OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 40

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Simmons, Plaintiff,

v.

Mark Lift Industries, Inc.; Mark Industries, Inc.; Terex Corporation; BPS Equipment Rental and Sales, Inc.; and Prime Equipment and Rental Service Corporation, Defendants.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR SOUTH CAROLINA
Matthew J. Perry, United States District Judge

Opinion No. 26050
Heard April 7, 2005 - Filed October 24, 2005

CERTIFIED QUESTIONS ANSWERED

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JUSTICE WALLER: We granted certification from the United States District Court of South Carolina pursuant to Rule 228, SCACR, to address the following three questions:

1. May a plaintiff maintain a product liability claim in South Carolina under a successor liability theory against a defendant which purchased only assets of a voluntarily bankrupt selling company in an arms-length and court-approved bankruptcy sale and the purchasing company did not approve of, participate in, cause, or contribute to the selling company's bankruptcy?
2. In the product liability context in South Carolina, what test is employed to determine whether there is successor liability of a company which purchased the assets of an unrelated company?
3. May a plaintiff maintain a product liability claim in South Carolina under a successor liability theory against a defendant when there are one or more other viable product liability defendants that may be liable to the plaintiff as a post-manufacturer seller of the allegedly defective product?

FACTUAL/PROCEDURAL BACKGROUND

James Simmons (Simmons) brought a product liability action in state court against Mark Industries, Inc., Terex Corp. (Terex), Mark Lift Industries, Inc., and BPS Equipment Rental and Sales, Inc. (BPS Equipment). The case was removed to federal court based on diversity jurisdiction. Simmons' only basis of liability against Terex and Mark Lift Industries is a successor liability theory.

Simmons' complaint alleges he was injured in a work-related accident at a construction site on August 9, 1999, when an elevated scissorlift aerial work platform collapsed. Mark Industries (Mark), a California corporation, designed, manufactured and sold the scissorlift in 1990. BPS Equipment sold the scissorlift to the end user, which provided it for use on the construction site.

Mark filed for bankruptcy in federal bankruptcy court in July 1991. The bankruptcy court entered an order granting Mark's motion to sell specified assets for adequate consideration on November 6, 1991. Terex was the winning bidder for the assets at an auction the next day.

Following the auction, Mark and Terex entered into a purchase agreement. Section 1.1 of the agreement provides:

> Except as otherwise specifically provided in this Agreement, at the Closing . . . all the Assets shall be transferred from seller to Buyer free and clear of all security interests, liens, claims, encumbrances, restrictions or rights of others of every kind and description, including, without limitation, tax liens. Nothing herein shall be construed as the assumption of or by Buyer of any liabilities of the Seller, including, without limitation, any liability for products manufactured or sold by Seller.

Under the agreement, the assets purchased by Terex included the inventory of supplies, raw materials, work in progress, finished goods, trademarks, service

marks, trade names, goodwill, all intellectual property, such as drawings, designs, blueprints, patents, licenses, and technology.

On November 13, 1991, the bankruptcy court issued an order approving the auction of assets and the terms and conditions of the purchase agreement entered into by Mark and Terex on November 7, 1991. Specifically, the order provided "that [Mark] is authorized to sell the assets of its estate to Terex Corporation, the maker of the highest and best offer at the auction, on terms and conditions consistent with the Purchase Agreement and related attachments." The order stated that "the sale of the assets authorized hereby is free and clear of any and all liens and encumbrances as may presently attach to the assets. . . ." The order further stated that the "sale of assets shall be free and clear of all liens and encumbrances of those creditors who had adequate notice of the Debtor's motion and opportunity to appear and object at the time of the hearing on the Motion. . . ."

On December 5, 1991, Terex created a wholly owned subsidiary to implement the asset purchase agreement between Mark and Terex. The new corporation was named Mark Lift Industries, Inc. (Lift Industries). The assets of Mark were transferred to Lift Industries several days later.

Lift Industries continued to manufacture similar scissorlifts at the California plant for several months, until mid-1992. At this time, Lift Industries closed the plant in California, and relocated the assets and equipment to Terex's manufacturing plant in Waverly, Iowa. Only three Mark employees, none of whom were officers or directors, continued with Terex following the closing of Lift Industries' California plant. From 1992 to 2001, Lift Industries marketed and distributed scissorlifts from its Iowa plant using the trade name used by Mark.

Terex did not have any business relationship with Mark until purchasing its assets in the bankruptcy court auction. **There has never been any commonality of officers, directors, or stockholders between Mark and Terex.**

DISCUSSION

We find the certified questions may be resolved in accordance with existing South Carolina authority.

In Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924), this Court held that in the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company **unless** (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants a finding of a consolidation or merger of the two corporations, (3) the successor company was a mere continuation of the predecessor,[1] or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims. Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924) (successor corporation which purchased part of predecessor's assets was not liable for lost shipment by predecessor, where successor did not assume liability for such debts and predecessor remained a live and going concern with substantial assets).

Our opinion in Brown sets forth the proper test to determine, in a products liability action, whether there is successor liability of a company which purchases the assets of an unrelated company. Certified Question number 2 is answered accordingly.

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[1] Essentially, the dissent advocates an expansion of the mere continuation exception. However, as noted by the dissent, the majority of courts interpreting the mere continuation exception have found it applicable **only when there is commonality of ownership**, *i.e.*, **the predecessor and successor corporations have substantially the same officers, directors, or shareholders.** We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders. Further, we find no conflict with Holloway v. John E. Smith's Sons Co., 432 F. Supp. 454 (D.S.C. 1977). We do not find that the Holloway court established a new test of successor liability. Although the court in Holloway did not cite the test established in Brown, it applied the mere continuation exception. Unlike the present case in which Mark Lift and Terex did not share common officers, directors and shareholders, it appears from a reading of Holloway that there was, indeed, a commonality of ownership. Accordingly, the mere continuation exception was properly applied to that case.

Further, we conclude a plaintiff may maintain a state law-based product liability claim under a successor liability theory against a successor corporation which purchased the predecessor's assets in a voluntary sale approved by the federal bankruptcy court **provided** one of the exceptions set forth in the Brown opinion applies. Accordingly, we find the District Court in this case may answer Certified Question number 1 by reference to the existing precedent set forth in Brown.

Lastly, Terex urges us to find it may not be held liable as a successor because Simmons may seek recovery from the seller, BPS Equipment. Terex asserts that when other entities may answer in damages under a strict liability or negligence theory, it is unnecessary to hold a successor corporation liable in a product liability action. We disagree.

We find a plaintiff may maintain a product liability claim under a successor liability theory against a defendant when there are one or more other viable product liability defendants. The status and availability of other potential defendants is irrelevant in determining the issue of a successor corporation's liability in a product liability action. However, as noted in the answer to the first two certified questions, a plaintiff must fall within one of the four exceptions set forth in Brown.

We hold that each of the certified questions presented in this case may be answered in accordance with our opinion in Brown.

CERTIFIED QUESTIONS ANSWERED.

MOORE, J., Acting Justices John W. Kittredge and James R. Barber, concur. BURNETT, J., dissenting in a separate opinion.

JUSTICE BURNETT: Because I believe the mechanical application of the factors recited in Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924) without considering the facts which may support a finding of a consolidation, merger or continuation of the predecessor entity result in an injustice to the consumer, I respectfully dissent, in part.

The facts set forth by the district court and the majority reveal that Plaintiff Simmons alleges he was injured by the collapse of an elevated scissorlift aerial work platform manufactured in 1990 by the predecessor corporation, Mark Industries, Inc. (Mark). Terex and its wholly owned subsidiary, Mark Lift Industries, Inc. (Lift Industries) purchased Mark's assets in bankruptcy in 1991. From December 1991 to September 1992, Terex continued to manufacture the same scissorlift platform as Mark had manufactured at the same California factory – using essentially the same technology, same design, same equipment, same marketing materials, same logo, same tradename, same supplier list, same dealer list, same customer list, and same employees. Terex then moved the factory to Iowa, where from 1992 to 2001 it continued to manufacture the same scissorlift as Mark had manufactured – still using essentially the same technology, same design, same equipment, same marketing, same logo, same tradename, same supplier list, same dealer list, same customer list, and a few of the same employees.

The federal district court has presented the Court with three questions, which I will address in the following order:

> 1. In the product liability context in South Carolina, what test is employed to determine whether there is successor liability of a company which purchased the assets of an unrelated company?
>
> 2. May a plaintiff maintain a product liability claim in South Carolina under a successor liability theory against a defendant which purchased only assets of a voluntarily bankrupt selling company in an arms-length and court-approved bankruptcy sale and the purchasing company did not approve of, participate in, cause, or contribute to the selling company's bankruptcy?

3. May a plaintiff maintain a product liability claim in South Carolina under a successor liability theory against a defendant when there are one or more other viable product liability defendants that may be liable to the plaintiff as a post-manufacturer seller of the allegedly defective product?

STANDARD OF REVIEW

In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and -330 (1976 & Supp. 2004), and S.C. Code Ann § 14-8-200 (Supp. 2004)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same); Antley v. New York Life Ins. Co., 139 S.C. 23, 30, 137 S.E. 199, 201 (1927) ("In [a] state of conflict between the decisions, it is up to the court to 'choose ye this day whom ye will serve'; and, in the duty of this decision, the court has the right to determine which doctrine best appeals to its sense of law, justice, and right.").

LAW AND ANALYSIS

1. SUCCESSOR LIABILITY AFTER PURCHASE OF ASSETS

Simmons asserts the Court should adopt either of two exceptions to the general rule that a successor corporation which purchases the assets of a predecessor corporation is not liable for the predecessor's obligations and liabilities. Both exceptions – continuity of enterprise and product line – are grounded in the premise that a person who is injured by a defective product should be able to bring a product liability action against a company which purchases the assets of an unrelated company and then continues

manufacturing and distributing essentially the same product using the predecessor's assets, equipment, intellectual property and goodwill.

Terex contends we should reject both exceptions and instead apply the four traditional exceptions to the rule that a successor corporation, in an asset purchase, usually does not assume the liabilities of the predecessor entity. Terex argues that none of the four exceptions apply in this case, and Simmons' lawsuit should be dismissed on a motion for judgment as a matter of law.

In South Carolina, in the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants a finding of a consolidation or merger of the two corporations,[2] (3) *the successor company was a mere continuation of the predecessor,* or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims. Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924) (successor corporation which purchased part of predecessor's assets was not liable for lost shipment by predecessor, where successor did not assume liability for such debts and predecessor remained a live and going

[2] A merger, share exchange, or consolidation typically involves the transfer of stock, not just the transfer of assets such as real, personal, or intellectual property or goodwill. The predecessor corporate entity ceases to exist and is merged into the successor, or both cease to exist and are consolidated into a new corporation. It is widely accepted that the successor corporate entity in these situations is liable for all debts and obligations, including negligence and product liability claims, incurred by the predecessor. See S.C. Code Ann. § 33-11-101 to -108 (1990 & Supp. 2004) (mergers and share exchanges); 15 Fletcher Cyclopedia Corporations §§ 7121-7122 (1999); 1 American Law of Products Liability 3d § 7:10 (2001). The issues presented in this case and others like it arise when only assets – not shares of stock – are sold or transferred to a successor corporation.

concern with substantial assets). The case at hand involves the application of the emphasized "mere continuation" exception.

Courts nationwide apply the general rule expressed in Brown, which originated in the common law, to determine successor liability in the context of contract and creditor-debtor cases. *E.g.* Huff v. Shopsmith, Inc., 786 So.2d 383, 388 (Miss. 2001); Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 98 (Minn. 1989); Martin v. Abbott Laboratories, 689 P.2d 368, 384 (Wash. 1984); Schumacher v. Richards Shear Co., 451 N.E.2d 195, 198 (N.Y. 1983); Johnston v. Amsted Indus., Inc., 830 P.2d 1141, 1142-43 (Colo. App. 1992); 15 Fletcher Cyclopedia Corporations § 7122 (1999); 1 American Law of Products Liability 3d § 7:1 (2001).

Most courts traditionally have applied the mere continuation exception (also known as a *de facto* merger) contained in the general rule on successor liability only when there is commonality of ownership, *i.e.*, the predecessor and successor corporations have substantially the same officers, directors, or shareholders, and the business continues largely unchanged. *E.g.* Taylor v. Atlas Safety Equip. Co., 808 F. Supp. 1246, 1251 (E.D. Va. 1992) (applying Virginia law and stating that continuity of shareholders and management is key element of mere continuation exception); 15 Fletcher's Cyclopedia Corporations § 7123.20 (discussing expansion of mere continuation exception); 1 American Law of Products Liability 3d §§ 7:10, 7:14, 7:19 (same); Phillip I. Blumberg, The Continuity of the Enterprise Doctrine: Corporate Successorship in the United States Law, 10 Fla. J. Intl. L. 365, 371 (1996) (listing cases for proposition that mere continuation doctrine applies "only where the successor has the same stockholders as the predecessor and conducts the same business with the same management, facilities, employees, products, and trade names").

I disagree with the majority that the certified questions may be resolved by relying exclusively on a general rule of corporate law set forth in Brown more than eighty years ago. The Brown court did not resolve the meaning of the mere continuation exception in South Carolina. Brown should be the starting point of our analysis, not the beginning and end of it.

Furthermore, Brown did not involve a bankrupt predecessor corporation or a defective product implicating modern product liability law. Brown was decided in the nascent days of product liability law, a time preceding widespread acceptance of basic product liability principles now well established in this state and elsewhere. In those days, the analysis of product liability cases was grounded primarily in negligence; the concept of strict liability in tort was not even a gleam in the eye of attorneys, judges, and professors who would develop and endorse the concept in the 1960s.

