OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 43

November 14, 2005

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

2005-UP-539-Tharington v. Votor	Pending
2005-UP-540-Fair et al. v. Gary Realty et al.	Pending
2005-UP-541-State v. S. Cunningham	Pending
2005-UP-543-Jamrok v. Rogers et al.	Pending
2005-UP-549-Jacobs v. Jackson	Pending
2005-UP-556-Russell v. Gregg	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3745-Henson v. International (H. Hunt)	Pending
3776-Boyd v. Southern Bell	Pending
3777-State v. Childers	Pending
3780-Pope v. Gordon	Pending
3787-State v. Horton	Pending
3808-Wynn v. Wynn	Pending
3809-State v. Belviso	Pending
3813-Bursey v. SCDHEC & SCE&G	Pending
3820-Camden v. Hilton	Pending
3821-Venture Engineering v. Tishman	Pending
3825-Messer v. Messer	Pending
3830-State v. Robinson	Pending
3832-Carter v. USC	Pending
3833-Ellison v. Frigidaire Home Products	Pending

3835-State v. Bowie	Pending
3836-State v. Gillian	Pending
3841-Stone v. Traylor Brothers	Pending
3842-State v. Gonzales	Pending
3843-Therrell v. Jerry's Inc.	Pending
3847-Sponar v. SCDPS	Pending
3848-Steffenson v. Olsen	Pending
3849-Clear Channel Outdoor v. City of Myrtle Beach	Pending
3850-SC Uninsured Employer's v. House	Pending
3852-Holroyd v. Requa	Pending
3853-McClain v. Pactiv Corp.	Pending
3855-State v. Slater	Pending
3857-Key Corporate v. County of Beaufort	Pending
3858-O'Braitis v. O'Braitis	Pending
3860-State v. Lee	Pending
3861-Grant v. Grant Textiles et al.	Pending
3863-Burgess v. Nationwide	Pending
3864-State v. Weaver	Pending
3865-DuRant v. SCDHEC et al	Pending
3866-State v. Dunbar	Pending
3871-Cannon v. SCDPPPS	Pending

3877-B&A Development v. Georgetown Cty.	Pending
3879-Doe v. Marion (Graf)	Pending
3883-Shadwell v. Craigie	Pending
3884-Windsor Green v. Allied Signal et al.	Pending
3890-State v. Broaddus	Pending
3900-State v. Wood	Pending
3903-Montgomery v. CSX Transportation	Pending
3906-State v. James	Pending
3910-State v. Guillebeaux	Pending
3911-Stoddard v. Riddle	Pending
3912-State v. Brown	Pending
3914-Knox v. Greenville Hospital	Pending
3917-State v. Hubner	Pending
3918-State v. N. Mitchell	Pending
3919-Mulherin et al. v. Cl. Timeshare et al.	Pending
3926-Brenco v. SCDOT	Pending
3928-Cowden Enterprises v. East Coast	Pending
3929-Coakley v. Horace Mann	Pending
3935-Collins Entertainment v. White	Pending
3936-Rife v. Hitachi Construction et al.	Pending
3938-State v. E. Yarborough	Pending

3939-State v. R. Johnson	Pending
3940-State v. H. Fletcher	Pending
3943-Arnal v. Arnal	Pending
3947-Chassereau v. Global-Sun Pools	Pending
3949-Liberty Mutual v. S.C. Second Injury Fund	Pending
3950-State v. Passmore	Pending
3952-State v. K. Miller	Pending
3954-Nationwide Mutual Ins. v. Erwood	Pending
3963-McMillan v. SC Dep't of Agriculture	Pending
3965-State v. McCall	Pending
3966-Lanier v. Lanier	Pending
3968-Abu-Shawareb v. S.C. State University	Pending
3970-State v. C. Davis	Pending
3971-State v. Wallace	Pending
3976-Mackela v. Bentley	Pending
3977-Ex parte: USAA In Re: Smith v. Moore)	Pending
3978-State v. K. Roach	Pending
3981-Doe v. SCDDSN et al.	Pending
3984-Martasin v. Hilton Head	Pending
3985-Brewer v. Stokes Kia	Pending
3988-Murphy v. Jefferson Pilot	Pending

3989-State v. Tuffour	Pending
3993-Thomas v. Lutch (Stevens)	Pending
3994-Huffines Co. v. Lockhart	Pending
3995-Cole v. Raut	Pending
3996-Bass v. Isochem	Pending
3998-Anderson v. Buonforte	Pending
4000-Alexander v. Forklifts Unlimited	Pending
4004-Historic Charleston v. Mallon	Pending
4005-Waters v. Southern Farm Bureau	Pending
4014-State v. D. Wharton	Pending
4015-Collins Music Co. v. IGT	Pending
4020-Englert, Inc. v. LeafGuard USA, Inc.	Pending
2003-UP-642-State v. Moyers	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-757-State v. Johnson	Pending
2004-UP-219-State v. Brewer	Pending
2004-UP-251-State v. Davis	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-289-E. Hathaway Const. v. Eli	Pending
2004-UP-344-Dunham v. Coffey	Pending
2004-UP-359-State v. Hart	Pending

2004-UP-366-Armstong v. Food Lion	Pending
2004-UP-381-Crawford v. Crawford	Pending
2004-UP-394-State v. Daniels	Pending
2004-UP-397-Foster v. Greenville Memorial	Pending
2004-UP-407-Small v. Piper	Pending
2004-UP-409-State v. Moyers	Pending
2004-UP-422-State v. Durant	Pending
2004-UP-427-State v. Rogers	Pending
2004-UP-430-Johnson v. S.C. Dep't of Probation	Pending
2004-UP-439-State v. Bennett	Pending
2004-UP-460-State v. Meggs	Pending
2004-UP-482-Wachovia Bank v. Winona Grain Co.	Pending
2004-UP-485-State v. Rayfield	Pending
2004-UP-487-State v. Burnett	Pending
2004-UP-496-Skinner v. Trident Medical	Pending
2004-UP-500-Dunbar v. Johnson	Pending
2004-UP-504-Browning v. Bi-Lo, Inc.	Pending
2004-UP-505-Calhoun v. Marlboro Cty. School	Pending
2004-UP-513-BB&T v. Taylor	Pending
2004-UP-517-State v. Grant	Pending
2004-UP-520-Babb v. Thompson et al (5)	Pending

2004-UP-521-Davis et al. v. Dacus	Pending
2004-UP-537-Reliford v. Mitsubishi Motors	Pending
2004-UP-540-SCDSS v. Martin	Pending
2004-UP-542-Geathers v. 3V, Inc.	Pending
2004-UP-550-Lee v. Bunch	Pending
2004-UP-554-Fici v. Koon	Pending
2004-UP-555-Rogers v. Griffith	Pending
2004-UP-556-Mims v. Meyers	Pending
2004-UP-560-State v. Garrard	Pending
2004-UP-596-State v. Anderson	Pending
2004-UP-598-Anchor Bank v. Babb	Pending
2004-UP-600-McKinney v. McKinney	Pending
2004-UP-605-Moring v. Moring	Pending
2004-UP-606-Walker Investment v. Carolina First	Pending
2004-UP-607-State v. Randolph	Pending
2004-UP-609-Davis v. Nationwide Mutual	Pending
2004-UP-610-Owenby v. Kiesau et al.	Pending
2004-UP-613-Flanary v. Flanary	Pending
2004-UP-617-Raysor v. State	Pending
2004-UP-632-State v. Ford	Pending
2004-UP-635-Simpson v. Omnova Solutions	Pending

