The Supreme Court of South Carolina

In the Matter of George Randall Taylor, Petitioner.

ORDER

Pursuant to Rule 28, RLDE, Rule 413, SCACR, petitioner requests to be transferred to incapacity inactive status due to a serious medical condition. The request is granted. Petitioner is hereby transferred to incapacity inactive status pursuant to Rule 28, RLDE.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

November 24, 2010

The Supreme Court of South Carolina

RE: Extension of Lawyer Mentoring Second Pilot Program

O R D E R

By Order dated December 2, 2008, the Court adopted the Lawyer Mentoring Second Pilot Program, which was recommended by the Chief Justice's Commission on the Profession. The Program is scheduled to end on December 31, 2011. After study, the Chief Justice's Commission on the Profession has recommended extending the Program to April 1, 2012. We grant the request and extend the Second Pilot Program to April 1, 2012. Participation is mandatory for all persons admitted to the South Carolina Bar on or before April 1, 2012, who meet the definition of a "qualifying lawyer" under Section 3 of the Second Pilot Program.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 1, 2010

LAWYER MENTORING SECOND PILOT PROGRAM

1. DURATION OF PROGRAM.

The second pilot program will run from March 2009 until April 1, 2012, and include all qualifying lawyers admitted to the Bar between March 1, 2009, and April 1, 2012. The Program shall be administered by the Commission on Continuing Legal Education and Specialization.

2. MANDATORY PARTICIPATION.

The second pilot program is mandatory for all qualifying lawyers. Unless participation is delayed under Section 3 below, all lawyers must complete the mentoring program within the first full calendar year after admission to the South Carolina Bar.

3. QUALIFYING LAWYER DEFINED.

A qualifying lawyer is any lawyer admitted to the South Carolina Bar during the prescribed period if that lawyer (1) is a resident of the State of South Carolina or practices law in an office located in South Carolina on more than a temporary basis; and (2) has not previously practiced law actively in another jurisdiction for more than two years.

Special Circumstances:

a) A qualifying lawyer who is employed as a non-permanent, full-time clerk to a state or federal judge during the first year of admission to the South Carolina Bar may elect to participate in the mentoring program after the completion of his or her clerkship.

b) A qualifying lawyer who is not engaged in the representation of clients nor any other form of the active practice of law may request a waiver of this requirement by certifying that he or she is not engaged in the active practice of law in South Carolina and does not intend to do so for a period of at least two years. If that lawyer later begins to actively practice law in South Carolina, he or she must then notify the Commission on Continuing Legal Education and Specialization and participate in the mentoring program for one year after beginning to actively practice law. [This last sentence will not apply to lawyers who begin to actively practice law in South Carolina after April 1, 2012, unless the mentoring program is made permanent.]

c) A qualifying lawyer who begins the mentoring program, but, prior to the completion of the program, moves his or her residency out of the state and no longer practices regularly in the state, is not required to complete the mentoring program. The new lawyer must provide notice to the Commission on Continuing Legal Education and Specialization of his or her move from the state as the basis for not completing the program. The new lawyer's license to practice law shall not be affected by the failure to complete the program in this circumstance. If that lawyer subsequently returns to South Carolina prior to having been engaged in the active practice of law as a member of another bar for at least two years, however, the new lawyer may be required to complete the mentoring

program within the first full calendar year after returning to the state. [This last sentence will not apply to lawyers who return to the state after April 1, 2012, unless the mentoring program is made permanent.]

4. PURPOSE OF PROGRAM.

The purpose of the mentoring program is to provide assistance to the new lawyer in the following respects:

a) The mentor should assist the new lawyer in developing an understanding of how law is practiced in a manner consistent with the duties, responsibilities, and expectations that accompany membership in the legal profession. The mentor should provide guidance or introduce the new lawyers to others who can provide guidance as to proper law practice management, including the handling of funds, even if the new lawyer is not currently in a setting that requires the use of those practices. Guidance should be given not only as to a lawyer's ethical duties, but also as to the development of a higher sense of professionalism based upon internalized principles of appropriate behavior consistent with the ideals of the profession.

b) The mentor should assist the new lawyer in developing specific professional skills and habits necessary to gain and maintain competency in the law throughout one's career and should assist the new lawyer in developing a network of other persons from whom the new lawyer may seek personal or professional advice or counsel when appropriate or necessary throughout their career. While a strong mentoring relationship (particularly if the mentor and new lawyer are in the same firm or office) may also include specific advice to or training of a new lawyer regarding substantive aspects of the law, such substantive legal training should not be required of a mentor in this program.

c) The mentor should assist the new lawyer in identifying and developing specific professional skills and habits necessary to create and maintain professional relationships based upon mutual respect between the lawyer and client; the lawyer and other parties and their counsel; the lawyer and the court, including its staff; the lawyer and others working in his or her office, including both lawyers and staff; and the lawyer and the public. The mentor should assist the new lawyer in understanding the appropriate boundaries between advocacy and overzealous or uncivil behavior and in developing appropriate methods of responding to inappropriate behavior by others.

d) The mentor should introduce the new lawyer to others in the lawyer's local or regional legal community and encourage the new lawyer to become an active part of that community.

5. STRUCTURE OF PROGRAM.

Mentoring shall be made available through either individual or group mentoring. Unless a different mentoring plan is approved under Section 6, each qualifying new lawyer is required to complete the mentoring tasks set forth in a standard mentoring plan prepared by the Commission

on Continuing Legal Education and Specialization and approved by the Court. The standard plan may include a recommended schedule for completing the tasks, but that actual order and timing of completion of the tasks shall be within the discretion of the participants, provided that the full plan is completed as required in Section 2 above. In addition to completing the specific required tasks, it should be expected that, in an individual mentoring arrangement, the mentor and new lawyer will consult throughout the calendar year as either may deem necessary or appropriate.

The mentor and new lawyer may choose the method of communication that best suits their needs. However, if a mentor and new lawyer do not otherwise have regular in-person contact, they should schedule at least some periodic in-person discussions throughout the mentoring period. Each person should be cognizant of demands on the other's schedule and attempt to find a mutually acceptable time for these meetings. If there is a recurrent failure by either party to make time available for this purpose, or if other difficulties arise which cannot be resolved by the parties and which threaten the timely and effective completion of the mentoring program, the parties to the relationship (or either of them) should advise the Commission on Continuing Legal Education and Specialization of the situation and request the assistance of that office in resolving the matter.

a) Individual Mentoring.

Most new lawyers will have an individual mentor approved by the Commission on Continuing Legal Education and Specialization. Preference should be given to the appointment of a mentor selected by the new lawyer, who may be, but is not required to be, a lawyer working in the same firm or office as the new lawyer.

If a new lawyer does not select a qualified mentor, then one of the following options will apply:

1) if the new lawyer is employed and another lawyer in the same firm or office could serve as a mentor, the Commission on Continuing Legal Education and Specialization shall contact the firm or office and seek the voluntary agreement of a qualified lawyer in the firm or office to serve as the new lawyer's mentor;

2) if the new lawyer wishes to have an individual mentor and either no mentor is obtained under option (1) or the new lawyer is not employed in a firm or office able to supply a mentor, then the Commission on Continuing Legal Education and Specialization shall seek to recruit a qualified individual mentor from among the members of the South Carolina Bar. In this event, a reasonable effort should be made to designate a mentor from the same or a nearby geographic area with experience in a practice setting similar to that of the new lawyer; or

3) the new lawyer shall be assigned to participate in group mentoring.

b) Group Mentoring.

The Commission on Continuing Legal Education and Specialization will develop a program of group mentoring for those new lawyers not assigned an individual mentor. A group mentoring program should have some element of live contact with members of the mentoring group, but it may be a combination of live contact and electronic or other forms of distance mentoring as may be deemed sufficient by the Commission on Continuing Legal Education and Specialization. The preferred ratio of new lawyers to mentors in a group mentoring program shall be no greater than 3 to 1.

6. CERTIFICATION OF INTERNAL PROGRAMS.

A law firm or office (including, but not limited to, governmental agencies, corporate legal departments, state and local prosecutors, and public defenders) which has an internal mentoring program in place that it believes achieves all of the purposes of this program may apply to the Commission on Continuing Legal Education and Specialization to have its mentoring plan certified as compliant with the mentoring obligation under the pilot program. The application for certification should include a detailed description of the internal program and a detailed showing of how each of the purposes of this program will be achieved under the internal program. If a program is certified, completion of that program by a qualifying new lawyer should be deemed to satisfy the mentoring requirement. The new lawyer and the lawyer responsible for the certified program should be required to file a statement for each new lawyer verifying that the new lawyer has completed all requirements of the program. Once certified, a program should remain certified throughout the duration of the pilot program unless it is materially altered.

7. GENERAL QUALIFICATIONS OF MENTORS

Mentors must be active members of the South Carolina Bar, or persons who have taken retired or inactive status within the preceding two years. Mentors must have at least five [5] years experience in the active practice of law. It is preferable that mentors have experience with the court system, although it is understood that not all mentors will have litigation experience. A lawyer without such litigation experience may nevertheless be an appropriate mentor if that lawyer has otherwise developed an understanding of appropriate behavior in a lawyer's relationship with the court.

Mentors should display, through their own conduct, an understanding of and commitment to ethical responsibilities and the prevailing expectations with regard to a lawyer's appropriate professional behavior. A mentor must have a good reputation for professional behavior and must have not been publicly reprimanded in any jurisdiction within the past 10 years or suspended or disbarred from the practice of law at any time.

Mentors should be able to assist the newer lawyer in developing a style of lawyering that is compatible both with professional expectations and with the personality of the newer lawyer.

8. APPOINTMENT OF MENTORS; EDUCATION AND SUPPORT OF MENTORS

A lawyer may serve as a mentor for purposes of this program only if first approved by the Commission on Continuing Legal Education and Specialization. The prospective mentor must submit an application to the Commission on Continuing Legal Education and Specialization in an approved form certifying that the lawyer meets the experience requirements for a mentor and has not been publicly reprimanded within 10 years, suspended, or disbarred from the practice of law.

Upon determining that a mentor applicant meets the threshold qualifications, the Commission on Continuing Legal Education and Specialization may conduct such further investigation of a prospective mentor's qualifications and reputation for professional behavior as it may deem appropriate. The Commission on Continuing Legal Education and Specialization has authority to appoint qualified lawyers as mentors or, in its discretion, to decline to appoint an applicant to serve as a mentor under this program.

An appointment shall qualify a lawyer to serve as a mentor in this program for five years, unless earlier removed as a mentor. A lawyer may be appointed to multiple consecutive terms as a qualified mentor. If at any time a lawyer appointed as a mentor is publicly reprimanded, suspended, or disbarred in any jurisdiction, the lawyer shall be removed immediately as an approved mentor. If the lawyer is serving as a mentor at the time that his or her name is removed from the list of approved mentors, the Commission on Continuing Legal Education and Specialization shall immediately appoint a new mentor for the lawyer being mentored.

A lawyer appointed as a mentor is not required to attend a training session, but will be provided access to materials gathered or prepared by the Commission on Continuing Legal Education and Specialization that will assist the mentor in carrying out his or her responsibilities. The Commission on Continuing Legal Education and Specialization will provide at least annually a voluntary mentor orientation program that will qualify for ethics MCLE credit. Mentors are encouraged to contact other mentors to discuss issues, the most effective approaches to be used in working with new lawyers, the most effective means of resolving problems that are encountered in the relationship, or other concerns that arise during the mentoring relationship.

