The Supreme Court of South Carolina

In the Matter of H.
Franklin Burroughs, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Burroughs and the interests of Mr. Burroughs' clients.

IT IS ORDERED that Richard M. Lovelace, Esquire, is hereby appointed to assume responsibility for Mr. Burroughs' client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Burroughs may have maintained. Mr. Lovelace shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Burroughs' clients and may make disbursements from Mr. Burroughs' trust, escrow, and/or operating account(s) as are necessary to effectuate this

appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of H. Franklin Burroughs, Esquire, shall serve as notice to the bank or other financial institution that Richard M. Lovelace, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Richard M. Lovelace, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Burroughs' mail and the authority to direct that Mr. Burroughs' mail be delivered to Mr. Lovelace's office.

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

Columbia, South Carolina

January 24, 2002

The Supreme Court of South Carolina

IN THE MATTER OF HARRY CRAIG FARVER, RESPONDENT

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 8, 1979, Harry Craig Farver was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 13, 2001, Mr. Farver submitted his resignation from the South Carolina Bar. We accept Mr. Farver's resignation.

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

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

Mr. Farver shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Harry Craig Farver shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
January 25, 2002

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

January 28, 2002

ADVANCE SHEET NO. 2

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

2002-MO-008 - In the Interest of Monshea C.
(Dillon County - Judge Roger E. Henderson)

PETITIONS - UNITED STATES SUPREME COURT

25319 - Kenneth E. Curtis v. State of SC, et al.	Pending
25347 - State v. Felix Cheeseboro	Pending
2001-OR-00171 - Robert Lamont Green v. State	Pending
2001-OR-00780 - Maurice Mack v. State	Pending
2001-MO-047 - DuBay Enterprises, etc. v. City of North Charleston Board of Zoning Adjustment, et al.	Pending

PETITIONS FOR REHEARING

None

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2002-UP-013 Prezzy v. Orangeburg County
(Orangeburg, Judge Diane S. Goodstein)

2002-UP-014 In the Matter of Prezzy v. Maxwell
(Orangeburg, Judge Diane S. Goodstein)

2002-UP-015 Oxendine v. Holt
(Spartanburg, Judges J. Derham Cole and Joseph J. Watson)

2002-UP-016 State v. Larry Gene Cantrell
(Pickens, Judge Henry F. Floyd)

2002-UP-017 Kewalramani v. Pankey
(Marion, Judge Hicks B. Harwell)

2002-UP-018 State v. Robert Orlando Hill
(Abbeville, Judge J. Derham Cole)

2002-UP-019 Clemson Hospitality Enterprises v. Cannon
(Pickens, Judge John W. Kittredge)

2002-UP-020 State v. Hazel Stoudemire, Jr.
(Spartanburg, Judge Lee S. Alford)

2002-UP-021 Riggins v. Riggins
(Greenville, Judge Amy C. Sutherland)

2002-UP-022 State v. Phinizy Heyward
(Beaufort, Judge Jackson V. Gregory)

2002-UP-023 State v. William F. Tate
(Anderson, Judge H. Dean Hall)

2002-UP-024 State v. Charles Britt
(Williamsburg, Judge John M. Milling)

2002-UP-025 Armstrong v. First Union National Bank
(York, Judge Lee S. Alford)

2002-UP-026 Babb v. Thompson
(Horry, Judge John M. Milling)

2002-UP-027 Johnson v. Smith
(Georgetown, Judge Howard P. King)

2002-UP-028 State v. Stoney Glenn Allison
(Spartanburg, Judge Wyatt T. Saunders, Jr.)

2002-UP-029 State v. Kimberly Renee Poole
(Horry, Judge Edward B. Cottingham)

2002-UP-030 Majors v. Taylor
(Charleston, Judge Edward B. Cottingham)

2002-UP-031 State v. Ryan Richard Cowick
(Darlington, Judge Alexander S. Macaulay)

2002-UP-032 State v. Christopher Farmer
(Anderson, Judge John C. Few)

2002-UP-033 State v. Patrick Sugden
(Horry, Judge Howard P. King)

2002-UP-034 State v. Ruben Manvel Sullivan
(Greenville, Judge James E. Brogdon, Jr.)

2002-UP-035 State v. Willie Nabritt
(Lexington, Judge Marc H. Westbrook)

2002-UP-036 State v. Dwayne R. Glasscho, a/k/a Pearlyn Dwayne Glasscho
(Florence, Judge James E. Brogdon, Jr.)

2002-UP-037 State v. Julia Fay Bolden
(Pickens, Judge Joseph J. Watson)

2002-UP-038 State v. Corey Washington
(Charleston, Judge Diane Schafer Goodstein)

2002-UP-039 State v. Marlow Brown
(Williamsburg, Judge Thomas W. Cooper, Jr.)

2002-UP-040 State v. James C. Gagum
(Horry, Judge Paula H. Thomas)

2002-UP-041 State v. Cheves Langston
(Richland, Judge James Carlyle Williams, Jr.)

2002-UP-042 State v. Willie Reid
(Aiken, Judge Alison Renee Lee)

2002-UP-043 State v. Antwine F. Anderson
(Greenville, Judge J. Derham Cole)

2002-UP-044 State v. Felicia Ann Deason
(York, Judge John C. Hayes, III)

2002-UP-045 State v. Valerie Freeman
(Bamberg, Judge Thomas W. Cooper, Jr.)

2002-UP-046 State v. Andrea Nicholas
(Aiken, Judge William P. Keesley)

2002-UP-047 Barnes v. The County of Anderson
(Anderson, Ellis B. Drew, Jr., Master-in-Equity)

2002-UP-048 DSS v. Stephens
(Anderson, Judge Robert H. Cureton)

2002-UP-049 State v. Teresa Cooke Updike
(Florence, Judge Sidney T. Floyd)

2002-UP-050 In the Interest of: Michael Brent H.
(Lexington, Judge Richard W. Chewning, III)

2002-UP-051 State v. Christopher Campbell
(Marlboro, Judge Paul M. Burch)

2002-UP-052 State v. Terrance Toomer
(Bamberg, Judge William P. Keesley)

2002-UP-053 State v. Frank Green
(Bamberg, Judge William P. Keesley)

2002-UP-054 County of Spartanburg v, Davis
(Spartanburg, Judge Donald W. Beatty)

2002-UP-055 State v. Sidtonio Israel Smalls
(Charleston, Judge Daniel F. Pieper)

2002-UP-056 State v. Patrick Small
(Florence, Judge James R. Barber, III)

2002-UP-057 State v. Charles Walter Koon
(Richland, Judge James R. Barber, III)

2002-UP-058 State v. Tony Rowe
(Lexington, Judge Rodney A. Peeples)

2002-UP-059 McKenzie v. The Exchange Bank of South Carolina
(Williamsburg, Judge Thomas W. Cooper, Jr.)

PETITIONS FOR REHEARING

3406 - State v. Yukoto Cherry	Pending
3408 - Brown v. Stewart	Denied 1-16-02
3411 - Lobresti v. Burry	(2) Pending
3413 - Glasscock v. United States Fidelity	Denied 1-16-02
3414 - State v. Duncan R. Proctor #1	Pending
3415 - State v. Duncan R. Proctor #2	Pending
3416 - Widman v. Widman	Denied 1-17-02
3417 - Hardee v. Hardee	(1) Denied 1-17-02 (1) Denied 1-23-02
3418 - Hedgepath v. AT&T	(2) Pending
3419 - Martin v. Paradise Cove	Pending
3420 - Brown v. Carolina Emergency	Pending
3422 - Allendale City Bank v. Cadle	Pending
3424 - State v. Roy Edward Hook	(2) Pending
3425 - State v. Linda Thompson Taylor	Denied 1-17-02
3426 - State v. Leon Crosby	Pending
3429 - Charleston County School Dist. v. Laidlaw	Pending
3430 - Barrett v. Charleston County School Dist.	Pending
3431 - State v. Paul Anthony Rice	Pending
3433 - Laurens Emergency v. Bailey	Pending

3435 - Pilgrim v. Miller	Pending
2001-UP-419 - Moak v. Cloud	Denied 1-18-02
2001-UP-430 - State v. Dale Johnson	Denied 1-16-02
2001-UP-455 - Stone v. Roadway Express	Denied 1-14-02
2001-UP-469 - James Schneider v. State	Denied 1-14-02
2001-UP-493 - State v. Marcus Griffin	Denied 1-23-02
2001-UP-507 - Adams v. Greaves	Denied 1-16-02
2001-UP-513 - Industrial Tractor Co. v. Poovey	Denied 1-16-02
2001-UP-518 - Abbott Sign Co. v. SCDOT	Denied 1-16-02
2001-UP-522 - Kenney v. Kenney	Pending
2001-UP-528 - State v. Kenneth Allen Barnes	Denied 1-23-02
2001-UP-533 - Corbett v. The Cottages at Shipyard	Denied 1-16-02
2001-UP-538 - State v. Edward Mack	Denied 1-17-02
2001-UP-543 - Benton v. Manker	Pending
2001-UP-548 - Coon v. McKay Painting	Pending
2001-UP-550 - State v. Gary W. Woodside	Denied 1-17-02
2001-UP-560 - Powell v. Colleton City	Pending
2001-UP-565 - United Student Aid v. SCDHEC	Pending
2002-UP-001 - Ex Parte: State v. A-1	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3263 - SC Farm Bureau v. S.E.C.U.R.E.	Pending
3271 - Gaskins v. Southern Farm Bureau	Pending
3314 - State v. Minyard Lee Woody	Pending

3343 - Langehans v. Smith	Pending
3348 - Thomas v. Thomas	Granted 1-24-02
3351 - Chewning v. Ford Motor Co.	Pending
3353 - Green v. Cottrell	Pending
3354 - Murphy v. Owens-Corning	Granted 1-24-02
3358 - SC Coastal Conservation v. SCDHEC	Pending
3360 - Beaufort Realty v. Beaufort County	Pending
3365 - State v. Laterrance Ramon Dunlap	Granted 1-24-02
3367 - State v. James E. Henderson, III	Pending
3369 - State v. Don L. Hughes	Pending
3372 - Dukes v. Rural Metro	Pending
3376 - State v. Roy Johnson #2	Pending
3380 - State v. Claude and Phil Humphries	Pending
3381 - Bragg v. Bragg	Pending
3382 - Cox v. Woodmen	Pending
3383 - State v. Jon Pierre LaCoste	Pending
3386 - Bray v. Marathon Corporation	(2) Pending
3403 - Christy v. Christy	Pending
3404 - State v. Charles M. Stuckey, Jr.	Pending
2001-UP-016 - Stanley v. Kirkpatrick	Pending
2001-UP-232 - State v. Robert Darrell Watson, Jr.	Pending
2001-UP-235 - State v. Robert McCrorey, III & Robert Dimitry McCrorey	Pending
2001-UP-248 - Thomason v. Barrett	Pending

