The Supreme Court of South Carolina

Request for Written Comments and Notice of Public Hearing on South Carolina Bar Foundation's Petition to Amend Rule 412, SCACR

The South Carolina Bar Foundation has submitted the attached petition to amend Rule 412 of the South Carolina Appellate Court Rules (SCACR) relating to Interest on Lawyer Trust Accounts (IOLTA).

Persons or entities desiring to submit written comments regarding the Foundation's petition may do so by filing an original and seven (7) copies of their written comments with the Supreme Court. The written comments must be sent to the following address:

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

The Supreme Court must receive any written comments by Monday, June 15, 2009. Additionally, the Court requests that an electronic version of the comments in Microsoft Word or WordPerfect be e-mailed to Rule412@sccourts.org.

The Court will hold a public hearing regarding the Foundation's petition on Tuesday, June 23, 2009, at 3:00 p.m. in the Supreme Court Courtroom in Columbia, South Carolina. Those desiring to be heard shall notify the Clerk of the Supreme Court no later than Friday, June 19, 2009.

Columbia, South Carolina
May 28, 2009

THE STATE OF SOUTH CAROLINA
In The Supreme Court

PETITION
South Carolina Bar Foundation

IN RE: Amendment of Rule 412, SCACR

Frank B.B. Knowlton
President, South Carolina Bar Foundation
P.O. Box 608
Columbia, SC 29202
(803) 765-0517

REQUEST

The South Carolina Bar Foundation Board of Directors respectfully requests approval of the proposed rule changes to ensure that comparable rates are paid on all IOLTA accounts.

BACKGROUND

For three years, the Board of Directors of the South Carolina Bar Foundation, Inc. (SCBF) has explored the concept of a comparable interest rate rule so that IOLTA (Interest on Lawyers Trust Accounts) accounts are treated equitably by earning interest or dividends comparable to that earned by similarly-situated non-IOLTA customers. With a goal to engage in a dialogue with banking partners, in January 2007, SCBF initiated a process to encourage banks to voluntarily provide comparable rates, primarily with the financial institutions that held large amounts on deposit. In July 2008, a second wave of negotiation was pursued with additional IOLTA financial partners. The success of the negotiation was mixed, but did generate additional revenues. As the economy declined, rates achieved through negotiation fell. In addition, IOLTA rates in general began to decline further, highlighting the discrepancy between rates paid on IOLTA accounts (particularly those with high balances) and rates paid to similarly situated non-IOLTA customers.

In March 2009, SCBF formed a committee to develop a comparable interest rule change. In the rule development process, the committee received substantial input from the Joint Technical Assistance Committee of the National Association of IOLTA Programs and the ABA Commission on IOLTA. Simultaneously, SCBF hired experienced and qualified consultants to perform a feasibility study to determine the impact an interest rate comparability rule would have in South Carolina. The study estimated that under an IOLTA interest rate comparability rule and the current economic environment, the Foundation should earn an additional $800,000 in revenues. The study also estimated that longer term impact could range from an additional $4 million per year to an additional $7 million per year – depending on the rate at which the economy recovers.

GENERAL COMMENTS
Appendix A presents the proposed rule with deletions in strikethroughs and additions in underlines. Appendix B presents the proposed changes within the context of the entire trust account rule. Appendix C includes a list of potential questions and answers that typically surround comparability rule changes.

DISCUSSION
In SCBF's 24-year history of administering the IOLTA program, it has granted more than $41 million to organizations that provide civil legal services, law related education initiatives or otherwise enhance the administration of justice. At our highest IOLTA funding capacity, 8,500 of the state's poor received legal services and 4,700 of our youth benefited from a law related education program.

Since the beginning of IOLTA, some banks have not treated IOLTA accounts in the same manner as other accounts with similar balances. In general, IOLTA accounts have been treated as a group, regardless of principal balance size. IOLTA accounts have been paid low interest rates even when their balances would have garnered non-IOLTA customers a higher yield at the same institution.

It is important to update IOLTA account interest requirements because the banking landscape has changed since those requirements were written more than 20 years ago. Today, an interest-bearing checking (NOW) account often may no longer be the best or only option for such accounts. To participate in this changed landscape, updating the IOLTA rule is necessary. The proposed changes would permit IOLTA accounts to be treated equitably so that they receive rates comparable to the rates that banks pay similarly-situated non-IOLTA customers.

The reason IOLTA comparability works speaks to the very basics of how banks price their products. Most banks will pay a premium for large balance accounts, since the fixed costs associated with maintaining the account make large balance accounts more profitable than smaller balance accounts. The widespread use of "tiered" interest rate pricing is a good example of such. Tiered interest rates increase as balances increase. This is one mechanism utilized by banks to attract and reward the large balance customer. Financial institutions also routinely offer higher yielding cash management products to their customers with higher balances, who demand more than basic checking rates for their large balances, while still maintaining safety and liquidity.

Without a rule change, IOLTA rates in South Carolina will continue to lag behind rates offered to similarly-situated non-IOLTA customers. Negotiation was attempted as a good faith effort, but the successes were not sustainable. The chart below compares South Carolina rates for the years 2005 to 2009. There is a marked difference between IOLTA rates and rates offered to similarly-situated accounts.

Key South Carolina Interest Rates 2005-2009

Average Fed Funds Rate	3.57%
Average High Yield Rate, National	2.70%
Average High Yield Rate, SC.	2.27%
Average Other Comparable Rate, SC	1.52%
Top 10 SC Banks Avg. IOLTA Rate	0.57%
All SC Banks Avg. IOLTA Rate	0.56%
Identified Comparability Gap TOP Banks	170 basis points
Identified Comparability Gap ALL Banks	96 basis points

The current IOLTA rule was amended in January 2005 to require mandatory attorney participation. Language regarding the rate to be paid on accounts was as follows:

"The rate of interest payable on any interest bearing trust account shall not be less than the rate paid by the depository institution on comparable accounts to its non-IOLTA customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility requirements, if any."

Similar language is found in most interest rate comparability rules and the intention that financial institutions pay IOLTA accounts comparable rates is clear. However, because the current rule does not also include the ability for SCBF to certify eligible institutions, product guidelines or specific authorization for higher yielding bank products, banks in South Carolina (and elsewhere) interpret the language to link IOLTA rates with NOW account rates.

It is a matter of fairness that IOLTA accounts be paid the highest interest rate or dividend generally available at a bank to its other customers when IOLTA accounts meet the same minimum balance or other qualifications. To date, 24 states have incorporated an interest rate comparability provision into their IOLTA Supreme Court rule, statute or regulation or guideline.[1] Most states that have adopted interest rate comparability have seen impressive increases in IOLTA revenue. Massachusetts, which had a January 1, 2007 implementation date, experienced an annual increase from $17 million to $32 million. The average interest rate went from just over 1 percent to an average of 2.5 percent immediately upon implementation. States which had particularly low interest rates prior to interest rate comparability had even more dramatic results. Illinois IOLTA revenue went from less than $5 million to approximately $17 million in their first year of comparability. New York IOLTA revenue increased from $15 million to $34 million the year after. At least doubling revenue was fairly typical for rule changes that became effective in 2006 through 2007.

[1] As of May 2009, these states have adopted comparability rules: Alabama, Arkansas, California, Connecticut, Florida, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Maine, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Tennessee, Texas, Utah and West Virginia.

With the recent and unprecedented Federal Funds target rate cuts, interest rates have fallen to record low levels and remain near those lows as of this writing. Importantly, an interest rate comparability requirement as part of an IOLTA rule does not mean that IOLTA rates will always be high. If all of a bank's other rates are falling, IOLTA rates will fall as well. However, what comparability does accomplish, even in an ultra low rate environment, is to ensure IOLTA accounts are guaranteed fair treatment, again, compared to similar balances for other depositors. Absent such a requirement, IOLTA rates are usually among the first to be lowered in a downward trending rate environment.

The proposed rule change will predominantly affect IOLTA accounts with larger balances. These accounts often qualify for higher yield products that offer higher rates, but the current rule does not specify that IOLTA accounts can be placed in higher yield products with the necessary insurance and safety protections. IOLTA accounts with smaller balances already typically receive business checking account interest rates which are comparable to what banks pay their customers with similar account balance sizes.

To give banks flexibility and maximum choice in complying with comparability requirements, the proposed rule provides banks with a variety of choices for achieving comparability. The option of converting or establishing an IOLTA account in a higher yield product is offered in all of the states that have comparability rules. However, virtually all banks have chosen a second option provided in the proposed rule – to mirror interest rates of higher yield products. The higher yield product must be one of the options for IOLTA accounts, or consequently, IOLTA accounts would not be compared to higher yield products. In addition, because establishing and maintaining higher yield products often takes additional bank resources, the proposed rule change allows for sweep fees and an IOLTA administrative fee approved by SCBF, in addition to other permissible fees.

Comparability requirements regulate where lawyers place IOLTA accounts, but do not regulate the banking industry. Under the proposed rule change, lawyers would be required to place IOLTA accounts in eligible institutions that meet rate comparability and related IOLTA account requirements. Banks are not required to offer IOLTA accounts; doing so is completely voluntary. The proposed rule does not change this fact.

Comparability requirements do not require banks to create or offer a product for IOLTA accounts that they do not already offer their other customers. Presumably, these other products are profitable or banks would not offer them to their customers. When banks pay comparable rates, IOLTA accounts will remain profitable. Banks also profit from other relationships they have with attorneys or law firms. By paying comparable rates, banks will promote "good-will" by increasing funding for civil legal services, law related education and the administration of justice.

Comparability requirements do not compare rates among banks or set specific rates. Rather, each bank sets rates for its own customers based on factors a bank normally considers in setting rates. The proposed rule, however, notes that in setting these rates, banks may not consider the fact that an account is an IOLTA account. Comparability

simply requires that an IOLTA account receive the highest interest rate or dividend that other non-IOLTA customers receive if the IOLTA account meets the same eligibility or other requirements.

Rate comparability is important because it achieves fairness by treating IOLTA accounts comparably with other similarly situated non-IOLTA bank customers. SCBF believes that rate comparability will significantly enhance the revenue paid on IOLTA accounts thereby generating substantially more revenue for the advancement of justice in South Carolina.

WHEREFORE, the South Carolina Bar Foundation prays that the Supreme Court of South Carolina amend Rule 412, SCACR, Interest on Lawyer Trust Accounts (IOLTA).

_s/ Frank B. B. Knowlton___
Frank B.B. Knowlton
President

May 21, 2009

RULE 412
INTEREST ON LAWYER TRUST ACCOUNTS (IOLTA)

(a) Definitions. As used herein, the term:

(1) "Nominal or short-term" describes funds of a client or third person that, pursuant to section (d) below, the lawyer has determined cannot provide a positive net return to the client or third person;

(2) "Foundation" means the South Carolina Bar Foundation, Inc.;

(3) "IOLTA account" means ~~an interest bearing~~ a trust account benefiting the South Carolina Bar Foundation established in ~~a participating~~ an eligible[1] institution for the deposit of pooled nominal or short-term funds of clients or third persons. The account product may be an interest-bearing checking account; a money market account with or tied to check-writing; a sweep account which is a government money market fund or daily overnight financial institution repurchase agreement invested solely in or fully collateralized by United States government securities; or an open-end money market fund solely invested in or fully collateralized by United States government securities.[2]

(i) "Open-end money market fund" is a fund holding itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Act of 1940 and, at the time of the investment, having total assets of at least $250,000,000.

(ii) "United States government securities" are United States treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof, including obligations of Government Sponsored Enterprises.

(4) "~~Participating~~ Eligible Institution" means any bank~~, credit union~~ or savings and loan association authorized by federal or state laws to do business in South Carolina and insured by the Federal Deposit Insurance Corporation~~, the National Credit Union Share Insurance Fund,~~ or any successor insurance corporation(s) established by federal or state laws.[3]

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[1] A key component to a comparability rule is the fact that while participation by banks is voluntary, lawyers can only hold their IOLTA accounts at financial institutions that comply with IOLTA rule provisions. Use of the word "eligible" gives the Foundation the ability to certify whether or not a bank is in compliance with the provisions of the Rule. If it is not, the Foundation will contact the financial institution to confirm if it has chosen not to participate. Attorneys and/or law firms are then notified that they must move their IOLTA accounts to an eligible financial institution.

