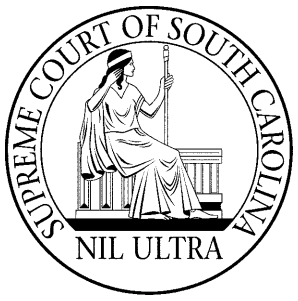

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 43
December 5, 2011
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 Matthew Edward Davis, Respondent.

Opinion No. 27071
Heard September 22, 2011 – Filed December 5, 2011

DISBARRED

Disciplinary Counsel Lesley M. Coggiola and Deputy Disciplinary Counsel Barbara M. Seymour, both of Columbia, for Office of Disciplinary Council.

Matthew Edward Davis, of Gilbert, pro se, Respondent.

PER CURIAM: In this attorney discipline matter, the Office of Disciplinary Counsel (ODC) filed formal charges on allegations of misconduct against Matthew Edward Davis (Respondent) stemming from alleged violations of eight different Rules of Professional Conduct. Following a hearing, the Hearing Panel of the Commission on Lawyer Conduct (Panel) recommended Respondent be disbarred and ordered to pay the costs of these proceedings. The Panel also recommended that Respondent be ordered to pay restitution, reimbursement, and be required to complete the Legal Ethics and Practice Program Ethics School and Trust Account School, as a condition of reinstatement. Neither ODC nor Respondent took exception to the Panel's recommended sanctions. We agree with the Panel's findings, and adopt all of the recommended sanctions.

I. FACTUAL/PROCEDURAL HISTORY

Matter A

Respondent has been convicted for numerous traffic offenses between 1998 and 2008, including twenty driver's license suspensions and fourteen violations for Driving Under Suspension (DUS).

Matter B

In 2004, Respondent closed four loans in which his client's construction company purchased real properties. Respondent withheld approximately $3,000 from the four closings to pay property taxes on his client's behalf. Because Respondent did not pay the taxes, this forced the client to pay these taxes from his own income to avoid a tax sale. Additionally, Respondent used the withheld funds to pay a "consultant," unauthorized by the client, and who did not actually participate in the closing transactions. The closing's settlement statements, prepared by Respondent, erroneously reflected property tax payments that did not occur and did not accurately reflect the unauthorized payment to a consultant.

Matter C

Respondent accepted $350 from a client and agreed to perform title work, and to obtain a title insurance policy. Respondent used the client's funds to pay the premium to the title insurance company, but the client never received the policy. Respondent claims that a previous outstanding mortgage on the property prevented issuance of the policy, but admitted that he should not have used the client's money to pay the premium after the policy could not be obtained.

Matter D

In 1996, Respondent handled property transactions for a deceased woman's estate. Respondent accepted funds on behalf of the estate's heirs but one of the heirs could not be located. Respondent deposited $1,486.11 into a

Certificate of Deposit (CD) account at BB&T on behalf of the missing heir. Respondent closed the CD account in May 2003 and deposited the funds into an investment account with Carolina First Bank (Carolina First)[1]. Respondent then withdrew the entire amount, an estimated $2,794.62, and transferred the funds to his friend, an investor in California. This transfer and subsequent investment led to the loss of all funds.

Matter E

In 2002, Respondent contracted with a title abstractor to perform work on behalf of Respondent's clients. Respondent failed to pay the title abstractor for the work she performed. The title abstractor sued Respondent for $25,090 and obtained a default judgment. Although Respondent disputes the total amount owed he did not appeal or contest the default judgment. The default judgment remains outstanding.

Matter F

This Court placed Respondent on interim suspension on February 4, 2005. ODC alleged that Respondent engaged in the unauthorized practice of law by continuing to represent clients, and assist others in the practice of law during his suspension.

Specifically, ODC alleged that in 2005 and 2006, Respondent's friend approached him with mortgages already bearing the borrower's signatures. Respondent then signed as a witness to the borrower's signatures, even though Respondent did not know whether an attorney facilitated the closing and did not witness the borrowers execute the documents. Respondent then notarized the attestation clause falsely stating that he witnessed the mortgage's execution.

[1] At the hearing, Respondent failed to provide documentation of any investment account at Carolina First or any deposits made into such an account.

In 2009, ODC alleges, a client retained Respondent to conduct a title search and render a title opinion in exchange for $100. Respondent failed to provide the title opinion in a timely manner, and blamed the delay on out-of-state "litigation." Respondent claims that he requested the $100 payment from the client to pay for copy expenses, and that he agreed to check the title only, not to provide a title opinion. However, in an email communication with the client, Respondent referred to himself as "esquire," and stated his intention to provide a "final opinion of title."

Panel's Recommendation

The Panel found that Respondent committed misconduct with respect to all of the above matters. Therefore the Panel found Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (Diligence); Rule 1.15 (Safekeeping of Property); Rule 4.1 (Truthfulness in Statements to Others); Rule 4.4 (Respect for Rights of Third Persons); Rule 5.5 (Unauthorized Practice of Law); Rule 8.1(b) (Bar Admissions and Disciplinary Matters); Rule 8.4 (Conduct Involving Dishonesty); Rule 8.4(b) (Criminal Conduct); and Rule 8.4(d) (Conduct Involving Dishonesty). The Panel also determined the Respondent violated Rule 417 (Financial Recordkeeping), SCACR.

