The Supreme Court of South Carolina

In the Matter of Donna Landis Bates, Petitioner

Appellate Case No. 2015-000284

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 1981, 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 February 16, 2015, 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 Donna Landis Bates 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 20, 2015

The Supreme Court of South Carolina

In the Matter of Julie Michaels Bondura, Petitioner

Appellate Case No. 2015-000278

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 16, 1990, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to Supreme Court of South Carolina, dated February 17, 2015, 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 Julie Michaels Bondura 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 20, 2015

The Supreme Court of South Carolina

In the Matter of Elizabeth Keys-Farrell, Petitioner

Appellate Case No. 2015-000148

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 9, 1981, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated February 2, 2015, 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 Elizabeth Keys-Farrell 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 20, 2015

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8
February 25, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kendra Samuel, Petitioner.

Appellate Case No. 2013-000115

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27498
Heard January 14, 2015 – Filed February 25, 2015

VACATED

Richard A. Harpootlian, of Richard A. Harpootlian, P.A., and Graham L. Newman, of Chappell Smith & Arden, P.A., both of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr.,both of Columbia, for Respondent.

PER CURIAM: This matter is before the Court by way of a petition for a writ of certiorari to review the court of appeals' decision in *State v. Samuel*, 400 S.C. 593, 735 S.E.2d 541 (Ct. App. 2012), reversing the trial court's pre-trial order excluding a statement that Kendra Samuel (Petitioner) made to law enforcement in connection with a polygraph examination. Because the trial court's ruling was not immediately appealable, we vacate the court of appeals' decision.

FACTS/PROCEDURAL BACKGROUND

Petitioner was arrested and charged with homicide by child abuse after babysitting her friend's ten-week-old baby (the victim), who died as a result of Shaken Baby Syndrome. Prior to arresting Petitioner, Columbia Police Department Investigator Joe Gray conducted a polygraph examination on Petitioner. After Gray informed Petitioner that the results of the polygraph examination indicated deception, Petitioner provided a statement (Statement 1) in which she discussed injuries that occurred to the victim while in her care. Subsequently, Petitioner provided four additional statements to various Columbia Police Department investigators and South Carolina Law Enforcement Division (SLED) agents providing similar information as she did in Statement 1.[1]

During pre-trial motions, Petitioner moved to suppress all of the statements she made to investigators, arguing that her statements were not knowing, voluntary, and admissible. During a *Jackson v. Denno*[2] hearing, the trial court heard testimony from the investigators involved in Petitioner's case. The trial court ultimately excluded Statement 1 based on its connection to Petitioner's polygraph examination, and admitted the remainder of Petitioner's statements.

In response, the State announced its intention to appeal the trial court's ruling regarding Statement 1, and the trial court concluded the hearing. The State filed a Notice of Appeal in the court of appeals, contending that the trial court's suppression of Statement 1 substantially impaired its ability to prosecute the case.[3]

[1] The statements made subsequent to Statement 1 included a recorded statement, a handwritten three-page statement, and handwritten questions and answers (consisting of two separate statements).

[2] 378 U.S. 368 (1964).

[3] Petitioner filed a cross-appeal as to all of the statements the trial court allowed

The court of appeals reversed the trial court's suppression of Statement 1. This Court granted Petitioner's petition for a writ of certiorari to review the court of appeals' decision pursuant to Rule 242, SCACR.

LAW/ANALYSIS

"Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within [section] 14-3-330 [of the South Carolina Code]." *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) (citing *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004)). Under section 14-3-330(2)(a), an interlocutory order is immediately appealable if the order affects "a substantial right" and "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." S.C. Code Ann. § 14-3-330(2)(a) (1976).

In *State v. McKnight*, 287 S.C. 167, 168, 337 S.E.2d 208, 337 (1985), we held that "[a] pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case" is directly appealable under section 14-3-330(2) of the South Carolina Code.

The State contends that it had the right to immediately appeal the trial court's suppression of Statement1 pursuant to *McKnight*. We disagree. Petitioner's statements made subsequent to Statement 1 were admitted by the trial court. Because those statements supplied essentially the same information and confession as Statement 1, the suppression of Statement 1 did not significantly impair the prosecution's ability to try Petitioner's case.

Accordingly, we vacate the court of appeals' decision reversing the trial court's suppression of Statement 1 because the trial court's pre-trial order was not immediately appealable.

into evidence. The court of appeals affirmed the trial court's admission of all statements other than Statement 1, holding that those statements were voluntary and admissible. *Samuel*, 400 S.C. at 604, 735 S.E.2d 547. Petitioner abandoned this issue on appeal to this Court.

VACATED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Independence National Bank, Petitioner,

v.

Buncombe Professional Park, LLC, and David DeCarlis,
s/a David D. DeCarlis, Respondents.

Appellate Case No. 2013-000915

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 27499
Heard February 5, 2015 – Filed February 25, 2015

REVERSED

D. Sean Faulkner, of Greenville, C. Mitchell Brown and Mattison Bogan, both of Columbia, all of Nelson Mullins Riley & Scarborough, LLP., for Petitioner.

Mary Leigh Arnold, of Mt. Pleasant, for Respondents.

JUSTICE PLEICONES: We granted certiorari to consider the Court of Appeals' decision in this mortgage priority case. *Independence Nat'l Bank v. Buncombe*

Prof'l Park, L.L.C., 402 S.C. 514, 741 S.E.2d 572 (Ct. App. 2013). We reverse the Court of Appeals' decision and reinstate the master's judgment because we find petitioner Independence National Bank (Bank) is entitled to be equitably subrogated to the original first mortgage on the property.[1]

FACTS

Respondent DeCarlis is the sole member of respondent Buncombe Professional Park, L.L.C. (Buncombe), which owned an undeveloped parcel of land. In 2007, DeCarlis, as Buncombe's representative, executed a note and mortgage with Bank. At the same time, DeCarlis executed a personal guaranty. As part of this transaction, Bank satisfied the existing first mortgage at closing.

Buncombe ceased paying on the 2007 mortgage. As Bank prepared this foreclosure suit, it learned in 2010 that DeCarlis held what had been, prior to Bank's satisfaction of the original first mortgage, a second mortgage on the property executed and properly recorded in 2006. The same attorney represented both Bank and Buncombe at the 2007 mortgage closing, and had actual notice of DeCarlis' 2006 mortgage at the time of the 2007 closing since he had conducted the title search. The attorney testified at the hearing in this matter that he erroneously neglected to have DeCarlis execute a satisfaction, release, or subordination of his 2006 mortgage at the 2007 closing in order to effectuate the parties' agreement that Bank was to have a first mortgage. Since no such document was executed, DeCarlis' 2006 second mortgage became the first lien, with priority over Bank's 2007 mortgage.

Bank brought this foreclosure action against both Buncombe and DeCarlis. The master "reformed" both Bank's 2007 and DeCarlis' 2006 mortgage, subordinating DeCarlis' mortgage to that of Bank. In a post-trial order following the parties' Rule 59 motions, the master found Bank was equitably subrogated to the original first mortgage which Bank had satisfied as part of the 2007 closing, thus giving Bank's 2007 mortgage priority over the 2006 DeCarlis mortgage on a second ground.

Buncombe and DeCarlis appealed, and the Court of Appeals reversed. We granted Bank's petition for a writ of certiorari to review that decision and now reverse on the equitable subrogation ground.

[1] In light of this ruling, we need not reach the issue of reformation.

EQUITABLE SUBROGATION

In order to be equitably subrogated to the original mortgage, Bank was required to demonstrate:

> (1) it paid the original first mortgage;
>
> (2) it was not a volunteer, but had a direct interest in the discharge of that mortgage;
>
> (3) it was secondarily liable for that mortgage;
>
> (4) no injustice would be done to DeCarlis by the allowance of equitable subrogation; and
>
> (5) it did not have actual notice of DeCarlis' 2006 second mortgage at the 2007 closing.
>
> *Matrix Fin. Serv. Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), *citing Dedes v. Strickland*, 307 S.C. 155, 158, 414 S.E.2d 134, 136 (1992).

The Court of Appeals held that Bank satisfied all the equitable subrogation criteria except the last, the absence of actual notice. The Court of Appeals held that the closing attorney was the agent of both Bank and Buncombe, and that his actual knowledge of DeCarlis' 2006 mortgage, garnered during the title search, constituted actual knowledge to Bank, his principal. Bank contends this holding was error, and that an agent's actual knowledge imputes only constructive knowledge to his principal. We agree.

The rule is that a principal has constructive notice of all the material facts which its agent, while acting in the scope of his authority, receives notice. *See SCJUR Agency* § 94, *citing Crystal Ice Co. of Columbia v. First Colonial Corp.*, 273 S.C. 306, 257 S.E.2d 496 (1979); *Bankers Trust of S.C. v. Bruce*, 283 S.C. 408, 323 S.E.2d 523 (Ct. App. 1984). The principal's constructive knowledge of a prior mortgage does not defeat a claim for equitable subrogation. *E.g., Dedes v. Strickland, supra*; *Enterprise Bank v. Fed. Land Bank of Columbia*, 139 S.C. 397, 138 S.E. 146 (1927); *Pee Dee State Bank v. Prosser*, 295 S.C. 229, 367 S.E.2d 708

(Ct. App. 1988) *overruled on other grounds United Carolina Bank v. Caroprop, Ltd.*, 316 S.C. 1, 446 S.E.2d 415 (1994).

The Court of Appeals erred in finding Bank had actual notice of DeCarlis' 2006 second mortgage by virtue of its agent's actual knowledge of this lien. Since Bank had only constructive knowledge of that mortgage, and since it otherwise met the requirements for equitable subrogation to the original first mortgage it satisfied in 2007, the master correctly ordered that Bank's 2007 mortgage was equitably subrogated to that mortgage and therefore has priority over DeCarlis' 2006 mortgage.

CONCLUSION

We reverse the decision of the Court of Appeals and reinstate the master's judgment.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Edwin Donald Givens, Respondent.

Appellate Case No. 2015-000036

Opinion No. 27500
Submitted February 18, 2015 – Filed February 25, 2015

DEFINITE SUSPENSION

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

James Emerson Smith, Jr., of James E. Smith Jr., PA, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel 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 of no less than six (6) to no more than nine (9) months. He requests the suspension be imposed retroactively to May 15, 2014, the date of his interim suspension. In the Matter of Givens, 408 S.C. 181, 758 S.E.2d 505 (2014). In addition, respondent agrees 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 suspend respondent from the practice of law in this state for nine (9) months, retroactive to the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

Facts

On May 13, 2014, respondent entered a plea in the United States District Court for the District of South Carolina Columbia Division in which he admitted to committing misprision of a felony in violation of Title 18 U.S.C. § 4. Respondent admitted he had actual knowledge that a federal felony had been committed by another person and that he failed to timely disclose the information to a federal law enforcement officer and affirmatively, actively, and deliberately concealed this information.

The criminal information states that, beginning in or around the summer of 2011 and continuing up to on or about January 13, 2012, respondent had actual knowledge of the commission of federal felony offenses involving the solicitation and receipt of kickbacks by J.P. and the payment of kickbacks by E.R. in connection with the 2011 South Carolina State University homecoming concert and that he failed to disclose this knowledge and took affirmative steps to conceal this information from federal law enforcement agents investigating the matter, both prior to and during a November 14, 2011 interview with agents of the Federal Bureau of Investigation.

On October 3, 2014, respondent was sentenced to probation for a term of six months and given probation credit beginning with the date of his plea on May 13, 2014. Respondent has completed the probation.

Respondent has accepted full responsibility for his conduct, self-reported the matter to ODC, and fully cooperated with the Government in its prosecution of the matter that gave rise to the criminal charges. The Government filed a motion for a downward departure based on respondent's exceptional cooperation. At respondent's sentencing, an Assistant United States Attorney described respondent as "extraordinarily accommodating, cordial, polite, forthcoming and patient" and further stated that she "could not have asked more from a witness."

Law

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

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 lawyer in other respects); Rule 8.4(c) (it is professional misconduct for lawyer to commit criminal act involving moral turpitude); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

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) and Rule 7(a)(4) (it shall be ground for discipline for lawyer to be convicted of crime of moral turpitude or serious crime).

Conclusion

We accept the Agreement for Discipline by Consent and impose a nine (9) month suspension, retroactive to the date of respondent's interim suspension. In the Matter of Givens, supra. Within one (1) year of the date of this opinion, respondent shall complete the Legal Ethics and Practice Program Ethics School and, within ten (10) days after completion of the course, provide certification of his compliance to the Commission on Lawyer Conduct. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Toni Lee Tack Pennington, Respondent.

Appellate Case No. 2014-002479

Opinion No. 27501
Submitted February 18, 2015 – Filed February 25, 2015

PUBLIC REPRIMAND

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

Harvey M. Watson, III, Esquire, of Ballard & Watson, Attorneys at Law, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel 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 public reprimand or definite suspension of up to nine (9) months, both with conditions. We accept the Agreement and issue a public reprimand with conditions as set forth hereafter. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Complainant A was employed as a secretary in respondent's law office. Complainant A's husband received a $25,000 inheritance. In January 2010, the funds were deposited into respondent's trust account. Respondent agreed to hold these funds in her trust account and disburse the funds to Complainant A and her husband at Complainant A's direction. Complainant A maintains she did not indicate that any of the money was to be retained by respondent for prior legal services. Respondent, on the other hand, maintains that Complainant A authorized her to write checks to herself to pay for past legal fees incurred when respondent represented Complainant A and her husband in various domestic matters.

In respondent's initial response to the Notice of Investigation, dated January 11, 2012, respondent indicated that when Complainant A gave her the check to deposit in January 2010, Complainant A authorized her to take $1,500 to pay for past legal fees. Respondent stated that in August 2010, Complainant A authorized another $1,000 payment to pay for respondent's representation of Complainant A's husband in a child support arrearage collection action. Respondent emphasized that the $2,500 total she received from Complainant A's money was for earned legal fees and that these fees were authorized by Complainant A. However, instead of withdrawing those earned fees, respondent wrote a check for $1,000 and a check for $1,500 payable to third parties to pay her personal obligations directly from her trust account.

In a subsequent response dated September 28, 2012, respondent informed ODC for the first time that Complainant A had authorized her to take $4,500 from the $25,000 for earned legal fees. Respondent claimed Complainant A then changed her mind and told respondent that $4,500 was only meant to be a loan from Complainant A to respondent. Respondent stated she disputed this later characterization by Complainant A, but relented and agreed to treat the $4,500 disbursement as a loan. Respondent continued to disburse funds from this money after the $25,000 was exhausted. The ledger for the $25,000 reflected a negative balance in the amount of $4,500; according to respondent, the negative balance represented funds she was to repay. Respondent repaid Complainant A by leaving earned fees from other matters in her trust account.

Respondent admitted there were no fee agreements for the cases she handled for Complainant A. In an on-the-record interview with ODC on May 16, 2013, respondent stated that when the $25,000 was deposited, she took $4,500 for herself. Respondent stated Complainant A simply told her she could take what she needed, and there was no fee agreement as to how much she was owed for the work previously performed. Respondent did not tell Complainant A how much of the funds she took and admitted she did not tell Complainant A that she took this money at all.

Matter II

Respondent admits she was familiar with the recordkeeping requirements of Rule 417, SCACR, but failed to maintain adequate financial records as required by the rule. She stated that she performed reconciliations by comparing the bank statements with the outstanding checks, but admitted that if the account did not reconcile, she did not do anything so long as her trust account balance was positive. Respondent failed to maintain client ledgers for all clients.

Matter III

Respondent served as a trustee for John Doe, an individual who was receiving social security benefits as the result of an accident. Once the social security payments were deposited into John Doe's trust, respondent would write checks from John Doe's trust to her trust account and then wire the money to John Doe in Greece. On several occasions, respondent disbursed funds to John Doe before she transferred the money from John Doe's trust account to her own, thus utilizing money belonging to other clients to pay John Doe.

Matter IV

Respondent deposited $35,000 in settlement proceeds into her trust account on behalf of a client in a products liability case. The client had signed the settlement agreement but later refused to sign the necessary release. Respondent held the settlement funds in her trust account for over two years until the matter was resolved. However, respondent's trust account fell below $35,000 at least once during that period. Respondent stated this likely happened as a result of disbursing funds to John Doe from her trust account prior to transferring those funds from John Doe's trust. Respondent admits she failed to safeguard funds entrusted to her.

Respondent attended the Legal Ethics and Practice Program Trust Account School on February 13, 2013.

Law

Respondent admits that by her conduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15(a)(lawyer shall safekeep client property); Rule 1.15(f) (lawyer shall not disburse funds from trust account unless funds to be disbursed have been deposited in account and are collected funds); and Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation). Respondent also violated provisions of Rule 417, SCACR.

Respondent also admits she 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

After careful consideration, the Court concludes that, at the time of her misconduct, respondent was overwhelmed by personal concerns, including her mother's declining health, caring for her special needs child, her pending divorce, and an impending move out of state. Further, the Court finds respondent had no intent to take funds belonging to others and that all clients have been made whole. Accordingly, the Court finds respondent's misconduct warrants a public reprimand. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) and, no later than one (1) year from the date of this opinion, respondent shall complete the Legal Ethics and Practice Program Ethics School and provide proof of completion of the course to the Commission. Accordingly, we accept the Agreement and publicly reprimand respondent for her misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina ex. rel. Alan Wilson, in his capacity as Attorney General of the State of South Carolina, Respondent,

v.

Ortho-McNeil-Janssen Pharmaceuticals, Inc., f/k/a Janssen Pharmaceutical, Inc., and/or Janssen, L.P., and Johnson & Johnson, Inc., Defendants,

of whom Ortho-McNeil-Janssen Pharmaceuticals, Inc. is the Appellant.

Appellate Case No. 2012-206987

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

Opinion No. 27502
Heard March 21, 2013 – Filed February 25, 2015

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Steven W. Hamm and Steven J. Pugh, both of Richardson, Plowden & Robinson, PA, of Columbia; C. Mitchell Brown, William C. Wood, Jr., A. Mattison Bogan, and Miles E. Coleman, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia; Edward M.

Posner and Chanda A. Miller, both of Drinker Biddle & Reath, LLP, of Philadelphia, Pennsylvania, for Appellant.

John B. White, Jr., and Donald C. Coggins, Jr., both of Harrison, White, Smith & Coggins, PC, of Spartanburg; John S. Simmons, of Simmons Law Firm, LLC, of Columbia; Attorney General Alan M. Wilson, Deputy Attorney General Robert D. Cook, and Assistant Deputy Attorney General C. Havird Jones, Jr. all of Columbia; Fletcher V. Trammell, Robert W. Cowan, and Elizabeth W. Dwyer, all of Bailey Peavy Bailey, of Houston, Texas, for Respondent.

Gray T. Culbreath and Laura W. Jordan, both of Gallivan White & Boyd, P.A., of Columbia, for Amicus Curiae, The South Carolina Chamber of Commerce.

JUSTICE KITTREDGE: Appellant Ortho-McNeil-Janssen Pharmaceuticals (Janssen) is a pharmaceutical company that manufactures the antipsychotic drug Risperdal. Risperdal is among a class of drugs prescribed primarily for the treatment of schizophrenia. The Attorney General of South Carolina believed that Janssen had violated the South Carolina Unfair Trade Practices Act (SCUTPA)[1] by engaging in unfair methods of competition by willfully failing to disclose known risks and side effects associated with Risperdal.

On January 24, 2007, the State and Janssen entered into a tolling agreement concerning the statute of limitations. SCUTPA has a three-year statute of limitations, as section 39-5-150 of the South Carolina Code provides that "[n]o action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit." The State filed its Complaint on April 23, 2007, seeking statutory civil penalties against Janssen on two claims. The first claim arose from the content of the written material furnished by Janssen since 1994 with each Risperdal prescription, the so-called labeling claim. The second claim centered on alleged false information contained in a November 2003 Janssen-generated letter sent to the South Carolina community of

[1] S.C. Code Ann. §§ 39-5-10 to -180 (1985 & Supp. 2013).

prescribing physicians, the so-called Dear Doctor Letter. Because both claims arose more than three years prior to January 24, 2007, Janssen pled the statute of limitations as a bar to the Complaint.

