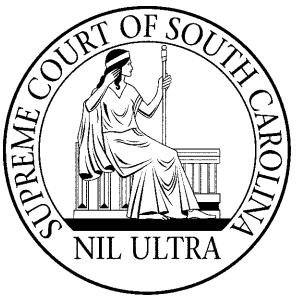

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41
October 15, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

US SUPREME COURT - EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

PETITIONS FOR REHEARING

27444 - In the Matter of the Care and Treatment of Vincent N. Way	Pending
27447 - The State v. Desmond Sams	Pending
2014-MO-022 - Travelers Property v. Senn Freight	Pending
2014-MO-035 - Mokhtar Elkachbendi v. Anne Elkachbendi	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5266-State v. Anthony K. Blakney	Pending
5267-Steve Bagwell v. State	Pending
5268-Julie Tuten v. David C. Joel	Pending
5270-56 Leinbach Investors, LLC v. Magnolia Paradigm	Pending
5271-Richard Stogsdill v. SCDHHS	Pending
5272-Cindy Ella Dozier v. American Red Cross	Pending
2014-UP-224-State v. James E. Wise	Pending
2014-UP-240-Robert A. Warren, Jr. v. State	Pending
2014-UP-270-Progressive Northern Ins. v. Stanley Medlock	Pending
2014-UP-299-Lucille Smith v. The Heirs at Law of Benjamin Days	Pending
2014-UP-318-Linda Johnson v. Heritage Healthcare	Pending
2014-UP-326-Bernard Bagley v. SCDPPPS	Pending
2014-UP-332-State v. Michael Anthony Rogers	Pending
2014-UP-337-State v. Elizabeth Dinkins	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4909-North American Rescue v. Richardson	Pending
4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending
4979-Major v. City of Hartsville	Pending
5008-Willie H. Stephens v. CSX Transportation	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5031-State v. Demetrius Price	Pending

5052-State v. Michael Donahue	Pending	
5055-Hazel Rivera v. Warren Newton	Granted	10/08/14
5077-Kirby L. Bishop et al. v. City of Columbia	Pending	
5078-Estate of Livingston v. Clyde Livingston	Pending	
5092-Mark Edward Vail v. State	Pending	
5099-Roosevelt Simmons v. Berkeley Electric	Pending	
5112-Roger Walker v. Catherine Brooks	Pending	
5118-Gregory Smith v. D.R. Horton	Pending	
5140-Bank of America v. Todd Draper	Pending	
5152-Effie Turpin v. E. Lowther	Pending	
5156-State v. Manuel Marin	Pending	
5160-State v. Ashley Eugene Moore	Pending	
5175-State v. Karl Ryan Lane	Pending	
5176-Richard A. Hartzell v. Palmetto Collision, LLC	Pending	
5191-Jacqueline Carter v. Verizon Wireless	Pending	
5193-Israel Wilds v. State	Pending	
5196-State v. James Anderson	Pending	
5197-Gladys Sims v. Amisub	Pending	
5201-Phillip Grimsley v. SLED	Pending	
5203-James Teeter v. Debra Teeter	Pending	
5209-State v. Tyrone Whatley	Pending	

5214-State v. Alton W. Gore, Jr.	Pending
5217-H. Eugene Hudson v. Mary Lee Hudson	Pending
5224-State v. Alex Lorenzo Robinson	Pending
5227-State v. Frankie Lee McGee	Pending
5230-State v. Christopher L. Johnson	Pending
5231-Centennial Casualty v. Western Surety	Pending
5232-State v. Clarence W. Jenkins	Pending
5242-Patricia Fore v. Griffco of Wampee, Inc	Pending
5243-Kerry Levi v. Northern Anderson County EMS	Pending
5244-Clifford Thompson v. State	Pending
5246-State v. Jason A. Johnson	Pending
5247-State v. Henry Haygood	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Denied 10/08/14
2012-UP-078-Seyed Tahaei v. Sherri Tahaei	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-479-Elkachbendi v. Elkachbendi	Pending

