The Supreme Court of South Carolina

In the Matter of David Allen Calhoun, Petitioner

Appellate Case No. 2015-000816

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 2000, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to Daniel Shearouse, Clerk of the Supreme Court, dated July 27, 2015, Petitioner submitted his resignation from the South Carolina Bar. Further, Petitioner has asserted that he does not have any clients in South Carolina and does not have access to his certificate of admission to practice law. Petitioner is directed to return his Certificate to the Clerk of this Court if located in the future.

We accept Petitioner's resignation and his name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
September 3, 2015

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF HARVEY BREECE BRELAND, PETITIONER

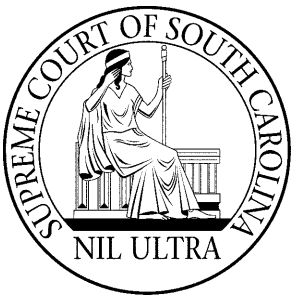
Petitioner was definitely suspended from the practice of law for one (1) year, *In the Matter of Harvey Breece Breland*, 405 S.C. 573, 749 S.E.2d 299 (2013). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
September 9, 2015



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 35
September 9, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Christopher Gerald Harper, Respondent.

Appellate Case No. 2015-000932

Opinion No. 27570
Submitted August 20, 2015 – Filed September 9, 2015

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

Christopher Gerald Harper, of Durham, North Carolina, *pro se*.

PER CURIAM: This attorney disciplinary matter is before the Court pursuant to the reciprocal disciplinary provisions of Rule 29 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

Respondent was admitted to the North Carolina Bar on August 23, 1991, and to the South Carolina Bar on November 12, 1991. On November 15, 2014, respondent was disbarred from the North Carolina Bar for misconduct involving several instances of misappropriation of client funds, and failing to conduct required trust account reconciliations and maintain accurate financial records. *See The North Carolina State Bar v. Harper*, Order of Discipline, Case No. 13 DHC 29 (November 15, 2014) (attached).

Respondent failed to inform the Office of Disciplinary Counsel (ODC) of his discipline in North Carolina as required by Rule 29 (a), RLDE. Once ODC learned

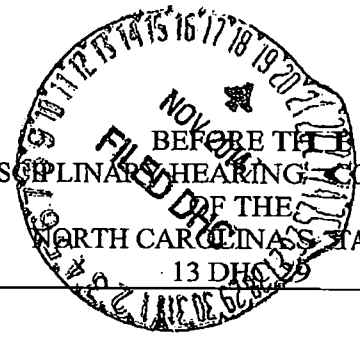
of respondent's disbarment, it filed a certified copy of the North Carolina disciplinary order with the Court. *See* Rule 29(a), RLDE. As required by the provisions of Rule 29(b), the Clerk of Court provided ODC and respondent with thirty (30) days in which to assert whether identical discipline should not be imposed in this state. ODC filed a return stating it had no information that would indicate the imposition of identical discipline was unwarranted. Respondent did not file a return.

Since the record of the disciplinary proceeding in North Carolina comports with due process, respondent does not assert that the imposition of identical discipline in this state is unwarranted, and the Court has disbarred lawyers for similar misconduct, the Court finds that reciprocal discipline is appropriate and hereby disbars respondent from the practice of law in South Carolina. *See* Rule 29(d), RLDE; *see also In the Matter of Auman*, Op. No. 27549 (S.C. Sup. Ct. filed July 23, 2015) (Shearouse Adv. Sh. No. 29 at 26); *In the Matter of Newton*, 402 S.C. 365, 741 S.E.2d 23 (2013).

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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



TATE OF NORTH CAROLINA

BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR

WAKE COUNTY

13 DHC 35

THE NORTH CAROLINA STATE BAR, Plaintiff v. CHRISTOPHER G. HARPER, Attorney, Defendant	ORDER OF DISCIPLINE

THIS MATTER was heard on May 22-23, 2014, July 28, 2014, and September 25-26, 2014 by a hearing panel ("panel") of the Disciplinary Hearing Commission ("DHC") composed of Steven D. Michael, Chair; Donald C. Prentiss; and Michael S. Edwards pursuant to 27 N.C.A.C. 1B § .0114 of the Rules and Regulations of the North Carolina State Bar. Barry S. McNeill, Deputy Counsel, represented Plaintiff, the North Carolina State Bar. Eric C. Michaux represented Defendant at the first two days of the hearing on May 22-23, 2014, and subsequently withdrew with permission of the panel. Defendant, Christopher G. Harper, represented himself upon the resumption of the hearing on July 28, 2014 and September 25-26, 2014.

Based upon the pleadings and evidence introduced at the hearing, the panel hereby finds by clear, cogent and convincing evidence the following

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar ("State Bar"), is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar (Chapter 1 of Title 27 of the North Carolina Administrative Code).

2. Defendant, Christopher G. Harper ("Harper" or "Defendant"), was admitted to the North Carolina State Bar on August 23, 1991, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the Rules and Regulations of the North Carolina State Bar and the Rules of Professional Conduct.

3. During all of the relevant periods referred to herein, Defendant was engaged in the practice of law in the State of North Carolina and maintained a law office in Durham, Durham County, North Carolina.

4. Defendant maintained a trust account at Wells Fargo Bank (formerly Wachovia) with an account number ending in No. -8883 (hereinafter "trust account").

5. Defendant maintained a business operating account at Wells Fargo Bank (formerly Wachovia) with an account number ending in No. -5187 (hereinafter "operating account").

FINDINGS OF FACT REGARDING FIRST CLAIM FOR RELIEF

6. On January 13, 2012, William K. Graham ("Graham") of Versailles Realty Partners, L.L.C. ("VRP"), engaged Defendant to complete a real estate transaction for his purchase of Mary L. Henry's 1/15 interest in property located at 511 Dupree Street, Durham, North Carolina ("511 Dupree Street").

7. VRP agreed to purchase the property interest from Ms. Henry for $3,000, and to pay a fee to Defendant of $800 for his legal services to complete the transaction.

8. On or about January 17, 2012, Graham paid Defendant via a check in the amount of $3,800, which Defendant acknowledged receiving as "earnest money" to be held in "escrow" until the deed was returned from Ms. Henry for the purchase of her interest in the property.

9. Instead of depositing and holding the earnest money and fee in his trust account, Defendant cashed the check from Graham and utilized the proceeds for his own benefit.

10. On February 8, 2012, Defendant forwarded to Ms. Henry a contract signed by Graham, a quitclaim deed concerning "511 Dupree Street" to be signed by Ms. Henry, and a settlement statement showing that Ms. Henry would receive $2,000 of the $3,000 paid by Graham, and that Defendant would receive $1,000 as his attorney's fee from Ms. Henry.

11. Defendant requested that Ms. Henry sign and return the enclosed documents to Defendant's office.

12. On April 23, 2012, Defendant issued trust account check number 2823 payable to himself in the amount of $3,000, which Defendant utilized that same date to purchase a cashier's check in the amount of $3,000 payable to "Mary L. Henry."

13. On check number 2823, Defendant attributed the withdrawal on the memo line to "Mary L. Henry."

14. At the time Defendant made the withdrawal of $3,000 from his trust account via check number 2823 on April 23, 2012, Defendant was not holding and had not deposited any funds in his trust account for William K. Graham, Graham's VRP, or Ms. Henry.

15. Ms. Henry declined to sign the quitclaim deed of her interest to Graham.

16. Defendant never forwarded the cashier's check to Ms. Henry.

17. On June 4, 2012, Graham filed a grievance against Defendant with the State Bar claiming that Defendant had failed to complete the real estate transaction between VRP and Ms. Henry, and that Defendant would not refund the money Graham had provided to fund the transaction.

18. A State Bar investigator contacted Defendant on June 6, 2012 and informed him that the State Bar had received a complaint from Graham about the real estate transaction involving Ms. Henry's interest in the property located at 511 Dupree Street.

19. Following the State Bar investigator's contact with Defendant, Graham approached Defendant on June 6, 2012 and demanded the return of VRP's $3,800 in entrusted funds.

20. Using the uncashed cashier's check in the amount of $3,000 referenced in Paragraph 12 above, on June 6, 2012 Defendant purchased another cashier's check from Wells Fargo Bank on West Club Boulevard in Durham, North Carolina in the amount of $3,800 payable to VRP.

21. On June 6, 2012, Defendant paid to Graham the purported refund of the $3,800 using the cashier's check in the amount of $3,800 payable to VRP.

22. Defendant never replaced the $3,000 he withdrew from his trust account to purchase the cashier's check payable to Ms. Henry.

23. At the time Defendant made the withdrawal of the $3,000 from his trust account referenced in Paragraph 12 above, Defendant was not holding and had not deposited any funds in his trust account for Graham, VRP, or Ms. Henry.

24. Defendant made inconsistent statements to the State Bar investigator about whether he had placed the $3,800 in entrusted funds from VRP in his trust account or had cashed the check from VRP.

25. Defendant's bank records, including the bank records for his trust account and operating account, showed that Defendant never deposited the $3,800 check from VRP in either account.

26. Defendant eventually admitted to the State Bar investigator that he had cashed the $3,800 check from Graham's VRP.

27. Defendant's trust account records showed that Defendant used entrusted settlement funds belonging to Defendant's client Courtney Tanner to purchase the cashier's check in the amount of $3,000 payable to Ms. Henry, which Defendant eventually used to refund the $3,800 to Graham's VRP.

28. Courtney Tanner did not authorize Defendant to utilize his $3,000 in entrusted settlement funds to purchase the cashier's checks which were eventually used to refund the $3,800 to Graham's VRP.

29. Defendant misappropriated $3,000 from VRP and then misappropriated $3,000 from Tanner to cover the misappropriation from VRP.

FINDINGS OF FACT REGARDING SECOND CLAIM FOR RELIEF

30. Henry L. McGhee ("McGhee") retained Defendant on or about August 21, 2009 to represent him in connection with injuries he sustained in a motor vehicle accident that occurred on August 17, 2009.

31. On August 21, 2009, McGhee signed a contingent fee agreement under which Defendant would receive 33⅓% of any settlement.

32. Defendant and the insurance company settled McGhee's claim for $3,500, which Defendant deposited in his trust account on February 2, 2010.

33. Under Defendant's contingent fee agreement with McGhee, on February 3, 2010 Defendant disbursed to himself, via check number 2761 from his trust account, his contingent fee of $1,166.65.

34. McGhee was entitled to $2,333.35 of the settlement proceeds deposited in Defendant's trust account.

35. Defendant made a disbursement from his trust account to McGhee of $550 via check number 2762 on February 12, 2010, noting "Medpay" on the memo line of the check.

36. Defendant had received a check from Progressive Universal Insurance Company, issued October 27, 2009, in the amount of $750 for McGhee's medical expenses.

37. Defendant's client ledger card for McGhee did not reflect the deposit of the $750 into Defendant's trust account on behalf of McGhee.

38. On February 12, 2010, McGhee signed a settlement statement acknowledging receipt of check number 2762 from Defendant for $550.

39. Although Defendant designated the $550 to McGhee as a disbursement from the $3,500 February 2, 2010 settlement proceeds, the $550 to McGhee should have been attributed to the $750 "Medpay" proceeds received from Progressive Universal Insurance Company on or about October 27, 2009.

40. Defendant made a disbursement from his trust account to McGee of $500 via check number 2810 on April 21, 2010.

41. Except for the disbursement referenced in Paragraph 40 above, Defendant made no other disbursements from his trust account by check payable to McGhee of the funds to which McGhee was entitled under the settlement.

42. Between March 10, 2010 and April 29, 2010, Defendant made disbursements payable to himself totaling $1,145 from McGhee's entrusted settlement funds via the following checks:

CHECK NUMBER	DATE	AMOUNT

2765	March 10, 2010	$200
2766	March 17, 2010	$400
2779	April 9, 2010	$25
2811	April 21, 2010	$100
2768	April 22, 2010	$120
2769	April 24, 2010	$100
2770	April 28, 2010	$200

43. According to Defendant's client ledger card for client "Henry McGhee," on April 28, 2010 there remained a balance of $138.35 in Defendant's trust account of the settlement funds to which McGhee was entitled.

44. Defendant testified that the $138.35 was his earned money, but that he paid McGhee the $138.35 in cash.

45. Defendant testified that all the checks made payable to himself on McGhee's client ledger card, except the check for Harper's fee of $1,166.65, were cashed, with the cash being given to McGhee.

46. Defendant admitted that he did not obtain receipts from McGhee and does not have any documentation of the cash given to McGhee.

47. There was no documentation or notation of the $138.35 alleged cash payment to McGhee on Defendant's client ledger card for McGhee.

48. On Defendant's Settlement Statement for client "Henry McGhee," Defendant made a notation by asterisk that the balance of the settlement owed to McGhee ($2,333.35) was to be "[held] in trust and disburse per client[;] also apply to additional cases[,] i.e. DWI Roxboro".

49. In 2010, McGhee did not retain Defendant to represent him on a driving while impaired charge in Person County, North Carolina courts.

50. In 2010, Defendant did not represent McGhee on a driving while impaired charge in Person County, North Carolina courts.

51. Other than representing McGhee in connection with the settlement of his personal injury claim during 2009-2010, Defendant did not perform additional legal services for McGhee or bill McGhee for such services during 2009-2010.

52. Defendant never provided McGhee a copy of the settlement statement showing the disbursements related to the $3,500 settlement funds.

53. On Friday, May 7, 2010, McGhee and his girlfriend met with Defendant at Defendant's office in Durham to receive a payment from the settlement proceeds referenced in Paragraph 32 above.

54. On May 7, 2010, Defendant wrote a check payable to McGhee in the amount of $500, and gave McGhee the check.

55. Defendant wrote the check to McGhee, referenced in Paragraph 54 above, on his operating account, not from his trust account into which he had deposited McGhee's settlement funds.

56. McGhee testified that on one or two occasions, Defendant provided him cash disbursements in the amount of $100 to $200.

57. McGhee testified that he only received from Defendant approximately $1,200 of the $2,333.35 in entrusted settlement proceeds to which he was entitled, including the $500 disbursement to him from Defendant's trust account on April 21, 2010, the $500 from Defendant's operating account on May 7, 2010, and $100 to $200 in cash provided to McGhee from Defendant.

58. The hearing panel finds McGhee's testimony, referenced in Paragraphs 56 and 57 above, to be credible.

59. Defendant disbursed to McGhee no more than $1,750 of the $4,250 total proceeds Defendant received on McGhee's behalf.

60. Defendant disbursed to himself and/or utilized for his own benefit $1,133.35 of entrusted settlement proceeds to which McGhee was entitled.

61. Defendant misappropriated $1,133.35 of McGhee's entrusted settlement funds.

FINDINGS OF FACT REGARDING THIRD CLAIM FOR RELIEF

62. A motor vehicle struck the residence of Nancy J. Mack ("Mack") in Durham, North Carolina on January 2, 2009, causing property damage and alleged bodily injury to Mack.

63. Mack initially negotiated with her homeowner's insurance, Nationwide Insurance ("Nationwide"), and GMAC, the insurer of the responsible party (Kimberly Conely).

64. Nationwide paid Mack an initial $832.68 for temporary lodging.

65. On January 6, 2009, GMAC paid Mack $6,990.92 for property damage.

66. On February 5, 2009, GMAC paid Mack an additional $17,495.06 for property damage, and reimbursed Nationwide for the $832.68 in temporary lodging.

67. After becoming frustrated with her ongoing negotiations with GMAC, Mack retained Defendant on October 6, 2009 to represent her in connection with her remaining property damage and personal injury claims against GMAC.

68. On October 6, 2009, Defendant and Mack signed a contingent fee agreement under which Defendant would receive 35% of any settlement amount above $3,000.

69. In addition to $25,318.66 previously paid to Mack, Defendant and GMAC settled Mack's remaining claims on or about January 3, 2011 for an additional $3,000 in property damage and $5,000 for bodily injury.

