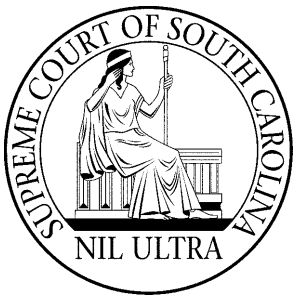

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 44

November 8, 2004

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

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Paul W. Nevill, Respondent.

Opinion No. 25888
Submitted October 11, 2004 – Filed November 8, 2004

PUBLIC REPRIMAND

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

Paul W. Nevill, of Bluffton, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to either an admonition, public reprimand, or definite suspension not to exceed thirty (30) days. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

On December 31, 2003, respondent represented Purchaser in a real estate closing. In that transaction, Purchaser was buying investment property from Seller for $240,445.00. Seller was to manage the property for Purchaser.

Without consulting respondent, Purchaser paid $44,000.00 of her own money to Seller. This payment was not required by the sales contract and was in addition to the $1,000.00 earnest money Purchaser was required to pay under the contract. Purchaser's understanding was that these funds would be used to pay the balance owed on the purchase of the new property after the loan proceeds ($158,000) and the proceeds of the sale of other investment property owned by Purchaser ($61,014.17). Any excess would be placed in Purchaser's property management account held by Seller. Purchaser and Seller did not document the payment of the $44,000.00 or the terms of their agreement about its purpose.

In preparation of the HUD-1 settlement statement, respondent correctly calculated that $27,948.08 of the $44,000.00 would be required for Purchaser to meet the sale price. Respondent should have listed this amount on the "Summary of Borrower's Transaction" on the HUD-1 as a down payment paid outside of closing (POC). Respondent should have then listed the same amount as an excess deposit POC on the "Summary of Seller's Transaction" on the HUD-1 and reduced the final amount to Seller by that amount. Instead, respondent added the $27,948.08 to the $1,000 earnest money deposit on line 201 of the HUD-1 and showed that money being paid to Seller at closing.

Neither Purchaser nor Seller brought $27,948.08 to the closing. Respondent conducted the closing without correcting the HUD-1. As a result, respondent issued a trust account check to Seller for $27,948.08 more than respondent received to fund the closing.

On January 21, 2004, respondent realized the error when his bank contacted him and informed him there were insufficient funds in his trust account to cover a check issued in a subsequent closing. Respondent immediately transferred $10,000.00 from his personal home equity account into his trust account to cover the check. Upon review of his trust account records, respondent discovered that the error in the December 31, 2003 closing was the source of the shortage. Respondent deposited the remaining amount available from his personal home equity account ($6,000.00) into his trust account, leaving the trust account $11,948.08 short.

Over the next several months, respondent did not withdraw funds owed to him for fees for subsequent closings in an effort to make up the shortage. Respondent relied on the "float" from those closings to avoid any losses to clients or returned checks.

Respondent was unable to make up the shortage in full by June 2004. In discussion with the Seller's attorney about repayment to respondent for the overpaid funds, it came to respondent's attention that use of the "float" in his trust account was in violation of the Rules of Professional Conduct.

Respondent self-reported this matter to the Commission on Lawyer Conduct. He provided Disciplinary Counsel with complete records of the transactions and has fully cooperated in the disciplinary investigation.

LAW

Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct). Respondent admits that by his misconduct he has violated the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 1.15 (lawyer shall safe keep client property).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael V. Hart, Respondent.

Opinion No. 25889
Submitted October 8, 2004 – Filed November 8, 2004

PUBLIC REPRIMAND

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

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

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

FACTS[1]

Matter I

Respondent was admitted to practice law in 1988. Until approximately March 2003, respondent worked for several law firms, primarily representing plaintiffs or claimants. From March 2003 through April 2004, respondent operated a solo practice in which he handled personal injury cases on a contingency fee basis.

In connection with his solo practice, respondent failed to maintain accurate or complete client ledgers, a check register or accounting journal, monthly account reconciliations, or any other system to facilitate the reliable identification of clients who had funds in his accounts and the balance of those funds. During that same period, respondent failed to maintain copies or originals of checks written on his operating or trust account. Respondent relied primarily on check stubs, on-line banking, and his own recollection to monitor the flow of funds through his accounts. As a result, respondent was unable to identify client funds remaining in accounts at any given point in time.

It was respondent's practice to deposit a client settlement check into his trust account, confirm that the check had cleared, and then electronically transfer the funds from the trust account to his operating account. Respondent then disbursed funds to and on behalf of clients from the operating account. This practice was based on respondent's erroneous belief that his former employer, a more experienced attorney, processed settlements in this matter.

Respondent left a portion of his fees from client settlements in his trust account as a cushion. Respondent's remaining fees from settlement funds often remained in his operating account for his use in connection with operating his law office and for his personal use. Respondent failed to maintain records to ensure an accurate accounting

[1] Both matters were initiated by respondent's self-report.

of his accumulated fees in the trust account and the operating account. Although no client or client creditor has complained that payment was not received, respondent acknowledges that he should have processed client settlements using only his trust account and that his deposit of client funds and earned fees into his operating account constituted commingling.

Respondent prepared and negotiated eight operating account checks payable to cash. Additionally, respondent used a debit or cash card to pay office expenses, to purchase personal items, and to make cash withdrawals from the operating account. Respondent acknowledges that, because it contained client funds, his operating account was a de facto trust account and that it was improper to make disbursements from that account in cash. Respondent's cash transactions and payments for office expenses and personal items were made from what respondent believed to be earned fees remaining in his operating account. Although there is no indication respondent misappropriated client funds, he acknowledges that his lack of proper accounting and documentation raised a question of misappropriation and impaired his ability to confirm the integrity of client funds.

On at least six occasions, respondent negotiated client settlement checks for cash without depositing them into his trust account. Respondent failed to accurately and completely account for remittances of cash to these clients and to himself. Although respondent did this as an accommodation to his clients and no client has complained of not receiving funds due, respondent acknowledges that it was inappropriate to make these disbursements in cash and to handle these settlements outside his trust account.

In addition to reporting this matter to the Commission on Lawyer Conduct, respondent retained an accountant with experience in law firm accounting. Respondent's accounts have now been reconciled and all client funds have been accounted for and properly disbursed. Respondent represents he now has in place accounting and recordkeeping practices that are fully compliant with the Rules of Professional Conduct, Rule 407, SCACR, and Rule 417, SCACR.

Matter II

Of the approximately one hundred client files opened by respondent from March 2003 to April 2004, approximately seventy were referrals from other attorneys. These files were referred to respondent for the purpose of litigation and/or final settlement. Respondent's general agreement with the referring attorneys was to split any fees recovered on a fifty-fifty basis. Respondent acknowledges that this fee-splitting arrangement was not necessarily in proportion to the amount of work performed by each attorney and, therefore, a written agreement with the client in which both attorneys acknowledged full responsibility for the matter was required. Although the clients did consent to the referrals and no client has complained about the fee sharing arrangement, respondent and his referring attorney did not enter into the required written agreements with the clients regarding each attorney's responsibility for the matters in violation of Rule 1.5 of the Rules of Professional Conduct, Rule 407, SCACR.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.5 (division of fees between lawyers who are not in the same firm may be made only if the division is made in proportion to the services performed by each attorney or, by written agreement with the client, each lawyer assumes joint responsibility for the representation) and Rule 1.15 (lawyer shall hold property of clients in his possession separately from the lawyer's own property). In addition, respondent agrees he has violated Rule 417, SCACR. Respondent acknowledges his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Verdell Barr, Respondent.

Opinion No. 25890
Submitted October 11, 2004 – Filed November 8, 2004

PUBLIC REPRIMAND

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

Verdell Barr, of Kingstree, pro se.

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

FACTS

Matter I

On April 26, 2001, respondent was appointed to represent Client A in a post-conviction relief action. At the time of his appointment, respondent and his law partner had agreed that respondent

would handle appointments in domestic cases and his partner would handle appointments in post-conviction relief cases. Respondent referred the appointment of Client A to his law partner without notifying Client A or opposing counsel and without seeking substitution of counsel from the court.

Respondent's partner mistakenly believed Client A was no longer incarcerated because he saw someone matching Client A's description in town. The partner erroneously assumed Client A was no longer in need of post-conviction relief. In fact, Client A remained incarcerated.

From the date of respondent's appointment in April 2001 until January 2002, no action was taken on behalf of Client A. On January 2, 2002, respondent's partner wrote the Office of the Attorney General inquiring about the status of the matter. On March 11, 2002, Client A wrote respondent asking for contact from him and seeking information about his case. Neither respondent nor his partner took further action.

On April 18, 2002, respondent was notified by Disciplinary Counsel that Client A had filed a grievance against him. Respondent was given fifteen days to respond to the allegations. After no response was received, Disciplinary Counsel sent a second letter on May 7, 2002, pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting a response. On May 16, 2002, respondent replied that his partner had agreed to handle the matter and that Client A had been seen in public. He sent a copy of his response to Client A.

On May 24, 2002, Client A wrote respondent confirming he was still incarcerated. In that letter, Client A requested information about his case and documents from his file.

On June 17, 2002, respondent's partner wrote Client A and asked for his consent for substitution of counsel. Client A confirmed his consent to this arrangement. No request for substitution of counsel was filed with the court.

On August 6, 2002, respondent resumed his representation of Client A. He represented him at his hearing and filed a notice of appeal after his post-conviction relief application was denied. Respondent subsequently referred the appeal to the Office of Appellate Defense which is now responsible for the representation.

Matter II

Respondent was retained to represent Client B in connection with a dispute over the purchase of a vehicle. Respondent filed a lawsuit on Client B's behalf and ultimately negotiated a favorable settlement. The settlement was entered on the record before the presiding judge in February 2001. Respondent prepared a consent order, however, Client B subsequently requested modifications to the terms of the settlement agreement. Respondent consulted with the judge. The judge was unwilling to change the terms of the settlement. Client B then refused to sign the consent order or pay respondent's outstanding fees and costs.

Client B alleged respondent had a conflict of interest, claiming respondent had a personal and professional relationship with the opposing party which he had not disclosed. Investigation revealed no evidence of a conflict of interest nor any evidence that respondent provided anything but competent and diligent representation to Client B.

However, upon termination of representation, respondent failed to promptly comply with requests from Client B and Client B's new counsel for the client file. Client B's telephone bills show twenty-three telephone calls to respondent's office from May 2002 to January 2002. Client B also sent two certified letters, delivered to respondent on March 19, 2002 and June 24, 2002. It was not until January 2004 that respondent sent the file to Client B's new attorney.

Respondent failed to timely respond to Disciplinary Counsel's inquiries in 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 to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter and promptly comply with reasonable requests for information); Rule 1.16 (upon termination of representation, lawyer shall take steps to extent reasonably practicable to protect a client's interests, such as surrendering papers to which client is entitled); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of the client); Rule 8.1(b) (lawyer shall not fail to respond to lawful demand for information from disciplinary authority); and Rule 8.4(a) (it is processional misconduct for lawyer to violate Rules of Professional Conduct). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and 7(a)(3) (it shall be ground for discipline for lawyer to knowingly fail to respond to a lawful demand from a disciplinary authority).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Opinion No. 25891
Submitted October 8, 2004 – Filed November 8, 2004

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Michael J. Virzi, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Robert Lee Newton, Jr., of Pickens, 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 pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension from the practice of law of up to one year, retroactive to the date of his interim suspension. We accept the agreement and impose a one year suspension. The facts, as set forth in the agreement, are as follows.

FACTS

Between September 5, 2003, and September 18, 2003, law enforcement observed respondent cultivating marijuana plants in the woods

behind his home. On September 18, 2003, respondent was arrested by members of the Pickens County Sheriff's Department and charged with one count of manufacturing marijuana and one count of possession with intent to distribute (PWID) marijuana, both in violation of South Carolina Code Ann. § 44-53-370(b)(2) (1985). At the time of his arrest, respondent was in possession of approximately 3.5 ounces of marijuana. Based on the arrest warrants and affidavits contained therein, respondent consented to and was placed on interim suspension by order of the Court dated September 25, 2003.

Because respondent had previously worked as a prosecutor in Pickens County, his criminal prosecution was assigned to a solicitor in another circuit. At all times relevant hereto, respondent has been fully cooperative with the solicitor assigned to his case and with Disciplinary Counsel, but has maintained his innocence on the PWID charge and stated the marijuana was solely for his personal use. ODC is informed and believes that the solicitor assigned to respondent's criminal prosecution discovered no evidence consistent with an intent on respondent's behalf to distribute the marijuana. On December 29, 2003, the PWID charge was dismissed as duplicative and unsupported by the available evidence; the PWID records were expunged by order dated May 28, 2004.

Respondent voluntarily entered into drug counseling. He was subsequently admitted to Pre-Trial Intervention (PTI) on March 8, 2004 in lieu of prosecution on the charge of manufacturing. Respondent successfully completed PTI on June 10, 2004, the manufacturing charge was dismissed on June 14, 2004, and the records expunged by order dated June 16, 2004. After investigation, Disciplinary Counsel also discovered no evidence consistent with an intent on respondent's part to distribute the marijuana.

