The Supreme Court of South Carolina

In the Matter of Richard Showse Myers, Jr., Petitioner

Appellate Case No. 2016-000409

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina

April 14, 2016

The Supreme Court of South Carolina

In the Matter of Matthew G. Krumtum, Petitioner

Appellate Case No. 2016-000264

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

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(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina

April 14, 2016

The Supreme Court of South Carolina

In the Matter of Amanda Schlager Wick, Petitioner

Appellate Case No. 2016-000623

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

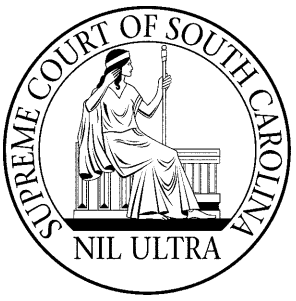
s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina

April 18, 2016



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
April 20, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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The Supreme Court of South Carolina

The State, Respondent,

v.

Donna Lynn Phillips, Petitioner.

Appellate Case No. 2015-000351

ORDER

After careful consideration of the cross-petitions for rehearing, the Court grants the State's petition for rehearing, dispenses with further briefing, and substitutes the attached opinion for the opinion previously filed in this matter. With regards to Phillips's petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, Phillips's petition for rehearing is denied.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ Jean H. Toal A.J.

Columbia, South Carolina
April 20, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Donna Lynn Phillips, Petitioner.

Appellate Case No. 2015-000351

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Pickens County
The Honorable D. Garrison Hill, Circuit Court Judge

Opinion No. 27607
Heard December 3, 2015 – Re-Filed April 20, 2016

AFFIRMED AS MODIFIED

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney General J. Benjamin Aplin, both of Columbia, for Respondent.

JUSTICE HEARN: Donna Lynn Phillips was convicted of homicide by child abuse and sentenced to twenty-five years' imprisonment in the death of her grandson (Child). The court of appeals affirmed her conviction. *State v. Phillips*, 411 S.C. 124, 767 S.E.2d 444 (Ct. App. 2014). Phillips now argues the court of appeals erred in affirming the denial of her motion for directed verdict because it considered the testimony offered by a co-defendant as well as Phillips' own testimony in its analysis. Although we agree the court of appeals erred in disregarding *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013), we ultimately find the denial of Phillips' directed verdict motion was proper and we affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

On Monday, March 17, 2008, paramedics responded to a 911 call reporting a child not breathing. Upon arriving at the house, paramedics encountered Latasha Honeycutt, Child's mother, outside on the porch. After entering the home they discovered twenty-one-month-old Child lying on the floor of his bedroom "all alone, cold, not breathing, no pulse, just laying [sic] there." Child was transported to Baptist Easley Hospital and was determined to be in an opiate-induced cardiac arrest. After resuscitation, Child was taken by helicopter to Greenville Memorial Hospital. Ultimately Child was pronounced brain dead and removed from life support; the cause of his death was documented as a hydrocodone[1] overdose.

During the course of the police investigation, it was discovered that Child had been in the care of his father, Jamie Morris, and his paternal grandmother, Phillips, the weekend preceding his death. At that time, Phillips had a prescription for Tussionex[2], which contains hydrocodone and she was eventually arrested and charged with homicide by child abuse. The State proceeded to trial against Phillips, who was tried jointly with Morris, who was charged with aiding and abetting homicide by child abuse, and Honeycutt, who was likewise charged with homicide by child abuse.

At trial, the State presented the testimony of Detective Rita Burgess of the Pickens County Sheriff's Office, who interviewed and took statements from the three defendants. Honeycutt told her Child was with Morris and Phillips from the afternoon of Friday, March 14, 2008, until the evening of Sunday, March 16, 2008. She stated that when Child arrived home around 8:00 p.m. or 9:00 p.m., he was fussy and extremely sleepy; therefore, Honeycutt immediately put him to bed. She checked on him when she woke up around 8:30 a.m. or 9:00 a.m. the following morning, but he was still sleeping. She returned at 11:00 a.m., found Child unresponsive, and awoke Brandon Roper, her boyfriend who lived with her; at that point she called 911.

Phillips spoke with Detective Burgess at Greenville Memorial Hospital and told her Child had trouble sleeping and experienced "frightmares" where he would wake up fighting and crying. Phillips further stated Child had a cough and seemed congested, so

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[1] The opiate hydrocodone is an antitussive used to treat coughs. *Physicians' Desk Reference* 3443 (64th ed. 2010).

[2] Tussionex is a prescription medication used for the relief of cough and upper respiratory symptoms. *Physicians' Desk Reference* 3443 (64th ed. 2010).

Morris gave him generic Tylenol[3] on Sunday. Detective Burgess also noted that during their conversation, Phillips made "random statements" about Lortab, and that she hoped "[Child] didn't get any of her Lortab" or "she hoped [Child] did not get her sister's Lortab.[4]"

Charlie Lark, an investigative consultant in Pickens County, also testified about his interviews with Phillips and Morris. He noted that Morris informed him Phillips had a prescription for cough medication, but Morris stated he never saw Phillips medicate Child over the course of the weekend. Morris further explained Phillips kept her Tussionex in a wire-mesh pumpkin at the top of her closet. Although Phillips retrieved the medication on two occasions in Child's presence, Morris did not see Child ingest any of Phillips' medication; however, he did note that Child played with the Tussionex bottle while Phillips had it out of the pumpkin. Additionally, Lark stated Phillips informed him Child played with her "medicine bottles," but the tops were on them so she did not believe he could have ingested anything. She further stated although she was concerned she may have dropped a bottle on the floor and Child picked it up, she never witnessed him consume any medication.

Two witnesses testified as to the results from the tests performed on Child's blood and urine samples. The supervisor of the chemistry department at Baptist Easley Hospital testified about the drug screen performed on Child's urine and noted the results indicated the presence of hydromorphone, which is a metabolite of the opiate hydrocodone. Robert Foery, a forensic toxicologist, testified as to tests performed on the urine and blood taken from Child. Foery stated the tests revealed chlorpheniramine[5] and hydrocodone in the blood, as well as hydrocodone, hydromorphone, and chlorpheniramine in the urine. Foery stated hydrocodone and chlorphenaramine are both found in Tussionex. He further testified that the concentration of hydrocodone in Child's blood was 102 nanograms per milliliter and that the therapeutic range for an adult is 10 to 40 nanograms per milliliter. Foery could not opine on the dosage that was likely administered to Child, but stated he believed this could have been a repetitive dosing. Additionally, he testified the first dose would have been given some twenty-four to thirty-six hours prior to the blood being drawn at 12:30 p.m. on Monday, March

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[3] Tylenol contains acetaminophen, which is used for the treatment of minor aches and pains, nasal congestion, headaches, and temporarily reduces fever. *Physicians' Desk Reference* 1950 (59th ed. 2005).

[4] Lortab, a combination of acetaminophen and hydrocodone, is a prescription medication for the relief of moderate to moderately severe pain. *Physicians' Desk Reference* 3240 (59th ed. 2005).

[5] Chlorpheniramine is an antihistamine. *Physicians' Desk Reference* 3443 (64th ed. 2010).

17, 2008. On cross-examination, Foery also stated that Lortab contained acetaminophen in addition to hydrocodone, and because there was no acetaminophen found in the samples, he did not believe Child ingested Lortab.

The State also presented testimony from a chemistry expert who analyzed the Tussionex bottle retrieved from Phillips' home and who opined it contained both chlorpheniramine and hydrocodone. The coroner also testified, stating he concluded Child's death was a homicide caused by an overdose of hydrocodone. Without objection, he also noted that the hydrocodone "came from the grandmother's home . . . in the form of Tussionex." He determined Tussionex caused the death because of the presence of chloropheniramine and hydrocodone in Child's bloodstream.

At the close of the State's evidence, Phillips moved for directed verdict arguing there was no evidence presented "she gave any drugs to anybody" nor was evidence presented from which a jury could conclude she did so with extreme indifference to human life. The trial court denied the motion.

Each defendant presented a defense. Phillips testified she did not give Child any medication, stating "I was not raised that way. I would not give a child any kind of medicine that was not prescribed for them. I would never give a child anything under the age of two years old." She further stated there was no way for Child to have gotten into the pumpkin without her knowledge because it was on the top shelf out of his reach and because they never left him alone.

Honeycutt called Kayla Roper, her boyfriend's sister, in her defense, who testified as to the events of Monday, March 17, 2008. She specifically described how at Baptist Easley Hospital she was near Phillips and Morris and overheard Phillips indicate that she gave Child some cough medicine over the weekend, stating "surely to God that's not what is wrong."

At the close of the evidence, Phillips again moved for directed verdict, which was denied. The jury ultimately convicted Phillips and she was sentenced to twenty-five years' imprisonment.[6]

Phillips appealed, arguing the State failed to present substantial circumstantial evidence that she acted with extreme indifference. Prior to oral argument at the court of

[6] Honeycutt was acquitted. Morris was found guilty of aiding and abetting homicide by child abuse and sentenced to twelve years' imprisonment, suspended to eight years. His convictions were affirmed on appeal and he did not petition this Court for certiorari. *State v. Morris*, Op. No. 2014-UP-112 (S.C. Ct. App. filed Mar. 12, 2014).

appeals, but subsequent to the filing of her initial brief, this Court decided *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013), which adopted the waiver rule, but noted an exception to when testimony is offered by co-defendants.[7] *Id.* at 436, 752 S.E.2d at 412. Phillips' appellate counsel submitted a letter to the court listing *Hepburn* as a supplemental citation, but did not specify the proposition for which it was being cited. During oral argument, the court of appeals focused on Kayla Roper's testimony and the fact it provided direct not circumstantial evidence, ignoring that under *Hepburn*, her testimony could not be considered in reviewing the denial of directed verdict.

Ultimately, the court of appeals affirmed her conviction. Specifically, the court found Kayla Roper's testimony provided direct evidence of child abuse therefore, relying on Phillips' testimony that she would never give medicine to Child coupled with the medical evidence of the extreme levels of hydrocodone within Child's blood, there was direct and circumstantial evidence presented of extreme indifference sufficient to withstand Phillips' directed verdict motion. *Phillips*, 411 S.C. at 134–36, 767 S.E.2d at 448–50. Phillips filed a petition for rehearing, arguing the court of appeals erred in failing to apply the waiver rule enunciated in *Hepburn* and in considering Phillips' testimony as well as evidence presented by Honeycutt. The court of appeals denied the petition. This Court granted certiorari.

ISSUE PRESENTED

Did the court of appeals err in affirming the denial of Phillips' directed verdict motion?

LAW/ ANALYSIS

Phillips argues the court of appeals failed to apply applicable precedent and therefore erred in its affirmance of the trial court's denial of her directed verdict motion. Although we agree the court of appeals should have applied *Hepburn*, we nevertheless hold sufficient evidence was presented to withstand Phillips' motion for directed verdict. We therefore affirm the court of appeals as modified, writing only to reiterate an appellate court's proper framework in analyzing the denial of directed verdict in cases where *Hepburn* is implicated.

In reviewing a motion for directed verdict, the trial court is concerned with the existence of evidence, not with its weight. *State v. Curtis*, 356 S.C. 622, 633 591 S.E.2d

[7] Under the waiver rule, a defendant who presents evidence in his own defense waives the right to have the court review the denial of directed verdict based solely on the evidence presented in the State's case-in-chief. *Hepburn*, 406 S.C. at 431, 753 S.E.2d at 410.

600, 605 (2004). When the evidence presented merely raises a suspicion of the accused's guilt, the trial court should not refuse to grant the directed verdict motion. *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). However, the trial court must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

As we recently stated in *State v. Bennett*, "the lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." Op. No. 27600 (S.C. Sup. Ct. filed January 6, 2016) (Shearouse Adv. Sh. No. 1 at 19). The jury's focus is on determining whether every circumstance relied on by the State is proven beyond a reasonable doubt, and that all of the circumstances be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955). The trial court must view the evidence in the light most favorable to the State when ruling on a motion for directed verdict, and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *Id.* at 329, 89 S.E.2d at 926. As we noted in *Bennett*, while "the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." *Bennett*, Op. No. 27600 (S.C. Sup. Ct. filed January 6, 2016) (Shearouse Adv. Sh. No. 1 at 19).

In *Hepburn*, the appellant argued that in reviewing the propriety of the trial court's denial of her mid-trial motion for directed verdict, the appellate court should only review the evidence presented by the State in its case-in-chief. The State sought to augment the evidence presented in its case-in-chief with evidence offered by a co-defendant and with evidence offered by appellant in opposition to the co-defendant's evidence. Accordingly, the appellant requested we overrule the decision in *State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996), wherein the court of appeals held that when a defendant presents evidence in his own defense, he waives the right to limit the appellate court's consideration of the denial of his motion for directed verdict to only the evidence presented in the State's case-in-chief. Declining the appellant's invitation, we expressly adopted the reasoning in *Harry* and the waiver rule propounded therein.

Consistent with the approach taken in other states, we also acknowledged in *Hepburn* the inapplicability of the waiver rule to evidence offered by a co-defendant. Thus, we held that although we adopted the waiver rule, because the co-defendant's testimony implicated appellant, and because appellant's testimony merely rebutted the

testimony of the co-defendant, neither testimony could be considered in assessing the propriety of the trial court's denial of appellant's directed verdict motion.

The State contends Phillips has not preserved her *Hepburn* argument because this precise point—that the testimony offered by a co-defendant should not be considered in reviewing a motion for directed verdict—was never squarely presented to the court of appeals. We acknowledge Phillips never specifically argued until her petition for rehearing that the review of her motion should be limited to the evidence presented in the State's case; however, this does not preclude her from arguing this now, nor, more fundamentally, can it prevent this Court from applying the proper standard of review. Phillips has consistently argued the denial of her motion for directed verdict was in error. Requesting that the Court consider *Hepburn* in its analysis is not a distinct argument, but merely adds nuance to the inquiry engaged in by the appellate court. Further, it is incumbent upon the court of appeals to apply this Court's precedent. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Simply because a party does not expressly articulate the relevance of a particular case does not excuse the court of appeals from failing to apply controlling precedent. While it may have been preferable for Phillips to make this argument during oral argument, the court of appeals should not have overlooked recent case law—especially where it was expressly cited. Moreover, the court of appeals had the opportunity to correct its error on rehearing but declined to do so. We therefore reject the State's argument that Phillips' reliance on *Hepburn* is not preserved.

