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.

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STATEMENT OF THE ISSUES ON APPEAL

1. **WHETHER THE TRIAL COURT'S INTERLOCUTORY ORDER CONCERNING THE TIMING OF MR. EPTING'S WITHDRAWAL AS COUNSEL FOR STOKES-CRAVEN IN LIGHT OF APPELLANT'S DECISION TO NAME MR. EPTING AS AN EXPERT WITNESS IS IMMEDIATELY APPEALABLE.**

2. **WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REQUIRING MR. EPTING AND HIS LAW FIRM TO WITHDRAW AS COUNSEL LESS THAN NINETY (90) DAYS BEFORE THE CLOSE OF DISCOVERY TO AVOID THE MYRIAD PROBLEMS CAUSED BY MR. EPTING'S DESIGNATION AS AN EXPERT WITNESS AND ALLOW FOR A REASONABLE PERIOD OF EXPERT DISCOVERY.**

STATEMENT OF THE CASE

On April 16, 2010, Plaintiff-Appellant Stokes-Craven Holding Corp. ("Stokes-Craven") filed this legal malpractice case against Defendants-Respondents Scott L. Robinson and Johnson, McKenzie & Robinson, LLC ("Respondents"). (R. pp. 39-43.) This case results from an underlying lawsuit wherein Donald Austin sued Stokes-Craven on a variety of claims related to Stokes-Craven's fraudulent sale of a used truck to Mr. Austin. Mr. Robinson and the law firm represented Stokes-Craven in the Austin case. Following a three-day jury trial, the jury found in favor of Mr. Austin and awarded him $242,971.10, which included an award of punitive damages. After an appeal, the Supreme Court affirmed the jury verdict. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010).

In 2010, following the affirmance of the jury verdict, Andrew K. Epting, Jr., began representing Stokes-Craven in both the *Austin* case and this newly filed malpractice case. (Appellant's Br. at 2.) Although the *Austin* jury verdict of $242,971.10 was rendered in 2006 and affirmed in 2010, Stokes-Craven, represented by Mr. Epting, did not resolve the case until

the end of 2013, at which point Stokes-Craven paid $1,060,000 to settle and obtain a satisfaction of judgment. (*Id.*)

In this malpractice case, Respondents obtained summary judgment from Hon. George C. James, Jr. in 2013 on statute of limitations grounds. (R. pp. 1-17.) The decision was appealed and, in 2016, the Supreme Court reversed, holding that the statute of limitations was tolled during the appeal of the underlying *Austin* case. *See generally Stokes-Craven Holding Corp. v. McKenzie,* 416 S.C. 517, 787 S.E.2d 485 (2016).

Following remittitur, and because of Justice James's elevation to the Supreme Court, this case was reassigned to Hon. Michael G. Nettles. (R. p. 20.) Recognizing the age of the case and the need to move quickly to trial, in August 2017, Judge Nettles entered a Scheduling Order, setting deadlines for the identification of expert witnesses, the completion of discovery, the filing of dispositive motions, and trial not before April 30, 2018. (R. pp. 18-19.)

On October 2, 2017, which was the deadline for Stokes-Craven to identify its expert witnesses, Mr. Epting signed and served a document entitled "**PLAINTIFF'S EXPERT DISCLOSURE**" (the "Expert Disclosure"), in which he was named as one of Stokes-Craven's expert witnesses. (R. pp. 57-58.) No further information as to the subject matter of Mr. Epting's testimony and no discovery material was provided at that time, even though previous interrogatories and requests for production had asked for a description of the testimony of each expert and each expert's file materials. (R. pp. 59-70.)

Immediately recognizing the impropriety of Mr. Epting calling himself to testify as an expert, Respondents moved on October 4, 2017, to exclude Mr. Epting as an expert or, alternatively, to disqualify him as counsel and compel interrogatory responses and document production as to Mr. Epting. (R. pp. 48-70.)

On October 13, 2017, the trial court held a hearing on Respondents' motion. At the conclusion of the hearing, Judge Nettles gave Mr. Epting until noon the following Monday to decide and inform the court and the parties whether he would be a witness or a lawyer in the case. (R. p. 217, lines 18-22.)

On October 16, 2017, Mr. Epting informed the trial court and the parties by letter that he had elected to be a witness in the case. (R. pp. 87-88.) He also served supplemental answers to interrogatories naming himself as an expert witness and describing his areas of opinions. (R. pp. 194-195.) Thereafter Mr. Epting filed objections to Respondents' proposed order in which he limited his objection to being required to withdraw as counsel ***immediately***. (R. p. 97.) Mr. Epting did not dispute that he would have to withdraw as counsel before trial; rather, he merely disputed whether he should be required to withdraw at that time instead of further into the discovery period. (*Id.*)

On October 19, 2017, the trial court conducted a telephone conference on Respondents' motion, at which time Judge Nettles heard further argument from all counsel. During that telephone conference, Mr. Epting demanded 10 days' notice and an in-person hearing, which the court granted. (R. p. 230, line 19 to p. 231, line 2.)

On November 2, 2017, the trial court conducted a third hearing on Respondents' motion. At that hearing, Mr. Epting admitted: "**I do not think I can be an advocate and an expert at trial**." (R. p. 268, lines 9-10 (emphasis added).) He further admitted that, as a designated expert, Respondents would be entitled to take his deposition and that he would need to withdraw before that deposition. (*Id.* at R. p. 287, lines 4-21.) Thus, the crux of the dispute at the November 2, 2017 hearing was not ***whether*** Mr. Epting would be required to withdraw but ***when***. Respondents contended that Mr. Epting should be required to withdraw immediately

(approximately 120 days from the close of discovery), whereas Mr. Epting argued that he should withdraw after the depositions of Stokes-Craven's damages experts but before his own deposition. (*Id.*) Mr. Epting nevertheless admitted that it was up to the trial judge to determine when he should withdraw. (*Id.* at R. p. 287, lines 7-11.)

