The Supreme Court of South Carolina

In the Matter of Carol S. Hawkins, Petitioner

Appellate Case No. 2012-213640

ORDER

The records in the office of the Clerk of the Supreme Court show that on January 1, 1978, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court, dated December 20, 2012, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Carol S. Hawkins shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 24, 2013

The Supreme Court of South Carolina

In the Matter of Claire V. Hill, Petitioner

Appellate Case No. 2012-213680

ORDER

The records in the office of the Clerk of the Supreme Court show that on April 1, 1991, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 27, 2012, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Claire V. Hill shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 24, 2013

The Supreme Court of South Carolina

In the Matter of Katharine Hamer Moore, Petitioner

Appellate Case No. 2013-000055

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 15, 2004, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated January 7, 2013, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Katharine Hamer Moore shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 24, 2013

The Supreme Court of South Carolina

In the Matter of Anne Dufour Zuckerman, Petitioner

Appellate Case No. 2013-000014

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 21, 1994, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated December 27, 2012, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Anne Dufour Zuckerman shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

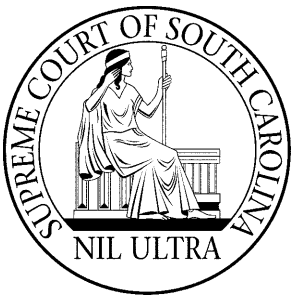
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 24, 2013



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 5
January 30, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION TO FILE PETITION FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2013-UP-048-SCDSS v. Michael D. and Heather K.
(Berkeley, Judge Jack A. Landis)

2013-UP-049-Eugenia Minniti f/k/a Eugenia Steedley v. M. Scott Steedley
(Colleton, Judge Peter L. Fuge)

2013-UP-050-Marshall Corbin Johnson v. Kohler Company
(S.C. Workers' Compensation Commission)

2013-UP-051-State v. David Myers
(Florence, Judge Thomas A. Russo)

2013-UP-052-State v. Darius Cathcart
(Spartanburg, Judge Roger L. Couch)

2013-UP-053-State v. Martin Keenan
(Aiken, Judge Doyet A. Early, III)

2013-UP-054-State v. Joseph Sanders IV
(Pickens, Judge G. Edward Welmaker)

2013-UP-055-Timotheus E. Hemingway v. SCDC
(Administrative Law Court Judge Carolyn C. Matthews)

2013-UP-056-William Lippincott v. S.C. Dep't of Employment and Workforce
(Administrative Law Court Judge John D. McLeod)

2013-UP-057-Progressive Home Builders Inc. v. Grace Hucks
(Florence, Judge Michael G. Nettles)

2013-UP-058-State v. Bobby J. Barton
(Greenville, Judge Edward W. Miller)

2013-UP-059-Amy Davidson v. City of Beaufort et al.
(Beaufort, Judge Carmen T. Mullen)

2013-UP-060-Bruce M. Bryant v. John F. Sipsis
(York, Judge S. Jackson Kimball, III)

2013-UP-061-SCDSS v. Elizabeth W.
(Anderson, Judge Tommy B. Edwards)

2013-UP-062-State v. Christopher M. Stephens
(Horry, Judge Steven H. John)

2013-UP-063-State v. Jimmy Lee Sessions
(Horry, Judge Steven H. John)

2013-UP-064-Plantation Federal Bank v. J. Gray
(Oconee, Judge Ellis B. Drew, Jr.)

PETITIONS FOR REHEARING

5016-SC Public Interest Foundation v. Greenville County	Pending
5053-State v. Thomas E. Gilliland	Denied 01/25/13
5055-Hazel Rivera v. Warren Jared Newton et al.	Pending
5059-Burnette v. City of Greenville	Denied 01/25/13
5060-State v. Larry B. Brayboy	Denied 01/25/13
5062-Duke Energy Carolina v. SCDHEC	Pending
5065-Curiel v. Hampton County EMS	Denied 01/25/13
5066-W. Rhett v. J. Gray	Denied 01/25/13
2012-UP-399-Bowen v. S.C. Department of Motor Vehicles	Pending
2012-UP-520-Johnson v. Mew	Pending
2012-UP-576-State v. Trevee J. Gethers	Pending
2012-UP-609-Coghlan v. Coghlan	Pending
2012-UP-614 - Charles Griggs v. Ashleytowne Development	Pending
2012-UP-520-C. Johnson v. C. Mew	Denied 01/25/13

2012-UP-580-State v. K. Dennis	Denied 01/25/13
2012-UP-623-L. Paul Trask v. S.C. Department of Public Safety et al.	Pending
2012-UP-626-Maurice Morant v. SCDC	Pending
2012-UP-627-Mack v. American Spiral Weld	Pending
2012-UP-632-State v. Stevie Lamont Aiken	Pending
2012-UP-647-State v. Danny Ryant	Denied 01/25/13
2012-UP-651-State v. Ben Robert Stewart	Denied 01/25/13
2012-UP-654-State v. Marion Stewart	Denied 01/25/13
2012-UP-658-Palmetto Citizens Fed. Credit Union v. Johnson	Denied 01/25/13
2012-UP-663-Carlton Cantrell v. Aiken Cty.	Denied 01/25/13
2012-UP-668-Thacker v. Aaron's Sales & Leasing	Denied 01/25/13
2012-UP-669-S. Burgess v. Y. Burgess	Denied 01/25/13
2012-UP-670-Burgess v. Burgess	Pending
2012-UP-674-SCDSS v. Devin B, Brian G., and Sue G.	Pending
2012-UP-675-State v. Deqing Chen	Denied 01/25/13
2012-UP-676-G. Gottschlich v. D. McNeil	Pending
2012-UP-678-State v. Darrin D. Holston	Pending
2012-UP-679-Dianne B. Sprott v. Brookdale Senior Living et al.	Denied 01/25/13
2012-UP-688-L. Brown v. Dick Smith Nissan	Pending
2013-UP-001-R. Coleman v. State	Pending
2013-UP-010-N. Mitchell v. Juan P. Marruffo et al.	Pending
2013-UP-014-D. Keller v. ING Financial Partners et al.	Pending

2013-UP-015-Travelers Property Casualty Co. v. Senn Freight Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4670-SCDC v. B. Cartrette Pending

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4779-AJG Holdings v. Dunn Pending

4819-Columbia/CSA v. SC Medical Pending

4832-Crystal Pines v. Phillips Pending

4833-State v. L. Phillips Pending

4851-Davis v. KB Home of S.C. Pending

4857-Stevens Aviation v. DynCorp Intern. Pending

4859-State v. B. Garris Pending

4862-5 Star v. Ford Motor Company Pending

4863-White Oak v. Lexington Insurance Pending

4865-Shatto v. McLeod Regional Medical Pending

4867-State v. Jonathan Hill Pending

4872-State v. Kenneth Morris Pending

4873-MRI at Belfair v. SCDHEC Pending

4877-McComb v. Conard Pending

4879-Stephen Wise v. Richard Wise Pending

4880-Gordon v. Busbee Pending

4887-Rebecca West v. Todd Morehead	Pending
4888-Pope v. Heritage Communities	Pending
4890-Potter v. Spartanburg School	Pending
4892-Katie Green Buist v. Michael Scott Buist	Pending
4894-State v. Andre Jackson	Pending
4895-King v. International Knife	Pending
4897-David Tant v. SCDC	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Patricia Lewin v. Albert Lewin	Pending
4921-Roof v. Steele	Pending
4923-Price v. Peachtree Electrical	Pending
4924-State v. Bradley Senter	Pending
4926-Dinkins v. Lowe's Home Centers	Pending
4927-State v. John Porter Johnson	Pending
4932-Margie Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending

4934-State v. Rodney Galimore	Pending
4936-Mullarkey v. Mullarkey	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. Bentley Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Robert Crossland v. Shirley Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4954-North Point Dev. Group v. SCDOT	Pending
4956-State v. Diamon D. Fripp	Pending
4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending
4964-State v. Alfred Adams	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4983-State v. James Ervin Ramsey	Pending
4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending
4997-Allegro v. Emmett J. Scully	Pending
5001-State v. Alonzo Craig Hawes	Pending
5003-Earl Phillips as personal representative v. Brigitte Quick	Pending

5006-J. Broach and M. Loomis v. E. Carter et al.	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5025-State v. Randy Vickery	Pending
5031-State v. Demetrius Price	Pending
5032-LeAndra Lewis v. L.B. Dynasty	Pending
5034-State v. Richard Bill Niles, Jr.	Pending
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Pending
5044-State v. Gene Howard Vinson	Pending
2010-UP-356-State v. Darian K. Robinson	Pending
2011-UP-038-Dunson v, Alex Lee, Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-127-State v. Beulah Butler	Pending
2011-UP-199-Amy Davidson v. City of Beaufort	Pending
2011-UP-328-Davison v. Scaffe	Pending

2011-UP-343-State v. Eric Dantzler	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. Lloyd Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Harris	Pending
2011-UP-385-State v. Anthony Wilder	Pending
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-447-Brad Johnson v. Lewis Hall	Pending
2011-UP-456-Thomas Heaton v. State	Pending
2011-UP-463-State v. Rebekah Rogers	Pending
2011-UP-468-Patricia Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. Terrell McCoy	Pending
2011-UP-475-State v. James Austin	Pending
2011-UP-495-State v. Arthur Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2011-UP-516-Vaughn Smith v. SCDPPPS	Pending
2011-UP-517-N. M. McLean et al. v. James B. Drennan, III	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-522-State v. Michael D. Jackson	Pending

2011-UP-550-McCaskill v. Roth	Pending
2011-UP-558-State v. Tawanda Williams	Pending
2011-UP-562-State v. Tarus Henry	Pending
2011-UP-565-Griggs v. Ashley Towne Village	Pending
2011-UP-572-State v. Reico Welch	Pending
2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending
2011-UP-583-State v. David Lee Coward	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2011-UP-590-A. Leon Ravenell v. Nancy Meyer	Pending
2012-UP-010-State v. Norman Mitchell	Pending
2012-UP-014-State v. Andre Norris	Pending
2012-UP-018-State v. Robert Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-037-Livingston v. Danube Valley	Pending
2012-UP-058-State v. Andra Byron Jamison	Pending
2012-UP-060-Austin v. Stone	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-089-State v. A. Williamson	Pending
2012-UP-091-State v. Mike Salley	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending

2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-217-Forest Beach Owners' Assoc. v. C. Bair	Pending
2012-UP-218-State v. Adrian Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending
2012-UP-290-State v. Eddie Simmons	Pending
2012-UP-292-Demetrius Ladson v. Harvest Hope	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-321-James Tinsley v. State	Pending
2012-UP-330-State v. Doyle Marion Garrett	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending

2012-UP-365-Patricia E. King and Robbie King Jones, as representatives of W.R. King and Ellen King v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King et al.	Pending
2012-UP-371-State v. Thomas Smart	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-471-SCDSS v. Kelcie C. et al.	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-504-Palmetto Bank v. Cardwell	Pending
2012-UP-559-NAFH National Bank v. Israel Romero	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway	Pending
2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William James Biggins, Petitioner,

v.

Karen Lee Burdette, f/k/a Karen Burdette Biggins, Respondent.

Appellate Case No. 2011-192286

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Kershaw County
James F. Fraley, Jr., Family Court Judge

Opinion No. 27213
Heard January 23, 2013 – Filed January 30, 2013

DISMISSED AS IMPROVIDENTLY GRANTED

Charles D. Lee, III, of McLaren & Lee, of Columbia, for Petitioner.

Russell T. Burke and Victoria L. Eslinger, both of Nexsen Pruet, LLC, of Columbia, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *Biggins v. Burdette*, 392 S.C. 241, 708 S.E.2d 237 (Ct. App. 2011). We now dismiss the writ as improvidently granted.

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

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Appellate Court Rules.

