The Supreme Court of South Carolina

In the Matter of Susan Arrington Brown, Petitioner

Appellate Case No. 2013-000152

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 Supreme Court of South Carolina, dated January 26, 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 Susan Arrington Brown 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

February 7, 2013

The Supreme Court of South Carolina

In the Matter of Tara Denise Fetherling, Petitioner

Appellate Case No. 2013-000160

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 15, 1993, 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 January 25, 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 Tara Denise Fetherling 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

February 7, 2013

The Supreme Court of South Carolina

In the Matter of Traci L. Goins, Petitioner

Appellate Case No. 2013-000026

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 27, 2008, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk, South Carolina Supreme Court, dated December 28, 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 Traci L. Goins 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

February 7, 2013

The Supreme Court of South Carolina

In the Matter of Mark J. Long, Respondent

Appellate Case No. 2013-000228

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 13, 1995, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk, South Carolina Supreme Court, dated January 31, 2013, Petitioner submitted his 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 his 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 his 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 he has fully complied with the provisions of this order. The resignation of Mark J. Long shall be effective upon full compliance with this order. His 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

February 7, 2013

The Supreme Court of South Carolina

In the Matter of Ansel D. Orander, Jr. Petitioner

Appellate Case No. 2013-000096

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 13, 1975, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar Association, received by the Court on January 14, 2013, Petitioner submitted his 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 his 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 his 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 he has fully complied with the provisions of this order. The resignation of Ansel D. Orander, Jr. shall be effective upon full compliance with this order. His 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

February 7, 2013

The Supreme Court of South Carolina

In the Matter of Honeyeh K. Zube, Respondent

Appellate Case No. 2012-213639

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 22, 2010, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Judicial Department, dated December 22, 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 Honeyeh K. Zube 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.

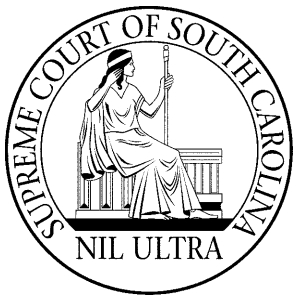
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 7, 2013



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7
February 13, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

SunTrust Bank s/b/m National Bank of Commerce, including its Division, Central Carolina Bank, Respondent,

v.

Brandy K. Bryant, a/k/a Brandy K. McGarthy, Arnold L. Bryant, Phyllis W. Davis and Stephen Ford, as Spartanburg County Tax Collector, Defendants, of whom Phyllis W. Davis is the Petitioner.

Appellate Case No. 2011-194366

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
Gordon G. Cooper, Master-in-Equity

Opinion No. 27216
Heard February 6, 2013 – Filed February 13, 2013

DISMISSED AS IMPROVIDENTLY GRANTED

Daniel R. Hughes and John B. Duggan, both of Duggan & Hughes, LLC, of Greer, for Petitioner.

Dean A. Hayes, of Korn Law Firm, PA, of Columbia, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *SunTrust Bank v. Bryant*, 392 S.C. 264, 708 S.E.2d 821 (Ct. App. 2011). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Christopher Clay Olson, Respondent

Appellate Case No. 2012-213319

Opinion No. 27217
Submitted January 15, 2013 – Filed February 13, 2013

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

R. Davis Howser, of Howser Newman & Besley, LLC, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or definite suspension not to exceed sixty (60) days. Respondent further agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within thirty (30) days of the imposition of a sanction and to complete the Legal Ethics and Practice Program Ethics School within one (1) year of the imposition of a sanction. We accept the Agreement and issue a public reprimand. In addition, within thirty (30) days of the date of this opinion respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter and, within one (1)

year of the date of this opinion, shall complete the Legal Ethics and Practice Program Ethics School. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent's Client is a financial services and equipment leasing company. Client's customers, Borrowers, agreed to provide a collateral mortgage against real estate owned in connection with an equipment lease transaction. On January 16, 2008, Client retained respondent to 1) provide a title search on the real property showing all encumbrances, liens, and outstanding taxes and 2) record the mortgage. Respondent recorded the mortgage and conditional assignment of leases and rents on January 24, 2008. He then sent the recorded documents to Client as well as an email to Client stating, "[t]he title was updated by our office. No liens or other encumbrances."

When the property later went into foreclosure, Client learned there were several senior liens on the property. Specifically, there were converted judgments against one of the two Borrowers in the amounts of $2,646.05, $3,616.05, and $11,747.91. On September 1, 2009, Client contacted respondent requesting a copy of the title report. Respondent responded that he would send a copy to Client as soon as possible. Client made additional requests on September 14, 2009, and September 21, 2009. In a responsive email, respondent stated: "I can tell you that we filed and recorded a mortgage on January 24th, 2008. Title was clear at that time."

Respondent admits that he did not perform a title search of the property and did not prepare a title report. Client foreclosed on Borrowers' property and purchased the property at a foreclosure sale. After purchasing the property, the payoffs on the judgments were $4,311.55, $4,015.70, and $14,870.20. Client filed suit against respondent. The suit settled.

Respondent acknowledges he did not fully perform the services he was hired to perform and that his communications to Client were inaccurate and misleading. He maintains, however, that he never intended to mislead Client. His recollection is that, because Client and the Borrowers were anxious to conclude the transaction, he was instructed by Client's employee, who served as his contact, that a title search, though originally ordered, was no longer needed. Respondent acknowledges that Client's employee does not share his recollection. Despite his understanding that a title search was no longer needed, respondent submits he took

action to confirm that the Borrowers owned the property. He further represents that he had someone performing services at the county register of mesne conveyances to confirm that Borrowers owned the property. He reports that same person, whose name he cannot recall, also told him the lien book showed no encumbrances against the property. Finally, after foreclosure commenced and Client requested a copy of the title report, respondent admits he did not consult his file before reporting that the title was clear at the time he submitted the mortgage for recording.

Respondent further admits he overbilled his Client by $10.00 for filing fees.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rules 1.2 (lawyer shall abide by client's decisions concerning objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 1.3 (lawyer shall act with reasonable diligence in representing client); Rule 1.5 (lawyer shall not charge unreasonable amount for expenses); and Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Within thirty (30) days of the date of this opinion respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter and, within one (1) year of the date of this opinion, complete the Legal Ethics and Practice Program Ethics School. Respondent shall provide the Commission with certification of his completion of the Legal Ethics and Practice Program Ethics School no later than ten (10) days after the conclusion of the program.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of P. Michael DuPree, Respondent

Appellate Case No. 2012-213379

Opinion No. 27218
Heard January 9, 2013 – Filed February 13, 2013

DEFINITE SUSPENSION

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

J. Steedley Bogan, of Bogan Law Firm, of Columbia, and Dan M. David, of Dan M. David Attorney at Law, LLC, of Charleston, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension ranging from nine (9) months to one (1) year. He requests the suspension be made retroactive to April 18, 2012, the date of his interim suspension. *In the Matter of* Dupree, 398 S.C. 111, 727 S.E.2d 739 (2012). Respondent also agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of a sanction and, further, to complete the Legal Ethics and Practice Program Ethics School within six (6) months of the imposition of a sanction, to comply with the terms of his two (2)

year monitoring contract with Lawyers Helping Lawyers,[1] and to insure quarterly reports from his treating physician regarding his diagnosis, treatment compliance, and prognosis are filed with the Commission for two (2) years. We accept the Agreement and suspend respondent from the practice of law in this state for nine (9) months, retroactive to the date of his interim suspension, with conditions as stated hereafter in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

While vacationing in Utah, respondent was a passenger in a vehicle that was pulled over by law enforcement on March 22, 2012. Utah Highway Patrol Trooper David Wurtz asked the driver for his license, vehicle registration, proof of insurance, and other information. Trooper Wurtz began to ask the driver about whether he had been drinking. Respondent repeatedly interrupted and told the driver not to answer the trooper's questions. Respondent told Trooper Wurtz he was a lawyer and that the driver did not have to do what the trooper asked.

Trooper Wurtz called for backup and other troopers arrived on the scene. When Trooper Wurtz requested the driver exit the vehicle, respondent, who was obviously intoxicated, became belligerent, repeatedly used profanity, and refused to cooperate with the troopers' requests to calm down. Respondent again reminded the troopers he was a lawyer. When the troopers told respondent to stay in the vehicle, he tried to get out. A few minutes later, when the troopers asked respondent to get out of the vehicle so it could be towed, respondent refused and locked the vehicle doors every time the troopers unlocked the doors. Respondent continued to berate the troopers and call them derogatory names.

The troopers were required to use force to remove respondent from the vehicle. One of the troopers deployed his TASER, but it did not function properly. When the troopers managed to remove respondent from the vehicle, respondent attacked the troopers. During the attack, respondent struck Trooper Wurtz in the mouth and bit him on the arm. Eventually, respondent was subdued and taken into custody. He was arrested and charged with two counts of assault on a police officer, disorderly conduct, resisting arrest, and public intoxication.

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[1] On April 20, 2012, respondent executed a two year monitoring contract with Lawyers Helping Lawyers.

On September 12, 2012, respondent, through counsel, pled guilty to two counts of assault, one count of interference with a peace officer making a lawful arrest, and one count of failure to disclose identity, all misdemeanors. The pleas were entered *nunc pro tunc* to March 22, 2012, the date of respondent's arrest. Respondent was sentenced to one hundred and eighty (180) days on each charge, concurrent. The sentences were stayed and respondent was placed on probation for six (6) months under the following conditions: maintaining good behavior and no violation of any laws, payment of a $1,500.00 fine, payment of $840.52 to the Utah Worker's Compensation Fund, receipt of a substance abuse evaluation and completion of all recommended treatment, delivery of two letters of apology, one to Trooper Wurtz and one to another trooper, and service of one (1) day in the Summit County Jail with credit for one (1) day previously served. On September 17, 2012, the Third District Court in and for Summit County, Utah, found the conditions had been satisfied.

Law

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

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or to bring courts or legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate oath of office taken to practice law in this state and contained in Rule 402(k), SCACR).

Conclusion

The Court has viewed the dash camera video recording of the vehicle stop and respondent's ensuing response. Given respondent's repeated use of profanity and his combative, hostile, and belligerent attitude, we find the troopers exercised extreme restraint in their treatment of respondent. Respondent's criminal acts and

his complete disrespect for law enforcement warrant a suspension from the practice of law.

This situation underscores the negative affect of alcohol on good judgment. At oral argument, respondent testified he began drinking alcohol on the morning of the incident and "drank to oblivion." [2] We emphasize alcohol use does not excuse or mitigate respondent's misconduct.

However, respondent is contrite and appears earnestly determined to overcome his alcoholism. Prior to his interim suspension, respondent voluntarily entered into an intensive outpatient therapy program at the Medical University of South Carolina, contacted lawyers to serve as personal mentors, and began attending Alcoholics Anonymous. Respondent sought counseling from his minster and a therapist. Respondent contacted Lawyers Helping Lawyers, entered into a monitoring contract, and has willingly "told his story" to other lawyers at the request of Lawyers Helping Lawyers.

Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for nine (9) months, retroactive to April 18, 2012, the date of his interim suspension. Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this opinion and shall complete the Legal Ethics and Practice Program Ethics School within six (6) months of the date of this opinion. Further, respondent shall comply with the terms of his two (2) year monitoring contract with Lawyers Helping Lawyers and shall insure that quarterly reports from his treating physician regarding his diagnosis, treatment compliance, and prognosis are filed with the Commission for two (2) years. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.
PLEICONES, J., not participating.

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[2] The Court requested the parties appear for oral argument.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Suzanne Roerig Mendenall, Personal Representative of the Estate of Everette Eugene Mendanall, Plaintiff,
v.
Anderson Hardwood Floors, LLC, Shaw Industries, Inc., and Shaw Industries Group, Inc., Defendants.

Appellate Case No. 2012-210806

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR SOUTH CAROLINA
David C. Norton, United States District Judge

Opinion No. 27219
Heard October 30, 2012 – Filed February 13, 2013

CERTIFIED QUESTION ANSWERED

Randolph Murdaugh, IV, and Ronnie L. Crosby, both of Hampton, Paul N. Siegel of Walterboro, and John P. Freeman of Columbia, for Plaintiff.

Stephen L. Brown and Russell G. Hines, both of Charleston, for Defendants.

JUSTICE KITTREDGE: We certified the following question from the United States District Court for the District of South Carolina:

> Does the "dual persona" doctrine allow an injured employee to bring an action in tort against his employer as a successor in interest who, through a corporate merger, received all liabilities of a predecessor corporation that never employed the injured person but allegedly performed the negligent acts that later caused the employee's injuries, or is such action barred by the exclusivity provision of the South Carolina Workers' Compensation Act?

