The Supreme Court of South Carolina

In the Matter of Jack T. Flom, Respondent.

ORDER

By order of this Court dated April 9, 2001, respondent was suspended from the practice of law for failure to pay his 2001 license fees. The Office of Disciplinary Counsel now moves, pursuant to Rule 31, RLDE, Rule 413, SCACR, for the appointment of an attorney to protect the interests of respondent's clients.

IT IS ORDERED that Frederick C. Parsons, III, 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. Parsons shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Parsons 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 Frederick C. Parsons, III, 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 Frederick C. Parsons, III, 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. Parson's office.

s/Jean H. Toal C.J.

Columbia, South Carolina

August 10, 2001

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

August 20, 2001

ADVANCE SHEET NO. 30

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UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

25326 - Sea Pines Association for the Protection of Wildlife, Inc., et al. v. South Carolina Dept. of Natural Resources, et al.	Pending
25335 - Stardancer Casino, Inc. v. Robert M. Stewart, Sr.	Pending
2001-MO-047 - DuBay Enterprises, etc. v. City of North Charleston Board of Zoning Adjustment	Pending

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

3355 - The State v. Leroy Wilkes	Pending
3356 - Kenney's Metal v. Palmieri	Denied 8-17-01
3357 - The State v. Richmond Truesdale, Jr.	Pending
3358 - S. C. Coastal Cons. V. SCDHEC	Pending
3360 - Beaufort Realty v. Beaufort County	Pending
3361 - The State v. Tommy Lee James	Pending
3362 - Johnson v. Arabi	Pending
3363 - Watts v. Metro Security Agency	Pending
3364 - SCDSS v. Mrs. H. and Mr. H.	Pending
3365 - State v. Laterrance Ramone Dunlap	Pending
3366 - Crafton v. Brown	Pending
3367 - State v. James Henderson, III	Pending
3369 - State v. Don L. Hughes	Pending
3370 - Bailey v. Segars	Pending
3371 - State v. Curtis Gibbs	Pending
3372 - Dukes v. Rural Metro, et al.	Pending
3374 - Heilker v. Zoning Board of Appeals	Pending
3375 - State v. Otis Williams	Pending
3376 - State v. Roy Johnson #2	Pending
2001-UP-016 - Stanley v. Kirkpatrick	(2) Pending
2001-UP-123 - SC Farm Bureau v. Cynthia Rabon	Pending
2001-UP-160 - The State v. Elijah Price, Jr.	Pending

2001-UP-212 - Singletary v. La-Z-Boy Pending

2001-UP-235 - State v. Robert McCrorey, III and Robert Dimitry McCrorey Pending

2001-UP-248 - Thomason v. Barrett (2) Pending

2001-UP-282 - Holland v. Gunn Pending

2001-UP-292 - Frazello v. Bankhead Pending

2001-UP-300 - Robert L. Mathis, Jr. v. The State Pending

2001-UP-304 - Jack McIntyre v. The State Pending

2001-UP-307 - State of SC v. Joseph McQuatters Pending

2001-UP-315 - Joytime v. Orr (2) Pending

2001-UP-321 - The State v. Randall Scott Foster Pending

2001-UP-322 - Edisto Island v. Gregory Pending

2001-UP-323 - Goodwin v. Johnson Pending

2001-UP-324 - The State v. John Williams, III Pending

2001-UP-325 - Hessenthater v. Tri-County SisterCare Pending

2001-UP-328 - S&R Services v. Thompson Pending

2001-UP-335 - The State v. Andchine Vance Pending

2001-UP-337 - The State v. Leonard Carter Pending

2001-UP-338 - Ladd v. Rainey Pending

2001-UP-344 - NBSC v. Renaissance Pending

2001-UP-355 - The State v. Gavin Jones Pending

2001-UP-358 - McCleskey v. McCleskey Pending

2001-UP-360 - Davis v. Davis Pending

2001-UP-363 - King v. Island Club Apartments Pending

2001-UP-364 - Clark v. Greenville County Pending

2001-UP-365 - Gaither v. Blue Cross Blue Shield Pending

2001-UP-368 - Collins Entertainment v. Vereen Pending

2001-UP-371 - SCDHEC v. Paris Mountain Utilities Pending

2001-UP-374 - Boudreaux v. Marina Villas Association Pending

2001-UP-375 - Sutton v. Sutton Pending

2001-UP-376 - Eastwood v. Barnwell County Pending

2001-UP-377 - Miller v. The Ward Law Firm Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3069 - State v. Edward M. Clarkson Pending

3231 - Hawkins v. Bruno Yacht Sales Pending

3248 - Rogers v. Norfolk Southern Pending

3254 - Carolina First v. Whittle Pending

3267 - Jeffords v. Lesesne Pending

3271 - Gaskins v. Southern Farm Bureau Pending

3273 - Duke Power v. Laurens Elec. Coop Pending

3274 - Pressley v. Lancaster County Pending

3276 - State v. Florence Evans Pending

3284 - Bale v. SCDOT Pending

3289 - Olson v. Faculty House (2) Pending

3292 - Davis v. O-C Law Enforcement Comm. Pending

3294 - State v. Nathaniel Williams		Pending
3297 - Silvester .v Spring Valley Country Club		Pending
3298 - Lockridge v. Santens of America, Inc.		Pending
3299 - SC Properties & Casualty Guaranty Assn. v. Yensen	(2)	Pending
3300 - Ferguson v. Charleston/Lincoln		Pending
3301 - Horry County v. The Insurance Reserve		Pending
3307 - Curcio v. Caterpillar		Pending
3310 - Dawkins & Chishold v. Fields, et al.		Pending
3311 - SC Farm Bureau v. Wilson		Pending
3312 - Eady v. Oliver		Pending
3314 - State v. Minyard Lee Woody		Pending
3315 - State v. Ronald L. Woodruff		Pending
3319 - Breeden v. TCW, Inc.	(2)	Pending
3321 - Andrade v. SCE&G		Pending
3324 - Schurlknight v. City of N. Charleston		Pending
3325 - The Father v. SCDSS		Pending
3327 - The State v. John Peake		Pending
3329 - S. C. Dept. of Consumer Affairs v. Rent-A-Center		Pending
3330 - Richard Bowen v. Ann Bowen		Pending
3331 - Wade Jenkins v. Janna Jenkins		Pending
3332 - SC Farm Bureau Mutual Ins. Co. v. Kelly		Pending
3335 - Joye v. Yon		Pending
3337 - Brunson v. SLED		Pending

3345 - Cunningham v. Helping Hands		Pending
2000-UP-656 - Martin v. SCDC		Pending
2000-UP-677 - Chamberlain, et al. v. TIC		Pending
2000-UP-783 - State v. Clayton Benjamin		Pending
2001-UP-015 - Milton v. A-1 Financial Services		Pending
2001-UP-022 - Thomas v. Peacock		Pending
2001-UP-038 - Gary v. American Fiber		Pending
2001-UP-049 - Johnson v. Palmetto Eye		Pending
2001-UP-054 - State v. Ae Khingratsaiphon		Pending
2001-UP-058 - State v. Brian Keith Nesbitt		Pending
2001-UP-069 - SCDSS v. Taylor		Pending
2001-UP-076 - McDowell v. McDowell		Pending
2001-UP-078 - State v. James Mercer		Pending
2001-UP-085 - Curcio v. Caterpillar		Pending
2001-UP-091 - Boulevard Dev. V. City of Myrtle Beach		Pending
2001-UP-092 - State v. Robert Dean Whitt		Pending
2001-UP-114 - McAbee v. McAbee		Pending
2001-UP-122 - State v. Robert Brooks Johnston		Pending
2001-UP-124 - State v. Darren S. Simmons	(2)	Pending
2001-UP-125 - Spade v. Berdish		Pending
2001-UP-126 - Ewing v. Mundy		Pending
2001-UP-156 - Employer’s Insurance of Wausau v. Whitaker’s Inc., of Sumter		Pending
2001-UP-161 - Meetze v. Forsthoefel		Pending

2001-UP-167 - Keels v. Richland County	Pending
2001-UP-186 - The State v. Coy L. Thompson	Pending
2001-UP-193 - Cabaniss v. Pizza Hut of America, Inc.	Pending
2001-UP-199 - Summerford v. Collins Properties	Pending
2001-UP-200 - Cooper v. Parsons	Pending
2001-UP-201 - Pittman v. MasTec, Inc.	Dismissed 8-13-01
2001-UP-238 - State v. Michael Preston	Pending
2001-UP-239 - State v. Billy Ray Jackson	Pending
2001-UP-249 - Hinkle v. National Casualty	Pending
2001-UP-261 - San Souci Association v. Miller	Pending
2001-UP-269 - Wheeler v. Revco	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Unisys Corporation, Appellant/Respondent,

v.

The South Carolina Budget and Control Board Division of General Services Information Technology Management Office, as an agency of the State of South Carolina, as agent for the South Carolina Department of Health and Human Services (formerly the South Carolina Health and Human Services Finance Commission), and as agent for the South Carolina Department of Social Services; Voight Shealy, in his official capacities as Acting Information Technology Management Officer and Chief Procurement Officer of the Information Technology Management Office; Ronald E. Moore, in his official capacities as

Technology Management Officer and Chief Procurement Officer of the Information Technology Management Office; the South Carolina Department of Health and Human Services; and the South Carolina Department of Social Services, Defendants,

Of whom

The South Carolina Budget and Control Board Division of General Services Information Technology Management Office, as an agency of the State of South Carolina, as agent for the South Carolina Department of Health and Human Services (formerly the South Carolina Health and Human Services Finance Commission), and as agent for the South Carolina Department of Social Services; Ronald E. Moore, in his official capacities as Technology

Management Officer and
Chief Procurement
Officer of the
Information Technology
Management Office;
the South Carolina
Department of Health
and Human Services;
and the South Carolina
Department of Social
Services are Respondents/Appellants.

Appeal From Richland County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 25342
Heard June 6, 2001 - Filed August 14, 2001

AFFIRMED

John E. Johnston, Michael J. Giese, and James T. Hewitt, of Leatherwood Walker Todd & Mann, P.C., of Greenville, for appellant/respondent.

Marcus A. Manos, Wilburn Brewer, Jr., and Susan Batten Lipscomb, of Nexsen Pruet Jacobs & Pollard, L.L.P., of Columbia, for respondents/appellants.

ACTING CHIEF JUSTICE MOORE: This dispute involves the State's multi-million dollar contract with appellant Unisys Corporation

for the implementation of a state-wide automated child support enforcement system as required under the federal Family Support Act of 1988. Unisys appeals the dismissal of its complaint. We affirm.

FACTS

On February 22, 1993, respondent Information Technology Management Office (ITM Office) issued a Request for Proposal (RFP) soliciting bids for a child support enforcement system. The system was to be in effect by October 1, 1995. After a bidder's contest to the February RFP, an amended RFP was issued on October 8, 1993. This RFP was further amended six times in October and early November 1993. On November 9, Unisys submitted a successful bid. As a result, on December 30, 1993, Unisys signed an agreement to provide the system. This agreement was signed by respondent Budget and Control Board on January 27, 1994.

More than four years later, in September 1998, respondents (collectively "the State") submitted a request for resolution of a contract controversy pursuant to the South Carolina Consolidated Procurement Code, S.C. Code Ann. § 11-35-4230 (Supp. 2000). The request was submitted to Ronald Moore, the Chief Procurement Officer (CPO) for the ITM Office. The State alleged various breaches of contract by Unisys, including the failure to meet federally mandated deadlines for the system to be operational. Further, it alleged fraud in the inducement of the contract, and unfair and deceptive acts in violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-20 (1985) (SCUTPA). Unisys responded to the State's request for resolution by moving for dismissal on several grounds asserting essentially that the CPO lacked jurisdiction.[1]

Unisys then filed this action in circuit court seeking damages for breach

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[1]On the merits, Unisys alleged the State had breached the contract by failing to meet its obligations including inadequate payment to Unisys in an amount totaling approximately $8.5 million.

of contract, a declaratory judgment regarding the inapplicability of the Procurement Code on jurisdictional and constitutional grounds, and an injunction against the State's proceeding under the Procurement Code. The State answered and filed a counterclaim alleging breach of contract, breach of warranty, fraud in the inducement, and a violation of SCUTPA.[2] The State then moved to dismiss under Rule 12(b)(1), (6), and (8), SCRCP, on the grounds the circuit court lacked subject matter jurisdiction of the dispute between the parties which was governed by the Procurement Code, Unisys had failed to state facts sufficient to constitute the causes of action asserted, and there was another action pending between the same parties for the same claim.

The trial judge found the Procurement Code was the exclusive means of resolving the dispute between the parties and disposed of Unisys's constitutional challenges to the Procurement Code proceeding. He dismissed Unisys's complaint and the State's counterclaims but enjoined the pursuit of the Procurement Code proceeding pending this appeal. Unisys appealed the dismissal of its complaint and the State cross-appealed the injunction pending appeal.

UNISYS'S APPEAL

1. Novel issue

Unisys contends the trial judge erred in disposing of its constitutional challenges to the Procurement Code proceeding on a Rule 12(b)(6) motion to dismiss because these are novel and complex issues. We disagree.

As a general rule, important questions of novel impression should not

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[2]The State claimed it was exposed to $117 million per year in federal sanctions because of Unisys's failure to complete and implement the system for which it had contracted. Further, it sought an injunction "requiring Unisys to give the fully documented, latest version of the [system] source code to the State."

be decided on a motion to dismiss. Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss. Evans v. State, 344 S.C. 60, 543 S.E.2d 547 (2001). Here, the questions involved are questions of law and Unisys points to no factual issues that require further development. This issue is without merit.

2. Exclusive jurisdiction of circuit court

The trial judge found the procedure set forth in the Procurement Code, as provided in § 11-35-4230, is the exclusive means of resolving this dispute. Unisys contends this was error because the circuit court has exclusive jurisdiction under S.C. Code Ann. § 15-77-50 (1976).[3]

Section 15-77-50 provides:

The circuit courts of this State are hereby vested with jurisdiction

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[3]Unisys also cites art. V, § 11, of our State Constitution which vests the circuit court with general jurisdiction in civil cases as follows:

> The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law.

To the extent Unisys's brief may be read to argue that this constitutional provision in itself guarantees the circuit court's jurisdiction over its suit, this argument is incorrect. Article X, § 10, provides: "The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted." Accordingly, jurisdiction over actions against the State is established by the General Assembly and is not endowed by the Constitution.

> to hear and determine all questions, actions and controversies, other than those involving rates of public service companies for which specific procedures for review are provided in Title 58, affecting boards, commissions and agencies of this State, and officials of the State in their official capacities in the circuit where such question, action or controversy shall arise.

