" fees and costs).

The Court chose the multiplier based on four factors: "[1] the expedited litigation timeline imposed by the Court, [2] the wholly successful recovery for the entire class of TERI participants, [3] the extraordinary sum of money returned to the TERI participants and ultimately saved by the TERI participants, and [4] the termination of governmental acts constituting a breach of contract." *Id.* at 461, 658 S.E.2d at 334. Here, [1] there was no expedited timeline; however, there were [2] a wholly successful recovery of the actual damages claimed; [3] an extraordinary sum of money returned to Mr. Austin; and [4] a strong disincentive to dealerships' acts constituting fraud in the sale of vehicles. Moreover, here:

[5] Mr. Austin not only recovered the entire price of the truck, he was allowed to keep the truck, over Defendant's strong objection on appeal that retaining the truck invalidated the damage award. *See* Justice Pleicones' dissent on the same point, Op. p. 33. [6] Here, unlike in *Layman*, counsel obtained an award of punitive damages on behalf of the client. [7] Here, unlike in *Layman*, new and wide-ranging substantive law was created. [8] Success in the present case required mastery of a wide range of issues, success in *Layman* comparatively few.

[9] While both *Layman* and the present case were brought on contingency bases, there is an important difference. As explained in *Edmonds v. United States*, 658 F. Supp. 1126 (D.S.C. 1987), a case on which *Layman* relies throughout, an important criterion in determining the proper multiplier in a contingency case is the degree of "risk of non-recovery of a reasonable fee," *id.* at 1140. Comparing the apparent degree of risk at various stages of that litigation, *id.*, the court applied a larger multiplier for work undertaken when the risk of non-recovery was

great, *id.* at 1148. For work performed as the risk of non-recovery was reduced to zero, the risk element of the multiplier was reduced or eliminated. *Id.*

The *Layman* defense “had no reasonable basis in law or in fact.” *Id.* at 449, 658 S.E.2d at 328. It was “not substantially justified.” *Id.* See also *id.* at 445, 658 S.E.2d at 325 (it was not justified “to a degree that could satisfy a reasonable person.”). Where, as in *Layman*, the defense has no reasonable basis, and the defendant is the State, the risk of non-recovery is slight. Here, on the other hand, the risk of non-recovery of a reasonable fee appeared great when Mr. Moskos entered the case, and the risk appeared greater for Mr. Fudenberg when he began his work, as to recover more than a token fee the team would need both to overcome the arguments of the Dealership that the verdict should be reversed or vacated, and to convince the Court to set new law regarding the election of remedies doctrine. A high multiplier is appropriate for that work. The risk of non-recovery was less for work undertaken after the Supreme Court issued its decision.

[10] “The quality of opposing counsel is also important in evaluating the quality of plaintiffs’ counsels’ work.” *In re Warner Communications Sec. Litigation*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) (citations omitted) (citing numerous cases to similar effect). “Defendants in this action were represented [by] highly prestigious law firms Plaintiffs were thus confronted in this litigation by some of the most skilled and respected firms” in the jurisdiction. *Id.* See also *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010) (similar) (finding it important that counsel were required “to respond to complex legal and factual defenses raised by highly qualified defense counsel.”) (citing additional cases).

So too here. Plaintiff’s attorneys were confronted by one of the most skilled and respected firms in the jurisdiction, Young Clement Rivers, LLP. As explained on its website, Young

Clement Rivers is a member of “[a]n international association of elite law firms.” <http://www.ycrlaw.com>. It provides “superior legal work.” www.ycrlaw.com/practice-groups. Three attorneys from the firm, including two partners, were among the four attorneys representing the Dealership on the cross-appeals. Its Commercial Litigation and Appeals Practice Group, whose chair, Mr. Brown, was a member of the defense team, has successfully engaged in “hundreds” of appeals, not only for “the firm’s own clients,” as it “is regularly sought out to initiate actions in the original jurisdiction of the South Carolina Supreme Court, and to prepare briefs as amicus curiae,” “handling numerous appeals from cases originating outside of the firm” on matters “referred by other attorneys.” www.ycrlaw.com/practice-groups/commercial-litigation-and-appeals. “At the cutting edge of Charleston’s legal community,” where it is “constantly setting new standards,” the firm is “recognized internationally.” *Id.* The relevant webpages are assembled in Tab 15.

In contrast, in *Layman*, defense counsel had—whatever the quality of their work as a general matter—produced a defense with “no reasonable basis in law or in fact.”

The exceptional quality of the opposition here necessitates an exceptional multiplier. “Plaintiffs’ attorneys [have] been up against established and skillful defense lawyers, and should be compensated accordingly.” *In re Equity Funding Corp. Sec. Litigation*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). So too here.

[11] It was not mere chance that the defense in *Layman* lacked a reasonable basis. It was inherent in the theory of fee shifting embodied in the statute. The operative statute there, S.C. Code Ann. § 15-77-300 (2005), applies only where the defense lacks rationality. *Layman*, 376 S.C. at 444–52, 658 S.E.2d at 325–29 (explaining and applying § 15-77-300). That statute is not designed to encourage litigation, but merely to manage litigation already underway. It is like

sanctions under the Rules of Civil Procedure. Such rules are strictly construed. *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001) (collecting those rules) (further holding that those rules are strictly construed).

In contrast, the fee-shifting provision here has the purpose of increasing the willingness of plaintiffs to litigate. It “facilitates” suits “against dealers who engage in deceptive practices.” Op. p. 29. Such fee-shifting provisions warrant the most substantial awards. *See, e.g., Taylor v. Medenica*, 331 S.C. 575, 503 S.E.2d 458 (1998) (affirming fee award of \$500,000 on actual damages of less than \$36,500); *In re Warner Communications Sec. Litigation*, 618 F. Supp. 735, 750–51 (S.D.N.Y. 1985) (“‘generous’ awards are appropriate under similar statutes) (collecting similar cases); *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 363 (E.D.N.Y. 2010) (collecting additional cases) (“‘generous fee awards in cases such as this [are appropriate]’”).

The Court should follow *Layman* in “embrac[ing] the theory of fee-shifting embodied in [the relevant statutes],” *id.* at 458, and the Opinion in the present case, and conclude that the Dealer’s Act, a statute designed to encourage litigation to protect consumers, is more conducive to a substantial multiplier than is a statute that applies only where the defense that must be overcome lacks a rational basis.

In sum, Mr. Austin’s counsel navigated a highly extensive case involving an exceptionally broad range of issues against exceptionally skilled opponents and obtained exceptional results. Their fees are to be awarded pursuant to a provision that epitomizes the definition of a remedy. An exceptional multiplier is in order.

2. Alternative Grounds for an Increased Award

Courts are also authorized to increase awards due to the special import of any of the six common law factors. *Layman* authorizes consideration of factors beyond the traditional six, not

instead of the traditional six. Each common-law factor independently supports an increased award; they do so cumulatively as well. The Court should increase the award based on:

- The highly beneficial results obtained (factor 5). *See, e.g., Connolly v. National Sch. Bus Serv.*, 177 F.3d 593, 597 (7th Cir. 1999) (setting forth a three-part test for determining the degree of success, “the difference between the judgment recovered and the recovery sought, the significance of the legal issues on which the plaintiff prevailed and, finally, the public purpose served by the litigation.”). Mr. Austin scores at the top of this test, with a complete recovery, resolution of a novel issue, and public purposes well served.
- The unusual complexity and difficulty of the appellate and post-appellate case (factor 1). *E.g., Metlife, supra*, 689 F. Supp. 2d at 357 (in awarding fees, courts “should consider factors such as the novelty and difficulty of the questions presented [and] the skill requisite to perform the legal services properly”).
- The large investment of time without contemporary compensation (factor 2).
- The special competence of counsel (factor 3), especially as compared to the customary rates for similar work (factor 6). This small team was very well qualified to represent Mr. Austin in this matter. “Given the complexity [and] the presence of numerous contested issues . . . only well-qualified counsel could have litigated this case and achieved the [results obtained].” *Metlife*, 689 F. Supp. 2d at 362. So too here. It is doubtful that a team lacking Plaintiff’s attorneys’ knowledge of automotive issues and appellate skill would have produced a similar result. Yet Mr. Austin’s counsel, more than 15 years out of law school when they began to work on this case, and highly respected in their fields, requested baseline rates identical to those the Supreme Court approved, pre-multiplier, for counsel two years out of law school.
- The highly contingent nature of the compensation (factor 4).

The Court can, and should, enhance the award even before reaching the additional factors that should be considered pursuant to *Layman*.

IV. THE DEALERSHIP’S ARGUMENTS RE: THE ENTITLEMENT TO FEES

The Dealership maintains that Mr. Austin is not entitled to any fees—not trial-level, not appellate, not post-appellate. Mr. Austin addresses these arguments here. It further argues that

an award, if any, must be severely restricted.³ Mr. Austin addresses those arguments in Part V. Each is fatally flawed. As the substance of the Dealership's objections would apply equally to fees incurred in seeking fee awards, such reasoning is also addressed here by implication.

A. The Dealership Errs in Arguing that the Statute Prohibits Appellate Fees

The Dealership claims that the statute's provision that anyone wrongfully "injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common pleas and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee" limits fees to those incurred in the court of common pleas. It errs for numerous reasons. Mr. Austin incorporates by reference his arguments and authorities under the heading, "The Entitlement to Fees," establishing that appellate and post-appellate fees are properly awarded, and that the mandatory language of the statute here makes fees and costs even more appropriate than in many cases wherein the Supreme Court held that fee-shifting statutes require the award of such fees.

It suffices to resolve the issue to note the remedial nature of the statute and of its fee-shifting provision, and the rule that remedial measures are broadly construed, *see, e.g., South Carolina Dep't of Mental Health v. Hanna*, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978) (remedial measures are broadly construed); Op. p. 20 (the provision here is remedial). Thus, even if the Dealership's reading made sense—which it does not—it would be trumped by the

³ As background, the Dealership presented its objections in its return to Mr. Austin's motion for appellate fees before the Supreme Court. Mr. Austin had noted that controlling case law declared that appellate fees pursuant to a fee-shifting statute are ordinarily a matter for the trial court on remand, but in an abundance of caution, asked the Supreme Court to award such fees nonetheless. The Dealership argued that the Supreme Court should not reach the matter of appellate fees under the statute, which it maintained were a matter for the trial court on remand, and cited additional authority. Nevertheless, were the Supreme Court to reach that question, the Dealership presented numerous arguments why it believed appellate fees should be denied or minimized. The Supreme Court denied the motion via form order, stating simply, "Motion Denied." The relevance here is the arguments that the Dealership raised to the effect that if the Supreme Court were to address the question of statutory fees, such fees should be denied or limited.

rule that remedial statutes are to be broadly construed, coupled with the observation that the Dealership's reading would not be the only plausible reading.

Further, the Dealership's reading does not make sense. The phrase on which the Dealership relies does not so limit the fees. The phrase "may sue therefor in the court of common pleas" is meant to indicate where the suit is to originate, and not to define "reasonable attorney fee." The plain language does not support the Dealership's position.

Instead, the plain language refutes the Dealership's reading, which is unreasonable and illogical. "[A] reasonable attorney's fee" necessarily implies all work that is reasonable; it would not be "reasonable" to deny payment for work reasonably necessary. *E.g., Renaissance Enters. v. Ocean Resorts*, 326 S.C. 460, 469, 483 S.E.2d 796, 801 (Ct. App. 1997) (contractual provision) (finding "no reason" that such a fee would be excluded) (not needing to reach the governing rules of construction), *rev'd in part on other grounds*, 334 S.C. 324, 513 S.E.2d 617 (1999). The Dealership's position thus fails, even without reaching the principles of construction.

Work reasonably necessary includes work required to secure the damages award and to secure a proper fee award, such as prosecuting and/or defending against an appeal, and, if a proper award be still resisted by the losing party, taking the steps necessary to secure such an award.

The Dealership's reading is contradicted by well-established principles of statutory construction in addition to the rule that remedial statutes are broadly construed. South Carolina recognizes the sensible proposition that when the legislature shifts fees, it has a purpose in doing so, *see e.g., Layman*, 376 S.C. at 442–58, 658 S.E.2d at 324–33; Op. p. 29; and the equally sensible proposition that a statute's language must be read consistently with its purpose, *e.g., Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct.

App. 2003). To deny the later fees would clash with the statute's requirement for the Dealership "to fully compensate Austin" for his fees and costs, Op. p. 29. It would create the type of deterrent the statute is designed to prevent, *id.* In this case, due to the much greater complexity of the later stages of the case and the resulting increase in fees, it would create an even greater disincentive. To hold that a dealership that lost at trial may quadruple the number of its attorneys for the appeal, engage an internationally recognized law firm, Tab 15, increase its own appellate fees ten-fold over its trial-level fees, Tabs 16–17, and that the plaintiff may not recover the resulting appellate fees, would eviscerate the statute.

More generally, the Dealership's reading conflicts with the underlying theory of fee-shifting statutes generally, and especially of statutes that shift fees only in favor of prevailing plaintiffs. It would make no sense to provide fees to compensate attorneys for their work, on the one hand, only to then require them to work without compensation to obtain those fees, on the other. *E.g., Parker v. I&F Insulation Co.*, 730 N.E.2d 972, 975 (Ohio 2000) (quotation marks omitted) ("The work of the attorney on appeal is part of the legal process of achieving and maintaining the judgment for the consumer. Disallowing attorney fees for appellate work undermines the purpose of the Act."). This is especially so under a fee-shifting provision designed to "transfer the costs of litigation" to those who violate the statute. *Balark v. Curtin*, 655 F.2d 798, 803 (7th Cir. 1981) (quotation marks omitted) (explaining that to deny such fees would "undermine[]" the statute).

In sum, the Dealership's position is illogical on its face, at war with theories of statutory fee-shifting, and, even if it had passed those tests, would be trumped by the remedial nature of this provision.

B. The Dealership Errs in Reading the Supreme Court Opinion as Holding that Mr. Austin Is Not Entitled to Any Fees or Costs

One might have thought the matter non-controversial: The Opinion of the Supreme Court states, p. 31 (emphasis added), “In terms of Austin’s cross-appeal, *we hold*: (1) *he is entitled to . . . attorney’s fees and costs under the South Carolina Dealer’s Act.*” When the Supreme Court issues an opinion explicitly stating, “*we hold*,” that would seem to end debate.

The Dealership disagrees. The Dealership maintains the Court actually held Mr. Austin is not entitled to any fees or costs. It points to the concurring in part, dissenting in part, opinion of Justice Pleicones. Justice Pleicones stated that he “agree[d] with the majority” that a plaintiff who proves violations of both common and statutory law may recover both common law damages and statutory fees. Op. p. 37 (Pleicones, J.) (concurring in part) (citing *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (N.C. 1993)). However, he believed the trial court “did not rule” on the issue, and therefore, because Mr. Austin failed to file a Rule 59 motion, the issue was not preserved for appellate review. *Id.* p. 38 (Pleicones, J.) (dissenting in part).

Although the Dealership presents Justice Pleicones as writing for a majority on the fees issue, Justice Pleicones himself emphatically disagrees. “*I do not believe this [attorney fees] issue is preserved for our consideration.*”, Op. p. 37 (Pleicones, J., dissenting in part) (emphasis added); “*In my view, his claim for attorneys’ fees and costs dies,*” *id.* p. 38; “*In my view, this issue is not preserved.,*” *id.*; “*I also disagree with the majority’s holding that [one] entitled to fees under the Dealers Act need not segregate the amount of attorney time and costs attributable to that claim and recover only these sums.*”, *id.*; “*I disagree with the majority that we may award all fees and costs sought on this record,*” *id.*, p. 39.

Thus, Justice Pleicones explicitly recognizes that it is the position of “the majority” that “we may award all fees and costs sought on this record.” By repeatedly and consistently employing the first-person singular, he further recognizes he is in dissent on this question.

The Dealership fails to recognize that there are two (2) election of remedies discussions in the principal opinion. Thus, when Justice Kittredge writes, “Concerning the trial court’s failure to grant a directed verdict due to the lack of evidence of fair market value and the election of remedies issue, I join the dissent of Justice Pleicones,” Op. p. 40, the Dealership erroneously assumes that Kittredge means the election of remedies matter discussed on pages 29–31 of the principal opinion, rather than the election of remedies matter discussed on pages 14–15.

With the Chief Justice joining Justice Kittredge, and Kittredge joining Pleicones, the Dealership argues, a majority of three Justices voted for the position that Mr. Austin is not entitled to fees. But Kittredge and Toal did not join Pleicones and part ways with Beatty and Waller on the attorney fees/election of remedies matter; they did so on the fair market value/election of remedies matter.

The conflict between the Dealership’s position, on the one hand, and on the other hand, the principal opinion’s “we hold” and Justice Pleicones’ recognition that he is in dissent would suffice to resolve any ambiguity as to Justice Kittredge’s opinion. But there is more. The Dealership’s reading also conflicts with Justice Kittredge’s opinion. First, Justice Kittredge placed the election of remedies issues about which he wrote squarely in the context of the fair market value issue. His opinion does not mention attorney fees. Second, and more importantly, the single sentence on which the Dealership focuses must be read in the context of Justice Kittredge’s opinion as a whole. Immediately after declaring, “I join the well-written majority opinion of Justice Beatty save two exceptions,” he explained (1) “Concerning the trial court’s

failure to grant a directed verdict due to the lack of evidence of fair market value and the election of remedies issue, I join the dissent of Justice Pleicones,” and (2) “Additionally, regarding the reprehensibility prong of the punitive damages analysis, I believe Justice Pleicones is correct in rejecting any reliance on Stokes-Craven's practice of not showing titles to customers” Op. p. 40. The Dealership erroneously reads this as *three* exceptions: (1) “the trial court's failure to grant a directed verdict due to the lack of evidence of fair market value,” (2) “the election of remedies issue,” and (3) “the reprehensibility prong of the punitive-damages analysis.”

In sum, the Dealership's position conflicts with every opinion in this case. It presents Justice Kittredge as joining Beatty save three exceptions, whereas Kittredge wrote, “two exceptions.” It presents Justice Pleicones as authoring the majority opinion on fees, whereas Justice Pleicones wrote that he was disagreeing with the majority opinion on fees. It presents Justice Beatty's “we hold” as the minority position. It is more reasonable to conclude that the Justices knew what they were writing: Justice Kittredge's “two exceptions” means “two exceptions,” not “three exceptions”; Justice Pleicones' “I disagree with the majority” means he disagrees with the majority, not “I have a majority for the opposite view;” Justice Beatty's “we hold” means “we hold,” not “I dissent.”

C. The Dealership Doubly Errs in Arguing That Justice Pleicones' Opinion Would Forbid Appellate Fees

As discussed above, the Dealership errs in contending that Justice Pleicones wrote for a majority on the fees issues. The Dealership's argument regarding appellate fees places error atop error. Mr. Austin would be entitled to his appellate fees and costs even if Justice Pleicones wrote for a majority on the fees issues.

The Dealership misreads Justice Pleicones' opinion. He “agree[d] with the majority” that a plaintiff who proves a Dealer's Act violation “may” be entitled to fees and costs in addition to

damages for a common-law violation. Op. p. 37. To turn that “may” into an “is” on appeal, as he explained, the appellant must have both (1) raised that issue to the lower court, and (2) have received a ruling on that issue. If he has not received a ruling, he is required to file a Rule 59 Motion. See, e.g., *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–422, 526 S.E.2d 716, 724 (2000). In Justice Pleicones’ view, Mr. Austin raised the issue, but the Court did not rule on it, and therefore Mr. Austin’s failure to file a Rule 59 motion was fatal. Op. pp. 37–39.

The point on which he contended with the majority was whether this Court had ruled. All agree that Mr. Austin raised the issue: all at least implicitly agree that no Rule 59 motion was filed. All agree, at least implicitly, that no Rule 59 need have been filed if this Court did rule on the issue. The majority found that this Court did rule on the matter. Op. p. 27. Justice Pleicones believed that this Court “did not rule on this issue involving an election between punitive damages and statutory fees.” Op. p. 38. With no ruling and no Rule 59 motion, there would be nothing for the appellate court to review (“no issue regarding the availability of Dealers Act fees and costs is preserved for our review,” Op. p. 38).

Mr. Austin believes that this Court did rule, and that the Supreme Court held that this Court ruled. Nevertheless, and assuming, strictly for purposes of argument, that Justice Pleicones did, as the Dealership maintains, command a majority for his position that this Court did not rule on Mr. Austin’s 2006 request for trial-level fees, that would have no bearing on Mr. Austin’s present request for appellate and post-appellate fees.

He is entitled to those fees and costs pursuant to Section 56-15-110(1) and *McDowell*, *Layman*, and other authorities previously cited, regardless of whether he filed or did not file, should have filed or did not need to file, a Rule 59 motion to follow up on his earlier request.

He is entitled to appellate fees entirely independently of anything in the remand to that effect. It suffices that he proved a Dealer's Act violation, and on appeal successfully defended the determination that a violation had occurred, thus preserving the entitlement to fees. The Supreme Court's multiple determinations in his favor regarding fees and costs are *sufficient* to award appellate and subsequent fees and costs—more than sufficient, they are controlling, compelling reasons—but not *necessary* in order to award those fees and costs. Multiple, independently sufficient, lines of analysis lead to that conclusion.

Therefore, in the unlikely event the Court were to agree with the Dealership that Justice Pleicones wrote for a majority regarding the entitlement to fees and costs, Mr. Austin requests appellate and subsequent fees directly pursuant to the statute. He incorporates by reference his arguments and authorities under the heading, "The Entitlement to Fees." (As to his *a fortiori* claims there based on the Act being remedial and its fee-shifting provision intending to encourage Dealer's Act suits, he substitutes the plain language of the statute as authority for those propositions in place of the Opinion.) His request here is almost certainly academic, as Justice Pleicones clearly did not command a majority for any part of his position regarding fees; it is raised solely in an abundance of caution.

V. THE DEALERSHIP'S ARGUMENTS RE: THE AMOUNT OF AWARD

A. The Argument that Fees Are to be Awarded Only for Time Narrowly Attributable to the Dealer's Act Claim Misreads the Opinion in Ways Addressed Above

The Dealership has another version of its view regarding Justice Pleicones' opinion. Even if Justice Pleicones did not command a majority for his view that Mr. Austin's request was not ruled on by the circuit court, Justice Pleicones must at least have commanded a majority, the Dealership maintains, for his view that a plaintiff who proves a Dealer's Act violation must segregate the hours and costs attributable to the Dealer's Act claim and recover only those sums.

This too is erroneous, as Justice Pleicones commanded no majority on any aspect of the fees issue. Justice Pleicones was quite clear that the majority holding on this issue was the opposite of his view. He recognized, and disagreed with, what he explicitly refers to as “*the majority’s holding* that, pursuant to *Taylor v. Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992), a plaintiff entitled to fees under the Dealers Act *need not segregate* the amount of attorney time and costs attributable to that claim and recover only these sums.” Op. p. 38 (Pleicones, J., dissenting) (emphasis added). He similarly recognized that “the majority” have concluded “that we may award all fees and costs sought on this record.” *Id.*, p. 39.

Similarly, the majority explicitly addressed the question, held in Mr. Austin’s favor, and explained its rationale. “[T]he question becomes . . . should the amount be limited to the fees incurred in establishing his claim under the Dealer’s Act.” Op. p. 30. “[H]e is entitled to the *entire amount of his request* for attorney’s fees and costs.” *Id.*, p. 31 (emphasis added). “[T]o award Austin his claim in its entirety,” the Court explained, “would be consistent with the precedent of this Court. *Cf. Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992).” It thus rejected the view that precedent requires a restrictive approach to Dealer’s Act fee awards.

