The Supreme Court of South Carolina

In the Matter of Nancy Hamilton Corbett, Petitioner

Appellate Case No. 2015-002132

ORDER

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

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

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

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

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

s/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

November 5, 2015

The Supreme Court of South Carolina

In the Matter of Melissa Jane Armstrong, Petitioner

Appellate Case No. 2015-002070

ORDER

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

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

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

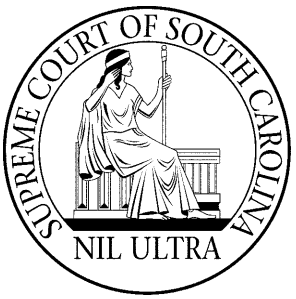
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

November 5, 2015



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 44
November 12, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Patricia Fore, Employee, Petitioner,

v.

Griffco of Wampee, Inc., Employer, and Chartis Claims, Inc., Carrier, Respondents.

Appellate Case No. 2014-002039

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from The Workers' Compensation Commission

Opinion No. 27588
Heard October 20, 2015 – Filed November 12, 2015

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Stephen B. Samuels, of Samuels Law Firm, LLC, and Peter P. Leventis, IV, of McKay Cauthen Settana & Stubley, PA, both of Columbia, for Petitioner.

James H. Lichty, of Columbia, and Helen F. Hiser, of Mt. Pleasant, both of McAngus Goudelock & Courie, LLC, for Respondents.

PER CURIAM: We granted certiorari to review the court of appeals' opinion in *Fore v. Griffco of Wampee, Inc.*, 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014). We now dismiss the writ of certiorari as improvidently granted.[1]

DISMISSED AS IMPROVIDENTLY GRANTED

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

[1] Accordingly, pursuant to the court of appeals' opinion, this matter is remanded to the Workers' Compensation Commission for a redetermination of Patricia Fore's benefits with express direction to consider Tony Owens' testimony and for Garry Smith's letter to be removed from Fore's public file.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Stephen Edward Carter, Respondent.

Appellate Case No. 2015-001890

Opinion No. 27589
Submitted November 3, 2015 – Filed November 12, 2015

DISBARRED

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

Stephen Edward Carter, of Hilton Head Island, *pro se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment with conditions. He requests the disbarment be imposed retroactively to March 3, 2015, the date of his interim suspension. *In the Matter of Carter*, 411 S.C. 609, 769 S.E.2d 665 (2015). We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to the date of his interim suspension. In addition, we impose the conditions as stated hereafter in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts and Law

Respondent was admitted to the South Carolina Bar in 1989.[1] At the time of his interim suspension, respondent operated a solo practice on Hilton Head Island handling a variety of legal matters.

Matter I

In May 2014, a circuit court judge forwarded ODC a motion filed by respondent in a civil case in which he admitted he had neglected the case and had failed to keep his clients informed of the status of the proceedings. In response to the Notice of Investigation, respondent represented to ODC that his failing in the case resulted from depression, that he had been in touch with Lawyers Helping Lawyers, that he was getting the recommended treatment, and that his other cases were in order and unaffected by his condition.

Respondent proposed a deferred discipline agreement which was accepted by an Investigative Panel of the Commission on Lawyer Conduct (the Commission) on October 17, 2014. In the deferred discipline agreement, respondent admitted to violations of the Rules of Professional Conduct and agreed to comply with certain terms and conditions, including completing the South Carolina Bar's Legal Ethics and Practice Program (LEAPP) Ethics School and Law Office Management School within nine months, seeking treatment with a psychologist, contacting his Lawyers Helping Lawyers' monitor on a weekly basis, and filing quarterly reports to the Commission for a period of two years.

On March 2, 2015, respondent self-reported that he had not complied with the terms of his deferred discipline agreement. As a result of respondent's failure to comply with the terms of the deferred discipline agreement, the Investigative Panel terminated the agreement.

According to its terms, allegations in the deferred discipline agreement were deemed admitted if respondent failed to comply with the agreement. Those allegations which are now admitted are as follows:

[1] Respondent was admitted to the Ohio Bar in 1980.

> Respondent failed to diligently represent the defendants in a civil action filed in 2011 in Beaufort County. Respondent was neglectful in failing to keep his clients informed of the status of the proceedings, failing to return his clients' telephone calls, and failing to timely respond to Court-imposed deadlines, including failing to timely schedule mediation. In response to the plaintiff's motion for sanctions, respondent admitted his responsibility for the delays and withdrew as counsel from the case. The defendants obtained new counsel who was able to successfully resolve the matter.

Further, pursuant to the deferred discipline agreement, respondent is deemed to have admitted that his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2 (lawyer shall abide by client's decisions concerning objectives of representation and shall consult with client as to means by which they are to be pursued); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of client); and 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).

Matter II

In addition to reporting that he failed to comply with the terms of his deferred discipline agreement, respondent also self-reported that he had neglected other client matters. Specifically, respondent reported that he had neglected a legal matter for Client A who he represented in a breach of contract lawsuit arising from a real estate transaction. Respondent filed suit for Client A in 2009 and completed some discovery, however, he admitted he did not do all that he should have to prepare the case for trial, including failing to depose the defendants and failing to compel compliance with his discovery requests. Respondent admitted he took no steps to keep Client A informed of the status of the case. In particular, respondent did not inform Client A of the court date. The trial judge had to continue the matter as a result of respondent's self-report and anticipated interim suspension.

Respondent's self-report also included his neglect of a legal matter for Mr. and Mrs. Doe. Respondent represented the Does in defense of a breach of contract lawsuit filed against them in 2011. Although some discovery was completed,

respondent admits that he did not do all that he should have to prepare the case for trial, including failing to depose the plaintiffs. Respondent took no steps to keep the Does informed of the status of their case. Respondent did not inform Mr. and Mrs. Doe of the trial date. The trial judge had to continue the matter as a result of respondent's self-report and anticipated interim suspension.

Respondent admits his conduct in connection with Client A and Mr. and Mrs. Doe violated the following provisions of the Rules of Professional Conduct: Rule 1.2 (lawyer shall abide by client's decisions concerning objectives of representation and shall consult with client as to means by which they are to be pursued); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of client); and 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to administration of justice).

Matter III

In his March 2, 2015, self-report and in a complaint filed by the Honorable Marvin H. Dukes, III, ODC was informed of a shortage in respondent's trust account. The shortage occurred in connection with respondent's representation of Client B and Client B's real estate companies. Specifically, Client B and Mr. Roe signed an escrow agreement naming respondent as escrow agent. On February 26, 2014, Mr. Roe wired $250,000.00 into respondent's trust account as an earnest money deposit in connection with a business transaction with Client B. On February 27, 2014, respondent disbursed $150,000.00 to Client B as authorized by the escrow agreement. Respondent was to hold the remaining $100,000.00 in trust pending completion of the business transaction.

Instead, on February 27, 2014, contrary to the terms of the escrow agreement, respondent issued and negotiated a check from his trust account payable to himself in the amount of $10,000.00. Respondent did not have funds on deposit in his trust account for this purpose. Other than a nominal amount, the only money on deposit in respondent's trust account at the time of this disbursement was the $100,000.00 escrowed funds for the Client B/Mr. Roe transaction. Respondent was not authorized by Client B or Mr. Roe to disburse $10,000.00 from those funds.

Between April and November 2014, respondent made twenty-one disbursements totaling over $90,000.00 from his trust account. Respondent did not have any funds in his trust account deposited for the purpose of making these disbursements. Respondent admits that the funds removed by these disbursements came from funds that he was supposed to be holding in trust for the Client B/Mr. Roe transaction and that he was not authorized to make any of these disbursements. Respondent admits he used the misappropriated funds for office expenses, personal expenses, the purchase of a vehicle, and payment of alimony arrearages.

Ultimately, a dispute arose between Client B and Mr. Roe regarding the terms of their business transaction. In October 2014, Mr. Roe filed a lawsuit against Client B. Respondent filed an answer and counterclaim on behalf of Client B. On December 2, 2014, in response to a motion filed on behalf of Mr. Roe seeking return of the escrowed funds, Judge Dukes issued an order requiring respondent deliver to the clerk of court the $100,000.00 that should have been in his trust account pending the resolution of the lawsuit. Respondent did not comply.

On March 2, 2015, Judge Dukes held a contempt hearing. Respondent did not appear. The same day, Judge Dukes issued an order requiring respondent to deliver the funds to the clerk of court no later than 3:30 p.m. on March 6, 2015. Respondent did not comply. On March 12, 2015, Judge Dukes issued an order finding respondent in contempt of court for failing to deliver the funds as ordered and scheduling a hearing on March 30, 2015, for a final disposition. At that hearing, respondent appeared and represented to Judge Dukes that he had the ability to pay the funds if given sufficient time and he requested 150 days in which to pay the ordered funds. Judge Dukes granted respondent's request and held that he could purge himself of contempt of court by paying $100,000.00 plus interest to the clerk of court and $6,064.98 to opposing counsel for attorney's fees.

Respondent did not pay any funds to the clerk of court within 150 days. On June 29, 2015, Judge Dukes held another hearing. At that hearing, respondent represented to Judge Dukes that he could pay $5,000.00 in thirty days and that he could pay the obligation in full by the end of the year. Without issuing a written order, Judge Dukes continued the matter until July 28, 2015, to allow respondent to pay $5,000.00 and work out a payment plan for the remaining funds.

By signing this Agreement for Discipline by Consent and the affidavit required by Rule 21, RLDE, respondent represents to the Court that he has the financial ability

to make the $5,000.00 payment as promised and to pay the remaining balance by the end of 2015.

In connection with this matter, respondent admits his conduct violated the following provisions of the Rules of Professional Conduct: Rule 1.15(a) (lawyer shall hold property of clients or third persons that is in lawyer's possession in connection with a representation separate from lawyer's own property); Rule 1.15(g) (lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for lawyer or any person other than the legal or beneficial owner of that property); Rule 3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent admits that by his conduct in these matters, he is subject to discipline pursuant to the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactive to March 3, 2015, the date of his interim suspension.[2] *In the Matter of Carter*, supra. In addition, the following conditions are imposed:

[2] Respondent's disciplinary history includes a confidential admonition issued in 2013. *See* Rule 7(b)(4), RLDE ("[a]n admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of sanction to be imposed.").

1. within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission;[3]

2. by December 31, 2015, respondent shall pay restitution (including interest) to Mr. Roe, attorney's fees in connection with the Client B/Mr. Roe matter, and any other fees, fines, or awards ordered by Judge Dukes in connection with the Client B/Mr. Roe matter;[4]

3. respondent shall reimburse the Lawyers' Fund for Client Protection (Lawyers' Fund) for any claims paid on his behalf prior to seeking readmission;[5] and

4. respondent shall complete the South Carolina Bar's Ethics School, Trust Account School, and Law Office Management School prior to seeking readmission.

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.

---

[3] This obligation is separate and apart from any obligation to reimburse the Commission for the Receiver's expenses. Respondent's obligation to pay the Receiver's expenses will be determined by the Court at the time of the termination of the Receiver's appointment.

[4] In the meantime, if Judge Dukes or any other judge orders respondent to pay funds related to the Client B/Mr. Roe matter sooner than December 31, 2015, respondent understands he must comply with that order, notwithstanding the terms of the Agreement or this opinion. Further, respondent understands that the Agreement does not preclude Judge Dukes or any other judge from ordering his incarceration for his conduct in connection with the Client B/Mr. Roe matter.

[5] If the Court orders the Lawyers' Fund to pay the Receiver's expenses, respondent's obligation to reimburse the Lawyers' Fund shall be determined by the Court at the time of the termination of the Receiver's appointment.

DISBARRED.

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

The Supreme Court of South Carolina

Re: Certification Program for South Carolina Paralegals

Appellate Case No. 2015-001110

ORDER

The Chief Justice's Commission on the Profession has requested that this Court adopt a program for the voluntary certification of paralegals in South Carolina. The purpose of a paralegal certification program is to assist in the delivery of legal services to the public by identifying individuals who are qualified by education, training, and experience and who have demonstrated knowledge, skill, and proficiency to perform substantive legal work under the direction and supervision of a lawyer licensed in South Carolina.

