The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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CHIEF DEPUTY CLERK

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N O T I C E

IN THE MATTER OF KENNETH B. MASSEY, PETITIONER

On February 23, 2004, Petitioner was definitely suspended from the practice of law for two years. In the Matter of Massey, 357 S.C. 439, 594 S.E.2d 159 (2004). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than May 28, 2007.

Columbia, South Carolina

March 29, 2007

The Supreme Court of South Carolina

RE: Administrative Suspension for Failure to Pay South Carolina Bar License Fees and Assessments

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O R D E R

The South Carolina Bar has furnished the attached list of lawyers who were administratively suspended from the practice of law on January 31, 2007, under Rule 419(b)(1), SCACR, and remain suspended as of April 1, 2007. Pursuant to Rule 419(e)(1), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall surrender their certificates to practice law in this State to the Clerk of this Court by May 1, 2007.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be terminated and the

lawyer's name will be removed from the roll of attorneys in this State. Rule 419(g), SCACR.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by the provisions of Rule 419, SCACR, or this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

April 6, 2007

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As of April 4, 2007

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520 Madison Ave., Ste. 405
Toledo, OH 43604-1343

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13

April 9, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Daniel V. Staggs, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 26297
Submitted February 14, 2007 – Filed April 2, 2007

REVERSED AND REMANDED

Frank L. Eppes, of Eppes & Plumbee, PA, of Greenville, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Karen C. Ratigan, all of Columbia, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the denial of Post-Conviction Relief (PCR) to Petitioner, Daniel Staggs. The sole

issue we need address is whether trial counsel had a conflict of interest in representing Staggs in his trial for murder, while simultaneously representing Staggs' father, mother and brother on accessory after the fact charges.[1] We find that he did and, accordingly, we reverse.

FACTS

Staggs was arrested for the murder of Daniel L. Grier. It appears Grier was shot after he and Staggs were engaged in a "road rage" type incident in Greenville. Staggs was represented by attorney Michael A. Devine.[2] Subsequent to Staggs' arrest, his father, mother and brother were charged as accessories after the fact. Thereafter, Devine undertook to represent his father, mother and brother while simultaneously representing Staggs on the murder charge.

Staggs did not testify at trial based upon counsel's recommendation. Counsel also declined to offer the testimony of Staggs' family members at trial. Staggs was convicted of murder and possession of a firearm during commission of a violent crime and sentenced to life plus five years for the weapons charge.

Staggs filed for PCR, contending counsel had a conflict of interest in representing him together with his family members. The PCR court denied relief. We reverse.

DISCUSSION

To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest

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[1] Although Staggs also raised the issue of trial counsel's failure to preserve issues relating to the trial court's self-defense and manslaughter charges, we need not address those issues in light of our remand for a new trial.

[2] Staggs also had co-counsel; however, Devine was lead counsel. Devine has since been indefinitely suspended from the practice of law. In the Matter of Devine, 345 S.C. 633, 550 S.E.2d 308 (2001).

adversely affected his attorney's performance. Cuyler v. Sullivan, 446 U.S. 335 (1980); Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001); Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. Id. In Thomas, this Court held that a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief.

Staggs asserts Devine had an actual conflict inasmuch as the interests of his mother, father, and brother were adverse to his own. We agree.

At PCR, Staggs testified Devine advised him he did not want him taking the stand in order to preserve the right to final closing argument. However, Staggs' sister-in-law, who is married to his brother Yancey, testified that Devine told her he was not going to allow Staggs to testify because "he say he cannot testify because he was representing all four of us. And if Daniel said, if anything, it could hurt us. If we said anything, it could hurt Daniel. It was in our best interest that nobody said anything about anybody." Staggs' father Billy testified similarly at PCR that Devine had told him to persuade Staggs not to testify because it might hurt their case.

It is clear from the testimony of Staggs' father and sister-in-law that Devine had an actual conflict of interest and that the conflict adversely affected his performance. Under Fuller and Thomas, Staggs is clearly entitled to relief. Accordingly, the order of the PCR court denying Staggs relief is reversed and the matter remanded for a new trial.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

City of Camden, Respondent,

v.

Fairfield Electric Cooperative, Inc., Appellant,

and

Lowe's Home Centers Of Camden, South Carolina, Intervenor, Appellant.

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

Opinion No. 26298
Heard January 30, 2007 – Filed April 2, 2007

AFFIRMED

Marcus A. Manos and Manton M. Grier, Jr., both of Nexsen Pruet LLC, of Columbia, for Primary Appellant Fairfield Electric Cooperative.
Thomas H. Pope, III, of Newberry, for Secondary Appellant Lowe's Home Centers.
James M. Brailsford, III, of Edisto Island, for Respondent.

JUSTICE WALLER: This is an appeal from an order of the circuit court granting the City of Camden summary judgment and holding that Fairfield Electric Cooperative, Inc. has no legal authority to provide electric service to a newly constructed Lowe's Store located in an area recently annexed by city. We affirm.

FACTS

This case involves a 12.981 acre tract of land, originally located just outside the city limits of Camden, SC, which was owned by Town and Country, Inc. In early 2002, Town and Country began negotiating to sell the property to Lowe's for construction of a Lowe's store. In the summer of 2002, Town and Country requested Fairfield Electric Cooperative to install a security light on the property.[1] Fairfield installed the security light on July 29, 2002. Thereafter, on September 10, 2002, Town and Country requested the City annex the property.

On September 3, 2002, prior to purchasing the property, Lowe's wrote a letter to Town and Country, indicating that it had chosen Fairfield as its electric supplier for the proposed store in the "unassigned" area. Fairfield notified the City of this letter, and indicated it had been serving the premises and would "honor their request to serve this new store." On September 23, 2002, Camden's City Manager responded that Camden would not give Fairfield permission to serve any new customers in the current City limits, or any area which might be annexed in the future, stating, "[w]hen the site on which Lowe's proposes to build its new store becomes a part of the City, the City Council will assert its legal right to be the power provider, regardless of the customer's preference."

Camden annexed the property on October 8, 2002. Town and Country thereafter sold the parcel to Lowe's on January 6, 2003, and Lowe's began to clear and grade the tract to begin construction of the store. Both the security light placed on the property by Fairfield Electric and the City's sewer easement were temporarily disconnected during construction. After

[1] At the time, Fairfield had a distribution line which crossed the property, and the city of Camden had a sewer easement.

completion of construction, Fairfield continued to provide the new Lowe's store with electricity, and the City of Camden brought this action pursuant to S. C. Code Ann. § 33-49-250(1) for an order compelling Fairfield to cease and desist. The circuit court ruled Fairfield had no legal authority to provide electricity to the new Lowe's store. Fairfield appeals.

ISSUE

Did the circuit court err in ruling Fairfield was without authority to service the new Lowe's store?

DISCUSSION

Pursuant to S.C. Code Ann. § 33-29-240, a rural electric cooperative generally has the power to sell and distribute electricity only in rural areas, i.e., those with a population under 2500. Carolina Power and Light v. Town of Pageland, 321 S.C. 538, 471 S.E.2d 137 (1996). There are two exceptions to this rule contained in South Carolina Code Ann. § 33-49-250(1), to wit:

> 1) a city's act of incorporating or annexing into a city or town an area in which the cooperative is serving shall constitute the consent of the governing body of such city or town for the cooperative to **continue serving all premises then being served** and to serve additional premises within such area until such time as the governing body of the city or town shall direct otherwise, and
> 2) the right of a cooperative to continue to serve in a city or town in which it is the principal supplier of electricity shall not be affected by the subsequent growth of such town beyond a population of two thousand five hundred persons.

(emphasis supplied). The purpose of the exceptions is to "prevent the ouster of co-ops from areas they have historically served due to population growth or annexation." Duke Power Laurens Elec. Co-op., Inc., 344 S.C. 101, 105, 543 S.E.2d 560, 562 (Ct.App.2001).

It is undisputed here that the second exception does not apply as Fairfield is not the principal supplier of the disputed area. Accordingly, the sole issue before us is whether the Lowe's store was a "premises then being served" at the time of annexation so as to come within the first exception. We find that it does not.

The term "premises" is not defined in S.C. Code Ann. § 33-49-10 et seq., the Electric Cooperative Act. The circuit court therefore looked to the definition of "premises" contained in S.C. Code Ann. § 58-27-610 (2) of the Territorial Assignments Act of 1969. That section defines "premises" as follows:

> the building, structure or facility to which electricity is being or is to be furnished; provided, that two or more buildings, structures or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer for farming, business, commercial, industrial, institutional or governmental purposes, shall together constitute one "premises," except that any such building, structure or facility shall not, together with any other building, structure or facility, constitute one "premises" if the electric service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building, structure or facility.