Appellate Case No. 2011-190326

ORDER

The Commission on Lawyer Conduct and the Commission on Judicial Conduct have proposed a number of amendments to the Rules for Lawyer Disciplinary Enforcement and the Rules for Judicial Disciplinary Enforcement, which are found in Rules 413 and 502, SCACR. The purpose of the amendments is to provide better guidance in proceedings involving incapacity or where a lawyer or judge may be unable to participate in a disciplinary investigation or to assist in his or her own defense in formal proceedings due to a physical or mental condition.

Rules 413 and 502, SCACR, are hereby amended as set forth in the attachment to this order. Additionally, Rule 608, SCACR, is amended to provide appointment credit for a lawyer who is appointed to represent a lawyer or judge in Rule 28, RLDE and RJDE proceedings involving incapacity or the inability to participate in a disciplinary investigation or defend in formal proceedings. The amendments are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 28, 2013

Amendments to Rule 502, SCACR

Rule 17 is amended to read:

RULE 17. INTERIM SUSPENSION

(a) Criminal Prosecution or Conviction for a Serious Crime. Without the necessity of Commission action, the Supreme Court may place a judge on interim suspension upon notice of the filing of an indictment, information, or complaint charging the judge with a serious crime, and shall immediately place a judge on interim suspension on receipt of a certified copy of a judgment of conviction or other competent evidence showing that the judge has been convicted of a serious crime. The fact that sentencing may be delayed or an appeal may be taken shall not prevent the Supreme Court from imposing an interim suspension.

(b) Other Misconduct. Upon receipt of sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice, the Supreme Court may place the judge on interim suspension pending a final determination in any proceeding under these rules.

(c) Failure to Respond to Notice of Investigation, Subpoena, or Notice of Appearance. Upon receipt of sufficient evidence demonstrating that a judge has failed to fully respond to a notice of investigation, has failed to fully comply with a proper subpoena issued in connection with an investigation or formal charges, has failed to appear at and fully respond to inquiries at an appearance required pursuant to Rule 19(c)(3), or has failed to respond to inquiries or directives of the Commission or the Supreme Court, the Supreme Court may place that judge on interim suspension.

(d) Motion for Reconsideration. A judge placed on interim suspension may apply to the Supreme Court for reconsideration of the order. A copy of the motion shall be filed with the Commission and served on disciplinary counsel.

(e) Order to be Public. The order of interim suspension shall be public.

Rule 28 is amended to read:

RULE 28. CASES INVOLVING ALLEGATIONS OF MENTAL OR PHYSICAL INCAPACITY AND/OR THE INABILITY TO PARTICIPATE IN A DISCIPLINARY INVESTIGATION OR ASSIST IN THE DEFENSE OF FORMAL PROCEEDINGS

(a) Initiation of an Incapacity Proceeding or a Proceeding Involving the Inability to Participate in a Disciplinary Investigation or to Assist in the Defense of Formal Disciplinary Proceedings. An incapacity proceeding or a proceeding to determine whether a judge is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings may be initiated:

(1) if a judge alleges an inability to participate in the disciplinary investigation or to assist in the defense of formal proceedings due to a mental or physical condition;

(2) if information comes to disciplinary counsel's attention by complaint or from another source that the judge suffers from an incapacity or is incapable of participating in the disciplinary investigation or of assisting in the defense of formal proceedings due to a mental or physical condition; or

(3) by an order of an investigative panel, a hearing panel, or the Supreme Court.

(b) Proceedings to Determine Incapacity and/or the Inability to Participate in a Disciplinary Investigation or to Assist in the Defense of Formal Proceedings Generally. All proceedings under this rule shall be conducted in accordance with the procedures for disciplinary proceedings, except:

(1) Incapacity Proceedings. The purpose of incapacity proceedings shall be to determine whether the judge suffers from a physical or mental condition that adversely affects the judge's ability to perform judicial functions.

(2) Proceedings Involving the Inability to Participate in a Disciplinary Investigation or Assist in the Defense of Formal Proceedings. The purpose of such proceedings shall be to determine whether the judge suffers from a physical or mental condition that renders the judge unable to participate in a disciplinary investigation or assist in the

defense of formal proceedings.

(A) The Commission shall notify the Supreme Court of the initiation of the proceedings. The Supreme Court shall immediately transfer the judge to incapacity inactive status pending a determination by the Supreme Court of whether the judge is capable of participating in the disciplinary investigation or of assisting in the defense of formal proceedings pursuant to this rule.

(B) Any pending formal proceedings based on misconduct by the judge shall be temporarily stayed pending a determination of whether the judge is capable of participating in the disciplinary investigation or of assisting in the defense of formal proceedings under this rule. However, any investigation of the disciplinary complaint may continue.

(3) Initiation of Proceedings. Upon initiation of proceedings under this rule, the Commission chair, vice chair, or chair's designee shall be assigned as the hearing officer for all matters related to the proceedings, including making appointments and conducting a hearing pursuant to this rule.

(A) The hearing officer, if he or she deems appropriate, may appoint counsel for the judge, if the judge is without representation, or appoint a guardian ad litem for the judge.

(B) The hearing officer shall designate one or more qualified medical, psychiatric, or psychological experts to examine the judge prior to the hearing on the matter. The hearing officer may designate an expert agreed upon by disciplinary counsel and the judge.

(C) The judge shall submit to an examination by the expert(s) within 30 days of receipt of notice of designation of the expert(s). The judge shall cooperate with the expert(s) with regard to scheduling and participating in the examination. If the judge fails to attend or participate in the examination, the hearing officer shall issue an order terminating proceedings under this rule and, if disciplinary proceedings were interrupted by a claim that the judge was unable to participate in a disciplinary investigation or assist in the defense of formal proceedings, the interrupted disciplinary proceedings shall resume.

(D) The expert or experts shall report the results of the examination(s) to the hearing officer and the parties.

(4) Stipulations.

(A) Within 20 days of receipt of the examination report(s) of the expert or experts designated by the hearing officer, disciplinary counsel and the judge may agree upon proposed findings of fact, conclusions, and recommended disposition. The stipulation shall be submitted, without the necessity of a hearing, to the hearing officer for a recommendation to the Supreme Court for approval or rejection. The final decision on the recommendation shall be made by the Supreme Court.

(B) If the Supreme Court accepts a stipulation, it shall enter an order in accordance with its terms. If the stipulation is rejected by the Supreme Court, it shall be withdrawn and cannot be used against the judge in any proceedings. If the Supreme Court rejects the stipulation, the Supreme Court shall order that the hearing proceed.

(5) Hearing. Unless a stipulation is submitted by the parties, the hearing officer shall schedule a hearing and notify disciplinary counsel and the judge of the date, time, and place of the hearing. Within 30 days of the filing of the transcript of the hearing, the hearing officer shall file with the Supreme Court the record of the proceeding and a report setting forth findings of fact, a conclusion regarding incapacity and/or the ability of the judge to participate in a disciplinary investigation or assist in the defense of formal proceedings, and a recommended disposition of the proceedings.

(6) Review by the Supreme Court.

(A) If the Supreme Court determines that the judge suffers from a physical or mental condition that adversely affects the judge's ability to perform judicial functions, it may enter any order appropriate to the circumstances, the nature of the incapacity, and probable length of the period of incapacity, including:

(i) retiring or removing the judge from office if the incapacity seriously interferes with the judge's performance of judicial duties and the incapacity is, or is likely to become, of a

permanent character;

(ii) transferring the judge to judicial incapacity inactive status;

(iii) placing restrictions or conditions on the judge, to include limiting the judge's performance of judicial functions or requiring the judge to undergo appropriate treatment;

(iv) transferring the judge to the lawyer incapacity status if the judge is a lawyer and the Supreme Court determines the judge is incapacitated to practice law.

(B) If the Supreme Court determines the judge does not suffer from a physical or mental condition that adversely affects the judge's ability to perform judicial functions, the Court shall vacate any order transferring the judge to incapacity inactive status and enter any other order as appropriate to the circumstances.

(C) If the Supreme Court determines that the judge is incapable of participating in the disciplinary investigation or assisting in the defense of formal proceedings due to a physical or mental condition, any formal disciplinary proceedings based on misconduct shall be deferred. Any investigation of the disciplinary complaint may continue. The judge shall remain on incapacity inactive status until the Supreme Court grants a petition for reinstatement to active status as a judge. If the Supreme Court determines that a petition for reinstatement to active status should be granted, the interrupted disciplinary proceedings shall resume.

(D) If the Supreme Court determines that the judge is capable of participating in a disciplinary investigation or assisting in the defense of formal proceedings, the interrupted disciplinary proceedings based on misconduct shall resume. The judge shall, however, be retained on incapacity inactive status pending completion of the disciplinary proceedings.

(7) Costs. In its discretion, the Supreme Court may direct that the costs incurred by the Commission and the Office of Disciplinary Counsel related to proceedings under this rule be paid by the judge.

(8) Waiver of Privilege. The raising of a mental or physical condition as a defense to, or in mitigation of, formal charges or the raising of a claim of inability to participate in a disciplinary investigation or assist in the defense of formal proceedings by the judge constitutes a waiver of any medical privilege.

(9) Confidentiality. All of the proceedings, information, and documents related to the proceedings shall be confidential except that an order transferring a judge to incapacity inactive status or reinstating a judge to active status following transfer to incapacity inactive status shall be public. Such an order shall not, however, disclose the nature of the judge's condition. All other orders issued in the proceeding shall be confidential.

(c) Involuntary Commitment or Adjudication of Incompetency. If a judge has been judicially declared incompetent or is involuntarily committed on the grounds of incompetency or incapacity by a final judicial order after a judicial hearing, the Supreme Court, upon receipt of a certified copy of the order, shall enter an order immediately transferring the judge to incapacity inactive status. If the judge is a lawyer, the order shall also transfer the judge to the lawyer incapacity inactive status. A copy of the order shall be served, in the manner the Supreme Court shall direct, upon the judge, the judge's guardian, or the director of the institution to which the judge has been committed. Unless the Supreme Court determines that it is appropriate to do so, an order transferring a judge to incapacity inactive status shall not disclose the nature of the incapacity.

(d) Other Incapacity. Upon receipt of sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice, the Supreme Court may transfer the judge to incapacity inactive status pending a final determination in any proceeding under these rules. Unless the Supreme Court determines that it is appropriate to do so, an order transferring a judge to incapacity inactive status shall not disclose the nature of the incapacity.

(e) Motion for Reconsideration. A judge transferred to incapacity inactive status pursuant to Rule 28(d) may apply to the Supreme Court for reconsideration of the order. A copy of the motion shall be filed with the Commission and served on the disciplinary counsel.

(f) Agreement. Nothing within this rule shall prohibit disciplinary counsel and

a judge from agreeing that the judge suffers from an incapacity or is unable to participate in a disciplinary investigation or to assist in the defense of formal proceedings due to a mental or physical condition. If disciplinary counsel and a judge so agree, the judge and disciplinary counsel may waive the proceedings under this rule by submitting to the Supreme Court a consent to transfer the judge to incapacity inactive status. If the judge is placed on incapacity inactive status because the judge is incapable of participating in a disciplinary investigation or assisting in the defense of formal proceedings, formal proceedings will be deferred in accordance with Rule 28(b)(6)(C).

(g) Reinstatement From Incapacity Inactive Status.

(1) Generally. No judge transferred to incapacity inactive status may resume active status except by order of the Supreme Court.

(2) Petition. Any judge transferred to incapacity inactive status shall be entitled to petition for transfer to active status once a year or at whatever shorter intervals the Supreme Court may direct in the order transferring the judge to incapacity inactive status or any modifications thereof. The judge shall serve a copy of the petition on disciplinary counsel, and shall file 10 copies of the petition with the Clerk of the Supreme Court. The copies filed with the Clerk shall be accompanied by proof of service showing service on disciplinary counsel.

(3) Examination. Upon the filing of a petition for transfer to active status, the Supreme Court may take or direct whatever action it deems necessary or proper to determine whether the incapacity has been removed, including a direction for an examination of the judge by qualified medical or psychological experts designated by the Supreme Court. In its discretion, the Supreme Court may direct that the expense of the examination be paid by the judge.