Pursuant to Article V, § 4 of the South Carolina Constitution, we hereby adopt Rule 429, SCACR, and Appendix G to Part IV, SCACR.

Rule 429 and the regulations contained in Appendix G are effective immediately. A copy of the rule and the regulations is attached.

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
November 12, 2015

RULE 429

CERTIFICATION OF PARALEGALS

(a) Purpose. The purpose of certification of South Carolina's paralegals is to assist in the delivery of legal services to the public by identifying individuals who are qualified by education, training, and experience and who have demonstrated knowledge, skill, and proficiency to perform substantive legal work under the direction and supervision of a lawyer licensed in South Carolina.

(b) Board of Paralegal Certification. The South Carolina Board of Paralegal Certification (Board) shall have jurisdiction over the certification of paralegals in South Carolina. The responsibility for operating the paralegal certification program rests with the Board, subject to regulations approved by the Supreme Court of South Carolina ("Court").

(c) Size and Composition of Board. The Chief Justice shall appoint the members of the Board based on nominations from the Board of Governors of the South Carolina Bar. The Board shall have nine members, five of whom must be Regular members of the South Carolina Bar in good standing. Four members of the Board shall be paralegals certified under the program, provided, however, that the paralegals appointed to the inaugural Board shall be exempt from this requirement during their initial terms, but shall be eligible for certification by the Board.

(d) Responsibilities of the Board. Subject to the jurisdiction of the Court, the Board shall have the responsibility to:

> **(1)** prepare and publish applications and other forms required by the regulations for certification of paralegals;
>
> **(2)** certify paralegals or deny or revoke the certification of paralegals;
>
> **(3)** evaluate and approve continuing paralegal education courses for the purpose of meeting the continuing paralegal education requirements established by the regulations; and
>
> **(4)** recommend to the Court any changes regarding fees set forth in the regulations.

(e) Regulations. Regulations may be promulgated by the Court or the Board. Regulations will be effective only upon approval by the Court.

REGULATIONS FOR CERTIFICATION OF PARALEGALS

I. SCOPE AND PURPOSE

These regulations implement Rule 429, SCACR.

II. MEMBERSHIP

A. The Board of Governors of the South Carolina Bar shall nominate persons to serve on the South Carolina Board of Paralegal Certification ("Board") for appointment by the Chief Justice. Terms shall be for three years, and initial appointments and subsequent appointments may be for terms less than three years to accomplish staggered terms and so that three members are appointed each year with a mix of lawyers and paralegals in rotation. Terms shall continue until successor members are appointed.

B. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the Chief Justice following nomination by the Board of Governors.

C. Any member of the Board may be removed at any time by order of the Chief Justice.

D. The members of the Board are absolutely immune from suit for acts carried out under their duties pursuant to these regulations.

III. CHAIRPERSON

The Board of Governors of the South Carolina Bar shall nominate a lawyer member of the Board as chairperson for appointment by the Chief Justice. The chairperson shall preside and present the annual report of the Board to the Supreme Court. The chairperson may appoint a vice-chairperson from members of the Board.

IV. FISCAL RESPONSIBILITY

Funding for the program carried out by the Board shall come from such application fees, annual fees, or renewal fees as the Court may establish.

V. MEETINGS; QUORUM; VOTING

A. The Board will meet at least once annually at the call of the chairperson. Notice of the time and place of the annual meeting will be given at least two weeks in advance of the meeting. Special meetings of the Board may be called at any time upon notice given by the chairperson. Notice of meeting shall be given at least twenty-four (24) hours prior to the meeting by electronic mail or telephone. Meetings may be convened by telephone conference call, videoconference, or Internet conference.

B. At all meetings, five members will constitute a quorum. The latest edition of Robert's Rules of Order will govern proceedings.

C. Voting may be in person, by letter, by telephone, by fax, or by email. Members may vote by proxy if the proxy is in writing, signed, and received by the chairperson prior to the convening of the meeting.

VI. ANNUAL REPORT

The Board shall prepare a report of its activities for the preceding year and submit the report to the Clerk of the Supreme Court no later than August 1 of each year.

VII. LIMITATIONS

A. No person shall be required to be certified as a paralegal to be employed by a lawyer as a paralegal to assist the lawyer in the practice of law.

B. Any person certified as a paralegal under this plan shall be entitled to represent that he or she is a "South Carolina Certified Paralegal."

VIII. STAFF; COMMITTEES

A. The South Carolina Bar will provide administrative assistance to the Board and any committees from funds provided through the certification process. The Bar may use the funds for purposes necessary to support administrative staff and may deposit the funds at interest in federally insured banks or savings and loan associations located in the State of South Carolina. The Board may delegate to staff administrative responsibilities for certification and other matters in these regulations.

B. The Board may establish a separate certification committee and such other committees as it requires to conduct its work. The certification committee shall be composed of members appointed by the Board, one of whom shall be designated annually by the chairperson of the Board as chairperson of the certification committee.

C. Meetings of the certification committee shall be held at regular intervals at such times, places, and upon such notices as the committee may from time to time prescribe or upon direction of the Board.

D. The certification committee shall advise and assist the Board in the implementation and regulation of this program. The certification committee shall be charged with actively administering the program as follows:

(1) upon request of the Board, the certification committee may make recommendations to the Board for certification, continued certification, denial of certification, or revocation of certification of paralegals and for procedures with respect thereto; and

(2) perform such other duties and make such other recommendations as may be delegated to or requested by the Board.

IX. STANDARDS FOR CERTIFICATION OF PARALEGALS

A. To qualify for certification as a paralegal, an applicant must:

(1) Pay an annual fee of $50.00; and

(2) At the time of application, be designated as a Certified Legal Assistant (CLA)/Certified Paralegal (CP) or PACE-Registered Paralegal (RP).

B. No individual may be certified as a paralegal if:

(1) the individual's certification or license as a paralegal in any state is under suspension or has been revoked;

(2) the individual is or was licensed to practice law in any jurisdiction and has been disbarred, is suspended from the practice of law, or resigned in lieu of discipline;

(3) the individual has been convicted of a criminal act that reflects adversely on the individual's honesty, trustworthiness, or fitness as a paralegal, or has engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation; provided, however, the Board may certify an applicant if, after consideration of mitigating factors, including remorse, reformation of character, and the passage of time, the Board determines that the individual is honest, trustworthy, and fit to be a certified paralegal; or

(4) the individual is not a legal resident of the United States.

C. Applications shall be typewritten on forms provided by the Board. Each question shall be answered responsively or shown as "not applicable." Applications and the information included therein shall be sworn to by the applicant as being true and complete.

D. An applicant shall complete all requirements prior to application.

E. To assist in determining an applicant's entitlement to certification, the Board or the certification committee may require an applicant to submit information in addition to that called for on the application form.

F. All matters concerning the qualification of an applicant for certification, renewal, or matters related to revocation, including, but not limited to, applications, files, reports, investigations, hearings, findings, recommendations, and adverse determinations shall be confidential and shall not be disclosed except as necessary for the Board, the certification committee, or the Clerk of the Supreme Court to carry out their responsibilities.

X. CONTINUED CERTIFICATION; RENEWAL

A. The period of certification as a paralegal shall be one (1) year, and each certification year shall run from July 1 to June 30. During such period the Board may require evidence from the paralegal of his or her continued qualification for certification as a paralegal, and the paralegal must consent to inquiry by the Board regarding the paralegal's continued competence and qualification to be certified. Application for and approval of renewal of certification shall be required annually and shall be typewritten on forms provided by the Board. To qualify for renewal of certification as a paralegal, an applicant must demonstrate completion of the continuing paralegal education (CPE) requirements during the certification year within which the application for renewal is made.

B. Applications for renewal must be filed on or before July 1. A late fee of $50.00 will be charged to any certified paralegal who fails to file the renewal application by July 31; provided, however, a renewal application will not be accepted after August 31. Failure to timely submit an application for renewal shall result in lapse of certification until the paralegal submits an application for renewal and pays any renewal fees and late fees. A certified paralegal who fails to file an application for renewal on or before August 31 must reapply for initial certification in accordance with Regulation IX.

XI. REVOCATION OF CERTIFICATION

A. The Board may revoke its certification of a paralegal, after a hearing before the Board on appropriate notice, upon a finding that:

(1) the certification was made contrary to the rules and regulations of the Board;

(2) the individual certified as a paralegal made a false representation, omission, or misstatement of material fact to the Board;

(3) the individual certified as a paralegal failed to abide by these regulations;

(4) the individual certified as a paralegal failed to pay the fees required;

(5) the individual certified as a paralegal no longer meets the standards established by the Board for the certification of paralegals; or

(6) the individual is not eligible for certification on one or more of the grounds set forth in Regulation IX(B).

B. An individual certified as a paralegal has a duty to inform the Board within thirty (30) days of any fact or circumstance described in Regulation XI(A).

C. If an individual's certification lapses, or if the Board revokes a certification, the individual cannot again be certified as a paralegal unless he or she so qualifies upon application made as if for initial certification and upon such other conditions as the Board may prescribe.

XII. CONTINUING PARALEGAL EDUCATION (CPE)

A. Each certified paralegal subject to these regulations shall complete twelve (12) hours of approved continuing education during each year of certification.

B. Of the twelve (12) hours, at least one (1) hour shall be devoted to the areas of professional responsibility or professionalism or any combination thereof.

(1) A professional responsibility course or segment of a course shall be devoted to:

(a) the substance, the underlying rationale, and the practical application of the Rules of Professional Conduct;

(b) the professional obligations of the lawyer to the client, the court, the public, and other lawyers, and the paralegal's role in assisting the lawyer to fulfill those obligations;

(c) the effects of substance abuse and chemical dependency, or debilitating mental condition on a lawyer's or a paralegal's professional responsibilities; or

(d) the effects of stress on a paralegal's professional responsibilities.

(2) Professionalism courses should address principles of competence and dedication to the service of clients, civility, improvement of the justice system, advancement of the rule of law, and service to the community.

XIII. CPE STANDARDS

A. Continuing education activities will be approved when the education experience is an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, professionalism, or ethical obligations of paralegals, has significant intellectual or practical content, and has the primary objective of increasing the participant's professional competence and proficiency as a paralegal.

B. A certified paralegal may receive credit for continuing education activities in which live instruction or recorded material is used. Recorded material includes

videotaped or satellite transmitted programs and programs on electronic replay formats. A minimum of three certified paralegals must register to attend the presentation of a replayed prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment.

C. A certified paralegal may receive credit for participation in a course online. An online course is an educational seminar available on a provider's website reached via the internet.

D. Continuing education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes.

E. Thorough, high quality, and carefully prepared written materials must be distributed to all attendees at or before the time the course is presented. These may include written materials printed from a computer presentation, computer website, or CD-ROM.

F. Any continuing legal education activity approved for lawyers by the South Carolina Commission on Continuing Legal Education and Specialization meets these standards.

G. In-house continuing education offered by the paralegal's employer solely for the paralegal and self-study shall not qualify for CPE credit.

H. A certified paralegal may receive credit for completion of a course offered by an ABA accredited law school for which academic credit may be earned. No more than six (6) CPE hours in any year may be earned by attending such courses. Credit shall be awarded as follows: 3.5 hours of CPE credit for every quarter hour of credit assigned to the course by the educational institution, or 5.0 hours of CPE credit for every semester hour of credit assigned to the course by the educational institution.

XIV. GENERAL COURSE APPROVAL

A. Continuing education activities may be approved by the Board, including those recommended by the certification committee, upon the written application of a

sponsor or of a certified paralegal on an individual program basis. An application for CPE approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation (i.e., the agenda with timeline, speaker information, and a description of the written materials) shall be submitted at least forty-five (45) days prior to the date on which the course or program is scheduled. If advance approval is requested by a certified paralegal, the application need not include a complete set of supporting documentation.

(2) If more than five certified paralegals request approval of a particular program, either in advance of the date on which the course or program is scheduled or subsequent to that date, the program will not be accredited unless the sponsor applies for approval of the program and pays the accreditation fee set forth in XV.

