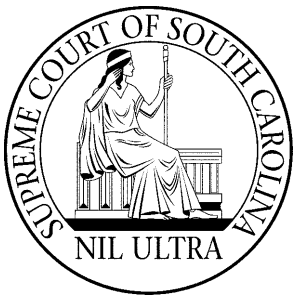

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 42

October 25, 2004

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of M. Parker Vick, Respondent.

Opinion No. 25880
Submitted October 5, 2004 – Filed October 25, 2004

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, Susan M. Johnston, Deputy Disciplinary Counsel, and Princess Henryhand Hodges, Assistant Disciplinary Counsel, all of Columbia, for Office of Disciplinary Counsel.

M. Parker Vick, pro se, of Spartanburg.

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

FACTS

Respondent wrote seventeen checks to the Clerk of the Bankruptcy Court for clients' filing fees. The checks were returned for insufficient funds during May and June 2003. The checks were written on respondent's operating account and were made good by him upon being informed they had been returned.

Respondent was sanctioned by the Honorable John E. Waites. By order dated September 15, 2003, respondent was required to pay $200 to the South Carolina Bar Pro Bono Program (the Program) within fifteen days. Respondent delivered a $200 check written from his attorney's account to the Program, but it was returned for insufficient funds. Respondent subsequently paid the Program two hundred dollars.

While investigating this matter, ODC uncovered that, between May 20 and July 2, 2003, respondent wrote four checks to himself from his trust account. The funds, $6,080, were to be held for a probate matter. Although the four checks were noted "attorney's fees," respondent admits the funds were not earned fees and he used these funds for his personal use. As a result of contact from ODC, respondent replaced the funds on September 18, 2003. At no time did respondent's trust account fall into a negative balance.

ODC states that, to its best knowledge and belief, respondent has fully and immediately cooperated with ODC's inquires into these matters.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 **(**lawyer shall hold client property in lawyer's possession separately from his own property); Rule 8.4(a) (lawyer shall not violate the Rules of Professional Conduct); and Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or

misrepresentation). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (lawyer shall not violate the oath of office taken upon admission to practice law in this state).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Dirk J. Kitchel, Respondent.

Opinion No. 25881
Submitted October 5, 2004 – Filed October 25, 2004

DEFINITE SUSPENSION

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

Dirk J. Kitchel, pro se, of Charleston.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction up to an eighteen month suspension from the practice of law. See Rule 7, RLDE, Rule 413, SCACR. We accept the agreement and impose a definite suspension of eighteen months from the practice of law. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

In 2000, respondent was paid a retainer of approximately $5,000 to represent Client A in defense of federal drug charges. During the time that respondent represented Client A, Client A was also represented by Attorney Newman in an unrelated matter. In the course of that representation, Mr. Newman obtained approximately $2,268.90 on Client A's behalf. In November 2000, Mr. Newman forwarded those funds to respondent in trust for Client A. At the time the funds were forwarded to respondent, Mr. Newman notified respondent of his claim to attorney fees from those funds. Client A claimed he did not owe Mr. Newman any money and refused to allow respondent to disburse funds to him.

When respondent did not receive a copy of a written agreement between Client A and Mr. Newman concerning the funds, respondent disbursed the funds to Client A and to himself without holding in trust the amount claimed by Mr. Newman. Respondent did not prepare a written accounting of the disbursement of these funds.

Investigation of the complaint was referred to an Attorney Appointed to Assist Disciplinary Counsel (ATA). The ATA notified respondent of his appointment by letter dated November 25, 2002, requesting respondent contact him within thirty days to arrange for a meeting. Respondent failed to respond or otherwise communicate with the ATA in response to his November 25, 2002 letter. On December 26, 2002, the ATA sent respondent a second letter, again requesting his contact within thirty days. This letter was sent to respondent by certified mail and receipt was confirmed. Respondent failed to respond or otherwise communicate with the ATA following receipt of the December 26, 2002 letter.

Respondent did respond to the initial inquiries of ODC in this matter. However, he failed to respond to the Notice of Full Investigation served on him on June 26, 2003. Respondent

subsequently appeared pursuant to Rule 19(c)(4), RLDE, Rule 413, SCACR, and responded to the allegations on the record.

Matter II

In June 2002, Mrs. B paid respondent a retainer of approximately $2,500 to represent her son, Client B, in a post-conviction relief matter. Respondent fully investigated the case and adequately communicated with his client about the investigation. When Mrs. B and Client B became dissatisfied with the time it was taking for a hearing to be scheduled, Mrs. B terminated respondent's representation. Respondent failed, however, to confirm the termination with Client B and failed to seek a withdrawal from the matter with the court.

Respondent was notified of the complaint by letter from ODC. The letter requested a response within fifteen days. Respondent did not respond to the letter or to a subsequent letter sent pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982). Respondent also failed to respond to the Notice of Full Investigation served on him on June 27, 2003. Respondent subsequently appeared pursuant to Rule 19 (c)(4), RLDE, Rule 413, SCACR, and responded to the allegations on the record.

Matter III

On September 24, 2002, respondent was paid a retainer to represent Client C in a federal criminal case. Client C entered a guilty plea on November 4, 2002 and was scheduled to be sentenced at a March 4, 2003 hearing. Respondent had no contact with his client following the plea. Respondent did not provide him with a copy of the presentence report.

Because respondent was not diligently collecting his mail and because his office telephone had been disconnected, respondent did not receive the notice of the sentencing hearing and, therefore, failed to appear. Telephone calls were placed from the clerk of court's office to

respondent, but he could not be reached. The presiding judge appointed new counsel to represent Client C in the sentencing phase of his case.

Respondent was notified of the complaint by letter from ODC which requested a response within fifteen days. Respondent did not respond to that letter or a subsequent inquiry sent pursuant to In the Matter of Treacy, id. Respondent also failed to respond to the Notice of Full Investigation served on June 27, 2003. Respondent subsequently appeared pursuant to Rule 19 (c)(4), RLDE, Rule, 413, SCACR.

Matter IV

In November 2002, Client D paid respondent approximately $585 to handle a bankruptcy matter. Respondent competently and diligently represented Client D, however, the bankruptcy was dismissed because Client D did not produce certain documentation required by the trustee. Client D demanded respondent refund his retainer and provide him with his client file. Respondent did not refund the fee as he felt it had been earned. However, respondent did not send Client D his client file.

Respondent was notified of the complaint by letter from ODC which requested a response within fifteen days. Respondent did not respond to that letter or a subsequent inquiry sent pursuant to In the Matter of Treacy, id. Respondent also failed to respond to the Notice of Full Investigation served on June 27, 2003. Respondent subsequently appeared pursuant to Rule 19 (c)(4), RLDE, Rule, 413, SCACR.

Matter V

Client E paid respondent a retainer to assist him in defense of driving while intoxicated charges pending in Georgia. At the time respondent was retained, he was not licensed to practice law in Georgia. Although respondent advised Client E that he was not

licensed in Georgia and that he could only try to get the matter continued until a deal could be made or Georgia counsel could be retained, respondent did not confirm this arrangement in writing.

Respondent sent a request to the clerk of court for a continuance of the hearing. Respondent called to confirm receipt and was informed that the request was denied. Respondent informed Client E that he needed to retain an attorney licensed in Georgia and that his hearing was not continued. Neither respondent nor Client E appeared at the hearing. As a result, Client E's license was suspended.

Respondent was notified of the complaint by letter from ODC which requested a response within fifteen days. Respondent did not respond to that letter or a subsequent inquiry sent pursuant to Matter of Treacy, id. Respondent also failed to respond to the Notice of Full Investigation served on July 31, 2003. Respondent subsequently appeared pursuant to Rule 19 (c)(4), RLDE, Rule, 413, SCACR.

Respondent acknowledges he should have confirmed both the limited scope of his representation and the status of Client E's case in writing. Although his failure to do so did not violate the Rules of Professional Conduct, respondent acknowledges that documentation of this communication with his client would have been the better practice.

Matter VI

Client F hired respondent to represent her in a bankruptcy matter. She was unable to pay the full fee at the first meeting and agreed in writing that respondent would not file until his retainer and costs were paid in full. Respondent proceeded to collect the necessary documentation and to prepare the forms for filing. The file was complete when Client F made her final payment, however, respondent failed to file the petition on her behalf. Respondent ceased his work on Client F's file without notice to her, without refunding her fees and costs, and without returning her client file.

Respondent was notified of the complaint by letter from ODC. The letter requested a response within fifteen days. Respondent did not respond to that letter. Respondent also failed to respond to the Notice of Full Investigation served on him on August 19, 2003. Respondent subsequently appeared pursuant to Rule 19(c)(4), RLDE, Rule 413, SCACR, and responded to the allegations on the record.

Matter VII

Client G consulted with respondent about a bankruptcy matter in September 2002. She was unable to pay the full $500 fee and $200 costs at the first meeting. She paid $200 and agreed in writing that respondent would not file until he was paid in full. Respondent proceeded to collect the necessary documentation and to prepare the forms for filing. In April 2003, the file was completed when Client G made her second payment of $250. Respondent informed Client G that he would not file until the final payment of $250 was received. Client G did not pay and respondent did not file. Client G telephoned respondent on a couple of occasions; respondent admits he did not return the calls.

Respondent failed to respond to the Notice of Full Investigation served on him on August 19, 2003. Respondent subsequently appeared pursuant to Rule 19 (c)(4), RLDE, Rule 413, SCACR, and responded to the allegations on the record.

Matter VIII

Mrs. H filed a complaint regarding the manner in which respondent was handling her son's, Client H's, case. A copy of the complaint was provided to respondent on February 3, 2004, along with a request for a written response to the allegations within fifteen days. Respondent did not comply. Respondent did respond to the Notice of Full Investigation.

LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(3) (lawyer shall not knowingly fail to respond to a lawful demand from a disciplinary authority), Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (lawyer shall not violate the oath of office taken upon admission to practice law). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.5 (lawyer's fee shall be reasonable); Rule 1.15(a)(lawyer shall hold property of clients or third persons separate from lawyer's own property; complete records of account funds shall be kept by the lawyer); 1.15(b) (upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person); Rule 1.16 **(**upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, and surrendering papers and property to which the client is entitled); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 8.1(b) (lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); and Rule 8.4(e) (lawyer shall not engage in conduct that is

prejudicial to administration of justice).[1] Finally, respondent admits he violated the financial recordkeeping provisions of Rule 417, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a definite suspension of eighteen months from the practice of law. Respondent's request the suspension be made retroactive to the date of his interim suspension is denied. 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.[2]

DEFINITE SUSPENSION.

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

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[1] Respondent was previously suspended for sixty days due to misconduct which violated many of these same provisions. In the Matter of Kitchel, 347 S.C. 291, 554 S.E.2d 868 (2001).

[2] Respondent acknowledges his reinstatement, if any, will be subject to Rule 33, RLDE, Rule 413, SCACR, including Rule 33(f)(3). Moreover, respondent shall not be reinstated until he has paid the costs of these proceedings, which includes $208.00 in court reporter fees and $22.10 in postage.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Mark Douglas Lattimore, Respondent.

Opinion No. 25882
Submitted October 5, 2004 – Filed October 25, 2004

DISBARRED

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

J. Steedley Bogan, of Columbia, for respondent.

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

FACTS

Respondent was admitted to the practice of law in North Carolina in 1996 and the practice of law in South Carolina in 1998. From 1998 until 2000, he worked as an associate for the law firm of

Forquer & Green in the firm's Charlotte office. In 2000, respondent formed the partnership of Forquer, Green & Lattimore with offices in Greenville and Charleston. In 2001, the firm of Forquer, Lattimore & Calloway was formed to succeed Forquer & Green in Charlotte. Neither Forquer, Green, nor Calloway are licensed to practice law in South Carolina.

The primary business of Forquer, Green & Lattimore was residential real estate closing services. Respondent worked out of the Greenville office from early 2001 until August 2003. The firm employed various associates licensed in South Carolina until its dissolution upon respondent's departure.

I.

On December 17, 2002, respondent conducted a residential real estate closing for Client A. For her convenience, respondent traveled from his office in Greenville to Anderson to conduct the closing. Respondent did not bring any witnesses to the closing and conducted the closing with only Client A present. Upon his return to the office, non-lawyers signed as witnesses and notary on the closing documents.

Respondent acknowledges that non-lawyers signing closing documents as witness or notary when they were not present at the closing was routine in his office, especially during a period of high volume that occurred as a result of the low interest rates from 2002 through 2004. Respondent further admits that, on occasion, his staff would witness and notarize documents prior to closing and prior to execution by the signatory. Respondent states this practice violated his own policies and procedures, but acknowledges he is responsible.

In the Greenville office during this high volume period, non-lawyers conducted real estate closings outside the presence of a licensed attorney. Although respondent had policies in place against this practice, he acknowledges it did occur and that he is responsible for creating an environment in which the practice was tacitly condoned.

