The Supreme Court of South Carolina

In the Matter of Dan Thomas Coenen, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 1981, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated March 1, 2005, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Dan Thomas Coenen shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

March 16, 2005

The Supreme Court of South Carolina

In the Matter of Stephen K. Deay, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on October 1, 1973, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to South Carolina Bar, dated December 15, 2004, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Stephen Keith Deay shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

March 16, 2005

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13

March 21, 2005

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard Wehle, Jerry Miller and the Town of Wellford, on behalf of themselves and all others similarly situated, Respondents-Plaintiffs,

v.

The South Carolina Retirement System and the South Carolina Budget and Control Board, Petitioners-Defendants.

ORIGINAL JURISDICTION

Opinion No. 25951
Heard January 20, 2005 – Filed March 21, 2005

JUDGMENT FOR DEFENDANTS

Gedney M. Howe, III, of Law Offices of Gedney M. Howe, III, P.A., of Charleston; A. Camden Lewis, of Lewis, Babcock & Hawkins, L.L.P.; and Michael E. Spears, of Michael E. Spears, P.A., of Spartanburg, for respondents-plaintiffs.

Richard M. Gergel and W. Allen Nickles, III, of Gergel, Nickles & Solomon, P.A.; Stephen Van Camp, of South Carolina Retirement Systems, Edwin E. Evans, of S.C. Budget and Control Board; and

Kent Porth, of Nexsen, Pruet, Jacobs & Pollard, LLP, all of Columbia, for petitioners-defendants.

PER CURIAM: This case is before us in our original jurisdiction asking that we construe S.C. Code Ann. § 9-1-10(4) (Supp. 2003) which determines how unused annual leave is figured into the calculation of state retirement benefits.

We recently construed this provision in Kennedy v. South Carolina Retirement System, 345 S.C. 339, 549 S.E.2d 243 (2001). Kennedy involved the computation of "average final compensation" which is one of the factors used to calculate monthly state retirement benefits. Until 1978, average final compensation was defined under § 9-1-10(17) as:

> the average annual earnable compensation of a member during the three consecutive fiscal years of his creditable service producing the highest average.

As a matter of policy, retiring employees were given credit for unused annual leave in whatever amount had accrued although there was no statutory requirement that such credit be given.

In 1978, the legislature amended § 9-1-10(17) by adding a specific provision regarding unused annual leave:

> an amount up to and including forty-five days termination pay for unused annual leave may be added to the pay period immediately prior to retirement and included in the average as applicable.

In 1986, the legislature amended this provision regarding unused annual leave:

> An amount up to and including forty-five days termination pay for unused annual leave at retirement may be added to the average final compensation.

The plaintiffs in Kennedy claimed the change in the underscored language meant that the credit for unused annual leave should be added after the average final compensation is calculated, rather than simply factored into the average as previously provided, resulting in an increased benefit. The trial court found against the plaintiffs on August 19, 1997. On May 22, 2000, we issued our opinion reversing.

We granted rehearing in Kennedy, and on December 5, 2000, extensive oral arguments were heard. On May 22, 2001, we refiled our opinion, this time finding in favor of the Retirement System. We held the legislature could not have intended to bestow a benefit on retirees adding $1.177 billion in liability to the Retirement System without any fiscal impact analysis, floor debate, or the provision of additional funding. We concluded the employees' interpretation of the statute would lead to the absurd result of rendering the Retirement System actuarially unsound. Rehearing was denied on July 23, 2001.

Meanwhile, on May 11, 2000, before our original Kennedy opinion was issued, an amendment to the 2000-2001 Appropriations Bill was introduced. The amendment recodified the definitions found in § 9-1-10 and alphabetized them. The definition of average final compensation was renumbered as subsection (4) rather than (17), but otherwise it remained unchanged. This amended provision was ratified as part of the Appropriations Bill in Part II, § 67, Act No. 387, on June 22, 2000, one month after our initial decision in Kennedy.

The action now before us was commenced on September 24, 2001, two months after we refused to rehear the final Kennedy decision. Plaintiffs filed this case as a class action in Colleton County circuit court. The complaint alleges that the Retirement System has failed to add a credit for unused annual leave up to forty-five days to the average final compensation as required by the 1986 amendment to § 9-1-10(17); further, the failure to pay this additional benefit has resulted in overfunding the Retirement System in breach of the System's fiduciary duty. Plaintiffs claim their position is supported by the legislature's ratification of the same definition of average final compensation on June 18, 2000, after our initial Kennedy opinion which

construed that definition in favor of the employees. Plaintiffs seek payment of the amounts purportedly withheld illegally since 1986.

On October 25, 2001, defendants petitioned this Court to take the case in our original jurisdiction which we granted on December 4, 2001. We appointed then Circuit Judge John W. Kittredge as referee. Judge Kittredge filed his report on February 24, 2004, recommending the complaint be dismissed with prejudice. After careful consideration of the briefs and oral argument in this case, we hereby adopt Judge Kittredge's recommendations as reported below and enter judgment for defendants. Footnotes indicated by an asterisk are ours.

REFEREE'S ORDER

FACTS AND PROCEDURAL BACKGROUND

The South Carolina Retirement Systems (collectively, the "System") service several groups of state employees, active and retired. Of the four separate pension funds administered by the South Carolina Budget and Control Board (the Board), this case concerns the two largest funds, consisting of approximately 200,000 active employees and approximately 80,000 former employees in retired status. The South Carolina Retirement System (SCRS) is comprised of state employees, public school teachers and local governmental employees. This action further involves the Police Officer Retirement System (PORS).[1] The SCRS, as of July 2001, had a market value well in excess of $18 billion.

The System is administered under an elaborate statutory and constitutional scheme designed to protect the independence, integrity and actuarial soundness of the funds. The Board is directed to appoint a plan actuary whose responsibilities include the preparation of annual actuarial valuation. S.C. Code Ann. §§ 9-1-230, -240, -260 (1986). The actuarial valuation establishes the foundation for the determination of employer contribution rates and the ongoing monitoring of the actuarial soundness of

[1]The remaining two pension funds, unrelated to this case, are the Legislative Retirement System and the Judicial Retirement System.

the various components of the System. The employee contribution rate is set by the General Assembly and the employer rate is set by the Board upon the advice of the plan actuary and the findings and conclusions of the annual actuarial valuation. S.C. Code Ann. § 9-1-1020 (Supp. 2003). The actuarial valuation is relied upon in the preparation of the State's annual financial statement and by outside entities in rating the State for purposes of issuance of bonds.

South Carolina Constitution, Article X, § 16, grants the Board broad powers to protect the fiscal integrity of the retirement funds. Since 1979, the Board has been empowered to determine that no benefit increase granted by the General Assembly can be implemented until the Board first determines that "funding for such increase on a sound actuarial basis has been provided or is currently provided." Section 16 also provides that should the Board determine that any retirement system is not funded on a sound actuarial basis, the General Assembly must provide funding necessary to restore the fiscal integrity of the System. This constitutional provision further protects the accounts of the System from being used for any purpose other than the payment of retirement benefits. In this manner, the fiscal integrity of the System is entrusted to the Board, which relies upon its plan actuary to value, on an annual basis, its ability to provide benefits. S.C. Code Ann. § 9-1-230 (1986).

In this action, Plaintiffs seek to re-open and modify official valuations prepared by the plan actuary and relied upon by the Board and General Assembly. Since 1986, the General Assembly has enacted substantial enhancements to retirement benefits, relying upon the official valuations prepared in keeping with the authority delegated to the Board and the plan actuary by statutes and by the State's Constitution. While the granting of relief to Plaintiffs may have unsettling implications in terms of the State's financial condition and the present ability of the system to absorb more debt, Plaintiffs have correctly challenged the System's "scare tactics" at every turn. The success of Plaintiffs' claim depends solely on the matter of legislative intent.

The dispositive issue here, as it was in Kennedy v. South Carolina Retirement System, 345 S.C. 339, 549 S.E.2d 243 (2001), is determining the

legislative intent in the General Assembly's 1986 amendment to the calculation of "average final compensation," currently codified at S.C. Code Ann. § 9-1-10(4) (Supp. 2003).

The South Carolina General Assembly amended the definition of "average final compensation" in 1986 to allow members of the Retirement System to retire throughout the year, rather than require essentially all retirements to occur on June 30, the last day of the fiscal year. As expressly stated in the title of the bill that gave rise to this amendment, its purpose was to "change the definition of average final compensation from average earnable compensation of a member during three consecutive fiscal years to twelve consecutive quarters." 1986 S.C. Act No. 540. No mention was made in the title of the bill of an intent to increase or alter retirement benefits or the benefit formula in any manner. Further, there was no legislative debate or record suggesting that the amendment was in any way associated with a benefit or formula change, and no fiscal impact statement was prepared or provided, which would have been required if there were to be any increase in retirement benefits and costs.

Although inartfully drawn, a member at retirement was allowed to add up to forty-five days of unused annual leave to his or her final pay period, which may or may not have been included in the three highest consecutive fiscal years of salary for purposes of computing the "average final compensation."

Prior to 1986, "average final compensation" was defined as follows:

> (17) "Average final compensation" with respect to those members retiring on or after July 1, 1970, shall mean the average annual earnable compensation of a member during the three consecutive fiscal years of his creditable service producing the highest such average; an amount up to and including forty-five days termination pay for unused annual leave may be added to the pay period immediately prior to retirement and included in the average as applicable.

In 1986, the amendment read as follows:

> (17) "Average final compensation" with respect to those members retiring on or after July 1, 1986, shall mean the average annual earnable compensation of a member during the twelve consecutive quarters of his creditable service on which regular contributions as a member were made to the System producing the highest such average; a quarter means a period January through March, April through June, July though September, or October through December. An amount up to and including forty-five days' termination pay for unused annual leave at retirement may be added to the average final compensation.

Upon adoption of the amendment, the System interpreted the statute to allow retirement at the end of any quarter and computed the "average final compensation" to be the twelve highest consecutive quarters of salary. Up to forty-five days of unused annual leave could be added as "termination pay" and included in the computation of "average final compensation" regardless of which twelve quarters of compensation were used. For nine years this consistent administrative interpretation went unquestioned by thousands of state employees as they qualified for retirement.

The Kennedy suit was commenced in 1995. As noted, the Supreme Court rejected the employees' position and held that the "General Assembly intended the forty-five days of unused annual leave to be added to the computation [of average final compensation] **before** taking the average of the 12 highest quarters." Kennedy, 345 S.C. at 348, 549 S.E.2d at 247 (emphasis in original). Plaintiffs here seek to avoid the holding in Kennedy by arguing that the proposed benefit is "affordable."

RECOMMENDATION

Having carefully considered the record, I am firmly convinced that the General Assembly's intent in 1986 in amending the definition of "average final compensation" is precisely as determined in Kennedy. I recommend the Court reject Plaintiffs' position pursuant to the doctrine of *stare decisis.* Should the Court desire to revisit the merits of the claim in Kennedy, I recommend dismissal of the complaint for two primary reasons: (1) the

matter of legislative intent is not a moving target; and (2) the issue of affordability is largely irrelevant to a determination of legislative intent.

ANALYSIS

I. *Stare Decisis*

The Court should honor the Kennedy precedent and dismiss Plaintiffs' action, which seeks to relitigate the identical issue, pursuant to the doctrine of *stare decisis*. The doctrine of *stare decisis* enjoys particular efficacy in the context of challenges concerning the construction of statutes and determination of legislative intent. As noted by the Court:

> It is manifestly in the public interest that the law remain permanently settled. Especially is this so in the construction of statutes, for if any change in the statutory law is desired, the General Assembly may readily accomplish it.

Powers v. Powers, 239 S.C. 423, 427, 123 S.E.2d 646, 647 (1962).

In the event the Court elects to address the merits of Plaintiffs' claim, I offer the following analysis.

