Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E

July 23, 2013

The Judicial Merit Selection Commission is currently accepting applications for the judicial office listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629 (M-Th).

The Commission will not accept applications after 12:00 Noon on Friday, August 23, 2013.

A vacancy will exist in the office currently held by the Honorable Lisa A. Kinon, judge of the Family Court for the Fifteenth Judicial Circuit, Seat 2, upon Judge Kinon's retirement on or before October 5, 2013. The successor will fill the unexpired term of that office which will expire June 30, 2016.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at http://www.scstatehouse.gov/html-pages/judmerit.html

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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34
July 31, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Michael Brown, Respondent.

Appellate Case No. 2013-000463

Opinion No. 27289
Heard May 14, 2013 – Filed July 31, 2013

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

James Michael Brown, of Sumter, *pro se.*

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension not to exceed three (3) years. He requests the suspension be made retroactive to April 13, 2011, the date of his interim suspension. *In the Matter of Brown*, 392 S.C. 142, 708 S.E.2d 218 (2011). In addition, respondent agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within thirty (30) days of the imposition of discipline, to comply with the terms of a two (2) year monitoring contract with Lawyers Helping Lawyers, and to have his treating physician provide quarterly reports addressing his diagnosis, treatment compliance, and prognosis to the Commission for the two year period. Respondent further agrees to comply "with all additional terms of reinstatement as

outlined in the Supreme Court's previous order of suspension filed April 12, 2010."[1] Agreement ¶ 5.

We accept the Agreement and suspend respondent from the practice of law in this state for three (3) years, retroactive to the date of his interim suspension. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter. Respondent shall further comply with the terms of a two (2) year monitoring contract with Lawyers Helping Lawyers and ensure his treating physician provides quarterly reports addressing his diagnosis, treatment compliance, and prognosis to the Commission. Further, as directed by the April 12, 2010, suspension order, respondent shall pay restitution to clients and the Lawyers Fund for Client Protection in accordance with the parties' Restitution Plan, and he shall complete the Legal Ethics and Practice Program Trust Account School and Ethics School within one (1) year of reinstatement. We rescind respondent's obligation to file quarterly reports addressing the status of his trust account(s) with the Commission.

The facts, as set forth in the Agreement, are as follows.

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[1] On April 12, 2010, the Court suspended respondent from the practice of law for six (6) months, subject to the following conditions: 1) compliance with a two (2) year monitoring contract with Lawyers Helping Lawyers; 2) quarterly reports by respondent's physician to the Commission addressing respondent's diagnosis, treatment compliance, and progress for two (2) years; 3) payment of restitution to certain clients and the Lawyers Fund for Client Protection in accordance with the parties' Restitution Plan; 4) completion of the Legal Ethics and Practice Program Trust Account School and Ethics School within one (1) year of reinstatement; and 5) the filing of quarterly reports by respondent with the Commission addressing the status of his trust account(s) including, but not limited to, submission of complete records maintained pursuant to Rule 417, SCACR, for two (2) years after reinstatement. *In the Matter of Brown*, 387 S.C. 305, 692 S.E.2d 536 (2010).

The Court reinstated respondent on March 21, 2011. *In the Matter of Brown*, 392 S.C. 10, 708 S.E.2d 431 (2011).

Facts

On April 8, 2011, respondent was arrested and charged with felony driving under the influence, leaving the scene of an accident, open container, and driving under the influence, second offense. On November 27, 2012, respondent pled guilty to driving under the influence, second offense, and leaving the scene of an accident. For driving under the influence, second offense, respondent was sentenced to one (1) year imprisonment and fined $2,000, suspended upon service of ninety (90) days and payment of a $1,100 fine with the balance suspended upon service of probation for eighteen (18) months. For leaving the scene of an accident, respondent was sentenced to six (6) months imprisonment and fined $1,000, suspended upon service of eighteen (18) months of probation. Respondent paid a fine on the open container charge.

Respondent represents that all pending criminal matters have been resolved. He further represents that he is currently seeking treatment for alcoholism.

Law

Respondent admits that by his conduct he has violated the following provision of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(4) (it shall be ground for discipline for lawyer to be convicted of a crime of moral turpitude or a serious crime).

Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for three (3) years retroactive to April 13, 2011, the date of his interim suspension. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter. Respondent shall further comply with the terms of a two (2) year monitoring contract with Lawyers Helping Lawyers and ensure his treating physician provides quarterly reports addressing his diagnosis, treatment compliance, and prognosis to the Commission for the two year period. Further, as directed by the April 12, 2010, suspension order, respondent shall pay

restitution to clients and the Lawyers Fund for Client Protection in accordance with the parties' Restitution Plan, and he shall complete the Legal Ethics and Practice Program Trust Account School and Ethics School within one (1) year of reinstatement. We rescind respondent's obligation to file quarterly reports addressing the status of his trust account(s) with the Commission. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of M. Scott Taylor, Respondent.

Appellate Case No. 2013-001135

Opinion No. 27290
Submitted June 18, 2013 – Filed July 31, 2013

DISBARRED

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

Harvey MacLure Watson, III, of Ballard Watson Weissenstein, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension of nine (9) months to three (3) years or disbarment. He requests the suspension or disbarment be made retroactive to February 8, 2013, the date of his interim suspension. *In the Matter of Taylor*, S.C. Sup. Ct. Order dated February 8, 2013 (Shearouse Adv. Sh. No. 7 at 72). In addition, respondent agrees to complete the Legal Ethics and Practice Program Ethics School prior to seeking reinstatement or readmission. We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to the date of respondent's interim suspension. *Id.* We further order respondent to complete the Legal Ethics and Practice Program Ethics School prior to seeking reinstatement. The facts, as set forth in the Agreement, are as follows.

Facts

In March 2010, respondent was retained to assist Client in filing a civil action regarding a contract dispute. The defendant filed a motion to dismiss on the merits. The motion to dismiss was not heard as Client's lawsuit was administratively dismissed in April 2011 due to the parties' failure to comply with certain ADR requirements. Respondent did not advise Client of the dismissal and took no further action on Client's behalf.

In late 2011, Client inquired about the status of his lawsuit. In response, respondent falsely stated to Client that the defendant had filed a motion for summary judgment that would need to be resolved before the case could move forward.

In May 2012, Client again inquired about the status of the lawsuit. In response, respondent falsely stated to Client that a hearing had been scheduled in August 2012 to address the motion for summary judgment. Following the date of the fictitious summary judgment hearing, respondent falsely stated to Client that the motion was taken under advisement by the judge.

In October 2012, respondent falsely stated to Client that summary judgment had been granted. When Client asked for a copy of the order, respondent created a fake order and forged the name of the judge on it. Respondent did not immediately provide the order to Client. In December 2012, after another request, respondent forwarded the false order to Client.

In January 2013, after receiving a copy of the false order which purportedly held Client's contract insufficient, Client consulted another attorney about drafting future contracts that would be enforceable. During that consultation, Client referenced the lawsuit and the summary judgment order. The new attorney reviewed the order and discovered it did not have the clerk's date stamp. The new attorney sent his assistant to the courthouse to get a clocked copy of the order. The clerk's office was unable to locate a copy of the order.

