The Supreme Court of South Carolina

RE: Business Court Pilot Program Extension

Administrative Order

Pursuant to the provisions of S.C. Const. Art. V § 4,

I find that the South Carolina Business Court Pilot Program, established on September 2, 2007, by Order 2007-09-07-01, has operated for two years since its effective date of October 1, 2007, and has successfully created an option to litigate complex business, corporate, and commercial matters in the circuit courts of this State. A committee appointed to evaluate the Pilot Program issued a report, based on input from the Business Court judges and lawyers, recommending extension of the Pilot Program and other modifications to enhance the program's effectiveness.

IT IS ORDERED that the Business Court Pilot Program, as established in Order 2007-09-07-01, shall be extended for two years, effective October 1, 2009.

The judges designated as Business Court judges are to continue to preside over the Business Court.

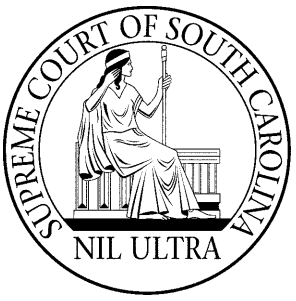
In accordance with the laws and rules governing the courts of this State, Business Court judges are authorized to determine administrative procedures for Business Court cases that are consistent with the South Carolina Rules of Civil Procedure to the extent practicable. Any Business Court procedures shall be publicly available on the Judicial Department's web site at www.sccourts.org.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
Jean Hoefer Toal, Chief Justice

Columbia, South Carolina

October 13, 2009



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45
October 19, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

RE: Amendments to Rule 402 of the South Carolina Appellate Court Rules

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ORDER

Pursuant to Article V, §4 of the South Carolina Constitution, Rule 402 of the South Carolina Appellate Court Rules (SCACR) is amended as shown in the attachment to this order. These amendments shall be effective January 1, 2010.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
October 16, 2009

Amendments to Rule 402, SCACR

(1) Rule 402(b), SCACR, is amended to read:

(b) Committee on Character and Fitness.

(1) Members. The Committee on Character and Fitness shall consist of twelve (12) active members of the South Carolina Bar who shall be appointed by the Supreme Court for five (5) year terms. In case of a vacancy on the Committee, the Supreme Court shall appoint an active member of the Bar to serve the remainder of the unexpired term.

(2) Chair; Secretary. The Supreme Court shall appoint a chair and a secretary of the Committee from among the Committee's membership.

(3) Panels and Meetings. The members shall be divided by the chair into panels composed of three (3) members. The chair may rotate membership on the panels, and may substitute members between panels. Panels shall meet when scheduled by the chair or the Committee, and the full Committee may meet to consider administrative matters. Meetings of the Committee other than periodic meetings may be called by the chair upon the chair's own motion and shall be called by the chair upon the written request of three members of the Committee.

(4) Quorum. A quorum for a meeting of the full Committee shall be seven (7) members, and a quorum for a panel shall be three (3) members.

(5) Duties. The Committee on Character and Fitness shall investigate and determine whether an applicant for admission to the Bar possesses the qualifications prescribed

by this Rule as to age, legal education, and character. The applicant must establish to the reasonable satisfaction of a majority of a panel that the applicant is qualified. In conducting investigations, a panel may take and hear testimony, compel by subpoena the attendance of witnesses, and require the applicant to appear for a hearing before a panel or for a personal interview before a single member of the Committee. An applicant will not be denied admission by the Committee without being afforded the opportunity for a hearing before a panel. Any member of the Committee may administer oaths and issue subpoenas. The Committee may adopt rules that shall become effective upon approval by the Supreme Court. In addition, the Committee shall perform the duties specified by Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, and any other duties as directed by the Supreme Court.

(2) Rule 402(c)(4), SCACR, is amended to read: "has been found qualified by a panel of the Committee on Character and Fitness;".

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules for Judicial Disciplinary Enforcement

---

ORDER

Pursuant to Article V, §4 of the South Carolina Constitution, the Rules for Judicial Disciplinary Enforcement (RJDE) contained in Rule 502 of the South Carolina Appellate Court Rules are amended as shown in the attachment to this order. These amendments shall be effective January 1, 2010, and shall apply to all disciplinary complaints filed on or after that date. The amendments shall also apply to all matters in which formal charges are pending on the effective date.

For a complaint pending on the effective date of these amendments for which no formal charges have been filed, the matter shall continue under the current rules until concluded or until formal charges are filed. Once formal charges are filed, the matter shall proceed under the amended rules.

Further, the increase in public members on the Commission on Judicial Conduct will be phased in, beginning with the addition of two public

members (one to each panel) in the first year and then adding the second public member to each panel as the terms of current judicial members expire.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
October 16, 2009

Amendments to the Rules for Judicial Disciplinary Enforcement

(1) Rule 2(b), (h), (o), (p) and (q), RJDE, are amended to read:

> (**b) Closed, But Not Dismissed:** a manner of disposing of a matter where a panel of the Commission makes a finding that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the judge is deceased, disappeared, incarcerated, physically or mentally incapacitated, or removed from judicial duties, or for other good cause.
>
> **(h) Disciplinary Counsel:** the lawyer in charge of screening and investigating complaints, prosecuting formal charges and performing other duties assigned by the Supreme Court. See Rule 5.
>
> **(o) Investigation:** an inquiry into allegations of misconduct, including a search for and examination of evidence concerning the allegations. See Rule 19.
>
> **(p) Investigative Panel:** the panel of the Commission that considers the recommendations of disciplinary counsel with regard to the disposition of cases and acceptance of agreements for resolution of disciplinary matters. The investigative panel also determines whether formal charges will be filed. See Rule 4.
>
> **(q) Letter of Caution:** a written caution or warning about past or future conduct issued when it is determined that no misconduct has been committed or that only minor misconduct not warranting the imposition of a sanction has been committed. A letter of caution may be issued by disciplinary counsel, an investigative panel or the Supreme Court. The issuance of a letter of caution is not a form of discipline under these rules and does not constitute a finding of misconduct unless the letter of caution specifically states that misconduct has been committed. The fact that a letter of caution has been issued shall not be considered in a subsequent disciplinary proceeding against the judge unless the

caution or warning contained in the letter of caution is relevant to the misconduct alleged in the proceedings.

(2) Rule 3(c) and (d), RJDE, are amended to read:

(c) Appointment. The Commission shall be composed of 26 members appointed by the Supreme Court. 10 members shall be judges from the circuit court or family court or masters-in-equity. 4 members shall be judges from the magistrate, municipal or probate courts. 4 members shall be active members of the South Carolina Bar who have never held a judicial office. 8 members shall be public members.

(d) Terms. Commission members shall serve for a term of 4 years and shall be eligible for reappointment. A member assigned to a hearing panel may continue to participate in the hearing and decision of a matter despite the expiration of the member's term if the hearing began before the expiration of the term.

(3) Rule 4(b), RJDE, is amended to read:

(b) Panels and Meetings. The members of the Commission, other than the chair, vice-chair and public members, shall be divided by the chair into 4 panels of 6 members. Each panel shall be composed of 2 members who are judges from the circuit court, judges from the family court or masters-in-equity; 1 member who is a judge from the magistrate, municipal or probate courts; 1 attorney member and 2 public members. The panels shall be assigned to serve as an investigative panel or a hearing panel as designated by the chair. If the panel is assigned to serve as an investigative panel, the chair shall add either the chair or the vice-chair to the panel to increase its membership to 7. The chair may rotate the assignments of the panels as investigative or hearing panels, and may rotate membership on the panels; provided, however, that no member shall sit on both the investigative and hearing panel for the same proceeding. Panels shall meet when scheduled by the Commission. The full Commission shall meet periodically as determined by the Commission to consider

administrative matters. Meetings of the Commission other than periodic meetings may be called by the chair upon the chair's own motion and shall be called by the chair upon the written request of 3 members of the Commission.

(4) Rule 4(e)(2) , RJDE, is amended to read:

(2) In addition to the duties assigned to Commission counsel in Rule 6, the Commission may delegate to the Commission counsel the duty and authority to:

(A) maintain the Commission's records;

(B) maintain statistics concerning the operation of the Commission and make them available to the Commission and the Supreme Court;

(C) prepare an annual report of the Commission's activities for presentation to the Supreme Court and the public;

(D) inform the public of the existence and operation of the judicial discipline system, including the Commission's address and telephone number and the disposition of each matter in which public discipline is imposed;

(E) monitor judges for compliance with conditions of discipline and deferred discipline and refer judges who fail to comply to disciplinary counsel for contempt proceedings; and,

(F) supervise attorneys, court reporters, and other staff as the Supreme Court may provide to the Commission.