The mere continuation exception enunciated in Brown – while valid and sufficient under existing law in other settings such as a merger or consolidation – should be interpreted in a manner which encompasses product liability claims against a successor corporation in appropriate circumstances. An examination of the reasoning in Brown, as well as other precedent in this state, supports such an interpretation.

The basic rationale of the general rule expressed in Brown is obvious. "It would be manifestly unfair, unjust, and contrary to equity that [the successor] should thus acquire all of the assets of the other corporation, and its franchise, both to be, and to do, leaving no one to be sued by its creditors and no property to satisfy its debts and other liabilities, and not itself become responsible for such debts and other liabilities. *If [the successor] takes the benefit, it must, as has so often been said, take the burden, which equitably attaches, with it.*" Brown 128 S.C. at 432, 123 S.E. at 99 (emphasis added).

In an earlier case involving the same successor corporation as in Brown, but where the predecessor corporation no longer existed and the successor had agreed to resolve outstanding loss and damage claims, this Court rejected the successor's effort to avoid the claims with unusually strong language.

> The [successor's] position does not appeal to us; it is an attempt to dodge the damages that [the plaintiff] has sustained by a quirk and technical question of the law, and smacks too much of a skin game, and hand stacked and dealt to dealer from the bottom of

> the deck. . . . By its action [the successor] has allowed the [predecessor] to go out of existence and now proposes to let the [plaintiff] whistle for his money, and by its technicality, which would besmirch the character of any honest man, smacks its lips and licks its chops and congratulates itself on its shrewdness in avoiding its payment of a just claim.

Brabham v. Southern Express Co., 124 S.C. 157, 117 S.E. 368 (1922).

In a similar vein, this Court has applied a trust-fund doctrine to ensure creditors may reach assets in the hands of the successor corporation when a transaction amounts to a *de facto* merger or consolidation. See Beckroge v. S.C. Power Co., 197 S.C. 184, 194-95, 15 S.E.2d 124, 128 (1941) (transfer of assets from one corporation to another may amount to a merger in fact even when predecessor corporation continues to exist, particularly when amount paid by successor does not reflect true value of predecessor; in such cases, equity looks past form and at the real effect of the transaction and, by application of the trust fund doctrine, successor may be held liable to prior creditors to extent of assets received); Huggins v. Commercial & Sav. Bank, 141 S.C. 480, 140 S.E. 177 (1927) (successor bank which by transfer obtained all assets of predecessor bank held liable to depositor of predecessor bank); Ex parte Sav. Bank of Rock Hill, 73 S.C. 393, 53 S.E. 614 (1906) (equity regards the property of a corporation as held in trust for the payment of debts, and recognizes the right of creditors to pursue the property wherever it may be transferred unless it has passed into the hands of a bona fide purchaser).

Our appellate courts rarely have addressed successor liability in the context of a tort action and have never done so in a product liability action. In Long v. Carolina Baking Co., 190 S.C. 367, 3 S.E.2d 46 (1939), plaintiff was injured when her vehicle collided with a baking company truck. Carolina Baking, a North Carolina corporation, had operated a plant and done business in South Carolina since 1924. In 1935, two years before the wreck, all assets of the predecessor corporation (Carolina Baking) were transferred to a successor corporation (Columbia Baking), a newly chartered Delaware corporation with its principal offices in Atlanta. The predecessor

was dissolved as a corporate entity, although no notice of dissolution was filed in South Carolina.

After the asset transfer, the successor continued to use the trade name of predecessor Carolina Baking, licensing the subject truck and its business in that name and using the name on its vehicles and buildings. Carolina Baking entered a general appearance and defended the action. The Court rejected the successor's attempt to avoid liability on the ground that Carolina Baking no longer existed and the plaintiff had failed to sue the proper corporate entity. "[T]he verdict and judgment against Carolina Baking Company [are] binding upon the existent corporate entity and its assets, by whatsoever name it may be known or called. The corporate fiction and the rules surrounding it have been of inestimable service in the affairs of business, but they must be applied in such a manner as to promote justice, not to hinder or defeat it." Long, 190 S.C. at 377, 3 S.E.2d at 50.[3]

In Bryant v. Waste Management, Inc., 342 S.C. 159, 536 S.E.2d 380 (Ct. App. 2000), the employee of a waste treatment plant sued the waste hauler for negligence after a waste container dropped on his foot, partially amputating it. The Court of Appeals concluded Waste Management was the proper defendant because Chambers Waste Systems, the original defendant, had been subsumed by USA Waste Services, which in turn had merged with Waste Management while the lawsuit was pending. The Court of Appeals rejected Waste Management's argument it had been improperly substituted as a defendant pursuant to Rule 25(c), SCRCP. *Id.* at 163-66, 536 S.E.2d at 382-84.

The above authority derived from contract and tort precedent reveals that our appellate courts have not looked favorably upon efforts by a successor corporation to employ corporate law principles to avoid liability to

[3] The Court employed the same analysis and reached the same result in a companion case involving the estate of a plaintiff decedent. Long v. Carolina Baking Co., 193 S.C. 225, 8 S.E.2d 326 (1939).

a wronged creditor or plaintiff. In addition, I have considered the numerous foreign decisions, treatises, and law review articles offered by the parties and amici curiae, as well as authority revealed by the Court's own research. I have studied the leading cases of Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich. 1976) (adopting continuity of enterprise exception) and Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977) (adopting product line exception), and their progeny. *E.g.* Holloway v. John E. Smith's Sons Co., 432 F. Supp. 454 (D.S.C. 1977) (applying continuity of enterprise exception)[4]; Asher v. KCS

[4] I disagree with the majority's conclusion there was commonality of ownership between the predecessor and successor corporations in Holloway. Simmons, Op. No. 26050, at n.1. As I read Holloway, Hobam, Inc., purchased the assets of an unrelated, separate corporation known as John E. Smith Son's Co. and, in a common corporate tactic, retained the name and created a Hobam subsidiary called John E. Smith Son's Co. There is no indication that the officers, directors, and shareholders of Hobam were the same as the officers, directors, and shareholders of the old John E. Smith Son's Co. The district court explained that the successor business (the Hobam subsidiary) continued at the same address with virtually all of its previous employees, continued to maintain equipment sold by the predecessor, and held itself out to the public as a business entity under a name virtually identical to the predecessor corporation. Id. at 456. Furthermore, the case raised "[t]he question of whether or not the corporation which purchases the assets of *another business entity* is a continuation of the previous entity for purposes of products liability . . . ." Id. at 455 (emphasis added). The district court in Holloway applied the rationale of Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974), a leading "continuity of enterprise" case which in appropriate circumstances allows a successor corporation to be held liable for defective products manufactured by a defunct predecessor.

As previously explained, the successor corporation in the present case continued to manufacture the same scissorlift as did the predecessor – using essentially the same technology, same design, same equipment, same marketing, same logo, same tradename, same supplier list, same dealer list,

continued . . .

Intern., Inc., 659 So.2d 598 (Ala. 1995) (applying continuity of enterprise exception); Savage Arms, Inc. v. Western Auto Supply Co., 18 P.3d 49 (Alaska 2001) (adopting continuity of enterprise); Huff v. Shopsmith, Inc., 786 So.2d 383 (Miss. 2001) (adopting product line exception); Ramirez v. Amsted Indus., Inc., 431 A.2d 811 (N.J. 1981) (adopting product line exception); Garcia v. Coe Mfg. Co., 933 P.2d 243 (N.M. 1997) (adopting product line exception); Kradel v. Fox River Tractor Co., 308 F.3d 328 (3d Cir. 2002) (product line exception is law of Pennsylvania); Hill v. Trailmobile, Inc., 603 A.2d 602 (Pa. Super. 1992) (applying product line exception); Martin v. Abbott Laboratories, 689 P.2d 368 (Wash. 1984) (adopting product line exception); Cyr v. B. Offen & Co., 501 F.2d 1145, 1151-56 (1st Cir. 1974) (leading case adopting continuity of enterprise); Russell v. Philip D. Moran, Inc., 449 A.2d 1208 (N.H. 1982) (favorably citing Cyr and continuity of enterprise theory); but see Simoneau v. South Bend Lathe, Inc., 543 A.2d 407 (N.H. 1988) (calling Cyr into question because risk spreading, a basis of Cyr decision, is not accepted as a rationale for strict liability in New Jersey; however, court did not reject continuity of enterprise exception).[5]

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same customer list, and a few of the same employees. I agree with the rationale and outcome in Holloway, and cite it as additional support for the approach I believe the Court should adopt in the present case.

[5] The continuity of enterprise and product line theories have been distinguished as follows:

> [A] continuity of enterprise analysis seeks to establish whether there is substantial continuity of pretransaction and posttransaction *business activities* resulting from the use of the acquired assets, while a product line analysis seeks to establish whether there is a substantial continuity in the *products* resulting from the pretransaction and posttransaction use of the assets.

Nissen Corp. v. Miller, 594 A.2d 564, 567 n. 1 (Md. 1991) (quoting 1 American Law of Products Liability 3d § 7:20) (emphasis in original).

I also have considered authority rejecting one or both exceptions. Courts rejecting successor liability in the product liability setting have done so primarily because they believe it violates the principle that only those which are responsible for manufacturing and marketing a product should bear liability for its defects; the exceptions violate traditional principles of successor liability; the exceptions defeat the parties' expectations arising from the negotiation and sale of assets; the successor has no control over products already produced and marketed; smaller successor corporations might face financial ruin if held liable for a predecessor's products; and the issue should be left to the legislature. *E.g.* Winsor v. Glasswerks PHX, L.L.C., 63 P.3d 1040, 1046 (Ariz. App. Div. 1 2003); Johnston v. Amsted Indus., Inc., 830 P.2d 1141, 1146-47 (Colo. App. 1992); Bernard v. Kee Mfg. Co., Inc., 409 So.2d 1047, 1049-50 (Fla. 1982); Nissen Corp. v. Miller, 594 A.2d 564, 566-73 (Md. 1991); Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 99 (Minn. 1989); Jones v. Johnson Mach. and Press Co., 320 N.W.2d 481 (Neb. 1982); Simoneau v. South Bend Lathe, Inc., 543 A.2d 407 (N.H. 1988); Downtowner, Inc. v. Acrometal Products, Inc., 347 N.W.2d 118, 121-25 (N.D. 1984); Flaugher v. Cone Automatic Mach. Co., 507 N.E.2d 331, 336-37 (Ohio 1987); Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 823-25 (Wis. 1985); 15 Fletcher's Cyclopedia Corporation § 7123.20; Restatement (Third) of Torts: Products Liability § 12 (1998); 1 American Law of Products Liability §§ 7:19-7:24.

The central inquiry is this: Should a successor corporation, which under the law is rightfully allowed to seek financial gain from the accumulated goodwill and reputation of a predecessor after purchasing the predecessor's assets, simultaneously be allowed to rid itself of the burden of claims brought by persons injured by an allegedly defective product made by the defunct predecessor? In other words, will the law allow the successor to embrace the benefits with one arm while evading the burdens with the other?

I conclude the law should not allow such an obviously inequitable result, which does not comport with the sound public policies of this state with regard to corporate successor liability or product liability law. This Court long has maintained that the burdens follow the benefits in the arena of successor liability under appropriate circumstances. Brown 128 S.C.

at 432, 123 S.E. at 99. Moreover, as the Court aptly observed sixty-six years ago, "[t]he corporate fiction and the rules surrounding it have been of inestimable service in the affairs of business, but they must be applied in such a manner as to promote justice, not to hinder or defeat it." Long, 190 S.C. at 377, 3 S.E.2d at 50.

The Court has not previously had the opportunity to determine the meaning of the mere continuation exception set forth in Brown, 128 S.C. 428, 123 S.E. 97, in this context, and I would decline to interpret that exception as narrowly as other courts have. The general rule and mere continuation exception are sufficiently flexible to encompass successor liability in the context of a product liability action. I conclude that a successor corporation which acquires all or substantially all of the assets of a predecessor, whether through a transfer of stock or a transfer of assets for cash or the equivalent, may be held liable in a product liability claim arising from a unit previously manufactured and distributed by the predecessor when the successor is determined to be, in effect, a mere continuation of the defunct predecessor.

In determining this issue, a court should consider factors such as (1) whether the successor, taking lawful advantage of the predecessor's accumulated goodwill and reputation, held itself out to the world as a continuation of the predecessor through continued use of the predecessor's corporate identity, trade names, advertising, or other intellectual property; (2) whether the successor continued to manufacture substantially the same product line as the predecessor, recognizing that manufacturing activity by its nature involves modification of product lines and elimination of unprofitable items; (3) whether the successor retained the predecessor's managers, employees, or sales force; (4) whether the successor continued to use the predecessor's equipment, supplier, dealer, or customer lists; (5) whether the successor assumed those liabilities and obligations of the predecessor ordinarily necessary for the continuation of normal business operations of the predecessor; and (6) whether the successor's officers, directors, or shareholders are substantially the same as the predecessor's. No one factor can be dispositive in this fact-intensive analysis. Again, the overarching principle in the analysis is that a successor which stands to benefit from

exploitation of the predecessor's identity and accumulated goodwill and reputation may not avoid the burden of the predecessor's product liability claims.

This approach best comports with the policies and goals of both corporate law and product liability law in South Carolina. It is well established that a successor corporation in appropriate circumstances obtains the benefits and accompanying burdens in the contract or creditor-debtor setting. The same ought to be true in a product liability action involving a corporation which is found to be a mere continuation of the predecessor.

