The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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POST OFFICE BOX 11330
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N O T I C E

IN THE MATTER OF GEORGE TURNER PERROW, PETITIONER

George Turner Perrow, who was indefinitely suspended from the practice of law, retroactive to August 2, 2000, has petitioned for reinstatement as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, October 10, 2003, beginning at 11:00 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

D. Cravens Ravenel, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
August 25, 2003

The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF K. DOUGLAS THORNTON, PETITIONER

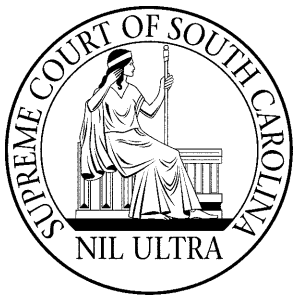
K. Douglas Thornton, was suspended from the practice of law on September 25, 2000 for a period of six months and one day, retroactive to February 15, 2000; suspended on May 15, 2000 for a period of ninety days, retroactive to February 15, 2000; and suspended on April 8, 2002 for a period of nine months. He has now petitioned for reinstatement as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, October 10, 2003, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

D. Cravens Ravenel, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
August 25, 2003



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

August 25, 2003

ADVANCE SHEET NO. 32

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

25678 - David Jackson, Jr. v. State	Pending
25681 - In the Matter of the Case and Treatment of Peter E.J. Harvey	Denied 08/19/03
25688 - Pamela Curcio v. Caterpillar, Inc.	Denied 08/20/03
2003-MO-049 - Ronald Eugene Bogan v. State	Pending

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

Page

None

UNPUBLISHED OPINIONS

2003-UP-483-Lamar Advertising of Mobile, Inc. v. Li'l Cricket, LLC
(Richland, Judge G. Thomas Cooper, Jr.)

2003-UP-484-The State v. Gina Dervin
(Kershaw, Judge G. Thomas Cooper, Jr.)

2003-UP-485-Varnell McCloud v. Food Lion, Inc.
(Richland, Judge L. Casey Manning)

2003-UP-486-The State v. James Robert Bagley
(Charleston, Judge Gerald C. Smoak)

2003-UP-487-In the Matter of the Estate of William Balish
(Charleston, Judge A. Victor Rawl)

2003-UP-488-Mellon Mortgage Co. v. R. Vaughn Kershner and
Laurie Sherrod
(Oconee, Judge Ellis B. Drew, Jr.)

2003-UP-489-James D.Willis v. City of Aiken
(Aiken, Judge Rodney A. Peeples)

2003-UP-490-Town of Olanta v. James R. Epps
(Florence, Judge Paul M. Burch)

2003-UP-491-Les Springob v. Susan Williamson Springob
(Richland, Judge Walter B. Brown, Jr.)

2003-UP-492-In the interest of Demetrick Tyrell N.
(Sumter, Judge Ruben L. Gray)

PETITIONS FOR REHEARING

3602-The State v. Al-Amin	Denied 8/22/03
3634-Murray v. Bank of America	Pending
3635-The State v. LaQuinces Davis	Denied 8/21/03
3640-The State v. Adams	Denied 8/22/03
3642-Hartley v. John Wesley United	Denied 8/22/03
3643-Eaddy v. Smurfit-Stone	Denied 8/21/03
3645-Hancock v. Wal-Mart	Denied 8/21/03
3646-O'Neal v. Intermedical	Pending
3647-The State v. Andre Tufts	Pending
3648-Walsh v. Woods	Pending
3649-The State v. Chisolm	Denied 8/21/03
3650-Cole et al. v. SCE&G	Denied 8/21/03
3652-Flateau v. Harrelson et al.	Denied 8/22/03
3653-The State v. Uuno Mattias Baum	Denied 8/22/03
3654-John Miles v. Rachel Miles	Denied 8/22/03
3655-Kibby Daves v. Jim R. Cleary	Denied 8/22/03
3656-The State v. Carlos Gill	Denied 8/22/03
3658-Swindler v. Swindler	Denied 8/21/02
3660-Venture Engineering v. Tishman	Pending
3661-Neely v. Thomasson	Pending

3663-The State v. Rudd	Pending
3664-Lighthouse Tennis v. South Island Public Service Dt.	Pending
3667-Overcash v. SCE&G	Pending
3669-Pittman v. Lowther	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-317-State v. Jimmy Jones	Denied 8/22/03
2003-UP-324-McIntire v. Columbia	Pending
2003-UP-328-The State v. Tuck	Denied 8/22/03
2003-UP-335-State v. Rogers	Denied 8/21/03
2003-UP-336-Tripp v. Price et al.	Denied 8/21/03
2003-UP-353-The State v. Holman	Denied 8/22/03
2003-UP-358-McShaw v. Turner	Denied 8/22/03
2003-UP-360-Market at Shaw v. Hoge	Denied 8/21/03
2003-UP-366-King v. Poston	Denied 8/22/03
2003-UP-368-State v. Walker	Denied 8/21/03
2003-UP-376-Heavener v. Walker	Denied 8/22/03
2003-UP-381-Dickey v. Holloway	Denied 8/21/03
2003-UP-394-Windham v. McLeod	Denied 8/21/03
2003-UP-396-Coaxum v. William Washington	Denied 8/22/03
2003-UP-397-BB&T v. Chewning	Denied 8/22/03
2003-UP-404-Thurmond Guess v. Benedict College	Denied 8/22/03

2003-UP-409-The State v. Legette	Denied 8/21/03
2003-UP-412-McCormick v. McCormick	Denied 8/22/03
2003-UP-416-Sloan v. SCDOT	Denied 8/21/03
2003-UP-420-Carol Bates v. William Fender	Denied 8/22/03
2003-UP-433-State v. Eugene Kearns	Denied 8/21/03
2003-UP-437-Jones v. Denmark Police Dept.	Denied 8/21/03
2003-UP-439-Belton v. Jordan	Denied 8/21/03
2003-UP-444-The State v. Donald Roberts	Denied 8/21/03
2003-UP-447-Samantha Crooks v. Richard Crooks	Denied 8/21/03
2003-UP-448-Geiger v. Pardee's et al.	Pending
2003-UP-451-The State v. Shantone D. Curry	Denied 8/21/03
2003-UP-453-Elizabeth Way v. Three Rivers Apartments	Denied 8/21/03
2003-UP-458-InMed Diagnostic v. MedQuest	Denied 8/22/03
2003-UP-459-The State v. Anthony Nellis, Jr.	Denied 8/22/03
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-468-Jones v. Providence Hospital	Pending
2003-UP-469-Adams v. Cook	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-472-Proctor v. SCDHEC	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending
2003-UP-475-In the matter of Newsome	Pending

2003-UP-477-Berry v. Logan	Pending
2003-UP-478-Debordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3518-Chambers v. Pingree	Pending
3551-Stokes v. Metropolitan	Pending
3563-The State v. Missouri	Pending
3565-Ronald Clark v. SCDPS	Pending
3580-FOC Lawshe v. International Paper	Pending
3585-The State v. Murray Roger Adkins, III	Pending
3588-In the Interest of Jeremiah W.	Pending
3592-Gattis v. Murrells	Pending
3597-Anderson v. Augusta Chronicle	Pending
3598-Belton v. Cincinnati	Pending
3599-The State v. Grubbs	Pending
3600-State v. Lewis	Pending
3604-State v. White	Pending
3606-Doe v. Baby Boy Roe	Pending
3607-State v. Parris	Pending
3608-The State v. Padgett	Pending
3610-Wooten v. Wooten	Pending

3614-Hurd v. Williamsburg	Pending
3623-Fields v. Regional Medical Center	Pending
3626-Nelson v. QHG of S.C. Inc.	Pending
3627-Pendergast v. Pendergast	Pending
3629-Redwend Ltd. v. William Edwards et al.	Pending
3631-The State v. Dunbar	Pending
3633-Murphy v. NationsBank, N.A.	Pending
3638-The State v. Smalls	Pending
3639-Fender v. Heirs at Law of Smashum	Pending
3641-The State v. Dudley	Pending
2002-UP-220-The State v. Hallums	Pending
2002-UP-368-Roy Moran v. Werber Co.	Pending
2002-UP-489-Fickling v. Taylor	Pending
2002-UP-514-McCleer v. City of Greer	Pending
2002-UP-537-Walters v. Austen	Pending
2002-UP-538-The State v. Richard Ezell	Pending
2002-UP-586-Ross v. University of S.C.	Pending
2002-UP-598-Sloan v. Greenville	Pending
2002-UP-656-SCDOT v. DDD (2)	Pending
2002-UP-662-State v. Morgan	Pending
2002-UP-715-Brown v. Zamias	Pending

2002-UP-734-SCDOT v. Jordan	Pending
2002-UP-749-The State v. Keenon	Pending
2002-UP-753-Hubbard v. Pearson	Pending
2002-UP-760-State v. Hill	Pending
2002-UP-785-The State v. Lucas	Pending
2002-UP-788-City of Columbia v. Jeremy Neil Floyd	Pending
2002-UP-794-Jones v. Rentz	Pending
2002-UP-800-Crowley v. NationsCredit	Pending
2003-UP-014-The State v. Lucas	Pending
2003-UP-019-The State v. Wigfall	Pending
2003-UP-029-SCDOR v. Springs	Pending
2003-UP-032-Pharr v. Pharr	Pending
2003-UP-033-Kenner v. USAA	Pending
2003-UP-036-The State v. Traylor	Pending
2003-UP-062-Lucas v. Rawl	Pending
2003-UP-087-The State v. Major	Pending
2003-UP-088-The State v. Murphy	Pending
2003-UP-098-The State v. Dean	Pending
2003-UP-101-Nardone v. Davis	Pending
2003-UP-111-The State v. Long	Pending
2003-UP-112-Northlake Homes Inc. v. Continental Ins.	Pending
2003-UP-113-Piedmont Cedar v. Southern Original	Pending

2003-UP-116-Rouse v. Town of Bishopville	Pending
2003-UP-125-Carolina Travel v. Milliken	Pending
2003-UP-126-Brown v. Spartanburg County	Pending
2003-UP-127-City of Florence v. Tanner	Pending
2003-UP-143-The State v. Patterson	Pending
2003-UP-144-The State v. Morris	Pending
2003-UP-148-The State v. Billy Ray Smith	Pending
2003-UP-150-Wilkinson v. Wilkinson	Pending
2003-UP-161-White v. J. M Brown Amusement	Pending
2003-UP-163-Manal Project v. Good	Pending
2003-UP-165-The State v. Sparkman	Pending
2003-UP-171-H2O Leasing v. H2O Parasail	Pending
2003-UP-175-BB&T v. Koutsogiannis	Pending
2003-UP-179-State v. Brown	Pending
2003-UP-180-State v. Sims	Pending
2003-UP-184-Tucker v. Kenyon	Pending
2003-UP-188-State v. Johnson	Pending
2003-UP-190-Henfield v. Taylor	Pending
2003-UP-196-T.S. Martin Homes v. Cornerstone	Pending
2003-UP-205-The State v. Bohannan	Pending
2003-UP-228-Pearman v. Sutton Builders	Pending

2003-UP-244-The State v. Tyronne Edward Fowler	Pending
2003-UP-245-Bonte v. Greenbrier Restoration	Pending
2003-UP-255-BB&T of South Carolina v. Fleming	Pending
2003-UP-269-Golf Restaurants v. Tilghman Ins. Agency	Pending
2003-UP-270-Guess v. Benedict College	Pending
2003-UP-271-Bombardier Capital v. Green	Pending
2003-UP-274-The State v. Robert Brown	Pending
2003-UP-277-Jordan v. Holt	Pending
2003-UP-284-Washington v. Gantt	Pending
2003-UP-293-Panther v. Catto Enterprises	Pending
2003-UP-294-Langley v. Bowers	Pending
2003-UP-308-Ahmad v. Davis	Pending
2003-UP-325-Miller v. Miller (6)	Pending
2003-UP-348-The State v. Battle	Pending
0000-00-000-Dreher v. Dreher	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Laurie M. Joye, Respondent,

v.

Theron R. Yon, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
C. David Sawyer, Jr., Family Court Judge

Opinion No. 25702
Heard March 5, 2003 - Filed August 25, 2003

REVERSED

Thomas E. Elliott, Jr., of Columbia, for Petitioner.

William Yon Rast, Jr., of W. Columbia, for Respondent.

CHIEF JUSTICE TOAL: Theron Yon ("Husband") appeals the Court of Appeals' determination that his obligation to make periodic alimony payments was revived after his ex-wife's subsequent remarriage was annulled.

FACTUAL/PROCEDURAL BACKGROUND

Husband and Laurie Joye ("Wife") were married in 1970, and they divorced 26 years later on October 31, 1996. Husband was required to pay wife periodic alimony payments of $750 per month. On March 23, 1999,[1] wife married Donald Vance ("Vance"), but two months later, she discovered that Vance never divorced his former spouse. Wife immediately filed an annulment action, and the family court judge granted the annulment on September 24, 1999.

Wife filed a contempt action against Husband for his failure to pay alimony arguing that since her subsequent marriage was *void ab initio*, Husband's obligation to make periodic alimony payments never terminated. The judge did not hold Husband in contempt, but he did find Husband's alimony obligation continued and ordered Husband to make the payments retroactively and prospectively.

Husband appealed, and the Court of Appeals affirmed, finding that a second bigamous marriage is void from its inception and is perceived as never having existed. Consequently, husband's alimony obligation never ceased. *Joye v. Yon*, 345 S.C. 264, 547 S.E.2d 888 (Ct. App. 2001).

This Court granted a Petition for Certiorari to review the Court of Appeals' decision to uphold the trial judge's finding of Husband's delinquency in paying wife alimony. Husband raises the following issue on appeal:

> Did the Court of Appeals err in affirming the family court judge's reinstatement of Husband's alimony obligation?

LAW/ANALYSIS

Whether an annulment of a remarriage reinstates the payor spouse's periodic alimony obligation is a novel issue of law in South Carolina. In

[1] Husband's final periodic alimony payment was on March 25, 1999.

South Carolina, the payor spouse's periodic alimony obligation terminates upon his death, remarriage of payee spouse, or after payee spouse has continuously cohabitated with another for a ninety-day period. S.C. Code Ann. § 20-3-130(B)(1) (Supp. 2002).[2]

Courts are split as to how to classify the effect a payee spouse's remarriage and subsequent annulment has on pre-existing periodic alimony payments. They have adopted one of the following rules: (1) the void/voidable approach, (2) the automatic termination approach, or (3) a case by case approach. *See* Carla M. Venhoff, *Divorce or Death, Remarriage & Annulment: The Path Toward Reinstating Financial Obligations from a Previous Marriage*, 37 Brandeis L.J. 435 (1998) (advocating that courts should adopt the void/voidable approach).

Under the void/voidable approach, the courts will determine whether the subsequent marriage was either void *ab initio* or voidable. A subsequent marriage that is void *ab initio* is deemed to never have existed. Thus, states that have adopted the void/voidable approach find that since a void marriage never existed, the payor spouse is not relieved of his periodic alimony obligation. *See Broadus v. Broadus*, 361 So.2d 582, 585 (Ala.Civ.App.1978); *Reese v. Reese*, 192 So.2d 1, 2 (Fla. 1966); *Johnston v. Johnston*, 592 P.2d 132, 135 (Kan. 1979); *Watts v. Watts*, 547 N.W.2d 466, 470 (Neb. 1996); *Brewer v. Miller*, 673 S.W.2d 530, 532 (Tenn. App. 1984).[3]

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[2] We note that a recent amendment to S.C. Code Ann. § 20-3-130 (Supp. 2002) does not apply to this matter. The amendment added "continued cohabitation" of the supported spouse as an additional ground to terminate periodic alimony payments, S.C. Code § 20-3-130(B)(1) (Supp. 2002), and defined "continued cohabitation" as "the supported spouse [residing] with another person in a romantic relationship for a period of ninety or more consecutive days." This section does not apply to this case because the Record shows that Wife was married to Vance for only two months before she filed the annulment action, so she could not have satisfied the ninety-day requirement.

[3] The following types of marriages in South Carolina are considered void *ab initio*: (1) bigamous marriages, S.C. Code Ann. § 20-1-80 (Supp. 2002); (2)

A voidable marriage is legally valid until an annulment is granted, and these jurisdictions hold that the prior periodic alimony obligation is terminated upon remarriage. *Id*.

Under the automatic termination approach, a subsequent marriage extinguishes the payor spouse's periodic alimony obligation regardless of the future status of the remarriage. *In re Marriage of Kolb*, 425 N.E.2d 1301 (Ill. App. 1981). This approach operates under the notion that the payee spouse, who entered into the subsequent marriage, should bear the risk that the subsequent marriage is voided. *Glass v. Glass*, 546 S.W.2d 738 (Mo. App. 1977); *Shank v. Shank*, 691 P.2d 872 (Nev. 1984); *G. v. G.*, 387 A.2d 200 (Del. Fam. Ct. 1977). These courts find that the payor spouse should be able to rely on the expectation that payee spouse's subsequent marriage is not voided due to the actions of payee spouse's subsequent spouse. *See Richards v. Richards*, 353 A. 141 (N.J. 1976); *McKonkey v. McKonkey*, 215 S.E.2d 640 (Va. 1975). Finally, these jurisdictions reason that the payee spouse's decision to remarry transfers any financial burden from payor spouse to the new spouse. *Beebe v. Beebe*, 179 S.E.2d 758 (Ga. 1971).