The circuit court ruled the security light placed on the unimproved lot owned by Town and Country did not constitute a "building, structure or facility" to which electricity was being furnished, such that it was not a "premises then being served" pursuant to the statute and therefore did not come within this exception. Fairfield asserts the circuit court's reliance upon this definition of "premise" is misplaced inasmuch as the Territorial Assignments Act was enacted some six years after passage of the Electric Cooperative Act. Accordingly, it contends the Legislature could not have intended for this definition of "premises" to apply in the context of § 33-49-250(1). We disagree. We find the circuit court properly looked to the definition of "premises" as set forth in § 58-27-610(2), and the court properly applied that definition.

There is a presumption that the legislature has knowledge of previous legislation when later statutes are enacted concerning related subjects. State v. McKnight, 352 S.C. 635, 648, 576 S.E.2d 168, 174 (2003); Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993). Accordingly, the Legislature is presumed to have had knowledge of the definition of "premises" contained in § 58-67-210.[2]

Fairfield contends the trial court's holding will effectively require continuous ownership of a premises, and prohibit cooperatives from serving premises they have historically served when those premises changes ownership. We disagree with this contention.

As noted in City of Newberry, "although the annexation exception also implies consent for cooperatives to serve additional premises, i.e., new customers, within an annexed area, the statute expressly limits a cooperative's authority to provide new or increased service by allowing it only until such time as the governing body of the city or town shall direct otherwise. . . ." 352 S.C. at 576, 575 S.E.2d at 86. It is clear that a co-operative may continue serving customers due to a change in ownership; the statute merely requires the coop to be serving a building, structure, or facility at the time of annexation.

Finally, we decline to hold that the security light placed by Town and Country is a "structure" within the contemplation of § 33-49-250. Such a holding would allow cooperative providers to effectively circumvent the statutory scheme set up by the Legislature simply by placing security lights in any areas in which it has distribution lines. Such a result is untenable.

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[2] S.C. Code Ann. § 33-49-250(1) was rewritten by 2004 Act No. 179, § 5, effective February 19, 2004 and now provides that an electric cooperative has power to:

> to generate, manufacture, purchase, acquire, accumulate, and transmit electric energy and to distribute, sell, supply, and dispose of electric energy to . . . persons. . . provided that the premises to be served must be located in an area a cooperative is permitted to serve pursuant to Section 58-27-610 through Section 58-27-670.

Section 58-27-610 is the section of the Electric Cooperative Act which specifically defines "premises."

Accordingly, we affirm the circuit court's ruling that Fairfield Electric Cooperative is without authority to serve the recently annexed Lowe's property.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner

v.

Lord Byron Slater, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 26299
Heard March 7, 2007 – Filed April 9, 2007

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, and Solicitor Ralph E. Hoisington, of Charleston, for Petitioner.

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, of the South Carolina Commission on Indigent Defense Division of Appellate Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Lord Byron Slater ("Slater") was convicted of murder and possession of a firearm during the commission of a violent crime. Slater appealed his conviction and sentence to the court of appeals alleging that the trial court committed reversible error in failing to charge the jury on self-defense. The court of appeals reversed Slater's conviction and remanded the case for a new trial. *See State v. Slater*, 360 S.C. 487, 602 S.E.2d 90 (2004). The State appealed and this Court granted a Writ of Certiorari to review the court of appeals' decision. We reverse.

FACTUAL / PROCEDURAL BACKGROUND

Slater attended a step show at North Charleston High School in February 2001. After the step show ended, Slater went outside and began talking with some of the girls at the school. During this time, Slater noticed a gathering around a truck. Slater went to his car, retrieved a gun, and walked toward the truck. According to Slater, he initially retrieved his gun with the intention of shooting it into the air to cause a commotion. Slater alleges, however, that he changed his mind and returned to his car where three of his friends were waiting for him. Moments later, Slater noticed that another disturbance was taking place in an adjacent parking lot. Carrying his gun with him, Slater went to the adjacent parking lot to investigate.

In the second parking lot, a robbery was unfolding where the victim was on the ground being assaulted by five men. Slater knew neither the victim nor his attackers. Slater testified that he walked up to the robbery and surprised one of the attackers. According to Slater's testimony, the man turned around and pointed a gun toward him. Slater quickly turned away from the man and started running back toward his car. Slater also testified that as he ran, he heard a gunshot and responded by shooting his own gun behind him. As Slater and his friends left the scene, Slater continued shooting in the air as the car pulled away and the victim lay dying on the ground from several gunshot wounds.

Slater and his three friends drove to Slater's house, where Slater left the gun. The four then went back to the parking lot where the shooting had occurred. On the way, the police stopped them and searched the car but did not find a weapon.

Early the next morning, detectives from the city of North Charleston went to Slater's residence to arrest him for the murder of the victim. Following the arrest, they obtained a search warrant for Slater's house. The detectives recovered various ammunitions from Slater's yard and from inside his house, including two guns, bullets, and shell casings.

At the police station, Slater told the police that he had not shot anyone. However, a ballistics expert testified at trial that the bullets which fatally wounded the victim came from Slater's gun, as did the ones retrieved from the crime scene. Additionally, numerous witnesses placed Slater at the crime scene with a gun. At trial, Slater himself admitted to shooting his gun, but insisted that he did not mean to shoot anyone.

Before the case was submitted to the jury, Slater requested a jury charge on the law of self-defense. The trial court declined Slater's request on the grounds that the evidence did not support the charge. Despite the trial court's refusal to include the jury charge on self-defense, the court included a manslaughter option in the jury charge. The jury convicted Slater of murder and possession of a firearm during the commission of a violent crime, and Slater appealed.

At the court of appeals, Slater alleged that the trial court erred in failing to charge the jury on the law of self-defense. The court of appeals agreed and reversed Slater's conviction and sentence. We granted the State's Writ of Certiorari, and the State raises the following issue for review:

> Did the court of appeals err in finding that Slater was entitled to a charge on self-defense?

LAW / ANALYSIS

The State argues that the court of appeals erred in finding that Slater was entitled to a self-defense charge. We agree.

A self-defense charge is not required unless it is supported by the evidence. *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. *State v. Bryant*, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." *State v. Muller*, 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984).

In the instant case, Slater fails to meet the first requirement for the self-defense charge: specifically, Slater was not without fault in bringing on the difficulty. "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense." *Bryant*, 336 S.C. at 345, 520 S.E.2d at 322. In the instant case, the record clearly reflects that Slater approached an altercation that was already underway with a loaded weapon by his side. Such activity could be reasonably calculated to bring the difficulty that arose in this case.

Additionally, the uncontradicted evidence illustrates that Slater acted in violation of the law by carrying a weapon. The court of appeals relied on *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999), to support its finding that Slater's unlawful possession of a weapon did not foreclose the possibility of asserting self-defense. Although we agree that "the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge," we reject the position that the unlawful possession of a weapon could never constitute an unlawful activity which would preclude the assertion of self-defense.

Burriss, which deals with the defense of accident, is instructive in the instant case. In *Burriss*, this Court discussed the use of an accident defense where the defendant unlawfully possessed a gun. Burriss maintained that he was lawfully armed in self-defense when the gun accidentally fired. *Id*. at 259, 513 S.E.2d at 106. Because a defendant must be acting lawfully to use the defense of accident, we discussed whether a person in unlawful possession of a weapon may lawfully arm himself in self-defense. Id. at 262, 513 S.E.2d at 108. Clarifying an ambiguity in this Court's prior case law, we noted that where the defendant's unlawful possession of a weapon is merely incidental to the defendant's lawful act of arming himself in self-defense, the unlawful possession of the weapon will not prevent the use of an accident defense. *Id*. at 262 n.5, 513 S.E.2d at 108 n.5. We further explained, however, that the unlawful possession of a firearm can, under some circumstances, constitute an unlawful activity so as to preclude an accident defense if the weapon is the proximate cause of the killing. *Id*. Although *Burriss* takes the additional step of applying the rule in the context of accident, the analysis is equally applicable in determining if a defendant in unlawful possession of a weapon is entitled to a charge on self-defense.

Here, Slater's unlawful possession of the weapon was the proximate cause of the homicide. Slater was not merely in unlawful possession of a weapon; he carried the cocked weapon, in open view, into an already violent attack in which he had no prior involvement. Slater's actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire, and ultimately the death of the victim. Consequently, Slater fails to

meet the requirement that he be without fault in bringing on the difficulty and may not avail himself of a charge on self-defense.

Accordingly, the trial court correctly found that Slater was not entitled to a self-defense charge and the court of appeals erred in reversing Slater's conviction on this ground.

CONCLUSION

For the foregoing reasons, we reverse the court of appeals' decision reversing the trial court's exclusion of a jury charge on the law of self-defense.

MOORE and BURNETT, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth S. Roper, Respondent.

