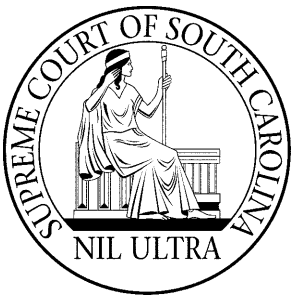

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 46
December 7, 2016
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 John Wesley Locklair, III, Respondent.

Appellate Case No. 2016-001754

Opinion No. 27686
Submitted November 18, 2016 – Filed December 7, 2016

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Julie K. Martino, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

John Wesley Locklair, II, of Columbia, *pro se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment with conditions as set forth later in this opinion. He requests that disbarment be imposed retroactively to March 6, 2015, the date of his interim suspension. *In the Matter of Locklair*, 411 S.C. 627, 769 S.E.2d 675 (2015). We accept the Agreement and disbar respondent from the practice of law in this state retroactively to the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

Matter I

On May 20, 2013, respondent was appointed to represent Client A who had been charged with first degree burglary in May 2011. A jury trial was held in October

2013 and Client A was found guilty and sentenced to life without parole pursuant to the "three strikes" law.

On November 8, 2013, respondent filed a Notice of Intent to Appeal in the South Carolina Court of Appeals. On November 13, 2013, the Clerk of the Court of Appeals notified respondent that his Notice of Appeal was deficient because the sentencing sheet was not attached and the lower court case number was incorrect. The Clerk gave respondent ten days to correct the errors. Respondent did not respond to the Clerk's letter.

On March 6, 2014, the Chief Judge of the Court of Appeals issued an order directing respondent to correct the errors in the Notice of Appeal within ten days or appear before the Court of Appeals on March 20, 2014, to explain why he had not complied. Fourteen days later, respondent submitted an Amended Notice of Appeal to the Court of Appeals.

On July 11, 2014, the Chief Appellate Defender of the Division of Appellate Defense wrote respondent to notify him that his office would take over representation of Client A if respondent desired. The Chief Appellate Defender requested respondent either send him a copy of the order of appointment or notice that he planned to continue to pursue the appeal on behalf of Client A.

On July 20, 2014, Client A filed a complaint with ODC complaining that he did not know the status of his appeal and his attempts to communicate with respondent had gone unanswered. Respondent did not timely respond to the Notice of Investigation sent by ODC on August 4, 2014, or to the reminder letter sent on August 28, 2014. On September 30, 2014, ODC sent a subpoena to respondent requiring him to appear for an on-the-record interview on October 23, 2014, and to provide a copy of Client A's entire file.

On October 7, 2014, respondent faxed a letter to ODC stating he knew his response in the matter was overdue and that he would provide a response the next day. However, respondent did not provide a response until October 22, 2014. In the response, he indicated he had twice sent an Affidavit of Indigency to Client A but

Client A failed to return it.[1] Respondent stated he would visit Client A at the Department of Corrections the following week to review the case with him and ensure Client A had everything he needed from respondent's file. Respondent did not file a signed verification with his response, he did not appear for the October 24, 2014, interview, and he did not comply with the subpoena requiring he provide Client A's file.

In the meantime, on August 1, 2014, the Court of Appeals had ordered respondent to provide proof within ten days that he had ordered the trial transcript or that he had responded to the Chief Appellate Defender's letter. Respondent did not respond to the letter. On December 30, 2014, the Chief Judge of the Court of Appeals issued an order relieving respondent from representing Client A in the appeal, requesting the Division of Appellate Defense screen Client A's case, and directing the Clerk of Court to forward the order to ODC. The order cited several Rules of Professional Conduct.

On March 2, 2015, respondent emailed ODC and stated he had been involuntarily committed for substance abuse issues. Upon petition by ODC, the Court issued an order placing respondent on interim suspension and transferring him to incapacity inactive status on March 6, 2015. *Id.*

Respondent was released from the rehabilitation facility on March 9, 2015. On March 12, 2015, respondent telephoned ODC to state he would soon be responding to its request for information.

On April 17, 2015, ODC issued a subpoena to respondent for financial records. To date, respondent has not complied with this subpoena.

On September 25, 2015, respondent voluntarily submitted to an on-the-record interview with ODC. During the interview, respondent indicated he did not respond to the Chief Appellate Defender's letter because, at the time, he had a serious cocaine addiction and was suffering from severe depression and bi-polar disorder. Respondent stated he was diagnosed with these problems during his

[1] The Chief Appellate Defender's letter stated respondent need only submit the completed Affidavit of Indigency on behalf of Client A if respondent had been retained. As noted above, respondent was appointed.

rehabilitation stay in March 2015. He admitted he had had a serious drug problem for several years.[2]

Respondent admits that, by his conduct in connection with his representation of Client A, he violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonableness and diligence in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information); Rule 3.2 (lawyer shall make efforts to expedite litigation consistent with interests of client); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Matter II

Respondent represented Client B in an automobile accident case. Client B sought treatment from Dr. Rodney Arnold, a chiropractor. On January 23, 2013, respondent sent Dr. Arnold a letter of protection stating he would make direct payment to Dr. Arnold from the proceeds received from settlement.

On August 6, 2014, Client B told Dr. Arnold that his case had settled eight months earlier and he thought his medical bills had been paid by respondent. After several unsuccessful attempts were made to contact respondent, Dr. Arnold filed a complaint with ODC on August 29, 2014.

Respondent did not timely respond to the Notice of Investigation sent by ODC on September 3, 2014. On September 30, 2014, ODC sent a subpoena to respondent requiring him to appear for an on-the-record interview on October 23, 2014, and to provide a copy of the client file. On October 7, 2014, respondent faxed a letter to ODC stating he knew his response was overdue and that he would provide a response the next day. Respondent did not provide a response until October 22, 2014, but failed to include a signed verification. He did not appear for the scheduled interview. On December 9, 2014, respondent faxed Client B's file to ODC.

[2] According to the Agreement, respondent is not currently in any treatment or counseling program.

In his response, Respondent admitted he failed to protect Dr. Arnold's interests. He stated the settlement funds went directly to his client and not through his trust account. Respondent requested sixty days in which to reimburse Dr. Arnold.

At an interview in September 2015, respondent admitted misconduct in this matter. With regard to the settlement funds, respondent clarified that he deposited the money from the settlement into his trust account then used the funds to buy cocaine. He explained he had another case that he believed would settle for a significant amount of money and he intended to reimburse the Client B ledger when that happened. Respondent stated that Client B received the proceeds from the settlement, but that he failed to pay Dr. Arnold.

Respondent admits that, by his conduct in connection with his representation of Client B, he violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonableness and diligence in representing a client); Rule 1.15 (lawyer shall hold property of third person that is in lawyer's possession in connection with a representation separate from lawyer's own property; lawyer shall promptly deliver to third person any funds third person entitled to receive); Rule 4.4 (in representing client, lawyer shall not use means that have no substantial purpose other than to burden third person); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Matter III

Respondent represented Client C in a breach of contract action against a defendant. On April 18, 2013, the special referee signed an order granting judgment in favor of Client C for $17,500 plus costs and attorney's fees. The order was filed in the Horry County Clerk of Court's Office on May 14, 2013.

On February 4, 2014, respondent called Client C's president to relay an offer from the defendant to settle the judgment for $15,000 to be paid within three weeks. The president agreed to the offer.

On February 14, 2014, a Satisfaction of Judgment signed by respondent was filed in Horry County. The satisfaction indicated the judgment had been paid. Client C's president was not informed of the filing of the Satisfaction of Judgment and he did not receive the settlement funds.

Several times during March of 2014, Client C's president called and emailed respondent asking if the defendant had paid the settlement. On March 19, 2014, respondent told the president he would have the money by the following week.

In May 2014 and for the next six months, Client C's president attempted to reach respondent to inquire about the payment. Respondent refused to communicate with Client C's president.

In February 2015, Client C hired another attorney ("New Attorney") to assist with the collection of the judgment from the defendant. New Attorney discovered that the judgment was marked satisfied and had been signed by respondent. On February 12, 2015, New Attorney left a voicemail for respondent inquiring about the judgment. New Attorney also contacted the defendant's attorney to find out what he knew about the judgment.

Respondent did not return New Attorney's telephone call, but sent an email to Client C's president on February 13, 2015. He apologized for the delay and stated he now had the matter resolved and would get the money to him within ten to fourteen days.

On February 16, 2015, the defendant's attorney informed New Attorney that the defendant had paid the judgment in February 2014. The defendant's attorney forwarded a copy of the cashier's check to New Attorney. The copy showed the check was issued by a bank on February 7, 2014, on behalf of the defendant to "[respondent] attorney for [Client C]." The defendant's attorney also told New Attorney that respondent had personally picked up the check and signed for it on February 14, 2014.

New Attorney informed Client C's president. Client C's president was shocked to learn that respondent had received payment of $15,000 and that the judgment had been satisfied. Respondent did not remit payment to Client C. On February 20, 2015, New Attorney filed a complaint with ODC.

Respondent did not respond to the Notice of Investigation, Notice to Appear, and Subpoena for Client's C's file and trust account records sent by ODC on February 20, 2015. At the September 25, 2015, interview, respondent admitted the conduct described above and stated he retained the money in his trust account and, over

time, removed the funds to purchase drugs. He further admitted he signed the Satisfaction of Judgment and misappropriated the settlement funds.