[2] Specifying the product type and safety parameters allows IOLTA accounts to receive the benefits of higher rates that are typically associated with such products.

[3] Credit unions permitted February 19, 2009 via SC Supreme Court. Per the Joint Technical Assistance Committee of NAIP and the Commission on IOLTA (TA Committee), this is a tricky issue insofar as the NCUA has said that the IOLTA account deposits that are funds of clients who are not members of a CU are not insured, so some states have deleted CUs as permissible for IOLTA accounts. However, this insurance may be there when for CUs that are officially designated as "Low-Income CUs." The TA Committee is researching this.

(5) "Reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, Federal deposit insurance fees, sweep fees and a reasonable IOLTA account administrative fee. [4]

(b) Attorney Participation.

(1) All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of the South Carolina Bar practicing law from an office or other business location within the state of South Carolina shall be deposited into one or more IOLTA accounts, except as provided in Rule 1.15 of Rule 407, South Carolina Appellate Court Rules, with respect to funds maintained other than in a bank account and as provided in section (i) below.

(2) A law firm of which the lawyer is a member may maintain the account on behalf of any or all lawyers in the firm.

(c) Depository Procedures.

(1) The IOLTA account shall be established with ~~a participating~~ an eligible institution that voluntarily choose to participate. [5] Funds deposited in each IOLTA account shall be subject to withdrawal upon request and without delay, subject only to any notice period which the institution is required or permitted to reserve by law or regulation and as provided in Rule 1.15 regarding safekeeping of client property.

(2) The rate of interest or dividends payable on any IOLTA trust account shall ~~not~~ be no less than: ~~the rate paid by the depository institution on comparable accounts to its non-IOLTA customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility requirements, if any. Higher rates offered by the institution to customers whose deposits exceed certain or quantity minima may be obtained by a lawyer or law firm on some or all of the deposited funds so long as there is no additional impairment of the right to withdraw or transfer principal. Reasonable service charges or fees may be assessed, as provided in section (h) below, only against the interest or dividends generated and not against the principal~~.

(i) the highest interest rate or dividend generally available from the institution to its non-IOLTA customers for each IOLTA account that meets the same minimum balance or other eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, the institution may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers if such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and these factors do not include that the account is an IOLTA account. The institution also shall consider all product option types noted at (a)(3) for an

[4] Combination of Alabama RPC Rule 1.15 (g) & Definitions, Michigan RPC Rule 1.15 (a) (1) and Missouri Supreme Court Rule 4-1.15(b)

[5] Successful comparability rules emphasize the fact that, while participation by banks is voluntary, lawyers can only hold their IOLTA accounts in eligible financial institutions that comply with comparability.

IOLTA account offered by the financial institution to its non-IOLTA customers by either establishing the applicable product as an IOLTA account or paying the comparable interest rate or dividend on the IOLTA checking account in lieu of actually establishing the comparable highest interest rate or dividend product; or[6]

(ii) a benchmark rate determined periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for qualifying accounts in the South Carolina Bar Foundation's IOLTA program and that is net of reasonable fees. When applicable, the Foundation will express that benchmark in relation to the Federal Funds Target Rate.

(3) Eligible institutions may choose to pay rates higher than comparable rates described at (c)(2) above.

(d) Determination of Nominal or Short-Term Funds.

(1) The lawyer shall exercise good faith judgment in determining upon receipt whether the funds of a client or third person are nominal or short-term. Client or third person funds shall be deposited in a lawyer's or law firm's IOLTA account unless the funds can ~~otherwise~~ earn income for the client in excess of the costs incurred to secure such income.

In the exercise of this good faith judgment and determining whether a client's funds can earn income in excess of costs of securing that income for the benefit of the client or third person,[7] and thus provide a positive net return to the client or third person, the lawyer or law firm shall consider the following factors:

~~(A)~~ (i.) the amount of funds to be deposited;

~~(B)~~ (ii.) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

~~(C)~~ (iii.) the rates of interest or yield at financial institutions where the funds are to be deposited;

~~(D)~~ (iv.) the cost of establishing and administering non-IOLTA accounts for the ~~client's~~ benefit of the client of third person, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the ~~client's~~ benefit of the client or third person;

~~(E)~~ (v.) the capability of financial institutions, lawyers or law firms[8] to calculate and pay income to individual clients or third persons; and

~~(F)~~ (vi.) any other circumstances that affect the ability of the client's or third persons' funds to earn a net return for the client or third person.

[6] From Missouri IOLTA Rule – effective January 1, 2008
[7] Utah IOLTA Rule 14-1001(b)
[8] Utah IOLTA Rule 14-1001 (b)(5)

The lawyer or law firm shall review its IOLTA account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third person.

(2) The determination of whether a client's or third person's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with ethical impropriety based on the exercise of such good faith judgment.

(3) Notification to the client is not required nor shall the client or third person have the power to elect whether nominal or short-term funds shall be placed in the IOLTA account.

(4) The provisions of section (c) shall not relieve a lawyer or law firm from an obligation imposed by Rule 1.15 of the Rules of Professional Conduct with respect to safekeeping of client property.

(e) IOLTA Refund Procedures.

The Foundation ~~will issue refunds when interest has been remitted in error when, pursuant to subsection (d), the funds should have been placed in a non-IOLTA account for the benefit of the client. The Foundation~~ shall establish procedures for the processing of refund requests for such instances as bank or lawyer error.[9]

(f) Notice to Foundation.

Lawyers or law firms shall advise the Foundation, at Post Office Box 608, Columbia, SC 29202-0608, ~~or~~ by facsimile at (803) 779-6126, or in such other manner as the Foundation publishes in its materials is acceptable, of the establishment and closing of an IOLTA account for funds covered by this rule. Such notice shall include: the name of the institution where the IOLTA account is established; the IOLTA account number as assigned by the institution; the institution address; and the name and South Carolina Bar attorney number of the lawyer, or of each member of the South Carolina Bar in a law firm, practicing from an office or other business location within the state of South Carolina that has established the IOLTA account.

(g) Certification.

Each member shall certify annually on his annual licensure pursuant to Rule 410, South Carolina Appellate Court Rules, that the member is in compliance with the provisions of this rule or, pursuant to section (i) below, has been approved by the Foundation as exempt from the provisions of this rule.

(h) Remittance and Reporting Instructions.

[9] Many states have a procedure but do not put it in the rule to avoid lawyers thinking they don't have to make a careful judgment because they can always get a refund. Also, the proposed language allows the Foundation to establish procedures, such as making clear that service charges deducted by the bank and never received by the Foundation would not be refunded by the Foundation. Most refund procedures are internal and make the refund to the bank after bank documentation.

A lawyer or law firm depositing client funds in an IOLTA account shall direct the depository institutions to:

(1) calculate and remit interest or dividends, net of reasonable service charges or fees, if any, on the average monthly balance in the account or as otherwise computed in accordance with the institution's standard accounting practice, monthly[10] to the Foundation, which shall be the sole beneficial owner of the interest or dividends generated by the accounts;

(2) transmit monthly to the Foundation a report, listing by account the name of the lawyer or law firm for whom each remittance is made, the lawyer's or law firm's IOLTA account number as assigned by the institution, the rate and type of interest or dividend applied, the average account balance for the reporting period or the other amount from which interest or dividends are determined, the amount of each remittance, and the amount and type of any service charges or fees assessed during the remittance period, and the net amount of interest remitted for the period;

(3) transmit at least quarterly to the depositing lawyer or law firm, a report or statement ~~containing the information required in subsection (2) above~~ in accordance with normal procedures for reporting to its depositors.

~~In the event that a financial institution does not waive service charges or fees on IOLTA accounts, reasonable customary account maintenance fees may be assessed. Fees for wire transfer, insufficient funds, bad checks, stop payment, account reconciliation, negative collected balances and check printing are not considered customary account maintenance charges and may not be assessed against an IOLTA account. Such non-routine fees must be brought to the attention of the lawyer or law firm, who in turn may absorb these specific costs or pass along those fees to the client(s) being served by the transaction (in accordance with attorney/client agreements).~~

~~Negative interest earnings resulting from service charges which exceed interest earned are prohibited on IOLTA accounts. Service charges may only be imposed to the extent of interest earned on an individual account.~~

~~Participating banks shall forward the remittance report to the Foundation within 45 days of the end of the reporting period.~~

"Reasonable fees" as defined in (a) (5) may be deducted from interest or dividends on an IOLTA account provided that such charges or fees shall be calculated in accordance with an eligible institution's standard practice for non-IOLTA customers. No other fees or charges shall be assessed against the interest on an IOLTA account, but rather shall be the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account." Fees or charges in excess of the interest or dividend earned on the account for any month shall not be taken from interest or dividends earned on other IOLTA accounts

[10] Most rules say "at least quarterly" rather than "monthly."

or from the principal of the account. Eligible institutions may elect to waive any or all fees on IOLTA accounts.[11]

(i) Exempt Accounts.
The Foundation will establish procedures for a lawyer or law firm to maintain an interest-free trust account for client and third-person funds that are nominal or short-term when ~~these nominal or short-term funds~~ the lawyer's or law firm's account cannot reasonably be expected to produce or ~~have not~~ has not produced over time an interest income net of reasonable ~~participating institution~~ service charges or fees.

(j) Program Administration.
The Foundation shall, in accordance with its charter and by-laws, receive, administer, invest, disburse and separately account for all funds remitted to it through this program.

[11] Combination of Alabama RPC Rule 1.15 (g) & Definitions, Michigan RPC Rule 1.15 (a) (1) and Missouri Supreme Court Rule 4-1.15(b)

RULE 412
INTEREST ON LAWYER TRUST ACCOUNTS (IOLTA)

(a) Definitions. As used herein, the term:

(1) "Nominal or short-term" describes funds of a client or third person that, pursuant to section (d) below, the lawyer has determined cannot provide a positive net return to the client or third person;

(2) "Foundation" means the South Carolina Bar Foundation, Inc.;

(3) "IOLTA account" means a trust account benefiting the South Carolina Bar Foundation established in an eligible institution for the deposit of pooled nominal or short-term funds of clients or third persons. The account product may be an interest-bearing checking account; a money market account with or tied to check-writing; a sweep account which is a government money market fund or daily overnight financial institution repurchase agreement invested solely in or fully collateralized by United States government securities; or an open-end money market fund solely invested in or fully collateralized by United States government securities.

(i) "Open-end money market fund" is a fund holding itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Act of 1940 and, at the time of the investment, having total assets of at least $250,000,000.

(ii) "United States government securities" are United States treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof, including obligations of Government Sponsored Enterprises.

(4) "Eligible Institution" means any bank or savings and loan association authorized by federal or state laws to do business in South Carolina and insured by the Federal Deposit Insurance Corporation or any successor insurance corporation(s) established by federal or state laws.

(5) "Reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, Federal deposit insurance fees, sweep fees and a reasonable IOLTA account administrative fee.

(b) Attorney Participation.

(1) All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of the South Carolina Bar practicing law from an office or other business location within the state of South Carolina shall be deposited into one or more IOLTA accounts, except as provided in Rule 1.15 of Rule 407, South Carolina Appellate Court Rules, with respect to funds maintained other than in a bank account and as provided in section (i) below.

(2) A law firm of which the lawyer is a member may maintain the account on behalf of any or all lawyers in the firm.

(c) Depository Procedures.

(1) The IOLTA account shall be established with an eligible institution that voluntarily choose to participate. Funds deposited in each IOLTA account shall be subject to withdrawal upon request and without delay, subject only to any notice period which the institution is required or permitted to reserve by law or regulation and as provided in Rule 1.15 regarding safekeeping of client property.

(2) The rate of interest or dividends payable on any IOLTA trust account shall be no less than:

(i) the highest interest rate or dividend generally available from the institution to its non-IOLTA customers for each IOLTA account that meets the same minimum balance or other eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, the institution may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers if such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and these factors do not include that the account is an IOLTA account. The institution also shall consider all product option types noted at (a)(3) for an IOLTA account offered by the financial institution to its non-IOLTA customers by either establishing the applicable product as an IOLTA account or paying the comparable interest rate or dividend on the IOLTA checking account in lieu of actually establishing the comparable highest interest rate or dividend product; or

(ii) a benchmark rate determined periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for qualifying accounts in the South Carolina Bar Foundation's IOLTA program and that is net of reasonable fees. When applicable, the Foundation will express that benchmark in relation to the Federal Funds Target Rate.