II. Legislative Intent

The determination of legislative intent is a matter of law. City of Myrtle Beach v. Juel P. Corp., 344 S.C. 43, 543 S.E.2d 538 (2001); Charleston County Parks and Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995). Legislative intent, once determined, is "permanently settled" absent subsequent action by the General Assembly to effect a change in the statutory law. Powers, 239 S.C. at 427, 123 S.E.2d at 647. Either Kennedy is good law or it is not. Plaintiffs certainly cannot be heard to argue that the General Assembly in 1986 intended one result for the Kennedy plaintiffs and another result in this action. As Kennedy goes, so go these Plaintiffs. In my firm judgment, the record before me serves only to reaffirm the holding in Kennedy. I find the evidence concerning legislative history

clearly preponderates contrary to Plaintiffs' position. In so finding, I rely heavily on the sound reasoning of the Kennedy court.

"The most powerful indication of legislative intent is the lack of legislative history and debate which accompanied" the change in the definition of "average final compensation." Kennedy, 345 S.C. at 348, 549 S.E.2d at 247. As the Court further stated:

> The history in no way indicates the legislature intended to make such a dramatic increase in benefits. First, the title of the 1986 Appropriations Act, which included the amendment . . . did not reference an increase in benefits. [footnote omitted]. *See* Ex Parte Georgetown County Water & Sewer Dist., 284 S.C. 466, 468-69, 327 S.E.2d 654, 656 (1985) ("The purpose of Article III, § 17 is to prevent the General Assembly from being misled into the passage of bills containing provisions not indicated in their titles.") . . . . The plain language of the title gives no indication or notice that the amendment would triple the dollar value for unused annual leave.
>
> Secondly, had the General Assembly intended to increase benefits and spend $1.177 billion, it is reasonable to assume they would have engaged in floor debate. They did not. [footnote omitted]. Furthermore, no fiscal impact analysis was undertaken. *See* S.C. Code Ann. § 2-7-72 (Supp.1999) (Bills and resolutions requiring expenditure of funds shall have impact statements). [footnote omitted]. Finally, the legislature did not determine whether the increase would impact the actuarial soundness of the State Retirement System as a whole. While we hold the amendment to section 9-1-10(17) does not violate S.C. Const. art. X, § 16, the fact that the legislature has never funded the increase as required by article X, § 16 is further evidence the legislature did not intend to bestow such an increase when it amended [the definition].

Kennedy, 345 S.C. at 349, 549 S.E.2d at 248.

An additional factor weighing against Plaintiffs' position is that application of such interpretation "would allow members to retire with benefits calculated on an 'average' salary which is greater than any salary they earned during employment." *Id*. Another consequence would be the exclusion of most public school teachers (who generally do not acquire unused annual leave) from the proposed benefit. It is difficult to imagine that the legislature would intend such a dramatic benefit increase and purposefully exclude teachers from the increased benefit. Certainly, those representing teachers would not sit idly by while all other employee groups were bestowed with an unprecedented and unrequested retirement benefit increase.[2]

In 1986, the cost of the proposed benefit increase would have been $350 million dollars. It borders on frivolity to suggest that the General Assembly intended to spend $350 million dollars on an unprecedented and unrequested benefit without any meaningful discussion. There was neither floor debate nor controversy nor rancor nor funding, for the simple reason the General Assembly never intended the so-called Kennedy benefit. Moreover, the post-Kennedy legislative inaction lends further support to this conclusion.

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[2] Plaintiffs assert that the proposed benefit was indeed requested by Purvis Collins, former director of the System. I disagree. First, the absence of direct evidence has forced Plaintiffs to resort to speculation. I give little weight to such self-serving conjecture. Second, just as Plaintiffs cry foul over the System's reliance on the current director, Peggy Boykin, to establish more recent legislative intent, Plaintiffs are similarly foreclosed from relying on Collins's alleged motives. *See* Kennedy, 345 S.C. at 353, 549 S.E.2d at 250 (rejecting the employees' reliance on the testimony of Purvis Collins to establish legislative intent and recognizing the "settled principle in the interpretation of statutes that even where there is some ambiguity or some uncertainty in the language used, resort cannot be had to the opinions of legislators or of others concerned in the enactment of the law, for the purpose of ascertaining the intent of the legislature"). Nevertheless, the Kennedy court deemed Collins's testimony as head of the System relevant, insofar as the executive branch interpreted and administered the 1986 amendment. *Id*. This agency interpretation inures to the benefit of the System's position concerning legislative intent.

See Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003) (recognizing the presumption that the legislature is aware of court interpretation of statutes, and construing legislative inaction as evidence of the legislature's concurrence with the court's interpretation); State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000) (noting the presumption that the legislature is aware of court interpretation of statutes).

Plaintiffs assert the General Assembly "adopted" the initial Kennedy opinion issued by the Supreme Court on May 22, 2000. Plaintiffs' argument overlooks the fact that the initial Kennedy decision was never final. It is the General Assembly's inaction following the entry of the final judgment in Kennedy which is entitled to consideration.[*]

It is on the issue of funding where Plaintiffs seek to revisit Kennedy through the back door. Indeed, the Kennedy plaintiffs sought rehearing on the contention that the General Assembly in 1986 provided the funding mechanism for the proposed increase in retirement benefits by the elimination of the longevity pay program. The rehearing petition was denied. Kennedy v. South Carolina Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001). The next line of attack on Kennedy is an independent action to set aside the judgment alleging fraud on the court. For purposes of the present claim, this leads to the focus of Plaintiffs' case, the issue of affordability.[3]

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[*] Further, as we noted above, the legislature's re-enactment of the definitions in § 9-1-10 was introduced on May 11, 2000, which was before our initial decision in Kennedy while the appeal of the trial court's decision in favor of the Retirement System was still pending. This legislative action could therefore indicate an intent to confirm the trial court's reading of the statute in favor of Retirement System and not the employees.

[3] Plaintiffs' moving-target approach to legislative intent is further reflected in their attempt to merge the issue of legislative intent with that of affordability by drawing this court's attention to the year 2000. Plaintiffs assert that the "System could easily absorb more than $2 billion in new benefits in 2000." I recommend the court reject these efforts, for the sole matter before this court is discerning the General Assembly's intent in 1986

III. Affordability

Plaintiffs' "affordability" argument has expanded well beyond the idea that the funding for the claimed retirement benefit was contemplated in the elimination of the longevity benefit in 1986. The transparent weakness of the position that the new benefit was "swapped" for the elimination of the prior benefit, I believe, has forced Plaintiffs to scurry for cover in other areas. In this regard, Plaintiffs seek to scrutinize many of the actions and decisions of the plan actuaries, the Board and others since 1986, and in some instances even prior to 1986. While I do find the proposed benefit was affordable in 1986, Plaintiffs' claims of affordability are otherwise manifestly without merit.[4]

The assertion that the 1986 proposed benefit tripling the value of unused annual leave was a "swap" for the 1986 elimination of the longevity benefit can be dealt with in short order. As noted, the cost of the proposed benefit in 1986 was $350 million; today, the figure is far in excess of $1 billion. The savings to the System as a result of the elimination of the longevity benefit was *de minimus*. For example, in an experience study from 1980 to 1985, of the 4,416 state employees who retired, only 132 (or 2.86%) qualified for the longevity benefit. Plaintiffs do not dispute these figures but simply argue that a five-year study is not a sufficiently "mature experience."

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in amending the definition of "average final compensation." Plaintiffs are not alone in selectively choosing certain years, for the System is willing to debate the issue of affordability in every year except 1986.

[4] I address the matter of affordability for two reasons. First, the parties, particularly Plaintiffs, have devoted considerable attention to the issue. Second, I wish to provide the Court with a meaningful response to all issues deemed important by the parties. By doing so, the Court can make its own determinations of relevancy. I recommend the Court determine the matter of legislative intent on a basis other than affordability. Affordability in years other than 1986 clearly has no bearing on the intent of the General Assembly in 1986. Legislative inaction, however, since the final judgment in Kennedy is some evidence of the General Assembly's concurrence with the Court's decision.

Assuming the accuracy of these figures, even Plaintiffs' retained actuary, Mr. James Berberian, concedes the modest savings (the so-called "actuarial gain") from eliminating longevity pay would have a "smaller impact" and be insufficient to pay the staggering costs associated with the tripling of the value of unused annual leave.[5] There is absolutely no nexus between the discontinuance of the longevity pay program and the change in definition of "average final compensation," other than that both items appear in the 1986 Appropriations Act consisting of more than 950 pages.[*]

The fact remains the benefit was affordable in 1986, and the System offers only token resistance to this indisputable fact.[6] Quite frankly, I view

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[5] I reject as meritless the testimony of Plaintiffs' expert who opined that the System saved $150 million from the elimination of the longevity benefit.

[*] In a similar vein, Plaintiffs rely on a memo written to Rick Kelly, Executive Director of the State Retirement Systems, from Bob Toomey, Chief Administrator of the Budget and Control Board, discussing the impact of our initial decision in Kennedy. The memo recommends asking the legislative conference committee to strike a proposal guaranteeing an annual COLA increase of 1% in order to accommodate the increased benefit for unused annual leave under Kennedy. Plaintiffs argue the fact that the proposed 1% guaranteed COLA was not included in the 2000 Appropriations Act demonstrates legislative intent that "average final compensation" be interpreted as initially construed by the Court in Kennedy. Plaintiffs' theory is simply too speculative to support a finding of legislative intent. There is nothing linking an intended increase in benefits and the General Assembly's ultimate failure to include the proposed COLA guarantee which could have been dropped for any number of reasons.

[6] It appears that the unfounded accrued liability of the System was at that time slightly in excess of $200 million, with a projected amortization period of only four years, well within the thirty-year liquidation period. The System was well situated in the mid to late 1980's to handle new and increased retirement benefits, which were in fact added in the 1980's and 1990's. The increase in retirement benefits, and corresponding increase in the liabilities to the System, has taken many forms, including the recognition

the affordability of the proposed benefit in 1986 as much ado about nothing. The System could "afford" many things in 1986 that it most probably could not today.[7] The critical inquiry is the intent of the General Assembly in 1986 in amending the definition of "average final compensation." To bootstrap an affirmative finding of legislative intent on the mere affordability of the proposed benefit in 1986 would require the court to ignore the factors typically considered in determining legislative intent, as discussed above, which uniformly lead to the conclusion that the General Assembly in 1986 did not intend the proposed benefit.[*]

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in some years of liability associated with cost of living adjustments and otherwise. In later years, more substantial benefits were added, such as the Teacher Employee Retention Incentive Program (TERI/28) in 2000.

[7] The term "afford" simply reflects the System's then existing ability to absorb additional debt without pushing the amortization period to the brink of the thirty-year mark. Moreover, had the proposed benefit been recognized and funded in 1986, we would now be looking at a vastly different history in terms of retirement benefits and increases through the years. It is this inability to rewrite history that partly explains Plaintiffs' desire to alter previous years' contribution rates and actuarial methodologies to create an appearance of current affordability. As noted at the end of this section, the affordability focus may also be traced to Plaintiffs' perceptions of the underpinnings of the Kennedy decision. The simple and correct answer to this quandary is that the General Assembly in 1986 did not intend to triple the value of unused annual leave.

[*]A footnote in our Kennedy decision specifically states: "Although we find $1.177 billion to be the correct figure, even a quarter of that figure, as suggested by the dissent, would cause dire consequences to the Retirement System." Kennedy, 345 S.C. at 352, 549 S.E.2d at 249, n. 15. The fact remains that in 1986 there was no fiscal impact statement, no floor debate, no funding of an increased benefit, and no indication in the title of the 1986 Appropriations Act that such an increase was intended. Our reliance in Kennedy on evidence that the increased liability would render the Retirement System actuarially unsound was only one factor in determining legislative intent.