The Panel considered three aggravating circumstances: Respondent's prior disciplinary offenses[2], the pattern of misconduct, and Respondent's lack of cooperation with ODC's investigation.[3]

[2] Respondent's disciplinary history includes a letter of caution in 1998 citing Rules 1.1 (Competence), 1.3 (Diligence), and 1.15 (Safekeeping Property) of the Rules of Professional Conduct, Rule 407, SCACR; a public reprimand in 2000 for failing to comply with Rule 417 (Financial Recordkeeping) SCACR, and for violations of Rules 1.1 (Competence), 1.3 (Diligence), 1.15 (Safekeeping Property) and 8.4(a) and (e) (Misconduct) of the Rules of Professional Conduct, Rule 407, SCACR; and a definite suspension for sixty days in 2002 for violating Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 3.2 (Expediting Litigation), 5.5 (Unauthorized Practice Law), and 8.4(a) and (e) (Misconduct) of the Rules of Professional Conduct, Rule 407, SCACR.

Based on these findings the Panel recommended that this Court: (1) disbar Respondent from the practice of law; (2) order Respondent to pay restitution to his former clients and third parties harmed by his misconduct (3) order Respondent to reimburse the Lawyers' Fund for Client Protection for sums paid on his behalf; and (4) require Respondent to complete the Legal Ethics and Practice Program Ethics School and Trust Account School as a condition of reinstatement.

II. DISCUSSION

The sole authority to discipline attorneys and decide appropriate sanctions rests with this Court. *In re Welch*, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003); *In re Thompson*, 343 S.C. 1, 10–11, 539 S.E.2d 396, 401 (2000). We are not bound by the Panel's recommendation and may make our own findings of fact and conclusions of law. *In re Hazzard*, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008). Nonetheless, the findings and conclusions of the Panel are entitled much respect and consideration. *Thompson*, 343 S.C. at 11, 539 S.E.2d at 401. Moreover, "[a] violation must be proven by clear and convincing evidence." *In re Greene*, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); *see also* Rule 8, RLDE, Rule 413, SCAR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

We agree with the Panel that Respondent committed misconduct with respect to all of the matters discussed above. Neither party takes exception to the Panel's findings. Accordingly, "the parties are deemed to have accepted the Panel's findings of fact, conclusions of law, and recommendations" as to these matters. *In re Prendergast*, 390 S.C. 395, 396 n.2, 702 S.E.2d 364, 365 n.2 (2010) (*citing* Rule 27(a), RLDE, Rule 413, SCACR, which states "The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.").

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[3]Throughout ODC's investigation into all of the matters described above, Respondent failed to comply with ODC's requests and subpoenas.

Thus we find Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (Diligence); Rule 1.15 (Safekeeping of Property); Rule 4.1 (Truthfulness in Statements to Others); Rule 4.4 (Respect for Rights of Third Persons); Rule 5.5 (Unauthorized Practice of Law); Rule 8.1(b) (Bar Admissions and Disciplinary Matters); Rule 8.4 (Conduct Involving Dishonesty); Rule 8.4(b) (Criminal Conduct); Rule 8.4(d) (Conduct Involving Dishonesty); and Rule 417 (Financial Recordkeeping) SCACR.

We conclude that Respondent's misconduct, coupled with his failure to provide any explanation, warrants disbarment from the practice of law. This Court has recognized that "the primary purpose of disbarment . . . is the removal of an unfit person from the profession for the protection of the courts and the public, not punishment of the offending attorney." *In re Pennington*, 393 S.C. 300, 304, 713 S.E.2d 261, 263 (2011) (*citing In re Burr*, 267 S.C. 419, 423, 228 S.E.2d 678, 680 (1976)). Moreover, a central purpose of the disciplinary process is to protect the public from unscrupulous and indifferent lawyers. *In re Hall*, 333 S.C. 247, 251, 509 S.E.2d 266, 268 (1998); *see also In re Sifly*, 279 S.C. 113, 115, 302 S.E.2d 858, 859 (1983) (*finding* disbarment appropriate for an attorney who failed to timely file an appeal on behalf of a client, failed to adequately represent a client in a trust fund matter resulting in significant monetary losses by the client, drew checks on his personal account that were not sufficiently funded, had a civil judgment entered against him, and failed to cooperate with disciplinary authorities or appear to contest the charges against him).

Respondent engaged in conduct which violated state law and the orders of this Court. He failed to adequately represent clients, sufficiently respect the rights of third parties, or satisfy adverse monetary judgments. Respondent is clearly not fit to practice law. We **disbar** Respondent. Within fifteen days of the filing date of this opinion, Respondent shall surrender his certificate of admission to practice law and shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR.

