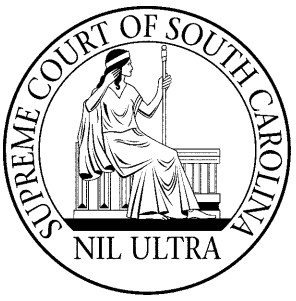

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 48
November 9, 2009
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 George A. Harper, Respondent.

Opinion No. 26737
Submitted October 13, 2009 – Filed November 4, 2009

DEFINITE SUSPENSION

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

John S. Simmons, of Simmons Law Firm, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the issuance of a public reprimand or a definite suspension not exceed ninety (90) days. See Rule 7(b), RLDE, Rule 413, SCACR. Respondent requests that, if the Court imposes a suspension, that the suspension be made retroactive to March 31, 2009, the date of his interim suspension. In the Matter of Harper, 382 S.C. 162, 675 S.E.2d 721 (2009). We accept the Agreement and definitely suspend respondent from the practice of law in this state for a

ninety (90) day period, retroactive to the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent pled guilty to one count of willful failure to file a state income tax return and failure to pay taxes in violation of South Carolina Code Ann. § 12-54-44(B)(3) (2000) and was sentenced accordingly. Respondent represents he has paid the taxes owed and the costs of the prosecution.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct) and Rule 8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(4) (it shall be a ground for discipline for a lawyer to be convicted of a crime of moral turpitude or a serious crime), and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a ninety (90) day period. We grant respondent's request that the suspension be made retroactive to the date of his interim suspension. 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.

WALLER, ACTING CHIEF JUSTICE, PLEICONES, BEATTY and KITTREDGE, JJ., concur. TOAL, C.J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Newberry County Associate
Probate Judge Rebecca A. Allen, Respondent.

Opinion No. 26738
Submitted October 20, 2009 – Filed November 9, 2009

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Paulette Edwards, of Law Office of Paulette Edwards, PA, of Columbia, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR.[1] The facts as set forth in the Agreement are as follows.

[1] Respondent no longer holds judicial office. A public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. See In re O'Kelley, 361 S.C. 30,

FACTS

On or between April 19, 2007, and December 21, 2007, respondent embezzled public funds while working as a Newberry County Associate Probate Judge. In mitigation, respondent submits that she took the money to pay for medical expenses and to pay deposits needed for surgery and medical testing. Further, respondent submits that, at the time she took the money, she hoped to repay the funds at a later time. When confronted by agents from the South Carolina State Law Enforcement Division (SLED), respondent confessed and accepted responsibility for her actions.

On April 28, 2008, respondent was arrested and charged with embezzlement of public funds over $1,000.00. Respondent entered Pre-Trial Intervention (PTI) and, as a condition of PTI, made full restitution. Respondent has successfully completed PTI and her criminal record has been expunged.

LAW

By her misconduct, respondent admits she has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold the integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); and Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). Respondent also admits she has violated Rule 7(a)(1) (it shall be ground for discipline for judge to violate the

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603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

Code of Judicial Conduct) and Rule 7(a)(9) (it shall be ground for discipline for judge to violate the Oath of Office) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Respondent shall not apply for, seek, or accept any judicial position whatsoever in this State without the prior express written authorization of this Court after due service on ODC of any petition seeking the Court's authorization. Respondent is hereby reprimanded for her misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Representative Harold Mitchell, Petitioner,

v.

Spartanburg County Legislative Delegation, Respondent.

ORIGINAL JURISDICTION

Opinion No. 26739
Heard October 6, 2009 – Filed November 9, 2009

JUDGMENT FOR PETITIONER

Charles J. Hodge and T. Ryan Langley, both of Spartanburg, for Petitioner.

J. Derham Cole, Jr., of Cole Law Firm, of Spartanburg, Ralph Keith Kelly, of Lister Flynn & Kelly, of Spartanburg, Suzanne Boulware Cole, of Collins & Lacy, of Greenville, Glenn G. Reese, of Inman, Harvey S. Peeler, Jr., of Gaffney, Joey Millwood, of Landrum, Lee Bright, of Roebuck, Mike Anthony, of Union, and Shane R. Martin, of Pauline, for Respondent.

Bradley S. Wright, Charles F. Reid, Bonnie B. Goldsmith, and Jennifer L. Dobson, all of Columbia, for *Amicus Curiae*, Robert W. Harrell, Jr. Speaker.

Michael R. Hitchcock, S. Phil Lenski, and Kenneth M. Moffitt, all of Columbia, for Intervenor, President, Pro Tempore of S. C. Senate.

CHIEF JUSTICE TOAL: Because Harold Mitchell's (Petitioner) petition presents an issue of great public interest, we exercise our authority to review this matter in our original jurisdiction. S.C. Const. art. V, § 5; Rule 245, SCACR; *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991).

FACTS/PROCEDURAL HISTORY

Following the November 2008 elections, the Spartanburg County Legislative Delegation (Respondent) consisted of thirteen members from the House and Senate.[1] On November 10, 2008, Respondent met and elected Rep. Lanny Littlejohn to serve as its Chairman by a vote of nine to four and Rep. Keith Kelly to serve as Vice-Chairman by a vote of eight to five. Subsequent to that meeting, Sen. Lee Bright sought an opinion from South Carolina Senate legal counsel regarding the procedure Respondent used in selecting officers. That inquiry resulted in a letter written to Sen. Bright by Senate staff members John Hazzard and Michael Hitchcock that concluded *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999) requires weighted voting in selecting delegation officers. In response, Rep. Keith Kelly sought an opinion from House counsel on the issue. House counsel concluded that selection of delegation officers is a matter of internal administrative procedure and does not constitute the sort of governmental action requiring weighted voting as contemplated by *Vander Linden*.

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[1] The delegation was comprised of Representatives Rita Allison, Mike Anthony, Derham Cole, Jr., Mike Forrester, Keith Kelly, Lanny Littlejohn, Joey Millwood, Harold Mitchell, and Steve Parker; Senators Lee Bright, Shane Martin, Harvey Peeler, and Glenn Reese.

The members of the delegation split into two factions over whether the officers of the delegation should be elected by a simple majority of the delegation or by weighted vote according to the number of constituents in each member's district. The result of this split was that each group held its own meetings as the county delegation.

Petitioner filed a petition on April 4, 2009 seeking the original jurisdiction of this Court to resolve this dispute. Subsequent to the filing of the petition to this Court, Respondent held a meeting on May 4, 2009. At that meeting, a compromise was reached and a vote held whereby the following officers were selected: Rep. Lanny Littlejohn as Chairman and Sen. Shane Martin as Vice-Chairman. No information was given to the Court about the compromise election until briefs were filed in this matter. This Court issued an Order dated June 11, 2009 accepting the petition, directing the Petitioner to submit a brief, and dispensing with formal requirements of a transcript of record given the circumstances of this particular matter.

ISSUE

Is the election of officers to a legislative delegation in South Carolina a procedural matter such that a simple majority vote is appropriate or a substantive matter such that a weighted vote is required?

LAW/ANALYSIS

Petitioner argues the election of officers to a legislative delegation is a procedural matter such that the simple majority method is appropriate. We agree.

In *Vander Linden*, the Fourth Circuit concluded that the Equal Protection Clause's one person, one vote requirement applied to South Carolina's legislative delegations. *Vander Linden*, 193 F.3d at 281. The Fourth Circuit did not dictate a remedy, but remanded the case in order to permit the South Carolina legislature to correct the constitutional defect. *Id.*

In determining that the one person, one vote rule applied to the election of legislative delegations the Fourth Circuit stated, "Focusing on whether the delegations exercise governmental functions seems to us entirely appropriate."[2] *Id.* at 275. "Surely it is fair to infer . . . that the one person, one vote rule does not apply to the election of officials who do *not* 'perform governmental functions.'" *Id.* (emphasis in original).

Respondent admits that the offices of Chairman and Vice-Chairman are ceremonial, *pro forma* positions. Furthermore, the Chairman and Vice-Chairman: (a) cannot take any action on behalf of the delegation save for calling a meeting to order and certain other procedural matters, (b) cannot independently exercise any of the substantive functions of the delegation except by virtue of their roles as voting members, and (c) are not accorded greater weight when voting by virtue of their positions as delegation officers. Thus, these officers do not perform substantive duties and perform no governmental functions that raise the concerns at issue in *Vander Linden*. Therefore, *Vander Linden*'s weighted voting remedy does not apply to the election of Chairman and Vice-Chairman, and these offices can be elected by a simple majority vote of the delegation.

