The Supreme Court of South Carolina

In the Matter of
Keri Angela Rose Mathews, Deceased.

ORDER

The Office of Disciplinary Counsel has filed a petition advising the Court that Ms. Mathews passed away on August 3, 2006, and requesting appointment of an attorney to protect Ms. Mathews' clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that Eve Stacey, Esquire, is hereby appointed to assume responsibility for Ms. Mathews' client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Ms. Mathews maintained. Ms. Stacey shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Ms. Mathews' clients. Ms. Stacey may make disbursements from Ms. Mathews' trust account(s), escrow account(s),

operating account(s), and any other law office account(s) Ms. Mathews maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Ms. Mathews, shall serve as notice to the bank or other financial institution that Eve Stacey, Esquire, has been duly appointed by this Court.

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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina
August 23, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34

August 28, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anna Martha Dreher, Appellant,

v.

J. Clarence Dreher, III, as Personal Representative of the Estate of Julius Clarence Dreher, Jr., and as Trustee of the J. C. Dreher, Jr. Trust, Respondent.

Appeal From Richland County
Amy W. McCulloch, Probate Court Judge

Opinion No. 26205
Heard June 20, 2006 – Filed August 21, 2006

REVERSED AND REMANDED

Kenneth B. Wingate and Paul D. Kent, both of Sweeny, Wingate & Barrow, P.A., of Columbia, for Appellant.

Pope D. Johnson, III, of McCutchen, Blanton, Johnson & Barnette, LLP, of Columbia, for Respondent.

JUSTICE BURNETT: Anna Martha Dreher (Appellant) filed a claim for an elective share of her husband's probate estate and alleged her husband's revocable inter vivos trust should be included in the calculation of her elective share because the trust was illusory. The probate court granted Appellant's request for an elective share but found the trust was not illusory pursuant to S.C. Code Ann. § 62-7-112 (Supp. 2004). Appellant contests the probate court's construction and application of § 62-7-112 and Seifert v. Southern National Bank of South Carolina, 305 S.C. 353, 409 S.E.2d 337 (1991), to the trust. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

The parties agree to the following stipulated facts and undisputed findings of fact made by the probate court:

Julius Clarence Dreher, Jr., (Decedent) and Appellant were married on March 21, 1968. On April 4, 1988, Decedent established the J.C. Dreher, Jr. Trust (Dreher Trust). Decedent and his son were designated as co-trustees. During his lifetime, Decedent received disbursements from the Dreher Trust as a beneficiary. Also on April 4, 1988, Decedent executed his Last Will and Testament, in which he devised the rest and residue of his estate to the Dreher Trust. Decedent devised to Appellant all the personal property acquired subsequent to their marriage and a bequest of $10,000. Prior to his death, Decedent designated Appellant as the beneficiary of all but one of his Individual Retirement Accounts.

Decedent died on June 28, 1997. Appellant timely and properly filed her claim for an elective share of Decedent's probate estate. Appellant sought a court order granting her an elective share, declaring the Dreher Trust invalid as illusory and thus includable in the calculation of her elective share, and removing the personal representative. J. Clarence Dreher, III, as Personal Representative of the Estate of Decedent and as Trustee of the Dreher Trust, (Respondent) denied the claim and requested, among other things, that S.C. Code Ann. § 62-2-201 (Supp. 2005) (the elective share statute) be declared unconstitutional.

After a merits hearing, the probate court granted Appellant's request for her elective share of Decedent's probate estate.[1] Pursuant to S.C. Code Ann. § 62-7-112, the probate court found the Dreher Trust was not illusory and thus could not be used to calculate or fund the elective share. Further, the probate court found the elective share statute was constitutional and refused to remove the personal representative.

The parties agreed to appeal directly to this Court pursuant to S.C. Code Ann. § 62-1-308(g) (Supp. 2005).

ISSUES

I. Did the probate court err in its construction of S.C. Code Ann. § 62-7-112 (Supp. 2004)?

II. Did the probate court err in its application of S.C. Code Ann. § 62-7-112 (Supp. 2004) and Seifert v. Southern National Bank of South Carolina, 305 S.C. 353, 409 S.E.2d 337 (1991), to the Dreher Trust?

III. Did the probate court err in finding S.C. Code Ann. § 62-2-201 (Supp. 2005) constitutional?

STANDARD OF REVIEW

"When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999). "In such cases, the appellate court owes no particular deference to the trial court's legal conclusions." *Id.*

[1] The parties have not challenged this ruling, and the unappealed ruling is the law of the case. See In re Morrison, 321 S.C. 370 n.2, 468 S.E.2d 651 n.2 (1996) (an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal).

The issue of interpretation of a statute is a question of law for the court. Charleston County Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (holding the determination of legislative intent is a matter of law). This Court is free to decide questions of law with no particular deference to the lower court. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

LAW AND ANALYSIS

I. Construction of S.C. Code Ann. § 62-7-112

Appellant argues the probate court erred in construing S.C. Code Ann. § 62-7-112 (Supp. 2004). We agree.

In Seifert v. Southern National Bank of South Carolina, 305 S.C. 353, 409 S.E.2d 337 (1991), a widow sought a declaratory judgment that her husband's revocable inter vivos trust was void because the trust was illusory. The Court found the husband as settlor retained extensive control of the trust during his lifetime and the trustee's powers were "custodial." *Id.* at 355-56, 409 S.E.2d at 338. The Court concluded the trust was illusory and held "where a spouse seeks to avoid payment of the elective share by creating a trust over which he or she exercises substantial control, the trust may be declared invalid as illusory, and the trust assets will be included in the decedent's estate for calculation of the elective share." *Id.* at 357, 409 S.E.2d at 339.

After Seifert, the legislature enacted S.C. Code Ann. § 62-7-112 (effective June 23, 1992).[2] This statute provided:

> A revocable inter vivos trust may be created either by declaration of trust or by a transfer of property and is not rendered invalid

[2] South Carolina Code Ann. § 62-7-112 (Supp. 2004) is currently codified as S.C. Code Ann. § 62-7-401(c) (Supp. 2005). The current § 62-7-401(c) uses the same language as former § 62-7-112, except that "trust creator" is now referred to as "settlor."

> because the trust creator retains substantial control over the trust including, but not limited to, (1) a right of revocation, (2) substantial beneficial interests in the trust, or (3) the power to control investments or reinvestments. Nothing herein, however, shall prevent a finding that a revocable inter vivos trust, enforceable for other purposes, is illusory for purposes of determining a spouse's elective share rights under Section 62-2-201 et seq. A finding that a revocable inter vivos trust is illusory and thus invalid for purposes of determining a spouse's elective share rights under Section 62-2-201 et seq. shall not render that revocable inter vivos trust invalid, but would allow inclusion of the trust assets as part of the probate estate of the trust creator only for the purpose of calculating the elective share and would make available the trust assets for satisfaction of the elective share only to the extent necessary under Section 62-2-207.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

The probate court construed § 62-7-112 to prohibit a finding that a revocable inter vivos trust was illusory when a settlor retained substantial control of the trust, and the court concluded the statutory provision accordingly modified the Seifert holding. The probate court also determined that unless a revocable inter vivos trust was declared illusory for a reason other than the settlor's retained substantial control, then the trust assets could not be included in the elective share calculation.

The probate court's construction was erroneous. Section 62-7-112 confirms the validity of revocable inter vivos trusts by providing such trusts shall not be declared completely invalid because the trust creator or settlor retained substantial control over the trust. The statutory provision then provides, "Nothing herein, however shall prevent a finding that a revocable inter vivos trust, enforceable for other purposes, is illusory for purposes of determining a spouse's elective share rights . . . ." The second sentence clearly conveys that no part of the statute, including the first sentence, should be construed to prevent a finding that a revocable inter vivos trust is illusory for purposes of the elective share. This construction of the second sentence does not cause the first sentence to be superfluous because of the third sentence in the statute. The third sentence specifically provides that a revocable inter vivos trust found to be illusory and thus invalid for elective share purposes will not be rendered completely invalid. Further under § 62-7-112, if a revocable inter vivos trust is illusory for elective share purposes, the trust assets become a part of the probate estate only for the calculation of the elective share and are available to satisfy the elective share to the extent necessary under § 62-2-207.