The matter proceeded to trial. A jury rendered a liability verdict against Janssen on both claims. The trial court rejected Janssen's defenses, including the statute of limitations, finding that both claims were timely. The trial court imposed civil penalties against Janssen for both claims totaling $327,073,700 based on 553,055 separate violations of SCUTPA in connection with its deceptive conduct in the sales and marketing of Risperdal.

Janssen appeals. We affirm the liability judgment on the labeling claim but modify the judgment to limit the imposition of civil penalties to a period of three years from the date of the tolling agreement, which is essentially coextensive with the three-year statute of limitations, subject to an additional three months by virtue of the time period between the January 24, 2007, tolling agreement and the filing of the Complaint on April 23, 2007. We further remit the civil penalties on the labeling claim to $34,545,400. We affirm the liability judgment on the DDL claim, but remit those civil penalties to $101,480,000. Accordingly, we affirm in part, reverse in part, and remand for entry of judgment against Janssen in the amount of $136,025,400.

I.
FDA Regulatory Process and Background

A brief summary of the Food and Drug Administration's (FDA) regulatory authority over the pharmaceutical industry and the evolution of antipsychotic drugs provides a helpful backdrop to the facts of this case. "In the 1930's, Congress became increasingly concerned about unsafe drugs and fraudulent marketing, and it enacted the Federal Food, Drug, and Cosmetic Act (FDCA)."[2] *Wyeth v. Levine*, 555 U.S. 555, 566 (2009) (citation omitted). The FDCA's "most substantial innovation was its provision for premarket approval of new drugs." *Id.* Following implementation of the FDCA, the FDA "required every manufacturer to submit a new drug application, including reports of investigations and specimens of

[2] The FDCA is codified at 21 U.S.C. §§ 301–399f (2006 & Supp. V 2011).

proposed labeling" for regulatory review and approval.[3] *Id.* "Until its application became effective, a manufacturer was prohibited from distributing a drug." *Id.* FDA regulations require a new drug application to "include all clinical studies, as well as preclinical studies related to a drug's efficacy, toxicity, and pharmacological properties." *Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S. 193, 196 (2005) (citing 21 C.F.R. § 314.50(d)(2), (5) (2005)).

The FDA new drug approval process includes specific procedures through which warning labels are drafted, approved, and required to be included in the packaging of manufactured drugs. A drug label "must contain a summary of the essential scientific information needed for the safe and effective use of the drug," and the label "must be informative and accurate and neither promotional in tone nor false or misleading in any particular." 21 C.F.R. § 201.56(a)(1)–(2) (2014). Indeed, federal regulations set forth detailed requirements as to the content, the formatting, and the order of required information about potential risks and the safe and effective use of a drug. *Id.* § 201.57(c) (2014). Specifically, FDA regulations require drug labels to include, *inter alia*: (1) "black box" warnings about serious risks that may lead to death or serious injury; (2) contraindications describing any situations in which the drug should not be used because the risk of use outweighs any possible therapeutic benefit; (3) warnings and precautions about significant adverse reactions and other potential safety hazards; and (4) any adverse reactions for which there is a basis to believe a causal relationship exists between the drug and the occurrence of the adverse event. *Id.* As these FDA regulations make clear, the category in which a particular risk appears on a drug label is a critical indicator of both the degree of the risk and also the likelihood and severity of the adverse consequences the drug may cause.

After a new drug application has been approved, the drug's sponsor has continuing duties to the FDA to ensure the long term efficacy and safety of the approved drug. For example, once drugs are approved by the FDA, the drug's sponsor is required to review, and report to the FDA, all "adverse drug experience"[4] information it

[3] Prior to submitting a new drug application to the FDA for approval, the developer of the drug must first "gain authorization to conduct clinical trials (tests on humans) by submitting an investigational new drug application (IND)." *Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S. 193, 196 (2005) (citations omitted).

[4] FDA regulations define an "adverse drug experience" as:

receives from any source, including adverse experiences reported during the process of post-marketing clinical trials. 21 C.F.R. § 314.80(b), (c) (2014). As new risks and side effects are discovered, a manufacturer must revise a drug's label "to include a warning about a clinically significant hazard as soon as there is reasonable evidence of a causal association with a drug; a causal relationship need not have been definitely established." 21 C.F.R. § 201.57(c)(6)(i). As the FDA does not conduct independent scientific testing, it is incumbent upon sponsors to disclose all clinical data to ensure the safe and effective use of drugs.

Some have expressed a growing concern regarding the pharmaceutical industry's reticence to disclose negative clinical data, and the impact this has on the public health and welfare. Indeed, it has been stated that:

> [T]he failure to disclose study results not only impacts clinical trial participants, but the health of the general public may be put in jeopardy as well. For drugs that have received FDA approval, post-market clinical trials investigating new uses of the medication often reveal important information concerning side effects and related adverse complications with the treatment. To the extent that prescribing physicians do not have this essential data, they could inadvertently be putting their patients at serious risk by continuing to recommend the medication.
>
> Over the past few years, numerous scandals in the drug industry illustrate that concealing unfavorable research results is far from an isolated practice. . . . . In a quest to boost sales and increase corporate profits, the temptation to hide or selectively disclose clinical trial data has proven to be too much.

> Any adverse event associated with the use of a drug in humans, whether or not considered drug related, including the following: An adverse event occurring in the course of the use of a drug product in professional practice; an adverse event occurring from drug overdose whether accidental or intentional; an adverse event occurring from drug abuse; an adverse event occurring from drug withdrawal; and any failure of expected pharmacological action.

21 C.F.R. § 314.80(a) (2014).

Christine D. Galbraith, *Dying to Know: A Demand for Genuine Public Access to Clinical Trial Results Data*, 78 Miss. L.J. 705, 710 (2009).

"The FDA's premarket approval of a new drug application includes the approval of the exact text in the proposed label." *Wyeth*, 555 U.S. at 568 (citing 21 U.S.C. § 355 (2006); 21 C.F.R. § 314.105(b) (2008)). Subsequent to approval of the new drug application, a drug manufacturer must submit a supplemental application to the FDA in order to effect any changes in the drug label. *Id.* (citing 21 U.S.C. § 355 (2006); 21 C.F.R. § 314.105(b) (2008)). "There is, however, an FDA regulation that permits a manufacturer to make certain changes to its label *before* receiving the agency's approval." *Id.* (emphasis added).

> Among other things, this "changes being effected" (CBE) regulation provides that if a manufacturer is changing a label to "add or strengthen a contraindication, warning, precaution, or adverse reaction" or to "add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product," it may make the labeling change upon filing its supplemental application with the FDA; it need not wait for FDA approval.

Id. (quoting 21 C.F.R. §§ 314.70(c)(6)(iii)(A), (C)).

Following FDA approval of a new drug (or a new indication for an existing drug), pharmaceutical companies may begin to market the drug, subject to federal regulations. *See, e.g.*, 21 C.F.R. § 203.2 (2014) ("The purpose of this part is . . . to protect the public health . . . ."). Typical pharmaceutical marketing strategies include both direct sales calls (i.e., visits to prescribing doctors to distribute literature and samples) and academic writings and speaking events led by healthcare professionals.

Risperdal (risperidone) is an antipsychotic drug primarily used to treat schizophrenia. Schizophrenia is a chronic, debilitating mental illness that affects approximately 1% of the population. Following onset, schizophrenia is a lifelong, incurable disease, and treatment almost always involves the use of an antipsychotic drug. Between the 1950s and 1990s, medical practitioners prescribed typical antipsychotics such as Thorazine (chlorpromazine), Prolixin (fluphenazine), Haldol (haloperidol), Loxitane (loxapine), and Mellaril (thioridazine) to treat schizophrenia. Although effective, these typical antipsychotics posed a number of negative side effects, including involuntary muscle movements and tardive dyskinesia, a long-lasting movement disorder.

By the 1980s, clozapine was being investigated for the treatment of schizophrenia on the theory that it might be more effective and cause fewer movement disorders than typical antipsychotics. Clozapine was termed an "atypical antipsychotic" because it affected a different part of the brain than the older, typical antipsychotics. The medical community soon discovered that clozapine, too, had negative side effects, including agranulocytosis—a dramatic and sometimes deadly decrease in white blood cell count. Thus, in spite of its efficacy in treating the symptoms of schizophrenia, clozapine was usually used only as a "last resort" drug, prescribed for only about 10% of the schizophrenic population.

In 1994, Janssen introduced Risperdal in the United States as the second atypical antipsychotic drug on the market. From 1994 to 1996, Risperdal held a unique place in the market—it was promoted as being more effective than the older, typical antipsychotics, without the dangerous side effects associated with clozapine. In 1996, Eli Lilly (Lilly) introduced a third atypical antipsychotic drug to the market: Zyprexa. Zyprexa was dramatically successful when it hit the market, and Lilly and Janssen competed to capture the antipsychotic market.

Spurred by this fierce competition, Janssen developed a marketing strategy to distinguish Risperdal and protect its market share. By 1998, Janssen was promoting Risperdal as having a lower risk of weight gain and a lower metabolic risk profile than Zyprexa.[5] Despite the claims made by Janssen, post-marketing studies, some as early as 1994, revealed Risperdal posed a serious risk of substantial weight gain, increased prolactin levels, and hyperprolactinemia in patients taking atypical antipsychotics. This increased the long-term risk of developing various kinds of cancer, osteoarthritis, cardiovascular disease, and stroke. Additionally, atypical antipsychotics greatly increased the risk of diabetes mellitus, which can have very serious, even life-threatening consequences. By

[5] In turn, Lilly differentiated Zyprexa as posing a lower risk for movement disorders and hyperprolactinemia, a hormonal imbalance causing serious and lasting reproductive side effects, when compared to Risperdal.

1997, Janssen also had information that Risperdal posed a serious risk of stroke, cardiac arrest, and sudden death in the elderly. Despite this clinical information, it was several years before Janssen updated the Risperdal label to accurately reflect the frequency and severity of the risk of hyperprolactinemia, weight gain and diabetes, or stroke, cardiac arrest, and sudden death in the elderly.

In 1997, Janssen commissioned a clinical trial (Trial 113) designed to establish Risperdal's superiority over Zyprexa as to metabolic side effects, including weight gain and diabetes. In 1999, the results of Trial 113 were not what Janssen desired, as the study concluded that there was no difference between Risperdal and Zyprexa in terms of long-term weight gain or the onset of diabetes mellitus. Janssen did not disclose or publish the results of Trial 113 and continued to claim that Risperdal was superior to Zyprexa in terms of these negative metabolic side effects.

By August 2000, Janssen also received results from two epidemiological studies. One study was based on a review of the records of patients treated with atypical antipsychotics in a New England insurance database (ERI study). The ERI study showed that Risperdal patients developed diabetes mellitus at a significantly higher incident rate than patients taking Zyprexa. The second study was commissioned by Janssen (HECON study), and it concluded that Risperdal was not associated with an increased risk of diabetes mellitus. By this time, and notwithstanding Janssen's furtive efforts, the risks and adverse side effects associated with atypical antipsychotic drugs were fairly well known.

In May 2000, the FDA asked sponsors of atypical antipsychotic drugs to submit a comprehensive review of all clinical data pertaining to metabolic side effects. In response, Janssen did not disclose the results of the Trial 113 study but disclosed *only* the favorable results from its own HECON study, affirmatively indicating to the FDA that no long-term trials pertaining to metabolic side effects had taken place. The FDA's review was not thwarted by Janssen's efforts, as the FDA's investigation prompted it to request that product labeling for all atypical antipsychotic medications, including Risperdal, include a warning about hyperglycemia and diabetes.

Janssen was concerned that the FDA-mandated label warning would result in a substantial loss of Risperdal market share. Notwithstanding the Trial 113 and ERI study results suggesting an association between Risperdal and diabetes, in October 2000, Janssen's Associate Director of Central Nervous System Medical Affairs wrote an email to her colleagues urging that Janssen must avoid Risperdal being "lumped in to [sic] the atypical class for diabetes. . . . [W]e need to work hard on a strategy to avoid risperdal being thought of as a diabetes-inducing medication. Instead, when worried about diabetes, we want doctors to prescribe Risperdal."

Janssen then determined it would take control of how the message surrounding the new diabetes warning would be communicated. Janssen officials' strategy was to "soften the blow" through what is known in the industry as a Dear Doctor Letter (DDL). The inspiration came from a DDL that Lilly sent to prescribers, informing them that the entire class of atypical antipsychotics was now subject to a new "class label" for diabetes and hyperglycemia. A senior vice president for Janssen's parent company wrote in an internal email that "Lilly's DDL is pretty clever. How much commercial liability would we incur if we sent a similar letter about Risperdal, assuming the FDA is unwilling to communicate the issue?"

On November 10, 2003, Janssen disseminated a DDL, which did not include the text of the new diabetes/hyperglycemia warning, but stated:

> Hyperglycemia-related adverse events have infrequently been reported in patients receiving RISPERDAL. Although confirmatory research is still needed, a body of evidence from published peer-reviewed epidemiology research suggests that RISPERDAL is not associated with an increased risk of diabetes when compared to untreated patients or patients treated with conventional antipsychotics. Evidence also suggests that RISPERDAL is associated with a lower risk of diabetes than some other studied atypical antipsychotics.

To put it mildly, the November 2003 DDL contained false information.

Additionally, in training its employees on the labeling update, Janssen communicated to its field sales team that Risperdal had a "0%" increased diabetes risk compared to placebo. This was part of the message communicated to physicians in DDL follow-up visits with physicians.

Meanwhile, by January 2004, Janssen had updated the Risperdal label to include the new diabetes/hyperglycemia warning. Janssen determined that the negative sales impact had been minimal because of its deceptive efforts in the November

2003 DDL. In other words, the November 2003 DDL worked, as far as Janssen was concerned, in protecting its market share.

Thereafter, in April 2004, the FDA's Division of Drug Marketing Advertising and Communications (DDMAC)[6] issued a "Warning Letter" to Janssen, characterizing the November 2003 DDL as "false or misleading" in violation of the FDCA. Specifically, the letter provided:

> DDMAC has concluded that the DHCP[7] letter is false or misleading in violation of Sections 502(a) and 201(n) of the Federal Food, Drug, and Cosmetic Act (Act) (21 U.S.C. 325(a) and 321(n)) because it fails to disclose the addition of information relating to hyperglycemia and diabetes mellitus to the approved product labeling, minimizes the risk of hyperglycemia-related adverse events, which in extreme cases is associated with serious adverse events including ketoacidosis, hyperosmolar coma, and death, fails to recommend regular glucose control monitoring to identify diabetes mellitus as soon as possible, and misleadingly claims that Risperdal is safer than other atypical antipsychotics. The healthcare community relies on DHCP letters for accurate and timely information regarding serious risks and associated changes in labeling and the dissemination of this letter at a time critical to educating healthcare providers is a serious public health issue.

The FDA also determined that the scientific studies referenced in the DDL "do not represent the weight of the pertinent scientific evidence" nor did the DDL accurately describe the results of the cited studies. As a result of the FDA's warning, Janssen issued a corrective letter in July 2004, acknowledging that the November 2003 DDL "omitted material information about Risperdal, minimized potentially fatal risks, and made misleading claims suggesting superior safety to other atypical antipsychotics without adequate substantiation, in violation of the [FDCA]."

[6] This agency is now known as the Office of Prescription Drug Promotion (OPDP).

[7] Dear Health Care Provider, which is another term for a Dear Doctor Letter.

As to Risperdal's label, Janssen did not update the label to include a boxed warning regarding the risk of stroke, cardiac arrest, and sudden death in the elderly until February 2005, and no warning about hyperprolactinemia appeared in the label until August 2008.[8]

In April of 2007, the Attorney General of South Carolina filed a state law claim against Janssen, seeking civil penalties under SCUTPA. The State pursued two claims against Janssen, one in connection with the Risperdal label (the labeling claim) and the second concerning the November 2003 DDL (the DDL claim). Following a twelve-day trial, the jury returned a verdict on liability in favor of the State, finding that Janssen's actions with respect to both the labeling and DDL claims were willful violations of SCUTPA.

After dismissing the jury, the trial court separately considered evidence and arguments during a two-day hearing to determine the appropriate penalty for Janssen's SCUTPA violations. The trial court issued an order assessing penalties against Janssen of $152,849,700 for the labeling claim and $174,224,000 for the DDL claim, for a total penalty of $327,073,700. This appeal followed. This case was transferred from the court of appeals to this Court pursuant to Rule 204(b), SCACR.

II.
Analysis Concerning Liability

SCUTPA "declares unfair or deceptive acts or practices in trade or commerce unlawful." *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004) (citing S.C. Code Ann. § 39-5-20(a) (2002)). "An unfair trade practice

[8] To be sure, prior versions of the Risperdal label mentioned the risk of "cerebrovascular adverse events" in elderly patients, increased prolactin levels, and hyperprolactinemia; however, Janssen's categorization of those risks on the label underrepresented and minimized the frequency and severity of the risks associated with Risperdal. As noted, the category in which a particular risk appears on a drug label is a critical indicator of both the degree of the risk and also the likelihood and severity of the adverse consequences the drug may cause. *See* 21 C.F.R. §§ 201.56, 201.57 (setting forth detailed requirements on the content and format of information on drug labels to ensure labels are not inaccurate, false, or misleading and convey all pertinent information regarding the safe and effective use of drugs).

has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000) (citing *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 326, 396 S.E.2d 105, 108 (Ct. App. 1989), *aff'd in part, rev'd in part on other grounds*, 309 S.C. 263, 422 S.E.2d 103 (1992)).

SCUTPA provides for both civil actions brought by private citizens and enforcement actions brought by the Attorney General on behalf of the State. S.C. Code Ann. §§ 39-5-50(a), -110(a), -140(a) (1985). While the only section of SCUTPA at issue in this case is an enforcement action brought by the Attorney General, we note the distinction between the two types of actions. In an action brought by a citizen under section 39-5-140(a) of the South Carolina Code, there is a requirement that the person suffer an "ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice . . . ." Thus, SCUTPA requires that a private claimant suffer an *actual* loss, injury, or damage, and requires a causal connection between the injury-in-fact and the complained of unfair or deceptive acts or practices. S.C. Code Ann. § 39-5-140(a).[9]

Conversely, an enforcement action brought by the Attorney General has no such actual impact requirement. *See* S.C. Code Ann. § 39-5-50(a). The Attorney General "may recover on behalf of the State a civil penalty of not exceeding five thousand dollars per violation." S.C. Code Ann. § 39-5-110(a). "The legislature intended . . . [SCUTPA] to control and eliminate the large scale use of unfair and deceptive trade practices within the state of South Carolina." *Noack Enters. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 477, 351 S.E.2d 347, 349 (Ct. App. 1986) (quotations and citations omitted).

At the outset of our analysis, our review of the extensive record compels us to acknowledge that Risperdal has been an effective drug. The State did not file this case because of concern with Risperdal's efficacy as an atypical antipsychotic.[10]

[9] "Under section 39-5-140, a plaintiff can recover treble damages where 'the use or employment of the unfair or deceptive . . . act or practice was a willful or knowing violation of § 39-5-20.'" *Wright v. Craft*, 372 S.C. 1, 23–24, 640 S.E.2d 486, 498 (Ct. App. 2006) (quoting *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 477, 351 S.E.2d 347, 348–49 (Ct. App. 1986)).

Risperdal, like virtually all pharmaceutical drugs, has risks and side effects. The State filed this case because of its belief that Janssen engaged in unfair and deceptive conduct in South Carolina by failing to properly disclose Risperdal's risks and side effects in an attempt to mislead prescribing physicians and the public. An objective review of the evidence and law bears out the State's allegations that Janssen engaged in a systematic pattern of deceptive conduct.

Janssen raises a number of issues in their appeal. While we reach the merits of a number of these issues, many of the issues are not preserved for this Court's review, and we address them only briefly.