2004-UP-650-Garrett v. Est. of Jerry Marsh	Pending
2004-UP-653-State v. R. Blanding	Pending
2004-UP-654-State v. Chancy	Pending
2004-UP-657-SCDSS v. Cannon	Pending
2004-UP-658-State v. Young	Pending
2005-UP-001-Hill v. Marsh et al.	Pending
2005-UP-002-Lowe v. Lowe	Pending
2005-UP-014-Dodd v. Exide Battery Corp. et al.	Pending
2005-UP-016-Averette v. Browning	Pending
2005-UP-018-State v. Byers	Pending
2005-UP-022-Ex parte Dunagin	Pending
2005-UP-023-Cantrell v. SCDPS	Pending
2005-UP-039-Keels v. Poston	Pending
2005-UP-046-CCDSS v. Grant	Pending
2005-UP-054-Reliford v. Sussman	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending
2005-UP-113-McCallum v. Beaufort Co. Sch. Dt.	Pending
2005-UP-115-Toner v. SC Employment Sec. Comm’n	Pending
2005-UP-116-S.C. Farm Bureau v. Hawkins	Pending
2005-UP-122-State v. K. Sowell	Pending
2005-UP-124-Norris v. Allstate Ins. Co.	Pending

2005-UP-128-Discount Auto Center v. Jonas	Pending
2005-UP-130-Gadson v. ECO Services	Pending
2005-UP-138-N. Charleston Sewer v. Berkeley County	Pending
2005-UP-139-Smith v. Dockside Association	Pending
2005-UP-149-Kosich v. Decker Industries, Inc.	Pending
2005-UP-152-State v. T. Davis	Pending
2005-UP-155-CCDSS v. King	Pending
2005-UP-160-Smiley v. SCDHEC/OCRM	Pending
2005-UP-165-Long v. Long	Pending
2005-UP-170-State v. Wilbanks	Pending
2005-UP-171-GB&S Corp. v. Cnty. of Florence et al.	Pending
2005-UP-173-DiMarco v. DiMarco	Pending
2005-UP-174-Suber v. Suber	Pending
2005-UP-192-Mathias v. Rural Comm. Ins. Co.	Pending
2005-UP-195-Babb v. Floyd	Pending
2005-UP-200-Cooper v. Permanent General	Pending
2005-UP-216-Hiott v. Kelly et al.	Pending
2005-UP-219-Ralphs v. Trexler (Nordstrom)	Pending
2005-UP-224-Dallas et al. v. Todd et al.	Pending
2005-UP-296-State v. B. Jewell	Pending
2005-UP-297-Shamrock Ent. v. The Beach Market	Pending

2005-UP-298-Rosenblum v. Carbone et al.	Pending
2005-UP-303-Bowen v. Bowen	Pending
2005-UP-305-State v. Boseman	Pending
2005-UP-319-Powers v. Graham	Pending
2005-UP-337-Griffin v. White Oak Prop.	Pending
2005-UP-340-Hansson v. Scalise	Pending
2005-UP-345-State v. B. Cantrell	Pending
2005-UP-348-State v. L. Stokes	Pending
2005-UP-354-Fleshman v. Trilogy & CarOrder	Pending
2005-UP-365-Maxwell v. SCDOT	Pending
2005-UP-373-State v. Summersett	Pending
2005-UP-375-State v. V. Mathis	Pending
2005-UP-422-Zepsa v. Randazzo	Pending
2005-UP-425-Reid v. Maytag Corp.	Pending
2005-UP-460-State v. McHam	Pending
2005-UP-471-Whitworth v. Window World et al.	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mary P. Brown, individually and in her capacity as Berkeley County Clerk of Court,

Appellant/Respondent,

v.

The County of Berkeley, James H. Rozier, Jr., in his official capacity as Berkeley County Supervisor and Chairman of Berkeley County Council and individually; William E. Crosby, in his official capacity as Vice Chairman of Berkeley County Council and individually; Charles E. Davis, Steve C. Davis, Milton Farley, Dennis L. Fish, Judy C. Mims, Caldwell Pinkney, Jr., and Judith K. Spooner, each in their official capacity as Berkeley County Council members and individually,

Defendants,

Of Whom The County of Berkeley, James H. Rozier, Jr., in his official capacity as Berkeley County Supervisor and Chairman of Berkeley County Council and individually; William E Crosby, in his official capacity as Vice Chairman of Berkeley County Council and individually; Charles E. Davis, Steve C. Davis, Milton Farley, Dennis L. Fish, Caldwell Pinkney, Jr., and Judith K. Spooner, each in their official capacity as Berkeley County Council members and individually are

Respondents/Appellants,

and

Judy C. Mims is Respondent.

Appeal from Berkeley County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 26062
Heard October 4, 2005 - Filed November 14, 2005

AFFIRMED

Margaret D. Fabri, of Charleston, for Appellant/Respondent.

D. Mark Stokes, of Moncks Corner, for Respondent/Appellant Berkeley County.

Sandra J. Senn and Stephanie P. McDonald, both of Charleston, for all other Respondents/Appellants.

James A. Stuckey, Jr., of Charleston, for Respondent Judy C. Mims.

CHIEF JUSTICE TOAL: This is an appeal from the trial court's refusal to grant a preliminary injunction preventing a "special audit" of the Berkeley County Clerk of Court's Office. The individual members of the Berkeley County Council cross-appeal the denial of their motion to dismiss Mary P. Brown's claims for defamation, defamation *per se*, and intentional

infliction of emotional distress. This case was certified for review pursuant to Rule 204(b), SCACR. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

This is a dispute between branches of Berkeley County Government. Mary P. Brown (Brown) has served as the Berkeley County Clerk of Court (the Clerk) since being first elected to that office in 1983. Under South Carolina law, Berkeley County (the County) is subject to an annual financial audit conducted by independent and outside auditors. S.C. Code Ann. § 4-9-150 (Supp. 2004). The outside financial audit for the fiscal year 2002-2003 began in early August, 2003.

In November of 2003, the outside auditor issued a financial report to the County. The auditor found no major instances of noncompliance, but did report some "immaterial instances of noncompliance." Over the course of the next few months, the auditor raised concerns regarding Brown's use of the county credit card, the reporting of interest earned on the Clerk's escrow accounts, and instances of payments to employees that may not have been reported on the proper federal tax forms. The auditor also observed that certain details of the Clerk's handling of discretionary funds, specifically funds collected by the issuance of professional or surety bondsman licenses, were not maintained in accordance with the applicable statutes. Throughout this process of investigation, the auditor maintained that these findings did not materially alter the November report. The auditor instead classified these findings as "opportunities for strengthening internal controls and operating efficiency."

The dispute in this case involves the actions of the Berkeley County Council (the County Council) during this same time period. In November of 2003, the County Council enacted a written request for Brown to produce financial documentation for the past two years regarding ten (10) county bank and credit card accounts. In reply to the County Council's request, Brown asserted that the County Council violated the Freedom of Information Act (FOIA) by authorizing the request to produce in a closed executive session. Brown additionally claimed that James H. Rozier, Jr., Supervisor and

Chairman of the County Council, improperly accused Brown of misusing the county credit card. Following three months of discourse between the clerk's office and the County Council, the County Council enacted a resolution approving an "expanded audit[1]" of the clerk's office. Brown filed suit seeking, among other forms of relief, a preliminary injunction prohibiting the audit of the clerk's office, and damages against the County, the County Council, and the individual council members for defamation, defamation *per se*, and intentional infliction of emotional distress.

The trial court denied Brown's motion for a preliminary injunction, relying largely on the language of S.C. Code Ann. § 4-9-150.[2] The trial court found that the County Council was not free to interfere with the operation of the clerk's office in a manner that was unreasonable, unduly burdensome, or of a harassing nature, but the trial court found no evidence of such action in this case.

In the same order, the trial court declined to dismiss the individual council members "at this early stage." The individual council members had moved for dismissal from the lawsuit citing the terms of the South Carolina Tort Claims Act and absolute legislative immunity.