Respondent admits that, by his conduct in connection with his representation of Client C, he violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall hold property of client in lawyer's possession in connection with a representation separate from lawyer's own property; upon receiving funds which client has an interest, lawyer shall promptly notify client and shall promptly deliver to client any funds client entitled to receive); Rule 3.3 (lawyer shall not knowingly make false statement of fact to tribunal); Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as lawyer in other respects); Rule 8.4(c) (it is professional misconduct for lawyer to commit criminal act involving moral turpitude); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Matter IV

On December 1, 2014, Client D retained respondent to represent her on a DUI charge. Client D made three payments of $200 each to respondent. When respondent was suspended on March 6, 2015, he had not completed any work for Client D; he did not refund any money to her.

Respondent did not respond to the Notice of Investigation dated August 6, 2015, or to a reminder letter from ODC sent on August 31, 2015. During the September 25, 2015, interview, respondent stated he started work on Client D's file but was suspended and did not contact Client D.

Respondent admits that, by his conduct in connection with his representation of Client D, he violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonableness and diligence in representing a client); Rule 1.16 (upon termination of representation, lawyer shall refund fee that has not been earned); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice)

Matter V

Client E retained respondent for representation on drug charges stemming from his arrest on December 19, 2014. On January 3, 2015, the mother of Client E's children paid respondent $1,000 for the representation. She made two more payments of $500 each, one on January 20, 2015, and the second on February 6, 2015, for a total of $2,000.

Respondent visited Client E in the detention center on one occasion. He did not file any discovery motions and did not conduct an investigation on Client E's behalf. Respondent did not file a notice of appearance on behalf of Client E.

When he was initially booked into the detention center, Client E filed an Affidavit of Indigency. On February 17, 2015, a local contract public defender was appointed to represent Client E. The public defender filed discovery motions the same day.

Client E did not tell the public defender that he had hired and paid respondent. The public defender did not know another attorney represented respondent. She had no communication with respondent. The public defender negotiated a favorable plea deal for Client E and he pled guilty on August 14, 2015.

Client E filed a complaint with ODC on December 14, 2015, alleging respondent did not do the work he was hired to do and did not earn the fee paid to him. Respondent did not respond to the Notice of Investigation sent on December 23, 2015.

Respondent admits that, by his conduct in connection with his representation of Client E, he violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonableness and diligence in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice)

Respondent further agrees that, in connection with all of the matters discussed above, his communication and cooperation with ODC has been sporadic since the first disciplinary matter was opened in July 2014. Respondent admits his failure to cooperate violates the following provision of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority).

Additional Matters

During his September 25, 2015, interview, respondent admitted to three additional matters of misconduct that were not the subject of disciplinary complaints. It is believed that the three clients discussed below are unaware of respondent's handling of their settlement proceeds.

Respondent represented Client F in an automobile accident case. Respondent agreed to pay the physical therapist's bill from the settlement proceeds. The case settled and respondent disbursed Client F's portion of the proceeds to Client F but failed to pay Indigo Therapy Specialists for Client F's treatment. The bill totals $3,133.92.

Respondent admits he used the money from Client F's settlement proceeds to purchase drugs. He further admits he did not maintain an adequate client file and did not maintain financial records as required by Rule 417, SCACR.

Respondent represented Client G in an automobile accident case. Client G received a litigation loan from Covered Bridge Capital, LLC, as an advance on her proceeds. Respondent admitted he was obligated to reimburse the loan from the settlement proceeds, but he did not reimburse the loan company as he used the money to purchase drugs.

Respondent also admits he failed to maintain an adequate file, thus, no disbursement sheet is available and the details of the loan are unknown. In addition, respondent failed to maintain trust account records in this matter as required by Rule 417, SCACR.

Respondent represented Client H in an automobile accident case. After the case settled, Client H received her proceeds and respondent maintained $5,000 in his

trust account to negotiate and pay Client H's medical bills. Respondent used the money to buy drugs and did not pay the medical bills. Further, respondent failed to maintain trust account records for this matter as required by Rule 417, SCACR.

Client H's file, provided to ODC by the Receiver, contains a list of medical providers and amounts owed. Respondent failed to pay providers a total of $4,605.49.

Respondent admits that, by his conduct in connection with the representation of Client F, Client G, and Client H, he violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonableness and diligence in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall hold property of third persons in lawyer's possession in connection with a representation separate from lawyer's own property; upon receiving funds which third person has an interest, lawyer shall promptly notify third person and promptly deliver to third person any funds third person entitled to receive); Rule 4.4 (in representing client, lawyer shall not use means that have no substantial purpose other than to burden third person); Rule 8.4(b) (it is professional misconduct for lawyer to commit 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 lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). In addition, respondent admits he violated the recordkeeping provisions of Rule 417, SCACR.

Finally, in addition to his admitted violations of the Rules of Professional Conduct specifically referenced in each matter discussed above, respondent agrees that his misconduct constitutes grounds for discipline pursuant to the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(3) (it shall be ground for discipline for lawyer to knowingly fail to respond to lawyer demand from disciplinary counsel); Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or to bring courts or legal professions into disrepute and demonstrating unfitness to practice law); Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate Oath of Office taken upon admission to practice

law in South Carolina); and Rule 7(a)(7) (it shall be ground for discipline for lawyer to willfully violate valid court order).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactively to March 6, 2015, the date of his interim suspension. *Id.* Within thirty (30) days of the date of this opinion, respondent shall enter into a payment plan with the Commission on Lawyer Conduct (the Commission) to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Further, within thirty (30) days of the date of this opinion, respondent shall enter into a payment plan to pay restitution as follows:

1. $2,736.00 to Dr. Rodney Arnold;

2. $15,000.00 to the President of Client C;

3. $600.00 to Client D;

4. $2,000 to the individual who paid fees on behalf of Client E;

5. $3,133.92 to Indigo Therapy Specialists;

6. $2,519.59 to Covered Bridge Capital, LLC;

7. a total of $4,605.49 to medical providers on behalf of Client H as specified in Exhibit 1 to the Addendum to Agreement; and

8. respondent shall fully reimburse the Lawyers' Fund for Client Protection for any and all amounts paid on his behalf.

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.

PLEICONES, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur. FEW, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Maurice C. Kinard, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-001205

Appeal From Richland County
The Honorable Diane S. Goodstein, Circuit Court Judge
The Honorable Brooks P. Goldsmith, Post-Conviction Judge

Opinion No. 27687
Submitted November 14, 2016 – Filed December 7, 2016

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney General Jessica Elizabeth Kinard, both of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari to review the denial of his application for post-conviction relief (PCR). We grant the petition for a writ of

certiorari, dispense with further briefing, and proceed with a review of the direct appeal issue pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986).

Petitioner contends the PCR judge erred in finding plea counsel was not ineffective in failing to file a notice of appeal on petitioner's behalf. We agree.

Petitioner testified at the PCR hearing that he asked plea counsel, promptly after sentencing, to file a notice of appeal. Plea counsel testified he could not recall if petitioner made such a request at the conclusion of the plea proceeding, but counsel acknowledged he received a letter from petitioner after the time to appeal had expired. Counsel testified he did not see a reason to appeal.

The PCR judge found plea counsel believed an appeal would be frivolous and "credibly emphasized" that he and petitioner "worked hard for the plea deal and received what [c]ounsel testified [w]as a near best case scenario in being able to plead to voluntary manslaughter." The PCR judge found petitioner was advised by the plea judge that if he wished to appeal, he would have ten days to do so. Finally, the PCR judge found petitioner failed to present any evidence showing he may be prejudiced by the alleged deficiency, as there were no objections made at the guilty plea proceeding and plea counsel had no reason to file a notice of appeal.

We find the PCR judge applied the wrong standard in evaluating petitioner's allegation that plea counsel was ineffective in failing to file a notice of appeal after petitioner requested he do so. The merits of any such appeal, while relevant to an allegation that counsel failed to advise a defendant of the right to appeal, are not relevant where a PCR applicant alleges counsel failed to file an appeal after being asked to do so. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable regardless of whether the appeal would have had merit. *Id.*, at 477. "[W]hen counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Id.*, at 484. The defendant need not show that his hypothetical appeal might have had merit, only that but for counsel's deficient conduct, the defendant would have appealed. *Id.*, at 486.

Because the PCR judge failed to apply the proper standard in evaluating petitioner's claim, and instead evaluated the claim on the improper basis of whether the appeal would have been successful, we reverse the finding that plea counsel was not ineffective in failing to file a notice of appeal and proceed with a review of petitioner's direct appeal issue. *See Hiott v. State*, 381 S.C. 622, 674 S.E.2d 491 (2009)(The decision of the PCR judge may be reversed when it is controlled by an error of law.).

Petitioner's conviction and sentence are affirmed pursuant to Rule 220(B)(1), SCACR, and the following authorities: Rule 203(d)(1)(B)(iv), SCACR (If the appeal is from a guilty plea, the appellant must file a written explanation showing that there is an issue which can be reviewed on appeal. The explanation should identify the issue(s) to be raised on appeal and the factual basis for the issue(s) including how the issue(s) was raised below and the ruling of the lower court on that issue(s). If an issue was not raised to and ruled on by the lower court, the explanation must include argument and citation to legal authority showing how the issue can be reviewed on appeal. If the appellant fails to make a sufficient showing, the notice of appeal may be dismissed.); *State v. Johnston*, 333 S.C. 459, 462 510 S.E.2d 423, 425 (1999)("[T]his Court has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.").