9. MIGRATION OF A MENTOR OR A NEW LAWYER

From time to time, either a mentor or a new lawyer may change jobs during the mentoring year. It is expected that, whenever possible, the mentoring relationship, once established, will be maintained despite such a move. When maintenance of the relationship is not possible because one of the parties to the relationship has moved to a distant location or because of other extraordinary circumstances, the mentor or new lawyer should notify the Commission on Continuing Legal Education and Specialization, and that office may assign a substitute mentor or take such other measures as are appropriate.

10. ADDRESSING SITUATIONS IN WHICH MENTOR IS IN POSITION OF AUTHORITY REGARDING THE NEW LAWYER

If a mentor participates in or has responsibility for any performance evaluations of the new lawyer being mentored, the mentor and new lawyer should set forth clearly at the outset of the relationship how information learned by the mentor during the mentoring relationship might be used in that evaluation process. If the role of the mentor as a supervisor or evaluator may conflict with the new lawyer's need for advice in some situations, the mentor should assist the new lawyer in making contacts with other lawyers who could provide advice in those situations.

11. CERTIFICATION OF PARTICIPATION; SANCTION FOR FAILURE TO COMPLETE

At the end of the first full calendar year after a new member is admitted to the Bar, if the new lawyer has completed all requirements of the mentoring program, he or she must file with the Commission on Continuing Legal Education and Specialization a document signed by the mentor certifying such completion. If the new lawyer has not completed all requirements of the mentoring program by that time or is otherwise unable to obtain a certificate from the mentor, the new lawyer shall report the specific reasons that a certificate has not been filed. The Commission on Continuing Legal Education and Specialization may, without requiring court approval, grant such additional time as is appropriate to file the certificate, or may recommend to the Court that other appropriate action be ordered.

Failure to complete all elements of the proposed mentoring plan during the pilot program will not result in sanction of the participants, provided that the explanatory certificate set forth above is completed and filed in a timely manner.

12. ADVICE REGARDING SPECIFIC LEGAL ISSUES

In fulfilling his or her responsibilities as a mentor, a mentor may provide general advice and guidance to the new lawyer on how to resolve substantive or procedural legal issues. However, it is not the purpose of the mentoring program to provide specific legal advice to the new lawyer or to provide the new lawyer with co-counsel in a legal matter.

When a mentor is associated with the same law firm or office as the new lawyer, the mentoring relationship does not preclude the mentor from assisting the new lawyer in resolving a specific substantive or procedural legal issue. The extent to which such advice or supervision occurs should be determined by the policies of the law firm or office.

When a mentor is not associated with the same firm or office as the new lawyer, the mentor should instruct the new lawyer at the outset of the relationship about the duty of the new lawyer not to share with the mentor confidential information about any representation. If a new lawyer needs advice about a particular situation, the mentor may discuss with the new lawyer the general area of law at issue, without reference to the facts of a specific matter, and may direct the

new lawyer to resources that may assist the new lawyer in finding the necessary information. **By virtue of acting as a mentor, the mentor does not undertake to represent the client of the new lawyer or assume any responsibility for the quality or timeliness of the work on a matter being handled by the new lawyer. The lawyer being mentored remains solely responsible for the client's matter.** If a mentor does consult with the new lawyer about a specific legal matter, however, both the mentor and the new lawyer must keep in mind that the same professional duties apply as would apply whenever two lawyers not in the same firm consult about a matter.

When appropriate, the mentor should assist the new lawyer in obtaining specific legal advice as may be necessary or appropriate with regard to the establishment or management of a law office.

13. SATISFACTION OF MCLE REQUIREMENTS

During any year in which a lawyer completes a full year as a mentor for one or more new lawyers, the mentor shall be deemed to have completed 4 hours of CLE credit, including two hours of ethics CLE. The mentor should not receive additional CLE credit for mentoring more than one lawyer in the same year.

ATTACHMENT A
(PDF Version)

UNIFORM MENTORING PLAN

OBJECTIVE A

To establish a clear understanding as to the expectations of both the mentor and the new lawyer.

ACTION STEPS

The two should meet in person as soon as possible to discuss their expectations as to how often they should communicate, how they will attempt to achieve the nine objectives of this plan including any appropriate revisions to these action steps, and what each hopes to gain from the relationship. They should discuss the extent to which communications will be kept confidential. If the mentor serves in a supervisory role over the new lawyer, they should discuss openly any limitations that might place on their discussions, and the mentor should make clear the extent to which information learned in the mentoring relationship might be considered in the mentor's supervisory capacity. The mentor should also assist and encourage the new lawyer in identifying other persons who may serve as additional informal career and personal mentors. This is especially important if supervisory duties or other factors may limit the mentoring relationship..

OBJECTIVE B

To introduce the new lawyer to other members of the legal profession and to other participants in the legal system.

ACTION STEPS

If the new lawyer works in a different office than the mentor, the mentor should introduce the new lawyer to other lawyers and staff at the mentor's office. If they work in the same office, the mentor should either provide introductions or ensure that they have already occurred.

Throughout the year, the mentor should introduce the new lawyer to other lawyers in the community, especially those with whom the new lawyer is most likely also to have professional contact. At least some of these introductions should be made in a lawyer's office or in a similar environment that permits significant interaction between the new lawyer and the lawyer to whom he or she is introduced. In addition, the mentor and the new lawyer should attend a meeting together of a local bar association or similar lawyer's organization and discuss opportunities to participate in the work of local, state, or national bar organizations.

The mentor should escort the new lawyer on a tour of the local courts and, to the extent practicable, introduce the new lawyer to judges and court personnel.

If the new lawyer is likely to undertake any criminal defense representation, the mentor should escort or arrange for another lawyer to escort the new lawyer to the local jail and explain procedures for jail visits. The mentor should also introduce the new lawyer to local prosecutors and staff in the prosecutor's office. If the new lawyer is a prosecutor, the mentor should arrange for the new lawyer also to meet the local public defender and staff in the public defender's office.

The mentor should acquaint the new lawyer with the court appointment process, with pro bono expectations, and with various legal services organizations that provide services to indigent persons.

OBJECTIVE C

To ensure that the new lawyer has a thorough understanding of generally accepted professional values and standards of behavior, as well as an understanding of the need to regularly educate oneself throughout a professional career.

ACTION STEPS

The mentor and new lawyer should review together the Lawyer's Oath and the South Carolina Bar Standards of Professionalism and discuss how a lawyer should deal with any the practical challenges the lawyer may encounter in upholding the requirements and expectations of those documents. They should discuss the lawyer's role in the legal system and the lawyer's responsibilities to the client and to persons or institutions other than the client. If the new lawyer is a prosecutor, they should discuss the unique role and responsibilities of the prosecutor and appropriate interaction with victims. If the new lawyer is in-house counsel for a company or staff counsel for an agency, they should discuss the identity of the client and the duties owed to the entity.

The mentor should offer examples of practice situations that may place stress on a lawyer's relationship with other lawyers or with other parties and should discuss with the new lawyer ways to deal with those situations in a professional and civil manner. They should discuss client expectations, how to communicate with and involve a client effectively in a matter, and other steps that a lawyer should take to gain a client's trust and confidence in a manner consistent with the lawyer's professional obligations. They should discuss customs, unwritten rules, and other expectations of etiquette and behavior among lawyers and judges in the community.

The mentor should discuss with the new lawyer the importance of continuing education throughout a lawyer's career and provide the new lawyer with advice as to how best to remain informed of the latest developments in the lawyer's practice areas.

OBJECTIVE D

To ensure that the new lawyer is fully aware of a lawyer's ethical obligations and how to identify and deal with any ethical issues that may arise.

ACTION STEPS

The mentor and new lawyer should discuss the importance of developing a relationship with at least one other lawyer with whom possible ethical issues can be appropriately discussed. The mentor should assist the new lawyer in identifying other resources to resolve complicated ethical issues, including, when applicable, the process for consulting a law firm's ethics committee or the Bar's ethics advisory committee. They should discuss also how and when to address situations in which the new lawyer believes that another lawyer has committed an ethical violation or in which the new lawyer believes that he or she has been instructed to engage in unethical behavior.

OBJECTIVE E

To ensure that the new lawyer is fully aware of the proper practices for avoiding mishandling of other's assets, conflicts of interest, neglect of a matter and other common ethical and civil liability problems.

ACTION STEPS

The mentor should discuss with the new lawyer the most common reasons for which an ethics grievance or civil malpractice complaint is filed, especially the mishandling of funds, conflicts of interest, and negligence, and how to recognize and avoid common problems.

The mentor should discuss or arrange for another lawyer to discuss with the new lawyer all applicable rules regarding trust account management and emphasize the importance of keeping accurate records of property of others held by the lawyer. The discussion should include detailed advice as to when funds generally may be disbursed and a discussion of IOLTA accounts. Because of the possibility that the new lawyer could change jobs, this conversation should take place even if the new lawyer currently has no such responsibility for the funds of others. If the new lawyer works in a different office than the mentor, the mentor should advise the new lawyer to create appropriate trust accounts or to ensure that such accounts exist. If they work in the same office, the mentor should ensure that the new lawyer understands how the firm's trust accounts operate.

The mentor should discuss with the new lawyer practical situations in which unanticipated conflicts may occur and should emphasize the importance of identifying fully all possible interested persons or entities. If the new lawyer works in a different office than the mentor, the mentor should advise the new lawyer to ensure that his or her office has an appropriate system to identify potential conflicts of interest. If they work in the same office, the mentor should ensure that the new lawyer understands how the firm's conflict identification system operates.

The mentor and new lawyer should discuss time management skills and techniques as well as the desirable features of a calendaring or tickler system. They also should discuss timekeeping methods that provide accurate records of time spent on a client's matter.

They should discuss a lawyer's duties to supervise non-lawyer staff and discuss what activities a non-lawyer staff member or employee may engage in without undertaking the unauthorized practice of law.

They should discuss when and how it is appropriate to contact judges, especially to avoid impermissible contacts. They also should discuss the lawyer's duty of confidentiality and common pitfalls regarding protection of the attorney-client privilege.

If the new lawyer is a prosecutor, the mentor should discuss the appropriate considerations in making charging decisions.

OBJECTIVE F

To help the new lawyer create and implement a successful career plan.

ACTION STEPS

The mentor and the new lawyer should discuss the new lawyer's long-term career objectives and how best to achieve them. If appropriate to the practice setting, also discuss the importance of developing a long-term business plan. If the new lawyer is uncertain as to his or her career goals, the mentor should help the new lawyer to identify those goals or guide the new lawyer to others who can provide that assistance.

They should discuss the most effective approaches for handling office politics so as to avoid harm to one's career. They should discuss how to deal most effectively with inappropriate or discriminatory behavior when it is encountered and how to develop appropriate support systems of persons with whom the lawyer can discuss problems when they arise. Toward this purpose, the mentor should assist the new lawyer in identifying other individuals who may provide additional informal mentoring support.

OBJECTIVE G

To assist the new lawyer in improving professional skills necessary for the effective practice of law.

ACTION STEPS

The mentor and new lawyer should discuss appropriate negotiation techniques, focusing on expectations of behavior during negotiations as well as the effectiveness of various approaches.

They also should discuss appropriate techniques for interviewing clients and witnesses to ensure that information is completely and productively obtained without prejudice to the rights of others.

They should discuss how to conduct an effective deposition, consistent with the purposes of the deposition. If a new lawyer participates in a deposition or court proceeding during the mentoring period, the mentor should either observe the new lawyer's performance or discuss the experience with the new lawyer afterwards to the extent permitted by rules of confidentiality and without harm to any applicable attorney-client privilege.

