The Supreme Court of South Carolina

In the Matter of Annette T. Quinn, Respondent.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 5, 1982, Annette Theresa Quinn was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated December 12, 2003, Ms. Quinn submitted her resignation from the South Carolina Bar. We accept Ms. Quinn's resignation.

Ms. Quinn shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, she shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Ms. Quinn shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Annette Theresa Quinn shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 8, 2004

The Supreme Court of South Carolina

In the Matter of Stuart M. Vaughan, Jr., Respondent.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 1, 1974, Stuart M. Vaughan, Jr. was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the S. C. Supreme Court, dated November 18, 2003, Mr. Vaughan submitted his resignation from the South Carolina Bar. We accept Mr. Vaughan's resignation.

Mr. Vaughan shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, he shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Mr. Vaughan shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of

Stuart Moulton Vaughan, Jr. shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 8, 2004

The Supreme Court of South Carolina

RE: Administration of Amended Lawyers Oath contained in Rule 402, SCACR.

O R D E R

Since the amendment of the Lawyers Oath contained in Rule 402, SCACR, questions have arisen as to how the Oath will be administered and who will be required to take the Oath. The Chief Justice's Commission on the Profession is preparing a curriculum for a seminar, which will be available at Continuing Legal Education Seminars. Additionally, local Bar Associations as well as other associations of members of the Bar will be provided materials to present their own one hour CLE on the Oath. Presenters of the seminar will not be limited but the curriculum developed by the Commission must be used at all seminars.

At all seminars where the Oath is administered, a Justice of the Supreme Court, a Judge of the Court of Appeals, or a Circuit Court Judge will be available to administer the Oath. The South Carolina Bar's 2005 Dues Statement will provide space for members to certify that they have taken the Oath.

All members of the Bar, regardless whether they are required to meet the requisite CLE hours shall be required to attend a seminar and take the Oath. These members include inactive members, members who have reached the age of sixty and practiced for thirty years and senior members. However, these members shall not be required to pay any fees associated with the seminar.

As to out-of-state members, any member who does not live in South Carolina but undertakes representation in any cases in South Carolina shall attend a seminar and take the Oath in person. Those out-of-state members who do not take cases in South Carolina, shall notify the South Carolina Bar of their status and will be mailed a copy of the Oath and required to attest the Oath has been taken.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 9, 2004

The Supreme Court of South Carolina

O R D E R

The Attorney General of South Carolina has initiated a program that will utilize lawyers, on a pro bono basis, to assist in the prosecution of criminal domestic violence cases in magistrate's and municipal courts. Because the prosecution allowed in these cases is very limited in nature and scope, neither a lawyer who participates in this program nor the lawyer's firm is prohibited, under Rules 1.7 and 1.10 of the Rules of Professional Conduct, Rule 407, SCACR, from representing clients in criminal matters or civil matters unrelated to any case the lawyer has prosecuted unless the lawyer or the lawyer's firm is disqualified for some other reason.

This Court is currently considering comprehensive amendments to the Rules of Professional Conduct in light of amendments made to the Model Rules of Professional Conduct by the American Bar Association following a study and evaluation of the rules by the ABA Ethics 2000 Commission. Any broader issues related to Rules 1.7 and 1.10 will be considered by the Court during this process and any necessary amendments

to the rules will be made, along with amendments to the remaining Rules of Professional, when the Court concludes its review process.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

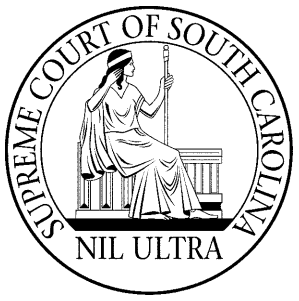
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Moore, J., not participating

Columbia, South Carolina
January 7, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

January 12, 2004

ADVANCE SHEET NO. 2

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Hospitality Management Associates, Inc., et al., Appellants,

v.

Shell Oil Company d/b/a Shell Chemical Company, Hoechst Celanese Corporation, and E.I. Dupont de Nemours & Company, Respondents.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 25764
Heard November 18, 2003 - Filed January 12, 2004

AFFIRMED

David A. Collins, of Smith & Collins, of Charleston; Fleet Freeman, of Freeman & Freeman, of Mt. Pleasant; Justin O'Toole Lucey, of Mt. Pleasant; M. Lee Robertson, Jr., of Mt. Pleasant; and Paul Dominick, of Nexsen Pruet Jacobs Pollard & Robinson, LLP, of Charleston, for Appellants.

Timothy W. Bouch and G. Hamlin O'Kelley, III, of Leath Bouch & Crawford, LLP, of Charleston; and David T. Harvin

and Erica L. Krennerich, of Vinson & Elkins L.L.P., of Houston, for Respondent Shell Oil Company.

Jane W. Trinkley and Robert L. Widener, of McNair Law Firm, P.A., of Columbia; and Paul M. O'Connor, III, and Seth Moskowitz, of Kasowitz, Benson, Torres & Friedman LLP, of New York, for Respondent Hoechst Celanese Corporation.

Henry B. Smythe, Jr., and David B. McCormack, of Buist Moore Smythe McGee P.A., of Charleston; and Kathleen Taylor Sooy, of Crowell & Moring LLP, of Washington, for Respondent E.I. Dupont de Nemours & Company.

JUSTICE WALLER: In this direct appeal, the trial court denied appellants' request for class certification and granted summary judgment in favor of respondents. The main issue of this appeal is whether two nationwide class action settlements approved by the Alabama and Tennessee state courts are entitled to full faith and credit, thereby precluding appellants – as absent class members who did not opt out – from proceeding with this action. Moreover, the crucial sub-issue of that question is what is the appropriate **scope of collateral review** this Court should give to the rendering courts' final decisions approving the settlements. The trial court found that: (1) a limited scope of review is proper, and (2) the due process issues were fully and fairly litigated; therefore, the trial court ruled the final settlements are entitled to full faith and credit. We affirm.

FACTS/PROCEDURAL HISTORY

Appellants seek damages against respondents Shell Oil Company ("Shell"), Hoechst Celanese Corporation ("Celanese"), and E.I. DuPont de Nemours & Co. ("DuPont"), for defective polybutylene plumbing systems. Appellants own structures containing this type of plumbing system. Neither of the respondents manufactured these polybutylene systems, but each

produced and sold a resin utilized in the manufacture of the systems.[1] The systems were marketed as an alternative to copper-based systems. Appellants allege respondents **falsely** represented that the polybutylene plumbing systems were of high quality, were reliable, and would last decades. Indeed, appellants claim respondents knew the resins would degrade and corrode when exposed to the chemicals found in ordinary drinking water (e.g., chlorine), and therefore, knew these systems would fail. According to appellants, polybutylene plumbing systems are an "unmitigated disaster" as they experience an unusually high failure rate.

On May 30, 1995, the original plaintiffs filed this lawsuit ("the Howard plaintiffs"). However, two nationwide class action settlements – Spencer in Alabama state court and Cox in Tennessee state court – were finalized in November 1995; the Howard plaintiffs opted out of these two settlements and subsequently settled their individual claims.[2] Appellants successfully intervened in the instant case in 1996 and 1997. The lawsuit was designated as a complex case, and Judge Pieper was assigned to it. Initial discovery in the litigation was restricted to the full faith and credit issue.

Respondents moved for summary judgment arguing that appellants were members of the national class actions which had been settled and those settlements are entitled to full faith and credit. Appellants responded that because class members were not provided with due process, the state courts did not acquire personal jurisdiction, and thus, the final orders should not be accorded full faith and credit. Holding that further inquiry into the facts was appropriate, Judge Pieper denied respondents' motions for summary judgment in June 1998.

---

[1] Shell manufactured and sold polybutylene, which is a raw material plastic, i.e., a resin, to manufacturers who extruded it into the polybutylene pipes used in these systems. Celanese and DuPont manufactured and sold Celcon and Delrin, respectively, which were molded into the plastic fittings used to join the pipes together.

[2] The Howard plaintiffs were three couples who each owned a home with a polybutylene plumbing system. They received settlements for $25,000, $20,000 and $20,000.

Shortly after the denial of summary judgment, Judge Pieper *sua sponte* recused himself after learning that a family member had requested claim information from one of respondents' representatives in the out-of-state litigation. Thereafter, Judge Dennis was assigned to the case.

Respondents moved to have Judge Dennis reconsider or vacate Judge Pieper's order denying summary judgment. The trial court denied this request, finding that Judge Pieper's order was "a temporary ruling which invites another Motion."

Pursuant to Rule 23, SCRCP, appellants requested certification of a class defined, in pertinent part, as follows:

> An opt-in class of all South Carolina persons and entities that own structures in which there has been installed a polybutylene plumbing system, wherever located; and non-resident persons and entities that own such structures located in the State of South Carolina.

Finding that none of Rule 23's requirements had been satisfied, Judge Dennis denied class certification.

Finally, after respondents renewed their motions for summary judgment, the trial court granted judgment in their favor. The trial court found that the Alabama court-approved Spencer settlement and the Tennessee court-approved Cox settlement were both entitled to full faith and credit. Significantly, the trial court found that the issue of whether absent class members were provided with minimum due process was an issue subject only to extremely limited collateral review, making the dispositive issue whether the due process issue was fully litigated in, and determined by, the Alabama and Tennessee courts. The trial court found that the due process issues relating to the exercise of personal jurisdiction over the absent class members had been fully considered by the Cox and Spencer courts, and therefore their findings of jurisdiction were entitled to full faith and credit without further review on the merits.

To resolve the issues raised in this appeal, a review of the facts surrounding the nationwide settlements is also necessary.

The *Spencer* and *Cox* Settlements

The Spencer lawsuit was filed in November 1994 in Alabama state court. At that time, yet another nationwide class action case was pending in a Texas state court, Beeman v. Shell Oil Co., and a settlement was actively being negotiated. Although the parties reached a settlement in Beeman, it ultimately fell through when the Texas court denied preliminary approval in February 1995. In May 1995, DuPont reached a settlement in Spencer, and the Alabama court preliminarily approved it. However, because the settlement was only with DuPont, claims against Shell and Celanese remained.

According to the original terms of the settlement with DuPont, DuPont agreed to pay 8% of: (1) the actual cash value of physical damage to tangible property caused by a leak in the plumbing system which occurred within 15 years of the installation, and (2) the cost of a replumb completed within 15 years of the installation. The fund for these costs was set at $120 million, and when that amount was paid, DuPont retained the option to provide additional funding. If it opted not to provide additional funding, class members who had not been paid would retain all rights against DuPont.

In June 1995, Cox was filed against Shell and Celanese in Tennessee. The same day the lawsuit was filed, the Tennessee court certified the class. Meanwhile, the Spencer action was still proceeding against Shell and Celanese, and the Alabama court certified that class as well. Thus, two competing nationwide classes had been certified.[3]

[3] It may even be more accurate to say that **three** classes had been certified: a settlement class vs. DuPont in Alabama, a trial class vs. Shell and Celanese in Alabama, and a settlement class vs. Shell and Celanese in Tennessee. The competition aspect, however, clearly was between the trial class against Shell and Celanese in Alabama and the settlement class against those same two companies in Tennessee.

Negotiations in Cox resulted in a settlement being reached with Shell and Celanese on July 31, 1995. The original settlement terms were that Shell and Celanese would provide $850 million to fund replumbs for those claimants who had a qualifying leak. In addition, recovery could be had for physical damage to tangible property resulting from a leak. A centralized facility, the Consumer Plumbing Recovery Center (CPRC), was to be created to administer the terms of the settlement. Like the settlement reached with DuPont in Spencer, the agreement tolled the statutes of limitation and repose in the event the fund was exhausted and Shell and Celanese decided not to contribute additional funding. Moreover, future owners were covered by the settlement because the agreement provided for four future notice periods.

Objections were raised to the Cox settlement. In October/November 1995, class counsel for both Cox and Spencer participated in a two-week mediation with California Judge Richard M. Silver,[4] and ultimately, a joint national settlement was reached. This global settlement was basically the Cox settlement that previously had been approved by the Tennessee court, but with several significant changes, such as the joint settlement fund was increased to $950 million; the interest on the funds was to go to the CPRC (not back to Shell and Celanese); and the window for filing claims was increased from one year to two years. In addition, the parties agreed that no objection would be made to Spencer class counsel requesting up to $30 million in attorneys' fees. After the global settlement was reached, the objections to Spencer by Cox class counsel and the objections to Cox by Spencer class counsel were withdrawn.

On November 17, 1995, the Cox court entered a final order approving the class action settlement against Shell and Celanese which included $45 million for class counsel and $3,000 for class representatives. The funds for notice and attorneys' fees were **in addition** to the $950 million in settlement funds. On the same day, the Spencer court finally approved the class action settlement against DuPont.

[4] Judge Silver was presiding over another class action suit, this one a statewide class action pending in California.

Also on November 17, Shell, Celanese and DuPont entered into an agreement coordinating the two settlements. DuPont agreed to pay 10% of all CPRC costs associated with claims arising from polybutylene plumbing systems with acetal insert fittings, and 10% of CPRC administrative expenses (excluding costs for Cox attorneys' fees or notice). These payments by DuPont were to come out of the Spencer settlement fund. The coordination apparently allows claimants to file a single claim with the CPRC in order to get relief from both settlements.

ISSUES

Appellants appeal from three orders wherein the trial court granted summary judgment to respondents, denied appellants' request for class certification, and denied respondents' request to vacate or reconsider Judge Pieper's previous order denying summary judgment. However, we find the dispositive issue of this appeal is:

> Did the trial court err in granting summary judgment based on its finding that the Spencer and Cox final settlement orders are entitled to full faith and credit?