70. On or about January 7, 2011, Defendant received from GMAC checks in the amount of $3,000 for settlement of Mack's property damage claim and $5,000 for settlement of her bodily injury claim.

71. On January 7, 2011, Defendant deposited the $5,000 insurance check for Mack's bodily injury claim in his trust account.

72. Under Defendant's retainer agreement with Mack, referenced in Paragraph 68 above, on January 7, 2011 Defendant disbursed to himself from his trust account via check number 2786 his contingent fee of 35% of the settlement amount above $3,000 (35% of $5,000), which amounted to $1,750.

73. On February 2, 2011, Defendant disbursed to himself from his trust account via check number 2789 an additional $914 as a fee from Mack.

74. On February 28, 2011, Defendant deposited into his trust account the $3,000 insurance check for Mack's property damage claim.

75. Defendant did not notify Mack of his receipt of the settlement checks from GMAC referenced in Paragraph 70 above.

76. According to the contingent fee arrangement, referenced in Paragraph 68 above, Mack was entitled to $6,250 of the settlement proceeds deposited in Defendant's trust account referenced in Paragraphs 71 and 74 above.

77. Between February 17, 2011 and June 3, 2011, Defendant made disbursements payable to himself totaling $5,350 from Mack's entrusted settlement funds via the following checks:

CHECK NUMBER	DATE	AMOUNT
2792	February 17, 2011	$1,000
2793	February 25, 2011	$500
2787	March 10, 2011	$250
2795	April 8, 2011	$150
2796	April 15, 2011	$250
2798	May 4, 2011	$100
2797	May 11, 2011	$100
2799	May 18, 2011	$150
2800	May 19, 2011	$2,500
2801	May 27, 2011	$100
2802	May 27, 2011	$150
2803	June 3, 2011	$100

78. Defendant had no documentation that the disbursements from Mack's entrusted funds to himself (outside of his $1,750 fee) were pursuant to any agreement with Mack.

79. As of June 3, 2011, Defendant's client ledger card for Mack showed a balance of $236, with no disbursements having been made to Mack of the entrusted settlement proceeds deposited in Defendant's trust account.

80. On July 28, 2011, Defendant made a deposit to his trust account in the amount of $4,000.

81. Defendant's client ledger card for Mack showed the $4,000 deposit referenced in Paragraph 80 above as having been credited to Mack.

82. Defendant made the deposit referenced in Paragraph 80 above by check number 1382, dated July 28, 2011, in the amount of $4,000, drawn on his operating account.

83. Defendant deposited the $4,000 into his trust account to cover the shortage of Mack's entrusted settlement funds in his trust account, which had fallen to a balance of $236 on June 3, 2011 according to Defendant's client ledger card for Mack.

84. On July 28, 2011, Defendant disbursed to Mack a check (check number 2807) from his trust account in the amount of $6,250.

85. According to Mack's client ledger card referenced in Paragraph 81 above, the disbursement of the $6,250 to Mack on July 28, 2011 created a negative balance of $2,014 in Mack's account.

86. Defendant's client ledger card for Mack, referenced in Paragraph 81 above, omitted check number 2796, dated April 15, 2011, made payable to Defendant in the amount of $250.

87. Because of Defendant's omission of check number 2796 in the amount of $250 on Mack's client ledger card, as referenced in Paragraph 86 above, Defendant's disbursement of the $6,250 to Mack on July 28, 2011, as referenced in Paragraph 84 above, created a negative balance of $2,264, not $2,014, in Mack's account.

88. Defendant used Mack's entrusted funds for his and/or someone's personal benefit during the months of February to sometime in late July or August 2011.

89. Because Defendant had disbursed to himself a total of $6,264 ($914 + $5,350) of Mack's entrusted funds for his and/or others personal benefit, and only deposited $4,000 from his operating account to cover the shortage created by the disbursements, Defendant used another client's entrusted funds (see Paragraph 104 below) to make up the $2,250 shortage in order to pay Mack the $6,250 to which Mack was entitled.

90. Defendant's disbursements to himself (outside of his $1,750 fee) during February to June 2011 totaling $6,264 ($914 + $5,350) were misappropriations from Mack's entrusted funds for his own and/or someone else's personal benefit, even though Defendant eventually paid Mack the full $6,250 to which she was entitled.

FINDINGS OF FACT REGARDING FOURTH CLAIM FOR RELIEF

91. Shanicka Lewis ("Lewis") retained Defendant to represent her minor son in connection with injuries he sustained in a motor vehicle accident that occurred on July 31, 2008.

92. Lewis signed a contingent fee agreement under which Defendant would receive 33⅓% of any settlement amount and 10% of the initial $1,000 in Medicaid reimbursement.

93. On or about April 25, 2011, Defendant and Lewis, on behalf of her minor son, agreed to a structured settlement with the insurance company, including a cash settlement of $15,500 and guaranteed future lump sum payments to the minor son.

94. By consent order filed on July 11, 2011, Superior Court Judge Orlando Hudson approved the structured settlement referenced in Paragraph 93 above, specifically directing Defendant to make, among other disbursements from the settlement funds, an immediate payment of $2,375.91 to the North Carolina Department of Health and Human Services, Division of Medical Assistance, for medical expenses incurred by Lewis's minor son.

95. On July 11, 2011, Defendant deposited the $15,500 insurance settlement check referenced in Paragraph 90 above in his trust account.

96. Under Defendant's retainer agreement with Lewis and the terms of the consent order, on July 14, 2011 Defendant disbursed to himself a check (check number 2806) from his trust account for $11,933.32, representing a contingent fee of 33⅓% of the settlement ($11,833.32) plus 10% of the initial $1,000 in Medicaid reimbursement ($100).

97. On July 15, 2011, Defendant disbursed to himself from his trust account an additional $1,078.37 by check (check number 2805), which was to be provided to Lewis for the necessary expenses of her minor son.

98. Although the State Bar had alleged that Defendant did not disburse the $1,078.37 to Lewis (Defendant claimed that he cashed the check and provided the cash to Lewis), Lewis did not appear to testify as subpoenaed by the State Bar and therefore, because of the absence of clear, cogent, and convincing evidence, the State Bar did not pursue this allegation.

99. Following the disbursements to Defendant referenced in Paragraphs 96 and 97 above, a total of $2,488.31 should have remained in Defendant's trust account to cover the remaining Medicaid reimbursement ($2,375.91) and Defendant's expenses ($112.50).

100. As referenced in Paragraph 84 above, on July 28, 2011 Defendant disbursed to client Nancy Mack a check from his trust account in the amount of $6,250.

101. Defendant's trust account balance fell to $251.07 on August 18, 2011.

102. Defendant's trust account balance was zero as of May 3, 2012.

103. On October 1, 2012, Defendant paid the Division of Medical Assistance a check in the amount of $2,375.91 from his operating account, representing the Medicaid reimbursement which he should have paid out of the entrusted settlement funds for Lewis's minor son in July 2011, over one year earlier.

104. An analysis of Defendant's trust account by the State Bar investigator showed that the $2,375.91 in entrusted funds for Lewis's minor son were used by Defendant to cover other over disbursements from his trust account, including the shortage and negative balance created by the August 18, 2011 disbursement to Nancy Mack of $6,250.

105. At the hearing before this panel on May 22-23, 2014, Defendant was questioned about his failure to make the disbursement of $2,375.91 to the Division of Medical Assistance as directed by Judge Hudson in the consent order of July 11, 2011, referenced in Paragraph 94 above, but Defendant provided no credible explanation for his failure to make the required disbursement or what happened to the funds.

106. Defendant misappropriated the $2,375.91 in entrusted funds for Lewis's minor son.

107. On September 19, 2014, only five days prior to the resumption of the hearing before this panel on September 25, 2014, Defendant moved for and obtained an *ex parte* order signed by Judge Hudson purporting to "correct" the July 11, 2011 consent order, and purporting to amend the consent order "to *Nunc Pro Tunc* the actual compliance date to the original compliance date and the court finds that all orders have been complied with per the orders previously entered by this court."

108. The September 19, 2014 *ex parte* order signed by Judge Hudson, referenced in Paragraph 107 above, does not absolve Defendant of the misappropriation of entrusted funds for Lewis's minor son.

FINDINGS OF FACT REGARDING FIFTH CLAIM FOR RELIEF

109. Courtney Tanner ("Tanner") retained Defendant to represent him in connection with injuries he sustained in separate motor vehicle accidents occurring on December 27, 2009 and March 19, 2010, respectively.

110. On or about April 6, 2012, Defendant and Integon National Insurance Company settled Tanner's claim for the March 19, 2010 accident for $4,500.

111. Defendant deposited the $4,500 settlement into his trust account on April 6, 2012.

112. Defendant did not notify Tanner of the settlement referenced in Paragraph 110 above, and Defendant did not notify Tanner of his receipt of the settlement funds referenced in Paragraph 111 above.

113. Under Defendant's retainer agreement with Tanner, on April 9, 2012 Defendant disbursed to himself a check (check number 2819) from his trust account for $1,500, representing his contingent fee of 33⅓% of the settlement referenced in Paragraph 110 above.

114. Following the disbursement to Defendant for his contingent fee, a total of $3,000 should have remained in Defendant's trust account to be disbursed to Tanner.

115. As noted above in Paragraph 12 above, on April 23, 2012 Defendant disbursed to himself from his trust account a check (check number 2823) in the amount of $3,000 which Defendant used to purchase a cashier's check in the amount of $3,000 payable to Mary L. Henry.

116. Following the disbursement to himself of $3,000 in the Mary L. Henry matter, Defendant's trust account balance fell to $1,600 on April 23, 2012.

117. As of April 23, 2012, a total of $3,000 (in addition to a $1,600 medical reimbursement to Helen Grey) should have remained in Defendant's trust account to be disbursed to Tanner.

118. An analysis of Defendant's trust account by the State Bar investigator showed that the $3,000 in entrusted funds for Tanner were used by Defendant to purchase the cashier's check in the amount of $3,000 payable to Mary L. Henry.

119. Defendant and Progressive Universal Insurance Company settled Tanner's claim for the December 27, 2009 accident for $11,700.

120. Defendant received the $11,700 settlement check from Progressive Universal Insurance Company during the same time period that he was contacted by a State Bar investigator about the complaint from Graham, referenced in Paragraph 18 above.

121. Because of the State Bar's investigation and impending preliminary injunction freezing his trust account, Defendant did not deposit the $11,700 check into his trust account upon its receipt.

122. On or about June 8, 2012, Defendant met Tanner at a branch of Bank of America in Durham, North Carolina, and endorsed the $11,700 check to Tanner.

123. At their meeting at the Bank of America, Defendant informed Tanner for the first time that he had kept the earlier $4,500 in settlement funds as his fee for settling both of Tanner's accident claims.

124. Until their meeting referenced in Paragraphs 122 and 123 above, Tanner never knew that Defendant intended to keep the entire $4,500 settlement as his fee for settling both of Tanner's accident claims.

125. Tanner never agreed to Defendant's keeping the entire $4,500 settlement as his fee for settling both of Tanner's accident claims.

126. Without Tanner's knowledge or agreement, Defendant kept the entire $4,500 settlement, including the $3,000 in entrusted settlement funds which should have been promptly disbursed to Tanner, in order to purchase the April 23, 2012 cashier's check in the amount of $3,000 payable to Mary L. Henry.

127. Defendant's use of Tanner's $3,000 in entrusted settlement funds to purchase the April 23, 2012 cashier's check in the amount of $3,000 payable to Mary L.

Henry was a misappropriation by Defendant for his own and/or someone else's personal benefit, even though Defendant eventually endorsed to Tanner the check for $11,700 in settlement funds from Progressive Universal Insurance Company.

FINDINGS OF FACT REGARDING SIXTH CLAIM FOR RELIEF

128. Defendant's uncle, John Harper, Jr., received a traffic ticket in Moore County, North Carolina.

129. Defendant represented his uncle on the Moore County ticket, but did not charge his uncle an attorney fee for doing so.

130. Defendant's uncle did not have any entrusted funds in Defendant's trust account.

131. On July 14, 2010, Defendant paid the court costs and fine for his uncle by disbursing a check from his trust account (check number 2774) to the Moore County Clerk of Court in the amount of $155.

132. At the time of the disbursement on behalf of his uncle, Harper did not have sufficient personal earned funds in his trust account to cover the $155 check to the Moore County Clerk of Court.

133. During the same time period (June 17, 2010 thru July 19, 2010), Defendant's operating account showed financial strain, including a closing balance of minus $17.85 on July 19, 2010 and an average balance during June 17, 2010 to July 19, 2010 of $156.03.

134. Defendant's trust account balance on June 30, 2010 was $141.76.

135. Of the $141.76 referenced in Paragraph 134 above, $138.35 was attributed to Henry McGhee's entrusted fund balance.

136. On July 6, 2010, Defendant made a deposit of $50 to his trust account to increase the balance to cover the check to the Clerk of Court on behalf of his uncle, referenced in Paragraph 127 above.

137. Defendant thereafter made withdrawals on July 15, 2010 for $20 (check number 2776) and on July 26, 2010 for $10 (check number 2780), leaving a balance in his trust account of $6.76.

138. An analysis of Defendant's trust account by the State Bar investigator showed that the Defendant used proceeds from the entrusted funds for his client McGhee to cover the shortage created by the disbursement on behalf of his uncle.

139. Defendant misappropriated funds of other clients to cover the disbursement he made on behalf of his uncle.

FINDINGS OF FACT REGARDING SEVENTH CLAIM FOR RELIEF

140. From January 2010 through June 2012, Defendant failed to conduct monthly reconciliations of his trust account.

141. From January 2010 through June 2012, Defendant failed to conduct quarterly reconciliations of his trust account.

142. From January 2010 through June 2012, Defendant failed to keep accurate records of the funds received and disbursed on behalf of his clients.

ADDITIONAL FINDINGS OF FACT

143. On March 2, 2006, the State Bar's auditor performed a random audit of Defendant's trust account.

144. Following the audit, the State Bar's auditor notified Defendant in writing and Defendant acknowledged a number of trust account deficiencies pursuant to 27 N.C. Admin. Code, Ch. 1B, Rule 1.15-1 *et. seq.* of the Revised Rules of Professional Conduct, including: (a) not maintaining a ledger for each person or entity from whom or for whom trust money was received; (b) trust account not reconciled quarterly; (c) original deposit slip did not identify source of funds if other than personal; (d) written accountings not always provided to client at completion of disbursement or at least annually if funds are held more than twelve (12) months; (e) provide assurance to the State Bar that the trust account had been reconciled for the month of February 2006; (f) reference list was needed to identify client file number on checks; and, (g) check numbers did not always appear on clients' ledgers.

145. In the Procedural Review Summary of the audit, the State Bar's auditor marked in the affirmative that, under Rule 1.15-2(j), Defendant had given assurance that he had not used or pledged any entrusted property to obtain credit or other personal financial benefit for the lawyer or any other person other than the legal or beneficial owner of that property.

146. In the Procedural Review Summary of the audit, the State Bar auditor marked in the affirmative that, under Rule 1.15-2(l), Defendant promptly notified a client of the receipt of any funds, securities or property belonging in whole or in part to the client.

147. On March 15, 2006, Defendant provided to the State Bar auditor the reconciliation of his trust account for February 2006, and reported that "all deficiencies [noted in the audit] have been corrected."

148. Based upon the earlier random audit by and feedback from the State Bar's auditor, Defendant knew of the requirement for monthly and quarterly reconciliations of his trust account but did not conduct such reconciliations in the January 2010 to June 2012 time period.

149. Based upon the earlier random audit by and feedback from the State Bar's auditor, Defendant knew of the requirement to keep accurate records of the funds received and disbursed on behalf of his clients but did not keep such accurate records in the January 2010 to June 2012 time period.

150. Defendant did not maintain accurate ledger cards for his clients from whom or for whom entrusted monies were deposited in or disbursed from his trust account in the January 2010 to June 2012 time period.