The new attorney then contacted respondent for a clocked copy of the order. Respondent scanned a clocked copy of a filed pleading in an unrelated matter and digitally cut the clerk's stamp from that document and pasted it on the false summary judgment order in Client's case. On January 18, 2013, respondent

forwarded the altered document to the new attorney by email message with a copy to Client stating:

> I have attached the filed order as we discussed. The time to appeal ran back in November, and honestly while I didn't agree with all the rulings I didn't see any grounds for appeal. As you can imagine [Client] was not going to be pleased with the result but in the end the litigations costs were likely going to far exceed the recovery anyway.

The new attorney then confirmed with the clerk's office that the order had not been filed, that the judge whose name appeared on the signature line had been on vacation at the time of the purported summary judgment hearing, and that the matter had been administratively dismissed in April 2011.

On January 23, 2013, the deputy clerk of court called respondent and informed him that the motion for summary judgment and summary judgment order could not be located in the court's file. Respondent falsely stated to the deputy clerk that another judge (a judge other than the one who was shown on the order) had actually heard the motion and that the defendant's motion to dismiss was "converted" to a motion for summary judgment. The deputy clerk then asked respondent to bring his file to her office. Respondent informed the deputy clerk that he would not be able to bring the file until the next afternoon.

On January 24, 2013, respondent met with Client and told him the truth about the case and his falsification and forgery of the order. Client then accompanied respondent to the clerk's office where respondent admitted to the deputy clerk that he had fabricated and forged the order. The matter was reported to the Chief Judge for Administrative Purposes. The Chief Judge for Administrative Purposes, the new attorney, and respondent each reported this matter to ODC.

Respondent's law firm has reimbursed Client for all fees and costs paid.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2 (a lawyer shall abide by 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 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about the status of the matter and promptly comply with reasonable requests for information); Rule 1.16(a)(2) (lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of client if lawyer's mental condition materially impairs the lawyer's ability to represent the client); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client); Rule 4.1 (in course of representing client, lawyer shall not knowingly make false statement of material fact or law to third person); Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken to practice law in this state).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law, retroactive to February 8, 2013, the date of his interim suspension. *Id.* Before submitting a petition for reinstatement, respondent shall complete the Legal Ethics and Practice Program Ethics School. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Gary D. James, Sr., Respondent.

Appellate Case No. 2013-001165

Opinion No. 27291
Submitted June 18, 2013 – Filed July 31, 2013

DISBARRED

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

Gary D. James, Sr., *pro se*, of North Myrtle Beach, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment. He requests the disbarment be made retroactive to November 15, 2011, the date of his interim suspension. *In the Matter of* James, 395 S.C. 333, 718 S.E.2d 430 (2011). In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of discipline. Further, within sixty (60) days of the imposition of discipline, respondent agrees to enter into a payment plan to pay restitution as enumerated hereafter. We accept the Agreement and disbar respondent from the practice of law in this state, not retroactive to the date of respondent's interim suspension. In addition, respondent shall pay the costs incurred by ODC and the Commission in

the investigation and prosecution of this matter within thirty (30) days of the date of this opinion and shall, within sixty (60) days of the date of this opinion, enter into a payment plan with the Commission to pay restitution as set forth hereafter in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

From 2003 until his interim suspension in November 2011, respondent was a solo practitioner. His practice focused primarily on real estate matters, but he also handled probate matters.

Respondent maintained two trust accounts at Conway National Bank. One account was for real estate transactions; the other was for all other client matters. Respondent did not fully comply with the recordkeeping and reconciliation requirements set forth in Rule 417, SCACR, for either account. Respondent's monthly reconciliation process consisted of comparing his monthly bank statement to his client settlement statements, then checking off items on the settlement statements as those items cleared. Once all items on a settlement statement cleared, respondent shredded the settlement statement. Respondent did not maintain client ledgers for six years as required by Rule 417. Other violations of Rule 417 included failure to create or maintain reconciliation reports. As a result of respondent's lack of records, a complete accounting of funds is not possible.

Matter II

Respondent conducted a real estate closing in which his client was purchasing property from a state agency. Respondent issued the purchase money check from his real estate trust account to the state agency on July 13, 2011, even though he had not received the funds to cover the check from his client. Respondent asked the state agency to hold the check until the deed was received and recorded. On July 28, 2011, respondent informed the state agency it could negotiate the check. The check was returned for insufficient funds because the client's funds were not credited to the trust account until July 29, 2011.

Matter III

From 2007 through 2011, respondent issued approximately $1,407,928.00 in checks payable to himself or to his law firm from his real estate trust account. Records produced by respondent reflect approximately $182,572.00 of the funds were earned fees. Respondent's records are not sufficient to explain the difference of approximately $1,225,356.00 in disbursements.

However, it can be determined that, sometime in 2010, respondent could not cover the disbursement in a real estate closing because the balance in his real estate trust account was insufficient. From that point forward, respondent engaged in a pattern of using funds received for one real estate closing to pay off the loan in a previous closing.

A.

In January 2011, respondent conducted a cash closing for Client A. Client A wired $487,883.31 to respondent's real estate trust account for the purchase of the property. Respondent was supposed to use the funds to pay off the seller's mortgage of approximately $435,132.03. After the deposit of Client A's funds, respondent paid the commissions and other closing costs, but did not have sufficient funds to pay off the loan. The balance in respondent's real estate trust account at the end of January 2011 was only $148,577.99.

In February 2011, respondent used the remaining funds from Client A to pay off the loan in a prior closing. The payoff of the loan in the prior closing left only $74.00 in the trust account. The seller's mortgage in the Client A closing remained unpaid.

In March 2011, respondent conducted a real estate closing for Client B. Respondent used the funds received for Client B's closing to issue a check for $200,000.00 as a partial payment on the seller's loan in the Client A closing.

In May 2011, respondent borrowed $225,000.00 from Mr. Doe, a client and friend. Respondent deposited that money into his trust account and used the money to pay off the loan in the Client B closing and to make monthly payments on the balance of the loan in the Client A closing.

In August 2011, respondent attempted to make arrangements to borrow another $200,000.00 from Mr. Doe. Respondent intended to deposit the proceeds of this second loan into his operating account and then transfer it to his real estate trust account to pay off the balance in the Client A closing. Before respondent received the money, he wrote a check for $200,000.00 from his operating account and deposited it into his real estate trust account. He then arranged to wire funds to pay off the balance of the loan in the Client A closing. At the time respondent wrote the operating account check and sent the wire from his real estate trust account, he knew he had not deposited funds to cover these transactions.

Ultimately, respondent did not receive a second loan from Mr. Doe. The operating account check failed to clear because respondent never deposited the funds to cover it. As a result, $200,000.00 was charged back to respondent's trust account. In the meantime, respondent's title insurance company paid the seller's loan in the Client A closing.

B.

On July 31, 2011, Client C wired $10,600.00 to respondent's real estate trust account for the purchase of a time share from the trust of an elderly woman with Alzheimer's disease. The transaction was scheduled to close in September 2011. Respondent transferred the time share but did not pay the seller's trust.

From the date of the receipt of Client C's wire until August 31, 2011, respondent issued nine checks from his real estate trust account payable to his law firm totaling $11,280.00. Respondent's records are insufficient to determine whether or not any of these payments were legitimate, however, none of these payments were made on behalf of Client C. The balance in the real estate trust account fell below the amount of the Client C deposit eleven times in August and September 2011. Funds were not available to cover Client C's closing at the time of respondent's interim suspension in November 2011.