Section 62-7-112 uses the word "invalid" in two contexts. A revocable inter vivos trust which is illusory is invalid for purposes of determining a surviving spouse's elective share rights. However, under the terms of the statute, a revocable inter vivos trust, which is illusory and thus invalid for elective share purposes, is not completely invalid. Section 62-7-112 overruled Seifert to the extent that Seifert held a revocable inter vivos trust which had been declared illusory was completely invalid.

II. Application of S.C. Code Ann. § 62-7-112 and Seifert

Appellant contends the probate court erred in applying § 62-7-112 and Seifert to the Dreher Trust. We agree.

The probate court found the co-trustees paid income to Decedent; filed tax returns; and invested, monitored, and reported the assets of the Dreher Trust. The probate court also found § 62-7-112 specifically prohibited invalidation of the Dreher Trust because Decedent retained

substantial control of the Dreher Trust until his death. Based on these findings, the probate court concluded the Dreher Trust was not illusory.

In Seifert, the inter vivos trust was revocable, and the settlor had extensive powers over the trust. The trustee's role was custodial, and the trustee was prohibited from exercising any powers of sale, investment, or reinvestment during the settlor's lifetime without the settlor's written notice or certification of the settlor's incompetence. 305 S.C. at 355-56, 409 S.E.2d at 338.

In the instant case, Decedent retained the powers to revoke the trust, to withdraw all or any part of the principal, to name a substitute or successor co-trustee, and to revoke the co-trustee requirement; he was a co-trustee and could sell, manage, invest, and reinvest trust property;[3] and as a trust beneficiary, he received income during his lifetime. Moreover, any benefit Appellant received from non-probate assets of Decedent's estate are irrelevant to the determination of whether the Dreher Trust is illusory because, as the surviving spouse, Appellant had a statutory right to take an elective share of one-third of the decedent's probate estate.[4] See also Gallagher v. Evert, 353 S.C. 59, 67, 577 S.E.2d 217, 221 (Ct. App. 2002) ("Any benefits the surviving spouse may obtain through non-probate assets of the deceased spouse's estate are immaterial to the surviving spouse's right to seek an elective share of the [probate] estate.").

We conclude Decedent retained substantial control because he "retained such extensive powers over the assets of the trust that he ha[d] until [his] death the same rights in the assets after creation of the trust that he had

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[3] The co-trustees could not exercise their powers and discretions unilaterally, but Decedent as settlor could revoke this unanimity requirement.

[4] Probate estate is defined as "the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy, reduced by funeral and administration expenses and enforceable claims." S.C. Code Ann. § 62-2-202 (Supp. 2005).

before its creation." Seifert, 305 S.C. at 357 n.2, 409 S.E.2d at 339 n.2;[5] see also *id.* at 355-56, 409 S.E.2d at 338 (referencing the illusory transfer test to determine whether a revocable inter vivos trust was illusory) (citing Moore v. Jones, 261 S.E.2d 289, 292 (N.C. Ct. App. 1980) ("only that where, as here, the settlor retains up to the instant of his death powers over the trust assets so extensive that in a real sense he had the same rights therein after creating the trust as he had before its creation, such assets should be considered part of his estate insofar as the statutory rights granted the settlor's surviving spouse . . . .") and Newman v. Dore, 9 N.E.2d 966, 969 (N.Y. 1937) (describing the illusory transfer test as "the test of whether the [settlor] has in good faith divested himself of ownership of his property or has made an illusory transfer. 'The 'good faith' required of the . . . settlor in making a valid disposition of his property during life does not refer to the purpose to affect his wife but to the intent to divest himself of the ownership of the property . . . .'") (internal citation omitted)). We find the Dreher Trust is illusory and thus invalid for elective share purposes, but remains valid for all other purposes.

III. Constitutionality of S.C. Code Ann. § 62-2-201

As an additional sustaining ground, Respondent asks this Court to declare the elective share statute unconstitutional. We refuse to address this issue because Respondent failed to properly raise it in this Court. See Rule 220(c), SCACR (appellate court may affirm for any ground appearing in the record on appeal); Rule 203, SCACR (notice of appeal requirements).

[5] We note the retention, and not the exercise, of substantial control is the key to determining whether a revocable inter vivos trust is illusory. Furthermore, the retention of the power to revoke "gives the settlor the greatest substantial control." William D. Macdonald, Fraud on the Widow's Share 90 (1960); see also S. Alan Medlin, Result-Oriented Interpretations of the South Carolina Probate Code Create Estate of Confusion, 44 S.C. L. Rev. 287, 300 (1993) ("The right to revoke is the ultimate right that a settlor can retain; all other rights are incidental.").

CONCLUSION

The probate court erred in its construction and application of § 62-7-112 and in its application of Seifert to the Dreher Trust. Because Decedent retained substantial control over the Dreher Trust, the trust is illusory for purposes of determining Appellant's elective share rights. We cannot address Respondent's constitutional issue, and we need not address Appellant's remaining issues. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive). We remand this case to the probate court for determination of Appellant's elective share.

REVERSED AND REMANDED.

MOORE, A.C.J., WALLER, PLEICONES, JJ., and Acting Justice Edward B. Cottingham, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Walter H. Smith, Respondent.

Opinion No. 26206
Submitted June 26, 2006 – Filed August 28, 2006

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

Michael G. Sullivan; A. Camden Lewis and Peter D. Protopapas of Lewis & Babcock, LLP, all of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Amended Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a definite suspension not to exceed two years or an indefinite suspension. We accept the Agreement and indefinitely suspend respondent from the practice of law in this state. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

Respondent was admitted to the practice of law in 1981. He is a sole practitioner in Columbia. Prior to being placed on interim suspension, respondent devoted approximately 75% of his time to the practice of domestic law, 10% of his time to the practice of real estate law, and the remaining 15% of his time to other miscellaneous aspects of the law.

In furtherance of his real estate practice, respondent entered into an arrangement with State Title, a corporation, in or around 1988, working principally through Stella Kelly, the owner, manager, and principal employee of the corporation, but also on occasion with Lauren Proctor (Kelly's daughter) who was an employee of State Title. Neither Kelly nor Proctor were licensed to practice law and, during the period of the arrangement, there were no licensed lawyers employed by or working within the offices of State Title. State Title maintained an office separately from respondent's law office. Respondent had no interest in or position with State Title at any time.

The purpose of the arrangement between respondent and State Title was to have State Title provide real estate closing services to respondent and/or his law firm. The arrangement remained in effect from approximately 1988 until respondent discovered significant shortages in his trust account in June 2005. The following is a description of the parties' arrangement:

1. Respondent opened and maintained an IOLTA trust account with banks in his name and/or in the name of his law firm.

2. The IOLTA account was originally opened with BB&T and then with South Trust Bank, which merged with and is now known as Wachovia.

3. Cancelled checks, bank statements, and other communications between the banks where the IOLTA accounts were maintained were sent to respondent's office, opened, and reviewed by respondent, however the communications were not as closely and carefully reviewed by respondent as he now recognizes they should have been.

4. Respondent caused Kelly to be a signatory on the IOLTA accounts.

5. Kelly was a licensed title insurance agent and State Title was a licensed title insurance agency for Atlantic Title Insurance Company (Atlantic Title); respondent was approved to close real estate transactions where Atlantic Title was issuing title insurance.

6. Atlantic Title was the principal, if not exclusive, title insurance company utilized under the arrangement between State Title and respondent.

