The Supreme Court of South Carolina

O R D E R

The attached certificate form is hereby approved for use with Rule 403, SCACR.

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

Columbia, South Carolina
June 29, 2010

The Supreme Court of South Carolina

C E R T I F I C A T E

This certificate is to be used to show completion of the trial experiences required by Rule 403 of the South Carolina Appellate Court Rules (SCACR). This Certificate must be submitted in DUPLICATE (the original and one copy) to the Clerk of the South Carolina Supreme Court, P.O. Box 11330, Columbia, SC 29211, along with a filing fee of $25. Except for the signatures, all entries must be legibly printed or typed. COMPLETED CERTIFICATES SHALL NOT BE ACCEPTED UNTIL AFTER THE APPLICANT HAS BEEN SWORN IN AS A MEMBER OF THE SOUTH CAROLINA BAR.

COURT OF COMMON PLEAS or U.S. DISTRICT COURT FOR THE DISTRICT OF S.C.

Case Name:_____Date:_____ATTEST:_____
*Signature of Judge

Court:_____Name of Judge:_____

COURT OF GENERAL SESSIONS or U.S. DISTRICT COURT FOR THE DISTRICT OF S.C.

Case Name:_____Date:_____ATTEST:_____
*Signature of Judge

Court:_____Name of Judge:_____

FAMILY COURT

Case Name:_____Date:_____ATTEST:_____
*Signature of Judge

Name of Judge:_____

***The signature of the Judge is an attestation that the trial experience complied with the requirements of Rule 403(c), SCACR, including the requirement that the trial experience include an opening statement, a closing argument and direct and cross examination of at least three witnesses for the civil and criminal trial, and at least two witnesses for the family court trial.**

EQUITY TRIAL/ADMINISTRATIVE PROCEEDING

Case Name:_____Date:_____ATTEST:_____
Signature of Judge/Presiding Officer

Name of Presiding Officer and Title:_____

JUDICIAL OBSERVATION AND EXPERIENCE PROGRAM APPROVED BY THE CHIEF JUSTICE'S COMMISSION ON THE PROFESSION

Program Name:_____ Date: To: _____ From: _____

Name of Judge:_____ ATTEST:_____
*Signature of Judge

CERTIFICATION BY ATTORNEY

I, _____, hereby certify that I completed one-half of the credit hours needed for law school graduation prior to participating in and/or observing the trials or hearings listed on this form; and/or that I had completed one year of law school prior to my participation in a judicial observation and experience program approved by the Chief Justice's Commission on the Profession. I further certify that I have observed or participated in the above trials or observation program in accordance with the provisions of Rule 403, SCACR.

Signed this _____ day _____, 20_____. _____
SIGNATURE

NAME: _____

STREET OR P. O. BOX: _____

CITY, STATE and ZIP: _____

TELEPHONE NO. (Home)(____)_____ (Work)(_____)_____

The Supreme Court of South Carolina

In the Matter of Garfield D. Stuart, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Commission Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Stuart and the interests of Mr. Stuart's clients.

IT IS ORDERED that Jason Wendell Lockhart, Esquire, is hereby appointed to assume responsibility for Mr. Stuart's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Stuart may have maintained. Mr. Lockhart shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Stuart's clients and may make disbursements from Mr. Stuart's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Garfield

D. Stuart, Esquire, shall serve as notice to the bank or other financial institution that Jason Wendell Lockhart, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Jason Wendell Lockhart, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Stuart's mail and the authority to direct that Mr. Stuart's mail be delivered to Mr. Lockhart's office.

Mr. Lockhart's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

IT IS SO ORDERED.

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

Columbia, South Carolina
June 23, 2010

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 25
June 29, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Erick L. Bradshaw, Sr., Doreen Montepara, and Michael Montepara, Appellants,

v.

Anderson County, Edwin E. Moore, Individually, Thomas Allen, Individually, and Robert E. Waldrep, Jr., Individually, Respondents.

Appeal from Anderson County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26830
Heard May 12, 2010 – Filed June 28, 2010

AFFIRMED

Candy Kern-Fuller, of Easley, for Appellants.

Francis G. Delleney, Jr. and Brian T. Grier, both of Hamilton, Delleney & Gibbons, of Chester; Frank S. Holleman, III, J. Theodore Gentry, and David H. Koysza,

all of Wyche, Burgess, Freeman & Parham, of Greenville, for Respondents.

JUSTICE KITTREDGE: Appellants[1] appeal from the trial court's dismissal of their declaratory judgment action against Respondents Anderson County Council and three individual council members (collectively, "the Council"). The gravamen of Appellants' challenge is their contention that the Council violated the Home Rule Act by engaging professionals to investigate the conduct of the former county council, especially concerning contracts related to the former and current County Administrators. The trial court determined the Home Rule Act empowers a county council, operating within a "Council-Administrator" form of government, to conduct such an investigation and dismissed Appellants' complaint. We affirm.

I.

The voters of Anderson County elected a new County Council in November 2008. In late 2008, after the election, but prior to the installation of the new Council, the former Council declared an "anticipatory breach" of County Administrator Joey Preston's contract and awarded Preston over $1 million. The former Council also promoted Preston's assistant, Deputy Administrator Michael Cunningham, to the Administrator's position and awarded him a three-year contract.

The new Council was sworn into office on January 6, 2009. The new Council launched an investigation into the County's business and financial practices, including a review of the post-election contracts awarded by the former Council. By unanimous resolution, the Council selected Robert Daniel, a certified public accountant and investigative auditor, to serve as "chief financial investigator," and it engaged the accounting firm of Greene and Company to assist Daniel with the investigation. The Council

---

[1] Appellants are Anderson County taxpayers.

additionally engaged attorney William W. Wilkins, Jr. and his law firm, Nexsen Pruet, to serve as "Special Legal and Investigative Counsel" throughout the investigation.[2]

In February 2009, Erick Bradshaw, Fred Foster, and Cordes Seabrook (the initial Plaintiffs) filed an action seeking to restrain the Council's investigation of the County's business practices. Plaintiffs additionally sought a declaratory judgment that the Council had violated both the South Carolina Home Rule Act and the procurement provisions of the Anderson County Code by hiring Daniel and engaging Greene and Company, Wilkins, and Nexsen Pruet to conduct the investigation.

In response to Plaintiffs' lawsuit, the Council hired the Wyche, Burgess, Freeman, and Parham Law Firm ("the Wyche Firm") to defend the County. Thereafter, Plaintiffs amended their complaint to: (1) seek injunctive relief and a declaratory judgment regarding the engagement of the Wyche Firm; (2) add Plaintiffs Doreen and Michael Montepara; (3) seek actual damages and attorneys' fees from Anderson County; and (4) seek punitive damages against individual Council members Edwin Moore, Thomas Allen, and Robert Waldrep, Jr.