II.

Respondent failed to complete his mandatory continuing legal education (CLE) requirements for 2002. He filed an incomplete reporting affidavit with the Commission on Continuing Legal Education and Specialization (the Commission). On February 7, 2003, respondent was served with a notice from the Commission that his licensed to practice law was suspended as of February 5, 2003, for failing to meet mandatory CLE requirements. Respondent subsequently obtained the credits needed for compliance and filed an amended affidavit. His administrative suspension was lifted on February 26, 2003.

While suspended, respondent continued to practice law. Eighty-four closings were conducted in the Greenville office during the twenty-one days in which respondent was suspended. During this period of time, no licensed attorneys worked in the Greenville office. Respondent acknowledges he was aware he was suspended and not permitted to practice law, but nevertheless admits he made a conscious decision to continue to do so.

III.

In August 2001, respondent conducted a real estate closing in which Clients B & C sold one of two adjacent lots they owned. The lot sold had a house on it; the adjacent lot was empty. As a result of errors in the title search, the closing documents conveyed and encumbered the empty lot rather than the lot with the house that the clients had intended to sell.

In Spring 2002, respondent was informed of the error. Respondent corrected the problem by having the clients and the buyer sign reciprocal deeds. Respondent failed, however, to secure a release of the empty lot from the buyer's mortgage company until July 2003, after receiving notice of the grievance filed by Client B and C. This caused a several month delay in Client B and C's sale of the empty lot

to a new buyer. Respondent failed to adequately communicate with Client B and C during the time he was attempting to solve the problems.

IV.

On January 9, 2003, respondent conducted a real estate closing in which Client D and E were selling their home to buyer. Through no fault of respondent, the lender did not fund the loan and the transaction had to be cancelled.

When the problems were resolved, the closing was rescheduled for February 11, 2003. Respondent conducted the second closing even though he was aware his license to practice law was suspended. Respondent's partner, Green, was present in the office when the loan was closed, but Green was not licensed to practice law in this state. Respondent failed to sign some of the closing documents. A non-lawyer in the office subsequently signed respondent's name to the closing documents without indicating someone was signing for him. This was not done with respondent's specific authorization, however, respondent acknowledges he was responsible for creating an environment in which non-lawyers in his office would assume the practice was acceptable.

V.

From March 2001 through July 2002, the Greenville office of Forquer, Green & Lattimore conducted 166 closings in which National City Mortgage was the lender. In instances in which the loans were for refinancing rather than purchase money purposes, representatives of the lender insisted that the closing be done prior to completion of the title search and the title work be done during the three-day recession period. Respondent advised the borrowers in these cases that the title search had not been conducted and that the closings would not be completed or the loans funded until the title work was complete. Respondent instructed the borrowers to sign closing documents without property descriptions. The property descriptions

would be added once the title work was complete. This process was contrary to the firm's standard practice and, as a result, the post-closing process in many of the files was not timely handled. In forty-eight of the National City files, the mortgages were not recorded as of January 2003. By the time respondent was contacted by National City Mortgage, many of the mortgages had been lost and had to be re-executed.

It was the firm's practice to collect the title insurance policy premium from the closing and then issue a separate check once respondent issued the title opinion. Forquer visited the office periodically to collect the premium checks. It was his responsibility to pay the premium over to the title company which would then issue the policy. In approximately eighty-four of the National City Mortgage closings, premiums were collected, but policies were not issued.

VI.

Respondent received a significant portion of his business in Anderson from three mortgage loan brokerage companies. Certain employees and owners of these mortgage loan brokerage companies conspired with certain loan officers employed by National City Mortgage and certain real estate appraisers to obtain loans on properties for more than the properties were worth using inflated appraisals. (The mortgage brokers, loan officers, and appraisers are referred to collectively as "Co-Conspirators."). Respondent conduct the closings on many of the properties involved in the conspiracy.

In several instances, the Co-Conspirators obtained the fraudulent loans by using a practice known as property "flipping." In an illegal property flip, a straw buyer or co-conspirator (Buyer A) will enter into a contract to purchase property for its actual value from the Seller. Buyer A will not obtain financing but will, instead, enter into a contract to sell the property to a co-conspirator (Buyer B) at an inflated price. Buyer B will then use an appraisal for the inflated price to obtain a loan. Closings on the sale from Seller to Buyer A and from Buyer A to Buyer B are done at the same time. Buyer A will pay the contract

price to Seller from the loan proceeds and will then often split the difference with Buyer B. The actual transaction is contrary to the information contained on the HUD-1 forms, which misrepresents the sales prices and the source of the funding for the purchases and often falsely indicates that the buyers are contributing significant down payments in cash. According to the Agreement for Discipline by Consent, when no payments are made to the lender and the property is foreclosed, the lender can recoup only the actual value of the property rather than the amount loaned on the inflated appraisal.

An illegal property flip generally requires the conspiracy of at least one of the buyers, an appraiser, and a mortgage broker or loan officer. It also requires the assistance of an attorney who is aware of the fraud, chooses to look the other way, or who fails to supervise non-lawyer assistants engaging in the unauthorized practice of law. In order for the flip to work, the same attorney has to close both transactions. If an attorney conducts a closing on property for a certain sales price and funds that closing with proceeds from the immediate resale of the same property for a significantly higher amount, the attorney has constructive notice that the second sale might be based on a fraudulently inflated appraisal of the property. This is particularly true when the buyer leaves the closing with both the property and with money from the loan.

In the case of the loans closed by respondent, in addition to the constructive notice described above, respondent had actual knowledge in at least two of the transactions that the appraisals were inflated. In several of the transactions, respondent falsely represented on closing documents that mortgage broker fees to a Co-Conspirator were payments to creditors of the borrower.

Respondent was on further notice that the conduct of the Co-Conspirators might be illegal because, in connection with several of the closings, the documents reflected that the loans were for refinancing rather than purchase money. At the same time, respondent prepared documents actually conveying the property. Additionally, at least one

Co-Conspirator who was personally known to respondent used aliases to obtain some of the loans.

The Co-Conspirators used 116 fraudulent appraisals, each of which had been inflated by at least $50,000 to obtain loans from National City Mortgage. The Co-Conspirators pled guilty to federal felony conspiracy charges and admitted to obtaining inflated amounts totaling $13,000,000.

Respondent closed eighty-eight loans for the Co-Conspirators with inflated appraisals of at least $25,000 each. Respondent did not share in the profits from the fraudulently obtained loans, but he did benefit from significant business generated by the various mortgage brokers involved. Additionally, respondent charged a fee of $175 for the title search on each closing. In cases of flip transactions done simultaneously on the same property, there is no need for a second title search. Respondent essentially double-billed for this work.

On June 3, 2004, respondent pled guilty to one count of conspiracy to commit mail fraud in the United States District Court arising out of his involvement in the above-described activities relating to the National City Mortgage loans. As of the date of the Agreement for Discipline by Consent, respondent had not been sentenced.

VII.

Respondent conducted a closing on a refinancing loan for Client F in September 2002. Respondent issued and mailed a check to Client F's existing lender to pay off her mortgage. In December 2002, Client F received a notice from her lender that payment had not been received. When respondent received a copy of this notice, he reissued payment to the lender with a request that it apply the payment retroactively to September. The lender would not comply with this request and returned the check as insufficient to pay the debt. In March 2003, Client F received a delinquency notice. At that time, respondent

paid the full amount claimed by the lender using his firm's funds to make up the shortage.

Although respondent maintained a separate trust account for the Greenville office and kept some financial records there, primary bookkeeping and account reconciliation were conducted by non-lawyers in the Charlotte office. Respondent did not supervise this process and was not informed of discrepancies in the trust account. Additionally, non-lawyers in respondent's Greenville office often placed checks returned by lenders and deeds or mortgages returned by the RMC office into the closing files without alerting respondent to the problem. For these reasons, respondent was unaware that the two checks issued to Client F's lender did not clear the bank in a timely fashion but sat non-negotiated in Client F's file. It was not until Client F contacted respondent with her delinquency notices that respondent took action to correct the situation.

VIII.

At the request of Client G's lender, the Greenville office conducted a closing for Client G in July 2001. Due to miscommunication on the lender's part, both respondent's firm (on behalf of Client G) and the lender ordered title searches on the property. Respondent issued a title opinion and paid out funds from the closing for his title search and for a title policy. When the lender learned it would have to pay for the title work it conducted, the lender demanded respondent reimburse it for this expense, claiming respondent was hired solely to "witness" the closing.

Initially, respondent refused to refund the money, asserting his firm's policies prohibited "witness-only" closings and required their own title work. In order to maintain a good working relationship with the lender, however, respondent decided to pay $500 to share in the loss. The check to Client G's lender was written on the Greenville office's operating account. The check was returned for insufficient funds. Respondent was unable to explain the deficiency because all accounting and bookkeeping for the operating account had

been transferred to the Charlotte office. The firm ultimately paid the lender $500 plus bank fees incurred as a result of the returned check.

IX.

In October 2002, respondent conducted a loan closing for Client G. At the closing, he withheld an estimated payment for the property taxes that would become due in January 2003. In January 2003, payment was issued to the tax authority for the amount withheld, however, the estimate was lower than the actual taxes due. Client G contacted respondent's office in June 2003 to inform him that she had received a delinquent tax notice. Payment was reissued in the full amount with respondent's firm paying the difference. Client G made numerous attempts to get information from respondent about the status of her tax payment. She had no success. In fact, at the time she filed her disciplinary complaint, the matter had been resolved but respondent had failed to inform Client G.

Respondent acknowledges that, due to his insufficient supervision of the firm's accounting practices, he was unaware the tax check did not clear the bank for six months. He acknowledges that the volume of real estate closings he was attempting to accomplish in the Greenville office led to misfiling and misplacing important documents such as the trust account check that was returned by the tax office. Respondent further acknowledges that his delegation of the responsibility to respond to Client G's inquiries was not sufficient to meet his obligation to adequately communicate with his client.

X.

In April 2002, respondent conducted a closing on the sale of property from Mr. H to Mr. I. In the transaction, Mr. H was selling a portion of a tract of land encumbered by a mortgage owed by Mr. H. The agreement provided Mr. H's lender would accept $35,000 in exchange for a release of the portion of the property being purchased by Mr. I. Mr. I obtained a loan on the property and, by June 2003, had paid it off. Mr. I then attempted to borrow additional funds using the

property as collateral. In the course of closing on this second loan, it was discovered that Mr. H's mortgage still encumbered the portion of the property now owned by Mr. I.

In May 2002, after the closing on the sale from Mr. H to Mr. I, respondent had issued payment to Mr. H's lender. However, the lender did not accept the payment or release its mortgage because certain documentary requirements had not been met by respondent at the time of the closing. Respondent's file contains no record of receiving the check back from the lender, although the lender did produce a cover letter indicating that it had sent the check back. The firm ultimately paid $35,000 plus interest to the lender and obtained a release of Mr. I's portion of the property.

From the time of the closing in April 2002 until payment was made in August 2003, the balance in respondent's trust account remained sufficient to cover the $35,000 withheld from the closing. Respondent admits that his failure to adequately supervise the firm's trust accounting procedures resulted in his failure to know that the check to Mr. H's lender had never cleared the bank. He also acknowledges that the volume of real estate closings he was attempting to accomplish in the Greenville office led to misfiling and misplacing important documents such as the payoff check that Mr. H's lender returned.

XI.

For each of the law offices in which closings on South Carolina properties were handled (Greenville, Rock Hill, Charleston, and Charlotte), Robert Forquer and Scott Green opened a bank account called the "recording" account. When funds were collected at closing to pay fees for the recording of mortgages, deeds, and other documents, a check in the amount collected would be written from the real estate trust account and deposited into the recording account for that office. Checks to the appropriate county office would, in turn, be written from the recording account and delivered with the documents to be filed. The firm routinely and intentionally overcharged clients for these

recording fees and failed to reimburse the amounts not used for the designated purpose. The overcharges ranged from $2.00 to $40.00 per closing.

The recording accounts were also sometimes used for processing the entire closing. The firm failed to maintain sufficient records of the recording accounts and failed to identify and track client funds maintained in the accounts. No record was kept in the closing files of the actual amounts paid for recording fees and no accounting of overcharges to the clients was kept. The overcharges for the recording fees were separate from the attorney's fees and courier fees charged to clients.

The funds in the recording accounts were used for a variety of purposes other than document recording fees, including office expenses (stamps, bank charges, staff lunches), correction of errors in closings (payoff shortages and miscalculation of title insurance premiums), settlement of minor claims against the firm, payroll or other payments to staff, and checks to Mr. Forquer and Mr. Green in various amounts, including checks for $4,000 and $7,000.

