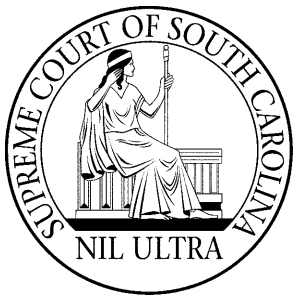

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21
May 27, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Philip Ethier and Jeanne Ethier, Petitioners,

v.

Fairfield Memorial Hospital; Guy R. Bibeau, M.D.; Tuomey Medical Professionals, Inc.; and Pee Dee Emergency Medical Associates, PA, Defendants,

Of whom Guy R. Bibeau, M.D. is the Respondent.

Appellate Case No. 2018-001435

ORDER

The petition for rehearing is denied. However, the attached opinion is substituted for the previous opinion, which is withdrawn.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ James E. Lockemy A.J.

Columbia, South Carolina

May 27, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Philip Ethier and Jeanne Ethier, Petitioners,

v.

Fairfield Memorial Hospital; Guy R. Bibeau, M.D.; Tuomey Medical Professionals, Inc.; and Pee Dee Emergency Medical Associates, PA, Defendants,

Of whom Guy R. Bibeau, M.D. is the Respondent.

Appellate Case No. 2018-001435

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Fairfield County
Roger L. Couch, Circuit Court Judge

Opinion No. 27953
Heard September 24, 2019 – Filed May 11, 2020
Re-Filed May 27, 2020

REVERSED AND REMANDED

Ronald Brian Cox and Robert David Proffitt, of Proffitt & Cox, LLP, of Columbia, for Petitioners.

David Cornwell Holler, of Lee, Erter, Wilson, Holler & Smith, LLC, of Sumter, Stanley Lamont Myers, Sr., of Moore Taylor Law Firm, P.A., of West Columbia, Andrew F. Lindemann, of Lindemann, Davis & Hughes, PA, of Columbia, and G. Murrell Smith, Jr., of Smith Robinson Holler DuBose Morgan, LLC, of Sumter, all for Respondent.

JUSTICE HEARN: In this medical malpractice action, Petitioners Phillip and Jeanne Ethier appeal a verdict in favor of Respondent Dr. Guy Bibeau, who misdiagnosed a popliteal aneurysm as a probable spider bite. Petitioners contend the court of appeals erred in affirming the trial court's decision to deny granting a new trial based on intentional juror concealment and premature deliberations. We reverse and remand for a new trial.

FACTUAL BACKGROUND

I. Facts

In April 2011, Philip Ethier went to the emergency room at Fairfield Memorial Hospital after he felt a sudden, excruciating pain jolt up his leg as he walked to a shed in his backyard. Rather than drive to a nearby hospital in Chester County, Ethier traveled to Fairfield Memorial because he recently had been hired as a licensed practical nurse in its emergency department. Upon arrival, a certified nurse assistant examined his vitals, and Ethier informed her that his leg and foot were in severe pain—about a 7 or 8 on a scale of 10. She noted on a medical intake form that his "feet started to turn ecchymotic."[1] According to the nurse's notes, she examined Ethier's pedal and post-lib pulses, but the corresponding section was left blank.[2]

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[1] Related to ecchymosis, which is "a discoloration due to extravasation of blood, as in a bruise." *See* Ecchymosis, Dictionary.com, https://www.dictionary.com /browse/ecchymosis.

[2] These pulses are taken in a patient's foot, where according to the Ethiers' expert, an abnormal reading may indicate a vascular issue.

Thereafter, Bibeau examined Ethier, diagnosing him with a probable spider bite—a "ridiculous" diagnosis according to the plaintiff's expert at trial, especially since neither Ethier nor the nurse assistant mentioned that as a possible scenario and no one ever identified a bite mark. Bibeau informed Ethier to follow-up with his primary physician if symptoms changed and was given similar information upon discharge that afternoon.

Over the next six weeks, Ethier's symptoms gradually improved, allowing him to return to work at the hospital. However, during that time, the tip of one of the toes on his right foot turned black, and according to Ethier, he spoke with Bibeau and another doctor a couple of times during his shifts at the hospital. The occurrence and extent of these "curbside consultations" were disputed at trial. Ethier's initial symptoms returned in late May 2011, requiring him to return to the emergency room. This time, however, Ethier went to a hospital in Chester County, and doctors immediately realized Ethier was suffering from an aneurysm. Shortly thereafter, Ethier was transported by ambulance to a hospital in Charlotte, where vascular surgeons first attempted noninvasive measures to alleviate the blood clots caused by the vascular injury. After these measures failed, surgeons elected to perform invasive surgery, requiring them to cut an incision from his hip to above his ankle.

Due to the severity of the surgery, Ethier suffered intense pain, and trial testimony indicated he is no longer as active as before. Further, while Ethier attempted to return to work as a nurse, the pain eventually prevented him from doing so. Additionally, his wife testified that his disability strained the close companionship they previously enjoyed in their marriage.

The jury found Bibeau negligent and awarded $1,250,000 in economic damages and $500,000 in non-economic damages to Philip Ethier. Additionally, the jury awarded $250,000 in damages to Jeanne Ethier for loss of consortium. However, because the jury apportioned only 30% of the fault to Bibeau and the remaining 70% to Philip Ethier, the trial court entered a defense verdict on both claims. The Ethiers filed a motion to alter or amend the judgment, asserting Jeanne Ethier was entitled to recover the full amount on her loss of consortium claim, but the trial court disagreed, finding Philip Ethier's comparative negligence barred recovery for both claims.

II. Allegations of Juror Misconduct

During voir dire, the court asked prospective jurors whether they ever had a "close social or a personal relationship" with either the Ethiers or Dr. Bibeau. After no one indicated they did, the court asked the same question about the list of potential witnesses, which included Jerilyn Wadford and Rhonda Gwynn, two nurses who examined Ethier, and the CEO of Fairfield Memorial, Mike Williams. To this question, juror Teresa Killian informed the court, "I used to work at Fairfield Memorial Hospital with Mike Williams." The court responded, "[s]o you knew him from that employment," which Killian confirmed. Killian never disclosed that she also worked with Bibeau or the two nurses.

After trial, the Ethiers' counsel learned Killian previously worked with Bibeau and the nurses, and that Killian had discussed her knowledge of them with other jurors. One of the jurors, Sandra Carmichael, attested Killian stated she knew the nurses as well as Bibeau, and that both "were very careful and thorough, and if they said they did something, they did it." Carmichael also noted that during jury breaks, Killian repeatedly discussed Bibeau's skills as a doctor.

The Ethiers' counsel filed an affidavit with the trial court, which then held a hearing pursuant to *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), to determine the scope of Killian's conduct. The court first called Killian, who denied making any of the alleged statements. She also indicated that she only disclosed knowing Mike Williams because he had treated her son nearly sixteen years earlier. Further, she added that because the question only called for a close social or personal relationship, she did not include Bibeau or the nurses when she mentioned Williams at trial. Thereafter, the court called the remaining members of the jury, and nine testified they specifically recalled Killian informing them she had worked with Bibeau and the nurses. Four jurors said Killian vouched for the skill, proficiency, and truthfulness of all three during jury breaks. Carmichael testified that Killian's statements affected her vote, as she initially believed Bibeau was more negligent. Nevertheless, while the trial court found Killian had engaged in premature deliberations, it found no prejudice. The court also believed Killian did not intentionally conceal that she knew Bibeau and the three nurses through her previous employment, contending the question was ambiguous because it only addressed "close personal or social relationships." Accordingly, the trial court denied the Ethiers' motion for a new trial.

The Ethiers appealed to the court of appeals, which, in an unpublished opinion, affirmed the denial of a new trial based on juror misconduct and the trial court's decision that Philip Ethier's comparative negligence barred Jeanne Ethier's loss of consortium claim. We granted the Ethiers' petition for a writ of certiorari.

ISSUE

Did the court of appeals err in affirming the trial court's denial of Petitioner's motion for a new trial based on juror misconduct for premature deliberations?

LAW/ANALYSIS

The Ethiers contend Killian's premature deliberations affected the fundamental fairness of the trial. Conversely, Bibeau asserts evidence of premature deliberations is inadmissible and regardless, the trial court did not abuse its discretion in denying the motion for a new trial.

Ordinarily, juror testimony concerning juror misconduct is not admissible unless the allegations of misconduct pertain to external influences. *Shumpert v. State*, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008) ("For a considerable period of history, the rule in South Carolina was that a juror's testimony was not admissible to prove either a juror's own misconduct or the misconduct of fellow jurors."). Rule 606, SCRE, also favors exclusion over inclusion of juror testimony pertaining to internal misconduct. However, a well-recognized exception exists where the misconduct affects the fundamental fairness of the trial. *State v. Hunter*, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995) ("Normally, juror testimony involving internal misconduct is competent only when necessary to ensure due process, i.e. fundamental fairness."). Premature deliberations fall within this exception. *State v. Aldret*, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) ("[W]e hold premature jury deliberations may affect 'fundamental fairness' of a trial such that the trial court may inquire into such allegations and may consider affidavits in support of such allegations."). Once the court determines that premature deliberations occurred, the moving party bears the burden of demonstrating prejudice, which involves an analysis as to whether the juror misconduct actually affected the verdict. *Id.* at 315, 509 S.E.2d at 815 ("[W]e hold the burden is on the party alleging premature deliberations to establish prejudice."). Finally, the trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *Id.*

Because premature deliberations may affect the fundamental fairness of the trial, the affidavit and juror testimony are admissible. Accordingly, our inquiry concerns whether the trial court abused its discretion in finding Killian's conduct did not prejudice the Ethiers. In *Aldret*, we imposed the burden to prove prejudice on the party alleging premature deliberations. *Id.* We did so in part because we previously required a showing of prejudice in the context of external influences and based on the fact that the majority of jurisdictions have imposed prejudice on internal influences. *Id.* at 313–15, 509 S.E.2d at 814–15. While the burden to demonstrate prejudice is high,[3] when evidence strongly supports the fact that votes were changed as a result of a juror's impermissible conduct, we cannot countenance such a tainted verdict.

We have previously upheld a trial court's finding of no prejudice even when there was direct evidence that votes were changed. *Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 384 S.C. 441, 682 S.E.2d 489 (2009). In *Vestry*, a church filed suit against an exterminating company for breach of contract after members discovered termite damage following an inspection. *Id.* at 443, 682 S.E.2d at 490–91. The jury returned a verdict in favor of the exterminating company, but the trial court soon learned of potential juror misconduct. *Id.* at 443–44, 682 S.E.2d at 491. As a result, the court held a hearing, where it questioned jurors about the alleged misconduct. It became apparent that a juror violated virtually every instruction given by the trial court. *Id.* For example, the juror ignored the court's instruction not to discuss the case during the trial with anyone, including fellow jurors. Specifically, the juror informed her fellow jurors early and often of her view of the case, referring to the church members as "historic people" with money who should "clean up their own mess." *Id*. The juror did not understand why she had to hear both sides of the case, and she mentioned that she had consulted with a painter about the termite damage. Stunningly, she even drove to the church to look at the damage prior to deliberations and based on her own inspection, determined it was in good condition. *Id.* The trial court actually held her in criminal contempt of court; yet nevertheless, the court denied the church's motion for a new trial, inexplicably finding the church was not prejudiced—a decision which this Court upheld. *Id.* at 445, 448–49, 682 S.E.2d at 491, 493–94. Because *Vestry* stands for the principle that

[3] The Ethiers did not challenge the trial court's use of the clear and convincing evidence standard. Accordingly, because this issue is not properly before the Court, we leave for another day the standard of proof to be applied when determining whether a party has suffered prejudice as a result of alleged juror misconduct.

less than twelve fair and impartial jurors is perfectly acceptable and is an anomaly in our jurisprudence, we overrule it.

