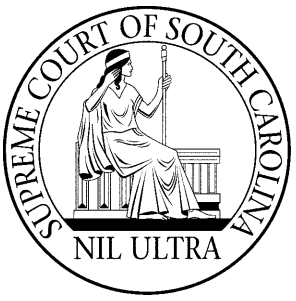

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 44
November 16, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth E. Johns, Jr., Respondent.

Appellate Case No. 2016-001996

Opinion No. 27677
Submitted October 26, 2016 – Filed November 16, 2016

DEFINITE SUSPENSION

Joseph P. Turner, Jr., Senior Assistant Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21of the Rules for Judicial Disciplinary Enforcement contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the issuance of a public reprimand or a suspension of up to six (6) months. Respondent requests that any suspension be imposed retroactively to April 12, 2016, the date of his interim suspension. We accept the Agreement and suspend respondent from office for six (6) months, retroactive to the date of respondent's interim suspension. The facts, as set forth in the Agreement, are as follows.

Facts

An estate was opened in Oconee County for the estate of Z.H. Z.H.'s parents had filed a wrongful death suit on behalf of the estate against the Seneca Police Department. The case was settled with the family for the sum of $2,150,000. Due to the public nature of the case, the settlement received extensive press coverage.

Despite the matter being before the probate court for administration of the estate, respondent expressed his opinion about the settlement on Facebook posting: "In the end it's all about the money. Always. Unfortunately, I see it EVERYDAY." Respondent later added: "Once ck is in hand, they'll disappear."

A review of respondent's Facebook account revealed that he has made extensive political posts, including ones in which he appears to endorse the presidential candidacy of one candidate. A review of respondent's Facebook account further revealed a post in which he engaged in fundraising for a local church. Respondent's Facebook account identifies himself as the probate court judge for Oconee County and the account, along with all of respondent's posts, were accessible to all members of Facebook.

Respondent greatly regrets his conduct with regard to the estate of Z.H. matter and is sorry for any distress that it may have caused Z.H.'s family. Respondent recognizes that, while he did not mention the estate of Z.H. by name on Facebook, it was inappropriate for him to make the statements as it would be clear in the community to what he was referring. Respondent also recognizes that it was inappropriate for him to make political posts and to post information about a fundraiser for a local church.

Respondent has now removed reference to himself as a judge on his Facebook page. He submits that he is deeply embarrassed about the matter and seeks to assure the Court that, in the future, he will not make reference to anything involving his court and will refrain from making political posts or posting fundraising information on Facebook or any other social media. Respondent is extremely proud of the Oconee County Probate Court and wants to assure the Supreme Court that he will do nothing further that could damage the reputation of the probate court.

Law

Respondent admits that by his conduct he has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity and independence of judiciary); Section 1A of Canon 1 (judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that integrity and independence of judiciary will be preserved); Canon 2 (judge shall avoid impropriety and appearance of impropriety in all judge's activities); Section 2A of Canon 2 (judge shall respect and comply with the law and shall act at all times in manner that promotes public confidence in integrity and impartiality of judiciary); Section A(1) of Canon 4 (judge shall conduct all of judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as judge); Section A(2) of Canon 4 (judge shall conduct all of judge's extra-judicial activities so that they do not demean the judicial office); Section C(3)(b)(i) of Canon 4 (judge shall not personally participate in the solicitation of funds or other fundraising activities); and Section A(1)(b) of Canon 5 (judge shall not publicly endorse candidate for election to public office).

Respondent also admits he has violated the following Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rules 7(a)(1) (it shall be ground for discipline for judge to violate Code of Judicial Conduct) and Rule 7(a)(9) (it shall be ground for sanction for judge to violate Judge's Oath of Office contained in Rule 502.1, SCACR).

Conclusion

We find respondent's misconduct warrants a six (6) month suspension from judicial duties, retroactive to April 12, 2016, the date of his interim suspension. We therefore accept the Agreement for Discipline by Consent and suspend respondent from office for six (6) months.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David L. Savage, Respondent.

Appellate Case No. 2016-001529

Opinion No. 27678
Submitted October 31, 2016 – Filed November 16, 2016

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Gerald Malloy, Malloy Law Firm, of Hartsville, and William Angus McKinnon, McGowan Hood & Felder, LLC, of Rock Hill, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of confidential admonition or public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts and Law

Respondent and client met on June 20, 2010, regarding a criminal charge of rape and a potential civil claim against client's former paramour. Respondent was not

retained at that time. On August 6, 2010, client filed a report of her paramour's actions with the police department. On August 23, 2011, client's paramour pled nolo contendere to the charge of Assault and Battery of a High and Aggravated Nature and was sentenced to thirty (30) days of weekend incarceration, 500 hours of community service, and three (3) years' probation. Client subsequently retained respondent, who filed a civil suit against client's paramour on December 21, 2011. The case proceeded with discovery and negotiations.

Respondent began a sexual relationship with client in mid-September 2013. Respondent ended the sexual relationship in January 2014. According to respondent, the sexual relationship did not interfere with his handling of the civil case but was an act of very poor judgment. Respondent discovered the paramour had a number of judgments against him and very few unencumbered assets. Respondent notified client sometime after March 2014 that a substantial settlement of the civil case was not likely, but he continued to work on the case, setting a deposition for July 7, 2014. On July 2, 2014, another attorney told respondent on behalf of client that respondent's services were terminated. The attorney also told respondent to notify his malpractice carrier of a potential lawsuit alleging the sexual relationship had affected respondent's handling of the civil case. A courier for client retrieved client's file from respondent on July 30, 2014. Respondent reported these events to Disciplinary Counsel, and a few days later, another attorney filed a complaint with Disciplinary Counsel.

Respondent admits his conduct violated Rule 1.8(m) of the Rules of Professional Conduct, Rule 407, SCACR (a lawyer shall not have sexual relations with a client when the client is in a vulnerable condition or is otherwise subject to the control or undue influence of the lawyer, when such relations could have a harmful or prejudicial effect upon the interests of the client, or when sexual relations might adversely affect the lawyer's representation of the client). Respondent admits this violation constitutes grounds for discipline under Rule 7(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

Conclusion

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Abigail Scudder Duffy, Respondent.

Appellate Case No. 2016-001742

Opinion No. 27679
Submitted October 31, 2016 – Filed November 16, 2016

PUBLIC REPRIMAND

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

Stephanie Nichole Weissenstein, of McDonnell & Associates, P.A., of Lexington, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a confidential admonition or public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Matter A

Respondent represented clients in a pending family court matter. On February 5, 2016, respondent sent a letter regarding the case to the family court judge (Judge A) but failed to copy opposing counsel. In the letter, respondent notified Judge A that her clients had filed a complaint against the judge with ODC. Consequently,

respondent requested Judge A issue an order of permanent recusal on any case in which her clients might appear as litigants or where respondent would be attorney of record. Respondent further stated there were concerns of serious "home cooking" in the case and requested Judge A issue an order transferring venue.

On February 17, 2016, a hearing in the case was conducted before another family court judge (Judge B). During the hearing, respondent stated: "Unfortunately [Judge A] and I no longer interact with each other. We have been recused from each other." At the time respondent made this statement, Judge A had not issued an order of recusal and no motion for recusal was pending. Upon questioning, respondent admitted she did not know whether Judge A had issued an order of recusal.

On February 22, 2016, Judge A emailed a letter to the attorneys of record in the family court matter. Judge A advised that she had neither recused herself from the case nor from hearing any matters regarding any attorney or law firm involved in the case.

Respondent admits she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1, (a lawyer shall provide competent representation to a client which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation); Rule 3.5(b) (a lawyer shall not communicate ex parte with a judge during a proceeding unless authorized to do so); Rule 8.4(a) (it is professional misconduct to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct to engage in conduct that is prejudicial to the administration of justice). Respondent has also violated Rule 402(k), SCACR (according to the Lawyer's Oath, lawyers will maintain respect and courtesy due to courts of justice and judicial officers, treat opposing parties with integrity and civility in all written communications and will maintain the respect due to courts of justice and judicial officers).

Respondent also admits the facts described constitute grounds for discipline under Rule 7(a) of the RLDE (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Matter B

Respondent represented clients in a domestic action. On January 7, 2016, respondent sent an email to opposing counsel (Complainant) which read in part:

> From what I've seen of your County, I am little impressed with their ability to protect children.
>
> Additionally, I understand that [counsel involved in the case] was having lunch with [counsel for the Department of Social Services (DSS)]. Shall we call impropriety there and have that matter addressed with [counsel for DSS]?
>
> This is a simple issue of a severe burn. By continuing to claim my actions were improper you are additionally accusing the judge of two judicial canon violations. "Your" county is the only county that operates this way. I think this matter needs to rest until either [one family court judge] rules or our judge next week rule (sic).

Respondent copied her client on the email.

On January 28, 2016, respondent sent an email to counsel for DSS, which read, in part:

> The copy I saved was tracked. As if this is a major life crisis, you can always <u>compare</u> the documents electronically. That option is located right in the same place as track and change. I did not turn off the track and change as I included notes for your consideration. If a copy of the order goes out without my objections, I will file an appeal. You are required to note objections to the Court, but I understand that ex parte and improper communications with the court are normal in your county. I have personally seen you ex parte [a family court judge] in this case, and I know [another family court judge] was ex parted prior to the last hearing. This matter has already been brought to the attention of the office of disciplinary counsel, your general counsel (useless as usual), and will be appealed. Your blatant disregard for my clients' due process rights is unbecoming.

(Underline in original.)

Respondent copied numerous parties on the email, including the Complainant and general counsel for DSS.

Respondent admits this conduct violates the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct to engage in conduct that is prejudicial to the administration of justice). Respondent also admits that she has violated Rule 402(k), SCACR (according to the Lawyer's Oath, lawyers will treat opposing parties with integrity and civility in all written communications and will maintain the respect due to courts of justice and judicial officers).

Conclusion

We accept the Agreement for Discipline by Consent and find respondent's misconduct warrants a public reprimand. Accordingly, we publicly reprimand respondent for her misconduct. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of the matters discussed in this opinion.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Joseph Raymond Neal, Jr., Respondent.

Appellate Case No. 2016-001752

Opinion No. 27680
Submitted October 31, 2016 - Filed November 16, 2016

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Julie K. Martino, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa Ballard, of Ballard & Watson, Attorneys at Law, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a confidential admonition, a public reprimand, or a definite suspension up to nine (9) months. Respondent requests that any suspension be made retroactive to the date of his interim suspension. We accept the Agreement and impose a definite suspension of nine (9) months from the practice of law. We deny respondent's request to make his suspension retroactive to the date of respondent's interim suspension.

Facts and Law

During the evening of December 16, 2011, respondent and his wife provided alcohol to an eighteen (18) year old female guest at their home in Augusta, Georgia. The guest had formerly worked for the couple as a babysitter. Marijuana was also used in the home that evening. Respondent and his wife engaged in sexual intercourse with the guest. According to respondent, the marijuana belonged to his wife, and the sexual intercourse was consensual. On December 21, 2011, the guest contacted law enforcement to report the incident.

On March 6, 2012, respondent was indicted on one count of Rape and one count of Furnishing Alcohol to a Person under Twenty–One in violation of the laws of the State of Georgia. Because of the pending indictment, respondent was placed on interim suspension by order of this Court on March 27, 2012. *In the Matter of Neal*, 397 S.C. 496, 727 S.E.2d 27 (2012).

On June 6, 2012, respondent pled guilty to three misdemeanor charges: Disorderly Conduct, Furnishing Alcohol to a Person under Twenty-One, and Possession of Marijuana. The indictment for Rape was dismissed and a *nolle prosequi* was granted by the trial court.

Respondent was sentenced to twelve (12) months of probation on each charge, with all sentences to run consecutively. Respondent was ordered to have no contact with the victim or the victim's family, submit to random drug screens, and perform 100 hours of community service at a wastewater treatment facility. Respondent was also fined $1,000 for each charge.

On June 21, 2012, respondent filed a motion to withdraw his guilty plea on the charge of Possession of Marijuana because he stated he was not informed he would lose his driver's license for 180 days as a result of his plea. The court granted respondent's motion on March 29, 2013, and allowed respondent to substitute a plea of *nolo contendre nunc pro tunc* on the Possession of Marijuana charge. The order providing for the substituted plea modified respondent's sentence to include a requirement that he offer himself as a speaker to each of the five law schools in the State of Georgia regarding "issues which arose in this case."

Respondent complied with all conditions of his probation, and his probation was terminated on June 6, 2015.

Respondent admits his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(b) (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).

Respondent also admits his convictions bring the legal profession into disrepute and thereby constitute grounds for discipline under Rule 7(a)(5), RLDE.

Conclusion

We accept the Agreement for Discipline by Consent and impose a non-retroactive definite suspension for nine months from the practice of law.

Prior to any reinstatement, respondent shall complete the Legal Ethics and Practice Program Ethics School.