A.
Opening and Closing Arguments

Janssen claims that various portions of the State's opening and closing arguments were inflammatory and unduly prejudicial and thus warrant a new trial. Specifically, Janssen claims that the State invited the jury to impose liability on the basis of Janssen's size and commercial success by repeatedly referring to Janssen's profits from selling Risperdal and claiming that Janssen put "profits over safety."

We find that Janssen's arguments on appeal are procedurally barred. Although Janssen noted a generalized "continuing objection" at the outset of trial, apparently believing it could make a more specific after-the-fact objection to any alleged improper argument or evidence, such an approach is wholly inconsistent with our law requiring a contemporaneous objection. *See Young v. Warr*, 252 S.C. 179, 200, 165 S.E.2d 797, 807 (1969) ("[T]he proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object and to

[10] Similar Risperdal litigation against Janssen and its parent company, Johnson & Johnson, has been ongoing throughout the United States. In November 2013, Johnson & Johnson agreed to pay more than $2.2 billion in civil and criminal settlements with the United States Department of Justice to resolve claims that it improperly marketed Risperdal.

Following oral argument, we received supplemental citations filed by Janssen regarding similar litigation in Louisiana and Arkansas. After closely examining the reported decisions in those states, we have determined that the cases involve statutory claims which do not mirror the SCUTPA.

have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon." (citing *Crocker v. Weathers*, 240 S.C. 412, 424, 126 S.E.2d 335, 340 (1962))). This rule is designed to enable the trial court to timely address and remedy a founded objection. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("'Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.'" (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.,* 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006))). Here, absent a contemporaneous objection identifying the particular comments complained of and the basis for the objection, Janssen has waived its right to complain about this issue on appeal. *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005) (holding that the failure to contemporaneously object precluded the defendant from raising an issue on appeal (citing *Taylor v. Medenica*, 324 S.C. 200, 212, 479 S.E.2d 35, 41 (1996))).[11]

Moreover, Janssen's "continuing objection" at trial concerning the propriety of counsel's statements to the jury was limited to relevance, which is an entirely different basis than the inflammatory/unduly prejudicial argument that Janssen now advances on appeal. Thus, even generously construing Janssen's pre-trial objection as sufficient to preserve the objection, Janssen's claim is nonetheless procedurally barred from appellate review because Janssen argues a different basis on appeal than was argued at trial. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal." (citing *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001); *State v. Benton*, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000))).

[11] We acknowledge the rule in South Carolina that counsel is not required to harass the trial judge by making continued objections after an issue has been ruled upon. *See Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 45–46, 426 S.E.2d 756, 758 (1993) (noting that where a trial judge has fair opportunity to consider and rule upon an issue, it is not incumbent upon counsel "to harass the judge by parading the issue before [the trial judge] again"). However, that is not the situation before us, for Janssen failed to bring to the trial court's attention any of the comments of which it now complains or specify the basis for its objection, much less obtain a ruling from the trial court. Thus, because the trial court did not have a fair opportunity to consider and rule upon Janssen's specific objections, it was incumbent upon Janssen's counsel to object contemporaneously.

Janssen's claims of error are without merit in any event. Janssen relies on our holding in *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010), in urging this Court to order a new trial. In *Branham*, the plaintiff's attorney strayed beyond the parameters of permissible jury argument and sought punitive damages for the damage caused to non-parties. *Id.* at 235, 701 S.E.2d at 22. We ordered a new trial, holding that "[t]he closing argument invited the jury to base its verdict on passion rather than reason. . . . [and] denied [defendant] a fair trial." *Id*. We find that *Branham* is readily distinguishable from this case. Here, counsel for the State directly linked the elements of SCUTPA to Janssen's misleading and deceptive practices and its motivations to retain (and increase) Risperdal market share. Such arguments were within proper bounds as the State sought to establish that Janssen acted willfully and contrary to the public interest. In addition, the nature of counsel's comments is more closely associated with what Janssen believes was a grossly excessive award of civil penalties, and the jury's role was limited to determining liability. The jury had no role in determining the amount of the civil penalties.

B.
Admission of 1994, 1999, and 2004 DDMAC Letters

Janssen argues that the admission of several DDMAC letters was reversible error because the letters constitute inadmissible hearsay and should also have been excluded under Rule 403, SCRE. Once again, we find that Janssen has not preserved these assignments of error for appellate review.[12] Even if we were to

[12] Janssen's contemporaneous objection at trial to admission of the 1994 DDMAC letter was on the basis of relevance, not on the basis of hearsay or Rule 403, SCRE. *See Talley v. S.C. Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) ("It is an axiomatic rule of law that issues may not be raised for the first time on appeal." (citing *Am. Hardware Supply Co. v. Whitmire*, 278 S.C. 607, 609, 300 S.E.2d 289, 290 (1983))). While it appears that Janssen was more specific in objecting to the admission of the 1999 DDMAC letter—objecting on relevancy, hearsay, and Rule 403, SCRE grounds—the trial judge did not specifically rule on the hearsay or Rule 403, SCRE, issues. Thus, Janssen's assignment of error is not preserved for appellate review. *Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) ("An issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court . . . ." (citing *Anonymous (M-156-90) v. State Bd. of*

reach the merits of these claims, however, we would affirm the admission of these letters pursuant to Rule 220(b)(1), SCACR. This evidence was relevant to the issue of liability and concomitantly the statute of limitations concerning the labeling claim, which, as discussed below, inures to Janssen's benefit.

C.
Adverse Impact

Janssen argues that the State's SCUTPA claims fail as a matter of law because the State failed to show that Janssen's unfair and deceptive conduct had an adverse impact within South Carolina. We disagree. We reject Janssen's attempt to ascribe an injury-in-fact element in an individual claim to an Attorney General directed claim, for to do so would be judicial engrafting of an element beyond that imposed by the legislature. In the context of this case, Janssen's attempt to judicially impose an injury-in-fact element to an Attorney General initiated SCUTPA claim is nothing more than an "if we lied, nobody fell for it" defense. In this regard, we observe that Janssen seeks to impose an absurd adverse impact element in a claim concerning alleged unfair and deceptive marketing of prescription medicines. In many instances, as here, the manifestations of adverse consequences from prescription medicines are not immediate, but occur over time. Such is generally the case with Risperdal. In any event, Janssen's deceptive conduct had an adverse impact on the citizens of South Carolina, for Janssen maintained its superior market share, which, after all, was what Janssen sought to achieve by its dishonesty.

The provisions of SCUTPA allow three types of enforcement actions: (1) lawsuits initiated by the Attorney General seeking injunctive relief; (2) lawsuits by the Attorney General seeking civil penalties; or (3) lawsuits by private parties who have suffered ascertainable losses. S.C. Code Ann. §§ 39-5-50, -110, -140; *see*

Med. Exam'rs, 329 S.C. 371, 375, 496 S.E.2d 17, 18–19 (1998); *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993))). Regarding the 2004 DDMAC letter, no challenge is preserved for our review. Janssen's pre-trial objection to admission of the letter was only with regard to use or mention of the letter during opening statements, and Janssen's counsel did not state the specific grounds for the objection. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector." (citation omitted)).

also Michael R. Smith, Note, *Recent Developments Under the South Carolina Unfair Trade Practices Act*, 44 S.C. L. Rev. 543, 543–44 (1993) (discussing generally various provisions of SCUTPA). Although this case is an appeal from a lawsuit by the Attorney General seeking civil penalties, we note some important distinctions between actions brought by the Attorney General and those brought by private parties.

To recover actual damages under SCUTPA, a private claimant must suffer an actual loss, injury, or damages, and the claimant must demonstrate a causal connection between the injury-in-fact and the complained of unfair or deceptive acts or practices. S.C. Code Ann. § 39-5-140(a). Additionally, a private party may recover treble damages if the unlawful acts at issue are determined to be willful or knowing. *Id*. On the other hand, where the Attorney General files suit on behalf of the State, he is not required to show any injury-in-fact to recover a civil penalty.[13] *See* S.C. Code Ann. §§ 39-5-110, -140. Rather, SCUTPA allows the Attorney General to recover statutory damages of up to $5,000 per violation upon a showing

[13] Other states have similar provisions. *See, e.g.*, *Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1196 (Ill. App. Ct. 2008) ("Although the Attorney General may prosecute a violation of the [Consumer Fraud and Deceptive Business Practices] Act without showing that any person has in fact been damaged, it is well settled that in order to maintain a private cause of action under the Consumer Fraud Act, a plaintiff must prove that she suffered actual damage as a result of a violation of the Act." (citation omitted)); *Edmonds v. Hough*, 344 S.W.3d 219, 223 (Mo. Ct. App. 2011) ("The [Merchandising Practices] Act eliminates the need for the Attorney General to prove intent to defraud or reliance in order for the court to find that a defendant has engaged in unlawful practices. Intent and reliance are not necessary elements of the cause of action." (quotations and citations omitted)). We recognize, however, there are jurisdictions that require the state to show an injury-in-fact as an element of unfair trade practice type claim. Following oral argument in this case, Janssen has submitted supplemental authority consisting of court decisions from other states reversing trial court verdicts against Janssen. We have carefully reviewed those decisions and conclude they are not persuasive, for the cases submitted by Janssen involve different claims with elements that do not mirror the South Carolina UFTPA.

that the unlawful acts at issue are willful.[14] S.C. Code Ann. § 39-5-110(a). If the Attorney General determines that an enforcement action "would be in the public interest," he is statutorily authorized to proceed without making any such showing of injury-in-fact or reliance.[15] S.C. Code Ann. § 39-5-50(a). Thus, Janssen misconstrues the legislature's manifest purpose in providing for an Attorney General directed claim, for a SCUTPA action brought by the State is to protect the citizens of South Carolina from unfair or deceptive acts in the conduct of any trade or commerce. Janssen's contention to the contrary is not only fundamentally at odds with unambiguous legislative intent in authorizing an Attorney General SCUTPA claim, but is also inconsistent with well-established South Carolina law.

On the issue of liability, our case law interpreting and applying SCUTPA is clear—while a private party SCUTPA action requires the traditional showing of an injury, an action brought by the Attorney General on behalf of the State contains

[14] "[A] willful violation occurs when the party committing the violation knew or should have known that his conduct" was unlawful. S.C. Code Ann. § 39-5-110(c). In addition to the civil penalty, the Attorney General is authorized to seek injunctive relief when he "has reasonable cause to believe that any person is using, has used or is about to use any method, act or practice declared by § 39-5-20 to be unlawful . . . ." S.C. Code Ann. § 39-5-50(a). To be sure, the legislature has granted the Attorney General broad investigative powers. *See* S.C. Code Ann. § 39-5-70(a) ("When it appears to the Attorney General that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this article[,] . . . [he may serve] an investigative demand . . . ."). While an individual statutory claim necessarily includes an injury-in-fact element, an Attorney General initiated claim does not. It is the protection of the people of South Carolina that lies at the center of an Attorney General directed claim.

[15] "'It is in the public interest generally to prevent the use of false and misleading statements in the conduct of business . . . [and] actual deception need not be shown; a finding of a tendency [and capacity] to deceive and mislead will suffice.'" *State ex rel. McLeod v. Brown*, 278 S.C. 281, 285, 294 S.E.2d 781, 783 (1982) (quoting *U.S. Retail Credit Assoc., Inc. v. F.T.C.*, 300 F.2d 212, 221 (4th Cir. 1962)) (ellipsis in original). Additionally, "[t]he health, welfare, and safety of the lives and property of the people of this State . . . are matters of public concern." S.C. Const. art. XII, § 1.

no actual injury element. For the foregoing reasons, we hold that, although the State had the burden of proving Janssen's representations had a *tendency to deceive*, the State was not required to show actual deception or that those representations caused any appreciable injury-in-fact or adversely impacted the marketplace. We find ample support in the record that the State met its burden of proving that Janssen's actions had the tendency to deceive. Janssen's unfettered desire for sales and market share led it to engage in a systematic pattern of intentional nondisclosure, false representations, and deceptive conduct in violation of SCUTPA. Most assuredly, Janssen intended to deceive the public and the medical community. Although we reject Janssen's effort to impose an injury-in-fact element in an Attorney General initiated claim, we believe the argument carries persuasive weight in the assessment of an appropriate penalty, which we address in the penalty section.

D.
Exclusion of Dr. Wecker's Expert Testimony

Janssen claims that the trial court erred in excluding the testimony of Dr. William Wecker, an expert statistician whose testimony, according to Janssen, would have shown that Janssen's representations in the Risperdal label and the November 2003 DDL had no impact on any prescribing physicians. The import of Dr. Wecker's testimony would have been that, notwithstanding Janssen's false representations, the community of prescribing physicians was well aware of the risks and side effects of Risperdal.

We are again presented with an issue that was not properly preserved for appellate review. When the trial court filed its order on February 25, 2011, excluding the testimony of Dr. Wecker on relevancy grounds, Janssen waited until March 21, 2011, to make an offer of proof of his testimony. The offer of proof came too late. *TNS Mills, Inc. v. S.C. Dep't of Rev.*, 331 S.C. 611, 628, 503 S.E.2d 471, 480 (1998) (noting that a failure to make a proffer of what an excluded witness's testimony would have been precludes appellate review); *see also Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) ("An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in absence of an adequate proffer of evidence in the court below." (citations omitted)).[16]

On the merits, for the reasons discussed in the previous section, we would not find reversible error in any event. We do acknowledge there was evidence presented, which otherwise tended to support Janssen's thesis that its deceptive conduct had no effect on the community of prescribing physicians, for they knew the truth concerning the risks and side effects associated with Risperdal. Excluding Dr. Wecker's testimony, therefore, resulted in no prejudice to Janssen. Yet, as discussed above, Janssen's relevancy argument is based on the false premise that actual harm resulting from the deceptive conduct is a necessary element of an Attorney General directed claim.

E.
First Amendment

Janssen argues that the liability verdict and the penalty award impermissibly restrict its right to free speech. We disagree.

Again, Janssen has not preserved this issue for review. Although Janssen requested a First Amendment jury instruction and raised the issue in its motion for JNOV, Janssen failed to raise any First Amendment issues in its motion for a directed verdict. Janssen's failure to raise this issue in its motion for a directed verdict precludes any appellate review. *In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001) ("[S]ince only grounds raised in the directed verdict motion may properly be reasserted in the jnov motion, and since no grounds were raised in the directed verdict motion, no jnov claim is preserved for our review." (citing *Duncan v. Hampton Cnty. Sch. Dist. #2*, 335 S.C. 535, 545, 517 S.E.2d 449, 454 (Ct. App. 1999))).

There is no error in any event, for the First Amendment does not bar imposition of liability on Janssen for violating SCUTPA. Janssen relies on the false premise that its conduct was not unfair and deceptive. While commercial speech is entitled to First Amendment protections, the Constitution does not erect a blanket shield

[16] It is for the same reason we reject Janssen's claim that the trial court erred by excluding the testimony of the twenty surveyed physicians and evidence of the 2007 Zyprexa product insert and 2010 Latuda product insert.

insulating commercial speech from liability in all circumstances. In this regard, we find Janssen's reliance on *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), is misplaced. The Supreme Court of the United States held in *Sorrell* that "[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment." *Id*. at 2659. *Sorrell*, however, does not deal with deceptive commercial speech. Instead, the *Sorrell* Court invalidated a Vermont law that regulated the type of pharmacy records that a drug manufacturer could obtain and use in marketing prescription drugs. *Id.* at 2659. The State of Vermont never argued "that the provision challenged . . . will prevent false or misleading speech," nor did it argue that the detailing[17] at issue was "false or misleading within the meaning of [the Supreme] Court's First Amendment precedents." *Id.* at 2672. We do not construe *Sorrell* as foreclosing a state from prohibiting unfair and deceptive prescription drug marketing.

Indeed, it is a well-settled proposition that "[t]he government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563–64 (1980) (internal citations omitted). The State correctly notes that commercial speech is not protected by the First Amendment unless it concerns lawful activity and is not misleading. *Johnson v. Collins Entm't Co.*, 349 S.C. 613, 624, 564 S.E.2d 653, 659 (2002).

Here, the jury found that Janssen's acts were unfair or deceptive, and thus unlawful under SCUTPA. In an action at law tried to a jury, the jury's factual findings will not be disturbed unless a review of the record discloses that there is no evidence that reasonably supports the jury's findings. *City of North Myrtle Beach v. E. Cherry Grove Realty Co.*, 397 S.C. 497, 502, 725 S.E.2d 676, 678 (2012). The record is replete with evidence that reasonably supports a finding that Janssen's conduct was unfair and deceptive. Thus, we conclude Janssen may not avail itself

[17] Pharmaceutical companies such as Janssen "promote their drugs to doctors through a process called 'detailing.' This often involves a scheduled visit to a doctor's office to persuade the doctor to prescribe a particular pharmaceutical. Detailers bring drug samples as well as medical studies that explain the 'details' and potential advantages of various prescription drugs." *Sorrell*, 131 S. Ct. at 2659.

of the protections of the First Amendment to shield itself from its deceptive conduct and false representations.

F.
Jury Instructions

Janssen argues that the trial court erred by failing to charge the jury on federal law regarding "unfairness" and instead looking to South Carolina law to define the term. We disagree.

Modeled after the language of the Federal Trade Commission Act (FTCA),[18] SCUTPA declares unlawful any unfair or deceptive acts or practices in trade or commerce. *Compare* 15 U.S.C. § 45(a)(1) (2012) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."), *with* S.C. Code Ann. § 39-5-20(a) ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."). SCUTPA does not define the terms "unfair" and "deceptive"; rather, the legislature intended the courts to be guided by federal interpretations of those terms. S.C. Code Ann. § 39-5-20(b) (1985) (instructing South Carolina courts to take guidance from "the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a)(1)" of the FTCA); *see also Wright v. Craft*, 372 S.C. 1, 26, 640 S.E.2d 486, 500 (Ct. App. 2006) ("Whether an act or practice is unfair or deceptive within the meaning of the [SC]UTPA depends on the surrounding facts and the impact of the transaction on the marketplace." (citing *deBondt*, 342 S.C. at 269, 536 S.E.2d at 407)).

To this end, our courts have interpreted those terms consistent with legislative intent. "'An act is "unfair" when it is offensive to public policy or when it is immoral, unethical, or oppressive.'" *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013) (quoting *Gentry v. Yonce*, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999)). "'An act is "deceptive" when it has a tendency to deceive.'" *Id.* (quoting *Gentry*, 337 S.C. at 12, 522 S.E.2d at 143).

[18] 15 U.S.C. §§ 41–77 (2012).

At trial, Janssen requested a jury instruction based on section 45(n) of the FTCA as it relates to determining whether an act or practice is "unfair."[19] Specifically, Janssen asked the trial court to instruct the jury that in order to find dissemination of the November 2003 DDL to be an "unfair" trade practice, the jury must find "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n) (2012). We find no error, and we view this assignment of error as closely aligned with Janssen's view that an Attorney General directed action will not lie in the absence of an actual loss or damage, a view which we reject. Nevertheless, while there is little evidence of actual harm, there is overwhelming evidence of Janssen's longstanding pattern of deception in pursuit of its goal to deceive prescribing physicians and the public, as well as maintain and increase market share as a result of its deceptive practices.

Janssen also requested that the jury be instructed that a violation of public policy is not, in and of itself, a basis for finding Janssen's conduct to be an unfair trade practice and that a violation of public policy may not even be the primary basis upon which the jury based a finding of liability. According to Janssen, its requested jury instructions reflect the definition of "unfair" set forth in the FTCA, by which South Carolina courts are to be guided. We find no reversible error.