Except for Plaintiffs' argument concerning 1986, their affordability claim is otherwise premised on challenges to the methodologies and assumptions utilized by the responsible parties, including the plan actuaries and the Board. While Plaintiffs' broad brush attack implicates virtually every facet of the System, only three areas warrant discussion: the determination of (1) the "normal cost contribution;" (2) the methodologies to ensure that payment of a future benefit (unfunded actuarial accrued liability, or "UAAL") is accomplished within the thirty-year liquidation period; and (3) an appropriate "load" factor. These issues, to be sure, are not mutually exclusive, for there exists critical interplay between each of these areas.

Plaintiffs in general argue that the System, through its actuaries and the Board, has intentionally miscalculated its assets and liabilities to create the illusion that the purported benefit is not affordable. More specifically, Plaintiffs assert that the System has improperly and artificially increased the State's contribution to "normal cost," which has the effect of reducing funds available for the employer portion attributable to UAAL to fund future payments. There is no credible evidence to support these arguments. To the contrary, the credible evidence compellingly demonstrates that the professionals charged with managing the System have discharged their duties responsibly and with a commitment to ensure the continued stability and soundness of the State's various pension funds.

Retirement benefits are funded by contributions from the employee and employer. "Normal cost" represents that portion of the employer's contribution, as determined by the Board, necessary to pay the anticipated benefits of active members. For example, in 2001 the contribution levels [were] (i) employee contributions of 6.0% and (ii) employer contributions of 7.55% for State employees and teachers, and 6.7% for other employers. The employer contribution rates are the sum of 4.61% normal cost contribution and a 2.94% (state employees and teachers) or 2.09% (other employees) contribution intended to amortize the unfunded liability. (Defendants' Ex. 15). In properly administering the System's multi-billion dollar pension funds, such critical decisions should be influenced by neither unqualified

experts[8] nor creative lawyering. Plaintiffs suggest that a minor change in the "normal cost contribution" from 4.61% to 4% (with a corresponding increase in the UAAL contribution for funding of future benefits) would make the Kennedy benefit affordable. Under Plaintiffs' approach, any proposed benefit can appear affordable on paper, provided one is not too concerned with the integrity and overall soundness of the System. The reality is that ostensibly slight changes to the contribution levels can dramatically affect the System's soundness, especially in ensuring that future benefits are paid within the thirty-year liquidation period.

The unfunded accrued liability liquidation period serves as another area where Plaintiffs' proposals would push the system to the edge, and perhaps beyond. In fact, I am persuaded that Plaintiffs' proposals (to make the Kennedy benefit affordable) would defeat the System's ability to comply with the thirty-year liquidation period. Plaintiffs claim that the retirement plans are "overfunded" as a result of "excessive contributions," leading to a "surplus." This argument cannot withstand scrutiny. Plaintiffs' actuaries concede the SCRS and the PORS had unfunded actuarial liabilities according to the 2001 Actuarial Valuations that exceeded $2.6 billion. The premise of Plaintiffs' argument is that they have the right to reduce the Board's determination of "normal cost" and thereby shorten the liquidation period. A liquidation period of less than thirty years is viewed by Plaintiffs as a "surplus." Reducing the "normal cost contribution" has the effect of increasing the ability of the System to absorb additional debt. For example, if the liquidation period is twenty years, then the System, according to Plaintiffs, has a surplus of ten years in which to create more debt. "Overfunding" in this context merely describes a system retiring debt sooner than actuarially anticipated. Reducing the "normal cost contribution" has this very effect.

Plaintiffs would be content to reduce the "normal cost," increase debt, and run the liquidation period to (and likely beyond) thirty years, while the System has opted for a more cautious approach. The System's approach

[8] Plaintiffs' experts were qualified in the sense their testimony was admissible. I use the term "unqualified" only to register the lack of credence I assign to their testimony.

allows for a measure of flexibility in the event of lean financial times where the return on investments is less than anticipated. I see absolutely no reason to find fault with the System's philosophy and approach, especially since the System began investing in equity markets. Manipulating the "normal cost contribution" and UAAL portions of the employer contributions to achieve Plaintiffs' desired result would wreak havoc on the System.[9]

It is perhaps significant to note that the benefits supposedly purposefully enacted by the General Assembly in 1986 has no peer in the annals of United States public pension plans. In this regard, even Plaintiffs' experts acknowledge that the proposed benefit has never been contemplated by any public retirement system. The testimony of one of Plaintiffs' experts, Mr. Fred Bass, is particularly instructive. Bass was not a credible witness. His willingness to manipulate data to promote Plaintiffs' cause did not go unnoticed. Bass, however, had some limits in his propensity to advocate for Plaintiffs. Forced to admit that he had never seen a pension plan where unused annual leave is added after average final compensation is computed, Bass described the benefit proposed by Plantiffs as "extraordinary."

Another illustration of Plaintiffs' fast and loose approach to actuarial methodologies concerns their desire to alter the System's "load" factor. Plaintiffs contend the System has already accounted for the proposed benefit through pre-funding a "load" of 3.5%, which they assert would have been "more than enough" to cover the liability of tripling the value of unused

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[9] The thirty-year liquidation period is a mandatory policy of the Board, not merely an aspirational goal. The soundness of the System depends on continued compliance with the thirty-year liquidation period. The System, through the Board, has been vigilant through the years to stay within the thirty-year liquidation period. One example of these efforts is the accounting for a liability over a five-year period, known as "smoothing." This accounting adjustment began in approximately 1995 when the System was preparing to transition from book value to market related value. "Smoothing," which is a recognized approach, allows a retirement benefit/debt to be reflected pro rata over a five-year period, thereby avoiding significant fluctuations in a given year. Plaintiffs' effort to assign nefarious motives to the "smoothing" method simply finds no traction in this record.

annual leave. A "load" is a factor calculated to project the cost of a benefit. In this instance, the record indicates that prior to 1995, a 1% factor was included as a projected cost of all leave in the retirement benefit formula. During the Kennedy litigation, a study was performed by the plan actuary, using a cross section of participants, to calculate an amount attributable to unused annual leave, based upon historical use. This study indicated that including up to forty-five days in the average final compensation formula increased costs to the retirements systems by approximately 2.5% per year. Thereafter, the 2.5% "load" was substituted for the earlier 1% "load." The plan actuaries have never used a composite 3.5% "load" as argued by Plaintiffs. Having never utilized the proposed 3.5% "load," it would be highly inappropriate to retroactively modify methodologies and assumptions utilized in official valuation reports that have been relied upon by the State and others.

In rejecting the various claims of affordability, it is not my intent to disparage Plaintiffs or their excellent counsel, for it is readily apparent they embarked on the affordability abyss not entirely of their own choosing. Plaintiffs perceive the Kennedy decision as revenue driven, resulting from the potential impact of recognizing the proposed benefit in the context of the present status of the System. I do not read Kennedy as embracing post-1986 affordability as the benchmark for determining legislative intent. In my view, Kennedy properly relied on the facts and circumstances surrounding the 1986 amendment to ascertain the intent of the General Assembly at that time. The concerns with the current financial impact of the proposed benefit on the System are, at best, an adjunct to bolster the underlying determination of legislative intent.

IV. Class Certification

In light of my proposed findings and recommendations, I need not address the issue of class certification.

CONCLUSION

After exhaustively reviewing this voluminous record, I come to the conclusion that the courts should be reticent to intervene in the management

of the South Carolina Retirement System. Absent evidence of a gross abuse of discretion, the management and administration of the South Carolina Retirement System must remain with those upon whom the law imposes the responsibility. To permit present and former state employees to cherrypick preferred methodologies and financial projections to advance a particular agenda would irreparably undermine the ability of those responsible to discharge their critical duties and compromise the State's credibility among financial institutions and rating agencies. The wisdom of protecting and maintaining constitutional independence concerning the South Carolina Retirement System is beyond serious challenge.[10]

In sum, in light of Kennedy, the application of the doctrine of *stare decisis* would require dismissal of this action. In any event, Plaintiffs have failed to establish that the General Assembly in 1986 intended to triple the value of unused annual leave in amending the definition of "average final compensation." The credible evidence overwhelmingly demonstrates, just as determined by this court in Kennedy, that the forty-five days of unused annual leave should be added to the computation of "average final compensation" before taking the average of the twelve highest quarters. I recommend Plaintiffs' complaint be dismissed with prejudice.

JUDGMENT FOR DEFENDANTS.

TOAL, C.J., WALLER, MOORE, BURNETT, JJ., and Acting Justice Alexander S. Macaulay, concur.

[10] I do not suggest for a moment that the System, and those individuals charged with the fiduciary duty of managing the System, are beyond the reach of the courts. Upon a proper showing, courts will provide appropriate relief. Where, as here, there is an insufficient showing, the court should recognize, and defer to, the broad range of reasonableness inherent in determining acceptable actuarial applications and methodologies.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Rock Hill Telephone Company, Inc., Plaintiff,

v.

Globe Communications, Inc., Defendant.

Opinion No. 25952
Heard March 2, 2004 – Filed March 21, 2005

CERTIFIED QUESTIONS ANSWERED

Robert A. McKenzie and Gary H. Johnson, II, both of McDonald, McKenzie, Rubin, Miller & Lybrand, of Columbia, for plaintiff.

Kenneth R. Raynor, of Templeton & Raynor, of Charlotte, for defendant.

CHIEF JUSTICE TOAL: Pursuant to Rule 228, SCACR, we accepted the following questions on certification from the United States District Court for the District of South Carolina:

I. Is the relationship between a utility holding a construction permit from the South Carolina Department of Transportation (DOT) and a subcontractor hired by the utility's independent contractor a "special relationship," allowing for a claim of equitable indemnity by the utility against the subcontractor?

II. Does the utility have a nondelegable duty that makes it vicariously liable for the subcontractor's negligence?

We answer both questions in the negative.

FACTUAL/PROCEDURAL BACKGROUND

Rock Hill Telephone Company (utility) received a permit from the DOT to install an underground cable along a highway. The utility hired an independent contractor to complete the work. In turn, the independent contractor subcontracted a portion of the work to Globe Communications (subcontractor).

One evening, a car struck the subcontractor's backhoe. The driver of the car was severely injured, and she sued the utility and the subcontractor.[1] The utility cross-claimed against the subcontractor on a theory of equitable indemnification. After discovery and mediation, the utility settled with the driver for $300,000 and dismissed its indemnity action against the subcontractor without prejudice. The subcontractor eventually settled with the driver for $1,500,000.

The utility then sued the subcontractor—the action currently pending in federal court—based on a theory of equitable indemnification, seeking to recover the $300,000 paid to the driver in settlement.

LAW/ANALYSIS

I. SPECIAL RELATIONSHIP

The utility argues that it has a "special relationship" with the subcontractor supporting a claim for equitable indemnification. We disagree.

There are two forms of indemnity: contractual indemnity and indemnity implied in law, or "equitable indemnity." James C. Gray, Jr. and Lisa D.

[1] It is unclear as to why the driver did not also sue the independent contractor hired by the utility.

Catt, *The Law of Indemnity in South Carolina*, 41 S.C. L. Rev. 603, 604 (1990). Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties. *Id.* Equitable indemnity, on the other hand, "is based upon the specific relation of the indemnitee to the indemnitor in dealing with a third party." *Id.*

In general, indemnity may be defined as a "form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 449 (1994) (quoting *Town of Winnsboro v. Wiedemen-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992)). The right to indemnity arises by operation of law "in cases of imputed fault or where some special relationship exists between the first and second parties." *Id.* In other words,

> a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.[2]

Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983) (citations omitted). We have held that the relationship between a contractor and a subcontractor supports a claim for equitable indemnification.