(5) Rule 4(f), RJDE, is amended to read:

(f) Powers and Duties of Investigative Panel. An investigative panel shall have the duty and authority to:

(1) review the recommendations of the disciplinary counsel after investigation and either issue a letter of caution with or without a finding of misconduct, issue notice of intent to impose a confidential admonition, enter into a deferred discipline agreement, consider an agreement for discipline by consent, authorize formal charges, refer the matter to another agency, or dismiss the complaint;

(2) designate a member of the panel to preside over the investigative panel in the absence of the chair or vice-chair of the Commission;

(3) declare a matter closed but not dismissed prior to the filing of formal charges; and,

(4) after proper notice, re-open a matter that has been previously dismissed or closed but not dismissed.

(6) Rule 5(b)(1) and (8), RJDE, are amended to read:

(1) receive and screen complaints, dismiss complaints, issue letters of caution with no finding of misconduct, refer complaints to other agencies when appropriate, conduct investigations, notify complainants about the status and disposition of their complaints, make recommendations to an investigative panel on the disposition of complaints after investigation, file formal charges when directed to do so by an investigative panel, prosecute formal charges, and file briefs and other appropriate petitions with the Supreme Court;

(8) perform other duties at the direction of the Commission or the Supreme Court.

(7) The heading of Rule 5(c), RJDE, is amended to read: "(c) Appointment of Attorneys to Assist Disciplinary Counsel."

(8) Rule 11, RJDE, is amended to read:

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) 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.

(9) Rule 12(a), RJDE, is amended to read:

(**a) General Rule.** Except as otherwise provided in these rules or ordered by the Supreme Court, the members of the Commission, the staff of the Commission, the disciplinary counsel, the staff of the disciplinary counsel, the members of the Supreme Court and the staff of the Supreme Court shall not in any way reveal the existence of the complaint, while the matter remains confidential, except to persons directly involved in the matter and then only to the extent necessary for a proper disposition of the matter. A violation of this provision may be punished as a contempt of the Supreme Court.

(10) Rule 14(b)(2), (3) and (4), RJDE, are amended to read:

> **(2) By Disciplinary Counsel.** Disciplinary counsel may extend the time for responses due from a judge under Rule 19 for one or more periods not to exceed 30 days in the aggregate for each.
>
> **(3) By the Parties.** Disciplinary counsel and the judge may, by written agreement, extend the time to respond under Rule 19 or 23(a) after the execution and delivery by both parties of an agreement for discipline by consent or deferred disciplinary agreement for the duration of the period the agreement is awaiting a final disposition and for a period of 30 days thereafter if the Agreement is not accepted.
>
> **(4) By the Supreme Court.** Except for those periods of time that may be extended by the Commission under (1) above, the Supreme Court or any justice thereof may grant an extension of time to perform any act required by these rules. The Supreme Court or any justice thereof may shorten any time period prescribed by these rules.

(11) Rule 14(c), RJDE, is amended to read:

> **(c) Service.** Service upon the judge of formal charges in any disciplinary or incapacity proceedings shall be made by personal service upon the judge or the judge's counsel by any person authorized by the chair of the Commission or by registered or certified mail to the judge's last known address. Service of all other documents shall be made in the manner provided by Rule 262(b), SCACR.

(12) Rule 15(a) and (b), RJDE, are amended to read:

> **(a) Oaths.** Oaths and affirmations may be administered by any member of the Commission, disciplinary counsel, or any other person authorized by law to administer oaths and affirmations.

(b) Subpoenas for Investigation.

(1) Disciplinary counsel may compel by subpoena the attendance of the judge or witnesses and the production of pertinent books, papers, documents (whether in typed, written, digital, electronic or other format), and other tangible evidence, for the purposes of investigation.

(2) The Commission chair, vice-chair, or Commission Counsel may issue subpoenas for specific witnesses or documents at the request of the judge under investigation or direct disciplinary counsel to subpoena witnesses or documents and provide the subpoenaed information to the Commission chair, vice-chair or Commission Counsel.

(13) Rule 17(c), RJDE, is amended to read:

(c) Failure to Respond to Notice of Investigation, Subpoena, or Notice of Appearance. Upon receipt of sufficient evidence demonstrating that a judge has failed to fully respond to a notice of investigation, has failed to fully comply with a proper subpoena issued in connection with an investigation or formal charges, has failed to appear at and fully respond to inquiries at an appearance required pursuant to Rule 19(c)(3), or has failed to respond to inquiries or directives of the Commission or the Supreme Court, the Supreme Court may place that judge on interim suspension.

(14) Rule 18, RJDE, is amended to read:

RULE 18. NOTIFICATION TO COMPLAINANT; LIMITED RIGHT TO REVIEW

(a) Notification to Complainant. Disciplinary counsel shall provide written acknowledgment of every complaint, if the complainant is known, and notify the complainant in writing of the final disposition of a proceeding under these rules. Notification in writing shall be mailed within 20 days of the decision disposing of the proceeding.

(b) Limited Right to Review. Although entitled to notice, a complainant is not a party to the proceeding. However, upon notice of a dismissal by disciplinary counsel pursuant to Rule 19(d)(1), a complainant may seek review by the investigative panel. Disciplinary counsel shall inform the complainant of the following review process in the notice of dismissal. The complainant may seek review by submitting a request to the disciplinary counsel in writing within 30 days of the date of the notice of dismissal. Upon receipt of the request for review, disciplinary counsel shall provide the judge with a copy of the request. The judge may submit a written response within 15 days. Disciplinary counsel shall submit the complainant's request and the judge's response, if any, for consideration at the next meeting of the investigative panel. Notification in writing shall be mailed to the complainant and the judge within 20 days of the investigative panel's decision. The complainant is not entitled to appeal or otherwise seek review of a dismissal or referral by disciplinary counsel pursuant to Rule 19(a) or of any decision, action, or disposition by the investigative panel, the hearing panel, the Commission chair or vice-chair, or the Supreme Court.

(15) Rule 19, RJDE, is amended to read:

RULE 19. SCREENING AND INVESTIGATION

(a) Screening. Disciplinary counsel shall evaluate all information coming to disciplinary counsel's attention by complaint or from other sources that alleges judicial misconduct or incapacity. If the information would not constitute misconduct or incapacity if it were true, disciplinary counsel shall dismiss the complaint or, if appropriate, refer the matter to another agency. If the information raises allegations that would constitute judicial misconduct or incapacity if true, disciplinary counsel shall conduct an investigation.

(b) Investigation. Disciplinary counsel shall conduct all investigations. Disciplinary counsel may issue subpoenas pursuant to Rule 15(b), conduct interviews and examine evidence

to determine whether grounds exist to believe the allegations of complaints. Disciplinary counsel shall issue a notice of investigation to the judge with a copy of the complaint or information received, requesting that the judge file a response to the allegations in the notice; provided, however, that disciplinary counsel may seek permission of the chair or vice-chair to dispense with the requirement to make this request or to dispense with the requirement to provide the judge with a copy of the complaint or information received. The judge shall file a written response within 15 days of notice to do so from disciplinary counsel. The written response must include the judge's verification that it is complete and accurate to the best of the judge's knowledge and belief.

(c) Requirements of Notice of Investigation.

(1) When issuing notice of investigation pursuant to Rule 19(b), disciplinary counsel shall give the following notice to the judge:

(A) a specific statement of the allegations being investigated and the canons or other ethical standards allegedly violated, with the provision that the investigation can be expanded if deemed appropriate by disciplinary counsel;

(B) the judge's duty to respond pursuant to Rule 19 (b);

(C) the judge's opportunity to meet with disciplinary counsel pursuant to Rule 19(c) (3); and,

(D) the name of the complainant unless the investigative panel determines that there is good cause to withhold that information.

(2) The investigative panel may defer the giving of notice but, when notice is deferred, disciplinary counsel

must give notice to the judge before making a recommendation as to a disposition.

(3) Before the disciplinary counsel or the investigative panel determines its disposition of the complaint under Rule 19(d), either disciplinary counsel or the judge may request that the judge appear before disciplinary counsel to respond to questions. The appearance shall be on the record and the testimony shall be under oath or affirmation. If disciplinary counsel requests the judge's appearance, disciplinary counsel must give the judge 20 days' notice.

(4) Any person giving testimony pursuant to Rule 19 shall be entitled to obtain a transcript of his or her testimony from the transcribing court reporter upon paying the subscribed charges unless otherwise directed by an investigative panel for good cause shown.

(d) Disposition After Investigation.

(1) Upon completion of investigation, if disciplinary counsel believes that no misconduct has been committed, and a written caution or warning is not appropriate to conclude the matter, disciplinary counsel may dismiss the complaint.

(2) If disciplinary counsel believes that no misconduct has been committed, but a written caution or warning is appropriate to conclude the matter, disciplinary counsel may issue a letter of caution with no finding of misconduct.