On November 30, 2017, the trial court entered an Order ruling that it was then the appropriate time for Mr. Epting and his law firm to withdraw as counsel for Stokes-Craven. (R. pp. 27-36.) Stokes-Craven moved for reconsideration. (R. pp. 163-190.) The trial court held a hearing on the motion for reconsideration on December 21, 2017 and denied the Motion on January 12, 2018. (R. pp. 300-324; R. pp. 37-38.) This appeal followed.

STANDARD OF REVIEW

South Carolina Circuit Courts have the inherent authority to control their dockets and safeguard the rights of litigants appearing before them. *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). The circuit court's exercise of that authority is reviewed only for abuse of discretion. Likewise, circuit courts have the authority to manage discovery and the schedule for discovery, and "[t]he trial court's rulings on discovery matters will not be disturbed on appeal absent a clear abuse of discretion." *Arthur v. Sexton Dental Clinic*, 368 S.C. 326, 333, 628 S.E.2d 894, 898 (Ct. App. 2006) (upholding trial court's authority to issue and enforce a scheduling order). Finally, trial courts have the authority to disqualify attorneys under appropriate circumstances, and a trial's court's disqualification order is reviewable only for abuse of discretion. *Brooks v. S.C. Comm'n on Indigent Defense*, 419 S.C. 319, 324, 797 S.E.2d 402, 404 (Ct. App. 2017).

In this case, the issue of whether Mr. Epting should be disqualified is not presented or preserved for review. Rather, as set forth above, Mr. Epting, on behalf of Stokes-Craven,

admitted on multiple occasions that he was not seeking to remain Stokes-Craven's counsel at the time of trial. He was seeking only to represent Stokes-Craven through some—but not all—of the remaining discovery period, after which he would withdraw in time to "give [Respondents] plenty of time to take [his] deposition." (R. p. 287, lines 4-11.) The only issue properly on appeal is the ***timing of Mr. Epting's withdrawal***, which is a classic case management / discovery question that can only be reversed for a "clear abuse of discretion." *Arthur*, 368 S.C. at 333, 628 S.E.2d at 898.

ARGUMENT

I. THE TRIAL COURT'S ORDER CONCERNING THE TIMING OF MR. EPTING'S WITHDRAWAL IS NOT SUBJECT TO IMMEDIATE APPEAL.

This appeal should be dismissed for want of appellate jurisdiction. As explained more fully in Respondents' Joint Memorandum Regarding the Lack of Appellate Jurisdiction, which is incorporated herein by reference, Stokes-Craven admitted to the trial court that the only question before the court was the ***timing*** of Mr. Epting's withdrawal, not whether he must withdraw at all. (*See, e.g.*, R. p. 287, lines 4-21.) Moreover, Stokes-Craven and Mr. Epting readily admitted that Mr. Epting would have to withdraw ***before*** trial; the only question was ***how soon*** before trial. (*Id.*) Indeed, Mr. Epting admitted to the trial judge, "When I said an appropriate time [to withdraw], I meant at the time that you thought would serve getting this case moving, giving them plenty of time to take my deposition, and still keep this case moving going forward. I was not suggesting that I would be in control of that decision at all." (R. p. 287, lines 7-11.) When the trial judge asked Mr. Epting for his suggestion on when he should withdraw, Mr. Epting responded ". . . I think a logical time would be when their discovery is finished..." (*Id.* at R. p. 287, lines 17-18.)

In its Brief, Stokes-Craven has doubled-down on this position, arguing that the trial court's only error with respect to Mr. Epting was in requiring that he withdraw "from participating in pre-trial proceedings." (Appellant's Initial Br. at 6.) Nowhere does Appellant argue that Mr. Epting should have been allowed to represent Stokes-Craven at trial.

This position, however, is totally at odds with Appellant's argument concerning appellate jurisdiction. In its Brief, Stokes-Craven relies entirely on *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005), in which the Supreme Court held that the full-fledged disqualification of a party's attorney is immediately appealable because it affects the mode of trial. *Id.* at 198, 607 S.E.2d at 710. The pre-trial ***timing*** of counsel's withdrawal, however, plainly does not affect the mode of trial for purposes of appellate jurisdiction ***because everyone admits that Stokes-Craven must have new counsel for trial.*** The trial itself is utterly unaffected by the timing of Mr. Epting's pre-trial withdrawal. Therefore, unlike in *Hagood*, the Order at issue does not affect the mode of trial, but is rather an ordinary interlocutory case management order that is not subject to immediate appeal, and the appeal should be dismissed.

II. MR. EPTING WAS NAMED AS AN EXPERT WITNESS WHO COULD BE CALLED TO THE STAND AT ANY TIME.

If the Court reaches the merits of Stokes-Craven's appeal (and it should not), it is important to begin the analysis with a clear understanding of Mr. Epting's status as set forth in the documents Mr. Epting signed, served, and filed.

Under the trial court's Scheduling Order, Stokes-Craven was required to "name all experts it **intends** to use at trial." (R. pp. 18-19 (emphasis added).) Based on that Order, Stokes-Craven served on Respondents a document entitled "**PLAINTIFF'S EXPERT DISCLOSURE**," which listed "**Andrew K. Epting, Jr.**" as an expert witness. (R. pp. 57-58.) The document was signed by Mr. Epting and served by his law firm on Respondents' counsel.

(*Id.*) At no time has Stokes-Craven served or filed any documents withdrawing or amending this expert disclosure.

Four aspects of Stokes-Craven's expert disclosure under the Scheduling Order are critical in evaluating the trial court's subsequent order.