Pursuant to the Panel's recommendations, Respondent is ordered to pay restitution to his former clients and third parties harmed by his misconduct,

reimburse the Lawyers' Fund for Client Protection for sums paid on his behalf, and complete the Legal Ethics and Practice Program Ethics School and Trust Account School as a condition of his reinstatement. Further, Respondent is ordered to pay the costs of the Panel proceedings within 60 days.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Karen Cole, as Guardian ad litem for David C.,	Appellant,
v.	
Boy Scouts of America, Indian Waters Council, Pack 48, Faith Presbyterian Church and Jeff Wagner,	Defendants,
of whom Jeff Wagner is,	Respondent.
David Cole and Karen Cole,	Appellants
v.	
Boy Scouts of America, Indian Waters Council, Pack 48, Faith Presbyterian Church and Jeff Wagner,	Defendants,
of whom Jeff Wagner is,	Respondent.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27072
Heard October 5, 2011 – Filed December 5, 2011

AFFIRMED

Arthur K. Aiken, of Aiken & Hightower, P.A., of Columbia, for Appellants.

John M. Grantland, Alice P. Adams, and Ashley B. Stratton, of Murphy & Grantland, of Columbia, for Respondent.

JUSTICE HEARN: David Cole, the primary appellant, was injured while catching during a father-son game of softball at a Cub Scout outing when a baserunner collided with him at home plate. He brought this action alleging negligence and recklessness against the baserunner and the sponsors of the game. The circuit court judge granted summary judgment to the baserunner, and we affirm.

FACTUAL/PROCEDURAL BACKGROUND

In March 2004, David Cole and his son, David Jr., who was a member of Cub Scout Pack 48, attended a Cub Scout family camping trip. During the course of the trip, Cole and David Jr. participated in a father-son, pick-up softball game. Jeff Wagner and his son were also on the camping trip and were playing on the opposite team from the Coles in the softball game. Although one of the older boys had been playing catcher, Cole took over the position because he was afraid the boy would be hit by a foul ball or by the batter.

Neither of the teams kept score, and during each inning everyone was allowed to bat. Apparently, some of the fathers were playing too aggressively in the minds of some participants and hitting the ball with full swings. One of the Scout leaders, Keith Corley, briefly interrupted the game

and asked them to play more safely, fearing that they were putting the scouts in danger.

During Wagner's next turn at bat, he hit a double. Another father came up to bat after him and hit the ball into the outfield, potentially allowing Wagner to score. As Wagner reached home plate, he collided with Cole, who had moved on top of the plate, thereby placing his body directly in the baseline. Wagner was running so fast that he was unable to stop or change directions in time to avoid Cole. Upon impact, Wagner flipped in the air and landed on a bat, breaking a rib. Cole suffered a closed head injury and was rendered semiconscious. He then began bleeding and went into convulsions. Cole had to be airlifted to Palmetto Richland Hospital where he spent two days in the intensive care unit. David Jr. witnessed the entire accident in fear that his father was going to die.

Cole and his wife Karen, personally and as guardian ad litem for David Jr. (collectively, Appellants), brought this action against Wagner, the Boy Scouts of America, Indian Waters Council of the Boy Scouts of America, Pack 48, and Faith Presbyterian Church for personal injury, loss of consortium, and negligent infliction of emotional distress. Wagner[1] moved for summary judgment, contending he owed no duty to Cole because Cole assumed the risks incident to the sport of softball. The circuit court granted Wagner's motion, and this appeal followed.

STANDARD OF REVIEW

An appellate court reviewing a grant of summary judgment applies the same standard used by the trial court. *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 244, 711 S.E.2d 908, 910 (2011). Summary judgment is appropriate if "there is no genuine issue as to any material fact." Rule 56(c), SCRCP. In determining whether a triable issue of material fact exists, the Court must construe all facts and inferences in the light most favorable to the non-movant. *Wogan v. Kunze*, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008) "In order to withstand a motion for summary judgment in cases

[1] The Coles settled with all the other defendants.

applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). "A motion for summary judgment on the basis of the absence of a duty is a question of law for the court to determine." *Oblachinski v. Reynolds*, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011). If a legal duty is established, whether the defendant breached that duty is a question of fact. *Singletary v. S.C. Dept. of Educ.*, 316 S.C. 153, 157, 447 S.E.2d 231, 233 (Ct. App. 1994).

LAW/ANALYSIS

Appellants argue that the circuit court erred in finding Cole assumed the risk of his injury by engaging in a game of softball because Wagner's conduct was outside the scope of the game. Specifically, Appellants argue Wagner's behavior was inconsistent with the ordinary risks of softball because the game was intended to be noncompetitive, Wagner violated a rule of the game, and he acted recklessly. We disagree.

"Primary implied assumption of risk arises when the plaintiff impliedly assumes those risks that are *inherent* in a particular activity." *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 81, 508 S.E.2d 565, 570 (1998). The doctrine of primary implied assumption of risk "goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff." *Id.* To establish a claim for negligence, a plaintiff must first show that the defendant owed a duty of care to the plaintiff. *Doe*, 393 S.C. at 246, 711 S.E.2d at 911. Absent a legally recognized duty, the defendant in a negligence action is entitled to a judgment as matter of law. *Hurst v. East Coast Hockey League*, 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006).