The source of the funds in the recording accounts (client charges and overcharges for recording fees) was insufficient to cover the firm's uses of the account. As a result, the accounts were frequently short of funds. Mortgages, deeds, and other closing documents were routinely held and not timely filed because there were insufficient funds in the recording account to pay the recording fees. Occasionally, associates used their own money to pay recording fees and then sought reimbursement from the firm.

In the Greenville office, a paralegal with signatory authority on the recording and real estate trust accounts wrote a series of approximately twenty-five checks payable to herself or to cash in various amounts. This paralegal was also responsible for reconciling the recording account and maintaining records associated with it. Upon receipt of the cancelled checks, the paralegal altered the payee to make it appear that the checks had been written to county offices for

legitimate purposes. Using this method, the paralegal took approximately $46,000 from the recording account.

Although he was unaware of the paralegal's activities in this regard, respondent had supervisory authority over the employee. From February 2003 through May 2004, the Greenville recording account had insufficient fund charges of approximately $11,522.

Respondent acknowledges that the recording accounts were client trust accounts. He further acknowledges that, as a partner in the Greenville, Charleston, and Charlotte offices, he shared responsibility for the safekeeping of client funds and for maintaining certain financial records. Respondent acknowledges that the use to which his firm put the recording account funds constituted mismanagement, commingling, and misappropriation.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.15(a) (lawyer shall hold property of clients in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 5.1 **(**partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct); Rule 5.3(a) (a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that a non-lawyer employee's conduct is compatible with the professional obligations of the lawyer); Rule 5.3(b) (lawyer having direct supervisory authority over a non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.3(c) (lawyer shall be

responsible for conduct of a non-lawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if either the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved or the lawyer is a partner in the law firm in which the non-lawyer is employed, or has direct supervisory authority over the non-lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action); Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

In addition, respondent admits his conduct violated Rule 417, SCACR. Respondent admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it is a ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(4) (it is a ground for discipline for lawyer to be convicted of a crime of moral turpitude or a serious crime); Rule 7(a)(5) (it is a ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (it is a ground for discipline for lawyer to violate oath of office).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent. Respondent's request that the disbarment be made retroactive to the date he was placed on interim suspension is denied.

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

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bert C. Atkinson and Stephanie S. Atkinson, Respondents-Appellants,

v.

Orkin Exterminating Co., Inc., Appellant-Respondent.

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

Opinion No. 25883
Heard November 5, 2003 – Filed October 25, 2004

REVERSED AND REMANDED

G. Dana Sinkler, of Warren and Sinkler, of Charleston; Michael W. Davis and Robert N. Hochman, both of Sidley, Austin, Brown, & Wood, of Chicago, for Appellant-Respondent.

Keating L. Simons, III, of Simons and Keaveny, of Charleston, for Respondents-Appellants.

CHIEF JUSTICE TOAL: This cross-appeal arises from an action brought by homeowners Bert and Stephanie Atkinson (Atkinsons) against Orkin Exterminating Company (Orkin), seeking recovery for structural damage to their home caused by termite infestation. In this appeal, Orkin seeks a remittitur of the punitive damages award, and the Atkinsons seek reversal of the trial court's decision to offset their compensatory damages by the

amount they received in a settlement from a third party.[1] After certifying this case from the court of appeals pursuant to Rule 204(b), SCACR, we reverse and remand the issue concerning the amount of punitive damages, with instructions, and reverse the trial court's decision to offset compensatory damages.

FACTUAL/PROCEDURAL BACKGROUND

In the underlying action, the Atkinsons sued Orkin, among others, for breach of contract with a fraudulent act and negligence.

A. BREACH OF CONTRACT WITH A FRAUDULENT ACT

When the Atkinsons purchased their home in 1995, they discovered that the previous owners of the house had purchased and maintained a termite bond from Orkin since 1972. The documents comprising the termite bond included a LIFETIME TERMITE DAMAGE GUARANTEE, which provided up to $100,000 in recoverable repair costs for termite damage at a fixed, renewable rate of $28 per year (fixed-rate provision). The guarantee also included a provision that allowed customers to transfer the bond to any subsequent purchaser of the house (transferability provision). Orkin categorizes this version of the LIFETIME TERMITE DAMAGE GUARANTEE as a "pre-1975 contract" because it provided benefits and coverage not available to customers today.[2]

Soon after the Atkinsons moved into their new home, they attempted to have the termite bond transferred to them as permitted by the transferability provision. But, when the Atkinsons contacted Earl Beck (Beck), then manager of Orkin's Charleston office, seeking to have the bond transferred in their name, Beck refused. Instead, Beck offered the Atkinsons a new contract with less desirable terms. The Atkinsons rejected the offer,

[1] Initially, the Atkinsons sued both Terminix Service, Inc. (Terminix) and Orkin but settled with Terminix for $31,111.75 before trial.

[2] In 1975, Orkin changed its contracts omitting the fixed-rate provision and including language allowing Orkin to unilaterally increase renewal rates.

and Orkin canceled the termite bond in June 1996 for non-payment. At trial, Orkin admitted that it breached the contract when it refused to honor the transferability provision.[3]

Because Orkin refused to transfer the contract, the Atkinsons obtained coverage from Terminix. In August 1996, after Orkin's protection had expired and while Terminix's bond was in force, the Atkinsons discovered termites and termite damage in the structure of their house. Terminix denied full coverage, asserting that most of the termite damage took place during the twenty-four years that Orkin's coverage applied.

B. NEGLIGENCE

Before the Atkinsons purchased the house, Orkin conducted a routine inspection and reported that the residence was free of termites and termite damage. Shortly after they moved into the house, the Atkinsons found living termites and termite damage in a windowsill. Further investigation revealed termite damage in the structure of the house.

To determine the extent of the termite damage, the Atkinsons hired Cam Lay of Clemson University's Department of Pesticide Regulation (South Carolina's regulatory agency for pest control businesses) to conduct an additional inspection of the house. Lay concluded that Orkin (1) failed to report termite damage, (2) violated state regulatory standards by failing to disclose powder-post-beetle damage and decay damage, and (3) failed to disclose crawl-space-moisture readings. At trial, Orkin admitted that it negligently failed to disclose prior termite damage to the house in its inspection report but denied the remaining allegations in Lay's report.

C. ORKIN'S 1980 INITIATIVE

In 1980, Orkin's president wrote a memorandum outlining an initiative that directed branch managers to raise the renewal rates of all pre-

[3] The trial court found that Beck, as manager of Orkin's Charleston branch, was Orkin's agent, and therefore Orkin was vicariously liable for Beck's actions.

1975 contracts in direct contradiction to the fixed-rate provision. The memo prescribed the manner in which managers were to deal with customers complaining about rate increases. It provided that if the customers mentioned a pamphlet that Orkin sent to some customers to promote the fixed-rate provision, the managers would ask the customers to read the fixed-rate language aloud, over the telephone. If the customers repeated the language verbatim, the manager would tell them that "a computer mistake was made" and that a corrected bill would be sent. But if the customers did not repeat the language verbatim, the customers were told that the rates were "eligible for increase" according to a "recent legal ruling." At trial, over Orkin's objection, the judge allowed the Atkinsons to submit this memo into evidence.

Four years after Orkin began its initiative to raise rates, the Federal Trade Commission ("FTC") filed an administrative complaint alleging that Orkin's unilateral renewal rate increase was an unfair trade practice. In addition, the administrative law judge ordered Orkin to reimburse those customers who paid increased rates pursuant to Orkin's initiative. The Eleventh Circuit Court of Appeals affirmed the ALJ's ruling. *Orkin Co., Inc. v. Federal Trade Comm'n*, 849 F.2d 1354 (11th Cir. 1988).

After Orkin was enjoined from raising rates on its pre-1975 contracts, Orkin decided to change its advertising material as to the transferability provision as well. For many years, the renewal forms Orkin sent to customers contained the statement, "[i]f you sell your property this protection can be transferred to the new owner. An excellent selling point for you." Orkin removed this language from its renewal forms after the FTC ruling.

At trial, Orkin's president admitted that the FTC ruling caused Orkin to lose money and that the company had conducted "some economic analysis" to determine its projected losses. During discovery, Orkin did not disclose any findings from that analysis.[4] In an attempt to show that Orkin had a financial incentive to breach the transferability provision in its pre-

[4] The trial judge found that Orkin abused the discovery process and sanctioned Orkin $25,000.

1975 contracts, the Atkinsons retained Dr. Perry Woodside (Woodside), an economist and business professor at the College of Charleston, to project (1) Orkin's current and potential losses for honoring the fixed-rate provision; and (2) Orkin's current and projected gain if Orkin dishonored the transferability provision. The Atkinsons offered Woodside's projections to show that Orkin's gain from breaching the transferability provision would mitigate Orkin's losses due to the FTC ruling. Over Orkin's objection, the trial judge allowed Woodside to testify that Orkin could have sustained "staggering" losses amounting to $53,872,894 as a result of the FTC ruling. In addition, Woodside testified that Orkin could realize a gain of $42,352,548 if it dishonored the transferability provision.

The jury awarded $75,259.33 in compensatory damages – $6,191 for the contract claim and $69,068.33[5] for the negligence claim. The jury also awarded $786,500 in punitive damages for the contract claim.[6]

In a post-trial motion, Orkin requested that the court reduce the Atkinsons' damages award by the amount recovered from the Atkinsons' settlement with Terminix. Because the trial judge found that "Terminix's conduct could be a contributing factor in the neglience cause of action and, thus, a contributing factor to Plaintiff's damages," the judge granted Orkin's motion for set-off. The parties filed notices of cross-appeal and submitted the following issues for review:

I. Was the punitive damages award so excessive as to violate Orkin's due process rights?

II. Did the trial court err in offsetting the Atkinson's judgment by the amount received from the settlement with Terminix?

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[5] The negligence award breaks down into $10,268.33 for expenses the Atkinsons incurred before trial and $58,800 in repair costs.

[6] The trial judge permitted the jury to review Orkin's 1999 financial statement during its consideration of punitive damages. The punitive damages award constituted one percent of Orkin's net worth that year.

LAW/ANALYSIS

I. DUE PROCESS AND PUNITIVE DAMAGES

The jury returned a verdict finding Orkin liable for breach of contract accompanied by a fraudulent act and awarded $6,191 in compensatory damages and $786,500 in punitive damages, a ratio of approximately approximately 127 to 1. Orkin argues that the punitive damages award was so excessive that it violated its right to due process. We agree.

The practice of awarding punitive damages originated in principles of criminal law "to deter the wrongdoer and others from committing like offenses in the future." *Laird v. Nationwide Ins. Co.,* 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964). Historically, our courts have recognized that punitive damages are intended to punish a wrongdoer when "criminal" conduct is intertwined with civil causes of action. *See* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 12-20 (1982) (describing how the court system has come to approve public punishment in private actions by utilizing punitive damages). This Court has held that "[p]unitive damages also serve to vindicate a private right to the injured party.…" *Clark v. Cantrell,* 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (quoting *Harris v. Burnside*, 261 S.C. 190, 196, 199 S.E.2d 65, 68 (1973)).

The policy behind awarding punitive damages must also remain consistent with the principle of penal theory that the "punishment should fit the crime." *Mathias v. Accor Economy Lodging Inc. and Motel 6 Operating L.P.*, 347 F.3d 672, 676 (7th Cir. 2003). "In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 426 (2003).

Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Due Process Clause insures that "a person receive fair notice not only of the

conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996). In addition, a defendant's right to reasonable notice should not be diminished simply because the defendant is a deep pocket corporation. *Id.* at 585. For example, in *Gore*, the United States Supreme Court proclaimed, "[t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of business." *Id.*

After the parties submitted their briefs in the present case, the United States Supreme Court issued its opinion in *State Farm v. Campbell*, which considered whether a punitive damages award was so excessive as to violate due process. 538 U.S. at 416-429. In *Campbell*, plaintiffs sued State Farm in a Utah trial court for bad-faith failure to settle – a legal theory similar to South Carolina's bad faith (now negligent) failure to settle cause of action set forth in *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933). During trial, the judge allowed the plaintiffs to present evidence of other instances around the nation in which State Farm had refused, in bad faith, to settle a client's claim.

The Utah Supreme Court noted that State Farm was being punished for its nationwide policies rather than for the conduct in the Campbells' case and reduced plaintiffs' punitive damages award from $145 million to $25 million. State Farm subsequently petitioned the United States Supreme Court for a writ of certiorari, which the Court granted. The Court held that the punitive damages award was so excessive as to violate State Farm's due process rights under the Fourteenth Amendment of the United States Constitution. *Campbell*, 538 U.S. at 429.