(3) Eligible institutions may choose to pay rates higher than comparable rates described at (c) (2) above.

(d) Determination of Nominal or Short-Term Funds.

(1) The lawyer shall exercise good faith judgment in determining upon receipt whether the funds of a client or third person are nominal or short-term. Client or third person funds shall be deposited in a lawyer's or law firm's IOLTA account unless the funds can earn income for the client in excess of the costs incurred to secure such income.

In the exercise of this good faith judgment and determining whether a client's funds can earn income in excess of costs of securing that income for the benefit of the client

or third person, and thus provide a positive net return to the client or third person, the lawyer or law firm shall consider the following factors:

(i.) the amount of funds to be deposited;

(ii.) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(iii.) the rates of interest or yield at financial institutions where the funds are to be deposited;

(iv.) the cost of establishing and administering non-IOLTA accounts for the benefit of the client of third person, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the benefit of the client or third person;

(v.) the capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients or third persons; and

(vi.) any other circumstances that affect the ability of the client's or third persons' funds to earn a net return for the client or third person.

The lawyer or law firm shall review its IOLTA account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third person.

(2) The determination of whether a client's or third person's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with ethical impropriety based on the exercise of such good faith judgment.

(3) Notification to the client is not required nor shall the client or third person have the power to elect whether nominal or short-term funds shall be placed in the IOLTA account.

(4) The provisions of section (c) shall not relieve a lawyer or law firm from an obligation imposed by Rule 1.15 of the Rules of Professional Conduct with respect to safekeeping of client property.

(e) IOLTA Refund Procedures.

The Foundation shall establish procedures for the processing of refund requests for such instances as bank or lawyer error.

(f) Notice to Foundation.

Lawyers or law firms shall advise the Foundation, at Post Office Box 608, Columbia, SC 29202-0608, by facsimile at (803) 779-6126, or in such other manner as the Foundation publishes in its materials is acceptable, of the establishment and closing of an IOLTA account for funds covered by this rule. Such notice shall include: the name of the institution where the IOLTA account is established; the IOLTA account number as assigned by the institution; the institution address; and the name and South Carolina Bar attorney number of the lawyer, or of each member of the South Carolina Bar in a law firm, practicing from an office or other business location within the state of South Carolina that has established the IOLTA account.

(g) Certification.

Each member shall certify annually on his annual licensure pursuant to Rule 410, South Carolina Appellate Court Rules, that the member is in compliance with the provisions of this rule or, pursuant to section (i) below, has been approved by the Foundation as exempt from the provisions of this rule.

(h) Remittance and Reporting Instructions.

A lawyer or law firm depositing client funds in an IOLTA account shall direct the depository institutions to:

(1) calculate and remit interest or dividends, net of reasonable service charges or fees, if any, on the average monthly balance in the account or as otherwise computed in accordance with the institution's standard accounting practice, monthly to the Foundation, which shall be the sole beneficial owner of the interest or dividends generated by the accounts;

(2) transmit monthly to the Foundation a report, listing by account the name of the lawyer or law firm for whom each remittance is made, the lawyer's or law firm's IOLTA account number as assigned by the institution, the rate and type of interest or dividend applied, the average account balance for the reporting period or the other amount from which interest or dividends are determined, the amount of each remittance, and the amount and type of any service charges or fees assessed during the remittance period, and the net amount of interest remitted for the period;

(3) transmit at least quarterly to the depositing lawyer or law firm, a report or statement in accordance with normal procedures for reporting to its depositors.

"Reasonable fees" as defined in (a) (5) may be deducted from interest or dividends on an IOLTA account provided that such charges or fees shall be calculated in accordance with an eligible institution's standard practice for non-IOLTA customers. No other fees or charges shall be assessed against the interest on an IOLTA account, but rather shall be the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account." Fees or charges in excess of the interest or dividend earned on the account for any month shall not be taken from interest or dividends earned on other IOLTA accounts or from the principal of the account. Eligible institutions may elect to waive any or all fees on IOLTA accounts.

(i) Exempt Accounts.

The Foundation will establish procedures for a lawyer or law firm to maintain an interest-free trust account for client and third-person funds that are nominal or short-term when the lawyer's or law firm's account cannot reasonably be expected to produce or has not produced over time an interest income net of reasonable service charges or fees.

(j) Program Administration.

The Foundation shall, in accordance with its charter and by-laws, receive, administer, invest, disburse and separately account for all funds remitted to it through this program.

Appendix C

The South Carolina Bar Foundation, Inc.
Potential Questions about Proposed IOLTA Rule Change

Why do we need a comparability rule?

We want to ensure fair treatment of IOLTA accounts by banks.

An IOLTA comparability rule requires attorneys to place their IOLTA accounts in a financial institution that pays those accounts the highest interest rate or dividend generally available at that institution to other customers when IOLTA accounts meet the same minimum balance or other account qualifications, if any.

The original IOLTA rule was written in a rate environment where NOW (Negotiable Order of Withdrawal) accounts were the primary option in cash management products and when NOW accounts were receiving interest in the four and five percent range. Today there are new banking products that generally offer much higher rates to customers with qualifying balances. However, high balance IOLTA accounts continue to be paid lower NOW account rates even though other similarly situated customers receive higher rates via other cash management products.

The SC Bar Foundation (SCBF) has worked for three years to get banks to increase rates voluntarily with partial success. We successfully raised the rates of several of our top banks as well as a few of our smaller institutions. Yet, the overall statewide weighted average IOLTA rate has been in the region of 0.68 percent since January 2005. During this same time period, rates paid by financial institutions on cash management products that many large IOLTA accounts would qualify for averaged over 2 percent. In addition, we have found that negotiated rates are not binding and almost always end up being temporary.

SCBF wishes to be treated fairly by asking banks to pay the same interest or dividend on IOLTA accounts generally available to similarly situated non-IOLTA customers at the same institution. If a financial institution does not offer higher rate products to its non-IOLTA customers, it does not have to do so for IOLTA customers.

What is the expected response from the banking community?

While banks certainly will not be happy to pay higher rates, based on the experience of the IOLTA programs that have implemented comparability, they will comply. Indeed, it is difficult to make the argument that IOLTA customers should not receive the same rates that are generally provided to similarly-situated non-IOLTA customers.

Comparability regulates lawyers by requiring them to place their IOLTA accounts at financial institutions that pay interest rates on IOLTA accounts comparable to those paid to similarly-situated non-IOLTA customers. Participation in IOLTA **has always been and continues to be voluntary for financial institutions.**

Comparability does not set or compare rates among banks. Rates paid under comparability are set by each bank for its own customers and are based on all the factors a bank normally considers when it sets rates. Comparability only requires an eligible financial institution to pay interest rates or dividends comparable to those it already pays its own similarly situated non-IOLTA customers.

We think it is unlikely that banks or savings and loan associations would choose not to participate in the IOLTA program, especially as the attorney or law firm may choose to move operating and other accounts if the IOLTA account had to be moved. Across the country, we know of no bank that has ceased to offer IOLTA accounts in states that have implemented an IOLTA comparability rule. Even when banks pay comparable rates, IOLTA accounts should remain profitable, since the bank is only paying what it already pays to its other depositors. Banks also my charge fees associated with higher paying products on IOLTA accounts as they can for any other account.

Only accounts that have high balances are likely to be affected. Other states that have implemented this rule have not experienced any significant problems; South Carolina should be no different.

Banks would also have an option to choose to pay a benchmark rate that reflects overall comparability on all of its IOLTA accounts – as opposed to determining rates for individual accounts via review of all applicable products. Many financial institutions have selected this option in other states. (*See benchmark section below*.)

What is the impact of a comparability rule on attorneys and/or law firms?

Attorneys and law firms would be required to maintain their IOLTA account in banks, savings and loan associations which comply with the rule.

Comparability does not require attorneys and/or law firms to move their accounts to banks that pay the highest IOLTA rates. SCBF has always encouraged attorneys to use financial institutions that offer the most favorable rates on IOLTA, but this rule does not require them to do so.

The rule change would not require attorneys to contact their banks for higher rates. Rather, SCBF will initiate compliance activity on a bank by bank basis and will communicate directly with any affected law firms. SCBF will be responsible for ensuring implementation and monitoring compliance. Where possible, we will provide technical assistance to each financial institution to assist with implementation and ensure compliance with no or minimal burden to lawyers and/or law firms.

As it exists under the current IOLTA rule, should a bank decided to stop participating in IOLTA, SCBF would advise the affected attorneys and law firms and provide them a list of eligible institutions in their area. The proposed rule draft does not change this scenario.

With new product options for IOLTA accounts proposed, what does this mean regarding the safety of trust funds?

The rule proposes bank repurchase agreements (REPOs) for IOLTA accounts and requires that REPOs be fully collateralized by US Government Securities (as opposed to commercial bonds or other lower quality collateral). As the investment is "overnight," REPOs present a very low risk of market loss.

The rule also permits investment in money market fund products. Several safeguards include 1) limiting such funds to government money market funds and 2) limiting government money market fund eligibility to a minimum asset level of $250 million. These provisions suggest that, in the unlikely event that a money market fund loses money, the bank or brokerage firm would likely have sufficient other assets to make up any loss.

The only significant risk to client or third person trust funds would result from bank failure. However, the draft rule requires that REPOs be available for IOLTA accounts only at banks which meet the highest two capitalization categories set by federal regulators. In the event of bank failure, stated FDIC policy is that the acquiring bank(s) honor the REPO agreements of the failed bank. Or in the case of a bank liquidation, the depositor is paid the full value of the government securities by the FDIC.

In addition, IOLTA accounts must be at banks which carry federal deposit insurance. FDIC insurance is currently unlimited for IOLTA checking accounts through at least December 31, 2009 under a temporary FDIC rule. FDIC insurance may return to the $100,000 limit after 2009, which has long been accepted by states as the best available safety parameter for funds in IOLTA trust accounts.

How would the benchmark rate be established?

In lieu of a review of all account offerings, banks may choose to pay a benchmark rate which, as proposed, would be determined periodically by the Foundation. The rate would reflect the Foundation's estimate of an overall statewide comparability rate for qualifying accounts, net of reasonable fees. Current data would be used to determine the benchmark so that it is fair and based on comparable rates for South Carolina. When applicable, the Foundation will express that benchmark in relation to the Federal Funds Target Rate.

Administratively, how does comparability work?

The rule chiefly would affect only high balance accounts of which there are roughly 780 held by the largest ten IOLTA depositories. While the rule provides that these may be set up as sweep accounts, in most cases the product is not switched, but the sweep rate and fees are mirrored. Reports from other states with comparability rules indicate that virtually all banks have chosen to either mirror the higher product rate or pay the benchmark rate on the existing IOLTA checking account. In the unlikely event that a bank requires actually establishing the higher rate product, only the small number of attorneys and law firms affected would need to complete new bank forms. SCBF would

offer to obtain the needed paperwork and help the law firms complete it and submit it to the bank.

Should an eligible institution regularly pay checking accounts interest rates based on the size of the account balance ("tiered interest rates"), they would need to do so for IOLTA accounts as well. Data from other states indicates that this would likely affect a small number of accounts in South Carolina and that the required changes are not significant for financial institutions.

SCBF will use a variety of methods, including surveys, direct confirmations with banks and possibly commercially-available rate data to ensure that banks are paying the correct rates.

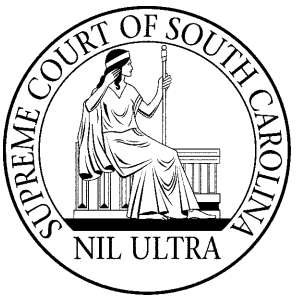
As with IOLTA checking accounts, the tax payer identification number on a government money market fund would be that of SCBF and would remain on the IOLTA checking account tied to a REPO. Eligible institutions could issue and mail IRS form 1099 to SCBF with a preference that they suppress them as they do now for IOLTA checking accounts.