- ***First***, the document clearly and unambiguously names Mr. Epting as an expert witness.
- ***Second***, the decision to name Mr. Epting as an expert for Stokes-Craven was voluntary. Nothing prevented Stokes-Craven from hiring a third-party expert to testify concerning the reasonableness of Stokes-Craven's actions. Likewise, nothing prevented Mr. Epting from limiting himself to purely factual testimony.
- ***Third***, the expert disclosure plainly permits Stokes-Craven to utilize any of the experts named at any point in the case; none of the named experts are limited to rebuttal testimony.
- ***Fourth***, the expert disclosure was made on October 2, 2017. The Order now on appeal was not rendered until November 30, 2017, after no fewer than **three separate hearings**. Mr. Epting could have withdrawn or amended his client's expert designation at any time, but he elected instead to stand on the designation of himself as a voluntary expert witness who could be called at any time.

As discussed in more detail below, each of these points is clear from the text of Plaintiff's Expert Disclosure itself and from the circumstances of the case.

A. Mr. Epting was Clearly Named as an Expert Witness.

There is no ambiguity whatsoever in Stokes-Craven's Expert Disclosure: it names Mr. Epting as an expert witness. (R. pp. 57-58.) In subsequent hearings, Mr. Epting tried to muddy the waters by claiming that he ***thought*** he would only offer factual testimony and merely named himself as an expert out of "an abundance of precaution." (*See, e.g.*, R. p. 233, lines 20-22.) In the same breath, however, Mr. Epting was crystal clear that he was preserving Stokes-Craven's right to use him as an expert witness at trial. (*Id.* at R. p. 234, lines 7-13.) Indeed, he told the trial court over and over again that he needed to preserve his right to serve as an expert in case he

wandered into expert territory during his testimony. (*See, e.g.*, R. p. 202, lines 21-22 ("I may be a witness in this case and may be an expert witness."); R. p. 234, lines 7-13; p. 245, lines 1-16; p. 268, lines 16-22; p. 274, lines 2-7.) In other words, Mr. Epting would not commit to limiting his testimony to factual issues; rather, he insisted on preserving his client's ability to offer him as an expert witness.

Stokes-Craven and Mr. Epting cannot avoid the plain meaning of their own Expert Disclosure. What Stokes-Craven desires is to identify Mr. Epting as an expert witness but then preclude the trial court and opposing parties from treating him as an expert witness. According to Stokes-Craven, the trial court and opposing parties must wait until Mr. Epting actually testifies at trial to determine if he really is acting as an expert and then figure out what rights, duties, and consequences flow from that determination.

This is entirely backwards. When a party formally identifies a person as an expert witness, the trial court and the other parties to the action must proceed with the understanding that the person identified will be called to the stand at trial to provide expert testimony. Indeed, that is the only way the trial court and opposing parties can properly and fairly prepare the case for trial. Thus, once an expert is formally identified, the trial court may adjudicate the propriety of the proposed expert, and opposing parties may take normal expert witness discovery from and concerning the identified person.[1] The identification of expert witnesses in advance of trial would serve no purpose whatsoever if a party were entitled to identify an expert but then force the court and opposing parties to act as if the expert had not been identified.

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[1] Notably, Stokes-Craven's position on appeal would effectively end the practice of motions *in limine* to exclude experts because the circuit court would be precluded from ruling on the propriety of an expert witness until that person is actually called and testifies. This, of course, is not the law. Rather, South Carolina courts routinely pass on the propriety of experts and expert testimony before trial. *See, e.g.*, *Graves v. CAS Med. Sys.*, 401 S.C. 63, 68, 735 S.E.2d 650, 652 (2012) (affirming circuit court's pre-trial exclusion of expert witnesses and grant of summary judgment).

The testimony that Mr. Epting proposed to offer at trial was clearly expert testimony. According to Mr. Epting, he served as Stokes-Craven's counsel in the underlying *Austin* matter from the time of its remittitur by the South Carolina Supreme Court in 2010 until the case was settled in December 2013, during which time Stokes-Craven, through its attorney Mr. Epting, squabbled with Mr. Austin's counsel over the accrued interest, attorneys' fees, and other matters. (R. p. 242, line 25 to p. 245, line 6.) Ultimately, some six years after the remittitur, Stokes-Craven settled the underlying case for $1,060,000, which was far in excess of the $242,971.10 verdict. (Appellant's Br. at 2.) For good reason, Stokes-Craven anticipates that, at trial, Respondents could contend that Stokes-Craven woefully failed to mitigate its damages by allowing the verdict to balloon to more than four times its original value before finally cutting its losses and settling the case.

Mr. Epting apparently proposes to counter this argument by taking the stand to explain what Stokes-Craven did during this six-year time period **and to opine that Stokes-Craven's actions were reasonable**. (R. 2p. 42, line 25 to p. 245, line 6.) Indeed, Mr. Epting proposes to answer such questions as "Why didn't we do that? Why didn't we do this?" and explain "**from a lawyer point of view** . . . this is what I did and I think it's reasonable and I think the result was reasonable." (*Id.* (emphasis added).) In supplementing its answers to interrogatories after naming Mr. Epting as an expert, Stokes-Craven specified that Mr. Epting would "opine" on these matters. (R. pp. 194-195.)

Offering an opinion as a lawyer that Stokes-Craven's actions and omissions—including its legal strategy—in the nearly four-year period between the remittitur and the ultimate settlement of the case is plainly beyond the ken of an ordinary lay person and is therefore expert testimony under Rule 702, SCRE. Indeed, our Supreme Court has noted that a lay witness "**may**

not offer opinion testimony which requires special knowledge, skill, experience, or training." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (emphasis added). Rather, a person offering opinions based on specialized knowledge must be qualified as an expert under Rule 702, SCRE. *Id.* Here, Mr. Epting admits he proposes to offer opinions, "from a lawyer point of view," concerning Stokes-Craven's acts and omissions in handling the settlement of a lawsuit; thus, he clearly proposes to offer opinion testimony requiring specialized knowledge—*i.e.*, the specialized knowledge of a lawyer. (R. p. 244, lines 4-20.) It is therefore clear that Stokes-Craven listed Mr. Epting as an expert witness to offer testimony that can only be offered in his capacity as an expert witness.