On February 25, 2009, the trial court heard arguments concerning Plaintiffs' attempt to halt the Council's investigation. Shortly after the arguments, two of the initial Plaintiffs, Fred Foster and Cordes Seabrook, voluntarily dismissed their claims. On March 9, 2009, the court denied injunctive relief after finding Plaintiffs had failed to establish the elements of likelihood of success on the merits and irreparable harm. The trial court's order denying the Plaintiffs' action for injunctive relief stated:

> Anderson County's elected County Council members have decided the investigation is in the best interests of all the

[2] The trial court's order noted that the County Attorney "had concluded he could not represent [Council] in this action." The County Attorney answers to the County Administrator, whose office is a subject of the inquiry.

> County's residents, taxpayers and voters. An injunction would interfere with the investigation and the County Council's attempt to learn about the County's contracts and financial dealings. The County Council members are accountable to the voters, as fully demonstrated by the last County Council election.

The trial court subsequently dismissed Plaintiffs' amended complaint. The court found the Home Rule Act expressly authorized the Council to conduct an investigation without acting through the County Administrator. The court's order of dismissal explained:

> Taking the factual allegations of the Amended Complaint as true, the Anderson County Council's investigation, and its hiring of professionals to carry out that investigation, are thus fully consistent with the South Carolina Home Rule Act. . . .
>
> Indeed, it would make no sense for the Council to be required to go through the administrator to investigate the operation of county government or to hire investigators and legal counsel. In this case, the plaintiffs' amended complaint recites that the contracts of the former county administrator and of the then-current county administrator were two of the subjects of the County Council's investigation. Such a requirement would require the Council to put the investigation in the hands of the person who oversaw the business operations that the Council may be seeking to investigate and, in this case, whose contract is a subject of the investigation. It would likewise make no sense for the Council to be required to turn over the legal defense of the investigation to the county administrator and the legal counsel of his choosing, when the administrator's actions and operations under his control may be the subject of the investigation. The Home Rule Act does not require such absurd results. Under the Home Rule Act, the Council has the express authority to conduct

> its own investigations as it sees fit, without acting through the county administrator to investigate these contracts or other aspects of the County's business and finances.
>
> Oversight of a county's business and finances is one of the fundamental responsibilities of a county council. The county council must have the ability to investigate or inquire concerning the operation of the county government without placing the investigation in the hands of the administrator who has overseen the matters that may be the subject of the investigation. The Home Rule Act creates no obstacles to this basic function of a county council, and in fact, expressly recognizes the authority of a county council to undertake an investigation without acting through the county administrator.

Following dismissal of the complaint, Appellants appealed; the appeal was certified to this Court.

II.

Anderson County operates under a "Council-Administrator" form of government, pursuant to South Carolina Code Ann. §§ 4-9-610 to -670 (1986 & Supp. 2009). The entire seven-member Council is elected every other year. The Council employs an Administrator who is responsible for managing the various departments that are under the Council's control. S.C. Code Ann. § 4-9-620.

A.

Rule 12(b)(6), SCRCP

The trial court dismissed Appellants' case pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. This Rule permits a defendant to move for a judgment on the pleadings when the defendant contends the

complaint fails "to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCP. The reviewing Court is required "to construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (quoting *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001)).

B.

Home Rule Act

Article 7 of the South Carolina Home Rule Act defines the "Council-Administrator" form of government. S.C. Code Ann. §§ 4-9-610 to -670 (1986 & Supp. 2009). Under this governance structure, the Council employs an Administrator to serve as the County's chief administrative officer and to direct all departments under the Council's control. The resolution of this appeal turns on whether the trial court correctly construed the Home Rule Act as expressly authorizing the Council to conduct its own investigation into the County's business practices and to engage professionals needed to carry out the investigation. The statutory language manifestly establishes the legislature's intent:

> **Except for the purposes of inquiries and investigations**, the council shall deal with county officers and employees who are subject to the direction and supervision of the county administrator solely through the administrator, and neither the council nor its members shall give orders or instructions to any such officers or employees.

S.C. Code Ann. § 4-9-660 (emphasis added); s*ee also* S.C. Code Ann. § 4-9-25 (Supp. 2009) ("The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.").

III.

Appellants contend the trial court erred in finding the Home Rule Act permits a county council operating under the Council-Administrator form of government to directly engage professionals "for the purposes of inquiries and investigations." We disagree and adopt the well-reasoned order of the trial court. Section 4-9-660 expressly authorizes the very action taken by the Council.[3] Beyond the unambiguous language in section 4-9-660, we further note the absurdity of requiring an administrator, who is answerable to the council and not the electorate, to investigate himself.

We further reject Appellants' argument that the Council's investigatory actions are prohibited under the Anderson County Code. This challenge is not preserved, for the trial court's order contains the unchallenged finding that "[a]ll counsel agreed at oral argument that the provisions of the Home Rule Act prevail over any contrary provisions of the Anderson County Code." In any event, the Anderson County Code is not in conflict with the Home Rule Act, including section 4-9-660.

IV.

Under the "Council-Administrator" form of government a county council has the authority pursuant to section 4-9-660 of the Home Rule Act to conduct "inquiries and investigations."

---

[3] Appellants' reliance on an April 4, 2008 Attorney General letter is misplaced. That letter was in response to an entirely different situation concerning an administrator's authority to hire "internal auditors." An administrator's general authority is not before us. The question before us concerns a council's authority to independently conduct an investigation in light of section 4-9-660 of the Home Rule Act. A council clearly has such authority.

AFFIRMED.

TOAL, C.J., PLEICONES, HEARN, JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

In the Matter of Brian Charles Reeve, Respondent.

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Benton Williamson, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Williamson shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of

respondent's clients. Mr. Williamson may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Benton Williamson, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Williamson's office.

Mr. Williamson's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C. J.

FOR THE COURT

Columbia, South Carolina

June 28, 2010

The Supreme Court of South Carolina

In re: Amendments to the South Carolina Appellate Court Rules

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O R D E R

The Chief Justice's Commission on the Profession has proposed amending Rule 403, South Carolina Appellate Court Rules, to provide that required Family Court trial experiences must include direct and cross-examination of at least two witnesses, rather than three witnesses. The amendment also deletes the requirement that such matters include opening and closing statements. The Commission suggested the amendment because trials in the Family Court rarely include opening or closing statements and often have less than three witnesses. We agree.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 403(c), South Carolina Appellate Court Rules, as set forth below. The amendment is effective immediately.