Unisys contends § 15-77-50 vests exclusive jurisdiction in the circuit court under Kinsey Constr. Co. v. S.C. Dep't of Mental Health, 272 S.C. 168, 249 S.E.2d 900 (1978). Kinsey involved two breach of contract actions against the Department of Mental Health. The Department argued it enjoyed sovereign immunity from actions on a contract and that the exclusive remedy available to the plaintiffs was limited to that allowed under former § 2-9-10[4] which provided:

> All claims for the payment for services rendered or supplies furnished to the State shall be presented to the State Budget and Control Board by petition, fully setting forth the facts upon which such claim is based, together with such evidence thereof as the Board may require. The petition shall be filed with the chairman of the Board at least twenty days prior to the convening of the General Assembly.

The Court held that by entering a contract, the State waives its sovereign immunity and consents to be sued for breach thereof. Further, § 2-9-10 was not the exclusive remedy available to plaintiffs in light of § 15-77-50 which vests jurisdiction of civil actions against the State in the circuit court.

We decline to follow Kinsey[5] in this case. First, Kinsey is distinguishable from the case at hand. In Kinsey, § 15-77-50 was enacted

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[4]Repealed by 1981 S.C. Act No. 148, § 14.

[5]Kinsey was expressly overruled in McCall v. Batson, 285 S.C. 243, 247, 329 S.E.2d 741, 743 (1985), "to the extent [it holds] that an action may not be maintained against the State without its consent."

after the limited remedy provided in § 2-9-10.[6] In contrast, here § 11-35-4230 is the later statute and therefore takes precedence over § 15-77-50. *See* Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (more recent and specific legislation controls if there is a conflict between two statutes).

Moreover, five years before Kinsey, in Harrison v. South Carolina Tax Comm'n, 261 S.C. 302, 199 S.E.2d 763 (1973), we specifically held that § 15-77-50 is not a blanket waiver of sovereignty but is essentially a venue statute governing instances where the State is subject to suit.[7] Kinsey does not attempt to distinguish or overrule Harrison but discords with Harrison's essential conclusion that § 15-77-50 is not a general waiver of sovereign immunity. If the Kinsey court were actually following Harrison, as it purports to do,[8] it would have found the State had waived its immunity only to the extent permitted under § 2-9-10. We find the decision in Kinsey conflicts with the basic principle that a statute waiving the State's immunity from suit, being in derogation of sovereignty, must be strictly construed. Truesdale v. South Carolina Highway Dep't, 264 S.C. 221, 213 S.E.2d 740 (1975), *overruled in part on other grounds*, McCall v. Batson, *supra*; Jeff Hunt Mach. Co. v. South Carolina State Highway Dep't., 217 S.C. 423, 60 S.E.2d 859 (1950). Accordingly, we now overrule Kinsey and reaffirm Harrison's interpretation of § 15-77-50 as a venue statute.

In conclusion, § 15-77-50 does not trump § 11-35-4230 to vest exclusive original jurisdiction in the circuit court.

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[6]Section 15-77-50 was enacted in 1954, S.C. Act. No. 154; § 2-9-10 was enacted in 1878, S.C. Act. No. 459.

[7]*See also* Whetstone v. South Carolina Dep't of Highways and Pub. Transp., 272 S.C. 324, 252 S.E.2d 35 (1979) (confirming § 15-77-50 is essentially a venue statute).

[8]The Kinsey opinion cites Harrison as "recognizing jurisdiction in the circuit court and providing for venue in cases in which the sovereign immunity doctrine is inapplicable." Kinsey, 272 S.C. at 174, 249 at 903.

3. Application of § 11-35-4230.

The trial judge found § 11-35-4230 vested the CPO and Procurement Review Panel (Review Panel) with exclusive original jurisdiction over the dispute between Unisys and the State. This section provides in large part:

> **§ 11-35-4230. Authority to resolve contract and breach of contract controversies.**
>
> (1) Applicability. This section applies to controversies between the State and a contractor or subcontractor when the subcontractor is the real party in interest, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recision. The procedure set forth in this section shall constitute the exclusive means of resolving a controversy between the State and a contractor or subcontractor concerning a contract solicited and awarded under the provisions of the South Carolina Consolidated Procurement Code.
>
> (2) Request for Resolution; Time for Filing. Either the contracting state agency or the contractor or subcontractor when the subcontractor is the real party in interest may initiate resolution proceedings before the appropriate chief procurement officer by submitting a request for resolution to the appropriate chief procurement officer in writing setting forth the general nature of the controversy and the relief requested with enough particularity to give notice of the issues to be decided. . . .
>
> (3) Duty and Authority to Attempt to Settle Contract Controversies. Prior to commencement of an administrative review as provided in subsection (4), the appropriate chief

> procurement officer shall attempt to settle by mutual agreement a contract controversy brought under this section. The appropriate chief procurement officer shall have the authority to approve any settlement reached by mutual agreement.
>
> (4) Administrative Review and Decision. If, in the opinion of the appropriate chief procurement officer, after reasonable attempt, a contract controversy cannot be settled by mutual agreement, the appropriate chief procurement officer shall promptly conduct an administrative review and shall issue a decision in writing within ten days of completion of the review. The decision shall state the reasons for the action taken.
>
> . . .
>
> (6) Finality of Decision. A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). . . .

Unisys contends the trial judge's ruling was erroneous for the following reasons.

a. Legislature's authority to enact § 11-35-4230

Article X, § 10, of our State Constitution provides: "The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted." Unisys contends this section limits the General Assembly to providing for jurisdiction in matters against the State and therefore does not authorize § 11-35-4230 because that statute applies as well to suits brought by the State.

The State Constitution is a limitation upon and not a grant of power to the General Assembly. Army Navy Bingo, Garrison No. 2196 v. Plowden, 281 S.C. 226, 314 S.E.2d 339 (1984). "The legislative power of the General

Assembly is not dependent upon specific constitutional authorization. The State Constitution only limits the legislature's plenary powers. Thus, the General Assembly may enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions." Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 350, 287 S.E.2d 476, 479 (1982). There is no constitutional provision limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.

We conclude art. X, § 10, simply limits claims against the State to those allowed by the legislature and does not invalidate § 11-35-4230.

b. Construction of § 11-35-4230

Unisys contends the language of § 11-35-4230 is insufficient to vest exclusive jurisdiction in the CPO and Review Panel. Subsection (1) of this statute provides: "The procedure set forth in this section shall constitute the exclusive means of resolving a controversy between the State and a contractor . . . concerning a contract solicited and awarded under the provision of the South Carolina Consolidated Procurement Code." (emphasis added). Unisys claims this language means that when the parties voluntarily chose to proceed under the Procurement Code, § 11-35-4230 is the exclusive means of undertaking that procedure. Unisys contends the term "exclusive means," when strictly construed, is not sufficient to wrench jurisdiction from the circuit court. We disagree.

This Court has used the terms "exclusive means," "exclusive remedy," and "exclusive jurisdiction" synonymously when discussing the Workers' Compensation Act. *See* S.C. Code Ann. § 42-1-540 (1985) (providing the rights and remedies provided under that Act "shall exclude all other rights and remedies)." *See, e.g.*, Loges v. Mack Trucks, Inc., 308 S.C. 134, 417 S.E.2d 538 (1992) (exclusive means); Carter v. Florentine Corp., 310 S.C. 228, 423 S.E.2d 112 (1992) (exclusive remedy); McSwain v. Shei, 304 S.C. 25, 402 S.E.2d 890 (1991) (exclusive jurisdiction). Thus, the term "exclusive

means" has been used to indicate exclusivity of jurisdiction.

Further, because a statute waiving the State's immunity must be strictly construed, the State can be sued only in the manner and upon the terms and conditions prescribed by the statute. Jeff Hunt Mach. Co. v. South Carolina State Highway Dep't, *supra*. The term "exclusive means" must therefore be strictly construed to limit suits on contracts with the State to the forum provided in § 11-35-4230. Application of the strict construction rule, contrary to Unisys's assertion, results in upholding the exclusivity provision of § 11-35-4230.

c. Effective date

Under ¶ 3.3, the contract between the State and Unisys provides:

> Any action at law, suit in equity or judicial proceeding for the enforcement of this contract or any provision thereof shall be instituted only in the Circuit Court in the County of Richland, State of South Carolina.

Unisys contends this provision, rather than § 11-35-4230, determines in what forum this controversy must be heard.

Unisys argues the "exclusive means" provision of § 11-35-4230 was added by statutory amendment "effective for bids or proposals solicited on or after July 1, 1993,"[9] and it therefore does not apply here because the original RFP was issued on February 25, 1993, before this provision became effective. We disagree. The contract itself recites that it is based on an RFP issued on October 8, 1993. Since this RFP was issued after the pertinent 1993 amendment, the amendment applies.

Further, we find the "exclusive means" provision of § 11-35-4230

[9]1993 S.C. Act No. 178, § 38.

overrides the contract provision to the extent it requires that any suit on the contract be brought in circuit court.[10] Contractual relationships formed pursuant to the Procurement Code are highly regulated contracts. We have recognized that the underlying goals of the Procurement Code serve important public interests concerning this particular contractual relationship. Ray Bell Constr. Co. v. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998); *see generally* S.C. Code Ann. § 11-35-20 (Supp. 2000) (purpose and policies of Procurement Code). We now hold contracts formed pursuant to the Procurement Code are deemed to incorporate the applicable statutory provisions and such provisions shall prevail. *Accord* S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072 (Fed. Cir. 1993) (mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law); *see generally* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (anyone entering contract with federal government takes the risk of accurately ascertaining limit of government agent's authority as defined by legislation); *cf.* Jordan v. Aetna Cas. & Sur. Co., 264 S.C. 294, 214 S.E.2d 818 (1975) (statutory provisions relating to an insurance contract are deemed part of the contract as a matter of law and prevail over conflicting contractual provisions).

Accordingly, to the extent ¶ 3.3 of the contract conflicts with § 11-35-4230, it is overridden. We therefore construe this contract provision to require simply that the circuit court of Richland County is the proper venue for any appeal of the Review Panel's decision. *See* S.C. Code Ann. § 11-35-4410(6) (Supp. 2000) (appeal of Review Panel's decision is to circuit court).

4. Right to jury trial and due process.

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[10]The State contends the statute controls because subject matter jurisdiction cannot be bestowed by consent of the parties. As discussed in footnote 13, *infra*, however, the exhaustion of administrative remedies, which this case involves, does not pertain to subject matter jurisdiction. Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000).

Unisys contends that requiring it to proceed under the Procurement Code violates its constitutional right to a jury trial and deprives it of procedural due process. We disagree.

a. Right to jury trial

Article I, § 14, of our State Constitution provides: "The right of trial by jury shall be preserved inviolate." Unisys claims that under this provision, it is entitled to a jury trial on its contract controversy with the State.

It is well-settled that art. I, § 14, secures the right to a jury trial only in cases in which that right existed at the time of the adoption of the constitution in 1868. C.W. Matthews Contracting Co. v. South Carolina Tax Comm'n, 267 S.C. 548, 230 S.E.2d 223 (1976); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955); State v. Gibbes, 109 S.C. 135, 95 S.E. 346 (1918). The right to a jury trial does not apply to actions against the sovereign that were not recognized in 1868. C.W. Matthews Contracting, *supra*; *accord* Ex parte Bakelite Corp., 279 U.S. 438 (1929) (Seventh Amendment does not preserve right to jury trial on claims against the federal government because they were not recognized at common law).

At the time our constitution was adopted in 1868, the State was immune from suit on a contract. Treasurers v. Cleary, 15 S.C. (3 Rich. Law) 370 (1832) (action on debt against the State); *see also* Hodges v. Rainey, *supra* (observing that in 1934 the State was protected by total sovereign immunity and could be sued in tort or contract only when it consented). Accordingly, art. I, § 14, does not guarantee the right to a jury trial on a contract with the State.

b. Due process

Unisys contends the proceeding available under the Procurement Code violates art. I, § 22, of our State Constitution on several grounds. This provision states:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

Unisys contends that CPO Ronald Moore, who is the "appropriate CPO" referred to in § 11-35-4230 to hear this controversy,[11] is not impartial because he was involved in the contract negotiations and amendments and investigated disputes as they arose under the contract. Mr. Moore has in fact recused himself and has designated Voight Shealy, the Assistant Director of the Office of General Services, to serve as acting CPO in this matter. Unisys complains this substitution is unauthorized. We disagree.

Section 11-35-840 (Supp. 2000) provides:

> Subject to the regulations of the board, the chief procurement officers may delegate authority to designees or to any department, agency, or official.

This section is part of Article 3 of the Procurement Code entitled, "Procurement Organization." It is therefore a provision with general application to all functions of the CPO including those functions regarding dispute resolutions under § 11-35-4230. Accordingly, Mr. Moore may delegate his authority to hear this matter.

Unisys further complains that Mr. Shealy is not competent to hear this

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[11]Section 11-35-310(5) and (6) indicate the "appropriate chief procurement officer" is the head of the Information Technology Office of the State. This is Ronald Moore.

matter and, in fact, no one in the ITM Office has sufficient expertise and none is qualified to serve. Conversely, it claims everyone in the ITM Office was "intimately involved" in this project and cannot be impartial.

Under § 11-35-4230(6), Unisys may seek a review of the CPO's decision by the Review Panel. This review is *de novo*. S.C. Code Ann. § 11-35-4410(1) (Supp. 2000). An adequate *de novo* review renders harmless a procedural due process violation based on the insufficiency of the lower administrative body. Ross v. Med. Univ. of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997) (administrator's lack of impartiality cured by *de novo* review before impartial panel). The members of the Review Panel are not ITM Office employees, *see* § 11-35-4410(d), and there is no basis for questioning their impartiality. As far as expertise, we question whether a circuit court judge would have any more expertise in the area of procurement contracts. Moreover, technical expertise is not a requirement of due process.

Unisys further claims a due process violation because the General Assembly has established no specific procedures applicable to dispute resolutions before the CPO. We rejected a similar argument in Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987), and held the Review Panel's failure to formally adopt rules and procedures is not fatal to due process requirements where there is an opportunity to be heard at a meaningful time and in a meaningful manner.

In this case, the procedure set forth by the Review Panel provides for representation by counsel, opening statements, the presentation of evidence, direct, cross, re-direct, and re-cross examination of witnesses, and closing statements. The complaining party presents its case first and bears the burden of proof. The Review Panel may receive additional evidence although issues are generally limited to those presented to the CPO. Since this proceeding meets due process requirements and is *de novo*, Unisys can show no substantial prejudice from the lack of an established procedure before the CPO. Ross, *supra*; Tall Tower, *supra*.

Finally, Unisys contends an administrative body cannot rule on the

constitutionality of statutes and therefore it should not be required to proceed under the Procurement Code. *See* Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000) (administrative body cannot rule on constitutionality of statute). This argument overlooks the fact that the circuit court has already ruled on Unisys's constitutional challenges to the Procurement Code and these issues will not be before the CPO or the Review Panel.

In conclusion, the trial judge properly found no due process violation.