B. The Dealership’s Argument that Later Fees Are Greater than Trial-Level Fees Cuts Against the Dealership

The Dealership complains that Mr. Austin’s appellate fees are 2.3 times his trial-level fees. It may similarly complain that his post-appellate fees are 2.4 times his trial-level fees. Yet the Dealership’s own appellate fees are ten times its trial-level fees. Tabs 16–17. Mr. Austin would be happy to agree with the Dealership that the proper measure for appellate fees is the ratio of those fees to trial-level fees, and that the proper lodestar award for Mr. Austin is therefore ten times his trial-level fees. He is unable, however, to represent to the Court that the Dealership’s position accurately states the law. Nevertheless, when a party, such as the Dealership here,

engages a firm that advertises it is "dedicated to improving the quality and depth of legal services," www.yrc.com (Tab 15), it should not be heard to complain that the firm did what it advertises, and that opposing counsel's work became correspondingly more difficult and expensive. The dramatic increase in the Dealership's fees is yet more evidence that the appellate case was of much greater extent and difficulty than was the trial-level case. If anything, the Dealership's ten-fold increase indicates that Mr. Austin's increase was too low. When a party engages an international-class law firm, quadruples the number of its own counsel, and increases its own fees ten-fold, it cannot credibly complain that the hours required of opposing counsel multiplied.

In contrast, other than the time spent in trial, the time demands at trial level were remarkably small. Pre-trial, the Dealership served no discovery requests, engaged no experts, noticed no depositions. For strategic reasons, neither did Mr. Austin notice any depositions.⁴ Mr. Austin's counsel thus had little to do except to straightforwardly prepare his own case. The trial itself was largely a straightforward credibility contest, pitting the customer and supporting witnesses against the Dealership's agents. The parties did engage during trial on a complicated odometer act issue, but Mr. Austin's counsel had previously researched and briefed that issue to what he considered sufficient depth for trial purposes. Thus, even that issue required relatively little time of Mr. Austin's counsel.

Post-trial, the relatively complicated issues of elections of remedies, attorneys fees, and pre-judgment interest were issues Mr. Austin's counsel had similarly researched and briefed sufficiently for post-trial motions, and thus again, the time commitment was minimized. Nor did

⁴ The lack of discovery requests and deposition notices by the Dealership was part of a deliberate strategy, according to the Dealership's trial counsel, to avoid spurring Mr. Moskos to move to compel the Dealership to respond to his discovery requests. Tab 18.

Mr. Austin's counsel feel compelled to respond either to the Dealership's post-trial motions or to its extensive memorandum in support of those motions. Rightly or wrongly, he considered the former too skeletal to warrant a response and the latter untimely.

With no pre-trial demands from opposing counsel, the heftier legal issues previously briefed, and no need to respond to any post-trial filings, the time required and thus the fees were minimized. On appeal, in contrast, the Dealership presented issues with sufficient clarity and force, and sufficient insistence that they had been raised to this Court, to mandate detailed responses. More generally, whether due to the inherent nature of the case, or to the quality of the Dealership's briefing, the appellate case was one of such importance that the Supreme Court certified it, the Justices reached the vast majority of questions the parties raised, and issued an exceptionally lengthy opinion detailing an exceptional number of issues. It simply became a much more extensive case.

C. There Is No Merit to the Dealership's Claim that Mr. Austin's Fees Are Otherwise Excessive / Final Considerations

For reasons sketched above, the appellate and later fees are entirely reasonable in the context of the six factors, and in comparison to the trial-level fees in light of those factors. Some final observations relate to the Dealership's claim that the fees are excessive in relation to some undefined standard.

As noted above, the Dealer's Act is a consumer-protection statute with a fee-shifting provision exclusively in favor of successful plaintiffs; these provisions often lead to large awards. The theory of fee-shifting negates any limitation of awards to a percentage of the amount awarded, nor even to the entirety of the amount awarded. "[T]here is no requirement that an attorney's fee be less than or comparable to a party's monetary judgment." *Taylor v. Medenica*, 331 S.C. 575, 582, 503 S.E.2d 458, 462 (1998) (affirming fee award of \$500,000 on

actual damages of less than \$36,500). Such a limitation would conflict with the theory of fee-shifting statutes enacted because the costly fees involved make a fee limited to the amount at stake inadequate to attract quality counsel in sufficient numbers.

Nor is recovery limited to charges incurred due to wrongful litigation conduct. Fees and costs awarded as sanctions, such as those awarded under the Rules of Civil Procedure, are limited to those incurred in responding to a party's wrongful litigation conduct. No such limitation exists under the Dealer's Act or similar statutes. The only conduct at issue is the tortfeasors' underlying wrongful conduct, and the choice to put the plaintiffs to their proof. Plaintiffs are entitled to recover for time spent responding to the most meritorious defense and to the most unreasonable defense.

Finally, as the Supreme Court explained in *Taylor v. Medenica*, 331 S.C. at 581, 503 S.E.2d at 460, in affirming an award of a half-million dollars in fees and \$24,068 in costs incurred in obtaining an actual damage award of \$36,242.00, a larger fee was appropriate where the defendant "vigorously contested" the plaintiff's claims. It is not technically a matter of fault. The more vigorous defense may be vigorous precisely because the claims have some merit. However, there is an extra measure of justice in awarding larger fees against wrongdoers who vigorously defend against making good their wrong.

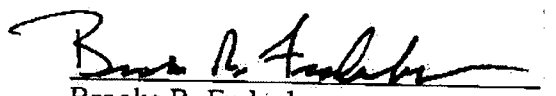
The Dealership kept doubling down. It could have returned Mr. Austin's money and taken back the truck when he first told them he knew it had been wrecked. It could have settled when Mr. Austin's first attorney, John Polito, wrote to the Dealership, and it became aware Mr. Austin had engaged counsel. It could have settled after suit was filed. It could have satisfied the award after this Court issued its Orders, and spared Mr. Austin's counsel a great deal of work. It could have paid after the Supreme Court decision. It just kept doubling down.

This is precisely the sort of case for which the Dealer's Act is designed.

Conclusion

The Dealer's Act fee-shifting provision "epitomizes the definition of a remedy." For the reasons stated above, and such other reasons as may be apparent to the Court, Mr. Austin asks the Court to vigorously apply the Dealer's Act attorney fee provision, grant Mr. Austin's full lodestar requests, and apply a substantial multiplier. He further asks the Court to direct the clerk of court to enter on the judgment rolls that Mr. Austin is awarded \$26,371.10 in actual damages and \$216,600.00 in punitive damages for fraud and \$49,360.00 for trial level attorneys fees to make the judgment consistent with the Supreme Court's Order.

Respectfully Submitted,


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 535 Stinson Dr.
 Charleston, SC 29407
 (843) 763-5297
 csmoskos@earthlink.net
 Attorneys for Plaintiff

Mt. Pleasant, SC
 May 21, 2012

Disbursement Statement

Page: 1

Account No: 830031670

Bank: Land, Parker & Welch, P.A.
Order #: 14-043RLW

John C Land III dba Land Parker & Welch PA
Post Office Box 138
29 South Mill Street
Manning South Carolina 29102

OPENED: 05/05/2014
SETTLED: 05/12/2014
DISBURSED: 05/12/2014
CLOSER: KGS

LENDER: Bank of America, N.A.
LOAN NO: 11-7939132-New
BUYER(S)/BORROWER(S): Santee Automotive Properties, LLC
SELLER(S): SSC, a South Carolina Partnership
PROPERTY LOCATION: 2585 Paxville Highway &
2601 Paxville Highway
Manning, SC 29102

FUNDS RECEIVED

FROM	METHOD	STATUS	ITEM DATE	POST DATE	DEPOSIT #	DUE	RECEIVED
Stokes Craven	Check	Not Recvd	05/12/14	05/12/14	WIRE IN	247,186.26	
Santee Automotive Properties,	Check	Deposited	05/12/14	05/12/14	TRANS IN		374,663.52
Santee Automotive, LLC	Check	Deposited	05/12/14	05/12/14	TRANS IN		247,186.26
Stokes Craven	Check	Not Recvd	05/12/14	05/12/14	TRANS IN	53,079.61	
LPW-Operating	Check	Not Recvd	05/12/14	05/12/14	TRANS IN	12.00	
Bank of America, N.A.	Check	Deposited	05/12/14	05/12/14	WIRED IN		2,121,380.00
TOTAL FUNDS DUE:						300,277.87	
TOTAL FUNDS RECEIVED:							2,743,229.78

FUNDS DISBURSED

TO	STATUS	ITEM DATE	POST DATE	CHECK #	HELD	DISBURSED
Clarendon County Register of Deeds	Printed	05/12/14	05/12/14	28886		9,308.00
Investors Title Insurance Company	Printed	05/12/14	05/12/14	28886		2,173.00
Land, Parker & Welch, P.A.	Printed	05/12/14	05/12/14	28887		190.00
Land, Parker & Welch, P.A.	Printed	05/12/14	05/12/14	28888		3,122.00
SSC, A SC Partnership	Held	05/12/14	05/12/14	WIRED	300,265.87	
The Bank of Clarendon	Printed	05/12/14	05/12/14	DEBITED		12.00
Bank of Clarendon	Printed	05/12/14	05/12/14	DEBITED		12.00
Bank of Clarendon	Printed	05/12/14	05/12/14	DEBITED		12.00
Bank of Clarendon	Printed	05/12/14	05/12/14	DEBITED		12.00
Bank of Clarendon	Held	05/12/14	05/12/14	DEBITED	12.00	
SSC, a South Carolina Partnership	Printed	05/12/14	05/12/14	WIRED OUT		1,607,544.98
Wells Fargo	Printed	05/12/14	05/12/14	WIRED OUT		573,391.67
Wells Fargo	Printed	05/12/14	05/12/14	WIRED OUT		300,265.87
Stokes-Craven Holdings, Corp	Printed	05/12/14	05/12/14	WIRED OUT		247,186.26
TOTAL FUNDS HELD:						300,277.87
TOTAL FUNDS DISBURSED:						2,743,229.78

TitleExpress Escrow System

CONFIDENTIAL

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SC003207

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Disbursement Statement

Page: 2

Account No: 830031670

Bank: Land, Parker & Welch, P.A.

Order #: 14-043RLW

Received/Disbursed Difference:	0.00
Projected Balance:	0.00

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

STOKES-CRAVEN HOLDING CORP)
d/b/a STOKES-CRAVEN FORD,)

CASE NO. 2010-CP-14-457

Plaintiff,)

vs.)

STOKES-CRAVEN HOLDING CORP.'S
MOTION TO RECONSIDER PURSUANT
TO RULE 59(e), SCRCP

SCOTT L. ROBINSON and JOHNSON,)
McKENZIE & ROBINSON, LLC,)

Defendants.)
_____)

On December 6,¹ counsel for Stokes Craven Holding Corp. (“Stokes-Craven”) was served with a copy of this Court’s Order filed November 30, (“the Order”) ordering Andrew K. Epting, Jr. and his firm to withdraw from their representation of Stokes Craven. (**Exh. A**). Much has been said on the issue by the Parties, and the Court indicated its preference that no motion for reconsideration be filed. The instant motion is not filed lightly. Nonetheless, Stokes-Craven seeks clarification on certain matters that are not addressed by the Order and therefore respectfully requests, pursuant to Rule 59(e), SCRCP,² that the Court amend or alter its Order.

I. Withdrawal

Defendants’ motion was styled “Defendants’ Joint Motion to Exclude Expert Witnesses, or, in the Alternative, *to Disqualify Plaintiff’s Counsel* and Compel Discovery,” and sought, *inter alia*, to have Mr. Epting disqualified as counsel. It was not contemplated in the motion or in any

¹ All dates herein refer to the year 2017.

² The Appellate Courts of this state have explained that, “while a Rule 59(e) motion is a vehicle to alter or amend a judgment, it is also a means to reconsider previously raised issues and arguments.” *S.E. Housing Found. v. Smith*, 380 S.C. 621, 634 n.13 (Ct. App. 2008).

subsequent briefing by Defendants that Mr. Epting would withdraw; rather, Defendants requested that he “be immediately disqualified from his role as attorney for the Plaintiff” by the Court. Motion at 4.

Nonetheless, the Order states that Mr. Epting and his firm must withdraw within 5 days of the Order,³ in spite of the plain language of Rule 3.7 and the related authority interpreting that rule cited by Plaintiff in its briefs. There would appear to be no meaningful distinction between a disqualification of counsel by a court and a court-ordered withdrawal as counsel. However, Stokes Craven requests that the order be amended to reflect the relief sought in Defendants’ motion, namely disqualification.

II. Epting Firm’s Involvement

At the hearing before this Court on November 2, counsel for Stokes-Craven requested the Court’s guidance on whether Mr. Epting and his firm would be permitted to handle the appeal of the Court’s Order. In a November 20, email to the Court, Mr. Epting again requested that the Court address this question in its Order, copying opposing counsel. (**Exh. B**).

The Order signed by this Court is silent on the question. Stokes-Craven requests the Order be amended to provide guidance on Mr. Epting’s status with regard to an appeal of the Order, as well as that of his firm. Likewise, the Order does not address to what extent, if any, Mr. Epting and his firm can assist in transitioning the file to new counsel and the extent to which any communications related to this effort would be privileged. The statement in the Court’s Order that no substantial hardship to Stokes-Craven was demonstrated as a result of new counsel

³ Also absent from Defendants’ motion was any request that Mr. Epting’s firm should be disqualified or withdraw.

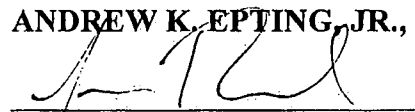
entering the case⁴ depends on whether the Court intends to hold the Parties to the current Scheduling Order and creates ambiguities as to whether the Epting firm's efforts in transitioning the file would be privileged.

III. All Prior Objections Renewed

Stokes-Craven renews all grounds for objection as set forth in its October 16 letter to this Court (**Exh. C**), its October 17 Objections to Defendants' Proposed Order (**Exh. D**), and its November 16 Objections to Proposed Order (**Exh. E**), as stated on the record during the October 13, October 19, and November 2 hearings before this Court, and in any other communications with the Court regarding the issue.

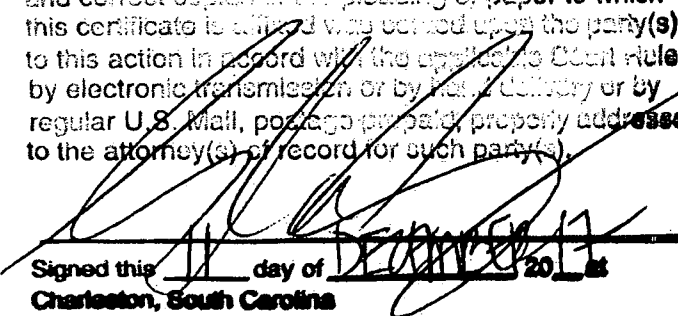
Respectfully submitted:

ANDREW K. EPTING, JR., LLC


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mne@epting-law.com
jgr@epting-law.com

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is attached was served upon the party(s) to this action in record with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).


Signed this 11 day of December, 2017 at
Charleston, South Carolina

⁴ Order at 8.

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)

Plaintiff,)

vs.)

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

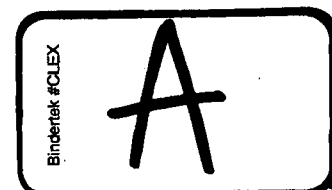
Defendants.)

ORDER

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CLARENDON COUNTY, SC
BEULAH
CLERK
RIS

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

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



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

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

1. Steve Luoma, CPA
McGregor & Company
3830 Forest Dr.
Columbia SC 29204
803-787-0003
2. John Flack
2601 Paxville Hwy.
Manning SC 29102
803-433-5400
3. Andrew K. Epting, Jr.
46-A State St.
Charleston SC 29401
843-377-1871
4. Ronald L. Richter, Jr., Esquire
Bland & Richter, LLP
18 Broad Street
Charleston SC 29401
803-256-9664

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

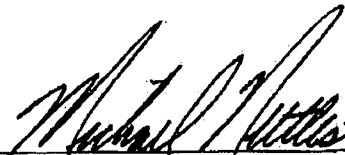
Furthermore, Defendants would be prejudiced by any delay in withdrawal for a number of reasons. First, a delay would increase the likelihood that the opportunity for a timely trial is missed. This case is already seven years old and a decision to unnecessarily push back a trial date should be avoided.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

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

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

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

IT IS SO ORDERED.



The Honorable Michael G. Nettles
Presiding Judge
Third Judicial Circuit

Florence, South Carolina
11-22-, 2017

Angela Gross

From: Jaan Rannik on behalf of Andrew K. Epting
Sent: Monday, November 20, 2017 3:03 PM
To: Nettles, Michael G.; Nettles, Michael G. Secretary (Charlene S. Bryant); 'mnettleslc@sccourts.org'
Cc: Angela Gross; Hal Frampton; Ann Allison; Warren Powell; Susan Wall; bertcone@aol.com; Andrew K. Epting; Jaan Rannik
Subject: Stokes-Craven v Robinson et. al; Civil Action No. 2010-CP-14-457

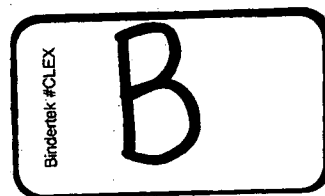
Dear Judge Nettles,

In anticipation of this Court's ruling, I write to request that Your Honor's Order regarding my disqualification include guidance on the following: (i) whether my firm and I are disqualified from handling or assisting in the appeal of the Order, and (ii) whether and the extent to which my firm and I are disqualified from assisting in the transition of the matter to new counsel of record.

Thank you, and best wishes to all for a Happy Thanksgiving,

Drew

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



ANDREW K. EPTING, JR., LLC

ATTORNEYS AT LAW

ANDREW K. EPTING, JR. · AKE@EPTING-LAW.COM

JAAN G. RANNIK · JGR@EPTING-LAW.COM

October 16, 2017

VIA EMAIL mnettlessc@sccourts.org

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

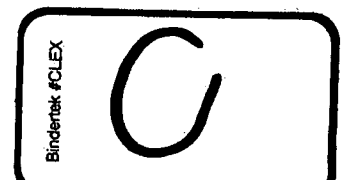
RE: *Stokes-Craven v. Robinson et al.*
Case No.: 2010-CP-14-457

Dear Judge Nettles,

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

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

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



Warren C. Powell, Jr., Esquire
Susan Taylor Wall, Esquire
October 16, 2017
Page 2 of 2

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

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

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

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

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

With thanks and kindest regards,

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr.
AKE/JGR

Cc: Susan Wall, Esquire
Warren Powell, Esquire

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)
Plaintiff,)

v.)

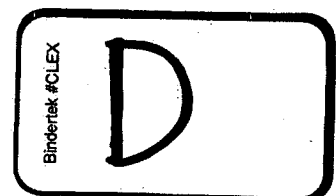
Scott L. Robinson and, Johnson)
McKenzie & Robinson, LLC,)
Defendants.)

**STOKES-CRAVEN'S OBJECTIONS TO
DEFENDANTS' PROPOSED ORDER**

Defendants submitted a proposed Order to the Court following a hearing held on October 13, 2017 regarding Defendants' motion to disqualify Andrew K. Epting as counsel for Stokes-Craven. Defendants' motion is based on S.C. Rule of Professional Conduct 3.7, which concerns whether a lawyer can be both a testifying witness and trial counsel. The proposed Order submitted by Defendants suggests that Mr. Epting's entire firm is disqualified. The proposed Order exceeds the scope of Defendants' motion and what was before the Court.

I. The Issue

Defendants' motion stems from the inclusion of Andrew K. Epting in Stokes-Craven's list of expert witnesses on October 2, 2017 pursuant to this Court's Scheduling Order. His testimony, if required at all, would concern his personal knowledge of actions taken by Stokes-Craven in the underlying suit between the Supreme Court's decision in that case and the ultimate settlement of



that case. If required at all, the testimony will be factual, but should Defendants contend it is expert testimony, then the Court's Scheduling Order disclosure requirement was met.¹

"Then why was he listed?" one might ask. Mr. Epting was listed in anticipation of certain defenses that Defendants may raise in trial and in recognition of the fact that, were he to testify without having listed himself as an expert, Defendants would object and seek to have his testimony excluded. Mr. Epting was listed on Plaintiff's expert disclosure out of an abundance of caution. Whether he will be required to testify is not yet clear and will depend on how the case progresses. His testimony is unlikely to be expert testimony but will be based upon his knowledge of events. But, rather than risk not being able to testify should he be obliged to, he was listed among the experts pursuant to this Court's deadline so as not to waive any claimed right. Defendants seek to turn this disclosure and its very uncertain future path to their tactical advantage and have Mr. Epting and his firm disqualified.

Additionally, in their letter of October 16, 2017, Defendants say Mr. Epting is not a "necessary fact witness," but rather a "voluntary expert witness." The Rule makes no distinction between expert and lay witnesses. This is not a voluntary act; to be sure, he would only testify if it were necessary, in his client's best interest, and to satisfy his ethical obligation to his client.

II. Disqualification of Andrew Epting's Firm

As an initial matter, the disqualification of the firm was not raised in Defendants' motion. Moreover, Rule 3.7(b) states: "A lawyer may act as advocate in a trial in which another lawyer in the layer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or

¹ Stokes-Craven supplemented its list of fact-witnesses on October 6 to add Mr. McCarthy. As with Mr. Epting, Stokes-Craven believes Mr. McCarthy will testify solely as a fact witness. However, should Defendants claim that his testimony crosses into expert testimony, Stokes-Craven has also listed him as an expert out of an abundance of caution.

Rule 1.9.” Accordingly, even if Mr. Epting were to testify as a witness, his firm would not be disqualified from representing Stokes-Craven through and at trial.

III. Disqualification of Andrew K. Epting, Jr.

As stated in Mr. Epting’s letter to the Court of October 16, Rule 3.7 of the South Carolina Rules of Professional Conduct would not provide for termination of Mr. Epting’s role as counsel at this stage, prior to trial. Rather, that Rule states “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.” Rule 3.7(a) (emphasis added). The reasoning behind this rule is that jurors would be confused by an advocate taking the stand and testifying directly to them, blurring the line between what is advocacy and what is factual testimony on the basis of personal knowledge. *See, e.g., Hagood v. Sommerville*, 362 S.C. 191, 199 (2005) (noting that a lawyer’s employee can testify without violating Rule 3.7 because “[j]urors are not likely to be confused by a lawyer’s employee testifying as a witness for a client while the lawyer serves as the client’s advocate”)²; *Brooks v. S.C. Comm’n on Indigent Defense*, 419 S.C. 319, 324 (2017) (affirming the trial court’s disqualification of an attorney where “there may be confusion as to whether statements made by [Appellant] as advocate witness would be taken as proof as a fact witness or as an analysis of proof as an attorney”); *see also* Comments to Rule 3.7 (“A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.”).

² The *Hagood* court also held that the disqualification of an attorney was immediately appealable as it affected a substantial right of the client. 362 S.C. at 197–98. This case has already been appealed once, and there is a way for this Court to fashion relief that is responsive to the Defendants’ right to discovery, Stokes-Craven’s right to counsel, and this Court’s docket. *See* Stokes-Craven’s Proposed Order.