(3) If disciplinary counsel believes there is evidence supporting the allegations against a judge, disciplinary counsel may:

(A) propose an agreement for discipline by consent to the judge pursuant to Rule 21;

(B) recommend to an investigative panel that the matter be concluded with a letter of caution or a confidential admonition; or,

(C) recommend to an investigative panel that formal charges be filed.

(4) The investigative panel may adopt, reject or modify the recommendations of disciplinary counsel.

(A) If the investigative panel finds no violation or a violation pursuant to Rule 7 for which the imposition of a sanction is not warranted, it may dismiss or issue a letter of caution.

(B) If the investigative panel finds that there is reasonable cause to believe the judge committed misconduct for which the imposition of a sanction is warranted, it may accept an agreement for discipline by consent pursuant to Rule 21; it may execute a deferred discipline agreement; it may admonish the judge pursuant to the provisions of Rule 19(d)(5); or, it may direct disciplinary counsel to file formal charges.

(C) If the investigative panel finds that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the judge is deceased, disappeared, incarcerated, or physically or mentally incapacitated, or for other good cause, the panel may designate the matter closed but not dismissed. If the judge files a written objection with the Commission and serves a copy of that objection on disciplinary counsel within 10 days of service of notice that the matter was closed, but not dismissed, the matter shall be deemed re-opened and in the investigation phase. Any objection need not contain any grounds for objecting. Before a matter can be re-opened after being closed,

but not dismissed, an investigative panel of the Commission must make a finding that there has been a change in the circumstances that were the basis for the matter to be closed, but not dismissed, or that there is other good cause for it to be re-opened. Before a motion can be considered by an investigative panel of the Commission to re-open a matter that has been previously closed, but not dismissed, disciplinary counsel shall serve a copy of the motion to do so containing the grounds to re-open on the judge and then the judge shall have 10 days to respond thereto. Disciplinary counsel shall notify both the judge and the complainant when a matter is closed, but not dismissed and when the matter is re-opened. If the panel declines to re-open the matter, disciplinary counsel shall so advise the judge.

(5) When the investigative panel finds reasonable cause to conclude that the judge has committed misconduct, but finds that public discipline is not warranted, it may issue notice to the judge that it intends to impose a confidential admonition as a final disposition of the matter(s). Notice to the judge shall include a copy of the confidential admonition and shall be served on the judge in accordance with Rule 14(c). The notice of intent shall state the judge's right to object and that any such objection need not include any grounds therefor. The confidential admonition shall thereafter be imposed unless the judge both files with the Commission and serves on disciplinary counsel a written objection within 30 days of mailing of the notice. If the judge objects to the imposition of the confidential admonition in conformity with the requirements of this rule, disciplinary counsel shall file formal charges.

(16) Rule 20, RJDE, is amended to read:

RULE 20. MOTION BY DISCIPLINARY COUNSEL TO RE-OPEN DISMISSED COMPLAINTS

If a complaint has been dismissed, the allegations made in that complaint shall not be used for any purpose unless the complaint is re-opened by the Commission. A complaint dismissed prior to the filing of formal charges may be re-opened by an investigative panel upon motion of disciplinary counsel upon a finding by the investigative panel that there is new information concerning the matter dismissed, an additional complaint has been filed against the same judge involving related or similar allegations, or other good cause. Prior to a motion to re-open being decided, a copy of the motion to re-open containing the grounds therefor shall be served on the judge by disciplinary counsel, and the judge shall then have 10 days thereafter to file a written response with the Commission. The judge and the complainant shall be notified by disciplinary counsel as to the panel's decision on the motion to re-open.

(17) Rule 25, RJDE, is amended to read:

RULE 25. DISCOVERY

(a) Initial Disclosure. Within 20 days of the filing of an answer, disciplinary counsel and respondent shall exchange:

(1) the names and addresses of all persons known to have knowledge of the relevant facts;

(2) non-privileged evidence relevant to the formal charges;

(3) the names of expert witnesses expected to testify at trial and affidavits setting forth their opinions and the bases therefor; and,

(4) other material only upon good cause shown to the chair of the hearing panel.

Disciplinary counsel or the respondent may withhold such information only with permission of the chair of the hearing panel or the chair's designee, who shall authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to the judge. The chair's review of the withholding request is to be in camera, but the party making the request must advise the opposing party of the request without disclosing the subject of the request.

(b) Pre-Hearing Disclosure. Within 20 days of the date of the filing of an answer, the administrative chair of the hearing panel shall set a date for the exchange of witness lists and exhibits no later than 30 days prior to the scheduled hearing. Disciplinary counsel and respondent shall exchange exhibits to be presented at the hearing, names and addresses of witnesses to be called at the hearing, witness statements, and summaries of interviews with witnesses who will be called at the hearing (for purposes of this paragraph, a witness statement is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded). Copies of transcripts of testimony taken by a court reporter pursuant to Rule 15(b) or Rule 19(c) may be obtained by the parties from the court reporter at the expense of the requesting party and need not be made available to the requesting party by the opposing party unless not otherwise available or otherwise directed by the Commission under Rule 25(h).

(c) Depositions. Depositions shall only be allowed if agreed upon by disciplinary counsel and the respondent, or if the chair of the hearing panel or the chair's designee grants permission to do so based on a showing of good cause. The chair or the chair's

designee may place restrictions or conditions on the manner, time and place of any authorized deposition.

(d) Exculpatory Evidence. Notwithstanding any other provision of this rule, disciplinary counsel shall provide respondent with exculpatory evidence relevant to the formal charges.

(e) Duty of Supplementation. Both parties have a continuing duty to supplement information required to be exchanged under this rule.

(f) Completion of Discovery. All discovery shall be completed within 60 days of the filing of the answer.

(g) Failure to Disclose. If a party fails to timely disclose a witness's name and address, any statements by the witness, summaries of witness interviews, or other evidence required to be disclosed or exchanged under this rule, the hearing panel may grant a continuance of the hearing, preclude the party from calling the witness or introducing the document, or take such other action as may be appropriate. In the event disciplinary counsel has not timely disclosed exculpatory material, the hearing panel may require the matter to be disclosed and grant a continuance, or take such other action as may be appropriate.

(h) Resolution of Disputes. Disputes concerning discovery shall be determined by the hearing panel. Review of these decisions shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

(i) Pre-Hearing Conferences. The hearing panel may require the respondent and disciplinary counsel to participate in a pre-hearing conference in person or by telephone. Either party may request a pre-hearing conference. Scheduling of a pre-hearing conference is at the sole discretion of the chair of the hearing panel.

(18) Rule 27(g), RJDE, is amended to read:

> **(g) Recusal.** A justice of the Supreme Court shall not participate in any proceeding involving allegations of misconduct or incapacity against the justice, or in any proceeding where recusal is required under the Code of Judicial Conduct. Upon notice of recusal, the Chair of the Commission on Judicial Conduct may appoint a lawyer who is not an employee of the Judicial Department to act as disciplinary counsel in the matter. Following recusal of the affected justice, the Chief Justice (or Acting Chief Justice) shall appoint an acting justice to replace the recused justice for the duration of the case.

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules for Lawyer Disciplinary Enforcement

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ORDER

Pursuant to Article V, §4 of the South Carolina Constitution, the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules are amended as shown in the attachment to this order. These amendments shall be effective January 1, 2010, and shall apply to all disciplinary complaints filed on or after that date. The amendments shall also apply to all matters in which formal charges are pending on the effective date.

For a complaint pending on the effective date of these amendments for which no formal charges have been filed, the matter shall continue under the current rules until concluded or until formal charges are filed. Once formal charges are filed, the matter shall proceed under the amended rules.

Further, the increase in public members on the Commission on Lawyer Conduct will be phased in, beginning with the addition of two public

members (one to each panel) in the first year and then adding the second public member to each panel as the terms of current lawyer members expire.

Finally, lawyers who were indefinitely suspended before January 1, 2010, shall not be eligible to file a petition for reinstatement under Rule 33, RLDE, until two years from the date of entry of the order of indefinite suspension.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
October 16, 2009

Amendments to the Rules for Lawyer Disciplinary Enforcement

(1) Rule 2(b), (h), (o), (p) and (r), RLDE, are amended to read:

(**b) Closed, But Not Dismissed:** a manner of disposing of a matter where a panel of the Commission makes a finding that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the lawyer is deceased, disappeared, incarcerated, physically or mentally incapacitated, disbarred, or suspended from the practice of law, or for other good cause.

(h) Disciplinary Counsel: the lawyer in charge of screening and investigating complaints, prosecuting formal charges and performing other duties assigned by the Supreme Court. See Rule 5.

(o) Investigation: an inquiry into allegations of misconduct, including a search for and examination of evidence concerning the allegations. See Rule 19.

(p) Investigative Panel: the panel of the Commission that considers the recommendations of disciplinary counsel with regard to the disposition of cases and acceptance of agreements for resolution of disciplinary matters. The investigative panel also determines whether formal charges will be filed. See Rule 4.