OBJECTIVE H

If the new lawyer is in private practice, to assist the new lawyer in developing a productive and effective law practice.

ACTION STEPS

The mentor and new lawyer should discuss how a lawyer can ethically and professionally make others aware of the availability of his or her professional services.

They should discuss how to evaluate a matter and decide whether to undertake a representation, and, if appropriate to the practice setting, how to set and memorialize a fee and how to talk with the client about the fee for a matter.

They should discuss when and how to retain additional counsel to assist in a matter.

They should discuss how to terminate a representation.

OBJECTIVE I

To help the new lawyer enjoy a healthy personal life while fulfilling his or her professional obligations.

ACTION STEPS

The mentor should provide advice to the new lawyer about the appropriate balance between one's personal and professional responsibilities. They should discuss the warning signs of substance abuse or depression and how to address those problems when they are manifested in oneself or in others. If the new lawyer has substantial educational loans or other debt, they should discuss practical ways to manage long-term debt.

ATTACHMENT B
(PDF Version)

SAMPLE LETTER TO LAWYER BEING MENTORED
[South Carolina Commission on the Profession Letterhead]

Dear _____,

As a newly admitted member of the South Carolina Bar, you will participate in a pilot South Carolina Lawyer Mentoring Program. The goal of this new program is to assist your transition into the legal profession and to provide you with a stronger understanding of its accompanying ethical and professional obligations and expectations.

Enclosed are materials describing the program as implemented by the Supreme Court of South Carolina. You should review those materials immediately. If you work in a law firm or office with other lawyers who meet the qualifications to be a mentor as set forth in those materials, you may seek a mentor from among those qualified lawyers. You should discuss the program with potential mentors and attempt to secure their consent to serve as a mentor. They should be made aware that completion of their work as a mentor would qualify for four hours of MCLE credit in the year in which the mentoring is completed. You may also work in an office or firm with an internal mentoring program that has been certified as compliant with the mentoring program. You should ask your employer if that is the case.

If you prefer, you may select a qualified mentor who does not work with you or you may request that a mentor be appointed for you. In any event, you must return the enclosed form to the Commission on Continuing Legal Education and Specialization within 30 days after your admission to the South Carolina Bar, indicating the name of a mentor who has consented to serve in that role or requesting appointment of a mentor.

Enclosed with this letter is a copy of the reporting form that you and your mentor will be required to submit at the end of your participation in the mentoring program. During the mentoring period, you will be expected to work with your mentor to achieve each of the objectives set forth in the Uniform Mentoring Plan or in your firm's mentoring plan if it has been approved. If any activities are not completed, you will be asked to explain the omission of those elements. A purpose of the pilot program is to ascertain which activities are feasible and appropriate to require, and your explanations will be important in that determination.

Sincerely,

ATTACHMENT C
(PDF Version)

SOUTH CAROLINA LAWYERING MENTORING PROGRAM
DESIGNATION OF MENTOR/REQUEST FOR APPOINTMENT OF MENTOR

For the Mentoring Period beginning _____, 20__ and ending _____, 20__.

Full Name of Newly Admitted Lawyer to be Mentored: _____

South Carolina Bar Number: _____

Check the appropriate response:

_____ I have selected a mentor, who has agreed to serve in that capacity during the mentoring period. The name and address of my proposed mentor is

Name: _____

Mailing Address: _____

_____

_____

_____ I have not obtained a mentor and ask that one be appointed for me or that I be assigned to a group mentoring team.

Does your employer have an internal mentoring program that has been approved as satisfying the requirements of the S.C. Lawyer Mentoring Program?___Yes ___No

Signature: _____

Submit Completed Form within 30 days after admission to the South Carolina Bar to:

Commission on Continuing Legal Education and Specialization
Post Office Box 2138
Columbia, South Carolina 29202

ATTACHMENT D
(PDF Version)

SAMPLE LETTER TO MENTOR AT BEGINNING
OF PROGRAM PERIOD
[South Carolina Commission on the Profession Letterhead]

Dear _____,

This letter confirms your agreement to participate in the pilot South Carolina Lawyer Mentoring Program as a mentor for _____. Your active participation is vital to the success of the program and the fulfillment of its goal of improving the transition of new lawyers into the profession, with a stronger understanding of the accompanying ethical and professional expectations. At the end of the one-year mentoring period, your comments and recommendations regarding this pilot program will be vital to subsequent evaluation of the program and a decision by the Supreme Court as to whether the program should be made permanent.

As a mentor, you will have available to you materials designed to assist you in carrying out your responsibilities as a mentor.

Enclosed with this letter is a copy of the reporting form that you will be required to submit at the end of the mentoring period. During the mentoring period, you will be expected to assist the lawyer being mentored in achieving each of the objectives of the mentoring program. Those objectives are set forth in the Uniform Mentoring Plan, attached to that form. If any activities are not completed, you will be asked to explain the omission of those elements. A purpose of the pilot program is to ascertain which activities are feasible and appropriate to require and your explanations will be important in that determination. Fulfillment of your mentoring obligations will also qualify for 4 hours of South Carolina MCLE credit in the year in which the mentoring is completed.

We thank for your participation as a mentor.

Sincerely,

ATTACHMENT E
(PDF Version)

CERTIFICATE OF COMPLETION
SOUTH CAROLINA UNIFORM MENTORING PLAN

Name of Lawyer Being Mentored (Print): _____

For the Mentoring Period beginning _____, 20__ and ending _____, 20__.

The undersigned participants in the South Carolina Lawyer Mentoring Program certify that, with the exceptions noted below, if any, they have completed their agreed upon mentoring plan, consistent with either the Uniform Mentoring Plan or a mentoring plan approved as compliant with the requirements of the South Carolina Lawyer Mentoring Program.

The following parts of the mentoring plan were not completed:
_____
_____
_____.

Any recommendations or suggestions of the participants for changes in the Uniform Mentoring Plan or other aspects of the mentoring program are attached as Attachment C (Recommendations by Mentor) and/or Attachment D (Recommendations by Lawyer Being Mentored).

The undersigned Mentor (___does/ ___does not) work in the same office or firm as the undersigned Lawyer Being Mentored.

MENTOR	**LAWYER BEING MENTORED**
Signature: _____	Signature: _____
Print Name: _____	Print Name: _____
S.C. Bar Membership Number: _____	S.C. Bar Membership Number: _____
Date: _____	Date: _____

Submit Completed Form within 30 days after the end of the mentoring period to:

Commission on Continuing Legal Education and Specialization
Post Office Box 2138
Columbia, South Carolina 29202

ATTACHMENT F
(PDF Version)

RECOMMENDATIONS AND COMMENTS BY MENTOR

(This form may be used by the Mentor to provide recommendations or comments to those evaluating the pilot mentoring program. Of particular interest to the evaluators are recommendations regarding the deletion or addition of elements in the Uniform Mentoring Plan.)

ATTACHMENT G
(PDF Version)

RECOMMENDATIONS AND COMMENTS BY NEW LAWYER

(This form may be used by the New Lawyer to provide recommendations or comments to those evaluating the pilot mentoring program. Of particular interest to the evaluators are recommendations regarding the deletion or addition of elements in the Uniform Mentoring Plan.)

The Supreme Court of South Carolina

O R D E R

The following form is hereby approved for use by law schools under Rule 402(n)(2), SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 3, 2010

Request for Release of Information Pursuant to Rule 402(n)(2) of the South Carolina Appellate Court Rules

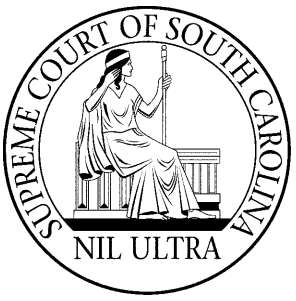
I, _____, Dean of the _____ School of Law (Law School), located at_____, hereby request that the Clerk of the Supreme Court of South Carolina release the following information regarding applicants taking the South Carolina Bar Examination who are graduates of the Law School: the names of the applicants who took the Examination and whether they passed or failed the Examination, the number of times each applicant has taken the South Carolina Bar Examination, the Law School Admission Council number for each applicant, and the overall pass rate of the applicants on each section of the Bar Examination. If this information is released, the Law School understands and agrees that this information shall be kept confidential by the Law School, shall only be used for statistical analysis, and shall only be released for purposes of reporting aggregated information to accrediting bodies.

The Law School understands that this request shall be construed as a continuing request for subsequent Examinations unless withdrawn in writing by the Law School.

_____
Signature of Dean

Subscribed and sworn to before me
this _____ day of _____, 20___.

_____
Notary Public for _____
My Commission expires _____



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 48
December 6, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John E. Cheatham, Respondent.

Opinion No. 26896
Submitted November 8, 2010 – Filed December 6, 2010

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

John E. Cheatham, of Lexington, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of an admonition or a public reprimand, agrees to complete the Legal Ethics and Practice Program Ethics School and Trust Account School, and to pay the costs of these proceedings. We accept the agreement and issue a public reprimand. Further, respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School within one (1) year of the date of this opinion and shall pay the costs of these proceedings within thirty (30) days of this opinion. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

Respondent represented the plaintiff in a post-divorce domestic action. The parties reached a verbal agreement at a hearing and the family court instructed respondent to draft a proposed order. The next day, respondent faxed his original proposed order to opposing counsel for review. In response, opposing counsel drafted his own version of the proposed order and faxed it to respondent. Respondent has no record or recollection of receiving opposing counsel's draft, but does not dispute opposing counsel's records demonstrating his version of the draft order was successfully faxed to respondent's office.

Unaware of opposing counsel's response, respondent again faxed his original proposed order to opposing counsel. He attached the same fax cover sheet he had previously used but marked "second request" and the date at the bottom of the document. Approximately a week later, respondent submitted his proposed order to the family court along with a copy of his fax cover sheet indicating he had made a third attempt to receive opposing counsel's input on the proposed order before submitting it to the court. The fax cover sheet warned that the proposed order would be given to the judge on a specific date if opposing counsel had not responded. Although he asserts he sent the "third request" fax to opposing counsel, respondent cannot document transmission of the fax to opposing counsel and opposing counsel insists he did not receive the "third request" fax.

Respondent did not serve opposing counsel with a copy of the proposed order when he submitted it to the family court. It was not until respondent received additional correspondence in which opposing counsel inquired about the proposed order and asked respondent not to submit it to the court until they reached an understanding that respondent advised he had already submitted the order to the family court. By that time, the judge had already signed and filed the order. Ultimately, additional litigation was necessary to resolve issues opposing counsel had with the order.

Respondent admits his submission of the proposed order to the family court without serving it at the same time and by the same manner on opposing counsel violated Rule 5(b)(3), SCRCP. He further admits his conduct violated Rules 3.4(c) and 3.5(b), RPC, Rule 407, SCACR, although he submits his violation of these rules was unintentional and inadvertent. Respondent believed when he submitted his original proposed order to the court that he had complied with Rule 5, SCRCP, because he had previously submitted it to opposing counsel for review and was unaware of opposing counsel's response.

Matter II

Complainant A hired respondent to represent her in a divorce action and custody action. Respondent filed the complaint. At the temporary hearing, the family court awarded Complainant A temporary custody, set visitation as Complainant A had requested, and appointed a Guardian ad Litem (GAL). The family court instructed respondent to prepare the proposed order.