Although SCUTPA refers to the FTCA for guidance, we find that the language of section 39-5-20(b) of the South Carolina Code reveals that federal interpretations are persuasive but not binding authority. Our appellate courts have amassed a strong and consistent body of case law defining "unfair" under SCUTPA. In the absence of a legislative response, it would be inappropriate for this Court to depart from settled South Carolina precedent. Moreover, we do not discern the wide

[19] Section 45(n) of the FTCA prohibits the Federal Trade Commission (FTC) from declaring an act or practice to be "unfair" unless "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n) (2012). Further, in determining whether an act or practice is unfair, section 45(n) provides that the FTC may consider established public policy along with all other evidence, but such public policy considerations may not serve as the primary basis for a finding of unfairness. *Id.*

chasm between the federal and state definitions of "unfair" that Janssen urges. We find that the jury instructions as given correctly stated South Carolina law and afforded the proper test for determining whether Janssen's conduct was "unfair" under SCUTPA. Thus, we hold that the trial court did not abuse its discretion by declining to adopt Janssen's proposed jury instructions. *See Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 379 (2005) ("The trial judge is required to charge only the current and correct law of South Carolina." (citing *McCourt v. Abernathy*, 318 S.C. 301, 305, 457 S.E.2d 603, 606 (1995))).

G.
Regulated Activity Exception to SCUTPA

Janssen claims that the State's labeling claim was barred by SCUTPA's regulated activity exemption. We hold that Janssen has failed to preserve this issue for appellate review. However, even if we were to reach the merits, we would find that Janssen is not entitled to avail itself of the regulated activity exemption.

SCUTPA expressly provides that it is inapplicable to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." S.C. Code § 39-5-40(a) (1985). "This exception exempts an entity from liability where its actions are lawful or where it does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations." *Dema v. Tenet Physician Servs. Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009) (quotations omitted). Janssen argues that, after approval of a proposed label, the FDA both authorized and required the use of that approved label. Thus, Janssen argues that FDA approval of the label triggers SCUTPA's regulated activity exemption and prohibits any claim in connection with the sufficiency of the label.

Initially, Janssen fails to identify any specific trial court rulings claimed to constitute error. Because of this, Janssen's argument does not sufficiently identify with particularity the alleged error, and Janssen has abandoned its claim on appeal. *See* Rule 208(b)(4), SCACR ("The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal . . . to support the salient facts alleged. References shall also be made to where relevant objections and rulings occurred in the transcript."); *see also First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)

("Mere allegations of error are not sufficient to demonstrate an abuse of discretion. On appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling." (citation omitted)).

However, even if Janssen had properly preserved this issue, we note that Janssen was not entitled to avail itself of this SCUTPA provision. *Wyeth* makes clear that "a central premise of federal drug regulation [is] that the manufacturer bears responsibility for the content of its label at all times." 555 U.S. at 570–71. "[The manufacturer] is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market." *Id*. at 571 (citing 21 C.F.R. § 201.80(e); 21 C.F.R. § 314.80(b); 73 Fed. Reg. 49605). *Wyeth* clearly rejects the notion that a manufacturer's decision not to include a stronger warning is authorized by the FDA—absent evidence that the FDA affirmatively considered and rejected the stronger warning after being supplied with an evaluation or analysis of the specific dangers presented. *Id*. at 572–73. The very purpose of the "changes being effected" corollary to the FDCA authorizes manufacturers to strengthen the warnings on a label without FDA approval, as long as the manufacturer files a supplemental new drug application. *Id*. at 568; 21 C.F.R. § 314.70(c)(6)(iii)(A), (C) (2013). Indeed, the United States Supreme Court in *Wyeth* noted that "Congress enacted the FDCA to bolster consumer protection against harmful products. Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs in the [FDCA]. Evidently, it determined that widely available state rights of action provided appropriate relief for injured consumers." *Id*. at 574. Accordingly, Janssen cannot shield itself from liability by claiming that the FDA's approval of its label constituted an express authorization of its labeling decisions. *See id*. at 583 (Thomas, J., concurring in the judgment) ("[F]ederal law does not give drug manufacturers an unconditional right to market their federally approved drug at all times with the precise label initially approved by the FDA.").

H.
Statute of Limitations

Janssen claims that the trial court erred by granting the State's motion for a directed verdict on the statute of limitations on the labeling claim and the DDL claim. We disagree concerning the DDL claim and affirm, but agree in part with Janssen regarding the labeling claim. The statute of limitations bars the labeling claim insofar as the trial court imposed civil penalties for violations that occurred more than three years prior to the parties' tolling agreement. Because of the ongoing nature of Janssen's deceptive conduct, we affirm the judgment on the labeling claim but limit the imposition of civil penalties to a three-year period, coextensive with the statute of limitations, subject only to the additional period of time between the tolling agreement and the filing of the Complaint.

At the close of all of the evidence, the State moved for a directed verdict as to Janssen's statute of limitations defense, arguing that Janssen failed to present any evidence that the Attorney General's office had actual or constructive notice of Janssen's unlawful conduct prior to the commencement of the three year statute of limitations.[20] Specifically, the State argued there was no evidence that the Attorney General, more than three years prior to the commencement of the statute of limitations on January 24, 2004, knew or should have known about the deceptiveness of the DDL and the Risperdal label, the concealed studies, or the unlawful promotion of Risperdal in South Carolina.

The trial court granted the State's motion for a directed verdict, finding that neither the DDL claim nor the labeling claim was barred by the three-year statute of limitations. Specifically, the trial court noted that although the medical community at large was aware of the risks associated with Risperdal, some even as early as the mid-1990s, the point in time at which the side-effects of Risperdal became known was not the gravamen of the State's claims. Rather, the specific conduct at issue was Janssen's false and misleading statements in the DDL and Janssen's failure to update its label to reflect the known degree of risks associated with Risperdal. Accordingly, the relevant inquiry was the point at which the State should have known that Janssen's *conduct* as to the DDL and the Risperdal label was unfair or deceptive and, thus, gave rise to a SCUTPA claim.

As to the DDL claim, the trial court found that claim was not barred by the statute of limitations because there was no evidence that the false or misleading nature of the DDL could have been discovered before the DDMAC issued its warning letter to Janssen in April 2004, which was within the timeframe of the tolling agreement. As to the labeling claim, the trial court found that because Janssen took affirmative steps to prevent disclosure of unfavorable clinical trial results that revealed the

[20] The Complaint was filed on April 23, 2007, but, as noted, the State and Janssen entered into a tolling agreement concerning the statute of limitations on January 24, 2007.

serious degree of risks associated with Risperdal, the statute of limitations was equitably tolled during the period of time in which Janssen knew, but failed to disclose and shielded from public knowledge, the true degree of risks associated with Risperdal. The trial court found the labeling claim likewise was not barred by the statute of limitations, and awarded a civil penalty for each of the of 509,499 Risperdal "sample boxes" distributed in South Carolina from 1998 through the date of the Complaint, April 23, 2007, each of which included the drug label in the sample packaging.

Janssen argues this was error and that both claims are barred by the statute of limitations because the State had actual or constructive knowledge of the claims before January 24, 2004. Specifically, as to the DDL claim, Janssen contends that the claim was discoverable from the face of the DDL itself, and therefore, the statute of limitations began to run at the time the DDL was mailed in November 2003. As to the labeling claim, Janssen contends that claim is barred because the risks associated with Risperdal were widely known by the mid-1990s and that the alleged inadequacies in the labeling were apparent from the face of the label itself; therefore, Janssen posits that the labels themselves put the State on notice of its labeling claim as early as 1994, and that the three-year statute of limitations thus ran long before the State's Complaint was filed in 2007. Janssen further argues the doctrine of equitable tolling should be sparingly applied and that there is no basis for applying it here.

We first address the DDL claim. SCUTPA provides for a three-year statute of limitations. S.C. Code Ann. § 39-5-150 (1985). Under the discovery rule, the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from wrongful conduct. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (citation omitted). We have carefully reviewed the record in light of the appropriate standard of review, and we agree with the trial court. As a matter of law, the only reasonable conclusion supported by the evidence at trial was that the existence of a claim, i.e. the deceptive and unfair nature of Janssen's conduct in disseminating the DDL, could not have reasonably been discovered prior to April 2004 when the FDA issued the Warning Letter to Janssen.[21] *See id.*

[21] Considerable argument is presented over whether the discovery rule should be analyzed through the person of the Attorney General or the typical approach of the

at 366, 468 S.E.2d at 648 (finding that where the only reasonable conclusion supported by the evidence was that the lawsuit accrued on a particular date, there was no issue for the jury to decide and a directed verdict was proper). We affirm the trial court's finding that the DDL claim was timely.

We turn to the labeling claim. The procedural dilemma we confront is that the statute of limitations issue concerning the labeling claim was resolved at trial through principles of equitable tolling. A determination in equity is not proper for a directed verdict motion insofar as determining what matters should be submitted to the jury. It was therefore legal error to resolve the issue of equitable tolling pursuant to a directed verdict motion. Under our *de novo* review of this equitable issue, we agree with Janssen that there is an insufficient basis for application of that doctrine to preserve the timeliness of all labeling violations, reaching back to the time Risperdal was first introduced in 1994. *See Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009) (noting the doctrine of equitable tolling should be used sparingly and only when the interests of justice demand its use). However, we do not view the error as one mandating reversal and a new trial, given the continuing nature of the accrual of labeling violations.

Clearly, much of the labeling claim accrued more than three years prior to the January 24, 2007 tolling agreement. The risks associated with atypical antipsychotics, like Risperdal, were becoming well known by the late 1990s. The State's experts testified that the Risperdal label was inadequate as early as 1994 when Janssen began marketing the drug. By all accounts, in the early 2000s, evidence of the risks was pervasive.[22] We find that the only reasonable conclusion supported by the evidence is that the Attorney General knew, or most assuredly should have known, of potential SCUTPA violations regarding the Risperdal label prior to January 24, 2004. Thus, the labeling violations occurring prior to January 24, 2004, were therefore barred by the statute of limitations.

reasonably prudent person. We need not decide the "relevant plaintiff" question and purported distinction between the two, for the result would be the same here.

[22] This underscores Janssen's point that the community of prescribing physicians was well aware of the Risperdal risks, and Janssen's resulting contention that the allegedly deceptive practices had little or no effect on the practice and frequency of prescribing Risperdal.

Nevertheless, the labeling claim presents ongoing violations of SCUTPA that continued *after* January 24, 2004 and during the three-year-period prior to the tolling agreement. In requesting that the entire labeling claim be dismissed as time barred, Janssen assumes, wrongly so, that its ability to successfully invoke the statute of limitations to bar the labeling claim prior to January 24, 2004, ends the labeling claim altogether. We reject Janssen's position, for Janssen misapprehends the statute of limitations and the concept of continuous accrual of this SCUTPA cause of action. The labeling claim presents a series of discrete, independently actionable wrongs that are at the core of the typical unfair trade practice action. The principles of this type of continuous accrual respond to

> the inequities that would arise if the expiration of the statute of limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct; parties engaged in long-standing malfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing malfeasance. In addition, where misfeasance is ongoing, a defendant's claim to repose, the principal justification underlying the limitations defense, is vitiated. . . . [Accordingly,] separate, recurring invasions of the same right can each trigger their own statute of limitations. . . . Generally speaking, continuous accrual applies whenever there is a continuing or recurring obligation: [w]hen an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.

Aryeh v. Canon Bus. Solutions, Inc., 292 P.3d 871, 880 (Cal. 2013) (quotations and citations omitted) (distinguishing the continuous accrual doctrine from the continuing violation doctrine, which involves a single injury that is the product of a series of small harms, any one of which is not actionable on its own). *See Estate of Livingston v. Livingston*, 404 S.C. 137, 147–48, 744 S.E.2d 203, 209 (Ct. App. 2013) (finding a new statute of limitations begins to run after each separate injury, and therefore statute of limitations barred only claims falling outside the three-year time period and did not bar claims occurring within that time), *cert. granted*, No. 2013-001505 (S.C. Sup. Ct. filed Oct. 24, 2014); *see also Hogar Dulce Hogar v. Cmty. Dev. Comm'n of Escondido*, 2 Cal. Rptr. 3d 497, 502 (Ct. App. 2003) ("When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period."

(citation omitted)); *cf. Anonymous Taxpayer v. S.C. Dep't of Rev.*, 377 S.C. 425, 440–41, 661 S.E.2d 73, 81 (2008) (finding that, under the facts presented, the particular claim alleged by plaintiff constituted only one cause of action, and therefore, there was no continuing injury that would trigger a new limitations period).

Indeed, the language of SCUTPA itself contemplates that an unlawful method, act, or practice may result in multiple statutory violations, and it is the violations themselves that cause the statute of limitations to begin to run. S.C. Code Ann. § 39-5-110(a) ("If a court finds that any person is willfully using or has willfully used a method, act or practice declared unlawful by § 39-5-20, the Attorney General . . . may recover on behalf of the State a civil penalty of not exceeding five thousand dollars *per violation*." (emphasis added)). We adopt the view that aligns with legislative intent as reflected in section 39-5-110, a common sense approach recognizing that the SCUTPA statute of limitations begins to run anew with each violation. Thus, where a claim involves a series of ongoing violations, recovery is limited to a period coextensive with the applicable statute of limitations.

In sum, we agree with the State regarding the DDL claim, for we find that claim, in the exercise of reasonable diligence, could have been discovered no earlier than April 2004 when the FDA issued its warning letter to Janssen. However, we agree with Janssen concerning the labeling claim insofar as civil penalties were awarded for violations occurring from 1998 until January 24, 2004 (three years prior to the tolling agreement). Under these facts, it was error to award the State civil penalties for violations in connection with the labeling claim outside the statute of limitations. An award for civil penalties within the statute of limitations was proper.

I.
Preemption

Janssen argues that both the labeling claim and the DDL claim are preempted by federal law. Specifically, Janssen argues the labeling claim is barred by implied conflict preemption and that the DDL claim is barred by the express preemption provision of the FDCA, 21 U.S.C. § 337(a) (2006). We disagree.

When "Congress has 'legislated . . . in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotations and citations omitted) (ellipses in original).

"In 1962, Congress amended the FDCA and shifted the burden of proof from the FDA to the manufacturer." *Wyeth*, 555 U.S. at 567. "Before 1962, the [FDA] had to prove harm to keep a drug out of the market, but the amendments required the manufacturer to demonstrate that its drug was safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling before it could distribute the drug." *Id.* (quotations and citations omitted). "In addition, the amendments required the manufacturer to prove the drug's effectiveness by introducing substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling." *Id.* (quotations and citations omitted). "As [Congress] enlarged the FDA's powers to protect the public health and assure the safety, effectiveness, and reliability of drugs, Congress took care to preserve state law." *Id*. (quotations and citations omitted). "The 1962 amendments [to the FDCA] added a saving clause, indicating that a provision of state law would only be invalidated upon a direct and positive conflict with the FDCA." *Id.* (quotations and citations omitted). "Consistent with that provision, state common-law suits 'continued unabated despite . . . FDA regulation.'" *Id*. (quoting *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 340 (2008) (Ginsburg, J., dissenting)).[23]

Based upon *Wyeth*, we find that the State's DDL claim is not expressly preempted by federal law. Additionally, we find that Janssen has not preserved their implied conflict preemption claim for appellate review. Even assuming Janssen's argument regarding implied preemption is not procedurally barred, however, we find it to be without merit.

1.
Express Preemption of the DDL Claim

[23] The FDA did not have the authority to mandate a manufacturer change its label until amendments to the FDCA in 2007. 21 U.S.C. § 355(o)(4) (Supp. V 2011).

Janssen argues that the State's claim regarding the DDL relies on a single piece of evidence—the April 2004 DDMAC warning letter characterizing Janssen's DDL as "false and misleading." As such, Janssen asserts the DDL claim is based solely on a violation of the FDCA, which provides no private right of action. Janssen thus concludes that this "federal claim" is preempted and may not be maintained. Because Janssen's argument is based on a false premise, we disagree.

It is true that the State pursued a SCUTPA claim based on the November 2003 DDL. It is also true that the State introduced the April 2004 DDMAC warning letter as evidence in support of its DDL claim. It is not true that the sole evidence establishing the false and misleading nature of the DDL comes from the subsequent April 2004 DDMAC warning letter. Janssen not only views the DDL claim myopically, but conflates the concepts of evidence and claims. There was substantial additional evidence relating to the deception surrounding the November 2003 DDL, much of which is noted above. For example, the State presented evidence that, scientific proof to the contrary, Janssen's Risperdal sales strategy specifically sought to differentiate Risperdal from competing drugs by emphasizing that Risperdal caused less weight gain relative to other atypical antipsychotics such as Zyprexa.

Moreover, the State presented internal emails between Janssen executives, one of which included discussion of Janssen's desire to gain market share over competitors by avoiding being subjected to a class labeling requirement as to diabetes/hyperglycemia. Yet another email indicated that at least one Janssen scientist supported glucose screening and monitoring for Risperdal patients, but that such a position was "not the company line." Janssen's broad, aggressive, and deceptive marketing strategy resulted in the discrete DDL claim. In short, the record is replete with evidence beyond the 2004 DDMAC warning letter to support the State's DDL claim. Further, at the end of trial, the jury was charged with determining several factual issues, each of which was based solely on the provisions of SCUTPA, and the trial judge assessed penalties under SCUTPA framework. Accordingly, we find that the State's SCUTPA claim concerning the DDL is not preempted by the FDCA.

2.
Implied Conflict Preemption of the Labeling Claim

Janssen argues that the State's labeling claim is barred by implied conflict preemption. Janssen failed to raise the doctrine of implied conflict preemption in its motion for summary judgment or its initial directed verdict motion at the close of the State's case-in-chief. Accordingly, this argument was waived because it was not asserted in Janssen's initial motion for directed verdict.[24] *See Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 258–59, 359 S.E.2d 532, 535 (Ct. App. 1987).

Additionally, Janssen's argument on appeal is substantively different than the argument below. Before the trial court, Janssen moved for a directed verdict, arguing that the *Wyeth* "exception to preemption" did not apply since the State failed to establish that Janssen could have, and should have, updated the Risperdal label without prior FDA approval. Given this purported failure of proof, Janssen argued that the State's labeling claim was preempted. The trial court rejected Janssen's argument and found that *Wyeth* was controlling. In contrast, Janssen now argues that the State's SCUTPA claims sought to impose labeling requirements different from those required by the FDA, and thus, according to Janssen, the doctrine of implied conflict preemption bars the State's claims. This argument, however, is not preserved for appellate review. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal." (citing *Prioleau*, 345 S.C. at 411, 548 S.E.2d at 216; *Benton*, 338 S.C. at 157, 526 S.E.2d at 231)).

Nonetheless, even were we to find Janssen's argument not to be procedurally barred, we would find it is without merit. Janssen suggests that the State sought to impose labeling requirements different than those imposed by the FDA. The State's claim, however, did not seek to penalize Janssen for distributing its FDA-approved label. Rather, the State sought civil penalties based on Janssen's actions in failing to discharge its ongoing, affirmative duty to keep its label updated and

[24] Notably, Janssen did raise express preemption as to the DDL in its initial directed verdict motion. However, counsel for Janssen candidly acknowledged in its renewed directed verdict motion at the close of the evidence, "[W]e have an argument that hasn't been made by us before, and that is that the package insert claim, the claim dealing with the label, is preempted by federal law." Further, counsel for Janssen stated, "We're arguing something quite different that we haven't argued before. We haven't [previously] argued about Wyeth against Levine."

ensure "that its warnings remain adequate as long as the drug is on the market." *Wyeth*, 555 U.S. at 571 (citing 21 C.F.R. § 201.80(e); 21 C.F.R. § 314.80(b); 73 Fed. Reg. 49605).

Further, we reject Janssen's argument that *Wyeth* is inapposite because this case involves an enforcement action by the Attorney General on behalf of the State. Regardless of whether a state-law enforcement action is brought by a private individual or an attorney general on behalf of a state, *Wyeth* makes clear that federal labeling standards are "a floor upon which States could build" and noted the FDA's agency position that, "in establishing minimal standards for drug labels, it did not intend to preclude the states from imposing additional labeling requirements." *Id*. at 577–78 (quotations omitted). Rather, "[f]ailure-to-warn actions, in particular, lend force to the FDCA's premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times." *Id*. at 579. Indeed, "federal law does not give drug manufacturers an unconditional right to market their federally approved drug at all times with the precise label initially approved by the FDA." *Id*. at 583 (Thomas, J. concurring in the judgment). Janssen's claim is without merit.