Turning first to Phillips' contention that her own testimony should be excluded, we disagree and find it falls squarely within our articulation of the waiver rule in *Hepburn.* In support of her argument, Phillips asserts her testimony was a preemptive response to Honeycutt's defense. Temporally, her defense preceded Honeycutt's; we do not find her testimony can be considered responsive to Honeycutt. Accordingly, under *Hepburn*, Phillips waived her right to have this Court review the sufficiency of the State's case based solely on its case-in-chief when she chose to testify in her own defense.

However, we find it was improper for the court of appeals to consider the testimony of Kayla Roper in reviewing the denial of the directed verdict motion. The State argues *Hepburn*'s exception to the waiver rule is limited to the testimony of a co-defendant and does not extend to other witnesses called by a co-defendant. Specifically, it contends that unlike calling a defendant, the State could have called Kayla Roper in reply and presented precisely the same testimony. We disagree. Although in the discussion of the waiver rule the Court noted the unfairness of allowing the State to use

to its advantage evidence it could not otherwise elicit—testimony of a co-defendant—it also clearly stated that "[t]he rationale behind the co-defendant exception pertains to control." *Id.* at 435, 753 S.E.2d at 412. It further explained,

> Requiring the defendant to accept the consequences of his decision to challenge directly the government's case affirms the adversary process. But the decision of a co[-]defendant to testify *and produce witnesses* is not subject to the defendant's control like testimony the defendant elects to produce in his own defensive case, nor is such testimony within the government's power to command in a joint trial.

Hepburn, 406 S.C. at 435, 753 S.E.2d at 412 (quoting *United States v. Belt*, 574 F.2d 1234, 1237 (5th. Cir. 1978) (emphasis added)). Thus, in *Hepburn* we grounded our holding in the notion that the defendant has no control over the testimony of a co-defendant *or his witnesses*, and it would therefore be unfair to allow the State to use that evidence to support its case. Nor do we accept the State's misplaced argument that it could have called Kayla Roper in reply; it did not and it cannot now rewrite history and rely on that testimony simply because it *could* have called her as a witness. Accordingly, we do not consider Kayla Roper's testimony presented by Honeycutt in reviewing Phillips' directed verdict motion, and it was error for the court of appeals to have done so. Today we clarify our holding in *Hepburn* that the waiver rule is inapplicable not only to testimony of a co-defendant but also to testimony *offered* by a co-defendant, as in this case, Kayla Roper's testimony.

However, considering the evidence presented in the State's case-in-chief and in Phillips' defense, we hold the trial court properly denied her motion for directed verdict. Section 16-3-85 of the South Carolina Code (2003) provides "A person is guilty of homicide by child abuse if the person . . . causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life . . . ." "[I]ndifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care." *State v. Jarrell*, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). For purposes of this statute, "extreme indifference" has been characterized as "a mental state akin to intent characterized by a deliberate act culminating in death." *McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting *Jarrell*, 350 S.C. at 98, 564 S.E.2d at 367).

We find there is direct and circumstantial evidence that, when construed in the light most favorable to the State, could allow the jury to conclude Phillips acted with extreme indifference in administering the medication that caused Child's death. The

testimony indicates the administration of multiple doses of Tussionex and a concentration of at least two-and-a-half times the therapeutic amount of the drug in Child's blood. It is common knowledge that giving another person, particularly a toddler, drugs not prescribed to him is inherently dangerous. Importantly, Phillips herself testified she would never give Child medication not prescribed to him and nor would she give any medication to a child under the age of two. There is no question that Child was in the care and custody of Phillips and her son at the time of the lethal dose; Phillips herself testified he was never alone during the weekend. Accordingly, the evidence was sufficient to allow a reasonable juror to conclude Phillips acted with extreme indifference to human life in administering the Tussionex.

CONCLUSION

We affirm as modified the court of appeals' opinion, holding that under *Hepburn*, Phillips' testimony, but not Kayla Roper's, can be considered in the Court's review of the denial of directed verdict. Because there was sufficient evidence under that standard to withstand Phillips' directed verdict motion, we affirm her conviction and sentence.

PLEICONES, C.J., BEATTY, KITTREDGE, JJ., and Acting Justice Jean H. Toal, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Gene Stockholm, Respondent.

Appellate Case No. 2016-000453

Opinion No. 27624
Submitted April 5, 2016 – Filed April 20, 2016

DISBARRED

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

Frank Anthony Barton, 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 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to a definite suspension of nine months to three years, or disbarment, with conditions. 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

Matter A

Respondent filed a summons and complaint on behalf of Client A. Thereafter, he performed no work on the case and did not enter into settlement negotiations.

After about a year, the case came up on the docket, at which time respondent realized he never served the defendant with the summons and complaint, and the statute of limitations had expired. Respondent filed a motion to dismiss the case pursuant to Rule 40(j), SCRCP, which was granted. Respondent told Client A the case had settled for $60,000. Respondent hoped to receive money in another case and give his earnings from that case to Client A.

Respondent's law partner met with Client A and explained he carried malpractice insurance. He also explained there was still time to file an action on behalf of Client A's daughter arising out of the same accident before the statute of limitations expired. However, Client A took her client file and hired other counsel. Respondent self-reported this matter to ODC. Respondent's law partner also reported the misconduct. Respondent's law partner subsequently discovered there were two other cases in which respondent had misled clients and allowed the statute of limitations to expire, and notified ODC of this discovery.

Matter B

Respondent filed a summons and complaint on behalf of Client B and forwarded it for service, but never received an affidavit confirming service on the defendant. Respondent learned the process server was very ill and could not sign an affidavit of service. However, respondent did not attempt to re-serve the defendant and the statute of limitations expired. Respondent later fabricated a disbursement statement that indicated the total recovery from the defendant was $10,750. Of that amount, $3,250 was indicated to be for attorney's fees, $1,000 for medical costs, and $6,500 for Client B. Respondent went so far as to write a check to Client B for $6,500; however, the check was never cashed. Respondent anticipated receiving funds from another case and using his fee in that case to pay Client B.

Respondent's law partner met with Client B, who agreed to accept $3,000 from the firm. In exchange for that amount and negotiation of her medical bills, Client B signed a release of all claims arising from any case handled by the firm. Respondent's law partner paid Client B $3,000 out of firm funds.

Matter C

Respondent filed a summons and complaint on behalf of Client C and began the discovery process. However, due to difficulty locating a witness and the need for more time to conduct depositions, opposing counsel requested the case be dismissed pursuant to Rule 40(j) in order to continue discovery. Respondent agreed and the case was stricken from the docket with the intent of restoring the case once the witness was located and depositions were completed. Respondent made some attempts to find the missing witness, but missed the one year deadline for restoring the case to the docket. Respondent's law partner later paid Client C $1,000 and Client C signed a release discharging any claims arising from the firm's representation of him.

Matter D

Respondent filed a lawsuit on behalf of Client D, but then requested the case be stricken from the docket pursuant to Rule 40(j). The one year time limit to restore the case to the docket expired without respondent filing a motion to restore. Respondent asserted he either calendared the deadline incorrectly or not at all. Respondent paid Client D $12,500 from his own earnings to compensate Client D for the missed deadline. In addition, Client D accepted $3,000 from respondent's firm in exchange for a release of all claims arising from the firm's representation of Client D.

Matter E

Respondent was hired by Client E to bring a wrongful death action on behalf of Client E and her husband against the South Carolina Department of Social Services (DSS) based on the death of Client E's infant son in an in-home daycare. Respondent informed Client E he had handled similar cases in the past and therefore knew how to handle Client E's case. Respondent informed Client E the most that could be recovered in the case was $300,000 and respondent's fee was thirty percent of the amount recovered. Respondent showed Client E the complaint and noted the case could take a while because the defendant was a government agency.

Respondent informed Client E of two court dates, but on both occasions, told Client E her presence was not necessary. Respondent later informed Client E that the judge determined there was merit to the case and they should proceed with settlement

negotiations. At one point, respondent informed Client E that DSS was offering to settle for $10,000. However, respondent also informed Client E that DSS often makes low offers to see if they can get desperate families to settle quickly, so Client E declined the purported offer and instructed respondent to ask for the maximum. Respondent later informed Client E that DSS offered $40,000, but Client E instructed respondent to request $150,000. However, thereafter, respondent told Client E that it was time to appear before a judge and the judge would most likely dismiss the case. Client E asked respondent to see if he could get DSS to settle for $60,000, but if he could not, Client E would settle for $40,000. Respondent told Client E that $40,000 was DSS's final offer, which Client E agreed to accept.

Client E came to respondent's office to sign a release, at which time respondent told Client E not to speak to anyone about the settlement. He also informed Client E he would only take $10,000, instead of thirty percent, as his fee and the check would take a few weeks to arrive. Client E called several times to inquire about the money and respondent led Client E to believe it was forthcoming. However, respondent subsequently left Client E a voicemail stating he would not be continuing with the case and was leaving the practice of law. Client E called respondent's office and was connected to respondent's law partner, who informed Client E there was no settlement check. He further informed Client E the release she had signed was fabricated and that respondent never served DSS with a complaint. He apologized to Client E and advised her to retain a malpractice attorney with whom he would fully cooperate.

Once again, respondent claimed he thought the summons and complaint had been served, and that by the time he discovered the documents had not been served, the statute of limitations had run. As a result, respondent informed Client E the case had been settled when it had not. Respondent stated he intended to pay the settlement out of his own money, but was unable to do so.

Respondent also advised Client E to proceed with probate of her son's estate, which she did. The probate court wrote respondent on numerous occasions requesting information about the status of the litigation against DSS, but respondent never responded to the requests.

LAW

Respondent admits that by his conduct he has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall promptly inform a client of any decision or circumstance with respect to which the client's informed consent is required, and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; and promptly comply with reasonable requests for information); Rule 1.5 (requiring that fees be reasonable and be communicated to the client in a certain manner, and setting forth the circumstances under which a contingent fee may be charged); Rule 3.2 (a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); 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 conduct constitutes grounds for discipline under Rule 7(a)(1), (5), and (6) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state.

Respondent shall, within thirty days of the date of this opinion, pay the costs incurred by ODC and the Commission on Lawyer Conduct in the investigation and prosecution of this matter. If respondent seeks to be readmitted to the practice of law in the future, he must, within the year prior to filing a petition for readmission, complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School. If readmitted, respondent shall, within thirty days of readmission, hire a law office management advisor who has been approved by the Commission on Lawyer Conduct; meet with the advisor within thirty days of hiring and assist the advisor in conducting a thorough review of respondent's office management practices, including, but not limited to, staff

supervision, processing of legal matters, law office accounting, and communications with clients, opposing counsel and the courts, if applicable; and for a period of two years, meet with the advisor once every three months. Failure to comply with any of these conditions or with the advisor's recommendations will constitute grounds for discipline under Rule 7(a)(3), RLDE.

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.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert Ryan Breckenridge, Respondent.

Appellate Case No. 2015-000181

Opinion No. 27625
Heard June 2, 2015 – Filed April 20, 2016

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Robert Ryan Breckenridge, of Greenville, *pro se*.

ACTING JUSTICE TOAL: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) filed formal charges against Respondent, alleging that in a residential real estate transaction, Respondent failed to: properly supervise the disbursement of funds; maintain proper records; disclose to his clients the actual disbursement of their loan proceeds, including his sharing of legal fees with non-lawyer third parties; and ensure that the representations in the HUD-1 settlement statement (HUD-1 statement) matched the actual disbursements of loan proceeds. Following a hearing, the Hearing Panel of the Commission on Lawyer Conduct (the Panel) found that Respondent committed misconduct by violating Rules 1.5(b), 5.3, and 5.4 of the Rules of Professional Conduct (RPC), Rule 407, SCACR, and Rule 417, SCACR. The Panel recommended the following sanctions: public reprimand; assessment of the costs of the proceedings; and completion of the Legal Ethics and Practice Programs (LEAPP) Ethics School and Trust Account School. We agree with the Panel's recommendation, and impose the

recommended sanctions. Additionally, for the benefit of the Bar, we take this opportunity to address an attorney's duty in supervising disbursements of loan proceeds in residential real estate transactions.

FACTS/PROCEDURAL BACKGROUND

Background

At the time of the hearing before the Panel, Respondent's practice consisted of conducting residential real estate closings. According to Respondent, he worked as an independent contractor for Carolina Attorney Network, a management service located in Lexington and owned by a non-lawyer. Carolina Attorney Network provides its services to title companies, and coordinates the residential real estate closing process by contracting with attorneys who act as closing agents. Respondent testified that over 99.9% of his business comes from Carolina Attorney Network.

Vantage Point Title, Inc. is a non-lawyer-owned title company doing business out of Florida. According to Respondent, Vantage Point Title produces title insurance policies, disburses funds, and prepares the title commitments for closings. While the lender prepares loan documents, Vantage Point Title prepares the HUD-1 statement.

Vantage Point Title refers closings and sends closing packages to Carolina Attorney Network, which in turn, assigns closings to its contract attorneys, including Respondent.[1] Carolina Attorney Network then sends the assigned attorney the documents via e-mail prior to the closing. When Respondent is assigned a closing, he testified that he reviews the title opinion, the closing instructions, and the HUD-1 statement. Respondent does not, however, review the title commitment or verify the loan payoff amount. After Respondent conducts the closing, he returns the closing package containing the executed loan documents to Vantage Point Title, along with an authorization to disburse the funds.

[1] Respondent had no direct contact with Vantage Point Title. If Respondent had a problem with any loan documents, he contacted someone at Carolina Attorney Network, who in turn, contacted Vantage Point Title.

Upon receipt of the executed loan documents, Vantage Point Title disburses the funds, files the satisfaction of the executed mortgage, files the new mortgage, and issues the title policy. Vantage Point Title then sends Respondent a disbursement log showing how the closing funds were disbursed.

Respondent testified that he reviewed disbursement logs to ensure that they were "zeroed out"—or in other words, that there was no balance or no negative number after the transaction is complete. According to Respondent, as long as he saw a "zero balance," he "assumed" that everything had "been done correctly." He stated that even without verification that a deposit was made, or that checks actually cleared, he considered the disbursement log a "verification that [Vantage Point Title did] everything [it is] supposed to do . . . ."

Furthermore, Respondent testified that he had no first-hand knowledge of Vantage Point Title's disbursement process except for what was reflected on the disbursement logs he received, and that he had no signatory authority on any of the lender or Vantage Point Title's accounts. Vantage Point Title deposits closing funds into an account at Wells Fargo Bank, which includes closing funds for borrowers in all states. Therefore, Vantage Point Title does not place closing funds in an attorney trust account.

Finally, Respondent or an employee of Carolina Attorney Network verifies that the new mortgage has been recorded. Vantage Point Title pays Carolina Attorney Network $250 for the closing. Carolina Attorney Network then pays Respondent $150.

