The Supreme Court of South Carolina

In re: Amendments to the Commission's Regulations
for Legal Specialization in South Carolina

O R D E R

The Commission on Continuing Legal Education and Specialization has proposed amending the Regulations for Legal Specialization concerning the various specialization fees which have been established for the specialization program.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Regulation IX(A), (C), (D) and (E) of Appendix D to Part IV, South Carolina Appellate Court Rules, concerning the various specialization fees which have been established for the specialization program. Pursuant to the amendments, as set forth in the attachment to this Order, the amount of fees associated with various activities in the area of specialization will be set by the Commission.

The amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
January 4, 2007

APPENDIX D

REGULATIONS FOR LEGAL SPECIALIZATION IN SOUTH CAROLINA

IX. SPECIALIZATION FEES

The following fees, which may be adjusted as necessary, have been established for the specialization program:

A. Application Fee. A fee as specified by the Commission shall be assessed for each application for certification that is submitted. The applicant is not entitled to a refund of the application fee or any portion thereof if his or her application is returned, rejected or withdrawn.

. . .

C. Certification Fee. A fee as specified by the Commission is due and payable by an applicant who has been notified that he or she has been approved for certification by the Court. Payment of the certification fee is a prerequisite to issuance of a certificate of specialization.

D. Application Fee for Approval as an Independent Certifying Organization. Independent certifying organizations filing applications for approval to issue certificates of specialization to South Carolina lawyers shall pay a nonrefundable application fee as specified by the Commission for each field of the law in which an applicant proposes to offer specialization.

E. Annual Administrative Fee. Each independent certifying organization approved to issue certificates of specialization to South Carolina lawyers shall pay an annual administrative fee as specified by the Commission for each field of the law in which it is approved to issue certificates of specialization.

. . .

The Supreme Court of South Carolina

In re: Amendments to the Commission's Regulations for Mandatory Continuing Legal Education for Judges and Active Members of the South Carolina Bar

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O R D E R

The Commission on Continuing Legal Education and Specialization has proposed amending Regulation VI, Regulations for Mandatory Continuing Legal Education for Judges and Active Members of the South Carolina Bar concerning the amount of the filing fee which must accompany an annual report of compliance with the relevant continuing legal education (CLE) requirements. The Commission has also proposed amending Regulation VIII, concerning the reinstatement fee which must accompany a petition for reinstatement after suspension for failure to comply with the relevant CLE requirements.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Regulation VI(A) and (B) of Appendix C to Part IV, South Carolina Appellate Court Rules, concerning the filing fee which must accompany an annual report of compliance with the relevant CLE requirements. Pursuant to the amendments, as set forth in the attachment to

this Order, the amount of the fee which must accompany a report of compliance will be specified by the Commission. Additionally, we amend Regulation VIII(A) of Appendix C to Part IV, South Carolina Appellate Court Rules, concerning the reinstatement fee which must accompany a petition for reinstatement after suspension for failure to comply with the relevant CLE requirements. Pursuant to the amendment, as set forth in the attachment to this Order, the amount of the fee which must accompany a petition for reinstatement will be specified by the Commission.

The amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
January 4, 2007

APPENDIX C
REGULATIONS FOR MANDATORY CONTINUING LEGAL EDUCATION FOR JUDGES AND ACTIVE MEMBERS OF THE SOUTH CAROLINA BAR

. . .

VI. Reports and Fees

A. Active Members.
On forms prepared by the Commission and available through its offices (or a reasonable facsimile), each active member of the South Carolina Bar not exempt from Regulation II(A) shall, not later than March 1 of each year, file with the Commission a sworn annual report of compliance for the preceding annual reporting period and pay an annual filing fee as specified by the Commission. Any active member submitting a report of compliance after March 1 shall pay, in addition to the annual filing fee, a late filing fee as specified by the Commission. The late filing fee shall be doubled for any member who files after the filing deadline and who has filed late and paid a late filing fee on any prior occasion.

B. Judicial Continuing Legal Education (JCLE).
On forms prepared by the Commission and available through its offices (or a reasonable facsimile), each judicial member specified in Rule 504(a), SCACR shall, not later than April 15 of each year, file with the Commission an annual report of compliance for the preceding educational period and pay an annual filing fee as specified by the Commission. Any judicial member submitting a report of compliance after April 15 shall pay, in addition to the annual filing fee, a late fee as specified by the Commission.

. . .

. . .

VIII. Petition for Reinstatement

A. Reinstatement by the Commission.
An active member of the South Carolina Bar who has been suspended for failure to comply with these Regulations may petition the Commission for reinstatement. Petitions for reinstatement by the Commission must be received by the Commission not later than June 1. Each petition for reinstatement shall be accompanied by proof that the petitioner is then in compliance and that a reinstatement fee as specified by the Commission plus filing fees and late fees have been paid. If the petitioner is found to be in compliance by the Commission, to include payment of all fees, the petition shall be granted and the Commission will notify the petitioner, the Clerk of the South Carolina Supreme Court, and the judge or judges of the judicial circuit in which the

petitioner principally practices and/or maintains a principal residence. The Commission shall inform the petitioner of the curative actions necessary for reinstatement if the petition is found not to be in compliance.

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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1

January 8, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

None

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

2006-UP-329-Washington Mutual v. Hiott	Pending
2006-UP-333-Robinson v. Bon Secours	Pending
2006-UP-350-State v. M. Harrison	Pending
2006-UP-364-State v. Leroy A. Matthews	Pending
2006-UP-372-State v. Bobby Gibson	Pending
2006-UP-375-State v. Randy W. Joye	Pending
2006-UP-377-Curry v. Manigault	Pending
2006-UP-378-Ziegenfus v. Fairfield Electric	Pending
2006-UP-379-Wanda Phillips v. Martin Bayless	Pending
2006-UP-382-SCDSS v. Valerie B.	Pending
2006-UP-383-Murray v. Avondale Mills	Pending
2006-UP-385-York Printing v. Springs Ind.	Pending
2006-UP-387-State v. Dorian Cain	Pending
2006-UP-389-Sladek v. Sladek	Pending
2006-UP-390-State v. S. Robinson	Pending
2006-UP-393-M. Graves v. W. Graves	Pending
2006-UP-395-S. James v. E. James	Pending
2006-UP-399-Cooksey v. Wachovia Bank	Pending
2006-UP-400-State v. J. Derek	Pending
2006-UP-401-SCDSS v. B. Moore	Pending
2006-UP-405-J. Floyd v. SC Budget and Control Board	Pending

2006-UP-411-SCDSS v. Maurrasse	Pending
2006-UP-413-S. Rhodes v. M. Eadon	Pending
2006-UP-416-State v. K. Mayzes and C. Manley	Pending
2006-UP-417-D. Mitchell v. Florence City School	Pending
2006-UP-419-State v. T. Finley	Pending
2006-UP-420-B. Ables v. M. Gladden	Pending
2006-UP-421-J. Holliday v. T. Holliday (2)	Pending
2006-UP-423-SC Farm Bureau v. H. Kennedy	Pending
2006-UP-426-J. Byrd v. D. Byrd	Pending
2006-UP-427-R. Collins v. B. Griffin	Pending
2006-UP-430-SCDSS v. E. Owens	Pending
2006-UP-431-B. Lancaster v. L. Sanders	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3949-Liberty Mutual v. S.C. Second Injury Fund	Pending
3956-State v. Michael Light	Pending
3963-McMillan v. SC Dep't of Agriculture	Pending
3967-State v. A. Zeigler	Pending
3968-Abu-Shawareb v. S.C. State University	Pending
3982-LoPresti v. Burry	Pending
3983-State v. D. Young	Pending
3994-Huffines Co. v. Lockhart	Pending

3998-Anderson v. Buonforte	Pending
4004-Historic Charleston v. Mallon	Pending
4006-State v. B. Pinkard	Pending
4011-State v. W. Nicholson	Pending
4014-State v. D. Wharton	Pending
4022-Widdicombe v. Tucker-Cales	Pending
4025-Blind Tiger v. City of Charleston	Pending
4026-Wogan v. Kunze	Pending
4027-Mishoe v. QHG of Lake City	Pending
4033-State v. C. Washington	Pending
4034-Brown v. Greenwood Mills Inc.	Pending
4035-State v. J. Mekler	Pending
4036-State v. Pichardo & Reyes	Pending
4037-Eagle Cont. v. County of Newberry	Pending
4039-Shuler v. Gregory Electric et al.	Pending
4041-Bessinger v. Bi-Lo	Pending
4042-Honorage Nursing v. Florence Conval.	Pending
4043-Simmons v. Simmons	Pending
4044-Gordon v. Busbee	Pending
4045-State v. E. King	Pending
4047-Carolina Water v. Lexington County	Pending

4048-Lizee v. SCDMH	Pending
4052-Smith v. Hastie	Pending
4054-Cooke v. Palmetto Health	Pending
4058-State v. K. Williams	Pending
4060-State v. Compton	Pending
4061-Doe v. Howe et al.(2)	Pending
4062-Campbell v. Campbell	Pending
4064-Peek v. Spartanburg Regional	Pending
4068-McDill v. Mark's Auto Sales	Pending
4069-State v. Patterson	Pending
4070-Tomlinson v. Mixon	Pending
4071-State v. K. Covert	Pending
4071-McDill v. Nationwide	Pending
4074-Schnellmann v. Roettger	Pending
4075-State v. Douglas	Pending
4078-Stokes v. Spartanburg Regional	Pending
4079-State v. R. Bailey	Pending
4080-Lukich v. Lukich	Pending
4082-State v. Elmore	Pending
4088-SC Mun. Ins. & Risk Fund v. City of Myrtle Beach	Pending
4089-S. Taylor v. SCDMV	Pending