2001-UP-261 - San Souci Owners Association v. Miller	Denied 1-24-02
2001-UP-298 - State v. Charles Henry Bennett	Pending
2001-UP-300 - Robert L. Mathis, Jr. v. State	Pending
2001-UP-304 - Jack McIntyre v. State	Pending
2001-UP-321 - State v. Randall Scott Foster	Pending
2001-UP-322 - Edisto Island v. Gregory	Pending
2001-UP-323 - Goodwin v. Johnson	Pending
2001-UP-324 - State v. John Williams, III	Pending
2001-UP-335 - State v. Andchine Vance	Pending
2001-UP-344 - NBSC v. Renaissance Enterprises	Pending
2001-UP-355 - State v. Gavin V. Jones	Denied 1-25-02
2001-UP-360 - Davis v. Davis	Pending
2001-UP-364 - Clark v. Greenville County	Pending
2001-UP-368 - Collins Entertainment v. Vereen	Pending
2001-UP-374 - Boudreaux v. Marina Villas Association	Pending
2001-UP-377 - Doe v. The Ward Law Firm	Pending
2001-UP-384 - Taylor v. Wil Lou Gray	Pending
2001-UP-385 - Kyle & Associates v. Mahan	Pending
2001-UP-389 - Clemson v. Clemson	Pending
2001-UP-391 - State v. Jerome Hallman	Pending
2001-UP-393 - Southeast Professional v. Companion Property & Casualty	Pending
2001-UP-397 - State v. Brian Douglas Panther	(2) Pending
2001-UP-398 - Parish v. Wal-Mart Stores, Inc.	Pending
2001-UP-399 - M.B. Kahn Construction v. Three Rivers Bank	Pending

2001-UP-401 - State v. Keith D. Bratcher	Pending
2001-UP-403 - State v. Eva Mae Moss Johnson	Pending
2001-UP-409 - State v. David Hightower	Pending
2001-UP-421 - State v. Roderick Maurice Brown	Pending
2001-UP-425 - State v. Eric Pinckney	Pending
2001-UP-452 - Bowen v. Modern Classic Motors	Pending
2001-UP-461 - Storage Trailers v. Proctor	Pending
2001-UP-476 - State v. Jeffery Walls	Pending
2001-UP-477 - State v. State v. Alfonso Staton	Pending
2001-UP-479 - State v. Martin McIntosh	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Harold Fitzgerald Wilson, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Georgetown County
David H. Maring, Trial Judge
Paula H. Thomas, Post-Conviction Judge

Opinion No. 25399
Submitted November 28, 2001 - Filed January 28, 2002

REVERSED AND REMANDED

Senior Assistant Appellate Defender Wanda H. Haile, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and

Assistant Attorney General Douglas E. Leadbitter, all of Columbia, for respondent.

CHIEF JUSTICE TOAL: Harold Fitzgerald Wilson ("Wilson") filed for post-conviction relief ("PCR") arguing he had ineffective assistance of counsel, the evidence against him was insufficient to secure an indictment, and the trial judge was not impartial. The PCR court dismissed Wilson's claim on summary judgment, ruling that he failed to timely file his application.

FACTUAL/ PROCEDURAL BACKGROUND

On July 26, 1995, a grand jury in Georgetown County indicted Wilson on one count of armed robbery. On October 18, 1995, a jury convicted Wilson of the charge, and the trial court sentenced Wilson to thirty (30) years confinement in the Department of Corrections. Wilson claims he instructed his attorney to appeal his conviction; however, no appeal was filed.

On September 30, 1997, Wilson filed an application for PCR alleging ineffective assistance of counsel, the evidence against him was insufficient to secure an indictment, and the trial judge was not impartial. The State moved to dismiss Wilson's claim arguing the claim was untimely under the applicable statute of limitations set forth in S.C. Code Ann. § 17-27-45(A) (Supp. 2000).[1] On November 24, 1998, the PCR court granted the State's motion to dismiss. Wilson now appeals. The sole issue before this Court is:

> Does the statute of limitations for PCR applications, S.C. Code Ann. § 17-27-45(A), apply to an applicant who alleges

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[1]Section 17-27-45(A) provides: "An application for relief filed pursuant to this chapter must be filed within one year after the entry of judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal of the filing of the final decision upon an appeal, whichever is later."

that he did not knowingly and intelligently waive his right to a direct appeal from his criminal conviction?

LAW/ ANALYSIS

Wilson argues that the PCR judge erred by summarily dismissing his PCR application based on his failure to file within the applicable statute of limitations as set forth in S.C. Code Ann. § 17-27-45(A). We agree.

When considering the State's motion for summary dismissal of an application for PCR, a judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant. *Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000).

To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal. *Davis v. State*, 288 S.C. 290, 352 S.E.2d 60 (1986); *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Wilson alleges that he requested an appeal from his original conviction, but his lawyer failed to timely file the appeal. Viewed in the light most favorable to Wilson, the evidence suggests that Wilson did not voluntarily waive his direct appeal.

This Court has ruled, in *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999), that the one year statute of limitations required by S.C. Code Ann. § 17-27-45(A), does not apply to *Austin*[2] appeals. *Austin* appeals do not have to be filed within the one year statute of limitations because they are belated appeals intended to correct unjust procedural defects. A petitioner is entitled to an

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[2]*Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). In *Austin*, petitioner's counsel failed to file a timely appeal following the denial of a PCR application. The petitioner then filed a subsequent PCR application claiming ineffective assistance of counsel during his first application for PCR. This Court ruled that petitioner's case must be remanded for an evidentiary hearing to determine whether petitioner requested and was denied the right to appeal.

Austin appeal if the PCR judge affirmatively finds either that (1) the applicant requested and was denied an opportunity to seek appellate review, or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. *Odom*, 337 S.C. at 262, 523 S.E.2d at 756.

We extend our reasoning in *Odom* and *Austin* to the instant situation. A defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal[3] and one PCR application. In this case, Wilson has not had "one bite of the apple" since he has not received either a direct appeal from his conviction or a PCR hearing. *See Poston v. State*, 339 S.C. 37, 528 S.E.2d 422 (2000); *Odom*.

Just as it was in *Odom*, *Austin's* policy would be frustrated if the one year statute of limitations for PCR claims applied where the applicant was denied his direct appeal due to ineffective assistance of counsel, and then was denied his right to a PCR application because of the one year statute of limitations.

CONCLUSION

For the foregoing reasons, we **REVERSE** the PCR court's ruling that Wilson's PCR application was barred by the one year statute of limitations and **REMAND** to the PCR court to conduct an evidentiary hearing to determine if Wilson knowingly and intelligently waived his right to direct appeal.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

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[3]After the client is convicted and sentenced, trial counsel in all cases has a duty to make certain that the client is fully aware of the right to appeal, and if the client is indigent, assist the client in filing an appeal. *In re Anonymous Member of the Bar*, 303 S.C. 306, 307, 400 S.E.2d 483 (1991); *see also Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed.2d 493 (1967).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John A. Gaines, Respondent,

Opinion No. 25400
Heard December 13, 2001 - filed January 28, 2002

DISBARRED

Attorney General Charles M. Condon, and Assistant Attorney General Tracey Colton Green, both of Columbia, for the Office of Disciplinary Counsel.

John A. Gaines, *pro se*.

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct filed formal charges against respondent. Respondent filed an answer admitting the allegations. A hearing, at which respondent did not appear, was convened before a panel of the Commission on Lawyer Conduct. The Panel recommended he receive a two-year definite suspension.

FACTS

Prior Disciplinary History

Respondent was given a public reprimand on November 8, 1983. In re

Gaines, 279 S.C. 531, 532, 309 S.E.2d 5 (1983) (noting respondent's conduct of neglecting to timely accomplish necessary tasks for his clients and failing to adequately prepare for representation of his clients demonstrated "an intolerable degree of ineptitude and indifference").

On August 24, 1987, respondent, who was facing the possibility of disbarment, was indefinitely suspended from the practice of law. In re Gaines, 293 S.C. 314, 360 S.E.2d 313 (1987). He was indefinitely suspended for conduct unbecoming to an attorney by failing to cooperate with and respond to the disciplinary investigation, and for three other acts of misconduct: (1) contacting a witness in a criminal matter and offering the witness money to drop the criminal charges against his client; (2) notarizing a forged signature on a verification form and submitting it, along with a summons and petition, to the circuit court; and, (3) failing to properly and timely account for the funds of a client. In that decision, the Court noted respondent's actions reflected a pattern of unprofessional conduct and demonstrated his unfitness to practice law. However, the Court did "not foreclose the possibility that respondent may rehabilitate himself and become capable of practicing law again." Gaines, 293 S.C. at 315, 360 S.E.2d at 314.

He was reinstated by order of the Court on October 5, 1993. Thereafter, on May 5, 1998, he received a private admonition.

Financial Matters

In numerous instances, respondent wrote checks for personal and business expenses directly from his escrow account while he was using the account as his general operating account. During the period of June 1996 through August 1997, he had sixteen negative balances and sixteen checks returned for insufficient funds. Further, he had sixteen negative balances, six checks returned for insufficient funds, and eight overdrafts between January 1999 and October 1999.

Williams Matter

Respondent was retained to represent Mr. Williams regarding an employment discrimination claim. However, he failed to properly communicate and establish the terms of his representation as to who was responsible for serving subpoenas on necessary witnesses. The Panel found respondent was not diligent in ensuring the required witnesses were subpoenaed to appear at trial. Further, respondent subpoenaed a doctor to testify without previously contacting the doctor, in contravention of an agreement between the local Bar Association and the medical profession.

Washington Matter

Respondent accepted a fee to represent Mrs. Washington; however, he failed to perform the work for which the fee was accepted. When Mrs. Washington's son requested the return of the fee, respondent executed a promissory note in favor of Mrs. Washington. He failed to make payment on the note on the stated due date. He returned the fee only after a judgment was obtained against him in magistrate's court.

Bacote Matter

Respondent was retained to represent Ms. Bacote regarding her workers' compensation claim. Although Ms. Bacote suffered no prejudice, respondent was late for a hearing on the claim. Subsequently, although respondent was able to submit the matter for consideration on the briefs, he failed to appear at an appeals hearing on Ms. Bacote's workers' compensation award. The Panel found he failed to maintain and supervise his employees with regard to maintaining a system for alerting him of pending court dates and conflicts.

Legette Matter

Respondent was retained to represent Mr. Legette regarding an employment discrimination claim. Respondent failed to meet various filing

deadlines. After missing a number of the deadlines, he attempted to file virtually the same document with a different title.

Respondent also failed to file proper objections to the Magistrate Judge's Report and Recommendation, instead repackaging as his objections a memorandum that previously was excluded from consideration by the Magistrate Judge. The United States District Court rejected the repackaged memorandum, noting that it "constitute[d] a blatant attempt to circumvent the Magistrate Judge's April 30, 1997 order striking the filing." The district court also noted for the record, respondent's "demonstrated history . . . of filing untimely and improper pleadings not permitted under the Federal Rules of Civil Procedure or the Local Rules."

Respondent subsequently improperly filed two Notices of Appeal from the federal district court's order. The Panel found he ultimately failed to perfect the appeal because he had not read the Federal Rules of Appellate Procedure, the Fourth Circuit Rules, and the applicable orders issued by the district court.

Byrd, Kolberg, Culp, and Kelly Matters

Alice Byrd, Betty Kolberg, Terrie J. Culp, and Andrea R. Kelly, all court reporters, rendered services to respondent. Respondent failed to pay for the services even though the court reporters requested that he do so in each matter. In the Culp matter, Ms. Culp contacted respondent's office at least fifteen times for payment; however, the Panel found he either ignored these contacts or made unfulfilled promises to pay the fee. The Panel found although he has now paid the court reporters, he did not do so until after they filed disciplinary complaints.