In *Hurst*, we considered the application of assumption of risk in a sports context. The plaintiff was injured when a hockey puck struck him in the face while he was watching a professional hockey game. 371 S.C. at 36, 673 S.E.2d at 561. The plaintiff sued the hockey team for negligence, and we affirmed the grant of summary judgment for the team finding that "a flying

puck is inherent to the game of hockey and is also a common, expected, and frequent risk of hockey." *Id.* at 38, 673 S.E.2d at 562-63. We held that by attending the hockey game, the plaintiff implicitly assumed the risks inherent in the sport and the defendant had no duty to protect him from those risks. *Id.* at 38, 673 S.E.2d at 562.

Appellants argue that *Hurst* is factually distinguishable, and therefore inapplicable, since the plaintiff in *Hurst* was a spectator and the game was being played by a professional team. Both of these arguments are unavailing. We acknowledge that the duty owed by a player to a spectator may differ in form to a duty owed to a coparticipant in a sport, but only because a duty owed to a spectator would be greater. Thus, if anything, by playing the game, Cole assumed a greater risk than the plaintiff in *Hurst* who was a mere spectator.

Furthermore, it is legally inconsequential that *Hurst* involved a professional sport. *Hurst* contained no qualifying language to limit its holding to the professional sports context, and we take this opportunity to emphasize that the critical fact is not the level of play, but the nature of the sport itself. *See Marchetti v. Kalish*, 559 N.E.2d 699, 702 (Ohio 1990) ("Whether the activity is organized, unorganized, supervised or unsupervised is immaterial to the standard of liability."). A risk inherent in a sport can be found at any level of play, possibly more so in a non-professional arena where the players engage with less skill and athleticism. While Cole was playing a casual game in which the teams did not even keep score, he was still playing softball, which is a contact sport.[2] Where a person chooses to

[2] Numerous courts across the country have similarly acknowledged softball is a contact sport. *See, e.g., D'Agostino v. Easton Sports, Inc.*, No. X04HHDCV085026631S, 2010 WL 5492731, at *3 (Conn. Super. Ct. Dec. 9, 2010) (unpublished decision) (noting that "softball is a contact sport" (internal citation omitted)); *Gonzales*, 629 N.E.2d at 715 (finding softball is a contact sport in a case involving an employee pick-up game, noting that "physical contact is part of the game"); *Feld v. Borkowski*, 790 N.W.2d 72, 79 (Iowa 2010) (concluding that softball is a contact sport and noting that this was the conclusion of other courts that have considered this question); *Crawn*

participate in a contact sport, whatever the level of play, he assumes the risks inherent in that sport. *See Landrum v. Gonzales*, 629 N.E.2d 710, 714 (Ill. App. Ct. 1994) (noting that the relative inquiry into the standard of care is whether the sport is a contact sport, which should be determined "by examining the objective factors surrounding the game itself, not on the subjective expectations of the parties"); *Keller v. Mols*, 509 N.E.2d 584, 586 (Ill. App. Ct. 1987) ("[I]n determining whether a sports participant may be liable for injuries to another player caused by mere negligence, the relevant inquiry is whether the participants were involved in a contact sport, not whether they were organized and coached."). Therefore by playing softball, Cole assumed those risks that are integral to the sport of softball, which includes the risk of a collision at home plate.

Appellants accordingly contend that Wagner violated a rule of softball by "running over the catcher during a play at home plate," and therefore his conduct was outside the scope of the game. However, the risk of someone violating a rule of the game is one of the risks taken when engaging in a sport. *See Landrum*, 629 N.E.2d at 714 (citing *Oswald v. Township High Sch. Dist. No. 214*, 406 N.E.2d 157, 160 (Ill. Ct. App. 1980)) (noting that "rule infractions, deliberate or unintentional, are virtually inevitable in contact games" and thus a different standard of care in such sports is justified). If no one ever violated the rules, then there would be no need for penalty shots in basketball, a penalty box in hockey, or flags on the field in football. Collisions at home plate are common, mainly because catchers often attempt to keep a runner from scoring by blocking the plate with their body. Even if a rule prohibits running into the catcher, that fact alone is insufficient evidence to show the injury resulting from the violation of the rule was not inherent in the sport.

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v. Campo, 643 A.2d 600, 606 (N.J. 1994) (applying the standard of care applied for contact sports across most states to softball); *Licitra v. Inc. Vill. of Garden City*, No. 188449/02, 2004 WL 2034999, at *2 (N.Y. App. Div. May 25, 2004) (unpublished opinion) ("The risk of injury is clearly inherent in contact sports such as softball."); *Kalan v. Fox*, 933 N.E.2d 337, 341-42 (Ohio Ct. App. 2010) (noting that physical contact is inevitable in contact sports like softball).