Both parties appealed, and the following issues have been raised for review:

I. Did the trial court err in denying Brown's request for a preliminary injunction to prevent the expanded audit?

---

[1]The terms "special audit" and "expanded audit" are used interchangeably. The County Council's resolution calls for an "expanded audit," and the statute at issue, S.C. Code Ann. § 4-9-150 (Supp. 2004), uses the term "special audit." Both terms refer to the same activity.

[2] S.C. Code Ann. § 4-9-150 (Supp. 2004) states that special audits may be provided for any agency receiving county funds as the governing body considers necessary.

II. Did the trial court err in denying the individual council members' motion to dismiss?

LAW/ANALYSIS

I. Brown's Request for a Preliminary Injunction.

Brown argues that the trial court erred in denying her request for a preliminary injunction. We disagree.

Generally, actions for injunctive relief are equitable in nature. *Wiedemann v. Town of Hilton Head*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of the evidence. *Doe v. Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995). To obtain an injunction, a party must demonstrate a likelihood of success on the merits, irreparable harm, and the absence of an adequate remedy at law. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002).

Brown claims that the special audit ordered by the County Council is invalid because the County Council did not articulate specific reasons why such an audit was necessary. The relevant portion of the code provides in part:

> The council shall provide for an independent annual audit of all financial records and transactions of the county and any agency funded in whole by county funds and may provide for more frequent audits as it considers necessary. *Special audits may be provided for any agency receiving county funds as the county governing body considers necessary.*

S.C. Code Ann. § 4-9-150 (Supp. 2004) (emphasis added).

Clear and unambiguous words in a statute should be given their plain and ordinary meaning. *In re Vincent J.*, 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (*citing Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 423 S.E.2d 101 (1992)). In this case, the plain language of the statute unequivocally allows a county government to order special audits whenever the county government considers the audit necessary.

The instant case does not require this Court to look beyond the plain words of the statute and interpret the meaning of the phrase "considers necessary." The resolution adopted by the County Council clearly outlines (1) that the County Council has previously made requests for the Clerk to provide financial information, including documentation in support of certain financial transactions, (2) that the Clerk has refused to provide the requested documentation, (3) that the funds involved are public funds, and (4) that the County Council feels that the most appropriate method of ensuring the proper use of public funds is to request a special audit of the clerk's office. This constitutes the functional equivalent of articulating necessity, and no reasonable construction of the statute at issue could require the County Council to do more in the way of offering justification for a special audit. Were we to adopt the position advocated by Brown, our conclusion would inevitably be the same.[3] For this reason, we affirm the trial court's decision denying Brown's request for a preliminary injunction.[4]

[3] Brown asks this Court to interpret § 4-9-150 to require the County Council to articulate why a special audit is necessary.

[4] Brown also argues that through the special audit, the County Council is exerting improper control over the constitutionally created office of the Clerk of Court and that the Clerk's Office would be irreparably harmed by the auditor's "open ended and burdensome" demand for documents and information. We decline to address the issue of harm as the trial court's ruling on the temporary injunction is affirmed for reasons already stated.

II. The Motion to Dismiss the Individual Defendants.

The individual council members argue that they should be dismissed from Brown's suit pursuant to the principle of absolute immunity and the terms of the South Carolina Tort Claims Act. We disagree and instead hold that the denial of the individual council members' motion to dismiss is not reviewable at this time.

It is well settled that an interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right. S.C. Code Ann. § 14-3-330 (Supp. 2003); *Woodward v. Westvaco Corp.*, 319 S.C. 240, 243, 460 S.E.2d 392, 394 (1995); *Mid-State Distributors, Inc. v. Century Importers*, 310 S.C. 330, 334-35, 426 S.E.2d 777, 780 (1993); *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). To involve the merits of a case, the order must "finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Woodward*, 319 S.C. at 243, 460 S.E.2d at 394. To affect a substantial right, the order must "determine the action and prevent a judgment from which an appeal might be taken or discontinue the action." *Id.* We decide, then, whether the trial court's order denying the individual council members' motion to dismiss is an immediately appealable order.

Individual members of a local county council are not entitled to absolute immunity. *See Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) (noting that privilege depends not on rigid requirements but is determined by consideration of public policy). Furthermore, the trial court's denial of the individual council members' motion to dismiss does not preclude the individual council members from raising the issues presented in their motion at a later point in the case. *See Frazier v. Badger*, 361 S.C. 94, 101, 603 S.E.2d 587, 590 (2004) (stating that immunity under the Tort Claims Act is an affirmative defense that must be proved at trial); *Sanders v. Prince*, 304 S.C. 236, 240, 403 S.E.2d 640, 643 (1991) (stating that when a government employee's conduct constitutes actual malice, he is not entitled to immunity from suit).

The South Carolina Tort Claims Act provides "[n]othing in this chapter may be construed to give an employee of a governmental entity immunity from suit…if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70 (b) (2005). Were we to recognize that the individual members of the county council enjoyed absolute immunity from suit, the above statute would be meaningless. Additionally, the individual council members will be free to raise such issues as qualified immunity, qualified privilege, and the provisions of the Tort Claims Act, at later stages of this case. For these reasons, we hold that the denial of the individual council members' motion to dismiss is not presently reviewable.[5]

CONCLUSION

We affirm the trial court's refusal to issue a preliminary injunction preventing a special audit of the Berkeley County Clerk of Court's Office. Because the grounds laid out in the County Council's resolution authorizing the special audit constitute the functional equivalent of articulating necessity, we need not answer the question of whether a county government must articulate necessity in authorizing a special audit under S.C. Code Ann. § 4-9-150 (Supp. 2004).

Because the denial of the individual members of the Berkeley County Council's motion to dismiss is an interlocutory order and neither involves the

[5] Courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338, 574 S.E.2d 502, 512 (Ct. App. 2002) (*citing Morris v. Anderson County*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002)). In the instant case, however, the two issues argued on appeal (the denial of a preliminary injunction preventing a special audit and the denial of a motion to dismiss claims for defamation, defamation *per se*, and intentional infliction of emotional distress) lack a sufficient nexus or companionship to justify this Court's exercise of immediate appellate review.

merits nor affects a substantial right of the parties, we hold that this motion is not presently subject to appellate review.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jane Smith, Respondent,

v.

John Doe, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lexington County
C. David Sawyer, Jr., Family Court Judge

Opinion No. 26063
Heard October 5, 2005 - Filed November 14, 2005

AFFIRMED

H. Wayne Floyd, of W. Columbia, for Petitioner.

John D. Elliott, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Jane Smith (Smith) brought this action to establish paternity and award child support. The family court declared that John Doe (Doe) was the father and ordered Doe to pay child support. The court of appeals held that Doe had an ongoing duty to support the child (Danielle) and that the action was not barred by the statute of limitations. On appeal, the court of appeals held that the amount of the child support award was reasonable. We affirm the court of appeals.

FACTUAL / PROCEDURAL BACKGROUND

The child in the present case, Danielle, was thirty-four years old when this action was commenced. Danielle is the child of Doe and Smith. Smith and Doe met in 1964, and although Doe was married at the time, the two had an affair. Danielle, the result of the affair, was born in July of 1965.

Danielle is mentally handicapped and has the mental capacity of a six-year-old. Danielle does not have the capacity to read, do math, cook, or drive. In addition, Danielle cannot be left unsupervised, and as a result, she is under childcare supervision most of the day.

Doe was aware Danielle's birth but did not have a relationship with her or offer support to her. Out of concern for Danielle's well being, Smith asked Doe if he would recognize Danielle as his daughter in order to allow Danielle to receive Social Security benefits upon Doe's death. Doe refused to recognize Danielle as his child. As a result, Smith filed an action against Doe seeking a declaration of child support and paternity.