Having affirmed the trial court concerning Janssen's liability in connection with both the labeling claim and the DDL claim, we turn now to the penalty award.[25]

[25] Janssen raises a number of other issues, each of which we have carefully reviewed and find to be without merit or unpreserved. We affirm based upon Rule 220(b)(1), SCACR, and the following authorities**:** *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008) (holding that in order to warrant reversal, the appealing party must show both the error of the ruling and resulting prejudice) (citing *Fields v. Reg. Med. Ctr. Orangeburg,* 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)); *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005) (finding the failure to raise a contemporaneous objection at trial waives the right to complain about an issue on appeal) (citing *Taylor v. Medenica,* 324 S.C. 200, 214 n.9, 479 S.E.2d 35, 42 n.9 (1996)); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting that an appellate court need not address remaining issues when disposition of prior issues is dispositive) (citing *Whiteside v. Cherokee Cnty. Sch. Dist. No. One,* 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993)); *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the

III.
Penalty Award

SCUTPA allows the Attorney General to recover on behalf of the State a civil penalty of up to $5,000 per violation. S.C. Code Ann. § 39-5-110(a). Undoubtedly, Janssen's deceptive conduct relating to Risperdal warrants a civil penalty, and because the civil penalty award under section 39-5-110(a) is within the discretion of the trial court, we review the trial court's penalty award under an abuse of discretion standard. *State ex rel. McLeod v. C & L Corp., Inc.*, 280 S.C. 519, 528, 313 S.E.2d 334, 340 (Ct. App. 1984) ("The party challenging a discretionary ruling of the trial court has the burden of showing a clear abuse of discretion."); *accord Vanderbilt Mortg. & Fin., Inc. v. Cole*, 740 S.E.2d 562, 566 (W.Va. 2013) (holding a trial court's award of civil penalties pursuant to state statute will not be disturbed on appeal unless it clearly appears the trial court abused its discretion).

The State argued, and the trial court agreed, that the distribution of each sample box containing the deceptive labeling, each DDL, and each follow-up sales call to the DDL by a Janssen representative constituted a separate SCUTPA violation. The trial court adopted a multi-factor test used by the United States Court of Appeals for the Third Circuit in determining an appropriate civil penalty: "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of [the regulatory agency]." *United*

objector." (citation omitted)); *Talley v. South Carolina Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) ("It is an axiomatic rule of law that issues may not be raised for the first time on appeal." (citing *Am. Hardware Supply Co. v. Whitmire*, 278 S.C. 607, 609, 300 S.E.2d 289, 290 (1983))); *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review." (citing *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001))).

States v. Reader's Digest Ass'n, Inc., 662 F.2d 955, 967 (3d Cir. 1981).[26]

Janssen challenges the penalty award on numerous grounds, including the argument that the total penalty, in excess of $327,000,000, is excessive. We agree with Janssen in part. There are certain factors common to the labeling and DDL claims. First, Janssen's deceit was substantial. In order to maintain its market share, Janssen's furtive efforts to mislead prescribing physicians about the risks and side effects associated with Risperdal were reprehensible and in callous disregard for the health and welfare of the public. Janssen's desire for market share and increased sales[27] knew no bounds, leading to its egregious violation of South Carolina law, particularly in connection with the DDL. Janssen's conduct is irrefutably linked to its longstanding efforts to conceal the truth regarding Risperdal. This corrupt corporate culture through the years was a factor, and understandably so, in the trial court's imposition of such a substantial penalty.

We agree in part with Janssen that its conduct had little impact on the community of prescribing physicians. The truth about the risks associated with atypical antipsychotics was well known, particularly in the pharmaceutical and medical professions. This begs the question of why Janssen would go to such lengths to perpetuate and defend a lie. Whatever the answer, the point remains that Janssen

[26] Application of the *Reader's Digest* factors was proper here. Given that this is our first opportunity to address the appropriate factors for assessing a civil penalty in an Attorney General directed claim under SCUTPA, we direct that, prospectively, the following list of non-exclusive factors be used in assessing civil penalties under SCUTPA: (1) the degree of culpability and good or bad faith of the defendant; (2) the duration of the defendant's unlawful conduct; (3) active concealment of information by the defendant; (4) defendant's awareness of the unfair or deceptive nature of their conduct; (5) prior similar conduct by the defendant; (6) the defendant's ability to pay; (7) the deterrence value of the assessed penalties; and (8) the actual impact or injury to the public resulting from defendant's unlawful conduct. We further authorize our able trial judges to consider any other factors they deem appropriate under the circumstances. In issuing a ruling, the trial court should make sufficient findings of fact concerning all relevant factors to enable appellate review.

[27] Since 1994, Risperdal sales approximated $30 billion.

did go to such lengths. Yet, the absence of significant actual harm resulting from Janssen's deceptive conduct leads us to conclude the trial court erred in part in its penalty assessment.

A.
Violations and Reduced Civil Penalty

1.
Labeling Claim

The trial court assessed a $300 civil penalty against Janssen for each Risperdal "sample box" distributed to South Carolina prescribers from 1998 through the date of the Complaint, April 23, 2007, for a total of 509,499 violations. As discussed, we reverse the civil penalties awarded for conduct that occurred prior to January 24, 2004, for that part of the State's labeling claim is barred by the statute of limitations. Based on the record, during the period of time from February 2004 until the filing of the Complaint in April of 2007, Janssen made 20,575 visits to prescribing physicians in South Carolina and distributed 345,454 sample boxes containing deceptive labeling.[28]

Janssen challenges the penalty award of $300 per sample box on numerous grounds, including the argument that the penalty is excessive. We agree and find the $300 penalty per sample box excessive. Based on the totality of the circumstances and consideration of the *Reader's Digest* factors, we remit the penalty to $100 per sample box, for a civil penalty of $34,545,400.

2.
DDL Claim

Janssen mailed 7,184 DDLs to South Carolina physicians in November 2003. The trial court considered each letter a separate violation and imposed a penalty of $4,000 per letter, for a penalty of $28,736,000. In addition, the trial court counted each follow-up sales call to the DDL by a Janssen representative as a separate

[28] We arrive at this number based on documents submitted by Janssen showing the total samples distributed and the total number of visits to prescribing physicians. (20,575 visits times 16.79 sample boxes per visit equals a total of 345,454.25 sample boxes, rounded to 345,454).

violation. There were 36,372 follow-up sales calls. The trial court again assessed a penalty of $4,000 for each sales call, for a penalty of $145,488,000.

Janssen challenges the penalty award on numerous grounds, including excessiveness. While the question presented is close, we cannot say that the trial court abused its discretion in assessing the $28,736,000 penalty associated with the 7,184 DDLs. A $4,000 penalty per each DDL is indeed substantial. But Janssen's deceit, as described above, was also substantial. The DDL was especially egregious, for it represented not mere nondisclosure but a corporately sanctioned decision to affirmatively lie and an attempt to mislead the medical community. We affirm the civil penalty of $28,736,000 penalty associated with the 7,184 DDLs.

Janssen's misconduct in the more than 36,000 follow-up visits may be similarly viewed, for the follow-up visits were designed to continue the false DDL narrative. Nevertheless, a penalty of $4,000 per follow-up visit is excessive as a matter of law under the circumstances. We find in most instances, these were follow-up calls to the same prescribing physicians who received the DDL in the mail. In fact, in many instances there were multiple calls to the *same* physicians. We remit the penalty to $2,000 per follow-up sales call, for a penalty of $72,744,000. When combined with the penalty for the DDL mailing, the total penalty assessed against Janssen for the DDL claim is $101,480,000.

The combined civil penalty for the labeling and DDL claims is $136,025,400.

B.
Constitutionality of the Penalty Award

Janssen also raises a number of constitutional challenges to the trial court's penalty order. First, Janssen claims that the $327 million penalty violates the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution and Article 1, Section 15 of the South Carolina Constitution. Second, Janssen claims that the penalty award violates due process because it is grossly excessive. We analyze this argument on the basis of the remitted penalty of approximately $136 million. We find no constitutional violation.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause [of the U.S. Constitution] is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998); *see also Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001*, 322 S.C. 127, 132, 470 S.E.2d 373, 377 (1996) (adopting the federal "instrumentality" standard in the context of civil forfeitures for purposes of South Carolina's "excessive fines" analysis). The Court will only find a violation of the Excessive Fines Clause if the penalty is "*grossly* disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334 (emphasis added). "The Ninth Circuit and other federal courts have consistently found that civil penalty awards in which the amount of the award is less than the statutory maximum do not run afoul of the Excessive Fines Clause." *United States v. Mackby*, 221 F. Supp. 2d 1106, 1110 (N.D. Cal. 2002) (citing cases from the First Circuit, Ninth Circuit, and D.C. Circuit). This is so because legislative pronouncements regarding the proper range of fines "represent the collective opinion of the American people as to what is and is not excessive. Given that excessiveness is a highly subjective judgment, the courts should be hesitant to substitute their opinion for that of the people." *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1309 (11th Cir. 1999) (citing *Bajakajian*, 524 U.S. at 336).

We find that the penalty in this case, now reduced, bears a rational relationship to the gravity of Janssen's conduct in perpetuating a marketing scheme in South Carolina designed to be unfair and deceptive under our law. Furthermore, the penalty awards per violation are within the range set by the legislature in enacting SCUTPA. Accordingly, the penalty award is not grossly disproportionate to Janssen's pattern of unfair and deceptive behavior, and, thus, we hold that the award does not violate the Excessive Fines Clause of the South Carolina or the United States Constitution. We turn now to Janssen's due process argument.

The Due Process Clause of the U.S. Constitution "places a limitation upon the power of the states to prescribe penalties for violations of their laws . . . ." *St. Louis, Iron Mt. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919). States, however, "still possess a wide latitude of discretion in the matter, and . . . their enactments transcend the limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at 66–67 (citations omitted); *see also Shipman v. Du Pre*, 222 S.C. 475, 480, 73 S.E.2d 716, 718 (1952) (embracing the *Williams* standard).

Given the evidence that demonstrates Janssen's pattern of unfair and deceptive behavior, we find that the penalties in this case are not violative of the Due Process Clause. We decline to set forth a bright-line rule or ratio to delineate what level of penalties are appropriate, instead undertaking a case-by-case determination based on the severity of the underlying conduct. While the penalty award against Janssen is quite large, the penalty must be analyzed in context in view of the clear legislative intent of SCUTPA to deter unfair and deceptive behavior in the conduct of trade and commerce in South Carolina. When all factors are considered, we find that the penalty award does not violate the Due Process Clause.

And finally, we comment on the amicus curiae brief filed by the South Carolina Chamber of Commerce. The Chamber seeks clarity from this Court to provide a predictable and favorable business climate in this state. The Chamber is especially distressed by the $327 million penalty, which it views as excessive and as "overt hostility toward business." While we agree the penalty awarded by the trial court was excessive, the Chamber's additional concerns are based on a series of false premises. The Chamber posits that Janssen's conduct is being "judged according to subjective, intangible standards." More to the point, the implication is that South Carolina stands alone in arbitrarily singling-out Janssen for what amounts to nothing more than an aggressive marketing strategy. That is simply not the case. Because of its deceptive conduct in the marketing of Risperdal, Janssen has been the subject of litigation throughout the country. Indeed, the deceptive marketing that gave rise to this action also formed the basis of federal civil and criminal claims against Janssen and its parent company; the federal litigation has thus far resulted in agreed upon penalties in excess of $2 billion. When viewed objectively, Janssen over the course of many years consciously engaged in lies and deception in the marketing of Risperdal. Thus, the suggestion that the Attorney General of South Carolina stands alone in pursuing amorphous and subjective claims against Janssen is without merit. Surely the Chamber desires a legal system that honors the rule of law and one which does not insulate businesses from liability for unfair and deceptive practices. Our decision today is faithful to objective legal principles, legislative intent in SCUTPA and the rule of law. Moreover, we have set forth clear guidance for the business community, the Bench and the Bar for determining what conduct is actionable under SCUTPA and what factors bear on the determination of an appropriate penalty—precisely the type of clarity the Chamber seeks.

IV.
Conclusion

Based on the statute of limitations, we reverse the judgment on labeling claim to the extent the trial court awarded civil penalties for conduct prior to January 24, 2004. We otherwise affirm as modified the judgment on the labeling claim and remit the civil penalty to $34,545,400. We affirm the liability judgment on the DDL claim, but remit those civil penalties to $101,480,000. We remand to the trial court for entry of judgment in the amount of $136,025,400.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

TOAL, C.J., BEATTY, and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: With great respect for the majority's thorough treatment of these complex issues, I dissent from those portions of its opinion addressing: (1) the timeliness of the labeling claim; and (2) the reduction of the DDL penalty award.

I. Statute of Limitations

I agree the Attorney General knew or should have known prior to January 24, 2004 that he may have had a SCUTPA claim against Janssen based, in part, on research indicating Janssen's Risperdal label misled consumers insofar as it failed to disclose the drug's side effects. *See Kreutner v. David*, 320 S.C. 283, 285–86, 465 S.E.2d 88, 90 (1995) (discussing the discovery rule for purposes of triggering the limitations period and finding that where the evidence is overwhelming a reasonable person should have known she might have a claim at a time beyond the statute of limitations, then such claim is time-barred). I therefore agree with the majority's conclusion that the Attorney General's SCUTPA claim for labeling violations occurring before January 24, 2004 was time-barred, and that the trial judge erred in holding equitable tolling removed the bar.

My disagreement is with the majority's application of the continuous accrual doctrine. I would not apply the doctrine in this appeal because doing so does not affirm the statute of limitations ruling to the extent the trial judge found the pre-January 24, 2004 labeling claim timely and permitted that claim to go to the jury. In my opinion, we may invoke our authority to affirm on any ground appearing in the record only when the result is to affirm the trial judge's ruling in toto. *See* Rule 220(c), SCACR. Here, the effect of applying the continuous accrual doctrine is only a partial affirmance. Further, we have no way of knowing whether the jury's liability determination was based on conduct outside the limitations period since we cannot know whether this jury would have found a SCUTPA violation had it considered only Janssen's labeling conduct after January 24, 2004. I do not agree that reducing the amount of the penalty for the labeling claim cures the prejudice to Janssen given the unreliability of the jury's liability determination. Thus, I respectfully submit we should not apply the continuous accrual doctrine[29] in this appeal as doing so prejudices Janssen.

[29] I leave for another day whether we should adopt this doctrine in the context of SCUTPA or other statutory claims.

Accordingly, I would reverse the jury's finding of liability because the labeling claim is barred by the statute of limitations. I would also reverse the trial judge's labeling claim penalty because the claim is untimely.

DDL Penalty Award

As for the reduction of the DDL penalty award, I would find the trial judge did not abuse his discretion in awarding $174,224,000 based on Janssen mailing 7,184 deceptive DDLs and following up with 36,372 sales calls to sanction the deception already perpetrated. *See State ex rel. McLeod v. C & L Corp.*, 280 S.C. 519, 528, 313 S.E.2d 334, 340 (Ct. App. 1984) (reviewing the award of civil penalties under an abuse of discretion standard). As for Janssen's contention that the follow-up sales calls were made to the same prescribing physicians who had already received the DDL, I would find the trial judge properly considered this argument and exercised his discretion in finding Janssen's culpability (*Reader's Digest*[30] Factor 2) outweighed the actual impact or injury resulting from Janssen's unlawful conduct (*Reader's Digest* Factor 8).

Ultimately, the trial judge was in the best position to evaluate Janssen's conduct, the degree of culpability, the duration of Janssen's conduct, Janssen's active concealment of Risperdal's side effects to South Carolina health care providers, Janssen's awareness of its deceptive conduct, Janssen's ability to pay, and the actual impact, if any, resulting from Janssen's deceptive conduct. *See Reader's Digest Ass'n*, 662 F.2d at 967. Based on the trial judge's articulation of the *Reader's Digest* factors and his proper consideration of those factors, I would find Janssen has not shown the court abused its discretion in awarding a $174,224,000 civil penalty for the DDL claim, an amount within the limits set forth in SCUTPA. *See Wallace v. Timmons*, 237 S.C. 411, 421, 117 S.E.2d 567, 572 (1960) (stating that in reviewing a trial judge's decision under an abuse of discretion standard, this Court may not substitute its judgment simply because it might have reached a different conclusion had it been in the trial judge's place). Therefore, I would affirm the trial judge's penalty award of $174,224,000 as to the DDL claim.

[30] *United States v. Reader's Digest Ass'n*, 662 F.2d 955, 967 (3d Cir. 1981) (outlining the multi-factor analysis to determine the propriety of a statutory penalty, which the trial judge applied, the majority has adopted, and with which I concur).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Mark Andrew Brunty, Respondent.

Appellate Case No. 2014-001840

Opinion No. 27503
Heard January 13, 2015 – Filed February 25, 2015

DISBARRED

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

Mark Andrew Brunty, of Edgefield, *Pro se* Respondent.

PER CURIAM: Respondent failed to answer or appear in this attorney disciplinary matter and was held in default.[1] Following a hearing, the Panel recommended respondent be disbarred. We agree, disbar respondent, and order him to pay the costs of this disciplinary proceeding,[2] to make restitution to the clients identified in the attached appendix, to repay the Lawyers Fund for Client Protection for any payments made on respondent's behalf, and to complete the Legal Ethics and Practice Program, Ethics School, Trust Account School, and Advertising School prior to seeking readmission to the South Carolina Bar.

[1] Respondent is presently serving a forty-six month federal sentence following his plea to conspiracy to commit wire fraud. In addition to his active sentence, respondent was ordered to pay $1,575,600 in restitution and placed on three years supervised release following his incarceration.

[2] $1,891.32.

PROCEDURAL HISTORY

Formal Charges were personally served on respondent on March 24, 2014. When he failed to answer, the Panel entered an order of default. By virtue of his default, respondent is deemed to have admitted the factual allegations made in the Formal Charges. Rule 24(a), Rules of Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR. The Panel sent a copy of the order of default and an order to appear by certified mail and by first class mail to respondent at three addresses. The certified mail to all three addresses was returned, as were two of the three first class mailings. The Panel held a hearing on the Formal Charges on August 15, 2014. Respondent did not appear at that hearing. The Panel issued a report reciting the admitted facts, finding respondent violated seven subsections of Rule 7(a), RLDE, Rule 413, and that aggravating circumstances existed. The Panel recommended that respondent be disbarred with conditions. Neither the Office of Disciplinary Counsel (ODC) nor respondent has filed exceptions to this report.

Since respondent is in default, the sole question before the Court is the appropriate sanction. *In re Berger*, 408 S.C. 313, 759 S.E.2d 716 (2014). In determining the appropriate sanction, we take into consideration both respondent's failure to answer the Formal Charges, and his failure to appear at the August 2014 Panel hearing. *In re Hall*, 333 S.C. 247, 509 S.E.2d 266 (1998).

FACTS/FINDINGS

The factual allegations, admitted by respondent, and the accompanying rules violations found by the Panel, are as follows:

A. Matter 11-DE-L-380

Respondent represented a husband and wife in several legal matters related to the couple's business. During the course of representation, respondent engaged in a sexual relationship with the wife, in violation of the then current version of Rule 1.7(b), Rules of Professional Conduct (RPC), Rule 407, SCACR. Further, during the investigation of this matter, respondent testified under oath that he had not had sexual relations with any other client, client's spouse, or client's employee. This testimony was false as respondent was then engaged in a sexual relationship with the client who is the complainant in Matter 12-DE-L-1459, Item C *infra*.

Respondent's conduct in this matter violated Rules 1.7(b), 8.1(a), 8.4(d), and 8.4(e), RPC, Rule 407.

B. Matter 12-DE-L-0346

Respondent represented the client property owner's association in a construction defect suit. Without the association's knowledge, respondent used a forged agreement to sell a portion of the association's interest in the suit to Incline Energy, LLC (IE) in exchange for $100,000 to fund the litigation. Respondent executed a separate document agreeing to hold the $100,000 in his trust account and to disburse it only for litigation purposes. In fact, he had the funds wired to his operating account and used it for his own purposes.