Moreover, prejudice to the client is a primary consideration of a court faced with a motion to disqualify counsel. *See* Comment [4] to Rule 3.7 (“due regard must be given to the effect of disqualification on the lawyer’s client”). Here, Mr. Epting has served as Stokes-Craven’s counsel since approximately August 2010. To bring incoming counsel up to speed will take some time, and to disqualify Mr. Epting at this stage without allowing for some period of transition would prejudice the client. Mr. Epting remains in the best position to move this case through discovery.

In a letter to the Court on October 16, 2017, counsel for Defendant Robinson stated that Rule 3.7 applies “necessary fact witness[es]” rather than “voluntary expert witness[es].” However, the Rule makes no such distinction between fact and expert witnesses and refers only to “necessary witness[es].” To be sure, Mr. Epting would testify only if necessary.

The letter also states that, because Mr. Epting will testify as an expert, his deposition would have to be taken now and retaken periodically were he to continue as counsel. Stokes-Craven does not dispute that Defendants may have the right to depose Mr. Epting, but the subject matter of his testimony would be Stokes-Cravens actions to protect itself in response plaintiff Austin’s effort to collect interest, fees, and appoint a receiver, which occurred in the period between 2010 and 2014.³

Accordingly, Stokes-Craven objects to the proposed order to the extent it requires Mr. Epting to immediately withdraw as counsel.

IV. Motion for Sanctions

While the motion for sanctions was not heard by the Court, reference to it finds its way into the proposed holding of the Court submitted by Defendants. Moreover, that reference recasts

³ The scope of any waiver, which is not before the Court but is part of Defendants’ letter to the Court of October 16, is for a later day as it is not known whether Mr. Epting will even testify, let alone what the scope of that testimony would be.

Defendants' motion from one regarding noncompliance with this Court's August 8, 2017 Order⁴ to one regarding amended discovery responses generally.⁵ As no motion to compel has been filed with regard to Stokes-Craven's responses to interrogatories, there is no basis for a motion for sanctions under Rule 37, SCRCP. Moreover, Stokes Craven has complied with the letter and the spirit of this Court's August 8th Order.

A. Calculation of Damages

Defendants advance that (i) Plaintiff has not sufficiently explained how a settlement of \$1,060,000 was reached in the underlying case, (ii) Plaintiff has not provided a calculation of its loss of revenue damages, and (iii) Plaintiff has not produced certain documents, all purportedly in violation of this Court's Order.

1. Settlement Amount

The Order required Plaintiffs to produce "all documents evidencing moneys paid to satisfy the judgment and settle the underlying case (including identification of the source of the funds, and copies of any wire transfers and/or checks together with any correspondence pertinent thereto as well as court orders)." In response, Stokes-Craven produced what is attached hereto as **Exhibits A–E**, consisting of (i) copies of the bank statements showing wire transfers of \$100,000 and \$960,000 respectively to Dino Moskos (**Exh. A**), (ii) the satisfaction of judgment filed with the Court showing a settlement amount of \$1,060,000 (**Exh. B**), (iii) Court Orders setting forth actual damages, punitive damages, trial-level attorney's fees, and an interest rate of 11.25% (**Exhs. C &**

⁴ "Plaintiff continues to refuse to itemize and produce documents concerning damages, including but not limited to attorneys fees and loss of business value." Defendants' Joint Motion for Sanctions at 1.

⁵ Defendants' proposed Order refers to "Plaintiff's discovery responses including but not limited to Plaintiff's naming of experts and the information provided therewith" as the purportedly sanctionable conduct. Proposed Order at 1. This is not a part of the sanction motion based on compliance with the Court's Order of August 8, 2017.

D), and (iv) briefing regarding the motion for appellate-level attorney's fees that was pending at the time of settlement (Exh. E). Stokes-Craven has complied with the Court's Order and there are no other documents to produce. None.

In addition, and so there can be no further confusion, Stokes-Craven restates here what it stated in its updated interrogatory answer of August 9, 2017. The \$1,060,000 settlement amount represents the verdict of \$242,971.10 (Exh. C, Order of Judge Hayes), trial fees of \$49,936.50 (*id.*), interest at a fixed rate of 11.25% accruing from August 17, 2006 (Exh. D, Order of Judge James), an application for appellate and post-appellate attorney's fees to be increased by "an exceptional multiplier" (Exh. E, briefing regarding appellate attorney's fees, at SC003854), and the threat of receivership hanging over Stokes-Craven at the time of settlement. All documentation regarding the amount of the settlement has long since been produced to Defendants and there are no further damage documents.

2. Lost Revenue

Defendants have likewise stated that Plaintiff has not sufficiently explained the basis of its damages related to loss of revenue. The August 8 Order is silent on any such requirement, but Plaintiff has nonetheless provided Defendants with all documentation relating to lost revenue.

In addition to the \$1,060,000 settlement amount, Stokes-Craven's has disclosed damages resulting from Mr. Robinson's malpractice consist of (i) the loss of revenue following the verdict in *Austin* and (ii) the loss of revenue resulting from the sale of the business.

a. Following Austin Verdict

With regard to the loss of revenue following the verdict, Defendants took a second deposition of Mr. Craven devoted to this very issue and hired an expert to refute that claim of

damages, who was also deposed. These damages were not only disclosed, but discovery was conducted on this issue.

b. Resulting From Sale of Business

As to the loss of revenue resulting from the sale of the business, every document related to the sale that is in Stokes-Craven's possession, custody, or control has been produced to Defendants. Stokes-Craven has produced the closing documents, sales records, inventory records, income tax returns, sales tax returns, bank account statements, invoices, and other financial statements, totaling over 5,000 pages.

What Defendants now seek is Stokes-Craven's experts' opinions as to the valuation of Stokes-Craven's business. As the Court observed at its hearing, Defendants can depose Plaintiff's experts, and Messrs. Luoma and Flack are expected to testify to their opinion of how much revenue was lost as a result of the *Austin* verdict, which led to the ultimate sale of the business. Specifically, they are expected to opine that the dealership business was worth approximately \$2,500,000 more than Stokes-Craven received for it. These damages were disclosed to Defendants in response to interrogatories on January 19, 2017. However, there are no further sale-related documents to produce, and Stokes-Craven has complied with this Court's Order.

3. Other Documents

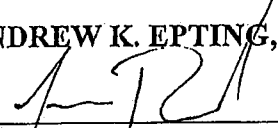
Defendants have subsequently requested additional documents outside of the scope of this Court's Order, which Stokes-Craven has provided or is working to provide. See Plaintiff's Amended Response in Opposition to Plaintiff's Motion for Sanctions (filed October 12, 2017). If Defendants think the responses to its subsequent requests are inadequate, Stokes-Craven will continue to attempt in good faith to remedy any inadequacy brought to its attention. However, to

the extent these additional requests form the basis of Defendants' motion for sanctions, Defendants must first file a motion to compel.

Respectfully submitted:

Dated: October 17th 2017
Charleston, SC

ANDREW K. EPTING, JR., LLC



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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)

Plaintiff,)

v.)

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

Defendants.)

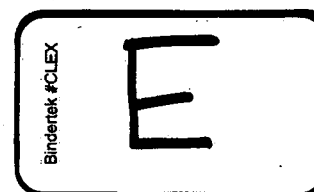
OBJECTIONS TO PROPOSED ORDER

Stokes-Craven Holding Corp. ("Stokes-Craven") submits the following objections to Defendants' proposed Order submitted to the Court following the November 2, 2017 hearing in this matter.

I. No Discovery Motion is Pending

Pending the motion to disqualify Mr. Epting as counsel in this case, the Court held all other motions in abeyance. Accordingly, no outstanding discovery motions have been argued or are pending before this Court. Nevertheless, a discussion as to who Stokes-Craven may use as experts permeates the proposed order. Stokes-Craven objects to any reference to any such discovery issue in this Order.

As has been repeatedly stated by Stokes-Craven's counsel, there is no certainty that Mr. Epting *will* be a witness at the trial, nor an expert witness. This is why the restrictions of Rule 3.7 are limited to the time of trial.



II. Nature of the Disclosure of Mr. Epting

As has also been stated repeatedly by Stokes-Craven, the Court's Scheduling Order required that Stokes-Craven list those persons it intends to call as expert witnesses by October 2, 2017. As the possibility existed that Mr. Epting would be a witness, and as Defendants would likely object to his testimony as being expert testimony were he not listed among the potential experts, the prudent course of action was to name Mr. Epting among the expert witnesses. This was not a statement that he would be an expert witness, or even that he would be a witness at all.

Defendants' argument to the contrary would mean that any person listed on Plaintiff's disclosure would *have* to be called as a witness. This argument puts the cart before the horse and is inconsistent with the plain language of the Court's Scheduling Order.

III. Withdrawal vs. Disqualification

To the extent a distinction exists between disqualification and court-ordered withdrawal, Stokes-Craven objects to any requirement that Mr. Epting withdraw as counsel. There has been no motion seeking his withdrawal; rather, the motion was that he be disqualified as counsel.¹

IV. Use of Disqualification for Tactical Advantage

Stokes-Craven objects to Defendants' improper use of the disqualification of Stokes-Craven's counsel for tactical purposes. Defendants attempt to disqualify Plaintiff's counsel while demanding that the current Scheduling Order be maintained,² which will substantially prejudice

¹ "Therefore, if Mr. Epting is allowed to stand on his expert designation of October 2, 2017, he should be immediately disqualified from his role as attorney for the Plaintiff." Motion at 4.

² "Moreover, as this choice was of Plaintiff's own making, no extensions of time should be provided to find new counsel." Motion at 4.

Plaintiff. Moreover, Defendants seek to prevent Mr. Epting or his firm from consulting with and assisting Plaintiff's new counsel in preparing the case for trial. This is not the purpose of Rule 3.7.

In addition, Defendants seek extensions of their own deadlines under the Court's Scheduling Order, having requested that they be allowed to name their intended experts sometime after the motion to disqualify is finally resolved. If this Court is inclined to maintain the existing Scheduling Order, Stokes-Craven requests that Defendants immediately name their intended experts, as they were required to do on November 13, 2017 under that Order. Defendants cannot demand the schedule be adhered to on one hand while seeking extensions of their own deadlines on the other. The due-process rights of all parties must be protected.

V. The Court's Discretion

Recognizing that disqualification of counsel is immediately appealable under South Carolina law, Defendants seek to cast the Court's ruling as a matter of the Court's discretion. However, this Court lacks the discretion to disqualify Mr. Epting prior to trial or to disqualify his firm at any time under the plain language of Rule 3.7, the rule forming the sole basis for Defendants' motion. Nor does Rule 3.7 empower the Court to prevent the orderly transfer of the case file from Mr. Epting's firm to Plaintiff's new counsel.

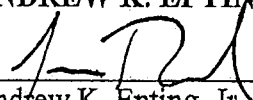
VI. Further Objections

Plaintiff objects to any argument Defendants make with regard to waiver of privilege as this issue is not before the Court. While Defendants' motion and proposed order say nothing that would prevent Mr. Epting from consulting with new counsel to prepare the case, Defendants will undoubtedly argue that all privilege is waived, which will have the effect of preventing Mr. Epting from consulting in this manner, causing prejudice to Plaintiff. Stokes-Craven objects to the citing

of out-of-state cases that say one cannot be an expert and have an economic interest in the case as that issue was not raised in Defendants' motion and is not before this Court. Stokes-Craven objects to the inclusion of language suggesting Mr. Epting's prudent conduct would nevertheless result in "negative implications," "taint to the judicial system and the public's perception of the judicial system," damage to the "dignity of the judicial system," and "the public's interest in fair, open and appropriate proceedings."

Respectfully submitted:

ANDREW K. EPTING, JR., LLC



Andrew K. Epting, Jr.

Michelle N. Endemann (*Special Counsel*)

Jaan G. Rannik

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ATTORNEYS FOR PLAINTIFF

Dated: November 16, 2017
Charleston, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	Civil Action No. 2010-CP-14-457
Stokes-Craven Holding Corp, d/b/a	)	
Stokes-Craven Ford,	)	
	)	
Plaintiff,	)	
	)	
v.	)	DEFENDANTS' RESPONSE TO
	)	PLAINTIFF'S MOTION TO RECONSIDER
	)	PURSUANT TO RULE 59(e), SCRCF
Scott L. Robinson and, Johnson	)	
McKenzie & Robinson, LLC,	)	
	)	
Defendants.	)	

Plaintiff moves this court for an order to reconsider and clarify its order signed November 22, 2017 and filed November 30, 2017 on the grounds that certain matters are not addressed in the court's order. The defendants respond as follows:

First, Plaintiff contends that the order is "ambiguous" and in so doing requests that the order be amended to provide instruction as to how Plaintiff's counsel and his firm should comply with the order. The Court's order dated November 22, 2017 and filed November 30, 2017 is not ambiguous. The trial court cannot address each and every circumstance which might result from the plaintiff having named its counsel as Plaintiff's expert in the case.

Second, on multiple occasions since the plaintiff named its attorney as its expert in its October 2, 2017 response to the scheduling order the plaintiff through counsel has requested the court on multiple occasions to provide advice as to whether Mr. Epting and his law firm would be permitted to handle the appeal and to what extent, if any, both he and his firm can, "assist in the transition of the file to new counsel and the extent to

which any communications relate to their effort would be privileged.” The court’s order is not ambiguous merely because it does not provide advice to Plaintiff’s counsel as to how to proceed given the plaintiff’s decision to name its own attorney as an expert witness in the case. Specifically, the plaintiff does not find ambiguity in the order itself, but, rather, finds uncertainty in matters which may follow the implementation of the court’s order.

Third, the issues addressed in the plaintiff’s motion such as the extent of Plaintiff’s counsel’s involvement in its “dual role” as advocate and expert witness and the ramifications of that participation are not before the court and, accordingly, would not be properly addressed in the order.

Fourth, in at least one hearing the court to the extent that it was able to do so answered Plaintiff’s counsel’s question as to how he should proceed by informing him that the court could not advise counsel as to how to conduct himself in the matter and, furthermore, the defendants would add that the court has neither a duty nor jurisdiction to do so.

s/Susan Taylor Wall
Susan Taylor Wall
Email: swall@grsm.com
Henry W. Frampton, IV
Email: hframpton@grsm.com
GORDON & REES
Suite 110
170 Meeting St.
Charleston SC 29401
Phone: 843-714-2506
Attorneys for Defendant Scott L. Robinson

Charleston, South Carolina
December 14, 2107

s/Warren C. Powell, Jr.

Warren C. Powell, Jr.

Email: wpowell@brunerpowell.com

BRUNER POWELL WALL & MULLINS, LLC

PO Box 61110

Columbia SC 29260

Phone: 803-252-7693

*Attorneys for Defendant Johnson McKenzie
& Robinson, LLC*

Columbia, South Carolina
December 14, 2017

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

STOKES-CRAVEN HOLDING CORP)
d/b/a STOKES-CRAVEN FORD)

CASE NO. 2010-CP-14-457

Plaintiff)

vs.)

SCOTT L. ROBINSON and JOHNSON,)
McKENZIE & ROBINSON, LLC)

PLAINTIFF'S SUPPLEMENTAL
ANSWERS TO DEFENDANT
JOHNSON McKENZIE & ROBINSON'S
FIRST SET OF INTERROGATORIES

Defendants)
_____)

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

The Plaintiff, Stokes-Craven Holding Corp d/b/a Stokes-Craven Ford, amends its answers to Interrogatories of October 25, 2011 as follows:

INTERROGATORY 5: List the names and addresses of any and all expert witnesses whom you propose to use as a witness at the trial of this case.

ANSWER:

In addition to those expert witnesses previously named in Plaintiff's Answers to Defendants' Interrogatories, Plaintiff names the following:

- a. Steve Luoma, CPA
McGregor & Company
3830 Forest Drive
Columbia, SC 29204

Mr. Luoma will opine as to the value of Stokes-Craven Holding Corp. at the time of the sale of the business. His testimony will be based on the documents produced by Stokes-Craven subsequent to the sale of the business and Mr. Luoma's experience as a CPA. He is expected to testify that Stokes-Craven Holding Corp. was sold for substantially less than it was worth.

- b. John Flack
Santee Automotive
2601 Paxville Highway
Manning, SC 29102

His testimony will be based on the documents produced by Stokes-Craven subsequent to the sale of the business and Mr. Flack's experience as a CFO. He is expected to testify that Stokes-Craven Holding Corp. should have sold for approximately \$2,500,000 (see Plaintiff's Second Amended Answers to Defendant Robinson's First Set of Interrogatories, dated August 9, 2017).

- c. Andrew K. Epting, Jr., Esquire
46A State Street
Charleston, SC 29401

Mr. Epting will opine, if necessary, as to those matters related to the plaintiff Austin's efforts to collect interest and fees, close the business, and decisions made and actions taken by Stokes-Craven following the Supreme Court's decision in *Austin v. Stokes-Craven* up to the resolution of the *Austin* matter in order to protect Stokes-Craven's interest.

- d. Bill McCarthy, Esquire

Mr. McCarthy is expected to testify regarding his knowledge of the facts and circumstances surrounding a potential bankruptcy filing and the settlement of the case of *Austin v. Stokes-Craven*. Mr. McCarthy's testimony is not anticipated to be expert testimony, but he is listed here out of an abundance of caution.

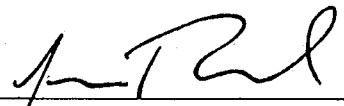
CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Court Rules by electronic transmission or by hand delivery or by regular U.S. Mail, postage prepaid, properly addressed to the attorney(s) of record for such party(s).

Signed this 16 day of October, 2017 at
Charleston, South Carolina

October 16th, 2017
Charleston, SC

ANDREW K. EPTING, JR., LLC


Andrew K. Epting, Jr.
Michelle N. Endemann (*Special Counsel*)
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ATTORNEYS FOR PLAINTIFF

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

NOTICE OF ELECTRONIC FILING [NEF]

-

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

Official File Stamp: 10-17-2017 11:37:35 AM

Court: CIRCUIT COURT

Common Pleas

Clarendon

Case Caption: Stokes Craven Holding Corp , plaintiff, et al VS
Scott L. Robinson , defendant, et al

Event(s):

Notice/Notice of Appearance

Filed by or on behalf of:

Robert B. Ransom

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

-

The following people were served electronically:

Susan Taylor Wall for Scott L. Robinson

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

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

Michelle Nicole Endemann for Stokes Craven Holding Corp

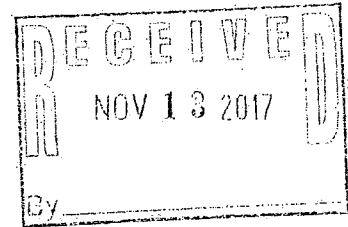
Jaan Gunnar Rannik for Stokes Craven Holding Corp et al

Henry Wilkins Frampton, IV for Scott L. Robinson

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

Amanda C Williams for Scott L. Robinson

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



October 13, 2017
 Florence, South Carolina

B E F O R E:

The Honorable Michael G. Nettles, Judge

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

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

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

Krystal J. Smith
 Circuit Court Reporter

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I N D E X

<u>WITNESS/DESCRIPTION</u>	<u>PAGE NUMBER</u>
Motion re: expert witnesses.....	4
Ruling.....	21
Court Reporter Certification.....	31

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2
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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>

(No Exhibits Presented)

COURT REPORTER LEGEND

dashes	--	intentional or purposeful interruption
		or change in thought
ellipses	. . .	trailing off
[ph]		phonetically written
[sic]		written as said

1 OCTOBER 13, 2017

2 (WHEREUPON, the proceedings began at 1:05 p.m.)

3 THE COURT: All right. I'm going to ask each of y'all,
4 if you could, to stand, identify yourself and who you
5 represent for the court reporter.

6 MR. EPTING: Drew Epting, Stokes-Craven.

7 MR. RANNIK: Jaan Rannik, Stokes-Craven.

8 THE COURT REPORTER: I'm sorry?

9 MR. RANNIK: Jaan, J-a-a-n. Rannik, R-a-n-n-i-k.

10 MR. POWELL: Warren Powell. I'm the attorney for
11 Johnson, McKenzie, and Robinson, LLC.

12 MS. WALL: And Susan Wall. I represent Scott Robinson,
13 defendant.

14 THE COURT: All right. I'll be glad to hear from the
15 moving party.

16 MS. WALL: Your Honor, Susan Wall on behalf of all of
17 the defendants, and if I might begin? And if you'll just
18 give me one moment?

19 Your Honor, we are before the Court on three motions
20 filed jointly by the defendants in this legal malpractice
21 matter. The first one is a joint motion to exclude expert
22 witnesses or, in the alternative, to disqualify plaintiff's
23 counsel and compel discovery.

24 The second follows from that, which is a motion for
25 summary judgment based on the argument that the expert named

1 by plaintiff in this case, being plaintiff's own counsel, if
2 disqualified, summary judgment is in order because there
3 would be no expert testimony with regard to a breach in the
4 standard of care, which, of course, is required in a legal
5 malpractice action.

6 And then finally, Your Honor, our third motion -- and
7 they all come together -- is defendants' joint motion for
8 sanctions.

9 Your Honor, if I might begin by kind of going back to
10 basics here. Your Honor, you signed and promulgated your
11 order, a scheduling order, subsequent to the remittitur.
12 Your Honor, I'd like to hand you a copy of your order, if I
13 might, Your Honor?

14 In this order, Your Honor stated very clearly, number
15 one, that on October the 2nd, 2017, plaintiff shall -- that's
16 not can, might, but shall name all -- and the word all is
17 right there very clearly from the Court -- all experts it
18 intends to use as witnesses at trial. And, of course, that
19 was done because, under the scheduling order, we will be
20 going to trial any time after -- I believe it was April the
21 30th and this case -- by way of background, Your Honor,
22 plaintiff filed this lawsuit in 2010 and this case has gone
23 up and down to the Supreme Court.

24 In 2010, Your Honor, both defendants served plaintiff
25 with interrogatories and requests for production. In our

1 interrogatories, which were answered in January 2011, we, of
2 course, asked for the name of all experts that the plaintiff
3 intended to use. And since that time, since January of 2011,
4 the list of experts has not been supplemented except now
5 under this Court's scheduling order.

6 So we then look at what is it that the plaintiffs served
7 -- and if I might, Your Honor, I'd like to hand this to you
8 -- served -- and these are all attachments to our motion,
9 Your Honor -- served, and we look at the title of what it is
10 they served. Plaintiff's expert disclosure and in that
11 expert disclosure, which Your Honor said had to be a list of
12 all experts they intended to use, they list three persons,
13 Steve Luoma, a CPA, a John Flack, and Andrew K. Epting, who,
14 of course, is plaintiff's counsel. So --

15 THE COURT: Let's just stop right there. Mr. Epting, do
16 you seriously propose to testify in the trial and represent
17 them?

18 MR. EPTING: Judge, I had mentioned this to you in our
19 last hearing. I think that I am probably going to have to
20 testify and, as a consequence, you gave us a deadline. And
21 so I simply responded that I may be a witness in this case
22 and may be an expert witness. So I don't know if that
23 answers your question.

24 THE COURT: Well, you can't -- you've got to pick.
25 You've got to be a witness or a lawyer. You can't do both.

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

9 THE COURT: All right.

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

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

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

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

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

1 be a lawyer and -- and an expert witness in the same case. I
2 think Mr. Epting recognizes that and I think he's made
3 measures to get another lawyer involved in it. And if that
4 be the case, then he's complied with the scheduling order in
5 that he's named himself and somebody else is going to take
6 over the prosecution of the claim.