Opinion No. 26300
Submitted March 12, 2007 – Filed April 9, 2007

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Kenneth Scott Roper, of Liberty, 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, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the issuance of a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent closed an equity line of credit for a client and the client's wife. The client informed respondent his wife was unable to attend

the closing, after which respondent allowed the client to leave the closing and take the documents home to have his wife sign them. Respondent had no reason to question the client's honesty or trustworthiness, as respondent and the client had known each other since childhood, attended church together, the client was a law enforcement officer and member of city council, and respondent had worked with the client when respondent was an assistant solicitor and, later, a city attorney. However, the client's wife alleged she had no knowledge of the loan and that the client forged her name to the documents when he left respondent's office.

Respondent signed as witness to the signature of the client's wife on the closing documents despite the fact that he had not witnessed her signature. In doing so, respondent gave false and misleading information on a document, record, report or form required by the laws of this state. A member of respondent's staff notarized the documents despite the fact that all of the signatures had not occurred in her presence.

Law

Respondent admits that his conduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (a lawyer shall not violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding the professional conduct of lawyers) and Rule 7(a)(6) (it shall be a ground for discipline for a lawyer to violate the oath of office taken upon admission to practice law in this state). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 4.1(a) (in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); 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 find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Steven Robinson Cureton, Respondent.

Opinion No. 26301
Submitted March 12, 2007 – Filed April 9, 2007

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Assistant Deputy Attorney General Robert E. Bogan, both of Columbia, for the Office of Disciplinary Counsel.

Perry Hudson Gravely, of Pickens, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension or any lesser sanction set forth in Rule 7(b), RLDE. Respondent requests that, if a definite suspension is imposed, it run from the date of his interim suspension.[1] We accept the Agreement and find a two year suspension from the practice of law is the appropriate sanction; however, we deny respondent's request that the definite suspension run from the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

[1] In re Cureton, 363 S.C. 78, 609 S.E.2d 527 (2005).

Facts

A. Criminal Matter

Respondent was arrested and charged with possession of alprazolam, a generic form of Xanax; possession of hydrocodone biterate, a generic form of Lortab; and possession of morphine sulfate, all in violation of S.C. Code Ann. § 44-53-370(d)(2). He was also charged with possession of marijuana, less than 28 grams, in violation of S.C. Code Ann. § 44-53-370(d)(3), and possession of cocaine with intent to distribute, based on his possession of 3.84 grams of cocaine, in violation of S.C. Code Ann. § 44-53-370(b)(1). These charges remain pending; however, respondent does not dispute that he committed the offenses. Respondent also admits that, at the time of his arrest, he suffered from a cocaine dependency, for which he has since sought and completed inpatient and outpatient treatment.

B. Legal Representation Matter

Respondent was retained by three clients and was paid a fee of either $3,000 or $3,500 by or on behalf of each client. The clients maintain that, upon his suspension, respondent failed to adequately communicate with them regarding their cases and they were required to retain other counsel to complete their litigation.

Respondent acknowledges he did not communicate with the clients with reasonable diligence and promptness as required by Rules 1.3 and 1.4 of the Rules of Professional Conduct, Rule 407, SCACR, and that his physical and mental condition, caused by his drug dependency, may have impaired his ability to handle the clients' cases, in violation of Rule 1.16(a)(2), RPC, Rule 407, SCACR. Respondent also acknowledges the clients are entitled to a refund of their retainer fees, less any amount respondent earned by performing work on the clients' behalf.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, keep the client reasonably informed about the status of the matter, and promptly comply with reasonable requests for information); 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 has not been earned or incurred); 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 in other respects); and Rule 8.4(c) (it is professional misconduct for a lawyer to commit a criminal act involving moral turpitude).

Respondent also admits that he has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or to engage in conduct demonstrating an unfitness to practice law).

Conclusion

We find a two year suspension is the appropriate sanction for respondent's misconduct. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for

two years. Respondent shall not be eligible for reinstatement until there has been a final disposition of the above referenced charges, and until respondent has paid any fine and completed any sentence imposed, has successfully completed the terms of pre-trial intervention and has successfully completed or been released from any period of probation, should there be any. See Rule 33(f)(10), RLDE. Finally, respondent shall, within thirty days of the date of this opinion, enter into a restitution plan with the Office of Disciplinary Counsel, and begin making restitution to presently known and/or subsequently identified clients, banks, and other persons and entities, including the Lawyers' Fund for Client Protection, who have incurred losses as a result of respondent's misconduct in connection with these matters. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Key Corporate Capital, Inc., National Tax Assistance Corporation, TransAm Tax Certificate Corp. d/b/a Destiny 98TD, Advantage 99TD, TA Escrow 97 and Destiny 98,

Respondents,

v.

County of Beaufort, Treasurer of Beaufort County, and Tax Collector of Beaufort County, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Thomas Kemmerlin, Master in Equity

Opinion No. 26302
Heard December 7, 2006 – Filed April 9, 2007

REVERSED

David S. Black, and Mary B. Lohr, both of Howell Gibson & Hughes, of Beaufort, for Petitioners.

James H. Ritchie, Jr., of Holcombe, Bomar, Gunn & Bradford, of Spartanburg, for Respondents.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' decision in Key Corp. Capital, Inc. v. County of Beaufort, 360 S.C. 513, 602 S.E.2d 104 (Ct. App. 2004). We reverse.

FACTS

In 1998 and 1999, respondents Key Corporate Capital, Inc., National Tax Assistance Corporation, and TransAm Tax Certificate Corporation purchased several properties at Beaufort County tax sales. The Beaufort County Treasurer subsequently voided twelve of these tax sales. See S.C. Code Ann. § 12-51-150 (2000).[1]

The parties stipulated to the following facts: (1) the tax sales were voided because the Treasurer discovered "errors, oversights, and/or miscommunications within the Beaufort County offices;" (2) the tax sales were not voided "due to any actions or inactions on the part of" respondents; (3) the tax sales would have been set aside by a court if the Treasurer had not voided them; (4) the County retained the purchase price on each property for

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[1] The version of section 12-51-150 relevant to the instant action states as follows:

> In the case that the official in charge of the tax sale discovers before a tax title has passed, the failure of any action required to be properly performed, **the official may void the tax sale and refund the amount paid to the successful bidder**. If the full amount of the taxes, assessments, penalties, and costs have not been paid, the property must be brought to tax sale as soon as practicable.

S.C. Code Ann. § 12-51-150 (2000) (emphasis added). As will be discussed *infra*, this statutory section was recently amended to also provide to the successful bidder any interest earned on the purchase price. See 2006 S.C. Act No. 386, effective June 14, 2006.

at least 28 days, and for three of the properties, the funds were held for over a year; (5) the Treasurer's Office refunded the full purchase price to respondents; and (6) the County earned a 6% rate of interest on respondents' funds with an actual earned amount of $28,010.93 in interest.

Seeking the interest their money earned while in the County's possession, respondents brought suit against the County of Beaufort, the Treasurer of Beaufort County, and the Tax Collector of Beaufort County (collectively "petitioners" or "the County"). One of respondents' theories for relief was unjust enrichment. Petitioners answered, asserting that respondents were limited to the statutory remedy. The master-in-equity heard the matter and ruled in favor of respondents. Specifically, the master found that: (1) the applicable statute, section 12-51-150, was silent as to interest; and (2) applying the rules of equity, petitioners would be unjustly enriched if they retained the interest earned on respondents' funds when it was petitioners' errors that caused them to void the tax sales. Therefore, the master awarded respondents actual damages of $28,010.93.

The Court of Appeals affirmed. Key Corp., supra. First, the Court of Appeals found that section 12-51-150's silence on the subject of interest did not "entitle[] the County to retain the interest." Key Corp., 360 S.C. at 516, 602 S.E.2d at 106. The Court of Appeals then reasoned that because other sections within Chapter 51 specifically address interest,[2] the Legislature's omission regarding interest in section 12-51-150 required that the rules of equity be applied. Like the master-in-equity, the Court of Appeals found "it would be unjust to allow the County to keep the interest on the purchase prices of tax sales that were voided due to the County's own errors and omissions;" therefore, the Court of Appeals concluded that respondents were

[2] See S.C. Code Ann. § 12-51-100 (where the defaulting taxpayer redeems the property, the successful bidder at the tax sale is entitled to be "refunded the purchase price plus the interest"); S.C. Code Ann. § 12-51-130 (County is directed to invest amounts paid at a tax sale that exceed the amount owed by delinquent taxpayer in a separate account "so as not to be idle," and if taxpayer does not claim the overage within the specified time period, County is entitled to both the overage and "the earnings for keeping the overage").

entitled to the interest actually earned while in the County's possession. Id. at 519-20, 602 S.E.2d at 107-08.

ISSUE

Did the Court of Appeals err in affirming the award of interest to respondents?