Before the order was drafted and signed, Complainant A attempted to pay her portion of the GAL's retainer. The GAL would not accept payment until the court had issued a written order so Complainant A submitted her check to respondent's office with the intention it would be forwarded to the GAL at the appropriate time. Respondent's assistant mistakenly believed the check was for earned legal fees and deposited the check into respondent's operating account. The error was not discovered for many months and was resolved only after the GAL threatened Complainant A with a contempt action for failing to pay her portion of the retainer and Complainant A twice informed respondent's office that she had submitted her portion of the retainer to the office. Respondent states that the first time Complainant A informed his office that she had given the retainer check to the office, she did not provide a copy of the check. When she provided a copy of the check, the error was quickly realized and resolved.

The temporary order respondent drafted and the family court signed erroneously set visitation by reference to a non-existent prior order rather than the pleadings. Respondent explains he erroneously referred to a prior order because the parties had been exercising visitation as set out in the temporary order from a prior domestic action in another county which had been previously dismissed for inactivity.

The erroneous reference in the order respondent drafted and the court signed resulted in confusion between the parties. Complainant A asked respondent to resolve the matter. Respondent attempted to have the order amended by consent, but the parties could not reach agreement on the language for an amended order.

Respondent admits he also failed to timely communicate the father's request for extended summer visitation to Complainant A.

Matter III

Complainant B hired respondent to represent her in a domestic matter involving child custody, visitation, and support. At the time respondent was hired, the parties were operating under an order from a prior action which gave custody of the child to the paternal grandmother and required both parents to pay child support to her through the family court.

Several months after the new action commenced, Complainant B advised respondent the parties had reached an agreement which opposing counsel would reduce to writing. Respondent repeatedly asked opposing counsel about the agreement, but did not receive any substantive response for several months.

Finally, opposing counsel faxed a proposed consent order to respondent. It provided that physical custody would be transferred to Complainant B, her child support arrearage would be forgiven upon receipt of a specified partial payment, and she would begin receiving child support from the father. Respondent informed opposing counsel

that the proposed order was satisfactory and asked him to provide a signature page for Complainant B to sign. Opposing counsel never provided a signature page for the parties to sign and did not submit the consent order to the family court for more than one year. However, in accordance with the parties' agreement, Complainant B paid her child support arrearage and the child was placed in her care. While Complainant B was operating under the agreement but no order existed, she could not prove the child was lawfully in her care, reportedly did not receive child support from the father, and did not have an enforceable child support order. Additionally, during this time, she was the subject of a contempt proceeding for the arrearage she owed to the grandmother under the prior order although that matter was successfully resolved with respondent's assistance.

Respondent admits he failed to adequately follow up on the status of the proposed consent order or take other actions to protect Complainant B's interests.

Matter IV

Respondent's bank reported that a check drawn on his trust account was dishonored for insufficient funds. Respondent acknowledges he issued a check to a client for the client's portion of a settlement before depositing the settlement funds into his trust account. Respondent deposited the settlement funds on the same day he issued the check to his client. A review of respondent's trust account records revealed he had a reserve of approximately $1,200.00 of his own funds in the account.

Respondent has now modified his office practice to ensure funds are deposited and collected before they are disbursed. Additionally, he has withdrawn his excess personal funds from his trust account and now maintains only enough of his personal funds in the account as is necessary to pay service charges.

Throughout the investigation of these matters, respondent has been fully cooperative with ODC.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); Rule 1.15(a) (lawyer shall hold property of client or third party which is in lawyer's possession in connection with representation separately from lawyer's own property); Rule 1.15(b) (lawyer may deposit the lawyer's own funds in client trust account for sole purpose of paying service charges on that account, but only in amount necessary for that purpose); Rule 1.15(d) (lawyer shall promptly deliver to client or third person any funds or other property that client or third person is entitled to receive and, upon request by client or third person, shall promptly render full accounting regarding such property); Rule 1.15(f) (lawyer shall not disburse funds from account containing the funds of more than one client or third person unless funds to be disbursed have been deposited in the account and are collected funds); Rule 3.4(c) (lawyer shall not knowingly disobey obligation under the rules of a tribunal); and Rule 3.5(b) (lawyer shall not communicate ex parte with a judge during proceeding unless authorized to do so by law or court order). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for a lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. Within one (1) year of the date of this opinion, respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account

School and, within thirty (30) days of the date of this opinion, he shall pay the costs of these proceedings.

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Harry Ennis Bodiford, Respondent.

Opinion No. 26897
Submitted November 8, 2010 – Filed December 6, 2010

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Susan B. Hackett, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Harry Ennis Bodiford, of Clemson, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

In December 2007, Complainant retained respondent to represent him in a civil action against several defendants concerning problems with a lawn mower. Complainant paid respondent a retainer of $150.00 and $85.00 to cover court costs.

Although he never filed suit on Complainant's behalf, respondent assured Complainant that his case was progressing. These assurances were not truthful as respondent had neither filed a lawsuit on respondent's behalf nor entered into any negotiations with the putative defendants.

During the period between December 2007 and May 2010, respondent did not adequately communicate with Complainant and did not return many of Complainant's telephone calls. Respondent did not pursue Complainant's claim diligently and failed to expedite litigation on Complainant's behalf.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for a lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent’s misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Patrick James Thomas Kelley, Respondent.

Opinion No. 26898
Submitted November 8, 2010 – Filed December 6, 2010

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Patrick James Thomas Kelley, of Bluffton, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

On May 16, 2008, respondent served as the closing attorney in a transaction where Complainant was the purchaser of a home and related property. On or about October 16, 2008,

Complainant informed respondent that she had just discovered the property was still listed in the name of the previous owner.

Respondent represents that the original documents were sent to his abstractor for recording. He also represents that the documents were returned to his office as the deed did not have the consideration on its face and needed an affidavit of true consideration in order to be recorded. Respondent further represents that he made corrections and placed the documents in the courier bag on May 23, 2008, for re-delivery and filing.

Respondent agreed to assist Complainant with correcting the error and getting the deed recorded. Respondent admits he failed to pursue and to keep Complainant reasonably informed about the status of the matter.

Complainant hired a new attorney to assist with the correction and filing of the deed. Respondent failed to respond to requests for information from Complainant's new attorney. Ultimately, the deed was re-signed by the previous owner and filed by Complainant's new attorney without respondent's assistance.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); and Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for a lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Archie Patrick, Respondent.

Opinion No. 26899
Submitted November 22, 2010 – Filed December 6, 2010

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

James Archie Patrick, of Shepard, Montana, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to disbarment pursuant to Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

On or about May 5, 2005, respondent was charged by information with two (2) counts of Assault with a Weapon (Felony) and one (1) count each of Partner or Family Member Assault

(Misdemeanor), Intimidation (Felony), and Tampering with Witnesses and Informants (Felony). The information was issued in Yellowstone County, Montana. On August 26, 2005, the Court placed respondent on interim suspension. In the Matter of Patrick, 365 S.C. 425, 618 S.E.2d 920 (2005).

On or about October 24, 2007, respondent was convicted of two counts of Assault with a Weapon (Felony), one count of Partner or Family Member Assault (Misdemeanor), one count of Intimidation (Felony), and one count of Tampering with Witnesses and Informants (Felony). On or about March 25, 2008, respondent was sentenced to twenty years imprisonment on the first count of Assault with a Weapon (Felony), twenty years imprisonment to run consecutively on the second count of Assault with a Weapon (Felony), one year imprisonment to run consecutively on the count of Partner or Family Member Assault (Misdemeanor), ten years imprisonment to run consecutively on the count of Intimidation (Felony), and ten years imprisonment to run consecutively on the count of Tampering with Witnesses and Informants (Felony). The Montana Supreme Court affirmed the convictions on or about June 30, 2009.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(c) (it is professional misconduct for a lawyer to commit a criminal act involving moral turpitude); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Further, respondent admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a)(4) (it shall be ground for discipline for lawyer to be convicted of a crime of moral turpitude or a serious crime), and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

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

DISBARRED.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Fred Wallace Woods, Jr., Respondent.

Opinion No. 26900
Submitted November 8, 2010 – Filed December 6, 2010

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard, of Law Office of Desa Ballard, of West Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of an admonition or a public reprimand. In addition, respondent agrees to complete the Legal Ethics and Practice Program Ethics School within one (1) year of the Court's opinion and to read and to require each of his employees to read the South Carolina Notary Public Manual published by the South Carolina Secretary of State within twenty (20) days of the date of the Court's opinion. We accept the agreement and issue a public reprimand. Further, respondent shall complete the Legal Ethics and Practice Program Ethics School within one (1) year of the date of this opinion and he shall read and require each of his employees

to read the South Carolina Notary Public Manual published by the South Carolina Secretary of State within twenty (20) days of the date of this opinion. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

A staff member accompanied respondent during a lengthy initial consultation with a domestic client. The staff member had the client sign a verification of the complaint at the meeting even though the complaint had not yet been prepared. The staff member also notarized the verification at the initial consultation. Although the verification was executed before the complaint was drafted, a different member of respondent's staff reviewed the complaint with the client in detail by telephone before the complaint and verification were filed.

Later, just before a temporary hearing, the staff member who notarized the client's verification of the complaint presented the client with an affidavit for the client's signature which the staff member had already notarized. This staff member is no longer employed by respondent.

Matter II

In June 2007, a North Carolina law firm serving as closing coordinator for a credit counseling agency asked respondent to perform a real estate closing on property located in South Carolina. The deed was prepared by a South Carolina attorney representing the seller.

After the closing, respondent provided the closing documents to the North Carolina law firm for disbursement of closing funds and recording of the deed and mortgage. The deed was not timely recorded by that law firm because it lacked a proper legal description.

Respondent was not advised that the deed had been rejected, but acknowledges he did not follow up to ensure it had been recorded. When he learned of the ongoing issue in November 2007, respondent took immediate action and a corrective deed was prepared and recorded. In February 2008, a second defect in the deed was discovered and corrected.

Respondent admits he did not notify the purchaser of the problems with the recording of her deed or the efforts he made to correct the same on her behalf. The purchaser independently learned that her deed had not been timely recorded and was unaware at the time of her complaint that the deed had recently been properly corrected and recorded.

Matter III

Respondent represented the husband in a domestic case brought by the wife. At the start of a temporary hearing, respondent learned the court imposed an eight-page limit on affidavits. Respondent had intended to submit affidavits in excess of the page limit and, thus, selected three affidavits which complied with the court's rule. Respondent did not bring copies of the affidavits and other documents to the hearing. The court and opposing counsel agreed to proceed without the copies with the understanding opposing counsel would be provided with copies upon the arrival of respondent's staff member.

One of the submitted affidavits was that of respondent's client's mother who lived out-of-state, but whose affidavit was notarized by a member of respondent's staff. Respondent admits the document was not signed or affirmed by the client's mother in the notary's physical presence and it appears to have been signed by someone other than the client's mother.

Respondent explains that he and his employee spoke with his client's mother by telephone and video conference prior to mailing the affidavit to her and that he spoke with her upon receipt of the

signed affidavit. Although respondent acknowledges he was aware of how the document had been notarized and recognizes the notary procedure used was improper, he believed his client's mother had signed the document when he submitted it to the court. He further notes that his client's mother has since signed an affidavit which contains the same substantive information as the first affidavit.

Immediately after the hearing, respondent met with his client and employee in private before providing opposing counsel with copies of the documents he had submitted to the court. Respondent provided opposing counsel with six affidavits, including copies of the affidavits he had submitted to the court. Five of the affidavits bore "original signatures" for the affiants, while the signature of the notary on each document was a photocopy. Of those five affidavits, two bore signatures appearing to be those of the affiants (the client's sister and mother), although neither document had been signed by the purported affiant and neither document indicated it was a conformed copy. The client's mother and sister later signed statements containing the same substantive information contained in the original affidavits.