Formal charges were not filed against respondent in the Kelly matter; however, respondent stipulated the matter could be considered here. Although Ms. Kelly made numerous requests for payment, respondent failed to pay the fee. Ms. Kelly was forced to file an action against him in magistrate's court to obtain payment.

McCray Matter

Respondent was retained to represent Ms. McCray for a $1,075.00 fee. The Panel found he failed to take any action on her behalf, including filing a summons and complaint, until after she filed a disciplinary complaint.

Panel's Findings

Regarding the financial matters, the Panel found respondent failed to comply with the following record-keeping requirements as delineated by Rule 417, SCACR: failure to maintain on a regular basis a receipt and disbursement journal as required by Rule 417(a)(1); failure to maintain the proper accountings to clients or third persons showing the disbursement of funds to them or on their behalf as required by Rule 417(a)(4); failure to consistently maintain checkbook registers or check stubs as required by Rule 417(a)(7); failure to perform and maintain copies of monthly reconciliations of his trust accounts with the statements received from financial institutions as required by Rule 417(a)(8); failure to maintain adequate records to identify each item deposited into his escrow account as required by Rule 417(b)(1); and the making of withdrawals from his escrow account by check payable to "Cash," in violation of Rule 417(b)(2).[1]

Regarding the other matters, the Panel found the following violations of Rule 7(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: (1) violating the Rules of Professional Conduct, Rule 7(a)(1); (2) engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law, Rule 7(a)(5); and (3) violating the oath of office taken upon admission to practice law in this state, Rule 7(a)(6).

The Panel further found respondent violated certain rules from the

[1]At the hearing, it was noted that respondent did not have client money in his possession at the time and that he had not lost any client money.

Rules of Professional Conduct, Rule 407, SCACR. The Panel found violations of Rule 1.1, failure to provide competent representation; Rule 1.2, failure to consult with a client and abide by the client's wishes; Rule 1.3, failure to diligently represent a client; Rule 1.4, failure to properly communicate with a client; Rule 1.15, failure to safekeep a client's property; and Rule 8.4, violation of the Rules of Professional Conduct. The Panel also found respondent had violated the provisions of Rule 417, SCACR, regarding financial record-keeping.

The Panel recommended respondent be suspended from the practice of law for a definite period of two years, and that he be directed to pay the costs of the proceedings against him. Because the misconduct before the Panel included misconduct similar to that for which respondent was previously disciplined, the Panel felt a more severe sanction was warranted. The Panel denied respondent's motions for reconsideration and for a new hearing.

DISCUSSION

The authority to discipline attorneys and the manner in which discipline is given rests entirely with the Supreme Court. In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001). The Court may make its own findings of fact and conclusions of law, and is not bound by the recommendation of the Panel. In re Larkin, 336 S.C. 366, 520 S.E.2d 804 (1999). The Court must administer the sanction it deems appropriate after a thorough review of the record. *Id.*

The violations presented here would normally warrant a two-year definite suspension; however, given respondent's prior disciplinary history we find disbarment is the more appropriate sanction. In a past disciplinary matter in which respondent was indefinitely suspended, respondent offered a witness money to drop the criminal charges against his client and notarized a forged signature on a verification form and submitted it to the circuit court. Further, respondent's failures to properly and timely account for the funds of a client and to adequately represent his clients are the same types of misconduct for which respondent has been sanctioned before. We also give

weight to the comments made by the United States District Court Judge in the Legette Matter. In that matter, the District Court Judge noted respondent's "demonstrated history . . . of filing untimely and improper pleadings not permitted under the Federal Rules of Civil Procedure or the Local Rules," and that respondent had made "a blatant attempt to circumvent" a Federal Magistrate's order.

The sanction of disbarment has been imposed by this Court in similar cases involving multiple acts of misconduct. *See*, *e.g.*, In re Godbold, 336 S.C. 568, 521 S.E.2d 160 (1999) (attorney disbarred for failing to remit settlement funds to clients, failing to remit funds to clients' medical providers, failing to pay bills, and failing to file state and federal tax returns); In re Glee, 333 S.C. 9, 507 S.E.2d 326 (1998) (attorney disbarred for converting client funds for his own purposes, failing to provide competent representation, failing to comply with demand for payment, and failing to act with reasonable diligence).

Consequently, we disbar respondent and order him to pay the costs of the disciplinary proceedings. 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 the Rules for Lawyer Disciplinary Enforcement.

DISBARRED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Fairfield
County Magistrate
Marion C. Smith, Respondent.

Opinion No. 25401
Submitted January 8, 2002 - Filed January 28, 2002

PUBLIC REPRIMAND

Henry B. Richardson, Jr. and Deborah S. McKeown, both of Columbia, for the Office of Disciplinary Counsel.

James Loggins, of Winnsboro, for respondent.

PER CURIAM: In this judicial grievance matter, respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to an admonition or a public reprimand. We accept the agreement and publicly reprimand respondent.

Facts

Prior to June 9, 1999, respondent failed to personally sign various court orders issued in respondent's name. Respondent knowingly allowed his office personnel to sign his name to the orders. Respondent admits allowing office personnel to sign his orders, but asserts that he was unaware this practice was improper. Respondent acknowledges that he should have been aware that this practice was contrary to published orders, opinions, and guidelines of the South Carolina Supreme Court and South Carolina Court Administration, which require that judges personally sign court orders. He averred that once he was notified the practice was improper, he corrected the procedure and has personally signed all orders since June 9, 1999.

Additionally, respondent admits various orders issued by him fail to designate any factual basis to support the issuance of those orders by respondent. Respondent admits he was unaware that every order must set out the factual basis supporting the issuance of the order. Respondent has agreed to ensure that all orders issued by him include the factual basis supporting the issuance of the order.

Law

By his actions, respondent has violated the following canons set forth in the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall uphold the integrity and independence of the judiciary); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 3 (a judge shall perform the duties of judicial office impartially and diligently); and Canon 3(A) (a judge shall be faithful to the law and maintain professional competence in it). These violations also constitute grounds for discipline under the following Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1) (violation of the Code of Judicial Conduct); 7(a)(4) (persistent performance of judicial duties in an incompetent or neglectful manner); and 7(a)(7) (willful violation of a valid court order).

Conclusion

Respondent has fully acknowledged that his actions were in violation of the Code of Judicial Conduct and the Rules for Judicial Disciplinary Enforcement. We find respondent's actions warrant a public reprimand. Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Calhoun
Falls Municipal Court
Judge Harold C. Dixon, Respondent.

Opinion No. 25402
Submitted January 8, 2002 - Filed January 28, 2002

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Senior Assistant Attorney General Nathan Kaminski, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Harold C. Dixon, of Calhoun Falls, pro se.

PER CURIAM: In this judicial grievance matter, respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to a range of sanctions from a letter of caution to a public reprimand. We accept the agreement and publicly reprimand respondent. The facts in the agreement are as follows.

Facts

In May 2000, the victim of an assault appeared before respondent to take out arrest warrants on the three men who attacked him. The victim told respondent that he did not want to sign a warrant against one of the attackers. Respondent told the victim that he had to sign all three warrants or none at all. When respondent refused to sign the warrants, respondent imposed an unauthorized fee of $25 per warrant as court costs, giving the appearance he was attempting to pressure the victim into signing the three warrants, or that he was fining the victim for his refusal to sign the warrants.

When the victim failed to pay the fees, respondent signed a bench warrant, stating that the victim had been convicted of contempt of court and that a sentence of twenty-nine days in jail and a $75 fine had been imposed. Respondent had not issued a summons to the victim, had not conducted a contempt hearing, and had not formally imposed a sentence on the victim. Moreover, because respondent had no authority to require the victim to pay court costs under the circumstances, he had no legal basis upon which to hold the victim in contempt. As a result of the bench warrant, the victim was arrested and incarcerated until he paid the $75 fine.

Law

By his actions, respondent has violated the following canons set forth in the Code of Judicial Conduct, Rule 501, SCACR: Canon 1(A) (a judge shall uphold the integrity and independence of the judiciary); Canon 2(A) (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 3 (a judge shall perform the duties of judicial office impartially and diligently); Canon 3(B)(2) (a judge shall be faithful to the law and maintain professional competence in it); Canon 3(B)(4) (a judge shall be patient, dignified and courteous to litigants and others with whom the judge deals in an official capacity); Canon 3(B)(7) (a judge shall accord to every person who has a legal interest in a proceeding the right to be heard according to law); Canon 3(B)(8) (a judge shall dispose of all judicial matters promptly, efficiently and fairly); and Canon 3(C)(1) (a

judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice). These violations also constitute grounds for discipline under Rule 7(a)(1), RJDE, Rule 502, SCACR.

Conclusion

We find respondent's actions warrant a public reprimand. Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Olanta
Municipal Court Judge
Thomas H. Eskridge, Jr., Respondent.

Opinion No. 25403
Submitted January 8, 2002 - Filed January 28, 2002

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Senior Assistant Attorney General Nathan Kaminski, Jr., of Columbia, for the Office of Disciplinary Counsel.

Michael G. Nettles, of Lake City, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a sanction of a confidential admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts as admitted in the agreement are as follows.

Facts

Respondent was appointed as a municipal judge for the Town of Olanta in March of 2000.[1] Prior to a municipal court hearing in December of 2000, respondent received a list of defendants scheduled to appear before him. An Olanta public official provided respondent with the list of defendants. The letters "NG" appeared by some of the defendant's names on the list. Respondent understood the letters to mean "not guilty." Each defendant whose name appeared next to the letters "NG" was subsequently found "not guilty." Even the defendants who failed to appear in court but had the letters "NG" next to their name were found "not guilty." As a result, the South Carolina Law Enforcement Division launched an investigation. After a full investigation, the solicitor elected not to prosecute respondent because he concluded there was insufficient evidence of any criminal conduct.

Law

As a result of his conduct, respondent has violated the following canons set forth in the Code of Judicial Conduct, Rule 501, SCACR: Canon 1(A) (a judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2(A) (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 2(B) (a judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment; a judge shall not convey or permit others to convey the impression that they are in a special position to influence the judge); Canon

[1]At the time of these events, respondent had not attended the Magistrate's Orientation School, did not possess a copy of the Magistrate's Bench Book, and had not received training concerning the Code of Judicial Conduct. Respondent has now received training in judicial ethics.

3(B)(2) (a judge shall not be swayed by partisan interests, public clamor or fear of criticism); and Canon 3(B)(7) (a judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding). These violations constitute grounds for discipline under Rule 7(a)(1), RJDE, Rule 502, SCACR.

Conclusion

We find that respondent's actions warrant a public reprimand. We therefore accept the Agreement for Discipline by Consent and publicly reprimand respondent.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Pierce S. White, Jr., Respondent.

Opinion No. 25404
Submitted December 19, 2001 - Filed January 28, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Susan M. Johnston, and Barbara M. Seymour, all of Columbia, for the Office of Disciplinary Counsel.

Pierce S. White, Jr., of Saluda, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR.[1] In the Agreement, respondent admits misconduct and consents to the imposition of any sanction deemed appropriate by this Court. We accept the Agreement and impose a definite suspension of two years from the practice of law. The facts

[1]Respondent was placed on interim suspension by order of this Court dated May 3, 2000. In the Matter of White, 340 S.C. 290, 531 S.E.2d 907 (2000).

as admitted in the Agreement are as follows.