In many ways, Killian's behavior mirrors that of the juror in *Vestry*. The trial court initially recognized the seriousness of Killian's conduct, and therefore, held an *Aldret* hearing to probe the extent of her statements. At the hearing, nine jurors testified they heard Killian state during breaks at trial that she worked at the hospital with Bibeau and the nurses. Four jurors testified Killian vouched for the skill of all three by stating they were "good, careful, or thorough," and if Bibeau did not take foot pulses, then "the nurse" did. Further, four jurors noted Killian vouched for the truthfulness and credibility of all three, asserting Killian informed the jury during breaks that if they "said they did something, they did it."

Despite this testimony, Killian denied discussing the case prematurely and noted her relationship with Bibeau and the nurses did not impact her vote. The trial court found Killian engaged in premature deliberations, but it concluded the Ethiers failed to prove the requisite prejudice in order to grant a new trial. While we commend the trial court for its thorough post-trial evidentiary hearing, it is clear Killian's conduct severely hampered the fundamental fairness of the trial, and that the circumstances here demonstrate prejudice. Carmichael testified that Killian's comments directly affected her vote, as she initially believed Bibeau was more negligent. Indeed, in response to the court's prejudice inquiry, Carmichael stated,

> **Carmichael:** Because when we got back there . . . several of us was leaning towards in favor of [Philip Ethier] and she kept on repeating the reputation and some of the jurors changed their minds and left only two of us with [Philip Ethier], and basically was like, well, if she worked with [Bibeau] and she knew that he was a good doctor . . .
>
> **The Court:** Okay, so it did have some effect on your ultimate decision?
>
> **Carmichael:** Yeah. She stated several times that she knew him and he was a good, reliable doctor.

Killian's intentional disregard of the trial court's repeated instructions not to engage in premature deliberations directly affected the verdict. Killian discussed matters that were not introduced as evidence, and bolstered other evidence that had been admitted. Further, Killian's conduct is egregious, as she repeatedly discussed the case after being instructed not to do so. *Aldret*, 333 S.C. at 311, 509 S.E.2d at

813 (holding premature deliberations may affect the fundamental fairness of a trial in part because the Court has "routinely held instructions which invite jurors to engage in premature deliberations constitute reversible error"). Moreover, the content of her statements is equally troubling, as it concerns the most hotly disputed fact at trial—whether Bibeau checked Ethier's foot pulses. Ethier's expert testified his symptoms presented a classic indication of a vascular issue, which a simple check of his foot pulse would have revealed, and the medical forms do not indicate these pulses were taken. In essence, Bibeau received the benefit of having a character witness on the jury who could attest to his skill without being subjected to cross-examination. This benefit is not speculation, as Killian directly affected Carmichael's vote. Although we have been reluctant to reverse a trial court's denial of a motion for a new trial based on juror misconduct, Killian's disregard of her oath, with resulting prejudice, heightens the error and necessitates the step we take here.

Because we find this issue dispositive, we decline to address the Ethiers' remaining issues.[4] *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address additional arguments after reaching a dispositive issue). While we do not reach the effect of Philip Ethier's negligence on his wife's consortium claim, we do note that South Carolina has historically aligned itself with the minority of jurisdictions which hold a loss of consortium claim and the underlying negligence action are two separate claims. *Lee v. Bunch*, 373 S.C. 654, 647 S.E.2d 197 (2007) ("In South Carolina, claims for personal injuries and for loss of consortium are separate and distinct."). However, the majority of jurisdictions recognize that a spouse's negligence reduces the damages award for loss of consortium. *See Tuggle v. Allright Parking Sys., Inc.*, 922 S.W.2d 105, 108–09 (Tenn. 1996) ("The clear majority of jurisdictions…hold that a loss of consortium award must be reduced, and may be barred, by the comparative fault of the physically injured spouse."). We do not reach this issue today because the juror misconduct infected both actions, and a new trial as to both claims is warranted.

[4] The Ethiers also contended the trial court erred in failing to grant a new trial based on juror concealment when Killian did not disclose during voir dire her working relationship with Bibeau and the two nurses, and it erred in barring recovery for Wife's loss of consortium claim when the jury found her husband 70% at fault.

CONCLUSION

We reverse the court of appeals' decision and remand for a new trial as to all of the Ethiers' claims.

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE, FEW, JJ., and Acting Justice James Edward Lockemy, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Johnny Thomerson, Plaintiff,

v.

Richard DeVito and Samuel Mullinax, both individually and as Liquidating Shareholder Trustees of Lenco Marine, Defendants.

Appellate Case No. 2019-000552

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Richard M. Gergel, United States District Judge

Opinion No. 27972
Heard September 26, 2019 – Filed May 27, 2020

CERTIFIED QUESTION ANSWERED

Dan M. David, of Charleston, and O. Grady Query, of Query Sautter & Associates, LLC, of Charleston, for Plaintiff.

Mark W. McKnight, of Charleston, and W. Scott Turnbull, of Crary Buchanan, PA, of Stuart, Florida, *pro hac vice*, for Defendants.

CHIEF JUSTICE BEATTY: The Court accepted the following question certified to it by the United States District Court for the District of South Carolina:

> Does the three-year statute of limitations of S.C. Code Ann. § 15-3-530 apply to claims for promissory estoppel?

We take this opportunity to clarify state law in this regard and hold the statute of limitations does not apply to promissory estoppel claims.

I. FACTS

Plaintiff alleges Defendants, the former owners of Lenco Marine (a manufacturer of boat products), failed to give him a three-percent ownership interest in Lenco that was promised to him as part of his compensation package. Plaintiff was hired by Lenco no later than May 2007. Defendant Samuel Mullinax was the CEO of Lenco and Defendant Richard DeVito was its president. Lenco was sold in December 2016 to Power Products, LLC.

In his complaint, Plaintiff asserted claims against Defendants for (1) breach of contract and the covenant of good faith and fair dealing, (2) promissory estoppel, (3) *quantum meruit* and unjust enrichment, (4) negligent misrepresentation, (5) constructive fraud, and (6) amounts due under the South Carolina Payment of Wages Act. Defendants moved for summary judgment, arguing the claims were time-barred.

Plaintiff testified that, during negotiations regarding his compensation with Defendant DeVito prior to his start at Lenco, they discussed the fact that he and another employee wanted to have an ownership interest in the company, and DeVito told them they would "work on that as we go on down the road." Plaintiff stated Defendant DeVito provided some detail about an equity plan in early 2009, informing him and the second employee that Lenco was going to buy back a fifteen percent interest from a minority shareholder, Matthew Muer, and distribute it as a three percent share to each of five employees, including Plaintiff. Plaintiff believed the five sets of three-percent equity shares would be issued contemporaneously with the stock buyback.

In 2011, Plaintiff and the second employee had two conversations with Defendant DeVito, in which they inquired about their equity shares. Each time, Defendant DeVito abruptly ended the conversation. Defendant DeVito allegedly told Plaintiff at one point that he did not want to distribute ownership shares in the

company while there was a lawsuit pending against Lenco by another company, Bennett Marine. The second employee resigned shortly thereafter without receiving an ownership share of Lenco.

The Bennett Marine litigation was concluded in September 2013 in Lenco's favor; however, Plaintiff did not receive a three-percent equity share. Defendant DeVito variously advised Plaintiff that he did not want to discuss the subject or that they would talk about it later. Finally, at the end of 2016, Plaintiff again pressed Defendant DeVito as to whether he was going to fulfill his promise to give him a three-percent ownership interest, and Defendant DeVito stated he was not. Plaintiff then brought this action against Defendants in the federal district court in 2018.

The district court granted summary judgment to Defendants on all of Plaintiff's claims—except promissory estoppel—on the basis they were time-barred by the three-year statute of limitations contained in S.C. Code Ann. § 15-3-530 (2005). The district court found Plaintiff should have known he potentially had a claim against Defendants in 2013 (after the litigation concluded with Bennett Marine and the equity shares were not distributed). The parties disagreed on whether the claim for promissory estoppel was subject to the three-year statute of limitations. The district court certified this question to the Court after finding it presented a question of law that could be outcome determinative and there appeared to be no controlling state precedent. The Court accepted the question pursuant to Rule 244, SCACR.

II. STANDARD OF REVIEW

"In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Shaw v. Psychemedics Corp.*, 426 S.C. 194, 197, 826 S.E.2d 281, 282 (2019) (citation omitted).

III. DISCUSSION

Plaintiff contends this Court has held promissory estoppel is an equitable claim and has expressly stated in long-standing precedent that the statute of limitations is not applicable to equitable claims. As a result, the statute of limitations in S.C. Code Ann. § 15-3-530 (2005) is not directly applicable to a claim for

promissory estoppel.[1] Defendants, in contrast, assert Plaintiff is seeking monetary damages, which they contend is legal, not equitable, relief. Defendants note promissory estoppel has been described in our case law as a quasi-contractual equitable remedy and that the statute of limitations has been applied to claims for *quantum meruit*, which has also been characterized as a quasi-contract, so application of the statute of limitations should be extended to claims for promissory estoppel, either under the subsection governing contracts, obligations, or liabilities (express or implied) in S.C. Code Ann. § 15-3-530(1), or the subsection applicable to injuries to the rights of others not arising on contract or enumerated by law, contained in S.C. Code Ann. § 15-3-530(5). We agree with Plaintiff that the statute of limitations is not applicable to a claim of promissory estoppel. Our decision rests on (A) an examination of our statute of limitations, and (B) the determination whether a claim for promissory estoppel is properly characterized as legal or equitable in nature.

A. The Statute of Limitations

This Court has long recognized that the statute of limitations now codified in section 15-3-530 applies to actions at law, while the doctrine of laches[2] applies to suits in equity. Although the statute of limitations may be applied by analogy in a court of equity, the court has the authority to extend that period if it believes a longer period is warranted under the circumstances. This distinction logically flows from the fact that equity transcends the direct application of legal restrictions such as the statute of limitations to provide relief to wronged parties where the law otherwise affords no relief:

> This Court has held that the statute of limitations does not apply to actions in equity. *See Anderson v. Purvis,* 211 S.C. 255, 44 S.E.2d 611 (1947); *Anderson v. Purvis,* 220 S.C. 259, 67 S.E.2d 80 (1951) (holding that the Court's

[1] Plaintiff also asserts his claim should not be deemed untimely even if the statute of limitations applies. This issue, however, is not before the Court.

[2] *Mid-State Tr., II v. Wright*, 323 S.C. 303, 307, 474 S.E.2d 421, 423–24 (1996) (defining laches as neglect in bringing a claim for an unreasonable period that results in material prejudice to the opposing party and stating whether laches applies is highly fact-specific, "so each case must be judged on its own merits").

> power to do equity transcends the limitations of the statute of limitations).

Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005); *see also Parr v. Parr*, 268 S.C. 58, 67, 231 S.E.2d 695, 699 (1977) ("The action of the plaintiffs is one in equity. Therefore, the trial judge correctly ruled that neither statute of limitations is applicable."); *McKinnon v. Summers*, 224 S.C. 331, 336–37, 79 S.E.2d 146, 148 (1953) (observing the statute of limitations for law cases applies only by analogy to a court of equity); *Parrott v. Dickson*, 151 S.C. 114, 122, 148 S.E. 704, 707 (1929) ("Certainly, the [s]tatute of [l]imitations is not applicable, since this is a case in equity."); *Fanning v. Bogacki*, 111 S.C. 376, 381, 98 S.E. 137, 138 (1919) (considering laches, not the statute of limitations, in an equitable matter); *Blackwell v. Ryan*, 21 S.C. 112, 126 (1884) (observing "courts of equity are to be considered as affected only by analogy [by] the statute of limitations" and applying laches to an equitable claim); *Kirksey v. Keith*, 32 S.C. Eq. (11 Rich. Eq.) 33, 38–39 (1859) ("It is plain that neither the statute of limitations nor the Act of 1787 applies, in express terms, to the Court of Equity . . . ."); *Mazloom v. Mazloom*, 382 S.C. 307, 319, 675 S.E.2d 746, 752–53 (Ct. App. 2009) (citing *Dixon* for the proposition that the statute of limitations does not apply to actions in equity and noting "[e]quitable causes of action may be barred as untimely, however, by the doctrine of laches").

Defendants maintain section 15-3-530 is broadly drafted and if the South Carolina General Assembly had wished to create an exception for equitable claims involving a contract, obligation, or liability it could have done so. They also focus on the language regarding "obligations" in subsection (1) and argue promissory estoppel imposes an obligation that is subject to the statute or falls under what they term the "catch-all" provision of subsection (5).

The statute of limitations has existed in virtually the same form in South Carolina since this Court's earliest decisions interpreting the statute as applying to actions at law. To date, the General Assembly has not seen fit to alter the statute on this point in response to those decisions. The only subsection that expressly provides that it applies to matters in equity is subsection (7) regarding fraud, which is not at issue here.[3] *See Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100,

[3] *See* S.C. Code Ann. § 15-3-530(7) (2005) (applying a three-year limitations period to "any action for relief on the ground of fraud in cases *which prior to the adoption of the Code of Civil Procedure in 1870 were solely cognizable by the court of chancery*, the cause of action in the case not considered to have accrued until the

105 (2003) ("The Legislature is presumed to be aware of this Court's interpretation of its statutes. When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation." (citation omitted)).

In addition, if "obligation" is read as broadly as urged by Defendants, it could potentially envelope a multitude of claims, whether at law or in equity, erasing the historic distinctions between the two. In our view, this interpretation would extend the statute's reach much further than was ever intended by the General Assembly. *See Cain v. Nationwide Prop. & Cas. Ins. Co.*, 378 S.C. 25, 29–30, 661 S.E.2d 349, 351–52 (2008) (stating the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly and if the plain reading of a statute lends itself equally to two logical interpretations, the Court must apply the rules of statutory interpretation to discover the General Assembly's intent); *see also Bell v. Mackey*, 191 S.C. 105, 114–15, 3 S.E.2d 816, 820–21 (1939) (observing while there is now but one form of action, a civil action, this change has not altered the inherent distinctions between causes of action as legal or equitable that existed prior to this change, and whatever was previously at law or in equity remains so).

While the dissent asserts only substantive, not procedural, differences should remain between matters at law versus equity, particularly in light of the fact that there is now only one form of civil action under Rule 2, SCRCP, we decline to adopt this view.[4] *Cf. Maynard v. Bd. of Educ.*, 357 S.E.2d 246, 253–54 (W. Va. 1987)

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discovery by the aggrieved party of the facts constituting the fraud" (emphasis added)); *see also* Randolph R. Lowell, et al., *South Carolina Equity: A Practitioner's Guide* 88 (S.C. Bar 2010) ("Unlike many equitable causes of action, an action to set aside a fraudulent conveyance is subject to the statute of limitations rather than the doctrine of laches. An action to set aside a fraudulent conveyance falls within S.C. Code Ann. § 15-3-530(7) . . . ." (footnote omitted)).

[4] The dissent contends none of the cases cited above for the proposition that the statute of limitations does not apply to a court of equity (i.e., *Dixon*, *Parr*, et al.) involve a claim for money damages. However, as the dissent acknowledges, the issue before the Court is novel, and this does not negate the fundamental proposition of these cases. Further, to the extent the dissent advances the view that procedural distinctions between suits at law and in equity should be deemed "meaningless" in light of Rule 2, SCRCP, we disagree. That distinction is one that has been

(explaining the fact that the state's civil procedure rules had abolished the procedural distinctions between actions at law and in equity did not mean the distinctions between its various statutes of limitations and the equitable doctrine of laches were also abolished; rather, it is still true that "[l]aches applies to equitable demands[,] where the statute of limitations does not" and, conversely, "statutes of limitations, not laches, apply to demands at law" (alterations in original)). Thus, whether the statute of limitations applies to a claim for promissory estoppel turns on the characterization of the claim as legal or equitable.

B. Development and Characterization of Promissory Estoppel

It has been observed that "promissory estoppel" did not enter the general legal lexicon as a labeled doctrine until the early twentieth century. *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 149 (Minn. 2001). At that time, Samuel Williston recognized the concept in his treatise on contracts, stating "since [the promisee] relies on a promise and not on a misstatement of fact [as with equitable estoppel], the term 'promissory' estoppel or something equivalent should be used to mark the distinction."[5] *Id.* at 149 n.3 (quoting Samuel Williston & George J.

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maintained by our General Assembly, and it is not the province of this Court to judicially abolish that legislative directive. Because equity may provide relief where the law does not, strict legal restrictions are not directly applicable. *See generally Kirksey*, 32 S.C. Eq. at 38–39 (observing while the statute of limitations does not apply to a court of equity in express terms, an equitable court can follow the statute as to legal demands by analogy if the circumstances support its application). The dissent's assertion that the distinction is the result of an "historical accident" is unfounded supposition woven from whole cloth. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 914 (1987) ("Although they were complementary, law and equity courts each had a distinct procedural system, jurisprudence, and outlook. The development of contemporary American civil procedure cannot be understood without acknowledging these differences."); *id.* at 934 ("There are, however, critical differences between equity and the Field Code. Discretion and flexibility were at the heart of historic equity practice. But judicial discretion and legal flexibility were anathema to Field and his Commission." (footnote omitted)).

Thompson, *Williston on Contracts* § 139 (rev. ed. 1936)) (first alteration in original); *see also* 28 Am. Jur. 2d *Estoppel and Waiver* § 51 (2011) (stating a false representation or concealment of material facts is not a required element of promissory estoppel, as "the reliance is on the promise rather than a misrepresentation of fact").

American jurisdictions have adopted and applied "a theory of promissory estoppel grounded, in some form, in Section 90 of the Restatements [First and Second] of Contracts."[6] Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 Willamette L. Rev. 263, 514 (1996). "[T]he drafters of the Restatement (Second) made several important changes to § 90 of the Restatement (First) with the intent of making promissory estoppel more available, the role of reliance more prominent, and the remedies awarded to successful litigants more flexible . . . ." Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. Rev. 669, 669 (2010). The Second Restatement does not require the promise to induce action or forbearance that is "of a definite and substantial character," and it adds language indicating the remedy "may be limited as justice requires" (e.g., reliance damages may be appropriate instead of expectation damages).[7] *Id.* at 669–70, 707–10.

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[5] In contrast to promissory estoppel, equitable estoppel is used defensively only and is grounded on a party's misstatement of existing fact; the essence of equitable estoppel is that the party invoking it was misled to his injury. *See Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017); *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992); 31 C.J.S. *Estoppel and Waiver* § 76 (2008). The representation in equitable estoppel "must relate to some present or past fact or state of things as distinguished from mere promises or statements as to the future," as with claims for promissory estoppel. 28 Am. Jur. 2d *Estoppel and Waiver* § 49 (2011).

[6] "Although Section 90 nowhere mentioned the term 'promissory estoppel,' courts invoking the doctrine often referred to that section to determine the elements of a valid claim." Phuong N. Pham, Note, *The Waning of Promissory Estoppel*, 79 Cornell L. Rev. 1263, 1265 (1994).

[7] C*ompare* Restatement (First) of Contracts § 90 (1932) ("A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action

In *Higgins Construction Co. v. Southern Bell Telephone & Telegraph Co.*, 276 S.C. 663, 665–66, 281 S.E.2d 469, 470 (1981), this Court noted it had never used the term "promissory estoppel" before, but it had previously applied the doctrine in a 1922 decision.[8] In *Higgins*, the Court defined "promissory estoppel" as a doctrine to avoid injustice by providing a remedy for a party's reliance on an otherwise unenforceable promise:

> That doctrine holds "an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice."

Id. at 665, 281 S.E.2d at 470 (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 48 (1966)).

In subsequent cases, our appellate courts enumerated the elements a party must prove to obtain relief under the doctrine of promissory estoppel as follows: (1) the presence of a promise unambiguous in its terms, (2) reasonable reliance upon the promise by the party to whom the promise is made, (3) the reliance is expected and foreseeable by the party who makes the promise, and (4) the party to whom the promise is made must sustain injury in reliance on the promise. *See, e.g.*, *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005); *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993); *Powers Constr. Co. v. Salem Carpets, Inc.*, 283 S.C. 302, 306, 322 S.E.2d 30, 33 (Ct. App. 1984).

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or forbearance is binding if injustice can be avoided only by enforcement of the promise.") *with* Restatement (Second) of Contracts § 90(1) (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.").

[8] *Furman Univ. v. Waller*, 124 S.C. 68, 117 S.E. 356 (1922).

This Court has stated the basis of the doctrine lies not so much in contract, but rather, it is an application of the equitable principle of estoppel:

> The principle of promissory estoppel is viewed as a substitute for, or an equivalent of, consideration. The basis of the doctrine is not so much one of contract, with a substitute for consideration, but an application of the general principles of estoppel under appropriate circumstances. The circumstances which may trigger the application of promissory estoppel in this case cannot be tortured into the requisite elements of a traditional contract. A contract and promissory estoppel are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other.

Duke Power Co. v. S.C. Pub. Serv. Comm'n, 284 S.C. 81, 100–01, 326 S.E.2d 395, 406 (1985) (citation omitted); *see also Link v. Sch. Dist. of Pickens Cty.*, 302 S.C. 1, 7, 393 S.E.2d 176, 179 (1990) ("Promissory estoppel and contract are separate and distinct causes of action.").