LAW

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

lawyer in other respects. In addition, respondent admits that his actions constitute grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for one year retroactive to the date of his interim suspension. Within fifteen days of the filing of this opinion, respondent shall file an affidavit demonstrating he has complied with the requirements of Rule 30 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Eddie Lee Arnold, Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Colleton County
Donald B. Beatty, Circuit Court Judge

Opinion No. 25892
Heard January 6, 2004 – Filed November 8, 2004

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Derrick K. McFarland, of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for petitioner.

Scott M. Merrifield and J. Brent Kiker, both of Kiker & Douds, P.A., of Beaufort; and Samuel C. Bauer, of Hilton Head Island, for respondent.

JUSTICE MOORE: Respondent Eddie Lee Arnold was convicted of murdering Dr. Jennings Cox of Savannah, Georgia. The State appeals the Court of Appeals' decision[1] reversing the denial of a directed verdict of acquittal. We affirm.

FACTS

Dr. Cox was missing for three days when his body was found off a dirt road near I-95 in Colleton County on June 21, 1997. He had been shot twice, once in the head and once in the chest. Although both bullets exited the victim's body, no projectiles or human tissue were found at the scene, nor was there any blood spattering or evidence of a struggle. The victim had no wallet or identification but he was still wearing a watch and gold ring.

The last day Dr. Cox was seen alive was June 18. He went to his office in Savannah that morning where he saw patients as a child psychologist. Because his car was being repaired, his wife drove him to work. Between 10:30 and 11:00 a.m., Dr. Cox borrowed a colleague's car to go to a dentist appointment. The car was a nearly-new BMW Z3 two-seater, a car Dr. Cox had never borrowed before.

Dr. Cox never returned to the office. At about 1:20 p.m., he called his secretary and she cancelled his remaining appointments. Dr. Cox withdrew money from an ATM at a Hardeeville bank that day.[2] His wife paged him every half-hour from about 2:30 until 5:30 p.m. without success. She then filed a missing persons report.

Shortly thereafter, Dr. Cox's office manager discovered a floppy disk marked "personal" lying on Dr. Cox's computer. After viewing the data contained on the disk, she contacted police. The information

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[1] State v. Arnold, 351 S.C. 302, 569 S.E.2d 379 (Ct. App. 2002).

[2] Hardeeville is located along I-95 in Jasper County between Savannah and Colleton County.

on the disk included the name of Bobby Ray Ware who was subsequently interviewed by police.

Ware was the State's chief witness at trial. He testified he was employed as a long-distance truck driver and lived in Savannah. He had had a sexual relationship with Dr. Cox for more than a year but knew him only by the name "Jay." They first met at a rest area on I-95 when "Jay" performed oral sex on him. After that, "Jay" would come to Ware's house about once a week for sex. Because Ware knew "Jay" liked to have sex with truckers, on the weekend of June 14-15 he introduced "Jay" to respondent who was staying with Ware. That weekend, "Jay" and respondent had sex at Ware's house. Ware also testified he had seen respondent in possession of a gun while respondent was staying with him.

Ware left at 6:00 a.m. the following Tuesday, June 17, to drive to Chicago. Respondent was still staying at Ware's residence. On June 19, Ware received a message from respondent to call him at a phone number in Tennessee. Ware later contacted respondent at a phone number identified as belonging to respondent's father who lived in Gray, Tennessee.

Meanwhile, on June 20, the borrowed BMW was found in a parking lot in Johnson City, Tennessee. There was no blood in the car. When recovered, it had some unspecified scratches on it. The only evidence found in the car was a fingerprint on a tab from a coffee cup lid found in the center compartment between the seats. The fingerprint was identified as respondent's right thumbprint.

Respondent was arrested at his father's house in Tennessee on June 27. The State's theory of the case was that respondent and Dr. Cox drove to the woods where respondent shot Dr. Cox while Dr. Cox was kneeling "either by force or for sex." Respondent then drove the car to Tennessee and stopped for coffee on the way.

ISSUE

Was there any substantial evidence to submit the case to the jury?

DISCUSSION

The Court of Appeals majority found there was no substantial evidence to submit the case to the jury and a directed verdict of acquittal should have been granted.

The trial court has a duty to submit the case to the jury where the evidence is circumstantial if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978). The trial judge should grant a directed verdict, however, when the evidence merely raises a suspicion that the accused is guilty. State v. Martin, *supra.* On appeal of the denial of a directed verdict of acquittal, we must look at the evidence in the light most favorable to the State. State v. Martin, *supra*; State v. Williams, *supra*.

Viewing the evidence most favorably to the State, respondent's fingerprint on the coffee cup lid tab establishes he was in the borrowed BMW on the same day the victim was last seen alive. The fact that the BMW was found abandoned in Tennessee, the same state where respondent was located after his stay in Savannah, raises a suspicion of guilt[3] but is not evidence that respondent killed Dr. Cox. Further, there is no evidence respondent was at the scene of the crime, which according to the State's theory was in Colleton County. *See* State v.

[3]We note there is no evidence in the record establishing the distance between respondent's father's home and the site where the BMW was found. Rand McNally's Road Atlas indicates Gray, Tennessee, is about ten miles from Johnson City, Tennessee.

Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984) (directed verdict should have been granted where there was no substantial evidence establishing defendant's presence at scene of murder). Accordingly, the Court of Appeals properly reversed the denial of a directed verdict of acquittal.

AFFIRMED.

WALLER AND PLEICONES, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which BURNETT, J., concurs.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, the State presented sufficient evidence to warrant the trial judge's denial of respondent's motion for a directed verdict of acquittal.

The events in this case occurred within a few days. The victim was found dead on June 21 in Colleton County, off an access road that had rough terrain and overgrown brush. The coroner estimated that the victim had been murdered on June 18. Just days before the murder, on June 14-15, respondent and the victim met for the first time, in Savannah, and the two had sex. Respondent was in town visiting Bobby Ray Ware, a truck driver who had a sexual relationship with the victim for over a year. According to Ware, Respondent was carrying a gun.

Ware left town for Chicago on the morning of June 17. Respondent stayed behind at Ware's residence. The next morning, June 18, the victim borrowed a nearly new BMW from one of his colleagues. He withdrew $300 from an ATM in Hardeeville, near Colleton County. Later, the victim was murdered by gunshot. When his body was found, he was still wearing a watch and a gold ring, but his wallet and cash were missing.

On June 19, the very next day, respondent left Ware a phone message, asking Ware to call him in Tennessee. On June 20, the BMW was found in Tennessee, near respondent's father's home. The lead investigator reported that the exterior of the BMW had scratches on it, "like it had been [driven] down something rough." Respondent's thumbprint was found on a coffee cup lid left in the car.

Given the short timeframe within which these events occurred; the sexual relationship between the victim and respondent; the thumbprint evidence in the borrowed BMW; the scratches on the car; and the location of the abandoned car in Tennessee, near the place respondent was staying, there was enough evidence, in my view, from

which respondent's guilt could be fairly and logically deduced.[4] *See State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (the trial judge must submit the case to the jury if there is "*any substantial evidence* which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced").

Therefore, in my view, the court of appeals erred in reversing respondent's conviction.

BURNETT, J., concurs.

[4] It is also my view that had this case been submitted to the jury, respondent would have been entitled to the traditional circumstantial evidence charge as described in *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888, *cert. denied*, 493 U.S. 895 (1989).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Reyes Cabrera-Pena, Petitioner.

On Writ of Certiorari to
The Court of Appeals

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

Opinion No. 25893
Heard February 3, 2004 – Filed November 8, 2004

REVERSED IN PART; AFFIRMED IN RESULT

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

ACTING JUSTICE MACAULAY: The Court granted a writ of certiorari to review the Court of Appeals' opinion in State v. Cabrera-Pena, 350 S.C. 517, 567 S.E.2d 472 (Ct. App. 2002). We affirm in result.

FACTS

On June 30, 1999, Reyes Cabrera-Pena (Cabrera-Pena) went to an Applebee's restaurant in Spartanburg where his estranged wife Alma was dining with three of her friends and the couples' two-year-old daughter, Melissa. According to the only direct evidence, the testimony of Alma's friends, Cabrera-Pena and Alma went outside and argued briefly; Cabrera-Pena then left.

After he left the restaurant, Cabrera-Pena purchased a gun for $30.00. He then went back to the restaurant and sat in his van in the parking lot, waiting for Alma to come out. As Alma and her friends left the restaurant around midnight, they spotted Cabrera-Pena's van in the parking lot; Cabrera-Pena flashed his lights and Alma walked toward his van. After speaking to him for several minutes, Alma began walking towards her friends' pickup truck, followed by Cabrera-Pena. She motioned to her friends that he had a gun. Cabrera-Pena told the group that he was taking Melissa and Alma with him. Alma refused to go and Cabrera-Pena pulled the gun and pointed it at her as she held Melissa on her hip. Alma put her hand on his wrist and pushed the gun down. Cabrera-Pena lifted the gun and pointed it at her head. As Alma backed away, still holding her child, Cabrera-Pena shot her in the right eye. Both Alma and Melissa fell to the ground. Cabrera-Pena pointed the weapon at each of Alma's three friends, but then threw the gun over a fence, ran back to his van and drove away. Cabrera-Pena was arrested a short time later.

After his arrest, Cabrera-Pena was taken to an interview where two detectives, Officer Morrow and Officer Taylor, initially questioned him. When it became apparent that Cabrera-Pena was not fluent in English, they called in Officer Tony Membreno, who was fluent in Spanish to assist them in questioning Cabrera-Pena. At trial, Officer Membreno testified that, after

reading him his rights, Cabrera-Pena blurted out, "I'm guilty. I fully accept everything that had happened and I'm responsible for it." Membreno then began referring to his notes from the interview. According to Membreno, Cabrera-Pena told him that when he left Applebee's the first time, he dropped his friend Juan at home, purchased some beer and, on his way home, he found a person from whom he purchased a gun for $30.00. After that, Cabrera-Pena said he then went back to Applebee's, parked his van and waited for his wife. Two hours later, his wife came out and, after they talked, they walked back to her friends. He told Membreno that, before he got out of his van, he had put the gun in his pants between his belt and his shirt. Cabrera-Pena told him that when the shot was fired, he got scared and threw the gun away behind a fence and left in the van.

On cross-examination, Cabrera-Pena, who was proceeding *pro se*, handed Membreno a document and inquired whether Membreno had signed it and given it to him. The document contained Cabrera-Pena's written statement to the police, which included his statement: "I do not know how she took the gun out of my pants pocket. I tried to grab and force her, but the gun went off and fired."

The following colloquy occurred out of the presence of the jury:

> The Court: The State has objected to any statement that was made by you that tends to be in your favor. You may remain silent or you may tell the jury about this, but you may not ask this witness about this statement, this part of it.
>
> Cabrera-Pena: Why can't I?
>
> The Court: You either have to testify or remain silent. If you are permitted to ask him to read this part of the statement, then you are testifying through another witness, which is not permitted. Do you understand?
>
> Cabrera-Pena: It's the **same thing that I said** that I signed. It's the same thing.

The Court: You may testify or remain silent, but **you may not ask this witness what you said** to defend yourself. (Emphasis supplied).

The jury was charged with the law of murder and voluntary manslaughter, possession of a firearm during the commission of a violent crime, and three counts of pointing and presenting a firearm. During its deliberations, the jury inquired as to whether Cabrera-Pena's statement of his guilt to Membreno was admissible as evidence and inquired as to why it did not have Cabrera-Pena's statement. Thereafter, the jury requested to re-hear the testimony of Officer Membreno and requested to be recharged on the law of manslaughter. After lengthy deliberation and an Allen[1] charge, the jury returned verdicts of guilty on all counts. Cabrera-Pena was sentenced to life imprisonment for murder and concurrent terms of five years for each of three pointing a firearm offenses.

On appeal, Cabrera-Pena asserted the trial court erred in prohibiting him from questioning Officer Membreno about his statement made to the officer that his wife had somehow gotten the gun out of his pants pocket and it had gone off. He contended the "rule of completeness" and fundamental fairness demanded he be allowed to put his statement into context. The Court of Appeals disagreed. State v. Cabrera-Pena, 350 S.C. 517, 567 S.E.2d 472 (Ct. App. 2002).

ISSUE

Did the Court of Appeals err in ruling Cabrera-Pena was not entitled to cross-examine Officer Membreno concerning the self-serving portions of the statements he made to the officer?

[1] Allen v. United States, 164 U.S. 492, 17 S. Ct. 154 (1896).

DISCUSSION

A. Self-Serving Statement

The trial court ruled Cabrera-Pena's self-serving statement made to Officer Membreno was not a proper subject for cross-examination. The Court of Appeals agreed, finding Cabrera-Pena's statements to Membreno were not admissible under either Rule 106, SCRE, or under this Court's opinions in State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975) or State v. Terry, 339 S.C. 352, 529 S.E.2d 274 (2002), cert. denied, 531 U.S. 882 (2000).

Initially, we note that, at oral argument before this Court, counsel for Cabrera-Pena indicated that this Court's opinion in State v. Terry is being read as requiring exclusion of the exculpatory portions of a defendant's statement under any and all circumstances. Such a reading misconstrues the holding in Terry.