B. Naming Mr. Epting as an Expert Witness was Voluntary.

Nothing required Stokes-Craven to name Mr. Epting as witness. As Judge Nettles noted multiple times in the hearings on this matter, Stokes-Craven could have engaged an unaffiliated lawyer to review the evidence from the period between remittitur and settlement and offer an expert opinion as to whether Stokes-Craven acted reasonably to mitigate its damages. (R. p. 245, lines 7-17; R. p. 272 line 21 to p. 273, line 8.) Indeed, Stokes-Craven already had an unaffiliated lawyer—Ronnie Richter—serving as its liability expert. Stokes-Craven could have expanded Mr. Richter's engagement to include opinions about the settlement and Stokes-Craven's acts and omissions leading to it. Instead, Stokes-Craven elected to name its own lawyer to provide this expert testimony. Because the expert testimony to be offered by Mr. Epting was available from another source—i.e., hiring a traditional third-party expert—the decision to identify Mr. Epting as an expert was entirely voluntary.

Moreover, even if Mr. Epting now attempted to limit his testimony to purely factual matters, such testimony would not be necessary because Mr. Craven or some other representative

of Stokes-Craven could offer such factual testimony. Under our ethical rules, settlement is always the client's decision, not the lawyer's decision. Rule 1.2(a), RPC, Rule 407, SCACR. Further, even if the lawyer handles the mechanics of settlement, the lawyer is ethically required to keep the client reasonably informed about the settlement. Rule 1.4, RPC, Rule 407, SCACR. Thus, someone affiliated with Stokes-Craven—other than Mr. Epting—must have been involved in and informed about whatever Mr. Epting was doing on Stokes-Craven's behalf and should have been making all important decisions with respect to settlement. If factual testimony concerning what Stokes-Craven did or did not do between remittitur and settlement is needed, Mr. Craven or some other representative of Stokes-Craven should offer that testimony based on their personal knowledge and involvement with the process. Of course, any opinions concerning the reasonableness or propriety of their action would need to come from an expert. *Watson*, 389 S.C. at 446, 699 S.E.2d at 175.

In sum, neither Mr. Epting's expert testimony nor his factual testimony is necessary, as Stokes-Craven could procure such testimony from other sources. Rather, Stokes-Craven has voluntarily elected to name Mr. Epting as an expert witness in this case and, having done so, must accept the timing of withdrawal ruling of the trial court.

C. Mr. Epting's Potential Testimony was Never Limited to Rebuttal.

While it has little effect on the analysis, it is important to dispel the notion raised in Appellant's Brief that Mr. Epting was listed only as a rebuttal witness. To the contrary, neither the Plaintiff's Expert Disclosure nor any subsequent document so limited Mr. Epting's testimony. Rather, Mr. Epting was listed as an expert witness like any other expert witness.

To be sure, Mr. Epting once told the court that ***he*** would decide whether to serve as a witness based on "how [Respondents are] going to defend the case," but this statement in no way

limited Mr. Epting to calling himself in Stokes-Craven's rebuttal case. (R. p. 213, lines 15-17.) Respondents have been defending this case for eight years, and they will continue to defend the case in pre-trial written discovery, in pre-trial depositions, through pre-trial motions, at jury selection, in opening statements, through evidentiary objections during Stokes-Craven's case-in-chief, and through the cross-examination of witnesses called in Stokes-Craven's case-in-chief—all before Respondents ever reach their own case-in-chief, and well before Stokes-Craven reaches its rebuttal case. Nothing filed by or said by Mr. Epting would prevent him from deciding at any of these points that he thinks he should testify and then calling himself as an expert witness during Stokes-Craven's case-in-chief.

More fundamentally, Appellant never explains what difference it would make if Mr. Epting's expert testimony were limited to Stokes-Craven's rebuttal case. Expert witnesses still have to be disclosed under the trial court's Scheduling Order. The trial court still has to pass on the propriety of any expert witnesses, and Respondents still have a right to take discovery from any expert witnesses identified. Moreover, the spectacle of the trial court qualifying one party's lawyer as an expert and designating him as such to the jury would still cause significant and irreversible prejudice to Respondents. Thus, while Mr. Epting was clearly designated as an expert witness who could be called to the stand at any time, he could not have cured the impermissible problems presented by purporting to limit his testimony to Stokes-Craven's rebuttal case.

D. Stokes-Craven Had Multiple Chances to Withdraw Mr. Epting Either as an Expert Witness or as a Fact Witness.

After Stokes-Craven served its expert disclosure, the trial court held three separate hearings on Respondent's motion to disqualify Mr. Epting, and a fourth hearing on Stokes-Craven's motion to reconsider. Thus, Mr. Epting had four separate court appearances at which

he could have withdrawn himself altogether as an expert witness or as a fact witness. He did neither. Instead, over and over again, Mr. Epting stated that he needed to preserve Stokes-Craven's right to call him as an expert witness. Thus, the trial court's order requiring him to withdraw was proper and totally avoidable.

III. A PERSON DESIGNATED AS AN EXPERT WITNESS CANNOT SERVE AS AN ADVOCATE IN THE SAME PROCEEDING, NOR CAN HIS LAW FIRM.

As an initial matter, this Court is not properly called upon on appeal to decide in the abstract whether Mr. Epting must withdraw as Stokes-Craven's counsel, as Mr. Epting repeatedly admitted that he would have to withdraw during the discovery period—in time for Respondents to take his deposition. (R. p. 97; R. p. 287, lines 4-21.) Thus, the application of Rule 3.7, RPC, Rule 407, SCACR (hereinafter Rule 3.7) is not at issue on appeal as there is no disagreement, through Mr. Epting's own admissions, that he must withdraw before trial. However, because Appellant's Brief addresses Rule 3.7, Respondents note that the Rule clearly prohibits Mr. Epting from serving both as advocate and expert witness, and this prohibition includes his law firm.