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[2] In general, there is no right to indemnity between joint tortfeasors. *Atl. Coast Line R.R. Co. v. Whetstone*, 243 S.C. 61, 70, 132 S.E.2d 172, 176 (1963). In the underlying case, both Rock Hill and Globe settled with the driver before liability could be determined. Because there is no evidence in the record that Rock Hill was adjudged to be without fault, we are unwilling to recognize a right of indemnity on this basis as well. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999) (holding that the most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified *is adjudged without fault* and the indemnifying party is the one at fault).

First Gen. Servs., 314 S.C. at 442, 445 S.E.2d at 448; *Town of Winnsboro*, 307 S.C. at 131, 414 S.E.2d at 120.

In the present case, however, the relationship between the utility and the subcontractor is an attenuated one. The utility hired an independent contractor to install an underground communications line. The contractor, in turn, hired a subcontractor to perform part of the work. Given these facts, we find that the subcontractor is merely a remote or distant independent contractor, and therefore does not have a special relationship with the utility as contemplated under our jurisprudence.[3]

Accordingly, the answer to the first certified question is no.

II. VICARIOUS LIABILITY

The utility argues, in the alternative, that it has a nondelegable duty that makes it vicariously liable for the subcontractor's negligence. We disagree.

The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor. *Duane v. Presley Constr. Co., Inc.*, 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978). An exception to the general rule is that "[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee." *Durkin v. Hansen*, 313 S.C. 343, 347, 437 S.E.2d 550, 552-53 (Ct. App. 1993) (citing 57 C.J.S. *Master and Servant*, § 591 (1948)). This

[3] Unlike the dissent, we find that there must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing. *See, e.g*, *First Gen. Serv.*, 314 S.C. at 443, 445 S.E.2d at 448 (holding relationship between contractor and subcontractor supports a claim of equitable indemnification); *Stuck*, 279 S.C. at 24, 301 S.E.2d at 553 (holding purchaser of defective vehicle was entitled to indemnification from seller); *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971) (holding landlord entitled to indemnification from general contractor for damage caused to tenant's property).

Court has recently described the exception—the nondelegable duty doctrine—and its legal consequences, in the following way:

> [a] person may delegate a *duty* to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains *liable* for that breach. It actually is the liability, not the duty, that is not delegable. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor.

Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000).

Moreover, this Court has identified several situations in which the nondelegable duty doctrine applies:

> An employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools, and remains vicariously liable for injuries caused by unsafe activities or tools under the employer's control.
>
> A landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly.
>
> A common carrier has a nondelegable duty to ensure that cargo is properly loaded and secured, and remains vicariously liable for injuries caused by an unsecured load.
>
> A bail bondsman has a nondelegable duty to supervise the work of his employees, and remains vicariously liable for injuries caused by those employees.
>
> A municipality has a nondelegable duty to provide safe streets even when maintenance is undertaken by the state Highway Department, and remains vicariously liable for injuries caused by defective repairs.

Osborne v. Adams, 346 S.C. 4, 12, 550 S.E.2d 319, 323-24 (2001); *see also Simmons*, 341 S.C. at 50, 533 S.E.2d at 323 (holding that a hospital owes a nondelegable duty to render competent service to its emergency room patients).

In the present case, the utility contends that it had a nondelegable duty to perform the work in a safe manner.[4] This duty, the utility argues, stems from the language in the DOT permit and South Carolina statutory and regulatory law.[5] The DOT permit provides, in relevant part, that the utility agrees "to assume any and all liability [the DOT] might otherwise have in connection with accidents or injuries to persons … [and] agrees to indemnify [the DOT] for any liability incurred." In addition, statutory law provides that telephone companies may lay telephone lines if "such line is constructed so as not to endanger the safety of persons or interfere with the use of such highways or public roads." S.C. Code Ann. § 58-9-2020 (1976). Finally, regulatory law provides that "[e]ach *utility shall exercise reasonable care* to reduce the hazards to which its employees, its customers and the general public may be subjected." 26 S.C. Code Ann. Regs. 103-671 (1976) (emphasis added).

We hold that the provisions cited by the utility do not impose a nondelegable duty. First, the terms in the permit are enforceable only as between the DOT and the utility, not the utility and a remote independent

[4] Although this argument seems counterintuitive, it is necessary for the utility to establish that it would have initially been liable for the subcontractor's negligence. *See First Gen. Servs.*, 314 S.C. at 442, 445 S.E.2d at 449 (the right to indemnity arises by operation of law "in cases of *imputed fault* or where some special relationship exists between the first and second parties").

[5] We respectfully find the dissent's analysis of this issue rests on facts that are not part of the record. Therefore, we analyze this issue based solely on the language in the DOT permit and the statutory law identified by Rock Hill as the source of its alleged nondelegable duty.

contractor. Second, the statute and the regulation impose a duty of reasonable care, not an absolute, nondelegable duty.

Therefore, because we find that the utility did not owe a nondelegable duty, the answer to the second certified question is no.

CONCLUSION

Because we find that (1) the relationship between the utility and a subcontractor hired by the utility's independent contractor is not a "special relationship," and that (2) the utility does not have a nondelegable duty making it vicariously liable for the subcontractor's negligence, we answer both certified questions in the negative.

MOORE, WALLER, JJ., and acting Justice Mark H. Westbrook, concur. PLEICONES, J, dissenting in a separate opinion.

JUSTICE PLEICONES: I write separately because I believe that Rock Hill is entitled to seek equitable indemnification from Globe, the negligent entity. As explained below, I reach this conclusion by examining the facts presented to us.

The holder of a public franchise is subject to special liability rules, similar to those imposed upon common carriers. The Restatement (2nd) of Torts § 428 states the rule this way:

> An individual or corporation carrying on an activity which can lawfully be carried on only under a franchise granted by a public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to others by the negligence of a contractor employed to do work in carrying on the activity.

The comments to this section make clear that the utility is liable to a person injured by the negligence of an independent contractor carrying on the exclusive business of that utility which involves an unreasonable risk of harm, but is not liable for the contractor's negligence in performing ordinary construction. The critical question here, then, is whether Globe was doing unreasonably dangerous work that only the holder of a franchise could perform when Ms. Smith was injured.

The facts certified to us are that Ms. Smith was injured when she struck a tractor/backhoe belonging to Globe. At the time of the accident, Globe was installing underground communications lines along a state highway pursuant to a permit issued to Rock Hill. It is well established that the construction of transmission lines is an integral part of a utility's business. See e.g., Snyder v. Southern Calif. Edison Co., 44 Cal. 2d 793, 285 P.2d 912 (1955); compare, e.g. Reith v. General Tele. Co. of Illinois, 22 Ill. App. 3d 337, 317 N.E.2d 369 (Ill. App. 5th Dist. 1974) (defendant utility has nondelegable duty to take safety precautions around excavation site constructed pursuant to franchise and state permit). It is the utility's nondelegable duty to insure that transmission lines are safely and properly installed, and it matters not whether the source of this duty is said to be the franchise agreement, statutes, or the common law. Snyder, *supra*.

The next question is whether equity will require the negligent party, Globe, to indemnify Rock Hill.

> [A] right to indemnity exists whenever the relationship between the parties is such that either in law or equity there is an obligation on one party to indemnify the other, **as where one person is exposed to liability by the wrongful act of another in which he does not join.**

Stuck v. Pioneer Logging Mach. Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983) (emphasis supplied).

Unlike the majority, I find the attenuated relationship between Rock Hill and Globe weighs in favor of equitable indemnification rather than against it. Rock Hill employed an independent contractor, which in turn chose the negligent subcontractor. The majority acknowledges that the independent contractor here would be entitled to indemnity, but denies that relief to Rock Hill, which had absolutely nothing to do with the selection of Globe.

In my opinion, since Rock Hill did not join in Globe's negligent act, but is liable as the result of its franchise and its DOT permit, I would find Rock Hill entitled to equitable indemnity.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Franklin M. Epstein, M.D. and
Southern Neurological Institute, Appellants,

v.

David A. Brown, Esquire, Respondent.

Appeal From Aiken County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 25953
Heard January 4, 2005 - Filed March 21, 2005

AFFIRMED

Hugh M. Claytor, and Heather Goetz Ruth, of Womble, Carlyle, Sandridge and Rice, of Greenville, for Appellants.

M. Dawes Cook, Jr., and P. Gunnar Nistad, of Barnwell, Whaley, Patterson and Helms, of Charleston, for Respondents.

JUSTICE WALLER: We certified this case from the Court of Appeals pursuant to Rule 204(b), SCACR. The issue on appeal involves the date on which the statute of limitations (SOL) for a legal malpractice claim begins to run.

FACTS

Dr. Franklin Epstein (Appellant) performed spinal fusion surgery on Marshall O. Welch in February, 1996. Welch died three days later of complications.[1] Welch's estate brought wrongful death and survival actions against Dr. Epstein alleging medical malpractice. Respondent, David Brown, a licensed South Carolina attorney, represented Epstein. On February 18, 1998, a jury returned a verdict of $3,000,000 in the wrongful death action, and $28,535.88 in the survival action. The following day, the jury assessed $3,000,000 punitive damages against Dr. Epstein.

Brown filed a notice of appeal on behalf of Dr. Epstein. Although Brown remained counsel of record during the appeal, Dr. Epstein was represented on appeal by Stephen Groves, John Hamilton Smith, and Steven Brown. The Court of Appeals affirmed the verdicts on July 31, 2000. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). This Court denied certiorari in January 2001.

Dr. Epstein filed this legal malpractice claim against Brown on January 9, 2002, alleging breach of fiduciary duty, negligence, and breach of contract. Brown moved for summary judgment on the ground that Dr. Epstein had failed to commence the action within the applicable three-year statute of limitations (SOL). The trial court ruled the SOL began to run, at the latest, on February 18, 1998, the date of the jury's verdict, such that this action was untimely. Accordingly, Brown was granted summary judgment.

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, this Court applies the same standard as the trial court under Rule 56(c), SCRCP: "summary judgment is proper when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438-439 (2003),

[1] Welch was a 37 year old nurse who worked for Epstein's neurological group, Southern Neurological Institute, in the care of surgical patients. The facts surrounding his surgery and post-surgical care are fully set forth in the Court of Appeals' opinion. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).

citing Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 545 (1991). In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. Id. at 115, 410 S.E.2d at 545.

ISSUE

Did the trial court err in ruling Dr. Epstein knew, or should have known, he had a possible claim against Brown by the date of the jury's adverse verdict, such that the SOL began to run on that date?

DISCUSSION

South Carolina Code Ann. § 15-3-530 (Supp. 2003) provides a three year statute of limitations for legal malpractice lawsuits. Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. See Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996); S.C.Code Ann. § 15-3-535. See also Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct.App.1997). The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist. **The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.** Id. (emphasis supplied). Under § 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. True v. Monteith, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997).

In his complaint, Dr. Epstein alleged Brown was negligent in numerous particulars, including: failing to conduct an adequate investigation, failing to advise Epstein to settle, failing to keep Epstein adequately informed during the pendency of the case, representing multiple defendants with conflicts of interest, forgetting to call expert witnesses, and adopting a defense which was

contrary to Dr. Epstein's medical opinion. Counsel for Dr. Epstein conceded that many of these allegations were within Dr. Epstein's knowledge at the time of the jury's verdict. The court found the majority of the damages alleged by Dr. Epstein stemmed from the adverse jury verdict, and the damages to his reputation resulting from the publicity were all damages suffered at the time of the verdict. The court concluded that, although these damages might be mitigated by a successful appeal, they could never be wholly eliminated by a reversal of the jury's verdict. Accordingly, the trial court ruled Dr. Epstein either knew, or should have known, of a possible claim against Brown by the date of the adverse verdict, such that the SOL began to run on that date.