RULE 403
TRIAL EXPERIENCES

. . .

(c) Trial Experiences Required. An attorney must complete four (4) trial experiences. The required trial experiences are:

(1) one (1) civil jury trial in a Court of Common Pleas or in the United States District Court for the District of South Carolina;

(2) one (1) criminal jury trial in General Sessions Court or in the United States District Court for the District of South Carolina;

(3) one (1) trial in the Family Court; and

(4) one (1) trial experience which must be either a trial in equity before a circuit judge, master-in-equity, or special referee, or an administrative proceeding before an Administrative Law Judge or administrative officer of this State or of the United States. The administrative proceeding must be governed by either the South Carolina Administrative Procedures Act or the Federal Administrative Procedure Act, and the hearing must take place within South Carolina.

Each of the trial experiences set forth in (1) and (2) above must include an opening statement, a closing argument and direct and cross examination of at least three witnesses. Trial experiences in the Family Court set forth in (3) must include direct and cross examination of at least two witnesses.

. . . .

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

June 28, 2010

The Supreme Court of South Carolina

In re: Amendments to the Rules of Professional Conduct, Rule 407, SCACR, and the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

O R D E R

The Commission on Lawyer Conduct has proposed certain revisions to the Rules of Professional Conduct, Rule 407, SCACR, and the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. The Commission has proposed that the filing requirement be deleted from Rule 7.2(b), RPC; that lawyers be required under Rule 8.3, RPC, to report arrests for serious crimes, that the definition of "serious crime" be added to Rule 1.0, RPC, and that the definition of "serious crime" in Rule 2, RLDE, be amended to conform to that proposed for Rule 1.0, RPC; and that provision be made in the Comment to Rule 1.15, RPC, for delivery of unidentified or unclaimed funds from a lawyer's trust account to the Lawyers' Fund for Client Protection. Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby adopt all but the latter of the proposed amendments, which we find is

governed in part by the Uniform Unclaimed Property Act, S.C. Code Ann. § 27-18-10, et seq (2007 & Supp. 2009). However, we hereby amend the Comment to Rule 1.15, RPC, to note the applicability of the Act. We also amend Comment 5 to Rule 7.2, RPC, to reflect the deletion of the filing requirement for advertisements.

These amendments shall become effective immediately. A copy of the amended rules is attached.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

June 28, 2010

AMENDMENTS TO RULE 407, SCACR
RULES OF PROFESSIONAL CONDUCT

RULE 7.2
ADVERTISING

(b) A lawyer is responsible for the content of any advertisement or solicitation placed or disseminated by the lawyer and has a duty to review the advertisement or solicitation prior to its dissemination to reasonably ensure its compliance with the Rules of Professional Conduct. The lawyer shall keep a copy or recording of every advertisement or communication for two (2) years after its last dissemination along with a record of when and where it was disseminated.

Comment

Record of Advertising

[5] Paragraph (b) imposes upon the lawyer the responsibility for reviewing each advertisement prior to dissemination to ensure its compliance with the Rules of Professional Conduct. It also requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule.

RULE 8.3
REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Commission on Lawyer Conduct in writing within fifteen days of being arrested or being charged by way of indictment, information or complaint.

(b) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(c) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office in other respects shall inform the appropriate authority.

(d) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(e) Inquiries or information received by the South Carolina Bar Lawyers Helping Lawyers Committee or an equivalent county bar association committee regarding the need for treatment for alcohol, drug abuse or depression, or by the South Carolina Bar law office management assistance program or an equivalent county bar association program regarding a lawyer seeking the program assistance, shall not be disclosed to the disciplinary authority without written permission of the lawyer receiving assistance. Any such inquiry or information shall enjoy the same confidence as information protected by the attorney-client privilege under applicable law.

Comment

[1] Self regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. The South Carolina version of paragraph (c) modifies the model version by specifically including "honesty" and "trustworthiness" to parallel the requirement of paragraph (b).

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a

requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client lawyer relationship.

[5] Paragraph (e) encourages lawyers to seek assistance from the South Carolina Bar Lawyers Helping Lawyers Committee, from a South Carolina Bar law office management assistance program, or from an equivalent county bar association program without fear of being reported for violating the Rules of Professional Conduct. Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (b) and (c) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

RULE 1.0
TERMINOLOGY

(n) "Serious crime" denotes any felony; any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; or, any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, willful failure to file income tax returns, or an attempt, conspiracy or solicitation of another to commit a serious crime.

(o) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(p) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(q) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 1.15
SAFEKEEPING PROPERTY

Comment

[7] A lawyer's obligations with regard to identified but unclaimed funds are set forth in the Uniform Unclaimed Property Act, S.C. Code Ann. §27-18-10, et seq.

AMENDMENTS TO RULE 413, SCACR
RULES FOR LAWYER DISCIPLINARY ENFORCEMENT
RULE 2
TERMINOLOGY

(aa) Serious Crime: any felony; any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; or, any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, willful failure to file income tax returns, or an attempt, conspiracy or solicitation of another to commit a serious crime.

The Supreme Court of South Carolina

In re: Amendments to the South Carolina Appellate Court Rules

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O R D E R

The South Carolina Bar has proposed amending Rule 2 of Rule 416, SCACR, to clarify that the Resolution of Fee Disputes Board retains jurisdiction over a fee dispute if an attorney is suspended from the practice of law after the fee dispute is filed. In conjunction with that proposal, the Bar also requests the Court amend Rule 411(c)(1), SCACR, to provide the definition of dishonest conduct in matters pending before the Lawyers' Fund for Client Protection Committee includes the failure of a lawyer to return an unearned fee after the Resolution of Fee Disputes Board determines the lawyer is not entitled to retain the fee. The amendments further state a fee dispute which is timely filed before the Resolution of Fee Disputes Board shall be considered timely filed before the Lawyers' Fund for Client Protection Committee if an unearned fee is not repaid by the lawyer.

Pursuant to Article V, § 4, of the South Carolina Constitution, we grant the Bar's request to amend Rule 2 of Rule 416, SCACR, and Rule 411(c)(1), SCACR, as set forth in the attachment to this Order. The

amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

June 28, 2010

RULE 416

Resolution of Fee Disputes Board

RULE 2. JURISDICTION

The purpose of the Board is to establish procedures whereby a dispute concerning fees, costs or disbursements between a client and an attorney who is a member of the South Carolina Bar (the Bar) may be resolved expeditiously, fairly and professionally, thereby furthering the administration of justice, encouraging the highest standards of ethical and professional conduct, assisting in upholding the integrity and honor of the legal profession, and applying the knowledge, experience and ability of the legal profession to the promotion of the public good. As used in these Rules, "fee" is deemed to include a legal fee, costs of litigation and disbursements associated with a legal cause, claim or matter and "client" is defined as a person on whose behalf professional legal services have been rendered by an attorney who is a member of the South Carolina Bar.