DISCUSSION

Appellants argue that as absent parties who did not appear in the out-of-state actions, they are free to collaterally challenge the Spencer and Cox judgments based on personal jurisdiction. Appellants claim the Alabama and Tennessee courts did not have personal jurisdiction over them because they were not accorded the minimal due process required for absent class members. Specifically, appellants argue that, for several reasons: (1) notice was constitutionally insufficient; and (2) there was inadequate representation.

Respondents, on the other hand, argue the trial court correctly found that the scope of review when determining full faith and credit is limited to whether the jurisdictional issues were fully and fairly litigated in the rendering courts. Because they claim the issues related to due process were fully and fairly litigated, respondents argue the trial court correctly granted

summary judgment without further inquiry into the merits of personal jurisdiction/due process.

Clearly, the **scope of review** aspect of the full faith and credit issue is the threshold question, and, given the current state of the law on this issue, it is also a thorny one.

Scope of Collateral Review

The Full Faith and Credit Clause provides, in pertinent part, that "[f]ull faith and credit shall be given in each state to the . . . judicial proceedings of every other state." U.S. Const. art. IV, § 1. Full faith and credit "generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded **in the State which rendered it**." Durfee v. Duke, 375 U.S. 106, 109 (1963) (emphasis added).

The rule in a class action lawsuit is not any different. Indeed, the United States Supreme Court ("USSC") has specifically stated that "a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit." Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 374 (1996).

Nonetheless, it is also well settled that a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit, and therefore has no res judicata effect as to that party. E.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805 (1985); see also Kremer v. Chemical Const. Corp., 456 U.S. 461, 482 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, … and other state and federal courts are not required to accord full faith and credit to such a judgment.") (footnote omitted).

In Shutts, the USSC held that the Due Process Clause protects an absent class action plaintiff "even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." Shutts, 472 U.S. at 811. Thus, in order to provide minimal due process, absent class plaintiffs:

> must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." … The notice should describe the action and the plaintiffs' rights in it. Additionally, … due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Id. at 812 (citations omitted). If the due process requirements of (1) notice; (2) an opportunity to be heard; (3) an opportunity to "opt out;" and (4) adequate representation are met, the foreign court properly asserts personal jurisdiction over the absent class plaintiffs. Accordingly, those plaintiffs who elect not to opt out are bound by the foreign court's judgment.

The law is less settled, however, when the issue is the scope of review of a rendering court's judgment regarding due process in a class action lawsuit. According to respondents, the Court of Appeals for the Ninth Circuit's view on the law is the correct one. In Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir.), cert. denied, 528 U.S. 1004 (1999) ("Epstein III"), the Ninth Circuit held that **broad** collateral review of the due process requirements for binding absent class members is **not** available. Instead, the extent of collateral review is **limited** to a consideration of "whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue." Id. at 648-49. The Epstein III court declared the following:

> Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States

> Supreme Court. … Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review.

Id. at 648 (citations omitted).[5]

Moreover, the procedural history of Epstein v. MCA, Inc. is noteworthy. The initial decision by the Ninth Circuit reversed a district court's ruling which gave full faith and credit to a class action settlement in Delaware. See Epstein v. MCA, Inc., 50 F.3d 644 (9th Cir. 1995) ("Epstein I"). The Epstein I court held that because the Delaware class action settlement released **exclusively federal claims**, the Delaware state court judgment was not entitled to full faith and credit. The USSC reversed and remanded. See Matsushita Elec. Indus. Co. v. Epstein, supra. On remand, a divided panel of the Ninth Circuit held that the Delaware judgment was **not** entitled to full faith and credit because it violated due process based on the inadequacy of the class representation. Epstein v. MCA, Inc., 126 F.3d 1235 (9th Cir. 1997) ("Epstein II"). Significantly, the Epstein II court rejected Matsushita's argument that the court was limited to reviewing "the **procedures** that Delaware had in place to ensure adequate representation, rather than the adequacy of the representation itself." Id. at 1242 (emphasis in original). Thereafter, the Ninth Circuit granted rehearing, and a reconstituted panel[6] withdrew its Epstein II opinion and rejected the appellants' contention that the Delaware judgment was not entitled to full faith and credit. Epstein III, supra.

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[5]While the specific challenge in Epstein III involved adequate representation, the Epstein III court made clear that its reasoning applied to all aspects of the Shutts due process requirements. See Epstein III, 179 F.3d at 649 ("Matsushita itself indicates that broad collateral review of the adequacy of representation (**or of the other due process requirements for binding absent class members**) is not available.") (emphasis added).

[6] The authoring judge of both Epstein I and II had resigned in the interim.

Thus, the final word from the Ninth Circuit in Epstein III was the emphatic statement that "where the certifying court makes a determination of the adequacy of representation in accord with Shutts," this determination is **not** subject to broad collateral review. 179 F.3d at 648.[7] The USSC declined to review Epstein III. Epstein v. Matsushita Elec. Indus. Co., 528 U.S. 1004 (1999).

After Epstein III was decided, however, the Court of Appeals for the Second Circuit handed down Stephenson v. Dow Chemical Co., 273 F.3d 249 (2nd Cir. 2001). Appellants contend that, pursuant to Stephenson, a broad collateral attack on the nationwide settlements is permissible.[8]

In Stephenson, two Vietnam War veterans brought suit in 1998 and 1999 for injuries based on their exposure to Agent Orange during the war. But in 1984, a global class action settlement had been entered on identical claims. The settlement provided that no payments would be made for death or disability occurring after December 31, 1994. The Stephenson plaintiffs' conditions had not been diagnosed until 1996 and 1998.

The district court dismissed the Stephenson lawsuit finding it was an impermissible collateral attack on the 1984 settlement. On appeal, the

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[7] One judge on the panel dissented, standing by the decision in Epstein II. Epstein III, supra (Thomas, J., dissenting).

[8] Appellants also argue that South Carolina precedent supports the proposition that the courts of this state may review the jurisdictional underpinnings of a foreign judgment before granting full faith and credit. See, e.g., Peoples Nat'l Bank of Greenville v. Manos Bros., Inc., 226 S.C. 257, 275, 84 S.E.2d 857, 866 (1954) (where in determining the validity of a Georgia divorce decree, the Court stated: "It is well settled that want of jurisdiction over either the person or the subject matter is **open to inquiry** where a judgment rendered in one state is challenged in another.") (emphasis added). We note, however, that nationwide class action lawsuits clearly raise very particularized due process issues, and we therefore focus our analysis on case law in that context.

plaintiffs argued they were inadequately represented, and therefore, the earlier class action settlement did not preclude their claims. The Stephenson court agreed thereby allowing a "broad collateral attack" on the class action settlement. The Stephenson court specifically found that the plaintiffs' lawsuit could continue because there had been "no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund." Id. at 258. The court rejected the defendants' reliance on Epstein III for "a limited collateral review theory." Id. at n.6. Instead, the court decided that:

> [T]he propriety of a collateral attack such as this is amply supported by precedent. In Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), the Supreme Court entertained a collateral attack on an Illinois state court class action judgment that purported to bind the plaintiffs. The Court held that class action judgments can only bind absent class members where "the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation." Id. at 41, 61 S.Ct. 115; cf. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) ("[I]t is true that a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment.").

Id.

As to the merits of the collateral attack, the Stephenson court relied on the USSC's recent decisions in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), and Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999),[9] to find that the Stephenson plaintiffs had not been adequately represented in the 1984 settlement, and therefore were not bound by it.

[9] Both these cases involved **direct appeals** of global class settlements in asbestos litigation.

The USSC granted certiorari to review Stephenson.[10] However, the USSC ultimately issued a per curiam decision which vacated the Second Circuit's opinion as to one set of plaintiffs, and, by an equally divided court, summarily affirmed the decision allowing collateral review as to the other set of plaintiffs. Dow Chemical Co. v. Stephenson, ___ U.S. ___, 123 S.Ct. 2161 (2003) (Stevens, J., not participating).

Thus, it remains an open, and hotly litigated, question as to whether limited collateral review is required on the Shutts due process requirements in a class action case (see Epstein III), or whether a broader, merits-oriented collateral review is permitted (see Stephenson). In addition to the conflict in the federal circuits as exemplified by Epstein III and Stephenson, there is also disagreement amongst the state courts[11] and legal scholars.[12]

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[10] The two questions at issue on certiorari were whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, and, if collateral attack is permissible, whether the "adequacy of representation" issue is properly determined as of the time of the original litigation or in light of changes in the law years after the settlement has become final.

[11] Compare Fine v. America Online, Inc., 743 N.E.2d 416, 420 (Ohio Ct. App. 2000), cert. denied, 532 U.S. 942 (2001) (staunchly following Epstein III and stating: "Modern constitutional jurisprudence requires that the absent class members' rights to due process be protected not by substantive collateral review, but, rather, by the application of appropriate procedures in the certifying court and by the courts that review its determinations.") with State v. Homeside Lending, Inc. 826 A.2d 997, 1016-17 (Vt. 2003) (recognizing disagreement on whether collateral attack is available on adequate representation, but indicating its inclination "to follow the recent decision of the Second Circuit Court of Appeals in Stephenson because adequacy of representation is 'the quintessence of due process in class actions'") (citation omitted).

[12] Compare, e.g., Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L.Rev. 765, 771 (1998) (critiquing the Epstein II decision, and advocating what became the Epstein III position that if the initial forum made

In our opinion, there are important policy considerations favoring both limited and broad collateral review. Certainly, in the specialized context of class action litigation, the significant interests in efficiency and finality favor limited review. If the due process issues are fully and fairly litigated and necessarily decided by the rendering court, then the strong interest in finality militates in favor of an extremely limited collateral review. Without limited review, a nationwide class action could be vulnerable to collateral actions in the 49 other states in which it was not litigated initially. It would seem to be a waste of judicial resources to require reviewing courts to conduct an extensive substantive review when one has already been undertaken in a sister state. As the Ohio court stated in Fine v. America Online: "To allow substantive collateral attacks would be counterintuitive to [the] procedural relief that a class-action suit is intended to afford our judicial system nationwide." 743 N.E.2d at 421-22.

On the other hand, there is the fundamental interest in not allowing constitutionally infirm judgments to be enforced. It would be troublesome to enforce a class action settlement against parties over whom the rendering court did not have personal jurisdiction. We note, however, that the view espoused in Epstein III envisions that direct appellate review of a class action is the appropriate vehicle to correct whatever errors may have been made at the trial court level.[13]

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a finding of adequate representation and employed "fair procedures" in making the finding, then "the substance of the finding itself is not subject to collateral attack.") (hereinafter "Kahan & Silberman") with Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Tex. L. Rev. 383, 388 (2000) ("The argument for limiting collateral attack contradicts two fundamental principles: first, a court has no jurisdiction over absent class members who have not been adequately represented; second, a judgment entered without jurisdiction may be collaterally attacked if the party bound by the judgment did not appear and had no obligation to do so.").

[13] We also recognize there exists the concern that a particular state may abuse the class action lawsuit by improperly providing a too-friendly forum for class actions. See Kahan & Silberman, 73 N.Y.U. L.Rev. at 775-76

We hold that in a case such as this one, only a limited collateral review is appropriate. It would run counter to the class action goals of efficiency and finality to allow successive reviews of issues that were, in fact, fully and fairly litigated in the rendering court. Moreover, second-guessing the fully litigated decisions of our sister courts would violate the spirit of full faith and credit. See Fine v. America Online, 743 N.E.2d at 421.

Therefore, we concur with the Ninth Circuit's view and find due process requires that an absent class member's rights are protected by the adoption and utilization of appropriate procedures by the certifying court; thereafter, the merits of the certifying court's determinations are subject to direct appellate review. As for collateral review, however, due process does not afford any "second-guessing of those determinations." Epstein III, 179 F.3d 648. Instead, what this limited review entails is "an examination of **procedural** due process and nothing more." Fine v. America Online, 743 N.E.2d at 421. More specifically, we must determine: (1) whether there were safeguards in place to guarantee sufficient notice and adequate representation; and (2) whether such safeguards were, in fact, applied. Id. at 422.

Initially, we note our agreement with the trial court's findings that both the Spencer court in Alabama and the Cox court in Tennessee actually ruled that the due process requirements had been met. Both these courts specifically found that the respective notice programs met minimal due process. The Cox final order stated that the adequacy requirement (in terms of Tennessee's Rule 23) had been met and it had jurisdiction over the parties. The Spencer final order found the "settlement fair, adequate and reasonable" to the members of the class.

(describing the class action forum shopping problem as "sinister" and observing that "both class counsel and defendant may prefer a forum that rubberstamps any settlement they reach"); see also State v. Homeside Lending, Inc., 826 A.2d at 1020 (where the Vermont Supreme Court noted that for "whatever reason, Alabama has been a magnet forum for national class actions, even when Alabama has no connection with the vast majority of the plaintiffs or with the defendants.").

Accordingly, under a limited collateral review, the two foreign judgments on their face appear to be entitled to full faith and credit. See, e.g., Epstein III, supra; Fine v. America Online, supra. Nonetheless, we turn separately to a review of the procedures utilized by the foreign courts to ensure proper notice and adequate representation.

Notice

Some factual background on the notice programs is required.

As noted by the Cox court, the notice in Cox was "a singularly comprehensive and creative notice program." According to the president of one of the consulting companies hired to provide notice in Cox, the program was designed to reach the largest possible number of consumers whose homes contained polybutylene plumbing. Over 5.6 million individual mailed notices were sent; of those, 244,756 were mailed to South Carolina addresses. In addition, there was a toll-free 800 telephone number set up to field questions about the settlement. More than 1 million calls were received, and over 10,000 additional notices were mailed out.