2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending
2012-UP-663-Carlton Cantrell v. Aiken County	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending
2013-UP-062-State v. Christopher Stephens	Pending
2013-UP-066-Dudley Carpenter v. Charles Measter	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health	Pending
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Denied 10/08/14
2013-UP-127-Osmanski v. Watkins & Shepard Trucking	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2013-UP-158-CitiFinancial v. Squire	Pending
2013-UP-188-State v. Jeffrey A. Michaelson	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-257-Matter of Henson (Woods) v. Breakfield	Pending
2013-UP-290-Mary Ruff v. Samuel Nunez	Pending
2013-UP-297-Greene Homeowners v. W.G.R.Q.	Pending

2013-UP-310-Westside Meshekoff Family v. SCDOT	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2013-UP-358-Marion L. Driggers v. Daniel Shearouse	Pending
2013-UP-424-Lyman Russell Rea v. Greenville Cty.	Pending
2013-UP-435-State v. Christopher Spriggs	Pending
2013-UP-442-Jane AP Doe v. Omar Jaraki	Pending
2013-UP-461-Ann P. Adams v. Amisub of South Carolina Inc.	Pending
2013-UP-489-F.M. Haynie v. Paul Cash	Pending
2014-UP-013-Roderick Bradley v. The State	Pending
2014-UP-020-Joseph Marshall v. Carrie Marshall	Pending
2014-UP-034-State v. Benjamin J. Newman	Pending
2014-UP-047-State v. Sam Harold Smith	Pending
2014-UP-056-In the matter of the care and treatment of P. Guess	Pending
2014-UP-074-Tim Wilkes v. Horry County	Pending
2014-UP-087-Moshtaba Vedad v. SCDOT	Pending
2014-UP-088-State v. Derringer Young	Pending
2014-UP-091-State v. Eric Wright	Pending
2014-UP-094-Thaddeus Segars v. Fidelity National	Pending
2014-UP-103-State v. David Vice	Pending
2014-UP-113-State v. Jamaal Hinson	Pending
2014-UP-114-Carolyn Powell v. Ashlin Potterfield	Pending

2014-UP-121-Raymond Haselden v. New Hope Church	Pending
2014-UP-122-Ayree Henderson v. State	Pending
2014-UP-128-3 Chisolm Street v. Chisolm Street	Pending
2014-UP-132-State v. Ricky S. Bowman	Pending
2014-UP-143-State v. Jeffrey Dodd Thomas	Pending
2014-UP-159-City of Columbia v. William K. Wilson	Pending
2014-UP-167-State v. David G. Johnson	Pending
2014-UP-172-Willie Rogers v. Charles Carr	Pending
2014-UP-173-Reda Reilly v. Kevin Reilly	Pending
2014-UP-178-State v. Anthony R. Carter	Pending
2014-UP-180-State v. Travas D. Jones	Pending
2014-UP-183-Allison Johnson v. Russell Johnson	Pending
2014-UP-187-State v. Mark Peters	Pending
2014-UP-192-Lawrence Terry v. Allen University	Pending
2014-UP-203-Helena P. Tirone v. Thomas Dailey	Pending
2014-UP-206-State v. Forrest K. Samples	Pending
2014-UP-210-State v. Steven Kranendonk	Pending
2014-UP-222-State v. James Curtis Tyner	Pending
2014-UP-228-State v. Taurus L. Thompson	Pending
2014-UP-230-State v. Travis N. Buck	Pending
2014-UP-241-First Citizens Bank v. Charles T. Brooks, III	Pending

2014-UP-265-State v. Gregory A. Ivery	Pending
2014-UP-266-Mark R. Bolte v. State	Pending
2014-UP-273-Gregory Feldman v. William Casey	Pending
2014-UP-279-Jacqueline Smith v. Horry County Schools	Pending
2014-UP-282-State v. Donald M. Anderson	Pending
2014-UP-284-John Musick v. Thomas Dicks	Pending
2014-UP-288-Gayla Ramey v. Unihealth Post Acute	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Thomas Moody, Respondent.