South Carolina courts have consistently characterized promissory estoppel as an equitable claim. *See, e.g.*, *A&P Enters., LLC v. SP Grocery of Lynchburg, LLC*, 422 S.C. 579, 587, 812 S.E.2d 759, 763 (Ct. App. 2018) (stating, in an appeal from a special referee, that South Carolina courts recognize a remedy in equity for promissory estoppel); *Barnes v. Johnson*, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct. App. 2013) (observing promissory estoppel "is a flexible doctrine that aims to achieve equitable results" and to provide "a remedy where contract law cannot"); *Craft v. S.C. Comm'n for the Blind*, 385 S.C. 560, 564, 685 S.E.2d 625, 627 (Ct. App. 2009) ("Promissory estoppel is equitable in nature. In an action at equity, this court can find facts in accordance with its view of the preponderance of the evidence." (citation omitted)); *West v. Newberry Elec. Coop.*, 357 S.C. 537, 542, 593 S.E.2d 500, 502 (Ct. App. 2004) ("The doctrine of promissory estoppel is equitable in nature." (citing 28 Am. Jur. 2d *Estoppel and Waiver* §§ 1, 55 (2000))); *Satcher v. Satcher*, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002) (observing "[o]ur courts recognize a remedy in equity if the claimant can prove" the elements of promissory estoppel).

It has also been observed that "[p]romissory estoppel is a quasi-contract remedy." *See, e.g.*, *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015) (citing *Higgins*). A "quasi-contract" has been defined as "an obligation imposed by law because of some special relationship between the parties or because one of them would otherwise be unjustly enriched"; it "is not actually a contract *but instead a remedy* that allows the plaintiff to recover a benefit conferred on the defendant."[9] *Quasi-Contract*, Black's Law Dictionary (11th ed. 2019) (emphasis added). It is also termed an "implied-in-law contract." *Id.*

This Court has "used the terms *quantum meruit,* quasi-contract, and contract implied by law as equivalent terms, to distinguish those situations *where equity would aid recovery* from those where law provided the remedy, that is, express contracts or contracts implied in fact."[10] *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000) (emphasis added).[11] In *Myrtle*

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[9] *See* 1 Timothy Murray, *Corbin on Contracts* § 1.20, at 86–87 (rev. ed. 2018) (explaining the term "quasi contract" is directly derived from Roman law and refers to an obligation created by law for reasons of justice and suggesting "it might be better not to use the word 'contract' at all" because its use has engendered much confusion in the law).

[10] There are two types of implied contracts, and the definitions have been conflated in the jurisprudence of this (and other) states. *See Stanley Smith & Sons v. Limestone College,* 283 S.C. 430, 434 n.1, 322 S.E.2d 474, 478 n.1 (Ct. App. 1984) ("The unfortunate use of 'implied contract' to connote both true ('implied in fact') and quasi ('implied in law') contracts has led to much confusion."). "A contract 'implied in fact' arises when the assent of the parties is manifested by conduct, not words." *Id.* "A quasi contract, or one implied in law, is no contract at all, but an obligation created by the law in the absence of any agreement between the parties." *Id.* The statute of limitations has been interpreted by this Court as applying to implied in fact contracts (true contracts), not implied by law contracts (quasi-contracts).

[11] *But see Corbin on Contracts*, *supra* note 8, § 1.20, at 86 (observing "the term quantum meruit is sometimes used as the equivalent of the term quasi contract" although "it is not an equivalent term"); *Quasi-Contract*, Black's Law Dictionary (11th ed. 2019) (defining quasi-contract and stating because claims for unjust enrichment did not belong to either the category of contract or tort, they came to be called quasi-contract; "[s]ome of them were originally characterized as being in

Beach Hospital, Inc., the Court noted there had been confusion in prior case law as to implied-in-fact versus implied-by-law contracts, and it adopted a three-part test "as the sole test for a *quantum meruit*/quasi-contract/implied by law claim," overruling prior decisions employing a different analysis. *Id.* at 8–9, 532 S.E.2d at 872.

Defendants assert Plaintiff's claim is subject to section 15-3-530 because it "is an equitable quasi-contractual remedy when it seeks money damages." They contend claims for *quantum meruit* have been subjected to the statute of limitations in South Carolina, citing *Graham v. Welch, Roberts & Amburn, LLP*, 404 S.C. 235, 743 S.E.2d 860 (Ct. App. 2013), and several federal district court decisions, so "the logical extension of the *quantum meruit* precedent mandates that promissory estoppel be subject to the applicable statute of limitations." Defendants assert this Court has the power to apply section 15-3-530 to claims of promissory estoppel even if the claim is not specifically addressed in the statute.

In *Graham*, the appealing party did not dispute the application of the statute of limitations to all of his claims, which included unjust enrichment, so neither the application of the statute nor promissory estoppel was an issue before the court of appeals. As a result, *Graham* cannot be "extended" to hold the statute of limitations is applicable to claims of promissory estoppel, as urged by Defendants.[12] Further, the federal district court decisions cited by Defendants are unreported decisions concerning *quantum meruit* or unjust enrichment, distinguishable claims, and none cite reported decisions (other than *Graham*) from the South Carolina appellate courts to directly support their determinations.[13] Thus, the district court's decisions do not aid this Court in its analysis of promissory estoppel.

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quantum meruit (as much as he deserved), a form of action used for claims [for] payment for services," and this term "is sometimes used inexactly as a synonym for the more general term *quasi-contract*, which refers to any money claim for the redress of unjust enrichment" (quoting E. Allan Farnsworth, *Contracts* § 2.20, at 103 (2d ed. 1990))).

[12] Defendants correctly note the statute of limitations has been applied to *quantum meruit* in several cases, but *quantum meruit* is a distinguishable claim and the propriety of the holdings as to *quantum meruit* is not currently before the Court.

Describing promissory estoppel as quasi-contractual is not dispositive of the issue before us. Equitable estoppel has also been described by this Court as quasi-contractual, but it is a defensive measure to which the statute of limitations undoubtedly does not apply. *See generally Rodarte v. Univ. of S.C.*, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017) ("We agree with the Supreme Court of Rhode Island that *'quasi-contractual remedies such as equitable estoppel* are inapplicable when the parties are bound by an express contract.'" (emphasis added) (citation omitted)).

A request for monetary relief should not be viewed in isolation to convert what is otherwise an equitable claim to a legal claim. *See generally Watson v. Pub. Serv. Co. of Colo.*, 207 P.3d 860, 865–66 (Colo. App. 2008) ("Even though a plaintiff seeks to recover money damages, the plaintiff is not entitled to a jury trial if the essence of the action is equitable in nature. *Snow Basin, Ltd. v. Boettcher & Co.,* 805 P.2d 1151, 1154 (Colo. App. 1990) (money damages sought on promissory estoppel claim)."); *Kim v. Dean*, 135 P.3d 978, 981 (Wash. Ct. App. 2006) ("Under the historical test, Washington courts determine the overall nature of an action by 'look[ing] to see whether the claims in question were within the exclusive jurisdiction of the equity courts when the state constitution was adopted in 1889.'" (alteration in original) (citation omitted)).

Monetary relief is not available at law for an unenforceable promise. Thus, monetary relief is not properly characterized as legal if the source for its recovery lies solely in a principle of equity. The claim—and the remedy—are still equitable because the recovery does not exist at law but is provided solely to avoid injustice in a court of equity. In this case, if Defendants had not sold the company, Plaintiff would be seeking transfer of the promised equity shares. The relief awarded is ultimately an equitable matter for the court to determine, not a jury. The fact that a court might have to fashion some other equitable relief for the unmet promise (assuming Plaintiff is able to establish his claim), does not lessen its overall nature

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[13] *See, e.g.*, *Crossroads Convenience, LLC v. First Cas. Ins. Grp.*, No. 1:15-CV-02544-JMC, 2017 WL 1135132 (D.S.C. Mar. 27, 2017); *Brown v. Goodman Mfg. Co., L.P.*, No. 1:13-CV-03169-JMC, 2015 WL 1006319 (D.S.C. Mar. 5, 2015); *Wells Fargo Bank, N.A. v. Carter*, No. 9:14-127-SB, 2014 WL 11034776 (D.S.C. July 22, 2014); *Magwood v. Heritage Tr. Fed. Credit Union*, No. 2:09-2751-DCN-BM, 2010 WL 4604661 (D.S.C. June 4, 2010), *adopted*, No. 2:09-2751-RMG-BM, 2010 WL 4622454 (Nov. 4, 2010).

as equitable. *See generally* 28 Am. Jur. 2d *Estoppel and Waiver* § 51 (2011) (stating "[a] trial court retains broad discretion under promissory estoppel to fashion whatever remedies or damages justice requires"). As a result, equitable defenses such as laches, not the statute of limitations, apply.

Defendants' assertion that the promissory estoppel claim could exist "in perpetuity" in the absence of invoking the statute of limitations is wholly without merit, as laches will prevent the pursuit of stale claims. *See Kirksey v. Keith*, 32 S.C. Eq. (11 Rich. Eq.) 33, 39 (1859) (observing the statute of limitations may be applied by analogy to matters of account and courts of equity will refuse to afford relief to stale demands based on considerations of public policy and the difficulty of providing justice when the transaction has become obscured by time and evidence is lost; thus, the general rule is "where conscience, good faith and reasonable diligence are lacking, a Court of Equity is passive and does nothing; and therefore from the beginning of Equity Jurisdiction, there was always a limitation of suit in that Court" (citation omitted)).

IV. CONCLUSION

Based on the foregoing, we answer the certified question in the negative. The statute of limitations in S.C. Code Ann. § 15-3-530 does not apply to a claim for promissory estoppel.

CERTIFIED QUESTION ANSWERED.

KITTREDGE, HEARN and JAMES, JJ., concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: I would apply the statute of limitations to all actions for money damages. For this reason, I respectfully dissent.

The procedural differences between actions at law and suits in equity arose centuries ago for accidental reasons hardly known to any modern South Carolina lawyer or judge. Not long after the already outdated distinctions arrived in the new world, states began refusing to recognize them. In New York in 1848, for example, the legislature provided in the new "Field Code,"[14]

> The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action.

Charles E. Clark, *The Union of Law and Equity*, 25 Colum. L. Rev. 1, 1 (1925) (quoting N.Y. Laws 1848, c. 379 § 62).

The movement to do away with meaningless differences between actions at law and suits in equity continued into the twentieth century. *See* Edward R. Taylor, *The Fusion of Law and Equity*, 66 U. Pa. L. Rev. 17 (1917). Discussing his view of how an "organized, civilized society" should approach a meaningful unity of the divergent systems, this author wrote, "Until we have taken steps to achieve that [unity] we are simply walking round and round like one lost." *Id.* at 17; *see also* Charles T. McCormick, *The Fusion of Law and Equity in United States Courts*, 6 N.C. L. Rev. 283, 285 (1927) ("Any separation of the stream of equity from the main channel of legal administration is today seen to be unjustifiable as an administrative device and explainable only as a historical survival from an era of multitudinous separate courts.").

[14] I concede the irony that I cite the origin of code pleading in the United States in support of simplicity and uniformity.

The unification of the two systems—particularly the elimination of their silly distinctions—hit its full stride in 1938 with Rule 2 of the Federal Rules of Civil Procedure. Rule 2 then provided, "There shall be one form of action to be known as 'civil action.'" Rule 2 now provides, "There is one form of action—the civil action." Fed. R. Civ. P. 2. South Carolina adopted Rule 2 in 1985. "There shall be one form of action to be known as 'civil action.'" Rule 2, SCRCP.

There remain substantive differences between law and equity, but the differences remain because the differences make sense. As Professors Wright, Miller, and Steinman stated, "The Rules have not abrogated the distinction between equitable and legal remedies," but "the procedural distinctions have been abolished." 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, FEDERAL PRACTICE AND PROCEDURE § 1043 n.1 (4th ed. 2015). These procedural distinctions were abolished because there was no reason to have the distinctions in the first place.