DISCUSSION

Petitioners argue that the Court of Appeals erred in not following the plain and unambiguous language of section 12-51-150 which, at the relevant time, provided only for a return of the "amount paid" to the successful bidder when a tax sale is voided. Petitioners further contend it was error to apply the principles of equity because the statute provided an adequate remedy at law, i.e., the refund of the purchase price paid by the bidder. We agree with both these arguments.

The sale of the property of a defaulting taxpayer is governed by statute. Durham v. United Cos. Fin. Corp., 331 S.C. 600, 603, 503 S.E.2d 465, 467 (1998). "If a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted). Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Id. Moreover, "it is beyond this Court's power to effect a change in the statutes enacted by the Legislature." State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); see also Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (this Court does "not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly").

We need not go any further than the plain language of section 12-51-150 to determine that it was error to award respondents the earned interest. At the time in question, this statute provided a clear remedy if a tax sale was

voided – a "refund" of "the amount paid" to the successful bidder. If the Legislature had intended the County to earn and then refund interest, it could easily have specified these requirements in the statute as it did in sections 12-51-100 and 12-51-130. See footnote 2, *supra.*

Indeed, the Legislature amended this section just last year to expressly provide that when a tax sale is voided, the purchaser would be provided a refund **plus** actual interest earned. Section 12-51-150 now reads as follows, in pertinent part:

> If the official in charge of the tax sale discovers before a tax title has passed that there is a failure of any action required to be properly performed, the official may void the tax sale and refund the amount paid, **plus interest in the amount actually earned by the county on the amount refunded**, to the successful bidder.

S.C. Code Ann. § 12-51-150 (Supp. 2006) (emphasized language effective June 14, 2006).

We have long acknowledged the presumption that in adopting an amendment to a statute, the Legislature intended to change the existing law. See Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 155, 135 S.E.2d 841, 844 (1964); see also North River Ins. Co. v. Gibson, 244 S.C. 393, 398, 137 S.E.2d 264, 266 (1964) (where the Court recognized "the rule of construction that the adoption of an amendment which materially changes the terminology of a statute ... raises a presumption that a departure from the original law was intended"); Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 210, 442 S.E.2d 582, 583 (1994) (Toal, J., dissenting) ("Where a statute has been amended, there is a presumption that the legislature intended to change the law.").[3]

[3] But see Stuckey v. State Budget and Control Bd., 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) ("A subsequent statutory amendment may be interpreted as clarifying original legislative intent.").

We see no reason not to apply this presumption and therefore conclude that the Legislature's amendment to section 12-51-150 sought to effect a change in the law. Because the amendment materially changed the terminology of the statute, a departure from existing law clearly was intended, rather than a clarification of original intent. See North River Ins. Co. v. Gibson, supra. In fact, to hold otherwise would indicate that this amendment essentially was a futile act, which we are disinclined to do. See Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) ("The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something."); TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998) (same).

Accordingly, we hold that the plain language of the prior version of section 12-51-150 clearly limits respondents' remedy to a refund of the purchase price **without** interest.

Moreover, we find it was error to fashion an equitable remedy in this case. While equitable relief is generally available where there is no adequate remedy at law, an adequate legal remedy may be provided by statute. Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). Indeed, a "court's equitable powers must yield in the face of an unambiguously worded statute." Id. There is simply nothing inadequate about the remedy of a full refund provided by the plain language of the prior version of section 12-51-150; hence, there was no reason for the lower courts to resort to equity principles.

Finally, as to respondents' argument that an equitable remedy is justified by the Court of Appeals' opinion in H & K Specialists v. Brannen, 340 S.C. 585, 532 S.E.2d 617 (Ct. App. 2000), we simply disagree. In H & K Specialists, the Court of Appeals held that section 12-51-100[4] applied to

[4] This section, entitled "Cancellation of sale upon redemption; notice to purchaser; refund of purchase price," states:

> Upon the real estate being redeemed, the person officially charged with the collection of delinquent taxes shall cancel the sale in the tax sale book and note thereon the amount paid, by whom and when. The

the case because the tax sale was set aside in a later court action. The Court of Appeals deemed the master-in-equity's return of the property to the delinquent taxpayers "as the ultimate redemption" thereby triggering section 12-51-100's remedy of the return of the purchase price plus interest to the successful bidder. Id. at 588, 532 S.E.2d at 619. While the Court of Appeals did note that the County's errors and omissions created the "inequitable situation" present in the case,[5] this does not establish that the Court of Appeals fashioned an equitable remedy in favor of the appellant. Id. at 589, 532 S.E.2d at 620. On the contrary, the Court of Appeals merely held that the setting aside of the tax sale was tantamount to a redemption which triggered section 12-51-100 and the remedy contained therein. In the instant case, however, there is no question that the applicable statute is section 12-51-150 which, in its previous form, did not provide the successful bidder with interest on the purchase price.

CONCLUSION

In sum, we hold that the version of section 12-51-150 in effect at the relevant time only required the County, upon voiding the tax sales, to refund the purchase price, and not the interest, to respondents. Therefore, the Court of Appeals' opinion is

REVERSED.

> successful purchaser, at the delinquent tax sale, shall promptly be notified by mail to return the tax sale receipt to the person officially charged with the collection of delinquent taxes in order to be expeditiously refunded the purchase price plus the interest provided in Section 12-51-90.

S.C. Code Ann. § 12-51-100 (2000).

[5] The County failed to provide the delinquent taxpayers with proper notice, which led to the tax sale being set aside by the master, and then erroneously refunded the purchase price to the delinquent taxpayers instead of the successfully bidder.

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

CHIEF JUSTICE TOAL: I respectfully dissent. I would affirm the court of appeals' decision, but remand the case for a determination of the appropriate amount Beaufort County must disgorge as a result of its unjust enrichment.

A court may grant equitable relief where there is no adequate remedy at law. *Santee Cooper Resort, Inc. v. South Carolina Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). An adequate remedy at law is one which provides the plaintiff with "the full end and justice of the case. It is not enough that there is some remedy at law, but that remedy must be as practical, efficient, and prompt as the remedy in equity." *Chisolm v. Pryor*, 207 S.C. 54, 60, 35 S.E.2d 21, 24 (1945) (internal citations omitted).

"Restitution is a remedy designed to prevent unjust enrichment." *Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 435 n.1, 322 S.E.2d 474, 478 n.1 (Ct. App. 1984). To recover on a theory of restitution, the plaintiff must show that: (1) he conferred a non-gratuitous benefit on the defendant, (2) the defendant realized some value from the benefit, and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 581 S.E.2d 161 (2003).

The majority finds that S.C. Code Ann. § 12-51-150 (2000) provided the Respondent's with an adequate remedy at law. Although I agree that the statute provides some remedy for the Respondents, I do not find the remedy adequate because it is neither practical, complete, nor efficient. While the statute mandates the return of the amount paid by the bidder, the statute fails to provide complete relief to the Respondents who, through no fault of their own, have been denied the use of their funds. The interpretation propounded by the majority provides little incentive for the County to resolve its mistakes in a timely fashion, and instead, encourages the County to indefinitely hold funds which rightfully belong to the bidder.

Here, the Respondents gave the County money in exchange for the title to real property. Although the County failed to deliver title for the real property to the Respondents, the County retained the money and utilized the

funds to earn interest. Clearly, this constitutes a non-gratuitous benefit for which the County received some value. Surely it is inequitable for the County to retain these benefits without compensating the Respondents for their value.

The County argues that no inequity occurred because the Respondents had actual notice that interest would not be given in the event the tax sale was voided. However, in my opinion, the notice provided to the bidders refers to the statutory interest payments bidders normally receive if a property is redeemed by the taxpayer, *see* S.C. Code Ann. § 12-51-100 (2000), and not the interest the County earns on the funds through a deposit account or other similar investment. While it is reasonable that the County should not pay statutory interest that it has not received through redemption, it is unreasonable and inequitable to allow the County to retain interest earned on funds which rightfully belonged to the Respondents.

Additionally, the majority holds that the legislature intended to prohibit the return of any interest earned on bid money retained by the County because the statute is silent on the issue of interest and the legislature could have included such language in § 12-51-150 as it has in other statutes. I disagree.

First, I would find that the statute's silence regarding the return of interest is ambiguous and does not clearly demonstrate legislative intent to prohibit the return of such interest. This Court has acknowledged that "subsequent legislation may be of service as indicating the construction given to the former by the legislature itself." *Abell v. Bell*, 229 S.C. 1, 5, 91 S.E.2d 548, 550 (1956) (internal citations omitted). Furthermore, this Court recognizes:

> the rule of construction that the adoption of an amendment which materially changes the terminology of a statute under some circumstances indicates persuasively and raises a presumption that a departure from the original law was intended. However, like all rules of construction, the presumption is merely an aid in interpreting an ambiguous statute and determining the legislative

> intent. The presumption is strongest "in the case of an isolated independent amendment. . . and. . . is of little force in respect of amendments adopted in a general revision or codification of the laws."