A. Rule 3.7 of the Rules of Professional Conduct Prohibits an Advocate from Serving as a Voluntary Expert Witness.

Rule 3.7 outlines the limited circumstances under which a person may serve as lawyer and witness in the same proceeding. Because it is the only Rule of Professional Conduct addressed to a lawyer's service as witness, under the interpretive canon *expressio unius est exclusio alterius*, Rule 3.7 contains the entire universe of situations in which service as a witness is permissible. *See Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002) (applying presumption that the exceptions enumerated in a statute are the only exceptions permitted by the statute).

None of these limited situations apply. Mr. Epting is not a necessary witness, his testimony does not relate to an uncontested issue or to the nature or value of legal services rendered in this case, nor would his withdrawal work a substantial injustice on Stokes-Craven.

1. Mr. Epting Is Not a Necessary Witness.

As an initial matter, under Rule 3.7, a lawyer's service as a witness is only potentially permissible if the lawyer is a "necessary witness." Because the term "necessary witness" is not defined by the Rule, it must be construed in accordance with its ordinary meaning. Merriam-Webster defines the term "necessary" as "absolutely needed"; "required"; "inescapable"; "inevitable"; "logically unavoidable"; and "compulsory." Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/necessary. Utilizing the plain meaning of the word "necessary," a "necessary witness" is a witness that is absolutely needed, required, or compulsory to present a party's case. This interpretation comports with the definition of "necessary witness" adopted by this Court, which is a witness who has testimony material to a party's case and "there is no other evidence available to prove those facts." *Brooks*, 419 S.C. at 326, 797 S.E.2d at 405 (internal citations and quotation marks omitted).

Mr. Epting is not a necessary witness. For one thing, an individual expert witness is, by definition, not "necessary" because another expert in the field can be hired to offer the same opinions. Here, as the trial court pointed out multiple times and Mr. Epting acknowledged, Stokes-Craven could hire a lawyer-expert to review the file materials, speak to the relevant facts, and offer opinions concerning whether or not Stokes-Craven's acts and omissions between the remittitur and the settlement of the underlying case were reasonable. (R. p. 245, lines 7-17; p. 272, line 21 to p. 273, line 8.) For this reason alone, Mr. Epting is not a necessary witness within the meaning of Rule 3.7.

In addition, a non-lawyer representative of Stokes-Craven could testify to the facts concerning Stokes-Craven's ultimate settlement of the *Austin* case. The Rules of Professional Conduct provide that the client must be kept informed about the progress of the matter, and settlement is always the decision of the client, not the lawyer. This non-lawyer representative could testify to the facts concerning settlement and explain, if possible, why Stokes-Craven did what it did. Then, Stokes-Craven could either leave it to the jury to determine the reasonableness of those actions or non actions, or call a third-party expert to opine on reasonableness. Either way, Mr. Epting's testimony is totally unnecessary.

In sum, Mr. Epting is not a necessary witness within the meaning of Rule 3.7. Because the Rule only permits a person to serve as lawyer and witness if the lawyer is a necessary witness, the Rule prohibits Mr. Epting in this matter from acting as both lawyer and expert witness.

2. Mr. Epting's Testimony Relates Neither to Uncontested Issues Nor to the Nature or Value of Legal Services Rendered in this Case.

Rule 3.7 contains three exceptions only whereby a lawyer may serve as a necessary witness in the same proceeding: (1) when the lawyer's testimony will relate to uncontested issues, (2) when the lawyer's testimony will relate only to the nature of value of the lawyer's services in that case, and (3) when disqualification of the lawyer would work substantial hardship on the client.

In its Brief on appeal, Stokes-Craven does not argue for the application of any of these exceptions, and they clearly do not apply. As to the first exception concerning the uncontested nature of the issues, it does not apply. Mr. Epting's testimony will attempt to justify Stokes-Craven's utter failure to mitigate its damages between the time of the remittitur and the ultimate settlement of the *Austin* case. Suffice it to say that Respondents will heavily contest Stokes-

Craven's failure to mitigate. Thus, it is undisputed that the exception contained in Rule 3.7 does not apply.

Likewise, as to the second exception, Mr. Epting's testimony will not involve the nature and value of legal services rendered ***in this case***; rather, the testimony concerns the underlying *Austin* case. Thus, the second exception contained in Rule 3.7 does not apply.

3. Mr. Epting's Withdrawal Will Not Work a Substantial Hardship on Stokes-Craven.

The best evidence that Mr. Epting's withdrawal will not work a substantial hardship on Stokes-Craven is that Stokes-Craven does not argue on appeal that it will. In addition, as the trial court noted, Stokes-Craven has retained new counsel, and that counsel has access to Mr. Epting in Mr. Epting's capacity as an expert witness, through which Mr. Epting can provide whatever factual information or data is needed. More fundamentally, because Mr. Epting is not a necessary witness, any hardship wrought by his withdrawal is of Stokes-Craven's own choosing and is not the kind of involuntary hardship contemplated by Rule 3.7. Thus, the third exception contained in Rule 3.7 does not apply.

In sum, Rule 3.7 outlines the full universe of limited circumstances in which a person may serve as lawyer and witness in the same proceeding, and none of those circumstances apply to this case. Rule 3.7, therefore, prohibits Mr. Epting from serving as lawyer and expert witness, and the trial court was entirely correct in requiring that he withdraw after electing to serve as an expert witness.

B. Mr. Epting's Law Firm Must Also Withdraw.

Mr. Epting's law firm is also precluded from representing Stokes-Craven in a case in which the law firm's sole principal and owner is an expert witness. Although under some circumstances when one lawyer from a law firm is likely to be called as a witness, other lawyers

in the firm may continue to represent the client, here Mr. Epting's service as an expert disqualifies his law firm for two reasons.