Furthermore, there was an extensive multimedia campaign. For example, between August 21, 1995 and September 3, 1995, a 30-second television spot was aired 213 times on national network and cable television; during September 1995, full page notices appeared in Parade magazine, USA Weekend, USA Today, People magazine, and TV Guide, as well as in 201 daily and weekly newspapers in 13 targeted states (of which South Carolina was one), 38 Hispanic newspapers, and 2 African-American newspapers; on October 3, 1995, a national news conference was held in Washington, DC, and a press release was sent to 2,000 newspapers, wire services, magazines and broadcast points across the United States; and a World Wide Web home page was created. Statistics as of October 30, 1995, estimated that the media campaign reached over 90% of those Americans over age 25, or exposure to over 150 million people.

Likewise, in Spencer, an extensive notice program occurred during August, September and October 1995. Because the DuPont product was sold

"more heavily in the Mid-Atlantic and Southeast regions in site-built ('starter') homes, mobile homes, and apartments," the notice program was designed to reach people that fell within this demographic, which was determined to be middle-class, high school educated adults with household incomes of less than $45,000. Over 2.5 million notices were directly mailed to people in 12 states, of which South Carolina was one. The mailing list was generated based on mobile home ownership listings. Over 275,000 phone calls were initially received on the 800 number, and 90,000 additional notices were sent out based on individual requests.

As in Cox, there was a multimedia campaign in Spencer as well. The notice was published in USA Today, USA Weekend, TV Guide, Jet magazine, Parade magazine, and 66 Spanish-language newspapers. Television and radio commercials were aired; press and video news releases were distributed. The notice program cost $7.4 million.

Regarding the content of the notices, the notices in both Cox and Spencer explained the terms of the settlement, provided for the opportunity to participate (e.g., by filing objections and appearing at the fairness hearing), and gave information on how to opt out.

Nonetheless, appellants contend that notice to them as absent class members was constitutionally insufficient. Appellants argue, *inter alia*, that they were entitled to personal notice, rather than by publication. In addition, they maintain that the notice programs were deficient to all class members **other than** mobile home owners and the content of the notice was incomplete.

Without question, due process requires that absent class plaintiffs be given notice. Shutts, supra. However, the standard for notice is that it must be "the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Shutts, 472 U.S. at 812 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950)).

In the final order approving the class settlement, the Cox court made several general findings, and numerous specific findings, related to notice. The Cox court characterized the notice program as excellent and found it was the best notice practicable under the circumstances. The court further described the program as one unprecedented in "reach, scope, and effectiveness." Additionally, the Cox court used court-appointed class notice providers (two consulting companies), and considered testimony of employees of these companies. The final order extensively details the notice program, highlighting many of the aspects outlined above. The Cox court concluded that the notice program "met and exceeded" both minimum due process requirements and the notice requirements under Tennessee's class action rule.[14]

Clearly, the Cox court designed and utilized various procedural safeguards to guarantee sufficient notice under the circumstances. Pursuant to a limited scope of review, we need go no further in deciding the Cox court's findings that notice met due process are entitled to deference.

As in Cox, the issue of notice was fully litigated in Spencer. The Spencer court issued an order prior to the implementation of the notice program specifically approving the notice and authorizing the notice program.[15] In the final order approving the class settlement, the Spencer court stated that notice was sent "via first class and by means of a massive national media campaign." The court specifically found that the form of notice satisfied both due process requirements and the notice requirements under Alabama's class action rule. The Spencer court relied on the affidavit of the consultant who designed the notice program and related the details of the notice program, as discussed above. The court concluded that "the means of disseminating the notice was the best practicable, reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the Action and their rights therein."

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[14] We note further that the Cox court had been kept apprised of the notice program as it progressed.

[15] This order expressly stated that the court had heard arguments of counsel on the notice issue.

Accordingly, we hold that under a limited collateral review it is clear there were proper procedures in place to ensure notice in the Spencer case complied with minimum due process.

Adequate Representation

Appellants argue full faith and credit should not be accorded to the Spencer and Cox settlements because adequate representation was lacking. More specifically, appellants argue that conflicts within the class required subclasses; class counsel had impermissible conflicts with class members; and class representatives, as mobile home owners, were inadequate representatives for other types of owners, such as those who own multi-unit structures. Pursuant to a limited review, however, we need merely to determine whether there were safeguards in place to guarantee adequate representation. We conclude that in both Spencer and Cox, there were the proper procedures present.

Shutts declared that due process "of course requires that the named plaintiff **at all times adequately represent** the interests of the absent class members." 472 U.S. at 812 (emphasis added).

Recently, the USSC has elaborated on what constitutes adequate representation. In Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), an asbestos litigation case decided **after** the Spencer and Cox settlements were finalized, the USSC affirmed the Third Circuit's decision to vacate a global class settlement where the federal district court had certified the class for settlement purposes. The Amchem class covered plaintiffs who had been exposed to asbestos; the plaintiffs included people who had already manifested personal injury **and** those who had not yet manifested any affliction; this latter group was labeled the "exposure-only" plaintiffs.

Initially, the Amchem court made clear that while settlement is certainly relevant to a trial court's decision to certify a class, the other requirements for certification under Rule 23, Fed.R.Civ.P., must still be given appropriate, and even heightened, attention because they are specifically

designed to bind and protect absent class members. Id. at 619-21. The court also clearly stated that the overall fairness of a settlement is no substitute for Rule 23's certification criteria. Id. at 622.[16]

With respect to adequate representation, the Amchem court stated that the adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." Id. at 625. Significantly, a class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." Id. at 625-26 (internal quotations and citations omitted). Furthermore, "[t]he adequacy heading also factors in competency and conflicts of class counsel." Id. at 626 n.20.

On the merits of the adequate representation issue, Amchem found serious problems with the global class settlement. First, the named parties had "diverse medical conditions" but nevertheless "sought to act on behalf of a single giant class rather than on behalf of discrete subclasses." Id. at 626. In addition, the USSC found it significant that the currently injured plaintiffs' interest in "generous immediate payments" would be adverse to the exposure-only plaintiffs' interest "in ensuring an ample, inflation-protected fund for the future." Id. The Amchem court also was troubled by certain terms of the settlement, *to wit*, it included no adjustment for inflation and only a few claimants per year could opt out at the back end. Thus, the court stated the global settlement had "no **structural assurance** of fair and adequate representation for the diverse groups and individuals affected." Id. at 627 (emphasis added).

Appellants argue that, pursuant to Amchem, there was inadequate representation, and therefore Spencer and Cox should not be given full faith and credit. Respondents argue that Amchem is not appropriately considered on this issue because it involved a direct appeal, rather than a collateral review as in this case. Along the same lines, respondents also contend that

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[16] See also Ortiz v. Fibreboard Corp., 527 U.S. 815, 863-64 (1999) ("the settlement's fairness under Rule 23(e) does not dispense with the requirements of Rules 23(a) and (b)"). The USSC's decision in Ortiz, decided two years after Amchem, reiterated many of the significant holdings of Amchem.

Amchem cannot be retroactively applied to Spencer and Cox, both of which were finalized in 1995, when Amchem was decided in 1997.

Given our limited scope of review, we need not address the merits of appellants' arguments on adequate representation. In addition, we believe the arguments raised by respondents on Amchem's applicability do not require resolution for our limited review. Instead, we find it is patent that both the Spencer and Cox courts had procedures in place to ensure adequate representation. For example, the Spencer court made preliminary findings regarding the adequacy of the named plaintiff representatives and the qualifications of counsel. Moreover, many of appellants' allegations regarding the actions of class counsel were expressly raised at the Spencer fairness hearing. Finally, the final order in Spencer stated that the settlement was fair, adequate and reasonable to the members of the class. The Cox court responded specifically to various objections to class counsel's alleged conflicts of interest and found such allegations to be without factual support. Indeed, the court commented on class counsel's professionalism in protecting and promoting the interests of the class. The court further noted that the $45 million in attorneys' fees represented only approximately 5% of the settlement fund and were not deducted from the settlement fund. The court in Cox specifically stated that "the Agreement is the result of good faith, arms-length, and non-collusive negotiations." Finally, we note the Cox court also found that the settlement class met the adequacy requirements of Tennessee's class action rule.

We find there obviously were procedures in place to ensure adequate representation in both Spencer and Cox, and that such procedures were implemented throughout. Accordingly, these court findings survive our limited collateral review. Furthermore, it is important to observe that we agree with the Fine v. America Online court's view that "[m]ere disagreement with the terms of a settlement cannot provide grounds for a collateral attack" on a class settlement. 743 N.E.2d at 423.

CONCLUSION

In sum, we find that the proper scope of collateral review of a rendering court's rulings on the due process requirements for binding absent class members is one **limited** to a consideration of whether the **procedures** in the prior litigation allowed a full and fair opportunity to litigate the due process issues. It is our opinion that such procedures were not only in place in Spencer and Cox, but were also consciously and steadfastly utilized to accord minimum due process to the absent class members. Consequently, we hold the trial court correctly accorded full faith and credit to the Spencer and Cox orders approving the nationwide settlements and properly granted summary judgment to respondents.

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Corey Randall, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Lexington County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 25765
Submitted November 19, 2003 - Filed January 12, 2004

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh and Assistant Deputy Attorney General Allen Bullard, of Columbia, for Petitioner.

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the grant of Petitioner's application for post-conviction relief (PCR). We reverse.

FACTS

Petitioner, Corey Randall, was convicted of trafficking in crack cocaine and possession with intent to distribute (PWID) crack cocaine within proximity of a school. He was concurrently sentenced to 25 years and 15 years, respectively. He was granted PCR on the basis that 1) his trial counsel was ineffective in failing to advise him that, if he proceeded to trial and was convicted, he would have to serve 85% of his sentence prior to being eligible for parole, and 2) counsel should have objected to the solicitor's closing argument comparing Randall to a cockroach.

ISSUES

1. Was counsel ineffective in failing to advise Randall he would be required to serve 85% of his sentence before being eligible for parole?

2. Was counsel ineffective in failing to object to the solicitor's closing argument?

1. PAROLE ELIGIBILITY

The PCR court ruled counsel was ineffective in failing to advise Randall that, if convicted, he would be required to serve 85% of his sentence prior to being parole eligible. This was error.

This Court has repeatedly acknowledged that normally, parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). See also Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000)(counsel is not ineffective for failing to advise a defendant regarding parole eligibility in connection with his guilty plea because it is a collateral consequence of sentencing); Smith v. State, 329 S.C.

280, 494 S.E.2d 626 (1997) (unless counsel gives erroneous advice, parole information is not a ground for collateral attack of a guilty plea); Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991)(guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence).

Randall was advised of the maximum potential sentences he was facing if he proceeded to trial (25 years for trafficking and 15 years for PWID within proximity of a school), and nonetheless elected to proceed to trial, rejecting an offer for a 10 year sentence if he pled to PWID. The fact that he was not advised of the collateral consequence of his parole eligibility did not render his counsel ineffective. Jackson v. State, 349 S.C. 62, 562 S.E.2d 475 (2002) (trial counsel need not advise client of collateral consequence of parole eligibility). The grant of PCR on this ground is reversed.

2. SOLICITOR'S COCKROACH ARGUMENT

Randall next argues the solicitor's closing argument, equating him and his co-defendant with cockroaches, was improper and infected the trial with unfairness by arousing the passion and prejudice of the jury. We disagree; the comments did not so infect the trial with unfairness as to deprive Randall a fair trial.

A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences thereto. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. Id. Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002).

During his closing argument, the solicitor was describing Randall and his co-defendant (Yawn), accusing them of driving up from Florida to South Carolina to traffic drugs. He explained to the jury that a multitude of 10 and 20 dollar bills were found in their motel room, and 211 grams, or nearly one-half pound, of cocaine was found in a brown paper bag in the room. He told the jury they were not nice people and they were dirty because they were in the business of selling death and had come up to South Carolina to get rich, and they didn't care who they hurt when they sold their drugs. The solicitor then went on:

> That's why when I think of dope dealers ladies and gentlemen, the only way I can think of them is like cockroaches. And if that sounds foul to you, it should. Cause drug dealers are filthy just like cockroaches. Everywhere they go, everything they touch, they contaminate. And one thing about cockroaches and certainly is true is they hate the light. Particularly the blue kind like the ones that stopped these two fellows cause they were scurrying back to their nest egg. 40 to 80 thousand dollars total. But the thing that makes them worse than cockroaches is the fact they're human beings.[1]

Randall contends the "dirty cockroach" analogy deprived him of a fair trial. We disagree. Given the facts of the case, we are confident the solicitor's cockroach analogy in no way affected the jury's verdict. Nearly one-half pound of crack cocaine, along with razor blades, was found in a motel room registered to Randall, and nearly $900.00 cash was found upon him, and several hundred more dollars were found amongst his personal belongings in a motel room, registered solely to Randall. We find the solicitor's comments did not so infect the trial with unfairness as to make Randall's conviction a denial of due process.

Further, the objected-to argument consists of only 10 lines in the transcript. This is not akin to other situations in which we have reversed for

[1] We note that a "cockroach" closing argument has been upheld against challenge by the Supreme Court of Indiana. See Bowles v. State, 737 N.E.2d 1150 (Ind. 2000)(prosecutor utilized cockroach poem to analogize the defendant as a cockroach and the victims as the writer of the poem who ultimately triumphed over the cockroach).

repeated improper references throughout trial. See State v. Day, 341 S.C. 410, 535 S.E.2d 41 (2000)(23 references to defendant by his nickname "Outlaw" were prejudicial when used not to establish identity but, rather, to demonstrate the defendant's character); State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)(solicitor's reference to defendant's nickname, "Mad Dog," over forty times denied the defendant due process). This case is more akin to State v. Tubbs, 333 S.C. 316, 509 S.E.2d 815 (1999) in which this Court held seven isolated references to the defendant's nickname "Cobra," though undesirable, did not so infect the trial with unfairness as to deprive the defendant due process.