The third and final approach allows the family court judge to achieve an equitable result to this unique issue on a case by case basis. *See*, *In re Marriage of Cargill,* 843 P.2d 1335 (Colo. 1993); *Peters v. Peters*, 214 N.W.2d 151 (Iowa 1974); Louanne S. Love, *The Way We Were: Reinstatement of Alimony After Annulment of Spouse's "Remarriage"*, 28 J. Fam. L. 289 (1990). Under this method, the family court need not adhere to a bright-line rule and can consider relevant factors such as: length of the subsequent marriage, whether the payee spouse receives support and maintenance from the annulled marriage, whether the payor spouse is prejudiced by the revival of alimony payments, whether the subsequent marriage was properly annulled, and any change in the spouses' personal and financial circumstances after the subsequent marriage is annulled. *Cargill*, 843 P.2d at 1343; *see also, Peters*, 214 N.W.2d 151; *In re Marriage of*

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same sex marriages, S.C. Code Ann. § 20-1-15 (Supp. 2002); and (3) marriages of minors under the age of 16, S.C. Code Ann. § 20-1-100 (supp. 2002).

Williams, 677 P.2d 585 (Mont. 1984); Love, *Alimony After Annulment,* 28 J. Fam. L. 289 (1990).

We hold that the case by case approach affords the Court the most appropriate method for resolving this novel issue. Just as the family court employs principles of equity in determining support and maintenance, equitable distribution, and child custody, so should it embrace these same principles in determining whether payor spouse's periodic alimony obligation is revived after payee spouse's subsequent marriage is annulled.

Restricting family courts to the rigid void/voidable approach or the automatic termination approach could produce unjust results. For example, payee spouse remarries, and ten years later, she discovers that her present marriage was bigamous. If the state employs the void/voidable approach, former payor spouse's support and maintenance is revived regardless of the change of circumstances and the amount of time payee spouse had to determine that her second marriage was void *ab initio*. Equity *may* deem this result unfair. Another example would be a payee spouse being fraudulently induced into a subsequent marriage. She quickly discovers the fraud, brings an annulment action, and her subsequent marriage is void. Under the automatic termination approach, the family court judge would be barred from reinstating periodic alimony. Equity *may* also deem this result unfair, as the payee spouse's subsequent marriage was short-lived, and the payor spouse would likely not be prejudiced if he resumed making the alimony payments.[4] A case by case approach provides the family court judge with the tools to avoid these potentially inequitable results.

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[4] The dissent would adopt the automatic termination approach because the payee spouse's decision to remarry evidences her intent to no longer receive alimony. In addition, the dissent argues the payor spouse could be inconvenienced by the case by case method. We disagree. The new, ninety day cohabitation rule will drastically reduce the time that a payor spouse will be "in limbo." Further, for instances, such as this, where the ninety day rule does not apply, the case by case method will provide an equitable approach to resolving the alimony issue, and the payee spouse will not be subjected to a bright line rule that may have an inequitable result.

We believe that the *Cargill* factors mentioned above provide a sound basis for a case by case analysis, and since the Record on Appeal contains scant information as to Husband's and Wife's change of circumstances after their divorce, we hold that the case should be remanded to the family court so that the record can be reopened to include evidence to assist the court in employing the *Cargill* analysis. We also hold that regardless of whether the family court determines to reinstate periodic alimony payments or not, Husband has no obligation to pay retroactive alimony to Wife for the time period that Wife was married to her bigamous husband.

CONCLUSION

We **REVERSE** the Court of Appeals and **REMAND** this case to family court and direct it to apply the case by case approach in analyzing whether to reinstate payor spouse's pre-existing periodic alimony obligation after payee spouse's remarriage was annulled.

MOORE and BURNETT, JJ., concur. PLEICONES, J, dissenting in a separate opinion in which WALLER, J., concurs.

JUSTICE PLEICONES: I agree with the majority that the Court of Appeals erred in adopting the void/voidable approach and therefore agree that its decision should be reversed. However, I disagree with the majority that the case by case approach is the best alternative and would adopt automatic termination as the most appropriate method for terminating the payor spouse's periodic alimony obligation. Therefore, I would not remand the case to the family court.

One of the *Cargill* factors to be considered in the case by case approach is the length of the subsequent marriage. In South Carolina, alimony can be terminated under the ninety day cohabitation statute.[5] S.C. Code Ann. § 20-3-130(B) (Supp. 2002). The ninety day cohabitation rule does not require that the couple cohabit while married, only that the "supported spouse reside[] with another person in a romantic relationship for a period of ninety or more consecutive days." Id.[6] In my opinion, if residing with another in a romantic relationship for ninety days, without being married, terminates alimony, then marrying, regardless of the length of the marriage or whether it was legal, should terminate alimony. The intent of the payee spouse is important. Whether the payee spouse lives in a romantic relationship with another or marries another, the payee spouse enters into the relationship fully aware that periodic alimony will terminate.

There are several policy considerations that, in my opinion, make automatic termination a better rule. The case by case approach seems to imply that a payee spouse would not remarry were it not for the existence of a substitute source of support. I do not agree with this implication. Further, the automatic termination approach provides a bright line rule that is predictable. Under the case by case or void/voidable approach, a payor spouse could conceivably be in limbo for years, assuming that the ninety day rule were not

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[5] Although this statute does not apply in this case because the action was filed in 1999, before the effective date, I note that the ninety day rule will remove most future cases from the ambit of the case by case approach.

[6] The ninety day rule cannot be defeated by cessation of cohabitation for brief periods for that purpose. Rather, "tacking" of the periods is allowed. S.C. Code Ann. § 20-3-130(B) (Supp. 2002).

triggered. While inequitable results could obtain for either spouse under any approach, the certainty of the automatic termination approach makes it the most appealing. If either party should bear the risk of uncertainty arising out of entry into a new relationship, it should be the payee spouse. Therefore, I would hold automatic termination is the appropriate rule.

WALLER, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Collins Music Co., Inc., Respondent/Appellant,

v.

FMW Corporation, Bob Finney, F.M. Witt, James R. Munn and Farmers and Merchants Bank, Defendants,

Of whom James R. Munn is the Appellant/Respondent.

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

Opinion No. 25703
Heard March 18, 2003 - Filed August 25, 2003

AFFIRMED

M.M. Weinberg, Jr., and M.M. Weinberg, III, of Weinberg, Brown, and Curtis, both of Sumter, for Appellant-Respondent.

David Wesley Whittington, of Charleston; Desa A. Ballard, of West Columbia, and Philip Lacy, of Columbia, for Respondent-Appellant.

CHIEF JUSTICE TOAL: This case involves a cross appeal of the trial judge's grant of a judgment notwithstanding the verdict in favor of Collins Music Company ("Collins") because the Appellant/Respondent,

James R. Munn ("Munn"), could not prove actual compensable damages in his claim of fraud.

FACTUAL/PROCEDURAL BACKGROUND

In February of 1987, FMW Corporation ("FMW") issued a note and mortgage to Collins in the principal sum of $50,000. The debt was to be repaid in one year and was secured by certain real property. FMW used the proceeds of the check to renovate its truck stop. While Bob Finney ("Finney"), F.M. Witt ("Witt"), and Munn admit that they signed and personally guaranteed the FMW note and mortgage, they testified that Collins never intended that they pay back the note. Instead, they testified that the $50,000 represented an advancement on the future proceeds that Collins' video poker machines would generate, and the note and mortgage were to provide security that its machines would remain at the truck stops. Collins' agent testified that he never promised to forgive the obligation on the note.

In 1989, Collins entered into a Coin Machine Lease Agreement with Munn and FMW, which does not refer to the 1987 note and mortgage but does contain an integration provision. The integration clause states that the agreement "contains all agreements of the parties, there being no other reservations or understandings."

Collins brought this action to collect on the 1987 note and mortgage. In their answer, Finney,[1] Witt, and Munn asserted fraud as an affirmative defense and counterclaimed asserting that Collins fraudulently induced them to personally guarantee the note and mortgage. The jury returned a verdict for Finney, Munn, and Witt on the fraud counterclaim awarding each of the three parties $1.00 in nominal damages and $200,000 in punitive damages. FMW was not awarded any damages.

The trial judge granted Collins' motion for JNOV, finding that Witt, Munn, and Finney had not established a cause of action for fraud since they did not prove actual damages - an essential element of a fraud claim. In addition, the judge also concluded that Collins could not recover on its breach

[1] Finney had passed away, and his estate was substituted as a party.

of contract cause of action since the jury found for Witt, Munn, and Finney on its affirmative defense to fraud.[2] Both parties have appealed raising the following issue:

I. Did the trial judge err in granting Collins' JNOV motion on Witt, Finney and Munn's fraud counterclaim on the basis that they could not establish a fraud cause of action since they failed to show they suffered actual damages resulting from the alleged misrepresentation?

LAW/ANALYSIS

Upon appellate review of an action at law tried by a jury, the jury's findings of fact will not be disturbed unless the reviewing tribunal determines that no evidence in the record supports the jury's conclusion. *Townes Associates Limited v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

I. Actual Damages

Munn argues that the trial judge erred in setting aside the verdict on their counterclaim for fraud on the grounds that they failed to establish actual damages. We disagree.

A determination of the presence of actual damages in this case is controlled by our analysis in *Daniels*, 253 S.C. 218, 169 S.E.2d 593. In *Daniels*, the plaintiffs' brother and father owed the defendant a sizeable debt. The plaintiffs' father conveyed his $75,000 to $100,000 farm to the plaintiffs for $5.00 and love and affection. The defendant, who became angered by this transaction, sought to settle a portion of the outstanding debt with the plaintiffs. The parties negotiated a settlement where the plaintiffs executed a $20,000 note, secured by a mortgage on the farm to the defendant, and the

[2] The judge ruled in Witt, Munn, and Finney's favor based on the following principle: "where fraud is merely set up as a defense and compensation by way of damages is not sought, it has been held that damage need not be proved." *Daniels v. Coleman*, 253 S.C. 218, 226-227, 169 S.E.2d 593, 597 (1969) (citation omitted).

defendant agreed to release the father from any debt obligation and to restructure the brother's obligation by reducing the interest rate. *Id*. at 222-223, 169 S.E.2d at 595.

The plaintiffs signed the note, but the parties had not agreed to the provisions of the release when the defendant surreptitiously "took" the note and mortgage from the plaintiffs' attorney's office and attempted to record the mortgage. The defendant had not attempted to collect on the debt when the plaintiffs filed an action for fraud. The jury returned a verdict for the plaintiffs, declaring the note and mortgage null and void and granting $17,000 of punitive damages for the fraud action. *Id*. at 223-224, 169 S.E.2d at 595-596.

This Court reversed, finding that the plaintiffs did not prove that they suffered any actual damages. The Court analyzed a line of cases that suggested that damages are inherently embedded within one's obligation on a promissory note. *See Nipper v. Griffin Mercantile Co.,* 120 S.E. 439 (Ga. App. 1923); *Planters' Bank & Trust Co., v. Yelverton*, 117 S.E. 299 (N.C. 1923): *See also* 91 A.L.R. 2d 354 (1963). The Court held that while the potential damages associated with a promissory obligation are sufficient to establish the damage element of the affirmative defense to fraud, they are insufficient to establish the actual pecuniary damages element of a fraud claim. *Id*. at 226-227, 169 S.E.2d at 597.

The *Daniels* Court reasoned that when fraud is asserted as an affirmative defense to a breach of contract action, the defendant is exposed to a threat of loss in that the plaintiff might prevail on the breach of contract and subject the defendant to liability on the obligation. *Id*. The *Daniels* Court distinguished the threat of loss concept from the actual loss element that was necessary for the plaintiffs to prevail on their fraud claim and held that the plaintiffs had suffered no pecuniary loss resulting from defendant's questionable actions in procuring the note and mortgage. *Id.*

The present case closely resembles the *Daniels* case. Here, Witt, Finney, and Munn could successfully defend against Collins' breach of contract action because there was a threat of damages if Collins prevailed. If

Collins' prevailed, Witt, Finney, and Munn would be stuck with a sizeable judgment against them for $50,000 plus interest.

In our opinion, the trial judge correctly ruled that the jury found that Witt, Finney, and Munn prevailed on the fraud affirmative defense since they could establish the threat of damages. Consequently, their obligation on the note and mortgage was terminated. As to their fraud claim, they could not establish any actionable, out-of-pocket damages because the only threat of damages to which they were subjected was the potential liability on the note and mortgage. Further, any expenses that Witt, Finney or Munn may have incurred in defending this action do not fall within the ambit of fraud damages. This Court has stated,

> Where the rights, or asserted rights, of parties are in conflict, it is inevitable that each party desiring to protect his rights must give time and attention to that end. To do so is not generally an element of damage, although it may be in some situations where loss of earnings is involved, which is not the case here.
>
> Nor do recoverable damages include the expense of employing counsel, except when so provided by contract or statute, which is not the case here.
>
> This is the general law of the land.

Rimer v. State Farm Mutual Automobile Insurance Company, 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966) (citing *25* C.J.S. *Damages* § 50); *see also Prickett v. A & B Electrical Service, Inc.*, 280 S.C. 123, 311 S.E.2d 402 (Ct. App. 1984) (finding that expenses incurred defending a cross-complaint are not considered consequential damages, so without evidence of other actual damages, fraud cannot be proved).

The trial judge correctly held that the threat of damages allowed Witt, Finney, and Munn to prevail on their affirmative defense to Collins' breach of contract claim, and their obligation on the note and mortgage was extinguished. However, we find that the threat of loss on the breach of

contract action, which was not a pecuniary loss to which Witt, Finney and Munn were subjected prior to the cause of action, is not a form of actual damages that is contemplated by the fraud cause of action. Therefore, we hold that the trial judge's grant of JNOV in setting aside the award of punitive damages was appropriate.

CONCLUSION

For the forgoing reasons, we **AFFIRM** the trial court's decision to grant a JNOV.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles Sullivan,

Appellant,

v.

South Carolina Department
of Corrections,

Respondent.

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 25704
Heard August 5, 2003 - Filed August 25, 2003

AFFIRMED AS MODIFIED

Assistant Appellate Defender Tara S. Taggart, of Columbia, for Appellant.

Andrew F. Lindemann and Barton Jon Vincent, both of Davidson, Morrison, and Lindemann, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Appellant, Charles Sullivan ("Sullivan"), appeals from the circuit court's decision affirming the Administrative Law Judge's ("ALJ") dismissal of his claim.

FACTUAL / PROCEDURAL BACKGROUND

Sullivan is currently serving a 35-year sentence within the South Carolina Department of Corrections ("SCDC") after pleading guilty to 32 separate charges in 1998.[1] Once incarcerated, Sullivan attended and successfully completed Phase I of the Sex Offender Treatment Program ("SOTP"). Upon completion of Phase I, Sullivan sought admission to the second phase of the SOTP, but received no response to his request. Subsequently, Sullivan filed a Step 1 Inmate Grievance Form complaining that he was denied access to Phase II of the SOTP. In his grievance, Sullivan requested to be enrolled immediately in Phase II of the program.

When Sullivan failed to receive the requested relief, he filed a Step 2 Inmate Grievance Form. The SCDC denied Sullivan's grievance as follows:

> Due to bed space availability, inmates are placed on a waiting list for evaluation and interviewed prior to participation in the SOTP program. The interview will determine if an inmate will participate in SOTP Phase II.
>
> Therefore, your grievance is denied.

Sullivan appealed the SCDC's decision to the ALJ Division ("ALJD"). SCDC filed a motion to dismiss, alleging that the ALJD lacked subject matter jurisdiction to review SCDC's decision. Citing the ALJD's en banc decision, *McNeil v. South Carolina Dept. of Corrections*, 02-ALJ-04-00336-AP (filed Sept. 5, 2001), the ALJ concluded that "no jurisdiction exists in the ALJD to decide this matter."

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[1] Sullivan pled guilty to multiple counts of the following charges: committing a lewd act upon a child, exhibiting harmful performance, sexual exploitation of a minor, and contributing to the delinquency of a minor. Sullivan also pled guilty to two counts of assault and battery of a high and aggravated nature.

Sullivan filed a petition in the circuit court seeking review of the ALJ's dismissal order. The appeal was heard, and several months later, an order dismissing Sullivan's appeal was issued. The circuit court's order found that "because [Sullivan] does not challenge the calculation of his sentence-related credits, custody status, nor is [Sullivan] the object of punishment in a major disciplinary hearing that the ALJD did not have jurisdiction."