IE notified two attorneys involved in the construction defect litigation of the agreement, and respondent repaid IE in two transactions. When questioned by ODC, respondent made numerous misrepresentations, including that he repaid IE from his personal investment accounts. Respondent presented altered documents from a closed investment account to ODC to support his claim. In fact, the money came from two clients who were ultimately repaid with funds respondent misappropriated from others. ODC subpoenaed respondent's trust account records, and in response respondent provided some photocopied bank statements from Conway National Bank (CNB) and a few incomprehensible ledgers. He failed to inform ODC of accounts at South Carolina Bank & Trust (SCB&T).

ODC compared statements obtained from CNB with those provided by respondent. Among other issues, the examination revealed altered pages, memo lines, and wire amounts; that overdraft fees had been obscured; that NSF items had not been reported to ODC; and that non-client payees and personal expenses had been paid both by checks and debits out of this trust account. While respondent attended one interview with ODC, he ceased cooperating after the altered bank records were discovered.

Respondent's conduct in this matter violated Rules 1.15, 8.1(a), 8.1(b), 8.4(b), 8.4(c), 8.4(d), and Rule 8.4(e), RPC, and Rule 417, SCACR.

C. Matter 12-DE-L-1459

Complainant hired respondent to bring a mortgage fraud suit against a lender, and paid him $15,000 towards his $25,000 fee. They subsequently developed a sexual relationship, and respondent told the complainant she need not pay the fee balance. Respondent failed to pursue the fraud case in any meaningful way.

Complainant also gave respondent $22,000, and he agreed to manage an inactive business for her. Approximately $5,000 was used for legitimate business expenses, but respondent has refused to either return the remaining funds or provide complainant with an accounting.

Respondent violated Rules 1.3, 1.4, 1.5, 1.7, 1.8(m), 1.15, 1.16, 7.1, 8.1(b), 8.4(b), 8.4(c), 8.4(d), and 8.4(e), RPC, Rule 407, in his handling of this matter.

D. Matter 12-DE-L-1470

Respondent, or someone acting on his behalf, contacted complainant and informed him his mortgage lender had violated several regulations and therefore complainant's mortgage could be adjusted. This telephone call was an impermissible direct solicitation. Following an in-person meeting, respondent accepted $5,000 to represent complainant in seeking a mortgage reduction, promising a full refund if he were unsuccessful and a half refund if he were successful.

Respondent did not pursue relief on behalf of complainant, but falsely represented the situation when complainant sought updates. Following respondent's interim suspension, complainant contacted respondent who assured him his case was progressing well, and that another attorney would complete the case. Complainant asked for a refund, but has received no further communication from respondent. Respondent did not cooperate with ODC in this matter.

Respondent's conduct in this matter violated Rules 1.3, 1.4, 1.5, 1.16(d), 3.2, 7.3(a), 8.1(b), and 8.4(d), RPC, Rule 407.

E. Matter 12-DE-L-1492

Respondent impermissibly solicited mortgage-related business from complainant's daughter. When complainant contacted respondent, complainant was told he would receive title to his property and a refund of all his mortgage payments.

Complainant paid respondent $5,000. Respondent performed no work on complainant's behalf, but misrepresented that the case was "about finished." Respondent was suspended shortly thereafter, and did not cooperate in ODC's investigation.

Respondent violated Rules 1.3, 1.4, 1.5, 1.16(d), 3.2, 7.1, 7.3, 8.1(b), 8.4(d), and 8.4(e), RPC, Rule 407, in this matter.

F. Matter 12-DE-L-1602

Respondent agreed to negotiate two condominium short sales for complainant. Respondent asked for and received $20,000 to use in negotiating with one of the lenders, but did not safeguard that money, and did not return it to complainant who was dissatisfied with the lack of progress. Both condominiums are subject to foreclosure actions and complainant faces deficiency payments. Respondent did not cooperate with ODC in this investigation.

Respondent violated Rule 1.3, 1.15, 1.16, 8.1(b), 8.4(d), and 8.4(e), RPC, Rule 407, in this matter.

G. Matter 12-DE-L-1644

Complainant and her husband hired respondent to deed back two timeshares. Respondent negotiated the couple's checks, but did not deliver or record the new timeshare deeds. As a result of respondent's inaction, complainant and her husband incurred additional timeshare fees. Respondent avoided complainant except for one phone call where he agreed to discuss a possible meeting, a meeting that never took place. Respondent did not cooperate with ODC in the investigation of this matter.

By his conduct here, respondent violated Rules 1.3, 1.4, 1.6, 5.5, 8.1(b), and 8.4(e), RPC, Rule 407.

H. Matter 13-DE-L-0006

Complainant hired respondent for $2,000 to bring suit on complainant's behalf. Respondent failed to work diligently and to communicate adequately with the complainant. Respondent represented to complainant that the suit had been filed and induced complainant to spend thousands of dollars on the nonexistent litigation. Upon his suspension, respondent did not return the unearned fees to complainant, and did not surrender complainant's file to complainant or to the individual appointed as the Attorney to Protect Client's Interests (ATP). Respondent did not cooperate in ODC's investigation.

Complainant filed a fee dispute and was awarded $2,000 by the Resolution of Fee Disputes Board. Respondent did not pay this award.

Respondent's conduct in this matter violated Rules 1.2, 1.3, 1.4, 1.5, 1.16(d), 8.1(b), 8.4(d), and 8.4(e), RPC, Rule 407 and the Lawyer's Oath, Rule 402(k)(3), SCACR.

I. Matter 13-DE-L-0007

Complainants hired respondent to assist in the sale of their business to investors. In connection with the sale, respondent was entrusted with $210,000 from the investors to be used to pay the business's debts and federal tax liability of $25,000.

Respondent disbursed funds to settle the debts and assured complainants that the remaining funds were sufficient to satisfy the tax liability. Complainant received a number of IRS notices, and was told by respondent that he was working with the IRS. He eventually told complainants the federal tax liability could be settled for $15,000. In fact, respondent never made any effort to settle or pay the tax debt, and by the time respondent was placed on interim suspension, the tax liability had increased to $40,854.18. Respondent had no funds in trust for complainants, and did not cooperate with ODC's investigation.

By his conduct in this matter, respondent violated Rules 1.3, 1.15, 8.1(b), 8.4(d), and 8.4(e), RPC, Rule 407 and the Attorneys Oath, Rule 402(k)(3), SCACR.

J. Matter 13-DE-L-0061

Complainant hired respondent to assist in litigation, and eventually instructed respondent to accept a settlement offer which would result in complainant's receipt of almost $54,000. Respondent rejected the offer, and did not inform complainant that his case was going to trial. At that trial, respondent represented that complainant chose not to be present. He presented no evidence and did not challenge the opposing party's evidence. Although the record was held open to allow respondent to brief a legal issue, no brief was ever submitted. Complainant's claim was unsuccessful.

Following respondent's interim suspension, complainant hired a different attorney to pursue the settlement offer. This attorney discovered that respondent had taken the claim to trial and lost. As a result, complainant received nothing. Respondent did not cooperate in the investigation of this matter.

Respondent's conduct in this matter violated Rules 1.1, 1.2, 1.3, 1.4, 3.3, 8.1(b), 8.4(d), and 8.4(e), RPC, Rule 407.

K. Matter 13-DE-L-0075

Respondent and a business partner convinced complainants to invest in a scheme to purchase distressed promissory notes and real property which would be sold quickly for a significant property. The complainants were to receive 80% of the profits from each transaction while respondent and the associate were to receive 20%. After what they believed to be a successful first transaction, the complainants were persuaded to invest $600,000 for a distressed note that respondent represented could be resold quickly for a $150,000 profit, and to invest $100,000 to purchase two real estate parcels. Respondent presented forged, fabricated documents to complainants to demonstrate his authority to make these purchases, and complainants sent respondent $700,000 in four transactions. Respondent misappropriated the funds.

Following respondent's interim suspension, respondent showed the complainants fraudulent bank records purporting to show that $600,000 was held in an account. The complainants sued respondent, his business associate, and a corporate entity, and respondent was held in default. He did not cooperate with ODC in this matter.

Respondent was indicted by the federal government on four counts of mail fraud, a violation of 18 U.S.C. § 1343, for his conduct in this matter. Respondent subsequently pled guilty to one count of conspiracy to commit wire fraud.

Respondent's conduct in this matter violated Rules 1.8, 1.15, 1.16, 8.1(b), 8.4(b), 8.4(c), 8.4(d), and 8.4(e), RPC, Rule 407.

L. Matter 13-DE-L-0080

Complainant, a Florida attorney, introduced respondent to the complainants in Matter 13-DE-L-0075, Item K *supra*. Complainant decided to invest with respondent, and obtained the promised return on his first investment with respondent. He later wired respondent $50,000 for a second investment. The second investment never took place, and respondent did not safeguard complainant's money. Further, respondent did not cooperate in ODC's investigation.

In this matter, respondent's conduct violated Rules 8.1(b), 8.4(b), 8.4(c), 8.4(d), and 8.4(e), RPC, Rule 407.

M. Matter 13-DE-L-0096

Respondent's representation of client over the span of two years was neither competent nor diligent, and the lack of diligence caused client financial harm. Respondent also misled client, and following respondent's suspension, two forged promissory notes were found in client's file, one representing client's alleged $50,000 debt to respondent and the other his alleged $50,000 debt to a third person. Respondent failed to cooperate with ODC's investigation.

By his conduct in this matter, respondent violated Rules 1.1, 1.3, 1.4, 8.1(b), 8.4(b), 8.4(c), 8.4(d), and 8.4(e), RPC, Rule 407.

N. Matter 13-DE-L-0326

Claimant was employed by respondent. After he left respondent's employ, his notary signature was forged on litigation loan documents by which a client was lent $10,000. The client, whose signature was also forged, was unaware of the loan and received none of the proceeds, but ultimately paid the loan company $13,000 to avoid costly litigation. Respondent did not cooperate in the investigation of this matter.

By his conduct in this matter, respondent violated Rules 8.1(b), 8.4(b), 8.4(c), 8.4(d), and 8.4(e), RPC, Rule 407.

O. Matter 13-DE-L-0817

Client lent respondent $500,000 as a real estate investment in exchange for certain benefits. After the loan was made, client learned that respondent had presented him with forged and fabricated documents, and that respondent lacked the authority to fulfill certain of the promised benefits. Respondent repaid client only $90,000, and misrepresented the source of those funds. Respondent did not cooperate in ODC's investigation.

Respondent's conduct in this matter violated Rules 8.1(b), 8.4(b), 8.4(c), 8.4(d), and 8.4(e), RPC, Rule 407.

P. Matter 13-DE-L-1046

Respondent retained an unearned $500 payment. He did not cooperate in this investigation.

Respondent violated Rules 1.16(d) and 8.1(b), RPC, Rule 407, in this matter.

Q. Out-of-State Loan Modification Matters

Respondent employed marketing companies to solicit out-of-state clients interested in home loan modifications or foreclosure avoidance. Respondent, who was licensed only in South Carolina, failed to oversee the actions of these marketing companies, and employed a third party to process the loan modifications. Upon respondent's interim suspension, this third party began working with a different South Carolina law firm. Neither respondent nor this third party notified the loan modification clients of respondent's suspension, did not seek their consent to work with the new firm, and shared confidential client information with that firm. Eventually the third party mailed a cryptic unsigned letter to respondent's out-of-state clients notifying them of respondent's suspension and giving them the ATP's contact information. The third party surrendered many, but not all, of respondent's loan modification client files to the ATP. Respondent did not cooperate in the investigation of these matters.

Respondent's conduct constituted the unauthorized practice of law in many of these foreign jurisdictions. This is a violation of Rule 5.5, RPC, Rule 407.

The applicable rules of professional conduct are those of the jurisdictions where the clients and homes are located. Rule 8.5, RPC, Rule 407. For this reason, the individual client matters are grouped by jurisdiction.

1. Arkansas, Matter 13-DE-L-0337

A couple paid respondent $2,900 to assist in obtaining a modification of their already modified home loan. They did not receive adequate communications and could not obtain a status update.

Respondent's conduct in this matter violated the following Arkansas Rules of Professional Conduct: 1.3, 1.4, 1.5, 1.16(d), and 8.1(b).

2. California, Matters 13-DE-L-1201, 13-DE-L-0135, 13-DE-L-0210, and 13-DE-L-0050

Client A paid $2,900 upfront for help with a loan modification matter. Client B paid $2,800 despite being eligible for free services and was eventually told to send the lender her documents directly. Client Couple C paid $2,900 and were informed the foreclosure on their home had been stopped. They subsequently learned the home had been sold at foreclosure. Client Couple D paid $2,900, but received neither diligent service nor adequate communications.

Respondent's conduct constituted the unauthorized practice of law in violation of § 6125 of the California Business and Professional Code, and Rule 1-300 of the California Rules of Professional Conduct. By charging and collecting an upfront fee, respondent violated California Civil Code § 2944.7. In addition, respondent's conduct violated these California Rules of Professional Conduct: 1-400, 3-110, 3-500, 3-700, 4-100, and 4-200.

3. Colorado, Matter 13-DE-L-0162

Client was told respondent could assist her only if she stopped paying her mortgage and instead paid respondent $2,900. After receiving client's payment, respondent did not work diligently on her behalf or do anything to assist in client's loan modification. When client called respondent's law firm directly for a status update, she received a voicemail response from respondent's employee directing her not to call his office. Following respondent's interim suspension, the third party contacted client to inform her that respondent's firm was out of business. Client lost her home in foreclosure.

Respondent's conduct in this matter violated the following Colorado Rules of Professional Conduct: 1.3, 1.4, 1.5, 1.15, 1.16(d), 5.3, and 8.1(b).

4. Connecticut, Matters 13-DE-L-0244, 13-DE-L-0992, and 13-DE-L-0563

Client Couple A paid respondent $2,900 to help them with their mortgage. They received confusing and conflicting emails from three different processors who identified themselves as employees of respondent's firm. Respondent did not diligently work to obtain a modification or otherwise earn the fee collected. After respondent was placed on interim suspension, one of the three processors emailed clients and said their file had been submitted to their lender. Later, clients were advised that respondent had transferred their file to another firm. Clients gave the successor firm permission to negotiate on their behalf, but did not receive satisfactory service. Clients later learned respondent had been suspended.

Client B paid respondent $2,900 to help her obtain a loan modification. Respondent did not provide Client B with diligent representation or adequate communication. The loan processors she thought were firm employees often provided her with conflicting information about the status of her matter. After respondent's interim suspension, the loan processors continued to tell her they were working on her file, but indicated they were with a successor law firm. When she refused to pay additional fees to the successor firm, any work being performed on her file ceased.

Client C hired respondent's firm to help her obtain a loan modification. She paid the firm $2,400 after a non-lawyer salesperson gave her legal advice and told her respondent's firm was very experienced. Sometimes she could not receive any response from her firm contacts, and at other times she received inconsistent and/or false information. Client C did not receive any discernable service from respondent or his firm and ultimately obtained a loan modification on her own.

Respondent's conduct in these matters violated the following portions of the Connecticut Rules of Professional Conduct: 1.1, 1.3, 1.4, 1.5, 1.6, 1.15, 1.16(d), 5.3, 7.1, 8.1(2), and 8.4(d).

5. Florida, Matter 12-DE-L-1419

Client responded to an internet advertisement and was contacted by a salesperson associated with respondent's firm. Client paid the firm $2,900, but did not receive the promised modification. Client communicated only with employees of the marketing company and the loan modification processing companies. Respondent did nothing on client's behalf.

Under Florida law, it is generally impermissible to charge or collect a fee for foreclosure prevention services prior to completion of all of the services. Florida Statutes § 501.1377. Respondent did not fall within any exception to that general rule. Florida Statutes § 501.212; § 501.1377. Respondent's collection of an up-front fee violated Rule 4-1.5 of the Florida Rules of Professional Conduct, and he also violated Rules 4-1.3, 4-1.4, 4-5.3, 4-7.13, and 4-8.1(b).

6. Georgia, Matter 13-DE-L-0273

Client hired respondent after a salesperson guaranteed a loan modification and convinced client to sell his truck to pay the $2,900 fee. No progress was made on Client's file, and respondent failed to notify him of his suspension.

Respondent's conduct in this matter violated the following portions of the Georgia Rules of Professional Conduct: 1.3, 1.4, 1.5, 5.3, 1.16(d), 7.1, and 8.1(b).

7. Idaho, Matter 13-DE-L-0256

Client hired respondent to help him obtain a loan modification and agreed to pay half of the $2,900 fee up front and the second half after his loan was modified. However, client's credit card was charged with both payments before any work was completed. Respondent did not provide client with adequate communication or diligent representation.

Respondent's conduct in this matter violated Rules 1.3, 1.4, 1.5, 1.15, 1.16(d), 5.3, 8.1(b), and 8.4 of the Idaho Rules of Professional Conduct.

8. Illinois, Matters 13-DE-L-0051 and 13-DE-L-0053

Client A hired respondent after a salesperson convinced him his home could be saved from foreclosure and his mortgage debt reduced. Client was specifically told the firm could practice law in his home state of Illinois as well as Oklahoma, where his lender was located. He was instructed to stop paying his mortgage and to use that money to pay respondent $2,900. After several months, client requested a refund. By this point in time, respondent was on interim suspension. Client did not receive a refund and his file was not surrendered to the ATP.

Client Couple B paid respondent's firm $2,900 for loan modification assistance. A non-lawyer associated with the firm instructed the couple not to make further mortgage payments. Respondent failed to provide competent or diligent service and failed to adequately communicate. After respondent was placed on interim suspension, non-lawyers associated with respondent shared clients' confidential information with another South Carolina law firm without the couple's consent.

Respondent's conduct in these matters violated Rule 5.5 of the Illinois Rules of Professional Conduct, which prohibits lawyers from assisting another person in the unauthorized practice of law and prohibits lawyers not admitted in Illinois from holding themselves out as admitted in the jurisdiction. Respondent's conduct also violated the following additional portions of the Illinois Rules of Professional Conduct: 1.3, 1.4, 1.5, 1.6, 1.16(d), 5.3, 7.1, 8.1(b), and 8.4.

9. Kentucky, Matters 13-DE-L-0008 and 13-DE-L-0034

Client A agreed to pay respondent $2,900 after a salesperson called respondent a loan modification specialist and made unrealistic promises. Client A did not receive adequate communication and when she was updated, she was given false information about the status of her loan modification. Respondent did not provide her with diligent service or the level of service she had been promised. For example, client was promised the firm would have a court-ordered mediation cancelled, but when it was not cancelled, she had to attend alone. Neither respondent nor the non-lawyers associated with his firm timely informed client of his interim suspension. The third party charged Client A's final $725 credit card payment to a different firm without her knowledge or consent. Client A attended a foreclosure hearing by herself. When the third party surrendered Client A's file, it contained no evidence of work performed on her behalf.

Client Couple B were persuaded to hire respondent's firm after a salesperson promised them the attorney fee would be held in trust and that their mortgage payment would be reduced. They were advised to stop making payments as the firm tried to negotiate a modification. After Client Couple B paid the $2,900 attorney's fee, communication ceased. Respondent did not diligently work on the couple's matter and did not surrender their file upon his suspension.

Respondent's conduct in these matters violated the following portions of the Kentucky Supreme Court Rules 3.130: -1.3, -1.4, -1.5, -1.6, -1.16(d), -5.3, -7.15, -8.1, and -8.4.

10. Maine, Matter 13-DE-L-0226

Client and his wife paid respondent's firm $3,500 to help lower their mortgage payments. They completed several packets of forms the firm provided, but none were submitted to the lienholders. They learned the firm was closed more than a month after respondent's suspension.

Respondent's conduct in this matter violated the following portions of the Maine Rules of Professional Conduct: 1.3, 1.5, 1.16(d), 5.3, and 8.1(b).