C.

On August 30, 2011, respondent deposited $236,000.00 received for a refinance closing for Mr. and Mrs. Roe into his real estate trust account. The loan proceeds were supposed to be used to pay off three existing loans totaling $226,689.14 and to cover closing costs. The Roes' credit union was the lender on the new loan and

the existing loans. Upon receipt of the proceeds of the Roes' new loan, respondent used part of those funds to reimburse the title insurance company for its payoff of the Client A loan. On September 9, 2011, respondent conducted the Roes' closing knowing funds received for that purpose were not in his real estate trust account. Respondent did not mail the payoffs of the Roes' existing loans to the credit union.

Between August 30, 2011, and September 26, 2011, respondent wrote twelve checks payable to his law firm totaling $12,090.00. At the end of September 2011, the balance in respondent's real estate trust account was less than $5,000.00, more than $220,000.00 short of the funds that were due in connection with the Roe closing.

For several weeks, the Roes and representatives of the credit union made repeated, unsuccessful attempts to contact respondent about the payoff of the existing loans. On October 18, 2011, respondent contacted the Roes and told them they could come to his office to pick up the payoff checks at 10:00 a.m. the next morning. For medical reasons, the Roes could not drive to Myrtle Beach, so a representative of the credit union agreed to go.

On October 19, 2011, respondent gave the credit union representative four checks, three from his real estate trust account and one from his operating account. At the time respondent disbursed the checks, there were no funds in his accounts to cover them. Respondent had received a $350,000.00 check for a closing from another client[1] and had intended to use this money to cover the checks to pay off the Roe's loans, but he had not yet deposited that check.

Upon receipt of the Roes' payoff checks, the credit union representative went to the Myrtle Beach branch of the Conway National Bank which was two blocks away from respondent's office. The representative inquired if there were sufficient funds in the accounts to cover the checks and was informed there were not sufficient funds.

The credit union representative returned to respondent's office. Respondent informed the representative that he had not yet made the deposit to cover the checks, but intended to do so later in the day. Respondent then agreed to make the

[1] Respondent does not recall the name of this client and he is unable to produce any documentation related to this closing.

deposit and meet the representative at noon. Respondent then drove to the Conway branch of the bank, miles from his office, rather than make the deposit at the branch nearby. Respondent deposited the other client's closing check into his trust account then returned to his office in Myrtle Beach and showed the credit union representative the deposit slip as evidence that the Roes' payoff checks were covered. The credit union representative then deposited the checks into the credit union account.

The three Roe payoff checks written on the real estate trust account were returned due to insufficient funds as the bank had placed a hold on the $350,000.00 check. Ultimately, the bank determined that the check was fraudulent. At the time the bank returned the Roe payoff checks to the credit union, there was only $10.25 in respondent's real estate trust account. Forty-six dollars and sixty-five cents ($46.65) remained in respondent's other trust account.

Matter IV

After paying the mortgage in the Client A closing, the title insurance company terminated respondent as an approved closing attorney. Respondent manufactured a closing protection letter for the Roe closing by using a closing protection letter from an unrelated file and cutting and pasting the Roes' closing information onto it; respondent submitted the letter to the Roes' lender. The closing was not approved by the title insurance company and the closing protection letter was not valid. As a result, when respondent failed to pay off the Roes' existing loans, there was no title insurance to cover the loss. Consequently, the Roes were obligated to make monthly payments on both the new mortgage and existing loans.

The Roes made monthly payments on all of the loans until the matter was sorted out. The matter was resolved when the credit union agreed not to collect on the new loan and to restore the Roes to the position they were in prior to the refinance. The credit union filed a claim with its insurance carrier for the loss of the new loan proceeds. The Lawyers' Fund paid the Roes $4,231.45 as reimbursement for the extra loan payments they made to the credit union.

Matter V

Respondent had represented Mr. Doe and his company in a number of matters for several years. *See* Matter III (A). On May 30, 2011, in an attempt to cover for the

funds in the Client B closing, respondent borrowed $225,000.00 from Mr. Doe. At the time of the loan, respondent was representing Mr. Doe's company in a real estate transaction. Respondent signed a promissory note stating that he would repay the full amount plus 10% interest on June 30, 2011. When respondent was unable to repay the loan as agreed, he promised Mr. Doe he would file a mortgage to secure the loan.

Respondent failed to comply with the Rules of Professional Conduct when he entered into this business transaction with his client, Mr. Doe. First, the terms of the loan were not fair and reasonable to Mr. Doe as respondent knew the only source for repayment would be funds received on behalf of a client for a real estate closing. Respondent knew he would not obtain funds from a legitimate source to pay off the loan to Mr. Doe within thirty days. Second, respondent failed to advise Mr. Doe, in writing or otherwise, of the desirability of seeking the advice of independent legal counsel regarding the loan. Finally, respondent failed to disclose the conflict of interest or obtain Mr. Doe's informed, written consent, as required by the Rules of Professional Conduct.

Respondent failed to repay the loan as agreed. Respondent did not record a mortgage to secure the loan. In December 2011, Mr. Doe filed a civil action in an attempt to recover the funds. In April 2012, Mr. Doe obtained a default judgment against respondent in the amount of $247,320.14. The judgment has not been paid.

Matter VI

In June 2011, Client D retained respondent to probate an estate. Client D paid respondent $1,500.00 for attorney's fees and $452.84 due to the Probate Court. Upon respondent's interim suspension in November 2011, Client D learned the funds had not been paid to the Probate Court. Client D was informed by the attorney appointed to protect respondent's clients' interests that her funds were not on deposit in respondent's trust account.

Client D had to hire another attorney to assist her with the estate. Client D paid the funds to the Probate Court. She received $1,952.84 from the Lawyers' Fund as reimbursement of the attorney's fees and other funds paid to respondent.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.7(a)(2) (lawyer shall not represent client if there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer); Rule 1.8(a) (lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: a) the transaction and terms on which lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; b) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and c) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction); Rule 1.15(a) (lawyer shall hold property of clients or third persons separate from lawyer's own property and shall retain complete records of funds for six years after termination of representation); Rule 1.15(d) (lawyer shall promptly deliver to client or third person any funds or other property that the client or third person is entitled to receive); Rule 1.15(f) (lawyer shall not disburse funds from trust account unless funds to be disbursed have been deposited and collected); Rule 1.15(g) (lawyer shall not use any entrusted property to obtain credit or other personal benefit for lawyer or any person other than the legal or beneficial owner of the property); Rule 4.1 (in the course of representing a client, lawyer shall not knowingly make false statement of material fact or law to a third person); Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); and Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation). In addition, respondent admits he has violated the provisions of Rule 417, SCACR.

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute

the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken to practice law in this state); and Rule 7(a)(7) (it shall be ground for discipline for lawyer to willfully violate valid court order issued by a court of this state).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, not retroactive to the date of his interim suspension. Within thirty (30) days of the date of this opinion respondent shall pay the costs incurred by ODC and the Commission for the investigation and prosecution of this matter. Within sixty (60) days of the date of this opinion respondent shall enter into a payment plan with the Commission to pay the following restitution: 1) $247,320.14, plus post-judgment interest, to Mr. Doe; 2) $10,600.00 to the seller-trust for the Client C closing; 3) and repayment of all funds paid on respondent's behalf by the Lawyers' Fund, including but not limited to, payments to Client D and Mr. and Mrs. Roe. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

The Supreme Court of South Carolina

Jason Kelly, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-001079

ORDER

Petitioner has filed a notice of appeal from an order denying his third application for post-conviction relief as successive and untimely. Petitioner argued to the circuit court and now argues to this Court in the explanation required by Rule 243(c), SCACR, that his application should not have been dismissed in light of the United States Supreme Court's recent decision in *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).