Soon after the hearing, respondent withdrew from the case as a result of a conflict of interest unrelated to these allegations, although he continued to represent his client for the limited purpose of preparing the temporary order requested by the court. Opposing counsel thereafter made several inquiries of respondent and his staff in an attempt to identify the notary appearing on the affidavits respondent had provided. Respondent did not respond to the inquiries because he did not believe he had a duty to confer with opposing counsel as to any subject other than the proposed order.

The staff member who notarized the affidavits provided to the court and opposing counsel in this matter is the same staff member who notarized the documents in Matter I. She is no longer employed by respondent.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); Rule 3.3(a) (lawyer shall not knowingly offer false evidence); Rule 5.3 (lawyer shall make reasonable efforts to ensure that non-lawyer employee's conduct is compatible with professional obligations of lawyer; lawyer shall be responsible for conduct of non-lawyer employee if lawyer knows of conduct at time when its consequences can be avoided or mitigated and fails to take reasonable action); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for a lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. Within one (1) year from the date of this opinion, respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School and, within twenty (20) days of the date of this opinion, he shall read and require each of his employees to read the

South Carolina Notary Public Manual published by the South Carolina Secretary of State.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur. BEATTY, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: South Carolina
Department of Motor Vehicles, Appellant,

In Re: Don C. Gillespie, Respondent

v.

The State of South Carolina, Defendant.

Appeal from Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 26901
Heard October 20, 2010 – Filed December 6, 2010

APPEAL DISMISSED

General Counsel Frank L. Valenta, Jr.; Deputy General Counsel Philip S. Porter; and Assistant Counsel Linda A. Grice, of Blythewood, for Appellant.

Paul L. Reeves, of Columbia, for Respondent.

Solicitor Donald V. Myers and Deputy Solicitor Samuel R. Hubbard, III, of Lexington, for Defendant.

JUSTICE KITTREDGE: The South Carolina Department of Motor Vehicles (SCDMV) appeals from an order of the circuit court establishing Respondent Don C. Gillespie's (Gillespie) right to a South Carolina driver's license. Because the SCDMV is not a party to this case, we dismiss the appeal.

In 2008, Gillespie petitioned the circuit court for a driver's license. The statute relied on by Gillespie directed service on the State through the Solicitor's Office. The matter proceeded to a hearing. The State did not object to the petition, and the trial court granted relief. Gillespie then served the order on SCDMV.

SCDMV responded by filing successive motions to reconsider under Rule 59, SCRCP. At no time did SCDMV file a motion to intervene under Rule 24, SCRCP. Noting SCDMV's lack of "standing,"[1] the trial court denied both motions to reconsider.

Although not a party, SCDMV filed a Notice of Appeal and attempted to portray itself as a party. In its notice, SCDMV unilaterally and without court authorization changed the caption from *Don C. Gillespie v. State of South Carolina* to *Don C. Gillespie v. South Carolina Department of Motor Vehicles*.

A well-known rule of appellate procedure is that only an aggrieved party may appeal. Rule 201(b), SCACR; *see also Condon v. State*, 354 S.C. 634, 642, 583 S.E.2d 430, 434 (2003) ("[T]he Attorney General is required, like everyone else, to formally intervene and become a named party before he can file an appeal."). Having failed to intervene as a party, SCDMV's appeal is dismissed.

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[1] The trial court referred to SCDMV's non-party status as a lack of standing.

APPEAL DISMISSED.

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

The Supreme Court of South Carolina

In the Matter of Amanda Graham Steinmeyer, Respondent.

ORDER

On October 10, 2010, respondent was charged with Distribution or Possession with Intent to Distribute a Schedule IV Drug, Possession of Prescription Medication in an Unlabeled Container, Possession of Less than One Gram of Methamphetamine or Cocaine Base (1st offense), Driving under the Influence (1st offense), and Open Container. She later pled guilty to Driving under the Influence and Open Container. The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Michael W. Tighe, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Tighe shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Tighe may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Michael W. Tighe, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Michael W. Tighe, Esquire, has been duly appointed by this Court and has the authority to receive

respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Tighe's office.

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

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

Columbia, South Carolina

December 2, 2010

The Supreme Court of South Carolina

RE: Amendments to South Carolina Appellate Court Rules

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the following amendments are made to the South Carolina Appellate Court Rules:

(1) Rule 402(n), SCACR, is amended to read as follows:

(n) Confidentiality.

(1) The files and records maintained by the Board of Law Examiners, the Committee on Character and Fitness, and the Clerk of the Supreme Court relating to Bar applications, Examinations, and admissions shall be confidential, and shall not be disclosed except as necessary for the Board, the Committee or the Clerk to carry out their responsibilities. The Board of Law Examiners, the Committee on Character and Fitness, and the Clerk may disclose information to the National Conference of Bar Examiners and to the bar admission authorities in other jurisdictions, and may disclose the names of those persons who have passed the Bar Examination or those who are or will be admitted and the date of their admission. The Supreme Court may authorize the release of confidential information to other persons or agencies.

(2) Notwithstanding the above, beginning with the results of the February 2011 Bar Examination, the Clerk may release the following information to law schools regarding applicants taking the South Carolina Bar Examination who are graduates of that law school: the names of the applicants who took the Examination and whether they passed or failed the Examination, the number of times each applicant has taken the South Carolina Bar Examination, the Law School Admission Council number for each applicant, and the overall pass rate of the applicants on each section of the Bar Examination. Any information released to law schools pursuant to this rule shall be kept confidential by the law school, shall only be used for statistical analysis, and shall only be released for purposes of reporting aggregated information to accrediting bodies. Each law school requesting the release of the above information shall, on a form approved by the Supreme Court, agree to comply with the confidentiality and use restrictions placed on this information.

(2) The phrase "Rule 402(i)" in Rules 405(k), 414(h), and 415(h), SCACR, is replaced with the phrase "Rule 402(n), SCACR."

(3) Rule 424, SCACR, is amended by adding the following:

(j) Confidentiality. The files and records maintained by the Clerk relating to the licensing of foreign legal consultants shall be confidential and shall not be disclosed except as necessary by the Clerk to carry out his or her responsibilities. The Clerk may disclose information to the National Conference of Bar Examiners and to the bar admission authorities in other jurisdictions, and may disclose the names of those persons who are licensed as foreign legal consultants and date of their licensing. The Supreme Court may authorize the release of confidential information to other persons or agencies.

These amendments shall take effect immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

December 3, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Shirley Mae Geer, Appellant.

Appeal from Greenwood County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4760
Heard May 19, 2010 – Filed November 24, 2010

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General A. West Lee, all of Columbia; and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

GEATHERS, J.: Shirley Mae Geer appeals her conviction for possession of crack cocaine. Geer asserts the trial court erred by (1) failing to dismiss the charges against her or to grant a continuance in order to give her time to request and review exculpatory evidence withheld by the State that was favorable to her defense; (2) denying her motion to quash the indictment on the ground of selective prosecution; (3) denying her motion to suppress drug evidence seized as the result of an unreasonable, warrantless, beneath-the-skin search that was unsupported by probable cause; and (4) denying her motion to suppress the drug evidence because the State failed to present a sufficient chain of custody. We affirm.

FACTS/PROCEDURAL BACKGROUND

At approximately 11:30 p.m. on the night of September 9, 2007, Officer Byrd and Officer Crisp responded to a dispatch call directing them to Butler Street (a dead-end street) in Greenwood County. Upon arriving at the location, they found Michael Leon Parks standing outside of his vehicle and Geer seated in the vehicle on the front, passenger seat. Officer Byrd began to question Parks about his reason for being at the location, and he determined that Parks was being dishonest. Officer Byrd continued to question Parks. After Officer Byrd told Parks that it would be in his best interest to be honest, Parks admitted that he had given Geer two rocks of crack cocaine in exchange for her performance of oral sex and that Geer had put the rocks in her mouth. Relying on Parks' assertion, Officer Byrd approached Geer and asked her to open her mouth. When Geer complied, Officer Byrd discovered two off-white, rock-like substances underneath her tongue. Officer Byrd then asked Geer to spit the rocks onto the hood of his patrol car, and she complied. He then scooped the rocks into a manila envelope and secured the envelope in the patrol car.

Before making any arrests, the officers telephoned their supervisor. Thereafter, they decided not to arrest Parks because the situation would embarrass his girlfriend and family and would cause him embarrassment at work. Instead, they gave him a courtesy summons for solicitation of prostitution. The officers also discussed how Parks was going to get home. They could not allow him to drive because he did not have a valid driver's license. This conversation was recorded on an audiotape from the patrol car

and later stored at the Greenwood County Police Department. Geer, however, was arrested, taken into custody, and charged with prostitution and possession of crack cocaine. Even though Parks admitted to distributing the crack cocaine to Geer, he was not charged with distribution of crack cocaine, and the charge against him for solicitation of prostitution was dismissed at the request of Officer Byrd. The charge against Geer for prostitution was also dismissed, and she proceeded to trial on the charge of possession of crack cocaine.

After Geer was arrested, Officer Byrd took the manila envelope containing the crack cocaine rocks to the Greenwood City Hall, where a field test was performed on them. After the substance was tested and weighed, it was placed in a "best bag"[1] with an assigned control number, documented, and put into the evidence locker. The evidence was then taken from the locker by Officer Ed Suddeth and transferred to the control evidence room. A few days later, Officer Suddeth took the evidence to the South Carolina Law Enforcement Division (SLED) to be analyzed. From the time Officer Suddeth removed the evidence from the evidence locker until he turned it over to the SLED log-in area to be placed in a vault, the seal on the best bag was intact and the chain of custody logs were signed.

SLED Officer Larry Zivkovitch, a drug analyst, retrieved the best bag from the log-in area on October 31, 2007, and on November 28, 2007, he performed an analysis on its contents.[2] The initial spot test indicated that

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[1] A best bag is a sealable envelope in which evidence is placed. In order to ensure that it is not tampered with, after the bag is sealed, a blue line sticker is placed on it. If it is ever tampered with, the line would break and it would be easy to detect that the contents had been compromised.

[2] The record indicates that the evidence was in the custody of Officer Zivkovitch from October 31, 2007, until he took it "back down to the vault, down in the log-in area for the officers to pick back up." Officer Zivkovitch did not perform the test until November 28, 2007. The record does not indicate exactly where within Officer Zivkovitch's custody the evidence was actually secured, and Geer made no objection concerning this issue.

there was a possibility that the substance was cocaine. Officer Zivkovitch then ran a second, instrument-based test used by scientists (an FTIR test)[3] on the substance, and it was positively identified as cocaine base, commonly known as crack. After Officer Zivkovitch analyzed and weighed the substance, he placed it in a heat-sealed bag with his initials underneath the heat seal and returned it to the evidence log-in area to await its transfer by the Greenwood Police Department.

Geer's trial was held on February 28, 2008, in Greenwood County. The trial lasted one day, and the jury returned a verdict of guilty on the charge of possession of crack cocaine. As a result of her conviction, Geer was sentenced to two years' incarceration, suspended upon two years' probation with substance abuse counseling and random drug and alcohol testing, and a $500 fee was imposed upon her for the use of the public defender. This appeal followed.

ISSUES ON APPEAL

The issues on appeal are: (1) whether the trial court erred in denying Geer's motion for a continuance; (2) whether the trial court erred in denying

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[3] A Fourier Transform Infrared Spectroscopy (FTIR) or Full Spectrum Scan is an instrument that "shines infrared light through a sample" substance.