In determining the constitutionality of the punitive damages award, the *Campbell* Court looked to three guideposts[7] set forth in *Gore*:

[7] The *Campbell* Court used the word "guidepost" to emphasize its intent to create a guide, not a bright-line rule. *Campbell*, 538 U.S. at 424. For example, Judge Posner of the Seventh Circuit recently explained that it is not necessary for courts to follow rigid mathematical rules when reviewing

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Campbell, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575). In addition, the United States Supreme Court applied a *de novo* standard of review and instructed appellate courts to so the same when reviewing punitive damage awards. *Campbell*, 538 U.S. at 417 (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424, 435-436 (2001)).

In the present case, we reverse and remand the issue of punitive damages because (1) the trial court improperly admitted evidence that unfairly prejudices Orkin's case; and (2) the award is so excessive that it constitutes an irrational and arbitrary deprivation of property under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

1. DEGREE OF REPREHENSIBILITY OF ORKIN'S MISCONDUCT

Orkin argues that the trial judge caused the degree of reprehensibility of Orkin's conduct to be unfairly inflated by allowing the jury to consider evidence of Orkin's 1980 initiative and Woodside's expert testimony concerning Orkin's current and potential loss for honoring the fixed-rate provision in all its pre-1975 contracts. We agree.

The first guidepost established in *Gore* is the degree of reprehensibility of the defendant's misconduct, which the United States

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a punitive damages award: "What follows from these principles, however, is that punitive damages should be admeasured by standards or rules rather than in a completely ad hoc manner, and this does not tell us what the maximum ratio of punitive to compensatory damages should be in a particular case." *Mathias*, 347 F.3d at 676.

Supreme Court held is "[t]he most important indicium of the reasonableness of a punitive damages award.…" *Gore*, 517 U.S. at 575. The United States Supreme Court has provided state courts with a list of considerations to be used in determining the degree of reprehensibility of a defendant's conduct:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health and safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.
> …
> The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.

Campbell, 538 U.S. at 419.

We find the evidence of Orkin's 1980 initiative and Woodside's expert testimony about the initiative unfairly amplified the degree of reprehensibility of Orkin's conduct and, in turn, unfairly inflated the amount of punitive damages the jury awarded.

(a) Orkin Initiative Memo

The Atkinsons argue that Orkin, which was already enjoined from breaching the fixed-rate provision, was searching for new ways to mitigate the losses of its unprofitable pre-1975 contracts. On the contrary, Orkin contends that because the initiative was not related to the conduct in the Atkinsons' breach of contract claim, the trial judge erred in allowing the memo to be admitted. We agree with Orkin.

The United States Supreme Court considered a similar issue in *Campbell*. During the damages phase, the trial judge allowed the plaintiff to present evidence concerning State Farm's prior conduct, suggesting that State Farm had developed a nationwide policy of denying claims and refusing to settle claims in bad-faith. The trial court not only allowed

testimony of State Farm's conduct toward the Campbells, it accepted testimony concerning State Farm's denial of claims around the country. Much of the evidence concerning State Farm's out-of-state conduct was dissimilar and unrelated to State Farm's conduct toward the Campbells. Because of the dissimilarity in conduct, the United States Supreme Court held that State Farm's out-of-state conduct was not admissible to inflate the Campbells' punitive damages award:

> [t]he courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbell's harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of reprehensibility analysis
> ….
> Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct.

Campbell, 538 U.S. at 422-423.

The "similarity" analysis conducted in *Campbell* arises from the same general relevance safeguards addressed by Rule 403, SCRE (a court shall rule evidence inadmissible if its probative value is substantially outweighed by its prejudicial value). The analysis applied in *Campbell*, however, requires us to determine, in the present case, whether evidence of the 1980 initiative is "similar to" the breach of the transferability provision. In other words, unless Orkin's past conduct is "similar" to the conduct directed at the Atkinsons, it is inadmissible.

For the following reasons, we find Orkin's initiative directing agents to breach the fixed-rate provision (Orkin's past conduct) is dissimilar from Orkin's breach of the transferability provision in the present case. First, Orkin's past "initiative" conduct was directed toward existing customers,

while Orkin's "transferability" conduct in the present case only affected the Atkinsons, who were prospective customers. In addition, those affected by Orkin's past conduct would have coverage but for a higher price, while the conduct here forced the Atkinsons to negotiate coverage from an entirely different provider. Finally, Orkin's past conduct involved an attempt to make unprofitable contracts profitable, while the conduct in the present case was an attempt to get out of an unprofitable contract.

Second, Orkin's past conduct arose from an initiative developed almost fifteen years before Orkin dishonored the transferability provision in the present case. In addition, Orkin was enjoined from unilaterally raising rates more than ten years before Orkin had any contractual obligation with the Atkinsons. We find that the considerable period of time between Orkin's past conduct and Orkin's conduct in the present case lends further support to our finding that the two are dissimilar.

Allowing the jury to consider evidence of Orkin's breach of the fixed-rate provision was extremely prejudicial because it allowed the jury to punish Orkin for conduct unrelated to the conduct in the present case. Moreover, at trial, the Atkinsons did not present any evidence that Orkin refused to honor the transferability provision on other contracts in South Carolina. The fact that Orkin stood to gain financially from breaching both provisions of the contract is not sufficient to render the two breaches "similar." Accordingly, we hold that the trial court erred in allowing the Atkinsons to present evidence of the Orkin initiative and, in doing so, permitted the Atkinsons to unfairly exaggerate the degree of reprehensibility of Orkin's conduct.

(b) Expert Testimony

Orkin argues that the trial judge erred in admitting into evidence Woodside's expert testimony concerning Orkin's projected losses for honoring the fixed-rate provision of all its pre-1975 contracts. We agree.

It is well settled that "opinion testimony of an expert may be based upon a hypothetical question." *Gazes v. Dillard's Dep't Store, Inc.*, 341

S.C. 507, 514, 534 S.E.2d 306, 310 (Ct. App. 2000). But "the hypothetical question must be based on facts supported by the evidence …." *Id*.

We hold that Woodside's testimony as to Orkin's projected loss from honoring the fixed-rate provision of its contracts is inadmissible for the same reasons we find the 1980 initiative was inadmissible. This projection is based upon conduct that is too dissimilar from the conduct in the present case and is therefore, inadmissible because it unfairly inflates the reprehensibility of Orkin's conduct in the present case.

On the other hand, we are much more hesitant to restrict outright Woodside's testimony concerning Orkin's gain from breaching the transferability provision in all its pre-1975 contracts. This testimony – subject to the evidentiary safeguards of *Gazes* and *Campbell* – could be probative of the reprehensibility of Orkin's conduct in the present case.

2. DISPARITY BETWEEN COMPENSATORY AND PUNITIVE DAMAGE AWARDS

The jury awarded the Atkinsons $786,500 in punitive damages and $6,191 in compensatory damages, representing a 127 to 1 ratio.[8] We hold that such a sizable disparity between punitive and compensatory damages establishes a presumption that the punitive damages award is an unconstitutional deprivation of property.

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[8] The jury found for the Atkinsons on both the breach of contract accompanied by a fraudulent act and negligence claims. The punitive damages award attached to the breach of contract accompanied by a fraudulent act claim, which was the only cause of action in the complaint that warrants punitive damages. *See Scott v. Porter*, 340 S.C. 158, 172, 530 S.E.2d 389, 396 (2000) (holding that it is only proper for a jury to award punitive damages for a negligence claim when that negligence was wilful, wanton, or reckless); *Wright v. Public Savings Life Ins. Co.*, 262 S.C. 285, 289, 204 S.E.2d 57, 59 (1974) (holding punitive damages may be awarded when a breach of contract is accompanied by a fraudulent act). Therefore, we did not include the jury's compensatory damages award as to Orkin's simple negligence in our computation of the ratio.

The *Campbell* opinion provides that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[9] 538 U.S. at 424 (quoting *Gore*, 517 U.S. at 582). Nevertheless, "the Constitutional line [setting forth the appropriate ratio of actual to punitive damages] is not marked by a simple mathematical formula." *Id.* The Court emphasized that "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." *Id*.

Recently, the Seventh Circuit Court of Appeals upheld a punitive damages award that exceeded a single-digit ratio where a particularly egregious act resulted in small economic damages. *Mathias*, 347 F.3d at 678. In that case, the plaintiff suffered bites from hundreds of bed bugs when he and his family rented a hotel room from the defendant. The court upheld a punitive damages award that exceeded a single-digit ratio because "[t]he defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional." *Id.* at 677.

Although the amount of compensatory damages in the present case was particularly low, Orkin's acts were not so egregious as to warrant a 127 to 1 ratio. Therefore, we hold that the Atkinsons have failed to rebut the presumption that the three-digit, punitive-compensatory damages ratios in this case is unconstitutional.

3. SANCTIONS FOR COMPARABLE MISCONDUCT

Finally, *Campbell* requires us to consider cases involving comparable conduct to determine whether the ratio in the case before us is

[9] The *Campbell* Court recites a long history of statutory sanctions concerning double, treble, or quadruple damages awarded to deter and punish. The Court provides that "while they are not binding, they are instructive" in that they all provide single-digit ratios. *Campbell*, 538 U.S. at 425.

unconstitutional. After reviewing cases involving breach of contract with a fraudulent act, we find that the 1 to 127 ratio awarded in this case is well above the average compensatory-punitive damages ratio. *See, e.g., Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (upholding a punitive damage award that was approximately 28 times compensatory damages); *Pinkney v. Orkin Exterminating Co.*, 268 S.C. 430, 234 S.E.2d 654 (1977) (upholding an award of $5,000 compensatory damages and $4,000 punitive damages).

II. THE COLLATERAL SOURCE RULE

The Atkinsons argue that proceeds from their settlement with Terminix was a "collateral source," and therefore Orkin was not entitled to any set-off. We agree.

According to the collateral source rule, a wrongdoer should not receive a windfall simply because the injured party received compensation from an independent source. *Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989). Moreover, this rule has been liberally applied in South Carolina to preclude the reduction of damages. *See Otis Elevator v. Hardin Constr. Co.*, 316 S.C. 292, 450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); *Rattenni*, 298 S.C. at 277, 379 S.E.2d at 892 (1989) (tortfeasor's liability for damages not reduced by underinsurance proceeds); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1976) (tortfeasor's liability for damages not reduced by disability payments from employer). To qualify as a collateral source, the source must be "wholly independent of the wrongdoer." *Citizens and S. Nat'l Bank of South Carolina v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

In a post-trial motion, Orkin asked the court to reduce the judgment by the amount the Atkinsons recovered from their settlement with Terminix. Because the judge viewed Terminix and Orkin as joint tortfeasors, the judge reduced the amount Orkin owed by the amount Terminix had already paid in settlement. The trial judge also reasoned that the negligence claim was "general in nature" and that "Terminix's conduct could be a contributing

factor in this cause of action and, thus, a contributing factor to Plaintiff's damages under the negligence cause of action."

We find that the trial judge erred in treating Orkin and Terminix as joint-tortfeasors. The duties that Orkin and Terminix owed the Atkinsons were based upon independent, unrelated contracts, not a common duty of care. Moreover, we see no indication that the claims against Terminix constituted a "contributing factor" to Orkin's negligent inspection of the house. Accordingly, we hold that the proceeds from the Terminix settlement was a collateral source, and therefore the trial court erred in offseting the judgment, by the amount the Atkinsons received in settlement.

CONCLUSION

We recognize that Orkin's breach of the transferability provision in the contract with the Atkinsons will support a jury award of significant punitive damages. Nevertheless, after applying the United States Supreme Court's holding in *Campbell*, we reverse and remand this case on the issue of the amount of punitive damages awarded, with instructions that on retrial of the issue of the amount of punitive damages, evidence of Orkin's 1980 initiative and Woodside's expert testimony concerning Orkin's current and potential losses for honoring the fixed-rate provision of its pre-1975 contracts must not be admitted.

We also reverse the trial court's decision to offset the proceeds from the Atkinsons' settlement with Terminix. Accordingly, we affirm the jury's award of $75,259.33 in actual damages without setting off that amount by the $31,111.75 the Atkinsons received in their settlement with Terminix.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

William E. Downs, Jr., Appellant.

Appeal From Aiken County
L. Casey Manning, Circuit Court Judge

Opinion No. 25884
Heard September 21, 2004 – Filed October 25, 2004

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, and Jeffrey P. Bloom, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for Respondent.

JUSTICE PLEICONES: This is a death penalty case. Appellant pleaded guilty to murder, kidnapping, and first-degree criminal sexual conduct with a minor. With respect to the murder, the circuit court found the following aggravating circumstances: Appellant committed the murder while in the commission of criminal sexual conduct; Appellant committed the murder while in the commission of a kidnapping; and Appellant murdered a child

eleven years old or younger. The circuit court sentenced Appellant to death.[1] This opinion consolidates Appellant's direct appeal and the sentence review required by S.C. Code Ann. § 16-3-25 (2003). We affirm.