North River Ins. Co. v. Gibson, 244 S.C. 393, 398, 137 S.E.2d 264, 266 (1964) (holding that the legislature's modification of language in a statute accomplished by general revision of the laws indicated the legislature's intent to clarify the existing law and not to materially change the existing law).

The legislature recently revised § 12-51-150 to include additional language requiring a county that voids a tax sale to also relinquish the amount of interest actually earned on the amount paid by the bidder. *See* Act No. 386, 2006 S.C. Acts 3077. Like the statute at issue in *Gibson*, §12-51-150 was modified through an act which provided a general revision to many statutes in our Code of Laws. Because the modification of the statute was accomplished through an act of general revision and not an isolated independent amendment, I would hold that the revision by the legislature indicated its intent to clarify the statute as opposed to an intent to materially modify the law.

Second, I find the majority's reliance on the fact that the legislature could have included language requiring the return of interest in § 12-51-150 as it had in other statutes inconsequential. Both §§ 12-51-100 and -130 refer to situations distinctly different from the one at hand. As I have discussed, § 12-51-100 clearly refers to the statutory interest provided by § 12-51-90. Section 12-51-130, on the other hand, allows the County to retain interest earned on money which it *rightfully possesses* due to the failure of the defaulting taxpayer or owner of record to claim the funds in a timely fashion. Therefore, in my opinion, the legislature's discussion of interest in these statutes provides no indication of its intent to prohibit the relinquishment of interest pursuant to §12-51-150. These statutes simply address interest in different contexts.

For the foregoing reasons, I would affirm the court of appeals and allow the Respondents to maintain an action against the County for

restitution. However, in recognition of the unintentional nature of the County's mistake and the costs associated with carrying out these types of transactions, I believe that the equitable remedy of restitution only allows the Respondents to recover the amount in which the County was unjustly enriched. Therefore, I would remand the case to the trial court with instructions to determine the amount of unjust enrichment the County must disgorge.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ralph C. McCullough, as Plan Trustee for the Estates of HomeGold, Inc., HomeGold Financial, Inc., and Carolina Investors, Inc., Plaintiff,

v.

Goodrich & Pennington Mortgage Fund, Inc., Advanta Mortgage Corp., USA, and Chase Home Finance, LLC, Defendants.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR SOUTH CAROLINA
G. Ross Anderson, Jr., United States District Judge

Opinion No. 26303
Heard March 20, 2007 – Filed April 9, 2007

CERTIFIED QUESTION ANSWERED

Richard G. Gleissner and William R. Padget, both of Finkel Law Firm, of Columbia, for Plaintiff.

Frank Langston Eppes and Jason James Andrighetti, both of Eppes and Plumblee, of Greenville, for Defendant Goodrich & Pennington.

Suzanne Taylor G. Grigg, of Nexsen Pruet, of Columbia, and Laura E. Krabill and Timothy E. Stauss, both of Wolf, Block, Schorr and Solis-Cohen, LLP, of Philadelphia, PA, for Defendant Advanta Mortgage Corp. USA.

C. Mitchell Brown, of Nelson Mullins Riley and Scarborough, of Columbia, William Stevens Brown, of Nelson Mullins Riley & Scarborough, of Greenville, and Gregory T. Parks, Jami Wintz McKeon, and John C. Goodchild, III, all of Morgan, Lewis and Bockius, LLP, of Philadelphia, PA, for Defendant Chase Home Finance, LLC.

CHIEF JUSTICE TOAL: This certified question asks whether South Carolina recognizes a secured creditor's right to bring a claim against a third party for causing a reduction in the value of the secured party's collateral. After giving the question full consideration, we answer "no."

FACTUAL/PROCEDURAL BACKGROUND

Beginning 1997, Goodrich & Pennington Mortgage Fund, Inc. ("G&P"), an originator of mortgage loans, entered into an agreement with Advanta Mortgage Corp., USA ("Advanta"), in which Advanta agreed to service G&P mortgages.[1] Under a series of separate agreements, G&P was entitled to payments from Advanta related to the servicing of G&P's mortgage loans. In 2001, Advanta appointed Chase Home Finance, LLC ("Chase") as Advanta's attorney-in-fact for servicing the G&P mortgages.

In 1999, G&P entered into a series of loans with HomeGold Financial, Inc. ("HomeGold"). As collateral for the loans, G&P granted HomeGold a security interest in G&P's contractual right to receive payments under G&P's

[1] Under the agreement, "servicing" mortgage loans involved efforts to collect money due under the mortgages and taking appropriate action when the borrower on a mortgage loan defaulted on the obligation to pay.

agreements with Advanta. G&P informed Advanta of this security interest and HomeGold ultimately loaned G&P one million dollars pursuant to the loan agreements.

G&P defaulted on the loan with HomeGold and in December 2005, HomeGold's bankruptcy trustee ("Trustee")[2] filed a complaint in the United States District Court for the District of South Carolina. The complaint alleged breach of contract against G&P, and negligent/wrongful impairment of HomeGold's security interest in G&P's contractual right to receive payments against Advanta and Chase. Specifically, the Trustee alleged that G&P's default was a result of the negligent servicing of the mortgage loans by Advanta and Chase which failed to generate revenue for G&P so that G&P could fulfill its obligations to HomeGold.

The district court granted Advanta and Chase's motions to dismiss the Trustee's claim on the grounds that South Carolina did not recognize a cause of action for negligent/wrongful impairment of collateral. The Trustee moved the district court to reconsider the ruling and to certify the issue for review, and the district court granted the Trustee's motion for the limited purpose of certifying the question to this Court pursuant to Rule 228, SCACR.

This Court accepted the following certified question from United States District Judge G. Ross Anderson, Jr.:

> Does South Carolina law recognize a secured creditor's right to bring a claim for negligent/wrongful impairment of collateral where a third party's negligence or other actions caused the erosion, destruction, or reduction in value of the secured party's collateral?

[2] The Trustee is the plan trustee for the bankruptcy estates of HomeGold, Inc., HomeGold Financial, Inc., and Carolina Investors, Inc.

STANDARD OF REVIEW

In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right. *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 157, 628 S.E.2d 475, 477 (2006).

LAW/ANALYSIS

This certified question asks whether South Carolina law recognizes a secured creditor's independent right to bring a claim against a third party for causing the reduction in value of the secured party's collateral. We answer "no."

In order for liability to attach based on a theory of negligence, the parties must have a relationship recognized by law as providing the foundation for a duty to prevent an injury. *Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003). An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656-57 (2006). However, this Court will not extend the concept of a legal duty of care in tort liability beyond reasonable limits. *Huggins*, 355 S.C. at 333, 585 S.E.2d at 277 (holding that the relationship between banks and potential victims of identity theft was too attenuated to establish a duty giving rise to a cause of action for negligent enablement of imposter fraud). With these principles in mind, we turn to the issue of whether South Carolina recognizes a legal duty between a secured creditor and a third party.

1. Duty arising from a contract

The Trustee contends that the contractual duties between G&P and Advanta provide the basis for the imposition of a duty of care running from Advanta to G&P's creditor, HomeGold. We disagree.

To support his claim, the Trustee relies on several South Carolina cases where this Court has found that a contractual relationship between the tortfeasor and one party formed the basis of a relationship giving rise to liability for injury to a third party. *See Dorrell v. SCDOT*, 361 S.C. 312, 605 S.E.2d 12 (2004) (holding that a subcontractor hired by SCDOT to repave a roadway owed a duty to motorists using the road); *Barker v. Sauls*, 289 S.C. 121, 345 S.E.2d 244 (1986) (holding that an insurance broker who contracted to sell workers' compensation coverage to an employer was liable to the employee who was denied workers' compensation benefits because the broker failed to procure coverage on behalf of the employer); *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980) (holding that a contract between a homebuilder and homeowner extended to future home purchasers because, by placing his product into the stream of commerce, the builder owed a duty of care to the product's users); *Edward's of Byrnes Downs v. Charleston Sheet Metal Co., Inc.*, 253 S.C. 537, 172 S.E.2d 120 (1970) (holding that in performing a contract with a building owner for the installation of a roof, the roofer owed a duty of due care to the occupant of the adjacent building to which the work was being performed). According to the Trustee, a contract for services between a debtor and another party – such as that between Advanta and G&P – establishes a relationship giving rise to the other party's liability for injury to a secured creditor who later acquires a security interest in the debtor's rights under the contract

In the cases relied on by the Trustee, this Court held that a tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party. Where there is such a contractual basis for a legal duty to a third party, this Court has determined that the tortfeasor's liability exists independently of the contract and rests upon the common law duty to exercise due care to foreseeable plaintiffs. *See, e.g., Dorrell*, 361 S.C. at 318, 605 S.E.2d at 15. In *Terlinde*, which addressed the duty of a homebuilder to future homeowners, the Court articulated several public policy considerations upon which it's opinion was based; specifically, that the ordinary buyer was not in a position to discover latent defects in a structure, and that the lapse of time before which latent defects manifest

themselves created unequal bargaining positions between the subsequent purchaser and the builder. 275 S.C. at 397-98, 271 S.E.2d at 769.