Sullivan appealed to the South Carolina Court of Appeals, and by order dated June 28, 2002, the appeal was certified to this Court. The following issues are currently before this Court:

I. Did the ALJD have subject matter jurisdiction to review the SCDC's resolution of Sullivan's grievance?

II. If so, may Sullivan proceed *in forma pauperis* before the ALJD?[2]

LAW /ANALYSIS

I. ALJD's Subject Matter Jurisdiction

Sullivan argues that the ALJ erred in refusing to review the SCDC's denial of his grievance, and, in turn, that the circuit court erred in affirming the ALJ's decision. We disagree.

In *Al-Shabazz v. State*, this Court held:

> [a]n inmate may . . . seek review of [the SCDC's] final decision in an administrative manner under the [Administrative Procedures Act ("APA")]. Placing review of these cases within the ambit of the APA will ensure that an inmate receives due process, which consists of notice, a hearing, and judicial review.

338 S.C. 354, 369, 527 S.E.2d 742, 750 (1999).

[2] This issue was briefed at the request of the Court.

In *Al-Shabazz*, the Court recognized that the administrative matters entitled to review by the ALJD "typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status." 338 S.C. at 369, 527 S.E.2d at 750. The Court explained further that procedural due process was guaranteed only when an inmate was deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property. *Id.*

In *Wolff v. McDonnell*, the United States Supreme Court determined that Nebraska had created a liberty interest to good time credits by statute, which provided that good time credits were to be forfeited only for serious misbehavior. 418 U.S. 539, 557, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935, 951 (1974) (citing Neb.Rev.Stat. § 83-1 (Supp.1972)). Based on Nebraska's statute, the United States Supreme Court held:

> the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest [in good time credits] has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process clause to ensure that the state-created right is not arbitrarily abrogated.

418 U.S. at 557, 94 S.Ct. at 2975, 41 L.Ed.2d at 951.

Two decades after *Wolff*, the United States Supreme Court decided *Sandin v. Conner,* 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). In *Sandin,* the Supreme Court reexamined the circumstances under which state prison regulations afforded inmates a liberty interest protected by the Due Process Clause. *Id.* The *Sandin* Court recognized that states may create liberty interests which are protected by the Due Process Clause, but held that "these interests will be generally limited to freedom from restraint which . . . imposes *atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id.* at 484, 115 S. Ct. at 2300, 132 L. Ed. 2d. at 430 (emphasis added). The inmate in *Sandin* challenged that the

prison's imposition of solitary confinement for his misconduct implicated a liberty interest deserving of due process protection. The Court disagreed, holding that "discipline in segregated confinement did not present the kind of ***atypical, significant deprivation in which a State might conceivably create a liberty interest.***" *Id.* at 486, 115 S. Ct. at 2301, 132 L. Ed. 2d at 431 (emphasis added).[3]

Like the inmate in *Wolff*, the inmate in *Al-Shabazz* protested the SCDC's reduction of good time credits that he had accrued as a method of punishment. In *Al-Shabazz*, this Court found the inmate had a "protected liberty interest due to the potential loss of sentence-related credits" and, therefore, that he was entitled to review by the ALJD and then by the judicial branch. 338 S.C. at 382, 527 S.E.2d at 757.

Recently, in *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services,* this Court held that the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process, and, therefore, review by the ALJD. 352 S.C. 594, 598, 576 S.E.2d 146, 149 (2003). In reaching this conclusion, the Court emphasized the finality of the Department's decision, and distinguished the *final* determination of parole eligibility from the *temporary* granting or denial of parole to an eligible inmate. *Id.* at n.4. Although the Court found S.C. Code Ann. § 24-21-620 created a liberty interest in the one-time determination of parole *eligibility*, it was quick to note that the statute did not create a liberty interest in parole.[4] *Id.*

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[3] In reaching this conclusion, the Court noted that disciplinary segregation mirrored conditions other inmates experienced who were in administrative segregation and protective custody. *Id.*

[4] In simple terms, this means that an inmate has a right of review by the ALJD after a *final* decision that he is *ineligible* for parole, but that a parole-eligible inmate does not have the same right of review after a decision denying parole; the parole board is, however, required to review an inmate's case every twelve months after a negative parole determination. S.C. Code Ann. § 24-21-620 (Supp. 2002). This distinction stems from the fact that parole is a privilege, not a right.

Denial of Sullivan's grievance did not arise in any of the "typical" ways enumerated in *Al-Shabazz*; it is not the result of a disciplinary proceeding and does not involve sentence-related credits or custody status. Sullivan's claim is most accurately described as a "condition of confinement claim." Under *Wolff*, *Sandin, Al-Shabazz,* and *Furtick,* to determine whether Sullivan is entitled to review of the SCDC's decision, the Court must decide whether Sullivan's request for access to SOTP II implicates a liberty interest sufficient to trigger procedural due process guarantees. The only way for the ALJ Division to obtain subject matter jurisdiction over Sullivan's claim is if it implicates a state-created liberty interest. *See Sandin; Furtick.*

Sullivan contends that the South Carolina Constitution guarantees him a right to rehabilitation, which requires the SCDC to give him access to sex offender treatment while incarcerated. The South Carolina Constitution provides:

> The General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and *rehabilitation* of the inmates.

S.C. Const. art. XII, § 2 (emphasis added).

In *McLamore v. State,* this Court declined to impose a duty of education or rehabilitation on the prison system. 257 S.C. 413, 186 S.E.2d 250 (1972). Instead, the Court held that "[e]fforts to rehabilitate and educate are to be commended; to require that every prisoner be treated exactly alike might discourage rather than encourage the programs." *Id.* at 423, 186 S.E.2d at 255. Even if this provision is read to require *some* rehabilitation for inmates, it does not mandate any specific programs that must be provided by the General Assembly or the SCDC and, more importantly, it does not mandate any particular timetable for the furnishing of any rehabilitative services.

Sullivan has already received some rehabilitation; he successfully completed Phase I of the SOTP. Further, in denying Sullivan's grievance request for "immediate" enrollment in Phase II of the SOTP, the SCDC simply stated that there was no space in the program, but indicated that there was a waiting list. If room becomes available, it may even become possible for Sullivan to enroll in Phase II.

In our opinion, the South Carolina Constitution does not require that the SCDC grant Sullivan enrollment in SOTP II. To interpret the constitutional mandate in Article XII, § 2, as requiring the SCDC to provide this specific program, would make the ALJD and then the judicial branch micro-managers of the prison system. *See Abbeville County Sch. Dist. v. State,* 335 S.C. 58, 68-69, 515 S.E.2d 535, 541 (1999) (holding that S.C. Const. Art. XI, § 3, which requires the General Assembly "to provide for the maintenance and support of a system of free public education," guarantees only a "minimally adequate education," and does not call for this Court to dictate what programs are to be used in this State's public schools). In addition, such a holding would conflict with the hands-off approach that this Court has taken towards internal prison matters. *Al-Shabazz.* Finally, recognizing a liberty interest in a specific course of rehabilitation does not comport with *Sandin's* standard; denying Sullivan access to SOTP II or any other sex offender program does not impose an "atypical or significant hardship" on Sullivan as all other inmates designated as sex offenders are afforded the same access to treatment.

Because the SCDC's denial of enrollment in SOTP II does not implicate a liberty interest, we find that Sullivan's grievance is *not* entitled to review by the ALJD.[5]

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[5] The en banc decision of the ALJD in *McNeil* formed the basis for the ALJD's and the circuit court's dismissal of Sullivan's claim. For this reason, and because we know *McNeil* has been relied upon by the ALJ in other cases to deny jurisdiction, the ALJD and the circuit court are instructed to look to this opinion, not *McNeil,* for guidance in future cases. Although much of *McNeil's* analysis is accurate, we believe *Wolff* requires minimal due process when for state-created liberty interests, which are not necessarily limited to sentence credit issues and major disciplinary decisions. We recognize that a

II. In Forma Pauperis

Sullivan maintains that indigent inmates should be entitled to proceed *in forma pauperis* in appeals from the decision of the ALJ under the APA. We disagree.

In *Ex Parte: Martin v. State,* 321 S.C. 533, 471 S.E.2d 135 (1995), the Court addressed when an inmate may proceed *in forma pauperis*. This Court held, "[i]n the absence of a statutory provision allowing the general waiver of filing fees, we conclude motions to proceed *in forma pauperis* may only be granted where specifically authorized by statute or required by constitutional provisions." *Id.* at 535, 471 S.E.2d at 134-35 (citations omitted). There is no statutory provision that permits the waiver of filing fees for an appeal brought under the APA, and S.C. Code Ann. § 8-21-310(11)(a) provides that a clerk of court must collect a filing fee of $100.00 for *any* complaint or petition.

Sullivan urges the Court to make an exception for appeals from the ALJD that would have been brought as PCRs prior to *Al-Shabazz.* Alternatively, Sullivan contends that the waiver of the filing fees for cases like his is constitutionally required. *See Martin*, 321 S.C. at 535, 471 S.E.2d at 135 (noting that "where certain fundamental rights are involved, the Constitution requires that an indigent be allowed access to the courts.").

The General Assembly is the body charged with the power to waive filing fees, and they have not created a waiver for this set of cases. Further, this is not a case involving "fundamental rights," so access to the courts is not constitutionally required in this case. Therefore, Sullivan is not entitled to proceed *in forma pauperis* on his appeal from the ALJ's dismissal.

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condition of confinement *could* implicate a state created liberty interest under *Wolff*. However, we adhere to *Sandin's* pronouncement that "these interests will generally be limited to freedom from restraint which . . . imposes atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin* at 484, 115 S. Ct. at 2300, 132 L. Ed. 2d at 430.

CONCLUSION

For the foregoing reasons, we **AFFIRM AS MODIFIED**.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Mark Alexander Pearson, Respondent.

Opinion No. 25705
Submitted August 12, 2003 - Filed August 25, 2003

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Barbara M. Seymour, both of Columbia, for the Office of Disciplinary Counsel.

Mark Alexander Pearson, of Charlotte, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a 146 day suspension from the practice of law. We accept the agreement and suspend respondent from the practice of law for 146 days. The facts, as set forth in the agreement, are as follows.

Facts

On February 5, 2001, respondent was suspended from the practice of law for failing to comply with the Continuing Legal Education requirements set forth in Rule 408, SCACR. Respondent was notified of his suspension pursuant to Rule 419, SCACR. Respondent was not reinstated to the practice of law until June 1, 2001. However, respondent continued to practice law uninterrupted during the period of his suspension.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.5(a) (a lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also acknowledges that his misconduct constitutes grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate or attempt to violate the Rules of Professional Conduct); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute); and Rule 7(a)(7) (it shall be a ground for discipline for a lawyer to willfully violate a valid court order issued by a court of this state or of another jurisdiction).

Conclusion

We hereby accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for 146 days, representing the 116 days of respondent's original suspension plus 30 days. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Gibson and
Donnie Ray Gibson, Petitioners,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Oconee County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 25706
Submitted February 20, 2003 - Filed August 25, 2003

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Petitioner(s).

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Assistant Attorney General William Bryan Dukes, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: David and Donnie Ray Gibson submit that the post-conviction relief ("PCR) judge erred in denying their PCR applications.

FACTUAL/PROCEDURAL BACKGROUND

David and Donnie Ray Gibson were convicted of murdering Marvin Bramlett ("Bramlett") in Seneca, South Carolina on July 23, 1976 and sentenced to life imprisonment.

Donnie Ray applied for PCR in 1981, which was denied and this Court affirmed. *Gibson v. State*, Op. No. 83-MO-029 (S.C. Sup Ct. filed January 24, 1983). Donnie Ray and David petitioned for writs of habeas corpus in 1995, which were denied. On appeal, this Court remanded their cases to be considered as separate PCR applications. *Gibson v. State*, 329 S.C. 37, 495 S.E.2d 426 (1998). Petitioners now appeal the PCR judge's denial of post-conviction relief and raise the following issues for review:

I. Did the PCR judge err in denying Donnie Ray's petition for post-conviction relief because it was a successive application?

II. Did the trial judge's malice charge shift the burden from the prosecution to the defense, and if so, should this Court retroactively apply *Sandstrom v. Montana* to grant a new trial?

LAW/ANALYSIS

I

Donnie Ray asserts that the PCR judge erred in finding that he has applied for successive PCR petitions. We disagree.

Donnie Ray wants to assert that he should be granted a new trial because of the trial judge's defective malice charge, which was deemed unconstitutional in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). This Court disfavors successive PCR applications, especially when the new ground that the petitioner raises could have been

raised in his initial application. *Tilley v. State*, 334 S.C. 24, 511 S.E.2d 689 (1999); *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991).

Since the U.S. Supreme Court decided *Sandstrom* in 1979, Donnie Ray could have raised the issue in 1981, in his first application. Therefore, we find that he should not be able to raise the issue in the present PCR application.

II

David asserts that this Court should retroactively apply *Sandstrom v. Montana* to the defective malice charge that the trial judge enunciated to the jury. We disagree.

Donnie Ray and David shot and killed Marvin Bramlett in January 1976. The brothers and Bramlett had a history of dislike for one another, which involved Bramlett pointing a handgun at Donnie Ray, Donnie Ray slapping Bramlett over the head, and various verbal threats uttered by both parties during the time leading up to Bramlett's death. On the night of the killing, the hostility that the parties shared for each other escalated as both Bramlett and Donnie Ray fired warning gunshots in the air towards each other.

Bramlett got into the car of a friend, Theresa Edwards ("Edwards"), and told her his plans to kill Donnie Ray when he said, "He's crazy. I'm going to kill him tonight." Meanwhile, Donnie Ray returned to town and found David. They got in their car, which contained their two loaded guns in the back. On their way out of town, they saw Edwards' car on the side of the road and slowed down to speak with Edwards not knowing that Bramlett was in the vehicle. Bramlett got out of the car and fired his sawed off shotgun in the direction of the brothers' car. Donnie Ray then shot his 30-30 at Bramlett through the back window of Edwards' car, which knocked Bramlett down. David got out of the car, walked around Edwards' car, and shot Bramlett three times with a .22 magnum as Bramlett was crawling in his direction. Bramlett died on the scene.

At David and Donnie Ray's trial, the trial judge charged the jury on malice as follows:

> I charge you that malice is presumed from the willful, deliberate, intentional commission of a felony, and murder is a felony, or an unlawful act without just cause or excuse. In other words, in its general signification, malice means the doing of a wrongful act intentionally and without just cause or excuse.
>
> I charge you also that even if the facts proven are sufficient to raise the presumption of malice, such presumption would be a rebuttable one, and it is for you, the jury, to determine from all the evidence whether or not malice has been proven in the case.
>
> I charge you further that malice is presumed from the use of a deadly weapon, and I charge you in that connection, that the burden is on the State to prove malice by evidence, satisfying you beyond a reasonable doubt. This presumption is also a rebuttable one. And when all the facts and circumstances are brought out in the evidence, the presumption vanishes and it is for you to determine from all the facts and circumstances whether or not malice did, in fact, exist.

The U.S. Supreme Court found this malice charge unconstitutional in *Sandstrom*, because when the trial judge states that a jury can presume malice, he is alleviating the prosecution's burden of proof of one of the elements of murder and implying that the burden shifts to the defense to disprove the presumption. We believe the malice charge quoted above is unconstitutional because the charge effectively shifted the burden to prove malice from the prosecution to the defense. *See also*, *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988); *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

But during the trial, which took place in 1976, the instruction that permits the jury to presume malice if the homicide is committed with a deadly weapon was not yet deemed an unconstitutional burden shift from the prosecution to the defense. Thus, this Court could grant the brothers a new trial only if *Sandstrom* is retroactively applied, and in our opinion, *Sandstrom* should not be retroactively applied in this case based on the U.S. Supreme Court's analysis of when the retroactivity of a landmark criminal procedure decision can be collaterally attacked.

The U.S. Supreme Court set forth two exceptions to the general principle that landmark criminal procedure decisions should not have a retroactive effect in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The first exception is that a decision may be retroactively applied "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U.S. at 311, 109 S.Ct. at 1075 (quoting Justice Harlan's opinion in *Mackey v. United States*, 401 U.S. 667, 692, 91 S.Ct. 1160, 1180, 28 L.Ed.2d 404 (1971)). This first exception is not applicable to this case. The second exception applies to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Id*.[1]

We hold that the defective malice charge did not rise to the very high standard established in *Teague.* We do not believe that the accuracy of the Gibson brother's murder conviction was seriously diminished by the charge that allowed the jury to presume malice. The jury heard plenty of testimony that established the malice element. For example, the brothers testified that they killed Bramlett; the defense stipulated that the brother's weapons were used to kill Bramlett; the brothers had a prior history of altercations with Bramlett; knowing that Bramlett was out to cause trouble on the evening of the killing, the brothers armed themselves with loaded weapons and carried them in the back seat of their vehicle; and David testified that he shot Bramlett two times with his .22 Magnum as Bramlett was in a crouch beside Edwards' car. Based on this evidence, we do not believe that the jury's capacity to arrive at a verdict was seriously diminished by the defective malice charge. *See Adams*, 965 F.2d 1306 (holding that the *Cage v. Louisiana*, reasonable doubt rule should not be retroactively applied because it does not meet the *Teague* standard).