7. On approximately a monthly basis, the bank statements and cancelled checks that had been received and opened by respondent were picked up from respondent's law office by a representative of State Title, carried to the offices of State Title and, for the most part, thereafter maintained at the offices of State Title until termination of the arrangement in 2005.

8. The bank statements, cancelled checks, checkbook(s) and deposit book(s) for the IOLTA accounts were, for the most part, maintained at the offices of State Title, but respondent had a checkbook and some bank records at his office.

9. In connection with respondent's real estate closings handled by State Title, State Title would cause a title examination to be conducted and an abstract to be prepared, would prepare closing documents, deliver closing document to respondent's law office,

pick up executed closing documents after closing, and draft checks on the IOLTA accounts for disbursement of the proceeds.

10. Proceeds related to the closings were wired or deposited into the IOLTA accounts for use by State Title in making disbursements from closings conducted by respondent.

11. Respondent reviewed all the closing documents prior to the closings.

12. The closings were generally, if not always, at respondent's office. Respondent attended all closings of the real estate transactions handled under the arrangement.

13. After the closings, the executed closing documents and any proceeds related thereto and not already deposited into the IOLTA accounts would be taken back to the offices of State Title by an officer, agent, or employee of State Title and left in possession of State Title.

14. State Title handled the recordation of documents from closings without supervision by or involvement of respondent.

15. State Title would make disbursements from respondent's IOLTA accounts under Kelly's signature without supervision by respondent.

16. Respondent's involvement in the closings ended when clients left his office and, thereafter, recordation, disbursement of proceeds, and other actions needed to complete the transactions were handled by non-lawyer personnel of State Title without supervision of respondent, to include but not limited to, correspondence with payees, lenders, and clients, payment of real property taxes on subject property, recordation of documents, payoffs of prior liens, and the like.

17. For the most part, respondent had no meaningful involvement in the handling of the transactions after the clients left his law office (unless some impediment to the closing was reported to respondent) and monies and documents connected therewith were left to a non-lawyer representative of State Title for completion of the transactions.

18. When respondent became aware of problems related to any of the closings, the problems were generally referred to State Title for remediation.

19. Respondent did not reconcile or thoroughly inspect the records of his IOLTA accounts until severe shortages appeared in 2005.

20. No or virtually no monthly reconciliations of the IOLTA accounts were made by respondent; however respondent represents he thought Kelly was making a monthly reconciliation of the accounts and respondent relied on her to do so.

21. In fact, Kelly did some type of reconciliations or recordkeeping in writing which respondent viewed, but it is now recognizes that her reconciliations were inaccurate, incomplete, and did not come close to meeting the requirements imposed by Rule 417, SCACR.

22. Respondent closed numerous real estate transactions utilizing the services of State Title.[1]

23. During the period of the arrangement, most client files related to the closings were maintained at the office of State Title.

[1] After this matter was brought to its attention, Atlantic Title was given possession of approximately 1400 of respondent's files for review.

24. State Title would pay or absorb any charges or assessments to the bank accounts for any insufficient funds or "NSF" checks.

25. The IOLTA accounts were only to be used by State Title for transactions where respondent was the closing attorney.

Respondent now recognizes and acknowledges that there were dramatic and glaring "red flags" evidencing that proceeds of the real estate closings were not being safely kept. These red flags include the following insufficient funds notices and assessments to the IOLTA accounts: 1) twenty-two insufficient funds checks with assessments of $526 in 2000; 2) fifteen insufficient funds checks with assessments of $392 in 2001; 3) twenty-two insufficient funds checks with assessments of $616 in 2002; 4) three insufficient funds checks with assessments of $90 in 2003; 5) forty-four insufficient funds checks with assessments of $1,320 in 2004; 6) for a portion of 2005 (until respondent ended the arrangement with State Title), there were thirty-four insufficient funds checks of $1,020; 7) in August 2004 alone, $900 was assessed against the IOLTA accounts for insufficient funds; and 8) in January 2005 alone, $600 was assessed against the IOLTA accounts for insufficient funds.

In addition to the insufficient fund charges assessed against the IOLTA accounts, there were other red flags on the bank statements and cancelled checks which indicated the accounts were not being properly handled by State Title. For example:

1. Numerous checks totaling $40,603 were written on the accounts payable to the order of or for the benefit of Debbie Mitchell (the roommate, companion, and/or close friend of Kelly's daughter, Lauren Proctor). These checks were not written, signed, or authorized by respondent.

2. Numerous checks totaling approximately $151,476 made payable to South Trust Bank and drawn on the accounts bore no relation to any real estate transactions closed by respondent. It is now known that there were monthly payments made on an equity

loan for Mitchell. These checks were not written, signed, or authorized by respondent.

3. Five checks payable to South Carolina Electric and Gas and one check payable to Time Warner Cable were written on the IOLTA accounts and bore no known relationship to any real estate closings handled by respondent.

4) During the period of the arrangement, one check was signed by Mitchell (who was not even a signatory on the IOLTA accounts). This check was not written, signed, or authorized by respondent.

Notwithstanding the numerous assessments to the IOLTA accounts, checks written to payees unrelated to real estate closings, and a check signed by a person who was not a signatory to the accounts, respondent continued his arrangement with State Title. In addition, he allowed State Title to have access to and control over the IOLTA accounts.

During the period of the arrangement, Kelly became critically ill for several months and unable to come to the office of State Title on her regular schedule. Kelly's daughter, Proctor, carried on the business of State Title on her mother's behalf. Respondent was aware of Kelly's serious illness and that, for a period of several months, Proctor was operating State Title and providing services to respondent under the terms of the arrangement. During Kelly's absence from State Title, Proctor brought prepared documents to respondent's law office and then carried executed documents back to State Title after each closing at respondent's office. Proctor signed Kelly's name to checks drawn on the IOLTA accounts.

It is now known that, in August 2004, there was a deposit of $50,000 into an IOLTA account from Nancy Abernathy and, thereafter, a check drawn out of the account payable to Nancy Abernathy for the same amount. The deposit and withdrawal had no relationship to any client files handled by respondent. Respondent did

not participate in the Abernathy transaction. The parties believe the transaction was arranged by someone at State Title to conceal shortages and/or other irregularities in the IOLTA account. Had respondent closely reviewed the cancelled checks and bank statements, he would have recognized the account was being used by State Title for inappropriate purposes unrelated to the arrangement and recognized that there were unacceptable and inappropriate shortages in the account.

It is now known that on September 30, 2004, Joan T. Sammons (Kelly's sister) borrowed money on real estate and made a $50,000 deposit into respondent's IOLTA account, presumably to cure shortages in the account and as an accommodation to Kelly. The funds deposited in the account are now missing and Sammons' mortgage is outstanding and unpaid.

Respondent did not participate in Sammons' closing and it appears that someone forged respondent's name without his consent or knowledge to at least one of the closing documents in that transaction. Had respondent closely examined the cancelled checks and bank records, he would have recognized the IOLTA account was being used by someone for inappropriate purposes unrelated to his arrangement with State Title.

On or about April 1, 2005, respondent learned from Kelly that there was an unexplained shortage in the IOLTA account in the approximate amount of $60,000. Respondent promptly deposited $60,000 of his own funds into the account to compensate for the shortage and directed Kelly to determine and report the cause of the shortage to him. Kelly later reported to respondent that she had discovered the source of the shortage was a previously non-received wire transfer or non-deposited check that had been received and/or located and deposited into the account, thereby curing the reported shortage.[2] Respondent relied on the representation from Kelly. On or

[2] On April 1, the bank records indicated that there had been a check returned for insufficient funds.

about April 25, 2005, respondent withdrew $60,000 from the account and deposited the amount into his personal funds and/or the firm's operating account. However, respondent did not independently verify Kelly's representations as to the cause of the shortage and that the $60,000 deposit had in fact cured the reported shortages.[3]

On April 8, 2005, after respondent's deposit of $60,000 into the account, two insufficient fund checks were issued on the account. On May 24, 2005 (after respondent's withdrawal) and again on May 25, 2005, two more insufficient funds checks were written against the account.[4] The assessments for the insufficient funds checks were reported on the monthly bank statements sent by the bank to respondent. It now appears that at least a portion of the $60,000 withdrawn by respondent from the account on April 25, 2005 was from monies of others, albeit unknown to respondent on the occasion of the withdrawal.