We answer this question only insofar as acknowledging that South Carolina recognizes the dual persona doctrine. However, we do not decide whether the dual persona doctrine is applicable to this case, as that determination is one properly made by the United States District Court.

I.

Walterboro Veneer, Inc., (Walterboro) was a South Carolina corporation that owned and operated a wood product manufacturing plant in Colleton County. It appears that in 2003, Walterboro designed and constructed a cement vat, "Vat #3," for the purpose of soaking hardwood logs in a highly heated solution prior to milling. Thereafter, through a series of mergers, Anderson Hardwood Floors, LLC, (Anderson) became the surviving entity, assuming all liabilities.[1] As a result of these mergers, the former physical plant and operation of Walterboro continued under the Anderson name.

In January 2008, Everette Mendenall was hired to work at the Colleton County plant formerly owned and operated by Walterboro. Tragically, four months into his employment, Mendenall fell into Vat #3 while he was attempting to access a

[1] Pursuant to S.C. Code Ann. § 33-11-106(a)(1) (2006), when a merger takes effect, "every other corporation party to the merger merges into the surviving entity and the separate existence of every corporation except the surviving entity ceases." The surviving entity has all liabilities of each corporation party to the merger (including potential lawsuit liability) and the surviving entity may be substituted in the proceeding for the corporation whose existence ceased. *See* S.C. Code Ann. § 33-11-106(a)(3).

steam leak for repairs. The solution in the vat was heated to approximately 193 degrees Fahrenheit and severely burned ninety percent of Mendenall's body, which eventually resulted in his death.

Because Mendenall was injured and ultimately died from the work-related injury, he received workers' compensation benefits. Mendenall's wife (Plaintiff), as personal representative of her husband's estate, filed a complaint in state court alleging wrongful death and survival actions against Walterboro, Anderson, and the previously existing corporate entities (collectively "Defendants"). Essentially, Plaintiff alleged that Mendenall's fall was the result of Vat #3's faulty design and construction; the failure to warn of Vat #3's dangerous conditions; and the negligent maintenance of Vat #3 after notice of its hazardous conditions.

Defendants removed the case to federal court in May 2011 and subsequently moved to dismiss the case, arguing they were immune under the South Carolina Workers' Compensation Act (the Act).[2] Each defendant sought dismissal based on the Act's exclusivity provision.[3]

Plaintiff opposed dismissal, arguing injured employees are not barred from filing civil actions against third parties. Thus, since Mendenall was never employed by Walterboro, Plaintiff argued Walterboro's inchoate liability for defectively designing and constructing Vat #3 did not derive from any employment relationship. Rather, according to Plaintiff, Walterboro's liability arose independently as a third party and passed to Anderson through the series of mergers. Therefore, based on the "dual persona" doctrine, Plaintiff contended Anderson should be liable for the allegedly tortious acts of its predecessors

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[2] S.C. Code Ann. §§ 42-1-10 to -19-50 (Supp. 2012).

[3] The Act's exclusivity provision states:

> The rights and remedies granted by this Title to an employee . . . shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

S.C. Code Ann. § 42-1-540.

because of its dual persona, both as Mendenall's employer and as the successor in interest to the third-party liabilities of Walterboro.

The federal district court certified the above question for our consideration.

II.

The Act is a comprehensive scheme created "to provide compensation to employees injured by accidents arising out of and in the course of their employment." *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 69—70, 267 S.E.2d 524, 526 (1980). The concept of workers' compensation is "founded upon recognition of the advisability, from the standpoint of society as well as of employer and employee, of discarding the common law idea of tort liability in the employer-employee relationship and of substituting therefor the principle of liability on the part of the employer, regardless of fault, to compensate the employee, in predetermined amounts based upon his wages, for loss of earnings resulting from accidental injury arising out of and in the course of employment." *Id*. (quoting *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 530—531, 115 S.E.2d 57, 66 (1960)). "The employee receives the right to swift and sure compensation; the employer receives immunity from tort actions by the employee." *Id*. "This quid pro quo approach to [workers'] compensation has worked to the advantage of society as well as the employee and the employer." *Id*.

As noted above, section 42-1-540 of the Act is an exclusivity provision, disallowing tort suits against the employer and limiting the injured employee's rights and remedies to those provided by the Act. However, by its terms, the exclusive remedy provision of the Act limits the employee's remedy "as against his employer." Thus, where the injury is due to a third party's negligence, a plaintiff can collect workers' compensation benefits *and* sue the third party responsible for causing the injuries. Yet, some jurisdictions recognize narrow exceptions which permit an employer to be sued in tort.

These recognized exceptions are premised on the notion that the employee is not suing his employer, but rather a separate legal entity that allegedly caused his injury. *See Tatum v. Med. Univ. of S.C.*, 346 S.C. 194, 205, 552 S.E.2d 18, 24 (2001). These doctrines are the "dual capacity" doctrine and the related "dual persona" doctrine. "Under the 'dual capacity' doctrine, an employer becomes vulnerable to suit as a third party 'if he occupies, in addition to his capacity as

employer, a second capacity that confers on him obligations independent to those imposed on him as employer.'" *Id*. at 203, 552 S.E.2d at 23 (quoting 2A Larson *Workmen's Compensation Law* § 72:80 (1976)). Under the dual persona doctrine, "[a]n employer may become a third person, vulnerable to tort suit by an employee, if—and only if—it possesses a second persona so completely independent from and unrelated to its status as employer that by established standards the law recognizes that persona as a separate legal person." 6 *Larson's Workers' Compensation Law* § 113.01[1] (Matthew Bender, Rev. Ed. 2012). "While the 'dual persona' doctrine recognizes different identities, the 'dual capacity' doctrine recognizes different activities or relationships." *Tatum*, 346 S.C. at 203, 552 S.E.2d at 23 (noting Larson disfavors the dual capacity doctrine but suggests the dual persona doctrine is more favorable). This Court has considered and rejected the dual capacity doctrine. *Johnson v. Rental Uniform Serv. of Greenville*, 316 S.C. 70, 70, 447 S.E.2d 184, 185 (1994). However, this Court has neither accepted nor rejected the dual persona doctrine.[4] Today, we accept the dual persona doctrine as an exception to the Act's exclusivity provision.

The dual persona doctrine is a narrow exception, applicable only where the second set of obligations that forms the basis of the tort suit is entirely independent of the defendant's obligations as an employer. *See* Larson, *supra*, § 113.01[4]. Where those sets of obligations are intertwined such that they cannot be logically separated, application of the dual persona doctrine is inappropriate. *See id*. Professor Larson explains:

> If the dual persona doctrine is to apply, it must be possible to say that the duty arose *solely* from the *nonemployer* persona . . . . For only in such a case can the second persona be really distinct from the employer persona. In other words, it is not enough . . . that the second persona impose *additional* duties. They must be totally separate from and unrelated to those of the employment.

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[4] This Court discussed the dual persona doctrine in *Tatum v. Medical University of South Carolina*, 346 S.C. 194, 552 S.E.2d 18 (2001). However, this Court did not accept or reject the dual persona doctrine in *Tatum* because a majority of the Court found that, in any event, the dual persona doctrine was inapplicable to the facts presented. *Id*. at 206, 552 S.E.2d at 24. Although the *Tatum* majority's discussion of the dual persona doctrine is correct, its application of the law to the facts of that case was erroneous.

Id.

The dual persona doctrine will apply only in truly exceptional situations. *See, e.g.*, *Herbolsheimer v. SMS Holding Co*., 608 N.W.2d 487, 493 (Mich. Ct. App. 2000) ("These exceptional situations are found only where there is a genuine case of a separate legal personality and the relationship between the cause of action and the plaintiff's employment is no more than incidental."). We agree with analytical framework and reasoning of the *Herbolsheimer* court, which stated:

> We are unprepared to . . . assume that a predecessor company in our case is automatically a third party that can be sued through the successor company that happens to also be the employer. . . . Instead, we must look to see if there are *separate obligations* created by the predecessor that can form the basis of the dual-persona suit. Simply being a successor in liability does not make a company liable—there must be an allegedly viable legal claim against the predecessor in order for the case to survive a motion for summary disposition.

Id. at 496 (emphasis added). We further agree with the proposition that "if the plaintiff[s] could not have sued the predecessor in tort if the merger had not occurred, they cannot sue the [successor] in tort." *Van Doren v. Coe Press Equip. Corp*., 592 F. Supp. 2d 776, 801 (E.D. Pa. 2008). "This rationale is based on the idea that the dual persona doctrine should not be applied to allow 'a merger to increase, rather than preserve, inchoate liability.'" *Id*. (quoting *Braga v. Genlyte Group, Inc*., 420 F.3d 35, 44—45 (1st Cir. 2005)).

We emphasize that, under South Carolina law, whether the dual persona doctrine applies in a particular case turns on whether the duty claimed to have been breached is distinct from those duties owed by virtue of the employer's persona as such. In this case, that determination lies with the federal court.

III.

We find South Carolina recognizes the dual persona doctrine.

CERTIFIED QUESTION ANSWERED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Raymondeze Rivera, Appellant.

Appellate Case No. 2010-162706

Appeal from Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 27220
Heard June 5, 2012 – Filed February 13, 2013

REVERSED AND REMANDED

Keir M. Weyble, of Cornell Law School, Ithaca, New York and Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Christina T. Adams, of Anderson, for Respondent.

JUSTICE KITTREDGE: This is a direct appeal from a sentence of death. Although Appellant Raymondeze Rivera raises multiple challenges, we are constrained to reverse and grant a new trial based on one—the trial court's error in refusing to allow Appellant to testify during the guilt phase of his trial.

I.

Appellant was indicted in connection with the death of Kwana Burns, whose body was found lying in the bedroom floor of her home on December 13, 2006. Her death was the result of asphyxiation. The State sought the death penalty against Appellant based on a prior murder conviction. It is stipulated that Appellant was competent to stand trial.

The State presented overwhelming evidence of Appellant's guilt. At the close of the State's case, the trial court properly informed Appellant of his right to testify or not to testify. Appellant elected to testify, yet counsel refused to call him to the stand. Despite Appellant's persistence, the trial court acquiesced in counsel's decision and refused to allow Appellant to testify. Appellant was convicted of murder and ultimately sentenced to death.

II.

A.

The Colloquy and the Trial Court's Ruling

On appeal Appellant presents a host of challenges. Because we believe the trial court erred in refusing to allow Appellant to testify and that such error is structural, we reluctantly reverse Appellant's murder conviction and death sentence and remand for a new trial.

We begin with the trial court's questioning of Appellant at the close of the State's case:

> The Court: We have now reached or are approaching the stage in the trial where you may present your defense. You have the right to claim the protections given to you by the Fifth Amendment to the Constitution of the United States. This amendment states

in pertinent part, no person shall be compelled in any criminal case to be a witness against themselves. Do you understand this?

[Appellant]: Yes, sir.

The Court: This means that you cannot be required to testify in this case. You have the right to testify on your own behalf; however, no one can make you testify. This is a personal right, and no one can waive this right except you. Do you understand this?

[Appellant]: Yes, sir.

. . . .

The Court: If you decide to testify, this decision on your part must be freely, voluntarily and intelligently made with knowledge of the protections given to you by the Fifth Amendment and the consequences of your decision to testify. Do you understand that?

[Appellant]: Yes, sir.

The Court: If you decide not to testify, I will instruct the jurors that they cannot give the fact that you did not testify any consideration whatsoever and that there is to be absolutely no prejudices to you because you did not testify. It is left entirely up to you whether or not to testify. Do you understand?

[Appellant]: Yes, sir.

The Court: You may talk with your attorney or anyone else about this, but it will be your final decision—or the final decision will be left entirely up to you. Do you understand that?

[Appellant]: Yes, sir.

The Court: Do you understand what I've explained to you?

[Appellant]: Yes, sir.

The Court: Do you have any questions about what I've explained to you?

[Appellant]: No, sir.

The Court: Have you discussed with your lawyer whether you should testify or not?

[Guardian *ad Litem*]: Excuse me, Your Honor. He just asked if we could have a small break. He needs to go to the restroom and he would like to ask a couple of questions of us.

The Court: Certainly. All right. We'll take a short break. When you're ready to return, of course, let me know.

. . . .

The Court: Is the [Appellant] ready to proceed?

[Guardian *ad Litem*]: He is, Your Honor. He had a couple questions and we've answered them, and he wishes to proceed on to finish answering the questions.

The Court: Very good. . . . Have you discussed with your lawyer whether you should or you should not testify?

[Appellant]: Yes, sir.

The Court: Do you wish to testify?

[Appellant]: Yes, sir.

The Court: You do wish to testify?

[Appellant]: Yes, sir.

. . . .