Doe filed a motion to dismiss, denying that he was Danielle's father and arguing that the action was barred by the statute of limitations. The family court denied the motion and ordered the parties to undergo paternity testing. The paternity test revealed that Doe was Danielle's father.

As a result, the court ordered Doe to pay $91.00 per week in child support starting from the commencement of the action and the court also ordered Doe to pay attorney's fees. The court of appeals affirmed the decision of the family court, rejecting Doe's argument that the statute of limitations barred the action. Doe appealed and this Court granted certiorari to review the following issues:

I. Does the general statute of limitations bar Smith's paternity and child support actions?

II. Did the family court err in awarding child support?

LAW / ANALYSIS

I. Statute of Limitations

Doe argues that the court of appeals erred in holding that the statute of limitations did not bar the paternity and child support actions. We disagree. The action to determine paternity and the action for child support are separate actions, however, in the present case the actions were brought together. We will address the support obligation first.

A. Support Obligation

When a child is so physically or mentally disabled that the child cannot support himself or herself, the parent's duty to support the child continues beyond the child reaching the age of majority. *Riggs v. Riggs*, 353 S.C. 230, 234-35, 578 S.E.2d 3, 5 (2003). When the disability prevents the child from becoming emancipated, the presumption of emancipation upon reaching the age of majority is inapplicable. *Parker v. Parker*, 230 S.C. 28, 31, 94 S.E.2d 12, 13 (1956).

In *Riggs v. Riggs*, this Court held that a parent's support obligation continued past the age of majority even when the disability was not diagnosed until after the child reached age eighteen. 353 S.C. at 235, 578 S.E.2d at 5 (2003). The child in *Riggs* was diagnosed with Leigh's Syndrome after reaching eighteen. As a result of the degenerative condition, the child was not able to function above the level of a ten-year-old and had mobility problems. The Court held that even though the child had reached the age of majority, the disability prevented the child from being emancipated. *Id*.

In the present case, Danielle is thirty-four years old, but unlike the child in *Riggs*, Danielle's condition manifested at birth. However, due to her disability, Danielle is incapable of being emancipated. As a result, we hold that Doe's support obligation did not terminate when Danielle reached the age of majority. Accordingly, we affirm the court of appeals' decision holding that the action for support was not barred by the statute of limitations.

B. Paternity

Doe argues that the paternity action is barred by the general statute of limitations.[1] We disagree. This Court has not directly addressed the issue of whether an action to determine paternity can be barred by the statute of limitations.

As noted by the court of appeals, some jurisdictions have placed a statute of limitations on bringing an action for paternity. *See e.g.*, 23 PA. Cons. Stat. Ann. § 4343(b) (2003) (requiring that a paternity action be instituted within eighteen years of the child's birth).

The South Carolina legislature has passed statutes addressing both a parent's support obligation and a procedure outlining paternity testing.[2] Nowhere in this state's statutory law is a there a time limit for when an action for paternity may be commenced.[3]

---

[1] The general statute of limitations is codified at S.C. Code Ann. § 15-3-350 (Supp. 2004).

[2] *See* S.C. Code Ann. § 20-7-952 (Supp. 2003) (allowing paternity actions by and on behalf of children older than eighteen); S.C. Code Ann § 20-7-90 (Supp. 2004) (requiring parents to provide support for their legitimate and illegitimate children).

[3] Upon review of this Court's jurisprudence, it seems that statute of limitations issues have arisen only in limited situations involving a parent's duty of support. *S.C. Dep't of Soc. Serv. v. Lowman*, 269 S.C. 41, 236 S.E.2d 194 (1977). In *Lowman*, this Court held that the general statute of limitations applied to a support obligation but only in an action to seek retroactive child support. *Id*. at 47, 236 S.E.2d at 196. Further, the Court stated that although a claim for retroactive support might be barred, "the duty of support is a continuing obligation. New causes of action arise over the years with each instance of a putative father's failure to support his child." *Id*. at 48, 236 S.E.2d at 196. (citation omitted).

The statutory authority read in conjunction with this Court's common law makes it clear that the legislature did not intend to impose a statute of limitations on paternity actions because the Legislature did not specifically include one in the statutory scheme. *See Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 214, 423 S.E.2d 101, 103 (1992) (holding that the Court will give statutory provisions reasonable and practical construction consistent with the purpose and policy of the entire act).

As a result, we affirm the court of appeals, but hold that there is no statute of limitations that is applicable for an action to determine paternity.

II. Amount of Child Support

Doe argues that the court of appeals erred in determining the amount of child support. We disagree.

Child support awards are within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. *Mitchell v. Mitchell*, 283 S.C. 87, 92, 320 S.E.2d 706, 710 (1984). The trial court abuses its discretion when factual findings are without evidentiary support or a ruling is based upon an error of law. *McKnight v. McKnight*, 283 S.C. 540, 543, 324 S.E.2d 91, 93 (Ct. App. 1984).

In the present case, the family court accounted for all income received by Danielle. The court recognized that Danielle received social security benefits of $275 per month. In addition, the court noted that Danielle receives between $250 and $350 per week from her job at the Babcock Center. The family court used the child support guidelines and ordered Doe to pay $91.00 per week in support. The court refused to deviate from the guidelines.

We hold that the family court did not err in determining the amount of support to which Danielle was entitled. The court followed the child support guidelines and accounted for all income Danielle was receiving in order to reach the total amount of support Doe is obligated to pay.

As a result, we affirm the court of appeals' decision finding that the family court did not err in awarding child support.

CONCLUSION

Based on the above reasoning, we affirm the court of appeals.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Darren S. Haley, Respondent.

Opinion No. 26064
Submitted October 10, 2005 - Filed November 14, 2005

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Darren S. Haley, of Greenville, pro se.

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 a public reprimand or a definite suspension not to exceed thirty (30) days. See 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 thirty (30) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

Respondent admits he was not as diligent as he should have been in handling a domestic case. He failed to adequately communicate with his client.

Matter II

Respondent admits he was not diligent in notifying his client of the hearing dates. In addition, he did not meet with his client to prepare her for a hearing. He admits he failed to respond in a timely manner to ODC's request for additional information.

Matter III

Respondent failed to perfect service of a summons and complaint and later failed to file an amended complaint in a timely manner. Both actions were dismissed. Respondent failed to respond to ODC's initial inquiry and did not respond in a timely manner to ODC's second letter of inquiry. Respondent agrees to repay this client's attorney's fees in the amount of $750.00 within one year of the date he signed the Agreement.[1]

Matter IV

Respondent failed to diligently pursue his client's domestic action. He failed to adequately communicate with his client.

Matter V

Respondent failed to respond to a motion for summary judgment and failed to appear at the summary judgment hearing. Summary judgment was granted to the opposing party.

[1] Respondent signed the Agreement on June 30, 2005.

Respondent maintains he had expected his client to either obtain other counsel or contact him if she wanted him to respond to the summary judgment motion, however, he failed to obtain his client's written consent or the approval of the court to withdraw from representation. In addition, on an earlier occasion, respondent failed to communicate with the client.

Matter VI

Respondent failed to diligently defend a civil forfeiture action against his client. As a result, the answer was late and a default judgment was entered. Respondent failed to adequately communicate with his client and failed to return the $3,000.00 retainer fee he did not earn. Respondent also delayed in responding to inquiries from ODC.

Respondent agrees to repay the $3,000.00 fee to his client within one year of the date he signed the Agreement.

Matter VII

Respondent signed his client's name to a bond assignment form without authorization. The form provided that $7,500.00 of the posted bond money was to be assigned to respondent's firm for its fee. Although he did not have the authority to sign the form, the amount of the fee was not in dispute. Respondent was not prosecuted.

Matter VIII

Respondent failed to diligently handle a case and to adequately communicate with his client. Respondent failed to safely maintain the client's file and the file was lost. Respondent agrees to return the client's retainer fee of $1,200.00 within one year of signing the Agreement.