"[S]trict liability for manufacturers exists in large part as a deterrent and a method of allocating the risk of loss among those best equipped to deal with it." Madison v. American Home Products Corp., 358 S.C. 449, 454, 595 S.E.2d 493, 496 (2004). The approach I propose is consistent with the notion that manufacturers – whether they are the original manufacturer or a successor – are in the best position to protect the public from defective products by evaluating the risks and ensuring they place a reasonably safe product in the stream of commerce. Furthermore, this approach would encourage existing corporations to produce safe products because, knowing they will be unable to offer themselves for sale free of successor liability, they will have an additional incentive to manufacture safer products in order to maximize the corporation's market value if sold.

I reject as speculative and unfounded the argument that holding a successor liable in a product liability action will damage business interests or prompt rash decisions by corporations. Terex has not cited, nor have I found, any studies or evidence demonstrating that the view I propose would inhibit asset-based transactions, lead to increased piecemeal sales, or discourage large-scale transfers. Potential legal liability often is a factor every responsible corporation must consider; however, it is not the driving or primary force behind every decision. Successors contracting for an asset transfer in a free market, when they intend to continue the basic enterprise, will negotiate a price which reflects the fair market value of the transfer, taking heed of the risk of future claims. A successor also may factor in the

cost of purchasing successor liability insurance. See *e.g.* Savage Arms, 18 P.3d at 56-58.

The traditional rule on successor liability "was designed for the corporate contractual world where it functions well. It protects creditors and dissenting shareholders, and facilitates determination of tax responsibilities, while promoting free alienability of business assets." Polius v. Clark Eqpt. Co., 802 F.2d 75, 78 (3d Cir. 1986). However, courts have come to recognize, as I would, "that the traditional rule of nonliability was developed not in response to the interests of parties to product liability actions, but rather to protect the rights of commercial creditors and dissenting shareholders following corporate acquisitions, as well as to determine successor corporation liability for tax assessments and contractual obligations of the predecessor. Strict interpretation of the traditional corporate law approach leads to a narrow application of the exceptions to non-liability, and places unwarranted emphasis on the form rather than the practical effect of a particular corporate transaction." Ramirez, 431 A.2d at 815-16.

I agree with the New Jersey Supreme Court that it is somewhat anomalous and rather perplexing that after the long journey from the seminal product liability case of MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), the drafters of the Restatement (Third) of Torts and courts rejecting successor liability in this context would frame the issue solely in terms of contract law and essentially ignore product liability law. See Lefever v. K.P. Hovnanian Enterprises, Inc., 734 A.2d 290, 294-95 (N.J. 1999). The better view, as outlined above, is that strict liability in tort may be imposed on a successor corporation in a product liability action in a manner which allows corporations to protect their interests and yet still fulfills the goals of product liability law.

2. EFFECT OF FEDERAL BANKRUPTCY COURT ORDER ON VIABILITY OF PRODUCT LIABILITY ACTION BASED ON STATE LAW

I agree with the majority that a plaintiff may maintain a product liability claim in South Carolina under a successor liability theory against a defendant which purchased only the assets of a voluntarily bankrupt selling company in a transaction approved by the federal bankruptcy court. As explained in Question 1, I part with the majority in its exclusive reliance on Brown, 128 S.C. 428, 123 S.E. 97. I would apply the analysis previously set forth to determine whether the successor is a mere continuation of the predecessor. Accordingly, I would answer "yes" to Question 2 and analyze it in the following manner.

Terex argues it cannot be held liable as a successor because it purchased the assets free and clear of all claims pursuant to the terms of a bankruptcy court order; the Full Faith and Credit Clause requires this Court give binding effect to the bankruptcy court order; and the Bankruptcy Code preempts a successor liability theory of recovery when the bankruptcy court approves the sale of assets. I disagree.

A. LANGUAGE OF BANKRUPTCY COURT ORDER

The 1991 purchase agreement between Mark and Terex stated "[n]othing herein shall be construed as the assumption of or by Buyer of any liabilities of the Seller, including, without limitation, any liability for products manufactured or sold by Seller." The bankruptcy court order approving the sale provided that "[Mark] is authorized to sell the assets of its estate to Terex . . . on terms and conditions consistent with the Purchase Agreement and related attachments." The order stated that "the sale of the assets authorized hereby is free and clear of any and all liens and encumbrances *as may presently attach to the assets*. . . (emphasis added)." The order further stated that the "sale of assets shall be free and clear of all liens and encumbrances of those creditors who had *adequate notice* of the

Debtor's motion and *opportunity to appear and object at the time of the hearing on the Motion* (emphasis added)."

Terex asserts the terms of the order and purchase agreement insulate it from product liability claims as the successor of Mark. Simmons asserts the bankruptcy court order does not bar liability in this instance because – while the purchase agreement expressly mentioned product liability claims that may arise in the future – the order did not. Citing the above-emphasized language, Simmons contends his product liability claim is not barred because it did not exist until he was injured in the 1999 accident; thus, it does not fall within the ambit of the order.

I would decline to resolve this question by attempting to parse the language of the order and purchase agreement as Simmons suggests. Instead, I would find that the order apparently incorporated the terms and conditions of the purchase agreement, which included the provision on future product liability claims purporting to insulate Terex from successor liability. The real question which must be answered is whether such a provision precludes a state law-based product liability action against Terex.

B. FULL FAITH AND CREDIT CLAUSE

Terex argues this Court is required by the Full Faith and Credit Clause to enforce the bankruptcy court order in its entirety, including the disclaimer of liability for future product liability claims. I disagree.

The Full Faith and Credit Clause,[6] as well as the Full Faith and Credit Statute,[7] are inapplicable. Simmons, who was injured in 1999, did not have an existing claim and never received notice of the bankruptcy

[6] U.S. Const. art. IV, § 1.

[7] 28 U.S.C.A. § 1738 (West 1994).

proceeding before the sale of assets in 1991. A court of this state is not required by the Full Faith and Credit Clause to enforce a foreign state judgment or order when it is rendered by a court lacking personal or subject matter jurisdiction, or when it is rendered in violation of due process of law without notice and a fair opportunity to be heard. See Baker by Thomas v. General Motors Corp., 522 U.S. 222, 242 (1998) (Full Faith and Credit Clause and its implementing statute make the record of a judgment, rendered after due notice in one state, conclusive evidence in the courts of another State, or of the United States, of the matter adjudged) (Scalia, J., concurring); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. . . . Due process requires that the defendant be given adequate notice of the suit . . . and be subject to the personal jurisdiction of the court."); Barnes v. Buck, 346 A.2d 778, 782 (Pa. 1975) ("the full and faith and credit clause does not require that we give recognition to a judgment rendered without jurisdiction or without notice and a fair opportunity to be heard; indeed, due process of law mandates that we not do so."); Pector v. Meltzer, 689 A.2d 814, 816 (N.J. Super. App. Div. 1997) (stating the "well-established principle that a court of this State, when asked to enforce a foreign state judgment, must deny full faith and credit if the rendering court lacked in personam jurisdiction, subject matter jurisdiction, *or failed to provide adequate notice and an opportunity to be heard*") (emphasis in original).

C. PREEMPTION

Terex argues the U.S. Bankruptcy Code, specifically 11 U.S.C.A. § 363(f) (West 2004),[8] preempts any attempt under state law to impose successor liability for product liability claims. I disagree.

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[8] Section 363(f) states:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –

continued . . .

"The Supremacy Clause provides that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' It is basic to this constitutional command that all conflicting state provisions be without effect." Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (quoting U.S. Const. art. VI, cl. 2). It is a "familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that interfere with or are contrary to federal laws." Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707, 712 (1985) (internal quotes omitted). However, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." Maryland, 451 U.S. at 746.

In the interest of avoiding unintended encroachment on the authority of the states, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption. Thus, preemption will not lie unless it is the clear and manifest purpose of Congress. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Evidence of Congress' intent to preempt state law is sought in the text and structure of the statute at issue. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983). Congress did not intend the Bankruptcy Code to preempt all state laws. Midlantic Natl. Bank v. N.J. Dept. of Environ. Protection, 474 U.S. 494, 506-07 (1986) (holding that bankruptcy trustee may not abandon environmentally contaminated property in contravention of state law that is reasonably designed to protect public health or safety).

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(1) applicable nonbankruptcy law permits the sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Federal law may preempt state law in three ways. First, Congress may expressly define the extent to which it preempts state law. Second, Congress may occupy a field of regulation, impliedly preempting state law. Third, a state law may be preempted to the extent it conflicts with federal law. Michigan Canners & Freezers Assn., Inc. v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984); Professional Samplers, Inc. v. S.C. Empl. Sec. Commn., 334 S.C. 392, 397, 513 S.E.2d 374, 377 (Ct. App. 1999). Such a conflict arises when either compliance with both laws is impossible or when the state law frustrates the federal purpose and creates an obstacle to the fulfillment of federal objectives. Michigan Canners & Freezers, 467 U.S. at 469.

I conclude § 363(f), which establishes the bankruptcy trustee's power to sell assets of the estate, does not preempt a state law which adjudicates a successor corporation's liability in a product liability claim. Section 363(f) does not expressly preempt such a state law, and the Bankruptcy Code does not so occupy the field of product liability that such a state law is impliedly preempted. Such a state law does not conflict with § 363(f) because compliance with both laws is possible and the state law does not frustrate or create an obstacle to federal bankruptcy laws. State successor liability law may co-exist with federal bankruptcy law because state law will not prevent asset sales or affect the trustee's authority to conduct such sales, but merely may subject the purchaser to successor liability. As explained in Question 1, a purchaser may consider any potential future liability in negotiating the sale of assets. See Wilkerson v. C.O. Porter Mach. Co., 567 A.2d 598 (N.J. Super. Law. 1989) (preemption would not preclude applying product line theory of successor liability to asset purchaser in bankruptcy sale; application of successor liability to product liability claim would not conflict with bankruptcy orders involving sale of assets).

At least two courts have held liability for a product liability claim may not be imposed on a successor who purchased assets at a court-approved bankruptcy sale, although the decisions were not based on a preemption analysis. See Nelson v. Tiffany Indus. Inc., 778 F.2d 533, 538 (9th Cir. 1985) (applying California law to hold the product line exception

does not apply when there is a good-faith dissolution in bankruptcy which is not intended to avoid future tort claims against the predecessor; under such circumstances, the successor corporation has not caused the destruction of the plaintiff's remedies); In re White Motor Credit Corp., 75 B.R. 944 (Bankr. N.D. Ohio 1987) (imposition of liability on successor corporation for preconfirmation product liability claims against predecessor was precluded by order of sale approving parties' agreement that successor would not assume any liabilities of predecessor for personal injury or property damage because of alleged negligence or breach of warranty or under any other theory of product liability).

I find more persuasive the views expressed by several courts which have held that a successor may be held strictly liable in a state law product liability claim despite a bankruptcy court order or purchase agreement purporting to discharge such liability. See In re Savage Indus., Inc., 43 F.3d 714, 719-23 (1st Cir. 1994) (parties to an all-asset transfer in Chapter 11 bankruptcy, where purchase agreement purported to disclaim successor's liability for product liability claims not pending at time of sale, are not entitled to rely on protective jurisdiction of bankruptcy court to enjoin prosecution of a state-law based successor product-line liability action; court emphasized the importance of notice and procedural due process, which permeate the Bankruptcy Code); Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 161-64 (7th Cir. 1994) (bankruptcy court did not have power to enjoin state law product liability claim under successor doctrine despite language in order purporting to do so; court suggested that § 363(f) may not be used to extinguish successor product-line claims); Mooney Aircraft Corp. v. Foster, 730 F.2d 367, 373-75 (5th Cir. 1984) (bankruptcy court lacked jurisdiction to enjoin plaintiff's product liability suit against successor which purchased assets used to make allegedly defective airplane because plaintiff did not have a claim at time of bankruptcy sale and so there was no property right to be deprived or claim to be divested); Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 941-44 (3d Cir. 1985) (discharge in bankruptcy does not discharge a product liability claim when claimant does not have a sustainable cause of action at the time of the discharge); In re Schwinn Bicycle Co., 210 B.R. 747 (Bankr. N.D. Ill. 1997) (bankruptcy court order approving sale of assets, which indicated successor-purchaser

would not be regarded as successor in interest, could not bind plaintiff subsequently injured while using exercise equipment manufactured by predecessor; even assuming order was intended to have such an effect, applying it to accident victim whose product liability claim arose after sale of assets, and who had received no notice or opportunity to participate in bankruptcy process, would violate due process and bankruptcy notice requirements); Lefever v. K.P. Hovnanian Enterprises, Inc., 734 A.2d 290, 295-301 (N.J. 1999) (federal bankruptcy law did not preclude forklift operator's product liability claim against successor who purchased assets at bankruptcy sale because bankruptcy proceeding did not deal with his claim; court noted that successors who purchase assets at bankruptcy sale may be held liable in other contexts, including liability for environmental contamination, delinquent pension fund contributions, and age discrimination claims).

In sum, I conclude Simmons may maintain a state law-based product liability claim under a successor liability theory against a successor corporation which purchased the predecessor's assets in a voluntary sale approved by the federal bankruptcy court.

3. AVAILABILITY OF OTHER POTENTIAL DEFENDANTS

Terex urges we find it may not be held liable as a successor because Simmons may look to seller, BPS Equipment, for recovery. Terex asserts that when other entities may answer in damages to Simmons under a strict liability or negligence theory, it is unnecessary to hold a successor corporation liable in a product liability action.