HARMLESS ERROR

This Court has employed a harmless error analysis in reviewing post-*Sandstrom* defective malice charges. *See e.g., Arnold v. Plath*, 309 S.C. 157, 420 S.E.2d 834 (1992). Since, we find that *Sandstrom* should not be

[1] The same test for retroactivity was applied by the Fourth Circuit Court of Appeals in *Adams v. Aiken*, 965 F.2d 1306, 1312 (4th Cir. 1992).

retroactively applied to this case, it is unnecessary to employ the harmless error analysis to review the effect of the defective malice charge in this case. Nevertheless, even if a harmless error analysis was applied to the defective malice charge, we believe that the jury found malice based on the evidence presented at trial and *not* based upon the judge's instruction allowing it to presume malice.

CONCLUSION

For the foregoing reasons, we find that the *Sandstrom* decision should not be retroactively applied to this case because the stringent *Teague* standard has not been met, as the validity of the murder conviction was not seriously diminished by the defective malice charge. Accordingly, we **AFFIRM** the PCR judge's denial of the Gibson brothers' applications for PCR.

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: These matters come before the Court on certiorari to two circuit court orders denying petitioners' applications for post-conviction relief (PCR). I concur in the majority's decision to affirm the orders, but write separately because I view the issues in a slightly different light.

A. Donnie Ray Gibson

Petitioner Donnie Ray Gibson (Donnie) contends the circuit court erred in summarily dismissing his PCR application as successive.[2] While I tend to agree,[3] the PCR judge went further and addressed the merits of Donnie's claim that his trial counsel were ineffective in failing to object to the trial judge's malice charge. I agree with the PCR judge that counsel were not ineffective in failing to anticipate at Donnie's 1976 trial that in 1979 the United States Supreme Court would declare the malice charge unconstitutional. See, e.g., Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (trial counsel not required to be clairvoyant). The question is whether trial counsels' performance met prevailing professional norms.[4] Robinson v.

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[2] In 1998, we remanded an order summarily dismissing Donnie's and David's petitions for habeas corpus and instructed the circuit court to treat the habeas petitions as PCR applications. Gibson v. State. 329 S.C. 37, 495 S.E.2d 426 (1998). On remand, the brothers were required to show why their applications were not impermissibly successive. Id.

[3] But see Keeler v. Mauney, 330 S.C. 568, 500 S.E.2d 123 (Ct. App. 1998)(South Carolina's reluctance to acknowledge and apply Sandstrom v. Montana did not excuse applicant's failure to raise claim in first PCR application).

[4] I recognize the validity of Donnie's contention that Sandstrom v. Montana is merely a logical extension of In re Winship, 397 U.S. 358 (1970) and Mullany v. Wilbur, 421 U.S. 684 (1975). See, e.g. Francis v. Franklin, 471 U.S. 307, 326 (1985) ("Sandstrom v. Montana made clear that the Due Process Clause of the 14th Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in In re Winship on the critical question of intent in a criminal prosecution. Today we reaffirm the rule of Sandstrom and the wellspring due process principle from which it was drawn"). Had Donnie framed his claim as a violation of his due process rights, rather than as a

State, 308 S.C. 74, 417 S.E.2d 88 (1994). There is probative evidence in this record to support the PCR judge's finding that counsel were not ineffective in failing to object to the malice charge, and therefore we should uphold that finding. Id. Accordingly, I agree with the majority that we should affirm the PCR order denying Donnie relief.

B. David Gibson

We granted certiorari to review Petitioner David Gibson's (David's) claim that the circuit court judge erred in denying David's request for PCR. Like his brother Donnie, he contends that the malice charge given at their joint 1976 trial violated the Constitution. Like Donnie, David raised this claim below solely as one of ineffective assistance of counsel. For the reasons given above, I agree with the majority that we should affirm the PCR judge's ruling denying David relief on this claim.

C. Conclusion

I concur in the majority's decision to affirm the PCR orders denying Donnie and David post-conviction relief. Unlike the majority, I would not reach the retroactivity issue. Were I to find it necessary to reach the claim, I would employ a different analytical approach. In my opinion, whether to apply a new decision retroactively under Teague v. Lane is determined by applying the Teague v. Lane exceptions to that new decision. Therefore, I would analyze the Sandstrom decision to determine whether it met a Teague v. Lane exception. Only if I found that Sandstrom met one of these exceptions would I engage in a review of the facts of the case in which the unconstitutional malice charge was given to determine, on a case-by-case basis, whether the defendant in that pre-Sandstrom case had been so prejudiced by the charge that he was entitled to a new trial.

For the reasons given above, I concur in the majority's decision to affirm the PCR orders.

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violation of his sixth amendment right to counsel, I would reach the issue of retroactivity under Teague v. Lane, 489 U.S. 288 (1989). Were I to reach this issue, I would not necessarily find that Sandstrom did not apply retroactively. See, e.g., Hall v. Kelso 892 F.2d 1541 (11th Cir. 1990).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

W.J. Douan, Petitioner,

v.

Charleston County Council and Charleston County Election Commission, Respondents.

And

Wallace B. Scarborough, as an individual South Carolina Representative, G. Robert George, Larry D. Shirley, Henry B. Fishburne, Jr., as individual City of Charleston Councilmen, Lawrence A. Carr, as an individual Town of Mount Pleasant Councilman, Mary G. Clark, individually as Mayor of the Town of James Island, Joe Qualey, Bill Wilder, Parris Williams, Bill Woolsey, as individual Town of James Island Councilmen, A. C. Mitchum, individually as a City of North Charleston Councilman, Eugene Platt, individually as a James Island Public Service District Commissioner, Bob Linville,

individually as a City of Folly Beach Councilman, Ann G. H. Rounds, Jaroslaw Burbello, Warwick Jones, and Patricia Jones, as individual voters, Petitioners,

v.

Charleston County Election Commission, Respondent.

Certiorari to the State Election Commission

Opinion No. 25707
Heard June 10, 2003 - Filed August 25, 2003

REVERSED

Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, P.A., of Charleston, for Petitioner Douan; Trent M. Kernodle and Christine Companion Varnado, of Kernodle, Taylor & Root, of Charleston, for Petitioner Scarborough, et al.

Mikell Ross Scarborough, of Charleston, for Respondent Charleston County Election Commission.

Joseph Dawson, III, Bernard E. Ferrerra, Jr., and W. Kurt Taylor, of Charleston, for Respondent-Intervenor Charleston County Council.

Charlton deSaussure, Jr., John P. Linton, and Sarah P. Spruill, of Haynsworth Sinkler Boyd, P.A., of Charleston, for City of Charleston and CARTA, Amicus Curiae.

J. Brady Hair, of North Charleston, for City of North Charleston, Amicus Curiae.

R. Allen Young, of Mt. Pleasant, for Town of Mt. Pleasant, Amicus Curiae.

CHIEF JUSTICE TOAL: W.J. Douan et al. ("Petitioners") challenge the State Election Commission's decision to uphold the election results for the Sales and Use Tax Referendum ("Referendum") presented to voters during the 2002 general election in Charleston County.

FACTUAL / PROCEDURAL BACKGROUND

In 1995, the General Assembly enacted S.C. Code Ann. §§ 4-37-10 et seq. (Supp. 2002) to provide counties with an optional method of financing transportation facilities. Section 4-37-30 empowers counties to impose a sales and use tax in order to raise revenue for transportation related projects. Section 4-37-30 provides, in relevant part,

> (A) Subject to the requirements of this section, the governing body of a county may impose by ordinance a sales and use tax in an amount not to exceed one percent within its jurisdiction for a single project or multiple projects and for a specific period of time to collect a limited amount of money.
>
> (1) The governing body of a county may vote to impose the tax authorized by this section, subject to a referendum, by enacting an ordinance. The ordinance must specify:
>
> (a) the project or projects and a description of the project or projects for which the proceeds of the tax are to be used, which may include projects located within or without, or both within or without, the boundaries of the county imposing the tax and which may include:

> (i) highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects facilities including, but not limited to, drainage facilities relating to the highways, roads, streets, bridges, and other transportation related projects;

S.C. Code Ann. § 4-37-30(A) (Supp. 2002). After the County has enacted an ordinance pursuant to this section, and it is submitted to the county election commission, the county election commission is required to conduct a referendum for approval of the optional sales and use tax. S.C. Code Ann. § 4-37-30(A)(2).

In July 2002, the Charleston County Council ("County Council") enacted an ordinance to impose a one-half percent sales and use tax, and submitted it to the Charleston County Election Commission ("County Election Commission"). Upon receipt of the request to hold a referendum on the proposed tax, the County Election Commission noted that the proposed Ballot question and instructions did not appear neutral, and so advised County Council to change them. Initially, County Council agreed to change the language, but subsequently called a special meeting during which they voted to resubmit the original language. Upon receipt of this news, the County Election Commission voted unanimously that the instructions on the Ballot advocating the tax's passage should be eliminated. County Council objected, claiming that the County Election Commission had no authority to alter the language submitted. The State Election Commission agreed, and, as a result, the County Election Commission printed the Ballot for the November 2002 general election as it was originally submitted by County Council.

The Ballot contained the following instructions to the voters:[1]

[1] *See* Appendix 1 for complete text of the Ballot used within the City of Charleston. The Ballot used in other parts of the County was identical to the Ballot shown here except it did not contain the last item entitled "City of Charleston Referendum." That referendum is not at issue in this appeal.

> All qualified electors desiring to vote in favor of the traffic congestion relief, safe roads, and clean water sales tax, for the stated purposes shall vote "YES."
>
> All qualified electors opposed to the traffic congestion relief, safe roads, and clean water sales tax for the stated purposes shall vote "NO."

Apparently at the County Election Commission's request, County Council printed handouts for distribution by poll workers on election day. The Ballot appeared verbatim on one side of the yellow handout, and the projects to be funded by the tax were listed on the opposite side of the handout. There is some confusion concerning who authored the handout, but it appears staff for County Council produced the handout and included the list of projects to be funded by the tax in addition to the Ballot question.

The tax passed by a narrow margin of 865 votes.[2] Petitioner Douan filed a timely protest to the election results on November 13, 2002. In addition, state Representative Wallace Scarborough and numerous other public officials filed a timely protest against the election results. The County Election Commission held a hearing on November 18, 2002, and upheld the election results. Petitioners (both groups) appealed to the State Election Commission. After considering the transcript of the proceeding below, arguments of counsel, and various exhibits, one member of the Commission made a motion to void the results of the election. Two members of the State Election Commission voted to void the results, but the other two members voted to uphold the election. The fifth seat on the Commission was vacant, and the motion to void the election failed for lack of a majority.[3]

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[2] In 2000, a referendum on the same tax failed to pass by just over 900 votes.

[3] Although the protests filed by Douan and Representative Scarborough raised essentially the same issues, the State Election Commission issued two separate orders denying the protests of each group. The protests differ only in that Douan sued County Council and the County Election Commission, and Representative Scarborough sued only the County Election Commission.

This Court granted certiorari to review the following issues raised in the election protests:

I. Did the County and State Election Commissions err in refusing to void the results of the 2002 Referendum to adopt the Sales and Use Tax in Charleston County?

   A. Did the non-neutral language of the Ballot violate the fundamental integrity of the election?

   B. Did the Handout distributed by the County Election Commission at the polls constitute unlawful campaign literature?

II. Should the County and State Election Commissions have recused themselves from hearing the appeals below?

LAW /ANALYSIS

I. Election Results

Petitioners argue that the results of the Referendum must be voided because the language of the Ballot violated mandatory statutory requirements and the fundamental integrity of the election, and that the handout constituted campaign literature, distributed in violation of S.C. Code Ann. § 7-25-180 (Supp. 2002).

The scope of appellate review of the State Election Commission's order is limited to corrections of errors of law; findings of fact will not be overturned unless wholly unsupported by the evidence. *Fielding v. South Carolina Election Com'n,* 305 S.C. 313, 408 S.E.2d 232 (1991). "The Court will employ every presumption to sustain a contested election and will not set aside an election due to mere irregularities unless the result is changed or rendered doubtful." *George v. Municipal Election Com'n of City of Charleston*, 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999) (citations omitted). We have consistently recognized that perfect compliance with the

numerous statutes regulating elections is unlikely, and have been loathe to nullify an election based on minor violations of technical requirements. *Id.*

This Court will overturn the results of an election, however, when mandatory statutory provisions have been violated and those violations interfere with a full and fair expression of the voter's choice. *Id.* (citing *State ex rel. Parler v. Jennings,* 79 S.C. 414, 60 S.E. 967 (1908); *accord Laney v. Baskin,* 201 S.C. 246, 22 S.E.2d 722 (1945); *Smoak v. Rhodes,* 201 S.C. 237, 22 S.E.2d 685 (1942); *Killingsworth v. State Exec. Comm. of Democratic Party,* 125 S.C. 487, 118 S.E. 822 (1921); *State ex rel. Davis v. State Bd. of Canvassers,* 86 S.C. 451, 68 S.E. 676 (1910)). We "may deem such provisions to be mandatory [even] after an election – and thus capable of nullifying the results – when the provisions substantially affect the free and intelligent casting of a vote, the determination of the results, an essential element of the election, or the fundamental integrity of the election." *George,* 335 S.C. at 187, 516 S.E.2d at 208.

In *George*, the Court made it clear that total disregard of a statute cannot be treated as an irregularity, but must be held to be a cause for declaring the election void and illegal. *Id.* In short, this Court "'will not sanction practices which circumvent the plain purposes of the law and open the door to fraud.'" *Id.* at 187, 516 S.E.2d at 209 (quoting *May v. Wilson,* 199 S.C. 354, 19 S.E.2d 467 (1942)).

A. Ballot Language

Petitioners argue that the language of the Ballot is not neutral and, in fact, advocates passage of the Referendum. As such, Petitioners argue the ballot language violates the mandate of two statutory sections - S.C. Code Ann. §§ 4-37-30(A)(3) and 7-13-400 - and violates the fundamental integrity of the election. We agree.

Section 4-37-30(A)(3) requires that the Ballot question read *substantially* as follows:

"I approve a special sales and use tax in the amount of (fractional amount of one percent) (one percent) to be imposed in (county) for not more than (time) to fund the following project or projects:

Project (1) for _____ $_____.

Yes ____
No ____

Project (2), etc."

S.C. Code Ann. § 7-37-30(A)(3) (Supp. 2002). The language actually placed on the ballot in this case differed from the required language in three ways.

First, instead of listing a dollar amount for the cost of each project, the Ballot question adopted by County Council listed the *percentage* of the total amount to be collected that would be allotted to each project. The Ballot question included the total amount to be collected in the first paragraph of the ballot: 1,303,360,000. Second, the two main projects were not numbered (1) and (2) as suggested in § 4-37-30(A)(3), and, instead, were separated into two different paragraphs. The second project's purpose (purchasing and improving parklands and otherwise preserving greenspace)[4] was buried at the end of the paragraph, after all of the benefits of the project were listed. Third, and, most importantly, the title and instructions to the voters appeared to advocate passage of the tax.[5]

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[4] Section 4-37-30(A) includes "greenbelts" as a permissible project for funding through the tax. Greenbelt is not defined in the statute, but is commonly defined as "a belt of parkways or farmlands that encircles a community." The *New Merriam-Webster Dictionary* 328 (1989).

[5] The Ballot has a title under the heading "Question 1" that does not even contain the word "tax." The Ballot stated "Question 1: TRAFFIC CONGESTION RELIEF, SAFE ROADS, AND CLEAN WATER FOR CHARLESTON." None of the other questions presented at this election had such a title.

In our opinion, the first two differences between the Ballot actually used and the model ballot set forth in section 4-37-30(A)(3) do not require voiding the election results under the prevailing standard. *George* (recognizing that perfect compliance with the numerous statutes regulating elections is unlikely, and that this Court has been loathe to nullify an election based on minor violations of technical requirements). We find the advocacy language within the Ballot, however, to be more troublesome.

This Court nullified election results because the ballot contained empty promises and misleading language in *Bellamy v. Johnson,* 234 S.C. 172, 107 S.E.2d 33 (1959). In *Bellamy,* the ballot, used in an election to determine whether certain property should be annexed to the municipality, contained a stipulation that if the measure passed, the municipality would exempt parcels of more than 10 acres in the newly annexed area from taxation until the property was sub-divided. *Id*. This Court found the stipulation to be misleading, stating that it was nothing more than an "empty promise," "unfairly calculated to induce favorable votes by freeholders who were residents in the area proposed to be annexed." *Id.* at 175, 107 S.E.2d at 34-35.