Within thirty (30) days of the date of this order, respondent shall pay the costs incurred in the investigation and prosecution of this matter by Disciplinary Counsel and the Commission on Lawyer Conduct.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Amy M. Parker, Respondent.

Appellate Case No. 2016-001485

Opinion No. 27681
Submitted October 31, 2016 - Filed November 16, 2016

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Julie K. Martino, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Jennifer Lynn Mook, of Law Office of Jennifer Mook, LLC, of Aiken, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension for three years or disbarment, with conditions. We accept the Agreement and disbar respondent from the practice of law in this state, with conditions as specified later in this opinion.

Matter A

Client A hired respondent to represent him in a divorce. Respondent did not promptly communicate with Client A. Mediation was ordered at the temporary hearing. Respondent did not promptly communicate with Client A about scheduled mediation and thereafter did not inform Client A when mediation was

rescheduled. This happened several times. Respondent never directly contacted Client A after Client A asked to be contacted by respondent.

Client A fired respondent, requested his file and requested a full refund of the fees he had paid to respondent. Respondent never replied to Client A, did not refund any money, and did not provide Client A with his file.

Matter B

On May 6, 2013, a family court judge filed a complaint with ODC stating that for several months, respondent had failed to appear for scheduled hearings and had appeared late several times. On several occasions, respondent's clients appeared in court without representation because they had been unable to contact respondent. The judge was concerned that because the clients did not appear in some cases, respondent had failed to notify them of the hearings.

The judge reported that Client B, who was respondent's client and former legal assistant, had appeared before the judge on May 6, 2013, for a custody matter. Respondent did not appear for the hearing. Client B reported to the judge that she had begun working for respondent in February of 2013 but had left respondent's employ two weeks prior to the hearing. Client B told Judge she had asked another attorney to take over representation and asked Judge for a continuance. Client B reported respondent was not communicating with her clients, was not coming to her office, and was not appearing for hearings. Client B also reported respondent was still accepting new clients and taking retainers from them.

Another of respondent's former legal assistants, Assistant A, filed an affidavit with ODC in support of the judge's complaint. Assistant A worked for respondent from October 2011 to October 2012. According to Assistant A, in the beginning of her employment, she could not have asked to be employed by a better person. However, respondent's behavior changed after several months. Assistant A stated respondent would not communicate with her and it was difficult to find respondent on a daily basis. Assistant A would try to contact respondent using several different methods, but respondent would not regularly respond to Assistant A. Assistant A said respondent did not appear for court in domestic, DSS, and criminal cases. According to Assistant A, clients, clerks, and judges called her almost daily looking for respondent.

A third former assistant, Assistant B, also filed an affidavit with ODC. Assistant B worked as respondent's assistant between October 2012 and January 2013. During Assistant B's first week, respondent never came to the office. Thereafter, respondent was rarely in the office, and when she was there, it was only for a few minutes. Assistant B related respondent had gotten a parasite under her skin while on vacation and could not get rid of it.

Assistant B would schedule consultations for new clients, then respondent would not attend the consultations. On one occasion, respondent did not show up for a consultation, but the client talked to respondent on the telephone. The client hired respondent and paid her $1,500 to file a petition for an emergency custody hearing. On the date of the hearing, Assistant B took the file to court for respondent. The client was there, but respondent never appeared. Assistant B tried several times to reach respondent but was unsuccessful. Assistant B called another attorney who contacted the judge for a continuance on respondent's behalf. On the rescheduled date, respondent failed to appear again.

Assistant B stated respondent failed to appear for scheduled hearings in several cases. Clients called the office to speak to respondent, but respondent was not there to talk to them.

Matter C

Client C hired respondent in December 2012 to complete her divorce, which had begun in March 2010. Client C signed a retainer agreement and paid respondent $2,500. Respondent did not communicate with Client C despite several attempts by Client C to communicate with respondent. Respondent did not show up for a scheduled appointment. Respondent did not refund any money to Client C when Client C requested a refund.

Matter D

On January 15, 2013, Client D, who was charged with DUI, paid respondent $1,000 of a $3,000 fee to represent him. He paid the remaining $2,000 by credit card the next day. Client D did not hear from respondent for several months. Respondent was placed on interim suspension by order dated June 4, 2013. *In re Parker*, 403 S.C. 622, 743 S.E.2d 807 (2013). Because Client D did not hear from

respondent, he hired another lawyer to represent him. Client D did not receive a refund from respondent.

Matter E

Client E hired respondent to represent him in a divorce and child custody action. He paid the full quoted fee of $3,500 to respondent. Respondent appeared at the temporary hearing on Client E's behalf on December 12, 2012. Client E's wife was awarded custody, temporary child support, and temporary alimony.

Client E called and emailed respondent about a contempt hearing because he believed respondent was representing him in that action as well as the divorce and child custody action. Respondent asserts she was not retained for the contempt action but admits that her fee agreement was not clear as to the scope of her representation. A court date was set to hear the matter of Client E's child support arrearage, but the hearing was not held due to respondent's absence. Client E later discovered respondent's office was closed and her telephone numbers were disconnected.

Matter F

Client F appeared at respondent's office for a scheduled consultation on January 14, 2013. Client F was seeking representation in a divorce and child custody action. Client F waited for over an hour before respondent called the office and discovered Client F was there waiting for her. Respondent and Client F discussed the matter on the telephone, and Client F retained respondent. Client F paid respondent $1,300 and agreed to make weekly payments of $100 until the total fee of $3,200 was paid. Respondent told Client F she would file the complaint that week.

Thereafter, Client F tried several times to speak with respondent but respondent was never available. A few weeks later, Client F was served with divorce papers which had been filed by her husband. Client F called respondent's office, and respondent's secretary told her respondent had not filed a complaint on her behalf. Client F tried calling respondent, but respondent only responded with text messages saying she had been sick but was going to start on the case right away. Client F paid a total of $2,400 to respondent.

Matter G

On May 13, 2011, Client G retained respondent for $1,500 to represent her in a divorce.

On June 27, 2012, Client G's case was dismissed without prejudice pursuant to the 365-day Family Court Benchmark Order. Client G continued to call respondent to find out the status of her case until one day she called respondent's office and discovered the telephone had been disconnected. She then received a letter informing her of respondent's suspension. Two and a half years had passed, and Client G was not divorced.

Matter H

Client H hired respondent in February 2013 to represent her in a custody matter. Client H paid $1,000 of the quoted $1,500 fee. Client H never met respondent in person. She spoke with respondent once, and respondent indicated the case was a simple one and would take only a couple of months to complete.

Client H called respondent's office and wrote letters to her, but received no response. Client H filed a complaint with ODC in November 2013. At that time, she had not spoken to respondent since April 2013.

Violations of Rules of Professional Conduct

Respondent admits that by her conduct in Matters A through H, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (a lawyer shall act with reasonable diligence in representing client); Rule 1.4 (a lawyer shall keep client reasonably informed and comply with reasonable requests for information); Rule 1.5(b) (a lawyer shall adequately communicate the scope of the representation to the client); Rule 1.5(f) (if a lawyer charges an advance fee, the client is entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided); a lawyer shall refund unearned fees); Rule 1.16(b) (a lawyer may withdraw from representation if withdrawal can be accomplished without material adverse effect on the client's interests or good cause for withdrawal exists); Rule 1.16(d) (upon termination of representation, a lawyer

must surrender the client's file to the client); Rule 8.4(e) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).

Respondent admits her misconduct constitutes grounds for discipline under Rule 7(a)(1), (3), (5), and (6), RLDE, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to: (a) violate the Rules of Professional Conduct, Rule 407, SCACR, (b) willfully fail to comply with a subpoena issued under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, (c) engage in conduct tending to pollute the administration of justice or to bring the legal profession into disrepute or conduct demonstrating an unfitness to practice law, and (d) violate the oath of office taken to practice law in this state).

Failure to Cooperate and Rule 417

Respondent failed to respond to the Notices of Investigation in all eight matters discussed above. After receiving the complaint from the family court judge, ODC issued a demand subpoena and had an investigator serve it on respondent. This subpoena required respondent to immediately produce all trust account records kept pursuant to Rule 417, SCACR. Respondent failed to comply with the subpoena. While she indicated to the investigator that she could produce the requested records, she never did. Respondent admits her failure to respond to ODC and her failure to comply with the subpoena violated Rule 8.1(b) of the Rules of Professional Conduct, Rule 407, SCACR. Moreover, respondent admits her failure to maintain financial records violated Rule 417, SCACR. Respondent did not maintain receipt and disbursement journals, did not keep ledger records for her clients, did not maintain physical or electronic equivalents of checkbook registers, bank statements, and records of deposit, did not maintain records of all electronic transfers from client trust accounts, and did not maintain copies of monthly trial balances and monthly reconciliations of client trust accounts.

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of the matters discussed in this opinion.

Respondent shall repay the Lawyers' Fund for Client Protection (Lawyers' Fund) any payments it has made to respondent's former clients on her behalf and shall pay restitution as follows:

(a) $2,500.00 to Client A;
(b) $2,500 to Client C;
(c) $3,000 to Client D;
(d) $2,400 to Client F;
(e) $1,500 to Client G; and
(f) $950 to Client H.

Within sixty (60) days of the date of this opinion, ODC and respondent shall enter into a restitution agreement specifying the terms upon which respondent shall pay restitution to her former clients and to the Lawyers' Fund as ordered by this opinion.

Prior to seeking readmission, respondent shall complete the Legal Ethics and Practice Program Ethics School pursuant to Rule 33(f), RLDE. In addition, she shall complete the Legal Ethics and Practice Program Trust Account School and Law Office Management School and submit proof of completion of these programs to the Commission prior to seeking readmission.

If readmitted, for a period of two (2) years from the date of readmission, respondent shall retain the services of an accountant trained in law office trust accounting to conduct her monthly reconciliations in accordance with Rule 417, SCACR, and she will file her monthly reconciliations and all relevant source documents with the Commission.

According to respondent, the matters described in this opinion occurred during a time when she was using prescription drugs and alcohol to cope with stress and depression. Based on her agreement to do so, we order respondent upon any readmission to either retain the services of a mental health professional for a period of two (2) years or to enter into a two (2) year contract with Lawyers Helping Lawyers. During that two (2) year period or the two (2) year contract, respondent shall submit quarterly reports from either her mental health treatment provider or her Lawyers Helping Lawyers monitor to the Commission.

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

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert T. Thompson, Jr., Respondent.

Appellate Case No. 2016-001016

Opinion No. 27682
Submitted October 31, 2016 – Filed November 16, 2016

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

Robert T. Thompson, Jr., of Atlanta, Georgia, *pro se*.

PER CURIAM: Respondent was admitted to the Georgia Bar in 1975 and to the South Carolina Bar in 1976.[1] By order dated August 26, 2014, the Supreme Court of Georgia placed respondent on interim suspension[2] and, on February 2, 2015, disbarred him from the practice of law in that state. *In the Matter of Thompson*, 296 Ga. 491, 769 S.E.2d 92 (2015) (opinion attached). According to the opinion, respondent failed to file a Notice of Rejection of the Notice of Discipline and, therefore, was deemed in default, not entitled to an evidentiary hearing, and subject to discipline as provided by Georgia Bar Rule 4-208.1(b).

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[1] On January 29, 2015, respondent changed his South Carolina Bar membership class to "retired." Although a retired member of the South Carolina Bar, respondent remains subject to discipline under the Rules for Lawyer Disciplinary Enforcement. *See* Rule 2(q), RLDE ("lawyer" defined as "anyone admitted to practice law in this state …").

[2] By order dated October 6, 2014, the Supreme Court of Georgia also placed respondent on interim suspension.

Respondent failed to inform the Office of Disciplinary Counsel (ODC) of his disbarment as required by Rule 29(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). After ODC notified the Court of respondent's disbarment, the Clerk of this Court provided ODC and respondent with thirty (30) days in which to inform the Court of any reason why the imposition of identical discipline is not warranted in South Carolina.

In his response, respondent appears to argue that, under the circumstances in his case, the Georgia disciplinary proceeding violated his right to due process because he was physically and mentally incapacitated at the time of the Georgia disciplinary proceeding and, therefore, unable to respond within the deadlines imposed by the State Bar of Georgia. Consequently, respondent claims he should not have been found in default and disbarred but, instead, permitted to participate in a diversionary program. Respondent further claims there was insufficient proof of his misconduct, that his disbarment in South Carolina would result in grave injustice, and that substantially different discipline is warranted.

ODC filed a response asserting the imposition of reciprocal discipline is warranted, noting that respondent was aware of the disciplinary proceeding in Georgia and that he raised his alleged disability in response. ODC further maintained the misconduct stated in the Georgia disbarment opinion would likely result in similar discipline in South Carolina.