Appellate Case No. 2014-001889

Opinion No. 27453
Submitted September 16, 2014 – Filed October 15, 2014

DISBARRED

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

J. Calhoun Watson, Esquire, of Sowell Gray Stepp & Laffitte, LLC of Columbia, 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 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment with conditions. Respondent requests the disbarment be imposed retroactively to January 27, 2014, the date of his interim suspension. In the Matter of Moody, 407 S.C. 81, 754 S.E.2d 266 (2014). We accept the Agreement and disbar respondent retroactively to the date of his interim suspension. In addition, we impose the conditions set forth hereafter in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent represented Client A in a contested estate case that was resolved several years ago. Ultimately, approximately $700,000 from the estate was placed in trust for the benefit of Client A until he reached the age of thirty. Respondent was named trustee of the trust. Most of the trust fund was placed with an independent broker and was invested properly.

Respondent invested $15,000 of Client A's trust funds in a commercial real estate venture arranged by respondent's friend. The venture was unsuccessful and the funds were lost. In 2013, when Client A turned thirty, respondent determined that he needed to repay the trust the funds lost in his investment, plus interest.

Respondent also represented the personal representative (Client B) of the Estate of John Doe. Respondent received $50,000 on behalf of the Doe Estate for renovations on estate property. Respondent deposited those funds into his law firm trust account on October 1, 2013.

On October 9, 2013, respondent registered an entity called HCJ Enterprises, LLC, with the South Carolina Secretary of State and named himself the registered agent. On October 11, 2013, at respondent's instruction, a check was written from the law firm trust account in the amount of $22,000 payable to HCJ Enterprises, LLC. Respondent used the check to open a bank account in the name of HCJ Enterprises, LLC.

On October 15, 2013, respondent wrote a check from the HCJ Enterprises, LLC, account in the amount of $19,176.16 payable to Client A to reimburse him for funds lost in the real estate venture, plus interest. On the same date, respondent cashed a check from the HCJ Enterprises, LLC, account in the amount of $2,300.

On October 23 and October 25, 2013, respondent made counter withdrawals from the HCJ Enterprises, LLC, account in the amounts of $300 and $200, respectively. Respondent used these funds for personal purposes.

On November 1, 2013, at respondent's direction, a second check was written from the client trust account to HCJ Enterprises, LLC, in the amount of $7,500. On the same date, respondent make a counter withdrawal of $4,000.

Between November 4 and November 14, 2013, respondent made cash withdrawals from the HCJ Enterprises' account totaling $3,350. Respondent used all of these funds for his own benefit.

On November 19, 2013, respondent obtained a check in the amount of $5,000 from Client B for the renovation project. Respondent did not place these funds in his trust account, but deposited them into the HCJ Enterprises' account. Respondent converted these funds to his own use. At the time of respondent's interim suspension, the balance in the HCJ Enterprises' account was $5.84.

Respondent acknowledges he used HCJ Enterprises, LLC, and the related bank account to misappropriate Doe Estate funds held in the law firm trust account. He admits there was no legitimate purpose for payment of $34,500 from the Doe Estate to Client A, HCJ Enterprises, LLC, or respondent.

On January 3, 2014, respondent wrote a check on a law firm petty cash account for $3,000 payable to Client B in an attempt to replace some of the misappropriated funds. At the time he wrote the check, the law firm petty cash account did not have sufficient funds to cover the check. Notice of the overdraft on the petty cash account alerted respondent's law partner (Partner) to the misappropriation of funds from the Doe Estate. Partner made arrangements to cover the check on the petty cash account, removed respondent as a signatory on the firm accounts, terminated the partnership, and reported respondent's conduct to the Commission on Lawyer Conduct (the Commission). In addition to the $3,000 paid from the petty cash account on January 3, 2014, respondent paid a total of $10,895.10 to or on behalf of the Doe Estate from petty cash and from personal funds.

Matter II

Client C retained respondent to represent her in a partition action related to her mother's estate. Respondent successfully handled that matter.