Terry involves the issue of whether a statement against penal interest may be admitted by a non-testifying defendant pursuant to Rule 804(b)(3), SCRE. There, we held that Terry, who had elected not to testify, could not thereafter admit the self-serving statement he made to the police. The rationale for this holding, however, was that a defendant may not claim "unavailability" as a witness by virtue of exercising his fifth amendment privilege against self-incrimination. Terry stands only for the proposition that such an exculpatory statement may not be admitted by a non-testifying defendant pursuant to Rule 804(b)(3). However, this does not mean that the exculpatory statement of a non-testifying defendant is inadmissible under any and all circumstances. Indeed, we find the statement in the present case was admissible pursuant to State v. Jackson, 265 S.C. 278, 284, 217 S.E.2d 794, 797 (1975).

In State v. Jackson, it was held:

> When part of a conversation is put into evidence, an adverse party is entitled to prove the remainder of the conversation, so long as it is relevant, particularly when it explains or gives new meaning to the part initially recited. "All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore **the plainest principles of justice requires that if one of the statements is to be used against the party, all of the other statements tending to explain it or to qualify this use should be shown and considered in connection with it."**

265 S.C. at 284, 217 S.E.2d at 797 (emphasis supplied; internal citations omitted).

Here, Cabrera-Pena was interviewed during a one-hour period at 4:00 a.m. During this interview, he made oral statements to Officer Membreno and gave a written statement. At trial, the state elected, notwithstanding an abundance of eyewitness testimony, to call Officer Membreno to the stand and question him concerning the statements made to him by Cabrera-Pena. The trial court then prohibited Cabrera-Pena from cross-examining Membreno as to the remaining self-serving statements made to Membreno. This was error.

Officer Membreno testified as to his conversation with Cabrera-Pena, referring to his notes from the interview. Membreno testified that Cabrera-Pena blurted out that he was guilty and went on to give him the details of the evening. Thereafter, when Cabrera-Pena attempted to cross-examine Membreno concerning the contents of his report of their conversation, he was prohibited from doing so.[2] Under Jackson, once the state elected to utilize Officer Membreno's testimony to elicit incriminating statements made by Cabrera-Pena, justice required that his remaining statements tending to explain or qualify those statements should have been considered in

[2] The omitted portion of Cabrera-Pena's statement was that "I do not know how she took the gun out of my pants pocket. I tried to grab and force her, but the gun went off and fired."

connection therewith. Accordingly, we find Cabrera-Pena's cross-examination of Membreno was improperly limited.

We find the state's assertion of a distinction between the written and oral conversations in this case to be one without a difference. As noted previously, Officer Membreno testified on direct examination from his notes concerning the substance of his conversation with Cabrera-Pena. Cabrera-Pena then attempted to cross-examine Membreno regarding the contents of the report of that conversation. This is not a case in which the defendant gave numerous written and oral statements to police over several hours, days or weeks. To the contrary, this was a one-hour conversation with police wherein Cabrera-Pena "gave a statement – a written statement and vocal statements." We find that fundamental fairness requires that Cabrera-Pena be permitted to cross-examine Officer Membreno concerning the entirety of their conversation. Jackson, supra. Accordingly, we hold the Court of Appeals erred in holding Cabrera-Pena was not entitled to cross-examine Membreno.

Further, we take this opportunity to clarify for the bench and bar the application of Rule 106, SCRE. Rule 106 provides:

> When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The Court of Appeals held that Rule 106, by its terms, applies only to written or recorded statements. As we noted in State v. Taylor, 333 S.C. 159, 170, 508 S.E.2d 870, 876 (1998), Rule 106 is based on the rule of completeness and seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context. We stated:

> Rule 106 [of the Federal Rules of Evidence] is a procedural device governing the timing of completion evidence; the Rule is 'primarily designed to affect the order of proof'. It means that

> the adverse party need not wait until cross-examination or rebuttal. As such, the Rule reduces the risk that a writing or recording will be taken out of context and that an initial misleading impression will take hold in the mind of the jury.

Id. (citing S. Saltzburg, M. Martin & D. Capra, Federal Rules of Evidence Manual, 98-99 (1998)). The Historical Notes to Rule 106 recognize, however, that adoption of the "rule does not change the order of proof as to the remainder of an **unrecorded conversation**; the party seeking to bring out the remainder must do so during cross-examination or during that party's case." (Emphasis supplied). Accordingly, Rule 106 merely requires that an oral or unrecorded conversation be brought out upon cross-examination, rather than on direct examination; the rule does not, however, prohibit introduction of oral statements or otherwise vitiate the rule of completeness as it applies to such statements.

We find the common law of this state extends the rule of completeness to oral communications. Jackson, supra. Accord State v. Eugenio, 579 N.W.2d 642 (Wis. 1998) (notwithstanding provision identical to Rule 106 referring only to written or recorded statements, common law rule of completeness continues to exist for oral statements); State v. Cruz-Meza, 76 P.3d 1165 (Utah 2003) (recognizing rule of completeness may be applied to oral statements through Rule 611);[3] State v. Johnson, 479 A.2d 1284 (Maine 1984). See also United States v. Haddad, 10 F.3d 1252 (7th Cir. 1993) (citing 1 Weinstein & Berger, Weinstein's Evidence, § 106-4 (1992). Accordingly, where, as here, the state elects to use a witness to elicit portions of a conversation (and incriminating statements therein) made by a defendant, the rule of completeness requires the defendant be permitted to inquire into the full substance of that conversation.

[3] Rule 611(a) provides that the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth. SCRE 611(a) is identical to the federal rule.

B. Harmless Error

Although we find Cabrera-Pena should have been permitted to cross-examine Membreno concerning the remainder of what Cabrera-Pena said in his conversation during the interview, we find this error harmless beyond a reasonable doubt given the overwhelming evidence of guilt in this case. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992), cert. denied, 507 U.S. 927 (1993) (error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained). We make this determination fully cognizant of the rule that if any evidence exists to warrant the jury charge of the lesser-included offense of involuntary manslaughter, then the charge must be given. *State v. Burriss*, 334 S.C. 256, 265, 513 S.E.2d 104,109 (1999).

Under the facts in the instant case, Cabrera-Pena was not entitled to the charge on the lesser-included offense of involuntary manslaughter as a matter of law. Involuntary manslaughter is defined as either:

> (1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not tending to cause death or great bodily harm; or (2) the killing of another without malice unintentionally, but while one is acting lawfully with reckless disregard of the safety of others. … Again, the pivotal issue is whether Appellant was engaged in a lawful activity at the time of the killing.

Id. 334 S.C. at 264-265, 513 S.E.2d at 109.

We find that Cabrera-Pena's conduct -- leaving Alma at Applebee's and purchasing a handgun; loading the handgun; returning to the Applebee's parking lot to wait for Alma to exit the restaurant; calling her over to his van after she exited the restaurant; showing Alma the gun and then walking her back over to the truck where the friends were standing, prompting Alma to motion to them that he had a gun; and finally, shooting her in the eye, killing her -- is not the type of conduct contemplated under either definition of involuntary manslaughter.

Cabrera-Pena's conduct does not fit within the first definition of involuntary manslaughter because he was engaged in unlawful, felonious and harmful conduct. At minimum, he used the loaded pistol to intimidate Alma and forcefully walk her over to the pickup truck where her friends were. This conduct may be considered felonious under S.C. Code Ann. § 16-23-410 (1976) (pointing or presenting a firearm) or S.C. Code Ann. § 16-3-910 (1976) (kidnapping).[4] Further, we note that Cabrera-Pena was convicted of three counts of the felony of pointing and presenting a firearm, S.C. Code Ann. § 16-23-410, as he pointed the pistol at Alma's three friends after he shot Alma and before he fled the scene.

Cabrera-Pena's conduct also does not fit within the penumbra of the second definition of involuntary manslaughter. Cabrera-Pena was acting unlawfully when he took advantage of the unfair and extremely dangerous situation that he created by bringing a loaded, deadly weapon into a domestic dispute in a public place.

Moreover, this is not a type of involuntary manslaughter case where "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was **entitled to arm himself in self defense at the time of the shooting**." State v. Crosby, 335 S.C. 47, 52, 584 S.E.2d 104, 112 (2003) (emphasis supplied) (citing Burriss, 334 S.C. at 256, 584 S.E.2d at 110). Cabrera-Pena presented no evidence that he was acting in self-defense.

The dissent would hold, however, that mere "evidence of negligent handling of a loaded gun will support a charge of involuntary manslaughter."

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[4] See also S.C. Code Ann. § 16-25-65 (Supp. 2003), "Criminal Domestic Violence of a High and Aggravated Nature" as amended by 2003 Act No. 92, § 3, eff. January 1, 2004 (a person who commits "an assault and battery which involves the use of a deadly weapon" or "an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death" is guilty of a felony).

Burriss, 334 S.C. at 265, 513 S.E.2d at 109; State v. White, 253 S.C. 475, 479, 171 S.E.2d 712, 714 (1969).[5]

In Burriss, the question was, as here, whether the defendant was entitled to have the lesser-included offense of involuntary manslaughter submitted to the jury. According to Burriss, Kenneth and James were smoking crack laced marijuana cigarettes, "getting crazy or something," when they threatened to rob him. After being physically attacked and thrown to the ground, Burriss drew his gun and Kenneth ran into a house "like he was getting something." Burriss was afraid it was a gun. When James began moving threateningly toward Burriss, Burriss snatched his gun up and it fired, killing Kenneth. 334 S.C. at 263, 513 S.E.2d at 108. This Court found that "the evidence in the record supports Appellant's claim *he was acting lawfully when the gun fired*." Id. at 265, 513 S.E.2d at 109 (emphasis supplied).

The unlawful possession of a firearm does not preclude a charge of accident if the accused was engaged in a lawful activity at the time of the killing. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). However, the "unlawful possession of a firearm can under certain circumstances constitute an unlawful activity so as to preclude an accident defense if it is the proximate cause of the killing." Burriss, 334 S.C. at 262, 513 S.E.2d at 108 n. 5. The same reasoning applies in the context of involuntary manslaughter, and "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." Id. at 265, 513 S.E.2d at 109.[6]

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[5] In her well-reasoned dissent in State v. Reese, 359 S.C. 260, 280, 597 S.E.2d 169, 179 (Ct. App. 2004), Chief Judge Hearn of the Court of Appeals points out that while White cites this as a proposition of law, the issue in White did not hinge on this analysis but rather whether the trial judge erred in permitting a murder indictment to go to the jury when the only offense charged was involuntary manslaughter.

[6] As noted in Burriss, "[t]here is a difference being lawfully *armed* in self-defense and *acting* in self-defense." 334 S.C. at 265, 513 S.E.2d at 109 n. 10 (emphasis supplied). In this case, there is no evidence Cabrera-Pena "was engaged in a lawful activity at the time of the killing" so as to have entitled

The dissent duly notes that this Court does not sit as a finder of fact to determine the believability of Cabrera-Pena's statement. But this Court must determine as a matter of law whether that statement would have entitled Cabrera-Pena to a charge of involuntary manslaughter in this case. State v. Tyler, 348 S.C. 526, 560 S.E.2d 888 (2002). It is patent that Cabrera-Pena's conduct in arming himself with a deadly weapon, to lay in wait for his wife, so that he could confront her, was not a lawful activity and, indeed, created a highly volatile and incendiary domestic situation that resulted in Alma's death. Id. Therefore, Cabrera-Pena was not entitled to an involuntary manslaughter charge.

CONCLUSION

We REVERSE the ruling of the Court of Appeals that an adverse party is not permitted to bring out, during cross-examination, remaining portions of an unrecorded conversation or oral statement made by the adverse party for the purpose of clarifying or explaining an entire conversation. Jackson, supra. If the statement is in writing or recorded, the adverse party may require the introduction of the relevant portions -- at the time of introduction of other

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him to be armed. Id. Nevertheless, the dissent would find "there is no evidence Cabrera-Pena was unlawfully carrying a weapon" because there is an exception for those persons with a permit from SLED from the express provision that "[i]t is unlawful to carry about the person any pistol, whether concealed or not." S.C. Code Ann. § 16-23-20(12) (2003). This is notwithstanding that the "statute clearly states that it is unlawful to carry a pistol, and the exceptions are not descriptive of the offense. This Court holds the view that the state is not required to negate each exception to the offense of unlawfully carrying a pistol to sustain its burden of proof." State v. Clarke, 302 S.C. 423, 425, 396 S.E.2d 827, 828 (1990). Without addressing whether or not SLED was granting permits that night, we find that Cabrera-Pena was not simply carrying a weapon; he was carrying the weapon for the purpose of laying in wait in order to confront his wife. The subsequent confrontation that ensued illustrated that Cabrera-Pena had every intention of using the gun.

portions of the statement -- pursuant to Rule 106, SCRE. We hold that Cabrera-Pena should, in fairness, have been allowed to cross-examine Officer Membreno to fully place into context the substance of their conversation. Accordingly, to the extent the Court of Appeals held otherwise, its opinion is reversed.

We, nonetheless, affirm in result because we find there was overwhelming direct evidence of Cabrera-Pena's guilt of the offense of murder such that any error in the limitation of Cabrera-Pena's cross-examination was harmless beyond a reasonable doubt.

REVERSED IN PART; AFFIRMED IN RESULT.

TOAL, C.J., and BURNETT, J., concur. MOORE, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

JUSTICE MOORE: I respectfully dissent. I agree the trial court erred in refusing to admit appellant's statement in its entirety, but I would not find this error harmless.