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David Paul Reuwer, Respondent.

Appellate Case No. 2016-001495

Opinion No. 27688
Submitted November 16, 2016 – Filed December 7, 2016

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Kelly B. Arnold, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

David Paul Reuwer, of Camden, *Pro Se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the issuance of a confidential admonition or a public reprimand. As a condition of discipline, respondent agrees to complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School within nine months of imposition of a sanction. Respondent also agrees to submit his monthly bank statement, reconciliation report, and trial balance report for his trust account for a period of one year following the imposition of a sanction. We accept

the Agreement, subject to the aforementioned conditions, and issue a public reprimand.[1] The facts, as set forth in the Agreement, are as follows.

Facts

Matter A

Respondent provided legal services to Client A with regards to obtaining a name change for the client's minor child. Client A paid respondent a non-refundable retainer fee of $500 pursuant to a fee agreement that indicated "name change" as the legal service respondent would be providing. Respondent did not provide any further written explanation as to the specific legal services he would or would not be providing in connection with the name change. Client A believed the services provided would include obtaining an amended birth certificate for the minor child. Respondent represents that he orally explained to Client A that legal services provided in connection with the name change did not include obtaining the amended birth certificate but that he would assist Client A in doing so. Respondent has no documentation regarding his conversation with Client A.

Despite respondent's unsuccessful attempts to resolve the matter by agreement with the opposing party, respondent did not request a final hearing until five months after the attempts at an agreement failed. According to Client A, respondent failed to notify her of the final hearing date until the day before the hearing. Respondent

[1] Respondent has a disciplinary history that consists of a letter of caution with a finding of minor misconduct, issued in 2005, which cites Rule 8.4(e) of the Rules of Professional Conduct (RPC), Rule 407, SCACR (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice); a letter of caution with no finding of misconduct, issued in 2010, which cites Rule 1.4, RPC (a lawyer shall reasonably consult with the client, keep the client reasonably informed and promptly comply with reasonable requests for information); a letter of caution with no finding of misconduct, issued in 2010, citing Rule 1.3, RPC (a lawyer shall act with reasonable diligence and promptness in representing a client) and Rule 1.4, supra; a letter of caution with a finding of minor misconduct, issued in 2010, citing Rule 8.4, RPC (setting forth what constitutes professional misconduct); and a letter of caution with no finding of misconduct, issued in 2010, citing Rule 1.3, supra, Rule 1.4, supra, and Rule 3.2, RPC (a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client). See Rule 2(r), RLDE (the fact that a letter of caution has been issued may be considered in a subsequent disciplinary proceeding against the lawyer if the caution or warning contained in the letter of caution is relevant to the misconduct alleged in the proceedings).

represents Client A was given notice of the hearing earlier, but he has no documentation of the prior notice. Respondent also failed to serve the opposing party with notice of the hearing. The hearing was re-scheduled, after which Client A paid respondent an additional $501.30 for the filing fee, court costs, and guardian *ad litem* fees.

Documentation respondent subsequently submitted to the Department of Vital Records at the Department of Health and Environmental Control was not complete and respondent failed to satisfy requests for additional information. Respondent represents he communicated with the Department of Vital Records by telephone several times, but he has no documentation regarding those communications. While initially respondent assisted and advised Client A in obtaining the amended birth certificate, he later decided to require additional payment from Client A for those legal services; however, he failed to inform Client A of his decision in a timely manner.

At times, respondent failed to respond to Client A's reasonable requests for information about the status of the matter, including the status of the amended birth certificate. When Client A's attempts to contact respondent by telephone and email were unsuccessful, she went to respondent's office without an appointment. Respondent represents he informed Client A she would have to pay for his assistance in obtaining the amended birth certificate. Respondent stopped communicating with Client A regarding the amended birth certificate when she refused to further compensate respondent.

Respondent also represented Client A in a child custody action. Client A paid respondent a non-refundable retainer fee of $500 pursuant to an agreement that indicated "child custody" was the legal service being provided. Respondent did not provide any further written explanation as to the specific legal services he would or would not be providing with regard to the action. Respondent represents he agreed to appear with Client A on her *pro se* child custody contempt action against the father of her minor son, but respondent has no documentation related to his specific legal services.

During a hearing in the action, respondent repeatedly stated he would prepare a proposed order, circulate the order among the parties, and then forward it to the judge for review and signature. Respondent represents he was negotiating a co-parenting agreement with the child's father on Client A's behalf and intended the order to also reflect the parties' agreement; however, when the parties failed to

reach an agreement, respondent failed to prepare the proposed order, and to date, over two and a half years after the hearing, has not prepared a proposed order.

At times, respondent failed to respond to Client A's reasonable requests for information about the status of the child custody case, including inquiries about the missing court order. Respondent eventually decided to terminate his representation of Client A, but failed to inform her of his decision in a timely manner and stopped communicating with her about the case.

Matter B

Respondent represented Client B in her capacity as personal representative of her deceased brother's estate. Client B paid respondent a non-refundable retainer fee of $1,500 pursuant to a fee agreement that indicated "probate of dec. brother" was the legal service being provided by respondent. Client B believed this included representing the estate. Respondent did not provide any further written explanation as to the specific legal services he would or would not be providing to Client B. Respondent represents he orally communicated to Client B that he was only representing her as the personal representative and not the estate; however, respondent has no documentation of those communications.

Respondent deposited the fee directly into his operating account even though he had not yet fully provided the service associated with the fee. Because respondent did not have a written advance fee agreement containing all of the language required by Rule 1.5(f), RPC, and received the fee in advance of performing the work, respondent violated Rule 1.15, RPC, by failing to deposit the unearned fee into his trust account. Client B paid additional fees, as requested by respondent.[2]

At times, respondent failed to respond to Client B's reasonable requests for information about the status of the case and failed to timely file required documents with the probate court, which led Client B to release respondent from his representation. Respondent failed to provide Client B with her file despite verbal and written requests.

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[2] In response to a subpoena for all records required by Rule 417, SCACR, respondent provided copies of some of Client B's checks but did not document Client B's billing and therefore did not have any copies of bills for legal fees or expenses to provide during the investigation. Respondent also did not maintain copies of records of deposit or cancelled checks in this matter and therefore did not have them to provide during the disciplinary investigation.

Client B's new counsel requested the file by letter and by telephone, and arrangements were made to drop the file off at new counsel's office; however, respondent informed new counsel he needed to make copies of the file in light of Client B's complaint in this disciplinary matter and that he would not be returning the file as previously scheduled. Over the next month, Client B's new counsel attempted by certified letters and voice mail messages to re-schedule a time to retrieve the file, but respondent did not respond to the letters or the messages. Respondent eventually called Client B's new counsel and stated he had to provide the file to ODC for an upcoming hearing. Thereafter, Client B's new counsel sent a staff member to respondent's office to retrieve the file without success. Respondent represents he told the staff member she could return the next day to pick up the file, and the file was in fact retrieved at that time. Upon review of the file, ODC discovered original documents relevant to the probate matter and to Client B personally.

Respondent also represented Client B as a closing attorney in a residential real estate purchase transaction. In response to a subpoena issued by ODC for all records required by Rule 417, SCACR, respondent provided the HUD-1 settlement statement and copies of disbursement checks regarding the closing but did not maintain reconciliation reports and therefore did not have them to provide during this investigation. Respondent did not reconcile his trust account in the manner required by Rule 417, SCACR, and particularly as described in Comment 5 to Rule 1 of that rule.[3]

A notice of investigation was mailed to respondent; however, he failed to respond to the complaint. Respondent did submit a written response after receipt of a Treacy letter.[4]

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[3] Comment 5 states: "The potential for these records to serve as safeguards is realized only if the procedures set forth in Rule 1(i) are regularly performed. The trial balance is the sum of balances of each client's ledger card (or the electronic equivalent). Its value lies in comparing it on a monthly basis to a control balance. The control balance starts with the previous month's balance, then adds receipts from the Trust Receipts Journal and subtracts disbursements from the Trust Disbursements Journal. Once the total matches the trial balance, the reconciliation readily follows by adding amounts of any outstanding checks and subtracting any deposits not credited by the bank at month's end. This balance should agree with the bank statement. Monthly reconciliation is required by this rule."

[4] In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982).

Law

Respondent admits his conduct in these matters violates the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2(a)(a lawyer shall abide by a client's decisions concerning the objectives of representation and consult with the client as to the means by which they are to be pursued); Rule 1.3, supra; Rule 1.4, supra; Rule 1.5(f)(requirements for advance fees); Rule 1.15(a)(a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property; complete records of such account funds and other property shall be kept by the lawyer and preserved for a period of six years after termination of the representation; a lawyer shall comply with Rule 417, SCACR); Rule 1.15(c)(a lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the lawyer and the client have entered into a written agreement concerning the handling of fees paid in advance pursuant to Rule 1.5(f)); Rule 1.15(d)(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, shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property); Rule 1.16(d) (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, surrendering papers and property to which the client is entitled and refunding any advance payment of fees or expenses that have not been earned or incurred; the lawyer may retain papers relating to the client to the extent permitted by other law and may retain a reasonable nonrefundable retainer); Rule 3.2, supra; Rule 8.1(b)(a lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); and Rule 8.4(e), supra.