(4) Required Disclosure. With the filing of a petition for reinstatement to active status, the judge shall be required to disclose the name of each psychiatrist, psychologist, physician and hospital or other institution by whom or in which the judge has been examined or treated since the transfer to incapacity inactive status. The judge shall furnish to the Supreme Court written consent to the release of information and records relating to the incapacity if requested by the Supreme Court or court-appointed medical or

psychological experts.

(5) Granting of Petition for Transfer to Active Status. The Supreme Court shall grant the petition for transfer to active status upon a showing by clear and convincing evidence that the incapacity has been removed.

(6) Judicial Declaration of Competency. If a judge transferred to incapacity inactive status on the basis of a judicial determination of incompetence has been declared to be competent, the Supreme Court may dispense with further evidence that the incapacity has been removed and may immediately direct reinstatement to active status.

Rule 2(m) is amended to read:

(m) Incapacity Inactive Status: non-disciplinary suspension of a judge from office based on incapacity or because the judge is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition.

Rule 4(e)(1)(A) is amended to read:

(A) adopt its own rules of procedure for discipline proceedings, incapacity proceedings, and proceedings to determine whether a judge is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition subject to the approval of the Supreme Court; and

Rule 7(b) is amended to read:

(b) Sanctions. Misconduct shall be grounds for one or more of the following sanctions:

> **(1)** removal from Office by the Supreme Court. The removal shall operate as a permanent injunction prohibiting the judge from holding any judicial office within the unified judicial system in South Carolina. On petition, the Supreme Court may dissolve this permanent injunction;
>
> **(2)** suspension by the Supreme Court. The Supreme Court may also make a recommendation to the appropriate authority that the judge not be reappointed to the office at the end of the judge's term;
>
> **(3)** public reprimand;
>
> **(4)** admonition, provided that an admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of sanction to be imposed;
>
> **(5)** assessment of the costs of the proceeding, including the cost of hearings, investigations, service of process and court reporter services;
>
> **(6)** limitations on the nature and extent of the judge's performance of judicial duties; or
>
> **(7)** any other sanction or requirement as the Supreme Court may determine is appropriate.

Rule 9 is amended to read:

Except as otherwise provided in these rules, the South Carolina Rules of Evidence applicable to non-jury civil proceedings and the South Carolina Rules of Civil Procedure apply in judicial discipline, incapacity cases, and proceedings to determine whether a judge is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition when formal charges have been filed. The right to discovery, however, shall be limited to that provided by Rule 25.

Rule 10 is amended to read:

The judge shall be entitled to retain counsel and to have the assistance of counsel at every stage of these proceedings. The Commission may appoint counsel to represent the judge in incapacity proceedings and proceedings to determine whether a judge is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition. See Rule 28(b)(3)(A). After appearing as counsel for a judge in a matter under these rules, counsel for the judge may only withdraw upon leave of the chair, vice chair, or a panel of the Commission after 10 days notice to disciplinary counsel and the judge or, prior to formal charges having been filed, upon stipulation of the judge, the withdrawing counsel and disciplinary counsel. Provided, after a matter has been forwarded to the Supreme Court for action, counsel can only withdraw from representation upon leave of the Supreme Court after due notice to the client and disciplinary counsel.

Rule 12(b) is amended to read:

(b) When Misconduct Proceedings Become Public. When formal charges are filed regarding allegations of misconduct, the formal charges and any answer shall become public 30 days after the filing of the answer or, if no answer is filed, 30 days after the expiration of the time to answer under Rule 23. Thereafter, except as otherwise provided by these rules or the Supreme Court, all subsequent records and proceedings relating to the misconduct allegations shall be open to the public inclusive of a letter of caution or admonition issued after the filing of formal charges. If allegations of incapacity or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition are raised during the misconduct proceedings, all records, information, and proceedings relating to these allegations shall be held confidential.

Rule 13 is amended to read:

Communications to the Commission, Commission counsel, disciplinary counsel, or their staffs relating to misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition and testimony given in the proceedings shall be absolutely privileged, and no civil lawsuit predicated thereon may be instituted against any complainant or witness. Members of the Commission, Commission

counsel and staff, and disciplinary counsel and staff shall be absolutely immune from civil suit for all conduct in the course of their official duties.

Rule 14(c) is amended to read:

(c) Service. Service upon the judge of formal charges in any disciplinary or incapacity proceedings shall be made by personal service upon the judge or the judge's counsel by any person authorized by the chair of the Commission, or by registered or certified mail, return receipt requested, to the judge's last known address. If service cannot be so made, service shall be deemed complete when deposited in the U.S. Mail, provided the formal charges were sent by registered or certified mail, return receipt requested, to the primary address the judge provided in the Attorney Information System under Rule 410, SCACR, and to the judge's last known address, if those addresses differ, or, if the judge is not a member of the South Carolina Bar, to the judge's last known address. Service of all other documents shall be made in the manner provided by Rule 262(b), SCACR.

Rule 19(a) is amended to read:

(a) Screening. Disciplinary counsel shall evaluate all information coming to disciplinary counsel's attention by complaint or from other sources that alleges judicial misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition. If the information would not constitute misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings if it were true, disciplinary counsel shall dismiss the complaint or, if appropriate, refer the matter to another agency. If the information raises allegations that would constitute lawyer misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings if true, disciplinary counsel shall conduct an investigation.

Rule 23(b) is amended to read:

(b) Waiver of Privilege. The raising of a mental or physical condition as a defense constitutes a waiver of any medical privilege pursuant to Rule 28(b)(8).

Rule 27(e)(1) is amended to read:

(1) The Supreme Court shall file a written decision dismissing the case, containing a letter of caution, imposing a sanction(s), or transferring the judge to incapacity inactive status. Any order relating to incapacity shall comply with Rule 28(b)(9). Unless otherwise ordered by the Supreme Court, the decision shall be effective upon filing.

Amendments to Rule 413, SCACR

Rule 17 is amended to read:

RULE 17

INTERIM SUSPENSION

(a) Criminal Prosecution or Conviction for a Serious Crime. Without the necessity of Commission action, the Supreme Court may place a lawyer on interim suspension upon notice of the filing of an indictment, information, or complaint charging the lawyer with a serious crime, and shall immediately place a lawyer on interim suspension on receipt of a certified copy of a judgment of conviction or other competent evidence showing that the lawyer has been convicted of a serious crime. The fact that sentencing may be delayed or an appeal may be taken shall not prevent the Supreme Court from imposing an interim suspension.

(b) Other Misconduct. Upon receipt of sufficient evidence demonstrating that a lawyer poses a substantial threat of serious harm to the public or to the administration of justice, the Supreme Court may place the lawyer on interim suspension pending a final determination in any proceeding under these rules.

(c) Failure to Respond to Notice of Investigation, Subpoena, or Notice of Appearance. Upon receipt of sufficient evidence demonstrating that a lawyer has failed to fully respond to a notice of investigation, has failed to fully comply with a proper subpoena issued in connection with an investigation or formal charges, has failed to appear at and fully respond to inquiries at an appearance required pursuant to Rule 19(c)(3), or has failed to respond to inquiries or directives of the Commission or the Supreme Court, the Supreme Court may place that lawyer on interim suspension.

(d) Motion for Reconsideration. A lawyer placed on interim suspension may apply to the Supreme Court for reconsideration of the order. A copy of the motion shall be filed with the Commission and served on the disciplinary counsel.

(e) Order to be Public. The order of interim suspension shall be public.

Rule 28 is amended to read:

RULE 28

CASES INVOLVING ALLEGATIONS OF MENTAL OR PHYSICAL INCAPACITY AND/OR THE INABILITY TO PARTICIPATE IN A DISCIPLINARY INVESTIGATION OR ASSIST IN THE DEFENSE OF FORMAL PROCEEDINGS

(a) Initiation of an Incapacity Proceeding or a Proceeding Involving the Inability to Participate in a Disciplinary Investigation or to Assist in the Defense of Formal Disciplinary Proceedings. An incapacity proceeding or a proceeding to determine whether a lawyer is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings may be initiated:

(1) if a lawyer alleges an inability to participate in the disciplinary investigation or to assist in the defense of formal proceedings due to a mental or physical condition;

(2) if information comes to disciplinary counsel's attention by complaint or from another source that the lawyer suffers from an incapacity or is incapable of participating in the disciplinary investigation or of assisting in the defense of formal proceedings due to a mental or physical condition; or

(3) by an order of an investigative panel, a hearing panel, or the Supreme Court.

(b) Proceedings to Determine Incapacity and/or the Inability to Participate in a Disciplinary Investigation or to Assist in the Defense of Formal Proceedings Generally. All proceedings under this rule shall be conducted in accordance with the procedures for disciplinary proceedings, except:

(1) Incapacity Proceedings. The purpose of incapacity proceedings shall be to determine whether the lawyer suffers from a physical or mental condition that adversely affects the lawyer's ability to practice law.

(2) Proceedings Involving the Inability to Participate in a Disciplinary Investigation or Assist in the Defense of Formal Proceedings. The purpose of such proceedings shall be to determine

whether the lawyer suffers from a physical or mental condition that renders the lawyer unable to participate in a disciplinary investigation or assist in the defense of formal proceedings.

(A) The Commission shall notify the Supreme Court of the initiation of the proceedings. The Supreme Court shall immediately transfer the lawyer to incapacity inactive status pending a determination by the Supreme Court of whether the lawyer is capable of participating in the disciplinary investigation or of assisting in the defense of formal proceedings pursuant to this rule.

(B) Any pending formal proceedings based on misconduct by the lawyer shall be temporarily stayed pending a determination of whether the lawyer is capable of participating in the disciplinary investigation or of assisting in the defense of formal proceedings under this rule. However, any investigation of the disciplinary complaint may continue.

(3) Initiation of Proceedings. Upon initiation of proceedings under this rule, the Commission chair, vice chair, or chair's designee shall be assigned as the hearing officer for all matters related to the proceedings, including making appointments and conducting a hearing pursuant to this rule.

(A) The hearing officer, if he or she deems appropriate, may appoint counsel for the lawyer, if the lawyer is without representation, or appoint a guardian ad litem for the lawyer.

(B) The hearing officer shall designate one or more qualified medical, psychiatric, or psychological experts to examine the lawyer prior to the hearing on the matter. The hearing officer may designate an expert agreed upon by disciplinary counsel and the lawyer.

(C) The lawyer shall submit to an examination by the expert(s) within 30 days of receipt of notice of designation of the expert(s). The lawyer shall cooperate with the expert(s) with regard to scheduling and participating in the examination. If the lawyer fails to attend or participate in the examination, the hearing officer shall issue an order terminating proceedings under this rule and, if disciplinary proceedings were interrupted by a claim that the lawyer was unable to

participate in a disciplinary investigation or assist in the defense of formal proceedings, the interrupted disciplinary proceedings shall resume.

(D) The expert or experts shall report the results of the examination(s) to the hearing officer and the parties.

(4) Stipulations.

(A) Within 20 days of receipt of the examination report(s) of the expert or experts designated by the hearing officer, disciplinary counsel and the lawyer may agree upon proposed findings of fact, conclusions, and recommended disposition. The stipulation shall be submitted, without the necessity of a hearing, to the hearing officer for a recommendation to the Supreme Court for approval or rejection. The final decision on the recommendation shall be made by the Supreme Court.

(B) If the Supreme Court accepts a stipulation, it shall enter an order in accordance with its terms. If the stipulation is rejected by the Supreme Court, it shall be withdrawn and cannot be used against the lawyer in any proceedings. If the Supreme Court rejects the stipulation, the Supreme Court shall order that the hearing proceed.

(5) Hearing. Unless a stipulation is submitted by the parties, the hearing officer shall schedule a hearing and notify disciplinary counsel and the lawyer of the date, time, and place of the hearing. Within 30 days of the filing of the transcript of the hearing, the hearing officer shall file with the Supreme Court the record of the proceeding and a report setting forth findings of fact, a conclusion regarding incapacity and/or the ability of the lawyer to participate in a disciplinary investigation or assist in the defense of formal proceedings, and a recommended disposition of the proceedings.