The majority relies on evidence from the State's witnesses to conclude appellant was not entitled to a charge of involuntary manslaughter. Under appellant's version of the facts, however, he was entitled to such a charge. The excluded part of appellant's statement was: "I do not know how she took the gun out of my pants pocket. I tried to grab and force her, but the gun went off and fired."[7] Because this critical part of appellant's statement would have entitled him to a charge of involuntary manslaughter, the error in its exclusion cannot be harmless. *See* State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999) (evidence of negligent handling of a loaded gun will support a charge of involuntary manslaughter); State v. White, 253 S.C. 475, 479, 171 S.E.2d 712, 714 (1969) (same).

As stated by the majority, involuntary manslaughter is defined as either:

> (1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the killing of another without malice and unintentionally, but while one is acting lawfully with reckless disregard of the safety of others.

Burriss, 334 S.C. at 264-65, 513 S.E.2d at 109. Here, there is no evidence appellant unlawfully possessed the weapon.[8] Even if appellant was acting

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[7]Eyewitnesses testified the victim put her hand on appellant's wrist but she backed away before the gun was fired. appellant referred to this testimony in closing argument and maintained the shooting was an accident.

[8]The majority cites S.C. Code Ann. § 16-23-20 (2003) for the proposition that it is unlawful to carry a weapon on one's person. This section provides in full that it is unlawful to carry a weapon without a permit.

unlawfully in carrying a concealed weapon, this conduct is not a felony[9] such that it would preclude a charge of involuntary manslaughter, nor is it an activity in itself "tending to cause death or great bodily harm." To preclude a charge of involuntary manslaughter, the unlawful possession of a weapon must be the proximate cause of the killing. *Id*. at 262, 513 S.E.2d at 108, n.5. Under appellant's version of the facts, his possession of the gun was not the proximate cause of the victim's death since the gun was removed from his pocket only when the victim herself grabbed it.

This Court does not sit as a finder of fact. It was for the jury to determine whether appellant's version of the shooting was believable or not. Had appellant's statement been admitted in full, it would have entitled him to a charge of involuntary manslaughter. Accordingly, I would reverse.

PLEICONES, J., concurs.

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§ 16-23-20 (12). The State did not come forward with any evidence that appellant was in unlawful possession of the gun and there is no evidence regarding whether or not appellant had a permit.

[9]A violation of § 16-23-20 (carrying a concealed weapon) is a misdemeanor. S.C. Code Ann. § 16-1-100(C) (Supp. 2003).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Bamberg County Magistrate Danny J. Singleton, Respondent.

Opinion No. 25894
Submitted September 24, 2004 – Filed November 8, 2004

REMOVED

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

C. Bradley Hutto, of Orangeburg, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to any sanction set forth in Rule 7(b), RJDE, Rule 502, SCACR. We accept the agreement and remove respondent from office. The facts as set forth in the agreement are as follows.

FACTS

Respondent adjudicated fourteen traffic tickets issued to close family members and three traffic tickets issued to a friend. With regard to these instances, respondent and ODC agree:

1. Respondent served as the presiding judge on five speeding tickets which had been issued to his father. Respondent adjudicated his father not guilty on each of the tickets. Notations on three of the tickets indicate the officer or trooper had already reduced the violation to speeding less than ten miles over the speed limit at the time the tickets were issued.

2. Respondent served as the presiding judge on a speeding ticket issued to his mother for speeding 64 in a 55 miles per hour zone. Notations by the officer on this ticket indicate the vehicle was traveling 68 miles per hour, that respondent's mother admitted she thought she was driving 65 miles per hour, and that the ticket was issued for the lesser offense of speeding less than ten miles per hour over the speed limit. Respondent adjudicated his mother not guilty.

3. Respondent served as the presiding judge on a speeding ticket issued to his daughter for speeding 73 in a 55 miles per hour zone. Notations on the ticket indicate respondent's daughter admitted "she was rushing to get home." Respondent adjudicated his daughter not guilty.

4. Respondent served as the presiding judge on two speeding tickets issued to his sister-in-law. "No Help" is written in large letters on the bottom of the earlier ticket. Respondent adjudicated his sister-in-law not guilty on this ticket.

Notations on the "Trial Officer's Copy" of the other ticket indicate respondent's sister-in-law was traveling 70 in a 55 miles per hour zone and that she told the trooper she was inattentive to her speed. The trooper issued the ticket for the lesser offense of speeding 64 miles per hour in a 55 miles per hour zone. The "Drivers Record Copy" of this ticket is marked to indicate that respondent's sister-in-law did not appear for court, was found guilty, and a $50.00 fine was imposed. Approximately ten days later, respondent caused an Ishmell[1] order to be issued changing the verdict to not guilty for the following reason: "Defendant had come before the judge prior to court time and had been granted a Not Guilty verdict. This verdict failed to reach proper persons handling court." Three days after the Department of Public Safety acted on the Ishmell order, respondent, or someone at his request, entered the notation "NG 3-9-01 DJS" on the "Trial Officer's Copy" of this ticket. Respondent also wrote a note on the back of this ticket stating that the "verdict of the trial should read not guilty."

5. Respondent served as the presiding judge on a speeding ticket issued to his sister for driving 64 in a 55 miles per hour zone. Notations on the ticket indicate she was actually driving 72 miles per hour, that she told the trooper she was not aware of her speed, and that the trooper reduced the charge to speeding less than ten miles per hour over the speed limit at the time the ticket was issued. Respondent adjudicated his sister not guilty.

6. Respondent served as the presiding judge on two tickets issued to another sister. A March 10, 1996, ticket for a seat belt violation was adjudicated guilty. Court records indicate the fine was suspended.

[1] See Ishmell v. South Carolina Hwy. Dept., 264 S.C. 340, 215 S.E.2d 201 (1975).

On October 25, 1998, respondent's sister was issued a speeding ticket for driving 64 in a 55 miles per hour zone. The "Trial Officer's Copy" of this ticket bears notations indicating that the car was traveling 68 miles per hour and that the driver told the trooper she "had [her] cruise on 64." Court was set for November 19, 1998. The "Violator's Copy" of this ticket bears a notation at the bottom "Not Guilty per conversation with [the trooper] on 11-18-98" (the day before court was to convene), and respondent's initials. Court records establish that a not guilty verdict was entered on this ticket.

7. Respondent served as the presiding judge on two tickets issued to his brother. On April 4, 1998, respondent's brother was charged with speeding 78 in a 55 miles per hour zone. The ticket was adjudicated not guilty by respondent.

   On June 24, 2000, respondent's brother was charged with speeding 64 in a 55 miles per hour zone. Notations on the ticket indicate the car was traveling 70 miles per hour, that the driver said he "was not paying attention," and that the officer issued the ticket for the lesser offense of speeding less than ten miles per hour over the speed limit. Court records establish respondent adjudicated his brother guilty and imposed a sentence of one day in jail, but suspended the sentence.

8. Respondent served as the presiding judge on three tickets issued to his friend Kenneth C. McMillian. Respondent found McMillian not guilty on one speeding ticket. Two tickets were issued to McMillian on December 6, 2002, one for speeding 83 in a 55 miles per hour zone and the other for no driver's license in possession. Respondent found McMillian guilty of the diver's license violation but suspended the fine. The "Driver's Record Copy" of the speeding ticket indicates McMillian appeared for court and was found guilty of the speeding violation. This disposition is certified as correct by a

> signature which appears to be respondent's on the "Driver's Record Copy" of the ticket. Later, respondent sought to have an Ishmell order issued concerning the ticket but the trooper refused on the ground that the proposed disposition would not be truthful. According to the trooper, McMillian appeared for court and pled guilty to the offense. Respondent, however, contacted the trooper's supervisor who agreed to issuance of an Ishmell order. The order subsequently was issued and McMillian's guilty verdict was changed to not guilty. A note handwritten by respondent appears on the back of the ticket stating that the "verdict of trial should read not guilty."

Of the foregoing seventeen tickets issued to respondent's family and friends, respondent rendered a guilty verdict in five instances. He subsequently changed two of the convictions to not guilty by an Ishmell order. He issued suspended sentences on the remaining three convictions.

An examination of the thirteen tickets obtained by ODC revealed that the two instances where a finding of guilt was recorded but later nullified by an Ishmell order, the "Driver's Records Copy" of the tickets had been marked in the appropriate manner to show the disposition of the matter and the identity of the presiding judge. In all other instances where respondent issued a not guilty verdict for family members, no entry was made in the appropriate area of the "Trial Officer's Copy" of the ticket and no identification of the presiding judge was made on that copy. Instead, the notation "NG" or "Not Guilty" notation is accompanied by the typewritten initials "DJS" or "djs."

Respondent failed to comply with the financial recordkeeping requirements set forth in the Chief Justice's Order of November 9, 1999, establishing financial recordkeeping standards in magisterial courts. In particular, the order requires that deposits be made "(1) daily; or upon the accumulation of $250.00, whichever occurs least; (2) on each Friday; (3) and for the last working day of the month." Information provided by respondent's office and an analysis of bank records by ODC establish that, on

average, respondent made deposits only once a week from 1999 until the present.

The November 9, 1999, order requires deposit slips to include starting and ending receipt numbers. An analysis of deposit ticket exemplars and information received from magistrate's office personnel establish that, from 1999 until the date of the agreement, respondent failed to enter beginning and ending receipt numbers on the deposit tickets for funds deposited into respondent's bank accounts.

The November 9, 1999, order provides that "all funds related to that docket and accompanying documentation must be remitted to the County Treasurer" at the end of each monthly docket period. An analysis of bank records and financial summary reports by ODC established that funds and supporting documentation for respondent's Civil and Criminal accounts were not remitted to the treasurer in accordance with the order.

Specifically, during the eight month period from December 2002 through July 2003,[2] respondent failed to timely submit both monthly reports and funds on eight occasions. In some instances, the submission of funds and reports was months late.

An examination of financial records by ODC revealed that during the eight month review period, funds received by respondent were not remitted to the County Treasurer in accordance with the Court's November 1999 order, leaving large balances to be carried forward each month in the Civil and Criminal accounts. For the review period of December 2002 through July 2003, the carry forward balance in respondent's Criminal Account ranged from $128,000.000 to $199,000,000 and the carry forward balance in respondent's Civil Account ranged from $7,000.00 to $16,000.00.

Respondent incurred an unexplained cash shortage of $445.00 in December 2001 and allowed this shortage to exist since that time without resolution. Although respondent made a memorandum of the shortage and

[2] ODC selected this period for review.

represents that he reported the shortage to the County Administrator, respondent failed to report the shortage to Court Administration and ODC as required by the November 9, 1999 order.

Respondent permitted his criminal account to incur monthly bank fees and charges which were drawn automatically by the bank from monies held in that account for safekeeping (i.e., bonds, fines). For the eight month period of December 2002 through July 2003, the bank charged approximately $638.00 against the account for analysis fees.

In matters where respondent allowed defendants to make scheduled time payments, he withheld those payments from deposit until full payment of the bond or fine had been received.

LAW

Respondent admits that the conduct set forth above constitutes a violation of the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold the integrity and independence of the judiciary); Canon 2(A) (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2B (judge shall not allow family or other relationships to influence his judicial conduct or judgment); Canon 3(B)(7) (judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding); Canon 3(C) (judge shall diligently discharge his administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration); and Canon 3(E) (judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned).[3] Respondent agrees he violated the Chief Justice's November 9, 1999, Order.

[3] Respondent was previously suspended for six months after he violated of some of the same canons. Matter of Singleton, 355 S.C. 85, 584 S.E.2d 365 (2003).

Respondent also concedes that his misconduct constitutes grounds for discipline under the following provisions of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a judge to violate the Code of Judicial Conduct); Rule 7(a)(4) (it shall be a ground for discipline for a judge to persistently fail to perform judicial duties or persistently perform judicial duties in an incompetent or neglectful manner); and Rule 7(a)(7) (it shall be a ground for discipline for a judge to willfully violate a valid court order issued by a court of this state).

CONCLUSION

We accept the Agreement for Discipline by Consent and remove respondent from office.[4] It is therefore ordered that respondent be removed from office as of the date of the filing of this opinion.

REMOVED.

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

[4] In a recent opinion, the Court publicly reprimanded a magistrate for misconduct similar to that herein. Matter of O'Kelley, Op. No. 25871 (S.C. Sup. Ct. filed September 13, 2004) (Shearouse Adv. Sh. No. 36 at 68). That magistrate, however, had already resigned from office, leaving a public reprimand as the most severe sanction available.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Frank Bryant Brown, Respondent.

Opinion No. 25895
Submitted September 23, 2004 – Filed November 8, 2004

DEFINITELY SUSPENDED

AND

DISBARRED

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

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

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into two Agreements for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the first agreement, respondent admits misconduct and consents to the imposition of any sanction up to and including a two year definite suspension from the practice of law. See Rule 7, RLDE, Rule 413, SCACR. We accept the first agreement and impose a definite suspension of two years from the practice of law. In the second agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RLDE. We accept

the second agreement and disbar respondent. The two sanctions shall run concurrently.

FIRST AGREEMENT

The facts, as set forth in the first agreement, are as follows.