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[2] The governmental functions of the legislative delegation at issue in *Vander Linden* included: (a) making and/or recommending appointments to boards and commissions; (b) approving and/or recommending the expenditure of money allocated by the South Carolina General Assembly for highways, parks, recreation, tourism, and other matters; (c) approving the budgets of local school districts; (d) initiating referenda regarding the budgetary powers and the election of governing bodies for a special purpose in public service districts; (e) approving the reimbursement of expenses for county planning commissioners; (f) approving county planning commission contracts with architects, engineers, and other consultants; (g) altering or dividing school districts of counties; (h) reducing existing special school levies in counties and school districts; and (i) submitting grant applications for planning, development, and renovating park and recreation facilities. *Vander Linden*, 193 F.3d at 271.

CONCLUSION

For the aforementioned reasons, we find that a simple majority vote is the appropriate method of electing county legislative delegation officers.

WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth L. Mitchum, Respondent.

Opinion No. 26740
Submitted October 13, 2009 – Filed November 9, 2009

INDEFINITE SUSPENSION

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

Kenneth L. Mitchum, pro se, of Georgetown.

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

FACTS

I.

Respondent represented Complainant A in a civil action. Respondent failed to keep Complainant A reasonably informed regarding the status of the case and failed to diligently pursue the case. In addition, respondent signed a Stipulation of Dismissal in the case without Complainant A's knowledge or consent and failed to inform Complainant A that he had signed the Stipulation of Dismissal.

II.

Respondent represented a client in a civil action. Respondent failed to diligently pursue the case. During the representation, respondent was placed on definite suspension for nine (9) months and an attorney was appointed to protect the interests of respondent's clients (ATP). In the Matter of Mitchum, 378 S.C. 597, 663 S.E.2d 482 (2008).

On or about September 26, 2008, respondent delivered a check to the ATP in the amount of $19,480.00 made payable to the client and requested the ATP deliver the check to the client. The $19,480.00 check tendered to the client was not the result of any actual settlement in the client's case. Instead, by tendering the check to the client, respondent was attempting to provide financial assistance to the client in connection with pending or contemplated litigation.

III.

Respondent was retained to represent Complainant B in a civil action against a defendant. Respondent was served with the defendant's Interrogatories and Request for Documents; he failed to timely respond to either document. Respondent was served with a Notice of Motion and a Motion to Compel, but failed to respond to the

Motion to Compel. Based on respondent's failure to respond to the Interrogatories, the Request for Documents, or the Motion to Compel, Complainant B's case was dismissed with prejudice. Respondent did not notify Complainant B that the matter had been dismissed and falsely led Complainant B to believe the case was still on the docket for trial.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.2 (lawyer shall abide by client's decision whether to accept settlement); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing clients); Rule 1.4 (lawyer shall keep clients informed); Rule 1.8(e) (lawyer shall not provide financial assistance to client in connection with pending or contemplated litigation); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).[1]

[1] Respondent's disciplinary history includes a definite suspension for nine (9) months, a definite suspension for ninety (90) days, a public reprimand, a private reprimand, and an admonition. In the Matter of Mitchum, 378 S.C. 597, 663 S.E.2d 482 (2008); In the Matter of Mitchum, 333 S.C.265, 510 S.E.2d 214 (1998); In the Matter of Mitchum, 331 S.C. 34, 501 S.E.2d 733 (1998); In the Matter of Two Anonymous Members of the South Carolina Bar, 278 S.C. 477, 298 S.E.2d 450 (1982).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Governor Mark Sanford, Petitioner,

v.

South Carolina State Ethics Commission and Herbert R. Hayden, Jr., in his official capacity as Executive Director of the State Ethics Commission, Respondents,

The Honorable Robert W. Harrell, Jr., Speaker of the South Carolina House of Representatives, Intervenor.

and

The Honorable Robert W. Harrell, Jr., Speaker of the South Carolina House of Representatives, Petitioner,

v.

South Carolina State Ethics Commission and Herbert R. Hayden, Jr., in his official capacity as Executive Director of the State Ethics Commission, Respondents,

Governor Mark Sanford, Intervenor.

ORIGINAL JURISDICTION

Opinion No. 26741
Heard October 19, 2009 – Filed November 5, 2009

RELIEF DENIED

Karl S. Bowers, Jr., Kevin A. Hall, and M. Todd Carroll, all of Columbia, for Petitioner and Intervenor Governor Mark Sanford.

Charles F. Reid, Bradley S. Wright, Bonnie B. Goldsmith and Patrick G. Dennis, all of Columbia, for Petitioner and Intervenor Speaker Robert W. Harrell, Jr.

Cathy L. Hazelwood, of Columbia, for Respondents South Carolina State Ethics Commission and Herbert R. Hayden, Jr., in his official capacity as Executive Director of the State Ethics Commission.

JUSTICE WALLER: These matters involve the confidentiality of an ethics investigation involving Governor Mark Sanford which is currently pending before the South Carolina State Ethics Commission (Commission).

PROCEDURAL BACKGROUND

On September 30, 2009, Governor Sanford petitioned this Court for a writ of mandamus directing the Commission to comply with the statute and regulations regarding confidentiality of Commission proceedings. More specifically, the Governor requested that the Commission not be permitted to publicly disseminate any investigatory reports or other information about this investigation. The Commission filed a return in opposition to the Governor's petition for a writ of mandamus.

Robert W. Harrell, Jr., Speaker of the South Carolina House of Representatives, then filed a motion to intervene in the Governor's action. We granted that motion, and the Speaker filed a return in opposition to the Governor's petition. In addition, Speaker Harrell filed his own petition for a writ of mandamus in the Court's original jurisdiction. The Speaker asked the Court to direct the Commission to issue "its investigation materials and information to the House of Representatives" because the House is "the sole prosecuting authority for purposes of impeachment." The Commission filed a return in opposition to the Speaker's petition. The Governor sought to intervene in the Speaker's action; we granted that request.

Because of the exigencies related to the case, we agreed to entertain this matter in the Court's original jurisdiction, on an expedited basis, and heard oral arguments of the parties on October 19, 2009. On October 21, 2009, we issued an order requesting additional materials and briefs from the parties on the issue of waiver. With that briefing now complete, the matter is ripe for our decision.

FACTS

By letter dated August 18, 2009, Governor Sanford was informed by Herbert R. Hayden, Jr., Executive Director of the Commission, that the Commission had determined an ethics complaint against the Governor set forth "sufficient facts" to warrant an investigation. See S.C. Code Ann. § 8-13-320(10)(c) (Supp. 2008). The Governor was informed that: (1) he would be contacted by an investigator concerning any statements he desired to make; and (2) he could provide a written response to the complaint and include any documentation he would like for the Commission to consider.

Significantly, this letter also advised the Governor of the following:

> In accordance with [S.C. Code Ann.] Section 8-13-320(9) and (10), **all complaints, investigations, inquires [sic], hearings, and accompanying documents are confidential unless the respondent waives the right to confidentiality in writing to the Commission**, or the Commission issues a public disposition….

(Emphasis added).

By letter to Hayden dated August 24, 2009, **counsel** for the Governor stated it was his understanding that if the Governor waived his right to confidentiality the following would apply:

> 1. The **only** information that will be made public during the pendency of this matter is the fact that an investigation is being conducted and the Complaint Form itself;
>
> 2. The investigation and the results thereof, including any statements or documents, will remain

confidential and will not be made public at any time, either during or after the conclusion of this matter;

3. If a hearing is held in this matter, such hearing will be held in executive session unless Governor Sanford requests an open hearing; and

4. Any action taken by the Commission will be made public upon final disposition.

(Emphasis in original). Counsel for the Governor further represented that his understanding was based on information Hayden had given him during their recent discussions regarding the impact of a potential waiver by the Governor.

Hayden responded to counsel's letter with his own letter dated August 27, 2009, which stated:

> If Governor Sanford waives his right to confidentiality, the following will apply:
>
> 1. The **only information that will be made public during the pendency of this matter is the fact that an investigation is being conducted and the Complaint Form itself**;
>
> 2. **The investigative report, including any statements or documents, will not become part of the public record; however, any testimony given, documents entered into evidence at an administrative hearing, and the Commission's findings will become a**

> **part of the formal record along with the Commission's Decision and Order, and will be public;**
>
> 3. If a hearing is held in this matter, such hearing will be held in executive session unless Governor Sanford requests an open hearing; and
>
> 4. Any action taken by the Commission will be made public upon final disposition.

(Emphasis added). Hayden also stated that the only item "affected by a waiver of confidentiality is Item 1. **Items 2, 3 and 4 are required by either statute or regulation and will apply regardless of a waiver**." (Emphasis added).

The following day, August 28, 2009, the Governor **himself** (i.e., not counsel for the Governor) sent a signed letter to Hayden setting forth his record of "going the extra mile in fighting for transparency in our state government." The Governor's August 28th letter further stated as follows:

> **In an effort to once again go the extra mile, I would like to waive my right to confidentiality in your upcoming ethics probe.** I believe that what **the whole of our travel records** will show is that this administration has worked very hard to be a good steward of taxpayer resources.
>
> It's also my hope that **my decision to take the unilateral step of waiving confidentiality** will serve to encourage both the public to invite, and legislators to lead, in changing the current system. In this system all constitutional officers, and every state employee, is held to one standard – while the General

> Assembly lives under a completely different standard without transparency. I strongly believe this needs to change, and again do hope this is one of the byproducts of what takes place this fall.[1]

(Emphasis added.)