5. Claims for fraud, SCUTPA violation, and punitive damages.

Unisys contends the CPO and Review Panel have no authority to resolve the State's claims against Unisys alleging fraud in the inducement, unfair trade practices under SCUTPA, and punitive damages based on Unisys's allegedly willful misrepresentations. It contends this contract controversy should therefore proceed in circuit court as a matter of judicial economy.

Section 11-35-4230(1) specifically provides it is the exclusive means of resolving controversies between the State and a contractor that "arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recission." (emphasis added). Further, S.C. Code Ann. § 11-35-4320 (Supp. 2000) provides the CPO or the Review Panel "may award such relief as is necessary to resolve the controversy as allowed by the terms of the contract or by applicable law." (emphasis added). Accordingly, the legislature has clearly indicated its intent that the administrative proceeding under the Procurement Code applies to the State's claims in this case for fraud in the inducement, which involves misrepresentation, and punitive damages. *See* Smyth v. Fleischmann, 214 S.C. 263, 52 S.E.2d 199 (1949) (punitive damages recoverable for fraudulent act independent of breach). Further, any punitive damages award is ultimately reviewable by the circuit court on appeal. *See generally* Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) (providing for review of punitive damages award by judge).

The State's cause of action under SCUTPA is a different matter. S.C. Code Ann. § 39-5-40(a) (1985) exempts from SCUTPA:

> Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of the State or the United States or actions or transactions permitted by any other South Carolina State law.

In Ward v. Dick Dyer and Assocs., Inc., 304 S.C. 152, 403 S.E.2d 310 (1991), we rejected a "general activity" analysis that would exempt all activities regulated by an administrative body. We retained, however, the exemption recognized in State ex rel. McLeod v. Rhoades, 275 S.C. 104, 267 S.E.2d 539 (1980), for a security transaction because it is a "unique transaction . . . . subject to strict regulation and must comply with stringent requirements." 304 S.C. at 155 n. 1, 403 S.E.2d at 312 n.1. Similarly, we hold transactions under the Procurement Code are exempt from SCUTPA and the State's SCUTPA cause of action is not a viable claim.[12]

The fact that the SCUTPA cause of action is not viable, however, does not effect the determination whether administrative remedies must be exhausted but simply means the SCUTPA action is subject to dismissal in either forum. In conclusion, judicial economy does not mandate that this action be heard in circuit court.

6. Dismissal under Rule 12(b)

Since Unisys is required to exhaust its administrative remedies as a matter of law, dismissal under Rule 12(b)(6) for failure to state a claim was proper. Further, because an action was pending pursuant to the Procurement Code as required when this action was brought, dismissal was also proper

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[12]Our holding does not infringe on the Attorney General's right of action on behalf of the State pursuant to SCUTPA. *See, e.g.*, S.C. Code Ann. §§ 39-5-50 through -120 (1985).

under Rule 12(b)(8). *See* Southern Ry. Co. v. Order of Ry. Conductors, 210 S.C. 121, 41 S.E.2d 774 (1947) (exhaustion of remedies will preclude original resort to courts where statute by express terms gives exclusive jurisdiction to administrative agency).[13]

STATE'S CROSS-APPEAL

On cross-appeal, the State challenges the trial judge's temporary injunction against the Procurement Code proceeding during the pendency of this appeal. A stay pending appeal is moot upon disposition of the appeal on the merits. South Carolina Tax Comm'n v. Gaston Copper Recycling, Corp., 316 S.C. 163, 170 n.1, 447 S.E.2d 843, 844 n. 1 (1994); *see generally* Seabrook v. City of Folly Beach, 337 S.C. 304, 523 S.E.2d 462 (1999) (issue moot where decision on appeal will have no practical effect). Accordingly, we need not address this issue.

AFFIRMED.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice C. Victor Pyle, Jr., concur.

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[13]We note that, contrary to the trial judge's ruling, the required exhaustion of administrative remedies goes to the prematurity of a case and not subject matter jurisdiction. Ward v. State, *supra*; *see generally* Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994) (subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong). Accordingly, Unisys's complaint was not properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Rollison, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Greenville County
John W. Kittredge, Trial Judge
Larry R. Patterson, Post-Conviction Judge

Opinion No. 25343
Submitted April 24, 2001 - Filed August 20, 2001

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General G. Robert DeLoach, III, all of Columbia; and Assistant Attorney General Kathleen J. Hodges, of Greenville, for petitioner.

Assistant Appellate Defender Eleanor Duffy Cleary,

of the Office of Appellate Defense, of Columbia, for respondent.

JUSTICE PLEICONES: We granted certiorari to review a circuit court order granting respondent post-conviction relief (PCR). The PCR judge concluded trial counsel rendered respondent ineffective assistance when she failed to challenge a search and when she allowed him to plead guilty, pursuant to a negotiated agreement, to both first and second offense drug charges in the same proceeding. We reverse.

Facts/Procedural History

Respondent was charged with possession of crack cocaine and unlawfully carrying a pistol based on an incident in January 1995. In June 1995, he was arrested and charged with possession of crack cocaine with intent to distribute (PWID). In addition, respondent faced two drug charges from 1994 and one from 1996. Pursuant to a negotiated agreement, the State dropped the 1994 and 1996 charges, and in August 1996 respondent pleaded guilty to possession of crack cocaine, second offense PWID, and carrying a pistol. He received concurrent sentences of twenty years suspended on service of fifteen with three years' probation (PWID), five years (possession), and one year (weapons charge).

Respondent did not file a direct appeal, but did file a PCR application. Following an evidentiary hearing, he was granted a new trial on all charges. We granted the State's petition for a writ of certiorari to review this decision.

Law/Analysis

In order to obtain relief on an ineffective assistance of counsel claim, a PCR applicant must establish both that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced

by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668 (1984); Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000). Further, the PCR judge's findings should be upheld if supported by any probative evidence in the record. E.g., Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000).

A. Search Issue

The following can be gleaned from the record: The solicitor told the trial judge at the plea that someone called the police from a Saturn car dealership to complain that a man was selling crack at the dealership. The caller said the seller always came twice on Fridays. When the man returned a second time on that Friday, someone from the dealership again called the police, who went to the location. The solicitor stated that when the police approached respondent and began questioning him, he "resisted them." When they patted him down, they found the crack.

According to the arrest warrant affidavit, however, the officer went to the dealership and observed respondent standing beside a vehicle. Respondent and the car matched the caller's description. The officer approached respondent and began a weapons pat-down. Respondent became combative, and after using "necessary force," marijuana was found in his pocket. The search incident to the arrest revealed the crack cocaine.

A reading of the affidavit in isolation raises a question regarding the legality of the weapons frisk. See Ybarra v. Illinois, 444 U.S. 85 (1979) (police must have a reasonable belief the defendant is armed and dangerous before they may conduct a weapons frisk). Respondent cannot rely upon this document alone, however, to establish his ineffective assistance claim, especially since the solicitor's rendition of facts at the plea show no constitutional error. Respondent must also show prejudice, that is, that had his trial attorney challenged the frisk, there is a reasonable probability that she would have prevailed in a suppression hearing.

"Failure to conduct an independent investigation does not

constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). Here, we are left to speculate whether, in fact, the search was unconstitutional. The PCR judge's finding that "without further investigation by Defense Counsel it would be impossible to decide on the legality of the search" is an insufficient basis upon which to order PCR. Assuming that trial counsel's failure to investigate the circumstances surrounding the search fell below an objective standard of reasonableness, respondent did not meet his burden of showing resulting prejudice. We therefore reverse the grant of PCR on this ground. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (grant of PCR must be reversed where no prejudice is shown).

B. Plea

The PCR judge also found trial counsel ineffective in allowing respondent to plead to second offense PWID at the same time he was pleading guilty to his first drug offense. Respondent contended, and the PCR judge agreed, that respondent and the plea judge[1] were not "clearly informed" that the PWID charge was being "enhanced" to a second offense based upon the simultaneous plea to the possession charge. We find respondent knowingly, intelligently, and voluntarily agreed to plead guilty to both offenses as part of a plea bargain in which the State agreed to drop three other drug charges. We therefore reverse the grant of PCR on this ground.

A defendant may, as part of a plea bargain, agree to plead guilty to a crime for which he has been indicted (or to which he has waived grand jury presentment), but of which he is not guilty. In Anderson v. State, supra, for example, we held that an individual could plead guilty to voluntary manslaughter under an indictment charging him with murder, even though

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[1]While it is unfortunate that the plea judge **may** not have understood that respondent had no previous drug convictions, this fact standing alone does not entitle respondent to relief. It is respondent's understanding, not the judge's, which is at issue here.

the facts would not support such a lesser charge. Cf. Gaines v. State, 335 S.C. 376 n.1, 517 S.E.2d 439 n.1 (1999)(explaining that in North Carolina v. Alford, 400 U.S. 25 (1970), United States Supreme Court held it was constitutional to allow accused to consent to imposition of sentence, although unwilling to admit culpability, where he intelligently concludes that a guilty plea is in his best interest and the evidence strongly supports his guilt).

While the PCR judge and respondent refer to the possession charge as "enhancing" the PWID charge to a second offense, this characterization overlooks the fact that this case involves a plea bargain. As such, the agreement is governed by contract principles,[2] and petitioner was free to negotiate this type of agreement. See Anderson v. State, supra.

All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea. Anderson v. State, supra. A review of both the plea record and respondent's PCR testimony[3] indicates he was well aware that he was pleading guilty both to first offense possession and to second offense PWID, and of the potential sentences he faced as a result. Further, there was a sufficient factual basis presented for both the PWID charge and the separate possession charge in the recitation made by the solicitor at the plea. This is all that is required, and the plea was proper.[4]

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[2]See State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994).

[3]Both records are considered on appellate review of a PCR matter. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

[4]We attach no significance to the order in which respondent pled to these offenses. As noted above, a defendant may constitutionally plead guilty to a charge he did not commit, so long as the plea is knowing, intelligent, and voluntary. In any event, respondent's second offense plea was based on his arrest in June 1995 while his plea to the first offense was

Respondent received the benefit of the agreement for which he bargained and cannot now complain. Cf. State v. Thrift, supra ("Whether a plea agreement is wise, or even in the best interests of the [party], is not the question before us").

There is no evidence in the record to support the PCR judge's finding that trial counsel was ineffective in allowing respondent to accept this plea bargain. A finding that is without evidentiary support must be reversed. Anderson v. State, supra.

Conclusion

For the reasons given above, the order granting respondent post-conviction relief is

REVERSED.

MOORE, WALLER, BURNETT, JJ., concur. TOAL, C.J., concurring in part and dissenting in part in a separate opinion.

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predicated on his January 1995 arrest. The actual sequencing of the pleas is immaterial, as is the issue of respondent's guilt-in-fact, since respondent received the benefit of his constitutional plea bargain.

CHIEF JUSTICE TOAL: I concur in part, and respectfully dissent in part. While I agree with the majority's analysis of the search issue, I disagree with the analysis of the voluntary nature of Rollison's plea. Accordingly, I would affirm the PCR court's ruling.

Rollison argues he was not informed by his counsel or the guilty plea judge that he was pleading guilty to a second offense which carried an enhanced sentence. Therefore, he claims his plea was not knowing and voluntary. I agree.

Entering a guilty plea results in a waiver of several constitutional rights, therefore, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. E. 2d 274 (1969). In order for a guilty plea to be knowing and voluntary, a defendant must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991); *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980). When determining issues relating to guilty pleas, the court can consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. *Harres v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984). Any defects in the information conveyed by defense counsel can be cured by information provided at the guilty plea proceeding. *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998). The knowing and voluntary nature of the plea "may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both." *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993).

Based on the entire record, I would hold Rollison did not enter a voluntary plea. There is little evidence as to what defense counsel communicated with Rollison. Rollison's testimony at the PCR hearing indicates he was not informed by his counsel before his plea that he was charged with possession of crack cocaine with intent to distribute which would be enhanced to a second offense if he pled guilty to the simple possession charge. Furthermore, any defect in the information given to Rollison by his counsel was

not cured by the information he received at the plea hearing because the guilty plea judge was not fully informed Rollison was pleading to a second offense.[5]

There are two clear indications, evidenced in the record, that the plea judge was not clearly informed Rollison's charge of possession of crack cocaine with intent to distribute was enhanced to a second offense based on a first offense of simple possession which Rollison was pleading to at the same time. First, the following colloquy occurred during the plea:

> The Court: There are three indictments, sir. 96-4898 does allege, sir, that you did on or about June 23, 1995, possess a quantity of crack cocaine with intent to distribute in violation of the laws of South Carolina. Do you understand that charge?
>
> The Defendant: Yes, sir.
>
> The Court: Do you plead guilty or not guilty to that charge?
>
> The Defendant: Guilty, sir.

Therefore, when asking for Rollison's plea of guilty or not guilty, the court made no mention that he was pleading to a second offense.

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[5]I disagree with the majority's contention in footnote 1 that the plea judge's misunderstanding concerning the fact that Rollison had no previous drug convictions does not, standing alone, entitle Rollison to relief. The plea judge's knowledge is very much at issue. If the judge is misinformed, it is up to the defendant's counsel to correct his information. If counsel fails to correct the judge's perception, his representation has fallen below the objective standard of reasonableness.

Secondly, the sequence of the plea indicates the plea judge was not aware Rollison was pleading to a second offense which was based upon a first offense which was pled to at the same time. Rollison pled guilty to the second offense before he pled guilty to the first offense. Furthermore, the plea judge sentenced him for the second offense before the first offense. Therefore, there was no *conviction* for a first offense upon which to base an enhanced sentence for the second offense.

The definition of a second offense is contained in S.C. Code Ann. § 44-53-470 (Supp. 2000). It provides, "[a]n offense is considered a second or subsequent offense, if, *prior to his conviction of the offense*, the offender has at any time been *convicted* under this article." *Id.* (emphasis added). The plain meaning of the statute requires a *prior conviction* before an enhanced sentence can be imposed.

As this Court stated in *De Witt v. S.C. Dep't of Highways & Pub. Transp.*, 274 S.C. 184, 262 S.E.2d 28 (1980),

> When the State is prosecuting a person for an offense that carries an enhanced penalty on a conviction of a second or subsequent offense, the State is not required to prove the legality of the prior conviction, nor does it have to show the facts surrounding that conviction. *It is only necessary for the State to prove that a previous conviction exists, that the conviction was for an offense which occurred prior to the commission of the offense for which the defendant is being tried, and the defendant was the subject of that prior conviction.*

Id. at 187, 262 S.E.2d at 29-30 (emphasis added). The first offense (for which a defendant was convicted) must have occurred prior to the commission of the second offense. In Rollison's case, this is true. However, the transcript of the guilty plea shows Rollison first pled guilty to and was convicted and sentenced under the June 1995 offense, not the January 1995 offense. Therefore, Rollison

pled guilty and was *convicted* of a second offense before he pled guilty and was *convicted* of a first offense.