11. New Hampshire, Matter 13-DE-L-0152

Client paid respondent's firm $3,495 following a high-pressure sales pitch. Client experienced difficulty reaching anyone and never had a consistent firm contact. He never received the services or results he was promised.

Respondent's conduct in this matter violated the following portions of the

New Hampshire Rules of Professional Conduct: 1.3, 1.4, 1.16(d), 5.3, and 8.1(b).

12. New Jersey, Matter 13-DE-L-1028

Client hired respondent to help him with a loan modification and made one payment of $967 prior to respondent's suspension. Respondent had not earned the fee and did not issue client a refund.

Respondent's conduct in this matter violated the following portions of the New Jersey Rules of Professional Conduct: 1.16(d) and 8.1(b).

13. Nevada, Matter 13-DE-L-0052

Clients paid respondent $2,900 to help them with a loan modification after a non-lawyer salesperson gave them false and misleading information about respondent and his firm. Respondent did not provide diligent representation or adequate communication.

Respondent's conduct in this matter violated the following portions of the Nevada Rules of Professional Conduct: 1.3, 1.4, 1.5, 1.16(d), 5.3, 7.1, 8.1(b), and 8.4(c).

14. New York, Matter 13-DE-L-0566

Client paid respondent $2,900 after a salesperson promised her specific results. Respondent did not diligently represent client and did not adequately communicate with her. He did not earn the fee and failed to surrender the unearned fee or client's file upon his suspension.

By collecting money to represent client in this matter, respondent engaged in the practice of law in violation of Section 484 of the New York Judiciary Law and Rule 5.5 of the New York Rules of Professional Conduct. Respondent's conduct also violated the following portions of the New York Rules of Professional Conduct: 1.3, 1.4, 1.5, 1.15, 1.16(e), 5.3, and 8.4(c).

15. North Carolina, Matter 13-DE-L-0227

Clients paid respondent $2,495 to help them obtain a loan modification.

By offering to provide loan modification services in North Carolina, respondent engaged in the unauthorized practice of law in violation of N.C. Gen. Stat. § 84-4 and Rule 5.5 of the North Carolina Rules of Professional Conduct. Further, because he was not licensed to practice law in North Carolina and accepted an upfront fee, respondent violated N.C. Gen. Stat. § 14-424. Respondent's conduct also violated the following portions of the North Carolina Rules of Professional Conduct: 1.3, 1.4, 1.16(d), 5.3, and 8.1(b).

16. Pennsylvania, Matters 13-DE-L-0182, 13-DE-L-0475, 13-DE-L-0081, and 13-DE-L-0211

Client A paid respondent $2,900 to help her obtain a lower mortgage payment. Respondent did not diligently represent her or provide her with adequate communication. After respondent's suspension, information from her file was shared with individuals associated with another South Carolina law firm without her consent.

Client B tried to obtain a loan modification under the Making Home Affordable Modification Program, but she was ineligible. She then communicated with a salesperson associated with respondent, who assured her that she was eligible for the program and that her lender was misleading her. After the salesperson made this claim and made other promises, client hired the firm and paid respondent $2,900. Respondent did not diligently represent client or adequately communicate with her. After respondent's suspension, information from her file was shared with individuals associated with another South Carolina law firm which solicited her business by email and phone.

Client Couple C paid respondent $3,000 to help them obtain a loan modification. After paying the fee and submitting the paperwork, the couple received no communication and no progress was made.

A foreclosure sale was already scheduled on Client D's home. He received numerous phone calls from salespeople associated with respondent's firm, who falsely reported that the firm had Pennsylvania bar members on staff.

Client hired respondent and paid $2,000. When Client D received the fee agreement, he noticed the terms and conditions were different from those the salesperson described. Client requested a refund, but did not receive one.

Respondent's conduct in these matters violated the following portions of the Pennsylvania Rules of Professional Conduct: 1.3, 1.4, 1.5, 1.6, 1.16(d), 5.3, 7.1, 8.1(b), and 8.4(c).

17. Tennessee, Matters 13-DE-L-0297, 13-DE-L-0049, and 13-DE-L-0183

Client A paid respondent $2,200 to help him with his home loan. After receiving no services, he sought a refund but received no response.

Client B paid respondent $2,900 to help her with a loan modification after a salesperson identified herself as a firm employee and gave her false and misleading information about the firm. Respondent performed no work on client's behalf and never contacted her lender.

Client Couple C paid respondent $2,800 to help them obtain a loan modification after their own attempts were unsuccessful. They were repeatedly asked to submit documents they had already submitted and experienced a lack of responsiveness from firm contacts.

Respondent's conduct in these matters violated the following portions of the Tennessee Rules of Professional Conduct: 1.3, 1.4, 1.5, 1.16(d), 5.3, 7.1, 8.1(b), 8.4(a), and 8.4(c).

18. Texas, Matters 13-DE-L-0054, 13-DE-L-1156, 13-DE-L-0215, and 13-DE-L-0062

Client A paid respondent $1,300 after a salesperson promised him the firm could obtain specific loan modification terms for him. Client submitted the requested paperwork, but it was returned to him with instructions to mail it to his lender. He then received a phone call advising him that he would have to pursue the matter on his own. Client's phone calls and emails to the firm went unanswered. After filing a complaint with the Better Business Bureau, client received a call from the firm offering to represent him for an additional payment of $1,600. The caller guaranteed favorable results, while noting that such a guarantee is illegal. Client made the additional payment and again communication ceased.

Client Couple B hired respondent to help them obtain a loan modification. They were advised by their non-lawyer firm contact to stop paying their mortgage even after their income increased significantly. Shortly after clients paid the entire $2,900 fee, their firm contacts stopped communicating with them. Thereafter, the lender assessed a large amount of fees for late payments and began foreclosure proceedings.

Client Couple C paid $2,900 after receiving legal advice and misleading information from a firm salesperson. They were unable to speak with respondent. They were told their modification had been worked out but never received any paperwork.

Client D hired respondent to help her obtain a loan modification, agreeing to pay the firm's $2,900 fee in four $750 [sic] installments. Shortly after her first payment to respondent, client's lender offered to modify her loan if she made certain payments over three months. She forwarded the lender's offer to her firm contact, but was instructed not to make payments or acknowledge the offer as the firm could negotiate a better interest rate. Respondent was then suspended, and her firm contact told Client D to make the payments the lender offered. Her file and personal information were then shared with another firm without her knowledge or consent.

Respondent's conduct in these matters violated the following portions of the Texas Rules of Professional Conduct: 1.01, 1.04, 1.05, 1.15, 5.03, 5.05, 7.02, 8.01(b), and 8.04(a)(3).

19. Virginia, Matter 13-DE-L-1191

Client hired respondent after a salesperson emailed her false and misleading information about respondent and his services. After paying $2,900 and repeatedly submitting paperwork, client questioned the firm's conduct. The firm contacts stopped communicating with her.

Respondent's conduct in this matter violated Virginia Rules of Professional

Conduct: 1.3, 1.4, 1.5, 1.16(d), 5.3, 7.1, 8.1(c), and 8.4(c).

20. Washington, Matters 13-DE-L-0413, 13-DE-L-0314, 13-DE-L-0370, and 13-DE-L-0433

Client A paid respondent $2,900 but did not receive the services she was promised. Respondent did not surrender her file upon his suspension, but the loan modification processing company forwarded the electronic file they maintained to the ATP.

Client B paid respondent $2,900 after a salesperson's statements gave him an unreasonable expectation of what the firm could accomplish for him. Client stopped making mortgage payments per his firm contact's instructions. Respondent was suspended approximately one week after client's final payment, and did not provide any meaningful representation. After respondent's suspension, confidential information from client's file was shared with another law firm without client's knowledge or consent.

A salesperson gave Client C misleading information about the services respondent could provide and persuaded her to divert funds earmarked for her mortgage payments to pay the firm. Soon after she paid the $2,900 fee, all communication with the firm ceased. Respondent provided no meaningful representation to client and she lost her home in foreclosure.

Client Couple D decided against hiring respondent's firm, but relented after the salesperson continued calling them and would not take no for an answer. They paid $1,000 toward the fee before signing a fee agreement. They then changed their minds and requested a refund, but did not receive one.

Respondent's conduct violated the following portions of the Washington State Rules of Professional Conduct: 1.3, 1.4, 1.5, 1.6, 1.16(d), 5.3, 7.1, 8.1(b), and 8.4(c).

SANCTION

The authority to discipline lawyers and the manner in which discipline is imposed is a matter within the Court's discretion. *In re Jardine*, 410 S.C. 369, 764 S.E.2d 924 (2014) (internal citation omitted). When the lawyer is in default, the sole question before the Court is that of the appropriate sanction. *Id*. In determining the sanction, the Court will consider the respondent's failure to cooperate with ODC's investigation, his false statements to ODC, and his failure to appear at the disciplinary hearing. *Id*.

The magnitude of respondent's misconduct mandates disbarment. The Panel found respondent was subject to discipline pursuant to Rules 7(a)(1), 7(a)(2), 7(a)(3), 7(a)(4), 7(a)(5), 7(a)(6), and 7(a)(10), RLDE, Rule 413. We agree with the Panel's findings and adopt its recommendations as to additional sanctions which are warranted here. Prior to seeking reinstatement, respondent must pay the costs of this disciplinary proceeding, make restitution to the fortynine clients identified in the attached list, repay the Lawyers Fund for Client Protection for any payments made on respondent's behalf, and complete the Legal Ethics and Practice Program, Ethics School, Trust Account School, and Advertising School.

CONCLUSION

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

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

APPENDIX

1. $32,000 to the complainant in Matter 12-DE-L-1459;

2. $5,000 to the complainant in Matter 12-DE-L-1470;

3. $5,000 to the client in Matter 12-DE-L-1492;

4. $20,000 to the complainant in Matter 12-DE-L-1602;

5. $2,000 to the complainant in Matter 13-DE-L-0006;

6. $25,000 to the clients in Matter 13-DE-L-0007;

7. $700,000 to the complainants in Matter 13-DE-L-0075;

8. $50,000 to the complainant in Matter 13-DE-L-0080;

9. $50,000 to the third person in Matter 13-DE-L-0096;

10. $10,000 to the client in Matter 13-DE-L-0326;

11. $410,000 to the investor in Matter 13-DE-L-0817;

12. $500 to the client in Matter 13-DE-L-1046;

13. $2,900 to Arkansas Client Couple in Matter 13-DE-L-0337;

14. $2,900 to California Client A;

15. $2,800 to California Client B;

16. $2,900 to California Client Mr. C;

17. $2,900 to California Client Couple D;

18. $2,900 to Colorado Client;

19. $2,900 to Connecticut Client Couple A;

20. $2,900 to Connecticut Client B;

21. $2,400 to Connecticut Client C;

22. $2,900 to Florida Client;

23. $2,900 to Georgia Client;

24. $2,900 to Idaho Client;

25. $2,900 to Illinois Client A;

26. $2,900 to Illinois Client Couple B;

27. $2,175 to Kentucky Client A;

28. $2,900 to Kentucky Client Couple B;

29. $3,500 to Maine Client;

30. $3,495 to New Hampshire Client;

31. $967 to New Jersey Client;

32. $2,900 to Nevada Client Couple;

33. $2,900 to New York Client;

34. $2,495 to North Carolina Client Couple;

35. $2,900 to Pennsylvania Client A;

36. $2,900 to Pennsylvania Client B;

37. $3,000 to Pennsylvania Client Couple C;

38. $2,000 to Pennsylvania Client D;

39. $2,200 to Tennessee Client A;

40. $2,900 to Tennessee Client B;

41. $2,800 to Tennessee Client Couple C;

42. $2,900 to Texas Client A;

43. $2,900 to Texas Client Couple B;

44. $2,900 to Texas Client Couple C;

45. $2,900 to Texas Client D;

46. $2,900 to Virginia Client;

47. $2,900 to Washington Client A;

48. $2,900 to Washington Client B;

49. $2,900 to Washington Client C; and

50. $1,000 to Washington Client Couple D.

The Supreme Court of South Carolina

The State, Respondent,

v.

Daisy Lynne Mimms, Petitioner.

Appellate Case No. 2014-002198
Lower Court Case No. 2011-CP-38-00486

ORDER

We deny the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Mimms*, 410 S.C. 32, 763 S.E.2d 46 (Ct. App. 2014). However, we hereby direct the Court of Appeals to depublish its opinion and assign the matter an unpublished opinion number. The above opinion shall no longer have any precedential effect.

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 20, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jane Srivastava, Appellant,

v.

Ravindra Srivastava, Respondent.

Appellate Case No. 2013-000344

Appeal From Beaufort County
Peter L. Fuge, Family Court Judge

Opinion No. 5287
Heard September 10, 2014 – Filed December 23, 2014
Withdrawn, Substituted and Refiled February 25, 2015

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jane Srivastava, of Hilton Head Island, Pro Se.

H. Fred Kuhn Jr., of Moss Kuhn & Fleming, P.A., of Beaufort, for Respondent.

GEATHERS, J.: In this divorce action, Jane Srivastava (Wife) appeals the family court's final order. Wife argues the family court erred by (1) failing to either impute income to Ravindra Srivastava (Husband) or deviate from the Child Support Guidelines in its child support award, (2) giving credit to Husband for excess child support payments, (3) awarding Husband attorney's fees, (4) not awarding Wife attorney's fees, (5) dividing the marital property in an inequitable manner, (6) finding Husband did not condone Wife's adultery, (7) denying Wife alimony, and (8) rendering a partial and biased decision. We affirm in part, reverse in part, and remand.

ISSUES ON APPEAL

I. Did the family court err by failing to either impute income to Husband or deviate from the Child Support Guidelines in its child support award?

II. Did the family court err in giving credit to Husband for excess child support payments?

III. Did the family court err in awarding Husband attorney's fees and not awarding Wife attorney's fees?

IV. Did the family court err in finding Husband did not condone Wife's adultery, and, thus, err in denying Wife alimony?

V. Did the family court err in dividing the marital property in an inequitable manner?

VI. Did the family court fail to render an impartial and nonbiased decision?

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). In appeals from the family court, the appellate court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011) (citations omitted). "*De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the [family] court's findings." *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654–55. However, this broad scope of review does not require the appellate court to disregard the factual findings of the family court or ignore the fact that the family court was in a better position to assess the credibility of the witnesses. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Moreover, the appellant is not relieved of the burden of convincing this court that the family court erred in its findings. *Id.* at 387–88, 544 S.E.2d at 623. Accordingly, we will affirm the decision of the family court unless its decision is controlled by some error of law or the appellant satisfies the burden of showing that the preponderance of the evidence actually supports contrary factual findings by this court. *See Lewis*, 392 S.C. at 390–91, 709 S.E.2d at 654–55.

LAW/ANALYSIS

Wife argues the family court erred in its final order for several reasons. We address each issue in turn.

I. Did the family court err by failing to either impute income to Husband or deviate from the Child Support Guidelines in its child support award?

Wife argues the family court erred in its child support determination by failing to (a) impute income to Husband, or (b) deviate from the Child Support Guidelines to award a larger sum of child support. Husband asserts these arguments are not preserved. We agree with Husband.

"To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [family] court." *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006). "Therefore, when an appellant neither raises an issue at trial nor [files] a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review." *Id.* at 212, 634 S.E.2d at 54–55.

In *Marchant v. Marchant*, the wife alluded to the fact that the husband was capable of earning more in the final hearing, but she did not request a finding that the husband was voluntarily underemployed for the purpose of imputing income. 390 S.C. 1, 7, 699 S.E.2d 708, 711 (Ct. App. 2010). Furthermore, the family court did not rule on the issue of income imputation. *Id.* This court determined that the wife was required to file a Rule 59(e) motion to seek a ruling on that point, and she failed to do so. *Id.* Because income imputation was not raised to and ruled upon by the family court, this court found the issue was unpreserved. *Id.* at 7, 699 S.E.2d at 711–12.

Likewise, here, Wife failed to raise the issues of income imputation and deviation from the Child Support Guidelines to the family court, and she never filed a Rule 59(e) motion for the family court to consider these issues. Because Wife failed to do so, these arguments are not preserved for appellate review. *See id.*; *Doe*, 370 S.C. at 212, 634 S.E.2d at 54–55.

II. Did the family court err in giving credit to Husband for excess child support payments?

Wife argues the family court erred in giving credit to Husband for overpayment of child support. Husband argues this issue is unpreserved. We agree with Husband.

Similar to the first issue, Wife did not file a Rule 59(e) motion to reconsider this ruling after the family court issued its final order. Therefore, we find this issue is also unpreserved. *See, e.g.*, *Bennett v. Rector*, 389 S.C. 274, 284, 697 S.E.2d 715, 720 (Ct. App. 2010) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." (quoting *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998))); *id.* (finding that when the family court made the child support award retroactive in its order, the mother needed to raise the issue in a Rule 59(e) motion to preserve her argument on appeal).

III. Did the family court err in awarding Husband attorney's fees and not awarding Wife attorney's fees?

Wife argues the family court erred in awarding Husband attorney's fees in the amount of $50,000 because Husband earns a substantially higher income than Wife. Wife maintains that she should have been awarded attorney's fees instead. We find the family court erred, as the evidence does not support the attorney's fees awarded to Husband.

Section 20-3-130(H) of the South Carolina Code (2014) authorizes the family court to order payment of litigation expenses to either party in a divorce action. "An award of attorney's fees rests within the sound discretion of the trial [court] and should not be disturbed on appeal absent an abuse of discretion." *Doe v. Doe*, 319 S.C. 151, 157, 459 S.E.2d 892, 896 (Ct. App. 1995) (citation omitted).

In deciding *whether* to award attorney's fees and costs, a family court should first consider the following factors as set forth in *E.D.M. v. T.A.M.*: "(1) each party's ability to pay his or her own fee; (2) the beneficial results obtained by the attorney;

(3) the parties' respective financial conditions; and (4) the effect of the fee on each party's standard of living." *Farmer v. Farmer*, 388 S.C. 50, 57, 694 S.E.2d 47, 51 (Ct. App. 2010) (citing *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992)). Then, if the family court decides to award attorney's fees to a particular party, the family court should weigh the following factors as set forth in *Glasscock v. Glasscock* in considering *how much* to award in attorney's fees and costs: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Id.* (citing *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991)).

In *Rogers v. Rogers*, our supreme court found the family court's award of attorney's fees to the husband was excessive because the award represented approximately 16% of the wife's annual income. 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001). In remanding the issue of attorney's fees to the family court, the supreme court emphasized, "A party's ability to pay is an essential factor in determining whether an attorney's fee should be awarded, as are the parties' respective financial conditions and the effect of the award on each party's standard of living." *Id.* (citing *Sexton v. Sexton*, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993)).

Here, the family court generally acknowledged in its final order that it considered the four factors in *E.D.M. v. T.A.M.* in deciding whether to award attorney's fees. The family court then referenced its application of the *Glasscock* factors in determining how much to award in attorney's fees. While the family court's decision to award attorney's fees is generally within its discretion, *Doe*, 319 S.C. at 157, 459 S.E.2d at 896, we find the award of $50,000 in attorney's fees to Husband is excessive and an abuse of discretion.

As in *Rogers*, we have compared the award of attorney's fees to Wife's annual income. According to the family court's order, Wife has a gross annual income of $55,260.[1] Applying this number to the award of attorney's fees, the $50,000 award here represents approximately 90% of Wife's gross annual income.[2] And, although

[1] The family court's order states that Wife earns a gross monthly income of $4,605. We used this number to extrapolate her annual earnings of $55,260.

[2] According to the numbers proffered by Husband in his appellate brief, Wife's average annual income between 2008 and 2011 was $73,690. Even if we used this

the family court generally referenced the *E.D.M.* factors, the income-to-attorney's fees ratio makes it apparent that the family court did not sufficiently consider each party's ability to pay, their respective financial conditions, and the effect of the award on each party's standard of living. *See Rogers*, 343 S.C. at 334, 540 S.E.2d at 842; *Sexton*, 310 S.C. at 503, 427 S.E.2d at 666 (noting a party's ability to pay is an "essential" factor in determining an award of attorney's fees); *Spreeuw v. Barker*, 385 S.C. 45, 72, 682 S.E.2d 843, 857 (Ct. App. 2009) (stating this court "would be very concerned by an award of attorney's fees representing approximately 40% of [a party's] annual income").