In his petition for a writ of mandamus, Governor Sanford maintains he actually intended his August 28th letter to be a "limited" waiver of confidentiality and not the unconditional waiver conveyed by the letter's clear terms.

The Governor's counsel met with Hayden on September 8, 2009. Hayden advised counsel that the Commission intended to publicly distribute its preliminary investigative report to the House of Representatives.

On September 14, 2009, the Governor filed a Motion to Enjoin Dissemination of Investigative Report with the Commission.[2] By letter dated

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[1] Moreover, we note the Governor also issued a press release on August 28th which stated in relevant part:

> In the continued spirit of a fair and transparent process, I am today announcing that I'll be waiving confidentiality as the Ethics Commission studies some of the allegations made in the press and by political detractors. Our administration has nothing to hide. We would welcome the public to scrutinize our record, just as the Ethics Commission will do.

See http://www.scgovernor.com/news/releases/8-28-2009.htm.

[2] The motion for an injunction requested that the Commission enjoin itself, including all commissioners and staff members, from disseminating any investigative reports, recommendations, pre-hearing reports, or any other written or oral materials or information regarding this matter that may be

September 15, 2009, Cathy Hazelwood, counsel for the Commission, advised the Governor's counsel that the motion was premature because the investigation into this matter is "ongoing and no report has been begun, let alone completed." She explained the Governor would receive the report "when the Commission receives the report," and at that time, there would be an opportunity "to argue any and all motions related to this matter."

Regarding Speaker Harrell's petition for a writ of mandamus, he argues that pursuant to Article XV, Section 1 of the South Carolina Constitution, the House has the sole power of impeachment.[3] Therefore, because the House of Representatives is the prosecutorial authority for purposes of impeachment, the Speaker contends this Court should order the Commission to release its investigation materials to the House.

ISSUES

1. Has either the Governor or the Speaker met the requirements for the issuance of a writ of mandamus?

2. Does the Governor's August 28th letter constitute a complete waiver of confidentiality under S.C. Code Ann. § 8-13-320(10)(g)?

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created by any person associated with the Commission. The motion is nearly identical to the petition for a writ of mandamus filed in this Court.

[3] Article XV, Section 1 provides as follows:

> The House of Representatives alone shall have the power of impeachment in cases of serious crimes or serious misconduct in office by officials elected on a statewide basis, state judges, and such other state officers as may be designated by law. The affirmative vote of two-thirds of all members elected shall be required for an impeachment. Any officer impeached shall thereby be suspended from office until judgment in the case shall have been pronounced, and the office shall be filled during the trial in such manner as may be provided by law.

DISCUSSION

1. Writ of Mandamus

This Court has the power to issue writs or orders of injunction or mandamus. S.C. Const. Art. V, § 5; S.C. Code Ann. § 14-3-310 (1976). The writ of mandamus is "the highest judicial writ known to the law." Willimon v. City of Greenville, 243 S.C. 82, 86, 132 S.E.2d 169, 170 (1963); accord Edwards v. State, 383 S.C. 82, 678 S.E. 2d 412 (2009); City of Rock Hill v. Thompson, 349 S.C. 197, 563 S.E.2d 101 (2002); Ex parte Littlefield, 343 S.C. 212, 540 S.E.2d 81 (2000). The "principal function" of mandamus "is to command and execute, and not to inquire and adjudicate; therefore, it is not the purpose of the writ to establish a legal right, but to enforce one which has already been established." Willimon, 132 S.E.2d at 171; see also Porter v. Jedziniak, 334 S.C. 16, 18, 512 S.E.2d 497, 497 (1999) ("The primary purpose of a writ of mandamus is to enforce an established right and to enforce a corresponding imperative duty created or imposed by law."); Redmond v. Lexington County Sch. Dist. No. 4, 314 S.C. 431, 445 S.E.2d 441 (1994) (a writ of mandamus is not appropriate for a discretionary authority).

To obtain a writ of mandamus requiring the performance of an act, the petitioner must show: (1) a duty to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. E.g., Wilson v. Preston, 378 S.C. 348, 662 S.E.2d 580 (2008); Porter v. Jedziniak, supra; Willimon, supra. Mandamus is based on the theory that an officer charged with a purely ministerial duty can be compelled to perform that duty in case of refusal. Wilson v. Preston, supra.

The confidentiality provision of the Ethics Act is found in S.C. Code Ann. § 8-13-320(10)(g), which states as follows:

> **All investigations, inquiries, hearings, and accompanying documents must remain confidential until final disposition of a matter unless the respondent waives the right to confidentiality.** The willful release of confidential information is a misdemeanor, and any person releasing such confidential information, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year.

(Emphasis added).

We find there is no ministerial act to be performed under this provision, and consequently no duty to perform the act. Moreover, the Governor has other legal remedies available. As noted, the Governor has a motion for an injunction pending before the Commission in which he seeks the same relief he is seeking from this Court. The Commission has indicated it will not disseminate the investigative summary or preliminary report in this matter until the Governor's motion has been heard and acted upon by the Commission and, if the Commission's decision is adverse to the Governor, until he has had an opportunity to seek review of that decision. For these reasons, a writ of mandamus is simply not available to the Governor under these circumstances and his petition is therefore denied.

Likewise, there is no ministerial act under the statute requiring the Commission's investigation materials to be provided to the House of Representatives. While the Ethics Act clearly indicates the statute "does not limit the power of either chamber of the General Assembly to impeach a public official," S.C. Code Ann. § 8-13-320(n), it is nonetheless indisputable that there is no "imperative duty created or imposed by" the Ethics Act which compels the Commission to release its investigation materials to the House. Porter v. Jedziniak, 334 S.C. at 18, 512 S.E.2d at 497.[4]

[4] We note that with regard to turning over evidence to the Attorney General, the Ethics Act provides it is within the "discretion" of the Commission whether to do so. S.C. Code Ann. § 8-13-320(h). Discretionary authority,

Furthermore, we note the House has a number of alternative avenues available for obtaining the information it seeks, none of which have been pursued. See, e.g., S.C. Code Ann. § 2-69-10 (2005); S.C. Code Ann. § 30-4-10 et seq. (2007 & Supp. 2008). Additionally, as the parties conceded at oral argument in this matter, the pending ethics investigation is wholly unrelated to any potential impeachment. The House of Representatives may proceed (or not proceed) with impeachment at its own choosing, irrespective of any finding by the Commission, or any other investigation of the Governor.

Accordingly, like the Governor, the Speaker has failed to establish the necessary requirements for issuing a writ of mandamus; therefore, we deny the Speaker's petition as well.

2. Waiver

Although a writ of mandamus is unavailable to the Governor, we are cognizant of the Governor's pending motion filed with the Commission for an **injunction** based on the same legal grounds as are asserted to this Court in his petition for a writ of mandamus. Because it is "the substance of the requested relief that matters" and not the form in which the petition for relief is framed, we may construe the Governor's request as one for injunctive relief if that is substantively what he is requesting.[5] Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 437, 673 S.E.2d 448, 458 (2009); accord Richland County v. Kaiser, 351 S.C. 89, 567 S.E.2d 260 (Ct. App.

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however, is insufficient for mandamus. See Redmond v. Lexington County Sch. Dist. No. 4, 314 S.C. at 438, 445 S.E.2d at 445 (a writ of mandamus is inappropriate for a discretionary authority). To the extent the Speaker argues S.C. Code Ann. Regs. 52-718(C) (Supp. 2008) – which permits the Commission to release information "to another prosecuting authority" – creates an **imperative** duty appropriate for mandamus, we disagree.

[5] As previously discussed, this Court has the power to issue a writ or order of injunction. S.C. Const. Art. V, § 5; S.C. Code Ann. § 14-3-310.

2002) (where the Court of Appeals treated a denial of a petition for a writ of mandamus as a denial of injunctive relief).

Generally speaking, an injunction should be granted only where some irreparable injury is threatened for which the parties have no adequate remedy at law. Greenwood County v. Shay, 202 S.C. 16, 23 S.E.2d 825 (1943). The Governor contends that if the Commission is allowed to publicly disclose information about the investigation, "the integrity of the entire process" would be destroyed. Thus, he has requested that we **prevent** the Commission from publicly distributing any investigatory reports or other information about the investigation. Given the arguments raised by the Governor, we find the requested relief is akin to a prohibitory injunction.[6] Accordingly, we will also construe the petition as one asking for injunctive relief.