A defendant can enter a valid plea to a first and second offense at the same plea hearing. However, the court and/or counsel must clearly explain to a defendant the consequences of such a plea. Here, Rollison was not informed his plea to a second offense would result in an increase in his jail sentence by ten years. Furthermore, he was not told he could go to trial on the simple possession charge first before he pled guilty to the possession with intent to distribute second, and that this strategy could have helped him avoid the enhancement of his possession with intent to distribute charge.

There is ample probative evidence in the record to support the PCR court's findings. *See Anderson v. State*, 342 S.C. 54, 535 S.E.2d 649 (2000) (PCR court's findings should be upheld if supported by any probative evidence in the record).

Accordingly, I would **AFFIRM** the lower court's order granting PCR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Eric Gill, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From York County
William T. Howell, Trial Judge
J. Derham Cole, Post-Conviction Judge

Opinion No. 25344
Submitted February 28, 2001 - Filed August 20, 2001

AFFIRMED

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 G. Robert DeLoach, III and

Assistant Attorney General David Spencer, all of Columbia, for respondent.

CHIEF JUSTICE TOAL: Eric Gill ("Gill") appeals the circuit court judge's order denying post-conviction relief ("PCR"). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On October 6, 1977, Isabelle Mills ("Mills") was cooking hamburgers at Bert's Grill along with several co-workers. At approximately 11:00 a.m., she heard a "bang" and saw Gill coming towards her with a gun. Gill fired the gun, killing Mills' co-worker, Bert Long ("Long"), with a gunshot wound to the head. Mills ran to the ladies room. Gill followed her and fired the gun inside the bathroom. He then entered the bathroom and fired the gun at Mills. As the two struggled over the gun, the gun fired. Mills was struck by bullets a total of three times. Kathie Faile ("Faile"), another employee of Bert's Grill who was present during the shooting, testified Gill also shot at her and one bullet hit her in the right shoulder and another hit her in the back. Despite being shot, Faile managed to get to a phone in an attempt to call for help. While Faile was making the call, Gill yanked the receiver from her hand and fled. Mills and Faile saw Gill and another man drive away from the scene.

In October 1979, Gill was found guilty of murder, grand larceny of a vehicle, armed robbery, and two counts of assault and battery with intent to kill ("ABIK"). During the penalty phase, the jury deadlocked on the question of aggravating circumstances and the judge declared a mistrial. Thereafter, the trial judge sentenced Gill to life imprisonment on the murder conviction, eight years on the grand larceny conviction, twenty years on the armed robbery conviction, twenty years for ABIK, and eighteen years for the second conviction of ABIK.[1]

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[1]This was Gill's second trial. At the first trial, Gill was found guilty of murder and sentenced to death. However, his conviction and sentence were reversed by this Court in *State v. Gill*, 273 S.C. 190, 255 S.E.2d 455 (1979),

Gill appealed his convictions and sentences, but later withdrew his appeal. This Court ordered the appeal dismissed on February 15, 1980.

On June 2, 1993, and July 17, 1995, Gill filed an application for PCR and an amended application for PCR, respectively. At the PCR hearing on June 3, 1997, Gill argued his appeal was involuntarily withdrawn because he was advised by counsel he could face the death penalty if he prevailed on direct appeal. On July 16, 1997, the PCR judge issued an order of dismissal denying Gill's application for PCR on the ground Gill did not sustain his burden of proving trial counsel rendered ineffective legal representation. Gill appealed the PCR judge's order and filed a petition for writ of certiorari. On March 9, 2000, this Court granted certiorari. The following issues are before this Court on certiorari:

I. Did Gill knowingly, intelligently, and voluntarily waive his right to direct appeal when counsel advised him that if he appealed and his convictions and sentences were overturned, he could receive the death penalty upon retrial?

II. Did the trial court err in denying Gill's request for a jury charge on diminished capacity?

III. Did the trial court err in denying Gill's motion for mistrial after the solicitor commented during closing argument on Gill's failure to present a defense?

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because the trial judge instructed the jurors they could begin consideration of the case prior to completion so long as they confined their consideration to the jury room. The trial judge also erred by failing to find as a matter of law, for sentencing purposes, Gill's prior conviction for statutory rape was not a conviction for a crime involving the use of violence against another person.

LAW/ANALYSIS

I. Waiver of Right to Direct Appeal

Gill argues the PCR judge erred by denying his PCR application because his attorney mistakenly advised him he could face the death penalty if he prevailed on appeal and was retried. According to Gill, this advice caused him to involuntarily withdraw his appeal. We disagree.

A. The PCR Proceeding

In a PCR proceeding, the burden of proof is on the applicant to prove the allegations in his application. *Brown v. State*, 340 S.C. 590, 533 S.E.2d 308 (2000); Rule 71.1 (e), SCRCP. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must demonstrate: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) he was prejudiced by his counsel's ineffectiveness. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). In order to prove prejudice, an applicant must demonstrate that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

This Court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Likewise, a PCR judge's findings should not be upheld if there is no probative evidence to support them. *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996).

At the June 3, 1997, PCR hearing, Gill argued he received ineffective assistance of counsel because his attorney advised him to withdraw his appeal. Specifically, Gill claims his attorney advised him the State could seek the death penalty if he was retried. The PCR judge found Gill's allegation "meritless."

According to the PCR judge, Gill's testimony was not credible, and Gill did not demonstrate ineffective assistance of counsel or prejudice.

Defense counsel testified at the PCR hearing he could not recall discussing the appeals process with Gill and could not recall whether an appeal was filed, but he had a vague recollection co-counsel filed a notice of appeal "just to do it." While he did not recall specifically, defense counsel testified it was "highly likely" he informed Gill that if his conviction was overturned on appeal, he may face the death penalty again. This advice was a correct statement of the law as discussed *infra*.

B. The Clean Slate Rule

This Court has never addressed whether a mistrial during the sentencing phase of a capital trial precludes the State from seeking the death penalty in the event of a new trial. As a general rule, a court cannot retry a defendant for an offense greater than and including the offense for which he was previously convicted. Conviction for a lesser included offense is an implied acquittal of any greater charges. Therefore, a prosecution on retrial for a greater offense than that for which the defendant was first convicted would constitute a violation of the Double Jeopardy Clause. *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970); *see also Bozeman v. State*, 307 S.C. 172, 414 S.E.2d 144 (1992) (finding trial counsel ineffective for falsely informing defendant he could be convicted of murder on retrial if he appealed and succeeded in vacating his manslaughter conviction). However, in certain circumstances, the sentence imposed at the first trial does not prevent the State from seeking a greater sentence upon retrial.

For example, the general rule in capital punishment cases is that when a defendant's conviction is reversed on appeal, the original conviction is nullified and the slate is wiped clean.[2] If the defendant is convicted again on retrial, the

[2]*See* Anne Essaye, *Cruel and Unusual Punishment*, 75 GEO. L.J. 1168 (Feb. 1987).

death penalty may be validly imposed. This doctrine is known as the clean slate rule and was enunciated by the United States Supreme Court in *United States v. Ball*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896) and *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

In *Ball*, the United States Supreme Court held the constitutional guarantee against double jeopardy imposes no limitations upon the power to retry a defendant who has succeeded in getting his first conviction set aside. In *Pearce*, the question arose as to whether that same constitutional guarantee precluded the imposition of a harsher sentence after conviction upon retrial. The United States Supreme Court held, because the original conviction was nullified at the defendant's request, the slate was wiped clean and the sentencing court could impose any legally authorized sentence, whether or not it was greater than the sentence imposed following the first trial.

In *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981), the United States Supreme Court recognized a limited exception to the clean slate rule – when a jury or appellate court finds the prosecution has failed to "prove its case" for the death penalty, and a life sentence is imposed, the clean slate rule does not apply, and the State cannot seek a harsher sentence upon retrial. In *Bullington*, the jury found the petitioner guilty of murder. The trial court then conducted a sentencing hearing before the same jury, and the parties presented additional evidence in aggravation or mitigation of the punishment. The jury returned a unanimous verdict of life imprisonment. When the petitioner was granted a new trial on appeal, the State notified him of its intention to seek the death penalty. The petitioner appealed to the United States Supreme Court, and they granted certiorari to review the Double Jeopardy issue.

The United States Supreme Court held that, where the first jury returns a unanimous verdict of life imprisonment, the Double Jeopardy Clause of the Fifth Amendment bars the imposition of the death penalty on retrial. The first jury, by choosing life, impliedly decides the prosecution has not proved its case for death, and impliedly acquits the defendant of the death penalty. According to the United States Supreme Court, the clean slate rule is inapplicable whenever

a jury agrees or an appellate court decides the prosecution has not proved its case. *Id.* at 443-445, 101 S. Ct. at 1860-61; *see also Arizona v. Ramsey*, 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984) (holding that once the trial judge rejected the death penalty and sentenced defendant to life, there could be no further attempt to have the death penalty imposed); *Pennsylvania v. Martorano*, 634 A.2d 1063 (Pa. 1993). *But see Poland v. Arizona*, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986) (holding the Double Jeopardy Clause does not forbid a second capital sentencing hearing where either the sentencer or the reviewing court finds evidence sufficient to justify imposition of the death penalty and, therefore, does not impliedly acquit the defendant on the merits).

In *Riddle v. State*, 314 S.C. 1, 443 S.E.2d 557 (1994), this Court found the Double Jeopardy Clause did not preclude the imposition of the death sentence on remand in a capital case. Relying on *Poland, supra,* the Court held that a defendant may not be retried if he obtains reversal of his first conviction on the ground the evidence was *insufficient* to convict. In *Riddle*, the petitioner appealed a third jury's recommendation that a sentence of death be imposed for his previous convictions of murder, armed robbery, and burglary. The petitioner asserted on appeal that this Court's prior decision precluded consideration of the death penalty because the concurring opinion stated that no evidence was submitted to the jury to support the aggravating circumstance. *Id.* at 4, 443 S.E.2d at 559. However, we found the relevant question in *Riddle* was whether the prior decision was based on the sufficiency of the evidence or a trial error in the admission of evidence. If the evidence was simply erroneously admitted, the Double Jeopardy Clause does not bar a retrial for sentencing. *Id.* at 5, 443 S.E.2d at 560. Because the error in *Riddle* was the admission of indictments and verdict forms from the first trial as proof of aggravating circumstances, the error was one of admission of evidence, rather than insufficiency of evidence. Therefore, we held the trial judge properly denied the defendant's motion to quash the notice of death penalty on Double Jeopardy grounds. *Id.*

The instant case does not involve a decision by the trial judge or jury that the prosecution had not proved its case because the jury was deadlocked during

the penalty phase. Other jurisdictions have found the Double Jeopardy Clause does not bar the prosecution from seeking the death penalty on retrial for murder where a life sentence was imposed during the penalty phase following the first trial by operation of law due to jury deadlock. In *Martorano, supra,* the Pennsylvania Supreme Court found where a jury is deadlocked during the sentencing phase of a capital trial, there is no implied acquittal because the jury did not make a decision. Furthermore, the imposition of a life sentence by a trial judge does not operate as an implied acquittal because, under Pennsylvania's sentencing scheme, the judge has no discretion to fashion a sentence once he finds the jury is deadlocked. *Martorano,* 634 A.2d at 1070; *see also Pennsylvania v. Sattazahn,* 763 A.2d 359 (Pa. 2000) (upholding the *Martorano* decision concerning jury deadlock and finding this decision did not have a chilling effect so as to constitute a *de facto* denial of defendant's right to appeal); *Kentucky v. Eldred,* 973 S.W.2d 43 (Ky. 1998) (finding Double Jeopardy did not bar capital prosecution on retrial where a jury in the first trial found the presence of aggravating circumstances, but recommended life).

Gill argues the *Bullington* exception applies in this case and, therefore, his trial counsel was ineffective because he advised Gill he could be sentenced to death upon retrial. First, *Bullington* was decided in 1981 and the order dismissing Gill's appeal is dated February 15, 1980. Therefore, Gill's trial counsel did not provide incorrect legal advice because the *Bullington* exception was not available at that time.[3] Second, the *Bullington* exception is not applicable because the jury was deadlocked in this case and was unable to decide whether the death penalty was appropriate. The life sentence in this case did not amount to an implied acquittal of the death penalty as was the case in *Bullington*. Here, the jury deadlocked on the existence of aggravating circumstances. The trial judge imposed a life sentence pursuant to S.C. Code

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[3]In 1980, the United State Supreme Court reaffirmed the principle the Double Jeopardy Clause does not prevent a more severe sentence at retrial. *United States v. DiFrancesco,* 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980). *Ball, supra,* and *Pearce, supra,* were also applicable at the time of Gill's appeal.

Ann. § 16-3-20 (C) (Supp. 2000), which states, "If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A)." In the event of a jury deadlock, the trial judge exercises no discretion and merely imposes the sentence mandated by section 16-3-20 (C).

Therefore, the PCR judge's decision is affirmed because defense counsel adequately advised Gill of the consequences of appealing his life sentence, and Gill has not demonstrated either ineffective assistance of counsel or prejudice.

II. Diminished Capacity

Gill argues on direct appeal the trial court erred by refusing to instruct the jury on the "diminished capacity doctrine." Even though Gill concedes South Carolina does not accept the diminished capacity doctrine, he argues it is applicable, and his conviction should be reversed because the State failed to prove malice. We disagree.

At trial, Dr. Harold Morgan, a forensic psychiatrist, testified Gill had a borderline intellectual capacity (I.Q. of 73), and he possessed an antisocial personality. As a result of these conditions, Dr. Morgan testified Gill could not formulate malice aforethought, an essential element of murder. According to Dr. Morgan, Gill had a personality disorder as a result of an absent mother and father, which resulted in Gill's inability to handle problems or think of the consequences of his behavior.

At the close of the trial, Gill's attorney asked the trial judge to charge diminished capacity, an accepted defense in several jurisdictions. The diminished capacity doctrine allows a defendant to offer evidence of his mental condition with respect to his capacity to achieve the *mens rea* required for the commission of the offense charged. 21 Am. Jur. 2d *Criminal Law* § 38 (1998). In particular, the defense may be invoked to negate specific intent, where such

intent is an element of the offense charged. *Id.* Diminished capacity differs from the insanity defense in that it may be raised by a defendant who has conceded to be legally sane. *Id.*

The trial judge did not err by refusing to charge diminished capacity because it is not recognized in South Carolina. Furthermore, according to this Court in *State v. Fuller*, 229 S.C. 439, 93 S.E.2d 439 (1956), a defendant is not entitled to an instruction concerning his capacity to form the requisite intent for malice aforethought when the instructions, taken as a whole, properly present elements of malice. Gill received proper jury charges on murder, voluntary manslaughter, ABIK, insanity, and self defense. These jury charges, taken as a whole, were sufficient because they adequately presented the elements of malice as recognized by South Carolina law.

III. Solicitor's Comments During Closing Arguments

Gill argues the trial court erred by failing to grant a mistrial based on the solicitor's statement during closing arguments that Gill failed to present a defense. We disagree.