I agree with the majority this argument is without merit and conclude the answer to Question 3 is "yes," a plaintiff may maintain a product liability claim under a successor liability theory against a defendant when there are one or more other viable product liability defendants. The status and availability of a seller or other potential defendants are irrelevant in determining the issue of a successor corporation's liability in a product liability action. To hold otherwise would be to grant a fortuitous windfall to

a successor, if a plaintiff should prevail, while unfairly and improperly placing the entire burden of responding to the plaintiff's damages on remaining defendants.

CONCLUSION

In Question 1, I disagree with the majority's decision to rely exclusively on Brown, 128 S.C. 428, 123 S.E. 97. A successor corporation which purchases the assets of a predecessor may be held liable in a product liability action for an allegedly defective product manufactured by the predecessor when an analysis of the facts and circumstances reveals it is appropriate to hold the successor liable as a mere continuation of the predecessor. In Question 2, I agree with the majority a plaintiff may maintain a product liability claim under a successor liability theory grounded in state law against a successor corporation which purchased the predecessor's assets in a voluntary sale approved by the federal bankruptcy court. I disagree with the majority's decision to rely exclusively on Brown in determining the issue of successor liability. In Question 3, I agree with the majority that the fact there may be one or more viable product liability defendants who may be liable to Simmons as a seller of an allegedly defective product is irrelevant in analyzing the issue of successor liability.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jesse Waylon Sapp, Appellant.

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

Opinion No. 26051
Heard September 21, 2005 - Filed October 24, 2005

AFFIRMED

Joseph L. Savitz, III, Acting Chief Attorney, South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

JUSTICE WALLER: Appellant, Jessie Waylon Sapp, was convicted of the murder of a South Carolina Highway Patrolman in Berkeley County and was sentenced to death.[1] We affirm.

FACTS

At approximately 2:30 a.m., on July 7, 2002, four state highway patrolmen were conducting a driver's license checkpoint in Berkeley County. A pick-up truck with a female driver and male passenger approached the checkpoint and were stopped by Patrolman Patrick Sigwald. When Sigwald noticed alcohol containers in the back of the truck, he instructed the driver, Kathryn Boles, to pull over to the right shoulder of the road. Sigwald then approached the passenger side of the truck and asked the passenger, Sapp, for the registration and insurance certificate. Sapp opened the glove box and began looking for papers. Sigwald noticed an empty beer bottle on the front floor board and asked Sapp to hand it to him. The driver of the truck (Boles) spoke up and indicated the beer had been her first one that night. Sigwald asked Boles to step to the rear of the vehicle and she complied. At that point, Corporal Jeff Johnson, the supervisor, came up and spoke to Sigwald, asking if Boles was under age twenty-one. Patrolman Sigwald handed Corporal Johnson Sapp's driver's license. Johnson took the driver's license and approached the right-hand side of the truck, toward Sapp. Sigwald heard a loud bang, and heard Johnson say, "you sorry bastard." Sigwald heard another gunshot, then several more, and saw Johnson firing shots at Sapp, who was running away. Sigwald opened fire and Sapp eventually fell to the ground, wounded.

Sigwald saw Johnson lying face down on the pavement. He turned Johnson over and opened his bullet-proof vest, and saw one bullet hole right below the vest. Johnson bled to death at the scene. Sapp was charged with murder, and the state sought the death penalty based upon the aggravating circumstances that Sapp had created a great risk of death to more than one person, and that he had murdered a state law enforcement officer. S.C. Code

[1] Sapp was also convicted of possession with intent to distribute (PWID) Ecstasy, 3rd offense, PWID cocaine, PWID morphine sulfate, possession of Xanax, 3rd offense, and unlawfully carrying a pistol. He was given concurrent 20 year sentences on the PWID offenses, 1 year for the weapon offense, and 2 years for the Xanax offense.

Ann. § 16-3-20 (C)(a)(3) and (7)(2003). He was found guilty of murder, and sentenced to death. This appeal follows.

ISSUES

1. Did the trial court err in excusing a potential juror for cause due to her religious beliefs concerning the death penalty?
2. Did the trial court err in sustaining the state's objection to testimony of Sapp's girlfriend as to whether she would like to see Sapp put to death?

1. REMOVAL OF JUROR FOR CAUSE

During *voir dire* of potential juror Kathleen McNair, the trial court explained the three types of death penalty jurors: i.e., Type 1 would always vote for death if the offense of murder were established; Type 2 would never vote for the death penalty; and Type 3 would consider the facts of the case to decide if death were appropriate. When asked which of these three types she was, McNair responded "well, as a matter of fact, I don't believe in the death penalty because of my religion." The court engaged in the following colloquy with McNair:

> Q. Okay. Well, let me ask you, when you say you don't believe in it, I appreciate that and I understand that. You further stated that it's a part of your religion?
>
> A. Yeah, that's the only thing.
>
> Q. Okay. That's no problem. But the law of South Carolina would be and I would instruct you that the death penalty may be warranted in some cases.
>
> A. I understand.
>
> Q. You understand?
>
> A. I understand that.
>
> Q. But you're saying, as a juror you couldn't consider that law?
>
> A. **No, I couldn't just because of my belief. That's all.**

Q. Your belief would prevent you?

A. It is my religion, that's it. But otherwise, you know, it should be – you know, it should be that way. But to me, I can't.

Q. You could never do that?

A. I can't decide on that because of my religion. I'm sorry but - -

Q. I understand. As I said, there are no correct answers to any of these. It's merely how you feel.

(emphasis supplied). The solicitor then queried McNair as follows:

Q. Would it then be impossible if you sat on a jury for you to consider the death penalty based on your beliefs? And let me take it one step further. If you're sitting on a jury with the other 11 jurors and they all said the death penalty and you sort of believe, well, maybe the death penalty if it ever is appropriate might be appropriate here, could you sign your name on the death penalty verdict saying I'm calling for the death of the defendant?

A. Oh, this is hard.

Q. You're not required to.

A. I probably will. But because of my beliefs – what I'm telling you, I probably would because of the type of crime.

Q. You're saying you probably would call for the death penalty if you thought it was appropriate?

A. Yes, because of the crime.

Q. Okay. So depending on the circumstances of the case, you would set aside your religion?

A. Oh - -

Q. Again, we're not trying to put you in a position you can't be in.

A. I understand.

Q. We're just trying to find out - - because if you're on the jury and you realize you couldn't, it would be too late for you to give both sides a fair trial.

Q. So that's why we ask you up front. So tell me about it again, just tell me what your feelings are about the death penalty.

A. If I put my religion aside, if it wasn't my religion, I believe in it, I will go for the death penalty.

Q. Yes, ma'am. But do you understand you don't have to put your religion aside?

A. I understand.

Q. When you go back there, you are who you are.

A. I am who I am, uh-huh.

Q. Now, knowing you do not have to put your religion aside, would that put you in a position that you couldn't deal with by being on the jury and having to determine the death penalty?

A. I could deal with it. I know I can deal with it because I believe in God. So I could deal with it.

Q. Could you do it if you thought it were appropriate? Could you return a death penalty verdict and sign your name on a death penalty warrant?

A. If it was appropriate, yes.

Q. Appropriate is a term that you would have to make a determination after you hear the facts. Are there—have you had an opportunity to think about the death penalty other than in your—in the sense of your religion?

A. I did thought about it. . . . (brief colloquy with court)

Q. What religion are you?

A. I'm a Methodist.

Q. And what is the teaching of that religion regarding the death penalty?

A. Thou shall not kill.

Q. Would that affect your ability to deliberate on a jury?

At this point, counsel for Sapp objected that she had already answered the question and the court overruled the objection, finding this a critical issue. The court then queried whether Ms. McNair needed a moment. (The court reporter's note indicates the juror was crying). The trial court indicated the record was to reflect that the juror was emotionally distraught.

After discussing the matter with counsel, the trial court ruled:

> Considering the answers given by Ms. McNair, observing also her demeanor in the courtroom during the examination and the questions propounded by the solicitor, which she never answered, became so emotionally distraught by the question, "Would that affect your ability to deliberate on a jury," and she never answered the question. Given her answers and her inconsistency or the inconsistency of her answers, given the feelings that she articulated to my questions and to the solicitor's questions that her religious beliefs were very sincere and deep seeded with her in her life, I would conclude that her inability to answer the question affecting her ability to deliberate and constantly apologizing is a human reaction to suggest that she couldn't consider it. And therefore, she felt inadequate because she couldn't. And that would be the only justification for somebody becoming emotionally distraught and apologizing. So given that and given her demeanor and considering the totality and completeness of her answers, I would agree that she's not qualified. And the record is clear that Mr. Sapp finds and would argue that she is qualified and has stated – clearly I don't argue with the position that she indicated at one point that, yes, she could invoke—award the death penalty. But I believe it would substantially affect her ability to consider both sentences, that is her religious belief.

Sapp asserts the trial court erred in excusing McNair for cause. We disagree. We find the record fully supports the trial court's removal of the juror.

The exclusion of venire persons simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction is unconstitutional. Witherspoon v. Illinois, 391 U.S. 510 (1968). However, a prospective juror may be excluded for cause when his views on capital punishment are such as would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985). See also State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004), cert. denied 125 S.Ct. 2942 (2005); State v. Council, 335 S.C. 1, 515 S.E.2d 508, cert. denied, 528 U.S. 1050 (1999); S.C. Code Ann. § 16-3-20(E) (juror may not be

excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire *voir dire*. Council, supra. The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915 (1993), overruled on other grounds, Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him. Id. On review, the trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881 (1990). See also Wainwright, supra, (there will be situations where the trial court is left with the definite impression that prospective juror would be unable to faithfully and impartially apply the law and this is why deference must be paid to trial court who sees and hears the juror).

Here, McNair unequivocally stated, at the outset, that she could not consider the law regarding imposing the death penalty because of her religious beliefs, going on to apologize and state that "I can't decide that because of my religion." After being questioned by the solicitor as to whether she could put aside her religion if she was on a death penalty jury and the other 11 members agreed on a sentence of death, she eventually stated that she probably would. Ultimately, however, when questioned as to whether the Methodist teaching that "Thou shalt not kill" would affect her ability to deliberate on the jury, McNair broke down in tears and was unable to answer the question.

Given the deference which is afforded to trial courts in assessing a death penalty juror's qualification, and McNair's initial responses that she could not vote for death due to her religious beliefs, we affirm the trial court's disqualification of McNair. Accord Commonwealth v. Duffy, 855

A.2d 764 (Pa. 2004) (where voir dire indicated juror was somewhat unclear as to her convictions regarding imposition of the death penalty, and these concerns could have substantially impaired her ability to function as an impartial juror, the trial court was in the best position to make that determination and did not abuse its discretion in dismissing the prospective juror for cause).

2. ACCOMPLICE'S OPINION OF SENTENCE

At sentencing, counsel for Sapp cross-examined Kathryn Boles, the driver of the pick-up truck and Sapp's former girlfriend, as to her relationship with Sapp. After stating that she was not "in love" with Sapp, but did love him, counsel asked whether she would like to see him put to death. The state objected that the question was inappropriate, and the court sustained the objection. Sapp contends Boles should have been permitted to respond to his inquiry. Although we agree that Boles should have been allowed to testify as to whether she wished to see Sapp put to death, her failure to respond to this question was in no way prejudicial.

In State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, cert. denied, 531 U.S. 840 (2000), this Court stated:

> In [State v.] Torrence, we adopted the Georgia Supreme Court's distinction between a plea for mercy and the ultimate question to be decided by the jury: "[A]lthough a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, a defendant may not present witnesses to testify merely to their religious and philosophical attitudes about the death penalty .... Nor is a defendant entitled to present the opinion of a witness about what verdict the jury 'ought' to reach." Torrence, 305 S.C. at 45, 51, 406 S.E.2d 315, at 318 (quoting Childs v. State, 257 Ga. 243, 357 S.E.2d 48, 60 (1987)).

In Johnson, notwithstanding the ruling that the trial court should have permitted Johnson to inquire of his sister whether she wanted him to die, we

found no prejudice to Johnson because the sister was able to make a general plea for mercy on her brother's behalf in the form of testimony concerning their abusive family life, and the fact that she expressed her love and affection for Johnson at trial.

More recently, in State v. Wise, 359 S.C. 14, 596 S.E.2d 475, 481-482, cert. denied 125 S.Ct. 355 (2004), we addressed the issue of whether the trial court erred in refusing to allow a surviving victim to testify on cross-examination during the sentencing phase of the trial that he did not personally believe Wise should receive the death penalty. We reiterated our holding in Johnson, stating, "[a] close relative of a defendant, such as his sister, may be asked whether she wants the defendant to die, which is akin to asking her to make a general plea for mercy and not explicitly directed toward eliciting her opinion of what verdict the jury should reach." 359 S.C. at 26, 596 S.E.2d at 481.[2]

Under Johnson and Wise, Boles should have been permitted to answer the question as to whether she would like to see Sapp put to death. However, we find no prejudice. Initially, it is implicit from Boles' testimony that she would have answered that she did not wish to see Sapp put to death. Further, given Boles' testimony that she loved Sapp and had known him for years, we find her testimony akin to that in Johnson in which Johnson's sister was able to express her love for him.