4091-West v. Alliance Capital	Pending
4092-Cedar Cove v. DiPietro	Pending
4093-State v. J. Rogers	Pending
4095-Garnett v. WRP Enterprises	Pending
4096-Auto-Owners v. Hamin	Pending
4100-Menne v. Keowee Key	Pending
4102-Cody Discount Inc. v. Merritt	Pending
4104-Hambrick v. GMAC	Pending
4107-The State v. Russell W. Rice, Jr.	Pending
4109-Thompson v. SC Steel Erector	Pending
4111-LandBank Fund VII v. Dickerson	Pending
4112-Douan v. Charleston County	Pending
4118-Richardson v. Donald Hawkins Const.	Pending
4119-Doe v. Roe	Pending
4120-Hancock v. Mid-South Mgmt.	Pending
4121-State v. D. Lockamy	Pending
4122-Grant v. Mount Vernon Mills	Pending
4126-Wright v. Dickey	Pending
4127-State v. C. Santiago	Pending
4128-Shealy v. Doe	Pending
4130-SCDSS v. Mangle	Pending

4136-Ardis v. Sessions	Pending
4139-Temple v. Tec-Fab	Pending
4140-Est. of J. Haley v. Brown	Pending
4143-State v. K. Navy	Pending
4144-Myatt v. RHBT Financial	Pending
4145-Windham v. Riddle	Pending
4148-Metts v. Mims	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2005-UP-163-State v. L. Staten	Pending
2005-UP-188-State v. T. Zeigler	Pending
2005-UP-197-State v. L. Cowan	Pending
2005-UP-256-State v. T. Edwards	Pending
2005-UP-274-State v. R. Tyler	Pending
2005-UP-283-Hill v. Harbert	Pending
2005-UP-345-State v. B. Cantrell	Pending
2005-UP-361-State v. J. Galbreath	Pending
2005-UP-373-State v. Summersett	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending
2005-UP-490-Widdicombe v. Dupree	Pending
2005-UP-517-Turbevile v. Wilson	Pending
2005-UP-535-Tindall v. H&S Homes	Pending

2005-UP-540-Fair v. Gary Realty	Pending
2005-UP-541-State v. Samuel Cunningham	Pending
2005-UP-543-Jamrok v. Rogers	Pending
2005-UP-557-State v. A. Mickle	Pending
2005-UP-574-State v. T. Phillips	Pending
2005-UP-580-Garrett v. Garrett	Pending
2005-UP-584-Responsible Eco. v. Florence Consolid.	Pending
2005-UP-585-Newberry Elect. v. City of Newberry	Pending
2005-UP-590-Willis v. Grand Strand Sandwich Shop	Pending
2005-UP-595-Powell v. Powell	Pending
2005-UP-603-Vaughn v. Salem Carriers	Pending
2005-UP-604-Ex parte A-1 Bail In re State v. Larue	Pending
2005-UP-608-State v. (Mack.M) Isiah James	Pending
2005-UP-613-Browder v. Ross Marine	Pending
2005-UP-615-State v. L. Carter	Pending
2005-UP-635-State v. M. Cunningham	Pending
2006-UP-001-Heritage Plantation v. Paone	Pending
2006-UP-002-Johnson v. Estate of Smith	Pending
2006-UP-006-Martin v. State	Pending
2006-UP-013-State v. H. Poplin	Pending
2006-UP-015-Watts Const. v. Feltes	Pending

2006-UP-022-Hendrix v. Duke Energy	Pending
2006-UP-025-State v. K. Blackwell	Pending
2006-UP-027-Costenbader v. Costenbader	Pending
2006-UP-030-State v. S. Simmons	Pending
2006-UP-037-State v. Henderson	Pending
2006-UP-038-Baldwin v. Peoples	Pending
2006-UP-043-State v. Hagood	Pending
2006-UP-047-Rowe v. Advance America	Pending
2006-UP-049-Rhine v. Swem	Pending
2006-UP-051-S. Taylor v. SCDMV	Pending
2006-UP-066-Singleton v. Steven Shipping	Pending
2006-UP-071-Seibert v. Brooks	Pending
2006-UP-072-McCrea v. Gheraibeh	Pending
2006-UP-073-Oliver v. AT&T Nassau Metals	Pending
2006-UP-074-Casale v. Stivers Chrysler-Jeep	Pending
2006-UP-079-Ffrench v. Ffrench	Pending
2006-UP-084-McKee v. Brown	Pending
2006-UP-088-Meehan v. Meehan	Pending
2006-UP-096-Smith v. Bloome	Pending
2006-UP-115-Brunson v. Brunson	Pending
2006-UP-122-Young v. Greene	Pending

2006-UP-128-Heller v. Heller	Pending
2006-UP-130-Unger v. Leviton	Pending
2006-UP-151-Moyers v. SCDLLR	Pending
2006-UP-158-State v. R. Edmonds	Pending
2006-UP-172-State v. L. McKenzie	Pending
2006-UP-180-In the matter of Bennington	Pending
2006-UP-194-State v. E. Johnson	Pending
2006-UP-203-Sammy Garrison Const. v. Russo	Pending
2006-UP-211-Cunningham v. Mixon	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-230-Ex parte Van Osdell (Babb v. Graham)	Pending
2006-UP-237-SCDOT v. McDonald's Corp.	Pending
2006-UP-241-Marin v. Black & Decker	Pending
2006-UP-243-Sun Trust Mortgage v. Gobbi	Pending
2006-UP-245-Gobbi v. People's Federal	Pending
2006-UP-246-Gobbi v. Simerman	Pending
2006-UP-247-State v. Hastings	Pending
2006-UP-256-Fulmer v. Cain	Pending
2006-UP-262-Norton v. Wellman	Pending
2006-UP-279-Williamson v. Bermuda Run	Pending
2006-UP-281-Johnson v. Sonoco Products	Pending

2006-UP-286-SCDSS v. McKinley	Pending
2006-UP-287-Geiger v. Funderburk	Pending
2006-UP-299-Kelley v. Herman	Pending
2006-UP-303-State v. T. Dinkins	Pending
2006-UP-304-Bethards v. Parex	Pending
2006-UP-309-Southard v. Pye	Pending
2006-UP-313-Uzenda v. Pittman	Pending
2006-UP-316-State v. Tyrelle Davis	Pending
2006-UP-317-Wells Fargo Home Mortgage v. Thomasena J. Holloway and Albert Holloway	Pending
2006-UP-320-McConnell v. John Burry	Pending
2006-UP-323-Roger Hucks v. County of Union	Pending
2006-UP-360-SCDOT v. Buckles	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of C. Craig Young, Respondent.

Public Reprimand

Opinion No. 26241
Heard June 20, 2006 – Filed January 3, 2007

Attorney General Henry Dargan McMaster and Senior Assistant Attorney General James Bogle, both of Columbia, for Office of Disciplinary Counsel.

Reynolds Williams, of Florence, for Respondent.

PER CURIAM: The Full Panel (Panel) adopted the report of the Hearing Master finding Respondent's misconduct in litigation was more "unprofessional" than "unethical," and recommending that the Court discipline Respondent by issuing an admonition. The Office of Disciplinary Counsel (ODC) appeals, contending the Panel erred in failing to find Respondent violated the Rules of Professional Conduct, Rule 407, SCACR (RPC), to recommend a more severe sanction, and to require Respondent to pay $1,552.00 as the costs of the proceeding. We agree with ODC that Respondent violated the RPC, that a public reprimand is the appropriate sanction, and that Respondent should pay costs.

FACTS

Respondent undertook the representation of an attorney (Ruffin) in litigation arising out of Ruffin's participation in a limited liability company (LLC). Ruffin and two doctors formed the LLC to purchase property and build an office building. Ruffin would be responsible for overseeing the construction and associated issues, and would be a tenant in the building, while the doctors would provide the financial backing.

In 1998, the LLC members began to feel uneasy about the business, and in 1999 the doctors commenced civil litigation on their individual behalves and on behalf of the LLC against Ruffin individually and against Ruffin's legal practice. The plaintiffs were represented by Jerome P. Askins, III, and the defendants by Respondent. Askins is a personal friend of the doctors, while Respondent was a friend of Ruffin. The Panel found, and the record supports the finding, that personal friendship adversely affected Respondent's professional judgment in this matter.

In July 1999, Respondent and Askins appeared before a circuit judge and the outline of a settlement agreement was placed on the record. The agreement had been roughed-out between Respondent and Askins at the courthouse that day. When Ruffin could not obtain financing in time to close the deal as agreed at the July hearing, the parties agreed to an extension. Relationships between the parties and between the attorneys became increasingly acrimonious as it was learned that Ruffin had, in fact, misused LLC funds,[1] and as the settlement was postponed. The closing was reset for October 6, 1999.

On October 5 and 6, the parties executed a Revised Purchase Agreement. On October 6, Respondent faxed to Askins a document, labeled "Draft," entitled "SEVERANCE AGREEMENT, RELEASE AND HOLD HARMLESS, AND CONFIDENTIALITY AGREEMENT" (Severance

[1] Ruffin was indefinitely suspended for this misconduct. In re Ruffin, 363 S.C. 347, 610 S.E.2d 803 (2005).

Agreement). Two paragraphs of this Severance Agreement are at issue in the present disciplinary action:

> 5. In exchange for receiving the consideration set forth herein, [the Doctors] hereby agree and acknowledge that neither they nor [the] LLC have been a legal client of Thomas E. Ruffin, Jr. and/or Thomas E. Ruffin, Jr., P.C.
>
> 6. [The Doctors] agree to keep this Agreement, the reasons for withdrawing from the LLC, and all matters pertaining to the lawsuit captioned [Doctors] Individually and for the Benefit of [the] LLC, a South Carolina Limited Liability Company v. Thomas E. Ruffin, Jr. and Thomas E. Ruffin, Jr., P.C. completely confidential. In the event that the existence of this Agreement or facts pertaining to the limited liability company and/or the above-referenced lawsuit become known and it can be proved by Mr. Ruffin that such knowledge has come about as a result of [the Doctors] breaching the Confidentiality Agreement, then [one Doctor] and/or [the other Doctor], their heirs and/or assigns shall repay the One Hundred Forty Eight Thousand and 00/100 ($148,000.00) Dollars set forth in this Agreement upon demand, plus interest at the rate of one and one half percent (1 ½%) per month.