151. In the January 2010 to June 2012 time period, Defendant did not provide written accountings or settlement statements to his clients showing receipts and disbursements from his trust account on their behalf.

152. On April 10, 2012, Defendant made a disbursement by check (check number 2820) from his trust account to Davion Tilley ("Tilley") in the amount of $125.

153. On the client ledger card for Defendant's client "Helen Grey," Defendant attributed the disbursement to Tilley of $125 by check number 2820 to the account of client Helen Grey.

154. Tilley was an AAU basketball player, and Defendant made the disbursement to Tilley in order for Tilley to purchase a pair of basketball shoes.

155. Tilley had no connection or relationship to Defendant's client Helen Grey.

156. Tilley was not entitled to the disbursement from Defendant's trust account.

157. The State Bar investigator's analysis of Defendant's trust account showed that at the time of Defendant's disbursement to Tilley, Defendant did not have sufficient personal earned funds in his trust account to cover the $125 check to Tilley.

158. On April 12, 2012, Defendant made a deposit into his trust account of a medical reimbursement check in the amount of $2,000 in connection with the settlement of client Helen Grey.

159. On April 13, 2012, Defendant made a disbursement to himself from his trust account by check (check number 2821) in the amount of $275.

160. On the client ledger card for Defendant's client "Helen Grey," as well as on the image of check number 2821 referenced in Paragraph 159 above, Defendant attributed the disbursement to himself of $275 to the account of client Helen Grey.

161. Defendant's disbursement to Tilley on April 10, 2012 posted on April 11, 2012.

162. Defendant did not disburse to himself the $275 as his fee (via check number 2821) in the Helen Grey matter until April 13, 2012.

163. Defendant's testimony before this hearing panel of the Disciplinary Hearing Commission was not credible.

Based upon the foregoing Findings of Fact, the panel enters the following

CONCLUSIONS OF LAW

1. All parties are properly before the hearing panel and the panel has jurisdiction over Defendant, Christopher G. Harper, and the subject matter of this proceeding.

2. Misappropriation by a lawyer of clients' entrusted funds is serious misconduct that reflects adversely on a lawyer's fitness to practice law.

3. Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) under the North Carolina Rules of Professional Conduct as follows:

a) By failing to identify, hold and maintain the entrusted funds from Graham in his trust account, and by failing to promptly deposit the entrusted funds from Graham in his trust account, Defendant violated Rules 1.15-2(a) and 1.15-2(b);

b) By cashing the check from Graham for $3,800 and withdrawing another $3,000 from his trust account that belonged to other clients, Defendant used entrusted property for his own personal benefit or for the personal benefit of another when neither Defendant nor the other were the legal or beneficial owner of that property, in violation of Rule 1.15-2(j);

c) By cashing the check from Graham for $3,800 and withdrawing another $3,000 from his trust account that belonged to other clients, Defendant committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 8.4(b), and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);

d) By failing to make disbursements to McGhee from his trust account of the funds to which McGhee was entitled under the settlement, Defendant failed to promptly pay or deliver to his client the entrusted property belonging to the client and to which the client was entitled, in violation of Rule 1.15-2(m);

e) By making disbursements to himself of McGhee's entrusted settlement funds and by using McGhee's entrusted settlement funds to cover shortages from his other trust account disbursements, Defendant used entrusted property for his own personal benefit or for the personal benefit of another when neither Defendant nor the other were the legal or beneficial owner of that property, in violation of Rule 1.15-2(j);

f) By making disbursements to himself of McGhee's entrusted settlement funds and by using McGhee's entrusted settlement funds to cover shortages from his other trust account disbursements, Defendant committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 8.4(b), and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);

g) By failing to make disbursements to Mack from his trust account of the funds to which Mack was entitled under the settlements, Defendant failed to promptly pay or deliver to his client the entrusted property belonging to the client and to which the client was entitled, in violation of Rule 1.15-2(m);

h) By making disbursements to himself of Mack's entrusted settlement funds, Defendant used entrusted property for his own personal benefit or for the personal benefit of another when neither Defendant nor the other were the legal or beneficial owner of that property, in violation of Rule 1.15-2(j);

i) By making disbursements to himself of Mack's entrusted settlement funds and by using other clients' entrusted funds to cover the shortage created by the disbursement to Mack, Defendant committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 8.4(b), and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);

j) By making the disbursement to client Mack in July 2011 using, in part, Shanicka Lewis's minor son's entrusted settlement funds, Defendant used entrusted property for his own personal benefit or for the personal benefit of another when neither Defendant nor the other were the legal or beneficial owner of that property, in violation of Rule 1.15-2(j);

k) By using Shanicka Lewis's minor son's entrusted funds to cover the shortage created by the disbursement to Mack, Defendant committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 8.4(b), and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);

l) By failing to make disbursements to Tanner from Defendant's trust account of the funds to which Tanner was entitled under the settlement, Defendant failed to promptly pay or deliver to his client the entrusted property belonging to the client and to which the client was entitled, in violation of Rule 1.15-2(m);

m) By making the disbursements to Tilley and himself in the Helen Grey and Mary Henry matters, Defendant used entrusted property for his own personal benefit or for the personal benefit of another when neither

Defendant nor the other were the legal or beneficial owner of that property, in violation of Rule 1.15-2(j);

n) By using the entrusted funds of Tanner to cover the shortages created by the disbursements to Tilley and himself, Defendant committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 8.4(b), and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);

o) By making the disbursement to the Moore County Clerk of Court on behalf of his uncle, John Harper, Jr., from his trust account, Defendant used entrusted property for his own personal benefit or for the personal benefit of another when neither Defendant nor the other were the legal or beneficial owner of that property, in violation of Rule 1.15-2(j);

p) By using the entrusted funds of McGhee to cover the shortage created by the disbursement on behalf of his uncle, Defendant committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 8.4(b), and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);

q) By failing to conduct monthly and quarterly reconciliations of his trust account, Defendant violated Rule 1.15-3(d); and,

r) By failing to keep accurate records of the funds received and disbursed on behalf of his clients, Defendant violated Rule 1.15-3(b)(5).

Based upon the evidence, the hearing panel also finds by clear, cogent, and convincing evidence the following

ADDITIONAL FINDINGS OF FACT CONCERNING DISCIPLINE

1. Defendant has substantial experience in the practice of law.

2. Defendant's misconduct occurred in connection with his representation of clients.

3. On September 19, 2014, only five days prior to the resumption of the hearing before this panel, Defendant moved for and obtained an ex *parte* temporary restraining order ("TRO") from Judge Hudson in *Christopher G. Harper v. Edward White, Nancy Mack, Henry McGhee, Courtney Tanner, Shanicka Lewis, & Helen Gray,* No. 14-CVS-4829 (Durham Co. Super. Ct.), alleging that he had commenced a civil suit (Defendant did not file a complaint, but obtained summonses with leave to file a complaint) against the named defendants who were potential witnesses against him in this disciplinary proceeding.

4. The TRO purported to prevent the named defendants (all of the named defendants, except State Bar Investigator Ed White, were Defendant's former clients) from testifying against Defendant in the disciplinary proceeding scheduled to resume on Thursday, September 25, 2014.

5. Defendant obtained the TRO without notice to the named Defendants.

6. As a result of the issuance of the *ex parte* TRO, the State Bar's Office of Counsel was required to take extraordinary measures on an exigent basis to stay the TRO so that this proceeding could resume as scheduled, including emergency petitions to the North Carolina Court of Appeals.

7. On Wednesday, September 24, 2014, the North Carolina Court of Appeals allowed the State Bar's motion for temporary stay and stayed Judge Hudson's TRO, allowing the disciplinary hearing to proceed as scheduled. *Harper v. White, et al.*, No. P14-744 (N.C. Ct. of App., Order of Sept. 24, 2014).

8. The State Bar has an important public interest in the completion of its disciplinary hearings, and Defendant sought to subvert that interest by obtaining the *ex parte* TRO from Judge Hudson.

9. Defendant's actions in attempting to subvert the State Bar's important public interest in its disciplinary hearings and his collateral unfounded civil action against potential witnesses against him show that he refuses to acknowledge the wrongful nature of his conduct and that he elevates his own interest above that of his former clients.

10. Defendant enjoys a reputation in the Durham community of being a compassionate attorney.

Based upon the Findings of Fact, Conclusions of Law, and Additional Findings Regarding Discipline, the hearing panel also enters the following

DISCIPLINE CONCLUSIONS

1. The hearing panel has carefully considered all of the different forms of discipline available to it. In addition, the hearing panel has considered all of the factors enumerated in 27 N.C. Admin. Code 1B § .0114(w)(3) of the Rules and Regulations of the North Carolina State Bar and finds the following factors are applicable in this matter:

a. No prior disciplinary offense;

c. A dishonest or selfish motive;

f. Defendant engaged in a pattern of misconduct;

g. There were multiple offenses;

o. Defendant refused to acknowledge the wrongful nature of his conduct, but, after the hearing panel announced its findings in the Phase One hearing,

Defendant did acknowledge to the hearing panel the wrongful nature of his conduct;

p. Defendant expressed remorse for his conduct after the hearing panel's findings were announced;

q. Defendant's good character or reputation for honesty in the community;

r. The vulnerability of the victims; and,

s. Defendant's substantial experience in the practice of law.

2. The hearing panel has carefully considered all of the factors enumerated in 27 N.C. Admin. Code 1B § .0114(w)(1) of the Rules and Regulations of the North Carolina State Bar and finds the following factors warrant consideration of suspension or disbarment of Defendant's license:

a. Intent of Defendant to cause the resulting harm or potential harm;

b. Intent of Defendant to commit acts where the harm or potential harm is foreseeable;

c. Circumstances reflecting Defendant's lack of honesty, trustworthiness, or integrity;

d. Elevation of Defendant's own interest above that of the client;

e. Negative impact of Defendant's actions on the clients' or public's perception of the legal profession;

f. Negative impact of Defendant's actions on the administration of justice;

g. Impairment of the clients' ability to achieve the goals of the representation; and

i. Acts of dishonesty, misrepresentation, deceit, or fabrication.

3. The hearing panel has also carefully considered all of the factors enumerated in 27 N.C. Admin. Code 1B § .0114(w)(2) of the Rules and Regulations of the North Carolina State Bar and finds the following factors warrant consideration of suspension or disbarment of Defendant's license:

a. Acts of dishonesty, misrepresentation, deceit, or fabrication;

c. Misappropriation or conversion of assets of any kind to which Defendant or recipient is not entitled, whether from a client or any other source; and,

d. Commission of felonies.

4. Defendant's failure to properly maintain and handle entrusted funds betrays a vital trust that clients and the public place in attorneys and the legal profession.

5. Defendant's misconduct caused potential significant harm to his clients in that his failure to safeguard entrusted client funds placed his clients' funds at risk.

6. Defendant's misconduct caused significant harm to multiple of his clients in that he failed to make prompt disbursements of entrusted settlement funds to or on behalf of some clients (though he ultimately paid these clients the sums to which they were entitled).

7. Defendant's misconduct caused significant harm to one client, Henry McGhee, in that Defendant misappropriated for his own benefit $1,333.35 of McGhee's entrusted funds, never paying McGhee all of the settlement funds to which McGhee was entitled.

8. Defendant's misappropriations from his clients show that he is untrustworthy and his misappropriations also constitute criminal offenses, demonstrating his unfitness to be an attorney, especially an attorney who handles entrusted funds.

9. Given the prior random audit of Defendant's trust account which addressed many of the same issues, Defendant is unable or unwilling to conform his conduct to the Rules of Professional Conduct.

10. Defendant's actions in seeking and obtaining the *ex parte* orders from Judge Hudson show that he refuses to acknowledge the wrongful nature of his conduct and suggest the loss of Defendant's ability to practice law may be the only means of protecting the public from Defendant.

11. The hearing panel has considered all other forms of discipline available and concludes that any sanction less than disbarment would fail to acknowledge the seriousness of the offenses committed by Defendant, would not adequately protect the public, and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar.

Based upon the foregoing Findings of Fact, Conclusions of Law, and Findings Regarding Discipline, the hearing panel enters the following

ORDER OF DISCIPLINE

1. Defendant, Christopher G. Harper, is hereby DISBARRED from the practice of law, effective 30 days from the date of service of this order upon him.

2. Defendant shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following service of this order upon him.

3. Defendant shall comply with the wind down provisions contained in 27 N.C. Admin. Code 1B § .0124. As provided in § .0124(d), Defendant shall file an affidavit with the Secretary of the North Carolina State Bar within 10 days of the effective date of this order, certifying he has complied with the wind down rule.

4. Defendant is taxed with the administrative fees and costs of this action, including the cost of the depositions taken in this matter as allowed by statute. The deposition costs were necessarily incurred for the prosecution of this proceeding. Defendant will receive a statement of costs from the Secretary of the State Bar and Defendant shall pay these costs within 90 days of service of the notice of costs upon him.

Signed by the undersigned Chair with full knowledge and consent of the other members of the Hearing Committee.

This is the 18th day of November, 2014

Steve D. Michael, Chair
Disciplinary Hearing Committee

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Antonio Scott, Petitioner.

Appellate Case No. 2014-001124

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Jasper County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 27571
Heard June 3, 2015 – Filed September 9, 2015

AFFIRMED

Appellate Defender Benjamin John Tripp, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Anthony Mabry, all of Columbia, and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Respondent.

CHIEF JUSTICE TOAL: Petitioner Antonio Scott was convicted of murder. On appeal, Scott argues that the court of appeals erred in finding that the evidence did not support a jury instruction on involuntary manslaughter, and thus, in upholding the trial court's failure to charge involuntary manslaughter. *State v. Scott*, 408 S.C. 21, 757 S.E.2d 533 (Ct. App. 2014). We affirm.

FACTS/PROCEDURAL BACKGROUND

On March 19, 2011, Cynthia Nelson called the police and reported that Scott tried to break into her apartment. Scott was allegedly resentful of Cynthia's disapproval of Scott's relationship with her daughter, Akera. Scott departed Cynthia's apartment before the police arrived.

The following day, Scott attended a wake for his cousin in Ridgeland, South Carolina. At the wake, Scott told several people that he used a knife to threaten Cynthia's life the previous night. Scott stated that he was going to kill Cynthia the next time he saw her.

Later that day, Akera and Cynthia arrived at Scott's sister's apartment in Ridgeland to drop off Akera and Scott's child. Akera took the child into the apartment while Cynthia waited outside. When Akera walked inside, Scott stood with a knife in his hand and asked her, "Is this how you wanna [sic] do things?" and "You gonna [sic] let your mom come between us?" A short time later, Cynthia walked in and told Scott, "I'm tired of you beating on my daughter."[1] Cynthia and Scott then engaged in a physical altercation, during which Cynthia was stabbed in the neck.

Scott's sister called 911, and Scott initially attempted to apply pressure to Cynthia's wound. However, Scott fled when the police arrived, and the officers were unsuccessful in their attempts to locate Scott in the apartment complex. Cynthia later died from the wound.

Eventually, Scott contacted a detective in the Ridgeland Police Department

[1] At the time of the altercation, Scott was on probation for criminal domestic violence, second offense, and Akera was the victim.

and surrendered himself. Investigator Daniel Litchfield interviewed Scott at the police station. Scott told Investigator Litchfield that he engaged in a verbal altercation with Cynthia, during which Cynthia pulled "something shiny and silver out of her pocket" and stepped towards Scott. Scott stated that he then executed a "martial arts move, pushing her elbow up, [and] causing her to stab herself in the throat." Investigator Litchfield interviewed several other people in connection with the case and was not able to locate anyone who could corroborate Scott's story.[2]

Scott was indicted and tried for murder. At trial, Scott did not testify and rested without presenting any evidence. After excusing the jury, the trial judge indicated that she would instruct the jury on murder, voluntary manslaughter, and self-defense. However, the trial judge denied Scott's request to charge involuntary manslaughter.