On June 15, 2005, respondent received a telephone call from Wachovia and was advised a deposit of $195,000 was necessary in order to make good checks drawn on the IOLTA account. The same day respondent raised the sum of $195,000 from his own personal funds and those of his family and made a deposit into the account.

Respondent contacted forensic Certified Public Accountant Roger Long to assist him in determining the source of the shortages in the account. Respondent and Long worked at the offices of State Title from June 17 through 19, 2005, reviewing the files and bank records to determine the nature and source of the shortages. The review indicated

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[3] Neither respondent, his CPA, nor ODC have been able to locate any non-received wire transfer or non-deposited check and it now appears to the parties that Kelly's representations concerning the cause of the shortage were false.

[4] While the four checks were honored by the bank, an assessment was charged against the account for each check.

significant shortages in the account and other irregularities in the handling of respondent's real estate closings by State Title.

On June 20, 2005, respondent contacted an attorney. The same day, the attorney and respondent met with respondent's CPA and ODC. That day, respondent made a self-report of what had been learned since June 16, 2005 and he notified Atlantic Title of the shortages and problems which had been reported to ODC.

It now appears that, over an extended period of time, someone (not respondent) misappropriated money belonging to respondent's clients and third parties from respondent's IOLTA accounts in excess of $838,916. This amount has been reduced to approximately $643,916 due to respondent's deposit of $195,000 into the account.

Further, it now appears that, in addition to claims regarding missing funds, State Title was not handling closings properly for respondent. The improper closings include, but are not necessarily limited to, the following claims:[5]

1. seven unpaid mortgages notwithstanding the funds to pay off the mortgages were collected and deposited into the IOTLA account at closing;

2. five mortgages were not recorded after closing;

3. two mortgages which were paid off were not satisfied by record;

4. two deeds were not recorded;

[5] As set forth below, some of these claims have been remediated.

5. approximately twenty-eight documents had not been transmitted for recordation in a timely fashion or, in some cases, not transmitted for recordation at all;

6. two cases of unpaid real property taxes where funds for the payment thereof had been deposited in the IOLTA account at closing for the payment of those taxes;

7. six cases of other unpaid bills not being paid where funds for their payment were collected and deposited into the IOLTA account at closing;

8. one parcel of real estate subject to a closing handled by respondent with the assistance of State Title is subject to an ongoing foreclosure action because the prior lien was not paid off after closing, notwithstanding that the sum of $213,903 was deposited into the IOLTA account for that purpose; and

9. Flagstar Bank funded a real estate transaction closed by respondent where the first lien on the subject property was not paid off (although the sum of $192,292 was deposited into respondent's IOLTA account for the purpose of paying the lien), leaving Flagstar Bank in a subordinate position rather than as the superior lien holder as contemplated by both the closing instructions and the closing documents; Atlantic Title and respondent have been named as defendants in a civil action brought by Flagstar Bank.

As the title insurance carrier for respondent in the real estate transactions closed under his arrangement with State Title and because of the shortages in respondent's IOLTA account, Atlantic Title reports as follows:

1. as of November 14, 2005, Atlantic Title paid out approximately $350,000 towards claims made against it;

2. additional claims pending against Atlantic Title (which it reports it will likely pay) exist in the amount of approximately $201,304;

3. Atlantic Title has lost $14,441.62 in its share of premiums for title insurance issued by State Title in connection with the closings handled by respondent;

4. respondent has $500,000 in Errors and Omissions coverage; the payments made by and projected losses to Atlantic Title alone are approximately $565,475, plus attorney's fees and costs; respondent's Errors and Omissions carrier has denied coverage for the losses and claims; and

5. Atlantic Title discovered problems with real estate closings conducted by respondent and unrelated to Atlantic Title.

Matter II

In November 2004, respondent closed a real estate transaction for Complainant A. In April 2005, Complainant A discovered that the real property taxes had not been paid and, further, that the deed had not been recorded. In his Response to Disciplinary Counsel dated May 5, 2005 (made after respondent had deposited the $60,000 in the account), respondent made no mention of the shortages. He further stated that, in response to an allegation of lack of response to communications from Complainant A, that the situation was "…like repeatedly pushing an elevator button will not bring the elevator any faster. [That] the money remained in escrow and was not applied to any other purpose."

Respondent represents he relied on Kelly in drafting his Response to Disciplinary Counsel and it now appears that the money had been applied by someone at State Title for purposes other than intended, albeit unknown to respondent at the time he filed his Response to Disciplinary Counsel. The taxes have now been paid on behalf of Complainant A and the deed has now been recorded.

Matter III

Complainant B alleges that a real estate transaction was closed by respondent in October 2004, but that her deed to the property had not been recorded as of April 2005 and a tax execution had been issued against the property notwithstanding that funds had been withheld by respondent at closing to pay the real estate taxes. In his Response to Disciplinary Counsel dated May 20, 2005, (after his deposit of $60,000 into the IOLTA account) respondent blamed the problems on the Clerk of Court and stated, "the money collected for taxes never left my escrow account and the Complainant's property was never at risk." Respondent made no mention in his response about the shortages he knew existed in the account. As part of his Response to Disciplinary Counsel, respondent submitted a statement from Kelly in which she took responsibility for the shortcomings and claimed they were due to her inability to obtain qualified staff during her illness.

Respondent represents he relied on Kelly in drafting his Response to Disciplinary Counsel and, based on information later learned through an audit, he recognizes that, due to the account shortages and the fact that Complainant B's property was subject to a tax execution due to failure to pay property taxes withheld at closing, Complainant B's property is now known to have "been at risk" contrary to his earlier representations. The real property taxes on the subject property have now been paid and the deed has now been recorded.

Matter IV

Complainant C alleges respondent closed a real estate transaction but failed to pay off a prior lien in a timely fashion. In his Response to Disciplinary Counsel dated May 20, 2005, respondent represented that replacement checks were issued on January 22, 2005 (for checks that should have been issued on January 14, 2005). The bank records, however, do not indicate that the earlier checks had been issued.

Once again, respondent did not mention the shortages in the IOLTA account which were known to him. He relied on the assistance of and/or information from Kelly in drafting his Response to Disciplinary Counsel. After an audit, respondent recognizes that representations made in the Response to Disciplinary Counsel were incomplete and, in some parts, incorrect. The refinanced mortgage has been paid off.

Matter V

Complainant D alleges that respondent closed a loan transaction for her on March 31, 2005, but the payoff of the $96, 509.89 first lien was not received by the lender until approximately two months later.

Matter VI

Complainants Seller and Buyers allege respondent closed a real estate transaction but the payoff of the first mortgage lien reflected on the closing statement in the amount of $209,988.30 was not made by respondent. The failure resulted in a foreclosure action against the Seller and Buyers. The Seller's mortgage has now been paid off, the foreclosure action dismissed, and the related civil suit against respondent dismissed.

Matter VII

Respondent closed a real estate transaction for Complainant E on or about April 20, 2005, but failed to pay off the first mortgage lien in the amount of $120,292.44. As a result, the lender filed litigation against Atlantic Title.

On June 15, 2005, respondent's IOLTA account had a negative balance of $192,059, indicating funds to pay off the mortgage had been misappropriated. The first mortgage has now been satisfied and a related civil action against respondent has been dismissed.