As a final matter, Appellants argue that even if mere negligence may be outside the duty of care, Wagner's conduct was reckless and therefore outside the scope of risks assumed in the game of softball. "[R]ecklessness or willfulness may be inferred from conduct so grossly negligent that a person of ordinary reason and prudence would then have been conscious of the probability of resulting injury." *Yuan v. Baldridge*, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964). "[R]ecklessness implies the doing of a negligent act knowingly . . . [or] the conscious failure to exercise due care." *Id.* (quoting *State v. Rachels*, 218 S.C. 1, 8, 61 S.E.2d 249, 252 (1950)). "Due care" can be defined as "that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances." *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting *Hart v. Doe*, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973)).

Even assuming, arguendo, that Wagner's conduct could be characterized as reckless, it was not so reckless as to involve risks outside the scope of softball. The likelihood of someone running too fast to stop or playing more aggressively than anticipated is part of the competitive atmosphere of athletics. Almost all contact sports, especially ones that require protective gear as part of their equipment, involve conduct that a reasonably prudent person would recognize may result in injury. To the extent these risks inhere in the sport involved, we hold some recklessness by coparticipants in a contact sport must be assumed as part of the game. Accordingly, a player assumes the risk of ordinary recklessness committed within the course of the game.

We emphasize that this holding is limited to recklessness committed within the scope of the game and does not include intentional conduct by a coparticipant of a sport, or conduct so reckless as to be outside the scope of the game.[3] Even within the context of a contact sport, players owe reciprocal

[3] While other courts have carved out exceptions for both reckless and intentional conduct, a viable recklessness claim must embrace conduct inconsistent with the game. *See Rudzinski v. BB*, No. 0:09-1819-JFA, 2010 WL 2723105 at *3 (D.S.C. 2010) (finding one boy had not acted recklessly in

duties to not intentionally injure each other. Cole does not allege that Wagner's conduct was intentional nor does he allege such recklessness as would fall outside the scope of the game of softball. Thus, Wagner's conduct fell within the duty of care he owed to Cole as a coparticipant in the game.

CONCLUSION

Based on the foregoing, we affirm the circuit court's order granting summary judgment in favor of Wagner.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur.
PLEICONES, J., concurring in a separate opinion.

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hitting another boy with the backswing of his golf club because he had not "engaged in conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport of golf"); *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992) (failing to find defendant liable for recklessness for knocking over plaintiff and stepping on her hand during a game of touch football, stating that defendant's conduct was not "so reckless as to be totally outside the range of ordinary activity involved in the sport"); *Borque v. Duplechin*, 331 So.2d 40, 42-43 (La. Ct. App. 1976) (finding defendant liable under a theory of recklessness where he had run several feet outside the baseline to collide with the second baseman in an effort to break up a double play and noting that such unsportsmanlike behavior was not incidental to playing softball).

JUSTICE PLEICONES: I concur in the decision to affirm the grant of summary judgment because I would find that Wagner owed no duty to Cole under these circumstances, relying on the doctrine of implied primary assumption of the risk. Hurst v. East Coast Hockey League, 371 S.C. 33, 637 S.E.2d 560 (2006). I also note that I am not convinced that a game of pick-up softball is a contact sport.

The Supreme Court of South Carolina

In the Matter of Tobias Horne, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a Petition for Interim Suspension or Transfer to Incapacity Inactive Status pursuant to Rule 17, RLDE, Rule 413, SCACR, and requests the appointment of an attorney to protect respondent's clients' interests under Rule 31, RLDE, Rule 413, SCACR. Respondent consents to either being placed on interim suspension or being transferred to incapacity inactive status and to the appointment of an attorney to protect his clients' interests.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of the Court.

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

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

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

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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina

December 1, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stevens & Wilkinson of South Carolina, Inc., Gary Realty Company, Inc., Garfield Traub Development, LLC, and Turner Construction Company,	Plaintiffs,
Of Whom	
Stevens & Wilkinson of South Carolina, Inc., Gary Realty Company, Inc., and Garfield Traub Development, LLC are	Appellants,

v.

City of Columbia, Paul C. "Bo" Aughtry, III, Windsor/Aughtry Co., Inc., Vista Hotel Partners LLC, and Hilton Hotels Corporation,	Defendants,
Of Whom	
City of Columbia is	Respondent.

Appeal From Richland County
George C. James, Jr., Circuit Court Judge

Opinion No. 4914
Heard September 13, 2011 – Filed November 30, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Kenneth M. Suggs and Francis M. Hinson, IV, both of Columbia, for Appellants Gary Realty Company, Inc. and Garfield Traub Development, LLC.

Richard A. Harpootlian and Graham L. Newman, both of Columbia, for Appellant Stevens & Wilkinson of South Carolina, Inc.

Michael W. Tighe, D. Reece Williams, III, Kathleen M. McDaniel, and Richard C. Detwiler, all of Columbia, for Respondent.