Respondent also admits his conduct constitutes grounds for discipline under Rule 7(a)(1), RLDE (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Respondent shall complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School within nine months of the date of this opinion. Respondent shall also submit his monthly bank statement, reconciliation report, and trial balance report for his trust account to ODC for a period of one year from the date of this opinion.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John Kevin Owens, Respondent.

Appellate Case No. 2016-001741

Opinion No. 27689
Submitted November 16, 2016 – Filed December 7, 2016

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Robert Clyde Childs, III, Childs Law Firm, of Greenville, 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 (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment with conditions. He requests the disbarment be imposed retroactively to March 5, 2014, the date of his interim suspension. *In the Matter of Owens*, 407 S.C. 225, 755 S.E.2d 113 (2014). We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to the date of his interim suspension. In addition, we impose the conditions set forth in this opinion. The facts, as set forth in the Agreement, are as follows.

Matter A

Respondent was retained on February 26, 2013, to represent Client A in a domestic matter. Respondent was paid $1,000 for his representation. On March 6, 2013, Respondent sent a letter to Client A indicating he was enclosing a copy of the complaint he had forwarded to the family court for filing. Respondent stated he would serve the opposing party as soon as he received the filed copy back from the family court. In fact, Respondent never filed the complaint with the family court. Client A eventually terminated the representation and requested a refund of his unused retainer. Respondent did not return the unearned portion of the fee.

ODC mailed a Notice of Investigation to Respondent on June 10, 2013, requesting a response within fifteen (15) days. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent responded on October 22, 2013, when he appeared for an on-the-record interview pursuant to Rule 19(b), RLDE.

Matter B

On February 19, 2013, Respondent was retained to represent Client B in a domestic matter. Client B paid Respondent $1,400 for the representation. Because Client B was out of the country, Respondent was directed to communicate with Client B's mother.

On March 13, 2013, Respondent sent an email to Client B's mother which read, "Attached is the copy of the complaint I have filed with the Family Court in [Client B's] divorce proceeding. I should reeve (sic) the cocked (sic) copy back in several days and will begin the process of serving it through publication in a local newspaper obviously without any identifying information." At the time, Respondent had not filed any documents with the family court on Client B's behalf, and in fact, Respondent never filed the referenced complaint.

On May 22, 2013, this Court placed Respondent on administrative suspension for failure to comply with continuing legal education (CLE) requirements. Lawyer did not inform Client B or her mother of his administrative suspension.

Client B terminated Respondent's representation on June 3, 2013, and requested a refund of the entire amount paid to Respondent. Respondent failed to timely

refund the unearned portion of his fee. ODC mailed a Notice of Investigation to Respondent on June 17, 2013, requesting a response within fifteen (15) days. Respondent's written response was hand delivered on October 22, 2013, when Respondent appeared for an interview with ODC.

Matter C

Pursuant to Rule 416, SCACR, the South Carolina Bar Resolution of Fee Disputes Board (RFDB) ordered Respondent to pay Client B the amount of $1,400. After Respondent failed to pay Client B, a certificate of non-compliance was issued by RFDB. ODC mailed a Notice of Investigation to Respondent on October 7, 2013, requesting a response within fifteen (15) days. Respondent's written response was received by Disciplinary Counsel on July 14, 2014.

Matter D

Respondent submitted a letter to South Carolina Farm Bureau Insurance (Farm Bureau) asserting his representation of Client C in connection with a claim arising from an automobile accident. After agreeing to settle the claim, Farm Bureau issued two checks to Respondent made payable to Respondent for Client C. Farm Bureau issued a written request to Respondent to hold the drafts in trust and not disburse any funds until a release was fully executed and returned to the claims adjuster. Respondent negotiated the checks. Despite numerous requests and reminders, Respondent failed to deliver the release to Farm Bureau. Further, Respondent failed to disburse any proceeds of the settlement to Client C.

Respondent failed to safeguard Client C's settlement and converted the funds for Respondent's personal use. ODC mailed a Notice of Investigation to Respondent on December 30, 2013, requesting a response within fifteen (15) days. On January 8, 2014, Disciplinary Counsel issued a Notice to Appear requesting Respondent's appearance on February 6, 2014, for an interview. Prior to his scheduled appearance, Respondent retained counsel, and the appearance was continued at the request of counsel. Respondent's written response was received on July 14, 2014.

Matter E

While administratively suspended, Respondent agreed to represent Client D in a civil matter concerning Client D's business. Respondent accepted payment from

Client D but did not do any work on Client D's behalf. Due to Respondent's failure to do any work on the matter, a default judgment was entered against Client D's company.

ODC mailed a Notice of Investigation to Respondent, requesting a response within fifteen (15) days. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent's written response was received on July 14, 2014.

Matter F

While administratively suspended, Respondent agreed to represent Client F on a probate matter. Client F paid Respondent $600. Respondent did not perform any legal services for Client F and converted the money paid by Client F for Respondent's personal use. ODC mailed a Notice of Investigation to Respondent on March 12, 2014, requesting a response within fifteen (15) days. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent's written response was received on July 14, 2014.

Matter G

Respondent accepted $750 to complete a will for Client G after his license was administratively suspended. Respondent did not complete the will for Client G and failed to adequately communicate with Client G. Respondent later reimbursed Client G the amount of $750.

ODC mailed Respondent a Notice of Investigation on March 12, 2014, requesting a response within fifteen (15) days. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent's written response was received on July 14, 2014.

Matter H

Respondent represented Client H prior to being administratively suspended. After Respondent's suspension, Respondent accepted additional fees of approximately $6,975 from Client H. Respondent maintains some of the fees were for services performed prior to his suspension. However, Respondent acknowledges he also accepted fees for work he did not perform. Respondent later reimbursed Client H $10,000.

ODC mailed a Notice of Investigation to Respondent on March 12, 2014. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent's written response was received on July 14, 2014.

Matter I

In September 2012, Client I retained Respondent for representation in a domestic matter. Respondent received $350 for the representation. Respondent prepared a summons and complaint that was filed on September 13, 2012. A temporary hearing was held on October 22, 2012. A final hearing was held on January 31, 2013. Respondent was administratively suspended prior to the completion of a final order in the domestic matter. As part of a plea agreement reached in the criminal case discussed in Matter R below, Respondent agreed to reimburse Client I the amount of $350.

ODC mailed a Notice of Investigation to Respondent on March 12, 2014. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent's written response was received on July 14, 2014.

Matter J

Client J paid respondent $500 to represent him in a matter involving the South Carolina State Guard. At the time Respondent accepted the fee, his license to

practice law had been administratively suspended. Respondent did not perform any legal services for Client J and converted the $500 paid by Client J for Respondent's personal use. Respondent later reimbursed Client J the amount of $500.

ODC mailed a Notice of Investigation to Respondent on March 12, 2014. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent's written response was received on July 14, 2014.

Matter K

After his administrative suspension, Respondent accepted $1,500 to represent Client K in a civil matter. Respondent performed legal services for Client K while Respondent was administratively suspended by this Court. Respondent failed to adequately communicate with Client K. Respondent refunded $1,500 to Client K.

ODC mailed a Notice of Investigation to Respondent on March 12, 2014. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent's written response was received on July 14, 2014.

Matter L

Client L retained Respondent prior to Respondent's administrative suspension. Respondent was paid $1,387.50 by Client L to prepare a deed, wills and durable powers of attorney. Respondent continued to work for Client L following his suspension. Respondent failed to adequately communicate with Client L regarding the status of Client L's matters.

ODC mailed a Notice of Investigation to Respondent on March 12, 2014. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent's written response was received on July 14, 2014.

Matter M

On May 10, 2013, Client M's grandfather paid $500 to Respondent to review Client M's criminal charges. At that time, Client M was represented by another attorney. Respondent made several inquiries about Client M's situation. After Respondent was placed on administrative suspension, Responded failed to adequately communicate with Client M and did not adequately explain the scope and extent of his representation. Respondent did not perform any legal work on Client M's behalf, and a public defender was appointed to represent Client M. Respondent did not refund the unused portion of the fee paid to him for the representation of Client M.

ODC mailed a Notice of Investigation to Respondent on March 12, 2014. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent's written response was received on July 14, 2014.

Matter N

Client M's mother paid Respondent $5,280 to represent Client M in connection with criminal charges. Of the funds received, Respondent paid $800 on behalf of Client M for restitution. Respondent admits he received a portion of the funds after he was placed on administrative suspension. Respondent failed to adequately communicate with Client M or Client M's mother. Respondent did not refund the unearned portion of the fee paid to him for the representation. Respondent also failed to hold the fees in trust until earned. Respondent later reimbursed Client M the amount of $500.

ODC mailed a Notice of Investigation to Respondent on July 18, 2014, requesting a response within fifteen (15) days. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent's written response was received on October 3, 2014.

Matter O

Client N paid Respondent $1,500 to complete a qualified domestic relations order (QDRO). Respondent failed to complete the QDRO and failed to adequately communicate with Client N regarding the matter. After Respondent was administratively suspended from the practice of law, he failed to refund the unused portion of the fee. Respondent also failed to hold the fees in trust until earned.