In *Martinez*, the "precise question" addressed by the United States Supreme Court is "whether ineffective assistance in an initial review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default *in a federal habeas proceeding*." *Martinez*, 132 S.Ct. at 1315. (Emphasis added). The Court held that "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a *federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez*, 132 S.Ct. at 1320. (Emphasis added). The Court went on to set forth the requirements that must be met to overcome the procedural default in a federal habeas action. *Martinez*, 132 S.Ct. at 1318-19.

Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief

actions. *See State v. Travis*, 2013 WL 1196332 (Del. Super. Ct. 2013)(finding the holding in *Martinez* is "limited only to that narrow procedural situation under federal law concerning *habeas corpus*."); *Gore v. State*, 91 So.2d 769 (Fla. 2012)("It appears that *Martinez* is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context. . . . *Martinez* provides Gore with no basis for relief in this Court."); *People v. Blackmon*, 2013 IL App (1st)111908-U (2013)(finding Blackmon's reliance on *Martinez* in attempting to file a successive state PCR application misplaced because *Martinez* applies to federal habeas review); *Logan v. State*, 377 S.W.3d 623 (Mo. Ct. App. 2012)("The limited holding of *Martinez*, while having the potential to aid Logan should he file a future federal habeas action, does not afford Logan a second chance at obtaining relief through a [state post-conviction relief] proceeding."); *Rowell v. State*, 2013 WL 1501618 (Nev. 2013)("[A]ppellant's reliance upon *Martinez* was misplaced as *Martinez* relates to federal procedural bars and not state procedural bars. Thus, the holding in *Martinez* would not provide good cause because it is inapplicable in state court."); *Commonwealth v. Saunders*, 60 A.3d 162 (Pa. Super. Ct. 2013). As such, petitioner's contention that, based on *Martinez*, the circuit court erred in dismissing petitioner's third application for post-conviction relief as successive is without merit. The notice of appeal in this matter is therefore dismissed. Rule 243(c), SCACR.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
June 20, 2013

The Supreme Court of South Carolina

Adoptive Couple, Appellants,

v.

Baby Girl, a minor child under the age of fourteen years, Birth Father, and the Cherokee Nation, Respondents.

Appellate Case No. 2011-205166

ORDER

On July 22, 2013, Birth Father and the Cherokee Nation filed petitions for rehearing requesting that this Court reconsider its order dated July 17, 2013. Additionally, on July 22, 2013, Birth Father filed a petition for supersedeas, which the Cherokee Nation joins by way of return. All petitions are denied.[1]

We remain fully aware of the important and time-sensitive interests at stake. More to the point, we are cognizant that the paramount consideration is the best interest and welfare of Baby Girl. This matter was, without objection, placed in the jurisdiction of the South Carolina courts long ago. Jurisdiction remains in South Carolina, notwithstanding apparent actions filed in other jurisdictions following the decision of the United States Supreme Court (USSC). As determined by the USSC, the Indian Child Welfare Act (ICWA) has no application to Birth Father. Our original and erroneous decision was premised on the applicability of ICWA to the Birth Father. As a result, the Birth Father's rights, if any, are determined by the law of the state of South Carolina. While this Court was in error concerning the applicability of ICWA, we have consistently held that under state law, the Birth

[1] It has come to our attention that on July 23, 2013, Birth Father filed a motion in the Charleston County Family Court requesting a de novo hearing. We reiterate that such a hearing is unavailable in light of this Court's order dated July 17, 2013.

Father's parental rights (because of his irrefutable lack of support, interest and involvement in the life of Baby Girl) would be terminated.[2] Therefore, under state law, the Birth Father is precluded from challenging the adoption. Moreover, in light of the urgent need for this matter to be concluded, we determine, upon review of the record, that the adoption of Baby Girl by the Adoptive Couple is in the best interests of Baby Girl.

The Adoptive Couple has throughout this litigation confirmed their intent to rear Baby Girl in a manner that maintains a meaningful connectedness to her Native American heritage. Consistent with their commitment to serve Baby Girl's best interests, and in recognition that the return of Baby Girl to them must be accomplished with her best interest as the controlling consideration, the Adoptive Couple has commendably proposed a thoughtful transition plan. We leave it to the family court to determine whether to adopt the Adoptive Couple's proposed transition plan or another plan. Nevertheless, our order of July 17, 2013, stands.

We reiterate that, aside from the narrow issue of whether a transition plan is in Baby Girl's best interest, the orders of this Court following remand from the USSC leave nothing further to be decided by the family court. Accordingly, the family court shall forthwith approve the adoption and award legal custody to the Adoptive Couple. The matter of transfer of physical custody shall be accomplished in accordance with Baby Girl's best interest, as determined by the family court.

It is our fervent hope that the parties will work together in good faith and place the best interest and welfare of Baby Girl above their own desires. This emotionally charged case was fully litigated in the South Carolina courts and the United States Supreme Court. This case has reached finality, in this unchallenged forum and jurisdiction. That finality should be honored.

s/ Jean H. Toal C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

[2] On this point, the respective majority and dissenting opinions from our original decision are in accord.

We would grant the petitions for rehearing, vacate the Court's earlier order, and remand this matter to the family court for further proceedings. Since the majority of the Court has decided to deny rehearing, we would grant the request for a stay.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina
July 24, 2013

The Supreme Court of South Carolina

Re: Amendments to Appendix C to Part IV, South Carolina Appellate Court Rules

Appellate Case No. 2013-001146

ORDER

The Commission on Continuing Legal Education and Specialization has proposed amending Appendix C to Part IV of the South Carolina Appellate Court Rules to specifically permit programs focusing on the elimination of bias in the legal profession to qualify for legal ethics/professional responsibility credit. We grant the Commission's request to amend Appendix C as set forth in the attachment to this Order.

Additionally, Appendix C has been further amended to reflect a number of prior amendments to several South Carolina Appellate Court rules, which took effect January 1, 2013. These amendments altered the nomenclature used to identify attorneys and foreign legal consultants, and Appendix C has been amended to accurately reflect these changes.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
July 30, 2013

APPENDIX C

REGULATIONS FOR MANDATORY CONTINUING LEGAL EDUCATION

FOR JUDGES AND MEMBERS OF THE SOUTH CAROLINA BAR

I. Purpose

These Regulations implement Rules 408, 419, and 504, SCACR.

II. Requirements

A. Members of the South Carolina Bar.

1. Except as otherwise provided in Regulation III, each member of the South Carolina Bar, as defined in Rule 410, SCACR, shall complete a minimum of 14 hours of accredited continuing legal education (CLE) each annual reporting period.

2. At least 2 of the 14 hours shall be devoted to legal ethics/professional responsibility (LEPR). LEPR shall include, but not be limited to, instruction focusing on the Rules of Professional Conduct as they relate to law firm management, malpractice avoidance, lawyer fees, legal ethics, and the duties of lawyers to the judicial system, the public, clients and other lawyers. LEPR may also include, but not be limited to, instruction focusing on the elimination of bias in the legal profession. Elimination of bias instruction includes programming designed to educate lawyers on the recognition, identification, prevention, and elimination of bias in the legal setting as well as programming on diversity in the legal profession.