FEW, C.J.: The City of Columbia entered into a Memorandum of Understanding (MOU) with members of a development team in preparation for the construction of a hotel near the Columbia Metropolitan Convention Center. When the City gave the project to another team approximately one year later, some members of the original development team filed suit against the City for breach of the MOU and other causes of action. The City made a motion for summary judgment contending the MOU is not a contract, and the circuit court granted the motion. We find the circuit court erred in ruling as a matter of law that the MOU is not a contract.[1] We reverse and remand for trial. We also reverse summary judgment on a quantum meruit claim. We affirm summary judgment on a promissory estoppel claim.

I. Facts

In January 2001, the City sought requests for qualifications to develop, build, and operate a hotel near the Convention Center. In December 2002,

[1] This issue is raised in two appeals from the same order. Accordingly, we consolidate the appeals pursuant to Rule 214, SCACR.

City Council selected a team to develop the hotel. The team chosen consisted of three developers, Garfield Traub Development, Gary Realty Company, and Edens & Avant Real Estate Services; architecture firm Stevens & Wilkinson; Turner Construction Company; Hilton Hotels Corporation; and bond underwriter Salomon Smith Barney. The team proposed a 300-room, full-service Hilton Hotel. It planned to publicly finance the hotel using bonds that would be paid with hotel revenue, subsidized by the City if necessary.

After choosing the development team, the City hired a consulting company to negotiate and draft the MOU. In April 2003, the City and the team signed the MOU. The MOU begins by reciting the following language: "[I]n consideration of the foregoing and the mutual promises contained herein, and other valuable consideration the sufficiency and receipt of which are hereby acknowledged, the parties agree as follows." The MOU called on the team members and the City to perform various tasks. It provided the City would purchase and prepare land for the hotel site, form a non-profit corporation to own the land, and issue "approximately $60 million" in hotel revenue bonds. Meanwhile, the development team was to complete certain work, such as plans, drawings, and financial models, that would enable Turner Construction to calculate a guaranteed maximum price for the hotel construction.

The MOU also required the parties to negotiate numerous agreements over the course of developing the hotel. The MOU recited some of the basic elements these future agreements would contain. These written agreements were to be executed at the bond closing. The bonds were set to close on October 13, 2003. If the bonds failed to close "as a result of the City not meeting its obligations outlined in the Development Agreement, or as a result of an unforeseen catastrophic event not caused by any of the [] [t]eam, the City [would] reimburse the [] [t]eam for actual, documented costs." However, the MOU also stated that "[n]otwithstanding anything herein to the contrary, if the City determines that it is not feasible to proceed with the Hotel project it shall have no liability under this MOU."

The City and the development team performed in accordance with the MOU for over a year. In June 2003, the City filed articles of incorporation for the Columbia Convention Center Hotel Corporation. By July 2003,

Stevens & Wilkinson completed the architectural plans necessary for bond closing. At this point, Stevens & Wilkinson had performed architectural work valued at approximately $1.2 million.

The bonds did not close in October 2003 as planned. By February 2004, the non-profit corporation's board of directors and the development team set April 1, 2004, as the new date for the bond closing. At the same time, the board approved an increased total project cost of over $71 million, and Ambac Assurance issued a Commitment for Financial Guaranty Insurance for over $63 million in bonds to the City.

During this time the Windsor/Aughtry Company expressed to City Council its desire to build a privately funded hotel instead of the development team's publicly funded hotel. In March 2004, City Council voted to issue a second request for proposals for the hotel. By that time, the cost of the development team's plan had risen to over $72 million. The City never determined whether the team's plan was feasible and never directed the team to stop its work on the project.

In response to the City's new request for proposals, the development team submitted two proposals for Hilton Hotels.[2] One was a resubmission of its original publicly financed proposal. The other was a new proposal for the hotel to be partially funded by the City and partially privately funded. Windsor/Aughtry submitted a proposal for a privately funded hotel with an estimated cost of $26 million. Its proposal allowed the City a choice of a Hilton Garden Inn or a Marriot Courtyard. Later, at the City's request, Windsor/Aughtry offered to build a Hilton Hotel if the City paid an additional $3 million. The City chose Windsor/Aughtry's proposal.

II. Procedural History

Stevens & Wilkinson, Garfield Traub, and Gary Realty brought suit against the City alleging breach of contract based on the MOU. Stevens & Wilkinson also brought a cause of action for promissory estoppel. Garfield Traub and Gary Realty also sought recovery based on quantum meruit. The

[2] Edens & Avant did not take part in the second request for proposals.

City filed motions for summary judgment as to all three causes of action. In a consolidated order, the circuit court granted the City's motions. The court determined there was no genuine issue of material fact as to the existence of a contract, making the issue a matter of law for the court to decide. The court found the MOU was not a contract because it stated the parties' intention to proceed in good faith toward executing definitive agreements that would bind the parties. The court also found the parties did not agree on material terms and the MOU did not resolve disputed issues, such as executive compensation and whether the hotel would pay property taxes.