Dr. Epstein contends that because Brown remained counsel of record during the pendency of the appeal,[2] the SOL did not begin to run until this Court denied certiorari, in January 2001. Dr. Epstein urges us to adopt the "continuous representation" rule to toll the SOL during the period an attorney continues to represent a client on the same matter which forms the basis of a legal malpractice action. We decline to adopt the continuous representation rule in the context of a legal malpractice claim and adhere, instead, to the discovery rule set forth by the Legislature.

Under the continuous representation rule, the SOL is tolled during the period an attorney continues to represent the client on the same matter out of which the alleged malpractice arose. See George L. Blum, Attorney Malpractice—Tolling or Other Exceptions to Running of Statute of Limitations, 87 ALR 5th 473, § 4 (2001). In those jurisdictions where it is adopted, the rule requires: 1) ongoing representation by the lawyer; 2) on the same subject matter; and 3) continuous representation. See generally, Mallen and Smith, Legal Malpractice, § 22.13, p. 431 (5th Ed. 2000).

This Court has not specifically addressed the continuous representation rule. However, in Holy Loch Distributors v. Hitchcock, 332 S.C. 247, 503 S.E.2d 787 (Ct. App. 1998), *rev'd on other grounds*, 340 S.C. 20, 531 S.E.2d 282 (2000), the Court of Appeals specifically declined to adopt the continuous representation rule, based in large part on this Court's refusal to

[2] Although Brown remained counsel of record, the appeal was handled by a different firm.

adopt the "continuous treatment" rule in the context of medical malpractice cases. See Preer v. Mims, 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996).

In Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (2003), this Court declined to adopt the continuous treatment rule. In Harrison, the plaintiff was a schizophrenic who had been involuntarily committed in 1982. He remained there until 1995, and ultimately brought suit against the defendant, the state hospital, alleging he had been confined too long and had been improperly medicated. He argued his causes of action should be deemed to have accrued on the date of his discharge in 1995. We defined the continuous treatment rule as follows:

> The so-called continuous treatment rule as generally formulated is that if the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated--unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.

354 S.C. at 135, 580 S.E.2d at 112, *quoting* David W. Louisell & Harold Williams, Medical Malpractice, § 13.02[3] (1996).

In Harrison, we recognized the policy behind adoption of the continuous treatment rule being that, without such a rule, a plaintiff would be required to bring suit against his or her physician before treatment is even terminated. 354 S.C. at 136, 580 S.E.2d at 113. Alternative reasons justifying the rule are "a patient's right to place trust and confidence in his physician," the difficulty of determining the precise timing of an act of malpractice during continuous treatment, and "basic tort principles of fairness and deterrence." Id. at 136-137, 580 S.E.2d at 113. Notwithstanding the very legitimate policy rationales in favor of adoption of a continuous treatment rule, we declined to adopt it, finding the Legislature has set absolute time restrictions for the bringing of medical malpractice actions in

the statutes of repose both for medical malpractice and for persons operating under disability. See S.C. Code Ann. §§ 15-3-545 and 15-3-40. Id.

We find the justifications favoring adoption of the continuous treatment rule are similar to those justifying the continuous representation rule, to wit: to avoid disruption of the attorney-client relationship; to allow an attorney to continue efforts to remedy a bad result, even if some damages have occurred and the client is aware of the attorney's errors. See generally, Mallen and Smith, Legal Malpractice, § 22.13 (5th Ed. 2000). See also United States National Bank of Oregon v. Davies, 548 P.2d 966, 970 (Or. 1976)(it seems anomalous to force a plaintiff to contend in the underlying litigation on appeal that he is entitled to a favorable decision, while in a simultaneous legal malpractice action he is forced to contend his attorney's negligence was why he received an unfavorable judgment at the trial level).

Notwithstanding such justifications, numerous jurisdictions refuse to judicially adopt the continuous representation rule. See Beesley v. Van Doren, 873 P.2d 1280 (Alaska 1994) (statute of limitations in attorney malpractice cases is not tolled pending final resolution of litigation underlying malpractice claim); Laird v. Blacker, 828 P.2d 691 (Cal. 1992) (limitations period commences and is not tolled by filing an appeal absent continuous representation by the trial attorney);[3] Law Offices of Jerris Leonard, P.C. v. Mideast Sys. Ltd., 111 F.R.D. 359, 363 (D.D.C.1986) (under discovery rule, legal malpractice claim was deemed to have occurred when summary judgment entered against it or at latest when answer was due in suit for legal fees); Zupan v. Berman, 491 N.E.2d 1349, 1351-52 (Ill. 1986) (statute of limitations for legal malpractice began to run when adverse judgment was entered, not when appellate court modified judgment); Chambers v. Dillow, 713 S.W.2d 896, 898-99 (Tenn. 1986) (injury for legal malpractice held to have accrued when lawsuit was initially dismissed).

Generally, those jurisdictions which adopt the continuous representation rule also adopt the continuous treatment in the context of

[3] Notably, the California statute specifically has a provision for tolling in the event the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred. West's Ann. Cal. Code Civ. P. § 340.6(2).

medical malpractice. See generally Mallen and Smith at § 22.13, p. 430 (noting rule's medical malpractice origins); Rosenfield v. Rogin, 795 A.2d 572 (Conn. 2002); Seebacher v. Fitzergerald et al. , 449 N.W.2d 673 (Mich. App. 1989); Skidmore v. Rottman, 450 N.E.2d 684 (Ohio 1983) (holding that cause of action for legal malpractice accrues and the statute of limitations commences to run when the client discovers, or, in the exercise of reasonable care and diligence should have discovered, the resulting injury; court noted that policy considerations underlying discovery rule in medical malpractice cases are no less compelling in legal malpractice cases).

In accord with these authorities, and in light of the Legislature's declaration that an action "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known he had a cause of action,"[4] we decline to adopt the continuous representation rule.

Dr. Epstein asserts that, even if we do not adopt the continuous representation rule, the statute of limitations should not be deemed to have begun to run until the date on which this Court denied certiorari (January 11, 2001), because it was not until that date upon which he suffered "legal damages." We disagree.

Although there is a split of authority as to whether a plaintiff has suffered legally cognizable damages prior to the conclusion of an appeal, those jurisdictions which decline to adopt the continuous representation rule tend to hold that a plaintiff may institute a malpractice action prior to the conclusion of an appeal. See Laird v. Blacker 828 P.2d 691, 696 (Cal. 1992)(disagreeing with plaintiff's contention that a successful appeal negates the client's ability to file a malpractice action. The court noted that the client sustains an injury as soon as he or she is forced to incur costs pursuing an appeal and that, "although appellate review may correct judicial error, and thus reduce the client's damages, an appeal does not necessarily exonerate the attorney, nor does it extinguish the client's action against him for negligence in the conduct of trial."); Beesley v. VanDoren, 873 P.2d 1280, 1282(Alaska 1994)(rejecting claim that injury or damaging effect on the unsuccessful

[4] See S.C. Code Ann. § 15-3-535 (Supp. 2003).

party is not ascertainable until the appellate process is completed);[5] Michael v. Beasley, 583 So. 2d 245 (Ala. 1991), *reversal on other ground recognized by*, Borden v. Clements 261 B.R. 275 (Ala. 2001) (on the date of adverse jury verdict, plaintiffs became obligated to expend additional monies for the appellate process including the continuing service of an attorney, the cost of the transcript, the cost of the appeal, and the inconvenience of the appeal. In finding that the plaintiffs' injury accrued on the date of the jury's verdict, the court held that a plaintiff was not required to exhaust all appellate remedies before filing a claim for legal malpractice); St. Paul Fire & Marine Insurance Co. v. Speerstra, 666 P.2d 255, 258 (Or. 1983) (plaintiff was held to have suffered harm when trial court's judgment was entered, because plaintiff was then required to either pay the judgment or the costs of appeal); Hunt v. Bittman, 482 F.Supp 1017 (D.C. 1980), aff'd, 652 F.2d 196 (D.C.Cir.), *cert. denied*, 454 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1981), (SOL began to run from date of Watergate conspirator's conviction, the date on which he suffered actual injury). See generally, Ronald Mallen, Limitations and the Need for Damages in Legal Malpractice Actions, 60 Def. Couns. J. 234, 245-246 (April 1993) (noting that a client who has suffered an adverse result because of a lawyer's negligence has both knowledge of the negligence and present damage).

Epstein also asserts that requiring him to pursue an appeal while simultaneously filing a malpractice suit against his attorney puts him in the awkward position of arguing inconsistent positions in two different courts. The same may also be raised in the context of continuous medical treatment.

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[5] The Van Doren court noted that the "overwhelming majority of courts" hold the statute of limitations applicable to a claim for legal malpractice is not tolled pending resolution of the underlying litigation. 873 P.2d at 1282, c*iting* Rhoades v. Sims, 692 S.W.2d 750, 752 (Ark. 1985); Laird v. Blacker, 828 P.2d 691, 696 cert. denied, 506 U.S. 1021, (1992); Jankowski v. Taylor, Bishop & Lee, 273 S.E.2d 16, 18 (Ga. 1980); Belden v. Emmerman, 560 N.E.2d 1180, 1183 (Ill. 1990); Basinger v. Sullivan, 540 N.E.2d 91, 94 (Ind.App.1989); Dearborn Animal Clinic P.A. v. Wilson, 806 P.2d 997, 1006 (Kan. 1991); Braud v. New England Ins. Co., 576 So.2d 466, 469-70 (La.1991); Hayden v. Green, 431 429 N.W.2d 604 (Mich. 1988); Sabes & Richman, Inc. v. Muenzer, 431 N.W.2d 916, 918-19 (Minn.App.1988); Dixon v. Shafton, 649 S.W.2d 435, 438 (Mo.1983); Suzuki v. Holthaus, 375 N.W.2d 126, 128 (Neb. 1985); Zimmie v. Calfee, Halter & Griswold, 43 538 N.E.2d 398, 402 (Ohio 1989); Chambers v. Dillow, 713 S.W.2d 896, 898 (Tenn.1986); Richardson v. Denend, 795 P.2d 1192, 1195 n. 7 (Wash. 1990); Hennekens v. Hoerl, 465 N.W.2d 812, 818-19 (Wis.1991).

In any event, there are measures which may be taken to avoid such inconsistent positions. See Morrison v. Goff, 91 P.3d 1050, 1056 (Co. 2004); Gerhard v. O'Rourke, 510 N.W.2d 900 (Mich. 1994) (holding that a plaintiff who files a malpractice claim against an attorney at the same time an appeal is pending may seek a stay of the malpractice action in the trial court);[6] Mallen, supra, 60 Def. Couns. J. at 248 (suggesting that during the pendency of an appeal, "most lawyers are willing to stipulate to toll a statute of limitations on the hope that the existence or extent of an injury will be minimized or terminated" by the appeal).[7]

This Court has recognized that, under the discovery rule, the statute of limitations begins to run when a reasonable person of common knowledge and experience would be on notice that a claim against another party might exist. The fact that the injured party may not comprehend the full extent of the damage is immaterial. Dean v. Ruscon Corp., 321 S.C. 360, 363-364, 468 S.E.2d 645, 647 (1996). See also Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994) (reasonable diligence means simply that injured party must act with some promptness where facts and circumstances of injury would put person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist; statute of limitations begins to run from this point and not when advice of counsel is sought or full-blown theory of recovery is developed); Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333 (1981) (same).

Under the facts of this case, we find Dr. Epstein clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial. The damages he claims are largely those to his reputation, and the claims he raises in his complaint are primarily related to trial and pre-trial errors. Counsel for Dr. Epstein conceded at oral argument on the summary judgment motion that "some of the allegations down there, your Honor, were within the man's knowledge when the verdict came in." Further, in a letter from Dr. Epstein to his appellate attorney, Steven Groves,

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[6] Gebhardt and Goff both involved malpractice claims brought by criminal defendants who brought malpractice claims while pursuing an appeal of their convictions.

[7] Here, the only discussions concerning a tolling agreement came after the Court of Appeals' opinion in this matter.