Rule 29(d), RLDE, provides, in part, as follows:

> …the Supreme Court shall impose the identical discipline …unless the lawyer or disciplinary counsel demonstrates, or the Supreme Court finds that it clearly appears upon the face of the record from which the discipline is predicated, that:
>
> (1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;
>
> (2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Supreme Court could not, consistent with its duty, accept as final the conclusion on that subject;
>
> (3) The imposition of the same discipline by the Supreme Court would result in grave injustice;

> (4) The misconduct established warrants substantially different discipline in this state; …

We find nothing in this record which suggests the Georgia disciplinary proceeding violated respondent's due process rights. Based on the documentation offered by respondent, we find respondent failed to establish that he was incapacitated at the time of the Georgia disciplinary proceedings.[3] Indeed, as specified in the disbarment opinion, respondent participated in the disciplinary proceeding by filing a response, albeit untimely, to the Notice of Investigation and, as stated by respondent in his submission to the Clerk of this Court, he filed a Response and Opposition to Motion for Interim Suspension.[4]

Finally, in cases of similar misconduct, this Court has imposed disbarment. *See In the Matter of Rogers*, 413 S.C. 187, 775 S.E.2d 387 (2015); *In the Matter of Brunty*, 411 S.C. 434, 769 S.E.2d 426 (2015); *In the Matter of Wooden*, 349 S.C. 281, 562 S.E.2d 649 (2002). Accordingly, the Court concludes the imposition of reciprocal discipline is appropriate and disbar respondent from the practice of law in South Carolina.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of

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[3] Respondent presented no medical documentation supporting his claim that he was physically incapacitated during the disciplinary proceedings resulting in his February 2015 disbarment in Georgia. While he offered some evidence that he suffered from depression for a period of time during which the Georgia disciplinary proceedings were presumably ongoing, his doctor's statements provided that, since May 2014, respondent was "able to go to the office and perform much of his usual work" and, by November 2014, he "has at last begun to improve sufficiently to be able to work regularly, though still at reduced capacity on the backlog of legal complaints, grievances and State Bar concerns facing him."

[4] Georgia's procedural rule regarding the effect of the failure to timely file a response is similar to the rule in this State and to the ABA Model Rules for Lawyer Disciplinary Enforcement (Model Rules). Rule 24, RLDE ("Failure to answer the formal charges shall constitute an admission of the allegations."); Rule 33(A), Model Rules ("Failure to answer charges filed shall constitute an admission of the factual allegations.").

Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

In the Supreme Court of Georgia

Decided: February 2, 2015

S15Y0003. IN THE MATTER OF ROBERT T. THOMPSON, JR.

PER CURIAM.

This disciplinary matter is before the Court on a Notice of Discipline seeking the disbarment of Robert T. Thompson, Jr. (State Bar No. 709750). Thompson, who was admitted to the Bar in 1975, is currently under interim suspension. See In the Matter of Thompson, S14Y1900 (Aug. 26, 2014); In the Matter of Thompson, S15Y0159 (Oct. 6, 2014). Thompson provided the State Bar's membership department with only a post office box as his address, and so in accordance with Bar Rule 4-203.1 (b) (3) (ii), the State Bar requested that Thompson acknowledge service. Because Thompson never acknowledged service, the State Bar properly served him by publication pursuant to Bar Rule 4-203.1 (b) (3) (ii). Thompson failed to file a Notice of Rejection. Therefore, he is in default, has waived his right to an evidentiary hearing, and is subject to such discipline and further proceedings as may be determined by this Court. See Bar Rule 4-208.1 (b).

The facts, as deemed admitted by virtue of Thompson's default, are that in March 2012, a client hired Thompson to file an action on her behalf against JP Morgan Chase Bank. The client paid Thompson a flat fee of $5,000. In April 2012, the superior court granted a temporary restraining order against the foreclosure of the client's house and required the client to pay $1,000 into the registry of the court. Thompson paid the money into the court's registry, and the client reimbursed him. JP Morgan removed the case to federal court, and the client paid an additional $5,000 flat fee. Thompson then instructed the client to pay $1,000 monthly into his trust account in order "to show good faith"; the payments were not required by court order. The client made $15,000 in payments to Thompson's trust account. In February 2013, the federal district court granted JP Morgan's motion to dismiss. In the meantime, the client negotiated, without Thompson's involvement, a loan modification with JP Morgan. Thereafter, the client asked that Thompson return her $15,000, but he refused. In response to the grievance filed with the State Bar, Thompson admitted that he did not keep the client's funds in his attorney trust account and falsely claimed that the $15,000 was payment for additional legal services. Although Thompson acknowledged service of the Notice of Investigation and

filed a response, he failed to file the response within 30 days as required by Bar Rule 4-204.3.

The Investigative Panel found that by this conduct Thompson violated Rules 1.15 (I) (a), 1.15 (II) (a), 1.16 (d), 8.4 (a) (4), and 9.3 of the Georgia Rules of Professional Conduct found in Bar Rule 4-102 (d). The maximum sanction for a violation of Rules 1.15 (I) (a), 1.15 (II) (a), and 8.4 (a) (4) is disbarment, and the maximum sanction for a violation of Rules 1.16 (d) and 9.3 is a public reprimand.

Having reviewed the record, we conclude that disbarment is the appropriate sanction in this matter. Accordingly, it is hereby ordered that the name of Robert T. Thompson, Jr. be removed from the rolls of persons authorized to practice law in the State of Georgia. Thompson is reminded of his duties pursuant to Bar Rule 4-219 (c).

Disbarred. All the Justices concur.

Supreme Court
State of Georgia
STATE JUDICIAL BUILDING
Atlanta 30334

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

May 1, 2015

I hereby certify that the foregoing pages, attached hereto, contain a true and complete copy of the opinion of the Supreme Court of Georgia in Case No. **S15Y0003. IN THE MATTER OF ROBERT T. THOMPSON, JR.** as appears from the file in this office.

Witness my signature and seal of the said Court hereto affixed the day and year above written.

Lee C. Fulton, Chief Deputy Clerk

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Margaret D. Fabri, Respondent.

Appellate Case No. 2016-000917

Opinion No. 27683
Heard September 21, 2016 – Filed November 16, 2016

PUBLIC REPRIMAND

Disciplinary Counsel Lesley M. Coggiola and Senior Assistant Disciplinary Counsel Charlie Tex Davis, Jr., both of Columbia, for Office of Disciplinary Counsel.

David Dusty Rhoades, of Charleston, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel ("ODC") filed formal charges against Margaret Fabri ("Respondent"), alleging Respondent committed misconduct by issuing two subpoenas without providing notice to opposing counsel as required under Rule 45(b)(1) of the South Carolina Rules of Civil Procedure ("SCRCP").[1] By way of return, Respondent argued she was not required to notify opposing counsel because the subpoenas commanded the appearance of a witness and the production of documents at a hearing rather than before the hearing; therefore, discipline is

[1] Rule 45 states, in relevant part: "[u]nless otherwise ordered by the court, prior notice in writing of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b) at least 10 days before the time specified for compliance." Rule 45(b)(1), SCRCP.

improper. A five member hearing panel ("Hearing Panel") for the Commission on Lawyer Conduct ("Commission") disagreed with Respondent. As a result, a majority of the Hearing Panel recommended Respondent: receive a public reprimand; be directed to pay the costs of the proceedings; and be ordered to attend the South Carolina Bar's Legal Ethics and Practice Program Ethics School. We accept this recommendation.

I. Factual and Procedural History

Respondent represented Husband in a divorce action. Due to Wife's delay in producing a financial declaration, Respondent issued two subpoenas to the records custodian at Wife's employer. The subpoenas were titled "Hearing Subpoena (Duces Tecum)" and commanded the records custodian appear at a temporary hearing and produce various documents related to Wife's employment. The cover letter to the subpoenas provided: "[i]f you are able to produce the requested documents to me prior to the hearing date, it may not be necessary for your records custodian to appear." Respondent signed the subpoenas, certifying that they were "issued in compliance with Rule 45(c)(1) and that notice as required by Rule 45(b)(1) ha[d] been given to all parties." In actuality, Respondent did not provide opposing counsel notice of either subpoena.

ODC subsequently filed formal charges against Respondent, alleging she committed misconduct by failing to provide opposing counsel notice of the subpoenas as required under Rule 45(b)(1), SCRCP. In response, Respondent argued she was not required to notify opposing counsel because the subpoenas were titled "hearing subpoena duces tecum" and commanded the appearance of a witness and the production of documents at the hearing. Although Respondent recognized she invited the records custodian to produce the documents before the hearing, Respondent attempted to dismiss this fact by asserting it was merely a request not a command. In light of her assertions, Respondent requested the charges be dismissed.

After a hearing, the Hearing Panel issued its report in which it agreed with ODC. In finding Respondent's actions constituted professional misconduct, the Hearing Panel relied on the fact that: (1) Respondent issued two subpoenas without providing notice to opposing counsel as required under Rule 45(b)(1), SCRCP; (2) Respondent nevertheless certified that notice to opposing counsel had been provided; and (3) the subpoenas commanded the production of documents in

contravention of Rule 25 of the South Carolina Rules of Family Court ("SCRFC"), which prohibits discovery in the family court without a court order or a stipulation by both parties. Based on these facts and Respondent's prior disciplinary history, which will be discussed in greater detail below, three panel members recommended Respondent receive a public reprimand. Two panel members recommended Respondent receive an admonition. In addition, the entire panel recommended Respondent be directed to pay the costs of the proceedings and be directed to attend the South Carolina Bar's Legal Ethics and Practice Program Ethics School within one year of the imposition of any discipline imposed. Respondent now asks this Court to review the Hearing Panel's findings.

II. Standard of Review

"This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record." *In re Thompson*, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "The Court is not bound by the panel's recommendation and may make its own findings of fact and conclusions of law." *In re Hazzard*, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008); *see* Rule 27(e)(2), RLDE, Rule 413, SCACR ("The Supreme Court may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission.").

"A disciplinary violation must be proven by clear and convincing evidence." *In re Greene*, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); *see* Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

III. Discussion

Respondent maintains she was not required to notify opposing counsel of the subpoenas. We disagree.

Rule 45 of the South Carolina Rules of Civil Procedure sets forth the procedures for issuing a subpoena. Rule 45(b)(1) explains when a party issuing a subpoena must provide notice of the subpoena to an opposing party. It provides, in pertinent part: "Unless otherwise ordered by the court, ***prior notice in writing of any commanded production of documents and things*** or inspection of premises

before trial ***shall be served on each party*** in the manner prescribed by Rule 5(b) at least 10 days before the time specified for compliance." Rule 45(b)(1), SCRCP (emphasis added). South Carolina added this notice provision in accordance with a similar provision in Rule 45 of the Federal Rules of Civil Procedure,[2] which, at that time,[3] stated, in relevant part: "If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party." Fed. R. Civ. P. 45(b)(1). This notice provision was added to the Federal Rules of Civil Procedure by a 1991 amendment, the comment to which explained:

> The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. Such additional notice is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or 31. But when production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced.

Fed. R. Civ. P. 45(b)(1) cmt.

Respondent interprets Rule 45(b)(1), SCRCP as requiring notice to the opposing party only when issuing a subpoena commanding the production of documents before a hearing or a trial. Therefore, according to Respondent, she

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[2] *See* Rule 45, SCRCP cmt. ("Rule 45 is amended to conform to federal Rule 45, as amended in December 1991.").

[3] In 2013, the Advisory Committee on Rules of Civil Procedure ("Committee") moved the notice provision to Rule 45(a)(4), and clarified that the notice must include a copy of the subpoena. Fed. R. Civ. P. 45(a)(4) cmt. The Committee made these changes in order "to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials." *Id*. Accordingly, Rule 45(a)(4) now provides: "If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party." Fed. R. Civ. P. 45(a)(4).

was not required to notify opposing counsel because the subpoenas commanded the production of documents at the hearing. While Respondent acknowledged she invited the records custodian to produce the documents before the hearing, Respondent attempts to distinguish this situation from one in which the notice requirement would apply under her interpretation of the rule by stating it was merely a request not a command.

We need not delve too deep into Respondent's argument because we disagree with Respondent's interpretation of Rule 45, SCRCP. Instead, we interpret the rule as requiring that notice be given to the opposing party anytime a party issues a subpoena commanding the production of documents, *regardless of when the documents are commanded to be produced*. *See* James F. Flanagan, *South Carolina Civil Procedure*, at 387 (3d ed. 2010) ("The last sentence of Rule 45(b)(1) requires that notice be given to other parties if a subpoena requesting production of materials is served on a non-party. The notice keeps all parties abreast of the pending discovery and upon request, they may obtain copies of the material produced."). Our interpretation is consistent with the purpose of the notice provision, the remaining provisions of Rule 45,[4] decisions from federal courts interpreting the notice provision in Rule 45 of the Federal Rules of Civil Procedure,[5] and with a previous order from this Court in which we clarified:

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[4] For example, Rule 45 provides that the opposing party must make a written request in order to receive a copy of the documents procured from a subpoena. Rule 45(c)(2)(A), SCRCP. In order to make such a request, however, the opposing party must have notice of the subpoena.