The Governor's argument is based upon the confidentiality provision of the Ethics Act and the accompanying regulations. See § 8-13-320(10)(g); S.C. Code Ann. Regs. 52-718 (Supp. 2008). As outlined above, the Ethics Act clearly provides a right of confidentiality; just as clearly, however, the statute allows this right to be waived by the respondent under investigation. § 8-13-320(10)(g); S.C. Code Ann. Regs. 52-718(B) (Supp. 2008) (the respondent "may waive the confidentiality of the proceeding in writing filed with the Commission").

The dispositive issue therefore becomes: Did the Governor's August 28th letter waive his right to confidentiality?

A waiver is a voluntary and intentional abandonment or relinquishment of a known right. E.g., Eason v. Eason, 384 S.C. 473, 682 S.E.2d 804 (2009). Waiver requires a party to have known of a right and known that right was being abandoned. Id. The determination of whether one's actions constitute waiver is a question of fact. Laser Supply and Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009). Because the instant

[6] A prohibitory injunction is defined as an injunction "that forbids or restrains an act." BLACKS LAW DICTIONARY 855 (9th ed. 2009).

case has been brought in the Court's original jurisdiction, it is within the province of this Court to make findings of fact and conclusions of law regarding the issues before us. See Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001); S.C. Code Ann. § 14-3-340 (1976).

Initially, we find the Governor knew of his right to confidentiality, as it was clearly set forth and correctly stated in the complaint and the initial letter from the Commission, which was sent directly to Governor Sanford and not to his counsel. The Governor asserts, however, that his August 28th letter effected a "limited" waiver of confidentiality, and his expectation was that only the existence of an investigation and the contents of the Complaint would be made publicly available.

We disagree. The intent of the August 28th letter – which Governor Sanford himself signed and was written on the Governor's letterhead – is clear from the letter's plain language:

> In an effort to once again go the extra mile, I would like to waive my right to confidentiality in your upcoming ethics probe.

Moreover, the Governor characterized this waiver as a "unilateral step." Governor Sanford's August 28th letter did not limit the waiver in any way, shape or form. It did not reference the very specifically delineated restrictions that had been outlined by Hayden to the Governor's counsel. Indeed, the Governor specifically stated this is "my decision." The additional language the Governor used in the letter, regarding "fighting for transparency," disclosure, as well as his reference to travel records – which would not have been disclosed under the partial waiver that had been discussed between the Governor's counsel and Hayden – indicates his intent was to waive confidentiality **without limitation** and without reliance upon the communications between his counsel and Hayden.[7]

[7] Governor Sanford's press release of the same day confirms this reading. See fn.1, supra.

Thus, the only reasonable interpretation of Governor Sanford's August 28th letter is that it was an intentional relinquishment of the right to confidentiality, and therefore a valid – and complete – waiver. Eason, supra.

Governor Sanford also maintains that even when confidentiality is waived pursuant to section 8-13-320(10)(g), the waiver is limited by the regulations applicable to confidentiality. We disagree.

Section 8-13-320(10)(g) states that "[a]ll investigations, inquiries, hearings, and accompanying documents must remain confidential until final disposition of a matter unless the respondent waives the right to confidentiality."

Regulation 52-718 governs the confidentiality of the Commission's ethics proceedings. Subsection 52-718(F) provides as follows:

> After the final disposition of a matter where a violation is found, the Commission shall prepare a public record which shall consist of the pleadings and record of the hearing. The Commission's internal and investigatory papers including work product shall not be made part of the public record.

Based on regulation 52-718(F), the Governor argues the Commission's "preliminary reports and other working papers remain confidential" even if the respondent has waived his right to confidentiality under section 8-13-320(10)(g). We disagree.

Although regulations authorized by the Legislature generally have the force of law, a regulation may not alter or add to the terms of a statute. Gaffney Ledger v. S.C. Ethics Comm'n, 360 S.C. 107, 600 S.E.2d 540 (2004); Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531 (1995); Banks v. Batesburg Hauling Co., 202 S.C. 273, 24 S.E.2d 496 (1943); see also Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 567,

324 S.E.2d 313, 315 (1984) ("Although a regulation has the force of law, it must fall when it alters or adds to a statute.").

Initially, we find Regulation 52-718(F) is not even implicated by this case because it addresses what would become the public record **after the final disposition of a matter where a violation is found**. In contrast, the Governor is primarily concerned with the release of investigatory materials during the ongoing investigation stage because – according to the Governor – he will not get a chance to present "his side of the story" until probable cause is found and a hearing is held.[8] Regardless, because we find Governor Sanford has waived his right to confidentiality, the import of Regulation 52-718(F) is irrelevant. However, to the extent Regulation 52-718(F) may be construed to limit the materials covered by a **respondent's** waiver which is allowed by section 8-13-320(10)(g), it is invalid. Gaffney Ledger v. S.C. Ethics Comm'n, supra (a regulation may not alter the terms of a statute); Goodman v. City of Columbia, supra (same).

Although we conclude the Governor's August 28th letter constituted a complete waiver of **his** right to confidentiality under section 8-13-320(10)(g), we hasten to add that the Governor's waiver does not reach the Commission's work product. To permit a respondent's waiver to include the Commission's work product and internal investigative process would chill the Commission's ability to thoroughly investigate a complaint. The policy reasons for maintaining the confidentiality of the Commission's work product (especially during the investigative process**)** are self-evident and compelling. Governor Sanford's waiver here, of course, reaches all documentation to

[8] We note the plain language of the statute refutes the Governor's contention. See § 8-13-320(10)(h) ("The commission must afford a public official … who is the subject of a complaint the opportunity to be heard on the alleged violation under oath, the opportunity to offer information, and the appropriate due process rights, including, but not limited to, the right of counsel."). Counsel for the Commission confirmed at oral argument that the Governor has been allowed to offer information during the investigatory process, and has availed himself of that opportunity.

which **he** is entitled.[9] Otherwise, we respect the Commission's authority in the first instance to determine what matters and documentation are subject to the Governor's waiver, which the Commission can make in ruling on the Governor's pending motion for an injunction. See Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("[T]he Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation.").

Accordingly, to the extent the Governor's petition seeks injunctive relief, the petition is denied.

CONCLUSION

For the reasons discussed above, the relief requested by both the Governor and the Speaker is

DENIED.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in a separate opinion.

[9] It is our opinion the waiver would not apply to the work product of the Commission, including mental impressions, generated during the internal investigative process.

JUSTICE PLEICONES: I agree with the majority that both petitions should be denied for the reasons stated.

I respectfully differ, however, with the finding of fact which concludes that the only reasonable interpretation of the Governor's letter of August 28, 2009, is that it constitutes a complete waiver of confidentiality under S.C. Code Ann. § 8-13-320(10)(g). Though the letter of August 28 certainly constitutes a waiver, I am not persuaded that the evidence before us demonstrates that the Governor knew that he was waiving *all* confidentiality. See Eason v. Eason, 384 S.C. 473, 682 S.E.2d 804 (2009) (waiver requires a party to have known of a right and known he was abandoning that right); Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 433, 673 S.E.2d 448, 456 (2009) (waiver is the voluntary and intentional abandonment or relinquishment of a known right by a party that knew of its rights, or of all the material facts upon which they depend). To the contrary, I conclude that the letter of August 28, 2009, though grandiose and poorly-articulated, is clearly the end-product of negotiations between the Governor's counsel and the executive director of the Ethics Commission. In making this finding, I have considered Mr. Hayden's letters of August 18 and 27, 2009; the Governor's counsel's letter of August 24, 2009; the Governor's affidavit filed herein; and, of course, the Governor's letter of August 28, 2009.

I would have allowed the Ethics Commission to determine in the first instance the meaning and scope of the August 28, 2009, letter in the proceeding referenced by the majority. That avenue is now foreclosed. To the extent that the majority may suggest that a waiver submitted pursuant to S.C. Code Ann. § 8-13-320(10)(g) cannot be limited, I would find that the Governor's attempt at doing that which cannot be done, constitutes a nullity.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Oliver W. Johnson, III Respondent.

Opinion No. 26742
Heard September 17, 2009 – Filed November 9, 2009

DISBARRED

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

Oliver W. Johnson, III, of Columbia, *pro se*.

PER CURIAM: This disciplinary matter arises out of numerous charges filed against Respondent Oliver W. Johnson, III. Following a hearing, the Commission on Lawyer Conduct Panel (Panel) recommended that Respondent be disbarred. We agree and disbar Respondent effective the date of this opinion.

I.

On September 21, 2000, the Office of Disciplinary Counsel (ODC) filed formal charges alleging Respondent failed to properly maintain his trust account, misappropriated a portion of a $700,000 settlement fund, incurred numerous tax liens and orders related to his

child support arrearages, failed to represent clients diligently and communicate with them, failed to pay a court reporter, an expert witness, and a final fee dispute award, and failed to cooperate with ODC's investigation. Subsequently, ODC filed supplemental charges relating to a matter in which estate settlement funds were transferred to Respondent to be used for litigation purposes, but he failed to properly deliver the funds. Respondent filed a response to the initial formal charges, but failed to respond to the supplemental charges.