Dr. Epstein indicated both that he would not deal with Mr. Brown, and that "I believe that my representation was so egregiously lacking." It is patent Dr. Epstein knew, or should have known, of a possible claim against Brown long before this Court denied certiorari in January 2001. Accordingly, we find the trial court properly granted summary judgment on this issue.[8] The judgment below is

AFFIRMED.[9]

MOORE AND BURNETT, JJ., concur, TOAL, CJ., and PLEICONES, J., dissenting in separate opinions.

[8] We do not hold that, in all instances, the date of a jury's adverse verdict is the date on which the SOL begins to run. To the contrary, we hold only that, under the facts of this case, Dr. Epstein knew of a potential claim against Brown by this date, at the latest.

[9] The remaining issue is affirmed pursuant to Rule 220(b)(1), SCACR, and the following authority: Vines v. Self Mem'l Hosp., 314 S.C. 305, 309, 443 S.E.2d 909, 911 (1994) (summary judgment is proper where there is no evidence of conduct warranting estoppel).

CHIEF JUSTICE TOAL: I respectfully dissent. I would adopt a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until an appellate court disposes of the action by sending a remittitur to the trial court.

I agree that under the discovery rule, the statute of limitations is tolled until the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. S.C. Code Ann. § 15-3-535 (Supp. 2003); *See also Dean v. Ruscon Corp*., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (explaining the discovery rule). In *Dean*, this Court explained the nature of "reasonable diligence":

> [w]e have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of *an injury* place a reasonable person of common knowledge and experience on notice that a claim against another party might exist.

Id. (emphasis added).

I disagree with the majority's decision holding that the appellants should have known of the existence of a cause of action arising from respondent's alleged malpractice at the conclusion of the trial. In my opinion, there was no evidence that appellants were injured as a result of respondent's alleged malpractice until the court of appeals disposed of the case by sending a remittitur to the trial court. Therefore, I would establish a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until a remittitur has been sent to the trial court. As a result, in my opinion, the statute of limitations does not bar Appellants' claim.

JUSTICE PLEICONES: I respectfully dissent. I concur in the majority's rejection of the continuous-representation rule and in its retention of the discovery rule. In my opinion, however, Brown should be estopped from asserting the statute of limitations as a defense. I would therefore reverse and remand to the circuit court for trial.

"Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute ha[s] been induced by the defendant's conduct." Kleckley v. N.W. Nat. Cas. Co., 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000) (internal quotation omitted). "Such inducement may consist of … conduct that suggests a lawsuit is not necessary." Kleckley, 338 S.C. at 136-37, 526 S.E.2d at 220.

Brown affirmatively represented to Epstein that the adverse verdict had resulted from errors of law committed by the trial judge which had in turn affected the jury's fact-finding role. Brown also remained nominally as counsel to Epstein throughout the appeal from the verdict. I would hold that the circuit court erred by holding that Brown's representations coupled with his presence on the appellate team did not reasonably induce Epstein's forbearance. That Brown did not actually participate in the appellate representation, other than filing the appeal and being counsel of record, makes this conclusion all the more compelling, as his watchful presence bolstered his affirmative representations. I would therefore hold that Brown is estopped from asserting the statute of limitations as a defense.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cecil Heyward Dempsey, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Orangeburg County
Donald W. Beatty, Trial Judge
Rodney A. Peeples, Post-Conviction Relief Judge

Opinion No. 25954
Submitted October 20, 2004 – Filed March 21, 2005

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Chief, Capital & Collateral Litigation Donald J. Zelenka, Assistant Deputy Attorney General Salley Elliott, and Assistant Attorney General Elizabeth R. McMahon, all of Columbia, for Petitioner.

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Respondent Cecil Heyward Dempsey (Dempsey) was convicted of first-degree criminal sexual conduct (CSC) with a minor and was sentenced to thirty years in prison. The court of appeals affirmed. *State v. Dempsey*, 340 S.C. 365, 532 S.E.2d 306 (Ct. App. 2000). Dempsey applied for post conviction relief (PCR) and relief was granted. This Court granted the State's petition for certiorari. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Dempsey was charged with CSC with a minor for sexually abusing his nine-year-old stepson (victim). The victim testified that Dempsey sexually abused him "four times [a week], almost everyday" for a period of more than a year. In addition, the State's case included testimony of the arresting officer and several doctors and counselors at the Low Country Children's Center, a center that specializes in caring for abused children.

The State offers the following issues for review:

I. Did the PCR court err when it found Dempsey's trial counsel ineffective for failing to subpoena the victim's grandfather to offer testimony that could have potentially exculpated Dempsey?

II. Did the PCR court err when it found Dempsey's trial counsel ineffective for failing to offer expert testimony on sexual abuse to rebut the state's expert testimony?

III. Did the PCR court err when it found Dempsey's trial counsel ineffective for failing to request a jury charge of assault and battery of a high and aggravated nature (ABHAN)?

LAW/ANALYSIS

STANDARD OF REVIEW

This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (citing *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995)). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, the Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000) (citing *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996)).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. *Payne v. State*, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing *Strickland v. Washington*, 466 U.S. 688, 694 (1984)). An attorney's performance is not deficient if it is reasonable under professional norms. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Second, the applicant must show that there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

I. Failure to Subpoena Witness

The State argues that the PCR judge erred in granting Dempsey relief on the basis that trial counsel was ineffective for failing to subpoena an out-of-state witness that would have allegedly offered exculpatory testimony. We agree.

A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence. *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995).

In his PCR application, Dempsey claimed trial counsel was ineffective for failing to subpoena the victim's grandfather, who Dempsey alleged would have testified that the victim lied about being sexually assaulted. At the PCR hearing, counsel admitted that he did not know the proper procedure to subpoena an out-of-state witness. Nevertheless, because we cannot determine what the victim's grandfather would have said in his testimony, any prejudice to Dempsey is merely speculative. In addition, because the victim's grandfather did not testify at the PCR hearing or otherwise have his testimony offered, there is no evidence that, if counsel had subpoenaed the witness, the result at trial would have been different. Accordingly, we hold that the PCR court erred in granting relief on the basis that trial counsel was ineffective in failing to subpoena the victim's grandfather to testify at trial.

II. Failure to Present Expert Testimony

The State argues that the PCR judge erred in granting Dempsey relief on the basis that counsel was ineffective for failing to offer expert testimony on child sexual abuse to rebut the testimony of the state's expert witness. We agree.

At trial, the State called Dr. Donald Elsey, a therapist at the Low Country Children's Center, to testify as an expert on child sexual abuse. Dr. Elsey testified that it was his opinion that the victim had been sexually abused.

In addition, the State presented expert testimony from Dr. Elizabeth Baker who performed the victim's physical examination. Dr. Baker testified that she found no physical evidence that the victim was sexually abused, but that it was likely that if someone was assaulted in the manner in which the victim alleged, there would be no physical evidence of the assault. Dempsey's counsel did not call an expert to rebut the State's expert testimony because he believed that the lack of physical evidence of abuse, by itself, was enough to rebut the state's expert testimony.

First, because Dempsey failed to have an expert on child sexual abuse testify at the PCR hearing, we hold that any finding of prejudice is merely

speculative. Second, we find that counsel's decision not to call an expert witness to rebut the state's expert witness was a legitimate trial strategy. *See McLaughlin v. State*, 352 S.C. 476, 483-484, 575 S.E.2d 841, 844-845 (2003) (holding that where counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective assistance of counsel.) Accordingly, we hold that the PCR court erred in granting relief on the basis that trial counsel was ineffective in failing to call an expert witness on child sexual abuse.

III. Failure to Request Jury Charge

The State argues that the PCR judge erred in granting relief on the basis that counsel was ineffective for failing to request a jury charge on the lesser-included offense of ABHAN. We agree.

A judge must charge the jury on material issues raised by the evidence. *Frasier v. State*, 306 S.C. 158, 162, 410 S.E.2d 572, 574 (1991). Nevertheless, a judge is required to charge a jury on a lesser-included offense "if there is any evidence from which it could be inferred the lesser, *rather than the greater*, offense was committed." *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996) (emphasis supplied).

ABHAN is a lesser-included charge of CSC. *State v. Primus*, 349 S.C. 576, 582, 564 S.E.2d 103, 106 (2002). ABHAN is the unlawful act of violent injury to another accompanied by circumstances of aggravation. *Id.* at 580, 564 S.E.2d at 105. Circumstances of aggravation include the use of a deadly weapon, intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties of familiarities with a female, and resistance to lawful authority. *Id.* at 580-581, 564 S.E.2d at 105-106.

In the present case, both the victim's aunt and the victim testified that Dempsey acted violently towards the victim. The aunt testified that on one occasion she witnessed Dempsey pick up the victim and yell obscenities at him. In addition, victim testified that on another occasion Dempsey "jacked

[the victim] up against the wall" and threatened to hurt him if he told anyone about the sexual abuse. Nevertheless, the evidence indicates that on several different occasions Dempsey forced the victim to perform various sexual acts. We find that there is no evidence that Dempsey committed ABHAN rather than CSC with a minor on those occasions.

In this case, Dempsey points to evidence that he physically assaulted the victim to support his claim that counsel was ineffective in failing to request an ABHAN charge. The indictment charged that the CSC occurred between December 1996 and June 1997, during which period there was evidence of several instances of sexual battery. While it is true, as Dempsey contends, that there was also evidence of conduct that could be construed as ABHAN, none of these incidents was alleged to have occurred instead of the sexual batteries. Under these circumstances, where there is no evidence from which it could be inferred that ABHAN rather than CSC was committed, an ABHAN charge is not warranted.

CONCLUSION

We find no evidence of probative value sufficient to support the PCR court's finding that counsel was ineffective.

REVERSED.

MOORE, WALLER, BURNETT AND PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Gary James Long, Jr., Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Sumter County
Clifton Newman, Circuit Court Judge

Opinion No. 25955
Heard February 15, 2005 – Filed March 21, 2005

AFFIRMED

David I. Bruck, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and Solicitor Cecil Kelley Jackson, of Sumter, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review a Court of Appeals' decision holding that, pursuant to S.C. Code Ann. § 56-5-2946 (Supp. 2004), a law enforcement officer may require, without first offering a breath test, a person charged with felony driving under the influence (Felony DUI)[1] to submit to a chemical test of his blood. State v. Long, Op. No. 2003-UP-111 (S.C. Ct. App. filed February 12, 2003). We affirm.

FACTS

Following a single-car accident, petitioner (Driver) and his two passengers were transported to a hospital. One of the passengers died as a result of injuries received. Around 4 a.m., several hours after Driver arrived at the hospital, a blood sample was taken at the behest of a law enforcement officer.

At trial, Driver objected to the introduction of the results of this blood test since he alleged he had neither been offered a breath test nor had a licensed medical personnel determined that he was unable to give a breath sample. Driver relied upon the general implied consent statute,[2] which provides "the person must first be offered a breath test…[unless] the person is physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel…." before a blood sample may be taken. § 56-5-2950(a). The State contended, and the trial judge agreed, that the specific statute applicable to individuals suspected of Felony DUI, § 56-5-2946, obviated the requirement of § 56-5-2950(a) that a breath test be offered or be deemed unavailable, before a blood test is ordered. The test result was admitted, and on appeal, the Court of Appeals affirmed.

ISSUE

Did the Court of Appeals err in holding that

[1] S.C. Code Ann. § 56-5-2945 (Supp. 2004).
[2] S.C. Code Ann. § 56-5-2950 (Supp. 2004).

§ 56-5-2946 altered the prerequisites for ordering a blood test of individuals charged with Felony DUI?

ANALYSIS

The general implied consent statute was rewritten by 1998 Act No. 434, § 7. Section 6 of that same act created § 56-5-2946. We are not asked today to determine all the changes wrought by § 56-5-2946, but only whether this statute alters the general requirement that an officer offer a breath test or obtain a medical opinion that such a test is not feasible before offering a blood test. We hold that it does.