Matter IX

In this matter, respondent failed to serve and file a notice of appeal from a client's conviction. He failed to continue to represent the client until relieved by the court.

Respondent further admits he unsuccessfully tried to establish personal relationships with a female client and with a woman who hired him to represent a third person. Respondent now recognizes such relationships are to be avoided because they often lead to a conflict of interest.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a) (lawyer shall keep a client reasonably informed concerning the status of a matter and promptly comply with reasonable requests for information); Rule 1.7 (lawyer shall not represent a client if the representation of that client will be materially limited by the lawyer's own interests); Rule 1.15 (lawyer shall promptly deliver funds and property to a client; lawyer shall promptly deliver an accounting about client property); Rule 1.16 (upon termination of representation, lawyer shall take steps to extent reasonably practicable to protect the client's interests); 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).[2] Respondent further admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate

[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.

Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) 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 and definitely suspend respondent from the practice of law for a thirty (30) day period. Furthermore, as part of the Court's sanction, we adopt respondent's agreement to repay his clients in the amounts stated herein within one year from the date respondent signed the Agreement. See Footnote 1. 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.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Lillie R. Davis, Respondent.

Opinion No. 26065
Submitted September 27, 2005 - Filed November 14, 2005

DEFINITE SUSPENSION

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

Susan B. Lipscomb, of Parker Poe Adams & Bernstein, LLP, 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, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension not to exceed two years or any lesser sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and impose a two year definite suspension from the practice of law. The facts, as set forth in the Agreement, are as follows:

FACTS

On January 28, 2002, respondent was suspended from the practice of law for twenty (20) months. In the Matter of Davis, 348 S.C. 199, 599 S.E.2d 573 (2002).[1] At the time of her suspension, respondent assured ODC that she would close her practice in an orderly manner and that it was not necessary to appoint an attorney to protect her clients' interests.

In connection with her suspension and the closing of her practice, respondent executed an affidavit on February 12, 2002, in which she attested to her compliance with Rule 30, RLDE. In relevant part, respondent's affidavit states:

> 4. In accordance with Rule 30 of Rule 413, SCAR [sic] I have notified by registered or certified mail, return receipt requested, all clients beign represented by me in a pending matter.
>
> 5. The notice advises the client of the suspension and of the consequent inability to act as an attorney. The notice also advises the client to seek legal advice of the client's own chose elsewhere, and, if the matter involves pending litigation or administrative proceedings, of the desirability of the prompt substitution of another lawyer to act as the client's attorney in the proceeding.
>
> 6. I have also notified or caused to be notified, any co-counsel in any pending matter and any opposing counsel, or in the absence of opposing counsel, the adverse parties, of the suspension and the consequent inability of the lawyer to act as an attorney. The notice states my place of residence.

[1] Respondent has not sought to be reinstated pursuant to Rule 33, RLDE, Rule 413, SCACR.

7. In the event the client did not obtain substitute counsel within ten days of the notice, I moved in the court or agency in which the proceedings were pending for leave to withdraw.

8. I have promptly refunded any fees paid in advance that have not been earned. I have delivered to all clients being represented in pending matters any papers of [sic] other property to which they are entitled and notified them of and any counsel representing them of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers and other property.

9. I have kept and will maintain records showing compliance with the requirements of Rule 30 of Rule 413, SCAR [sic] and shall make these records available to disciplinary counsel upon request.

Underline added.

Matter I

On or about January 23, 2002, Client A met with and retained respondent for a domestic matter. At that meeting, Client A executed a fee agreement for $2,500 and paid respondent $200 towards that fee. Client A paid the balance of the fee, $2,300, a few days later.

After learning respondent's telephone had been disconnected, Client A alleges she telephoned the Commission on Lawyer Conduct and discovered respondent had been suspended. Although Client A acknowledges she learned of respondent's suspension before respondent executed the above-referenced affidavit of compliance with Rule 30, Client A alleges she did not subsequently

receive written notice as respondent represented in the affidavit. Respondent does not dispute Client A's allegation for purposes of the Agreement, but explains she believes Client was sent notice in compliance with Rule 30.

Respondent did not refund the unearned portion of Client A's fee as represented in her affidavit. Client A petitioned the Lawyers' Fund for Client Protection (Lawyers' Fund) which determined Client A was entitled to $2,500.

Matter II

At the time of her suspension on January 28, 2002, respondent was shown on the records of the United States Bankruptcy Court as counsel of record in twelve pending bankruptcy matters, though respondent represents two of the matters had been concluded. As of February 27, 2002, fifteen days after executing the above-referenced affidavit, respondent remained counsel of record in nine bankruptcy matters according to the records of the Bankruptcy Court. Orders of substitution in two of those matters were not submitted to the Bankruptcy Court until May 2002.

Respondent explains that she may have continued to appear as counsel on the bankruptcy court's records because some of the matters had been dismissed, but orders had not yet been issued, and because other matters were inactive and clients were making payments.

Matter III

In February 2001, Client B paid respondent $1,200 in fees for a divorce matter. Client B alleges that she made several long distance telephone calls and trips to Columbia from Orangeburg to attempt to contact respondent, but usually reached respondent's answering machine or was told that respondent was not "in" but would be "in touch." Respondent represents that she met with Client B whenever Client B had a scheduled appointment, but has no knowledge of Client B's trips to Columbia or long distance telephone calls.

In addition, Client B's complaint to ODC, dated March 25, 2002, alleged that respondent had not notified her that she had been suspended from the practice of law.

Respondent provided ODC with a copy of an unsigned letter dated May 2, 2002, from respondent to Client B, in which respondent notified Client B of the suspension, purported to return Client B's file, and offered to substitute respondent's brother or "a couple of my colleagues" as counsel or, alternatively, return $550 in unearned fees.

Respondent's response to the Notice of Full Investigation dated November 21, 2002, acknowledges that Client B's file was sent by overnight mail at a date later than May 2, 2002, and further states that respondent "still plans to make every effort to refund $550 to [Client B] as soon as she is able to do so."

As of the date of the Agreement, respondent had not refunded the $550 to Client B.

Matter IV

Client C retained respondent in a domestic matter and paid her $2,190. The court subsequently ordered Client C's husband to pay $1,188 of Client C's attorney's fees. Respondent received and retained the $1,188 as additional fees for herself.

Respondent represents that the attorney's fee award by the court was for additional work on behalf of Client C for which Client C had not paid. In her Response to Notice of Full Investigation, respondent stated:

> The hearing proceedings went on for an extended period of time. The Court was not able to break for lunch, because what was intended to be a hearing took the length of a trial. In the Court's award of attorney's fees and other awards, the Court noted a lot

> of the Court's time had been expended on the [Client C] matter. Accordingly, it required unanticipated attorney time, which [respondent] believes entitled her to additional fees. In any event, [respondent's] time spent on the matter exceeded the attorney's fees paid.

Matter V

Client D hired respondent to represent him in a Department of Social Services matter. Client D agreed to pay respondent $2,500. Client D made the last payment of $250 to respondent on December 14, 2001. Respondent was suspended on January 28, 2002. The matter had not been concluded at the time of respondent's suspension.

Client D alleges respondent failed to inform him of her suspension and that respondent told him in May 2002 that respondent had made arrangements for another attorney to handle his case. However, when Client D called the other attorney, he was told the attorney would not be able to take his case because respondent had already been paid the full fee.

In her response to the Notice of Full Investigation, respondent stated:

> [she] represented [Client D] in a matter brought against him by the Department of Social Services, performing various specific tasks for which he would make periodic payments to her. [Respondent] represented him in Court, met with witnesses, and met with the Department of Social Services among other things. [Respondent] was suspended from the practice of law on January 28, 2002 and it was [her] understanding that [Client D] signed an order substituting [another attorney] as his attorney in this matter. [Respondent] understood that [the other attorney] would complete the representation of [Client D] and first learned of [Client D's] allegations on receipt of the Notice of Full Investigation.