During closing argument, the solicitor made the following remarks:

> Now as I sit in the courtroom and listened to testimony trying to anticipate somebody's defense, something he can hang his hat on. What is that defense in this case? I'll tell you my opinion. Of course, His Honor is in charge of the law, but in my opinion there is no defense in this case. They have failed. Mr. Fewster is a good attorney. Mr. Honeycutt is a good attorney, but they are shackled by the facts of the case. *They are limited as to what they can do in the case. What can they do to put up a defense in the case? There is no defense in this case.* October 6th, 1977, Bert Long for no justifiable reason, for no justifiable cause, for nothing that he did, was murdered. Now you can call it killed, you can call it snuffed out, I'll tell you there is no way to get around it, it was cold blooded

> murder. There is no other way to describe it. These two attorneys can play legal gymnastics with words and try and turn this phrase around and this phrase around, but it's murder.

(emphasis added).

Gill argues the trial judge should have granted a mistrial because the solicitor referred to Gill's failure to present a defense, which violated his right to remain silent under the Fifth and Fourteenth Amendments. It is impermissible for the prosecution to comment directly or indirectly upon the defendant's failure to testify at trial. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). However, even improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant. *Id.* The defendant bears the burden of demonstrating that improper comments on his refusal to testify deprived him of a fair trial. *Id.* Furthermore, even if the solicitor makes an improper comment on the defendant's failure to testify, a curative instruction emphasizing the jury cannot consider defendant's failure to testify against him will cure any potential error. *Id.*

Gill's argument concerning the solicitor's remarks is without merit. First, the solicitor's remarks implied Gill did not have a defense, which most likely meant he did not have a defense of insanity or self defense. Second, any prejudice caused by the remarks was eliminated by the trial judge's curative instruction to the jury, which emphasized the defendant did not have to demonstrate his innocence, and his failure to testify could not be considered during their deliberations. Finally, any error caused by the solicitor's remarks was harmless considering the overwhelming evidence of Gill's guilt.

CONCLUSION

Based on the foregoing, we **AFFIRM** the PCR court's decision, Gill's sentences, and Gill's convictions.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jennifer M. Tatum and
Billy Joe Scarbrough, Respondents,

v.

Medical University of
South Carolina, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 25345
Heard June 8, 2000 - Filed August 20, 2001

REVERSED

Robert H. Hood, Barbara W. Showers, and P. Gunner Nistad, of Hood Law Firm, LLC, of Charleston, for petitioner.

Donald E. Jonas, of Cotty & Jonas, of Columbia, for respondents.

JUSTICE BURNETT: This Court granted a writ of certiorari to review Tatum v. Medical University of South Carolina, 335 S.C. 499, 511, 517 S.E.2d 706, 713 (Ct. App. 1999), in which the Court of Appeals adopted the "dual persona doctrine" and held "where [an] employer-hospital and its physicians negligently treat an employee for a work-related accident and, in doing so, exacerbate the injury," a tort action may be maintained by the employee against the employer-hospital. We reverse.

FACTS

Respondent Tatum (Mrs. Tatum) injured her back in the course of her employment with Petitioner Medical University of South Carolina (MUSC). She was treated at MUSC's Employee Health Care Service and diagnosed with a midline broadly-based disc herniation.

Mrs. Tatum was later referred to Dr. Sunil J. Patel, a physician employed by MUSC as an assistant professor and neurosurgeon. Ultimately, Dr. Patel performed three surgeries on Mrs. Tatum's back.

Mrs. Tatum filed a medical malpractice action against MUSC alleging she suffered permanent damage to her spinal cord as a result of Dr. Patel's negligence. Her husband, Respondent Scarbrough, asserted a claim for loss of consortium. MUSC denied the allegations in Mrs. Tatum's complaint and claimed Mrs. Tatum's exclusive remedy was under the Workers' Compensation Act.

Finding workers' compensation was Mrs. Tatum's exclusive remedy, the trial court granted MUSC's motion to dismiss under Rule 12(b)(6), SCRCP. Mrs. Tatum appealed.

The Court of Appeals reversed. It reasoned 1) an employee injured within the scope of employment may maintain a malpractice action against a negligent treating physician; 2) the South Carolina Tort Claims Act prohibits Mrs. Tatum from maintaining a malpractice action against Dr. Patel because he is MUSC's employee 3) the provisions of the South Carolina Workers' Compensation Act preclude her from maintaining a tort action against her employer MUSC; 4) nonetheless, pursuant to the "dual persona" doctrine, Mrs. Tatum may maintain a malpractice action against MUSC, not as her employer, but as a provider of hospital services. Tatum, 335 S.C. 499, 517 S.E.2d 706.

ISSUE

Did the Court of Appeals err by holding an employee of a governmental entity/hospital who sustains a compensable work-related injury may maintain a tort action against the governmental entity/hospital for the negligence of the treating physician?[1]

DISCUSSION

This case asks us to resolve the conflict, if any, between the South Carolina Tort Claims Act (the Tort Claims Act)[2] and the South Carolina Workers' Compensation Act (the Worker's Compensation Act).[3]

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[1]Tatum holds *all* hospitals may be held liable in tort for the negligence of physicians who treat work-related injuries sustained by hospital employees. We have limited our discussion to the law relevant to the facts presented by this case.

[2]S.C. Code Ann. §§ 15-78-10 to -200 (Supp. 2000).

[3]S.C. Code Ann. §§ 42-1-10 to 42-17-90 (1985).

Under the Tort Claims Act, "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained [in the Act]." § 15-78-40. The Tort Claims Act does not create causes of action. Rather, it removes the common law bar of sovereign immunity in certain circumstances, but only to the extent permitted by the Act itself. Summers v. Harrison Constr., 298 S.C. 451, 381 S.E.2d 493 (Ct. App. 1989). The Tort Claims Act specifically provides: "[t]he governmental entity is not liable for a loss resulting from any claim covered by the South Carolina Workers' Compensation Act, except claims by or on behalf of an injured employee to recover damages from any person other than the employer. . .". § 15-78-60 (14).

Pursuant to the Tort Claims Act, an employee of a governmental entity who commits a tort while acting within the scope of his official duty is generally immune from suit. § 15-78-70 (a) and (b). Instead, a person seeking to file a tort claim against a governmental entity must "name as a party defendant only the agency or political subdivision for which the employee was acting." § 15-78-70(c).

MUSC is a governmental agency subject to the provisions of the Tort Claims Act. Proveaux v. Medical University of South Carolina, 326 S.C. 28, 482 S.E.2d 774 (1997). Accordingly, a physician-employee of MUSC is immune from suit for alleged negligence committed in the course of employment. Id. A tort action against a physician-employee of MUSC must be maintained against MUSC.

The Workers' Compensation Act provides:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, *shall exclude all other*

> *rights and remedies of such employee*, his personal representative, parents, dependents or next of kin *as against his employer, at common law or otherwise*, on account of such injury, loss of service or death.

S.C. Code Ann. § 42-1-540 (emphasis added).

The Workers' Compensation Act further provides:

> . . . [T]he employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident and shall be compensated for as such.

Section 42-15-70.

The Court of Appeals asserted the purpose of § 42-15-70 "was simply to insulate the employer from liability for a treating physician's negligence merely because the employer exercised control in choosing the physician."[4] Tatum, 335 S.C. 499, 505, 517 S.E.2d 706, 709. It maintained while § 42-15-70 protects an employer from suit resulting from the negligence of a treating physician, it does not preclude an injured employee from maintaining a malpractice action against the negligent treating physician. Id.

It is undisputed Mrs. Tatum may not maintain a tort action

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[4]Section 42-15-60 permits the employer to furnish the treating physician and requires the employee to accept the treating physician, unless otherwise ordered by the Workers' Compensation Commission, or compensation is barred for the period of refusal. In addition, the employee is barred from compensation if he refuses to accept any medical, hospital, surgical or other treatment provided by the employer.

against Dr. Patel but must, instead, prosecute the action against MUSC in order to comply with the provisions of the Tort Claims Act. However, because the exclusivity provisions of the Worker's Compensation Act preclude a tort action against the employer, the Court of Appeals concluded Tatum is "a victim of the circuitous statutory logic which, at least in theory, was enacted to benefit her." Tatum, S.C. at 506, S.E.2d at 709. To overcome this "circuitous statutory logic," the Court of Appeals adopted the "dual persona" doctrine. Under the "dual persona" doctrine adopted by the Court of Appeals, "once MUSC referred Tatum to Dr. Patel for treatment, its role as her employer ended, and it took on the legally distinct persona of her treating hospital." Tatum, S.C. at 511, S.E.2d at 713. In effect, the Court of Appeals determined, in passing the Tort Claims Act and Workers' Compensation Act, the General Assembly intended to allow government employees who sustain work-related injuries subject to the Workers' Compensation Act the right to maintain tort actions against their government employers for the negligence of treating physicians.

Initially, we note this is a case of statutory interpretation. The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature. Lester v. South Carolina Workers' Compensation Comm'n, 334 S.C. 557, 514 S.E.2d 751 (1999). We conclude provisions in both the Tort Claims Act and Workers' Compensation Act clearly establish the General Assembly did not intend to allow a government employee to maintain a tort action against her employer when workers' compensation is applicable.

First, in passing the Tort Claims Act, the legislature contemplated the effect of tort liability on government employers where government employees sustain a work-related injury. The Tort Claims Act specifically bars an action by an employee against her government employer when the claim is covered by workers' compensation. § 15-78-60 (14) ("[t]he governmental entity is not liable for a loss resulting from any claim covered by the South Carolina Workers' Compensation Act . . .".); see Lester S. Jayson and Robert C. Longworth Handling Federal Tort Claims §

5.05[2][f] (2000) ("[w]hen an employee has sustained injuries which are compensable under the [Federal Employees] Compensation Act, and those injuries are aggravated, or others are sustained, in the course of treatment for the initial injuries, as for example, when there has been negligence or malpractice in the government hospital where the employee was sent, the employee may not prosecute a separate claim under the [Federal] Tort Claims Act for such aggravation or subsequent injuries. Here, too, the Compensation Act provides the exclusive remedy."). In keeping with the provisions of the Workers' Compensation Act, government employers, like private employers, are not liable in tort for work-related injuries sustained by their employees. § 15-78-40 (". . . governmental entities are liable for their torts in the same manner and to the same extent as a private individual in like circumstances . . . ").

Second, the exclusivity provision of the Workers' Compensation Act precludes an employee from maintaining a tort action against her employer where the employee sustains a work-related injury. § 42-1-540 (the remedies granted an employee to accept compensation excludes all other remedies against his employer). The State and its employees are subject to the exclusivity provision of the Workers' Compensation Act. § 42-1-320 (Supp. 1999).

Section 42-15-70 is particularly applicable. As noted above, § 42-15-70 provides:

> . . . [T]he employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident and shall be compensated for as such.

Section 42-15-70 has been interpreted as providing "the aggravation of an injury by medical or surgical treatment necessitated by an original compensable injury is compensable and new injuries resulting

indirectly from the original injury or from medical or surgical treatment are likewise compensable." Whitfield v. Daniel Constr. Co., 226 S.C. 37, 41, 83 S.E.2d 460, 462 (1954); see 82 Am. Jur. 2d Workers' Compensation § 371 (1992) (". . . rule that a new injury or aggravation of an injury under treatment, as result of that treatment, arises out of and in the course of employment has been followed even where the aggravation of the work-related injury is caused by medical malpractice."). The original work-related injury is regarded as the proximate cause of the damage flowing from the subsequent negligent treatment. Whitfield, supra ("[e]very natural consequence which flowed from this injury, unless the result of an independent intervening cause, sufficient to break the chain of causation, is likewise compensable.").

We agree with the Court of Appeals that, in general, treating physicians, as third parties to the employer-employee relationship, do not fall within the immunity provisions of the Workers' Compensation Act and are subject to suit. § 42-1-540 (employee may maintain action at law against "any person other than the employer"); see 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 112.02[1][a] (1999) ("[w]hen a physician has no special status under the act conferring immunity, every jurisdiction dealing with the question has recognized in some form that a suit will lie against a physician who has aggravated a compensable injury by malpractice.").[5] Unlike a treating physician, however, the employer is not a third party amenable to suit. Section 42-1-540 authorizes suit against "any person other than the employer." Section 42-15-70 expressly states the employer shall not be liable in tort for the physician's malpractice. Instead, the consequences of the malpractice are compensated as part of the work-

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[5]Presumably, the employer would have a lien on any proceeds attributable to the negligence of the third-party physician. § 42-1-560(b) (1985); see Hardee v. Bruce Johnson Trucking Co., 293 S.C. 349, 360 S.E.2d 522 (Ct. App. 1987) (where workers' compensation claimant instituted third-party action against physician who allegedly exacerbated work-related injury by negligent surgery).

related injury without the necessity of the employee establishing traditional tort liability.[6] The plain language of the Workers' Compensation Act precludes suit by an employee against her employer. Lester, 334 S.C. 557, 514 S.E.2d 751 (if a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning).

Third, even if we were persuaded the Tort Claims Act and Workers' Compensation Act did not specifically preclude suit by a government employee against her government employer for the negligence of the treating physician, the "dual persona" doctrine would nevertheless be inapplicable under the circumstances of this case. Under the "dual persona" doctrine, "[a]n employer may become a third person, vulnerable to suit by an employee, if - and only if - it possesses a second persona so completely independent from and unrelated to its status as employer that by the established standards the law recognizes that persona as a separate legal person." Larson's Workers' Compensation Law § 113.01 [1] (1999). Larson suggests use of the term "persona" is dictated by the typical third-party workers' compensation statute which usually defines a third party as "a *person* other than the employer."[7] The "dual persona" concept is applied in situations where the law clearly recognizes "the duality of legal persons, so

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[6]See Balancio v. United States, 267 F.2d 135, 137-138 (2d Cir. 1959), cert. denied 361 U.S. 875 (" . . . the initial wrong is the cause of all that follows, even when there has intervened a succeeding negligent act that produced the aggravation. We interpret the [Federal Employees] Compensation Act as a substitute for the whole of the claim that, but for it, would have arisen under the [Federal] Tort Claims Act . . . [W]e cannot disregard the fact that Congress meant that, whenever 'compensation' was available to a Federal employee, it was to be his only remedy").

[7]S.C. Code Ann. § 42-1-540 (employee may maintain an action at law against "any *person* other than the employer") (italic added).

that it may be realistically assumed that a legislature would have intended that duality to be respected." Id. § 113.01 [2]; see 82 Am. Jur. 2d Workers' Compensation § 82 (1992) (for "dual persona" doctrine to apply, employer must have a completely unrelated and legally recognized identity other than as employer to be liable in a tort action).