Scott's counsel candidly admitted that he desired the involuntary manslaughter charge so as to avoid a compromise verdict of voluntary manslaughter. At no point during the charge conference did Scott's counsel ever specifically articulate what evidence supported an involuntary manslaughter charge, instead reiterating his fears of a compromise verdict.

After closing arguments, the trial court charged the jury on the law. The jury deliberated for a short time and found Scott guilty of murder. During sentencing, the State informed the trial court that Scott had a very extensive criminal history and was on probation for criminal domestic violence. The trial court noted Scott's history of violent crime and sentenced him to thirty years' imprisonment.

Scott appealed, contending that the trial court erred by failing to charge involuntary manslaughter. The court of appeals affirmed, *Scott*, 408 S.C. at 27, 757 S.E.2d at 536, and we granted Scott's petition for a writ of certiorari to review the court of appeals' decision.

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[2] The closest any eyewitness came to corroborating Scott's story was Scott's sister. She testified that she was present when the altercation occurred, and did not see a knife before or after the struggle. Rather, she stated that she saw Scott strike Cynthia, saw Cynthia fall to the couch, and saw blood pouring down the front of Cynthia's body. Scott's sister did not describe Scott making a martial arts move.

STANDARD OF REVIEW

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Laney*, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006) (citing *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id*. at 643–44, 627 S.E.2d at 729 (citing *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)). "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007) (citing *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000)).

ANALYSIS

Scott contends the court of appeals erred in determining there was no evidence to support a charge of involuntary manslaughter. We disagree.

"'The law to be charged to the jury is determined by the evidence presented at trial.'" *State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014) (quoting *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993)). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." *Id*. (citations omitted). In determining whether the evidence requires a charge on a lesser-included offense, courts view the facts in the light most favorable to the defendant. *Id*. (citing *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512–13 (2000)).

Involuntary manslaughter is a lesser-included offense of murder, and "is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others." *Id*. at 309, 764 S.E.2d at 514 (citation omitted). Involuntary manslaughter requires a showing of criminal negligence, which "is defined as the reckless disregard of the safety of others." S.C. Code Ann. § 16-3-60 (2003). "'Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating.'" *State v. Brayboy*, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010) (quoting *Pittman*, 373 S.C. at 571, 647 S.E.2d at 167).

Here, Scott asserts that his conduct falls under the second definition of involuntary manslaughter, claiming the evidence demonstrates that he unintentionally killed Cynthia while executing a martial arts move, and therefore that he must have recklessly disregarded the safety of others. However, the only evidence presented at trial that supports Scott's version of the facts is Investigator Litchfield's testimony that Scott told him Cynthia charged at him with a "shiny [] silver" object, at which point he executed a "martial arts move, pushing her elbow up, [and] causing her to stab herself in the throat." Scott did not testify, nor did he offer any evidence that he was criminally negligent in executing the martial arts move. To the contrary, Investigator Litchfield testified that Scott's father had a black belt in martial arts, and that he trained Scott. Thus, the only testimony regarding Scott's martial arts background suggests that his actions were anything but reckless, and that he intentionally caused Cynthia's death.

We acknowledge that under Scott's version of the facts, the evidence supported a self-defense instruction, which he received. However, on appeal, Scott attempts to argue that he was also entitled to an involuntary manslaughter instruction because the jury could have inferred that he acted recklessly in self-defense.[3] We recently rejected this argument in *State v. Sams*, wherein the defendant "argue[d] that he acted lawfully in self-defense, but that he perhaps acted excessively and recklessly in doing so." 410 S.C. at 314, 764 S.E.2d at 517. We found that argument "tantamount to imperfect self-defense," which is a doctrine that "South Carolina has not expressly adopted." *Id*. at 315, 764 S.E.2d at 517 (citations omitted). Moreover, we noted that "even if this Court were to accept the doctrine of imperfect self-defense, it is of no consequence to [the defendant's] proceeding as it would, at most, entitle him to an instruction on voluntary manslaughter, which he already received."[4] *Id*. at 316, 764 S.E.2d at 517 (citations omitted).

Simply put, Scott has not presented any evidence that he acted with reckless disregard for the safety of others. As the trial court noted, if the jury accepted

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[3] *See State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 470 (2008) ("[A] self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges." (citations omitted)).

[4] Scott also received a jury instruction on voluntary manslaughter.

Scott's version of the facts as true, he would be entitled to acquittal because the killing would have been justified. *See Robinson v. State*, 308 S.C. 74, 79, 417 S.E.2d 88, 91 (1992) ("Self-defense is a complete defense; if established, a jury must find that the defendant is not guilty." (citing *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (per curiam))). Thus, we hold that the evidence did not warrant an involuntary manslaughter charge. *See State v. Smith*, 315 S.C. 547, 549, 446 S.E.2d 411, 413–14 (1994) ("The trial court may and should refuse to charge on a lesser-included offense where there is no evidence that the defendant committed the lesser rather than the greater offense." (citation omitted)).

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision.

AFFIRMED.

BEATTY, HEARN, JJ., and Acting Justice Alison Renee Lee, concur.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent and would reverse the decision of the Court of Appeals because I find, viewing the evidence in the light most favorable to petitioner, that there is "evidence from which it could be inferred that [he] committed" involuntary manslaughter. *State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014). Unlike the majority, I would not require that a defendant testify or present evidence that he acted in a criminally negligent manner in order to obtain such a charge but rather would review the evidence, including that presented by the State, to determine whether a charge was warranted. Here, there is evidence from which a jury could find that petitioner acted intentionally in moving to deflect the perceived threat, but with reckless disregard of the possible consequences. That petitioner is an experienced martial arts practitioner goes to his intent when acting and to the skill with which he executed the move, not to his reasoned consideration of the possibility that the consequence could be that the victim would stab herself in the neck.

I would reverse the decision of the Court of Appeals and order a new trial.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stokes-Craven Holding Corp., d/b/a Stokes-Craven Ford, Appellant,

v.

Scott L. Robinson and Johnson McKenzie & Robinson, LLC, Respondents.

Appellate Case No. 2013-001452

Appeal From Clarendon County
George C. James, Jr., Circuit Court Judge

Opinion No. 27572
Heard December 10, 2014 – Filed September 9, 2015

REVERSED AND REMANDED

Andrew K. Epting, Jr. and Michelle Nicole Endemann, both of Andrew K. Epting, Jr., L.L.C., of Charleston, for Appellant.

Susan Taylor Wall and Henry Wilkins Frampton, IV, both of McNair Law Firm, P.A., of Charleston and Warren C. Powell, Jr., of Bruner Powell Wall & Mullins, L.L.C., of Columbia, for Respondent.

JUSTICE BEATTY: In this legal malpractice case, Stokes-Craven Holding Corporation d/b/a Stokes-Craven Ford ("Stokes-Craven") appeals the circuit court's order granting summary judgment in favor of Scott L. Robinson and his law firm, Johnson, McKenzie & Robinson, L.L.C., (collectively "Respondents") based on the expiration of the three-year statute of limitations. Stokes-Craven contends the court erred in applying this Court's decision in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005),[1] and holding that Stokes-Craven knew or should have known that it had a legal malpractice claim against its trial counsel and his law firm on the date of the adverse jury verdict rather than after this Court affirmed the verdict and issued the remittitur in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). We overrule *Epstein*, reverse the circuit court's order, and remand the matter to the circuit court for further proceedings consistent with this opinion.

I. Factual / Procedural History

Donald C. Austin filed suit against Stokes-Craven, an automobile dealership, after he experienced problems with his used truck and discovered the vehicle had sustained extensive damage prior to the sale. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). In his Complaint, Austin alleged the following causes of action: revocation of acceptance, breach of contract, negligence, constructive fraud, common law fraud, violation of the South Carolina Motor Vehicle Dealer's Act (the "Dealer's Act"), violation of the South Carolina Unfair Trade Practices Act ("UTPA"), and violation of the Federal Odometer Act. Based on these claims, Austin sought actual damages, punitive damages, prejudgment interest, and attorney's fees and costs. *Id.* at 35, 691 S.E.2d at 141-42. Stokes-Craven was represented by Scott L. Robinson of Johnson, McKenzie & Robinson, L.L.C. throughout the trial proceedings. On August 16, 2006, after a three-day trial, the jury found in favor of Austin and awarded $26,371.10 in actual damages and $216,600 in punitive damages. *Id.* at 35, 691 S.E.2d at 142.

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[1] *See Epstein*, 363 S.C. at 381, 610 S.E.2d at 820 (rejecting the continuous-representation rule and affirming the dismissal of a legal malpractice case based on the expiration of the statute of limitations on the ground the three-year limitations period began to run on the date that the adverse verdict was entered against claimant).

Austin and Stokes-Craven filed cross-appeals to this Court. Although Robinson was listed as counsel of record on the appellate pleadings, Stokes-Craven had employed attorneys with Young, Clement, Rivers, L.L.P. to represent it during the course of the appeal. On March 8, 2010, a majority of this Court affirmed the jury's verdict and held that: (1) there was no prejudicial abuse of discretion in admitting certain challenged testimony; (2) Austin offered proof of actual damages in the amount of $26,371.10; (3) Austin failed to prove Stokes-Craven violated the Federal Odometer Act with the requisite intent to defraud him as to the mileage of the truck; (4) the verdicts of fraud and violation of the UTPA were not inconsistent; and (5) there was evidence to support the jury's award of $216,000 in punitive damages. *Id.* at 59, 691 S.E.2d at 154. This Court issued the remittitur on April 21, 2010.[2]

On August 16, 2010, Stokes-Craven filed a legal malpractice action against Respondents, alleging negligence and breach of fiduciary duty in trial counsel's representation of Stokes-Craven both prior to and during the trial. Specifically, Stokes-Craven alleged that trial counsel failed to: adequately investigate the facts of the case; prepare or serve written discovery; depose witnesses; obtain copies of the plaintiff's experts' curriculum vitas; prepare a pretrial brief, trial exhibits, voir dire, and requests to charge; preserve certain evidentiary issues for appellate review; notify Stokes-Craven's insurance carrier about the claims; and settle the case prior to the jury verdict. Based on these purported errors, Stokes-Craven claimed the jury returned the adverse verdict. Respondents generally denied the allegations and asserted several defenses, including that Stokes-Craven's claims were barred by the expiration of the three-year statute of limitations.

Subsequently, Respondents filed motions for summary judgment. Stokes-Craven filed a cross-motion for partial summary judgment and a motion to compel discovery of Respondents' professional liability policy applications for the years 2002 through 2012, all correspondence between Respondents and their malpractice insurer, and the billing records for computer research from any research provider used by Respondents for the years 2003 through 2006.

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[2] In a related appeal, this Court (1) affirmed the circuit court's order that entered judgment in favor of Austin for his requested trial-level fees, and (2) remanded the matter to the circuit court to determine what amount of appellate and post-appellate fees should be awarded to Austin. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 750 S.E.2d 78 (2013).

Following a hearing, the circuit court granted Respondents' motions for summary judgment on the ground Stokes-Craven's legal malpractice claim was barred by the expiration of the statute of limitations. In so ruling, the court concluded that Dennis Craven, as agent of Stokes-Craven, had notice of the claim on August 17, 2006, the date of the jury's adverse verdict. Referencing portions of Craven's deposition testimony, the court determined that Craven's testimony as a whole indicated that he was aware that he might have a legal malpractice claim against Respondents because Craven: knew at the time of trial that counsel had not contacted and interviewed crucial witnesses prior to trial; was not shown the defendants' interrogatory responses until the day of trial; had not been prepared for cross-examination; and knew that counsel failed to settle the case despite the admission by Stokes-Craven that it "had done something wrong." The court also noted that Craven acknowledged the jury's verdict presented a "serious problem" for Stokes-Craven. Citing *Epstein*, the court found that Craven's knowledge of counsel's "shortcomings" and other "actionable errors" constituted evidence that Craven knew at the time of the verdict that he might have a claim against trial counsel.

The court also held that the doctrines of equitable estoppel and equitable tolling were inapplicable. In terms of equitable estoppel, the court found "nothing in the record to support the conclusion that [Respondents] did anything to mislead Stokes-Craven" or that Robinson "engaged in any conduct to prevent Stokes-Craven from filing a malpractice action." The court further found Stokes-Craven could not invoke equitable tolling because it failed to present evidence of an "extraordinary event" beyond its control that prevented it from timely filing its legal malpractice action.

Because the court granted Respondents' motions for summary judgment, it noted that it was unnecessary to rule on Stokes-Craven's motion to compel discovery. However, in the event the decision on summary judgment was overturned on appeal, the court proceeded to rule on the motion. Initially, the court found the correspondence between Respondents and their malpractice carrier was not discoverable as it was prepared in anticipation of or during litigation. The court further determined that Stokes-Craven had not established the need for this information. Although the court ruled Respondents' professional liability policy applications were discoverable, the court stated that any "issues of ultimate admissibility" would be left to the trial judge.

Stokes-Craven appealed the circuit court's order and filed a motion to argue against precedent pursuant to Rule 217, SCACR. This Court granted Stokes-Craven's motion to argue against *Epstein*.

II. Standard of Review

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

III. Discussion

A. Commencement of the Statute of Limitations

Stokes-Craven asserts the circuit court erred in holding as a matter of law that the statute of limitations began to run on the date of the adverse jury verdict against Stokes-Craven. Contrary to the circuit court's characterization of Craven's testimony, Stokes-Craven notes that Craven "repeatedly testified that, at the time of the trial, he had never been sued before, had never participated in litigation, and had no idea what an attorney should or should not do to prepare a case for trial." Based on this testimony, Stokes-Craven maintains that Craven did not know or could not have known that it might have a claim for legal malpractice on the date the verdict was rendered.

Stokes-Craven further argues the court erred in relying on *Epstein* as it is not only factually distinguishable from the instant case but is no longer viable precedent. Stokes-Craven requests that this Court overrule its decision in *Epstein* and adopt a bright-line rule that the statute of limitations in a legal malpractice case does not commence until the remittitur has been issued in the underlying lawsuit.

A claimant in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014). Furthermore, a claimant is required to demonstrate that "he or she 'most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.' " *Doe v. Howe,* 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005) (quoting *Summer v. Carpenter,* 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997)).