FACTS

Matter I

Respondent graduated from law school in June 1999. Before being admitted to practice law in any state, respondent obtained employment with Brock & Scott, a Winston-Salem, North Carolina-based real estate firm. He was assigned to the firm's law office in Rock Hill. Respondent worked under the supervision of an attorney licensed to practice law in South Carolina.

While employed as a non-lawyer at Brock & Scott, respondent conducted real estate closings without an attorney being present. Respondent signed his own name to the documents associated with the real estate closings. After conducting the closings, it was respondent's practice to have other employees of the firm sign as witness and/or notary on the documents even though they were not present at the closings. Respondent conducted some closings when there was no licensed South Carolina attorney on the premises. Respondent routinely signed as witness and notary to documents relating to closings at which he was not present.

In September 1999, Brock & Scott merged with the firm of Forquer & Green, a Charlotte, North Carolina-based real estate firm with an office in Columbia, The two firms remained separate in North Carolina, but operated as Green, Brock, Forquer & Scott in South Carolina. Respondent continued to conduct real estate closings without an attorney present (and sometimes without an attorney on the premises) while employed by the new firm. In connection with those real estate closings, respondent signed the name of his supervising

attorney without indicating he was signing on her behalf. He continued his practice of soliciting signatures and notarizations from staff members not present at the closings and signing his own name as witness and notary to documents executed outside his presence.

In January 2000, the South Carolina attorney responsible for respondent's supervision left Green, Brock, Forquer & Scott to work for a subsidiary company of Forquer & Green in Charlotte. Respondent continued to conduct real estate loan closings without the presence or supervision of a South Carolina attorney. Respondent continued to sign his former supervising attorney's name to real estate documents.

In April 2000, Green, Brock, Forquer & Scott dissolved and respondent became employed with Forquer & Green. He continued to conduct real estate closings in the manner described above until his admission to the South Carolina Bar in November 2000.

Respondent estimates he conducted two or three closings per day from June 1999 until November 2000. During the time period in which respondent conducted closings for the three law firms, it was not his practice to inform parties he was not an attorney. While he did not affirmatively hold himself out as an attorney, respondent only disclosed the fact that he was not an attorney when a party made a specific inquiry. Respondent acknowledges that it was likely that the parties to the closings assumed he was an attorney.

During the time period in which respondent was conducting the closings for the three law firms, he made no meaningful inquiry about the propriety of a nonlawyer conducting real estate closings, although he represents he did have concerns in this regard. Respondent did not question his employers, conduct research into the statutory or case law on the subject, consult with an attorney outside the firm, or seek guidance from the South Carolina Bar.

Matter II

On January 28, 2000, respondent traveled to the office of a mortgage company in Greenville to conduct a real estate closing for Mr. and Mrs. Doe. Respondent was not licensed to practice law at the time. There was no licensed attorney present at the closing or on the premises. Many of the closing documents were signed by the Does in blank. Respondent signed his supervising attorney's name to the closing documents. He returned the closing documents to the firm and solicited signatures of other staff members as witnesses and notary. Respondent's involvement in this matter was discovered during an investigation of a grievance filed after the Does attempted to refinance the property and discovered that that mortgage and deed had never been filed.

Matter III

On February 25, 2000, respondent's former supervisor at Green, Brock, Forquer & Scott conducted a real estate closing for Mr. and Mrs. Smith as a favor to the firm because respondent was studying for the bar examination and unavailable. Respondent was unaware of this arrangement.

Upon his return to the firm after taking the examination, respondent found a stack of approximately ten to twenty closing files, including the Smiths' file, waiting for him to complete. Respondent proceeded to sign his former supervisor's name to the closing documents in those files. He was unaware that his former supervisor had actually conducted the Smiths' closing. He assumed a paralegal had conducted the Smiths' closing. Respondent signed his own name as witness and/or notary on the documents in the files, including the documents in the Smiths' file, although he was not present when the documents were executed. Some of the documents in the Smiths' closing file were incomplete or contained blanks. Respondent completed the documents or filled in the blanks. Respondent's involvement in the matter was discovered during an investigation of a

grievance filed after the Smiths attempted to refinance the property and discovered that the mortgage and deed had never been filed.

Matter IV

On April 26, 2000, while working as a non-lawyer for Forquer & Green, respondent was sent to a mortgage company in Greenville to conduct a closing for Mrs. Jones. At this time, respondent was being supervised by a different South Carolina attorney who was not available to conduct the closing himself. Although he was unaware of the circumstances at the time, respondent now reports that, in accordance with pleadings filed in ensuing litigation, they are as follows.

Mrs. Jones contacted the mortgage company about refinancing her home because she faced foreclosure. As a result of delays by the mortgage company, Mrs. Jones' home was sold at a foreclosure sale. Mr. Pressley, an employee of the mortgage company, purchased the home at the foreclosure sale. Mr. Pressley also persuaded Mrs. Jones to endorse the check for her portion of the sales proceeds to himself. For some reason, no deed was recorded by the special referee. At Mr. Pressley's request, respondent's firm prepared a deed from Mrs. Jones to Mr. Pressley.

Upon his arrival at the mortgage company, respondent was handed the above-mentioned deed and was informed that Mrs. Jones had signed the deed, but had left before he arrived. Respondent returned to the law office and signed his supervising attorney's name as witness and his own name as notary. Neither respondent nor his supervising attorney were present during the execution of the documents. Respondent did not confirm with Mrs. Jones that she had in fact signed the deed.

Ultimately, Mr. Pressley defaulted on the property and the home was sold at a second foreclosure. In settlement of the lawsuit filed against respondent, his supervising attorney, and Forquer &

Green, the firm arranged for financing for Mrs. Jones, placed title to the property back in her name, and paid her a cash settlement.

Matter V

Respondent continued his employment with Forquer & Green following his admission to the South Carolina Bar in November 2000. He became a partner in the firm in April 2001.

After becoming a licensed attorney, respondent allowed non-lawyers under his supervision to conduct real estate closings outside his presence. During that time, respondent also continued the practices of witnessing and notarizing documents that were executed outside his presence and soliciting witness and notary signatures from individuals in the firm not present during execution. These practices continued until early in January 2002, when respondent received notice of grievances filed against him. Respondent has now discontinued these practices and has instructed the members and staff of his firm to discontinue these practices.

LAW

Respondent admits that his 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 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). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.3 (lawyer having direct supervisory authority over non-lawyer employee shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; lawyer is responsible for conduct of non-lawyer employee if the conduct would be a violation of the Rules of Professional Conduct if engaged in by a lawyer and lawyer orders or, with the knowledge of the specific

conduct, ratifies the conduct involved); Rule 5.5 (lawyer shall not assist non-lawyer in performance of activity which constitutes unauthorized practice of law); 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).

We note that a significant portion of respondent's misconduct, including conducting real estate closings, signing documents on behalf of others without so indicating, and requesting others sign as witness or notary on documents not signed in their presence, occurred before respondent was licensed to practice law in this state. We take this opportunity to address the Court's authority to discipline an attorney for conduct which occurred prior to, but was not discovered until after, his or her admission to the practice of law. [1]

The South Carolina Constitution specifies that this Court has jurisdiction "over the admission to practice law and the discipline of persons admitted." S.C. Const. art. V, § 4. The "central purpose of the disciplinary process is to protect the public from unscrupulous and indifferent lawyers." Matter of Hall, 333 S.C. 247, 251, 509 S.E.2d 266, 268 (1998); Matter of Brooks, 324 S.C. 105, 477 S.E.2d 98 (1996) (primary purpose of lawyer discipline is to maintain integrity of courts

[1] It is a violation of the Rules of Professional Conduct for an applicant for admission to the bar to knowingly make a false statement of material fact in connection with the application process. Rule 8.1 of Rule 407, SCACR. In addition, the Rules Pertaining to the Admission to Practice Law advise the Court may vacate the admission or otherwise discipline an attorney if it is determined he provided false or misleading information in his application. Rule 402(h), SCACR. These rules are not directly applicable to the circumstances presented here as respondent's misconduct was not specifically addressed in the admissions process. However, they suggest the Court can sanction an attorney for misconduct which occurs prior to admission.

and protect the public). In order to maintain the public's trust, the Court possesses the authority to discipline attorneys for misconduct related to the legal profession and for misconduct which occurs outside the legal profession.[2] For the purpose of protecting the public's trust in the legal system it is likewise the Court's duty to discipline an attorney for misconduct which precedes his or her admission to the practice of law. See Stratmore v. State Bar of California, 538 P.2d 229 (Cal. 1975); Kentucky Bar Assoc. v. Signer, 533 S.W.2d 534 (Ky. 1976); Matter of Wong, 710 N.YS.2d 57 (N.Y. App. Div. 2000); see also Office of Disciplinary Counsel v. Zdrok, 645 A.2d 830 (Pa. 1994) (attorney disciplined for conduct which occurred before becoming member of bar did not violate constitutional prohibition against ex post facto laws). [3]

Practically speaking, had the Court known of respondent's misconduct prior to his admission, the information could have affected his admission to the Bar. Respondent's ability to keep relevant information from the Court until after his admission should not leave the Court without any means to address the situation.

By holding the Court has the authority to discipline an attorney for misconduct which occurred prior to admission, we do not suggest attorneys will be or should be disciplined for any and all pre-admission misconduct. Instead, the Court will consider the nature and severity of the misconduct along with its date in relation to the attorney's admission.

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[2] See Preamble to Rules of Professional Conduct, Rule 407, SCACR (lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs).

[3] In Matter of Edwards , 327 S.C. 148, 488 S.E.2d 864 (1997), the Court stated conduct occurring prior to an attorney's admission to the Bar is not sanctionable. To the extent Edwards is inconsistent with this opinion, it is overruled.

Here, respondent's misconduct occurred after his graduation from law school, while he was preparing to sit for and awaiting the results of the bar examination, and while he was working for a law firm. Respondent candidly admits he allowed firm clients to assume he was a licensed attorney. This Court cannot ignore the fact that, within months prior to his admission to the South Carolina Bar, respondent actively participated in the unauthorized practice of law. The Court concludes respondent is subject to the disciplinary authority of this Court for this misconduct.

We accept the first agreement and impose a definite suspension of two years from the practice of law.

SECOND AGREEMENT

The facts, as set forth in the second agreement, are as follows.

FACTS

Matter I

From June 2001 through May 2002 when he worked for the Rock Hill subsidiary of Forquer, Lattimore & Calloway (f/k/a Forquer & Green and f/k/a Green, Brock, Forquer & Scott), respondent conducted real estate closings on behalf of two real estate investment companies, Kenbill Properties (Kenbill) and Keystone Properties (Keystone). Respondent became involved with these real estate investment companies less than a year after his admission to the Bar. Although he was made a partner in the firm, he was provided no training or supervision by Mr. Green or Mr. Forquer, the senior partners in the firm, neither of whom was licensed in South Carolina.

Kenbill Properties (Kenbill) and Keystone Properties (Keystone) were in the business of locating properties and finding borrowers/investors to purchase the properties. The borrowers/investors were told they needed no down payment and would actually be paid money to purchase homes. The real estate

investment companies promised to locate renters and manage the properties. They agreed to collect rent, pay the mortgage and upkeep, retain a fee, and then pay the balance to the borrowers/investors.

The seller (usually the builder) established a sales price for the property. The real estate investment companies, with the assistance of a mortgage broker or loan officer, then prepared a sales contract, loan application, and other documents containing an inflated sales price (approximately $15,000 to $100,00 above the actual sales price), down payment amount, and false information about the borrower/investor. The documents were presented to and approved by a lender.

Thereafter, respondent would complete a title search, a title commitment, and a HUD-1 settlement statement. The HUD-1 prepared by respondent would reflect the inflated sales price, a down payment from the borrower/investor, and a cash payment to seller. At closing, the HUD-1 would be signed by the borrower/investor, the seller, and respondent. The parties would also sign a certification that the information on the HUD-1 was a true and accurate representation of the receipts and disbursements in the transaction. Instead of disbursing the cash to seller as stated in the HUD-1, respondent would pay a portion to the real estate investment company as an assignment or consulting fee and pay the balance to the seller. The borrower/investor would then be paid a fee outside the closing by the seller or the real estate investment company.

In some cases, the borrower/investor would not bring any cash to the closing, contrary to the representation made on the HUD-1. The only funds received by respondent were the loan proceeds which would be disbursed according to the assignment agreement between the real estate investment company and the seller, rather than in accordance with the HUD-1.

In cases where the lender required proof of certified funds from the borrower, the real estate investment company would purchase a cashier's check to bring to the closing (implying the check was provided by the borrower). In those cases, respondent would deposit

the cashier's check and would add that amount back to the assignment fee check paid to the real estate investment company.

While respondent did not participate in the preparation of the fraudulent contracts or loan applications, he was responsible for preparing the fraudulent HUD-1 forms. He did so with knowledge that no cash would be received from the borrower/investor and that loan proceeds would not be disbursed as stated. With each loan package, respondent received a set of closing instructions. Those instructions specifically required respondent to verify that the HUD-1 settlement statement was a true and accurate accounting of the transaction. In many cases, respondent was instructed not to proceed with the transaction if he became aware of any payments to or contributions from any third parties not identified on the HUD-1.