Respondent acknowledges she did not pay any portion of the fee Client D had paid to her to the attorney she arranged to handle Client D's case.

Matter VI

Respondent represented Client E on municipal court charges of failing to register a vehicle, driving under suspension, and operating an uninsured vehicle. At a court appearance on March 29, 2000, respondent told Client E to wait in the hall. Client E alleges that, after approximately one hour, respondent came out and told him "everything was straightened out" and handed Client E his driver's license.

On July 14, 2002, Client E was stopped for another traffic violation and charged with third offense driving under suspension. One of the prior DUS convictions that caused the July 2002 violation to be a third offense was the matter on which respondent represented Client E in March 2000.

Respondent did not respond to ODC's requests in this matter. Respondent notified ODC on December 17, 2003, that she was in the process of locating her file and that a response to the Notice of Full Investigation would be submitted as soon as possible. As of the date of the Agreement, respondent has neither responded to the Notice of Full Investigation nor submitted her file to ODC. Respondent represents that she has not been able to locate her file and believed that she responded to the Notice of Full Investigation by submitting to questioning under oath by ODC.

Matter VII

In January 2001, Client F was injured in a car accident; Client F retained respondent. After resolving the matter, respondent disbursed the proceeds. Client F alleged respondent failed to pay $98 to a medical provider.

Respondent believes all disbursements were made, but has not been able to locate her file to confirm this belief. For purposes of this Agreement, respondent does not dispute Client F's claim and takes the position that any failure to disburse funds was inadvertent.

Matter VIII

Respondent's clients made claims to the Lawyers' Fund totaling $11,470. The Lawyers' Fund awarded respondent's clients $10,420, including the $2,500 awarded to Client A. Respondent has not reimbursed her clients or the Lawyers' Fund. She acknowledges her statement "I have promptly refunded any fees paid in advance that have not been earned" in her February 12, 2002 affidavit was inaccurate.

Respondent acknowledges that she had not fully cooperated with ODC in the investigation of these matters. She agreed to appear at ODC's office on January 7, 2004, for an appearance under oath pursuant to Rule 19(c)(4), RLDE, and agreed to bring with her files previously subpoenaed by ODC. Although respondent appeared, she did not produce the files. Respondent explained that the files were in storage and she had not had time to locate them despite the fact that prior subpoenas for the files had been issued.

During her appearance on January 7, 2004, respondent agreed to retrieve the files and provide them to ODC. The appearance was recessed to give respondent the opportunity to retrieve the files. As of the date of the Agreement, respondent had not provided the files to ODC. Respondent represents she has not been able to locate the files.

LAW

Respondent admits that her misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 30

(listing requirements for suspended lawyer). In addition, respondent admits she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (lawyer shall keep client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.5 (lawyer shall charge reasonable fee); Rule 1.15 (lawyer shall promptly deliver funds which belong to third person); Rule 1.16(d) (upon termination of representation, lawyer shall take steps to the extent reasonably practicable to protect client's interests, including giving reasonable notice to client and refunding unearned funds) Rule 8.1 (lawyer shall not knowingly fail to respond to lawful demand from disciplinary authority); and Rule 8.4(a) (it shall be professional misconduct for lawyer to violate Rules of Professional Conduct).[2]

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a two year definite suspension from the practice of law. We deny respondent's request to apply the suspension retroactively to the date of her previous suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR.

In addition, respondent shall pay restitution to all presently known and/or subsequently identified clients, banks, and other persons and entities who have incurred losses as a result of her misconduct in connection with these matters. Respondent shall also reimburse the Lawyers' Fund for any claims paid as a result of her misconduct in

[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.

connection with these matters. ODC is directed to establish a restitution plan for respondent.[3]

DEFINITE SUSPENSION.

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

[3] We note respondent has specifically agreed not to apply for reinstatement unless and until all restitution has been paid in full.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Timothy Vincent Norton, Respondent.

Opinion No. 26066
Submitted September 27, 2005 - Filed November 14, 2005

INDEFINITE SUSPENSION

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

Coming B. Gibbs, Jr., of Gibbs & Holmes, of Charleston, 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 pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension not to exceed two years or an indefinite suspension, provided the indefinite suspension is made retroactive to the date of his interim suspension.[1] We accept the

[1] On April 30, 2003, respondent was placed on interim suspension. In the Matter of Norton, 365 S.C. 284, 618 S.E.2d 295 (2003).

agreement and indefinitely suspend respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

The Domestic Matters

In two family court actions, respondent did not complete qualified domestic relations orders and submit filings in a timely manner. Respondent did not respond to his clients' inquiries which caused delays and, in some instances, prejudice to the rights of his clients.

The Criminal Matters

In two matters, respondent took fees for criminal representations he did not complete. In a third matter, respondent did not consult with his client before accepting the solicitor's offer to resolve a pending criminal charge and did not return the client's file upon request, thereby causing difficulties with his client's defense.

The Client Abandonment Matter

In late March 2003, respondent was admitted to a rehabilitation center for alcohol abuse for approximately three weeks. Upon his release from the center, respondent spent the weekend with his family and then left town, leaving no forwarding address, no notice to his clients, and no instructions. Respondent withdrew approximately $4,000 of client funds from his escrow account prior to his departure and used these funds for his own purposes. Respondent made no arrangements for his clients.

Subsequently, respondent was placed on interim suspension by the Court. See Footnote 1. Since that time, respondent has had difficulties in recovery and has attempted suicide.

On March 23, 2004, respondent effectively completed a six month recovery program. He is continuing his outpatient efforts and is currently employed in the construction field.

Respondent has fully cooperated with ODC in connection with this matter.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing clients); Rule 1.4 (lawyer shall keep clients informed); Rule 1.5 (lawyer shall not charge excessive fee); Rule 1.15 **(**lawyer shall promptly deliver to client any funds or other property to which client is entitled; lawyer shall keep client funds separate from his own funds); Rule 1.16 (lawyer shall withdraw from representation if his physical or mental condition materially impairs the lawyer's ability to represent the client); Rule 3.2 (lawyer shall expedite litigation consistent with interests of client); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice).[2] 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 or any other rules of this jurisdiction regarding professional conduct of lawyers) 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).

---

[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.

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. The suspension shall be retroactive to the date respondent was placed on interim suspension. ODC shall 1) determine the amount of restitution owed to respondent's clients and others who have been harmed as a result of respondent's misconduct and 2) institute a meaningful restitution plan. Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and 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 Supreme Court of South Carolina

In the Matter of Walter Henry Smith, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that John Barron McArthur, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. McArthur shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. McArthur may make disbursements from respondent's trust account(s), escrow account(s), operating account(s),

and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that John Barron McArthur, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that John Barron McArthur, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. McArthur's office.

s/ Jean Hoefer Toal C.J.

FOR THE COURT

Columbia, South Carolina

November 9, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

2002-CP-21-120

Honorage Nursing Home of Florence, S.C., Inc., Appellant,

v.

Florence Convalescent Center, Inc., Respondent.

2002-CP-21-1058

Honorage Nursing Home of Florence, South Carolina, Inc., Appellant,

v.

Genevieve Powell, Respondent.

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 4042
Heard September 12, 2005 – Filed November 14, 2005

AFFIRMED

Charles Craig Young, of Florence, for Appellant.

Jeffrey L. Payne, of Florence, for Respondents.

HEARN, C.J.: Honorage Nursing Home of Florence, South Carolina, Inc. appeals (1) the circuit court order vacating the default judgment against Florence Convalescent Center, Inc. (FCC), and (2) the circuit court's grant of summary judgment in favor of FCC. We affirm.