7 MS. WALL: Well, Your Honor, if that's the position that
8 Mr. Epting is taking today where he agrees that he is now
9 disqualified as being the advocate in this case, which, of
10 course, he cannot do and also serve as an expert witness, we
11 still have a problem, Your Honor, and we still need this
12 hearing because Mr. Epting now tells us, oh, no, no, no, even
13 though Your Honor's order says that he must name by -- he
14 must name all expert witnesses he intends to call at trial,
15 and how many did he list? Three. He lists three. Of
16 course, he doesn't tell us anything about them, but he lists
17 these three people.

18 Well, now he's going to tell Your Honor, oh, gosh, no.
19 All I was doing was supplementing the names of witnesses that
20 I had given back in January of 2011. That is not the point
21 of Your Honor's order. This order was crystal clear that all
22 expert witnesses were to be named and, of course, there's a
23 reason for that. Because we need to all be prepared to come
24 before Your Honor and try this case. This is not playing
25 hide the ball or anything else. That's not what our

1 discovery -- that is not the purpose of our discovery, and
2 our rules are very clear about that.

3 THE COURT: Is there anybody that you want to add other
4 than these three witnesses?

5 MR. EPTING: We did add, Judge, when we realized they
6 filed the motion, but what's not being said to you, Judge,
7 the way I read your order is to say that the deadlines for
8 naming experts were October the 2nd. We had named Ronnie
9 Richter as an expert on the question of standard of care. He
10 was the expert that was -- provided the affidavit for the
11 filing of the lawsuit and his deposition had been taken.

12 And so when we answered the discovery, we felt like
13 we've already named him. So we've met that deadline and then
14 I put my name on there and I'm sure Your Honor will give me
15 an opportunity to speak when the time is right, but Mr.
16 Richter is going to be the expert on standard of care, and
17 they've taken his deposition. And I didn't read the order to
18 say we needed to name people who had already been named and
19 who had been deposed.

20 THE COURT: Okay. All right. But when you take the
21 initial responses that you have in these three, You don't
22 intend on trying to call any more than that, do you?

23 MR. EPTING: The -- Mr. Richter and those three. No,
24 sir.

25 THE COURT: So that's a comprehensive list --

1 MR. EPTING: Yes, sir.

2 THE COURT: -- of the -- I think that sounds reasonable.
3 I mean if you knew that that's the position that they were
4 going to take and you've already taken their deposition,
5 that's certainly not a surprise. I think that's been -- the
6 surprise -- the surprise has been ruined since 2011 I
7 imagine.

8 MS. WALL: All right. Well, Your Honor, to follow up on
9 that though, here's the problem. In 2010 when the case first
10 started, we asked for answers to interrogatories and, in
11 addition to that, we look at Rule 26(e) and, of course,
12 there's a duty for timely supplementation of information,
13 which includes information on experts. And it spells out in
14 Rule 26(e) what you're supposed to be -- the information
15 you're supposed to be giving.

16 So then let's look at this expert disclosure. And we've
17 not been told anything by way of supplementing plaintiff's
18 answers to our interrogatories. This has not been
19 supplemented. Who is Steve Luoma, CPA? What is he going to
20 have an opinion about? We don't know if he's going to --
21 what he's going to talk about. There's absolutely nothing.

22 My interrogatories to the plaintiff back in 2010 had
23 asked for not only their names and addresses, but had said,
24 as the standard interrogatory says, what are their opinions?
25 You know, what area are they alleged experts in? We have no

1 idea about Mr. Luoma. John Flack --

2 THE COURT: Well, let's --

3 MS. WALL: -- we assume has something, because he works
4 at the dealership.

5 THE COURT: All right.

6 MS. WALL: We assume it's something to do with damages.

7 THE COURT: Mr. Epting --

8 MS. WALL: And we have no idea about Mr. Epting, none.

9 THE COURT: Mr. Epting -- well, I think really and truly
10 the -- this response, plaintiff's experts disclosure, and
11 this scheduling order essentially just says list them, and I
12 think therein lies the confusion. But clearly, what I'm
13 going to -- what is Steve Luoma going to testify to?

14 MR. EPTING: He's a CPA and would be assisting with the
15 damages, Judge.

16 THE COURT: Okay.

17 MR. EPTING: Judge, would you --

18 THE COURT: I think that's been sort of an elusive thing
19 up until this point, hasn't it?

20 MR. EPTING: Well, one aspect of it has, Judge, but if
21 you would give me a couple minutes, because I think I can put
22 this historically into some context.

23 So the Supreme Court ruled in the underlying case in
24 2010. There was a malpractice suit filed in 2010. Judge
25 James granted summary judgment in 2013. That case was on

1 appeal and finally decided in 2016.

2 During the entire time, Judge, 2010, '11, '12, '13, '14,
3 there were efforts made by counsel for Austin in the
4 underlying case to put this company out of business. We went
5 to the Supreme Court on a petition for appellate fees. We
6 appeared in two further judge's chambers, in which they
7 sought additional fees. And so the litigation, Judge,
8 continued.

9 Well, when the verdict came down, the malpractice
10 verdict, the underlying fees and how this company had been
11 damaged, it wasn't finalized, Judge, until the business was
12 sold. Judge James had before him a receivership motion and
13 they were -- settled it at the hearing I think in 2014 or
14 2015.

15 And so what's going on here is -- with Mr. Luoma and Mr.
16 Flack, is essentially they're the people who are going to
17 tell the story about what happened with the closing of the
18 dealership and the sale of the dealership, which are all the
19 records that we have been exchanging with the defendants as
20 ordered by the Court.

21 And so these damages, if you will, Judge, they didn't
22 exist. They didn't exist until a couple years ago and they
23 evolved, and it's that piece, Judge, that I feel like I need
24 -- I may be a witness in.

25 THE COURT: All right.

1 MR. EPTING: And so I don't know if that context helps,
2 but both of these gentlemen are related to the damages
3 sustained by the dealership as a result of it being forced
4 out of business and sold.

5 THE COURT: Okay. All right.

6 MS. WALL: Your Honor, might I just respond to that?
7 Because I don't want this record to be unclear in any way.

8 I heard Mr. Epting say that the verdict in the
9 malpractice case did not come out until whenever. There's
10 never been a verdict. That's what we are about today.

11 THE COURT: I was a little confused by that too. They
12 are --

13 MS. WALL: Yes. Oh, no. Oh, no.

14 THE COURT: That has never been tried to a verdict.

15 MS. WALL: Quite to the contrary. It's our position
16 that there was never any malpractice, and we go back to when
17 this case was tried back in 2006. There's never been a
18 verdict on that and, in fact, we were granted summary
19 judgment by Judge James. That was overturned by the Supreme
20 Court for purposes of statute of limitations and --

21 THE COURT: Mr. Epting, I heard you say that, a verdict
22 on the malpractice.

23 MR. EPTING: I misspoke, Judge.

24 MS. WALL: All right. I wanted that --

25 MR. EPTING: The order was overturned.

1 MS. WALL: Okay. I wanted --

2 MR. EPTING: I misspoke.

3 THE COURT: All right. Very good.

4 MS. WALL: I wanted that to be very clear, Your Honor.

5 THE COURT: All right.

6 MS. WALL: Because that is what we're all about is to --
7 is defending that. Let me go back for a moment and, you
8 know, maybe this will be -- we'll appear before Your Honor
9 another time on this, but it is part of what the defendants
10 have moved before you on this time around.

11 Mr. Epting just finished telling you -- well, he names
12 himself because he thinks he's going to have to get up in
13 front of the jury and talk about the evolving damages and the
14 dealership. This is what's so critical, Your Honor, about
15 Rule 3.7.

16 Rule 3.7 states very, very clearly that a lawyer shall
17 not act as advocate at trial in which the lawyer is likely to
18 be a necessary witness unless -- and then it has things.
19 Well, first of all -- and that's why, Your Honor, I want to
20 hand up to you the two South Carolina cases because they
21 speak to this. They define for us what is a necessary
22 witness.

23 A necessary witness -- a lawyer doesn't get to call
24 himself a necessary witness because he thinks he can get in
25 front of this jury and talk about all kinds of things that

1 maybe he was involved in as a lawyer. That is not a
2 necessary witness.

3 A necessary witness as defined in the Brooks v. South
4 Carolina Commission on Indigent Defense case -- which, by the
5 way, Your Honor, came out in February of this year. So it's
6 a very new case. And then also the Collins Entertainment v.
7 White case, which came out in 2005, and, Your Honor, I'll
8 hand you copies of these, if I might. Thank you.

9 These cases make it very clear that a necessary witness
10 is a witness where there is no one else who can testify to
11 this. Absolutely no one else exists out there who could
12 possibly do it. Well, it's the plaintiff's claim here, the
13 dealership. They're saying, gee, whiz, all these terrible
14 things happened to us after the verdict and ultimately, 11
15 years later, we had to sell our business because of this
16 verdict way back in 2006.

17 So certainly, someone for the dealership can testify to
18 this. Mr. Epting is not what is defined under our law as a
19 necessary witness.

20 And then secondly, the -- this idea that the lawyer can
21 testify with regard to damages, fees, costs, the point of
22 Rule 3.7 in ever allowing that is in a case such as a
23 foreclosure where it's an uncontested issue and the lawyer
24 said I spent -- you know, I sent out four subpoenas and I did
25 this, that, and the other thing, and I'm entitled to fees

1 under the agreement and so forth, and my fees are \$4,000.

2 That is not what this rule is all about.

3 Now, if Your Honor would prefer that we come back before
4 you if Mr. Epting, in fact, is going to continue to say that
5 he is a witness -- and I mean I guess that's what we're
6 hearing today.

7 THE COURT: Well, I'll tell you what.

8 MS. WALL: It's just not fair.

9 THE COURT: I'm a little bit confused about your order.
10 Mr. Epting is not going to get on the stand and testify in
11 this trial and be a lawyer too. We all know that.

12 MS. WALL: All right.

13 THE COURT: And I think that it's not really for you or
14 me to decide whether or not he's going to be a witness in
15 this case. If -- but he can't continue on representing the
16 plaintiff and continue to have the possibility of being a
17 witness. That's not going to happen.

18 MR. EPTING: Judge?

19 MS. WALL: So -- so is that where we are today, Your
20 Honor? I mean --

21 THE COURT: I --

22 MS. WALL: -- because I don't know what I need to be
23 presenting --

24 THE COURT: I understood him --

25 MS. WALL: -- to the Court. Because I filed the motion

1 because we were placed in that very situation --

2 THE COURT: Well, we --

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

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

8 MR. EPTING: I --

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

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

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

1 quickly.

2 There's a way to get this financial case in the bag and
3 done. The question of do I testify or do I not is maybe
4 something that doesn't have to be decided today, simply
5 because I myself don't know. But if you tell me I have to
6 decide today, then I'll make that decision. What I'm saying
7 to you is, given what needs to happen in this case, I think
8 there's a place for me to stay in this case.

9 THE COURT: Mr. Powell, what do you have to say about
10 that?

11 MR. POWELL: Your Honor, here is what -- here's what I
12 foresee. If the plaintiff does not, as Your Honor says, fish
13 or cut bait, now we're -- this is 7 years down the road and
14 if they don't fish or cut bait, then the scheduling order is
15 going to go to the devil. We won't be trying this in April,
16 lord no.

17 New lawyer coming in. If a new lawyer is going to -- if
18 there's a remote chance a new lawyer needs to come in, he
19 needs to come in now because we can't -- obviously, when does
20 this happen? At the pretrial? You know, if he's going to be
21 the expert, we've got to depose him. That will trigger
22 discovery waiver of any privilege, total waiver of privilege.
23 We've got to get into all of that. All of that takes time.

24 I'm not telling him what he's got to do, of course.
25 Just as Your Honor said, that's -- if they want to make that

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

3 THE COURT: All right.

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

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

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

15 THE COURT: Right.

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

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

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

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

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

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

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

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

1 to --

2 THE COURT: To damages.

3 MR. EPTING: Well, it's not even to damages, Judge.

4 It's -- it's what happened after the verdict, all the
5 decisions that were made about --

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

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

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

12 MR. EPTING: And I just --

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

17 MR. EPTING: All right, sir.

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

22 MR. EPTING: All right, sir.

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

1 MR. POWELL: There are, Your Honor, but depending upon
2 what this answer is, I think Your Honor identified the very
3 issue. Depending upon what the answer is, then there's no
4 point in taking up the Court's time today debating that when
5 we may be facing a new lawyer on Tuesday.

6 THE COURT: Right.

7 MS. WALL: Although, Your Honor, if I might add this?
8 Even if we're facing a new lawyer on Monday at noon or
9 whatever, as I understand, I mean this -- you know, this is
10 certainly up to the Court, but we have all been in this case
11 for a long time and, even with a new lawyer, it is incumbent
12 upon that new lawyer -- it doesn't matter if he has to spend
13 24 hours a day for seven days or, you know, whatever it's
14 going to take, but, Your Honor, I would ask that we be able
15 to continue under this scheduling order so that there's no
16 delay --

17 THE COURT: We will. We will until I --

18 MS. WALL: -- occasioned.

19 THE COURT: We will until I am convinced otherwise.

20 MS. WALL: Thank you, Your Honor.

21 THE COURT: All right. And it's hard for me to say in a
22 vacuum what might occur. It might be that you want to vary
23 from it at some point in time, but you don't anticipate that?

24 MS. WALL: Your Honor, I just don't anticipate it --

25 THE COURT: All right. Okay.

1 MS. WALL: -- because, you know, for purposes of
2 certainly my client, he's been living with this over his head
3 now --

4 THE COURT: Okay.

5 MS. WALL: -- for almost 10 years.

6 THE COURT: Well, you know, never say never.

7 MS. WALL: We want to get our day in court.

8 THE COURT: But my intention is we're going to move
9 forward with the spirit of this scheduling order and we're
10 going to -- we're going to do something with the case, even
11 if it's wrong, and we're going to move it because this case
12 needs to be handled. So we are indeed going to do that.

13 But one thing, Mr. Epting, just from looking at the
14 tenor of their motion, it does appear as if there has not
15 been a real close attention to the discovery. I don't know
16 -- we aren't even going to talk about that today, but --

17 MR. EPTING: Judge, I feel compelled to tell you. I
18 understand we're not here to talk about that. We have -- the
19 amount of effort, the amount of documents that we have
20 produced -- and it will take a while, Judge, but we don't
21 have anything more.

22 THE COURT: Right. All right. Well, that very well
23 might be the case. I'm just a saying from the tenor of their
24 motion it sounds as though there's not been a good faith
25 effort. And if there has not, then, you know, all of the

1 sanctions are -- I'm -- I can't count -- I'm not real sure
2 I've ever sanctioned a lawyer on discovery matters or a
3 party, but we need -- you need to take a look at it. You
4 need to speak with Ms. -- Ms. Wall and Mr. Powell.

5 By the time we reconvene, there probably needs to be a
6 good understanding and you need to be convinced yourself that
7 you've done all that you can do because, you know, there can
8 be monetary sanctions, there can be sanctions with regard to
9 pleadings, there can be dispositive sanctions, but -- and I
10 don't -- I don't know that without hearing it all, but I'm
11 just saying that you need to take the -- take that very
12 seriously and try to resolve it with them.

13 MR. EPTING: Judge, I've been doing this for 40 years.

14 THE COURT: Right.

15 MR. EPTING: I have never had a discovery sanction
16 levied against me.

17 THE COURT: Right.

18 MR. EPTING: I take it seriously. I took this
19 seriously. I understood your Court's order.

20 THE COURT: Right.

21 MR. EPTING: And we didn't trust the client to get these
22 documents. We were in there ourselves up to our elbows.

23 THE COURT: Right. Well, that's good. Well, it might
24 be that the party needs sanctioning if they aren't -- if they
25 aren't getting right.

1 MS. WALL: And all I want to say on that -- and I know
2 we're not arguing this today, Your Honor, but my goodness,
3 the amount of time we've spent writing deficiency letters.
4 And I don't know if it's Mr. Epting, I don't know if it's his
5 client, but again, Your Honor, his client filed this lawsuit
6 against my client and Mr. Powell's client 10 years ago. He's
7 had 10 years to get this. If he thinks there's something out
8 there, he's required under the rules to get it to us in a
9 timely fashion.

10 THE COURT: Right.

11 MS. WALL: And it simply hasn't happened, Your Honor.

12 THE COURT: Okay.

13 MS. WALL: And it's of tremendous concern to us.

14 THE COURT: Okay.

15 MS. WALL: And what I'm hoping isn't going to happen
16 from all of this, if Mr. Epting decides, well, he's not going
17 to be the lawyer anymore and now instead he's going to be an
18 expert witness that because we get a new lawyer, the new
19 lawyer says well, gee, it's not my fault, I just got into
20 this case. Then, in fact, it's the plaintiff's fault.

21 THE COURT: Right. Well, we are -- we're shadowboxing
22 worrying about all those eventualities. We don't need to do
23 that. So we'll wait for your response at high noon on Monday
24 and we'll figure out what we've got to -- what we're going to
25 have to do and we'll hold the balance of the motions in

1 abeyance.

2 MR. EPTING: All right, sir.

3 THE COURT: Unless there's something that you feel that
4 we need to do today.

5 MR. EPTING: Judge, the only thing I want you to
6 understand is I've never been in this position before.

7 THE COURT: Right.

8 MR. EPTING: I think that I have weighed the options
9 that are available to it -- to me and I am making as sincere
10 and good faith effort as I can to get this Court where it
11 wants to be and do what I think ethically I'm bound to do.

12 THE COURT: Right. All right. Mr. Powell, do you see
13 that there's anything that we need to do today beyond what
14 we've resolved?

15 MR. POWELL: No, sir. I think that to go any further
16 today, depending on what -- what the decision is going to be
17 Monday, would be a wasted effort.

18 THE COURT: Okay. And, Mr. Powell, I'm going to ask you
19 to draft the order stating, you know, that he's going to
20 respond by 12:00 and it's going to be a definitive response
21 as to whether he's going to be a witness or a lawyer.

22 MR. POWELL: Okay.

23 THE COURT: And -- and the fact that he is compelled to
24 give the necessary responses to the substance of the expert
25 witnesses' testimony.

1 MR. EPTING: Judge, just as a formality, I think I can
2 put together these interrogatory responses and do what you
3 asked me to do, but I don't think I can do it before I step
4 down Wednesday midday. But I think it would be a good idea
5 for --

6 THE COURT: Monday midday.

7 MR. EPTING: Monday. I think it would be a good idea
8 for me to try to do that, answer these interrogatories, and
9 specify what the opinions are. I think it would help
10 everybody.

11 THE COURT: All right.

12 MR. EPTING: Even if I'm subsequently relieved.

13 THE COURT: All right.

14 MR. EPTING: But -- so I'll give you an answer. Can I
15 continue on until you formally relieve me so I can answer
16 this?

17 THE COURT: Yes. I think that would be a good idea and
18 I think you pretty much -- I think you pretty much said
19 essentially what you're going to be testifying -- what these
20 people are going to be testifying to and, obviously, these
21 very fine lawyers are going to have an opportunity to take
22 the depositions. But still, they really are entitled to know
23 the basis, what you -- the areas you're going to testify to
24 and I think it's important that -- that you set forth that
25 you're not going to testify --

1 MR. EPTING: Yes, sir.

2 THE COURT: -- as to the underlying verdict.

3 MR. EPTING: Right.

4 THE COURT: And the standard of care and all that.

5 Yours has to do with what happened after --

6 MR. EPTING: Right, sir.

7 THE COURT: -- after that. So I think -- for that
8 reason, I think it's important for you to issue a summary.
9 You know, it's still 2:00. You've got three good hours left
10 to today and you can dictate that out and maybe get it out
11 Monday morning. How about that?

12 MR. EPTING: You're being much more successful, Judge,
13 in this electronic world than I am.

14 THE COURT: All right.

15 MR. EPTING: But I'll do it.

16 THE COURT: All right. Very good. All right. Anything
17 else from you, Mr. Epting?

18 MR. EPTING: No, sir.

19 THE COURT: All right. Mr. Rannik, you haven't said
20 anything. Would you like to say anything?

21 MR. RANNIK: No, Your Honor. I think the ground has
22 been pretty well covered. The only thing I would say, Judge,
23 is that our response to the sanctions motion has been set
24 forth in the response that we filed yesterday to the Court.
25 And to the extent that might offer some of what our position

1 would be at the time that that gets argued, it's probably all
2 in there.

3 THE COURT: Very good.

4 MR. POWELL: Your Honor, do you want me to email you a
5 proposed order this afternoon?

6 THE COURT: That would be good. And also, if you would,
7 forward to me an original with a self-addressed stamped
8 envelope.

9 MR. POWELL: All right.

10 THE COURT: That would be -- that would be good as well.

11 MR. EPTING: Judge, can I ask that it not be signed
12 until sometime midmorning since I've got a three-hour drive
13 back to the office?

14 THE COURT: Right.

15 MR. EPTING: I need to pick up an automobile in the
16 process and won't have a chance to look at it until after
17 hours.

18 THE COURT: That will -- that will be fine.

19 MR. EPTING: All right, sir.

20 THE COURT: It's going to take a little while for it to
21 get here and then I'm going to have to review it and I'm
22 going to be in court all next week. So sometime next week,
23 I'll sign it.

24 MR. EPTING: All right, sir.

25 THE COURT: But you will -- you will receive an email of

1 that and if it causes problems, you can get Mr. Powell and
2 Ms. Wall on the phone and tell me you've got problems with it
3 and we'll resolve it.

4 MR. EPTING: All right, sir.

5 THE COURT: Okay. All right.

6 MR. EPTING: Thank you, Your Honor.

7 THE COURT: Well, y'all -- y'all have a good weekend.

8 And once again, this case is an important case and it's got
9 some age on it and, for that reason, it's sometimes like day-
10 old grits. Nobody wants to mess with it, but don't let the
11 problems fester and, if something like this comes up, let's
12 deal with it immediately and that way we can move forward.

13 All right?

14 All right. Thank you all.

15 MR. EPTING: Thank you, Judge.

16 MS. WALL: Thank you, Judge.

17 MR. POWELL: Thank you, Judge.

18 MR. RANNIK: Thank you, Judge.

19 (WHEREUPON, the proceedings ended at 1:45 p.m.)

20

21 --- END REQUESTED TRANSCRIPT ---

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23

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1 State of South Carolina)
2) Certificate
3 County of Florence)
4

5 I, the undersigned, Krystal J. Smith, Notary Public and
6 Official Court Reporter for the Twelfth Judicial Circuit of
7 the State of South Carolina, do hereby certify that the
8 foregoing pages, numbered 1 through 30, constitute a true,
9 accurate, and complete Transcript of Record of all the
10 proceedings had and evidence introduced in the hearing of the
11 above captioned case, relative to appeal, in the Court of
12 Common Pleas for Clarendon County, South Carolina, held in
13 Florence, South Carolina on the 13th day of October, 2017.

14 I do further certify that I am neither of kin, counsel,
15 nor interest to any party hereto.

16
17 

18 Court Reporter

19
20 Florence, South Carolina

21 October 24, 2017

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I N D E X

(WHEREUPON, there were no witnesses called.)

THE COURT: You can stand right here so we can hear everybody. Mr. Powell, since you are here and present why don't you kind of explain what brings us here today, the previous hearing, what I ordered and the discrepancies that developed after the proposed order was submitted to me and who all do we have on the phone?