(6) Review by the Supreme Court.

(A) If the Supreme Court determines that the lawyer suffers from a physical or mental condition that adversely affects the lawyer's ability to practice law, it may enter any order appropriate to the circumstances, the nature of the incapacity, and probable length of the period of incapacity, including:

(i) transferring the lawyer to incapacity inactive status; or

(ii) placing restrictions or conditions on the lawyer, to include limiting the lawyer's practice of law or requiring the lawyer to undergo appropriate treatment;

(B) If the Supreme Court determines the lawyer does not suffer from a physical or mental condition that adversely affects the lawyer's ability to practice law, the Court shall vacate any order transferring the lawyer to incapacity inactive status and enter any other order as appropriate to the circumstances.

(C) If the Supreme Court determines that the lawyer is incapable of participating in the disciplinary investigation or assisting in the defense of formal proceedings due to a physical or mental condition, any formal disciplinary proceedings based on misconduct shall be deferred. Any investigation of the disciplinary complaint may continue. The lawyer shall remain on incapacity inactive status until the Supreme Court grants a petition for reinstatement to active status as a lawyer. If the Supreme Court determines that a petition for reinstatement to active status should be granted, the interrupted disciplinary proceedings shall resume.

(D) If the Supreme Court determines that the lawyer is capable of participating in a disciplinary investigation or assisting in the defense of formal proceedings, the interrupted disciplinary proceedings based on misconduct shall resume. The lawyer shall, however, be retained on incapacity inactive status pending completion of the disciplinary proceedings.

(7) Costs. In its discretion, the Supreme Court may direct that the costs incurred by the Commission and the Office of Disciplinary Counsel related to proceedings under this rule be paid by the lawyer.

(8) Waiver of Privilege. The raising of a mental or physical condition as a defense to, or in mitigation of, formal charges or the raising of a claim of inability to participate in a disciplinary investigation or assist in the defense of formal proceedings by the lawyer constitutes a waiver of any medical privilege.

(9) Confidentiality. All of the proceedings, information, and documents related to the proceedings shall be confidential except that an order transferring a lawyer to incapacity inactive status or reinstating a lawyer to active status following transfer to incapacity inactive status shall be public. Such an order shall not, however, disclose the nature of the lawyer's condition. All other orders issued in the proceeding shall be confidential.

(c) Involuntary Commitment or Adjudication of Incompetency. If a lawyer has been judicially declared incompetent or is involuntarily committed on the grounds of incompetency or incapacity by a final judicial order after a judicial hearing, the Supreme Court, upon receipt of a certified copy of the order, shall enter an order immediately transferring the lawyer to incapacity inactive status. A copy of the order shall be served, in the manner the Supreme Court shall direct, upon the lawyer, the lawyer's guardian, or the director of the institution to which the lawyer has been committed. Unless the Supreme Court determines that it is appropriate to do so, an order transferring a lawyer to incapacity inactive status shall not disclose the nature of the incapacity.

(d) Other Incapacity. Upon receipt of sufficient evidence demonstrating that a lawyer poses a substantial threat of serious harm to the public or to the administration of justice, the Supreme Court may transfer the lawyer to incapacity inactive status pending a final determination in any proceeding under these rules. Unless the Supreme Court determines that it is appropriate to do so, an order transferring a lawyer to incapacity inactive status shall not disclose the nature of the incapacity.

(e) Motion for Reconsideration. A lawyer transferred to incapacity inactive status pursuant to Rule 28(d) may apply to the Supreme Court for reconsideration of the order. A copy of the motion shall be filed with the Commission and served on the disciplinary counsel.

(f) Agreement. Nothing within this rule shall prohibit disciplinary counsel and a lawyer from agreeing that the lawyer suffers from an incapacity or is unable to participate in a disciplinary investigation or to assist in the defense of formal proceedings due to a mental or physical condition. If disciplinary counsel and a lawyer so agree, the lawyer and disciplinary counsel may waive the proceedings under this rule by submitting to the Supreme Court a consent to transfer the lawyer to incapacity inactive status. If the lawyer is placed on incapacity inactive status because the lawyer is incapable of participating in a disciplinary investigation or

assisting in the defense of formal proceedings, formal proceedings will be deferred in accordance with Rule 28(b)(6)(C).

(g) Reinstatement From Incapacity Inactive Status.

(1) Generally. No lawyer transferred to incapacity inactive status may resume active status except by order of the Supreme Court.

(2) Petition. Any lawyer transferred to incapacity inactive status shall be entitled to petition for transfer to active status once a year or at whatever shorter intervals the Supreme Court may direct in the order transferring the lawyer to incapacity inactive status or any modifications thereof. The lawyer shall serve a copy of the petition on disciplinary counsel, and shall file 10 copies of the petition with the Clerk of the Supreme Court. The copies filed with the Clerk shall be accompanied by proof of service showing service on disciplinary counsel.

(3) Examination. Upon the filing of a petition for transfer to active status, the Supreme Court may take or direct whatever action it deems necessary or proper to determine whether the incapacity has been removed, including a direction for an examination of the lawyer by qualified medical or psychological experts designated by the Supreme Court. In its discretion, the Supreme Court may direct that the expense of the examination be paid by the lawyer.

(4) Required Disclosure. With the filing of a petition for reinstatement to active status, the lawyer shall be required to disclose the name of each psychiatrist, psychologist, physician and hospital or other institution by whom or in which the lawyer has been examined or treated since the transfer to incapacity inactive status. The lawyer shall furnish to the Supreme Court written consent to the release of information and records relating to the incapacity if requested by the Supreme Court or court-appointed medical or psychological experts.

(5) Learning in the Law; Examinations and Training. The Supreme Court may also direct that the lawyer establish proof of competency and learning in the law, which may include a requirement to successfully complete the examinations and training required by Rule 402(c)(5), (6), and (8), SCACR.

(6) Granting of Petition for Transfer to Active Status. The Supreme Court shall grant the petition for transfer to active status upon a showing by clear and convincing evidence that the incapacity has been removed.

(7) Judicial Declaration of Competency. If a lawyer transferred to incapacity inactive status on the basis of a judicial determination of incompetence has been declared to be competent, the Supreme Court may dispense with further evidence that the incapacity to practice law has been removed and may immediately direct reinstatement to active status.

Rule 2(m) is amended to read:

(m) Incapacity Inactive Status: non-disciplinary suspension of a lawyer from the practice of law based on incapacity or because the lawyer is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition.

Rule 4(e)(1)(A) is amended to read:

(A) adopt its own rules of procedure for discipline proceedings, incapacity proceedings, and proceedings to determine whether a lawyer is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition subject to the approval of the Supreme Court; and

Rule 9 is amended to read:

Except as otherwise provided in these rules, the South Carolina Rules of Evidence applicable to non-jury civil proceedings and the South Carolina Rules of Civil Procedure apply in lawyer discipline, incapacity cases, and proceedings to determine whether a lawyer is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition when formal charges have been filed. The right to discovery, however, shall be limited to that provided by Rule 25.

Rule 10 is amended to read:

The lawyer shall be entitled to retain counsel and to have the assistance of counsel at every stage of these proceedings. The Commission may appoint counsel to represent the lawyer in incapacity proceedings and proceedings to determine whether a lawyer is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition. See Rule 28(b)(3)(A). After appearing as counsel for a lawyer in a matter under these rules, counsel for the lawyer may only withdraw upon leave of the chair, vice chair, or a panel of the Commission after 10 days notice to disciplinary counsel and the lawyer or, prior to formal charges having been filed, upon stipulation of the lawyer, the withdrawing counsel and disciplinary counsel. Provided, after a matter has been forwarded to the Supreme Court for action, counsel can only withdraw from representation upon leave of the Supreme Court after due notice to the client and disciplinary counsel.

Rule 12(b) is amended to read:

(b) When Misconduct Proceedings Become Public. When formal charges are filed regarding allegations of misconduct, the formal charges and any answer shall become public 30 days after the filing of the answer or, if no answer is filed, 30 days after the expiration of the time to answer under Rule 23. Thereafter, except as otherwise provided by these rules or the Supreme Court, all subsequent records and proceedings relating to the misconduct allegations shall be open to the public inclusive of a letter of caution or admonition issued after the filing of formal charges. If allegations of incapacity or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition are raised during the misconduct proceedings, all records, information, and proceedings relating to these allegations shall be held confidential.

Rule 13 is amended to read:

Communications to the Commission, Commission counsel, disciplinary counsel, or their staffs relating to misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition and testimony given in the proceedings shall be absolutely privileged, and no civil lawsuit predicated thereon may be instituted against any complainant or witness. Members of the Commission, Commission counsel and staff, disciplinary counsel and staff, any attorney appointed to protect

clients under Rule 31, and any supervising or monitoring attorney appointed under Rule 33 shall be absolutely immune from civil suit for all conduct in the course of their official duties.

Rule 14(c) is amended to read:

(c) Service. Service upon the lawyer of formal charges in any disciplinary or incapacity proceedings shall be made by personal service upon the lawyer or the lawyer's counsel by any person authorized by the chair of the Commission, or by registered or certified mail, return receipt requested, to the lawyer's last known address. If service cannot be so made, service shall be deemed complete when deposited in the U.S. Mail, provided the formal charges were sent by registered or certified mail, return receipt requested, to the primary address the lawyer provided in the Attorney Information System under Rule 410, SCACR, and to the lawyer's last known address, if those addresses differ. Service of all other documents shall be made in the manner provided by Rule 262(b), SCACR.

Rule 19(a) is amended to read:

(a) Screening. Disciplinary counsel shall evaluate all information coming to disciplinary counsel's attention by complaint or from other sources that alleges lawyer misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition. If the information would not constitute misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings if it were true, disciplinary counsel shall dismiss the complaint or, if appropriate, refer the matter to another agency. If the information raises allegations that would constitute lawyer misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings if true, disciplinary counsel shall conduct an investigation.

Rule 23(b) is amended to read:

(b) Waiver of Privilege. The raising of a mental or physical condition as a defense constitutes a waiver of any medical privilege pursuant to Rule 28(b)(8).

Rule 27(e)(1) is amended to read:

(1) The Supreme Court shall file a written decision dismissing the case, containing a letter of caution, imposing a sanction(s), or transferring the lawyer to incapacity inactive status. Any order relating to incapacity shall comply with Rule 28(b)(9). Unless otherwise ordered by the Supreme Court, the decision shall be effective upon filing.

Rule 608(f)(4)(C), SCACR is amended to read**:**

(C) A member who receives an appointment as an attorney to protect under Rule 31, RLDE, contained in Rule 413, SCACR; or receives an assignment to investigate a matter as an attorney to assist disciplinary counsel under Rule 5(c), RLDE; or receives an appointment as counsel under Rule 28(b), RLDE, or Rule 28(b), RJDE, shall receive credit for the appointment under this rule. The Office of Disciplinary Counsel shall notify the appropriate clerk of court of the appointment, and the clerk shall mark the list to reflect the appointment. If the member is relieved of this appointment before it is substantially completed, the Supreme Court or the Office of Disciplinary Counsel shall notify the clerk so that the credit may be withdrawn.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Plantation Federal Bank, as successor in interest to First Savers Bank, Respondent,

v.

Peggy B. Gray and Waterford Ridge Owners Association, Inc., Defendants,

Of whom, Peggy B. Gray is the Appellant.

Appellate Case No. 2010-173826

Appeal From Oconee County
Ellis B. Drew, Jr., Master-in-Equity

Opinion No. 5075
Heard November 1, 2012 – Filed January 30, 2013

REVERSED AND REMANDED

Charles R. Griffin, Jr., of Anderson, for Appellant.

Bradley Keith Richardson, of Anderson, for Respondent.

WILLIAMS, J.: Peggy Gray appeals the master-in-equity's ruling ordering separate trials on Plantation Federal Bank's (Bank) foreclosure action and her compulsory legal counterclaims. Gray argues the master erred in allowing Bank to proceed with its foreclosure action before her compulsory legal counterclaims were adjudicated. We reverse and remand.