[5] *See, e.g.*, *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 386 (7th Cir. 2008) ("A party must serve each party with prior notice if the subpoena commands the production of documents."); *Murphy v. Bd. of Educ. of Rochester City Sch. Dist.*, 196 F.R.D. 220, 222 (W.D.N.Y. 2000) ("Without question, Rule 45(b)(1) requires a party issuing a subpoena for the production of documents to a non-party to 'provide prior notice to all parties to the litigation.'" (quoting *Schweizer v. Mulvehill*, 93 F. Supp. 2d 376, 411 (S.D.N.Y. 2000)); *Anderson v. Gov't of Virgin Islands*, 180 F.R.D. 284, 291 (D.V.I. 1998) ("Before serving any subpoena, a party is required to provide notice to all other parties in the litigation to allow them the equal opportunity to review and obtain the materials at the same time as the party who served the subpoena.").

> [A] subpoena may be used for the production, inspection or copying of books, documents or tangible objects, or for the inspection of premises. Rule 45(a), SCRCP. When used for this purpose, the subpoena may be issued only to compel a witness to produce materials in his possession or control at the time the subpoena is served; it may not be used to require a witness to perform any other affirmative act such as preparing a sworn statement. Wright & Miller, Federal Practice and Procedure: Civil § 2454 (1971); 97 C.J.S. Witnesses § 25e (1957). ***Unless otherwise ordered by the court, notice of the issuance of this kind of subpoena must be served on all parties to the action***. Rule 45(b)(1), SCRCP.

S.C. Sup. Ct. Order dated Oct. 9, 1993 (Davis Adv. Sh. No. 25) (emphasis added).

Accordingly, we hold Respondent violated Rule 45, SCRCP by failing to notify opposing counsel. We also conclude Respondent's issuance of the subpoenas contravened Rule 25, SCRFC, which prohibits discovery in the family court without a court order or a stipulation by both parties, since neither condition was in effect when Respondent issued the subpoenas. As the Hearing Panel pointed out:

> It is abundantly clear from the record that Respondent issued the subpoenas as a discovery tool to obtain the financial records of the opposing party because Respondent had not yet received the financial declaration. The subpoenas . . . were clearly an attempt by Respondent to discover information and not to compel the appearance of a witness at a temporary hearing.

Thus, we find there is clear and convincing evidence Respondent violated Rule 8.4(e), RPC, Rule 407, SCACR (providing a lawyer shall not "engage in conduct that is prejudicial to the administration of justice"); Rule 7(a)(1), RLDE, Rule 413, SCACR (proclaiming lawyer shall not violate the Rules of Professional Conduct or any other rules regarding the professional conduct of lawyers); and Rule 7(a)(5), RLDE, Rule 413, SCACR (prohibiting lawyer from "engag[ing] in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or demonstrating an unfitness to practice law"). We further find clear and convincing evidence Respondent violated Rule 4.1(a), RPC, Rule 407, SCACR (explaining "lawyer shall not knowingly . . . make a false statement of

material fact or law to a third person") and Rule 8.4(d), RPC, Rule 407, SCACR (recognizing it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"), because Respondent signed the subpoenas, certifying she notified opposing counsel as required under Rule 45, SCRCP.[6]

In addition to the misconduct that gave rise to this case, Respondent has been sanctioned for misconduct in two previous instances that involved improperly subpoenaing an out-of-state party and issuing a subpoena in a case that was not pending. These incidents coupled with Respondent's misconduct in this case indicate an admonition is insufficient to deter Respondent from improperly issuing subpoenas in the future.

IV. Conclusion

For the abovementioned reasons, we find Respondent's misconduct warrants a public reprimand. Accordingly, we accept the majority of the Hearing Panel's recommendation to publicly reprimand Respondent for her misconduct. In addition, Respondent shall, within thirty days of the date of this opinion, pay the costs incurred in the investigation of this matter by ODC and the Commission. Finally, Respondent shall complete the South Carolina Bar's Legal Ethics and Practice Program Ethics School within one year of the date of this opinion. Respondent shall provide proof of her completion to the Commission no later than ten days after the conclusion of the program.

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[6] It has also come to our attention that some attorneys will receive documents from a witness prior to the time the witness was commanded to appear with the documents. Once the attorney receives the documents, the witness is generally released from their obligation to appear without any notice to the opposing party, who is still under the expectation that the witness will appear at the trial or hearing with the requested documents. We caution against this practice. Further, we conclude not only must an attorney notify the opposing party when subpoenaing the production of documents, but the opposing party must also be notified anytime the party issuing the subpoena receives the documents prior to the time requested in the subpoena. To hold otherwise would circumvent the purpose of the notice provision and would allow the party issuing the subpoena to gain a competitive advantage over the opposing party who may have no knowledge of the contents of the documents until the trial or hearing.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: South Carolina Department of Disabilities and Special Needs, Appellant,

In re: State of South Carolina, Respondent,

v.

Rocky A. Linkhorn, Respondent.

Appellate Case No. 2013-002208

Appeal From Lexington County
J. Michael Baxley, Circuit Court Judge

Opinion No. 27684
Heard December 3, 2015 – Filed November 16, 2016

REVERSED

Andrew F. Lindemann and William H. Davidson, II, both of Davidson & Lindemann, P.A., of Columbia; General Counsel Tana G. Vanderbilt, of South Carolina Department of Disabilities and Special Needs, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Deputy Solicitor General J. Emory Smith, Jr., and Assistant Attorney General T. Parkin Hunter, all of Columbia, and Public Defender Elizabeth C. Fullwood, of Lexington, for Respondents.

JUSTICE BEATTY: Rocky A. Linkhorn was arrested and charged with Criminal Sexual Conduct with a Minor in the First Degree, Lewd Act on a Minor, and Disseminating Obscene Material to a Minor. After finding Linkhorn was incompetent to stand trial and unlikely to become fit in the foreseeable future, the circuit court ordered the solicitor to initiate judicial admission proceedings in the probate court to have Linkhorn involuntarily committed to the South Carolina Department of Disabilities and Special Needs ("DDSN"). Before the probate court determined whether Linkhorn was intellectually disabled, the solicitor filed a motion for a rule to show cause in the circuit court, requesting DDSN be ruled into court "to show just cause for services being denied to [Linkhorn] as previously ordered." The circuit court granted the solicitor's motion and ordered DDSN to, *inter alia*, take custody of Linkhorn and house him in a secure facility until the probate court determines whether Linkhorn is intellectually disabled. Additionally, the court prohibited DDSN from refusing involuntary commitment of individuals similarly situated to Linkhorn. DDSN appealed. We certified the appeal pursuant to Rule 204(b), SCACR. For reasons which will be discussed, we reverse.

I. Discussion

This case concerns the application of the South Carolina Intellectual Disability, Related Disabilities, Head Injuries, and Spinal Cord Injuries Act[1] ("Act") and certain provisions under Title 44, Chapter 23 of the South Carolina Code. The Act and Title 44, Chapter 23 contain competing definitions of the term "intellectual disability." The crux of the issue before the Court is which definition is applicable to Linkhorn.

A long recitation of the facts and the tortured procedural history of this case are unnecessary to determine the resolution of the ultimate issue presented. The uncontroverted evidence shows that Linkhorn suffers from dementia caused by an anoxic brain injury resulting from Linkhorn's attempt to hang himself. Linkhorn has numerous cognitive and intellectual deficits in addition to slow speech and difficulty performing certain motor activities. It is noteworthy that Linkhorn's disability did not manifest until he was twenty-three years of age.

[1] S.C. Code Ann. §§ 44-20-10 to -1170 (Supp. 2015).

A. Statutory Overview

Title 44, Chapter 23 outlines, *inter alia*, the procedures for individuals found unfit to stand trial. These provisions apply to both the mentally ill and persons with intellectual disabilities.[2] Under *this* Chapter, "person with intellectual disability" is defined as:

> a person, other than a person with a mental illness primarily in need of mental health services, whose inadequately developed or impaired intelligence and adaptive level of behavior require for the person's benefit, or that of the public, special training, education, supervision, treatment, care, or control in the person's home or community or in a service facility or program under the control and management of the Department of Disabilities and Special Needs.

S.C. Code Ann. § 44-23-10(21) (Supp. 2015). This definition does not have an age limitation. The General Assembly limited the application of this definition to Title 44, Chapters 9, 11, 13, 17, 23, 24, 27, 48, and 52. *Id.* § 44-23-10 (Supp. 2015). Notably absent from this list is Title 44, Chapter 20.

The Act sets forth specific procedures applicable to judicial admission proceedings concerning the involuntary commitment of an individual to DDSN once the individual is found unfit to stand trial. S.C. Code Ann. § 44-20-450 (Supp. 2015). Under section 44-20-450(A)(8) of the Act, if an individual is found unfit to stand trial, the solicitor responsible for the criminal prosecution pursuant to section 44-23-430 is authorized to initiate judicial admission proceedings for the involuntary commitment of the individual to DDSN as long as the individual has an "intellectual disability" or "related disability." "Intellectual disability" is defined *under the Act* as "significantly sub average general intellectual functioning existing concurrently with deficits in adaptive behavior and ***manifested during the***

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[2] Prior to this appeal, the probate court determined Linkhorn was not mentally ill. Neither party disputes this determination. Therefore, while provisions of Title 44, Chapter 23 apply to both the mentally ill and people with intellectual disabilities, we limit our review of this authority to its application to individuals with intellectual disabilities.

developmental period."[3] *Id*. § 44-20-30(12) (Supp. 2015) (emphasis added). A "related disability" is defined as:

> A severe, chronic condition found to be closely related to intellectual disability or to require treatment similar to that required for persons with intellectual disability and must meet the following conditions:
>
> (a) It is attributable to cerebral palsy, epilepsy, autism, or any other condition other than mental illness found to be closely related to intellectual disability because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of persons with intellectual disability and requires treatment or services similar to those required for these persons.
>
> (b) It is ***manifested before twenty-two years of age***.
>
> (c) It is likely to continue indefinitely.

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[3] In 2011, the General Assembly substituted the term "mental retardation" with "intellectual disability." Act No. 47, 2011 S.C. Acts 172. The definition of the term stayed the same. Act No. 47, 2011 S.C. Acts 172, 176. The General Assembly has not defined the term "developmental period." However, since the term was part of the same definition previously used to define mental retardation, which has generally been accepted as a condition occurring prior to age eighteen, we believe the General Assembly intended for the same age limitation to apply to intellectual disabilities. *See the American Association on Intellectual and Developmental Disabilities*, Definition of Intellectual Disability, http://aaidd.org/intellectual-disability/definition#.V7NoXE32Y5s (last visited on Aug. 16, 2016) (defining "intellectual disability" as "a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18"). Our belief is also supported by the expert testimony of psychiatrist Dr. Richard Frierson in this case. During the hearing on the rule to show cause motion, Dr. Frierson opined that a condition which does not manifest prior to the age of eighteen is not "the same intellectual disability that has been [previously] referred to as mental retardation."

> (d) It results in substantial functional limitations in three or more of the following areas of major life activity: self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living.

Id. § 44-20-30(15) (Supp. 2015) (emphasis added).

If the court determines the individual has an intellectual disability or related disability, the court shall order the individual "be admitted to the jurisdiction of [DDSN] as soon as necessary services are available." S.C. Code Ann. § 44-20-450(E) (Supp. 2015). If, however, the court determines the individual does not have an "intellectual disability or a related disability to an extent which would require commitment, it shall terminate the proceeding and dismiss the petition." *Id*. § 44-20-450(D) (Supp. 2015).

While the Act also applies to individuals with "head injuries" and "spinal cord injuries," the provisions of the Act concerning the *involuntary* commitment of individuals to DDSN only apply to those with an intellectual disability or a related disability. *Id*. § 44-20-450 (Supp. 2015). Therefore, those individuals with a head injury or spinal cord injury can only be *voluntarily* committed to DDSN.

B. "Intellectual Disability"

DDSN contends the circuit court erred in applying the definition of "person with intellectual disability" under section 44-23-10(21) to the determination of this case. We agree.

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

We find the statutes concerning the involuntary commitment of individuals to DDSN are clear and unambiguous. Under the Act, only individuals who developed an "intellectual disability" during the developmental period or a "related disability" before the age of twenty-two can be involuntarily committed to DDSN.

Our finding is supported by the General Assembly's exclusion of the Act from the list of chapters to which the broad definition of "person with intellectual disability" may apply. *See* S.C. Code Ann. § 44-23-10 (Supp. 2015) (stating that the definitions within Chapter 23 also apply to "Chapter 9, Chapter 11, Chapter 13, Articles 3, 5, 7, and 9 of Chapter 17, Chapter 24, Chapter 27, Chapter 48, and Chapter 52, unless the context clearly indicates a different meaning"). Chapter 20 is not included.