MR. POWELL: We have Susan Wall and with the plaintiff with Mr. Epting's office -- Jaan, pronounce your last name for me please?

MR. RANNIK: It's Jaan Rannik.

MR. POWELL: Rannik.

THE COURT: All right. Very good. Does everybody agree to us conducting this hearing in this manner and at this time?

MS. WALL: Your Honor, I agree on behalf of Defendant Scott Robinson and I also appreciate the Court allowing to have counsel who are so far away to do this by telephone. We appreciate that. Thank you.

THE COURT: Mr. Powell, do you agree to us having it at this time, the timing of it and the

manner in which we are having it?

MR. POWELL: Yes, sir.

THE COURT: All right. Mr. Rannik, how about you?

MR. EPTING: Judge, this is Drew Epting. Judge, I can hear you now well, but when you first came on the bench, I could not. Judge, we agree and as I understood it the Court announced what it's ruling was going to be when we were on the phone ---

THE COURT: No, no, Mr. Epting, that's not true. I told you what my inclination was going to be. And I specifically said that your -- that you might convince me otherwise, but I was familiar with what the ---

MR. EPTING: That's true, Judge, and I in return said that other than what you put in our objections to the order, I wouldn't have anything further to say.

THE COURT: All right. And you understand that if you wanted to, we could give you ten days notice and we could have a hearing and allow you to be here in person. Do you want to do that?

MR. EPTING: Well, Judge, the answer is, yes, because I thought that you said that you essentially were going to disqualify me and my firm.

And so I said in return I didn't have anything more to say other than what was in my papers.

THE COURT: Well, you heard ---

MR. EPTING: I thought that this was merely for you to announce on the record what your ruling was.

THE COURT: No, no, no, that was never what I said. And I told you that we are working on a time constraint in this file. This is an old case. I think, it started what in -- how long ago did it start?

MR. POWELL: 2010 in August.

MS. WALL: August 2010.

THE COURT: And for that reason, we were moving with speed and dispatch. And I've asked and directed all the parties if there were problems developed to get in touch with me and we would deal with it and that's what I'm trying to do. But I don't want to get ahead of myself if anybody -- when we talked about the fact that in the previous hearing, Mr. Epting, I said that you can't be an expert witness and a lawyer. I said you're going to have to fish or cut bait, that was clear and you indicated on the record that you've already contacted outside counsel because you anticipated that might be

a problem. Although, you were preferring to get out of the case at a later date and time. You knew that that was something that was eminent or could be eminent. So my ruling was that you were disqualified from being a lawyer, if you were going to be an expert witness in the case. I think that was very clear. And then as I understand it based on our telephone conference, you indicated that the lawyer that you contacted did not want to do that because of some reason maybe the timing of it, the fact that you were not going to be able to assist him as co-counsel. There were problems with it, but nonetheless the issue you raised objections to the whole firm being disqualified and that brought an issue that was really not before me at the previous hearing. And you would have indeed hired the lawyer that you spoke of on the record, we wouldn't be in this predicament now. But an additional wrinkle has come up and the question has presented to us has been set out in the memorandums and the letters that have been submitted to me that state that you feel as though the law would allow you -- someone in your firm to be -- to represent -- the plaintiff and you serve as an expert witness.

I told you on the telephone conference and I

tell you here today my inclination is that that's not appropriate and that's not my understanding of the law. But I specifically told you in the telephone conference and I'm telling you one again here today, I have not made up mind in that regard. And I ask you here today whether or not you wanted ten days notice so you could appear and argue this particular motion. You indicated that you did. If that's the case, then we will adjourn and give you ten days notice, give you time to contemplate the matter and to present the matter on the record. That was what I was intending to do to start with. What do you have to say about that, Mr. Epting?

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

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

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

listed myself as an expert witness due to an abundance of precaution ---

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

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

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

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

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

MR. POWELL: May.

THE COURT: In May of next year. And if you were to do all the discovery in this case and like you had envision prepare the case for trial and then on the eve of trial, you start cogitating, well, I need to testify as a witness. Then we're still six months out because there's another lawyer's going to have to get involved to try the case, so that's why we need to address the issue now. And that's why I

ask you to make a determination as to whether or not you were going to be an expert. And I said you needed to answer that by high noon this past Monday and your response was, yes, I'm going to be an expert or yes I'm listing myself as an expert.

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

Judge, I want to go back to your point because it's exactly why I reached out to Mr. Ranson. I did not want to put the Court in the position that if I were to testify that there was not some other lawyer who would already be in the blocks and ready to take this case up. The other thing I said, Judge, at the hearing was if I was going to testify it's a question of timing, but if I stayed in the case, I know this case better than anyone, getting this case ready for trial and doing the discovery, I can do it

much more effectively with a lot less effort than new counsel. And so the whole idea to get Mr. Ranson was to address exactly the concern that you raised because I didn't want you to think that I understood or believed I might be a witness and did nothing. The minute I realize this could happen, I thought I need to reach out to make sure that whoever might take this case is in a position to take it over. All right.

THE COURT: But as I understand it, Mr. Ranson is no longer available?

MR. EPTING: No, Judge, but the -- what I said about Mr. Ranson is Mr. Ranson believed that essentially this was an issue about whether I can be a lawyer at trial and testify. Mr. Ranson when he agreed to come into the case didn't understand nor did I that this was going to be a motion to disqualify me effectively -- effective immediately.

THE COURT: All right.

MR. EPTING: And that's what the issue is.

THE COURT: All right. Well, that is ---

MR. EPTING: I'll be happy to work in any way with this court ---

THE COURT: All right.

MR. EPTING: --- to try to get this case

ready, bring in new counsel and to make certain that we hold these deadlines.

THE COURT: Well ---

MR. EPTING: So when you ask me the question to to give you an answer by high noon, I think, Judge, we're talking past each other because I don't think the rule that they're relying on it has anything to do with a discovery period. The rule relates to a testifying lawyer cannot be both lawyer and witness. There's nothing in the rule, Judge, about expert versus factual witness.

THE COURT: Well, we aren't going to obviously today going to be litigating nor submitting that to me for a determination here today because you've indicated that you want ten days notice. We'll reconvene and you'll be able to put all that on the record. But -- and I will make a ruling whether or not you can stay on as a lawyer and prepare the case and then it turn over to another lawyer for trial. I'm going to make a ruling on that and you need -- and that was the reason why I wanted to have the hearing. And I thought we were all sort of in agreement doing the expedited way. And so I specifically -- since, you weren't in a position to agree to be just a witness and not a lawyer preparing

the case, I thought that it was appropriate for us to have a hearing, so we could put it all on the record in case you wanted to appeal the issue, that was the whole reason for this gathering here today. But then you've indicated that you did not feel as though you could add anything more than what was in the memorandum. And I ask you today whether or not you wanted the ten days notice and you say that you do. So what I will do -- well, let me ask you this, do you think that this issue right here is interlocutory or is it something that's directly appealable?

MR. EPTING: Judge, it's a case I cited in the brief, it deals with exactly this issue. It is called Haygood vs. Summerville and it says that the disqualification of a lawyer is immediately appealable.

THE COURT: Okay. Well, that's why we need

MR. EPTING: 2005 case.

THE COURT: Well, that's we need ---

MR. EPTING: Another reason, Judge, it's such an old case. It looks like to me we ought to be able to work together to get this case ready, to move this case without having to take an appeal, but, yes, the appeal judge is not interlocutory. It's a matter

of right.

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

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

THE COURT: Okay.

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

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

MR. POWELL: Your Honor, the reason that Mr. Epting's argument the plan he would set out to conduct this is absolutely in error is that were the law, were the courts to operate as he suggest, then he would continue on I take it as plaintiff's counsel and then at some unknown time a week before trial, at

the pretrial, during the -- in the middle of the case decide to put himself on the stand and another lawyer take it from there.

Here are the problems, if that's the case, I could see the plaintiff -- the other lawyer saying, Judge, I've got to have time. I need more time. And you got the one possibility is another six month delay that Your Honor identified. If the Courts were run the way Mr. Epting suggest, they could not control their docket. Any time they wanted to a lawyer could simply grant himself a continuance by naming himself as potential witness. The -- but more fundamental thing as far as my clients are concerned is that during that course from today until trial, he's going to I'm sure contend I'm still the plaintiff's lawyer. My work product protection is still in effect and the attorney-client privilege is still in effect.

THE COURT: That will present a problem.

MR. POWELL: And if he then later on, if he then later says well now I'm a witness, well all the time that we would had to discover that has been lost and we are then at a distinct disadvantage because once he becomes the witness, the work-product doctrine is out the window and the attorney-client

privilege is out the window. So that is the -- two fundamental reasons why his approach to this matter is absolutely incorrect.

THE COURT: Okay. That really probably goes more to the merits of the argument that's going to be presented in some point in time after ten days. What do you have to say about what brings us here today and the procedural -- what brought us here today and your proposed order.

MR. POWELL: Your Honor, I have filed a proposed order and have it here. It was prepared. The reason I did that is the other order I was directed to prepare on the 13th is now stale for a number of reasons. So what I did is I brought that current detailing the history of what happened since last Friday and the decision the plaintiff made and what we would seek the Court to do which is in light of the plaintiff's decision to continue to list Mr. Epting as an expert witness in the case, that he would be -- he could participate as an expert witness as the plaintiff desires, but could not any longer serve as plaintiff's counsel for the reasons we identified.

THE COURT: Right. All right.

MR. POWELL: And the other thing I would

1
speak to in terms of whether this is interlocutory or not, I question that because this is not a situation where the Court either sua sponte or in any other fashion disqualified Mr. Epting. This was a decision made by the plaintiff. The plaintiff chose to either chose him as a witness and nowhere does Mr. Epting argue that he is a necessary witness. He just says he is a better witness than somebody else might be.

THE COURT: Let me interrupt you right there. Mr. Epting, I never ask this because I didn't really think it was particularly relevant, but apparently you have a particular view and you're going to be an expert with regard to damages and why they sold the business at a lower dollar value and probably something to do with attorney fees and all kind of other things. But why is it that there could not be an expert lawyer gather up all the information that you have available and testify as to what the damages are. Why do you have to do that?

MR. EPTING: Judge, I wouldn't be testifying to the damages that have to do with the loss of the business.

THE COURT: What are you going to be testifying to?

MR. EPTING: Well, what I said, Judge, when

I was there -- and, Judge, the history of this case is pretty cordially and I thought I explain this when I was there, but let me try and be a little more thorough. What happened in this case is the Supreme Court ruled in Austin in 2010 in the underlying case, the malpractice case this case was filed in 2010. What happened is we discovered and advanced the malpractice case. And we lost the statute of limitations argument and it went up on appeal and it was finally decided in May of 2016, but between, Judge, at the time of the filing the malpractice case in 2010, in the Supreme Court ruling on the statute limitations in 2016, a considerable amount of activity occurred in the underlying Austin case.

Austin sought to recover Dealer's Act fees. Austin sought to recover appellate fees. He petitioned the Supreme Court. I asked -- well, so I -- no one else would handle that, Judge, so I handled it. I opposed the Dealer Act fees. I opposed the fees for appellate -- for their appellate work. Then there was a disagreement, Judge, about what is the interest computation and that was briefed and it went on for a considerable amount of time. Judge James ruled against me. And so all of these actions, Judge, I believe through the discovery that is being served on

us are going to be challenged.

THE COURT: All right. My question to you

MR. EPTING: Why didn't we do that? Why didn't we do this? What happened when they executed on the business and I see myself as a potential witness. And since the subject matter, Judge, is the client would say, no, I didn't want to pay the Dealer Act Fees.

THE COURT: Would you classify yourself as a necessary witness?

MR. EPTING: I'm the only person who can at least explain from a lawyer point of view, not an expert witness point of view because I don't think it's expert testimony.

THE COURT: You think it's a factual issue?

MR. EPTING: Plaintiff's counsel for Austin made this motion and this is what I did and I believe it's reasonable and I think the result was reasonable.

THE COURT: You view yourself as a necessary fact witness?

MR. EPTING: I would say, Judge, that is true.

THE COURT: Okay.

MR. EPTING: But I don't, Judge, want to be challenged as a potential fact witness, a necessary fact witness. And then find out that a judge rules, no, I think that's expert testimony. And you can't give testimony, that's the only reason I answered that question by listing myself.

THE COURT: Okay. Well, so you essentially say that you don't believe that an expert witness, a lawyer, expert witness lawyer could look at this case and make a determination as to what happened and why? And you're going to be the one that has to do that?

MR. EPTING: I think I can to do that and I think it would cost my client a quarter of a million dollars.

THE COURT: Okay. Well, I was just asking whether or not you thought that could be done. All right.

MR. EPTING: Judge, I don't think that anyone -- I believe it's an ethical question, Judge. I don't want to take myself out of this case. I like this case. I believe in this case, but I don't want a client to say you would have done a better job in this and I recognize that there's proof to that. I may be the best person to give this testimony.

THE COURT: Okay. All right. Well, that's

what we're going to address in ten days or shortly thereafter. I'm going to give you adequate notice of that. I'm going to listen to all of the arguments. I'm going to read all of the briefs and I'm going to make a ruling. And we very well might find out whether or not it's interlocutory or something that's directly appealable, but we got to do it. And we will set up a hearing here shortly. Hang on just one second and I'll take a look and see what we got.

Ms. Wall, I hadn't heard from you.

MS. WALL: Well, I'm biting tongue, Your Honor, but if we're going to have a hearing, I'll be happy to address all of these issues that I been hearing, you know. And I just would remind the Court -- I mean, after all you yourself, Judge, I mean, you had an order out there that we are required to follow and now Mr. Epting wants it sort of both ways. Well, he doesn't really know if he's an expert. He might be a fact witness, but he's going to hedge steps on that. And then hedge his steps on when he's going to let us know and it may be boom right in the middle of trial at which point we would get a mistrial. You know, and then he's concerned that his client is going to have to spend money if they go out and get someone else.

Well, the defendants have rights here too and we are entitled to know as is the Court how this case is going to unfold meaning who are the witnesses, who are the expert witnesses and you required the plaintiff to fish or cut bait by October the 2nd, that didn't really happen. And then we had the hearing on the 13th and you gave him over the weekend and yet more time. And we keep saying we gave him, Mr. Epting. The truth of the matter is this is the plaintiff's choice.

THE COURT: All right.

MS. WALL: And plaintiff has made this choice.

THE COURT: Okay. Procedurally, do you want to say anything about what brings us here today to this hearing?

MS. WALL: Well, procedurally, I'm very concerned because I'm like you, Judge, I thought Mr. Epting on behalf of the plaintiff agreed that we would have -- this is a hearing. We have a court reporter and that the Court was very kind not to force Mr. Epting to get in the car and drive nor me and I appreciate that. And that Mr. Powell would be there in order to effectuate this telephone conference. And now I'm hearing that we need to do

this again because even though Mr. Epting told the Court that he had briefed -- and he has briefed it. He's made various filings on behalf of the plaintiff, but now the Court is being forced to do this yet again. That concerns me because I thought that's what we were doing today with the agreement of the plaintiff. So procedurally that's my response to you, Your Honor. I'm a little dismayed that we have to do this yet once again.

THE COURT: Okay. Well, it appears as if we are. Does anybody want to say anything else?

MR. POWELL: Your Honor, the only thing I would add is the other day Mr. Epting -- I took good notes the other day on Friday and he made the statement there. I'm sure it will be on the record, but I wrote it down specifically says I think I am going to have to testify, maybe an expert witness in the case. So -- and when we discussed on the phone the other day about how this was going forward today, he did mention that he had a mediation, but that he could arrange something. He could somehow deal with that. Naturally, I'm always delighted to come to Florence, like to be here, but this is not how I envisioned and how I understood the matter was going to happen to take place today.

THE COURT: All right. Well ---

MR. POWELL: But I too appreciate Your Honor's indulgence.

THE COURT: All right. Well, let's look at the -- I'm looking I have an administrative week on November the 30th week after next. October 30th I'm sorry and November 1st, 2nd, and 3rd.

MR. POWELL: Your Honor, I got a mediation in Myrtle Beach on the 3rd and one here in Mr. Folkens' office on the 28th. I know those two dates.

THE COURT: Now, the court reporter is here and I received an e-mail from court administration on administrative weeks and chambers weeks they ask us to try not to schedule hearings on Monday and Tuesday or Wednesday. Are you aware of that?

COURT REPORTER: No, sir.

THE COURT: Okay. Well, I tell you what I'm going to do is I'm going to take a stab in the dark and see if we can't get this done on November the 2nd. Does that give us ten days?

MR. POWELL: Yes, it would.

MS. WALL: Yes, Your Honor.

THE CLERK: Can everybody be here November the 2nd?

MS. WALL: Yes.

MR. POWELL: I can do that.

MR. EPTING: Yes, Judge.

THE COURT: All right. November the second and where is everybody coming from?

MR. POWELL: Columbia.

MS. WALL: Two from Charleston, one from Columbia.

THE COURT: All right. How early do big city lawyers get up in the morning? I'm asking when would you all like to have the hearing? I'm open that day. I rather get it done early in the morning, but I'll do it whenever you all think is best.

MR. POWELL: I've got to go from here to Myrtle Beach because I got a mediation down there the following day, so it doesn't matter to me.

MS. WALL: Will 11 o'clock work and then, Warren, you could just go from the hearing?

THE COURT: Will 11 o'clock work with you, Mr. Epting?

MR. EPTING: Yes, sir.

THE COURT: All right. All right. Very good November the 2nd.

MR. EPTING: Thank you, Judge.

THE COURT: Thank you all.

MS. WALL: Thank you, Judge.

MR. POWELL: We going to sign off.

END OF REQUESTED TRANSCRIPT

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter in and for the State of South Carolina At Large, do hereby certify that the above-entitled cause was heard as hereinafter set out; that I was authorized to and did transcribe the said proceedings; and that the foregoing and annexed paged, numbered 1 through 24, inclusive, constitute a true and accurate transcription of my stenographic report of the said cause taken during the said hearing. In the Court of Common Pleas for Florence County, South Carolina, on the 19th day of October, 2017.

I do further certify that I am neither of kin, counsel nor interest to any party hereto. In witness whereof, I have hereunto affixed my signature this 5th November 2017.

Keshia Reed, Court Reporter

State of South Carolina) Court of Common Pleas
County of Clarendon) Third Judicial Circuit
Case No. 2010-CP-14-00457

Stokes-Craven Holding Corp.,)

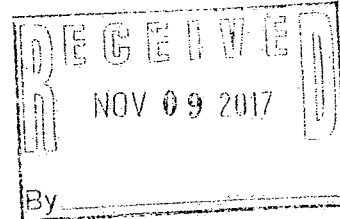
Plaintiff,)

-vs-)

Scott L. Robinson, et. al.,)

Defendants.)

Transcript of Record



November 2, 2017
Florence, South Carolina

B E F O R E:

The Honorable Michael G. Nettles, Judge

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

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

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

Krystal J. Smith
Circuit Court Reporter

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I N D E X

<u>WITNESS/DESCRIPTION</u>	<u>PAGE NUMBER</u>
Motion.....	6
Ruling.....	37
Court Reporter Certification.....	47

1
2
3
4
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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
C-1	letter w/attached contract		41

COURT REPORTER LEGEND

dashes	--	intentional or purposeful interruption
		or change in thought
ellipses	. . .	trailing off
[ph]		phonetically written
[sic]		written as said

1 NOVEMBER 2, 2017

2 (WHEREUPON, the proceedings began at 11:13 a.m.)

3 THE COURT: Y'all come on forward. Let's get the clerk
4 up here to do the Court Call. Get the clerk up here to get
5 that Court Call going.

6 All right. I'll tell you what. Do y'all have -- you
7 know, we had set up Court Call, but the clerk is not in here.
8 I think we're going to do it the old-fashioned way and just
9 call her. Does anybody have her number? Ms. Wall's?

10 MR. POWELL: I think I do, Judge. Let me see.

11 MR. RANNIK: Judge, I'm sure I can pull it up through an
12 email.

13 THE COURT: Okay. You can tell her to come on up here.
14 We're not going to do the Court Call if we can get her lined
15 up.

16 THE LAW CLERK: All right.

17 MR. RANNIK: So, Judge, I have her direct office number
18 here.

19 THE COURT: Okay.

20 MR. RANNIK: It's 843-714 --

21 THE COURT: Okay. Hang on just a moment. 1-843 --

22 MR. RANNIK: 714-2506.

23 THE COURT: I'm going to try to get her just on the
24 phone here.

25 THE CLERK: I can get it on this phone if you'd rather.

1 THE COURT: We'll see. It might just be easier.
2 (WHEREUPON, a telephone call was placed to Attorney Wall
3 on a cell phone, who was then placed on speaker phone
4 for the duration of the proceedings.)
5 MS. WALL: This is Susan Wall.
6 THE COURT: Ms. Wall, this is Michael Nettles. How are
7 you doing?
8 MS. WALL: I'm fine. Thank you, Your Honor.
9 THE COURT: Good.
10 MS. WALL: Thank you for calling.
11 THE COURT: Can -- can everybody hear her?
12 MR. POWELL: Yes, sir.
13 THE COURT: All right. Does anybody have an objection
14 to her appearing by phone?
15 MR. EPTING: The plaintiffs do not, Judge.
16 THE COURT: Okay. Very good. All right. I'll be happy
17 to -- if you have trouble hearing, let us know.
18 MS. WALL: Thank you, Your Honor. I can hear you and I
19 appreciate your courtesy, Your Honor.
20 THE COURT: Very good. All right. I'll be glad to hear
21 from the moving party.
22 MR. POWELL: Your Honor, I have a request. Is there a
23 way I could get some water?
24 THE COURT: Yes.
25 MR. POWELL: I've been on the phone for a while on the

1 --

2 THE COURT: Yeah.

3 MR. POWELL: -- way over here. So I'm kind of dry.

4 THE COURT: There you go.

5 MR. POWELL: That's good. Thank you.

6 THE COURT: I'll be glad to hear from the moving party.

7 MR. POWELL: Yes, sir. Warren Powell, Your Honor. I am

8 counsel for defendant, Johnson, McKenzie, and Robinson.

9 THE COURT: And could you put the caption on the record

10 for us?

11 MR. POWELL: Yes, sir. The caption of this matter is --

12 MR. EPTING: 2010-CP-14-457.

13 THE COURT: Very good. And the parties?

14 MR. POWELL: It is Stokes-Craven Holding Corp., DBA

15 Stokes-Craven Ford, plaintiff, versus Scott L. Robinson and

16 Johnson, McKenzie, and Robinson, LLC.

17 THE COURT: Very good. Yes. Yes, sir?

18 MR. POWELL: Your Honor, we are here as a culmination of

19 a number of events which have occurred since October the 2nd

20 and I won't -- I'll try not to take too long, but our motion

21 is to -- defendant's motion is to -- was originally for to

22 either disqualify Mr. Epting from testifying as an expert

23 and, in the alternative, for disqualification of Mr. Epting

24 and his firm as -- as counsel for the plaintiff.

25 On the deadline of -- of the Court's scheduling order,

1 October the 2nd, the plaintiff named experts, as the
2 scheduling order called for, and the plaintiff in that
3 response named his attorney as an expert witness to testify
4 in the case. The plaintiff, by way of argument of counsel,
5 contends that it will suffer substantial harm if Mr. Epting
6 cannot testify as an expert witness and serve -- and at the
7 same time serve as trial counsel or a member of his firm
8 serving as trial counsel.