As for the administrative impact on banks, SCBF would work directly with its existing IOLTA contacts at currently participating financial institutions to implement the new rule. Eligible institutions in many cases would not need to modify their products but would need to adjust interest payments and reporting to reflect comparable rates. Most banks have sophisticated systems that can easily accommodate these requirements, but SCBF will offer technical assistance to them as needed and possible.

Once the Court rule is approved, there would need to be a reasonable period of time for implementation. It is the goal of SCBF that no attorney or law firm has to change banks. As such, we feel that it is important to have sufficient time for an orderly transition.

How does the Court decision ensure separation of powers?

The proposed comparability rule regulates lawyers not banks. As the IOLTA proposed rule states, IOLTA is voluntary for financial institutions. Individual bank rates are based on each individual bank's own rates that have already been established under their customary rate setting procedures.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23
June 1, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Noel and Elizabeth Dillon, Appellants/Respondents,

v.

Neil Frazer, Respondent/Appellant.

The Honorable G. Edward Welmaker
Greenville County
Trial Court Case No. 2005-CP-23-01781

ORDER

We deny the petition for rehearing in this matter. We now withdraw our previous opinion and substitute the attached opinion.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
June 1, 2009

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Noel and Elizabeth Dillon, Appellants/Respondents,

v.

Neil Frazer, Respondent/Appellant.

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 26629
Heard January 8, 2009 – Re-filed June 1, 2009

AFFIRMED IN PART; REVERSED IN PART

Cynthia Barrier Patterson, of Columbia, and Donald R. Moorhead, of Greenville, for Appellant/Respondents.

C. Stuart Mauney and T. David Rheney, both of Gallivan, White & Boyd, of Greenville, for Respondent/Appellant.

JUSTICE PLEICONES: This action arose out of an automobile accident in which Noel Dillon was injured due to Neil Frazer's admitted negligence. The men were co-employees of a company located in Ontario, Canada and both were residents of Ontario. After a jury verdict for $6,000,

Dillon[1] appealed the trial court's refusal to grant a new trial absolute on damages. Frazer appealed four points, all relating to whether or not Dillon's action should have been barred by the exclusivity statute found in Ontario workers' compensation law. We certified the case pursuant to Rule 204(b), SCACR. We now affirm the trial court's ruling refusing to apply Ontario law, reverse the trial court's refusal of a new trial absolute as to damages, and remand.

FACTS

In 2002, Dillon and Frazer were employed by Massiv Die-Form (Massiv), a Canadian corporation with no facilities or place of business in South Carolina. The men were in Greenville, South Carolina working for Massiv. During their visit, Dillon and Frazer stayed at a hotel in Greenville and drove a rental car, all of which was paid for by Massiv. Both Dillon and Frazer were paid 30 minutes per day for the travel time between their hotel and the worksite. Frazer was the only employee authorized to drive the rental car.

Dillon sustained injuries in a car accident when Frazer ran a stop sign in a car in which Dillon was a passenger. Dillon was transported by ambulance to a hospital, where it was determined that he had eight fractured ribs on his right side and two on his left, a fractured sternum, a fractured clavicle, a fractured left thumb, and a punctured lung. He was admitted to the hospital where he remained for two days. Once back in Canada, Dillon received physical therapy. The remainder of his care was covered by the Canadian Health System and those costs were not sought in this action.

Due to his punctured lung, Dillon was not medically able to fly back to Canada until the Friday following his release from the hospital. He did not return to work for at least 10 weeks. Initially, Dillon returned to full-time work, but performed fewer overtime hours than prior to his injuries. Dillon testified that, prior to the accident, he worked roughly between 900 and 1,100

[1] Though Elizabeth Dillon filed Notice of Appeal, she did not pursue her appeal.

hours of overtime and double time each year. He stated that, after the accident, the number of hours he was able to work diminished.

Frazer admitted liability, so the only questions remaining for the jury were the amount of damages due Dillon and whether Dillon's wife was entitled to damages for loss of consortium. All told, Dillon's hospital care in Greenville amounted to $10,518. Dillon also claimed $320 for EMS transportation to the hospital and $1,188 in physical therapy bills. In addition to compensation for medical care, Dillon also contended that he was entitled to $509,168 in lost past and future earnings, including $101,350 in lost wages from the date of injury to the estimated trial date and $407,818 for the post-trial period, based on calculations by Dillon's expert.

During deliberations, the jury sent questions to the judge asking whether any compensation had been paid to Dillon by a third party. The jury awarded Dillon $6,000 and found for Frazer on the consortium claim by Dillon's wife. Dillon moved for a new trial *nisi additur* or in the alternative, for a new trial absolute as to damages only. The trial court granted Dillon's motion for *additur* and increased the damages by $15,000, bringing the total amount of damages to $21,000. He denied all other motions.

I.

New trial absolute

Dillon argues on appeal that the trial court erred by not granting a new trial absolute as to damages. We agree.

The trial court has sound discretion when addressing questions of excessiveness or inadequacy of verdicts, and its decision will not be disturbed absent an abuse of discretion. Toole v. Toole, 260 S.C. 235, 239, 195 S.E.2d 389, 390 (1973). "The trial court must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive. The failure of the trial judge to grant a new trial absolute in this

situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute." Vinson v. Hartley, 324 S.C. 389, 404-05, 477 S.E.2d 715, 723 (Ct. App. 1996). When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, prejudice, or some other improper motive. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).

DISCUSSION

In Kalchthaler v. Workman, 316 S.C. 499, 450 S.E.2d 621 (Ct. App. 1994), the Court of Appeals held that a party, having requested and been granted an *additur*, cannot complain of the amount. However, this does not preclude a party that is granted *additur* from appealing the trial judge's refusal to grant a new trial absolute. Sullivan v. Davis, 317 S.C. 462, 467, 454 S.E.2d 907, 911 (Ct. App. 1995).

Dillon presented evidence of over $500,000 in damages as a result of the accident. While Frazer contested portions of Dillon's claim, unchallenged testimony at trial established the following damages: $10,518 in medical bills, $320.00 for EMS transportation to the hospital, $1,188 in physical therapy bills, and $18,000 in lost wages and overtime pay. This totals $30,026 in undisputed damages.

We find the jury verdict of $6,000 irreconcilably inconsistent with the unchallenged evidence presented at trial. The disparity between the award and the admitted damages goes beyond a merely conservative award and suggests that the jurors were motivated by improper considerations.

This suggestion is borne out by the following three questions asked by the jury during deliberations: (1) if it could see the deposition of the human resources director for Massiv; (2) whether Dillon received any compensation while he was not working during the ten weeks after the accident; and (3) whether medical bills for the accident were paid for, and if so, by whom. The trial judge responded that those matters "are not for your concern." The

jury's verdict demonstrates that the jury failed to follow the court's instruction.

In Sullivan, supra, the jury sent questions to the trial judge inquiring as to what medical expenses had been covered by insurance. Id. at 466, 454 S.E.2d at 910. The jury awarded $20,000 despite the plaintiff's medical bills totaling roughly $130,000, leading the Court of Appeals to conclude that "[t]he jurors obviously did not follow the court's instructions to disregard insurance. . . . Therefore we must set it aside and grant a new trial absolute." Id. at 466-67, 454 S.E.2d at 910-11. In the instant case, the record demonstrates that the jury ignored the trial court's instruction to disregard matters relating to third party payment of medical bills.

The jury's award of $6,000 in the face of over $30,000 in undisputed damages is grossly inadequate and demonstrates that the verdict was actuated by improper motivation. No plausible reason for the amount of the verdict has been advanced. For these reasons, the trial court erred in not granting Dillon's motion for a new trial absolute.

II.

Application of Ontario law

Frazer argues in relation to the Ontario worker's compensation exclusivity law, that the trial court erred: (1) in refusing to apply the exclusivity law; (2) in refusing to admit evidence on the exclusivity law; (3) in refusing to charge the jury on the exclusivity law; and (4) in denying Frazer's motion for judgment notwithstanding the verdict based on application of the exclusivity law. Because each point hinges on the applicability of Ontario worker's compensation law and the exclusivity law, we address these points as one and affirm on the ground that Frazer failed to plead Ontario law and so, is barred under Rules 12(b) and 8(c). See Rule 12(b), SCRCP (every defense must be asserted in the responsive pleading); Rule 8(c), SCRCP (in a responsive pleading a party "shall set forth

affirmatively . . . any other matter constituting an avoidance or affirmative defense.").[2]

Even if Frazer's argument was preserved, we find that *lex loci delicto* properly governs this case. See Lister v. Nationsbank of Delaware, 329 S.C. 133,, 143, 494 S.E.2d 449, 454 (Ct. App. 1998) (In choice of law in South Carolina, the general rule is that the substantive law governing a tort action is the law of the state where the injury occurred.); Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303, 305 (1964), overruled on other grounds (In tort cases, the law of the place where the injury was occasioned or inflicted governs in respect of the right of action.).

CONCLUSION

For the reasons stated above, we affirm the trial court's refusal to apply Ontario law and reverse the denial of Dillon's motion for a new trial absolute. Since Frazer admitted liability, we remand for a new trial on damages only.

TOAL, C.J., WALLER, BEATTY and KITTREDGE, JJ., concur.

[2] Frazer asserted South Carolina worker's compensation law in his pleadings, but did not include Ontario worker's compensation law. The trial court denied his motion to amend his pleadings to include Ontario law.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James C. Blackburn, Respondent,

v.

Daufuskie Island Fire District, Appellant.

Appeal From Beaufort County
Curtis L. Coltrane, Circuit Court Judge

Opinion No. 26656
Heard March 18, 2009 – Filed May 26, 2009

AFFIRMED

Caroline W. Cleveland, of Cleveland Law, LLC, of Charleston, for Appellant.

James B. Richardson, Jr., of Columbia, for Respondent.

Adelaide S. Andrews, of Charleston, for *Amicus Curiae* City of Charleston.

Jeffrey A. Lehrer, of Ford & Harrison, of Spartanburg, for *Amicus Curiae* City of Spartanburg.

Shahin Vafai and Linda Pearce Edwards, both of Gignilliat, Savitz & Bettis, of Columbia, for *Amicus Curiae* Municipal Association of South Carolina.

W. A. Nickles, III, of Gergel Nickles & Solomon, of Columbia, for *Amicus Curiae* City of Columbia.

JUSTICE WALLER: In this declaratory judgment action, appellant Daufuskie Island Fire District directly appeals from the Master-in-Equity's decision that under the emergency leave portion of the South Carolina military leave statute, "thirty days" means thirty work days, as opposed to thirty calendar days. We affirm.

FACTS[1]

Appellant is a Special Purpose Tax District within Beaufort County which provides fire protection services to the residents of Daufuskie Island. Appellant employed respondent, James C. Blackburn, as a firefighter from July 2002 until his resignation in December 2005. Respondent's normal work schedule as a firefighter consisted of 24-hours on duty, followed by 48-hours off duty ("24/48"). Respondent's 24-hour working period would begin at 8:15 a.m. on one calendar day, and conclude at 8:15 a.m. the following day. Generally, respondent worked ten 24-hour shifts per month.

Respondent was compensated every two weeks, for a total of 26 times per year. The 24/48 schedule meant that respondent would work 120 hours for two pay periods in a row, and then 96 hours for the next consecutive pay period. Nonetheless, appellant's pay practices provided for uniform payments every two weeks equivalent to pay for 112 hours, i.e., the average hours worked over the course of three pay periods.[2]

In addition to being a firefighter, respondent is a sergeant in the United States Air Force Reserve. While employed by appellant, respondent had a

[1] The parties entered into a stipulation of facts.

[2] Respondent was paid by the hour.

number of work absences due to his military duties. Some of these military absences were for annual training, i.e., regular military leave, but others were for tours of active duty, considered emergency leave.

Respondent filed a declaratory action seeking a determination that under the South Carolina military leave statute, he was entitled to be paid for 30 work days of emergency military leave. The parties filed cross-motions for summary judgment, and the Master found in respondent's favor. Specifically, the Master ruled that under S.C. Code Ann. § 8-7-90, respondent was entitled to 30 work days of emergency leave, and the measure of respondent's work day was "his usual 24-hour shift."[3]

ISSUE

Did the Master err in ruling that the "thirty additional days" of emergency leave provided under S.C. Code Ann § 8-7-90 refers to 30 work days as opposed to 30 calendar days?