Respondents argue this is an absurd result given, in part, the language of section 44-23-220, which states: "[n]o person who is mentally ill or who has an intellectual disability shall be confined for safekeeping in any jail." S.C. Code Ann. § 44-23-220 (Supp. 2015). We disagree. Respondents overlook the language from the Act which states "No person with intellectual disability or a related disability must be confined in jail ***unless there is a criminal charge pending against him***." S.C. Code Ann. § 44-20-450(G) (Supp. 2015) (emphasis added). Thus, based on our interpretation of the statutes, we conclude that if an individual cannot be involuntarily committed to DDSN following judicial admission proceedings, the individual *may* be confined in jail if there are criminal charges pending against him.

As this Court has acknowledged, "it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. Consequently, we reverse the circuit court's decision, finding it erred in applying the definition of "person with intellectual disability" as defined in section 44-23-10(21) to this case. Instead, we hold the proper definition to apply in involuntary commitment proceedings to DDSN is the definition of "intellectual disability" as defined in section 44-20-30(12) under the Act. We are constrained to recognize that the General Assembly has failed to provide for involuntary commitment to DDSN for any defendant who did not manifest his condition before age twenty-two.

II. Conclusion

In conclusion, we hold the circuit court erred in applying the broad definition of "person with intellectual disability" found in section 44-23-10 to Linkhorn. Because this issue is dispositive of the appeal, we decline to address

DDSN's remaining arguments.[4] Accordingly, we reverse the decision of the circuit court.

REVERSED.

PLEICONES, C.J., KITTREDGE, HEARN, JJ., and Acting Justice Jean H. Toal, concur.

[4] *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing this Court need not address remaining issues when disposition of prior issue is dispositive of the appeal).

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Beaufort County and Jasper County. Effective December 6, 2016, all filings in all common pleas cases commenced or pending in Beaufort County and Jasper County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Clarendon	Lee	Greenville
Sumter	Williamsburg	Pickens
Spartanburg	Cherokee	Anderson
Oconee	Beaufort and Jasper—Effective December 6, 2016	

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal.

s/Costa M. Pleicones
Costa M. Pleicones
Chief Justice of South Carolina

Columbia, South Carolina
November 15, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Todd Olds, Appellant,

v.

City of Goose Creek, Respondent.

Appellate Case No. 2014-002393

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

Opinion No. 5454
Heard June 6, 2016 – Filed November 16, 2016

AFFIRMED

Thomas R. Goldstein, of Belk Cobb Infinger & Goldstein, PA, of Charleston, for Appellant.

Timothy Alan Domin, of Clawson & Staubes, LLC, of Charleston, for Respondent.

SHORT, J.: Todd Olds appeals the circuit court's order affirming a decision of the Goose Creek City Council regarding the computation of gross income under the business license tax ordinance of the City of Goose Creek (the City). On appeal, Olds argues the circuit court erred in finding the City (1) was not exceeding its authority under the state constitution by imposing a business license tax on the sale price of real property and (2) was properly applying its business license tax ordinance. Olds also appeals the circuit court's grant of summary judgment as to

his claim against the City for a violation of procedural due process, arguing the circuit court erred in finding the City's appeal procedure was unfair but not granting Olds a remedy. Finally, Olds appeals the circuit court's grant of summary judgment as to various claims he alleged against the City, arguing evidence demonstrated City employees violated his constitutional rights and singled him out for disparate and arbitrary treatment. We affirm the circuit court on all issues.

FACTS/PROCEDURAL HISTORY

The City collects a business license tax on persons doing business within the City limits. The tax is computed according to the business's gross income from the preceding year. This case arises out of Olds's dispute with the City as to the meaning of gross income under its business license tax ordinance.

Olds is engaged in the business of buying and selling real property. In January 2011, Olds filed an application to renew his City business license and reported actual gross receipts for 2010 of $58,432.46.[1] Based on this information, Olds calculated his 2011 business license tax to be $460.40, and he paid this amount to the City. In May 2011, City Business License Inspector Jennifer Althoff sent Olds a notice, informing him of a deficiency in his business license payment. Althoff claimed Olds failed to report "revenue" from the sale of real property located at 123 Evergreen Magnolia Avenue in Goose Creek. Althoff explained Olds should have included the sale price of the property as revenue on his 2011 business license renewal application. Accordingly, Althoff claimed Olds underpaid his business license tax by $468. Olds appealed this decision to City Finance Director Ron Faretra, then to City Administrator Dennis Harmon, and eventually to the City Council.

In anticipation of the City Council hearing his appeal, Olds submitted a memorandum of law in support of his appeal. Prior to reviewing Olds's appeal, the City informed Olds that pursuant to the relevant ordinance, the appeal would be reviewed without further oral argument or presentation of evidence. During the appellate hearing, City officials presented a brief summary of the issue to the City Council and answered questions from council members. Olds attended the

[1] The City's business license renewal form uses the term "actual gross receipts," rather than "gross income." However, the form also includes a section where the applicant certifies he or she has accurately reported the business's "gross income."

hearing; however, neither he nor his attorney was allowed to actively participate. The City Council affirmed the City Administrator's decision.

On October 12, 2011, Olds filed a complaint against the City in the Berkeley County Court of Common Pleas. Olds later amended his complaint, adding Althoff, Faretra, and the City Department of Public Works as defendants. In his amended complaint, Olds listed his first cause of action as "Appeal from City Council—substantive/procedural due process." Olds asserted additional claims against the City for (1) violation of equal protection; (2) violation of procedural due process; (3) abuse of process; (4) violations of 42 U.S.C. § 1983 and Article I § 22 of the South Carolina Constitution; and (5) violation of the South Carolina Freedom of Information Act. Olds also included a civil conspiracy claim against Faretra and Althoff and a breach of contract claim against the City's Department of Public Works.

On August 31, 2012, while the case was pending in circuit court, Olds moved for an injunction, requesting the circuit court order the City to turn on water service at a home he owned, located at 834 North Aylesbury Road. Olds alleged the City was withholding water service in an attempt to force him to capitulate to the City's position in the 2011 business license dispute. In support of his motion, Olds submitted an affidavit from himself, explaining the City initially refused to supply water to the property until he paid his 2012 business license tax based on gross sales from 2011. Olds further explained that after he paid this tax under protest, the City still refused to supply water service based on an alleged underpayment of his 2011 business license tax. Olds also submitted an affidavit from Robert Eckhardt, who claimed that while picking up trash at the home one day, he was "detained" by Faretra and Althoff and questioned about how much Olds was paying him and whether he had a business license. The circuit court denied the motion.

On January 16, 2013, Olds moved for summary judgment on the issue of liability on the grounds that (1) the City had denied him due process by not allowing him to appear and be heard in the appeal to the City Council and (2) the City was improperly attempting to levy a business license tax upon his gross receipts, rather than his gross income. In support of his motion, Olds submitted a supplemental affidavit describing his disagreement with the City. In the affidavit, Olds explained that in 2010 he had a dispute with the City regarding repairs he was making to a home he owned. Olds stated that shortly after resolving the repair

dispute, he received the City's notice alleging he had incorrectly reported his gross income on his business license renewal application. Olds claimed the City had denied him water service and Faretra and Althoff threatened to "shut off water to all properties" if he did not capitulate to the City's position in the business license dispute. Olds also submitted an affidavit of Kristin Balding Gutting, a professor of tax law at the Charleston School of Law. In her affidavit, Professor Gutting opined the City was incorrectly applying its business license tax ordinance by levying the tax on the sale price of the homes sold by Olds, rather than his gain.

Subsequently, the City moved the circuit court to hear Olds's appeal from the City Council and for summary judgment as to Olds's other claims. In support of its motion, the City submitted affidavits from Harmon and Faretra. Both Harmon and Faretra explained it is the City's policy to not initiate water service if a business does not have a business license or has failed to pay its business license tax. However, they explained the City will not shut off existing water service in these instances. Faretra also claimed the City had discovered Olds did not report any income from the 2010 sale of a home located at 100 Spalding Drive and stated the City will not provide Olds with new water service until his past due business license taxes are paid in full.

The circuit court affirmed the City Council's decision regarding the meaning of gross income under the ordinance and granted the City summary judgment on Olds's other claims. As to Olds's procedural due process claim, the circuit court found it was unfair for the City to allow its employees to participate in the appellate hearing but not allow Olds to participate. However, the circuit court found Olds was not prejudiced by this process because the issue was one of statutory construction and the issue was preserved for appeal. The circuit court suggested that in the future, the City Council allow persons appealing the City Administrator's decisions to participate in the appellate hearing or review the decision without hearing from either side.

The circuit court also granted summary judgment to the City on Olds's other claims. The circuit court found evidence showed the City was applying the business license ordinance uniformly and not taxing Olds differently from any other business. Additionally, the circuit court found that under the Tort Claims Act, Olds was barred from asserting any tort claim based on the City's assessment of the business license tax. Olds filed a motion for reconsideration, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

This appeal consists of a review of the circuit court's decision affirming the decision of the City Council and the circuit court's order granting the City summary judgment as to Olds's other claims. As to the circuit court's decision affirming the City Council, the issue on appeal concerns the construction of a state statute and a city ordinance. Accordingly, this court is free to decide this issue without any deference to the circuit court. *See Sloan v. Greenville Cty.*, 380 S.C. 528, 534, 670 S.E.2d 663, 667 (Ct. App. 2009) ("The issue of statutory interpretation is a question of law for the court."); *id.* ("We are free to decide questions of law with no deference to the trial court.").

We review Olds's other issues under the standard of review applicable to appeals from a grant of summary judgment. "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860.

I. GROSS INCOME AND THE BUSINESS LICENSE TAX

Olds argues the circuit court erred in affirming the City Council's decision concerning the meaning of gross income under the City's business license ordinance because (1) the City exceeded its authority under the South Carolina Constitution by levying its business license tax on Olds's gross receipts and (2) the plain language of the ordinance imposes a tax on gross income, not gross receipts. We disagree.

"The cardinal rule of statutory construction is that courts will ascertain and effectuate the intent of the lawmaking body." *Historic Charleston Found. v. Krawcheck*, 313 S.C. 500, 504, 443 S.E.2d 401, 404 (Ct. App. 1994). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with

the purpose, design, and policy of the lawmakers." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000).

Section 5-7-30 of the South Carolina Code (Supp. 2015) grants municipalities the power to "enact regulations, resolutions, and ordinances, not inconsistent with the [c]onstitution and general law of this [s]tate." This statute describes various powers possessed by municipalities, including the power to "levy a business license tax on gross income." *Id.* The statute does not define gross income. Furthermore, gross income is not defined anywhere within Title 5 of the South Carolina Code, which provides the laws governing municipal corporations.

Olds first argues the City has exceeded its authority under our state constitution by levying a business license tax on the sale price of real property. Olds contends the City's authority to levy a business license tax is limited by the meaning of "gross income," as that term is used in section 5-7-30. Olds further asserts gross income under section 5-7-30 carries the same meaning as gross income under the South Carolina Income Tax Act, which provides that South Carolina gross income is computed by making certain modifications to gross income computed under the Internal Revenue Code (IRC). S.C. Code Ann. § 12-6-1120 (2014). None of the modifications required to compute South Carolina gross income are relevant in Olds's case, and both parties agree that under the IRC, gross income on the sale of real property is equal to the seller's gain. *See id.*; I.R.C. § 61(a)(3) (2012) (explaining gross income includes "[g]ains derived from dealings in property"); Treas. Reg. § 1.61-6(a) (2015) ("Generally, the gain is the excess of the amount realized over the unrecovered cost or other basis for the property sold or exchanged.").

We find the City's power to levy a business license tax is not limited by section 5-7-30. As our supreme court has explained, "the broad grant of power stated at the beginning of [section 5-7-30] is not limited by the specifics mentioned in the remainder of the statute." *Hosp. Ass'n of S.C., Inc. v. Cty. of Charleston*, 320 S.C. 219, 227, 464 S.E.2d 113, 118 (1995). "The only limitation on the broad grant of power to municipalities in [section] 5-7-30 is that the regulation, resolution, or ordinance may not be inconsistent with the [c]onstitution and general law of this [s]tate." *Id.* Olds has not set forth an argument explaining how the ordinance is inconsistent with our state constitution or other state law. Accordingly, our inquiry must focus on whether the City is properly applying its own ordinance.

For the purpose of calculating the applicable business license tax, the City defines gross income as follows:

> ***GROSS INCOME.*** The total revenue of a business, received or accrued, for one calendar year, collected or to be collected by a business within the city, excepting, therefrom, business done wholly outside of the city on which a license tax is paid to some other municipality or county and fully reported to the city or county. The term ***GROSS RECEIPTS*** means the value proceeding or accruing from the sale of tangible personal property, including merchandise and commodities of any kind and character and all receipts, by the reason of any business engaged in, including interest, dividends, discounts, rentals of real estate or royalties, without any deduction on account for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid or any other expenses whatsoever and without any deductions on account of losses. The ***GROSS INCOME*** for business license purposes shall conform to the gross income reported to the State Tax Commission or the State Insurance Commission. In the case of brokers or agents, ***GROSS INCOME*** shall mean gross commissions received or retained, unless otherwise specified. ***GROSS INCOME*** for insurance companies means gross premiums collected. ***GROSS INCOME*** for business license tax purposes shall not include taxes collected for a governmental entity, escrow funds or funds, which are the property of a third party. The value of bartered goods or trade-in merchandise shall be included in ***GROSS INCOME***. The ***GROSS INCOME*** for business license purposes may be verified by inspection of returns and reports filed with the Internal Revenue Service, the South Carolina Department of Revenue, the South Carolina Insurance Commission or other government agency.