On July 18, 2014, ODC mailed a Notice of Investigation to Respondent, requesting a response within fifteen (15) days. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent's written response was received on October 3, 2014.

Matter P

Client P retained Respondent to represent him in a domestic matter. Respondent quoted Client P a fee of $750 plus costs for the representation, which Client P paid in installments. Respondent received a portion of the fees and costs after he was placed on administrative suspension. Respondent failed to do any work in furtherance of the representation. According to Respondent, he could not begin work on the matter until Client P paid the outstanding amount of his child support obligations. Respondent did not hold the fees and costs in trust and also did not refund Client P's fees and costs upon Respondent's suspension.

On August 4, 2014, ODC mailed a Notice of Investigation to Respondent, requesting a response within fifteen (15) days. When no response was received, Respondent was served with a letter pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting Respondent's response. Respondent's written response was received on October 3, 2014.

Matter Q

Client P paid Respondent $1,500 to complete guardianship paperwork for Client P's relative. At the time Respondent received the funds, he was employed by a law firm. Respondent left the law firm before completing the guardianship paperwork. Respondent did not deposit the funds paid by Client P in the firm's trust account

and did not refund any portion of the fee to Client P. Respondent failed to notify Client P when he left the law firm, and he failed to adequately communicate with Client P regarding the status of the guardianship. Another attorney in the firm continued the work on Client P's behalf without additional compensation.

Matter R

On June 13, 2016, Respondent pled of guilty to one count of Unauthorized Practice of Law. Respondent was sentenced to five years and a $5,000 fine, suspended on service of five years' probation and payment of restitution. The order further provided probation could be terminated after no less than thirty months if Respondent paid all ordered restitution. According to the Attorney General's office, the plea resolved claims of Unauthorized Practice of Law and Breach of Trust for Clients B, F, G, H, I, J, K, L and M, above.

Violations of the Rules of Professional Conduct

Respondent admits he violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (a lawyer shall act with reasonable diligence in representing a client); Rule 1.4 (a lawyer shall keep his or her client reasonably informed and comply with reasonable requests for information); Rule 1.5 (a lawyer must refund the unearned portion of a fee upon termination); Rule 1.15(c) (a lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred); Rule 1.15(d) (upon receiving funds in which a client has an interest, a lawyer shall promptly notify the client and shall promptly deliver to the client any funds the client is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property); Rule 1.16(a) (a lawyer shall withdraw from representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law); Rule 1.16(d) (upon termination of representation, a lawyer must return the unearned fee to the client); Rule 3.2 (a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); Rule 5.5(a) (a lawyer shall not practice law in a jurisdiction in violation of any regulation of the legal profession in that jurisdiction); Rule 8.1(b) (a lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority in a disciplinary matter); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct);

Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); 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).

Conclusion

We accept the Agreement for Discipline by Consent and disbar Respondent from the practice of law in this state, retroactive to March 5, 2014, the date of his interim suspension. In addition, we impose the following conditions:

1. within thirty (30) days of the date of this opinion, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission);

2. Respondent shall complete the South Carolina Bar's Legal Ethics and Practice Program Ethics School and Trust Account School prior to seeking readmission;

3. within sixty days of the date of this opinion, Respondent shall enter into a restitution agreement with the Commission for the payment of restitution in the following amounts to the following clients, reduced by any payment made by the Lawyer's Fund for Client Protection (Lawyers' Fund) to or on behalf of the client, and shall repay the Lawyers' Fund for any payments it has made to Respondent's former clients on Respondent's behalf:

   (a) $1,000 to Client A;

   (b) $7,000 to Client C;

   (c) $300 to Client D;

   (d) $3,980 to Client M;

(e) $1,500 to Client N; and

(f) $750 to Client P.

4. Respondent shall comply with the terms of the June 13, 2016 Order of Restitution issued by the Court of General Sessions.

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.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Stephen Douglas Berry, Petitioner.

Appellate Case No. 2015-002580

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Union County
The Honorable John C. Hayes, III, Circuit Court Judge

Opinion No. 27690
Submitted November 17, 2016 – Filed December 7, 2016

AFFIRMED AS MODIFIED

League B. Creech, of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., of Hampton, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

[PER CURIAM]: Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *State v. Berry*, 413 S.C. 118, 775 S.E.2d 51 (Ct. App. 2015). We grant the petition, dispense with further briefing, and affirm the Court of Appeals' decision as modified.

Petitioner was convicted of criminal sexual conduct with a minor, second degree. At trial, the State called Kim Roseborough (Roseborough) who was qualified as an expert in the field of "child sexual abuse assessment and treatment." The relevant section of Roseborough's testimony consisted of three distinct parts: (1) testimony regarding the victim's demeanor witnessed by Roseborough during therapy; (2) testimony explaining and discussing delayed disclosure as part of the Child Sexual Abuse Accommodation Syndrome; and (3) testimony addressing trauma associated with sexual abuse and post-traumatic stress disorder (PTSD).

During the first portion of Roseborough's testimony, the State asked, "Were the circumstances of [the victim's] disclosure . . . consistent with the disclosure of sexual abuse?" Trial counsel objected, citing *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) as grounds for the objection. The trial judge sustained the objection, finding such a question solicited Roseborough's opinion on whether the victim was telling the truth.

During the second portion of her testimony, Roseborough explained why victims of child sexual abuse often choose to delay disclosing abuse. The State asked if any factors were present in the victim's case which might have led to her delaying disclosure of the alleged abuse. The trial court sustained trial counsel's objection to this question.[1] The solicitor continued to try and ask, in many different ways, what factors of delayed disclosure were demonstrated by the victim. Trial counsel continued to object, without stating his grounds, and these objections were all sustained. At no point during the first two portions of Roseborough's testimony did trial counsel move for a mistrial, curative instructions, or to strike the testimony solicited immediately prior to a sustained objection.

Finally, the State introduced the third part of Roseborough's testimony discussing the trauma associated with sexual abuse and possible PTSD resulting from that trauma. The solicitor asked Roseborough about the typical symptoms of trauma

[1] The jury was excused so that the attorneys could argue this objection. The record on appeal is missing five pages containing a majority of this discussion, therefore, only part of the conversation was available for review by this Court.

exhibited by a child who suffered sexual assault. Roseborough's answer discussed symptoms of trauma, including PTSD. Trial counsel objected and approached the bench for an off the record conference. After the conference, neither the grounds for the objection nor the trial judge's ruling were placed on the record, and Roseborough continued to testify about trauma and PTSD. Specifically, Roseborough testified to the trauma symptoms a child would tend to show after being sexually abused and began to explain the trauma symptoms she observed in the victim. After discussing three such symptoms demonstrated by the victim, trial counsel objected, but the objection was overruled. Roseborough went on to explain that she referred the victim to a psychiatrist because she exhibited many of the criteria for diagnosing PTSD listed in the *Diagnostic Statistical Manual* and, that in her opinion, the victim suffered from PTSD.

After the State concluded its case-in-chief, trial counsel placed the objection, discussed at sidebar during the third portion of Roseborough's testimony, on the record. Trial counsel argued there was no evidence of Roseborough's qualifications to diagnose PTSD; specifically, trial counsel asserted Roseborough was qualified as a social worker and not a medical doctor. The trial judge reiterated his sidebar determination that you do not need to be a medical doctor to diagnosis PTSD.

The Court of Appeals found the issue of whether Roseborough's testimony regarding trauma symptoms and PTSD violated the directives established in *Kromah* preserved for appeal. In coming to this conclusion, the Court of Appeals found the specific grounds for petitioner's objection to questions regarding trauma symptoms and PTSD were apparent from the context given his objections to the first two portions of Roseborough's testimony. On the merits, the Court of Appeals found the trial court did not abuse its discretion in allowing Roseborough to testify regarding behaviors she observed in the victim and the symptoms of PTSD.

However, we find any issues regarding Roseborough's testimony, other than her discussion of symptoms of trauma associated with sexual assault and PTSD, are not preserved for review because petitioner's objections were sustained and trial counsel did not take any further measures to have the testimony stricken from the record, curative instructions given, or a mistrial granted. *See State v. Wilson*, 389 S.C. 579, 698 S.E.2d 862 (Ct. App. 2010) ("Appellate courts have recognized that an issue will not be preserved for review where the trial court sustains a party's objection to improper testimony and the party does not subsequently move to strike the testimony or for a mistrial," because "without a motion to strike or motion for a

mistrial, when the objecting party is sustained, he has received what he asked for and cannot be heard to complain about a favorable ruling on appeal."); *see also State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011) ("When a witness answers a question before an objection is made, the objecting party must make a motion to strike the answer to preserve the issue of the statement's admissibility.").

Additionally, to the extent petitioner asserts error in Roseborough's testimony regarding symptoms of trauma and PTSD, the record clearly shows that the only objection made to that portion of Roseborough's testimony was based upon her qualifications to diagnose PTSD. As such, petitioner's current arguments regarding that portion of Roseborough's testimony were not properly before the Court of Appeals, should not have been ruled upon, and are not properly before this Court. *See State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (noting for an issue to be properly preserved, it has to be raised to and ruled upon by the trial court); *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003) (holding a party may not argue one ground at trial and another ground on appeal).

Accordingly, we vacate the Court of Appeals' analysis, but affirm on the grounds set forth above.

AFFIRMED AS MODIFIED

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

The Supreme Court of South Carolina

In the Matter of J.M. Long, III, Respondent.