In addition, Sapp's mother testified at sentencing, stating, "I'm begging you, please don't take my son's life. To take my son's life is not going to bring back Corporal Johnson. . . Please if you kill my son, you're going to devastate the community again and more and more families. Please don't do

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[2] However, in Wise, we held the trial court properly prohibited the defendant from inquiring of a security officer who had been shot by Wise whether he thought Wise should be sentenced to death, stating, "[w]e accept as true the proffer by Appellant's attorney Vance would testify he told the media shortly after the shootings he did not personally believe Appellant should receive the death penalty. However, such a statement by Vance would not constitute a plea for mercy on behalf of Appellant. Instead, it would constitute Vance' opinion of what verdict--life in prison versus the death penalty--the jury should reach. Accordingly, the trial judge properly disallowed the question, recognizing it was an attempt to elicit an inadmissible opinion from a witness." 596 S.E.2d at 482.

it. Please don't kill him." Sapp's nine-year old nephew James also testified that if Sapp were gone from him, it would be the worst thing ever. In light of this testimony, Sapp cannot demonstrate prejudice. See State v. Myers, 359 S.C. 40, 596 S.E.2d 488, cert. denied, 125 S.Ct. 485 (2004) (exclusion of testimony is harmless where it is cumulative to other testimony in the record); State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v. Gaskins, 284 S.C. 105, 127, 326 S.E.2d 132, 145 (erroneous admission of evidence in sentencing phase may be reviewed for harmless error), cert. denied, 471 U.S. 1120 (1985), overruled in part on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

PROPORTIONALITY REVIEW

We have conducted a proportionality review pursuant to S.C. Code Ann. § 16-3-25(C) (2003). We find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of prior cases shows the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999), cert. denied 529 U.S. 1025 (2000); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991), cert. denied, 503 U.S. 993, (1992); State v. South, 285 S.C. 529, 331 S.E.2d 775, cert. denied 474 U.S. 888 (1985).

AFFIRMED.[3]

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

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[3] The remaining issues are affirmed pursuant to Rule 220(b)(1), SCACR, and the following authorities: Sapp's Issue 2- In re McCracken, 346 S.C. 87, 93, 551 S.E.2d 235 , 238- 39 (2001) (contemporaneous objection is required to preserve issues regarding a closing argument for review); State v. Wiggins, 330 S.C. 538, 550, 500 S.E.2d 489, 496 (1998) (failure to object to comments made during argument precludes appellate review of the issue); Sapp's Issue 4- State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996), cert. denied 520 U.S. 1268 (1997) (failure to request charge on additional statutory mitigating circumstances precludes review of issue on appeal); Sapp's Issue 5- State v. Crisp, 362 S.C. 412, 608 S.E.2d 429, 433-434 (2005) (aggravating circumstances need not be alleged in indictment for murder); State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (alleged defects in indictment do not deprive trial court of subject matter jurisdiction).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Charleston County Magistrate James B. Gosnell, Jr., Respondent.

Opinion No. 26052
Submitted June 24, 2005 - Filed October 24, 2005

PUBLIC REPRIMAND

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

Lionel S. Lofton, of Lofton & Lofton, PC, and Andrew J. Savage, II, of Savage & Savage, PA, both of Charleston, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a confidential admonition, public reprimand, or definite suspension not to exceed sixty (60) days pursuant to Rule 7, RJDE, Rule 502, SCACR. The facts as set forth in the Agreement are as follows.

FACTS

I.

At approximately 9:15 p.m. on November 8, 2003, Joseph S. Mendelsohn, a Charleston Municipal Court Judge, was arrested for driving under the influence (DUI) in Mount Pleasant. Judge Mendelsohn was also charged with having an open container in his vehicle in violation of South Carolina Code Ann. § 61-6-4020 (Supp. 2004).

South Carolina Code Ann. § 22-5-530 (Supp. 2004) provides that a person charged with a magistrate or municipal court offense may deposit a sum of money not to exceed the maximum fine with the magistrate, municipal judge, jail, or detention center in lieu of entering into a recognizance. This provision is applicable, however, only in those jurisdictions which adopt the procedure. The City of Charleston and the Charleston County Sheriff's' Department, which operates the Charleston County Detention Facility, use this procedure for DUI cases. As of November 2003, Mount Pleasant had not adopted this procedure.

Judge Mendelsohn was transported to the Mount Pleasant Police Department for paperwork and administration of a Datamaster test. While there, Judge Mendelsohn learned that, under procedures established by the Mount Pleasant Chief Municipal Judge, the bond for DUI was $1,002.00, but that bond could not be posted at that time. Instead, under the established procedures, Judge Mendelsohn would be transferred to the Charleston County Detention Facility where he would remain until a bond hearing could be held the next morning at approximately 8:00 a.m.

Judge Mendelsohn knew the Mount Pleasant procedure was not the same procedure used in Charleston for DUI cases. He questioned the arresting officer, a sergeant, and a lieutenant about the procedure.

Judge Mendelsohn telephoned a Mount Pleasant municipal judge. After the municipal judge discussed the bond policy with the police sergeant, he explained the policy to Judge Mendelsohn.

Thereafter, Judge Mendelsohn telephoned respondent, a Charleston County Magistrate. Respondent, who was familiar with the procedure used in Charleston, asked the lieutenant why Judge Mendelsohn could not be released. After the lieutenant explained Mount Pleasant's bond procedure, respondent remarked that he would go to the bond court and conduct a bond hearing for Judge Mendelsohn that night. Respondent asked that Judge Mendelsohn be brought directly to bond court rather than first being booked into the detention center. The lieutenant refused to bypass the standard booking procedure, stating respondent would be booked like any defendant. The lieutenant then advised the arresting officer that respondent would be at the Charleston County Detention Center to conduct a bond hearing.

Respondent telephoned the Summary Court Director to inquire whether she could arrange for staff to meet him at the detention center to hold a bond hearing. During the conversation, respondent and the Summary Court Director discussed that if a bond hearing was held at other than normal operating hours, respondent would be required to hold a bond hearing for all incarcerated defendants. Respondent elected not to call in staff to hold bond hearings.

Respondent met the arresting officer and Judge Mendelsohn at the detention center. At some point, respondent took possession of the ticket, placed a "bond hearing" stamp on the back, and entered the amount of $1,002.00. When detention center officials expressed concerns over Judge Mendelsohn's release, respondent remarked "this didn't happen until 8:00 a.m.," or words of similar import and effect. Respondent acknowledges it was his intention to facilitate Judge Mendelsohn's release without waiting for the morning bond hearing and to make it appear that Judge Mendelsohn's bond was set at 8:00 a.m. in accordance with Mount Pleasant's bond procedure.

Respondent communicated his setting of the bond to the Mount Pleasant Chief Judge and asked the judge to indicate his approval of the bond. The Mount Pleasant Chief Judge called the Charleston County Detention Center and was advised that officers were in possession of a valid bond set by respondent. The Mount Pleasant Chief Judge told the officers that, since a bond had been set, the bond procedure he had established did not apply. Judge Mendelsohn was released from the Charleston County Detention Center at approximately 2:30 a.m.

Contrary to the published directives of the Chief Justice, respondent did not undertake to set bonds for the other detainees in the detention center. See Chief Justice's Administrative Order of November 28, 2000, revised July 1, 2001.

II.

On November 6, 2003, respondent presided over a bond reduction hearing. Respondent represents he knew the defendant, the defendant's father, and the defendant's grandfather.

Respondent represents that when the defendant, an African-American, appeared in court for the bond hearing, respondent recalled a statement made to him by a veteran African American sheriff's deputy that "there are four kinds of people in this world – black people, white people, red necks, and n_____." Respondent alleges he repeated this statement to the defendant in an ill-considered effort to encourage him to recognize and change the path he had chosen in life.

LAW

By his misconduct, respondent agrees he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1(A) (judge should participate in establish, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved);

Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 2B (judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment); Canon 3 (judge shall perform the duties of judicial office impartially and diligently); Canon 3(B)(5) (judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race); Canon 3B(7) (judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending proceeding); and Canon 3B(8) (judge shall dispose of all judicial matters promptly, efficiently, and fairly). By violating the Code of Judicial Conduct, respondent admits he has also violated the following provisions of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a judge to violate the Code of Judicial Conduct) and Rule 7(a)(7) (it shall be a ground for discipline for a judge to willfully violate a valid order issued by a court of this state).

CONCLUSION

We accept the Agreement for Discipline by Consent. Standing alone, respondent's failure to comply with the Chief Justice's Administrative Order would not necessitate imposition of a public reprimand. Combined, however, with respondent's favoritism towards Judge Mendelsohn and his racial remark, the Court deems a public reprimand appropriate. Accordingly, respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Karl Bryant Allen, Respondent.

Opinion No. 26053
Submitted September 12, 2005 - Filed October 24, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for respondent.

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 agrees to issuance of a letter of caution, an admonition, or a public reprimand and to the imposition of other requirements. We accept the agreement. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

On or about August 24, 2000, respondent received a Covenant Not to Execute and a settlement check from opposing

counsel to settle a portion of a claim for damages arising out of the death of respondent's client's son. The probate judge approved the settlement at a hearing on August 24, 2000. Thereafter, on September 12, 2000, the probate court judge signed a written order approving the settlement and the client's agreement to sign a Covenant Not to Execute. The client timely executed the Covenant Not to Execute, however, the original document was misplaced and was not received by opposing counsel.

Respondent delayed in responding to opposing counsel's requests that the executed Covenant Not to Execute be returned to him. Opposing counsel filed a Motion to Compel respondent to either provide the executed covenant or return the settlement check. Respondent did not appear at the February 26, 2001 Motion to Compel hearing before the circuit court. Respondent states he has no recollection of receiving notice of this hearing.

On February 27, 2001, the circuit court judge issued an order commanding respondent to deliver to opposing counsel the executed Covenant Not to Execute within ten days. The order also commanded respondent to pay opposing counsel $500.00 in attorney's fees within thirty days. Respondent neither appealed the order nor filed a motion for reconsideration. Respondent did not comply with the order to deliver the signed Covenant Not to Execute or to pay opposing counsel's attorney's fees.

On March 19, 2001, opposing counsel filed a Rule to Show Cause why respondent had failed to comply with the February 27, 2001 order. Respondent failed to appear at the March 30, 2001 Rule to Show Cause hearing. The circuit court judge found no valid reason why respondent had not delivered the executed covenant to opposing counsel and directed the Clerk of Court to execute the covenant. Respondent subsequently paid the court-ordered attorney's fees.

Respondent failed to timely respond to ODC's inquiries in this matter.

Matter II

A client alleged respondent failed to competently and diligently represent him. He further alleged respondent failed to adequately communicate with him about his pending legal matter.

Full investigation by ODC revealed no evidence to support the client's allegations. However, respondent failed to timely respond to ODC's inquiries in this matter.

Matter III

Respondent represented Mr. Doe in a number of legal matters. In 1999, Mrs. Doe consulted respondent about a potential personal injury claim arising from a dog bite. Mrs. Doe alleged respondent accepted her case and a $100.00 check for costs.

Respondent denied accepting Mrs. Doe's case. The disciplinary investigation revealed no evidence indicating respondent accepted Mrs. Doe's case. Respondent represents the $100.00 check, which was from Mr. Doe, was for a legal matter for Mr. Doe and unrelated to the dog bite matter.

Respondent admits his records were insufficient to determine for which of Mr. Doe's cases the check was written. Respondent also admits he could have taken steps to insure that Mrs. Doe understood he did not accept her dog bite case.

Matter IV

Respondent entered into a deferred disciplinary agreement to resolve the three matters discussed above. In that deferred disciplinary agreement, respondent admitted to violations of the Rules of Professional Conduct and agreed to comply with certain terms and conditions. In the deferred disciplinary agreement, respondent stated that, due to injuries he sustained in an automobile accident and as a result of the terminal illness of his law partner, he did not devote

sufficient attention to the management of his office and he was unable to diligently handle the volume of cases he had accepted. In the deferred disciplinary agreement, respondent proposed to retain the services of a law office management advisor, meet with the advisor on stated occasions, and to insure that the advisor filed timely reports with the Commission on Lawyer Conduct (the Commission). Respondent agreed that his willful failure to comply with the terms of the deferred disciplinary agreement would constitute misconduct under the Rules of Professional Conduct and constitute grounds for discipline. The deferred disciplinary agreement was accepted by the Investigative Panel of the Commission on January 16, 2004.

Respondent admits he failed to comply with the terms and conditions of the deferred disciplinary agreement. In particular, he failed to meet with his law office management advisor in accordance with specific provisions of the agreement and he failed to insure the advisor filed the reports required by the agreement. Following respondent's noncompliance, the Investigative Panel terminated deferment of the discipline.

LAW

Respondent admits that, by his misconduct, he violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of the client); Rule 3.4(c) (lawyer shall not knowingly disobey obligation under the rules of a tribunal); Rule 8.1(b) (lawyer shall not fail to respond to lawful demand for information from disciplinary authority); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); and 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). 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 lawyer to violate Rules of Professional Conduct), Rule 7(a)(3) (it shall be ground for discipline for lawyer to knowingly fail to respond to a lawful demand from a disciplinary authority), and Rule 7(a)(9)it shall be ground for discipline for lawyer to willfully fail to comply with the terms of a finally accepted deferred disciplinary agreement).

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.[1]

Additionally, within fifteen (15) days of the date of this opinion, respondent shall retain the services of a law office management advisor. The advisor must be a member in good standing with the South Carolina Bar and his or her services must be approved by ODC. Respondent shall be responsible for the fees and costs associated with hiring the advisor.

The services of the advisor shall include the following:

1. An initial review and assessment of respondent's law office management systems, including identification of problem areas and recommendations for improvement;

2. A quarterly meeting with respondent (and members of his staff in the discretion of the advisor) to monitor the implementation of the advisor's recommendations;

3. Availability by telephone to respond to respondent's questions about law office management issues;

[1] Respondent has agreed to pay the costs associated with the proceedings before the Commission. Accordingly, respondent shall remit $130.25, which includes $104.00 for court reporter services, to the Commission within thirty (30) days of the date of this opinion.