(3) Where advance approval is not requested, the application and supporting documentation must be submitted not later than forty-five (45) days after the date the course or program was presented.

(4) The application shall be submitted on a form furnished by the Board.

(5) The application shall contain all information requested on the form.

(6) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic, and shows each date and location at which the program will be offered.

(7) The application shall include a detailed calculation of the total CPE hours and the hours of professional responsibility for the program.

(8) If the sponsor has not received notice of accreditation within fifteen (15) days prior to the scheduled date of the program, the sponsor should contact the South Carolina Board of Paralegal Certification via telephone or e-mail.

B. Sponsors who have advance approval for courses from the Board may include in their brochures or other course descriptions the information contained in the following illustration:

> This course [or seminar or program] has been approved by the South Carolina Board of Paralegal Certification for continuing paralegal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility. This course is not sponsored by the Board of Paralegal Certification.

XV. FEES

Sponsors seeking accreditation for a particular CPE program that has not already been approved or accredited by the South Carolina Commission on Continuing Legal Education and Specialization shall pay a non-refundable fee of $75.00.

XVI. TEACHING CREDIT

A. CPE credit may be earned for teaching an approved continuing education activity. Three CPE credits will be awarded for each thirty minutes of presentation. Repeat live presentations will qualify for one-half of the credit available for the initial presentation. No credit will be awarded for video replays.

B. CPE credit may be earned for teaching a course at a qualified paralegal studies program. Two (2) CPE credits will be awarded for each semester credit (or its equivalent) awarded to the course.

The Supreme Court of South Carolina

Re: Proposed Rule Revisions Submitted by the Office of Commission Counsel

Appellate Case No. 2015-000504

ORDER

On behalf of the Commission on Lawyer Conduct and the Commission on Judicial Conduct, the Office of Commission Counsel has submitted a number of proposed rule amendments to various South Carolina Appellate Court Rules that involve lawyer and judicial discipline and the Rules of Professional Conduct.

We grant the proposed amendments that: (1) add Commission Counsel to the persons who may communicate with Disciplinary Counsel regarding a matter; (2) clarify that the Commission on Lawyer Conduct or the Commission on Judicial Conduct may direct Disciplinary Counsel to disclose certain information; and (3) delete an incorrect reference in the comments to Rule 3.5, RPC, Rule 407, SCACR. We decline to adopt the remainder of the proposed rule amendments.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rules 407, 413, and 502, SCACR, as set forth in the attachment to this order.

These amendments are effective immediately.

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
November 12, 2015

Rule 11, RLDE, Rule 413, SCACR, is amended to provide:

RULE 11

EX PARTE CONTACTS

Members of the Commission and Commission counsel shall not engage in ex parte communications regarding a case, except that before making a determination to file formal charges in a case pursuant to Rule 19(d)(4), Commission counsel and members of the investigative panel assigned to that case may communicate with disciplinary counsel as required to perform their duties in accordance with these rules, and the chair and vice-chair may entertain requests for permissive disclosure pursuant to Rule 12(c) made by disciplinary counsel without notice to the lawyer. Where disciplinary counsel makes a request to the chair or vice-chair pursuant to either Rule 12(c) or 19(b) without notice to the lawyer, the request shall so state and set forth the reason that notice is not being given. Ex parte communications shall include any communication which would be prohibited by Section 3B(7) of the Code of Judicial Conduct, Rule 501, SCACR, if engaged in by a judge.

Rule 11, RJDE, Rule 502, SCACR, is amended to provide:

RULE 11. EX PARTE CONTACTS

Members of the Commission and Commission counsel shall not engage in ex parte communications regarding a case, except that before making a determination to file formal charges in a case pursuant to Rule 19(d)(4), Commission counsel and members of the investigative panel assigned to that case may communicate with disciplinary counsel as required to perform their duties in accordance with these rules and the chair and vice chair may entertain requests for permissive disclosure pursuant to Rule 12(c) made by disciplinary counsel without notice to the judge. Where disciplinary counsel makes a request to the chair or vice chair pursuant to either Rule 12(c) or 19(b) without notice to the judge, the request shall so state and set forth the reason that notice is not being given. Ex parte communications shall include any communication which would be prohibited by Section 3B(7) of the Code of Judicial Conduct, Rule 501, SCACR, if engaged in by a judge.

Rule 12(c), RLDE, Rule 413, SCACR, is amended to provide:

(c) Permissive Disclosure by Commission. The Commission may, however, disclose information, or direct disciplinary counsel to disclose information, at any stage of the proceedings:

. . . .

Rule 12(c), RJDE, Rule 502, SCACR, is amended to provide:

(c) Permissive Disclosure by Commission. The Commission may, however, disclose information, or direct disciplinary counsel to disclose information, at any stage of the proceedings:

. . . .

Comment 1 to Rule 3.5, RPC, Rule 407, SCACR, is amended to provide:

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Conduct, Rule 501, SCACR, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. The South Carolina version of paragraph (a) differs from the Model Rule in its reference to a "member of the jury venire" rather than "prospective juror" since any person technically could be the latter.

The Supreme Court of South Carolina

Abbeville County School District, et al., Appellants-Respondents,

v.

The State of South Carolina, et al., of whom Hugh K. Leatherman, Sr., as President Pro Tempore of the Senate and as a representative of the South Carolina Senate and James H. Lucas, as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives are, Respondents-Appellants,

and

State of South Carolina, Nikki R. Haley, as Governor of the State of South Carolina, are, Respondents.

Appellate Case No. 2007-065159

ORDER

On November 12, 2014, a majority of this Court found that the State of South Carolina, Governor Nikki R. Haley, President Pro Tempore Hugh K. Leatherman, Sr., and the South Carolina Senate, and Speaker Pro Tempore James H. Lucas and the South Carolina House of Representatives (collectively, the Defendants) violated their constitutional duty to ensure that the students of South Carolina receive a minimally adequate education. *Abbeville County School District v. State* (*Abbeville II*), 410 S.C. 619, 624, 767 S.E.2d 157, 159 (2014). [1] Moreover, the

[1] Specifically, the Court found that the Defendants had enacted what appeared to be a robust educational scheme; however, despite the Defendants' good intentions,

Court stated that the Plaintiff Districts were partially responsible for their own problems, at times prioritizing popular programs such as student athletics above the academic environment. *Id.* at 660, 767 S.E.2d at 178. Therefore, the Court noted that "the Plaintiff Districts must work in concert with the Defendants to chart a path forward which appropriately prioritizes student learning," rather than placing sole blame on the Defendants. *Id.* at 660, 767 S.E.2d at 178–79.

To ensure the parties' compliance, the Court ordered "both the Plaintiff Districts and the Defendants to reappear before this Court within a reasonable time . . . and present a plan to address the constitutional violation announced today, with special emphasis on the statutory and administrative pieces necessary to aid the myriad troubles facing these districts at both the state and local levels." *Id.* at 661, 767 S.E.2d at 179. Until that time, the Court retained jurisdiction of the case. *Id.*

Following the Court's ruling, Speaker Pro Tempore Lucas formed the House Education Policy Review and Reform Task Force (the House Task Force). The House Task Force has conducted public hearings and is developing remedies addressing the findings of the Court. Similarly, President Pro Tempore

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the Record demonstrated that the statutory scheme resulted in abysmal student and school district performance. *Abbeville II*, 410 S.C. at 633–42, 767 S.E.2d 164–69. The Court noted that the evidence at trial demonstrated that insufficient transportation, poor teacher quality, high teacher turnover, local legislation, school district size, and poverty all potentially contributed to the problems facing the Plaintiff Districts. *Id.* at 642–50, 654–55, 767 S.E.2d at 169–73, 175–76.

The Court recognized that the "principle of separation of powers directs that the legislature, not the judiciary, is the proper institution to make major educational policy choices." *Id.* at 655–56, 767 S.E.2d at 176. Thus, the Court "charged [the Defendants] with identifying the issues preventing the State's current efforts from providing the requisite constitutional opportunity," ordering them "to take a broader look at the principal causes for the [poor student and district performance] beyond mere funding." *Id.* at 653, 660, 767 S.E.2d at 175, 178. To that end, the Court stated that it would likely be necessary to hold "lengthy and difficult discussions regarding the wisdom of continuing to enact multiple statutes which have no demonstrated effect on educational problems, or attempting to address deficiencies through underfunded and structurally impaired programming." *Id.* at 660, 767 S.E.2d at 178.

Leatherman formed the Senate Finance Special Subcommittee for Response to the *Abbeville* Case (the Senate Special Subcommittee), which is in the process of developing remedies addressing the Court's findings. The Plaintiff Districts also formed a committee of education experts and others following the ruling to develop remedies addressing the Court's findings. The Plaintiff Districts reduced their proposed remedies to writing and presented them to the House Task Force and the Senate Special Subcommittee.

On June 18, 2015, the Plaintiff Districts filed a motion for entry of a supplemental order proposing a detailed framework and requesting the Court establish a more concrete timeline for addressing the constitutional violations announced by the Court in *Abbeville II*. We grant the Plaintiff Districts' motion as amended and order as follows:

1. Within one week of the conclusion of the 2016 legislative session, the Defendants will submit a written summary to the Court detailing their efforts to implement a constitutionally compliant education system, including all proposed, pending, or enacted legislation. This summary is intended to keep the Court informed, in a formal manner, of the Defendants' progress toward remedying the constitutional violations announced in *Abbeville II*—including alarmingly-low student and school district performance, insufficient transportation, poor teacher quality, high teacher turnover, local legislation, school district size, and poverty. We are mindful that staffing and other critical needs may require time to fully implement any proposed or adopted plan. Accordingly, the Defendants should advise as to an expected timeline for implementation of its proposed plan.

2. The Court will conduct a review of the Defendants' efforts to implement a constitutionally-compliant education system. As the Court assesses whether the efforts seem designed to provide a remedy for the constitutional defects identified in *Abbeville II*, it will give due consideration to the General Assembly's prerogative to choose the methodology by which the constitutional violation shall be remedied.

3. The Court will issue an order after conducting its review of the summary analyzing whether Defendants' efforts are a rational means of bringing the system of public education in South Carolina into constitutional compliance, and whether or not the Court's continued maintenance of jurisdiction is necessary.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ Kaye G. Hearn J.

JUSTICE KITTREDGE: I adhere to my dissenting opinion and view that this Court has egregiously violated fundamental separation of powers principles by involving itself in a matter that lies exclusively in the Legislative Branch. While I would join the majority in vacating its September 24, 2015 order, I certainly would not replace it with a version that ostensibly violates separation of powers *less*. The principle of separation of powers demands complete adherence and countenances not the slightest transgression. I would deny the motion of the Plaintiff Districts.

s/ Costa M. Pleicones J.

s/ John W. Kittredge J.

Columbia, South Carolina

November 5, 2015

The Supreme Court of South Carolina

Carolina First Bank, n/k/a TD Bank, NA, Petitioner,

v.

BADD, LLC, William McKown and Charles A. Christenson, Defendants,

of whom BADD, LLC and William McKown are Respondents.

BADD, LLC and William McKown, Third Party Plaintiffs,

v.

William Rempher, Third Party Defendant.

Appellate Case No. 2013-000107

ORDER

We granted the respondents' petition for rehearing following the issuance of Op. No. 27486 (S.C. Sup. Ct. filed January 28, 2015). After rehearing the case, we adhere to our original opinion and therefore dismiss the petition for rehearing as improvidently granted.

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

November 6, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bobby Joe Reeves, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-187246

ON WRIT OF CERTIORARI

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5359
Heard June 1, 2015 – Filed November 12, 2015

REVERSED

Jeremy Adam Thompson, of Law Office of Jeremy A. Thompson, LLC, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Megan Harrigan Jameson, of Columbia, for Respondent.

SHORT, J.: Bobby Joe Reeves was convicted of first-degree criminal sexual conduct (CSC) with a minor and lewd act upon a child. He appeals from the denial

and dismissal of his application for post-conviction relief (PCR), arguing the PCR court erred in finding his trial counsel was not ineffective for failing to investigate and present the testimony of a gynecological expert witness. We reverse.