"A question should not be submitted in such form as to amount to an argument for its acceptance or rejection." 29 C.J.S. *Elections* § 170 (1965). This common sense proposition was applied by the Appellate Court of Illinois when it nullified the results of a referendum on the issuance of bonds by the city. *O'Beirne v. City of Elgin,* 1914 WL 2613 (Ill. App. 1914). In *O'Beirne,* the city council passed an ordinance to issue $162,000 of bonds for an electrical lighting plant and electric street lighting. The ordinance was put before the public on a referendum, and passed on the following ballot:

> If you favor Municipal Ownership Vote Yes.
>
> If you oppose Municipal Ownership Vote No.
> By making a cross in one square below, thus: (X).
> Shall Bonds or obligations of the City of Elgin for the purpose of providing funds for the purposes mentioned in the ordinance printed hereon to the amount of One Hundred and Sixty-Two Thousand

> Dollars ($162,000) be issued by the City Council of the City of Elgin, Illinois?
>
> Yes _____
>
> No _____

O'Beirne at 1. Those protesting the election objected to the characterization of a yes vote as a "vote in favor of municipal ownership" rather than a vote in favor of the bonds at issue. The Illinois court agreed and nullified the election finding that the ballot did not substantially conform to the statute.[6] The court found that the statute intended for the instructions to aid the voter in understanding the *meaning* of his vote and not the *reason* for it. *Id.* at 2. The court explained,

> *[i]t was not intended that public officers charged with a duty to* ***impartially*** *submit a question to the vote of the people should use the ballot as a vehicle for information or argument as to the motives that might influence the voter in making his choice.* Such suggestions as were made are open to argument. It was not for the City Council of Elgin to determine that every voter in favor of municipal ownership should vote "Yes." *It is quite conceivable that there might be among the voters those who favored municipal ownership but for reasons satisfactory to themselves did not favor the bond issue in question.*

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[6] The relevant Illinois statute provided:

> If a constitutional amendment or other public measure is submitted to a vote, such question shall be printed upon the ballot after the list of candidates, and words calculated to aid the voter in his choice of candidates or to answer any question submitted to vote may be added, such as "Vote for one," "Vote for three," "Yes," "No," and the like.

*Id.*at 2 (citations omitted).

Id. at 2 (emphasis added). For these reasons, the court held that the ballot did not substantially conform to the form prescribed by statute, and rendered the election results void. *Id.*

In the present case, the instructions to the voters characterized the tax as the "traffic congestion relief, safe roads, and clean water sales tax." The Petitioners complain that the characterization of the tax in the voter's instructions was so misleading as to warrant nullification of the election results. Under the rule established in *Bellamy* and under the reasoning of *O'Beirne,* we agree. South Carolina Code Ann. § 7-13-400 provides for the form of the ballot when questions are submitted. That section states, in relevant part:

> The form of the ballot in an election on the issuance of bonds or in which any other question or issue is submitted to a vote of the people shall be a statement of the question or questions and shall thereafter have the following words:
>
> In favor of the question or issue (as the case may be) □
> Opposed to the question or issue (as the case may be) □
>
> The voter shall be instructed in substance, if he wishes to vote in favor of the proposition to place a check or cross mark in the square after the words second above written.

S.C. Code Ann. § 7-13-400 (1976 & Supp. 2002).

In our opinion, the Ballot used here does not conform with this statutorily mandated format, and the non-conformance is so substantial that it affects the fundamental integrity of the election. *See George.* The purpose of section 7-13-400 is the same as that of the Illinois statute discussed in *O'Beirne*: to aid the voter in understanding the *meaning* of his vote, not the *reason* for it. *See O'Beirne.* Instead of explaining *how* the voter could vote for or against the sales tax, the instructions to the voters in this case attributed *reasons* to vote in favor of the measure: "traffic congestion relief, safe roads, and clean water." In fact, these were the very same reasons that supporters of the tax espoused in favor of the tax in the weeks preceding election day.

Additionally, just as in *O'Beirne*, persons may be in favor of traffic congestion relief and clean water, "but for reasons satisfactory to themselves [do] not favor the [tax] in question." *O'Beirne* at 2.

Like the ballot in *Bellamy,* the voter instructions here appear calculated to persuade and ultimately mislead voters into voting in favor of the tax by obscuring the fact that a vote for clean water was a vote for increased sales tax. This conclusion is supported by the language of Question 2 on the Ballot. In contrast to the language used on Question 1 of the Ballot, the voter instructions for Question 2 are worded neutrally. The voter instructions for Question 2 stated:

> All qualified electors desiring to vote in favor of the issuance of bonds for the stated purposes shall vote "Yes."
> and
> All qualified electors opposed to the issuance of bonds for the stated purposes shall vote "NO."

See Appendix 1. In addition, the Ballot submitted in the 2000 election on the same sales and use tax, which was defeated, was worded more like Question 2 on the 2002 Ballot, in a content-neutral manner.

While we do not fault County Council for advocating the passage of this tax *before* election day, the fundamental integrity of the election process requires that the voters be presented with an objectively phrased choice on election day. Section 7-13-400 sets forth the format to create a neutrally worded Ballot and does not contemplate words of advocacy. Accordingly, we find that the election results in this case must be voided.

B. Election Day Handout

Petitioners argue that the handout distributed on election day by election officials constitutes unlawful campaign literature, and serves as an additional reason for the election to be voided.[7]

[7] *See* Appendix 2.

South Carolina Code Ann. § 7-25-180(A) prohibits the distribution of any type of campaign literature within 200 feet of a polling place on election day. S.C. Code Ann. § 7-25-180(A) (Supp. 2002). The statute gives law enforcement officers the authority to remove any such material upon the request of the poll manager. *Id.* Section 7-25-180(A) was intended to grant poll managers authority to prevent certain activity by members of the public on election day. In this case, the poll managers themselves distributed the alleged "campaign literature" at the behest of the County Election Commission.[8]

Petitioners also contend that there is no statutory authority for distribution of a supplemental handout except when constitutional amendments are proposed. S.C. Code Ann. §§ 7-13-2110 and –2120 (1976). This Court has recognized that "[t]he only supplemental ballot handout local election officials are explicitly authorized by statute to distribute is an explanation of a proposed constitutional amendment." *Charleston County Sch. Dist. v. Charleston County Elec. Com'n.,* 336 S.C. 174, 185, 519 S.E.2d 567, 573 (1999). However, we also recognize that a practice of distributing such handouts for questions other than constitutional amendments has developed over the years. *Id.* at n.2.

Resolution of the specific question presented to us is unnecessary as we have determined that the election should be voided based on the ballot language alone. Because a practice of distribution by county election officials of explanatory handouts for questions other than constitutional amendments has developed, however, we urge the General Assembly to offer local election officials some statutory guidance in this area. It may be that distribution by the election commission of neutral explanatory material will be approved by the General Assembly. Nevertheless, we can find no logical distinction which would allow partisan, campaign literature drafted by a governmental entity to be distributed within 200 feet of a polling place on election day when the same literature distributed by a private party would not be allowed pursuant to § 7-25-180(A). Preserving the fundamental integrity

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[8] The Code does not define "campaign literature" and there is no case law that defines the term.

of the election process requires that governmental entities with a position on or stake in an election adhere to the same rules which all private groups with a stake in an election are required to follow on election day.

III. Recusal of Election Commission

Petitioners argue that both the County Election Commission and the State Election Commission erred in refusing to recuse themselves from reviewing Petitioners' election protests. We disagree.

South Carolina Code sections 4-37-30 and 7-17-30 vest the county election commissions with the duty to hold referenda, canvas ballots, and hear election protests. S.C. Code Ann. §§ 4-37-30 and 7-17-20 & -30 (Supp. 2002). The County Election Commission is always "involved" in elections as a matter of statutory mandate. Thus, to follow Petitioners' logic would be to vitiate the County Election Commission's duty to hear any county election protests.[9]

CONCLUSION

For the foregoing reasons, we **REVERSE** the State Election Commission's order and nullify the results of the 2002 Sales and Use Tax Referendum in Charleston County.

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

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[9] The County and State Election Commissions did not have a stake in this Referendum because their duties are ministerial in nature. "Neither the State Commission nor County Commission has any unilateral authority to shorten or change the wording of a question to fit a particular ballot form. State and County Commission, subject to statutory guidance, control the form of the ballot only as it pertains to physical characteristics of the ballot such as space limitations and the arrangement of names and issues." *Charleston County Sch. Dist.,* 336 S.C. at 184, 519 S.E.2d at 572.

Charleston County
Sales and Use Tax Referendum

QUESTION 1

TRAFFIC CONGESTION RELIEF, SAFE ROADS, AND CLEAN WATER FOR CHARLESTON

I approve a special sales and use tax in the amount of one-half (½) percent to be imposed in Charleston County for not more than 25 years, or until a total of $1,303,360,000 in resulting revenue has been collected, whichever occurs first. The spending program shall have an administrative cost of no more than five (5) percent, and all spending shall be subject to an annual independent audit to be made available to the public. The sales tax proceeds will fund the following projects for the following purposes:

Improving roads and road safety throughout Charleston County by building, repairing and maintaining highways, streets, bridges, sidewalks, curbs, gutters, drainage systems and other road amenities where required, including, but not limited to, a new Cooper River Bridge; reducing traffic congestion; discouraging over-development; preventing unnecessary highway and road expenses; and improving air quality by funding and improving mass transit projects operated by Charleston County and other governmental entities serving Charleston County, including, but not limited to, the Charleston Area Regional Transportation Authority and Berkeley-Charleston-Dorchester Rural Transportation Management Association (eighty-three percent of total revenue raised).

Protecting farms, forestland, and open space from over-development; safeguarding rivers, creeks, bays, drinking water and groundwater; providing new parks; and improving air quality by purchasing and improving parklands and otherwise preserving greenspace (seventeen percent of total revenue raised).

_____ YES _____ NO

TOTAL COST OF ALL PROJECTS: $1,303,360,000

Instructions to Voters: All qualifjhied electors desiring to vote in favor of the traffic congestion relief, safe roads, and clean water sales tax for the stated purpose shall vote "YES."

All qualified electors opposed to the traffic congestion relief, safe roads, and clean water sales tax for the stated purposes shall vote "NO."

QUESTION 2

I approve the issuance of not exceeding $113,000,000 of general obligation bonds of Charleston County, payable from the sales and use tax described in Question 1 above, maturing over a period not to exceed 25 years, to fund completion of projects from among the categories described in Question 1 above.

_____ YES _____ NO

Instructions to Voters: All qualified electors desiring to vote in favor of the issuance of bonds for the stated purposes shall vote "YES;" and

All qualified electors opposed to the issuance of bonds for the stated purposes shall vote "NO."

Charleston County
Sales and Use Tax Referendum

Project Plan

Total revenue = $1,303.26 million (levied until money raised or up to 25 years)

- 83 percent for roads, maintenance/drainage and mass transit = $1.08 billion
  - No more than 18 percent for mass transit.
    - CARTA
      - Replaces lost subsidy from SCANA/federal funds; replace buses
    - RTMA
      - Provides vehicle replacement costs
- 17 percent for parks and greenspace = $221.5 million
  - PRC to develop annual plan and administer:

Road List (based on 2002 dollar values)

- Regional Projects = $415.1 million
  - Cooper River Bridge
  - Mark Clark Expressway*
  - Resurfacing countywide secondary roads
  - I-26 improvements between Aviation and Ashley Phosphate
  - Glenn McConnell Parkway to county line*
  - **US 17 North/Johnnie Dodds Parkway#**
  - US 17 North/I-526 Interchange

* partial funding - to be matched with federal and/or state funds

- Annual CTC submissions = $75 million
  - Annual consideration of projects needed by:
    - S.C. Department of Transportation, area municipalities and the unincorporated areas of the county

- Local projects = $200.45 million**
  - Bees Ferry Road widening
  - Ben Sawyer Bridge rehabilitation
  - Bowman Road widening
  - Loop interchange Paul Cantrell/I-526
  - New Road - Highway 162/US 17
  - **New Road - Ashley Phos./Palmetto Pkwy.#**
  - New Road - I-26/Wescott
  - I-26 Interchange - Ashley Phosph./US78
  - Rivers Avenue overpass near Harley
  - IOP Connector widening - US 17/Rifle Range
  - **Folly Rd/Maybank intersection redesign#**
  - **Harborview improvements#**
  - **Loop interchange James Is. Conn./Folly Rd.#**
  - Middle Street road/drainage improvements
  - **Traffic circle-Bees Ferry/Glenn McConnell#**
  - **US 17 access ramp onto US 61#**

**some projects may or may not qualify for federal and/or state matching funds

- Future improvements = $159.45 million
  - Improvements for future projects, underfunded listed projects and projected highway needs

- Contingency projects = $160.45 million
  - Recommended projects which may be completed if funding allows:
    - Bainbridge Drive/I-26 connector
    - Folly Road redesign/improvements
    - Hungryneck Boulevard West – Phase II
    - McLeod/Sanders/Mary Ader extensions
    - SC 7/US 17/SC 61/SC 171 retrofit
    - US 17 North improvements – Phase II
    - SC 41 widening
    - Rivers Avenue widening
    - Wingo Way Connector to Patriots Point
    - Maybank Highway improvements - Johns Island

 # Projects that will be paid for through bond money if Question 2 of the referendum also passes.

STATEWIDE CONSTITUTIONAL AMENDMENTS

Instructions: Those voting in favor of the questions shall deposit a ballot by filling in the oval before the word "Yes", and those voting against the questions shall deposit a ballot by filling in the oval before the word "No".

Number 1

Must Section 16, Article X of the Constitution of this State relating to benefits and funding of public employee pension plans in this State and the equity securities investments allowed for funds of the various state-operated retirement systems be amended so as to delete the restrictions limiting investments in equity securities to those of American-based corporations registered on an American national exchange as provided in the Securities Exchange Act of 1934 or any successor act, or quoted through the National Association of Securities Dealers Automatic Quotations System or similar service?

Explanation of above:

Currently, the state constitution provides that state retirement system funds invested in the stock market must be invested only in American companies traded on the American stock exchanges.

A "yes" vote would allow the General Assembly to pass a law allowing additional stock market investments for state retirement system funds.

A "no" vote would maintain the current constitutional limitation on the stock market investments allowed for state retirement system funds.

◯ YES

◯ NO

Number 2

Must Section 11, Article X of the Constitution of this State relating to restrictions on pledging the credit of the State or its political subdivisions for a private purpose and the restrictions on the State or its political subdivisions from becoming a joint owner or stockholder of a business be amended so as to allow a municipality, county, special purpose district, or public service district of this State which provides firefighting service and which administers a separate pension plan for its employees performing this service to invest and reinvest the funds in this pension plan in equity securities traded on a national securities exchange as provided in the Securities Exchange Act of 1934 or a successor act or in equity securities quoted through the National Association of Securities Dealers Automatic Quotations System or similar service?

Explanation of above:

Currently, the state constitution prohibits a separate retirement system for firefighters operated by a local government from investing in the stock market.

A "yes" vote would allow such a separate firefighters' retirement system to invest in the stock market.

A "no" vote would maintain the current constitutional prohibition on stock market investments for a separate firefighters' retirement system operated by a local government.

◯ YES

◯ NO

QUESTION 1
TRAFFIC CONGESTION RELIEF, SAFE ROADS, AND CLEAN WATER FOR CHARLESTON

I approve a special sales and use tax in the amount of one-half (1/2) percent to be imposed in Charleston County for not more than 25 years, or until a total of $1,303,360,000 in resulting revenue has been collected, whichever occurs first. The spending program shall have an administrative cost of no more than five (5) percent, and all spending shall be subject to an annual independent audit to be made available to the public. The sales tax proceeds will fund the following projects for the following purposes:

Improving roads and road safety throughout Charleston County by building, repairing and maintaining highways, streets, bridges, sidewalks, curbs, gutters, drainage systems and other road amenities where required, including, but not limited to, a new Cooper River Bridge; reducing traffic congestion; discouraging over-development; preventing unnecessary highway and road expenses; and improving air quality by funding and improving mass transit projects operated by Charleston County and other governmental entities serving Charleston County, including, but not limited to, the Charleston Area Regional Transporation Authority and Berkeley-Charleston-Dorchester Rural Transporation Management Association (eighty-three percent of total revenue raised).

Protecting farms, forestland, and open space from over-development; safeguarding rivers, creeks, bays, drinking water and groundwater; providing new parks; and improving air quality by purchasing and improving parklands and otherwise preserving greenspace (seventeen percent of total revenue raised).

TOTAL COST OF ALL PROJECTS: $1,303,360,000

Instructions to Voters: All qualified electors desiring to vote in favor of the traffic congestion relief, safe roads, and clean water sales tax for the stated purposes shall vote "YES."
All qualified electors opposed to the traffic congestion relief, safe roads, and clean water sales tax for the stated purposes shall vote "NO."