FACTS

The victim, a six-year-old boy, was taken into a wooded area of a park, raped, and strangled to death. After newspapers reported the murder, Appellant told his sister that he had committed the crime. Appellant's sister reported this to the police and disclosed Appellant's location. The police found and detained Appellant, and he confessed.

Appellant was charged with murder, kidnapping, and first-degree criminal sexual conduct with a minor. At the plea hearing, Appellant expressed the desire to plead guilty but was uncertain whether he wanted to later present evidence that he was mentally ill at the time of the crime (guilty but mentally ill or GBMI).[2] Appellant never suggested that he wanted to plead guilty only if found mentally ill. Rather, Appellant repeatedly stated that he knew he wanted to admit guilt. Moreover, Appellant claimed to understand that if he were to present evidence of mental illness and the court were to find him GBMI, death would remain a possible sentence.[3]

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[1] Appellant was not sentenced for the kidnapping or first-degree criminal sexual conduct with a minor. S.C. Code Ann. § 16-3-910 (2003) does not permit a sentence for kidnapping if the defendant is sentenced for murder.

[2] A defendant is GBMI if at the time of the offense, "he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law." S.C. Code Ann. § 17-24-20(A) (2003).

[3] S.C. Code Ann. § 17-24-70 (2003) requires that a defendant found GBMI be sentenced "as provided by law for a defendant found guilty." This Court has held it is constitutional to sentence a GBMI defendant to death. State v. Wilson, 306 S.C. 498, 512, 413 S.E.2d 19, 27 (1992) (subsequent history omitted).

The court proceeded with the hearing on the guilty plea while permitting Appellant to defer the decision whether to claim mental illness. Upon the court's inquiry Appellant claimed to understand that by pleading guilty he waived his right to a jury trial on both guilt and sentencing. When the judge asked if Appellant wanted to impanel a jury, admit guilt, and ask the jury to decide the sentence, Appellant answered in the negative. The court accepted Appellant's guilty plea as voluntarily, knowingly, and intelligently entered.

At a later hearing, Appellant did present evidence that he was mentally ill when the crime occurred. An expert testified that Appellant's mental condition rendered him unable to conform his conduct to the requirements of the law, that is, he was mentally ill. Two other experts testified that Appellant was not mentally ill, that he could so conform his conduct. After considering the evidence, the court ruled that Appellant failed to prove he was GBMI.[4]

At sentencing the court found the three aggravating circumstances stated above. In addition, even though Appellant's attorneys represented that Appellant had instructed them to neither "offer any mitigation to the court" nor "argue to the court for a sentence of life without parole," the court found four mitigating circumstances.[5] After considering both sets of circumstances, the court sentenced Appellant to death.

ISSUES

[4] The defendant has the burden of proving mental illness by a preponderance of the evidence. S.C. Code Ann. § 17-24-20(D) (2003).

[5] First, Appellant had "no significant history of prior criminal conviction involving the use of violence against another person." Second, Appellant committed the murder while "under the influence of mental or emotional disturbance." Third, Appellant's capacity "to appreciate the criminality of his act or to conform his conduct to the requirements of the law was substantially impaired." And fourth, Appellant's age or mentality at the time of the crime weighed in his favor.

I. Whether Appellant's guilty plea was an invalid conditional plea.
II. Whether Appellant had a right to a jury trial on sentencing of which he was deprived.

III. Whether the circuit court lacked subject matter jurisdiction to sentence Appellant to death because the indictment did not allege aggravating circumstances.

ANALYSIS

I. The Plea

Appellant claims his guilty plea was a conditional plea and therefore invalid. We disagree.

In South Carolina, guilty pleas must be unconditional. State v. Peppers, 346 S.C. 502, 504, 552 S.E.2d 288, 289 (2001); State v. O'Leary, 302 S.C. 17, 18, 393 S.E.2d 186, 187 (1990); State v. Truesdale, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982). If "an accused attempts to attach any condition or qualification" to a guilty plea, then "the trial court should direct a plea of not guilty." Truesdale, 278 S.C. at 370, 296 S.E.2d at 529. If the trial court accepts a conditional guilty plea, then the plea will be vacated on appeal. Peppers, 346 S.C. at 505, 552 S.E.2d at 290.

Appellant asserts his plea was conditional because he pleaded guilty while deferring the decision whether to present evidence of mental illness. Appellant argues the potential of being found mentally ill constituted a condition attached to his plea. We disagree.

Appellant never attempted to reserve the right to later deny his guilt. He reserved the right only to present evidence that he committed the crime while mentally ill. Guilty but mentally ill is still guilty. See S.C. Code Ann. § 17-24-70 (2003) (requiring that a GBMI defendant be sentenced as guilty); see also State v. Hornsby, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997) (noting that a finding of GBMI "does not absolve a defendant of guilt"). The difference between guilty and GBMI pertains only to post-sentencing medical

treatment. See S.C. Code Ann. § 17-24-70 (2003). Appellant's guilty plea was unconditional.

II. The Sentencing Procedure

Appellant asserts Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), renders unconstitutional the requirement in S.C. Code Ann. § 16-3-20(B) (2003) that the sentencing proceeding be held before the judge when a defendant pleads guilty to murder. We disagree.

The capital-sentencing procedure invalidated in Ring does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz. Rev. Stat. § 13-703(C) (2001) (amended 2002); Ring, 536 U.S. at 597, 122 S. Ct. at 2437, 153 L.Ed.2d at 569. In South Carolina, conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C. Code Ann. § 16-3-20(B) (2003); Sheppard v. State, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).

In any event, Ring did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. See, e.g., Leone v. Indiana, 797 N.E.2d 743, 749-50 (Ind. 2003); Colwell v. Nevada, 118 Nev. 807, 59 P.3d 463, 473-74 (Nev. 2003); Illinois v. Altom, 338 Ill.App.3d 355, 362, 788 N.E.2d 55, 61 (Ill. App. 5 Dist. 2003), app. denied, 203 Ill.2d 663, 792 N.E.2d 308 (Ill. 2003).

Appellant was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing. He does not argue his waiver was made involuntarily, unknowingly, or unintelligently. See Burnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003) (discussing waivers of constitutional rights). Appellant was not deprived of his right to a jury trial.

III. The Indictment

Appellant argues the circuit court lacked subject matter jurisdiction to

sentence him to death because the indictment charging him with murder[6] did not allege an aggravating circumstance.[7] Appellant did not challenge the indictment below, but subject matter jurisdiction may be raised at any time, including on appeal. See Koon v. State, 358 S.C. 359, 365, 595 S.E.2d 456, 459 (2004). We disagree with Appellant on the merits.

Appellant asserts Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), and Ring v. Arizona, supra, mandate that indictments in state capital cases allege aggravation. Appellant is incorrect. The Court expressly noted in both Apprendi and Ring that the cases did not involve challenges to state indictments. Apprendi, 530 U.S. at 477, 120 S. Ct. at 2356, 147 L.Ed.2d at 447 n. 3; Ring, 536 U.S. at 597, 122 S. Ct. at 2437, 153 L.Ed.2d at 569 n. 4. More important, the Fourteenth Amendment has not been construed to incorporate the Fifth Amendment's Presentment or Indictment Clause. See Apprendi, 530 U.S. at 477, 120 S. Ct. at 2356, 147 L.Ed.2d at 447 n. 3; Ring, 530 U.S. at 597, 122 S. Ct. at 2437, 153 L.Ed.2d at 569 n. 4; Alexander v. Louisiana, 405 U.S. 625, 633, 92 S. Ct. 1221, 1226-27, 31 L.Ed.2d 536, 543-44 (1972); Hurtado v. California, 110 U.S. 516, 534-35, 4 S. Ct. 111, 120-21, 28 L.Ed. 232, 238 (1884). State law governs indictments for state-law crimes.

Under South Carolina law, aggravating circumstances need not be alleged in an indictment for murder. S.C. Code Ann. § 17-19-30 (2003); State v. Butler, 277 S.C. 452, 456-57, 290 S.E.2d 1, 3-4 (1982) (subsequent history omitted). The aggravating circumstances listed in S.C. Code Ann. § 16-3-20(C)(a) (2003) are sentencing factors, not elements of murder. See Butler, 277 S.C. at 456-67, 290 S.E.2d at 3-4. The circuit court had subject matter jurisdiction to sentence Appellant to death.

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[6] The indictment stated Appellant "did in Aiken County on or about April 17, 1999, with malice aforethought, kill [the victim] by means of asphyxia due to manual strangulation and said victim died as a proximate result thereof. All in violation of Section 16-3-10 of the South Carolina Code of Laws (1976), as amended."

[7] The State timely gave Appellant notice of aggravation pursuant to S.C. Code Ann. § 16-3-20(B) (2003).

SENTENCE REVIEW

The Court must conduct a proportionality review of Appellant's death sentence based on the record. S.C. Code Ann. § 16-3-25(A) (2003). In conducting the review, the Court considers similar cases in which the death penalty has been upheld. See S.C. Code Ann. § 16-3-25(E) (2003).

We find Appellant's death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the evidence supports the trial judge's findings of aggravation. See S.C. Code Ann. § 16-3-25(C) (2003). Further, in relation to sentences in similar cases, Appellant's was neither excessive nor disproportionate to his crime. See State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002); State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (2001); State v. Rogers, 338 S.C. 435, 527 S.E.2d 101 (2000); State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999); State v. Charping, 333 S.C. 124, 508 S.E.2d 851 (1998), cert. denied, Charping v. South Carolina, 527 U.S. 1007, 119 S. Ct. 2345, 144 L.Ed.2d 241 (1999); State v. Conyers, 326 S.C. 263, 487 S.E.2d 181 (1997).

CONCLUSION

Appellant's guilty plea was not a conditional plea, and Appellant was not deprived of his right to a jury trial. In addition, the circuit court had subject matter jurisdiction to sentence Appellant to death. Finally, the punishment was proportionate to the crime. Appellant's guilty plea and sentence are

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Damon Griffin, Respondent

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Lexington County
James R. Barber, Circuit Court Judge

Opinion No. 25885
Submitted September 23, 2004 – Filed October 25, 2004

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Elizabeth R. McMahon, of Columbia, for petitioner.

Acting Deputy Chief Attorney Wanda P. Hagler, of Columbia, for respondent.

JUSTICE MOORE: We granted certiorari to determine whether the post-conviction relief (PCR) court erred by finding counsel ineffective for promising respondent a specific sentence. We reverse.

FACTS

Respondent pled guilty to third-degree arson, second-degree burglary, criminal conspiracy, and malicious injury to property. He received ten-year concurrent sentences for the arson and injury to property charges. He also received fifteen years imprisonment for second-degree burglary and five years imprisonment for conspiracy. Those sentences were each to be served consecutive to the ten-year imprisonment terms for a total imprisonment period of thirty years. Respondent did not appeal. Thereafter, his PCR application was granted.

Respondent and Michael Easter (Easter) vandalized White Knoll High School, causing approximately $250,000 in damage. During the plea proceeding, the solicitor submitted respondent's prior criminal record and informed the plea court there were no plea negotiations and that the solicitor felt consecutive sentences would be appropriate.

Before accepting respondent's guilty plea, the plea court questioned respondent extensively about the plea, asking him, *inter alia*, whether he understood he could get fifteen years for second-degree burglary, ten years for arson, ten years for malicious injury to property, and five years for criminal conspiracy and whether he had been promised anything for pleading guilty.

The plea court sentenced respondent's accomplice in the crimes, Easter, earlier the same day. Easter was given a total sentence of twenty-two years imprisonment. At respondent's plea proceeding, before sentencing respondent, the court noted several factors he had considered in arriving at a sentence for respondent. First, that respondent's record was more severe than Easter's. Second, that both respondent and Easter had cooperated with law enforcement. Finally, the court stated the sentence he gave would send a message to the public to stay away from schools and other public institutions.

The court then sentenced respondent to a total imprisonment period of thirty years.

Respondent testified at the PCR hearing that he initially informed counsel that if his sentence would be more than twenty years, then he would go to trial. Respondent testified that, on the day of the plea, counsel told him he had talked to the plea judge and the judge told counsel respondent would get a sentence comparable to Easter's twenty-two year sentence. Respondent testified counsel gave him his word that he would not get more than twenty or twenty-two years if he pled guilty. Respondent stated if he had known an agreement did not exist whereby he would receive a sentence comparable to Easter's sentence, he would not have pled guilty but would have gone to trial.

Counsel testified he explained the maximum sentencing range to respondent and that there was no plea deal. He stated he told respondent he felt this particular judge would not give consecutive sentences for those charges.

Counsel testified the plea court, which had just heard Easter's plea, told counsel he did not see why the sentences for respondent would be any different from Easter's, unless he heard something new and different during the plea. Counsel stated he repeated this information to respondent and told him he felt comfortable respondent would receive a sentence in the twenty-two year range, but he did not guarantee such a sentence. Counsel testified that if he had known the sentence would have differed that much from Easter's, he would have recommended going to trial.