3. As part of the LEPR requirement set forth in paragraph 2, at least once every three annual reporting periods, each lawyer must complete one hour of LEPR devoted exclusively to instruction in substance abuse or mental health issues and the legal profession.

4. A member who accumulates in excess of 14 hours credit in an annual reporting period may carry a maximum of 14 hours forward to the next annual reporting period, of which a maximum of 2 hours may be LEPR

credit (earned LEPR credit in excess of the required 2 hours may be applied to CLE requirements and/or carried forward not to exceed the maximum of 14 hours).

B. Judicial Members.

1. Minimum Requirements.

Judicial members specified in Rule 504(a), SCACR, shall complete a minimum of 15 hours of accredited judicial continuing legal education (JCLE) each annual reporting period. JCLE credit accumulated in any annual reporting period in excess of 15 hours may be carried forward to the next annual reporting period; provided, however, that not more than 30 hours credit may be carried forward to the next annual reporting period. At least once every three annual reporting periods, each judicial member must complete one hour of JCLE devoted exclusively to instruction in substance abuse or mental health issues and the legal profession.

2. Mandatory Attendance at Designated Educational Activities.

Without regard to any JCLE credit accumulated pursuant to the requirements of Regulation II(B)(1), judicial members shall attend any educational activity designated as mandatory by the Supreme Court of South Carolina or the Commission on Continuing Legal Education and Specialization (Commission). "Educational activity" means any seminar, program, conference, roundtable, or other activity which has been accredited for JCLE purposes and which has been designated mandatory for judicial members. Attendance at an educational activity may be designated as mandatory for all judicial members or only for certain specified categories of judicial members (for example: mandatory for probate judges only).

III. Exemptions

The following shall be exempt from the requirements of Regulation II:

A. Specialists certified pursuant to Rule 408, SCACR, who satisfy the CLE requirements of their specialty; provided, however, that at least two (2) hours of the CLE credits completed by certified specialists shall be devoted to LEPR. At least once every three (3) reporting years, the member must complete one (1) hour

of LEPR devoted exclusively to instruction in substance abuse or mental health issues and the legal profession.

B. Members who are at least sixty (60) years old and have been admitted to practice law for thirty (30) or more years, and who apply to the Commission for this exemption. Further, any exemptions granted prior to June 23, 1994, shall remain in effect. Provided, however, that if a member who receives an exemption or is entitled to an exemption under this provision is suspended for a definite period of more than six (6) months under Rule 413, SCACR, this exemption shall not apply or be granted during the suspension period.

C. Inactive members, military members, and retired members.

D. Newly admitted lawyers in the year in which they are licensed.

E. For JCLE requirements imposed by Regulation II(B), judicial members in the year in which they are sworn into office, provided they have satisfied the CLE requirements for members of the South Carolina Bar.

F. Members who are federal judges or federal administrative law judges.

G. Limited members licensed under Rule 415, SCACR (Limited Certificate of Admission for Retired and Inactive Attorney Pro Bono Participation Program).

IV. Hours and Accreditation

A. General.

One (1) hour of accredited CLE means 60 minutes of instruction as teacher or student at any CLE program which has been accredited by the Commission or which is sponsored or co-sponsored by an accredited organization. A list of currently accredited sponsors can be obtained from the Commission.

B. Application for Accredited Sponsor Status.

A sponsor wishing to apply for sponsor accreditation shall submit to the Commission:

1. An application for status as an accredited sponsor of CLE activities (forms available from the Commission);

2. Copies of written materials described in that application form; and

3. Any further information the Commission requires.

Except for accredited sponsors designated by the Commission, sponsor accreditation must be renewed every 5 years; provided, however, that sponsor accreditation may be withdrawn for cause at any time after 60 days notice to the sponsor and the South Carolina Bar.

C. Accreditation of Courses Sponsored by Non-accredited Sponsors.

CLE courses presented by sponsors which have not been granted sponsor accreditation will be considered for accreditation on an individual basis. An application for accreditation of a program may be obtained from the Commission and must be submitted to the Commission by the sponsor or by a lawyer who desires credit for attending the program. Except as provided in IV(D), the Commission will consider applications for the retroactive as well as prospective accreditation of programs.

D. In-House CLE.

In-house CLE, which is defined as CLE courses, training, programs, etc., sponsored or offered by law firms (individually or collectively), corporate legal departments, and similar organizations (but excluding public/governmental organizations and their subdivisions, agencies, etc.) primarily for the education of their members and employees, may be approved for credit under the rules and regulations applicable to other sponsors, subject to the following additional conditions:

1. The courses shall be submitted for approval on a course-by-course rather than an approved-sponsor basis;

2. The courses, including all written material related thereto, must be filed with an application for accreditation on or before the date on which the course is to be held;

3. The courses must be attended by at least 5 lawyers, not including the instructors; and

4. Not more than one-half of the approved credits for any reporting period may be earned through in-house programs.

E. Client Seminars.

Client seminars, which are defined as educational activities sponsored by a law firm in which the target audience is clients or potential clients of the sponsoring law firm, shall not be accredited even though the educational activities otherwise satisfy the accreditation standards specified in Regulation V. For this purpose, a law firm may be a professional corporation, professional association, partnership, sole practitioner or any other association of lawyers engaged in the private practice of law.

F. Fees.

Fees for the processing of applications for accreditation of individual programs or applications for accredited sponsor status and fees for other applications and purposes shall be as specified by the Commission.

G. Enhanced Credit for Teaching.

Upon application to the Commission, enhanced CLE credit may be earned through teaching at an accredited CLE activity. Information regarding the enhanced credit, including qualifications for the credit, the formula for calculating the credit, and exceptions to the credit, may be obtained from the Commission.

H. CLE Credit for Legal Writing.

Upon application to the Commission, CLE credit may be earned through authorship of articles or books concerning substantive or procedural law which are published or accepted for publication in approved third party publications. Information about this credit may be obtained from the Commission.

V. Accreditation Standards

The following standards will be considered by the Commission in the granting, denying, or withdrawal of accreditation of sponsors, programs, or parts of programs:

A. Courses must have significant intellectual or practical content;

B. Subject matter must deal primarily with the theory, practice, or ethics of law and the legal profession;

C. Courses must be directed to and intended for an audience of lawyers or judges;

D. Faculty members must be qualified by practical or academic experience to teach the subject;

E. High quality written materials must be distributed to participants;

F. Suitable classroom or laboratory setting must be provided for participants;

G. Ethical considerations pertaining to the subject matter should be included in the program;

H. Audio-visual and Media Presentations.

1. Audio-visual or media presentations, including telephone and on-line seminars, are acceptable provided:

(a) A faculty member is in attendance or available by telephone hook-up to comment and answer questions; or

(b) Other appropriate mechanisms, as determined by the Commission, are present to enable the attendee to participate or react with the presenters and other attendees. Appropriate mechanisms include quizzes or examinations, response tracking, user prompts, and instant messaging.