Under no circumstances will the Board participate in: (1) a fee dispute involving an amount in dispute of $50,000 or more; or (2) disputes over which, in the first instance, a court, commission, judge, or other tribunal has jurisdiction to fix the fee. When an allegation of attorney misconduct arises out of a fee dispute other than as to the reasonableness of the fee, the Board, in its discretion, may refer the matter to the Commission on Lawyer Conduct. If the alleged misconduct does not arise out of a fee dispute, it shall be referred to the Commission on Lawyer Conduct.

If an attorney is suspended from the practice of law after a fee dispute has been filed with the Board, the Board shall retain jurisdiction over the dispute until the conclusion of the fee dispute process. This shall include all applicable appeals under Rule 20.

No fee dispute may be filed with the Board more than three (3) years after the dispute arose.

Jurisdictional issues shall be determined by the circuit chair.

RULE 411
LAWYERS' FUND FOR CLIENT PROTECTION

. . .

(c) Duties of Lawyers' Fund Committee for Client Protection Committee.

(1) The Committee shall be authorized, commencing on January 1, 1980, to consider applications for reimbursement of losses which arise after the effective date of this Rule and which are caused by the dishonest conduct of a member of the South Carolina Bar who was acting either as a lawyer or in a fiduciary capacity customary to the practice of law in the matter in which the loss arose, but only to the extent to which these losses are not bonded or to the extent these losses are not otherwise covered; and provided the Bar member has died, has been adjudicated a bankrupt, has been adjudicated mentally incompetent, has been disbarred or suspended from the practice of law, has voluntarily resigned from the practice of law, has left the jurisdiction of this state or cannot be found, or has become a judgment debtor of the applicant based upon his dishonest conduct as a lawyer; or provided that the application has been certified to the Committee by the Commission on Lawyer Conduct of the Supreme Court or the Board of Governors of the South Carolina Bar as an appropriate case for consideration because the loss was caused by the dishonest conduct of a member of the South Carolina Bar. For the purposes of this rule, dishonest conduct of a member of the South Carolina Bar shall include not only dishonest conduct committed by the member, but also dishonest conduct of any person who is not a member of the Bar employed by a member or the firm of a member to assist the member or firm in providing legal services. Reimbursement for losses caused by dishonest conduct of an employee of a member or firm shall only be allowed if the acts giving rise to the loss occurred during the course of that employment. Additionally, for purposes of this rule, dishonest conduct shall include the failure of a lawyer to return an unearned fee after the Resolution of Fee Disputes Board determines the lawyer is not entitled to retain the fee.

The Committee shall investigate applications, which are brought to its attention. The Committee shall be authorized and empowered to reject or allow applications in whole or in part to the extent that funds are available to it. The Committee shall have complete discretion in determining the order, extent, and manner of payments of applications. The payment to any applicant shall not exceed the sum of $40,000 per claim; provided, however, that the aggregate total of claims paid per attorney shall not exceed $200,000. In operating the Lawyers' Fund for Client Protection pursuant to this Rule, the South Carolina Bar does not create or acknowledge any legal responsibility for the acts of individual lawyers in the practice of law. All reimbursements of losses from the Lawyers' Fund for Client Protection shall be a matter of grace in the sole discretion of the Committee and not as a matter of right. No client or member of the public shall have any right in the Lawyers' Fund for Client Protection as a third party beneficiary or otherwise. No attorney shall be compensated for representing an applicant except as authorized by the Committee.

In order for an application to be considered by the Committee, the application must be received by the South Carolina Bar within three (3) years of the date the applicant discovered or reasonably ought to have discovered the dishonest conduct. No application may be considered after the expiration of six (6) years from the date of the dishonest conduct. An application for resolution of a fee dispute which is timely filed under Rule 416, SCACR, shall be considered timely filed for purposes of consideration under this rule in the event an unearned fee is not repaid.

The Committee is further authorized to disburse funds as ordered by the Supreme Court pursuant to Rule 31(f) contained in Rule 413, SCACR. Unless otherwise provided by the order of the Supreme Court, the Committee shall be entitled to reimbursement from the suspended, disbarred, disappeared, or deceased attorney or his estate.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James E. Sanders, Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4527
Heard September 16, 2008 – Filed April 7, 2009
Withdrawn, Substituted, and Refiled October 1, 2009

AFFIRMED

Melissa Jane Reed Kimbrough, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Kevin Scott Brackett, of York, for Respondent.

THOMAS, J.: James E. Sanders was convicted of the murder of the child of co-defendant Billy Wayne Cope (Child Cope),[1] two counts of first-degree criminal sexual conduct, and criminal conspiracy and was sentenced to life imprisonment, plus thirty years. He appeals. We affirm.

FACTS/PROCEDURAL HISTORY

On January 12, 2002, police responded to a burglary at a house on White Street in Rock Hill. After taking fingerprints, the officer was called to a house down the street where a man of a similar description was attacking Victim 4.[2] On January 12, 2002, at about midnight, Victim 4 was in her room watching a movie when she heard a knock at her door. When Victim 4 opened the door, Sanders pushed the door in and shoved her into the bathroom. The fight continued in the kitchen where Sanders kicked and pushed Victim 4. Sanders also held Victim 4 in a choke hold and tried to get on top of her several times. While Victim 4 was on the floor, Sanders ran into her room and grabbed her purse. As he was trying to leave, Victim 4 grabbed a pan from the stove and hit Sanders with it. He dropped the purse and Victim 4 grabbed her Mace. She tried to spray him, but missed. She then saw a small screwdriver on the floor and swung it at him, hitting him at least once in the shoulder.

Victim 4 had a blood stain on her shirt, which the police took as evidence. When officers searched for the suspect, they spotted Sanders crouched between two buildings around the corner from Victim 4's house. Sanders' clothes and hair matched the description both victims had given and he was bleeding. Police were able to match Sanders' prints with the fingerprints taken at the White Street house. Sanders submitted to a blood test on January 14, 2002.

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[1] See State v. Cope, Op. No. 4526 (S.C. Ct. App. refiled September 29, 2009) (providing background facts of the murder of Child Cope).

[2] See id. (providing background facts concerning other incidents in which Sanders was allegedly involved).