In the meantime, a dispute arose between Client C and her brother (who was the personal representative of the mother's estate) about the distribution of personal

property. Respondent agreed to represent Client C in that dispute. On November 9, 2010, respondent accepted a fee of $750 from Client C to assist her in resolving that dispute.

Respondent admits that he failed to diligently pursue the personal property dispute and that he failed to adequately communicate with Client C about the matter. Although he had some discussions with Client C's brother in an attempt to settle the matter, respondent took no significant action in the matter for more than three years.

Matter III

In January 2010, Client D and his two brothers retained respondent to represent them as plaintiffs in a civil matter involving a dispute with a neighbor and her landlords. Respondent represented Client D and his brothers in filing a lawsuit and participating in discovery and other pretrial matters. Respondent did not present Client D or his brothers with a formal fee agreement or with billing statements, but contacted Client D from time to time asking for payment.

The neighbor filed a motion to dismiss. Subsequently, all defendants filed a motion for summary judgment referencing documents attached to the neighbor's answer and her motion to dismiss. On October 29, 2013, a hearing was held on the motion for summary judgment. At that hearing, respondent protested, claiming that he had not received a copy of the answer. The judge continued the matter based on respondent's statement.

In fact, respondent had received a copy of the answer on June 18, 2012. Opposing counsel filed a motion for sanctions against respondent. Following the rescheduled motion hearing, the judge ruled in favor of the defendants, granting summary judgment on all but one cause of action. The judge held the issue of sanctions in abeyance.

On January 9, 2014, the day respondent was confronted by Partner about the $3,000 withdrawal from the law firm petty cash account, respondent sent a text message to Client D stating: "[t]o finish up this part of the case it looks like with time and costs about $3,000. Is that going to be a problem?" Respondent sent additional text messages to Client D asking that he deposit the fee into respondent's personal account, that the deposit be made in cash to avoid a hold by the bank, and

he urged Client D to make the deposit immediately. Client D deposited the money as requested. Respondent acknowledges that the fee obtained from Client D and his brothers in advance of his work should have been placed in the law firm's trust account.

On January 10, 2014, respondent and the defendants' attorney agreed to have the case dismissed pursuant to Rule 40(j), SCRCP, to facilitate mediation and settlement on the remaining cause of action. On January 14, 2014, the judge signed a form order dismissing the case pursuant to Rule 40(j). Client D stated respondent neither consulted with him or his brothers about the Rule 40(j) motion nor did he inform them that it was granted.

On January 27, 2014, respondent was placed on interim suspension. In the Matter of Moody, Id. Although he was suspended, respondent continued to communicate with Client D regarding the scheduling of mediation and other matters related to the civil action. During this communication, respondent did not advise Client D of his interim suspension or the Rule 40(j) dismissal of the case.

On February 5, 2014, Client D sent a text message to respondent inquiring about the opposing party's Facebook posting stating respondent had been suspended. Respondent responded with a text message that he was "not sure" where the opposing party got that information and that he would call Client D the following morning. On February 6, 2014, respondent called Client D and informed him of his suspension. Respondent still did not tell Client D about the Rule 40(j) dismissal. Client D discovered the dismissal when he retrieved his file from Partner who had been appointed to protect the interests of respondent's clients.

Matter IV

Respondent represented Client E in a legal matter related to Client E's business. To settle the matter, Client E agreed to make monthly payments to the opposing party. Prior to respondent's interim suspension, Client E delivered to respondent a series of personal checks in the amount of $500, each payable to respondent. As it was Client E's intent that respondent make the payments to counsel for the opposing party on a monthly basis, Client E post-dated the checks.

Respondent delivered a total of $3,000 to the opposing party's counsel between April and November 2013. In December 2013 and January 2014, respondent negotiated Client E's checks, but rather than delivering them to the opposing party or his counsel, respondent converted the checks to this own use.

On January 27, 2014, respondent was placed on interim suspension and Partner was appointed to protect the interests of respondent's clients. In the Matter of Moody, Id. Following the suspension, Client E contacted respondent and respondent assured him that the payments were being made. Respondent did not deliver the remaining checks to Partner. Respondent converted four more checks between February and May 2014 for a total of $3,500.