Pursuant to § 56-5-2950, a person driving a motor vehicle in South Carolina is deemed to have consented to a chemical test of his breath, blood, or urine if arrested for an offense arising out of acts alleged to have been committed while under the influence of alcohol, drugs, or a combination of the two. § 56-5-2950(a). The arresting officer must first assure the individual is offered a breath test, unless "licensed medical personnel" deems such a test unacceptable. In that case, the officer may request a blood test. Id. The officer must notify the individual of his right to independent testing, and provide affirmative assistance to assist in arranging such testing. Id.

Section 56-5-2950(a) also prescribes certain technical testing requirements, such as requiring an accurate simulator test be performed before the breath test is administered, and that blood and urine samples be obtained by medical personnel. This section also provides civil and criminal immunity to those administering the tests or obtaining the samples in most situations.

Part (b) of § 56-5-2950 provides for certain evidentiary presumptions based upon the alcohol concentrations shown by the tests. Part (c) deems an unconscious person or one otherwise unable to refuse to have been informed as provided by part (a). Part (d) requires the individual be given a written report giving the times and results of tests, and requires him to furnish results of his independent test to the arresting officer if the driver intends to rely upon that test result as evidence. Part (e) provides for judicial or administrative review of regulations, and for the exclusion of evidence if

these regulations are not complied with, and part (f) permits fees to be assessed for certain services.

Section 56-5-2946 is entitled "Submission to testing for alcohol or drugs," and applies only to persons believed to have committed Felony DUI. This statute begins with "Notwithstanding any other provision of law, a person must submit" to chemical tests to determine alcohol concentration when he is suspected of Felony DUI. The second paragraph of § 56-5-2946 provides, "The tests must be administered at the direction of a law enforcement officer…A person who is tested or gives samples must be notified of his right to independent tests."

These two paragraphs essentially alter the procedural prerequisites which must be met under § 56-5-2950 before an officer may order a blood test for a Felony DUI suspect. Under § 56-5-2946, the officer need no longer offer a breath test as the first option, nor must he obtain a medical opinion that such a test is not feasible before ordering a test or sample.

Driver contends that § 56-5-2946 retains all the requirements of § 56-5-2950. This contention is based upon § 56-5-2946's third paragraph, which provides:

> The provisions of Section 56-5-2950, relating to the administration of tests to determine a person's alcohol concentration, additional tests at the person's expense, the availability of other evidence on the question of whether or not the person was under the influence of alcohol, drugs, or a combination of them, availability of test information to the person or his attorney, and the liability of medical institutions and persons administering the tests **are applicable to this section** and also extend to the officer requesting the test, the State or its political subdivisions, or governmental agency, or entity which employs the officer making the request, and the agency, institution, or employer, either governmental or private, of persons administering the tests. Notwithstanding any other provision of state law pertaining to confidentiality of

> hospital records or other medical records, information regarding tests performed pursuant to this section must be released, upon subpoena, to a court, prosecuting attorney, defense attorney, or law enforcement officer in connection with an alleged violation of Section 56-5-2945.

We disagree with Driver's interpretation of this paragraph. The legislature is presumed to intend that its statutes accomplish something. E.g., S.C. Coastal Conserv. League v. S.C. DHEC, 354 S.C. 585, 582 S.E.2d 410 (2003). Driver's reading of the statute, to duplicate the requirements of § 56-5-2950, renders § 56-5-2946 virtually meaningless. Driver's construction violates the rule that a statute is presumed to have meaning, and ignores the language of the statute itself.

We hold that paragraph three of § 56-5-2946 incorporates the technical testing requirements of § 56-5-2950(a). The paragraph also makes clear that the release from liability provisions of § 56-5-2950(a) apply to persons acting pursuant to § 56-5-2946, incorporates other informational requirements of § 56-5-2950(d), and provides for the applicability of the evidentiary rules found in § 56-5-2950(b) and (e). The Court of Appeals was correct in affirming the trial court's ruling that the officer was not required to offer a breath test or receive a medical opinion before ordering Driver's blood test.

CONCLUSION

A law enforcement officer can order a person suspected of Felony DUI to submit to any chemical test without first offering a breath test. The decision of the Court of Appeals is

AFFIRMED.

TOAL, CJ., MOORE, WALLER AND BURNETT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Thomas E. Ruffin, Jr., Respondent.

Opinion No. 25956
Heard February 3, 2005 – Filed March 21, 2005

INDEFINITE SUSPENSION

Attorney General Henry Dargan McMaster and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for Office of Disciplinary Counsel.

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

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct filed formal charges against respondent, Thomas E. Ruffin, Jr. After a hearing, the Panel recommended an indefinite suspension.

FACTUAL BACKGROUND

The charges against respondent stem from his involvement in a real estate deal with two doctors. The Doctors and respondent formed a limited liability company (LLC) for the purpose of purchasing a lot and constructing a building in which respondent could rent law office space. The agreement

was for the Doctors to provide the purchase money and then become "silent partners" with respondent. Respondent's duties, as the Doctors understood them, were to: (1) handle all architectural fees at no cost to the Doctors; (2) perform all of the legal work involved at no cost;[1] (3) use his contacts in the area with a contractor to construct the building and supervise all construction; and (4) lease the building from the LLC at a fair market value, with plans for the Doctors to get their initial investment back in seven years, and thereafter the LLC would turn a profit for all members.

An attorney, other than respondent, closed a $300,000 construction loan from Anchor Bank on March 24, 1998. Subsequently, respondent opened the LLC account with Anchor Bank. On the day the LLC account was opened, respondent wrote a check, payable to himself, labeled "costs/expenses" in the amount of $15,000, and then deposited the check into his personal bank account. This check was the beginning of many LLC checks that respondent would write to himself or his law firm. Respondent did not inform the Doctors he was going to write checks from the LLC account to himself and his firm, nor that he would do so in order to pay vendors out of his personal or law firm accounts.

The allegations of misconduct against respondent in the Formal Charges cover four areas: (1) that respondent engaged in a scheme to misappropriate funds from the LLC; (2) that respondent drafted or participated in the last-minute submission of a settlement agreement, between he and the Doctors, that contained elements inconsistent with settlement agreements he had already signed or put on the record before the circuit court; (3) that respondent participated in or authorized frivolous litigation; and (4) that respondent failed to cooperate with the disciplinary investigation. We separate the allegations into these four categories: The LLC, Misappropriation of Funds, The Litigation, and Failure to Cooperate.

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[1]Respondent testified he was not acting as an attorney for the LLC, except for two mechanic's lien actions that arose later; and that he simply promised the Doctors he would be able to have any legal matters regarding the LLC completed at a reduced rate by other attorneys.

The LLC

A few months after the LLC closed on the construction loan at Anchor Bank, respondent convinced the Doctors to refinance the loan for $360,000 at another bank. Respondent assured the Doctors the extra $60,000 would never actually be needed and that he would pay the entire amount back. An attorney, other than the previous closing attorney and respondent, conducted the closing for the refinancing.

Subsequently, respondent met with the Doctors and informed them that, although he had paid the contractor for the building being constructed, the contractor had not paid two vendors who then filed mechanic's liens as a result. One of the Doctors testified respondent stated the Doctors needed to place more money in the LLC account to pay the liens in order to avoid a bad credit rating. Respondent explained that the vendors who filed the liens had a legal right to do so; however, the Doctors believed this advice was incorrect. The Panel found respondent had given false legal advice to his clients.

In September 1998, the Doctors requested the LLC records from respondent so that they could examine them. After repeated delays by respondent, the Doctors contacted respondent who stated he had taken all the records to Greg Lipe, an accountant. Respondent had not in fact taken any records to Lipe at this time. The Doctors' accountant, Lawrence D. Guerry, finally retrieved the records directly from the bank.

When the Doctors examined the bank records, they were disturbed because respondent had written LLC checks to himself, his law firm, to his wife in one incident, and because the account had been subject to several insufficient funds fees and other bank fees indicating a mismanagement of the account by respondent. The Doctors also discovered that at least three LLC checks and possibly more, totaling over $13,800, had been written to the respondent's law firm for legal fees. The Doctors never received a bill or an accounting from respondent has to how he had earned the alleged legal fees.

When a settlement could not be reached between the Doctors and respondent with the assistance of their respective attorneys, the Doctors filed

a suit against respondent and his firm in July 1999. At the end of July, the attorneys placed a settlement agreement on the record in front of a circuit court judge that provided respondent would purchase the Doctors' interest in the LLC for $148,000. The closing did not occur as planned and respondent requested an extension of time.

A closing was eventually set for October 6, 1999. However it did not occur because, on the morning of the closing date, respondent's attorney, Craig Young, faxed a Severance Agreement to the Doctors' attorney, Jerome Askins. This agreement contained items that were not agreed upon. The details of this incident are discussed below under the heading, "The Litigation."

After a motion to compel settlement and other negotiations, the litigation was eventually settled and the building was sold. As part of the settlement, respondent paid the Doctors the amount of their net loss from the venture. Therefore, the Doctors recovered the money they had lost.

The Panel found that, while respondent contended he was simply a business partner with the Doctors in this venture and did not perform legal services on their behalf, the facts showed otherwise given that respondent acted as an attorney for the LLC regarding the mechanic's liens and given that he had written LLC checks, with the label "legal" or "legal fees" to his law firm.

Misappropriation of Funds

Respondent admits he did not maintain detailed records of the transactions involving the LLC account and that he is unable to provide an accounting of the funds that were deposited into the LLC account or to trace the funds into and out of the account. The Panel found it was clear respondent was writing checks back and forth from his two law firm accounts (one at Anchor Bank and one at Carolina First Bank), his personal account, and the LLC account. The Panel stated respondent was expending sums from all of these accounts for items totally unrelated to the building being

constructed by the LLC. The Panel found respondent often had negative balances in his personal and law firm accounts.

Although there were numerous instances of check writing misconduct, for brevity we cite only two examples:

(1) Respondent wrote LLC check number 115, in the amount of $5,000 to himself, and deposited it into his personal account at Anchor Bank on the same day. The balance in his personal account had been negative (-) $211.95 three days earlier. On the date of the deposit of the LLC check, respondent's personal account balance rose to $3,924.06.

(2) Respondent wrote LLC check number 143, to "Thomas E. Ruffin, Jr., P.C.," in the amount of $5,550. A deposit was made into the law firm general account (at Carolina First Bank) of $5,500 on July 8 and $50 on July 9. On July 8, the balance in the law firm account rose to negative (-) $955.13 but dropped to negative (-) $5,005.13 on July 9. It rose to $1,494.87 on July 13, 1998, aided by a deposit of $6,500 on that day. That rise was a result of the deposit of LLC check number 151, in the amount of $6,500, written to "Ruffin Law Firm – General Account." That month, there were nine insufficient funds fees on respondent's law firm account at Carolina First Bank.

Respondent's accountant, after analyzing the cost of the construction project and respondent's transfer of funds from the LLC account to respondent's law firm accounts or personal account, determined that the total amount due appeared to be $30,390.70. The Attorney to Assist (ATA), who was appointed to investigate this matter, concluded there was a total shortage of $30,023.45.[2] The Doctors' accountant, Lawrence D. Guerry, testified it

[2]A circuit court order noted that it had been determined by accountants that there was $34,904.90 in LLC funds that could not be accounted for by respondent.

was disturbing that respondent's LLC checks were almost always in round figures, which, he testified, is atypical of checks written to vendors in a construction project.