FACTS

Reeves was tried September 17-18, 2002. At the trial, during a video interview, Victim[1] testified Reeves lived with her and her mother in South Carolina. After she and her mother moved to Georgia, Victim stated she visited Reeves every other weekend. Reeves picked her up in Georgia and took her to stay at his house in South Carolina or her mother drove her to South Carolina. She testified she thought of Reeves as a father figure. Victim testified that during her visits with Reeves, he would "touch her private" with his hands and "sometimes with his private." He would "rub his private on [her] private." She was not wearing clothes when these incidents occurred and sometimes Reeves also was not wearing clothes. She explained Reeves would occasionally ask her to "suck his private" and when she did, "yellow stuff would come out." She stated the "yellow stuff" would "sometimes [go] in [her] mouth" and other times it would go "on [her] private." According to Victim, the weekend of July 4, 2000, was the last time she saw Reeves. She stated Reeves "stuck his finger up [her]" for the first time during that weekend. She testified she was four years old when Reeves began touching her. She told her mother about the sexual abuse after her last visit with Reeves.

Dawn Bridgett, Victim's mother, testified she and Victim moved in with Reeves when Victim was eight months old because they needed a place to live. Bridgett stated Victim and Reeves continued to spend time together after she and Victim moved to Georgia. She recalled the last time Victim saw Reeves was the weekend of July 4, 2000. Bridgett drove Victim to South Carolina and Victim did not want Bridgett to leave. Victim was also "very clingy" when she returned to Georgia. Reeves contacted Bridgett to schedule a visit with Victim toward the latter part of July 2000, but Victim refused to go to Reeves' home. When Bridgett questioned Victim about her decision, Victim discussed incidences that occurred in Reeves' bedroom.[2] After the conversation, Bridgett called her sister and the police. On the

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[1] Victim was ten years old at the time of the incident and twelve years old at the time of trial.

[2] The trial court limited Bridgett's testimony to "date, time, place, and nature but not any names." Therefore, Bridgett did not testify regarding the specific details of

following Monday, Bridgett took Victim for a medical examination with Dr. Dennis Bash. Several weeks later, Bridgett took Victim for a medical examination with Dr. Maureen O'Brien Claiborne.[3]

Dr. Bash, an expert in the field of emergency room pediatric care, testified he examined Victim on July 31, 2000. Dr. Bash stated he observed what "appeared to be a healing scar" on Victim's hymen. When asked, "Could you date or in any way tell how much earlier that time [sic] had been inflicted," Dr. Bash responded, "The only thing that you can say about that is that it had time to heal so that it was at least one week before that and probably longer." Dr. Bash opined any kind of penetration, penile or digital, would have caused the injuries. Further, Dr. Bash agreed the healing scar was consistent with some kind of penetration approximately thirty days earlier. During cross-examination, Dr. Bash admitted he did not find any bruising, bite marks, claw marks, or sperm on Victim during the examination. Further, he stated, in "cases where . . . it's been a long time period in-between the time that – whatever happened supposedly happened in that time they presented to us – we just do a basic screening evaluation and always recommend that they follow-up in the sexual abuse clinic." On re-direct examination, Dr. Bash maintained he would not have expected to see any bruising or sperm even if he had conducted the examination thirty days prior.

Jodi Lee Lashley, the Child Advocate Program Director at Children's Advocacy Center for Abused Children, testified she conducted a forensic interview of Victim on August 11, 2000. Lashley testified Victim stated she was made to "perform oral sex," "touch the private of the person," and "the person touched her private." Lashley testified Victim stated the incidents took place at a male's home and the male had a roommate named "Jessie."[4] According to Lashley, Victim explained the sexual abuse began occurring when she was four or five years old and the last incident occurred during her last visit with the male. Lashley testified she did not observe any signs that Victim was coached to say something during her interview.

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her conversation with Victim, only "[she] played a game with [Victim]. [She] named events, and [Victim] told [her] whether it happened[.]"

[3] Dr. Claiborne's name is also spelled Clayborne in the record.

[4] Victim testified Reeves had a roommate named "Jessie" who was at the home during her visits. Additionally, Jessie Wheaton testified at trial, and stated he and Reeves had been roommates, and "[they had] been living together now off and on, a couple of time[s in] different places."

Dr. Claiborne, an expert in pediatrics, testified she examined Victim on August 28, 2000. Dr. Claiborne stated she examined Victim and took cultures because none were taken in the emergency room. Dr. Claiborne explained, "On [Victim's] genital exam, her hymen appeared normal. She [did not] have any tears or scars. She [did not] have any unusual discharge. And the rectal area also appeared to have normal appearance and tone." Dr. Claiborne acknowledged her examination of Victim took place one month after Dr. Bash's initial evaluation and her results were normal. Dr. Claiborne explained it is common to see normal exams in these types of cases. She elaborated,

> What we know is that an awful lot of child abuse, sexual abuse in younger children, is not the violent rape kind of things that you sometimes see in adults or in older kids. A lot of the time in younger kids, it is more of a coercion kind of thing. And, you know, yes[,] penile may not leave terrible scars and stuff. But then you're also dealing with children who have never had consensual sex. So they don't know exactly what's all the way inside them, what is part of the way inside them[,] and what's trying to get inside of them. So, yes, we normally see normal exams. Most kids who have been sexually abused will have normal exams.

Dr. Claiborne opined healing would be in the process or would have taken place two months after the incident. She explained, "It would depend upon the degree of healing. If this had been a violent rape, I would [have] expect[ed] . . . bleeding and suturing, I would expect that I would see a lot of evidence." Finally, when asked if her findings, two months after the fact, were consistent with a child who had been digitally penetrated, Dr. Claiborne responded, "Yes." On cross-examination, she admitted her results were also consistent with the possibility that nothing happened to Victim.

Dr. Carl Brunie, an expert in child psychiatry and Victim's psychiatrist, testified regarding the behavioral changes he noticed in Victim before and after the alleged incident occurred. He stated he began treating Victim in 1999 because she had a history of anger, self-directed aggression, and biting herself. She had threatened to hurt herself, burned her arms with an eraser, suffered from frequent nightmares,

exhibited mood swings, experienced significant anxiety, and often expressed fears of some harm coming to her mother. He explained that during his treatment "[he] felt like there was history that [he] was missing" and "the picture became considerably clearer after [Victim's] mother reported to [him] that Victim had disclosed the history of sexual abuse." He testified Victim's condition deteriorated after the disclosure as she began to have more nightmares, became depressed and sad, and "would get in the fetal position sucking her thumb, acting like a much younger child."

During closing arguments, the State argued:

> But remember what Dr. Bash said when he examined Victim about three weeks after the last time she had seen [Reeves]. There was healing scar tissue in her hymen. Ten year old girls who have not been sexually molested do not have healing scar tissue in their hymen. There is no other explanation other than she was penetrated. A ten year old. We're not taking about a grown woman, a sexually active woman. We're talking about a ten year old. That just doesn't happen on its own. And that is a fact [the defense] cannot overcome.

The State repeated:

> [Victim] told you about digital penetration. . . . And again, 100 percent corroborated by the medical evidence. Three weeks later when a doctor examined her, a doctor who's a pediatric specialist and finds healing scar tissue. It just doesn't happen on its own; not on a ten year old; not in an unsexually active ten year old. It's just not going to be there. . . . Dr. Bash examines Victim on that day and finds healing scar tissue. Again, there's no other explanation for it other than Victim had been penetrated by something. And that's undisputed testimony.

The jury convicted Reeves of first-degree CSC with a minor and lewd act upon a child, and the trial court sentenced him to concurrent fifteen-year sentences. Reeves filed a direct appeal, and this court affirmed. *See State v. Reeves*, Op. No.

2005-UP-099 (S.C. Ct. App. filed Feb. 10, 2005). Reeves filed an application for PCR, which the PCR court dismissed on February 3, 2011, after a hearing. Reeves filed a petition for a writ of certiorari, which this court granted on January 31, 2014. Reeves now requests that this court grant him post-conviction relief and vacate his convictions and sentences.

STANDARD OF REVIEW

An appellate court must affirm the factual findings of the PCR court if they are supported by any probative evidence in the record. *Hyman v. State*, 397 S.C. 35, 42, 723 S.E.2d 375, 378 (2012). "However, reversal is appropriate where the PCR court's decision is controlled by an error of law." *Id.*

LAW/ANALYSIS

Reeves argues his trial counsel was ineffective in failing to investigate and present the testimony of a gynecological expert witness. We agree.

Trial counsel must provide reasonably effective assistance under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690. To receive relief, the applicant must show (1) counsel was deficient and (2) counsel's deficiency caused prejudice. *Stalk v. State*, 383 S.C. 559, 560-61, 681 S.E.2d 592, 593 (2009). Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 693. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id*. at 700.

At the PCR hearing, Dr. Fredrick Morris Thompson, an expert in gynecology, testified on Reeves' behalf. Dr. Thompson testified injuries in the vaginal area do not necessarily heal quicker than any other area of the body. According to Dr. Thompson, there are multiple ways a trauma may occur in the vaginal area. He stated, "[S]ex is certainly not – or sexual play is not the only away [sic] the vagina can be injured." He explained injuries can occur through accidental injury, self-mutilation, or a fall. Further, Dr. Thompson opined that girls, more than boys, are

given to masturbation, and in the course of masturbation, they could potentially injure themselves. However, he admitted there was no way to document what caused Victim's injury. He recalled he thought Dr. Bash described Victim's injuries as a minor laceration near the opening of the vaginal area. When asked about Dr. Bash's ability to see a physical injury on Victim one month after the incident, Dr. Thompson stated,

> If it was a significant health-threatening injury, it probably would be fairly evident. If it was a minor laceration, a tear, it – you know, it could be in various stages of healing, and I know that there's [sic] ways of categorizing bruises to determine how long the bruise has been there. I don't think that was described in [Dr. Bash's] examination. A laceration would be very difficult to date, I think exactly, as to how long it had been there, and certainly difficult to say what exactly had caused that particular injury if there was not any other evidence of trauma.

As to Dr. Claiborne's testimony stating her findings were consistent with some kind of penetration even though the medical exam results were normal, Dr. Thompson stated, "I think it would be very difficult to make a statement as to could physical abuse [have] occurred or not if there were no signs to lead you to believe there was anything out of the ordinary." According to Dr. Thompson, the injury to Victim would have had to be fairly substantial in order to be seen a month after the injury. Further, when asked if an injury observed thirty days after the incident is something he would expect a person to seek medical attention for, Dr. Thompson responded,

> Again, you're given someone who may or may not have the expected degree of intelligence. There's a fear involved. There's all sorts of reasons why people fail to seek medical attention, but if your child was bleeding, I would think this would alarm them enough that they would probably want to go to a caregiver of some sort. Again, there's a lot of pain involved. Again, there would probably be some reaction.

However, he opined he would not expect to see the injury thirty days after the incident if it was a fairly minor laceration.

Trial counsel testified he received Reeves' case from his partner in 2002. He asserted the State made an offer of five years' probation, which Reeves declined because he was adamant he had not done anything wrong. Trial counsel maintained he no longer had his notes and file for this case because the file was destroyed, and he could not remember many details about the case. Trial counsel admitted he did not consult with an expert prior to trial even though he knew the State would attempt to admit evidence of a physical trauma. When asked if a medical expert would have been helpful to counteract the State's expert witnesses, trial counsel explained,

> It might have, sir. As I remember, [Reeves] was making payments to my partner because he didn't have a lot of money at the time. I do not remember – I remember – I think I saw [Reeves], met with [Reeves] several times before we actually got ready for the trial. He had provided me with a witness list, a long list of people who, you know, would have helped him out. I do not remember whether he did that at my request or he just had it ready for me when I met with him. We decided to go that route. I started going down the list. If I'm correct, the entire defense was that [Victim's] mom had been convicted, [sic] against [Reeves] because [Reeves] had said, 'I don't like the lifestyle. You're not treating [Victim] well. I want you out of my house', if I remember correctly.