On June 12, 2014, Partner sent Client E a letter from opposing counsel indicating Client E had not made the payments as agreed. When Client E contacted respondent, respondent told him he would "look into it." Respondent did not tell Client E that he had failed to make the payments as agreed. On June 30, 2014, respondent delivered $3,500 in cash and the remaining unnegotiated checks to Client E.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2 (lawyer shall abide by client's decisions concerning objectives of representation); Rule 1.3 (lawyer shall act with diligence and promptness in representing client); Rule 1.4 (lawyer shall promptly inform client of any decision with respect to which client's informed consent is required, shall reasonably consult with client about means by which client's objectives are to be accomplished, and shall keep client reasonably informed about status of matter); Rule 1.7(a)(2) (lawyer shall not represent client if representation involves concurrent conflict of interest; conflict of interest exists if there is significant risk that representation of one or more clients will be materially limited by lawyer's responsibilities to another client); Rule 1.15(a) (lawyer shall hold property of clients or third persons in lawyer's possession in connection with representation separate from lawyer's own property); Rule 1.15(g) (lawyer shall not use any entrusted property to obtain personal benefit for lawyer or other person other than the legal or beneficial owner of the property); Rule 1.16 (upon termination of representation, lawyer shall take steps to extent reasonably practicable to protect client's interests, such as giving reasonable notice to client

and surrendering property to which client is entitled); Rule 3.3 (lawyer shall not knowingly make false statement of fact to tribunal); Rule 5.5(a) (lawyer shall not practice law in a jurisdiction in violation of the regulation of law in that jurisdiction); Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation). In addition, respondent admits he violated Rule 30(d) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (suspended lawyer shall deliver to client being represented in pending matter any papers or other property to which client entitled).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it is ground for discipline for lawyer to violated Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactively to January 27, 2014, the date of his interim suspension.[1] In the Matter of Moody, supra. Further, we impose the following conditions:

1) within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission;

[1] Respondent's prior disciplinary history includes letters of caution issued in 2007 and 2010 warning respondent to adhere to some of the Rules of Professional Conduct cited in the current Agreement. *See* Rule 2(r), RLDE (fact that letter of caution has been issued shall not be considered in subsequent disciplinary proceeding against lawyer unless the caution or warning contained in letter of caution is relevant to the misconduct alleged in new proceedings).

2) within one (1) year of the date of this opinion, respondent shall:

    a) refund the $750 fee paid by Client C;

    b) refund the $3,000 fee paid by Client D and his two brothers;

    c) pay any remaining funds owed to Partner as a result of respondent's misappropriation in Matter I; and

    d) reimburse the Lawyers' Fund for Client Protection for any funds paid out on his behalf; and

3) complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management Program prior to applying for readmission.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mitul Enterprises, L.P., Appellant,

v.

Beaufort County Assessor, Respondent.

Appellate Case No. 2013-000106

Appeal From The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Opinion No. 5275.
Heard September 8, 2014 – Filed October 15, 2014

AFFIRMED

James Ashley Twombley, of Twenge & Twombley, LLC, of Beaufort, for Appellant.

Stephen P. Hughes and William Thomas Young, III, both of Howell Gibson & Hughes, PA, of Beaufort, for Respondent.

KONDUROS, J.: Mitul Enterprises, L.P. (Mitul) appeals the Administrative Law Court's (ALC) ruling affirming the imposition of an additional $105,282.48 to its 2009 tax bill. We affirm.

FACTS/PROCEDURAL BACKGROUND

In 2007, Mitul began construction of a new Holiday Inn in Beaufort, South Carolina. Construction was not completed until 2008, and therefore, the Holiday Inn structure was to be taxed for the first time in the 2009 tax year. Prior to construction of the new Holiday Inn, the property had been improved with other structures, including a restaurant. The property was assessed a value of $930,300.00, resulting in a 2008 tax bill of $13,220.75.