FACTS

Gray purchased an unimproved lot in Oconee County as a real estate investment. On March 30, 2010, Bank filed a summons, complaint, and lis pendens seeking an order of foreclosure and a deficiency judgment against Gray in regards to Bank's first mortgage on the lot. On May 18, 2010, Gray filed an answer, and Bank successfully moved to have the matter referred to the Oconee County master.

On June 17, 2010, Gray amended her answer and asserted five counterclaims: breach of contract, breach of fiduciary duty, fraud, violations of the South Carolina Unfair Trade Practices Act, and tortious interference with economic opportunities. Gray prayed for actual and punitive damages, attorney's fees, and costs. Bank replied, denying Gray's counterclaims and asserting defenses.

On August 4, 2010, Bank filed a motion for separate trials pursuant to Rule 42(b), SCRCP. On August 25, 2010, a hearing was held before the master. Bank argued its equitable foreclosure action should be tried separately from Gray's legal counterclaims. Bank also argued it should be allowed to proceed with its foreclosure action immediately because Gray had failed to protect the property from being sold at a tax sale, failed to pay costs incidental to the ownership of property such as homeowners' association dues and taxes, and did not occupy the lot as her residence.[1] Bank contended that because the lot at issue was a vacant lot, proceeding with the foreclosure action immediately would not prejudice Gray. Bank did not dispute that Gray's counterclaims were compulsory but argued that extenuating circumstances, namely that the lot's vacancy and Bank's continued expenditures to maintain the property, warranted trying the foreclosure action before Gray's legal counterclaims.

Gray stated she had no objection to the bifurcation and remand of the legal claims to the circuit court but argued that her counterclaims were compulsory and that her legal claims must be tried first. The master orally ruled that the foreclosure should proceed and that trying it first did not "jeopardize[]" Gray because the lot was vacant. In addition, the master instructed that Gray could add "the loss of a vacant lot . . . to [her] damages claim maybe." The master issued a written order on September 2, 2010, allowing the actions to be tried separately, remanding Gray's legal claims to the circuit court, and allowing the foreclosure action to

[1] In its brief, Bank notes that, following the hearing, it paid the 2009 Oconee County taxes to prevent the lot from being sold at a delinquent tax sale.

proceed as soon as the docket allowed. The order specifically protected Gray's right to a jury trial on her legal claims. This appeal followed.

LAW/ANALYSIS

Gray argues the master erred in holding Bank could proceed with its foreclosure action as soon as the docket allowed, thus allowing Bank's equitable claims to be adjudicated before Gray's compulsory legal counterclaims. Gray contends her actions are compulsory legal counterclaims and that there are factual issues common to both claims. We agree.

When a defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, both the plaintiff and the defendant have a right to have a jury trial on the issues raised by the compulsory legal counterclaim. *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 54, 354 S.E.2d 895, 896 (1987). If there are factual issues common to both the legal and equitable claims, the legal claim, "absent the most imperative circumstances," must be tried, that is, disposed of, first. *Id.* at 56, 354 S.E.2d at 897 (internal quotation marks omitted). In such cases, the United States Supreme Court has cautioned that the discretion to try an equitable claim first "is very narrowly limited and must, whenever possible, be exercised to preserve jury trial." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959). Accordingly, the Court indicated that such discretion should only be exercised in the face of "irreparable harm" to the plaintiff if the legal claims were to be tried first. *Id.* "If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first." *Johnson*, 292 S.C. at 56, 354 S.E.2d at 897.

We hold the master erred in allowing the foreclosure action to proceed prior to a jury trial on Gray's legal counterclaims. Gray's counterclaims, which are compulsory, rest on her allegations, inter alia, that Bank "wrongfully, unlawfully, intentionally, willfully, and illegally declared Gray to be in default and/or . . . accelerated the balance due on the note and mortgage[,]" fraudulently induced Gray into executing the note and mortgage, and intentionally "frustrated [Gray's] ability to comply with the terms and conditions on her part to be performed." These allegations all involve questions of fact that will most certainly arise in the foreclosure action, especially when considered in light of Gray's defenses to the foreclosure action, including unclean hands.

Because we find that Bank's equitable claim and Gray's legal counterclaims share common questions of fact, Gray's counterclaims must be tried first "absent the most imperative circumstances." *Johnson*, 292 S.C. at 56, 354 S.E.2d at 897 (internal quotation marks omitted). No such showing has been made here. At the hearing on the motion to bifurcate, Bank argued that the foreclosure action should proceed because the value of the lot was declining based on the general state of the economy and because Bank would have to pay taxes on the lot to prevent it from being sold at a tax sale scheduled for later in the year. These circumstances would possibly, if not likely, occur in every foreclosure action currently pending. Further, neither of these concerns represent the kind of "irreparable harm" contemplated by the Supreme Court that would justify infringing on Gray's constitutional right to a trial by jury. Bank may recoup its payment of any taxes in the foreclosure sale pursuant to section 29-3-30 of the South Carolina Code (2007) and may be entitled to a deficiency judgment for any balance remaining on the note after the foreclosure sale should the proceeds from the foreclosure sale fail to satisfy the full amount of the indebtedness. *See* S.C. Code Ann. § 29-3-660 (2007) (authorizing the court to direct the payment by the mortgagor of any remaining balance of the mortgage debt left unsatisfied after a sale of the mortgaged property); *see also Am. Gen. Fin. Servs., Inc. v. Brown*, 376 S.C. 580, 583, 658 S.E.2d 99, 100 (2008) ("[T]he general rule is that if the mortgaged premises are sold under a foreclosure decree and fail to bring a sufficient amount to satisfy the debt, the mortgagee is entitled, absent any statutory limitation or waiver on his part, to a personal judgment for the remaining deficiency." (internal quotation marks omitted)). Accordingly, Bank has failed to demonstrate that this case falls into the very limited class of cases in which a trial on the equitable claim before a jury trial on any legal claims or counterclaims is justified.

CONCLUSION

Based on the foregoing, we reverse the master's order to the extent it allows the foreclosure action to proceed prior to Gray's legal counterclaims and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

FEW, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In re: Estate of Atn Burns Livingston, Emma Lou Livingston Martin as Personal Representative of the Estate of Atn Burns Livingston, and Emma Lou Livingston Martin, Respondents/Appellants,

v.

Clyde B. Livingston; Miller Communications, Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; and American First Federal, Inc., Defendants, Of whom Clyde B. Livingston is, Appellant/Respondent.

Appellate Case No. 2010-179986

Appeal From Orangeburg County
Olin Davie Burgdorf, Master-in-Equity

Opinion No. 5078
Heard December 11, 2012 – Filed January 30, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Andrew S. Radeker, of Harrison and Radeker, P.A., of Columbia, for Appellant/Respondent.

Richard B. Ness, of Ness and Jett, LLC, of Bamberg, for Respondents/Appellants.

KONDUROS, J: In this cross-appeal, the parties dispute the master's findings concerning farmland in North, South Carolina, devised in a will. Clyde Livingston argues the master erred in concluding (1) the United States Department of Agriculture (the USDA) benefits were estate property and (2) the statute of limitations did not bar Emma Livingston Martin's claim to collect repayment of those benefits. Emma, both personally and on behalf of the estate, contends the master erred by (1) failing to apply the probate code, (2) applying section 15-61-25 of the South Carolina Code (2009), governing partition, (3) allowing Clyde to retain one-half of the USDA subsidies, and (4) concluding judgments of an heir-at-law affects the ability of a personal representative (PR) of an open estate to convey good title to real estate. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Atn Burns Livingston died in 1999. His will named his two children, Emma and Clyde, as sole heirs and PRs of his estate. In 2000, Clyde applied for farm operator status with the USDA. Clyde signed the application in two capacities, signing as the farmer applicant and noting he was signing on behalf of the estate, which was the owner of the land. From 2000 to 2008, Clyde received USDA subsidy payments totaling $29,902.

On January 18, 2002, the probate court removed Clyde as co-PR of the estate on the ground that he and Emma could not cooperate. Emma has served as the sole PR of the estate since that time. In April 2002, Emma received a letter from the USDA regarding Clyde's status as a farm operator. She spoke with officials at the local USDA office, who informed her that Clyde had been receiving farm subsidy payments.

Emma notified her attorney, who had been assisting her with the closing of the estate, about the subsidy payments. Her attorney discussed this issue with Clyde's attorney and on May 30, 2006, Emma brought a claim seeking reimbursement for the USDA subsidies on behalf of the estate. The case was filed in the probate court and was removed to circuit court in April 2007. The case was then referred to the master on August 19, 2008. Also in 2008, Emma, as PR of the estate, began receiving the USDA subsidies. Because the issues before the master were so numerous, the case was trifurcated.

Prior to trial, the master heard Clyde's motion for summary judgment on Emma's claim concerning the USDA payments, but deferred ruling on the motion until after hearing the evidence at trial. When trial began on March 24, 2010, Emma testified and introduced the USDA records and a summary of benefit amounts paid. Clyde moved for an involuntary nonsuit on the grounds that the USDA payments were not property of the estate and the statute of limitations in section 15-3-530 of the South Carolina Code (2005) would bar the claim. The master deferred ruling on the motion.

On November 17, 2010, the master granted Clyde's motions for summary judgment and involuntary nonsuit in part and denied them in part. The master found the USDA payments were part of the estate and found Clyde liable for receiving them; however the master limited Emma's recovery to $11,690 because the "[t]he statute of limitations limits [Emma]'s recovery, on behalf of the estate, to the USDA payments that were made within three years before this action was commenced." The master determined the recoverable portion of Emma's claim involved only $23,380, and because Clyde was a devisee entitled to one half of the estate, Emma had the right to $11,690. The master further based his decision on section 62-3-619 of the South Carolina Code (2009), *executor de son tort*, finding half of the farm subsidy payments would have gone to Clyde because he and Emma were the sole and equal devisees of the estate despite any limitation in recovery. The master denied Emma's request for prejudgment interest because she did not plead that prejudgment interest should be awarded. Both parties appealed.

STANDARD OF REVIEW

Rule 41(b) permits the defendant, "[*a*]*fter the plaintiff in an action tried by the court without a jury* has completed the presentation of his evidence," to move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Rule 41(b), SCRCP (emphasis added); *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 284, 543 S.E.2d 563, 565 (Ct. App. 2001); *See also Johnson v. J.P. Stevens & Co.*, 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992) (holding Rule 41(b), allows the judge as the trier of facts to weigh the evidence, determine the facts, and render a judgment against the plaintiff at the close of his case if justified). Because a dismissal under these circumstances has the same effect as summary judgment, the standard for summary judgment applies.

Id. at 284-85, 543 S.E.2d at 566; *Ex parte United Servs. Auto. Ass'n*, 365 S.C. 50, 53, 614 S.E.2d 652, 653 (Ct. App. 2005).

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

LAW/ANALYSIS

I. USDA BENEFITS

Clyde argues the USDA benefits are not estate property because they were a product of a contract between himself and the USDA based on his status as a farmer operator. He maintains the estate was not a farm operator, and as such he is solely entitled to the benefits. Furthermore, he suggests he is a cotenant entitled to possess the whole of the land, which includes the USDA benefits. We disagree.

Section 62-3-101 of the South Carolina Code (2009) states:

> The power of a person to leave property by will and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this Code to facilitate the prompt settlement of estates, including the exercise of the powers of the [PR]. *Upon the death of a person, his real property devolves to the persons to whom it is devised by his last will* or to those indicated as substitutes for them in cases involving lapse,

> renunciation, or other circumstances affecting the devolution of testate estates, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting the devolution of intestate estates, subject to the purpose of satisfying claims as to exempt property rights and the rights of creditors, and the purposes of administration, particularly the exercise of the powers of the [PR] under [s]ections 62-3-709, 62-3-710, and 62-3-711, and his personal property devolves, first, to his [PR], for the purpose of satisfying claims as to exempt property rights and the rights of creditors, and the purposes of administration, particularly the exercise of the powers of the [PR] under [s]ections 62-3-709, 62-3-710, and 62-3-711, and, at the expiration of three years after the decedent's death, if not yet distributed by the [PR], his personal property devolves to those persons to whom it is devised by will or who are his heirs in intestacy, or their substitutes, as the case may be, just as with respect to real property.