Larson carefully distinguishes the "dual persona" doctrine from the "dual capacity" doctrine. Under the "dual capacity" doctrine, an employer becomes vulnerable to suit as a third party "if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent to those imposed on him as employer." 2A Larson Workmen's Compensation Law § 72:80 (1976). While the "dual persona" doctrine recognizes different identities, the "dual capacity" doctrine recognizes different activities or relationships. Larson's Workers' Compensation Law § 113.01 [2] (1999). Larson disfavors the "dual capacity" doctrine, noting courts have tended to use the judicially-created doctrine to destroy employer immunity simply when there are separate legal theories which can be brought against the employer and suggests the "dual persona" doctrine is more tolerable. Our Court has rejected the "dual capacity" doctrine. Johnson v. Rental Uniform Service of Greenville, 316 S.C. 70, 447 S.E.2d 184 (1994).

While this Court has not considered the "dual persona" theory, several states have adopted the "dual persona" doctrine in the context of product liability suits by employees. See Thomeier v. Rhone-Poulenc, Inc., 928 F. Supp. 548 (W.D. Pa. 1996) (under "dual persona" doctrine, injured employee may maintain tort action against employer when the employer is the corporate successor of the manufacturer of the defective product that caused the injury and the product was manufactured before the corporate merger); Thomas v. Valmac Indus., 812 S.W.2d 673 (Ark. 1991) (same); Percy v. Falcon Fabricators, Inc., 584 So.2d 17 (Fla. Dist. Ct. App. 1991) (same); Robinson v. KFC Nat. Management Co., 525 N.E.2d 1028 (Ill. 1988) (same); Gurry v. Cumberland Farms, Inc., 550 N.E.2d 127 (Mass. 1990) (same); Kimzey v. Interpace Corp., Inc., 694 P.2d 907 (Kan. Ct. App. 1985)

(same); Schweiner v. Hartford Acc. & Indem. Co., 354 N.W.2d 767 (Wis. Ct. App. 1984) (same); Billy v. Consolidated Mach. Tool Corp., 412 N.E.2d 934 (N.Y. 1980) (same). Similarly, courts have applied the "dual persona" doctrine where the employer has other legally-recognized identities. See Evans v. Thompson, 879 P.2d 938 (Wash. 1994) (employees/plaintiffs could maintain suit against defendants who owned the land upon which plaintiffs were injured and were also corporate shareholders, officers, directors, and co-employees of employer corporation); Rauch v. Officine Curioni, S.P.A., 508 N.W.2d 12 (Wis. Ct. App. 1993) (employee could maintain tort action against employer, since in creating legal entity separate from employer-corporation to own and lease machine which injured employee, employer created second persona independent and unrelated to status as employer); LaBelle v. Crepeau, 593 A.2d 653 (Me. 1991) (employee could maintain suit against corporate employer's majority stockholder who was landlord and owner of the work site); Doggett v. Patrick, 398 S.E.2d 770 (Ga. Ct. App. 1990) (grocery store employee may maintain action against landlord who leased premise to corporate employer-store even though landlord was president of corporation); but see Estate of Blakely v. Asbestos Corp., Ltd, 766 F.Supp. 721 (E.D. Ark. 1991) (workers' compensation exclusivity did not apply to employee's products liability action against employer based on exposure to asbestos which was manufactured by employer and applied in employer's plant by outside contractor).[8] Conceptually, under the "dual persona" doctrine the employee is not suing his employer, but rather the legal entity which is alleged to have caused his injury.

Courts have declined to apply the "dual persona" doctrine in situations where the employer does not have separate legal identities at the

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[8]At least two jurisdictions have rejected the "dual persona" theory on the basis that any exceptions to the workers' compensation exclusivity doctrine must be adopted by the legislature. Smith v. Monsanto Co., 822 F. Supp. 327 (S.D.W.Va. 1992); Panaro v. Electrolux Corp., 545 A.2d 1086 (Conn. 1988). North Carolina has not addressed the "dual persona" doctrine. Anderson v. Piedmont Aviation, Inc., 68 F.Supp.2d 682 (M.D.N.C. 1999).

time of the work-related injury. Durham v. County Village Assoc., 1999 WL 169402 (Del. Super. 1999) (relying on "dual persona" doctrine, maintenance employee-tenant at apartment complex could not maintain action against employer-landlord after sustaining work-related injury); Estate of Donley v. Pace Indus., 984 S.W.2d 421 (Ark. 1999) (estate of employee killed in work accident involving machine precluded from maintaining products liability action against company that used to own machine and company's parent, both of which had merged three years earlier with employee's employer); Singhas v. New Mexico State Highway Dep't, 946 P.2d 645 (N.M. 1997) ("dual persona" doctrine did not provide exception to workers' compensation exclusivity provision so as to allow one state agency's employee to bring tort suit against another state agency for injuries sustained in work-related automobile accident); Samson v. DiConzo, 669 A.2d 760 (Me. 1996) (cocktail waitress injured by patron failed to establish employers who performed different functions and duties within restaurant in individual capacities were separate legal entity); Li v. C.N. Brown Co., 645 A.2d 606 (Me. 1994) (without alleging employer maintained separate legal identity as owner of premises where employee convenience store worker was shot and killed, exclusive remedy against employer was workers' compensation); Quinn v. DiPietro, 642 A.2d 1335 (Me. 1994) (employee could not maintain suit against employer who both operated business and co-owned building).

The "dual persona" theory is inapplicable to the facts of this case. Contrary to the Court of Appeals' assertion, MUSC did not take on the "legally distinct persona of [Mrs. Tatum's] treating hospital" by referring her to Dr. Patel for treatment. MUSC is only one legal entity even though it may act in many different capacities, including those of employer and medical provider. McAlister v. Methodist Hospital of Memphis, 550 S.W.2d 240, 246 (Tenn. 1977) (court refused to apply "dual persona" theory to permit suit against hospital-employer, recognizing "[t]he employer is the employer; not some person other than the employer."). Even if we were to adopt the "dual persona" doctrine, it is inapplicable in this situation.

Finally, the Court of Appeals' analysis assumes all employees

may maintain a tort action against physicians for negligently treating a work-related injury. This assumption ignores the workers' compensation principle providing statutory immunity for co-employees. § 42-5-10 (when an employer accepts the workers' compensation provisions, "he or those conducting his business shall only be liable to any employee . . . to extent provided in Act."); Nolan v. Daley, 222 S.C. 407, 73 S.E.2d 449 (1952) ("those conducting his business" includes any person who is performing any work incident to the employer's business); Neese v. Michelin Tire Corp., 324 S.C. 465, 478 S.E.2d 91 (Ct. App. 1996), overruled on other grds. Abbott v. The Limited, Inc., 338 S.C. 161, 526 S.E.2d 513 (2000) (employee injured by actions of co-employee conducting employer's business is barred by Workers' Compensation Act from proceeding in tort against co-employee). While we need not decide whether physicians may be liable in tort to their co-employees, it is at least questionable whether Mrs. Tatum could have maintained a tort action against her co-employee Dr. Patel in spite of the Tort Claims Act provision requiring suit against the employer or the Workers' Compensation Act exclusivity provisions. See Daniels v. Seattle Seahawks, 968 P.2d 883 (Wash. Ct. App. 1998) (co-employee doctor was immune from action by employee for negligence in diagnosis and treatment of work-related injury); Deller v. Naymick, 342 S.E.2d 73 (W. Va. 1985) (employee may not sue co-employee doctor for alleged negligence in treatment of work-related injury); Franke v. Durkee, 413 N.W.2d 667 (Wis. Ct. App. 1987) (co-employee doctor is immune from suit under workers' compensation law); see also 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 112.02 [1][b] (1999) (where statute excludes co-employees from range of suable third parties, physician employed by same employer as injured employee is usually held sheltered by the exclusive-remedy provision).

We conclude there is no conflict between the Tort Claims Act and the Workers' Compensation Act. Both Acts expressly prohibit a government employee who sustains a work-related injury from maintaining a tort action against her government employer. While we sympathize with Mrs. Tatum, we are bound by the General Assembly's declaration of state policy.

The decision of the Court of Appeals is reversed. The trial judge's order granting MUSC's motion to dismiss pursuant to Rule 12(b)(6), SCRCP, is reinstated. McEachern v. Black, 329 S.C. 642, 496 S.E.2d 659 (Ct. App. 1998) (trial court's grant of motion to dismiss will be sustained if facts alleged in the complaint do not support relief under any theory of law).

REVERSED.

MOORE, J., concurs. WALLER, J., concurring in a separate opinion. TOAL, C.J., dissenting in a separate opinion in which PLEICONES, J., concurs.

WALLER, A.J. (Concurring in result with the majority): Although I am sympathetic to Tatum, I am constrained to concur with the majority opinion. Pursuant to S.C. Code Section 42-15-70, it is patent that MUSC is not liable for the negligence of its treating physician, and Tatum's exclusive remedy is worker's compensation. Accordingly, as the legislature has not indicated an intent to allow Tatum to recover in this situation, I must concur with the majority.

Moreover, although I am not averse to adoption of the dual persona doctrine, I concur with the majority that it would have no application to the present case. There is a distinction between the doctrines of dual **capacity** and dual **persona**. As noted by Professor Larson,

> [A dual **persona**] is quite different than a person acting in a **capacity** other than that of employer. The question is not one of activity or relationship– it is one of identity. The Tennessee Supreme Court, brushing aside all the fictitious sophistry of 'dual capacity,' nailed down this point with breathtaking simplicity:
>
> The employer is the employer; not some person other than the employer. It is as simple as that.[9]
>
> The only way a court can break through this monolithic truism is to resort to a legal fiction.

6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 113.01[2](2000).

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[9] Citing McAlister v. Methodist Hospital of Memphis, 550 S.W.2d 240, 246 (Tenn. 1977), in which the Tennessee Supreme Court held a hospital employee who sustained a compensable injury while at work, and thereafter sustained further injury after undergoing surgery in same hospital to correct her back injury, could not bring tort action against hospital or treating physician as workmen's compensation provided exclusive remedy.

To hold Tatum may recover in tort from MUSC is, in reality, simply an application of the legal fiction known as the dual capacity doctrine, a doctrine sharply criticized by Professor Larson, and previously rejected by this Court. Id.; Johnson v. Rental Uniform Service of Greenville, 316 S.C. 70, 447 S.E.2d 184 (1994).

CHIEF JUSTICE TOAL: I respectfully dissent. In my opinion, the Court of Appeals correctly held that Mrs. Tatum and Mr. Scarborough should not be precluded from pursuing these negligence and loss of consortium claims in light of the "dual persona" doctrine. Once MUSC undertook to act as Mrs. Tatum's medical provider, it took on a persona legally distinct from its status as her employer. I would dismiss the writ of certiorari as improvidently granted.

PLEICONES, concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Anonymous Member of
the South Carolina Bar, Respondent.

Opinion No. 25346
Heard June 6, 2000 - Filed August 20, 2001

PER CURIAM: As the result of our consideration of an attorney disciplinary matter in which an attorney was charged with commission of misconduct based on alleged discovery abuse, for the benefit of the bar we take this opportunity to address a senior attorney's duty to supervise junior attorneys and attorney conduct in depositions.

I. RULE 407, SCACR, RULE 5.1[1]

A. Overview of Rule 5.1

Rule 5.1[2] governs the responsibilities of partners and lawyers who,

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[1]Rule 407, SCACR contains the South Carolina Rules of Professional Conduct. Rule 407, SCACR is where Rule 5.1 and the other Rules of Professional Conduct referenced in this opinion may be found.

[2]The full text of Rule 5.1 states:

directly or indirectly, supervise other lawyers. Attorneys in South Carolina do not have "vicarious liability"[3] for the ethical violations of other attorneys. However, vicarious liability is *not* the issue when a supervised attorney violates

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> RULE 5.1. RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER
> (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> > (1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
> >
> > (2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[3]**Vicarious Liability.** Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) because of the relationship between the two parties. *Black's Law Dictionary* 927 (7th ed. 1999).

the Rules of Professional Conduct. The issue is whether the supervising attorney violated Rule 5.1 by failing to satisfy the ethical responsibilities of a partner or supervisory lawyer in relation to the other supervised attorney's misconduct. If an attorney fails to satisfy the supervisory requirements of Rule 5.1 by actions or omissions, that attorney violates the Rules of Professional Conduct and can be sanctioned completely separate from any sanction issued for the underlying actions or omissions of the supervised attorney.

Rule 5.1 addresses three different levels of supervision. First, under Rule 5.1(c), attorneys will be responsible for another lawyer's violation of the Rules of Professional Conduct if they ratify or fail to mitigate known misconduct committed by an attorney they supervise. Second, under Rule 5.1(b), attorneys with "direct supervisory authority" over another attorney who violates the Rules of Professional Conduct will be disciplined if they failed to "make reasonable efforts" in their supervision. Attorneys can be sanctioned under Rule 5.1(b) even if they had no knowledge of the supervised attorney's inappropriate behavior. Lastly, under Rule 5.1(a), partners in a law firm have a generalized duty to put into place systematic measures to help prevent attorney misconduct.

B. Rule 5.1(c)

Rule 5.1(c)(1) and (2) create a heightened form of liability for attorneys. These sections provide:

> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> > (1) The lawyer *orders* or, with knowledge of the specific conduct, *ratifies* the conduct involved; or
> >
> > (2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and *knows of the*

> *conduct at a time when its consequences can be avoided or mitigated* but fails to take reasonable remedial action.

(Emphasis added). In addition to liability for ordered or ratified misconduct, Rule 5.1(c) requires a law firm partner to take action or face personal liability when the partner discovers another attorney in the firm has engaged in ethical misconduct. Once the partner is on notice of another attorney's misconduct, this subsection imposes a clear duty to take remedial measures to avoid or mitigate the consequences of that behavior. Rule 5.1(c)'s liability is not vicarious liability because the obligation does not arise merely from the relationship between the attorneys. The supervising attorney's ethical violation will be based on his participation in the underlying misconduct or his failure to mitigate it.

C. Rule 5.1(b)

Under Rule 5.1(b), lawyers having "direct supervisory authority over another lawyer" are ethically bound to take "reasonable efforts" to ensure that junior lawyers have conformed to the Rules of Professional Conduct. This subsection provides:

> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

As the comment explains, "Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation." Rule 5.1 cmt. Therefore, in these situations, this Court will sanction an attorney not for ordering or ratifying the underlying violation of the Rules of Professional Conduct, but because as a lawyer with "direct supervisory authority over

another lawyer" the attorney failed to "make reasonable efforts" to ensure the supervised attorney conformed to the Rules of Professional Conduct.

In order to sanction an attorney under this subsection, this Court must make three separate findings:

> (1) The attorney in question was a lawyer with "direct supervisory authority" over the offending attorney;
>
> (2) The supervised attorney failed to conform to the Rules of Professional Conduct;[4] and
>
> (3) The supervising attorney failed to "make reasonable efforts" in an attempt to ensure the supervised attorney followed the Rules of Professional Conduct.

1. Direct Supervisory Authority

A close examination of each case will determine whether an attorney had direct supervisory authority over another. "Whether a lawyer has such supervisory authority in particular circumstances is a question of fact." Rule 5.1 cmt. In the past, this Court has found a violation of Rule 5.1 where a senior attorney handed over the entire discovery process to an associate who then violated the Rules of Professional Conduct. *See In the Matter of Moore*, 329 S.C. 294, 494 S.E.2d 804 (1997). As this case illustrates, Rule 5.1 does not require that an attorney be the day-to-day supervisor of the attorney committing the misconduct to create liability. The key to liability is whether there was *authority* over the violating attorney.