On August 24, 2005, ODC filed second supplemental formal charges against Respondent. ODC made further allegations regarding the $700,000 settlement fund referenced above,[1] and additionally, alleged Respondent failed to properly disburse funds from a conservatorship account, failed to pay an expert witness, and pled guilty to assault and battery and willful tax avoidance. Respondent failed to respond to these charges.

II.

In November 2006, the Court placed Respondent on incapacity inactive status pursuant to Rule 28(b), RLDE, Rule 413, SCACR, after he submitted a letter from his doctor stating he was treating Respondent for bipolar disorder and attention deficit hyperactivity disorder and he felt Respondent was incapable of testifying in a deposition. Respondent requested two specific attorneys to be appointed as counsel and as guardian ad litem, but both attorneys declined.

On June 1, 2007, a hearing was held before the Panel on the issue of Respondent's incapacity. Respondent appeared by telephone, but after he was informed the proceeding would continue without the appointment of counsel, he terminated the call. The Panel found that Respondent waived his right to present additional medical evidence regarding his incapacity and that the letter from his doctor simply

[1] Specifically, ODC alleged that the client's signature on the settlement statement was forged and Respondent either knew or should have known of the forgery.

stating Respondent could not testify was insufficient to show he was unable to assist in his own defense. Therefore, the Panel ordered ODC to schedule a final hearing on the merits.

Despite receiving notice of the merits hearing, Respondent failed to appear. ODC presented testimony from four witnesses[2] as well as substantial evidence showing Respondent failed to properly maintain his trust, escrow, and operating accounts. The Panel recommended that Respondent be disbarred.

Respondent is currently incarcerated as a result of federal mortgage fraud charges, which are unrelated to this disciplinary matter. After receiving notice that oral arguments before this Court were scheduled, Respondent sought a continuance due to his mental and physical incapacity and requested that the Court appoint counsel. We denied this request. This matter has been pending since 2000. ODC has afforded Respondent more than sufficient time to seek counsel as well as numerous opportunities to submit any medical records showing he is unable to assist in his own defense. Respondent has repeatedly failed to show any good-faith or genuine effort in asserting his rights or cooperating with ODC. Accordingly, this matter need not be further delayed.

III.

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, 10-11, 539 S.E.2d 396, 401 (2000). We "may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the [Panel]." Rule 27(e)(2), RLDE, Rule 413, SCACR.

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[2] The four witnesses included: the lawyer who worked with Respondent in the estate settlement matter; the court reporter Respondent failed to pay; the solicitor who prosecuted Respondent's client and witnessed Respondent's neglect of his client; and the client involved in the $700,000 settlement fund.

Respondent has engaged in a pattern of egregious financial misconduct by misappropriating client funds and failing to properly maintain his accounts. This Court "has never regarded financial misconduct lightly, particularly when such misconduct concerns expenditure of client funds or other improper use of trust funds." *Matter of McMillan*, 327 S.C. 98, 104, 490 S.E.2d 1, 3-4 (1997). In addition to numerous incidents of financial misconduct, Respondent has neglected client matters, pled guilty to tax evasion and assault and battery, failed to pay a court reporter and expert witness, and failed to cooperate with ODC. Respondent's disciplinary history includes a private reprimand in 1995 and a public reprimand in 1998. *Matter of Johnson*, 329 S.C. 363, 495 S.E.2d 777 (1998) (imposing a public reprimand where Respondent neglected legal matters in two cases and was in arrears on child support obligations). In August 1999, this Court placed Respondent on interim suspension due to his failure to properly maintain his trust and escrow accounts.

By his conduct, we find Respondent has violated the following Rules of Professional Conduct, Rule 407, SCACR: 1.1 (lawyer shall provide competent representation); 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); 1.4 (lawyer shall consult and inform client of matters); 1.5 (lawyer shall not charge an unreasonable fee); 1.15 (lawyer shall hold property of client or of third person separately from his own property); 8.4(a),(b),(d),(e) (lawyer shall not: violate the Rules of Professional Conduct; commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer; engage in conduct involving dishonesty, fraud, deceit or misrepresentation; or engage in conduct that is prejudicial to the administration of justice).

We agree with the Panel's recommendation that Respondent be disbarred from the practice of law. This Court has imposed disbarment in similar disciplinary matters. *See In re Robertson*, 383 S.C. 140, 678 S.E.2d 440 (2009) (finding disbarment warranted where attorney failed to disburse settlement funds in several cases and neglected his clients' cases); *In re Tullis***,** 375 S.C. 190, 652 S.E.2d 395 (2007) (disbarring

attorney where attorney failed to adequately communicate with his clients, failed to act with diligence and competence, misused and mismanaged trust account funds, and failed to respond to ODC's inquiries); and *In re Trexler*, 343 S.C. 608, 541 S.E.2d 822 (2001) (disbarring attorney for financial misconduct, neglecting client matters, and convictions of breach of trust, blackmail, and conspiracy).

Respondent has exhibited a pattern of severe, grave, and intentional misconduct without regard for his clients' interests. Accordingly, we disbar Respondent effective the date of this opinion. We further order Respondent to make full restitution to all injured parties who have incurred losses as a result of his misconduct and order him to pay the costs of these proceedings. 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, RLDE, Rule 413, SCACR, and shall surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

The Supreme Court of South Carolina

In the Matter of
Vannie Williams, Jr., Petitioner.

ORDER

On February 27, 2002, petitioner was placed on interim suspension. In the Matter of Williams, 350 S.C. 211, 565 S.E.2d 763 (2002). The Court indefinitely suspended petitioner on September 23, 2002. In the Matter of Williams, 351 S.C. 415, 570 S.E.2d 521 (2002). On February 13, 2009, petitioner filed his Petition for Reinstatement. The matter was referred to the Committee on Character and Fitness (CCF) pursuant to Rule 33(d), RLDE, Rule 413, SCACR.

On October 1, 2009, the CCF issued its Report and Recommendation in which it recommended the Court reinstate petitioner to the practice of law subject to certain conditions. Petitioner filed exceptions to the CCF's Report and Recommendation. The Office of Disciplinary Counsel did not file exceptions to the CCF's Report and Recommendation.

The Court grants the Petition for Reinstatement subject to the following two conditions:

1. before practicing law, petitioner shall retain the services of a law office management consultant approved by the Commission on

Lawyer Conduct (the Commission) and submit a written plan for establishing his law office and maintaining his trust accounts to the Commission. Thereafter, for a period of two years, petitioner shall submit quarterly reports documenting his compliance with the law office and trust account plan to the Commission; and

2. petitioner shall remain current with his agreement to repay the Lawyers' Fund for Client Protection. The Lawyers' Fund shall immediately notify the Commission if petitioner fails to remain current with his agreement.

Petitioner shall be reinstated to the practice of law upon taking the Lawyer's Oath and completing the other admission requirements set forth in Rule 402(k), SCACR, at the next regularly scheduled swearing-in ceremony.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

November 4, 2009

cc: Commission on Lawyer Conduct

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and
Treatment of James Carl Miller,

Appellant.

Appeal From Lexington County
James R. Barber, Circuit Court Judge
Larry R. Patterson, Circuit Court Judge

Opinion No. 4618
Heard April 23, 2009 – Filed September 9, 2009
Withdrawn, Substituted, and Refiled November 4, 2009

AFFIRMED

Appellate Defender Lanelle C. Durant, of Columbia, for Appellant.

Attorney Genernal Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney Genernal Deborah R. J. Shupe, Assistant Attorney General Brandy A. Duncan, Assistant Attorney General William M. Blitch, Jr., all of Columbia, for Respondent.

LOCKEMY, J.: James Carl Miller appeals the trial court's denial of his motion to dismiss, arguing the State's failure to hold a hearing within sixty days after the court found probable cause to believe Miller was a sexually violent predator requires the action be dismissed pursuant to the Sexually Violent Predator Act (the Act). We affirm.

FACTS/PROCEDURAL BACKGROUND

In 1998, the mother of a one-year-old baby walked into a room and found Miller leaning over her child with his pants down, while the baby's diaper was off. While exiting the room, Miller punched the mother. Miller pled guilty to committing a lewd act on a child under the age of sixteen years and criminal domestic violence of a high and aggravated nature (CDVHAN). The trial court sentenced Miller to fifteen years' imprisonment for the lewd act offense suspended upon the service of ten years and five years' probation, and ten years imprisonment for the CVDHAN, to be served concurrently.[1]

Prior to his release, Miller's case was referred to the multi-disciplinary committee for assessment pursuant to section 44-48-40 of the South Carolina Code (Supp. 2008). After review in May of 2005, the multi-disciplinary team found Miller satisfied the statutory definition of "Sexually Violent Predator" (SVP) pursuant to section 44-48-30 of the South Carolina Code (Supp. 2008). Thereafter, the multi-disciplinary team referred the case to the Prosecutor's Review Committee (the Committee).