In September 2002, SLED tested bodily fluids it recovered during its investigation of the murder of Child Cope and found Sanders' DNA matched semen and saliva found on the victim's body. As a result of this discovery, Sanders was indicted on the charge of murdering Child Cope as well as two counts of first-degree criminal sexual conduct, and criminal conspiracy. Eventually, Sanders and Cope were tried together on all charges arising from the sexual assault on and murder of Child Cope.[3]

On June 18, 2004, Sanders filed a motion to suppress the DNA evidence extracted from him in January 2002 because it was unlawfully obtained. Conceding the blood drawn in January 2002 was invalidly obtained, the State moved on August 3, 2004, to have more blood drawn from Sanders.[4] Sanders argued the second blood draw was fruit of the poisonous tree of the first draw. Judge Alford determined all the Snyder[5] factors were present: (1) probable cause existed to believe Sanders committed the crime of first degree burglary; (2) there was a clear indication that relevant material evidence would be found; (3) the method used to secure Sanders' blood sample was safe and reliable; and (4) the crime of first degree burglary is serious and the evidence to be collected from Sanders would be important to the investigation. On August 4, 2004, Judge Alford ordered Sanders to submit to a second blood test. Sanders' blood was drawn again on August 5, 2004. The trial court in this case denied Sanders' motion to suppress the DNA evidence based on Judge Alford's analysis under Snyder.

The jury convicted Sanders. This appeal follows.

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[3] Cope was also indicted on the charge of murdering Child Cope as well as two counts of first-degree criminal sexual conduct and one count of criminal conspiracy. See id.

[4] The State conceded the Snyder factors were not considered in the warrant for the January 2002 blood test.

[5] In re: Snyder, 308 S.C. 192, 417 S.E.2d 572 (1992).

LAW/ANALYSIS

I. DNA Sample

Sanders argues the trial court erred in admitting the DNA evidence because the first blood draw was invalid and the evidence from the subsequent blood draw, after the August 2004 hearing in the Victim 4 case, should therefore have been suppressed. We disagree.

In State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000), our supreme court articulated the standard of review to apply to a trial court's determination that a search did not violate the Fourth Amendment. The Brockman court rejected the de novo standard set forth in Ornelas v. United States, 517 U.S. 690 (1996), for reviewing determinations of reasonable suspicion and probable cause in the context of warrantless searches and seizures and reviewed the "trial court's ruling like any other factual finding." Brockman, 339 S.C. at 66, 528 S.E.2d at 666. Therefore, an appellate court may reverse a trial court's ruling only upon a showing of clear error and must affirm if there is any evidence to support the ruling. See State v. Williams, 351 S.C. 591, 597, 571 S.E.2d 703, 706 (Ct. App. 2002).

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. Amend. IV. A court order that allows the government to procure evidence from a person's body constitutes a search and seizure under the Fourth Amendment. Schmerber v. California, 384 U.S. 757, 767-70 (1966). "[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." Id. at 768. "In other words, the questions we must decide . . . are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." Id.

In In re Snyder, our supreme court set forth the considerations for a warrant or order compelling a bodily intrusion. 308 S.C. 192, 195, 417 S.E.2d 572, 574 (1992). The elements to determine whether probable cause exists to permit the acquisition of such evidence are: (1) probable cause to believe the suspect has committed the crime; (2) a clear indication that relevant material evidence will be found; and (3) the method used to secure the evidence is safe and reliable. Id. The court also approved consideration of the seriousness of the crime and the importance of the evidence to the investigation. Id. The trial court, in issuing such an order, must "balance the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures." Id.

We find no error in the trial court's review of probable cause under the Snyder factors in the Victim 4 case. Victim 4's shirt contained blood from the attack, Sanders was found nearby, his appearance matched Victim 4's description, and Sanders was injured when found.

Sanders also argues the trial court erred in permitting the DNA obtained in the Victim 4 case to be used in this case. We disagree.

A blood sample validly obtained in connection with one crime may be used in a subsequent unrelated case. See State v. McCord, 349 S.C. 477, 484, 562 S.E.2d 689, 693 (Ct. App. 2002) (finding no improper search or seizure where defendant's blood, voluntarily submitted in an unrelated case, is used in a subsequent case); see also Washington v. State, 653 So.2d 362, 364 (Fla. 1994) ("[O]nce the samples were validly obtained, albeit in an unrelated case, the police were not restrained from using the samples as evidence in the murder case."); Bickley v. State, 489 S.E.2d 167, 169 (Ga. Ct. App. 1997) (holding the DNA evidence should not be "suppressed on the basis that additional testing of defendant's blood . . . required an independent warrant"); Patterson v. State, 744 N.E.2d 945, 947 (Ind. Ct. App. 2001) ("[U]nder the facts of this case, society is not prepared to recognize as reasonable an individual's expectation of privacy in a blood sample lawfully obtained by police."); Wilson v. State, 752 A.2d 1250, 1272 (Md. Ct. App. 2000) (holding

Fourth Amendment claims are no longer applicable once a person's blood sample has been lawfully obtained).

We find no error in using the results from the validly obtained blood evidence in the Victim 4 case as evidence in this case.

II. Conspiracy

Sanders argues the trial court erred in failing to direct a verdict on the conspiracy charge based on the lack of evidence supporting an agreement between Sanders and Cope. We disagree.

"In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." Kelsey, 331 S.C. at 62, 502 S.E.2d at 69 (1998). "In ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight." Id. In addressing the standard of review where the State relies exclusively on circumstantial evidence and a motion for directed verdict is made, our supreme court has stated:

> [T]he circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, **a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.**

State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004) (boldface material in original) (internal citations omitted).

Criminal conspiracy is defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C. Code Ann. § 16-17-410 (2003). "The essence of a conspiracy is the agreement." State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001). "Often proof of conspiracy is necessarily by circumstantial evidence alone." State v. Miller, 223 S.C. 128, 133, 74 S.E.2d 582, 585 (1953). Nevertheless, "the law calls for an objective, rather than subjective, test in determining the existence of a conspiracy." State v. Crocker, 366 S.C. 394, 406, 621 S.E.2d 890, 897 (Ct. App. 2005). Moreover, in viewing the sufficiency of the evidence to support a charge of conspiracy, an appellate court "must exercise caution to ensure the proof is not obtained 'by piling inference upon inference.' " State v. Gunn, 313 S.C. 124, 134, 437 S.E.2d 75, 81 (1993) (quoting Direct Sales Co. v. U.S., 319 U.S. 703, 711(1943)).

"The gravamen of the offense of conspiracy is the agreement or combination." Gunn, 313 S.C. at 134, 437 S.E.2d at 80; see also State v. Condrey, 349 S.C. 184, 193, 562 S.E.2d 320, 324 (Ct. App. 2002) (stating the crime of conspiracy "consists of the agreement or mutual understanding"). Recognition of this reality, however, does not compromise the standard that a trial court must use in deciding a directed verdict motion when the evidence against an accused is entirely circumstantial, namely, that the case must be submitted to the jury only "if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004).