2. Reasonable Efforts

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[4]In some situations, the actions of several supervised attorneys when taken together may result in a violation of the Rules of Professional Conduct even where their individual actions do not rise to the level of a violation.

As noted by the comment to Rule 5.1:

> The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary.

Rule 5.1 cmt. This comment makes clear that a senior attorney in a large firm has an even greater responsibility than an attorney in a smaller practice to enact formal office procedures to ensure compliance with the Rules of Professional conduct. Furthermore, attorneys who attempt to shield themselves from any direct liability under Rule 5.1(c) by distancing themselves from attorneys under their direct supervisory authority may find themselves guilty of a failure to properly supervise under Rule 5.1(b).

As stated in the comment to Rule 5.1, "Partners of a private firm have *at least* indirect responsibility for *all* work being done by the firm . . ." Rule 5.1 cmt. (emphasis added). Again, this section does not establish a vicarious liability standard where supervisory attorneys will be sanctioned every time another attorney violates the Rules of Professional Conduct. Under Rule 5.1(b), supervisory attorneys can employ many different procedures depending on the size of the firm to review the work of their subordinates and effectively meet their responsibilities recognized by Rule 5.1.

D. Rule 5.1(a)

Rule 5.1(a) establishes that all partners in a law firm have a generalized responsibility for the actions of other members in their firm. The rule states:

> (a) A partner in a law firm shall make reasonable efforts to ensure

> that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

As mentioned above, all partners in a law firm, no matter the size, have at least indirect responsibility for the work done by the firm. *See* Rule 5.1 cmt. The liability here is not vicarious liability for the unethical conduct of another attorney, instead this subsection places on all partners a responsibility for enacting measures that give "reasonable assurance" that the firm's attorneys will abide by their ethical responsibilities.

Rule 5.1(a) promotes several goals of the Rules of Professional Conduct. First, by recognizing that senior attorneys have some responsibility for all the work done by their partners and subordinates, senior attorneys in charge are encouraged to construct mechanisms to prevent younger partners and associates from facing an ethical "sink or swim" office mentality. In these unhealthy situations, less experienced lawyers are left alone with little or no guidance from senior attorneys. Senior partners can either establish office procedures to assist new associates when they face ethical questions or they may face sanctions under this subsection. As a New Jersey Supreme Court Justice has noted: "It is not enough that the principals be available if needed. This sorry episode points up the need for a systematic, organized routine for periodic review of a newly admitted attorney's files." *In re Barry*, 447 A.2d 923, 926 (N.J. 1982)(Clifford, J., dissenting).

Furthermore, the rule recognizes that "the ethical atmosphere of a firm can influence the conduct of all its members . . . ." Rule 5.1 cmt. By placing some responsibility on the senior management of a firm, the rule prevents those attorneys who have the most influence over the atmosphere of the firm from turning a blind eye to the behavior of the firm's attorneys. While partners are not required to guarantee that other attorneys in their firm will not violate the Rules of Professional Conduct, ignoring their supervisory responsibilities can lead to sanctions for those running the firm.

Undoubtably, the supervision of attorneys by other attorneys in their firm is one of the most effective methods of preventing attorney misconduct. However, that supervision must be reasonably competent or it is meaningless and that failure in itself can encourage unethical behavior.[5] In situations where supervising attorneys fail to make reasonable efforts to ensure their subordinates follow the Rules of Professional Conduct, if the disciplinary proceedings only punished the individual attorney who committed the violation, the environment that fostered the attorney's unethical conduct would be allowed to continue.

When an attorney has allegedly violated Rule 5.1, it is not a complete defense to prove that the attorney did not know about the underlying misconduct. This Court looks to see if the attorney took reasonable measures in supervising the subordinate attorney. In fact, a complete lack of knowledge can lead to a finding of poor supervision if the subordinate's violation is such that reasonable supervision would have discovered it. However, Rule 5.1 does not mean that in every situation where an attorney in a firm violates the duties of professional responsibility other attorneys in the firm will find themselves sanctioned. In fact, partners in a law firm can implement many varied procedures and policies based on the size of the firm to effectively meet their responsibilities recognized by Rule 5.1 and therefore protect themselves from exposure under this provision.

II. DEPOSITION CONDUCT

We take this opportunity to alert the bar to the enactment of Rule 30(j), SCRCP and to address attorney conduct in depositions in general so that attorneys in South Carolina will be aware of what actions can result in sanctions

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[5]Individual attorneys in a firm do not operate in an ethical vacuum. Studies have revealed that "an attorney's willingness to violate legal or professional rules depends heavily on the exposures to temptation, client pressures, *and collegial attitudes in his practice setting*." Deborah Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491, 559 (1985)(emphasis added).

both by the trial court under the South Carolina Rules of Civil Procedure and by this Court under the Rules of Professional Conduct.

A. New Rule 30(j), SCRCP

"A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Rule 407, SCACR pmbl. In depositions attorneys may face the greatest conflict between their obligations to the court and opposing counsel under Rule 3.4,[6] and their obligations to their own client under Rule 1.3.[7] Since depositions almost always occur without direct judicial supervision, lawyers must regulate themselves during this highly critical stage of litigation. In the past, this Court has sanctioned attorneys who have failed to properly conduct themselves during depositions. *See Matter of Golden*, 329 S.C. 335, 496 S.E.2d 619 (1998). In addition to subjecting themselves to possible ethical sanctions, attorneys who engage in misconduct during depositions may find themselves sanctioned by the trial court as well. *See* Rule 37, SCRCP.

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[6]"A lawyer shall not:

(a) Unlawfully obstruct another party's access to evidence . . .;

. . .

(d) In pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party." Rule 3.4, Rule 407, SCACR.

[7]"A lawyer shall act with reasonable diligence and promptness in representing a client." Rule 1.3., Rule 407, SCACR. The comment to this rule states "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

Rule 30(j), SCRCP, is nearly identical to the guidelines used in federal district court in South Carolina. The rule states:

> **Conduct During Depositions**
>
> (1) At the beginning of each deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness' own counsel, for clarifications, definitions, or explanations of any words, questions or documents presented during the course of the deposition. The witness shall abide by these instructions.
>
> (2) All objections, except those which would be waived if not made at the deposition under Rule 32(d)(3), SCRCP, and those necessary to assert a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion pursuant to Rule 30(d), SCRCP, shall be preserved.
>
> (3) Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege[8] or a limitation on evidence directed by the court or unless that counsel intends to present a motion under Rule 30(d), SCRCP. In addition, counsel shall have an affirmative duty to inform a witness that, unless such an objection is made, the question must be answered. Counsel directing that a witness not answer a question on those grounds or allowing a witness to refuse to answer a question on those grounds shall move the court for a protective order under Rule 26(c), SCRCP, or 30(d), SCRCP, within five business days of the

[8]For purposes of this rule, the term "privilege" includes but is not limited to: attorney-client privilege; work product protection; trade secret protection and privileges based on the United States Constitution and the South Carolina Constitution.

suspension or termination of the deposition. Failure to timely file such a motion will constitute waiver of the objection, and the deposition may be reconvened.

(4) Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's objections shall be stated concisely and in a non-argumentative and non-suggestive manner, stating the basis of the objection and nothing more.

(5) Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

(6) Any conferences which occur pursuant to, or in violation of, section (5) of this rule are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature.

(7) Any conferences which occur pursuant to, or in violation of, section (5) of this rule shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall be noted on the record.

(8) Deposing counsel shall provide to opposing counsel a copy of all documents shown to the witness during the deposition, either before the deposition begins or contemporaneously with the showing of each document to the witness. If the documents are provided (or otherwise identified) at least two business days before the deposition, then the witness and the witness' counsel do not have the right to discuss the documents privately before the witness answers questions about them. If the documents have not been so provided or identified, then counsel and the witness may have a

reasonable amount of time to discuss the documents before the witness answers questions concerning the document.

(9) Violation of this rule may subject the violator to sanctions under Rule 37, SCRCP.

Our Rule 30(j), SCRCP, is derived from Judge Robert S. Gawthrop's seminal opinion in *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993). Having adopted the *Hall* approach, our Court requires attorneys in South Carolina to operate under one of the most sweeping and comprehensive rules on deposition conduct in the nation.

B. Off-the-Record Conferences

Rule 30(j), SCRCP, makes clear that a deposition's beginning signals the end of a witness's preparation. Once a deposition begins, an attorney and a client may have an off-the-record conference only when deciding whether to assert a privilege or to discuss a previously undisclosed document. *See* Rule 30(j)(5), SCRCP; Rule 30(j)(8), SCRCP. Before beginning such a conference, the deponent's attorney should note for the record that a break is needed to discuss the possible assertion of a privilege or a newly produced document. After any such conference, the conferencing attorney should state on the record why the conference occurred and the decision reached. If the party decides to assert a privilege, the basis for the privilege should be clearly stated. Whether or not a privilege is asserted, deposing counsel may inquire on the record into the subject of the conference to determine if there has been any witness coaching. *See* Rule 30(j)(6), SCRCP. Conferences called to assist a client in framing an answer, to calm down a nervous client, or to interrupt the flow of a deposition are improper and warrant sanctions.

Off-the-record conferences not specifically permitted by the rule are not allowed whether they are called by the deponent's attorney or the deponent. "There is simply no qualitative distinction between private conferences initiated

by a lawyer and those initiated by a witness. Neither should occur." *Hall*, 150 F.R.D. at 528. According to our rule, even during breaks in the deposition such as a lunch or overnight break, witnesses and their counsel cannot talk substantively about prior or future testimony in the deposition. *See* Rule 30(j)(5), SCRCP.

C. Suggestive Objections and Interjections

In order to prevent witness coaching during depositions, the rule prohibits lengthy "speaking" objections and brief suggestive interjections. As noted by Judge Gawthrop in *Hall*, the rules of evidence "contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions, since it tends to obstruct the taking of the witness's testimony." *Hall*, 150 F.R.D. at 530; *see also* Rule 30(c), SCRCP ("Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the South Carolina Rules of Evidence . . ."). Therefore, interjections during a deposition by the witness's attorney such as "if you remember" and "don't speculate" are improper because they suggest to the witness how to answer the question. Attorneys can easily make these admonitions to their client before the deposition begins. As summarized by Judge Gawthrop:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did--what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness--not the lawyer--who is the witness.

Hall, 150 F.R.D. at 528.

Rule 30(j)(1), SCRCP also directs the deponent to look to the attorney asking the question, not the witness's own counsel, for any clarifications or explanations. A witness's attorney cannot object to a question just because the attorney does not understand the question. *See Hall*, 150 F.R.D. at 530 n. 10. Furthermore, it is improper for counsel to state for the record their interpretations of questions, since such interpretations are completely irrelevant and improperly suggestive to the deponent. *Id.* A witness's attorney must also refrain from rephrasing questions for the witness.

D. Instructions Not to Answer

New Rule 30(j), SCRCP, also limits when an attorney may advise a witness not to answer a question during a deposition. The only circumstances under which an attorney may instruct the witness not to answer a question in a deposition are: (1) when counsel has objected to the question on the ground that the answer is protected by a privilege; (2) when the information sought is protected by a limitation on evidence directed by the court; and (3) when the witness's counsel intends to present a motion under Rule 30(d), SCRCP (witness harassment). *See* Rule 30(j)(3), SCACR. The rule even requires attorneys to affirmatively direct their witnesses to answer a question unless they make one of these objections. *Id.*

On this point, instructing a witness not to respond to a question because it has been "asked and answered" will generally be improper. No rule prevents a deposing attorney from asking the same question more that one time or different variances of the same question. The witness's attorney can question the witness after the opponent's examination is done to clarify any confusion brought about by the witness's answers. An attorney may use the "asked and answered" objection without an instruction not to answer the question to

establish a record of abuse where the attorney believes the questioning is approaching the level of harassment. If repetitive questioning reaches the point of harassment, the witness's attorney should make a motion under Rule 30(d), SCRCP.

E. Handling Discovery Abuse in Depositions

"The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999). The entire thrust of our discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). In this respect, the discovery process is designed to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *See United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S. Ct. 983, 986-87 (1958).

Depositions are widely recognized as one of the "most powerful and productive" devices used in discovery. *See* A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 Md. L. Rev. 273, 277 (1998). Since depositions are so important in litigation, attorneys face great temptation to cross the limits of acceptable behavior in order to win the case at the expense of their ethical responsibilities to the court and their fellow attorneys. Claiming that any such improper behavior was merely "zealous advocacy" will not justify discovery abuse. When attorneys cross the line during a deposition, their actions do not promote the "just, speedy, and inexpensive determination of every action." *See* Rule 1, SCRCP.

Actions taken in a deposition designed to prevent justice, delay the process, or drive up costs are improper and warrant sanctions. In South Carolina, our judges have broad discretion in addressing misbehavior during depositions. *See* Rule 37, SCRCP. In addition to their traditional contempt powers, judges may issue orders as a sanction for improper deposition conduct:

(1) specifying that designated facts be taken as established for purposes of the action; (2) precluding the introduction of certain evidence at trial; (3) striking out pleadings or parts thereof; (4) staying further proceedings pending the compliance with an order that has not been followed; (5) dismissing the action in full or in part; (6) entering default judgment on some or all the claims; or (7) an award of reasonable expenses, including attorney fees. *Id.* Among the costs a judge may deem appropriate could be those incurred for future judicial monitoring of depositions or payment for the retaking of depositions. Our judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law.

TOAL, C.J., MOORE, WALLER, BURNETT, JJ., and Acting Justice C. Victor Pyle, Jr., concur.

The Supreme Court of South Carolina

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, are amended as follows:

(1) The title of Rule 32 is amended to read as follows:

"Reinstatement Following a Definite Suspension of Less than Nine Months"

(2) The phrase "six months or less" in the first sentence of Rule 32 is replaced with the phrase "less than 9 months".

(3) The title of Rule 33 is amended to read as follows:

"Reinstatement Following a Definite Suspension for Nine Months or More, Indefinite Suspension or Disbarment"

(4) Rule 33(a) is amended to read as follows:

> **(a) Generally.** A lawyer who has been suspended for a definite period of 9 months or more, has been suspended for an indefinite period, or has been disbarred, shall be reinstated to the practice of law only upon order of the Supreme Court. A petition for reinstatement shall not be filed earlier than 5 years from the date of entry of the order of disbarment or 2 years from the date of entry of the order of indefinite suspension. A lawyer who has received a definite suspension for 9 months or more may file the petition for reinstatement no earlier than 270 days prior to the expiration of the period of suspension. All records and proceedings relating to reinstatement shall be open to the public.

(5) The phrase "more than 6 months" in the first sentence of Rule 33(f)(9) is replaced with the phrase "9 months or more".