Matter VIII

On behalf of certain borrowers, $28,475 in cash or its equivalent was deposited into respondent's IOLTA account in connection with a scheduled real estate matter to be handled by respondent. The funds were misappropriated and have not been located.

In summary, after credit is given for amounts paid into the IOLTA account by respondent, there are estimated shortages of approximately $643,916. ODC does not contend respondent misappropriated the funds or knew of or condoned the misappropriation by others. However, ODC asserts, and respondent concedes, that the shortages and other problems which have come to light after June 16, 2005 would not have occurred (or at least would not have occurred to their current magnitude) had respondent strictly followed the published directives of this Court and been more alert to the red flags mentioned herein.

Since discovering the shortages and making a self-report, respondent has fully cooperated with ODC in connection with these matters. Respondent has no prior disciplinary history.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing clients); Rule 1.4 (lawyer shall keep clients informed about status of a matter); Rule 1.15 (lawyer shall promptly deliver to client any funds or other property to which client is entitled and lawyer shall keep client funds separate from his own funds); Rule 5.3 (lawyer is responsible for conduct of non-lawyer assistants); Rule 5.5 (lawyer shall not assist person who is not a member of the Bar in performance of activity that constitutes the unauthorized practice of law); Rule 8.4(a) (lawyer shall not violate

Rules of Professional Conduct); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). Respondent agrees his recordkeeping and money handling procedures also violated Rule 417, SCACR. In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. The Court denies respondent's request that the suspension run retroactively to the date of his interim suspension.[6] Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

Respondent shall not be reinstated until he has provided proof that he has paid full restitution to all persons and entities who have been harmed by his misconduct, including clients, banks, the Lawyers' Fund for Client Protection, and any others.

INDEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., not participating.

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[6] On November 9, 2005, respondent was placed on interim suspension. In the Matter of Smith, 366 S.C. 339, 622 S.E.2d 526 (2005).

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William F. Gorski, Respondent.

Opinion No. 26207
Submitted July 31, 2006 – Filed August 28, 2006

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

William F. Gorski, pro se, of Lexington.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to either an admonition or a public reprimand. In addition, respondent agrees to pay the costs incurred by ODC in its investigation of these matters and to undergo a law office management review. We accept the agreement, issue a public reprimand, and order respondent to pay the costs incurred by ODC in its investigation of these matters and to undergo a law office management review. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

In April 2000, Client A retained respondent to represent her in a divorce proceeding. In February 2001, prior to the issuance of the divorce decree, Client A's husband passed away. Client A retained respondent to handle her husband's intestate estate for which she had been appointed personal representative.

Respondent failed to diligently pursue probate of the estate. The estate was administratively closed in November 2002. Respondent spoke with Client A on December 29, 2002. He did not inform her of the closing of the estate.

Respondent did not communicate further with Client A until April 3, 2003, after receiving notice of her complaint with ODC. At that time he agreed to reopen the estate at no additional cost to Client A. On July 30, 2003, respondent submitted his petition to reopen the estate. Respondent then proceeded to negotiate reductions in the outstanding debts of the estate. The matter has now been resolved to Client A's satisfaction.

Matter II

In November 2001, respondent ordered a transcript of a deposition from a court reporter. The charge for the service was $228.20. Respondent did not timely pay the bill and did not respond to the court reporter's inquiries. Upon receipt of the court reporter's complaint to ODC respondent paid the debt in full.

Matter III

Respondent represented Client B in his divorce. On March 4, 2003, Client B's wife, pro se, appeared at the final hearing. Respondent prepared the final order which was signed on June 23, 2003. In that order, the judge retained jurisdiction over the matter to

review and approve qualified domestic relations orders (QDROS) regarding Client B's retirement accounts. Client B requested respondent prepare a QDRO.

On October 13, 2003, Client B contacted respondent and asked that he conclude the matter. By January 8, 2004, Client B had not heard from respondent so he contacted him again. On March 15, 2004, respondent submitted a proposed QDRO to Client B's former employer. After revisions, a final draft was prepared and submitted to the parties for signature.

Matter IV

In January 1999, respondent was retained to represent Client C in a medical malpractice claim against the South Carolina Department of Corrections (SCDC) and the contractor the SCDC paid to provide medical services to inmates. In March 2001, respondent associated another attorney to assist him in the trial of the case. Respondent and the associated attorney agreed to split the fee evenly. The scope of the associated attorney's involvement or the relative responsibilities of the two attorneys was not reduced to writing or consented to by the associated attorney. The litigation was delayed for three reasons: 1) summary judgment was granted to the SCDC based on provisions of the South Carolina Tort Claims Act; 2) the expert witness selected by respondent could not confirm his theory of liability; and 3) the contractor's insurance company filed bankruptcy and the case was dismissed pursuant to Rule 40(j), SCRCP.

During the course of the representation, respondent provided competent representation, however, he did not adequately communicate with Client C. Additionally, believing he had timely restored the case to the docket, respondent told Client C he had done so, although he had not in fact timely restored the case.

Matter V

In order to conclude three of the above-mentioned matters, respondent and ODC proposed a deferred disciplinary agreement that was accepted by the Investigative Panel of the Commission on Lawyer Conduct (Commission) on August 27, 2004. In that agreement, respondent agreed to comply with certain terms and conditions. Under those terms and conditions, respondent was to undergo a review of his law office management practices with a consultant of his choice approved by ODC. This review was to be completed within six months of the date of acceptance of the agreement. At the conclusion of the six month period, respondent was to file a certification of completion by the consultant. Respondent was required to comply with the terms of the agreement no later than February 28, 2005.

Respondent did not retain a consultant, undergo the review, or file certification of completion within the six month period. On July 15, 2005, an Investigative Panel terminated deferment of discipline and reopened the investigation.

Matter VI

Client D alleged lack of diligence and communication by respondent. Although there appears to be no merit to the underlying allegations, respondent failed to timely respond to ODC's inquires in this matter.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter and promptly comply with reasonable requests for information); Rule 1.5(e) (division of fees between lawyers who are not in same firm may be made only if

the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of the client); Rule 8.1 (lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).[1] Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a)(3) (it shall be ground for discipline for lawyer to willfully violate a valid order of the Commission), and 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. Further, within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC in its investigation into these matters and, within six (6) months of the date of this opinion, respondent shall undergo a law office management review as set forth in his deferred disciplinary agreement dated July 16, 2004.

PUBLIC REPRIMAND.

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[1] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

J.T. Baggerly, Appellant,

v.

CSX Transportation, Inc., National Railroad Passenger Corporation, d/b/a Amtrak, Southern Companies of South Carolina, Inc., and Ervin Lavern Lucky, Defendants,

Of Whom CSX Transportation, Inc. and National Railroad Passenger Corporation, d/b/a Amtrak are Respondents.

Appeal From Richland County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 26208
Heard June 7, 2006 – August 28, 2006

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

John K. Koon, of Koon & Cook PA, of Columbia, and John S. Nichols, of Bluestein & Nichols, LLC, of Columbia, for Appellant.

Charles Craig Young, of Young, Miller & Braddock, LLC, of Florence, James M Saleeby, Jr., of Aiken, Bridges, Nunn, Elliott &

Tyler, PA, of Florence, John C. Millberg, of Millberg Gordon & Stewart, PLLC, of Raleigh, for Respondents.

JUSTICE WALLER: This is a direct appeal from the trial court's grant of a directed verdict in favor of respondents. Appellant also raises various evidentiary issues, including whether the trial court erred in excluding one of his expert witnesses, a professional engineer. We affirm in part, reverse in part, and remand for a new trial.