> [T]he light that is absorbed or transmitted is measured by the instrument. An IR spectrum, or printout, is created that shows the light absorbed at different wavelengths. An IR spectrum is much like a fingerprint in that it is unique to a substance and can therefore be used to make a positive identification.

State of Alaska Department of Public Safety, Scientific Crime Detection Laboratory, Controlled Substances, http://www.dps.alaska.gov/Crimelab/services/controlledsubstances.aspx (last visited Aug. 3, 2010).

Geer's motion to quash the indictment, asserting selective prosecution by the State; (3) whether the trial court erred in denying Geer's motion to suppress the drug evidence, asserting that it was obtained through an unconstitutional, warrantless search; and (4) whether the trial court erred in denying Geer's motion to suppress the drug evidence because the State failed to present a sufficient chain of custody.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." Id. "This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Id.

LAW/ANALYSIS

I. Motion for Continuance

Geer argues the trial court erred when it denied her motion for a continuance because evidence was withheld by the State until the day before trial. We disagree.

"The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion." State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-50 (Ct. App. 2006) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law."). Even if there was no evidentiary support, "[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant." State v.

Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005); see also State v. Wyatt, 317 S.C. 370, 372-73, 453 S.E.2d 890, 891 (1995) (stating that error without prejudice does not warrant reversal). "[R]eversals of refusal of continuance are about as rare as the proverbial hens' teeth." State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

In addressing the merits of Geer's motion for a continuance, we first analyze her contention that the State withheld evidence that was favorable to her defense until the eve of trial in violation of Rule 5, SCRCrimP. Rule 5(a)(1)(C), SCRCrimP, states in part:

> Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects . . . which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial . . . .

In the present case, the evidence presented to Geer by the State the evening before the trial was an audiotape of the arrest. According to Rule 5, SCRCrimP, if the evidence was considered "material to the preparation of [her] defense . . . and intended for use by the prosecution as evidence in chief at the trial," Geer had a right to possession and review of the audiotape. Geer argued "under the solicitor's program, the State was required to provide all discovery at the initial appearance or provide a list of things that were outstanding," but the record does not indicate that Geer requested that the State provide any evidence as required under Rule 5.

Geer was arrested and charged with possession of crack cocaine on September 9, 2007, but her trial was not held until February 28, 2008. She had ample time to request and receive discovery information before the eve of trial. Geer did not request any information regarding the night of her arrest but relied upon the State's production of the audiotape on the eve of trial. Geer has not shown that the discovery of information contained on the audiotape was a denial of evidence that was material to the preparation of her defense, thereby rising to the level of a Rule 5 violation. Further, the

audiotape provided evidence that served to inculpate rather than exculpate her. That is, the evidence provided proof that Geer was in fact in possession of crack cocaine on the night of her arrest. Furthermore, the record does not indicate the State intended to use the audiotape "as evidence in chief at the trial." In fact, a thorough review of the record reveals that the State never introduced the audiotape or a transcript of its contents into evidence. The facts show that there was no violation of Rule 5, and the trial court did not err in denying Geer's motion for a continuance.

In conjunction with her assertion of a violation of Rule 5, SCRCrimP, Geer also maintains that the State's withholding of evidence was in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). The State argues that Geer did not raise the issue of a Brady violation in support of her motion to dismiss at the trial, and thus, it is not preserved for our review.

The State is correct in its argument that Geer did not explicitly state its late delivery of the evidence constituted a Brady violation; however, Geer presented arguments "sufficiently specific to bring into focus the precise nature of the alleged error so that it [could] be reasonably understood by the trial judge." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003); see also State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (explaining that even though exact words are not used to argue an issue, if it is clear from the argument presented in the record that the motion was made on a particular ground, the argument will be considered raised to the trial court and will be preserved for review).

Nevertheless, Geer has not established that a Brady violation occurred. There are three categories of Brady violations: "(1) cases that include [non-disclosed] evidence of perjured testimony about which the prosecutor knew or should have known, (2) cases in which the defendant specifically requested the [non-disclosed] evidence, and (3) cases in which the defendant

made no request or only a general request for Brady material." Gibson v. State, 334 S.C. 515, 524-25, 514 S.E.2d 320, 325 (1999).

"Brady only requires disclosure of evidence which is both favorable to the accused and material to guilt or punishment." State v. Taylor, 333 S.C. 159, 177, 508 S.E.2d 870, 879 (1998) (citing United States v. Bagley, 473 U.S. 667 (1985)). "A Brady claim is based on the requirement of due process." Gibson, 334 S.C. at 524, 514 S.E.2d at 324. To establish a due process violation, an accused must demonstrate "(1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Id.

Moreover, the State's late disclosure of the evidence did not impair Geer's ability to present a defense regarding whether she possessed crack cocaine. A Brady violation would have occurred only had the evidence been favorable to the defense, the State possessed and withheld it, and it was material to Geer's guilt or punishment. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. Also, "[n]o due process violation occurs as long as Brady material is disclosed to a defendant in time for its effective use at trial." United States v. Smith Grading & Paving, Inc., 760 F.2d 527, 532 (4th Cir. 1985). Geer has not established a Brady violation occurred such that there is a reasonable probability the result of her trial would have been different had she received the evidence earlier. The audiotape was not played during trial nor did Geer attempt to use its contents to establish a defense to the charge of possession of crack cocaine. As such, the trial court did not err in denying Geer's motion for a continuance based on a Rule 5, SCRCrimP, or a Brady violation. Thus, the decision of the trial court to deny her motion for a continuance is affirmed.

II. Motion to Quash Based on Selective Prosecution

Geer argues the trial court erred when it denied her motion to quash the indictment based on selective prosecution. The State argues that Geer's motion to quash based on selective prosecution was in reference to the charge

of prostitution, not on the drug possession charge, and is therefore not preserved for this Court's review. We conclude that the issue was preserved, but that the trial court did not err by denying Geer's motion to quash.

"It is well settled that an issue may not be raised for the first time in a post-trial motion." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). "Further, it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error." Id. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); see also Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002) (stating that to be preserved for appellate review, an issue must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.").

In this case, Geer argued selective prosecution because she was arrested for prostitution while Parks was not. Geer further argued that the decision not to prosecute Parks for distributing drugs was part of the overall scheme to protect his reputation as the prosecution of the drug charge would likely reveal his involvement in prostitution. The court, Geer, and the State discussed at length the State's decision to prosecute Geer for drug possession while declining to charge Parks with drug distribution. Ultimately, the court denied Geer's motion to quash the indictment against her. Accordingly, because the issue of selective prosecution on the drug charge was sufficiently raised and ruled upon, we hold that it has been preserved for this Court's review.

Nevertheless, while we find the State's exercise of its prosecutorial discretion troublesome, we conclude that Geer's argument fails on the merits. There are two prongs that a defendant must satisfy to establish selective prosecution. First, "a defendant must first demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted." United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978). "Second, the defendant

must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his exercise of his [F]irst [A]mendment right to free speech." Id.

"Courts look suspiciously on selective prosecution claims because they 'ask[ ] the court to exercise judicial power over a "special province" of the Executive [branch].'" State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 200, 525 S.E.2d 872, 885 (2000) (quoting United States v. Armstrong, 517 U.S. 456 (1996)) (first alteration by court). Because of this balance of powers concern, a '"presumption of regularity supports' . . . prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.'" Armstrong, 517 U.S. at 465 (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926)).

In order to prevail on a claim for selective prosecution, Geer would have to show not just that she "had been singled out for prosecution, but that the decision to prosecute was based on unconstitutional considerations." United States v. Marcum, 16 F.3d 599, 602 (4th Cir. 1974). "A defendant may demonstrate that the administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law." Armstrong, 517 U.S. at 464-65 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)) (omission by court).

"In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." Wayte v. United States, 470 U.S. 598, 607 (1985) (quoting United States v. Goodwin, 457 U.S. 368, 380, n.11 (1980)). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). Here, Geer has not established that she was singled out for prosecution on unconstitutional grounds. She has not alleged nor does the record contain anything to show that the State chose to prosecute her based solely on impermissible grounds such as her gender or race. As a result, she has not proven that the State's decision to prosecute her constitutes selective

prosecution warranting reversal of the trial court's denial of her motion to quash.

III. Warrantless, Beneath-the-Skin Search and Probable Cause

Geer argues the trial court erred when it denied her motion to suppress drug evidence on the ground that it was obtained through an unconstitutional, warrantless, beneath-the-skin search because the search was unsupported by probable cause. We disagree.

"When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial judge's ruling if there is any evidence to support the ruling." State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004). The trial court's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666-67 (2000) (stating that a private search is a question of fact and the trial court's ruling will be reversed only if there is clear error).

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

Similarly, the South Carolina Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall

> issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

S.C. Const. Art. I, § 10.

With respect to searches involving intrusions beyond the body's surface, the United States Supreme Court has held:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Schmerber v. California, 384 U.S. 757, 769-70 (1966).

The acquisition of beneath-the-skin evidence requires certain considerations, namely, the existence of "probable cause to believe the suspect has committed the crime," "a clear indication that relevant material evidence will be found," and "the method used to secure [the evidence] is safe and reliable." State v. Baccus, 367 S.C. 41, 53-54, 625 S.E.2d 216, 222-23 (2006). Probable cause merely requires that,

> [T]he facts available to the officer would 'warrant a man of reasonable caution in the belief,' that certain items may be . . . . useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.

Texas v. Brown, 460 U.S. 730, 742 (1983) (quoting Brinegar v. United States, 338 U.S. 411, 418 (1981)). "Probable cause may be found somewhere between suspicion and sufficient evidence to convict." State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999).

In the case at hand, the police responded to a call at approximately 11:30 p.m. on a dead end street and found Geer and Parks with Parks' vehicle. When Officer Byrd questioned Parks as to why they were there, Parks began to act suspiciously and lied about the circumstances surrounding his presence at the scene. This caused Officer Byrd to believe that Parks and Geer may have been involved in criminal activity. Upon further questioning and against his interests, Parks admitted that he and Geer had been engaged in an act of prostitution and that he had paid Geer for the act with illegal drugs. Parks informed the officers that Geer had placed the drugs in her mouth, underneath her tongue. This information gave Officer Byrd a clear indication that if he searched Geer, "relevant material evidence" would be found.

Even though he initially lied about what they were doing at the scene, Parks' eventual truthful admission gave Officer Byrd the probable cause necessary to conduct a search of Geer's mouth, and the search was not based upon a "mere chance that [the] desired evidence might be obtained." Schmerber, 384 U.S. at 70. The facts available to Officer Byrd led him to believe that a criminal offense had occurred and that Parks and Geer were involved. Considering the totality of the circumstances (the lateness of the hour, the dead-end street, Parks' initial suspicious behavior and his eventual admission against his interest) Officer Byrd had a clear indication that not only had a criminal act taken place but also that evidence would be found. The record indicates that Officer Byrd did not reach into Geer's mouth but asked her to spit the rocks onto the hood of the patrol car and she complied, thus, ensuring the evidence was found and retrieved in a safe and reliable manner.

Furthermore, our Supreme Court has held, "[a] suspect has no constitutional right to destroy or dispose of evidence by swallowing, consequently he cannot consider the mouth a 'sacred orifice' in which contraband may be irretrievably concealed from the police." State v. Dupree, 319 S.C. 454, 458, 462 S.E.2d 279, 282 (1995) (quoting State v. Williams,

560 P.2d 1160, 1162 (Wash. Ct. App. 1977)). Given the nature of the evidence and the manner in which Geer sought to conceal it, it was necessary for Officer Byrd to immediately seize the evidence in order to ensure that Geer did not destroy it by swallowing it. Baccus, 367 S.C. at 53, 625 S.E.2d at 222.