Facts

Respondent was retained to recover a $16,000 debt for Client. Respondent obtained a judgment on behalf of Client and was paid for his services. Client subsequently retained respondent to collect payments towards the judgment from the defendant. Client agreed that respondent could retain a contingency fee from each payment, and forward the balance to him. In 1997, respondent collected funds from the defendant, and forwarded the net proceeds to Client in a timely manner. However, from 1998 through 2000, defendant continued to make payments on the judgment, but respondent did not forward any portion of these payments to Client. Respondent admits that he misappropriated approximately $14,400 for his own purposes, and that he failed to maintain accurate financial records of these transactions.

Respondent also failed to maintain a trust account separate from his personal and operating bank account. Further, from January 1997 until May 2000, respondent's bank account had a negative balance on 136 separate occasions. During the same time period, 43 checks were returned to respondent's bank because his account contained insufficient funds.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (failure to safeguard client documents); Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (conduct prejudicial to the administration of justice). Respondent has also violated Rule 417, SCACR, by failing to maintain financial records.

Respondent has also violated the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in conduct tending to pollute

the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state).

Conclusion

Respondent has fully acknowledged that his actions in the aforementioned matters were in violation of the Rules of Professional Conduct and the Rules for Lawyer Disciplinary Enforcement. We therefore suspend respondent from the practice of law for two years. This suspension is not retroactive to the date of respondent's interim suspension. Prior to petitioning for reinstatement to the practice of law, respondent must provide satisfactory evidence to the Office of Disciplinary Counsel that he has repaid the Lawyer's Fund for Client Protection. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Lillie R. Davis, Respondent.

Opinion No. 25405
Submitted December 14, 2001 - Filed January 28, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Susan B. Lipscomb, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR.[1] In the agreement, respondent conditionally admits misconduct and consents to a definite suspension ranging from six months to twenty months. We accept the agreement and hereby suspend respondent. The facts as set

[1]Respondent has received two previous public reprimands. In the Matter of Davis, 336 S.C. 574, 521 S.E.2d 275 (1999); In the Matter of Davis, 321 S.C. 281, 468 S.E.2d 301 (1996).

forth in the agreement are as follows.

Facts

In the first matter, respondent chose to proceed with a theory of recovery in which there was insufficient evidence to establish all of the necessary elements. Respondent falsely represented to client that the action had been filed on client's behalf. However, the action was never filed. Respondent did not communicate with client regarding the status of the case and failed to follow client's instructions regarding the case. Respondent failed to return client's file and refund unearned fees. Respondent also falsely represented the amount of time spent on client's case to ODC and failed to respond to two inquiries from ODC. Additionally, respondent failed to cooperate with ODC's investigation.

In a second matter, respondent failed to deposit a retainer fee into her trust account and converted it to her own use. Shortly after retaining respondent, client terminated respondent's services and requested a refund of her fee. Respondent only returned half of the fee even though respondent did not bill against the fee nor did respondent offer any accounting to client as to how the fee was earned. Additionally, respondent failed to properly supervise her employee, causing an affidavit of attorney's fees to contain false information. Respondent also failed to reply to two inquiries from ODC and failed to cooperate with ODC's investigation.

In a third matter, respondent executed a retainer agreement which did not comply with Rule 1.5 (c) of the Rules of Professional Conduct, Rule 407, SCACR. Respondent failed to communicate with client regarding the status of the case, did not advise client of the expiration of the statute of limitations, falsely represented to client that the case was being litigated, and failed to take any action within the applicable statute of limitations period. Respondent also obstructed ODC's investigation and failed to cooperate with the investigation.

In a fourth matter, respondent was retained by client to represent

her in two separate actions. With regard to the first action, respondent deposited client's retainer fee into an account other than her trust account prior to earning the fee and failed to communicate with client. Frustrated with respondent's lack of communication regarding her case, client terminated respondent's services and requested a refund of unearned attorney's fees and her client file. Respondent refused and client subsequently filed a civil action against respondent which resulted in a $350 judgment against respondent. Respondent did not appeal or pay the judgment. In regard to the second action, respondent executed a retainer agreement that did not comply with Rule 1.5 of the Rules of Professional Conduct, Rule 407, SCACR. Moreover, respondent agreed to represent the client despite a conflict of interest in violation of Rule 1.7 of the Rules of Professional Conduct, Rule 407, SCACR. Respondent also failed to apply money recovered in the action to certain liens. Additionally, respondent failed to respond to two inquires from ODC and failed to cooperate in ODC's investigation.

In a fifth matter, respondent failed to withhold and pay taxes from her employee's paychecks. As a result, several federal tax liens were filed against her. Additionally, several warrants of distraint were filed against respondent by the South Carolina Department of Revenue.

Law

Respondent admits that her conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (failing to provide competent representation); Rule 1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation, and shall consult with the client as to the means by which they are to be pursued); Rule 1.3 (failing to act with reasonable diligence and promptness while representing a client); Rule 1.4 (failing to keep a client reasonably informed about the status of a matter, failing to promptly respond to reasonable requests for information, and failing to explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 1.5 (fees); Rule1.7 (a lawyer shall not represent a client if representation of that

client creates a conflict of interest); Rule 1.15 (failure to keep client funds in a separate account); Rule 1.16 (failure to withdraw from representation when representation results in a conflict of interest or when the lawyer is discharged by the client); Rule 3.1 (bringing a frivolous lawsuit); Rule 3.3 (knowingly making a false statement of material fact to a tribunal and offering evidence that the lawyer knows is false); Rule 4.1 (making a false statement of material fact to a third person in the course of representing a client); Rule 4.4 (using means in the course of representing a client, that have no purpose other than to delay or burden a person); Rule 5.3 (failing to properly supervise non-lawyer employees); Rule 8.1(b) (failing to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a),(d), and (e) (violating the Rules of Professional Conduct, engaging in conduct involving dishonestly, fraud, deceit or misrepresentation).

Respondent also admits that she violated Rule 7(a)(1), RLDE, Rule 413, SCACR (violating the Rules of Professional Conduct), and Rule 417, SCACR (requirements of financial record keeping).

Conclusion

We find that respondent's misconduct warrants a definite suspension. Accordingly, we accept the Agreement for Discipline by Consent and hereby suspend respondent from the practice of law for twenty months.

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

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Harry
Ennis Bodiford, Respondent.

ORDER

By order dated April 17, 1997, petitioner was transferred to incapacity inactive status. In the Matter of Bodiford, 326 S.C. 88, 484 S.E.2d 473 (1997). Petitioner has filed a petition in which he seeks to return to active status. The petition is granted.

IT IS SO ORDERED.

S/Jean H. Toal C.J.

S/James E. Moore J.

S/John H. Waller, Jr. J.

S/E.C. Burnett, III J.

S/Costa M. Pleicones J.

Columbia, South Carolina
January 14, 2002

The Supreme Court of South Carolina

In the Matter of Lyndon B. Jones, Respondent.

O R D E R

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, because he poses a substantial threat of serious harm to the public or the administration of justice. The Office of Disciplinary Counsel also seeks the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that the petition is granted and respondent is suspended from the practice of law in this State until further order of this Court.

IT IS FURTHER ORDERED that B. Scott Suggs, Esquire, is appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Suggs shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's

clients. Mr. Suggs may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that B. Scott Suggs, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that B. Scott Suggs, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Suggs' office.

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

Columbia, South Carolina

January 16, 2002

The Supreme Court of South Carolina

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the following amendments are made to the South Carolina Appellate Court Rules:

(1) The following is added to Rule 402(a), SCACR:

> **(3) Attorneys to Assist the Board.** The Supreme Court shall appoint such additional attorneys to assist the Board as it deems appropriate. These attorneys shall assist the members of the Board in preparing the essay examinations and model answers, administering the bar examination, and grading the examination, and shall have such additional duties as may be determined by the Board. While the Supreme Court shall not be limited in who it appoints, the Board shall nominate attorneys to serve in this capacity.

(2) The first four sentences of Rule 402(e), SCACR, are replaced with the following:

> The Bar Examination shall consist of seven (7) sections. The members of the Board of Law Examiners shall each prepare and grade or supervise the grading of one (1) essay section. The Multistate Bar Examination shall be the seventh (7^{th}) section. To pass the Multistate portion of the

examination, an applicant must attain a scaled score of at least 125. To pass an essay section, the applicant must obtain a score of seventy (70). An applicant must pass six (6) of the seven (7) sections to pass the Bar Examination; provided, however, that an applicant who receives a scaled score of 110 or less on the Multistate Bar Examination shall fail the Bar Examination without any grading of the essay questions.

(3) Rule 608(d)(1), SCACR, is amended by adding the following:

(M) Members who are serving as members of the Board of Law Examiners.

Except for the change to Rule 402(e), these amendments are effective immediately. The amendment to Rule 402(e) shall not apply to the February 2002 bar examination, but shall be applicable to all bar examinations thereafter.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 24, 2002

The Supreme Court of South Carolina

In the Matter of J.
Stephen McCormack, Respondent.

O R D E R

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the relief sought by Disciplinary Counsel.

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

IT IS FURTHER ORDERED that Daniel E. Henderson, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Henderson shall take action as

required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Henderson may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Daniel E. Henderson, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Daniel E. Henderson, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Henderson's office.

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

Columbia, South Carolina
January 28, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

United Educational Distributors, LLC,

Appellant,

v.

Educational Testing Service,

Respondent.

Appeal From Beaufort County
Thomas Kemmerlin, Jr., Special Circuit Judge

Opinion No. 3436
Heard October 1, 2001 - Filed January 22, 2002

AFFIRMED

Bruce R. Hoffman, of Beaufort, for appellant.

William B. Harvey, III, of Harvey & Battey, of Beaufort; and Bruce M. Berman and Michael D. Leffel, both of Wilmar, Cutler & Pickering, of Washington, D.C., for respondent.

CONNOR, J.: United Educational Distributors, LLC ("UED") appeals the dismissal of its cause of action for "tortious interference with prospective economic advantage." We affirm.

FACTS/PROCEDURAL BACKGROUND

Educational Testing Services ("ETS"), a nonprofit corporation headquartered in Lawrenceville, New Jersey, administers, scores, and prepares testing materials for, among others, the College-Level Examination Program ("CLEP"). UED sells study aids for the CLEP test, which it markets primarily to military personnel.

On October 9, 1998, UED filed its original complaint in the Court of Common Pleas for the County of Beaufort alleging ETS wrongfully interfered with UED's present and future sales contracts of its study materials. Essentially, UED alleged two tort causes of action: (1) intentional interference with present contractual relationships and (2) intentional interference with prospective economic advantage.[1] UED prayed for actual and punitive damages of not less than $1,500,000.00.

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[1] Although the trial court identified this action as "tortious interference with prospective economic advantage," South Carolina has labeled this tort "intentional interference with prospective contractual relations." See Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990). Because the parties use the two terms interchangeably, we will, for consistency purposes, analyze UED's cause of action as that of intentional interference with prospective contractual relations. This decision does not affect the substance of our analysis. See 45 Am. Jur. 2d Interference § 36 (1999) ("The torts of intentional interference with contractual relations, with lawful business, and with prospective business advantage are closely related. . . . The general wrong involved in each tort consists of intentional and improper methods of diverting or taking away ongoing or prospective business or contractual rights from another, which methods are not within the privilege of fair competition.").