FACTS

At approximately seven a.m. on August 21, 2000, an Amtrak Silver Meteor passenger train derailed in Lake City. Minutes before the derailment, a street sweeper had jumped the curb and collided with the railroad track after defendant Ervin Lucky ("Lucky") fell asleep while operating the sweeper. Appellant J.T. Baggerly was the locomotive engineer driving the Amtrak train. Appellant suffered injuries from the derailment and brought suit against: his employer, respondent National Railroad Passenger Corporation ("Amtrak"); the track owner, respondent CSX Transportation, Inc. ("CSX"); the owner of the street sweeper, defendant Southern Companies of South Carolina, Inc. ("Southco"); and the sweeper operator, Lucky. Appellant's complaint alleged a Federal Employers' Liability Act[1] (FELA) claim against Amtrak, and separate negligence claims against CSX, Southco, and Lucky. Appellant sought actual and punitive damages.

The trial court denied cross-motions for summary judgment, and the case proceeded to trial. After appellant presented his case regarding liability, respondents moved for a directed verdict which the trial court granted. The trial continued against defendants Southco and Lucky, and the jury returned a verdict for appellant, finding $577,000 in actual damages.

ISSUES

1. Did the trial court err in directing a verdict for Amtrak and CSX?

[1] 45 U.S.C. § 51 *et seq.* (2000).

2. Did the trial court err in excluding appellant's out-of-state professional engineer expert pursuant to S.C. Code Ann. § 40-22-30?

DISCUSSION

1. Directed Verdict

Appellant argues that he presented sufficient evidence to withstand respondents' motion for directed verdict. Specifically, appellant contends there was enough evidence to show that the negligence of Lucky, the street sweeper operator, **combined with CSX's negligence** regarding insufficient ballast on the roadbed, to bring about the derailment. We agree.

Appellant presented evidence from two experts who each established that if CSX had maintained the proper ballast level at the point of derailment, then the street sweeper would not have collided with the cross-tie, but instead would have ridden the incline up and over the tracks, with only the tires coming into contact with the track.

Tom Paton, a railroad industry safety consultant and former employee of the Federal Railroad Administration, testified that CSX did not comply with its own internal specifications for ballast requirements at the point of derailment.[2] When asked what factors contributed to cause the misalignment of the track, Paton responded as follows: "Well, obviously, the fact that Mr. Lucky fell asleep and drove the sweeper up towards the tracks is a factor, and the absence of a full ballast section of the part of CSX is another factor." As to the fact that a piece of wood from the crosstie was found lodged in the sweeper's underframe, Paton opined that the wood "came from the track

[2] According to Paton, CSX's specification drawing 2602 required a minimum of eight inches of ballast below the crosstie and full ballast even with the top of the tie. It also required a six-inch shoulder level with the top of the tie and then progressing downward at a two-to-one slope. This internal CSX document states that the specification is "the minimum necessary to assure the track is maintained to permit safe passage of trains at authorized speed."

upon impact with the tie itself." In addition, Paton stated that the bumper of the sweeper actually struck the rail.

Paton further testified that if the ballast had been "full," i.e., in compliance with CSX's own specifications, "neither the piece of crosstie would have wedged in the undercarriage, nor would the front bumper have contacted the rail." Paton did not believe that the street sweeper's speed was a factor because the relevant fact was that "the undercarriage in the bumper struck the track itself." Finally, Paton stated that with a proper ballast section, the air-filled tires of the sweeper would have struck the rail.

Don Bowden also provided expert testimony for appellant. Bowden, a railroad safety consultant and former Road Master[3] for CSX, testified that at the point of derailment, the ballast was missing between the ends of the ties and had eroded down the bank of the footpath that crossed the track at that particular location; he further stated that he did not believe that CSX was in compliance with federal regulation 49 C.F.R. § 213.119 which required CSX, as track owner, to comply with written procedures which address the maintenance and inspection of Continuous Welded Rail.[4] In Bowden's opinion, if the railroad track had been properly ballasted, the street sweeper should not have misaligned the track because the ballast would have protected the end of the crosstie. Additionally, Bowden testified that a CSX employee in the Florence division had, at deposition, testified that in the Florence subdivision, vehicles strike CSX tracks approximately three or four times a year.

When reviewing the grant of a directed verdict, the evidence **and all reasonable inferences therefrom** must be viewed in the light most favorable to the party against whom the verdict was directed. E.g., Quesinberry v. Rouppasong, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998). If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury. Id.

[3] A Road Master is in charge of track maintenance and supervises track inspectors.
[4] Bowden testified that CSX filed its specification drawing 2602 in accordance with 49 C.F.R. § 213.119.

To establish a negligence cause of action under South Carolina law, the plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. E.g., Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000).

Normally, proximate cause is a question of fact for the jury, and it may be proved by direct or circumstantial evidence. Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531 (1972). Proximate cause requires proof of: (1) causation-in-fact, and (2) legal cause. Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation-in-fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence, and legal cause is proved by establishing foreseeability. Id.

Indeed, foreseeability is considered "the touchstone of proximate cause," and it is determined by looking to the natural and probable consequences of the defendant's act or omission. Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). However, while foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the defendant should have contemplated **the particular event** which occurred. Whitlaw v. Kroger Co., 306 S.C. 51, 410 S.E.2d 251 (1991).

Moreover, it is not necessary to prove that the defendant's negligence was the **sole** proximate cause of the injury. Player v. Thompson, supra. Instead, it is sufficient if the evidence establishes that the defendant's negligence is "a concurring or a contributing proximate cause." Id. at 606, 193 S.E.2d at 534. "'[C]oncurring causes operate contemporaneously to produce the injury, **so that it would not have happened in the absence of either**.'" Id. (emphasis added, citation omitted). In other words, "[i]f the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in

which it occurred does not negative his liability." Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966).[5]

Appellant argues that a jury issue was created regarding respondents' liability because of the insufficient ballast level at the point of derailment. More specifically, appellant's liability theory is that the inadequate ballast level was a contributing, concurring cause which combined with Lucky's negligence to produce appellant's injuries. We agree with appellant that the evidence presented was sufficient to create a jury question on each element of negligence, and therefore, the trial court erred by granting respondents' directed verdict motion.

As to duty, it is reasonable to infer from appellant's evidence that both CSX and Amtrak had a duty to properly inspect and maintain the tracks which includes keeping proper ballast levels.[6] Regarding breach, appellant's experts testified that at the point of derailment the crossties were exposed, and therefore, the ballast was not compliant with CSX's own specification drawing 2602.

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[5] Likewise, for appellant's FELA claim, he must prove the traditional common law elements of negligence (i.e., duty, breach, causation and damages) and that the employer's negligence "contributed, in whole or in part, to the worker's injury." Rogers v. Norfolk S. Corp., 356 S.C. 85, 93, 588 S.E.2d 87, 91 (2003), cert. denied, 541 U.S. 1085 (2004) (citing 45 U.S.C. § 51 which states that a railroad a "shall be liable in damages to any person suffering injury while he is employed by such carrier ... for such injury ... resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier").

[6] CSX's duty to maintain the ballast is based, at least in part, by its own specification 2602. See Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 618 S.E.2d 903 (2005). Amtrak had a nondelegable duty to maintain the tracks by virtue of its agreement to run its trains on CSX-owned tracks and CSX's clear duty to inspect the track under federal regulations. See Sinkler v. Missouri Pac. R. Co., 356 U.S. 326, 331-32 (1958) (where the United States Supreme Court held that "when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of … FELA").

The critical issue is whether appellant presented sufficient evidence of proximate cause. As to cause-in-fact, both experts supplied testimony that **but for** the lack of proper ballast, the street sweeper would not have collided with the tie and the track. Viewing the expert testimony in a light most favorable to appellant, a reasonable inference can be drawn that had the ballast been fully in compliance, the sweeper would have ridden over the tracks instead of colliding with the track and causing the misalignment.