III. Whether the Circuit Court Erred in Ruling as a Matter of Law That the MOU is Not a Contract

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When there is conflicting evidence on some material issue, the court may not grant summary judgment. See Shirley's Iron Works, Inc. v. City of Union, 387 S.C. 389, 397, 693 S.E.2d 1, 4 (Ct. App. 2010) ("At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." (internal quotation marks omitted)). "If the evidence as to the existence of a contract is conflicting or raises more than one reasonable inference, the issue should be submitted to the jury." Armstrong v. Collins, 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005); see also Small v. Springs Indus., Inc., 292 S.C. 481, 483, 357 S.E.2d 452, 454 (1987) (same). Viewing the evidence in the light most favorable to the plaintiffs, we find disputed facts that permit more than one inference as to whether the parties intended the MOU to be a contract.

To explain that evidence exists to support the plaintiffs' claim that the parties intended the MOU to be a contract, we consider the plaintiffs' theory of the case. Their theory begins with the premise that the City needed significant work done before it could determine whether financing, building, and operating the hotel was feasible. The plaintiffs argue the MOU contains a mutual exchange of promises between the City and the team members to perform the various tasks necessary for the City to eventually make this

determination of feasibility. Under this theory, Stevens & Wilkinson, Garfield Traub, and Gary Realty agreed to perform the work allocated to each of them in the MOU in exchange for the promises made by the other parties, particularly the City. The plaintiffs argue these promises include the City's promise to actually make the determination of feasibility, and to do so in good faith.

The MOU provides evidence supporting this theory. For example, the City needed detailed architectural plans from Stevens & Wilkinson and a guaranteed maximum price from Turner Construction before it could submit the hotel plan to a bond underwriter. The MOU contains Stevens & Wilkinson's promise to prepare the architectural plans. Stevens & Wilkinson contends it made that promise in exchange for, or in consideration of, the City's various promises, including its promise to acquire and prepare the land for the hotel site. The MOU also contains promises made by Garfield Traub and Gary Realty, supporting the plaintiffs' theory that all the promises were given as consideration for each other. See Sauner v. Pub. Serv. Auth., 354 S.C. 397, 405, 581 S.E.2d 161, 166 (2003) ("A bilateral contract . . . exists when both parties exchange mutual promises.").

The MOU contains other promises the plaintiffs argue were made in consideration of each other, including the following:

- The City promised to reimburse the development team's expenses out of "Hotel Revenue Bond proceeds" in exchange for the team's promise to expend substantial effort to design a feasible hotel.
- The developers promised to "coordinate design . . . of the Hotel" prior to the execution of any other contracts in exchange for the right to do the development work on the hotel and the promise of a fee of 4.75% of the project budget.
- Stevens & Wilkinson promised to prepare hotel plans in exchange for the right to complete the architectural work on the hotel and the promise of a fee of 7.25% of the "hard construction costs" and Turner Construction's "general expenses and fees."
- Hilton promised to "contribute $1.5 million in the form of [a] . . . loan" in exchange for the right to operate the hotel for fifteen years under a Qualified Management Agreement.

Based on the existence of these promises in the MOU, it is reasonable to infer that the plaintiffs would not have agreed to do their work unless the City made these promises, and that the City made the promises in order to induce the plaintiffs to perform the work.

There is other evidence to support the plaintiffs' claim that the MOU is a contract. First, the parties chose to use the classic contract language "in consideration of the foregoing and the mutual promises contained herein, and other valuable consideration the sufficiency and receipt of which are hereby acknowledged, the parties agree as follows." The MOU also contains provisions excluding liability for certain actions. For example, the MOU states, "[I]f the City determines that it is not feasible to proceed with the Hotel project it shall have no liability under this MOU." The exclusion of liability under one circumstance is some evidence the parties intended there to be liability under the MOU in other circumstances. Additionally, Garfield Traub submitted affidavits from three of its employees stating they intended the MOU to be a contract and "never would have agreed to put in the effort necessary to develop the Hotel if [they] did not consider the MOU to form a contract." Thus, the evidence permits the reasonable inference that the parties entered the MOU with the intent to create a contract.

There is also evidence to support the City's theory that the MOU is not a contract, but instead was merely a nonbinding framework for the development stage of the project. This theory is based on the premise that the parties would be bound in the future by the written agreements contemplated by the MOU, not by the MOU itself. The MOU also supports this theory, as it refers to numerous agreements that were to be negotiated after the parties signed the MOU. For example, the Qualified Management Agreement mentioned in the MOU needed to be executed before the bonds could close, and the Design-Build Agreement was to include the agreed-upon construction costs, which would ultimately determine the amount each member of the development team would be paid.

The City cites various cases to support its claim that the MOU is not a contract because it contemplated future agreements. At oral argument, however, the City conceded that a preliminary agreement that contemplates a

future agreement could be a contract, depending on the facts and circumstances surrounding the transaction. Here, the plaintiffs allege a breach of the MOU, not a breach of a future contract committing them to build the hotel. As noted above, there is evidence in the facts and circumstances surrounding the MOU that supports a reasonable inference that the MOU was a contract.