◯ YES

◯ NO

QUESTION 2

I approve the issuance of not exceeding $113,000,000 of general obligation bonds of Charleston County, payable from the sales and use tax described in Question 1 above, maturing over a period not to exceed 25 years, to fund completion of projects from among the categories described in Question 1 above.

Instructions to Voters: All qualified electors desiring to vote in favor of the issuance of bonds for the stated purposes shall vote "YES." and
All qualified electors opposed to the issuance of bonds for the stated purposes shall vote "NO."

◯ YES

◯ NO

CITY OF CHARLESTON REFERENDUM

Shall the South Carolina Department of Revenue be authorized to issue temporary permits in the City of Charleston for a period not to exceed twenty-four hours to allow the possession, sale and consumption of alcoholic liquors in sealed containers of two ounces or less to bona fide nonprofit organizations and business establishments otherwise authorized to be licensed for sales?

◯ YES

◯ NO

TURN THE BALLOT OVER TO CONTINUE VOTING

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles Allen Simmons and Sandra Faye Simmons, as Guardians ad Litem for Chavis Allen Simmons, a minor under the age of eighteen years, Appellants,

v.

Greenville Hospital System, d/b/a Greenville Memorial Hospital, Respondent.

Appeal From Greenville County
Joseph J. Watson, Circuit Court Judge

Opinion No. 25708
Heard February 19, 2003 - Filed August 25, 2003

REVERSED

Michael Parham, S. Blakely Smith, and William L. Dodson, Jr., all of Parham, Smith, & Dobson, of Greenville, for Appellants.

G. Dewey Oxner, Jr., Sally McMillan Purnell, and J. Ben Alexander, all of Haynsworth Sinkler Boyd, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: Appellants, Charles Allen Simmons and Sandra Faye Simmons ("Appellants"), appeal from the circuit court's grant of summary judgment for Respondent, Greenville Hospital System, in this declaratory judgment action.

FACTUAL / PROCEDURAL BACKGROUND

This appeal arises from the settlement of a medical malpractice claim that Appellants brought against Respondent on behalf of their minor child, Chavis Allen Simmons. Chavis was born prematurely at Respondent hospital on April 24, 1992. Chavis was admitted to Respondent's Neonatal Intensive Care Unit ("NICU") and placed on a ventilator due to respiratory distress. While in the NICU, Chavis became infected with *Flavobacterium Memingosepticum* ("FM"), a highly virulent organism. Chavis suffered permanent neurological injury as a result of the infection.

On May 8, 1998, Appellants filed suit against Respondent alleging negligence in the care and treatment of Chavis.[1] After filing an answer denying all allegations of negligence, Respondent offered to settle the claim and entered into negotiations with Appellants. The parties agreed to execute a settlement and release in which they stipulated that Chavis's damages totaled $1.5 million, but recognized that a dispute existed regarding the applicability of the liability caps set forth in the South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-120 (Supp. 1994).[2] Respondent contended its

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[1] Appellants filed suit both as individuals and as guardians for their minor child. The Appellants' individual suits were dismissed because they were filed after the expiration of the applicable statute of limitations, but the suit brought on behalf of Appellants' minor child survived.

[2] S.C. Code Ann. § 15-78-120 (Supp. 1994) states, in part, as follows:

> (a) For any action or claim for damages brought under the provisions of this chapter, the liability shall not exceed the following limits:

liability was limited to the $250,000 cap imposed by § 15-78-120(a)(1). Accordingly, Respondent paid Appellants $250,000 with the understanding that either party was entitled to file a declaratory judgment to determine the applicability of the caps.

Appellants filed for declaratory judgment. Thereafter, both parties filed motions for summary judgment. The trial court found that the caps within

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> (1) Except as provided in Section 15-78-120(a)(3), no person shall recover in any action or claim brought hereunder a sum exceeding two hundred fifty thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.
>
> (2) Except as provided in Section 15-78-120(a)(4), the total sum recovered hereunder arising out of a single occurrence shall not exceed five hundred thousand dollars regardless of the number of agencies or political subdivisions or claims or actions involved.
>
> (3) No person may recover in any action or claim brought hereunder against any governmental entity and caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, a sum exceeding one million dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.
>
> (4) The total sum recovered hereunder arising out of a single occurrence of liability of any governmental entity for any tort caused by any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, may not exceed one million dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

§ 15-78-120(a)(1) applied to Appellants' cause of action and limited Respondent's liability to the $250,000 Respondent had already paid Appellants. Appellants raise the following issue on appeal:

> Did the circuit court err in finding that the $250,000 liability cap in S.C. Code Ann. § 15-78-120(a)(1) limits Appellants' recovery to $250,000?

LAW /ANALYSIS

In 1986, the Legislature established statutory caps to limit the State's liability when it enacted the South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-120(a)(1) (Supp. 1987). In 1988, the Legislature adopted the Uniform Contribution Among Joint Tortfeasor's Act ("Uniform Contribution Act") which purported to provide an unlimited right of contribution for joint tortfeasors who have paid more than their pro rata share of common liability. S.C. Code Ann. § 15-38-20(B) (Supp. 1993). In a 1994 decision, *Southeastern Freight Lines v. City of Hartsville,* 313 S.C. 466, 443 S.E.2d 395 (1994), this Court held that the unlimited pro rata liability required by the Uniform Contribution Act was inconsistent with the caps on liability imposed by § 15-78-120(a)(1). Accordingly, the Court held that § 15-78-120(a)(1) had been impliedly repealed in 1988 with the enactment of the Uniform Contribution Act.

The Legislature reacted swiftly to the *Southeastern* decision by passing 1994 Act. No. 497, Part II, § 107(B)(1) ("1994 Act"). The 1994 Act provided,

> The provisions of Section 15-78-120(a)(1) of the 1976 Code are reenacted and made retroactive to April 5, 1988, the effective date of the South Carolina Uniform Contribution Among Joint Tortfeasors Act, except for causes of action that have been ***filed*** in a court of competent jurisdiction before July 1, 1994.

Id. (emphasis added).[3]

Southeastern did not address whether subsections (a)(3) & (a)(4) of § 15-78-120 were also impliedly repealed by the Uniform Contribution Act.[4] In *Dykema v. Carolina Emergency Physicians,* 348 S.C. 549, 560 S.E.2d 894 (2002), this Court found that subsections (a)(3) & (a)(4) had been impliedly repealed by the enactment of the Uniform Contribution Act. The *Dykema* court found that while the 1994 Act reset the caps within subsection (a)(1) of § 15-78-120, it did not reset the caps within subsections (a)(3) & (a)(4). *Dykema.* Apparently the Legislature had realized their error already: in 1997, the Legislature passed an Act reinstating § 15-78-120, *in toto*.[5] 1997 Act No. 155, Part II, § 55(C) ("1997 Act"). The 1997 Act contained the following statement concerning its applicability:

> Except where otherwise provided, this section takes effect upon approval by the Governor and applies ***to claims or actions pending on that date or thereafter filed***, except where final judgment has been entered before that date.

Id. (emphasis added).

In *Steinke v. S.C. Dept. of Labor,* the Court examined the Legislature's attempt to reinstate the caps in the 1997 Act with respect "to claims or actions pending," in addition to those "thereafter filed." 336 S.C. 373, 520 S.E.2d 142 (1999). In *Steinke*, the accident that was the subject of the plaintiffs' suit (the death of their son) occurred in 1993, and the plaintiffs filed their complaint on June 29, 1994, two days before the 1994 Act's

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[3] The 1994 Act recognized that a window of unlimited liability existed for cases ***filed*** between April 5, 1988, (the effective date of the Uniform Contribution Act) and July 1, 1994.

[4] Subsections (a)(3) & (a)(4) of § 15-78-120 limit recovery in suits against licensed physicians and dentists employed by governmental entities.

[5] In addition, the 1997 Act amended the original § 15-78-120 by increasing the liability caps. 1997 Act No. 155, Part II, § 55(D).

reinstatement of the caps became effective. As such, the 1994 amendment did not apply to plaintiffs' claim, but the defendant contended that the caps within the 1997 Act did apply, and that they limited plaintiffs' recovery.

This Court disagreed. Based on the Court's prior decision in *Lindsay v. Nat'l Old Line Ins. Co.,* 262 S.C. 621, 207 S.E.2d 75 (1974), the *Steinke* Court found that the Legislature had attempted to reset the caps retroactively, which would effectively "reverse" this Court's *Southeastern* decision. *Steinke,* 336 S.C. at 403, 520 S.E.2d at 157-58. The Court quoted the following language from *Lindsay* for support:

> Subject to constitutional limitations, the legislature has plenary power to amend a statute. However, a judicial [interpretation] of a statute is determinative of its meaning and effect, and any subsequent legislative amendment to the contrary will only be effective from the date of its enactment and cannot be applied retroactively.

Steinke, 336 S.C. at 402, 520 S.E.2d at 157 (quoting *Lindsay,* 262 S.C. 621, 628-29, 207 S.E.2d 75, 78 (1974) (citation omitted)).[6] Because the *Steinke* claim was **filed** before either the 1994 or 1997 Act became effective, the Court found that the defendant's liability was not limited by the caps.

The following quote from the *Steinke* opinion has spawned the question presently before the Court: "The Legislature may, of course, do what it did in 1994, which was to resolve the statutory conflict and reinstate the statutory caps in ***future cases***." *Id.* at 403, 520 S.E.2d at 157-58 (emphasis added). The case before us now calls for a final decision on whether **"future cases"** includes all cases that have not been filed regardless of when they **arose or accrued**. In other words, whether the liability caps within the 1994 and 1997 Acts are applicable to claims which **arose or accrued** prior to each Act's

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[6] In *Lindsay,* the Court held that the Legislature's attempt to declare, by retroactive amendment, that insurance companies were entitled to certain investment credits, after this Court had interpreted the relevant statutes to mean that insurance companies were not entitled to the credits, violated the separation of powers doctrine.

effective date, but which were not **filed** until after the effective date. This precise question was not resolved in *Steinke* or *Dykema* because the claims in both *Steinke* and *Dykema* were **filed** before the effective date of the 1994 and 1997 Acts reinstating the applicable caps by the Legislature. In Appellants' case, the claim **accrued** before the effective date of either Act, but was not **filed** until 1998, after both Acts became effective.

Respondent argues that the Court's language in *Steinke* emphasizing the filing date supports a holding that the date of filing is the only significant date for purposes of determining retroactivity. We disagree and believe such a finding would betray logic.[7] As noted, the preceding cases were filed before the effective date of the relevant Act, and so the date of accrual was not significant. At the time Appellants' claim arose – when Chavis was infected shortly after his birth in 1992 – there were no statutory caps in place under the rule of *Southeastern.* Therefore, the Legislature's attempt to reach back and change the status of such claims that arose prior to the Legislature's 1994 reinstatement of the liability caps in § 15-78-120(a)(1), and of § 15-78-120 *in toto* in 1997, is, by definition, retroactive, and violates the doctrine of separation of powers. *Steinke; Lindsay.* The Legislature had authority to reinstate the caps, but it could only do so prospectively, with respect to those claims that **arose or accrued** after the effective date of the reenactments.

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[7] In addition, the Court's holding today is consistent with its prior opinion in *Moore v. Berkeley County,* 290 S.C. 43, 348 S.E.2d 174 (1986). In *Moore*, the Court was asked to interpret the following language it used when it abolished the doctrine of sovereign immunity in *McCall v. Batson,* 285 S.C. 243, 246, 329 S.E.2d 741, 743 (1985): "[s]overeign immunity will not bar recovery in any case currently pending or in those filed on or before July 1, 1986, provided the defendant has liability insurance coverage. Recovery shall not exceed the limits of the liability insurance coverage," and "[s]overeign immunity shall not apply to any case filed after July 1, 1986." The *Moore* Court held that "the Court intended that sovereign immunity shall not bar recovery in any case **pending** or which **arose** prior to July 1, 1986." 290 S.C. at 45, 348 S.E.2d at 176 (emphasis added).

CONCLUSION

For the foregoing reasons, we **REVERSE** the circuit court's finding that the liability caps within S.C. Code Ann. § 15-78-120(a)(1) apply to Appellants' claim.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gaylan and Catherine Williamson, individually, and as Guardians ad Litem for Cody Williamson, a minor, Respondents,

v.

The South Carolina Insurance Reserve Fund and the Spartanburg County Health Services District, Inc., Appellants.

Appeal From Spartanburg County
Donald W. Beatty, Circuit Court Judge

Opinion No. 25709
Heard June 26, 2002 - Filed August 25, 2003

AFFIRMED IN PART; REVERSED IN PART

Andrew F. Lindemann and William H. Davidson, II, of Davidson, Morrison and Lindemann, P.A., of Columbia, and William U. Gunn and Ginger D. Goforth, of Holcombe, Bomar, Gunn and Bradford, P.A., of Spartanburg, for Appellants.

Michael Parham and S. Blakely Smith, of Parham & Smith LLC, of Greenville, for Respondents.

CHIEF JUSTICE TOAL: This is an appeal from the circuit court. Respondents brought a declaratory judgment action to determine a number of issues involving interpretation of the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 through 200 ("TCA"). The trial court found that Respondents were entitled to collect the full $2.5 million in stipulated damages, and that the South Carolina Insurance Reserve Fund ("the Fund") was obligated, under the insurance policy it issued to Spartanburg County Health Services District, Inc., ("the District") to pay this entire amount. The Fund and the District appealed.

FACTUAL / PROCEDURAL BACKGROUND

Gaylan and Catherine Williamson filed suit against the District on October 20, 1997, after Catherine gave birth to a son, Cody, on January 3, 1997. The Williamsons alleged two doctors employed by the District, Drs. Kiesau and Davis, had rendered negligent professional services during the child's delivery, as a proximate result of which, Cody was born with severe birth defects. The Williamsons brought two suits, one as guardians *ad litem* for Cody, and a second suit in their own right, seeking damages they had incurred and would incur in the future in caring for Cody. The District was defended in the suits by its liability insurance provider, the Fund.

The parties settled the underlying negligence suits. Cody's damages were stipulated to be $1.5 million, and the Williamsons' damages were set at $1 million. Pursuant to the settlement agreement, the Fund paid the Williamsons $1 million at the time of settlement, $800,000 to be applied to Cody's total damages of $1.5 million, and $200,000 to be applied to the Williamsons' $1 million damages. The settlement agreement contemplated that Respondents would subsequently file a declaratory judgment to determine:

(1) the District's total monetary liability under the TCA;

(2) whether the underlying acts of Drs. Kiesau and Davis constituted more than a single "occurrence" under the TCA;

(3) whether the liability limits contained in S.C. Code Ann. § 15-78-120 applied to Respondents' claims; and,

(4) whether the Fund was obligated to pay more than $1 million under the insurance policy.

The settlement further stipulated that the District's liability for damages would extend only to the limits of insurance coverage provided by the Fund. The parties agreed that resolution of the declaratory judgment action involved only questions of law, and each filed a motion for summary judgment. The trial court determined the statutory caps at S.C. Code Ann. § 15-78-120 (a)(3) & (a)(4) (Supp. 1996) applied to Respondents' causes of action. The court found further that the Williamsons' loss, as parents, was separately cognizable from Cody's loss. Thus, the Williamsons were entitled to recover a maximum of $1 million per occurrence, and Cody was entitled to a maximum recovery of $1 million per occurrence.

The trial court found that Respondents had established two separate "occurrences" for purposes of the TCA, one "occurrence" arising from Dr. Kiesau's negligence, and a second "occurrence", separate and apart from the first, arising from Dr. Davis's negligence.

Finally, the trial court determined that pursuant to S.C. Code Ann. § 15-78-140 (a)[1] (effectively repealed on June 14, 1997), the State Budget and Control Board was obligated to provide insurance coverage, through the Fund, up to the amount of the District's liability

[1]That section provided: "It is the duty of the Budget and Control Board to cover risks for which immunity has been waived under the provisions of this chapter by the purchase of insurance as authorized in § 15-78-150." S.C. Code Ann. § 15-78-140 (a) (Supp. 1996).

regardless of any liability limits contained in the insurance policy, or the statutory caps.

The trial court's ruling permitted Respondents to recover from the Fund the entire amount of the stipulated damages of $2.5 million, or $1.5 million above that already paid pursuant to the settlement agreement.

With the exception of the trial court's determination that the monetary caps applied to Respondents' claims, Appellants challenge all of the holdings above. Respondents urge, *inter alia*, pursuant to Rule 220 (c), SCACR, that we should affirm the judgment of the trial court because the caps do not apply to their claims. The following issues are before the Court:

Respondent's Issue:

I. Did the trial court err in determining that the statutory caps apply to Respondents' claims?

Appellants' Issues:

II. Did the trial court err in ruling that the child's claim for bodily injuries and the parents' claim for medical expenses entitled each party to an aggregate cap of $1 million per single occurrence?

III. Did the trial court err in ruling the injuries and damages sustained by the Respondents were the result of two separate "occurrences"?