After construction of the hotel was completed, the Beaufort County Tax Assessor (Assessor) found the market value of the newly-improved property was $11,775,674.00 and noticed Mitul of this in September of 2009. Mitul successfully challenged that valuation, and the Assessor reduced the market value of the property to $9,000,000.00. The Assessor notified Mitul of this revision in writing in April of 2010 and also issued Mitul a new tax notice. However, the new tax notice continued to reflect a taxable amount based on the pre-improvement value of the property. Because of this error, the tax due was listed as $14,209.10.

According to the Assessor, this omission of the Holiday Inn from the tax rolls was the result of an error in the software used to create the tax rolls that failed to incorporate those structures for which building permits and certificates of occupancy were issued in different years. Because the building permit and certificate of occupancy for the hotel were issued in different years, the hotel was inadvertently omitted from the tax rolls.

Upon discovery of the omission, the Assessor, through the Beaufort County Treasurer, issued a corrected 2009 tax bill reflecting additional taxes in the amount of $105,282.48. Mitul objected to the additional tax, contending it constituted an unwarranted reassessment. Mitul exhausted its administrative appeals with a final decision from the ALC affirming the Assessor's decision. This appeal followed.

STANDARD OF REVIEW

A party who has exhausted all administrative remedies available within an agency and who is aggrieved by an ALC's final decision in a contested case is entitled to judicial review. S.C. Code Ann. § 1-23-380 (Supp. 2013). "[T]his [c]ourt's review

is limited to determining whether the ALC's findings were supported by substantial evidence or were controlled by an error of law." *Engaging & Guarding Laurens Cnty.'s Env't (EAGLE) v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 334, 341, 755 S.E.2d 444, 448 (2014). "Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law *de novo*." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "[T]he [c]ourt generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003).

LAW/ANALYSIS[1]

Mitul contends the ALC erred in finding the taxpayer was not to be given the benefit of the doubt in this case in determining whether the County Assessor could levy taxes pursuant to the statute and in finding the new construction constituted omitted property under the statute. We disagree.

> While a tax statute is to be reasonably construed as a whole with the view of carrying out its purpose and intent, where the language relied upon to bring the particular person or subject within the law is ambiguous or is reasonably susceptible of an interpretation that would exclude the person or subject sought to be taxed, the well-established general rule requires that any substantial doubt should be resolved against the government and in favor of the taxpayer.

Fuller v. S.C. Tax Com'n, 128 S.C. 14, 21, 121 S.E. 478, 481 (1924) (citations omitted).

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[1] Issues 2, 5, and 6 as delineated in Mitul's appellate brief were not ruled on by the ALC, and Mitul did not file a motion for reconsideration to obtain rulings on those issues. Therefore, these issues are not preserved for our review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

In the instant case, Mitul does not contend the Holiday Inn property should not be taxed for 2009 because of an ambiguity in any statute that imposes a tax. Instead, Mitul challenges the interpretation of section 12-39-220 of the South Carolina Code (2014), a statute regarding which public official, the County Assessor or the County Auditor, can order collection of an otherwise properly assessed tax.[2] We recognize a strict construction of section 12-39-220 may result in Mitul avoiding the tax at issue; nevertheless, the statute itself does not define who shall be taxed and does not require the favorable taxpayer construction urged by Mitul.

Because we are not dealing with a statutory ambiguity regarding whether the Holiday Inn should be taxed, we are to construe section 12-39-220 "reasonably" and "as a whole with the view of carrying out its purpose and intent." *Fuller*, 128 S.C. at 21, 121 S.E. at 481. The purpose of the statute is to collect taxes that inadvertently escaped taxation. At the contested hearing, the County Assessor testified some of the terminology in section 12-39-220 is outdated in light of the technology now employed by the taxing offices. Furthermore, the record presents no evidence that contradicts the summation in the ALC's order regarding the division of labor between County Auditors and County Assessors. The ALC determined:

> Both parties acknowledge that the language of Section 220, and indeed several other code sections, is obsolete because it refers to the county auditor performing functions related to the taxation of real property that are now routinely performed by the assessor in each county. Section 220 speaks of the Auditor maintaining the duplicate, charging the real property taxes, and appraising the real property. All those are duties which currently fall under the authority and duties of the Beaufort County Assessor.