There is likewise no reason to draw the distinction the majority makes in this case. Whether labeled an action for promissory estoppel in equity or breach of contract in law, Thomerson's action is one action in which he must prove the promise, a breach, and his resulting damages. The consideration he must prove in the law action is no different from the reliance he must prove in the equity action. There is simply no substantive difference arising from the label he puts on the claim.

The majority cites what looks like an impressive string of cases holding the statute of limitations does not apply in equity cases going all the way back to *Kirksey v. Keith* in 1859. Not one of those cases, however, involves an action for money damages. The majority correctly calls the question before us "novel" because it is a new question, different from any question we have answered before. When we decide new questions, we should not be too quick to rely on old answers to different questions, nor should we rely at all on senseless, long-discarded procedural fictions that arose by historical accident. We should answer novel questions on a substantive basis, or as the majority states, "based on [our] assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's

sense of law, justice, and right." *See Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n*, 424 S.C. 542, 551-54, 819 S.E.2d 124, 129-30 (2018) (Few, J., concurring) (a majority of this Court explaining how we should approach "novel questions of law not governed by statute or controlled by prior decision").

I would not answer the certified question by merely reciting the answer we used to give in different cases based on procedural distinctions that should no longer exist.

> How absurd for us to go on until the year [2020] obliging judges and lawyers to climb over a barrier which was put up by historical accident in 14th century England . . . .

T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 Am. Bus. L.J. 455, 455 (2008) (quoting Zechariah Chafee Jr., *Foreword to Selected Essays on Equity* iii, iv (Edward D. Re ed., 1955)).

I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of an Anonymous Member of the South Carolina Bar, Respondent.

Appellate Case No. 2020-000476

Opinion No. 27973
Heard May 8, 2020 – Filed May 27, 2020

ADMONISHMENT

John S. Nichols, Disciplinary Counsel, and Sabrina C. Todd, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Respondent, *pro se*.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, Respondent admits misconduct and consents to the imposition of a public reprimand. An investigative panel of the Commission on Lawyer Conduct (the Commission) voted unanimously to recommend accepting the Agreement and further recommended a public reprimand, issued in an anonymous opinion, be imposed.

We agree with the spirit of the Commission's recommendation; however, the sanction of a public reprimand requires *publicly* identifying the name of the disciplined attorney. In the instant matter, we find the imposition of a public reprimand identifying Respondent by name is not warranted based on Respondent's cooperation with ODC and the fact Respondent has never been sanctioned for

misconduct by any disciplinary authority. Accordingly, we accept the Agreement and issue this anonymous admonition for the benefit of the Bar. The facts, as set forth in the Agreement, are as follows.

Facts

Morris Hardwick Schneider

Morris Hardwick Schneider (MHS) was a multi-jurisdictional real estate closing and default services law firm based in Atlanta, Georgia. In 2014, Nathan Hardwick was MHS's CEO and held a majority interest in the firm. Hardwick oversaw corporate accounting for MHS and financial and accounting matters for the closing side of the practice from his office in Atlanta. MHS had two other equity partners, Mark Wittstadt and Gerard Wittstadt, who were based in Maryland and headed the firm's default services practice. None of MHS's equity partners were licensed to practice law in South Carolina.

In 2014, Respondent served as the managing attorney for MHS's Dunwoody, Georgia office but was also a non-equity partner in the firm and held the title of President of South Carolina Operations. In that role, Respondent provided oversight and assistance with business development, marketing, communications, hiring, and training in the South Carolina offices located in Columbia and Greenville. However, Respondent was not involved with or responsible for the day-to-day operations of either South Carolina office.

The NSF Reports

In May 2014, SunTrust Bank reported it paid three wires that were presented against insufficient funds on one of MHS's South Carolina IOLTA accounts, leaving the account overdrawn by $65,752.69. Approximately one month later, SunTrust reported the same account was overdrawn by $18,538.43 after the bank paid two additional wires that were presented against insufficient funds.

The Trust Account Shortfalls

In July 2014, while ODC was investigating the insufficient funds reports, MHS and its title insurance company also began investigating the handling of the firm's accounts. That internal investigation revealed several firm operating accounts and

dozens of firm trust accounts suffered shortfalls due to internal misappropriation. An early report estimated four of MHS's five South Carolina trust accounts were $648,937.40 short, and, companywide, firm operating and trust accounts were more than $29.4 million short.[1]

In South Carolina, the misappropriations occurred primarily through online transfers between firm trust accounts. More than $9 million in transfers in and out of the South Carolina trust accounts occurred during 2014 alone. According to MHS's internal records, the trust account against which insufficient funds items were presented was $448,170.36 short at the end of June 2014. On the same day, a second trust account was $320,668.10 short, and a third account was $140,060 short.

MHS's title insurance company ultimately funded $29,530,391 to cover trust account shortfalls throughout the firm. ODC reports it is unaware of any South Carolina clients who were harmed by the misappropriation of funds from South Carolina trust accounts.

Law

A partner in a law firm is required to make reasonable efforts to ensure the law "firm has in effect measures giving reasonable assurances that all lawyers in the firm conform to the Rules of Professional Conduct." Rule 5.1(a), RPC, Rule 407, SCACR. Additionally, law firm partners are required to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance" that the

[1] The misappropriated funds were eventually traced to Hardwick and Asha Maurya, head of MHS's accounting department and CFO of the firm's closing division. The United States Attorney's Office prosecuted both Hardwick and Maurya. Initial investigations indicated Maurya redirected firm and client funds to Hardwick and to third parties for Hardwick's benefit, but federal prosecutors discovered Maurya also misappropriated more than $900,000 for her personal benefit. Maurya pled guilty to one count of conspiracy to commit wire fraud and was sentenced to seven years' imprisonment and three years' supervised release. Following a jury trial, Hardwick was convicted of twenty-one counts of wire fraud, one count of conspiracy to commit wire fraud, and one count of making false statements to a federally insured financial institution. Hardwick was sentenced to fifteen years' imprisonment and six years' supervised release. Both Maurya and Hardwick were ordered to pay restitution, jointly and severally. Both have filed appeals.

conduct of non-attorney assistants is compatible with the attorneys' own professional obligations. Rule 5.3(a), RPC, Rule 407, SCACR.

Rule 417, SCACR, restricts access to South Carolina trust accounts in order to protect the funds contained in those accounts and those to whom the funds belong. Rule 2, Rule 417, SCACR. Only an attorney admitted to practice in South Carolina and individuals directly supervised by an attorney so admitted may have authority to sign checks or transfer funds from a client trust account. *Id.* Rule 417 also requires monthly reconciliation of all South Carolina trust accounts. Rule 1, Rule 417, SCACR.

In the instant matter, Respondent admits she failed to uphold her responsibilities as a partner in MHS. She failed to make reasonable efforts to ensure the firm's attorneys and non-attorney staff complied with Rule 417, SCACR, with regard to South Carolina trust accounts. Numerous people who had access to the South Carolina trust accounts were neither licensed to practice law in South Carolina nor directly supervised by an attorney who was, including several attorneys licensed in other jurisdictions and non-attorney staff who worked in the firm's accounting department in Atlanta. Respondent's misconduct enabled those with impermissible and unfettered access to misappropriate almost $30 million. Further, the misappropriations were allowed to continue undetected because MHS's non-attorney accounting staff were in charge of receiving the trust account bank statements and reconciling the accounts. Neither Respondent nor any other South Carolina licensed attorney reviewed the reports or supervised the reconciliation process as required by Rule 417, SCACR.

Accordingly, Respondent admits her conduct in this matter violated Rules 5.1(a) and 5.3(a), RPC, Rule 407, SCACR, and Rule 417, SCACR. Respondent also admits the allegations contained in the Agreement constitute grounds for discipline pursuant to Rule 7(a)(1), RLDE, Rule 413, SCACR (violating or attempting to violate the Rules of Professional Conduct).

Conclusion

We find Respondent violated Rule 417, SCACR, and her violation constitutes grounds for discipline. Accordingly, we accept the Agreement and admonish

Respondent for her misconduct.[2] We publish this admonishment in the "In re Anonymous Member of the Bar" format so as to remind and caution members of the Bar who hold partner positions of their duty to reasonably ensure their firms have measures in effect providing reasonable assurances that all attorneys in the firms conform to the Rules of Professional Conduct and that the conduct of non-attorney assistants is compatible with the attorneys' own professional obligations. We further warn members of the Bar against allowing law firm leadership or staff located outside of South Carolina to have unfettered access and control over South Carolina client funds.

ADMONISHMENT.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

[2] In accordance with the Agreement, Respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter or enter into a reasonable payment plan with the Commission to pay the same within thirty (30) days of the date of this opinion. Respondent shall also complete the Legal Ethics and Practice Program Ethics School and Trust Account School within one (1) year of the date of this opinion.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of an Anonymous Member of the South Carolina Bar, Respondent.

Appellate Case No. 2020-000478

Opinion No. 27974
Submitted May 8, 2020 – Filed May 27, 2020

ADMONISHMENT

John S. Nichols, Disciplinary Counsel, and Sabrina C. Todd, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

William C. Wood, Jr., of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, Respondent admits she failed to restrict access to South Carolina-based trust accounts containing client funds and ensure monthly reconciliations of those accounts were performed properly. Respondent consents to the imposition of confidential admonition or a public reprimand. An investigative panel of the Commission on Lawyer Conduct (the Commission) voted unanimously to recommend accepting the Agreement and further recommended a public reprimand, issued in an anonymous opinion, be imposed.

We agree with the spirit of the Commission's recommendation; however, the sanction of a public reprimand requires *publicly* identifying the name of the

disciplined attorney. In the instant matter, we find the imposition of a public reprimand identifying Respondent by name is not warranted based on Respondent's prior responsible handling of client funds, her complete lack of knowledge regarding the criminal activities of other involved parties, and her continuous cooperation with ODC's investigation. Accordingly, we accept the Agreement and issue this anonymous admonition for the benefit of the Bar. The facts, as set forth in the Agreement, are as follows.

Facts

Morris Hardwick Schneider

Morris Hardwick Schneider (MHS) was a multi-jurisdictional real estate closing and default services law firm based in Atlanta, Georgia. In 2014, Nathan Hardwick was MHS's CEO and held a majority interest in the firm. Hardwick oversaw corporate accounting for MHS and financial and accounting matters for the closing side of the practice from his office in Atlanta. MHS's two other equity partners, Mark Wittstadt and Gerard Wittstadt, were based in Maryland and headed the firm's default services practice. None of MHS's equity partners were licensed to practice law in South Carolina.

Respondent began working for MHS in 2004. Respondent—who was licensed to practice law in South Carolina and Georgia—worked from one of MHS's Georgia offices and handled some South Carolina transactions. In 2013, Hardwick asked Respondent to open an MHS office in Columbia. MHS had an existing office in Greenville and previously had offices in other South Carolina cities. The Columbia office opened in early 2014. Respondent was the sole attorney in the Columbia office and held the title of "Senior Managing Attorney." Respondent took marketing direction from a South Carolina licensed attorney who was a non-equity partner at MHS and held the title of "President of South Carolina Operations." However, Respondent received no other formal supervision or training regarding trust accounting or other aspects of running the Columbia office.