The Francis Closing

In June 2012, Respondent conducted a residential real estate closing for John and Dorothea Francis, who were refinancing their home mortgage. The Francises' lender contracted with Vantage Point Title, who referred their closing to Carolina Attorney Network. Carolina Attorney Network assigned the closing to Respondent.

When asked whether he had any recollection of the Francis closing, Respondent testified that he did not because he had conducted at least 5,000 transactions in the past five years. He explained further that while he could not remember the specifics of the Francis closing, he could "tell you how pretty much

every single one of my transactions occurs" because it is "a pretty repetitive process." Respondent then explained the closing process as follows.

Prior to the closing, Respondent received the title search results for the Francises' closing and verified that a South Carolina attorney completed the title opinion. Respondent also acknowledged that the HUD-1 statement "looked like it should have looked." Further, Respondent testified that he would have obtained the Francises' signatures on a dual representation disclosure form. However, Respondent neither disclosed to the Francises that he was splitting the attorney's fee with Carolina Attorney Network, nor did he disclose to them the details of the disbursement.

After Respondent returned the closing documents for the Francis closing to Vantage Point Title, he received and reviewed the disbursement log. Specifically, Respondent reviewed the disbursement log to ensure it showed a zero balance. However, despite the fact that the disbursement log showed a zero balance, the receipts and disbursements did not actually "zero out." The disbursement log showed a credit of $104,907 and total debits of only $801.30, leaving what should have been calculated as a balance of $104,105.30. As it turns out, the loan had been "net funded,"[2] and the lender did not disburse $104,907 to Vantage Point Title to pay off the original mortgage. Therefore, in the Francis closing, the disbursement log was not accurate.

At the time of the closing, however, Respondent did not know the loan had been net funded. In fact, Respondent admitted that at the time of the closing, he did not know exactly how much money was going to be disbursed or to whom, because he was unaware that the lender was net funding the transaction.

[2] The fact that the transaction was net funded means that because the same lender held both the original mortgage and the refinancing, the lender transferred the funds "in-house" to pay off the original mortgage rather than wiring the money elsewhere at the time of the refinancing.

Therefore, the lender paid Vantage Point Title $801.30[3] to fund the closing, $250 of which was attorney's fees paid to Carolina Attorney Network (who then paid Respondent $150).[4] In other words, the $801.30 amount is considered the "wire-in" money, because it was the only amount that the lender actually paid to Vantage Point Title in this case.

Respondent acknowledged that he did not verify that any checks involved in this closing cleared the bank. Indeed, two checks which caused insufficient funds in Vantage Point Title's trust account[5] involved with the Francis closing spurred the ODC investigation into Respondent's participation in the closing.[6]

An investigative panel authorized formal charges against Respondent following an investigation by ODC in connection with the Francis closing. ODC filed formal charges against Respondent on October 31, 2013, alleging that Respondent failed to supervise the disbursement of funds in the Francises' residential real estate transaction and failed to maintain proper records of Vantage Point Title's account—into which Respondent's clients' closing funds were deposited. Respondent filed an Answer, denying the charges against him.

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[3] As indicated by the HUD-1 statement, the $801.30 amount is the sum of $785.30 "total title charges" and a $16 recording fee.

[4] The HUD-1 statement does not specify the payment of attorney's fees. Instead, attorney's fees are included in the $785.30 amount listed on the HUD-1 statement for "title services and lender's title insurance." Therefore, the HUD-1 statement neither indicates that $250.00 of that amount was for attorney's fees, nor that Carolina Attorney Network received a payment.

[5] Although Vantage Point Title maintains a national trust account for all fifty states, at some point, Vantage Point Title—for an unknown reason—opened a South Carolina Interest on Lawyers Trust Accounts (IOLTA) account. Vantage Point Title then wrote two checks from this South Carolina IOLTA account in connection with the Francis closing.

[6] Ultimately, all checks cleared, however, and the Francises sustained no harm as a result of the overdrafted account.

Panel Hearing and Report and Recommendation

A hearing convened before the Panel on August 26, 2014. Respondent appeared pro se and testified at the hearing, along with Mrs. Francis and Diane Temple, the owner of Carolina Attorney Network. In his closing comments to the Panel, Respondent admitted that he may have been "negligent" in reviewing the disbursement log, but that he did not fail to conform to his duties as set forth in the RPC. Finally, Respondent contended that despite his admitted mistake, he was not required to maintain his own trust account for the funds in residential real estate transactions to pass through,[7] and thus, was not required to maintain records under Rule 417, SCACR.

ODC contended that under the case controlling Respondent's misconduct, *Doe v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006),[8] Respondent's act of simply reviewing the disbursement log was not sufficient to fulfill his responsibility to ensure that the funds were properly deposited and disbursed. While ODC agreed with Respondent's assertion that he was not required to maintain his own trust account, ODC stated that attorneys must maintain certain records regardless of the existence of a trust account. Further, ODC discussed Respondent's failure to explain the scope of his representation to the Francises, and argued that the evidence supported a finding that Respondent improperly shared a fee with a non-lawyer based on the way the funds were disbursed through Carolina Attorney Network.

Subsequently, the Panel issued a Report and Recommendation (the Panel Report). The Panel found that the evidence presented at the hearing raised four instances of misconduct in connection with Respondent's handling of the Francis closing: (1) Respondent failed to ensure that his clients' loan proceeds were

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[7] *See Doe v. Richardson*, 371 S.C. 14, 18, 636 S.E.2d 366, 868 (2006) (providing that the Court does not require the funds disbursed in a residential real estate closing to pass through the supervising attorney's trust account).

[8] In that case, this Court held that disbursement of loan proceeds for a residential real estate refinancing is an integral step in the closing of such a transaction, constitutes the practice of law, and thus, disbursement must be conducted under the supervision of an attorney. *See* 371 S.C. at 18, 636 S.E.2d at 868. The Court stated that it chose not to specify the form that supervision must take, and did not require that the funds pass through the supervising attorney's trust account. *Id.*

properly disbursed; (2) Respondent failed to disclose to his clients the actual disbursement of their loan proceeds, including his sharing of legal fees with non-lawyer third parties; (3) Respondent failed to ensure that the representations in the HUD-1 statement matched the actual disbursements of loan proceeds; and (4) Respondent did not maintain accurate financial records related to the Francis closing.

The Panel found clear and convincing evidence that Respondent engaged in professional misconduct in violation of Rules 1.5(b) (Disclosure of the Scope of Representation and Fees), 5.3 (Responsibilities Regarding Non-lawyer Assistants), and 5.4 (Professional Independence of a Lawyer, which prohibits sharing fees with non-lawyers) RPC, Rule 407, SCACR; that Respondent was not in compliance with the recordkeeping requirements of Rule 417, SCACR; and that Respondent failed to ensure that the representations in the HUD-1 statement—specifically, the attorney's fees—actually matched the disbursement of loan proceeds.

The Panel noted that Respondent presented no evidence in mitigation. In aggravation, the Panel considered Respondent's prior disciplinary history, which included a thirty day suspension in 2008 for failure to maintain his trust account and safeguard client property, which resulted in several reports of insufficient fund items.

The Panel recommended a public reprimand. It further recommended that the Court order Respondent to pay the costs of the proceedings and be required to complete the LEAPP Ethics School and Trust Account School.

STANDARD OF REVIEW

The sole authority to discipline attorneys and decide appropriate sanctions after a thorough review of the record rests with this Court. *In re Thompson*, 343 S.C. 1, 10–11, 539 S.E.2d 396, 401 (2000) (per curiam). In such matters, this Court may draw its own conclusions and make its own findings of fact. *Id.*; Rule 27(e)(2), RLDE, Rule 413, SCACR (We "may accept, reject or modify in whole or in part the findings, conclusions and recommendations of the [Panel]."). Nevertheless, the findings and conclusions of the Panel are entitled much respect and consideration. *Thompson*, 343 S.C. at 11, 53 S.E.2d at 401. Moreover, "[a] disciplinary violation must be proven by clear and convincing evidence." *In re Greene*, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006) (per curiam); *see also* Rule

8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

LAW/ANALYSIS

Respondent takes exception to four specific factual findings in the Panel Report, as well as the Panel's finding of misconduct regarding Respondent's alleged failure to disclose to the Francises the limited scope of his representation or the actual disbursement of their loan proceeds. ODC takes no exceptions to the Panel Report and its recommendation.

A. Exceptions to Factual Findings

1. Mortgage Satisfaction

In its Findings of Fact section, the Panel Report states that after Respondent receives the disbursement log, "Respondent or an employee of Carolina Attorney Network then verifies that the new mortgage is properly filed by reviewing the online records of the county's Register of Deeds office. Based on this, Respondent assumes that the existing mortgage has been satisfied."

Respondent takes exception to the last sentence of this statement, arguing that Respondent did, in fact, review the county website to ensure that the mortgage satisfaction occurred. However, as ODC points out, the Panel did not find that Respondent failed to ensure that the Francises' mortgage had been satisfied, and that fact did not affect any of the Panel's findings of misconduct. Moreover, this finding of fact is based on Respondent's testimony at the Panel Hearing that he or someone from Carolina Attorney Network reviewed the online records to determine that the Francises' mortgage had been satisfied, in conformance with his routine procedure for closings.

Therefore, we find this exception is meritless.

2. Respondent's Presence at the Francis Closing

Respondent takes exception to a footnote in the Panel Report which states:

> Evidence emerged at the hearing that suggested that Respondent was not present at the closing and that he did not review or explain the closing documents to Mrs. Francis. Disciplinary Counsel did not allege misconduct in this regard in the formal charges. Because there was conflicting testimony as to these issues, the Hearing Panel does not find clear and convincing evidence to support a finding of misconduct in this regard.

Based on his exception, Respondent seems to argue that misconduct is alleged with regard to his presence at the Francis closing. However, as the footnote states, the Panel did not make any finding on this issue, and there is no indication that the Panel gave any consideration to the evidence mentioned in the footnote.

3. Settlement Statement

Next, Respondent takes exception to a finding of fact in the Panel Report, which states that the "[s]ettlement statement does not specify the payment of attorney's fees." Respondent asserts that the document attached to the settlement statement, entitled "Itemization of Fees"— which would have been signed by the Francises—"breaks down" the settlement charges.

We find that both the Panel Report and Respondent are correct: the settlement statement does not specify to whom the $250 attorney's fee will be paid or that it would be split between Respondent and Carolina Attorney Network; and the "Itemization of Fees" form does indeed list the $250 attorney's fee. Nevertheless, even if the "Itemization of Fees" form had been signed by the Francises,[9] the form still does not specify the splitting of the $250 attorney's fee. Therefore, the "Itemization of Fees" form does not impact the Panel's finding that Respondent failed to properly disclose to the Francises—and obtain approval of—the distribution of the attorney's fee or Carolina Attorney Network's involvement in the closing.

[9] The copy of the form in the record does not include the Francises' signatures.

4. South Carolina IOLTA Account

Respondent's fourth exception relates to a footnote in the Panel Report which states:

> In a submission to ODC following his written response to·the Notice of Investigation, Respondent stated that it was Vantage Point Title's "[failure] to deposit funds into the correct trust account" that caused the overdraft. Respondent repeated this theory at the hearing. According to the financial records produced by Respondent, this is not true. The wire confirmation clearly shows that the funds were received into the South Carolina account . . . on July 2, 2012. The disbursement checks, issued on June 28, 2012, were written on that same account. Review of the June 2012 bank statement for the All States Escrow account . . . reveals· no deposit of $801.30 from the date of closing (June 19) through the date of disbursement (June 28). The funds were clearly deposited into the same account from which the checks were written. The cause of the overdraft was disbursement before deposit, not deposit into the wrong account.

Respondent argues that he "was unaware of the overdraft because there was never supposed to be a [South Carolina] IOLTA account opened." Respondent further states that the "account was never supposed to be opened and there never would have been an investigation without this account having been opened."

In response, ODC asserts that the manner in which allegations of misconduct come to their attention is not relevant to whether misconduct occurred or whether an attorney should be sanctioned. We agree. At this point, it is of no consequence whether or not the South Carolina IOLTA account should have been opened, because the existence of the account does not affect Respondent's duty to supervise the disbursement of funds. Therefore, this exception is also meritless.

B. Exception to Finding of Misconduct

Respondent takes exception to the Panel's second finding of misconduct, in which the Panel found "clear and convincing evidence that Respondent failed to disclose to Mr. and Mrs. Francis the limited scope of his representation or the

actual disbursement of their loan proceeds in violation of Rule 1.5(B), RPC, Rule 407, SCACR." Specifically, Respondent challenges the finding of misconduct with regard to the failure to disclose, arguing that "it is virtually impossible to tell what Respondent disclosed because both the Respondent and client . . . do not recall the closing." Respondent contends that there is no evidence in the record regarding Respondent's conversations with the Francises at their closing, and "there is no way to justify" the Panel's finding on this issue.

Rule 1.5(b) of the RPC requires lawyers to communicate to their clients the scope of their representation, as well as the basis or rate of their fee. Rule 1.5(b), RPC, Rule 407, SCACR. We find that the Panel was correct in concluding that under this rule, "a lawyer who supervises [a residential real estate closing] process must, at a minimum, explain [the disbursement] process to the clients and ensure that they understand the lawyer's limited role in the transaction does not include receipt and disbursement of funds."

The only evidence in the record supporting Respondent's position is the dual representation disclosure, which Respondent testified that he presented to the Francises at their closing.[10] That form states that the clients "have engaged [Respondent] in connection with Carolina Attorney Network, to perform certain services regarding your real estate transaction and to oversee your transaction to ensure that it is properly performed in accordance with the laws of the State of South Carolina." The form further provides the notice of dual representation, stating that the attorney "represents both you and the lender."

However, even assuming the Francises signed this form, the form does not specify what the term "certain services" includes, nor does it go on to explain how Respondent would "oversee" the transaction. At the hearing before the Panel, Respondent first admitted that he did not inform the Francises that his legal services did not include obtaining the title opinion or exactly who was going to be handling the disbursement. Respondent then went on to testify that at closings, he routinely stated that the title company was going to be "handling the money" involved with the closing.

[10] Respondent did not provide a signed copy of the dual representation disclosure form in the record, but testified that he presented the form to the Francises for their signatures at the closing.

Nevertheless, the dispositive fact is that Respondent did not know the details of the disbursement in the Francises' transaction. Indeed, Respondent testified that he was unaware at the time of the closing that the transaction would be net funded. Therefore, Respondent could not have properly explained the transaction—or his role in it—because he was unaware of the details. Accordingly, we find there was clear and convincing evidence in the record to support the Panel's finding that Respondent failed to properly disclose the limited scope of his representation of the Francises.