The Litigation

The Doctors' attorney, Jerome Askins, III, (Askins) testified that, in the beginning of his representation of the Doctors, he made several unsuccessful attempts to meet with respondent to discuss the LLC bank records. Once a meeting was held, it became apparent respondent had engaged in financial misconduct in relation to the LLC account. Askins filed suit on behalf of the Doctors when negotiations with respondent to buy the building were unsuccessful. The matter was finally scheduled for a settlement and closing on October 6, 1999. On that date, Askins received a fax, which changed the previous agreement. He testified this new agreement, known as the Severance Agreement, was not a part of the settlement that had previously been placed on the record.

Paragraph 5 of the agreement stated that respondent had never served as an attorney for the Doctors or the LLC; however, respondent had in fact represented the LLC in mechanic's lien actions.

Paragraph 6 of the agreement faxed by respondent's attorney, Young, was a confidentiality clause and a statement of the penalty upon the Doctors if the confidentiality should be breached.[3]

Thereafter, Young filed a Counterclaim and Third Party Complaint involving RICO violations.[4] As a result, Askins had to withdraw from

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[3]During respondent's attorney's testimony, it became clear that respondent's attorney, Craig Young, and not respondent, had inserted the offending paragraphs into the agreement.

[4]A RICO violation is a violation of the Federal Racketeer Influenced and Corrupt Organization Act. Racketeering involves a person who uses extortion, loan sharking, bribery, or obstruction of justice to further his illegal

representing the Doctors and the Doctors had to find new counsel. Subsequently, the circuit court issued an order, which noted the third party action against Askins had been ended by the payment of $10,000 to Askins from respondent.

Failure to Cooperate

The Commission requested that respondent deliver certain bank records to the investigator. Respondent only partially complied with the request. He failed to provide all of the bank statements, cancelled checks, and deposit slips that were requested. Respondent admits that, due to poor record-keeping, he is unable to provide all of the requested financial information.

Panel's Findings

The Panel found the following violations of Rule 7(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: 7(a)(1), violating a Rule of Professional Conduct; 7(a)(3), failing to fully comply with a subpoena issued by the Commission; 7(a)(5), engaging in conduct tending to pollute the administration of justice or to bring the legal profession into disrepute or conduct demonstrating an unfitness to practice law; and 7(a)(6), violating the oath of office taken upon admission to practice law in this State.

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activities. Usually this person uses some sort of authority or power to illegally persuade others to further his interests.

Mr. Young explained he filed the third party complaint against Askins with a clear understanding of RICO violations. Young testified he filed the third party complaint as a result of Askins calling him and stating that Young would get his client to do what the Doctors wanted regarding the settlement or that Askins was going to get the solicitor's office and SLED involved. Respondent asserts he relied on Young's expertise in determining whether to file the RICO action.

The Panel further found respondent violated the Rules of Professional Conduct, Rule 407, SCACR. The Panel found violations of Rule 1.1, competence; Rule 1.2, scope of representation; Rule 1.5, fees; Rule 1.7, conflict of interest; Rule 1.15, safekeeping property; Rule 3.1, meritorious claims and contentions; Rule 3.3, candor toward a tribunal; Rule 3.4, fairness to opposing party and counsel; Rule 4.1, truthfulness in statements to others; Rule 8.1(b), failure to respond to a lawful demand from a disciplinary authority; Rule 8.4(a), violating the Rules of Professional Conduct; Rule 8.4(c), engaging in conduct involving moral turpitude; Rule 8.4(d), engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and Rule 8.4(e) engaging in conduct prejudicial to the administration of justice.[5]

The Panel found respondent's misconduct was mitigated by the eventual settlement and the fact that respondent did not have a prior disciplinary record. The Panel concluded the appropriate sanction was an indefinite suspension and a requirement that respondent pay the costs of the proceedings. Both Disciplinary Counsel and respondent have raised issues regarding the Panel's report.

ISSUES

I. Did the Panel err by failing to find respondent had engaged in check kiting?

II. Did the Panel err by failing to find respondent had filed a third party RICO action without a sufficient factual basis?

III. Did the Panel err by finding respondent violated certain rules of the Rules for Professional Conduct?

[5]Regarding Rule 8.4, the Panel incorrectly lettered the subsections of the rule. The correct rules are noted above.

DISCUSSION

I

Disciplinary Counsel argues the Panel erred by failing to find respondent had violated Rule 8.4(b) of the Rules for Professional Conduct, Rule 407, SCACR, by engaging in check kiting. Rule 8.4(b) defines attorney misconduct to include committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

We find the Panel did not err by failing to find a violation of Rule 8.4(b) because there was no evidence of check kiting. Check kiting involves creating artificial balances in an account until funds are received to cover shortages in that account. While respondent wrote checks from the LLC account presumably to cover his personal and law firm accounts that had insufficient funds to cover checks he had written from those accounts, there is no evidence respondent was engaged in an intentional scheme to kite checks. *Cf.* *In re* Miller, 328 S.C. 283, 494 S.E.2d 120 (1997) (disbarment administered for soliciting assistance of other persons to engage in check kiting); *In re* Robson, 318 S.C. 77, 456 S.E.2d 374 (1995) (disbarment administered for entering guilty plea to check kiting); *In re* Gibbes, 323 S.C. 80, 450 S.E.2d 588 (1994) (disbarment administered for devising and implementing check kiting scheme). Further, there is no evidence respondent was "knowingly covering checks drawn on insufficient funds with worthless checks deposited from other accounts and taking advantage of the lag time necessary for clearance of the checks to keep the 'kite' afloat." *In re* Gates, 311 S.C. 246, 247, 428 S.E.2d 716, 717 (1993) (emphasis added). The LLC checks respondent used to eliminate negative balances in his personal and law firm accounts were not worthless.

Accordingly, the Panel did not err by failing to find respondent had violated Rule 8.4(b) because there is no evidence respondent engaged in check kiting. *See* *In re* Flom, 356 S.C. 246, 588 S.E.2d 593 (2003) (disciplinary violation must be proven by clear and convincing evidence).

II

Disciplinary counsel argues the Panel erred by failing to find respondent had, through his counsel, frivolously filed a third party RICO complaint against the Doctors' attorney, Jerome Askins. Specifically, Disciplinary Counsel argues the Panel erred by failing to find respondent had violated Rule 3.1, meritorious claims and contentions; Rule 3.3, candor to a tribunal; Rule 3.4, fairness to opposing party and counsel; and Rule 8.4 (misconduct), subsections (a), (d), and (e). However, the Panel in fact found respondent had violated all of those rules and that he had frivolously filed the RICO complaint. Therefore, Disciplinary Counsel's argument is without merit.

However, we disagree with the Panel's finding that respondent frivolously filed the RICO complaint because there is not clear and convincing evidence of this misconduct. *See* *In re* Flom, *supra* (disciplinary violation must be proven by clear and convincing evidence). Respondent testified he relied on the advice of his attorney because the area of RICO law was not within his area of expertise. Therefore, the Panel erred by finding respondent violated Rule 3.1, which states a lawyer shall not bring or defend a proceeding, unless there is a basis for doing so that is not frivolous.

III

Respondent argues the Panel erred by finding he had violated certain Professional Rules. We agree with respondent in part.

Initially, we disagree with the Panel's finding that a legal relationship, outside of the mechanic's lien actions, existed between respondent and the Doctors. There is a dispute in the testimony as to whether a legal relationship existed. The Doctors testified respondent was to act as their attorney and the LLC's attorney by preparing documents related to the LLC and by performing the closings on the real estate and the loan refinancing. Respondent testified he never informed the Doctors that he would be performing legal work and that he told the Doctors that he would be able to get legal work done by another attorney for a reduced rate. Consistent with

respondent's testimony, the real estate and refinancing closings were performed by other attorneys. Further, another attorney assisted in the preparation of the LLC documents.

While the Panel finds a legal relationship existed partially on the basis that checks, denoted "legal" or "legal fees," from the LLC account were made out to respondent or his law firm, we do not find this fact dispositive. It is clear that attorneys, other than respondent, handled the legal issues that arose with the LLC. Therefore, it appears respondent may have used these particular checks to take money from the LLC account for a seemingly proper reason.

Given we may make our own findings of fact and conclusions of law in a disciplinary action, we find respondent did not have a general legal relationship with the Doctors and the LLC. *In re* Wilkes, 359 S.C. 540, 598 S.E.2d 272 (2004) (Court may make own findings of fact and conclusions of law in disciplinary action). The allegation that respondent's misconduct arose out of the existence of a legal relationship was not proven by clear and convincing evidence. *See In re* Flom, *supra* (disciplinary violation must be proven by clear and convincing evidence).

Because we find a general legal relationship did not exist between respondents and the Doctors or the LLC, we find the Panel erred by finding respondent violated Rule 1.2 (scope of representation), Rule 1.7 (conflict of interest), and Rule 1.15 (safekeeping property).

Respondent argues the Panel erred by finding he had violated Rule 7(a)(5), Rule 1.1, Rule 3.3., Rule 3.4, and Rule 4.1. We uphold the Panel's findings that respondent violated Rule 7(a)(5), Rule 3.3, and Rule 3.4 without comment.

Regarding Rule 1.1. (competence), we find the Panel did not err by finding a Rule 1.1 violation because respondent incorrectly advised the Doctors regarding mechanic's liens actions that had been filed against the LLC. Regarding respondent's misstatements to the Doctors, the Panel also found respondent had violated Rule 4.1, which provides: "In the course of

representing a client a lawyer shall not knowingly: (a) Make a false statement of material fact or law to a third person . . . ." Whether respondent's advice was simply due to incompetence or due to respondent's desire to acquire more money from the Doctors is unclear. Because there is not clear and convincing evidence that respondent violated Rule 4.1, we find the Panel erred by finding respondent violated this rule. *See* *In re* Flom, *supra* (disciplinary violation must be proven by clear and convincing evidence).

SANCTION

This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record. *In re* Thompson, 343 S.C. 1, 539 S.E.2d 396 (2000). The Court may make its own findings of fact and conclusions of law, and is not bound by the Panel's recommendation. *In re* Larkin, 336 S.C. 366, 520 S.E.2d 804 (1999). The Court must administer the sanction it deems appropriate after a thorough review of the record. *Id.*

We have deemed indefinite suspension the appropriate sanction in similar cases. *See* *In re* Perrow, 346 S.C. 515, 552 S.E.2d 295 (2001) (indefinite suspension where attorney issued check to himself that exceeded his fee in several cases and used funds in escrow account to pay for repairs to residence); *In re* Jenkins, 346 S.C. 617, 552 S.E.2d 734 (2001) (indefinite suspension where attorney failed to respond to disciplinary authority and thereby admitted misconduct of failing to pay bar license fees, failing to comply with CLE requirements, and failing to appear as ordered by the Court). *See also* *In re* Sipes, 297 S.C. 531, 377 S.E.2d 574 (1989) (although practice of law not involved, Court ordered one-year suspension for attorney's misappropriation of Girl Scout cookie funds and attempt to repay funds through forged checks drawn on a closed account).

We indefinitely suspend respondent from the practice of law and order him to pay the costs of the disciplinary proceedings. If he has not already done so, within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk

of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

In the Matter of Dane Arlen Bonecutter, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(c), 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 S. Murry Kinard, 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. Kinard shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Kinard 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 S. Murry Kinard, 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 S. Murry Kinard, 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. Kinard'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.

IT IS SO ORDERED.

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

Columbia, South Carolina
March 11, 2005

The Supreme Court of South Carolina

In the Matter of Donald Loren Smith, Respondent.

ORDER

Respondent has been charged with possession of a quantity of Alprazolam under circumstances indicating an intent to distribute the substance to another in violation of S.C. Code Ann. § 44-53-370(b)(3) (1985). The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), 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 William B. Darwin, Jr., 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. Darwin shall take action

as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Darwin 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 William B. Darwin, Jr., 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 William B. Darwin, Jr., 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. Darwin'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.

IT IS SO ORDERED.

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

Columbia, South Carolina

March 14, 2005