[Guardian *ad Litem*]: Thank you, Your Honor. In discussions with [Appellant], he has indicated to me that apparently he does wish to testify, but he would like to do so after lunch if he could. His lunch is being delivered to him.

The Court: Very well.

. . . .

[Defense Counsel]: Your Honor, [Appellant] has indicated to the Court that he wishes to take the stand on his own behalf. That is something [Co-Counsel] and I have explained to him on innumerable occasions was not in his best interest. This is the same scheme of things that occurred in the Asha Wiley case, exactly the same thing. Your Honor, I would like to be able to tell the Court as an officer of the Court—and I do so with full knowledge of the Court's responsibilities—[Co-Counsel] and I will refuse to call him to the stand.

If the Court wishes to call him under Rule 614, the extraordinary circumstances that 614 notices, that obviously would be the Court's option. [Co-Counsel] and I, however, feel that under our constitutional oath as his attorneys, we cannot put him on the stand without him harming his case so irreparably as to void any meaningful consideration to guilt or innocence in this matter.

. . . But if that is [Appellant's] wish, we will respectfully and honorably decline the opportunity to call him.

. . . .

The Court: All right. I'm going to go along—inasmuch as [Appellant] has to consider these matters over lunch, I'm going

to have the other matter to consider, whether or not I will exercise under the appropriate rule to call him as the Court's witness. All right. So you have three things to consider now. So any questions, [Appellant]?

[Appellant]: (No response)

The Court: All right. Let me restate the three things you need to consider. One is whether you wish to testify as a witness. Two, whether you wish to give the final argument after the case is closed. And three, knowing that your attorneys would decline to call you as a witness, whether you want the Court to call you as a witness. Those are the three things that you need to consider. Any questions?

[Appellant]: No, sir.

The Court: Very good. I'll see you after lunch.

(R. 2186-95).

Following the lunch recess, the trial proceedings continued as follows:

[Defense Counsel]: Judge, if I could just briefly—we talked briefly at the bench about my request for a continuance to get a psychiatrist here to determine the competency of [Appellant] to make this decision [about whether to testify]. I concede to the Court that we don't have a case in the country that says we're allowed to do that, but this is a rather unique situation that I would make that request. In the alternative I would request that the Court have [Appellant] proffer his testimony to make sure that it's not going to be the kind of testimony that would erode the integrity of these proceedings.

The Court: I understand. On the first, I understand that he has been examined.

. . . .

All right. And on the second, I think that's how we're going to proceed.

. . . .

I'm going to ask the Defendant if he wishes to testify. And if he tells me so, I'm going to call him as a Court's witness. And he's going to be on the stand, and he's going to be under oath. I have no idea what he wants to testify to. It's his right, his absolute right, to testify if he wants to, provided that his testimony is material, relevant, and the probative value outweighs any prejudice to his case. In making that decision, I'll hear what he says. . . . [Appellant], do you understand your right to testify or not to testify under our Constitution?

[Appellant]: Yes, sir.

The Court: Have you discussed with your lawyer and others whether you should testify or not testify?

[Appellant]: Yes, sir.

The Court: And what has their advice been? What has their advice been? What have they advised you?

[Appellant]: Not to testify.

The Court: Now, I'm going to ask you—because it is your decision—do you wish to testify?

[Appellant]: Yes, sir.

The Court: All right. You understand that whatever you have to say must be relevant, admissible, and its probative value, meaning its value to the decision of the issues in this particular case, must outweigh any prejudicial value. You understand?

[Appellant]: Yes, sir.

. . . .

The Court: All right. And again, I understand that the Defense has advised [Appellant] not to take the stand and testify?

[Defense Counsel]: We have, Your Honor, yes, sir.

(R. 2193-98).

Thereafter, outside the presence of the jury, the trial judge called Appellant as a court's witness, first asking Appellant to proffer his testimony. The in camera examination by the trial judge is as follows:

Q. All right. You understand that you are under oath?

A. Yes, sir.

. . . .

Q. And you are the defendant in this case?

A. Yes, Your Honor.

Q. And you wish to testify?

A. Yes, sir.

Q. What's the testimony you wish to give?

A. About the murders in Anderson County.

Q. Pardon?

A. The murders in Anderson County, sir.

Q. Murders? Both murders?

A. Right.

Q. No. What's the testimony you want to give us about the death of Kwana Burns?

A. Okay. That will be fine, sir.

Q. What do you want to testify to?

A. To what happened, sir.

Q. Pardon?

A. To what happened.

Q. And what are you going to testify to?

A. About the killing of Kwana Burns.

Q. You're what?

A. The killing of Kwana Burns.

Q. What are you going to testify to? What is the testimony you're going to give?

A. I just said it, Judge.

Q. If that's all you say, that's no probative value. I want to hear your testimony. I want to find out if it's relative [sic], material and non-prejudicial.

A. That is my testimony, Your Honor.

Q. Then you don't testify.

(R. 2199-2200).

The trial judge determined Appellant would not be called as a court's witness based on the outcome of the proffer. The trial judge stated:

> In light of [Appellant's] reluctance to offer anything in a particular way or of a particular nature that would actually be material to the charges in this indictment and any of the issues raised in this matter other than a generalization, and being asked on more than one time to make or to give testimony that would be relevant, material and probative without prejudicial value outweighing that probative value, the Court finds that [Appellant] has exercised his right to testify and declined to testify to anything that would be helpful to the jury in reaching the issues in this case.
>
> Having so exercised his rights and declined to give anything of material value to the jury, in determining the issues of the case as required by [Rules] 401 and 402, [SCRE], the Court finds that whatever probative value [of] the generalization without any specificity . . . is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, and also undue delay, waste of time, and needless presentation. Rule 403, South Carolina Rules of Evidence.
>
> . . . .
>
> This is the guilt phase when the proof must be upon the State beyond a reasonable doubt or something that is material, relevant and probative not exceeded by the prejudicial value. So I do find that—and I have tried to give [Appellant] every opportunity to testify to something that would be admissible.
>
> A defendant, like any other witness, if he testifies, he has the right to testify under our rules of evidence and procedure in law and not to—what is it—use it as a forum to do anything he would like. I don't know if he wanted to do that or not, but I asked him at least once, maybe twice or three times, what would be his testimony, what would he proffer, what would he offer. And that's the same thing that I'm going to have to know before I permit any testimony.

(R. 2201-03).

Through his Guardian *ad Litem,* Appellant timely objected to the trial court's ruling:

> [Appellant]: Your Honor, I just want to, for the record, I just want to go ahead and object to the Court's decision under Rule—excuse me—under the Constitution's Sixth and Fourteenth Amendments.
>
> The Court: All right. What was the testimony you were going to give?
>
> [Appellant]: As I said, Your Honor, I was going to testify about—
>
> The Court: What is that testimony? What is that testimony?
>
> [Appellant]: About the details of the case.
>
> The Court: What are the details?
>
> [Appellant]: That's for me to say on the stand, Your Honor.
>
> The Court: Sir?
>
> [Appellant]: That's for me to say on the stand, Your Honor.
>
> The Court: No, sir. Unfortunately—or rather fortunately, it's not for you to testify to anything you want to, but it has to be something—remember those three things, material, relevant, and not prejudicial or the probative value not outweighed by the prejudice.
>
> [Appellant]: Your Honor, I never said I was going to testify to anything. That was you saying.
>
> The Court: It's not mine, sir. It's the law. Anything else?

[Appellant]: No, sir.

The Court: All right. I'll note your objection. Thank you very much. Anything else? I note that the State feels that the Court has erred too in—what is it—limiting the testimony of [Appellant] only to those matters that would be relevant, material, and probative value outweighed—not outweighed by the prejudice.

(R. pp. 2203-05).

Appellant was not permitted to testify. The defense rested without presenting any evidence, and the jury deliberated only eleven minutes before returning a guilty verdict.

When proceedings reconvened two days later for the penalty phase of Appellant's trial, the trial judge *sua sponte* clarified his decision to prohibit Appellant from testifying:

> All right, there are certain matters that I need to clarify from our proceedings Friday. The Court has a grave responsibility to assure that justice be done in every case if it can be done according to law. And Friday [Appellant] advised the Court that he chose to exercise his right to testify, and the Court permitted him to testify except the Court did what it would do on any case out of the presence of the jury, have an in-camera hearing as to what the testimony might be. The reason for that, of course, is our rules of evidence in South Carolina, and particularly Rules 401, 402 and 403. Because it's not just what somebody wants to say; it's whether what somebody wants to say is material—or excuse me, relevant, material, and even if relevant, is there any—if the prejudicial value outweighs any probative value to be admissible.
>
> So I trust the record will reflect—and I can't remember how many times I asked [Appellant], once he was on the stand—to proffer his testimony as to what he wished to testify. And if my recollection is correct, it was to a general matter of, about the death of the victim. Obviously he did not give any specifics as to what would be

presented, so the Court had no way to rule on the admissibility of such evidence. And no evidence or no testimony was suggested or was offered that the Court could let it go forward to the jury. The Court made every effort to see if there was something that would be admissible under our rules of evidence, and [Appellant] declined to give the Court any assistance in that matter, and therefore, disallowed his—just did not permit him to testify to something that the Court could not, in response to its duty to see that justice is done in every case, could exercise that awesome responsibility.

I do note that—what is it—the right of the defendant to testify is well established in *[Rock] v. Arkansas*, . . . a 1987 case. The court there knew or addressed the situation when there was a per se rule against admissibility. In other words, the rule in Arkansas at the time was that, I think, it was post-hypnotic testimony would not be admissible per se. In other words, without consideration. There the court said that that was a violation of the defendant's right to testify. In so doing, the—not only did the majority, five of the [United States] Supreme Court at that time, noted—note that in the exercise of this right, the accused, as is required of the state, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. . . . The Constitution does not in any way relieve a defendant from compliance with, quote, rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

The Court, in the exercise of its discretion, its well in light of the grave responsibility to assure that justice is served, complied in its opinion with its duty. I might note that also, considering the nature of this particular Defendant's propensity to say things that would obviously not be in his best interest, although he would like to do it perhaps or has done it in the past, this Court does not feel that this would be in . . . [Appellant's] best interest and would be prejudicial. And which I say, 401 is relevant evidence, 402 is material to the particular issues, and 403, Rule 403, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. And in this case, since nothing was offered that would be any

> different from what had already been addressed in the—as far as evidence is concerned, the Court found that even that, if anything, would be cumulative.
>
> So as far as the efforts to have [Appellant] exercise his rights were not successful. The Court stands by its ruling.

(R. 2249-53).

As noted, Appellant was convicted and sentenced to death.

B.

Preliminary Procedural Issues

Appellant argues the trial court erred in failing to honor his request to testify in his own defense and that such error is not subject to harmless-error analysis. With great respect for the able trial judge, we are constrained to agree.

The State presents two arguments to avoid this issue on direct review, preferring that it be considered in a post-conviction relief (PCR) proceeding. First, the State argues that because the objection to the trial court's failure to call Appellant as a court's witness was made by Appellant and his Guardian *ad Litem* and not by defense counsel, Appellant's claim is not preserved for appellate review based on the prohibition against hybrid representation. The State next argues that it was not the *trial court's* responsibility to call Appellant as a witness; rather, Appellant's right to testify in his own defense was denied by *defense counsel's* refusal to call him as a witness for strategic reasons. Therefore, the State argues once again that the appropriate procedure for reviewing counsel's strategic decision is through the PCR process. We disagree.

"There is no constitutional right to hybrid representation either at trial or on appeal." *Jones v. State*, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002); *see State v. Stuckey*, 333 S.C. 56, 57-58, 508 S.E.2d 564, 564 (1998) (finding there is no right to hybrid representation under either the United States or the South Carolina constitutions and refusing to consider substantive documents not submitted through counsel). We find it is inappropriate to invoke the prohibition against hybrid representation here based on the absence of an objection by counsel, particularly

since counsel acknowledged to the trial court Appellant's desire to testify yet expressly refused to comply with those wishes. Moreover, we are presented with a unique situation involving the appointment of a Guardian *ad Litem* to assist Appellant. Appellant, directly and through his guardian, objected to the trial court's refusal to permit him to testify. [1] We further note that the State, to its considerable credit, urged the trial court to honor Appellant's request to exercise his constitutional right to testify. We fully appreciate the State's issue preservation argument and its concomitant desire to have this issue vetted in a post-conviction relief action where a petitioner must typically establish prejudice resulting from constitutionally deficient representation. Given the circumstances of this case, however, we find the issue is preserved for direct review

Next, regarding the State's argument that Appellant's claim is not a trial court error and therefore not reviewable on direct appeal, we acknowledge there is no absolute rule as to whether a denial of the right to testify is properly analyzed as a constitutional error on direct appeal or as an ineffective assistance of counsel claim in the context of a PCR proceeding. *See, e.g., United States v. Teague*, 953 F.2d 1525, 1535 (11th Cir. 1992) ("Where the defendant claims that this right [to testify] was violated by defense counsel, this claim is properly framed as a claim of ineffective assistance of counsel."); *Ortega v. O'Leary*, 843 F.2d 258, 263 (7th Cir. 1988) (reviewing trial court's denial of petitioner's request to testify in the habeas corpus context and acknowledging that such an error was reviewable on direct appeal); *Passos-Paternina v. United States*, 12 F.Supp.2d 231, 240 (D.P.R. 1998) (recognizing that the right to testify exists independently of the right to counsel and stating "[r]egardless of whether the denial of the right to testify can be ascribed to defense counsel's conduct, the deprivation complained of is not effective assistance but the right to testify, and the right to testify itself is constitutionally protected"); *Rossignol v. State*, 274 P.3d 1, 7 (Idaho Ct. App. 2012) ("[T]he issue of the failure of a defendant to testify may be viewed . . . either as a claim of ineffective assistance of counsel or as a claim of a deprivation of a constitutional right. . . . [T]he appropriate inquiry depends on how the claim is pled and argued . . . .").