MHS had five South Carolina IOLTA accounts, some of which were referred to as "the old and new SunTrust accounts." Respondent had signatory authority on all South Carolina accounts, but both the Columbia and Greenville offices used the old and new SunTrust accounts. MHS's President of South Carolina Operations was not a signatory on any of the South Carolina trust accounts, but numerous non-

attorney accounting staff located outside of South Carolina and attorneys not licensed in South Carolina were signatories on the accounts.

As she had done when she was in Georgia, Respondent responsibly handled the receipt and disbursement of funds related to her real estate closings; she ensured that disbursements were made only after corresponding funds were deposited and that all funds were disbursed. Respondent personally authorized the release of outgoing wires and issued checks for her closings. Respondent also followed up on outstanding checks issued for the closings she handled. However, if money was wired into the wrong account by mistake, only the MHS accounting staff in Atlanta could correct the mistake by transferring funds from one account to another. Although Respondent had access to a bank portal to review and approve wires, she did not have access to bank records for all transactions. Respondent never saw the South Carolina trust accounts' bank statements or reconciliation reports. She could not generate a reconciliation report, and, although she could see ledgers for all individual South Carolina closings, she did not review, and does not know if she could access, firm ledgers. The MHS accounting staff in Atlanta reconciled the accounts and never advised Respondent of any problems with the accounts.

The NSF Report

In May 2014, SunTrust Bank reported it paid three wires that were presented against insufficient funds on a new SunTrust IOLTA account, leaving the account overdrawn by $65,752.69. Approximately one month later, SunTrust reported the same account was overdrawn by $18,538.42 after the bank paid two additional wires that were presented against insufficient funds.

Respondent's Response

In response to the insufficient funds reports, Respondent submitted an explanation she prepared with the assistance of Asha Maurya, MHS's Chief Financial Officer for the firm's closing division. Maurya provided Respondent with the supporting documentation attached to Respondent's response. Respondent explained a real estate software upgrade made it necessary for MHS to open the new trust account at SunTrust, but several subsequent deposits were incorrectly made into the old trust account, triggering the shortfalls in the new account. In each instance, the firm's accounting department in Atlanta internally transferred the funds to the

proper account, but the transfer process could not be completed until the end of the next business day.

Respondent noted that each MHS office was responsible for balancing its accounts and ensuring all funds were received and deposited prior to disbursement. Respondent explained she had followed normal procedure, but a bank error resulted in unspecified deposits being routed to the wrong account. Respondent provided a letter from a vice president of SunTrust asserting the bank had incorrectly credited remote deposits meant for the new trust account to the old trust account. The SunTrust vice president indicated the error had been corrected and would not be a problem in the future.

Respondent also included in her response MHS's reconciliation report for the new trust account. One of the wires presented against insufficient funds was an internal wire transfer from the new SunTrust account to the old SunTrust account to cover a shortage in a client ledger. Although it is unclear why this transaction occurred, this $1,320 wire was not large enough to explain the shortfall in the new account. All of the other wires presented against insufficient funds were proper disbursements for transactions with adequate funds on deposit. Respondent was not able to identify any other misdirected deposits or provide any additional documentation of corrective measures.

MHS's Self-Report

In an August 4, 2014 letter, Hardwick and Mark Wittstadt notified ODC of an unfolding investigation into MHS's trust accounts. The letter claimed Maurya admitted to Hardwick that she altered a bank statement to conceal her inadvertent transfer of nearly $690,000 from a trust account into an operating account. The letter advised (1) numerous irregular transfers between trust accounts were identified, (2) Maurya had been placed on leave, (3) a full investigation was underway, and (4) both the firm's outside counsel and outside auditing firm had been instructed to disclose all data they obtained to ODC.

The Trust Account Shortfalls

The investigation by MHS and its title insurance company revealed unauthorized transfers between various MHS trust accounts and significant shortfalls in dozens of trust accounts. An early report estimated more than $29.4 million in shortages

across the firm's operating and trust accounts, with the majority of the shortages occurring in trust accounts. The report estimated $648,937.40 in shortages across four South Carolina trust accounts.

After discovering funds in various trust and operating accounts had been moved and then transferred to or used for the benefit of Hardwick, the majority partners demanded Hardwick's resignation. MHS changed its name and sued Hardwick and a company he controlled. The United States Attorney's Office prosecuted both Hardwick and Maurya.[1] MHS's title insurance company funded $29,530,391 to cover MHS's trust account shortfalls.

After MHS filed for bankruptcy, Respondent assisted MHS in closing its South Carolina offices. However, because of the bankruptcy, pending litigations, and pending prosecutions, both Respondent and ODC struggled to gain full access to MHS's South Carolina trust account records.

ODC's investigation revealed the explanatory letter issued by SunTrust was issued at Maurya's request and using her explanation. The SunTrust vice president who authored the letter did not check the trust account records before writing the letter, and the explanation he offered did not match the fact that no remote deposits were ever credited to the old trust account. Additionally, the balance report prepared by Maurya and submitted with Respondent's response to ODC was altered to conceal the fact that multiple firm ledgers and one client ledger had significant negative balances. Respondent was unaware the document had been altered and fully cooperated with ODC.

Genuine reconciliation reports showed that, at the end of June 2014, the new SunTrust trust account had $48,170.36 less than necessary to cover client ledger balances and outstanding disbursements. Meanwhile, comparison of MHS's

[1] Initial investigations indicated Maurya redirected firm and client funds to Hardwick and to third parties for Hardwick's benefit, but federal prosecutors discovered Maurya also misappropriated more than $900,000 for her personal benefit. Maurya pled guilty to one count of conspiracy to commit wire fraud and was sentenced to seven years' imprisonment and three years' supervised release. Following a jury trial, Hardwick was convicted of twenty-one counts of wire fraud, one count of conspiracy to commit wire fraud, and one count of making false statements to a federally insured financial institution. Hardwick was sentenced to fifteen years' imprisonment and six years' supervised release. Both Maurya and Hardwick were ordered to pay restitution, jointly and severally. Both have filed appeals.

internal records for the old SunTrust trust account to bank statements revealed the account had had $320,668.10 less than was needed to cover all outstanding checks and client ledger balances. Additionally, the June 2014 reconciliation report for a South Carolina trust account Respondent was not using was short $140,060.

It appears that money was misappropriated from the accounts primarily through frequent online transfers between accounts that were recorded on firm ledgers, money was often replaced or partially replaced later, and misappropriated funds primarily left MHS via Georgia accounts. A review of the firm's South Carolina trust account statements and available internal records revealed over $9 million in suspicious, unexplained transfers into and out of the accounts during 2014. As noted above, MHS's title insurance company funded any identified shortfalls and ODC reports it is unaware of any South Carolina clients who were harmed.

Law

Rule 417, SCACR, restricts access to South Carolina trust accounts in order to protect the funds contained in those accounts and those to whom the funds belong. Rule 2, Rule 417, SCACR. Only an attorney admitted to practice in South Carolina and individuals directly supervised by an attorney so admitted may have authority to sign checks or transfer funds from a client trust account. *Id.* Rule 417 also requires monthly reconciliation of all South Carolina trust accounts. Rule 1, Rule 417, SCACR. Individual ledgers must be reconciled to the firm's journal of receipts and disbursements, and the journal must be reconciled to the bank statement. *Id.* Outstanding items must be reviewed in the reconciliation process because the account must contain enough money to cover both the ledger balances and the outstanding disbursements. *Id.* The resulting reports must be carefully and skillfully reviewed, and any problems identified and addressed in order to gain the client protection envisioned by the Rule's reconciliation requirement. *Id.*

Respondent admits numerous people forbidden by Rule 417 from having access to South Carolina trust accounts had such access. *See* Rule 2, Rule 417, SCACR. Respondent failed to ensure a South Carolina licensed attorney had access to the bank statements and reconciliation reports and, instead, improperly allowed MHS accounting staff in Atlanta to transfer funds between MHS's accounts, including South Carolina trust accounts, without Respondent's direct supervision as required by Rule 417. *See* Rules 1 and 2, Rule 417, SCACR. Respondent's failure to exercise control over the South Carolina trust accounts placed South Carolina

client funds at risk and allowed misappropriation of those funds. By failing to restrict access to the South Carolina trust accounts, directly supervise individuals who had access to the accounts, and ensure monthly reconciliations were not only performed, but also revealed no problems requiring her attention, Respondent violated Rule 417, SCACR. *See id.*

Respondent admits the allegations contained in the Agreement constitute grounds for discipline pursuant to Rule 7(a)(1), RLDE, Rule 413, SCACR (violating or attempting to violate the Rules of Professional Conduct).

Conclusion

We find Respondent violated Rule 417, SCACR, and her violation constitutes grounds for discipline. Accordingly, we accept the Agreement and admonish Respondent for her misconduct.[2] We publish this admonishment in the "In re Anonymous Member of the Bar" format so as to warn members of the Bar against allowing law firm leadership or staff located outside of South Carolina to have unfettered access and control over South Carolina client funds.

ADMONISHMENT.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

[2] In accordance with the Agreement, Respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter or enter into a reasonable payment plan with the Commission to pay the same within thirty (30) days of the date of this opinion. Respondent shall also complete the Legal Ethics and Practice Program Ethics School and Trust Account School within one (1) year of the date of this opinion.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Rhodes Bailey, Robert Wehrman, South Carolina Democratic Party, and DCCC, Plaintiffs-Petitioners,

v.

South Carolina State Election Commission and Marci Andino as Executive Director of the State Election Commission, Defendants-Respondents,

and South Carolina Republican Party, Intervenor.

Appellate Case No. 2020-000642

ORIGINAL JURISDICTION

Opinion No. 27975
Heard May 12, 2020 – Filed May 27, 2020

DISMISSED

Christopher James Bryant and Bruce V. Spiva, both of Perkins Coie, LLP, of Washington, D.C., for Plaintiffs-Petitioners.

William Grayson Lambert and Mary Elizabeth Crum, of Burr & Forman, LLP; Karl Smith Bowers Jr., of Bowers Law Office; J. Robert Bolchoz, of Robert Bolchoz, LLC; and Harrison D. Brant, of the South Carolina Election Commission, all of Columbia, for Defendants-Respondents.

Robert E. Tyson, Jr. and Vordman Carlisle Traywick III, both of Robinson Gray Stepp & Laffitte, LLC, of Columbia, for Intervenors.

Attorney General Alan McCrory Wilson, Deputy Solicitor General J. Emory Smith Jr., and Assistant Attorney General Harley Kirkland, all of the South Carolina Attorney General's Office, of Columbia, for Amicus Curiae.

JUSTICES KITTREDGE, FEW, JAMES: Plaintiffs[1] contend in this lawsuit that—in the face of the COVID-19 pandemic—existing South Carolina law permits all South Carolina registered voters to vote by absentee ballot in the June 9, 2020 primary election and November 3, 2020 general election. Plaintiffs implicitly contend that if existing law does not permit this, it should. Plaintiffs ask that we hear this case in our original jurisdiction. *See Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) (only if an extraordinary reason exists, such as a question of significant public interest or an emergency, will the Court hear a case in its original jurisdiction). We allowed the South Carolina Republican Party (SCGOP) to intervene. The SCGOP filed a motion to dismiss. We granted the Attorney General permission to submit an *amicus curiae* memorandum.