Appellate Case No. 2016-002354

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

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

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

s/ Costa M. Pleicones C.J.

Columbia, South Carolina
December 1, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William Lee Turner, Employee, Appellant,

v.

SAIIA Construction, Employer, and Old Republic General Insurance Corporation c/o Gallagher Bassett Services, Inc., Carrier, Respondents.

Appellate Case No. 2014-002416

Appeal From The Workers' Compensation Commission

Opinion No. 5458
Heard June 9, 2016 – Filed December 7, 2016

AFFIRMED

Preston F. McDaniel, of McDaniel Law Firm, of Columbia, for Appellant.

Jason Wendell Lockhart and Helen Faith Hiser, both of McAngus Goudelock & Courie, LLC, of Mount Pleasant, for Respondents.

LOCKEMY, C.J.: William Lee Turner appeals the Appellate Panel of the South Carolina Workers' Compensation Commission's (the Commission) decision and order denying him benefits under the Workers' Compensation Act (the Act). Turner argues the Commission erred in: (1) failing to apply the presumption that his injury arose out of and in the course of employment; (2) affirming the single commissioner's findings of fact; (3) finding he did not establish a cause for his

accidental injury; and (4) allowing Respondents[1] to draft the Commission's order. We affirm.

FACTS

Turner began working for SAIIA Construction Company as a heavy equipment operator in 2007. Turner's alleged accident occurred on April 19, 2012, when his co-workers found him lying on his back next to his dump truck. Turner testified he had no memory of the accident or how it happened. Paul Barnette and David Bolden, Turner's co-workers, testified they never saw Turner in or on the truck prior to his fall. However, Turner testified both of his co-workers saw him "up in the truck" at some point before he fell.

Barnette testified that at the end of the work day Turner washed his truck, which was typically done with a high pressure washer. Turner then went into a building adjacent to the wash area to do some paperwork and retrieve his backpack and Barnette's cooler. After Turner left the building, Bolden exited a trailer called "the hut" and walked over to Barnette. They were talking for some time when they noticed Turner lying on his back next to the cab of his truck. Barnette and Bolden found Turner lying on his back on the ground with his arms outstretched and his palms up. Although Barnette could not say for certain how long Turner was lying on the ground before they saw him, he estimated it would not have been more than three or four minutes. Barnette's cooler and Turner's backpack were found lying on the seat of the truck and the truck's door was still open. Bolden testified, "I never saw [Turner] on the steps of the truck," but only "standing on the ground, placing the [cooler] on the truck, I did not see him on the steps."

Turner was taken to Palmetto Health Richland, where he was provided emergency treatment and admitted. Turner was diagnosed with a small subdural hemorrhage, intraparenchymal contusion left lobe, and an endplate compression deformity of T3 and T4. His discharge diagnosis included a small subdural hemorrhage and T3 to T4 endplate fractures; however, CT scans showed Turner did not fracture his skull.

At a follow-up appointment, Dr. James Selph noted Turner, "has a history of back pain and in fact was taking Ultram prior to his fall." All of Turner's remaining follow-up treatment was with Dr. Peterson, his family doctor.

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[1] SAIIA Construction Company and Old Republic General Insurance Corp., c/o Gallagher Bassett Services, Inc., are the Respondents in this matter (collectively, Respondents).

On March 27, 2012, a few weeks before his accident, Turner sought medical care for his lower back, which he injured lifting logs while working on a house he was building. He was prescribed Ultram 50MG two times daily and Flexeril 5MG two times daily. On April 16, 2012, three days before his accident, Turner sought medical care again complaining of both lower and upper back pain. Turner was then prescribed Ultram 100MG two times daily and Neurontin 300MG three times daily. On April 17, 2012, two days before his accident, Turner was seen at Palmetto Health Baptist Emergency Department with complaints of vomiting, diarrhea, and suspicion of dehydration. James Speegle, Turner's supervisor at the time of the injury, testified Turner was complaining about not feeling well a couple days before his fall. Speegle recommended Turner take a few days off.

Turner filed a Form 50 on November 25, 2013, alleging he suffered a compensable injury to his back, head, and thoracic spine. Respondents filed a Form 51, denying Turner's injuries were the result of an accident that arose out of and in the course and scope of employment. The parties were heard by the single commissioner on February 4, 2014. In an April 14, 2014 order, the single commissioner found "[Turner] failed to carry his burden of proving that he sustained a compensable injury by accident within the course and scope of his employment with the [Respondents] on April 19, 2012." The single commissioner also found Turner's alleged accident was unwitnessed and that he did not remember anything that happened on April 19, 2012, or the day after, and that co-workers found Turner lying on his back next to his truck. The single commissioner further found Turner was impeached at least twice. The single commissioner concluded Turner failed to meet his burden of proving a compensable injury and denied any benefits or medical treatment associated with his alleged accident.

Turner filed a Form 30 raising eleven points of appeal. Following oral arguments, the Commission issued its decision on October 10, 2014, affirming the single commissioner's order in its entirety. In addition, the Commission set forth its standard of review, and responded to Turner's reliance on prior case law. Turner relied on *Packer v. Corbett Canning Co.*, 238 S.C. 431, 120 S.E.2d 398 (1961) and *Owens v. Ocean Forest Club*, 196 S.C. 97, 12 S.E.2d 839 (1941), to establish he suffered from a compensable work related accident due to the unexplained death or injury presumption. The Commission found that because Turner was found on the ground and could not remember or testify as to how he fell, and there were no witnesses to the accident, the presumption could not be applied to establish the accident arose out of his employment. The Commission held Turner failed to meet his burden of proving a compensable injury by accident within the course and

scope of his employment and denied him any benefits under the Act. This appeal followed.

STANDARD OF REVIEW

On appeal from an appellate panel of the Workers' Compensation Commission, this court can reverse or modify the decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." *Crisp v. SouthCo.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). In a workers' compensation case, the appellate panel is the ultimate fact-finder. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 273 (2004). However, when there are no disputed facts, the question of whether an accident is compensable is a question of law. *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007). "[W]orkers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the [Workers' Compensation] Act; only exceptions and restrictions on coverage are to be strictly construed." *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010).

LAW/ANALYSIS

I. Presumption

Turner argues the Commission erred as a matter of law by failing to apply the unexplained death presumption. We disagree.

For an accidental injury to be compensable, it must "aris[e] out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (2015). An injury arises out of employment if it is proximately caused by the employment. *Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965).

The unexplained death presumption is

> a natural presumption, or a presumption of fact, that one charged with the performance of a duty and injured while performing such duty, or found injured where his duty

> required him to be, is injured in the course of, and as a consequence of, his employment.

Jennings v. Chambers Dev. Co., 335 S.C. 249, 255-56, 516 S.E.2d 453, 456-57 (Ct. App. 1999) (quoting *Packer*, 238 S.C. at 436, 120 S.E.2d at 400). "The presumption is applied simply to establish that the injury occurred in the course of and as a consequence of employment. The presumption cannot be applied to establish the incident of accident." *Id.*

We disagree with Turner's assertion that the unexplained death presumption should apply in cases where the employee survives the injury but has no memory of the events leading up to the injury. Turner failed to cite any South Carolina case law extending the presumption, heretofore applied only in death cases, to cases where the employee survives but has no memory of the injury. In addition, we note other states, including North Carolina, have limited the presumption to cases where the employee is deceased and have refused to apply it where the employee is alive but has no memory of the injury. *See Janney v. J.W. Jones Lumber Co.*, 550 S.E.2d 543, 546 (N.C. Ct. App. 2001) (declining to adopt the unexplained death presumption in a workers' compensation case not resulting in death). "Because South Carolina workers' compensation law is fashioned after North Carolina's statute, our courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers' Compensation Act." *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 248-49, 647 S.E.2d 691, 698 (Ct. App. 2007).

We particularly find persuasive the North Carolina Court of Appeals' reasoning in declining to extend the presumption beyond those cases which result in death. With facts very similar to the instant case, a lumber grader in *Janney* was waiting on a board to grade and soon found himself lying on the grading booth floor with an injury to his head. *Id.* at 545. The employee testified that, when he regained consciousness, he had no memory of hitting his head on the grading console or the floor. *Id.* In awarding benefits, the workers' compensation commission found the employee was entitled to the unexplained death presumption of compensability. *Id.* at 546.

On appeal, the North Carolina Court of Appeals reversed the commission's application of the unexplained death presumption in the case. *Id.* The court explained the underlying purpose of the presumption is fairness because employers, rather than a decedent's family, are in a better position to offer evidence surrounding the employee's death. *Id.* Employers and their employees are often the last to see the decedent alive, the first to discover the body, and are familiar

with the decedent's work duties. *Id.* In a case of an unexplained injury where the claimant survives but has no memory of the injury's details, however, no "inequality of information" exists because the employer does not know any more about the circumstances of the claimant's injury than did the claimant himself. *Id.*

Even if we were to extend the presumption in the present case, we find the employer presented sufficient evidence that Turner had very recent, non-work-related preexisting back conditions and rebutted such presumption. Upon our review of the Commission's final order, we believe the Commission weighed this competent evidence in its finding that Turner's alleged injury to his back at the job site did not arise out of his employment. Therefore, we affirm on this issue.