On November 12, 1998, the case was removed to federal district court and UED subsequently moved to remand the case. Thereafter, on December 18, 1998, ETS filed its first motion to dismiss UED's action pursuant to Fed. R. Civ. P. 12(b)(6). UED filed its return to this motion and its first amended complaint on January 5, 1999, to which ETS moved to dismiss the amended complaint on January 14, 1999. On January 21, 1999, the action was remanded to the Beaufort County Court of Common Pleas.

ETS filed its first motion to dismiss UED's action pursuant to Rule 12(b)(6), SCRCP, on February 17, 1999.[2] After a hearing on ETS's motion, Judge Kemmerlin, Master in Equity and Special Circuit Judge for the Court of Common Pleas of Beaufort County, filed his order on July 12, 1999, requiring UED to re-plead its first cause of action and allowing UED to re-plead its second cause of action for intentional interference with prospective contractual relations.

UED filed its second amended complaint on July 29, 1999. For the second cause of action, UED named several people from ETS specifically and alleged they participated in ETS's "concerted effort to prevent [UED] from obtaining new business." However, UED failed to allege that ETS interfered with any specific contracts it had received or was certain to enter into. Rather, UED alleged that it "would have continued to receive responses from at least 10% of the lead cards [it] mailed." Paragraphs fourteen and fifteen of UED's second amended complaint state:

> 14. Businesses selling products on military bases are prohibited from selling door to door. Instead, with addresses only obtained from the military through the Freedom of Information Act (no names or telephone numbers are provided), [UED] sends out lead cards (in

[2] This motion is dated February 6, 1999; however, in ETS's additional memorandum in support of its motion to dismiss UED's second amended complaint, ETS states it did not move to dismiss the first amended complaint until February 17, 1999.

> the Beaufort area, normally 4 mailings a year, 1500 cards mailed at a time) to all the addresses inviting calls if the recipients have an interest in the product being sold ([UED] does not have a store front, it is a direct sales company whose business is completely dependent on generating new customers through these lead cards). As a result of [ETS's] interference, [UED] has seen the average expected response (per past history) to its lead cards in the Beaufort area drop from 10% in 1996 and 1997 to virtually none in 1998 (when the interference began) and none in 1999.
>
> 15. [UED], not having names or phone numbers, couldn't do follow-up to see why they have not been receiving the normal percentage of lead card responses, as they had in the past (i.e. [UED] has no way of knowing who didn't respond and why, they only know they don't receive responses anymore). Meanwhile, the only change in circumstance[s] from 1996 to present, and therefore the only possible cause for this quantifiable, precipitous drop in responses/business (to nothing), is [ETS's] interference.

ETS moved to dismiss UED's second amended complaint on August 16, 1999. UED responded with its return to ETS's motion to dismiss, which was followed on October 20, 1999 by ETS's "memorandum of points and authorities in further support of its motion to dismiss" the second amended complaint. UED again filed a return to ETS's addition to its motion.

On November 30, 1999, Judge Kemmerlin filed his order striking UED's second cause of action in its second amended complaint but allowing the first cause of action, stating: "I believe the First Cause of Action meets the bare bones requirements necessary to state a cause of action for 'Tortious Interference With Present Contractual Relations.'" (emphasis in original). On December 20, 1999, UED filed notice of appeal from Judge Kemmerlin's order

that struck UED's claim for intentional interference with prospective contractual relations.[3]

DISCUSSION

UED argues it sufficiently pled its cause of action for intentional interference with prospective contractual relations in its second amended

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[3] Subsequently, UED filed its third amended complaint clarifying its first cause of action and including its second cause of action for intentional interference with prospective contractual relations. Nevertheless, Judge Kemmerlin's last order filed February 11, 2000, addressed only UED's second amended complaint. Of import in this appeal, the judge found UED's allegations for intentional interference with prospective contractual relations "fail to satisfy the requirements of South Carolina law or my earlier Order" because UED failed to allege specific customers and contracts lost due to ETS's actions or any knowledge of the same by ETS. The judge cited this lack of proof apparent in Paragraphs seven and eight of UED's second amended complaint. Thus, the judge concluded:

> [ETS] should not be required to attempt to answer [UED's] Second Amended Complaint without knowing the particular contracts (if any) that [UED] claims have been breached and of which [ETS] had knowledge. [UED] is the only party in a position to identify such contracts, and [ETS] cannot be made to guess at the contracts that [UED] may have in mind.

Judge Kemmerlin noted in a footnote to the above referenced citation that: "[i]f discovery reveals other contracts then [UED] can amend [its] complaint to include them." By letter dated February 15, 2000, UED inquired from Judge Kemmerlin why he had based his latest order on the second amended complaint. In a handwritten note on this letter, the judge responded to "[j]ust to keep up with it, I think you[, UED,] should now prepare a pleading complying with my Order of 2/11/2000."

Thereafter, Judge Kemmerlin recused himself on June 23, 2000.

complaint. Although UED has alleged facts sufficient to put ETS on notice of a cause of action generally, it has failed to plead any specific contracts to put ETS on notice of what, with some particularity, it must defend against in an intentional interference action.

A ruling on a motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, must be based solely on the allegations set forth on the face of the complaint. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Washington v. Lexington County Jail, 337 S.C. 400, 404, 523 S.E.2d 204, 206 (Ct. App. 1999); McCormick v. England, 328 S.C. 627, 632-33, 494 S.E.2d 431, 433 (Ct. App. 1997). "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Therefore, pleadings in a case should be construed liberally and the trial court and this Court must presume all well pled facts to be true so that substantial justice is done between the parties. See Justice v. Pantry, 330 S.C. 37, 42, 496 S.E.2d 871, 874 (Ct. App. 1998). "The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action." McCormick, 328 S.C. at 633, 494 S.E.2d at 434.

South Carolina only recently recognized the tort of intentional interference with prospective contractual relations in Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990). The elements of the cause of action are (1) the intentional interference with the plaintiff's potential contractual relations, (2) for an improper purpose or by improper methods, and (3) causing injury to the plaintiff. Brown v. Stewart, Op. No. 3408 (S.C. Ct. App. filed Nov. 19, 2001) (Shearouse Adv. Sh. No. 41 at 33, 50); Love v. Gamble, 316 S.C. 203, 214, 448 S.E.2d 876, 882 (Ct. App. 1994).[4] "As an

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[4] See also Landry v. Hornstein, 462 So. 2d 844, 846 (Fla. Dist. Ct. App. 1985); Restatement (Second) of Torts § 766B (1989 & Supp. 2001). A number of other jurisdictions, on the other hand, generally express the tort with four elements, requiring a plaintiff to plead and prove:

alternative to establishing an improper purpose, the plaintiff may prove the defendant's method of interference was improper under the circumstances." Crandall, 302 S.C. at 266, 395 S.E.2d at 180. Generally, there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party. Southern Contracting, Inc. v. H.C. Brown Constr. Co., 317 S.C. 95, 102, 450 S.E.2d 602, 606 (Ct. App. 1994).

Upon a review of our limited South Carolina precedent, a cause of action for intentional interference with prospective contractual relations generally stands following the loss of an identifiable contract or expectation. See, e.g., Crandall, 302 S.C. at 267-68, 395 S.E.2d at 180-81 (alleged interference with a verbal parts and labor supply contract); Love, 316 S.C. at 205-07, 448 S.E.2d at 877-78 (alleged interference with pickle supply contract); Williams v. Riedman, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000) (asserted as a counterclaim by employer in a wrongful termination case where the former employee allegedly solicited the employer's current clients); Edens & Avant

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> (1) his reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the plaintiff's expectancy; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference.

Fellhauer v. City of Geneva, 568 N.E.2d 870, 878 (Ill. 1991); accord Purgess v. Sharrock, 33 F.3d 134, 141 (2d Cir. 1994); Preyer v. Dartmouth Coll., 968 F. Supp. 20, 26 (D.N.H. 1997); SNA, Inc. v. Array, 51 F. Supp. 2d 554, 567 (E.D. Pa. 1999); DeBonaventura v. Nationwide Mut. Ins. Co., 428 A.2d 1151, 1153 (Del. 1981); Swanset Dev. Corp. v. City of Taunton, 668 N.E.2d 333, 338 (Mass. 1996); Printing Mart-Morristown v. Sharp Elecs. Corp., 563 A.2d 31, 37 (N.J. 1989); see generally Richard D. English, Annotation, Liability for Tortious Interference with Prospective Contractual Relations Involving Sale of Business, Stock, or Real Estate, 71 A.L.R.5th 491 (1999).

Inv. Props., Inc. v. Amerada Hess Corp., 318 S.C. 134, 456 S.E.2d 406 (Ct. App. 1995) (alleging interference with an option contract; nevertheless, the action is dismissed because plaintiff has no right to recover damages); Southern Contracting, 317 S.C. at 96-97, 450 S.E.2d at 603-04 (alleged interference with a subcontracting agreement); Gailliard v. Fleet Mortgage Corp., 880 F. Supp. 1085 (D.S.C. 1995) (alleged interference with a mortgage contract dismissed by summary judgment motion). That is, "Crandall and other authority discussing this tort usually require the aggrieved party to have been unsuccessful in acquiring an expected contract due to a third party's intentional and wrongful actions." Egrets Pointe Townhouses Prop. Owners Ass'n v. Fairfield Cmtys., Inc., 870 F. Supp. 110, 116 (D.S.C. 1994).

The plaintiff must actually demonstrate, at the outset, that he had a truly prospective (or potential) contract with a third party. This does not require plaintiff to prove the tort in his initial pleadings; rather, the allegations must present facts that give rise to some reasonable expectation of benefits from the alleged lost contracts. This requirement mirrors the analysis of other jurisdictions.

In New Jersey, "[w]hat is actionable is the luring away, by devious, improper and unrighteous means, of the customer of another." Printing Mart-Morrison v. Sharp Elecs. Corp., 563 A.2d 31, 36 (N.J. 1989). "A complaint based on tortious interference must allege facts *that show some protectable right*–a prospective economic or contractual relationship. Although the right need not equate with that found in an enforceable contract, *there must be allegations of fact giving rise to some 'reasonable expectation of economic advantage*.'" Id. at 37 (emphasis added); see Democratic State Comm. v. Bebchick, 706 A.2d 569, 573 (D.C. 1998) ("In order to survive a motion to dismiss on a claim of intentional interference with prospective economic advantage a plaintiff must allege business expectancies, not grounded on present contractual relationships, but which are commercially reasonable to anticipate."); Walker v. Sloan, 529 S.E.2d 236, 242 (N.C. Ct. App. 2000) ("[T]o state a claim for wrongful interference with prospective advantage, the plaintiffs must allege facts to show that the defendants acted without justification in inducing a third party from entering into a contract with them which contract would have ensued but for the interference."); see also Spartan Equip. Co. v. Air

Placement Equip. Co., 140 S.E.2d 3, 11 (N.C. 1965) (Plaintiff had not entered a contract with its prospective customer; therefore, Plaintiff's cause of action for malicious interference with a proposed or prospective contract did not survive a *demurrer ore tenus* because Plaintiff failed to "allege that its prospective sale [to the potential customer] would have been consummated but for the malicious interference of defendant's agent."); Everest Props. II, L.L.C. v. Am. Tax Credit Props. II, L.P., 2000 WL 145757 (Del. Super. Ct. 2000) (pleading loss of tender offers for corporate stock allegedly thwarted by defendants is sufficient to state a cause of action for tortious interference).