We refer to Paragraph 5 as the "Legal Representation Clause" and Paragraph 6 as the "Confidentiality Clause."

These two paragraphs caused the entire settlement to fail. The doctors were unwilling to agree to the false[2] Legal Representation Clause, and unwilling to agree to the one-sided Confidentiality Clause. Part of the problem arose because these two paragraphs were "in addition" to the terms

[2] As will be explained *infra*, Ruffin's firm had in fact represented the LLC in several mechanic's liens actions.

placed on the record before the circuit judge, and were not presented to the doctors until mere hours before the settlement agreement was to be consummated.[3]

After reviewing the Severance Agreement and speaking with the doctors, Askins called Respondent. The Panel found that the "telephone conversation became heated on both sides, and when Askins threatened to 'take Ruffin to the Bar' if Ruffin did not 'cooperate' in the settlement, Respondent said: 'I am not going to let [Ruffin] buy the building [from the LLC] and have the Doctors run to the Bar and yank his license.'"[4] Askins then faxed a letter to Respondent suggesting alterations to the Severance Agreement, including the deletion of both the Legal Representation Clause and the Confidentiality Clause. Respondent replied by sending an intemperate letter to Askins, stating among other things, that "as a result of your bad faith, the transaction and settlement cannot take place." Respondent subsequently sent Askins another letter, "clarifying" his earlier letter and "confirming" that, prior to sending the first letter, Respondent had offered to redraft the Legal Representation Clause to reflect that Ruffin's firm had, in fact, represented the LLC in some mechanic's lien matters, and offering to reword the Confidentiality Clause.

The events of October 6 led to a complete breakdown in relations between the parties and their attorneys. On October 15, 1999, Askins was served with Ruffin's Answer, Counterclaim, and Third-Party Complaint. The Third-Party Complaint drafted by Respondent alleged Askins and the doctors

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[3] The terms agreed to at the hearing pertained primarily to the division of the LLC's assets, while the Severance Agreement was intended to establish the terms of the dissolution of the business relationship.

[4] In making the finding that these two statements were made, the Hearing Master necessarily resolved credibility questions in favor of Respondent. While we are not bound by the Panel's findings, we give great weight to those findings which are premised on witness credibility. E.g., In re Flom, 356 S.C. 246, 588 S.E.2d 593 (2003).

had violated the civil RICO Act[5] and had committed the tort of outrage against Ruffin. Upon receipt of these pleadings, Askins withdrew from representation of the doctors and the LLC. Respondent withdrew soon after. The underlying suit was eventually settled by Ruffin's payment of sums to both Askins and the doctors, and the LLC.

PANEL FINDINGS

The Panel found that Respondent was "aggressive" in propounding the Severance Agreement and in deciding to file the Third Party Complaint (RICO action). The Panel recommended Respondent be admonished "against emotional reactions and attachments in the practice of law, which can not only cloud judgment, recollection, and analysis, but also lead to intemperate conduct towards fellow members of the bar."

A. Severance Agreement

The Panel concluded that by the time the October 1999 documents were prepared, the settlement agreement put before the circuit court in July 1999 "had simply…come off the rails…." The Panel found Respondent believed the relationship between Ruffin and the doctors related solely to a business deal, and did not implicate the practice of law, but "was aggressively one-sided in his attempt to lay that factual issue to rest."[6] It found Respondent's aggressiveness in proposing the Severance Agreement was mitigated by the fact it was merely a draft, which Respondent quickly offered to correct when the "Legal Representation" error was pointed out. Finally, the Panel found "Respondent's judgment and memory were likely affected by the friendship with his client, and Respondent was erecting

[5] RICO is an acronym for the Federal Racketeer Influenced and Corrupt Organizations Act. See 18 U.S.C. §§ 1961 *et seq.*

[6] We accept the Panel's conclusion that in drafting the Severance Agreement Respondent was influenced by his firmly held belief that the doctors and Ruffin had only a business relationship governed by applicable fiduciary duties and not a legal relationship in a general sense. See also In re Ruffin, *supra*, holding there was no "general legal relationship."

positive barriers to potential disciplinary action. Respondent should be admonished that his conduct here was unprofessional."

We defer to the Panel's findings and conclusions regarding the Severance Agreement.

While the "Legal Representation Clause" was patently false, we defer to the Panel's finding, premised on its belief in Respondent's credibility, that the factual error in this clause was the result of an honest oversight by Respondent, which he immediately offered to correct when it was called to his attention. As to the "Confidentiality Clause," the Panel found it was merely a draft, created in the course of emotional litigation, which was the result of Respondent's overly-aggressive representation of Ruffin. We accept the Panel's findings here, but not without noting that based upon Respondent's conduct and statements at oral argument before the Court, we have grave reservations whether Respondent's aggressiveness in the Ruffin litigation was an isolated event, or whether Respondent approaches the practice of law in general from a gladiatorial perspective. Respondent would be well-served to reflect upon his attitude and demeanor.

B. RICO Claim

ODC contends Respondent violated the RPC in filing the RICO claim. We agree.

The RICO complaint alleges that the doctors and Askins engaged in an enterprise using "the U.S. mails and the telephone systems to convey threats and other extortionate communications." These defendants were alleged to have violated state and federal laws, specifically two state statutes proscribing unlawful use of a telephone,[7] and blackmail,[8] and federal

[7] S.C. Code Ann. § 16-17-430.

[8] § 16-11-640.

racketeering statutes.[9] The RICO complaint also alleged that the three defendants unlawfully conspired to violate these state criminal statutes and/or were accessories to their violation.

At the disciplinary hearing, Respondent testified that to the factual basis for the RICO claim:

> 1) Ruffin told him one of the doctors had, in a July 1999 telephone conversation, stated that if Ruffin did not settle the case in the manner the doctors felt like it needed to be, then they would go to S.L.E.D. or the sheriff;
>
> 2) Askins told Respondent in a telephone conversation that he wanted to "stomp [Ruffin's] ass;"
>
> 3) Askins told Respondent in a phone call that if the case were not settled on the doctors' terms then the doctors would go to S.L.E.D., the solicitor's office, the attorney general's office, the sheriff or disciplinary counsel; and
>
> 4) The CPA involved in the case told Respondent that in a phone conversation Askins had told the CPA that if Ruffin did not settle on the doctors' terms, "then there would be disciplinary action involved."

Respondent testified he viewed the enterprise's common purpose to be to extort as much money as possible from Ruffin in settling the civil litigation and winding up the parties' business relationship.

Respondent also testified that while he did not dispute the right of any of the RICO defendants to report a crime, the threats in this case violated the blackmail statute because they were made with the intent to extort money

[9] 18 U.S.C.§§ 1951; 1952; and 1957.

from Ruffin.[10] When asked what evidence he had to support the claim that the defendants had violated the unlawful use of a telephone statute, which prohibits among other things profane, vulgar, indecent or immoral words over the phone, Respondent referred to Askins' threat to stomp Ruffin's ass, and to the extortionate threats as "immoral." We note that in Respondent's factual recitation, only one of the doctors is alleged to have made threats although both were sued.

The RICO complaint drafted by Respondent alleged a violation of 18 U.S.C. § 1957, which concerns engaging in monetary transactions in property derived from specific unlawful activities. When asked to explain the factual basis for this allegation, Respondent was unable to provide one, and testified he would have to do some research in order to answer. When he was then asked whether he had done any research prior to filing this RICO claim, Respondent replied he had not, but had instead relied upon knowledge gained in connection with other RICO claims he had handled.

Rule 3.1, RPC, provides that "A lawyer shall not bring…a proceeding…unless there is a basis in law and fact for doing so that is not frivolous…." The comments to this rule state, in part, that lawyers are required "to inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions." It is apparent from Respondent's testimony that he did no investigation into either the state criminal law upon which his RICO complaint is predicated, nor did he conduct any research into

[10] While 'truth' is generally not a defense to blackmail charges based upon extortionate threats to expose non-criminal behavior, it is unclear whether the 'truth' of a threat to refer someone for criminal charges, i.e. that the person actually committed the offense, is a defense to extortion. See Annot., *Truth as a defense to state charges of criminal intimidation, extortion, blackmail, threats and the like, based upon threats to disclose information about the victim*, 39 A.L.R. 4th 1011 (1985). We need not decide the novel issue today, but point out that Respondent never even considered whether threats to report a crime could be the basis of a criminal prosecution under the blackmail statute.

the federal RICO law as it may apply to these facts before proceeding to make these grave allegations against Askins and the doctors. Respondent testified he checked with two (unnamed) members of his firm before filing the RICO complaint, at least one of whom urged him not to file. Respondent presents himself as a RICO expert, and accordingly cannot rely upon his consultations with others to insulate him from a finding that he brought a frivolous RICO claim. Compare In re Ruffin, *supra*.

The Panel found, based implicitly on a determination that Respondent was the most credible witness, that Askins and at least one of the doctors had made the statements against Ruffin that Respondent alleged they had made. However, whether these "threats" were violative of the state criminal blackmail statute or the unlawful use of a telephone statute is highly doubtful. What is clear is that Respondent had no facts implicating one of the doctors he sued, nor did he conduct any legal research before filing this complaint. Further, Respondent was unable to explain the legal basis for at least part of his pleading at this disciplinary hearing, and never contemplated whether South Carolina would recognize a blackmail violation where the defendant threatened to report the plaintiff's criminal activity to law enforcement and/or disciplinary authorities.