The Committee determined probable cause existed to conclude Miller was an SVP. After this finding, pursuant to section 44-48-70 of the South

[1] Prior to Miller's 1998 plea, Miller pled guilty to taking indecent liberties with children in a North Carolina court. The date of the offense was on or about June 5, 1995. North Carolina sentenced Miller to probation for the offense on the condition that he participate in sex offender treatment. Subsequently, he violated probation and was imprisoned for approximately two-and-a-half months in 1996. In 1998, Miller fled North Carolina while still on probation and was considered a fugitive.

Carolina Code (Supp. 2008), the State filed a petition requesting a trial court make a judicial determination as to whether Miller was an SVP and petitioned the trial court for a probable cause hearing. In August, the court appointed Janice Baker as Miller's counsel. A probable cause hearing pursuant to section 44-48-80 of the South Carolina Code (Supp. 2008) was set for August 29, 2005, before the Honorable William P. Keesley.

When notified of the hearing, Baker informed the Attorney General's office that she would be relieved of counsel in the case and that the new attorney would be David B. Betts. Therefore, she would not participate in the hearing, and it needed to be postponed until Betts received the case file from her. The original hearing date was continued, and Betts was appointed by order. Efforts to get a new hearing were hindered by the untimely death of Judge Marc Westbrook shortly thereafter. On November 3, 2005, the court held Miller's probable cause hearing.

After the court found probable cause existed to believe Miller was an SVP, pursuant to section 44-48-90 of the South Carolina Code (Supp. 2008), the State had sixty days to conduct Miller's civil SVP trial. Although Miller was scheduled to be released from prison on December 1, 2005, the Act allowed the State to continue to confine Miller for the sixty days leading up to his SVP civil trial. See § 44-48-90. The sixty-day window would have expired on January 2, 2006. Prior to the expiration of the sixty day time period, the State realized that it would not have a mental health evaluation from the Department of Mental Health by the deadline set by the statute. The State, therefore, moved for a continuance pursuant to section 44-48-90 on December 29, 2005. In its motion, the State pointed out January 2, 2006, was a holiday, and the last day for a trial of Miller's case would be December 30, 2005. Furthermore, the State indicated the court-ordered evaluation of Miller would not be complete until January 31, 2006, and pointed to problems in obtaining information related to Miller's prior North Carolina convictions.[2]

[2] Though the State indicated Miller's evaluation would not be completed until January 31, 2006, from the record it appears the evaluation was completed on January 13, 2006, as the State was ready to proceed with Miller's civil commitment trial the day of the continuance hearing. Further,

On January 13, 2006, the trial court held a hearing regarding the State's motion for a continuance. At the hearing, Miller's counsel argued Miller was being held "without bond and is now incarcerated because they said there was probable cause to have him evaluated." Further, Miller's counsel argued "the statute says--the [S]tate can ask for a continuance . . . only if the respondent will not be substantially prejudiced, and it says it may be continued up[on] request of either party on a showing of good cause." Up until this time, Miller had made no motion to dismiss or raised an objection even though he was being held beyond his release date. The State responded that it was ready to try the case on January 13 or as soon as the court could get a jury together. The trial court commented on the State's delay in bringing the action by stating: "The Attorney General has got to comply with the statute, and the [courts] have got to give you an opportunity to be heard." Furthermore, the trial court noted: "The State has a habit of waiting until the man's about to be released in all cases and then filing these actions. . . . The legislature drew hard and fast lines and if [Miller] is going to suffer substantial prejudice and a deprivation of liberty is substantial prejudice." The court made the assertion about alleged habits of the State without any supporting documentation or evidence for its assertion. Even so, the trial court found it was not unreasonable to set the trial for the following week, beginning January 17, 2006. Thus, in effect the trial court granted the State's motion for a continuance.

Miller voiced no objection to the continuance, but in response to the trial court's ruling, Miller's counsel made a motion to dismiss for the first time based on Miller's substantial prejudice and cited to In re Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001). The trial court did not rule on Miller's motion to dismiss, but stated: "I think you have to file your motion if you want it dismissed, and then if you have a motion to dismiss and set forth the reasons then I could address that today." Miller's counsel agreed to file the motion to dismiss that afternoon and requested scheduling a hearing on that motion. The trial court again did not rule on Miller's motion to dismiss but

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the record indicates Miller's counsel received the evaluation report prior to the January 17, 2006 hearing.

instructed trial counsel to "file whatever you think you need to" and indicated "[w]hat I've stated in the record is the order of the [c]ourt."

On January 17, 2006, the trial court held a hearing on Miller's motion to dismiss. There, counsel stated: "[Miller] paid his debt under the criminal statutes of this State. He was free to go on December the 1st." The State responded by pointing out that Dr. Pamela Crawford conducts all the SVP evaluations in South Carolina, which is a fairly significant load. Further, the State reasoned "that [it] is very important, not only for the public and the State . . . for her to do a thorough job." As support for its "good cause" assertion, the State mentioned several things out of its control occurred before and after Miller's probable cause hearing, including the untimely death of Judge Westbrook, change of Miller's counsel, and changes in the Attorney General's office. The State repeated that it was ready for trial, but the defense inferred that if the motion to dismiss was not granted it needed the case continued to have its own evaluation completed to combat the State's expert. Accordingly, the trial court continued the case. Further, it did not rule on Miller's motion that day but apparently took the matter under advisement. The trial court denied Miller's motion in a written order filed July 24, 2006, after weighing the State's interest in proceeding with the SVP trial against Miller's prejudice. Specifically, the trial court's order stated:

> [T]he State routinely waits until the inmates falling under the [Act] are nearing their max-out date before beginning the process set out under the statute. However, the [c]ourt finds that the State's interest in examining potential [SVP]s outweighs the prejudice to [Miller]. Absent a showing of substantial prejudice, the [c]ourt DENIES the motion to dismiss but reminds the State that it is in the interest of justice to begin the statutory evaluation prior to the imminent max out date of inmates falling under the statute.

Thereafter, the State moved to alter or amend the trial court's order denying Miller's motion to dismiss. Specifically, the State requested the trial court remove the following sentence: "[T]he State routinely waits until the inmates falling under the [Act] are nearing their max-out date before beginning the process set out under the statute" from its order. The State pointed out that regardless of what may have occurred in other cases, the state began this process more than 180 days prior to Miller's scheduled release date. Furthermore, the State asserted but for Miller's decision to change counsel which delayed the process for more than sixty days, the probable cause hearing would have taken place more than ninety days before his release date. The trial court denied the State's motion to alter or amend on September 6, 2006, once again without providing any evidence to support its assertion.

Miller's civil SVP trial began on November 27, 2006, in Lexington County.[3] The jury found Miller was an SVP, and the trial court issued an order of commitment. This appeal followed.

LAW/ANALYSIS

Miller argues the trial court erred in denying his motion to dismiss when his civil SVP trial was not held within sixty days after the probable cause hearing because he was incarcerated past his release date. Specifically, Miller argues section 44-48-90 allows for a continuance only upon 1) request of either party; 2) good cause shown; and 3) "only if the respondent will not be substantially prejudiced." Miller argues he was substantially prejudiced because he was faced with two choices: 1) he could have gone forward with trial on January 13, 2006, without having an independent psychiatric evaluation, depriving him an opportunity to prepare a defense or 2) he could have asked for a continuance in order to obtain the independent psychiatric evaluation which would have resulted in his continued incarceration past his release date. Miller argues either choice was substantially prejudicial.

[3] The record on appeal does not indicate that Miller made any other requests to the court after the January 17, 2006 hearing to seek an earlier trial date or make any other complaints about the process before his trial on November 27, 2006.

In reply, the State argues the trial court did not err in denying Miller's motion because the case was properly continued under section 44-48-90. Specifically, the State addressed the three statutory requirements Miller cited and argued it demonstrated good cause for a continuance and Miller was not substantially prejudiced. In its prejudice argument, the State mentions most of Miller's extended confinement was due to circumstances beyond its control, including the untimely death of Judge Westbrook. Additionally, Miller's change in counsel required a postponement of the initial probable cause hearing from August 29, 2005 to November 3, 2005. Finally, the State contends obtaining records for a complete evaluation is in the best interest of the State as well as Miller and explained Dr. Pamela Crawford could not perform a complete evaluation of Miller within the statutory time parameters. The State further argues that "as a matter of public policy, it is important that the court appointed evaluator be afforded the time and opportunity to conduct a complete evaluation." Such a thorough evaluation, explains the State, would be in the best interest of the public at large as well as Miller. Further, the State notes all the burdens it must comply with under the Act and argues "any prejudice to [Miller] in this case was overwhelmingly outweighed by the interest of the State."