We recognize that in the present case there was no direct evidence of an agreement between Cope and Sanders. The State's evidence of a conspiracy was entirely circumstantial, including: (1) forensic evidence that the bite mark where Sanders' DNA was found was inflicted within the same two-hour time frame as the injuries that Cope confessed to inflicting; (2) Sister's

testimony that she and Child locked the doors before they went to bed and testimony that there was no evidence of forced entry; (3) the deduction from the forensic evidence that Sanders was present in a secure private home after the residents had retired for the night; (4) testimony that the house was full of debris and therefore passage inside, particularly at night, would have been difficult for someone not familiar with the residence; (5) statements by Cope revealing knowledge about the factors of the assault and injuries to Child consistent with forensic evidence; (6) evidence that Cope delayed calling the police after he claimed to have fatally strangled and choked Child; and (7) evidence that Cope staged the scene to make Child's death appear to have been an accident.

Nevertheless, in the present case, the DNA evidence on Child's body, along with Cope's admissions about his interactions with Child shortly before she died, place Cope and Sanders together at the time of the assault on Child and her resulting death. Likewise, the testimony regarding lack of forced entry and the cluttered condition of the home constitute evidence that Sanders, who had no known connection with Cope's family, received assistance to navigate his way to Child's bedroom. Finally, Cope's staging of the crime scene after Child died is evidence that a cover-up had begun before Cope called the police to his home on the pretext that Child had accidentally strangled herself, notwithstanding forensic evidence revealing Sanders was present and actively participating during the same time period in which her death was found to have occurred. Although each of these factors alone may have supported only a mere suspicion of a conspiracy between Cope and Sanders, it is our view that when considered together, they yield the requisite level of proof of "acts, declarations, or specific conduct" by the alleged conspirators to withstand a directed verdict motion on this charge. See State v. Hernandez, 382 S.C. 620, 625, 677 S.E.2d 603, 605 (2009) (reversing a conviction for trafficking and noting "the State failed to present any evidence such as acts, declarations, or specific conduct to support [an] inference" that the petitioners had knowledge that drugs were being transported).

CONCLUSION

We affirm the trial court's evidentiary rulings and uphold the trial court's denial of a directed verdict on the conspiracy charge. As a result, the sentences of life imprisonment for murder, plus thirty years for criminal sexual conduct, are also affirmed.

AFFIRMED.

SHORT and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda Rouvet, Appellant,

v.

Bernard-Steven C. Rouvet, Respondent.

Appeal From Beaufort County
Jane D. Fender, Family Court Judge
Robert S. Armstrong, Family Court Judge

Opinion No. 4701
Submitted April 1, 2010 – Filed June 22, 2010

REVERSED AND REMANDED

James Frederick Berl of Hilton Head Island, for Appellant,

Bernard-Steven C. Rouvet, pro se, for Respondent.

PIEPER, J.: This appeal arises out of the denial of a Rule 60, SCRCP, motion for relief from judgment made by Appellant Linda Rouvet (Wife). Before the issuance of the judgment, Wife's attorney was suspended from the

practice of law and Wife was evaluated for competency. We reverse and remand.[1]

BACKGROUND

Respondent Bernard-Steven C. Rouvet (Husband) and Wife were divorced in 1992; pursuant to an agreement incorporated into the divorce decree, Husband was required to provide health insurance for the parties' minor son. After issuance of the decree, Husband lost his job and consequently lost the insurance he had been providing for his son. The Clerk of Court issued a Rule to Show Cause in September 2002, based on Wife's pro se affidavit, and scheduled a hearing in November 2002. Wife did not appear at that hearing, although she did ask the Clerk to issue a second Rule to Show Cause on the same date of the hearing, based on a second pro se affidavit. In February 2003, the Honorable Jane D. Fender issued an order requiring Husband's attorney, Douglas W. MacNeille (MacNeille), and Wife to get together to discuss medical bills. Judge Fender also found Husband owed Wife one-half of all medical bills.

In April 2003, the Honorable Robert S. Armstrong heard arguments from the parties on Wife's third Rule to Show Cause. Attorney Robert L. Gailliard (Gailliard) made his first appearance on Wife's behalf and MacNeille represented Husband. Judge Armstrong issued an amended order in August 2003, finding Judge Fender had already ordered Husband to pay one-half of the medical expenses. The court further found Husband in contempt and ordered him to provide proof of insurance for the parties' son and to pay or make arrangements to pay the outstanding medical bills. Finally, the court directed Wife to execute a release so that Husband could communicate with medical providers regarding the child's medical conditions.

Thereafter, Wife's fourth Rule to Show Cause alleged Husband should be held in contempt for failure to comply with the prior orders of Judge Fender and Judge Armstrong. Judge Fender presided over the fourth Rule to

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

Show Cause. Gailliard represented to the court that Wife was asking for reimbursement for the child's medical expenses, insurance premiums and deductibles, and attorney's fees. In response, MacNeille argued that some of the expenses Wife claimed had been paid by insurance and that she was not entitled to reimbursement for those amounts. MacNeille also claimed Wife owed Husband her share of the premium on the insurance obtained by Husband. Without taking testimony from either party or allowing the parties to present evidence, the judge ordered the parties to figure out how much each party owed to the other and to pay it within thirty days.

Judge Fender signed an order on March 2, 2004, declining to hold Husband in contempt (March Order). Judge Fender further ordered Gailliard and MacNeille to meet within thirty days to attempt to resolve the dispute; otherwise, each attorney was directed to submit a proposed order. Judge Fender retained jurisdiction, concluding that the matter would be rescheduled for a final hearing in the event the parties were unable to reach an agreement.

Gailliard faxed a letter to MacNeille in May 2004, asking for $12,834.85 for medical expenses incurred for the parties' son between 1993 and 2003. Gailliard enclosed a list of expenses incurred, along with Husband's portion of the expenses owed. On October 1, 2004, Wife sent a letter to Judge Fender, asking the court to intervene and to compel both attorneys to comply with the March Order. On December 17, 2004, MacNeille sent a letter and proposed order to Judge Fender. On January 5, 2005, Judge Fender signed Husband's proposed order, attaching nine exhibits, as a supplemental order (Supplemental Order) to the March Order. Wife did not appeal the Supplemental Order.

In the interim between the issuance of the March 2004 Order and the January 2005 Supplemental Order, several things occurred that are significant to the litigation. First, on October 25, 2004, Dr. L. Randolph Waid, a clinical psychologist at the Medical University of South Carolina, signed an affidavit, based in part upon a forensic evaluation by Dr. Pamela M. Crawford on January 15, 2004, regarding Wife's competency. Additionally, on November

24, 2004, a guardian ad litem was appointed to represent Wife in an unrelated civil case in circuit court in Charleston County.