We find clear and convincing evidence that Respondent violated the following ethical rules in filing this retaliatory RICO complaint against the doctors and Attorney Askins: Rule 3.1 (lawyer shall not bring a frivolous proceeding); and Rule 1.1(5) (competent representation includes thoroughness and preparation).

CONCLUSION

This Court may make its own findings of fact and conclusions of law regarding allegations of misconduct. In re Ruffin, *supra*. Based upon our review of the entire record in this matter, we find Respondent committed ethical misconduct in the RICO complaint matter. Further, we disagree with the Panel's recommendation that Respondent receive only an admonition for his misconduct in the Ruffin litigation, and instead impose a Public

Reprimand.[11] Finally, we order that Respondent pay, within fifteen (15) days of the date of the filing of this opinion, $1,552.00 for costs.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT, JJ., and Acting Justice Edward B. Cottingham, concur.

[11] In 2005 we accepted an Agreement for Discipline by Consent in an unrelated disciplinary matter involving Respondent and imposed a public reprimand where Respondent admitted sending a settlement proposal which threatened criminal prosecution to gain an advantage in a civil matter, and which mischaracterized part of the proposed settlement as a gift. In re Young, 366 S.C. 180, 621 S.E.2d 359 (2005).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, and the South Carolina Public Interest Foundation, Petitioner,

v.

John N. Hardee, Robert W. Harrell, John Moultrie "Moot" Truluck, Respondents.

IN THE ORIGINAL JURISDICTION

Opinion No. 26242
Heard November 2, 2006 – Filed January 8, 2007

James G. Carpenter, of Greenville, for Petitioner.

A. Camden Lewis, Keith M. Babcock, Ariail E. King, and Linda C. McDonald, all of Columbia, E. LeRoy Nettles, Sr., and Marian D. Nettles, of Lake City, Gedney M. Howe, III, of Charleston, Keith D. Munson, of Greenville, and S. Jahue Moore, of W. Columbia, for Respondents.

JUSTICE WALLER: We accepted this matter in our original jurisdiction to address whether Respondents, Commissioners for the South Carolina Department of Transportation (DOT), were appointed in violation of S.C. Code Ann. § 57-1-330(A)(2006).

FACTS

Hardee, Harrell and Truluck are DOT Commissioners. Hardee was appointed to a four-year term, to be served from February 18, 1998 to February 15, 2002. In June 2001, his legislative delegation re-elected him to serve a second term, from February 2002 until August 2002. Thereafter, in May 2002, his legislative delegation re-elected him to serve as DOT Commissioner from August 15, 2002 to August 15, 2006. In January 2005, Hardee was re-elected to serve from August 2006 until August 2010.

Harrell was elected in May 1999 to serve as DOT Commissioner from February 2000 until February 15, 2004. He has been re-elected to serve from February 15, 2004 through February 15, 2008.

Truluck was elected to serve his first term as DOT Commissioner from February 15, 1998 until February 15, 2002. He served in a hold-over capacity until May 15, 2002, at which time he was re-elected to serve from May 15, 2002 through May 15, 2006.

Petitioners, Sloan and the South Carolina Public Interest Foundation, instituted this complaint for declaratory and injunctive relief, contending the Commissioners were serving in violation of SC Code Ann. §§ 57-1-320(B) and 57-1-330(A). We accepted the matter in our original jurisdiction.[1]

DISCUSSION

Title 57 of the South Carolina Code establishes the DOT and sets up transportation districts in accord with state congressional districts. S.C. Code Ann. § 57-1-310 (2006) requires the DOT Commission to be composed of one member from each transportation district elected by the delegations of each congressional district, and one at-large member appointed by the

[1] We find this matter of sufficient public interest as to confer standing on Petitioners. Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005); Baird v. Charleston Cty., 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance).

Governor. This section further requires that "[s]uch elections or appointment, as the case may be, shall take into account race and gender so as to represent, to the greatest extent possible, all segments of the population of the State." S.C. Code Ann. § 57-1-320 (2006), entitled, "County divided among two or more districts; consecutive terms limited; limit on commissioners from same county," states, in pertinent part:

> (B) No county within a Department of Transportation district shall have a resident commission member **for more than one consecutive term** and in no event shall any two persons from the same county serve as a commission member simultaneously except as provided hereinafter.

(Emphasis supplied). Section 57-1-330 provides:

> All commission members must serve for a term of office of four years which expires on February fifteenth of the appropriate year. Commissioners shall continue to serve until their successors are elected and qualify, provided that a commissioner may only serve in a hold over capacity for a period not to exceed six months. . . . No person is eligible to serve as a commission member who is not a resident of that district at the time of his appointment, except that the at large commission member may be appointed from any county in the State regardless of whether another commissioner is serving from that county.

Sloan and the SC Public Interest Foundation contend Hardee, Harrell, and Truluck are serving in violation of the above provisions, as they are currently serving in a second or subsequent "consecutive term." We agree.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179

(1994). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988); State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991).

"Consecutive" is defined as "successive; succeeding one another in regular order; to follow in uninterrupted succession." Black's Law Dictionary, 276 (5th Ed. 1979). The plain and unambiguous meaning of the phrase "more than one consecutive term" is that a DOT commissioner may serve one term and may not serve a succeeding, consecutive term.

Respondents contend the term "consecutive," permits a commissioner to serve one term, consecutive to a first term such that the commissioners may actually serve two successive terms. We disagree. Such a construction would produce an absurd result, clearly not intended by the Legislature.

There are numerous statutes which permit certain commissioners or board members to serve "two consecutive terms." See e.g. S.C. Code Ann. § 1-13-40 (Human Affairs Commissioner having served two consecutive terms shall be eligible for reappointment one year after the expiration of his second term); S.C. Code Ann. § 1-15-10 (Commission on Women members ineligible to serve more than two consecutive terms); S.C. Code Ann. § 40-61-20 (State Board of Examiners for Registered Environmental Sanitarian members are eligible for reappointment but cannot serve more than two consecutive terms); S.C. Code Ann. § 44-7-180 (State Health Planning Committee members are appointed for four-year terms, and may serve only two consecutive terms); S.C. Code Ann. § 55-11-320 (Richland/Lexington Airport Commission members may not serve more than two consecutive terms). To construe the phrase "consecutive" as meaning a term, consecutive to a first term, would result in the phrase "two consecutive terms", in actuality, meaning two terms consecutive to a first, for a total of three terms.[2] To construe the statutes as asserted by Appellants would produce an absurd

[2] Analogously, Article IV, § 3 of the South Carolina Constitution provides that "no person shall be elected Governor for more than two successive terms." Carried to its logical conclusion, "successive" as interpreted by the Commissioners would permit the Governor to serve for a total of three successive terms.

result. Charleston Trident Home Builders Inc. v. Town Council of Summerville, 369 S.C. 498, 632 S.E.2d 864 (2006); Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (when construing a statute, the Court will reject meaning that would lead to an absurd result not intended by the legislature).

Lastly, Respondent Hardee contends South Carolina Public Interest Foundation v. Judicial Merit Selection Comm'n, 369 S.C. 139, 632 S.E.2d 277 (2006), requires we refrain from ruling on this matter because it presents questions which are exclusively or predominantly political in nature rather than judicial. We disagree. In the Public Interest Foundation case, we held that whether the Judicial Merit Selection Commission properly evaluated a candidate seeking election to a circuit court seat was a nonjusticiable political question because the power to determine if a person is qualified to hold judicial office is vested with the General Assembly by the State Constitution. The issue raised there was that the Commission did not adequately investigate whether a candidate met residency requirements for the Fourteenth Judicial Circuit.

Public Interest Foundation has no application here. The sole issue in this case is whether the Commissioners are serving in violation of the statutory terms. Defining the meaning of the phrase "more than one consecutive term" is clearly within the prerogative of this Court. Cf. Lindsay v. Nat'l Old Line Ins. Co., 262 S.C. 621, 629, 207 S.E.2d 75, 78 (1974) (judicial interpretation of a statute is determinative of its meaning and effect).

Accordingly, we hold section 57-1-320(B) prohibits a DOT Commissioner from serving a consecutive term of office.

MOORE, BURNETT, JJ., and Acting Justices Deadra L. Jefferson and G. Thomas Cooper, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Troy Alan Burkhart, Appellant.

Appeal from Anderson County
J.C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 26243
Heard September 20, 2006 – Filed January 8, 2007

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Chief Attorney Joseph L. Savitz, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Derrick K. McFarland, of Columbia; and Solicitor Christina Theos Adams, of Anderson, for respondent.

JUSTICE MOORE: Appellant shot and killed three people in a rural area of Anderson County on November 19, 1997. The victims were brothers Shane and Stacy Walters, aged twenty-seven and twenty-two, and Sonya Cann, aged twenty-one. Appellant was convicted of three counts of murder and three counts of possessing a firearm during the commission of a violent crime and sentenced to death. These convictions were overturned on appeal. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002). In March 2004, appellant was again convicted and sentenced to death. We affirm appellant's convictions but reverse and remand for resentencing.

FACTS

Appellant became acquainted with brothers Shane and Stacy Walters on a Friday night when they met at a mutual friend's home. Appellant asked the brothers for help with the septic tank at his restaurant. They worked together and socialized over the course of the weekend. All three used methamphetamine repeatedly from Friday until late into the night on Sunday. At about 5:00 a.m. Monday morning, the three men went to pick up Shane's girlfriend, Sonya, at her home. The four of them drove off in Shane's extended-cab "dually" truck. The victims were not seen alive again.

Later that morning, at about 8:15 a.m., appellant came to the Seneca police department and told police he had killed three people in self-defense. He led police to a secluded kudzu field where police found the bodies of Shane, Stacy, and Sonya on the ground. The truck was recovered from where appellant had parked it at his father's house. Its interior was covered with blood. Forensic evidence indicated that all three victims had been shot in the head at close range while seated in the cab of the truck and their bodies had been dragged onto the ground. The State also produced evidence that Stacy and Shane had been stomped while on the ground and Sonya was shot in the head while lying there.