Goose Creek City Code § 110.001.

Similar to his argument regarding section 5-7-30, Olds contends gross income under the ordinance is the same as gross income under the IRC. Olds asserts the City is misapplying its ordinance by levying its business license tax on the sale price of real property rather than the gain. We disagree.

"The term 'gross income' does not carry the same definite and inflexible meaning under all circumstances and wherever used. Its meaning depends upon the subject under consideration, the connection in which it was used, and the results intended to be accomplished." *Bogan v. Bogan*, 298 S.C. 139, 142-43, 378 S.E.2d 606, 608 (Ct. App. 1989) (quoting *Alexander v. Alexander*, 158 F.2d 429, 430 (10th Cir. 1946)). The ordinance in this case defines gross income as "[t]he total revenue of a business, received or accrued, for one calendar year . . . ." Black's Law Dictionary defines "revenue" as "[i]ncome from any and all sources; gross income or gross receipts." *Revenue*, *Black's Law Dictionary* (10th ed. 2014).

Notwithstanding the ordinance's later explanation that gross income for business license purposes shall conform to the gross income reported to the State Tax Commission[2] and that gross income may be verified by the inspection of state and federal tax returns, we find the City intended to define gross income for business license tax purposes as the total revenue of the business. This is consistent with how our supreme court has historically defined gross income in the context of business license taxes. *See Columbia Ry., Gas & Elec. Co. v. Jones*, 119 S.C. 480, 494, 112 S.E. 267, 272 (1922) ("Gross income means the total receipts from a business before deducting expenditures for any purpose."). Applying the ordinance to the facts of the instant case, we find the City intended the business license tax to apply to the total sale price of real property rather than merely the business's gain. Accordingly, we affirm the circuit court on this issue.[3]

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[2] The State Tax Commission is now known as the South Carolina Department of Revenue. We note the standard income tax forms from the South Carolina Department of Revenue do not include a space for gross income to be reported.

[3] Olds also contends the circuit court erred in deciding this issue by ignoring (1) evidence of animus that exists between Olds and City employees and (2) Professor Gutting's affidavit. We find any animus that may exist between Olds and City employees is irrelevant in determining the meaning of gross income under the ordinance. As to Professor Gutting's affidavit, the circuit court properly disregarded the affidavit because it was nothing more than a legal argument. *See*

II. PROCEDURAL DUE PROCESS

Olds also appeals the circuit court's grant of summary judgment as to his procedural due process claim, arguing the circuit court erred in finding Olds was not entitled to a remedy for a violation of due process after declaring the City's administrative appeal procedure flawed and recommending the City amend its procedure. Olds contends he was prejudiced by the City Council allowing City employees to present the City's position in the appellate hearing but not allowing him to present his case. We disagree.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Id.* "Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest." *Id.* "Rather, due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 172, 656 S.E.2d at 350. "To prevail on a claim of denial of due process, there must be a showing of substantial prejudice." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 69, 663 S.E.2d 497, 504 (Ct. App. 2008).

The circuit court found the City Council's appellate procedure unfair; however, it found Olds was not prejudiced because the issue was one of statutory construction and Olds's position was fully preserved by the filing of his brief. We agree with the circuit court. The central issue of Olds's appeal to the City Council was the meaning of "gross income" as that term is used in computing Olds's business license tax under the applicable city ordinance. This is a question of law, which

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Dawkins v. Fields, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) ("In general, expert testimony **on issues of law** is inadmissible."); *id.* at 66-67, 580 S.E.2d at 437 (finding the trial court properly refused to consider an affidavit that was a legal argument as to why summary judgment should be denied).

the circuit court reviewed without any deference to the City Council's decision. *See Sloan*, 380 S.C. at 534, 670 S.E.2d at 667 ("The issue of statutory interpretation is a question of law for the court."); *id.* ("We are free to decide questions of law with no deference to the trial court."). Because the circuit court was able to review this issue without any deference to the City Council's decision, Olds suffered no prejudice from the procedure used by the City Council in reviewing Olds's appeal. Furthermore, as noted by the circuit court, Olds was able to submit a written memorandum to the City Council.

Olds also raised an issue to the City Council regarding the City's decision to withhold water service. Olds was able to raise this issue again in circuit court through various claims; therefore, the City Council's procedure did not prejudice Olds as to this issue. Accordingly, the circuit court properly granted summary judgment. *See Olson*, 379 S.C. at 69, 663 S.E.2d at 504 ("To prevail on a claim of denial of due process, there must be a showing of substantial prejudice.").

III. DISPARATE AND ARBITRARY TREATMENT

Olds further argues the circuit court erred in granting summary judgment because evidence showed the City singled him out for disparate and arbitrary tax treatment and shut off the water supply to his properties in an attempt to force him to capitulate to the City's position in the business license tax dispute. We disagree.

First, we note Olds does not clearly identify the causes of action to which this issue applies. His stated issue on appeal refers to his constitutional rights; however, in his argument, Olds also discusses some of his other claims that are not based on a violation of any constitutional right. In his brief, Olds writes:

> Whether the Court evaluates [the acts of Faretra and Althoff] as violations to the appellant[']s right to substantive due process, or equal protection or as acts of a civil conspiracy or abuse of process, the classification of [the] violation is not important at the summary judgment stage when all the plaintiff has to demonstrate is the existence of genuine issues of material fact as to whether the [City] did or did not single him out for particular action.

In his reply brief, Olds even suggests he intended this issue to relate to causes of action not mentioned in his argument under this issue in his appellant's brief.[4] Regardless of Olds's failure to clearly identify the causes of action to which this issue relates, we find there was no genuine issue of material fact regarding Olds's allegation that the City treated him differently from other similar businesses. Olds did not present any evidence to the circuit court to support this allegation. Accordingly, we affirm the circuit court's grant of summary judgment.

CONCLUSION

For the foregoing reasons, the circuit court's order is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

[4] For example, in Olds's reply brief, he contends it was unnecessary for him to set forth an argument regarding the circuit court's grant of summary judgment as to his breach of contract action because "[i]t is not a separate claim, but rather part of the same transaction that forms the plaintiff's claim for abuse of process [and] civil conspiracy."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William J. Montgomery, Respondent,

v.

Spartanburg County Assessor, Appellant.

Appellate Case No. 2013-002697

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

Opinion No. 5455
Heard September 8, 2016 – Filed November 16, 2016

REVERSED

Ray Nelson Stevens, Michael Enrico Kozlarek, and Walter Hammond Cartin, all of Parker Poe Adams & Bernstein, LLP, of Columbia; and Virginia M. Dupont, and John Holladay Harris, both of Spartanburg County Attorney's Office, of Spartanburg, for Appellant.

James G. Carpenter and Jennifer J. Miller, both of Carpenter Law Firm, PC, of Greenville; and Lewis Warren Clayton, III, of MSI-Viking Gage, LLC, of Greenville, for Respondent.

LOCKEMY, C.J.: In this action from the Administrative Law Court (ALC), the Spartanburg County Assessor (Assessor) appeals the ALC's order granting William

J. Montgomery's motion for summary judgment. Assessor argues the ALC erred in its definition of "fair market value for agricultural purposes" in section 12-43-220(d) of the South Carolina Code (2014). We reverse.

I. FACTS/PROCEDURAL HISTORY

Montgomery owns a tree farm located in Pauline, South Carolina. The property includes three buildings—two storage buildings for farm equipment and one mobile home that is used as an office for the farming operation. The parties agree the structures are related to the agricultural use of the property and are neither residences nor used for any other for-profit business.

For the 2011 tax year, the Assessor valued Montgomery's property for taxation purposes at $40,641. The Assessor reached its valuation by valuing the land at $12,211 using the soil capability valuation method, valuing the structures on the land at $28,430 using the fair market value of the improvements, and adding the two figures together.

Mongtomery appealed the Assessor's valuation to the ALC. Montgomery argued the entire tract, including the buildings, must be assessed as agricultural real property and the value of the buildings is subsumed in the statutory calculation of the agricultural real property value. The Assessor conceded the structures were agricultural real property and should be assessed using the 4% ratio; however, the Assessor argued section 12-43-220(d)(2)(A) only provides the process for valuing the land used for agricultural purposes, not the structures.

The ALC granted summary judgment in favor of Montgomery. The ALC found Montgomery's entire farm "must be classified and assessed as agricultural real property and the Assessor may not carve out and separately assess a small portion of the tract (such as the structures attached thereto) . . . ." Accordingly, the ALC found the Assessor improperly assessed Montgomery's property and ordered the property be "assessed and taxed based on its agricultural use value alone without adding a separate value for the improvements on the [p]roperty." This appeal followed.

II. STANDARD OF REVIEW

"Tax appeals to the ALC are subject to the Administrative Procedures Act (APA)." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 73, 716 S.E.2d 877, 880 (2011). "Accordingly, we review the decision of the ALC for errors of law." *Id*. at

74, 716 S.E.2d at 881. "Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the [ALC]." *Id*.

III. STATUTORY INTERPRETATON

The Assessor asserts the ALC erred by finding the value of structures located on agricultural real property is already included in, and subsumed by, the tract's fair market value for agricultural purposes. We agree.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Centex Int'l v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id*. (quoting *Sloan*, 371 S.C. at 498, 640 S.E.2d at 459). "In interpreting a statute, '[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *Id*. (alteration in original) (quoting *Sloan*, 371 S.C. at 499, 640 S.E.2d at 459). "Further, 'the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *Id*. (quoting *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)). This court "must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.'" *CFRE, LLC*, 395 S.C. at 74, 716 S.E.2d at 881 (quoting *State v. Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008)).

For the purposes of property taxes, real property "shall mean not only land, city, town and village lots but also all structures and other things therein contained or annexed or attached thereto which pass to the vendee by the conveyance of the land or lot." S.C. Code Ann. § 12-37-10 (2014). Generally, "[a]ll property must be valued for taxation at its true value in money which in all cases is the price which the property would bring following reasonable exposure to the market, where both the seller and the buyer are willing . . . ." S.C. Code Ann. § 12-37-930 (2014). "Agricultural real property which is actually used for such agricultural purposes shall be taxed on an assessment equal to . . . [f]our percent of its fair market value for such agricultural purposes . . . ." S.C. Code Ann. § 12-43-220(d)(1)(A) (2014); *see also* S.C. Const. art. X, §1. "'Fair market value for agricultural purposes', when applicable to land used for the growth of timber, is defined as the productive earning power based on soil capability . . . ." S.C. Code

Ann. § 12-43-220(d)(2)(A) (2014). "Soil capability when applicable to lands used for the growth of timber products means the capability of the soil to produce such timber products of the region considering any natural deterrents to the potential capability of the soil as of the current assessment date." *Id.*

"The construction of a statute by an agency charged with its administration will be accorded most respectful consideration and will not be overturned absent compelling reasons." *Jasper Cty. Tax Assessor v. Westvaco Corp.*, 305 S.C. 346, 348, 409 S.E.2d 333, 334 (1991); *see also Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 215, 423 S.E.2d 101, 104 (1992) ("Where an administrative agency has consistently applied a statute in a particular manner, its construction should not be overturned absent cogent reasons."). "If possible, the [c]ourt will construe a statute so as to escape [an] absurdity and carry the [General Assembly's] intention into effect." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016).

The ALC considered similar issues in two unappealed cases decided prior to this dispute.[1] *See Smith v. Clarendon Cty. Assessor*, 2011 WL 7119293 (S.C. Admin. Law Ct. Sept. 15, 2011); *Rabbit Point Farm Ltd. v. Charleston Cty. Assessor*, 1998 WL 85460 (S.C. Admin. Law Ct. Feb. 10, 1998).

The assessor in *Rabbit Point Farm* assessed a farm house on the landowner's property at the 6% ratio and the remaining agricultural property at the 4% ratio. 1998 WL 85460, at *1-2. The landowner appealed, arguing the entire tract should be assessed as agricultural real property. *Id*. The ALC found "[t]he construction of the farm house, without any supportive evidence that it is used for commercial, recreational or residential purposes, is not sufficient to change the character of the property from agricultural to residential for tax assessment purposes." *Id*. at *4. The ALC ordered the assessor to classify the property, including the structures, as agricultural real property. *Id*.

The facts in *Smith* are analogous to this case. The assessor valued Smith's property by adding together the soil capability of the land and the fair market value of the structures. *Smith*, 2011 WL 7119293, at *1. On appeal, the ALC found the assessor was statutorily required to use the soil capability method of valuation for

[1] During the pendency of this appeal, the ALC again found in favor of the taxpayer in a case involving this issue. *See Dotsy, LLC v. Greenwood Cty. Assessor*, 2014 WL 1234871 (S.C. Admin. Law Ct. Mar. 24, 2014).

the land and structures to determine the "fair market value for agricultural purposes." *Id*. at *3-4. The ALC ordered Smith's property be "assessed and taxed based on [its] agricultural use value[]." *Id*. at *4.