When asked again, trial counsel reiterated, "Sir, all I remember is there was a question about money. I know I never did talk to an expert, but whether [Reeves] and I talked about that, I cannot tell you."

The PCR court found Reeves failed to prove trial counsel was ineffective for failing to interview and present a medical expert at trial. The PCR court noted trial counsel testified he had not retained a medical expert because Reeves did not have the funds to do so. The PCR court stated, "A doctor could not state with certainty the exact cause of the injuries discovered and the determination of the cause of the

injury was a question for the jury." Further, the PCR court stated, "Dr. Thompson's testimony did not make it any less likely that [Reeves] had committed the crime, in fact, the substance of his testimony at the PCR hearing only confirmed that the cause of the injuries was unclear." Accordingly, the PCR court denied and dismissed this ineffective assistance of counsel claim.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (emphasis omitted) (citation omitted). "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91. "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions[.]" *Id.* at 691.

"[T]he United States Supreme Court has held that the defendant must have 'a fair opportunity to present his defense,' thereby requiring the State to provide the 'basic tools' for an adequate defense to an indigent defendant." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992) (quoting *Ake v. Oklahoma*, 470 U.S. 68 (1985)). "Thus, although the State is not required to provide the indigent defendant with unlimited funding, it must ensure that the defendant has competent counsel and the services of experts necessary to a meaningful defense[.]" *Id.*

South Carolina Code section 17-3-50 (B) (2003) provides in pertinent part:

> Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of fees and expenses not to exceed five hundred dollars as the court considers appropriate.

An applicant is only entitled to fees to pay for expert witnesses if the applicant shows a need for the expert testimony. *Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 683 (1996). The mere possibility the applicant could find a witness somewhere to support an allegation is insufficient to warrant authorization of funds. *Id.* Where counsel articulates a valid trial strategy for failing to call an expert witness to testify at trial, such conduct will not be deemed ineffective. *Legare v. State*, 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998).

In *Dempsey v. State*, the State called a therapist at the Low Country Children's Center to testify as an expert on child sexual abuse. 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005). The therapist opined the victim had been sexually abused. *Id.* In addition, the State presented expert testimony from a doctor who performed the victim's physical examination. *Id.* The doctor testified she found no physical evidence the victim was sexually abused, but it was likely that if someone was assaulted in the manner in which the victim alleged, there would be no physical evidence of the assault. *Id.* Dempsey's counsel did not call an expert to rebut the State's expert testimony because he believed the lack of physical evidence of abuse, by itself, was enough to rebut the State's expert testimony. *Id.* Our supreme court found Dempsey's counsel's decision not to call an expert witness to rebut the State's expert witness was a legitimate trial strategy. *Id.* Accordingly, the court held the PCR court erred in granting relief on the basis that trial counsel was ineffective in failing to call an expert witness on child sexual abuse. *Id.*

In this case, we find trial counsel was deficient because he should have discussed hiring a medical expert with Reeves to more thoroughly challenge the State's medical evidence presented at trial. *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Trial counsel admitted he did not consult with an expert prior to trial even though he knew the State would attempt to admit evidence of a physical trauma. Trial counsel recalled he failed to meet with an expert witness because "there was a question about money," but he also stated he could not recall whether he discussed this issue with Reeves at all.[5] Trial

[5] If Reeves was indigent and could not afford to pay for an expert, the South Carolina Office of Indigent Defense could have provided the funds needed to secure an expert witness. *See* S.C. Code Ann. § 17-3-50 (B) (2003) ("Upon a finding in ex parte proceedings that investigative, expert, or other services are

counsel could not recall much else about the case or his trial strategy, and he no longer had his notes and file for this case because the file was destroyed. We also find trial counsel did not provide a legitimate trial strategy for failing to consult with an expert before trial or call a medical expert witness to testify at trial. *Contra Dempsey*, 363 S.C. at 370, 610 S.E.2d at 815 (finding a trial counsel's decision not to call an expert witness to rebut the state's expert witness was a legitimate trial strategy and holding the PCR court erred in granting relief on the basis that trial counsel was ineffective in failing to call an expert witness on child sexual abuse); *Legare*, 333 S.C. at 281, 509 S.E.2d at 475 (stating that where counsel articulates a valid trial strategy for failing to call an expert witness to testify at trial, such conduct will not be deemed ineffective); *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (providing an attorney's performance is not deficient if it is reasonable under professional norms).

We further find Reeves was prejudiced by his trial counsel's deficiency. *See Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). Reeves presented evidence of prejudice through Dr. Thompson's testimony at the PCR hearing. Although Dr. Thompson admitted there was no way to document what was the cause of Victim's injury, he provided additional ways the injury could have occurred, including self-infliction or by accident. These additional theories were not presented during trial. In fact, the State, in its closing arguments, repeatedly argued, "There is no other explanation [for the injury] other than she was penetrated. . . . And that is a fact [the defense] cannot overcome. . . . that's undisputed testimony." Further, Dr. Thompson opined Victim's scars would have had to have been substantial to be seen one month after the incident. However, at trial, Dr. Bash's testimony does not indicate the injury was substantial.

CONCLUSION

Accordingly, we find the evidence does not support the PCR court's finding that Reeves failed to prove his counsel was ineffective. Further, we find counsel's ineffectiveness was prejudicial to Reeves.

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reasonably necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of fees and expenses . . . .").

REVERSED.

LOCKEMY and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Claude McAlhany, Appellant,

v.

Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc., and Erick Cogburn, Respondents.

Appellate Case No. 2013-000578

Appeal From Bamberg County
Clifton Newman, Circuit Court Judge

Opinion No. 5360
Heard March 3, 2015 – Filed November 12, 2015

REVERSED AND REMANDED

Richard Alexander Murdaugh and William Franklin Barnes, III, both of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, of Hampton, for Appellant.

Richard B. Ness and Alison Dennis Hood, both of Ness & Jett, LLC, of Bamberg, for Respondent Erick Cogburn; and Danielle F. Payne, of Grier, Cox, & Cranshaw, LLC, of Columbia, for Respondents Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control and Carter & Son Pest Control, Inc.

LOCKEMY, J.: In this negligence action, Claude McAlhany appeals the trial court's grant of summary judgment to Respondents Kenneth A. Carter, Sr. d/b/a Carter & Son Pest Control, Carter & Son Pest Control, Inc., and Erick Cogburn. McAlhany argues the trial court erred in finding the statute of limitations barred his property damage and personal injury claims. He further asserts the trial court erred in finding there was no evidence to support his personal injury claim. We reverse the trial court's grant of summary judgment and remand for further proceedings.

FACTS

In March 2007, Erick Cogburn purchased a house located at 3633 Faust Street (the home) in Bamberg. As part of the purchase, Cogburn asked Respondents Kenneth A. Carter, Sr. (Kenneth) d/b/a Carter & Son Pest Control and Carter & Son Pest Control, Inc. (collectively, Carter) to conduct a termite inspection on the home because Cogburn intended to "flip it." On March 20, 2007, Carter inspected the home and issued a South Carolina Wood Infestation Report, also known as a CL-100 (the March 2007 CL-100). According to the March 2007 CL-100, "[d]ue to the presence of water damage to the window sills, [Carter] has recommended termite treatment." The report noted "[t]here is visible water damage to the front [and] rear window sills." It further stated, "Wood and ground moisture is not available due to the building being on a cement slab." Finally, the report stated the visible water damage to the front and rear window sills was "being repaired by a licensed contractor." After the March 2007 inspection, Cogburn purchased a termite warranty from Carter that covered the cost of additional termite treatment for one year.

After purchasing the home, Cogburn began making repairs, including a new roof, new crown molding, new baseboard molding, new cabinet facings, tile on the kitchen backsplash, ceramic tile on the kitchen countertops, and new flooring. Cogburn stated that during the time he made the repairs, he never saw any "water seepage issues" or mold inside the home.

On November 5, 2007, Cogburn sold the home to McAlhany. Prior to the closing, Carter again inspected the home for termites and issued a second CL-100 on October 19, 2007 (the October 2007 CL-100). The October 2007 CL-100 found no "visible evidence of active . . . subterranean termites" or "other wood destroying insects," but it did find evidence of a prior infestation of subterranean termites.

Like the March 2007 CL-100, the October 2007 CL-100 stated, "Wood and ground moisture is not available due to the building being on a cement slab."
On April 7, 2011, McAlhany sued Carter and Cogburn, alleging Carter was negligent in its October 2007 inspection of the home and the October 2007 CL-100 was not performed in accordance with the South Carolina Pesticide Control Act (the Act).[1] According to his complaint, McAlhany was injured on August 16, 2009, while painting one of the home's interior walls, when a paint roller penetrated sheetrock, releasing mold spores into the air, which he inhaled. Upon further investigation, McAlhany discovered mold behind the home's interior walls. McAlhany claimed Carter was negligent in failing to conduct a reasonable inspection of the home's premises, failing to act as a reasonably prudent company would act under the same or similar circumstances, and failing to satisfy the applicable provisions of the Act. As a result of Carter's negligence, McAlhany claimed property damages to his home and personal injury damages. McAlhany explained in his deposition that the mold spores had caused him sinus problems, his eyes "burn and itch like crazy," he developed sores on his body, suffered nosebleeds, and suffered lost wages. In addition to the negligence claim against Carter, McAlhany sued Cogburn for negligent misrepresentation for failing to accurately disclose the home's condition prior to selling it to him.

Carter and Cogburn both filed answers, asserting the statute of limitations as a defense, among others. They later moved for summary judgment on the grounds that the statute of limitations barred all of McAlhany's claims. McAlhany argued the statute of limitations did not bar his claims because he did not discover mold in the home until August 2009 when he was injured by the mold spores, and he filed his claim within three years of that date. At the summary judgment hearing, the trial court considered the following evidence.

Kenneth explained in a deposition that a CL-100 inspection determines if a home has an infestation of termites, rotten wood caused by termites, or visible damage caused by termites. A bank typically requires a CL-100 inspection if the purchaser is borrowing money to buy the home. As part of conducting a CL-100 inspection, the inspector crawls under the home with a flashlight and "moisture reader," looking for visible damage from moisture and termites. Upon touching the surface of the wood with the moisture reader, the probe gives an immediate reading.

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[1] *See* S.C. Code Ann. § 46-13-10 (1987 & Supp. 2014).

Kenneth stated he looks for moisture and termites in every CL-100 inspection; however, he does not use a moisture reader to check moisture levels unless he sees visible evidence of moisture or termite damage. He explained that moisture levels in wood "cannot be above 20[%] . . . 28[%] max" because fungus can develop. According to Kenneth, fungus "leaves a white powder" on wood, which prompts him to do a moisture test. He stated, however, that the Official Code of the South Carolina Pesticide and Fertilizer Regulations do not require that he check moisture levels in areas of the home where there is no visible damage. He further stated a CL-100 inspection does not check a home for mold, he was not licensed to deal with mold, and "[m]old has nothing to do with infestation of termites." Kenneth explained that he was prevented from checking the moisture levels on the first floor of the home during both the March and October 2007 inspections because the home had "slab flooring."

The following colloquy occurred during Kenneth's deposition:

> Q: So you didn't do [a] moisture test in either instance, March or October of 2007?
>
> A: All the way around the, couple of places I seen that was wet and rotten that I asked Mr. Cogburn to replace.
>
> Q: So if you observed wet rotten wood, that prompts you to do the moisture test?
>
> A: Yes.

Kenneth explained that at the time of the March 2007 CL-100, he knew the home had "water issues," which is a common problem for homes built on an incline of more than five feet. Kenneth stated he was "sure" he informed Cogburn of the water issues within the home before Cogburn sold the home to McAlhany. Specifically, Kenneth testified that before his company re-inspected the home in October 2007, Cogburn had repaired the water damage to the home that was discovered in the March 2007 CL-100. Cogburn, however, stated Kenneth never told him of any of the water damage found during the March 2007 CL-100 inspection. According to Cogburn, he first learned of moisture problems or mold damage in the home in August 2009 when McAlhany showed him molded sheetrock in one of the downstairs bedrooms.