The PCR court found that because counsel advised respondent he would receive a sentence comparable to Easter's sentence, counsel was ineffective.

ISSUE

Did the PCR court err by finding counsel ineffective for promising respondent a specific sentence?

DISCUSSION

To prove counsel ineffective when a guilty plea is challenged, petitioner must show that counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability a guilty plea would not have been entered. Hill v. Lockhart, 474 U.S. 52 (1985); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). A defendant who pleads guilty upon the advice of counsel may attack the voluntary and intelligent character of the guilty plea only by showing the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998) (quotations and citation omitted).

While counsel told respondent the plea court had indicated he would likely give respondent a sentence comparable to Easter's twenty-two year sentence, counsel made no promises. He also informed respondent there were no plea negotiations and informed him of the possible range of sentences. Further, the plea court informed respondent of the maximum sentences he could receive for the charges prior to respondent's plea being entered. The plea court also asked respondent whether he understood there were no promises made regarding his guilty plea. Respondent's answers to those questions reflect an awareness of the potential range of sentences and an understanding that he had not been promised anything in return for his guilty plea. Accordingly, counsel's performance was not deficient even though he related his belief to respondent that the court would give a twenty-two year sentence instead of the thirty years respondent received. *See* Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (fact defendant "hoped" and "expected" to get reduced sentence does not render plea invalid; "wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences"); Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984) (fact defendant "thought" judge would give lighter sentence not ground for relief); State v. Dozier, 263 S.C. 267, 210 S.E.2d 225 (1974) (disparate sentences between co-defendants is not per se abuse of discretion); *cf.* Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000) (to be knowing and

voluntary, plea must be entered with awareness of consequences of plea, *i.e.* proper advice by judge on mandatory minimum sentencing).

Therefore, the PCR court erred by granting respondent relief for ineffective assistance of counsel. *See* Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002) (Court will not uphold findings of PCR court if no probative evidence supports those findings).
REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

B&A Development, Inc.; Baker-Haynes, LLC; H&C Fishers, Inc.; Charles C. Smith; James P. Mayes, III; Barry C. Haynes; Rachelle H. Hayes; Samuel H. Baker; Jody J. Baker; Andrew D. Smith; G.D. Rogers; Mary G. Collins; Individually and as Class Representative for all those similarly situated, Appellants,

v.

Georgetown County, a Body Politic; Georgetown County Council; Georgetown County School District; Edna Earle Freeman in her capacity as Georgetown County Auditor; and Loretta D. Washington, in her capacity as Georgetown County Treasurer, Respondents.

Appeal From Georgetown County
Steven H. John, Circuit Court Judge

Opinion No. 3877
Submitted September 15, 2004 – Filed October 25, 2004

AFFIRMED

Gene M. Connell, Jr., of Surfside Beach, for Appellants

David J. Mills and Thomas J. Rubillo, both of Georgetown and David T. Duff, of Columbia, for Respondents.

KITTREDGE, J.: In this case, a group of Georgetown County taxpayers brought action in circuit court alleging the County had imposed excessive, unlawful taxes on their real and personal property. These taxpayers sought relief in the form of a refund or tax credit. The circuit court dismissed the taxpayers' case on the grounds they had failed to exhaust the administrative remedies prescribed under the South Carolina Revenue Procedures Act (RPA or "the Act") (S.C. Code Ann. §§ 12-60-10 to -3390 (2000 & Supp. 2003)). The taxpayers now appeal, arguing the RPA does not apply to their claims. We affirm.

FACTS/PROCEDURAL HISTORY

The taxpayers who brought this case are twelve corporate and individual Georgetown County residents (hereinafter the "Taxpayers"). Styling the suit a class action on behalf of themselves and others similarly situated, Taxpayers brought this suit against several governing bodies and officers of the County—naming as defendants Georgetown County, members of the County Council, the County Auditor, the County Treasurer, as well as the Georgetown County School District. In their complaint, Taxpayers claimed the County had imposed an illegal levy of millage rates, resulting in unlawfully excessive taxation of their real and

personal property. The specific allegations center around the assessment of public money to fund the School District.

In Georgetown County, the amount of the annual property tax assessment depends to a large degree on the amount of money the School District determines it needs for operations in the coming the year. The process is straightforward: After the School District prepares its budget, the County auditor sets the tax rate, expressed in mills, to provide the necessary revenue to fund School District operations.

Taxpayers contend the County has levied upon property owners a higher millage rate than was needed to supply the revenue requested by the School District. Taxpayers allege this excess tax has created an illegal surplus each year from approximately 1991 until the time this lawsuit was filed in 2001. They claim the cumulative amount of the surplus collections exceeds $28 million.

Taxpayers brought their suit for the wrongful collection of taxes in the circuit court. The circuit court granted motions to dismiss filed by the County and School District, concluding the RPA requires Taxpayers to exhaust their administrative remedies under the Act. Therefore, as prescribed by the RPA, the circuit court dismissed the case without prejudice. See S.C. Code Ann. § 12-60-3390 (Supp. 2003). A subsequent motion to reconsider filed by the Taxpayers was denied. This appeal followed.

LAW/ANALYSIS

I. Applicability of the RPA

Taxpayers first argue the RPA does not apply to their cause of action for illegal taxation against the County. We disagree.

The RPA prescribes the procedures for resolving claims for the wrongful collection of taxes in our state.[1] The language of its operative

[1] In 1995, the Legislature adopted the RPA with the express legislative intent "to provide the people of this State with a straightforward procedure to determine any disputed revenue liability." S.C. Code Ann. § 12-60-20

provisions signals the Act's broad and comprehensive application. Specifically, section 12-60-80 of the RPA provides "there is no remedy other than those provided in this chapter in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes." S.C. Code Ann. § 12-60-80(A) (Supp. 2003) (emphasis added).[2] The only exception to this mandate is for "action[s] for a declaratory judgment where the sole issue is whether a statute is constitutional." § 12-60-80(B) ; see also Evans v. State, 344 S.C. 60, 66, 543 S.E.2d 547, 550 (2001) ("Recognizing the separation of powers doctrine prohibits an agency and ALJ from ruling on the constitutionality of a statute, [the court] concluded § 12-60-3390 was inapplicable 'where the sole issue [was] whether a statute or other legislative action is constitutional.'" (quoting Ward v. State, 343 S.C. 14, 20, 538 S.E.2d 245, 248 (2000)).[3]

(2000) (emphasis added). In 2000, the Legislature substituted the phrase "dispute with the Department of Revenue" for "any disputed revenue liability" in § 12-60-20. See § 12-60-20 (Supp. 2003). Our supreme court has noted that this alteration did not affect the applicability of the RPA to county tax protest procedures:

> Although this amendment could be read as indicative of an intent to limit the Act to tax issues involving the DOR, when amending § 12-60-20 the legislature did not amend or repeal those parts of the Act which deal solely with county tax disputes. In light of this, we hold that a court must look first to the Act when faced with a question of county tax protest procedures.

Brackenbrook North Charleston, LP v. County of Charleston, __ S.C. __, 602 S.E.2d 39, 42 (2004).

[2] We also note that recent amendments to § 12-60-80 provide that "a claim or action for the refund of taxes may not be brought as a class action in the Administrative Law Judge Division or any court of law in this State . . . ." § 12-60-80(C) (Act No. 69, 2003 S.C. Acts 744).

[3] Taxpayers do not challenge the facial constitutionality of the RPA. Consequently, the declaratory judgment exception pursuant to Evans v.

Taxpayers, however, contend their cause of action for illegal taxation arises under a statute that is not subject to the administrative and adjudicatory processes prescribed under the RPA. They claim their substantive right and remedy arise exclusively under South Carolina Code section 12-43-285. This statute was enacted as part of the South Carolina County Equalization and Reassessment Act (S.C. Code Ann. §§ 12-43-210 to -360 (2000 & Supp. 2003)), a law designed to ensure all property is taxed uniformly and equitably by assessing officials in the state. See § 12-43-210. Under the heading "Certification of millage rates; excessive rates," section 12-43-285 provides, in pertinent part:

> If a millage rate is in excess of that authorized by law, the county treasurer shall either issue refunds or transfer the total amount in excess of that authorized by law, upon collection, to a separate, segregated fund, which must be credited to taxpayers in the following year as instructed by the governing body of the political subdivision on whose behalf the millage was levied.

S.C. Code Ann. § 12-43-285(B) (Supp. 2003).

Taxpayers argue section 12-43-285 entitles them to bring action directly in circuit court. We disagree. This statute was enacted by the Legislature in 2001—six years after the enactment of the RPA. See Act No. 89, 2001 S.C. Acts 2070 (enactment of § 12-43-285); Act No. 60, 1995 S.C. Acts 362 (enactment of RPA). It is a well-established principle of statutory interpretation that subsequent legislation should be construed in harmony with existing laws. See Hodges v. Rainey, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) (holding that "[s]tatutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative"); Justice v. Pantry, 330 S.C. 37, 43-44, 496 S.E.2d 871, 874 (Ct. App. 1998) (opining that "[i]t is presumed that the Legislature [is] familiar with prior legislation . . . hence, if by any fair or liberal

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State does not apply, and Taxpayers so concede, for they only dispute the constitutionality of the RPA as applied to them.

construction two acts may be made to harmonize, no [c]ourt is justified in deciding that the last repealed the first") (quoting State v. Hood, 181 S.C. 488, 491, 188 S.E. 134, 136 (1936)). Neither section 12-43-285 nor any other provision of the County Equalization and Reassessment Act indicates a legislative intent to override or supplant the exclusive remedy provisions of the RPA.

Indeed, section 12-43-285 is silent regarding the forum in which an action may be pursued under its provisions. The RPA, on the other hand, provides explicit remedial procedures for taxpayers pursuing claims for allegedly wrongful real and personal property taxes assessed by county governments. The Act provides that a taxpayer may contest real property taxes assessed by the county assessor by filing a claim for refund with the assessor and provides a right of appeal to the Administrative Law Judge Division. S.C. Code Ann. § 12-60-2560 (2000). The same basic procedures for taxpayers contesting a county's personal property tax assessment are also provided for under the RPA. See S.C. Code Ann. § 12-60-2940 (2000).

Our supreme court further clarified the scope of the administrative remedies available to taxpayers under the RPA in Brackenbrook North Charleston, LP v. County of Charleston, __ S.C. __, 602 S.E.2d 39 (2004). In that case, the plaintiff taxpayers brought an action in circuit court alleging Charleston County levied an excessive millage rate on real property. The circuit court allowed the taxpayers' judicial action, finding the taxpayers had no administrative remedies under the RPA because the Act did not cover taxpayer challenges to the county's millage rate determination. The circuit court concluded the RPA's mandated administrative remedies only applied to taxpayer challenges to a county's "property tax assessment" (PTA).[4] Because the taxpayers in Brackenbrook did not dispute any component of their PTA, the circuit

[4] The PTA for each parcel of taxable real estate in a county is determined by multiplying the property's fair market value or special use value by the appropriate assessment ratio. S.C. Code Ann. § 12-60-30(19) (Supp. 2003). This PTA figure is then multiplied by the taxing district's millage rate, resulting in the tax assessment, that is, the dollar amount owed by the taxpayer for that year. See Brackenbrook, __ S.C. at __, 602 S.E.2d at 41.

court held the taxpayers had an immediate right of judicial action. The supreme court reversed, holding that:

> While the Act contains many specific procedures for taxpayers challenging their PTAs, relief under the Act is not limited to these types of protests. Section 12-60-2530(A) specifically provides the board of assessment appeals may rule on any PTA dispute "and also other relevant claims of a legal or factual nature except claims relating to property tax exemptions."
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> . . . .
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> Looking first to the Act, as we must, we hold that Taxpayers' remedy is not this direct circuit court refund suit, but rather an administrative refund pursuant to § 12-60-2560.

Id. at 44 (footnote omitted). As interpreted by our supreme court, therefore, the RPA's administrative procedures and remedies are not limited to a narrow class of taxpayer suits. Rather, the Act's provisions are sufficiently expansive to include any "relevant claims of a legal or factual nature." The RPA therefore vests county administrative bodies with jurisdiction to hear and decide in the first instance a broad range of taxpayer suits.

Accordingly, section 12-43-285 does not supplant the remedial scheme of the RPA. Had the Legislature intended to allow for direct action in circuit court—in contravention of the broadly defined scope of the RPA—it could have expressly provided for such immediate judicial review.

II. Constitutionality of the RPA's Remedies

Taxpayers alternatively claim they should be excused from the requirement to exhaust administrative remedies under the RPA because the Act as applied does not provide them a constitutionally adequate remedy under the facts of this case. We disagree.

In McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), the United States Supreme Court held due process requires that all taxpayers must have a "clear and certain" remedy for taxes collected in violation of law. Id. at 39. The Supreme Court has noted, however, that McKesson affords great flexibility to the states in satisfying these due process requirements, allowing states to "determine whether to provide a predeprivation process (e.g., an injunction) or instead to afford postdeprivation relief (e.g., a refund)." National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 587 (1995); see also Reich v. Collins, 513 U.S. 106, 110-11 (1994) (holding that "[d]ue process . . . allows the State to maintain an exclusively postdeprivation regime . . . or a hybrid regime. A State is free as well to reconfigure its remedial scheme over time, to fit its changing needs. Such choices are generally a matter only of state law.") (citation omitted).

As discussed above, sections 12-60-2560 (real property) and 12-60-2940 (personal property) of the RPA provide Taxpayers with a comprehensive postdeprivation procedure (claim for refund) to contest the taxes assessed by the County. Taxpayers offer no valid reason why they could not initiate a claim for a refund of the taxes paid by following the procedures prescribed under these statutes.

Taxpayers argue the circuit court erred in finding a constitutionally sufficient "clear and certain" remedy is available under the RPA. This contention is premised on Taxpayers' claim that they could not bring an action against the School District under the Act in the Administrative Law Judge (ALJ) Division. After the circuit court dismissed this suit without prejudice in January 2003, Taxpayers brought their action before the ALJ Division and did not name the School District as a party. Taxpayers then filed a motion to reconsider with the circuit court, claiming they had been "advised" that the School District could not be made a party "under the current statutory scheme for refunds of property taxes." Therefore, Taxpayers argue, the RPA fails to provide them a clear and certain remedy because they are prevented from pursuing their claims against the School District—the party they allege "has all of the taxes which [Taxpayers] assert are illegal."

We reject this argument as meritless. As revealed in the transcript of the circuit court hearing on the motion to reconsider, Taxpayers apparently received this "advice" from an unidentified employee in the office of the clerk of court in the ALJ Division. It hardly bears noting that the purported opinion of the ALJ clerk's office does not determine who may or may not be sued in our state's adjudicatory forums. Determining proper parties is a judicial function, not a clerk's function. There is nothing in the statutes that precluded Taxpayers from naming the School District or any other governmental subdivision with taxing authority. Taxpayers' purposeful decision not to include the School District in their complaint before the ALJ Division is a transparent attempt to create the illusion that the RPA and ALJ procedures do not provide a clear and certain remedy. Moreover, the record before us shows that the School District has successfully intervened and joined the ALJ action as a necessary party and that the School District is bound by that litigation.

We conclude the RPA provides a clear and certain remedy in the form of a post-deprivation process for Taxpayers to bring their action against the County and School District, therefore passing constitutional muster under McKesson and National Private Truck Council.

III. Novel Issue Rule

Taxpayers also argue the circuit court erred by deciding a novel issue on a Rule 12(b), SCRCP, motion to dismiss. They contend the nature of the issues presented in this case warranted further factual development before a dispositive ruling. We disagree.

As a general rule, our courts are reluctant to decide important questions of novel impression on a motion to dismiss before the parties have had an opportunity to fully develop the factual record. Evans v. State, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001). Instead, "[a] novel issue . . . is best decided in light of the testimony to be adduced at trial." Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980). "However, where the dispute is not as to the

underlying facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss for failure to state a claim." Evans, 344 S.C. at 68, 543 S.E.2d at 551.

The overarching issue in this case is whether the exclusive remedy provisions of the RPA govern the dispute resolution process in adjudicating Taxpayers' claims. This issue is purely a question of law. Therefore, we find further development of the factual record would not aid in determining the statutory and constitutional questions raised. The circuit court therefore acted appropriately in deciding this issue on a motion to dismiss.

CONCLUSION

We find the Taxpayers must exhaust their administrative remedies provided under the RPA before their suit for illegal taxation can receive judicial review. Taxpayers' arguments that the RPA does not apply to their action and that the RPA is unconstitutional as applied in this case are unpersuasive. Furthermore, we find the circuit court disposition of this matter on a motion to dismiss was proper. Accordingly, the order of the circuit court dismissing Taxpayers' case without prejudice is

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Timothy Scott Frey, Appellant.

Appeal From Spartanburg County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 3878
Submitted September 15, 2004 – Filed October 25, 2004

REVERSED AND REMANDED

Ricky Keith Harris, of Spartanburg, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

KITTREDGE, J.: Timothy Scott Frey appeals his conviction for driving under the influence. Frey seeks a new trial, contending the circuit court improperly admitted evidence of the results of a blood-alcohol test. We agree and the remand the case for a new trial.

FACTS AND PROCEDURAL HISTORY

On December 21, 2001, Frey, while driving a pick-up truck in Spartanburg County, collided with two Spartanburg County Sheriff's Office vehicles. Frey was injured in the accident and transported to the Spartanburg Regional Medical Center. The police officer investigating the accident, Trooper L.D. Smith of the South Carolina Highway Patrol, met Frey at the hospital emergency room. After Trooper Smith advised Frey of his rights under the Implied Consent Laws, Frey consented to a blood sample being taken for blood-alcohol level analysis.

Trooper Smith prepared a standard-form SLED Blood Collection Report in connection with obtaining the blood sample from Frey. According to the report, the blood was drawn from Frey by an individual named "Scott Darragh." The report does not indicate what position Darragh held at the hospital nor did the State offer any evidence to show what, if any, medical training or licensure Darragh had that would qualify him to obtain the blood sample.

At trial, Frey sought to suppress the admission of the blood-alcohol test results on the grounds the State did not present any evidence that the blood sample was drawn by a qualified individual as required under the implied consent statute. The circuit court denied Frey's request and admitted the test results. Frey was convicted and sentenced. This appeal followed.

STANDARD OF REVIEW

A trial judge's decision to admit or exclude evidence is within his discretion and will not be disturbed on appeal absent an abuse of

discretion. Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 185, 573 S.E.2d 789, 792 (2002).

LAW/ANALYSIS

Frey argues the circuit court erred in denying his request to suppress the admission of the blood-alcohol analysis test results. We agree.

Under the Implied Consent Statute, an arresting officer may direct that a blood sample be collected from a person arrested for DUI if that person is unable to submit to a breathalyzer test for medical reasons. S.C. Code Ann. § 56-5-2950 (Supp. 2003). The statute requires, however, that blood samples be collected by qualified medical personnel: "Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility." S.C. Code Ann. § 56-5-2950(a). The circuit court found there was enough "circumstantial evidence" to establish statutory compliance based upon the fact that, following the trooper's request, Darragh appeared in the emergency room wearing "hospital like scrubs."

We disagree with the reasoning of the circuit court. With any question regarding statutory construction and application, the court must always look first to the legislative intent as determined from the plain language of the statute. State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002); State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002). The plain language of section 56-5-2950 requires that, when an officer directs a blood sample be collected from a person arrested for DUI, the sample "must" be obtained by trained, qualified medical personnel. Our courts have consistently held that use of words such as "shall" or "must" indicates the Legislature's intent to enact a mandatory requirement. See, e.g., South Carolina Police Officers Ret. Sys. v. City of Spartanburg, 301 S.C. 188, 191, 391 S.E.2d 239, 241 (1990) (noting that statutory prescriptions couched in language such as "shall" and "must" are mandatory in application and effect); Starnes v. South Carolina Dep't of Public Safety, 342 S.C. 216, 221, 535 S.E.2d 665, 667 (Ct. App. 2000)

(same). The plain language of section 56-5-2950 demands that the State offer some evidence to establish compliance with this statutory requirement.

The plain language of section 56-5-2950 further requires that we reject the State's suggestion that the mere appearance of Scott Darragh in the emergency room is sufficient, for the statute mandates that the blood sample "must" be obtained by a trained medical professional. One's mere appearance in a hospital wearing generic hospital attire is not evidence of one's medical training. In light of the State's complete failure to satisfy this basic foundational requirement, we are constrained to find the circuit court erred in finding the foundational requirements of section 56-5-2950 had been satisfied.

The State alternatively asserts that, assuming Darragh was not qualified under the statute to collect the blood sample, suppression would not be warranted. Specifically, the State contends Frey was not prejudiced by the failure to comply with the statute. The State bases its argument on the principle that where a statute is silent about the admissibility of evidence, the "exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures." State v. Sheldon, 344 S.C. 340, 343, 543 S.E.2d 585, 586 (Ct. App. 2001) (quoting State v. Chandler, 267 S.C. 138, 226 S.E.2d 553 (1976)).

In support of its argument that prejudice has not been established, the State relies upon two supreme court decisions: State v. Chandler, 267 S.C. 138, 226 S.E.2d 553 (1976), and State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002). The present case, however, is critically different from the situations where our courts have found no prejudice arising from statutory violations. The two cases relied upon by the State illustrate this important distinction.[1]

[1] In its argument, the State also cites this court to State v. Sheldon, 344 S.C. 340, 543 S.E.2d 585 (Ct. App. 2001). Sheldon, however, is inapposite because the court in that case made no finding regarding

In State v. Chandler, the defendant claimed error and sought suppression of evidence obtained under a search warrant executed by law enforcement at nighttime although the warrant authorized a search "in the daytime only." 267 S.C. at 142, 226 S.E.2d at 555. The trial court admitted the evidence seized under the warrant. Our supreme court affirmed and understandably had no difficulty in finding no prejudice as a result of the nighttime search. The violation had no impact on the reliability or probative value of the evidence.

The same approach was followed in State v. Huntley. In that case, a defendant charged with DUI sought to suppress his breath test results on the grounds the breathalyzer operator did not strictly comply with the statutory guidelines governing the administration of breath tests. Specifically, the defendant claimed the operator used a 0.10 simulator test solution rather than the prescribed 0.08 solution. 349 S.C. at 3-4, 562 S.E.2d at 473-74. In its analysis, the supreme court focused on whether the failure to comply with the statute affected the reliability of the evidence. The court explicitly found the operator's error did not impact the accuracy of the results—concluding "[t]here is no question the breathalyzer machine was operating properly and its results were reliable." Id. at 6, 562 S.E.2d at 474.

In the present case, unlike Chandler and Huntley, the statutory violation is directly linked to the reliability of the critical evidence—the blood test results. The mandatory requirement imposed by the Legislature is designed to ensure the reliability of the test results. Recent revisions to section 56-5-2950 confirm this view. The statute was amended in 2003 to include the addition of subsection (e),[2] which provides, in pertinent part:

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whether prejudice was established but instead remanded that matter to the trial court. Id. at 344, 543 S.E.2d at 586.

[2] The 2003 revisions to § 56-5-2950 became effective shortly after the trial of this case. However, because subsection (e) addresses procedural rather than substantive rights, it is likely remedial in nature, and therefore retroactive in its application. See South Carolina Dep't of Revenue v. Rosemary Coin Machs., Inc., 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000)

> The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence any tests results, if the trial judge or hearing officer finds that such failure materially affected the accuracy or reliability of the tests results or the fairness of the testing procedure.

S.C. Code Ann. § 56-5-2950 (e) (Act No. 61, 2003 S.C. Acts 689). The State's complete failure to provide even minimal proof that the requirement was satisfied left the circuit court with no basis—other than pure conjecture or surmise—to determine the accuracy, reliability, or fairness of the test results. As such, legal prejudice is established. Were we to conclude otherwise in the face of no proof, the safeguards of section 56-5-2950 (a) would be rendered meaningless.

We are mindful of the legitimate concern of the circuit court that law enforcement officers who request blood samples should not be required to demand detailed background information about the hospital employee who shows up to take the sample. This concern, however, is misplaced. There is no basis to find fault with the actions of Trooper Smith. Law enforcement officers may generally rely on the implicit and explicit assurances of medical providers regarding the qualifications of personnel who are assigned to assist them in their investigation. The failure of proof in this case is directly attributable to the lack of preparation by the prosecutor. Had the Solicitor's Office engaged in minimum trial preparation, the qualifications of Scott Darragh would have been easily discovered. Such information, if consistent with the

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(noting that "statutes that are remedial or procedural in nature are generally held to operate retrospectively"). Nevertheless, we need not reach this issue in the present case. Whether evaluated under the legal prejudice theory advanced by the State or under the statutory procedure prescribed under the newly added § 56-5-2950(e), the analysis and result are the same: the instant case presented the trial court with no basis upon which to conclude the test results were accurate or reliable.

mandatory requirements of section 56-5-2950, would have foreclosed the present challenge.

CONCLUSION

Because the State offered no proof to show Frey's blood sample was obtained by a licensed physician, registered nurse, or "other medical personnel trained to obtain the samples in a licensed medical facility" as mandated by section 56-5-2950, we hold the trial court erred in denying Frey's motion to suppress the results of his blood-alcohol test. Accordingly, the ruling of the trial court is reversed and the case is remanded to the circuit court for a new trial.