"The Pennsylvania Supreme Court has defined 'prospective contractual relation' as 'something less than a contractual right, something more than a mere hope.' In short, it is 'a *reasonable probability*' that contractual relations will be realized." SNA, Inc. v. Array, 51 F. Supp. 2d 554, 567 (E.D.Pa. 1999) (emphasis added); Kachmar v. Sunguard Data Sys., Inc., 109 F.3d 173, 184 (3d Cir. 1997) ("[T]he Pennsylvania Supreme Court requires that there be an objectively reasonable probability that a contract will come into existence."). As such, mere business competition where the defendant takes no "purposeful action" to cause the plaintiff financial harm is not actionable. SNA, 51 F. Supp. 2d at 567.

The reasonable expectation need not be based on an enforceable contract. Landry v. Hornstein, 462 So. 2d 844, 846 (Fla. Dist. Ct. App. 1985) (The reasonable expectation need not be based on an enforceable contract "if the jury finds that an understanding between the parties would have been completed had the defendant not interfered."); see Printing Mart-Morristown v. Sharp Elecs. Corp., 563 A.2d 31, 36 (N.J. 1989). Rather, plaintiffs must allege "either a business relation with specific third parties or with an identifiable prospective class of third persons." Parkway Bank & Trust Co. v. City of Darien, 357 N.E.2d 211, 214 (Ill. App. Ct. 1976). Thus, in Fredrick v. Simmons Airlines, Inc., 144 F.3d 500, 503 (7th Cir. 1998) (applying Illinois law), where plaintiff failed to identify any third parties with whom he had a valid expectation to conduct business, the court did not allow the tortious interference action to stand. In fact, the court found plaintiff "failed to allege any reasonable expectation of a business relationship at all" since "[h]e does not claim that he had been offered a job by any other airline, or even that he had interviewed or

applied for such positions" to create a sufficient expectancy of employment. Id.; accord Citylink Group, Ltd. v. Hyatt Corp., 729 N.E.2d 869, 877 (Ill. App. Ct. 2000) (Plaintiffs' claim for the tort was properly dismissed because "[t]he record shows that plaintiffs failed to: (1) specifically identify another Hyatt hotel from which they expected to receive a contract; (2) allege that any other clearly identified group was 'contemplating prospective contractual arrangements' with plaintiffs; and (3) allege any specific acts of interference."); Quail Ridge Assocs. v. Chem. Bank, 558 N.Y.S.2d 655 (N.Y. App. Div. 1990) (affirming dismissal of plaintiff's cause of action for intentional interference with contract and precontractual business relations involving loan agreement where pleadings failed to contain a reference to any particular contract with a third party).

The agreement must be a close certainty; thus, a mere offer to sell, for example, does not, by itself, give rise to sufficient legal rights to support a claim of intentional interference with a business relationship. Landry, 462 So. 2d at 846. Likewise, the mere hope of a contract is insufficient. See Williams v. Weaver, 495 N.E.2d 1147, 1152 (Ill. App. Ct. 1986) (employment contract), cited in Jones v. SABIS Educ. Sys., Inc., 52 F. Supp. 2d 868, 881-82 (N.D.Ill. 1999) (plaintiff, an at-will employee who was discharged, did not have an expectation that his employment relationship would continue); accord Frederick, 144 F.3d at 503.

These contracts cannot be speculative. In SNA, a Pennsylvania District Court found mere allegations of losses from a general list of unknown customers does not sufficiently plead the tort.

> Plaintiffs also argue that through their internet sites, defendants interfere with plaintiffs' prospective contracts because prospective customers will see the sites and be dissuaded from ever contacting SNA. *This conclusory speculation certainly cannot form the basis of an action, because there is no evidence of a reasonable probability that a contract will be realized with the hypothetical internet user, nor any of economic loss to plaintiff caused by defendants*.

SNA, 51 F. Supp. 2d at 568 (emphasis added). Likewise, in Minnesota Mining & Mfg. Co. v. Graham-Field, Inc., 1997-2 Trade Cases P 71,882, 1997 WL 166497 (S.D.N.Y. 1997), a New York District Court dismissed defendant's counterclaim because it failed to state its alleged losses with specificity. The court stated:

> GFI fails to allege a particular customer relationship with which plaintiff interfered. Rather, GFI alleges generally that as a result of [plaintiff's] actions, "certain of GFI's customers have brought their business elsewhere." This is insufficient to sustain GFI's tortious interference with prospective economic advantage counterclaim, and that counterclaim must be dismissed.

Id. at *7.

Here, UED has redrafted its complaint twice and still has not alleged that it had a reasonable probability of entering into a specific contract but for the interference of ETS. Rather, UED merely asserts, based on past experience, it would have received a response from approximately 10% of its mailings. Further, UED asserts that *everyone* on the military bases it tried to serve constitutes a potential customer and, therefore, prospective contracts. Even with these alleged potential customers, however, UED acknowledges it "has no way of knowing who didn't respond and why." Moreover, UED does not allege that any of its past customers provided repeat business. Therefore, UED has failed to plead any potential contract was thwarted by any alleged tortious conduct on the part of ETS.

For the foregoing reasons, the decision of the circuit court dismissing UED's action for intentional interference with prospective contractual relations pursuant to Rule 12(b)(6) is

AFFIRMED.

HEARN, C.J. and GOOLSBY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No. 99-CP-36-180

Charles Olmstead,

Appellant,

v.

Shakespeare,

Respondent.

Case No. 99-CP-36-186

Joanna Olmstead,

Appellant,

v.

Shakespeare,

Respondent.

Appeal From Newberry County
John W. Kittredge, Circuit Court Judge

Opinion No. 3437
Heard December 5, 2001 - Filed January 22, 2002

REVERSED AND REMANDED

Daniel E. Henderson, of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Ridgeland, for appellants.

Gray T. Culbreath and Clayton B. McCullough, of Collins & Lacy, of Columbia, for respondents.

STILWELL, J.: Charles and Joanna Olmstead appeal the order of the circuit court dismissing their tort actions against Shakespeare. The circuit court held that Olmstead was Shakespeare's statutory employee and thus barred by the exclusive remedy provision of the Workers' Compensation Act. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Olmstead is the owner-operator of a truck-trailer combination used for long distance hauling of goods and materials. He leased his equipment to Hot Shot Express, which provided his tags, ICC licensing, and placards. He was paid by Hot Shot based on the miles he drove. Hot Shot dispatched Olmstead to Shakespeare's Newberry plant to pick up a load of utility poles. Olmstead's truck was loaded by Shakespeare employees, and Olmstead strapped the load down. After the load was strapped, Olmstead was asked to unstrap the poles because of a quality control problem. He was injured when some of the poles fell during unstrapping.

Olmstead filed suit against Shakespeare for negligence, and his wife filed suit for loss of consortium. Shakespeare answered and alleged, as an affirmative defense, that Olmstead was a statutory employee and thus the exclusive remedy

was under the South Carolina Workers' Compensation Act. After the period for filing a workers' compensation claim had expired, Shakespeare filed a motion to dismiss on the same basis. The circuit court granted the motion.

STANDARD OF REVIEW

In workers' compensation cases, the "existence of the employer-employee relationship is a jurisdictional question." Lake v. Reeder Constr. Co., 330 S.C. 242, 247, 498 S.E.2d 650, 653 (Ct. App. 1998). Subject matter jurisdiction is a question of law for decision by the court and includes findings of fact which relate to jurisdiction. Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 7, 132 S.E.2d 18, 21 (1963). "[T]his court may reverse where the decision is affected by an error of law." Lake at 247, 498 S.E.2d at 653.

LAW/ANALYSIS

Olmstead argues the trial court erred in holding that he was a statutory employee of Shakespeare. We agree.

The recent supreme court case of Abbott v. The Limited, Inc., 338 S.C. 161, 526 S.E.2d 513 (2000) is controlling. Abbott was employed by a common carrier which had a contract with The Limited Distribution Services to deliver goods to its retail stores. Abbott was injured while unloading boxes on the retailer's premises. The Abbott court cited the three established tests used to determine

> whether an employee is engaged in an activity that is part of the owner's trade, business, or occupation as required under [S.C. Code Ann.] § 42-1-400 (1985). . . : (1) is the activity an important part of the owner's business or trade; (2) is the activity a necessary, essential, and integral part of the owner's business; or (3) has the activity previously been performed by the owner's employees? . . . '[T]he guidepost is whether or not that which is being done is or is not a part of the general trade, business, or occupation of the owner.'

Abbott at 163, 526 S.E.2d at 514. In finding Abbott was not a statutory employee of The Limited, our supreme court stated, "'[t]he mere fact that transportation of goods to one's place of business is essential for the conduct of the business does not mean that the transportation of the goods is a part or process of the business.' We conclude that the mere recipient of goods delivered by a common carrier is not the statutory employer of the common carrier's employee." Abbott at 163-64, 526 S.E.2d at 514 (quoting Caton v. Winslow Bros. & Smith Co., 34 N.E.2d 638, 641 (1941)). In so holding, the court stated in a footnote: "To the extent Neese v. Michelin Tire Corp., 324 S.C. 465, 478 S.E.2d 91 (Ct. App. 1996), and Hairston v. Re: Leasing, Inc., 286 S.C. 493, 334 S.E.2d 825 (Ct. App. 1985), may be read to hold otherwise, they are hereby overruled."

In this case, the trial court stated it was influenced primarily by two factors in finding Olmstead was a statutory employee. First, the supreme court could easily have broadened the reach of Abbott to all transportation cases but chose not to, specifically limiting its holding to receipt of goods. Second, Abbott did not overrule Revels v. Hoechst Celanese Corp., 301 S.C. 316, 391 S.E.2d 731 (Ct. App. 1990). We find the court's reliance on these factors misplaced. We do not agree with the overly narrow reading of Abbott, as we find that its holding is not limited to situations involving a retailer's receipt of goods. The facts of Abbott involved receipt of goods, so it was unnecessary for the court to address the delivery of goods from a manufacturer to a customer because that issue was not presented.

A review of the overruled cases provides further evidence that the holding of Abbott is not limited to receipt of goods. In Hairston, the recipients determined the delivery dates and drop-off points for vehicles being transported by the common carrier. Hairston at 496, 334 S.E.2d at 826. The court did not emphasize or even address the delivery aspect of the case, but rather found that the preponderance of the evidence indicated the driver was performing services which were part of the trade or business. Hairston at 498, 334 S.E.2d at 827.

In Neese, an employee of a common carrier was injured while unloading a truck. In a footnote, the court noted the parties were not in agreement as to when the injury occurred. Neese at 470 n.1, 478 S.E.2d at 93-94 n.1. Neese

contended he was injured while transporting the goods from the Michelin plant to another location. Michelin contended he was injured while transporting materials back to the Michelin plant. The court stated, "Whether Neese was injured at AVRC or the Sandy Springs [Michelin] plant is not relevant to the issues involved in this appeal." Id. This language indicates the court did not make a distinction, nor would it have made a difference if Neese were delivering or receiving the goods. The court held that "[c]learly, the packaging and transportation of these semi-finished products . . . is an integral part of Michelin's business." Neese, 324 S.C. at 473, 478 S.E.2d at 95. Because this case did not specifically involve delivery or receipt, Abbott cannot be read to have been overruling a receipt case when it overruled Neese. Rather, we find that Abbott focused on the transportation aspect to determine if the individual is a statutory employee, not whether the purported statutory employer was a shipper or a recipient of goods.