First, Mr. Epting's law firm has a contingency fee agreement with Stokes-Craven, and Stokes-Craven does not dispute this fact. (R. p. 34.) It is equally undisputed that Mr. Epting is the sole owner of the law firm, Andrew K. Epting, Jr. LLC. Thus Mr. Epting, as the owner of the law firm, has a financial stake in the outcome of the litigation.

It is well-settled that it is unethical for an expert witness to have a financial stake in the outcome of litigation or to be paid on a contingency basis. 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. 1977) (contingent expert witness fee is void); *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72-73 (2d Cir. 1990) (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).

The rule precluding an expert from holding a financial stake in the outcome of the litigation in which he proposes to testify is both sensible and necessary. The role of an expert witness is to provide the jury with access to his or her expertise in a professional and unbiased manner. ABA Formal Ethics Op. 97-407 (May 13, 1997). Having a financial stake in the case would be entirely antithetical to this role. Because allowing Mr. Epting's firm to remain in the case would result in an expert witness having a financial stake in the case, it was entirely correct for the trial court to require Mr. Epting's firm to withdraw.

Stokes-Craven contends that the law firm's role is permissible because there is no contingency fee agreement for Mr. Epting's services *as expert witness*. This position, however, would elevate form over substance and would defeat the entire purpose of the rule. Indeed,

Stokes-Craven's position would allow an expert witness—Mr. Epting—to retain a financial stake in the outcome of the litigation through a contingency fee to be paid ***to a law firm of which he is the sole owner***. The law will not allow this sleight of hand, and the trial court was correct to require Mr. Epting's firm to withdraw.

Second, Mr. Epting's conflict of interest taints the entire firm. As the commentary to Rule 3.7 notes, a lawyer's testimony creates a conflict of interest if there is likely to be a conflict between the lawyer's testimony and the client's own testimony or the lawyer's testimony is likely to be harmful to the client's case. Rule 3.7, cmt. [6]. That possibility looms large when a lawyer attempts to serve as an expert witness because the expert's role is to offer honest, professional opinions based on his or her field of knowledge ***without regard*** to whether those opinions help or hurt any party's case. *See* ABA Formal Ethics Op. 97-407 (May 13, 1997). Even if Mr. Epting intends for his testimony to be entirely favorable to Stokes-Craven, he cannot control or predict what questions will be asked of him or what testimony he may ultimately be required to give.

The conflict-of-interest concern is particularly strong because there is no attorney-client privilege between lawyers acting as expert witnesses and their clients under South Carolina law, which is consistent with ABA Formal Ethics Op. 97-407 (May 13, 1997) ("[I]f 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. Communications between the expert and the retaining law firm or its client employed by the expert in preparing his testimony ordinarily are discoverable.") Thus, by choosing to testify as an expert, Mr. Epting has opened to discovery communications that otherwise would be privileged.

Any privilege that may have existed between Mr. Epting and Stokes-Craven by virtue of the attorney-client relationship vanished when Mr. Epting offered himself as an expert witness to testify concerning the reasonableness of Stokes-Craven's acts and omissions in settling this case. It is well-settled that the attorney-client privilege is waived when a client places its communications with its lawyer at issue. *See, e.g.*, *United States v. White*, 944 F. Supp. 2d 454, 459 (D.S.C. 2013) (explaining circumstances under which privilege is waived by placing attorney-client communications at issue). Here, it is inconceivable that Mr. Epting could opine on the claimed reasonableness of Stokes-Craven's actions—and his own actions and legal strategy on Stokes-Craven's behalf—without placing his communications with Stokes-Craven at issue. Thus, the probability of Stokes-Craven and/or Mr. Epting being required to divulge otherwise privileged information that harms Stokes-Craven's case is substantial, resulting in a conflict of interest under Rule 1.7, RPC, Rule 407, SCACR.

In sum, Mr. Epting's service as an expert witness creates a serious conflict of interest issue under Rule 1.7 because of the significant risk that his responsibilities as an expert witness result in a waiver of the attorney-client privilege with Stokes-Craven and a Rule 1.7 conflict is imputable to his law firm under Rule 1.10, RPC, Rule 407, SCACR. As the annotations to Rule 1.10 state, "The basic rule governing imputation of disqualification is relatively simple. When a lawyer in a firm is disqualified from handling a matter by virtue of a conflict of interest under Rule[s] 1.7 . . . no other member of the lawyer's law firm may undertake the representation . . . . The rule of imputation is based on the principle that lawyers practicing together owe a common duty of loyalty to the clients of the firm." Thus the conflict prevents the law firm from continuing to represent Stokes-Craven. For this reason as well, it was entirely proper for the trial court to require Mr. Epting's law firm to withdraw from the representation.

IV. THE TRIAL JUDGE PROPERLY EXERCISED HIS DISCRETION OVER THE TIMING OF MR. EPTING'S WITHDRAWAL.

As set forth above, Mr. Epting told the trial court that the appropriate time for him to withdraw would be after the depositions of Stokes-Craven's two damages experts and before Mr. Epting's deposition. (R. p. 287, lines 4-21.) Because Mr. Epting did not argue to the trial court that he should be allowed to remain as counsel until trial and instead specifically argued that he should withdraw toward the end of the discovery period, any contention that Mr. Epting did not have to withdraw until trial is waived. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("It is axiomatic that an issue cannot be raised for the first time on appeal." (internal citations and quotation marks omitted)).