The grant of PCR is reversed.

REVERSED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Joseph Wendell Arsi, Respondent.

Opinion No. 25766
Submitted December 9, 2003 – Filed January 12, 2004

DISBARRED

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Desa Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the sanction of disbarment. We accept the agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

Facts

I. Trust Account Matter

From September 2002 through July 2003, respondent, who had a large real estate practice, issued approximately 750 checks from his trust account to his operating account. The checks were not, on the occasions issued, payment for earned fees, but were from monies belonging to clients and/or lenders involved in pending real estate transactions. Respondent began this misappropriation in an effort to maintain his law practice after there was a dramatic reduction in the number of closings he was handling.

The checks at issue were usually written in amounts of $500, $550, or $600. Respondent wrote anywhere from ten to thirty-five checks at a time. The checks were written to appear like and replicate checks for fees respondent was regularly paid out of his trust account for real estate transactions. Respondent maintained a ledger of the checks which showed the check number, date of issuance and amount of money owed to the trust account due to the issuance of the checks. As real estate transactions were closed, respondent would use the check number of a previously written check listed on the ledger as the fee due respondent for that transaction so as to balance respondent's records for that particular transaction. Respondent would then delete that check number from the ledger.

As of February 2003, respondent had repaid all amounts previously misappropriated using the foregoing arrangement. Respondent repaid the misappropriated funds by not issuing checks for fees for real estate closings and instead using check numbers of checks already on the ledger to balance the trust account records for a particular real estate transaction.

However, beginning in March 2003, respondent resumed issuing checks from his trust account to his operating account pursuant to the foregoing arrangement, but was unable to repay those amounts due to a further downturn in the number of real estate closings his firm was handling.

Respondent misappropriated approximately $412,000 under the foregoing arrangement. After deducting the amount repaid from the total amount misappropriated, there was, and presently remains, a shortage in respondent's trust account of approximately $327,000.

Respondent self-reported his misconduct to the Office of Disciplinary Counsel and consented to being placed on interim suspension. In the Matter of Arsi, 355 S.C. 411, 585 S.E.2d 778 (2003). Respondent has fully cooperated with the Office of Disciplinary Counsel as well as the attorney appointed to protect the interests of respondent's clients.

II. Refinancing Matter

Respondent represented clients who refinanced a mortgage. The closing documents indicated the existing mortgage was to be paid from the proceeds of the refinancing transaction. The new mortgage was recorded and forwarded to the new lender along with a final loan policy of title insurance. A condition for the issuance of the loan policy of title insurance was that the existing mortgage be paid off and satisfied of record. The loan policy indicated the new mortgage was a first mortgage on the public records when, in fact, the existing mortgage had not been satisfied. Several months after the closing, respondent's clients were contacted by the holder of the existing mortgage and discovered the existing mortgage had not been paid. The clients attempted to contact respondent but for several months were only able to talk to respondent's staff. After the clients were finally able to talk directly with respondent, respondent caused the existing mortgage to be paid off and satisfied of record.

Respondent maintains the check to pay off the existing mortgage was issued at closing and was hand delivered to the holder of the mortgage on the day of closing, the original check has never been located, and respondent has not been able to discover any explanation as to what happened to the check after it reached the holder of the existing mortgage. Respondent contends the funds to pay the existing mortgage remained secure in respondent's trust account from the time they were received until paid by way of a new check to the holder of the existing mortgage.

Respondent acknowledges he did not provide competent representation to the clients, that he was not diligent in handling the matter, and that he gave incorrect information to the new lender when he represented that the new mortgage constituted a first lien of record on the secured property when, in fact the existing mortgage constituted a first lien on the property.

Respondent maintains he was utilizing a computer program that he thought was reconciling his trust account on a monthly basis. However, respondent recognizes that the system he was using was inadequate to meet the requirements of Rule 417, SCACR, inasmuch as respondent failed to recognize the funds in this matter had been retained and undisbursed in his trust account for over a one-year period. Approximately fourteen months elapsed from the date of the closing of the refinanced transaction until the existing mortgage was paid off and satisfied of record. As a result of the foregoing, foreclosure proceedings were initiated against the clients by the holder of the existing mortgage, but were eventually resolved. In addition, the clients filed a civil action against respondent which was settled.

III. Title Insurance Matter

Respondent, directly and/or through a title insurance agency, was a title insurance agent for, and obtained title insurance from, a title insurance company from 1999 through December 2001. Respondent was the owner of or had a substantial interest in the title insurance agency. On numerous occasions there was an undue delay in the issuance of final title insurance policies after the related loan transaction had been closed, which resulted in the title insurance company terminating its agency relationship with respondent and the title insurance agency. Thereafter, the title insurance company spent over a year preparing final title insurance policies on transactions closed by respondent while an agent for the company. Respondent acknowledges that on numerous occasions related to loan closings involving title insurance from the title insurance company, respondent did not provide competent representation, was not diligent, and did not properly supervise his non-lawyer staff.

The title insurance company maintains it is owed, by respondent and/or the title insurance agency, $4,353.23 for title insurance premiums collected by respondent and/or the title insurance agency but not forwarded to the title insurance company. Respondent contends the failure to pay the amount due was not a result of misappropriation of funds by respondent, but was instead due to respondent's failure to supervise his non-lawyer staff and his failure to comply with Rule 417, SCACR. However, respondent does not believe he owes any money to the title insurance company and maintains he has never received a statement or claim from the company for the amount it claims it is due. Regardless, respondent acknowledges he did not provide competent representation in connection with the related real estate transactions, was not diligent in the completion of work undertaken in connection with the transactions, and did not properly see to the safekeeping of funds belonging to the company that were deducted from proceeds of the real estate transactions.

IV. Title Agency Matter

Respondent entered into a business arrangement with a non-lawyer to form the above-referenced title insurance agency in which both respondent and the non-lawyer were principles. The agency entered into a title insurance underwriting agreement with a title insurance company. Under the terms of the agreement, respondent was required to maintain a separate escrow account for all funds received in connection with the title insurance company's title insurance policies and to remit premiums collected, and copies of all policies and commitments issued, to the company on a monthly basis. Respondent, acting as closing attorney, and the agency began closing real estate loans. Thereafter, differences arose between respondent and the non-lawyer, the agency ceased operations and the business arrangement between respondent and the non-lawyer was dissolved. Because it appeared that all title insurance premiums due the title insurance company had not been paid by the agency, and that there was a shortage in excess of $66,000, the title insurance company initiated a civil action against respondent. That action is still pending.

Respondent maintains he did not withhold any of the funds due the title insurance company,[1] but acknowledges he failed to properly supervise the non-lawyer employee of the agency and failed to oversee the safekeeping of the title insurance premiums collected by the agency in real estate closings handled by respondent in contravention of the procedures established by this Court for the operation of trust accounts and the handling of monies of others and in violation of the agreement between respondent and the title insurance company. Respondent contends any shortage in funds owed to the company is not due to any acts committed on the part of respondent or to misappropriation of funds.

V. Carolina Title Services Matter

Respondent closed approximately five real estate transactions in a two-week period for Carolina Title Services (CTS). There were no licensed attorneys employed by CTS. Pursuant to an arrangement between respondent and CTS, CTS prepared the closing documents and respondent reviewed the title abstract and closing documents and attended the closings as attorney for the borrowers. The HUD-1 Settlement Statements showed respondent as the "settlement agent" and respondent signed the settlement statements in that capacity. However, respondent represents his signature was added without his knowledge by non-lawyer staff of CTS.

For a period of time, respondent left disbursement of the proceeds from the transactions to be completed by the non-lawyer staff of CTS. During this period, respondent was under the impression, from discussions with the manager of CTS, that another attorney, William J. McMillian, III, was overseeing the disbursement of the proceeds of the transactions, the recordation of documents, and any other aspects of the closings required to be performed by an attorney. Respondent relied on those representations from the manager, but did not discuss the arrangement with McMillian. McMillian did, in fact, have a close working relationship concerning the closing of real estate transactions with CTS and respondent

[1] Respondent also believes the shortage to be considerably less than that claimed by the title insurance company due to the fact that the company's audit was based on commitments instead of policies actually issued.

was aware of that relationship. Respondent was paid by way of checks drafted on McMillian's trust account, signed by the manager of CTS, and transmitted to respondent by CTS rather than McMillian. All of the checks were returned due to insufficient funds; therefore, respondent was not paid for his services in the transactions.

Respondent later learned that McMillian was not involved in the transactions, that the manager of CTS had signature authority on McMillian's trust account, and that disbursements were being made by CTS without supervision by a licensed attorney. Thereafter, respondent insisted that all disbursements on real estate transactions with CTS be made by respondent through respondent's trust account. Respondent is now aware that the manager of CTS had directed the bank to "sweep" all funds out of McMillian's IOLTA trust account each day into the manager's personal bank account, which later resulted in a considerable shortage of funds in McMillian's trust account; however, respondent was unaware of that arrangement during the time respondent allowed CTS to handle the disbursement of funds from real estate transactions. Respondent now recognizes that, as a result of his reliance on incorrect information from the manager of CTS, respondent assisted one or more of the non-lawyer employees of CTS to engage in the unauthorized practice of law. Respondent maintains he discontinued participating in the "closing only" arrangement with CTS when he learned that representations made to him regarding the involvement of McMillian in other aspects of the transactions were incorrect.

In one case, respondent reviewed the closing documents but was unable to attend the closing due to a scheduling conflict. Respondent retained attorney Stephen M. Pstrak to attend the closing in his place. However, respondent did not advise the clients of the limited scope of Pstrak's representation. Neither respondent nor Pstrak did any further work on the matter after the closing. Shortly thereafter, McMillian was placed on interim suspension by this Court and his trust account, used by CTS for disbursement of funds from the transaction, was frozen by the attorney appointed to protect the interests of McMillian's clients. In the Matter of McMillian, 350 S.C. 216, 565 S.E.2d 765 (2002). Some time later, respondent was advised that the transaction had not been completed. The

clients had to retain another attorney to complete the closing, which took approximately one year. Respondent was never paid for the closing, but paid Pstrak for his participation.

Respondent contends he was under the mistaken impression on the occasion of the closing that McMillian would be handling the disbursement of the funds and recordation of the closing documents when, in fact, he now knows McMillian was not involved in the transaction and it was, instead, being handled by non-lawyer employees of CTS without the supervision of a licensed attorney. Respondent now recognizes that it was his responsibility to see that the transaction was properly closed and that the proceeds from the transaction were disbursed in accordance with the settlement statement since Pstrak, as his designee, signed as "settlement agent" under respondent's authorization and direction, and that it was his further responsibility to have assisted the clients in removing the impediments to closing once respondent was advised that the transaction had not been completed. However, due to respondent not supervising the non-lawyer employees of CTS after closing, respondent was unaware that the transaction had not been completed until some time later by the new attorney for the clients.

VI. Cooperation With Disciplinary Counsel

Disciplinary Counsel states that, to the best of his knowledge and belief, respondent has fully cooperated with the inquiries of Disciplinary Counsel into the above-referenced matters and that respondent has been forthright in acknowledging the misconduct set forth herein. Disciplinary Counsel states further that respondent maintained he did not realize some of his actions constituted misconduct at the time, but now recognizes as much with the advice of counsel and the advantage of hindsight.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a

client); Rule 1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation, except in limited circumstances, and shall consult with the client as to the means by which they are to be pursued); Rule 1.2(c) (a lawyer may limit the objectives of the representation if the client consents after consultation); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.15(a) (a lawyer shall hold property of clients that is in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 1.15(b) (a lawyer shall promptly deliver to the client any funds that the client is entitled to receive); Rule 5.3(b) (a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.3(c) (a lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved or the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action); Rule 5.4(c) (a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services); Rule 5.4(d) (a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration, a nonlawyer is a corporate director or officer thereof or a nonlawyer has the right to direct or control the professional judgment of a lawyer); Rule 5.5(b) (a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects);

Rule 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving moral turpitude); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also acknowledges that his misconduct constitutes grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute); and Rule 7(a)(7) (it shall be a ground for discipline for a lawyer to violate a valid court order issued by a court of this state).

Finally, respondent admits that he failed to comply with the record keeping and money handling procedures set forth in Rule 417, SCACR.

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent. Respondent's request that the disbarment be made retroactive to the date he was placed on interim suspension is denied.

Within thirty days of the date of this opinion, Disciplinary Counsel and respondent shall establish a restitution plan pursuant to which respondent shall pay restitution to all persons and entities who have incurred losses as a result of respondent's misconduct in connection with this matter. Respondent shall also reimburse the Lawyers' Fund for Client Protection for any claims paid as a result of his misconduct in connection with this matter. Failure to make restitution in accordance with this opinion and the restitution plan may result in respondent being held in contempt of this Court.

Moreover, respondent shall not apply for readmission unless and until all such restitution has been paid in full.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Stephen M. Pstrak, Respondent.

Opinion No. 25767
Submitted December 8, 2003 – Filed January 12, 2004

PUBLIC REPRIMAND

Henry B. Richardson, Jr., of Columbia, for Office of Disciplinary Counsel.

Stephen M. Pstrak, of Lexington, Pro Se.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to accept an admonition or a public reprimand. We accept the agreement and issue a public reprimand.[1] The facts, as set forth in the agreement, are as follows.