Many of the borrowers/investors received lower interest rates because it was represented to the lenders that they intended to occupy the properties as primary residences. This representation was made on the loan applications and on affidavits and certifications contained in the loan packages required by the lender. These representations were false. Additionally, the mortgage securing the lender's interest in the property contained an occupancy clause, violation of which would render the borrower in default. While respondent did not prepare the loan applications, owner occupancy affidavits, or mortgages, he did present them to the borrowers for signature at the closings. While respondent did not have specific knowledge that the borrowers did not intend to occupy the properties, he was aware of the nature of Kenbill's and Keystone's businesses and he had sufficient facts that should have caused him to question the legitimacy of the transactions.

Matter II

On at least eight occasions, respondent conducted concurrent real estate transactions on the same property for Kenbill and others. These transactions are sometimes referred to as either a property "flip" or loan "flip."

In an illegal property flip, the seller enters into a sales contract with Buyer A. Prior to the commencement of that sale, Buyer A enters into a contract to sell the same property at a higher price to Buyer B. Buyer B uses this contract to obtain financing. Buyer A obtains no financing. The conveyances are then made concurrently, with Buyer A using the loan proceeds obtained by Buyer B to purchase the property from Seller. The flip transaction is illegal when the information to the lender, including the information stated on the HUD-1 settlement statement, fails to disclose that the property is being conveyed in two transactions. Often documents have to be pre-dated or post-dated to mislead the lender. Title commitments, seller's affidavits or confirmations, and closing attorney certifications must contain false information. Often, neither Seller nor Buyer B is aware of the other's involvement. In those cases, Buyer A retains the excess loan proceeds. Buyer B then has a loan on the property that far exceeds the property value. In other cases, Buyer B is in collusion with Buyer A and they share the excess loan proceeds and leave the lender with property insufficient to cover its loan.

The cooperation of the closing agent is necessary for an illegal property flip to succeed. First, the title search required by the lender will reveal that the Seller owns the property rather than Buyer A (the party the lender believes is the seller). Second, the closing agent must actually close the Buyer A to Buyer B transaction first in order to fund the Seller to Buyer A transaction. However, the deed from Seller to Buyer A must be recorded prior to the deed from Buyer A to Buyer B. Finally, the lender's closing instructions often require that the closing agent verify that the property has not been conveyed within a certain time period prior to the closing and/or that there is no simultaneous conveyance of the property.

In the eight flip sales closed by respondent, the HUD-1 settlement statements and other closing documents did not disclose to the lenders that the properties were being transferred in two conveyances rather than one. Further, the HUD-1 settlement statements did not reveal that the loan proceeds were being used to fund the first conveyance. Respondent admits he failed to comply with

the lenders' closing instructions in these transactions, but certified that he had complied with the instructions. Respondent represents he lacked the experience or training sufficient to recognize the transactions as fraudulent. He relied on the experience and expertise of his partners, the brokers, agents, and investment companies.

Matter III

Mr. Heckle was the proprietor of Keystone. He was also affiliated with Kenbill. Mr. Heckle broke his ties with that company when its principals came under federal investigation for mortgage fraud. Respondent had ceased closing loans for Kenbill prior to that time.

Respondent subsequently entered into a joint venture with Mr. Heckle. Respondent intended to engage in real estate investment without defrauding lenders.

Respondent's agreement with Mr. Heckle provided that respondent would solicit investors to purchase homes built by Mr. Smith. The borrower/investor would advance money that would be listed on the HUD-1 as cash from buyer (i.e., down payment). Respondent would rebate or kick back a portion of the sales proceeds to Mr. Heckle. Mr. Heckle was to retain one-third of the rebate as his fee, pay one-third of the rebate to respondent as his non-legal fee, and place the remaining one-third into a Keystone account. The Keystone account was to be used to manage the properties and pay the mortgage payments until rent was received. Once rent was received, the balance from the transaction in the Keystone account would be paid to borrowers/investors. The rent payments would be applied to the loan payment and management expenses and any profit would go to the borrowers/investors. Respondent believed this arrangement would be legal because the trust account disbursements would correspond with the HUD-1.

Respondent recruited members of his family and friends to make these real estate investments. In these transactions, Mr. Smith determined the minimum sales price he would accept for each property.

Based on an inflated sales price and representation to the lender that the borrower would make a down payment, loans were obtained for more than Mr. Smith's sales price. Mr. Heckle and the borrower/investors would provide the down payment. Respondent or someone from his firm conducted the closings.

At the closings, the firm received the loan proceeds plus the "down payments." Trust account checks were then issued according to the HUD-1. Mr. Smith received a check in the amount listed on the HUD-1 as payable to the seller. Mr. Smith would then pay rebates (or kickbacks) to Keystone, to Mr. Heckle, and to the borrowers/investors.

At the time, respondent believed that, because the amount shown on the HUD-1 was the amount actually paid to the seller from the trust account, that the transactions were legal. Respondent now admits that, because he was aware that the seller made subsequent distributions to Keystone, Mr. Heckle, and the borrowers/investors, that those distributions should have been revealed to the lender. He further admits that he was aware that the sales prices listed on the HUD-1 statements were not the actual prices paid to the seller.

At the closing of several of these transactions, respondent began to have some concerns about Mr. Heckle when a $15,000 check to a borrower/investor from the Keystone account was returned for insufficient funds and when one of respondent's investors reported that a mortgage payment had not been made. Mr. Heckle explained the lack of funds by stating his wife, who had access to the Keystone account, had taken the funds.

After the check was returned for insufficient funds, respondent assumed control over the management of the funds using his own account. He required Mr. Heckle to make up the shortfalls in cash derived from subsequent transactions.

In connection with these transactions, owner occupancy affidavits that stated the borrowers/investors intended to occupy the properties as primary residences were signed, notarized, and submitted to the lenders. Respondent was aware that most of the

borrowers/investors did not intend to live in the homes. Respondent incorrectly advised the borrowers/investors that they were only required to spend one night in their properties to render the owner occupancy affidavits truthful. Respondent based this advice on incorrect information he received from a lender not associated with any of the transactions.

Respondent ultimately discovered that Mr. Heckle was not managing or maintaining the properties or securing renters. Respondent then dissolved the joint venture with Mr. Heckle and took over management of the properties. He used his own funds to cover investors' losses. When he discovered that his understanding of the requirements for owner occupancy was incorrect, he assisted the borrowers/investors in notifying the lenders and submitting corrected affidavits.

Respondent's interest in these investments created a conflict of interest for respondent and his firm. Respondent failed to advise the lenders or the borrowers/investors of that conflict of interest, although the investors he recruited were made aware of his personal involvement with Keystone. Respondent failed to obtained informed consent to waivers of this conflict of interest in accordance with the requirements of the Rules of Professional Conduct.

Respondent never received any funds from the proceeds of the loans as had been promised by Mr. Heckle. He did not personally profit from any of the transactions other than the legal fees generated which were paid to the firm. Respondent has paid significant sums to correct his errors.

Respondent made a self-report to the ODC. ODC agrees respondent has fully cooperated in this investigation.

LAW

Respondent admits his misconduct constitutes grounds for discipline under Rule 7, RLDE, Rule 413, SCACR, particularly Rule 7(a)(1) (it is ground for discipline for lawyer to violate Rules of

Professional Conduct), Rule 7(a)(5) (it is ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring legal profession into disrepute or to engage in conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (it is ground for discipline for lawyer to violate the oath of office taken upon admission to practice law in this state). In addition, 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 to a client); Rule 1.8 (lawyer shall not enter into a business transaction with a client or knowingly acquire a pecuniary interest adverse to a client unless transactions and terms are reasonable to the client and fully disclosed and submitted to client in writing and client consents in writing); Rule 4.1 (in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person); Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

We accept the second agreement and disbar respondent from the practice of law.

CONCLUSION

We accept the two Agreements for Discipline by Consent. We impose a definite suspension of two years and disbar respondent from the practice of law. The sanctions shall run concurrently. 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.

DEFINITELY SUSPENDED AND DISBARRED.

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

The Supreme Court of South Carolina

In re: Amendments to Rule 411(c)(1), SCACR.

O R D E R

The Lawyers' Fund for Client Protection Committee of the South Carolina Bar has proposed amending Rule 411(c)(1), SCACR, to raise the per claim maximum payout from $20,000 to $40,000 and to raise the per lawyer maximum payout from $100,000 to $200,000. The proposed amendments are approved.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 411(c)(1), SCACR, to reflect the changes set forth above. These amendments shall be effective immediately. A copy of the amended rule is attached.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

November 4, 2004

AMENDMENTS TO RULE 411(c)(1)
LAWYERS' FUND FOR CLIENT PROTECTION

(c) Duties of Lawyers' Fund for Client Protection Committee.

(1) The Committee shall be authorized, commencing on January 1, 1980, to consider applications for reimbursement of losses which arise after the effective date of this Rule and which are caused by the dishonest conduct of a member of the South Carolina Bar who was acting either as a lawyer or in a fiduciary capacity customary to the practice of law in the matter in which the loss arose, but only to the extent to which these losses are not bonded or to the extent these losses are not otherwise covered; and provided the Bar member has died, has been adjudicated a bankrupt, has been adjudicated mentally incompetent, has been disbarred or suspended from the practice of law, has voluntarily resigned from the practice of law, has left the jurisdiction of this state or cannot be found, or has become a judgment debtor of the applicant based upon his dishonest conduct as a lawyer; or provided that the application has been certified to the Committee by the Commission on Lawyer Conduct of the Supreme Court or the Board of Governors of the South Carolina Bar as an appropriate case for consideration because the loss was caused by the dishonest conduct of a member of the South Carolina Bar. For the purposes of this rule, dishonest conduct of a member of the South Carolina Bar shall include not only dishonest conduct committed by the member, but also dishonest conduct of any person who is not a member of the Bar employed by a member or the firm of a member to assist the member or firm in providing legal services. Reimbursement for losses caused by dishonest conduct of an employee of a member or firm shall only be allowed if the acts giving rise to the loss occurred during the course of that employment.

The Committee shall investigate applications which are brought to its attention. The Committee shall be authorized and empowered to reject or allow applications in whole or in part to

the extent that funds are available to it. The Committee shall have complete discretion in determining the order, extent, and manner of payments of applications. The payment to any applicant shall not exceed the sum of $40,000 per claim; provided, however, that the aggregate total of claims paid per attorney shall not exceed $200,000. In operating the Lawyers' Fund for Client Protection pursuant to this Rule, the South Carolina Bar does not create or acknowledge any legal responsibility for the acts of individual lawyers in the practice of law. All reimbursements of losses from the Lawyers' Fund for Client Protection shall be a matter of grace in the sole discretion of the Committee and not as a matter of right. No client or member of the public shall have any right in the Lawyers' Fund for Client Protection as a third party beneficiary or otherwise. No attorney shall be compensated for representing an applicant except as authorized by the Committee.

In order for an application to be considered by the Committee, the application must be received by the South Carolina Bar within three (3) years of the date the applicant discovered or reasonably ought to have discovered the dishonest conduct. No application may be considered after the expiration of six years from the date of the dishonest conduct.

The Committee is further authorized to disburse funds as ordered by the Supreme Court pursuant to Rule 31(f) contained in Rule 413, SCACR. Unless otherwise provided by the order of the Supreme Court, the Committee shall be entitled to reimbursement from the suspended, disbarred, disappeared, or deceased attorney or his estate.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Glasscock Company, Inc., Waste Industries, Inc. and Wilson MacEwen, Appellants,

v.

Sumter County, Frank Williams, Jr., Naomi Sanders, Carol Burr, Charles Edens, Louis Fleming, James Campbell, Rudy Singleton (members of the County Council) and Waste Management, Inc., Respondents.

Appeal From Sumter County
G. Wells Dickson, Jr., Special Referee

Opinion No. 3887
Heard October 12, 2004 – Filed November 1, 2004

AFFIRMED

M. M. Weinberg, Jr., of Sumter, for Appellants.

Harold W. Jacobs, of Charleston, Johnathan Werber Bryan, of Sumter and W. Thomas Lavender, Jr., of Columbia, for Respondents.

KITTREDGE, J.: This case concerns two contracts for waste disposal services Sumter County entered into with Waste Management, Inc., and whether the award of those contracts complied with local and state laws governing the competitive procurement of public services. The special referee concluded the County's award of these contracts complied with all applicable procurement laws. We agree and affirm.

FACTS

In 1998, Sumter County Council decided to close the Sumter County landfill and contract with a private firm to have the County's solid waste transported and disposed of in another landfill in neighboring Richland County. To this end, the County Council issued requests for proposals seeking sealed bids from private firms for two service contracts. One contract covered equipping and operating "convenience centers" located throughout the County where residents could dispose of their household garbage (the "collection contract"). The other contract provided for the transportation of municipal solid waste to a Richland County landfill (the "transportation contract").

Chambers Waste Systems of South Carolina was the successful bidder for both contracts. The collection contract entered into with Chambers was for a period of three years with two one-year options, while the transportation contract was for an initial five-year term with two five-year renewal options. However, shortly after entering into these contracts with the County, Chambers Waste Systems was acquired by Waste Management.

For the next three years, the County and Waste Management continued to operate under the original contracts. By 2001, Waste Management's business in the Midlands had grown substantially. To more effectively service their customers, Waste Management sought to

construct or acquire a regional waste transfer station in which solid waste from within a multi-county area could be collected and then transported to its Richland County landfill. In furtherance of this plan, a representative of Waste Management presented a written proposal to Sumter County for the purchase of the Sumter County Transfer Station for $1,300,000. The proposal also called for the extension of the collection and transportation contracts through the year 2021.