In his deposition, McAlhany explained that he was suing Carter for negligence because his company failed to conduct moisture tests on the home during the October 2007 CL-100 that would have revealed high moisture levels in the walls. McAlhany asserted that had he known there were high moisture levels in the home, he would have cut the sheetrock out of the walls to determine the source of the moisture. He explained that he reviewed the October 2007 CL-100 when it was issued and saw nothing that concerned him. McAlhany testified Kristi Lenox of Clemson University later told him a CL-100 required the inspector to check moisture levels in the home. He introduced into evidence a "Report of Structural Pest Inspection" issued on October 9, 2009, by Clemson University (the Clemson report). The Clemson report found the October 2007 CL-100 "did not comply with [s]ection 27-1085 K of the Rules and Regulations for the Enforcement of the [Act]. Although evidence of a previous infestation of subterranean termites was disclosed, the location of that infestation and the accompanying damage was not disclosed."

McAlhany testified he moved into the home approximately two weeks before the closing, which would have been mid to late October 2007. He stated that prior to purchasing the home, Cogburn informed him that the home had been treated for termites by Carter. McAlhany did not request nor was a property disclosure form filled out by Cogburn and given to McAlhany prior to the purchase of the home. Although McAlhany inspected the home prior to purchasing it, he was unsure if a building inspector inspected the home.

After McAlhany moved in, he painted the living room, painted some upstairs rooms, and replaced the floor on the first floor. He stated the floor had to be replaced because the home flooded about seven months after he moved in. He further stated Cogburn first told him the home had flooding problems around June 2008, and he would not have purchased the home had he known it had flooding problems.

McAlhany's testimony was unclear as to when he discovered mold within the home. Initially, he claimed he first discovered mold in "late '08"; however, he later stated it was "probably '09" or August 2009 when he was painting the downstairs, and the mold spores injured him. McAlhany also testified he discovered "black mold" when he "very first moved in" and replaced the floor on the first floor of the home. He explained that in 2007, he consulted with a mold specialist, who told

him to use bleach "and clean it up and put down the new flooring." McAlhany later claimed he replaced that floor seven months after he purchased the home, which would have been approximately June 2008. He admitted, however, that in October 2007, he was aware Carter "had not done its job properly." He further admitted he learned of termite problems in the home "[t]he day and hour [he] purchased the house." Later, McAlhany was asked, "So . . . there were termites and water damage prior to you purchasing the house?" and he responded, "Not water damage."

The trial court granted summary judgment to Carter and Cogburn, finding McAlhany's claims were barred by the three-year statute of limitations. It concluded McAlhany "knew or should have known by the exercise of reasonable diligence of the alleged termite and mold problems in October or November of 2007 . . . ." The trial court rejected McAlhany's claim that he did not discover mold in the home until 2009, finding he "testified thoroughly that he discovered in 2007 that the prior owner had not installed a proper moisture barrier and found mold when he pulled back the existing hardwood floor." As to his property damage claim, the court found that "[h]ad [McAlhany] conducted a reasonable investigation . . . [he] would have uncovered additional areas within the first floor of the home that also did not have a proper moisture barrier and contained mold." Next, the court concluded the statute of limitations barred McAlhany's personal injury action because the "personal injury and property damage are indivisible and caused by the same alleged negligent act of [Carter and Cogburn]." Finally, the trial court found McAlhany presented no evidence to support a personal injury action against Carter.[2] McAlhany filed a Rule 59(e), SCRCP, motion for reconsideration, which the trial court denied. This appeal followed.

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[2] Although the trial court's order indicates it granted summary judgment to Carter and Cogburn, the order does not specifically address McAlhany's negligent misrepresentation claim against Cogburn, which is the only claim McAlhany brought against Cogburn. Instead, it appears that for purposes of the statute of limitations, the court treated the negligent misrepresentation claim against Cogburn and the negligence claim against Carter as one "negligence" claim. Moreover, in his appellate brief, McAlhany does not specifically address the negligent misrepresentation claim. Nevertheless, at oral argument, both parties agreed the court granted summary judgment to Cogburn and that McAlhany had appealed that ruling. Therefore, the negligent misrepresentation claim is properly before us on appeal.

STANDARD OF REVIEW

"Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations." *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct. App. 2014), *cert denied*. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000), *holding modified on other grounds by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Rule 56(c), SCRCP). "Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Id.* "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Id.*

LAW/ANALYSIS

I. Property Damage Claim

McAlhany argues the trial court erred in finding the statute of limitations barred his property damage claim. Specifically, he asserts his testimony created a question of fact as to when he "first learned of any problems with the home"; however, the trial court failed to view McAlhany's testimony in the light most favorable to him. We agree.

Subsection 15-3-530(3) of the South Carolina Code (2005) provides for a three-year statute of limitations for "an action for trespass upon or damage to real property." According to the discovery rule, "'the three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been

discovered.'" *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011) (quoting *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004)). "The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). "[T]he fact that the injured party may not comprehend the full extent of the damage is immaterial." *Dean*, 321 S.C. at 364, 468 S.E.2d at 647. "The date on which discovery should have been made is an objective, not subjective, question." *Kreutner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995).

Viewing the evidence in the light most favorable to McAlhany, we find the trial court erred in finding the statute of limitations barred his claim for property damages. The trial court's finding that the statute of limitations had expired was based on a factual finding that McAlhany "testified thoroughly that he discovered in 2007 that the prior owner had not installed a proper moisture barrier and found mold when he pulled back the existing hardwood floor." Based on our review of the record, however, we believe McAlhany's testimony was conflicting as to when he first discovered mold within the home. *See Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury."); *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) ("When there is conflicting testimony regarding the time of discovery, it becomes an issue for the jury to decide."); *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("Whether a claimant knew or should have known that they had a cause of action is question for the jury.").

At one point in his deposition, McAlhany stated he first discovered mold in August 2009. He later claimed he saw "black mold" when he first moved into the home, which would have been late October 2007, while replacing the floor on the first floor of the home. He later testified, however, that he did not replace the floor until seven months after he moved in, which would have been June 2008. Because

McAlhany's testimony as to when he discovered mold within the home was conflicting, a question of fact existed as to this issue. Furthermore, the date McAlhany discovered mold in the home was a material fact because, assuming the statute of limitations was not triggered until June 2008, his lawsuit would have been timely filed in April 2011.

Carter and Cogburn rely on the case of *McMaster v. Dewitt*, 411 S.C. 138, 767 S.E.2d 451 (Ct. App. 2014), *cert denied*, for the proposition that a plaintiff "cannot manufacture a genuine issue of material fact . . . by submitting conflicting statements of fact . . . either by affidavit or within one's own deposition testimony." *McMaster* involved a medical malpractice claim brought against a doctor for overprescribing the appellant the drug Adderall. *Id.* at 141, 767 S.E.2d at 452. The trial court granted summary judgment to the doctor, finding the statute of limitations barred the action. *Id.* On appeal, the appellant argued summary judgment was improper because, although the appellant's deposition testimony indicated he failed to file his action within three years from when he was aware of the cause of his injury, the trial court erred in not considering his affidavit, which contained evidence that contradicted his deposition testimony. *Id.* at 148-49, 767 S.E.2d at 456. We concluded the trial court did not abuse its discretion in excluding the affidavit as a "sham affidavit." *Id.* at 149-51, 767 S.E.2d at 456-58. Specifically, we noted the statements contained in the affidavit differed greatly from the appellant's testimony, the appellant offered no explanation for his contradictory statements, and "[t]he last-minute submission of the affidavit indicate[d] [he] was attempting to create an issue of fact for purposes of summary judgment." *Id.*

McMaster is distinguishable from the present case for several reasons. First, and perhaps most importantly, McAlhany did not submit a last-minute "sham" affidavit in an attempt to create an issue of fact for summary judgment. Rather, his deposition testimony was conflicting as to when he discovered mold within the home. In contrast, the appellant's deposition testimony in *McMaster* was consistent as to when he learned the cause of his injury. Moreover, the inconsistencies in McAlhany's recollection of the date he saw mold in the home occurred several times during the same deposition rather than a few days before the summary judgment hearing as in *McMaster*. Thus, a trier of fact could find McAlhany was confused as to the dates rather than purposefully intending to contradict his earlier testimony. *Cf. id.* at 151, 767 S.E.2d at 458 (finding the trial court did not abuse its discretion in excluding a "sham affidavit" that contradicted

the appellant's testimony when the affidavit was submitted two days before the summary judgment hearing). Therefore, we find Carter and Cogburn's reliance on *McMaster* is misplaced.

We note with interest that McAlhany sued Carter, a pest control company, for negligence arising out of its inspection of the home and issuance of a CL-100 on October 17, 2007. While the parties dispute the scope of inspection required by a CL-100, it is undisputed that a CL-100 determines if a home has an active infestation of termites. The October 2007 CL-100, which McAlhany reviewed at the time it was issued, found no "visible evidence of active . . . subterranean termites" or "other wood destroying insects" within the home. Nonetheless, McAlhany's uncontradicted testimony was that he saw active termites in the home on the day he moved in, which would have been late October 2007, and he knew in October 2007 that Carter had not done its job properly. Because McAlhany was aware of termites in the home in late October 2007, and he knew the October CL-100 erroneously stated there were not active termites in the home, a reasonable person would have been on notice of a potential negligence claim against Carter for *termite damage*. Nevertheless, a reasonable person would not have been on notice of a potential negligence claim for *mold damage*. *See Holly Woods Ass'n of Residence Owners*, 392 S.C. at 183, 708 S.E.2d at 793 (stating "the three-year statute of limitations begins to run when the *underlying cause of action* reasonably ought to have been discovered" (emphasis added)). As Kenneth testified, "Mold has nothing to do with infestation of termites." Rather, the three-year statute of limitations for McAlhany's property damage claim did not accrue until a reasonable person would have discovered mold within the home. Because McAlhany presented evidence that he did not discover mold within the home until June 2008 or August 2009, which would have made his lawsuit timely filed in April 2011, the trial court erred in granting summary judgment as to the property damage claim. *See Logan*, 389 S.C. at 618, 698 S.E.2d at 883 ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury.").

II. Personal Injury Claim

McAlhany next argues the trial court erred in finding the statute of limitations barred his personal injury claim because the statute of limitations does not begin to run in a personal injury action until the injured party either knows or should know by the exercise of reasonable diligence that a cause of action has arisen. We agree.

Subsection 15-3-530(5) of the South Carolina Code (2005) provides for a three-year 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, and those provided for in Section 15-3-545." Section 15-3-545 of the South Carolina Code (2005) provides that, "Except as to [medical malpractice actions], all 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."

> The elements of a cause of action in tort for personal injury are (1) duty, (2) breach of that duty, (3) proximate causation, and (4) injury. . . . The fundamental test . . . in determining whether a cause of action has accrued[ ] is whether the party asserting the claim can maintain an action to enforce it. Stated differently, [a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it.

Grillo v. Speedrite Products, Inc., 340 S.C. 498, 502, 532 S.E.2d 1, 3 (Ct. App. 2000) (citations and internal quotation marks omitted) (second, third, and fourth alterations in original)); *see also Sims v. Amisub of S.C., Inc.*, Op. No. 27561 (S.C. Sup. Ct. filed Aug. 12, 2015) (Shearouse Adv. Sh. No. 31 at 27) ("A cause of action accrues at the moment when the plaintiff has a legal right to sue on it." (internal quotation marks omitted)).

In addition to his property damage claim, McAlhany sued Carter for personal injuries he allegedly sustained on August 16, 2009, when a paint roller he was using penetrated sheetrock, releasing mold spores into the air, which he inhaled. The trial court determined the statute of limitations for the personal injury claim began at the same time as his property damage claim and therefore this claim was untimely filed. We disagree with the learned trial court. Because a personal injury cause of action cannot accrue until there is an injury, McAlhany's cause of action accrued at the earliest on August 16, 2009—the time he suffered an injury and thus "ha[d] a legal right to sue on it." McAlhany filed his lawsuit on April 7, 2011, which was within three years from the date of accrual. Therefore, the trial court erred in granting summary judgment to Carter and Cogburn on the personal injury claim on the basis of the statute of limitations.