[1] In January 2003, respondent received an eight month suspension for misconduct unrelated to that set forth in this opinion. In the Matter of Pstrak, 352 S.C. 505, 575 S.E.2d 559 (2003).

Facts

I. Real Estate Closing Matter I

Respondent attended a real estate closing in place of attorney J. Wendell Arsi, who had a conflict and could not attend.[2] The closing involved the purchase of a mobile home from a mobile home dealer and real property from a developer. The transaction was being financed by a lender. Respondent was only asked to attend the closing and be responsible for the review and execution of the closing documents. Respondent was "under the good faith impression" that Arsi had examined, or would be examining, or at least reviewing, the abstract of title and had drafted, or at least reviewed, the closing documents.

Respondent attended the closing at the offices of Carolina Title Services, Inc. (CTS). The HUD-1 Settlement Statement reflected that attorney William J. McMillian, III, was the settlement agent. Respondent gathered from that information that the proceeds from the transaction would be disbursed by McMillian in accordance with the Settlement Statement. It was unclear to respondent whether Arsi or McMillian was to be responsible for updating the title and seeing to the recordation of documents in connection with this transaction, but respondent incorrectly assumed that one of those attorneys would do so.

Respondent is now advised, and does not dispute, that the loan documents were prepared by CTS, that Amy Cook, the owner and manager of CTS, advised Arsi that the funds from this transaction would be disbursed by McMillian, and that Arsi was under the impression that he was only expected to attend the closing and that other aspects of the transaction required by applicable rules to be handled by an attorney would be handled by McMillian.[3] Respondent did not confirm any of the foregoing with Arsi or McMillian and respondent is advised, and does not dispute, that Arsi did

[2] Respondent discussed the matter with Arsi's paralegal, but did not speak directly with Arsi.

[3] By separate opinion of this same date, Arsi has been disbarred due, in part, to his participation in this closing arrangement with CTS and McMillian.

not confirm any of the foregoing with McMillian. It is now known and acknowledged that McMillian had no involvement with the transaction whatsoever, that McMillian had previously opened an IOLTA account with BB&T on which he allowed Cook to be a signatory, that the checkbooks for that IOLTA account were kept by Cook at CTS, that the cancelled checks and bank statements concerning real estate transactions were returned to and maintained by Cook, that McMillian was not reconciling or even reviewing the bank statements and cancelled checks pursuant to Rule 417, SCACR, and that McMillian's only involvement with transactions such as the instant transaction was to allow CTS to use his IOLTA account and show McMillian as settlement agent.

Subsequently, there was a substantial shortage discovered in McMillian's IOLTA account. It is reported that BB&T placed a "sweep" on the account at the direction of Cook and would "sweep" the funds from the account into Cook's account on a daily basis. After the shortage of funds in McMillian's IOLTA account was discovered, McMillian was placed on interim suspension. In the Matter of McMillian, 350 S.C. 216, 565 S.E.2d 765 (2002).

The closing appeared to be a relatively simple matter. Respondent had no file in connection with the transaction when he arrived for the closing. Respondent questioned Cook about getting a file to Arsi. Respondent later checked with Arsi's office, which confirmed that it had received a file in connection with the closing, which, in turn, "triggered" the firm to compensate respondent for standing in for Arsi at the closing. At the time, respondent was under the impression that his involvement in the transaction ended upon the review and execution of the closing documents and the file being sent to Arsi.

As a result of delays and the subsequent suspension of McMillian, the transaction was not completed. The mobile home dealer received payment for the mobile home, but the developer did not receive payment for the real estate. Respondent subsequently received a telephone call from an attorney representing the developer advising that the transaction had not been completed. Respondent left a message on the attorney's

answering machine relating his limited involvement in the transaction and advising her to contact Arsi.

When the purchaser became aware that the transaction had not been completed in a timely manner, he filed a complaint with the Commission on Lawyer Conduct. He maintained he had expended funds to clear the real property and to have the driveway installed, but was not able to register his mobile home or get connections for water or electricity or a permit for a septic tank because the transaction had not been completed. The purchaser was under the impression that respondent was standing in for McMillian at the closing and was unaware of Arsi having any involvement in the matter.

Respondent now recognizes that, pursuant to State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987) and Doe v. McMaster, 351 S.C. 158, 568 S.E.2d 356 (2003), Cook was engaged in the unauthorized practice of law and that respondent, albeit unintentionally, assisted Cook in doing so. Respondent now acknowledges that when he served as the closing attorney in connection with the transaction it was his responsibility to see that an attorney had been involved in all other aspects of the transaction requiring attorney participation under the aforementioned cases, that it was his responsibility to either see to the proper disbursement of the funds or see that an attorney approved by the client was going to handle or oversee the recordation of documents and proper disbursement of the funds.

In mitigation, Disciplinary Counsel states respondent was under the good-faith impression that either Arsi or McMillian were to see to the other aspects of the closing that required attorney participation, that respondent was unaware that Cook was engaging in the unauthorized practice of law, that respondent was unaware Cook had unsupervised access to and use of McMillian's IOLTA account and that respondent in no way contributed to the subsequent defalcations in the transaction. Furthermore, Disciplinary Counsel has been advised by the attorney subsequently retained by the developer that the matters set forth herein were resolved to the satisfaction of the purchaser within a few months after the closing.

II. Real Estate Closing Matter II

Respondent was contacted by a paralegal in Arsi's office to attend a second closing in Arsi's place. The paralegal asked only that respondent attend the closing and perform as closing attorney at the closing. Respondent attended the closing, reviewed the closing documents with the clients and supervised the execution of the closing documents. Respondent did not undertake any further work on the transaction after attending the closing and, instead, left the executed documents and the proceeds from the transaction in the hands of Cook or another employee of CTS.

Respondent was under the impression that either Arsi or McMillian had conducted the title examination or reviewed a title abstract in connection with the property, had prepared and reviewed the closing documents, and would see to the finalization of the transaction, including updating the title prior to recordation, recordation of the necessary documents in the public records, and disbursement of the proceeds in accordance with the HUD-1 Settlement Statement presented and executed at closing.[4]

It was respondent's understanding, from his conversation with Arsi's paralegal, that his sole function at the closing was to review the closing documents, see to the proper execution of the documents, and answer any questions that the clients might have concerning the closing documents and the closing. Respondent did not advise the clients of the limited scope of his representation.

Due to McMillian being placed on interim suspension and his IOLTA account being frozen, the transaction could not be closed. The clients called respondent's office to discuss the impediments to closing the transaction. Respondent instructed his secretary to tell the clients that respondent's involvement was limited to attending the closing and they should contact Arsi about the problems they were having getting the transaction closed. Respondent tried to contact the clients directly on two occasions, but was unable to reach them. He left a message on their answering machine to contact Arsi since respondent was only at the closing

[4] The settlement statement showed McMillian as the settlement agent.

to assist Arsi and that he understood Arsi to be the actual closing attorney. The clients were able to remove the impediments to the transaction a year later after hiring counsel to assist them.

Arsi reported that had he been able to attend the closing, his participation would have been limited to the same participation respondent had in the transaction, that no lawyer examined the title to the real property which was the subject of the transaction or reviewed any title abstract, that no lawyer prepared the closing documents, that no lawyer saw to the recordation of documents in the public records or to the completion of the transaction in accordance with the wishes of the clients and the instructions from the lender, and that, had the transaction been closed, the disposition of the proceeds of the transaction would not have been made by a licensed attorney but would have been made by CTS using McMillian's IOLTA account.

Respondent now recognizes that, by his limited participation in the closing, he assisted Cook in the unauthorized practice of law, albeit unwittingly. Respondent further acknowledges that it was his professional responsibility upon serving as closing attorney, to ensure that the other aspects of the closing required to be handled by an attorney were handled or properly supervised by a person licensed to practice law in South Carolina.

III. Mitigation

Disciplinary Counsel reports that respondent has been fully cooperative in the conclusion of this matter, has been forthright in acknowledging his misconduct and addressing the matter, and had no involvement whatsoever in, or knowledge of, the subsequent shortages in McMillian's IOLTA account until after his participation in the two closings. Respondent now recognizes that he should have been more diligent in insuring that an attorney was acting at each stage of the transactions, for which he became responsible upon serving as the closing attorney, and that client funds from the transactions should not have been left in the hands of a non-lawyer. Finally, it appears that respondent's relationship with CTS was short lived and only involved two transactions.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.3(b) (a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.5(b) (a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct). We also find he has violated the following provisions of the Rules of Professional Conduct: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation, except in limited circumstances, and shall consult with the client as to the means by which they are to be pursued); and Rule 1.2(c) (a lawyer may limit the objectives of the representation if the client consents after consultation).

Respondent's misconduct constitutes grounds for discipline under Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct).

Conclusion

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of C.T. Wolf, Respondent.

Opinion No. 25768
Submitted December 8, 2003 – Filed January 12, 2004

DISBARRED

Henry B. Richardson, Jr., and Assistant Deputy Attorney General Robert E. Bogan, both of Columbia, for the Office of Disciplinary Counsel.

C.T. Wolf, of North Myrtle Beach, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any sanction permitted by Rule 7(b), RLDE. We accept the agreement and disbar respondent from the practice of law in this state.[1] The facts, as set forth in the agreement, are as follows.

[1] By order dated November 22, 2002, respondent was placed on interim suspension.

Facts

I. Misappropriation of Funds Matter

Respondent was retained by a client to assist her with the estate of her common law husband. Respondent received $22,275.57 from one of the husband's bank accounts and deposited those funds into respondent's trust account. Thereafter, respondent misappropriated and converted the entire amount to purposes other than those for which they were intended.

Respondent subsequently directed the bank to close the trust account. He then presented the client with a check, in the amount of $22,275.57, from the closed account. The check was returned due to the fact that the account had been closed and contained insufficient funds. Respondent provided the client with a letter of explanation which stated respondent had closed a real estate matter, the client's funds were in the trust account from which disbursements were made on the real estate matter, the lender in the real estate matter failed to wire the funds into the trust account, the lender was supposed to wire approximately $62,000 into the trust account, and if the lender did not wire the funds within the week, respondent would pay the client from personal assets.

Two weeks later, the client, who had not been paid, confronted respondent. Thereafter, respondent presented the client with a check for $12,000, drawn on his mother's home equity account, and a promissory note for the balance. As collateral, respondent gave the client the title to his boat and informed the client that she could sell the boat if respondent had not honored the promissory note by the following week. Respondent subsequently gave the client a cashier's check for the balance due and she returned the title to the boat.

Respondent admits he misappropriated the client's money and that the information he provided in his letter of explanation contained false and misleading information for the purpose of delaying the client until respondent could acquire funds to pay her.

II. Fee Dispute Matter

Respondent was retained to represent a client in a post-conviction relief matter. A fee agreement was prepared which indicated the fee would be $4,000. Thereafter, the client's mother met with an employee of respondent, paid $11,000 by way of two checks, and was given a receipt.

The client's wife later filed a complaint with the Resolution of Fee Disputes Board, alleging respondent failed to work on the case. In response to an inquiry from the Board, respondent represented that he had only received a payment of $4,000. Ultimately, the Board ruled that respondent must refund $10,000 of the fee paid. The Board notified the Office of Disciplinary Counsel of respondent's misrepresentation regarding the amount received.

An investigation by the Office of Disciplinary Counsel, which included an examination of respondent's financial records, revealed respondent received an $11,000 payment. Respondent thereafter admitted he received $11,000 and admitted he owed a refund of $10,000 of the fee paid.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15(a) (a lawyer shall hold property of clients that is in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also acknowledges that his misconduct constitutes grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to

violate the Rules of Professional Conduct); Rule 7(a)(3) (it shall be a ground for discipline for a lawyer to willfully violate a valid order of the Supreme Court, Commission or panels of the Commissions in a proceeding under these rules, willfully fail to appear personally as directed, willfully fail to comply with a subpoena issued under these rules, or knowingly fail to respond to a lawful demand from a disciplinary authority, to include a request for a response or appearance under Rule 19(b)(1), (c)(3) or (c)(4)); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (it shall be a ground for discipline for a lawyer to violate the oath of office taken upon admission to practice law in this state).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent. Within thirty days of the date of this opinion, respondent shall make restitution to the victims whose funds were misappropriated as well as the Lawyers' Fund for Client Protection for any amounts the Fund has paid to the attorney appointed to protect the interests of respondent's clients and any other amounts the Fund may have paid on claims resulting from respondent's misconduct in connection with this matter. Failure to make restitution in accordance with this opinion may result in respondent being held in contempt of this Court. Moreover, respondent shall not apply for readmission unless and until all such restitution has been paid in full.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Muttaquin Abdullah aka Clayton Pinckney, Respondent.

Appeal From Richland County
L. Henry McKellar, Circuit Court Judge

Opinion No. 3721
Heard November 5, 2003 – Filed January 12, 2004

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and

Solicitor Warren Blair Giese, of Columbia, for Appellant.

Assistant Appellate Defender Aileen P. Clare, of S.C. Office of Appellate Defense, of Columbia, for Respondent.

KITTREDGE, J.: Muttaquin Abdullah was indicted for possession with intent to distribute marijuana and possession with intent to distribute marijuana within a one-half mile proximity of a school. In pre-trial proceedings, Abdullah moved to suppress evidence seized in a warrantless search, contending that the search and seizure violated the Fourth Amendment. The circuit court granted the motion to suppress. The State appeals, claiming the circuit court erred in finding a Fourth Amendment violation of Adbullah's rights.[1] We reverse.

FACTS

Shortly before 1:00 a.m. on October 4, 2000, two officers of the Columbia Police Department, while on uniform patrol, responded to a call regarding a burglary in process at 34-F Bethel Bishop Apartments within the Columbia city limits. While en route, the officers also received a report of "shots fired" at the apartment.