DISCUSSION

Appellant argues the Master erred in interpreting the emergency leave provision of section 8-7-90. Appellant contends that for this portion of the statute, the phrase "thirty additional days" means thirty calendar days. We disagree.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. E.g., Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Moreover, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Sloan v. Hardee, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007).

[3] The Master also found that for regular military leave, respondent was entitled to payment for 15 work days. The only issue on appeal, however, is with respect to the emergency leave provision under § 8-7-90.

The statute regarding public employees' payment for military leave has evolved over the years. Prior to a 1990 amendment, section 8-7-90 read as follows:

> All officers and employees of this State or a political subdivision of this State who are either enlisted or commissioned members of the South Carolina National Guard, the United States Naval Reserve, the Officers Reserve Corps, or the Enlisted Reserve Corps, the Reserve Corps of the Marines, the Coast Guard Reserve and the United States Air Force Reserve shall be entitled to leave of absence from their respective duties without loss of pay, time, or efficiency rating **for a period not exceeding fifteen days** in any one year during which they may be engaged in training or other such duties ordered by the Governor, the War Department, the Treasury Department, the Navy Department, or the Air Force Department. **In the event any such person is called upon to serve during an emergency he shall be entitled to such leave of absence for not exceeding thirty additional days.**

S.C. Code Ann. § 8-7-90 (1986) (emphasis added).

The current version, which reflects the 1990 amendment, provides as follows:

> All officers and employees of this State or a political subdivision of this State who are either enlisted or commissioned members of the South Carolina National Guard, the United States Army Reserve, the United States Air Force Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, or the United States Coast Guard Reserve are entitled to leaves of absence from their respective duties without loss of pay, time, or efficiency rating **for one or more periods not exceeding an aggregate of fifteen regularly scheduled work days** in any one year during which they may engage in training or any other duties ordered by the Governor, the Department of Defense, the

> Department of the Army, the Department of the Air Force, the Department of the Navy, the Department of the Treasury, or any other department or agency of the government of the United States having authority to issue lawful orders requiring military service. **Saturdays, Sundays, and state holidays may not be included in the fifteen-day aggregate unless the particular Saturday, Sunday, or holiday to be included is a regularly scheduled work day for the officer or employee involved. In the event any such person is called upon to serve during an emergency he is entitled to such leave of absence for not exceeding thirty additional days.**
>
> As used in this section, 'in any one year' means either a calendar year or, in the case of members required to perform active duty for training or other duties within or on a fiscal year basis, the fiscal year of the National Guard or reserve component issuing the orders.
>
> **The provisions of this section must be construed liberally** to encourage and allow full participation in all aspects of the National Guard and reserve programs of the armed forces of the United States and to allow state officers and employees who are enlisted or commissioned members of the National Guard or reserve components to excel in military and emergency preparedness and service by taking full advantage of all career-enhancing assignments and training opportunities.

S.C. Code Ann. § 8-7-90 (Supp. 2008) (emphasis added).[4]

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[4] Due to a 2008 amendment, a new version of the statute will take effect July 1, 2009. The new version provides for yet another 30 days of military leave if the employee is serving **active duty in a combat zone**. The 2008 amendment adds the following paragraph, to be located after the first paragraph of the statute:

> A state employee in a full time position who serves on active duty in a combat zone and who has exhausted all available leave for military

Thus, before 1990, the language of the statute simply stated that employees were entitled to a leave of absence "for **a period not exceeding fifteen days** in any one year." § 8-7-90 (1986) (emphasis added). Significantly, the 1990 amendment made the following changes: (1) modified the above phrase to "for one or more periods not exceeding an aggregate of **fifteen regularly scheduled work days**;" (2) added the sentence specifying that weekends and holidays are **not** to be included in the 15-day aggregate (unless these days are "regularly scheduled work" days); and (3) added express language that the statute is to be construed liberally to encourage and allow full participation in all aspects of the military reserves. The 1990 amendment did not fundamentally change the sentence concerning "emergency" leave.

Appellant maintains that because the Legislature only changed "days" to "work days" in the sentences expressly relating to the aggregate 15-day "regular" training period, the word "days" in the emergency leave sentence does not mean work days, but instead means calendar days. In our opinion, however, a plain, unforced reading of the statute actually points to the opposite conclusion. See Sloan v. Hardee, supra.

The first sentence of the statute speaks of an employee's entitlement to military "leaves of absences." While that sentence goes on to discuss "regular" leaves of absences, the final sentence of the first paragraph refers to emergency leave, and then states that an employee is "entitled to **such leave** of absence for not exceeding thirty **additional** days." § 8-7-90 (Supp. 2008) (emphasis added). The phrase, "such leave," plainly means the type of leave the statute has already discussed earlier in the **same** paragraph; namely, a military leave of absence based upon regularly scheduled work days.[5]

> purposes is entitled to receive up to thirty additional days of military leave in any one year.

§ 8-7-90 (Supp. 2008).

[5] The Master's well-reasoned order aptly explained this point as follows:

> The only sensible meaning of "additional" here is more of the same kind. The unit of leave is the employee's regularly scheduled work

Appellant also contends that the majority of state jurisdictions facing this issue have found that the word "days" in the military leave statute refers to "calendar days." As pointed out by the Master, however, these authorities weigh in favor of respondent's position because those state statutes use the unmodified "days," whereas South Carolina's statute speaks in terms of "work days." See, e.g., Koppin v. Strode, 761 N.E.2d 455 (Ind. Ct. App. 2002) (rejecting firefighters' argument that a day should be based on a 24-hour shift, and instead interpreting 15 days in the military leave statute as 15 eight-hour days); Painters and Allied Trades Local Union 246 v. City of Des Moines, 451 N.W.2d 825, 826 (Iowa 1990) (holding that statute which allows municipal employees a leave of absence for military service "without loss of pay during the first thirty days of such leave of absence" meant calendar days, not working days); Glass v. City of Lynn, 729 N.E.2d 1136 (Mass. App. Ct. 2000) (rejecting police officer's claim that statute entitling paid military leave for 17 "days" did not allow compensation for seventeen **work** days); Smith v. School Dist. No. 1, 578 P.2d 820 (Or. Ct. App. 1978) (holding that the state statute entitling public employees to paid military leave for "a period not exceeding 15 days" meant no more than 15 consecutive calendar days).

In contrast, those jurisdictions where the statute expressly defines military leave by work days have interpreted firefighters' claims just as the Master did in this case. For example, Nebraska's statute expressly allows for paid military leave for up to 15 "workdays" in any one calendar year. In Hall v. City of Omaha, 663 N.W.2d 97 (Neb. 2003), the Nebraska Supreme Court found that a firefighter's workday is equivalent to his 24-hour shift. The court explained its reasoning as follows:

> In order to best promote military service and to afford the greatest percentage of employees paid military leave without loss of pay, we define the term "workday," for purposes of military leave, to mean any 24-hour period in which work is done. Any

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> day, the same for regular training leave as for active duty leave. If the general assembly had meant to change the unit of measurement for emergency leave, surely it would have said so.

> other construction would penalize an employee for working a shift which overlaps the midnight hour and thus may discourage military service. To construe the term "workday," as the district court did in this case, to mean the 24-hour period from midnight to midnight thwarts the clear intent of the Legislature. The court's interpretation penalizes the firefighters, not for working 24-hour shifts, but, rather, for having the shift extend over the midnight hour.

Id. at 101. The Minnesota Court of Appeals has also interpreted its military leave statute as compensating firefighters for 24-hour shifts. See Howe v. City of St. Cloud, 515 N.W.2d 77 (Minn. Ct. App. 1994) (holding that where the state statute entitles public employees to 15 days of paid military leave, a day should be defined as a 24-hour day because the firefighters' shifts missed while on military leave were each 24 hours long).

Given the Legislature's mandate that § 8-7-90 be construed liberally, we believe that the term "days" as used in the emergency leave provision means "work days," and therefore, we affirm the Master's holding below.

AFFIRMED.

TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Daniel Edwards, Jr., Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26657
Heard March 3, 2009 – Filed June 1, 2009

AFFIRMED AS MODIFIED

Tara Shurling, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, Solicitor Douglas A. Barfield, Jr., of Lancaster, for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the court of appeals opinion affirming the admission of witness intimidation evidence. *State v. Edwards*, 373 S.C. 230, 644 S.E.2d 66 (Ct. App. 2007).[1] We affirm as modified. We adhere to this Court's jurisprudence and hold that a trial court may admit evidence of witness intimidation when the defendant is established as the source of the intimidation.

I.

A jury found Daniel Edwards, Jr., guilty on three counts of criminal sexual conduct with a minor, second degree, and he was sentenced to prison. The minor was his step-daughter. The State's witnesses included the victim and her mother (Edwards' wife). The victim's mother testified that Edwards told her "to get in touch with [the victim] and have her not show up because he had a hit out on her, [and] that she wouldn't make it through the courtroom doors." When asked whether Edwards ever said "anything about what he would do to [the victim] if he were to go to jail on these charges," the victim's mother stated that "[h]e told me that he would have her killed or he would kill her when he got out." This evidence was admitted over Edwards' objection.

Before admitting the testimony into evidence, the trial court carefully considered counsels' arguments and thoroughly examined the issue.

> It is a statement by the defendant, alleged statement of the defendant. Clearly there is a reasonable inference to be drawn from the statement that the testimony of the witness would be damaging to him. . . .
>
> . . . [It] could be construed by the jury to some extent as an admission that he is guilty and will be found guilty and that he will punish her for that, for testifying to what, considering all the

[1] The court of appeals also disposed of issues concerning the admission of prior bad acts evidence and the denial of a motion for a mistrial. Certiorari was granted only on the challenge to the witness intimidation evidence.

> evidence in the light most favorable to the state . . . that he is the perpetrator of this crime.
>
> . . . In this case, clearly in this situation, with the nature of the crime, I feel that it is tantamount to a threat, an attempted threat to discourage a witness from testifying.
>
> There could be a logical inference that it wasn't made. There could be an inference, and you're entitled to cross-examine, but the jury is entitled to weigh that. I think that the probative value as to certainly being corroborative, while it's not necessary--I'm going to charge the jury accordingly. It corroborates the State's position. It corroborates the allegations that he's the perpetrator. There could be no other logical explanation for the statement being made other than to intimidate a witness.
>
> And for those reasons I think the prejudice is outweighed significantly by the probative value, so I will permit the testimony over the objection of counsel.

Edwards appealed, contending the evidence of alleged threats and witness intimidation was improperly admitted because the evidence was "unreliable." The court of appeals affirmed, relying primarily on case law from other jurisdictions, particularly the federal courts of appeals. The court of appeals observed that "[t]his appears to be a novel issue to South Carolina" and concluded by stating:

> While the precedents from other jurisdictions are not controlling, we find them persuasive and in this case elect to adopt their analysis. Just as conflicting statements and attempts to flee are indicative of "guilty knowledge and intent," so too are the threats communicated here. Consequently, the trial judge did not err in admitting the evidence regarding threats by Edwards against the victim/witness.

Edwards, 373 S.C. at 237, 240, 644 S.E.2d at 70, 71 (internal citation omitted).

II.

In criminal cases, this Court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

A.

The question presented is not novel to South Carolina. This state's jurisprudence answers this challenge to the admissibility of evidence of witness intimidation, especially Edwards' focus on the reliability of the evidence.[2]

In *State v. Rogers*, 96 S.C. 350, 80 S.E. 620 (1914), this Court addressed the admissibility of an unsigned letter delivered to a witness who later testified against Rogers. Rogers was "tried and convicted under an indictment charging him with willful and malicious injury to the cars and engine of the Atlantic Coast Line Railroad Company, and endangering the lives of the train crew and passengers." *Id.* at 351, 80 S.E. at 620. The letter introduced at trial was addressed to a witness for the State; the letter "was of a threatening nature, with a coffin drawn on it, and intended to intimidate." *Id.* at 351, 80 S.E. at 620.