(emphasis added). Notwithstanding the immediate passage of title to heirs and devisees, the PR is entitled to possession of all real property during administration and has broad powers over real property during administration. S.C. Code Ann. § 62-3-709 (2009); S.C. Code Ann. § 62-1-201(33) (2009).

Section 62-3-709 provides in part:

> Except as otherwise provided by a decedent's will, every [PR] has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the [PR], possession of the property by him will be necessary for purposes of administration.

The PR does not need to prove to the possessor of estate properties that such properties are needed for administration. *Id.* Section 62-3-709 further provides, "The request by a [PR] for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the [PR] is necessary for purposes of administration." This statute imposes upon the PR the responsibility and authority to "take all steps reasonably necessary for the management, protection, and preservation of, the estate in his possession." *Id.*

Section 62-3-711(a) of the South Carolina Code (2009) outlines the powers of the PR and states:

> Until termination of his appointment or unless otherwise provided in Section 62-3-910, a [PR] has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. Except as otherwise provided in subsection (b), this power may be exercised without notice, hearing, or order of court.

The Reporter's comments to section 62-3-711 note, "Under this section, [s]ection 62-3-101, and [s]ection 62-3-709, title to personal property (as well as real property) devolves at or soon after death to heirs and devisees, and not to the [PR]." The Reporter's comments to section 62-3-709 state:

> Section 62-3-101 provides that title to real and personal property devolves on death or thereafter to heirs or devises "subject . . . to administration." Section 62-3-711 vests in the [PR] a power over title to real and personal property during administration. This section deals with the [PR]'s duty and right to possess assets, real and personal. It proceeds from the assumption that it is desirable wherever possible to avoid disruption of the possession of the decedent's assets by his heirs or devisees. But if the [PR] considers it advisable he may take possession and his judgment is made conclusive. It is likely that the [PR]'s judgment could be questioned in a

> later action but this possibility should not interfere with the [PR]'s administrative authority as it relates to possession of the estate.

Under section 62-3-101, real property immediately passes to the named heirs. However, Emma has the authority as PR to retain the real property under section 62-3-711. Section 62-3-711 states that "this power may be exercised without notice, hearing, or order of court." Because Emma retained the authority over the estate as the PR, the property did not pass to Clyde despite his status as a named heir in the will. The probate code presents this as an absolute right derived out of necessity to manage the estate. Thus, when a PR asserts his or her authority over the property, the PR usurps the rights of the heirs regarding the control of the real property while the estate is still being administered. In this case, the estate is still being administered; thus, Emma has the authority to retain and control the property in her capacity as PR. § 62-3-709; § 62-1-201(33). Emma's right to retain the authority over the estate supersedes Clyde's argument that he was acting within his authority as a cotenant of Emma's based on his status as an heir.

Clyde also asserts the lease agreement grants him the right to contract with the USDA. The lease agreement does not convey the right or express permission to contract with the USDA or the authority to sign for the property as the owner of the land. Also, on the application for benefits, Clyde noted the estate owned the land not him as an heir. Without express authority through ownership or contract, Clyde did not have the authority to enter a contractual relationship with the USDA. Therefore, the master properly determined the USDA benefits belonged to the estate.

II. STATUTE OF LIMITATIONS

Clyde argues the master erred in concluding the statute of limitations did not bar Emma's claim for USDA subsidies. Clyde suggests because Emma became aware in 2002 that he was receiving subsidies, the statute of limitations began to run upon Emma's discovery. Thus, allowing recovery based on the amount of payments he received within three years before the action was brought was in error. We disagree.

The statute of limitations begins to run when a cause of action ought to have reasonably been discovered. *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996). In *Dean,* the supreme court stated:

> The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.

Id. at 363-64, 468 S.E.2d at 647 (citations omitted). "The date on which discovery of the cause of action should have been made is an objective, rather than a subjective, question." *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 355-57, 559 S.E.2d 327, 336 (Ct. App. 2001). "Reasonable diligence is intrinsically tied to the issue of notice." *Id.* In *Joubert v. South Carolina Department of Social Services*, the court explained, "We have interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." 341 S.C. 176, 191, 534 S.E.2d 1, 8 (Ct. App. 2000) (quoting *Dean*, 321 S.C. at 364, 468 S.E.2d at 647).

No direct case law discusses USDA benefits and statute of limitations in this context in South Carolina. However, our courts have examined the role of the statute of limitations in other settings. In the insurance context, the general rule is the renewal of a policy of insurance for a fixed term is in effect a new contract and must contain all the essential elements of a valid contract. *Knight v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 20, 22-23, 374 S.E.2d 520, 522 (Ct. App. 1988). This is true even though the parties' renewal contract continues to enforce the terms of the expiring contract and no new policy of insurance is issued. *Id.* The exception to the general rule is when the renewal is consummated in pursuance of

a provision in the expiring policy. *Id.* In such instance, the renewal is an extension of the old contract. *Id.*

The supreme court has held that when a nuisance is continuing and the injury is abatable, the statute of limitations does not run merely from the time of the original intrusion on the property and cannot be a complete bar. *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 287, 543 S.E.2d 563, 567 (Ct. App. 2001). Rather, a new statute of limitations begins to run after each separate invasion of the property. *Id.*; *see Cutchin v. S. C. Dep't of Highways & Pub. Transp.*, 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (stating if the injury is permanent, the plaintiff has a single cause of action that cannot be split; however, if the cause of the injury is abatable, each injury gives rise to a new cause of action (citing *Webb v. Greenwood Cnty.*, 229 S.C. 267, 277, 92 S.E.2d 688, 692 (1956))).

The master properly determined the statute of limitations was not a complete bar on the USDA benefits. Similar to the supreme court and this court's rulings in other statute of limitations cases, because each application with the USDA was for a fixed duration, it required a separate renewal each year and the benefit was contingent upon an offer and acceptance by the USDA. Therefore, the master properly determined the statute of limitations was not an absolute bar on Emma's rights to collect on a portion of the USDA benefits.

This action was commenced in 2006. Under section 15-3-530, any claim between 2000 to 2002 would be barred by the three-year statute of limitations. The remaining USDA applications for benefits from 2003 to 2007 were appropriately before the master. Accordingly, we affirm the master's finding the statute of limitations was not a complete bar.

III. PARTITION

Emma argues the master erred in relying on section 15-61-25 of the South Carolina Code (2009) because this is a partition action brought under section 62-3-911 of the South Carolina Code (Supp. 2012), which is contained in the probate code. Emma contends because the action originated in the probate court, the probate code continues to apply to the partition. She suggests the order of priority for abatement would be ignored by not applying the proper statute. We find the master should have applied the probate code's partition statute.

The master relied on section 15-61-25 in ordering partition of the property, which states:

> For the purposes of this section, "joint tenants and tenants in common" include heirs or devisees. Upon the filing of a petition for partition of real property owned by joint tenants or tenants in common, the court shall provide for the nonpetitioning joint tenants or tenants in common who are interested in purchasing the property to notify the court of that interest no later than ten days prior to the date set for the trial of the case. The nonpetitioning joint tenants or tenants in common shall be allowed to purchase the interests in the property as provided in this section whether default has been entered against them or not.

The probate code's partition statute, contained in section 62-3-911, states:

> When two or more heirs or devisees are entitled to distribution of undivided interests in any personal or real property of the estate, the [PR] or one or more of the heirs or devisees may petition the court prior to the closing of the estate, to make partition. After service of summons and petition and after notice to the interested heirs or devisees, the court shall partition the property in kind if it can be fairly and equitably partitioned in kind. If not subject to fair and equitable partition in kind, the court shall direct the [PR] to sell the property and distribute the proceeds.

In *Waddell v. Kahdy*, 309 S.C. 1, 4, 419 S.E.2d 783, 785 (1992), the supreme court found the probate code governs an action when it is moved to circuit court, and remains primarily within the scope of the probate code. *Id.* The court under an assumption that the action was removed pursuant to section 62-1-302 of the South Carolina Code (1991) based its decision on the fact the action originated in the probate court. *Waddell*, 309 S.C. at 4, 419 S.E.2d at 785. Here, the case was removed to circuit court pursuant to section 62-1-302 for the purpose of partition.

While no case has addressed the application of the revised circuit court statute, we find *Waddell* controlling. Because the action remains primarily an action governed by the probate code, we find the probate code should have continued to be applied after the removal to the master. *Waddell*, 309 S.C. at 4, 419 S.E.2d at 785. Furthermore, because a partition statute is provided in the probate code, the master should have relied upon that statute in addressing the partition issue. *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ("Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect."). Therefore, we reverse and remand this issue for the master to apply the probate code's statute.

IV. EXECUTOR DE SON TORT

Emma maintains the master erred in allowing Clyde to retain one-half of the value of the benefits to the estate pursuant to the *executor de son tort* statute. She argues this ruling allows Clyde to retain one-half of the gross value of the estate's receivables, which would require her to shoulder the entire burden of the administration of the estate. She argues the master erred in concluding Clyde would have received half of the USDA subsides. She maintains the estate was entitled to all of the payments and Clyde's share would be distributed after administration of the estate. We agree and find this ruling was premature.

The master's finding bypassed the distribution and order of abatement proscribed in the probate code; thus awarding one-half of the value of the property was an error of law. Section 62-3-902 of the South Carolina Code (2009) specifically states the order of abatement in which testamentary gifts are reduced to pay debts or other claims against the estate. By allowing Clyde to retain one-half of the value of the estate benefits, the master ignored the plain language of the abatement statute and completely disregarded the possibility that the assets of the estate were insufficient to pay all debts, claims, and devises. Without considering the estate as a whole from the purview of the probate court, there is no conceivable method by which the master could divide the subsidy award in half. Therefore, we reverse and remand the master's finding that Clyde was entitled to one-half of the USDA benefits prior to the estate's distribution pursuant to section 62-3-902.

V. TITLE OF PROPERTY

Emma maintains the trial court erred in concluding that judgments of an heir-at-law affect the ability of a PR of an open estate to convey good title to real estate. Based on our determination that this case be reversed to address the partition statute and the division of estate property, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Based on all of the foregoing, the order of the master is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Clyde and Kathy Barnes, Respondents,

v.

James E. Johnson, Appellant.

Appellate Case No. 2010-173767

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 5079
Heard September 11, 2012 – Filed January 30, 2013

REVERSED

Oscar W. Bannister, of Bannister & Wyatt, LLC, of Greenville, for Appellant.

Lauren Willoughby Barnwell and Scott Franklin Talley, both of Talley Law Firm, P.A., of Spartanburg, for Respondents.

GEATHERS, J.: In this property matter, heard in equity, James E. Johnson appeals the award of $75,616.17 to Clyde and Kathy Barnes. We reverse.

FACTS/PROCEDURAL HISTORY

Appellant James E. Johnson (Johnson) and Respondent Clyde Barnes (Barnes) are cousins who previously conducted informal business transactions together.[1] On August 25, 2003, Johnson purchased an eight-acre tract of property on New Cut Road in Spartanburg with a "dilapidated" house located on it. Johnson purchased the property for $131,733.61; he made a down payment of $30,733.61 and borrowed $101,000 from BB&T. Two days later, Johnson purchased a "fire policy" from Nationwide Insurance Company, insuring the house from loss due to fire and lightning. The policy listed Johnson as the named-insured of the tenant-occupied home and BB&T as the mortgagee.

Concurrent with Johnson acquiring the real property, Clyde and Kathy Barnes were living in Florida and looking for a Spartanburg-area home. Seeing an opportunity for mutual benefit with a previous business partner, Johnson and Barnes agreed that Barnes would, with the intent and possibility of later purchasing the property from Johnson: (1) move to the Spartanburg property; (2) pay for all maintenance, repairs, taxes, insurance, utilities, and the related mortgage in Johnson's name; (3) improve the home and surrounding acreage, at Barnes' discretion and own expense;[2] and (4) be able to purchase the home from Johnson *if* Barnes obtained his own financing. Beyond these general conditions, fundamental terms of their agreement, such as timing, pricing, and even repayment terms, were unclear.[3] In fact, the trial court expressly found "[t]he parties in their testimony

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[1] Both Clyde and Kathy Barnes are Respondents. Hereinafter, we refer to both Respondents as "Barnes."