The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005) (stating the statute of limitations for "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law" is three years); *see Berry v. McLeod,* 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct. App. 1997) (concluding that section 15-3-530(5) of the South Carolina Code provides a three-year statute of limitations for legal malpractice actions). Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989); *see* S.C. Code Ann. § 15-3-535 (2005) ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."). "This standard as to when the limitations period begins to run is *objective* rather than subjective." *Burgess,* 300 S.C. at 186, 386 S.E.2d at 800. "Therefore, the statutory period of limitations begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Id.*

"Statutes of limitations are not simply technicalities." *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009). "On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Id.* "Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Id.* "One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on

his or her rights." *Id.* (citations omitted). "Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation." *Id.* "Statutes of limitations are, indeed, fundamental to our judicial system." *Id.* (citation omitted).

a. *Epstein*

As noted by the circuit court and the parties, the key case in the instant dispute is *Epstein*. In *Epstein*, a jury returned a verdict for a wrongful death and survival action on February 18, 1998 against Dr. Franklin Epstein in a medical-malpractice action that arose out of the death of one of his patients following spinal surgery. *Epstein*, 363 S.C. at 374, 610 S.E.2d at 817. David Brown represented Epstein throughout the trial and filed a notice of appeal after the jury verdict. *Id.* at 374-75, 610 S.E.2d at 817. Although Brown remained counsel of record during the appeal, Epstein was represented on appeal by Stephen Groves, John Hamilton Smith, and Steven Brown. *Id.* at 375, 610 S.E.2d at 817. The Court of Appeals affirmed the verdicts on July 31, 2000 in *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). *Id.* This Court denied Epstein's petition for a writ of certiorari in January 2001. *Id.*

On January 9, 2002, Epstein filed a legal malpractice claim against David Brown in which he alleged breach of fiduciary duty, negligence, and breach of contract. *Id.* In terms of specific deficiencies, Epstein asserted that Brown was negligent in failing to conduct an adequate investigation, failing to advise him to settle, forgetting to call expert witnesses, and adopting a defense contrary to Epstein's medical opinion. *Id.* at 376, 610 S.E.2d at 818. Brown moved for summary judgment on the ground that Epstein failed to commence the action within the applicable three-year statute of limitations. *Id.* at 375, 610 S.E.2d at 817. The circuit court found the majority of the damages alleged by Epstein stemmed from the adverse jury verdict, and the damages to Epstein's reputation resulting from the publicity were all damages suffered at the time of the verdict. *Id.* at 376, 610 S.E.2d at 818. The court concluded that, although these damages might have been mitigated by a successful appeal, they could not have been wholly eliminated by a reversal of the jury's verdict. *Id.* Accordingly, the circuit court ruled the statute of limitations began to run, at the latest, on February 18, 1998, the date of the jury's verdict. *Id.* at 375, 610 S.E.2d at 817. As a result, the court found the action was untimely and granted Brown's motion for summary judgment. *Id.* Epstein appealed the circuit court's order to this Court. *Id.*

Justice Waller, who was joined by Justices Moore and Burnett, affirmed the circuit court's order. *Id.* at 383, 610 S.E.2d at 821-22. In reaching this decision, the majority declined to adopt the continuous-representation rule, which permits the statute of limitations to be tolled during the period an attorney continues to represent the client on the same matter out of which the alleged legal malpractice arose. *Id.* at 380, 610 S.E.2d at 820. Instead, the majority chose to strictly adhere to the discovery rule set forth by the Legislature. *Id.*

The majority explained its decision by comparing a legal malpractice action to a medical malpractice action. Despite the "very legitimate policy rationales in favor of adoption of a continuous treatment rule" in medical malpractice cases, the majority noted that our appellate courts had declined to adopt it because the "Legislature [had] set absolute time restrictions for the bringing of medical malpractice actions in the statutes of repose both for medical malpractice and for persons operating under disability." *Id.* at 378, 610 S.E.2d at 819. The majority also noted that "numerous jurisdictions" had refused to adopt the continuous-representation rule. *Id.* at 379, 610 S.E.2d at 819.

Additionally, the majority disagreed with Epstein's alternative argument that, absent applying the continuous-representation rule, the limitations period did not begin to run until the Court denied certiorari in January 2001. *Id.* at 380-81, 610 S.E.2d at 820. The majority explained that "those jurisdictions which decline to adopt the continuous representation rule tend to hold that a plaintiff may institute a malpractice action prior to the conclusion of the appeal." *Id.* at 380, 610 S.E.2d at 820.

The majority also rejected Epstein's argument that appealing the ruling in the medical malpractice action against him while filing a legal malpractice claim against Brown would cause him to argue inconsistent positions in two different courts. *Id.* at 381, 610 S.E.2d at 821. The majority maintained that "there are measures which may be taken to avoid such inconsistent positions." *Id.* at 381-82, 610 S.E.2d at 821.

Ultimately, the majority applied the discovery rule and found that Epstein "clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial." *Id.* at 382, 610 S.E.2d at 821. The majority reasoned that the damages claimed by Epstein were "largely those to his reputation" and the claims he raised in his Complaint were "primarily related to trial and pre-trial errors." *Id.* The majority also noted that trial counsel conceded

during oral argument on the summary judgment motion that "some of the allegations down there, your Honor, were within the man's knowledge when the verdict came in." *Id.* at 382-83, 610 S.E.2d at 821. Finally, the majority referenced a letter from Epstein to his appellate attorney, Steven Groves, in which Epstein indicated that he would not deal with Brown and that he believed Brown's representation "was so egregiously lacking." *Id.* at 383, 610 S.E.2d at 821. The majority concluded that it was "patent Dr. Epstein knew, or should have known, of a possible claim against Brown long before this Court denied certiorari in January 2001." *Id.*

Chief Justice Toal dissented as she would have adopted "a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until an appellate court disposes of the action by sending a remittitur to the trial court." *Id.* at 383, 610 S.E.2d at 822. Although Justice Toal agreed with the application of the discovery rule, she disagreed with the majority's holding that Epstein should have known of the existence of a cause of action arising from Brown's alleged malpractice at the conclusion of the trial. *Id.* at 384, 610 S.E.2d at 822. Instead, Justice Toal found "there was no evidence that [Epstein] [was] injured as a result of [Brown's] alleged malpractice until the court of appeals disposed of the case by sending a remittitur to the trial court." *Id.*

Justice Pleicones concurred in the majority's rejection of the continuous-representation rule and the retention of the discovery rule; however, he dissented as he believed that Brown should have been estopped from asserting the statute of limitations as a defense. *Id.* at 384, 610 S.E.2d at 822. Justice Pleicones pointed out that: (1) Brown affirmatively represented to Epstein that the adverse verdict had resulted from errors of law committed by the trial judge and, in turn, affected the jury's fact-finding role; and (2) Brown remained nominally as counsel to Epstein throughout the appeal of the verdict. *Id.* Justice Pleicones concluded that Brown's representations and his presence on the appellate team "reasonably induce[d] Epstein's forbearance." *Id.* at 384-85, 610 S.E.2d at 822.

b. Propriety of *Epstein*

Our appellate courts for the past ten years have continued to rely on the decision in *Epstein.*[3] However, *Epstein* is not without its critics. *See* James L.

[3] *See, e.g.*, *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 760 S.E.2d 399 (2014) (citing *Epstein* and affirming the circuit court's ruling that legal

Floyd, III, *South Carolina Tort Law: For Whom The Statute of Limitations Tolls−The Epstein Court's Rejection of the Continuous Representation Rule*, 57 S.C. L. Rev. 643 (2006). In this article, the author identified what he perceived to be fundamental flaws in the majority's analysis in *Epstein*. Specifically, the author found that the majority's reasoning and holding were questionable "because [of]: (1) the differences between the statute of limitations governing legal malpractice actions and the statute of repose governing medical malpractice actions, (2) the strength and applicability of the secondary authority upon which the *Epstein* court relied, and (3) *Epstein*'s operative facts." *Id.* at 654.

Although the author distinguished the secondary authority relied on by the majority and noted that *Epstein* was limited to its facts, his primary challenge was to the majority's reliance on the statute of repose in medical malpractice actions. Specifically, the author stated that:

> neither section 15-3-535 nor section 15-3-530(5) create a statute of repose governing legal malpractice actions. Instead, those sections create a general three-year statute of limitations in legal malpractice actions. This distinction may indicate the South Carolina Legislature is unwilling to create the same "absolute time limit" for legal malpractice actions which is observed in medical malpractice actions.

Id. at 656 (footnotes omitted). In addition to these distinctions, the author opined that the adoption of the "continuous representation rule would protect the sanctity of the attorney-client relationship" because a client should be able to rely on his attorney's advice, particularly where the attorney suggests filing an appeal of the underlying lawsuit. *Id.* at 658.

Notably, *Epstein* represents a minority position in this country as the majority of courts in other jurisdictions have adopted the continuous-representation rule. *See* 3 Ronald E. Mallen & Allison Martin Rhodes, *Legal Malpractice*, § 23:45 (2015) (discussing state cases which have adopted the majority and minority positions regarding the continuous-representation rule; identifying *Epstein* as within the minority position); George L. Blum, Annotation, *Attorney*

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malpractice claims were barred by the expiration of the statute of limitations); *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009) (citing *Epstein* and affirming grant of summary judgment in favor of attorneys in legal malpractice action based on the expiration of the statute of limitations).

Malpractice−Tolling or Other Exceptions to Running of Statute of Limitations, 87 A.L.R.5th 473, § 4 (2001 & Supp. 2015) (discussing state cases that have applied or found inapplicable the continuous-representation doctrine); *see also* George L. Blum, Annotation, *When Statute of Limitations Begins to Run on Action Against Attorney Based upon Negligence−View that Statute Begins to Run from Time Client Discovers, or Should Have Discovered, Negligent Act or Omission−Application of Rule to Conduct of Litigation and Delay or Inaction in Conducting Client's Affairs*, 14 A.L.R. 6th 1, § 8 (2006 & Supp. 2015) (collecting state and federal cases that applied or found inapplicable the discovery rule and highlighting *Epstein*).

The facts of the instant case present us with an appropriate opportunity to address the criticism and conflict that has arisen out of our decision in *Epstein*. As legislatively mandated, we begin our analysis with the well-established discovery rule. Pursuant to this rule, all legal malpractice actions must be commenced within three years after the claimant *knew or* by the exercise of reasonable diligence *should have known* that he or she had a cause of action.

Thus, a claimant seeking recovery for a legal malpractice claim is constrained by two constants: (1) filing the claim within the statute of limitations,[4] and (2) establishing the four requisite elements of his or her claim. As a result, a claimant must have knowledge of each element of the legal malpractice claim when it is filed. *See* 3 Ronald E. Mallen & Allison Martin Rhodes, *Legal Malpractice* § 23:14 (2015) ("Since a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued. Thus, 'accrual' means the existence of a legally cognizable cause of action.").

As evidenced by this case, the key question is when the claimant's cause of action accrues to trigger the running of the three-year statute of limitations. The answer to this question is complicated by the seemingly endless factual scenarios surrounding the underlying claim of a legal malpractice cause of action. For example, legal malpractice claims may stem from matters involving litigation or negotiated settlements while others may arise out of matters involving the probate

[4] "A legal malpractice cause of action is governed by the applicable statute of limitations whether it sounds in tort, contract or fraud." 1 S.C. Jur. *Attorney & Client*, § 69 (Supp. 2015) (citing section 15-3-530 of the South Carolina Code).

of a will or a divorce. Further complicating the determination of when a cause of action accrues is if the claimant pursues an appeal of an unfavorable ruling.

Our decision regarding the accrual date must also take into consideration the preservation of the attorney-client relationship as well as the public policy that is fundamental to the efficient management of our judicial system. Clearly, if a client files a legal malpractice cause of action while the client is still represented by counsel during an appeal, the attorney-client relationship is compromised and there are simultaneous lawsuits advocating conflicting positions.

While the legal bases and policy reasons for adopting the continuous-representation rule are persuasive, we find its application may be problematic because we can foresee factual scenarios where it is unclear exactly at what point trial counsel ends its representation. Moreover, we acknowledge the merit of the remittitur rule espoused by the dissent in *Epstein* as it offers a clear and definitive date for the accrual of a legal malpractice cause of action. However, we decline to adopt such an unyielding rule because each case presents unique circumstances. Instead, we are guided by the position taken by the Oklahoma Court of Appeals in *Ranier v. Stuart & Freida*, 887 P.2d 339 (Okla. Civ. App. 1994).

In *Ranier*, appellant retained respondent attorney and his law firm to represent him in a lawsuit that was ultimately dismissed as time-barred on August 15, 1990. *Ranier,* 887 P.2d at 340. On September 12, 1990, respondent mailed a letter to appellant, which notified appellant that the lawsuit had been dismissed and an appeal had been filed. *Id.* In the letter, respondent stated that he believed they had a "good chance" of getting the trial judge's decision reversed. *Id.* On February 5, 1992, the trial judge's decision was affirmed on appeal. *Id.*

On April 19, 1993, appellant filed a legal malpractice action against respondent and his law firm. *Id.* Respondents filed a motion for summary judgment, alleging the action was time barred because more than two years had elapsed since appellant's cause of action accrued. *Id.* Appellant responded that the statute of limitations did not begin to run until the appeal was decided on February 5, 1992 and, alternatively, that his attorney's letter assuring him that they had a "good chance" of reversing the trial judge's decision on appeal tolled the running of the statute of limitations. *Id.* The trial court granted summary judgment in favor of respondents. *Id.*

On appeal, the Oklahoma Court of Appeals addressed "whether Appellant's malpractice action accrued at the time the trial court dismissed the underlying action, starting the statute of limitations period, or whether the statute of limitations was tolled until after the case was finally determined adversely to Appellant on appeal." *Id.* at 341. In analyzing this issue, the court noted that there was a split of authority in other jurisdictions regarding the appropriate rule. In particular, the court considered the exhaustion of appeals rule and the continuous-representation rule. *Id.* at 341-42. Ultimately, the court declined to adopt either rule and, instead, crafted a compromise position between these rules. *Id.* at 343.

Relying on a decision issued by the Kansas Supreme Court,[5] the Oklahoma Court of Appeals stated:

> *A statute of limitations for a legal malpractice action may be tolled until resolution on appeal of the underlying case if the client has not become aware of the harm prior to the decision on appeal*. We come to this conclusion as a matter of common sense because in many situations, a client has no viable cause of action until he discovers whether his case is reversed on appeal. We caution, however, that the resolution of the appeal is not necessarily always the critical event triggering ripeness of a legal malpractice claim, but rather it is knowledge of the injury, its cause and the wrongdoing. *We emphasize the proper application of the discovery rule demands that the determinative factor be the client's knowledge of the injury, and each case must be decided under its own particular facts*. If it appears that the client knew of the harm before the case is finally determined on appeal, the statute of limitations begins to run from the time the underlying injury occurs or upon the client's awareness of the alleged negligence.

Id. at 343 (footnotes omitted) (emphasis added).

Based on the particular facts of the case, the Oklahoma Court of Appeals concluded that appellant had no knowledge of any harm suffered until the underlying judgment was affirmed on appeal. *Id.* at 343-44. Because the statute of

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[5] The Oklahoma Court of Appeals essentially adopted the rule enunciated by the Kansas Supreme Court in *Dearborn Animal Clinic, P.A. v. Wilson*, 806 P.2d 997 (Kan. 1991).

limitations was tolled until the appellate court issued its opinion, the Oklahoma Court of Appeals found that appellant's legal malpractice cause of action was timely filed. *Id.* at 344.

After carefully considering the rationale in *Ranier*, we conclude the rule adopted by the Oklahoma Court of Appeals comports with the discovery rule established by our Legislature and the purpose of the statute of limitations. Accordingly, we now adopt the following statement in *Ranier* as the statute of limitations standard for legal malpractice suits: "If it appears that the client knew of the harm before the case is finally determined on appeal, the statute of limitations begins to run from the time the underlying injury occurs or upon the client's awareness of the alleged negligence." *Ranier*, 887 P.2d at 343. We find the resolution on appeal rule provides a threshold limit to the tolling of the statute of limitations, eliminates the rigidity of the remittitur rule, and prevents arbitrary application of the rule with a case-by-case analysis. Furthermore, this rule advances the purpose of the statute of limitations, which is to punish plaintiffs who sleep on their rights, protect defendants from stale claims, and lend order to the judicial system.

Because the circuit court relied upon *Epstein* to hold that the statute of limitations began to run on the day of the jury's verdict, we reverse the court's grant of summary judgment without prejudice to either party's right to move for this relief under our newly announced statute of limitations standard for legal malpractice suits.[6]

B. Motion to Compel Discovery

Having reversed the circuit court's grant of summary judgment in favor of Respondents, the question becomes whether the court erred in denying a portion of Stokes-Craven's motion to compel. Stokes-Craven claims the circuit court erred in holding that Respondents' communications with their legal malpractice carrier were not discoverable. In particular, Stokes-Craven contends the documents are not protected by the work-product doctrine because they were "prepared in the

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[6] In view of our decision, we need not reach Stokes-Craven's contention that equitable doctrines precluded the application of the statute of limitations. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

ordinary course of insurance business" and not in anticipation of litigation. Additionally, Stokes-Craven maintains it has a "substantial need" for these documents and that it is unable to obtain equivalent information by other means.

A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009).