(r) Letter of Caution: a written caution or warning about past or future conduct issued when it is determined that no misconduct has been committed or that only minor misconduct not warranting the imposition of a sanction has been committed. A letter of caution may be issued by disciplinary counsel, an investigative panel or the Supreme Court. The issuance of a letter of caution is not a form of discipline under these rules and does not constitute a finding of misconduct unless the letter of caution specifically states that misconduct has been committed. The fact

that a letter of caution has been issued shall not be considered in a subsequent disciplinary proceeding against the lawyer unless the caution or warning contained in the letter of caution is relevant to the misconduct alleged in the proceedings.

(2) Rule 3(c) and (d), RLDE, are amended to read:

(c) Appointment of Members. The Commission shall be composed of 50 members appointed by the Supreme Court. 34 members shall be active members of the South Carolina Bar. 16 members shall be public members.

(d) Terms. Attorney members shall serve for a term of 4 years and public members shall serve for a term of 2 years. Commission members shall be eligible for reappointment. A member assigned to a hearing panel may continue to participate in the hearing and decision of a matter despite the expiration of the member's term if the hearing began before the expiration of the term.

(3) Rule 4(b), RLDE, is amended to read:

(b) Panels and Meetings. The attorney members of the Commission, other than the chair and vice-chair, shall be divided by the chair into 8 panels of 4 attorney members and 2 public members. The panels shall be assigned to serve as an investigative panel or a hearing panel as designated by the chair. If the panel is assigned to serve as an investigative panel, the chair shall add either the chair or the vice-chair to the panel to increase its membership to 7. The chair may rotate the assignments of the panels as investigative or hearing panels, and may rotate membership on the panels; provided, however, that no member shall sit on both the investigative and hearing panel for the same proceeding. Panels shall meet when scheduled by the Commission. The full Commission shall meet periodically as determined by the Commission to consider administrative matters. Meetings of the Commission other than periodic meetings may be called by the chair upon the chair's own motion

and shall be called by the chair upon the written request of three members of the Commission.

(4) Rule 4(e)(2) , RLDE, is amended to read:

(2) In addition to the duties assigned to Commission counsel in Rule 6, the Commission may delegate to the Commission counsel the duty and authority to:

(A) maintain the Commission's records;

(B) maintain statistics concerning the operation of the Commission and make them available to the Commission and the Supreme Court;

(C) prepare an annual report of the Commission's activities for presentation to the Supreme Court and the public;

(D) inform the public of the existence and operation of the lawyer discipline system, including the Commission's address and telephone number and the disposition of each matter in which public discipline is imposed;

(E) monitor lawyers for compliance with conditions of reinstatement, readmission, discipline and deferred discipline, and refer lawyers who fail to comply to disciplinary counsel for contempt proceedings;

(F) provide advice and assistance to attorneys appointed to protect clients' interests; and,

(G) supervise attorneys, court reporters, and other staff as the Supreme Court may provide to the Commission.

(5) Rule 4(f), RLDE, is amended to read:

(f) Powers and Duties of Investigative Panel. An investigative panel shall have the duty and authority to:

(1) review the recommendations of disciplinary counsel after investigation and either issue a letter of caution with or without a finding of misconduct, issue notice of intent to impose a confidential admonition, enter into a deferred discipline agreement, consider an agreement for discipline by consent, authorize formal charges, refer the matter to another agency, or dismiss the complaint;

(2) designate a member of the panel to preside over the investigative panel in the absence of the chair or vice-chair of the Commission;

(3) declare a matter closed, but not dismissed prior to the filing of formal charges;

(4) issue orders pursuant to Rule 31(b)(1); and,

(5) after proper notice, re-open a matter that has been previously dismissed or closed but not dismissed.

(6) Rule 5(b)(1) and (11), RLDE, are amended to read:

(1) receive and screen complaints, dismiss complaints, issue letters of caution with no finding of misconduct, refer complaints to other agencies when appropriate, conduct investigations, notify complainants about the status and disposition of their complaints, make recommendations to an investigative panel on the disposition of complaints after investigation, file formal charges when directed to do so by an investigative panel, prosecute formal charges, and file briefs and other appropriate petitions with the Supreme Court;

(11) perform other duties at the direction of the Commission or the Supreme Court.

(7) The heading of Rule 5(c), RLDE, is amended to read: "(c) Appointment of Attorneys to Assist Disciplinary Counsel."

(8) Rule 7(b), RLDE, is amended to read:

> **(b) Sanctions**. Misconduct shall be grounds for one or more of the following sanctions:
>
> **(1)** disbarment;
>
> **(2)** suspension for a definite period from the office of attorney at law. The period of the suspension shall not exceed 3 years and shall be set by the Supreme Court;
>
> **(3)** public reprimand;
>
> **(4)** admonition, provided that an admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of sanction to be imposed;
>
> **(5)** restitution to persons financially injured, repayment of unearned or inequitable attorney's fees or costs advanced by the client, and reimbursement to the Lawyers' Fund for Client Protection;
>
> **(6)** assessment of the costs of the proceedings, including the cost of hearings, investigations, prosecution, service of process and court reporter services;
>
> **(7)** assessment of a fine;
>
> **(8)** limitations on the nature and extent of the lawyer's future practice;
>
> **(9)** any other sanction or requirement as the Supreme Court may determine is appropriate.

(9) Rule 11, RLDE, is amended to read:

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), 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.

(10) Rule 12(a) and (b), RLDE, are amended to read:

(a) General Rule. Except as otherwise provided in these rules or ordered by the Supreme Court, the members of the Commission, the staff of the Commission, the disciplinary counsel, the staff of the disciplinary counsel, the members of the Supreme Court and the staff of the Supreme Court shall not in any way reveal the existence of the complaint, while the matter remains confidential, except to persons directly involved in the matter and then only to the extent necessary for a proper disposition of the matter. A violation of this provision may be punished as a contempt of the Supreme Court.

(d) Disclosure Necessary for Withdrawal as Counsel. When it is necessary to obtain the permission of a tribunal to withdraw from representation, a lawyer may reveal the fact that the client filed a complaint with the Commission to help establish good cause for withdrawal. If the motion to be relieved includes a

reference to the existence of a complaint which is confidential under this rule, the lawyer may elect to give opposing counsel notice of the motion only, without revealing the existence of the complaint. If the lawyer's motion to be relieved is accompanied by a request that the records relating to the motion be sealed, the tribunal shall take steps to prevent disclosure of the existence of the complaint to any other person. After deciding the motion to be relieved, the tribunal shall insure that either the record is sealed or that all references to the complaint are deleted from the record available to the public. No members of the tribunal or its staff who learn of the existence of the complaint shall reveal that fact to any other person.

(11) Rule 14(b)(2) and (3), RLDE, are amended to read:

(2) By Disciplinary Counsel. Disciplinary counsel may extend the time for responses due from a lawyer under Rule 19 for one or more periods not to exceed 30 days in the aggregate for each.

(3) By the Parties. Disciplinary counsel and the lawyer may, by written agreement, extend the time to respond under Rule 19 or 23(a) after the execution and delivery by both parties of an agreement for discipline by consent or deferred disciplinary agreement for the duration of the period the agreement is awaiting a final disposition and for a period of 30 days thereafter if the Agreement is not accepted.

(12) Rule 14(c), RLDE, is amended to read:

(c) Service. Service upon the lawyer of formal charges in any disciplinary or incapacity proceedings shall be made by personal service upon the lawyer or the lawyer's counsel by any person authorized by the chair of the Commission or by registered or certified mail to the lawyer's last known address. Service of all other documents shall be made in the manner provided by Rule 262(b), SCACR.

(13) Rule 15(a) and (b), RLDE, are amended to read:

> **(a) Oaths.** Oaths and affirmations may be administered by any member of the Commission, disciplinary counsel, or any other person authorized by law to administer oaths and affirmations.
>
> **(b) Subpoenas for Investigation.**
>
> > **(1)** Disciplinary counsel may compel by subpoena the attendance of the lawyer or witnesses and the production of pertinent books, papers, documents (whether in typed, printed, written, digital, electronic, or other format), and other tangible evidence for the purposes of investigation.
> >
> > **(2)** The Commission chair, vice-chair, or Commission counsel may issue subpoenas for specific witnesses or documents at the request of the lawyer under investigation or direct disciplinary counsel to subpoena witnesses or documents and provide the subpoenaed information to the Commission chair, vice-chair, or Commission counsel.

(14) Rule 17(c), RLDE, is amended to read:

> **(c) Failure to Respond to Notice of Investigation, Subpoena, or Notice of Appearance.** Upon receipt of sufficient evidence demonstrating that a lawyer has failed to fully respond to a notice of investigation, has failed to fully comply with a proper subpoena issued in connection with an investigation or formal charges, has failed to appear at and fully respond to inquiries at an appearance required pursuant to Rule 19(c)(3), or has failed to respond to inquiries or directives of the Commission or the Supreme Court, the Supreme Court may place that lawyer on interim suspension.