The Waste Management proposal was presented in February 2001 to County Council in executive session. Following this closed-door meeting, a council member gave a copy of the Waste Management proposal to James T. Glasscock, Jr., president of Glasscock Company, Inc., a company which is also in the waste disposal business. Mr. Glasscock thereafter began contacting council members, insisting the proposed contract extension be put out for competitive bid. However, because Waste Management's proposal, and particularly its terms, had been improperly disclosed, County Council determined the competitive sealed bidding process urged by Glasscock would be tainted and therefore was no longer feasible.

Council took up the matter of the Waste Management proposal at its next scheduled meeting on April 10, 2001. Several alternatives to the proposal were considered. After some debate, Council passed resolutions to amend the collection and transportation contracts by, among other things, extending their terms as proposed by Waste Management and agreeing to "sell" its solid waste transfer station to Waste Management.[1]

At its next scheduled meeting on April 24, 2001, Council gave first reading approval to two proposed ordinances—specifically, Ordinances

[1] Although termed a "sale," the then proposed conveyance of the transfer station provided that title to the property would revert to the County in the event Waste Management "ceases to operate the transfer station at the termination of the either of two existing contracts, or any extensions thereof, either through the passage of time or default by [Waste Management] in its performance of the two existing contracts . . . ." (footnote omitted).

01-436 and 01-437—authorizing the contract extensions that had been approved by resolution on April 10, 2001. Following second and third readings at the next two scheduled Council meetings and a public hearing, the ordinances approving the contract amendments were formally adopted on May 22, 2001. The addenda to the Waste Management contracts were subsequently executed. These contract extensions were an integral part of the agreement to convey the transfer station to Waste Management. Sumter County's sale of the transfer station is not challenged on appeal. Glasscock seeks only the rescission of the contract extensions authorized by Ordinances 01-436 and 01-437.

SCOPE OF REVIEW

An action for rescission of a contract is equitable in nature. Brown v. Greenwood School Dist. 50 Bd. of Trustees, 344 S.C. 522, 525, 544 S.E.2d 642, 643 (Ct. App. 2001). While this court may review the record and make findings based on its own view of the preponderance of the evidence as provided in the landmark case of Townes Associates v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), the material facts in this case are undisputed. The issues before us on appeal concern only the legal question of whether the County Council's actions complied with local and state procurement laws.

LAW/ANALYSIS

I. Compliance with Sumter County Procurement Ordinance

Glasscock first argues the referee erred in finding the County Council complied with the Sumter County Procurement Ordinance[2] provisions governing the purchase of county service contracts. We disagree.

Section 2-221 of the Procurement Ordinance provides, in pertinent part, that "competitive sealed bidding shall be used for all purchases . . . [w]here the purchase price exceeds twenty-five thousand dollars

[2] Sumter County Code §§ 2-171 to -268.

($25,000.00)." § 2-221(1). Specifically exempted, however, from the competitive procurement requirements are "[c]ontracts that are specifically approved by a county ordinance." § 2-186(A)(1).

As noted above, Ordinances 01-436 and 01-437 approving the amendment of the Waste Management contracts were duly passed by County Council in May 2001. Glasscock claims, however, these ordinances were ineffective to exempt the contract amendments from competitive bidding under section 2-186. He argues the contracts were effectively executed and binding upon the County several weeks before the ordinances were passed when County Council passed its initial resolution approving the contract amendments. Therefore, according to Glasscock, the contract amendments were void because they were not entered into in strict compliance with the Procurement Ordinance. Glasscock argues the subsequent passage of Ordinances 01-436 and 01-437 was simply an attempted remedial measure to imbue illegal contracts with the appearance of compliance with the Procurement Ordinance.

In support of his argument that it was the resolution and not the ordinances that effectively bound the County, Glasscock places heavy emphasis on the trial testimony of County Council member Rudy Singleton. Singleton testified that, based on his informal discussion with several other fellow council members, he thought the Waste Management contract amendments were a "done deal" when the resolution was passed on April 10, 2001.

We find this argument is without merit. Glasscock misapprehends the generally accepted function of resolutions as distinguished from ordinances in the conduct of local government legislation. Resolutions do not normally have mandatory or binding effect. Rather, the passage of resolutions is generally considered to be merely directory. See Central Realty Corp. v. Allison, 218 S.C. 435, 446, 63 S.E.2d 153, 158 (1951) (holding that "it seems to be well settled that a resolution is not a law, and in substance there is no difference between a resolution, order, and motion"); see also 56 Am Jur. 2d Municipal Corporations § 296 (2000) (commenting that "an ordinance is distinctively a legislative act, while a resolution may simply be an expression of opinion or mind concerning

some particular item of business coming within the legislative body's official cognizance . . ."); 62 C.J.S. Municipal Corporations § 247 (Supp. 2004) (commenting that "a resolution ordinarily is an act of a special or temporary character, not prescribing a permanent rule of government, but is merely declaratory of the will or opinion of a municipal corporation in a given matter . . .").

It is clear here that the adoption of the resolution was simply a first step in the process of County Council's formal, public consideration of the contract amendments. As noted above, following the adoption of the resolution, the contract amendments proposed by the resolution were given formal first, second, and third readings at public County Council sessions followed by a public hearing on the matter noticed several weeks in advance. Indeed, in order to carry out this public process, the Council and Waste Management needed to reach at least a tentative understanding regarding the details of any contract amendments that would ultimately be agreed upon. Such an understanding was needed prior to the period for public comment and hearings in order for specific ordinances to begin their journey through the deliberative process.

Accordingly, we concur with the referee's ruling that County Council complied with the applicable provisions of the Sumter County Procurement Ordinance in adopting the contract amendments through the enactment of Ordinances 01-436 and 01-437.

II. Compliance with State Statutory Procurement Law

Alternatively, Glasscock contends that, even if County Council's adoption of the contract amendments complied with the requirements of the Sumter County Procurement Ordinance, that Procurement Ordinance is contrary to and preempted by applicable state procurement laws.

Section 11-35-50 of the South Carolina Consolidated Procurement Code provides that "[a]ll political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement no later than July 1, 1983." S.C. Code Ann. § 11-35-50 (Supp. 2003). Glasscock contends the Sumter County

Procurement Ordinance's exemption from competitive bid requirements for contracts that are specifically approved by county ordinance violates the mandate of section 11-35-50 and is therefore invalid. As such, Glasscock argues, County Council's adoption of the contract amendments by enacting Ordinances 01-436 and 01-437 violated the state procurement code. We disagree.

First, we note that section 11-35-50 does not impose a specific requirement that all public procurement in our state be carried out by way of a single, narrowly defined procedure. While its mandate that all government bodies adopt some form of competitive procurement procedures is unambiguous, the statute's broad directive that the processes chosen "embody[] sound principles of appropriately competitive procurement" clearly was intended to afford local governments needed flexibility to determine what is "appropriately competitive" in light of the public business they must transact.

The state government, for example—operating under the same general approach prescribed by section 11-35-50—provides certain exceptions to the competitive sealed bid rule for state purchases in its procurement code. See S.C. Code Ann. § 11-35-710 (Supp. 2003). We find no logic or consistency in recognizing some flexibility at the state level while handcuffing local governments with none.

That local governments should be afforded a reasonable degree of latitude in devising their own individual procurement ordinances and procedures is entirely consistent with our state's now firmly rooted constitutional principle of "home rule." By the ratification of Article VIII of our state constitution in 1973, substantial responsibility for city and county affairs devolved from the General Assembly to the individual local governments. "[I]mplicit in Article VIII is the realization that different local governments have different problems that require different solutions." Hospitality Ass'n of South Carolina v. County of Charleston, 320 S.C. 219, 230, 464 S.E.2d 113, 120 (1995); see also Knight v. Salisbury, 262 S.C. 565, 571, 206 S.E.2d 875, 877 (1974) (opining that the constitutional amendment providing for home rule was "prompted by the feeling that Columbia should not be the seat of county government,

and that the General Assembly should devote its full attention to problems at the state level"). In addition, Article VIII mandates that "all laws concerning local government shall be liberally construed in their favor." S.C. Const. art. VIII, § 17. Coordinate with the principle of home rule, South Carolina Code section 4-9-25 empowers counties to enact regulations, ordinances, and other laws provided they are consistent with the general laws of our state. S.C. Code Ann. § 4-9-25 (Supp. 2003).

Glasscock urges this Court to construe section 11-35-50 as mandating sealed competitive bids in virtually every instance of public procurement. This approach would effectively strip our state's local governments of any flexibility in determining the competitive procurement policies and procedures appropriate for them to adopt. Indeed, such a reading of section 11-35-50 runs wholly contrary to the home rule authority vested in local government by our constitution. We reject Glasscock's argument.

In reaching this conclusion, we do not intend to diminish the vital role sealed bidding procurement procedures play in ensuring open, accountable government. To be sure, we recognize the general applicability of competitive sealed bids under the Sumter County Procurement Ordinance. In the present case, however, we address only a narrow exception to that general rule. Whether a contract should be approved by ordinance and therefore exempt from the sealed bid requirement is a function of County Council's discretion, the exercise of which they are accountable for as publicly elected officials. "In reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives. Such decisions 'should not be upset on appeal unless [they are] arbitrary, unreasonable, in obvious abuse of discretion, or in excess of lawfully delegated power.'" Sloan v. Greenville County, 356 S.C. 531, 555-56, 590 S.E.2d 338, 351 (Ct. App. 2003) (quoting Smith v. Georgetown County Council, 292 S.C. 235, 238-39, 355 S.E.2d 864, 866 (Ct.App.1987)).

CONCLUSION

For the foregoing reasons we conclude the contract amendments at issue here were validly executed in accordance with the procedures prescribed by the Sumter County Procurement Ordinance. Furthermore, we hold that the exemption from sealed competitive bidding provided for under the Sumter County Procurement Ordinance is valid under our state's mandate that all government bodies employ appropriately competitive procurement procedures. The order of the special referee is therefore

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Allison Campbell a/k/a Allison McSwain, Appellant.

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 3888
Submitted October 1, 2004 – Filed November 8, 2004

AFFIRMED

David F. Stoddard, of Anderson, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General David A. Spencer, all of Columbia; and Solicitor Druanne Dykes White, of Anderson, for Respondent.

WILLIAMS, J.: Allison Campbell appeals after pleading guilty to one count of felony driving under the influence ("D.U.I.") resulting in death. Following her guilty plea, the trial court sentenced Campbell

to six years in the State Department of Corrections, imposed a fine of $10,000, and ordered payment of restitution in the amount of $8,571.50 for the victim's funeral expenses. On appeal, Campbell argues the indictment was insufficient to confer subject matter jurisdiction. We affirm.

FACTS

On April 10, 2002, Campbell and the victim attended a party for Campbell's nephew. After leaving the party they went to a local bar and played pool. Upon leaving the bar, with Campbell driving and the victim riding in the passenger seat, the couple began to drive down Highway 59 towards Seneca, South Carolina.

After encountering a curve, Campbell ran approximately 200 feet off the road and failed to make any attempt to steer the car back onto the highway. The passenger side of the car collided with the end of a guardrail, the collision being violent enough to tear away a good portion of the passenger side of the car including the passenger door itself. The victim was ejected from the vehicle, his head struck the guardrail, and he died at the scene.

Campbell testified that she did not remember the accident, but only waking up and realizing the victim was no longer in the car. When EMS arrived at the scene, Campbell informed them she thought she had hit a deer. She also kept talking to the victim although he was not there. Both the EMS and Law Enforcement personnel on the scene indicated Campbell was under the influence and that she smelled strongly of alcohol. Campbell was taken to Oconee Hospital where she refused a legal blood alcohol test. The doctor at the hospital, however, opined that she was under the influence.

On June 18, 2002, an Oconee County grand jury indicted Campbell for violation of section 56-5-2945(A)(2) of the South Carolina Code for felony D.U.I. that resulted in death. On July 23, 2003, Campbell moved to have counsel relieved, but the request was withdrawn when the court informed her she would have to proceed pro

se should the motion be granted. On July 23, 2003, the State called the case for trial at which time Campbell pled guilty to the charge.

LAW/ANALYSIS

On appeal, Campbell argues the indictment was insufficient to confer subject matter jurisdiction on the court. We disagree.

In a criminal case, the circuit court has subject matter jurisdiction to convict a defendant only if: "(1) there has been an indictment which sufficiently states the offense; (2) there has been a waiver of the indictment; or (3) the charge is a lesser-included charge of the crime charged in the indictment." Cutner v. State, 354 S.C. 151, 155, 580 S.E.2d 120, 122 (2003). Furthermore, "[t]he lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court." State v. Guthrie, 352 S.C. 103, 107, 572 S.E.2d 309, 311 (Ct. App. 2002) (citing State v. Brown, 351 S.C. 522, 570 S.E.2d 559 (2002)).

Section 56-5-2945 of the South Carolina Code provides in pertinent part the following:

> (A) A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a vehicle and when driving does any act forbidden by law or neglects any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself, is guilty of a felony and upon conviction must be punished:
>
> > (2) by a mandatory fine of not less than ten thousand one hundred dollars nor more than twenty-five thousand one hundred dollars and mandatory imprisonment for not less than one year nor more than twenty-five years when death results.