2. In addition to meeting the standards of A through G, above, audio-visual or media presentations must:

(a) Utilize some mechanism to monitor course participation and completion in such a manner that certification of attendance is controlled by the provider. Courses must not be susceptible to a "fast forward" finish by attendees;

(b) High quality written materials must be available to be downloaded or otherwise furnished so that the attendees will have the ability to refer to such materials during and subsequent to the presentation;

(c) Telephone and on-line educational activities must be pre-approved by the Commission;

(d) Telephone activities will be accredited for the actual time spent to a maximum of 90 minutes per activity, and on-line educational activities, to include live webcasts, will be accredited for the actual time spent to a maximum of 6 hours per activity; and

(e) Providers shall furnish to the Commission password and/or log-in capabilities for accredited programs. Access will allow for review of course mechanisms, such as interactive functionality. Any such activity may be audited by 1 or more representatives of the Commission without charge.

3. CLE credit earned through audio-visual or media presentations and applied to the annual 14 hour minimum requirement shall not exceed 6 hours of credit per annual reporting period.

I. A written report of attendees shall be submitted to the Commission within 30 days of the course/program.

VI. Reports and Fees

A. Members.

On forms prepared by the Commission and available through its offices (or a reasonable facsimile), each member of the South Carolina Bar not exempt from Regulation II(A) shall, not later than March 1 of each year, file with the Commission a sworn annual report of compliance for the preceding annual reporting period and pay an annual filing fee of $20.00. Any member submitting a report of compliance after March 1 shall pay, in addition to the annual filing fee, a late filing fee of $50.00. The late filing fee shall be doubled for any member who files after the filing deadline and who has filed late and paid a late filing fee on any prior occasion.

B. Judicial Continuing Legal Education (JCLE).

On forms prepared by the Commission and available through its offices (or a reasonable facsimile), each judicial member specified in Rule 504(a), SCACR, shall, not later than April 15 of each year, file with the Commission an annual

report of compliance for the preceding educational period and pay an annual filing fee of $20.00. Any judicial member submitting a report of compliance after April 15 shall pay, in addition to the annual filing fee, a late fee of $50.00.

C. Amended Reports of Compliance.

For the purposes of these Regulations, an amended report of compliance is one that seeks to change a report of compliance previously submitted to the Commission. A report of compliance may be amended within 1 year from the date that the original report was received by the Commission or 1 year from the filing deadline for the original report, whichever date is later. An amended report shall be executed in the same manner as the report it is amending and shall be accompanied by the filing fees specified for such original report, to include late filing fees if appropriate.

D. Revenue From Filing and Other Fees.

The fees specified in these Regulations and fees paid by certified specialists shall be used only to defray operating expenses of the Commission and its staff and may be adjusted by the Commission from time to time in order to produce the actual income required for the expenditures, plus a reasonable reserve fund.

VII. Non-compliance

A. Members.

1. Automatic Suspension. A member of the South Carolina Bar who is neither exempt nor excused from the requirements of Regulation II(A) and/or VI(A) and who has failed to comply with these requirements by March 31 shall be automatically suspended from the practice of law.

2. Notice of Suspension. Notice of suspension will be provided to suspended members, the Clerk of the South Carolina Supreme Court, and to the judge or judges of the judicial circuit in which any suspended lawyer principally practices and/or maintains a principal residence. Suspended members will also be advised that unless they comply and are reinstated by the Commission by May 1, their names will be published in the Advance Sheets.

3. Publication of Names of Suspended Lawyers. The names of suspended lawyers who have not been reinstated by May 1 shall be provided to the

Clerk of the South Carolina Supreme Court for publication in the Advance Sheets.

B. Judicial Members.

Any judicial member specified in Rule 504(a), SCACR, who is not exempt from the requirements of Regulation II(B)(1), II(B)(2), and/or VI(B) and who is in violation thereof shall be notified of the violation by certified mail at the judicial member's last known address. The judicial member shall then have 60 days after the date the notice was mailed to file an affidavit responding to the notice. Any response may include documents establishing that the judicial member concerned has cured the deficiency. If any judicial member fails to respond to the notice of violation or if after considering a judicial member's response the Commission believes the judicial member is still in violation of Rule 504, SCACR, and these Regulations, the Commission shall report the matter to the South Carolina Supreme Court for action as deemed appropriate by the Court.

VIII. Petition for Reinstatement

A. Reinstatement by the Commission.

A member of the South Carolina Bar who has been suspended for failure to comply with these Regulations may petition the Commission for reinstatement. Petitions for reinstatement by the Commission must be received by the Commission not later than June 1. Each petition for reinstatement shall be accompanied by proof that the petitioner is then in compliance and that a reinstatement fee of $200.00 plus filing fees and late fees have been paid. If the petitioner is found to be in compliance by the Commission, to include payment of all fees, the petition shall be granted and the Commission will notify the petitioner, the Clerk of the South Carolina Supreme Court, and the judge or judges of the judicial circuit in which the petitioner principally practices and/or maintains a principal residence. The Commission shall inform the petitioner of the curative actions necessary for reinstatement if the petition is found not to be in compliance.

B. Reinstatement After June 1.

Petitions received after June 1 will be returned to the petitioner who will be informed that the petition for reinstatement must be filed with the Clerk of the South Carolina Supreme Court.

C. Notice to the Clerk of South Carolina Supreme Court.

Promptly after June 1, the Commission shall provide to the Clerk of the South Carolina Supreme Court the names of all lawyers who remain suspended.

IX. Waivers and Extensions

A. Waivers.

In individual cases involving extraordinary hardship or extenuating circumstances, the Commission may waive or modify the requirements of Regulation II(A) or extend the requirements of Regulation VI(A). When appropriate, and as a condition for any such waiver or modification, the Commission may proportionally increase the member's requirements for the succeeding annual reporting period. For example, if a member receives a waiver of 6 hours credit for one annual reporting period, the requirement for the following annual reporting period may be increased by 6 hours.

B. Extensions.

The Commission has no authority to extend the deadlines for compliance reporting or automatic suspension and all requests for such extensions made to the Commission will be denied.

X. Reconsideration

Any judicial member or member of the South Carolina Bar or any sponsor aggrieved by a decision or action of the Commission may request reconsideration. A request for reconsideration must be submitted to the Commission (a) in writing, (b) within 30 days from the mailing of notice of the decision to the requesting judge or member of the South Carolina Bar or sponsor or the publication of notice of the action in the South Carolina Bar News (or successor publication), and (c) may be accompanied by supporting evidence or documentation including affidavits. The request for reconsideration may, but need not, include a demand for a hearing. If a hearing is demanded, the judicial member, member, or sponsor requesting the hearing will be heard by the Commission or by a committee appointed by the Commission for that purpose and may present evidence and argument in support of the request for reconsideration.

XI. Appeals

Any person aggrieved by the operation of these Regulations and who has exhausted all other remedies available hereunder, may petition the South Carolina Supreme Court for redress; provided, however, that any appeal must be submitted to the Court, in writing, not later than 30 calendar days after notice of final action by the Commission is mailed (via United States Postal Service) to the individual concerned.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Chase Home Finance, LLC, Appellant,

v.

Cassandra S. Risher, individually, as Personal Representative and Legal Heir of the Estate of Sidney Allan Risher, Justin R., a minor, Sydney R., a minor, Ashley R., a minor, Sidney J. Risher, Pierre Risher and Drayton Holmes, as Legal Heirs to the Estate of Sidney Allan Risher, and Highland Hills Homeowners Association, Inc., Defendants,

Of whom Cassandra S. Risher is Respondent.