The Act requires the State to follow certain procedures and timelines before committing an individual as an SVP. When a person has been imprisoned for one or more of the sexually violent offenses identified in section 44-48-30 of the South Carolina Code (Supp. 2008), the Act requires the agency with jurisdiction over that person to notify the Attorney General and a multidisciplinary team designed to evaluate the particular offender prior to his release. See S.C. Code Ann. § 44-48-40(A) (Supp. 2008). The multidisciplinary team reviews relevant records and assesses whether the person the team is reviewing satisfies the definition of an SVP under the Act. S.C. Code Ann. § 44-48-50 (Supp. 2008). If the multidisciplinary team determines the person satisfies the statutory definition, the team forwards its assessment and all relevant records to the Committee. Id.

Section 44-48-80(A) of the South Carolina Code (Supp. 2008) states "the court must determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator." Once probable cause is established in a hearing, a trial is conducted. Section 44-48-90 of the South Carolina Code (Supp. 2008) states: "Within sixty days after the completion of a hearing held pursuant to Section 44-48-80, the court must conduct a trial to determine whether the person is a sexually violent predator." A provision in section 44-48-90 allows for an extension of the sixty-day time frame and states: "The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and only if the respondent will not be substantially prejudiced."

In In re Matthews, the South Carolina Supreme Court addressed whether a trial court had subject matter jurisdiction when the State failed to comply with the sixty-day time period without asking for a continuance. 345 S.C. 638, 550 S.E.2d 311 (2001). The Matthews court found "the legislature's use of the word 'shall' in section 44-48-90 indicates the holding of a trial within sixty days of the probable cause hearing is mandatory." 345 S.C. at 644, 550 S.E.2d at 313. Additionally, the court noted section 44-48-90 created a statutory burden on the State or the trial court to "require the issuance of a continuance, or even a notation in the record, indicating (1) the trial cannot be held within sixty days; (2) good cause for the delay; and (3) the respondent will not suffer prejudice." Id. at 644, 550 S.E.2d at 314. Ultimately, the supreme court found the State's failure to comply with the statutory time period did not deprive the trial court of jurisdiction. Id. at 645, 550 S.E.2d at 314. Thus, the appellant in Matthews should have filed a motion to dismiss when the State failed to bring the case within sixty days without asking for a continuance. Id. Here, the State sought a continuance before the expiration period as required by Matthews and noted why the case could not be tried within sixty days.

We find the trial court did not err in denying Miller's motion to dismiss. As the trial court mentioned, the legislature set definite timelines for SVP actions, and this court must give plain meaning to clearly written statutes.

See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. . . . 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."). Under the legislation at issue, the General Assembly used strong language like "shall" and intended to make exceptions to the sixty-day requirement only in limited circumstances. See Matthews, 345 S.C. 638, 644, 550 S.E.2d 311, 314 ("The language of the Act does allow a trial to be held outside the sixty day period, but only under certain conditions."). We find the State followed Matthews and the statutory requirements for the trial court to conduct Miller's civil commitment trial more than sixty days after the probable cause hearing.

Here, the State complied with these conditions and followed the guidelines set by Matthews by seeking a continuance prior to the expiration of the sixty day time period.[4] It is clear that the Matthews court decided that although the legislature has set mandatory standards to be followed in SVP cases, these standards are not jurisdictional. 345 S.C. at 645, 550 S.E.2d at 314. Further, Matthews notes that the statute provides a means for cases to be continued. Id. at 644, 550 S.E.2d at 314. In the instant case the trial court found good cause existed to grant the State's motion for a continuance and that granting the motion would not result in substantial prejudice to Miller. In making this ruling, the trial court considered several factors, including: 1) Miller's change in counsel that delayed the case over thirty days, 2) the interest of Miller in having a thorough report by DMH that could have been in his favor; and 3) granting the State's motion for continuance on January 13, 2006, was only ten days after the expiration of the sixty day window set on November 3, 2005. Therefore, we find the State satisfied the first two prongs

[4] We note with interest that Miller does not appeal the trial court's decision to grant the continuance based upon consideration of section 44-48-90, rather he appeals the trial court's decision not to grant his motion to dismiss. It should also be noted that the State was ready to proceed on and after January 13, 2006, and the record does not indicate any delay thereafter was attributable to the State.

of Matthews by demonstrating the trial could not be held within sixty days and good cause for the delay.

Our analysis now turns to whether Miller was substantially prejudiced by the trial court's granting of the State's motion for a continuance. The Act does not define "prejudice." Here, both Miller and the State were granted great latitude in order to sufficiently prepare for the SVP trial. Though the State was ready to proceed to trial on January 13, due to the trial court's grant of the motion for a continuance, Miller, pursuant to his request, was able to prepare a defense and complete an independent psychiatric examination. Therefore, the trial court's grant of the motion for a continuance enabled Miller to adequately prepare for his trial and develop a trial strategy, and we find the trial court properly denied Miller's motion to dismiss thereafter.

We recognize Miller was incarcerated past his release date; however, we are hesitant to set a bright line rule which would require reversal of an SVP's commitment when an individual is detained past his release date. In this respect, the State was ready to proceed with trial on January 13, 2006 and prior to that date Miller had not filed a motion to dismiss. Accordingly, the trial court found it was not unreasonable to set Miller's civil commitment trial the week beginning January 17, 2006. Accordingly, we do not believe Miller suffered substantial prejudice by his two week prolonged incarceration. For the reasons set forth above, we believe the State met the three part test articulated in Matthews.

We also note with concern that Miller's civil commitment trial did not occur until well over a year after the probable cause hearing was held, some ten months longer than the limit prescribed in section 44-48-90. It is further noted that, with the exception of the trial court's order denying the motion to dismiss, the record before us contains no indication whether either party moved to proceed with the commitment trial prior to the date it actually took place. Although not reversible error under these circumstances, as explained above, it is worth emphasizing that SVP trials should take priority when scheduling a court's docket, precisely because of the potential for the prolonged incarceration evidenced in this case. See § 44-48-90 ("If such a

request is made, the court must schedule a trial before a jury at the next available date in the court of common pleas in the county where the offense was committed. "). For the reasons set forth above, the decision of the circuit court is therefore

AFFIRMED.

HEARN, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mark Craft, Appellant,

v.

South Carolina
Commission for the Blind, Respondent.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4628
Heard June 10, 2009 – Filed November 3, 2009

AFFIRMED

Ralph Gleaton, of Greenville, for Appellant.

Melvin D. Bannister, of Columbia, for Respondent.

HEARN, C.J.: Mark Craft contends the trial court erred in finding he did not demonstrate the elements necessary to recover under a theory of promissory estoppel. We affirm.

FACTS

Craft received a vending license from the South Carolina Commission for the Blind (Commission) in 1981 and began working as a blind licensed vendor (vendor) in Florence that same year.[1] Craft, who has lived with his mother his entire life, continued to work as a vendor in Florence until he and his mother moved to Anderson in 1991. Thereafter, Craft accepted successive positions as a vendor at a welcome center in Fair Play, a rest stop in Anderson, and ultimately, at the county square in Greenville.

In 2005, while working at Greenville County Square, Craft received a bid notice from the Commission, informing him of new vending sites available through the South Carolina Department of Corrections. In the bid notice, the Commission informed all interested vendors that it did not guarantee income at any location, it could cancel the bid, and it could make adjustments to the bid as necessary. After having his mother read the bid notice to him, Craft submitted a bid to the Commission for a vending position at Perry Correctional Institution (Perry). In September 2005, Bill Holland, Craft's counselor with the Commission, called Craft and offered him the position at Perry, which Craft accepted. Following his conversation with Holland, Barbara Skinner, the Business Enterprise Program Director for the Commission, sent Craft a letter, confirming his selection as the vendor at Perry. According to the bid notice, Craft was scheduled to begin work at Perry in November 2005 or March 2006.

Pursuant to rules promulgated by the Commission, a vendor can only operate one vending location at a time. Thus, after Craft accepted the position at Perry, Holland informed Ronnie Roberts, property manager of the Greenville County Square, of Craft's impending departure from the county square in order to accept a vending position at another location. Furthermore, Holland added that the Commission would select a vendor to replace Craft at the county square. On October 17, 2005, Roberts, without citing any reason, notified Holland of Greenville County's intent to close the food service

[1] Vendors are self-employed and are not considered employees of the Commission.

canteen at the county square effective December 31, 2005. Despite subsequent efforts by the Commission to convince Greenville County to keep the canteen open, it refused to reconsider its decision.

Craft's last day of work at the county square was December 29, 2005. On this date, Holland inspected Craft's vending site at the county square and completed a report. In his report, Holland stated that Craft would begin work at Perry on January 24, 2006. On January 4, 2006, the Commission sent Craft a proposed contract between the Commission and the South Carolina Department of Corrections. Although the contract was unsigned, Barbara Skinner testified she had no reason to think an agreement between the parties would not be reached. However, the Commission never entered into a contract with the Department of Corrections, and the vending site at Perry never opened.