More fundamentally, it is well-settled in South Carolina that trial courts have inherent power to control their dockets, manage discovery, and protect the rights of the parties. *Williams*, 274 S.C. at 279, 262 S.E.2d at 883; *Arthur*, 368 S.C. at 333, 628 S.E.2d at 898. Here, the trial court properly exercised that power in an attempt to mitigate the myriad problems caused to the court system, to Respondents, and to Stokes-Craven itself by Mr. Epting's decision to serve as an expert witness. Nothing in Rule 3.7 or any other rule prevents a trial court from exercising its inherent case management authority to require that a lawyer who has offered himself as an expert witness withdraw at a time before trial determined by the court.[2]

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[2] Notably, none of the cases cited by Stokes-Craven in its Brief hold to the contrary. Rather, *Clough v. Richelo*, 616 S.E.2d 888 (Ga. Ct. App. 2005), merely contains dicta by the Georgia Court of Appeals that a lawyer who intends to serve as a necessary fact witness—not an expert witness—can, as a general proposition, continue to undertake some pre-trial responsibilities for the client. This dicta, however, was not addressed to a particular situation, expressly noted that there are exceptions, and did not address a lawyer serving as an expert witness. *Id.* at 895-96. Likewise, in *Cunningham v. Sams*, 588 S.E.2d 484 (N.C. Ct. App. 2003), the North Carolina Court of Appeals was not presented with a lawyer seeking to serve as an expert witness, and the court expressly noted that the party seeking disqualification failed to provide any reasons for disqualification before trial. *Id.* at 487. Here, the circuit court had and articulated myriad reasons for exercising its case management authority requiring Mr. Epting to withdraw before trial. The same is true for *Cerillo v. Highley*, 797 So.2d 1288 (Fla. 4th Dist. Ct. App. 2001), and

A. The Roles of Advocate and Expert Witness Are Wholly Inconsistent.

As the ABA Standing Committee on Ethics and Professional Responsibility has noted, and as is consistent with South Carolina law, the roles of advocate and expert witness are wholly inconsistent. The Committee explained the stark differences as follows:

> The testifying expert provides evidence that lies within his special knowledge by reason of training and experience and has a duty to provide the court, on behalf of the other law firm and its client, truthful and accurate information. To be sure, the testifying expert may review selected discovery materials, suggest factual support for his expected testimony and exchange with the law firm legal authority applicable to his testimony. The testifying expert also may help the law firm to define potential areas for further inquiry, and he is expected to present his testimony in the most favorable way to support the law firm's side of the case. **He nevertheless is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates**. **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**.

ABA Formal Ethics Op. 97-407 (May 13, 1997) (emphasis added).

Because the roles are wholly inconsistent, allowing Mr. Epting to serve as both counsel and as a designated expert in the final phases of discovery would taint the court system and condone an impermissible conflict of interest. If allowed to continue the representation, Mr. Epting will continue to make, respond to, and argue motions, will prepare witnesses and defend depositions, will consult with Stokes-Craven on legal strategy, and will take depositions, **all while crafting his own expert testimony**. It would stretch the imagination and impugn the integrity of the court system to presume that Mr. Epting could somehow compartmentalize his

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Lieberman v. Lieberman, 160 So.3d 73 (Fla. 4th Dist. Ct. App. 2014). Thus, Stokes-Craven has not presented the Court with any cases remotely supporting its contention that the circuit court lacks authority, in its sound discretion, to require a lawyer serving as expert witness to withdraw during discovery.

role as a zealous advocate and not allow that role to subsume and shape his role as a testifying expert.

The utter inconsistency between the roles of expert witness and advocate do not spring into existence for the first time at trial, or even on the date of the expert's deposition. Rather, because Mr. Epting would be simultaneously acting as an advocate in this case while preparing his expert testimony throughout the final phases of discovery, the conflict and taint existed at the moment Mr. Epting was designated as an expert witness, and perhaps before. Often, courts handle an improper attempt from a lawyer to serve as expert witness by simply excluding the expert testimony. *See, e.g.*, *Jarzyna v. Home Props., L.P.*, 201 F. Supp. 3d 650, 662 (E.D. Pa. 2016). Here, however, the trial court was generous in allowing Mr. Epting and his client to choose the role in which they thought Mr. Epting could best serve Stokes-Craven. (R. p. 217, lines 18-21.) Because Mr. Epting continued to be designated as an expert witness, it was entirely proper for the trial court to then require that he withdraw from acting as an advocate in the case.

B. Mr. Epting Cannot Serve as a Designated Expert in a Matter in Which He Retains a Financial Interest.

As discussed above, the law does not allow an expert witness to have a financial interest in the outcome of a case. As soon as Mr. Epting was identified as an expert witness and did not withdraw as counsel, he became an identified testifying expert with a financial interest in the outcome, in violation of the law. Logically, the only cure for that violation was for him to withdraw as counsel or withdraw as expert. The court gave him the choice between these options, and he chose to withdraw as counsel. It was certainly within the discretion of the trial court to enforce the rule against an expert remaining as advocate for a party (Stokes-Craven's attorney) by requiring that a choice be made between the two roles as soon as the violation occurred.

C. Allowing Mr. Epting To Continue To Serve As Counsel and Expert Creates Substantial Privilege Problems.

It is axiomatic that the attorney-client privilege cannot be used as a sword and a shield. Rather, as the Restatement puts it, a party must "either permit a fair presentation of the issues raised by the client [by waiving the privilege] or protect the right to keep privileged communications secret by not raising at all an issue whose fair exposition requires examining the [privileged] communications." Restatement (Third) of the Law Governing Lawyers § 80 (Reporter's Notes). Moreover, the law does not allow strategic or partial waivers of the attorney-client privilege. Instead, once the privilege is waived as to one communication, the privilege is waived as to all materials on the same subject so as to level the playing field and ensure that a party is not waiving as to favorable materials while trying to protect unfavorable materials. *See, e.g., In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988) (rejecting limited or partial waiver of privilege); *Shukh v. Seagate Technology, LLC*, 848 F. Supp. 2d 987, 990-991 (D. Minn. 2011) (noting the purpose of subject-matter waiver is to prevent a party from waiving privilege to favorable communications while asserting privilege to unfavorable communications). Finally, it is well-settled under South Carolina law that there is no privilege between the client and a testifying expert—even if the expert is a lawyer—because the expert-client relationship is not an attorney-client relationship.