9 Your Honor, I would point out that, at least to my
10 knowledge, there is no affidavit before Your Honor that would
11 indicate -- affidavit from the plaintiff that would indicate
12 or delineate what the substantial harm is or would be under
13 such a circumstance, and the extent to that.

14 So keeping in mind the overall view of this matter is
15 that this Court has substantial discretion in determining
16 what constitutes appropriate conduct here because it affects
17 the -- the efficacy and the respect of the tribunal, and I'll
18 speak to that more in a little while.

19 So other than argument of counsel, I am not aware --
20 which is not evidence. I am not aware of any evidence before
21 the Court that would indicate what kind of -- of -- of
22 substantial harm would befall the plaintiff and the extent of
23 it.

24 Now, the plaintiff -- the plaintiff's naming of the
25 plaintiff's counsel as an expert in the case was met with our

1 motion to disqualify and, in the alternative, as I said. On
2 October the 13th, a hearing was held before Your Honor on our
3 motion because we jumped on it as soon as we could after we
4 received the response that they intended to do this.

5 Now, the results of that hearing are several and, as the
6 record would reflect -- and I'm not going to read a lot from
7 the record, but I just want to tick off a few things that
8 happened that day.

9 The Court directed a question to plaintiff's counsel.
10 There was this matter of whether they could name -- they left
11 Mr. Richter out. He intended, no, he had been previously
12 named, and there was this back and forth about that.

13 And the Court directed a question to plaintiff's counsel
14 that these four -- these four experts that you've named here,
15 these are the ones. These are the ones. And the response
16 was that's it, there's no more than that. And that -- that's
17 on the transcript at page 9, lines 20 through 24.

18 Now, this is significant because, as we all know, this
19 case is going on seven years old and to -- Mr. Epting is a
20 fine lawyer and we have no -- I have no doubt that a lot of
21 thought and careful consideration and planning and
22 considering the alternatives went into the decision of
23 whether or not he was -- his client would be naming him as an
24 expert witness in this case. So that was the first thing
25 that represented to the Court that these were all that there

1 were going to be.

2 I believe it was the very next week after that where the
3 plaintiff attempts to name another expert, despite the
4 representation to Your Honor. That, of course, was out of
5 time and whether he would be able to use him or not is under
6 con -- is in contest.

7 But the other -- the way it went down on October 13th was
8 the Court questioned him. Do you seriously propose to
9 testify in the trial and represent the plaintiff as well at
10 the same time? The answer was, I think I'm probably going to
11 have to testify and, as a consequence, you gave us a
12 deadline. And so I simply responded that I may be a witness
13 in this case and may be an expert witness.

14 What the plaintiff seems to be contending here is that I
15 may or may not and, when we decide to do that, it could be
16 later on. You know, it could well be the week before trial,
17 but I don't know now because I don't know how they're going
18 to defend the case.

19 The plaintiff would stand the rules on its head. The
20 way that works -- the way it's supposed to work, the
21 plaintiff, if they believe the defendant is going to defend
22 in a certain way, take the depositions, which they've done,
23 take the experts' depositions, which they've done, and
24 discover whatever you want to discover.

25 It cannot be that the scheduling orders are totally

1 ignored. They would say to the Court, just trust me, it's
2 going to be all right, and what that does is that puts the
3 defendants at a distinct disadvantage because we don't know
4 along the way what role the gentleman is playing.

5 Now, the -- the Court has already advised the plaintiff
6 that its attorney of record would not be permitted to serve
7 as an expert witness, and Your Honor directed a statement to
8 Mr. Epting on October the 13th, it's time to fish or cut bait.
9 You can serve as plaintiff's counsel in the case or you can
10 serve as the plaintiff's expert in the case, but you cannot
11 do both. And I would -- would -- although it wasn't
12 confronted on that day, I will provide the Court with good
13 reason why his -- his law firm cannot do so either.

14 And Mr. Epting said, all right, I will -- can I have
15 until Monday to decide this, to talk it over with the client.
16 Okay. Well -- and the Court was gracious enough -- the Court
17 I think wanted an answer that day, but gave Mr. Epting until
18 Monday the 16th to decide.

19 The other thing that came out of that hearing -- Mr.
20 Epting represented that the plaintiff's counsel -- that he as
21 plaintiff's counsel had been in touch with another lawyer to
22 serve as the plaintiff's counsel in this case. So -- and as
23 a matter of fact, I think it was the following Monday when
24 Attorney Robert B. Ransom of the Richland Bar filed a notice
25 of appearance as plaintiff's counsel, and he is not

1 associated with Mr. Epting's law firm. He is totally
2 separate. And so -- so the -- the fact of the matter is that
3 they have another lawyer now that's appeared as attorney of
4 record in the matter.

5 The events following the --

6 THE COURT: Now, don't you think that if -- if he's
7 already filed a notice of appearance, he's going to have to
8 ask permission to get out of it, isn't he?

9 MR. POWELL: He would, Your Honor.

10 THE COURT: That might solve our problem.

11 MR. POWELL: The events following the October 13th
12 hearing -- on October the 16th, the Court was advised that the
13 plaintiff decided to have its attorney of record continue to
14 serve as expert witness, just as was disclosed in the October
15 the 2nd disclosures in responding to the schedule in the
16 scheduling order. The plaintiff argued in his submittals
17 that, no, another lawyer in his firm could take over and he
18 then could proceed as the expert witness.

19 On October the 17th, a conference call was held with the
20 Court and all counsel, in which in light of the plaintiff's
21 decision the prior day, the Court again stated its opinion
22 that, subject to being persuaded otherwise, subject to
23 argument or other -- other matters that may not have been
24 heard at that time, that it would not be appropriate for Mr.
25 Epting to serve as an expert witness for the plaintiff and to

1 serve as counsel for the plaintiff, nor for any attorney in
2 Mr. Epting's firm to do so.

3 The Court told plaintiff's counsel he would have the
4 opportunity to persuade the Court otherwise, and Mr. Epting
5 responded that he did not believe that he could add anything
6 other than what he had submitted by memorandum at that point.

7 A hearing was scheduled for the 19th, October 19th, to
8 provide the plaintiff the opportunity to set forth his
9 position. On October the 19th, Mr. Epting and Ms. Wall
10 participated by phone. I was present in the courtroom, at
11 which time -- and this was what at least I perceived to be
12 Mr. Epting's opportunity to explain to the Court to change
13 its position on the matter to present whatever argument and
14 so on and, to that, Mr. Epting demanded 10 days' notice. And
15 that -- and that's why that hearing was continued and here we
16 are today.

17 At one point during the exchange, during that hearing of
18 October the 19th, Mr. Epting said -- made the statement that
19 he may not testify after all. It is a little bit like Alice
20 in Wonderland. If that's the case, they should not have
21 named him. They made the decision on Monday and they made
22 the decision before that on October the 2nd, reaffirmed it on
23 Monday the 16th, and so -- and then there's a little bit of
24 equivocation after that.

25 We have to assume that the plaintiff -- and the

1 plaintiff has made a decision to use Mr. Epting as an expert
2 witness in the case. I don't believe we can backtrack on
3 that because we've been down that road.

4 In addition to our memorandum, we offer a number of
5 reasons why Mr. Epting and his firm must be disqualified
6 under these -- under these facts. First, the -- the role as
7 advocate and the plaintiff -- for the plaintiff in a lawsuit
8 and that of an expert witness, those two roles are anathema
9 to each other. One advocates and argues for his client's
10 cause. The other to state the facts and give his
11 independent, unbiased opinion without any fiduciary duty to
12 the plaintiffs. No fiduciary duty between an expert witness
13 and the client. There is quite a significant, the highest
14 fiduciary duty between the lawyer, the advocate, and the
15 client.

16 Another goal of the witness advocate rule is to protect
17 the dignity of the tribunal. To place the plaintiff's
18 counsel or a member of his firm on the stand and qualify him
19 as an expert leads to the following. And this is -- this is
20 what I would have to ask. It would be my job to ask, remiss
21 if I did not.

22 You and your firm, Mr. Expert Witness, have represented
23 the plaintiff in this case; correct? He'd have to say yes.

24 And your firm, your law firm --

25 THE COURT: Stands to gain monetarily.

1 MR. POWELL: Stands -- stands to gain. If another
2 member of your firm is now the counsel trying the case, then
3 the witness has -- the expert witness has a financial benefit
4 in the successful outcome of the lawsuit.

5 I have to ask -- you have a -- you have a contingency --
6 your -- your law firm has a contingency fee contract with the
7 plaintiff? True.

8 What percentage? And I have to go into -- and that
9 includes -- that's plus -- that percentage plus costs,
10 whatever, a third, 40 percent, whatever it is.

11 So I have -- because I have to do my job, you have
12 created the dynamic where the jury is sitting there and the
13 public is sitting there and the -- and the tribunal is
14 permitting this witness to be sworn when he has a financial
15 outcome in the success of the case. In other words, Mr.
16 Expert Witness, the better you testify for the plaintiff, the
17 better -- the greater the chances your firm is going to
18 benefit financially.

19 In addition, you had a -- you agree you had a fiduciary
20 relationship through your law firm with the plaintiff. Do
21 you lose that fiduciary relationship by virtue of taking the
22 witness stand? And if not, aren't you duty-bound as -- as an
23 expert, as the lawyer at your firm, duty-bound as advocate
24 for the plaintiff to jealously guard their rights, to
25 vigorously pursue what they seek here, the success in this

1 lawsuit? But here, you're representing that you're an
2 unbiased expert witness seeking -- the plaintiff is seeking
3 opinions from you on matters of presumably law, handling
4 appeals, and so on.

5 So the obvious solution -- the only solution at this
6 juncture, Your Honor, we would submit is disqualification
7 since the plaintiff has made this decision. Such a dynamic
8 is unseemly. It degrades the tribunal in the eyes of the
9 public to permit such a demonstration.

10 THE COURT: Well, he's certainly not disqualified. He
11 was -- he was given the option.

12 MR. POWELL: That's what I'm saying.

13 THE COURT: Yeah. He was given the option to be the --
14 of being the expert or being the lawyer.

15 MR. POWELL: That's right. And as I said, on October
16 13th, that was the choice.

17 THE COURT: As a matter of fact, if he goes forward
18 today and elects to represent the defendant [sic] without
19 offering himself as an expert, he can do that here today.

20 MR. POWELL: Well, Your Honor, I thought -- and perhaps
21 incorrectly -- that we were -- that the plaintiff had decided
22 because that's what they told us on the 16th.

23 THE COURT: I think -- I think you're right.

24 MR. POWELL: And so --

25 THE COURT: But I think that it would alleviate the

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

3 MR. POWELL: Right.

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

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

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

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

1 do that.

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

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

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

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

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

1 soundly that the law was that I could continue to serve, and
2 I believe by the time the day is over, Judge, I will have
3 convinced you that I can continue to serve.

4 But that if I was going to testify at trial, there would
5 have to be some experienced lawyer involved. Hence, Mr.
6 Ransom's involvement. I think Mr. Ransom believes that he is
7 coming in to learn this case alongside me so that, if I am a
8 witness, that he would be able to take this case over and
9 move it forward.

10 But I don't know, Judge, that he bargained for filing a
11 notice of appearance and me filing out and being the only dog
12 here in taking over an eight-year-old case with a scheduling
13 order the way it is. That's the honest answer and that's why
14 he became involved.

15 So, Judge, let me just pass this up.

16 THE COURT: What do you think if you were to continue on
17 as an advocate and then later on serve as an expert and all
18 -- all of the depositions that are going to be published and
19 all of the used depositions to impeach, it's actually going
20 to be you that asks the questions and you are going to be a
21 witness? It very well could be, but if we get -- if we get
22 Ransom involved in it now, then that would not be the case.
23 I mean that -- wouldn't you agree that that would pose
24 another problem?

25 MR. EPTING: Judge, I think it may. I mean it's

1 certainly a practical observation, but I keep going back to
2 this rule.

3 THE COURT: Right.

4 MR. EPTING: And if I could -- and I'm going to move
5 here, Judge, to the podium.

6 MR. POWELL: Your Honor, could I -- before Mr. Epting
7 continues, could I make one brief statement?

8 THE COURT: Yes.

9 MR. POWELL: Because I wasn't quite finished.

10 THE COURT: Right.

11 MR. POWELL: I would submit to the Court that most of
12 the authority -- almost all of the authority that Mr. Epting
13 is going to refer to here relates to fact witnesses. It does
14 not relate to expert witnesses.

15 There are circumstances in which a lawyer becomes a fact
16 witness. Yeah, he can continue in the case if it's a -- if
17 it's an important matter and he needs to testify to it and
18 there's no harm and so on. But that's not what we have.
19 They decided to name him as an expert, to give opinions from
20 the witness stand.

21 Now, there -- so far as we have been able to discern,
22 there has been no such case. Certainly, we haven't been able
23 to find an appellate case and they've acknowledged they
24 haven't either where a lawyer was also permitted to -- the
25 lawyer for a party was also permitted to testify as an expert

1 in the case.

2 Now, the reasons for that are voluminous. There's all
3 kinds of reasons, but the -- the part of it that the
4 plaintiff wants to do, they want to have their cake and eat
5 it too. They want him to remain as counsel from here to
6 trial and at maybe some point during the trial, he's also an
7 advocate, but from now until then, which if he's going to be
8 an expert, we're entitled to discover that. We're entitled
9 to get all communication. All privileges are waived. We are
10 entitled to discovery and what's left out is if there's going
11 to be this co-counsel agreement between he and Mr. Ransom,
12 then it sounds to me as though his law firm still has a
13 financial stake in the case.

14 THE COURT: Yeah. I agree with that. What do you --
15 what do you think about your knowledge of the case? Of
16 course, I have only been involved in it tangentially with
17 regard to these procedural matters, but you are familiar with
18 the case and have been involved in it for a long time. I got
19 involved in it what? Months ago?

20 MR. POWELL: Yes, sir.

21 THE COURT: All right. Based on your knowledge of the
22 case and you've spent a lot of time with it, do you think --
23 do you personally think as a lawyer that an expert could come
24 in, take a look at all of the files, take a look at all of
25 the alleged damages, and -- and testify as an expert?

1 MR. POWELL: Your Honor, that happens in practically
2 every case I have.

3 THE COURT: Right. That's what I was thinking.

4 MR. POWELL: I mean I can't -- I can't represent to you
5 that -- that all of them have had that scenario, but
6 practically every one I've had in the last 40 years on the
7 professional level, when you're dealing with a professional,
8 an expert is expected and required.

9 So -- but I can represent never, ever have I seen an
10 advocate seeking to take the witness stand --

11 THE COURT: All right.

12 MR. POWELL: -- as an expert in the case.

13 THE COURT: Okay. Mr. Epting?

14 MS. WALL: Your Honor, might I be heard?

15 THE COURT: Not at this --

16 MS. WALL: Or is this not the place?

17 THE COURT: Not at this moment. It's Mr. Epting's turn.

18 MR. EPTING: Judge, there is a lot of Armageddon that is
19 thrown at you. I'm not saying I am an expert. I was asked
20 to list those people who may be experts and here's the
21 dilemma that I'm in, and I think you would agree that I did
22 the right thing.

23 What I learned, I learned in this case, and I would like
24 to put on the record what I think my testimony would concern.
25 I don't think I would be an expert. I think I would be a

1 fact witness.

2 But what I know, Judge, is that every time you have a
3 fact witness who has some professional degree, they are
4 challenged, and the argument is made that they're experts.
5 Well, so if I don't list myself as an expert, thinking that
6 I'm a fact witness, and you disagree with me at the time of
7 trial, then I'm excluded because I wasn't named as an expert.

8 What I did, Judge, was purely precautionary, just like
9 we all do. I won't use all the experts that I have likely
10 listed.

11 THE COURT: Right.

12 MR. EPTING: So -- but, Judge, here's -- if we could
13 just take a look, there is no rule, Judge, other than this
14 one rule to disqualify lawyers because they may be witnesses.
15 This is it. This isn't that there are 10,000 versions of
16 conflicts and a lawyer has a conflict and can't serve.

17 So the only rule that relates to lawyers and their role,
18 should they find themselves as witness, is this one rule, and
19 the rule, Judge, that is relied upon by the defendants is, in
20 fact, Rule 3.7, and it could not be clearer.

21 In paragraph 2, Judge, under advocate witness rule, the
22 reason that is offered is the proof that the only issue that
23 3.7 concerns is the confusion with the jury. There is no
24 jury until there's a trial. There is no disqualification of
25 a lawyer until the time of trial.

1 The fact that I may be and am following prudent practice
2 and am doing what I think this Court would want me to do,
3 announce that you may be a witness, I think -- Judge, suppose
4 I'm sitting here on the day of trial and I'm telling you all
5 these things. I think your reaction would be why didn't you
6 tell me this sooner.

7 The rule could not be clearer, Judge. The only rule,
8 the rule relied upon by them, clearly says my firm can serve,
9 even at the trial. There's no ambiguity here.

10 What's more, Judge, here is an ethics advisory opinion.

11 MR. POWELL: Could I have a copy of that?

12 MR. EPTING: Yes, you may. I've got one for you.

13 And, Judge, if you will turn -- the fact situation is
14 right interesting, but if you turn to page 3, it says, while
15 disqualified as counsel at trial, however, the lawyer may
16 continue to assist in the representation to a limited extent,
17 including participation in pretrial proceedings, so long as
18 the matter in which the lawyer is to testify is not at issue
19 in the proceeding.

20 And here, Judge, is where I think my role, your role,
21 and where we find ourselves -- this is the discussion that I
22 was hoping to have when we were here first.

23 THE COURT: Okay. Yes, sir.

24 MR. EPTING: I agree they're entitled to take my
25 deposition. I think everybody in this room and Susan on that

1 call wants this case to get over. We have two or three
2 damage people that would have to testify, would have to be
3 discovered by way of deposition. If I am potentially going
4 to testify, they'll want to take my deposition, although my
5 testimony, Judge, would have nothing to do with the
6 underlying malpractice case that has been discovered.

7 And what I thought the logical thing to do was to get
8 Mr. Ransom in, recognize that at some point in time, whenever
9 this Court thought it was appropriate, let me try to get as
10 much done as I can because I know the continuity. Let me get
11 the lawyer, who may have to try the case, prepared. And try
12 to honor all the scheduling order dates and, at some point in
13 time, I would simply drop out because I know I can't testify
14 as a witness. In doing that, Judge, if it turns out in the
15 next several months that I would not be testifying, it would
16 be moot because I wouldn't be a witness.

17 And so what we have -- and I think this puts it in its
18 most stark complexion. There's nothing in 3.7, Judge, that
19 even talks about disqualification. It's only about what can
20 and cannot happen at trial, and we're not there. And what is
21 premature here is that they're trying to disqualify me and
22 take away from my client the counsel that he's had for eight
23 years.

24 THE COURT: I don't think they're necessarily trying to
25 disqualify you. They want you to either be a lawyer -- and

1 they -- there's certainly no objection and I can't disqualify
2 you if you're not a witness.

3 MR. EPTING: And, Judge, maybe I should ask you this
4 question. That I may be a witness? I would ask that you not
5 disqualify me on the basis that I may be a witness. That's
6 what I don't want to have happen is I put the scales together
7 of the sanctity of the lawyer/client relationship and me
8 serving in it, and you postponing to a later date whether or
9 not you may have to ask me to disqualify myself because I
10 tell you I have to be a witness -- and you won't have to ask,
11 Judge. I will do it on my own.

12 It seems to me that my continuing on in the capacity I
13 am in, I am absolutely, Judge, allowed to do it under the
14 rule that they rely on. I'll give you a question that I had
15 in my mind, Judge.

16 If you disqualified me now and, let's say, I'm right,
17 that it is an immediate appeal, does it mean that I can't
18 even appeal my client's case? Even though the time for the
19 making of your decision would be at the time or sometime
20 closer to trial when it was clear that I was going to be a
21 witness? Because I think, Judge, if you're going to rule
22 against me, I really ought to be allowed to write this
23 appeal. And it seems like to me that that puts into
24 perspective why it is that this is not a decision that is to
25 be made today.

1 THE COURT: Well, two things I have to say about that
2 is, number one, I think it's interlocutory. And secondly,
3 that decision would be made by a higher pay grade than I,
4 whether you can or you can't.

5 MS. WALL: Right.

6 MR. EPTING: Well -- and the problem though, Judge, is
7 -- and I think that in so many ways is my point. The -- I'm
8 put in a position of -- am I doing the right thing? Am I
9 going to be disciplined because I am continuing to represent
10 a client when I don't know the answer, or do I step aside?

11 THE COURT: I'm certainly not in the position to advise
12 you in that regard.

13 MR. EPTING: No, but you're in a position, Judge, to
14 recognize or to accept that there may be some truth in what
15 I'm saying, and my little story was simply meant to try to
16 paint it in a very graphic way where you could understand it.

17 If you disqualified me, Judge, now, does it mean that I
18 can't cooperate with my client in helping them get ready for
19 trial? The ethical rule clearly says that I can.

20 THE COURT: All right. Anything further?

21 MR. EPTING: Judge, just this. There is a way for
22 reasonable people to accommodate every objective in this
23 case. We can get the rest of the discovery done. They can
24 take my deposition. I can step down, if I have to, at an
25 appropriate time and the case can be tried, all in

1 conformance with Rule 3.7.

2 THE COURT: All right. Ms. Wall, what do you have to
3 say?

4 MS. WALL: Thank you. Thank you, Your Honor. I want to
5 respond to each one of these points that Mr. Epting has made
6 because they are not correct.

7 Let me start with number one, which is he just stated on
8 the record that, under your scheduling order, he merely had
9 to tell or he was required by the Court to name the people
10 who he -- who may be experts. That is not correct. I am
11 looking at your scheduling order, Your Honor. Number one
12 states as follows, and I quote.

13 Plaintiff shall name all experts it intends to use as
14 witnesses at trial.

15 There's nothing about who may be an expert, may not, and
16 we're just going to wait and see. The whole point of the
17 scheduling order, as in any scheduling order, it allows the
18 Court to have control over the case so that at the time of
19 trial, which is also contemplated by Your Honor's scheduling
20 order, all of the parties are treated equally and fairly and
21 come before the Court and the trier of fact and present their
22 case.

23 What Mr. Epting is asking this Court to do is allow him
24 something no party could be allowed to have. We would have
25 nothing but chaos in our courts.

1 When he is ready to let us know and maybe the Court --
2 who knows? The Court? The parties? -- an appropriate time.
3 He keeps using the term appropriate time. If he thinks it's
4 an appropriate time, then he may step down. He may tell Your
5 Honor, well, gee, maybe I will be an expert witness and,
6 therefore, I'll step down and let my co-counsel take over,
7 but, of course, in the meantime, I -- even though I'm going
8 to be an expert witness, I am going to continue to bring my
9 client along. I will help my co-counsel and I will prepare
10 this case for trial, the outcome of which will benefit me as
11 the expert witness and my client, who I continue to
12 represent, in preparing this case for trial.

13 A third point, Your Honor, and that is Mr. Epting stated
14 not once, but several times to Your Honor that the
15 defendants, in filing their motion, were relying on only Rule
16 3.7. As our moving papers will evidence, that is not correct
17 and, in fact, on the record when we were before Your Honor on
18 the -- I believe it was October the 13th and we have the
19 transcript of the record.

20 We made it very clear to the Court because this is the
21 truth of the matter. Rule 3.7 refers to a lawyer as a
22 witness and, in the first line, it says a lawyer shall not
23 act as advocate at trial in which the lawyer is likely to be
24 a necessary witness.