Moreover, on October 27, 2004, between the issuance of the March Order and the Supplemental Order, Gailliard was first placed on an interim suspension and then placed on an indefinite suspension in January 2005;[2] as a result, another attorney was appointed to assume responsibility for Gailliard's files. After the February 2004 hearing before Judge Fender, Wife filed a new summons and complaint seeking increased child support. On December 7, 2004, approximately one month before the issuance of the Supplemental Order, the family court continued a hearing in the child support matter, specifying that the reason for the continuance was Gailliard's suspension. The record does not indicate whether Husband or MacNeille knew about the continuance in the other case. However, ten days after the continuance, MacNeille mailed a proposed order to Judge Fender with a copy to Gailliard. Wife was not copied on MacNeille's correspondence with the family court.

In March 2005, two months after the issuance of the Supplemental Order and a little less than six months after Wife's attorney had been suspended from the practice of law, Wife filed a pro se motion to appoint a guardian ad litem to protect her interests. In April 2005, Judge Fender heard Wife's pro se motion as well as Husband's motion to terminate child support. Wife filed an amended affidavit on the day of the hearing. Judge Fender denied Wife's motion, holding the family court was without jurisdiction to appoint a guardian because "jurisdiction properly lies with the Probate Court in the county where the party resides." Further, Judge Fender encouraged Wife to obtain legal representation. The order also continued Husband's motion for thirty days. Wife filed a lengthy pro se motion, asking the court to reconsider its denial of her motion for the appointment of a guardian ad litem; however, the record does not indicate any disposition of this motion.

Judge Armstrong presided over the hearing on Husband's previously continued motion to terminate child support. Wife renewed her request to be

[2] Gailliard was conditionally reinstated to the practice of law by order of the supreme court dated June 9, 2010.

appointed a guardian ad litem. Judge Armstrong specifically directed the Clerk of Court to appoint an attorney to appear on behalf of Wife and to act as her guardian ad litem. Subsequently, attorney Jaye Jones Elliott (Elliott), appointed as counsel and guardian ad litem for Wife, appeared at a hearing regarding Wife's competency. Judge Armstrong found Wife was not competent to represent her own interests, basing his finding on arguments of counsel and the affidavits from Dr. Waid and Dr. Crawford.

Elliott filed a Rule 60 motion for relief from judgment on Wife's behalf. Elliott also filed a motion seeking the disqualification or recusal of Judge Fender, alleging that Judge Fender had represented Wife's estranged brother and his spouse when Judge Fender was in private practice. Further, Wife alleged Judge Fender had shown prejudice and/or bias against Wife, which allegedly resulted in decisions or statements that were not based upon information learned from Judge Fender's participation in the case. Judge Fender issued an order recusing herself from the case, but leaving all prior orders in effect.

Both parties were represented by counsel at the hearing on Wife's Rule 60 motion. Judge Armstrong specifically found Wife had not shown fraud upon the court pursuant to Rule 60(b) so as to warrant granting Wife relief from the Supplemental Order. Wife timely filed a Rule 59(e), SCRCP, motion to alter or amend the order denying relief from judgment and argued the family court failed to consider circumstances warranting relief under Rule 60(b)(1), including excusable neglect, and erred by relying solely on fraud under Rule 60(b)(3). Judge Armstrong denied the motion to alter or amend. This appeal followed.

ISSUES ON APPEAL

Wife argues the family court erred in denying her Rule 60 motion and her Rule 59 motion to alter or amend because:

(1) The Supplemental Order contains findings and/or conclusions that are false, misleading, and/or have no evidentiary support;

(2) The actions of preparing, submitting, and/or executing the supplemental order resulted in findings and/or conclusions that nullify, void, and/or violate previous findings and/or conclusions of the family court;

(3) The Supplemental Order resulted from an alleged ex parte communication between the family court and Husband's counsel;

(4) At the time the Supplemental Order was executed and filed, Wife was not competent and without legal counsel and/or a guardian ad litem to adequately protect her interests;

(5) The Supplemental Order contains an improper award of attorney's fees and costs in Husband's favor; and

(6) The totality of the circumstances shows a pattern of fraud, mistake, misrepresentation, misconduct, inadvertence, surprise, and/or excusable neglect.

STANDARD OF REVIEW

The decision to grant or deny a motion made pursuant to Rule 60(b) is within the sound discretion of the trial judge. BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006). The appellate standard of review is limited to determining whether there was an abuse of discretion. Id. at 551, 633 S.E.2d at 502-03. An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support. Gainey v. Gainey, 382 S.C. 414, 423, 675 S.E.2d 792, 797 (Ct. App. 2009).

ANALYSIS

Wife argues she is entitled to relief from the Supplemental Order because she was not competent and she did not have either an attorney or a

guardian ad litem to adequately protect her interests at the time the order was filed. We agree.

Rule 60(b) of the South Carolina Rules of Civil Procedure sets forth the circumstances where a party may obtain relief from a final judgment, order, or proceeding:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60(b), SCRCP (emphasis in original).

"The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief." BB&T, 369 S.C. at 552, 633 S.E.2d at 503. In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: "(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other

party." Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001). As to the first factor, we agree with the finding of the family court that Wife's motion for relief was timely made because it was filed within one year of the Supplemental Order.

As to the second factor, we must evaluate the reasons for Wife's failure to act promptly. Wife asserts she is entitled to relief because her attorney was suspended at the time of the issuance of the Supplemental Order. Generally, "the neglect of the attorney is the neglect of the client, and . . . no mistake, inadvertence, or neglect attributable to the attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client.'" Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 342, 644 S.E.2d 793, 798 (Ct. App. 2007) (quoting Simon v. Flowers, 231 S.C. 545, 551, 99 S.E.2d 391, 394 (1957)). In addition, lack of familiarity with legal proceedings is not an acceptable excuse and the court will hold a layman to the same standard as an attorney. Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001). Nonetheless, "'[t]he rule that an attorney's negligence may be imputed to his client and prevent the latter from relying on that ground for opening or vacating a judgment does not necessarily prevail in the event of the attorney's abandonment or withdrawal from the case.'" Graham v. Town of Loris, 272 S.C. 442, 452, 248 S.E.2d 594, 599 (1978) (quoting 46 Am.Jur.2d Judgments § 737 (1969)).