In granting summary judgment, the trial court relied on *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996). In *Dean*, the appellant purchased a building in September 1984 located on King Street in Charleston, and a contractor inspected it and determined it was structurally sound. *Id.* at 362, 468 S.E.2d at 646. In October and November 1984, Ruscon performed pile driving activities at a nearby construction site and, shortly thereafter, Dean saw a three-foot crack at the front right corner of the building and concluded Ruscon's pile driving caused the crack. *Id.* Ruscon resumed pile driving activities in the summer of 1985 and, shortly thereafter, Dean noticed the original crack had expanded and a new crack had formed on the other side of the building. *Id.* at 362, 468 S.E.2d at 646-47. Dean was forced to close her business after inspectors found the building was no longer structurally sound. *Id.* at 362, 468 S.E.2d at 647. In April 1991, Dean filed suit against Ruscon for damage to her building, and at trial, the evidence established that the damage to Dean's building was "most reasonably caused by the pile driving activity" in 1984, not 1985. *Id.* at 362-63, 468 S.E.2d at 647. The trial court granted Ruscon's directed verdict motion, finding Dean's lawsuit accrued in November 1984, when she discovered the damage to her building, and because she did not file her lawsuit until April 1991, the six-year statute of limitations under subsection 15-3-530(3)[3] barred her claim. *Id.* at 363, 468 S.E.2d at 647.

On appeal, our court reversed, finding a question of fact existed as to whether Dean was reasonably diligent in determining whether Ruscon caused the damage to her building thereby triggering the statute of limitations in 1984. *Id.* On appeal to the supreme court, Dean argued the crack in 1984 and the bulging of the bricks in 1985 presented two distinct harms and, therefore, two different dates of accrual existed for purposes of the statute of limitations. *Id.* at 364, 468 S.E.2d at 647. The supreme court disagreed, finding

> the resulting harm to Dean's building in 1985-enlarged crack and bulging bricks-by being in the same location and of the same nature as the original harm, evolved from Ruscon's 1984 pile driving activities. Therefore, because the subsequent harm was not separate and distinguishable, it was discoverable in 1984.

[3] This subsection was later amended to provide for a three-year statute of limitations.

Id. at 364-65, 468 S.E.2d at 648. The court noted the damage to Dean's building was not latent, but was apparent in November 1984, and there was "no question that Dean initially discovered the damage in 1984 and associated it with Ruscon's pile driving activities." *Id.* at 365, 468 S.E.2d at 648. Finally, the court concluded "the fact that Dean may not have comprehended in 1984 that the original crack would expand causing the building to ultimately buckle is immaterial." *Id.* at 366, 468 S.E.2d at 648.

We find *Dean* distinguishable from the present case. We note that the trial court relied on *Dean* to find the statute of limitations for McAlhany's personal injury claim began at the same time as his property damage claim because the two injuries were indivisible. As previously stated, however, a question of fact existed as to when a reasonable person would have discovered mold within the home and thus triggered the statute of limitations for the property damage claim. Thus, to the extent the trial court erred in granting summary judgment on the property claim, it likewise erred in doing so on the personal injury claim. Moreover, in *Dean*, both the original harm in 1984 and the subsequent harm in 1985 were property damage; whereas, here McAlhany allegedly suffered personal injury and property damage. Unlike *Dean*, where the appellant knew Ruscon damaged her building in 1984 yet waited until her building was further damaged by similar conduct before filing suit, McAlhany could not have "comprehend[ed] the full extent of his damages" because he had no personal injury damages prior to August 2009. *See Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 524, 443 S.E.2d 537, 539 (1994) (finding the appellant's negligence claim for neurological injuries resulting from a fall at a hospital was not barred by the statute of limitations because "[t]he nature of the injuries was not readily discoverable" when the fall occurred). Even if McAlhany's personal injuries were indivisible from his property damage, summary judgment was still improper because, as previously discussed, a question of fact existed as to when a reasonable person would have discovered mold in the home. Therefore, the trial court erred in granting summary judgment on McAlhany's personal injury claim.

III. Evidence Supporting Personal Injury Claim

McAlhany next argues the trial court erred in finding he did not present any evidence to support a personal injury claim against Carter. According to McAlhany, Carter was negligent because it knew of water damage to the home at the time of the October 2007 CL-100, yet it failed to conduct a moisture test. As a

result, the home developed mold, which caused McAlhany's injury in August 2009. We agree.

After finding the statute of limitations barred McAlhany's claims, the trial court determined McAlhany did not present any evidence to support a personal injury claim against Carter. The court found McAlhany's reliance on the Clemson report to support his personal injury claim was misguided because, although the report found the October 2007 CL-100 "did not comply with Section 27-1085 K of the Rules and Regulations for the Enforcement of the [Act,]" it did not indicate Carter's failure to comply with the Act "caused or contributed in any manner to the mold."

We interpret the trial court's ruling that the Clemson report did not indicate that Carter's failure to comply with the Act "caused or contributed in any manner to the mold" to mean that McAlhany failed to establish Carter's alleged negligence was the proximate cause of his personal injuries. *See J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (stating the elements of negligence are "(1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty"). The Clemson report indicates the October 2007 CL-100 did not comply with the Act because Carter did not disclose the location of a previous termite infestation and accompanying damage. The report does not state an opinion regarding Carter's alleged negligence in failing to discover and disclose mold or moisture damage within the home. In fact, it specifically states "This inspection was not made to address the presence or absence of any health-related molds or fungi. No opinions are given or intended concerning mold-related air quality or other health issues." Thus, we agree the Clemson report does not establish proximate cause because the report does not indicate Carter violated the Act for failing to discover or disclose mold or moisture damage. Nevertheless, McAlhany presented other evidence that created a genuine issue of material fact as to his personal injury claim against Carter. *See Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011) ("In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment.").

First, there was evidence Carter had a duty to check moisture levels in the home because Kenneth explained that as part of a CL-100 inspection, he looks for visible

damage from moisture and termites. Furthermore, there was evidence Carter knew the home previously had water damage. The March 2007 CL-100 indicates "visible water damage to the front [and] rear window sills" of the home, and Kenneth admitted he was aware of this damage to the home. The record, however, is unclear as to whether and to what extent Carter checked for moisture levels in the home. The March and October 2007 CL-100 reports indicate "[w]ood and ground moisture is not available due to the [home] being on a cement slab"; however, when Kenneth was asked whether he checked the home for moisture he replied, "All the way around the, couple of places I seen that was wet and rotten that I asked Mr. Cogburn to replace." One inference from Kenneth's testimony is that he checked the moisture levels of certain areas in the home; however, he did not disclose the moisture levels in either of the CL-100 reports.

We believe the evidence that Kenneth was aware of water issues in the home, yet apparently did not check and disclose the moisture levels in the October 2007 CL-100 created a question of fact as to whether Carter's inspection in the October 2007 CL-100 fell below the standard of care. There was also evidence that McAlhany's personal injuries would not have occurred but for Carter's negligence. *See J.T. Baggerly*, 370 S.C. at 369, 635 S.E.2d at 101 (stating "[p]roximate cause requires proof of: (1) causation-in-fact, and (2) legal cause. Causation-in-fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence" (citation omitted)). McAlhany testified that had he known there were high moisture levels in the home, he would have removed sheetrock from the walls to determine the source of the moisture. Thus, there is evidence that had Carter disclosed the moisture levels in the home, McAlhany would not have been injured.

Finally, we believe further inquiry into the facts is desirable as to this issue based on the language of the trial court's order. *See Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 434, 706 S.E.2d 501, 504 (2011) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."). The trial court clearly granted summary judgment on the personal injury claim due to the running of the statute of limitations; however, its order is unclear as to whether it granted summary judgment to Carter on the ground that McAlhany did not present any evidence to support this claim. The trial court's analysis on this issue was limited to one sentence: "The [Clemson] report does not indicate that [Carter's] failure to comply with [the] Act caused or contributed in any manner to mold." As previously stated, however, McAlhany presented other evidence that, when viewed in the light most

favorable to the non-moving party, created a question of fact as to whether any negligence by Carter caused McAlhany's injuries. Therefore, the trial court erred in finding McAlhany did not present any evidence to support his personal injury claim against Carter.

CONCLUSION

Based on the foregoing, we reverse the trial court's grant of summary judgment to Respondents and remand for further proceedings.

REVERSED AND REMANDED.

SHORT and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael Heath Bolin, #341806, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2014-000461

Appeal From The Administrative Law Court
Carolyn C. Matthews, Administrative Law Judge

Opinion No. 5361
Heard September 8, 2015 – Filed November 12, 2015

REVERSED

Trent Neuell Pruett, of Pruett Law Firm, of Gaffney, for Appellant.

Daniel John Crooks, III, of the South Carolina Department of Corrections, of Columbia, for Respondent.

GEATHERS, J.: Appellant Michael Bolin (Inmate) challenges a decision of the South Carolina Administrative Law Court (ALC) upholding a determination of the South Carolina Department of Corrections (DOC) that Inmate must serve eighty-five percent of his sentence before he is eligible for early release, discharge, or community supervision. Inmate argues that the eighty-five-percent requirement of section 24-13-150 of the South Carolina Code (Supp. 2014) does not apply to any

of the offenses to which he pled guilty because they are not considered "no-parole offenses." We reverse the ALC's decision.

FACTS/PROCEDURAL HISTORY

On May 15, 2012, Inmate pled guilty to possession of methamphetamine, second offense (possession), possession of methamphetamine with intent to distribute, second offense (intent to distribute), conspiracy to manufacture methamphetamine, second offense (conspiracy), and unlawful possession of a pistol. He was sentenced to five years' imprisonment on each methamphetamine offense and one year of imprisonment for the weapon offense, to run concurrently.

Curiously, after Inmate began serving his sentence, DOC informed him that he was eligible for parole on his conspiracy conviction and intent to distribute conviction under section 44-53-375(B) of the South Carolina Code (Supp. 2014) but if he was not granted parole, these offenses would be treated as no-parole offenses under section 24-13-100 of the South Carolina Code (2007) and section 24-13-150 of the South Carolina Code (Supp. 2014).[1] Section 24-13-100 defines the term "no-parole offense," and section 24-13-150 requires an inmate convicted of a no-parole offense to serve at least eighty-five percent of his sentence before he is eligible for early release, discharge, or community supervision.[2]

Subsequently, Inmate filed a Step 1 grievance form with DOC, stating that DOC incorrectly calculated his projected release date by requiring him to serve eighty-five percent of his sentence and, thus, treating his conspiracy and intent to distribute offenses as no-parole offenses under section 24-13-100. Inmate asserted

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[1] Inmate committed these offenses on April 7, 2011, and July 12, 2011, respectively. Both parties agree that Inmate's other offenses, simple possession of methamphetamine, second offense, and possession of a pistol, are not subject to the eighty-five-percent requirement.

[2] Section 24-13-150(A) states, in pertinent part, "Notwithstanding any other provision of law, . . . an inmate convicted of a 'no[-]parole offense' . . . is not eligible for early release, discharge, or community supervision . . . until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed."

that the amended provisions of section 44-53-375(B) preclude DOC from treating these offenses as no-parole offenses.[3] After this grievance was denied, Inmate filed a Step 2 grievance form, which was also denied.

Inmate appealed DOC's determination to the ALC, and the ALC upheld the determination. This appeal followed.

ISSUE ON APPEAL

Did the ALC err in concluding that Inmate must serve at least eighty-five percent of his sentence before he is eligible for early release, discharge, or community supervision?

STANDARD OF REVIEW

Section 1-23-610(B) of the South Carolina Code (Supp. 2014) sets forth the standard of review when this court is sitting in review of a decision by the ALC on an appeal from an administrative agency. Specifically, section 1-23-610(B) allows this court to reverse the ALC's decision if it violates a constitutional or statutory provision or is affected by any other error of law.[4] Here, the sole issue on review involves a question of statutory interpretation, which is a question of law "subject to de novo review." *Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 414, 745 S.E.2d 110, 120 (2013).