Turning to the instant case, we find that the circumstances under which a secured creditor obtains a security interest in contract rights is distinguishable from situations in which this Court has established a contractual basis for a legal duty to a third party. For example, in *Barker*, the employee was an identifiable third party beneficiary of a contract between the employer and an insurance agent providing workers' compensation coverage. *See* 289 S.C. at 122, 345 S.E.2d at 244. In contrast, this case involves a security interest in rights to payment created by a prior contract for services between the debtor and a third party. The contract was neither executed for the purpose of providing collateral for any future loan, nor was the secured creditor otherwise an identifiable beneficiary of the contract at the time of execution. It would be inconsistent with both *Barker* and *Huggins* for this Court to find a duty to a secured creditor based on such an attenuated beneficial relationship to a contract for services between a debtor and a third party.

This Court's decisions in *Dorrell*, *Terlinde*, and *Edward's of Byrnes Downs* are similarly distinguishable. Each case involved the negligence of homebuilders and contractors in carrying out their contractual duties which created a significant risk of physical injury to foreseeable users of the tortfeasor's end product. In our opinion, a secured creditor is not a foreseeable "user" of rights created pursuant to a contract for services between a debtor and a third party.[3] Furthermore, the policy concerns discussed in *Terlinde* are not at issue where the allegedly injured party is a sophisticated creditor for whom acquiring security interests is typically a

[3] While it is arguably foreseeable to one contracting party that the other contracting party might grant a security interest in its contractual rights to a creditor, foreseeability of injury to a secured creditor alone is not sufficient to support the imposition of a duty in tort. *See Huggins*, 355 S.C. at 333, 585 S.E.2d at 277.

calculated business decision in which the creditor is fully aware that some degree of risk of "injury" is involved.

Accordingly, we answer that there is no contractual duty giving rise to a claim by a secured creditor against a third party for negligent impairment of collateral.

2. Duty arising from a property interest.

The Trustee argues that HomeGold's security interest in G&P's rights to payment is a property interest which serves as the basis for the imposition of a duty in tort by Advanta to HomeGold. We disagree.

In South Carolina, legal title to mortgaged chattels vests in the mortgagee after default by the mortgagor. *Wilkes v. S. Ry. Co.*, 85 S.C. 346, 347, 67 S.E. 292, 293 (1910). In recognition of this property interest, this Court has held that a mortgagee has the right to possession of the collateral and the right to recover damages from a third party for conversion, injury or destruction of the collateral. *Id.* at 347-48, 67 S.E. at 293.

Although the Trustee analogizes a security interest in intangible rights to payment with a mortgagee's interest in tangible personal property, only two jurisdictions legitimize such a comparison. *See Baldwin v. Marina City Properties*, 79 Cal. App. 3d 393, 403 (Cal. 1978) ("A holder of a security interest may maintain an action for the impairment of a security by a third party tortfeasor."); *RFC Capital Corp. v. EarthLink, Inc.*, 2004 WL 2980402, at *18 (Ohio Ct. App.) (unreported opinion) ("Although the security interest impaired in every Ohio case dealing with [an impairment of collateral] claim was real property, we see no reason why security interests in other types of property cannot also be the subject of an impairment claim.")

Existing South Carolina jurisprudence, on the other hand, counsels against adopting such an approach. In fact, this Court has previously expressed an unwillingness to recognize a duty of care based on a secured party's interest in rights to payment. In *Universal C.I.T. Credit Corp. v. Trapp*, 232 S.C. 297, 101 S.E.2d 829 (1958), the mortgagor of an automobile

brought a claim for property damage against an at-fault driver (and his insurance company) for damage to the mortgagor's vehicle arising out of an automobile accident. *Id.* at 298, 101 S.E.2d at 830. Although the mortgagee notified the third party tortfeasor of its interest in the vehicle and requested joint payment of the settlement funds, the third party ignored the request and settled directly with the mortgagor. *Id.* at 298-99, 101 S.E.2d at 830. The mortgagee sued the third party for willfully and maliciously interfering with the mortgagee's right to recover damages. *Id.* at 298, 101 S.E.2d at 830.

Although this Court recognized that the property interests of the mortgagor and the mortgagee in the vehicle entitled them both to bring a claim against the third party for damage to the mortgaged chattel, this Court found no legal duty on the part of the third party to ensure that the mortgagee received its interest in the settlement funds.[4] *Id.* at 301, 101 S.E.2d at 832. *See also Johnson v. Wright*, 280 S.C. 535, 313 S.E.2d 343 (Ct. App. 1984) (holding that a third party tortfeasor who settled a suit with a mortgagor for property damage arising from an automobile accident had no legal duty to protect the right of a subrogee of the mortgagee to recover damages to the automobile). Other jurisdictions have reached the same conclusion. *See Fidelity Fin. Servs. v. Blaser*, 889 P.2d 268 (Okla. 1994), *Harvester Credit Corp. v. Valdez*, 709 P.2d 1233 (Wash. Ct. App. 1985); *Mercer v. New Amsterdam Cas. Co.*, 189 S.E. 762 (N.C. 1937).

Based on this Court's decision in *Universal*, and similar conclusions in other jurisdictions, we do not believe that a security interest in intangible collateral creates the same basis for a legal duty as a secured party's interest in tangible personal property. Accordingly, we answer that there is no property interest in intangible collateral giving rise to a claim by a secured creditor against a third party for negligent impairment of a security interest.

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[4] Although the Trustee argues that *Wilkes*, *Universal*, and similar decisions stand for the proposition that a secured creditor may seek recovery from a third party tortfeasor for damage to a security interest, these cases are more accurately characterized as discussions of the priority rules governing mortgagor and mortgagee in bringing actions for damages to collateral that is the subject of a mortgage.

3. Duty arising under special circumstances

The Trustee analogizes a secured creditor's interest in collateral to the special circumstances under which this Court has recognized a legal duty to a third party. *See Griffin Plumbing and Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995) (holding that the "special relationship" between a design professional and a contractor gives rise to a professional duty – separate and distinct from any contractual duties – to not negligently design or supervise a construction project); *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 384 S.E.2d 730 (1989) (holding that a homebuilder may be liable in tort to future homeowners for both physical and/or economic harm where the builder violates an applicable building code, deviates from industry standards, or constructs a house that he knows or should know will pose serious risks of physical harm). We disagree with this analogy.

The rule advanced by the Trustee would be a considerable extension of this Court's jurisprudence in recognizing a non-contractual basis for a duty in tort to a third party. For example, *Griffin* involved a professional duty based on the "special relationship" between the professional and the third party. 320 S.C. at 53, 463 S.E.2d at 87. In contrast, the Trustee has identified no basis for such a professional duty running from a third party to a secured creditor. Similarly, this Court's opinion in *Kennedy* expanded the homebuilder's duty of due care previously articulated in the Court's jurisprudence to include liability for foreseeable economic harm to future homebuyers. 299 S.C. at 346, 384 S.E.2d at 737 (citing *Terlinde*, 275 S.C. 395, 271 S.E.2d 768; *Rogers v. Scyphers*, 251 S.C. 128, 161 S.E.2d 81 (1968); *and Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986)). The *Kennedy* court articulated multiple policy reasons for its decision, including the post-World War II boom in new home building in which buyers no longer supervised construction, South Carolina's embrace of the maxim *caveat venditor* ("seller beware"), and the inherently unequal bargaining position of the buyer as against the seller. In light of these trends, the Court reasoned the need to expand traditional concepts of tort duty in order to provide the innocent buyer with protection. 299 S.C. at 344, 384

S.E.2d at 735-36. In contrast, the bargaining positions of secured creditors and the present nature of secured transactions do not implicate any of the legal and policy concerns giving rise to special circumstances under which this Court should recognize a legal duty between a secured creditor and a third party.

Accordingly, we find no foundation for a tort claim by a secured creditor against a third party for negligent impairment of the secured creditor's collateral based on any special circumstances surrounding secured creditors and their security interests.

4. Duty established by statute

The Trustee argues that Article 9 of the Uniform Commercial Code (UCC), S.C. Code Ann. §§ 36-9-101 *et. seq.* (2003 & Supp. 2006) recognizes a duty upon which a secured creditor may bring an independent action against a third party for negligent impairment of collateral. We disagree.