Appellate Case No. 2012-205706

Appeal From Lexington County
James O. Spence, Master-In-Equity

Opinion No. 5138
Heard January 16, 2013 – Filed May 29, 2013
Withdrawn, Substituted and Refiled July 31, 2013

AFFIRMED

Louis H. Lang, Jennifer N. Stone, and Kevin T. Hardy, all of Columbia, for Appellant.

H. Ronald Stanley, of Columbia, for Respondent.

THOMAS, J.: Chase Home Finance, LLC (Chase) sought to foreclose a mortgage on property owned by Cassandra S. Risher (Cassandra) and her late husband, Sidney Allan Risher (Sidney). The Lexington County Master-In-Equity allowed Chase to proceed against Sidney's undivided one-half interest, but refused to allow foreclosure of Cassandra's interest. Chase appeals. We affirm.

FACTS AND PROCEDURAL HISTORY

On June 17, 2008, Cassandra and Sidney entered into a contract to purchase a residence in Lexington County for $505,000. After signing the sales contract, Sidney met with a loan officer at Midland Mortgage Corporation to apply for a loan. Although Cassandra was present when Sidney met with the loan officer, she did not remember completing a loan application or any other paperwork in connection with the sale.

The closing took place on July 7, 2008. At the closing, Sidney obtained a loan from Midland Mortgage Corporation for $479,750 to finance the purchase of the property and executed a purchase money note in favor of Midland Mortgage Corporation along with a purchase money mortgage to secure the note. Although Cassandra was present at the closing and both she and Sidney were named on the deed, she did not sign either the note or mortgage. The note and mortgage were subsequently assigned to JPMorgan Chase Bank, N.A., on July 7, 2008.

Sidney died on August 23, 2009, and Cassandra was appointed personal representative of his estate. According to probate documents, Sidney's assets included an undivided one-half interest in the residence.

No payments were made on the loan since Sidney's death, and the mortgage went into default. On February 3, 2010, Chase, as current holder of the note and mortgage,[1] filed this action against Cassandra individually and in her capacities as personal representative and legal heir of Sidney's estate.[2] In its complaint, Chase

[1] JPMorgan Chase Bank assigned the note and mortgage to Chase on February 16, 2010, and the assignment was recorded on March 5, 2010.

[2] Chase also named as defendants several other individuals and the Highland Hills Homeowners Association. None of these defendants are parties to this appeal.

sought (1) foreclosure of its mortgage, (2) the establishment and foreclosure of an equitable lien on the entire subject property, including Cassandra's one-half interest, and (3) a judgment against Cassandra for unjust enrichment.

Cassandra responded on March 5, 2010, denying the substantive allegations of the complaint. Although she acknowledged Chase had a valid mortgage on Sidney's interest, she asserted she never mortgaged her undivided one-half interest and Chase should be barred from claiming any lien on the property other than its mortgage on Sidney's interest.

Pursuant to an order of reference, the Master heard the matter on May 12, 2011. During the hearing, Chase presented the testimony of a real estate paralegal and licensed title insurance agent who prepared the closing package for the sale, and the attorney who supervised the closing.[3] In addition, the record includes excerpts from a deposition that Cassandra gave on October 4, 2010.

On July 11, 2011, the Master signed an order in which he found (1) the mortgage executed by Sidney was not enforceable against Cassandra's interest in the property, (2) Chase was not entitled to an equitable lien against Cassandra's interest or judgment against Cassandra under the theory of unjust enrichment, and (3) Chase could proceed with its foreclosure action against Sidney's undivided one-half interest.

Chase moved to alter or amend the Master's order. The Master denied the motion, and Chase appeals.

ISSUES ON APPEAL

I. Did the Master err in finding that Chase failed to establish an equitable lien against Cassandra's undivided one-half interest in the subject property?

II. Did the Master err in finding Chase could not recover under the South Carolina common law remedy of unjust enrichment?

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[3] The attorney testified he was not present at the closing because he was probably on vacation. According to the appealed order, the paralegal who prepared the closing package contacted another attorney to attend the closing.

III. Did the Master err in citing a case on the federal common law theory of unjust enrichment?

IV. Did the Master err in holding that Chase was not entitled to any form of equitable relief?

STANDARD OF REVIEW

"An action to establish an equitable lien is an action in equity." *Fibkins v. Fibkins*, 303 S.C. 112, 115, 399 S.E.2d 158, 160 (Ct. App. 1990). Likewise, "[u]njust enrichment is an equitable doctrine." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). In an action in equity referred to a master for final judgment, an appellate court may find facts according to its own view of the preponderance of the evidence; however, it is not required to ignore the trial judge's findings. *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 571, 682 S.E.2d 252, 256-57 (2009).

LAW/ANALYSIS

I. Equitable Lien

Chase first argues the Master erred in ruling it failed to prove the necessary elements to establish an equitable lien against Cassandra's interest. Specifically, Chase complains the Master erred in (1) finding Chase failed to show a debt, duty, or obligation owed by one person to another, (2) requiring Chase to show a specific debt owed from Cassandra, (3) finding such a showing of a debt from Cassandra was necessary for an equitable lien to attach, (4) requiring Chase to show an "expressed affirmative action" by Cassandra to make Sidney's debt her own debt, (5) holding that because Cassandra had no obligation to Chase, there was no property on which such an obligation could attach, and (6) finding no evidence of express or implied intent that the entire property serve as collateral to secure the purchase money loan. We hold the Master correctly determined that Chase did not establish an equitable lien against Cassandra's undivided one-half interest in the subject property.

"An equitable lien or charge is neither an estate or property in the thing itself, nor a right to recover the thing, but is simply a right of a special nature over the thing, which constitutes a charge upon the thing so that the very thing itself may be

proceeded against in equity for payment of a claim." *Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 145, 337 S.E.2d 244, 247 (Ct. App. 1985). "'For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for payment of the debt.'" *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 250, 715 S.E.2d 348, 353 (Ct. App. 2011) (quoting *First Fed. Sav. & Loan Ass'n of S.C. v. Finn*, 300 S.C. 228, 231, 387 S.E.2d 253, 254 (1989)). Furthermore, "equity is generally only available when a party is without an adequate remedy at law." *Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 328, 721 S.E.2d 447, 449 (Ct. App. 2011).

Citing *First Federal Savings and Loan Ass'n of Charleston v. Bailey*, 316 S.C. 350, 356, 450 S.E.2d 77, 80-81 (Ct. App. 1994), and *Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 145, 337 S.E.2d 244, 247 (Ct. App. 1985), the Master correctly stated that "[i]n order for an equitable lien to arise as to specific property, there must be a debt, a duty or obligation owing from one person to another, a res to which the obligation attaches, which can be described with reasonable certainty, *and* an intent, expressed or implied, that the property is to serve as security for the payment or obligation." (emphasis added). If a party seeking an equitable lien cannot satisfy any one of these requirements, this remedy is not available.

Here, there is no dispute that Chase had a valid mortgage on Sidney's interest. The question, then, is whether any deficiency remaining after a foreclosure of this mortgage would attach to Cassandra's interest. In other words, the "res to which the obligation attaches" was not the entire interest in the subject property, but Cassandra's undivided one-half interest. We agree with the Master that Chase did not show the parties had an express or implied intent that Cassandra's interest would serve as security for payment of the debt that Sidney incurred.