As to foreseeability, there was evidence presented that: (1) sufficient ballast maintains proper track alignment; and (2) vehicles strike track three or four times per year in the Florence division. Viewing this evidence in a light most favorable to appellant, we conclude that a jury could have properly found it was foreseeable to CSX that the lack of proper ballast could cause a misalignment of the track due to a vehicle colliding with the track. Thus, it can be reasonably inferred from the evidence that the failure to maintain the ballast level contributed **in part** to the derailment. See Player v. Thompson, supra (the plaintiff need not prove the defendant's negligence was the **sole** proximate cause of the injury); see also Rogers v. Norfolk S. Corp., supra (to prove a FELA claim, plaintiff must prove that the railroad employer's negligence contributed "in whole or in part" to the injury).

Moreover, it was not necessary for appellant to establish that respondents specifically foresaw that a street sweeper operator would fall asleep and collide with the track; appellant merely has to show that it was foreseeable that respondents' act (or omission) could cause, or be a contributing cause to, appellant's injury. See Whitlaw v. Kroger Co., supra (the plaintiff need not prove the defendant should have contemplated the particular event that occurred); Childers v. Gas Lines, Inc., supra (if the defendant's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the manner in which it occurred does not absolve the defendant of liability).

Therefore, viewing the evidence and all reasonable inferences in the light most favorable to appellant, we hold that the trial court erred in directing a verdict for respondents. Quesinberry v. Rouppasong, supra.[7]

2. Exclusion of Professional Engineer Expert Witness

Prior to opening arguments, but after a jury had been selected, the parties argued several motions *in limine*. Significantly, respondents moved to exclude the testimony of one of appellant's expert witnesses, Robin Harrison, a professional engineer from California. Appellant had specially retained Harrison as an accident reconstruction expert and his expert testimony was also critical for the foundation of several exhibits that had been prepared. Harrison's trial testimony was going to be presented by videotaped trial deposition, and the recording of the deposition had been done in California.

Pursuant to South Carolina Code Section 40-22-30, the trial court granted respondents' motion to exclude Harrison's testimony because he was not a South Carolina licensed professional engineer. Appellant argues that the trial court misconstrued the statute and erred by excluding Harrison. This presents a novel issue of law. When reviewing a novel question of law, we are free to decide the issue with no particular deference to the lower court. E.g., I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000); Osprey, Inc. v. Cabana Ltd. P'ship, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000).

[7] We recognize that this Court has already decided a case arising out of this particular derailment. See Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 618 S.E.2d 903 (2005). In Peterson, a passenger on the train brought suit against Amtrak and CSX; we affirmed summary judgment in the railroad defendants' favor. Many similar arguments that are raised by appellant in this case were raised and rejected in Peterson. Hence, respondents argue that Peterson compels a decision upholding the directed verdict. However, the crucial evidence that was lacking in Peterson was presented at trial in the instant case. We therefore agree with appellant's arguments that Peterson is distinguishable from this case.

Title 40, Chapter 22 of the South Carolina Code governs the licensing of professional engineers and land surveyors. Section 40-22-20 defines the practice of engineering as follows, in pertinent part:

> "Practice of engineering" means any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, **expert technical testimony**....

S.C. Code Ann. § 40-22-20(22) (Supp. 2005) (emphasis added). Prior to 2000, however, the definition of the practice of engineering did **not** include the phrase "expert technical testimony." See S.C. Code Ann. § 40-22-10(4) (2001). Section 40-22-30 prohibits an individual from engaging in the practice of engineering in South Carolina without being registered pursuant to Chapter 22. S.C. Code Ann. § 40-22-30 (Supp. 2005). Violation of this section is a misdemeanor subject to a penalty of imprisonment up to six months and/or a fine up to $2,000. S.C. Code Ann. § 40-22-200 (Supp. 2005).

The trial court found that Harrison was not competent to testify in a South Carolina court because the plain language of the statute prohibits a person from practicing engineering without a South Carolina license, and that practice includes giving "expert technical testimony." Appellant argues that the purpose of the statute is not to restrict the admission of expert testimony in state court litigation, but rather to protect South Carolina consumers from unqualified people holding themselves out as engineers. In addition, appellant asserts that the trial court's decision is not in harmony with Rule 702, SCRE, which governs expert testimony.[8] We agree with appellant.

[8] Rule 702, SCRE, states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Regarding statutory construction, all rules "are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994). Nonetheless, however plain the ordinary meaning of the words used in a statute may be, we will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. Id.

The plain language of the statute uses the words "expert technical testimony" which arguably applies to expert testimony offered in a court of law. Thus, the statutory language suggests that only South Carolina licensed professional engineers are permitted to give expert engineering testimony in this State. We find, however, that this result could not have reasonably been intended by the Legislature.

First, we agree with appellant that one of the primary purposes of Section 40-22-30 is to shield South Carolina consumers from those who are not properly credentialed pursuant to this State's standards, but who nevertheless hold themselves out to be professional engineers. In the instant case, however, Harrison's role was as an **expert witness** in accident reconstruction engineering. His credentials, which include his status as a California licensed professional safety engineer as well as his education in mechanical engineering, go to his qualifications **as an expert witness**, rather than as a professional engineer offering services in South Carolina. In other words, Harrison's services were being offered to a South Carolina jury, not to the State's citizens seeking traditional professional engineering services.

Second, to accept the trial court's interpretation would clearly contravene Rule 702, SCRE, which states that if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify." Pursuant to Rule 702, Harrison plainly qualified as an expert witness; to permit his exclusion would therefore effect a significant limitation on Rule 702.

Without clear indication from the Legislature that the 2000 amendment was, in fact, intended specifically to limit Rule 702 in this way, we decline to adopt that interpretation.

Respondents contend that because the professional engineer statute is more specific than Rule 702 and was enacted more recently, the statute should control. See Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993) ("Generally, specific laws prevail over general laws, and later legislation takes precedence over earlier legislation"). However, we reiterate that it cannot be ignored that the effect of the 2000 amendment radically alters the scope of Rule 702. By applying the engineer licensing statute literally, no out-of-state engineer could ever be an expert witness in a South Carolina state court if the testimony is even remotely related to engineering. This singling-out of one type of expert witness seems to us to be an absurd result, and therefore we reject respondents' argument. Kiriakides, supra.

Furthermore, if we held that exclusion of an out-of-state professional engineering expert is proper under the statute, the result would be to limit the truth-seeking duty of the courts of this State. We can envision numerous litigation scenarios where a party's position might only be supported by the expert testimony of an engineer licensed and practicing outside the state of South Carolina. Yet, experts are intended **to assist juries**. We refuse to endorse an interpretation of the professional engineer licensing statute which has the potential of either preventing out-of-state experts from testifying in South Carolina courts or imposing the unreasonable burden of getting licensed in this State simply to be permitted to provide forensic testimony.

Accordingly, we reverse the trial court's decision to exclude appellant's expert witness in accident reconstruction engineering from testifying at trial.

Appellant's Remaining Issues

Appellant raises several other issues. These issues are affirmed pursuant to Rule 220(b)(1), SCACR, and the following authorities: Issues 3, 5, and 6: State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998); (a ruling *in limine* is not final; unless an objection is made at the time the evidence is

offered and a final ruling procured, the issue is not preserved for review); State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988) (rulings *in limine* do not constitute final determinations on admissibility of evidence); Issue 4: Webb v. CSX Transp., Inc., 364 S.C. 639, 656, 615 S.E.2d 440, 449 (2005) (Federal Railroad Administration report was not relevant **to liability** where it did not address specific breach complained of).

CONCLUSION

In summary, we reverse the directed verdict for respondents and remand for a new trial. Additionally, we reverse the trial court's decision to exclude the testimony of appellant's accident reconstruction expert. Despite the statutory language in the definition of the practice of engineering, see § 40-22-20(22), we hold that an out-of-state professional engineer may give expert testimony, if qualified under Rule 702, despite not being licensed in South Carolina. Finally, we affirm appellant's remaining issues.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

TOAL, C.J., MOORE, BURNETT, JJ., and Acting Justice Roger M. Young, concur.