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[1] We review this interlocutory appeal under State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) and State v. Henry, 313 S.C. 106, 108, 432 S.E.2d 489, 490 (Ct. App. 1993). Those cases provide, in pertinent part, that "a pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976)," which permits appellate review of "[a]n order affecting a substantial right made in an action when such order … in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action."

Upon arriving at the scene, the officers observed the door to apartment 34-F open, and they entered the doorway. One of the officers, Jesse Carrillo, saw "a black male subject in some black shorts or something … [a]nd when he saw us, he just kind of stood in the door right there and basically refused to come out as we were trying to call him out because we didn't know who he was." The man the officers observed was Abdullah.

The officers sought cooperation from Abdullah, who instead moved near a bedroom door where he stood in a manner such that his left side was shielded from the officers' view. According to Abdullah, he moved toward the bedroom door so that he could toss into the bedroom a gun left by purported burglars shortly before the officers arrived.

After unsuccessfully "pleading" with Abdullah to cooperate, Officer Carrillo "reached in and grabbed" Abdullah in an effort "to pull him out of the bedroom." A struggle ensued and, due to Abdullah's superior size and strength, Officer Nelson joined with Officer Carrillo in the struggle. During the struggle, Abdullah announced he was the victim of the burglary and had called 911. The officers intended to handcuff Abdullah with his hands behind him, as required by procedure, but were unable to do so. They eventually managed to handcuff one of his wrists to a chair in the kitchen.

At this point, the officers knew neither the accuracy of Abdullah's claim to be a victim nor the security status of the apartment. They had observed bullet holes outside the apartment door and inside the apartment. As the officers sought Abdullah's cooperation, they observed bullet holes in the walls of the apartment. Once Abdullah was secured, Officer Carrillo described the officers' perspective and concerns as follows:

> [W]e don't know if we've got additional victims down that are going to need medical assistance. We don't know if we've got subjects hiding. We don't know who else is in there. So that's why we've got to clear it essentially for persons for safety reasons … we still didn't know if we had people in there because that was as far as I had gotten …. We didn't

> know even at that point if there were more suspects in there … so we wanted to basically contain the apartment … with this alleged burglary in progress so that way we could make sure we didn't have anymore victims in there, anymore suspects.

Consequently, Officer Carrillo conducted a protective sweep of the apartment to search for victims, suspects, and to preserve the crime scene. He went to the doorway of the bedroom where Abdullah had been standing. Light from the kitchen partially illuminated the bedroom, enabling Officer Carrillo to see Adbullah's previously discarded gun lying on the bed. Officer Carrillo then turned on the bedroom light, at which time he saw money, drug paraphenalia, and bags containing green, leafy material he believed was marijuana.

Officer Carrillo immediately contacted his supervisor, who obtained a search warrant from a magistrate and summoned narcotics agents. The contraband was seized pursuant to a search warrant, and the green, leafy material was later determined to be marijuana. Abdullah was charged and indicted for possession with intent to distribute marijuana and possession with intent to distribute marijuana within one-half mile proximity of a school.

At trial, Abdullah moved to suppress the evidence seized, contending that the search and seizure violated the Fourth Amendment. The circuit court granted the motion to suppress, concluding that no exigent circumstances existed to justify the warrantless search. The State appeals.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). In an appeal from a motion to suppress evidence based on Fourth Amendment grounds, an appellate court may conduct its own review of the record to determine whether the evidence

supports the circuit court's decision. See State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002) (stating "Brockman does not hold the appellate court may not conduct its own review of the record to determine whether the trial judge's decision is supported by the evidence").

LAW/ANALYSIS

The State argues that the circuit court erred in granting Abdullah's motion to suppress evidence obtained during its warrantless search of the apartment, contending the search did not violate the Fourth Amendment to the United States Constitution. We agree.

Through its "exclusionary rule," the Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Similarly, the South Carolina Constitution provides protection against unlawful searches and seizures. See S.C. Const. art. I, § 10. Evidence seized in violation of the Fourth Amendment is excluded in both state and federal court. See Mapp v. Ohio, 367 U.S. 643 (1961); State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

"Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule." Id., 317 S.C. at 331-32, 457 S.E.2d at 621. In such cases, the burden is upon the State to justify a warrantless search. State v. Bailey, 276 S.C. 32, 35, 274 S.E.2d 913, 915 (1981). The State contends that the warrantless search in the present case fell within exceptions to the Fourth Amendment provided by the "exigent circumstances doctrine" and the "plain view doctrine."

I. Exigent Circumstances

Law enforcement officials have long been permitted to act without the permission of a magistrate when the "exigencies of the situation [have] made

that course imperative." McDonald v. U.S., 335 U.S. 451, 456 (1948). The exigent circumstances doctrine provides an exception to the Fourth Amendment's protection against warrantless searches, but only where, from an objective standard, a "compelling need for official action and no time to secure a warrant" exist. State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (quoting Michigan v. Tyler, 436 U.S. 499 (1978)). For instance, a warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. Minnesota v. Olson, 495 U.S. 91, 100 (1990). In such circumstances, a protective sweep of the premises may be permitted. See Maryland v. Buie, 494 U.S. 325, 337 (1990) (allowing a protective sweep of a house during an arrest where the officers have "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene"); see also Brown, 289 S.C. at 587, 347 S.E.2d at 886 (agreeing that police may be justified in conducting a "protective sweep" of a crime scene where the potential for danger exists). Additionally, "the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." Mincey v. Arizona, 437 U.S. 385, 392 (1978).[2]

In the present case, the officers were responding to a call reporting burglary and gunfire. They arrived at the scene to discover an uncooperative person, Abdullah, who only attempted to identify himself as the alleged victim after the officers abandoned their reasonable but futile efforts to secure his cooperation and instead turned to physically subduing him. Additionally, the officers observed bullet holes inside and outside the walls of the premises. We are firmly persuaded from our review of the record that the totality of the circumstances, including Abdullah's unsettling behavior and the evidence of a violent crime and gunfire, gave the officers highly reasonable grounds from

[2] In light of the uniformity and well-settled nature of exigent circumstances law in federal and state courts throughout the United States, we elect not to burden the reader with unnecessary case citations. For the reader desiring additional authority, we refer generally to 68 Am.Jur.2d Searches and Seizures § 134 (Supp. 2003).

an objective standard for searching the premises with the dual goals of securing the scene against perpetrators and facilitating assistance to possible victims. Moreover, the immediate need to secure the premises and assist potential victims provided no time for the officers to obtain a warrant before conducting their sweep of the crime scene. Thus, we find the State met its burden of proof in demonstrating that exigent circumstances existed to permit the State's warrantless search of the premises where Abdullah and the drugs were lawfully found.[3]

Accordingly, we find no evidence in the record to support the circuit court's assessment that, "once [the officers] handcuffed [Abdullah] to the chair, there weren't any exigent circumstances anymore." We find this basis for the circuit court's ruling improvidently presupposes that subduing and securing Abdullah foreclosed the officers' objectively reasonable need to search the crime scene for suspects and victims.

II. Plain View Doctrine[4]

Under the plain view doctrine, any object falling within the plain view of a law enforcement officer who is lawfully in a position to view the object is subject to lawful seizure. Brown, 289 S.C. at 588, 347 S.E.2d at 885. The plain view exception to the warrant requirement requires that "(1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating [nature

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[3] The reasonableness of the officers' conduct may be further gleaned from the decision to secure a warrant to seize the contraband once the protective sweep was concluded and exigent circumstances unquestionably ceased to exist.

[4] We address the applicability of the plain view doctrine although the evidence was technically seized pursuant to a warrant. It is readily apparent that the basis for the issuance of the warrant was Officer Carrillo's plain view observation of the contraband.

of the] evidence was immediately apparent to the seizing authorities." State v. Culbreath, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990).[5]

Here, Officer Carrillo's initial intrusion into the room containing the evidence was lawful because he was properly conducting a protective sweep to secure the premises. His discovery of the gun, money and drugs was clearly inadvertent, because he was searching for other victims or suspects and securing the scene. Finally, Officer Carrillo testified that the incriminating nature of the gun, money, and bags of marijuana was immediately apparent to him. Thus, we find that the items seized during the search, and suppressed at trial, were clearly within Officer Carrillo's plain view. Moreover, we note that Abdullah's own attorney acknowledged before the circuit court that the officers saw the drugs in "plain view" after they entered the house.

We respectfully find the circuit court's reliance on Arizona v. Hicks, 480 U.S. 321 (1987) to defeat the State's plain view argument is misplaced. In Hicks, the officer had to move a stereo to read its serial number and identify it before he had probable cause to seize it. In contrast, Officer Carrillo had probable cause to seize the evidence, without ever touching or moving it, because of his lawful presence and immediate observations that the evidence was incriminating. Thus, Hicks is clearly distinguishable from the present case.

We also respectfully reject the circuit court's reasoning that turning on the bedroom light negated the application of the plain view exception to the warrant requirement. In Texas v. Brown, 460 U.S. 730 (1983), an officer shined a flashlight into a vehicle and saw contraband. The United States Supreme Court held that the evidence was in plain view despite the use of artificial illumination. Id. at 740. The Court stated that "the use of artificial

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[5] However, the United States Supreme Court has concluded that the plain view exception to the Fourth Amendment's warrant requirement applies even if the discovery of the evidence was not inadvertent, if the other requirements of the exception are satisfied. Horton v. California, 496 U.S. 128, 130 (1990).

means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection." Id. Similarly, our supreme court in State v. Culbreath found that evidence was in plain view, and subject to warrantless search and seizure, when an officer inadvertently discovered the evidence by shining his flashlight into a suspect's car due to legitimate concerns about the suspect's safety. See also State v. Daniels, 252 S.C. 591, 596, 167 S.E.2d 621, 624 (1969) (finding the use of a flashlight in a lawful search of a suspect's car is "of no real consequence" when the evidence found had been left in a place where it could be "easily seen"). Accordingly, we find Officer Carrillo's use of the bedroom light, particularly under the exigent circumstances, was proper, and the evidence seized was in plain view notwithstanding the use of artificial illumination.

CONCLUSION

We conclude that the circuit court erred in suppressing the evidence. Due to the manifest presence of exigent circumstances and the application of the plain view doctrine, the search did not violate the Fourth Amendment and the evidence was properly seized. The circuit court's decision is

REVERSED.

HEARN, C.J., and HOWARD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jack L. Hinton, Jr., **Appellant,**

v.

South Carolina Department of Probation, Parole and Pardon Services, **Respondent.**

Appeal From Greenville County
Charles B. Simmons, Jr., Master in Equity

Opinion No. 3722
Heard December 10, 2003 – Filed January 12, 2004

REVERSED

William M. Hagood, III, of Greenville, for Appellant

Deputy Director for Legal Services Teresa A. Knox, Legal Counsel Tommy Evans and Legal Counsel J. Benjamin Aplin, all of Columbia, for Respondent.

ANDERSON, J.: Jack L. Hinton appeals from a declaratory judgment that his out-of-state conviction rendered him ineligible for parole by virtue of South Carolina's subsequent violent offender statute. We reverse.

FACTS/PROCEDURAL BACKGROUND

Since June 17, 1992, Jack L. Hinton has been serving a thirty-year sentence pursuant to a South Carolina kidnapping conviction. Prior to the present conviction, Appellant completed a jail sentence in Ohio for a 1986 conviction for abduction.

Upon Appellant's incarceration, the South Carolina Department of Corrections ("SCDC") provided a projected parole eligibility date of February 19, 2000. Based on this projected date, the South Carolina Department of Probation, Parole and Pardon Services ("the Department") conducted a pre-parole investigation and presented Appellant's case to the Parole Board for a hearing on March 1, 2000. Appellant was denied parole shortly thereafter.

Before a second parole hearing scheduled for April 17, 2002, the Department notified Appellant that he was not eligible to be considered for parole pursuant to South Carolina's subsequent violent offender statute.

ISSUE

> For purposes of applying the subsequent violent offender provision of section 24-21-640, should the exclusive list of "violent crimes" in section 16-1-60 be interpreted to implicitly include out-of-state convictions?

LAW/ANALYSIS

The Omnibus Crime Bill of June 3, 1986, enacted section 16-1-60 and amended section 24-21-640 of the South Carolina Code to prohibit the Parole Board from granting parole "to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in § 16-1-60." S.C. Code Ann. § 24-21-640 (Supp. 2001). Section 16-1-60 codifies which crimes are considered "violent crimes." S.C. Code Ann. § 16-1-60 (Supp. 2001). Effective January 1, 1994, the General Assembly amended section 16-1-60 so that each offense's name was parenthetically followed by its South Carolina Code section. The statute was again amended on January 12, 1995, this time adding the statute's final sentence: "Only those offenses specifically enumerated in this section are considered violent offenses." S.C. Code Ann. § 16-1-60 (Supp. 2001).

South Carolina has long recognized the principle that penal statutes are to be strictly construed. State v. Germany, 216 S.C. 182, 188, 57 S.E.2d 165, 168 (1949) ("[A] criminal statute must be strictly construed against the State and any doubt must be resolved in favor of the defendant . . . ."); State v. Lewis, 141 S.C. 207, 211, 139 S.E. 386, 389 (1927) ("This is a penal statute, and must be strictly construed."); State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) ("Penal statutes are strictly construed against the State and in favor of the defendant."). At the same time, the cardinal rule of statutory construction requires that we endeavor to "ascertain and effectuate the intent of the legislature." Branch v. City of Myrtle Beach, 340 S.C. 405, 409, 532 S.E.2d 289, 292 (2000); State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000); State v. Morgan, 352 S.C. 359, 365, 574 S.E.2d 203, 206 (Ct. App. 2002). A law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly. Abell v. Bell, 229 S.C. 1, 4, 91 S.E.2d 548, 550 (1956); see also Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003) ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute.").