(15) Rule 18, RLDE, is amended to read:

> **RULE 18. NOTIFICATION TO COMPLAINANT; LIMITED RIGHT TO REVIEW**

(a) Notification to Complainant. Disciplinary counsel shall provide written acknowledgment of every complaint, if the complainant is known, and notify the complainant in writing of the final disposition of a proceeding under these rules. Notification in writing shall be mailed within 20 days of the decision disposing of the proceeding.

(b) Limited Right to Review. Although entitled to notice, a complainant is not a party to the proceeding. However, upon notice of a dismissal by disciplinary counsel pursuant to Rule 19(d)(1), a complainant may seek review by the investigative panel. Disciplinary counsel shall inform the complainant of the following review process in the notice of dismissal. The complainant may seek review by submitting a request to the disciplinary counsel in writing within 30 days of the date of the notice of dismissal. Upon receipt of the request for review, disciplinary counsel shall provide the lawyer with a copy of the request. The lawyer may submit a written response within 15 days. Disciplinary counsel shall submit the complainant's request and the lawyer's response, if any, for consideration at the next meeting of the investigative panel. Notification in writing shall be mailed to the complainant and the lawyer within 20 days of the investigative panel's decision. The complainant is not entitled to appeal or otherwise seek review of a dismissal or referral by disciplinary counsel pursuant to Rule 19(a) or of any decision, action, or disposition by the investigative panel, the hearing panel, the Commission chair or vice-chair, or the Supreme Court.

(16) Rule 19, RLDE, is amended to read:

RULE 19. SCREENING AND INVESTIGATION.

(a) Screening. Disciplinary counsel shall evaluate all information coming to disciplinary counsel's attention by complaint or from other sources that alleges lawyer misconduct or incapacity. If the information would not constitute misconduct or incapacity if it were true, disciplinary counsel shall dismiss the complaint or, if appropriate, refer the matter to another agency. If

the information raises allegations that would constitute lawyer misconduct or incapacity if true, disciplinary counsel shall conduct an investigation.

(b) Investigation. Disciplinary counsel shall conduct all investigations. Disciplinary counsel may issue subpoenas pursuant to Rule 15(b), conduct interviews and examine evidence to determine whether grounds exist to believe the allegations of complaints. Disciplinary counsel shall issue a notice of investigation to the lawyer with a copy of the complaint or information received requesting that the lawyer file a response to the allegations in the notice; provided, however, that disciplinary counsel may seek permission of the chair or vice-chair to dispense with the requirement to make this request or to dispense with the requirement to provide the lawyer with a copy of the complaint or information received. The lawyer shall file a written response within 15 days of notice to do so from disciplinary counsel. The written response must include the lawyer's verification that it is complete and accurate to the best of the lawyer's knowledge and belief.

(c) Requirements of Notice of Investigation.

(1) When issuing notice of investigation pursuant to Rule 19(b), disciplinary counsel shall give the following notice to the lawyer:

(A) a specific statement of the allegations being investigated and the rules or other ethical standards allegedly violated, with the provision that the investigation can be expanded if deemed appropriate by disciplinary counsel;

(B) the lawyer's duty to respond pursuant to Rule 19(b);

(C) the lawyer's opportunity to meet with disciplinary counsel pursuant to Rule 19(c)(3); and,

(D) the name of the complainant unless the investigative panel determines that there is good cause to withhold that information.

(2) The investigative panel may defer the giving of notice but, when notice is deferred, disciplinary counsel must give notice to the lawyer before making a recommendation as to a disposition.

(3) Before the disciplinary counsel or the investigative panel determines its disposition of the complaint under Rule 19(d), either disciplinary counsel or the lawyer may request that the lawyer appear before disciplinary counsel to respond to questions. The appearance shall be on the record and the testimony shall be under oath or affirmation. If disciplinary counsel requests the lawyer's appearance, disciplinary counsel must give the lawyer 20 days' notice.

(4) Any person giving testimony pursuant to Rule 19 shall be entitled to obtain a transcript of his or her testimony from the transcribing court reporter upon paying the subscribed charges unless otherwise directed by an investigative panel for good cause shown.

(d) Disposition After Investigation.

(1) Upon completion of the investigation, if disciplinary counsel believes that no misconduct has been committed, and a written caution is not appropriate to conclude the matter, disciplinary counsel may dismiss the complaint.

(2) If disciplinary counsel believes that no misconduct has been committed, but a written caution or warning is appropriate to conclude the matter, disciplinary counsel may issue a letter of caution with no finding of misconduct.

(3) If disciplinary counsel believes there is evidence supporting the allegations against a lawyer, disciplinary counsel may:

(A) propose an agreement for discipline by consent to the lawyer pursuant to Rule 21;

(B) recommend to an investigative panel that the matter be concluded with a letter of caution or a confidential admonition; or,

(C) recommend to an investigative panel that formal charges be filed.

(4) The investigative panel may adopt, reject or modify the recommendations of disciplinary counsel.

(A) If the investigative panel finds no violation or a violation pursuant to Rule 7 for which the imposition of a sanction is not warranted, it may dismiss or issue a letter of caution.

(B) If the investigative panel finds that there is reasonable cause to believe the lawyer committed misconduct for which the imposition of a sanction is warranted, it may accept an agreement for discipline by consent pursuant to Rule 21; it may execute a deferred discipline agreement; it may admonish the lawyer pursuant to the provisions of Rule 19(d)(5) or, it may direct disciplinary counsel to file formal charges.

(C) If the investigative panel finds that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the lawyer is deceased, disappeared, incarcerated, physically or mentally incapacitated, disbarred, or suspended from the practice of law, or for other good cause, the panel may designate the matter closed but not dismissed. If the lawyer files a written objection with the Commission and serves a copy of that objection on disciplinary counsel within 10 days of service of notice that the matter was closed, but not dismissed, the matter shall be deemed

re-opened and in the investigation phase. Any objection need not contain any grounds for objecting. Before a matter can be re-opened after being closed, but not dismissed, an investigative panel of the Commission must make a finding that there has been a change in the circumstances that were the basis for the matter to be closed, but not dismissed, or that there is other good cause for it to be re-opened. Before a motion can be considered by an investigative panel of the Commission to re-open a matter that has been previously closed, but not dismissed, disciplinary counsel shall serve a copy of the motion to do so containing the grounds to re-open on the lawyer and then the lawyer shall have 10 days to respond thereto. Disciplinary counsel shall notify both the lawyer and the complainant when a matter is closed, but not dismissed, and when the matter is re-opened. If the panel declines to re-open the matter, disciplinary counsel shall so advise the lawyer.

(5) When the investigative panel finds reasonable cause to conclude that the lawyer has committed misconduct, but finds that public discipline is not warranted, it may issue notice to the lawyer that it intends to impose a confidential admonition as a final disposition of the matter(s). Notice to the lawyer shall include a copy of the confidential admonition and shall be served on the lawyer in accordance with Rule 14(c). The notice of intent shall state the lawyer's right to object and that any such objection need not include any grounds therefor. The confidential admonition shall thereafter be imposed unless the lawyer both files with the Commission and serves on disciplinary counsel a written objection within 30 days of mailing of the notice. If the lawyer objects to the imposition of the confidential admonition in conformity with the requirements of this rule, disciplinary counsel shall file formal charges.

(17) Rule 20, RLDE, is amended to read:

RULE 20. MOTION BY DISCIPLINARY COUNSEL TO RE-OPEN DISMISSED COMPLAINTS

If a complaint has been dismissed, the allegations made in that complaint shall not be used for any purpose unless the complaint is re-opened by the Commission. A complaint dismissed prior to the filing of formal charges may be re-opened by an investigative panel upon motion of disciplinary counsel upon a finding by the investigative panel that there is new information concerning the matter dismissed, an additional complaint has been filed against the same lawyer involving related or similar allegations, or other good cause. Prior to a motion to re-open being decided, a copy of the motion to re-open containing the grounds therefor shall be served on the lawyer by disciplinary counsel, and the lawyer shall then have 10 days thereafter to file a written response with the Commission. The lawyer and the complainant shall be notified by disciplinary counsel as to the panel's decision on the motion to re-open.

(18) Rule 25, RLDE, is amended to read:

RULE 25. DISCOVERY

(a) Initial Disclosure. Within 20 days of the filing of an answer, disciplinary counsel and respondent shall exchange:

(1) the names and addresses of all persons known to have knowledge of the relevant facts;

(2) non-privileged evidence relevant to the formal charges;

(3) the names of expert witnesses expected to testify at the hearing and affidavits setting forth their opinions and the bases therefor; and,

(4) other material only upon good cause shown to the chair of the hearing panel.