Here, both parties agree Montgomery's property should be assessed at the 4% ratio applicable to agricultural real property pursuant to section 12-43-220(d)(1)(A). The statutory definition of "real property" includes the structures attached to the land that pass by conveyance of the land. *See* § 12-37-10. Section 12-43-230 of the South Carolina Code (2014), explicitly includes within the definition of agricultural real property "any tract of real property which is used to raise, harvest or store crops, feed, breed or manage livestock, or to produce plants, trees, fowl or animals useful to man, including the preparation of the products raised thereon for man's use . . . ." Accordingly, the entire property is properly assessed at the 4% ratio to determine Montgomery's tax liability.

The analysis does not end there, however, because section 12-43-220(d)(1)(A) provides only the assessment ratio to apply to the property, not the valuation method. The plain language of section 12-43-220(d)(2)(A) provides the method for valuing only land used for the growth of timber, not structures also located on the property.

By its own terms, section 12-43-220(d)(2)(A) defines fair market value for agricultural purposes for *land* used for the growth of timber and *land* used for the growth of other agricultural products. It is noteworthy that the General Assembly did not use the more expansive "real property" as defined section 12-37-10. Instead, the General Assembly limited its valuation method to the "land used for the growth of timber." § 12-43-220(d)(2)(A). We find the ordinary meaning of "land" within section 12-43-220(d)(2)(A) applies only to the property used to grow timber, not the structures situated on the same property. *See Anderson v. S.C. Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 707 (2012) ("Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning."). The General Assembly would have used the defined term "real property" in section 12-43-220(d)(2)(A) if it intended to include structures attached to the land, as Montgomery argues. Because it did not, we find the value of the structures is not reflected in the soil capability valuation method and the structures must therefore be valued under the fair market value method. *See* § 12-37-930 ("All property must be valued for taxation at its true value in money which in all cases is the price which the property

would bring following reasonable exposure to the market, where both the seller and the buyer are willing . . . .").

This interpretation is the same interpretation used by the Department since 1975. Sandy Houck, Jr., the Special Projects Coordinator for the Local Government Section at the South Carolina Department of Revenue (the Department), explained in an affidavit that the Department "has interpreted the South Carolina Code to provide two components to the total taxable value" for agricultural real property. He stated, "[t]he first component is the agricultural land, which must be valued according to the productive earning capacity of the soil, as stated in section 12-43-220(d)(2)(A)." He also indicated, "[t]he Department has interpreted the constitutional provisions and statutes governing agricultural real property valuation as requiring county assessors to determine the fair market value of any structures located on the agricultural real property, utilizing the valuation methods applicable to structures located on all real property . . . ." Further, he asserted, "[u]nder the Department's interpretation, the value of any structures located on the agricultural land is added to the value of the agricultural land in order to determine the total taxable value of the agricultural property." We find the Department's interpretation of the statute is reasonable and the ALC erred by failing to give proper deference to the agency's longstanding policy. *See Westvaco Corp.*, 305 S.C. at 348, 409 S.E.2d at 334 ("The construction of a statute by an agency charged with its administration will be accorded most respectful consideration and will not be overturned absent compelling reasons.").

The ALC found the Department's instructional publications support Montgomery's position. Specifically, the ALC cited the Department's publication, *South Carolina Property Tax* that states, "'Real property' means not only land, but also all structures and other things therein contained or annexed or attached to the land that pass . . . by the conveyance of the land." *South Carolina Property Tax* § 110.1 (2015).[2] This quoted language in the Department's publication mirrors the definitional language used in section 12-37-10. This language is not applicable to this situation, however, because the term "real property" is only used in in the classification statute, not the valuation statute.

[2] South Carolina Property Tax is an online resource available on the Department's website.

The ALC also based its decision on the legislative history of the property tax statutes at issue in this case. We find the ALC's reliance on previous versions of the valuation statute is misplaced.

The legislative history of section 12-43-220(d)(1)(A) does not support Montgomery's argument that the structures on his property should be valued using the soil capability method. The first version of section 12-43-220(d)(1)(A) was enacted in 1975. *See* Act No. 208, 1975 S.C. Acts 248. The 1975 Act provided, "Agricultural real property which is actually used for such purposes shall be taxed on an assessment equal to four percent of its fair market value for such purposes . . . ." 1975 S.C. Acts 250. In 1976, the General Assembly enacted a new version of the statute that provided, "Agricultural *land* which is actually used for such agricultural purposes shall be taxed on an assessment equal to (A) [f]our percent of its fair market value for such agricultural purposes . . . ." Act No. 618, 1976 S.C. Acts 1648 (emphasis added). Finally, in 1979 the General Assembly again amended the Act to state, "Agricultural real property which is actually used for such agricultural purposes shall be taxed on an assessment equal to: (A) [f]our percent of its fair market value for such agricultural purposes . . . ." Act No. 133, 1979 S.C. Acts 221. These statutes, which deal only with the *classification* of agricultural real property, have no bearing on the *valuation method* to be used when determining the owner's property tax liability.

The General Assembly also amended the precursor to section 12-43-220(d)(2)(A) in 1979. From 1976 to 1979, the statute provided, "'Fair market value for such agricultural purposes' is defined as the productive earning power based on soil capability . . . ." Act No. 618, 1976 S.C. Acts 1649. During that time, only agricultural *lands* could be assessed as agricultural real property. In 1979, the General Assembly recognized the significant amount of land used for timber production and changed the valuation statute to its current version, which defines fair market value of agricultural purposes, "when applicable to *land* used for the growth of timber" as the productive earning power based on soil capability for that crop. Act No. 199, 1979 S.C. Acts 881 (emphasis added). The 1979 amendment thus created a new valuation method for land used for timber production, but did nothing to change the method of valuing any structures on the land.

Accordingly, we find the legislative history supports the Assessor's argument that the General Assembly intended to continue valuing only the land based upon the soil capability. In 1976, only lands could be assessed using the 4% rate. In 1979, when the General Assembly amended the statute to include all agricultural real

property in the 4% assessment, it also changed the valuation statute to apply only to land. Therefore, the ALC erred in determining the legislative history supports Montgomery's argument regarding the valuation method to be used for structures on agricultural land.

Finally, the definition adopted by the ALC would lead to an absurd result. According to Montgomery, the only valuation method applicable to agricultural real property is the soil capability method. As a result, structures on agricultural land would be essentially exempt from tax. Montgomery acknowledged at oral argument that under his interpretation, a valuable home located on a tree farm would not be valued for tax purposes as long as that home is not a legal residence and is used for agricultural purposes. We find the General Assembly did not intend to create such an exemption. Instead, the General Assembly sought to protect farmers from rapidly escalating property tax liabilities by limiting the assessable value of the land. As Montgomery acknowledged at oral argument, to expand the exemption to include structures would allow both tractor sheds and million dollar buildings that are nominally used for agricultural purposes to avoid assessment for property tax purposes. The legislature could not have intended such a result.

CONCLUSION

For the foregoing reasons, the ALC's decision is

REVERSED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Devin Johnson, Appellant.

Appellate Case No. 2014-000766

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

Opinion No. 5456
Heard September 8, 2016 – Filed November 16, 2016

REVERSED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

GEATHERS, J.: Devin Johnson appeals his convictions for murder and possession of a weapon during the commission of a violent crime, arguing the trial court erred in (1) admitting text messages and historical cell service location

information obtained from his cellular service provider by a search warrant, (2) admitting his statement to a police officer, (3) instructing the jury concerning "the hand of one is the hand of all" because the evidence did not support the instruction, and (4) rendering the trial fundamentally unfair because the timing of the hand of one instruction prevented Appellant from addressing the theory in his closing argument. We reverse.

FACTS/PROCEDURAL HISTORY

In June 2011, two males entered the courtyard breezeway of Georgetown Apartments in Charleston and shot and killed Akeem Smalls (Victim). At the time of the crime, Charmaine Johnson, Appellant's sister, whom he visited regularly, lived in Georgetown Apartments. Victim was Charmaine's boyfriend. At some point prior to the shooting, Appellant had loaned Victim $420.00, and Victim refused to pay him back.

Two days after the murder, officers interrogated Appellant regarding the crime. During the interrogation, Appellant initially denied being in Charleston at the time of the crime; however, he eventually admitted to being at the scene of the crime with another individual identified as "Creep" around the time the crime occurred. Subsequently, a magistrate issued the search warrant at issue in this case, and officers proceeded to obtain Appellant's cell phone records, including his historical cell site location information. Thereafter, a grand jury indicted Appellant for murder and possession of a weapon during the commission of a violent crime, and he proceeded to trial.

At trial, Tenika Elmore testified that at the time of the crime, she and Appellant lived together in Orangeburg. She stated she worked in North Charleston and Appellant would occasionally drive her to work in her car. Elmore owned a blue 2008 Toyota Camry that was missing a rear passenger-side hubcap. On the day of the crime, Appellant dropped her off at work in the afternoon and picked her up at 11:15 that evening. Appellant and Elmore stopped at a gas station in Summerville on the way back to Orangeburg from Charleston. Based on the video surveillance from the gas station and Elmore's testimony, Appellant had dreadlocks and wore a white tee shirt and dark blue jeans on the evening of the crime.

Investigator David Osborne testified officers were interested in one portion of the video surveillance from Georgetown Apartments, which showed a blue Toyota Camry backing into a parking spot with two men exiting the vehicle and walking

toward Building C. Investigator Osborne opined backing into a parking space indicated "someone trying to get out in a hurry." He testified the two individuals walked toward the scene of the murder, which occurred outside of the camera's view, ran back to the car a few seconds later, and fled the complex. He explained the vehicle depicted in the surveillance video was consistent with the color, make, and model of Elmore's car, and the vehicle in the surveillance video and Elmore's car were missing a rear passenger hubcap. According to Investigator Osborne, the driver of the car wore a white tank top and black pants. The individuals in that car were the only two individuals of interest on the video surveillance because everyone else appeared to be "just normally walking around their apartment."

The jury convicted Appellant as indicted, and the trial court sentenced him to concurrent sentences of thirty-six years' imprisonment for murder and five years' imprisonment for possession of a firearm. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in finding the magistrate had probable cause to issue the search warrant for Appellant's cell phone?

2. Did the trial court err in admitting Appellant's statement to investigators?

3. Did the trial court err in charging "the hand of one is the hand of all" because the evidence did not support the instruction?

4. Did the timing of the "the hand of one is the hand of all" jury charge render the trial fundamentally unfair?

LAW/ANALYSIS

Because we find Appellant's fourth issue dispositive, it is the only issue we will address.[1] Appellant argues that in crafting his closing argument, he relied on the trial court's assurance that it would not instruct the jury on "the hand of one is the hand of all." He contends the court's subsequent reversal of its earlier ruling and

[1] *See State v. Crisp*, 362 S.C. 412, 420, 608 S.E.2d 429, 434 (2005) (holding appellate courts need not address remaining issues when the resolution of a prior issue is dispositive).

charging "the hand of one is the hand of all" rendered the trial fundamentally unfair. We agree.

After the defense rested, the State requested the "the hand of one is the hand of all" jury charge because it "ha[d not] been able to identify a co-defendant." The court denied the request, stating it did not "buy" the State's rationale that the evidence showed two individuals were involved in the crime. The court stated, "The whole testimony in this case is [Appellant was] the shooter." Further, the court stated,

> There's got to be some evidence that somebody else other than -- there's no evidence of anything that either one of them shot, to be candid. There's evidence that [Victim] was shot. But if you take [Appellant's] statements, his inconsistent statements, which the jury can consider, and his possibly being the person driving the car, pull all of those together, there's probably substantial circumstantial evidence to support a verdict, but there is no evidence to support that he was a -- that someone else shot, other than him if he shot at all. So, thank you, I decline to give that.

Thereafter, the following exchange occurred between Appellant and the trial court:

> THE COURT: All right. I assume you object to that being charged?
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: Well, I think, a review of the record, there's not any evidence to support that charge at all.

Subsequently, after a lunch break, the following occurred between the State and the trial court:

> [THE STATE]: They haven't raised -- there's one quick issue. I'm concerned that -- [Appellant] can let me know if he believes I'm overthinking i[t]. When we had the charge conference[,] he knows that that charge

> conference could be reopened, specifically. You know, that that charge conference would be reopened specifically to the hand of one charge?
>
> . . . .
>
> THE COURT: Let me tell you something. I thought about it at lunch. You know what that says to me? 'Judge, I don't give [sic] feel good about my case.'
>
> [THE STATE]: Well, Judge, I---
>
> THE COURT: No, I'm sorry, because you could have gone with that theory from the get-go, and you haven't done that.
>
> [THE STATE]: Okay.
>
> THE COURT: That's just bootstrapping, man. And you've presented this case, "I've got my shooter. I let this guy go." But listen, if there's evidence of that -- the reason I'm not charging that is I find that there is absolutely no evidence to warrant it. I don't know what the evidence may be after he testifies.[2]

Thereafter, in his closing arguments, defense counsel argued, "He didn't see a murder. He didn't participate in a murder. He wasn't there." Defense counsel further argued Appellant lied when he told officers he was at Georgetown Apartments when the crime occurred. He also argued Appellant lied when he stated he drove Elmore's car to the crime scene because "that car [in the surveillance video] is not [Elmore's] car." Thereafter, the trial court instructed the jury without including an instruction on accomplice liability.