After learning the vending location at Perry would not become available, Craft routinely checked the bid line, a telephone service provided by the Commission that informs vendors of job openings. As of the time of trial, no vending positions had become available near the Anderson area where Craft lived with his mother. As a result, Craft has not worked since his last day at the county square canteen on December 29, 2005. However, Craft continued to receive commissions from the vending machines at the county square through February 6, 2006.

On June 29, 2006, Craft commenced an action against the Commission, seeking to recover damages from the Commission based on promissory estoppel. Following a bench trial, the trial court issued an order denying recovery, finding Craft failed to demonstrate the elements of promissory estoppel. This appeal followed.

STANDARD OF REVIEW

Promissory estoppel is equitable in nature. Rushing v. McKinney, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006). In an action at equity, this court can find facts in accordance with its view of the preponderance of the evidence. Doe v. Clark, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995). However, this court is not required to disregard the findings of the trial court

who saw and heard the witnesses and was in a better position to judge their credibility. Tiger, Inc. v. Fisher Argo, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

LAW/ANALYSIS

I. PROMISSORY ESTOPPEL

Craft argues the trial court erred in finding he did not demonstrate the elements necessary to recover under promissory estoppel. We disagree.

In order to recover under a theory of promissory estoppel, a claimant must demonstrate: (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance on the promise; (3) the reliance was expected and foreseeable; and (4) injury in reliance on the promise. Satcher v. Satcher, 351 S.C. 477, 483-84 570 S.E.2d 535, 538 (Ct. App. 2002). The applicability of the doctrine of promissory estoppel depends on whether the refusal to apply it would virtually sanction the perpetration of fraud or would result in other injustice. Citizens Bank v. Gregory's Warehouse, Inc., 297 S.C. 151, 154, 375 S.E.2d 316, 318 (Ct. App. 1988).

A. Unambiguous Promise

Craft argues the Commission, by way of its agents, Bill Holland and Barbara Skinner, unambiguously offered him the vending position at Perry. By contrast, the Commission asserts its promise was ambiguous because the language in the bid notice did not guarantee income at any location, allowed the Commission to cancel the bid, and stated that the opening dates for the correctional facilities were subject to change. In addition, the Commission contends Craft knew the contract between the Commission and Perry was unsigned on January 4, 2006; as a result, Craft knew or should have known any promise made to him concerning future employment was contingent upon the parties signing the contract.

Initially, the Commission seems confused as to what constitutes the promise in this case. The promise in this case occurred when Holland called Craft and offered him the position at Perry. Most of the Commission's

arguments center around the language found within the bid notice itself. However, the bid notice did not promise Craft future employment at Perry. Rather, the bid notice merely provided all interested vendors with a list of locations where vending positions were available and invited them to apply for these job openings. Therefore, because the bid notice was not part of the promise of future employment or referenced as controlling terms by Holland, its language is of no force in determining whether the promise was ambiguous. Furthermore, the Commission acknowledges Craft did not receive notice of the unsigned contract between the Commission and Perry until January 4, 2006. As stated above, the promise in this case occurred when Holland offered Craft the position at Perry a few days prior to Skinner's congratulatory letter dated September 22, 2005. Thus, the fact that the Commission mailed an unsigned contract between itself and Perry more than two months following the promise of employment does not render the promise ambiguous. Accordingly, the Commission unambiguously promised Craft the vending position at Perry.

B. Reasonable Reliance

Craft argues he reasonably relied on the promise of future employment made by the Commission because it possessed the sole authority to operate vending locations and hire vendors pursuant to statute.[2] The Commission contends Craft's reliance on the promise was unreasonable in light of the fact he knew the agreement between the Commission and Perry was unsigned on January 4, 2006.

Regulations promulgated by the Commission prevent a vendor from operating more than one vending location at a time. Thus, when the

[2] Section 43-25-70 of the South Carolina Code (1985) empowers the Commission to operate all vending locations. Section 43-26-30(b) of the South Carolina Code (1985) grants the Commission the authority to "appoint such personnel as may be necessary for the administration of the vending facility program." Regulation 18-1(A) of the South Carolina Code of Regulations (Supp. 2007) vests the Commission with the authority to provide employment for vendors licensed under the Randolph-Sheppard Vending Facility Program.

Commission offered Craft the vending position at Perry, he was forced to choose between accepting the Commission's offer and continuing to work at the Greenville County Square. Ultimately, Craft relinquished his job at the Greenville County Square in reliance on the Commission's promise of employment at Perry. In our view, Craft's reliance on the Commission's promise of employment was reasonable. The Commission maintained the sole authority to hire vendors. See § 43-26-30(b) (stating the Commission possesses the authority to hire personnel for the administration of the vending facility program). To us, it seems reasonable for a would-be employee to rely on a promise of future employment from the only entity with the power to hire him. Additionally, the Commission did not make the promise of employment conditioned upon Perry entering into a formal contract with the Commission. See Davis v. Greenwood Sch. Dist., 365 S.C. 629, 635, 620 S.E.2d 65, 68, (2005) (holding it is unreasonable to rely on a conditional promise). Moreover, Craft did not learn that Perry and the Commission had not entered into a contract until January 4, 2006. By this time, Craft had already relied on the Commission's promise by giving up his job at the county square. October 3, 2005, the date on which the Commission informed Greenville County of Craft's imminent departure from the location, Craft neither knew, nor should have known, that the contract between the Commission and Perry had not been signed. Accordingly, we find Craft's reliance on the Commission's promise was reasonable.

C. Reliance Was Expected & Foreseeable

Craft contends it was expected and foreseeable he would quit his job at the county square after being promised employment at Perry because the Commission's rules prevented him from holding more than one vending position at a time. The Commission asserts this element cannot be established because it committed no wrongful act.

In our view, the Commission could have both expected and foreseen that Craft would relinquish his job at the county square in reliance on the promise of employment at Perry. The Commission's own rules prevented Craft from holding more than one vending position at a time. Thus, after Craft accepted the job at Perry, he was forced to give up his job at the county

square. Accordingly, Craft's reliance on the Commission's promise of employment at Perry was expected and foreseeable.

D. Injury

Craft argues he sustained injury in reliance on the Commission's promise of employment at Perry by giving up his job at the county square. The Commission asserts Craft did not suffer any injury in reliance on the Commission's promise because the Commission never promised him income at any site, Craft's damages were not proximately caused by the Commission, and Greenville County decided to terminate the vending position at the county square. In the alternative, the Commission contends Craft is not entitled to recover from the Commission because he failed to mitigate his damages.

Craft has failed to demonstrate that he suffered injury in reliance on the Commission's promise. Without citing any reason for its decision, Greenville County informed the Commission of its intent to close the food service canteen at the county square effective December 31, 2005.[3] Because Greenville County offered no explanation for its decision and no reason was presented at trial, we simply cannot speculate as to the motivating factors prompting the county's decision. All we are left with on appeal is the fact that the vending position at the county square was eliminated as of December 31, 2005. Although Craft could have remained at the county square until its closing date, he quit on December 29. Thus, even assuming Craft quit his job in reliance on the Commission's promise, he could no longer work at the county square after December 31 because the location had been closed down. As a result, because his job at the county square was no longer available

[3] Pursuant to the contract entered into between the Commission and Greenville County, either party could terminate the agreement upon ninety days written notice. Although Greenville County terminated the contract with less than ninety days notice, the Commission chose not to commence legal action against Greenville County. Because Craft was not a party to this contract and because he does not argue he was a third-party beneficiary under the contract, this fact has no effect on Craft's attempt to recover damages from the Commission.

following his resignation, Craft has failed to demonstrate that he sustained injury by quitting his job in reliance on the Commission's promise. Accordingly, we find Craft has failed to demonstrate the elements of promissory estoppel.

II. REMAINING ISSUES

Craft contends the trial court erred in concluding the theories of promissory estoppel and quasi-contract are equivalent. In addition, Craft argues the trial court erred in finding his claim for promissory estoppel was barred by the South Carolina Tort Claims Act.

In the trial court's order, it observed "promissory estoppel is considered quasi-contract and quasi-tort . . . ." Even assuming Craft is correct and the trial court erred in making this statement, it makes no difference on appeal. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). The trial court correctly set forth the elements of promissory estoppel. If the trial court erred in referring to promissory estoppel as quasi-contract, this error had no bearing on the resolution of this case. Similarly, even if the trial court erred in concluding Craft's claim for promissory estoppel was barred by the Tort Claims Act, it makes no difference on appeal. After concluding Craft failed to demonstrate the elements of promissory estoppel, the trial court also found the Tort Claims Act barred Craft's claim. Because we agree with the trial court that Craft failed to demonstrate the elements of promissory estoppel, we need not address this issue. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (stating appellate courts need not address remaining issues when resolution of prior issue is dispositive).

Accordingly, the decision of the trial court is

AFFIRMED.

THOMAS, J., and KONDUROS, J., concur.