Further, while the interpretation of a statute by the agency charged with its administration "will be accorded the most respectful consideration," an agency's interpretation "affords no basis for the perpetuation of a patently erroneous application of the statute." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575-76 (2010) (quotation marks omitted).

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[3] Inmate also complained that DOC incorrectly classified his conspiracy offense as a violent offense. DOC ultimately resolved this particular part of Inmate's grievance in his favor.

[4] S.C. Code Ann. § 1-23-610(B)(a), (d) (Supp. 2014).

LAW/ANALYSIS

Inmate contends that the eighty-five-percent requirement of section 24-13-150 does not apply to his conspiracy and intent to distribute convictions because they are no longer considered no-parole offenses by virtue of the 2010 amendment to section 44-53-375(B), which addresses the possession, manufacture, or trafficking of methamphetamine. We agree.

As previously stated, section 24-13-150 requires an inmate who has been convicted of a no-parole offense to serve eighty-five percent of his sentence before he is eligible for "early release, discharge, or community supervision."[5] A no-parole offense is defined, in pertinent part, in section 24-13-100 as "a class A, B, or C felony."[6] Whether a felony is a Class A, B, or C felony depends on the maximum sentence for the felony—a Class A felony is a felony punishable by not more than thirty years, a Class B felony is a felony punishable by not more than twenty-five years, and a Class C felony is a felony punishable by not more than twenty years. S.C. Code Ann. § 16-1-20 (2003); *see also* S.C. Code Ann. § 16-1-30 (2003) ("All criminal offenses created by statute after July 1, 1993, must be

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[5] In contrast, most inmates who have been convicted of a parolable, nonviolent offense are required to serve only twenty-five percent of their sentences before becoming eligible for parole. *See* S.C. Code Ann. § 24-21-610 (2007) (requiring a prisoner convicted of a parolable, nonviolent offense to serve "at least one-fourth of the term of a sentence" before the Parole Board "may . . . parole" the prisoner). Of course, an inmate's eligibility for parole merely gives the Parole Board the *authority* to grant parole—the decision to grant or deny parole is within the Parole Board's discretion, as indicated by the legislature's use of the word "may" in section 24-21-610. *See Robertson v. State*, 276 S.C. 356, 358, 278 S.E.2d 770, 771 (1981) ("Ordinarily, 'may' signifies permission and generally means the action spoken of is optional or discretionary."). Notably, if the Parole Board denies parole to an eligible inmate, it must review the inmate's case on a yearly basis. *See* S.C. Code Ann. § 24-21-620 (2007) ("Upon an affirmative determination, the prisoner must be granted a provisional parole or parole. Upon a negative determination, the prisoner's case shall be reviewed every twelve months thereafter for the purpose of such determination.").

[6] Section 24-13-100 was enacted in 1995. *See* Act No. 83, 1995 S.C. Acts 551.

classified according to the maximum term of imprisonment provided in the statute and pursuant to Sections 16-1-10 and 16-1-20, except as provided in Section 16-1-10(D)."); S.C. Code Ann. § 16-1-10(D) (Supp. 2014) (listing offenses that are exempt from classification).

Prior to June 2, 2010, conspiracy to manufacture methamphetamine, second offense, and possession with intent to distribute methamphetamine, second offense, were in fact considered no-parole offenses. In other words, section 44-53-375(B) imposed a maximum sentence of thirty years for a second offense of possession with intent to distribute methamphetamine or conspiracy to manufacture methamphetamine. *See* Act No. 127, 2005 S.C. Acts 1497 (increasing the maximum sentence from twenty-five to thirty years). Accordingly, these offenses were considered Class A felonies and, thus, no-parole offenses. *See* S.C. Code Ann. § 16-1-20(A) (2003) (stating that a person convicted of a Class A felony must be imprisoned for "not more than thirty years"); S.C. Code Ann. § 24-13-100 (2007) (including a Class A felony in the definition of no-parole offense).

However, on June 2, 2010, the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act) became effective. While the Act did not decrease the maximum sentence for a second offense of possession with intent to distribute methamphetamine or conspiracy to manufacture methamphetamine, it amended section 44-53-375(B) to add the following language: "*Notwithstanding any other provision of law*, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and *is eligible for parole*, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits." 2010 Act No. 273, § 38 (emphases added). Similar language was added to subsection (A) of section 44-53-375 and various provisions in section 44-53-370 covering controlled substances.

The Act did not amend the definition of the term "no-parole offense" in section 24-13-100. Nonetheless, the legislature's use of the phrase "Notwithstanding any other provision of law," in the amendments to sections 44-53-375 and -370 expresses its intent to repeal section 24-13-100 to the extent it conflicts with amended sections 44-53-375 and -370. *See Stone v. State*, 313 S.C. 533, 535, 443 S.E.2d 544, 545 (1994) (holding that when two statutes "are in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute"); *Hair v. State*, 305 S.C. 77, 79, 406 S.E.2d 332, 334

(1991) ("The law clearly provides that if two statutes are in conflict, the latest statute passed should prevail so as to repeal the earlier statute to the extent of the repugnancy."); *Strickland v. State*, 276 S.C. 17, 19, 274 S.E.2d 430, 432 (1981) ("[S]tatutes of a specific nature are not to be considered as repealed in whole or in part by a later general statute *unless* there is a direct reference to the former statute or *the intent of the legislature to do so is explicitly implied therein*." (emphases added)). Even if the language of section 24-13-100 could be considered more specific than the amendment to section 44-53-375(B), the intent to repeal section 24-13-100 to the extent it conflicts with the amendments to sections 44-53-370 and -375 is "explicitly implied" in the language of the amendments stating, "Notwithstanding any other provision of law." *See Strickland*, 276 S.C. at 19, 274 S.E.2d at 432 ("[S]tatutes of a specific nature are not to be considered as repealed in whole or in part by a later general statute *unless* there is a direct reference to the former statute or *the intent of the legislature to do so is explicitly implied therein*." (emphases added)). Without this implicit repeal, the amendments themselves would be meaningless. *See State v. Long*, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005) ("The legislature is presumed to intend that its statutes accomplish something.").

DOC interprets the interplay between amended section 44-53-375(B), the definition of no-parole offense in section 24-13-100, and the eight-five-percent requirement in section 24-13-150 to allow a person convicted of a second offense under section 44-53-375(B) to be eligible for parole the first time he is considered by the Parole Board. However, DOC argues that if such an inmate is initially denied parole, he would be required to serve eighty-five percent of his sentence before he is once again considered to be eligible for parole or other early release, discharge, or community supervision. That is, he is not considered for parole on a yearly basis under section 24-21-620.

According to DOC, a second offense under section 44-53-375(B) is still considered a no-parole offense unless the inmate is granted parole. In other words, DOC treats this particular second offense as both a parolable offense and a no-parole offense. This interpretation is illogical and inconsistent with the legislative intent behind section 44-53-375(B), section 24-13-100, and section 24-13-150. *See Sweat*, 386 S.C. at 350, 688 S.E.2d at 575 ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." (quotation marks omitted)); *id.* ("A statute as a

whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."); *id.* at 351, 688 S.E.2d at 575 ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention."); *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute.").

It is without doubt that the statutory definition for the term "no-parole offense" in section 24-13-100, i.e., "a class A, B, or C felony . . . ," simply describes the types of offenses for which the offender is not eligible for parole.[7] *See Sweat*, 386 S.C. at 350, 688 S.E.2d at 575 ("The Court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." (quotation marks omitted)); *id.* ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." (quotation marks omitted)). Yet, the plain language of the amendment to section 44-53-375(B) adds a provision expressly allowing first offenders or second offenders to be eligible for parole, expressing an intent to treat first offenders and second offenders the same for purposes of the collateral consequences of the offense, i.e., exempt from the consequences of a no-parole offense. Thus, it is unreasonable to characterize an offense for which the offender is eligible for parole as a no-parole offense.

Accordingly, section 24-13-100, which was enacted in 1995,[8] conflicts with the legislative intent behind the 2010 amendment to section 44-53-375(B). In

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[7] This is consistent with provisions in related statutes clarifying that a no-parole offender is not eligible for parole. *See* S.C. Code Ann. § 24-21-30(A) (2007) ("A person who commits a 'no[-]parole offense' as defined in Section 24-13-100 on or after the effective date of this section is not eligible for parole consideration . . . ."); § 24-21-30(B) ("Nothing in this subsection may be construed to allow any person who commits a 'no[-]parole offense' as defined in Section 24-13-100 on or after the effective date of this section to be eligible for parole."); *Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) ("[I]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.").

[8] *See* Act No. 83, 1995 S.C. Acts 551.

addition to the plain language of the amendment itself, legislative intent is expressly addressed in Section I of the Act, which states, in pertinent part,

> It is the intent of the General Assembly to preserve public safety, reduce crime, and *use correctional resources most effectively*. Currently, the South Carolina correctional system incarcerates people whose time in prison does not result in improved behavior and who often return to South Carolina communities and commit new crimes, or are returned to prison for violations of supervision requirements. It is, therefore, the purpose of this act to reduce recidivism, *provide fair and effective sentencing options, employ evidence-based practices for smarter use of correctional funding*, and improve public safety.

2010 Act No. 273, § 1 (emphases added). Hence, one of the Act's objectives is to conserve taxpayer dollars by allowing earlier release dates for inmates convicted of less serious offenses. In light of this objective, it makes little sense to allow the Parole Board to review the case of an inmate convicted of a drug offense for the purpose of determining whether he is entitled to parole only to suspend the Parole Board's yearly review schedule for that inmate should he not be granted parole the first time.

DOC argues that amended section 44-53-375 does not conflict with sections 24-13-100 and -150 because offenders can be afforded each item listed in the amendment, i.e., parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits, without altering an eighty-five-percent service requirement for those not granted parole. DOC explains that none of the items in this list are incompatible with a requirement that an offender not granted parole serve eighty-five percent of his sentence. In support of this argument, DOC cites the following provisions: S.C. Code Ann. § 24-13-210(B) (Supp. 2014) (providing for good conduct credits at the rate of three days for each month served for no-parole offenders subject to the eighty-five-percent requirement); S.C. Code Ann. § 24-13-230(B) (Supp. 2014) (providing for work and education credits at the rate of six days for every month of employment or enrollment for no-parole offenders); S.C. Code Ann. § 24-21-560(A) (2007) (requiring no-parole offenders to participate in a community supervision program).

However, we note the stark contrast between the credits allowed for inmates convicted of parolable offenses and the credits allowed for no-parole offenders. *See* S.C. Code Ann. § 24-13-210(A), (B) (Supp. 2014) (allowing twenty days for each month served for inmates convicted of parolable offenses versus three days for each month served for no-parole offenders); S.C. Code Ann. § 24-13-230(A), (B) (Supp. 2014) (allowing zero to one day for every two days of employment or enrollment for inmates convicted of parolable offenses versus six days for every month of employment or enrollment for no-parole offenders).

Further, DOC has not explained away the following language from the amendment: "[A] person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted . . . ." The disparity between this allowance and the requirement that an offender serve eighty-five percent of his sentence makes it unlikely that the legislature intended for the eighty-five-percent requirement to apply to the amended provisions of section 44-53-375(B).

DOC also argues that Inmate's interpretation of the amendment would render the language referencing community supervision meaningless because "only offenders serving sentences for 'no[-]parole offenses' are required to participate in community supervision." That may have been true before the amendments to sections 44-53-370 and -375 were enacted, but these amendments now *expressly allow* offenders to participate in community supervision as an alternative to the use of taxpayer funds to house them in prison. *See* 2010 Act No. 273, § 1 ("It is, therefore, the purpose of this act to reduce recidivism, *provide fair and effective sentencing options, employ evidence-based practices for smarter use of correctional funding*, and improve public safety." (emphasis added)).

Based on the foregoing, we hold that a second offense under section 44-53-375(B) is no longer a no-parole offense. *See Sweat*, 386 S.C. at 350, 688 S.E.2d at 575 ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." (quotation marks omitted)). Therefore, the ALC erred in rejecting Inmate's interpretation of the statutes in question.

CONCLUSION

Accordingly, we reverse the ALC's decision.

REVERSED.

SHORT and MCDONALD, JJ., concur.