Moreover, Husband earns a substantially higher annual income than Wife, which further illustrates the family court's failure to adequately address the *E.D.M.* factors. *Cf. Bodkin v. Bodkin*, 388 S.C. 203, 224–25, 694 S.E.2d 230, 241–42 (Ct. App. 2010) (affirming the family court's attorney's fees award, in part, because the husband was in a far better financial condition to pay the wife's attorney's fees based upon their respective incomes and the effect of the award on their standard of living). Accordingly, we remand to the family court to address each of the *E.D.M.* factors with specificity in determining whether to award attorney's fees in light of the conclusions of this opinion. If the family court determines that attorney's fees should be awarded to a particular party, it should then specifically address each of the *Glasscock* factors in determining the amount of attorney's fees.

IV. Did the family court err in finding Husband did not condone Wife's adultery, and, thus, err in finding Wife was barred from receiving alimony?

Wife argues the family court erred in finding Husband did not condone Wife's adultery. In turn, Wife contends that she should have been awarded alimony. Husband maintains that he never forgave Wife for her actions, and the family court properly found Wife's claim of condonation was not credible. We disagree with Husband. The evidence does not support the family court's finding of the absence of condonation, and, therefore, Wife is not barred from receiving alimony.

A. Condonation

number instead of the court's calculations, the award of attorney's fees would constitute 67.8% of Wife's annual income, which is still excessive.

Condonation, a defense to adultery in a divorce action, "means 'forgiveness, express or implied, by one spouse for a breach of marital duty by the other. More specifically, it is the forgiveness of an antecedent matrimonial offense on condition that it shall not be repeated, and that the offender shall thereafter treat the forgiving party with conjugal kindness.'" *Nemeth v. Nemeth*, 325 S.C. 480, 488, 481 S.E.2d 181, 185 (Ct. App. 1997) (quoting *McLaughlin v. McLaughlin*, 244 S.C. 265, 272, 136 S.E.2d 537, 540 (1964)). "To establish condonation, there generally must be proof of reconciliation, 'which implies normal cohabitation of the husband and wife in the family home.'" *Id.* (quoting *Langston v. Langston*, 250 S.C. 363, 373, 157 S.E.2d 858, 863 (1967)). "A full resumption or continuance of marital cohabitation after the conduct complained of and with knowledge thereof, *for any considerable period of time*, quite conclusively shows an intention to forgive or condone such conduct." *McLaughlin*, 244 S.C. at 274, 136 S.E.2d at 541 (emphasis added) (internal quotation marks and citation omitted).

Once an act of adultery is condoned, a spouse cannot later revive the marital offense as a bar to paying alimony unless the other spouse repeats the offense. *See RGM v. DEM*, 306 S.C. 145, 150, 410 S.E.2d 564, 567 (1991) (stating condonation may be revoked by subsequent illicit conduct); *McLaughlin*, 244 S.C. at 275, 136 S.E.2d at 542 (same); *see also Murray v. Murray*, 271 S.C. 62, 64, 244 S.E.2d 538, 539 (1978) (finding that even if the husband's initial decision to stay in the home constituted condonation, the condonation was nullified by the wife's subsequent acts of misconduct). Moreover, a condoned act of adultery cannot be employed as a bar to paying one spouse alimony as a matter of law. *Doe v. Doe*, 286 S.C. 507, 512, 334 S.E.2d 829, 832 (Ct. App. 1985).

In *McLaughlin*, after the husband committed marital misconduct (physical cruelty), our supreme court found that the wife continued living with her husband for approximately five months before the couple separated. 244 S.C. at 274, 136 S.E.2d at 541. The supreme court noted that although the relationship between the couple appeared to have been strained, the parties nevertheless continued living together under the same roof for five months. *Id.* at 274–75, 136 S.E.2d at 541–42. Therefore, the evidence of five months' continued cohabitation convinced the court that the wife condoned the husband's misconduct. *Id.*; *see also Doe*, 286 S.C. at 510, 334 S.E.2d at 831 (finding the marital misconduct was condoned by the husband when the couple continued to cohabitate and voluntarily engage in sexual relations for approximately five months); *Grubbs v. Grubbs*, 272 S.C. 138, 141, 249 S.E.2d 747, 749 (1978) (finding the husband's assertion that he did not learn of his wife's affair until over ten years after it occurred was "insufficient to rebut the presumption of condonation arising from the lapse of time, the cohabitation of the parties, and other related conduct by the husband"). *But see Nemeth*, 325 S.C. at 488, 481 S.E.2d at 185 (finding the evidence was insufficient to prove the husband condoned the wife's adultery by spending two nights in the home after the wife confessed her adultery when the husband testified they did not sleep together and there was no agreement to reconcile); *Murray*, 271 S.C. at 63–64, 244 S.E.2d at 539 (holding it was not condonation for the husband to remain in the marital home on advice of counsel and for the sake of the parties' young son after the wife committed marital misconduct).

Notwithstanding continued cohabitation, our supreme court has found that the presence or lack of sexual access is also a pertinent factor in determining the existence of condonation. *See, e.g.*, *Wilson v. Wilson*, 274 S.C. 236, 238–40, 262 S.E.2d 732, 733–34 (1980) (holding that even though the couple continued living together for three months after the husband last physically abused the wife, the family court erred in not allowing the wife to testify about the lack of sexual access for condonation purposes). Nevertheless, condonation is "primarily a state of mind," *id.* at 238, 262 S.E.2d at 733, the existence of which concerns whether the evidence shows the injured spouse forgave the offending spouse. *See McLaughlin,* 244 S.C. at 272, 136 S.E.2d at 540 ("Condonation . . . means forgiveness, express or implied, *by one spouse* for a breach of marital duty *by the other*." (emphases added)); Roy T. Stuckey, *Marital Litigation in South Carolina* 132 (4th ed. 2010) (evaluating the elements of condonation and stating "[t]he primary evidentiary issue is *the fact or act of forgiveness on the part of the injured spouse*" (emphasis added)).

Here, Wife's testimony indicates that she and Husband resumed "normal cohabitation" after Wife admitted to the affair. Wife testified that after her admission, she ended the relationship with her paramour and never engaged in another extramarital relationship. She also stressed that the parties continued living together in the marital home from the time Husband learned of the affair in January 2010 until Wife moved out over a year later in March 2011—a fact that Husband does not dispute. As Wife testified—and Husband admitted—even before Wife's admission of adultery, the couple regularly slept in separate bedrooms because Husband snored and was "on call a lot" with his practice. Despite continuing to maintain separate bedrooms after Wife's admission of adultery, Wife contends the parties engaged in conjugal conveniences at least once per month from January 2010 until October 2010. As additional evidence of condonation, Wife cites an e-mail Husband sent in July 2010—*seven months* after her admission of adultery—which she claims is a clear indication of his intent to forgive Wife and a plea to continue their marital relationship in full.[3]

Although fourteen months of cohabitation elapsed after Wife's admission of adultery, Husband insists that no "normal cohabitation" occurred because the couple never slept in the same bedroom and Wife frequently traveled away from the marital home during much of the alleged period of reconciliation. Specifically, during oral argument, Husband's counsel stressed that Wife traveled and was gone "most of the time," and, therefore, she was not "seeking condonation." Moreover, despite living together for fourteen months, Husband cites an e-mail Wife sent to Husband in August 2010—halfway through the fourteen-month cohabitation period—notifying Husband of Wife's intent to separate and file for divorce. Finally, as to intimacy between the two, Husband contradicted Wife and maintained that they only "attempted" to engage in sexual relations on one occasion after Husband learned of Wife's affair.

In the final hearing, the family court found Wife not credible and Husband credible, and, in turn, it determined Husband's testimony revealed he did not condone Wife's adultery. While matters of credibility are generally left to the discretion of the family court, *see Reiss v. Reiss*, 392 S.C. 198, 204, 708 S.E.2d 799, 802 (Ct. App. 2011), the evidence here does not support the family court's determination.

[3] Husband's e-mail states, in pertinent part,

> We are going through the worst conflict in our life but as awful as it feels, it is an opportunity to revive the connection, values, love and dreams that we had together. *At no point in this turmoil . . . have* [*I*] *stopped loving you or dreaming of our future together.* . . . I want our relationship to survive and thrive not because of kids or geography or shame of a failed marriage but because of our love and commitment to be better for each other.

(emphasis added).

As our supreme court noted in *McLaughlin*, continued cohabitation for a considerable amount of time "quite conclusively" shows condonation. 244 S.C. at 274, 136 S.E.2d at 541 (citation omitted). Here, after Wife's admission of adultery, Husband and Wife continued normal cohabitation for at least seven months until Wife expressed her desire to separate in her August 2010 e-mail to Husband. Furthermore, after this e-mail, the couple continued living together under the same roof for an additional seven months. Although the relationship between Husband and Wife appears to have been strained, their continued marital cohabitation for a "considerable period of time[] *quite conclusively shows an intention to forgive or condone such conduct*." *Id.* (emphasis added) (citation omitted). Moreover, Husband admitted that after he learned of Wife's affair in January 2010, he and Wife attempted marriage counseling twice to work on the marriage. Wife also testified—and Husband has not offered clear and positive proof otherwise—that she has not repeated an adulterous act after admitting to the affair.[4] *See McLaurin v. McLaurin*, 294 S.C. 132, 133, 363 S.E.2d 110, 111 (Ct. App. 1987) (stating proof of adultery must be clear and positive, and the infidelity must be established by a clear preponderance of the evidence (citation omitted)).

Despite Husband's testimony concerning minimal marital intimacy, the evidence of fourteen months of continued cohabitation and two counseling sessions, together with Husband's July 2010 e-mail, strongly evinces Husband's condonation of

[4] After the parties separated, Wife admitted joining "JDate," a Jewish dating website, in late September or October of 2011. Wife revealed that she went on four different dates while the parties were separated, but insists that she only had "coffee dates" with these four men and was simply "looking for company." Husband has not offered proof that anything more than an informal "coffee meeting" occurred during these "dates." As we have stated in a previous opinion, *McElveen v. McElveen*, we decline to find the wife committed adultery because there is "virtually no evidence of a romantic or sexual relationship" between the wife and an alleged paramour. 332 S.C. 583, 598–99, 506 S.E.2d 1, 8–9 (Ct. App. 1998), *disapproved of on other grounds by Wooten v. Wooten*, 364 S.C. 532, 615 S.E.2d 98 (2005). "[W]ithout evidence to support a romantic relationship, including love letters, romantic cards, hand-holding, hugging, kissing, or any other romantic demonstrations or actions between the wife and [the alleged] paramour, adultery [is] not adequately established." *Brown v. Brown*, 379 S.C. 271, 279, 665 S.E.2d 174, 179 (Ct. App. 2008).

Wife's adultery. As noted, the law of condonation focuses on forgiveness from the standpoint of the injured party. *See, e.g.*, *McLaughlin*, 244 S.C. at 272, 136 S.E.2d at 540 ("Condonation in the law of divorce means forgiveness, express or implied, *by one spouse* for a breach of marital duty *by the other*." (emphases added) (internal quotation marks and citation omitted)); Roy T. Stuckey, *Marital Litigation in South Carolina* 132 (4th ed. 2010) ("The primary evidentiary issue [when evaluating condonation] is the fact or act of forgiveness on the part of the injured spouse."). Furthermore, we reject Husband's contention that *Wife's* conduct and travels negated evidence of *Husband's* condonation under these circumstances. Wife's travels in 2010 included brief trips to Paris and Italy, and two months with the children during the summer in New York; however, Wife always returned home after these trips.

Therefore, under our view of the preponderance of the evidence, it is apparent that Husband condoned Wife's adultery, and he cannot now revive the marital offense. *See McLaughlin*, 244 S.C. at 275, 136 S.E.2d at 542 (finding one spouse may not later revoke condonation unless a subsequent and similar act of marital fault is repeated by the offending spouse). Accordingly, we proceed to the discussion of alimony.

B. Alimony

Because the family court erred in finding Husband did not condone Wife's adultery, Wife is not barred from receiving alimony. Therefore, the family court should reconsider the issue of alimony on remand.[5] *See Doe*, 286 S.C. at 512, 334 S.E.2d at 832 (holding a condoned act of adultery cannot be employed as a bar to paying one spouse alimony as a matter of law).

"Alimony is a substitute for the support normally incident to the marital relationship and should put the supported spouse in the same position, or as near as is practicable to the same position, enjoyed during the marriage." *Reiss*, 392 S.C. at 208, 708 S.E.2d at 804. "If an award of alimony is warranted[,] the family court has a duty to make an award that is fit, equitable, and just." *Id.* The family court

[5] Because the family court found Husband did not condone Wife's adultery, it ordered Wife to repay all amounts of temporary alimony paid by Husband before the final hearing. In light of our holding, we reverse the family court as to this issue as well.

"may grant alimony in such amounts and for such term as the [court] considers appropriate under the circumstances." *Davis v. Davis*, 372 S.C. 64, 79, 641 S.E.2d 446, 454 (Ct. App. 2006).

In determining an award of alimony, the family court must consider the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital property of the parties; (9) custody of the children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) any other factors the family court considers relevant. S.C. Code Ann. § 20-3-130(C). However, "[t]he family court is only required to consider relevant factors." *King v. King*, 384 S.C. 134, 142, 681 S.E.2d 609, 613 (Ct. App. 2009).

After consideration of the appropriate factors, if the family court determines Wife is entitled to alimony, it "must determine what type of alimony is most likely to do justice in this case and, based upon [its] findings of fact and upon consideration of the factors in making such [an] award[], decree either periodic alimony, lump sum alimony or rehabilitative alimony." *Carroll v. Carroll*, 309 S.C. 22, 25, 419 S.E.2d 801, 802–03 (Ct. App. 1992) (footnote omitted).

V. Did the family court err in dividing the marital property in an inequitable manner?

Wife argues the family court erred in its equitable distribution award, particularly because the court's calculations gave excessive weight to (1) her "indiscretion," (2) the $45,360 "gift" Wife gave to her mother, and (3) the unauthorized $16,626 withdrawal from a marital account while the divorce action was pending. Wife also argues the family court failed to consider the relevant tax consequences in its award. We address Wife's arguments in turn.

First, we do not find the family court placed excessive weight on her indiscretion. There is simply no evidence in the record to support this allegation. *See Pinckney*, 344 S.C. at 387–88, 544 S.E.2d at 623 (finding the appellant in an equitable action has the burden of convincing the appellate court that the trial court committed error).

Second, the evidence supports the family court's determination that Wife's $45,360 transfer to her mother was fraudulent and made in anticipation of divorce. The family court may alter the equitable distribution of marital property based on economic misconduct if the allegedly at-fault party engaged in "willful misconduct, bad faith, intention to dissipate marital assets, or the like." *McDavid v. McDavid*, 333 S.C. 490, 496, 511 S.E.2d 365, 368 (1999); *cf. Panhorst v. Panhorst*, 301 S.C. 100, 104–06, 390 S.E.2d 376, 378–79 (Ct. App. 1990) (finding no fraudulent intent on the husband's part in giving his mother a total of $25,000 to $30,000 *over the course of twenty years*, even without the wife's knowledge, because there was no evidence to show that the husband made the gifts with the intent to deprive the wife of her share of the marital estate).

Here, the facts show Wife transferred $45,360 from the marital estate to her mother, without Husband's knowledge, while she had an ongoing affair. Furthermore, the family court noted Wife met with a few divorce lawyers during this time, and Wife, herself, is an attorney and is knowledgeable of the law. The family court found this was evidence that she fraudulently and purposely reduced the marital estate to her advantage in contemplation of divorce. The family court's finding of economic misconduct is supported by the evidence, and, accordingly, the deduction of the amount Wife transferred to her mother from Wife's portion of the marital estate was warranted.

As to Wife's third argument, we find Wife's unauthorized $16,626 withdrawal was also properly deducted from her award. In the family court's temporary order, it authorized each party to withdraw up to $15,000 from any marital account for payment of attorney's fees and litigation costs before the final hearing. Because Wife withdrew $16,626 in excess of the authorized $15,000 limit from a marital account, the amount of the unauthorized withdrawal was properly charged against Wife's portion of the marital estate. *See* S.C. Code Ann. § 20-3-620(B)(3) (2014) (stating the court shall give weight in apportioning marital property, among other factors, to the *depreciation* of the marital estate by one party).

Finally, Wife argues that the family court failed to consider the relevant tax consequences in fashioning its equitable distribution award. Wife contends the family court should have recognized the tax consequences that would follow from her need to liquidate her retirement accounts for reasonable living expenses. Because Wife did not raise this issue to the family court in the first instance, this argument is not preserved for appellate review. *Woodward v. Woodward*, 294 S.C. 210, 216, 363 S.E.2d 413, 417 (Ct. App. 1987) (finding the failure to raise an objection in a post-trial motion to certain issues in the equitable distribution award or seek to obtain a ruling on those issues from the family court rendered the issues unpreserved for appellate review). In conclusion, we find the family court did not err in its equitable distribution award.[6]

VI. Did the family court fail to render an impartial and nonbiased decision?

Wife argues the family court's final order is biased and partial to Husband. In particular, Wife alleges (1) the family court's order is contrary to the evidence, (2) the court found for Husband on all issues, (3) the court had ex-parte communications with Husband's counsel, and (4) the court had previously referred litigants in need of a psychiatric or addiction evaluation to Husband's practice.

Wife cites *Patel v. Patel* for the proposition that a family court's impartiality might reasonably be questioned when its factual findings are not supported by the record. 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). While this is true, the family court's factual findings are not so deficient as to question the judge's impartiality in this action. "The fact [that] a [family court] judge ultimately rules against a litigant

[6] Because we have remanded for an alimony determination, we note that the equitable distribution award may affect alimony, and vice versa. *See* S.C. Code Ann. § 20-3-620(B)(9) (stating that, in apportioning marital property, the family court must give weight in such proportions as it finds appropriate to "whether separate maintenance or alimony has been awarded"); *Johnson v. Johnson*, 288 S.C. 270, 277, 341 S.E.2d 811, 815 (Ct. App. 1986) ("The amount of property awarded in an equitable distribution may be an important factor in determining alimony."); *id.* at 277, 341 S.E.2d at 815–16 ("Since we are remanding the equitable distribution award for reconsideration, the alimony award should be reconsidered in light of [the wife's] portion of the property distribution determined on remand."). Moreover, the determination of attorney's fees on remand must contemplate the reversal of substantive results achieved at trial by Husband's counsel. *Sexton*, 310 S.C. at 503, 427 S.E.2d at 666 (finding beneficial results obtained by counsel is an essential factor in determining whether attorney's fees should be awarded and acknowledging that the supreme court has previously reversed the award of attorney's fees where the substantive results achieved by counsel were reversed on appeal (citations omitted)).

is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings." *Mallett v. Mallett*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996) (citing *Reading v. Ball*, 291 S.C. 492, 495, 354 S.E.2d 397, 399 (Ct. App. 1987)). Although we have assigned error to certain issues in this appeal, we find Wife's allegations of judicial bias are without merit, and, accordingly, we have no reason to question the family court's impartiality.

CONCLUSION

In conclusion, we hold Wife did not preserve her arguments that the family court erred by failing to either impute income to Husband or deviate from the Child Support Guidelines in its child support award. We also find unpreserved Wife's argument regarding the family court's alleged error in giving credit to Husband for excess child support payments.

As to the award of attorney's fees, we find the family court erred in awarding $50,000 to Husband, and, thus, we remand for reconsideration. As to condonation and alimony, we reverse the family court's finding that Husband did not condone Wife's adultery and, therefore, remand for reconsideration of alimony. As to the equitable distribution award, we hold the family court did not err in fashioning the award. Finally, we find Wife's allegations of bias on the part of the family court are without merit.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS and McDONALD, JJ., concur.