4. Within ninety (90) days of the date of this opinion, preparation of an initial report stating the extent to which respondent's law office management practices have been reviewed, suggestions for improvement, and the steps taken by respondent to implement those suggestions;

5. Immediate reporting to ODC of any failure on respondent's part to attend a scheduled appointment, provide requested access to information, or cooperate with the advisor in any fashion; and

6. At the conclusion of one year, preparation of a final report stating the extent to which respondent's office management practices have been reviewed, the steps taken by respondent to implement the advisor's suggestions, and the advisor's opinion as to whether further improvement is necessary.

Respondent shall be responsible for the timely filing of the advisor's reports set forth in #4 and #6 above.

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Ernest Hamilton, Respondent.

Opinion No. 26054
Submitted September 27, 2005 - Filed October 24, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and C. Tex Davis, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

James L. Goldsmith, Jr., of Hendersonville, North Carolina.

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 agrees to either 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

Pursuant to his contract with Greenville County to provide legal services for indigent criminal defendants, respondent was appointed to represent Client regarding two charges pending against her in General Sessions Court. In or about January 2004, respondent obtained Client's release from jail on a personal recognizance bond.

Shortly thereafter, Client met with respondent at his office to discuss her case. Client was accompanied by Friend. During the meeting, Friend inquired if respondent would work harder on a retained case than he would on one in which he was appointed. Friend stated he wanted to show his appreciation for the work already accomplished by respondent and to ensure that Client continued to receive appropriate legal services.

Respondent represents that, despite his assurances to Friend that he handles both retained and appointed cases in the same professional manner, Friend insisted respondent accept a fee. Respondent excused Client from the meeting and, at this point, Friend paid respondent $1,000. Respondent gave Friend a receipt for the money and a copy of the receipt was placed in Client's file.

Respondent represents that the money from Friend was paid, with Client's knowledge, to represent Client on a pending charge in magistrate court (unrelated to her General Sessions charges) and a Department of Social Services matter. This agreement was not placed into writing. Respondent acknowledges he failed to clearly clarify the fee arrangement with Client and Friend.

In or about September 2004, respondent admits that, after explaining the parameters of a plea offer with Client as to the General Sessions charges, Client seemed reluctant and inquired about pursuing a trial. Respondent responded by telling Client that a jury trial would cost an additional $1000. Client was never charged this additional fee.

Shortly thereafter, respondent was relieved as counsel for Client. Respondent represented he never intended to charge Client an additional fee, only that he wanted to convince Client of the benefit of accepting the plea offer rather than incurring the risks of a jury trial.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.5 (when lawyer has not regularly represented a client, the basis or rate of a fee shall be communicated to the client, preferably in writing, within a reasonable time after commencing the representation); Rule 1.8 (lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after consultation); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).[1] 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 lawyer to violate Rules of Professional Conduct) and 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice).

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.

PUBLIC REPRIMAND.

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

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[1] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of C. Craig Young, Respondent.

Opinion No. 26055
Submitted September 27, 2005 - Filed October 24, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for respondent.

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 agrees to either 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

On or about July 29, 2003, at the behest of his client, respondent sent a letter offering to settle litigation between his client and another individual. The settlement proposal threatened criminal prosecution to gain an advantage in the civil matter; it offered not to pursue criminal charges as part of the settlement. The proposal

mischaracterized part of the proposed settlement payment as a gift. Respondent did not receive a response to the proposal and the litigation proceeded.

Respondent represents that he suffers from anxiety and was prescribed medication by a physician on an "as needed" basis in 1994. Respondent represents that, as his anxiety increased, his usage of the prescription medication also increased. Respondent asserts he became addicted to the prescription medication and was suffering from this addiction at the time he sent the settlement proposal.[1] Respondent states that, due to his anxiety and addiction, he did not fully appreciate the consequences of portions of the settlement proposal at the time it was made, but he now acknowledges the ramifications.

Respondent represents he has voluntarily sought help for his addiction. He states he has completed a detoxification program and has continued in an after-care program that includes intense weekly therapy and attendance at Narcotics Anonymous. Respondent represents he no longed takes the prescription medicine to which he had become addicted. He has entered into a contract with Lawyers Helping Lawyers and is working with a mentor in that program.

Respondent was admitted to the South Carolina Bar in 1991. He has no prior disciplinary history. Respondent has fully cooperated with ODC.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2 (lawyer shall not assist client by participating in conduct which violates Rules of Professional Conduct); Rule 4.5 (lawyer shall not threaten to present criminal charges solely to obtain an advantage in a civil matter); Rule 8.4(a) (it is professional

[1] Respondent was not addicted to illegal drugs.

misconduct for lawyer to violate Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).[2] 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 lawyer to violate Rules of Professional Conduct); and 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice).

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.

PUBLIC REPRIMAND.

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

[2] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John J. Dodds, III, Respondent.

Opinion No. 26056
Submitted September 16, 2005 - Filed October 24, 2005

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Susan M. Johnston, Deputy Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Frank M. Cisa, of Cisa & Dodds, LLP, of Mount Pleasant, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to any sanction in Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a ninety (90) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent represented the plaintiff/mother in an action to terminate the defendant/father's parental rights for willful failure to support or visit their child for several years. Notice had been properly served for the final hearing. Respondent requested his client take the child out of school to attend the hearing.

While reviewing the file for the hearing, respondent discovered that, although he had prepared the necessary documents to have a guardian ad litem appointed and had intended to contact Robert M. Hadden, Esquire, to serve as guardian, respondent had not contacted Attorney Hadden and, therefore, the appropriate documents concerning the appointment had not been signed and filed with the court. Not wanting to disappoint his client, respondent signed Attorney Hadden's name to four (4) separate documents incident to his appointment as guardian, namely 1) Attorney Hadden's February 18, 2005, affidavit, 2) the Order Appointing Guardian Ad Litem Nisi dated March 1, 2005, 3) the Answer of Guardian Ad Litem dated March 2, 2005, and 4) the Acknowledgement of Service of Guardian Ad Litem dated March 2, 2005.

Prior to the hearing, the family court judge requested a meeting with respondent and the guardian ad litem. Respondent advised the judge that the guardian was not present. The family court judge continued the hearing to allow the guardian to be present.

Respondent admits he did not accurately represent the facts to the family court judge until a few days later when he gave the judge, Attorney Hadden, and ODC a full accounting of what he had done. Respondent has fully cooperated with ODC in resolving this matter. Respondent has no prior disciplinary history.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule

407, SCACR: Rule 3.3 (lawyer shall not knowingly make a false statement of material fact to a tribunal); Rule 3.4 (lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Rule 4.1 (in the course of representing a client, a lawyer shall not knowingly make a false statement of fact to a third person); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice).[1] In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct) and Rule 7(a)(5) (lawyer shall not 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).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a ninety (90) day period. 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, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

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[1] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Walter W. Brooks, Respondent.

Opinion No. 26057
Heard September 22, 2005 - Filed October 24, 2005

INDEFINITE SUSPENSION

Attorney General Henry D. McMaster and J. Emory Smith, Jr., Assistant Deputy Attorney General, both of Columbia, for Office of Disciplinary Counsel.

Jack B. Swerling, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, a Panel of the Commission on Lawyer Conduct (the Panel) found that Walter W. Brooks (Respondent) violated Rules 7(a)(1), 7(a)(3), 7(a)(4), 7(a)(5), and 7(a)(7) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, as well as Rule 8.4 of the Rules of Professional Conduct, Rule 407, SCACR. The Panel recommended that Respondent receive an indefinite suspension from the practice of law, retroactive to the date of his 1996 definite suspension, and that Respondent pay the costs of this action. We agree.

FACTUAL/PROCEDURAL BACKGROUND

In 1980, Respondent was disbarred from the practice of law for failing to obey a police order in violation of the "blue light law," for causing an

affidavit to be prepared which misrepresented the incident, for having knowledge that this affidavit was fraudulently notarized, and for financing a drug deal for a client. *In re Brooks*, 274 S.C. 601, 604-607, 267 S.E.2d 74, 75-77 (1980). Respondent was reinstated to the practice of law in 1989. *In re Brooks*, 298 S.C. 13, 13, 377 S.E.2d 827, 827 (1989). According to court records, Respondent was the first attorney in South Carolina to be reinstated following disbarment.

In October of 1996, Respondent was suspended from the practice of law for nine months. *In re Brooks*, 324 S.C. 105, 107, 477 S.E.2d 98, 99 (1996). Respondent was suspended for making threatening and harassing phone calls to a client's husband, making lewd comments to a client while inebriated in his [Respondent's] office, and serving a deposition notice on a party known to be represented by counsel when there was no discovery order. *Id*.

In addition, the Court ordered Respondent to submit to monthly substance abuse testing during the first year following his suspension. *Id.* at 108, 477 S.E.2d at 99. Following the first year, Respondent was to submit to testing every six months for two years. *Id*. After every test, the results were to be reported to the Court. *Id*. Respondent filed a petition for reinstatement from this suspension in January of 2002.

Later that same month, the Office of Disciplinary Counsel (ODC) notified the Court of a new disciplinary matter involving Respondent. ODC alleged that Respondent failed to comply with the terms of his definite suspension and had committed misconduct by (1) failing to submit reports of substance abuse testing to the Court as required[1] and (2) pleading guilty to a string of alcohol related offenses occurring between October 1998 and May 1999. In particular, Respondent pled guilty to:

[1] Court records showed that results for only nine of the fifteen required substance abuse tests were submitted. Eventually, the Panel concluded that all required tests were in fact performed and that Respondent had merely failed to ensure that the remaining six test results were submitted to the Court.

a. Three (3) counts of driving under the influence, fourth offense and above, in violation of S.C. Code Ann. §§ 56-5-2930, 56-5-2940 (1991);

b. Two (2) counts of driving under suspension, in violation of S.C. Code Ann. § 56-1-460 (1991);

c. One (1) count of violation of the Habitual Traffic Offender Law, S.C. Code Ann. §§ 56-1-1020, 56-1-1100 (Supp. 2004); and

d. One (1) count of leaving the scene of an accident, in violation of S.C. Code Ann. § 56-5-1220 (1991).

The Panel found that Respondent violated Rule 8.4 of the Rules of Professional Conduct (criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects) and the following Rules for Lawyer Disciplinary Enforcement: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(3) (willfully violating a valid order of the Supreme Court); Rule 7(a)(4) (conviction of a crime of moral turpitude or a serious crime); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(7) (willfully violating a valid order issued by a court of this state). The Panel recommended that Respondent be indefinitely suspended from the practice of law, retroactive to the date of his 1996 definite suspension, and that Respondent pay the costs of this action.[2]

ISSUES

Respondent accepts the Panel's findings and conclusions, but disagrees with the recommended sanction of an indefinite suspension. Respondent asks

[2] The Panel's award of costs has not been contested. *See In re Yarborough*, 348 S.C. 243, 249, 559 S.E.2d 836, 839-840 (2002) (holding that failure to take exception to the Panel's report constitutes an acceptance of the report).

the Court to impose a definite suspension for less than nine months so that he can seek reinstatement pursuant to Rule 32 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. In the alternative, Respondent requests that the Court (1) waive the requirement that any future petition for reinstatement be referred to the Committee on Character and Fitness per Rule 33(d), RLDE, Rule 413, SCACR, and (2) permit his reinstatement without fulfilling the requirements of Rule 33(f)(8), RLDE, Rule 413, SCACR (an attorney who has been disbarred or indefinitely suspended must take and pass the Bar Examination, take and pass the Multistate Professional Responsibility Exam, and complete the Bridge the Gap program).

Respondent additionally requests that the Court allow reinstatement from his 1996 suspension in the same manner. Respondent asks that the Court consider these unusual requests in light of his intention to immediately retire from the practice of law; an intention driven by Respondent's extremely poor health.[3]

LAW/ANALYSIS

The South Carolina Supreme Court possesses the ultimate responsibility of determining sanctions in attorney disciplinary matters. *In re Rushton*, 286 S.C. 543, 544, 335 S.E.2d 238, 238 (1985). In this case, the Court must note that several of the crimes involved are felonies under South Carolina law. Violation of the Habitual Traffic Offender Law is a felony. S.C. Code Ann. § 56-1-1100 (Supp. 2004). Additionally, DUI fourth offense and above carries a minimum prison sentence of one year[4], and is therefore a felony. S.C. Code Ann. § 56-1-2030(14) (Supp. 2004). In the case of Respondent, these convictions represent not Respondent's first, second, or third DUI arrests, but at least the fourth, fifth, and sixth occasions on which Respondent elected to drive while under the influence of alcohol.

[3] Respondent is seriously ill, is undergoing treatment, and has a poor prognosis.

[4] *See* S.C. Code Ann. § 56-5-2940(4) (1991).

This Court has imposed varying degrees of sanctions in cases involving a DUI conviction. Looking at existing case law, Respondent's disciplinary history, and the serious nature of the offenses for which Respondent was convicted, we find that the proper sanction is an indefinite suspension retroactive to the date of Respondent's 1996 definite suspension. Should Respondent desire to gain readmission to the practice of law, he must proceed according to Rule 33(d), RLDE, Rule 413, SCACR (unless otherwise directed by the Supreme Court, the petition for reinstatement shall be referred to the Committee on Character and Fitness), and Rule 33(f)(8), RLDE, Rule 413, SCACR (an attorney who has been disbarred or indefinitely suspended must take and pass the Bar Examination, take and pass the Multistate Professional Responsibility Exam, and complete the Bridge the Gap program).

Because Respondent has not satisfied the above requirements, we decline to address the issue of Respondent's petition for reinstatement from the 1996 definite suspension.