As stated, when an appellate court reviews a Fourth Amendment search and seizure case, it must affirm the trial court's ruling if any evidence supports the ruling. State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004). In this case, we agree with the trial court, finding sufficient evidence supports the search and seizure. Accordingly, Geer has not shown that the trial court committed clear error when it allowed the evidence to be admitted. Even though Officer Byrd did not secure a warrant for the search of Geer's mouth due to the nature of the evidence and the possibility that it could be easily destroyed, this Court finds that the trial court properly found the search constitutional and supported by probable cause. Consequently, this Court finds no Fourth Amendment violation and the trial court's denial of Geer's motion to suppress the evidence is affirmed.

IV. Chain of Custody

Geer argues the trial court erred when it denied her motion to suppress the drug evidence because the State failed to present a sufficient chain of custody. We disagree.

"[A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). "In applying this rule, [the South Carolina Supreme Court] has held that where a party has established the identity of each person in the chain of custody, issues regarding the care of the evidence only go to the weight of the specimen as credible evidence, and not its admissibility." Id. at 8, 647 S.E.2d at 206. "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

At trial, the State submitted testimony sufficient to prove the chain of custody from the time Officer Byrd secured the evidence in the patrol vehicle at the scene of the arrest until it was returned to the custody of the Greenwood Police Department. There was also testimony that the blue line seal and the heat seal on the envelope containing the evidence, although opened by each person who tested it, had not been tampered with. At trial, the evidence was also presented, examined, and found to be intact.

Geer argues that because the State admits that there were inconsistencies in the affidavit that was submitted regarding Officer Suddeth's receipt of the evidence from Officer Byrd, the admission of the evidence should be suppressed. The affidavit states that the evidence was received "in person"; however, Officer Suddeth actually retrieved the evidence from the evidence locker. The custody form that is used to log in evidence lists two choices when logging the evidence, "in person" or "via mail." The discrepancy was explained to and accepted by the trial court that as a matter of standard procedure, when filling out a form, if the receiver takes the evidence from the evidence locker, he or she has no other choice but to log it as received "in person." The discrepancy was not a blatant disregard for the truth of how the evidence was transferred. Additionally, Geer argues that there was a discrepancy of one tenth of a gram in the actual weight of the substance when it was logged by Officer Byrd compared to when it was logged by Officer Zivkovitch. That discrepancy was explained to and accepted by the trial court as resulting from the field testing done at City Hall.

"While proof need not negate all possibility of tampering, it is generally held that the party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed." Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957) (internal citation omitted). Conversely, if the State had failed to establish an adequate chain of custody such that the inconsistency or discrepancy in the chain was critical, the chain of custody would have been considered fatally deficient and the trial court would have erred in admitting the evidence. State v. Joseph, 328 S.C. 352, 364-65, 491 S.E.2d 275, 281-82 (Ct. App. 1997). Here, the State has established a complete chain of custody

from the time the evidence was taken from Geer until it was admitted at trial. None of the minor discrepancies rise to the level of reversible error. Consequently, the decision of the trial court to deny Geer's motion to suppress the evidence based on an insufficient chain of custody is affirmed.

CONCLUSION

Based on the foregoing, the trial court did not err or abuse its discretion when it denied Geer's motion for a continuance, her motion to quash based on selective prosecution, and her motion to suppress the drug evidence. Accordingly, the decision of the trial court is

AFFIRMED.

KONDUROS, J., concurs.

LOCKEMY, J., dissents.

LOCKEMY, J: I agree with the majority that the State's exercise of its prosecutorial discretion is "troublesome" to say the least. However, I respectfully dissent because I believe the search of Geer's mouth violated the Fourth Amendment's prohibition against an unreasonable search. The only fact available to Officer Byrd indicating a search of Geer's mouth would reveal relevant material evidence was Parks's mere assertion that Geer had placed drugs in her mouth, which he made after previously lying to Officer Byrd. I would hold this sole assertion from someone with doubtful veracity is insufficient to establish a clear indication drugs would be found in Geer's orifice to support a search. U.S. Const. amend. IV; S.C. Const. art. I, §10; see State v. Dupree, 319 S.C. 454, 459, 462 S.E.2d 279, 282 (1995) (finding a clear indication drugs would be found in Dupree's mouth existed where officers observed Dupree standing in a laundromat known for drug activity, holding what the they believed were drugs, placing his hand to his mouth and attempting to leave through the back door). As in Dupree, I believe more facts are necessary to establish a clear indication.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert Coake and Susan Coake, Appellants/Respondents,

v.

Kathleen Burt, n/k/a Kathleen Thomason, Respondent/Appellant.

Appeal From Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No.4761
Heard June 22, 2010 – Filed December 1, 2010

REVERSED

James A. Blair, III and Kirsten E. Small, both of Greenville, for Appellants/Respondents.

Harold P. Threlkeld, of Anderson, for Respondent/Appellant.

LOCKEMY, J.: Robert and Susan Coake (the Coakes) argue the trial court erred in granting Kathleen Thomason Davis's[1] (Davis) motion for a directed verdict on their cause of action for violation of the Residential Property Condition Disclosure Act[2] (the Disclosure Act). Davis cross-appeals and maintains the trial court erred in failing to award her attorney's fees. We reverse.

FACTS

In July 2004, the Coakes purchased property located at 2203 East North Avenue in Anderson, South Carolina (the Property) from Davis for $296,900. The Property consisted of a house, free-standing garage and apartment, pool, and pool house on approximately two acres. Prior to the sale, Davis completed a Residential Property Condition Disclosure Statement (the Disclosure Statement) as required by the Disclosure Act. In addition, a licensed professional home inspector hired by the Coakes completed an inspection of the Property on June 28, 2004. According to Robert Coake, he did not receive the inspection report until during or after the closing on July 13, 2004. Robert Coake spent between one and two hours personally inspecting the Property before closing.

In May 2005, the Coakes filed suit against Davis alleging she violated the Disclosure Act and committed fraud. During a jury trial held in July 2007, the Coakes alleged Davis failed to make certain disclosures in the Disclosure Statement regarding the Property.[3] The Coakes alleged Davis made the following misrepresentations:

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[1] Formerly known as Kathleen Burt.

[2] S.C. Code Ann. §§ 27-50-10 to -110 (2007).

[3] The Disclosure Statement enumerates twenty-four items concerning various aspects of the Property that may have problems. For each item on the Disclosure Statement, the homeowner can answer "Yes," "No," or "No Representation." According to the instructions, a "Yes" answer requires the homeowner to explain the problem. Furthermore, a "No" answer indicates

1. Underground fuel tank

The Coakes alleged Davis failed to disclose an underground fuel tank on the Property. Item number 14 on the Disclosure Statement required Davis to identify whether any "[e]nvironmental hazards (substances, materials or products) including asbestos, formaldehyde, radon gas, methane gas, lead-based paint, underground storage tank, toxic mold or other hazardous material (whether buried or covered), contaminated soil or water, or other environmental contamination" were located on the Property. Davis checked "Yes," underlined "asbestos," and wrote "#14 asbestos is present in basement" in the explanation area provided at the bottom of the Disclosure Statement. Davis testified it was not her intention to not disclose the underground tank, and that she disclosed it by checking "Yes."

2. Water leakage in basement

The Coakes alleged Davis failed to disclose water leakage in the basement. Item number 3 asked whether there was any "[w]ater seepage, leakage, dampness or standing water or water intrusion from any source in any area of the structure." Davis answered "No." She testified that although she knew about the leakage, she did not consider it to be a problem.

3. Termite bond

The Coakes alleged Davis incorrectly asserted there was a transferrable termite bond on the Property. In the Disclosure Statement, Davis indicated there was a transferrable termite bond on the Property. After closing, the Coakes discovered the termite bond expired two years before the sale. Davis testified she indicated there was a transferrable termite bond on the Property because she "assumed" there was a transferrable bond.

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the homeowner has no actual knowledge of any problem. Davis admitted she did not read the instructions prior to completing the statement.

4. Wood rot

The Coakes alleged Davis failed to disclose rotten wood on the garage doors and in the pool house. Davis indicated she did not have any knowledge of problems with any of the structural components of the Property. At trial, Davis testified she checked "No" because she was not aware of any problems with the garage or pool house.

5. Security system

The Coakes alleged Davis incorrectly asserted the house had a working security system. While Davis indicated the house had a working security system, Robert Coake testified the security system did not work. According to Davis, she stopped paying the security company when she moved out of the house two years before the sale, but the security system worked while she lived in the house.

6. Pool house plumbing

The Coakes alleged Davis failed to disclose problems with the plumbing in the pool house. Davis indicated there were no problems with any of the plumbing on the Property. The Coakes later discovered the pool house had no hot water because the supply line had become encased in concrete.

Robert Coake testified $10,090 of the $38,390 he and his wife spent on repairs and improvements to the Property was for repairs related to Davis's misrepresentations. The repairs made by the Coakes included: $2,500 for a new alarm system, $2,040 for filling and capping the underground fuel tank, $500 for repairs to the pool house plumbing, $450 for miscellaneous repairs by a contractor, and $4,600 for repairing wood rot in the garage, apartment, and pool house. In January 2006, the Coakes sold the Property for $440,000.

After the Coakes presented their case to the jury, the trial court granted a directed verdict to Davis on the Coakes' fraud claim. Following the presentation of Davis's case, the trial court granted a directed verdict to Davis on the Coakes' cause of action for violation of the Disclosure Act. In a written order, the trial court found a genuine issue of fact existed as to

whether Davis disclosed any material information on the Disclosure Statement that she knew to be false, incomplete, or misleading. In addition, the trial court found the Coakes' failure to conduct a reasonable examination of the Property and to review the inspection report violated their duty to exercise reasonable diligence or discretion to protect their own interests. The trial court determined the Coakes failed to prove damages because they realized a profit from the sale of the Property, did not repair all of the items that were not disclosed by Davis, and failed to relate any expenditure directly to Davis's failure to disclose. Thereafter, the Coakes moved for a reconsideration of the trial court's ruling on their Disclosure Act claim, and Davis moved for an award of attorney's fees and costs. The trial court denied both motions. This appeal followed. [4]

STANDARD OF REVIEW

In reviewing a motion for directed verdict, the appellate court applies the same standard as the circuit court. Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). The court must view the evidence and the inferences that can reasonably be drawn in the light most favorable to the nonmoving party. Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied. Bailey v. Segars, 346 S.C. 359, 366, 550 S.E.2d 910, 913 (Ct. App. 2001).

LAW/ANALYSIS

I. The Coakes' Appeal

A. Reasonable Inspection

The Coakes argue the trial court erred in granting Davis's directed verdict motion because the evidence presented at trial permits more than one

[4] The Coakes did not appeal the trial court's grant of a directed verdict on their fraud claim.

reasonable inference as to whether the Coakes reasonably inspected the Property. We agree.

The trial court determined the Coakes violated their duty to exercise reasonable diligence or discretion to protect their interests. In its order, the trial court noted the Coakes spent less than two hours inspecting the Property, and the defects complained of were open and obvious to anyone making a reasonable examination of the Property. Furthermore, the trial court noted the Coakes failed to review the home inspection report.