Moreover, each of the cases the City cites is distinguishable from this case because none involves facts and circumstances supporting a reasonable inference that the preliminary arrangement was a contract. In each case cited by the City, the plaintiff sued for a breach of the final contract the parties never reached, not for a breach of a preliminary agreement. See Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, 357 S.C. 363, 369-70, 593 S.E.2d 170, 173-74 (Ct. App. 2004) (finding general contractor's use of subcontractor's estimate in bid, later request for subcontractor's bond rate, and fax stating subcontract was forthcoming did not amount to a contract because these communications "were merely preliminary negotiations"); Trident Constr. Co. v. Austin Co., 272 F. Supp. 2d 566, 575-76 (D.S.C. 2003) (finding no oral contract when the plaintiff alleged the defendant told it if the defendant won the bid to build an airplane hangar, it would give the plaintiff the supplier subcontract, because the parties never agreed on price); Blanton Enters., Inc. v. Burger King Corp., 680 F. Supp. 753, 768-70, 773 (D.S.C. 1988) (finding no oral franchise agreement because "the parties intended to be bound only after plaintiff had received the requisite written approvals and they had reduced their agreement to a signed writing"); Savannah Guano Co. v. Fogle, 112 S.C. 234, 238, 100 S.E. 59, 60 (1919) (finding no contract for the plaintiff to sell the defendant fertilizer and carry his indebtedness forward to the next year because the parties had not agreed on quantity, price, delivery, or payment); Holliday v. Pegram, 89 S.C. 73, 81-82, 71 S.E. 367, 370 (1911) (finding the parties' correspondence concerning the lease of a tobacco warehouse did not amount to a contract because the language of the letters was provisional).

Rather than focusing on whether the MOU calls for the parties to reach future agreements, the proper inquiry is to determine whether the MOU meets the elements of a contract. Because evidence exists to support the plaintiffs' theory that it does since it contains mutually binding promises the

parties intended to be a contract, we find the circuit court erred in holding as a matter of law that the MOU is not a contract. Accordingly, we reverse the circuit court's decision to grant summary judgment on the question of whether the MOU is a contract.

IV. Garfield Traub and Gary Realty's Quantum Meruit Claim

Garfield Traub and Gary Realty argue the circuit court erred in granting summary judgment for the City on their quantum meruit cause of action. We agree.

To recover on a claim for quantum meruit, a plaintiff must establish three elements: "(1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 616-17, 703 S.E.2d 221, 225 (2010). Focusing on the first element, the circuit court found the team's plans, drawings, financial models, construction estimates, and expertise had no intrinsic value and did not benefit the City. Based solely on that element, the circuit court granted summary judgment for the City. We do not believe it is possible to rule as a matter of law that the alleged benefit to the City had no value. Therefore, we reverse the circuit court's decision to grant summary judgment on this element of the quantum meruit claim.

V. Stevens & Wilkinson's Promissory Estoppel Claim

Finally, Stevens & Wilkinson argues the circuit court erred in granting summary judgment on its promissory estoppel cause of action. We disagree.

To recover for promissory estoppel, a plaintiff must prove the following: (1) a party made a promise unambiguous in its terms; (2) the party to whom the promise is made reasonably relied on the promise; (3) the reliance was expected and foreseeable by the party who made the promise; and (4) the party to whom the promise is made sustained injury in reliance on

the promise. Woods v. State, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993).

The promise Stevens & Wilkinson argues is unambiguous, and therefore meets the first element of promissory estoppel, is in the MOU. Consequently, this court must interpret the promise as it appears in the MOU. Because the MOU provides that the promise is contingent, it cannot be an unambiguous promise to pay. The promise is this statement: "The Architect is to be paid a fee of 7.25% . . . based on hard construction costs . . . ." The same paragraph in which that statement is made contains a contingency which provides that Stevens & Wilkinson would receive its fee only if bond financing closed. Therefore, Stevens & Wilkinson bore the risk of non-payment. The MOU also provides that if bond financing did not close, Stevens & Wilkinson could recover its documented out-of-pocket expenses only if financing fell through due to either the City's breach of the Development Agreement, which was never executed, or an unforeseen catastrophic event not caused by a member of the team. Even if any of these scenarios triggering payment occurred, the City would not be required to pay Stevens & Wilkinson if the City determined moving forward with the project was infeasible.

To the extent Stevens & Wilkinson claims the promise is unambiguous, it cannot deny the clarity of the contingency. It is not possible to read the MOU as requiring payment of the fee except on the occurrence of a contingency all parties agree never occurred. Therefore, the circuit court correctly found that the MOU does not contain an unambiguous promise by the City to pay Stevens & Wilkinson. Thus, we affirm the circuit court's decision to grant summary judgment on the promissory estoppel claim.

VI. Conclusion

We reverse the circuit court's decision to grant summary judgment for the City on the issue of whether the MOU is a contract. We remand for a jury to make that determination. We also reverse the circuit court's decision to grant summary judgment as to Garfield Traub and Gary Realty's quantum

meruit claim. We affirm summary judgment as to Stevens & Wilkinson's promissory estoppel claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

THOMAS and KONDUROS, JJ., concur.