C. Undisputed Findings of Misconduct

The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations. Rule 27(a), RLDE; *see In re Jardine*, 410 S.C. 369, 375, 764 S.E.2d 924, 927 (2014) (per curiam). Neither party disputes the Panel's remaining findings of misconduct, which conclude that Respondent committed misconduct by violating Rules 5.3 and 5.4, RPC, Rule 407, SCACR, and Rule 417, SCACR, and that under South Carolina law, Respondent failed to properly supervise the disbursement of funds—which constitutes the practice of law—by failing to ensure that the settlement documents properly described the disbursement of funds.

The Panel Report provides an excellent analysis of Respondent's violations of each of these rules. This case presents a situation where Respondent conducted his duty to supervise the disbursement of residential real estate proceeds in name only. In other words, Respondent "rented" his name and status as an attorney to attempt to satisfy the attorney supervision requirement. A finding that Respondent did not commit misconduct despite his very minimal role in the Francis closing would essentially eliminate the meaning and the purpose behind the requirement that an attorney supervise the disbursement of funds in a residential real estate transaction and recordkeeping requirement of Rule 417, SCACR. *See Richardson*, 371 S.C. at 18, 636 S.E.2d at 868. We provide guidance to the bar, *infra*, as to how attorneys may satisfy their duty to oversee the disbursements of funds in a real estate transaction; in this case, there is no question that Respondent's cursory review of the disbursement log did not satisfy his duty to oversee the disbursement of the Francises' funds.

Therefore, we find that in addition to violating Rule 1.5(b), as discussed, *supra*, Respondent also violated Rules 5.3 and 5.4, RPC, Rule 407, SCACR, and

Rule 417, SCACR, and that Respondent is subject to discipline pursuant to Rule 7(a)(1), RLDE, Rule 413, SCACR.

D. Duty to Supervise Disbursement of Funds

In furtherance of our concern that attorneys are being used as "rubber stamps" to satisfy the attorney supervision requirement in low cost real estate closings, we take this opportunity to expand upon *Richardson*, in which we held that the disbursement of funds in the context of a residential real estate transaction must be supervised by an attorney. *See* 371 S.C. at 18, 636 S.E.2d at 868; *see also State v. Buyers Serv. Co.*, 292 S.C. 426, 434, 357 S.E.2d 15, 19 (1987) (providing that real estate closings should be conducted only under the supervision of attorneys). While we declined, in *Richardson*, to specify the form that such supervision must take, we held that an attorney's obligation to supervise the disbursement of funds includes "overseeing" that step of the closing process. 371 S.C. at 18, 636 S.E.2d at 868.

We now clarify that an attorney's duty to oversee the disbursement of loan proceeds in a residential real estate transaction is nondelegable. To fulfill his or her duty, the attorney must ensure: (a) that he has control over the disbursement of loan proceeds; or (b) at a minimum, that he receives detailed verification that the disbursement was correct. In practice, an attorney may find that utilizing his own trust account and disbursing the funds himself provides the most effective means of fulfilling this duty. We stand by our decision in *Richardson*, however, and do not require that the funds must pass through the supervising attorney's trust account. *See id.* Therefore, we also find an attorney's verification of proper disbursement, via sufficient documentation or information received from the appropriate banking institution—in addition to the disbursement log itself—to be acceptable in fulfilling his duty to oversee the disbursement of funds.[11]

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[11] In his dissent, Chief Justice Pleicones contends that Respondent's misconduct is limited to a single closing during which he argues Respondent's only violation was his failure to explain the nature of a "net funding transaction" to mortgage refinance clients. As has been discussed above, the Panel findings detail at least five violations of the RPC, including the (1) failure to insure proper disbursal of client funds; (2) failure to disclose to clients the actual disbursements made with their loan proceeds; (3) failure to insure that the HUD I listing of disbursements matched the actual disbursements; (4) failure to maintain factual records on the

In essence, Respondent was used as a rubber stamp[12] for a non-lawyer, out-of-state organization with no office in South Carolina, whose involvement was not disclosed to Respondent's clients. This Court has insisted on lawyer-directed real estate closings in order to protect the public. Respondent's method of handling his client's business provided no real protection to his clients and no attorney record of the transaction by which to verify the details of the closing if problems developed after closing.

CONCLUSION

Based on the foregoing, we find that Respondent has committed misconduct. Respondent does not take exception to the Panel's recommended sanctions, which included a public reprimand. Because we view Respondent's misconduct in failing to supervise the disbursement of funds in the Francis closing as a gross abandonment of his supervisory authority, we issue a public reprimand.

We also agree with the Panel's remaining recommended sanctions. Within thirty days of the date of this opinion, Respondent shall pay the costs incurred by ODC and the Panel in the investigation and prosecution of this matter. We further require Respondent to attend the LEAPP Ethics School and Trust Account School within six months of the date of this opinion.

PUBLIC REPRIMAND.

KITTREDGE, J., and Acting Justice James E. Moore, concur. PLEICONES, C.J., dissenting in a separate opinion in which HEARN, J., concurs.

Francis closing; and (5) sharing of attorneys' fees with non-lawyers. These are not simply "technical violations" confined to one transaction.

[12] Respondent admitted that he followed this same way of doing business in thousands of closings.

CHIEF JUSTICE PLEICONES: I respectfully dissent. Through an error on the part of a title insurance company, the Office of Disciplinary Counsel became aware of a single closing wherein Respondent failed to explain the nature of a "net funding transaction" -- to clients who admittedly sought and obtained a home mortgage refinance from their mortgage company, and who suffered no prejudice. In my opinion, these facts do not warrant a public reprimand. Moreover, nothing in this single instance justifies the modification of our holding in *Richardson*[13] - declining to "specify the form [that attorney supervision of loan disbursements] must take . . . ." - in favor of adopting a non-delegable duty to oversee loan disbursements through "detailed verification" or through the receipt of "sufficient documentation or information" in addition to the disbursement log itself. The majority neither explains what this means nor how more oversight could have prevented the title company from issuing checks drawn on the wrong account.

For the reasons given above, I respectfully dissent and would not impose a sanction for Respondent's conduct in this matter.[14]

HEARN, J., concurs.

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[13] *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006).

[14] The majority misunderstands the thrust of my objections to its decision. Respondent's misconduct arose from a single real estate transaction in which the clients, who did not file a complaint, suffered no prejudice. The majority's sanction is justified in part by statements such as "Respondent "rented" his name and status" and that he acted "simply [as] a rubber stamp," and in part by discounting Respondent's testimony regarding his usual practices apparently because the conversation at the Francis closing is not supported by "factual records." *Compare, e.g.*, *Frasier v. State*, 351 S.C. 385, 570 S.E.2d 172 (2002) (testimony of counsel's usual practice sufficient to find it was done in this case). Further, the majority imposes new, vague requirements on residential real estate closings despite the fact that the current practice is not implicated by the facts of the Francis closing.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Timothy Eugene Moses, Respondent.

Appellate Case No. 2015-001255

Opinion No. 27626
Heard January 12, 2016 – Filed April 20, 2016

DISBARRED

Assistant Disciplinary Counsel Julie K. Martino, of Columbia, for Office of Disciplinary Counsel.

Peter D. Protopapas, of Rikard & Protopapas, L.L.C., of Columbia; Alexander M. Sanders, Jr., of Charleston; and Michael J. Virzi, of Columbia, all for Respondent.

PER CURIAM: This attorney disciplinary matter stems from allegations that Respondent Timothy Eugene Moses stole thousands of dollars from his law firm (the Firm) by improperly billing clients. Respondent, who admitted to the misconduct after the Office of Disciplinary Counsel (ODC) filed formal charges, appeared before a panel of the Commission on Lawyer Conduct (the Panel). The Panel recommended Respondent be suspended from the practice of law for one year.

Both Respondent and ODC raise exceptions to the Panel's recommendation: Respondent argues his conduct justifies only a six-month suspension, while ODC argues Respondent should be disbarred. As discussed below, we agree with ODC that Respondent's conduct merits disbarment.

I.

There is no dispute over the facts in this case.

Respondent worked for the Firm, both as a summer clerk while in law school and as an attorney following his graduation in 1994,[1] until he abruptly resigned in September 2011. The Firm became suspicious of Respondent when a client contacted the Firm and claimed to have received a bill for $500 from Respondent asking the client to pay Respondent directly, which was in contravention of the Firm's policies. Typically, clients paid the Firm, and the Firm then paid its lawyers a fixed salary, a percentage of profits, or a combination of both. When the chairman of the Firm's executive committee (the Chairman) confronted Respondent on October 5, 2011, about the billing abnormality, Respondent initially feigned ignorance. The next day, Respondent emailed the Chairman and admitted sending the bill, which he termed a "local" statement, in response to the client's request. Respondent said the fact that he may have accidentally deposited the check into his personal account "embarrassed and horrified" him, "caused [him] fits," and kept him up at night. After "discovering" that he had in fact deposited the check, Respondent immediately agreed to repay the $500, plus interest. He reiterated that he was "*extremely* embarrassed and mortified" and "[could not] believe [he] made such an egregious error and [he was] just sick about it."[2]

About a week later, Respondent met with the Firm's executive committee to discuss his actions. He claimed the two local statements he mentioned to the Chairman were the only times he had billed clients directly and was adamant that those two occurrences were isolated mistakes. The Firm's executive committee, however, remained suspicious and hired a computer forensics expert to examine Respondent's laptop to ascertain whether there were other instances of improper billing.

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[1] Respondent passed both the Georgia and South Carolina Bar Exams that year.

[2] Respondent also admitted to sending another client a local statement, in an attempt to ensure prompt payment, after discovering the client was upset with the result of the Firm's representation. Respondent said he indorsed the check sent by that client and turned it over to the Firm for deposit.

The forensic examination uncovered approximately $77,000 in improper invoices, dated from August 2009 through September 2011. The computer expert also testified there had been two attempts to "scrub," or completely erase, the computer's hard drive. The expert said those attempts were largely successful, as there was evidence of other invoices that could not be recovered.

After discovering the extent of Respondent's actions, the Chairman filed complaints against Respondent in Georgia and South Carolina.[3] After Respondent became aware he was being investigated, in March 2012, he retained counsel, finally admitted to the theft, and offered to repay the money he stole from the Firm.[4] ODC filed formal charges against Respondent on March 13, 2013, alleging violation of the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (safekeeping property); Rule 4.1 (truthfulness in statements to others); Rule 8.4(b) (criminal act that reflects adversely on lawyer's honesty); Rule 8.4(d) (conduct involving dishonesty); and Rule 8.4(e) (conduct prejudicial to the administration of justice). ODC sought sanctions against Respondent pursuant to the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violation of the Rules of Professional Conduct); Rule 7(a)(5) (conduct tending to pollute the administration of justice, bring the legal profession into disrepute, or demonstrating an unfitness to practice law); and Rule 7(a)(6) (violation of the oath of office taken to practice law).

Respondent appeared before the Panel at a hearing held on October 24, 2013. The Panel issued its report (the Report) on June 9, 2015.[5]

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[3] According to ODC, the Georgia disciplinary action is on hold pending resolution of the South Carolina disciplinary proceedings.

[4] By October 2013, Respondent had repaid the Firm $81,719.43, which covered the amount of the improper invoices, plus the cost of the computer forensics expert. Respondent said he repaid the full amount of the improper invoices even though he did not actually collect that entire amount from clients.

[5] ODC did not seek to have Respondent placed on interim suspension while awaiting this Court's decision.

II.

Because Respondent admitted his misconduct, the hearing was mainly for the purpose of considering aggravating and mitigating factors and recommending a sanction.[6]

As aggravating factors, the Panel considered (1) Respondent's dishonest and selfish motive and (2) the fact he committed multiple offenses and engaged in a pattern of misconduct over two years. As mitigating factors, the Panel considered (1) Respondent's lack of a prior disciplinary record; (2) Respondent's admission of guilt and cooperation; (3) Respondent's remorse for his conduct, which the Panel found to be genuine; and (4) Respondent's good character and reputation. The Panel considered Respondent's repayment of the stolen money as neither aggravating nor mitigating as it was not timely, being made only at the advice of counsel after disciplinary proceedings had begun.

The Panel appeared to give great weight to the testimony of Respondent's character witnesses: John Bell, an attorney licensed in Georgia and South Carolina; Bob Young, former mayor of Augusta and Assistant Deputy Secretary of the Department of Housing and Urban Development; and Dan Sisson, former chairman of Leadership Georgia and Leadership South Carolina. The witnesses testified to Respondent's competency as a lawyer, his participation in numerous civic and charitable organizations, and his outstanding reputation in the community, both personally and professionally. They testified Respondent's deceptive conduct was out of character and Respondent was extremely remorseful for engaging in it. The witnesses indicated they did not expect Respondent to engage in similar misconduct in the future and they still had the utmost trust in him.

The Panel concluded that the mitigating factors in this case were "significant" and therefore disbarment was inappropriate. The Panel recommended Respondent be suspended from the practice of law for one year, ordered to pay the costs of the disciplinary proceedings, and required to complete the Legal Ethics and Practice Program Ethics School and "a personal financial management program."

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[6] The Panel found Respondent violated all of the rules alleged by ODC: Rules 1.15, 4.1, 8.4(b), 8.4(d), and 8.4(e), RPC, Rule 407, SCACR; and Rules 7(a)(1), 7(a)(5), and 7(a)(6), RLDE, Rule 413, SCACR.

Both Respondent and ODC raise exceptions to the Report and take issue with the Report's recommendation that Respondent be suspended from the practice of law for one year. Respondent argues a shorter suspension is appropriate, while ODC argues Respondent should be disbarred.

III.

A.

"'The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court.'" *In re White*, 391 S.C. 581, 587, 707 S.E.2d 411, 414 (2011) (quoting *In re Tullis*, 375 S.C. 190, 191, 652 S.E.2d 395, 395 (2007)). This Court "may accept, reject, or modify in whole or in part the findings, conclusions[,] and recommendations of the Commission [on Lawyer Conduct]." Rule 27(e)(2), RLDE, Rule 413, SCACR. "The 'central purpose of the disciplinary process is to protect the public from unscrupulous and indifferent lawyers.'" *In re Brown*, 361 S.C. 347, 355, 605 S.E.2d 509, 513 (2004) (quoting *In re Hall*, 333 S.C. 247, 251, 509 S.E.2d 266, 268 (1998)). "The primary purpose of disbarment or suspension is the removal of an unfit person from the profession for the protection of the courts and the public, not punishment of the offending attorney." *In re Brooks*, 324 S.C. 105, 108, 477 S.E.2d 98, 99 (1996) (citing *In re Fullwood*, 322 S.C. 1, 6, 471 S.E.2d 151, 154 (1996); *In re Kennedy*, 254 S.C. 463, 465, 176 S.E.2d 125, 126 (1970)). In determining a sanction, this Court considers the punishments elicited by similar misconduct in the past. *See, e.g.*, *In re Jenkins*, 346 S.C. 617, 620–21, 552 S.E.2d 734, 736–37 (2001) (citations omitted) (reviewing sanctions previously imposed by the Court "for somewhat similar misconduct").