The only weapon used was appellant's semi-automatic pistol which could hold eight rounds, seven in the magazine and one in the chamber.[1] Two empty magazines were at the scene indicating appellant had reloaded. Experts estimated up to eleven shots could have been fired.

ISSUES

1. Was the exclusion of evidence in the guilt phase prejudicial?

2. Was the admission of evidence regarding prison conditions in the sentencing phase reversible error?

DISCUSSION

1. Exclusion of evidence in guilt phase

Appellant claimed self-defense. He testified that he killed the victims because he believed the brothers had been hired to kill him by his uncle, Ronnie Burkhart, an infamous drug-dealer with whom appellant was on bad terms.

Appellant testified that when they arrived at the kudzu field, Shane was holding appellant's gun because appellant had given it to him to shoot at a deer earlier. While they were sitting in the truck, Shane asked appellant if he had ever wronged "Uncle Ronnie." Because appellant had been threatened by Ronnie and was surprised that Shane knew Ronnie, he immediately became anxious. Shane then pointed the gun at appellant and ordered him out of the truck. Stacy said, "We're going to make you squeal like a pig, boy," which appellant took to mean they were going to rape him.

[1]Shane's unloaded hunting rifle was found under the truck's back seat beneath a large speaker. In Sonya's purse were two unopened pocketknives, and Shane had an unopened knife in his pants pocket.

Appellant grabbed the gun from Shane and began shooting. When it was over, he pushed the bodies out of the truck and put the second magazine in the gun because he thought someone else may have been out in the field. A shot went off outside the truck. Finally, appellant drove off in Shane's truck. He went to pick up his wife and his father because he was afraid Ronnie would hurt them. After parking Shane's truck at his father's house, appellant went to the police.

Sheriff Taylor was called as a defense witness. He testified that Ronnie, who was now deceased, was at one time an international drug smuggler in cocaine and marijuana with connections to violent drug lords. On cross-examination, Sheriff Taylor stated that Ronnie was very careful in his dealings. The solicitor then asked, "Did you ever uncover anything that showed that Shane and Stacy were on *(sic)* any of this inside circle that Ronnie Burkhart would have trusted them?" Sheriff Taylor answered "no." In reply, the defense sought to elicit Sheriff Taylor's testimony that Shane had been arrested for buying a sixteenth of an ounce of methamphetamine from an undercover agent in December 1995, two years before the killings. The solicitor objected on the ground of relevance and the trial judge excluded the evidence. Appellant claims the exclusion of this evidence prejudiced him because it indicated a relationship between the brothers and Ronnie that would substantiate his claim of self-defense. We disagree.

Sheriff Taylor testified Ronnie Burkhart was out of the drug business by 1991, Ronnie did not deal in methamphetamine, and he knew of no connection between Shane's 1995 drug transaction and Ronnie. In the absence of any evidence linking Shane's drug transaction to Ronnie, the excluded evidence did not tend to make more or less probable appellant's claim that Shane would have worked for Ronnie as a hit man. *See* Rule 401, SCRE (evidence is relevant if it tends to make the existence of any fact at issue more or less probable). We find the exclusion of this evidence could not reasonably have affected the outcome of the trial. *See* State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (exclusion of evidence is not reversible error if it could not reasonably have affected outcome of trial).

2. Admission of evidence in sentencing phase

During the sentencing phase of trial, appellant objected to testimony by State's witness James Sligh, Director of Inmate Classification for the Department of Corrections, regarding the privileges available to an inmate who receives a sentence of life without parole. These privileges include access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors. On cross-examination, Sligh acknowledged that prison life is "very regimented" and "is not a country club." Further, appellant presented evidence through his own witness that prison is a harsh environment with violent predators where one's freedom is severely curtailed.

We have long held that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). The jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). "Such determinations as the time, place, manner, and conditions of execution or incarceration . . . are reserved . . . to agencies other than the jury." State v. Plath (Plath II), 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) (emphasis added). Based on this reasoning, we have disallowed defense evidence regarding the process of electrocution, State v. Plath (Plath I), 277 S.C. 126, 284 S.E.2d 221 (1981), and expert testimony regarding the deterrent effect of capital punishment. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996).

Recently, in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005), the defendant challenged on appeal the admission of evidence regarding general prison conditions. Although we found the issue was not preserved for review, we cautioned the State and the defense bar that such evidence is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. 366 S.C. at 498-99, 623 S.E.2d at 387.

This case was tried before our decision in Bowman; however, we apply that reasoning here because it is consistent with our long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible,[2] and this restriction on the admission of evidence regarding prison life in general. We note, however, that evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions.

Here, unlike Bowman, appellant objected to the State's evidence regarding general prison conditions. Although appellant attempted to counter the testimony of the State's witness with evidence regarding the harshness of prison life, this entire subject matter injected an arbitrary factor into the jury's sentencing considerations. A capital jury may not impose a death sentence under the influence of any arbitrary factor. S.C. Code Ann. § 16-3-25(C)(1) (2003). When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, § 16-3-25(C)(1) is violated. State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982). Accordingly, we reverse appellant's death sentence and remand for resentencing.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

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[2]*See generally* Skipper v. South Carolina, 476 U.S. 1 (1986) (evidence of good behavior in prison admissible in mitigation as relevant to future adaptability); State v. Schafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (evidence of violent behavior in prison relevant to future dangerousness); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) (defendant's future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a capital case).

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

JUSTICE PLEICONES: I concur in the majority's conclusion that appellant is entitled to a new sentencing proceeding. I write separately because I believe a violation of S.C. Code Ann. § 16-3-25(C)(1) (2003) is not subject to a harmless error analysis.

I agree with the majority that the prison conditions testimony by Mr. Sligh violated our rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. More importantly, this inadmissible evidence infused an arbitrary factor into the jury's decision to return a death sentence. Once an arbitrary matter has been presented to the jury, this Court cannot uphold the death sentence if we are to fulfill our statutory duty under S.C. Code Ann. § 16-3-25(C)(1). State v. Shaw, 273 S.C. 194, 209-210, 255 S.E.2d 799, 807 (1979), *overruled on other grounds* by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

The dissent argues that the statute's prohibition against imposing a death sentence obtained under the influence of passion, prejudice, or any other arbitrary factor merely recites the requirements of the Eighth Amendment. As a result, although not finding the evidence in this case to introduce an arbitrary subject to the jury, the dissent would subject violations of § 16-3-25(C)(1) to a harmless error analysis.[3]

In my opinion, this Court should not apply a standard of review for constitutional errors to statutory violations. The dissent ignores the plain language of the statute, which requires this Court to "determine whether the sentence of death was imposed *under the influence of* passion, prejudice, or any other arbitrary factor." S.C. Code Ann. § 16-3-25(C)(1) (emphasis added). We are not required to determine if appellant's cross-examination of Mr. Sligh was able to remedy any error. Once improper evidence of any kind injects an arbitrary factor into the jury's consideration, this Court cannot uphold the death sentence under § 16-3-25(C)(1). Moreover, a review for harmless error

[3] This Court has acknowledged the appropriateness of harmless error analysis in capital cases where a defendant's constitutional rights are violated. *See* Arnold v. State, 309 S.C. 157, 430 S.E.2d 834 (1992).

is unnecessary because by definition, evidence that implicates an arbitrary factor is prejudicial.

We must honor the General Assembly's prerogative to establish the procedure which it deems necessary to the fair administration of the death penalty. Where the legislature requires this Court to review a death sentence for possible arbitrariness, that directive should be conscientiously honored. I would thus not engage in a harmless error analysis which could potentially uphold a death sentence returned under the influence of an arbitrary factor. Accordingly, I agree with the majority's decision to reverse the death sentence and remand for resentencing.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, the introduction of irrelevant evidence in a capital sentencing proceeding does not, in and of itself, warrant reversal of Appellant's death sentence.

Although we cautioned in *State v. Bowman* that evidence relating to the conditions of incarceration should not be admitted during a capital sentencing proceeding, nothing in that case indicated a departure from the general rules governing appeals involving the admission of evidence or constitutional issues. *See* 366 S.C. 485, 498-99, 623 S.E.2d 378, 385 (2005). With this principle in mind, I believe our jurisprudence requires clarification.

That evidentiary appeals in criminal trials and questions of fundamental fairness sometimes overlap must be an easy conclusion. Even the most cursory review of this Court's jurisprudence and federal precedent in the capital arena reveals as much. Arguments in capital cases involving the introduction of evidence will invariably be buttressed by considerations of fundamental fairness secured by the Eighth and Fourteenth Amendments. In these cases, both the evidentiary questions of state law and the federal constitutional questions are of paramount importance. Accordingly, a genuine resolution requires that these issues be given a complete discussion.

A trial court has a great deal of latitude concerning rulings on the admissibility of evidence, and a trial court's ruling on such an issue will not be reversed on appeal absent an abuse of discretion and a demonstration of prejudice. *State v. Plath*, 281 S.C. 1, 9-10, 313 S.E.2d 619, 624 (1984); *State v. Gregory*, 198 S.C. 98, 103, 16 S.E.2d 532, 534 (1941).