"The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party." *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010); *see* Rule 26(b)(3), SCRCP (stating, "a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for the trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means"). "Generally, in determining whether a document has been prepared 'in anticipation of litigation,' most courts look to whether or not the document was prepared because of the prospect of litigation." *Tobaccoville,* 387 S.C. at 294, 692 S.E.2d at 530.

We conclude the circuit court abused its discretion in ruling on Stokes-Craven's motion to compel production of communications between Respondents and their malpractice carrier because there was no evidentiary basis to support its factual conclusions. The court failed to conduct an in camera hearing to review the requested information and stated in its summary ruling that it had "not received a privilege log of these communications." Therefore, we find the court lacked sufficient information to determine whether the requested documents were prepared in anticipation of litigation and that Stokes-Craven had a substantial need of the materials in preparation of its case. Accordingly, we direct the circuit court on remand to conduct an in camera hearing, review the requested information, and issue a specific ruling.

IV. Conclusion

We overrule *Epstein* and now hold that the statute of limitations for a legal malpractice action may be tolled until resolution on appeal of the underlying case if the client has not become aware of the injury prior to the decision on appeal. We find this rule comports with the discovery rule and effectuates the purpose of the statute of limitations. Because the circuit court relied upon *Epstein* to hold that the statute of limitations began to run on the day of the jury's verdict, we reverse the court's grant of summary judgment without prejudice to either party's right to move for this relief under our newly announced statute of limitations standard for legal malpractice suits. Additionally, we find the circuit court abused its discretion in denying Stokes-Craven's motion to compel the production of communications between Respondents and their malpractice carrier because there was no evidence to support the court's ruling.

Based on the foregoing, we reverse the circuit court's order and remand the matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

PLEICONES and HEARN, JJ., concur. TOAL C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

CHIEF JUSTICE TOAL: I respectfully dissent. In determining when the statute of limitations period commences for legal malpractice actions, the majority adopts a subjective standard that is dependent on whether "the client has [] become aware of the injury prior to the decision on appeal." Because the General Assembly explicitly provided for an objective standard, rather than the majority's new subjective standard, I write separately.

In South Carolina, the statute of limitations for legal malpractice actions is three years. *See* S.C. Code. Ann. § 15-3-530(5) (2005); *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005); *Berry v. McLeod*, 328 S.C. 435, 444–45, 492 S.E.2d 794, 799 (Ct. App. 1997). In determining when a legal malpractice action accrues, the General Assembly set forth the discovery rule, stating that such an action "must be commenced within three years after the person knew or *by the exercise of reasonable diligence* ***should have known*** that he had a cause of action." S.C. Code Ann. § 15-3-535 (2005) (emphasis added); *Burgess v. Am. Cancer Soc'y S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989) (citing *Rogers v. Efird's Exterminating Co.*, 284 S.C. 377, 325 S.E.2d 541 (1985)). Thus, under this objective standard, the statutory period of limitations may begin to run before the client has actual, subjective knowledge of the potential claim or of the facts giving rise thereto. *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800; *see also Epstein*, 363 S.C. at 382, 610 S.E.2d at 821 ("This Court has recognized that, under the discovery rule, the statute of limitations begins to run when a person of common knowledge and experience would be on notice that a claim against another party might exist. The fact that the injured party may not comprehend the full extent of the damage is immaterial." (citations omitted)).

Here, the majority states that in general, the statute of limitations for a legal malpractice action commences upon the final determination of the appeal in the underlying case. The majority then outlines an exception to the rule, holding that the statute may begin to run earlier if the client has *actual* knowledge of the alleged negligence on the part of his lawyer. *See supra* ("'If it appears that the client knew of the harm before the case is finally determined on appeal, the statute of limitations begins to run . . . upon the client's awareness of the alleged negligence.'" (quoting *Ranier v. Stuart & Freida, P.C.*, 887 P.2d 339, 343 (Okla. Civ. App. 1994)). Thus, in effect, under the majority's rationale, the statute of limitations begins to run either when the client has actual knowledge of his lawyer's negligence, or at the conclusion of the appeal of the underlying case, whichever comes first.

While the majority claims its holding "comports with the discovery rule," in reality, it adopts a subjective standard contrary to the dictates of the General Assembly. As the Oklahoma Court of Appeals explained in *Ranier*, in Oklahoma, the client's actual knowledge of the injury is the "determinative factor" in deciding when a legal malpractice action accrues in that state. 887 P.2d at 343. However, in South Carolina, the statute of limitations begins to run when the client knows *or should know* that he has a cause of action. *See* S.C. Code Ann. § 15-3-535. Although the majority espouses a number of policy reasons in support of its holding, those policy reasons cannot override the General Assembly's decision to mandate an objective standard.

I further disagree with the majority's contention that the client's actual knowledge is the only way the statute of limitations may commence prior to the final decision on appeal of the underlying case. Although my dissent in *Epstein* espoused a similar rule to the majority's current formulation, I have now reconsidered my position, and would adhere to the majority's holding in *Epstein*. While it is certainly possible that a client would not know of his lawyer's alleged negligence until resolution of the underlying appeal, it is equally possible that a client would know of the alleged negligence far earlier in the proceedings, such as after the jury verdict. *Cf. Epstein*, 363 S.C. at 376–77, 610 S.E.2d at 818 ("[T]he majority of the damages alleged by [the client] stemmed from the adverse jury verdict, and the damages to his reputation resulting from the publicity were all damages suffered at the time of the verdict. . . . [A]lthough these damages might be mitigated by a successful appeal, they could never be wholly eliminated by a reversal of the jury's verdict. Accordingly, . . . [the client] either knew, or should have known, of a possible claim against [his lawyer] by the date of the adverse verdict, such that the [statute of limitations] began to run on that date."). Therefore, in my opinion, the better practice is for the Court to determine, on a case-by-case basis, the date that the client knew or should have known that he could file a legal malpractice suit. *See* S.C. Code Ann. § 15-3-535. In other words, the Court should not automatically assume that resolution of the underlying appeal is the "magic date" in all cases.

Applying the *Epstein* rule here, I would find that regardless of the date of Dennis Craven's actual notice of the possible claim against his lawyers, there is no genuine issue of material fact regarding whether he *should* have known of the alleged malpractice on August 17, 2006, the date of the jury's adverse verdict in the underlying case. As the majority succinctly outlines, at that time, Craven knew,

inter alia, that trial counsel did not contact or interview "crucial witnesses" prior to trial, and had failed to settle the case despite Stokes-Craven's admission that it "had done something wrong." Given those two allegedly critical mistakes, a reasonable person of common knowledge and experience should have known at the date of the jury's adverse verdict that he had a claim against his trial counsel.

Therefore, I would find the statute of limitations began to run on August 17, 2006, and in filing its malpractice action in 2010, Stokes-Craven allowed the three-year statute of limitations to expire. Accordingly, I would affirm the circuit court's ruling that the legal malpractice claim is time-barred.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph Azar, Frank J. Cumberland, Jr., and Michael A. Letts, Individually and as Class Representatives, Appellants,

v.

City of Columbia, Respondent.

Appellate Case No. 2014-000032

Appeal from Richland County
J. Ernest Kinard, Jr., Circuit Court Judge
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27573
Heard April 7, 2015 – Filed September 9, 2015

REVERSED AND REMANDED

Charles D. Lee, III, of McLaren & Lee, of Columbia, and Gene M. Connell, Jr., of Kelaher Connell & Connor, PC, of Surfside Beach, for Appellants.

M. McMullen Taylor, of Mullen Taylor LLC, of Columbia, for Respondent.

JUSTICE KITTREDGE: The City of Columbia generates approximately $110 million in revenue from user fees each year by providing water and sewer services.

For more than a decade, the City has been allocating substantial amounts of this revenue to its General Fund and for economic development purposes. Appellants filed this action contending the City's practices violate sections 6-1-330 and 6-21-440 of the South Carolina Code. The trial court granted the City summary judgment. Because there are genuine issues of material fact as to whether the City's expenditures of water and sewer revenues were lawful, we reverse and remand. Specifically, we remand to the trial court for further proceedings to determine whether the funds transferred into the City's General Fund were properly considered "surplus revenues" under section 6-21-440 of the Revenue Bond Act[1] and could therefore be spent for unrelated purposes and whether the City's direct economic-development expenditures bore a sufficient nexus to its provision of water and sewer services such that they would be considered "related" expenditures under the terms of section 6-1-330(B) of the South Carolina Code.

I.

The City owns and operates the state's largest water and sewer utility. The City provides water and sewer services to residents and non-residents by way of a service contract. Pursuant to the contract, the customer pays a minimum base rate plus any additional water or sewer use as measured by a meter. The rates the City charges for water and sewer services are set by ordinance. The revenue generated by the City in water and sewer fees is deposited into the Water and Sewer Enterprise Fund (Enterprise Fund).[2] Each year, the City transfers $4.5 million from the Enterprise Fund to its General Fund.

Joseph Azar, Frank Cumberland, Jr., and Michael Letts (collectively, Appellants) brought this action to challenge the City's practice of using water and sewer revenues for unrelated purposes. Specifically, Appellants sought an injunction to prevent the City from transferring revenues from the Enterprise Fund for these uses, and a refund of all such transfers from the past three years.

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[1] S.C. Code Ann. §§ 6-21-5 to -570 (2004 & Supp. 2014).

[2] The City allocates monies from its water and sewer enterprise fund to pay for all or part of the costs of City economic-development functions, including its economic development department, economic development special projects, the office of business opportunities, and four development corporations.

The parties filed cross-motions for summary judgment. Following a hearing, the trial court issued an order granting summary judgment for the City. Appellants appealed, which this Court certified pursuant to Rule 204(b), SCACR.

II.

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. *Zurich Am. Ins. Co. v. Tolbert*, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010) ("Summary judgment should be denied where the non-moving party submits a mere scintilla of evidence.") (citing *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009)). When reviewing a grant of summary judgment, this Court applies the same standard applied by the circuit court pursuant to Rule 56(c), SCRCP. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014).

III.

A.

The Legislature has directed that local governments must use revenue derived from service or user fees to pay costs related to the provision of the services for which the fee was paid:

> (A) A local governing body, by ordinance approved by a positive majority, is authorized to charge and collect a service or user fee. A local governing body must provide public notice of any new service or user fee being considered and the governing body is required to hold a public hearing on any proposed new service or user fee prior to final adoption of any new service or user fee. . . . A fee adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section.
>
> (B) *The revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid*. If the revenue generated by a fee is five percent or more of the imposing

> entity's prior fiscal year's total budget, the proceeds of the fee must be kept in a separate and segregated fund from the general fund of the imposing governmental entity.

S.C. Code Ann. § 6-1-330 (2004) (emphasis added).

The City admits the monies at issue fall within the definition of "service or user fee" as the term is statutorily defined. *See* S.C. Code Ann. § 6-1-300(6) (defining a "service or user fee" as "a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee"). Thus, the obvious question becomes: where section 6-1-330(B) plainly states that revenues from service or user fees "*must* be used to pay costs related to the provision of the service or program for which the fee was paid," how does the City justify using service and user fee revenues for purposes unrelated to the provision of water and sewer services?

Through an incorrect interpretation of the word "imposed," the trial court accepted the City's argument and found that section 6-1-330(B) does not apply to the water and sewer fees paid by the users. Specifically, the trial court found that because water and sewer customers must sign a contract agreeing to pay for water and sewer service, the service arrangement is therefore a voluntary one, in which the City acts in a "proprietary capacity." Following the City's lead, the trial court then reasoned the voluntary nature of the arrangement and the City's "proprietary capacity" somehow combine to allow these revenues to escape the limitations of section 6-1-330(B) and to permit the City to spend water and sewer revenues in any manner and for any purpose the City wishes. We reject this construction of section 6-1-330(B). *See Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 525–26, 642 S.E.2d 751, 754 (2007) ("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.") (citing *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)).

Moreover, we do not accept the unsupported premise that these contracts for water and sewer services are "freely entered into by resident and non-resident consumers."[3] Nor is the analysis of whether section 6-1-330(B) applies impacted

[3] *See* International Property Maintenance Code § 505.1 (2012) ("Every sink,

by whether the City is acting in a so-called "proprietary capacity."[4] Rather, the plain language of section 6-1-330(B) speaks in terms of whether revenues are "derived from a service or user fee," not whether the fee is charged pursuant to contract or ordinance or whether water and sewer customers voluntarily or involuntarily accept the imposition of such fees. Because the City has conceded that the source of the revenues is service or user fees, we find the statute requires that revenues *must* be spent on costs "related to" the City's provision of water and sewer services. Indeed, the plain and ordinary meaning of the language in section

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lavatory, bathtub or shower, drinking fountain, water closet or other plumbing fixture *shall be properly connected* to either a public water system or to an *approved* private water system.") (first emphasis added), *adopted by* City of Columbia Code § 5-151(a) (2013). Indeed, the City's own budget director testified in her deposition that "you can't live without water and sewer" and that these services are the "basis of life."

[4] Indeed, "proprietary capacity" is essentially an accounting concept that refers to governmental activities for which "a fee is charged to external users for goods or services," thus bearing closer resemblance to private businesses in terms of funding than to general governmental activities, which are funded primarily through tax revenues. *See* Codification of Accounting Standards and Procedures § 1300.109 (Gov'tl Accounting Standards Bd. 2014) (citing GASB Statement No. 34, ¶67 (Gov'tl Accounting Standards Bd. 1999)) (providing guidance on financial reporting for proprietary funds). According to the relevant Generally Accepted Accounting Principles, revenues derived from "proprietary" government activities must be segregated into a distinct enterprise fund and reported separately on financial statements if state "[l]aws or regulations require that the activity's costs of providing services . . . be recovered with fees and charges, rather than with taxes or similar revenues." *Id*. at § 1300.109(b). With no supporting authority, the City vastly overestimates the significance of its purported "proprietary capacity" in arguing that, when a county or municipality acts in a proprietary capacity to offer services by contract to residents and non-residents, section 6-1-330 does not constrain the local government's use of such funds. Nothing in the language of section 6-1-330(B) differentiates or depends upon whether the service or user fee revenues are deposited into a governmental fund or a proprietary or enterprise fund; rather, that statute simply speaks in terms of "revenue derived from a service or user fee imposed to finance the provision of public services."

6-1-330(B) requires some nexus—some commonality—between the underlying purpose of the expenditure and the City's provision of water and sewer services.

In light of the proper construction of section 6-1-330, there is a genuine issue of material fact as to whether the City's transfers and expenditures were lawful. As to the economic development expenses the City paid directly from the water and sewer Enterprise Fund, there is a genuine issue of material fact as to whether each of these expenditures has a sufficient nexus with the provision of water and sewer services such that the requirements of section 6-1-330(B) are satisfied.[5] We acknowledge the deposition of City Manager Steven A. Gantt, in which Gantt testified that the "overriding goal" of the City's economic development expenditures was "to bring new businesses within the [C]ity limits so that they can and do indeed become water and sewer customers." However, the record also includes an April 2007 report completed at the City's request by independent consulting firm Black & Veatch, in which the consulting firm cautioned against the very practice that led to this lawsuit:

> Based on our cost causal analysis, of the Utility's 2006 budget of $94.8 million . . . approximately $7.5 million of directly funded costs should not be funded by the Utility Enterprise Fund and are more appropriately funded through the general fund budget. This includes $3.6 million for non-departmental, capital improvements, and component units (development corporations). Our analysis is not intended to suggest the activities and functions provided by these departments is not of value to the City; rather, our analysis indicates no direct cost causation or benefit could be attributed to the Utility for these services, and therefore no cost causal based justification for direct funding from the Utility was supported for purposes of this study.

Based on this conflicting evidence about whether these economic development expenditures are sufficiently "related to" the provision of water and sewer services, summary judgment was premature and further factual development is warranted upon remand to evaluate the nexus, if any, between these economic development costs and the provision of water and sewer services. *See Bell v. Progressive Direct*

[5] The record reveals that since 1999, the City has budgeted more than $29 million in water and sewer funds on various economic development expenditures.