(6) The number "120" in the first sentence of Rule 33(g) is replaced with the number "180."

(7) The following sentences are added after the first sentence in Rule 33(g): "The Committee on Character and Fitness may promulgate rules and regulations governing practice and procedure before the Committee. These rules and regulations shall become effective when approved by the Supreme Court."

(8) The following is added after the fourth sentence in Rule 33(h):

> "The decision to grant or deny reinstatement rests in the discretion of the Court. In making this determination, the seriousness of the prior misconduct will be considered and the petition for reinstatement may be denied based solely on the seriousness of the prior misconduct."

These amendments are effective immediately. Despite these amendments, a lawyer seeking reinstatement following a definite suspension for more than six months which was imposed prior to the date of this order shall be required to file a petition for reinstatement under Rule 33.

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

August 9, 2001

The Supreme Court of South Carolina

In the Matter of Michael
R. Deddish, Jr., Respondent.

O R D E R

Respondent pled guilty to one count of willful failure to make and file a state income tax return in violation of S.C. Code Ann. § 12-54-40(b)(6)(c) (Supp. 1994). The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, and to appoint an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents.

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

IT IS FURTHER ORDERED that John E. Copeland, 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. Copeland shall take action as

required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Copeland 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 John E. Copeland, 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 John E. Copeland, 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. Copeland's office.

s/Jean H. Toal C.J.

Columbia, South Carolina

August 10, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Herschel Bragg,

Respondent,

v.

Susan Enid Cobb Bragg and Raymond Wayne Cobb,

Appellants.

Appeal From Spartanburg County
Georgia V. Anderson, Family Court Judge

Opinion No. 3381
Heard May 7, 2001 - Filed August 6, 2001

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

Richard H. Rhodes, of Burts, Turner, Rhodes & Thompson, of Spartanburg; and John K. Fort, of Drayton, for appellants.

James C. Cothran, Jr., of Spartanburg, for respondent.

HEARN, C.J.: Susan Enid Cobb Bragg (Wife) and Raymond Wayne Cobb (Cobb), Wife's father, appeal from several aspects of a divorce decree. We affirm in part and reverse and remand in part.

Facts and Procedural History

The parties married in June 1989 in Alabama, and moved to South Carolina immediately thereafter. They have one son, born in 1996. At the time of the final hearing Husband was 43 years old, and Wife was 33 years old. Both parties were employed during the marriage. Husband has a bachelor's degree in engineering technology and is employed at INA Bearing Company earning a monthly salary of approximately $5,168. Wife has a master's degree in counseling and was employed as a teacher during the marriage. At the time of the divorce hearing, Wife had relocated to Alabama and was employed by a mental health center earning approximately $1,916 per month.

During the marriage, Wife obtained credit in her own name without Husband's knowledge or consent, accumulating approximately $33,800 in debt. In 1996, Wife filed for bankruptcy without informing Husband. During the bankruptcy proceedings, she gave false information to the bankruptcy court, failing to disclose her interest in the parties' marital home. By order of the bankruptcy court, Wife's debts were discharged and the proceeding dismissed based on the court's conclusion it was a "no asset" case.

In May 1997, Wife was admitted to Charter Hospital and treated for depression. She was diagnosed with major depressive disorder and prescribed therapeutic treatment and antidepressant medication. While at Charter, Wife told Husband about the bankruptcy proceeding.

Husband commenced this action against Wife in January 1998, seeking a divorce on the ground of physical cruelty, child custody, equitable division of marital assets and debts, and attorney fees. Wife answered and counterclaimed, requesting child custody, equitable apportionment, and attorney

fees. The family court awarded Wife temporary custody of the parties' child and child support, established a visitation schedule, and held all other issues in abeyance pending a final hearing on the merits.

In March 1998, Husband began an investigation which revealed Wife's failure to list the marital home as an asset in the bankruptcy. When Husband reported this to the bankruptcy court, it ordered the case reopened. On August 28, 1998, the bankruptcy court entered an order approving the sale of Wife's interest in the marital home to Cobb for $35,000, which was applied to Wife's debts. The bankruptcy trustee did not, however, execute a deed in favor of Cobb.[1] Husband did not object to this resolution, and the bankruptcy proceedings were again closed.

By amended complaint, Husband joined Cobb as a party defendant to the divorce because of Cobb's interest in the marital home. Cobb sought an order directing that the home be sold or that Husband pay him for his interest therein. Husband filed a reply, admitting Cobb had an interest in the home, but alleging his interest should be the same as that to which Wife would have been entitled absent the bankruptcy proceedings.

During trial, the family court learned the marital home was still involved in bankruptcy proceedings and issued an order of continuance. The trial reconvened in March 1999. At that time, both parties moved to amend their pleadings to seek a divorce on the ground of one year's continuous separation.

By order dated July 2, 1999, the family court: (1) granted the parties a divorce on the ground of one year's continuous separation; (2) awarded custody of the parties' child to Husband; (3) apportioned the $119,131 marital estate on a 65%/35% basis in favor of Husband; and (4) awarded Husband $6,000 in attorney fees and costs. Having found Wife received assets valued at $27,694 in partial satisfaction of her 35% share of the estate, the court ordered

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[1] However, a later bankruptcy court order authorized the trustee to issue a deed to Cobb.

Husband to pay Wife $14,002 to fully accomplish equitable apportionment. Specifically regarding disposition of the marital home, the court found that notwithstanding Cobb's one-half interest, Cobb "in essence, by way of equity, stands in the same shoes as his daughter." Based on this finding, the court denied Cobb any interest in the marital home, and ordered him to deed his interest to Husband. This appeal followed.

During the pendency of this appeal, the bankruptcy court found the provisions of the family court's order denying Cobb a one-half interest in the marital home constituted an invalid collateral attack on the bankruptcy court's authorization of the sale of Wife's one-half interest in the home. This court granted Husband's motion for leave to move before the family court to amend in light of the bankruptcy court's order. By supplemental order, the family court recognized Cobb's one-half interest in the marital home, but found the allocation of equity in the marital home between Husband and Wife should be adjusted to account for Cobb's interest therein. Specifically, the court reaffirmed its 65%/35% award of equitable distribution, and ordered:

> A. At such time as husband compensates [Cobb] for [Cobb's] one-half interest in the marital home, said amount will be charged to [W]ife as an asset . . . .
>
> B. [H]usband's equity in the marital home . . . will be correspondingly reduced to an amount, so that his equity, when added to the amount charged to [W]ife, equals the equity of the marital home as of the filing date ($44,188 . . .) .
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> . . .
>
> D. While the exact buy-out of [Cobb's] interest is unknown, it is probable [W]ife will now owe [H]usband money to effectuate a 65%/35% division of the assets . . . .

> E. [W]ife is to therefore compensate [H]usband for any difference in what [H]usband would have received under the original order ($77,435) and what he will actually receive after buying out [Cobb's] interests. . .

Wife and Cobb again appealed. They argue (1) Wife should have been awarded child custody; (2) Cobb should have been awarded an interest in one-half of the marital home; (3) Wife should have received a higher percentage of the marital estate's equitable apportionment; and (4) Husband should not have been awarded $6,000 in attorney fees.

Standard of Review

In appeals from the family court, this court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not, however, require this court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Neither are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

Discussion

I. Child Custody

Wife argues the family court erred in awarding Husband custody of the parties' son. We disagree.

In all child custody controversies, the controlling considerations are the child's welfare and best interests. Cook v. Cobb, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978). In awarding custody, the family court should consider how the custody decision will impact the child's life, including physical,

psychological, spiritual, educational, familial, emotional, and recreational aspects. Pountain v. Pountain, 332 S.C. 130, 136, 503 S.E.2d 757, 760 (Ct. App. 1998). Additionally, the court must assess how each party's character, fitness, and attitude affect the child. Id. at 136, 503 S.E.2d at 760. Indeed, "the totality of circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed." Davenport v. Davenport, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975).

The family court recognized, as do we, that "[b]oth parties are loving parents, capable of rearing their child independently." Further, the guardian ad litem's report lists positive and negative characteristics of both Husband and Wife and does not overwhelmingly favor either party. Nonetheless, our reading of the record convinces us the family court correctly determined the child's interests are best served by awarding custody to Husband.

Without question, Wife acted irresponsibly regarding the family's finances during the marriage, aggravating the situation through secretiveness and deception. In addition to jeopardizing the economic well-being of her family, Wife's actions in this regard evince poor judgment.

Wife also engaged in an internet affair during the marriage which culminated in a rendezvous with a man at a hotel. While we do not place undue emphasis on this incident because there is no indication the child was adversely affected by Wife's alleged indiscretion, we have considered the issue as another example of Wife's poor judgment.

The record also shows that Wife has difficulty controlling her temper. One of the parties' neighbors testified she witnessed Wife cursing and repeatedly hitting Husband while he held the parties' child. The neighbor further stated Wife admitted she took alcohol to marital counseling sessions, often became impatient with the parties' child, and once cursed at the neighbor's children after they knocked on her door. Husband's brother testified Wife was impatient with the child and cursed at Husband in the child's presence. Wife

admitted that on one occasion she became enraged at Husband and kicked a hole in the kitchen wall. According to Husband, Wife struck him on a regular basis, with most of the incidents occurring after her release from Charter Hospital.

Finally, we also share the family court's concern that Wife may not have fully conquered her depression. As late as December 1998, she continued to exhibit symptoms of depression and anxiety despite treatment with antidepressant medication.

Therefore, under the facts and circumstances of this case, we find no error in the family court's decision to award custody to Husband.

II. Equitable Apportionment

Wife also alleges the family court erred in apportioning the marital estate on a 65%/35% basis. In addition, she specifically challenges the family court's treatment of the marital home in its supplemental order, arguing Cobb should have been awarded a one-half interest in the home because he purchased his interest in the home for valuable consideration. We affirm the equitable apportionment percentages, but reverse the division of assets in light of our disposition of the portion of the marital home previously handled by the bankruptcy court.

The apportionment of marital property will not be disturbed on appeal absent an abuse of discretion. Bungener v. Bungener, 291 S.C. 247, 251, 353 S.E.2d 147, 150 (Ct. App. 1987). South Carolina Code Ann. § 20-7-472 (Supp. 2000), lists fifteen factors for the court to consider in equitably apportioning a marital estate. Fault or marital misconduct affecting the parties' economic circumstances or contributing to the marital breakup is one factor to consider. S.C. Code Ann. § 20-7-472(2) (Supp. 2000). The statute grants the family court discretion to decide what weight to assign various factors. On appeal, this court looks to the overall fairness of the apportionment, and it is irrelevant that this court might have weighed specific factors differently than the

family court. Johnson v. Johnson, 296 S.C. 289, 300-01, 372 S.E.2d 107, 113 (Ct. App. 1988).

In this case, we find the family court's award to Wife of 35% of the marital estate fair and equitable. Husband earned a substantially higher income than Wife, and Wife's exuberant charging habits and calculated attempts to conceal her spending from Husband negatively affected the parties' finances. Therefore, we cannot conclude the family court placed undue weight on Wife's financial misconduct in reaching its equitable apportionment decision. However, we agree with Wife that the family court erred in charging Cobb's one-half interest in the marital home to her as an asset.

Once a bankruptcy petition is filed, the bankruptcy court takes custody of all property in the debtor's possession. 28 U.S.C. § 133 (1993); Tolk v. Weinsten, 265 S.C. 546, 550, 220 S.E.2d 239, 241 (1975). Property owned by the debtor is in the bankruptcy court's jurisdiction, and "no other Court, and no person acting under any process from any other Court, can, without the permission of the Bankrupt[cy] Court, interfere with it." Bratton v. Anderson, 5 S.C. 504, 504 (1875) (quoting In re Vogel, 4 N. B. R. 427 (1869)). Because the bankruptcy court has exclusive jurisdiction over the debtor's assets, no action can be maintained in a state court to enjoin assets within the bankruptcy court's jurisdiction. Southern v. Fisher, 6 S.C. 345 (1875).

Similarly, other jurisdictions have held that because a bankruptcy court is competent to apportion a debtor's property, a bankruptcy court's judgments are not thereafter subject to collateral attack. Kalb v. Feuerstein, 308 U.S. 433, 439 (1940); see, e.g., LaBarge v. Vierkant, 240 B.R. 317, 321 (B.A.P. 8th Cir. 1999); In re Fernandez-Lopez, 37 B.R. 664, 669 (B.A.P. 9th Cir. 1984). Further, state courts cannot issue orders interfering with the bankruptcy court's exclusive jurisdiction over the property of a bankrupt estate. See In re Brown, 734 F.2d 119, 124 (2d Cir. 1984); Missouri v. U. S. Bankruptcy Court, 647 F.2d 768, 774 (8th Cir. 1981).

We note that this case is distinguishable from those upholding the jurisdiction of the family court to equitably divide property titled in the name of a third party. See In re Sexton, 298 S.C. 359, 380 S.E.2d 832 (Ct. App. 1989), rev'd on other grounds, 310 S.C. 501, 427 S.E.2d 665 (1993) (holding marital property titled in Husband's mother's name can be equitably divided by the family court because Husband transferred title to his mother immediately before filing for divorce to keep property out of divorce proceeding). Here, Cobb purchased a one-half interest in the marital home for valuable consideration, and neither Husband nor Wife had any equitable interest in it after Cobb's purchase except to the extent that Husband continued to maintain the property. The bankruptcy court recognized this in its order by stating that the bankruptcy trustee sold Cobb a one-half interest in the marital home "free and clear" of Husband's interest and that "Cobb purchased an undivided one-half interest in the marital home, not merely an equitable interest." However, Husband may still be entitled to bring an action to recover costs he incurred for the property. As the bankruptcy court stated: "[Husband] may be able to equalize and recoup the 'equities' by adjusting any disparity in costs and expenses he paid post-petition through any subsequent partition of this property in state court."

Accordingly, once Cobb's one-half interest in the marital home became involved in the bankruptcy proceeding, the family court had no jurisdiction to include this portion of the home within its equitable division scheme. The bankruptcy court concluded Cobb owns a one-half interest because he paid valuable consideration for it; therefore, the family court had no jurisdiction to award this half of the marital home to any party. Because we find only one-half of the marital home was a marital asset, it is necessary for the family court to reapportion the couple's assets and liabilities to effectuate a 65%/35% division. Thus, we reverse the equitable apportionment of the parties' assets and remand for redetermination in light of this decision.

III. Attorney Fees

Wife also argues that the family court erred in ordering her to pay a portion of Husband's attorney fees.

At the time of trial Husband had incurred approximately $20,854 in attorney fees. The family court ordered Wife to pay $6,000 of Husband's attorney fees and costs. Because we have removed one-half of the marital home from the equitable distribution scheme and are remanding the equitable apportionment of the parties' assets, we remand the issue of attorney fees to the family court for redetermination in light of our decision.

For the foregoing reasons, the decision of the family court is

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

CURETON and SHULER, JJ., concur.