In Stearns, the court of appeals found when "an attorney's conduct transcends mere neglect and the party seeking relief establishes willful abandonment or withdrawal from the case, relief from judgment is available." Stearns, 373 S.C. at 342-43, 644 S.E.2d at 799. It is undisputed that Gailliard was suspended from the practice of law on October 27, 2004. Nearly two months later, Husband's attorney, MacNeille, mailed a proposed order to Judge Fender, which he copied to Gailliard but not to Wife, before the court issued the Supplemental Order. Because Wife's attorney was suspended from the practice of law at the time the Supplemental Order was issued, Wife was representing herself from the date of the suspension of her counsel. See Tobias v. Rice, 386 S.C. 306, 312, 688 S.E.2d 552, 554-55 (2010) (Pleicones,

J., concurring) (noting that from the moment a litigant's attorney is suspended from the practice of law, that litigant acts pro se).

In Tobias, the supreme court set aside a judgment after finding the movant was entitled to due process and had not received notice of the proceeding because she represented herself after the suspension of her attorney. Id. at 311, 688 S.E.2d at 554. Similarly, in the present case, Wife did not receive any communication from either Husband's attorney, or the court, from the March 2004 hearing until the date she received a copy of the Supplemental Order in January 2005. Additionally, Wife attempted to obtain some relief when she sent a letter to Judge Fender, asking the court to force the attorneys to comply with the March Order, but never received a reply. Wife did not file a motion to alter or amend the Supplemental Order or take any other action to contest the findings in Husband's proposed order until she was appointed counsel due to competency concerns.

Rule 17(c), SCRCP, provides for the appointment of a guardian ad litem to sue or defend on behalf of a person who is incompetent.

> Whenever a minor or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative he may sue by his next friend or by guardian ad litem. The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such order as it deems proper for the protection of the minor or incompetent person.

Rule 17(c), SCRCP. This rule retains the principal provisions of repealed section 15-5-310 of the South Carolina Code. Rule 17(c), SCRCP Note.

The burden of proving mental incompetency is upon the one seeking to establish it. Rogers v. Nation, 284 S.C. 330, 335, 326 S.E.2d 182, 185 (Ct. App. 1985). Where a court adjudicates the rights of a person who is not mentally competent without appointing a guardian ad litem, any judgment rendered by the court adverse to the person who is not competent is defective. S.C. Dep't of Soc. Servs. v. McDow, 276 S.C. 509, 511, 280 S.E.2d 208, 209 (1981) (based on S.C. Code Ann. § 15-5-310 (repealed)). Before divesting a person who is not competent of any rights, a court must proceed in strict compliance with the law. Id. In McDow, the supreme court remanded for a determination of whether McDow was sufficiently competent to proceed without the appointment of a guardian ad litem, after raising the issue of competency *ex mero motu* based on evidence in the record on appeal. Id.

Here, Dr. Pamela Crawford evaluated Wife in January 2004 as part of a criminal action against Wife. Dr. Crawford specifically found Wife was not capable of assisting counsel in her defense, noting in her opinion it was unlikely that Wife could be restored to competency. Likewise, in October 2004, Dr. Randolph Waid found Wife's disruptive psychiatric symptomatology and neurocognitive impairments rendered her unable to manage her property and affairs effectively, such that she was in need of protection. Although these psychiatric evaluations were not presented at the time the Supplemental Order was entered, Wife at this time was incompetent to manage her affairs and her attorney was incapable of managing her affairs due to his suspension. Because Wife's attorney had been suspended, and because Wife was not competent to represent herself, the family court abused its discretion by relying solely on the failure to demonstrate fraud, and thus erred in not excusing Wife's failure to act when this information was presented at the Rule 60 hearing.

Consequently, as to the third factor, we find Wife raised a meritorious defense to the judgment based on her incompetency and the suspension of her attorney. See id. (holding that where a court adjudicates the rights of an unrepresented person who is not competent, any judgment rendered therein is defective). "A meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial." Graham, 272 S.C. at 453, 248 S.E.2d at 599.

Wife did not have notice of Husband's proposed order because it was mailed to her former attorney. Although Judge Fender may not have been aware of the suspension and Wife's new pro se status, the judge's awareness of this fact would not change the nature of the communication and lack of notice to Wife.

Due to that lack of notice, Wife was unable to present a defense to or contest the findings in the Supplemental Order.[3] Wife did not have an opportunity to present evidence and testimony to refute the findings of fact in the Supplemental Order, as a hearing was not held. Wife was deprived of the opportunity to cross-examine Husband's witnesses and object to the sufficiency of any evidence relied upon by the family court in issuing its order. Accordingly, due to her incompetency, lack of notice and hearing, and lack of a guardian, we find Wife is entitled to relief from judgment.[4] See Tobias, 386 S.C. at 311, 688 S.E.2d at 554 ("Accordingly, absent notice of the proceedings [the movant] is entitled to relief from judgment."); see also Moore v. Moore, 376 S.C. 467, 473, 657 S.E.2d 743, 746 (2008) (quoting Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007) ("Procedural 'due process requires (1) adequate

[3] The law distinguishes trial errors, which occur during the presentation of a case and may be quantitatively assessed in the context of other evidence, from structural defects, which affect the conduct of the trial from beginning to end. LaSalle Bank Nat'l Ass'n v. Davidson, 386 S.C. 276, 280, 688 S.E.2d 121, 123 (2009). We find both types of errors or defects present in this case.

[4] As to the fourth factor, we conclude Husband has not demonstrated any prejudice that he may suffer if the Supplemental Order is vacated and remanded for a hearing. Husband, who is representing himself on appeal, submitted a brief that consists of a paragraph by paragraph denial of the statements in Wife's appellate brief. Unlike Wife, Husband has not asserted any reason why he should not be held to the same standard as an attorney in presenting his arguments on appeal. See Hill, 345 S.C. at 310, 547 S.E.2d at 897 (concluding failure to understand the legal process is not excusable neglect).

notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.'").[5]

CONCLUSION

We find the family court erred in finding only fraud would entitle Wife to relief. Based on the fact that Wife was not competent to safeguard her interests after the suspension of her attorney, and based on the lack of notice to Wife and the failure to hold an evidentiary hearing on the fourth Rule to Show Cause before the Supplemental Order was issued, we find Wife is entitled to relief from judgment. Therefore, the order of the family court is hereby

REVERSED and REMANDED.[6]

GEATHERS, J., and CURETON, A.J., concur.

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[5] Because Judge Armstrong previously determined Wife was not competent to represent her own interests, we need not remand for a competency determination as the court did in McDow.

[6] Because we find Wife should be granted relief from judgment due to excusable neglect, we need not address Wife's other grounds for relief. See 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 the remaining issues on appeal when the disposition of a prior issue is dispositive).