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[1] We reiterate Appellant's timely and specific objection to the trial court's ruling: "Your Honor, I just want to, for the record, I just want to go ahead and object to the Court's decision under Rule—excuse me—under the Constitution's Sixth and Fourteenth Amendments." (R. 2203-04).

Given the circumstances before us, we find Appellant's claim is proper for review on direct appeal. The record before the Court is adequately developed to permit full consideration of Appellant's claim. Indeed, the pertinent facts are undisputed—Appellant was properly informed of his right to testify, sought to invoke it, and was prevented from doing so through the refusal of both counsel and the trial court to call him as a witness during the guilt phase of his capital murder trial. A post-conviction relief hearing is unwarranted because it is not necessary to resolve a factual dispute and would not aid in our application of the law. Further, Appellant's claim is (and has consistently been) presented not as an ineffective assistance of counsel claim, but rather, as an error committed by the trial court in excluding Appellant's testimony, which is not an appropriate basis for an ineffective assistance of counsel claim. *See Wolfe v. State*, 326 S.C. 158, 162, 485 S.E.2d 367, 369 n.2 (1997) ("[T]rial court error does not constitute an appropriate basis for a finding of ineffective assistance of counsel.") Accordingly, we conclude review on direct appeal is proper and turn now to the merits of the claim.

C.

The Exclusion of Appellant's Testimony

The right of a criminally accused to testify or not to testify is fundamental. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) ("[F]undamental to a personal defense . . . is an accused's right to present his own version of the events *in his own words*." (emphasis added)). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Id.* at 53 (quoting *Harris v. New York*, 401 U.S. 222, 230 (1971)). "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." *Id.* at 51. "It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id.* (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment." *Id.* at 52 (citing *Washington v. Texas*, 388 U.S. 14 (1967)). "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.* "'The choice of whether to testify in one's own defense . . . is an exercise of [that] constitutional privilege.'" *Id.* at 53 (quoting *Harris*, 401 U.S. at 230) (omission in original). "'A person's right . . . to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence; . . . .'"

Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948) (emphasis omitted)).

However, the right to present testimony is not without limitation. "The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Rock*, 483 U.S. at 55 (quoting *Chambers*, 410 U.S. at 295). "But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 55-56. "In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.* at 56. Evidence rules which "'infringe upon a weighty interest of the accused'" but fail to serve any legitimate interest are arbitrary. *Holmes v. South Carolina*, 547 S.C. 319, 324-26 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)).

It is clear from the record that defense counsel actively thwarted Appellant's desire to testify. Although, as a practical matter, preventing Appellant from testifying may have been an advantageous strategic decision, it had no basis in the law. The circumstances of this case are particularly disturbing, given that Appellant disagreed with counsel's recommendation not to testify, unambiguously indicated to the trial court that he wished to take the stand, and vociferously objected to the trial court's decision not to permit him to testify. It is also clear from the record that the trial judge appeared willing to call Appellant as a court's witness, but ultimately declined to do so because during the peculiar proffer procedure, Appellant indicated his intention to testify about the crime. It is apparent the trial court, like defense counsel, was operating under the paternalistic belief that it wanted to protect Appellant from potentially undermining his own defense.[2]

To be sure, Appellant's testimony may have been prejudicial to his case but that cannot serve as a basis for the trial court to prevent him from taking the stand. The

[2] We recognize that counsel for an accused has a duty to prevent false testimony. Here, Appellant's attorneys refused to call him to the stand because they felt that his proposed testimony, though relevant, would not be to his advantage. This is not a decision for defense counsel to make. While defense counsel will provide the accused with his or her best judgment and recommendation, the ultimate decision of whether an accused will testify in his or her defense rests exclusively with the accused.

trial court's thorough colloquy with Appellant demonstrates the trial court well understood the fundamental nature of the right to testify and that the decision rested solely with Appellant. *See Rock*, 483 U.S. at 50 ("[P]ermitting a defendant to testify advances both the 'detection of guilt' and 'the protection of innocence.'" (quoting *Ferguson v. Georgia*, 365 U.S. 570, 581 (1961))); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.").

Other than a paternalistic desire to protect Appellant from himself, there was no basis upon which the trial court could have appropriately found Appellant's testimony to be irrelevant and therefore inadmissible. Rather, we find the logical relevancy of Appellant's testimony is self-evident—it pertained to the killing of the victim, which was the precise basis for the prosecution. Indeed, it is difficult to fathom anything more logically connected to the fundamental issue in this capital murder trial than a defendant's own testimony about the killing. *See United States v. Walker*, 772 F.2d 1172, 1179 (5th Cir. 1985) ("Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance."); *see also McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984) ("[T]he right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others."). This is particularly true given the lenient standard for admissibility—namely, that evidence is relevant if it has "*any* tendency to make the existence of *any* fact . . . more probable or less probable . . . ." Rule 401, SCRE (emphasis added); *see State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy."); *State v. Beck*, 342 S.C. 129, 134-35, 536 S.E.2d 679, 682 (2000) (finding accused's statements were "highly probative" of whether the accused committed the crime charged and noting "as a general rule" such evidence is admissible). Therefore, we find the trial court erred in preventing Appellant from testifying on the basis of relevance.

Further, although the trial judge relied upon Rule 403, SCRE, as an additional basis for excluding Appellant's testimony, it is clear his ruling was erroneously based upon his concern that Appellant's testimony would be prejudicial to Appellant. Again, while this concern may have been well founded, it is not a proper basis for disallowing the testimony of the accused. Thus, we find it was error to exclude Appellant's testimony pursuant to Rule 403, SCRE. *See State v.*

Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2008) ("'Unfair prejudice [within the meaning of Rule 403, SCRE,] means an undue tendency to suggest a decision on an improper basis.'") (quoting *State v. Dickerson*, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000)). Regardless of whether a defendant's decision to testify is to his own detriment, "it 'must be honored out of that respect for the individual which is the lifeblood of the law.'" *Dearybury v. State*, 367 S.C. 34, 39, 625 S.C. 212, 215 (2006) (quoting *Faretta*, 422 U.S. at 834); *see also Boyd v. United States*, 586 A.2d 670, 673 (D.C. Ct. App. 1991) ("Although a defendant who chooses to testify may actually decrease his or her chance of acquittal, nonetheless, 'the wisdom or unwisdom of the defendant's choice does not diminish his right to make it.'" (quoting *People v. Curtis*, 681 P.2d 504, 513 (Colo. 1984))); *United States v. Schrock*, 855 F.2d 327, 335 (6th Cir. 1988) ("Unfair prejudice as used in Rule 403 does *not* mean the damage to a defendant's case that results from legitimate probative force of the evidence."); *People v. Dist. Ct. of El Paso Cnty.*, 869 P.2d 1281, 1286 (Colo. 1994) ("Proffered evidence should therefore not be excluded by the [trial] court as unfairly prejudicial simply because it damages the defendant's case.").

It is true that "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes*, 547 U.S. at 326. It is also true "that the Constitution permits judges 'to exclude evidence that is repetitive, only marginally relevant' or poses an undue risk of 'harassment, prejudice, or confusion of the issues.'" *Id*. However, it is also clear that "the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote . . . ." *Id*. Here, because the trial court committed an error of law in finding Appellant's testimony was irrelevant and unfairly prejudicial, such erroneous application of the Rules of Evidence cannot serve any legitimate state purpose. Having determined that the trial court's decision to prevent Appellant's testimony violated the rules of evidence and the United States Constitution, we now consider whether such error requires reversal.

We emphasize Appellant does not challenge the legitimate purposes served by Rules 401, 402, or 403, SCRE. Nor does Appellant contend any of those evidentiary rules in and of themselves arbitrarily restrict his right to testify. Rather, Appellant claims the trial court arbitrarily *misapplied* those rules, and in committing that error of law, the trial court unconstitutionally prevented Appellant

from testifying during his own trial. Thus, we need not address whether proper application of the South Carolina Rules of Evidence impermissibly restricts a defendant's constitutional right to testify.[3] Rather, the narrow issue before the Court is this: Does the erroneous application of evidentiary rules which results in the wholesale exclusion of a defendant's testimony constitute a structural error not subject to harmless-error analysis?

The State asserts that the denial of a defendant's right to testify does not in all cases render a criminal trial fundamentally unfair or call into question the reliability of the trial as a vehicle for determining guilt or innocence. Rather, the State argues, such an error is appropriately characterized as a "trial error" which is subject to the harmless-error doctrine. We disagree.

Most trial errors, even those which violate a defendant's constitutional rights, are subject to harmless-error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991) (recognizing that most constitutional errors are subject to harmless-error analysis and do not automatically require reversal of a conviction) (citing *Chapman v. California*, 386 U.S. 18, 23 (1967)). Indeed, "the harmless-error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than the virtually inevitable presence of immaterial error.'" *Id*. at 306-08 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

However, despite the strong interests upon which the harmless-error doctrine is based, there are certain constitutional rights which are "'so basic to a fair trial that their infraction can never be treated as harmless error.'" *Id*. (quoting *Chapman*, 386 U.S. at 23). "These are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards" and which "affect[] the framework within which the trial proceeds, rather than simply an error in the

[3] We do not suggest that a defendant's testimony is not subject to the rules of evidence. Indeed, our findings should not be taken as a restriction of the trial court's ability to constrain a defendant's testimony based on a *proper* application of evidentiary rules.

trial process itself." *Id*. at 309-10. "'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Id*. at 310 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). Essentially, an error is structural if it is "the type of error which transcends the criminal process." *Id*. at 311.

The Supreme Court has found "an error to be 'structural,' and thus subject to automatic reversal only in a very limited class of cases." *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (*erroneous* disqualification of counsel of choice); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge).

The Supreme Court has not directly addressed whether a trial court's improper refusal to permit a defendant to testify in his own defense is a structural error or one which is subject to harmless-error analysis. We find this error is not amenable to harmless-error analysis and requires reversal without a particularized prejudice inquiry. *See Gonzalez-Lopez*, 548 U.S. at 150 ("We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.' . . . Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." (quoting *Sullivan*, 508 U.S. at 282)); *see also Neder*, 527 U.S. at 8-9 ("[Structural] errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair.'" (quoting *Rose*, 478 U.S. at 577-78)); *Sullivan*, 508 U.S. at 281-82 ("Denial of the right to a jury verdict of guilt beyond a reasonable doubt is . . . a 'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. The right to a trial by jury reflects, we have said, 'a profound judgment about the way in which the law should be enforced and justice administered.' The deprivation of that right, with consequences that are necessarily

unquantifiable and indeterminate, unquestionably qualifies as a 'structural error.'" (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968))); *Rock*, 483 U.S. at 51 n.9 ("This right [to testify] reaches beyond the criminal trial: the procedural due process required in some extrajudicial proceedings includes the right of the affected person to testify."); *Vazques*, 474 U.S. at 264 ("[T]he difficulty of assessing [the error's] effect on any given defendant[] requires our continued adherence to a rule of mandatory reversal."); *Luce v. United States*, 469 U.S. 38, 41-42 (1984) (noting that ascertaining prejudice requires "the court [to] know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify" and finding an "appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying"); *McKaskle*, 465 U.S. at 177 n.8 ("Since the right of self-representation is a right that when exercised usually *increases* the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." (emphasis added)); *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.22 (1968) ("[T]he jury-selection standards employed here necessarily undermined the very integrity of the process that decided the petitioner's fate . . . . To execute this death sentence would deprive him of his life without due process of law."); *United States v. Walker*, 772 F.2d 1172 (5th Cir. 1985) (reversing defendant's conviction and remanding the case for a new trial where the trial court abused its discretion in denying defendant's motion to reopen trial to allow defendant to testify which was made after the defense rested but before closing arguments or jury instructions); *State v. Hampton*, 818 So.2d 720, 729 (La. 2002) ("*Rock* thus spoke of the right to testify as among those rights that *'are essential to due process of law in a fair adversary process*.' Therefore, such language unmistakably places the defendant's right to testify among those protections without which a criminal trial is 'structurally flawed.'" (quoting *Rock*, 483 U.S. at 52)); *State v. Dauzart*, 769 So.2d 1206, 1210 (La. 2000) ("No matter how daunting the task, the accused therefore has the right to face jurors and address them directly without regard to the probabilities of success. As with the right to self-representation, denial of the accused's right to testify is not amenable to harmless-error analysis."); *State v. Rosillo*, 281 N.W.2d 877, 879 (Minn. 1979) ("[T]he right to testify is such a basic and personal right that its infraction should not be treated as harmless error."); *Irwin v. State*, 400 N.W.2d 783, 785 (Minn. Ct. App. 1987) ("Because [a criminal defendant's right to testify] is a basic right, fundamental to a fair trial, prejudice need not result in order to require a new trial. The denial itself is sufficient.").