II. Findings of Fact

Turner argues the Commission erred in affirming the following findings of fact made by the single commissioner: (1) Turner suffered a work related accident on April 19, 2012; (2) Turner's age; (3) Turner is a high school graduate; (4) Turner remembered nothing about the day before the accident, the day of the accident, and the day after the accident; (5) the alleged accident was unwitnessed; and (6) no witnesses claimed to have seen Turner's alleged accident. Initially, we note that under our standard of review, this court cannot weigh the evidence on questions of fact because the Commission is the ultimate fact finder. Furthermore, we find Turner's argument is without merit because the findings of fact are all supported by substantial evidence in the record. Thus, we hold the Commission did not err in affirming the single commissioner's findings of fact. *See Matute v. Palmetto Health Baptist*, 391 S.C. 291, 294, 705 S.E.2d 472, 474 (Ct. App. 2011) ("When reviewing an appeal from the Workers' Compensation Commission, this court may not weigh the evidence or substitute its judgment for that of the [Commission] as to the weight of evidence on questions of fact.").

III. Arising Out of Employment

Turner argues the Commission erred in finding he failed to meet his burden of proving he suffered a compensable injury by accident within the course and scope of his employment. We disagree.

For an accidental injury to be compensable, it must "aris[e] out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (2015). "'Arising out of' refers to the injury's origin and cause, whereas 'in the course of' refers to the injury's time, place, and circumstances." *Osteen v. Greenville Cty. Sch. Dist.*, 333 S.C. 43, 50,

508 S.E.2d 21, 24 (1998). For an injury to arise out of employment, there must be "a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Grant*, 372 S.C. at 201, 641 S.E.2d at 871.

An unexplained fall is generally not compensable unless the employment contributed to either the cause or the effect of the fall. *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 444, 452-53, 88 S.E.2d 611, 614-15 (1955). The causative danger "need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." *West v. All. Capital*, 368 S.C. 246, 252, 628 S.E.2d 279, 282 (Ct. App. 2006) (quoting *Douglas*, 245 S.C. at 269, 140 S.E.2d at 175). "The burden is on the claimant to prove such facts as will render the injury compensable, and such an award must not be based on surmise, conjecture or speculation." *Crosby v. Wal-Mart Store, Inc.*, 330 S.C. 489, 496, 499 S.E.2d 253, 257 (Ct. App. 1998). "A liberal construction of the evidence cannot be substituted for failure of proof of any essential element of the claim; and the preponderance of evidence rule has been held not to require, as a matter of law, that doubts arising from the evidence be resolved in favor of one party or the other." *Cross v. Concrete Materials*, 236 S.C. 440, 446-47, 114 S.E.2d 828, 832 (1960) (quoting 100 C.J.S. *Workmen's Compensation* § 547(7), pp. 602, 603).

In *Crosby*, a Wal-Mart employee sought benefits for injuries she sustained when she fell at work. 330 S.C. at 490, 499 S.E.2d at 254. The claimant testified she fell while walking through the store on the way to a meeting. *Id.* She stated, "I was just walking on the floor and my feet went from under me." *Id.* This court determined the claimant's fall was an unexplained fall. We stated, "there was no evidence offered in the case at hand as to what caused [the claimant] to fall. It would be wholly conjectural to say under the evidence presented that [the claimant's] employment was a contributing cause of her injury." *Id.* at 495, 499 S.E.2d at 256. This court further reasoned that, while the fall was unexplained, there was an apparent lack of work connection and an implication of a pre-existing physical condition. *Id.* at 496, 499 S.E.2d at 257. This court concluded there was substantial evidence to support the Commission's finding that claimant failed to show a causal connection between her fall and her employment. *Id.*

In *Barnes v. Charter 1 Realty*, 411 S.C. 391, 398, 768 S.E.2d 651, 654 (2015), our supreme court found a causal connection between the claimant's injury and employment where the claimant was performing a work-related task (walking to check another employee's email) when she tripped and fell. The court held the claimant "clearly established that she was performing her job when she sustained

an accidental injury." *Id.* at 399, 768 S.E.2d at 655. In a dissenting opinion, Justice Pleicones asserted "[w]here the claimant presents no evidence as to what caused the fall, it is wholly conjectural to say that 'employment was a contributing cause of [claimant's] injury.'" *Id.* at 400, 768 S.E.2d at 655. Further, because claimant failed to present evidence that her employment caused her fall, she failed to meet the "arises out of employment" component required to prove a compensable injury. *Id.* Justice Pleicones noted South Carolina denies compensation for unexplained falls, and absent special conditions or circumstances, a level floor cannot cause an accident. *Id.*

In *Nicholson v. South Carolina Department of Social Services*, 411 S.C. 381, 383, 390, 769 S.E.2d 1, 2 (2015), the claimant was walking down a hallway to a work-related meeting when she scuffed her foot on the carpet and fell. The supreme court found:

> Nicholson was at work on the way to a meeting when she tripped and fell. The circumstances of her employment required her to walk down the hallway to perform her responsibilities and in the course of those duties she sustained an injury. We hold these facts establish a causal connection between her employment and her injuries—the law requires nothing more. Because Nicholson's fall happened at work and was not caused by a condition peculiar to her, it was causally connected to her employment. Therefore, her injuries arose out of her employment as a matter of law and she is entitled to workers' compensation.

Id. at 390, 769 S.E.2d at 5-6. In a concurring opinion, Justice Pleicones stated the majority erred in absolving the petitioner of her obligation to present evidence that her unexplained fall was the result of special conditions or circumstances. *Id.* at 391, 769 S.E.2d at 6. He concluded it is not enough that a claimant show that she fell while at work but rather, when the fall occurs on a level surface, that she present evidence to explain her fall. *Id.*

We hold substantial evidence supports the Commission's finding that Turner failed to establish a causal connection between his unexplained fall and his employment. *See Bagwell*, 227 S.C. at 452-53, 88 S.E.2d at 614-15 (stating that an unexplained fall is generally not compensable unless the employment contributed to either the cause or the effect of the fall).

Turner was found lying on his back next to his truck; however, he had no recollection of the event and could not describe the circumstances regarding the fall. Turner's co-workers testified they did not see him fall, and only found him after he was lying on the ground. Further, despite Turner testifying his co-workers saw him on the steps of his truck, Bolden testified he never saw Turner on the steps and only found him on the ground after a few minutes. Here, unlike in *Barnes* and *Nicholson*, we cannot determine what Turner was doing at the time of his alleged accident. Although Turner was at work when he fell, no evidence indicates his employment contributed to the cause of his fall. As set forth above, the burden is on Turner to establish facts showing his injury is compensable. *See Crosby*, 330 S.C. at 496, 499 S.E.2d at 257 ("The burden is on the claimant to prove such facts as will render the injury compensable, and such an award must not be based on surmise, conjecture or speculation."). Accordingly, the Commission did not err in finding Turner failed to meet his burden of proving he suffered a compensable injury by accident within the course and scope of his employment.

IV. Drafting the Order

Turner argues the Commission erred in allowing Respondents to draft their own findings of fact and conclusions of law addressing the issues raised for review. We disagree.

In a letter to all counsel, the Commission stated, "This document is not an Order. It is a request for a proposed Order. The undersigned reserves the right to modify or delete any portion of this document." The letter goes on to include instructions stating:

> [Respondents] to prepare proposed Order unless otherwise agreed upon by the parties. Proposed Order shall include **VERBATIM** Findings of Fact attached hereto, **unless there is a mistake, in which case, it may be corrected. ATTORNEYS ARE RESPONSIBLE FOR PROOFING ORDERS PRIOR TO SUBMISSION.** Any other Findings of Fact not inconsistent with those attached hereto may also be included.

Here, the Commission asked Respondents to prepare a proposed order and reserved the right to modify and/or delete any portion before signing the order.

Therefore, Turner's argument is without merit. *See Brown v. Peoplease Corp.*, 402 S.C. 476, 486, 741 S.E.2d 761, 766 (Ct. App. 2013) (holding the Commission is not in error when it asks a party to prepare a proposed order reciting the specific findings of fact and rulings of law on the single commissioner's order, and the Commission reserves the right to modify and/or delete any or all portions of the submitted order).

CONCLUSION

We affirm the Commission's denial of compensation.

AFFIRMED.

WILLIAMS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

A. Marion Stone, III, Respondent,

v.

Susan B. Thompson, Appellant.

Appellate Case No. 2014-001488

Appeal From Charleston County
Jocelyn B. Cate, Family Court Judge

Opinion No. 5459
Submitted October 3, 2016 – Filed December 7, 2016

DISMISSED

Donald Bruce Clark, of Donald B. Clark, LLC, and Margaret D. Fabri, both of Charleston, for Appellant.

Alexander Blair Cash and Daniel F. Blanchard, III, both of Rosen, Rosen & Hagood, LLC, of Charleston, for Respondent.

WILLIAMS, J.: Susan B. Thompson appeals the family court's order finding the existence of a common law marriage between her and A. Marion Stone, III. We dismiss.

FACTS/PROCEDURAL HISTORY

Stone filed a complaint in the family court alleging the existence of a common law marriage with Thompson. In the complaint, Stone sought a divorce, equitable apportionment of the putative marital estate, attorney's fees and costs, and other relief. Thompson answered and filed a motion to bifurcate the case to first determine whether a common law marriage existed before deciding issues of divorce and equitable division. The family court subsequently granted Thompson's motion, and over the course of eight days, the court conducted a trial regarding the existence of a common law marriage.