Article 9 of the UCC is a comprehensive statutory scheme governing the rights and relationships between secured parties, debtors, and third parties. The Trustee argues that S.C. Code Ann. § 36-9-607 (2003) permits a secured creditor to bring an action against a third party for impairment of collateral. Specifically, the Trustee points to subsection (a)(3) which provides that after default, a secured party may exercise the rights of the debtor with respect to third parties' obligations on the collateral. S.C. Code Ann. § 36-9-607(a)(3) (2003). While this language appears to permit subrogation of the debtor's rights to the secured party – which could include a claim for damage or destruction to the collateral – it does not purport to permit a separate and independent tort claim by the secured party, and on behalf of the secured party, for impairment of collateral.

Other provisions within § 36-9-607 also refute the Trustee's theory that a statutory duty exists between the secured creditor and a third party. Subsection (e) provides that "[t]his section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to the secured party." S.C. Code Ann. § 36-9-607(e) (2003). Furthermore, the

Official Comment to § 36-9-607 cautions that "the secured party's rights, as between it and the debtor, to collect from and enforce collateral against account debtors . . . are subject to . . . applicable law." S.C. Code Ann. § 36-9-607 cmt. 6. As previously discussed, we do not find that "applicable law" in South Carolina recognizes a secured party's right to independently enforce the debtor's rights in intangible collateral.

Furthermore, a legal duty extending from a third party to a secured creditor is not necessary to protect a secured creditor. Under the UCC, a secured party such as HomeGold has a number of means available for protecting its interest in collateral. *See* S.C. Code Ann. § 36-9-601 (2003) (providing that after default, a secured party may enforce a claim or security interest by any available judicial procedure); S.C. Code Ann. § 36-9-609(a)(1) (2003) (providing that after default, a secured party may take possession of the collateral); S.C. Code Ann. § 36-9-607(a)(1) (2003) (providing that after default, the secured party may notify a third party obligated on the collateral of the debtor's default and instruct the third party to make payment to the secured party); S.C. Code Ann. § 36-9-607(a)(2)(2003) (providing that after default, the secured party may take proceeds of collateral to which it is entitled under § 36-9-315) and S.C. Code Ann. § 36-9-102(a)(64)(D) (defining "proceeds" to include any claims arising out of damage to collateral). This wide selection of remedies available to a secured creditor, in our view, counsels strongly against the recognition of a duty in tort between a third party and a secured creditor. *See also Universal*, 232 S.C. at 300, 101 S.E.2d at 831 (noting that where a mortgagor has already filed a claim for damages to collateral, there is no need to create a duty under which the third party must ensure the mortgagee receives its settlement funds because the mortgagee has other means by which it may protect its interest: namely, intervening in the mortgagor's action or initiating a proceeding to recover the settlement funds under a theory of constructive trust (citing *Martin v. Seaboard Air Line Ry. Co.*, 108 S.C. 130, 131, 93 S.E. 336, 336 (1917) and *Harris v. Seaboard Air Line Ry. Co.*, 130 S.E. 319, 323 (N.C. 1925))).

The UCC does not provide for an independent claim for impairment of collateral by the secured creditor against a third party. Instead, the UCC

gives a secured creditor numerous options for protecting its security interest from a reduction in value due to third party actions. For these reasons, we do not find a statutory duty extending from a third party to a secured creditor. Accordingly, we answer that South Carolina law does not recognize a secured creditor's independent claim against a third party for negligent impairment of collateral.

CONCLUSION

For the foregoing reasons, we answer the certified question in this case "no."

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert J. Burgess, Respondent,

v.

Nationwide Mutual Insurance Company, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 26304
Heard November 14, 2006 – Filed April 9, 2007

REVERSED

Robert C. Brown and J. Austin Hood, both of Brown & Brehmer, of Columbia, for Petitioner.

Kristi Fisher Curtis, of Sumter, and Nelson Russell Parker, of Land Parker & Welch, PA, of Manning, for Respondent.

JUSTICE PLEICONES: We granted certiorari to consider this Court of Appeals decision finding invalid an automobile insurance policy purporting to limit the portability of underinsured motorist (UIM) coverage. Burgess v. Nationwide Mut. Ins. Co., 361 S.C. 196, 603 S.E.2d 861 (Ct. App. 2004). We reverse.

FACTS

Burgess was injured in a motor vehicle accident while operating his motorcycle, which was insured by Alpha Property and Casualty Insurance Company. Burgess's damages exceeded the at-fault driver's coverage, and Burgess had no UIM coverage on the motorcycle. He did, however, own three other vehicles insured by Nationwide, each of which had $25,000 in UIM coverage.

Nationwide declined Burgess' UIM claim, relying on this policy provision:

> 3. If a vehicle **owned by you or a relative** is involved in an accident where you or a relative sustains bodily injury or property damage, this policy shall:
>
>   a) be primary if the involved vehicle is your auto described on this policy; or
>
>   b) be **excess** if the involved vehicle **is not your auto described on this policy**. The amount of coverage applicable under this policy **shall be the lesser of the coverage limits under this policy or the coverage limits on the vehicle involved in the accident**.
>
> (Emphasis supplied).

Burgess brought this declaratory judgment action, and the circuit court held that Nationwide must pay Burgess $15,000 in UIM benefits under one of its policies insuring Burgess' "at-home" vehicles. The Court of Appeals affirmed, and we granted Nationwide's petition for a writ of certiorari.

ISSUE

> Whether the Court of Appeals was correct when it concluded Nationwide's policy provision purporting to limit the portability UIM coverage is void because it violates S.C. Code Ann. § 38-77-160 (2002)?

ANALYSIS

The Court of Appeals first held that UIM, like uninsured motorist (UM) coverage, is "personal and portable," that is, the coverage follows the individual insured and not the insured vehicle. See Hogan v. Home Ins. Co., 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973) ("unlike the provisions relative to liability coverage, the statute plainly affords uninsured motorist coverage to the named insured and resident relatives of his or her household at all times and without regard to the activity in which they were engaged at the time. Such coverage is nowhere limited by the statute to the use of the insured vehicle").

The Court of Appeals then analyzed the impact of S.C. Code Ann. § 38-77-160 on the issue of the policy provision's validity. In relevant part, this statute provides:

> Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-

> fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. **If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. ….**
> (bold in Court of Appeals' opinion).

The Court of Appeals held the "If, however" sentence in § 38-77-160 applied only to stacking cases, found the issue here was not stacking but rather Nationwide's attempt to "exclude basic UIM coverage in a situation where the vehicle involved in the collision is owned by the insured but not specifically covered by a UIM policy," and concluded that nothing in the statute permitted an insurer to exclude basic UIM coverage under these circumstances. Furthermore, the court held that the endorsement purporting to preclude Burgess's recovery of basic UIM was void as against public policy because § 38-77-160 only permits an insurer to limit excess UIM coverage.

We begin by noting that we agree with the Court of Appeals that, as a general proposition, UIM coverage follows the individual insured rather than the vehicle insured, that is, UIM coverage, like UM, is "personal and portable." See Hogan v. Home Ins. Co., *supra*. Further, we agree with the Court of Appeals that the "If, however" sentence in § 38-77-160, relied upon by Nationwide here, does not literally apply to these facts since Burgess is not attempting to stack excess UIM coverage from his Nationwide policy.[1] In our view, however, this statutory language does provide support for Nationwide's contention that its policy provision does not violate public

[1] Stacking is defined "as the insured's recovery of damages under more than one policy until all of his damages are satisfied or the limits of all available policies are met." Giles v. Whitaker, 297 S.C. 267, 376 S.E.2d 278 (1989). Since Burgess seeks recovery under only one policy, technically he is not seeking to stack coverage.

policy. The "If, however" sentence in § 38-77-160 evinces the legislature's intent, in a stacking situation, to bind the insured to the amount of UIM coverage he chose to purchase in the policy covering the vehicle involved in the accident. Thus, the statute itself contains a limit on the "portability" of UIM coverage.

Neither § 38-77-160 nor our prior decisions decide the issue presented here: Is public policy offended by an automobile insurance policy provision that limits basic UIM portability when an insured is involved in an accident while in a vehicle he owns, but does not insure under the policy? We find it is not. UIM coverage is entirely voluntary, and permits insureds, at their option, to purchase insurance coverage for situations where they are injured by an at-fault driver who does not carry sufficient liability insurance to cover the insureds' damages. Essentially, the insured is buying insurance coverage for situations, as where he is a passenger in another's vehicle or is a pedestrian, where he cannot otherwise insure himself. When, however, the insured is driving his own vehicle, he has the ability to decide whether to purchase voluntary UIM coverage. Burgess chose not to do so when insuring his motorcycle.