The Supreme Court of South Carolina

RE: Act No. 385 of 2006 – relating to defining the "practice of medicine."

ORDER

Act No. 385 of 2006 – ratified 6/7/2006 and effective 6/9/2006 – substantially revises Chapter 47 of Title 40 of the South Carolina Code; the chapter dealing with "physicians, surgeons, and osteopaths." The Act contains the following language:

> 'Practice of Medicine' means:
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> ***
>
> (h) testifying as a physician in an administrative, civil, or criminal proceeding in this State by expressing an expert medical opinion.

Section 40-47-20(36), Act No. 385, 2006 S.C. Acts __. Furthermore, the Act provides significant detail regarding the information that the South Carolina Board of Medical Examiners shall require before issuing a "limited license" to a physician licensed in good standing in another state who has been engaged to testify as an expert medical witness in an administrative or judicial proceeding in South Carolina. Section 40-47-35, Act No. 385, 2006 S.C. Acts __.

Traditionally, court rules allowed any witness who was qualified as an expert by knowledge, skill, experience, training, or education to offer expert testimony in a South Carolina court. Rule 702, SCRE. Furthermore, in a lawsuit alleging a cause of action for medical malpractice, the general rule is that expert testimony is required to show that the defendant failed to conform to the required standard of care; specifically, the reasonable and ordinary knowledge, skill, and diligence physicians in similar neighborhoods and surroundings ordinarily use under like circumstances. *Green v. Lilliewood*, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978) (quoting *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. 1965)). Thus, although no South Carolina statute or court rule has ever embraced the higher scrutiny applied as a pre-requisite for the admission of expert testimony enunciated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), our rules have always charged the court with performing a "gate keeping" function in limiting the presentation of expert testimony to situations where the testimony will assist the trier of fact in understanding evidence or determining a fact in issue.[1]

[1] In *Daubert*, the United States Supreme Court interpreted Rule 702 of the Federal Rules of Evidence to require trial courts to ensure that all testimony offered as expert scientific, technical, or specialized testimony be both

After careful consideration, we believe that while the General Assembly certainly sought, through Act 385, to make needed revisions to the methods South Carolina courts utilize in the area of expert medical testimony, the effect of the revised statutes has the potential to substantially impair the orderly administration of justice. Specifically, Act 385 casts serious doubt on a physician's ability to offer testimony regarding the treatment provided to a witness, party litigant, or criminal defendant if the physician, at the time of trial, resides outside of South Carolina. This categorical exclusion overlooks the fact that the physician may have treated the patient in the physician's home jurisdiction, and also that the physician,

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relevant and reliable, be grounded in scientific methods and procedures, and be supported by appropriate scientific validation. 509 U.S. at 589-92. Furthermore, the court interpreted federal evidentiary rules to require "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. Although Rule 702, SCRE, contains identical language to the federal rule, we have expressly declined to adopt this interpretation in South Carolina. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (declining to adopt *Daubert*; interpreting the South Carolina Rules of Evidence to require the trial judge to determine that the evidence will assist the trier of fact, that the expert witness is qualified, and that the underlying science is reliable; and adopting the factors set forth in *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979) for determining the reliability of the offered evidence).

although at one time licensed and providing treatment to the patient in South Carolina, has relocated out of this state. We believe requiring a treating physician to seek a South Carolina medical license before offering often necessary testimony strains Act 385 far beyond its intended scope.

Additionally, Act 385 is ambiguous as to its relevance to pre-trial practices and proceedings that are of fundamental importance to the judicial process. For example, Act 385's applicability to witnesses used during discovery that might not be used at trial is unclear. Furthermore, although expert testimony is traditionally presented by a witness offering live testimony, lawyers often draw heavily from learned treatises authored by prominent national experts. It would do a great disservice to our system of justice if the doors of South Carolina courtrooms were closed to these scholarly works and the country's leading medical scholars, who may have no intentions of ever visiting this jurisdiction, because our state law would deem them unqualified to offer expert testimony by virtue of their refusal to

subject themselves to the disciplinary authority of the South Carolina Board of Medical Examiners.[2]

The South Carolina Constitution vests this Court with the authority to make rules governing the administration of the unified South Carolina court system. S.C. Const. art V, § 4. In order to prevent a significant impairment to this Court's duty to properly administer the judicial power of South Carolina, and pursuant to Article V, Section 4's authority, we hereby temporarily delay judicial enforcement of Act 385 insofar as the Act requires a physician to obtain a license to practice medicine in South Carolina before

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[2] We also note that although Title 40 of the Code has always contained civil and criminal penalties for violations of the title's licensing requirements and for aiding and abetting one who violates those provisions, *see* S.C. Code Ann. §§ 40-1-210, 40-47-260 (2001), Act 385's significantly broader definition of the "practice of medicine" and licensing requirements now introduce the possibility of incurring these penalties in connection with conducting a trial in South Carolina.

Furthermore, the Act defines the "practice of medicine" to include "rendering a written or otherwise documented medical opinion concerning the diagnosis or treatment of a patient or the actual rendering of treatment to a patient within this State by a physician located outside the State as a result of transmission of individual patient data by electronic or other means from within a state to such physician or his or her agent." Section 40-47-20(36), Act No. 385, 2006 S.C. Acts __. In an effort to ensure that unintended consequences do not overwhelm the noble motives of the legislation, these factors further necessitate our issuing this order.

offering expert medical testimony in a South Carolina administrative or court proceeding.[3]

While we remain respectful of the General Assembly's voice in matters of practice and procedure in South Carolina's courts, this Court cannot allow the administration of justice to be substantially impaired. We are confident, however, that when the General Assembly provides further clarity on this matter, the changes that result will reflect careful consideration and deliberation; will consider and account for the scope of the court's existing rules and the need for efficient and orderly court administration; and will be subjected to close scrutiny in the Judiciary Committees of both the South Carolina Senate and the House of Representatives.

This order is effective immediately and shall remain in effect until further order of this Court.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

[3] Because we are not presently presented with a case or controversy questioning the constitutionality of Act 385, we reserve those serious questions for another day. At the present, we rely exclusively on our Constitutional authority to police the orderly administration of justice in the South Carolina courts.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
August 24, 2006

The Supreme Court of South Carolina

In the Matter of
David E. Belding, Petitioner.

ORDER

On November 10, 2003, petitioner was definitely suspended from the practice of law for one year and ordered to pay the costs of the disciplinary proceeding. In the Matter of Belding, 356 S.C. 319, 589 S.E.2d 197 (2003).[1] This matter is now before the Court on petitioner's Petition for Reinstatement pursuant to Rule 33, RLDE, Rule 413, SCACR.

After a hearing, the Committee on Character and Fitness (CCF) filed its Report and Recommendation with the Court recommending petitioner be reinstated to the practice of law. No exceptions were filed.

We accept the CCF's Report and Recommendation and reinstate petitioner to the practice of law subject to the following two conditions:

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[1] Petitioner has paid the costs of the disciplinary proceeding.

1. For the first six months of his reinstatement, petitioner shall be supervised by an attorney-mentor approved by the Office of Disciplinary Counsel (ODC). The supervision shall include at least one weekly meeting between petitioner and the mentor. After three months of supervision and at the conclusion of the mentoring period, the mentor shall file a report with ODC documenting petitioner's progress; and

2. For the first six months of his reinstatement, petitioner shall participate in psychological counseling in such frequency as recommended by his therapist. After three months of counseling and at the end of the six month period, the therapist shall file a report with ODC documenting petitioner's progress.

In the event the reports required by this order are not filed or petitioner fails to make satisfactory progress with his mentoring or counseling, ODC shall immediately notify this Court.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
August 25, 2006