In this case, although the trial court admitted irrelevant evidence during Appellant's sentencing proceeding, I can find no evidence indicating that the introduction of this evidence prejudiced Appellant. Although the State improperly introduced evidence regarding the general conditions that Appellant would experience while in prison, Appellant cross-examined the State's witness at length and

demonstrated that the conditions of Appellant's imprisonment would be quite severe. Specifically, Appellant was able to inform the jury that, if he was spared the death penalty, he would be subject to the second highest degree of restriction in South Carolina's prison system for the remainder of his life.[4] In short, though this evidence was irrelevant and improper, Appellant used the evidence quite effectively to argue against imposing the death penalty. Absent a showing of prejudice which resulted from the introduction of this evidence, our standards of review require us to affirm the trial court's decision.[5]

Turning to the questions of federal law, the Eighth Amendment is violated when the decision to impose the death penalty is made in an arbitrary manner, or "out of a whim, passion, prejudice, or mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985); *State v. Copeland*, 278 S.C. 572, 587, 300 S.E.2d 63, 72 (1982). Violations of the Fourteenth Amendment occur when something "so infects the trial with unfairness as to make the resulting conviction a denial of due process." *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Furthermore, an appellate court's inquiry does not end upon finding that a constitutional violation occurred. Very recently, the United States Supreme Court reminded us that harmless error analysis is a constitutionally sufficient rubric by which an appellate court may judge whether most constitutional violations require reversal in a criminal case. *Washington v. Recuenco*, 548 U.S. __, 126 S.Ct. 2546, 2551 (2006).

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[4] Eight pages of the record contain the State's expert's direct testimony. Appellant's cross-examination of this expert fills twenty pages of the record.

[5] *Plath* further underscores my point. In that case, this Court unanimously affirmed a death sentence because these precise errors were not accompanied by any demonstration of prejudice. *See* 281 S.C. at 9-10, 313 S.E.2d at 624.

In this case, I would not reach the question of whether the trial court's error in admitting the above described evidence was harmless because I would find no constitutional violations occurred. As a first matter, Appellant did not raise any constitutional objections in the trial court, and it is not clear that he raises these issues here.[6] Assuming, however, that Appellant makes such arguments, in my view, the introduction of this improper evidence did not create an impermissible risk that the jury would make the decision to impose the death penalty in an arbitrary manner, nor did it so infect Appellant's sentencing proceeding with prejudice as to render it fundamentally unfair.[7] Again, because I would find that no constitutional violations resulted from the introduction of this evidence, I do not believe this Court need decide whether any evidentiary error was harmless.

In my view, the majority's resolution of this issue is controlled by a theme found largely in dicta beginning in *State v. Woomer*. In that case, this Court stated "[w]hen a solicitor's personal opinion is explicitly injected into the jury's deliberations as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor as required by S.C. Code § 16-3-25(C)(1), and by the Eighth Amendment to the United States Constitution." 277 S.C. at 175, 284 S.E.2d at 359.

I believe this Court has mistakenly seized upon the latter part of that statement and proceeded to treat § 16-3-25(C) as providing a

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[6] At trial, Appellant objected that this testimony was improper under this Court's ruling in *Plath*. That case contains no material discussion of the Eighth or Fourteenth Amendments. *Plath*'s discussion of this type of evidence is best interpreted as resolving a traditional appeal of a question of the admission of evidence. *See* 281 S.C at 14-16, 313 S.E.2d at 627.

[7] In making this determination, I judge the effect of these evidentiary errors in the context of the entire record. *See State v. Woomer*, 277 S.C. 170, 174-75, 284 S.E.2d 357, 359 (1981).

separate standard by which this Court should judge the conduct of capital sentencing proceedings.[8] In my view, *State v. Torrence* all but openly rejects the argument that the statute's prohibition of imposing a death sentence obtained under the influence of "passion, prejudice, or any other arbitrary factor," constitutes anything other than a recital of the Eighth Amendment's requirements. *See* 305 S.C. at 68, 406 S.E.2d at 328. Furthermore, in my view, the Eighth Amendment's requirements are primarily concerned with the ultimate result in capital cases, which is "preventing the imposition of excessive and disproportionate punishment upon the individual prisoner." *State v. Copeland*, 378 S.C. 572, 590, 300 S.E.2d 63, 73-74 (1982). Thus, even if *Torrence* did not reject this proposition, I would decline to view § 16-3-25(C) as proscribing a standard of review that is independent from the Eighth Amendment. Instead, I would interpret the statute to prohibit the imposition of the death penalty only in those situations where it would offend the Constitution. In my view, a separate standard is not necessary.[9]

Our pronouncement disfavoring this evidence in *Bowman* was nothing new. *See Plath*, 281 S.C. at 15, 313 S.E.2d at 627 ("It should

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[8] This principle has consistently re-appeared in our precedent. *See Thompson v. Aiken*, 281 S.C. 239, 240, 315 S.E.2d 110, 110 (1984); *State v. Sloan*, 278 S.C. 435, 438, 298 S.E.2d 92, 93 (1982); *State v. Smart*, 278 S.C. 515, 517, 299 S.E.2d 686, 687 (1982) (overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 70, 406 S.E.2d 315, 329 (1991)); and *State v. Butler*, 277 S.C. 543, 544, 290 S.E.2d 420, 420 (1982) (overruled on other grounds by *Torrence*, 305 S.C. at 70, 406 S.E.2d at 329).

[9] I do not necessarily question the holdings in the cases I have cited, only the reasoning. Any number of errors can infect a trial with unfairness to such a degree as to violate the Eighth and Fourteenth Amendments. These include (1) the introduction of overly inflammatory evidence and (2) arguments which impermissibly appeal to the passions or prejudices of a jury.

not be necessary in the near future . . . to remind the bench and bar of the strict focus to be maintained in the course of a capital sentencing trial."); *and Smart*, 278 S.C. at 526, 299 S.E.2d at 692-93 ("While this Court approves zealous representation . . . it is important in capital cases to maintain strict focus upon the particular characteristics of the specific crime and the unique attributes of the defendant."). In reversing this case, I believe we treat the disapproval of this type of evidence as though it were a novel development, and that we unnecessarily depart from an established course of analysis that is easily tied to defined doctrines. In my view, reversing Appellant's sentence uses *Bowman* to propagate a rule that inappropriately presumes prejudice in many cases and is unjustified given the existing constitutional framework.[10]

The majority and concurrence presume what they purport to establish, which is that § 16-3-25(C)(1) requires reversal when improper evidence is *introduced* in a capital sentencing proceeding. Were that the General Assembly's intention, I believe it surely would have spoken in terms of an arbitrary factor's "presence" instead of its "influence." Appellate courts are ill-equipped to speculate about the influence improperly admitted evidence might have exerted on a jury's determination. Therefore, in my view, the most prudent course in these cases is to tie the statutory review requirement to the established guideposts provided by the relevant constitutional jurisprudence. Today, the majority and concurrence endorse a rule that is markedly stricter than the constitution requires, is contrary to at least two of this Court's prior decisions, and plays far too loosely with the language of the statute.

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[10] Coincidentally, the view taken by the concurrence is contrary to our opinion in *Bowman* and seems to embrace a rekindled form of *in favorem vitae* review. This view, if applied in *Bowman*, would surely have commanded the Court to at least deal with the merits of Bowman's claim regarding this "prison conditions" testimony rather than disposing of his claim on error preservation grounds. *See* 366 S.C. at 498, 623 S.E.2d at 385.

For these reasons, I would hold that the trial court erred in admitting evidence relating to the conditions of incarceration during Appellant's capital sentencing proceeding, but I would affirm Appellant's death sentence.

BURNETT, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Carlton D. Robinson, Respondent.

Opinion No. 26244
Submitted November 14, 2006 – Filed January 8, 2007

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel and C. Tex Davis, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Jason B. Buffkin, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of an admonition or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

In 2005, respondent was contacted by National Real Estate Information Services (NREIS) about handling closings of residential real estate transactions in South Carolina. Respondent closed approximately

thirty transactions arranged by NREIS in 2005, all of which involved refinances except for the subject transaction, which was a purchase transaction.

With regard to the subject transaction, respondent, after speaking with the complainant, declined to proceed with the closing. As for the refinances, respondent represents that each was handled by him in substantially the same manner. Respondent would typically receive the closing package a day in advance of the closing. He did not prepare the title abstracts used in the closings. Instead, he was informed by NREIS that they use other South Carolina attorneys to do the title work and obtain a certified legal opinion prior to closing. Once a certified legal opinion was obtained, NREIS would forward the relevant closing materials to respondent for closing. However, respondent took no affirmative action to verify NREIS' representations nor did he ever obtain a copy of the certified legal opinions for the refinances. Respondent represents that at each closing he reviewed all of the relevant documents, including the terms of the loan, with the client and that this process included a careful review of the Settlement Statement to confirm the client's agreement with the costs and disbursements associated with the closing transaction. At the conclusion of the closings, respondent forwarded the closing documents to NREIS. He did not record the mortgage associated with any of the transactions nor did he take any affirmative action to confirm that the mortgages were properly recorded. In addition, respondent had no involvement in the disbursement of funds to each client and did not take any action to confirm that the funds were disbursed as reflected in the Settlement Statement.

Respondent, who has no prior disciplinary history, has been forthright and cooperative with ODC throughout this investigation and maintains he is committed to the improvement of the management of his practice to insure full compliance with the guidelines governing real estate closings.

Law

Respondent admits that his conduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Sally G. Calhoun, Respondent.

Opinion No. 26245
Submitted November 14, 2006 – Filed January 8, 2007

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel and C. Tex Davis, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Sally G. Calhoun, of Beaufort, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of an admonition or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

In May 2005, Nationwide Appraisal contacted respondent to retain her services as closing attorney to handle the closing of a home equity line of credit for a client. The closing occurred on May 9, 2005, at

respondent's office. Respondent received the closing documents and instructions from Nationwide Appraisal either the day before or the day of the closing. Respondent did not prepare the closing documents or perform the title exam nor does she know the identity of the person who did so. Respondent assumed that person was an attorney licensed in South Carolina or was supervised by such an attorney; however, she admits she took no affirmative action to verify this information.

Prior to the closing, respondent reviewed the closing documents for accuracy. In addition, she advised the client at the closing that the scope of her representation was limited to reviewing the closing documents, explaining them to the client and ensuring that the documents were properly executed. Further, respondent reviewed the documents with the client and ensured that the necessary documents were properly executed per Nationwide Appraisal's instructions. Respondent forwarded the closing documents to the lender, but did not record the mortgage for the client nor take any steps to ensure that someone else properly recorded the mortgage. Respondent again assumed that a licensed South Carolina attorney, other than herself, was responsible for recording the mortgage; however, she took no affirmative action to verify that such action was taken.