B.

Respondent relies heavily on the absence of client harm from his misconduct in arguing for a shorter suspension, noting he stole money from the Firm, not clients. Citing *In re Boyd*, 388 S.C. 516, 697 S.E.2d 603 (2010), *In re Sturkey*, 376 S.C. 286, 657 S.E.2d 465 (2008), and *In re McFarland*, 360 S.C. 101, 600 S.E.2d 537 (2004), Respondent argues the Panel should have considered the lack of client harm in its analysis. *See Boyd*, 388 S.C. at 517–18, 697 S.E.2d at 604 ("While recognizing the seriousness of this misconduct, the Court is aware that respondent

did not place any client funds at risk . . . ."); *Sturkey*, 376 S.C. at 293, 657 S.E.2d at 468 ("Lack of harm . . . may be considered as mitigating evidence in a disciplinary action." (citation omitted)); *McFarland*, 360 S.C. at 105, 600 S.E.2d at 539 ("We hold that the lack of prejudice to Client's case mitigates, but does not excuse, Respondent's misconduct.").

Respondent also relies heavily on the Panel's finding of significant mitigating factors. Respondent argues that cases dealing with misconduct similar to his with far fewer mitigating factors resulted in suspensions of between six and nine months. Respondent cites *Boyd*, 388 S.C. 516, 697 S.E.2d 603 (suspending for six months a lawyer who collected $2,000 from clients he billed directly, instead of through his firm), *In re Gray*, 381 S.C. 406, 673 S.E.2d 442 (2009) (suspending for nine months a lawyer who, during a one-year period, overcharged clients more than $14,000 by submitting fraudulent time entries and travel reimbursement requests), and *In re Lee*, 370 S.C. 501, 636 S.E.2d 624 (2006) (suspending for 180 days a lawyer who overbilled a client approximately $10,000 over a nine-month period) for support. Respondent argues that, for the sake of consistency, he should receive a six-month suspension.

In contrast, ODC argues that because Respondent engaged in a pattern of theft and deceptive conduct over an extended period of time, disbarment is appropriate. For support, ODC cites *In re Baldwin*, 411 S.C. 75, 767 S.E.2d 192 (2014) (disbarring a lawyer who, in addition to pleading guilty to breach of trust with fraudulent intent for failing to forward approximately $4,000 in client fee payments earned over a two-year period to his law firm, converted to his personal use approximately $670 in costs and fees owed to a client) and *In re Curlin*, 349 S.C. 287, 562 S.E.2d 652 (2002) (disbarring a lawyer who, in addition to stealing over $70,000 in law firm and client money from a real estate trust account over a three-year period, routinely forged signatures and prepared fraudulent documents, including a quitclaim deed).

ODC also argues the Panel gave too much weight to mitigating factors. ODC argues Respondent's remorse should be given little weight because he only expressed it after ODC initiated disciplinary proceedings against him, instead of when he was initially confronted by the Firm. In fact, referencing Respondent's initial responses to the Chairman in which Respondent claimed he was emotionally distressed by the mere thought of having wrongly deposited a $500 check, ODC argues Respondent's contrition at the hearing was disingenuous, which suggests the

Panel should not have considered it at all. Finally, ODC argues that the testimony of Respondent's character witnesses does not mitigate Respondent's conduct because all the while Respondent was busy earning his sterling reputation, he was also busy stealing from the Firm.

IV.

We agree with ODC that the Panel gave too much weight to Respondent's mitigating character evidence. We also find Respondent's situation to be distinguishable from the cases he cites for support.

In two of the cases Respondent cites, the attorney and ODC had entered into an agreement for discipline, and this Court merely imposed a sanction within the agreed-upon range. *See Boyd*, 388 S.C. at 516, 697 S.E.2d at 603 (imposing a six-month suspension when the parties agreed to "the imposition of an admonition, public reprimand, or a definite suspension not to exceed six [] months"); *Lee*, 370 S.C. at 502, 636 S.E.2d at 624 (imposing a 180-day suspension when the parties agreed to "a public reprimand or definite suspension not to exceed two [] years"). In another of the cases Respondent cites, we noted that "[n]either ODC nor [the attorney] complain[ed] about the recommended sanction." *Sturkey*, 376 S.C. at 291, 657 S.E.2d at 468.

In deciding a sanction in this case we find *Baldwin* most instructive. Between 2012 and 2013, Baldwin converted $4,000 in client fees to his personal use by (1) collecting fees from new clients of which his law firm was unaware because he did not create new case files and (2) forwarding to his law firm only a portion of the fees collected from existing clients and altering documents to make it appear as if the clients' fees were less than they actually were. *Baldwin*, 411 S.C. at 77, 767 S.E.2d at 193. We found Baldwin's conduct egregious enough to merit disbarment. *Id.* at 76, 767 S.E.2d at 193.

Like Baldwin, Respondent converted client fees that were owed to his law firm to his personal use and took great measures to conceal his theft. When confronted and given the opportunity to come clean, Respondent repeatedly and emphatically denied any wrongdoing. Respondent thereby engaged in a serious pattern of theft and dishonesty over an extended period of time. When compared to Baldwin's,

Respondent's conduct is certainly egregious enough to merit disbarment. Indeed, Baldwin only stole $4,000 from his firm, while Respondent stole well over $70,000.

V.

Given the severity of Respondent's misconduct, we conclude disbarment is the appropriate sanction. Respondent is hereby disbarred, effective retroactively to the date of filing of formal charges by ODC, March 13, 2013. Respondent is ordered to pay the costs of these proceedings within thirty (30) days of the date of this opinion. 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, RLDE, Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CareAlliance Health Services d/b/a Roper St. Francis Healthcare, Respondent,

v.

South Carolina Department of Revenue, Appellant.

Appellate Case No. 2014-001457

Appeal from the Administrative Law Court
The Honorable Shirley C. Robinson, Administrative Law Judge

Opinion No. 27627
Heard February 9, 2016 – Filed April 20, 2016

REVERSED

Milton G. Kimpson and Lauren Acquaviva, both of the South Carolina Department of Revenue, of Columbia, for Appellant.

John C. Von Lehe, Jr. and Bryson M. Geer, both of Nelson Mullins Riley & Scarborough, LLP, of Charleston, and Raymond P. Carpenter, of Roswell, Georgia, for Respondent.

JUSTICE HEARN: The South Carolina Department of Revenue (DOR) appeals the Administrative Law Court's (ALC) grant of summary judgment in favor of CareAlliance Health Services (the Hospital) finding (1) orthopaedic prosthetic devices purchased for specific patients are exempt from sales tax and (2) other bone, muscle, and tissue implants replaced a missing part of the body. We reverse.

FACTUAL/PROCEDURAL HISTORY

The Hospital is a health corporation comprised of Roper Hospital and St. Francis Hospital in Charleston, which render customary surgical and emergency services to patients. The Hospital provides orthopaedic prosthetic devices[1] and other implants to patients through either a planned surgical procedure or in response to trauma.

Generally during a scheduled surgery, a prosthetic device vendor is present in the operating room with a portfolio of prosthetic devices from which a surgeon can select the appropriate implant. Upon determining the appropriate device, the surgeon communicates his selection to the vendor. The vendor then provides the chosen device to a circulating nurse for implantation by the surgeon. Subsequently, the vendor fills out a requisition sheet, in which a record of the device is memorialized. The requisition sheet is initialed by the circulating nurse as an acknowledgement the items were consumed. The form is then provided to the Hospital's purchasing department, and a purchase order is generated and submitted to the vendor based on prearranged pricing agreements with the Hospital.

Believing the purchase of orthopaedic prosthetic devices and other implants were eligible for a sales tax exemption, the Hospital sought a refund from DOR.[2] Specifically, the Hospital asserted under *Home Medical Systems, Inc. v. South*

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[1] The orthopaedic prosthetic devices in question are Food and Drug Administration (FDA) Class II and Class III prosthetic devices. 21 U.S.C. § 360(a)-(c) (2013).

[2] The Hospital requested refunds for joint implants, pacemakers, bone, tissue, blood products, plasma derivatives, and oncology medicines. The subject of this appeal is strictly orthopaedic prosthetic devices and other bone, muscle, and tissue implants. The question of exemption as to the remaining items have been stayed pending a decision in this matter.

Carolina Department of Revenue, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009), the prosthetic devices were "sold by prescription" as required for the tax exemption under section 12-36-2120(28) of the South Carolina Code (2014). Pursuant to *Home Medical*, a device is sold by prescription if (1) the sale requires a prescription; (2) the device is actually sold by prescription; and (3) the device replaces a missing part of the body. 382 S.C. at 564, 677 S.E.2d at 587.

Following an audit, DOR denied the request as to orthopaedic prosthetic devices on the grounds they do not require a prescription to be sold and a prescription was not used in the purchase of the devices.[3] DOR also held other bone, muscle, and tissue implants were not exempt because they did not replace a missing part of the body, as required for the exemption.

The Hospital filed for a contested case hearing. After discovery, both parties filed motions for summary judgment. Following a hearing on the motions, the ALC granted summary judgment in favor of the Hospital, finding orthopaedic prosthetic devices qualified for the exemption and other bone, muscle, and tissue implants replaced a missing part of the body.

DOR filed a motion for reconsideration, which was denied, and thereafter filed a notice of appeal. This Court certified the case for review pursuant to Rule 204(b), SCACR.

ISSUES PRESENTED

I. Did the ALC err in finding the sales tax exemption applies to orthopaedic prosthetic devices and granting summary judgment in favor of the Hospital?

II. Did the ALC err in finding other bone, muscle, and tissue implants replaced a missing part of the body?

[3] The requested refund covered the Hospital's sales from August 1, 2007, through November 30, 2010, and amounted to $5,014,576.76.

STANDARD OF REVIEW

In an appeal from an ALC decision, the Administrative Procedures Act provides the appropriate standard of review. S.C. Code Ann. § 1-23-610(B) (Supp. 2015); *Kiawah Dev. Partners, II v. S. C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014). While an appellate court will not substitute its judgment for that of the ALC as to findings of fact, we may reverse or modify decisions that are controlled by an error of law or are clearly erroneous in view of the substantial evidence on the record as a whole. *S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 259, 659 S.E.2d 233, 235 (Ct. App. 2008). Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. *Lark v. Bi–Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Ordinarily, tax exemption statutes are strictly construed against the claimed exemption. *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998).

LAW/ANALYSIS

I. APPLICATION OF THE SALES AND USE TAX EXEMPTION

DOR challenges the ALC's holding the Hospital is entitled to the sales tax exemption for orthopaedic prosthetic devices. Specifically, DOR contends the ALC erred in finding a prescription is required for the sale of an orthopaedic device between the Hospital and vendor because of federal regulations. We agree.

Generally, the retail sale of a prosthetic device to a hospital or doctor is a taxable sale if the prosthetic device is furnished to a patient as part of a service being rendered by a hospital. S.C. Code Ann. § 12-36-110(1)(i) (2014). As noted above, the sales tax exemption enumerated in section 12-36-2120(28) is for prosthetic devices sold by prescription. S.C. Code Ann. § 12-36-2120(28); *see also* 10 S.C. Reg. 117-308 (2012) (explaining when a prosthetic device is furnished to a patient by a hospital as part of the services a patient is receiving, the hospital will be deemed a user or consumer of the prosthetic and subject to the sales and use tax); S.C. Rev. Ruling #98-9 (stating that once it is established that a sale to a hospital is a retail sale, then one must determine whether the item in question comes within an exemption). Although the tax code does not define the term *sold by prescription*, this Court in *Home Medical* enunciated a three-part test to

determine whether an item is sold by prescription. 382 S.C. at 564, 677 S.E.2d at 587. A device is sold by prescription if (1) the sale requires a prescription; (2) the device is actually sold by prescription; and (3) the device replaces a missing part of the body. *Id*.

DOR applied *Home Medical* and found the exemption inapplicable for orthopaedic prosthetic devices because a prescription is not required for the transaction between the Hospital and vendor. Relying on Regulation 117-308.3 and Regulation 117-308.8, DOR argues the purchase of an orthopaedic prosthetic device is equivalent to the purchase of traditional medical supplies like bandages. Under 117-308.3, "[d]octors are the consumers of the supplies, medicines, office furniture and fixtures and special tools and equipment they use in the practice of their profession. Sales of such supplies and equipment to doctors *are retail sales and subject to the sales tax*." 10 S.C. Reg. 117-308.3 (2011)(emphasis added). Similarly, hospitals are considered the consumers "[w]here drugs, prosthetic devices and other supplies are furnished to their patients as a part of the medical service rendered." 10 S.C. Reg. 117-308.8 (2011). DOR accordingly asserted the Hospital was not required to have a prescription to acquire supplies, be they prosthetic devices or bandages. Moreover, DOR suggested the exemption was intended for individual patients who purchase a prosthetic device with a prescription from a brace and boot shop, not for a hospital or doctor rendering services by implanting prosthetic devices.

However, the Hospital argued that because the devices are Class II and Class III federal prescription prosthetics, inquiry into the nature of the transaction was unnecessary—the implants are prescription devices by federal mandate. *See* 21 C.F.R. § 801.109(a) (2011) (exempting prescription devices from certain labeling requirements, including when devices "[are] to be sold only to or on the prescription or other order of such practitioner").[4] Consequently, the Hospital

[4] Section 801.109(a) states, in part, that a device is exempt from certain labeling requirements if:

> The device is:
>
> (1)(i) In the possession of a person, or his agents or employees, regularly and lawfully engaged in the

suggested these prosthetics will always satisfy *Home Medical*, and the Hospital was therefore entitled to the exemption. DOR argued the federal regulation relied on by the Hospital merely dictates labeling requirements for when the device is allowed in the stream of commerce and therefore provided no insight into the state's taxation of the devices. *See* 21 C.F.R. § 801.109(a). It therefore gave no weight to the devices' classification as Class II or Class III in formulating its position.