At the conclusion of the first phase of the trial, the family court issued an order finding a common law marriage and awarding Stone attorney's fees. The family court also ordered each party to immediately schedule the final hearing on the remaining issues with the county clerk of court. Thereafter, Thompson appealed the family court's order.[1]

LAW/ANALYSIS

Thompson argues the family court's order on the issue of common law marriage is immediately appealable because the order is a final judgment, involves the merits, and affects a substantial right determining the mode of trial.[2] We address each argument in turn.

I. Final Judgment

Thompson first contends the family court's order is a final judgment pursuant to section 14-3-330(1) of the South Carolina Code (1976). We disagree.

Generally, only final judgments are appealable. *See* S.C. Code Ann. § 63-3-630(A) (2010) ("Any appeal from an order, judgment, or decree of the family court shall be taken in the manner provided by the South Carolina Appellate Court

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[1] Stone filed a motion in this court to dismiss the appeal. The court denied the motion, but stated in the order that its decision did not preclude Stone from arguing the issue when the case was assigned to a panel.

[2] Because Thompson did not address appealability in her final brief, choosing instead to reassert the arguments made in her return to Stone's motion to dismiss, we reference her return in this opinion.

Rules. The right to appeal must be governed by the same rules, practices, and procedures that govern appeals from the circuit court."); § 14-3-330(1) (stating "if no appeal [is] taken until final judgment is entered[,] the court may[,] upon appeal from such final judgment[,] review any intermediate order or decree necessarily affecting the judgment not before appealed from"); Rule 72, SCRCP ("Appeal may be taken, as provided by law, from any final judgment or appealable order."); Rule 201(a), SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order[,] or decision.").

In the instant case, we find the family court's order is interlocutory. While the family court ruled that a common law marriage existed between Thompson and Stone, it has yet to decide the issues of divorce and equitable distribution. *See Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) (stating an order is interlocutory if some further act must be done by the court prior to the determination of the rights of the parties). Further, we do not believe the family court intended its decision on the common law marriage issue to be dispositive of the case as the family court included a handwritten notation on its Form 4F order stating that divorce and equitable distribution were "still pending." Additionally, the family court explicitly indicated on the Form 4F order that its order, although marked "Final," did not end the case. Thus, we find the order is not a final judgment.

II. Section 14-3-330

In the alternative, Thompson argues the family court's order is an immediately appealable interlocutory order under section 14-3-330 of the South Carolina Code (1976 & Supp. 2015). We disagree.

Absent a specialized statute, an interlocutory order must fall within one of several exceptions to the final judgment rule found in section 14-3-330 to be immediately appealable. *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005). Section 14-3-330 states, in pertinent part, the following:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order[,] or decree in a law case involving the merits in actions commenced

> in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered[,] the court may[,] upon appeal from such final judgment[,] review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action[.]

S.C. Code Ann. § 14-3-330(1), (2) (1976).

In keeping with precedent, we narrowly construe section 14-3-330 because immediate appeals of various orders generally have not been allowed. *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709. Indeed, our supreme court has cautioned that "[p]iecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial." *Id.*

Thompson first argues the family court's order is an intermediate order "involving the merits" of the case under subsection 14-3-330(1) because it finally decided the issue of common law marriage between the parties. We disagree.

Our supreme court has narrowly defined an order "involving the merits" as an order that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Mid-State Distribs., Inc.*, 310 S.C. at 334, 426 S.E.2d at 780 (quoting *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988)). In this case, the issue of common law marriage was a preliminary matter for the family court to determine before reaching Stone's requests for divorce and division of the marital estate. The family court merely exercised its discretion to bifurcate the trial to save time and resources on the

remaining issues if it found that a common law marriage did not exist.[3] However, the family court was not required to proceed in this fashion and could have resolved all the issues raised in Stone's complaint. At this point, the family court has yet to address any of Stone's remaining claims for relief.

Nonetheless, Thompson claims her "defense" to Stone's divorce action—that a common law marriage does not exist—has been finally determined by the family court. We find, however, that inherent in any divorce proceeding is an initial determination of the existence of a valid marriage, which a party certainly could not appeal prior to the adjudication of the other relevant issues before the court. To accept Thompson's interpretation would seriously inhibit the efficiency of the family court by allowing any party to delay divorce proceedings with an interlocutory appeal by contending a valid marriage does not exist. As our supreme court aptly stated, "[E]ndless delays would be encountered—delays which are unnecessary in cases similar to the one now before us, which can be decided upon an appeal from such final judgment as may later be entered by the trial [c]ourt." *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 42, 21 S.E.2d 209, 213 (1942). Therefore, because the order in this case does not bring the litigants to "the end of the road" and requires further action by the family court, we find the order is not immediately appealable under subsection 14-3-330(1). *See Mid-State Distribs., Inc.*, 310 S.C. at 334–35, 426 S.E.2d at 780.

Finally, Thompson contends the family court's order is immediately appealable under subsection 14-3-330(2) because it affects her fundamental right to marriage and determines the mode of trial. We disagree.

"Immediate appeals under subsection (2) have been allowed in situations whe[n] the substantial right could not be vindicated on appeal after the case." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). "Generally [subsection (2)] has only been used when the trial order affected the 'mode of trial' because if those orders are not immediately appealed, no appellate review is available to correct any error." *Id.* When a trial court's order deprives a party of a

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[3] The family court has discretion on whether to bifurcate a trial and is encouraged to do so when bifurcation helps clarify and simplify the issues. *See* Rule 42(b), SCRCP ("The court, in furtherance of convenience . . . may order a separate trial of any . . . separate issue . . . ."); *Durham v. Vinson*, 360 S.C. 639, 644–45 n.2, 602 S.E.2d 760, 762 n.2 (2004) (finding the circuit court has discretion to bifurcate a trial).

mode of trial to which it is entitled as a matter of right, the order is immediately appealable. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000).

We first find Thompson conflates the idea of a fundamental constitutional right to marry, or not to be married, with a substantial right in a legal proceeding. In any event, the order does not affect a substantial right because Thompson will not be prevented from correcting any alleged errors in the family court's interlocutory order following final judgment on the remaining issues. *See Breland*, 339 S.C. at 93, 529 S.E.2d at 13; § 14-3-330(1) (providing, "if no appeal [is] taken until final judgment is entered[,] the court may[,] upon appeal from such final judgment[,] review any intermediate order or decree necessarily affecting the judgment not before appealed from").

Nevertheless, Thompson also points out that Stone currently has similar claims against her in the circuit court that were stayed pending the outcome of the family court proceedings. Thompson claims the interlocutory order deprives her of a particular mode of trial because the family court would be divested of subject matter jurisdiction if it found a common law marriage did not exist between her and Stone. In effect, Thompson argues Stone would be forced to pursue his claims in the circuit court where Thompson would be entitled to a jury trial on some or all of the causes of action.

We reject Thompson's overly broad view of subsection 14-3-330(2). Stone's stayed action in the circuit court includes causes of action against Thompson for breach of a partnership agreement, breach of fiduciary duty, quantum meruit, partition, and constructive trust. We find the theories of recovery and considerations in that case based upon partnership law would be radically different from those in the present divorce action grounded in domestic law. Although a dismissal of the family court action certainly may have an effect on whether Stone pursues the circuit court action against Thompson, the two actions are completely separate. Therefore, the family court's order, which retains subject matter jurisdiction over *this* case, does not deprive Thompson of a mode of trial to which she may speculatively be entitled to as a matter of right in another case. *See Flagstar Corp.*, 341 S.C. at 72, 533 S.E.2d at 333 (stating the traditional analysis of subsection (2) is whether "a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case"); *see also, e.g.*, *Woodard v. Westvaco Corp.*, 319 S.C. 240, 242–43, 243 n.2, 460 S.E.2d 392, 393–94, 394 n.2 (1995) (holding an order denying a motion to dismiss for

lack of subject matter jurisdiction is not immediately appealable because it does not fall into one of the enumerated categories of section 14-3-330 and such order does not finally determine anything), *overruled on other grounds by Sabb v. S.C. State Univ.*, 350 S.C. 416, 422 n.2, 567 S.E.2d 231, 234 n.2 (2002).

CONCLUSION

In conclusion, we find the family court's order is not immediately appealable. The rights of the parties will not be finally determined until the presiding family court judge issues a final order on all of the remaining issues, at which time an appeal therefrom will be proper.[4] Therefore, based on the analysis set forth above, Thompson's appeal is

DISMISSED.[5]

THOMAS and GEATHERS, JJ., concur.

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[4] In her return to Stone's motion to dismiss, Thompson asserts the procedural posture of this case is identical to *Callen v. Callen*, 365 S.C. 618, 620 S.E.2d 59 (2005), and because our supreme court undoubtedly had subject matter jurisdiction in mind when deciding *Callen*, we are similarly bound to decide this appeal on its merits. Contrary to Thompson's assertion, we find this court is not bound by the procedural posture of *Callen*, as there are no facts demonstrating that either party or our supreme court, sua sponte, raised the issue of appealability in that case. *See Breland*, 339 S.C. at 95, 529 S.E.2d at 14 ("The fact that an appellate court may have decided an appeal of a particular type of order on the merits is not dispositive of whether the order is appealable when the issue of appealability was not raised.").

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