IV. Did the trial court err in ruling that the Fund was obligated, under the insurance policy it issued to the District to pay the entire amount of the stipulated damages?

LAW /ANALYSIS

I. Statutory Caps

Respondents argue, as an additional basis upon which to affirm the judgment below that the monetary caps contained in the TCA do not apply to their causes of action.[2] We agree.

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[2] At the time pertinent to this appeal, § 15-78-120(a)(3) & (a)(4) (Supp. 1996) provided in relevant part:

> (a) For any action or claim for damages brought under the provisions of this chapter, the liability shall not exceed the following limits:
> . . .
>
> (3) No person may recover in any action or claim brought hereunder against any governmental entity and caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, a sum exceeding one million dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.
>
> (4) The total sum recovered hereunder arising out of a single occurrence of liability of any governmental entity for any tort caused by any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, may not exceed one million dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

In *Southeastern Freight Lines v. City of Hartsville*, 313 S.C. 466, 443 S.E.2d 395 (1994), we held the Legislature's adoption of the Uniform Contribution Among Joint Tortfeasor's Act ("Uniform Contribution Act") impliedly repealed the statutory tort claims cap set forth in section 15-78-120 (a)(1), which was adopted by the Legislature as part of the South Carolina Tort Claims Act in 1986. We recently recognized, in *Dykema v. Carolina Emergency Physicians*, 348 S.E.2d 549, 560 S.E.2d 894 (2002), that the statutory caps set forth in 15-78-120(a)(3) & (a)(4) were likewise impliedly repealed by adoption of the Uniform Contribution Act. Accordingly, the statutory caps of subsections (a)(3) & (a)(4) were repealed upon adoption of the Uniform Contribution Act, April 5, 1988. Although the Legislature reenacted the provisions of section 15-78-120 (a)(1) with 1994 Acts No. 497, Part II, Section 107, this Act did not reenact subsections (a)(3) & (a)(4). *Dykema*.

In 1997, the Legislature enacted 1997 Act No. 155, Part II, § 55, in which it reenacted section 15-78-120, in toto. The reenactment of section 15-78-120 states that it takes effect upon approval by the Governor [June 14, 1997] and "applies to claims or actions **pending** on that date or thereafter **filed**, except where final judgment has been entered before that date." 1997 Act No. 155, Part II, § 55(F).

However, in *Steinke v. S.C. Dep't of Labor*, 336 S.C. 373, 520 S.E.2d 142 (1999), we addressed the Legislature's 1997 reenactment of section 15-78-120, and its attempt to reinstate the caps with respect to claims which were then pending. We held that "a judicial [interpretation] of a statute is determinative of its meaning and effect, and any subsequent legislative amendment to the contrary will only be effective from the date of its enactment and cannot be applied retroactively." 336 S.C. at 402, 520 S.E.2d at 157. Accordingly, we held the legislature could not retroactively reenact the caps to apply to claims **filed** prior to amendment. *Id. Steinke* went on to hold, however, that the Legislature was free to reinstate the statutory caps in **future cases**.

Although *Steinke* held the Legislature could not retroactively reinstate caps with respect to claims **filed** prior to June 14, 1997, it did not address whether such caps could be reinstated with respect to other "claims or actions pending." We finally resolved this question in *Simmons v. Greenville Hospital System,* Op. No. 25708 (S.C.Sup.Ct. filed August 25, 2003) (Shearouse Adv. Sh. No. 32). In *Simmons*, the plaintiffs' cause of action **accrued** in 1992, prior to the effective date of both the 1994 and 1997 reenactments of the caps, but was not **filed** until after the respective effective dates in 1998. Because the caps were not in effect at the time the plaintiffs' claim **accrued**, we held that the Legislature could not "reach back and change the status" of plaintiffs' claims without violating the doctrine of separation of powers. *Id.* In short, we held that the "Legislature had authority to reinstate the caps, but it could only do so prospectively, with respect to those claims that **arose or accrued** after the effective date of the reenactments." *Id.*

Here, the negligent act or acts occurred on January 3, 1997, but both complaints (Cody's complaint and the Williamsons' complaint) were **filed** on October 20, 1997. The claims **arose or accrued** prior to the effective date of the 1997 Act that reenacted subsections (a)(3) & (a)(4) of § 15-78-120, but were not **filed** until after the effective date of the 1997 Act. As we determined in *Simmons*, the date of accrual is the determinative date. Both Cody's and the Williamsons' claims **arose or accrued** before the reinstatement of the caps within subsections (a)(3) & (a)(4) took effect. Therefore, neither party's recovery is limited by the caps within the TCA, and the District must pay the parties the remainder of the stipulated damages.

II. Aggregate Cap

Appellants contend the trial court erred in holding that the Williamsons and Cody could each recover $1 million per occurrence. Based on our finding that the liability caps within § 15-78-120(a)(3) & (a)(4) are not applicable in this case, it is unnecessary to address this issue.

III. Number of Occurrences

Appellants argue that the trial court erred in ruling the injuries and damages sustained by the Respondents were the result of two separate "occurrences". Our finding that § 15-78-120(a)(3) & (a)(4) has no application to this case makes it unnecessary for us to address this issue also.

IV. The Fund's Obligation

Appellants assert that the trial court erred in holding the Fund must provide the District with coverage in excess of $1 million per occurrence. We disagree.

The "insuring agreement" portion of the contract of insurance between the District and the Fund provides,

> The Fund will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of an occurrence which results in Injury to any person.

In addition, the policy contained a section entitled "Limits of Liability" which read as follows:

> (1) Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain Injury, or (3) claims made or suits brought on account of Injury the Fund's liability is limited as follows.
>
> (2) The total liability of the Fund for all damages as the result of any Occurrence including damages for care and loss of services, because of Injury sustained by one or more persons or organizations, shall not exceed the limit of liability stated in the declarations as applicable to "each Occurrence." The limits under Coverage "A" and Coverage "B" are separate limits and under no circumstances would both limits apply to one Occurrence.

(3) For any action or claim brought under [the Act], the liability of the Fund shall not exceed the following limits:

Coverage A

(a) No person shall recover in any action or claim a sum exceeding 250,000 dollars because of a loss arising from a single Occurrence regardless of the number of agencies or political subdivisions involved.

(b) The total sum recovered arising out of a single Occurrence shall not exceed 500,000 dollars regardless of the number of agencies involved.

Coverage B

(a) No person may recover in any action or claim brought hereunder against any governmental entity and caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, a sum exceeding one million dollars because of loss arising from a single Occurrence regardless of the number of agencies or political subdivisions involved.

(b) The total sum recovered hereunder arising out of a single occurrence of liability of any governmental entity for any tort caused by any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, may not exceed one million dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

(emphasis added). Despite these liability limits in the policy, the trial court held that the Fund was obligated to provide coverage to the extent of the

stipulated damages. According to the trial court, § 15-78-140 (Supp. 1996) mandated this result.

Section 15-78-140(a) provides,

> It is the duty of the Budget and Control Board to cover risks for which immunity has been waived under the provisions of this chapter by the purchase of insurance as authorized in § 15-78-150.

S.C. Code Ann. § 15-78-140(a) (Supp. 1996). This provision establishes a duty for the Budget and Control Board to purchase insurance against risks for which immunity has been waived. As discussed in Part I of this opinion, the TCA waived this state's immunity up to the monetary limits defined in § 15-78-120. The limits of liability language within the insurance policy was taken verbatim from § 15-78-120. However, on the date the present action accrued in January 1997, the liability limits within subsections (a)(3) & (a)(4) were effectively repealed and had yet to be reinstated by the 1997 Act. *See* Part I, *infra*; *Dykema; Steinke.*

Accordingly, there was no limit on the District's liability for the negligence of one of its physicians on the date this claim **arose or accrued**, and the District is legally obligated to compensate Cody and the Williamsons for their stipulated damages. In turn, the Budget and Control Board was obligated to insure against risks for which liability had been waived. This statutory duty, reiterated within the policy's promise "to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages," obligates the Fund to cover the total amount of the stipulated damages against the District.

CONCLUSION

For the foregoing reasons, we **AFFIRM IN PART AND REVERSE IN PART.**

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

The Supreme Court of South Carolina

In re: Amendments to Rule 31(f), Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 31(f) of the Rules for Lawyer Disciplinary Enforcement to (1) emphasize that attorneys appointed pursuant to Rule 31(a), RLDE, Rule 413, SCACR, to protect the interests of clients in attorney disciplinary matters are, with the exception of basic costs set forth in the rule, expected to serve without compensation as a service to the legal profession; (2) give this Court the discretion to award additional costs in certain situations and to determine a reasonable amount to be awarded; (3) set forth the current rates which the Court has determined are reasonable for attorney's fees, support staff and copies; and (4) provide that costs awarded by the Court are to be paid by the Lawyers' Fund for Client Protection only if there are not sufficient funds remaining in the lawyer's accounts. Finally, the rule is amended to give this Court the ability to order the lawyer to reimburse the

Lawyers' Fund for Client Protection at any time. These amendments shall be effective immediately. A copy of the rule, as amended, is attached.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 21, 2003

AMENDMENTS TO RULE 31(f), RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, RULE 413, SCACR

(f) Compensation and Expenses. With the exception of reasonable and necessary expenses, such as postage, telephone bills, copies, supplies and the cost of publishing legal notice in the newspaper, an appointed attorney shall serve without compensation as a service to the legal profession. However, the Supreme Court may order that the appointed attorney be reimbursed a reasonable amount for other expenses, such as the appointed attorney's time or the time of support staff, when it determines that extraordinary time and services were necessary for the completion of the required duties or when the appointment has worked a substantial hardship on the appointed attorney's practice. The Supreme Court shall determine the reasonableness of necessary expenses and other expenses.[1] Expenses which are approved and awarded by the Supreme Court shall be paid from funds remaining in the lawyer's accounts. If no such funds exist, payment shall be made from the Lawyers' Fund for Client Protection under Rule 411, SCACR. If the appointed attorney's expenses are paid by the Lawyers' Fund for Client Protection, the Supreme Court may order the lawyer to reimburse that Fund.

[1] In an effort to balance the need to preserve the Lawyers' Fund for Client Protection with the need to, in certain situations, reimburse attorneys appointed pursuant to Rule 31, RLDE, Rule 413, SCACR, the following rates are currently established for reimbursement of the appointed attorney's fees, support staff costs and the cost of copies, but are subject to change at the discretion of the Court.

Appointed Attorney's Fees	$50.00 per hour
Support Staff	$10.00 per hour
Copies	$0.10 per page

The Supreme Court of South Carolina

RE: Amendments to Rule 413, SCACR, Rules for Attorney Disciplinary Enforcement and Rule 502, SCACR, Rules for Judicial Disciplinary Enforcement.

Order

Pursuant to Art.V, § 4, of the South Carolina Constitution the attached amendments are adopted effective September 1, 2003.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 20, 2003

Amendments to Rule 502, RJDE, SCACR

(1) Rule 2 is amended by relettering sections (b) through (aa) to (c) through (bb) and adding a new section (b) to read as follows:

> **(b) Closed, But Not Dismissed:** a manner of disposing of a matter where a panel of the Commission makes a finding that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the judge is deceased, disappeared, incarcerated, physically or mentally incapacitated, or removed from judicial duties, or for other good cause**.** If the judge files a written objection with the Commission and serves a copy of that objection on disciplinary counsel within 10 days of service of notice that the matter was closed, but not dismissed, the matter shall be deemed reopened and in the full investigation phase. Any objection need not contain any grounds for objecting. Before a matter can be reopened after being closed, but not dismissed, an investigative panel of the Commission must make a finding that there has been a change in the circumstances that were the basis for the matter to be closed, but not dismissed, or that there is other good cause for it to be reopened. Before a motion can be considered by an investigative panel of the Commission to reopen a matter that has been previously closed, but not dismissed, disciplinary counsel shall serve a copy of the motion to do so containing the grounds to reopen on the judge and then the judge shall have 10 days to respond thereto. Disciplinary counsel shall notify both the judge and the complainant when a matter is closed, but not dismissed and when a closed, but not dismissed matter is reopened. If the panel declines to reopen the matter, disciplinary counsel shall so advise the judge.

(2) The "and" at the end of Rule 4(f)(2) and the period after Rule 4(g)(3) are deleted; "and," is added after Rule 4(f)(3); and new subsection 4(f)(4) is added to read as follows:

> **(4)** declare, after proper notice, a matter closed, but not dismissed, after the filing of formal charges.

(3) The "and" at the end of Rule 4(g)(3) and the period after Rule 4(g)(4) are deleted; "and," is added after Rule 4(f)(4); and new subsection 4(g)(5) is added to read as follows:

> **(5)** declare, after proper notice, a matter closed, but not dismissed, after the filing of formal charges.

(4) Rule 5(b) is amended by deleting the "and" at the end of Rule 5(b)(5) renumbering Rule 5(b)(6) as Rule 5(b)(7) and adding the following subsection:

(6) initiate and prosecute proceedings before the Commission and the Supreme Court to enforce orders related to disciplinary proceedings or related to the conduct of judicial duties by judges and to seek restraining orders and sanctions in connection with violations thereof; and,

(5) Rule 7 is amended by deleting the period after Rule 7(a)(7) and adding the following section:

(8) willfully fail to comply with the terms of a finally accepted deferred disciplinary agreement or any terms of a finally accepted agreement for discipline by consent.

(6) Rule 9 is amended by adding "when formal charges have been filed" to the end of the first sentence of the Rule.

(7) Rule 10 is amended by adding the following two sentences to the present Rule:

After appearing as counsel for a judge in a matter under these rules, counsel for the judge may only withdraw upon leave of the chair, vice chair, or a panel of the Commission after 10 days notice to disciplinary counsel and the judge or, prior to formal charges having been filed, upon stipulation of the judge, the withdrawing counsel and disciplinary counsel. Provided, after a matter has been forwarded to the Supreme Court for action, counsel can only withdraw from representation upon leave of the Supreme Court after due notice to the client and disciplinary counsel.

(8) Rule 11 is amended by adding the following before the last sentence of the Rule:

and the chair and vice chair may entertain requests for permissive disclosure pursuant to Rule 12(c) and requests for subpoenas for investigation pursuant to Rule 15(b)(1) made by disciplinary counsel without notice to the judge. Where disciplinary counsel makes a request to the chair or vice chair pursuant to either Rule 12(c) or 19(b)(1) without notice to the judge, the request shall so state and set forth the reason that notice is not being given.

(9) Rule 12(b) is amended by adding "or the Supreme Court" to the first clause of the second sentence of the rule and adding "inclusive of a letter of caution or

admonition issued after the filing of formal charges" after the second clause of the Rule 12(b).

(10) Rule 12(c) is amended by replacing the period at the end of Rule 12(c)(3) with a semi-colon and adding the following two subsections:

(4) to persons from whom and entities from which it appears that a judge has misappropriated monies or other property when the chair or vice-chair or a panel of the Commission has determined that the disclosure of the information will tend to prevent further misappropriation or likely facilitate restitution, recovery, or compensation; or,

(5) to the appropriate disciplinary authority in any jurisdiction in which a judge is admitted to practice law or has applied for admission to practice law concerning a matter where there is evidence the judge committed misconduct under any lawyer or judicial disciplinary rules of that jurisdiction or where a judge receives any sanction under Rule 7(b).

(11) Rule 12 is amended by adding the following subsection (f):

(f) Permissive disclosure by the parties. Either party may disclose in proceedings before a hearing panel statements and other evidence, gathered prior to the matter becoming public after the filing of formal charges, that were subject to discovery under Rule 25 to the extent admissible under South Carolina Rules of Civil Procedure or South Carolina Rules of Evidence.

(12) Rule 14(b)(2) is renumbered 14(b)(4) and the following sub-sections are added to the Rule:

(2) By Disciplinary Counsel. Disciplinary counsel may extend the time for responses due from a judge under Rules 19(b)(1), 19(c)(3), and 23(a) for one or more periods not to exceed 30 days in the aggregate for each.

(3) By the Parties. Disciplinary counsel and the judge may, by written agreement, extend the time to respond under 19(b)(1), 19(c), or 23(a) after the execution and delivery by both parties of an agreement for discipline by consent or deferred disciplinary agreement for the duration of the period the agreement is awaiting a final disposition and for a period of 30 days thereafter if the Agreement is not accepted.

(13) The first sentence of Rule 15(b)(1) is amended by deleting the word "and" before the word "documents" and adding the following after the word "documents": "(whether in typed, printed, written, digital, electronic, or other format), and other tangible evidence". Further the last sentence of present Rule 15(b)(1) is deleted.

(14) The first sentence of Rule 15(b)(2) is amended by deleting the word "and" before the word "documents" and adding the following after the word "documents": "(whether in typed, printed, written, digital, electronic, or other format), and other tangible evidence"; by adding "or direct disciplinary counsel to subpoena witnesses or documents and provide the subpoenaed information to the investigative panel" to the end of the second sentence; and, by deleting the final sentence of present Rule 15(b)(2).