In sum, we are persuaded that the right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify "is either respected or denied; its deprivation cannot be harmless." *McKaskle*, 465 U.S. at 177 n.8. As such, the error is structural[4] in that it is "'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" *Fulminante*, 499 U.S. at 289 (quoting *Chapman*, 386 U.S. at 23).

III.

Accordingly, we reverse Appellant's conviction and sentence and decline to reach the remaining issues, save one. *See Futch v. McAllister Towing of Georgetown*, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive). The one issue we elect to address concerns the admissibility of mitigation evidence offered by Appellant during the sentencing phase of the trial. Appellant presented the expert testimony of Dr. Nicholas Cooper-Lewiter, from whom defense counsel attempted to elicit testimony that Appellant had been diagnosed with bipolar disorder. The State objected, arguing Dr. Cooper-Lewiter was not qualified to diagnose Appellant with any mental illness. The trial judge sustained the State's objection, finding bipolar disorder is "a medical condition that requires expert testimony," and that Dr. Cooper-Lewiter was not qualified to diagnose such a condition because he did not possess a medical degree. The State now concedes the trial court erred in excluding Dr. Cooper-Lewiter's testimony as to Appellant's bipolar disorder diagnosis but urges us to find the error harmless. Given the necessity of a new trial, we do not reach the question of harmless error. We do find, however, that the proffered testimony was clearly admissible and remind the State and the bench that due process requires that defendants be accorded considerable latitude in the presentation of mitigation evidence. *See Porter v. McCollum*, 130 S.Ct. 447, 454-55 (2009) (finding even where mental health evidence does not rise to the level of establishing a statutory mitigating circumstance, it may nonetheless be considered based on constitutional requirement that "'the sentence in capital cases must be permitted to consider any

[4] A trial court's discretion in the conduct of the trial and the admission of evidence is in no manner diminished merely because the underlying assignment of error relates to a matter deemed structural. The finding of a structural error simply renders the harmless error doctrine unavailable on appellate review.

relevant mitigating factor'" (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982))); *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (noting that where the prosecution specifically relies on an aggravating factor, it is not only *Lockett* and *Eddings* that require that a defendant "be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain'" (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977))).

This matter is remanded for a new trial.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Adams Gibson, Petitioner.

Appellate Case No. 2010-180806

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Steven H. John, Circuit Court Judge

Opinion No. 27221
Heard January 10, 2013 – Filed February 13, 2013

DISMISSED AS IMPROVIDENTLY GRANTED

Appellate Defender Robert Michael Dudek, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Alphonso Simon, Jr., and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

PER CURIAM: We granted certiorari to review the Court of Appeals' direct appeal decision in *State v. Gibson*, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010). After careful consideration of the record, appendix, and briefs, we dismiss certiorari as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

ACTING CHIEF JUSTICE PLEICONES, KITTREDGE, HEARN, JJ., and Acting Justices James E. Moore, and R. Markley Dennis, Jr., concur.

The Supreme Court of South Carolina

Re: Amendment to South Carolina Appellate Court Rules

Appellate Case No. 2013-000124

ORDER

Comment 3 to Rule 8.4, RPC, Rule 407, SCACR, refers to Paragraph (d) of Rule 8.4 in setting forth examples of a specific ground for misconduct. However the Comment should refer to Paragraph (e) of Rule 8.4. Accordingly, Comment 3 to Rule 8.4, RPC, is hereby amended to correct this scrivener's error, as set forth in the attachment to this Order. The amendment is 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
February 5, 2013

Comment 3 to Rule 8.4, RPC, Rule 407, SCACR,

is amended to provide as follows:

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

The Supreme Court of South Carolina

In the Matter of Robert Nathan Boorda, Respondent

Appellate Case No. 2013-000240

ORDER

The Office of Disciplinary Counsel petitions this Court to place respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). As indicated in the documents in support of the petition, respondent was charged by Information with conspiracy to commit wire fraud in violation of federal law and he pled guilty to the charge.

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

s/ Jean H Toal C.J.
FOR THE COURT

Columbia, South Carolina

February 6, 2013

The Supreme Court of South Carolina

In the Matter of M. Scott Taylor, Respondent

Appellate Case No. 2013-000257

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Respondent consents to the issuance of an order of interim suspension in this matter.

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

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

February 8, 2013

The Supreme Court of South Carolina

RE: Succession Planning Amendments to the South Carolina Appellate Court Rules

Appellate Case No. 2010-163374

ORDER

The Court has adopted a number of amendments to the South Carolina Appellate Court Rules concerning the appointment of attorneys to protect the interests of clients under Rule 31, RLDE, Rule 413, SCACR, and attorney succession planning.

First, based on recommendations made by the American Bar Association Standing Committee on Professional Discipline, the Court has amended Rule 31, RLDE, to create a receiver position within the Office of Commission Counsel. The receiver will handle matters formerly handled by members of the bar appointed as attorneys to protect clients' interests when lawyers are transferred to incapacity inactive status, disappear or die, or are suspended or disbarred, but no partner, personal representative or other responsible party capable of conducting the lawyers' affairs is known to exist. To fund the position, the Court has increased the Additional License Fee to Support Lawyer and Judicial Disciplinary Functions by $20 for Regular Members of the Bar. While the receiver will be authorized to ask this Court to appoint attorneys to assist the receiver, the employment of a receiver will substantially reduce the number of attorneys appointed to assist in protecting clients' interests under Rule 31.

In conjunction with the creation of a receiver position, the Court has also adopted Rule 1.19, RPC, Rule 407, SCACR: Succession Planning. This rule, which was based on a rule originally proposed by the South Carolina Bar, encourages lawyers to prepare written, detailed succession plans, which include the selection of a

successor attorney to assume responsibility for the interests of the lawyer's clients in the event of the lawyer's death or disability from the practice of law. A list of successor attorneys will be kept by the Bar.

These amendments, which are set forth in the attachment, are effective July 1, 2013. However, the Court recommends lawyers immediately consider and prepare written, detailed succession plans as described in Comment 2 to Rule 1.19. Succession planning will not only help reduce the number of appointments under Rule 31, but it will also protect clients, law firms, and lawyers and their estates when lawyers die or are disabled from the practice of law. Furthermore, the South Carolina Bar's Practice Management Program (PMAP) has a number of excellent resources available for lawyers who wish to formulate succession plans, including published articles, general advice on winding down a practice, and sample forms.

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

February 11, 2013

Rule 31, RLDE, Rule 413, SCACR, is amended to provide as follows:

RULE 31

ORDER OF RECEIVERSHIP

(a) Employment. Commission counsel shall employ a member of the South Carolina Bar who has been admitted under Rule 402, SCACR, as a standing receiver. The receiver shall not otherwise engage in the practice of law, except to the extent a staff attorney would be authorized to do so under Rule 506, SCACR, or as explicitly authorized by these rules. The receiver shall not serve in a judicial capacity.

(b) Petition. If a lawyer has been transferred to incapacity inactive status, has disappeared or died, or has been suspended or disbarred, and no partner, personal representative or other responsible party capable of conducting the lawyer's affairs is known to exist, disciplinary counsel shall petition the Supreme Court for an order of receivership appointing the receiver to inventory the files of the inactive, disappeared, deceased, suspended or disbarred lawyer and to take action as appropriate to protect the interests of the lawyer and the lawyer's clients. If the Supreme Court determines that a lawyer suffers from a physical or mental condition that adversely affects the lawyer's ability to practice law but decides that a transfer to incapacity inactive status is not warranted, it may appoint the receiver to protect clients' interests. The order of receivership shall be public.

(c) Duties. The receiver shall:

(1) Take custody of the lawyer's active and closed files and trust or escrow accounts. The chair or vice chair may issue such orders as may be necessary to assist the receiver in obtaining custody over such files and accounts, to include orders compelling the lawyer or a third party to take specific action regarding the files and accounts. The willful failure to comply with such an order may be punished as a contempt of the Supreme Court. A party who wishes to challenge such an order must immediately seek review of the order by petition to the Supreme Court;

(2) Notify each client in a pending matter, and in the discretion of the receiver, in any other matter, at the client's address shown in the file, by first class mail, of the client's right to obtain any papers, money or other property to which the client is entitled and the time and place at which the papers, money or other property may be obtained, calling attention to any urgency in obtaining the papers, money or other property;

(3) Publish, in a newspaper of general circulation in the county or counties in which the lawyer resided or engaged in any substantial practice of law, once a week for three consecutive weeks, notice of the discontinuance or interruption of the lawyer's law practice. The notice shall include the name and address of the lawyer whose practice has been discontinued or interrupted; the time, date and location where clients may pick up their files; and the name, address and telephone number of the receiver. The notice shall also be mailed, by first class mail, to any errors and omissions insurer or other entity having reason to be informed of the discontinuance or interruption of the law practice;

(4) Release to each client the papers, money or other property to which the client is entitled. Before releasing the property, the receiver shall obtain a receipt from the client for the property;

(5) With the consent of the client, file notices, motions or pleadings on behalf of the client where jurisdictional time limits are involved and other legal counsel has not yet been obtained; and

(6) Perform any other acts directed in the order of receivership.

(d) Term of Order. The term of an order of receivership shall be for a period of no longer than 9 months. Upon application by the receiver, the Supreme Court may extend the term of the order as necessary.

(e) Representation of Clients. Clients should be encouraged to engage other counsel as soon as possible.

(f) Termination of Receivership. When the provisions of (c) above and the order of receivership have been complied with, the receiver shall apply to the Supreme Court for termination of the receivership. The application shall contain the written releases of clients to whom files and other property were returned, information regarding the efforts made to contact the lawyer's remaining clients,

an inventory of the files and other property remaining in the receiver's possession and an itemized account of the expenses incurred in carrying out the order of receivership. Upon approval of the application by the Supreme Court, all files and property remaining in the receiver's possession shall be retained by the Commission. Unless otherwise ordered by the Supreme Court, the files shall be retained by the Commission for a period of 3 years at which time they shall be destroyed in a manner which protects their confidentiality. Other client property remaining in the possession of the Commission after 3 years shall be disposed of in a manner as ordered by the Supreme Court.

(g) Appointment of Attorneys to Assist the Receiver. Upon petition of the receiver, the Supreme Court may appoint members of the South Carolina Bar as needed to assist the receiver in performing duties under this rule. With the exception of reasonable and necessary expenses, such as postage, telephone bills, copies, supplies and the cost of publishing legal notice in the newspaper, an appointed attorney shall serve without compensation as a service to the legal profession. However, the Supreme Court may order that the appointed attorney be reimbursed a reasonable amount for other expenses, such as the appointed attorney's time or the time of support staff, when it determines that extraordinary time and services were necessary for the completion of the required duties or when the appointment has worked a substantial hardship on the appointed attorney's practice. The Supreme Court shall determine the reasonableness of necessary expenses and other expenses.[1] Expenses which are approved and awarded by the Supreme Court shall be paid from funds remaining in the lawyer's accounts. If no such funds exist, payment shall be made first from any budgeted allocation of the

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[1] In an effort to balance the need to preserve the allocated portion of the Additional License Fee to Support Lawyer and Judicial Disciplinary Functions and the Lawyers' Fund for Client Protection with the need to, in certain situations, reimburse attorneys appointed pursuant to Rule 31(g), RLDE, Rule 413, SCACR, the following rates are currently established for reimbursement of the appointed attorney's fees, support staff costs and the cost of copies, but are subject to change at the discretion of the Court.