We grant the request to hear the case in our original jurisdiction. We respectfully decline to dismiss the case on any of the grounds argued in the SCGOP motion. As we will explain, however, we dismiss the case on the ground that it does not present a justiciable controversy.

I.

Although this case does not present a constitutional challenge,[2] we begin with the

[1] Plaintiffs Bailey and Wehrman are candidates in the Democratic primary.

[2] As much as the dissent may wish otherwise, Plaintiffs' Complaint presents only a question of statutory construction. Plaintiffs' counsel confirmed at oral argument that Plaintiffs do not challenge the constitutionality of South Carolina's absentee voting statutes. We respectfully reject the dissent's effort to recast this lawsuit. In any event, we are not persuaded that the dissent's reframing of the question presented to the Court would permit the result the dissent desires.

unassailable proposition which all participants acknowledge: the right to vote is a cornerstone of our constitutional republic. *See Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 990, 59 L. Ed. 2d 230, 241 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481, 492 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."); *see also* S.C. Const. art. I, § 5 ("All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office."); S.C. Const. art. II, § 1 ("The right of suffrage, as regulated in this Constitution, shall be protected by laws regulating elections and prohibiting, under adequate penalties, all undue influence from power, bribery, tumult, or improper conduct."); S.C. Const. art. II, § 2 ("No power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage in this State."); *Sojourner v. Town of St. George*, 383 S.C. 171, 176, 679 S.E.2d 182, 185 (2009) ("The right to vote is a fundamental right protected by heightened scrutiny under the Equal Protection Clause. Restrictions on the right to vote on grounds other than residence, age, and citizenship generally violate the Equal Protection Clause and cannot stand unless such restrictions promote a compelling state interest." (internal citations omitted)); *City of Charleston v. Masi*, 362 S.C. 505, 509, 609 S.E.2d 301, 304 (2005) (noting the critical importance of ensuring voters are not improperly denied their right to vote in a particular election). As we stated in another election case in which this Court issued a declaratory judgment in its original jurisdiction, "This is a matter of great public importance. Integrity in elections is foundational." *Anderson v. S.C. Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 706 (2012).

The voting laws implicated in this case are South Carolina statutes governing absentee voting. Pursuant to subsection 7-15-320(A) of the South Carolina Code (2019), absentee ballots may be used by certain voters who are unable to vote in person because they are absent from their county of residence on election day during the hours the polls are open. Subsection 7-15-320(B) allows voters to cast absentee ballots when they are not absent from the county, but only if they fit into one of the listed categories of people eligible to vote by absentee ballot. One of these categories is "physically disabled persons." § 7-15-320(B)(1).[3] Subsection

[3] Among the other categories of voters eligible under the statute to vote absentee without a requirement of absence from the county are persons attending sick or physically disabled persons; persons admitted to hospitals as emergency patients

7-15-310(4) of the South Carolina Code (2019) defines "physically disabled person" as "a person who, because of injury or illness, cannot be present in person at his voting place on election day." Plaintiffs ask the Court to construe the term "physically disabled person" to include those practicing social distancing to avoid contracting or spreading the illness COVID-19. Plaintiffs contend these voters, "because of . . . illness, cannot be present in person" at the voting place on election day under subsection 7-15-310(4), and thus are "physically disabled persons" under subsection 7-15-320(B)(1). This construction of the term "physically disabled person," Plaintiffs argue, permits all registered voters to vote by absentee ballot if they choose.

II.

We will dismiss any case that does not present a justiciable controversy. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). On Tuesday, May 12—the day this Court heard oral argument on Plaintiffs' request that we construe the term "physically disabled person" to include any voter practicing social distancing to avoid contracting or spreading COVID-19—our Legislature met to consider whether it should make any changes to our election law in light of the COVID-19 pandemic. Both the House and the Senate enacted legislation to temporarily change the law. The bill provides,

> A qualified elector must be permitted to vote by absentee ballot in an election if the qualified elector's place of residence or polling place is located in an area subject to a state of emergency declared by the Governor and there are fewer than forty-six days remaining until the date of the election.

Act No. 133, § 2A, 2020 S.C. Acts ___.

The next day—May 13—the Governor signed the bill into law. Because the entire State is currently under a "state of emergency as declared by the Governor," S.C. Exec. Order No. 20-35 at 9 (May 12, 2020), and "there are fewer than forty-six

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on the day of an election or within a four-day period before the election; persons with a death or funeral in the family within a three-day period before the election; and persons sixty-five years of age or older. S.C. Code Ann. § 7-15-320(B)(4), (5), (6), and (8).

days" between now and the June primary, all South Carolina voters are permitted to vote in the primary by absentee ballot, if they choose. This action by our Legislature and Governor enacted into law the precise relief Plaintiffs request—as to the primary election. By its terms, however, the legislation expires on July 1, 2020. Act No. 133, § 2B.

Act 133 has two effects relating to whether the case before us presents a justiciable question. First, Plaintiffs' claim that all voters should be permitted to vote by absentee ballot in the June 9 primary election is now moot. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (stating a "court will not pass on moot . . . questions").

Second, though the new law expires on July 1, and thus does not moot Plaintiffs' claim as to any election after that date, the fact the Legislature changed the law to permit every voter to vote in the primary by absentee ballot is a clear indication the absentee voting statutes did not already permit that. To explain, if existing law already permitted all voters to vote by absentee in the face of a pandemic, it would have been unnecessary for the Legislature to change the law. In addition, by providing the new law "expires," the Legislature essentially reenacted the old law as of July 1. This makes clear the Legislature's intent that—under the old law reenacted—all voters may not vote by absentee ballot in the face of a pandemic. The question Plaintiffs raise is whether existing law permits all voters to vote by absentee ballot. The Legislature answered that question, "No"; it took a change in the law for that to be true. The change in the law means the answer is now, "Yes." But the law expires, by which the Legislature deliberately changed the answer back to, "No," after July 1. There is no way to interpret these changes other than as a legislative determination that subsection 7-15-320(B)(1) does not permit all voters to vote absentee in the face of a pandemic. Therefore, the only voters who may vote by absentee ballot after July 1 are those who fit into one of the listed categories in subsection 7-15-320(A) or (B). If there were any doubt that subsection 7-15-320(B)(1) does not permit what Plaintiffs claim it does, that doubt was removed by the Legislature's effective reenactment of the subsection with the clear intention of repealing the temporary provision that allowed all voters to vote absentee.

The dissent argues that Plaintiffs' claim relating to elections after July 1—in addition to the constitutional question—presents a question of statutory interpretation, not a political question. We certainly agree statutory interpretation is within the province of this Court. In fact, what we articulated in the previous paragraph is our construction of subsection 7-15-320(B)(1) as the Legislature

intends it after July 1, not based on its plain language or the canons of construction, but based on the Legislature's political act of reenacting the subsection after temporarily changing the law. We hold the question is now a political question because the Legislature answered the question of statutory interpretation with absolute clarity when it changed the law to permit all voters to vote absentee, and then sunset the new law for elections held after July 1.

Statutory interpretation is certainly a judicial question, but when the Legislature considers the very same question—knowing it is doing so at the very same time the Court considers the question—and answers the question with clarity, we cannot give a different answer through the judicial act of statutory interpretation. We may do so only by the political act of simply disagreeing. This Court will not do it.

Plaintiffs are left, therefore, only with their implicit argument as to what the law should be, that is, that this Court should change the law. As for the June primary election, the Legislature has determined that all voters may vote absentee. As for elections after July 1, 2020, we hold that whether any change should be made to the law is a political question for the Legislature likewise to answer. *See S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 142-44, 632 S.E.2d 277, 278-79 (2006) (explaining that this Court will not answer political questions). To consider this political question, the House and Senate by joint resolution Tuesday, May 12 set September 15, 2020 (or earlier at the call of the Senate President or House Speaker) to resume the legislative session. *See* S. Con. Res. 1194, 123d Gen. Assemb., 2d Reg. Sess. (S.C. 2020). The joint resolution specifically contemplates the Legislature may consider "introduction, receipt, and consideration of legislation concerning COVID-19 and related matters" at any time up to November 8, 2020. S. Con. Res. 1194 §§ (D)(10), (E)(6). This provision of the joint resolution keeps us mindful that it is the Legislature which bears the constitutional obligation to ensure that elections are carried out in such a manner as to allow all citizens the right to vote. "The General Assembly shall provide for the nomination of candidates, regulate the time, place, and manner of elections, provide for the administration of elections and for absentee voting." S.C. Const. art. II, § 10.

Pursuant to that constitutional obligation, the Legislature has determined that subsection 7-15-320(B)(1) does not permit all voters to vote absentee, and the Legislature has jointly resolved to return to session in September to consider whether that law should be changed—again—for the November election. There is no way for this Court to grant Plaintiffs the relief they seek without disagreeing with the Legislature on this political question. If conditions in the Fall warrant

another change in our election law, and if the will of the people as expressed through their legislative representatives is that such a change be made, the Legislature may change the law. This Court, however, will not. *See* S.C. Const. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.").

III.

We grant the motion to hear this case in our original jurisdiction. Having carefully reviewed the matter, we dismiss the case.

DISMISSED.

KITTREDGE, FEW, and JAMES, J.J., concur. HEARN, J., concurring in part and dissenting in part in a separate opinion in which BEATTY, C.J., concurs.

JUSTICE HEARN: I agree with the majority's decision to grant Plaintiffs' request to hear this case in our original jurisdiction, decline to dismiss the case on the grounds argued in the SCGOP's motion, and dismiss Plaintiffs' complaint as moot with respect to the June primary. *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006) ("Generally, this Court only considers cases presenting a justiciable controversy."); *Id*. at 26, 630 S.E.2d at 477 ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. If there is no actual controversy, this Court will not decide moot or academic questions." (internal citation omitted)).