The ALC rejected DOR's construction of federal regulations, finding *Home Medical* was satisfied because FDA regulation requires a prescription for orthopaedic prosthetic devices. *See* 21 C.F.R § 801.109(a); *see also* 21 U.S.C. § 360j(e)(1)(A) (2006) (explaining the Secretary of the FDA sets forth the sale, distribution, or use of restricted devices and requires restricted devices only be available "upon the written or oral authorization of a practitioner licensed by law to administer"). While the ALC acknowledged a prescription is not necessary for all sales under section 801.109, it found DOR interpreted the regulation too strictly and as a result defeated the statutory purpose to allow for an exemption as applied by *Home Medical*. The ALC concluded "if a distinction is made between 'prescription' and 'order' in the federal regulation, then no device would *ever require* a prescription for sale—an order could always suffice. Consequently the first prong of *Home Medical* would never be satisfied and no devices would ever be tax exempt." The ALC acknowledged Class II and Class III devices will always require a prescription to be sold and as a result, the first prong of *Home Medical* will always be satisfied.

> manufacture, transportation, storage, or wholesale or retail distribution of such device; or
>
> (ii) In the possession of a practitioner, such as physicians, dentists, and veterinarians, licensed by law to use or order the use of such device; and
>
> (2) Is to *be sold only to or on the prescription or other order of such practitioner* for use in the course of his professional practice.

21 C.F.R. § 801.109(a) (emphasis added).

At the outset, we agree with DOR that section 801.109(a) addresses the labeling requirements for Class II and Class III devices and does not always require a prescription. Federal regulation restricts the access of Class II and Class III surgical devices because the FDA has determined such devices are unsafe for public consumption without medical supervision. 21 C.F.R. § 801.109 (explaining such devices are "not safe except under the supervision of a practitioner licensed by law to direct the use of such device"). Due to the public's restricted access to these devices, the FDA exempts these devices from standard warnings and labeling requirements because they "[are] to be sold only to or on the prescription or other order of such practitioner for use in the course of his professional practice."[5] 21 C.F.R. § 801.109(a)(2).

By its terms, this regulation allows Class II or Class III prescription prosthetic devices to be sold directly to a practitioner, on the order of a practitioner, or on the prescription of a practitioner. *Id.* Thus, it envisions a sale can occur directly to a practitioner, with no prescription or order requirement. We therefore reject the Hospital's assertion and the ALC's finding the devices at issue can *only* be sold by prescription. Instead, the regulation allows for a sale directly between a vendor and practitioner, as an agent of the Hospital.

The ALC's broad interpretation of the federal regulation is fundamentally at odds with the plain reading of the regulation and the strict construction afforded a tax exemption. Accordingly, we hold the ALC erred in finding section 801.109(a) satisfies the first prong of *Home Medical*. The statute expressly allows a practitioner to be in possession of a prosthetic device without a prescription or order. We therefore reverse the ALC because these devices do not require a prescription for the purpose of qualifying for a tax exemption. Because we find the Hospital is unable to satisfy the first prong, we need not reach the second prong. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

[5] The provision indicates that practitioners are individuals "such as physicians, dentists, and veterinarians, licensed by law to use or order the use of such device." 21 C.F.R. § 801.109(a)(1)(ii).

II. OTHER BONE, MUSCLE, AND TISSUE IMPLANTS

DOR next argues the ALC erred in finding that the other bone, muscle, and tissue implants replace a missing part of the body because the Hospital did not present evidence to support this finding. We agree. The record is devoid of any evidence to support the ALC's finding that other bone, muscle, and tissue implants replaced missing parts of the body. No evidence provides any details regarding the bone, muscle, and tissue implants that were being ruled on by the ALC; therefore the record plainly does not contain the level of substantial evidence necessary to uphold the finding.

CONCLUSION

Based on the foregoing, we reverse the ALC and find the Hospital is not entitled to a tax exemption for the sale of orthopaedic prosthetic devices. Further, we reverse the ALC's finding that other bone, muscle and tissue implants replace a missing body part because it is not supported by substantial evidence in the record.

BEATTY, KITTREDGE, JJ., and Acting Justice Alison Renee Lee, concur.
PLEICONES, C.J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ronald Lee Legg, Appellant.

Appellate Case No. 2014-000568

Appeal from Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 27628
Heard February 9, 2016 – Filed April 20, 2016

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jennifer Ellis Roberts, both of Columbia, and Solicitor Jimmy A. Richardson, II, of Conway, for Respondent.

CHIEF JUSTICE PLEICONES: Appellant was convicted of lewd act on a minor. He was sentenced to twelve years' imprisonment, ordered to be placed on the sex offender registry, and subjected to GPS monitoring. Appellant argued at trial and before this Court that South Carolina Code Annotated section 17-23-175

(2014)—permitting a videotaped forensic interview of an alleged child abuse victim to be played before a jury—arbitrarily allows an alleged victim to testify twice therefore violating his Due Process[1] right to a fair trial under the Fourteenth Amendment.[2] The trial judge ruled the videotape at issue met the statutory requirement for admission, and that in his view, its admission was constitutional; therefore, the videotape was permitted to be played before the jury. Because we find the statute is not facially unconstitutional on procedural Due Process grounds, we affirm appellant's conviction and sentence.

ISSUE

> Is section 17-23-175 (2014), unconstitutional in that it arbitrarily allows an alleged victim's testimony to be presented twice, depriving a defendant of his Due Process right to a fair trial under the Fourteenth Amendment?

ANALYSIS

Appellant contends section 17-23-175 offends Due Process because it arbitrarily allows an alleged victim's "testimony" to be heard twice by the jury, thereby bolstering the testimony of the alleged victim, where no other type of criminal case allows this procedure.[3] We disagree.

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[1] *See* U.S. Const. amend. XIV, § 1.

[2] Appellant also raises a secondary issue which is not preserved for appellate review; therefore, it will not be addressed in this opinion. *See Foster v. Foster*, 393 S.C. 95, 99, 711 S.E.2d 878, 880 (2011) (finding issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court).

[3] Appellant's argument before this Court is novel; however, section 17-23-175 has been challenged myriad times in the appellate courts of this state, and has in each instance withstood scrutiny. *See, e.g.*, *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (holding section 17-23-175 did not violate the Confrontation Clause of the Sixth Amendment); *State v. Whitner*, 399 S.C. 547, 732 S.E.2d 861 (2012) (holding section 17-23-175 "is a valid legislative enactment," and does not permit

Section 17-23-175 provides, in pertinent part:

> (A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if:
>
> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
>
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
>
> (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
>
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.
>
> (B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:
>
> (1) whether the statement was elicited by leading questions;

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improper bolstering); *State v. Stahlnecker*, 386 S.C. 609, 690 S.E.2d 565 (2010) (holding section 17-23-175 merely authorizes the introduction of new evidence and "does not alter substantial personal rights; therefore, it does not violate *ex post facto* laws); *State v. Bryant*, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009) (holding section 17–23–175 did not violate the Savings Clause and did not constitute an *ex post facto* violation).

(2) whether the interviewer has been trained in conducting investigative interviews of children;

(3) whether the statement represents a detailed account of the alleged offense;

(4) whether the statement has internal coherence; and

(5) sworn testimony of any participant which may be determined as necessary by the court.

(C) For purposes of this section, a child is:

(1) a person who is under the age of twelve years at the time of the making of the statement or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of making the statement; and . . . .

. . . .

S.C. Code Ann. § 17-23-175.

Although not posited in these precise terms, appellant brings a facial challenge to section 17-23-175 under procedural Due Process.

Due Process is not a technical concept with fixed parameters unrelated to time, place, and circumstances; rather, it is a flexible concept that calls for such procedural protections as the situation demands. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citation omitted). Procedural Due Process contemplates a fair hearing before a legally constituted impartial tribunal. *Daniels v. Williams*, 474 U.S. 327, 337 (1986) ("[A] guarantee of fair procedure, sometimes referred to as 'procedural due process': the State may not execute, imprison, or fine a defendant without giving him a fair trial" (footnoted citation omitted)); *Vitek v. Jones*, 445 U.S. 480, 500 (1980); *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007).

A facial challenge is an attack on a statute itself as opposed to a particular application. *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2449 (2015). When a party challenges a statute arguing it can never be applied constitutionally, the party is bringing a facial challenge. *Id.* at 2450 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *Black's Law Dictionary* 261 (9th ed. 2009) (defining facial challenge as "[a] claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally."). A facial challenge is "the most difficult . . . to mount successfully," as it requires the challenger show the legislation at issue is unconstitutional in all its applications. *Id*. (quoting *Salerno*, 481 U.S. at 745);[4] *Sabri v. United States*, 541 U.S. 600, 604 (2004).

Because we find appellant's challenge fails to meet the *Salerno* standard, we find section 17-23-175 is not facially unconstitutional as a violation of procedural Due Process. In making this decision, we find persuasive the rationale articulated by

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[4] As this Court has noted, the viability of *Salerno* is a topic of debate in facial challenge cases. *See Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 543–44, 737 S.E.2d 830, 843–44 (2012) (Hearn, J., dissenting) (citations omitted) (concluding *Salerno* applied). Indeed, in 2010, the United States Supreme Court openly acknowledged it "is a matter of dispute" in a "typical case" whether Salerno's no-set-of-circumstances test, or whether overbreadth's plainly-legitimate-sweep test, is the proper facial challenge standard. *See United States v. Stevens*, 559 U.S. 1577, 1587 (2010) (declining to address which standard applies, finding free speech facial challenges are distinguishable as "a second type of facial challenge"); *see also United States v. Comstock*, 627 F.3d 513, 518–19 (4th Cir. 2010) (recognizing, "In the years since *Salerno*, some members of the Court have expressed reservations about the applicability of this stringent standard . . . . But at the very least, a facial challenge cannot succeed if a 'statute has a plainly legitimate sweep'"(citations omitted)). The United States Supreme Court has not overruled *Salerno*, which notably addressed a Due Process facial challenge, and state and federal courts continue to apply *Salerno* in the context of Due Process facial challenges. *See, e.g., United States v. Ruggiero*, 791 F.3d 1281, 1285–86 (11th Cir. 2015); *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 265–66 (2nd Cir. 2015); *Morrison v. Peterson*, 809 F.3d 1059, 1064–69 (9th Cir. 2015); *Neely v. McDaniel*, 677 F.3d 346, 349–50 (8th Cir. 2012); *United States v. Pendleton*, 658 F.3d 299, 305 (3rd Cir. 2011); *Gilbert v. State*, -- So.3d -- (Ala. Crim. App. 2016); *People v. Mosley*, 33 N.E.3d 137, 159 (Ill. 2015); *Montana Cannabis Industry Ass's v. State*, -- P.3d -- (Mont. 2016).

the Texas Criminal Court of Appeals in *Briggs v. State*, 789 S.W.2d 918 (Tex. Crim. App. 1990) (en banc). Relying on *Salerno*, the *Briggs* court overturned its prior holding that the statute allowing at trial both live testimony of an alleged child sexual abuse victim, and the videotaped forensic interview, unfairly permitted the State to present its case in chief twice thereby violating Due Process. *Id.* (overruling *Long v. State*, 742 S.W.2d 302 (Tex. Crim. App. 1987) (en banc)). The *Briggs* court first established that duplication of the state's evidence did not *ipso facto* render a trial fundamentally unfair. *Id.* at 922. The *Briggs* court noted that the State could choose to call the minor during its case in chief, limit its questioning strictly to the creation of the videotape, and then tender the minor to the defense for cross-examination. *Id.* The *Briggs* court determined that such a scenario in no respect "duplicated" evidence, or bolstered the State's version of the facts. *Id.* The *Briggs* court further found that although the statute at issue allowed for duplicative statements by the minor, the defendant could benefit from inconsistencies presented between the videotape and the live testimony, meaning the statute could be applied without offending Due Process; therefore, it was not facially unconstitutional. *Id.* at 923–24 (citing *Salerno*, 481 U.S. at 745).

We agree with the Texas court's finding that there would be no grounds for a Due Process duplication of testimony argument if the State only questioned the minor as to the creation of the videotape prior to its publication to the jury and cross-examination. Therefore, we find the statute can be applied constitutionally and appellant's facial challenge is without merit. *See Salerno*, 481 U.S. at 745 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish *that no set of circumstances exists under which the Act would be valid*" (emphasis supplied)). Moreover, we find it notable that in the instant case, appellant extensively cross-examined the minor as to prior inconsistent statements given during the videotaped interview, and during closing statements, argued those inconsistences damaged the minor's credibility.[5] We find appellant's utilization of the prior inconsistent

[5] Appellant cross-examined the minor regarding: discrepancies between the sequence of abuse she provided on direct examination versus the video interview; ambiguous responses she gave during the videotaped interview; why she continued to return to appellant's home if he were abusing her; why she delayed disclosing the abuse; the circumstances surrounding her disclosure, and whether she was really just upset because appellant had told her to "shut the F up"; whether some of her recollections mentioned in the interview were in fact based on a movie;

statements made on videotape demonstrates he may have actually strengthened his defense from its use by impeaching the only witness to the alleged sexual abuse besides himself. *See Salerno*, 481 U.S. at 745; *see also Folks v. State*, 207 P.3d 379, 383 (Okla. Crim. App. 2008) (noting the alleged victim was impeached on cross-examination after her videotaped interview was played for the jury and stating, "We recognize that while this interpretation of § 2803.1 may allow the State to present its principal witness twice, it does not invariably operate to allow the State to bolster its version of the facts." (citing *Briggs*, 789 S.W.2d at 922)). Accordingly, because section 17-23-175 can be applied without offending procedural Due Process, it is not facially unconstitutional. *See Salerno*, 481 U.S. at 745.

CONCLUSION

For the foregoing reasons, we affirm the trial judge's ruling, and hold section 17-23-175 is not facially unconstitutional as a violation of procedural Due Process.

BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice Alison Renee Lee, concur.

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whether games mentioned during the interview were actually played with her uncle as opposed to being played with appellant; and whether she had been coached or discouraged from using certain words while testifying at trial. As to discrepancies between her statements during the videotaped interview and her trial testimony, the minor stated she was "a little bit confused today."

During closing argument, appellant relied on the videotaped interview to argue the minor's conduct of repeatedly returning to appellant's home on her own volition was inconsistent with her allegations, stating, "If you want to, that video is available to look at if you don't believe or trust me." Appellant further referenced the videotape when pointing out that the minor's testimony at trial regarding which instance of abuse was most traumatic, was an event the victim did not mention in the videotape until almost the conclusion of the interview, long after discussing numerous other instances of inappropriate touching. Finally, appellant challenged the minor's demeanor during the interview, stating, "You look at that video and I would submit to you that child was happier then than she is now, and if she were traumatized, it would have shown on that video."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Loretta Traynum and Leonard Traynum, Appellants,

v.

Cynthia Scavens and Progressive Direct Insurance Co., Respondents.