Disciplinary counsel or the respondent may withhold such information only with permission of the chair of the hearing panel or the chair's designee, who shall authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to the judge. The chair's review of the withholding request is to be in camera, but the party making the request must advise the opposing party of the request without disclosing the subject of the request.

(b) Pre-Hearing Disclosure. Within 20 days of the date of the filing of an answer, the chair of the hearing panel shall set a date for the exchange of witness lists and exhibits no later than 30 days prior to the scheduled hearing. Disciplinary counsel and respondent shall exchange exhibits to be presented at the hearing, names and addresses of witnesses to be called at the hearing, witness statements, and summaries of interviews with witnesses who will be called at the hearing (for purposes of this paragraph, a witness statement is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded). Copies of transcripts of testimony taken by a court reporter pursuant to Rule 15(b) or Rule 19(c) may be obtained by the parties from the court reporter at the expense of the requesting party and need not be made available to the requesting party by the opposing party unless not otherwise available or otherwise directed by the Commission under Rule 25(h).

(c) Depositions. Depositions shall only be allowed if agreed upon by the disciplinary counsel and the respondent, or if the chair of the hearing panel or the chair's designee grants permission to do so based on a showing of good cause. The chair

or the chair's designee may place restrictions or conditions on the manner, time and place of any authorized deposition.

(d) Exculpatory Evidence. Notwithstanding any other provision of this rule, disciplinary counsel shall provide respondent with exculpatory evidence relevant to the formal charges.

(e) Duty of Supplementation. Both parties have a continuing duty to supplement information required to be exchanged under this rule.

(f) Completion of Discovery. All discovery shall be completed within 60 days of the filing of the answer.

(g) Failure to Disclose. If a party fails to timely disclose a witness's name and address, any statements by the witness, summaries of witness interviews, or other evidence required to be disclosed or exchanged under this rule, the hearing panel may grant a continuance of the hearing, preclude the party from calling the witness or introducing the document, or take such other action as may be appropriate. In the event disciplinary counsel has not timely disclosed exculpatory material, the hearing panel may require the matter to be disclosed and grant a continuance, or take such other action as may be appropriate.

(h) Resolution of Disputes. Disputes concerning discovery shall be determined by the hearing panel. Review of these decisions shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

(i) Pre-Hearing Conferences. The hearing panel may require the respondent and disciplinary counsel to participate in a pre-hearing conference in person or by telephone. Either party may request a pre-hearing conference. Scheduling of a pre-hearing conference is at the sole discretion of the chair of the hearing panel.

(19) Rule 32, RLDE, is amended to read:

RULE 32. REINSTATEMENT FOLLOWING A DEFINITE SUSPENSION OF LESS THAN NINE MONTHS

Unless otherwise provided for in the Supreme Court's suspension order, a lawyer who has been suspended for a definite period of less than 9 months shall be reinstated to the practice of law at the end of the period of suspension by filing with the Supreme Court, and serving upon disciplinary counsel and the Commission on Lawyer Conduct, an affidavit stating that the lawyer is currently in good standing with the Commission on Continuing Legal Education and Specialization and the South Carolina Bar, has fully complied with the requirements of the suspension order, and has paid any required fees and costs, including payment of necessary expenses and compensation approved by the Supreme Court to the attorney appointed pursuant to Rule 31, RLDE, to protect the interests of the lawyer's clients for necessary expenses, or to the Lawyers' Fund for Client Protection if the Fund has paid the appointed attorney under Rule 31(f), RLDE. If suspended for conduct resulting in a criminal conviction and sentence, the lawyer must also successfully complete all conditions of the sentence, including, but not limited to, any period of probation or parole. In such a case, the lawyer must attach to the affidavit documentation demonstrating compliance with this provision. The affidavit filed with the Supreme Court shall be accompanied by proof of service showing service on disciplinary counsel and the Commission on Lawyer Conduct, and a filing fee of $200. When all preconditions set out in this rule are met, the Court shall issue an order of reinstatement. The order shall be public.

(20) The caption of Rule 33, RLDE, is amend to read: "**RULE 33. REINSTATEMENT FOLLOWING A DEFINITE SUSPENSION FOR NINE MONTHS OR MORE OR DISBARMENT".**

(21) Rule 33(a) and (c), RLDE, are amended to read:

> **(a) Generally.** A lawyer who has been suspended for a definite period of 9 months or more, or has been disbarred shall be reinstated to the practice of law only upon order of the Supreme Court. A petition for reinstatement shall not be filed earlier than 5 years from the date of entry of the order of disbarment. A lawyer who has received a definite suspension for 9 months or more may file the petition for reinstatement no earlier than 270 days prior to the expiration of the period of suspension. All records and proceedings relating to reinstatement shall be open to the public.
>
> **(c) Service and Filing of Petition.** The lawyer shall serve a copy of the petition on disciplinary counsel and on the Commission on Lawyer Conduct and shall file 10 copies of the petition with the Supreme Court. The copies filed with the Supreme Court shall be accompanied by a filing fee of $1,500 and proof of service showing service on disciplinary counsel and the Commission on Lawyer Conduct.

(22) Rule 33(f)(8), RLDE, is amended to read:

> **(8)** If disbarred, the lawyer has successfully completed the examinations and training required by Rule 402(c)(5), (6) and (8), SCACR. The lawyer may take the examinations and begin this training no earlier than 9 months prior to the earliest date on which the lawyer may apply for readmission. The lawyer shall attach proof of completion of these examinations and training to the petition for readmission.

(23) Rule 33(g) and (h), RLDE, are amended to read:

> **(g) Action by Committee on Character and Fitness.** Within 180 days of the matter being referred to the Committee on Character and Fitness, a panel of the Committee shall conduct a hearing. If the petition for reinstatement is withdrawn after the

start of the hearing, the lawyer must wait two years from the date the petition is withdrawn to reapply for reinstatement.

At the hearing before the panel, the lawyer shall have the burden of demonstrating by clear and convincing evidence that the lawyer has met each of the criteria in paragraph (f) above. Any member of the Committee may issue subpoenas to compel the attendance of witnesses and the production of pertinent books, papers and documents. The willful failure to comply with a subpoena issued under this rule may be punished as contempt of the Supreme Court. Upon proper application, the Supreme Court may enforce the attendance and testimony of any witness and the production of any documents subpoenaed. The hearing shall be open to the public. Disciplinary Counsel and the Commission shall be allowed to present evidence and make arguments to the panel. The panel shall file a report with the Supreme Court containing its findings and recommendations.

The Committee on Character and Fitness may promulgate rules and regulations governing practice and procedure before the Committee. These rules and regulations shall become effective when approved by the Supreme Court.

(**h) Decision as to Reinstatement.** The Supreme Court shall review the report filed by the panel of the Committee on Character and Fitness. The Supreme Court may require the parties to file briefs or may schedule oral argument on the matter. If the Supreme Court finds that the lawyer has complied with each of the criteria of paragraph (f), it may reinstate the lawyer. The decision to grant or deny reinstatement rests in the discretion of the Court. In making this determination, the seriousness of the prior misconduct will be considered and the petition for reinstatement may be denied based solely on the seriousness of the prior misconduct. Unless otherwise ordered by the Supreme Court in the order denying reinstatement, no lawyer shall be permitted to reapply for reinstatement within 2 years following an adverse ruling upon a petition for reinstatement or readmission. Orders granting or denying petitions for reinstatement shall be public.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In The Matter Of The Care And Treatment Of Leo McClam, Respondent,

v.

The State Of South Carolina, Appellant,

and The South Carolina Department Of Mental Health Is The, Intervenor/Appellant.

Appeal From Florence County
Judge Michael G. Nettles, Circuit Court Judge

Opinion No. 4623
Submitted May 1, 2009 – Filed October 13, 2009

APPEAL DISMISSED

Assistant Attorney General Deborah R.J. Shupe, Mark W. Binkley, and L. Kimble Carter, all of Columbia, for Appellants.

LaNelle DuRant, of Columbia, for Respondent.

THOMAS, J.: The South Carolina Department of Mental Health (SCDMH) and the State of South Carolina (collectively Appellants) contend the trial court improperly expanded the operation of the Sexually Violent Predator Act (SVP Act) in transferring inmate Leo McClam to a private treatment facility. We dismiss the appeal as moot.[1]

FACTS AND PROCEDURAL HISTORY

McClam was committed in 2000 to the South Carolina Department of Mental Health Behavioral Disorders Treatment Program (BDTP) after adjudication as a Sexually Violent Predator (SVP) pursuant to the SVP Act, sections 44-48-10 through -170 of the South Carolina Code (2002 & Supp. 2008).