[2] Notably, the property was then in "very bad condition" and required considerable renovation; over about approximately one year beginning in September 2003, Barnes cleaned and painted the house, and replaced doors, carpeting, the air conditioning unit, and the hot water heater. Barnes also constructed a barn and installed a fence on the premises, which he subsequently dismantled and partially recouped.

[3] The trial court's order recognized that both parties agreed "they entered into an oral agreement the intention of which was that Barnes could move into the house and occupy the real property." However, the court also found that beyond this general arrangement, the record is unclear "as to how the financial arrangements should be handled and as to the exact terms of their agreement."

disagree as to how the financial arrangements should be handled and as to the exact terms of their agreement."

The record also reflects testimony alluding to another, related agreement. Barnes testified about an understanding "to sell the property [to a third party], repay Johnson his portion of the proceeds as far as what he invested in the property, and split the profit." Barnes further described this understanding as an agreement to "split the money." The record, however, is unclear whether the referenced "profit" consisted of capital gains or proceeds of the sale, *i.e.*, "split the money," and whether certain previous contributions (down payments, principal payments, on the mortgage, etc.) should be excluded from, or otherwise accounted for within, any such "profit" calculations. Thus, agreements allegedly existed to either: (1) sell the property to Barnes, whereby he would directly benefit from his related improvements; or (2) sell the property to a third-party with Barnes and Johnson splitting any "profits." Based upon these understandings, Barnes and his wife initially made improvements, beginning in September 2003, and later inhabited the dwelling in 2004.

In July 2005, while Barnes was in arrears as to both utility bills and payments on the mortgage in Johnson's name, a medical emergency necessitated the Barneses' return to Florida. While the home was unoccupied, on July 23, 2005, lightning struck and burned the home beyond repair. Upon finding the home's charred remnants, Barnes retrieved a stove and refrigerator from the debris, removed the fencing, and dismantled the barn he built upon the property.

Thereafter, on October 11, 2005, Johnson used $92,332.12, taken from the $95,000 in insurance proceeds paid to Johnson as the named-insured, to pay off his mortgage held by BB&T. Three days later, Johnson sold the property to Michael McDonald and Jed Aho for $136,000. Johnson did not remit any of these generated funds to Barnes.

On June 19, 2006, Barnes filed this action against Johnson alleging breach of contract, conversion, unjust enrichment and *quasi contract*, and promissory estoppel. Johnson counterclaimed, contending Barnes: (1) was a tenant who had abandoned the property in July 2005—then $2,618.79 in arrears as to rent payments and $470.32 behind on utility bills; and (2) owed Johnson $45,000 for the dismantled and removed barn. Barnes responded that Johnson's counterclaims

were barred by "unclean hands, laches, and estoppel." Prior to trial, however, Barnes withdrew the breach of contract action.

The circuit court conducted a bench trial on October 6, 2008. At trial, Barnes produced receipts for $9,639.59 in materials purchased to improve the home and property. Barnes also asserted he spent approximately $22,000 in building the barn, which he later dismantled and partially removed.

The trial court concluded that Barnes established the promissory estoppel and unjust enrichment claims against Johnson.[4] As to the trial court's finding that promissory estoppel existed, this conclusion only related to the parties' initial agreement that Barnes could live in the house with the possibility of later purchasing the home from Johnson if Barnes obtained adequate financing. The trial court did not address whether promissory estoppel existed due to any reasonable reliance and subsequent damages related to the parties' second agreement−selling the home to a third party and splitting the profits.

The trial court awarded Barnes damages of $75,616.17. The trial court subsequently denied Johnson's motions for a new trial, or alternatively, to alter or amend the judgment. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in finding that Barnes established the elements of quantum meruit and unjust enrichment?

II. Did the trial court err in finding that Barnes established the elements of promissory estoppel?

III. Did the trial court err in calculating damages payable to Barnes?

IV. Did the trial court err in taking judicial notice of the average appreciation of real property in Spartanburg County?

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[4] While the trial court's order concluded the elements of promissory estoppel and unjust enrichment existed, the court did not specifically associate either finding with its subsequent calculation of damages.

STANDARD OF REVIEW

"In an action in equity, tried by the judge alone, without a reference, on appeal the [appellate court] has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) (citing *Crowder v. Crowder*, 246 S.C. 299, 143 S.E.2d 580 (1965)).

> Except where the facts have been settled by a jury, whose verdict has not been set aside, it is the duty of this court in equity cases to review challenged findings of fact as well as matters of law. But such duty on our part does not require that we disregard the findings below, or that we ignore the fact that the trial [j]udge who saw and heard the witnesses is in better position than this court to evaluate their credibility; nor does it relieve the appellant of the burden of convincing this court that the trial [j]udge committed error in his findings of fact.

Twitty v. Harrison, 230 S.C. 174, 177-78, 94 S.E.2d 879, 880 (1956) (citations omitted).

LAW/ANALYSIS

I. Unjust Enrichment and Quantum Meruit

Johnson contends the trial court erred in finding Barnes was entitled to damages, under a theory of quantum meruit, because Barnes "conferred no benefit to [Johnson] who recognized no benefit and did not retain any benefit." We agree.

The South Carolina Supreme Court explained that quantum meruit is a remedy for unjust enrichment:

> This Court has recognized quantum meruit as an equitable doctrine to allow recovery for unjust enrichment. Absent an express contract, recovery under quantum meruit is based on quasi-contract, the elements of which are: (1) a benefit conferred upon the defendant

> by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value.

Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) (citations omitted).

"In a case involving improvements to realty, the measure of recovery in restitution is the difference in the fair market value of the property before and after the improvements." *Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc.*, 296 S.C. 530, 533, 374 S.E.2d 507, 509 (Ct. App. 1988) (citation omitted); *see Stringer Oil Co. v. Bobo*, 320 S.C. 369, 373-74, 465 S.E.2d 366, 369 (Ct. App. 1995) (finding the appropriate measure of a defendant's unjust enrichment is not the costs incurred by the plaintiff in making the improvements; rather, it is the value of the plaintiff's improvements to the defendant); *Barrett v. Miller*, 283 S.C. 262, 264, 321 S.E.2d 198, 199 (Ct. App. 1984) (confining the monetary value of a defendant's unjust enrichment to the increase in market value of the defendant's real property brought about by the plaintiff's efforts).

In his brief, Johnson asserts:

> Nothing in the record supports any claim by the Barnes that this increase in value [$4,266.39] was due to their efforts. The barn built by the Barnes was torn down by the new owners and given to the Barnes to remove. The fences were taken down and also given to the Barnes to remove. In conclusion, the record is bare of any improvements upon which a value has been placed and the lack of any such value leaves the Court to simply speculate.

We agree with Johnson's assertion that Barnes failed to introduce evidence showing that his efforts increased the market value of Johnson's property.

Johnson neither benefited from, nor was enriched by, Barnes' work to improve Johnson's property. Although the parties agreed that Barnes would move onto the property and make improvements, the fire consumed any then-existing potential

benefit to Johnson that was attributable to Barnes' efforts. Furthermore, Barnes does not claim that Johnson's receipt of insurance proceeds of $95,000 was in any way related to Barnes' efforts to improve the property: the home was insured by Johnson before Barnes began making repairs; Johnson was the named-insured; the fire was an unanticipated event; Johnson was the policy holder and BB&T was listed on the policy as the mortgagee. "The authorities generally agree that a contract of fire insurance is a personal contract between the insurer and insured, by which the former undertakes to indemnify the latter for the loss he sustains by fire." *Steinmeyer v. Steinmeyer*, 64 S.C. 413, 420, 42 S.E. 184, 186 (1902).

Additionally, after the fire the then-empty land sold for $136,000, an amount just above its previous purchase price with the dilapidated home of $131,733.61. This provides further support that Barnes' efforts did not benefit Johnson. This modest increase in selling price did not result from Barnes' labors; rather, it is a corollary to the modest inflation the trial court found existed within the surrounding area. Both sales involved: (1) a property without an immediately inhabitable dwelling, and (2) the difference in price being accounted for by inflation in the land's inherent value. Finally, construction of the barn, by Barnes, did not enrich Johnson. Barnes dismantled the entire barn and salvaged a portion of the structure's materials.

For the aforementioned reasons, Barnes failed to show any conferred benefit unjustly enriching Johnson. Accordingly, the trial court erred in awarding recovery under a theory of quantum meruit.

II. Promissory Estoppel

Johnson also contends the trial court erred in finding Barnes successfully established the elements to recover under promissory estoppel. We agree.

The Supreme Court of South Carolina first used the term "promissory estoppel" in 1981. *Higgins Constr. Co. v. S. Bell Tel. & Tel. Co.*, 276 S.C. 663, 665-66, 281 S.E.2d 469, 470 (1981).[5] In *Higgins*, the court explained the doctrine of promissory estoppel, stating:

[5] The court pointed out, however, that the doctrine of promissory estoppel had been applied in *Furman University v. Waller*, 124 S.C. 68, 117 S.E. 356 (1923). There, Waller had pledged $10,000 to Furman University's capital campaign. In reliance

> [A]n estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice.

276 S.C. at 665, 281 S.E.2d at 470.

Under the *Higgins* case and its progeny, the party asserting promissory estoppel must demonstrate: (1) a promise with unambiguous terms; (2) reasonable reliance upon the unambiguous promise; (3) foreseeability of the promisee's reliance; and (4) injury sustained in relying on the promise because of the promisor's inconsistent disposition. *Id.*; *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). Notably, neither meeting of the minds nor consideration is a necessary element. *Satcher v. Satcher*, 351 S.C. 477, 484, 570 S.E.2d 535, 538 (Ct. App. 2002). Thus, in the interest of equity, the doctrine "looks at a promise, its subsequent effect on the promisee," and where appropriate "*bars the promisor* from making an inconsistent disposition of the property." *Id.* (emphasis added).

Although promissory estoppel is a flexible doctrine that aims to achieve equitable results, it, like all creatures of equity, has limitations. *See Craft v. S.C. Comm'n for Blind*, 385 S.C. 560, 568, 685 S.E.2d 625, 629 (Ct. App. 2009) (withholding the equitable remedy from an injury independent from the promisor's inconsistent disposition); *Rushing v. McKinney*, 370 S.C. 280, 295, 633 S.E.2d 917, 925 (Ct. App. 2006) (holding absence of clearly articulated terms between parties precludes recovery in promissory estoppel). Specifically, the doctrine's elements represent a balancing between affording a remedy where contract law cannot, and ensuring the doctrine's application is not, itself, an inequity against the party estopped. *See Satcher*, 351 S.C. at 484, 570 S.E.2d at 538-39 (reasoning even absent a meeting of the minds and exchanged consideration, sufficient proof for enforcement still exists if there is an unambiguous promise, reasonable reliance, foreseeability, and related injury); *see e.g.*, *Craft*, 385 S.C. at 564-68, 685 S.E.2d at 627-29 (refusing to apply

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on the pledges received, Furman constructed a dormitory. *Id.* at 73, 117 S.E. at 358. The court held that Waller's estate was estopped from refusing to fulfill the pledge. *Id.* at 86-88, 117 S.E. 363-64.

promissory estoppel to remedy an injury occurring after a blind vendor's reliance upon an unambiguous promise, because the complained of harm resulted independently from the promisor's inconsistent disposition).