Once Mr. Epting was identified as an expert witness, Stokes-Craven created significant privilege problems with all of Mr. Epting's communications. Respondents' position is that no communications are privileged because they are between an expert witness and client. Allowing a dual role as expert and attorney for a party creates the opportunity to allow Stokes-Craven to attempt to shield some communications made to or from Mr. Epting ***as attorney*** vs. to or from Mr. Epting ***as expert*** which merely invites abuse, as it would be all too easy for Stokes-Craven to

create self-serving "expert-client" communications while shielding all real or unfavorable "attorney-client" communications. While it is the better analysis to conclude that all communications between Mr. Epting and Stokes-Craven are discoverable, it is in the best interest of all—including Stokes-Craven—to avoid the morass created by Mr. Epting's attempt to serve in two wholly inconsistent roles at the same time. It was well within the trial court's discretion as case manager to avoid this utterly unnecessary problem by requiring Mr. Epting to withdraw shortly after his identification as an expert witness. The trial court properly exercised its discretion in requiring Mr. Epting to withdraw within five days of the filing of the trial court's Order, which was within 90 days of the close of discovery, to avoid the myriad problems created by Mr. Epting's identification as an expert witness and to move this eight-year-old case to trial. (R. pp. 27-36.)

D. Forcing Respondents To Complete All Other Discovery Before Deposing or Subpoenaing Mr. Epting Would Be Unfair and Prejudicial.

When Mr. Epting admitted to the trial court that he would have to withdraw as counsel before trial, he suggested that he be allowed to remain as counsel until Respondents completed the bulk of the remaining discovery, including document discovery and depositions of Stokes-Craven's damages experts. (R. p. 287, lines 4-21.) Essentially, under Mr. Epting's plan, he would remain as Stokes-Craven's counsel until the only item of discovery left was taking his deposition.

This plan is fundamentally unfair because it would force Respondents to save all discovery related to Mr. Epting until the end of the discovery period. The Rules of Civil Procedure, however, do not force parties to take discovery in any particular order; rather, parties are free to serve written discovery, serve subpoenas, and notice depositions in any order or timeframe they wish as long as it comports with any scheduling order imposed by the court. One

party has no right to force a particular order or timeframe for discovery on the other, and it would be manifestly unfair to permit one party to dictate to the other party the discovery schedule by naming their lawyer as an expert witness.

If Mr. Epting is to be an expert witness concerning Stokes-Craven's acts and omissions with respect to settling the *Austin* case, then there is a great deal of work to be done. To start, Respondents must subpoena documents concerning Mr. Epting's communications and file materials related to the entire four-year timespan from when he entered an appearance for Stokes-Craven in the *Austin* case to when that case was settled. This discovery necessarily includes Mr. Epting's communications with Stokes-Craven, as Mr. Epting cannot testify concerning his service as Stokes-Craven's attorney, and Stokes-Craven's motivations, thought process, settlement strategy, or the reasonableness of any of these items without placing these communications at issue.[3] Because of the attorney-client privilege, these materials were previously unavailable to Respondents, so discovery on those materials must start from scratch. Moreover, because this discovery involves a unique set of privilege issues, the parties may expect discovery disputes, and it will take some time to resolve the written discovery alone. Then, Respondents must prepare for and take Mr. Epting's deposition, which, because of privilege issues and disputes concerning the same, will likely not be a single event.

Moreover, Mr. Epting's opinions are inextricably tied to the opinions of the Stokes-Craven damages experts, as all of these witnesses will testify in one way or another as to why

[3] Generally, the attorney-client privilege is waived when: "(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense." *White*, 944 F. Supp. 2d at 459 (internal citations and quotation marks omitted). Here, Mr. Epting's opinions as to the reasonableness of Stokes-Craven's action ***while he was serving as its counsel*** will necessarily be based, at least in part, on his communications with Stokes-Craven. Thus, the communications are at issue, and Respondents must have access to them to test the veracity and strength of Mr. Epting's opinions.

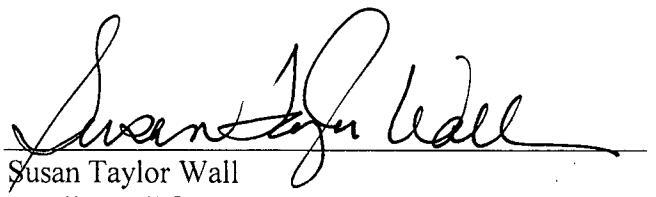
Stokes-Craven claims damages exponentially higher than the *Austin* verdict. Forcing Respondents to artificially separate discovery on the two damages experts from discovery concerning Mr. Epting would be prejudicial, not to mention the blatant unfairness of allowing Mr. Epting to prepare the damages experts in his role as lawyer while formulating his own testimony as expert.

This case is eight years old, and, at the time of the Order, there was a Scheduling Order in place to prepare the case for a May 2018 trial. (R. pp. 18-19.) The Scheduling Order gave the parties less than five months from Stokes-Craven's identification of expert witnesses to complete discovery. (*Id.*) With that short timeframe, it would be fundamentally unfair to Respondents to force them to wait until all other discovery was completed to begin the long road of taking discovery concerning Mr. Epting. Doing so would inevitably have required delaying the trial or truncating Respondents' right to expert discovery. Facing these outcomes, it was entirely reasonable and well within the discretion and purview of the trial court to require Mr. Epting to withdraw as counsel for Stokes-Craven—in time to complete the discovery of his documents and opinions without delaying the trial of an eight-year-old case.

CONCLUSION

For the foregoing reasons and any others in the Record, Respondents respectfully request that the Order of the Circuit Court requiring Mr. Epting and his law firm to withdraw as counsel be AFFIRMED.

Respectfully submitted,



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October 9, 2018

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

Pursuant to Rule 211(a), SCARC, the undersigned certifies that Respondents' Joint Final Brief complies with Rule 211(b), SCACR.

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