At trial, the judge instructed the jury not to consider the letter as testimony to prove Rogers' guilt unless the State connected him to the letter, which it never did. This Court found the omission harmless, but made it clear the admission of the letter was in error: "[h]is honor should not have admitted in evidence the letter . . . without connecting the defendant in some manner with it. It would have been better to require the [S]tate then and

[2] As noted, the testimony elicited during trial revealed that Edwards asked his wife to relay a death threat to the victim. We can envision a litany of other forms of witness intimidation, but for purposes of uniformity, we believe the term witness intimidation sufficiently captures the nature of the evidence in most situations.

there, after it was admitted, to connect the defendant with it, and, upon failure to do so, to have ruled it out." *Id.* at 352, 80 S.E. at 621.

This is the reliability analysis requested by Edwards—that is, the proponent of the evidence of intimidation must connect the defendant with the threat. Without establishing that connection, the evidence concerning witness intimidation is unreliable and therefore inadmissible.

This analysis is further supported by our reasoning and decision in *State v. Center*, 205 S.C. 42, 30 S.E.2d 760 (1944). In *Center*, this Court addressed the admissibility of evidence relating to witness intimidation. Center was convicted of violating a law dealing with the sale of alcohol. At trial, testimony revealed that Center's son came "to the shop [where one of the witnesses worked] and whipped [him] on [his] job." *Id.* at 47, 30 S.E.2d at 763. According to the witness, "[Center's son] said that if I got on the stand . . . that [what he had just done] was not half what he was going to do for me if I swore against his mother." *Id.* at 47-48, 30 S.E.2d at 763. The witness later revealed that being "whipped" meant he "[b]lacked my eye." *Id.* at 48, 30 S.E.2d at 763. The trial court admitted the witness intimidation evidence and Center was convicted. This Court reversed the conviction.

> There is no testimony whatever that the defendant had any knowledge of such transaction, therefore they are the acts of a third party and such testimony is prejudicial where it is not shown the accused was privy thereto in that it is obnoxious to the rule of law res inter alios acta which is defined as "'Things done between strangers ought not to injure those who are not parties thereto.'"
>
> . . . .
>
> In the above cited case the ones alleged to have made the threats were the mother and sister of the accused while in [the] instant case it was the son of the accused. In neither case was there any testimony showing that the accused had any knowledge of such threats.

Id. at 49-50, 30 S.E.2d at 764 (internal citation omitted).

Center stands for the proposition that the admissibility of witness intimidation evidence turns on whether the source of the intimidation may be linked to the defendant. The *Rogers* and *Center* analyses speak directly to the reliability sought by Edwards.

In *State v. Goodson*, 225 S.C. 418, 429, 82 S.E.2d 804, 809 (1954), a concurring opinion from this Court recognized that "[e]vidence that a person charged with [a] crime procured or attempted to procure [the] absence of a witness or to bribe or suppress testimony against him tends to show unrighteousness of defendant's cause and a consciousness of guilt."

More recently, in *Mincey v. State*, 314 S.C. 355, 444 S.E.2d 510 (1994), we dealt with the prejudicial effect of a solicitor's unsubstantiated reference in closing argument to witness intimidation. Elijah Mincey was convicted of distributing drugs. During Mincey's trial several people at the scene of the alleged drug distribution testified that he was not involved. In the State's closing argument, the solicitor referred to Mincey as "a pretty intimidating man." The solicitor also stated "[Elijah Mincey] must be pretty intimidating for these guys [to deny Mincey's involvement in the drug transaction]," and concerning the confidential informer, "[m]aybe she's intimidated by Elijah." *Id.* at 357-58, 444 S.E.2d at 511.

Mincey sought post-conviction relief on the basis that trial counsel was ineffective for failing to object to the solicitor's comments concerning witness intimidation. The post-conviction relief court denied relief, and we reversed and remanded for a new trial. In granting post-conviction relief, we noted the absence of "evidence that Mincey intimidated any of the witnesses." *Id.* at 358, 444 S.E.2d at 512.

Today we follow *Rogers*, *Center*, the concurring opinion in *Goodson*, and *Mincey* and hold that witness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt. Establishing the defendant as the source of the intimidation provides the necessary reliability for admissibility. Here, the mother of the victim identified Edwards as the author of the intimidation. Because the State presented

evidence linking Edwards as the source of the witness intimidation, we find no abuse of discretion in the admission of the evidence.[3]

B.

Our approach follows the majority of jurisdictions that have addressed the issue. For example, in *United States v. Hayden*, 85 F.3d 153, 159 (4th Cir. 1996), the court noted that "[e]vidence of witness intimidation is admissible to prove consciousness of guilt and criminal intent under Rule 404(b), if the evidence (1) is related to the offense charged and (2) is reliable." Hayden challenged the trial court's admission of "evidence that he had written a threatening letter to a witness" and that he "telephoned [a witness] to threaten [the witness] and his family if [the witness] testified." *Id.* at 158-59. With regard to the letter, the *Hayden* court found:

> There was no handwriting analysis, nor were there any fingerprints, and the letter was not signed—it was sent anonymously. The letter's content, however, pointed to [Hayden] as its author. The letter referred to the recipient as owing the writer money for drugs unpaid for. The recipient of the letter testified that . . . Hayden was the only person to whom he had ever owed drug money and about whom he was planning to testify. Thus, the recipient established the identity of the writer of the letter to a fairly reliable degree.

Id. at 159. As for the phone call, the court noted that the witness "was able to identify the voice [of Hayden]." *Id*. From the analysis in *Hayden*, it is reasonable to conclude that the Fourth Circuit equates the matter of reliability with the ability of the proponent of the evidence to link the threat to the defendant.

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[3] The admission of evidence, of course, remains in the sound discretion of the trial court. Relevant evidence may be excluded for a host of reasons, including a finding under Rule 403, SCRE, that the probative value of the evidence is substantially outweighed by its prejudicial effect.

As noted, the prevailing view across the country is in accord, as our court of appeals commendably demonstrated in its thorough research of witness intimidation evidence in other jurisdictions. *Edwards*, 373 S.C. at 238-39, 644 S.E.2d at 70-71.

III.

Edwards urges this Court to disallow, essentially on policy grounds, the type of witness intimidation evidence presented here. Edwards argues that the evidence is inherently unreliable and allowing such evidence will promote false allegations of witness intimidation. We do not discount Edwards' concerns. Yet we ultimately trust our adversarial system to work as designed. The trial judge serves a critical gatekeeping role, under Rule 403, SCRE, and otherwise, in determining the admissibility of evidence. Assuming the foundation for witness intimidation evidence has been satisfied and the evidence further survives a Rule 403 challenge, we trust the collective wisdom of juries to sift through conflicting evidence and find the truth.

In addition, while our jurisprudence in this area has been consistent since the early 1900s, it has been infrequent. In light of this Court's infrequent experience with this issue, and our review of other jurisdictions, we do not foresee a floodgate of witness intimidation evidence.

And finally, we are persuaded that the suggested *per se* rule disallowing evidence of witness intimidation would invite the very intimidation our system abhors. On balance, a cautious approach allowing for the admissibility of witness intimidation evidence serves to discourage witness intimidation as well as minimize the potential for false claims of witness intimidation.

IV.

Because evidence was presented pointing to Edwards as the source of the witness intimidation and the trial court, after careful consideration, determined that the probative value was not substantially outweighed by the

danger of unfair prejudice, we find no abuse of discretion in the admission of the evidence of witness intimidation. The court of appeals is

AFFIRMED AS MODIFIED.

TOAL, C.J., WALLER, BEATTY, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jack R. Bennett, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26658
Submitted March 18, 2009 – Filed June 1, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Karen Ratigan, all of Columbia, for Petitioner.

Division of Appellate Defense, of Columbia, and Susannah Conyers Ross, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: In this case, we granted a writ of certiorari to review the post-conviction relief (PCR) court's grant of Respondent Jack Randall Bennett's request for relief. The State argues that the PCR court erred in ruling that Respondent received ineffective assistance of trial counsel and appellate counsel. We find that Respondent's trial counsel and appellate counsel were not ineffective and reverse the PCR court's grant of relief.

FACTS/PROCEDURAL HISTORY

On the evening of October 13, 1998, Respondent was at the home of Robert Garland (the Victim) in Marietta, South Carolina. Also present were Lisa Ward (Ms. Ward) and Respondent's wife, Elizabeth Bennett (Ms. Bennett). Respondent and the Victim drank large quantities of beer and moonshine throughout the evening. Additionally, Respondent admits to ingesting multiple Valium pills. During the course of the evening, Respondent became violent with Ms. Bennett. The Victim and Ms. Ward ejected Respondent from the home. Breaking through the front door, Respondent re-entered the Victim's home and beat him severely.

In January 2001, Respondent was tried for assault and battery with intent to kill (ABWIK), possession of a weapon during the commission of a violent crime, and first-degree burglary. Ms. Bennett was not present for the trial but the trial court admitted her out-of-court statements.

Ms. Ward testified that while Respondent was assaulting the Victim, Ms. Bennett hysterically screamed, "He's going to kill me." Trial counsel objected to the admission of the statement on hearsay grounds. The trial judge ruled that Ms. Bennett's statement was an excited utterance, and thus admissible as an exception to the rule excluding hearsay testimony. Ms. Ward continued her testimony stating that as the two women were exiting the home, Ms. Bennett screamed, "[p]lease hurry, please hurry, because if he gets hold of me, he's going to kill me." Trial counsel did not renew his objection.

Next, the State presented Officer Keith Morecraft to read into evidence a statement he took from Ms. Bennett at the crime scene ninety (90) minutes to two hours after the crime had occurred. Trial counsel objected on both hearsay and Confrontation Clause grounds. The trial court overruled the objection and allowed Officer Morecraft to read the statement into evidence.

The jury found Respondent guilty and sentenced him to concurrent terms of eighteen (18) years for ABWIK, five (5) years for possession of a weapon during the commission of a violent crime, and eighteen (18) years for first-degree burglary. Appellate counsel filed an appeal pursuant to *Anders*,[1] which the court of appeals dismissed. *State v. Bennett*, Op. No. 2002-UP-45a2 (S.C. Ct. App. filed June 20, 2002). Respondent filed an application for PCR. After a hearing, the PCR court granted Respondent's request for relief. The PCR court found that trial counsel provided Respondent with ineffective assistance in failing to adequately object to the admission of Ms. Bennett's out-of-court statements. The PCR court also found that appellate counsel provided Respondent with ineffective assistance in failing to brief issues concerning the admission of Ms. Bennett's out-of-court statements.[2]

STANDARD OF REVIEW

In post-conviction relief proceedings, the burden of proof is on the applicant to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). If the PCR court's finding is supported by any evidence of probative value in the record, it should be upheld. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

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[1] Pursuant to *Anders v. California*, "if [appellate] counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." 386 U.S. 738, 744 (1967).

[2] The issue appellate counsel briefed in the *Anders* appeal was unrelated to the admission of Ms. Bennett's out-of-court statements.

LAW/ANALYSIS

Petitioner argues the PCR court erred in granting relief on the grounds that trial counsel and appellate counsel provided Respondent ineffective assistance to Respondent. We agree.

For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must show that 1) his counsel's performance was deficient,[3] and 2) he was prejudiced by his counsel's deficient performance.[4] *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

I. Trial Counsel

The State argues that the PCR court erred in finding trial counsel ineffective. We agree.

We find that trial counsel's performance was not deficient and, therefore, his assistance was not ineffective. Trial counsel clearly objected on hearsay grounds to the admission of Ms. Ward's testimony concerning Ms. Bennett's out-of-court statement. The trial court correctly ruled that the statements were admissible as excited utterances

[3] In order to prove that counsel's performance was deficient, an applicant must show that his counsel failed to render reasonably effective assistance under prevailing professional norms. *Cherry v. State*, 300 S.C. at 117-18, 386 S.E.2d at 625.

[4] In order to prove that he was prejudiced by his counsel's deficiency, an applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

and overruled trial counsel's objection.[5] Trial counsel's decision not to renew his objection to Ms. Ward's continuing testimony as to Ms. Bennett's out-of-court statements did not constitute deficient assistance. The second statement offered by Ms. Ward was essentially identical to the first; therefore, because the trial court had already ruled on the issue, it was not necessary for trial counsel to renew his objection. *See State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) ("so long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again.").