REVERSED AND REMANDED.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Doe, individually and as Guardian and next friend for his minor child, James Doe, **Appellants,**

v.

Robert Francis Marion, Jr., M.D., Individually, Parkwood Pediatrics Group, Carolina Family Care, Inc., Walton L. Ector, M.D., Individually, William Gamble, M.D., Individually, Malcolm Rhodes, M.D., Individually, William Fred O'Dell, M.D., Individually, Carol Graf, M.D., Individually, Carol Graf, M.D. & Associates, P.A., and Pitt Marion, Individually

Of Whom Carol Graf, M.D., Individually, and Carol Graf, M.D. & Associates, P.A., are, **Respondents.**

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 3879
Heard October 12, 2004 – Filed October 25, 2004

AFFIRMED

J. Graham Sturgis, Jr., of Charleston and Gary B. Blasingame, Henry G. Garrard, III, and Michael O. Crain, all of Athens, for Appellants.

Stephen L. Brown and Carol B. Ervin, both of Charleston, for Respondents.

ANDERSON, J.: John Doe, individually and as Guardian and next friend for his minor child James Doe (collectively, Appellants), brought this action against multiple defendants seeking to recover damages arising from Dr. Robert Francis Marion, Jr.'s sexual abuse of James Doe. Carol Graf, M.D., individually, and Carol Graf, M.D. & Associates, P.A. (collectively, Respondents) were two of the defendants in the action. Respondents were dismissed from the action after filing a motion to dismiss under Rule 12(b)(6), SCRCP. After the denial of Appellants' motion for reconsideration, this appeal follows. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

James Doe, while under the care of Dr. Robert Marion, was allegedly "repeatedly sexually molested by Defendant Marion for a period of several years." James Doe allegedly suffered "permanent physical pain and suffering and extreme emotional distress." John Doe, James Doe's father, asserted he

lost the companionship of his child, suffered extreme emotional distress, and has lost earnings as a result of his son's molestation.

Appellants filed an Amended Complaint, which alleged the following facts that are deemed true and admitted for purposes of this appeal.[1] Dr. Carol Graf is a psychiatrist who began treating a victim of Dr. Marion's molestation. The victim told Dr. Graf of the molestation beginning in at least 1984. Dr. Graf never notified law enforcement or social services authorities of the child abuse. Dr. Graf failed to notify the medical licensing board or ethics review panel. The Amended Complaint alleges that under S.C. Code Ann. section 20-7-510 (Supp. 2002), Dr. Graf had a duty to report the suspected child abuse and sexual abuse to the appropriate authorities. The complaint contends the failure to notify was negligence per se and "enabled Defendant Marion to continue contact with and molestation of his then current and future minor patients."

Dr. Graf attempted to treat Dr. Marion "for his predilection for child molestation simultaneously with her treatment of other existing victim(s)." The Amended Complaint alleges Dr. Graf "failed to warn the foreseeable victims of Defendant Marion of the danger that he posed." It contends Dr. Graf "breached her common law duty to warn Plaintiff James Doe." The complaint asserts Carol Graf, M.D. & Associates, P.A. is vicariously liable as a result of Dr. Graf's negligence.

Respondents filed a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), SCRCP. The trial court granted the motion. In its order, the trial court found: (1) no common law duty to warn existed because there was no specific threat to a specific individual; (2) even assuming section 20-7-510 created a private cause of action, it is only for failure to notify regarding threats to a specific child, not any possible future victims; and (3) section 20-7-510 does not create a private cause of action for failing

[1] See Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) (stating that for purposes of considering a motion for judgment on the pleadings, all properly pleaded factual allegations are deemed admitted).

to notify the appropriate authorities. The trial court denied Appellants' motion for reconsideration.

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003), cert. denied (citing Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999)). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995); see also Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) (noting trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); Williams, 347 S.C. at 233, 553 S.E.2d at 499 (finding that trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff).

"A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case." Flateau, 355 S.C. at 202, 584 S.E.2d at 415; see Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999); see also Baird, 333 S.C. at 527, 511 S.E.2d at 73 (declaring that if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (concluding that motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case). In deciding whether the trial court properly granted the motion to dismiss, this

Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. See Gentry, 337 S.C. at 5, 522 S.E.2d at 139; see also Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (explaining that looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief).

The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987). The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law. Tatum v. Medical Univ. of South Carolina, 346 S.C. 194, 552 S.E.2d 18 (2001); see also Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997) (stating motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case).

"Dismissal of an action pursuant to Rule 12(b)(6) is appealable." Williams, 347 at 233, 553 S.E.2d at 500. Upon review of a dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard of review implemented by the trial court. Id.

LAW/ANALYSIS

Appellants contend the trial court erred in dismissing the claims for negligence against Dr. Graf. They assert the complaint properly alleges causes of action for common law negligence and negligence per se for violation of S.C Code Ann. section 20-7-510 (Supp. 2002). We disagree.

In order to prove negligence, the plaintiff must show: (1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. Andrade v. Johnson, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003); Regions Bank v. Schmauch, 354 S.C. 648, 668, 582 S.E.2d 432, 443

(Ct. App. 2003). To sustain an action for negligence, it is essential the plaintiff demonstrate the defendant breached a duty of care owed to the plaintiff. Sabb v. South Carolina State Univ., 350 S.C. 416, 429, 567 S.E.2d 231, 237 (2002); Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998). The existence of a duty owed is a question of law for the courts. Doe v. Batson, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001). In a negligence action, if no duty exists, the defendant is entitled to judgment as a matter of law. Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000).

Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002); Rogers v. South Carolina Dep't of Parole & Cmty Corr., 320 S.C. 253, 464 S.E.2d 330 (1995); Rayfield v. South Carolina Dep't of Corr., 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988); Restatement (Second) of Torts § 314 (1965). The Faile court inculcated:

> We recognize five exceptions to this rule: 1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant. See generally, Hubbard & Felix, The South Carolina Law of Torts 57-72 (1990).

Faile, 350 S.C. at 334, 566 S.E.2d at 546 (footnotes omitted).

I. Common Law Negligence

Appellants argue a duty to warn all future foreseeable victims arose out of the "special relationship" created in the psychiatrist–patient relationship. We find that no duty to warn was created.

South Carolina law does not recognize a general duty to warn of the dangerous propensities of others. Bishop v. South Carolina Dep't of Mental

Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). "However, when a defendant has the ability to monitor, supervise, and control an individual's conduct, a special relationship exists between the defendant and the individual, and the defendant may have a common law duty to warn potential victims of the individual's dangerous conduct." Id. "This duty to warn arises when the individual has made a specific threat of harm directed at a specific individual." Id. (emphasis added).

The South Carolina Supreme Court relied upon Tarasoff v. Regents of Univ. of California, 551 P.2d 334 (1976), in reaching its conclusions in Bishop. Specifically, the court quoted the following language explicating the duty:

> When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

Tarasoff, 551 P.2d at 340. Citing several cases relying on Tarasoff, the court in Bishop enounced: "this duty [to warn] is only owed when a patient specifically threatens a readily identifiable third party" and reiterated that the duty requires "the defendant be aware or should have been aware of the specific threat made by the patient to harm a specific person." Bishop, 331 S.C. at 87-88, 502 S.E.2d at 82.

Nowhere in the complaint have Appellants alleged a specific threat made by Dr. Marion directed against James Doe. The Amended Complaint alleges a duty to warn "foreseeable victims" which are defined in the complaint as the "future minor patients with whom [Dr. Marion] came into contact." This Court addressed a similar situation in Gilmer v. Martin, 323

S.C. 154, 473 S.E.2d 812 (Ct. App. 1996). In Gilmer, this Court was specifically asked whether "there should be a duty to warn all 'foreseeable' victims, such as in this case, where an identifiable threat exists to a specific, small group of individuals." Id. at 157-58, 473 S.E.2d at 814. The Court refused to extend the duty to warn to all foreseeable victims. Id.

Because Appellants have failed to allege a specific threat necessary to compel a duty to warn, the trial court correctly determined no legal duty existed under the common law.

II. Negligence Per Se Under Section 20-7-510

"An affirmative legal duty, however, may be created by statute, contract relationship, status, property interest, or some other special circumstance." Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 388, 520 S.E.2d 142, 149 (1999).

Section 20-7-510 of the South Carolina Code provides:

> (A) A physician . . . shall report in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect.
>
> . . . .
>
> (D) Reports of child abuse or neglect may be made orally by telephone or otherwise to the county department of social services or to a law enforcement agency in the county where the child resides or is found.[2]

[2] Section 20-7-510(A) was amended in 2003 and now reads: "A physician . . . must report in accordance with this section when in the person's professional capacity the person has received information which

S.C. Code Ann. § 20-7-510 (Supp. 2002).

A rule of statutory construction is that any legislation which is in derogation of common law must be strictly construed and not extended in application beyond clear legislative intent. South Carolina Dep't of Soc. Servs. v. Wheaton, 323 S.C. 299, 302, 474 S.E.2d 156, 158 (Ct. App. 1996). Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable. Hoogenboom v. City of Beaufort, 315 S.C. 306, 318 n.5, 433 S.E.2d 875, 884 n.5 (Ct. App. 1992).

The main factor in determining whether a statute creates a private cause of action is legislative intent. Dorman v. Aiken Communications, Inc., 303 S.C. 63, 398 S.E.2d 687 (1990). In Dorman, the South Carolina Supreme Court enunciated:

> The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute. . . . In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.

Id. at 67, 398 S.E.2d at 689 (quoting Whitworth v. Fast Fare Markets of South Carolina, Inc., 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985)). When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party. Citizens for Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992).

The reporting statute of section 20-7-510 does not purport to establish civil liability for the failure to report. The statute is silent in that regard.

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gives the person reason to believe that a child has been or may be abused or neglected as defined in section 20-7-490." Act No. 94, 2003 S.C. Acts 1554.

However, a subsequent, related statute imposes liability for making a false report. As such, it can reasonably be determined the legislative intent was for the reporting statute **NOT** to create civil liability. See Byrd v. Irmo High School, 321 S.C. 426, 433-34, 468 S.E.2d 861, 865 (1996) (finding when one provision does not include a right that is included in a related provision, legislative intent is that a right will not be implied where it does not exist).

Additionally, in Rayfield v. South Carolina Dep't of Corr., 297 S.C. 95, 374 S.E.2d 910 (1988), this Court announced:

> [W]e are able to derive a test for determining when a duty created by statute will support an action for negligence. In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.

Id. at 103, 374 S.E.2d at 914.

The statute in the instant case is in the portion of the Children's Code establishing the policies and procedures of the state's child welfare services. See S.C. Code Ann. § 20-7-480 (Supp. 2002). The statute is concerned with the protection of the public and not with the protection of an individual's private right. This is consistent with other jurisdictions' interpretations of similar statutes. In C.B. v. Bobo, 659 So. 2d 98 (Ala. 1995), the Supreme Court of Alabama construed a similar statute requiring mandatory reporting and found:

> The Child Abuse Reporting Act creates a duty owed to the general public, not to specific individuals, and, consequently, it does not create a private cause of action in favor of individuals. Therefore, to the extent that the plaintiffs rely on that statute, they fail to state a cause of action, and the trial court properly dismissed the claims insofar as they were based on the statute.

Id. at 102; see, e.g., Arbaugh v. Board of Educ., County of Pendleton, 591 S.E.2d 235, 241 (W. Va. 2003) (finding "same conclusion has been reached by a decided majority of states"); Fischer v. Metcalf, 543 So. 2d 785 (Fla. Dist. Ct. App. 1989); Borne v. Northwest Allen County Sch. Corp., 532 N.E.2d 1196 (Ind. Ct. App. 1989).

Accordingly, we rule that section 20-7-510 does **NOT** give rise to a private cause of action. We further conclude section 20-7-510 does **NOT** support a claim for negligence per se. Apodictically, the trial court properly dismissed Appellants' claim for negligence per se under the statute.

Additionally, the trial court found the statute refers to a report once the psychiatrist has "received information which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect." The court concluded this meant that specific information about a specific child had to be received before a duty to report was created by the statute. The complaint failed to allege any specific threat to James Doe. As this finding was not appealed, it is the law of the case. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed ruling is the law of the case).

CONCLUSION

We find the trial court properly determined the Amended Complaint failed to allege Dr. Graf owed a duty which would support a claim for damages resulting from her failure to warn Appellants of Dr. Marion's propensities. We hold section 20-7-510 of the South Carolina Code does not support a private cause of action for failing to report alleged abuse. The decision of the trial court to dismiss the action against Dr. Graf pursuant to Rule 12(b)(6), SCRCP, is

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.