Additionally, the trial court's reliance on the fact that the supreme court did not overrule Revels was error. Revels was employed by a common carrier to transport liquid organic chemicals. Revels at 317, 391 S.E.2d at 731. The Revels court found "no difficulty in deciding that Revels was Celanese' 'statutory employee' when he was injured. The work then being performed by Revels, *i.e.*, checking the levels of the chemicals being loaded into the tanker, was a part of Celanese' general business." Revels at 318, 391 S.E.2d at 732. Unlike the employees in Abbott, Neese, and Hairston, who were merely transporting goods, Revels was more involved in the business process, since he monitored the levels of chemicals being pumped into the tanker. Additionally, this court in Revels specifically found that distribution, and therefore transportation, was an integral part of Celanese's business. Since Revels involved more than transportation alone and is easily distinguished on its facts, the supreme court had no reason to expressly overrule it.

We find the facts in the present case do not support the ruling that Olmstead was a statutory employee of Shakespeare. Olmstead was transporting a finished product away from Shakespeare's manufacturing plant to a customer. Shakespeare does not own or operate any receiving or delivery trucks. All of the raw material that arrives at its plant and all of the finished product that leaves its plant does so by common carrier. We find that Olmstead, as an

employee of a common carrier involved only in the transportation of goods, was not part of the general trade, business, or occupation of Shakespeare. We thus hold he was not a statutory employee.

While generally workers' compensation should be construed broadly in favor of coverage to further its purpose, the underlying rationale is not as pertinent where the statutory employee definition and exclusive remedy provision are used as a shield to prevent recovery under another theory. See Peay v. U.S. Silica Co., 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) ("[W]orkers' compensation statutes are construed liberally in favor of coverage. It follows that any exception to workers' compensation coverage must be narrowly construed."); Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948) (definitions in compensation acts should be broadly or liberally construed to effect legislative purpose); Pelfrey v. Oconee County, 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945) ("'Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed.'"); Ham v. Mullins Lumber Co., 193 S.C. 66, 75, 7 S.E.2d 712, 716 (1940) ("[T]he general and well established rule in construction of compensation acts is that they are intended to be for the benefit of employees and must be construed liberally in their favor."); but see Gentry v. Milliken & Co., 307 S.C. 235, 414 S.E.2d 180 (Ct. App. 1992).

Because we hold that Olmstead was not a statutory employee of Shakespeare, we need not address his estoppel argument. The decision of the trial court is reversed, and these cases are remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

CURETON and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Harold D. Knuckles,

Appellant.

Appeal From Cherokee County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 3438
Heard December 4, 2001 - Filed January 28, 2002

VACATED

Assistant Appellate Defender Katherine Carruth Link, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Charles H. Richardson, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for respondent.

CURETON, J.: Harold Knuckles was charged with driving under the influence (DUI), pled guilty, and was convicted. Knuckles appeals asserting the circuit court lacked subject matter jurisdiction to accept his plea because the indictment charging him with DUI did not contain all of the statutory elements of the offense. We agree and vacate the conviction.[1]

FACTS

On July 17,1998, Trooper Godfrey of the Highway Patrol responded to a traffic call from a Metro Narcotics Officer. Upon his arrival at the scene, Godfrey encountered Knuckles, performed sobriety tests, and determined Knuckles was under the influence. Knuckles was arrested and imprisoned for three days.

At his plea hearing, Knuckles requested the court's mercy as he had secured a new job to begin the following week. The court sentenced Knuckles to one year imprisonment and fined him $2,000 suspended on time served, $1,000 fine and probation for two years. Knuckles appeals.

LAW/ANALYSIS

Knuckles asserts the circuit court lacked subject matter jurisdiction to accept his guilty plea because the indictment failed to adequately charge him with DUI pursuant to section 56-5-2930 of the South Carolina Code. We agree.

The indictment reads as follows:

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[1] This appeal was originally filed pursuant to Anders v. California, 386 U.S. 738 (1967) and raised the issue of the voluntariness of Knuckles' plea. By order dated February 1, 2001, this court found the sufficiency of the indictment to be the only issue of arguable merit and directed the parties to brief the issue. Accordingly, we need not again address the voluntariness of Knuckles' plea.

> That Harold Knuckles, Sr. did in Cherokee County on or about July 17, 1998, drive a vehicle while under the influence of intoxicating liquors, and/or narcotic drugs, barbiturates, paraldehydes drugs and herbs; such not being the first offense within a period of ten years including and immediately preceding the foregoing date.

The caption of the indictment cited section 56-5-2930, but the section was not referenced in the body of the indictment.

Prior to June 29, 1998, section 56-5-2930 read as follows:

> It is unlawful for any person who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquors, narcotic drugs, barbiturates, paraldehydes or drugs, herbs or any other substance of like character, whether synthetic or natural, to drive any vehicle within this State.
>
> For purposes of this section 'drug' means illicit or licit drug, a combination of licit or illicit drug, a combination of alcohol and an illicit drug, or a combination of alcohol and a licit drug.

S.C. Code Ann. § 56-5-2930 (1991).

Section 56-5-2930 was amended effective June 29, 1998,[2] and at the time of the offense it read as follows:

> It is unlawful for a person to drive a motor vehicle within this State while under the:
>
> (1) influence of alcohol to the extent that the

[2] Act No. 434, 1998 S.C. Acts 3218.

> person's faculties to drive are **materially and appreciably impaired;**
>
> (2) influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are **materially and appreciably impaired;** or
>
> (3) combined influence of alcohol and any other drug or drugs, or substances which cause impairment to the extent that the person's faculties to drive are **materially and appreciably impaired.**

S.C. Code Ann. § 56-5-2930 (Supp. 1998) (emphasis added). The language used in the indictment tracked the language of the statute prior to the amendment, and did not contain the "materially and appreciably impaired" language.

The subject matter jurisdiction of a court is fundamental. "Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. It is well-settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal in this Court." Brown v. State, 343 S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001) (citation omitted). The action of a court, regarding a matter as to which it has no jurisdiction, is void. State v. Funderburk, 259 S.C. 256, 261, 191 S.E.2d 520, 522 (1972).

The circuit court does not have subject matter jurisdiction to hear a guilty plea unless: (1) there has been an indictment which sufficiently states the offense; (2) there has been a waiver of indictment; or (3) the charge is a lesser included offense of the crime charged in the indictment. Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998).

South Carolina law provides an indictment is sufficient if it "charges the crime substantially in the language . . . of the statute prohibiting the crime or so

plainly that the nature of the offense charged may be easily understood." S.C. Code Ann. § 17-19-20 (1985). "The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995).

South Carolina courts have held that the sufficiency of an indictment "must be viewed with a practical eye; all the surrounding circumstances must be weighed before an accurate determination of whether a defendant was or was not prejudiced can be reached." State v. Adams, 277 S.C. 115, 125, 283 S.E.2d 582, 588 (1981), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). We look first to the statutory history, mindful that it is the Legislature, not this court, that is responsible for defining a crime under a penal statute. Moreover, we are bound to construe section 56-5-2930 strictly against the State. See Williams v. State, 306 S.C. 89, 91, 410 S.E.2d 563, 564 (1991) (It is a well-settled rule of statutory construction that penal statutes are strictly construed against the State and in favor of the defendant.).

The statute was amended in June 1998, approximately four months after this court decided State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998). This court in Kerr, interpreting the version of the statute prior to the 1998 amendment, addressed the standard of proof for DUI. We concluded that DUI was established by proof that the defendant's ability to drive was materially and appreciably impaired. Kerr, 330 S.C. at 144, 498 S.E.2d at 218 ("Driving under the influence is therefore established by proof that defendant's ability to drive was materially and appreciably impaired.").

When construing an amendment to a statute, we presume the legislature did not intend a futile act. See TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). We conclude the legislature considered Kerr in amending section 56-5-2930, and thus intended to make material and appreciable impairment an element of the substantive offense charged rather than an element of proof to be adduced at trial. See State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (The court's primary function in interpreting a statute is to ascertain the intention of the legislature.). Because the indictment

does not include the element of material and appreciable impairment, we find it insufficient to charge DUI pursuant to section 56-5-2930.

The failure to include an element of a statutory offense in the body of an indictment will not invalidate the indictment if specific reference to the statute is made in the body of the indictment. State v. Owens, 346 S.C. 637, ___, 552 S.E.2d 745, 751 (2001). However, a reference to the statute in the caption does not validate an invalid indictment. The caption of an indictment is not a part of the finding of the grand jury. State v. Lark, 64 S.C. 350, 353, 42 S.E. 175, 176-77 (1902). Rather, it is the body of the indictment that is controlling. If the body specifically states the essential elements of the crime and is otherwise free from defect, a defect in the caption will not invalidate the indictment. Tate v. State, 345 S.C. 577, 581, 549 S.E.2d 601, 603 (2001). However, because the caption is not part of the indictment, a designation in the caption cannot enlarge or diminish the offense charged in the body of the indictment. See State v. Wilkes, 346 S.C. 67, 70, 550 S.E.2d 332, 333-34 (Ct. App. 2001) (citing 42 C.J.S. Indictments and Informations § 113 (1991)). Accordingly, we conclude the reference to the statute in the caption does not make the indictment sufficient.

CONCLUSION

Because the indictment failed to allege material and appreciable impairment, a necessary element of the offense, the trial court lacked subject matter jurisdiction to accept Knuckles' guilty plea. Accordingly, the resulting conviction is

VACATED.

STILWELL, J., concurs, and SHULER, J., dissents in separate opinion.

SHULER, J., dissenting: I respectfully dissent. In my view, all of the statutory elements of driving under the influence were included in the body of the indictment and thus, it was sufficient to confer jurisdiction on the circuit court.

Even before section 56-5-2930 was amended, driving under the influence

was established by proof that the defendant's ability to drive was materially and appreciably impaired. See City of Orangeburg v. Carter, 303 S.C. 290, 400 S.E.2d 140 (1991); State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998). This was the standard of proof necessary to establish driving under the influence and was not considered an element of the offense.

The majority points out that section 56-5-2930 was amended approximately four months after this Court decided State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998), indicating the amendment was in response to Kerr. The issue in Kerr was whether the trial judge committed error in his charge to the jury on the standard of proof for driving under the influence. In answering the question of what the proper standard of proof is in a DUI case, the Court stated: "Driving under the influence is . . . established by proof that the defendant's ability to drive was materially and appreciably impaired." Id. at 144, 498 S.E.2d at 218. In my view, the legislature did not intend to make material and appreciable impairment an element of driving under the influence, but instead intended to clearly establish the standard of proof to be used in such cases.

Moreover, after section 56-5-2930 was amended, this Court and the supreme court have continued to define the *corpus delicti* of DUI as (1) driving a vehicle; (2) within this state; (3) while under the influence of intoxicating liquors or drugs. See State v. Osborne, 335 S.C. 172, 516 S.E.2d 201 (1999); State v. McCombs, 335 S.C. 123, 515 S.E.2d 547 (Ct. App. 1999).