Appellate Case No. 2013-002797

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 27629
Heard December 3, 2015 – Filed April 20, 2016

AFFIRMED

Blake A. Hewitt and John S. Nichols, both of Bluestein, Nichols, Thompson & Delgado, L.L.C., of Columbia, and Tom Young, Jr., of Law Offices of Tom Young, Jr., P.C., of Aiken, for Appellants.

J.R. Murphy and Wesley B. Sawyer, both of Murphy & Grantland, P.A., of Columbia, for Respondents.

David C. Marshall and R. Hawthorne Barrett, both of Turner Padget Graham & Laney, P.A., of Columbia, for Amicus Curiae, Property Casualty Insurers Association of America.

JUSTICE KITTREDGE: Loretta Traynum and Leonard Traynum (collectively, Appellants) appeal the trial court's grant of summary judgment to Respondent Progressive Direct Insurance Co. (Progressive), arguing the trial court incorrectly held that Progressive made a meaningful offer of underinsured motorist (UIM) coverage via its website. We affirm.

I.

In April 2007, Loretta Traynum (Traynum) purchased an automobile insurance policy from Progressive through Progressive's website. Instead of selecting one of the preset packages Progressive offered, all of which contained UIM coverage by default, Traynum created a custom package which did not include UIM coverage. Traynum also increased the preset deductibles for comprehensive and collision coverages. The result of these changes was a lower monthly premium. Traynum then electronically signed a form acknowledging Progressive offered her optional UIM coverage and that she rejected that coverage.

Thereafter, in November 2007, Traynum and Cynthia Scavens were involved in an automobile accident, from which Appellants claimed more than $175,000 in damages. Appellants brought claims against Scavens for negligence and loss of consortium, which were settled for $100,000, the limits of Scavens's liability coverage. As the settlement did not fully satisfy Appellants' damages, Appellants also brought a declaratory judgment action against Progressive claiming Progressive did not make a meaningful offer of UIM coverage to Traynum, as required by law, and asking the court to reform Traynum's policy to include UIM coverage in the amount of the policy's liability limits.[1]

Appellants and Progressive filed cross-motions for summary judgment. Progressive noted it made an offer of UIM coverage to Traynum on its website and Traynum electronically signed a form rejecting that offer, while Appellants argued

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[1] "If [an] insurer fails to comply with its duty to make a meaningful offer [of UIM coverage], the policy will be reformed by operation of law to include UIM coverage up to the limits of liability insurance carried by the insured." *Ray v. Austin*, 388 S.C. 605, 611, 698 S.E.2d 208, 212 (2010) (citing *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 405, 475 S.E.2d 758, 760 (1996)).

the offer was insufficient and therefore Traynum's rejection of UIM coverage was ineffective. The trial court granted Progressive's motion for summary judgment, concluding that Progressive made a meaningful offer of UIM coverage to Traynum, which she knowingly rejected. Appellants contend this was error and ask this Court to reform Traynum's policy to include UIM coverage. We decline to do so.

II.

A.

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court . . . ." *Quail Hill, L.L.C. v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)). "[A] trial court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* at 234, 692 S.E.2d at 505 (quoting Rule 56(c), SCRCP).

Appellants' claim against Progressive is entirely predicated upon the allegation that Progressive's offer of UIM coverage was inadequate. When there is no factual dispute about its content or form, whether an offer of UIM coverage is sufficient is a question of law. *See Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). "Appellate courts may decide questions of law with no particular deference to the [trial] court's findings." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) (citing *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772–73 (2010)).

B.

In South Carolina, insurers must "offer, at the option of the insured, [UIM] coverage up to the limits of the insured liability coverage." S.C. Code Ann. § 38-77-160 (2015). In the seminal case of *State Farm Mutual Automobile Insurance Co. v. Wannamaker*, this Court held that "the statute mandates the insured to be provided with adequate information, and in such a manner, as to allow the insured to make an intelligent decision of whether to accept or reject the coverage." 291

S.C. 518, 521, 354 S.E.2d 555, 556 (1987). Under *Wannamaker*, for an offer of UIM coverage to be valid,

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

Id. at 521, 354 S.E.2d at 556 (citing *Hastings v. United Pac. Ins. Co.*, 318 N.W.2d 849 (Minn. 1982)). This amounts to a requirement that, to be valid, an offer of UIM coverage must be "a meaningful one." *Id.* at 522, 354 S.E.2d at 557. "If the insurer fails to comply with its duty to make a meaningful offer, the policy will be reformed by operation of law to include UIM coverage up to the limits of liability insurance carried by the insured." *Ray v. Austin*, 388 S.C. 605, 611, 698 S.E.2d 208, 212 (2010) (citing *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 405, 475 S.E.2d 758, 760 (1996)).

After *Wannamaker*, the General Assembly enacted section 38-77-350 of the South Carolina Code as a safe-harbor provision, creating a conclusive presumption of a meaningful offer of UIM coverage under certain conditions. *See, e.g., id.* at 611, 698 S.E.2d at 212 (noting that compliance with section 38-77-350 creates "a presumption that a meaningful offer of UIM coverage has been made") (citing S.C. Code Ann. § 38-77-350(A)–(B) (2015))). Subsection (A) requires the Department of Insurance (the Department) to promulgate a form for insurers to use when making the required offer of optional coverages to new applicants, which must include

> (1) a brief and concise explanation of the coverage;
> (2) a list of available limits and the range of premiums for the limits;
> (3) a space to mark whether the insured chooses to accept or reject the coverage and a space to state the limits of coverage the insured desires;
> (4) a space for the insured to sign the form that acknowledges that the insured has been offered the optional coverages; [and]
> (5) the mailing address and telephone number of the insurance

> department that the applicant may contact if the applicant has questions that the insurance agent is unable to answer.

S.C. Code Ann. § 38-77-350(A)(1)–(5). Subsection (B) states,

> If this form is signed by the named insured, after it has been completed by an insurance producer or a representative of the insurer, *it is conclusively presumed that there was an informed, knowing selection of coverage* and neither the insurance company nor an insurance agent is liable to the named insured or another insured under the policy for the insured's failure to purchase optional coverage or higher limits.

Id. § 38-77-350(B) (emphasis added). Our precedents thus recognize that an insurer can establish it made a meaningful offer of UIM coverage by proving *either* it is entitled to the conclusive presumption of section 38-77-350(B) *or* it satisfied the requirements of *Wannamaker*. *See, e.g.*, *Ray*, 388 S.C. at 612, 698 S.E.2d at 212 ("Even where the insurer is not entitled to the statutory presumption that a meaningful offer of UIM coverage was made, the insurer can still demonstrate that a meaningful offer of UIM coverage was made to the insured under *Wannamaker*." (citing *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 264, 626 S.E.2d 6, 12 (2005))).

C.

Appellants acknowledge they are not contesting the content of Progressive's offer of UIM coverage, but rather the method by which the offer was communicated to and rejected by Traynum through Progressive's website. Because the transaction occurred online, it is governed by South Carolina's version of the Uniform Electronic Transactions Act (the UETA).[2]

Under the UETA, "[a]n electronic signature satisfies a law requiring a signature." S.C. Code Ann. § 26-6-70(D) (2007). The UETA also allows offers to be communicated online, declaring that

[2] S.C. Code Ann. §§ 26-6-10 to -210 (2007 & Supp. 2015).

> [i]f parties agree to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt.

Id. § 26-6-80(A) (2007). Moreover, the UETA endorses automated transactions between an "electronic agent"[3] of a company and a consumer:

> In an automated transaction:
> . . . .
> . . . a contract may be formed by the interaction of an electronic agent and an individual, . . . including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance
> . . . .

Id. § 26-6-140 (2007).

Below, we analyze Appellants' arguments consistently with the purpose and provisions of the UETA.

III.

Appellants contend the trial court erred in granting Progressive summary judgment because Progressive's website was confusing and not designed to effectively communicate the offer of UIM coverage to Traynum. Therefore, Appellants argue, Progressive was not entitled to a presumption of a meaningful offer of UIM coverage and Traynum's policy should be reformed to include that coverage. We disagree.

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[3] An "electronic agent" is defined as "a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual." *Id.* § 26-6-20(6) (2007).

A.

Progressive maintains records of all online transactions that result in a purchase, which are stored as a series of images that preserve Progressive's website exactly as it appeared to the purchaser, screen by screen. Progressive also maintains records of all electronic signatures, making it possible to review everything Traynum saw and signed when she purchased the insurance policy on Progressive's website.

These images indicate that Traynum rejected the preset packages Progressive offered and chose instead to create a custom insurance package without UIM coverage. The preset packages all included UIM coverage, and it is uncontroverted that Progressive recommends consumers purchase a policy with UIM coverage equal to the policy's liability limits. The website also included hyperlinks to explanations of the various types of coverage, including UIM, none of which Traynum clicked.

After choosing her coverage, Traynum provided her electronic signature three times. The second of those signatures was below a document entitled "Offer of additional uninsured motorist coverage and optional [UIM] coverage" (the Offer Form). Traynum filled out the "Policyholder Electronic Signature" below the Offer Form, which stated,

> I, (LORETTA TRAYNUM), represent that I am the person whose name appears on the signature line of the document presented above, and that I viewed the document at the recommended text size.
>
> I acknowledge and agree to the statements, terms[,] and conditions in the document above, and that by typing my name below and clicking the "Continue" button, I am electronically signing the document. This will have the same legal effect as signing the document with a written signature and shall be valid evidence of my intent and agreement to be bound.

The Offer Form reflected and confirmed Traynum's rejection of additional uninsured motorist coverage and optional UIM coverage. By completing the

Policyholder Electronic Signature, Traynum also consented to her signature of the "Applicant's acknowledgement," which was contained in the Offer Form and stated,

> By my signature, I acknowledge that I have read—or I have had read to me—the above explanations and offers of additional uninsured motorist coverage and optional [UIM] coverage. . . .
>
> My signature below further acknowledges that I understand the coverages as they have been explained to me, and the type and amounts of coverage marked on the preceding pages have been selected by me. This is the type and amount of insurance coverage I wish to purchase.[4]

In granting Progressive summary judgment, the trial court found that the Offer Form contained the information required by section 38-77-350(A). The trial court further held that, pursuant to the UETA, Progressive effectively communicated the Offer Form to Traynum, who effectively signed it. Therefore, the trial court held Progressive was entitled to the conclusive presumption of section 38-77-350(B).

B.

Appellants argue that Progressive is not entitled to the presumption of section 38-77-350(B) because Progressive's website communicated the Offer Form in a confusing and misleading way. Appellants also argue there was not strict compliance with section 38-77-350(B) because there was no meaningful interaction between Traynum and Progressive, as is contemplated by the statute's requirement that a form offering UIM coverage be "completed by an insurance producer or a representative of the insurer." Therefore, according to Appellants, allowing Progressive to utilize the statute's conclusive presumption would violate the principles behind section 38-77-350 and *Wannamaker*.[5]

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[4] Traynum did not personally type her name on the signature line under the acknowledgment, but the form and signature were completed automatically based upon Traynum's earlier selections. Notwithstanding Traynum's signature, she never read the Offer Form.

[5] As already mentioned, Appellants are not contesting the Offer Form's content, but the method by which the Offer Form was communicated to and completed by

We agree with the trial court that the method by which Progressive communicated the offer of UIM coverage to Traynum and obtained Traynum's signature complied with section 38-77-350. Under the UETA, Traynum's electronic signature was as effective as a handwritten signature. *See* S.C. Code Ann. § 26-6-70(D). Progressive's online communication of the offer of UIM coverage was effective because Traynum agreed to interact with Progressive electronically by choosing to purchase insurance through Progressive's website and she had the ability to download and save or print the Offer Form. *See id.* § 26-6-80(A). Finally, despite Appellants' assertion that there was no meaningful interaction between Traynum and Progressive, the UETA, as already noted, expressly endorses this kind of transaction. *See id.* § 26-6-140. Progressive's website acted as the company's electronic agent, completing the Offer Form based on Traynum's selections of coverage and presenting it to Traynum in a format that was easily viewable, printable, and savable.

We thus find, based on the evidence in the record, that Progressive is entitled to the conclusive presumption of a meaningful offer of UIM coverage provided by section 38-77-350. Traynum rejected the recommended preset coverage packages, all of which included UIM coverage, instead choosing to create a customized package and decline UIM coverage. Appellants cannot now invoke the fact Traynum did not avail herself of the opportunity to read the Offer Form and the detailed description of UIM coverage it contained to defeat the statutory presumption.

Traynum. As the trial court correctly noted, the Offer Form Traynum signed was essentially identical to the form promulgated by the Department, which has been held to satisfy the requirements of section 38-77-350(A). *See, e.g.*, *Butler*, 323 S.C. at 408, 475 S.E.2d at 761 (noting the court of appeals had previously found the Department-created form satisfied the requirements of section 38-77-350 (quoting *Osborne v. Allstate Ins. Co.*, 319 S.C. 479, 487, 462 S.E.2d 291, 295 (Ct. App. 1995)) (citing S.C. Code Ann. §§ 38-77-160, -350)), *superseded by statute on other grounds*, Act of July 2, 1997, No. 154, § 3, 1997 S.C. Acts 931, 950–51 (codified as amended at S.C. Code Ann. § 38-73-470 (2015)), *as recognized in Moody v. Dairyland Ins. Co.*, 354 S.C. 28, 31–32, 579 S.E.2d 527, 529 (Ct. App. 2003).

We also note that the ability to purchase insurance online benefits consumers by allowing them to shop from the comfort of their own homes and avoid the time constraints and pressures associated with face-to-face interactions with sales agents. We therefore decline to add to the statutory requirements of section 38-77-350 and frustrate the purpose of the UETA by judicially engrafting an additional burden onto those transactions. Our law requires insurers to meaningfully offer UIM coverage and, if they comply with section 38-77-350's mandates, creates a conclusive presumption such an offer was made. Appellants cannot escape this fact merely because Traynum purchased insurance online.

Moreover, having made a statutorily compliant offer, consideration of *Wannamaker* is unnecessary. *See, e.g., Grinnell Corp. v. Wood*, 389 S.C. 350, 357, 698 S.E.2d 796, 799 (2010) (noting that if an insurer offers UIM coverage on a form that satisfies the requirements of section 38-77-350(A), "section 38-77-350(B) provides a *conclusive* presumption in favor of the insurer that the insured made a knowing waiver of the option to purchase additional coverages" and *Wannamaker* is a fallback position insurers may resort to if an offer does not comply with section 38-77-350 (emphasis added)); *cf. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 307, 676 S.E.2d 700, 706 (2009) (noting resolution of a case on one ground makes consideration of remaining issues unnecessary); *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008) ("The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act." (citing *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998))).

IV.