CONCLUSION

We are deeply saddened by the current state of Respondent's health. However, we cannot ignore the serious nature of the conduct here at issue, nor can we simply overlook the fact that Respondent has twice before been sanctioned for attorney misconduct, including being disbarred from the practice of law. Accordingly, we concur in the recommended sanction of the Panel and order that Respondent be indefinitely suspended from the practice of law, retroactive to the date of his 1996 definite suspension, and that Respondent pay the costs of this action. 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, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Charleston
Municipal Court Judge
Joseph S. Mendelsohn, Respondent.

Opinion No. 26058
Submitted July 6, 2005 - Filed October 24, 2005

PUBLIC REPRIMAND

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

Coming B. Gibbs, Jr., of Gibbs & Holmes, and Donald H. Howe of Howe & Wyndham, both of Charleston, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a letter of caution, admonition, or public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR. The facts as set forth in the Agreement are as follows.

FACTS

Respondent is a municipal court judge for the City of Charleston. At approximately 9:15 p.m. on November 8, 2003, respondent was arrested for driving under the influence (DUI) in Mount Pleasant. Respondent was also charged with having an open container in his vehicle in violation of South Carolina Code Ann. § 61-6-4020 (Supp. 2004).

Respondent was transported to the Mount Pleasant Police Department for paperwork and administration of a Datamaster test. While there, respondent learned that, under procedures established by the Mount Pleasant Chief Municipal Judge, the bond for DUI was $1,002.00, but that bond could not be posted at that time. Instead, under the established procedures, Judge Mendelsohn would be transferred to the Charleston County Detention Facility where he would remain until a bond hearing could be held the next morning at approximately 8:00 a.m.

Respondent knew the Mount Pleasant procedure was not the same as the procedure used in Charleston. In Charleston, an arrestee can post the preset bond and be released without having to wait for a bond hearing. Respondent believed the Mount Pleasant procedure was illegal and questioned the arresting officer, sergeant, and a lieutenant.

Respondent was allowed to use the telephone. He called a Mount Pleasant municipal judge, again questioned the city's procedure, and asked the judge to speak with the sergeant about the bond policy. After speaking with the sergeant, the Mount Pleasant judge explained the policy to respondent.

After first attempting to telephone another Charleston County magistrate, respondent contacted Charleston County Magistrate James B. Gosnell, Jr. Magistrate Gosnell was unfamiliar with the Mount Pleasant bond procedure.

Magistrate Gosnell asked the Mount Pleasant lieutenant why respondent could not be released. After the lieutenant explained the procedure, Magistrate Gosnell remarked that he would go to the bond court and conduct a bond hearing for respondent that night. Magistrate Gosnell asked that respondent be brought directly to bond court rather than first being booked into the detention center. The lieutenant refused to bypass the standard booking procedure, stating respondent would be booked like any other defendant. The lieutenant then advised the arresting officer that Magistrate Gosnell would be at the Charleston County Detention Center to conduct a bond hearing.

Magistrate Gosnell met the arresting officer and respondent at the detention center. At some point, Magistrate Gosnell took possession of the ticket, placed a "bond hearing" stamp on the back, and entered the amount of $1,002.00. Magistrate Gosnell communicated his setting of the bond to the Mount Pleasant Chief Judge and asked the judge to indicate his approval of the bond. The Mount Pleasant Chief Judge called the Charleston County Detention Center and was advised that officers were in possession of a valid bond set by Magistrate Gosnell. The Mount Pleasant Chief Judge told the officers that, since a bond had been set, the bond procedure he had established did not apply. Respondent was released from the Charleston County Detention Center at approximately 2:30 a.m.

Respondent represents his contact with Magistrate Gosnell and others was only for the purpose of determining the validity of the Mount Pleasant bond procedure, which he believed to be illegal, and was not to obtain preferential treatment or to be excused from the established procedure. Respondent acknowledges, however, that his contact with other judges concerning his ability to post bond has the appearance of seeking preferential treatment.

Respondent further represents he did not ask Magistrate Gosnell to set a bond outside the established procedure. Respondent asserts that, although he did have personal contact with Magistrate Gosnell, he was not aware of all of Magistrate Gosnell's actions

because he was involved in the booking process at the detention center and, at some point, was placed in a cell.

Additionally, respondent represents his recollection is cloudy inasmuch as he was under the influence of alcohol. Respondent contends he has no personal knowledge as to the individual actions and conversations of Magistrate Gosnell and others and that he learned of their activities only after the complaint in this matter was filed. However, for purposes of this Agreement, respondent does not dispute the allegations.

Respondent agreed to and did forfeit bond on the DUI and open liquor offenses.

To the best of ODC's knowledge, respondent has been forthright and cooperative in this matter.

LAW

Respondent used his judicial office to evade the policies of the arresting jurisdiction in order to obtain a non-scheduled bond hearing and early release from jail. His misconduct violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); and Canon 2B (judge shall not lend the prestige of his judicial office to advance the judge's private interests). By violating the Code of Judicial Conduct, respondent has also violated Rule 7(a)(1) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR (it shall be ground for discipline for a judge to violate the Code of Judicial Conduct).

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Accordingly, respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

The Supreme Court of South Carolina

RE: Amendment to Rule 402, SCACR

ORDER

Pursuant to Article V, §4A, of the South Carolina Constitution, Rule 402(d)(1)(i) is amended by replacing the phrase "December 31" with the phrase "January 10."

This change shall be effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 18, 2005

The Supreme Court of South Carolina

In the Matter of Robert Lee Newton, Jr., Petitioner.

ORDER

On November 8, 2004, petitioner was suspended from the practice of law for one year, retroactive to the date of his interim suspension.[1] In the Matter of Newton, 361 S.C. 404, 605 S.E.2d 538 (2004). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommends the petition be granted upon condition.

We grant the petition for reinstatement, subject to the following conditions:

1. Petitioner shall enter into a two year monitoring contract with Lawyers Helping Lawyers (LHL).[2] The terms of the contract shall be determined by J. Robert Turnbull, Jr., Director of LHL. If petitioner violates the terms of the contract in any material way, LHL shall notify the Office of Disciplinary Counsel (ODC). At

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[1] Petitioner was placed on interim suspension on September 25, 2003. In the Matter of Newton, 361 S.C. 91, 604 S.E.2d 369 (2003).

[2] LHL shall file a copy of the signed contract with the Office of Bar Admissions and Office of Disciplinary Counsel.

the conclusion of the contract period, LHL shall file a report with ODC verifying that petitioner has successfully completed the terms of the contract.

2. Petitioner shall obtain the "Revised Lawyers Oath" continuing legal education video/DVD and related form affidavit from the South Carolina Bar. After viewing the video/DVD, petitioner shall complete the affidavit and have a South Carolina Supreme Court Justice, Judge of the Court of Appeals, or a Circuit Court Judge administer the Revised Oath and sign the affidavit acknowledging the administration of the oath. Petitioner shall then return the video/DVD and completed affidavit to the South Carolina Bar. The South Carolina Bar shall notify the Clerk in writing that petitioner has completed this condition.

Once it has received a copy of the signed contract with LHL and written notification from the South Carolina Bar that petitioner has viewed the "Revised Lawyers Oath" video/DVD and taken the oath, the Clerk shall notify petitioner that he has been reinstated to the practice of law.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 19, 2005

The Supreme Court of South Carolina

Julie Hair, Jeffrey Stout and Stephanie Coker, as Personal Representatives of the Estate of Sharon B. Roberson, Respondents,

v.

Willie Joe Roberson, Petitioner.

ORDER

By order dated August 12, 2005, we granted certiorari to review the Court of Appeals' holding that there is no requirement that the family court make specific findings when requiring a spouse to secure an alimony obligation with a life insurance policy and its finding, in the alternative, that other statements in the family court order indicated that the requisite factors were considered. We granted certiorari based, in part, on the Court of Appeals' reliance on Wooten v. Wooten, 356 S.C. 473, 589 S.E.2d 769 (Ct. App. 2003), which has since been reversed by this Court in Wooten v. Wooten, 364 S.C. 532, 615 S.E.2d 98 (2005). However, because the death of Ms. Roberson has rendered the issue of securing alimony with a life

insurance policy moot, we now dismiss the writ of certiorari as improvidently granted.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 19, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edwin H. Brown, **Appellant/Respondent,**

v.

Greenwood Mills, Inc., **Respondent/Appellant.**

Appeal From Greenwood County
Wyatt T. Saunders, Jr, Circuit Court Judge

Opinion No. 4034
Heard October 12, 2005 – Filed October 24, 2005

AFFIRMED IN PART and REVERSED IN PART

Linda Byars McKenzie, of Greenville, for Appellant-Respondent.

Roy R. Hemphill, of Greenwood, for Respondent-Appellant.

ANDERSON, J.: The workers' compensation commission affirmed the order of the single commissioner awarding benefits to Edwin H.

Brown (Brown) for an occupational lung disease, byssinosis, which Brown claims he developed from working with cotton for many years at Greenwood Mills, Inc. (Greenwood). The circuit court affirmed the commission's ruling that Brown's claim was within the statute of limitations, but declared the commission should have allocated a portion of Brown's disease to his long history of cigarette smoking, a non-compensable cause. Therefore, the circuit court remanded the case to the commission for allocation. Both parties appealed.

FACTUAL/PROCEDURAL BACKGROUND

Greenwood employed Brown from 1966 to 1982 and again from 1983 until 1998. As a Greenwood employee, Brown worked primarily with cotton in the carding, spinning, and preparation departments. While at work, he frequently was exposed to cotton dust. Brown, who smoked a pack of cigarettes a day for approximately forty-five years, stopped working in 1998 due to breathing problems.

Brown's respiratory difficulties started sometime around the early 1990s. At that time, Greenwood began performing two breathing tests a year on Brown in order to evaluate and monitor his breathing troubles. Although he quit smoking in February of 1995, Brown continued to suffer from shortness of breath, difficulty walking, and fatigue. In December 1997, Greenwood referred Brown to Dr. Cobb for treatment.

Dr. Cobb diagnosed Brown as having hyper-expanded lungs, a depressed diaphragm, and obstructive lung disease. Initially, Dr. Cobb opined that Brown's obstructive lung disease was "probably secondary to remote tobacco use with progressive airway obstruction." The doctor asseverated, "I do not think this is a specific reaction to his work environment." However, after additional testing showed Brown experienced drops "in his flow rates across the work shift," Dr. Cobb recommended that Greenwood remove Brown from work for three months to see if his absence from the job would ameliorate his condition. Brown's leave did improve his breathing. As Dr. Cobb wrote in his report of June 18, 1998:

> Mr. Brown feels better. His exertional tolerance is slightly improved and he experiences less cough at the present time.
>
> . . . .
>
> The majority of his disease is emphysema related to his previous tobacco use. . . . In addition to the emphysema from smoking, however, he does have a component of industrial related broncospasm. I think this is more likely a nonspecific bronchitis than true byssinosis, but in any event, his underlying disease is exacerbated and has shown documented improvement on a period away from work and my recommendation is that he be removed from the present work space.

Brown did not work for Greenwood after 1998.

On December 4, 2001, Brown was treated at a Veterans' Administration Clinic in Augusta, Georgia. There, for the first time, he was diagnosed with byssinosis. The report from the VA Clinic records:

> Assessment:
>
> Hypertension. Not controlled
>
> . . . .
>
> Hx occupational exposure to cotton dust.44years. including carding and preparation.
>
> Bysinnosis. hx chest tightness and pre and post shift changes in spirometry (reactivity)
>
> Hx industrial noise exposure

Brown filed a Form 50 on February 14, 2002.

At the hearing, Greenwood presented the medical report of Dr. R. L. Galphin. Dr. Galphin believed Brown's disease "was most probably due to his long history of cigarette smoking, which may have been aggravated by exposure to respirable cotton trash dust and reactivity to that dust particularly in the latter part of his employment." He estimated that "70% of Mr. Brown's impairment is related to his long history of cigarette abuse and 30%

may represent a worsening of the condition secondary to his exposure to dust in the cotton textile industry." However, Dr. Galphin never examined Brown. His opinion was based solely on a review of records from Greenwood and Dr. Cobb.

The single commissioner issued an order, which stated:

> After reviewing all of the evidence in the case, it is the finding of the undersigned that the claimant's respiratory disease arose out of and in the course of his employment; said disease was due to hazards of the employment which are excess of hazards normally incident to normal employees. The disease is peculiar to the textile mill wherein they were running cotton products. There have been numerous cases of chronic obstructive pulmonary disease (byssinosis) arising out of inhalation of the organic or inorganic dust in the textile industry. See, Hanks v. Blair Mills, Inc., 286 SC [3]78, 335 SE2d 91 (1985)[.] The hazards causing this condition are peculiar to the textile industry in which the claimant was employed for many years. Based on the opinions of the doctors at the VA Clinic, it is found that the claimant's respiratory disease was a result of the exposure to cotton dust and trash in his employment. The conditions of his exposure are peculiar to his employment. Most particularly, his pre and post work pulmonary function studies, done by the employer, show he was having a reaction to the environment. Further, the doctors at the VA Clinic opined he had severe COPD as a result of many years of textile work.

The commissioner found that the statute of limitations had not run prior to the filing of Brown's claim because he was not definitively diagnosed with byssinosis until December 4, 2001. Indeed, Dr. Cobb, in 1998, had suggested, "this is more likely a nonspecific bronchitis than true byssinosis," and that "[h]is primary disease is emphysema related to underlying previous tobacco use."