Appointed Attorney's Fees	$50.00 per hour
Support Staff	$10.00 per hour
Copies	$ 0.15 per page

Additional License Fee to Support Lawyer and Judicial Disciplinary Functions and then from the Lawyers' Fund for Client Protection under Rule 411, SCACR. If the appointed attorney's expenses are paid by the Lawyers' Fund for Client Protection, the Supreme Court may order the lawyer to reimburse that Fund.

(h) Protection of Client Information. Neither the receiver nor an attorney appointed to assist the receiver shall be permitted to disclose any information contained in the files inventoried without the consent of the client to whom the file relates, except as necessary to carry out the order of receivership or order of appointment.

(i) Order Appointing Successor Lawyer. Where a lawyer has died or become disabled from practicing law, and the lawyer has named a successor lawyer in accordance with Rule 1.19, RPC, Rule 407, SCACR, the successor lawyer may petition the receiver to request an order of succession appointing the successor lawyer to inventory the files of the disabled or deceased lawyer and to take action as appropriate to protect the interests of the lawyer and the lawyer's clients.

(j) Succession Education. The receiver shall have primary responsibility for conducting educational efforts on the need to protect clients through planning for succession in practice.

Rule 4(e)(2)(F), RLDE, Rule 413, SCACR, is amended to provide as follows:

(F) provide advice and assistance to the receiver and attorneys appointed to assist the receiver; and,

Rule 5(b)(10), RLDE, Rule 413, SCACR, is amended to provide as follows:

(10) provide advice and assistance to the receiver and attorneys appointed to assist the receiver; and,

Rule 13, RLDE, Rule 413, SCACR, is amended to provide as follows:

RULE 13

IMMUNITY FROM CIVIL SUITS

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 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 receiver or attorney appointed to assist the receiver 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 30(d), RLDE, Rule 413, SCACR, is amended to provide as follows:

(d) Refund of Fees and Return of Property. A disbarred or suspended attorney shall promptly refund any part of any fees paid in advance that has not been earned. The lawyer shall also deliver to all clients being represented in pending matters any papers or other property to which they are entitled and shall notify them and any counsel representing them of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property. If a receiver or an attorney to assist the receiver has been appointed under Rule 31, the return of client fees and property shall be accomplished by the receiver or the attorney appointed to assist the receiver.

Rule 32, RLDE, Rule 413, SCACR, is amended to provide as follows:

RULE 32

REINSTATEMENT FOLLOWING A DEFINITE SUSPENSION

OF LESS THAN NINE MONTHS

Unless otherwise provided for in the Supreme Court's suspension order, a lawyer who has been suspended for a definite period of less than 9 months shall be reinstated to the practice of law at the end of the period of suspension by filing with the Supreme Court, and serving upon disciplinary counsel and the Commission on Lawyer Conduct, an affidavit stating that the lawyer is currently in good standing with the Commission on Continuing Legal Education and Specialization and the South Carolina Bar, has fully complied with the requirements of the suspension order, and has paid any required fees and costs, including payment of necessary expenses and compensation approved by the Supreme Court to the receiver or the attorney appointed to assist the receiver pursuant to Rule 31, RLDE, to protect the interests of the lawyer's clients for necessary expenses, or to the Lawyers' Fund for Client Protection if the Fund has paid the attorney appointed to assist the receiver under Rule 31(g), RLDE. If suspended for conduct resulting in a criminal conviction and sentence, the lawyer must also successfully complete all conditions of the sentence, including, but not limited to, any period of probation or parole. In such a case, the lawyer must attach to the affidavit documentation demonstrating compliance with this provision. The affidavit filed with the Supreme Court shall be accompanied by proof of service showing service on disciplinary counsel and the Commission on Lawyer Conduct, and a filing fee of $200. When all preconditions set out in this rule are met, the Court shall issue an order of reinstatement. The order shall be public.

Rule 33(f)(11), RLDE, Rule 413, SCACR, is amended to provide as follows:

(f) Criteria for Reinstatement and Readmission. A lawyer may be reinstated or readmitted only if the lawyer meets each of the following criteria:

. . .

(11) The lawyer has paid necessary expenses and compensation approved by the Supreme Court to the receiver or the attorney appointed to assist the receiver pursuant to Rule 31, RLDE, to protect the interests of the lawyer's clients for necessary expenses, or to the Lawyers' Fund for Client Protection if the Fund has paid the appointed attorney under Rule 31(g), RLDE.

The final paragraph of Rule 411(c)(1), SCACR, is amended to provide as follows:

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

Rule 608(f)(4)(C), SCACR, is amended to provide as follows:

(C) A member who receives an appointment as an attorney to assist the receiver 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 Court adopts Rule 1.19, RPC, Rule 407, SCACR, which provides as follows:

RULE 1.19: SUCCESSION PLANNING

(a) Lawyers should prepare written, detailed succession plans specifying what steps must be taken in the event of their death or disability from practicing law.

(b) As part of any succession plan, a lawyer may arrange for one or more successor lawyers or law firms to assume responsibility for the interests of the lawyer's clients in the event of death or disability from practicing law. Such designation may set out a fee-sharing arrangement with the successor. Nothing in this rule or the lawyer's designation shall prevent the client from seeking and retaining a different lawyer or law firm than the successor. The lawyer to be designated must consent to the designation.

(c) A registry shall be maintained by the South Carolina Bar. The successor lawyer(s) shall be identified on the lawyer's annual license fee statement.

Comment

[1] The rule serves as an encouragement, especially to sole practitioners, to arrange for the orderly protection of clients.

[2] A detailed succession plan should include written instructions concerning how and where client information is stored; bank account details, including operating and trust account information; information concerning disposition of closed client files, law office equipment, and payment of current liabilities; instructions to gain access to computer and voicemail passwords; and information detailing how the successor will be compensated.

[3] Where a detailed succession plan has been prepared, the designated successor should step in to wind down the practice without need of a court appointment.

[4] The client retains the power to select other counsel. The successor lawyer should ensure that the client is aware of that discretion and of any arrangement under which a portion of the fee is to be shared with the absent lawyer or his estate.

[5] The lawyer may designate multiple, different successors for different types of cases. Individual client interests may be better served if multiple lawyers agree to be successors.

[6] Law firms may also designate successors for lawyers, even if such successors are not members of the firm. Such a designation would be done according to the governing approval process of the particular law firm.

[7] A registry is maintained for the voluntary designations. There is no requirement that a successor be listed in the registry. The registry, however, can serve as a starting point to determine if there is a succession plan in the event of the unexpected death or disappearance of a lawyer. A lawyer who names a successor should contact the South Carolina Bar and inform the Bar of the designation.

Comment 5 to Rule 1.3, RPC, Rule 407, SCACR, is amended to provide as follows:

[5] To prevent neglect of client matters in the event of a practitioner's death or disability, it is the better practice, and the duty of diligence may require, that each lawyer or law firm prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. See Rule 1.19.

Rule 410(k)(1), SCACR, is amended to provide as follows:

(k) Additional License Fee to Support Lawyer and Judicial Disciplinary Functions. Members in good standing (other than deceased members) shall also pay an additional fee which shall be placed in a separate account by the South Carolina Bar and shall be disbursed as directed by the Supreme Court to help defray the costs of operating the Commission on Judicial Conduct, the Commission on Lawyer Conduct, and the Office of Disciplinary Counsel.

> **(1) Regular Member.** The additional license fee for a regular member who has been admitted to practice law in this State or any other jurisdiction for less than three years shall be $40. The additional license fee for all other regular members shall be $70.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Lee Brown, Appellant,

v.

Peoplease Corporation and ARCH Insurance Company, c/o Gallagher Bassett Services, Inc., Respondents.

Appellate Case No. 2011-196726

Appeal From The Workers' Compensation Commission

Opinion No. 5082
Heard October 16, 2012 – Filed February 13, 2013

AFFIRMED

Preston F. McDaniel, of the McDaniel Law Firm, of Columbia, for Appellant.

Weston Adams, III, and Helen Faith Hiser, both of McAngus Goudelock & Courie, LLC, of Columbia, for Respondents.

SHORT, J.: In this workers' compensation case arising out of an automobile accident, Thomas Brown appeals, arguing: (1) the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) erred by (a) not granting him lifetime medical care for his lower back problems, (b) not raising the compensation rate to $591.73, and (c) not writing its order; and (2) the court of appeals erred by denying Brown's motion for leave to present additional evidence

to the Workers' Compensation Commission (the Commission) pursuant to section 1-23-380(3) of the South Carolina Code (Supp. 2012). We affirm.

FACTS

On May 2, 2008, a passenger vehicle collided with the truck Brown was driving. At the time of the accident, Peoplease Corporation employed Brown to drive a truck for Bulldog Trucking, and Brown had been working for the company for approximately 16 weeks. After the accident, doctors treated Brown for pain in the cervical region of his neck and performed two surgeries on his neck. Brown's diabetes also worsened following the accident, and he is now insulin dependent.

Brown filed a Form 50 on July 13, 2012, seeking an award for permanent and total disability benefits with lifetime medical care for his neck, back, and arm pain from the accident. Peoplease Corporation and Arch Insurance Company, c/o Gallagher Bassett Services, Inc., (collectively, Respondents) admitted Brown sustained a compensable injury by accident arising out of and in the course of his employment; however, they denied Brown sustained injuries to his lower back and arms.

On October 22, 2010, the single commissioner heard the matter. In his order, the Commissioner noted the only issues before him were a determination of Brown's entitlement to a disability award and the resulting average weekly wage and compensation rate to be applied. He determined Brown is permanently and totally disabled based on the combination of his cervical injury and the aggravation of his underlying diabetes; however, he found no specific medical report tied Brown's lumbar (lower back) problems to his injury at work. Therefore, he ordered Respondents to provide Brown with lifetime, causally-related medical treatment for his cervical spine and diabetes. The commissioner also found exceptional circumstances existed to determine a fair and reasonable average weekly wage and compensation rate. Thus, he calculated the average weekly wage based on the salary and income a top producer for Bulldog would make per year. This amounted to $38,500 per year, resulting in an average weekly wage of $740.38 and a compensation rate of $493.84.

Brown appealed to the Appellate Panel, arguing the commissioner erred in not awarding him (1) lifetime medical care for his lower back and legs and (2) a higher average weekly wage and compensation rate. The Appellate Panel heard the

matter on March 21, 2011. Thereafter, it affirmed the single commissioner's factual findings and conclusions of law. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. *Carolinas Recycling Grp. v. S.C. Second Injury Fund*, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *See* S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2012). Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). "Where there are no disputed facts, the question of whether an accident is compensable is a question of law." *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007).

LAW/ANALYSIS

I. Lifetime Medical Care

Brown argues the Appellate Panel erred in denying him lifetime medical care for his lower back problems. We disagree.

This court must affirm the Appellate Panel's findings of fact if they are supported by substantial evidence. *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Id.* "[T]he

possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Id.* This court may not substitute its judgment for that of the agency's as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. *Id.* at 339, 513 S.E.2d at 845. When determining if a claimant has established causation, the Appellate Panel has discretion to weigh and consider all the evidence, both lay and expert. *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). "Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented." *Id.* The Appellate Panel has the final determination of witness credibility and the weight to be accorded the evidence. *Id.*

In his order, the commissioner stated that *McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984), "calls the back a much more complicated area of the body and calls for expert medical opinions in those kinds of cases." *See id.* at 471, 313 S.E.2d at 41 (noting the back is "a much more complicated area of the body," which requires "a higher degree of expertise than was presented to determine the degree of . . . loss of use"). He then found Brown presented "no specific medical report that ties the lumbar [lower back] problems to the injury at work."

Brown argues the commissioner overlooked or disregarded the undisputed evidence in the record that his lower back problems were caused by and stemmed from the accident. In support of his argument, Brown submits that on July 6, 2008, two months after the accident, he went to the emergency room complaining of lower back pain. The report notes, "History obtained from patient." The admission notes state Brown indicated he was in an automobile accident two months prior to when he developed the pain, and he does a lot of heavy lifting at work, which he thinks exacerbated the pain. However, he denied any back pain when a nurse assessed him. Brown's back was x-rayed, and the hospital discharged him with a lumbosacral strain and prescribed him Percocet, a drug for pain.

On July 10, 2008, Brown saw Dr. Abu-Ata, who noted Brown told him he was in a car accident two months prior, and afterwards, he started having neck and back pain. Brown told Dr. Abu-Ata "he had x-rays for his spine that were negative." Dr. Abu-Ata "did a nerve conduction study/EMG for him that was normal and that

showed no evidence of cervical or lumbosacral peri-radiculopathy." He then scheduled Brown for a magnetic resonance imaging (MRI) of his cervical spine and lower back. The lower back MRI revealed "mild to moderate degenerative disc disease at L3-4." However, the cervical spine MRI indicated Brown had "moderately severe degenerative disc/osteophyte disease of the cervical spine," and Dr. Abu-Ata gave him an emergency referral to Dr. Scott Boyd, a neurosurgeon.