In 2006, Circuit Court Judge Michael G. Nettles held an annual hearing in response to a petition for release filed by McClam. In the petition, McClam sought an order finding probable cause to believe his mental abnormality or personality disorder had so changed that he was safe to be at large and, if released, was not likely to commit acts of sexual violence. McClam attended the hearing with his court-appointed attorney. An assistant attorney general appeared on behalf of the State.

Judge Nettles then issued an order in which he found McClam had not shown probable cause to believe his mental abnormality or personality disorder had so changed that he was safe to be at large and, if released, not likely to commit acts of sexual violence. In the same order, however, Judge Nettles granted McClam's pro se Motion for Independent Evaluation. Judge Nettles approved Dr. Thomas V. Martin, of Martin Psychiatric Services in Columbia, to perform the evaluation and ordered, as part of the evaluation, that Dr. Martin conduct a penile plethysmograph (PPG) of McClam without advance notice to McClam of when the test would be administered. According to the order, McClam was to be monitored by a Public Safety Officer of SCDMH at all times until he was delivered to the facility

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

administering the PPG, at which time a staff member of the administering facility would monitor him until the test began. As part of the evaluation, Judge Nettles also directed Dr. Martin to conduct a review to determine if SCDMH had services available that would motivate McClam to complete treatment.

Dr. Martin evaluated McClam and issued a report in which he concluded as follows:

> Mr. McClam has been committed to the [SVP Program] for over five years without successful completion of treatment. It is therefore my recommendation that Mr. McClam be transferred to an alternate secure mental health treatment facility that is equipped with trained staff to treat sexually deviant individuals with severe mood and psychotic illnesses. This would better afford Mr. McClam the opportunity to stabilize with medication, develop techniques to complete his basic activities of daily living, and develop more appropriate social and interpersonal skills that would eventually lend towards establishing healthier relationships. I have consulted with health care administrators at Just Care, Inc. of Columbia, SC who are willing to accept Mr. McClam in transfer for completion of his sex offender and psychiatric treatment on an inpatient level.[2]

Several months after Dr. Martin issued his report, Judge Nettles held a hearing to determine whether McClam should be transferred to a different facility for more effective treatment. After this hearing, Judge Nettles ordered "that McClam be transferred to Just Care as recommended by Dr.

[2] Just Care is a private detention healthcare company and is not operated by SCDMH.

Martin in order to achieve a psychiatric balance" and that the matter be reviewed in six months. In support of this decision, Judge Nettles observed that the parties were at a stalemate and that McClam was not making any progress in his current treatment program. Neither McClam nor the State took formal exception to this order, a copy of which was also sent to SCDMH.

After receiving the order, SCDMH moved to intervene and join as a party in the matter. Simultaneously, SCDMH filed a notice of and motions for relief from and stay of the Judge Nettles' order transferring McClam to Just Care. SCDMH argued (1) it was a necessary party that was not joined in the proceedings; (2) the order affected the rights of two non-parties, SCDMH and Just Care, Inc.; and (3) the order required SCDMH to violate the explicit terms of the SVP Act in that the order allowed treatment of a sexually violent offender at a facility not operated by SCDMH. As to the third argument, SCDMH contended that if it followed the order, it would "abdicate its statutory responsibilities to control, care and treat Leo McClam including deference to the private sector in the exercise of professional judgment regarding treatment."

After a hearing on SCDMH's motions, Judge Nettles granted leave to SCDMH to intervene in the case; however, he allowed his prior order authorizing McClam's transfer to Just Care to stand. Regarding his refusal to change the order, Judge Nettles explained that "[a]lthough he's not in the physical care of [SCDMH], certainly they still are in charge of the care, custody, and control of this individual." Judge Nettles further clarified his order by specifically providing SCDMH could "take whatever factors they find be [sic] appropriate." In a written order issued pursuant to the hearing, Judge Nettles ruled "McClam's placement at the Just Care facility is to be determined by [SCDMH] in collaboration with the staff at Just Care" and the case would be reviewed in six months. After SCDMH and the State received written notice of entry of this order, a timely notice of appeal on behalf of SCDMH and the State was filed.

While the appeal was pending in this Court, Judge Nettles held the six-month review as mandated by his prior order. At the hearing, Judge Nettles received into evidence an affidavit from Peggy C. Wadman, M.D., the Forensic Medical Director of SCDMH, in which Dr. Wadman stated in part that McClam had finished the SVP Treatment Program and was currently being evaluated by his treatment team for possible release. Dr. Wadman also stated "[i]t has been necessary for the SCDMH staff to provide all psychiatric, sexual disorder and medical treatment to Mr. McClam since his transfer to Just Care."

A few days after the six-month review, the Darlington County Probate Court issued an order first committing McClam "to a state mental health facility for in-patient care and treatment" and then ordering him to "undergo an out-patient treatment program at Florence County (Pee Dee) mental health facility for a period not to exceed 12 months." In his order, the probate court judge noted his decision was made "[a]fter a full hearing on the issues involved" and the reason for the mandatory treatment was that McClam "lack[ed] sufficient insight or capacity to make responsible decisions with respect to his treatment" and it was likely that McClam, because of his condition, would inflict serious harm to himself or others.

After the probate court issued its order, Judge Nettles issued a written order pursuant to the six-month review hearing directed that "in light of his completion of all treatment segments to the Sexually Violent Predator Treatment Program Leo McClam shall be transferred from Just Care back to the Sexually Violent Predator Treatment Unit" within ten days.

Several weeks after Judge Nettles issued his order, a hearing took place before Circuit Court Judge Thomas Russo on a petition by McClam for his release from confinement. Two days after this hearing, Judge Russo authorized McClam's release from confinement and ordered him to comply with the statutory requirements of registration as a SVP. In his order, Judge Russo also noted inter alia (1) SCDMH had sought and obtained an order from the probate court committing McClam to inpatient treatment; (2) SCDMH authorized McClam to petition for release and advised the South

Carolina Attorney General's Office that McClam was safe to be at large and, if released, would not be likely to commit acts of sexual violence; and (3) although the testimony at the hearing was undisputed that McClam was not safe to be at large, the State could not prove beyond a reasonable doubt that McClam would be likely to commit acts of sexual violence if he was released.

During the pendency of this appeal in this Court, McClam moved to dismiss the matter as moot. Although this Court denied the motion, the parties were permitted to address this issue in their briefs.

LAW/ANALYSIS

We agree with McClam this appeal should be dismissed as moot and therefore decline to address the merits of the issues presented.[3]

"[M]oot appeals result when intervening events render a case nonjusticiable." Sloan v. Greenville County, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." Id. (brackets in original).

In the civil context, there are three general exceptions under which an appellate court can issue a ruling on an appeal on an otherwise moot controversy: (1) if the issue raised is "capable of repetition but evading review"; (2) if the question is one of "imperative and manifest urgency to necessitate establishing a rule for future conduct in matters of important public interest"; and (3) if the trial court's decision "may affect future events, or have collateral consequences for the parties." Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

[3] Appellants contend McClam's transfer to a private treatment facility was neither authorized by the SVP Act nor required by due process.

According to the facts presented in this appeal, McClam has successfully completed the SVP Program and been released from confinement with the consent of both SCDMH and the State. Any decision by this Court concerning the validity of the order transferring him to Just Care would have no practical effect on his placement because he is no longer "committed to the custody of the Department of Mental Health for control, care, and treatment . . . at a facility operated by the Department of Mental Health." S.C. Code Ann. § 44-48-100 (2002 & Supp. 2008). The rationale for Appellants' argument that McClam's transfer to Just Care was improper, namely the need to segregate SVPs from other persons under the supervision of SCDMH, is no longer a concern here.

As to the exceptions under which this Court can take jurisdiction of an otherwise moot dispute, we agree with McClam that none of these apply here. First, the record contains no indication the issue presented in this appeal "can be repeatedly presented to the trial court yet escape review at the appellate level because of its fleeting and determinate nature." Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc., 406 S.E.2d 65, 67 (W.Va. 1991) (cited in Curtis, 345 S.C. at 568, 549 S.E.2d at 596). The legislative findings behind the SVP Act emphasize the need for "long-term control, care, and treatment of sexually violent predators." S.C. Code Ann. § 44-48-20 (2002 & Supp. 2008) (emphasis added). We recognize the possibility exists that an appeal involving the placement of an inmate in the SVP Program will not be adjudicated before the inmate's discharge from the program. Nevertheless, no evidence was presented here that McClam's release, which was obtained with the authorization of SCDMH during the pendency of this appeal, is a common occurrence that would typically prevent an appellate court from ruling on the propriety of an order authorizing the transfer of an inmate in the SVP Program to a different facility. To the contrary, this is apparently the first time an appellate court has been called upon to decide the issue presented in this appeal, notwithstanding the fact that, according to an affidavit from the Director of the Forensic Evaluation and Treatment Service of SCDMH, 1,029 offenders

have been referred for commitment to the SVP Program since the passage of the SVP Act in 1998.