For the foregoing reasons, I would find that the indictment was sufficient to confer subject matter jurisdiction on the circuit court and affirm the conviction.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Alyce B. McInnis,

Appellant,

v.

Estate of E. C. McInnis, Jr.,

Respondent.

Appeal From Marlboro County
James Carlyle Williams, Jr., Circuit Court Judge

Opinion No. 3439
Heard November 7, 2001 - Filed January 28, 2002

REVERSED

Elizabeth R. Munnerlyn, of Rogers & Munnerlyn, of Bennettsville, for appellant.

J. Munford Scott, Jr., of Florence and Wade R. Crow, of Bennettsville, for respondent.

HEARN, C.J.: Alyce McInnis appeals the denial of her claim against her husband's estate. She asserts she was entitled to thirty percent of the cash remaining in his estate after the payment of debts in addition to the funds she received from two Individual Retirement Accounts (IRAs). We reverse.

FACTS/PROCEDURAL HISTORY

E. C. McInnis (Husband) and Alyce McInnis (Wife) married in 1988. Prior to their marriage, Husband opened two IRAs. He named his children, Duncan Allen McInnis and Terry Alice McInnis Hommel, as his beneficiaries and listed his grandchildren, Duncan Allen McInnis, Jr. and Jean Kaye McInnis, as contingent beneficiaries.

In 1992, Husband executed a will directing in Item II that "I give, devise, and bequeath any IRA Account which I might own at the time of my death to my wife, Alyce Braak McInnis." The will also directed in Item IX that "After the payment of all my just and lawful debts, I give, devise and bequeath any cash which I might own at the time of my death as follows: Thirty (30%) Per Cent [sic] to my wife, Alyce Braak McInnis . . . ."

Husband died in 1995, never having changed the beneficiary designation on his IRAs. Following his death, the named beneficiaries and the contingent beneficiaries, as represented by a guardian, signed documents disclaiming their interests in the IRAs. The IRA custodian then rolled over the proceeds from Husband's accounts to Wife's IRA.[1]

Duncan McInnis filed two claims against the estate in the amounts of $22,680 and $29,714, seeking reimbursement for money he advanced to cover the estate's expenses and taxes. Jon McInnis claimed $46,006 for recovery under a partnership agreement between himself and Husband. Wife filed a claim for $15,502.02 she asserted she was due under Item IX of the will.

The probate court initially ruled on only Duncan McInnis's and Wife's claims. The probate court allowed Duncan McInnis's claims but denied Wife's claim, reasoning that after allowing Duncan McInnis's claims, there was

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[1]The estate has not contested Wife's receipt of the IRA proceeds. In fact, the estate's attorney wrote a letter requesting a private letter ruling from the South Carolina Tax Commission shortly after the disclaimers were given which read in part, "That Alyce Braak McInnis (wife of deceased) is entitled to the Decedent's IRA pursuant to the Code and the Will of the deceased."

no cash left to distribute to Wife under Item IX of the will. Alyce McInnis appealed both the denial of her claim and the allowance of Duncan McInnis's claims.

The circuit court issued an order remanding the matter to the probate court for additional findings of fact about the E. C. and Jon McInnis partnership. On remand, the probate court found that the partnership contained insufficient assets to reimburse Duncan McInnis, and therefore, he was entitled to repayment from Husband's estate. Once again, it denied Wife's claim. Ruling for the first time on Jon McInnis's claim, the probate court found that the estate owed him for money withdrawn from the partnership by Husband exceeding the amount he was due under the partnership agreement. Wife challenged these findings to the circuit court.

The circuit court ruled that the named beneficiaries' disclaimers of their interests in the IRAs caused the IRA proceeds to become property of the estate to be distributed as cash under Item IX of the will. It then denied Duncan McInnis's claims and Jon McInnis's claim because there was insufficient evidence in the record to allow recovery of these claims. The circuit court also held Wife was entitled to $36,438.86 under Item IX of the will.[2] However, it denied Wife's claim because it found that her bequest was satisfied since the money disbursed to her from the IRAs was a cash distribution in excess of the amount she was entitled to receive under the will. This appeal followed.

STANDARD OF REVIEW

A claim for money due from an estate sounds in law as does an action to construe a will. See Howard v. Mutz, 315 S.C. 356, 362, 434 S.E.2d 254, 258 (1993) (finding claim for money against an estate is at law); NationsBank of S.C. v. Greenwood, 321 S.C. 386, 392, 468 S.E.2d 658, 662 (Ct. App.1996) (stating will construction is an action at law). In an action at law tried without a jury, the trial judge's factual findings will not be disturbed on appeal unless wholly unsupported by the evidence or controlled by an error of law. Gordon v. Colonial Ins. Co., 342 S.C. 152, 155, 536 S.E.2d 376, 378 (Ct.

[2]The circuit court reached this figure by calculating thirty percent of what he believed to be the cash in the estate, including the IRA proceeds.

App. 2000). However, this court may correct errors of law without deference to the lower court. State *ex rel* Condon v. City of Columbia, 339 S.C. 8, 13, 528 S.E.2d 408, 410 (2000).

LAW/ANALYSIS

On appeal, Wife asserts the circuit court wrongly denied her claim because she was entitled to thirty percent of the cash in the estate in addition to the proceeds of the IRAs. She contends the circuit court erred in treating the IRA proceeds as cash to be distributed under Item IX of the will and in characterizing her receipt of those proceeds as a satisfaction of the bequest to her in Item IX. We agree.

Wife contests the circuit court's finding that "the named beneficiaries of both IRA accounts disclaimed their interest as named beneficiaries under those accounts in order that the proceeds could be payable to the Estate and thus become cash of the Estate." This finding appears to treat the disclaimers as conditional. To be valid, a disclaimer must be unconditional. 26 U.S.C.A. § 2518 (1989) (providing "as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer . . . ."); S.C. Code Ann. § 62-2-801(a) (Supp. 2000) (allowing that a disclaimer made in compliance with federal tax requirements is effective under South Carolina law). In determining whether a disclaimer is conditional, we look to the language of the disclaimer instrument. Estate of Holden v. Holden, 343 S.C. 267, 275-76, 539 S.E.2d 703, 708 (2000). Here, the disclaimers are unequivocal and do not contain any qualifying language or manifest any intent to retain control over the disposition of the IRAs. We find that the disclaimers signed by the named and contingent beneficiaries are unconditional and the circuit court erred in finding that they were made so that the proceeds would pass to the estate.

Having concluded the disclaimers were unconditional, we must now determine what effect the disclaimers had on the IRA proceeds. By statute, if a person disclaims an interest in property, that interest "shall be deemed never to have been transferred to the disclaimant." S.C. Code Ann. § 62-2-801(a). The disclaimed interest then "shall be transferred (or fail to be transferred, as the case may be) as if the disclaimant had predeceased the date of effectiveness of the transfer of the interest; the disclaimer shall relate back to the date of effectiveness for all purposes[,]" unless the original transferor has provided an

alternate disposition. S.C. Code Ann. § 62-2-801(d) (1987). Section 801 also guides the determination of the date of effectiveness of a disclaimed interest, providing:

> The date of effectiveness of the transfer of the disclaimed interest is (1) as to transfers by intestacy, wrongful death, elective share, forced share, homestead allowance, exempt property allowance, devise and bequest, the date of death of the decedent transferor. . . (2) as to all other transfers, the date of effectiveness of the instrument, contract, or act of transfer.

S.C. Code Ann § 62-2-801(e) (1987). An interest in an IRA falls under section 801(e)(2); therefore, the effective date of the disclaimers here is the date the accounts were created. By operation of section 801, for purposes of determining the disposition of the IRAs, we treat the named and contingent beneficiaries here as having predeceased the creation of the accounts. Accordingly, it is as if no beneficiary was designated on the accounts when they were opened.

Wife argues the circuit court erred in treating the IRA proceeds as cash subject to distribution under Item IX because Item II acted as a testamentary designation of the beneficiary of a nontestamentary asset, or, alternatively, that Item II was a specific bequest to her of that asset. We agree with Wife that Item II acted as a designation of a nontestamentary asset.

Generally, an IRA account does not become an asset of the depositor's estate on his or her death. 31 Am. Jur. 2d Executors and Administrators § 502 (1989). Although the issue presented in this case is novel under South Carolina case law, we find guidance in the provisions of the probate code. By statute,

> Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, or other security interest, promissory note, deposit agreement, pension plan, trust agreement, conveyance, or any other written instrument otherwise effective as a contract, gift, conveyance, or trust is deemed to be

> nontestamentary, and this Code does not invalidate the instrument or any provision:
>
> (1) that money or other benefits theretofore due to, controlled, or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently . . . .

S.C. Code Ann. § 62-6-201 (1987). We note that it is not completely clear based on the quoted language whether the provision in the instrument is nontestamentary or the asset is nontestamentary. If a statute is ambiguous, the court must construe its terms in accordance with the rules of statutory construction. Lester v. S.C. Workers' Comp. Comm'n, 334 S.C. 557, 561, 514 S.E.2d 751, 753 (1999). The title of article six of the probate code is "Nonprobate Transfers." Although the title and headings of a statute may not be construed to limit the plain language of a statute, they may be used to shed light on an ambiguous word or phrase. Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993). Therefore, the placement of section 201 in this chapter suggests that these accounts should be treated as nontestamentary. Moreover, our section 201 was taken from the Uniform Probate Code. See Unif. Probate Code § 6-101 (amended 1998), 8 U.L.A. 430-31 (Supp. 2000). The reporter's comments to the uniform provision read in part as follows, "The sole purpose of this section is to prevent the transfers authorized here from being treated as testamentary." Id. Based on the above, we find section 201 reflects a legislative intent that such accounts be nontestamentary, even if the beneficiary designation is made by will.[3]

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[3]We disagree with respondent's contention that the bequest of the IRA account to Wife under Item II of the will was adeemed because we find Item II acted as a designation rather than a specific bequest. Ademption "ineffectuates a specific legacy or devise because the testator has parted with the subject and occurs when 'the thing bequeathed is, in the lifetime of the testator, lost, disposed of, or, so substantially changed or altered as not to exist in specie when the will takes effect.'" Taylor v. Goddard, 265 S.C. 327, 331, 218 S.E.2d 246, 248 (1975). Because we find no bequest, there can be no ademption.

This interpretation is consistent with the law relating to payable on death (POD) accounts. These accounts are nontestamentary as described in S.C. Code Ann. section 62-6-106 (1987). IRAs and POD accounts are similar in nature and operation. See S.C. Code Ann. §62-6-101(10) (1987) (defining POD account as "an account payable on request to one person during his lifetime and on his death to one or more payees"). Although IRAs are regulated by the federal tax code, they basically function as a POD account. Therefore, it is logical to analogize IRAs to POD accounts for purposes of this analysis.

Because we find that the IRAs were nontestamentary transfers, we must reverse the circuit court's calculation of cash in the estate and his denial of Wife's claim. Using the circuit court's calculations, it appears Husband's estate included $45,044.18 in cash.[4] We find that Wife is entitled to thirty percent of that amount ($13,513.25) under Item IX of Husband's will.

REVERSED.

CURETON and HOWARD, JJ., concur.

[4]We reach this number by subtracting the amount in the IRAs from the circuit court's cash total.