On August 4, 2008, Dr. Boyd determined Brown had cervical stenosis and scheduled him for an anterior cervical discectomy and fusion on September 2, 2008. In February 2010, Dr. Boyd performed a second cervical fusion on Brown. In relation to his claim for workers' compensation, Brown sent Dr. Boyd a letter that stated:

> Is it your opinion to a reasonable degree of medical certainty that the problems that [Brown] has with his neck and back and his need for medical care either stem directly from the automobile accident of May 2, 2008[,] or the accident aggravated and caused to become symptomatic a pre-existing conditions [sic] in his neck and back which resulted in the need for medical care?

Dr. Boyd checked "yes" and signed the letter. However, Dr. Boyd also signed a note excusing Brown from work, which stated: "Mr. Brown is having *back* surgery 09/02/08. He will be out of work until approximately 3 weeks after surgery." (Emphasis added.) Brown's first cervical fusion was on September 2, 2008. Therefore, Respondents contend Dr. Boyd interchangeably used the word "back" to refer to Brown's "neck." Further, Dr. Leonard Forrest did an independent medical evaluation of Brown, and although he notes Brown told him "his neck-related symptoms have always been worse than the low back related symptoms," he stated he did "not see any studies of a lumbar spine." He also stated that although Brown's back problems "certainly seem[] to be related to the motor vehicle accident for the same reason as noted above, [it] has not been evaluated adequately at this point."

Brown's doctors did not perform any surgeries or procedures on his lower back, and the only treatment given to Brown for his lower back was the Percocet given to him at the emergency room. Brown also testified he has not had any surgery or

medical treatment to his lower back. When asked about his lower back pain, Brown stated, "[I]t starts from the back of my neck and goes down and then sometimes it varies also. . . . it feels different all the time. I really couldn't pinpoint [it] in particular." Hence, even Brown could not specifically testify he experienced lumbar pain. Also, although "back" pain is referred to in the record, the only medical evidence specifically relating to Brown's lower back pain is the emergency room visit. Therefore, we find the few medical references in the record are insufficient to prove a causal link, and the substantial evidence in the record supports the Appellate Panel's decision that Brown presented no medical evidence that related his lumbar problems to the accident.

II. Compensation Rate

Brown argues the Appellate Panel erred in not raising his compensation rate to $591.73. We disagree.

Section 42-1-40 of the South Carolina Code provides four alternative methods for the commission to use to calculate the average wage. S.C. Code Ann. § 42-1-40 (Supp. 2012); *see Pilgrim v. Eaton*, 391 S.C. 38, 44, 703 S.E.2d 241, 244 (Ct. App. 2010). The primary method of calculation requires that the "'[a]verage weekly wage' must be calculated by taking the total wages paid for the last four quarters . . . divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." S.C. Code Ann. § 42-1-40 (Supp. 2012). However, "[w]hen for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." S.C. Code Ann. § 42-1-40 (Supp. 2012). "'The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity.'" *Sellers v. Pinedale Residential Ctr.*, 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002) (quoting *Bennett v. Gary Smith Builders*, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978)).

Brown alleged that at the time of the accident, his weekly wages were $589.69, which resulted in a compensation rate of $393.14. However, he sought a deviation in the calculation of his average weekly wage. He presented evidence that he worked for Boyd Brothers Trucking prior to working for Peoplease, and based on his income as reported on his W-2, he had an average weekly wage of $887.55

with a resulting compensation rate of $591.73. Brown also testified he thought Bulldog was going to pay him a rate of fifty cents per mile; however, he could not identify who at Bulldog told him that. Monica Reese, corporate counsel for Peoplease, testified she reviews every employment contract and completes the Form 20 for every workers' compensation claim. She testified she reviewed the payroll of all sixty similarly-situated drivers and determined Brown's wages would be approximately $26,000 for the year. She testified the high end of the salary that drivers could earn is forty-two cents per mile, which is approximately $38,500 per year. She did not know of anyone who would have told Brown he would make fifty cents per mile.

Additionally, Brown submitted paystubs he alleged showed Bulldog was paying him $1.00 per mile. However, the paystubs indicate the payment on the check was calculated at a "Rate" of "$1.00" for "*Hours*" of work. (Emphasis added.) Even at the hearing before the Appellate Panel, Brown's counsel stated: "[I]n our Pre-hearing Brief we submitted copies of his check and on his check – the four or five copies of the check we submitted it said that he was making $1.00 dollar an *hour*." (Emphasis added.) The commissioner asked him if that was correct, and counsel stated: "Excuse me, $1.00 dollar a *mile*." (Emphasis added.) He then continued to say, "But in other words not only does it support my client's testimony that he was going to make $.50 cents an *hour* . . . ." (Emphasis added.) Therefore, the evidence does not support Brown's argument the record contains evidence showing Bulldog was paying him one dollar per mile.

The commissioner noted Brown presented no documentary evidence to support his testimony that Bulldog promised him fifty cents per mile, and he did not identify the exact person that told him that at the time of employment. Nevertheless, the commissioner found exceptional circumstances existed to determine a fair and reasonable average weekly wage and compensation rate. As a result, the commissioner determined the fair average weekly wage was $740.38 with a resulting compensation rate of $493.84. Therefore, the commissioner assumed Brown would eventually earn the highest amount a driver in his situation could earn and took into account possible future earnings and wage increases in calculating his average weekly wage. We find no error.

III. Order

Brown argues the Appellate Panel erred in not writing its own order. We disagree.

On April 1, 2011, Judicial Director Virginia Crocker emailed a letter to all counsel, stating the Appellate Panel "has considered the matter and find[s] a full affirmation of the Single Commissioner's Decision and Order." The letter requested counsel for Respondents "prepare a proposed order with copies for each Party; and submit to the Judicial Department within thirty (30) days of this notice." It also requested the order "recite[] the specific Findings of Fact and Rulings of Law of the Single Commissioner's Decision and Order." Further, the letter stated "the Commissioners reserved the right to modify and/or delete any or all portions of the submitted decision and order."

We find no merit to Brown's argument. *See Trotter v. Trane Coil Facility*, 393 S.C. 637, 644, 714 S.E.2d 289, 292 (2011) (noting the "Appellate Panel of the Commission unanimously upheld the commissioner's order and adopted the findings of fact and conclusions of law contained therein in full"); *Matute v. Palmetto Health Baptist*, 391 S.C. 291, 295, 705 S.E.2d 472, 474 (Ct. App. 2011) (discussing without comment the single commissioner's receipt of the claimant's proposed order).

IV. Motion for Remand

Brown argues this court erred in denying his motion for leave to present additional evidence to the Workers' Compensation Commission pursuant to section 1-23-380(3) of the South Carolina Code (Supp. 2012). We disagree.

Section 1-23-380 of Administrative Procedures Act provides that a "party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review" of the agency decision by filing a petition for review in the court of appeals. S.C.

Code Ann. § 1-23-380 (Supp. 2012).[1] Section 1-23-380(3) provides that pursuant to the filing of a petition for review, the party may also apply to the court for leave to present additional evidence, and the court may order the additional evidence to be taken before the agency if "it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency." S.C. Code Ann. § 1-23-380(3) (Supp. 2012).

Brown sought leave with the Appellate Panel to introduce a photocopy of a card he found while going through his records, which he claimed someone gave him when he applied with Bulldog. The back of the card states: "Run Legal: 50¢ per loaded mile." Brown asserted the additional evidence was material because, in making his decision, the commissioner relied on the lack of documentary evidence to support Brown's testimony. The Appellate Panel denied Brown's motion. Brown then filed a motion for leave with this court to remand the case to the Appellate Panel to present the additional evidence. By order dated November 2, 2011, this court denied Brown's motion, finding Brown "presented no good reasons for his failure to present the evidence during the hearing before the single commissioner and the Appellate Panel."

In ruling on an application to submit additional evidence, this court should consider two factors: (1) the materiality of the additional evidence; and (2) the existence of a good reason for the failure to introduce such evidence at the original hearing. S.C. Code Ann. § 1-23-380(3) (Supp. 2012). After reviewing the record, we find this court correctly determined the additional evidence Brown sought to offer is not material. Additionally, we find this court correctly determined Brown presented no good reason for failing to present the evidence at the hearing before the commissioner and the Appellate Panel. Therefore, this court correctly denied Brown's motion. *See Byers v. S.C. Alcoholic Beverage Control Comm'n*, 305 S.C. 243, 245, 407 S.E.2d 653, 654-55 (1991) (finding the decision to hear additional evidence under section 1-23-380(e), prior to the statute's amendment, was "a matter within the sound decision of the trial judge" and the appellate court's proper

[1] This section was amended in 2006 to provide for review by an administrative law judge and appeal to the court of appeals instead of the circuit court. 2006 Act No. 387, § 2, eff. July 1, 2006. Because this case began in 2010, Brown's appeal was to this court.

standard for review was "whether the circuit judge committed an error of law in remanding the case to the Commission to hear additional evidence"); *id.* (stating that "[i]n ruling on an application under subsection (e), the [c]ircuit [c]ourt should have considered two factors: the materiality of the additional evidence and the existence of a good reason for the failure to introduce such evidence at the original hearing"); *id.* (finding any additional evidence the petitioner sought to offer was not material to the Commission's determination and holding the trial judge was controlled by an error of law in making his determination on the materiality of the additional evidence).

AFFIRMED.

KONDUROS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Greg Cohen and Stacy Cohen, Appellants,

v.

Progressive Northern Insurance Company and Auto-Owners Insurance Company, Respondents.

Appellate Case No. 2011-199408

Appeal From Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 5083
Heard December 12, 2012 – Filed February 13, 2013

AFFIRMED

Daniel L. Draisen, Krause, Moorhead & Draisen, PA, of Anderson, for Appellants.

J.R. Murphy, Murphy & Grantland, PA, of Columbia, for Respondent Progressive Northern Insurance Company.

J. Victor McDade, Doyle, Tate & McDade, PA, of Anderson, for Respondent Auto-Owners Insurance Company.

FEW, C.J.: Greg and Stacy Cohen filed this action requesting reformation of a motorcycle insurance policy issued by Progressive Northern Insurance Company to

include underinsured motorists (UIM) coverage. The trial court refused to reform the policy, finding Progressive made a meaningful offer of UIM coverage. We affirm.

I. Facts and Procedural History

In 2005, Greg Cohen called Citizens Insurance Agency to purchase a policy for his motorcycle. He remembers speaking with a female employee about the policy but does not recall her name. Meredith Thomason, a Citizens Insurance agent, does not specifically recall speaking with Cohen but testified she wrote the quote sheet generated as a result of that call. She also signed the application form for Cohen's policy.

Thomason does not remember the transaction with Cohen. Therefore, her account of how Cohen applied for the policy is based on the procedure she typically follows for completing an application. She testified that a transaction begins with a phone call, and she fills out a quote sheet while talking with the client. She then creates an application form using input from the client, and prints it only after she and the client have discussed and agreed upon what types and limits of coverage he wants. When the client comes to Citizens Insurance's office to complete the application, Thomason gives him an opportunity to read it. Going through each page of the application, she explains UIM coverage, tells the client he is not required by law to have it, and recommends the client buy UIM coverage with limits equal to the other types of coverage he is purchasing. She also reviews which coverage the client is selecting and which he is rejecting in the application form. The client signs the application in several places, including an acknowledgment stating he has read the information that Thomason presented to him regarding UIM coverage. Thomason then signs on a line indicating that the client has completed and signed the application. After that, she gives the client a copy. Thomason testified she never deviates from this procedure.

Cohen's recollection of applying for his policy differs from Thomason's procedure. He testified that when he called Citizens Insurance, he told the agent, "I want the same coverage that I have on my Expedition, my other vehicle." He does not recall talking on the phone about UIM coverage. The next day, he went to Citizens Insurance's office and spent less than five minutes signing paperwork. The employee with whom he met did not explain what was in the paperwork, and Cohen did not review the documents before signing them. They did not discuss

what coverage limits he wanted or what would happen if he did not buy UIM coverage and was later injured. He testified he did not tell the employee that he did not want UIM coverage.