The appellate panel affirmed the single commissioner's ruling with the following language:

> In an Appellate Review, the Commission has the power to weigh the evidence as presented at the initial hearing, and, after careful review in the instant case, the Commission, by unanimous vote, has determined that all of the Hearing Commissioner's Findings of Fact and Rulings of Law are correct as stated. Accordingly, they shall become, and hereby are, the law of the case; and, therefore, the Order is sustained in its entirety.

Greenwood appealed to the circuit court arguing (1) the statute of limitations had run on Brown's claim, and (2) the panel erred in failing to determine the proportion of Brown's disability allocable to non-compensable causes—i.e., smoking—pursuant to sections 42-11-90 and –100 of the South Carolina Code. The circuit court affirmed the panel as to the finding that the claim was within the statute of limitations, but reversed on the award of benefits:

> In this case, the record is replete with evidence of the Claimant's forty-five (45) year history of smoking, a non-compensable cause, and its effect on his lungs. Even if the Commission dismissed Dr. Galphins's opinion as not being credible, Dr. Cobb's June 19, 1998 opinion that the majority of Claimant's lung disease was non-compensable cannot be ignored. Indeed, the employer does have the burden of proving not only the interplay of a non-compensable cause, but also its proportion to the overall disability. Hanks v. Blair Mills, Inc., 286 SC 378, 335 SE2d 91 (Ct. App. 1985). In this case, the employer clearly met that burden, and no substantial evidence exists in the record to support the Commission's findings to the contrary. As such, in light of the statutes' mandatory language, the employer was entitled to a determination of the proportion allocable to the non-compensable cause, smoking, and a corresponding reduction of compensation owed to the Claimant.

Accordingly, the circuit court remanded the case to the commission "with the specific direction to make the necessary findings as to the apportionment between compensable versus non-compensable causes, and a corresponding reduction in the Claimant's disability award."

LAW/ANALYSIS

I. Appealability

Greenwood asserts, as a threshold matter, that the circuit court's order remanding the case to the commission is interlocutory and not immediately appealable. We disagree.

The rule governing the appealability of a circuit court order remanding a case to the commission is set forth in Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994):

> S.C. Code Ann. § 1-23-390 (1986) provides:
>
> > An aggrieved party may obtain a review of any final judgment of the circuit court under this article by appeal to the Supreme Court. The appeal shall be taken as in other civil cases.
>
> Accordingly, we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable. Owens v. Canal Wood Corp., 281 S.C. 491, 316 S.E.2d 385 (1984); Hunt v. Whitt, 279 S.C. 343, 306 S.E.2d 621 (1983).

Montjoy, 316 S.C. 52, 446 S.E.2d 618.

The question here is whether the circuit court order is a "final judgment" under section 1-23-390. Generally, an order is a final judgment on one or more issues if it constitutes an ultimate decision on the merits. In Owens v. Canal Wood Corp., 281 S.C. 491, 316 S.E.2d 385 (1984), one of the two cases cited by the Montjoy court, the supreme court found "[t]he

order of the circuit court does not involve the merits of the action. It is therefore interlocutory and not reviewable by this Court for lack of finality." Owens, 281 S.C. at 492, 316 S.E.2d at 385 (emphasis added) (citations omitted). Similarly, in Hunt v. Whitt, 279 S.C. 343, 306 S.E.2d 621 (1983), the supreme court held that "[b]ecause the interlocutory order of the circuit court does not involve the merits of the action, it is not reviewable by this Court for lack of finality." Id. (emphasis added) (citations omitted). Accordingly, in determining whether the court's order constitutes a final judgment, we must inquire whether the order finally decides an issue on the merits.

"An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case." Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993) (citing Henderson v. Wyatt, 8 S.C. 112 (1877)). In the case sub judice, the order of the circuit court finally determined an issue on the merits—that Brown's smoking, a non-compensable cause, contributed to his disability. The court noted "the employer does have the burden of proving . . . the interplay of a non-compensable cause" and found "the employer clearly met that burden[.]" Consequently, the circuit court ruled that "the employer was entitled to a determination of the proportion allocable to the non-compensable cause[.]" The case was remanded, not for evaluation whether apportionment was appropriate, but "with specific direction to make the necessary findings as to the apportionment between compensable versus non-compensable causes, and a corresponding reduction in the Claimant's disability award."

The court's order mandates apportionment. This ruling is a decision on the merits because it decides with finality whether Greenwood is required to reduce its compensation under sections 42-11-90 and –100. Although the judge left the percentage of apportionment to the commission on remand, the panel would have no choice but to allocate some part of Brown's disability to the non-compensable cause. Accordingly, the circuit court's order constitutes a final decision on the issue of apportionment and is appealable.

II. Statute of Limitations

Greenwood maintains that Brown filed his claim outside the period of the statute of limitations.

Section 42-15-40 provides:

> The right to compensation under this title is barred unless a claim is filed with the commission within two years after an accident, or if death resulted from accident, within two years of the date of death. However, for occupational disease claims the two-year period does not begin to run until the employee concerned has been **diagnosed definitively** as having an occupational disease and has been **notified of the diagnosis**.

S.C. Code Ann. § 42-15-40 (Supp. 2004) (emphasis added).

In McCraw v. Mary Black Hospital, 350 S.C. 229, 565 S.E.2d 286 (2002), our supreme court proclaimed that section 42-15-40 "requires that the employee be: (1) 'diagnosed definitively as having an occupational disease,' and (2) 'notified of the diagnosis[.]'" 350 S.C. at 235-36, 565 S.E.2d at 289. In McCraw, Carolyn McCraw, a nurse, began experiencing breathing problems associated with handling potent chemicals in the endoscopy unit of the hospital where she was employed. Dr. Applebaum, who worked with McCraw, noticed her breathing difficulties. McCraw discussed her condition with Dr. Applebaum on an informal basis until September of 1991 when she transferred out of the endoscopy unit. She then began seeing Dr. Applebaum, and on November 19, 1992, McCraw was admitted to the hospital for treatment of asthma and pneumonia. She did not file a workers' compensation claim until November 14, 1994. Although McCraw began to experience her work-induced breathing ailments more than two years before filing her claim, the supreme court found that the statute of limitations did not bar her from benefits:

> Considering the record as a whole, it simply is not reasonable to conclude that Dr. Applebaum's informal conversations with

> McCraw in the endoscopy unit constituted a definitive diagnosis, or that McCraw's understanding her asthma was affected by the workplace chemicals somehow constitutes notification of definitive diagnosis of an occupational disease.

Id. at 236, 565 S.E.2d at 289.

Here, Brown was not definitively diagnosed as having byssinosis until his December 2001 visit to the VA Clinic. Greenwood asserts that Brown's claim is barred because he understood in 1998 his deteriorated breathing condition was related to his work environment. However, both the statute and precedent make clear that in an occupational disease context, the statute of limitations begins to run only upon notification of a definitive diagnosis. As stated by the court in McCraw, "it simply is not reasonable to conclude" a claimant's "understanding" that his condition "was affected by the workplace" environment "somehow constitutes notification of definitive diagnosis of an occupational disease." 350 S.C. at 236, 565 S.E.2d at 289. Brown was given a definitive diagnosis on December 4, 2001, and he filed his Form 50 on February 14, 2002. Therefore, his claim is timely, and we affirm the circuit court as to the statute of limitations issue.

III. Allocation Under Sections 42-11-90 and –100

Section 42-11-90 states:

> When an occupational disease prolongs, accelerates or aggravates or is prolonged, accelerated or aggravated by any other cause or infirmity not otherwise compensable, the compensation payable for disability or death shall be limited to the disability which would have resulted solely from the occupational disease if there were no other such cause or infirmity and shall be computed by the proportion which the disability from occupational disease bears to the entire disability.

S.C. Code Ann. § 42-11-90 (1985). Similarly, code section 42-11-100 reads, in pertinent part,

> Compensation payable for disability from an occupational disease must be the same as that provided for an injury under this title. No compensation is payable:
>
> > (1) For the degree of disability resulting from noncompensable causes . . . .

S.C. Code Ann. § 42-11-100 (Supp. 2004).

The case sub judice is similar to Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985). Charles Hanks was exposed to cotton dust for approximately fifteen years as an employee of Blair Mills. In addition, he smoked a pack and a half of cigarettes a day "for years." Hanks was diagnosed with byssinosis and was awarded benefits. The commission did not apportion the award under section 42-11-90, and this Court affirmed. We observed:

> The issue of the extent of disability is a question of fact to be proved as any other fact is proved. Arnold v. Benjamin Booth Co., 257 S.C. 337, 185 S.E.2d 830 (1971). This Court's function is not to resolve conflicts in the evidence but to determine from the record if substantial evidence supports the agency's finding.
>
> . . . .
>
> The evidence revealed that Hanks had smoked a pack and a half of cigarettes a day for years and that smoking can cause or contribute to chronic obstructive lung disease. Appellants, however, presented no evidence of the percentage of Hanks' disability that was caused by smoking. Mizell v. Raybestos-Manhattan, Inc., 281 S.C. 430, 315 S.E.2d 123 (1984). We thus find no merit in the appellants' contention that the court should have apportioned the award based on Section 42-11-90.

286 S.C. at 384-85, 335 S.E.2d at 95.

In the instant case, the single commissioner was cognizant of section 42-11-90. Greenwood raised the statute and the issue of allocation at the hearing, and the commissioner responded:

> And in the pretrial conference you had stated your position in regards to the apportionment and I advised that I would like just a short brief, five, ten pages, on the issue of apportionment. And if you would submit that to me in ten or fifteen days. And Ms. McKenzie [counsel for Brown] is certainly entitled to do a brief on her position as well.

Moreover, the commissioner's order expressly finds, as a conclusion of law,

> 6. Per § 42-11-90, the claimant is entitled to compensation for his disability as being related to and as a result of an occupational disease resulting from cotton dust exposure. (See, Hanks v. Blair Mills, Inc., 286 SC 378, 335 SE2d 91, 1985[.]

(Emphasis added.) The commissioner's order concluded:

> [T]he claimant's respiratory disease arose out of and in the course of his employment; said disease was due to hazards of the employment which are excess of hazards normally incident to normal employees. . . . Based on the opinions of the doctors at the VA Clinic, it is found that the claimant's respiratory disease was a result of the exposure to cotton dust and trash in his employment.

The linchpin of this case is the standard by which we must review factual determinations of the commission. The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the workers' compensation commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Bass v. Isochem, ___S.C.___, 617 S.E.2d 369 (Ct. App. 2005); Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of

that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bursey v. South Carolina Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). Under the scope of review established in the APA, this Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (2005).

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Frame, 357 S.C. at 527, 593 S.E.2d at 494; Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002); see also Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001) ("Any review of the commission's factual findings is governed by the substantial evidence standard."). Pursuant to the APA, this Court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law. See Rodriguez v. Romero, 363 S.C. 80, 610 S.E.2d 488 (2005); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); S.C. Code Ann. § 1-23-380(A)(6) (2005); see also Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004) ("A reviewing court will not overturn a decision by the workers' compensation commission unless the determination is unsupported by substantial evidence or is affected by an error of law."); Lyles v. Quantum Chem. Co. (Emery), 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (noting that in reviewing decision of workers' compensation commission, court of appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia-Pacific

Corp., 355 S.C. 413, 586 S.E.2d 111 (2003); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999).

The appellate panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. Gibson, 338 S.C. at 517, 526 S.E.2d at 729; Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the appellate panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000); Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995); Frame, 357 S.C. at 528, 593 S.E.2d at 495; Gibson, 338 S.C. at 517, 526 S.E.2d at 729. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. South Carolina Dep't of Health & Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004); Corbin, 351 S.C. at 618, 571 S.E.2d at 95; Muir, 336 S.C. at 282, 519 S.E.2d at 591. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive. Hargrove, 360 S.C. at 290, 599 S.E.2d at 611; Etheredge, 349 S.C. at 455, 562 S.E.2d at 681.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999); Frame, 357 S.C. at 528, 593 S.E.2d at 495. It is not within our province to reverse findings of the appellate panel which are supported by substantial evidence. Pratt, 357 S.C. at 622, 594 S.E.2d at 274-75; Broughton, 336 S.C. at 496, 520 S.E.2d at 637.

The parties presented the commissioner with conflicting medical opinion evidence as to the cause of Brown's disability. Whether a history of cigarette smoking was a causal factor in Brown's disease was a factual question which the commissioner and the commission answered in the negative. The commissioner noted that byssinosis is a condition peculiarly associated with cotton dust exposure. Additionally, Brown stopped smoking

in 1995, yet his condition worsened between 1995 and 1998. Tests demonstrated that his work environment negatively affected Brown's breathing. Finally, the opinion of the doctor from the VA Clinic, the only doctor to definitively diagnose Brown with byssinosis, stated that Brown's condition was the result of forty-four years of exposure to cotton dust.

Although the circuit court might have ruled differently had it been the fact finder, it was error for the court to substitute its factual judgment in place of the commission's. As we observed in Stone v. Traylor Brothers, Inc., 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004), "Admittedly, the Commission could have reached a different conclusion. However, that fact does not alter the scope of our inquiry." Id. (citing Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984) ("[The] possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.")).

Based on the evidence presented, reasonable minds could conclude Brown's byssinosis is the result of his exposure to cotton dust without regard to his history of smoking. The commission, aware of the apportionment statutes, made a factual determination which is supported by substantial evidence. Accordingly, that portion of the circuit court's order reversing the commission's ruling on section 42-11-90 is reversed and the commission's award of benefits is reinstated.

CONCLUSION

Based on the foregoing, the order of the circuit court is affirmed in part and reversed in part, and the commission's order is reinstated.

AFFIRMED IN PART and REVERSED IN PART.

HUFF and WILLIAMS, JJ., concur.