Ins. Co., 407 S.C. 565, 575–76, 757 S.E.2d 399, 404 (2014) (stating "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment" (quotations and citations omitted)).

B.

As to the City's transfers of water and sewer fees into the General Fund, including the City's long-standing practice of annually budgeting a $4.5 million blanket transfer of water and sewer revenues into its General Fund, we similarly find a genuine issue of material fact rendered summary judgment inappropriate.[6] In this regard, the parties concede the applicability of section 6-21-440 of the Revenue Bond Act. Section 6-21-440 of the Revenue Bond Act sets forth in detail the order in which service or user fees are to be expended in paying related costs, directing that revenues must be set aside for certain purposes other than debt service and operating costs, and allows for the disposition of any surplus funds. Specifically, section 6-21-440 provides:

> Out of the revenues there shall be set aside a sum sufficient to pay the principal of and the interest upon the bonds as and when they become due and payable. . . . This fund shall be designated the "bond and interest redemption fund." Out of the revenues there also shall be set aside a sum sufficient to provide for the payment of all expenses of administration and operation and such expenses for maintenance as may be necessary to preserve the system, project or combined system in good repair and working order. This fund shall be designated the "operation and maintenance fund." . . . Out of the remaining revenues there shall be next set aside a sum sufficient to build up a reserve for depreciation of the existing system or combined system. This fund shall be designated the "depreciation fund." Out of the remaining

[6] The record reveals that certain monies within the Enterprise Fund may be derived not from service and user fees, but from other revenue sources (such as unrestricted interest income). However, the City has conceded that all the funds at issue are derived from service and user fees, and therefore, this analysis necessarily assumes that all monies transferred from the Enterprise Fund are derived from service or user fees. This issue may be further explored on remand.

> revenues there shall be next set aside a sum sufficient to build up a reserve for improvements, betterments, and extensions to the existing system, project, or combined system, other than those necessary to maintain it in good repair and working order as herein provided. This fund shall be designated the "contingent fund." Any surplus revenues thereafter remaining shall be disposed of by the governing body of the borrower as it may determine from time to time to be for the best interest of the borrower.

S.C. Code Ann. § 6-21-440 (2004). It is only after the utility system's operating and maintenance expenses and bond principal and interest expenses have been paid and the statutorily required set-asides have been made in the depreciation and contingent funds that "[a]ny surplus revenues thereafter remaining" may be used for unrelated purposes at the local government's discretion.[7]

We find the "surplus revenues" provisions of the Revenue Bond Act can be reconciled with the requirement of section 6-1-330(B) that all service or user fees must be used to pay for "related" costs. *See Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) ("Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative.") (citing *Butler v. Unisun Ins.*, 323 S.C. 402, 408, 475 S.E.20 758, 761 (1996)). Specifically, we find the "surplus revenues" provision of section 6-21-440 is a limited exception to the general rule in section 6-1-330(B)—an exception that allows disposition of surplus funds *if* the specific preconditions set forth in section 6-21-440 have been met. *See Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) ("The general rule of statutory construction is that a specific statute prevails over a more general one.") (citing *Mims v. Alston*, 312 S.C. 311, 313, 440 S.E.2d 357, 359 (1994)).

Turning to the facts of this case, there is a genuine issue of material fact as to whether the transfers into the City's General Fund are properly considered either "related" costs under section 6-1-330 or characterized as "surplus revenues" under section 6-21-440.

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[7] *See also* S.C. Code Ann. § 6-21-480 (disposition of surplus in operation and maintenance fund); *id*. § 6-21-490 (disposition of surplus in depreciation fund); *id*. § 6-21-500 (disposition of surplus in contingent fund).

As to the $4.5 million diverted from the Enterprise Fund into the General Fund each year, the record reveals this City practice has been longstanding[8] and the amount of the budgeted transfer does not seem to be impacted by any sort of periodic determination of the measurable, actual costs attributable to the water and sewer system. For over fifteen years, the City's budget has included a blanket transfer into the General Fund in the amount of $4.5 million, which appears to be a pre-determined amount that is essentially treated as "surplus" revenue and transferred into the General Fund for disposition at the City's discretion.

Although section 6-21-440 allows for the discretionary disposition of surplus revenues in certain circumstances, we find there is a genuine issue of material fact as to whether the City has adequately funded the ongoing operating and maintenance expenses and satisfied the specific set-asides commanded by section 6-21-440 (including setting aside "sufficient" sums in the depreciation fund and the contingent fund) as a precondition to diverting $4.5 million into the General Fund each year. Although there is some evidence to suggest that the City has made expenditures for maintenance and capital improvements to its utility infrastructure, there is also evidence that these maintenance efforts have been inadequately funded and insufficient to keep the utility system in good repair and working order as required by section 6-21-440.

The record reveals that in 2013, the United States, through the Environmental Protection Agency (EPA), and the State of South Carolina, through the Department of Health and Environmental Control (DHEC), sued the City in federal court for various violations of the federal Clean Water Act resulting from numerous sanitary sewer overflows and other water quality impairments. This suit was ultimately settled by consent decree, in which the City agreed to implement a sound management program and to make necessary repairs and improvements to the water and sewer system—maintenance projects that should have been, but apparently were not, readily funded by the revenues from the set-aside funds

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[8] Evidently, this practice was memorialized in 1993 through a resolution of the Columbia City Council, which provides that transfers from the water and sewer fund to the General Fund are permitted but should not be made where to do so would impair the City's ability to operate and maintain the system or service the related debt or result in a rate-increase for customers, among other things.

required by section 6-21-440.[9]

Accordingly, summary judgment was premature, and we reverse and remand to the trial court for further development of the factual circumstances under which these transfers were purportedly justified and for a determination of whether these transfers complied with the law.

IV.

Finally, we reject the City's contention that interpreting section 6-1-330 to apply and limit the City's expenditure of service and user fees would effectively preclude any water and sewer revenues from ever being spent on anything other than the utility's direct costs. We do not construe the statutes in such a narrow and restrictive manner. Rather, the relevant statutory scheme expressly contemplates the unrestrained disposition of surplus funds under the appropriate circumstances. *See* S.C. Code Ann. § 6-21-440 (allowing "surplus revenues" to be "disposed of by the governing body of the borrower as it may determine from time to time to be for the best interest of the borrower" once certain preconditions are satisfied). However, absent the legislatively sanctioned process and progression that permit the expenditure of user fees as "surplus revenues," the law requires some nexus between the City's provision of water and sewer services and the underlying purpose of each expenditure or transfer of water and sewer funds. Simply put, the statutes do not allow these revenues to be treated as a slush fund.[10]

REVERSED AND REMANDED.

TOAL, C.J., PLEICONES, BEATTY, and HEARN, JJ., concur.

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[9] The City also agreed to pay civil penalties in the amount of $476,400 and expend an additional $1,000,000 in a supplemental environmental project to improve water quality and reduce flooding in specific parts of the City's service area.

[10] We affirm pursuant to Rule 220(b)(1), SCACR, the trial court's denial of class action certification and its finding that Appellants Joseph Azar and Michael Letts lacked standing. Frank J. Cumberland, Jr., shall be the sole plaintiff on remand.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ken Lucero, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2012-213130

ON WRIT OF CERTIORARI

Appeal From Dorchester County
Diane Schafer Goodstein, Plea Court Judge
DeAndrea G. Benjamin, Post-Conviction Relief Court Judge

Opinion No. 5352
Heard June 2, 2015 – Filed September 9, 2015

REVERSED

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia, for Petitioner.

Eleanor Duffy Cleary, of Cleary Law LLC, of Columbia, for Respondent.

KONDUROS, J.: In this post-conviction relief (PCR) action, the State argues the PCR court erred in finding *Padilla v. Kentucky*, 559 U.S. 356 (2010), applied retroactively and granting Ken Lucero's application for PCR. The State also contends the PCR court erred in denying its motion to dismiss on the basis that the application was barred by the statute of limitations and laches. We reverse.

FACTS

Lucero was born in Ecuador, moved to the United States in 1993, and became a "permanent resident alien" in 2000. On June 6, 2002, she was traveling in a rental car from New York City, where she lived, to Orlando, Florida, when police executed a traffic stop in Dorchester County, South Carolina. According to Lucero, because she did not speak English, she was unsure why police stopped her. Police searched her vehicle and found heroin in the trunk, but she asserted she had never seen heroin or transported it for other people.

The State indicted Lucero for trafficking heroin in an amount more than one hundred grams but less than two hundred grams. In November 2002, she pled guilty to the lesser included offense of possession of heroin, and the plea court sentenced her to two years' imprisonment suspended on three years' probation.[1] Lucero did not file a direct appeal. In February 2011, an immigration judge ordered Lucero removed to Ecuador due to her conviction.

On April 14, 2011, Lucero filed an application for PCR alleging ineffective assistance of counsel based on *Padilla* because plea counsel failed to inform her of the possibility of deportation due to her conviction. At the PCR hearing, Lucero testified she met with plea counsel on three occasions and plea counsel never informed her of the possibility of deportation. She testified she would not have pled guilty if she knew she could be deported.

The State argued Lucero's application was barred by the statute of limitations because she pled guilty in 2002, never filed a direct appeal, and filed her PCR application in 2011, in excess of the one-year statute of limitations for PCR. The State claimed *Padilla* was not retroactive; therefore, her application was "far beyond the [one-year] statute of limitations." Alternatively, the State argued even

[1] The appendix does not contain a transcript of the guilty plea hearing because court administration maintains court reporter records for only five years.

if *Padilla* was retroactive, Lucero's application was still barred by the statute of limitations because she waited more than one year from the day the Supreme Court issued *Padilla*. The State also claimed the doctrine of laches barred Lucero's application.

The PCR court found Lucero was entitled to PCR and vacated her conviction. Initially, the PCR court determined Lucero's application fell within the one-year statute of limitations provided under section 17-27-45(B) of the South Carolina Code (2014) because *Padilla* was "'intended to be applied retroactively.'" Further, the PCR court ruled the one-year statute of limitations contained in section 17-27-45(B) begins from the day the Supreme Court issues its "mandate" because "[t]his is analogous to the state court's issuing of the remittitur under Rule 221, SCACR." The PCR court explained because the Supreme Court issued its mandate for *Padilla* on May 3, 2010, Lucero's application, filed on April 14, 2011, was within one year of *Padilla* becoming final. Finally, the PCR court found the doctrine of laches did not bar Lucero's application because "the severe consequences of [Lucero] being deported outweigh any prejudice caused to the [S]tate by trying this case."

The State filed a petition for writ of certiorari from the grant of Lucero's application for PCR. This court granted the petition.

STANDARD OF REVIEW

On review, we will uphold a PCR court's findings if any evidence of probative value supports them. *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). "This [c]ourt will reverse the PCR [court]'s decision when it is controlled by an error of law." *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007). We "give[] great deference to the PCR court's findings of fact and conclusions of law." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

LAW/ANALYSIS

The State argues the PCR court erred by finding *Padilla* applied retroactively. Specifically, the State claims the ruling in *Padilla* was a "new rule" under *Teague*[2]

[2] *Teague v. Lane*, 489 U.S. 288 (1989).

because it applied the ineffective assistance of counsel analysis from *Strickland*[3] for the first time to decide whether plea counsel's failure to inform a defendant about deportation consequences constituted ineffective assistance. According to the State, because *Padilla* was a "new rule," it does not apply retroactively and the PCR court should have dismissed Lucero's application as barred by the statute of limitations. The State further asserts *Padilla*'s ruling was not a watershed rule of criminal procedure. We agree.

"In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief." *Lomax v. State*, 379 S.C. 93, 100, 665 S.E.2d 164, 167 (2008). "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components." *Strickland*, 466 U.S. at 687. "The defendant must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice." *Walker v. State*, 407 S.C. 400, 404-05, 756 S.E.2d 144, 146 (2014). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). "The two-part test adopted in *Strickland* also applies to challenges to guilty pleas based on ineffective assistance of counsel." *Holden v. State*, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (internal quotation marks omitted).

"To satisfy the first prong, a defendant must show counsel's performance fell below an objective standard of reasonableness." *Walker*, 407 S.C. at 405, 756 S.E.2d at 146 (internal quotation marks omitted). "To prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different." *Id.* (internal quotation marks omitted). To prove prejudice in the context of a guilty plea, an applicant must show that but for counsel's errors, there is a reasonable probability the applicant would not have pled guilty and would have insisted on going to trial. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

In *Padilla*, 559 U.S. at 360, the Supreme Court addressed whether plea counsel must inform his or her client of the risk of deportation associated with a potential guilty plea. The Supreme Court explained:

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[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

> It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the mercies of incompetent counsel. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Id. at 374 (citation and internal quotation marks omitted). Further, to be effective, counsel must inform a defendant whether his or her plea carries a risk of deportation because it is a critical factor when deciding whether to plead guilty or proceed to trial. *Hamm v. State*, 403 S.C. 461, 463 n.1, 744 S.E.2d 503, 504 n.1 (2013).

The Supreme Court has found the retroactivity of federal criminal procedure decisions "turn[s] on whether they are novel," i.e., whether they constitute a "new rule." *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013). When the Supreme Court announces a "'new rule,' a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding." *Id*. "Only when [the Supreme Court] appl[ies] a settled rule may a person avail herself of the decision on collateral review." *Id*. "A case announces a new rule . . . when it breaks new ground or imposes a new obligation on the government" or "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id*. (brackets omitted) (internal quotation marks omitted). A case does not announce a new rule when it is "merely an application of the principle that governed a prior decision to a different set of facts." *Id*. (internal quotation marks omitted). In *Chaidez*,[4] the Supreme Court found *Padilla* announced a "new rule" because its "holding that the failure to advise about a non-criminal consequence could violate the Sixth Amendment would not have been . . . 'apparent to all reasonable jurists' prior to [*Padilla*]." *Id*. at 1111. Accordingly, the Supreme Court found *Padilla* did not apply retroactively and "defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding." *Id*. at 1107, 1113.

[4] The Supreme Court decided *Chaidez* on February 20, 2013, after the PCR court issued its order on July 31, 2012.

Our supreme court has acknowledged the Supreme Court's decision in *Chaidez*. *See Hamm*, 403 S.C. at 465 n.4, 744 S.E.2d at 505 n.4 ("[T]he [Supreme Court] held *Padilla* announced a new rule; therefore, the Court concluded it does not apply retroactively."). Additionally, the *Hamm* court found a PCR applicant "failed to file a PCR application raising any issue related to *Padilla* within one year of that decision, issued March 31, 2010, as required by section 17-27-45 of the South Carolina Code." *Id*. at 464, 744 S.E.2d at 504 (citing S.C. Code Ann. § 17-27-45(B) (2014)).

Despite its decisions addressing and applying retroactivity of "new" constitutional criminal procedure rules, the Supreme Court has also decided individual states are free to provide constitutional protections in excess of the minimum required by the Constitution. *See Danforth v. Minnesota*, 552 U.S. 264, 288 (2008). Specifically, the Supreme Court concluded "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." *Id*. (internal quotation marks omitted).[5,6] In *Aiken v. Byars*, our supreme court noted it "ha[d] not addressed

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[5] In *Talley v. State*, decided prior to *Danforth*, our supreme court found "[i]n determining whether Respondent was deprived of his federal constitutional right to counsel, we are *required* to follow the . . . Supreme Court's decisions on retroactivity." 371 S.C. 535, 541, 640 S.E.2d 878, 880 (2007) (emphasis added) (citing *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 178 (1990) (plurality opinion)). However, in *Danforth*, the Supreme Court discussed *American Trucking* and concluded that decision did not require states to follow the Supreme Court's decisions on retroactivity. 552 U.S. at 284-88.