[2] Section 12-39-220 provides "[i]f *the county auditor* shall at any time discover that any real estate or new structure, duly returned and appraised for taxation, has been omitted from the duplicate, he shall immediately charge it on the duplicate with the taxes of the current year and the simple taxes of each preceding year it may have escaped taxation." (emphasis added).

Because we give deference to an agency's construction of a statute regarding its operation and because this construction is reasonable and furthers the legislative intent of collecting duly owed taxes, we affirm the ALC's determination the County Assessor had authority to act as it did in this case.

Having determined the Assessor was an appropriate party to levy the additional tax, we turn now to the question of whether the Holiday Inn otherwise falls within the omitted property statute in this case. The issue here is analogous to the issues and facts in *Columbia Developers, Inc. v. Elliott*, 269 S.C. 486, 238 S.E.2d 169 (1977). In that case, the taxpayer added five additional stories to a building it owned in Columbia. *Id*. at 488, 238 S.E.2d at 170. The additional floors were ready for occupancy in 1971, and in 1972, the assessor notified the taxpayer of the value of the improvements. *Id.* "Through inadvertence or otherwise, the increase in the assessed value of [taxpayer]'s property was not included on the auditor's rolls for the tax years 1972 and 1973 and thus the taxes levied on the property in question for those two years were based on the 1971 assessed value." *Id.* at 489, 238 S.E.2d at 170. In 1974, taxpayer received a notice of appraisal and assessment that reflected the value of the five-story improvement and received notice of back taxes owed from 1972 to 1973. *Id.* "These back taxes were charged under the authority of [section 12-39-220]." *Id.* at 489, 238 S.E.2d at 171.

The court in *Columbia Developers* dismissed the taxpayer's appeal on the basis that he had failed to exhaust his administrative remedies, and Mitul attempts to distinguish *Columbia Developers* on that basis. *Id*. at 491, 238 S.E.2d at 171. However, the court determined that although it "need not discuss the substantive issues on appeal" it was "convinced" the trial court's conclusion the "property escaped taxation in 1972 and 1973" was supported by the evidence and the back taxes were properly charged. *Id.*

The facts in this case are nearly identical to those in *Columbia Developers*. The additional improvements were made to the property and assigned a value of which Mitul was well aware. The additional taxes that should have flowed from that increase in value were inadvertently not charged because of a software error. The Holiday Inn improvements escaped taxation, and it is appropriate to treat those improvements as omitted property under section 12-39-220. While we understand the dictum in *Columbia Developers* is not binding on this court, we find its reasoning to be persuasive.

Because the improvements to Mitul's property were properly assessed as omitted property, the decision of the ALC is

AFFIRMED.

HUFF and SHORT, JJ., concur.

The South Carolina Court of Appeals

Kimberly M. Morrow, Respondent,

v.

South Carolina Department of Employment and Workforce and A Wing and A Prayer, Inc., Defendants,

Of whom South Carolina Department of Employment and Workforce is the Appellant,

and A Wing and A Prayer, Inc. is the Respondent.

Appellate Case No. 2012-207406

ORDER

Counsel for the South Carolina Department of Employment and Workforce (the Department) filed a motion asking the Court to dismiss this appeal by agreement of the parties and to withdraw Opinion Number 5235, filed on May 28, 2014. *See Morrow v. S.C. Dep't of Emp't & Workforce*, Op. No. 5235 (Ct. App. filed May 28, 2014) (Shearouse Adv. Sh. No. 21 at 61).

The motion is granted. Opinion Number 5235 is hereby withdrawn and vacated and shall have no further precedential effect. The parties are directed to effectuate the settlement in accordance with the order of the Administrative Law Court. The

Department is further directed to file a proof of payment of the settlement amount within 90 days of the date of this order. The Court will hold the remittitur until the Department notifies this Court the settlement is finalized.

s/ Aphrodite K. Konduros, J.
FOR THE COURT

Columbia, South Carolina

Filed June 26, 2014.