The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. S. Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991); Dupree, 354 S.C. at 693, 583 S.E.2d at 446. Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 16, 492 S.E.2d 777, 779 (1997); see also Stephen v. Avins Constr. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996) (finding statutory provisions should be given reasonable and practical construction consistent with purpose and policy of entire act). In interpreting a statute, the language of the statute must be construed in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992); Multi-Cinema, Ltd. v. S.C. Tax Comm'n, 292 S.C. 411, 413, 357 S.E.2d 6, 7 (1987); State v. Hudson, 336 S.C. 237, 246, 519 S.E.2d 577, 582 (Ct. App. 1999). Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; see also Abell, 229 S.C. at 5, 91 S.E.2d at 550 ("But where the language of the statute gives rise to doubt or uncertainty as to the legislative intent, the search for that intent may range beyond the borders of the statute itself; for it must be gathered from a reading of the statute as a whole in the light of the circumstances and conditions existing at the time of its enactment.").

The legislature's intent should be ascertained primarily from the plain language of the statute. Georgia-Carolina Bail Bonds, 354 S.C. at 23, 579 S.E.2d at 336. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996); City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 375, 498 S.E.2d 894, 898 (Ct. App. 1998). When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Hudson, 336 S.C. at 246, 519 S.E.2d at 581.

If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning. Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); City of Camden v. Brassell, 326 S.C. 556, 560, 486 S.E.2d 492, 494 (Ct. App. 1997). When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 323, 440 S.E.2d 373, 374 (1994); Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 489, 523 S.E.2d 795, 802 (Ct. App. 1999); see also Parsons v. Georgetown Steel, 318 S.C. 63, 65, 456 S.E.2d 366, 367 (1995) ("Where the terms of a relevant statute are clear, there is no room for construction."). However, if the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Morgan, 352 S.C. at 367, 574 S.E.2d at 207; Hudson, 336 S.C. at 247, 519 S.E.2d at 582. The statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Dupree, 354 S.C. at 694, 583 S.E.2d at 447; Brassell, 326 S.C. at 561, 486 S.E.2d at 495. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. City of Sumter Police Dep't, 330 S.C. at 376, 498 S.E.2d at 896.

On two occasions, the question of the applicability of extra-jurisdictional criminal convictions to South Carolina law has been reviewed, once by our supreme court and once by this court. The supreme court examined the issue in State v. Breech, 308 S.C. 356, 417 S.E.2d 873 (1992), which involved a defendant charged with unlawfully driving under the influence of alcohol. Specifically, the issue before the court was whether the defendant's prior out-of-state convictions were within the scope of section 56-5-2940, which enhanced the penalty for repeat offenders. The version of section 56-5-2940 in effect when the supreme court decided Breech expounded:

> For the purposes of this chapter any conviction . . . for the violation of any law or ordinance of this State or any municipality of this State that prohibits any person from operating a motor vehicle while under the influence of intoxicating liquor, drugs, or narcotics shall constitute a prior offense for the purpose of any prosecution for any subsequent violation hereof.

S.C. Code Ann. § 56-5-2940 (1991).

Noting that the rules of statutory construction required that criminal statutes be construed strictly with ambiguities resolved in favor of the defendant, the supreme court determined that the statute did not cover out-of-state convictions because explicit language in the statute limited its coverage to "violation of any law or ordinance of this State or any municipality of this State." Breech, 308 S.C. at 358, 417 S.E.2d at 874 (quoting S.C. Code Ann. § 56-5-2940 (1991)). Effective June 30, 1992, the General Assembly subsequently amended section 56-5-2940 to provide for enhanced penalties when the prior convictions were from another state: "For the purposes of this chapter any conviction, entry of a plea of guilty or of nolo contendere, or forfeiture of bail for the violation of any law or ordinance of this or any other state or any municipality of this or any other state that prohibits a person from operating a motor vehicle while under the influence of intoxicating liquor, drugs, or narcotics constitutes a prior offense for the purpose of any prosecution for any subsequent violation hereof." S.C. Code Ann § 56-5-2940. By virtue of the statutory amendment, the State is now permitted to include out-of-state convictions in determining whether a DUI committed on or after June 30, 1992 is a second or subsequent offense. State v. Tennyson, 315 S.C. 471, 471-72, 445 S.E.2d 630, 630 (1994).

We recently addressed the same question for an entirely different statute in State v. Zulfer, 345 S.C. 258, 547 S.E.2d 885 (Ct. App. 2001), cert. dismissed, 353 S.C. 537, 579 S.E.2d 317 (2003). Zulfer related to section 16-11-311(A)(2), which allows a burglary offense to be enhanced to first-degree burglary if "the burglary is committed by a person with a prior record of two

or more convictions for burglary or housebreaking or a combination of both." S.C. Code Ann. § 16-11-311(A)(2) (2003).

In concluding that the statute applied to out-of-state burglary and housebreaking convictions, we stated that, unlike the "of this state" language in Breech, the statute in Zulfer contained no language explicitly providing jurisdictional limits. We further noted that to "restrict the predicate offenses for a first-degree burglary charge to acts occurring within South Carolina would give the statute a meaning that the legislature clearly did not intend." State v. Zulfer, 345 S.C. 258, 263, 547 S.E.2d 885, 887 (Ct. App. 2001).

Other states have examined the use of prior convictions from another state as the basis for the enhancement of punishment for an offense committed in the forum state. If the statute contains limiting language, the statute is determinative of whether the prior out-of-state conviction may be utilized to enhance the punishment. The Supreme Court of New Hampshire held in New Hampshire v. Cardin, 156 A.2d 118 (N.H. 1959) the defendant, who was charged with operating a motor vehicle while under the influence of intoxicating liquors, could not be considered as a second offender when his first conviction was in Massachusetts. Their statute reads:

> Any person who shall be convicted of operating, or attempting to operate, a motor vehicle upon any way while under the influence of intoxicating liquor . . . shall be imprisoned . . . . Upon a second conviction, he shall be imprisoned . . . his license shall be revoked and he shall be ineligible for a license for the next three calendar years.

Cardin, 156 A.2d at 315 (quoting N.H. Rev. Stat. Ann. § 262:19). "Way" is defined as "any public highway, street, avenue, road, alley, park or parkway, or any private way laid out under authority of statute." Id. The court professed: "The statute obviously refers to a public way within the State of New Hampshire. Whenever a conviction in another state is to be considered in determining whether a second offense has been committed under a local statute the Legislature has so stated in express terms." Id.

In New Jersey v. Coleman, 484 A.2d 1250 (N.J. 1984), the Superior Court of New Jersey, Appellate Division reviewed whether their mandatory extended term of imprisonment for a person previously convicted of an offense involving the use or possession of a firearm encompasses prior out-of-state convictions. The statute declares:

> If the grounds specified in subsection d. are found . . . the court shall sentence the defendant to an extended term as required by 2C:43-6c . . . .
>
> . . . .
>
> d. Second offender with a firearm. The defendant is at least 18 years of age and has been previously convicted of any of the following crimes: 2C:11-3, 2C:11-4, 2C:12-1b., 2C:13-1, 2C:14- 2a., 2C:14-3a., 2C:15-1, 2C:18-2, 2C:29-5, 2C:39-4a., or has been previously convicted of an offense under Title 2A of the New Jersey Statutes which is equivalent of the offenses enumerated in this subsection and he used or possessed a firearm, as defined in 2C:39-1f., in the course of committing or attempting to commit any of these crimes, including the immediate flight therefrom.

N.J. Stat. Ann. § 2C:44-3. N.J. Stat. Ann. section 2C:43-6c provides:

> A person who has been convicted of an offense enumerated by this subsection and who used or possessed a firearm during its commission, attempted commission or flight therefrom and who has been previously convicted of an offense involving the use or possession of a firearm as defined in 2C:44-3d., shall be sentenced by the court to an extended term as authorized by 2C:43-7c., notwithstanding that extended terms are ordinarily discretionary with the court.

The court held:

> [The defendant] was not "previously convicted of an offense involving the use or possession of a firearm as defined in 2C:44-3d." N.J.S.A. 2C:44-3d is precise and unambiguous in its definition of the prior crimes which mandate imposition of an extended term. Certain Title 2C offenses are specified and any other offense "under Title 2A of the New Jersey Statutes which is equivalent of the offenses enumerated in this subsection . . . ." No other offenses are included; subsection d. does not allow equivalent offenses under the laws of foreign jurisdictions to trigger the mandatory extended term provision.

Coleman, 484 A.2d at 1252.

In Missouri v. Rellihan, 662 S.W.2d 535 (Mo. Ct. App. 1983), the appellant argued the trial court erred in proclaiming him to be a prior offender. A prior offender is defined in their statute as "one who has pleaded guilty to or has been found guilty of one felony." Id. at 543 (quoting Mo. Rev. Stat. § 558.016.2). The court ruled:

> The foregoing section (§ 558.016.2), by its very wording, sets forth no requirement that the term felony is restricted or limited to felonies committed in Missouri. To state it another way, it is clear to this court that the Missouri General Assembly intended the term felony to define and thus include, felony offenses from other jurisdictions--federal and sister states. . . . The General Assembly, had it intended otherwise, could have included limiting language, such as "has been found guilty of one felony in this state," or words of similar limitation. No such language having been included by the General Assembly, it is quite clear that the General Assembly intended the term felony to be a term of inclusion which permits the trial court to impose sentencing, instead of the jury, for a prior felony offense committed within, and subject to, federal and sister state jurisdictions.

Id. at 544-45.

> South Carolina's subsequent violent offender statute establishes:
>
> The board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60.

S.C. Code Ann. § 24-21-640 (Supp. 2001). Section 16-1-60, which was enacted concurrently in 1986, instructs:

> For purposes of definition under South Carolina law, a violent crime includes the offenses of . . . kidnapping (Section 16-3-910) . . . . Only those offenses specifically enumerated in this section are considered violent offenses.

S.C. Code Ann. § 16-1-60 (Supp. 2001).

Contrastive to Breech where the legislature explicitly limited the statute's jurisdictional coverage, and dissimilar to Zulfer where the statute contained no limits whatsoever, the statute in this case was amended in 1995 to include its explicitly exclusionary ultimate sentence, but it is not clear whether or not the General Assembly intended for that language to exclude convictions of other jurisdictions. In an informal opinion issued on May 24, 1995, an Assistant Deputy Attorney General suggested that even after the January 12, 1995 amendment, the statute encompasses crimes committed in other states or against federal law, provided that the crime for which the offender was convicted shares the same elements with one of the enumerated violent offenses of section 16-1-60. S.C. Op. Atty. Gen. (1995 WL 803666).

Although we do not think it sensible to place undue emphasis on statutory nomenclature differences, we cannot discard as without import the glaring peculiarity that the crime of abduction appears nowhere among the enumerated offenses of section 16-1-60. The State urges the adoption of a same-elements test, which it contends resolves this problem. The

Department explained that in following this approach, it looks to whether the particular actions taken by the defendant which satisfy the elements of the crime in the other state would satisfy the elements of one of the enumerated crimes of section 16-1-60.

We find little evidence that such a test was the intent of our legislature for this particular statute, for if it had been, such an intent would have been made more overt, as is the case with section 17-25-45, which was drafted to explicitly include "a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section." S.C. Code Ann. § 17-25-45 (2000).

Moreover, we find such an approach unduly problematic, for we are uncertain how the Parole Board could reliably know on which particular elements of an offense a jury based its guilty verdict. Indeed, as is the case with Ohio's codification for abduction, there are multiple avenues by which a jury can determine that an accused committed the crime of abduction. The result is that, although some abduction convictions may fit within the elements of South Carolina's codification of kidnapping, some abduction convictions invariably will not.

Considering the relevant statutes in tandem illustrates this disconcerting predicament. Ohio has codified abduction as follows:

> (A) No person, without privilege to do so, shall knowingly do any of the following:
>
> > (1) By force or threat, remove another from the place where the other person is found;
> >
> > (2) By force or threat, restrain the liberty of another person, under circumstances which create a risk of physical harm to the victim, or place the other person in fear;
> >
> > (3) Hold another in a condition of involuntary servitude.

> (B) Whoever violates this section is guilty of abduction, a felony of the third degree.

Ohio Rev. Code Ann. § 2905.02 (West 2003). South Carolina has codified kidnapping as the following:

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20.

S.C. Code Ann. § 16-3-910 (2003).

Based on one set of facts and circumstances, an accused in Ohio may be prosecuted for abduction under several theories—(1) the accused "remove[d] another from the place where the other person is found," (2) the accused "restrain[ed] the liberty of another person" and still another being that he "[b]y force or threat, restrain[ed] the liberty of another person, under circumstances which create a risk of physical harm to the victim, or place[d] the other person in fear," and (3) the accused "h[e]ld another in a condition of involuntary servitude." South Carolina's kidnapping statute requires proof of an unlawful act taking one of several alternative forms: seizure, confinement, inveiglement, decoy, kidnapping, abduction, or carrying away. State v. Bernsten, 259 S.C. 52, 54, 367 S.E.2d 152, 153 (1988); see State v. Owens, 291 S.C. 116, 118, 352 S.E.2d 474, 475 (1987). "Kidnaping is a continuing offense." State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999); see State v. Bennett, 328 S.C. 251, 264, 493 S.E.2d 845, 851. "The offense commences when one is wrongfully deprived of freedom and continues until freedom is restored." State v. Hall, 280 S.C. 74, 78, 310 S.E.2d 429, 431 (1983) (citing State v. Ziegler, 274 S.C. 6, 10, 260 S.E.2d 182, 184 (1979)). "The mens rea required for the crime of kidnapping . . . is 'knowledge.'" Tucker, 334 S.C. at 13, 512 S.E.2d at 105; see State v. Jefferies, 316 S.C. 13, 19, 446 S.E.2d 427, 430-31 (1994).