Additionally, trial counsel clearly objected to the admission of Ms. Bennett's out-of-court statement given to Officer Morecraft. Trial counsel made this objection on multiple relevant grounds and argued it forcefully. Therefore, even though we find that the trial court erred in overruling trial counsel's objection and admitting Ms. Bennett's statement into evidence,[6] trial counsel unmistakably represented the interests of his client and thus his performance was not deficient.

We find that there is no evidence of probative value in the record to support the PCR court's finding that trial counsel's performance was deficient. Therefore, with respect to the PCR court's grant of Respondent's requested relief on the grounds of ineffective assistance of trial counsel, we reverse.

II. Appellate Counsel

The State argues that the PCR court erred in finding appellate counsel ineffective. We agree.

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[5] Additionally, Respondent's own defense, that he was entering the home to protect Ms. Bennett, opened the door to these statements.

[6] The trial court's error with respect to the admission of Ms. Bennett's statement to Officer Morecraft is discussed more fully below.

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). In analyzing a claim of ineffective assistance of appellate counsel, a court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *See Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance.

As a primary matter we must address the trial court's admission of Ms. Bennett's statement to Officer Morecraft. An analysis of the issues presented there properly contextualizes the facts relative to our analysis of appellate counsel's performance.

We find that Ms. Ward's statement to Officer Morecraft was not an excited utterance, thus the trial court erred when it allowed its admission into evidence. The excited utterance exception to the hearsay rule is based in the rationale that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." *State v. Dennis*, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999). In *State v. Washington* we held that an eyewitness's statement to police ninety (90) minutes after a startling event was not an excited utterance, even though the witness remained agitated, because the statement was made in response to an officer's questions and was not an independent assertion. 379 S.C. 120, 665 S.E.2d 602 (2008). The circumstances under which Ms. Bennett gave her statement to Officer Morecraft were identical to those surrounding the statement at issue in *Washington*. Even though Officer Morecraft testified that Ms. Bennett was "visibly shaken," her statement was taken approximately 90 minutes to two hours after the startling event, and therefore, it is unlikely that her process of reflective thought was still suspended. Thus, we hold that the trial court committed error when it determined that Ms. Bennett's statement to Officer Morecraft was an excited utterance and thus allowed the statement to be admitted into evidence.

Furthermore, we find that the admission of Ms. Ward's statement into evidence clearly violated the Confrontation Clause. *See Crawford v. Washington*, 541 U.S. 36 (2004) (holding that admission of a wife's out-of-court statement to police, regarding an incident in which her defendant husband allegedly stabbed the Victim, violated the Confrontation Clause). At the time of Respondent's trial, Confrontation Clause jurisprudence provided:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Ohio v. Roberts, 448 U.S. 56 (1980). Ms. Bennett was not present at trial, her statement was not an excited utterance, and thus it did not fall within any of the other "firmly rooted hearsay exceptions."[7] Additionally, there is no evidence in the record to indicate that the circumstances surrounding the statement created a "particularized guarantee[] of trustworthiness." For these reasons, admission of Ms. Bennett's out-of-court statement to Officer Morecraft violated the Confrontation Clause.

Returning to our application of the *Strickland* test, under the specific facts of this case, we find that appellate counsel's performance was deficient. Pursuant to *Anders*, appellate counsel's request to be relieved "must…be accompanied by a brief referring to anything in the record that might arguably support the appeal." 368 U.S. at 744.

[7] The excited utterance exception is the only "firmly rooted hearsay exception" into which Ms. Bennett's statement could arguably fit. However, as discussed *supra*, the statement was not an excited utterance.

Although reasonable minds might disagree about whether certain legal issues are "arguable," under the specific facts of this case, we find that the legal issues concerning the admission of Ms. Bennett's statement to Officer Morecraft were so obviously arguable that appellate counsel's failure to raise the issues in his *Anders* brief constituted deficient performance.

Nonetheless, we find that appellate counsel's deficient performance did not prejudice the defendant. In order to show that he was prejudiced by appellate counsel's performance, a PCR applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Ms. Bennett's out-of-court statement was cumulative evidence. Thus, despite the fact that its admission was error, it was harmless. Therefore, appellate counsel's performance was not ineffective and the PCR court erred when it granted Respondent's requested relief.

Accordingly, we find that the PCR court erred in finding that Respondent received ineffective assistance of trial counsel and appellate counsel and reverse the court's grant of relief.

CONCLUSION

For the foregoing reasons, we hold that the PCR court erred in granting relief.

WALLER, BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kernard Edward Redmond, Respondent.

Opinion No. 26659
Heard April 9, 2009 – Filed June 1, 2009

PUBLIC REPRIMAND

Disciplinary Counsel Lesley M. Coggiola and Deputy Disciplinary Counsel Barbara M. Seymour, both of Columbia, for Office of Disciplinary Counsel.

Kernard Edward Redmond, of Darlington, *pro se*.

PER CURIAM: This is an attorney disciplinary matter involving nine complaints against Kernard Edward Redmond (Respondent). After a full investigation by the Office of Disciplinary Counsel (ODC), the Commission on Lawyer Conduct filed formal charges against Respondent. ODC and Respondent stipulated to specific facts and rule violations. At a hearing before the Commission on Lawyer Conduct Panel (Panel), Respondent acknowledged his misconduct, expressed remorse, and presented evidence of his current success in the practice of law. A three-member majority of the Panel recommended that Respondent be admonished for his misconduct. One member of the Panel recommended a public reprimand and payment of

costs, while another member recommended a definite suspension and payment of costs.

We find Respondent's acknowledgement of his misconduct and remorse to be sincere and effective in the mitigation of his sanction. We further find that as the investigation progressed, Respondent was cooperative with ODC. Nonetheless, due to Respondent's prior disciplinary history[1] and the gravity and cumulative nature of his misconduct, we decline to adopt the majority's recommendation of an admonition. Accordingly, we hereby publicly reprimand Respondent and order him to pay the costs of the disciplinary proceedings. The facts, as stipulated to by ODC and Respondent, are as follows.

FACTS

Matter A

Respondent represented Client A on criminal charges arising out of a 1999 incident. Client A was tried and convicted. Due to Respondent's inattention to detail and failure to communicate with Client A, the Office of Appellate Defense (OAD) declined to represent him.[2] Respondent filed an appellate brief on Client A's behalf, but ignored Client A's requests that he move to be relieved as counsel. Client A repeatedly asked Respondent to produce his file, but Respondent refused to do so until he reimburse Respondent $1,950.00 for the cost of his trial transcript.

On multiple occasions, OAD informed Respondent that it would represent Client A if Respondent filed a motion to be relieved as counsel. Respondent failed to inform Client A of OAD's offer and

[1] On July 26, 2000, Respondent received a Letter of Caution in a matter unrelated to the complaints before us here.

[2] Respondent was given, but did not timely forward to his client, an affidavit of indigence required to be filled out by OAD applicants.

failed to file a motion to be relieved. Respondent's response to the notice of full investigation in Matter A was not timely.

Matter B

In January 2002, Client B hired Respondent to pursue a civil claim on his behalf. Respondent became aware that Client B previously filed his claim in magistrate's court where it was dismissed with prejudice. Despite knowing of no reason that the claim would not be dismissed, Respondent re-filed the claim in circuit court. The claim was dismissed on *res judicata* grounds.

Additionally, during the course of litigation, Respondent misplaced Client B's photographic evidence and, therefore, did not timely respond to defense counsel's discovery requests. Respondent was late in responding to ODC's initial inquiry into Matter B as well as subsequent requests for additional information.

Matter C

In 2001, Respondent represented Client C for criminal charges to which Client C pled guilty. After Respondent left private practice to work at the solicitor's office, Client C's mother asked Respondent for help in getting his sentence reduced. Respondent referred her to his old law firm but also undertook certain duties consistent with continued representation. Respondent admitted that although he intended to sever the attorney-client relationship, he never clearly did so and he knew Client C and his mother continued to rely on him. Respondent's responses to ODC in Matter C were not timely.

Matter D

Respondent represented Client D in a personal injury matter. Respondent failed to notify Client D that he was leaving private practice and that another lawyer would represent her. Client D was ultimately represented by another attorney in Respondent's former law firm. At the time formal charges were filed against him, Respondent

was unable to locate Client D's file. Respondent's responses to ODC in Matter D were untimely.

Matter E

In or around August 2003, Client E hired Respondent to represent him in a property damage case. Respondent continued to represent Client E even after he began to work at the solicitor's office. Contrary to Client E's request, Respondent failed to file Client E's suit until March 2005. Respondent's response to ODC's inquiry in Matter E was not timely.

Matter F

Respondent represented Client F in a medical malpractice matter and a disability benefits claim. After Respondent began working at the solicitor's office, Client F requested his file. Respondent merely told Client F to contact his old firm and made no effort to help Client F retrieve his file. Two years after Client F filed his complaint with ODC, and at the suggestion of ODC, Respondent retrieved Client F's file and returned it to him. Respondent's responses to ODC's inquiries into Matter F were timely.

Matter G

In November 1998, Respondent began to represent Client G in a civil matter. Respondent filed suit in magistrate's court and took the file with him when he began work at the solicitor's office. Respondent did not communicate adequately with Client G and, contrary to his specific directions, accepted a settlement offer of $500.00. Respondent delivered the entire amount to Client G without deducting a fee. Client G signed a release. Respondent's response to ODC in Matter G was timely.

Matter H

Before and after Respondent left private practice to work at the solicitor's office, he represented Client H in a civil rights matter. The matter was tried and the jury rendered a verdict against Client H. Client H requested that Respondent turn over his file. Respondent ignored this request. Only after Client H filed a complaint with ODC did Respondent attempt to locate the file. The file was never found. Respondent's response to ODC's initial inquiry in Matter H was not timely.

Matter I

While working at the solicitor's office, Respondent was assigned to the prosecution of a defendant whose brother he had represented in private practice. Because of this prior relationship, Respondent referred the case to a colleague. Nonetheless, the defendant complained to ODC that Respondent had engaged in a conflict of interest. The defendant's complaint in Matter I is without merit; however, Respondent's response to ODC's initial inquiry in this matter was not timely.

LAW

ODC argues that due to the gravity of Respondent's misconduct and his disciplinary history, the Panel erred in recommending an admonition. ODC argues that Respondent's actions warrant a harsher sanction. We agree.

Respondent stipulated that, by his misconduct, he 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 lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in

representing a client); Rule 1.4 (a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished, keep the client reasonably informed about the status of the matter, and promptly comply with reasonable requests for information); Rule 1.16 (a lawyer shall not represent a client under certain circumstances and should those circumstances come to light after an attorney-client relationship has been established, a lawyer must withdraw from representation in an appropriate manner); Rule 3.1 (a lawyer shall not bring or defend a claim unless there is a non-frivolous basis in law and fact for doing so); and Rule 8.1 (a lawyer, in connection with a disciplinary matter, shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority).

Furthermore, Respondent acknowledges that his 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). Accordingly, we find that a public reprimand is an appropriate sanction under these circumstances.

CONCLUSION

We decline to adopt the Panel majority's recommendation of an admonition due to Respondent's prior disciplinary history and the gravity and cumulative nature of his misconduct. Nonetheless, because Respondent recognizes his misconduct and expresses sincere remorse, we hereby publicly reprimand Respondent and order him to pay the costs of this action within ninety days of the filing of this opinion.

TOAL, C.J., WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Wyatt Breland Willoughby, Respondent.

Opinion No. 26660
Submitted May 4, 2009 – Filed June 1, 2009

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Wyatt Breland Willoughby, of Myrtle Beach, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Due to a down turn in business and resulting economic hardship, respondent closed his law practice. Respondent admits he failed to comply with Rule 1.17 of the Rules of Professional Conduct, Rule 407, SCACR, in closing his practice. In particular, respondent

admits he failed to personally safeguard client files in that he left the files in the hands of his paralegal instead of personally supervising the delivery of the files to a title insurance company. In addition, he admits there were communication failures concerning the delivery of the files to the title insurance company. Specifically, respondent failed to confirm his arrangements for delivery of files to the title insurance company management and that, at the time of delivery, a number of files were still awaiting final post-closing activities such as the issuance of final title policies.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer shall safekeep client property); Rule 1.17 (stating requirements for sale of law practice); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for a lawyer to violate 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 misconduct. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC and the Commission on Lawyer Conduct in the investigation and prosecution of this matter.