For the reasons discussed above, we affirm the trial court's grant of summary judgment to Progressive.

AFFIRMED.

PLEICONES, C.J., BEATTY, HEARN, JJ., and Acting Justice Jean H. Toal, concur.

The Supreme Court of South Carolina

David M. Pascoe, Petitioner,

v.

James R. Parks, Respondent.

Appellate Case No. 2016-000630

ORDER

This matter is before the Court pursuant to a petition for a writ of mandamus. Respondent has filed a return in opposition to the petition as well as a motion to seal all of the documents filed in this matter. We deny the motion to seal except as to Exhibits 1 and 3 to the return to the petition for a writ of mandamus. In addition, it is apparent from the filings in this matter that footnote 11 in Ex parte Harrell v. Attorney General, 409 S.C. 60, 760 S.E.2d 808 (2014) has been misconstrued; therefore, we take this opportunity to rescind it.

The petition for a writ of mandamus will be ruled upon after the deadline for filing any reply has expired and the Court has had sufficient time to thoroughly consider the issues raised by the petition.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
April 14, 2016

The Supreme Court of South Carolina

Re: Amendments to Appendix H to Part IV, South Carolina Appellate Court Rules

Appellate Case No. 2015-001110

ORDER

The South Carolina Board of Paralegal Certification requests the regulations setting forth the required number of Continuing Paralegal Education hours for paralegals certified under Rule 430, SCACR, be reduced from twelve hours per year to ten hours per year. We grant the request and amend paragraphs (A) and (B) of Regulation XII, Appendix H to Part IV, SCACR, as set forth below:

XII. CONTINUING PARALEGAL EDUCATION (CPE)

A. Each certified paralegal subject to these regulations shall complete ten (10) hours of approved continuing education during each year of certification.

B. Of the ten (10) hours, at least one (1) hour shall be devoted to the areas of professional responsibility or professionalism or any combination thereof.

. . . .

These amendments are effective immediately.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
April 20, 2016

The Supreme Court of South Carolina

Re: Amendment to Rule 410, South Carolina Appellate Court Rules

Appellate Case No. 2016-000102

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 410(h)(1)(F), SCACR, is amended to provide as follows:

> **(F) Administrative Law Judge or Workers' Compensation Commission Member.** This class shall include any member who is a judge on the South Carolina Administrative Law Court, is a federal administrative law judge whose duties are primarily performed within the State of South Carolina or is a South Carolina Workers' Compensation Commissioner.

The amendment is effective immediately. Members reclassified by this amendment are not entitled to any refund of license fees for License Year 2016.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
April 20, 2016

The Supreme Court of South Carolina

Re: Limited Certificate of Admission for Military Spouse Attorneys

Appellate Case No. 2015-001545

ORDER

The South Carolina Military Spouse JD Network has petitioned the Court to adopt a rule permitting Military Spouse Attorneys to be issued a limited certificate of admission in South Carolina. In recognition of the hardships faced by Military Spouse Attorneys, who must frequently relocate when their service member spouses are ordered transferred to new locations, and after review of similar rules in numerous other jurisdictions, we grant the request.

In accordance with Article V, § 4 of the South Carolina Constitution, we adopt Rule 430, SCACR, as set forth in the attachment to this Order. Furthermore, we amend Rules 403 and 410, SCACR, to reflect the adoption of Rule 430. These amendments are effective May 16, 2016.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
April 20, 2016

Rule 430, SCACR, is adopted and provides as follows:

RULE 430
LIMITED CERTIFICATE OF ADMISSION FOR MILITARY SPOUSE ATTORNEYS

(a) Purpose. The purpose of this rule is allow military spouse attorneys to obtain a limited certificate to practice law to represent clients before a court or administrative tribunal in South Carolina.

(b) Qualifications for Admission. The Supreme Court may issue a limited certificate of admission to practice in South Carolina to any person who:

(1) is at least twenty-one (21) years of age;

(2) is a person of good moral character;

(3) has received a JD or LLB degree from a law school which was approved by the Council of Legal Education of the American Bar Association at the time the degree was conferred;

(4) has been admitted to practice law in the highest court of another state, the District of Columbia, or a territory of the United States;

(5) is a member in good standing in each jurisdiction where the attorney is admitted to practice law;

(6) has not been disbarred or suspended from the practice of law and is not the subject of any pending disciplinary proceeding in any other jurisdiction;

(7) is the dependent spouse of an active duty service member of the United States Uniformed Services as defined by the Department of Defense (or, for the Coast Guard when it is not operating as a service in the Navy, by the Department of Homeland Security) and the service member is on Permanent Change of Station (PCS) orders stationed in South Carolina;

(8) has never failed the South Carolina Bar Examination;

(9) is physically residing in South Carolina;

(10) has completed or has registered for and will attend within three months of admission the Bridge the Gap program administered by the South Carolina Bar. This course may be completed either live or online. The South Carolina Bar shall make this course available to military spouse attorneys seeking admission under the rule either without a fee or for a minimal fee; and

(11) has completed or has registered for and will attend within the first year of practice an Essential Series Course administered by the South Carolina Bar.

(c) Application. An attorney desiring a limited certificate of admission to practice law under this rule shall file an application with the Clerk of the Supreme Court. This application shall be on a form approved by the Supreme Court. The application shall be accompanied by:

(1) a certificate of good standing from each jurisdiction in which the attorney has been admitted to practice law;

(2) a copy of his or her United States Uniformed Services Identification and Privilege Card evidencing marriage to the active duty service member; and

(3) a copy of the active duty service member spouse's orders.

No filing fee shall be required for the application.

(d) Reference to the Committee on Character and Fitness. Any questions concerning the fitness or qualifications of the attorney may be referred by the Supreme Court to the Committee on Character and Fitness for a hearing and recommendation.

(e) Confidentiality. The confidentiality provisions of Rule 402(n), SCACR, shall apply to all files and records of the Committee on Character and Fitness, and the Clerk of the Supreme Court relating to a limited certificate to practice law under this rule.

(f) Scope of Representation and Adherence to Rules. An attorney issued a limited certificate under this rule and meeting the requirements of Rule 403, SCACR, may represent clients before a court or administrative tribunal of this State in any proceeding. In providing representation, the attorney shall comply

with the rules of practice and procedure applicable to the court or tribunal, and shall adhere to the South Carolina Rules of Professional Conduct and any other ethical rules applicable to this matter. The attorney shall also comply with the continuing legal education requirements of Rule 408, SCACR, and the mandatory mentorship requirements of Rule 425, SCACR. Attorneys issued a limited certificate shall pay a licensing fee as provided in Rule 410(j)(8), SCACR. The failure to do so may result in administrative suspension under Rule 419, SCACR.

(g) Unauthorized Practice. If an attorney granted a limited certificate engages in the practice of law in excess of that permitted by this rule, the attorney may be subject to discipline under Rule 413, SCACR, a revocation of the limited certificate by the Supreme Court, or being held in contempt of the Supreme Court for engaging in the unauthorized practice of law.

(h) Misconduct and Incapacity. Except as otherwise provided in this rule, the procedures provided by Rule 413, SCACR, shall be used for resolving allegations that the attorney has committee ethical misconduct or suffers from a physical or mental condition which adversely affects the attorney's ability to practice law. If, however, the Supreme Court imposes a definite suspension or disbarment, or transfers the attorney to incapacity inactive status, the limited certificate shall be terminated as provided in (i) below. Unless otherwise ordered by the Court, the lawyer may not seek to be readmitted under this rule or any other rule until the period of suspension has expired, or, in the case of disbarment, until five years after the date of the opinion or order imposing the disbarment.

(i) Termination of Certificate. A limited certificate issued under this rule is valid for a maximum of five years from the date of issuance. The limited certificate of admission to practice law shall terminate if:

(1) The limited certificate is revoked by the Supreme Court under (h) above.

(2) The attorney is suspended or disbarred in this or any other jurisdiction. This does not include interim suspensions under Rule 17 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, or a similar rule in another jurisdiction. For an administrative suspension under Rule 419, SCACR, the attorney may seek reinstatement as provided in that rule.

(3) The attorney is admitted to practice in South Carolina under another rule.

(4) The attorney fails the South Carolina Bar Examination.

(5) The attorney is denied admission to practice in South Carolina under another rule.

(6) The attorney's spouse is no longer on active duty or is no longer assigned to a military installation located in South Carolina. Attorneys have six months from the date of the issuance of a spouse's permanent change of station (PCS) orders, retirement orders or other separation from the active military service to surrender the Certificate.

(j) Resignation. Any request by an attorney licensed under this rule shall be processed as provided by Rule 409, SCACR.

(k) Surrender of Certificate. Except as provided in paragraph (i)(6), upon the termination of the limited certificate or acceptance of a resignation, the attorney granted the limited certificate shall surrender the certificate to the Clerk of the Supreme Court. The failure to surrender the certificate upon termination or the acceptance of a resignation may subject the attorney to discipline under Rule 413, SCACR, or to being held in contempt of the Supreme Court.

Rule 403(a), SCACR, is amended to provide as follows:

RULE 403
TRIAL EXPERIENCES

(a) General Rule. Although admitted to practice law in this State, an attorney shall not appear as counsel in any hearing, trial, or deposition in a case pending before a court of this State until the attorney's trial experiences required by this rule have been approved by the Supreme Court. An attorney whose trial experiences have not been approved may appear as counsel if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing, trial, or deposition. Attorneys admitted to practice law in this State on or before March 1, 1979, are exempt from the requirements of this rule. Except for Military Spouse Attorneys licensed under Rule 430, SCACR, attorneys holding a limited certificate to practice law in this State need not comply with the requirements of this rule.

Rule 410(h)(2), SCACR, is amended to add paragraph (h)(2)(E), which provides as follows:

(E) Military Spouse Attorney Member - Rule 430 (Limited Certificate of Admission for Military Spouse Attorneys). Any person who holds a limited certificate under Rule 430, SCACR.

Rule 410(k)(8), SCACR, is amended to provide as follows:

(8) Limited Member. No fee shall be required for a person holding a limited certificate under Rule 415 (Limited Certificate of Admission for Retired and Inactive Attorney Pro Bono Participation Program), SCACR, or Rule 427 (Limited Certificate of Admission for Judge Advocates), SCACR. The additional license fee for a person holding a limited certificate under Rules 405 (Limited Certificate of Admission for In-House Counsel), 414 (Limited Certificate of Admission for Clinical Law Program Teachers), and 430 (Limited Certificate of Admission for Military Spouse Attorneys), SCACR, shall be $20.

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Bar Constitution

Appellate Case No. 2016-000250

ORDER

Pursuant to Rule 410(c), SCACR, we approve amendments to the South Carolina Bar Constitution submitted by the South Carolina Bar. These amendments: (1) add four At-Large Delegates to the House of Delegates; (2) add a young lawyer as an additional State Bar Delegate to the American Bar Association; and (3) provide for a method of election in the event of a tie vote.

These amendments shall be effective immediately. A copy of the amended portions of the South Carolina Bar Constitution is attached.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
April 20, 2016

Article VI, §§ 6.2 and 6.3 of the South Carolina Bar Constitution are amended to provide:

Section 6.2 Composition. The House of Delegates, which is designed to be representative of the Bar, is composed of the following members:

(1) Circuit Delegates elected from each Judicial Circuit in the manner set forth herein and in the Bylaws;
(2) The members of the Board of Governors;
(3) The former presidents of the Bar and its predecessor organizations, the South Carolina Bar Association and the South Carolina State Bar;
(4) One delegate representative from each section and the Young Lawyers Division;
(5) The President and Immediate Past President of the Senior Lawyers Division;
(6) Two delegate representatives elected by the members who reside without the State of South Carolina;
(7) Four At Large Delegates elected in the manner set forth herein and in the Bylaws;
(8) The deans of all law schools whose facilities are in South Carolina;
(9) The State Delegate and the State Bar Delegates to the American Bar Association; and
(10) The immediate past Chair of the House of Delegates.

Section 6.3 Circuit Delegates; At Large Delegates.

(a) The members of the Bar residing in each Judicial Circuit eligible to vote shall elect from among themselves the Circuit Delegate or Delegates to represent that Circuit in the House of Delegates. The number of Circuit Delegates from each circuit shall be proportionate to the membership in each Circuit with each Circuit having at least one Delegate. The number of Delegates from each Circuit shall be determined as follows:
(1) Each Circuit shall be entitled to one delegate for each representative unit as defined below together with one delegate for each fraction of a unit greater than one-half.
(2) A representative unit during any apportionment term shall be equal to one hundred five members.
(3) The apportionment term shall be a period of ten years. The initial term shall commence March 1, 2005.

(4) The House of Delegates shall be reapportioned each tenth year using the formula herein set forth.

(b) The At Large Delegates shall be elected by the Board of Governors.

(c) The term of each Circuit Delegate and At Large Delegate shall be two years beginning the first day of July following his selection.

Section 9.3 and Section 9.4(a) and (b) of the South Carolina Bar Constitution are amended to provide:

Section 9.3 Nominating Procedure.

(a) On or before November 15 of each year the Nominating Committee shall meet at a time and place designated by its Chair and shall promptly make nominations by majority vote for the offices of President-Elect, Secretary, and Treasurer, the members of the Board of Governors and ABA State Bar Delegates to be elected in that year, and in every alternate year the office of Chair of the House of Delegates. Only Circuit Delegates shall be eligible for nomination to the office of Chair of the House of Delegates. No one shall be eligible to be nominated or elected as State Bar Delegate who will at the time of election have served in such capacity for four years.

(b) The Board of Governors shall, on or before the following December 15, cause the name of each nominee selected by the Nominating Committee to be published. On or before the following January 15, twenty-five or more members who are entitled to vote may file with the Board of Governors a signed petition nominating a candidate or candidates for any or all offices to be filled. On January 15, the nominations shall be closed. The Board of Governors shall cause the name of each nominee to be published.

(c) Any ABA State Bar Delegate who must be a young lawyer shall not be nominated as set forth above. One or more nominees shall be chosen by vote of the Young Lawyers Division Executive Council.

Section 9.4 Election of Officers, Governors and State Bar Delegates.

(a) If there is only one nominee from the Nominating Committee for President-Elect or Secretary or Treasurer or Chair of the House of Delegates or Governor or State Bar Delegate, such nominee shall be considered elected automatically at the time the nominations are closed.

(b) If more than one person is nominated for any such office or position, ballots containing the names of all nominees for each contested position shall be mailed to all members who are eligible to vote at the same time as ballots for contested Circuit Delegate elections are distributed. The nominee who receives the greatest number of votes for each office or position shall be declared elected. In the event of a tie vote, the House of Delegates shall determine which of those tied nominees shall serve.

. . . .