After an hour of deliberations, the jury asked, "[I]f the other individual pulled the trigger, can the defendant still be guilty?" Because of this question, the trial court

[2] Appellant did not testify at trial.

apologized to the State, determining it was required to charge "the hand of one is the hand of all" and that its prior decision not to give the charge was incorrect. Appellant asked the court to respond to the question by either stating "the answer to that is no in this case" or "you have all the evidence and you have all the law." Instead, in order to cure the error, the trial court offered Appellant the opportunity to reargue his closing argument before the court recharged the jury. The trial court considered declaring a mistrial because of the error but stated it first wanted to find a case that said a trial court cannot give a supplemental jury charge after deliberations began and offer additional closing arguments to cure the error.

Appellant rejected the trial court's offer, asserting that rearguing the charge would "waive" the issue on appeal. Further, Appellant objected to the charge and moved for a mistrial, arguing (1) he would have addressed the charge in closing had he known it would become an issue, (2) giving the charge in response to a question after deliberations began was a judicial comment on the facts, (3) the charge would "constitute a premature deliberation after the fact because [the jury was] not supposed to deliberate until the case ha[d] been submitted, which include[d the trial court's] charge," and (4) the charge would require Appellant to "shift[] theories" in front of the jury because during his closing argument, he contended he was not at the scene, and after the additional jury charge, he would have had to argue he was merely present. Thereafter, the trial court charged the jury on "the hand of one is the hand of all" and mere presence. After the jury returned to the jury room, Appellant argued the evidence did not support the charge. The trial court responded as follows:

> And in response of the rationale, my reasoning for it, how the evidence does, because the evidence as presented supports -- we had two leaving the car, walking towards where the shooting occurred, the shooting, and two people come back, running, leaving, and identified by eyewitnesses as two people. A person is shot, cartridges are found, all of that is as to who was the shooter. For those reasons, I did it and I understand your objections.

We conclude the trial court's decision to give the charge after confirming it would not give the charge rendered the trial fundamentally unfair. The circumstances of this case are similar to those in *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813

(2001). During the charge conference in *Jones*, the trial court indicated it planned to charge that reasonable doubt is a doubt that would cause a reasonable person to hesitate to act. *Id.* at 576, 541 S.E.2d at 820. Defense counsel specifically incorporated the "hesitate to act" language in his closing argument, telling the jury that "when you go through this testimony and this evidence in this case, you're gonna hesitate." *Id.* at 576–77, 541 S.E.2d at 820–21. Subsequently, the trial court, upon request from the State, removed the "hesitate to act" language from the jury charge. *Id.* at 577, 541 S.E.2d at 821. On appeal, our supreme court held, "Appellant reasonably relied upon the [court's] representation that [it] intended to give that charge to the jury. The decision to alter the charge, after the argument, was fundamentally unfair." *Id.* at 578, 541 S.E.2d at 821.

We recognize this case can be distinguished from *Jones* in one regard. Here, Appellant rejected the trial court's offer to reargue his closing argument in order to correct the error.[3] While this is a novel issue in South Carolina—allowing counsel to present additional closing arguments after the jury has already begun deliberating in order to cure a defective jury charge—it is not necessarily prohibited. Nonetheless, we conclude South Carolina jurisprudence does not favor rearguing after deliberation has begun because of its potential invasion into the province of the jury. Moreover, if we were to decide this case under *Jones*, the decision to give the charge after the jury began deliberating was prejudicial because here, as in *Jones*, Appellant crafted his closing argument in reliance on the trial court's adamancy that it would not charge "the hand of one is the hand of all" during the charge conference because, at that time, the court believed the evidence did not support the charge. *See id.* at 578, 541 S.E.2d at 821 ("Appellant reasonably relied upon the [court's] representation that [it] intended to give that charge to the jury. The decision to alter the charge, after the argument, was fundamentally unfair."). We agree with Appellant's contention that to reargue his closing would have required him to "shift theories" because during his closing argument, he contended he was not at the scene, and after the additional jury charge, he would have had to argue he was merely present. We further agree with Appellant that this shifting of theories could have potentially diminished his credibility with the jury. *See id.* ("Appellant's attorney told the jury that the [court] would charge them reasonable doubt meant a doubt which would cause a

[3] The opinion in *Jones* does not suggest the trial court offered an opportunity for additional closing arguments.

reasonable person to 'hesitate to act.' The effect of the [court's] after the fact decision to excise the hesitate to act language from his charge was to diminish appellant's attorney's credibility in the eyes of the jury."). Furthermore, the colloquies between the trial court and the parties and the court's suggestion of a mistrial reveal the court recognized the magnitude of its decision with regard to its initial refusal to give the charge and its subsequent decision to give the charge.

Courts in other jurisdictions have reached the same conclusion. In *People v. Clark*, 556 N.W.2d 820, 822–23 (Mich. 1996), a trial court—after the parties made their respective closing arguments—changed its mind regarding jury charges and decided it would not give a specific modified instruction. Defense counsel objected, arguing he had relied on the modified instruction in formulating his closing argument. *Id.* at 823. The trial court, "acknowledging the predicament that had been created, offered the defense the opportunity to reopen the closing argument." *Id.* "Defense counsel declined this invitation, stating that in his opinion[,] the modified instruction was not a misstatement of the law and that to reargue would only accentuate issues that should not be accentuated and create credibility problems with the jury." *Id.* He also argued "he could not prepare a new argument on such short notice." *Id.*

The Supreme Court of Michigan affirmed the court of appeals' reversal of the defendant's conviction, holding:

> We agree with the Court of Appeals that reargument would be inappropriate. This would have accentuated the issue and impaired defense counsel's credibility with the jury. Because this error affected the jury's result, it is prejudicial error requiring reversal because it affirmatively calls into question the validity of the jury's decision.

Id. at 827.

The court cautioned:

> Under no circumstances do we conclude, advocate, or imply that a trial [court] has a duty to instruct the jury

> incorrectly, nor do we say that the [court] erred by refusing to give the erroneous instruction.
>
> The prejudice to the defendant in this case was incurred by virtue of defense counsel's argument in reliance on one instruction and the [court's] subsequent decision to instruct the jury on a different one. This misled defense counsel in formulating his closing argument.

Id.; *see also United States v. Oliver*, 766 F.2d 252, 254 (6th Cir. 1985) ("When the trial court determined that the jury should be re-instructed, it presented the attorneys the option of rearguing their respective positions in light of the revised instructions or, in the alternative, the court proposed to explain the reason for the modification of the instruction to the jury. . . . [D]efense counsel expressly tailored his closing argument upon the alleged failure of the government to prove a critical element of the crime . . . as directed by the original jury charge. When the court subsequently omitted that element as a prerequisite for conviction, the defense attorney was left with the impossible task of rearguing to the jury points which he had conceded during his first argument."); *Cruz v. State*, 963 A.2d 1184, 1192 (Md. 2009) ("We are not persuaded that a supplemental closing argument would have cured the problem created by the court's eleventh hour insertion of this new theory of culpability."); *Murray v. State*, 857 S.W.2d 806, 811 (Tex. Crim. App. 1993) ("Without notice that the court would submit this instruction, Murray's counsel could not fulfill his function of intelligently arguing the defenses actually available to Murray. Further, the court's repudiation of the very argument it allowed caused the trial to lose its character as an adversary proceeding, greatly jeopardizing Murray's ability to receive a fair trial. Murray would have been better off without closing argument."); *Moore v. State*, 848 S.W.2d 920, 922–23 (Tex. Crim. App. 1993) (holding defense counsel relied on the trial court's original charge, stating, "Counsel made a legitimate argument that was based entirely on the trial [court's] written instructions, and it is one the jury may have found persuasive if it followed those instructions, as it was bound by oath to do," and the trial court's offer of five more minutes of additional argument did not cure the error).

Yet, we note other courts have required the trial court to allow counsel to reargue should the court introduce new law after closing arguments. In *People v. Ardoin*, 130 Cal. Rptr. 3d 1, 24 (Cal. Ct. App. 2011), the court stated, "To prevent unfair

prejudice, if a supplemental instruction introduces new matter for consideration by the jury, the parties should be given an opportunity to argue the theory." Further, the court held, "If supplemental or curative instructions are given by the trial court without granting defense counsel an opportunity to object, and if necessary, offer additional legal argument to respond to the substance of the new instructions, the spirit of [a state statute] and the defendant's right to a fair trial may be compromised." *Id.*; *see also United States v. Horton*, 921 F.2d 540, 547 (4th Cir. 1990) (holding that when "a new theory is presented to the jury in a supplemental instruction after closing argument, the court generally should give counsel time for additional argument"); *United States v. Gaskins*, 849 F.2d 454, 460 (9th Cir. 1988) ("[I]nstructing the jury that it could convict [the defendant] as an aider or abettor without allowing additional argument to address this theory requires reversal of both counts.").

However, some courts, although not requiring additional closing arguments, found either no error when the trial court offered additional arguments after a supplemental jury instruction or no prejudice to the appellant when the appellant failed to request the opportunity for additional closing arguments after the supplemental jury instruction. *See State v. Bircher*, 132 A.3d 292, 302, 304–06 (Md. 2016) (holding the trial court did not err in determining a supplemental instruction on transferred intent was proper and "offering additional closing time" for the parties to give additional closing arguments); *Commonwealth v. Melvin*, 103 A.3d 1, 50 (Pa. Super. Ct. 2014) (noting the appellant "arguably waived this claim by failing to request the opportunity to offer additional argument to the jury to address the supplemental charge after being informed that it would be given"); *State v. Calvin*, 316 P.3d 496, 507 (Wash. Ct. App. 2013) (finding no prejudice when "[d]efense counsel was given the opportunity to reargue the case but declined"), *review granted in part, cause remanded*, 353 P.3d 640 (Wash. 2015); *see also United States v. Welbeck*, 145 F.3d 493, 497 (2d Cir. 1998) ("The initiative for the supplemental instruction came from the jury itself, precluding the possibility that the timing of the charge was unfairly suggestive on the court's part. Nor is there any indication that [the defendant] was unfairly prejudiced by the late instruction.").

Although appellate courts in some jurisdictions have determined the trial court's decision to allow counsel to reargue an issue after the trial court changed its jury charge does not require an automatic reversal, they have also acknowledged the decision, while not forbidden, "should be made only with extreme caution" and

will result in a mistrial if the defendant suffered prejudice as a result. *See Clark*, 556 N.W.2d at 826 ("A change in jury instructions at the eleventh hour, as occurred here, should be made only with extreme caution."); *see also United States v. Scheffer*, 463 F.2d 567, 574 (5th Cir. 1972) ("[A] trial [court's] failure to inform counsel of an instruction which is subsequently given to the jury, or omitted from their consideration, does not require that the conviction be reversed in every case. Rather, the test is whether the instruction, considered as a whole, was fundamentally prejudicial to the rights of the defendant."); *Clark*, 556 N.W.2d at 823 ("Reargument would only be appropriate if it would not prejudice the defendant.").

Based on the foregoing, we find the trial court's decision was fundamentally prejudicial to Appellant because Appellant crafted his closing argument in reliance on the trial court's adamancy that it would not charge "the hand of one is the hand of all" during the charge conference. *See Jones*, 343 S.C. at 578, 541 S.E.2d at 821 ("Appellant reasonably relied upon the [court's] representation that [it] intended to give that charge to the jury. The decision to alter the charge, after the argument, was fundamentally unfair."); *see also Oliver*, 766 F.2d at 254 (stating that although the trial court presented the attorneys with the option of rearguing their respective positions after the court determined the jury should be reinstructed, "defense counsel expressly tailored his closing argument upon the alleged failure of the government to prove a critical element of the crime . . . as directed by the original jury charge" and omitting that element as a prerequisite for conviction left the defense attorney "with the impossible task of rearguing to the jury points which he had conceded during his first argument"); *Moore*, 848 S.W.2d at 922–23 (holding defense counsel relied on the trial court's original charge, stating, "Counsel made a legitimate argument that was based entirely on the trial [court's] written instructions, and it is one the jury may have found persuasive if it followed those instructions, as it was bound by oath to do," and the trial court's offer of five more minutes of additional argument did not cure the error). Accordingly, we reverse the trial court's decision to provide the additional jury charge after trial counsel relied on the court's statement that it would not give the charge.

REVERSED.

WILLIAMS and THOMAS, JJ., concur.