FACTS

Honorage Nursing Home instituted this action against FCC for allegedly breaching the lease between the parties for a nursing home building in Florence, South Carolina. In 1975, FCC began leasing the building from Honorage. FCC operated the nursing home from that time until December 31, 2000.

In September of 2000, Genevieve Powell, the President of FCC, informed Howard Clarke, the President of Honorage, that she wanted to terminate the lease and sell the furniture and fixtures in the nursing home to Honorage. Over the course of the next few months, a series of negotiations took place between Clarke's attorney, Porter Stewart, and Powell's attorney, John Chase. The attorneys for the parties ultimately entered into a sales agreement on December 29, 2000, which provided for the purchase of the furniture and fixtures and the termination of the lease. The significant terms of the sales agreement were: (1) Honorage agreed to terminate the lease; (2) Honorage forgave the November and December 2000 rent payments that were due under the lease; (3) Honorage agreed to pay the remaining property taxes for 2000; (4) FCC sold Honorage all of the furniture and fixtures in the nursing home, and (5) Honorage agreed to pay FCC $5,000 for FCC's

computers, printers, and modems, together with all software and information therein.

On December 31, 2000, in reliance on the agreement, FCC vacated the nursing home and left behind all furniture and fixtures. Honorage took possession and began operating the nursing home on January 1, 2001.

Honorage filed this action on January 25, 2002, claiming FCC had breached the lease agreement. Honorage sought to recover outstanding rent, taxes, and other items due under the lease. Also on that date, Honorage filed a petition to serve FCC pursuant to section 15-9-210(c) of the South Carolina Code (Supp. 2005), claiming it could not locate FCC's registered agent. The circuit court entered an order allowing Honorage to serve FCC pursuant to this statute. However, the circuit court order incorrectly stated Honorage could serve FCC by mail at "the corporation's last known place of business on record with the Secretary of State's office." Section 15-9-210(c) provides the summons and complaint must be sent to "the address of the company's principal office which is listed on the last filed annual report of the corporation." The last filed annual report for FCC listed its address as 2512 Newcastle Road, Florence, South Carolina, and stated Powell was the sole director and officer of the corporation.

Thereafter, Honorage mailed the summons and complaint to Route 1, Clarke Road, Florence, South Carolina 29501, which was the address listed with the Secretary of State's office. This address was the same address used by Honorage's own registered agent, Howard Clarke, and it was also the physical address for the nursing home that FCC had previously leased for 25 years. Honorage never forwarded the summons and complaint to Powell or FCC.

After mailing the summons and complaint to its own address, Honorage conducted a default judgment hearing on June 4, 2002. Honorage also mailed notice of the hearing to the nursing home only and not to Powell or FCC. Neither FCC nor Powell made an appearance at the damages hearing. On March 19, 2002, the circuit court entered a default judgment against FCC in the amount of $1,281,779. The default order prepared by

Honorage also contained a finding that FCC's "corporate veil is pierced and that its sole shareholder is to be held personally liable for the judgment entered herein." Powell, however, was not a party to the initial action.

Powell learned of the original judgment when Honorage filed a declaratory judgment action against her to collect the damages. Powell filed a motion to set aside the entry of default against FCC.

The circuit court set aside the entry of default against FCC and also granted FCC summary judgment on the issue of the damages. The circuit court held Honorage had voluntarily terminated the lease as of December 29, 2000, and, therefore, FCC did not breach the agreement. Honorage's appeal follows.

LAW/ANALYSIS

I. Default Judgment

Honorage argues the circuit court improperly set aside the entry of default against FCC. We disagree.

Upon motion, the circuit court may relieve a party from a final judgment pursuant to Rule 60(b), SCRCP, where the moving party demonstrates the judgment or order was induced by, among other things, mistake, inadvertence, surprise, or excusable neglect. Hillman v. Pinion ex. rel Estate of Hillman, 347 S.C. 253, 256, 554 S.E.2d 427, 429 (Ct. App. 2001). Relief from judgment under Rule 60, SCRCP, rests within the sound discretion of the circuit court, and the circuit court's findings will not be disturbed on appeal absent an abuse of that discretion. Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 903 (1989); McCall v. Ikon, 363 S.C. 646, 651, 611 S.E.2d 315, 317 (Ct. App. 2005) (rehearing denied).

In this action, Honorage clearly failed to comply with section 15-9-210(c) in attempting to serve FCC. Section 15-9-210(c) clearly provides the summons and complaint must be sent to "the address of the company's

principal office which is listed on the last filed annual report of the corporation." Honorage did not do so. FCC's last annual report was filed with the Department of Revenue in March 2001. This annual report indicated FCC's address for service of process was 2512 Newcastle Road in Florence. FCC was never served at that address and, accordingly, never received notification of the action against it. Because Honorage failed to comply with the service requirements of section 15-9-210(c), the circuit court correctly set aside the entry of default against FCC.

Additionally, any attempt to serve FCC under section 15-9-210(c) was improper. Honorage's attorney argued to this court that he was under no obligation to locate FCC's registered agent prior to service under section 15-9-210(c). We strongly disagree.

"A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court." McCall, 363 S.C. at 651, 611 S.E.2d at 317 (citing Griffin v. Capital Cash, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992)). Section 15-9-210 (c) is designed to assist a party when a corporation has no registered agent or an agent that could not be served with "reasonable diligence." (emphasis added). In this case, Honorage's attorney informed the circuit court he had complied with the requirements in section 15-9-210, and that he attempted to locate the registered agent for FCC. Yet, Honorage knew the registered agent for FCC had been deceased for almost twenty years because Honorage's president and controlling shareholder, Howard Clarke, had served as a pallbearer in the registered agent's funeral. Moreover, Clarke knew Powell was the sole shareholder of FCC as he had known her for over forty years.

Therefore, the circuit court did not abuse its considerable discretion in setting aside the judgment against FCC under Rule 60(b), SCRCP.

II. Summary Judgment

In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court: summary judgment

is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

Honorage alleges the circuit court erred in granting summary judgment to FCC on the breach of the lease issue. Honorage asserts the lease did not terminate because any agreement to do so did not satisfy the Statute of Frauds. We disagree.

"The statute of frauds merely requires some memorandum or note of the agreement relating to real estate to be in writing and signed by the party charged therewith or his agent, and does not require a formally executed contract." Blocker v. Hundertmark, et al., 204 S.C. 269, 274, 28 S.E.2d 855, 856 (1944). The writing must reasonably identify the subject matter of the contract, sufficiently indicate a contract has been made between the parties, and state with reasonable certainty the essential terms of the agreement. Player v. Chandler, 299 S.C. 101, 106, 382 S.E.2d 891, 896 (1989).

Porter Stewart, Honorage's attorney at the time, testified that a letter he wrote in 2001 set forth the sales agreement on behalf of Honorage and Howard Clarke. In this letter, Stewart outlined the terms of the agreement between Honorage and FCC. Moreover, Stewart also testified Clarke had full knowledge of the letter, and authorized the terms of the sales agreement that expressly provided for the "termination of the lease between the parties." This letter sufficiently satisfies the requirements of the Statute of Frauds.

Moreover, even if the letter was insufficient, the part performance exception to the Statute of Frauds would apply. "Sufficient part performance

of a parole contract to convey or devise real estate will, in equity, remove agreement from operation of statute of frauds." Parr v. Parr, 268 S.C. 58, 65, 231 S.C. 695, 698 (1977).

Here, the parties entered into a sales agreement with one of the conditions being the termination of the lease. Pursuant to the agreement, FCC vacated the premises, and relinquished control over the furniture and fixtures in the nursing home to Honorage. Honorage took possession of the premises immediately after FCC vacated, and remained in possession thereafter. It is clear that both parties have partially performed in reliance of this sales agreement.