25 In our moving papers, we made the -- and orally, we made

1 the distinction. In fact, Rule 3.7 is referencing fact
2 witnesses. If you read the rule throughout and the comments,
3 it is absolutely clear that that is what is being referenced.
4 It is not referencing an expert witness.

5 The -- the -- if you look at AM JUR, if you look at
6 commentary made by --

7 THE COURT: You maintain that --

8 MS. WALL: -- the ADA --

9 THE COURT: You maintain that a fact witness is -- Rule
10 3.7, the general rule is that you can't act as an advocate in
11 the trial if you're likely to be a necessary witness. You're
12 saying that a necessary witness would be precluded, and there
13 are some exceptions for uncontested matters and --

14 MS. WALL: And then there are some exceptions.

15 THE COURT: -- various exceptions.

16 MS. WALL: That's correct, Your Honor.

17 THE COURT: But the general rule is you can't do it, and
18 you say that if it's a necessary fact witness, you can't do
19 it, but under any circumstances you couldn't be an expert
20 witness.

21 MS. WALL: That's correct, Your Honor.

22 THE COURT: And the rule doesn't even -- the rule
23 doesn't even contemplate an expert witness, does it?

24 MS. WALL: I just want to stay for the record that the
25 definition under Rule 3.7 of a necessary witness is -- and I

1 quote -- no other evidence is available to prove the fact,
2 end quote, except this person.

3 So I don't know if Mr. Epting is telling us today that
4 there is no other evidence but him to prove facts because
5 he's still trying to argue, well, gee, I don't know if I'm a
6 fact witness or an expert witness. I named myself as an
7 expert because I happen to be a lawyer.

8 Wait a minute. In order to be qualified by a Court as
9 an expert opinion -- as an expert to give your opinion, you
10 have to be presented to the Court as an expert. Is he now
11 saying that's not how he's going to be presented?

12 And that illustrates exactly the problem that we have
13 here. As Mr. Powell said, he wants his cake and eat it too.
14 He's going to make that decision I guess the day before
15 trial, in the middle of trial. This is so prejudicial to the
16 defendants.

17 I've never -- I'm with Mr. Powell. Almost 40 years in
18 practice, I have never in my life heard and seen an advocate
19 attorney list himself as an expert and then, with a straight
20 face, argue to the Court that he'll make the decision at an
21 appropriate time, when it's appropriate to him, as to
22 whether, in fact, that's what he's going to do or not and, in
23 the meantime, he's going to continue to be an advocate.

24 The -- the fourth thing that he said that is absolutely
25 not correct is that he and his client get to decide if he is

1 or is not an expert when and where that is appropriate, and
2 only then might he be disqualified and that the rule -- he
3 was looking at Rule 3.7. That disqualification can only
4 happen at the time of trial.

5 That is not correct. We have case law that we handed up
6 to the Court decided in our briefs. Disqualification comes
7 under exactly these circumstances that we have here before
8 you, Your Honor, where an advocate tries to say, oh, I'm
9 going to take on all these roles in front of the jury. And
10 the party that is going to be so highly prejudiced, here the
11 defendants, files a motion, which is exactly what we did. We
12 had no choice but to file this motion because Mr. Epting
13 cannot serve as an expert witness. He has a financial
14 interest in the outcome of this case.

15 And I want to quote Your Honor from an ABA -- an AM JUR,
16 Section 255, it says -- it talks about an expert and an
17 advocate attorney and how anathema these two rules -- these
18 two roles are to each other. One is --

19 THE COURT: Anathema? Anathema? Does that mean
20 diametrically opposed? Something like that?

21 MS. WALL: I'm sorry?

22 THE COURT: Anathema? Does that mean diametrically
23 opposed maybe?

24 MS. WALL: Yes. Yes, Your Honor.

25 THE COURT: Opposite?

1 MS. WALL: That's exactly right. They are wholly
2 inconsistent.

3 THE COURT: All right.

4 MS. WALL: As the --

5 THE COURT: Now, we're talking. Now, I understand that.

6 MS. WALL: Okay. They're wholly inconsistent because
7 what happens here in this kind of a situation is this -- and
8 this is actually a quote.

9 The advocate who then sets himself up and gets in front
10 of the trier of fact as an expert -- there is -- the witness
11 is placed in a position where it --

12 THE COURT: I don't -- Ms. Wall?

13 MS. WALL: -- is necessary --

14 THE COURT: Ms. Wall?

15 MS. WALL: -- to lie --

16 THE COURT: Ms. Wall, one of the things --

17 MS. WALL: Yes?

18 THE COURT: -- I think that -- I think Mr. Epting is
19 saying is I think -- I disagree with your position on this
20 because Mr. Epting is saying now that he would never testify
21 as an expert witness or perhaps even as a necessary witness
22 and be an advocate. That, at some point in time, he would
23 disqualify himself. The question is the timing of it.

24 MS. WALL: Well, Your Honor -- and I'll speak to the
25 timing, but let me just make this comment. An expert witness

1 cannot -- cannot have an economic interest in the outcome of
2 the case.

3 THE COURT: I think that's what I was saying is that, in
4 the event he's a witness, he's not going to be a lawyer. He
5 just wants to put it off.

6 MS. WALL: But, Your Honor, by putting it off, in the
7 mean -- he will still -- let me -- let me go at it this way.

8 THE COURT: Okay.

9 MS. WALL: Let's say a month from now -- because he
10 wants to put this off until it suits him and, in the
11 meantime, I don't know what we're supposed to be doing, but
12 let's just assume he decides a month from now, okay, fine. I
13 decided I'm now going to be an expert witness even though
14 I've already told the Court two weeks ago I'm going to be an
15 expert witness, but I didn't -- kind of didn't really mean it
16 and so now I'm going to do it. And so now I'm going to be an
17 expert and you guys come ahead and take my deposition.

18 But wait a minute. He can't be an expert because he
19 still has an interest in the outcome of this case because he
20 and his law firm have the agreement with a client to be paid
21 on a contingency. If he doesn't win this case, whether he's
22 the one who is the advocate or his now new co-counsel, he
23 still has that economic interest in the outcome and,
24 therefore, he cannot serve as an expert witness.

25 THE COURT: I kind of -- I kind of agree with your

1 general proposition, but I imagine what Mr. Epting would say
2 is that all of those issues would be a question of fact for
3 the jury as far as interest or bias, but that if he's a
4 witness, he's not going to be taking a contingency fee in the
5 result of it. But I understand what you're saying and we're
6 just arguing around in circles. I agree with -- I disagree
7 --

8 MS. WALL: I'm sorry, Your Honor?

9 THE COURT: I disagree with that to some extent because
10 he would never testify as a witness and be a lawyer and have
11 a contingency interest in it. I would hope that he wouldn't.

12 MS. WALL: But, Your Honor, he has a contingency. He
13 has now had a contingency interest for seven years.

14 THE COURT: Yeah. And I think that --

15 MS. WALL: He has --

16 THE COURT: I think that potentially -- I think that
17 that will indeed be a question of fact with regard to his
18 credibility at trial, the fact that he was their lawyer and
19 the fact that at one time he had a contingency interest in
20 it, but no longer does. All that is going to be a question
21 of fact for the jury.

22 But if he testifies, I anticipate -- I haven't asked him
23 this, but I would anticipate and would believe that he would
24 not take a contingency fee after declaring himself a witness.
25 But -- but I think I'm --

1 MR. EPTING: Judge, I would just like to say one -- just
2 one quick thing --

3 THE COURT: Right.

4 MR. EPTING: -- truly. When I said an appropriate time,
5 I don't think normally I would have difficulty working out an
6 appropriate time with my co-counsel. It's not to happen in
7 this case. When I said an appropriate time, I meant at the
8 time that you thought would serve getting this case moving,
9 give them plenty of time to take my deposition, and still
10 keep this case moving going forward. I was not suggesting
11 that I would be in control of that decision at all.

12 THE COURT: When do you suggest that you get out?

13 MR. EPTING: I'd answer the question this way, Judge.
14 Not in terms of time, but, for example, Warren and Susan need
15 to take two damage experts' depositions. I know more about
16 those people than anybody else and what they've relied on and
17 their records and what their theories are, and I think a
18 logical time would be when their discovery is finished
19 because I think by and large at that time most of the
20 discovery that Warren and Susan want to do would have been
21 done.

22 THE COURT: Okay. What do you have to say about that,
23 Mr. Powell?

24 MR. POWELL: Your Honor, the first thing I say about
25 that is that if -- if the lawyer -- if the advocate is able

1 to do what Mr. Epting suggests, it throws the Court's
2 scheduling order on a trash dump, and that's what -- look, we
3 -- it's -- tomorrow -- excuse me. Today was one month ago
4 they named -- we've spent a month talking about this.

5 THE COURT: Right.

6 MR. POWELL: And to allow them the -- they're the ones
7 that decided that this gentleman was going to be the expert.
8 And it's -- if they --

9 THE COURT: All right. So you disagree. You say that
10 it ought to be today or, if it's going to be done, it needs
11 to be done today.

12 MR. POWELL: It needs to be done as soon as possible
13 because -- because, again, this case has got to get going.

14 THE COURT: Right.

15 MR. POWELL: And if he's -- if there's any question --
16 and now they've told -- we have to believe he's going to be
17 an expert because they told us that.

18 THE COURT: Right.

19 MR. POWELL: On October the 2nd.

20 THE COURT: Okay. All right. Well, this is -- this is
21 going to be --

22 MS. WALL: And I agree, Your Honor.

23 THE COURT: All right. This is --

24 MS. WALL: I think it has to be today.

25 THE COURT: All right. This is going to be my ruling.

1 And I very well might be wrong, Mr. Epting. You're an
2 awfully fine lawyer and have a good understanding of the law
3 and I might be proven wrong, but I think that, under these
4 circumstances, you cannot serve -- continue to serve as a
5 lawyer and be a potential expert witness.

6 And I stand to be corrected and I invite you to do
7 whatever needs to be done in that regard. I personally
8 believe that it's an interlocutory issue, but we do have Mr.
9 Ransom, who has been -- has a notice of appearance. As it
10 stands now, Mr. Ransom is the attorney of record and, if he
11 intends on getting out of the case, he needs to move before
12 the Court.

13 MR. EPTING: Judge, I accept your ruling. Just for your
14 edification, you are -- have been very measured throughout
15 this whole thing. I think you've really struggled with
16 trying to get to where you've gotten. I got it. This is a
17 case that says it is an immediate appeal.

18 THE COURT: Right.

19 MR. EPTING: And so we'll notice an immediate appeal. I
20 suppose the smart thing for me to do, at least since I'm --
21 am I disqualified, Judge, as of this moment?

22 THE COURT: I think I'm going to allow you to -- you
23 move forward as the spirit moves you and -- and you can move
24 however you want to move.

25 MR. EPTING: In terms of?

1 THE COURT: Motion -- motion for reconsideration? Is
2 that what you're asking?

3 MR. EPTING: Judge, I find that you've deliberated over
4 this and, no, I was going to go straight to a notice of
5 appeal, but where I was headed with it is, if I'm
6 disqualified as of today's date, I don't even think I can
7 file the notice of appeal.

8 THE COURT: Well --

9 MR. EPTING: And --

10 THE COURT: If you believe that, I agree with you.

11 MR. EPTING: Well, I'm concerned about it, Judge.

12 THE COURT: Well, I am too.

13 MR. EPTING: And it chills my client's going forward.

14 THE COURT: All right.

15 MR. EPTING: What about this, Judge? Would you be
16 amenable that if there is an appeal in this case, Mr. Epting,
17 you can continue and -- but if the appeal at any time is
18 discontinued and this case is back here in front of me, then
19 you're going to be disqualified? And that way --

20 THE COURT: Yeah. What do you --

21 MS. WALL: Your Honor, may I to speak to that?

22 THE COURT: Just a minute, Ms. Wall.

23 MS. WALL: Okay.

24 THE COURT: Mr. Powell?

25 MR. POWELL: Your Honor, I believe that Mr. Epting does

1 not -- well, the plaintiff does not have that issue because,
2 as Your Honor recites, there is another attorney of record at
3 this time --

4 THE COURT: Right.

5 MR. POWELL: -- that can file an appeal. They can do
6 the briefs.

7 THE COURT: Right.

8 MR. POWELL: If Mr. Epting believes -- if he honestly
9 believes that he's ethically prevented from doing so, then --
10 that that's a decision for him to make.

11 THE COURT: Right.

12 MR. POWELL: But there is -- in terms of the plaintiff
13 --

14 THE COURT: I think he's probably appealing my ruling
15 that says he can't do it. He can't be a lawyer, and that's
16 an interesting novel question and I'm going to allow him to
17 proceed forward as he sees fit. And he can discuss it with
18 Mr. Ransom. He can discuss it with whoever he wants to, but
19 that's my ruling and y'all let the chips fall where they may.

20 As far as any motion for reconsideration, I don't
21 believe we need to have any more discussion about it. I
22 think we're clear. We've had one in-depth conversation on
23 the phone. It was a long, long conference on the phone. We
24 could not reach an agreement. I asked that we put it on the
25 record and then for various reasons, notice reasons, and you

1 indicated that you weren't in the position to agree and you
2 wanted to exercise the 10-day notice, it brings us here.

3 I do not believe that we can talk about this anymore and
4 bring any more light to the issues. So whoever does the
5 appeal, whether it be you, Mr. Ransom, or some appellate
6 guru, they can file the notice of intent to appeal. I do not
7 anticipate that we'll have to have another hearing to revisit
8 all these matters.

9 MR. EPTING: Judge, understood and accepted. One thing
10 I would like to do, just for purposes of the record, if you
11 would?

12 THE COURT: Sure.

13 MR. EPTING: I gave you some of these dates, Judge, when
14 we were here last time on October the 13th.

15 So the Supreme Court ruled in Austin in March of 2010.
16 The malpractice case that we're here today on was filed on
17 August 2010.

18 On 2012, there were hearings and proceedings in front of
19 Judge Hayes on the entitlement of Austin to fees under the
20 Dealers Act. I was involved in resisting him getting those
21 fees.

22 What he then did, Mr. Austin, is moved before the judge
23 sitting in Manning for appellate fees. We resisted that,
24 saying that the case was on appeal. The judge ruled he
25 couldn't hear it, the case was on appeal.

1 The Supreme Court sent it all back to the judge in
2 Manning and said you can hear it all. There was a question
3 of what was the interest rate and the interest calculation.

4 Every bit of this, Judge, happened from 2012 to 2014. I
5 was handling all of that, trying to resist this judgment
6 becoming larger and larger.

7 And so, what my involvement is, that's my involvement,
8 to testify to those matters. I personally think those are
9 factual matters. I listed myself as an expert because I can
10 see somebody saying, no, it's as an expert. But I wanted
11 just to put that on the record.

12 THE COURT: And you're -- you're protected on the record
13 in that regard.

14 MR. EPTING: Thank you. Thank you very much.

15 THE COURT: Very good.

16 MR. POWELL: Your Honor, if I might? I've provided --
17 this is actually from Mr. Epting some time ago and I meant to
18 have that marked as an exhibit.

19 MR. EPTING: It is.

20 MR. POWELL: This is your letter and the proposed order
21 delineating your contingency fee.

22 MR. EPTING: All right.

23 (WHEREUPON, the letter with proposed order was marked
24 and entered as Court's Exhibit Number 1.)

25 THE COURT: Mr. Powell?

1 MR. POWELL: Yes, sir.

2 THE COURT: I'm going to ask that you draft the order
3 and have a discussion in there of the issues that we've
4 discussed here today and Rule 3.7 that says a lawyer shall
5 not act as an advocate at a trial in which a lawyer is likely
6 to be a necessary witness and a discussion about the problems
7 with an individual acting as an advocate and an expert.

8 I'm not really sure that there is a whole lot of case on
9 that. I'm not sure there's ever been an attempt for that to
10 ever happen, nor has there ever been an appellate case
11 addressing that issue.

12 MR. POWELL: Not that we've discovered. Although --

13 THE COURT: I think we've talked about a lot of the
14 problems that it could present. I'm not real sure what the
15 law is. I don't think there is any law, but I know what the
16 law ought to be.

17 So -- but nonetheless, I'm going to ask that you discuss
18 that as well and a good firm discussion about -- about the
19 fact that based on what we know of this case and what's been
20 presented here that he would indeed be a necessary witness
21 and that the exceptions set forth in 3.7(a)(1), (2), and (3),
22 and Subparagraph B do not apply.

23 MR. EPTING: And, Judge, would you also -- since we're
24 going to be there, I think you were also inclined to rule
25 that my entire firm is disqualified as well?

1 THE COURT: That is 100 percent correct.

2 MR. EPTING: Okay.

3 THE COURT: And I think that under these circumstances,
4 if the rules don't provide for it, the inherent powers of the
5 Court seem to indicate that y'all would not be able to do
6 that.

7 MR. EPTING: All right.

8 THE COURT: All right. Judge, one piece just to clear
9 up the record. The case, the malpractice case, is a
10 contingency. The work that I just described that I was doing
11 for which I sent you the redacted bills --

12 THE COURT: Right.

13 MR. EPTING: -- or the completed bills and the redacted
14 bills, that work was done by the hour.

15 THE COURT: Very good.

16 MR. EPTING: All right, sir.

17 THE COURT: Very good. Thank you.

18 MR. EPTING: Thank you, Judge.

19 THE COURT: All right.

20 MS. WALL: Your Honor, may I ask kind of a cleanup
21 question, not having anything to do right there with your
22 ruling, but under your current scheduling order, the
23 defendants are to name all experts they intend to use as
24 witnesses at trial on November the 13th. So it's about a week
25 and a half from now.

1 May we ask the Court to allow us 10 days after -- to do
2 that 10 days after the date -- the deadline for filing a
3 notice of appeal?

4 If Mr. Epting does not file a notice of appeal, then, of
5 course, we'll go ahead and continue to follow your scheduling
6 order. But since he has 30 days, the 30-day deadline would
7 come after. Under the current scheduling order, we were to
8 name how were --

9 THE COURT: I think that makes sense. Do you have any
10 problem with that?

11 MR. EPTING: I don't, Judge, and if Warren will get the
12 order to you and we get it signed, I'll appeal it before that
13 date and it won't make a difference.

14 THE COURT: Okay. I don't see that -- I think that
15 won't be a problem.

16 MR. EPTING: Yes, sir.

17 THE COURT: We will put that language in there in case
18 you have an epiphany about the law or your opinion about the
19 case.

20 MR. EPTING: Judge, I probably used this before you.
21 You know, Scoop Jackson was from the state of Washington,
22 which meant he always spoke last. At about 3:00 one morning,
23 he's standing on the Senate floor and he gets up to begin his
24 remarks and he says everything that can be said on this
25 subject has been said, but not by me.

1 I feel like I've also said everything that I can say on
2 the subject; so I have nothing more to add.

3 THE COURT: All right. Very good.

4 MR. EPTING: Thank you, Judge.

5 THE COURT: All right. We'll -- we'll stand adjourned
6 and thank you all.

7 MR. EPTING: Thank you, sir.

8 MR. POWELL: Thank you, Your Honor.

9 MS. WALL: Thank you, Your Honor.

10 THE COURT: Yes. And I -- what are we going to do with
11 this exhibit? This is not a --

12 MR. POWELL: I just want it marked.

13 THE COURT: Marked and --

14 THE COURT REPORTER: But it's another county.

15 THE COURT: Can you forward that to Clarendon County?

16 MR. POWELL: Yeah. I'll do that.

17 THE COURT: I'm going to ask that you put that in the
18 record that the -- the article of evidence is going to be
19 filed with the -- with the Clerk of Court's file and it will
20 be there.

21 MR. POWELL: In Clarendon?

22 THE COURT: Yes.

23 MR. EPTING: Judge, let me ask this question. We send
24 things to you in chambers. I'm a little -- and I don't know
25 that we disagree about what has all been sent to you, but

1 what arrangements of what comes to you in chambers are
2 finding its way over into the --

3 THE COURT: That's a very good question, but if -- if --
4 I would anticipate, if the matter goes up on appeal, that you
5 might need to have a motion to settle the record.

6 MR. EPTING: All right.

7 THE COURT: I think y'all could probably agree on what
8 -- what should be in the record, all the memorandums and a
9 few other things.

10 MR. EPTING: All right, sir.

11 THE COURT: I think y'all ought to be able to agree on
12 that.

13 MR. EPTING: All right. Thank you, Judge.

14 THE COURT: All right. Very good. All right. Thank
15 you.

16 MS. WALL: Thank you, Your Honor.

17 (WHEREUPON, the proceedings ended at 12:22 p.m.)
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24
25

1 State of South Carolina)
2) Certificate
3 County of Florence)
4
5 I, the undersigned, Krystal J. Smith, Notary Public and
6 Official Court Reporter for the Twelfth Judicial Circuit of
7 the State of South Carolina, do hereby certify that the
8 foregoing pages, numbered 1 through 46, constitute a true,
9 accurate, and complete Transcript of Record of all the
10 proceedings had and evidence introduced in the hearing of the
11 above captioned case, relative to appeal, in the Court of
12 Common Pleas for Clarendon County, South Carolina, held in
13 Florence, South Carolina on the 2nd day of November, 2017.
14 I do further certify that I am neither of kin, counsel,
15 nor interest to any party hereto.
16
17 Krystal J. Smith
18 Court Reporter
19 Florence, South Carolina
20 November 6, 2017
21
22
23
24
25

1 STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**
2 COUNTY OF FLORENCE) CASE NO:2010-CP-14-00457

3 -----

4 **B E F O R E:** The Honorable Michael Nettles
5 December 21, 2017

6 -----

7 STOKES-CRAVEN HOLDING CORPORATION, d/b/a STOKES-CRAVEN
8 FORD,

9 Plaintiff,

10 vs.

11 SCOTT L. ROBINSON and JOHNSON MCKENZIE and ROBINSON,
12 LLC,

13 Defendants.

14 -----

15 **APPEARANCES:**

16 Jaan Rannick, Esq.
17 Robert Ransom, Esq.
18 For the Plaintiff.

19 Warren Powell, Esq.
20 For the Defendants.

21
22 Court Reporter:

23 Natalie Dahl, RPR

24
25

P-R-O-C-E-E-D-I-N-G-S

THE COURT: Good morning. Okay.

MR. RANNIK: Judge, thank you for allowing this hearing so promptly. I won't reargue things that we've covered, and I'll do my very best not to cover any territory we've been over.

As Your Honor is aware, we're debating whether or not we need to appeal Your Honor's order. Partially, that is going to depend on the outcome of this hearing, so that's why we filed our motion, just to get a little bit of clarity.

THE COURT: Okay. Your name?

MS. JOHNSON: Jaan Rannik, and this is Rob Ransom.

THE COURT: Good to see you.

MR. RANNIK: Judge, as an initial matter, we are seeking clarity on the record that Mr. Epting and his firm have been disqualified and are not voluntarily withdrawing.

THE COURT: Let me stop you one minute. Were you at the hearing, the last hearing?

MR. RANNIK: I was, Your Honor.