In addition to requiring sellers to disclose defects in their property, the Disclosure Act also requires buyers to inspect the property. See S.C. Code Ann. § 27-50-80 (2007) ("This article does not limit the obligation of the purchaser to inspect the physical condition of the property and improvements that are the subject of a contract covered by this article."). We find the evidence presented at trial allows for more than one reasonable inference as to whether the Coakes reasonably inspected the Property. Robert Coake testified he spent between one and two hours inspecting the Property before closing. Coake further testified his inspection was hindered by several factors including: (1) the rotten wood had been recently painted, (2) excessive overgrowth of vegetation prevented him from discovering the oil tank, and (3) the termite damage was not discoverable until the pool house floor was removed. Coake also testified the home inspection report was not available until it was faxed during or after the closing, and he and his wife were under time pressure to close because the closing date specified on the purchase contract had passed.

While the trial court determined the Coakes did not exercise reasonable diligence or discretion to protect their own interests, the reasonableness of the Coakes' actions is a factual question to be decided by the jury. See Unlimited Serv., Inc. v. Macklen Enter., Inc., 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991) (holding questions concerning reliance and its reasonableness are factual questions for the jury); see also Slack v. James, 364 S.C. 609, 615, 614 S.E.2d 636, 639 (2005) (holding a question of fact exists as to whether a Buyer's reliance on a Seller's misrepresentation is reasonable). Accordingly,

we find the trial court erred in failing to submit the question of whether the Coakes made a reasonable examination of the Property to the jury.[5]

B. Damages

The Coakes also argue the trial court erred in finding they failed to present sufficient evidence of damages from Davis's non-disclosures to submit the question of damages to the jury. We agree.

The trial court determined the Coakes failed, as a matter of law, to prove actual damages resulting from any alleged false, incomplete, or misleading disclosure made by Davis. In its order, the trial court noted the Coakes purchased the Property for less than $300,000 and spent less than $40,000 on repairs before selling the Property for $440,000. The trial court concluded that while the Coakes submitted a list of expenses in the amount of $38,398, those expenses related to improvements that presumably enabled them to realize a $143,100 gain from the sale of the Property.

Pursuant to the Disclosure Act, "[a]n owner . . . who discloses any material information on the disclosure statement that he knows to be false, incomplete, or misleading is liable for actual damages proximately caused to the purchaser and court costs." S.C. Code Ann. § 27-50-65 (2007). According to Robert Coake, he and his wife spent $10,090 on repairs for items not disclosed by Davis in the Disclosure Statement. Coake testified the repairs included: $2,500 for a new alarm system, $2,040 for filling and capping the underground fuel tank, $500 for repairs to the pool house plumbing, $450 for miscellaneous repairs by a contractor, and $4,600 for repairing wood rot in the garage, apartment and pool house. Coake further testified he was not claiming damages for any repairs that had not been made.

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[5] We decline to reach the issue of whether the scope of the Disclosure Statement extends to the detached structures on the Property. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding it is within the appellate court's discretion whether to address any of respondent's additional sustaining grounds); Id. at 421, 526 S.E.2d at 724 (stating the appellate court is "likely to ignore" any additional sustaining grounds not presented to the trial court).

We find the evidence presented at trial allows for more than one reasonable inference as to whether the Coakes established damages. Therefore, the trial court erred in failing to submit the issue of damages to the jury.

II. Davis's Appeal

Davis argues the trial court erred in failing to award her attorney's fees. Specifically, Davis contends she is entitled to attorney's fees as the prevailing party pursuant to section 27-50-65 of the South Carolina Code (2007). Based upon our reversal of the trial court's grant of a directed verdict, we need not address Davis's appeal. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Accordingly, the trial court's grant of a directed verdict on the Coakes' cause of action against Davis for violation of the Disclosure Act is

REVERSED.

KONDUROS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tache Franklin, Appellant.

Appeal From Orangeburg County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 4762
Submitted September 1, 2010 – Filed December 1, 2010

AFFIRMED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Julie M. Thames, all of Columbia; and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

SHORT, J.: Tache Franklin appeals his convictions for voluntary manslaughter and possession of a weapon during the commission of a crime.

Franklin argues the trial court erred in admitting his statement into evidence. We affirm.[1]

FACTS

Franklin was charged with murder, first-degree burglary, and possession of a weapon during the commission of certain crimes as a result of the investigation into Stephen Raines's (Victim) death. Officer James Shumpert of the Orangeburg County Sheriff's Office was the investigating officer and took Franklin's statement at the police station.

At trial, Franklin sought to suppress his statement. The trial court held a pre-trial Jackson v. Denno[2] hearing to determine the voluntariness of Franklin's statement. Shumpert testified that at 11:39 a.m. at the police station on the day of the shooting, he read Franklin his Miranda[3] rights from the Sheriff's Office's standard Miranda warning form. Franklin initialed next to each Miranda right on the form, proceeded to sign, then crossed out his signature and stated he did not want to talk. Franklin testified at the hearing the reason he initially refused to give a statement was because he wanted to speak to an attorney.[4] Shumpert testified Franklin did not ask for an attorney. Franklin was taken to a holding cell.

At approximately 3:00 p.m., Victim died and Officer Shumpert again met with Franklin to inform him of Victim's death. Franklin testified Officer Bamberg, of the Orangeburg County Sheriff's Office, was present and told him he could receive a life sentence. Franklin claimed Bamberg's threat of life imprisonment made him panic, and he "figured [he] had to tell them something." According to Shumpert, Franklin stated "I didn't kill no one," and indicated he wanted to talk. Shumpert again read Franklin his rights, and he signed the Miranda form. Franklin then gave Shumpert his statement.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.
[2] 378 U.S. 368 (1964).
[3] Miranda v. Arizona, 384 U.S. 436 (1966).
[4] At trial before the jury, Franklin testified he told the officers he wanted to talk to a lawyer.

When asked at the pre-trial hearing: "Did you freely and voluntarily give a statement to them?" Franklin responded: "Yes, I did." He admitted he was not forced or threatened or told he would spend the rest of his life in prison if he did not talk to them.

In the written portion of his statement, Franklin claimed he was at work when he received a telephone call from Damien asking for a ride to Corona Drive Apartments. Franklin called his friend, Anthony. Franklin, Damien, and Anthony met at the Citgo station. Damien got into the car with a shotgun, and Franklin dropped Anthony off "in the back" with his friend, Terrell. The men then went to the Corona Apartments. In his statement, Franklin continued:

> [T]hey went upstairs to do business. I was downstairs. I heard tumbling. I was getting ready to walk to the back with . . . Anthony and Terrell, then I heard a shot go off. I left the apartment walking because Damien had my keys. Later on got picked up by the police.

The latter portion of Franklin's statement consisted of questions asked by Shumpert and answered by Franklin.

The trial court found Franklin was given his Miranda warnings; the second interview was to advise him of a change in the case and that he was now faced with a murder charge; and the statement was not coerced and was freely and voluntarily made.

At trial, Franklin testified he and Anthony went to Victim's house to buy an ounce of cocaine for $600. Victim let him in the back door. Neither Franklin nor Anthony was armed. Franklin went upstairs with Victim while Anthony stayed downstairs. Victim told Franklin he needed $800. Franklin and Victim exchanged words, Franklin started to leave, Victim pushed Franklin then grabbed a rifle that was leaning against the wall. Franklin "rushed in," pushed Victim, and grabbed the gun. Franklin next tripped on a

shoe and fell into the closet. The two men tussled, and Victim snatched the gun from Franklin. Franklin pulled the trigger. Franklin admitted there was no person named "Damien" involved. He testified he lied in his statement to the police because he felt he had no choice and was panicked.

The trial court properly charged the jury it must first determine the voluntariness of Franklin's statement before considering it. The jury found Franklin guilty of voluntary manslaughter and possession of a weapon. The trial court sentenced Franklin to concurrent sentences of twenty and five years' imprisonment, respectively. This appeal followed.

STANDARD OF REVIEW

The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to constitute an abuse of discretion. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. When reviewing a trial court's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

LAW/ANALYSIS

Franklin argues the trial court erroneously admitted his statement because he invoked his right to silence and the police initiated contact on the same charges. Franklin maintains the admission of his statement was prejudicial error because it damaged his credibility. In his statement, Franklin blamed the shooting on a third person, but at trial he asserted self-defense. We affirm.

"A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda . . . ." State v. Aleksey, 343 S.C. 20, 30, 538 S.E.2d

248, 253 (2000). If a suspect invokes his right to counsel, police interrogation must cease unless the suspect initiates further communication with police. State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001).

The invocation of the right to remain silent, however, is not equivalent to the invocation of the right to counsel and "is not a permanent bar to police reinitiating contact with the suspect." State v. Benjamin, 345 S.C. 470, 476, 549 S.E.2d 258, 261 (2001) (citing Michigan v. Moseley, 423 U.S. 96 (1975)). If an accused invokes the right to remain silent, the police may resume questioning as long as the original request to cease questioning was "scrupulously honored." Id. (quoting Moseley, 423 U.S. at 102-04).

In Benjamin, our supreme court opined:

> Courts interpreting Mosley have set forth five factors to analyze to ascertain whether the defendant's right to cut off questioning was "scrupulously honored": (1) whether the suspect was given Miranda warnings at the first interrogation; (2) whether police immediately ceased the interrogation when the suspect indicated he did not want to answer questions; (3) whether police resumed questioning the suspect only after the passage of a significant period of time; (4) whether police provided a fresh set of Miranda warnings before the second interrogation; and (5) whether the second interrogation was restricted to a crime that had not been a subject of the earlier interrogation.

Id.

The defendant in Benjamin was arrested and taken to the sheriff's office. Id. at 475, 549 S.E.2d at 261. When asked by the officer if he wanted to talk, Benjamin invoked his right to silence, but according to the officer, did not request an attorney. Id. Approximately one hour later, a South Carolina

Law Enforcement Division ("SLED") officer investigating the case arrived. Id. Benjamin agreed to talk to the SLED officer and gave oral and written statements. Id. Finding the statements admissible, the supreme court stated: "[T]he Mosley factors are not exclusively controlling, nor do they establish a test which can be woodenly applied. Rather, the factors provide a framework for determining whether, under the circumstances, an accused's right to silence was scrupulously honored." Id. at 477, 549 S.E.2d at 261 (citations omitted). The court further concluded that a second interrogation is not unconstitutional merely for involving the same subject matter discussed in the first interview. Id. at 477, 549 S.E.2d at 262.

The Benjamin court found "a subsequent interrogation concerning the same crime does not, in and of itself, violate an accused's right to remain silent." Id. at 478, 549 S.E.2d at 262. Rather, "[w]hat is paramount is that police, under the totality of the circumstances, 'scrupulously honor'" a suspect's right to remain silent. Id. The court found Benjamin's right to remain silent was "scrupulously honored" as he had the right to cut off questioning at any time; the original officer immediately ceased questioning Benjamin upon his invocation of his right to remain silent; at least one hour passed before the SLED agent arrived; the SLED agent informed Benjamin of his Miranda rights; and Benjamin initialed and signed all the waivers. Id.

We likewise find, under the totality of the circumstances, Franklin's right to remain silent was "scrupulously honored." Franklin, after being advised of his Miranda rights, invoked his right to remain silent at approximately 11:39 a.m. on the day of his arrest. According to Officer Shumpert, Franklin did not invoke his right to counsel. More than three hours later, Officer Shumpert met with Franklin a second time to inform him of Victim's death. Shumpert again read Franklin his rights, and he signed the form. Although Officer Bamberg informed Franklin he could receive a life sentence, Franklin testified at the Jackson v. Denno hearing that he was not coerced or threatened, and he freely and voluntarily made his statement. We find, under the totality of the circumstances presented here, that the officers complied with the mandates of Moseley, and the trial court properly admitted Franklin's statement.

For the foregoing reasons, Franklin's convictions are

AFFIRMED.

THOMAS and LOCKEMY, JJ., concur.