Second, the question presented here is not one of imperative and manifest urgency that requires establishing a rule for future conduct in matters of important public interest. The South Carolina General Assembly has already established such a rule. See S.C. Code Ann. § 44-48-100(A) (2002 & Supp. 2008) ("At all times, a person committed for control, care, and treatment by the Department of Mental Health pursuant to this chapter [i.e. the SVP Act] must be kept in a secure facility, and the person must be segregated at all times from other patients under the supervision of the Department of Mental Health.").

Finally, we hold there was no showing that the decision to transfer McClam to Just Care could affect future events or have collateral consequences for the parties. As noted earlier, we are not aware of any similar controversies that have been presented to either this Court or the South Carolina Supreme Court. Furthermore, as noted in Judge Nettles' order authorizing McClam's transfer to Just Care, the reasons prompting McClam's desire for a transfer from BDTP to another facility were predominantly interpersonal, reflecting "the ineffective therapeutic alliance established between him and the treatment staff." As noted by McClam in his respondent's brief and not disputed by Appellants in their reply brief, numerous personnel changes have taken place among the SVP Program staff such that, if McClam should again be committed to the Program, it is not likely he will have the same treatment team that he had during his earlier commitment.

CONCLUSION

The order authorizing McClam's transfer to Just Care during his treatment would no longer affect his placement in the SVP Program because McClam has completed the Program and been released from confinement. This appeal is therefore moot, and, as we have noted, none of the exceptions under which we can take jurisdiction of such a dispute are applicable.

APPEAL DISMISSED.

HEARN, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Branche Builders, Inc., a South Carolina Corporation, Respondent,

v.

Saundra Coggins, d/b/a "Carolina Carpet World & Interiors," and Coggins & Kimbrell Enterprises, Inc., a South Carolina Corporation, Appellants.

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 4624
Submitted May 1, 2009 – Filed October 13, 2009

AFFIRMED

Gloria Y. Leevy, of Greenville, for Appellants.

John Martin Foster, of Rock Hill, for Respondent.

KONDUROS, J.: Branche Builders, Inc., a general contractor, brought suit against Saundra Coggins, a flooring subcontractor, doing business as Carolina Carpet World & Interiors, and Coggins & Kimbrell Enterprises, Inc. (collectively Carolina Carpet World)[1] for breach of contract after the flooring Coggins installed started to buckle from moisture. The trial court found in favor of Branche Builders and Carolina Carpet World appealed. We affirm.[2]

FACTS

Branche Builders was hired as the general contractor to remodel a home in Rock Hill. On April 30, 2003, Branche Builders hired Coggins to install laminate flooring in the home in exchange for $10,759.46. Coggins installed the floor in May 2003. The floors were manufactured by Witex and the instructions required polyethylene to be placed between a cement floor and a laminate floor. However, because the home had vinyl floors,[3] Coggins placed roofing felt between the vinyl and laminate floors during installation. Branche Builders paid Coggins according to the contract and shortly thereafter, the laminate flooring buckled and lifted off the subfloor. Coggins removed the laminate floor but did not replace it. Ultimately, Branche Builders hired Kellet's Floors and Interiors to replace the floor.

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[1] At trial, Coggins disputed she was doing business as Carolina Carpet World & Interiors and asserted that business was owned by Coggins & Kimbrell Enterprises, Inc. The trial court found Branche Builders had no notice it was dealing with a corporate entity. Further, it found Carolina Carpet World & Interiors, which was not a registered name of Coggins & Kimbrell Enterprises, was the only name shown on the contract with Branche Builders. Neither Coggins nor Coggins & Kimbrell Enterprises appeals this ruling.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

[3] Gene Branche, president of Branche Builders, testified the vinyl flooring was old and was beginning to tear at the seams.

Branche Builders filed a complaint against Carolina Carpet World, which included allegations of rescission of contract and breach of warranty. The case was tried without a jury. At trial, Coggins conceded she did not follow the manufacturer's instructions in that she used roofing felt instead of the manufacturer-recommended moisture barrier. She also was uncertain as to whether the floor was installed with the proper expansion specifications. However, Coggins and one of Carolina Carpet World's experts contended the moisture entered the home through a door or because of an inadequate drainage system during periods of heavy rain.

Howard Kellet, president of the company that installed the replacement laminate floors in the home, testified as an expert witness in the area of laying laminate flooring. He testified he had never seen roofing felt used as an underlayment. He further testified he would never have used it because it was not an approved vapor barrier for a laminate floor. Additionally, he stated there appeared "to be little or no expansion joints." When asked if he had "an opinion as to what caused the buckling in the floor" he responded "it was like a fifty-foot room and then there was no expansion joint put to allow for that. It's kind of like concrete expansions. I mean, this floor will move. It will expand and contract with humidity."

Another expert in the area of laminate floors, Richard Talbert, was asked if he had "an opinion as to whether that lack of use [of the recommended vapor barrier] and that lack of spacing was the probable cause of the problems that appeared in this case?" He responded, "Yes, sir, particularly around the fireplace where there's buck[l]ing and some darkening of the color. That means that the concrete floor itself was allowing moisture to come up from the bottom and get on the bottom of the product."

The trial court asked Michael Schwartz, an expert in the area of home examination, if the moisture was entering the house from the door. Schwartz testified it was not. The trial court further questioned, "What if you'd had a proper vapor barrier down there over the concrete if it leached into the concrete? Would that have made a difference as to what happened to the laminate?" Schwartz responded affirmatively.

Carolina Carpet World presented Gary Drury, a witness qualified as an expert in the installation of flooring, who testified "as far as the moisture of that magnitude, . . . it's just really hard to believe it solely came through the bottom of that concrete." He also testified the laminate flooring was protected through means other than polyethylene. James Kendrick, who installed the laminate flooring on Carolina Carpet World's behalf, also testified as an expert witness. He testified that the roof felting was "just as good as" the polyethylene.

The trial court found in favor of Branche Builders on the basis of rescission. The trial court found "the most probable cause of the damage to the installed flooring was the failure to follow the manufacturer's specifications regarding the proper moisture barrier on a concrete slab and the proper room for expansion of the flooring." The trial court awarded Branche Builders damages of $10,759.46, prejudgment and postjudgment interest, and attorney's fees. This appeal followed.

STANDARD OF REVIEW

"An action for breach of contract seeking money damages is an action at law." McCall v. IKON, 380 S.C. 649, 658, 670 S.E.2d 695, 700 (Ct. App. 2008). On appeal of an action at law tried without a jury, we will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Additionally, the appellate court can correct errors of law. Okatie River, L.L.C. v. Se. Site Prep, L.L.C. 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct. App. 2003). The trial court's findings are equivalent to a jury's findings in a law action. Chapman v. Allstate Ins. Co., 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975). Questions regarding credibility and the weight of the evidence are exclusively for the trial court. Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). "We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." Id.

LAW/ANALYSIS

Carolina Carpet World argues the trial court erred in finding in favor of Branche Builders because the evidence demonstrated the failure to use the manufacturer's instructions and moisture barrier was not the proximate cause of the damage to the floors.[4] We disagree.

The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Id. Rescission is an undoing of a contract from the beginning, as if the contract had never existed. Ellie, Inc. v. Miccichi, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct. App. 2004). "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co., 303 S.C. 74, 77, 399 S.E.2d 8, 10 (Ct. App. 1990).

The trial court found "the most probable cause of the damage to the installed flooring was the failure to follow the manufacturer's specifications regarding the proper moisture barrier on a concrete slab and the proper room for expansion of the flooring." The record contains evidence to reasonably support that finding. Three expert witnesses testified they believed the use of

[4] In its appellate brief, Carolina Carpet World references equitable estoppel and unclean hands. However, it never pled these defenses at trial. "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading[, with some exceptions]." Rule 12(b), SCRCP. The failure to plead an affirmative defense is deemed a waiver of the right to assert it. See Adams v. B & D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989) (finding if an appellant fails to plead an affirmative defense or raise it to the trial court, an appellate court will not address it on appeal). Accordingly, we cannot consider these arguments on appeal.

the roofing felt instead of the polyethylene allowed water to damage the floors. Additionally, the experts noted the failure to use proper expansion spacing could also cause the problems with the floor. Carolina Carpet World's appellate brief states it does not dispute it did not follow the manufacturer's instructions, use the recommended moisture barrier, or employ the proper expansion specifications. Although Carolina Carpet World presented expert testimony the roofing felt and vinyl floors were an adequate substitute for the polyethylene, the determination of the weight of the evidence is for the trial court. Accordingly, Branche Builders' expert testimony constitutes evidence to reasonably support the trial court's finding the failure to follow the manufacturer's specifications was the most probable cause of the buckling. Therefore, the trial court's decision is

AFFIRMED.

HEARN, C.J., and THOMAS, J., concur.