However, I part company with the majority in its haste to dismiss the action with finality as it relates to the general election on the theory that a political question is presented.[4] I view the issue before us not as a political question but rather a question of statutory interpretation, which is clearly within the province of this Court. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("[I]t is emphatically the province and duty of the judicial department to say what the law is."); *Abbeville Cty. Sch. Dist. v. State*, 410 S.C. 619, 632, 767 S.E.2d 157, 163-64 (2014) ("This hallowed observation is the bedrock of the judiciary's proper role in determining the constitutionality of laws, and the government's actions pursuant to those laws."); 82 C.J.S. *Statutes* § 368 (2009) (noting the interpretation and construction of statutory language presents a question of law for the court to decide). The General Assembly, in enacting the legislation, rendered the question before us moot with respect to the June primary, but it did not settle the ultimate issue at hand—the statutory construction of "physically disabled persons" in the absentee voting statutes consonant with the constitutional mandate for free and open elections. S.C. Const. art. I, § 5 ("All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers . . . ."). While it is the responsibility of the General Assembly to "provide for the administration of elections and for absentee voting," it remains the duty of this Court to ensure that statutes enacted by the Legislature are constitutionally valid. S.C. Const. art. II, § 10; *Boyd v. United States*, 116 U.S. 616, 635 (1886) ("It is the duty of courts to be watchful for the constitutional rights of the

[4] While none of the parties specifically argued the applicability of the political question doctrine in this case, I recognize this doctrine falls under the umbrella of Article I, Section 8 separation of powers generally. *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

citizen . . . ."); *Peoples Nat'l Bank of Greenville v. S.C. Tax Comm'n*, 250 S.C. 187, 192, 156 S.E.2d 769, 772 (1967) (noting this Court has a duty to adopt a statutory construction which conforms to constitutional requirements); *Moseley v. Welch*, 209 S.C. 19, 27, 39 S.E.2d 133, 137 (1946) ("[T]he provisions of our State Constitution are not a grant but a limitation of legislative power, so that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitution."). I reject the majority's assertion that I have reframed or recast the issue as a constitutional challenge but instead explain that this Court cannot ignore the constitutional ramifications of the statutory construction question presented. Although I agree with the premise that we generally answer only the questions specifically posited to us, we do not construe statutes in a vacuum, but rather in the shadow of the Constitution. Indeed, were this Court able to address the question of statutory construction raised here, we would inevitably have to determine whether our interpretation is consistent with the free and open elections clause of our Constitution, as both Plaintiffs and the SCGOP acknowledged at oral argument.[5]

My review of our jurisprudence does not support the majority's reliance on the political question doctrine. In *Alexander v. Houston*, 403 S.C. 615, 619, 744 S.E.2d 517, 520 (2013), we rejected the trial court's determination that a legal challenge under our Constitution's dual office holding provision was a nonjusticiable political question. Instead, we held the question presented a "bona fide legal challenge" that was proper for judicial resolution. *Id*. We further stated "this Court is duty bound to review the actions of the Legislature . . . ." *Id*. at 619, 744 S.E.2d at 519-20. Similarly, in *Abbeville County School District v. State*, 335 S.C. 58, 67, 515 S.E.2d 535, 539 (1999), we reversed the trial court's decision to rely on the political question doctrine as the basis for declining to interpret a constitutional provision. Finally, in *Sloan v. Hardee*, 371 S.C. 495, 500, 640 S.E.2d 457, 459-60 (2007), we held that the interpretation of the phrase "more than one consecutive term" in section

[5] Although Plaintiffs did not specifically plead a cause of action challenging the constitutionality of the absentee voting statute, they nevertheless explained at oral argument that the canon of constitutional avoidance requires this Court to interpret the statute in such a manner so as not to raise constitutional concerns. *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (holding the Supreme Court has an obligation to construe a statute to avoid constitutional problems "if it is fairly possible to do so"). Counsel further argued that if we were to find that people practicing social distancing were not included in the term "physically disabled persons," such an interpretation would run afoul of the free and open elections clause of our Constitution. The SCGOP's counsel also conceded this Court undoubtedly must construe the statute in light of the free and open elections clause.

57-1-320(B) to determine whether the statute had been violated was not a political question and "clearly within the prerogative of this Court." Indeed, these decisions demonstrate our reluctance to relinquish our judicial authority to decide "bona fide legal challenges" and to interpret statutory and constitutional provisions, unless a political question is clearly presented. *See Alexander*, 403 S.C. at 619, 744 S.E.2d at 519 ("[T]he political question doctrine is one of political questions, not one of political cases." (internal quotation marks omitted)).

Moreover, the action or inaction of the General Assembly does not determine whether a question is political, and therefore, nonjusticiable. *See Doran v. Robertson*, 203 S.C. 434, 445, 27 S.E.2d 714, 718 (1943) ("The Legislature cannot finally determine the limits of its power under the Constitution; that is a fundamental function of the courts. But it is so high a prerogative that it should be exercised with utmost care and circumspection." (internal citation omitted)). Rather, it is the responsibility of this Court to decide on a case-by-case basis whether a nonjusticiable political question is presented. *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."); *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 122, 691 S.E.2d 453, 460 (2010) ("In determining whether a question is political and nonjusticiable, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939)); *Id.* ("[C]onsideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." (quoting *Baker*, 369 U.S. at 198)). While I acknowledge that whether the political question doctrine applies is a threshold question for this Court, none of the parties to the litigation have briefed or had the opportunity to orally argue this specific issue. Therefore, I believe it would be most prudent to reserve judgment.

Further, in my view, the General Assembly's action in passing the temporary legislation does not necessarily resolve the issue of whether persons practicing social distancing to avoid contracting or spreading this serious, highly communicable disease are included within the plain and ordinary meaning of "physically disabled persons," as defined in Section 7-15-310(4) of the South Carolina Code of Laws

(2019) and allowed to vote by absentee ballot pursuant to section 7-15-320(B)(1). *See Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004) ("[W]hen an amendment alters, even 'significantly alters,' the original statutory language, this does 'not necessarily' indicate that the amendment institutes a change in the law."). *See also Baldwin v. City of Greensboro*, 714 F.3d 828, 837 (4th Cir. 2013). Indeed, the recent legislation simply provides that "[a] qualified elector must be permitted to vote by absentee ballot in an election if the qualified elector's place of residence or polling place is located in an area subject to a state of emergency . . . ." Act No. 133, § 2A (S.C. 2020). It did not *amend* section 7-15-310(4) or 7-15-320(B)(1) to temporarily allow all registered voters, in light of the COVID-19 pandemic, to vote by absentee ballot under the "physically disabled persons" provision. Accordingly, the legislation does not directly address the question of statutory interpretation before the Court, and I would decline to dismiss the suit on this basis. Instead, I would dismiss the complaint on the ground that the matter involving the general election is not yet ripe for judicial consideration, which would not foreclose a future suit requesting interpretation of the provision for the general election. *S. Bank & Tr. Co. v. Harrison Sales Co., Inc.*, 285 S.C. 50, 51, 328 S.E.2d 66, 67 (1985) ("A declaratory judgment action must involve an actual, justiciable controversy."); *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 353, 815 S.E.2d 446, 451 (2018) ("We have explained ripeness by defining what is not ripe, stating an issue that is contingent, hypothetical, or abstract is not ripe for judicial review." (quoting *Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006)); *Park v. Safeco Ins. Co. of Am.*, 251 S.C. 410, 414, 162 S.E.2d 709, 711 (1968) ("The courts generally decline to pronounce a declaration in a suit wherein the rights of the plaintiff are contingent upon the happening of some event which cannot be forecast and which may never take place."). For these reasons, I concur in part and dissent in part.

BEATTY, C.J., concurs.

The Supreme Court of South Carolina

South Carolina Department of Social Services,
Respondent,

v.

Andrea Benjamin and Ricky Pittman, Defendants,

Of whom Andrea Benjamin is the Petitioner.

In the interest of a minor under the age of eighteen.

Appellate Case No. 2020-000272

ORDER

In this termination of parental rights (TPR) action, the court of appeals affirmed the family court's order terminating Petitioner's parental rights after a review pursuant to *Ex Parte Cauthen*, 291 S.C. 465, 354 S.E.2d 381 (1987). *S.C. Dep't of Soc. Servs. v. Benjamin*, Op. No. 2019-UP-381 (S.C. Ct. App. filed Dec. 6, 2019). Petitioner has now filed a *pro se* petition for a writ of certiorari to review the decision of the court of appeals, a motion to proceed *in forma pauperis*, a motion to appoint counsel, and a motion for an extension of time in which to serve and file the Appendix.

This Court has held it will grant certiorari to the court of appeals only where special reasons justify the exercise of that discretion. *Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170, 170 (2008); *In re Exhaustion of State Remedies in Criminal Post-Conviction Relief Cases*, 321 S.C. 563, 564, 471 S.E.2d 454, 454 (1990). Further, Rule 242(b), SCACR, emphasizes the discretionary authority of the Court to review decisions of the court of appeals, stating a writ of certiorari will be granted only when there are special and important reasons, such as when there are novel questions of law; a dissent in the decision of the court of appeals; the decision of the court of appeals is in conflict with a prior decision of this Court;

substantial constitutional issues are directly involved; or a federal question is included, and the decision of the court of appeals conflicts with a decision of the United States Supreme Court.

A *Cauthen* review, which is a procedure similar to that set forth in *Anders v. California*, 386 U.S. 738 (1967), is conducted when an attorney representing an indigent defendant on TPR determines the appeal is without merit. The attorney files the transcript of the family court hearing and an affidavit, as an officer of the court, stating the attorney's belief that the appeal lacks merit. *Ex Parte Cauthen*, 291 S.C. at 467, 354 S.E.2d at 383. In *Cauthen* cases, the role of the appellate court is to review the transcript in its entirety and any responses submitted by the appellant or the respondent to determine whether the appeal contains any meritorious issues. *Id*. If an issue is found which warrants briefing, the appellate court will direct the parties to file briefs on the issue, and the case will proceed under the normal appellate process. *Id*. On the other hand, if the appellate court finds no meritorious issues, the appeal will be dismissed. *Id*.

This Court has held it is unnecessary to file a petition for writ of certiorari after a *Cauthen* appeal has been decided by the court of appeals because the court of appeals has reviewed the trial transcript for any possible issues of arguable merit. *See S.C. Dep't of Soc. Servs. v. Ihnatiuk*, 396 S.C. 207, 209, 721 S.E.2d 766, 767 (2003); *S.C. Dep't of Soc. Servs. v. Hickson*, 350 S.C. 213, 214, 565 S.E.2d 763, 764 (2002).

A decision issued by the court of appeals after a *Cauthen* review does not meet the "special and important" standard established by Rule 242(b) and this Court's decisions concerning petitions for writs of certiorari to the court of appeals.[1] As a

[1] *See Ellison v. State*, 382 S.C. 189, 191, 676 S.E.2d 671, 672 (2009) (holding petitions for writs of certiorari to the court of appeals will not be entertained when the court of appeals issued an order denying a writ of certiorari in a post-conviction relief (PCR) matter or initially issued an order granting a writ of certiorari but later issues an opinion dismissing the writ as improvidently granted without further discussion of the case); *State v. Lyles*, 381 S.C. 442, 445, 673 S.E.2d 811, 813 (2009) (deciding, as a matter of policy, not to entertain petitions for writs of certiorari when the court of appeals dismissed the appeal after conducting a review pursuant to *Anders v. California*, 386 U.S. 738 (1967)); *Haggins v. State*, *supra* (refusing to entertain petitions for writs of certiorari to the court of appeals when the court of appeals issued a letter of denial in a PCR case); *Missouri v. State*, 378 S.C. 594, 595, 663 S.E.2d 480, 481 (2008) (holding the Supreme Court will not entertain petitions for writs of certiorari to the court of appeals when the

matter of policy, this Court will no longer entertain petitions for writs of certiorari when the court of appeals has dismissed an appeal after conducting a *Cauthen* review. Accordingly, we dismiss the petition for a writ of certiorari in this matter, and deny Petitioner's motions to proceed *in forma pauperis*, to appoint counsel, and for an extension as moot.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

May 22, 2020

court of appeals denied a petition for a writ of certiorari filed pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), in a PCR matter).

The Supreme Court of South Carolina

In the Matter of Robert Nathan Boorda, Respondent

Appellate Case No. 2020-000485

ORDER

Respondent has submitted a motion to resign in lieu of discipline pursuant to Rule 35, RLDE, Rule 413, SCACR. We grant the motion to resign in lieu of discipline. In accordance with the provisions of Rule 35, RLDE, Respondent's resignation shall be permanent. Respondent will never again be eligible to apply, and will not be considered, for admission or reinstatement to the practice of law or for any limited practice of law in South Carolina.

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

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 22, 2020