We recognize that Cassandra admitted in a deposition (1) she and Sidney could not have purchased the residence without the loan from Midland Mortgage, (2) she was aware of the loan, and (3) she benefited from the transaction. Nevertheless, these admissions do not warrant a finding that the Rishers and Midland Mortgage intended that Midland Mortgage or any successor-in-interest could recover against Cassandra's interest in the property for any part of the debt that Sidney's share could not satisfy in event of a default. The Master noted the attorney who attended the closing did not testify at the hearing; therefore, no information was presented about her review of the title examination, the title commitment, the loan closing instructions and documents, the deed, and the failure to obtain Cassandra's

signature on the mortgage. Furthermore, although Cassandra signed several documents at the closing, there is no evidence that she was asked to sign either the note or the mortgage. We find particularly significant the Master's concern that no one from Midland Mortgage offered evidence that would have supported Chase's argument that Midland Mortgage had bargained for more than a mortgage encumbering only Sidney's interest. Applying our standard of review to the evidence presented, then, we affirm the Master's refusal to find Chase established a right to an equitable lien on Cassandra's interest.

Chase further suggests that it is entitled to an equitable lien on Cassandra's interest because it held a purchase money mortgage and note on the property. The priority conferred to the mortgagee of a purchase money mortgage, however, extends only to "all other claims or liens arising *through the mortgagor*." *SunTrust Bank v. Bryant*, 392 S.C. 264, 268, 708 S.E.2d 821, 823 (Ct. App. 2011) (emphasis added) (quoting *Hursey v. Hursey*, 284 S.C. 323, 327, 326 S.E.2d 178, 180 (Ct. App. 1985)). Chase further attempts to equate Cassandra's interest with "a variety of other non-lien interests arising through the purchase-mortgagor," such as dower rights and homestead claims. Cassandra's interest, however, did not "arise" through Sidney or from her status as his wife and widow. Moreover, her interest is not a judgment or lien, but an undivided ownership interest in the property that was granted to her by the prior owners of the property.

Citing *Home Owners' Loan Corp. v. Cilley*, 125 S.W.2d 313 (Tex. App. 1939), Chase further argues that Cassandra, as a tenant-in-common who knew about the mortgage at its inception and benefited from it, "agreed" that the entire property would be used as collateral for the loan. We hold *Cilley* is not applicable to the present case. The court in *Cilley* stated two exceptions to the rule co-tenants cannot encumber more than their individual shares: "One is that the act of the cotenant *with reference to the common property* must have been previously authorized by the nonassenting cotenants, and the other is that it must have been *subsequently ratified*." *Id.* at 316-17 (emphases added). Here, it was not established that Sidney's execution of the note and mortgage was "with reference to the common property" rather than to solely his undivided one-half interest. Furthermore, without evidence that Sidney ever encumbered Cassandra's one-half interest as well as his own, there was no unauthorized act for Cassandra to ratify. *Cf. Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989) (noting that ratification, as it relates to the law of agency, requires,

among other elements, "circumstances or an affirmative election indicating an intention to adopt the *unauthorized* arrangements") (emphasis added).

Finally, we agree with Cassandra that Chase has not alleged or proved it lacked an adequate remedy at law. Although the Master did not discuss the adequacy of a legal remedy in detail, he expressly allowed Chase to proceed with its foreclosure action against Sidney's undivided one-half interest. Here, there was no dispute Chase had a valid mortgage against Sidney's interest and, if necessary, the right to proceed with a deficiency claim against his estate.

II. Unjust Enrichment

Chase next argues the Master erred in finding it failed to establish the necessary elements to recover under the South Carolina common law remedy of unjust enrichment. As a corollary to this argument, Chase takes issue with the Master's finding that it did not confer a benefit to Cassandra because she was not a direct recipient of the loan. We hold the Master correctly determined that Chase was not entitled to recovery under the theory of unjust enrichment.

"Unjust enrichment is an equitable doctrine, which permits recovery of the amount that the defendant has been unjustly enriched at the expense of the plaintiff." *Regions Bank*, 394 S.C. at 256-57, 715 S.E.2d at 356. One seeking to recover for unjust enrichment must show: "(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

We hold Chase has not shown circumstances that would make it inequitable for Cassandra to retain any benefits that she received from Chase or Midland Mortgage. There was no evidence that Cassandra failed to disclose any information or discharge any legal obligation that would have prevented Midland Mortgage from authorizing a loan to Sidney that was secured only by his undivided one-half interest but was in an amount greatly exceeding the value of that interest. To the contrary, the evidence shows Midland Mortgage was or should have been aware that Cassandra was named on the contract with Sidney as a purchaser and did not sign either the note or the mortgage. *See Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 339, 574 S.E.2d 502, 512 (Ct. App. 2002) (stating the plaintiff "failed to establish any duty to disclose or other cause of action that would allow

recovery for unjust enrichment"). Moreover, Cassandra never signed the note or the mortgage, and there was no evidence that either Midland Mortgage or Chase attempted to procure her signature either at the closing or during the thirteen months between the closing date and Sidney's death.

III. Federal Common Law

Chase next takes issue with the Master's citation to a federal case on unjust enrichment, arguing there is no federal question at issue in this action.[4] Although Chase is correct that this case does not involve a federal question, we find no error. It is not improper to cite cases from the federal courts as persuasive authority even on a matter litigated in a state court that does not present a federal question. Moreover, the cases from the South Carolina state courts that we have cited on unjust enrichment and restitution support the affirmance of the Master's finding that Chase is not entitled to recover against Cassandra based on a theory of unjust enrichment.

IV. Other Relief

Finally, Chase contends that the Master erred in holding it is not entitled to any form of equitable relief because Midland Mortgage and the closing attorney could have avoided the loss. In support of this assertion, Chase argues the closing attorney is deemed to represent the buyer and Cassandra should be charged with the error of her attorney. Chase also points out that Midland Mortgage Corporation did not prepare or review the deed of conveyance. We hold these circumstances do not warrant reversal of the Master's refusal to award equitable relief to Chase.

We agree that in a standard real estate transaction, the closing attorney represents the borrower. *See* S.C. Code Ann. § 37-10-102(a) (2002) (referring to "legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing" of a loan that is primarily "for a personal, family or household purpose" and "is secured in whole or in part by a lien on real estate"). Nonetheless, even though Midland Mortgage Corporation did not prepare or review the deed, it processed the Rishers' loan application and, according to the Master's order, prepared the other closing documents. We found nothing in the record suggesting Midland Mortgage would have not had access to the contract of

[4] The Master cited *Mason v. M.F. Smith & Assocs.*, 158 F. Supp. 2d 673 (2001).

sale, which listed both Sidney and Cassandra as purchasers and was admitted into evidence as a plaintiff's exhibit. Furthermore, although Cassandra accompanied Sidney when he applied for the loan, she was never asked to complete an application or to sign either the note or the mortgage. We therefore hold that although Midland Mortgage Corporation was not formally represented by counsel at the closing, it had sufficient information to avoid the loss it sustained.

CONCLUSION

We affirm the Master's findings that Chase was not entitled to an equitable lien, recovery under the theory of unjust enrichment, or any other form of equitable relief.

AFFIRMED.

HUFF and GEATHERS, JJ., concur.