Nationwide Appraisal paid respondent $200 for her services a few weeks after the closing; however, the HUD-1A Settlement Statement executed at the client's closing does not reflect a payment to respondent. The Settlement Statement does include a charge of $175 to Nationwide Appraisal for a settlement or closing fee, as well as a charge of $55 to GAC for an abstract or title search.[1]

Respondent has informed ODC that prior to the closing at issue, she handled several other closings for Nationwide Appraisal and those closings were handled in substantially the same manner as described above. ODC has no information that anyone involved in these closings suffered any harm as a result of respondent's conduct.

[1] Respondent does not know the identity of GAC.

Respondent now recognizes that participating in "witness only" closings when no other South Carolina licensed attorney is involved has the effect of assisting in the unauthorized practice of law and constitutes a failure to carry out the responsibilities of a closing attorney as provided by previous directives of this Court. Respondent further recognizes that she did not provide her client with competent representation. She agrees her actions constitute misconduct under the Rules of Professional Conduct, Rule 407, SCACR. However, she maintains that, in the future, she will make every effort not to handle matters without first making herself familiar with the applicable guidelines and law. Finally, respondent, who has no prior disciplinary history, has been forthright and cooperative with ODC throughout this investigation.

Law

Respondent admits that her conduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers). In addition, respondent admits she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for her misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kevin M. Cunningham, Respondent.

Opinion No. 26246
Submitted November 14, 2006 – Filed January 8, 2007

DISBARRED

Henry B. Richardson, Jr., Disciplinary Counsel and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Lourie A. Salley, III, of Lexington, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a sanction of an indefinite suspension or disbarment. We accept the Agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent represented the personal representative of two estates. Respondent used approximately $70,000 received and collected for the beneficiaries of the estates to pay his personal household, medical and

business expenses. Respondent hoped to use future income to repay the misappropriated funds.

Respondent also failed to comply with Rule 417, SCACR, by not maintaining separate trust and operating accounts and not reconciling his accounts. As a result, respondent failed to hold funds of clients and third persons separate from his own.

Finally, respondent failed to diligently handle the estates and failed to adequately communicate with his client regarding the estates. He also provided false information to his client regarding the estates in an attempt to conceal his misappropriation of estate funds.

Respondent self reported his misconduct to ODC and the solicitor and has been fully cooperative with ODC during the course of its investigation. Respondent also consented to being placed on interim suspension.[1]

In addition, respondent represents, by way of mitigation, but not as a defense, that he was diagnosed in December 2002 with germ cell cancer, his second bout with cancer, at the same time his wife gave birth to their second child. Respondent underwent aggressive chemotherapy. The cost of the medical bills associated with the birth of the child and respondent's treatment, along with the fact that respondent was unable to work full time during his treatment, financially devastated his family.

Law

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall hold property of clients in

[1] In the Matter of Cunningham, 368 S.C. 178, 628 S.E.2d 887 (2006).

the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(c) (it is professional misconduct for lawyer to engage in conduct involving moral turpitude); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent further admits his misconduct is grounds for discipline under the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for lawyer to violate the Rules of Professional Conduct); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice, bring the courts or legal profession into disrepute, or demonstrating an unfitness to practice law); and Rule 7(a)(6) (it shall be a ground for discipline for a lawyer to violate the oath of office). In addition, respondent admits his misconduct violated Rule 417, SCACR.

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

Disbarred.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Miles L. Green, Jr., Respondent.

Opinion No. 26247
Submitted November 15, 2006 – Filed January 8, 2007

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Miles L. Green, Jr., of Columbia, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a sanction ranging from an admonition to a six month suspension. We accept the Agreement and find a six month suspension from the practice of law, retroactive to the date respondent was placed on interim suspension,[1] is the appropriate sanction. The facts, as set forth in the Agreement, are as follows.

[1] Respondent was placed on interim suspension on April 26, 2005. In the Matter of Green, 364 S.C. 180, 612 S.E.2d 706 (2005).

Facts

On February 7, 2003, respondent was arrested in Dekalb County, Georgia and charged with driving under the influence of methamphetamine. On April 15, 2005, he pled guilty as charged and was sentenced to twelve months in prison, suspended upon service of one year of probation.

On March 8, 2005, respondent was indicted for possession of methamphetamine in April 2002. On May 4, 2006, respondent pled guilty to disorderly conduct and a suspended sentence of one year imprisonment was imposed. Respondent is required, as a condition of his suspended sentence, to attend Alcoholic's Anonymous or Narcotics Anonymous on a weekly basis.

In August or September 2003, respondent entered in-patient treatment for drug addiction. After suffering a relapse, respondent entered intensive outpatient treatment in June or July 2004.

On April 12, 2005, respondent was arrested in Pickens County, South Carolina and charged with driving under the influence of drugs and possession of methamphetamine. Respondent was referred to the pre-trial intervention program (PTI), which he has completed. He was required as part of this program to undergo an assessment by Insights Educational and Treatment Services, Inc. Respondent has taken six classes through Insights and completed fifty hours of community service as required.

Respondent has also signed a two year contract with Lawyers Helping Lawyers and has attended Narcotics Anonymous on at least a weekly basis and on a twice weekly basis since signing that contract. As an additional requirement of the contract, respondent has had at least weekly contact with a mentor and face to face contact with the mentor at least once a month. Respondent has been employed as Director of Community Relations with Fasco Threaded Products since August 2005.

Respondent has been subject to regular drug screening as part of PTI, as part of his employment with Fasco, and as a requirement of his contract with Lawyers Helping Lawyers. Respondent has passed each of the drug screens he has undergone.

Law

Respondent admits that his misconduct constitutes grounds for discipline under the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violation of the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers); Rule 7(a)(4) (commission of a crime of moral turpitude or a serious crime); and Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

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

Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for six months, retroactive to April 26, 2005, the date respondent was placed on interim suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court demonstrating that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Taylor, Cotton & Ridley, Inc., Respondent,

v.

Okatie Hotel Group, LLC; The Devcon Group, Inc., SunTrust Bank, Savannah, N. A.; Capitol Materials of Savannah, Inc., Pro Slab, Inc. f/k/a OPP, Incorporated; Genco of Simpsonville, Inc., Imperial Marble Corporation; Turner Electrical of South Carolina, Inc., Cassidy of South Carolina, Inc., Cassidy O'Sullivan & Co.; Best Plumbing, Inc. and Malphrus Construction Company, Inc., Defendants,

Of whom Okatie Hotel Group, LLC is the Appellant.

Appeal From Beaufort County
Thomas Kemmerlin, Special Referee

Opinion No. 4194
Heard November 7, 2006 – Filed January 8, 2007

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

W. Duvall Spruill, of Columbia, for Appellant.

John S. Nichols, of Columbia; Marvin H. Dukes, of Beaufort, for Respondent.

SHORT, J.: Okatie Hotel Group, LLC (Owner) appeals the trial court's failure to consider settlement payments to seven other subcontractors (Other Subcontractors) and damages to the building when determining Owner's liability to Taylor, Cotton and Ridley, Inc. (Subcontractor). Owner also appeals the trial court's disregard of a waiver made by Subcontractor, use of an interest rate greater than the statutory maximum, and award of attorneys' fees. We affirm in part, reverse in part, and remand.

FACTS

The Devcon Group, Inc. (General Contractor) served as the general contractor for Owner's development of the Marriott Fairfield Inn. General Contractor hired Subcontractor to install door frames and locks for the development at an original contract price of $91,570.00. This original contract price increased to $115,085.75, due to additional line items, a revised door frame jam, and installation of "Ving card" locks. Subcontractor finished all major work and billed General Contractor by November 23, 1999, but was called back to the job site on several occasions to perform further installations and repairs. By December 6, 1999, Subcontractor had submitted a notice of non-payment and received $20,000 toward the total contract price of $115,085.75. The last service performed by Subcontractor was on March 8, 2000, when Subcontractor returned to install and repair exterior door locks. On April 24, 2000, Subcontractor filed a mechanic's lien for the $95,085.75 which remained due under the contract.

The amended total contract between General Contractor and Owner was $2,421,656.00, and prior to Subcontractor's lien filing, Owner paid General Contractor $2,166,613.00. Other Subcontractors claimed liens totaling $146,330.00, but, following mediation in the spring of 2001, they settled for $92,385.00. All Other Subcontractors participated in this mediation, but Subcontractor did not.

Subcontractor filed suit against General Contractor and Owner to enforce Subcontractor's lien against the developed property. At trial, the court adjusted the contract price by first decreasing it to $2,417,564.00 to reflect back charges, and then by increasing it to $2,461,510.00 to include change orders. The trial court found no adjustments were necessary for liquidated damages and held General Contractor and Owner were jointly and severally liable to Subcontractor for the lien of $95,085.15 with a 1.5% interest rate beginning in December of 1999. This accrued interest brought the total judgment amount to $184,940.62. In addition to this amount, the court, through a subsequent order issued on September 22, 2005, awarded Subcontractor $31,272.19 in attorney's fees and costs. This appeal followed.

STANDARD OF REVIEW

"A proceeding for the enforcement of a statutory lien, such as a mechanic's lien, is legal in nature." Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, ___, 631 S.E.2d 252, 255 (2006) (citing Willard v. Finch, 123 S.C. 56, 116 S.E.2d 96 (1923)). In an action at law tried without a jury, the trial court's findings of fact will be upheld on appeal when the findings are reasonably supported by the evidence. Butler Contracting, 369 S.C. at ___, 631 S.E.2d at 255. The trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or clearly influenced or controlled by an error of law. Id. at ___, 631 S.E.2d at 255-56.