THE COURT: And I was just wanting to ask that, but, you know, you had indicated that I disqualified him, and I think what you are trying to do is to

1 distinguish "disqualification" and "withdrawal"; so
2 that what you're --

3 MR. RANNIK: I'm seeking clarification on that,
4 yes.

5 THE COURT: Okay. Well, I think the order -- if
6 there is ever an order that says exactly what my
7 ruling was, it is this order. It is very well
8 articulated, says exactly what needs to be said, and I
9 think that the gravamen of the order is this: that I
10 did not disqualify Mr. Epting from representing the
11 plaintiff, he disqualified himself by letting him
12 serve as an expert witness. I think the order is very
13 clear. I think the record is clear on that. So with
14 regard to whether I disqualified him, I did not. I
15 think he withdrew by virtue of the fact that he
16 elected to be an expert witness.

17 MR. RANNIK: Well, Judge, now, I must break my
18 promise not to go into territory that's been covered,
19 but our position is that under Rule 3.717, Mr. Epting
20 would not be both a witness and an advocate at trial.
21 He is not required to withdraw before the date of
22 trial, he's allowed to stay in the case and help
23 prepare the case, and that is what the South Carolina
24 Bar Ethics Advisory Committee has also said.

25 THE COURT: Well, I see it a little differently

1 than you, and my position is set out in the order.
2 You have read the order, haven't you?

3 MR. RANNIK: I have, yes, Your Honor.

4 THE COURT: And although you disagree with me,
5 you understand my reasoning for my position on it,
6 couldn't you?

7 MR. RANNIK: I understand how the order is
8 graced, yes, Your Honor. Again, the motion -- and,
9 again, this may all be entirely academic. The Hagood
10 (phonetic) People vs. Summerville case was a court
11 ordered withdraw and the supreme court treated it as a
12 disqualification, so it may be exactly the same thing,
13 but, again, if we can gain clarity in the record.

14 THE COURT: You know, one of the few quotes I
15 remember Shakespeare, which was not my favorite
16 subject in college, but was a rose by any other name
17 would smell as sweet -- that which we call a rose by
18 any other name would smell as sweet. I don't think it
19 really makes a difference whether it is
20 disqualification or withdrawal. The fact of the
21 matter is that he cannot be a witness and an advocate
22 at the same time. I'm firm on that. There will have
23 to be someone from Columbia that tells me I'm wrong on
24 that. I feel as convinced of that position as there
25 could be. The circumstances that brought me to that

1 conclusion are clear. Whether it is a withdrawal or
2 disqualification, I think that makes no difference,
3 but I might be wrong. I bet you that you know how to
4 go down I-20, submit the matter to the appellant
5 entities, and they tell me I'm wrong, I'll abide by
6 it.

7 MR. RANNIK: Thank you, Judge. The other issue
8 we wanted to discuss today is what, if any, role Mr.
9 Epting and his firm are allowed in assisting new
10 counsel, Mr. Ransom, in getting up to the speed and
11 transitioning the case to him. This is a complexed
12 case. It was designated complexed by the
13 administrative judge. It's been going on for seven
14 years. There is an awful lot for a new counsel to get
15 up to speed on. Mr. Epting has a large amount of
16 historical knowledge. He has been in this case from
17 the beginning. He was involved in the underlying
18 case, which makes up part of the damages in this case.
19 Now, the defendants have argued that privilege is
20 going to be waived, all privilege for the entire case.
21 Anything Mr. Epting says or does going forward is --
22 the privilege is waived. If that is the case,
23 Mr. Epting and the firm are not going to be in any
24 position to assist new counsel. I raise this because
25 a prime consideration of Rule 3.7 is the prejudice to

1 the client, whether the disqualification or withdrawal
2 would create a substantial hardship to the client, and
3 if it does, then Rule 3.7 allows the counsel to be
4 both an advocate and witness at trial, if it is going
5 to be a substantial hardship.

6 So we would appreciate discussing this on the
7 front end. I realize there is no motion before Your
8 Honor for a protective order or anything like that,
9 but what is going to happen in the near future is if
10 Mr. Epting's deposition is taken, it is highly
11 possible that questions will be asked and he will be
12 instructed not to answer on the basis of privilege,
13 and we'll be in front of you arguing it, and that
14 could be another couple of months delay. The one
15 thing we all agree upon in this room is we want the
16 case to go forward. We want this case over and out of
17 our lives. I know our client feels very strongly that
18 way.

19 So to the extent that we can have a discussion
20 and gain clarity on what our role can be going forward
21 to assist counsel to get up to speed.

22 THE COURT: I'll hear what Mr. Powell has to say
23 about that.

24 MR. POWELL: Thank you, Your Honor. I will do my
25 best to --

1 THE COURT: My initial impression is it is
2 premature to say all of those things, and I'm not
3 really in a position to give an advisory opinion. It
4 is hard to rule on that in a vacuum, but Mr. Powell
5 has been doing this awhile, let's hear what he says
6 about it.

7 MR. POWELL: Your Honor, I think that is right.
8 I think what the plaintiff is asking the Court for is
9 an advisory opinion. Those issues are not before the
10 Court, but I would like to at least enter the
11 following on the record, if it has any influence
12 later. The plaintiff had 100 percent control over
13 preventing the events that are now before the Court.
14 It was completely under its control. Stokes-Craven --
15 first, Stokes-Craven Holding Corporation could have,
16 but for reasons of its own, decided not to engage
17 separate counsel to handle the appeals that Mr. Epting
18 stepped in to handle, which followed the supreme
19 court's affirming the fraud and -- with forgery in
20 it -- fraud claim of judgment that resulted from
21 Austin v. Stokes-Craven Holding that Mr. Epting
22 stepped in and did that and held that authority. Up
23 to that time, he was the malpractice lawyer suing
24 Scott, making claims against Scott Robinson and his
25 small three-person law firm over in Manning.

1 So for reasons of the plaintiff's own choosing,
2 they chose to have Mr. Epting do this. It is
3 significant because in this case, prior to that time,
4 Young Clement and Rivers handled the appeal to the
5 supreme court. So they had been involved extensively
6 and knew more about it than Mr. Epting did,
7 practically. So -- and I think that he would admit
8 that, at least at that time. They had all of the
9 information, but, no, they changed lawyers.
10 Mr. Epting stepped in and handled all of these things.

11 Now, the fact of the matter is -- and I believe
12 that Drew may have offered this -- that may have been
13 an economic decision on their part to have Mr. Epting
14 do that. Well, that's fine. That is something they
15 can do. But had they chose to retain the same lawyers
16 or to obtain separate counsel and handle those
17 appeals, apart from this case, then they would not be
18 in this situation. The plaintiff would have an
19 independent fact and expert witness to come in and
20 testify about these things, leaving Mr. Epting and his
21 firm free as an advocate not having to even address
22 the issue of a dual. They chose that path, no one
23 else.

24 Second, Stokes-Craven Holding could have, but for
25 reasons of its own, decided not to engage an

1 independent expert in this case, which, again,
2 eliminating -- if they had done that, it would have
3 eliminated any desire or notion from Mr. Epting and
4 his law firm from wearing two hats. Again, reasons of
5 their own. I think Drew did say that that was an
6 economic decision.

7 Now, Mr. Epting says that the plaintiff needs to
8 assume a dual role because, first, he participated in
9 the appeals personally, knows the details better than
10 anyone else, an independent expert in this case, just
11 as in almost every case, could read the appellant
12 opinions. The overriding issue here is that there is
13 nothing that Drew knows or has come in contact with
14 that experts in practically every one of these cases
15 that I have don't confront. They can read the
16 motions. They can read the correspondence between the
17 parties. They can read the documents. They can read
18 the transcript, all of that, and go on and do what
19 they want to do. But, no, they wanted to try this
20 case on a bargain-basement budget, not going forward.
21 I understand that is expensive, and I assure you,
22 everyone here, this case has been expensive for my
23 client too, not just in attorney's fees, but time
24 devoted and all of the rest of it.

25 The hearing before the Court on October 13, Your

1 Honor may recall, this Court, in the most judicious
2 terms I could possibly conjure, explained to
3 plaintiff's counsel that he should not go forward
4 assuming the roles as both advocate and expert witness
5 in this case. He could choose one or the other, but
6 could not do both. The term was it was time for them
7 to fish or cut bait to move the case forward.

8 Well, Mr. Epting chose -- requested the Court for
9 time to consult with his client, and then by high noon
10 on Monday, the following Monday, the 16th I believe,
11 he would let the Court know whether he would be an
12 advocate or expert witness, whether he would remain as
13 the expert witness in the case. There is no doubt
14 Mr. Epting is a seasoned lawyer, very fine lawyer, and
15 I have no doubt that during that interim period that
16 the Court allowed him, he consulted with his client,
17 explained to them the risks involved, look, if we go
18 down this road, there is issues about waivers, I may
19 have to step down, may not be able to continue as your
20 lawyer, there are risks in doing this. I have no
21 doubt that he explained -- probably in writing -- to
22 them that this is a decision that you have to make,
23 and here are the risks involved. Well, the plaintiff,
24 by virtue of Mr. Epting's letter of
25 October 16th informed the Court that the plaintiff

1 assumed, in essence, all of those risks. All of those
2 risks were accepted because the plaintiff said, no,
3 Mr. Epting is going to be a witness in the case.

4 Now, in light of that, the plaintiff before you
5 today is asking, at least on its submittals, and it
6 was submitted before coming in here, for guidance.
7 Allegedly they are asking for guidance as to what can
8 I do, what is the role that I can -- should take. And
9 Your Honor -- I believe it was on November 2nd --
10 very directly said, look, you need to move -- you need
11 to act as the spirit moves you. It is not the Court's
12 role -- very correctly -- it is not the Court's role
13 to advise you how to practice law or prepare your
14 case, that is not what we do.

15 The initial movement in this -- for this
16 rehearing is seeking that clarification and, in
17 essence, getting back to where we started, asking for
18 an advisory opinion. This is silly. Mr. Epting is
19 not just out of law school. He's been doing this a
20 long time. He is well aware under Appellant Court
21 Rule 241. He knows, and Mr. Ransom I'm sure knows,
22 about the rules concerning stay and supersedence in
23 appellant courts, that it is stayed -- whatever is in
24 the order is stayed on the Notice of Appeal. He can
25 do -- he continues, that is stayed until the appellant

1 courts speaks about it just as, Your Honor, said. He
2 doesn't have to come in here and ask this Court what
3 can I do.

4 THE COURT: I really don't think I have the
5 ability to make a ruling on whether or not he can file
6 an appeal. I don't think I can.

7 MR. POWELL: Absolutely. And under Rule 241, you
8 file a Notice of Appeal and that stays the order until
9 the appellant court rules on it.

10 THE COURT: Right.

11 MR. POWELL: So you don't get to -- I mean, this
12 is silly. I mean, to come in here and say, well, what
13 about privilege issues? Well, those issues, no doubt,
14 were discussed with the plaintiff when they sat down
15 with them over that weekend and they decided to go
16 forward. Those issues were not created by Your
17 Honor's order, they were created by the conduct and
18 the plaintiff's decision to use an advocate as an
19 expert witness in the case. That is all I have to say
20 about that.

21 THE COURT: Yes, sir.

22 MR. RANNIK: Just a few points. First, the
23 question is whether we are going to be filing an
24 appeal even. If there are things that the Court
25 feels --

1 THE COURT: Are you asking me whether you should?

2 MR. RANNIK: No. I'm saying we have not made a
3 decision. We're trying to figure out -- and this is
4 for Mr. Ransom to know how to advise the client,
5 whether it is beneficial, and what plays a part in
6 that decision, of course, is what our involvement is
7 permitted to be in terms of --

8 THE COURT: You know, let's talk about that
9 advisory thing. You know, particularly the older I
10 get, my children accuse me of giving advice when it is
11 not asked for. It appears as if you are asking for my
12 advice, but let me finish my thought. It appears as
13 if you are asking for my advice, and if you were doing
14 that, my advice would have been for him to be an
15 advocate in this case and not an expert. In every
16 case that is ever tried, there is a person who has
17 underlying facts, and you give it to an expert. Some
18 cynical people would say that the lawyer tells the
19 expert what to say and how to say it and back it up
20 with facts, but the bottom line is there is nothing in
21 this case that is so magical that an expert appellant
22 lawyer, or some other lawyer, could have not taken
23 what has transpired in this case and been able to put
24 that before a jury and render his opinion in that
25 regard.

1 So if you are asking for my advice, my advice
2 would have been that would have been the better course
3 of action, but I think asking my advice is
4 inappropriate, but you asked me to do that. You're
5 also asking me whether or not -- whether or not
6 Mr. Epting should file the appeal. I don't think that
7 I have the ability to do that.

8 MR. RANNIK: To be fair, we're not asking what we
9 should do or could do, we are asking are there things
10 that the Court's order is saying we are not allowed
11 to, so we want it clear on the record.

12 THE COURT: When you appeal it, I don't have any
13 say over it. I imagine that the supreme court or the
14 court of appeals will address the issue as to whether
15 or not it is appropriate to declare himself as an
16 expert witness, and then pursue an appeal. If you ask
17 me what I would do if I was Mr. Epting or you, is I
18 would not do it. But I'm not saying that is right.
19 If compelled by the supreme court, if they remand and
20 say that is your call, my call would be that I can't
21 do it, but I don't think that I have the ability to do
22 that until they tell me otherwise.

23 He asked me -- he asked me in the hearing, Can I
24 do the appeal. I declined to rule because I didn't
25 think it was appropriate for me to do it. He sent me

1 a letter pursuant to this order asking me, once again,
2 to clarify it. Again, I decline to do so, and once
3 again, I declined to do so here today. I might be
4 wrong. You all are seasoned in this area. It very
5 well could be that I'm wrong, but that is my decision.
6 They don't pay me to be right, they pay me to make a
7 decision, and I made one.

8 MR. RANNIK: We respect that, Your Honor. Thank
9 you.

10 MR. POWELL: I forgot, I meant to do this at the
11 opening, and I apologize. Ms. Wall is not here.

12 THE COURT: Right.

13 MR. POWELL: I received an E-mail or text that
14 her mother passed away.

15 THE COURT: Oh, I'm sorry, so sorry to hear that.

16 MR. POWELL: And she advised me to go forward and
17 speak for her. She didn't want Your Honor to think
18 that she just blew this off or doing something else,
19 she just really can't be here today.

20 THE COURT: Right. She is very enthusiastic
21 about this and I knew either you reached an agreement
22 or something prohibited her from being here. I would
23 have thought she would have been here had that not
24 taken place.

25 MR. POWELL: I will say that this event will

1 likely truncate these proceedings.

2 THE COURT: Okay. All right. Mr. Ransom, you
3 have been sitting over there, I would like to hear
4 anything you have to say.

5 MR. SEGO: Thank you, Your Honor. The only thing
6 that I would like to offer, and perhaps just as a
7 point of clarification, I understand the Court's view
8 in terms of Mr. Epting deciding that he could not be a
9 witness. It reminds me of the old story about Lou
10 Holtz who had a football player playing in the Orange
11 Bowl, star running back. He decided to miss curfew
12 and Coach Holtz said he wouldn't play in the game. He
13 said, Coach, don't you think that is awfully harsh?
14 And Coach Holtz said, You knew what the rules were. I
15 didn't decide you are not playing the game, you
16 decided you are not playing the game.

17 THE COURT: That is a good analogy.

18 MR. SEGO: But I think it is important for the
19 record to be clear that the ultimate withdrawal,
20 disqualification, of Mr. Epting came about as a result
21 of the motion that the defendants filed, so I just
22 wanted the record to be clear that it is not a
23 volunteer.

24 THE COURT: You know, I understand what you are
25 saying, but I think it is a distinctive difference,

1 and I might be wrong, and if you decide to appeal it,
2 you will talk about all of that up there.

3 MR. RANSOM: Again, I'm just trying to state our
4 position.

5 THE COURT: There is a reason why you want a
6 clarification.

7 MR. RANSOM: Right. Mr. Epting feels as he was
8 ordered to step away as opposed to doing it
9 voluntarily, and it may be a difference of
10 perspective, but --

11 THE COURT: Right. And I think it is what we
12 would call -- I think this is a 10-page order. It
13 says all of the reasons of what brought us to that
14 conclusion -- what brought me to that conclusion, and
15 whether it is categorized as a disqualification or a
16 withdrawal, I don't think it makes a difference, but
17 it might.

18 MR. RANSOM: The only other thing, Judge, is my
19 concern is in me preparing for this case going forward
20 is with the provision in the order relating to the
21 timing of the disclosure of the defense experts, which
22 Your Honor has set at 40 days, I believe. I'm just
23 not entirely sure when that 40 days starts.

24 THE COURT: A lot of it will depend on what you
25 all do. Clearly, you know, if the matter is appealed,

1 you know, we'll have to revisit that; if not -- well,
2 if -- if we're proceeding forward and not going down
3 the appellant route, what do you think is fair with
4 regard to this deadline?

5 MR. POWELL: Your Honor, I think there is already
6 a proposed solution to that, and that -- of course
7 I'll be candid --

8 THE COURT: Is that a consent order?

9 MR. POWELL: No, sir. No, sir.

10 THE COURT: Well, it needs to be. Before we go
11 -- we need to talk about it right here, or it needs to
12 be consented to.

13 MR. POWELL: I understand. What we were hoping
14 to -- the reason that we believed -- all of us
15 believed -- that by now the appellant court would have
16 involved, that is what Mr. Epting told us. He told us
17 right here on November 2nd, This is going to be
18 appealed and it won't take long. I promise you that
19 it is not going to take long, I'll appeal it. So what
20 we did is we set the time from the time of the order,
21 because he represented to us that he was going to
22 appeal it. Well, if he was going to appeal it
23 quickly, then that wouldn't be a problem, but that
24 isn't what has happened. I mean, I have it in the
25 transcript exactly what he said.

1 So, I mean, you know, I -- so, therefore, the 40
2 days from the time of the order was sometime in
3 January, and it is improper now because now we don't
4 know what is going to happen. We wanted to tie it to
5 some other event if it was appealed in 30 days after
6 the supreme court or appellant court disposes of it.
7 If it is not appealed, then we'll have to --

8 THE COURT: I think if it is appealed we ought to
9 -- if it is appealed, probably at some point in time
10 there needs to be a status conference to decide what
11 we do, whenever we do it. I don't think it is really
12 necessary. What I'm concerned about is if they do not
13 appeal it, where will we move forward? If it is
14 appealed, it probably won't even be me that handles
15 the case and that will be two, three years down the
16 road. So the issue is whether -- if they do not
17 appeal it.

18 MR. POWELL: Let me just ask this. I haven't
19 really anticipated addressing this today. I would
20 like to consult with Ms. Wall and get her input on it,
21 because I would be speaking for matters concerning her
22 schedule, which I'm unaware.

23 THE COURT: Right.

24 MR. POWELL: So I think I would --

25 THE COURT: I'll invite you all to see if you can

1 enter into a consent order with regard to the timing
2 of it, and you all can kind of look and see how you
3 all want to proceed.

4 MR. POWELL: The good thing for us to know would
5 be, you know, is it going to be appealed or not?

6 THE COURT: Well, they're not in a position to
7 make that decision right now. I doubt they are in a
8 position to make that decision right now.

9 MR. RANSOM: What I hear the Court saying is in
10 terms of keeping the schedule, that the Court would be
11 inclined to allow us to approach Your Honor as things
12 shake out and ask for additional time. We believe
13 that is necessary, and that is what I'll ask.

14 THE COURT: I think just pure necessity we'll
15 probably have to have more time to do that. This is
16 just my observation on my part, and no one asked for
17 it, but I'll give you my observation. It seems as
18 though Mr. Epting is a real good lawyer. He's tried
19 several cases before me, and I can't remember which
20 ones, but he is a very good lawyer. He's what we call
21 a "continental lawyer," he stays over in France and
22 half the time here, so clearly he knows what he is
23 doing. But, to me -- and I had a general practice, I
24 didn't do the high-end stuff that he does, but the
25 general principle is that a plaintiff's lawyer tries

1 to get their case together as best they can with as
2 little time involved and money in it as you can, get
3 it before the jury and try to make some money.
4 Defense lawyers -- and I'm just categorically
5 generally speaking -- engage in a more methodical,
6 deliberate way of practicing law, which results in
7 billable hours and various other things. I wouldn't
8 say that defense lawyers categorically engage in
9 billable practices, but as sort of a general rule,
10 that kind of plays out like that. I would -- at some
11 point in time, I would like to know why -- I'm just
12 curious as to why a plaintiff would -- seems to be
13 counterintuitive to proceed in this fashion. That is
14 just an observation. It is neither here nor there,
15 but there is some wisdom behind getting yourself
16 together and getting it to the jury in a short amount
17 of time, and I encourage both parties to engage in
18 that conduct. It might be that there are problems
19 with gathering up the proof and delaying the
20 inevitable, but at some point in time, this case is
21 going forward. If it is not appealed, and I still
22 have the authority, we are going to try this case, do
23 something with it even if it is wrong. Seven years
24 old, we have to move forward. All right. I feel
25 better now that I have an observation out. So how do

1 you all feel?

2 MR. RANSOM: I would say, for the record, before
3 you took the bench, I was trying to engage with
4 Mr. Powell of the very issues of what can we do, what
5 needs to be done, what are the circumstances which we
6 can move the case forward, and he agreed we can have
7 that discussion. I'm grateful to the Court for
8 suggesting that you will hear from us in an
9 administrative capacity in order to set deadlines that
10 are realistic for both parties. I'd be happy to
11 answer the other questions not on the record, but in
12 chambers, Judge.

13 THE COURT: Very good.

14 MR. POWELL: The only response I have to Mr.
15 Ransom's comments about the juxtaposition with regard
16 to withdrawal and disqualification, and along that
17 line, is that in Mr. Epting's words, this is a matter
18 of time. He agreed on November 2nd that he
19 understood he could not do both, that at some point in
20 time he would have to step down. There was some
21 confusion, Ms. Wall interjected that it was
22 outrageous, that she had never seen a lawyer tell the
23 Court that he would step down when he concluded that
24 he should do so. And to his credit, Mr. Epting said
25 we have confusion here, I'm not suggesting that it

1 would be the Court to make that decision. So where
2 this comes in is Mr. Epting's words of it's a matter
3 of time. Whether the appellant court will say that
4 the trial court cannot make a decision as to when the
5 withdrawal should occur, we'll find out in this case.

6 THE COURT: Sure will.

7 MR. POWELL: That is my only comment. Thank you
8 for your time, Your Honor.

9 THE COURT: Buck James, who is on the court of
10 appeals, his famous quote was --

11 MR. POWELL: Supreme court.

12 THE COURT: What did I say? Yeah, supreme court.
13 His most famous observation is, You don't never know.
14 You don't never know. We'll see how it works out.
15 Good ole double negative.

16 Anything else from anybody? I know the holidays
17 are coming up, but I'm going to be available.
18 Everybody has my cell phone number? 843-234-XXXX.
19 The only requirement is that you have the other
20 lawyers on the phone before you call me.

21 MR. POWELL: Could you give that again?

22 THE COURT: I'll give it to you again.
23 843-234-XXXX. And I'll be available if there is a
24 problem that comes up. We don't want it to fester.
25 Give me a call if you can't resolve it on the phone,

1 and we'll get a court reporter and do it before hours,
2 after hours or during lunch, but we'll move this
3 forward if it remains in my hands. Very good. We'll
4 stand at ease.

5 (Whereupon the proceedings concluded.)
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CERTIFICATE OF REPORTER

State of South Carolina)

County of Horry)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the proceedings of the captioned case in the Family Court for Horry County, South Carolina, on the 21st day of December, 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 12, 2018

Natalie Dahl, RPR

Court Reporter

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge
Appellate Case No. 2018-000092

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies, pursuant to SCACR 210(g), that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Dated: 9-18-2018



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