An automobile insurance company, in setting its rates, bases those rates at least in part on the probabilities involving the insured and the vehicle(s) he is insuring. Where, as here, the vehicle is not insured by the company from whom coverage is sought, the carrier cannot accurately calculate its risks. It is one thing to insure against "unknowable" risks, such as the chance that one will be injured by an underinsured at-fault driver while a passenger in another's vehicle, or as a pedestrian; it is an entirely different calculus where a company's insured owns and operates a motor vehicle, especially a motorcycle, not insured by the carrier making its risk assessments.

We hold that public policy is not offended by an automobile insurance policy provision which limits the portability of basic "at-home" UIM coverage when the insured has a vehicle involved in the accident. Compare State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000) (endorsement providing for set-off of workers' compensation benefits for UIM valid where UIM set-off is not, because UIM coverage is

voluntary). Upholding this limit on portability encourages persons to purchase UIM insurance on all their vehicles. To hold, as did the Court of Appeals, that basic UIM is portable even in this situation permits an individual who owns multiple vehicles to purchase UIM insurance on only one vehicle, yet have basic UIM coverage on all. We find this result undesirable.

CONCLUSION

The decision of the Court of Appeals requiring Nationwide to provide Burgess with $15,000 UIM benefits is

REVERSED.

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

The Supreme Court of South Carolina

In re: Amendments to the South Carolina Appellate Court Rules

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O R D E R

The Office of Disciplinary Counsel has proposed amendments to: (1) Rules 4(g) and 26, RLDE, Rule 413, SCACR; and Rules 4(g) and 26, RJDE, Rule 502, SCACR, to eliminate the subpanel process; (2) Rules 2, 7, and 19, RLDE, Rule 413, SCACR; and Rules 2, 7, and 19, RJDE, Rule 502, SCACR, to allow an investigative panel to issue a confidential admonition if a lawyer or judge does not object to the admonition within thirty days; and (3) Rule 411, SCACR, to require that the Lawyers' Fund for Client Protection hold and disburse monies recovered for the purpose of restitution ordered by this Court or by an agreement of a lawyer and Disciplinary Counsel.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend the South Carolina Appellate Court Rules as set forth in the attachment to this Order. This order is effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
April 4, 2007

Rule 413, SCACR.

RULE 4
ORGANIZATION AND AUTHORITY OF THE COMMISSION

. . .

(g) Powers and Duties of Hearing Panel. A hearing panel shall have the duty and authority to:

(1) rule on pre-hearing motions, conduct hearings on formal charges and make findings, conclusions, and recommendations to the Supreme Court for sanctions or for the dismissal of the case, pursuant to Rule 26;

(2) designate a member of the panel to serve as the chair of the panel; and

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

. . .

RULE 26
HEARING

(a) Scheduling. Upon receipt of the respondent's answer or upon expiration of the time to answer, the hearing panel of the Commission shall schedule a public hearing and notify disciplinary counsel and respondent of the date, time, and place of the hearing.

(b) Hearing Panel. The hearing shall be conducted by three or more members of the hearing panel of the Commission. See Rule 4(g).

(c) Conduct of Hearing.

(1) All testimony shall be given under oath or affirmation.

(2) Disciplinary counsel shall present evidence on the formal charges.

(3) Disciplinary counsel may call the respondent as a witness.

(4) Both parties shall be permitted to present evidence and produce and cross-examine witnesses.

(5) The hearing shall be recorded verbatim and a transcript shall be promptly prepared and filed with the Commission. A copy of the transcript shall be made available to the respondent at respondent's expense.

(6) Disciplinary counsel and the respondent may submit proposed findings, conclusions, and recommendations for dismissal, letter of caution, sanction(s), or transfer to lawyer incapacity inactive status to the members of the hearing panel who conducted the hearing.

(d) Submission of the Report. Within 30 days after the filing of the transcript, the hearing panel shall file with the Supreme Court the record of the proceeding and a report setting forth a written summary, proposed findings of fact, conclusions of law, any minority opinions, and recommendations for dismissal, letter of caution, sanction(s), or transfer to lawyer incapacity inactive status. The hearing panel shall at the same time serve the report upon the respondent and disciplinary counsel.

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

Rule 502, SCACR.

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

Rule 413, SCACR.

RULE 2
TERMINOLOGY

(a) Admonition: a sanction imposed on a lawyer by an investigative panel of the Commission or by the Supreme Court. See Rule 7(b)(5) and Rule 19(d)(2). A confidential admonition cannot be imposed by an investigative panel after the filing and service of formal charges. If imposed by the Supreme Court after the disciplinary proceeding has become public under Rule 12(b), the order imposing the admonition shall not be published, but shall be a matter of public record. Only in cases of minor misconduct, when there is little or no injury to the public, the legal system, or the profession, should an admonition be imposed.

. . .

RULE 7
GROUNDS FOR DISCIPLINE; SANCTIONS IMPOSED; DEFERRED DISCIPLINE AGREEMENT

. . .

(b) Sanctions. Misconduct shall be grounds for one or more of the following sanctions:

. . .

(5) admonition, provided that an admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of sanction to be imposed;

. . .

RULE 19
SCREENING AND INVESTIGATION

. . .

(d) Disposition After Full Investigation.

(1) Upon the conclusion of a full investigation, disciplinary counsel may recommend to the investigative panel:

(A) dismissal;

(B) admonition, letter of caution or deferred discipline agreement;

(C) the filing of formal charges;

(D) the filing of a petition for transfer to incapacity inactive status;

(E) referral to an appropriate agency; or

(F) a stay.

(2) The investigative panel may adopt, reject or modify the recommendations of disciplinary counsel.

(A) If the investigative panel finds no violation or a violation pursuant to Rule 7 for which the imposition of a sanction is not warranted, it may dismiss or issue a letter of caution.

(B) If the investigative panel finds that there is reasonable cause to believe the lawyer committed misconduct, it may admonish the lawyer pursuant to the provisions of Rule 19(d)(3) or it may direct disciplinary counsel to file formal charges.

(3) When the investigative panel finds reasonable cause to conclude that the lawyer has committed misconduct, but finds that public discipline is

not warranted, it may issue notice to the lawyer that it intends to impose a confidential admonition as a final disposition of the matter(s). Notice to the lawyer shall include a copy of the confidential admonition and shall be served on the lawyer in accordance with Rule 14(c). The notice of intent shall state the lawyer's right to object and that any such objection need not include any grounds therefor. The confidential admonition shall thereafter be imposed unless the lawyer both files with the Commission and serves on disciplinary counsel a written objection within thirty days of mailing of the notice. If the lawyer objects to the imposition of the confidential admonition in conformity with the requirements of this rule, disciplinary counsel shall file formal charges.

Rule 502, SCACR.

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(a) Admonition: a sanction imposed on a judge by an investigative panel of the Commission or by the Supreme Court. See Rule 7(b)(5) and Rule 19(d)(2). A confidential admonition cannot be imposed by an investigative panel after the filing and service of formal charges. If imposed by the Supreme Court after the disciplinary proceeding has become public under Rule 12(b), the order imposing the admonition shall not be published, but shall be a matter of public record. Only in cases of minor misconduct, when there is little or no injury to the public, the legal system, or the profession, should an admonition be imposed.

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RULE 411
LAWYERS' FUND FOR CLIENT PROTECTION

. . .

(e) That, in addition to the foregoing, the Fund shall accept and hold on deposit funds received from disciplinary counsel, in addition to monies raised by the assessment established herein for purposes of restitution ordered by the Supreme Court of South Carolina, and shall thereafter disburse these additional monies as directed by order of the Court or upon directive from disciplinary counsel made in accordance with a Plan of Restitution between disciplinary counsel and a lawyer or former lawyer. Amounts disbursed under this paragraph shall not apply toward the maximum limits otherwise available to be paid to any applicant, except to reduce the total amount due for such an applicant, and the disbursement thereof shall not be limited by the time limits otherwise applicable to those making application to the Fund. Nothing in this paragraph shall give any victim of the misconduct of a lawyer or former lawyer a right to make a claim against monies received by the Fund under this paragraph, nor create any cause of action to contest disbursements made under this paragraph by an order of the Supreme Court of South Carolina or a Plan of Restitution arrived at between disciplinary counsel and a sanctioned lawyer or former lawyer. Nothing in this rule shall in any way affect the right of any victim of the misconduct of any lawyer or former lawyer to seek redress against a lawyer or former lawyer's representatives in any legal forum, except to reduce the amount owed by the amount of any payment made to the victim/applicant under the provisions of this rule. Any such Plan of Restitution shall consider and address amounts paid out by the Fund on account of a lawyer or a former lawyer and may, if the parties to that Plan of Restitution agree, include provision for repayment of all or portions of monies paid out by the Fund on account of such lawyer or former lawyer from monies raised by assessments rated under this rule.