LAW/ANALYSIS

I. Credit for Payments to Other Subcontractors

Owner argues that sections 29-5-20, 29-5-40, and 29-5-60 of the South Carolina Code (Supp. 2005) require the trial court to credit Owner for the

settlement reached with Other Subcontractors before determining the amount owed Subcontractor. Owner paid Other Subcontractors 66.6% of their claimed lien amounts and sought to limit any amount paid to Subcontractor to this same percentage. At the time Owner settled with Other Subcontractors through mediation, Owner was aware of Subcontractor's outstanding lien. The trial court held that Subcontractor was not bound by the prorated limit in the settlement between Owner and Other Subcontractors. We agree.

Section 29-5-20(a) states:

> Every laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon, subject to existing liens of which he has actual or constructive notice, to the value of the labor or material so furnished, including the costs of the action and a reasonable attorney's fee which must be determined by the court in which the action is brought but only if the party seeking to enforce the lien prevails. If the party defending against the lien prevails, the defending party must be awarded costs of the action and a reasonable attorney's fee as determined by the court. The fee and the court costs may not exceed the amount of the lien. The lien may be enforced as herein provided.

Additionally section 29-5-40 states:

> Whenever work is done or material is furnished for the improvement of real estate upon the employment of a contractor or some other person than the owner and such laborer, mechanic, contractor or materialman shall in writing notify the owner of the furnishing of such labor or material and the amount or value thereof, the lien given by §29-5-20 shall attach upon the real estate improved as against the true owner for the amount of the work done or material furnished. <u>But in no event shall the aggregate amount of **liens** set up hereby exceed the amount due by the owner on the contract price of the improvement made</u>.

(**emphasis added**).

The main purposes of sections 29-5-20 and 29-5-40 are (1) the protection through a lien of a party, who furnished labor or material but was not a party to a contract with the owner and (2) the protection of the owner by preventing his liability on the liens from exceeding the amount owner owes on the contract price. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 629, 93 S.E.2d 855, 860 (1956).[1] Subcontractor brought this action in order to enforce his lien after providing labor to Owner.

The trial court adjusted the contract price to $2,461,510.00 based on change orders and back charges. Owner paid General Contractor $2,166,613.00, and Owner settled with Other Subcontractors for $92,385.00, which leaves a difference of $202,512.00 between the contract price and the amount paid by Owner. Subcontractor's lien is for $95,085.75. Therefore, section 29-5-40 is not violated because the difference between the contract price and amount Owner already paid is greater than Subcontractor's lien amount.

Section 29-5-60(a) (Supp. 2005) imposes a duty on Owner to settle and states: "In the event the amount due the contractor by the owner is insufficient to pay all the lienors acquiring liens as herein provided it is the duty of the owner to prorate among all just claims the amount due the contractor." When a lien attaches the subcontractor has a "just claim." Charleston Lumber Co., Inc. v. GPT, 303 S.C. 350, 353, 400 S.E.2d 508, 510 (Ct. App. 1991). Subcontractor attached a lien for $95,085.75, which gave subcontractor a just claim.

Subcontractor's just claim creates a duty on Owner under section 29-5-60. "The cardinal rule of statutory construction is that words used in a statute should be given their plain and ordinary meaning unless something in the statute requires a different interpretation." Seckinger v. Vessel Excalibur,

[1] This cited case refers to sections 45-252 and 45-254 of the South Carolina Code. These sections have since become sections 29-5-20 and 29-5-40, respectively.

326 S.C. 382, 387, 483 S.E.2d 775, 777 (Ct. App. 1997). A plain reading of section 29-5-60 requires an owner to prorate just claims when they exceed the amount due under the contract, but does not create a duty for the subcontractor to accept the prorated settlement.

The Mechanic's Lien statute (Section 29-5-60) does not credit owners who settle claims of non-perfected lien holders. Charleston Lumber, 303 S.C. at 353, 400 S.E.2d at 510. In the same regard, the Mechanic's Lien statute does not contain a provision requiring Subcontractor to settle or be forced to receive a prorated judgment as long as the aggregate amount of the liens do not exceed the amount due by the owner on the contract price. See §§ 29-5-20, 29-5-40, and 29-5-60. Therefore, a trial court need only consider whether a prior settlement agreement decreases the owner's contract liability to an amount smaller than the litigated lien. In this case, the settlement with Other Subcontractors did not decrease the remaining liability to a sum smaller than Subcontractor's lien. Accordingly, the trial court properly determined that Subcontractor's lien was enforceable and did not violate South Carolina law.

II. Consideration of Property Damages

Owner argues the trial court should have considered damage to the developed building when it determined the adjusted contract price which was used to calculate Owner's remaining liability to the General Contractor and, ultimately, to Subcontractor.[2] We disagree.

In a claim to enforce a mechanic's lien, the trial court's findings are not to be disturbed unless the findings are wholly unsupported by evidence. Butler Contracting, 369 S.C. at ___, 631 S.E.2d at 255-56. In this case, the trial court adjusted the contract price based on back charges and change orders. The damages Owner feels the trial court should have considered concern the alleged improper installation of insulation resulting in $651,551.00 in mold damage to the building. Owner sought to have this amount deducted from the adjusted contract price prior to determining its liability to Subcontractor. The trial court excluded evidence regarding mold

[2] As per § 29-5-40, Subcontractor could not claim a lien for an amount in excess of the amount still owed to the General Contractor under the contract.

damage as inapplicable to this litigation holding "after discovered negligence may not be asserted by way of off-set because it has not pled." Because the damage was not discovered until after Owner's pleading was submitted, the pleading obviously did not contain any reference to the damage. Moreover, evidence exists in the record that General Contractor may not have caused the mold problem. Owner's own witness testified that he inspected the insulation after its installation and found no problems, and he further testified that he had no evidence that General Contractor was responsible for the faulty insulation. The evidence in the record supports the trial court's finding that mold damage was inapplicable to this matter. Therefore, the trial court's ruling on liquidated damages is affirmed.

III. Waiver

Owner argues the trial court did not pay sufficient deference to Subcontractor's pay applications, which included a waiver and release of lien clause. We disagree.

"When a contract is unambiguous a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense." S.C. Farm Bureau Mutual Ins. Co. v. Oates, 356 S.C. 378, 381, 588 S.E.2d 643, 645 (Ct. App. 2003). In this case, the waiver section of the payment application is titled "WAIVER AND RELEASE OF LIEN UPON PROGRESS PAYMENT," and the waiver states Subcontractor agrees to waive and release its lien "in consideration of the progress payment." The trial court found the waiver language in the payment application conditioned the waiver upon payment taking place. It is undisputed that Subcontractor was not paid upon completion of the job. Therefore, the trial court's finding that Subcontractor's payment application included merely a conditioned waiver "to be held in trust pending payment" was supported by the evidence and shall not be disturbed. See Butler Contracting, 369 S.C. at __, 631 S.E.2d at 255-56.

IV. Interest Rate

Owner disputes the interest rate the trial court ordered Owner to pay Subcontractor because the interest rate exceeds the statutory limit, and Owner and Subcontractor did not contract for a higher interest rate. We agree.

Section 34-31-20 of the South Carolina Code (Supp. 2005) sets an interest rate for all cases in which money is found to be due. The established pre-judgment legal interest rate for ascertainable sums of money is 8.75% per annum. S.C. Code Ann. § 34-31-20(A) (Supp. 2005). The ascertained liquidated damages in this matter are $95,085.75. Despite the existence of section 34-31-20, parties are free to agree to higher interest rates within legal limits. Butler Contracting, 369 S.C. at __, 631 S.E.2d at 259. The trial court ordered Owner to pay Subcontractor 1.5% per month (18% per annum) prejudgment interest beginning in December 1999, which exceeds the 8.75% statutory annual interest rate. Evidence exists in the record that General Contractor and Subcontractor contractually agreed to a higher interest rate of 1.5% per month. However, Subcontractor and Owner did not contract for a higher interest rate. Therefore, we find Owner is not bound by General Contractor's agreement with Subcontractor. Accordingly, we remand for a determination of a pre-judgment interest rate consistent with section 34-31-20.[3]

[3] Subcontractor disputes the preservation of Owner's issue regarding the higher interest rate. In Owner's brief to the trial court, Owner disputes the use of 1.5% per month interest rate based on an agreement between General Contractor and Subcontractor. The trial court's order sets the interest rate as 1.5% per month. Therefore the issue was preserved because it was raised before and ruled upon by the trial court. See Holy Loch Distrib., Inc. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000).

V. Attorneys' Fees

Owner contends that if this Court reverses some portion of the trial court's order, then Subcontractor would not be the prevailing party and would not be entitled to attorneys' fees. We disagree.

Section 29-5-20 (A) of the South Carolina Code (Supp. 2005) provides attorneys' fees for the prevailing party in an action to enforce a lien. In an action to enforce a mechanic's lien, the prevailing party receives a favorable decision or verdict on liability. Seckinger, 326 S.C. at 388, 483 S.E.2d at 778. The award of attorneys' fees is left undisturbed absent abuse of the trial court's discretion. Patrick v. Britt, 364 S.C. 508, 514, 613 S.E.2d 541, 544 (Ct. App. 2005). Despite the remand for determination of an interest rate consistent with section 34-31-20, Subcontractor received a favorable verdict regarding liability. Therefore, as the prevailing party, Subcontractor may be properly awarded attorneys' fees.

CONCLUSION

This court finds the trial court did not err in: 1) refusing to credit Owner for payments made to Other Subcontractors, 2) refusing to consider after discovered property damage in determining the adjusted contract price, 3) finding the waiver clause in the payment application was an unsatisfied conditional waiver, and 4) awarding attorney's fees. We find the trial court erred in its determination of a pre-judgment interest rate. For the reasons stated herein, the trial court's decision is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GOOLSBY, J., and STILWELL, J., concur.