[6] Some states have taken advantage of the authority provided by the Supreme Court in *Danforth*. *See State v. Smart*, 202 P.3d 1130, 1136 (Alaska 2009) (citing *Danforth* and indicating a state test for determining whether a new decision was retroactive was appropriate "so long as the state test is at least as comprehensive as the federal test"); *Commonwealth v. Sylvain*, 995 N.E.2d 760, 762 (Mass. 2013) ("We conclude, as a matter of Massachusetts law and consistent with our authority as provided in *Danforth* . . . that the Sixth Amendment right enunciated in *Padilla* was not a 'new' rule and, consequently, defendants whose [s]tate law convictions were final . . . may attack their convictions collaterally on *Padilla* grounds."); *People v. Maxson*, 759 N.W.2d 817, 821-22 (Mich. 2008) ("The conclusion that [a

whether it should employ a more expansive analysis for determining retroactivity after *Danforth* . . . , which held that state courts can use a broader test than *Teague*." 410 S.C. 534, 539 n.4, 765 S.E.2d 572, 575 n.4 (2014) (citing *Danforth*, 552 U.S. at 282 (holding *Teague* "does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*")). The supreme court found "it unnecessary to [determine whether to use a broader test in that case] because [the new rule] is clearly retroactive under *Teague*." *Id.*

Since the supreme court's ruling in *Chaidez* that *Padilla* is not retroactive, states have split over whether to apply *Padilla* retroactively in their state. However, states all seem to rely on the determination of whether *Padilla* created a new right in their state. The states that have found *Padilla* applies retroactively point to their state's prior case law, statutes, rules, or expected attorney practices requiring attorneys to advise their clients of deportation consequences when pleading guilty. *See, e.g.*, *Sylvain*, 995 N.E.2d at 770-71 ("We conclude that *Padilla* did not announce a 'new' rule for the purposes of our retroactivity test under *Bray*. . . . *Padilla* did not announce a 'new' rule for the simple reason that it applied a general standard—designed to change according to the evolution of existing professional norms—to a specific factual situation. We also are not persuaded that Massachusetts precedent at the time *Padilla* was decided would have dictated an outcome contrary to that in *Padilla.* Indeed, long before *Padilla* was decided, it was customary for practitioners in Massachusetts to warn their clients of the possible deportation consequences of pleading guilty." (citation omitted)); *Ramirez v. State*, 333 P.3d 240, 243 (N.M. 2014) ("We decline to follow *Chaidez* . . . because since 1990, the New Mexico Supreme Court rules and forms have required an attorney to certify having engaged the client in detail in a guilty plea colloquy that included immigration consequences. Because the requirements that Form 9-406 imposes are not new in New Mexico, our holding in *Paredez* imposing requirements that were effective in 1990 applies retroactively to 1990, the adoption date of the Form 9-406 amendment that required a defendant to understand the possible immigration consequences of a plea conviction.").

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case] is not retroactive under federal law does not end our analysis, however. A state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords." (citing *Danforth*, 552 U.S. at 282-88)).

The states that have not applied *Padilla* retroactively have found *Padilla* recognizes a new right, one that was not previously recognized in their state. *See Miller v. State*, 77 A.3d 1030, 1044-45 (Md. 2013) ("The issue before us in the instant case, thus, becomes whether Miller's claims of involuntariness or ineffective assistance of counsel resulting from his failure to be advised of the adverse immigration consequences of his plea had independent state bases in Maryland in 1999. When queried on this point at oral argument, Miller's counsel could not identify any such state bases for affording Miller relief, because there are none. . . . By 1999, moreover, even after we adopted Rule 4-242(e), which mandated a trial court inform a defendant of the possibility of adverse immigration consequences, we further articulated that the failure to so advise a defendant did not itself mandate that the plea be declared invalid. The Rules Commentary acknowledged that the new Rule 4-242(e) did not overrule *Daley v. State*, in which the Court of Special Appeals held that the failure to advise of adverse immigration consequences did not render a guilty plea involuntary because possible deportation is merely collateral to his guilty plea, because it arises from a separate civil proceeding and, under immigration law at that time, deportation was not definite nor largely automatic." (citations and internal quotation marks omitted)); *People v. Baret*, 16 N.E.3d 1216, 1230-31 (N.Y. 2014) ("In 1995 we held in *Ford* that defense counsel were not under a duty to warn defendants of the possible deportation consequences before entering a guilty plea; and, stated another way, that the failure of counsel to warn defendant of the possibility of deportation [did not] constitute ineffective assistance of counsel. Thus, *Padilla* flatly contradicted and supplanted *Ford*'s holding as to whether defense attorneys were obligated to advise their noncitizen clients about the immigration consequences of a guilty plea. We agree with Justice Kagan that '[i]f [this] does not count as break[ing] new ground or impos[ing] a new obligation, we are hard pressed to know what would.' Thus, *Padilla* created a new rule of federal constitutional criminal procedure in New York which, consistent with *Teague* and *Eastman*, does not apply retroactively in CPL 440.10 proceedings." (alterations by court) (citations and internal quotation marks omitted)); *State v. Alshaif*, 724 S.E.2d 597, 603 (N.C. Ct. App. 2012) ("Persuaded by the reasoning of *Chang Hong*, we conclude that *Padilla* announced a new rule. Prior to *Padilla*, neither our state courts nor federal courts had interpreted *Strickland* as requiring counsel to advise a client of the immigration consequences of a guilty plea. We are aware that *Strickland* is a fact-specific test, and must naturally evolve over time as practical norms and underlying legal consequences change. However, we find that *Padilla* was an application of *Strickland* that would have been unreasonable to expect attorneys to

have foreseen—especially those attorneys unfamiliar with immigration law. We therefore hold that *Padilla* announced a new rule." (citations omitted)); *State v. Garcia*, 834 N.W.2d 821, 823-26 (S.D. 2013) ("This Court, however, has previously deemed the *Teague* rule to be unduly narrow as to what issues it will consider on collateral review. We opined that [w]hile the substance of what is to be applied is a federal constitutional matter, the decision on what criteria to use to determine prospective or retroactive application is a nonconstitutional state decision. Accordingly, we use the following criteria to determine whether a particular decision should be given [retroactive] effect [in South Dakota]: (1) The purpose of the decision, (2) reliance on the prior rule of law, and (3) the effect upon the administration of justice. Thus, while the trial court relied on the *Teague* factors in its analysis of the *Padilla* decision, we adhere to the *Cowell* precedent in analyzing whether *Padilla* applies retroactively. . . . At the time of Garcia's guilty plea in 2004, this Court had not yet addressed whether the failure to advise a defendant of the risk of deportation amounted to ineffective assistance of counsel. In our 2005 decision in *Nikolaev v. Weber*, we held that the overwhelming majority of courts to have addressed the question have held that deportation is a collateral consequence of the criminal process, and hence that, nothing else appearing, the failure to advise the defendant of the possibility of deportation does not amount to ineffective assistance of counsel. Subsequently, we denied Nikolaev relief on the same basis. Accordingly, the rule of law pronounced in *Nikolaev* in 2005 was exactly the opposite of the rule announced in *Padilla* in 2010. . . . In weighing the three *Cowell* criteria together, we will not apply the United States Supreme Court's decision in *Padilla* retroactively to cases that were decided prior to *Padilla*." (all alterations by court except last two) (citations and internal quotation marks omitted)); *see also Thiersaint v. Comm'r of Corr.*, 111 A.3d 829, 848 (Conn. 2015) ("Thus, by describing the holding in *Padilla* as an extension of *Strickland*, which was not a new rule, the court in *Sylvain* ignored the fact that the question of whether attorneys are *constitutionally required* to advise noncitizen criminal defendants of the deportation consequences of a guilty plea had never been addressed before *Padilla*. The court in *Sylvain* also ignored the fact that the ruling in *Padilla* was grounded in a legal analysis of the direct and indirect consequences of a plea, and that the court in *Padilla* had examined prevailing professional norms under the performance prong of *Strickland* only *after* resolving the threshold constitutional question of whether the rule applied in that case. We thus dismiss the reasoning in *Sylvain* because it fails to recognize that the rule announced in *Padilla* was new, and not merely an extension of the rule articulated in *Strickland*." (footnote and citation omitted)).

> Generally, new procedural rules should [not be] applied retroactively to cases on collateral review, unless the new rule falls within one of two exceptions to the general rule. The first exception is when the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." The second exception is when the rule "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." The second exception is "reserved for watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the proceeding.

Talley v. State, 371 S.C. 535, 543, 640 S.E.2d 878, 882 (2007) (second alteration by court) (quoting *Teague*, 489 U.S. at 305, 310-11).

Lucero argues that although *Padilla* created a new rule, South Carolina should apply it retroactively because it is a watershed rule of criminal procedure, which implicates the fundamental fairness and accuracy of the proceeding. We find it is not a watershed rule.

The Idaho Court of Appeals has noted, "We are aware of no court that has found that *Padilla* applies retroactively under *Teague*'s watershed exception." *Gutierrez-Medina v. State*, 333 P.3d 849, 853 (Idaho Ct. App. 2014). "The Tenth Circuit Court of Appeals addressed the question in *United States v. Chang Hong*, 671 F.3d 1147 (10th Cir. 2011), after determining (pre-*Chaidez*) that *Padilla* established a new rule of criminal procedure." *Id.* (footnote omitted). "The [*Chang Hong*] court first noted the Supreme Court has not hesitated to hold that less sweeping and fundamental rules than *Gideon* do not fall within *Teague*'s second exception." *Id.* The *Chang Hong* court determined *Padilla* did not announce a watershed rule of criminal procedure:

> Simply put, *Padilla* is not *Gideon.* *Padilla* does not concern the fairness and accuracy of a criminal proceeding, but instead relates to the deportation consequences of a defendant's guilty plea. The rule does not affect the determination of a defendant's guilt and

> only governs what advice defense counsel must render when his noncitizen client contemplates a plea bargain. *Padilla* would only be at issue in cases where the defendant admits guilt and pleads guilty. In such situations, because the defendant's guilt is established through his own admission—with all the strictures of a Rule 11 plea colloquy—*Padilla* is simply not germane to concerns about risks of inaccurate convictions or fundamental procedural fairness.

Chang Hong, 671 F.3d at 1158.

The Minnesota Supreme Court has also found *Padilla* did not create a watershed rule. *Campos v. State*, 816 N.W.2d 480, 498 (Minn. 2012).

> Requiring counsel to inform his noncitizen client of the immigration consequences of a guilty plea does not decrease the risk of an inaccurate conviction. *Padilla* is only implicated "in cases where the defendant admits guilt and pleads guilty." *Chang Hong*, 671 F.3d at 1158. In such cases, "because the defendant's guilt is established through his own admission . . . *Padilla* is simply not germane to concerns about risks of inaccurate convictions or fundamental procedural fairness." *Id.* Moreover, *Padilla*'s holding, unlike the expansive rule in *Gideon* establishing a right to counsel in all felony cases, affects only a small subset of defendants, indicating that the rule does not have a fundamental and profound impact on criminal proceedings generally.

Campos, 816 N.W.2d at 498-99 (alteration by court) (citing *United States v. Mandanici*, 205 F.3d 519, 528 (2d. Cir. 2000) (explaining that a watershed rule must institute "a sweeping change that applies to a large swathe of cases rather than a narrow right that applies only to a limited class of cases" (internal quotation marks omitted)); *Ellis v. United States*, 806 F. Supp. 2d 538, 549 (E.D.N.Y. 2011) (concluding that the rule announced in *Padilla* was not a watershed rule because "the rule has nothing to do with the accuracy of a defendant's conviction," applied "a relatively narrow holding," and "only applies to a limited class of defendants—

noncitizen defendants who face charges that carry with them immigration consequences")).

In *Gutierrez-Medina*, 333 P.3d at 857, the appellant contended "because Idaho has a broader statutory right to counsel than is imposed by the federal Constitution, a lower threshold for finding *Padilla* is a watershed rule should be applicable in this case." The court found the appellant was "correct that in some instances, Idaho's statutory right to counsel is more expansive than the federal right to counsel." *Id.* "It does not automatically follow, however, that this distinction supports a finding that *Padilla* announced a watershed rule. As we noted above, despite our Supreme Court's adoption of a modified approach to *Teague*, the fundamental questions inherent in that analysis are still applicable." *Id.* "It still stands that in order to be considered a watershed rule, a procedural rule must be one without which the likelihood of an accurate conviction is *seriously* diminished." *Id.* The court found the appellant made "no argument that without the *Padilla* rule, the likelihood of accurate convictions was seriously diminished." *Id.* The court "agree[d] with the numerous jurisdictions . . . that have explicitly concluded that *Padilla* is simply not germane to concerns about risks of inaccurate convictions given that it does not affect the determination of a defendant's guilt." *Id.* (internal quotation marks omitted).

The PCR court erred by ruling *Padilla* was retroactive in South Carolina. *See Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) ("This [c]ourt will reverse the PCR [court]'s decision when it is controlled by an error of law."). The Supreme Court determined *Padilla* was not retroactive for a collateral attack on a conviction in a federal proceeding. *Chaidez*, 133 S. Ct. at 1113. However, the Supreme Court also explicitly ruled a remedy in state court for a violation of the Federal Constitution is primarily a question of state law so long as the state law remedy meets the "minimum requirements" of the Federal Constitution. *Danforth*, 552 U.S. at 288. Because of the Supreme Court's decision in *Danforth*, our supreme court's ruling in *Talley*, 371 S.C. at 541, 640 S.E.2d at 880, that "we are required to follow the . . . Supreme Court's decisions on retroactivity" is no longer accurate. As such, our state is not required to follow the Supreme Court's holding in *Chaidez*. Therefore, we must determine whether *Padilla* will be retroactive for purposes of collateral attacks in state PCR proceedings.[7]

[7] In *Hamm*, 403 S.C. at 465, 465 n.4, 744 S.E.2d at 505, 505 n.4, the court noted *Padilla* was not retroactive due to the Supreme Court's decision in *Chaidez*.

We found no South Carolina case, statute, or rule requiring an attorney to advise a client of the deportation consequences that could arise from his or her guilty plea. Accordingly, *Padilla* created a new rule in South Carolina. *Padilla* did not provide for a right to counsel in a situation in which one had not previously been entitled to it. It simply added a new type of advice counsel should give. *Padilla* does not raise any concern about risks of inaccurate convictions or fundamental procedural fairness because a defendant has admitted guilt. *See Talley*, 371 S.C. at 544, 640 S.E.2d at 882 (finding a new rule was "a watershed rule of criminal proceeding because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding"). Therefore, this rule is not a watershed rule.

Further, Lucero contends section 17-27-45(B) would be pointless if a new rule did not apply retroactively. However, she overlooks the part of the subsection that states "a substantive standard not previously recognized or a right not in existence at the time of the state court trial, *and if the standard or right is intended to be applied retroactively*." The section clearly indicates the new rule must be intended to apply retroactively. For the reasons discussed above, the rule announced in *Padilla* should not apply retroactively in South Carolina. Therefore, the PCR court erred as a matter of law in finding *Padilla* applied retroactively in South Carolina.[8] Accordingly, the PCR's court granting of Lucero's PCR application is

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However, our supreme court's explanation of *Chaidez* was in dicta and did not discuss or make any findings with regard to whether *Padilla* was retroactive under state law and section 17-27-45(B) and made no mention of the Supreme Court's ruling in *Danforth*. *Id*. Thus, our supreme court's decision in *Hamm* did not clearly determine whether *Padilla* is retroactive under state law.

[8] The State also claims the PCR court erred by denying its motion to dismiss because Lucero's application was barred by the statute of limitations even if *Padilla* is retroactive because Lucero filed her application in excess of one year following the Supreme Court's release of the *Padilla* opinion because the one year time limit begins on the date the opinion is issued, not the date of its mandate. Additionally, it asserts the PCR court erred in denying its motion to dismiss based on the doctrine of laches. Based on our determination *Padilla* does not apply retroactively, we need not decide these issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

REVERSED.

THOMAS and GEATHERS, JJ., concur.