Therefore, the circuit court correctly concluded no genuine issue as to any material fact existed regarding the termination of the lease, and FCC was entitled to judgment as a matter of law.

CONCLUSION

For the aforementioned reasons, the circuit court's decision to set aside the default judgment against FCC and grant of summary judgment in favor of FCC on the breach of the lease is hereby

AFFIRMED.

BEATTY and SHORT, J.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Essie Simmons, Respondent,

v.

Rubin Simmons, Appellant.

Appeal From Charleston County
Paul W. Garfinkel, Family Court Judge

Opinion No. 4043
Submitted October 1, 2005 – Filed November 14, 2005

REVERSED

Donald Jay Budman, of Charleston, for Appellant.

Paul E. Tinkler, of Charleston, for Respondent.

CURETON, A.J.: Rubin Simmons (Husband) appeals the denial of his motion for relief from judgment arguing the family court lacked subject

matter jurisdiction when it entered a divorce decree effecting an equitable division of Husband's Social Security benefits. We reverse. [1]

FACTS

Husband and Wife were divorced by decree on August 24, 1990. The decree adopted an agreement between the parties as to alimony, equitable division, retirement benefits, and health insurance, among other things. In pertinent part, the agreement reads as follows:

> (b) The parties anticipate that Husband may be entitled to certain Social Security benefits, although neither is certain as to the amount of such benefits. In the event that Husband elects to receive such benefits at the age of 62, then and in that event, Wife shall receive one-third (1/3) of each monthly benefit check to which Husband is entitled, from and following the Husband's attainment of the age of 62 years and his election to receive such benefits. Husband shall not, however, be obligated to elect to receive early benefits. In the event that Husband waits to elect to receive Social Security benefits until the age of 65 years, then and in that event, Wife shall receive one-half (1/2) of each monthly benefit check to which Husband is entitled, from and following the Husband's attainment of the age of 65 years and his election to receive such benefits. In either event, <u>any payments to Wife under the terms of this provision regarding division of Social Security benefits shall be construed only as a property settlement</u>, and shall not in any way be considered or construed as alimony.

(emphasis added).

[1] We decide this case without oral argument, pursuant to Rule 215, SCACR.

This court denied Husband's appeal from the divorce decree "to 'revise and set aside the decree as it pertain[ed] to the award of alimony, and the equitable distribution of the property.'" Simmons v. Simmons, No. 92-UP-104 (Ct App. May 28, 1992). Husband attained the age of 62 in 1994 and the age of 65 in 1997. In December of 2003, because Husband failed to remit 1/3 of his Social Security benefits as required by the agreement, Wife filed a petition for a rule to show cause, requesting Husband account to her for the accrued Social Security benefits due her. Husband then filed a Rule 60(b)(4), SCRCP, motion requesting relief from judgment, asserting the family court lacked subject-matter jurisdiction to divide his Social Security benefits. The family court denied Husband's motion. [2] This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, this court has authority to find the facts in accordance with our own view of the preponderance of the evidence. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). This broad scope of review, however, does not require us to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). We are mindful that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Bowers v. Bowers, 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct. App. 2002).

LAW/ ANALYSIS

Husband claims the family court erred in denying his motion for relief from judgment because 42 U.S.C. § 407(a) (1998) provides that Social Security benefits "shall not be transferable or assignable." Therefore, the family court lacked subject matter jurisdiction to divide his Social Security benefits. [3] We agree.

---

[2] The family court indicated it denied a motion to compel by Wife. However, the record on appeal does not indicate the pertinence of the motion.

[3] A lack of subject matter jurisdiction cannot be waived and may be raised at any time. Hallums v. Bowens, 318 S.C.1, 3, 428 S.E.2d 894, 895 (Ct. App.

Under the Supremacy Clause of the United State Constitution, Article VI, South Carolina law must defer to the Social Security Act's statutory scheme for allocating benefits. See Hisquierdo v. Hisquierdo, 439 U.S. 572, 582 (1979) (ruling states must defer to the federal statutory scheme for allocating Railroad Retirement Act benefits insofar as terms of federal law require). The Social Security Act provides a comprehensive scheme as to how Social Security benefits are to be awarded to divorced spouses. Cruise v. Cruise, 374 S.E.2d 882, 883 (N.C. Ct. App. 1989) (finding the trial court's order requiring husband to share 1/2 of his benefits with wife contradicted the Supreme Court's rationale in Hisquierdo). "Since 1977 a divorced wife has been eligible to receive Social Security benefits on account of her former spouse if she had attained age 62 and also had been married to her insured spouse for at least 10 years." Id.

The Social Security Act, 42 U.S.C. § 407(a), also provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the monies paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

The statute goes further to declare that "[n]o other provision of law . . . may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." 42 U.S.C. § 407(b).

South Carolina courts have not directly considered whether family courts may divide Social Security benefits in property distributions. However, the U.S. Supreme Court found that section 407(a) imposed a "broad bar against the use of legal process to reach all social security

---

1993). A court that lacks subject matter jurisdiction cannot enforce its own decrees. Id.

benefits." Philpott v. Essex County Welfare Bd., 409 U.S. 413, 417 (1973). Furthermore, other jurisdictions have consistently held that the Social Security Act preempts state courts from treating Social Security benefits as property. In Re: Marriage of Boyer, 538 N.W.2d 293, 295 (Iowa 1995); Kirk v. Kirk, 577 A.2d 976, 980 (R.I. 1990); Cruise, 374 S.E.2d at 884; Sherry v. Sherry, 701 P.2d 265, 270 (Idaho Ct. App. 1985).

Because the Social Security Act preempts state law, the family court lacked subject matter jurisdiction to divide Husband's Social Security benefits in a property distribution. Inasmuch as the trial court did not have subject matter jurisdiction over Husband's Social Security benefits, it could not approve the settlement agreement dividing such benefits.

Finally, Wife argues and the family court found that 42 U.S.C. § 407 was inapplicable to the facts of this case because the case sub judice does not involve the transfer or assignment of Social Security benefits. The family court reasoned that "once [Husband] received his benefits, he is free to dispose of such funds as he deems fit" without the intervention of the Social Security Administration whatsoever. We find this argument to be without merit. Clearly, the divorce decree itself purports to divide Husband's Social Security benefits pursuant to the agreement of the parties. Moreover, the fact that Husband voluntarily agreed to pay Wife part of his Social Security benefits is of no significance. See Mansell v. Mansell, 490 U.S. 581, 585 (1989) (holding that although husband had agreed to pay wife 50% of military retirement pay waived by husband to receive veterans disability benefits, the Uniformed Services Former Spouses Protection Act does not grant state courts the power to treat such benefits as property divisible upon divorce); Gentry v. Gentry, 938 S.W.2d 231, 232 (Ark. 1997) (finding a property settlement agreement, which awarded wife 1/2 of her husband's future Social Security benefits as he received them, was unenforceable); Boulter v. Boulter, 930 P.2d 112, 114 (Nev. 1997) (holding the Social Security Act's prohibition against transferring future benefits preempted state action approving an agreement between a husband and wife to split their future Social Security benefits equally).

Although we are sympathetic to Wife's claim, Social Security benefits cannot be divided in an equitable distribution award. See Roy T. Stuckey, Marital Litigation in South Carolina Substantive Law 294-95 (The Honorable Timothy L. Brown et al. eds., 2001). However, see Kirk, 577 A.2d at 980 (holding Social Security benefits may be reached by a former spouse for alimony or child support, but not for property division).

CONCLUSION

Once Congress preempted the Social Security arena, state courts simply do not have the power to mandate distribution of such benefits whether by agreement or otherwise. Therefore, the family court's denial of Husband's Rule 60(b)(4), SCRCP, motion is hereby

REVERSED.

HUFF AND WILLIAMS, JJ., CONCUR.