S.C. Code Ann. § 56-5-2945(A) & (A)(2) (Supp. 2003).

The indictment alleged the following:

> That **Allison L. Campbell** did in Oconee County on or about **April 10, 2002**, drive a motor vehicle while under the influence of alcohol, drugs, or a combination of both, and did an act forbidden by law and/or neglected a duty imposed by law, to wit: **a Motor Vehicle Accident caused by the Defendant's driving while under the influence of alcohol**, which act and/or neglect proximately cuased [sic] the death of **Kevin Tremain Shook** in violation of §56-5-2945(A)(2)….

(emphasis in original).

Campbell contends the indictment is fatally flawed because it "fails to allege an act forbidden by law or neglect of a duty imposed by law." Specifically, she argues that although the indictment includes the statutory language "did an act forbidden by law and/or neglected a duty imposed by law," it fails to describe the specific act and/or neglected duty on which the State relied to support the felony D.U.I. charge.

The general rule regarding the adequacy of an indictment is that "[a]n indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon." State v. Adams, 354 S.C. 361, 364, 580 S.E.2d 785, 791 (Ct. App. 2003). Furthermore, "[t]he true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995) (citing State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987)).

An indictment is sufficient when it uses substantially the same language contained in the statute prohibiting the crime charged, or when it is described in such a way that the nature of the charge is plainly understood. State v. Reddick, 348 S.C. 631, 635, 560 S.E.2d 441, 443 (Ct. App. 2002). When examining the sufficiency of an indictment, "this court should 'look at the issue with a practical eye in view of the surrounding circumstances.'" State v. Barnett, 358 S.C. 199, 202, 594 S.E.2d 534, 535 (Ct. App. 2004) (citing State v. Gunn, 313 S.C. 124, 130, 437 S.E.2d 75, 78 (1993)).

Even a cursory reading of the indictment in the current case shows it contains virtually identical language to that contained in the statute defining the offense. In addition, because Campbell pled guilty, it is clear she was aware of the nature of the charge against her. A thorough review of the record discloses no indications of uncertainty in regard to the crime with which she was charged. Accordingly, as the indictment adequately alleged the elements of the offense, we find the indictment was sufficient to confer subject matter jurisdiction on the circuit court.

Because we find the indictment sufficient, we need not address Campbell's remaining argument concerning double jeopardy. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling appellate court need not review remaining issues when disposition of prior issues are dispositive); Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in Record on Appeal").

AFFIRMED.

GOOLSBY and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Daniel P. Rimer, Appellant,

v.

Kimberly V. Rimer, Respondent.

Appeal From Florence County
Wylie H. Caldwell, Jr., Family Court Judge

Opinion No. 3889
Heard October 12, 2004 – Filed November 8, 2004

AFFIRMED

Robert E. Lee, Charles L. McLain, III, and Amy Anderson Wise, all of Florence, for Appellant.

Evander G. Jeffords, of Florence, and John S. Nichols, of Columbia, for Respondent.

KITTREDGE, J.: In this appeal from the family court, we are asked to determine whether the alimony award was excessive. We find the family court did not abuse its discretion in its award of alimony and therefore affirm.

FACTS

Daniel P. Rimer (Husband) and Kimberly V. Rimer (Wife) were married in 1977 and separated in 2002. Citing irreconcilable differences, Husband brought the present action for separate maintenance and support. The family court issued an order distributing the marital property, setting the terms of custody and support for the Rimers' minor child,[1] and awarding alimony to Wife. The only issue raised in this appeal is whether the alimony award was excessive in light of the parties' respective incomes and expenses.

The relevant facts concerning the Rimers' financial circumstances are as follows. Husband has been employed by the same company, CSX Railroad, throughout the marriage. With only a high school education, Husband worked his way up through the ranks at the railroad to a position of substantial responsibility as a mechanical superintendent. This job has required that Husband work long hours and be available to travel to the railroad's various East Coast shop locations. At the time of the final hearing, Husband's reported gross income was approximately $7,000 per month.[2]

During the marriage, Wife was primarily occupied as a stay-at-home mother, raising the children and tending to the household affairs. Like Husband, she too did not pursue education or training beyond high school. Her work experience outside the home has been limited. Early in the marriage she was briefly employed as a bookkeeper and restaurant hostess. More recently, she has worked part time as a substitute teacher at a local private school, earning approximately $266 per month. The family court concluded, however, that Wife was

[1] The parties have two children of the marriage, one of whom had already reached the age of eighteen at the time this action was initiated.

[2] This income figure does not include substantial bonuses which Husband received in some years, ranging from $12,000 to $16,000. The family court did not consider the potential for bonuses in the alimony award.

underemployed, and found she was "capable of at least minimum wage employment," which, at the time, equaled approximately $900 income per month.

The family court granted Wife possession of the marital home. Wife's exclusive use and enjoyment of the house, however, was only to continue as long as the Rimers' minor son continued to live at home while finishing high school. Once their son left for college (anticipated in fall of 2003), the court order required that the house be listed for sale at its appraised value and sold, with the equity to be split sixty percent to Husband and forty percent to Wife.[3] In the interim, however, Wife assumed responsibility for paying all of the household bills, including the monthly mortgage payment.

Bearing full financial responsibility for the home, Wife faced substantial monthly expenses. The monthly mortgage payment alone was $1,046. This payment and her other household and living expenses totaled $3,496 per month according to the estimates accepted by the family court. Wife clearly could not make ends meet on her own—even assuming, as the family court did, she was capable of finding full-time, minimum wage employment.

The family court awarded Wife alimony of $2,600 per month—the amount necessary to cover the shortfall between the minimum wage income of $900 per month and Wife's monthly expenses of nearly $3,500. From this alimony award Husband now appeals.

STANDARD OF REVIEW

The amount of alimony is within the sound discretion of the family court judge and should not be disturbed on appeal unless an abuse of discretion is shown. Smith v. Smith, 264 S.C. 624, 628, 216 S.E.2d 541, 543 (1975). An abuse of discretion occurs either when a court is controlled by an error of law, or where the order is based upon

[3] This court was informed at oral argument that the former marital residence was sold in 2003.

findings of fact lacking evidentiary support. Townsend v. Townsend, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003).

LAW/ANALYSIS

Husband claims the family court abused its discretion in setting alimony at $2,600 per month, arguing the amount is excessive in light of Wife's income potential and his ability to pay. While a close question is presented, we conclude the award is within the broad discretion accorded the family court.

The purpose of an alimony award is to serve as a substitute for the support which is normally incident to the marital relationship, thereby placing the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage. Miles v. Miles, 355 S.C. 511, 516-17, 586 S.E.2d 136, 139 (Ct. App. 2003). Alimony should not dissuade a spouse, to the extent possible, from becoming self-supporting. McElveen v. McElveen, 332 S.C. 583, 599, 506 S.E.2d 1, 9 (Ct. App. 1998). The family court has broad discretion in determining the amount of permanent alimony, and there is no single, fixed standard to use in making that determination. See, e.g., Graham v. Graham, 253 S.C. 486, 491, 171 S.E.2d 704, 707 (1970) (opining that "[t]he amount of alimony . . . cannot be determined by any mathematical formula but is a matter resting within the sound discretion of the trial judge . . . "). All relevant factors must be considered and weighed by the court. South Carolina Code section 20-3-130(C) (Supp. 2003) lists some of the factors a family court must consider when deciding whether and how much alimony to award, including, but not limited to: the duration of the marriage, the educational background of the parties, the employment history and earning potential of the parties, the standard of living established during the marriage, and the current and reasonably anticipated expenses of the parties.

In the present case, the nub of Husband's argument is that the family court erred in its assessment of some of the critically relevant factors concerning the parties' current and prospective financial

situation. Specifically, Husband asserts: (1) the court should have found Wife had greater earning potential than merely the minimum wage; (2) the court should have judged his ability to pay alimony based on his net monthly income rather than his gross income; and (3) the court should not have included among Wife's expenses the monthly mortgage payment on the former marital home because of the home's imminent, court-ordered sale. We address each of these points separately below.

1. Wife's Earning Potential

Husband claims the family court arrived at an unrealistically low estimate of Wife's prospective earning capacity. We find no abuse of discretion.

As described above, Wife's training and work experience over the course of their twenty-five-year marriage were limited. In recent years, she has only worked "once or twice a month" as a substitute teacher. Her last full-time employment—as a bookkeeper performing "general office duties" for a hotel—was approximately twenty years ago. Husband maintains this work experience should have translated, as of the date of the final hearing, into a higher-paying managerial or professional level job today. We do not share his confidence. The paper-driven back office of decades past has been largely replaced by computer-based management tools. If Wife seriously desired to reenter that line of work, she would almost certainly need training in order to become competent in today's technology-intensive office environment. We do, however, recognize that Wife has considerable potential in the broader workforce. In this regard, we agree with the family court judge who recognized that Wife "is an attractive, bright woman and although her education and training are limited, she is capable, at the age of 47, of getting a reasonable job or obtaining training or education to qualify her for even better employment."[4]

[4] It was disclosed at oral argument that Wife obtained employment as a flight attendant during the pendency of this appeal. The issue of Wife's current earnings and earning capacity is not before us.

For these reasons, we cannot fault the family court for taking a less sanguine view of Wife's employment prospects. We find the court acted within its discretion by imputing only the minimum wage to Wife.

2. Husband's Income

Husband argues the family court should have considered only his net monthly income of $4,700 rather than his gross income of $7,000. We find no error. Included among the factors listed in section 20-3-130(C) that the family court "must consider" when determining the appropriate amount of alimony are "the current and reasonably anticipated earnings of both spouses." S.C. Code Ann. § 20-3-130(C)(6). The statute makes no distinction between net and gross income, and no such distinction has been imposed by our courts. While the family court judge referenced Husband's gross income, a careful review of the record reveals that proper consideration was given to his net income. The suggestion that the family court simply relied on Husband's gross income without regard to his net pay finds no traction in this record.[5]

Parties petitioning for alimony awards are, of course, free to argue that a spouse's earnings be calculated in any manner they think justified. We leave it largely to the family court judge's discretion, however, to determine what is appropriate in light of the circumstances of each individual case. Formulaic principles and bright-line rules will only hinder the ability of family court judges to reach an equitable result in this individualized, fact-intensive area of law.[6]

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[5] The alimony award here is not the result of a gross versus net income approach, but is primarily the result of two factors: (1) the award of exclusive possession of the former marital residence pending the parties' youngest child's completion of high school; and (2) the family court's assessment of Wife's earnings and earning capacity.

[6] Husband had been voluntarily paying pendente lite support of $2,700 monthly to Wife. Wife urges this court to rely on this fact in

3. Sale of the Former Marital Home

Husband next argues the family court improperly determined Wife's expenses. He claims the court should not have included the $1,046 monthly mortgage payment for the former marital home among Wife's expenses, arguing that obligation would be short-lived in light of the family court order that the home be sold in the fall of 2003 when their youngest son left for college. While we agree the substantial mortgage payment was designed to be short-lived, the able family court judge properly declined Husband's invitation to speculate as to Wife's reasonable and necessary expenses following sale of the former marital residence.

While the sale of the former marital residence was certainly contemplated in the final decree, the ultimate effect of this change of circumstances could not have been ascertained at the time of the initial award. Accordingly, it would have been inappropriate for the family court to follow Husband's suggestion and speculate as to the effect of this event on Wife's living situation and attendant expenses. We similarly decline to modify the alimony award based on purported

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affirming the award of permanent alimony of $2,600 per month. To do so, however, would be ill-advised. Family court litigants may well confront challenges at the onset of litigation which are not present if the case proceeds to trial. For example, an offer of temporary support may be motivated by a desire to reconcile the marriage. Moreover, the obligation to pay pendente lite support only continues during the pendency of the litigation prior to a final determination of the matter on its merits. To assign weight to the amount of support awarded pendente lite or view the award as having any precedential value at the merits hearing or on appeal would discourage parties from amicably agreeing upon temporary support for fear the slightest concession would prejudice their position at the final hearing. Temporary hearings are not de facto final hearings, and we adhere to the principle that temporary orders must be without prejudice to the rights of the parties at the final hearing.

changed circumstances associated with the sale of the former marital residence, for we find that such request must in the first instance be presented to the family court.[7]

This case illustrates well the competing tensions at stake when a family court judge initially rules on a matter which is modifiable upon a showing of a material change in circumstances. Recognizing that the desired goal of finality is elusive in this area, our family court judges strive to recognize anticipated, foreseeable changes. However, when the effect of anticipated changes is not readily ascertainable, it is inappropriate for the family court to speculate as to the effect of such anticipated changes. In such circumstances, as here, the family court should consider the effect of changed circumstances in the context of a modification action.

CONCLUSION

For these reasons, we find the family court did not abuse its discretion in the alimony award to Wife. The family court order is therefore

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

[7] Indeed, our law allows a supporting spouse the right to petition the family court for a reduction in alimony based upon a showing of a material change in circumstances. S.C. Code Ann. § 20-3-170 (1985). Our ruling today does not in any way foreclose Husband's right to pursue, as provided by law, a modification of the alimony award.