(15) Rule 15 is amended by adding the following section (f):

(f) Subpoena Pursuant to Law of Another Jurisdiction. Whenever a subpoena is sought in this State pursuant to the law or disciplinary rules of another jurisdiction for use in lawyer or judicial disciplinary or disability proceedings, and where the issuance of the subpoena has been duly approved under the applicable laws or rules of the other jurisdiction, the chair or vice-chair or a panel of the Commission upon a showing of good cause, may issue a subpoena to compel the attendance of witnesses and the production of documents in the county where the witness resides or is employed or elsewhere in this state as agreed by the witness. Service, enforcement, or challenges to such subpoenas shall be as provided in these rules.

(16) Sections (c) and (d) of Rule 17 are renumbered (d) and (e) and a new section (c) is added to read as follows:

(c) Failure to Respond to Notice of Full Investigation, Subpoena, or Notice of Appearance. Upon receipt of sufficient evidence demonstrating that a judge has failed to fully respond to a notice of full investigation, has failed to fully comply with a proper subpoena issued in connection with an investigation or formal charges, has failed to appear at and fully respond to inquiries at an appearance required pursuant to Rules 19(c)(4) or (5), or has failed to respond to inquiries or directives of the Commission or the Supreme Court, the Supreme Court may place that judge on interim suspension.

(17) Rule 19(b)(1) is amended by adding the following sentence at the end of the subsection: The judge shall file a written response with disciplinary counsel to a request within 15 days of notice to do so from disciplinary counsel.

(18) Rule 19(b)(3) is amended by adding the following after the second clause "issue a letter of caution without a finding of misconduct," and by adding the following after the word "caution" in the next clause "with a finding of minor misconduct".

(19) Rule 19(c) is amended by replacing "20" with "30" in the first sentence of subsection (1) and adding the following new subsection (6):

(6) Any person giving testimony pursuant to either rule 19(c)(4) or 19(c)(5) shall be entitled to obtain a transcript of his or her testimony from the transcribing court reporter upon paying the subscribed charges unless otherwise directed by an investigative panel for good cause shown.

(20) Rule 19(d)(3) is amended to read: Disciplinary counsel shall promptly notify the judge of the action the investigative panel has taken.

(21) Rule 19 is amended by adding the following section (e):

(e) Subsequent Complaints. Provided, not withstanding the other provisions of this Rule 19, where a judge is already subject to a pending full investigation, disciplinary counsel may include information received related to additional misconduct in a subsequent complaint or revealed in an investigation in a notice of full investigation, an amended notice of full investigation or a supplemental notice of full investigation without leave of the Commission and disciplinary counsel may dispense with seeking an initial response regarding such new information from the judge as would otherwise be required by Rule 19(b)(1).

(22) Rule 20 is amended by deleting everything after the work "purpose " in the first sentence of the rule and replacing it with the following:

unless the complaint is reopened by the Commission. A complaint dismissed prior to the filing of formal charges may be re-opened by an investigative panel upon motion of disciplinary counsel upon a finding by the investigative panel that there is new information concerning the matter dismissed, an additional complaint has been filed against the same judge involving related or similar allegations, or other good cause. Prior to a motion to reopen being decided, a copy of the motion to reopen containing the grounds therefor shall be served on the judge by disciplinary counsel, and the judge shall then have 10 days thereafter to file a written response with the Commission. The judge and the complainant shall be notified by disciplinary counsel as to the panel's decision on the motion to re-open. A matter reopened shall be deemed in the stage of investigation it was in when dismissed except as the investigative panel might otherwise direct.

(23) Rule 21 is amended by inserting the following sentence after the first sentence of Rule 21(c): "Provided, if formal charges have been filed but not heard, an investigative panel can consider the proposed agreement and affidavit if the parties both agree in writing." and adding new section 21(g) which reads as follows:

(g) Briefs and Oral Arguments. The Supreme Court may require the parties to submit briefs or participate in oral arguments in connection with the agreement. Either the judge or disciplinary counsel may move before the Supreme Court for permission for the parties to file briefs, to have oral arguments, or both in connection with the agreement**,** but the Supreme Court, in its discretion, may proceed to take action on the agreement without briefs, without oral arguments, or without either, not withstanding a request from one or both of the parties.

(24) Rule 25(b) is amended by having Rule 25(b)(1) read: "**(1)** non-privileged evidence relevant to the formal charges, documents to be presented at the hearing, witness statements, and summaries of interviews with witnesses who will be called at the hearing (for purposes of this paragraph, a witness statement is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded); and,"; and by adding a new sub-section (3) which reads as follows:

(3) Provided**,** copies of transcripts of testimony taken by a court reporter pursuant to Rule 15(b) or Rule 19(c) may be obtained by the parties from the court reporter at the expense of the requesting party and need not be made available to the requesting party by the opposing party unless not otherwise available or otherwise directed by the Commission under 25(h).

(25) Rule 26 is amended by adding a new section (e) which reads as follows:

(e) Combining Cases for Hearing. Upon motion of either party after 10 days notice to the opposing party, a hearing panel may combine for hearing two or more formal charges pending against a judge which have not been heard or may reconvene to hear additional formal charges against a judge filed prior to the hearing panel issuing a panel report concerning formal charges against the judge already heard by that panel.

(1) Rule 2 is amended by relettering sections (b) through (aa) to (c) through (bb) and adding a new section (b) to read as follows:

> **(b) Closed, But Not Dismissed:** a manner of disposing of a matter where a panel of the Commission makes a finding that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the lawyer is deceased, disappeared, incarcerated, physically or mentally incapacitated, disbarred, or suspended from the practice of law, or for other good cause**.** If the lawyer files a written objection with the Commission and serves a copy of that objection on disciplinary counsel within 10 days of service of notice that the matter was closed, but not dismissed, the matter shall be deemed reopened and in the full investigation phase. Any objection need not contain any grounds for objecting. Before a matter can be reopened after being closed, but not dismissed, an investigative panel of the Commission must make a finding that there has been a change in the circumstances that were the basis for the matter to be closed, but not dismissed, or that there is other good cause for it to be reopened. Before a motion can be considered by an investigative panel of the Commission to reopen a matter that has been previously closed, but not dismissed, disciplinary counsel shall serve a copy of the motion to do so containing the grounds to reopen on the lawyer and then the lawyer shall have 10 days to respond thereto. Disciplinary counsel shall notify both the lawyer and the complainant when a matter is closed, but not dismissed and when a closed, but not dismissed matter is reopened. If the panel declines to reopen the matter, disciplinary counsel shall so advise the lawyer.

(2) The "and" at the end of Rule 4(f)(2) and the period after Rule 4(g)(3) are deleted; "and," is added after Rule 4(f)(3); and new subsection 4(f)(4) is added to read as follows:

> **(4)** declare, after proper notice, a matter closed, but not dismissed, after the filing of formal charges.

(3) The "and" at the end of Rule 4(g)(3) and the period after Rule 4(g)(4) are deleted; "and," is added after Rule 4(f)(4); and new subsection 4(g)(5) is added to read as follows:

> **(5)** declare, after proper notice, a matter closed, but not dismissed, after the filing of formal charges.

(4) Rule 5(b) is amended by deleting the "and" at the end of Rule 5(b)(6) renumbering Rule 5(b)(7) as Rule 5(b)(10) and adding the following subsections:

(7) initiate and prosecute proceedings before the Commission and the Supreme Court to enforce orders related to disciplinary proceedings or related to the practice of law by lawyers and to seek restraining orders and sanctions in connection with violations thereof;

(8) serve as opposing counsel in proceedings before the Committee on Character and Fitness in which a lawyer seeks reinstatement or readmission;

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

(5) Rule 7 is amended by deleting the period after Rule 7(a)(8) and adding the following sections:

(9) willfully fail to comply with the terms of a finally accepted deferred disciplinary agreement or any terms of a finally accepted agreement for discipline by consent; and,

(10) willfully fail to comply with a final decision of the Resolution of Fee Disputes Board.

(6) Rule 9 is amended by adding "when formal charges have been filed" to the end of the first sentence of the Rule.

(7) Rule 10 is amended by adding the following two sentences to the present Rule:

After appearing as counsel for a lawyer in a matter under these rules, counsel for the lawyer may only withdraw upon leave of the chair, vice chair, or a panel of the Commission after 10 days notice to disciplinary counsel and the lawyer or, prior to formal charges having been filed, upon stipulation of the lawyer, the withdrawing counsel and disciplinary counsel. Provided, after a matter has been forwarded to the Supreme Court for action, counsel can only withdraw from representation upon leave of the Supreme Court after due notice to the client and disciplinary counsel.

(8) Rule 11 is amended by adding the following before the last sentence of the Rule:

and the chair and vice chair may entertain requests for permissive disclosure pursuant to Rule 12(c) and requests for subpoenas for investigation pursuant to Rule 15(b)(1) made by disciplinary counsel without notice to the lawyer. Where disciplinary counsel makes a request to the chair or vice chair pursuant to either Rule 12(c) or 19(b)(1) without notice to the lawyer, the request shall so state and set forth the reason that notice is not being given.

(9) Rule 12(b) is amended by adding "or the Supreme Court" to the first clause of the second sentence of the rule and adding "inclusive of a letter of caution or admonition issued after the filing of formal charges" after the second clause of the Rule 12(b).

(10) Rule 12(c) is amended by replacing the period at the end of Rule 12(c)(3) with a semi-colon and adding the following two subsections:

(4) to persons from whom and entities from which it appears that a lawyer has misappropriated monies or other property when the chair or vice-chair or a panel of the Commission has determined that the disclosure of the information will tend to prevent further misappropriation or likely facilitate restitution, recovery, or compensation from the Lawyers' Fund for Client Protection, insurance coverage, title insurance, or other sources; or,

(5) to the appropriate disciplinary authority in any jurisdiction in which a lawyer is admitted to practice law or has applied for admission to practice law concerning a matter where there is evidence the lawyer committed misconduct under lawyer or judicial disciplinary rules of that jurisdiction or where a lawyer receives any sanction under Rule 7(b).

(11) Rule 12 is amended by adding the following subsection (g):

(g) Permissive disclosure by the parties. Either party may disclose in proceedings before a hearing panel statements and other evidence, gathered prior to the matter becoming public after the filing of formal charges, that were subject to discovery under Rule 25 to the extent admissible under South Carolina Rules of Civil Procedure or South Carolina Rules of Evidence.

(12) Rule 14((b)(2) is renumbered 14(b)(4) and the following sub-sections are added to the Rule:

(2) By Disciplinary Counsel. Disciplinary counsel may extend the time for responses due from a lawyer under Rules 19(b)(1), 19(c)(3), and 23(a) for one or more periods not to exceed 30 days in the aggregate for each.

(3) By the Parties. Disciplinary counsel and the lawyer may, by written agreement, extend the time to respond under 19(b)(1), 19(c), or 23(a) after the execution and delivery by both parties of an agreement for discipline by consent or deferred disciplinary agreement for the duration of the period the agreement is awaiting a final disposition and for a period of 30 days thereafter if the Agreement is not accepted.

(13) The first sentence of Rule 15(b)(1) is amended by deleting the word "and" before the word "documents" and adding the following after the word "documents": "(whether in typed, printed, written, digital, electronic, or other format), and other tangible evidence". Further the last sentence of present Rule 15(b)(1) is deleted.

(14) The first sentence of Rule 15(b)(2) is amended by deleting the word "and" before the word "documents" and adding the following after the word "documents": "(whether in typed, printed, written, digital, electronic, or other format), and other tangible evidence"; by adding "or direct disciplinary counsel to subpoena witnesses or documents and provide the subpoenaed information to the investigative to the investigative panel" to the end of the second sentence; and, by deleting the final sentence of present Rule 15(b)(2).

(15) Rule 15 is amended by adding the following section (f):

(f) Subpoena Pursuant to Law of Another Jurisdiction. Whenever a subpoena is sought in this State pursuant to the law or disciplinary rules of another jurisdiction for use in lawyer or judicial disciplinary or disability proceedings, and where the issuance of the subpoena has been duly approved under the applicable laws or rules of the other jurisdiction, the chair or vice-chair or a panel of the Commission upon a showing of good cause, may issue a subpoena to compel the attendance of witnesses and the production of documents in the county where the witness resides or is employed or elsewhere in this state as agreed by the witness. Service, enforcement, or challenges to such subpoenas shall be as provided in these rules.

(16) Sections (c) and (d) of Rule 17 are renumbered (d) and (e) and a new section (c) is added to read as follows:

(c) Failure to Respond to Notice of Full Investigation, Subpoena, or Notice of Appearance. Upon receipt of sufficient evidence demonstrating that a lawyer has failed to fully respond to a notice of full investigation, has failed to fully comply with a proper subpoena issued in connection with an investigation or formal charges, has failed to appear at and fully respond to inquiries at an appearance required pursuant to Rules 19(c)(4) or (5), or has failed to respond to inquiries or directives of the Commission or the Supreme Court, the Supreme Court may place that lawyer on interim suspension.

(17) Rule 19(b)(1) is amended by adding the following sentence at the end of the subsection: The lawyer shall file a written response with disciplinary counsel to a request within 15 days of notice to do so from disciplinary counsel.

(18) Rule 19(b)(3) is amended by adding the following after the second clause "issue a letter of caution without a finding of misconduct," and by adding the following after the word "caution" in the next clause "with a finding of minor misconduct".

(19) Rule 19(c) is amended by replacing "20" with "30" in the first sentence of subsection (1) and adding the following new subsection (6):

(6) Any person giving testimony pursuant to either rule 19(c)(4) or 19(c)(5) shall be entitled to obtain a transcript of his or her testimony from the transcribing court reporter upon paying the subscribed charges unless otherwise directed by an investigative panel for good cause shown.

(20) Rule 19(d)(3) is amended to read: Disciplinary counsel shall promptly notify the lawyer of the action the investigative panel has taken.

(21) Rule 19 is amended by adding the following section (e):

(e) Subsequent Complaints. Provided, not withstanding the other provisions of this Rule 19, where a lawyer is already subject to a pending full investigation, disciplinary counsel may include information received related to additional misconduct in a subsequent complaint or revealed in an investigation in a notice of full investigation, an amended notice of full investigation or a supplemental notice of full investigation without leave of the Commission and disciplinary counsel may dispense with seeking an

initial response regarding such new information from the lawyer as would otherwise be required by Rule 19(b)(1).

(22) Rule 20 is amended by deleting everything after the work "purpose " in the first sentence of the rule and replacing it with the following:

unless the complaint is reopened by the Commission. A complaint dismissed prior to the filing of formal charges may be re-opened by an investigative panel upon motion of disciplinary counsel upon a finding by the investigative panel that there is new information concerning the matter dismissed, an additional complaint has been filed against the same lawyer involving related or similar allegations, or other good cause. Prior to a motion to reopen being decided, a copy of the motion to reopen containing the grounds therefor shall be served on the lawyer by disciplinary counsel, and the lawyer shall then have 10 days thereafter to file a written response with the Commission. The lawyer and the complainant shall be notified by disciplinary counsel as to the panel's decision on the motion to re-open. A matter reopened shall be deemed in the stage of investigation it was in when dismissed except as the investigative panel might otherwise direct.

(23) Rule 21 is amended by inserting the following sentence after the first sentence of Rule 21(c): "Provided, if formal charges have been filed but not heard, an investigative panel can consider the proposed agreement and affidavit if the parties both agree in writing." and adding new section 21(g) which reads as follows:

(g) Briefs and Oral Arguments. The Supreme Court may require the parties to submit briefs or participate in oral arguments in connection with the agreement. Either the lawyer or disciplinary counsel may move before the Supreme Court for permission for the parties to file briefs, to have oral arguments, or both in connection with the agreement**,** but the Supreme Court, in its discretion, may proceed to take action on the agreement without briefs, without oral arguments, or without either, not withstanding a request from one or both of the parties.

(24) Rule 25(b) is amended by having Rule 25(b)(1) read: "**(1)** non-privileged evidence relevant to the formal charges, documents to be presented at the hearing, witness statements, and summaries of interviews with witnesses who will be called at the hearing (for purposes of this paragraph, a witness statement is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously

recorded); and,"; and by adding a new sub-section (3) which reads as follows:

(3) Provided**,** copies of transcripts of testimony taken by a court reporter pursuant to Rule 15(b) or Rule 19(c) may be obtained by the parties from the court reporter at the expense of the requesting party and need not be made available to the requesting party by the opposing party unless not otherwise available or otherwise directed by the Commission under 25(h).

(25) Rule 26 is amended by adding a new section (e) which reads as follows:

(e) Combining Cases for Hearing. Upon motion of either party after 10 days notice to the opposing party, a hearing panel may combine for hearing two or more formal charges pending against a lawyer which have not been heard or may reconvene to hear additional formal charges against a lawyer filed prior to the hearing panel issuing a panel report concerning formal charges against the lawyer already heard by that panel.