Given that no explication accompanies a jury's finding of guilt, we are unclear how the Parole Board can differentiate which theory the jury ultimately embraced--or alternatively stated, which elements the jury found satisfied--in returning a guilty verdict. Appellant's Ohio indictment for kidnapping alleged that he

> without privilege to do so, knowingly and by force or threat, restrained Anne Miller of her liberty, under circumstances which created a risk of physical harm to the said Anne Miller or which place[d] the Anne Miller in fear, in violation of section 2905.02 of the Ohio revised code and against the peace and dignity of the state of Ohio.

Analyzing this indictment, we cannot say with any degree of certitude whether the jury's guilty verdict was within the scope of our kidnapping statute. We find it unacceptable that the Parole Board should look to the so-called "facts" of the case to make this determination, for the "facts" are almost always disputed, and neither this court nor the Parole Board has any way of extricating which particular "facts" the jury decided were true and which were not. The Parole Board should not undertake such a determination in what would amount to a de facto second trial and an egregious due process violation.

Disavowing the same-elements test, the 1995 amendment to section 16-1-60, makes plain that the General Assembly intended to prevent broadening of the statute's coverage. We are unable to discern the intent of the General Assembly in regard to the addition of the final sentence. If we determine that the sentence was meant only to prevent the expansion of "violent crimes" to other South Carolina offenses not specifically enumerated in section 16-1-60, then we effectively give the language no meaning because the principle of inclusio unius est exclusio alterius (the inclusion of one is the exclusion of another) already prohibits inclusion of non-enumerated offenses. See Brown v. State, 343 S.C. 342, 349, 540 S.E.2d 846, 850 (2001) ("Thus, the maxim of expressio unius est exclusio alterius . . . applies to exclude day care centers from falling within the statute since day care centers are not expressly included."). Such an interpretation violates the rule that we should seek a

construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless. See McClenaghan v. McClenaghan, 20 S.C. Eq. (1 Strob. Eq.) 295 (1847) (observing "if the clause means any thing, and we are obliged to find some meaning for it, on the maxim ut res magis valeat quam pereat").

In enacting the 1995 amendment, the General Assembly intended to circumscribe application of the statute. Because we cannot judicially fashion a demarcation line, we are bound to construe the statute with exactitude. First, when the nature of restrictive language is irresolvedly ambiguous, prudence dictates that we adopt the interpretation least likely to run afoul of the legislature's restrictive intent. In this case, that interpretation is one of strict construction. Second, in applying such an interpretation, our practice remains in accord with the requirement that penal statutes be construed strictly against the State. Third, by adopting such an interpretation of section 16-1-60, we avoid the needless entanglement of a same-elements test.

Finally, we note that our decision does not mean that Appellant will ever succeed in being paroled. Instead, our ruling merely assures that the authority to grant or deny parole remains with the body that can most capably make such challenging, case-by-case determinations: the Parole Board.

REVERSED.

CURETON, A.J., concurs.

GOOLSBY, J., concurs in a separate opinion.

GOOLSBY, J. (concurring in result): I concur in the result reached by the majority, that an Ohio conviction for the crime of abduction does not qualify as a second or subsequent conviction under S.C. Code Ann. § 24-21-640 (Supp. 2002), a statute that prohibits the Board of South Carolina Probation, Parole and Pardon Services from granting a parole to a "prisoner serving a second or subsequent conviction . . . for violent crimes as defined in

Section 16-1-60." I simply differ with the majority in how we should arrive at that conclusion.

The respondent Jack L. Hinton, a prisoner serving a sentence for kidnapping since his conviction in 1992 in Greenville County, South Carolina, once served a sentence of from three to ten years following his conviction in 1986 in Hamilton County, Ohio, for the offense of abduction, an offense proscribed by Ohio Rev. Code Ann. § 2905.02 (2002).

Section 24-21-640 provides in part as follows:

> The board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60.

At the time of his conviction in South Carolina in 1992, S.C. Code Ann. § 16-1-60 (1991),[1] provided in relevant part:

> For purposes of definition under South Carolina law, a violent crime includes the offenses of . . . kidnapping . . . .

A related statute, S.C. Code Ann. § 16-1-70 (1991), defined a "nonviolent crime" as including "all offenses not specifically enumerated in Section 16-1-60."

Subsequent amendments to Section 16-1-60,[2] among other things, added code sections to identify the offenses defined as violent crimes and a second sentence which reads, "Only those offenses specifically enumerated in this section are considered violent offenses."

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[1] See Act No. 184, 1993 S.C. Acts 3239.

[2] See Act No. 7, 1995 S.C. Acts 50; Act No. 83, 1995 S.C. Acts 556; Act No. 113, 1997 S.C. Acts 524; Act No. 136, 1997 S.C. Acts 688; Act No. 402, 1998 S.C. Acts 2450; Act No. 261, 2000 S.C. Acts 1929.

Because Section 16-1-60 is a penal statute, its terms must be strictly construed against the State and in favor of the defendant.[3] We, as judges, can add nothing to the words of the statute either by inference or intendment but must construe those words literally.[4]

At no point in its history has Section 16-1-60 defined the offense of abduction in violation of Ohio Rev. Code Ann. § 2905.02 (2002) as a violent crime. That offense throughout has not been one "specifically enumerated in Section 16-1-60." According a strict construction to Section 16-1-60 and a liberal construction to Section 16-1-70, we can only conclude that the term "violent crime," as used in Section 16-1-60 does not include the offense of abduction in violation of Ohio Rev. Code Ann. § 2905.02 (2002).

This court's decision in State v. Zulfer,[5] a case that dealt with S.C. Code Ann. § 16-11-311(A)(2) (Supp. 2000), does not aid the State. The wording that statute employs differs considerably from that of Section 16-1-60.

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[3] State v. Cutler, 274 S.C. 376, 378, 264 S.E.2d 420, 420-21 (1980).

[4] State v. Lewis, 141 S.C. 207, 220-21, 139 S.E.2d 386, 391 (1927).

[5] 345 S.C. 258, 547 S.E.2d 885 (Ct. App. 2001), cert. dismissed, 353 S.C. 537, 579 S.E.2d 317 (2003).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CEL Products, LLC, Respondent,

v.

Margaret F. Rozelle, Appellant.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 3723
Submitted October 6, 2003 – Filed January 12, 2004

AFFIRMED

Chalmers C. Johnson, of Charleston, for Appellant.

Sean K. Trundy, of Charleston, for Respondent.

BEATTY, J.: CEL Products, LLC ("CEL") filed a complaint against Margaret Rozelle ("Rozelle") alleging numerous actions. Rozelle counterclaimed. Rozelle appeals the trial judge's order granting summary judgment on Rozelle's counterclaims. We affirm.

FACTS

CEL purchased a business from William and Joanna White ("the Whites"). After taking over the business, CEL kept Rozelle, who had worked for the Whites, as an at-will employee. CEL later became dissatisfied with Rozelle and fired her.

CEL eventually brought suit against the Whites, claiming fraud in the sale of the business. The circuit court ordered the Whites' accounts receivable to be held in escrow. According to CEL, Rozelle then induced several customers owing those accounts receivable to make payments into a non-escrow account.

On October 27, 2000, CEL filed a complaint against Rozelle alleging civil contempt, tortious interference with contract, conspiracy, and unfair trade practices. In February 2001, Rozelle answered and counterclaimed, claiming abuse of process, libel and slander, and intentional infliction of emotional distress. She also alleged that CEL's suit was frivolous under S.C. Code Ann. §§ 15-36-10 to -50 (Supp. 2000), the Frivolous Proceedings Sanctions Act. Rozelle served interrogatories, requests for admission, and requests for production on CEL, at the same time as her answer. CEL failed to respond, and Rozelle moved to compel in June 2001. The trial court granted Rozelle's motion to compel on December 6, 2001. Around that time, CEL moved for a voluntary dismissal of its action against Rozelle and for summary judgment on Rozelle's counterclaims. CEL submitted responses to Rozelle's interrogatories and requests for production on December 17, 2001.

In March and April 2002, Rozelle attempted to depose Charles Lee, but the parties failed to reach an agreement on scheduling so the deposition did not take place. Rozelle filed a new motion to compel the deposition on April 14. In July of 2003, the trial judge held a hearing to entertain the various motions. The judge first granted CEL's motion for voluntary dismissal of CEL's actions. Then, the judge granted CEL's motion for summary judgment as to Rozelle's counterclaims. The trial judge did not rule on Rozelle's motion to compel.

ISSUES

(1) Did the trial court err in granting summary judgment since Rozelle claims not to have had a full and fair opportunity to conduct discovery?
(2) Did the trial court err in hearing the motion to dismiss before hearing the motion to compel discovery?

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of

law. Rule 56(c), SCRCP. However, summary judgment is improper if the parties dispute the inferences to be drawn from the facts even if the facts themselves are not in dispute. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Osborne ex rel. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

LAW/ANALYSIS

Rozelle argues the trial judge erred in granting CEL's motion for summary judgment on her counterclaims because she had not been afforded a "full and fair opportunity" to complete discovery. Rozelle further argues the trial judge should have conducted a hearing on her motion to compel a deposition before granting the motion for summary judgment. We disagree.

"The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." Carolina Alliance for Fair Employment v. S.C. Dept. of Labor, Licensing, and Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999).

The hearing on CEL's motion for summary judgment occurred seventeen months after Rozelle filed her answer and counterclaims.[1] Rozelle did not attempt to schedule a deposition until thirteen months after filing her counterclaims. More importantly, Rozelle did not present an affidavit in response to CEL's motion for summary judgment. As a result, the trial judge had only Rozelle's pleadings and CEL's affidavits before him. Therefore, he did not err in granting the motion for summary judgment. See Humana Hosp.-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) ("Where a plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required, under Rule 56, to grant

[1] While we affirm the trial court's ruling, the procedural history of this case raises a concern. The record makes very clear that CEL did not cooperate with Rozelle's discovery requests. Rozelle served interrogatories, requests to admit, and requests for production upon CEL in February 2001, but CEL did not respond. Rozelle then filed a motion to compel in June 2001. CEL did not complete this discovery until December 2001, when the trial judge issued an order compelling it to respond. In failing to respond to Rozelle's discovery for approximately ten months – including six months after Rozelle filed the motion to compel – CEL significantly delayed the resolution of this case. We do not condone such dilatory tactics.

summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law.").

Nor was it error for the trial judge to grant CEL's motion for summary judgment before conducting a hearing on Rozelle's motion to compel discovery. The manner in which a trial is conducted is within the trial judge's discretion. See, e.g., Baber v. Greenville County, 327 S.C. 31, 41, 488 S.E.2d 314, 319 (1997) (holding that the conduct of a trial is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion or the commission of a legal error that results in prejudice for appellant). Had the trial judge granted CEL's summary judgment motion prior to considering the prejudice to Rozell caused by the inability to depose Lee, the trial judge would have failed to exercise discretion. A failure to exercise discretion amounts to an abuse of that discretion. Samples v. Mitchell, 329 S.C. 105,112, 495 S.E.2d 213, 216 (Ct. App. 1997). When a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred. Ballon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152,155, 399 S.E.2d 439, 441 (1990).

In the instant case it is clear from the record that the trial court exercised discretion. The following colloquy took place:

> THE COURT: Where is the affidavit that is submitted in response to his motion for summary judgment?
>
> MS. TRAVAGLIO: We have not submitted any affidavits in response to his motion.
>
> THE COURT: How do I make a determination then that there is an issue of fact in this case? Based on what? What do I have?…
>
> THE COURT: My question is when you file a lawsuit, surely you aren't filing a lawsuit thinking, I think I have a cause of action.
>
> THE COURT: You have a cause of action and it's based on something that you have.

> MS. TRAVAGLIO: Yes, Your Honor.
>
> THE COURT: Now, you strengthen that through discovery, but you don't create your cause of action by taking depositions.

Rozelle's response to CEL's summary judgment motion and affidavits was a request for a continuance to depose Lee, but Rozelle failed to demonstrate that further discovery would be beneficial. See Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (stating "non moving party to summary judgment motion must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition").

This court is cognizant of the Supreme Court's decision in Lanham v. Blue Cross, 349 S.C. 356, 563 S.E.2d. 331 (2002). In Lanham, the court found that the trial court erred in ruling on the summary judgment motion without first ruling on Lanham's motion to produce and motion to compel. However, the instant case is distinguishable from Lanham. In Lanham, the information sought in discovery was necessary to respond to a material claim by Blue Cross **and** the information was in the sole possession of Blue Cross. That is not the case here. Rozelle's counterclaims were centered on alleged statements made by, and to, CEL's owner, Lee. CEL had disclosed what those statements were, who made them and to whom they were made. Rozelle failed to offer anything that contradicted this. Deposing Lee would have yielded very little, if any, additional relevant evidence. As the instant case was approximately twenty-one months old when CEL filed its motion for summary judgment, Rozelle's ability to sustain her counterclaims should not have hinged upon speculative deposition evidence. As such, summary judgment was warranted to avoid prolonging litigation based upon a mere possibility that Rozelle might obtain some helpful information from a deposition.

"The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party." Scott v. Greenville Hous. Auth., 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003). "The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required." Downy v. Dixon 294

S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). Here, CEL showed and the record indicates that Rozelle suffered no prejudice.

CONCLUSION

Based upon the foregoing, the trial court's order is

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.