The application Cohen and Thomason signed includes an explanation of what UIM coverage is and how it works. Additionally, using language nearly identical to that endorsed by the supreme court in *Bower v. National General Insurance Co.*, 351 S.C. 112, 119-20, 569 S.E.2d 313, 317 (2002), the application explains that UIM coverage is optional and that it can be purchased up to the limits of the liability coverage Cohen was purchasing. Another page, entitled "Offer of underinsured motorist coverage," has a table listing four levels of UIM coverage limits and the increased premium Cohen would have to pay for each level. The highest of the four levels is equal to the limits of the liability and uninsured motorist coverage Cohen requested in the application form. Below that table, the application asks, "Do you wish to purchase underinsured motorist coverage?" and provides blanks next to the words "Yes" and "No." A computer-generated "X" appears in the blank next to "No." Thomason selected that "X" when she generated the form on her computer. The next line of the application states, "If your answer is 'no' then you must sign here," and then provides a signature line. Cohen signed on that line. Below Cohen's signature, the application states, "If your answer is 'yes,' then specify the limits which you desire. These limits cannot exceed your motor vehicle insurance liability limits." The word "REJECTED" is typed below that instruction. Based on this application form, Progressive issued Cohen a policy that does not provide UIM coverage.

In 2007, Cohen was injured while riding his motorcycle. The Cohens filed this declaratory judgment action against Progressive and Auto-Owners Insurance Company. They asked that Progressive's policy be reformed to provide UIM coverage in the amount of the limits of the policy's liability coverage.[1]

Sitting nonjury, the trial court heard testimony from Cohen and Thomason and reviewed the application form. The court found Progressive made a meaningful offer of UIM coverage and Cohen rejected the offer. The Cohens filed a motion to reconsider, which the court denied.

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[1] Auto-Owners issued a policy for the Expedition. The parties stipulated that if the court reformed Progressive's policy to provide UIM coverage, then Auto-Owners' policy would also provide UIM coverage.

II. Whether the Trial Court Erred in Finding Progressive Made a Meaningful Offer of UIM Coverage

Automobile insurers are required to "offer . . . underinsured motorist coverage up to the limits of the insured's liability coverage." S.C. Code Ann. § 38-77-160 (2002). Our supreme court has interpreted this language to require that "the insured . . . be provided with adequate information . . . to allow the insured to make an intelligent decision of whether to accept or reject the coverage." *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987). In other words, "the insurer's offer of UIM coverage must be 'meaningful.'" *Atkins v. Horace Mann Ins. Co.*, 376 S.C. 625, 630, 658 S.E.2d 106, 109 (Ct. App. 2008) (quoting *Tucker v. Allstate Ins. Co.*, 337 S.C. 128, 130, 522 S.E.2d 819, 820-21 (Ct. App. 1999), which relied on *Wannamaker*, 291 S.C. at 521-22, 354 S.E.2d at 556-57). The *Wannamaker* court adopted a standard for "determin[ing] whether an insurer has complied with its duty to offer [UIM coverage]." 291 S.C. at 521, 354 S.E.2d at 556. The *Wannamaker* test requires the following:

> In general, for an insurer to make a meaningful offer of UIM coverage, (1) the insurer's notification process must be commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium.

Progressive Cas. Ins. Co. v. Leachman, 362 S.C. 344, 349, 608 S.E.2d 569, 571 (2005) (citing *Wannamaker*, 291 S.C. at 521, 354 S.E.2d at 556).

"If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of liability insurance carried by the insured." *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 261, 626 S.E.2d 6, 11 (2005) (citation and quotation marks omitted). "The insurer bears the burden of establishing that it made a meaningful offer." *Atkins*, 376 S.C. at 630, 658 S.E.2d at 109.

The question of whether an insurer met its burden of proving it made a meaningful offer of UIM coverage is a question of fact. *See Floyd*, 367 S.C. at 264, 626 S.E.2d at 12 (stating "[s]uch a case presents a factual issue"). The trial court found Progressive met its burden of proving its offer satisfied each prong of the *Wannamaker* test and, therefore, that it complied with section 38-77-160. On appeal, our role is limited to determining whether evidence in the record reasonably supports the trial court's findings. *See Atkins*, 376 S.C. at 630, 658 S.E.2d at 109 (stating in a declaratory judgment action to determine whether an insurer made a meaningful offer of UIM coverage, "the trial judge's factual findings will not be disturbed on appeal unless a review of the record reveals there is no evidence which reasonably supports the judge's findings").

The trial court based its factual finding that Progressive made a meaningful offer of UIM in compliance with section 38-77-160 on the basis of (1) Thomason's explanation of the coverage in her conversations with Cohen on the phone and in person, (2) the contents of the application form Progressive used to make the offer, and (3) the fact that Cohen signed the application's acknowledgment stating he read the explanation of UIM coverage. The court stated "the totality of the transaction with . . . Thomason shows that Cohen was given a meaningful offer."

As to Thomason's personal explanation of UIM coverage, the court found she "not only orally presented the offer but also provided him with the written offer form," she "specified the limits of optional coverage up to Cohen's liability limits," she "intelligibly advised him of the nature of the optional coverages," and she "told him that the optional coverages were available for an additional premium." These findings were based on the trial court's credibility determination that Thomason followed "her general procedure," which she spelled out in great detail. The court found "Thomason's testimony shows that the *Wannamaker* requirements for a meaningful offer were met."

The trial court also based its factual findings on the contents of the form Progressive used to make the offer. The court specifically found "the offer form fully satisfied the five requirements of § 38-77-350(A)" and "it also satisfied the four-element *Wannamaker* test." We agree with the trial court that the form, which was prescribed by the South Carolina Department of Insurance and includes language nearly identical to that endorsed by the supreme court in *Bower*, contained all of the information required under subsection 38-77-350(A) and

Wannamaker. Based on Thomason's personal explanation and on the content of the form, the court found "the notification process [was] commercially reasonable."

Finally, the trial court found that by signing the form, Cohen was deemed to understand its contents. Cohen signed the form in three places, including a page in which he acknowledged that he either read, or had someone read to him, the form's explanation of UIM coverage and its offer of that coverage. *See Floyd*, 367 S.C. at 263, 626 S.E.2d at 12 (stating "a competent person usually is presumed to have knowledge and understanding of a document he signs, absent evidence his signature was obtained by misrepresentation, fraud, forgery, or duress").

We find the evidence described above reasonably supports the trial court's finding that Progressive proved it met the *Wannamaker* test and therefore made a meaningful offer in compliance with section 38-77-160.

III. The Significance of the Form Not Being "Properly Completed" under Subsection 38-77-350(B)

Subsection 38-77-350(B) of the South Carolina Code (2002) provides that if the application form required by subsection 38-77-350(A) is "properly completed and executed by the named insured it is conclusively presumed that [the offer complied with section 38-77-160]." Progressive concedes the form was not "properly completed" because Cohen did not personally make all the required marks on it and, therefore, Progressive does not get the presumption. *See Floyd*, 367 S.C. at 262, 626 S.E.2d at 11 ("An insurer enjoys a presumption it made a meaningful offer when a form is executed in compliance with [section 38-77-350]. The insurer may not benefit from the [presumption] when the form does not comply with the statute." (citations omitted)). Thus, there is no reason to further consider the terms or requirements of subsection 38-77-350(B).

The Cohens argue, however, that because the form was not "properly completed" in compliance with subsection 38-77-350(B), it is not a meaningful offer under section 38-77-160 and *Wannamaker*. The argument is based on a misunderstanding of a statement the supreme court made in *Hanover Insurance Co. v. Horace Mann Insurance Co.*, 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990), and repeated in other cases including *Floyd*, 367 S.C. at 261, 626 S.E.2d at 11—"a noncomplying offer has the legal effect of no offer at all." The Cohens' argument confuses the requirement that the subsection 38-77-350(A) form be "properly

completed" to get the subsection 38-77-350(B) presumption with the requirement that an offer must be "meaningful" to comply with section 38-77-160. In essence, the Cohens argue that an offer form must be "properly completed" under subsection 38-77-350(B) or it is "no offer at all." We disagree.

In *Hanover*, the insurer's compliance with section 38-77-350 was not an issue.[2] Rather, the supreme court addressed only the requirement of a meaningful offer under section 38-77-160. In *Floyd*, the court made the statement in its general discussion of the requirement of a meaningful offer to comply with section 38-77-160.[3] In both cases, therefore, the court used the phrase "noncomplying offer" to refer to the requirement of a meaningful offer and compliance with section 38-77-160. The court was not referring in either *Hanover* or *Floyd*, or in any of the other opinions in which it has used the phrase,[4] to the subsection 38-77-350(B) requirement of "properly completing" the subsection 38-77-350(A) form. The supreme court has recently recognized, at least implicitly, that noncompliance with subsection 38-77-350(B) does not mean there was no meaningful offer:

> It is important to note "[f]ailure to comply with section 38-77-350(A) does not automatically require judicial reformation of a policy. Rather, even where an insurer is not entitled to the presumption [in section 37-77-350(B)]

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[2] In fact, subsection 38-77-350(B) did not apply in *Hanover* because the effective date of the subsection occurred after the events that gave rise to the lawsuit. *Compare* 1989 S.C. Acts 513 (stating section 38-77-350 "takes effect July 1, 1989") *and* 1989 S.C. Acts 461 (stating the "form must be used by insurers for all new applicants after December 1, 1989") *with Hanover*, 301 S.C. at 55, 389 S.E.2d at 657 (stating the appeal was heard January 9, 1990).

[3] The supreme court did discuss subsection 38-77-350(B) later in *Floyd*, but it was a separate discussion about the insurer's entitlement to the presumption available in that section, not about compliance with the *Wannamaker* test or section 38-77-160.

[4] *See Ray v. Austin*, 388 S.C. 605, 611, 698 S.E.2d 208, 212 (2010); *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 418, 618 S.E.2d 909, 917 (2005); *Progressive Cas. Ins. Co.*, 362 S.C. at 348-49, 608 S.E.2d at 571; *Bower*, 351 S.C. at 116, 569 S.E.2d at 315; *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 405, 475 S.E.2d 758, 759 (1996).

> that it made a meaningful offer, it may prove the sufficiency of its offer by showing that it complied with *Wannamaker*."

Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 164, 705 S.E.2d 432, 435 (2011) (quoting *Grinnell Corp. v. Wood*, 389 S.C. 350, 357, 698 S.E.2d 796, 799-800 (2010)).

We now expressly recognize it,[5] and hold that an insurer's noncompliance with subsection 38-77-350(B) does not render the use of the subsection 38-77-350(A) form a "noncomplying offer." Rather, the phrase "noncomplying offer," as used in *Hanover*, *Floyd*, and other cases, refers to an offer that is not meaningful under *Wannamaker*. Therefore, the insurer's inability to get the conclusive presumption under subsection 38-77-350(B) does not mean the insurer did not make a meaningful offer in compliance with section 38-77-160. Rather, it simply means the trial court must make the factual determination of whether the insurer made a meaningful offer. The trial court made that factual determination here.

Our holding is consistent with, if not mandated by, *Floyd*. In that case, the supreme court answered "no" to this specific question: "Is an offer form in which the blanks were filled in by an insurance agent . . . , and the form was then signed by the named insured, properly completed and executed pursuant to [subsection] 38-77-350(B) . . . ?" 367 S.C. at 258-59, 263, 626 S.E.2d at 9-10, 12. The court held, therefore, the insurer was "denied the benefit of the conclusive statutory presumption a meaningful offer was made." 367 S.C. at 264, 626 S.E.2d at 12. The court then stated, "Such a case presents a factual issue[,] . . . whether a meaningful offer was made to the insured pursuant to the *Wannamaker* analysis." *Id.* The result of *Floyd* is that after a determination that the insurer was not entitled

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[5] We say *Wiegand* "implicitly" recognized what we now hold because the issue there was different, and thus the case is distinguishable. In *Wiegand*, the court dealt with the sufficiency of the form, and not exclusively with the manner of its completion by the insured, *see* 391 S.C. at 164-65, 705 S.E.2d at 435, and the court's holding was that the insurer did get the conclusive presumption. Further, the quoted comment specifically mentions "failure to comply with [sub]section 38-77-350(A)," 391 S.C. at 164, 705 S.E.2d at 435, while the issue in this case is the significance of noncompliance with subsection 38-77-350(B).

to the conclusive presumption under subsection 38-77-350(B) because the insurance agent filled in the form, the case was returned to the district court for a factual determination of whether the insurer made a meaningful offer of UIM. 367 S.C. at 256, 263-64, 626 S.E.2d at 8, 12 (stating the supreme court answered the question on certification from the district court, leaving "a factual issue for resolution by the factfinder"). This precise scenario exists in this case—after a determination that the insurer was not entitled to the presumption because the insurance agent filled in the form, the trial court made the factual determination of whether the insurer made a meaningful offer under *Wannamaker* and section 38-77-160.

We do not address the parties' remaining arguments. *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 address remaining issues when resolution of another issue disposes of the appeal).

IV. Conclusion

The judgment of the trial court is **AFFIRMED**.

WILLIAMS and PIEPER, JJ., concur.