PUBLIC REPRIMAND.

TOAL, C.J., WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Revenue, Appellant,

v.

Anonymous Company A and Anonymous Company B, Respondents.

Appeal From Richland County
J. Michelle Childs, Circuit Court Judge

Opinion No. 26661
Heard April 8, 2009 – Filed June 1, 2009

REVERSED

Managing Counsel for Litigation Milton G. Kimpson, Counsel for Litigation Craig M. Pisarik, Director Ray N. Stevens, Chief of Staff Harry T. Cooper, Jr., and General Counsel for Litigation Nicholas P. Sipe, all of Columbia, for Appellant.

John D. Hawkins, of The Hawkins Law Firm, of Spartanburg, for Respondents.

JUSTICE PLEICONES: Companies A and B (Respondents) are two separate corporations with the same owners. Company A (Dealer) sells used cars and then sells the retail installment sales contracts to Company B (Finance Company). S.C. Code Ann. § 12-36-90(2)(h), allows a taxpayer to take a sales tax credit for those installment contracts on which the purchaser fails to make payments and which are consequently charged off as bad debts or uncollectible accounts. Pursuant to the statute, Respondents seek a refund of sales taxes for installment contracts which became uncollectible after Dealer sold them to Finance Company.

Respondents contested the South Carolina Department of Revenue's (SCDOR) ruling that they are ineligible for relief under the statute. The Administrative Law Court (ALC) ruled for Respondents and the circuit court affirmed. As more fully explained below, to qualify under the statute, Dealer and Finance Company must constitute one "person" and one "taxpayer" within the definitions set forth in Title 12, Chapter 36 of the South Carolina Code, also known as the Sales and Use Tax Act. Whether or not the parties together meet these definitions is the critical question in the instant case. We find that the parties are not one "person" under the terms of S.C. Code Ann. § 12-36-30 and so, reverse the decision of the circuit court.

FACTS

Timothy Brown (Husband) and his wife Noreen (Wife) are the sole shareholders of Dealer and Finance Company, which are sub-chapter S corporations doing business in South Carolina. Husband testified that the main purpose for Finance Company's existence is to take advantage of tax benefits. By selling its contracts to Finance Company, Dealer is able to avoid recognizing as income the full amount of the contract and can instead recognize only the discounted amount it receives from Finance Company.[1]

[1] Dealer sells its contracts to Finance Company for an amount determined by the historical default rate of its customers. The Internal Revenue Service allows Dealer to report this discounted rate as income rather than the full amount of the contract.

The sales tax on the purchase of each vehicle sold is included in the installment loan contract purchased by Finance Company. Only Dealer has a retail license and therefore, must pay sales tax to DOR. Dealer, along with Finance Company, submitted a Claim for Refund to DOR. The claimed amount covered 1,731 loans and totaled $330,274.

STANDARD OF REVIEW

"The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons." Sloan v. S.C. Bd. of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (2006). The circuit court's scope of review is set forth in S.C. Code Ann. § 1-23-610(C) (2008). On appeal, this Court's scope of review is the same as that of the circuit court. See Brown v. S.C. Dep't of Health and Environmental Control, 348 S.C. 507, 560 S.E.2d 410 (2002).

ISSUE

Did the circuit court err in finding that Dealer and Finance Company are entitled to sales tax relief under S.C. Code Ann. § 12-36-90(2)(h), also known as the "bad debt statute?"

DISCUSSION

S.C. Code Ann. § 12-36-90(2)(h) allows for a tax credit for sales tax paid on installment contracts that become worthless or uncollectible and are charged off as bad debt.[2] It provides in part:

> A taxpayer who pays the tax on the unpaid balance of an account which has been found to be worthless and is actually charged off

[2] Black's Law Dictionary defines "charge-off" in part as follows: "To treat (an account receivable) as a loss or expense because payment is unlikely; to treat as bad debt." Black's Law Dictionary 227 (7th ed. 1999).

> for state income tax purposes may take a deduction for the sales price charged off as a bad debt or uncollectible account on a return filed pursuant to this chapter, except that if an amount charged off is later paid in whole or in part to the taxpayer, the amount paid must be included in the first return filed after the collection and tax paid. The deduction allowed by this provision must be taken within one year of the month the amount was determined to be a bad debt or uncollectible account.

S.C. Code Ann. § 12-36-90(2)(h) (2008).[3]

The Code defines "taxpayer" as "any person liable for taxes under this chapter." S.C. Code Ann. § 12-36-40 (2008). The Code further defines "person" as:

> any individual, firm, partnership, limited liability company, association, corporation, receiver, trustee, any group or combination acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality.

S.C. Code Ann. § 12-36-30 (2008).

Though the statute does not explicitly say so, the logical reading of § 12-36-90(2)(h) is that the same taxpayer who paid the sales tax must be the taxpayer who charged the debt off for income tax purposes. To hold otherwise would be to render the second part of the bad debt statute meaningless. By providing that the taxpayer must include the amount in a return if the amount charged off is later repaid, it is apparent that the statute is meant to benefit only retailers who suffered financially from a customer's non-payment.

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[3] Section 12-39-90(2)(h) provides relief to a taxpayer in the form of a tax deduction on a future tax return. However, the ALC held, and the circuit court agreed, that the Dealer may demand a refund of the bad debt credit. DOR notes that its argument in this regard was rejected by the circuit court. It has not pursued this point on appeal.

Since Dealer paid the sales tax and Finance Company charged off the bad debt, Dealer and Finance Company must together meet the definition of "person" and "taxpayer" in order to meet the terms of the deduction statute.

Respondents contend, and the circuit court and ALC agreed, that Dealer and Finance Company together constitute a "person" under § 12-36-30. Therefore, in the view of the circuit court, they are together a "taxpayer" as one person liable for sales tax and "Dealer, as a member of this unit, may take a deduction on its sales returns for debts that are actually charged off by Finance Company, the second member of the taxpayer unit." Because we find that the two corporations do not constitute one person within the meaning of § 12-36-30, we do not reach Respondents' status as a "taxpayer."

A. The Circuit Court erred in finding that Dealer and Finance Company together constitute one "person"

As noted above, § 12-36-30 defines a "person" as follows:

> any individual, firm, partnership, limited liability company, association, corporation, receiver, trustee, any group or combination acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality.

S.C. Code Ann. § 12-36-30 (2008).

The phrase "any group or combination acting as a unit" has not been interpreted by South Carolina courts. Respondents argue that they constitute a "unit" because they are owned by the same individuals and "Finance Company's sole reason for existence is to purchase Dealer's installment sales contracts." The circuit court agreed with Respondents. It found it significant that the previous version of the statute read "or any other group or combination" and the word "other" was not included in the current version. The circuit court noted that "[h]ad the legislature wanted to limit 'any group or combination acting as a unit' to only non-incorporated entities, as

suggested by the Department, it could have kept the word 'other' in the statute, as in the former version . . . ."

DOR contends that the "unit" clause is a catch-all clause and, regardless of the presence or absence of the word "other," two corporations may not constitute one person under the statute. We agree with DOR.

The Supreme Court of Kansas considered a similar statute in Pemco, Inc. v. Kansas Department of Revenue, 907 P.2d 863 (Kan. 1995). Pemco leased construction equipment to its wholly-owned subsidiaries and argued that it did not owe sales tax for the leases. The company argued that it and one of its subsidiaries constituted a "unit" under the definition of "person," which provides:

> "Persons" means any individual, firm, copartnership, joint adventure, association, corporation, estate or trust, receiver or trustee, or any group or combination acting as a unit . . . .

Kan. Stat. Ann. § 79-3602(a) (1994 Supp.). The Supreme Court of Kansas held that the parent company and subsidiary could not constitute a single "person" under the statute:

> Note that the statute is simply defining what a person is for purposes of the Act. It first lists the usual types of entities recognized at law and then adds, "or any group or combination acting as a unit." There is nothing to indicate an intent that this catch-all phrase was intended to alter the status of any of the specifically listed entities. A logical interpretation is that it was intended to extend "person" status to groups or combinations acting as a unit even though the group or unit does not fit within the legal definition of any of the specifically designated entities. Thus, an improperly incorporated corporation could not escape sales tax liability by relying on its legal infirmities. Also, tax liability could not be avoided by claiming a weird type of group or unit not fitting into a standard type of organization.

Pemco, 907 P.2d at 866.

We agree with the reasoning of the court in Pemco in that "[t]here is nothing to indicate an intent that this catch-all phrase was intended to alter the status of any of the specifically listed entities." Id. Dealer and Finance Company are each "persons" within the meaning of § 12-36-30 since each is a corporation. To allow the two corporations to present themselves as one "person" by combining to form a unit would be to rewrite the statute.

Respondents argue that policy arguments weigh in their favor since, by avoiding application of the § 12-36-90(2)(h), "the government keeps money it was never owed." We note that whether or not sales tax is owed depends on the sale of an item rather than the fulfillment of the installment contract. See S.C. Code Ann. § 12-36-910 (2008). Thus, Respondents' argument is flawed since the Government was owed the money at the time of sale. By enacting the "bad debt statute," the General Assembly created a method by which a taxpayer may recoup sales tax paid on installment contracts that ultimately prove uncollectible. Respondents could have availed themselves of this method if not for their election to obtain income tax savings pursuant to IRS regulations.[4]

Because we find that Dealer and Finance Company are bound by their chosen forms, we reverse the decision of the circuit court.

B. Finance Company is not entitled to relief under the doctrine of assignment

[4] In pursuing a tax deduction under the "bad debt statute," Dealer seeks to benefit twice from defaults on the installment contracts. Dealer testified that he paid lower income taxes by selling the contracts to Finance Company for an amount less than face value based on the assumption that a certain number of the installment contracts would fail. See supra note 1 and accompanying text. Now that a number of the installment contracts have failed, as predicted, Dealer seeks an additional benefit through the sales tax deduction provided by the "bad debt statute."

Respondents posit as an additional sustaining ground that Finance Company is entitled to recoup sales tax based on the doctrine of assignment. We disagree.

DOR contends that Respondents did not appeal from adverse rulings by the ALC and circuit court on this issue and so, the rulings are the law of the case. We note, however, that the successful party in the lower court may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling. See I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

Exercising our discretion under I'On and considering the merits of the additional sustaining ground, we find that the lower courts correctly held that Finance Company is barred from the refund by § 12-60-470(C). "A refund of taxes is solely a matter of governmental or legislative grace and any person seeking such relief must bring himself clearly within the terms of the statute authorizing the same." Guaranty Bank & Trust Co. v. S.C. Tax Comm'n, 254 S.C. 82, 90, 173 S.E.2d 367, 370 (1970). Section 12-60-470(C)(2) provides that a taxpayer legally liable for the tax may assign a refund to another person "only after the taxpayer's claim is allowed, the amount of the refund is finally decided, and the department has approved the refund." S.C. Code Ann. § 12-60-470(C)(2) (2008). In the instant case, if an assignment occurred, it took place well before the event giving rise to a claim for relief under the bad debt statute. In fact, according to Husband, the only assignment cited by Respondents occurs almost immediately after the customer signs the installment agreement. Consequently, any assignment to Finance Company cannot meet the requirements of § 12-60-470(C)(2) and therefore, Finance Company is not entitled to a refund on this basis.

C. Dealer is not entitled to the tax credit on its own

Finally, Respondents offer as an additional sustaining ground the theory that Dealer may be entitled to the tax credit on its own based on the idea that it has "bad debt" "because it sells its contracts to Finance

Company for an amount determined by the historical default rate of its customers." The lower court declined to reach this argument and we find it without merit. According to the "Agreement to Purchase Automobile Contracts" between the two companies, Dealer assigns all right, title, and interest to Finance Company. Dealer therefore, having sold the contract, has no bad debt.

CONCLUSION

We hold that the circuit court erred in finding that Dealer and Finance Company together constitute a "person" under § 12-36-30. The decision of the circuit court is therefore

REVERSED.

WALLER, ACTING CHIEF JUSTICE, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.