To this end, and particularly because promissory estoppel applies without a contract, the promise to be enforced must be unambiguous with clearly articulated, definite terms, while the sustained injury must result from an inconsistent disposition by the promisor. *See Craft*, 385 S.C. at 568, 685 S.E.2d at 629) (holding an injury that would have occurred independent of any inconsistent disposition is beyond promissory estoppel's reach); *Rushing*, 370 S.C. at 295, 633 S.E.2d at 925 (holding that an agreement with unclear terms was ambiguous); *Satcher*, 351 S.C. at 483-84, 570 S.E.2d at 538-39 (refusing to apply promissory estoppel where the promise was unclear and lacked details). Therefore, the presence of either an ambiguous promise or an injury not arising out of the inconsistent disposition precludes promissory estoppel's application, though perceived inequities may exist. *See Craft*, 385 S.C. at 568, 685 S.E.2d at 629 (denying recovery in promissory estoppel for blind vendor who failed to demonstrate injury in reliance upon a promise with a later inconsistent disposition); *Satcher*, 351 S.C. at 486-87, 570 S.E.2d at 540 (finding a promise without details ambiguous, despite evidence of "some agreement regarding [the deceased grandfather's intent to transfer farmland to his grandson]"); *cf. Davis*, 365 S.C. at 634-35, 620 S.E.2d at 68 (precluding recovery in promissory estoppel, despite teachers' reliance upon superintendent's promise of an incentive payment because the payment was conditioned on the school board's approval). Thus, promissory estoppel has broad applicability to prevent injustice, but where a promise is unclear or the alleged harms are unconnected to the inconsistent disposition, the doctrine does not risk imposing its own inequity against the party sought to be estopped.

Consistent with these principles, promissory estoppel is inapplicable to any agreement related to either Barnes' potential purchase of the home (the first alleged promise), or the cousins splitting profits upon sale of the property to a third party (the second alleged promise).[6] Both alleged promises include significant

[6] The trial court specifically based its finding of promissory estoppel upon the first alleged promise. Nonetheless, the trial court based its damages calculations upon the "increase in the value of the property" "attributable to [Barnes'] improvements," a factor more relevant to the second alleged promise.

ambiguities related to key terms and, thus, lack promissory estoppel's requisite clarity, definiteness, and specificity. Additionally, Barnes' complained-of injury is independent from the alleged inconsistent disposition of the property and, therefore, not sustained in reliance upon any alleged promise. Either of these two findings alone precludes a remedy in promissory estoppel. We now address the presence of ambiguity and lack of an inconsistent disposition causing injury.

A. Ambiguity

Because one may properly invoke promissory estoppel absent elements typically required for a contract, such as a meeting of the minds or exchanged consideration, the doctrine still requires, by clear and convincing evidence, a "promise unambiguous in its terms." *See Satcher*, 351 S.C. at 483-87, 570 S.E.2d at 538-40 (holding an unclear agreement that lacked details was not shown by clear and convincing evidence to be unambiguous); *Rushing*, 370 S.C. at 295, 633 S.E.2d at 925 (holding that an agreement was ambiguous and not enforceable under promissory estoppel because the party seeking enforcement of the promise "could not clearly articulate [its] terms"). This necessity for unambiguous terms, in the absence of a contract, reflects balancing the availability of an equitable remedy with ensuring the remedy's appropriate application. *See Satcher*, 351 S.C. at 483-84, 570 S.E.2d at 538-39 (stating promissory estoppel requires "a promise unambiguous in its terms" and "[u]nlike a contract, which requires a meeting of the minds and consideration, promissory estoppel looks at a promise [and] its subsequent effect on the promisee").

Consistent with this balancing of interests and the lack of a contract specifically defining the agreement, an inability "*to clearly articulate the terms* of [an] alleged oral contract," including how an existing "capital contribution" would be treated and specifically how the parties "would settle up," renders an agreement ambiguous. *Rushing*, 370 S.C. at 295, 633 S.E.2d at 925; *see Satcher*, 351 S.C. at 487, 570 S.E.2d at 540 (finding, despite testimony that some agreement existed, an unclear, unspecific promise to be ambiguous); *see also* 28 Am. Jur. 2d *Estoppel and Waiver* § 52 (2011) ("The promise must be clear and unambiguous and sufficiently specific so that the judiciary can understand the obligation assumed and enforce the promise according to its terms.").

We find the first alleged promise, whereby Johnson would sell the property to Barnes subsequent to Barnes first procuring his own financing, is ambiguous.

Initially, clear and convincing evidence of the selling price does not exist. In Barnes' own attempts to arrange financing, even he was unsure how much principal he needed to borrow to effectuate the purchase; Barnes told the banker, "you'll have to ask [Johnson] *assuming* that, a hundred thousand." Additionally, in response to questioning at trial about the agreed purchase price and related terms, Barnes further testified that he "*assumed* a hundred thousand dollars," in the form of loan proceeds, plus forty-thousand dollars to be paid "*whenever* [he] could." Even if not controverted, such testimony does not evidence a clearly articulated and specific promise unambiguous in its terms. Furthermore, while Johnson does concede that Barnes could have purchased the home from him if Barnes had obtained sufficient financing, Johnson also asserted that he never gave Barnes a price.

In addition to the lack of a definite selling price, uncertainty surrounds other key terms of the agreement. The record also never clearly reveals how or when Barnes intended to repay Johnson's prior capital contributions; when the record does generally refer to these critical terms, the references are entirely based upon assumption.

Although it does appear a general understanding existed that Barnes *could* purchase the home, clear and convincing evidence of several key terms was never clearly articulated by Barnes. Interestingly, even the trial court recognized the record's significant uncertainty and "disagree[ment] as to how the financial arrangements should be handled and as to the *exact terms of the agreement*," a finding incompatible with the court's subsequent award based upon a theory of promissory estoppel.[7]

We find the record does not reflect an unambiguous promise by Johnson that Barnes could purchase the home. *See Rushing*, 370 S.C. at 295, 633 S.E.2d at 925 (holding an agreement ambiguous because the party seeking enforcement of the promise "could not clearly articulate [its] terms"); *Satcher*, 351 S.C. at 486-87, 570 S.E.2d at 540 (finding an unclear promise without details to be ambiguous, despite testimony of "some agreement regarding [disposition of the subject property]"). Because the first alleged promise is ambiguous, promissory estoppel is an

[7] The trial court's specific findings of fact as to the alleged agreement's terms did not include key terms such as purchase price or repayment conditions.

unavailable remedy. *See Rushing*, 370 S.C. at 295, 633 S.E.2d at 925 (holding an agreement with terms not clearly articulated is not enforceable through promissory estoppel).

Similarly, significant ambiguity exists regarding the potentially contingent, second alleged promise that Barnes and Johnson would sell the property to a third party and thereafter split any resulting profits. Regarding this alleged promise, Barnes testified that he would "give a hundred for it," "put 40,000 down, and whenever we sell it, we'll split whatever profits that we get." It is entirely unclear whether this second alleged promise is contingent upon completion of the first alleged promise, *i.e.*, Barnes' purchase of the home with a subsequent resale to a third party, or whether it was a potential course of action completely independent from a prior purchase by Barnes. In fact, the trial court's specific findings of fact made no mention of this promise existing as either an independent promise or as a corollary to the first alleged promise.

Furthermore, at no point is "profit," a key term of this second alleged promise, definite. It is unclear whether profit is to be based upon Johnson's original cost and down payment, whether Johnson's returns would be reduced by any improvements Barnes made, whether Barnes' initial payments on Johnson's loan balance increased Barnes' share of the profits, or whether Barnes' cost-basis, assuming he did first purchase the home, applied to determining total profit and each party's respective share. Given the paucity of evidence on this issue, as well as the vagueness and indeterminate nature of what little evidence does exist, the record does not clearly articulate the alleged second promise to sell the property to a third party and split any generated profits. Thus, even if a general understanding to sell the property to a third party did loosely exist, the second alleged promise's context and central terms are either ambiguous or entirely undefined. Such uncertainty renders judicial enforcement of the second alleged promise inappropriate. *See Satcher*, 351 S.C. at 483-87, 570 S.E.2d at 538-40 (holding an unclear agreement is not enforceable through promissory estoppel).

Because key terms requisite to bringing either alleged promise within the scope of promissory estoppel are absent, indefinite, or unclear within the record, we hold both alleged promises were ambiguous and, thus, unenforceable.

B. Injury In Reliance

The final element of promissory estoppel requires demonstrating that the reasonably relying promisee sustains injury due to a disposition inconsistent with alleged promise. *Craft*, 385 S.C. at 568, 685 S.E.2d at 629; *Satcher*, 351 S.C. at 484-85, 570 S.E.2d at 538. Because the doctrine only applies when the promisor's inconsistent disposition harms the promisee, the doctrine does not insure the promisee against all potential external forces acting against the promisee's interest or guarantee realization of an agreement's benefit. *See Craft*, 385 S.C. at 567-68, 685 S.E.2d at 629 (holding where a promisee reasonably and foreseeably relies upon an unambiguous promise, but where the alleged injuries are not caused by the promisor's inconsistent disposition, promissory estoppel does not exist). In order to demonstrate that the injury was sustained in reliance upon an alleged promise, the promisee must show, but for the promisor's inconsistent disposition, the complained-of injury would not have otherwise resulted. *See id.* (holding promissory estoppel is not appropriate when the complained-of harm does not result from the promisor's inconsistent disposition).

For instance, in *Craft*, this court found promissory estoppel inapplicable to a vendor's claim for loss of existing employment, which occurred after the vendor quit his job in reasonable reliance upon an offer of new employment that never materialized. *Id.* There, a canteen vendor, licensed through the Commission for the Blind (Commission), worked at Greenville County Square. *Id.* at 563, 685 S.E.2d at 626. Upon learning more desirable vending sites were available through the Commission, the vendor submitted his bid for a new location. *Id.* In reliance upon his bid's subsequent acceptance, the vendor resigned from his County Square position. *Id.* at 563, 685 S.E.2d at 626-27. However, the Commission's contract to operate the new location subsequently fell through; thus, the vendor was unable to work the new location. *Id.* at 563-64, 685 S.E.2d at 626-27. Moreover, Greenville County had since closed County Square's canteen. *Id.* at 563, 685 S.E.2d at 627-29. The vendor then sued the Commission, alleging the Commission's promise of new employment reasonably induced him to leave his job at County Square, causing his loss of employment at County Square. *Id.* at 565-68, 685 S.E.2d at 627-29. Although the vendor did reasonably leave County Square in anticipation of an unambiguous agreement, this court concluded the vendor did not "demonstrate that he sustained injury . . . in reliance on the Commission's promise"; he could no longer work there for reasons beyond the Commission's

control, and, thus, his unemployed status was not due to the Commission's inconsistent disposition. *Id.* at 568, 685 S.E.2d at 629.

Similarly, the home at issue in the present matter no longer existed following the fire and, thus, as in *Craft*, an external factor, and not any alleged inconsistent disposition, caused the complained-of injury. In fact, the injury claimed by Barnes is even less connected to the alleged inconsistent disposition than was the complained-of injury in *Craft*.

Prior to Johnson selling the then-unimproved property to a third party, an act of nature had already frustrated both alleged mutual agreements. Barnes could no more live in the then-scorched home than could his previous efforts in improving the home later contribute to the unimproved land's value at sale to a third party.[8] Consequently, the fire caused Barnes' injury. Therefore, as in *Craft*, the promisor's actions did not harm the reasonably relying promisee. Because Johnson's sale (alleged inconsistent disposition) of the property did not injure Barnes, Barnes necessarily cannot demonstrate any sustained injury in reliance on the alleged agreements. Thus, despite Barnes' sympathetic situation, promissory estoppel is an inapplicable remedy.

In summation, Barnes failed to demonstrate either an unambiguous promise or an injury sustained in reliance upon such a promise. The absence of either showing precludes recovery by Barnes in promissory estoppel. Accordingly, the trial court erred in ordering recovery under a theory of promissory estoppel.[9]

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[8] The trial court found Barnes' efforts "increase[d] the value of the property" at sale to the third party. Any improvements made by Barnes, however, were either destroyed by fire or disassembled by Barnes for removal.

[9] In view of our disposition of this case, we need not address appellant's remaining arguments. *See* Rule 220(c), SCACR; *Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993).

CONCLUSION

Based on the foregoing, the decision of the circuit court is

REVERSED.

HUFF and THOMAS, JJ., concur.